

1994

Final Report

Recommended Citation

Final Report, 28 INT'L L. 475 (1994)

<https://scholar.smu.edu/til/vol28/iss2/16>

This Section Recommendation and Reports is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in International Lawyer by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

TASK FORCE REPORTS

American Bar Association Task Force on an International Criminal Court

Final Report*

At the Annual Meeting of the American Bar Association, on August 11-12, 1992, the House of Delegates adopted the following recommendation, submitted by the ABA Task Force on an International Criminal Court and by the New York State Bar Association:

RECOMMENDATION

BE IT RESOLVED, that the American Bar Association recommends that the U.S. Government work toward finding solutions to the numerous important legal and practical issues identified in the accompanying reports of the Task Force on an International Criminal Court and the New York State Bar Association, with a view toward the establishment of an international criminal court, considering the following principles and issues:

- A. Jurisdiction of the court shall be concurrent with that of member states. It may cover a range of well established international crimes, but member

*The views expressed herein have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the policy of the American Bar Association.

states shall be free to choose by filing a declaration of the crimes they shall recognize as within the court's jurisdiction.

- B. No person shall be tried before the court unless jurisdiction has been conferred upon the court by the state or states of which he is a national and by the state or states in which the crime is alleged to have been committed.
- C. The fundamental rights of an accused shall be protected by appropriate provisions in the court's constituent instruments and in its rules of evidence and criminal procedure.
- D. The obligations of states under the court's constituent instruments shall be enforced by sanctions.

The report submitted with the recommendation by the Task Force on an International Criminal Court identified and discussed a number of legal and practical issues regarding the establishment of an international criminal court. Admittedly, however, the report was unable to explore all of these issues in a thorough fashion, and it was understood at the time of adoption of the recommendation that the Task Force would continue its work in an effort to examine those issues it previously had given little consideration to, such as, for example, proceedings at trial. There was also general agreement that the Task Force would benefit from the addition of several new members.

Accordingly, at its meeting in September 1992, the ABA Board of Governors approved the Annual Plan of the Task Force and authorized the Task Force to accept external funding for the purpose of continuing its operations during the 1992-1993 ABA Year. The new President of the ABA, Michael McWilliams, appointed seven new members of the Task Force. These new members are, in alphabetical order: Michael Abbell, Craig Baab, Eric L. Chase, William M. Hannay, Louis B. Sohn and Rebecca J. Westerfield.

The composition of the reconstituted Task Force, then, is as follows. The chairperson is Benjamin R. Civiletti. The other members of the Task Force are, in alphabetical order, Michael Abbell, Donald B. Ayer, Craig Baab, Eric L. Chase, Stuart H. Deming, Edward S.G. Dennis, Jr., Helen M. Eversberg, Robert B. Fiske, Jr., William M. Hannay, Jerome J. Shestack, Louis B. Sohn, Melvyn Tanenbaum, Michael E. Tigar, Rebecca J. Westerfield, and Bruce Zagaris.

Professor John F. Murphy continues as reporter for the Task Force.

After being reconstituted, the Task Force divided into working groups on the following topics: (1) Jurisdiction, Applicable Law, and Sentences, chaired by Professor Louis B. Sohn; (2) Structure, Process, Procedure, and Rules, chaired by Judge Melvyn Tanenbaum; and (3) Investigation, Charging, Prosecution, and Incarceration, chaired by Michael Abbell. These working groups exchanged views by letter and telephone and also commented on discussion papers prepared by the reporter.

The reconstituted Task Force as a whole held two meetings. In addition to general discussion members of the Task Force commented on drafts of this report by the reporter.

The Task Force also benefitted from the participation in its meetings of Bruce C. Rashkow, Assistant Legal Adviser for United Nations Affairs, and Michael P. Scharf, then Attorney/Adviser, Office of the Legal Adviser, U.S. Department of State, now Assistant Professor of Law, New England School of Law. Ms. Jamison Borek, Deputy Legal Adviser, provided helpful comments on a draft of this report, and the Office of the Legal Adviser also kindly supplied the Task Force with various documents relevant to an international criminal court.

A special note of thanks and appreciation is due Alaire Bretz Rieffel, staff liaison for the Task Force and Director, ABA Section of International Law and Practice. Ms. Rieffel's cheerful and efficient handling of numerous administrative details associated with this project has been of great assistance to the Task Force.

The expanded size of the Task Force has increased the already substantial diversity of views represented on it. Accordingly, it proved impossible to achieve agreement on all the propositions set forth in this report. To the extent possible, where there has been a sharp disagreement of view, this has been noted in the report. Every effort has been made to give a fair hearing to the full range of opinions. Association with the report as a member of the Task Force does not necessarily signify complete agreement in every particular, but rather general agreement with the report's substance.

This report should be read as a supplement to, as well as an updating and expansion of, the Task Force's report that accompanied the recommendation adopted by the House of Delegates in August 1992. [The complete text of the Task Force's first recommendation and report appears in the Spring 1993 issue of *The International Lawyer* (Vol. 27, No. 1).]

As a supplement to the first report this report does not re-examine the arguments for and against an international criminal court. Also, as we shall see, these arguments have largely been overtaken by recent developments. Rather, the report begins with a brief examination of major developments since the date of the first report. Next the report turns to the issue of the court's subject matter and personal jurisdiction and the law it should apply. The report then explores, in separate sections, the nature and structure of the court; its pre-trial and trial procedures; and the enforcement of sanctions against persons convicted of crimes within the court's jurisdiction.

I. Recent Major Developments

Perhaps the most significant development since the first report of the Task Force is the decision of the United Nations Security Council, on February 22, 1993, "that an international tribunal shall be established for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991."¹ Following

1. S.C. Res. 808, U.N. SCOR, 3175th mtg. at 2, U.N. Doc. 5/Res/808 (1993).

this decision the Security Council, on May 25, 1993, adopted a statute for an *ad hoc* tribunal attached to a report of the Secretary-General² and, *inter alia*, requested suggestions from member states of the United Nations as to the rules of procedure and evidence that the judges of the tribunal might adopt pursuant to the terms of the statute.³

On July 8, 1993, the ABA Section of International Law and Practice Task Force on War Crimes in Former Yugoslavia (War Crimes Task Force) issued its Report on the International Tribunal to Adjudicate War Crimes Committed in Former Yugoslavia. In this report the War Crimes Task Force supports the Secretary-General's Report and the Statute but recommends certain additions and modifications. In preparing our report we have drawn on a number of insights contained in the report of the War Crimes Task Force.

Although, as we shall see below, the tribunal being established by the Security Council differs in significant aspects from the kind of permanent international criminal tribunal that is under consideration by the International Law Commission and the United Nations General Assembly, there are considerable areas of overlap between the two kinds of tribunals. Moreover, it would appear that the Security Council's action has heightened interest in the establishment of a permanent international criminal court, and may result in an acceleration of efforts, inside and outside of the United Nations, to this end.

Within the United Nations there has been considerable movement on a permanent tribunal since the first report of the Task Force. Most significantly, on November 25, 1992, the General Assembly adopted a resolution that requested the International Law Commission to undertake "the elaboration of a draft statute for an international criminal court as a matter of priority as from its next session."⁴ At the 1993 summer session of the International Law Commission in Geneva, a Working Group on the Draft Statute for an International Criminal Court completed a report and draft statute,⁵ which will be considered by the Sixth (Legal) Committee of the General Assembly during the Assembly's Forty-Eighth session. A copy of the working group's draft statute has been attached to this report as Appendix [A]. There will be references to the working group's report and draft statute throughout this report.

There has also been some movement in Congress on the issue of an international criminal court. On May 12, 1993, the Senate Committee on Foreign Relations held a hearing on this topic. Partly as a result of this hearing the committee

2. *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808*, U.N. Doc. S/25704 (1993).

3. S.C. Res. 827, U.N. SCOR, 3217th mtg. ¶¶ 1-2, U.N. Doc. S/25626 (1993).

4. G.A. Res. 47/33, U.N. GAOR, 47th Sess., U.N. Doc A/47/584 (Nov. 25, 1992) (adopting the report of the Sixth Committee on the work of its forty fourth session).

5. *International Law Commission Revised Report of the Working Group on the Draft Statute for an International Criminal Court*, ILC, 45th Sess. U.N. Doc. A/CN.4/L.490 (July 19, 1993) (Draft Statute contained in add.1 to the Report).

reported favorably on S.J. Res. 32, which calls on the United States to "make every effort to advance" the proposal for the establishment of an international criminal court at the United Nations. The substance of S.J. Res. 32 has recently been incorporated into the State Department Authorization Bill, which, at this writing, awaits congressional consideration.

II. Jurisdiction and Applicable Law

Issues that have arisen with respect to subject matter and personal jurisdiction and applicable law have been among the most hotly debated in UN and other forums. Each area will be discussed in turn.

A. SUBJECT MATTER JURISDICTION

As noted in the first report of the Task Force, in 1990 the ABA Section of International Law and Practice favored the establishment of an international criminal court whose jurisdiction would be limited to international drug trafficking.⁶ For the reasons set forth in the report most members of the Task Force favored a tribunal with a wider jurisdictional scope.

At least one member of the newly reconstituted Task Force has argued strenuously for a tribunal whose jurisdiction would be limited to war crimes.⁷ The jurisdiction of the *ad hoc* tribunal that the Security Council is in the process of establishing is limited to "serious violations of international humanitarian law committed in the territory of the former Yugoslavia" between January 1991 and a date to be determined by the Security Council upon the restoration of peace.⁸ Specifically, the crimes covered by the court's statute include "Grave breaches of the Geneva Conventions of 1949,"⁹ "Violations of the laws or customs of war,"¹⁰ "Genocide,"¹¹ and "Crimes against humanity."¹² The jurisdiction of the *ad hoc* tribunal, then, is limited to crimes committed in the former Yugoslavia, and even this limited jurisdiction is anticipated to end as to any crimes committed in this area after the Security Council has determined that peace has been restored. The issue is whether a permanent tribunal should be established whose jurisdiction would be limited to war crimes but whose geographical scope would be world-wide.

6. *Report of American Bar Association Task Force on an International Criminal Court*, 27 INT'L LAW. 258, 261 (1993).

7. See Eric L. Chase, *Stop Swagging and Start Working for Justice*, 133 NEW JERSEY L.J. 17 (1993).

8. International Commission's Task Force on War Crimes in Former Yugoslavia, *Report on the International Tribunal to Adjudicate War Crimes Committed in the Former Yugoslavia*, Annex 2, Statute of the International Tribunal, art. 1, U.N. Doc. S/25704 add.1 (July 8, 1993).

9. *Id.* art. 2.

10. *Id.* art. 3.

11. *Id.* art. 4.

12. *Id.* art. 5.

As the situation in former Yugoslavia illustrates, there is much support for the concept of prosecuting "serious violations of international humanitarian law" before an international tribunal because of the failure of states to prosecute such crimes in national courts and the precedent Nuremberg affords of trying them before an international tribunal. Some members of the Task Force, however, would contend that such violations of international humanitarian law, if not prosecuted before national courts, should be tried before *ad hoc* tribunals established by the Security Council rather than by a permanent tribunal, especially since, in such cases, the violations may be the result of orders from the highest levels of government, and the enforcement powers of the Security Council are required to enable the perpetrators to be brought to trial. By contrast, this argument continues, a permanent court, presumably established by treaty rather than by Security Council resolution, would not have such powers to confront heads of state or other high ranking government officials. Finally, some believe that including such crimes within the jurisdiction of a permanent court would greatly increase the risk that the tribunal would become a politicized body, as some states would attempt to use it to pursue political agendas. Charges of "war crimes" or "genocide" have been levelled in the past, for example, against U.S. presidents or high ranking government officials in other countries.

In response others have contended that there is no guarantee that the Security Council would be willing to establish additional *ad hoc* tribunals to exercise jurisdiction over serious violations of international humanitarian law in other parts of the world than former Yugoslavia. Therefore, only a permanent international criminal court would afford a realistic alternative to trial in national courts. Moreover, in extreme cases, the Security Council might be called upon to exercise its enforcement powers and come to the assistance of the court. The Genocide Convention appears to envisage this possibility when it provides that, "Any Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide. . ."¹³

In any event, most members of the Task Force would not favor limiting the jurisdiction of a permanent international criminal court solely to war crimes. A majority of the Task Force, however, favors including serious violations of international humanitarian law within the court's subject matter jurisdiction. Article 22 of the draft statute prepared by the ILC's Working Group would confer jurisdiction on the court over such crimes.

In sharp contrast to suggestions for limited jurisdiction is the so-called "Chinese menu" approach. Under this approach, state A might agree to the court's jurisdiction over one crime, say, drug trafficking, while state B might agree that the court could exercise jurisdiction over a lengthy list of international crimes (twenty-four,

13. Art. VIII, Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 (entered into Force 12 January 1951).

according to one count). A draft statute introduced by the Special Rapporteur of the International Law Commission at the beginning of the Commission's 1993 summer session is an especially open-ended manifestation of this approach, since it provides that, "[p]ending the adoption of a criminal code relevant to its jurisdiction, offenses within the jurisdiction of the court shall be defined in special treaties between states parties, or in a unilateral instrument of a state."¹⁴ This approach might allow the court to exercise jurisdiction over such questionable "crimes" as "economic aggression," "colonial domination or other forms of alien domination," etc.

Alternatively, an approach that seems to have increasing support in general and one that is favored by a majority of the members of the Task Force is to limit the menu from which states could select. That is, the court's jurisdiction would include only those crimes covered by international conventions that are widely accepted by states representing all of the world's major legal systems and that have an extradite or prosecute obligation.

Article 22 of the ILC working group's draft statute adopts this approach and includes genocide; grave breaches of the four 1949 Geneva Conventions for the Protection of Victims of Armed Conflict, as well as of additional Protocol I to the 1949 Geneva Conventions; the unlawful seizure of aircraft; crimes covered by the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation; apartheid; attacks against internationally protected persons, including diplomatic agents; hostage taking; and crimes covered by the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation and by the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf. Article 22 does not include torture. In the Task Force's view, this is an unfortunate omission, and should be corrected.

To be sure Article 21 of the draft statute calls for a review conference to be held after the statute has been in force for at least five years to consider, *inter alia*, "possible revisions or additions to the list of crimes contained in article 22 by way of a Protocol to this statute or other appropriate instrument." Unfortunately, Article 21 expressly refers to the Code of Crimes against the Peace and Security of Mankind as a possible addition to the list. In light of the strongly negative reactions this code has engendered, the Task Force would suggest that this reference be deleted.

As explained by the ILC working group's commentary:

Part 2 of the draft Statute, dealing with jurisdiction and applicable law, is the central core of the draft statute. From the point of view of the crimes which may give rise to the court's jurisdiction, articles 22 to 26 lay down, basically, two strands of jurisdiction,

14. Doudou Thiam, *Eleventh Report on the Draft Code of Crimes Against the Peace and Security of Mankind, Draft Statute of an International Criminal Court*, art. 5(3), U.N. Doc. A/CN.4/449 (March 25, 1993).

which are based on a distinction drawn by the Working Group between treaties which define crimes as international crimes and treaties which merely provide for the suppression of undesirable conduct constituting crimes under national law. An example of the first category of treaties is the International Convention against the taking of Hostages of 17 December 1979. Examples of the second category of treaties are the 1963 Tokyo Convention on Offences and Certain Acts Committed on Board Aircraft (14 September 1963) as well as all treaties dealing with the combating of drug-related crimes, including the 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (19 December 1988).¹⁵

The working group's commentary further explains that the "two main criteria which led to considering the crimes contemplated in the treaties listed in article 22 as crimes under international law were (a) the fact that the crimes are themselves defined by the treaty concerned in such a way that an international criminal court could apply a basic treaty law in relation to the crime dealt with in the treaty and (b) the fact that the treaty created, with regard to the crime therein defined, either a system of universal jurisdiction based on the principle *aut dedere aut judicare* or the possibility that an international criminal tribunal try the crime, or both."¹⁶ Under these two criteria, in the view of a majority of the working group, drug related crimes, including the crimes referred to in the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, did not qualify for inclusion in Article 22.

In Article 23 of the draft statute, the ILC working group has set forth three alternative methods by which states might accept the court's jurisdiction over the crimes listed in Article 22. Under alternative A a state party to the court's statute could "by declaration lodged with the Registrar, at any time accept the jurisdiction over one or more of the crimes referred to in article 22." A state would not confer jurisdiction over certain crimes on the court merely by becoming a party to the court's statute. Rather, the state would "opt in" to the court's jurisdiction by filing a special declaration to that effect. Alternatives B and C, set forth in Article 23, would have states automatically confer jurisdiction on the court over the crimes listed in Article 22 simply by becoming parties to the court's statute, subject to the right of such states to "opt out" of the court's jurisdiction by excluding certain crimes. The working group has recommended that the International Law Commission transmit all three alternatives to the General Assembly to obtain some guidance as to which system the Assembly would favor.

The Task Force would favor an "opting in" system along the lines set forth in alternative A. This approach would be the most flexible and the one most commensurate with the concept that the court would serve as a supplemental forum to national courts for the prosecution of international crimes. It also would

15. *Revised Report of the Working Group on the Draft Statute for an International Criminal Court*, *supra* note 5, at 22.

16. *Id.*

be more likely to encourage widespread acceptance of the court's statute than a system that would require states affirmatively to exclude certain crimes from the court's jurisdiction.

Elsewhere, the ILC working group's draft statute would confer a much broader subject matter jurisdiction on the court. Specifically, Article 26 provides:

*Special acceptance of jurisdiction by States
in cases not covered by Article 22*

1. The Court also has jurisdiction under this Statute in respect of other international crimes not covered by Article 22 where the State or States identified in paragraph (3) notify the Registrar in writing that they specially consent to the Court exercising, in relation to that crime, jurisdiction over specified persons or categories of persons.

2. The other international crimes referred to in paragraph (1) are:

(a) a crime under general international law, that is to say, under a norm of international law accepted and recognized by the international community of States as a whole as being of such a fundamental character that its violation gives rise to the criminal responsibility of individuals;

(b) crimes under national law, such as drug-related crimes, which give effect to provisions of a multilateral treaty, such as the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, aimed at the suppression of such crimes and which having regard to the terms of the treaty constitute exceptionally serious crimes.

3. The State or States referred to in paragraph (1) are:

(a) in relation to a crime referred to in paragraph (2) (a), the State on whose territory the suspect is present, and the State on whose territory the act or omission in question occurred;

(b) in relation to a crime referred to in paragraph (2) (b), the State on whose territory the suspect is present and which has jurisdiction in conformity with the treaty to try the suspect for that crime before its own courts.

In its commentary to Article 26 the ILC working group notes that paragraph 2(a) of Article 26 is "intended to cover international crimes which have their basis in customary international law and which would otherwise not fall within the court's jurisdiction *ratione materiae* such as aggression, which is not defined by treaty, genocide, in the case of States not parties to the Genocide Convention, or other crimes against humanity not covered by the 1949 Geneva Conventions."¹⁷ The commentary further suggests that it is "inconceivable" that, "at the present stage of development of international law, the international community would move to create an international criminal court without including crimes such as those mentioned above, under the court's jurisdiction."

"Inconceivable" or not, the commentary also reports that some members of the working group opposed paragraph 2(a). As an alternative, these members proposed deleting paragraph 2(a) and covering the matter by Article 25 of the draft statute, which would allow such crimes to be referred to the court by the Security Council.

¹⁷ *Id.* at 29.

A majority of the Task Force would favor this alternative. In this view paragraph 2(a) of Article 26 is too open-ended and subject to misuse. Subjecting the court's jurisdiction over crimes under general international law to a condition precedent of referral to the court by the Security Council would appear to be a satisfactory compromise that would allow the punishment of crimes against humanity not covered by treaty yet minimize the risk that the court would exercise jurisdiction on the basis of political considerations. It would also be incumbent upon the Security Council, before referring the alleged offense to the court, to ensure that the crime in question was defined under general international law with the kind of precision necessary to protect fundamental human rights of an accused. The final decision on the existence and definition of the crime under general international law, as well as the guilt or innocence of the accused, would, of course, be left to the court.

A minority view in the Task Force would favor paragraph 2(a) of Article 36 in its present form. In this view a preliminary screening by the Security Council would be unnecessary and undesirable for the following reasons. First, the United States has historically defined some criminal activity by reference to the law of nations, and therefore it should have no difficulty in supporting a treaty that includes such a definition, particularly when the definition refers to the "fundamental" character of the norm. The clearest example in U.S. municipal law is piracy, which has been defined since the Act of 1790, c. 36, in accord with the "law of nations."

Second, the Security Council is a political organ of the United Nations. Other than the weight its actions may have in establishing custom or state practice, it should not be cast in the role of limiting the jurisdiction of the court. In *Nicaragua v. United States*, the International Court of Justice was (in effect) asked to defer from exercising jurisdiction to negotiations and to the Security Council. The Court rejected this view, and upheld its duty to say what international law requires in a concrete litigated case.

Third, there cannot any longer be a principled objection by Americans to the use of "fundamental norms." The United States for many years took the position that there was no such thing as *jus cogens* and that therefore it could not be bound by a customary norm to which it has not manifested its assent during the formative period of the norm. However, the Vienna Convention on the Law of Treaties, in Article 53, has now put that matter to rest.

Fourth, if there are fundamental norms, and if judicial tribunals are best-suited to finding and applying them, the draft statute of the ILC working group is surely preferable. It essentially puts the law-finding process where the Statute of the International Court of Justice puts it—in the hands of judges. The process for finding norms could be spelled out, perhaps borrowing from the ICJ statute. No defendant could object on *nulla poena sine lege* grounds, if the norm were subjected to the kind of rigorous analysis called for by the limitation to "fundamental" principles.

The crime of aggression is a special case, and the draft statute treats it as such. Under Article 27 a person could not be charged with the crime of aggression unless the Security Council had first determined that the "state concerned had committed the act of aggression which is the subject of the charge." Such a provision would be a significant safeguard against politically motivated agendas.

There remains, however, the more fundamental question as to whether the concept of aggression is an appropriate vehicle for the imposition of criminal liability. A majority of the Task Force is of the opinion that it is not. The only officially adopted definition of aggression is that contained in the General Assembly resolution adopted in 1974. Article 15 of the International Law Commission's Draft Code of Crimes Against the Peace and Security of Mankind largely tracks the Assembly's definition. Both governments and private scholars, however, in commenting on Article 15, have contended that it is inappropriate for a penal code to use an instrument intended to serve as a guide to a political organ (the Security Council) as the basis for defining criminal liability. Even as a guide to the Security Council, the General Assembly's resolution is controversial. As the basis for imposing criminal liability, it arguably would violate fundamental rights of an accused.¹⁸

Paragraph 2(b) of Article 26 also raises some complex issues, as indicated by the report in the commentary on that article that some members of the working group expressed serious reservations about it.¹⁹ The Task Force shares these reservations. Paragraph 2(b), as well as the commentary thereto, primarily addresses drug-related crimes. The provision, however, is not limited to drug trafficking and speaks in terms of "crimes under national law" which "give effect to provisions of a multilateral treaty." From the commentary it appears that the primary test for application of this provision is whether the multilateral treaty itself inadequately defines the crime, thus requiring reference to national law. This would leave the subject matter jurisdiction of the court open-ended, especially since, under paragraph 3(b) of Article 26, only the consent of the State on whose territory the suspect is present and which has jurisdiction under the treaty to try the suspect for that crime in its own courts would be required. As discussed later in this report, the application of national law by a permanent international criminal court is a controversial proposition. Rather than having the court apply, for example, the laws on drug trafficking of a number of states, the Task Force would suggest that the crime of drug trafficking be defined in the court's statute. The same should be done with respect to any other crime defined imprecisely by a multilateral treaty but deemed appropriate for inclusion within the court's subject matter jurisdiction.

18. For further discussion, see John F. Murphy, *Commentary on Article 15: Aggression*, in COMMENTARIES ON THE INTERNATIONAL LAW COMMISSION'S 1991 DRAFT CODE OF CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND 207-12 (M. Cherif Bassiouni, ed. 1993).

19. *Revised Report of the Working Group on the Draft Statute for an International Criminal Court*, *supra* note 5, at 29.

B. PERSONAL JURISDICTION

The issues here are which state or states should have to consent for the court to have jurisdiction over a particular accused and what form this consent should take, i.e., should the consent be general or on a case-by-case basis? Considering the latter question first, it appears that the consent would be on a case-by-case basis. In other words it would not necessarily follow that merely because a state was a party to the court's statute and had agreed to the court exercising subject matter jurisdiction over the alleged crime that state thereby had also agreed to the court exercising personal jurisdiction over a particular accused.

As to which state or states should have to consent for the court to have jurisdiction over a particular accused, the first report of the Task Force, as well as the draft statute of the ILC's Special Rapporteur,²⁰ would require *both* the consent of the state where the crime was committed and of the state of nationality of the accused. In support of this approach the ILC's Special Rapporteur notes that while the territorial principle is the primary basis for a state exercising personal jurisdiction over an accused, the nationality principle (i.e., the nationality of an accused) is also widely accepted. He then contends, "This draft, if it is not to be totally lacking in realism, cannot exclude one of the two rules in favor of the other. For this reason, jurisdiction should be conferred both by the State in whose territory the crime was committed and by the State of which the perpetrator is a national."²¹

The working group of the International Law Commission, however, adopted a different approach. Article 24 of its draft statute provides:

Jurisdiction of the Court in relation to Article 22

1. The Court has jurisdiction under this Statute in respect of a crime referred to in article 22 provided that its jurisdiction has been accepted under article 23:

(a) by any State which has jurisdiction under the relevant treaty to try the suspect of that crime before its own courts,

(b) in relation to a suspected case of genocide, by any State party to the Convention on the Prevention and Punishment of the Crime of Genocide, of 9 December 1948.

2. If the suspect is present on the territory of the State of his nationality or of the State where the alleged offence was committed, the acceptance of the jurisdiction of the Court by that State is also required.

Under the approach of the draft statute, the consent of both the state where the crime was committed and the state of nationality of the accused would never be required. The consent of either state would be required only when the accused was in one or the other of the two states. Absent such presence only the consent of any state which had jurisdiction under the relevant treaty to try the accused would be required.

20. Doudou Thiam, *supra* note 14, art. 5.

21. *Id.* at 12.

In its commentary on Article 24 the working group explains its approach to suspected crimes of genocide:

A special mention is made of the Genocide Convention in paragraph 1 (h) (sic) because unlike other treaties listed in article 22, the Genocide Convention is not based on the principle "*aut dedere aut judicare*" but on the principle of territoriality. Article VI of said Convention provides that persons charged with genocide or any of the other acts enumerated in the Convention shall be tried by a competent tribunal of the State in the territory of which the act was committed. However, as a counterpart to the non-inclusion of the principle of universality in the Convention, article VI also provides that the above-mentioned persons could also be tried by such international penal tribunal as may have jurisdiction with respect to those contracting parties which shall have accepted its jurisdiction. This can be read as an authority by States parties to it who are also parties to the Statute to allow an international criminal court to exercise jurisdiction over an accused who has been transferred to the Court by any State. The *travaux* of article VI support that interpretation.²²

For its part, the Task Force also has reexamined this issue, and a majority of its members would favor an approach where the court could exercise personal jurisdiction if only the state with custody over an accused gave its consent, provided that the state of custody itself would have a basis under the pertinent international convention for exercising jurisdiction.

The rationale behind this approach is that it would be most consistent with the view that the court would serve primarily as an alternative forum to national courts for prosecution of the crimes covered by the international conventions. Under these conventions the understanding is that normally the state where the crime was committed or the state of nationality of the accused has the primary interest in prosecution, and they are obligated to establish jurisdiction over the offense under their domestic law. For its part the state of custody (assuming it is not the territorial state or state of nationality) is obliged to establish its jurisdiction over the offense so it can submit an accused to prosecution if it does not extradite him to either the territorial state or the state of nationality. Since neither the territorial state, nor the state of nationality, nor the state of custody requires the consent of any other state to submit an accused to prosecution before its national courts, such consent should not be required for such states to submit an accused to an international criminal court.

The key question regarding "realism" may be whether states parties to the court's statute would insist on retaining the right to decide, on a case-by-case basis, whether to permit an international criminal court to exercise jurisdiction over their nationals. Besides this pragmatic consideration, an argument in favor of requiring the consent of the victim state and of the state of nationality is that these are the states with the primary interest in prosecuting the accused and they, rather than an international criminal court, should be permitted to do so if they

22. *Revised Report of the Working Group on the Draft Statute for an International Criminal Court*, *supra* note 5, at 26-7.

wish. Also, these states may need some time to investigate the alleged crime in order to decide whether they wish to prosecute, and this investigative process should not be undermined by a precipitous decision by the state of custody to refer the case to an international criminal court.

By contrast, if the Security Council refers a case to the international criminal court, there should be no requirement of consent to the court's jurisdiction by any state party to the statute. In such a case the Security Council would have determined that the crimes in question constituted a threat to international peace and security and would be acting pursuant to its mandatory powers under Chapter VII of the United Nations Charter. Reference of the case to the permanent international criminal court would be in lieu of the Council itself establishing an *ad hoc* tribunal along the lines of the tribunal for former Yugoslavia.

C. APPLICABLE LAW

The primary issues in this area seem to be twofold: (1) May the court apply the international conventions that cover the crimes within the court's jurisdiction directly, or should the court's statute itself define these crimes? (2) To what extent, if at all, should the court apply national law?

As noted above, the ILC's working group, under Article 22 of its draft statute, would have the court apply the conventions listed in that article directly. The acceptability of the court doing so would depend on whether these conventions define the crimes they cover with the precision necessary to meet due process and similar requirements of national criminal justice systems. If they do not, the court's statute should define these crimes.

The *ad hoc* tribunal being established by the Security Council, "[i]n determining the terms of imprisonment . . . shall have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia."²³ With respect to the permanent tribunal, as noted above, Article 26 of the ILC working group's draft statute would grant the court jurisdiction over certain crimes under national law, which would require the court to apply the national laws of various states. As a corollary, Article 28(c) of the working group's draft statute would direct the court to apply, "as a subsidiary source, any applicable rule of national law" and Article 41(c) would prohibit, under the principle of legality (*nullum crimen sine lege*), finding an accused guilty, "in the case of a prosecution under article 26(2)(b), unless the act or omission constituted a crime under the relevant national law, in conformity with the treaty, at the time the act or omission occurred."

The draft statute also envisages the court referring to national law to ascertain the type of oath or declaration witnesses shall make before testifying (Article 48(2)), to determine the length of a term of imprisonment or the amount of a fine to be imposed for a crime (Article 53), and to specify laws as to pardon,

23. Statute of the Tribunal, *supra* note 8, art. 24(1).

parole or commutation of sentence (Article 67). The Task Force is of the opinion, however, that this would create too much uncertainty or result in unequal justice. It is also doubtful whether the judges on an international criminal court would be competent to interpret and apply the law of a great variety of legal systems. These subjects should accordingly be covered by the court's statute or by its rules of procedure or evidence.

III. Nature and Structure of the Court

Because the United Nations has decided that a statute for a permanent international criminal court should be drafted, it may be assumed that the court would be established under UN auspices, either as a judicial organ of the United Nations or in association with the Organization. As such, the court would be global rather than regional in orientation. It may also be assumed that the court would be established by treaty rather than by Security Council or General Assembly resolution. Such a treaty might be drafted in a separate diplomatic conference called for that purpose or, more likely, through the UN General Assembly and its subsidiary organs.

What is as yet far from clear is the structure of the court and, perhaps most important, what selection process would be utilized to ensure the professional qualifications of the judges and to avoid the risk of politicization of the tribunal. As noted above in the discussion on jurisdiction and applicable law, decisions on the scope of the court's subject matter jurisdiction may enhance or diminish the risk of politicization of the court. Other factors will also be important determinants.

Perhaps the most important of these factors are the qualifications required for the judges and the method of their selection. The ILC working group's draft statute would require that the judges be "persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to the highest judicial offices. In the overall composition of the court, due account shall be taken of the experience of the judges in criminal law, international law, including international humanitarian law and human rights law."²⁴ On the whole this statement of the qualifications of judges appears satisfactory. The Task Force would recommend adding a requirement that the judges have previous experience in the conduct of criminal trials or appeals in national courts.

The primary concern regarding the selection process for judges on an international criminal tribunal is that it be designed to minimize the risk of politicization of the bench. Under the statute of the *ad hoc* tribunal being established by the Security Council, the judges would be elected by the General Assembly from a

24. *Revised Report of the Working Group on the Draft Statute for an International Criminal Court*, *supra* note 5, art. 6.

list submitted by the Security Council.²⁵ The Council's preparation of the list would be a significant safeguard against the selection of judges for political purposes. This safeguard would be absent, however, with respect to a permanent court not established by Security Council resolution.

Under Article 7 of the ILC working group's draft statute, eighteen judges would be elected by majority vote of the states parties to the statute. Each state party would be able to nominate one person, and election of the judges would be by secret ballot. No two judges could be nationals of the same state. Judges would hold office for twelve years and would *not* be eligible for reelection. The prohibition against reelection, which is an unusual provision for an international tribunal, is designed to minimize the possibility that a judge would render a judgment on political grounds to enhance his reelection chances. In case of a judicial vacancy, under Article 8 of the statute, a replacement judge would be elected in accordance with the same selection procedures. Judges elected to fill a term that had less than four years to run would be eligible for reelection.

There was some sentiment in the Task Force in favor of a requirement, as a safeguard against the risk of a politicized tribunal, of a two-thirds or even a three-fourths vote by states parties to the court's statute for a judge to be elected. Other members would favor a simple majority vote requirement.

There was also some concern in the Task Force that, at least in its initial stages, the bench not be too large and unwieldy. Some members of the Task Force believe eighteen judges might be too many for a tribunal that would represent a radical experiment in international adjudication. Some alternative numbers suggested include five to nine judges for the trial chambers and three to five for the appellate chamber. Allowing each state party to nominate one person to be a judge might result in a large number of candidates. If the number of these candidates elected to be judges was small, this would enhance the prospects for a highly competent and professional bench.

As to the structure of the court, Article 5 of the working group's draft statute provides that the organs of the tribunal shall consist of the court, or judicial organ, a Registry, and a Procuracy. The judges of the court, under Article 10, would elect, by an absolute majority, a President as well as a first and second Vice President. The President and the two Vice Presidents would constitute the Bureau of the court and would have administrative and other responsibilities under the statute.

Pursuant to Article 37 of the draft statute cases would be tried by chambers composed of five judges each. No judge from a complainant state or from a state of which an accused is a national could be a member of the chamber dealing with that particular case. Under Article 11 an accused could request the disqualification of a judge on the grounds of lack of impartiality or conflict of interest.

25. Statute of the Tribunal, *supra* note 8, art. 13(2).

Decisions regarding disqualification of a judge would be made by an absolute majority of the chamber concerned, including the President and two Vice Presidents. The challenged judge would not be able to take part in the decision.

The appeals chamber envisaged in Article 56 of the draft statute would not be composed of judges who serve solely in an appellate capacity. Rather, in the event of an appeal, the Bureau would constitute an appeals chamber consisting of seven judges who did not take part in the appealed from judgment but who otherwise would serve as trial judges. The Task Force would suggest that it would be preferable to have an appeals chamber composed of judges serving in an appellate capacity only. Judges normally serving in a trial capacity might have difficulty overruling a decision by judges with whom they normally would serve as colleagues.

Article 4 of the draft statute provides that the court would be "a permanent tribunal" but would sit only "when required to consider a case submitted to it." The commentary to article 4 indicates that this limitation "reflects the virtues of flexibility and cost-reduction" but notes also that some members of the working group believed that it was "incompatible with the necessary permanence, stability and independence of a true international Criminal Tribunal."²⁶ The Task Force is divided on this issue and would note that, in any event, the terms of Article 4 do not appear to preclude the court from evolving to the point where it would function on a full-time basis.

There is an issue as to what other activities that part-time judges might pursue would be incompatible with their judicial duties. Article 9 of the draft statute provides that the judges shall be independent and that they shall not engage "in any activity which interferes with their judicial functions, or which is likely to affect confidence in their independence. In case of doubt the Court shall decide." As an example of an activity that might compromise a judge's independence, the commentary to Article 9 cites service as a member or official of the executive branch of government.²⁷ The Task Force would suggest that any kind of government service would be incompatible with a judge's independence.

Lastly, there is the question of removal of judges for cause. The goal here would be to ensure the independence of judges from removal for political reasons while allowing them to be removed for malfeasance or misfeasance or inability to perform their functions, e.g., in the case of illness. Article 15 of the draft statute provides for the removal of judges if, "in the opinion of two thirds of the judges of the court, they have been found guilty of proven misconduct or a serious breach of this Statute." By contrast, Article 18 of the Statute of the International Court of Justice allows for the dismissal of a judge only if "in the *unanimous* opinion of the other members, he has ceased to fulfill the required

26. *Revised Report of the Working Group on the Draft Statute for an International Criminal Court*, *supra* note 5, at 9-10.

27. *Id.* at 13.

conditions.' (Emphasis added.) The ICJ's statute arguably gives the judges too much protection, since it makes it close to impossible to remove judges even in the most compelling of circumstances. The two-thirds vote requirement of the draft statute would seem the better approach.

Article 12 of the draft statute would govern the election and functions of the Registrar, who would be the principal administrative officer of the court. By its terms the judges on the court, on the proposal of the Bureau, would elect, by an absolute majority and secret ballot, the Registrar for a seven-year term, with the possibility of reelection. The Bureau would appoint or authorize the appointment of such other staff of the Registry as might be necessary. The staff of the Registry would be subject to staff regulations drawn up by the Registrar. The Registrar would be available on a full-time basis, but with the permission of the Bureau could exercise other functions within the United Nations system that were consistent with the duties of a Registrar. Under the draft statute the Registrar would perform such functions as notifications and reception of declarations of the court's jurisdiction.

It appears that the Registry would service both the judges of the court and the Procuracy. As pointed out by the Report of the War Crimes Task Force, "a shared Registry may interfere to a degree with the impartiality and legitimacy of the Tribunal."²⁸ Accordingly, it would appear desirable to ensure that the Registry's staff is divided into separate staffs for the court and the Procuracy, at least for those positions which are assigned confidential information, or which could be subject to manipulation.

Under Article 13 of the draft statute, the Procuracy would be composed of a Prosecutor, who would be head of the Procuracy, a Deputy Prosecutor, and such other qualified staff as might be required. The Prosecutor and the Deputy Prosecutor would be required to be of "high moral character and possess the highest level of competence and experience in the conduct of investigations and prosecutions of criminal cases." They would be elected, on a standby basis, by a majority vote of the states parties to the statute from among candidates nominated by the states parties for five-year terms and would be eligible for reelection. The responsibilities of the Prosecutor would include, upon receipt of a complaint, investigation of the alleged crime and prosecution of accused persons for crimes within the jurisdiction of the court. The Prosecutor would not be able to act in relation to a complaint involving a person of the same nationality, and the Procuracy would be required to act independently and not to seek or receive instructions from any government or any source. Where the Prosecutor is unavailable or disqualified, the Deputy Prosecutor would act as Prosecutor.

Under Article 15(2) of the draft statute, the Prosecutor, the Deputy Prosecutor, or the Registrar could be removed from office by a two-thirds vote of the judges

28. *Report on the International Tribunal to Adjudicate War Crimes Committed in the Former Yugoslavia*, *supra* note 8, at 22.

of the court. Permitting the removal of the Prosecutor, the Deputy Prosecutor, or the Registrar by a two-thirds vote of the judges arguably is inconsistent with the independence these officers should enjoy in performing their functions for the tribunal. An alternative approach would be to require a two-thirds vote of the states parties to the statute for removal.

Under Article 44 of the draft statute, defendants would have the right to court appointed counsel. The draft statute does not, however, establish a separate Office of Defense Counsel. A similar failure of the statute for the tribunal for former Yugoslavia to establish such an office was critically noted by the report of War Crimes Task Force.²⁹ The reasoning of the War Crimes Task Force would appear to apply *a fortiori* to a permanent international criminal court, in light of the lack of the time pressure attendant upon establishment of a permanent tribunal.

IV. Pre-Trial and Trial Procedures

A. PRE-TRIAL

As a preliminary matter, there is the issue as to who or what should be able to submit a case to a permanent international criminal court. In its first report the Task Force suggested that only states should have the right to institute proceedings before the court.³⁰ Some have gone further and suggested that only states that are parties to the court's statute and that have sufficient interest in the case should be permitted to submit a complaint to the court. Under this approach, a state would have sufficient interest in the case only if it had jurisdiction over the offense under the provisions of the particular convention or conventions that served as the basis for the court's subject matter jurisdiction.

A crucial step in the pre-trial process is the investigative stage. It is clear that a permanent court, to an even greater extent than the *ad hoc* tribunal, would require assistance from national authorities in conducting investigations of crime. The permanent court, however, unlike the *ad hoc* tribunal, would normally not have the coercive Chapter VII enforcement powers of the Security Council behind it to ensure the cooperation of national authorities. Rather, the obligation of national authorities to cooperate in investigations would depend upon provisions in the court's statute or, alternatively, in treaties on mutual assistance in criminal matters concluded between the court and states not parties to the court's statute.

An important component of such mutual assistance agreements would be provisions that would ensure that the investigation by national authorities would be conducted and evidence obtained in accordance with procedures that would protect the rights of an accused, e.g., the accused or his counsel would be able to cross examine a witness testifying before national authorities. Recently concluded

29. *Id.* at 23-5.

30. *Report of American Bar Association Task Force on an International Criminal Court*, *supra* note 6, at 273.

U.S. and other mutual assistance treaties, as well as the UN's Model Treaty on Mutual Assistance in Criminal Matters, may serve as a guide to this end.³¹

Some key issues concerning investigation include, who would be responsible for investigating the alleged crime and what safeguards should be employed to ensure that evidence obtained through the investigation would be admissible at trial.

Article 29 of the ILC Working Group's draft statute provides:

Complaint

Any State Party with jurisdiction over a particular crime under the terms of an international convention and which has accepted the jurisdiction of the Court pursuant to article 23 of the Statute with respect to the crime or other state with such jurisdiction and which has accepted the jurisdiction of the Court pursuant to article 23, or the Security Council pursuant to article 25; may by submission to the Registrar bring to the attention of the Court in the form of a complaint, with such supporting documentation as it deems necessary, that a crime, within the jurisdiction of the Court, appears to have been committed.

Under the ILC working group's approach, any state including states not parties to the court's statute, with jurisdiction over the offense under the particular convention concerned, would be permitted to submit a complaint to the court. In addition, as noted previously in this report, the Security Council would be able to submit a complaint regarding any crime within the subject matter jurisdiction of the court.

According to the commentary on Article 29,³² the working group considered limiting resort to the court to states parties to the statute. It opted, however, instead for an approach that would promote the goal of the international community to establish a universal mechanism for prosecuting, punishing and deterring international crimes wherever they may occur. As to the role envisaged for the Security Council, the working group pointed to the primary responsibility of the Council in the maintenance of international peace and security under the United Nations Charter and suggested that it would be preferable for the Council to be able to initiate criminal proceedings with respect to international crimes threatening the peace instead of itself creating an *ad hoc* tribunal along the lines of the tribunal it is in the process of establishing for former Yugoslavia.

The Task Force has reconsidered its earlier position and now would support the approach proposed by the working group. In its commentary on Article 29 the working group reports that one member suggested that the Prosecutor should be able to initiate an investigation in the absence of a complaint if it appeared that a crime apparently within the jurisdiction of the court might otherwise not be properly investigated. The majority of the working group, however, believed

31. See John F. Murphy, *The Need for International Cooperation in Combatting Terrorism*, 13 *TERRORISM: AN INTERNATIONAL JOURNAL* 381 (1990).

32. *Revised Report of the Working Group on the Draft Statute for an International Criminal Court*, *supra* note 5, add.1 at 2.

that "the investigation and prosecution of the crimes covered by the Statute should not be undertaken in the absence of the backing of a State or the Security Council, at least not at the present stage of development of the international legal system."³³ The Task Force agrees with the majority view. Moreover, it would note that the working group approach avoids the officious intermeddler problem, i.e., a complaint filed by a state which would not have jurisdiction to prosecute the crime under the applicable international convention.

Under Article 30 of the working group's draft statute, the Prosecutor, upon receipt of a complaint, is required to initiate an investigation, unless she determines "that no possible basis exists for action by the Court." The Prosecutor is directed to assess the information obtained from the investigation and to decide whether there is sufficient basis to proceed with a prosecution. Significantly, if the Prosecutor decides not to proceed, the Bureau is empowered to review this decision and, if it disagrees, to direct the Prosecutor to commence a prosecution.

The commentary to Article 30 reports that some members of the working group believed that judicial review of the Prosecutor's decision not to proceed with the case would be inconsistent with the independence of the Prosecutor and the doctrine of prosecutorial discretion. These members further believed that requiring a Prosecutor to proceed with a prosecution would create the risk of an ineffectual prosecution.³⁴ The Task Force agrees with this assessment. The remedy for consistent refusal on the part of a Prosecutor to prosecute when an objective analysis would seem to call for prosecution would be removal of the Prosecutor. Absent such refusal, the final decision as to whether to prosecute should rest with the Prosecutor.

To facilitate the investigation, the Prosecutor would have the power to "request the presence of and to question suspects, victims and witnesses, to collect evidence, including the disclosure and production of any documentation or exhibits relevant to the complaint, and to conduct on-site investigations."³⁵ The Prosecutor could also, "as appropriate, seek the cooperation of any State in a position to provide assistance" and could request the court to "issue such subpoenas as may be required, including for the arrest and detention of a suspect."³⁶

For their part, under Article 58, paragraph 1 of the draft statute, states parties would have the general obligation to "cooperate with the Tribunal in connection with criminal investigations relating to, and proceedings brought in respect of, crimes within the Court's jurisdiction." Under paragraph 2 of Article 58 states parties which had also accepted the jurisdiction of the court with respect to the particular crime would be required to respond without delay to a request or order issued by the court with respect to such measures as the location of persons, the

33. *Id.* at 3.

34. *Id.* at 6.

35. Draft Statute of ILC Working Group, *id.* art. 30(2) at 4.

36. *Id.* art. 30(3).

taking of testimony, the production of evidence, the service of documents, the arrest or detention of persons, or the surrender of the accused.

The scope of the obligation in paragraph 1 of Article 58 is unclear. Moreover, it is questionable whether states parties that have not accepted the jurisdiction of the court with respect to the particular crime under investigation or prosecution should be under any legal obligation to cooperate with the court. Rather, it would seem more appropriate to include such states parties within the terms of Article 59 of the draft statute, which calls for the voluntary cooperation of states not parties to the statute "on the basis of comity, a unilateral declaration, an ad hoc arrangement or other agreement with the court."

If an investigation includes questioning of a suspect, under paragraph 4(a) of Article 30 of the draft statute, he would be entitled to "be informed of the right to remain silent without such silence being a consideration in the determination of guilt or innocence, and of the right to have the assistance of counsel of the suspect's choice or, in the absence of means to retain counsel, to have counsel and legal assistance assigned to the suspect by the court." In addition the suspect could not be compelled to testify or to confess guilt and, if necessary, would be provided with competent interpretation services and translations of documents.³⁷ These are crucially important safeguards because neither international human rights law nor national laws adequately guarantee the right to counsel at all stages of the proceeding. Often the right to counsel attaches only at the trial stage.

Another important safeguard for an accused is the right to pre-trial release in appropriate cases. Article 35 of the draft statute provides for possible release on bail if the court decides such release is warranted. The commentary to Article 35 suggests that, considering "the serious nature of the crimes under this Statute," release on bail would be the exception rather than the rule.³⁸ If the court decides that an accused should be detained, Article 35 would require the state on whose territory the seat of the court is established to provide an appropriate place of detention as well as guards.

Upon a determination that there is a sufficient basis to proceed, under Article 31 of the draft statute the Prosecutor would prepare an indictment setting forth the facts and the crime or crimes with which the accused is charged. This indictment, under Article 32 of the draft statute, is to be submitted by the Prosecutor to the Bureau of the court (i.e., the President and two Vice Presidents). The Bureau, acting as an indictment chamber, then determines whether a *prima facie* case exists. If it so determines, the Bureau affirms the indictment and convenes a chamber of the court to try the case. Upon request of the Prosecutor the Bureau would be empowered to issue "such orders and warrants for the arrest, detention,

37. *Id.* art. 30(4)(b)&(c).

38. *Revised Report of the Working Group on the Draft Statute for an International Criminal Court*, *supra* note 5, at 12.

or surrender of persons, and any other orders as may be required for the conduct of the trial."³⁹

For the Bureau to perform the function of an indictment chamber would create major conflict of interest difficulties. Elsewhere in the draft statute, the Bureau is responsible for convening the trial chambers.⁴⁰ Moreover, and more significantly, the President or a Vice President would preside over an appeals chamber.⁴¹ Having affirmed the indictment of an accused, the President or a Vice President could have great difficulty in maintaining an impartial position on an appeal by an accused. Any court official who serves as a member of an indictment chamber should not be a member of the trial chamber that tries the case or of a chamber that hears an appeal by an accused. Nor should such an official be involved in the establishment of such a trial chamber or appeals chamber.

It should also be made clear in the court's statute that the judge responsible for deciding whether to confirm or dismiss an indictment would hold a hearing at which an accused person would have the right to respond to the charges and to enter a plea. Following the civil law model, an accused should have full access to the evidence in the prosecutor's file. He should enjoy the right to be represented by counsel and to have counsel assigned and paid for if he is indigent. These rights are not spelled out in the draft statute.

Lastly, under Article 54 of the draft statute, a state party may, at the request of the Prosecutor, designate persons to assist in a prosecution. Any persons so designated would serve at the direction of the Prosecutor and would not be permitted to seek or receive instructions from any government or source other than the Prosecutor.

B. TRIAL PROCEDURES

In discussions on an international criminal court, much has been made of the need (and the difficulty) of reconciling the procedures of the common law and the civil law systems. Such a reconciliation was accomplished, however, at the Nuremberg Trials,⁴² and a similar effort is underway for the *ad hoc* tribunal being established by the Security Council. There is, moreover, strong evidence of convergence between the two systems currently taking place.⁴³

There has been support in some quarters for trials *in absentia*, but this would be inconsistent with Article 14 of the International Covenant on Civil and Political Rights, which provides that an accused shall be entitled to be tried in his presence.

39. Draft Statute of ILC Working Group, *id.* art. 32(4).

40. *Id.* art. 32(3).

41. *Id.* art. 56(2).

42. See John F. Murphy, *Norms of Criminal Procedure at the International Military Tribunal*, in *THE NUREMBERG TRIAL AND INTERNATIONAL LAW* 61 (G. Ginsburgs and V.N.Kudriavtsev, eds. 1990).

43. Craig M. Bradley, *The Emerging International Consensus as to Criminal Procedure Rules*, 14 MICH. J. INT'L L. 171 (1993).

Under paragraph (h) of Article 44 of the ILC working group's draft statute, an accused would have to be present at the trial, "unless the Court, having heard such submissions and evidence as it deems necessary, concludes that the absence of the accused is deliberate." According to the commentary on Article 44, the issue of trials *in absentia* gave rise to a variety of views in the Working Group:

According to some members, this possibility [trials *in absentia*] was completely unacceptable from the perspective of a fair trial which respects the fundamental rights of the accused. Attention was drawn to article 14 of the United Nations Covenant on Civil and Political Rights which characterizes the right of the accused to be present at the trial as a minimum guarantee to which everyone shall be entitled, in full equality, in the determination of any criminal charge. Furthermore, they felt that judgments by the Court without the actual possibility of implementing them might lead to a progressive loss of its authority and effectiveness in the eyes of public opinion.

Other members were strongly in favour of drawing some distinctions, as regards, in particular, three possible situations: (a) the accused has been indicted but is totally unaware of the proceedings; (b) the accused has been duly notified but chooses not to appear before the Court; and (c) the accused has already been arrested but escapes before the trial is completed. Most of those members thought that while in hypothesis (a), an accused person should not be judged *in absentia*, in cases (b) and (c) a trial *in absentia* is perfectly in order, otherwise, the Court's jurisdiction would, in fact, be subject to the "veto" of the accused. Furthermore, they felt that in such cases a judgment *in absentia* would in itself constitute a kind of moral sanction which could contribute to the isolation of the accused wherever located and, possibly, to eventual capture. It was also argued in favour of trials *in absentia* that in criminal cases evidence should be effectively preserved by means of an expeditious trial. Such evidence might be lost if proceedings were delayed until such time as the accused could be brought before the Court. One member felt that trials *in absentia* could be appropriate under (c) above but not under (a) or (b). Another member also mentioned disruption of the trial by the accused, security reasons, or ill health of the accused, as valid grounds for pursuing the trial without the presence of the accused.

Members in favour of trials *in absentia* also generally felt that such a judgment should be provisional in the sense that if the accused appeared before the Court at a later stage, then a new trial should be conducted in the presence of the accused.

One member felt that if the Commission decided to allow trials *in absentia*, then this matter would need to be regulated in greater detail in the Statute.

The Working Group invited the Commission and the General Assembly to comment on the question of trials *in absentia*.⁴⁴

A majority of the Task Force would favor trial in the absence of an accused only when an accused has been present at trial but escapes before the trial is completed. Under U.S. law such a proceeding is not considered to be an *in absentia* trial.

Assuming no trials *in absentia*, it would be necessary, of course, to transfer an accused to the jurisdiction of the court. Under paragraph 3 of Article 63 of the draft statute, surrender of an accused person to the court might take place

44. Revised Report of the Working Group on the Draft Statute for an International Criminal Court, *supra* note 5, add.1, at 22-3.

in three different situations. First, a state party which has accepted the jurisdiction of the court with respect to the crime in question would be obliged to take immediate steps to arrest and surrender an accused person to the court. Second, a state party which is also a party to the relevant treaty defining the crime but which has not accepted the court's jurisdiction over the crime would have to arrest and either surrender or prosecute the accused. Third, a state party which is not a party to the relevant treaty would have to consider whether its internal law would permit the arrest and surrender of the accused. Article 63 also provides that a state party "should, as far as possible," give priority to a request from the court for surrender over requests for extradition from other states.

The commentary to Article 63 indicates that the working group decided to return to the question whether a state party that decided not to surrender an accused to the court should also be allowed as an alternative to prosecution to extradite him to another state for prosecution.⁴⁵ The Task Force would suggest an affirmative answer to this question. Arguably, national prosecution is inherently more effective than trial before an international tribunal. In any event, allowing a state party three options—prosecution, extradition to another state, or surrender to the court—would seem the approach most compatible with the view that the court should complement, rather than compete with, prosecution before national tribunals.

The grounds for refusal to transfer an accused should be kept to a minimum. It would be inappropriate, for instance, to include the political offense exception. By contrast, it is appropriate to include, as the court's statute does, the doctrine of speciality, which requires that a person surrendered to a court "not be subject to prosecution or punishment for any crime other than that for which the person was surrendered."⁴⁶

Related to the question of transfer of an accused to the court is the double jeopardy issue. The approach taken by the draft statute, in Article 45, would seem, with one exception, to be acceptable. As presently worded, Article 45 would obligate *all* parties to the court's statute not to try a person for an offense for which that person had been tried before the court, not just states parties that had accepted the court's jurisdiction over that particular crime.

Under Article 45, a person who has been tried by another court (including another international court) for an act constituting a crime within the international criminal court's jurisdiction could be tried again by the international criminal court only if the act in question was characterized by the other court as an ordinary crime or if "the proceedings in the other court were not impartial or independent or were designed to shield the accused from international criminal responsibility or the case was not diligently prosecuted." The principle of double jeopardy would also bar a subsequent trial of the accused for the same acts in national

45. *Id.* at 46.

46. Draft Statute of the ILC Working Group, *id.* art. 64(1).

courts of states parties that had accepted the court's jurisdiction over the particular crime and importantly, the international tribunal itself from trying a person twice for the same offenses.

As for the trial itself, Article 36 of the draft statute provides that, unless otherwise decided by the court, the trial shall take place at the seat of the tribunal (yet to be determined). Article 36 also provides, however, that the court may make arrangements with any other state for trial within its territory and, if "practicable and consistent with the interest or justice, a trial should be conducted in or near the State where the alleged crime was committed."

Some legal systems afford their prosecutorial authorities very little discretion as to whether to prosecute, resulting in a system of so-called "compulsory prosecution."⁴⁷ As noted previously in this report, however, in the case of an international criminal tribunal, it would be preferable to maximize the independence of the Prosecutor by granting her full discretion as to whether to institute proceedings. Moreover, if the caseload of the Prosecutor becomes heavy, she should have the authority to engage in plea bargaining, including possible grants of immunity to witnesses. Although plea bargaining has traditionally been rejected in principle by civil law legal systems, increased caseloads have resulted in plea bargaining in practice.⁴⁸

It would be crucially important that the trial chamber ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the rules of procedure and evidence and with full respect for the rights of the accused. The trial chamber would also have to provide appropriate protection for victims and witnesses during the proceedings. In most instances the hearings should be public unless the trial chamber decided to close the proceedings, in accordance with its rules of procedure and evidence, to satisfy a compelling need, such as protection of victims and witnesses through such measures as *in camera* proceedings or other means to ensure the confidentiality of a victim's or witnesses' identity.

The ILC working group's draft statute contains a number of provisions relating to protection of the rights of an accused as well as provisions relating to protection for victims and witnesses during the proceedings. With respect to protection of victims and witnesses, Article 46 of the draft statute would permit the court to conduct proceedings in camera or allow the presentation of evidence by such electronic means as video cameras. The commentary to Article 46, however, recognizes that allowing a prosecution witness to testify by video camera conflicts with the right of an accused to examine prosecution witnesses and the ability of the judges to assess the credibility of witnesses. Accordingly, in the view of the

47. See, e.g., John H. Langbein, *Land Without Plea Bargaining: How the Germans Do It*, 78 MICH. L.R. 204 (1979).

48. See Joachim Hermann, *Bargaining Justice—A Bargain for German Criminal Justice?* 53 U. PITT. L.R. 755 (1992).

working group, such procedures should be employed only when they are the only way to obtain the testimony of a particularly vulnerable victim or witness.⁴⁹

In its report the War Crimes Task Force devotes a considerable amount of attention to the difficulties involved in reconciling the cross examination and other rights of confrontation of an accused with the need to protect victims and witnesses.⁵⁰ This report makes no effort to replicate or expand upon this discussion. It suffices for present purposes to note that the situation in former Yugoslavia presents an especially acute, perhaps "historically unique"⁵¹ example of the need for protection of victims and witnesses. Although such situations could conceivably arise in proceedings before a permanent international criminal court, it would appear that the War Crimes Task Force cautionary suggestion that "in the vast majority of cases justice will be best served by affording the defendant the full confrontational rights discussed above without substantial modification to protect victims and witnesses"⁵² would apply a fortiori to proceedings before a permanent international criminal court.

As to the rights of an accused this report has already noted the draft statute's prohibition of double jeopardy. Other relevant provisions of the draft statute include Article 40, which requires trial chambers to ensure a fair trial with full respect for the rights of an accused; Article 41, which sets forth the fundamental criminal law principle *nullum crimen sine lege* that prohibits anyone being held guilty of a criminal offense based on an act that was not a crime, under national or international law, at the time it was committed; Article 42, which provides that all persons shall enjoy equality before the court; and Article 43, which provides that a person shall be presumed innocent until proved guilty. The commentary to Article 43 states that the Prosecutor "has the burden to prove every element of the crime beyond a reasonable doubt or in accordance with the standard for determining the guilt or innocence of the accused."⁵³ (Emphasis supplied.) The Task Force would suggest that the burden of the Prosecutor to prove every element of the crime beyond a reasonable doubt or its functional equivalent⁵⁴ be the standard for determining the guilt or innocence of an accused. This is not

49. *Revised Report of the Working Group on the Draft Statute for an International Criminal Court*, *supra* note 5, add. 1, at 26.

50. *Report on the International Tribunal to Adjudicate War Crimes Committed in the Former Yugoslavia*, *supra* note 8, at 36-45.

51. *Id.* at 37.

52. *Id.*

53. *Revised Report of the Working Group on the Draft Statute for an International Criminal Court*, *supra* note 5, add. 1, at 21.

54. As noted by the War Crimes Task Force, "it would not be reasonable [for the Task Force] to insist that the Tribunal adopt the same verbal standard as that used in the United States." But the War Crimes Task Force was "firmly convinced that either that standard or its functional equivalent must be adopted for application in the Tribunal." *Report on the International Tribunal to Adjudicate War Crimes in Former Yugoslavia*, *supra* note 8, at 34.

necessarily the standard in the national legal systems of other countries, but it is a crucially important protection.⁵⁵

The primary provision of the draft statute on the rights of an accused is Article 44, whose terms are set forth in full below:

Rights of the Accused

1. In the determination of any charge under this Statute, the accused is entitled to a fair and public hearing, subject to article 40, paragraph 2, and to the following minimum guarantees:

(a) to be informed promptly and in detail, in a language which the accused understands, of the nature and cause of the charge;

(b) to be informed of the right of the accused to conduct the defence or to have the assistance of counsel of the accused's choice or, in the absence of means to retain counsel, to have counsel and legal assistance assigned to the accused by the Court;

(c) to have adequate time and facilities for the preparation of the defence, and to communicate with counsel;

(d) to examine, or have examined, the prosecution witnesses and to obtain the attendance and examination of witnesses for the defence under the same conditions as witnesses for the prosecution;

(e) to be tried without undue delay;

(f) if any of the proceedings of, or documents presented to, the Court, are not in a language the accused understands and speaks, to have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness;

(g) not to be compelled to testify or to confess guilt;

(h) to be present at the trial, unless the Court, having heard such submissions and evidence as it deems necessary, concludes that the absence of the accused is deliberate.

2. At the commencement of a trial, the Court shall ensure that the indictment and other documents referred to in article 33, paragraphs 1 (h) and 4 (b) of the Statute, and copies thereof in a language understood and spoken by the accused, have been provided to the accused sufficiently in advance of the trial to enable adequate preparation of the defence.

3. All incriminating evidence on which the prosecution intends to rely and all exculpatory evidence available to the prosecution prior to the commencement of the trial shall be made available to the defence as soon as possible and in reasonable time to prepare for the defence.

The above provisions are drawn from Article 14 of the International Covenant on Civil and Political Rights, which the United States and numerous other countries have ratified. Although these provisions would provide a number of protections for an accused, there are a few protections not provided or perhaps inadequately provided by them. For instance, paragraph 1(h) would permit trials *in absentia*, a problem previously addressed in this report.

Also, paragraph 1(g) constitutes a recognition of the right against self-incrimination. But it does not address some subtle differences between the U.S. approach to this issue and that of the civil law systems. For example, in the United States, an accused cannot be compelled to take the stand. If he takes the

⁵⁵. For discussion see *id.* at 33-4.

stand, answers some questions, but refuses to answer others on the ground that his answer might incriminate him, the court is not permitted to comment on this refusal, and neither the court nor a jury is permitted to draw adverse (to the accused) inferences from this failure.⁵⁶ In contrast, in Germany an accused is required to take the stand. He then can refuse to answer any questions (although he rarely does so) and the court is not permitted to draw adverse inferences. However, if the accused answers some questions, but declines to answer others, the court may draw adverse inferences from such silence.⁵⁷

The Task Force is divided on the issue whether the U.S. or the German approach would be preferable for an international criminal court. A majority of the Task Force favors the U.S. position.

The words "to examine or have examined" in paragraph 1(d) are designed to accommodate the different approaches to examination of witnesses followed by the common law and civil law legal systems. Under the civil law approach the judge asks most of the questions, although some of these questions may be suggested by counsel, and counsel themselves may ask some questions with the judge's permission. Cross-examination, as it is employed in the United States, is not generally utilized in the civil law.⁵⁸ At Nuremberg, however, counsel freely cross-examined witnesses.⁵⁹ Similarly, cross-examination should be an integral part of the procedure before an international criminal court and the Task Force would recommend deletion of the words "or have examined."

As to the introduction of evidence, it is well known that the civil law legal systems do not employ the elaborate exclusionary rules characteristic of the U.S. legal system. In large part, although not entirely, this is because the civil law trial does not have a jury. In general the approach of a civil law tribunal is to admit the evidence and to permit professional judges to decide what weight, if any, to give it. Thus, hearsay, for example, is freely admitted in civil law criminal proceedings.

It is important to note, however, that the civil law does exclude some kinds of evidence and that a convergence between the civil law and common law approaches may be developing. For example, as reported by Craig M. Bradley:

Four trends emerge from the comparative analysis in this article. First, every country examined here except the United States agrees that the declaration of criminal procedure rules is, at least primarily, the province of the legislative, not the judicial branch. The legislature enacts rules in a code that the police can learn and obey, rather than a series of court opinions. Second, most countries require *Miranda*-type warnings prior to interrogation. If the requirement of such warnings in the United States was once aberrant-

56. *Griffin v. California*, 380 U.S. 609, 85 S.Ct. 1229 (1965).

57. RUDOLF B. SCHLESINGER ET AL., COMP. L. 487-8 (5th ed. 1987).

58. For recent discussion, see Gordon Van Kessel, *Adversary Excesses in the American Criminal Trial*, 67 NOTRE DAME L. REV. 403, 422-5 (1992).

59. John F. Murphy, *Norms of Criminal Procedure at the International Military Tribunal*, *supra* note 42, at 71.

tional, that is no longer the case. Third, exclusionary remedies are finding increasing favor as a means of deterring police breaches of the rules, even though the courts of two countries, Canada and Germany, continue to maintain that deterrence of police misconduct is *not* the purpose of the exclusionary rule. Fourth, these exclusionary remedies tend, except in the case of coerced confessions, to be discretionary, rather than mandatory as in the United States. Nonetheless, they tend to be enforced often enough to have an impact on the police, at least in Canada and England, increasingly in Germany, and perhaps in Italy and Australia as well.⁶⁰

Moreover, German courts regularly exclude evidence obtained in violation of a constitutionally protected right of privacy,⁶¹ and civil law legal systems often have extensive protection for privileged communications and exclusions based on personal incompetence to testify for such reasons as kinship, tender age or prior felony convictions.

Under Article 19 of the ILC working group's draft statute, the judges, by majority vote and on the recommendation of the Bureau, would have the authority to promulgate rules regarding the conduct of pre-trial investigations, the procedure to be followed and the rules of evidence to be applied in a trial, and "any other matter which is necessary for the implementation of this statute." With respect to evidentiary matters Article 48 of the draft statute would supplement Article 19 by authorizing the court to require any person to give evidence at the trial if deemed to be relevant to the proceedings.

In accordance with its earlier observations the Task Force would suggest that this provision be revised to avoid the possibility that the court would attempt to compel the appearance of nationals of a state that has not accepted the jurisdiction of the court regarding the offense in question. Also in accordance with its earlier observations the Task Force would suggest the revision of the provision in Article 48 of the draft statute that would have each witness "make such oath or declaration as is customary in judicial proceedings in the State of which the witness is a national." The rules of evidence should determine whether witnesses should be required to take an oath and if so, what form it should take rather than drawing on varying national practices. By contrast, the Task Force would applaud the provision of Article 48 that would bar the admission of evidence "obtained directly or indirectly by illegal means which constitute a serious violation of internationally protected human rights."

Article 19 of the draft statute follows the approach adopted by Article 15 of the Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia in giving the judges of the court the obligation and plenary power to adopt rules of procedure and evidence. To be sure, Article 48 of the draft statute contains some basic provisions on evidence, and other provisions of the draft statute are designed to protect the rights of an accused.

60. Craig M. Bradley, *supra* note 43, at 219-20.

61. *Id.* at 207-8.

Like the War Crimes Task Force, however, the Task Force on an International Criminal Court believes that "the rules of evidence and procedure will be critical in maintaining the utmost degree of fairness in the daily operations of the Tribunal"⁶² and is concerned about the plenary power of the judges to adopt these rules. In the case of the tribunal for former Yugoslavia, the suggestion was that the Security Council retain a role in approval of the rules of evidence and procedure prior to final adoption by the tribunal.⁶³ As for a permanent international criminal court the parties to the court's statute should assume the responsibility for developing rules of evidence and procedure and incorporate them in a protocol that would be adopted at the same time as the court's statute. It is highly likely that the rules developed for the Yugoslavia War Crimes Tribunal could serve as the basis, with appropriate modifications, for the rules for a permanent international criminal court.

Under Article 50 of the ILC working group's draft statute, at least four judges would have to be present at each stage of the trial, and decisions of the trial chambers would be taken by majority vote. Article 51 of the draft statute would require that the judgment of the chamber be in written form and contain "a full and reasoned statement of its findings and conclusions." Unlike the statute of the Yugoslavia War Crimes Tribunal,⁶⁴ Article 51 would not permit dissenting or separate opinions. According to the commentary on Article 51, various views were expressed in the working group on the desirability of allowing separate or dissenting opinions.⁶⁵ Among the reasons given for opposing such opinions were that they would undermine the authority of the court and its judgments and might endanger the personal safety of the judges given the serious nature of the crimes within the court's jurisdiction. The primary reasons advanced in favor of allowing such opinions were that they would be helpful to an accused who chose to appeal a conviction and that they would assist the appeals chamber in deciding whether to overturn a conviction. The working group concluded that the reasons advanced against dissenting and separate opinions outweighed the possibly favorable effects of such opinions. The Task Force takes no position on this issue.

The draft statute would permit an appeal to the appeals chamber on three grounds: "material error of law; error of fact which may occasion a miscarriage of justice; or manifest disproportion between the crime and the sentence."⁶⁶ The working group considered granting the Prosecutor as well as the defendant the right to appeal and decided to return to this question at some later time.⁶⁷ Although

62. *Report on the International Tribunal to Adjudicate War Crimes in Former Yugoslavia*, *supra* note 8, at 31.

63. *Id.* at 32.

64. Statute of the Tribunal, *supra* note 8, art. 23.

65. *Revised Report of the Working Group on the Draft Statute for an International Criminal Court*, *supra* note 5, add.1, at 32.

66. *Id.* art. 55.

67. *Id.* at 38.

in some legal systems the prosecutor has a right of appeal, the Task Force would favor the U.S. approach that regards an acquittal on the facts as final and giving rise to double jeopardy. Such an approach would permit only the person convicted by the trial chamber to request an appeal after final judgment or a review proceeding. However, either the defendant or the Prosecutor should be permitted an interlocutory appeal of issues of law.

V. Enforcement of Sanctions

In one sense the topic of enforcement of sanctions covers a wide range of issues. These could include, for example, compelling the attendance of the accused, or of witnesses, arrangement for detention of an accused pending trial, the production of evidence, punishment of perjury, or sanctions against states that fail to carry out their obligations under the court's constituent instruments or otherwise interfere with the court's functioning. Some of these issues are dealt with elsewhere in this report. In this section the focus is more narrow. It is on the enforcement of the penalty decided on following a final decision of the tribunal to convict an accused. This issue arises only once the final decision has been made and either the time for any appeal has passed or such appeal has resulted in a confirmation of sentence.

This issue in turn may be divided into two sub-issues: the type or range of sanctions to be imposed against convicted persons and the method or methods of enforcement of such sanctions.

A. TYPES OF SANCTIONS

Although a number of arguments might be advanced in favor of or against the death penalty, there appears to be general agreement in UN deliberations that the death penalty will not be one of the sanctions available to a permanent international criminal court. Accordingly, the Task Force has assumed that life imprisonment would be the most onerous punishment imposed by the court.

In addition to imprisonment, however, there are other sanctions the court might impose. For example, in appropriate cases the tribunal might order compensation for the victims, forfeiture of the convicted person's property, or even community service in aid of the victim or society at large. Even with respect to imprisonment the options available to the court could range from one day to life. There is an argument to be made in favor of giving the court considerable flexibility in deciding on appropriate sanctions. Factors the court might take into account would be similar to those employed in national legal systems, such as the nature of the offense, the age and position of the offender, the interest of the victim, and the balance between the rehabilitative and deterrent aspects of sentencing.

Under Article 52 of the ILC working group's draft statute, a chamber would be required to hold a further and separate hearing on sentencing of a convicted

person. Article 53 of the draft statute further provides that the chamber could impose "a term of imprisonment, up to and including life imprisonment" or "a fine of any amount." In deciding on the length of the term of imprisonment or the amount of a fine, the chamber would be able to consider the penalties provided by the law of "the State of which the perpetrator of the crime is a national; the state on whose territory the crime was committed; or the State which had custody of and jurisdiction over the accused."⁶⁸ The chamber would also be able to order the return of stolen property to its rightful owner or, if the rightful owner couldn't be traced, forfeiture of such property or proceeds.⁶⁹ As previously noted, an appeal could be taken against a sentence on the ground that there was a manifest disproportion between the crime and the sentence.⁷⁰

The draft statute does not specify which state's law on penalties would be applied in case of conflict among the three possibilities. In any event, the Task Force is opposed to allowing the court such a choice. This would result in considerable uncertainty and unequal justice. The type and range of possible sanctions should be specified in the court's statute.

B. METHODS OF ENFORCEMENT OF SANCTIONS

The methods to be used to enforce sanctions would obviously vary depending on which sanctions would be available. If, for example, forfeiture of assets or of the proceeds of crime were options available to the court, it might be possible to modify international systems of mutual assistance in criminal matters for use in imposing these sanctions. There is general agreement that using only financial sanctions in place of imprisonment would be inappropriate for most of the crimes which would be involved.

The complexity of this topic was aptly summarized in a report on a recent conference in Vancouver, Canada:

It was clear that an international criminal tribunal or court would face potentially enormous difficulties in the enforcement of sentences of imprisonment. These included: the expense of long-term imprisonment, in particular if a special facility was required; the security problems of detention of perhaps very high-profile prisoners; the desirability (if only for humanitarian reasons) for prisoners to be housed close to their home territory; the possibility that a prisoner might be regarded either as a hero or a monster by the local population, and in the former case that any local prison facility would be seen as a quasi-colonial imposition; the likely unwillingness of third states to house large numbers of long-term prisoners even though the costs of doing so might be borne internationally; the question of compliance with minimum standards for the treatment of prisoners, especially given the variation in economic and social conditions in different parts of the world; need for rules relating to such matters as conditions of imprisonment and prison discipline, and the related issues of parole, probation, pardon and release on compassionate grounds. . . .

68. *Id.* art. 53(2).

69. *Id.* art. 53(3).

70. *Id.* art. 55(1)(c).

The limited international experience with these issues was not a happy one. Although it was recognized that even small and poor states maintained effective prison systems, and that the United Nations's minimum standards and rules for detention had been drafted to apply to a wide range of situations, the additional problems of imprisoning war criminals and other persons convicted of international crimes made this an especially difficult area. Indeed the difficulties were such that some felt they were almost insuperable, at least for a long-term court, and required reconsideration of what such a court was really intended to achieve. Others were more optimistic that the problems could be resolved, if necessary on a case by case basis. But there was general agreement that without a solution, the arguments for having a criminal court trying individual persons would dissolve. And it would not be possible to proceed to trial in any given case unless arrangements for implementation of an eventual sentence were in hand.⁷¹

As noted in the first report of the Task Force, at the pre-trial stage an accused would probably be incarcerated in the state where he was apprehended, while during the trial he would, primarily for logistical reasons, be detained in a temporary jail facility located at the site of the court.⁷²

Under Article 65 of the ILC working group's draft statute, states parties would be required to recognize and give effect to judgments of the court. This is an important provision, because, in the absence of a treaty, states normally will not enforce the criminal or penal judgments of other states. It should be made clear, however, that a state party to the court's statute would have this obligation only with respect to judgments based on crimes the state party had recognized as within the court's jurisdiction. The draft statute further requests states parties to offer facilities for imprisonment of persons convicted by the court, states that imprisonment shall take place in a state designated by the court from a list of states that have offered their facilities, or, if no such state is designated, in the state where the court is located, and subjects imprisonment to the supervision of the court.⁷³

The commentary indicates that the working group plans to return to the factors to be considered by the court in deciding whether to designate a state to serve as the place of incarceration, but recognizes that these factors might more appropriately be contained in the rules of the court.⁷⁴ The commentary also suggests that the terms and conditions of imprisonment should be in accordance with international standards, most particularly, the UN's Standard Minimum Rules for the Treatment of Prisoners, that the rules of the court could provide for procedures under which a convicted person could seek redress for mistreatment and for reports by national authorities, and that all states parties should share in

71. International Centre for Criminal Law Reform and Criminal Justice Policy, *Report on International Meeting of Experts on the Establishment of an International Criminal Tribunal*, March 22-6, 1993, at 27.

72. *Report of American Bar Association Task Force on an International Criminal Court*, *supra* note 6, at 277.

73. *Revised Report of the Working Group on the Draft Statute for an International Criminal Court*, *supra* note 5, add.1, art. 66, at 48-9.

74. *Id.* at 49.

the costs that would be involved in the incarceration of persons for substantial periods of time.⁷⁵

From an ideal perspective, it would be desirable to have the state where the tribunal is located serve as the place where all the sentences imposed by the court would be carried out. However, the feasibility of this proposal would depend on the number of such sentences and the penal resources of that state. At a minimum having all of the sentences carried out in one state would greatly ease the court's administrative burdens in terms of oversight of their implementation.

Finally, there is the issue as to who should be able to grant an accused person a pardon, amnesty, or conditional release. The issue has come to the fore recently with El Salvador's controversial amnesty to those (on the government's side only) who committed war crimes or other human rights violations during the long civil war in that country. Under Article 67 of the working group's draft statute a decision whether to grant pardon, parole, or commutation of sentences would involve an unnecessarily cumbersome process that would include reference to and reliance upon various national laws. The War Crimes Task Force addressed a somewhat similar problem arising under the statute for the Yugoslavia War Crimes Tribunal. It suggested that the Tribunal should adopt guidelines providing for uniform standards concerning the treatment of prisoners, including the pardon of sentences, and that these guidelines should specify an alternative forum for review of requests for pardon or commutation once the Tribunal is no longer in existence.⁷⁶ The Task Force on an International Criminal Court believes that this suggestion is equally appropriate for a permanent international criminal court.

75. *Id.*

76. *Report on the International Tribunal to Adjudicate War Crimes Committed in the Former Yugoslavia*, *supra* note 8, at 60-1.

Appendix [A]

DRAFT STATUTE FOR AN INTERNATIONAL CRIMINAL TRIBUNAL

Part 1: Establishment and Composition of the Tribunal

Article 1

Establishment of the Tribunal

There is established an International Criminal Tribunal (hereinafter the Tribunal), whose jurisdiction and functioning shall be governed by the provisions of the present Statute.

Article 2

Relationship of the Tribunal to the United Nations

[The Tribunal shall be a judicial organ of the United Nations.]

[The Tribunal shall be linked with the United Nations as provided for in the present Statute.]

Article 3

Seat of the Tribunal

1. The seat of the Tribunal shall be established at . . .
2. The [Tribunal] [Secretary-General of the United Nations] shall, with the approval of [the General Assembly], conclude an agreement with the State of the seat of the Tribunal, which will regulate the relationship between that State and the Tribunal.

Article 4

Status of the Tribunal

1. The Tribunal is a permanent institution open to States parties to the Statute of the Tribunal (hereinafter called the State Parties) and to other States in accordance with this Statute. It shall sit when required to consider a case submitted to it.
2. The Tribunal shall enjoy in the territory of each of the States parties such legal capacity as may be necessary for the exercise of its functions and the fulfillment of its purposes.

Article 5
Organs of the Tribunal

The Tribunal shall consist of the following organs:

- (a) The Court, which shall consist of 18 judges elected in accordance with article 7;
- (b) The Registry, appointed under article 12;
- (c) The Procuracy, as provided under article 13.

Article 6
Qualifications of judges

The judges shall be persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to the highest judicial offices. In the overall composition of the Court, due account shall be taken of the experience of the judges in criminal law, international law, including international humanitarian law and human rights law.

Article 7
Election of judges

- 1. The judges shall be elected by majority vote of the States parties to this Statute.
- 2. Each State party may nominate for election one person who possesses the qualifications specified in article 6, and who is willing and able to serve as may be required on the Court.
- 3. The election of judges shall be by secret ballot.
- 4. No two judges may be nationals of the same State.
- 5. States parties should strive to elect persons representing diverse backgrounds and experience, with due regard to representation of the major legal systems.
- 6. Judges hold office for a term of 12 years and are not eligible for re-election. A judge shall, however, continue in office in order to complete any case the hearing of which has commenced.
- 7. At the first election, 6 judges chosen by lot shall serve for a term of 4 years and are eligible for re-election; 6 judges (chosen by lot) shall serve for a term of 8 years, and the remainder shall serve a term of 12 years.

Article 8
Judicial vacancies

- 1. In the event of a vacancy, a replacement judge may be elected in accordance with article 7.
- 2. Judges elected to fill a vacancy shall serve for the remainder of their predecessor's term, and if that period is less than four years, are eligible for re-election for a further term.

Article 9
Independence of judges

In their capacity as members of the Court, the judges shall be independent. Judges shall not engage in any activity which interferes with their judicial functions, or which is likely to affect confidence in their independence. In case of doubt, the Court shall decide.

Article 10
Election and functions of President and Vice-Presidents

1. The President, as well as the first and second Vice-Presidents, shall be elected by the absolute majority of the judges.
2. The President and the Vice-Presidents shall serve for a term of three years or until the end of their term of office on the Court, whichever is earlier.
3. The President and the Vice-Presidents shall constitute the Bureau which, subject to this Statute and the Rules, shall be responsible for the due administration of the Court, and other functions assigned to it under the Statute.
4. The first or second Vice-President, as the case may be, may act in place of the President on any occasion where the President is unavailable or ineligible to act.

Article 11
Disqualification of judges

1. Judges shall not participate in any case in which they have previously been involved in any capacity whatsoever, or in which their impartiality might reasonably be doubted on any ground, including an actual, apparent or potential conflict of interest.
2. A judge who feels disqualified under paragraph (1) or for any other reason in relation to a case shall so inform the President.
3. The accused may also request the disqualification of a judge under paragraph 1.
4. Any question concerning the disqualification of a judge shall be settled by a decision of the absolute majority of the chamber concerned. The chamber shall be supplemented for that purpose by the President and the two Vice-Presidents of the Court. The challenged judge shall not take part in the decision.

Article 12
Election and functions of the Registrar

1. On the proposal of the Bureau, the judges of the Court by an absolute majority shall elect the Registrar, by secret ballot, who shall be the principal administrative officer of the Court.

2. The Registrar shall be
 - (a) elected for a seven-year term, and eligible for re-election;
 - (b) shall be available on a full-time basis, but may with the permission of the Bureau exercise such other functions within the United Nations system as are not inconsistent with his office as Registrar.
3. The Bureau may appoint or authorize the appointment of such other staff of the registry as may be necessary.
4. The staff of the Registry shall be subject to Staff Regulations drawn up by the Registrar, so far as possible in conformity with the United Nations Staff Regulations and Staff Rules approved by the Court.

Article 13

Composition, functions and powers of the Procuracy

1. The Procuracy shall be composed of a Prosecutor, who shall be Head of the Procuracy, a Deputy Prosecutor and such other qualified staff as may be required.
2. The Prosecutor and Deputy Prosecutor shall be of high moral character and possess the highest level of competence and experience in the conduct of investigations and prosecutions of criminal cases. They shall be elected by majority vote of the States parties to this Statute from among candidates nominated by the States parties thereto for a term of five years and be eligible for re-election.
3. The States parties shall, unless otherwise decided, elect the Prosecutor or Deputy Prosecutor on a standby basis.
4. The Procuracy, as a separate organ of the Tribunal, shall act independently, and shall not seek or receive instructions from any Government or any source.
5. The Prosecutor shall appoint such staff as are necessary to carry out the responsibilities of the office.
6. The Prosecutor, upon receipt of a complaint pursuant to article 28, shall be responsible for the investigation of the crime alleged to have been committed and the prosecution of the accused for crimes referred to in articles 22 and 26.
7. The Prosecutor shall not act in relation to a complaint involving a person of the same nationality. In any case, where the Prosecutor is unavailable or disqualified, the Deputy Prosecutor shall act as Prosecutor.

Article 14

Solemn undertaking

Before first commencing to exercise their functions under this Statute, members of the Tribunal shall make a public and solemn undertaking to do so impartially and conscientiously.

Article 15
Loss of office

1. Judges shall not be deprived of their office unless, in the opinion of two thirds of judges of the court, they have been found guilty of proven misconduct or a serious breach of this Statute.
2. Where the Prosecutor, the Deputy Prosecutor or the Registrar is found in the opinion of two thirds of the Court, guilty of proved misconduct or in serious breach of this Statute, he or she shall be removed from office.

Article 16
Privileges and immunities

1. Judges shall enjoy, while performing their functions in the territory or States parties, the same privileges and immunities as those accorded to judges of the International Court of Justice.
2. Counsel, experts and witnesses shall enjoy, while performing their functions in the territory of the States parties, the same privileges and immunities as those accorded to counsel, experts and witnesses involved in proceedings before the International Court of Justice.
3. The Registrar, the Prosecutor, the Deputy Prosecutor and other officers and staff of the Tribunal shall enjoy, while performing their functions in the territory of the States parties, the same privileges and immunities necessary to the performance of their functions.
4. The judges may, by majority, revoke the immunity of any person referred to in paragraph 3 other than the Prosecutor. In the case of officers and staff of the Tribunal, they may do so only on the recommendation of the Registrar or Prosecutor, as the case may be.

Article 17
Allowances and expenses

1. The President shall receive an annual allowance.
2. The Vice-Presidents shall receive a special allowance for each day they exercise the functions of the President.
3. The judges shall receive a daily allowance during the period in which they exercise their functions, and shall be paid for the expenses related to the performance of their functions. They may continue to receive a salary payable in respect of another position occupied by them consistent with article 9.

Article 18
Working languages

The working languages of the Tribunal shall be English and French.

Article 19
Rules of the Tribunal

1. The Court may, by authority of the judges and on the recommendation of the Bureau, make rules for the functioning of the Tribunal under this Statute, including rules regulating:
 - (a) the conduct of pre-trial investigations, in particular so as to ensure that the rights referred to in articles 38 to 44 are not infringed;
 - (b) the procedure to be followed and the rules of evidence to be applied in any trial;
 - (c) any other matter which is necessary for the implementation of this Statute.

Article 20
Internal rules of the Court

Subject to this Statute and to the Rules of the Tribunal, the Court has the power to determine its own rules and procedures.

Article 21
Review of the Statute

A Review Conference shall be held, at the request of at least [. . .] States parties after this Statute has been in force for at least five years:

- (a) to review the operation of this Statute;
- (b) to consider possible revisions or additions to the list of crimes contained in article 22 by way of a Protocol to this statute or other appropriate instrument and in particular, the addition to that list of the Code of Crimes against the Peace and Security of Mankind, if it has then been concluded and has entered into force.

Part 2: Jurisdiction and Applicable Law

Article 22
List of crimes defined by treaties

The Court may have jurisdiction conferred on it in respect of the following crimes:

- (a) genocide and related crimes as defined by articles II and III of the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948;
- (b) grave breaches of:
 - (i) The Geneva Convention for the Amelioration of the Condition of Wounded and Sick in Armed Forces in the Field of 12 August 1949, as defined by article 50 of that Convention;

- (ii) The Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949, as defined by article 51 of that Convention;
- (iii) The Geneva Convention relative to the Treatment of Prisoners of War of 12 August 1949, as defined by article 130 of that Convention;
- (iv) The Geneva Convention relative to the Protection of Civilian Persons in the Time of War of 12 August 1949, as defined by article 147 of that Convention;
- (v) Protocol I additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts of 8 June 1977, as defined by article 85 of that Protocol;
- (c) the unlawful seizure of aircraft as defined by article 1 of the Convention for the Suppression of Unlawful Seizure of Aircraft of 16 of December 1970;
- (d) the crimes defined by article 1 of the Convention for the Suppression of unlawful Acts against the Safety of Civil Aviation of 23 September 1971;
- (e) apartheid and related crimes as defined by article 2 of the International Convention on the Suppression and Punishment of the Crime of Apartheid of 30 November 1973;
- (f) the crimes defined by article 2 of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents of 14 December 1973;
- (g) hostage-taking and related crimes as defined by article 1 of the International Convention against the Taking of Hostages of 17 December 1979;
- (h) the crimes defined by article 3 of the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation and by article 2 of the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf, both of 10 May 1988.

Article 23

Acceptance by States of jurisdiction over crimes listed in article 22

Alternative A

1. A State party to this Statute may, by declaration lodged with the Registrar, at any time accept the jurisdiction of the Court over one or more of the crimes referred to in article 22.
2. A declaration made under paragraph (1) may be limited to:
 - (a) particular conduct alleged to constitute a crime referred to in article 22
or
 - (b) conduct committed during a particular period of time, or may be of general application.

3. A declaration may be made under paragraph (1) for a specified period, in which case it may not be withdrawn before the end of that period, or for an unspecified period, in which case six months' notice of withdrawal must be given to the Registrar. Withdrawal does not affect proceedings already commenced under this Statute.
4. A State not a party to this Statute may, by declaration lodged with the Registrar, at any time accept the jurisdiction of the Court over a crime referred to in article 22 which is or may be the subject of a prosecution under this Statute.

Alternative B

1. Unless it makes the declaration provided for in paragraph 2, a State becoming party to this Statute is deemed to have accepted the jurisdiction of the Court over any crime referred to in article 22, if it is a party to the treaty which defines that crime.
2. A State party to the present Statute may, by declaration lodged with the Registrar, indicate that it does not accept the jurisdiction of the Court over one or more of the crimes referred to in paragraph 1.
3. The declaration may be made on the ratification of or accession to the Treaty embodying this Statute or at any time thereafter, in which case it shall come into effect 90 days after being made and it shall not affect any proceedings already commenced under this Statute.
4. Declarations may be withdrawn at any time, with immediate effect.

Alternative C

1. A State party to this Statute may, by declaration lodged with the Registry, at any time accept the jurisdiction of the Court.
2. Unless otherwise specified, a declaration of acceptance under paragraph 1 shall be deemed to confer jurisdiction on the court with regard to all of the crimes listed in article 22.
3. A declaration of acceptance under paragraph (1) may be limited to: (the rest of the provision as in paragraphs 2, 3 and 4 of Alternative A).

Article 24

Jurisdiction of the Court in relation to article 22

1. The Court has jurisdiction under this Statute in respect of a crime referred to in article 22 provided that its jurisdiction has been accepted under article 23:
 - (a) by any State which has jurisdiction under the relevant treaty to try the suspect of that crime before its own courts,
 - (b) in relation to a suspected case of genocide, by any State party to the Convention on the Prevention and Punishment of the Crime of Genocide, of 9 December 1948.

2. If the suspect is present on the territory of the State of his nationality or of the State where the alleged offense was committed, the acceptance of the jurisdiction of the Court by that State is also required.

Article 25

Cases referred to the Court by the Security Council

Subject to article 27, the Court also has jurisdiction under this Statute over cases referred to in Articles 22 or 26 (2) (a) which may be submitted to it on the authority of the Security Council.

Article 26

Special acceptance of jurisdiction by States in cases not covered by Article 22

1. The Court also has jurisdiction under this Statute in respect of other international crimes not covered by Article 22 where the State or States identified in paragraph (3) notify the Registrar in writing that crime, jurisdiction over specified persons or categories of persons.
2. The other international crimes referred to in paragraph (1) are:
 - (a) a crime under general international law, that is to say, under a norm of international law accepted and recognized by the international community of States as a whole as being of such a fundamental character that its violation gives rise to criminal responsibility of individuals;
 - (b) crimes under national law, such as drug-related crimes, which give effect to provisions of a multilateral treaty, such as the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, aimed at the suppression of such crimes and having regard to the terms of the treaty constitute exceptionally serious crimes.
3. The State or States referred to in paragraph (1) are:
 - (a) in relation to a crime referred to in paragraph (2) (a), the State on whose territory the suspect is present, and the State on whose territory the act or omission in question occurred;
 - (b) in relation to a crime referred to in paragraph (2) (b), the State on whose territory the suspect is present and which has jurisdiction in conformity with the treaty to try the suspect for that crime before its own courts.

Article 27

Charges of aggression

A person may not be charged with a crime of or directly related to an act of aggression under articles 25 or 26 (2) (a) unless the Security Council has first determined that the State concerned has committed the act of aggression which is subject of the charge.

Article 28
Applicable law

The Court shall apply:

- (a) this Statute;
- (b) applicable treaties and the rules and principles of general international law.
- (c) as a subsidiary source, any applicable rule of national law.

Part 3: Investigation and Commencement of Prosecution

Article 29
Complaint

Any State Party with jurisdiction over a particular crime under the terms of an international convention and which has accepted the jurisdiction of the Court pursuant to article 23 of the Statute with respect to the crime or other State with such jurisdiction and which has accepted the jurisdiction of the Court pursuant to article 23; or any State which has consented to the Court's jurisdiction under article 26; or the Security Council pursuant to article 25; may by submission to the Registrar bring to the attention of the Court in the form of a complaint, with such supporting documentation as it deems necessary, that a crime, within the jurisdiction of the Court, appears to have been committed.

Article 30
Investigation and preparation of the indictment

1. The Prosecutor shall, upon receipt of a complaint in accordance with article 29 and unless the Prosecutor determines that no possible basis exists for action by the Court, initiate investigations. The Prosecutor shall assess the information obtained and decide whether there is sufficient basis to proceed. The Prosecutor shall inform the Bureau of the Court of the nature and basis of the decision taken. In the case of a decision by the Prosecutor not to proceed, the Bureau acting as a Review Chamber, and at the request of the complainant State or the Security Council, shall have the power to review the decision and if it finds that there is sufficient basis, direct the Prosecutor to commence a prosecution.
2. The Prosecutor shall have the power to request the presence of and to question suspects, victims and witnesses, to collect evidence, including the disclosure and production of any documentation or exhibits relevant to the complaint, and to conduct on-site investigations.
3. In carrying out these tasks, the Prosecutor may, as appropriate, seek the cooperation of any State in a position to provide assistance and shall have

the authority to request the Court to issue such subpoenas and warrants as may be required, including for the arrest and detention of a suspect.

4. A person suspected of a crime shall:
 - (a) Prior to being questioned in an investigation under the Statute, be informed of the right to remain silent without such silence being a consideration in the determination of guilt or innocence, and of the right to have the assistance of counsel of the suspect's choice or, in the absence of means to retain counsel, to have counsel and legal assistance assigned to the suspect by the Court;
 - (b) Not be compelled to testify or to confess guilt;
 - (c) If questioned in a language other than a language the suspect understands and speaks, be provided with competent interpretation services, and translation of documents on which the suspect is to be questioned.

Article 31

Commencement of prosecution

1. Upon a determination that there is a sufficient basis to proceed, the Prosecutor shall prepare an indictment containing a statement giving particulars of the facts and indicating the crime or crimes with which the accused is charged under the Statute.
2. Prior to an indictment by the Court, a person may be arrested or detained under the Statute, for such period as may be determined by the Court, only pursuant to:
 - (a) A determination by the Court, that such arrest or detention is necessary because there is sufficient ground to believe that such person might have committed a crime within the jurisdiction of the Court; and, unless so arrested the person's presence at trial cannot be assured; and
 - (b) The issuance of a warrant or other order of arrest or detention by the Court.

Article 32

The indictment

1. The indictment together with the necessary supporting documentation shall be submitted by the Prosecutor to the Bureau of the Court.
2. The Bureau, acting as an Indictment Chamber, shall examine the indictment and determine whether or not a *prima facie* case exists.
3. If the Bureau concludes that a *prima facie* case exists, it shall affirm the indictment and convene a Chamber in accordance with article 37.
4. On affirming the indictment, the bureau may, at the request of the Prosecutor, issue such orders and warrants for the arrest, detention or surrender of persons, and any other orders as may be required for the conduct of the trial.

*Article 33**Notification of the indictment States parties to the Statute*

1. The Court, with a view to ensuring prompt notification of an indictment to the accused, shall immediately following the issuance of an indictment:
 - (a) notify all States parties of the indictment and of any order related to the accused that may have been issued by the Court; *and*
 - (b) transmit to the State Party, or State parties, within whose jurisdiction the accused is then believed to be:
 - (i) the indictment and any order relating to the accused that may have been issued by the Court;
 - (ii) a copy of the Statute of the Court;
 - (iii) a copy of the rules of evidence and procedures of the Court;
 - (iv) a statement of the accused's right to obtain legal assistance as set out in article 44, paragraph 1(b) of the Statute; and
 - (v) if one of the working languages of the Tribunal is not the principal language understood and spoken by the accused, a translation under the auspices of the Tribunal of the indictment and other documents referred to in the preceding subparagraphs.
2. Where the State party or States parties, within whose jurisdiction the accused is believed to be, have accepted the jurisdiction of the Court with respect to such crimes as are the subject of the indictment, the Court shall order such State Party, or State parties:
 - (a) to ensure that the indictment together with the other documents referred to in paragraph 1 of this article, are personally notified to the accused; *and*
 - (b) if an order for the arrest or detention of the accused has been issued by the Court, to assure that the accused is arrested or detained immediately following such notification.
3. Where the State Party or States parties, within whose jurisdiction the accused is believed to be, have not accepted the jurisdiction of the Court with respect to such crimes as are the subject of the indictment, the Court shall request such State or States:
 - (a) to cooperate with the Tribunal in having the indictment and other documents personally notified to the accused; and
 - (b) if an order for the arrest or detention of the accused has been issued by the Court, to cooperate in obtaining the arrest or detention of the accused.

States not parties to the Statute

4. Where the State or States, within whose jurisdiction an accused is believed to be, are not parties to the Statute, the Court shall with a view to prompt notification of an indictment to the accused and, where necessary, the arrest or detention of the accused, immediately following the issuance of an indictment:

- (a) notify such State or States of the indictment and of any order of the Court relating to the accused;
- (b) transmit to such State or States copies of the indictment and of any order of the Court relating to the accused;
- (c) invite such State or States:
 - (i) to cooperate with the Tribunal in having the indictment and other documents personally notified to the accused; and
 - (ii) if an order for the arrest or detention of the accused has been issued by the Court, to cooperate in obtaining the arrest or detention of the accused.

Cases where personal notification of the indictment may not be feasible

- 5. If personal notification of the indictment, together with the other documents, is not made to the accused within a period of sixty days after the indictment, the Court shall prescribe such other manner of bringing the indictment to the attention of the accused.

Article 34

Designation of persons to assist in a prosecution

- 1. A State party may, at the request of the Prosecutor, designate persons to assist in a prosecution.
- 2. Such persons should be available for the duration of the prosecution, unless otherwise agreed. They shall serve at the direction of the Prosecutor and shall not seek or receive instructions from any Government or source other than the Prosecutor in relation to the exercise of their functions under this article.

Article 35

Pre-trial detention or release on bail

- 1. The Court shall decide whether an accused person who is brought before it shall continue to be held in detention or be released on bail.
- 2. If the Court decides to hold the accused in detention, the State on whose territory the seat of the Court is established shall make available to the Court the appropriate place of detention and, where necessary, the requisite guards.

Part 4: The Trial

Article 36

Place of Trial

- 1. Unless otherwise decided by the Court, the place of the trial will be the seat of the Tribunal.

2. By arrangement between the Court and the State concerned, the Court may exercise its jurisdiction in the territory of any State party, or in the territory of any other State.
3. Where practicable and consistent with the interest of justice, a trial should be conducted in or near the State where the alleged crime was committed.

Article 37
Establishment of Chambers

1. Cases shall be tried by Chambers of the Court.
2. A Chamber of the Court shall be established in accordance with the rules of the Court. Each Chamber shall consist of five judges.
3. Several Chambers may be established and may sit concurrently.
4. No judge from a complainant State or from a State of which an accused is a national shall be a member of the Chamber dealing with that particular case.

Article 38
Disputes as to Jurisdiction

1. The Court shall satisfy itself that it has jurisdiction in any case brought before it.
2. Challenges to its jurisdiction may be made, in accordance with procedures laid down by the rules:
 - (a) at the commencement of the trial, by an accused or any State party;
 - (b) at any stage of the trial, by the accused.
3. If a State challenges the jurisdiction of the Court under paragraph 2 (a), the accused has full right to be heard in relation to the challenge. A decision that there is jurisdiction shall not be reopened at the trial.

Article 39
Duty of the Chamber

1. If the Bureau has not already done so under article 32, the Chamber shall decide, as early as possible in each case:
 - (a) the place at which the trial is to be held, having regard to article 36;
 - (b) the language or languages to be used during the trial, having regard to article 18 and article 44, paragraph 1 (f) and 2;
2. The Chamber may order:
 - (a) the disclosure to the defence of documentary or other evidence available to the Prosecutor, having regard to article 44, paragraph 3;
 - (b) the exchange of information between the Prosecutor and the defence, so that both parties are sufficiently aware of the issues to be decided at the trial.

3. At the commencement of the trial, the Chamber shall read the indictment, satisfy itself that the rights of the accused are respected and allow the accused to enter a plea of guilty or not guilty.

Article 40

Fair Trial

1. The Chamber shall ensure that the trial is fair and expeditious, conducted in accordance with the present Statute and the rules of procedure and evidence of the Court, with full respect for the rights of the accused and due regard for the protection of the victims and witnesses.
2. A trial shall be public, unless the Chamber determines that certain proceedings be in closed session, in accordance with article 46 of the Statute.

Article 41

Principle of Legality (nullum crimen sine lege)

An accused shall not be held guilty:

- (a) in the case of a prosecution under article 22, unless the treaty concerned was in force (and its provisions had been made applicable in respect of the accused);
- (b) in the case of a prosecution under article 26 (2) (a), unless the act or omission in question constituted a crime under international law; or
- (c) in the case of a prosecution under article 26 (2) (b), unless the act or omission constituted a crime under the relevant national law, in conformity with the treaty, at the time the act or omission occurred.

Article 42

Equality before the Tribunal

All persons shall enjoy equality before the Tribunal.

Article 43

Presumption of Innocence

A person shall be presumed innocent until proven guilty.

Article 44

Rights of the accused

1. In the determination of any charge under this Statute, the accused is entitled to a fair and public hearing, subject to article 40, paragraph 2, and to the following minimum guarantees:

- (a) to be informed promptly and in detail, in a language which the accused understands, of the nature and cause of the charge;
 - (b) to be informed of the right of the accused to conduct the defence or to have the assistance of counsel of the accused's choice or, in the absence of means to retain counsel, to have counsel and legal assistance assigned to the accused by the Court;
 - (c) to have adequate time and facilities for the preparation of the defence, and to communicate with counsel;
 - (d) to examine, or have examined, the prosecution witnesses and to obtain the attendance and examination of witnesses for the defence under the same conditions as witnesses for the prosecution;
 - (e) to be tried without undue delay;
 - (f) if any of the proceedings of, or documents presented to, the Court, are not in a language the accused understands and speaks, to have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness;
 - (g) not to be compelled to testify or to confess guilt;
 - (h) to be present at the trial, unless the Court, having heard such submissions and evidence as it deems necessary, concludes that the absence of the accused is deliberate.
2. At the commencement of a trial, the Court shall ensure that the indictment and other documents referred to in article 33 paragraphs 1 (h) and 4 (b) of the Statute, and copies thereof in a language understood and spoken by the accused, have been provided to the accused sufficiently in advance of the trial to enable adequate preparation of the defence.
 3. All incriminating evidence on which the prosecution intends to rely and all exculpatory evidence available to the prosecution prior to the commencement of the trial shall be made available to the defence as soon as possible and in reasonable time to prepare for the defence.

Article 45

Double jeopardy (non bis in idem)

1. No person shall be tried before any other court for acts constituting crimes referred to in articles 22 or 26, for which that person has already been tried under this Statute.
2. A person who has been tried by another court for acts constituting crimes referred to in article 22 or 26 may be subsequently tried under this Statute only if:
 - (a) the act in question was characterized as an ordinary crime; or
 - (b) the proceedings in the other court were not impartial or independent or were designed to shield the accused from international criminal responsibility or the case was not diligently prosecuted.

3. In considering the penalty to be imposed on a person convicted under this Statute, the Court shall take into account the extent to which any sentence imposed by another court on the same person for the same act has been served.

Article 46

Protection of the accused, victims and witnesses

The Chamber shall take all necessary measures available to it, to protect the accused, victims and witnesses, and may to that end conduct proceedings in camera or allow the presentation of evidence by electronic or other special means.

Article 47

Powers of the Court

1. The Court shall, subject to the provisions of the Statute and in accordance with the rules of procedure and evidence of the Court have, *inter alia*, the power to:
 - (a) require the attendance and testimony of witnesses;
 - (b) require the production of documentary and other evidentiary materials;
 - (c) rule on the admissibility or relevance of issues, evidence and statements;
 - (d) maintain order in the course of a trial.
2. The Court shall ensure that a complete record of a trial, which accurately reflects the proceedings, is maintained and preserved by the Registrar under the authority of the Court.

Article 48

Evidence

1. The Court shall, on the application of the prosecution or of the defence, require any person to give evidence at the trial unless it concludes that the evidence of such person would not contribute to clarifying any matter of relevance to the trial. The Court may also on its own initiative require any person to give evidence at the trial.
2. Before testifying, each witness shall make such oath or declaration as is customary in judicial proceedings in the State of which the witness is a national.
3. The court may require to be informed of the nature of any evidence before it is offered so that it may rule on its admissibility or relevance. Any such ruling shall be made in open court.
4. The Court shall not require proof of facts of common knowledge but may take judicial notice thereof.
5. Evidence obtained directly or indirectly by illegal means which constitute a serious violation of internationally protected human rights shall not be admissible.

6. A witness who has not yet testified shall not be present when the evidence of another witness is taken. However, a witness who has heard the evidence of another witness shall not for that reason alone be disqualified from giving evidence.
7. The Court may accept evidence in such forms as it deems appropriate in accordance with its rules of procedure and evidence.

Article 49
Hearings

1. The indictment shall be read to the accused and the Court shall ask the accused to plead guilty or not guilty to each of the charges in the indictment.
2. If an objection is raised as to the jurisdiction of the Court, the Court shall rule on the objection prior to proceeding any further with the trial.
3. The Prosecutor shall make an opening statement and call witnesses and present evidence on behalf of the prosecution and, thereafter, the defence may make an opening statement and may call witnesses and present evidence on behalf of the accused.
4. When hearings of evidence have been completed, the prosecution shall make its closing statement and, thereafter, the defence may make its closing statement.
5. The Court shall ask whether the accused wishes to make a statement before it delivers the judgment, and shall, if the accused so wishes, permit such a statement to be made.
6. The Court shall, thereafter, retire for closed and private deliberations upon the judgment it is to make.

Article 50
Quorum and majority for decisions

At least four judges must be present at each stage of the trial. The decisions of the Chambers shall be taken by a majority of the judges.

Article 51
Judgment

1. The court shall pronounce judgments and impose sentences on persons convicted of crimes under this Statute.
2. The judgment of the Court shall be in written form and contain a full and reasonable statement of its findings and conclusions. It shall be the sole judgment or opinion issued.
3. The judgment shall be delivered in open Court.

Article 52
Sentencing

1. The Court shall hold a further and separate hearing to consider the question of the appropriate sentences to be imposed on the convicted person and to hear the submissions of the prosecution and of the defence and such evidence as the Court may deem to be of relevance.
2. The Court shall retire for deliberations in private.
3. The decisions of the Court on the sentences shall be delivered in open court.

Article 53
Applicable penalties

1. The Chamber may impose on a person convicted of a crime under this Statute one or more of the following penalties:
 - (a) a term of imprisonment, up to and including life imprisonment;
 - (b) a fine of any amount.
2. In determining the length of a term of imprisonment or the amount of a fine to be imposed for a crime, the Chamber may have regard to the penalties provided for by the law of:
 - (a) the State of which the perpetrator of the crime is a national;
 - (b) the State on whose territory the crime was committed; or
 - (c) the State which had custody of and jurisdiction over the accused.
3. The Chamber may also order:
 - (a) the return to their rightful owners of any property or proceeds which were acquired by the convicted person in the course of committing the crime;
 - (b) the forfeiture of such property or proceeds, if the rightful owners cannot be traced.
4. Fines paid or proceeds of property confiscated pursuant to this article may be paid or transferred, by order of the Chamber, to one or more of the following:
 - (a) the Registrar, to defray the costs of the trial;
 - (b) a State whose nationals were the victims of the crime;
 - (c) a trust fund established by the Secretary-General of the United Nations for the benefit of victims of crime.

Article 54
Aggravating or mitigating factors

In imposing sentence, the Chamber should take into account such factors as the gravity of the crime and the individual circumstances of the convicted person.

Part 5: Appeal and Review

Article 55

Appeal against judgment or sentence

1. [The Prosecutor] and the convicted person may, in accordance with the rules, appeal against a decision under articles 51, 52 or 53 on any of the following grounds:
 - (a) material error of law;
 - (b) error of fact which may occasion a miscarriage of justice; or
 - (c) manifest disproportion between the crime and the sentence.
2. Unless the Chamber otherwise orders, a convicted person shall remain in custody pending appeal, and provisional measures may be taken to ensure that the judgment of the Chamber, if affirmed, can be promptly enforced.

Article 56

Proceedings on appeal

1. As soon as notice of appeal has been filed, the Bureau shall take steps in accordance with the rules to constitute an Appeals Chamber consisting of seven judges who did not take part in the judgment contested.
2. The President or Vice-President shall preside over an Appeals Chamber.
3. The Appeals Chamber has all the powers of the Chamber, and may affirm, reverse or amend the decision which is the subject of the appeal.
4. The decisions of the Appeals Chamber shall be by majority, and shall be given in open court. Six judges shall constitute a quorum.
5. Subject to article 57, decisions of the Appeals Chamber shall be final.

Article 57

Revision

The convicted person [or the Prosecutor] may, in accordance with the rules of the Court, apply to the Court for revision of its judgment on the ground that a new fact, not known at the time of the trial or at the time of the appeal, which could have been a decisive factor in the judgment of the Court, has since then been discovered.

Part 6: International Cooperation and Judicial Assistance

Article 58

International cooperation and judicial assistance

1. States parties shall cooperate with the Tribunal in connection with criminal investigations relating to, and proceedings brought in respect of, crimes within the Court's jurisdiction.

2. States parties which have accepted the jurisdiction of the Court with respect to a particular crime shall respond without undue delay to any request for international judicial assistance or an order issued by the Court with respect to that crime, including, but not limited to:
 - (a) the identification and location of persons;
 - (b) the taking of testimony and the production of evidence;
 - (c) the service of documents;
 - (d) the arrest or detention of persons;
 - (e) the surrender of the accused to the Tribunal, in accordance with article 53;
 - (f) any other request that may facilitate the administration of justice, including provisions on interim measures as required.

Article 59

Cooperation with States non-parties to the Statute

States non-parties to the present Statute may provide the Tribunal with judicial assistance and cooperation under article 58 (2) or 62 on the basis of comity, a unilateral declaration, an ad hoc arrangement or other agreement with the Court.

Article 60

Consultation

The States parties shall consult promptly, at the request of any one of them, concerning the application or the carrying out of the provisions on international cooperation and judicial assistance, either generally or in relation to a particular case.

Article 61

Communications and contents of documentation

1. Communications in relation to this Statute shall normally be in writing and shall be between the competent national authority and the Registrar of the Court.
2. Whenever appropriate, communications may also be made through the International Criminal Police Organization (ICPO/INTERPOL), in conformity with arrangements which the Tribunal may make with this organization.
3. Documentation pertaining to international cooperation and judicial assistance shall include the following:
 - (a) the purpose of the request and a brief description of the assistance sought, including the basis and legal reasons for the request;
 - (b) information concerning the individual who is subject of the request;

- (c) information concerning the evidence sought to be seized, describing it with sufficient detail to identify it, and describing the reasons for the request and the justification relied upon;
 - (d) description of the basic facts underlying the request; and
 - (e) information concerning the charges, accusations or conviction of the person who is the subject of the request.
4. All communications and requests shall be made in one of the working languages set forth in article 18 of the present Statute.
 5. If the requested State considers that the information contained in the request is not sufficient to enable the request to be dealt with, it may request additional information.

Article 62 *Provisional measures*

In cases of urgency, the Court may request of the State concerned any or all of the following:

- (a) to provisionally arrest the person sought for surrender;
- (b) to seize evidence needed in connection with any proceedings which shall be the object of a formal request under the provisions of the Statute; or
- (c) to take as a matter of urgency all necessary measures to prevent the escape of a suspect, injury to or the intimidation of a witness, or the destruction of evidence.

Article 63 *Surrender of an accused person to the Tribunal*

1. As soon as practicable after affirming the indictment under article 32, the Prosecutor shall seek from the Bureau or, if a Chamber has been constituted, from the Chamber, an order for the arrest and surrender of the accused.
2. The Registrar shall transmit the order to any State on whose territory the accused person may be found, and shall request the cooperation of that State in the arrest and surrender of the accused.
3. On receipt of a notice on paragraph (2):
 - (a) a State party which has accepted the jurisdiction of the Court with respect to the crime in question shall take immediate steps to arrest and surrender the accused person to the Court;
 - (b) a State party which is also a party to the treaty establishing the crime in question but which has not accepted the Court's jurisdiction over that crime shall arrest and, if it decides not to surrender the accused to the Tribunal, forthwith refer the matter to its competent authorities for the purpose of prosecution;

- (c) in any other case, a State party shall consider whether it can, in accordance with its constitutional processes, take steps to arrest and surrender the accused person to the Tribunal.
- 4. The surrender of an accused person to the Tribunal constitutes, as between the States parties to this Statute, sufficient compliance with a provision of any treaty requiring that a suspect be extradited or the case submitted to its competent authorities for the purpose of prosecution.
- 5. A State party should, as far as possible, give priority to a request under paragraph 2 over request for extradition from other States.
- 6. A State party may delay complying with paragraph 3 if the accused is in its custody and is being prosecuted for a serious crime or is serving a sentence imposed by a court for a crime.
- 7. A State party may, within 45 days of receiving an order under paragraph 2, file a written application with the Registrar requesting the Court to set aside the order or quash the indictment on specified grounds. Pending a decision of the Chamber on the application, the State concerned shall take all necessary provisional measures under article 62.

Article 64
Rule of speciality

- 1. A person delivered to the Tribunal shall not be subject to prosecution or punishment for any crime other than that for which the person was surrendered.
- 2. Evidence tendered shall not be used as evidence for any purpose other than that for which it was tendered.
- 3. The Court may request the State concerned to waive the requirements of paragraph 1 or 2, for the reasons and purposes specified in the request.

Part 7: Enforcement of Sentences

Article 65
Recognition of judgments

States parties undertake to recognize and give effect to the judgments of the Court. Where necessary or appropriate, States parties shall enact specific legislative and administrative measures necessary to comply with the obligation to recognize the judgments of the Court.

Article 66
Enforcement of sentences

- 1. States parties are requested to offer facilities for imprisonment in accordance with this Statute.

2. Imprisonment shall be served in a State designated by the Court from a list of States which have indicated to the Tribunal their willingness to accept convicted persons.
3. If no State is designated under paragraph 2, the imprisonment shall be served in a prison facility made available by the State referred to in article 3.
4. Imprisonment under paragraphs 2 or 3 shall be subject to the supervision of the Court.

Article 67

Pardon, parole and commutation of sentences

1. If, under a generally applicable law of the State of imprisonment, a person in the same circumstances who had been convicted for the same conduct by a court of that State would be eligible for pardon, parole or commutation of sentence, the State shall so notify the Court.
2. If a notification has been given under paragraph 1, the prisoner may, subject to and in accordance with the rules, apply to the Court seeking an order for pardon, parole or commutation of sentence.
3. If the Bureau decides that an application under paragraph 2 is apparently well-founded, it shall convene a Chamber to consider and decide whether in the interest of justice the person convicted should be released and on what basis.
4. When imposing a sentence, a Chamber may stipulate that the sentence is to be served in accordance with specified laws as to pardon, parole or commutation of the State which, under article 66, is responsible for implementing the sentence. In such a case, the consent of the Court is not required for subsequent action of that State in conformity with those laws, but the Court shall be given at least 45 days' notice of any decision which might materially affect the terms or extent of the imprisonment.
5. Except as provided in paragraphs 3 and 4, a person serving a sentence imposed by the Court is not to be released before the expiry of the sentence.

