ANNEX C2

PUBLIC

For Consideration by the Preparatory Committee on the

the Establishment of a Permanent International Criminal Court

Pursuant to General Assembly Resolution A/Res 50/46 (18 December 1995)

* * * * *

1994 ILC Draft Statute

for an

International Criminal Court

With Suggested Modifications

(Updated Siracusa-Draft)

prepared by a

Committee of Experts

* * * * *

Submitted by:

Association Internationale de Droit Pénal (U.N./NGO)

International Institute of Higher Studies in Criminal Sciences (U.N./NGO, also Affiliated with the United Nations Crime Prevention and Criminal Justice Programme)

International Scientific and Professional Advisory Council (U.N./NGO, also Affiliated with the United Nations Crime Prevention and Criminal Justice Programme)

Parliamentarians for Global Action (U.N./NGO)

World Federalist Movement/Institute for Global Policy (U.N./NGO)

Max-Planck Institute for International and Comparative Criminal Law

International Human Rights Law Institute, DePaul University

Done in Siracusa/Freiburg/Chicago, 15 March 1996

Dedication

In the memory of Bettina Pruckmayr, who was tragically killed in Washington D.C. on 16 December 1995. Bettina, a young lawyer, was Director of the International Criminal Court Project at the Washington office of the World Federalist Association. She also organized the Washington Working Group on the International Criminal Court, which held its first meeting the day before she died. In December 1994, Bettina attended the conference on the establishment of a permanent international criminal court at ISISC, Siracusa, Italy. In 1995 she was present and active during the two sessions of the Ad Hoc Committee.

Her dedication and commitment to this important humanitarian cause will be remembered by her friends.

"There is nothing more difficult to carry out, nor more doubtful of success, nor more dangerous to handle, than to initiate a new order of things. For the reformer has enemies in all those who profit by the old order, and only lukewarm defenders in all those who would profit by the new order..."

Machiavelli
The Prince

INTRODUCTION

1. In June 1995, a group of experts acting in their individual capacity convened at the International Institute of Higher Studies in Criminal Sciences (ISISC - Siracusa) to contribute alternative and supplemental text to the International Law Commission's (ILC) 1994 Draft Statute for an International Criminal Court. The so-called "Siracusa Draft" dated 15 July 1995 was then presented to the Ad Hoc Committee on the Establishment of an International Criminal Court. The Ad Hoc Committee graciously allowed the document to be distributed informally and several participants referred to it in statements and follow-up discussions. The document was also used by the Ad Hoc Committee's working group on procedural questions and the Ad Hoc Committee's report relied on some of the ideas and specifics contained therein.

2. On the basis of the Ad Hoc Committee discussions during the two sessions of April and August 1995, and its Report (A/50/22), it was felt that the "Siracusa Draft" of July 1995 needed to be revised and updated. Consequently, an international conference of experts, acting in their individual capacity, met at ISISC from 3-8 December 1995 to contribute ideas likely to improve the document. The Conference was co-sponsored by: Amnesty International, Association International de Droit Pénal, Human Rights Watch, International Centre for Criminal Law Reform and Criminal Justice Policy, International Commission of Jurists, International Scientific and Professional Advisory Council, Parliamentarians for Global Action, International Human Rights Law Institute, and Max-Planck Institute for International and Comparative Criminal Law. The Conference was held under the auspices of the Council of Europe's Secretary General Daniel Tarschys. The messages of Secretary General Daniel Tarschys and United Nations Under-Secretary General Hans Corell follow. All the participants at the Conference did not, however, engage in the drafting of this text, and only the organizations listed on the cover are its official sponsors.

3. The organizations which co-sponsored and contributed to this effort are Non-Governmental Organizations in Consultative Status with the United Nations and individual contributors who participated in the June and December 1995 meetings held at ISISC, Siracusa. Those who contributed to the drafting are indicated in the attached list by an asterisk. All those who contributed to the drafting, as well as those who expressed views and ideas at the two meetings that enhanced the scientific quality of this document, deserve grateful acknowledgement.

4. In preparing this text, the experts relied on the Report of the Ad Hoc Committee and the various submissions and statements made by Delegations at the two sessions of the Ad Hoc Committee. They also took into consideration the 1995 and 1996 reports of Amnesty International, the International Commission of Jurists, Human Rights Watch and the NGO Coalition for an International Criminal Court.

5. The "Updated Siracusa Draft" of 15 March 1996 is intended for consideration by the Preparatory Committee as a scientific contribution to the deliberations and drafting efforts of this body.

M. Cherif Bassiouni.
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Chicago, 15 March 1996

Message of Daniel Tarschys, Secretary General of the Council of Europe to the International Conference on the Establishment of a Permanent International Criminal Court (4 December 1995)

For more than 15 years the Council of Europe Secretariat has been closely associated with many activities carried out by the International Institute of Higher Studies in Criminal Sciences (ISISC) of Siracusa. Several of these activities were indeed directly related to ongoing work in the Council of Europe in the field of inter-state cooperation in criminal matters, such as the common fight against terrorism and money laundering.

Many other activities undertaken within the framework of your Institute were aimed at using the common standards achieved within the Council of Europe for new or model treaties at the much wider UN level, on subjects such as the transfer of sentenced persons, compensation of victims, the restitution of cultural property illegally removed from one country to another, and the prevention of torture, inhuman and degrading treatment. Similarly, your Institute has held many sessions devoted to the protection of human rights in the Arab world, in Africa, Asia and more recently in Eastern and Central Europe, where the European Human Rights Convention and its legal protection mechanisms are used as the point of departure and standard of achievement.

The Institute has thus served as a bridge and allowed for very constructive inter-action of the ongoing work and standards of the Council of Europe, of the UN and of various regional intergovernmental organisations. This was of course facilitated by the fact that several international non-governmental organisations, in particular the International Association for Penal Law (AIDP), but also Amnesty International and the International Commission of Jurists, are closely associated with the activities undertaken in the legal and human rights sectors in both the Council of Europe and the UN. These NGOs are moreover instrumental in preparing or developing IGO activities within the flexible and more academic framework of the Siracusa Institute. In this respect, we are greatly indebted to Professor Bassiouni who as the President of both AIDP and ISISC is the *spiritus rector* initiating, preparing, co-ordinating and implementing the activities carried out here.

As regards the particular theme of your present Conference, "the establishment of a permanent international criminal court," I have to recall that our Parliamentary Assembly has consistently supported this project when it discussed, for instance, the need for prosecution and punishment of the atrocities committed since the explosion of the former Yugoslavia and the important role of the International Tribunal set up to this effect. When the latter point was taken up by the European Committee on Crime Problems - the Council of Europe's steering committee competent for this matter -it appeared that our Member States were on the whole very supportive but mainly concerned with the smooth functioning of the cooperation between national authorities and the ad hoc International Tribunal. On the other hand, the draft statute of the Permanent International Criminal Court was discussed several times, as recently as September 1995, by our ad hoc Committee of Legal Advisers on International Public Law (CAHDI). Although this Committee has drawn the attention to several open questions and technical difficulties, there is now overall support for the establishment of such a new international permanent criminal court, to the point that it proposed to set up a new committee entrusted with the preparation of the diplomatic Conference which Italy has offered to host with a view to having the Statute refined and adopted by way of an international treaty.

Your present Conference is part of the worldwide effort to make sure that this diplomatic Conference will be successful and I am pleased therefore that it will be held under my auspices. I know that your proceedings will be constructive, given your programme and the list of eminent speakers and participants. I wish your work all the success it deserves.

Daniel Tarschys
Secretary General
Council of Europe

Message of Hans Corell, Under-Secretary General and Legal Counsel of the United Nations to the International Conference on the Establishment of a Permanent International Criminal Court (4 December 1995)

The question of the establishment of an international criminal court is now high on the agenda of the General Assembly of the United Nations. No doubt, the establishment of such a court is one of the major issues in which the international community of States is engaged today.

A few days ago, on 29 November, the Sixth Committee of the General Assembly adopted a resolution on the topic. According to this resolution, a preparatory committee is established to discuss further the major substantive and administrative issues arising out of the draft statute prepared by the International Law Commission, taking into account the different views expressed during the meetings. The main task of the Preparatory Committee will be to draft texts, with a view to preparing a widely acceptable consolidated text of a convention for an international criminal court as a next step toward consideration by a conference of plenipotentiaries. The work of the Preparatory Committee should be based on the draft statute prepared by the International Law Commission and should take into account the report of the Ad Hoc Committee on the Establishment of an International Criminal Court and the written comments submitted by States to the Secretary-General on the draft statute and, as appropriate, contributions of relevant organizations.

The Preparatory Committee will meet twice during 1996, namely from 25 March to 12 April, and from 12 to 30 August. It will be reporting to the General Assembly at the beginning of its fifty-first session.

The General Assembly will study the report of the Preparatory Committee, and, in the light of that report, decide on the convening of an international conference of plenipotentiaries to finalize and adopt a convention on the establishment of an international criminal court.

In the meantime, it is important that the matter be discussed in detail and that contributions are made not only by States but also by non-governmental organizations. The work of the International Institute of Higher Studies in Criminal Sciences is, in this respect, of great importance.

Personally, I very much regret that I was not able to accept the kind invitation to participate in your Conference. My duties at the United Nations Headquarters require my presence in New York. I can assure you that I will miss not being able to participate. I recall with great appreciation my participation in a similar conference under the auspices of the Institute in December 1992. As a CSCE Rapporteur on Croatia and Bosnia Herzegovina at that time, I found it very rewarding to take part in that Conference, in particular, since a few days later the CSCE Committee of Ministers entrusted my two co-Rapporteurs and myself with the task of drafting a statute for an International Criminal Tribunal for the Former Yugoslavia, a draft which was later submitted by the CSCE to the United Nations.

I look forward to receiving the results of your endeavors and wish you all the best for the Conference.

Hans Corell
Under-Secretary General
and Legal Counsel,
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1994 ILC DRAFT STATUTE FOR AN INTERNATIONAL CRIMINAL COURT [TRIBUNAL] - SUGGESTED MODIFICATIONS -

N.B.
- UNCHANGED TEXT IS IN ITALICS
- MODIFICATIONS ARE IN BOLD

1994 ILC DRAFT STATUTE FOR AN INTERNATIONAL CRIMINAL COURT [TRIBUNAL]: SUGGESTED MODIFICATIONS

Part 1. Establishment of the Court [Tribunal]

Article 1
The Court **[Tribunal]**

There is established an International Criminal Court **[Tribunal] (ICT)** *whose jurisdiction and functioning shall be governed by the provisions of this Statute.*

Commentary on Article 1

The ILC uses the term Court for the entire institution and then uses the same term to designate the judicial organ of the institute to avoid confusion. Tribunal is suggested for the institute and Court for the judicial organ.

Article 2
Relationship of the Court **[Tribunal]** *to the United Nations*

The President, with the approval of the States parties to this Statute ("States parties"), may conclude an agreement establishing an appropriate relationship between the Court ***[Tribunal]*** *and the United Nations.*

Commentary on Article 2

It is recommended that this fundamental aspect of the relationship between the ICT and the United Nations be reconsidered by the Preparatory Committee.

Article 2 Bis (1)
Purposes of the International Criminal Tribunal

The International Criminal Tribunal is hereby established to complement national criminal jurisdiction with respect to the prosecution and enforcement of the international crimes defined in Article 20, and other international crimes which the States Parties may add to those crimes listed in Article 20, or by supplemental agreements with the Tribunal whereby a State Party may confer jurisdiction to the Tribunal.

Article 2 Bis (2)
Competence of the Tribunal

The competence of the Organs of the Tribunal shall be interpreted and exercised in light of the purposes of the Tribunal as set forth in this Statute or in Convention.

Article 2 Bis (3)
Applicable Law

The Tribunal shall, subject to the provisions of the present Statute, exercise its competence in accordance with international law whose sources are stated in Article 38 of the Statute of the International Court of Justice.

Article 2 Bis (4)
Subjects Upon Whom the Tribunal Shall Exercise Its Jurisdiction

The Tribunal shall exercise its jurisdiction over natural persons.

Commentary on Articles 2 Bis (2) to (4)

While penal theoreticians may argue the merits of a distinction between jurisdiction and competence, it is suggested that jurisdiction establishes the Tribunal's subject-matter and *in personam* authority, as well as sphere of application. Competence determines the specific powers of the Court [Tribunal] with respect to its jurisdiction and provides the legal framework of reference for the Tribunal's exercise of its jurisdictional authority. This includes the theory of *La Competénce de la Competénce* whereby the Court can establish the parameters of its own competence. *See* Ibrahim Shihata, <u>The Power of the International Court of Justice to Determine its own Jurisdiction</u> (1965).

Article 3
Seat of the Court **[Tribunal]**

1. The seat of the **ICT** *shall be established at ... <u>in</u> ... ("the host State").*

2. The President, with the approval of the States Parties, may conclude an agreement with the host State establishing the relationship between that State and the **ICT.**

3. The **ICT** *may exercise its powers and functions on the territory of any State Party and, by special agreement, on the territory of any other State.*

Article 4
Status and legal capacity

1. The **ICT** *is a permanent institution open to States Parties in accordance with this Statute. It shall act when required to consider a case submitted to it.*

2. The **ICT** *shall enjoy in the territory of each State Party such legal capacity as may be necessary for the exercise of its functions and the fulfillment of its purposes.*

• • •

Part 2. Composition and Organization of the Court [Tribunal]

Article 5
Organs of the Court **[Tribunal]**

The Court **[Tribunal]** *consists of the following organs:*

- *(a)* *a Presidency, as provided in Article 8;*
- *(b)* *an Appeals Chamber, Trial Chambers and other chambers, as provided in Article 9;*
- *(c)* *a Procuracy, as provided in Article 12;*
- *(d)* *a Registry, as provided in Article 13*; **and**
- **(e)** **a standing Committee of States Parties**

Article 6
Qualification and election of judges

1. The judges of the Court 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, and have, in addition:

- *(a)* **experience in criminal matters; or**
- *(b)* *recognized competence in international law.*

2. Each State Party may nominate for election not more than two persons, of different nationality, who possess the qualification referred to in paragraph 1 (a) or that referred to in paragraph 1 (b), and who are willing to serve as may be required on the Court.

3. Eighteen judges shall be elected by an absolute majority vote of the **Standing Committee of** *States Parties by secret ballot. Ten judges shall first be elected from among the persons nominated as having the qualification referred to in paragraph 1 (a). Eight judges shall then be elected, from among the persons nominated as having the qualification referred to in paragraph 1 (b).*

4. No two judges may be nationals of the same State.

5. States Parties should bear in mind in the election of the judges that the representation of the principal legal systems of the world should be assured.

6. Judges hold office for a term of nine years and, subject to paragraph 7 and Article 7 (2), 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, six judges chosen by lot shall serve for a term of three years and are eligible for re-election; six judges chosen by lot shall serve for a term of six years; and the remainder shall serve for a term of nine years.*

8. *Judges nominated as having the qualification referred to in paragraph 1 (a) or 1 (b), as the case may be, shall be replaced by persons nominated as having the same qualification.*

Article 7
Judicial vacancies

1. *In the event of a vacancy, a replacement judge shall be elected in accordance with Article 6.*

2. *A judge elected to fill a vacancy shall serve for the remainder of the predecessor's term, and if that period is less than five years, is eligible for re-election for a further term.*

Article 8
The Presidency

1. *The President, the first and second Vice-Presidents and two alternate Vice-Presidents shall be elected by an absolute majority of the judges. They shall serve for a term of three years or until the end of their term of office as judges, whichever is earlier.*

2. *The first or second Vice-President, as the case may be, may act in place of the President in the event that the President is unavailable or disqualified. An alternate Vice-President may act in place of either Vice-President as required.*

3. *The President and the Vice-Presidents shall constitute the Presidency which shall be responsible for:*

- *(a) the due administration of the Court* **[Tribunal]**; *and*
- *(b) the other functions conferred on it by this Statute.*

4. *Unless otherwise indicated, pre-trial and other procedural functions conferred under this Statute on the Court may be exercised by the Presidency in any case where a chamber of the Court is not seized of the matter.*

5. *The Presidency may, in accordance with the Rules, delegate to one or more judges the exercise of a power vested in it under Articles 26 (3), 27 (5), 28, 29 or 30 (3) in relation to a case, during the period before a Trial Chamber is established for that case.*

Article 9
Chambers

1. As soon as possible after each election of judges to the Court, the Presidency shall in accordance with the Rules constitute an Appeals Chamber consisting of the President and six other judges, of whom at least three shall be judges elected from among the persons nominated as having the qualification referred to in Article 6 (1) (b). The President shall preside over the Appeals Chamber.

2. The Appeals Chamber shall be constituted for a term of three years. Members of the Appeals Chamber shall, however, continue to sit on the Chamber in order to complete any case the hearing of which has commenced.

3. Judges may be renewed as members of the Appeals Chambers for a second or subsequent term.

4. Judges not members of the Appeals Chamber shall be available to serve on Trial Chambers and other chambers required by this Statute, and to act as substitute members of the Appeals Chamber in the event that a member of that Chamber is unavailable or disqualified.

5. The Presidency shall nominate in accordance with the Rules five such judges to be members of the Trial Chamber for a given case. A Trial Chamber shall include at least three judges elected from among the persons nominated as having the qualification referred to in Article 6 (1) (a).

6. The Rules may provide for alternate judges to be nominated to attend a trial and to act as members of the Trial Chamber in the event that a judge dies or becomes unavailable during the course of the trial.

7. No judge who is a national of a complainant State or of a State of which the accused is a national shall be a member of a chamber dealing with the case.

Article 10
Independence of the judges

1. In performing their functions, the judges shall be independent.

2. Judges shall not engage in any activity which is likely to interfere with their judicial functions or to affect confidence in their independence. In particular, they shall not while holding the office of judge be a member of the legislative or executive branches of the Government of a State, or of a body responsible for the investigation or prosecution of crimes.

3. Any question as to the application of paragraph 2 shall be decided by the Presidency.

4. On the recommendation of the Presidency, the States Parties may by a two-thirds majority decide that the work-load of the Court [Tribunal] requires that the judges should serve on a full-time basis. In that case:

- *(a) existing judges who elect to serve on a full-time basis shall not hold any other office or employment; and*
- *(b) judges subsequently elected shall not hold any other office or employment.*

Article 11
Excusing and disqualification of judges

1. The Presidency at the request of a judge may excuse that judge from the exercise of a function under this Statute.

2. Judges shall not participate in any case in which they have previously been involved in any capacity or in which their impartiality might reasonably be doubted on any ground, including an actual, apparent or potential conflict of interest.

3. The Prosecutor or the accused may request the disqualification of a judge under paragraph 2.

4. Any question as to the disqualification of a judge shall be decided by an absolute majority of the members of the Chamber concerned. The challenged judge shall not take part in the decision.

Article 12
The Procuracy

1. The Procuracy is an independent organ of the Court **[Tribunal]** *responsible for the investigation of complaints brought in accordance with this Statute and for the conduct of prosecutions. A member of the Procuracy shall not seek or act on instructions from any external source.*

2. The Procuracy shall be headed by the Prosecutor, assisted by one or more Deputy Prosecutors, who may act in place of the Prosecutor in the event that the Prosecutor is unavailable. The Prosecutor and the Deputy Prosecutors shall be of different nationalities. The Prosecutor may appoint such other qualified staff as may be required.

3. The Prosecutor and Deputy Prosecutors shall be persons of high moral character and have high competence and experience in the prosecution of criminal cases. They *shall be elected by secret ballot by an absolute majority of the States Parties, from among candidates nominated by States Parties. Unless a shorter term is otherwise decided on at the time of their election, they shall hold office for a term of five years and are eligible for re-election.*

4. The States Parties may elect the Prosecutor and Deputy Prosecutors on the basis that they are willing to serve as required.

5. The Prosecutor and Deputy Prosecutors shall not act in relation to a complaint involving a person of their own nationality.

6. The Presidency may excuse the Prosecutor or a Deputy Prosecutor at their request from acting in a particular case, and shall decide any question raised in a particular case as to the disqualification of the Prosecutor or a Deputy Prosecutor. **[Suggest deletion of this sub-paragraph.]**

7. The staff of the Procuracy shall be subject to Staff Regulations drawn up by the Prosecutor.

Article 13
The Registry

1. On the proposal of the Presidency, the judges by an absolute majority by secret ballot shall elect a Registrar, who shall be the principal administrative officer of the Court **[Tribunal]**. *They may in the same manner elect a Deputy Registrar.*

2. The Registrar shall hold office for a term of five years, is eligible for re-election and shall be available on a full-time basis. The Deputy Registrar shall hold office for a term of five years or such shorter term as may be decided on, and may be elected on the basis that the Deputy Registrar is willing to serve as required.

3. The Presidency may appoint or authorize the Registrar to appoint 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.

Article 14
Solemn undertaking

Before first exercising their functions under this Statute, judges and other officers of the Court **[Tribunal]** *shall make a public and solemn undertaking to do so impartially and conscientiously.*

Article 15
Loss of office

1. A judge, the Prosecutor or other officer of the Court **[Tribunal]** *who is found to have committed misconduct or a serious breach of this Statute, or to be unable to exercise the functions required by this Statute because of long-term illness or disability, shall cease to hold office.*

2. A decision as to the loss of office under paragraph 1 shall be made by secret ballot:

(a) in the case of the Prosecutor or a Deputy Prosecutor, by an absolute majority of the States Parties;
(b) in any other case, by a two-thirds majority of the judges.

3. The judge, the Prosecutor or any other officer whose conduct or fitness for office is impugned shall have full opportunity to present evidence and to make submissions but shall not otherwise participate in the discussion of the question.

Article 16
Privileges and immunities

1. The judges, the Prosecutor, the Deputy Prosecutors and the staff of the Procuracy, the Registrar and the Deputy Registrar shall enjoy the privileges, immunities and facilities of a diplomatic agent within the meaning of the Vienna Convention on Diplomatic Relations of 16 April 1961.

2. The staff of the Registry shall enjoy the privileges, immunities and facilities necessary to the performance of their functions.

3. Counsel, experts and witnesses before the Court shall enjoy the privileges and immunities necessary to the independent exercise of their duties.

4. The judges may by an absolute majority decide to revoke a privilege or waive an immunity conferred by this Article, other than an immunity of a judge, the Prosecutor or Registrar as such. In the case of other officers and staff of the Procuracy or Registry, they may do so only on the recommendation of the Prosecutor or Registrar 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. Subject to paragraph 4, the judges shall receive a daily allowance during the period in which they exercise their functions. They may continue to receive a salary payable in respect of another position occupied by them consistently with Article 10.

4. If it is decided under Article 10 (4) that judges shall thereafter serve on a full-time basis, existing judges who elect to serve on a full-time basis, and all judges subsequently elected, shall be paid a salary.

Article 18
Working languages

The working languages of the Court **[Tribunal]** *shall be English and French.*

Proposed Additional Provisions to Part II

N.B. The numbering of the Articles which follow is free-standing.

Article A
The Procuracy

1. The Procuracy shall have a Prosecutor as its chief officer and shall consist of an administrative division, an investigative division and a prosecutorial division, each headed by a Deputy Prosecutor, and employing appropriate staff.

2. The Prosecutor shall be elected by the Standing Committee of States Parties from a list of at least three nominations submitted by members of the Standing Committee, and shall serve for a renewable term of six years, barring resignation or removal by two-thirds vote of the judges of the Court *en banc* for incompetence, conflict of interest, or manifest disregard of the provisions of this Statute or material Rules of the Tribunal.

3. The Prosecutor's salary shall be the same as that of the judges.

4. The Deputy Prosecutors and all other members of the Prosecutor's staff shall be named and removed by the Prosecutor at will.

Article B
The Registry

1. The Registry shall have as its chief officer the Registrar, who shall be elected by a majority of the Court sitting *en banc* and serve for a renewable term of six years barring resignation or removal by a majority of the Court sitting *en banc* for incompetence, conflict of interest or manifest disregard of the Provisions of the Statute or material Rules of the Tribunal.

2. The Registrar's salary shall be equivalent to that of the judges.

3. The Registrar shall employ such staff as appropriate to perform its chancery and administrative functions and such other functions as may be assigned to it by the Court that are consistent with the provisions of this Statute and the Rules of the Tribunal.

4. In particular, the Registrar shall twice each year:

a. prepare budget requests for each of the organs of the Tribunal; and
b. make and publish an annual report on the activities of each Organ of the Tribunal.

5. The Registry staff shall be appointed and removed by the Registrar at will.

6. An annual summary of investigations undertaken by the Procuracy shall be presented to the Registry for publication, but certain investigations may be omitted where secrecy is necessary, provided that a confidential report of the investigation is made to the court and to the Standing Committee and filed separately with the Registry. Either the Court [Tribunal] or the Standing Committee may order by majority vote that the report be made public.

Commentary on Article B

This text goes into more detail than Article 13 of the 1994 ILC Draft. Although most of the functions of the Secretariat or Registry are ministerial in character, its duties to oversee communications and prepare reports serves an inspectorate function as well. Accordingly, control over the Secretariat is vested in the Court.

Article C
The Standing Committee of States Parties

1. The Standing Committee of States Parties shall consist of one representative appointed by each State Party.

2. The Standing Committee shall elect by majority vote a presiding officer and alternate presiding officer and such other officers as it deems appropriate.

3. The presiding officer shall convene meetings at least twice each year of at least one week duration, each at the seat of the Tribunal, and call other meetings at the request of a majority vote of the Committee.

4. The Standing Committee shall have the power to perform the functions expressly assigned to it under this Convention, plus any other functions that it determines appropriate in furtherance of the purposes of the Tribunal that are not inconsistent with the Convention, but in no way shall those functions impair the independence and integrity of the Court [Tribunal] as a judicial body.

5. In particular, the Standing Committee may:

   a. offer to mediate disputes between States Parties relating to the functions of the Tribunal; and
   b. encourage States to accede to the Convention; and,
   c. propose to States Parties international instruments to enhance the functions of the Tribunal.

6. The Standing Committee may exclude from participation representatives of States Parties that have failed to provide financial support for the Tribunal as required by this Statute or States Parties that failed to carry out their obligations under this Statute.

7. Upon request by the Procuracy, or by a party to a case presented for adjudication to a Chamber of the Court, the Standing Committee may be seized with a mediation and conciliation petition. In that case, the Standing Committee shall within 60 days decide on granting or denying the petition, from which decision there is no appeal. In the event that the Standing Committee grants the petition, Court proceedings shall be stayed until such time as the Standing Committee concludes its mediation and conciliation efforts, but not for more than one year except by stipulation of the Parties and with the consent of the Court.

Commentary on Article C

The 1994 ILC Draft does not contemplate such an organ. The 1953 ILC Draft assumed that the Tribunal created under it would be a part of the United Nations, and therefore any governing-body needs or political issues regarding its operations would be addressed by the political organs of the United Nations, especially the General Assembly. Under the 1979 ILA Draft, a similar assumption appears to have been made in that no treaty-type provisions are included and, although references are made to "Contracting Parties," this term appears to mean only States that have consented to be subject to operation of the Court [Tribunal]. Nevertheless, the Commission contemplated in the ILA Drafts would have had a somewhat political character, in that only nations of States consenting to be subject to operations of the Commission could have been members and the Commission's own Statute is referred to as a "Convention" in its Article 3.

The present Statute, in contrast, would be entirely conventional in character, although there are various express provisions for coordination of action with the United Nations. Accordingly, the need for an organ to deal with governance of the Tribunal and political issues relating to its activities promoted provision for a Standing Committee. It should be noted that the express functions of the Standing Committee are of a governing-body nature for the most part, and that its functions beyond these are largely unspecified. This would permit the representatives of States Parties who constitute that organ to have wide flexibility in pursuing non-juridical matters helpful to international criminal justice. The requirement of meetings twice a year assures that the Standing Committee will be available for consultation on political questions.

One of the most significant functions of the Standing Committee may be with respect to proposing action to initiate and propose new norms of international criminal law or standards for its application by the Tribunal.

It should be noted that this Article does not contemplate deprivation of the status of a State Party in response to non-payment of financial support, but mere suspension.

No provision has been made for terms of representatives, it being assumed that their tenure shall be at the pleasure of the appointing State.

Article D
General Institutional Matters

1. Each of the Organs of the Court shall formulate and publish its own Rules in accordance with Article 19 to regulate its functions under this Statute, but the Rules of the Procuracy and Registry shall be subject to approval by a majority of the Court *en banc.*

2. The Prosecutor shall participate without a vote in formulating the Rules of the Court and the Registry. The President of the Court shall participate without a vote in formulating the Rules of the Procuracy and of the Registry.

3. In the absence of Rules, Procedures adopted by this Tribunal, those Rules and Procedures of the International Court of Justice and of the Registrar of the International Court of Justice shall apply.

4. Each of the Organs of the Tribunal shall cooperate with the Registry in formulating its budget request and such budget requests shall be presented to the Court *en banc* for modification or approval, subject to adoption or rejection in their entirety by the Standing Committee.

5. The Judges, the Procurator and Deputy Procurators and their assistants and the Registrar shall be deemed officers of the Tribunal, as well as counsels appearing in a given case, and they shall enjoy immunity from legal processes of States with respect to the performance of their legal duties.

6. No officer of the Tribunal other than counsel in a given case shall perform any function under this Statute without having first made a public, solemn declaration of impartiality and adherence to this Statute and the Rules of the Tribunal.

Commentary on Article D

The 1994 ILC Draft does not deal with these questions. Paragraph 1 rules, it should be noted, are subject to further provisions in Article 19. Recognition that flexibility should be provided for such Rules was expressed in Article 24 of the 1953 ILC Draft and Article 10 of the 1979 ILA Draft. Court approval of the Rules for the Procuracy and Registry appears appropriate in view of the need to assure that such rules are fair and conform to legal requirements. Participation by the Procurator in the formulation of Court Rules recognizes the desirability that such Rules interrelate properly with Procuracy procedures and capabilities.

Paragraph 2 gives the Court, a neutral body, a key role in shaping the budget of the Tribunal, but leaves a veto power with the Standing Committee, which represents the States obliged to meet the budget. Prior draft statutes did not deal in detail with budgetary approval. See 1953 ILC Article 23 and 1979 ILA Article 17.

Paragraph 5 parallels Article 14 of the 1953 ILC Draft, which has no counterpart in the 1979 ILA Draft as to judges. Expansion to other Court [Tribunal] officers is clearly appropriate. Expansion to other parties before the Court [Tribunal] is necessary in the interest of fairness. See, e.g., the European Agreement Relating to Persons Participating in Proceedings of the European Commission and Court of Human Rights (Council of Europe, May 1969; E.T.S. No. 69).

Paragraph 6's requirement of a solemn declaration parallels Article 13 of the 1953 ILC Draft and Article 11 of the 1979 ILA Draft, but is expanded to include officers of the Tribunal.

Article 19
Rules of the Court

1. Subject to paragraphs 2 and 3, the judges may by an absolute majority make rules for the functioning of the Court in accordance with this Statute, including rules regulating:

(a) the conduct of investigations;
(b) the procedure to be followed and the rules of evidence to be applied;
(c) any other matter which is necessary for the implementation of this Statute.

2. The initial Rules of the Court shall be drafted by the judges within six months of the first elections for the Court, and submitted to a conference of States Parties for approval. The judges may decide that a rule subsequently made under paragraph 1 should also be submitted to a conference of States Parties for approval.

3. In any case to which paragraph 2 does not apply, rules made under paragraph 1 shall be transmitted to States Parties and may be confirmed by the Presidency unless, within six months after transmission, a majority of States Parties have communicated in writing their objections. **In that case, the judges may change the drafted rule taking into account the objections of the States Parties and the Presidency may either retransmit to them, or submit the draft to a conference of the States Parties for their approval.**

4. A rule may provide for its provisional application in the period prior to its approval or confirmation. A rule not approved or confirmed shall lapse.

Commentary on Article 19

If a change of the rules in a "summary procedure" is rejected by the majority of the States Parties (Article 19, paragraph 3), it may still be possible to have recourse to this procedure again, if the views of the objecting States have been taken into account, thus avoiding a cumbersome conference of States Parties. Anyway a further procedure should be provided for.

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Part 3. Jurisdiction and Substantive Crimes

INTRODUCTORY REMARKS

Relationship between the ICT and National Jurisdictions

The Ad Hoc Committee selected the term "complementarity" to characterize the nature of the ICT and its relationship to national legal systems. This term is an English transposition of the French term *complementarité*. But to know the origin of that term does not necessarily contribute to the clarity of its meaning, nor the specificity of its import. Some see it as equivalent to the Maastricht Treaty's concept of "subsidiarity" which does not detract from the primacy of the Treaty of European Unity [hereinafter referred as E.U. Treaty]. Others see the term "complementarity" as meaning that the ICT can be seized with a matter only after national jurisdictions have agreed to it or when said jurisdictions are unable to act fairly and effectively. The range between these perceptions is quite vast.

It may be useful, however, to consider that the concept of "subsidiarity" in the E.U. Treaty is a formula for power-sharing between the regional entity and the various member-states. This concept relies on the assumption that national legal entities can best deal with certain problems. But it leaves the regional institution with certain specific areas that are within its exclusive regional powers. National institutions are, however, bound to recognize, apply and enforce that which is within the powers of the Union. Furthermore, the European Court of Justice has the power to decide issues arising *inter alia* out of "subsidiarity." Thus, the regional judicial institution is the legal authority on these issues.

The formula designed by the E.U. Treaty to implement the concept of "subsidiarity" allows national institutions the initial opportunity to deal with certain matters with which they are best suited to do, without preventing the Union from acting when a national initiative contravenes the E.U. Treaty and other sources of E.U. law. The Union shall, however, act as a regional institution when the tasks it may undertake are better carried out by the Union itself than by individual member-states. This situation arises when for example, execution or enforcement requires action by the Union, or when collective action is necessitated by the subject-matter or the circumstances and where the effects of a given action go beyond a single member-State. Thus, "subsidiarity" does not alter the Union's primacy, or inherent powers, irrespective of whether it exercises its powers directly or at first, or allows initial action by national jurisdictions.

"Complementarity," within the meaning of the ICT, can be compared to "subsidiarity," as described above with respect to the role of the ICT and its relationship to national legal systems. Consequently, the jurisdictional triggering

mechanisms and other aspects of the Enforcement Part will be affected by the meaning given to "complementarity."

The four core international crimes suggested below (namely, "aggression," "genocide," "crimes against humanity" and "war crimes"), which are to be the ICT's inherent subject-matter jurisdiction, are crimes that affect or have the potential of affecting the peace and security of humankind, are shocking to universal human conscience, and are deemed part of *jus cogens*. Prosecuting violators of these crimes is, therefore, as much the separate task of States as it is the collective task of the international community. Such prosecutions and the enforcement of judicial orders and judgments inherent thereto are likely to transcend national borders and to require the action and cooperation of multiple States. Thus, these crimes are best suited to be within the inherent jurisdiction of the ICT, even if national jurisdictions are given, whenever appropriate, the initial opportunity to act first. In this respect, the formula adopted in the Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTFY) in Articles 9 and 10, constitutes one of the models to draw upon. Quite clearly, the question of primacy of the ICT, whether it exercises or not, has to be established. Furthermore, careful consideration should be given in the context of these provisions of formulating a detailed provision on *non bis in idem*.

Unlike other international and transnational crimes, these four core international crimes are precisely the type of crimes for which an international judicial institution is more likely to be best suited to investigate, prosecute and punish their perpetrators. Above all, it is strongly believed that an ICT with inherent jurisdiction over these four core crimes enhances deterrence and thus reduces violations. These factors are important policy considerations that should be consistently reflected in the Statute.

Because these four core crimes are deemed part of the ICT's inherent jurisdiction, as the ILC suggests in Article 20, it does not mean that the ICT shall exercise unfettered jurisdiction or primary jurisdiction with respect to all four core crimes in all cases. That is why the jurisdictional triggering mechanisms are what gives substance to the concept of "complementarity." These mechanisms provide not only for when and how the ICT becomes seized of a given case, but also provide for the relationship between the ICT and national legal systems, and the Security Council.

From a methodological point of view, this approach, consisting of first formulating the role of the ICT and its relationship to national legal institutions and the Security Council, provides a pragmatic solution to what would otherwise be a significant theoretical problem not likely to be solved by the Preparatory Committee in the short duration of its two-three week sessions in 1996.

"Complementarity" and "subsidiarity" are useful concepts to draw upon in determining the relationship of the ICT and national legal institutions. But they are not useful in respect of the relationship between the ICT and the Security Council. Indeed, the Council may refer matters to the ICT, and may be called upon to enforce ICT decisions. Thus, the relationship between the ICT and the Security Council must necessarily be articulated on a different basis than that on which the relationship between the ICT and the national jurisdiction is established.

The Statute should provide for instances of Security Council referral in a manner that preserves the ICT's independence from the Security Council yet benefits from enforcement capabilities. This approach may prove particularly useful in the future, if States Parties take to the practice of requesting the Security Council to refer matters to the ICT as a means of ensuring that the Security Council can later use its sanction power to induce compliance with ICT orders and judgments. But it is also important to separate the question of referral by the Security Council to the ICT from that of the Security Council's competence.

The ICTFY and the International Criminal Tribunal for Rwanda (ICTR) are established by a Security Council Resolution and they can last only so long as conditions threatening peace and security exist, or when the Security Council finds that their existence is necessary to the maintenance of peace. These conditions should not be required with respect to cases within the "inherent jurisdiction" of the ICT, namely the four core crimes, even when a situation involving any of these crimes is referred to the ICT by the Security Council.

There is no doubt that States Parties to the Convention establishing an ICT will have to cede some jurisdiction to the ICT and to give effect to the orders and judgments of the Court [Tribunal]. Jurisdictional cession and the recognition of orders and judgments of an international judicial organ by domestic legal orders will depend on national constitutions' limitations and other aspects of national *ordre public.* Some Member States may deem the ICT an extension of their national judicial systems. Others can characterize it as an alternative judicial body or another forum to which cases can be ceded to or transferred as in the model of the European Convention on Transfer of Criminal Proceedings. However, each State Party will have to accommodate its participation in this new international judicial system in a manner that is more consonant with the requirements of its own national legal system.

In addition, there is also the question of how much power a State Party to the ICT convention will want to give the new international entity. These are probably the most critical, if not controversial, legal issues posed by the establishment of an ICT, and that is why they should be dealt with first. Most other questions relating to the ICT derive from the answers to these threshold ones.

It is politically more feasible to consider the ICT in a light other than that of a supranational organ to which States Parties will have to explicitly give up some of their sovereignty. Thus, the notion of "complementarity" with all its attendant constructive ambiguities serves an essential purpose. Prescinding from theoretical and other national constitutional considerations, the more practical implications of the notion of "complementarity" are reflected in the crimes over which the ICT will have subject-matter jurisdiction, the jurisdictional triggering mechanisms, and the relationship between the ICT and national judicial bodies. These aspects are discussed below.

Crimes within the Jurisdiction of the ICT

In part because of some concerns for national sovereignty and national constitutional difficulties and, in part, because it is advisable not to trivialize the ICT with certain types of "treaty crimes" as the ILC refers to them. Thus, ICT's jurisdiction should be limited, at first, to certain "core international crimes," namely: "aggression", "genocide", "crimes against humanity" and "war crimes". Nothing, however, precludes the establishment of a special Chamber of the ICT for other crimes for which some States Parties may elect to confer or cede jurisdiction subject to certain conditions. That is the concept of "treaty crimes" developed by the ILC's 1994 Draft. But as suggested by Denmark at the Ad Hoc Committee, the Statute can be revisited every five years, and the crimes over which the ICT would have jurisdiction can be expanded.

As stated above, these four categories of crimes are prohibited by international law and are deemed part of *jus cogens*. Thus, they are subject to universal jurisdiction. The ICT, in its exercise of jurisdiction over these crimes, would do no more than what all states can do severally and collectively. There is, therefore, no question that these crimes fall within the jurisdiction of an ICT. The question, however, is under what legal circumstances and how can the ICT exercise its subject-matter jurisdiction over them.

The Special Part

Two methodological approaches can be followed. The first is for the ICT's Statute to refer to these crimes by name and not to define them, leaving the task of discovering the applicable substantive law to the Court [Tribunal]. The second is to define the crimes with some degree of specificity, leaving room, however, for jurisprudential development by the Court [Tribunal]. The first of these approaches has the potential of violating the principles of legality in international criminal law and in many legal systems. The second approach does not, but requires a definition of each crime and a statement of its elements.

This latter approach can satisfy the principles of legality, if the Statute's definitions are clear, unambiguous and sufficient so as to inform a potential violator of the prohibited conduct, and of the nature and extent of the criminal charges he would face; and to provide the legal basis upon which the Court [Tribunal] can adjudicate the accused's guilt or innocence. Thus, the second option is preferable, but it is also a more difficult undertaking for the Preparatory Committee.

To define these four crimes in a manner that satisfies the principles of legality in accordance with the requirements of the world's major criminal justice systems must necessarily include at the very least the elements of each crime. But while some of these crimes are well-established in international criminal law, others do not have a well-defined content.

"Aggression" in particular needs to be carefully defined because neither conventional nor customary international law provides a sufficient basis to satisfy the requirements of legality. The Preparatory Committee's choice will then be to: (a) adopt or restate that which is substantially well-defined with respect to some of these crimes and only define that which is lacking; or (b) to define all four crimes *ex novo*. The discussions on this question at the Ad Hoc Committee sessions indicated a preference for the first option, namely to adopt or restate what is substantially well-defined and only define that which is not.

The Statute to be elaborated by the Preparatory Committee will in all likelihood have the additional virtue of serving as a model for future national legislation. Thus, the more precise it is in defining the crimes within its "inherent jurisdiction" (the four core crimes) and those that could become part of its "supplemental jurisdiction" ("treaty crimes"), the more useful that task can become as a model for national legislations. Such a foreseeable outcome will also enhance the harmonization of national and international criminal law. In any event, the ICT's Statute will constitute a new authoritative basis for international criminal law.

On the basis of the Ad Hoc Committee's discussions, the following appears to be the likelihood of the Preparatory Committee's direction.

1. Aggression -- Irrespective of the policy question about its inclusion as a crime within the ICT's inherent jurisdiction, "aggression" needs to be defined. The General Assembly's 1974 consensus resolution can be the basis for the definition, but it is clearly unsatisfactory with respect to providing the necessary elements required by the principles of legality. Thus, this category of crime will require the greatest attention and work in the formulation of its definition and legal elements. Furthermore, the relationship between the ICT and the Security Council has to be worked out.

2. <u>Genocide</u> -- While *Article 2 of the 1948 Genocide Convention* provides for a widely accepted definition, it has nonetheless several flaws: (i) it does not include social and political groups among the protected ones; (ii) the genocidal acts protecting a certain group seem to address only an entire homogenous group and does not specifically cover groups within a group (for example, the intellectual elite);(iii) the specific intent requirement makes its proof very difficult and it seems geared only to perpetrators who are part of the highest echelons of the decision-making process; (iv) there is no stated intent requirement for perpetrators who carry out superiors' orders that result in or are part of a policy or plan to commit genocide.

Notwithstanding the above, the Ad Hoc Committee's discussions revealed a reluctance to alter the terms of the Genocide Convention. If that is the choice of the Preparatory Committee, then the definition of "genocide" as a crime within the ICT's jurisdiction can easily be formulated. In this case, there should be language in the Commentary or in some other text that allows the Court's [Tribunal's] jurisprudence to fill these apparent legislative gaps.

3. <u>Crimes Against Humanity</u> -- Article 6(C) of the International Military Tribunal (IMT) and 5(C) International Miliary Tribunal for the Far East (IMTFE) define that category of crimes *as does Article 5 of the ICTFY and Article 3 of the* ICTR. All four definitions vary slightly, however, and all four of them have general and vague terms that need to be clarified. See M. Cherif Bassiouni, <u>Crimes Against Humanity in International Criminal Law</u> (1992). See also, M. Cherif Bassiouni, <u>The Law of the International Criminal Tribunal for the Former Yugoslavia</u> (1996). The following concerns need to be addressed: (i) rape and sexual assault should be specifically included (as in the case of Article 5 of ICTFY); (ii) "extermination," "deportation" and "enslavement" need to be clarified; (iii) "other inhumane acts" needs to be clarified or narrowed to mean nothing more than an interpretation of *ejusdem generis*, (iv) the mental element has to be specified with a distinction between decision-makers and executors (preferably in the same way as with the intent requirements for "genocide," though bearing in mind that "crimes against humanity" presently requires a general intent and not a specific intent for all categories of perpetrators).

Notwithstanding the problems raised above, "crimes against humanity" and the articulation of its elements do not pose any serious difficult drafting problems and could be accomplished with relative ease.

4. <u>War Crimes</u> -- As discussed during the deliberations of the Ad Hoc Committee, it appears that the ILC's attempted distinction between "serious crimes against the laws and customs of war" and "grave breaches of the Geneva Convention" was not felicitous. The so-called "Law of the Hague" and "Law of Geneva" are in some respects so intertwined that it may not be very useful to make

such fine legalistic distinctions in a text that aims at providing a definition for an international crime for which combatants will be facing international criminal prosecution.

There can, therefore, be an appropriate combination of the "Law of Geneva" and the "Law of the Hague" in connection with "War Crimes." Furthermore, the Statute must address the contexts of conflicts of an international character as well as conflicts of a non-international character. The following should therefore be considered:

(a) to include in the provision codifying the "Law of Geneva" not only grave breaches of the 1949 conventions and Protocol I, but also violations of Common Article 3 of the 1949 Conventions and Protocol II. Since it would be fairly easy to incorporate into a single text the relevant provisions of the 1949 Conventions and 1977 Protocols, that approach should be followed. Alternatively, an incorporation by reference of the applicable provisions in the Conventions and in the Protocols is feasible because of the availability and accessibility of these texts.

(b) whether to define the customary law of armed conflicts in some general terms, adding some specifics, or alternatively to make only a general reference to the laws and customs of war with some specifics as in the case of ICTFY Article 3. But that approach may violate the principles of legality in many legal systems. Thus, a well-defined provision is more advisable than a general statement purporting to incorporate by reference the customary law of armed conflicts. In either case, that part of the "war crimes" provision will necessarily be more general than the provision dealing with the "Law of Geneva," and, thus less responsive to the requirements of legality in some states.

The more specifically and precisely these definitions can be formulated, the more certainty the ICT's Statute will have, and the less criticism will be levelled at it when cases are brought before the Court [Tribunal]. On the other hand, however, the Preparatory Committee may want to avoid, for a variety of practical, tactical and other political considerations, a cumbersome drafting exercise; and it may simply elect to name those crimes and incorporate by reference to applicable conventional and customary international law, as well as to general principles of law. But, it should be noted that while this approach can eventually be resorted to for "genocide", "crimes against humanity" and "war crimes", it cannot work for "aggression," for reasons stated above. Consequently, consistency would require drafting a definition of all four crimes with as much specificity as possible.

Article 20
Crimes within the inherent jurisdiction of the Court [Tribunal]

20-1 Jurisdiction

The Tribunal has inherent jurisdiction in accordance with this Statute to try persons for the crimes of "aggression," "genocide," "crimes against humanity," and "war crimes" as defined in this Statute, and any other international crimes that the States Parties shall agree to make part of this Tribunal's jurisdiction.

20-2 Aggression

The crime of aggression is committed by a person who is in a position of exercising control or capable of directing political/military actions in his State, against another State, in contravention to the charter of the United Nations, by resorting to armed force, to threaten or violate that State's sovereignty, territorial integrity or political independence without legal justification.

Such action includes the following:

(a) the invasion or attack by the armed forces of a State or the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;
(b) bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;
(c) the blockade of the ports or coasts of a State by the armed forces of another State;
(d) an attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;
(e) the use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement, or any extension of their presence in such territory beyond the termination of the agreement;
(f) the action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;
(g) the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.

Commentary on Article 20-2

The 1994 ILC Draft refers to aggression in Article 20, but does not define it. This proposed text relies on Article 2 (4) of the United Nations Charter and general customary international law prohibiting the use of force and coercion by any State against another. Most of the language used here is based on the General Assembly's Definition of Aggression embodied in its Resolution 334 (XXIX) of 14 December 1974. See also M. Cherif Bassiouni and Benjamin B. Ferencz, "*The Crime Against Peace*," in I International Criminal Law: Crimes 167 (M. Cherif Bassiouni, ed. 1986); Julius Stone, "*Holes and Loopholes in the 1974 Definition of Aggression*," 7 AJIL 224 (1977); 2 Benjamin B. Ferencz, Defining International Aggression: The Search for World Peace 50-53 (1975); Yoram Dinstein, War, Aggression and Self Defence, (1994); Ian Brownlie, International Law and The Use of Force by States (1973); Law and Force in the New International Order, (Lori Fisler Damrosch and David J. Scheffer eds, 1971). It also reflects the contents of the Declaration on the Prohibition of Military, Political or Economic Coercion in the Conclusion of Treaties (A/Conf. 39/26, 1969) which condemned the "threat or use of pressure in any form, whether military, political, or economic by any State in order to coerce another State..." with regard to treaties. Similarly, the Charter of Economic Rights and Duties of States, 15 January 1975, G.A. Res. 3281 (XXIX), makes clear that economic coercion in violation of the principles of the United Nations Charter is unlawful. It also reflects the principles embodied in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States, G.A. Res. 2625 (XXV). See generally, D.W. Bowett, *Economic Coercion and Reprisals by States*, 12 VA. J. INT'L L. 1 (1972). This definition does not, however, address the relationship between the ICT and the Security Council

20-3 Genocide

A person commits genocide, whether in time of peace or in time of war, when, with the intent to destroy, in whole or in part, a national, ethnic, racial or religious group, he engages in conduct which results in:

(a) killing members of the group;
(b) causing serious bodily or mental harm to members of the group;
(c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
(d) imposing measures intended to prevent births within the group;
(e) forcibly transferring children of the group to another group.

In addition to the commission of the crime as defined above, the following acts **shall also be punishable:**

- (a) conspiracy to commit genocide;
- (b) direct and public incitement to commit genocide;
- (c) attempt to commit genocide;
- (d) complicity in genocide.

Commentary on Article 20-3

Genocide was among those "crimes against humanity" prosecuted at the Nuremberg trials under the IMT's Article 6 (c), but only in the context of its linkage to "Crimes against Peace" (IMT Article 6 (a)) and "War Crimes" (IMT Article 6 (b)). *See* Louis René Beres, *"Genocide and Genocide-Like Crimes,"* in I International Criminal Law: Crimes 271 (M. Cherif Bassiouni ed., 1986); M. Cherif Bassiouni, *International Law and the Holocaust*, 9 CAL. WEST. INT. L.J. 202-301 (1979); M. Cherif Bassiouni, *Genocide and Racial Discrimination*, in 1 A Treatise on International Criminal Law 523 (M. Cherif Bassiouni & Ved P. Nanda eds., 1973); 2 Peter Drost, The Crime of State: Genocide (1959); Lemkin, *Genocide as a Crime under International Law*, 41 AJIL 145 (1947). The need to prohibit and punish genocide committed during peacetime gave rise to the Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T. 277, 9 December 1948.

The proposed definition of this crime follows that of Article 2 of the 1948 Genocide Convention. It should be noted that the original General Assembly Resolution 96(I) of 1946 did include the destruction of political groups in the definition of genocide. However, the Sixth Committee excluded political groups, because, in its view, such groups were not readily identifiable, and inclusion of "political groups" would cause international interference in the domestic political affairs of a State (U.N. Doc. A/C.6/SR.69.128). Social and political groups were therefore excluded in order to facilitate the ratification of the Genocide Convention by a large number of States, some of which were engaged in violent political struggles. (*See* DROST, *supra*, at 62.) It would be advisable to include them in this new text, though it was apparent that at the Ad Hoc Committee sessions, many delegations were opposed to it.

The intent to destroy, in whole or in part, a national, ethnic, racial, religious or social group is the specific intent requirement which constitutes the mental element of the crime of genocide. The acts enumerated in Subsections (a) through (e) only constitute genocide when committed with the intent to destroy the group as such. Without such intent, killing members of the group may be homicide, but it would

not constitute genocide (U.N. Doc. A/C/6/SR.73). Although genocide is usually considered an attack against a large number of people, the murder of even a single individual may constitute genocide if committed with the requisite intent. Conversely, mass murder of persons who are members of one group without intent to destroy the group as such would not constitute genocide. In other words, the *actus reus* may be restricted to one human victim, but the *mens rea* or mental element must be directed against the life of the group.

The definition of genocide is limited to five specific acts. "Killing members of the group" (Subsection (a)) refers to the killing of one or more individual group members with the specific intent to destroy the group in whole or in part. "Causing serious bodily or mental harm to members of the group" (Subsection (b)) encompasses a variety of injuries inflicted upon group members which are intended to undermine the physical or mental health of the group as such.

"Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction" (Subsection (c)) means the imposition of measures intended to cause death, or, at least, serious bodily harm to a number of group members. The word "deliberately" was added in the comparable Subsection of the Genocide Convention to denote the premeditated planning of the imposition of deadly conditions of life (U.N. Doc. A/C.6/SR.83, p.3). Therefore, even if such measures do not actually bring about the physical destruction of the group, they will constitute genocide. This provision refers to "slow death" measures; for example, subjection to conditions such as lack of proper housing, food, clothing, medical care, or excessive work, which are likely to result in death or debilitation.

"Imposing measures intended to prevent births within the group" (Subsection (d)) relates to practices which are aimed at the prevention or limitation of births, such as compulsory sterilization or abortion, separation of the sexes, and prohibition of marriages. "Forcibly transferring children of the group to another group" (Subsection (c)) refers to the compulsory transfer of children away from their home within the group into a different environment. Drost comments that this provision of the Genocide Convention suffers from poor draftsmanship because there need be no element of force; compulsory administrative measures which are obediently performed also constitute genocide. (*See* DROST, *supra* at 87.)

Lastly, it should be noted that this definition applies essentially to decision-makers and not to executors of the policy, and that a separate subparagraph should be elaborated to apply to such categories of persons who carry out the policy.

20-4 Crimes Against Humanity

1. A person commits crimes against humanity, whether in time of peace or in time of war, when:

- **(a) he is in a position of authority and orders, commands, or fails to prevent the systematic commission of the acts described below, against a given segment of the civilian population;**
- **(b) he is in a position of authority and participates in the making of a policy or program designed to systematically carry out the acts described below against a given segment of the civilian population;**
- **(c) he is in a senior military or political position and knowingly carries out or orders others to carry out systematically the acts described below against a segment of the civilian population;**
- **(d) he knowingly commits the acts described below with the intent to further a policy of systematic persecution against a segment of the civilian population without having a moral choice to do otherwise.**

2. The acts constituting "crimes against humanity" when committed systematically against a segment of the civilian population are:

- **(a) Extermination;**
- **(b) Murder, including killings done by knowingly creating conditions likely to cause death;**
- **(c) Enslavement, including slavery-related practices;**
- **(d) Discriminatory and arbitrary deportation;**
- **(e) Imprisonment, in violation of international norms on the prohibition of arbitrary arrest and detention;**
- **(f) Torture;**
- **(g) Rape and other serious assaults of a sexual nature;**
- **(h) Persecution, whether based on laws or practices targeting select groups or their members in ways that seriously and adversely affect their ethnic, cultural or religious life, their collective well-being, and welfare, or their ability to maintain group identity;**
- **(i) Other inhumane acts, including but not limited to serious attacks upon physical integrity, personal safety, and individual dignity, such physical mutilation, forced impregnation or forced carrying to term of fetuses that are the product of forced impregnation, and unlawful human experimentation.**

Commentary on Article 20-4

The text of this definifion relies on the 1950 ILC Declaration on the Principles of the Nuremberg Charter and Judgment which decouples "crimes against humanity" as defined in the IMT's Article 6 (c) from a war-related context. It also relies on Article 5 of the Statute of the ICTFY, but adds more specificity to the enumerated acts. In addition, subparagraph (i) specifies the meaning of other inhumane acts. See M. Cherif Bassiouni, Crimes Against Humanity in International Criminal Law (1992); M. Cherif Bassiouni, The Law of the International Criminal Tribunal for the Former Yugoslavia (1996). The approach taken in this definition distinguishes between decision-makers and senior executors who would necessarily have knowledge and intent that these crimes be committed, and those who carry out or execute the policy in question, but are not in a position of high authority. Clearly the lower a person stands on the ladder of power or authority (such as a soldier), the less useful it is to criminalize his conduct. Thus, a higher degree of knowledge and intent would have to be required of those at the lower levels of execution of the criminal policy.

20-5 War Crimes[1]

1. **Definitions**

(a) "War crimes" are acts or omissions prohibited by the rules of international law applicable to international as well as non-international armed conflicts as set forth in international agreements and in generally recognized customs of international humanitarian law which are applicable in armed conflict.

(b) "First Convention," "Second Convention," "Third Convention" and "Fourth Convention" mean, respectively, the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949; the Geneva Convention for Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949; the Geneva Convention Relative to the Treatment of Prisoners of War, 12 August 1949; the Geneva Conventions of 12 August 1949 for the protection of war victims.

[1] The following text, with modifications, is based on M. Cherif Bassiouni, A Draft International Criminal Code and Draft Statute for an International Criminal Tribunal (1987).

(c) "Protocol I" means the Protocol I Additional to the Geneva Conventions of 12 August 1949, 12 December 1977.

(d) "Grave breach" means an act or omission which is defined as a grave breach in:

(i) Article 50 of the First Convention,
(ii) Article 51 of the Second Convention,
(iii) Article 130 of the Third Convention,
(iv) Article 147 of the Fourth Convention, or
(v) Articles 11 or 85 of Protocol I, and which is prohibited by any provision of the Conventions or Protocol I.

(e) "Protected person" means a person who is:

(i) protected against grave breaches by the First or Second Convention,
(ii) wounded, sick or shipwrecked belonging to an adverse party who is protected against grave breaches by Protocol I,
(iii) medical or religious personnel of an adverse party who is protected against grave breaches by Protocol I, or
(iv) protected against grave breaches by Protocol I but who is neither a protected prisoner of war nor a protected civilian.

(f) "Protected prisoner of war" means a person who is entitled to prisoner of war statute under Article 4 of the Third Convention of Article 44 of Protocol I, or a person entitled to equivalent treatment under the Third Convention or Protocol I.

(g) "Protected civilian" means a person protected under Article 4 of the Fourth Convention or under Articles 45 or 73 of Protocol I.

(h) "Protected property" means property protected against grave breaches under the Conventions or Protocol I.

(i) "Public official" means an officer, employee or other person authorized to act for or on behalf of the government or authorities of a party to an armed conflict or serving such a government or authorities in a civil or military capacity.

(j) "Serious injury to body or health" means trauma or disease which involves (1) a substantial risk of death, (2) extreme physical pain, (3) protracted and obvious disfigurement, or (4) protracted loss of impairment of the functions of a bodily member, organ or mental faculty.

(k) "Torture" means conduct by which extreme pain or suffering, whether physical or mental, is intentionally inflicted on a person by, or on behalf of, a public servant in order to intimidate, discredit or humiliate that person or another person.

(l) "Hostage" means a person detained by a party to an armed conflict,

- (i) as a shield against attack in violation of Article 28 of the Fourth Convention or Article 51, paragraph 7, of Protocol I,
- (ii) as security for compliance with terms and conditions demanded by an adverse party, or
- (iii) as security to prevent disorders or to ensure compliance by other persons with the security or administrative measures of a detaining or occupying power, or for compliance by others with any demands of the party to the conflict taking the hostage.

2. Acts Constituting War Crimes

A person commits a war crime when he:

(a) engages in conduct which constitutes a grave breach of the Geneva Conventions of 12 August 1949 and Protocol I of 1977, and violations of Common Article 3 of the said Convention and Protocol II, as well as serious violations of the laws and customs applicable in armed conflicts, whether of an international or non-international character as defined below:

(b) willfully engages in conduct defined as grave breaches under the First, Second, Third and Fourth Conventions and Protocol I and which results in the death, great suffering, or serious injury to body or health of any protected person, protected prisoner of war or protected civilian, regardless of the perpetrator's nationality or citizenship or that of those who aid, abet, command, induce or procure the commission of any such act regardless of the situs of such conduct.

(c) while acting as a public official, willfully and under circumstances amounting to a grave breach:

- (i) subjects any protected person, protected prisoner of war or protected civilian to torture or inhuman treatment,
- (ii) causes a protected civilian to be taken as a hostage,
- (iii) knowingly compels a protected prisoner of war or a protected civilian to serve in the armed forces of a party to an armed conflict adverse to the power on which such protected prisoner of war or civilian depends,

(iv) knowingly deprives a protected prisoner of war or a protected civilian of the rights to a fair and regular trial prescribed respectively in the Third and Fourth Conventions, or in Protocol I,

(v) causes extensive appropriation of protected property not justified by military necessity and carried out unlawfully and wantonly,

(vi) causes extensive appropriation of protected property not justified by military necessity and not authorized under international law applicable in armed conflict, or

(vii) orders an attack to be directed against a cultural or spiritual object which:

(1) is protected under the provisions of Article 53, Protocol I,

(2) is especially protected by an international agreement, then in effect, binding on the parties to the conflict, specifically identifying the protected object as especially protected cultural or spiritual property,

(3) is clearly recognized as such an especially protected object, and, thereby causes extensive destruction of such especially protected object.

(d) while acting as a public official of a detaining or occupying power, willfully commits any unjustified act or omission under circumstances amounting to a grave breach, which seriously endangers the physical or mental health and integrity of any protected prisoner of war, protected civilian or other protected person who is in the power of a party to the conflict other than the one on which that person depends by subjecting that person to any:

(i) medical procedure (including the administration of mind altering drugs),

(ii) physical mutilation,

(iii) medical or scientific experiment, or

(iv) removal of tissue or organs for transplantation, which is not indicated by the state of health of the person concerned and intended for that person's benefit, and which is not consistent with generally accepted medical standards which would be applied under similar medical circumstances to persons who are nationals of the party conducting the procedure who are in no way deprived of liberty.

(e) while acting as a public official of a detaining power having the authority to direct the repatriation of prisoners of war, that person, under circumstances amounting to a grave breach, willfully and without justification, causes extensive delay in the release and repatriation of prisoners of war held in the custody of that detaining power:

(i) after conclusion of a peace treaty, or
(ii) after cessation of active hostilities before a peace treaty is concluded.

(f) after the cessation of active hostilities, while acting as a public official of a detaining power who has the authority to direct the release and to facilitate the repatriation of protected civilians who are interned in the territory of a party to an armed conflict of which such protected civilians are neither nationals nor domiciliaries, he willfully and without justification and under circumstances amounting to a grave breach, prevents:

(i) the prompt release from internment of such protected civilians, or
(ii) the voluntary repatriation of such protected civilians to their country of origin which is willing to accept them.

(g) while acting as a public servant of an occupying power and having requisite authority, under circumstances amounting to a grave breach, that person willfully and knowingly causes:

(i) protected civilians to be forcibly transferred or deported from the occupied territory to the territory of another country, or
(ii) civilian nationals of the occupying power to be transferred to the occupied territory for the purpose of colonizing all or part of the occupied territory or for permanent residence in the occupied territory.

(h) while acting as a public servant having the authority to direct national policies affecting the treatment of protected persons, prisoners of war or civilians, under circumstances amounting to a grave breach, that person knowingly and willfully directs or continues inhuman or degrading practices involving widespread discrimination based on race against protected persons, protected prisoners of war or protected civilians in violation of any relevant provision of the Conventions or Protocol I.

3. Defences

(a) It is a defence to a prosecution under subparagraph 2 (c) that the defendant had a reasonable basis, at the time he ordered the attack, for believing that the object was being used to support the adverse party's military effort.

(b) Except for voluntary donations of blood for transfusion and skin for grafting in accordance with Protocol I, Article s, paragraph 3, it is not a defence to a prosecution under subparagraph 2 (d) that the conduct charged was consented to by the person injured or endangered.

(c) As used in subparagraph 2 (e), "justification" for a delay in repatriation includes:

- **(i) refusal of the country of origin to accept the repatriation of the prisoners of war;**
- **(ii) the existence of unstable economic or social conditions in the country of origin to the extent that repatriation should be deferred for humanitarian reasons;**
- **(iii) pendency of criminal proceedings against the prisoner of war for an indictable offense or service of a penal sentence for such an offense under international law or under the law of the detaining power;**
- **(iv) resistance of repatriation by a prisoner of war; or**
- **(v) grant of political asylum by the detaining power pursuant to the voluntary request of a prisoner of war.**

(d) As used in subparagraph 2 (f), "justification" for preventing release from internment or repatriation includes pendency of a criminal prosecution or service of a penal sentence to imprisonment.

(e) It is a defence to a prosecution under subparagraph 2 (i) that a temporary evacuation of protected civilians from occupied territory was honestly and reasonably believed by the defendant to be necessary for the security of the protected civilians or that it was demanded for imperative military reasons, and that temporary displacement within the occupied territory was impossible.

(f) It is a defence to a prosecution under subparagraph 2 (l) that the transfer of civilians to occupied territory was done for the purpose of providing necessary services in connection with the administration of the occupied territory, and that such a transfer was intended to last only for the duration of the occupation.

Commentary on Article 20-5

International humanitarian law of armed conflict is an outgrowth of centuries of warfare from which the rules and customs governing the conduct of hostilities have developed. Schindler & Toman, Friedman, Levie (code).

Its development has been stimulated by military men who recognized that violence and destruction which is superfluous to actual military necessary is not only immoral and wasteful of scarce resources, but also counter-productive to the attainment of the political objectives for which military force is used. In essence, it reflects those principles observed by the community of nations in an effort to mitigate the destruction of shared values. *See* W. Michael Reisman and Chris T.

Antoniou, The Laws of War (1994); International Dimensions of Humanitarian Law (UNESCO, 1988); Howard S. Levie, The Code of International Armed Conflict (2 vols., 1986); Michel Veuthey, Guerilla el Droit Humanitaire (1983); Michael Bothe, Karl Josef Partsch and Waldemar A. Solf, New Rules for Victims of Armed Conflicts, (1982); The Laws of Armed Conflicts, (Dietrich Schindler and Jiri Toman eds., 1981); The Law of War: A Documentary History, (2 vols., Leon Friedman ed., 1972); Myres McDougall & Florentino P. Feliciano, Law and Minimum World Public Order: The Legal Regulation of International Coercion (1961); U.S. Instructions for the Government of Armies of the United States in the Field, prepared by Francis Lieber, promulgated as War Dept. General Orders No. 100, 24 April 1863; and for a historical perspective, H. Grotius, De Jure Belli ac Pacis, (1625).

As indicated in paragraph 1 of the definition, war crimes consist of conduct which is prohibited by the rules of international law applicable in armed conflict, conventions to which the parties to the conflict are Parties, and the recognized principles and rules of international law of armed conflict (Protocol I, Article 2, paragraph 1). Evidence of customary international law may be derived by reference to treaties, conventions and legislation which have codified the principles and rules. These include the Declaration Respecting Maritime Law (Declaration of Paris), 16 April 1856, respecting Maritime Law; the Geneva Convention for the Amelioration of the Condition of the Sick and Wounded of Armies in the Field (First Red Cross Convention), 22 August 1864; Declaration Renouncing the Use in Time of War of Explosive Projectiles Under 400 Grammes Weight (St. Petersburg Declaration), 11 December 1868, the Hague Conventions of 1899 and 1907; the Declaration Concerning the Prohibition of the Use of Expanding Bullets (First Hague), 29 July 1899; the Geneva Conventions, 27 July 1929; Agreement for the Prosecution and Punishment of Major War Criminals on the European Axis (London Charter), 8 August 1945; the Allied Control Council Law No. 10 (Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Crimes Against Humanity), 20 December 1945; the U.N. Declaration, Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal, 29 July 1950; and the 1949 Geneva Conventions, and Protocol I and II. This list is not exhaustive.

The 1949 Geneva Conventions have codified international law relative to the protection of wounded, sick and shipwrecked armed forces, prisoners of war and civilians in the hands of a party to the conflict of which they are not nationals. The rules regulating methods and means of warfare were recently updated and developed in the 1977 Protocol with the primary object of protecting civilians against the effects of hostilities. These Rules can be also deemed part of the customary law of armed conflicts.

For a historical survey of efforts to enforce the law of armed conflict through penal sanctions, see R.A. Wright, History of the United Nations War Crimes Commission, (1948). *See also* M. Cherif Bassiouni, *An Appraisal of the Growth and Developing Trends of International Criminal Law*, 45 REV. INT'LE DROIT PENALE, 405, 409-20 (1974). For an analysis of penal sanctions in Protocol I, see Solf and Cummings, *A Survey of Penal Sanctions Under Protocol I to the Geneva Conventions of August 12, 1949*, 9 CASE W. RES. J. INT'L L. 205-251 (1977).

Common Articles 49/50/129/146 of the 1949 Geneva Conventions obligate each Party of the Convention to take necessary measures to suppress all acts contrary to the provisions of the Conventions. Certain breaches, however, are singled out as "grave breaches." With respect to these grave breaches, each of the common articles requires the parties (1) "to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention"; (2) "to search for persons alleged to have committed...such grave breaches"; and (3) "to bring such persons, regardless of their nationality before its own courts," or if it prefers, (4) "to hand such persons over for trial to another High Contracting Party concerned...".

Grave breaches are, therefore, universal crimes punishable by the national courts of each of the 145 Parties to the Geneva Conventions.

Protocol I, Article 85 applies to the provisions on repression of breaches of the *Conventions to the repression* of breaches of Protocol I. This is accomplished by incorporating into Protocol I the Conventions' provisions on penal sanctions. The incorporated portions include the provision relating to extradition, and the enactment of national legislation necessary to suppress breaches and to provide penal sanctions to repress grave breaches.

The form of the required legislation on penal sanctions has varied substantially among the States which have undertaken to enact implementing legislation. Such national legislation is collected in I.C.R.C., Respect of the Geneva Conventions; Measures Taken to Repress Violations; Reports Submitted to the ICRC, XXIInd AND XIst International Conferences of the Red Cross, Geneva, (1971). See Commentary on the Additional Protocols of 8 June 1977 to the Geneva Convention of 12 August 1949, (Yves Sandoz, Christophe Swinerski, and Bruno Zimmerman eds., 1987). In defining grave breaches, the United Kingdom and most members of the British Commonwealth have enacted Geneva Conventions Acts, which simply incorporate the grave breaches of the Conventions by reference. These Acts prescribe two levels of punishments. One provides very severe punishment for those breaches which involve willful killing, and the other provides a lesser punishment for other grave breaches (Geneva Conventions Act of 1957).

As Protocol I will require revision of existing legislation to provide penal sanctions for the newly created grave breaches, the definitions stated in paragraphs 1 and the offenses defined in Section 2 offer a guide in drafting legislation on grave breaches with greater particularity.

Under common Articles 29/50/129/146, States are obligated to employ all necessary means to suppress by penal, administrative or disciplinary measures all other acts violative of the Conventions or Protocol I. These other breaches are not universal crimes. Thus, a State's jurisdiction with respect to penal sanctions as to non-grave breaches would be based on the territorial, nationality or protective principles of jurisdiction. Non-grave breaches are not made subject to extradition by the Conventions or Protocol I, but, of course, some may fit within the scope of other extradition treaties.

The questionable nature of the prohibited acts, protected targets and persons would render very difficult, if not impossible, their codification without engaging in a truly legislative process which would be beyond the scope intended by this commentary. It should be clear, however, that there is no intention herein to justify unlawful use of weapons prohibited by conventional and customary international law. It must be noted that the use of weapons producing unnecessary harm, pain and suffering is implicitly proscribed in certain grave breaches of the Geneva Conventions and Protocol I, and hence, falls within the meaning of some of the provisions stated in this crime.

The Commentary on these definitions follows the same order as the text.

1. Definitions

(a) "War crimes." The rules of international law applicable in armed conflict are defined in Protocol I, Article 2(b). Every breach of the prohibitions contained in these rules is considered to be a war crime that should be suppressed by the Parties through administrative, disciplinary or penal sanctions. They are obligated to repress grave breaches through penal sanctions or extradition.

(b) "First" ... "Fourth Convention." This is a drafting device used in Protocol I, Article 2(a).

(c) "Protocol I ..." The definition is the official title of Protocol I.

(d) "Grave breach." This definition makes it clear that a "grave breach" must be both (1) a breach of a prohibition contained in the Conventions or Protocol I, and (2) meet the standard defined as a grave breach in common Articles 50/51/130/147 of the Conventions or Articles 11 or 85 of Protocol I. That standard includes a prohibited act or omission, the requisite *mens rea*, the specified

consequences of the act or omission, and the fact that the subject of the breach is person or property protected against grave breaches.

(e) "Protected person." For drafting purposes, this definition includes all persons protected against grave breaches except "protected prisoners of war" and "protected civilians." This is necessary to facilitate the drafting of grave breaches not applicable to all classes of victims.

Grave breaches of the First and Second Convention are applicable to the wounded, sick and shipwrecked members of the armed forces of all parties to the conflict without distinction including a party's own national (e.g., First Convention Articles 12, 13, and 50).

Protocol I extends the classes of persons who are entitled to substantive respect and protection to civilians, but Article 85(2) limits the grave breaches of Protocol I to breaches in which the victim belongs to the adverse party.

With respect to Subsection 1.5(d), it should be noted that Protocol I extends protection to certain persons who are neither prisoners of war nor civilians who are in the hands of an adverse party. These include:

(i) *hors de combat* combatants who lay down their arms but who have not yet come into the custody of a detaining power. Protocol I, Articles 41(2)(b) and 85 (3)(e).

(ii) enemy combatants killed or wounded through the perfidious use of the distinctive emblem. Protocol I, Articles 37, 38, 85(3)(f).

(iii) the civilian population in enemy territory protected against attack under Articles 51 and 85(3)(a), (c) and (d).

(f) "Protected prisoner of war." For persons entitled to equivalent treatment, see Third Convention, Articles 4B, 5(2), 33; Protocol I, Article 44(a).

(g) The text is self-explanatory.

(h) "Protected property." *See* First Convention, Articles 33-35, 50; Second Convention, Articles 22-27, 38, 51; Fourth Convention, Articles 53, 55, 57 and 147; Protocol I, Articles 8(e)-(j), 12, 14, 21-24.

(i) "Public official." Most of the rules in the Conventions and Protocol I govern the conduct of a person acting for a party to a conflict in a military or civil capacity. Some grave breaches denounced under Article 85(4) are of a nature which necessarily involves a policy-level government decision. With respect to these

grave breaches, it is necessary to limit the scope of penal legislation to persons in the government having the requisite authority. On the other hand, certain offenses against the person such as homicides and assaults against certain protected persons may be committed by civilians who have no official status, e.g., violence against the wounded and sick, First Convention, Article 18(2); Protocol I, Article 1, Article 17(1).

(j) "Serious injury to body or health." This term is used in Common Articles 50/51/130/147 and in Protocol I, Article 85(3). It involves each of the grave breaches denounced in that paragraph. It is also relevant to Article 11, as well as to the basic articles of the Conventions protecting wounded, sick and shipwrecked armed forces, prisoners of war and protected civilians.

(k) "Torture." Torture is prohibited in the Conventions, respectively by Articles 12/12/17(4)/32. Torture is a grave breach under common Articles 50/51/130/147 and under Protocol 85(2). See also the 1984 Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment (A/Res/39/46) 17 December 1984. *See also*, J. Herman Burges and Hans Danelius, The United Nations Convention Against Torture, (1988); M. Cherif Bassiouni and Daniel Derby, *The Crime of Torture*, in I International Criminal Law 363 (1986).

(l) "Inhuman treatment." Inhuman treatment of protected persons, prisoners of war and protected civilians is a grave breach under Common Articles 50/51/130/147. The substantive prohibitions are to be found respectively in Articles 12/12/13/27, but the term is not defined in the Conventions. The definition used in this section is based, in part, on the decision of the European Court of Human Rights in the case of *Ireland v. United Kingdom*, Jan. 1978.

(m) "Hostages." The taking of protected civilians as hostages is prohibited by the Fourth Convention, Article 34, and is defined as a grave breach under the Fourth Convention, Article 147. *See also* Fourth Convention, Article 28, and Protocol I, Article 51(7), which prohibit the use of civilians as a shield against hostile military operations.

2. Acts Constituting War Crimes

(a) This subsection establishes the scope of the Section and provides for jurisdiction based on the principle of universality as required by common Articles 29/50/129/146 of the Conventions and Article 85(1) of Protocol I.

(b) (i) Willfully killing or inflicting serious injury to body or health of protected persons, prisoners of war, and civilians is a grave breach under common Articles 50/51/120/147 as well as under Protocol I, Article 85. The acts listed in the Subsection are basically prohibited

by Conventions Articles 12/12/13/132 and elsewhere. In Protocol I. the acts prohibited are to be found in Articles 10, 15, 37, 38, 41, 51, 56, 57, and 60, 62, 70, 71. They become grave breaches under Articles 85(2) and (3). It is to be noted that Article 85(3) defines certain combat offenses which result in death or serious injury to body or health as grave breaches. All of these are included within the scope of this Subsection 2.2(a). For torture and inhuman treatment, see definitions above. The term "under circumstances amounting to a grave breach" is used to ensure that the charges allege, and the evidence proves, that the act or omission is prohibited by a substantive provision of the Conventions or Protocol I, and that they meet the standard of grave breaches as defined in the relevant Convention or Protocol I with respect to *mens rea*, status of victim and consequences.

(ii) For taking a protected civilian as a hostage, see definition under 1.13 above.

(iii) Compelling a protected civilian to serve in the armed forces of an adverse party is prohibited by Fourth Convention Article 51 and defined as grave breach in Article 147.

Third Convention Article 130 lists this offense as a grave breach with respect to prisoners of war. The specific breach is to be implied from the Third Convention, Articles 5, 6, 7 and 50. Article 123 of the 1907 Hague Regulations, Annex to Hague Convention No. IV of 18 October 1907, prohibits a belligerent from compelling the nationals of the hostile party to take part in the operation of war directed against their own country.

(iv) Deprivation of the right to a fair and regular trial is a grave breach under the Third Convention, Article 130, and Fourth Convention, Article 147. These were incorporated by reference with respect to protected prisoners of war and protected civilians in Protocol I under Article 85(2). It was expressly made a grave breach of the Protocol under Article 85(4)(e).

The rights protected are:

(1) Prisoners of war: Third Convention Articles 84-87, 99-108; Protocol I, Articles 44 and 45.

(2) Protected civilians: Fourth Convention, Articles 65-78; Protocol I, Articles 45 and 75. It is to be noted that a civilian tried for a grave breach is also entitled to the rights prescribed in Third Convention, Articles 105 and 108.

(v) *See* Subsection 1.8 above, for the substantive provisions protecting property against unnecessary destruction or unlawful appropriation. These acts are defined as grave breaches in First Convention Article 50, Second Convention Article 51 and Fourth Convention Article 147.

(vi) Knowingly attacking especially protected cultural or spiritual objects is made a grave breach under Protocol I, Article 85(4)(d).

Protocol I, Article 53, prohibits attacks against those historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples, unless these objects are used to support the adverse party's military effort. The defined grave breach, however, deals with cultural objects under special protection provided through special arrangements such as those contemplated under Article 8 of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, 14 May 1954. This grave breach is relevant to parties to a conflict or spiritual object.

(c) This subsection implements the prohibitions against endangering the physical or mental health of protected persons contained in the first three paragraphs of Protocol I, Article 11 and the grave breach defined in paragraph 4 of that Article. The prohibition of certain medical or scientific experiments of Article 11(a)(b) necessarily includes the biological experiments prohibited by Article 13 of the Third Convention and Article 32 of the Fourth Convention which are grave breaches under those Conventions.

Because the persons protected by this Article are in the power of an adverse party and frequently under some form of detention, one cannot presume freely given informed consent. Accordingly, consent is not a defence to the acts prohibited under paragraph 2 of Article 11, except with respect to voluntary donations of blood for transfusion or skin for grafting, provided the standards prescribed in Article 11, paragraph 3 are observed.

(d) Unjustified delay in repatriation of prisoners of war after the cessation of active hostilities is prohibited by Third Convention, Article 118, and made a grave breach by Protocol I, Article 85(4)(6). For a thorough analysis of the origins of Article 118 and the problems experienced thereunder, see C. Shields-Delessert, Release and Repatriation of Prisoners of War at the End of Active Hostilities (1977).

"Cessation of active hostilities" obviously means more than a temporary armistice. Accordingly, a reasonable belief that the hostilities may be resumed in the near future is made an affirmative defence. Subsection 4.3(1).

Subsection 4.3(2) lists some obvious examples of justification for delaying the repatriation of prisoners of war. Resisting repatriation by the prisoner of war as a justification for delay is based on the resolution of the issue of forced repatriation at the conclusion of the Korean conflict. U.N.G.A. Res 618 (VII) 1952; Article III, Korean Armistice Agreement, 27 July 1953 4 U.S.T. 234 T.I.A.S. 2782.

(e) The Fourth Convention, Article 147, makes the unlawful confinement of a protected civilian a grave breach. Protocol I, Article 35(4)(b) makes "unjustifiable delay in the repatriation of ... civilians" a grave breach.

The prompt release from internment after the cessation of active hostilities of alien civilians interned in the territory of a party to the conflict is required by the Fourth Convention, Article 46, and, in occupied territory, by Article 33.

Inasmuch as protected civilians may not be removed from occupied territory (Fourth Convention, Article 49), so much of Protocol I, Article 84(4)(b) as deals with repatriation of civilians can have relevance primarily to aliens detained against their will in enemy territory after conclusion of active hostilities. The obligation to repatriate under Fourth Convention, Article 134, is to "endeavor, upon the close of hostilities or occupation, to ensure the return of all internees to their place of residence, or to facilitate their repatriation."

(f) Subsection 2.6(a) implements the prohibition of Fourth Convention, Article 49, paragraph 1, concerning the deportation of civilians from occupied territory to another country, which was made a grave breach under Article 147 of that Convention, as well as under Protocol I, Article 85(4)(a).

Subsection 2.6(b) implements the prohibition of Fourth Convention, Article 49, sixth paragraph, containing transfers of a party's own civilians to colonize occupied territory. This was made a grave breach by Protocol I, Article 85(2)(a).

The defences stated in Subsection 4.5(1) are recognized in the 2nd paragraph of Article 49; those stated in Subsection 4.5(2) are not considered to be the evils against which Article 49(6) is directed.

(g) Protocol I, Article 85(2)(c) defines as a grave breach "practices of *apartheid* and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination," when committed willfully and in violation of the Conventions or Protocol I. (*See* "Racial Discrimination and *Apartheid,*" Crime Category No. VI.)

***Apartheid*, as such, is not mentioned in the Conventions or in Protocol I. Accordingly, the relevant substantive breaches must involve widespread breaches of the non-discrimination clauses of the Conventions and Protocol I. These are:**

(1) First and Second Conventions, Article 12.
(2) Third Convention, Article 16.
(3) Fourth Convention, Articles 13 and 27.
(4) Protocol I, Articles 9 and 10, 69, 70 and 75.

It is to be noted that Common Article 3 and Protocol II, Article 2 also have non-discrimination clauses, but as they deal with non-international armed conflict, they are not within the scope of articles defining grave breaches of the Conventions and Protocol I. Penal repression in non-international armed conflict remains within the discretion of States.

3. Defences

The defences specifically mentioned in this Section are commented upon together with Sections 2.2 and 2.6 above since such a treatment would be more relevant contextually.

20-5-A Unlawful Use of Weapons

1. Prohibited Use of Weapons

(a) The use of the following weapons is prohibited and shall be deemed a crime in time of peace and in first use in time of war without prejudice to the relevant prohibitions established by rules on the laws of war, when such weapons are used against humans. They are:

(i) explosive and expandable bullets;
(ii) asphyxiating gases;
(iii) chemical and bacteriological agents.

2. Areas in Which the Emplacement of Weapons is Prohibited

(a) The emplacement of nuclear weapons, weapons of mass destruction, and offensive weapons is deemed a crime when such emplacement is:

(i) on the bottom of the High Seas, or in permanent installations affixed to the bottom of the High Seas;
(ii) in the Arctic or Antarctic Zones;
(iii) in outer-space, on the moon, or any other celestial bodies.

Commentary on Article 20-5-A

The prohibitions contained in this crime are applicable in time of war. Insofar as they apply to war, they supplement "War Crimes," and should be deemed a part thereof. To that extent, the prohibitions contained in this crime are in part covered under war crimes with respect to unlawful use of weapons causing unnecessary human pain and suffering. Nevertheless, the prohibitions contained in this category are broader and more explicit and go beyond the war context.

Section 1 refers to the prohibition against using three types of weapons. The first type is prohibited by the Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight (St. Petersburg Declaration), 11 December 1868; the second type is prohibited by the Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases and of Bacteriological Methods of Warfare, 17 June 1925, which incorporates the Convention with Respect to the Laws and Customs of War on Land (First Hague, II), 29 July 1899, and the Convention Respecting the Laws and Customs of War on Land (Second Hague, IV), 18 October 1907; and the third type is prohibited by the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, 10 April 1972. *See* Denise Bindschedler-Robert, *Biological and Chemical Weapons*, in M. Cherif Bassiouni & Ved P. Nanda, A Treatise on International Criminal Law 351 (1973); and Jean Mirimanoff-Chilikine, *The Red Cross and Biological and Chemical Weapons*, in 1 A Treatise on International Criminal Law, *supra*. *See also* the U.S.S.R. Draft U.N. Convention on the Prohibition of the Development, Production, and Stockpiling of Chemical and Bacteriological (Biological) Weapons and on the Destruction of Such Weapons, U.N. Doc. A/7685 and the U.K. Draft Convention for the Prohibition of Biological Methods of Warfare, U.N. Doc. A/7575.

There is some question with respect to conventional source and enforceability of these conventions, but there is wide agreement that they are part of customary international law and thus binding as such.

Section 2 refers to the prohibition of emplacing weapons in internationally protected medias which are the object of several international conventions, which merely declare the prohibition without reference to whether its violation would be an international crime. Insofar as one may consider the prohibitory terms of these conventions as mandatory they may be considered such; otherwise, publicists will argue that the terms of these conventions are merely declaratory. The question is largely open, and strict constructionists of public international law will argue that

these conventions do not purport to make the violation of their provisions an international crime.

The conventions in question are the Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer-Space and Under Water, 5 August 1963; the Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Sea Bed and the Ocean Floor and in the Sub-Soil thereof, 11 February 1971; the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space Including the Moon and Other Celestial Bodies, 27 January 1967; the Antarctica Treaty, 1 December 1959; see Ved P. Nanda, *Legal Limits on the Military Use of the Sea Bed and Outer Space*, in 1 A Treatise on International Criminal Law, *supra*, at 343.

20-5-B War Crimes in Conflicts of a Non-International Character

A person commits a war crime in a conflict of a non-international character when he commits, or threatens, or attempts to engage in a conduct enumerated below against persons who do not take a direct part, or who have ceased to take part in hostilities, whether or not their liberty has been restricted, namely:

(a) violence to the life, health and physical or mental well-being of persons, in particular murder, manslaughter, rape, torture, and sexual violence, as well as cruel treatment such as torture, mutilation or any form of corporal punishment, and human experimentation;

(b) outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault;

(c) slavery and the slave trade in all their forms;

(d) collective punishments;

(e) taking of hostages;

(f) usage of human shields;

(g) acts of violence designed to inspire or instill terror into that population in whole or in part;

(h) pillage;

(i) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording fundamental

judicial guarantees which are recognized under general principles of international law;

(j) forcibly using members of the civilian population, including children, to take part in hostilities or to perform forced labor or labor related to military purposes;

(k) making the civilian population or individual civilians object of attack;

(l) failure to remove or protect civilians, particularly children, from areas in which hostilities are taking place to safer areas within the State of nationality of the civilian population, and with respect to children, to ensure that they are accompanied with persons responsible for their safety and well-being;

(m) starving of the civilian population and prevention of humanitarian assistance from reaching them;

(n) intentionally separating children from parents or persons responsible for their safety and well-being;

(o) failure to medically treat the wounded, the sick, the shipwrecked and persons deprived of their liberty for reasons related to the armed conflict;

(p) mistreatment of persons detained or interned;

(q) the perfidious use of the distinctive emblem of the red cross, red crescent or red lion and sun or of other recognized protective signs under international law;

(r) launching an attack against works or installations containing dangerous forces in the knowledge that such attacks will cause excessive loss of life, injury to civilians or damage to civilian objects;

(s) practices of apartheid and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination;

(t) making clearly recognized historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples and to which special protection has been given by special arrangement, for example, within the framework of a competent international organization, the object of attack, causing as a result, intensive destruction thereof, where there is no evidence of the violation by the adverse party of using such objects in support of a military effort, and when such historic monuments, works of art and places of worship are not located in the immediate proximity of military objectives;

(u) the transfer by the occupying power of parts of its own populations into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory;

(v) making non-defended localities and demilitarized zones the object of attack;

(w) unjustifiable delay in the repatriation of prisoners of war or civilians.

Commentary on Article 20-5-B

This text combines Common Article 3 of the Geneva Conventions of 12 August 1949 and Article 4-18 of Protocol II (1977). ***See*****, <u>Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949</u>, (Yves Sandoz, Christophe Swinerski, Bruno Zimmerman eds., 1987); Michael Bothe, Karl Josef Partsch and Waldemar A. Solf, <u>New Rules for Victims of Armed Conflicts</u>, (1987).** ***See also*****, Asbjorn Eide, Allan Rosas and Theodor Meron,** ***Combating Lawlessness in Gray Zone Conflicts through Minimum Humanitarian Standards*****, 89 AJIL 215 (1995).**

Article 21
Preconditions to the exercise of jurisdiction

1. The Court may exercise its jurisdiction over a person with respect to a crime referred to in Article 20 if:

- *(a) in a case of genocide, a complaint is brought under Article 25 (1);*
- *(b) in any other case, a complaint is brought under Article 25 (2) and the jurisdiction of the Court with respect to the crime is accepted under Article 22:*
  - *(i) by the State which has custody of the suspect with respect to the crime ("the custodial State"); and*
  - *(ii) by the State on the territory of which the act or omission in question occurred.*

2. If, with respect to a crime to which paragraph 1 (b) applies, the custodial State has received, under an international agreement, a request from another State to surrender a suspect for the purposes of prosecution, then, unless the request is rejected, the acceptance by the requesting State of the Court's jurisdiction with respect to the crime is also required.

Alternative Article 21
Preconditions to the exercise of jurisdiction

1. The Court may exercise its jurisdiction over a person with respect to a crime referred to in Article 20 and in accordance with the provisions of this Statute if the matter is referred to the Court [Tribunal] by the Security Council acting under Chapter VII of the U.N. Charter or if a complaint is lodged by either a State Party or by the Prosecutor.

2. The Court may defer proceedings in any case involving a crime within the inherent jurisdiction of the Tribunal to a competent national jurisdiction whose proceedings are initiated within a reasonable time and which is fair and effective.

Article 22
Acceptance of the jurisdiction of the Court **[Tribunal]**
for the purposes of Article 21

1. A State Party to this Statute may:

(a) at the time it expresses its consent to be bound by the Statute, by declaration lodged with the depositary; or
(b) at a later time, by declaration lodged with the Registrar;

accept the jurisdiction of the Court with respect to such of the crimes referred to in Article 20 as it specifies in the declaration.

2. A declaration may be of general application, or may be limited to particular conduct or to conduct committed during a particular period of time.

3. A declaration may be made 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 it may be withdrawn only upon giving six months' notice of withdrawal to the Registrar. Withdrawal does not affect proceedings already commenced under this Statute.

4. If under Article 21 the acceptance of a State which is not a party to this Statute is required, that State may, by declaration lodged with the Registrar, consent to the Court exercising jurisdiction with respect to the crime.

Article 23
Action by the Security Council

1. Notwithstanding Article 21, the Court has jurisdiction in accordance with this Statute with respect to crimes referred to in Article 20 as a consequence of the referral of a matter to the Court by the Security Council acting under Chapter VII of the Charter of the United Nations.

2. A complaint of or directly related to an act of aggression may not be brought under this Statute unless the Security Council has first determined that a State has committed the act of aggression which is the subject of the complaint.

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

Article 24
Duty of the Court as to jurisdiction

The Court shall satisfy itself that it has jurisdiction in any case brought before it.

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Part 4. Investigation and Prosecution

INTRODUCTORY REMARKS

Jurisdictional Triggering Mechanisms

A. Priority of State Action and Primacy of the ICT

As stated in the discussion on the Relationship between the ICT and National Jurisdiction in paragraph I, these are among the most crucial issues confronting the Preparatory Committee. One approach is to have the same jurisdictional triggering mechanisms apply to all four crimes and the same rules of priority and primacy also apply to all of them in the same manner. The other approach is to have different mechanisms for each crime. The first approach has the merit of a consistent approach and a parallel logic; the second can take into account political and practical variables attendant to each one of the crimes. To make such a decision, however, requires a clear vision of the stages in the prosecutorial phase.

B. The Stages of the Prosecutorial Phase

The various stages of the prosecution phase could be as follows:

(a) stage 1 -- a situation or particular case is brought to the attention of the Prosecutor by a State Party, the Security Council, or a Non-State Party;

(b) stage 2 -- the Prosecutor makes an initial informal and confidential investigation into a situation or particular case to determine whether there are sufficient grounds to initiate formal investigations that may lead to criminal charges, if the outcome produces such sufficient grounds;

(c) stage 3 -- the Prosecutor issues a confidential charge pending confirmation by the Indictment Chamber of the ICT;

(d) stage 4 -- a probable cause hearing is held before the Indictment Chamber of the ICT on the basis of the Prosecutor's charges to determine whether an indictment should be issued. A closed-door hearing is conducted before the Indictment Chamber of the Court [Tribunal] at which the Prosecutor presents evidence of probable cause. The accused are to have notice and opportunity to be heard. Interested States are invited to attend the hearing. If the Chamber finds probable cause, it shall issue an order authorizing an indictment to be redacted by the Prosecutor that shall be served upon the accused and made public.

These proposed stages in the prosecutorial phase are intended to provide for guarantees against unfounded charges and abuse of power.

Jurisdictional triggering mechanisms arise with respect to stages 1 and 2 above. Stages 3 and 4 are stages within the internal legal processes of the ICT, and to ensure their impartiality and fairness, they brook no external interference.

C. Who Can Initiate an Investigation

It is quite clear that any State Party and the Security Council are the primary sources for activating the ICT's jurisdiction. There are also other sources that can provide information to the Prosecutor, such as non-States Parties, NGOs and individuals. But the question is therefore whether the Prosecutor can act on the basis of this information, or act *sua sponte* to investigate a situation or a given case, and proceed independently along the stages of the prosecutorial phase described above. This is both a political as well as a legal judgment. Governments may be concerned that an overly zealous Prosecutor may cause it or its leaders unfounded embarrassment. The publicity resulting from such matters can indeed be devastating. One must also not forget the presumption of innocence, which in high visibility cases can easily overturn the social and political perception of innocence. But the safeguards provided in the four stages of the prosecutorial phase should be enough to protect against these and other possibilities of injudicious or intemperate actions at that phase of the proceedings. Thus, the Prosecutor should be given the prerogative of acting *sua sponte*, and should in any event be able to receive information, evidence and support from all interested parties, whether State or non-States Parties, NGOs or private individuals. The receipt of information, evidence and support should be wide open and not confused with that of initiating prosecution which is described in phase 4 above.

D. Triggering Mechanisms for the Four Core Crimes within the Inherent Jurisdiction of the ICT

On the assumption that a diversified approach is elected by the Preparatory Committee, the following may be considered:

(a) Aggression: Initiation of the first stage of the prosecutorial phase is by a State Party and the Security Council. No other source could initiate an action for this crime. National legal systems can be given the right to prosecute an accused, if it so ordered by the Indictment Chamber after reviewing the charges presented by the Prosecutor, (See above III C). At the request of the Prosecutor, the Indictment Chamber would either ask a State to defer to it the investigation or prosecution of such a crime, or the Indictment Chamber would relinquish investigation or prosecution to a State willing to assume

investigation or prosecution after a showing by such a State that it has the capability of doing so, that its actions would be fair and that it is in the best interest of justice to waive ICT jurisdiction and to allow State action. However, such a procedure would not be allowed if the situation or case was initiated by the Security Council without the Council's approval. There should also be textual language in the Statute designed to avoid conflict between the ICT, the Security Council and the International Court of Justice.

(b) <u>Genocide</u>: Initiation of the first stage of the prosecutorial phase can be by a State Party and the Security Council and by any State Party to the Genocide Convention. Deferral procedure and waiver of ICT jurisdiction would be the same as for "Aggression."

(c) <u>Crimes Against Humanity</u>: Same as for "Genocide."

(d) <u>War Crimes</u>: Same as for "Genocide" and "Crimes Against Humanity," but with the added formula that States Parties whose armed forces are part of a U.N. or regional organization multinational force, or are on a peace-keeping force sanctioned by the Security Council or any other regional organization, are first subject to the jurisdiction of the national military justice of that State under whose flag the alleged perpetrator is deemed to be a national. Only in cases where national military justice is demonstratably unable or unwilling to act can the Prosecutor request the Indictment Chamber to revoke the waiver provided herein. Any hearing before the Indictment Chamber would provide notice and opportunity for the interested States to be heard.

Article 25
Complaint

1. A State Party which is also a Contracting Party to the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948 may lodge a complaint with the Prosecutor alleging that a crime of genocide appears to have been committed.

*2. A State Party which accepts the jurisdiction of the Court **[Tribunal]** under Article 22 with respect to a crime may lodge a complaint with the Prosecutor alleging that such a crime appears to have been committed.*

3. As far as possible a complaint shall specify the circumstances of the alleged crime and the identity and whereabouts of any suspect, and be accompanied by such supporting documentation as is available to the complainant State.

4. *In a case to which Article 23 (1) applies, a complaint is not required for the initiation of an investigation.*

Article 26
Investigation of alleged crimes

1. *On receiving a complaint or upon notification of a decision of the Security Council referred to in Article 23 (1), the Prosecutor shall initiate an investigation unless the Prosecutor concludes that there is no possible basis for a prosecution under this Statute and decides not to initiate an investigation, in which case the Prosecutor shall so inform the Presidency.* **The Prosecutor may also, at his discretion, initiate an investigation on the basis of communications or information that comes to his attention from any source.**

2. *The Prosecutor may:*

   (a) *request the presence of and question suspects and witnesses;*
   (b) *collect documentary and other evidence;*
   (c) *conduct on-site investigations;*
   (d) *take necessary measures to ensure the confidentiality of information or the protection of any person;*
   (e) *as appropriate seek the cooperation of any State,* **governmental or non-governmental organizations,** *or of the United Nations.*

3. *The Presidency may, at the request of the Prosecutor, issue such subpoenas and warrants as may be required for the purposes of an investigation including a warrant under Article 28 (1) for the provisional arrest of a suspect.*

4. *If, upon investigation* **of a State complaint or of a case referred to him or her by the Security Council,** *and having regard,* <u>*inter alia*</u>, *to the matters referred to in Article 35, the Prosecutor concludes that there is no sufficient basis for a prosecution under this Statute and decides not to file an indictment, the Prosecutor shall so inform the Presidency* **and the complainant State** *giving details of the nature and basis of the complaint and of the reasons for not filing an indictment.*

5. *At the request of a complainant State or, in a case to which Article 23 (1) applies, at the request of the Security Council, the Presidency shall review a decision of the Prosecutor not to initiate an investigation or not to file an indictment.* **If the Presidency considers the Prosecutor's decision manifestly ill-founded, it may instruct the Prosecutor to initiate an investigation or to file an indictment. The order shall be communicated to the complainant State or the Security Council.**

6. *A person suspected of a crime under this Statute shall:*

(a) *prior to being questioned, be informed that the person is a suspect and of the rights:*

(i) *to remain silent, without such silence being a consideration in determination of guilt or innocence; and*
(ii) *to have the assistance of counsel of the suspect's choice or, if the suspect lacks the means to retain counsel, to have legal assistance assigned by the Court [Tribunal].* **If the suspect does not apply for the assignment of counsel, the Court may assign counsel if the interests of justice so require;**

(b) *not to be compelled to testify or to confess guilt; and*
(c) *if questioned in a language other than a language the suspect understands and speaks,* **or if he is unable to confidentially communicate with counsel in a language he understands and speaks,** *be provided with competent interpretation services and with translation of any document on which the suspect is to be questioned.*
(d) to obtain after his questioning a copy of the record of the interrogation or, if tape- or video-recorded, a copy thereof and if he has no facilities to play the tapes, in addition, a transcript of the interrogation.
(e) to obtain an order from the Court for measures to ensure "equality of arms."

Commentary on Article 26

Article 26, paragraph 1

The changes to paragraph 1 are needed as a complement to similar language that should be introduced at Article 21. The purpose is to incorporate an important amendment to the mechanism contemplated in the ILC Draft for triggering the jurisdiction of the ICT. The ILC Draft reduces the role of the Prosecutor to that of an executor of the decisions of the Security Council or of States Parties to set the ICT in motion. Under that scheme, the Prosecutor cannot act on information available to him through means other than a State complaint or a Security Council deferral and which, in his considered opinion, constitute prima facie evidence of the commission of crimes falling under the jurisdiction of the ICT.

This extremely limited access to the ICT runs the serious risk of making this permanent tribunal a tool of political decisions at best, and an empty gesture at worst. The Genocide Convention invests jurisdiction on the International Court of Justice subject to a State-to-State complaint, but it has only been used once (Bosnia and Hercegovina v. Serbia) even though since the Convention was signed in 1948, the world has witnessed genocide in Cambodia, Iraqi Kurdistan and Rwanda, to cite only the most clear-cut cases.

The Statute should trust the good judgment of an experienced and politically independent Prosecutor to use these powers judiciously and to separate good evidence from mere allegations. The proposed changes to Article 26, paragraph 1 would allow the Prosecutor to avail himself of leads and evidence from a wide variety of sources, while retaining ultimate discretion on how to act on them. Such discretion, needless to say, is to be exercised under standards of reasonableness.

Article 26, paragraph 2 (e)

Co-operation of governmental and non-governmental organizations may be of great use and should, therefore, not be excluded.

Article 26, paragraph 4

A complainant State shall be informed about the outcome of its complaint.

It is recognized that there is a difference, nevertheless, between complaints from States Parties and initiatives of the Security Council on the one hand, and communications from the public on the other. The requirement to notify the Presidency of a decision not to initiate an investigation is retained for the former but not the latter. Similarly, the Prosector is not required to inform if, after an investigation originated in a communication or *sua sponte*, he or she decides not to seek an indictment.

Article 26, paragraph 5

The Presidency should be able to order an investigation or to file an indictment if it considers the decision of the Prosecutor manifestly ill-founded. The proposed changes do not infringe upon the independence of the Prosecutor. They enhance his independence by making political pressures not to investigate a crime or not to file an indictment ineffective.

The power of the Presidency to overrule such a prosecutorial decision applies only to cases of State complaint or Security Council initiative. The change at Article 26, paragraph 5 simply incorporates the standard ("manifestly ill-founded") under which the Presidency can overturn a prosecutorial decision.

Article 26, paragraph 6 (a) (ii)

It is in the interest of justice that counsel be assigned without a request of the suspect if the latter is incapable of taking sufficient care of his own interests. It is taken for granted that the right to have the assistance of counsel includes the right to be assisted by him during interrogations.

Article 26, paragraph 6 (c)

It is to be expected that the suspect or accused will not always be able to communicate in his own language with the counsel assigned to him. He therefore has to rely on the services of an interpreter in order to prepare his defence. The availability of an interpreter is part of the adequate facilities for the defence as required by Article 41, paragraph 1 (b).

Article 26, paragraph 6 (d)

The right to obtain copies or transcripts is especially, but not only, important in cases in which counsel has not been present during interrogations.

Article 26, paragraph 6 (e)

The right to request application of the Prosecutor's powers is an important feature of the "equality of arms" during pre-trial proceedings. Without this facility, it may be impossible to obtain information that is relevant to the defence, notably documents.

Article 27
Commencement of prosecution

1. If upon investigation the Prosecutor concludes that there is a prima facie case, **which means a credible case which would - if not contradicted by the defence - be a sufficient basis to convict the accused,** *the Prosecutor shall file with the Registrar an indictment containing a concise statement of the allegations of fact and of the crime or crimes with which the suspect is charged.*

Alternative paragraph 1

1. If upon investigation the Prosecutor concludes that there is a prima facie case, the Prosecutor shall file with the Registrar an indictment containing a concise statement of the allegations of fact and of the crime or crimes with which the suspect is charged.

2. *The Presidency shall examine the indictment and any supporting material and determine*

Alternative paragraph 2

2. *The Presidency shall* **provide the Prosecutor, the suspect and/or his counsel an opportunity to be heard; thereafter the Presidency shall examine the indictment and all supporting material available at that time and determine:**

> *(a) whether a prima facie case exists with respect to a crime within the jurisdiction of the Court [Tribunal]; and*
>
> *(b) whether, having regard, inter alia, to the matters referred to in Article 35, the case should, on the* **material** *available, be heard by the Court [Tribunal].*

If so, the Presidency shall confirm the indictment and establish a trial chamber in accordance with Article 9.

3. *If, after any adjournment that may be necessary to allow additional material to be produced* **by the Prosecutor or the suspect,** *the Presidency decides not to confirm the indictment, it shall so inform the complainant State or, in a case to which Article 23 (1) applies, the Security Council.*

4. *The Presidency may at the request of the Prosecutor amend the indictment, in which case it shall make any necessary orders to ensure that* **(1)** *the accused is notified of the amendment and has adequate time to prepare a defence,* **and (2) the State which has surrendered the accused and the States which have consented to the Court's [Tribunal's] jurisdiction over the case do not object to the amendment in accordance with Articles 55 and 21.**

5. *The Presidency may make any further orders required for the conduct of the trial, including an order:*

> *(a) determining the language or languages to be used during the trial;*
>
> *(b) requiring the disclosure to the defence, within a sufficient time before the trial to enable the preparation of the defence, of documentary or other evidence available to the Prosecutor, whether or not the Prosecutor intends to rely on that evidence;*
>
> *(c) providing for 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;*
>
> *(d) providing for the protection of the accused, victims and witnesses and of confidential information.*

Commentary on Article 27

Article 27, Alternative paragraph 1

The word "shall" implies that the Prosecutor is obliged to file an indictment in all cases under investigation, provided a prima facie case exists. However, special circumstances may make it very difficult to comply with this duty, notably where the Prosecutor is confronted with a huge number of cases, creating a situation where the prosecution must prioritize its cases at the risk of postponing consideration of low priority cases until they are effectively dismissed. However, giving discretionary power to the Prosecutor might bring him in conflict with either the Security Council or the State that requested the investigation. Thus, the only discretion granted to the prosecution by this Article is in determining whether a prima facie case exists.

The expression *prima facie case* is an internationally recognized term of art with little variance among established definitions. Including a definition in the commentary section will be sufficient to resolve future conflicts over how it should be interpreted. The current Rules of the ICTFY include an Article substantially similar to the ILC Draft, without the definition clause; consistency warrants deletion of that clause, while retaining it in the commentary.

In order to avoid any dispute about the meaning of the (common law) concept of a prima facie case, the explanation given in the commentary on the ILC-Draft has been integrated in Article 27 (1) of this Draft Statute itself.

Article 27, paragraph 2

As far as the introduction of an oral hearing -- prior to the confirmation of the indictment -- is concerned, it should be clear that this should not be a mini-trial in itself. The hearing aims at preventing someone from being tried in public when there are no sound reasons to justify this. If it is highly unlikely that the trial chamber would convict the accused, it would be unfair to expose the suspect to a public trial. However, in order to reach a balanced decision, the suspect should have an opportunity to state his views on the merits of the indictment and the material available. If the suspect is in detention in another country (awaiting the confirmation of the indictment prior to being transferred to the host State of the tribunal), counsel should be given the opportunity to represent him. If the suspect is available, he may be assisted by his counsel.

Article 27, paragraph 3

Mere clarification of the text.

Article 27, paragraph 4

This is an application by analogy to a case of surrender of the rule of speciality prevailing in extradition cases. The same solution has been adopted in Article 59, paragraph 7 (infra).

Article 28
Arrest

1. At any time after an investigation has been initiated, the Presidency may at the request of the Prosecutor issue a warrant for the provisional arrest of a suspect if:

(a) there is probable cause to believe that the suspect may have committed a crime within the jurisdiction of the Court ***[Tribunal]****: and*
(b) the suspect may not be available to stand trial unless provisionally arrested.

2. A suspect who has been provisionally arrested is entitled to release from arrest if the indictment has not been confirmed within 90 days of the arrest, or such longer time as the Presidency may allow.

3. As soon as practicable after the confirmation of the indictment, the Prosecutor shall seek from the Presidency a warrant for the arrest and transfer of the accused. The Presidency shall issue such a warrant unless it is satisfied that:

(a) the accused will voluntarily appear for trial; or
(b) there are special circumstances making it unnecessary for the time being to issue the warrant.

4. A person arrested shall be informed at the time of arrest of the reasons for the arrest and shall be promptly informed of any charges.

Alternative Article 28
Arrest

1. At any time after an investigation has been initiated, the Presidency may at the request of the Prosecutor issue a warrant for the provisional arrest of a suspect if:

(a) there is probable cause to believe that the suspect may have committed a crime within the jurisdiction of the Court [Tribunal]; and
(b) the suspect may not be available to stand trial unless provisionally arrested.

2. A suspect who has been provisionally arrested is entitled to release from arrest if the indictment has not been confirmed within 60 days of the arrest, or such longer time as the Presidency may allow.

3. Upon confirmation of the indictment, the Presidency shall issue a warrant for the arrest and transfer of the accused, unless it is satisfied that:

(a) the accused will voluntarily appear for trial; or
(b) there are special circumstances making it unnecessary for the time being to issue the warrant.

4. A person arrested shall be informed at the time of arrest of the reasons for the arrest and shall be promptly informed of any charges.

Commentary on Article 28

Article 28, paragraph 2

Consideration ought to be given to the feasibility of also restricting the Presidency's discretion to extend the provisional arrest of a suspect to no more than a total of 180 days (See International Commission of Jurists, Third Position Paper on the ICC, August 1995).

The period of 90 days is in our opinion too long, instead we believe that 60 days together with such longer time as the Presidency may allow would be more reasonable, given the special difficulties presented by prosecutions of this sort, in which relatively easier tasks in domestic jurisdictions are complicated by distance and requirements of international cooperation.

Article 28, paragraph 3

It seems rather unnecessary to separate the issuance of a warrant for the arrest or transfer of the accused from the process of confirming the indictment, especially when sub-paragraph (b) allows for a delay due to special circumstances.

Article 29
Pre-trial detention or release

1. A person arrested shall be brought promptly before a judicial officer of the State where the arrest occurred. The judicial officer shall determine, in accordance with the procedures applicable in that State, that the warrant has been duly served and that the rights of the accused **listed in this Statute, especially the minimum guarantees listed in Article 26,** *have been respected.*

2. A person arrested may apply to the Presidency for release pending trial. The Presidency may release the person unconditionally or on bail if it is satisfied that the accused will appear at the trial, **and -- if released -- the accused will not pose a danger to victims, witnesses or any other person.**

3. A person arrested may apply to the Presidency for a determination of the lawfulness under this Statute of the arrest or detention. If the Presidency decides that the arrest or detention was unlawful, it shall order the release of the accused, and may award compensation.

4. A person arrested shall be held, pending trial or release on bail, in an appropriate place of detention in the arresting State, in the State in which the trial is to be held or if necessary, in the host State.

Commentary on Article 29

Article 29, paragraph 1

A reference to Article 26 will clarify what rights of the accused shall be guaranteed as a minimum.

Article 29, paragraph 2

The proposed changes are inspired by Rule 65 of the Rules of Procedure and Evidence of the ICTFY. The Presidency's power to release the arrested person on bail on condition that he will appear at the trial should be subject to the additional condition that the arrested person, if released, will not pose a danger to victims, witnesses or any other person.

Article 30
Notification of the indictment

1 The Prosecutor shall ensure that a person who has been arrested is personally served, as soon as possible after being taken into custody, with certified copies of the following documents, in a language understood by that person:

(a) in the case of a suspect provisionally arrested, a statement of the grounds for the arrest;
(b) in any other case, the confirmed indictment;
(c) a statement of the accused's rights under this Statute.

2. In any case to which paragraph (1) (a) applies, the indictment shall be served on the accused as soon as possible after it has been confirmed.

3. If, 60 days after the indictment has been confirmed, the accused is not in custody pursuant to a warrant issued under Article 28 (3), or for some reason the requirements of paragraph 1 cannot be complied with, the Presidency may on the application of the Prosecutor prescribe some other manner of bringing the indictment to the attention of the accused.

Article 31
Persons made available to assist in a prosecution

1. The Prosecutor may request a State Party to make persons available to assist in a prosecution in accordance with paragraph 2.

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 their exercise of functions under this Article.

3. The terms and conditions on which persons may be made available under this Article shall be approved by the Presidency on the recommendation of the Prosecutor.

Part 5. The Trial

Article 32
Place of trial

Unless otherwise decided by the Presidency, the place of the trial will be the seat of the Court [Tribunal].

It is recommended that this Article be removed from Part 5 insofar as this part should deal with the "General Part" only. Articles 32, 34-41 and 43-45 should be combined. Articles 46 and 47 can be kept with Article 34 in the General Part though it would be preferable to have them in a separate part. Article 42 can be kept with Article 34 in the General Part.

INTRODUCTORY REMARKS TO THE GENERAL PART

Defining crimes in the Statute, no matter what methodology is followed, corresponds to what national legal systems refer to as the "special part." It does not, therefore, include what national legal systems refer to as the "general part." The latter is also needed to satisfy the "principles of legality" in accordance with the requirements of the world's major criminal justice systems. The Preparatory Committee can decide to codify all or some of the basic principles on criminal responsibility, and those concerning exoneration thereof, which it believes should, at a minimum, apply. To do so would clearly be an arduous task of comparative criminal law synthesis. Even so, however, the Statute would have to delegate to the ICT the power to promulgate, before it starts any proceedings and in accordance with the principles contained in the Statute, whatever additional norms are needed, to satisfy the requirements of legality for the "general part."

Alternatively, the Preparatory Committee could decide on a different approach to establish norms in the nature of "choice of law" rules, by virtue of which the applicable "general part" would be the following: (a) that of the place where the crime was committed, or (b) that of the law of nationality of the perpetrator. This approach, however, would mean that different "general part" norms would apply to different defendants with the potential of producing different or inconsistent outcomes. It would also mean that the judges would have to become experts in many different legal systems, with the risk of misapplying the law of that system which is deemed applicable in a given case. Furthermore, this approach also means that the Court [Tribunal] would not be able to develop its own jurisprudence in interpreting and applying the law of the "general part," since there would be a separate body of applicable law for each case and for each defendant.

A number of important policy issues arise with respect to certain basic principles of the "general part" of international criminal law. The Ad Hoc Committee's report lists them in Annex II. They include the following:

- **(a) the minimum age of criminal responsibility;**
- **(b) the required mental state for individual perpetrators (general and specific intent), and any distinction between decision-makers and executors;**
- **(c) inchoate criminal responsibility for solicitation, attempt, and conspiracy;**
- **(d) responsibility for the conduct of others and group responsibility;**
- **(e) command responsibility;**
- **(f) defence of obedience to superior orders; and,**
- **(g) the extent to which traditional exonerating factors such as self-defence, necessity, and coercion apply;**
- **(h) what legal standards of proof are required for the above.**

At the very least, the Statute should address these issues with as much detail as possible in light of time constraints and available expertise offered by governments participating in the Preparatory Committee's work.

Sanctions

Sanctions are part of the requirements of legality. The principle, *nulla poena sine lege*, is the other side of the coin of *nullum crimen sine lege*. The Statute should not, therefore, ignore that important part of any system of criminal justice.

The Preparatory Committee can adopt the following approaches:

- **(a) to apply the penalties of the State where the crime was committed or of the State of nationality of the perpetrator;**
- **(b) to provide for certain principles and guidelines for penalties and other sanctions, as well as the conditions of execution of penalties and other sanctions; and**
- **(c) to specifically delegate to the ICT the task of codifying, on the basis of the principles and guidelines, the applicable norms and standards established by the Statute. The Statute should also clearly indicate that these ICT promulgated norms and standards should be done before the Court [Tribunal] commences its judicial functions.**

Whether the sanctions developed by the ICT should be approved by the States Parties is an issue to be considered in the context of the "structure" of the ICT.

Article 33
Applicable Law

The Court shall apply:

(a) *this Statute;*
(b) *applicable treaties and the principles and rules of general international law; and*
(c) *to the extent applicable, any rule of national law.*

Commentary on Article 33

Article 33 of the ILC Draft Statute should not be interpreted to permit the Court [Tribunal] to substitute the laws of any nation or general international law for a proper "general part" of an applicable substantive criminal law. Accordingly, such a General Part must be elaborated, and to be suitable for international use, it should reflect principles from the major criminal law systems of the world in a language that is as neutral or universal as possible. The following is an outline of the work that is envisioned.

It is based on an attempt to develop a common structure and nomenclature compatible with most of the European Codes and the U.S. Model Penal Code:

Open questions and elements to be regulated in a General Part

1. Sources of Law

- **(a) Nullum crimen sine lege (especially: certainty, no retroactivity)**
- **(b) Roles of international/national law**

2. Basic Principles

- **(a) Responsibility under international law**
- **(b) Official position/heads of State (Article 7, Statute of ICTFY)**

3. Elements of a crime

- **(a) Objective (actus reus)**
  - **(1) Age of Responsibility**
  - **(2) Voluntary conduct**

(3) Act or omission
(4) Causation and accountability

(b) Subjective (mens rea)
(1) Intention, recklessness/dolus eventualis or negligence
(2) Guilt (personal responsibility)
(3) Exclusion of strict liability for individuals
(4) Criminal liability of corporations

4. Defences (Justification and Excuse)

(a) Criminal Law Defences
(1) Lesser of evils
(2) Necessity
(3) Self Defence
(4) Defence of others
(5) Defence of property
(6) Law enforcement/other authority
(7) Consent of victim
(8) Mental capacity
(A) Insanity
(B) Intoxication
(C) Other diminished capacity
(9) Duress/coercion/force majeure
(10) Mistake of fact
(11) Mistake of law
(12) Superior orders

(b) Public International Law Defences
(1) Article 51 of the UN Charter
(2) Military necessity
(3) Reprisals

5. Limits of responsibility/obstacles to prosecution

(a) Statute of Limitations
(b) State responsibility v. individual responsibility

6. Special manifestations of crimes

(a) Incomplete crimes
(1) Attempts (withdrawal)
(2) Solicitation (withdrawal)
(3) Conspiracy (withdrawal)

(b) Complicity

(c) Command responsibility

7. Punishment

(a) Mitigation/Aggravation
- Repentance, restitution, active cooperation

(b) Penalty structure
(1) imprisonment (conditionally suspended sentence?)
(2) fines
(3) restitution/forfeiture/confiscation

(c) Amnesty, clemency, parole, pardon (See Article 60)

This approach groups together defences that might be classified as justifications or excuses under national legal codes, beginning with those that most systems would treat as justifications. No line is drawn between these defences because different systems might prefer different delineations. Further development of a general part will require a decision on whether and where to draw such a line.

A distinction is drawn between criminal law defences and public international law defences because the former flow simply from criminal law norms, while the latter will have to be derived through analysis of public international law principles and incorporated into the present general part.

The omission of a defence in the nature of tu quoque, in which an accused might escape punishment by pointing to similar conduct by others that has gone unpunished, is intentional. Although such a defence was argued at Nuremberg, the argument failed because it has no place in any modern criminal law system. In connection with crimes of the kind to be tried by the International Criminal Tribunal -- which have largely evaded prosecution until now -- such a defence would defeat the purpose of the Tribunal.

In the future, attention should be given to sentencing, including possible ranges or guidelines for different classes of offences, such as property crimes, crimes involving bodily harm, and crimes involving death or risk of death.

It should be noted that this General Part must be used in conjunction with a Special Part. In the proposed Draft Statute, the Special Part is described in Article 20, which bears the narrow label "Jurisdiction", but which actually defines the specific conduct to be punished.

Article 33
Applicable Law

1. The Court shall apply the provisions of the Statute and, insofar as not contradictory to it, the principles and rules of general international law and special treaties.

2. In addition to and under the conditions stated in section 1, the Court shall apply the national law of the territory in which the crime has been committed, provided that it does not contravene general principles of law recognized by the community of nations.

3. Without prejudice to the fundamental rights of the defendant, the Court shall pay particular attention to the law granting rights to the victim in his or in the State of the defendant, especially with regard to compensation.

Article 33-1
Nullum Crimen Sine Lege

1. An act may be punished under this Statute only if, prior to its commission, it has been made punishable by international law or by national law which is in accordance with international law.

2. If the law as it appeared at the commission of the crime is amended prior to the final judgement in the case, the most lenient law shall be applied.

Article 33-2
Individual and State responsibility

1. A person who commits a crime under this Statute is individually responsible and liable for punishment.

2. The official position of an individual who commits a crime under this Statute and particularly the fact that he acts as head of State or government or as a responsible government official does not relieve him of criminal responsibility nor mitigate punishment.

3. The fact that a crime under this Statute was committed by a subordinate does not relieve his superiors of criminal responsibility, if they knew or had reason to know, under the circumstances of the time, that the subordinate was committing or was going to commit such a crime and if they did not take all necessary measures within their power to prevent or repress the crime.

4. The fact that the present Statute provides criminal responsibility for individuals does not prejudice the responsibility of States under international law.

Article 33-3
Age of responsibility

1. A person under the age of sixteen at the time of the commission of a crime shall not be responsible under this Statute.

2. A person between the age of sixteen and twenty-one at the time of commission of a crime shall be evaluated as to his maturity whether he is responsible under this Statute.

Article 33-4
Insanity and intoxication

1. A person is legally insane when at the time of the conduct which constitutes a crime, he suffers from a mental disease or mental defect, resulting in his lacking substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law, and such mental disease or mental defect caused the conduct constituting a crime.

2. A person is intoxicated or in a drugged condition when under the effect of alcohol or drugs at the time of the conduct which would otherwise constitute a crime he is unable to formulate the mental element required by said crime. Such a defense shall not apply to a person who engages in voluntary intoxication with the pre-existing intent to commit a crime. With respect to crimes requiring the mental element of recklessness, voluntary intoxication shall not constitute a defense.

Article 33-5
Omission

Failure to carry out pre-existing legal duty constitutes material element of an offence when the person acted with knowledge or intent.

Article 33-6
Causation

Criminal responsibility under this Statute presupposes that the harm required for the completion of a crime is caused by and accountable to the perpetrator's act or omission.

Article 33-7
Mental Element

Unless otherwise provided for, crimes under this Statute are punishable only if committed with knowledge or intent, whether general or specific or as the substantive crime in question may specify.

Article 33-8
Attempt

1. A person is punishable for an attempt if, with the intent to commit the crime, he engages in conduct constituting a substantial step towards the accomplishment of that crime.

2. If the person abandons his effort to commit the crime or otherwise prevents the accomplishment of the crime, he is not punishable if he completely and voluntarily has given up his criminal purpose before the crime was committed.

Article 33-9
Complicity

1. Any person who plans, instigates, orders, commits or otherwise aids and abets in the attempt or execution of a crime under this Statute shall be individually responsible for the attempted or accomplished crime.

2. Each party *to a crime shall* be subject to punishment in accordance with his own individual responsibility apart from the responsibility of other participants.

Article 33-10
Conspiracy

A person is punishable for conspiracy when, with the intent to commit a specific crime, he agrees with another to perpetrate that crime and engages in an overt act that manifests *his* intent.

Article 33-11
Reasons excluding punishment

1. The Court shall determine the admissibility of reasons excluding punishment *in light of the character of each crime.*

2. Defences include but should not be limited to those in Article 33-12 to 33-17.

Article 33-12
Self Defence, defence of others and defence of property

1. Self defence consists in the use of force against another person which may otherwise constitute a crime when and to the extent that the actor reasonably believes that such force is necessary to defend himself or anyone else against such other person's imminent use of unlawful force, and in a manner which is reasonably proportionate to the threat or use of force.

2. Self defence, in particular defence of property, shall not exclude punishment if it causes damage disproportionate to the degree of the danger involved or the interest to be protected by the defence act.

Article 33-13
Necessity, coercion, duress

1. Necessity excludes punishment when circumstances beyond a person's control are likely to create an unavoidable private or public harm, and that person engages in criminal conduct only to avoid the greater imminent harm likely to be produced by such circumstances. This defence does not include use of deadly force.

2. A person acts under coercion when he is compelled by another under an imminent threat of force or use of force directed against him or another, to engage in conduct which may otherwise constitute a crime which he would not otherwise engage in, provided that such coerced conduct does not produce a greater harm than the one likely to be suffered and is not likely to produce death.

3. Military necessity may exclude punishment only as provided by the international law of armed conflict.

Article 33-14
Consent

Consent of the victim is no defence to the crimes within the inherent jurisdiction of the Tribunal.

Article 33-15
Mistake of fact or law

1. A mistake of law or a mistake of fact shall be a defence if it negates the mental element required by the crime charged provided that said mistake is not inconsistent with the nature of the crime or its elements, and provided that the circumstances he reasonably believed to be true would have been lawful.

2. The person who commits a crime in the mistaken belief that he is acting lawfully is not punishable, provided that he has done everything under the circumstances which could reasonably be demanded of him to inform himself about the applicable law. If he could have avoided his mistake of law, the punishment may be reduced.

Article 33-16
Superior order

1. A person acting pursuant to an order of a government or a superior, whether military or political, is not relieved of criminal responsibility, if the order appears to be manifestly unlawful and the person at a greater risk to himself has no alternative but to obey, or has no other moral choice. In such cases the norms of Articles 33-13 and 33-15 shall apply.

2. A superior order may be considered in mitigation of punishment.

Article 33-17
Renunciation

It shall be a defence to the crimes of attempt, conspiracy and solicitation if a person renounces or voluntarily withdraws from the commission of the said crimes before any harm occurs, if he has not engaged in an individual attempt, and by doing any of the following:

(a) wholly deprives others from the use or benefit of his participation in the commission of the crime;
(b) notifies law enforcement officials in time in order to prevent the occurrence or the commission of the crime.

Article 33-18
Statute of limitation

There is no statute of limitation for those crimes within the inherent jurisdiction of the Tribunal.

Article 34
Challenges to jurisdiction

Challenges to the jurisdiction of the Court may be made, in accordance with the Rules:

(a) prior to or at the commencement of the hearing, by an accused or any interested State; and
(b) at any later stage of the trial, by an accused.

Alternative Article 34
Challenges to Jurisdiction

In accordance with the Rules, challenges to the jurisdiction of the Court [Tribunal] may be made:

(a) by the accused, at any stage of the trial;
(b) by any interested State, prior to or at the commencement of the hearing.

Article 35
Issues of admissibility

*The Court **[Tribunal]** may, on application by the accused or at the request of an interested State at any time prior to the commencement of the trial, or of its own motion, decide, having regard to the purposes of this Statute set out in the preamble, that a case before it is inadmissible on the ground that the crime in question:*

(a) has been duly investigated by a State with jurisdiction over it, and the decision of that State not to proceed to a prosecution is apparently well-founded;
(b) is under investigation by a State which has or may have jurisdiction over it, and there is no reason for the Court **[Tribunal]** *to take any further action for the time being with respect to the crime; or*
(c) is not of such gravity to justify further action by the Court **[Tribunal]**.

INTRODUCTORY REMARKS TO THE PROCEDURAL AND EVIDENTIARY PART

The problems of defining the "general part" which are discussed above are not the same with respect to the elaboration of the "procedure and evidence" part. The latter lends itself much more to the type of drafting process that the Preparatory Committee can undertake. This was evident at the Ad Hoc Committee and was reflected in its Report. There is also the model of the ICTFY which is very helpful. Furthermore, the existence of U.N. and other regional norms and standards in the administration of criminal justice already prescribe certain minimum legal standards to which the drafters would have to conform. But easy, or easier, as that task may appear, it should be strongly instructed by practical experience; that is the experience of those who have been active in the practice of criminal law, whether as judges, prosecutors or defence counsels. Furthermore, it is important to take into account the peculiarities of criminal proceedings which are based on the four core crimes identified above. Indeed there is a significant difference between prosecuting and defending the following types of cases: (a) a single

murder case, and a mass murder one; (b) conducting a single post-mortem analysis and that of a large number of bodies discovered in a mass grave; (c) interviewing one or a few witnesses in a single city and hundreds of witnesses in different cities and countries; (d) investigating for evidence in a single city in which one is familiar with the legal system, the language and culture, and searching for evidence in multiple cities and countries whose legal systems, languages and cultures are different. The quantitative and qualitative nature of these factors alter the nature of the process in such a substantive way that new and imaginative procedural and evidentiary approaches should be developed. Thus, the drafters may have to consider combining features of different procedural systems to achieve a balance leading to fairness and justice. For example, the institution of a *juge d'instruction* might afford the best guarantee of fairness to the accused and the best access to evidence that the adversary-accusatorial model can offer. Combining judicial investigation with adversarial rights may therefore be a better alternative to what other adversary-accusatorial models have so far offered. The need to establish "equality of arms" and to provide equal access to evidence is simply quite different in cases involving major international crimes which by definition have many more victims, perpetrators, witnesses and other particularities. It is a fallacy to think that the traditional adversary-accusatory model is at all adequate, unless the same *resources of the prosecution* are also made available to the defence. But then the costs of the ICT would become exorbitant.

There are other questions concerning the protection of victims and witnesses that must also be addressed in the Statute, so that they can be an integral part of the budgetary considerations.

This part of the Statute must also take into account several aspects of the ICT's "structure," particularly with respect to guiding principles concerning internal procedures such as those of the "Presidency" and the procedures of the Prosecutor's office. The Report of the Ad Hoc Committee already addresses many of these questions.

If the "structure" of the ICT includes a committee of States Parties, then this body may have the right to approve norms, rules and standards developed by the ICT in connection with procedures, evidence and international governance.

These observations mean that this aspect of the task is not as easy as it otherwise appears to be.

Article 36
Procedure under Articles 34 and 35

1. In proceedings under Articles 34 and 35, the accused and the complainant State have the right to be heard.

2. Proceedings under Articles 34 and 35 shall be decided by the Trial Chamber, unless it considers, having regard to the importance of the issues involved, that the matter should be referred to the Appeals Chamber.

Article 37
Trial in the presence of the accused

1. As a general rule, the accused should be present during the trial.

2. The Trial Chamber may order that the trial proceeds in the absence of the accused if:

(a) the accused expressly waives the right to be present;
(b) the accused continuously disrupts the trial; or
(c) after the commencement of the trial the accused has escaped from lawful custody under this Statute or has violated the terms of bail.

Alternative paragraph 2:

(a) after the commencement of the trial the accused has escaped from lawful custody under this Statute, or in violation of the terms of bail, absconds; or
(b) the accused significantly and repeatedly disrupts the proceedings. In this case, the Trial Chamber must allow the accused to return to the proceedings at any time, subject to his respectful behavior.

3. The Chamber shall, if it makes an order under paragraph 2, ensure that the rights of the accused under this Statute are respected, and in particular **that the accused is legally represented, if not by his own counsel then by counsel appointed by the Court [Tribunal].**

4. In cases where a trial cannot be held because of the deliberate absence of an accused, the Court [Tribunal] may establish, in accordance with the Rules, an Indictment Chamber for the purpose of recording the evidence. **If the indictment is confirmed, the Chamber shall issue an international warrant of arrest against the accused, and request the cooperation of the international community in his apprehension and transfer to the jurisdiction of the Court [Tribunal]. In such**

proceedings, the Chamber shall ensure that the accused is legally represented, if not by his own counsel, then by counsel appointed by the Court [Tribunal].

5. *If the accused is subsequently tried under this Statute:*

   (a) *the record of evidence before the Indictment Chamber shall be admissible;*

   (b) *any judge who was a member of the Indictment Chamber may not be a member of the Trial Chamber.*

Commentary to Article 37

There are many problems with allowing trials in absentia before an International Criminal Court [Tribunal]. Such trials may violate the right of the accused to be present at trial, as guaranteed by the International Covenant on Civil and Political Rights. Moreover, if the Court [Tribunal] allowed such trials, it could quickly come to be viewed as merely a paper tiger used only as a forum for show trials. This would diminish its authority by creating the image of a powerless institution issuing nothing more than hollow judgments without any effect in terms of punishment or deterrence. Furthermore, because such trials would have to be repeated if the accused appears or can be brought to trial at a later stage, they would burden the limited financial and human resources of the Court [Tribunal]. For these reasons, the Statute and Rules of the ICTFY prohibit in absentia trials.

On the other hand, there is no compelling reason not to permit trials in the absence of the accused when the accused either expressly or implicitly waives the right to be present at trial. Implicit waiver, however, must be narrowly construed so as to include only escaping from custody or breaking bail after the commencement of the trial, or acting in a disruptive manner during the trial despite warnings from the Court [Tribunal]. The changes in paragraph 2 restrict trials in the absence of the accused to these three categories of cases.

Rather than confining in absentia trials to such exceptional cases, the ILC Draft Statute would allow such trials "if for reasons of security it is undesirable for the accused to be present" -- notwithstanding the accused's fundamental right of confrontation.

The ILC Draft would also allow trials in absentia when the accused has become ill, whereas a more appropriate approach in such cases would be to postpone the proceedings. In addition, the ILC Draft would allow trials in absentia when the accused has escaped from lawful custody of domestic authorities *prior to being*

surrendered to the Court [Tribunal] - a situation that raises the same general concerns about in absentia trials as those discussed above.

The accused cannot waive his right to be present, because the presence of the accused is not only a matter of right for him but in the general interest of justice as well. The public credibility of the effort and the need to prevent repetition of atrocities through public education does not present a compelling need for the accused to be present. In addition, allowing an express waiver of the right may well create difficult problems of interpretation as to under what conditions such a waiver will be considered valid. On the other hand, the ICT must not allow defendants to prevent it from carrying on a trial. Trial in absentia is therefore limited to the most narrow situation, i.e., when the accused takes advantage of the principle that he must be present in an attempt to sabotage the trial.

The deletion of paragraph 3 (a) of the ILC Draft is a logical consequence of the formulation of the new paragraph 2 (c), according to which a trial in the absence of the accused may proceed where the person concerned has either escaped from custody or has broken bail, after the commencement of the trial, and therefore had already been informed of the charge.

The change in paragraph 3 (b) merely clarifies that the accused must be represented by counsel, but not necessarily by a "lawyer", and that, if the accused's counsel does not represent him, the Court [Tribunal] will appoint counsel for that purpose.

The deletion of paragraph 4 (a) of the ILC Draft is based on the assumption that the Court [Tribunal] has made a finding of a prima facie case already at the time it had confirmed the indictment, and that this provision would therefore require the Court [Tribunal] to engage in a redundant procedure.

Paragraph 4 (c) of the ILC Draft is to be deleted. This provision is inherently political, rather than judicial, and redundant because the Court [Tribunal] is entitled already to issue an arrest warrant under other provisions of the Statute, such as Article 26.

This special hearing is the same as that in Rule 61 of the Rules of the Court issued by ICTFY. Since the object of the proceeding is not to determine guilt or innocence, this hearing does not constitute trial in absentia.

Article 38
Functions and powers of the Trial Chamber

1. *At the commencement of the trial, the Trial Chamber shall:*

   (a) have the indictment read;
   (b) ensure that Articles 27 (5) (b) and 30 have been complied with sufficiently in advance of the trial to enable adequate preparation of the defence;
   (c) satisfy itself that the other rights of the accused under this Statute have been respected; and
   (d) allow the accused to enter a plea of guilty or not guilty.

2. *The Chamber shall ensure that a trial is fair and expeditious and is conducted in accordance with this Statute and the Rules, with full respect for the rights of the accused and due regard for the protection of victims and witnesses.*

3. *The Chamber may, subject to the Rules, hear charges against more than one accused arising out of the same factual situation.*

4. *The trial shall be held in public, unless the Chamber determines that certain proceedings be in closed session in accordance with Article 43, or for the purpose of protecting confidential or sensitive information which is to be given in evidence.*

5. *The Chamber shall, subject to this Statute and the Rules have, inter alia, the power on the application of a party or of its own motion, to:*

   (a) issue a warrant for the arrest and transfer of an accused who is not already in the custody of the Court **[Tribunal]***;*
   (b) require the attendance and testimony of witnesses;
   (c) require the production of documentary and other evidentiary materials;
   (d) rule on the admissibility or relevance of evidence;
   (e) protect confidential information; and
   (f) maintain order in the course of a hearing.

6. *The Chamber shall ensure that a complete record of the trial, which accurately reflects the proceedings, is maintained and preserved by the Registrar.*

Commentary on Article 38

We propose to delete the last paragraph of this commentary. The ICT Draft Statute should not, in this instance, follow the ICTFY Rule 62 that requires a plea

of guilty or not guilty. It is enough to allow such a plea. In many legal systems, a plea at the beginning of the trial might be seen as a deviation from the principle that it is the prosecution's burden to prove the existence of the crime and the defendant's guilt.

We also propose to include in this Commentary a reference to the legal effect of a decision by the defendant to enter a plea of guilty. Specifically, the prosecution still bears the burden of persuasion; a guilty plea, however, can be considered in sentencing as a factor showing remorsefulness and willingness to cooperate on the part of the convicted person.

Article 38, paragraph 1 (d)

In common law jurisdictions, a plea of guilty or not guilty is closely linked to the jury system. If the accused pleads guilty, there is no need for trial by jury.

The ILC Statute does not provide for trial by jury; a trial under the Statute might be compared to a bench trial in a common law system. Hence the question whether an accused pleads guilty or not loses much of its importance. Its importance is, moreover, further reduced by the fact that the Statute does not require the accused to enter a plea of guilty or not guilty. On the other hand, according to the ILC Commentary to Article 38, a plea of guilty will not necessarily mean a summary end to the trial or an automatic conviction. The Commentary adds: "In many cases it may be prudent to hear the whole of the prosecution case; in others only the key witnesses may need to be called to give evidence, or the material before the Court [Tribunal] combined with the confession will themselves be certain proof of guilt".

It might be argued, therefore, that a reference to a plea of guilty should better be deleted. Since, moreover, the Court [Tribunal] is dealing with international crimes and since international society has a right to know about the merits of a case, it would seem hardly acceptable that, as a consequence of a guilty plea, the Court [Tribunal] may dispense with reviewing all the available evidence. Also, because the accused is not required to enter a plea of guilty or not guilty, the reference to these pleas in the Statute could be deleted. One may leave it to the Court's [Tribunal's] discretion and that of the parties how thoroughly the evidence will be discussed if the defence does not deny the charges.

On the other hand it might be argued that Article 38 should be amended in a way that provides for an obligation of the accused to enter a plea of guilty or not guilty. In this respect the Statute should follow the example of Rule 62 of the Rules of Procedure and Evidence adopted by ICTFY.

Article 39
Principle of legality (nullum crimen sine lege)

An accused shall not be held guilty:

(a) in the case of a prosecution with respect to a crime referred to in Article 20 (a) to (d), unless the act or omission in question constituted a crime under international law;

(b) in the case of a prosecution with respect to a crime referred to in Article 20 (e), unless the treaty in question was applicable to the conduct of the accused;

at the time the act or omission occurred.

Article 40
Presumption of innocence

An accused shall be presumed innocent until proved guilty in accordance with law. The onus is on the Prosecutor to establish the guilt of the accused beyond a reasonable doubt.

Article 41
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 43, 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 have adequate time and facilities for the preparation of the defence, and to communicate with counsel of the accused's choosing;

(c) to be tried without undue delay;

(d) subject to Article 37 (2), to be present at the trial, to conduct the defence in person or through legal assistance of the accused's choosing, to be informed, if the accused does not have legal assistance, of this right and to have legal assistance assigned by the Court [Tribunal], without payment if the accused lacks sufficient means to pay for such assistance;

(e) 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;

(f) *if any of the proceedings of or documents presented to the Court [Tribunal] 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.*

2. The Prosecutor shall, as soon as practical, disclose to the defence the existence of evidence known to the Prosecutor which in any way tends to suggest the innocence or mitigate the guilt of the accused or may affect the credibility of prosecution evidence.

Commentary on Article 41, paragraph 2

The changes made above affect only Article 41, paragraph 2 of the ILC Draft.

The paragraph 2 replaces the language contained in original paragraph 2 with the language used in amended Rule 68 of ICTFY. In addition to including what is called in the U.S. "Brady material" (i.e., exculpatory information), the new text requires the disclosure of evidence that tends to impeach the testimony of a prosecution witness. See Brady v. Maryland, 373 U.S. 83 (1963) and Giglio v. United States, 405 U.S. 150 (1972).

Alternative Article 41
Rights of the accused

1. In the determination of any charge under this Statute, every accused shall be treated equally before a fair and public hearing, subject to Article 43, and is entitled 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 have adequate time and facilities for the preparation of the defence, and to communicate confidentially with counsel of the accused's choosing;

(c) to be tried without undue delay;

(d) subject to Article 37 (2), to be present at the trial, to conduct the defence in person or through legal assistance of the accused's own choosing, to be informed, if the accused does not have legal assistance, of this right and to have legal assistance assigned by the Court [Tribunal], without payment if the accused lacks sufficient means to pay for such assistance;

(e) to examine, or have examined,the prosecution witnesses and to obtain the attendance and examination of witnesses for the prosecution;

(f) if any of the proceedings of or documents presented to the Court [Tribunal] 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 requirement of fairness; and

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

2. The Prosecutor shall, as soon as practical, disclose to the defence the existence of evidence known to the Prosecutor which in any way tends to suggest the innocence or mitigate the guilt of the accused or may affect the credibility of prosecution evidence.

3. The accused may apply to the Appeal Chamber for a determination concerning any alleged violation of any of the above mentioned rights. If necessary, the Appeal Chamber may issue such instructions as it deems appropriate to ensure that the situation is remedied and that the accused's rights are respected.

Commentary on Alternative Article 41

Article 41, paragraph 1

The right of all accused to be treated equally before any court or tribunal is so fundamental that it ought to be prominently stated. Also, the right to communicate with counsel usually includes the right to do so confidentially, however this ought nevertheless to be expressly stated.

Article 41, paragraph 2

Paragraph 2 replaces the language contained in the original paragraph 2 with the language used in amended Rule 68 of ICTFY. In addition to including what is called in the U.S. "Brady material" (i.e., exculpatory information), the new text requires the disclosure of evidence that tends to impeach the testimony of a prosecution witness. See Brady v. Maryland, 373 U.S. 83 (1963) and Giglio v. United States, 405 U.S. 150 (1972).

Article 41, paragraph 3

It is in the interest of justice to ensure that any violation of an accused's rights are remedied as promptly as possible, rather than merely providing grounds for an appeal challenging the fairness of the proceedings. The remedy available under Article 29 (3) only applies to those circumstances in which a person's arrest or detention is unlawful, and not to any other violations of an accused's rights.

Article 42
Non bis in idem

1. No person shall be tried before any other court for acts constituting a crime of the kind referred to in Article 20 for which that person has already been tried by the Court ***[Tribunal]****.*

2. A person who has been tried by another court for acts constituting a crime of the kind referred to in Article 20 may be tried under this Statute only if:

(a) the acts in question were characterized by the court as an ordinary crime and not as a crime which is within the jurisdiction of the court: or
(b) the proceedings in the other court - **including clemency, parole, pardon, amnesty and other similar relief** *- were not impartial or independent or were designed to shield the accused from international criminal responsibility or the case was not diligently prosecuted.*

Alternative 2 (a)
(a) **the characterization of the act by the national court does not correspond to its characterization under this Statute; or**

3. In considering the penalty to be imposed on a person convicted under this Statute, the Court [Tribunal] shall take into account any deprivation of liberty or penal sanction pronounced by another court and suffered by the same person for the same act. However, credit shall be given for remand in custody.

Commentary on Article 42

Alternative paragraph 2 (a) replaces the use of the term "ordinary crime" with language used in the Report to the Secretary General Pursuant to paragraph 2 of Security Council Resolution 808 (1993), Article 8, paragraph 66a. Although alternate language was chosen in lieu of the above for the final version of the ICTFY Statute, we believe the above language is the most appropriate. The term

"ordinary crime" is problematic for two reasons: (1) as recognized in the ILC Commentary to Article 42, there are numerous and varied definitions for the term - the proposed change eliminates confusion and give greater clarity to the Statute; and (2) the term "ordinary" carries implications of greater and lesser importance to the actions of national versus international tribunals and the crimes over which they exercise jurisdiction. The proposed changes focuses on the different nature of the charges.

The revision to paragraph 2 (b) is necessary to clarify that the exception to the non bis in idem principle for sham proceedings extends beyond trial, and includes clemency, parole, amnesty, pardon, and other proceedings that were used, for example, by Germany after World War I to frustrate efforts to establish criminal responsibility of convicted German war criminals.

***In this respect, at the time of voting on* Resolution 827, the United States emphasized that "with respect to Article 10, it is our understanding that the Tribunal is authorized to conduct proceedings against persons previously tried by a national court for the same crime when national proceedings - including clemency, parole, and other similar relief - were not impartial or independent, were designed to shield the accused from international criminal responsibility, or were not diligently prosecuted."**

The addition of paragraph 3 leaves it to the Court to determine in each individual case the necessary measures for taking into account any sanction already suffered for the same act by the convicted person. The last sentence clarifies that there must be correspondence with Article 47, paragraph 4.

Article 43
Protection of the accused, victims and witnesses

1. The Court shall take necessary measures available to it to protect the accused, victims and witnesses and may to that end conduct closed proceedings or allow the presentation of evidence by electronic or other special means, **provided that the measures are consistent with the rights of the accused.**

2. The court shall ensure the safety of the accused, victims and witnesses, as well as that of their families, from intimidation and retaliation before, during and after the trial. To this end a Victims and Witness Service shall be established. The Court may request all States Parties to cooperate with the Service in order to provide adequate protection to victims and witnesses.

3. Additional measures may be taken to protect the integrity and privacy of sexual assault survivors.

Commentary on Article 43

As drafted by the ILC, Article 42 may be read as elevating the rights and interests of victims and witnesses over those of the accused. There may be cases in which protection of witnesses cannot be consistent with the accused's right of confrontation. The U.S. Supreme Court expressed the importance of this right as follows: "Face-to-face confrontation generally serves to enhance the accuracy of fact finding by reducing the risk that a witness will wrongfully implicate an innocent person." *See Maryland v. Craig*, 497 U.S. 836, 846 (1990). The proposed revision to paragraph 1, which is based on the language of Rule 75 of the Rules of Procedure and Evidence of ICTFY, would make clear that protective measures for witnesses must be consistent with the basic rights of the accused, including the right to confront all accusatory witnesses. However, in instances involving young children and/or sexual assault survivors, the Court shall have discretion to balance the accused's right to face-to-face confrontation with the survivor's right to preservation of privacy. It has been recognized that young children and sexual assault victims usually suffer severe psychological and emotional harm as the result of an assault, harm which is in addition to the usual harm for crimes against the person. For sexual assault victims, the assault has violated the most sacred parts of their body. Further, most victims are unarmed females, and most accused are armed males, adding to the trauma of the assault, and making face-to-face confrontation even more difficult.

As experience in the former Yugoslavia and Rwanda shows, victims and witnesses who may have to appear before an International Tribunal are extremely vulnerable and in need of protection. Article 43 of the Statute, as well as Article 38 (2) and (4), take account of that fact in various ways. To shield the identity of a witness from the accused or third persons on a permanent basis, however, is not possible since that would necessarily infringe upon the accused's right to examine, or have examined, the prosecution's witnesses. The accused must be allowed to confront the witness or victim and should be able to inquire into aspects of that person's life that may have bearing on his credibility. In most instances, however, the address or current whereabouts of the witness need not be made available for such a person, nor should they be made available if there is a risk of intimidation or retaliation. Additionally, the Court [Tribunal] should make every effort to seal or protect the identity of survivors or witnesses from public record or scrutiny. For instance, while the testimony of a rape victim may and should be available to the public, the name of the victim should be shielded from the public, as well as information within the testimony which would identify the victim, if protection of her physical or moral integrity so requires. There is, unfortunately, shame and stigma attached to victims of sexual assault. The survivor may be rejected by society, even placed in harm by his family. There are severe societal repercussions

for making the name of a sexual assault survivor available to the public. As drafted, the Statute offers victims and witnesses little or no protection against intimidation or retaliation that may occur after the trial. This will make witnesses extremely reluctant to appear before the Court [Tribunal]. A victim and witness protection programme is therefore a necessity. For this programme to be effective, the cooperation of States Parties is indispensable. Included within the scope of protection should be victims or witnesses who testify to a general policy or scheme. *For instance, a rape survivor might testify,* not that the accused himself raped her, but that she was raped by a soldier who wore a uniform that would be considered under the command of the accused. Or a women forced into prostitution might testify as to the nationality or ethnicity of the "brothel" owners or patrons. It has become a recognized part of humanitarian law that leaders and commanders may be held responsible for acts or omissions committed by persons under their command. The purview of this section encompasses leaders and commanders whom may not have committed a particular act themselves, but who can nevertheless be held responsible for its commission under a theory of command responsibility.

The language of the first sentence in proposed new paragraph 2 is derived from the 1985 UN Declaration on Basic Principles of Justice for Victims of Crime and Abuse of Power (GA Res 40/734). It is deliberately phrased in a way that makes it possible to argue that victims and witnesses have an individual right to protection. The second sentence is derived from Rule 34 of ICTFY's Rules. For merely practical reasons, the Court [Tribunal] will have to determine whether the Service should function within the Office of the Prosecution or under the auspices of the *Court [Tribunal]*.

The first option might be more practical, effective, and efficient. The second option is likely to ensure a higher degree of objectivity and impartiality in giving protection to persons, including defence witnesses.

43.3 was added because sex crimes are more personally invasive crimes than other crimes against the person, and special provisions are often needed to ensure that a victim's right to privacy is taken into account.

Article 44
Evidence

1. The Rules of Evidence set forth in this Article shall govern the proceedings before the Court. The Court shall not be bound by national rules of evidence.

2. The Court shall promulgate and apply Rules in cases not otherwise provided for in this Article. The Court shall apply rules of evidence which will best favor a fair determination of the matter before it and are consistent with the spirit of the Statute and the general principles of law.

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 relevance or admissibility.

4. A document, audio-recording, or video-recording containing a statement of a person other than the accused, which was given before a judge of the court of a State Party, is admissible in evidence when that person is not able to testify before the Court [Tribunal] because of death, illness, injury, old age, or other good cause.

Alternative paragraph 4

The Court may, when the interests of justice require, order that a deposition be taken for use at trial in accordance with Rules established by the Court. Alternatively, the Court may admit in evidence previously conducted depositions satisfying requirements set forth in the Rules. The Rules shall include, as a minimum, provisions for audio and video recording and provisions to protect the rights of both parties.

5. The Court shall not require proof of facts of common knowledge but may take judicial notice of them. Even in a case where judicial notice is not appropriate, both sides should be permitted to agree, with the concurrence of the Court, that a fact in issue should be considered proven without the need for evidence to be produced.

6. No evidence shall be admissible if obtained directly or indirectly by methods which violate the rights of the suspect under Article 26, the rights of the accused under Article 41 or would otherwise constitute a violation of internationally protected human rights or cast substantial doubt on its reliability or if its admission would seriously damage the integrity of the proceedings.

7. Before testifying, each witness shall, in accordance with the Rules, give an undertaking as to the truthfulness of the evidence to be given by that witness.

8. The witness shall be excused from the duty to testify in regard to:

(a) communications between lawyer and client, which shall be regarded as privileged, and not subject to disclosure at trial, except provided for by the Rules.

(b) communications between other categories of privileged relationships identified by the Court in its Rules and subject to the exceptions provide for by the Rules.
(c) statements which may tend to incriminate the witness.

Alternative paragraph 8

8. The witness shall be excused from the duty to testify in regard to communications within privileged relationships as provided for in the Rules.

9. Subject to paragraph 8 above, a witness who refuses or fails contumaciously to answer a question relevant to the issue before the Court may be found in contempt of the Court. In such cases, the Court may impose a fine not exceeding US$10,000 or a term of imprisonment not exceeding six months, or both. Rulings under this paragraph shall be immediately appealable to the Appeals Chamber.

10. If the Court has strong grounds for believing that a witness has knowingly and willfully given false testimony, it may order the witness provisionally detained and direct the Prosecutor to investigate the matter with a view to the preparation and submission of an indictment for false testimony. The matter shall be immediately tried before a different panel of judges. The maximum penalty for false testimony under solemn declaration shall be a fine of US$20,000 or a term of imprisonment of twelve months, or both. Rulings of the Court under this paragraph shall be immediately appealable to the Appeals Chamber.

11. In cases of sexual assault:

(a) No corroboration of the victim's testimony shall be required;
(b) Consent shall not be allowed as a defence if the victim:

(i) has been subjected to or threatened with or has had reason to fear violence, duress, detention or psychological oppression, or
(ii) reasonably believed that if she/he did not submit, another might be so subjected, threatened or put in fear, or
(iii) reasonably believed that if she/he did not submit, the accused would withhold or remove basic necessities - such as food, water or heat - from the victim's possession;

(c) Before evidence of the victim's consent is admitted, the accused shall satisfy the Court *in camera* that the evidence is relevant and credible;
(d) Prior sexual conduct of the victim shall not be admitted in evidence.

In addition, States Parties shall extend their laws of perjury to cover sentences given under this Statute by their nationals, and shall cooperate with the Court in investigating and where appropriate prosecuting any case of suspected perjury.

Commentary on Article 44

New paragraphs 1 and 2, which follow the provisions of Rule 89 (a) and (b) of ICTFY, establish the general standard for the Court's Rules. The Court is to promulgate and apply Rules designed to achieve a fair determination of the matters before it and which are consistent with the spirit of the Statute and general principles of international law.

Formal promulgation provides a mechanism by which the evidentiary rules applied become more standard and more predictable for all parties concerned.

New paragraph 4 provides an exception to the "orality principle" (rule against hearsay) for prior testimony before a judicial officer if the witness is not able to appear before the Court because of death, illness, injury, old age, or other good cause of a similar nature.

Alternative paragraph 4 uses standard deposition terminology which is more universally recognized. It allows for Court-directed depositions while also allowing for previously conducted depositions meeting the Court's [Tribunal's] standards. As proposed, the change shifts the primary responsibility for the drafting of Rules concerning depositions to the Court and encourages the Court to exercise its discretion in the application of those Rules, while also ensuring that the Court includes provisions for audio and video recording and protections for both parties (most notably in the use of cross-examination).

The addition in paragraph 5 would enable the Court and the parties to avoid time-consuming presentation of evidence about which no one really disagrees.

Paragraph 6 revises the exclusionary rule. Article 44 (5) of the ILC Draft, which excludes evidence obtained by means which violate "other rules of international law," is too vague and overly broad. The proposed revision would replace this language with the more explicit phrase "methods which constitute a serious violation of internationally protected human rights or which otherwise cast substantial doubt on its reliability." This language, which refers to the rights enumerated in widely ratified International Treaties, such as the Torture Convention, provides a uniform standard for determining the admissibility of evidence before the Court. As revised, the exclusionary rule would discourage human rights violations in the gathering of evidence; exclude evidence obtained by illegal means, such as torture, for reasons of unreliability; avoid tainting the judicial process; and protect the fundamental interests of justice with respect to due process and the rule of law. The inclusion of the words "directly or indirectly" incorporate the common law exclusionary rule principle, that excludes even the "fruits of the poisonous tree" and not only the evidence directly obtained by illicit means. This proposed text follows Rule 95 of the ICTFY Rules of Evidence. It enhances the integrity of the proceedings by unequivocally discouraging the violation of rights under this Statute and other internationally accepted human rights standards to acquire evidence of the guilt of the accused. The deletion of the word "serious" with reference to the violation of internationally protected human rights further enhances the integrity of the proceedings by refusing to condone all violations of human rights standards rather than only serious violations. Doing so simultaneously removes the burden of differentiating between serious and acceptable violations while providing consistency to the application of the rule. The deletion of "is antithetical to" removes a duplicative phrase, which had diluted the importance of the integrity of the proceedings.

Paragraph 8 provides that the witness has a right to refuse to testify *inter alia* in case the statement might tend to incriminate the witness. This is a departure from the ICTFY Rules, which provide that the witness does not have such a right, but that the witness is given immunity from the use of such statements in national and international prosecutions.

The departure is justified because the Permanent International Criminal Court, unlike ICTFY, is not established by a binding Chapter VII Resolution of the Security Council.

Paragraph 8 also establishes the attorney-client privilege and authorizes the Court to provide other similar privileges (and exceptions thereto) in its Rules, such as the doctor-patient privilege, the husband-wife privilege, and the clergy-faithful privilege.

Alternative paragraph 8 consolidates the wording of paragraphs 8a and 8b while leaving their essence intact -- privileges shall be defined by the Rules.

New paragraphs 9 and 10 address the question of the "secondary" jurisdiction of the Court in cases of perjury or contempt of Court that are incidental to its own proceedings. As the U.S. Supreme Court pointed out long ago: "the power to punish for contempt is inherent in all courts; its existence is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders, and writs of the courts and, consequently, to the due administration of justice. The moment the courts of the United States were called into existence and invested with jurisdiction over any subject, they became possessed of this power." Ex Parte Robinson, 19 Wall. (86 U.S.) 510. The new

paragraphs 9 and 10 would ensure the Court's jurisdiction with respect to the crime of false testimony and contempt of court and grant it the authority to impose sanctions for such a violation. For cases where the person suspected of perjury is not available or accessible to the Court, the new paragraph 10 retains the provision of the language in the ILC Draft requiring States Parties to cooperate in investigating and where appropriate prosecuting any case of suspected perjury.

New paragraph 11. Sexual assault is a more personally invasive crime than other crimes against the person. Rarely are there witnesses to sexual assault, and the nature of the assault is quite different than that of most other crimes against the person, especially pertaining to the availability of physical evidence. Further, physical differences between men and women make it difficult for women to prevent sexual assault; often women will submit solely in an attempt to prevent additional harm to their body, life or child. Because of the breakdown of law and order prevalent in armed conflict, seldom can a victim report the crime and have it expeditiously or properly investigated. The language which is proposed tracks Rule 96 of the Rules of Procedure and Evidence of ICTFY.

Article 45
Quorum and judgment

1. At least four members of the Trial Chamber must be present at each stage of the trial.

2. The decisions of the Trial Chamber shall be taken by a majority of the judges. At least three judges must concur in a decision as to conviction or acquittal and as to the sentence to be imposed.

3. If after sufficient time for deliberation a Chamber which has been reduced to four judges is unable to agree on a decision, it may order a new trial.

4. The deliberations of the Court shall be and remain secret.

5. The judgment shall be in writing and shall contain a full and reasoned statement of the findings and conclusions. It shall be the sole judgment issued, and shall be delivered in open court.

Article 45 Bis

The Prosecutor may within 30 days of a decision to acquit petition the Trial Chamber for a rehearing of evidence concerning a miscarriage of justice.

Commentary on Article 45 Bis

The prohibition of double jeopardy as referred to in the Commentary on Article 48 requires that the Prosecutor not be given the right to ask another court to re-evaluate the evidence upon which a Trial Chamber's decision to acquit an accused was based. However, this rule is not infringed by a provision which allows the Prosecutor to ask the same Trial Chamber to correct a fundamental error of law or fact which may have resulted in a miscarriage of justice.

Article 46
Sentencing

1. In the event of a conviction, the Trial Chamber shall hold a further hearing to hear any evidence relevant to sentence, to allow the Prosecutor and the defence to make submissions and to consider the appropriate sentence to be imposed.

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

Article 47
Applicable **penal sanctions**

1. The Court may impose on a person convicted of a crime under this Statute one or more of the following **penal sanctions:**

(a) a term of life imprisonment or
(b) imprisonment for a time not less than one year and in addition
(c) an appropriate fine.

2. The Court may also order the confiscation of the proceeds of or the instruments used for the commission of the crime as well as decide on forfeiture.

3. In determining the length and enforcement of a term of imprisonment or the amount of a fine to be imposed, the Court will have regard to the general practice of States, and may specifically have regard to the penalties provided for by the law of:

(a) the State where the crime was committed;
(b) the State of which the convicted person is a national; and
(c) the State which had custody of and jurisdiction over the accused.

4. Credit shall be given to the convicted person for the period, if any, during which the convicted person was detained in custody pending his surrender to the Court or pending trial or appeal.

5. Proceeds from fines, forfeiture and confiscated property may be transferred, by order of the Court, to one or more of the following:

(a) a trust fund established by the Secretary-General of the United Nations for the benefit of victims of crime;
(b) a State the nationals of which were the victims of the crime;
(c) the Registrar, to defray the costs of the trial.

Commentary on Article 47

Because of the gravity of the crimes, paragraph 1 should be revised to indicate that fines, by themselves, are not an appropriate penalty and that the minimum sentence should be no less than one year.

A new paragraph 2 is required to deal with the important aspect of forfeiture and confiscation, which was omitted in the ILC Draft. The importance of this matter, as well as of the solution, in paragraph 5, of the question who is to receive the proceeds from fines, confiscation and forfeiture, will obviously grow in case the Court acquires jurisdiction to try not only the offences referred to in Article 20 (a) - (d), but also those referred to in Article 20 (e) and relating, as the case may be, to e.g. international drug traffic.

The change to paragraph 3 indicates that the Court will have recourse to the sentencing provision and practice of certain States concerning the appropriate sentence for grave international crimes. This will allow more uniformity over time than if the Court merely imported the sentencing practice of a particular State for this purpose.

The order of Article 47 cont., paragraph 3 (a) and paragraph 3 (b) are reversed to reflect the view that sentencing law of the State where the crime was committed is more important than that of the State of nationality of the offender for the purpose of determining an appropriate sentence.

New paragraph 4 is the language of Rule 101 (E) of ICTFY's Rules, which makes clear that credit must be given for time served during the course of proceedings. Any deprivation of liberty by another court is covered by Article 42, paragraph 3.

The order of paragraph 5 (a) - (c) are reversed to indicate that priority should go to compensating victims directly. Consideration about defraying Court costs should be of least importance in this context.

Alternative Article 47
Applicable Penal Sanctions

1. The Court [Tribunal] may impose on a person convicted of a crime under this Statute one or more of the following penal sanctions: life imprisonment, imprisonment for a time not less than one year, and in addition, an appropriate fine.

2. The death penalty, flogging and other physical or degrading punishment are excluded.

3. The Court [Tribunal] may also order the confiscation of the proceeds or of the instruments used for the commission of the crime or the forfeiture of other property.

Article 47-1
Assessment of Punishment

1. *In determining the sentence*, the Court [Tribunal] shall take into account any aggravating or mitigating circumstances, including the substantial cooperation by the convicted person with the prosecutor before or after conviction, and the general practice of the States. The Court shall pay special attention to the penalties provided *by the law of the State*:

(a) where the crime was committed;
(b) of which the convicted person or the victim is a national;
(c) *which had custody of* and jurisdiction over the convicted person.

2. Credit shall be given to the convicted person for the period during which he has been detained in custody for the crime pending his surrender to the Court [Tribunal] *for trial or* appeal.

3. Probation shall be granted only in exceptional cases of mitigating circumstances.

Article 47-2
Compensation for the Victim

1. In assessing the punishment, the Court shall pay due attention to the interests of the victim.

2. Proceeds from fines, forfeiture and confiscated property should in principle be transferred by the Court, to one or more of the following in the given order:

(a) compensation for the victim or the victim's family directly or through a trust fund established by the Secretary-General of the United Nations;
(b) a State whose nationals are the victims of the crime;
(c) the Registrar, to defray the costs of the trial.

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Part 6. Appeal and Review

Article 48
Appeal against judgment or sentence

1. The Prosecutor or the defendant may appeal immediately against pre-trial rulings based on questions of jurisdiction or exclusions of evidence where it is shown that such rulings will have a reasonable likelihood of causing serious impairment to the prosecution or defence.

2. The Prosecutor and/or the convicted person may, in accordance with the Rules, appeal against a decision under Article 45 on grounds of:

(a) procedural error or errors on a question of law invalidating the decision; or
(b) an error of fact which allegedly has resulted in a miscarriage of justice.

3. The Prosecutor and the convicted person may, in accordance with the Rules, appeal the sentence imposed.

4. Unless the Trial Chamber otherwise orders, a convicted person shall remain in custody pending an appeal.

Alternative Article 48
Appeal against pre-trial rulings, judgment or sentence

1. The Prosecutor or the defendant may appeal immediately against pre-trial rulings based on questions of jurisdiction or exclusions of evidence where it is shown that such rulings will have a reasonable likelihood of causing serious impairment to the prosecution or defence.

2. The convicted person may, in accordance with the Rules, appeal against a decision on the grounds of:

(a) an error of procedure and/or a question of law invalidating a decision;
(b) an error of fact which has allegedly resulted in a miscarriage of justice.

3. The Prosecutor may, in accordance with the Rules, appeal against a decision on the grounds of an error of procedure and/or a question of law invalidating a decision.

4. The convicted person may, in accordance with the Rules, appeal the sentence imposed.

5. Unless the Trial Chamber otherwise orders, a convicted person shall remain in custody pending an appeal.

Commentary on Article 48

The Constitutions or laws of most States, and general principles of international law prohibit double jeopardy. Many legal systems preclude the prosecution from appealing acquittals. The prohibition is not against being twice punished, but against being twice forced to stand trial for the same offenses. There are two important rationales for the rule. One rationale is that the trial itself is a great ordeal, and once the defendant is acquitted, the ordeal must end. The other is based on the increased risk of an erroneous conviction that may occur if the State, with its superior resources, were allowed to retry an individual until it finally obtained a conviction. These reasons are also applicable to prosecutions before an international criminal tribunal. The ICT Prosecutor, together with State authorities assisting the Prosecutor, will have the full resources of the Tribunal and several interested States behind it, while defendants and their counsel will be acting alone to refute guilt.

Article 48, paragraph 1

The proposed new paragraph 1 would allow the Prosecutor and the Defence to appeal pre-trial rulings based on questions of jurisdiction or exclusion of evidence. Such interlocutory appeals would be immediately disposed of by the Appeals Chamber prior to the commencement of the trial. The standard for such appeals is a high one: the Appeals Court will immediately entertain the appeal only where it is shown that failure to do so is reasonably likely to cause serious impairment to the prosecution or defence.

Regarding the issue of whether the Prosecutor should be able to appeal an acquittal based on errors of fact, the new text in paragraph 2 is similar to the original version of the ILC Draft. Given the gravity of the crimes to be tried, it is justifiable to allow the Prosecutor to appeal an acquittal.

However, it must be stressed that Article 49 authorizes the Appeals Chamber to order a new trial before a different Trial Chamber in case it accepts an appeal by the Prosecutor against an acquittal. This might affect the accused's legitimate desire for finality (which is at the core of the U.S. concept of "double jeopardy"), and expose the International Criminal Tribunal to criticism for lacking the

appearance of even handedness. Yet, one should not lose sight of the fact that there is no jury trial before the Court and the "double jeopardy" prohibition in this context refers to a system of lengthy and costly jury trials.

Finally, to avoid appeals on frivolous grounds, a requirement is added that would require that errors of fact rise to the level of "a miscarriage of justice." Similarly, an error of law would have to be of a nature as to "invalidate the decision." These criteria are taken from Article 25 of the ICTFY Statute.

Article 48, paragraph 2 & 3

The new paragraph 2 no longer deals jointly with the grounds for appeal by both the Prosecutor and the convicted person. As the above observations on Article 48 argue, there are good reasons for distinguishing between the rights of the Prosecutor, who will likely have considerable resources at hand, and a possibly innocent accused who must not only endure the great ordeal of being tried for the most serious of crimes but also run the risk, however remote it may be, of being erroneously convicted.

Thus, regarding the issue of whether the Prosecutor ought to be able to appeal an acquittal based on errors of fact, the new text in paragraph 3 defers to the provision in Article 45 Bis regarding the correction of fundamental errors of fact and limits the grounds for appeals by the Prosecutor to errors of procedure or of law which invalidate the decision.

However, to avoid appeals on frivolous grounds, the convicted person must show that the error of fact has resulted in a "miscarriage of justice." Similarly, appeals by either side on the grounds of errors of procedure or law must be shown to be of such a nature as to "invalidate the decision."

Article 48, paragraph 4

Though we allow for the possibility of appeal of an acquittal by the Prosecutor, we propose that sentences after conviction should be appealable only by the defence. The right of a convicted person to appeal a disproportionately harsh sentence may be undermined by the threat of a counter appeal by the Prosecutor.

Article 49
Proceedings on appeal

1. The Appeals Chamber has all the powers of the Trial Chamber.

2. If the Appeals Chamber finds that the proceedings appealed from were unfair or that the decision is vitiated by error of fact or law, it may:

(a) if the appeal is brought by the convicted person, reverse or amend the decision, or, if necessary, order a new trial;
(b) if the appeal is brought by the Prosecutor against an acquittal, order a new trial.

3. If in an appeal against sentence the Chamber finds that the sentence is manifestly disproportionate to the crime, it may vary the sentence in accordance with Article 47.

4. The decision of the Chamber shall be taken by a majority of the judges, and shall be delivered in open court. Six judges constitute a quorum.

5. Subject to Article 50, the decision of the Chamber shall be final.

Article 50
Revision

1. The convicted person or the Prosecutor may, in accordance with the Rules, apply to the Presidency for revision of a conviction of the ground that evidence has been discovered which was not available to the applicant at the time the conviction was pronounced or affirmed and which could have been a decisive factor in the conviction.

2. The Presidency shall request the Prosecutor or the convicted person, as the case may be, to present written observations on whether the application should be accepted.

3. If the Presidency is of the view that the new evidence could lead to the revision of the conviction, it may:

(a) reconvene the Trial Chamber;
(b) constitute a new Trial Chamber; or
(c) refer the matter to the Appeals Chamber;

with a view to the Chamber determining, after hearing the Parties, whether the new evidence should lead to a revision of the conviction.

* * *

Part 7. International Cooperation and Judicial Assistance

Article 51
Cooperation and judicial assistance

1. States Parties shall afford to the Tribunal the widest possible measures of judicial assistance in connection with any investigations and proceedings under this Statute.

2. The Registrar may transmit to any State **Party** *a request for cooperation and judicial assistance* **according to Article 57** *with respect to a crime* **under Article 20**, *including, but not limited to:*

(a) the identification and whereabouts of persons;
(b) the taking of testimony and the production of evidence;
(c) the service of documents;
(d) the arrest or detention of persons; or
(e) any other assistance which the Tribunal may require, including provisional measures.

3. In a case covered by:

(a) Article 20 (a) to (d), all States Parties;
(b) Article (e), States Parties which have accepted the jurisdiction of the Court [Tribunal] with respect to the crime in question, shall respond without undue delay to the request.

4. A State Party may, within 28 days of receiving a request under paragraph 2, file a written application with the Registrar requesting the Court [Tribunal] to set aside the request on specified grounds. Pending a decision of the Court [Tribunal] on the application, the State concerned may delay complying with paragraph 3 but shall take any provisional measure necessary to ensure that assistance can be given at a later moment.

5. The Tribunal shall ensure the confidentiality of evidence and information except as needed for the investigation and proceedings described in the request.

6. If requested, the Tribunal shall provide assistance to a State Party conducting an investigation in connection with this Statute.

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Commentary on Article 51

Article 51, paragraph 1 and 5 are taken from the UN Model Treaty on Mutual Assistance in Criminal Matters as an expression of generally accepted world-wide practice.

Article 51, paragraph 4 adjusts to Article 53, paragraph 6 of the ILC Draft with view to cooperation and judicial assistance. As to the period of now 28 days, see the differentiation in Article 52.

Articles 51-60 of the ILC Draft only impose duties on States Parties vis-a-vis the Court although it may be a frequent occurrence that national authorities will need to obtain the Court's assistance in their investigations, particularly when documentary evidence is concerned. In addition to supporting such requests paragraph 6 also re-emphasizes the duty of the Court to respect Article 51, paragraph 5 and Article 55, paragraph 2.

While, as a matter of principle, States Parties have to comply with requests for assistance, paragraph 4 enables them to make objections. The Court will have to carefully consider whether these objections should lead to a withdrawal of its requests. Where the use of evidence and information is concerned, paragraph 5 requires the Court to ensure the confidentiality of evidence and information in the interest of the State Party while the rule of speciality, incorporated in Article 55, ensures that evidence will not be used for other purposes than that for which it was provided without consent of the State providing the evidence. Moreover, Article 19 enables the Court [Tribunal] to incorporate in its Rules of Procedure special provisions with respect to disclosure of evidence to the defence which may safeguard legitimate interests of States Parties. Rules 66 and 70 of the Rules of Procedure of ICTFY, as revised 30 January 1995, may serve as an example here. It is also relevant to note here that Article 19 requires the approval of the initial Rules by a conference of States Parties.

Article 52
Provisional measures

1. In case of **urgency**, *the Court may request a State* **Party** *to take necessary provisional measures, including:*

(a) **the provisional arrest of** *a suspect;*
(b) **the seizure of** *documents or other evidence; or*
(c) **measures designed to protect witnesses against injury or intimidation.**

2. Where the Court has requested a provisional measure under paragraph 1, it shall as soon as possible and in any case within 28 days, make a formal request for assistance in conformity with Article 57.

3. Provisional arrest may be terminated if, within a period of 28 days after the arrest, the requested State Party has not received the request for surrender and the documents mentioned in Article 57. It shall not, in any event, exceed 40 days from the date of such arrest. The possibility of provisional release at any time is not excluded, but the State Party shall take any measures which it considers necessary to prevent the escape of the person sought.

Article 53
Surrender *of an accused to the Court* **[Tribunal]**

1. The Registrar shall transmit to any State on the territory of which the accused may be found the warrant for the arrest and transfer of an accused issued under Article 28 (3), and shall request the cooperation of that State in the arrest and surrender of the accused.

2. The requested State Party shall, subject to paragraphs 8 and 9, take immediate steps to arrest and surrender the accused to the Tribunal if the case is covered by:

(a) Articles 20 (a) to (d) [(a) or Article 23 (1)], or
(b) if the requested State has accepted the jurisdiction of the Court [Tribunal] with respect to the crime in question.

3. The requested State Party, if it is a party to the treaty covered by Article 20 (e) and has accepted the jurisdiction of the Tribunal, shall give priority to surrender the accused to the Tribunal over requests for extradition from other States.

4. In the case of a crime to which Article 20 (e) applies, the requested State Party, if it is a party to the treaty in question but has not accepted the Court's [Tribunal's] jurisdiction with respect to that crime shall, where it decides not to surrender the accused to the Court [Tribunal], promptly take all necessary steps to extradite the accused to a State having requested extradition or refer the case to its competent authorities for the purpose of prosecution.

5. In any other case, the requested State Party shall consider whether it can, in accordance with its legal procedures, take steps to arrest and surrender the accused to the Court [Tribunal], or whether it should take steps to extradite the accused to a State having requested extradition or refer the case to its competent authorities for the purpose of prosecution.

6. The surrender of an accused to the Tribunal constitutes, as between States Parties which accept the jurisdiction of the Tribunal with respect to the crime in question, compliance with a provision of any treaty requiring that a suspect be extradited or the case be referred to the competent authorities of the requested State for the purpose of prosecution.

7. A State Party which has accepted the jurisdiction of the Tribunal with *respect to the crime in question shall, wherever possible, give priority to a request* under paragraph 1 over requests for extradition from other States.

8. The requested State Party may delay complying with a request under paragraphs 2 - 4 if the accused is in its custody or control and is being proceeded against for a serious crime, or serving a sentence imposed by Court for a crime. It shall within 28 days of receiving the request inform the Registrar of the reasons for the delay. In such cases it

(a) may agree to the temporary surrender of the accused for the purpose of standing trial under this Statute; or

(b) shall comply with the request under paragraphs 2 - 4 after the prosecution has been completed or abandoned or the sentence has been served, as the case may be.

9. A State Party may, within 28 days of receiving a request under paragraph 1, file a written application with the Registrar requesting the Court [Tribunal] to set aside the request on specified grounds including those mentioned in Articles 35 and 42. Pending a decision of the Court on the application, the State concerned may delay complying with paragraphs 2 - 4 but shall take any provisional measures necessary to ensure that the accused remains in its custody or control.

10. To the extent permitted under the law of the requested State and subject to the rights of third parties, all property found in the requested State that has been acquired as a result of the alleged offence or that may be required as evidence shall, upon request, be transmitted to the Court [Tribunal] if surrender is granted, even if the surrender cannot be carried out, on conditions to be determined by the court.

Commentary on Article 53

This Article is the core provision for filling the gap between the Tribunal and national authorities which are to get hold of a suspect. The Article has been restructured and supplemented.

Article 53, paragraph 2 - 4 (5) depend on the final version of arts. 20 subs. They restructure paragraph 2 and the ILC Draft, paragraph 4 integrates Article 54.

Paragraph 6 - 9 are adaptations (including renumbering) to existing treaty and convention practice. As to the time limits in paragraph 8, see Article 52 in the proposed new version.

Paragraph 10 was necessary with view to confiscation, forfeiture and means of evidence (see Article 13 of the UN Model-Treaty on Extradition).

Article 54
Obligation to extradite or prosecute

- Delete - see Article 53, paragraph 4.

Alternative Article 54
Judicial Assistance

1. Proceedings in the execution of requests for judicial assistance shall be conducted with the same legal guarantees and in accordance with the same judicial procedures that are deemed ordinary under the laws of the requested State. In executing requests, States shall observe the Rules of Procedure of the Court [Tribunal] relating to the taking of evidence.

2. At the request of the Tribunal, the requested State shall secure the presence of a witness before the Tribunal. Where constitutional or other compelling considerations to be determined by the Tribunal make it impossible for the requested State to comply, it shall enable the Tribunal to hear the witness on its territory.

3. At the request of the Tribunal, the requested State shall permit the Tribunal to sit on its territory for the purpose of taking evidence or of conducting or continuing a proceeding before the Tribunal.

Commentary on Article 54

Paragraph 1 of the proposed Article ensures that the requested State applies its own laws, including constitutional provisions, to the execution of requests for judicial assistance by the Court [Tribunal]. It is by Article 7, Section 3, of M. Cherif Bassiouni, *Draft Statute International Criminal Tribunal*, 9 Nouvelles Études Pénales (1993). The paragraph also provides for applying the Court's [Tribunal's]

Rules of Procedure in order to ensure that the evidence gathered is of use to the Court [Tribunal].

Paragraph 2 obliges States Parties to secure the presence of witnesses before the Court [Tribunal]. There may, however, be circumstances in which the requested State faces legitimate difficulties in complying with the Court's [Tribunal's] request. In that case, the requested State should provide the Court [Tribunal] with the alternative of hearing the witness on its territory.

Paragraph 3 states the principle that the Court [Tribunal] may perform some of its functions on the territory of a State if its proper functioning so requires. Specific aspects of the Court's [Tribunal's] power may be laid down in agreements between the Court [Tribunal] and States Parties.

Article 55
Rule of speciality

1. A person **surrendered** *to the Court* ***[Tribunal]*** *under Article 53 shall not be* **proceeded against, sentenced or detained** *for any crime other than that for which the person* **has been surrendered.**

2. **A State providing evidence** *under this Part* **may require that the evidence not** *be used for any purpose other than that for which it was provided, unless this is necessary to preserve a right of an accused under Article 41 (2).*

3. The Court ***[Tribunal]*** *may request the State concerned to waive the requirements of paragraphs 1 or 2, for the reasons and purposes* **to be specified** *in the request.* **In a case of paragraph 1, the request shall be accompanied by an additional warrant for arrest and by a legal record of any statement made by the accused with respect to the offence.**

Article 55-1
No surrender to another State

Except as provided for in Article 55, the Court [Tribunal] shall not, without the consent of the requested State Party, surrender to another Party or third State a person surrendered to the Court [Tribunal] and sought by the other Party or third State in respect of offences committed before his surrender. The requested Party may request the production of the documents mentioned in Article 57.

Commentary on Article 55-1

According to general practice in transfer and extradition matters, Article 55-1 prevents the Tribunal from re-surrendering a surrendered person to any other than the surrendering State without the consent of the latter, because surrender was only granted to the Tribunal and not to other States.

Article 56
Cooperation with States not Parties to this Statute

The Tribunal may call on any State not a Party to this Statute to provide assistance.

Article 56-1
Support by the Security Council

In case of application of Article 23, the Tribunal may request the Security Council to take the measures necessary for the Tribunal to exercise its jurisdiction, in relation to both States Parties to this Statute or States not parties.

Commentary on Article 56-1

If the Security Council is dealing with the underlying matter under Chapter VII of the Charter of the United Nations (see Article 23), the Tribunal should be able to make use of the wide-ranging powers of the Security Council in relation to UN Member-States, both States Parties and not parties to this Statute.

This provision aims at supporting efforts of the Tribunal to show that - in a situation governed by Article 23 - any State's refusal to cooperate is detrimental to the overall aims of international society.

Article 57
Form and contents of requests

1. Requests under this Part shall:

a) be made by letter, fax, e-mail or any medium capable of delivering a written record and

b) containing the following, as applicable:

i) a brief statement of the purpose of the request and the assistance sought including the legal basis and grounds for the request;
ii) information regarding the person who is the subject of the request in sufficient detail to enable identification;

c) a brief description of the essential facts underlying the request;
d) information concerning the complaint or charge to which the request relates and of the basis of the Court's [Tribunal's] jurisdiction, and
e) in a case covered by Article 28, a written warrant for the provisional arrest or a written warrant for the arrest and surrender of the accused.

2. Where the requested party considers the information provided insufficient to allow it to comply with the request, it may seek, without delay, additional information.

Commentary on Article 57

Article 57 of the ILC Draft has been divided into two provisions concerning "Form and Contents" of (Article 57) and "Channels of Communication" for (Article 57a) requests.

Paragraph 1 (a) makes clear that new technologies may be used.

Paragraph 1 (e) requires at least a written warrant of arrest, which reflects constant State practice in extradition based on procedural safeguards. Furthermore, a warrant of arrest is a minimum condition for surrender/extradition under most, if not all, domestic laws.

The purpose of paragraph 2 is to accelerate proceedings.

Article 57-1
Channels of communication

1. Communications relating to a request under this Part shall be between the Registrar and the national authority designated by each Party for this purpose.

2. Where appropriate, communications may be made through the International Criminal Police Organization.

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Part 8. Enforcement

Article 58
General rule

States Parties undertake to **abide by** *the judgments of the Court.*

Commentary on Article 58

By replacing the word "recognize" by the word "abide", it will be clear that all States Parties henceforth are legally bound by the judgments of the Court, including the legal consequences attached thereto. States Parties may consider the Court as either a part of or an emanation or extension of their own domestic jurisdiction and therefore be bound by its judgments.

Article 59
Enforcement of sentences

1. All States Parties shall assist the Tribunal in enforcing prison sentences by accepting convicted persons and thus becoming the administering State. A sentence of imprisonment shall be served in a State designated by the Tribunal from the list of available administering States. To that end, the Tribunal shall provide the State so designated with a certified copy of the Court's judgment to be enforced. The State so designated shall promptly inform the Tribunal whether it accepts the request.

2. Only if no State is designated under paragraph 1, the sentence of imprisonment shall be served in a prison facility made available by the host State where the Tribunal has its official seat.

3. The consent of the sentenced person is not required.

4. A sentence of imprisonment shall be subject to the supervision of the Court and be enforced:

(a) as pronounced by the Court; and
(b) in accordance with the applicable law of the administering State.

5. The same applies mutatis mutandis to the enforcement of fines and confiscatory measures. The proceeds therefrom shall be handed over to the Court, which will dispose thereof in accordance with Article 47, paragraph 4.

6. The Court alone shall have the right to decide on any application for review of the judgment. The administering State shall not impede the sentenced person from making any such application.

7. A sentenced person in the custody of the administering State shall not be subjected to prosecution or punishment for any conduct committed prior to transfer unless such prosecution or punishment has been agreed to by the Court.

Commentary on Article 59

Article 59, paragraph 1

Insofar as cooperation regarding a State's acceptance of convicted persons for the purpose of enforcing their prison terms takes place on a voluntary basis, a State having made such an offer remains free to decline its cooperation in a specific case. One of the grounds which need not be listed may be that a State is asked to enforce a sentence in respect of an offence for which it has not recognized explicitly the Tribunal's jurisdiction. What matters is that the State be informed by the Tribunal of what judgment and sentence it is asked to enforce, and that the State then promptly informs the Tribunal whether it accepts the request.

Article 59, paragraph 3

Insofar as various international treaties dealing with the transfer of sentenced persons from the sentencing to the administering State require explicitly the consent of the person concerned, it was necessary to clarify that the enforcement of a sentence of the Court which has no prison facilities of its own is a wholly different matter and therefore the consent of the sentenced person is irrelevant.

Article 59, paragraph 4

The new text excludes any "conversion procedure" and requires the administering State to enforce the sentence as pronounced by the Court, which amounts to the "continued enforcement" option in the international treaties referred to above. The requirement that the Court alone is entitled to modify in any aspect its judgment is reflected as well in Article 59, paragraph 6, and Article 60 (infra). All the administering State is called upon is to enforce the Court's sentence on behalf of the Court, and it is only in this respect that the applicable law of the administering State will be of any relevance.

If, at a later stage, a large number of offenders are tried and sentenced by the Court following an extension of its jurisdiction to various crimes provided for by the international treaties referred to in Article 20 (e) of the ILC Draft Statute, the enforcement procedures foreseen in the present text may have to be modified with a view to giving the administering States a more important task in the enforcement of the sentences of the Court.

Article 59, paragraph 5

The addition of this new text is a logical consequence of the additions in the new text of Article 47. At a later stage, it might be appropriate to enhance the States Parties' cooperation with the Tribunal as regards forfeiture, confiscatory measures, etc., in the light of the provisions in Article 47, 58 and 59.

Article 59, paragraph 6

Cf. supra, comments on Article 59, paragraph 4. The second sentence confirms the right of any prisoner to take steps with a view to having his sentence reviewed. The provision that the administering State shall not prevent nor impede the prisoner from exercising this right applies, of course, too, to any application a prisoner may make under Article 60, paragraph 3, infra.

Article 59, paragraph 7

The application by analogy of the "speciality rule" generally agreed to in extradition matters appears to be all the more justified in cases of enforcement of sentences of the Court as the administering State is expected merely to enforce the sentence as pronounced by the Court and as the consent of the person concerned is not required (contrary to what happens when there is a transfer of a sentenced person from one State to another, supra).

Article 60
Early Release

1. **The administering State shall not release the prisoner before the expiry of the sentence as pronounced by the Court.**

2. **The Court alone shall have the right to decide on the release of a prisoner before the expiration of the sentence and determine the conditions and effects of the release. That decision shall be taken by a Chamber of five judges.**

3. **The prisoner may apply to the Court for a decision according to paragraph 2.**

Commentary on Article 60

The new text of Article 60 is consistent with, and confirms, the general rule in Article 59, paragraph 4, according to which the administering State shall enforce the sentence as pronounced by the Court. For this reason, pardon and/or amnesty enacted in the administering State as well as any regulations there concerning early release, such as parole and commutation of sentences, cannot automatically apply to a prisoner serving there a sentence pronounced by the Court. It is for the Court, and the Court alone, to decide whether any such grounds shall be taken into account for a prisoner's release before the expiry of the sentence as pronounced by the Court. Any application submitted by the prisoner to the Court to that effect will be decided upon in accordance with the second sentence of paragraph 2 of this Article. Cf. comments on Article 59, paragraph 4 and paragraph 6.

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Part 9. Final Clauses of the Convention

Article 61
Reservations

1. Any reservations a Contracting Party may wish to make to this Statute shall be subject to the provisions of the Vienna Convention of the Law of Treaties.

2. No reservation to the applicability of any provision of this Statute can be made with respect to existing international obligations and with respect to any crime defined in the Special Part of the International Criminal Code.

Article 62
Settlement of disputes

1. Any dispute by Contracting Parties arising out of the interpretation, application or implementation of this Statute, which has not been settled by negotiation, arbitration or referral to an independent and impartial body, shall, at the request of any Party to the dispute be brought before an International Criminal Jurisdiction, if one exists, or before the International Court of Justice.

Article 63
Signature and accessions

1. This Convention is open for signature by all States and any public international body.

2. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

Article 64
Ratification

1. This Convention is subject to ratification.

2. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.

Article 65
Entry into force

1. This Convention shall enter into force on the thirtieth day after the deposit of the thirtieth instrument of ratification or accession.

2. For each Party ratifying this Convention or according to it after the deposit of the thirtieth instrument of ratification or accession, the Convention shall enter into force on the thirtieth day after the date of the deposit of its own instrument of ratification or accession.

Article 66
Revision

1. A request for the revision of this Statute may be made at any time by any Contracting Party by means of a notification in writing addressed to the Committee of States Parties.

Article 67
Notification

The Secretary-General of the United Nations shall inform all Member States of the following particulars:

(a) signatures, ratifications, accessions and reservations under Articles 61, 63, 64, 65 and 66 of this Convention;
(b) date of entry into force of the present Convention;
(c) notification of Revision and Authority to Revise under Article 66 of the present Statute.

Article 68
Official Languages

This Convention, of which the Arabic, Chinese, English, French, Russian, and Spanish texts are equally authentic, shall be deposited in the archives of the United Nations.

Article 69
Transmittal

The Secretary-General of the United Nations shall transmit certified copies of this Convention to all Contracting Parties.

ANNEX

A Draft International Criminal Code and Draft Statute for an International Criminal Tribunal

by

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Part III – Procedural Enforcement Part

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Article I. Applicability

Section 1. *Contracting Parties*

1.0 The provisions of this Part shall apply as between the Contracting Parties for the enforcement of the provisions of the Special Part of the International Criminal Code, Part II.

Section 2. *Contracting Parties and International Criminal Tribunal*

2.0 The provisions of this Part shall also be applicable as between the Contracting Parties and the International Criminal Tribunal, except when a given provision herein may be inconsistent with any of the provisions of the Statute of the International Criminal Tribunal (Part V), in which case the Statute of the International Criminal Tribunal will supersede the provisions of this Part.

Commentary, Article I. Applicability

This Article is divided into two Sections, respectively concerning the applicability of this Part to the Contracting Parties and as between the Contracting Parties and the International Criminal Tribunal. As such, it reflects the possible utilization of this Part in conjuction with the "Direct" or "Indirect Enforcement Models."

It is to be noted that the provisions that follow hereinafter can be relied upon by the International Criminal Tribunal with the appropriate substitution of terms (e.g., replacing "Contracting Parties" or "states" with "International Criminal Tribunal" where appropriate).

Article II. Undertakings of the Parties

Section 1. *Duty to Enforce*

1.0. The Contracting Parties undertake to enforce the provisions of this Code and to engage in the various forms of assistance and cooperation defined in this Part, as between themselves and with the International Criminal Tribunal, and more specifically:

(a) to criminalize under their national laws all offenses defined in the Special Part of this Code, or to incorporate this Code into their national laws;

(b) to provide in accordance with their national laws for appropriate penalties for such crimes in proportion to the same social interest protected in their respective laws;

(c) to incorporate within their national laws and treaties the obligations contained in this Part, and, if appropriate, to enact enabling or implementing legislation; and

(d) to carry out in good faith and with due diligence the undertakings contained in this Part.

Commentary, Article II. Undertakings of the Parties

This Article obligates the Contracting Parties to comply with the more specific and detailed provisions of this part of the Code, which follow, and eventually with the International Criminal Tribunal.

This Article reflects the "Indirect Enforcement Model," whereby a state obligates itself under an international convention to include appropriate provisions in its national laws that would make the internationally proscribed conduct a national crime. This approach is found in all international criminal law conventions. *See, e.g.*, the Four *Geneva Conventions* of 12 August 1949, in their respective Articles 49-50/50-51/129-130/146-147, Doc. Nos. II.48, II.49, II.50, II.51. It is also the case with respect to all other international criminal law conventions.

The principle of proportionality of punishment as stated in (b) satisfies the principle of legality (*nulla poena sine lege, nullum crimen sine lege*). It requires States to enact national legislation whenever appropriate or necessary to implement the provisions of this Part, and to act with due diligence with respect to those judicial and administrative aspects of the modalities of cooperation included in this Part.

Article III. General Provisions

Section 1. *Applicable Law*

1.0. The law of the requested Party shall be applicable with respect to all procedures described in this Part, subject, however, to the provisions of this Code.

Section 2. *Communications*

1.1. All communications between the Contracting Parties shall be in writing and shall be between the Ministries of Justice of the requesting and requested Parties, or the Secretariat of the International Criminal Tribunal and the Ministry of Justice of the Contracting Party in question.
1.2. When appropriate, communications may also be made through the International Criminal Police Organization (ICPO/Interpol), but these shall not be deemed judicial communications, and shall only be deemed an official communication if it is so requested by the Party in question.

Section 3. *Documents*

1.1. Communications between the Contracting Parties and between the Contracting Parties and the International Criminal Tribunal shall be in writing and shall indicate:
 (a) the authority making the request in the requesting Party;
 (b) the authority having jurisdiction in the requesting Party;
 (c) the basis and legal reasons for the request in reliance upon the provisions of this Code;
 (d) information concerning the individual who is the subject of the request, such as name, age, sex, nationality, and address;
 (e) information concerning the evidence sought to be seized, describing it with sufficient detail to identify it, and describing the reasons why, and the legal basis relied thereon;
 (f) information as comprehensive as possible concerning the basic facts underlying the request;
 (g) some evidence concerning the charges, accusations or conviction of the person who is the subject of the request; and
 (h) any documents available to the requesting Party in support of the information required under (f) and (g).
1.2. If the information communicated by the requesting Party is found insuf-

ficient by the requested Party to act pursuant to the provisions of this Code, the requested Party shall inform the requesting Party of the additional information needed, specifying, if it deems appropriate, the period of time in which it would seek the additional information.

Section 4. *Languages*

1.0. All requests and communications made pursuant to this Code shall be in any of the official language or languages of the Party to which they are addressed, and with respect to the International Criminal Tribunal, in any of its official languages.

Section 5. *Multiple Requests*

1.0. Whenever a Party receives more than one request concerning the same person or the same evidence, it shall give priority to the said request on the basis of the jurisdictional priorities set forth in Article V of this Part, and in the event the requested Party elects not to follow the jurisdictional priorities set forth in Article V of this Part, it shall provide all Parties who have made the requests with statement describing its reasons for its decision.

Section 6. *Motivation of Refusal or Postponement of Enforcement*

1.0. Whenever a requested Party refuses or postpones action on a requesting Party's request under the provisions of this Part, it shall provide the requesting Party with the written reasons for the refusal or postponement.

Section 7. *Provisional Measures*

1.1. In case of urgency, the competent authorities of the requesting Party may request the requested Party to provisionally arrest the person sought for extradition, or to seize evidence needed in connection with any proceedings which shall be the object of a formal request under the provisions of this Part, or to undertake protective measures to prevent the escape of the person or evidence sought.
1.2. Provisional arrest or seizure of evidence are valid only for a period of thirty days, and if all the necessary documents specified in Section 3 are not received within such period, the person seized shall be released forthwith and the

evidence seized shall be returned to the person or entity from which it was seized. The requesting Party may, at its discretion, grant an extension to the requested Party for the submission of the documents, provided it shall not exceed an additional fifteen days, and provided reasonable explanations for the delay are provided in writing by the requested Party.
1.3. The person affected by any provisional order, whether for provisional arrest or provisional seizure of evidence, shall have the right to be heard by a court of ordinary criminal jurisdiction in connection with those provisional measures, subject to the applicable laws of the requested Party.

Section 8. *Delivery of Persons and Evidence*

1.1. Individuals surrendered for extradition or transfer, and evidence surrendered in connection with proceedings described in the provisions of this Part, shall be done on the basis of written documentation establishing the identity of the person surrendered and the basis thereof, and with respect to evidence, describing, with reasonable detail, the objects surrendered. Such documentation will clearly indicate the authority and identity of the persons carrying out this procedure on behalf of the Contracting Parties, and such documentation shall be made part of the record of the case in both the requested and requesting Parties.
1.2. Individuals surrendered from one Party to another shall be transported under humane and safe conditions, taking into account their health conditions, and shall be transported by the shortest direct air transport route, and when possible without transit through any other territory. In the event of transit, permission from the State of transit shall be requested by the Party who shall have custody of the individual. Transit shall not take place through any territory where there is reason to believe that the individual in question may fear for his life, freedom or well-being.

Section 9. *Rule of Speciality*

1.1. A person extradited shall not be subject to prosecution or punishment for any other offense than that for which he has been extradited.
1.2. Evidence surrendered shall not be used for any other purpose than for the purpose for which it was surrendered.
1.3. Waiver of the requirements of Sections 1.1 and 1.2 shall be made by the requested Party on the basis of a motivated request by the requesting Party and shall be examined by the appropriate authorities of the requested Party in

accordance with its laws, subject, however, to any other requirements set forth in the provisions of this Part.

Section 10. *Re-extradition and Surrender of Evidence to a Third Party*

1.1. A requesting Party shall not, without the consent of the requested Party, surrender to any other third Party a person surrendered for any reason, or evidence surrendered for any reason, in respect of any offense committed prior to the date of surrender.
1.2. Procedure for obtaining the consent of the requested Party shall be the same as for an original request.
1.3. The provisions of this Article shall not apply when the person in question has had the opportunity to leave the territory of the requesting Party to which he has been surrendered and has not done so within fifteen days of his final discharge, provided that there were no constraints on his right to leave the territory of that Party, or whenever he has left that territory and freely returned to it thereafter.

Section 11. *Conditional Surrender*

1.0. The requesting Party will, if it accepts, be bound by the conditions attached by the requested Party to the surrender of an individual or evidence in connection with any criminal proceedings that the requesting Party may elect to conduct with respect to such a person or in its use of the surrendered evidence.

Section 12. *Property Rights*

1.1. Property seized by a requested Party, whether or not held by the requested Party or surrendered to the requesting Party, shall remain the property of its owner at the time of the seizure and shall not be confiscated or destroyed before an appropriate judicial determination is made.
1.2. Any property seized in connection with the provisions of this Part shall be adjudicated in the ordinary courts of the Party wherein the object was seized. All persons having an interest in the outcome of such a judicial determination shall have the right to be heard. The person or legal entity from which the property was seized and any known owner of record shall receive notice, and shall have the opportunity to be heard.
1.3. In the event the object seized, as part of procedures established under this

Part, is surrendered to another Party, it shall be returned to the appropriate authorities of the Party where it was originally seized.
1.4. Neither the requested nor the requesting Party shall impose any customs or any other taxes upon the transfer and return of objects seized, transferred, and returned under the provisions of this Part.
1.5. The requested and requesting Parties have the duty to exercise reasonable care in the protection and preservation of objects seized, surrendered and returned, for the benefit of the owner, and any other person having an interest therein, and shall be responsible to such persons for failure to exercise reasonable care.

Section 13. *Cost of Proceedings and Return of Seized Objects*

1.0. The costs involved in extradition and judicial assistance, transfer of offenders and execution of sentences shall be borne by the requesting Contracting Party, except for those costs incurred by the very proceeding within the requested Contracting Party, which shall be borne by the Party wherein the proceedings are conducted. A Party requesting surrender of evidence shall bear the costs of transportation, shipment, storage, and packaging, and those connected with the return of the objects, unless they are properly confiscated, to the surrendering State after it has satisfied its requirements with these objects in connection with the proceedings for which they have been surrendered.

Commentary, Article III. General Provisions

These General Provisions are to a large extent common to the various modalities of enforcement and mechanisms of cooperation contained in this Part. While many of the provisions contained in this Section can be found in a number of bilateral and some multilateral conventions on judicial assistance and cooperation in penal matters, they are also found in the European Conventions on inter-State cooperation in penal matters.

Section 1 on applicable law can be found in all multilateral and bilateral conventions on extradition and judicial assistance and cooperation in penal matters.

Section 2 also reflects the prevailing practices of communication of many members of the world community, although a number of States will use their Ministries of Foreign Affairs or diplomatic missions as the appropriate channel for communications. Experience has demonstrated that this usually lengthens the process, and that direct communications between the Ministries of Justice speeds it up. As to Interpol communications, it is presently a practice in course with over one hundred members of that organization.

Section 3 on documentation is also inspired by a number of multilateral and bilateral conventions and the practices of many States. It is also reflected in the European Convention on Extradition, E.T.S. No. 24, (1957), article 12; the European Convention on Mutual Assistance, E.T.S. No. 30 (1959), article 14; and the European Convention on Transfer of Proceedings, E.T.S. No. 73 (1972), article 13.

Section 4 is common to multilateral and bilateral treaties.

Section 5 concerns multiple requests. It is not frequent to have multiple requests concerning the same person or subject, but since it is a possibility, it is important to establish a basis for resolving conflicts that might arise from such a situation. The principal basis was predicated on the jurisdictional theory and therefore gives priority to a Party having jurisdictional priority. The Section further allows a Party to depart from that, provided that it gives reasons to the various requesting Parties for its decision.

The language of Section 6 is self-explanatory and establishes the need for written answers providing reasons to a requesting Party with respect to action by the requested Party. It is believed that such a form of motivated communication of decisions will improve relations between the Contracting Parties.

Section 7 reflects the prevailing practice evidenced in multilateral and bilateral extradition treaties, but it also extends to provisional measures dealing with evidence, which is not found in any existing convention.

Section 8 provides for the means and manner by which an individual, as well as evidence, is to be delivered. The language is self-explanatory. It takes into account certain human rights standards embodied, in language and spirit, in a number of human rights instruments.

Section 9 embodies the well-established rule of speciality that can be found in a variety of bilateral and multilateral extradition conventions, and which has now become part of customary international law. It is placed in these general provisions because of its applicability to areas other than extradition. Its language is inspired by the European Convention on Extradition, E.T.S. No. 24 (1957).

Section 10 intends to clarify problems relating to re-extradition and surrender of evidence to a Party other than the one to which extradition or surrender of the evidence has been granted. It is seldom found explicitly stated in multilateral and bilateral conventions, and is, at times, a source of conflict, and that is why it was specifically expressed in this Section. The influence of the European Convention on Extradition, E.T.S. No. 24 (1957), article 15, is evident.

Section 11 recognizes the right of a Party to conditionally surrender a person or evidence. A similar provision can be found in the European Convention on Extradition, E.T.S. No. 24 (1957), article 19.

The provisions of Section 12 are fairly self-explanatory. They seek to protect the rights of owners, persons and parties having an interest in the property, while at the same time ensuring the orderly surrender and transfer of property needed in connection with criminal proceedings. It also establishes the proper judicial forum for the adjudication of property rights and confiscatory measures in order to avoid conflicts between the Contracting Parties and undue hardship on persons having a right of ownership or other economic rights and interests in the property. While there are practically no multilateral and bilateral conventions that go into such detail, the European Convention on Extradition, E.T.S. No. 24 (1957), article 20, deals with the preservation of property and its return, and the European Convention on International Validity of Criminal Judgments, E.T.S. No. 70 (1970), article 12, deals with the non-imposition of duties.

Section 13 concerns costs of proceedings. It was deemed advisable to include a provision allocating costs of proceedings under this Code in order to forestall any conflicts in this respect between the Contracting Parties. This provision recognizes that the Party requesting assistance ought to bear the cost of such proceedings under normal circumstances, but it is tempered with the recognition that, where a requested state incurs unusually great expenses, it is proper that costs beyond the usual ones be borne by the requesting state. This is a subject that has frequently arisen in the European context where such practices are more frequent, and some observers have argued that the high costs of judicial assistance and cooperation may work as an impediment thereto. Consequently, it was felt desirable to meet this argument head-on and to resolve the question.

Article IV. Aut Dedere Aut Judicare

Section 1. *The Basis of International Enforcement and Cooperation*

1.1. The Contracting Parties undertake to prosecute international offenses as defined in this Code (Special Part) or in the alternative to extradite persons accused of such offenses to another state willing to do so or to the International Criminal Tribunal on the basis of this Part.
1.2. The duty to prosecute is independent of the duty to extradite.
1.3. Jurisdictional priorities in prosecution and extradition shall be those established in Article V.
1.4. No violation of the provisions of the Special Part of this Code shall be deemed as falling within the category of the "political offense exception" for purposes of this Procedural Enforcement Part.

Commentary, Article IV. Aut Dedere Aut Judicare

This maxim derives from Hugo Grotius, *De Jure Belli ac Pacis* (1624). It is now recognized as a general principle of international law to "prosecute or extradite"; *see* Bassiouni, "International Extradition and World Public Order," in *Aktuelle Probleme des Internationalen Strafrechts* (1970), pp. 10, 15 (ed. D. Oehler and P.G. Pötz) and it is the conceptual basis of the indirect enforcement scheme that international criminal law has relied upon. It is embodied in all international criminal law conventions; *see* "Special Part".

Statute for an International Criminal Court, 9 U.N. GAOR (Supp. 12) at 23, U.N. Doc. A/2645 (1954); Dautricourt, "The Concept of International Criminal Jurisdiction: Definition and Limitation of the Subject," in M.C. Bassiouni and V.P. Nanda (eds), *A Treatise on International Criminal Law*, Vol. I (1973), pp. 636 et seq.; Klein and Wilkes, "United Nations Draft Statute for an International Criminal Court," in G.O.W. Mueller and E.M. Wise (eds), *International Criminal Law* (1965), pp. 513 et seq.; J. Stone and R. Woetzel, *Toward a Feasible International Criminal Court* (1970). For references to Pella, Sottile, Carjeu and Glaser, see the U.N.'s 1949 *Report on an International Criminal Jurisdiction*. See also Statute for an International Criminal Tribunal, Part V.

Article V. Jurisdiction

Section 1. *Jurisdictional Bases and Priorities*

1.1. Jurisdiction for the prosecution and punishment of any international offense as defined in this Special Part of this Code shall vest in the following order:

(a) the Contracting Party in whose territory the offense occurred in whole or in part;

(b) any Contracting Party of which the accused is a national;

(c) any Contracting Party of which the victim is a national;

(d) any other Contracting Party within whose territory the accused may be found.

1.2. Nothing in this Article shall be construed as affecting the jurisdiction of the International Criminal Tribunal or any international jurisdiction.

Commentary, Article V. Jurisdiction

The approach followed is that of ranking the priority of jurisdictional theories based on recognition of international law and practice. The primary jurisdictional theory in Paragraph 1(a) is that of territorial jurisdiction. Sound policy reasons as well as international practice favor this theory, and that state's judicial forum will probably be the most convenient. See *Harvard Draft Convention on Jurisdiction with Respect to Crime*, 29 A.J.I.L. Supp. 439 (1935); D. Greig, *International Law*, p. 168 (1970); Feller, "Jurisdiction over Offenses with a Foreign Element", in M.C. Bassiouni and V.P. Nanda (eds), *A Treatise on International Criminal Law*, Vol. II (1973), pp. 5 et seq.; and Bassiouni, *Theories of Jurisdiction and Their Application in Extradition Law and Practice*, 5 Calif. W. Int'l L. J. 1 (1974); Blakesley, C.L. *Extraterritorial Jurisdiction*, in Bassiouni, M.C., ed., *2 International Criminal Law* (3 vols., 1986); George, B.J., Jr. *Immunities and Exceptions to Jurisdiction*, in Bassiouni, M.C., ed., *2 International Criminal Law* (3 vols., 1986). Ranking thereafter in order of their international acceptance are the theories of nationality, passive personality and universality. See Feller and Bassiouni, op. cit. Universal jurisdiction is embodied in Subparagraph (d). It is generally a corollary of the recognition that a given offense constitutes an international crime as defined in the "Special Part". See *Attorney General of Israel v. Eichmann*, 36 I.L.R. 5 (Israel, 1961) and 36 I.L.R. 277 (1962); also P. Papadatos, *The Eichmann Trial* (1964). This Article also provides for the eventual jurisdiction of the International Criminal Tribunal, should one be established. *See* Part V. See, *La Création d'une Jurisdiction Pénale Internationale et la Cooperation Internationale en Matière Pénal*, 45 Revue Int'le de Droit Pénal 395 et seq. (1974); Draft *Statute for an International*

Criminal Court, 9 U.N. GAOR (Supp. 12) at 23, U.N. Doc. A/2645 (1954); Dautricourt, "The Concept of International Criminal Jurisdiction: Definition and Limitation of the Subject", in M.C. Bassiouni and V.P. Nanda (eds.), *A Treatise on International Criminal Law*, Vol. I (1973), pp. 636 et seq.; Klein and Wilkes, "United Nations Draft Statute for an International Criminal Court," in G.O.W. Mueller and E.M. Wise (eds.), *International Criminal Law* (1965), pp. 513 et seq.; J. Stone and R. Woetzel, *Toward a Feasible International Criminal Court* (1970). For references to Pella, Sottile, Carjeu and Glaser, see the U.N.'s 1949 *Report on an International Criminal Jurisdiction*. See also *Statute for an International Criminal Tribunal*, Part V.

Article VI. Extradition

Section 1. *Basis for Extradition and Extraditable Offenses*

1.1. The Contracting Parties undertake to include all violations of this Code as extraditable offenses in their appropriate legislation and in their extradition treaties.
1.2. If a Contracting Party whose extradition practice is conditional upon the existence of a treaty receives a request for extradition from another Contracting Party with which it has no extradition treaty, this code shall be considered as the legal basis for extradition in respect to all its violations.
1.3. The Contracting Parties that do not make extradition conditional on the existence of a treaty shall consider violations of this Code as extraditable offenses and shall apply the provisions of this Article in respect to extradition.

Section 2. *Priority in Extradition Requests*

1.1. In the event of multiple extradition requests, priority in granting extradition shall be as follows:
(a) the Contracting Party in whose territory the crime occurred in whole or part;
(b) any Contracting Party of which the accused is a national;
(c) any Contracting Party of which the victim is a national;
(d) any other Contracting Party within whose territory the accused may be found.
1.2. A request for surrender of a person to the International Criminal Tribunal shall take precedence over any other request for extradition by any Contracting Party.

Section 3. *Conditional Extradition*

1.1. Whenever the laws of the requested Party prohibit extradition for a violation susceptible to punishment by the death penalty, the requesting Party may, as a precondition to extradition, stipulate that such penalty shall not be imposed, and upon receipt of such assurances, the person requested shall be surrendered to the requesting Party, subject to the assurances given.
1.2. In the event that the constitution of one of the Contracting Parties prohibits extradition of its nationals, the person requested may be conditionally delivered to the requesting Party or to the International Criminal Tribunal for prosecution on the condition that he be returned to the requested Party after the trial, which Party shall recognize such a foreign penal judgment and execute its sentencing provisions in accordance with its laws.
1.3. As a means of ensuring that a person who commits violations of this Code shall be brought to trial and shall, if found guilty, receive appropriate punish-

ment, the Contracting Parties may grant extradition to any Contracting Party other than the one who requested the extradition for purpose of prosecution or punishment of the accused as an alternative to prosecution or punishment in the requested or requesting Party.

Section 4. *Bar to Extradition*

1.1. It shall be a bar to extradition if prosecution of the person accused of the violation alleged is barred by double jeopardy, *ne bis in idem*, or the statute of limitation of either the requested or requesting Party, whichever is longer.
1.2. A Contracting Party may deny extradition if it is in the process of prosecuting a person accused of committing any violation of this Code.
1.3. Extradition may be denied to a requesting Party if the requested Party has good reason to believe that the request for extradition has been made for purposes of prosecuting or punishing that person on account of his race, religion, nationality, political opinion or belief, or that that person's position may be prejudiced, or that the criminal procedures to which he will be subjected may not be impartial, or that he would be discriminated against for any of the above-stated reasons.
1.4. If a Contracting Party denies extradition or transfer of proceedings to a requesting Party for the reasons stated in subsection 1.3 above, the requested Party shall, upon request of the requesting Party, accept the transfer of the proceedings in this Code. Alternatively, the requested Party denying extradition will consider requests by any other Contracting Party to whom the proceedings have been transferred and who is willing to prosecute in accordance with the provisions of this Code.

Section 5. *Documents and Supporting Evidence*

1.1. Documents and supporting evidence required for extradition are those referred to in Article 3 of this Part.
1.2. The requesting Party shall, however, also include with the required documentation duly translated copies of such official documents as arrest warrants and judicial decisions regarding the case and person in question, and some evidence showing reasonable grounds to believe that the person in question may have committed the offenses charged in the request for his extradition.

Section 6. *Judicial Determination*

1.0. Extradition shall be granted on the basis of a judicial determination made by a court of ordinary jurisdiction under the laws of the requested Party, and a right of appeal shall be preserved for such a person, and he shall enjoy no less than those rights specified in Article X.

1.0. Surrender of individuals to the International Criminal Tribunal shall be on the basis of this Article and in accordance with the procedures set forth herein.

Commentary, Article VI, Extradition

Because of the importance of extradition, it is covered herein with as much detail as necessary, in light of existing problems perceived in the practice.

Section 1 deals first with what has been perceived as the major impediment to extradition, namely, the "political offense exception." This provision excludes from that exception all international offenses as defined in the "Special Part." *See* Article VII of the 1948 *Genocide Convention*, Doc. No. V.1; the *European Convention on the Suppression of Terrorism*, 27 January 1977, E.T.S. 90 (1977); the 1977 *Additional Protocol Amending the Geneva Conventions of August 12, 1949*, Protocol I, Doc. No. II.58. See also Bassiouni, *Repression of Breaches of the Geneva Conventions under the Draft Additional Protocol to the Geneva Conventions of August 12, 1949*, 8 Rutgers-Camden L.J. 185 (1977); Levie, H., *The Code of International Armed Conflict* (2 vols.) (1986); Bothe, M., K. Partsch and W. Solf, *New Rules for the Victims of Armed Conflicts* (1982); Poncet, D. and P. Neyroud, *L'Extradition et l'Aisle Politique en Suisse* (1976); Van den Wijngaert, C., *The political offense exception to extradition: The delicate problem of balancing the rights of the individual and international public order* (1980); *see also* Bassiouni, M.C., *International Extradition in U.S. Law and Practice* (2 vols. 1983).

Section 2 provides for extradition under any of the three modalities. The language is adapted from the 1970 *Hague Convention for the Suppression of Unlawful Seizure of Aircraft*, Doc. No. XI.3. See e.g., Bassiouni, M.C., *International Extradition and World Public Order* (1974), and Shearer, I., *Extradition in International Law* (1971).

Section 3 seeks to establish a basis for the resolution of conflicts arising out of multiple requests on the same priority basis upon which "jurisdiction" is predicated. *See* Article V, *supra*. It also provides the means for avoiding some of the impediments to extradition, such as non-extradition of nationals and non-extradition for a crime for which the penalty may be death. The mechanism provided herein is one occasionally resorted to in international practice, though it is not institutionalized. *See* Bassiouni, *op. cit.* and Shearer, *op. cit.*

Section 4 provides the requested Party with the opportunity to refuse extradition for double jeopardy, the running of the statute of limitation or the existence of immunity. The current international practice is divided in this area, as is the substantive doctrine; some authorities consider these matters to be of a substantive nature to be raised at trial, and thus in the requesting Party. To avoid unnecessary hardship on the relator, the defense is permitted at the extradition hearing in the requested Party. The provision also allows a state to refuse extradition pending its prosecution of the relator, since the duty to extradite is an alternative to prosecution. Extradition may also be denied by the requested Party in the event that the relator can demonstrate that he would be likely to be subject, upon return, to serious violations of human rights. Though this is presently done in the practice of states under the guise of asylum or refusal to extradite based on the "political offense exception," it is not clearly or explicitly stated in the non-discrimination terms expressed therein. However, in order for that situation not to inure to the benefit of the relator, the requested Party refusing extradition on that basis would still have the duty either to prosecute or extradite to another state. An alternative to extradition or prosecution is transfer of criminal proceedings in accordance with Article VIII of this Part.

Section 5 is in conformity with existing treaties and practice, but adds an evidentiary requirement, which is the practice in common law countries and not in civil law countries. The requirements of *prima facie* evidence showing "reasonable grounds," though a requirement in the practice and treaties of common law states, is nonetheless justified because of the guarantee for the protection of human rights that is in the spirit of international and regional human rights conventions. The requirement is based on the assumption that, even though extradition is a bilateral relation between two states, the rights of the relator as guaranteed by international human rights conventions, the applicable extradition treaty, and the constitution and other laws of the requested Party are equally applicable.

Section 6 establishes that extradition shall be a judicial determination by a court of ordinary jurisdiction as opposed to an administrative procedure. It also provides for a right to appeal, which is provided for under internationally protected human rights provisions. *See* the *International Covenant on Civil and Political Rights*, 16 December 1966, G.A. Res. 2200A, 21 U.N. GAOR Supp. (No. 16) 49, U.N. Doc. A/6316 (1966), and the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 218 U.N.T.S. 221, E.T.S. No. 5.

Section 7 is self-explanatory as it establishes the basis for extradition between a Party and the International Criminal Tribunal, should the Tribunal be established.

The language of this Article relies on the *European Convention on the Suppression of Terrorism of 1979*, E.T.S. 90 (1977), and the *European Convention on Extradition*, 13 December 1957, E.T.S. No. 24, the *Additional Protocol to the European Convention on Extradition*, E.T.S. No. 86 (1975), and the *Additional Protocol to the European Convention on Extradition*, E.T.S. No. 98 (1978).

Section 1. *General Principles*

1.0. The Contracting Parties undertake to afford each other, in accordance with the provisions of this Part, the widest measure of mutual assistance in administrative and judicial proceedings with respect to offenses established under the provisions of the Special Part of this Code, and in accordance with the procedures set forth in this Part of the Code. Such mutual assistance, however, shall be performed with a view to protecting the rights of all persons affected by such proceedings in accordance with the provisions of Article XI.

Section 2. *Information*

1.1. The Contracting Parties undertake to supply each other and the International Criminal Tribunal with information on their substantive and procedural laws and regulations, judicial organization, and the authority of various administrative, prosecutorial, judicial and law enforcement bodies with respect to criminal matters.
1.2. Such information will be provided by a requested Party on the basis of a request formulated in accordance with the provisions of Article III.
1.3. Each Contracting Party shall inform any other Party of all criminal convictions and subsequent measures, in respect to nationals of the latter Party, entered in the judicial records. Where the person concerned is considered a national of two or more other Contracting Parties, the information shall be given to each of these Parties unless the person is a national of the Party in the territory of which he was convicted.
1.4. A Party requesting mutual assistance and cooperation, as provided for in this Part, shall communicate to the requested Party the result of the proceedings for which mutual assistance was requested. A requested Party may also request from a requesting Party periodic reports on the progress of those matters for which it has provided mutual assistance.

Section 3. *Letters Rogatory*

1.1. Letters Rogatory shall be executed in the manner provided for by the law of the requested Party, subject to the provisions of Article III of this Part.
1.2. Any special requests from a requesting Party concerning the manner in which witnesses or experts are to be deposed or evidence taken, such as under oath, shall include such express specifications in the request, and unless such

specifications are prohibited by the law of the requested Party, the requested Party shall, to the extent possible, comply with the request.
1.3. Proceedings in the execution of Letters Rogatory are to be conducted with the same legal guarantees and in accordance with the same judicial procedures that are deemed ordinary under the laws of the requested Party. In addition, however, persons interested in the outcome of the proceedings, as well as persons whose legal rights may be affected by it, are entitled to be present at the proceedings executing the Letters Rogatory, to be represented by counsel, to present evidence, and to be heard with respect to their rights and interests.

Section 4. *Writs and Records*

1.1. A requested Party shall effect service of writs and give proof of records of judicial decisions and verdicts that are transmitted to it for this purpose by the requesting Party.
1.2. Service may be effected by simple transmission of the writ or record to the person to be served unless the requesting Party expressly requests a different form of service, which, if not inconsistent with the law of the requested Party and not unduly cumbersome, shall be effectuated as requested.

Section 5. *Witnesses*

1.1. A witness or expert requested by a requesting Party for appearance before its judicial authorities in connection with a penal matter relating to any of the offenses contained in this Code, shall be notified by means of service of a writ, as provided for in Section 3, but shall not be under compulsion to do so, unless he is a national of the requesting Party, in which case he would be subject to the applicable laws of that Party when he becomes subject to its jurisdiction.
1.2. If a person sought by a requesting Party as a witness or expert is in the custody of the requested Party, his transfer for testimonial purposes can only be based on his voluntary consent, to be established by a judicial officer in open court and with the witness's counsel present. A requested Party, however, may also deny the transfer of the witness even on a temporary basis if such a transfer may detrimentally affect the course or conduct of legal proceedings for which the witness is being held in custody by the requesting Party and for reasons of the safety, welfare and well-being of the witness.
1.3. A witness, whatever his nationality, voluntarily responding to a writ or summons to testify in whatever capacity in legal proceedings of a requesting Party shall be given safe conduct to and from the requesting Party for the period of his presence in the requesting Party for this purpose, and during his travel to

and from that Party. Such safe conduct shall include immunity from prosecution, detention, and other restrictions of his personal liberty, and seizure of his personal property, excluding, of course, items whose possession may constitute a violation of the criminal laws of that Party, in which case their seizure is permitted, but not the arrest, detention or prosecution of the witness.
1.4. Nothing in this section precludes the right of a requesting Party to pursue the prosecution or punishment of a witness appearing under summons or writ in accordance with the provisions of this Article fifteen days after the witness has left the territory of that Party.

Commentary, Article VII. Mutual Assistance

This Article is adapted from provisions of the 1959 *European Convention on Mutual Assistance in Criminal Matters*, E.T.S. No. 30, and the *Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters*, E.T.S. No. 99 (1978). *See also First Additional Protocol to the European Convention on Information on Foreign Law*, E.T.S. 98 (1978).

Section 1 is self-explanatory as it is a general statement of principles. It also relies on article 1 of the *European Convention on Mutual Assistance in Criminal Matters*, E.T.S. No. 30 (1959).

Section 2 relies on the provisions of article 1 of the *European Convention on Information on Foreign Law*, E.T.S. No. 97 (1978), and Second Additional Protocol E.T.S. No. 98 (1978) as well as on article 22 of the *European Convention on Mutual Assistance in Criminal Matters*.

Section 3 is based on articles 3, 4 and 14 of the *European Convention on Mutual Assistance in Criminal Matters* and details more specifically the manner by which the testimonial execution of Letters Rogatory is to be conducted. The additional specificity is intended to eliminate some of the problems that arise in connection with this form of judicial assistance.

Section 4 relies on articles 7 and 13 of the *European Convention on Mutual Assistance in Criminal Matters*, but makes the language more explicit.

Section 5 relies on articles 9 and 10 of the *European Convention on Mutual Assistance in Criminal Matters* and is to be read as complementary to Section 3 and 4. It adds certain conditions on safe conduct which are found also in article 12 of the *European Convention on Mutual Assistance in Criminal Matters*.

There is no compulsory transfer of witnesses; the process is voluntary and the requested Party may also oppose it, even if the witness volunteers.

All measures of mutual assistance contained in this Article are subject to the general provisions contained in Article 2, as well as Article IX.

While the text borrows heavily from relevant European conventions, it has sought to harmonize the different provisions pertaining to judicial assistance in a single Article. It maintains the principle of reciprocity, expands the duty of

Contracting Parties to use their respective judicial services in furtherance of the duty of mutual cooperation, while providing for an obligation that takes into account minimum human rights guarantees for individuals accused of or prosecuted for a crime. See e.g., *Explanatory Report on the European Convention on the Transfer of Proceedings in Criminal Matters* (Council of Europe, 1972); *Problems Arising from the Practical Application of the European Convention on Mutual Assistance in Criminal Matters* (Council of Europe 1971); de Schutter, *International Criminal Law in Evolution: Mutual Assistance in Criminal Matters between the Benelux Countries*, 14 Neth. Int'l L. Rev. 382 (1967); Grützner, *International Judicial Assistance and Cooperation in Criminal Matters*, and Markees, "The Difference in Concept Between Civil and Common Law Countries as to Judicial Assistance and Cooperation in Criminal Matters," in M.C. Bassiouni and V.P. Nanda (eds), *A Treatise in International Criminal Law*, Vol. 2, pp. 189 and 171 (1973). See also, H. Grützner, *Internationales Rechtshilfeverkehr* (1967). For the text of these and other treaties see, M. Pisani and F. Mosconi, *Codice Delle Convenzioni di Estradizione e di Assistenza Giudiziaria in Materia Penale* (1979). See also Ellis, A. and R.L. Pisani, "The United States Treaties on Mutual Assistance in Criminal Matters," in Bassiouni, M.C., ed., *2 International Criminal Law* (1986); Gardocki, L., "The Social System," in Bassiouni, M.C., ed., *2 International Criminal Law* (1986); and Muller-Rappard, E., "The European System," in Bassiouni, M.C., ed., *2 International Criminal Law* (1986).

Article VIII. Transfer of Criminal Proceedings

Section 1. *Basis*

1.1. A Contracting Party may request another Contracting Party to undertake the prosecution of a case even though it does not have a jurisdictional priority as set forth in Article V, provided that none of the Parties who have a priority under Article V, claim their priority in prosecuting an alleged offender.
1.2. Nothing in this Section precludes a Contracting Party from volunteering to undertake prosecution, and in such a case, the basis set forth in this Article and the other provisions of this Part shall apply.
1.3. In view of the voluntary nature of this procedure, a Contracting Party willing to accept prosecution may also, if it so desires, enter into an *ad hoc* agreement with a transferring Party, setting forth the specifications and conditions for the transfer of the proceedings and the conduct of the case.

Section 2. *Surrender of the Accused*

1.0. Whenever a Contracting Party has agreed to assume prosecution and another Contracting Party has agreed to transfer the proceedings, the accused shall be surrendered to the prosecuting Party in accordance with the extradition procedures set forth in Article VI. In such a case, it will be assumed that the prosecuting Party has jurisdiction in accordance with the provisions of Section 1 of this Article.

Section 3. *Transfer of Records*

1.0. The Contracting Party who has requested or consented to the transfer of proceedings to another Contracting Party undertakes to transmit to that Party at its expense all the records and materials pertaining to the transferred matter, and shall provide the Contracting Party who has accepted prosecution with every reasonable and available form of assistance in connection with the prosecution, including but not limited to those forms of assistance provided for in Article VII.

Secton 4. *Witnesses*

1.1. A Contracting Party which has requested or consented to transfer of proceedings shall use those compulsory means existing under its its laws to

ensure the presence of witnesses needed to appear at the transferred proceedings in the Party of prosecution.
1.2. All expenses in connection with the travel of such witnesses shall be borne by the transferring Party.

Commentary, Article VIII. Transfer of Criminal Proceedings

This Article is based on the *European Convention on the Transfer of Proceedings in Criminal Matters*, E.T.S. No. 73 (1972). It also relies in part on the European Convention on the Punishment of Road Traffic Offenses, E.T.S. No. 52 (1964). It provides for a jurisdictional priority to the Contracting Party to which the proceedings shall be transferred, as well as the rights of the Contracting Parties and the individual in question, concerning such a transfer. It refers to Article VII on Mutual Assistance for transfer of records and witnesses, and it is otherwise subject to all the general provisions contained in Article II.

Article IX. Enforcement of Foreign Penal Judgments

Section 1. *Definitions*

1.1. "Administering Party" means a Contracting Party that enforces a foreign penal judgment.
1.2. "Dual criminality" means that the conduct is deemed criminal under the laws of the administering Party and the sentencing Party, and that the individual upon whom the sanction was pronounced would have also been sanctionable by the administering Party. It does not mean identity of criminal charges or sanctions in the laws of the two Contracting Parties.

Section 2. *Purposes*

1.0. The purposes of this procedure are to enhance the prospects for the social rehabilitation or re-integration of the sentenced person in the social context and to assist a Contracting Party in the administration of a sentence in the best interests of the sentenced person.

Section 3. *Enforceable Sanctions*

1.0. Sanctions enforceable under this Article shall include:
(a) deprivation of liberty;
(b) fines;
(c) confiscation of property; and
(d) conditional release.

Section 4. *Nature of the Process*

1.1. The administering Party shall assume, for and on behalf of the sentencing Party, the duty to enforce a sanction imposed by the sentencing Party, with respect to a given sentenced person, in accordance with the provisions of this Article. The procedures set forth herein are in the nature of mutual cooperation between the Contracting Parties.
1.2. Nothing in this Article should be interpreted to mean that the administering Party grants judicial recognition to all aspects of the judicial proceedings and judgment leading to the sanction by the sentencing Party.

Section 5. *Procedure*

1.1. A Contracting Party may request another Contracting Party to enforce one of its penal judgments and to administer a sanction deriving from such a judgment on the basis of the provisions contained in this Article. Such a request shall follow the requirements for all requests for judicial assistance and cooperation under this Part, and which are stated in Article III.
1.2. A Contracting Party shall initiate a request for transfer of a sentenced person only upon the consent of the sentenced person and after all ordinary legal proceedings by way of appeal and collateral attack upon the conviction or sentence have been exhausted.

Section 6. *Substantive Conditions*

1.1. An administering Party, upon acceptance of the request of another Contracting Party, shall be deemed to have the necessary legal competence and authority to enforce a sanction as defined in Section 2, provided that the conduct of the sentenced person that was the basis of the foreign penal judgment satisfies the requirement of dual criminality as defined in Section 1, and that none of the grounds for refusal listed in Section 7 below are applicable.
1.2. No sentenced person shall be transferred to an administering Party without his express consent and the consent of the sentencing Party.
1.3. If the sentence is for deprivation of liberty, the remaining period of the sentence must be no less than one calendar year from the date of the request in order for the transfer to take place.

Section 7. *Grounds for Refusal*

1.1. A Contracting Party may refuse to enforce a foreign penal judgment whenever any of the following may exist:

(a) the theory of jurisdiction upon which the sentencing Party relied in prosecuting the sentenced person is not recognized under the laws of the Party requested to administer the sentence;
(b) the requirement of dual criminality, as defined in Section 1, is not satisfied;
(c) the administering Party is unable to administer the sanction;
(d) the sentenced person is neither a national nor a permanent resident of the administering Party;
(e) the offense for which the person has been sentenced is deemed to be,

under the laws of the Party requested to administer the sentence, a political offense or a purely military offense;

(f) the age of the sentenced person at the time of the execution or enforcement of the sanction is below the age prescribed for this type of sanction by the laws of the requested Party;

(g) the requested Party considers, based on substantial grounds, that the prosecution was brought about or the sentence aggravated by discriminatory considerations based on race, religion, nationality, or political opinion or belief;

(h) the nature, type, and length of sentence is contrary to the public policy of the requested Party;

(i) the requested Party is in the process of or contemplating the criminal prosecution of the sentenced person; or

(j) the sentence is final, all available means of review have been exhausted, and one calendar year remains to the sentence.

Section 8. *Effects of Acceptance by a Party to Enforce a Sanction*

1.1. The acceptance by the administering Party of the request to enforce a sentence grants that Party exclusive competence over the sentenced person and the measures it will adopt in enforcing the sentence, thereby extinguishing the competence of the sentencing Party over the sentenced person with respect to that sentence.

1.2. The administering Party may, for good reasons, elect to terminate its enforcement of the sanction and thereby return the sentenced person to the sentencing Party. Upon such return, the competence of the administering Party over the person shall cease as it shall revert back to the sentencing Party. In such an event, the sentencing Party shall give credit to the sentenced person for the time spent in the custody of or under the supervision of the administering Party.

1.3. The judicial, executive or administrative organs of the administering Party shall not have jurisdiction to review any aspect of the prosecution, judgment or sentence rendered by the sentencing Party.

1.4. The laws of the administering Party as well as its administrative regulations concerning the enforcement and execution of the sentence shall apply, including measures concerning pardon, amnesty, commutation of sentence conditional release or alternative measures provided under its laws.

1.5. Pardon, amnesty or commutation of the sentence by the sentencing Party shall inure to the benefit of the sentenced person and shall be recognized and enforced by the administering Party.

1.6. Any of the above measures shall be immediately communicated by one

Contracting Party to the other. However, the benefits inuring to the sentenced person shall not be dependent upon such communication.
1.7. Nothing in this Article shall preclude or limit the right of a sentenced person, even after his surrender to the administering Party, to resort to the legal processes of the sentencing Party with respect to any available means of review of the conviction and sentence. In such a case, the administering Party shall not impede the right of a sentenced person to such available recourse.
1.8. A transferred sentenced person shall be given credit toward service of the sentence by the administering Party for any period of time served or any fine paid in the sentencing Party, irrespective of whether the period of time served was for pre-trial detention or for administrative reasons, if they are connected with the criminal proceedings for which the individual was prosecuted. Such credit shall also include those credits for good behavior or other similar credits provided under the laws of the sentencing Party during that period of time in which the sentenced person was in the custody of the sentencing Party.

Section 9. *Prosecution and Punishment of the Sentenced Person by the Administering Party*

1.1. A sentenced person within the custody of the administering Party shall not be subjected to prosecution or punishment for any conduct committed prior to the transfer of the sentenced person from the custody of the sentencing Party to that of the administering Party unless such prosecution or punishment has been agreed to by the sentencing Party before the surrender of the sentenced person and in such a case, the appropriate procedures concerning extradition contained in Article VI and IX have been satisfied.

Section 10. *Supervision of the Conditionally Released*

1.0. A transferred sentenced person who may be conditionally released shall be subject to the laws and regulations of the administering Party with respect to any forms of conditional release, and no conditions for conditional release may be imposed by the sentencing Party even if the transfer was for a conditional sentence, unless the Administering Party specifically agrees otherwise.

Section 11. *Fines and Confiscations*

1.0. The enforcement of a fine or a confiscatory measure shall be governed by the same provisions contained in this Article, but their proceeds shall go to the administering Party.

Commentary, Article IX. Enforcement of Foreign Penal Judgments

This article relies on a number of European Conventions, such as the European Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders, E.T.S. No. 51, 1970; The European Convention on the Punishment of Road Traffic Offences, E.T.S. No. 52, 1964; The European Convention on the International Validity of Criminal Judgments, E.T.S. No. 70, 1970; and the European Convention on the Transfer of Sentenced Persons, E.T.S. No. 112, 1983.

Concerning the validity of foreign criminal judgments, *See* Harari, McLean and Silverwood, *Reciprocal Enforcement of Criminal Judgements*, 45 REVUE INTERNATIONALE DE DROIT PENAL 585 (1974); D. Oehler, "Recognition of Foreign Penal Judgements and their Enforcement," in M.C. Bassiouni and V.P. Nanda, A TREATISE ON INTERNATIONAL CRIMINAL LAW, Vol. II, p. 261 (1973); Schearer, *Recognition and Enforcement of Foreign Criminal Judgement*, 47 AUST. L.J. 585 (1973); D. Oehler, INTERNATIONALEN STRAFRECHT (1973); For the Benelux Convention, *see Convention Concerning Customs and Excise*, September 5, 1972, Belgium-Luxembourg-The Netherlands, 247 U.N.S.T.S. 329 (1956). *See also* K. Kraelle, LE BENELUX COMMENTE, TEXTES OFFICIELS 147, 209, 306 (1961); De Schutter, *International Criminal Cooperation: The Benelux Example*, in M.C. Bassiouni and V.P. Nanda, A TREATISE IN INTERNATIONAL CRIMINAL LAW, Vol. II, p. 261 (1973). The Scandinavian countries' arrangement for recognition and enforcement of penal judgments is reproduced in H. Grützner, INTERNATIONALES RECHTSHILFEVERKEHR IN STRAFSACHE, pt. IV (1967). The arrangement between France and certain African states is reproduced in 51 REV. CRITIQUE DE DROIT INTERNATIONAL PRIVE 863 (1973). *See also* D. Oehler, *The European System*, in M.C. Bassiouni, ed., 2 INTERNATIONAL CRIMINAL LAW (1986).

Concerning transfer of offenders *see* Bassiouni, *Perspectives on the Transfer of Prisoners Between the United States and Mexico and the United States and Canada*, 11 VANDERBILT J. TRANSNAT'L L. 249 (1978); Bassiouni, *A Practitioner's Perspective on Prisoner Transfer*, 4 NAT'L J. CRIM. DEFENSE 127 (1978); Abramowsky and Eagle, *A Critical Evaluation of the Newly-Ratified Mexican-American Transfer of Penal Sanctions Treaty*, 64 IOWA L. REV. 325 (1979) and Professor Vagt's response thereto in the same issue. The provision requires the existence of double criminality, that the transferee be a citizen or a permanent resident of the country to which he is to be transferred, that the transfer be subject to his consent, that the transfer be only after a conviction or sentence is final, that the receiving state shall give the transferee any legal advantages that the legal system under which the sentence was imposed provides to him, but that all other conditions of detention and custody are subject to the laws of the receiving state. Ameliorative conditions, whether under the laws of the sending or receiving state, shall be to the benefit of the transferee.

A scheme for transfer of offenders can be said to rely in part on the assumption that a given state will recognize, at least in part, the criminal judgment of another state. The manner in which this Article is drafted does not necessarily make such an assumption and leaves open the possibility that such a procedure is in the nature of an administrative transfer which derives from the sovereign powers of a state to enter into international agreements. The possibility of interpreting this Article in this manner allows needed flexibility for those states which would not otherwise be able to recognize the validity of a foreign penal judgment. *See also* EPP *The European Convention on Transfer of Prisoners*, M.C. Bassiouni ed., 2 INTERNATIONAL CRIMINAL LAW, p. 253 (1986).

Section 1 defines the terms "Administering Party" and "Dual Criminality". These terms will be recurring in this article and their definition was needed to clarify their intended meaning.

Section 2 relates to the purpose of this procedure, which is to enhance the prospects of social rehabilitation of sentenced persons and, as such, constitutes a framework for the judicial interpretation and administrative application of the provisions of this article with respect to the contracting parties.

Section 3 deals with the types of sanctions that can be enforced in the enforcement of foreign penal judgments. It is to be noted that it excludes ancillary civil consequences in the nature of disqualification that sometimes attach under the laws of some states for certain types of sanctions.

Section 4 recognizes the fact that the Administering Party shall assume the duty to enforce the sanction for and on behalf of the Sentencing Party, but clearly establishes that this does not mean that such enforcement necessarily requires a recognition of all aspects of the judicial proceedings and judgment. The reason for that is that some states may find it difficult to recognize a foreign penal judgment while at the same time find a way to enforce a foreign penal judgment. That is the case with respect to the United States. *See* Bassiouni, *Transfer of Prisoners between the United States, Mexico and Canada* in M.C. Bassiouni, 2 INTERNATIONAL CRIMINAL LAW, pp. 239 (1986).

Section 5 establishes the procedures to be followed between contracting parties for the transfer of sentenced persons.

Section 6 refers to the substantive conditions for accepting a transfer and to the requirement of "dual criminality", consent of both the sentenced person and the Sentencing Party, and a period of time remaining in a sentence of imprisonment of one year from the date of the request. These general conditions are found in the European Convention on the Transfer of Sentenced Persons, E.T.S. No. 112 (1983). This provision, however, must also be read in *pari materiae* with Section 7.

Section 7, the grounds for refusal are fairly self-explanatory in so far as they relate to the need for a parallel theory of jurisdiction with respect to the prosecution and conviction of the sentenced person, the requirement of "dual criminality" and the ability of the Administering Party to administer the sanction. This particular ground for refusal can apply to administrative limitations that the Administering Party may have, as well as to certain conditions dealing with the the execution of a certain type of sanction that the Administering Party may not be able to carry out. It also requires that the sentenced person be a national or permanent resident of the administering state and that relates to the purposes of the transfer, which are stated in Section 2. The provision dealing with the exclusion of political and military offenses is found in almost all treaties concerning extradition, judicial assistance and mutual cooperation in penal matters. Also, the provision on discrimination, which could be viewed separate and apart from the political offense exception is one that tends to be used as an alternative to the traditional political offense exception, which includes certain crimes of violence that seem now to be limited by concerns with terrorism. The requirement of age, may also have to do with the public policy of the Administering Party. Finally, the Administering Party's contemplation of criminal prosecution should be grounds for exclusion in order to that a person may not be transferred and then be subjected to prosecution for another crime. In that respect, it must be noticed that the general provisions of this Article also apply in that the "rule of speciality", which is established in Article III, Section 9, applies, as does the rule on re-extradition in Article III, Section 10.

Section 8 refers to the effects of accepting to enforce a sanction thereby removing competence over the sentence from the Sentencing Party, and vesting it into the Administering Party. It is to be noted that the term "competence" has been used here instead of jurisdiction since some residuary jurisdiction remains with the Sentencing Party insofar as commutation of sentence, pardon, amnesty or the like, as well as residuary jurisdiction with respect to any possible extraordinary means of review, which were not deemed part of those means of review that have been exhausted before the person has been transferred. It also establishes the basic rule that the Administering Party's judicial and administrative organs shall not have jurisdiction to consider any direct or collateral attacks on the original judgment or the sentence. But in the event the sentenced person seeks to use extraordinary means of recourse with the sentencing party, the Administering Party shall not impede that right of the individual. It also provides that certain benefits with respect to pardon, amnesty or commutation of sentence by either the Sentencing Party or the Administering Party shall inure to the benefit of the sentenced person. The Administering Party is also under a duty to provide those benefits to the sentenced person. Finally, this section covers the question of credit for time and good behavior to be given the sentenced person while under the custody of the Sentencing Party.

Section 9 is essentially the embodiment of the "rule of speciality" contained in Article III, Section 9.

Section 10 refers specifically to certain peculiarities of supervision of the conditionally released.

Section 11 deals with fines and confiscatory measures and provides that the proceeds of such fines and confiscatory measures, within the Administering Party's territory shall go to the benefit of the Administering Party. The reason for that is that the Administering Party assumes the cost of maintenance of the sentenced person.

Article X. Rights of the Individual

Section 1.

1.0. In all extradition proceedings and other forms of judicial assistance and cooperation, the individual who is the subject of said proceedings shall have the right to appear in person, to oppose the request or contemplated action of the Contracting Party, to be represented by counsel, to be heard before an ordinary tribunal and shall have the right to appeal before a reviewing court.

Commentary, Article X. Rights of the Individual

This provision was included in recognition of the desirability of acknowledging that the procedures under this Code are of importance and interest to the Contracting Parties in the prosecution or extradition of accused persons, but not to the exclusion of basic human rights to which an accused is entitled. It is intended to establish that individuals subjected to such procedures have a right to claim compliance with the provisions of this Code, and to minimum international human rights standards of such procedures. This provision is consonant with the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 Nov. 1950, and additional Protocols. See A. Robertson, *Human Rights in Europe* (1977), and D. Poncet, *La Protection de l'Accusé par la Convention Européenne des Droits de l'Homme* (1977); and with the *Universal Declaration on Human Rights* (1948), the *International Covenant on Civil and Political Rights* (1966), the *Inter-American Convention on Human Rights* (1969), and other applicable conventions. See, e.g., L. Sohn and T. Buergenthal, *International Protection of Human Rights* (1973). *See* Universal Declaration of Human Rights, 10 December 1948, G.A. Res. 217A (III); International Covenant on Civil and Political Rights, 26 December 1966, G.A. Res. 2200A, 21 U.N. GAOR Supp. (No. 16) 49, U.N. Doc. A/6316 (1966); Optional Protocol to the International Covenant on Civil and Political Rights, 16 December 1966, G.A. Res. 2200A, 21 U.N. GAOR Supp. (No. 16) 59, U.N. Doc. A/6316 (1966); European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, 218 U.N.T.S. 221, E.T.S. No. 5.

Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, 20 March 1952, 213 U.N.T.S. 262; Protocol 2 to the Convention for the Protection of Human Rights and Fundamental Freedoms, 1963, E.T.S. No. 44; Protocol 3 to the Convention for the Protection of Human Rights and Fundamental Freedoms, 1963, E.T.S. No. 45; Protocol 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, 1963, E.T.S. No. 46; Protocol 5 to the Convention for the Protection of Human

Rights and Fundamental Freedoms, 1966, E.T.S. No. 55; Inter-American Convention on Human Rights, 22 November 1969, O.A.S. Official Records Ser. K/XVI/1.1, Doc. 65, Rev. 1, Corr. 1 (January 7, 1970).

By ordinary court is meant those general courts which are not special or exceptional tribunals.