

January 1995

## A Permanent International Criminal Court: A Proposal That Overcomes Past Objections

Sandra L. Jamison

Follow this and additional works at: <https://digitalcommons.du.edu/djilp>

---

### Recommended Citation

Sandra L. Jamison, A Permanent International Criminal Court: A Proposal That Overcomes Past Objections, 23 Denv. J. Int'l L. & Pol'y 419 (1995).

This Article is brought to you for free and open access by the University of Denver Sturm College of Law at Digital Commons @ DU. It has been accepted for inclusion in Denver Journal of International Law & Policy by an authorized editor of Digital Commons @ DU. For more information, please contact [jennifer.cox@du.edu](mailto:jennifer.cox@du.edu), [digitalcommons@du.edu](mailto:digitalcommons@du.edu).

---

# A Permanent International Criminal Court: A Proposal That Overcomes Past Objections

## Keywords

International Criminal Court, Courts, Revolution, Politics

# Leonard v.B. Sutton Award Paper

## A Permanent International Criminal Court: A Proposal that Overcomes Past Objections

*Sandra L. Jamison\**

### I. INTRODUCTION

“Those who forget the past are condemned to repeat it.”

- Scripture on the Entrance Gate of Dachau, World War II Nazi Concentration Camp.

Fifty years after the liberation of the Nazi concentration camps, egregious violations of international humanitarian law continue. Bosnians, Rwandans, Haitians, and Guatemalans, for example, face genocide, torture, rape, and unjust imprisonment at the hands of repressive national regimes. Now is the time to stop these breaches of international humanitarian law, and to prevent their recurrence in the future, by creating a *permanent* international criminal court empowered to try these violators and to enforce their sentences.

Over the past 500 years, the global community has sought numerous ways to confront crimes against humanity. The proposals made have contributed overwhelmingly to the present desire to establish a fixed international criminal court, but concerns about extradition, the virtual impossibility of codifying internationally recognized crimes, and the Act of State doctrine continue to impede progress in the establishment of such a court.

---

\* J.D., University of Denver College of Law, 1995; M.A., Graduate School of International Studies, University of Denver, 1995; B.A., Tulane University, 1992. Ensign in the United States Navy Judge Advocate General Corps (JAG). The author wishes to express her sincere gratitude to Justice Leonard v.B. Sutton - former Chief Justice of the Colorado Supreme Court and former Chairman of the U.S. Foreign Claims Settlement Commission - for his generosity in funding this scholarship, which sends a University of Denver law student to the Hague Academy of International Law each summer.

In 1993, the United Nations established an *ad hoc* military tribunal, the International Tribunal for Violations of International Humanitarian Law in the Former Yugoslavia, at the Hague, to try violators of international human rights in the former-Yugoslavia (henceforth referred to as the Bosnian *ad hoc* Tribunal). To date, the court has not tried any of the alleged offenders. In Argentina in the 1980's, ex-President Alfonsín and the Sabato Commission fought to bring justice to the leaders of the *Guerra Sucia* through domestic proceedings, but, these efforts proved futile when the following president, Menem, pardoned the perpetrators.

These two phenomena lead to two conclusions: 1) the time, expense, and difficulty of establishing an *ad hoc* tribunal renders it an ineffective mechanism of deterring crime; and 2) domestic proceedings are an inadequate alternative to an international criminal court. Although they did not present long-term solutions to international crime, these two tribunals should be applauded for the pivotal role they played in furthering the principles of international criminal accountability.

In recognition of this need for accountability, the International Law Commission concluded its draft proposal for the creation of a permanent international criminal court in July of 1993.<sup>1</sup> This comprehensive proposal, with certain alterations, should serve as the centerpiece for the future of international criminal law.

The purpose of this commentary is to examine the historical efforts to develop an international criminal court, including the reasons for their various failures, and to incorporate this information into a new proposal for a workable permanent criminal court. To accomplish this goal, Section II analyzes these historical proposals, focusing on the critical contributions each has made to the concept of establishing an international criminal court. Section III analyzes the current Bosnian *ad hoc* Military Tribunal, and the International Law Commission's proposal for a *permanent* international criminal court. The final section of the paper provides a new proposal for the establishment of a permanent international criminal court that overcomes the objections set forth against the establishment of such a court. The proposal includes an outline of the institutional framework, jurisdiction, procedural laws, and enforcement mechanisms essential to an effective permanent international criminal court.

---

1. Report of the International Law Commission on the Work of its Forty-Fifth Session, U.N. GAOR, 48th Sess., Supp. No. 10, U.N. Doc. A/48/10 (1993) [hereinafter *ILC Draft*].

## II. HISTORICAL ASPECTS OF INTERNATIONAL CRIMINAL LAW

### A. 1474 to Pre-World War I

The global community has long been aware of its need for international courts to resolve international disputes. In fact, the International Court of Justice (ICJ) was initially created to resolve civil disputes, but the world still lacks a permanent international criminal court to address violations of international humanitarian law.

The idea of an international criminal court traces back to 1474, when Peter Von Hagenbush was tried and convicted by Austrians for crimes against "God and man," following his rule over the people of Breisach.<sup>2</sup> During the twentieth century, colonial powers declined while international trade, security, and humanitarian relations flourished. Countries have increasingly assented to bilateral treaties, multilateral treaties, and international conventions in exchange for greater benefits or security. The creation of an international penal code and court began at the Hague Conventions of 1899 and 1907, during which the former produced the Convention for the Pacific Settlement of Disputes, and the latter produced a "Court of Arbitral Justice."<sup>3</sup> Whereas the first Hague Peace Conference of 1899 stipulated that submission to the court would be optional, by 1907 the leaders of the international community recognized the importance of "obligatory" participation in an international forum for dispute resolution. Thus, the Court of Arbitral Justice made a proposal during the Second Hague Peace Convention of 1907, conveying this principle of obligatory arbitration.<sup>4</sup> The Convention's members agreed that the court would only go into effect upon the occurrence of three events: 1) agreement and ratification of the proposal during the Naval Conference of 1908, 2) the creation of a constitution for the court, and 3) the members' selection of judges. Two events stalled this momentum to develop an international criminal court and left the international community bereft of its court. First, the Naval Conference of 1908 never occurred, leaving ratification incomplete.<sup>5</sup> Second, the United States modified its original agreement to the principal of obligatory participation when it perceived a conflict between the jurisdictional power of the U.S. Supreme Court and the potential jurisdictional power of the proposed international criminal court. Justice Weeramantry, currently a member of the International

---

2. Joel Cavvichia, *The Prospects for an International Criminal Court in the 1990s*, 10 DICK. J. INT'L L. 223 (1992).

3. David J. Bederman, *The Hague Peace Conferences of 1899 and 1907*, in INTERNATIONAL COURTS FOR THE TWENTY-FIRST CENTURY 9-11 (Mark W. Janis, ed. 1992).

4. BENJAMIN FERENCZ, AN INTERNATIONAL CRIMINAL COURT, VOL. I. 14-15 (1980).

5. *Id.*

Court of Justice, states the problem of the Court of Arbitral Justice well: "it was neither a court, nor was it permanent."<sup>6</sup>

### B. *Post-World War I*

World War I kept the idea for an international criminal court in the background until 1919 when, at the end of the war, U.S. President Woodrow Wilson proposed both the creation of the League of Nations and a Peace Plan. This Peace Plan contained twenty-six articles, including Article 14 which proposed a Permanent Court of International Justice limited to disputes "which the parties thereto submit to it."<sup>7</sup>

In 1919, the League's Commission on the Responsibility of the Authors of the Wars and on the Enforcement of Penalties was delegated the task of investigating persons who had been involved in crimes against humanity and the laws or customs of war. The Commission considered crimes such as rape, use of poisonous gas, murders, massacres, and conspiring to wage aggressive war to be crimes against humanity and war, and therefore subject to investigation.<sup>8</sup> The Commission proposed a High Tribunal consisting of twenty-two members, chosen by the victorious powers, who would enforce "the principles of the laws of humanity and from the dictates of the public conscience."<sup>9</sup> The Americans recorded three major reservations to this proposal. First, the U.S. argued that the Commission's recommendation that Heads of State be placed on trial was an *ex post facto* law, which would violate the cherished "principle of legality" (no punishment without law, no crime without law) in the United States. Second, the United States complained that the standard of "laws and principles of humanity", adopted by the Commission, was too vague to provide individuals adequate notice of the crime.<sup>10</sup> In addition, the U.S. suggested that the differing linguistic and interpretational definitions of all of the court's governing terms could weaken the court's enforcement powers. These objections continue to surface today in debates over the establishment of a permanent international criminal court.

The U.S.'s concern, however, over *ex post facto* laws was outweighed by the desire to hold the Kaiser Wilhelm II of Germany responsible for egregious violations of humanitarian law during the First World War. Accordingly, the U.S. participated in establishing Article 227 of the 1920 Treaty of Versailles, which permitted the arraignment

---

6. Justice Weeramantry, 1994 MacDougal Law Lecture at the University of Denver College of Law (Nov. 22, 1994).

7. FERENCZ, *supra* note 4, at 27.

8. Jean Graven, *La Première Tentative Consecutive a la Guerre Mondiale de 1914-18*, in TOWARD A FEASIBLE INTERNATIONAL CRIMINAL COURT 96 (Julius Stone & Robert K. Woetzel eds., 1970).

9. FERENCZ, *supra* note 4, at 30.

10. *Id.*

of the Kaiser Wilhelm II, a Head of State, for his "supreme offense against international morality and the sanctity of treaties."<sup>11</sup> Unfortunately, the Kaiser escaped his trial by abdicating to then-neutral Holland.<sup>12</sup> His escape proved that, in the absence of adequate enforcement mechanisms or extradition procedures, the international criminal court could not function effectively. At this time, the members of the Legal Committee of the League of Nations decided that, until a criminal code was adopted by member states, there could be no court to try international criminals.

During 1920 and 1921, the Executive Council of the League of Nations commissioned an Advisory Committee of Jurists to prepare a draft statute for the Permanent Court of International Justice (PCIJ). In 1922, many states signed and ratified the draft statute, with the exception of the U.S., whose Congress failed to support the broad international measures inspired by its own president. The PCIJ became the predecessor of the International Court of Justice (ICJ) following World War II.<sup>13</sup>

Similarly, at the 1928 Havana Conference of Central American states, the participants drafted a Code of International Penal Law which codified piracy and slave trade, among others, as violations of international law. The one caveat of this Code, however, was that it would apply only to a state whose national laws also condemned this conduct.<sup>14</sup> This provision allowed nations to profit from the "good will" associated with the Penal Law, but, in effect, did not enhance the principle of universal criminal accountability. Many efforts continued in the quest to create an international criminal court. During the 1930's, the international community took a stance on the punishment of terrorists, and set up a Convention on Terrorism to meet in Geneva on April 30, 1935. The purpose of the meeting was to: 1) discuss a draft international criminal code proposed by the noted Italian scholar on humanitarian rights, Pella, 2) set forth grounds for extradition, and 3) propose, once again, the establishment of an international criminal court.<sup>15</sup> Several nations opposed the jurisdiction of the international criminal court proposed. Therefore, one year later in 1936, the proposal was amended to bifurcate the issue of terrorism from the issue of the international criminal court. This decision allowed the Convention on

---

11. *Id.* at 32.

12. Graven, *supra* note 8, at 45-46.

13. MARK W. JANIS, *INTERNATIONAL COURTS FOR THE TWENTY-FIRST CENTURY* 18 (1992).

14. FERENCZ, *supra* note 4, at 45-46. See also *Conferencias Internacionales Americanas*, 1899-1936, Carnegie Endowment, Washington, 1938, Supp., 1938-42 (Washington, 1943).

15. FERENCZ, *supra* note 4, at 49; League of Nations: *Committee for the International Repression of Terrorism, Report to the Council on the First Session of the Committee* (April 30-May 8, 1935).

Terrorism to move forward, but unfortunately left the reality of an international criminal court behind.<sup>16</sup>

By May 1938, nineteen states had signed the Convention on Terrorism, but India was the only nation to ratify the Convention. Although thirteen nations had signed the Convention for the Creation of an International Criminal Court, none of these nations ever ratified the court.<sup>17</sup> The major stumbling block for these two conventions was a controversy over whether extraditions would be 'discretionary' or 'compulsory.'<sup>18</sup> It appears that the majority of these nations were not yet willing to give up their national sovereignty to a body with compulsory jurisdiction.

### C. *Post-World War II*

After World War II, the concept of an international criminal court resurfaced in light of Nazi and Japanese wartime atrocities. In 1942, the Allies met in London's St. James Palace, to discuss the possibility of prosecuting Nazis for war crimes. The following year, the victorious powers, the United States, Great Britain and the Soviet Union, agreed to initiate criminal proceedings against the Germans.<sup>19</sup> In 1944, the United Nations set up a War Crimes Commission to investigate the allegations against the Nazis. This Commission recognized the likelihood that justice would not be served in the national court of a nation where state policy had actively participated in the atrocities committed,<sup>20</sup> and thus it created a Convention for the Establishment of an International War Crimes Court.

The Allies established the International Military Tribunal to prosecute and punish major war criminals of European Axis-power on August 8, 1945, and a similar tribunal for the Japanese war crimes on January 19, 1946. They stipulated that subject matter jurisdiction would consist of the following: 1) Crimes against the Peace, defined as the planning, preparation, initiation, or waging of a war of aggression, or a war in violation of international law, treaties, agreements or assurances or participation in a common plan or conspiracy for any of the foregoing; 2) Crimes against Humanity, defined as crimes such as murder or extermination<sup>21</sup>; 3) War Crimes, as delineated in the War

---

16. *Id.* at 50-51.

17. *Id.* at 55-56.

18. *Id.*

19. Cavvichia, *supra* note 2, at 3.

20. FERENCZ, *supra* note 4, at 64; United Nations War Crimes Commission, *Historical Survey of the Question of International Criminal Jurisdiction*, C.50(1) (Sept. 30, 1994).

21. *Charter of the International Military Tribunal for the Far East* [hereinafter *Charter of the IMTFE*], April 26, 1946, Art. 5, in *INSTITUTE FOR WORLD ORDER, CRISIS IN WORLD ORDER, WAR CRIMINALS, WAR VICTIMS* 26-28 (1971). These provisions echoed the Nuremberg Principles set out in 1946 for the Nuremberg Trials



Conventions; and 4) Conspiracy to commit any of these crimes. All four of these crimes were recognized by the world community as general principles of international law.<sup>22</sup>

Article 1 of the Charter of the International Military Tribunal proposed a tribunal "for the just and prompt trial and punishment of the major war criminals of the European Axis."<sup>23</sup> There were to be four justices total, one per country from the United States, the United Kingdom, the Soviet Union, and France. Any conviction required a majority of the vote. In the event of a tie, Article 4 allowed the President, selected at the beginning of the trial by all members, to cast the deciding vote. Article 6 granted the International Military Tribunal jurisdiction over Crimes against Peace, War Crimes, and Crimes against Humanity. The four powers chose the U.S. Chief Prosecutor, Prosecutor Jackson, and statutory provisions were made for a fair trial.<sup>24</sup> This format turned out to be highly successful for the *ad hoc* tribunal.

In Nuremberg, on October 18, 1945, United States Chief Prosecutor Jackson indicted twenty-four Nazi criminals for Crimes against Peace, Humanity, War Crimes, and Conspiracy to commit any of these crimes. Nearly one year later, on October 1, 1946, the final judgment of the court was read aloud in open court. Three defendants were fully acquitted, several others received partial acquittals and prison sentences, and ten criminals were executed by hanging.<sup>25</sup>

During the time that the Nuremberg International Military Tribunal was active, U.S. General Douglas MacArthur set up a similar military tribunal. The International Military Tribunal for the Far East (IMTFE) in Tokyo was established to prosecute Far Eastern criminals on the same four charges of Crimes against Peace, Crimes against Humanity, and War Crimes and Conspiracy, and under the same subject matter jurisdiction as Nuremberg.<sup>26</sup> The trial lasted for two and one half years, resulting in the conviction of all twenty-eight defendants. A few defendants received light sentences, seven men were sentenced to death by hanging, but the majority of the defendants received life imprisonment.<sup>27</sup>

Following the Tokyo Trials, many criticisms surfaced about the manner in which they were conducted. The criticisms included charges that: 1) the prosecution did not present its case fairly when it refused

---

held in London.

22. Cavvichia, *supra* note 2, at 3.

23. FERENCZ, *supra* note 4, at 70.

24. *Id.* at 70-71.

25. *Id.* at 74.

26. *Charter of the IMTFE*, *supra* note 21. The provisions of the Tokyo War Crimes Tribunal echoed those set out in 1946 for the Nuremberg Trials.

27. *Id.*

to examine certain pieces of defense information; 2) the verdicts were not based on the evidence presented at trial; and 3) the guilt of the defendants was not proven beyond a reasonable doubt.<sup>28</sup> However, no member of the Trials nor the Nuremberg Tribunal did anything to address these concerns. The victorious powers of World War II walked away from the trials satisfied that justice had been done, while the vanquished walked away feeling that injustice had been imposed.

What distinguishes the Tokyo and Nuremberg trials from the current Bosnian *ad hoc* Tribunal is the fact that the earlier trials were imposed by victorious nations on defeated nations. The *ad hoc* tribunal for the Bosnian war crimes, conversely, charges both the victorious and the defeated parties in Bosnia before an "impartial" tribunal. This distinction may quell some fears that the Bosnian tribunal will be unjust.

To prevent future similar concerns as those raised by the international community about the Tokyo trials, the United Nations General Assembly, in 1948, requested that its International Law Commission (ILC) "study the desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide or other crimes over which jurisdiction will be conferred upon that organization by international conventions."<sup>29</sup>

In 1949, several Geneva Conventions extended the list of war crimes to include torture, international infliction of suffering, serious bodily injury, forcing prisoners to work for imprisoners, and the deprivation of a right to a free trial.<sup>30</sup> In August of 1949, these Geneva Conventions established new humanitarian standards for the treatment of wartime prisoners and civilians, willful killing and torture, heightened standards for 'military necessity' defenses, and the possibility of a foreign country exercising extradition over another nations' military personnel. One year later, in 1950, the ILC concluded that the recent Geneva Conventions be drafted into a "Code of Offenses," which would supplement the Nuremberg Principles and create a larger codification of international criminal law. Mr. Jean Spiropoulos of Greece was charged with this task.<sup>31</sup> Mr. Spiropoulos submitted a report and a preliminary draft Code of Offenses to the ILC which delineated crimes such as the violations of Customs of War, Conspiracy, and

---

28. RICHARD H. MINEAR, *VICTORS' JUSTICE: THE TOKYO WAR CRIMES TRIAL* 204-208 (1971). This information is based on a letter written by Ben Bruce Blakeney, on behalf of the Defense Counsel at Tokyo, to General MacArthur on November 21, 1948.

29. G.A. Res. 260 B (III), U.N. Doc. A/810 at 177 (1948).

30. Rosemarie Buchanan, *Battling the Crimes of War: M. Cherif Bassiouni is on the Front Lines of International Human Rights Law*, *STUDENT LAW*. 14 (American Bar Association, May 1993).

31. BENJAMIN FERENCZ, *AN INTERNATIONAL CRIMINAL COURT*, VOL. II 17-18 (1980).

Crimes against Humanity.<sup>32</sup> The ILC realized that, in addition to a Code of Offenses, enforcement provisions must be included in the realm of international criminal law, or the process would be doomed to fail.<sup>33</sup> The efforts to create an international criminal court were too important to allow weak enforcement provisions jeopardize its effectiveness. Its members felt that the aggression of one man should no longer be able to bring the world to its knees, as it had during the second world war.

#### D. *The Cold War Era*

Following the Genocide Convention, reports and proposals for an International Criminal Court continued to emerge. At this time, however, the Soviet Union began to articulate opposition to an international criminal court as an unnecessary infringement upon its state sovereignty. This view characterized the Soviet Union's position in the Security Council over this issue throughout the Cold War, effectively paralyzing the Council from taking any action.

After 1950, the U.N. General Assembly appointed a Committee on International Criminal Jurisdiction which made slow progress for the following reasons. The Committee's first major controversy arose in the context of defining "aggression" as a violation of international law. The Committee appointed a fifteen-member Special Committee to define "aggression" and to sort through the various state-adopted interpretations. Without consensus on "aggression" there could be no court, and without a court, no jurisdiction.<sup>34</sup> This disagreement over the definition of "aggression" continued to paralyze the international criminal arena until 1974. In addition, the escalation of the Cold War and the Suez Crisis diverted the U.N. attention away from an international criminal court.<sup>35</sup>

During the mid to late 1960's, concern over international crime continued to escalate, re-emerging in the context of apartheid and racial discrimination. The following international conventions demonstrated the world's desire to try individuals who committed crimes against humanity: 1) the Convention for the Suppression of Unlawful Seizure of Aircraft (1970), 2) the Declaration of Principles of International Law Concerning Friendly Nations and Cooperation Among States in Accordance with the Charter of the United Nations (1970), 3) the International Convention for the Suppression and Punishment of the Crime of Apartheid (1973), 4) the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (1973), 5) the Terrorism Convention

---

32. *Id.* at 20-22.

33. *Id.* at 23.

34. *Id.* at 40-46.

35. See generally FERENCZ, *supra* note 31.

(1979), and 6) the International Convention Against the Taking of Hostages (1979).<sup>36</sup> The world continued slowly, but steadily, toward a society in which its members would be responsible for their criminal actions.

### III. THE CURRENT BOSNIAN AD HOC TRIBUNAL AND FOUR PROPOSALS FOR A PERMANENT INTERNATIONAL CRIMINAL COURT

In the early 1990's, proposals for an international criminal court escalated due to the break-up of the former Soviet Union, the demise of bi-polar stability, the rise of nationalistic and aggressive tendencies by many nations and the internationalization of trade and policy. As a result, the following two significant events have occurred: 1) an *ad hoc* military tribunal, created by the United Nations, currently functions at the Hague to try the violators of human rights in the former-Yugoslavia; and 2) four proposals for the creation of a permanent international criminal court have emerged. These four proposals include: 1) the 1953 U.N. Committee proposal; 2) the 1992 Bryan MacPherson proposal created through an independent organization from the U.N.; 3) the 1992 American Bar Association (A.B.A.) Task Force on an International Criminal Court; and 4) the 1993 International Law Commission (ILC) draft proposal. Both the Bosnian *ad hoc* War Crimes Tribunal and the most recent *permanent* court proposal, the ILC draft statute, will be addressed in detail below. The remaining proposals will be discussed throughout the remainder of this paper.

#### A. *The Bosnian Ad Hoc Military Tribunal*

The current upheaval and violence in the former-Yugoslavia caused the U.N. Secretary General, Mr. Boutros-Ghali, to recommend the establishment of an *ad hoc* International Court for War Crimes in Bosnia, under Chapter VII of the U.N. Charter, in 1993. This chapter authorizes U.N. intervention to counter a threat to peace.<sup>37</sup> The court is located at the Hague.<sup>38</sup> At present, most of the mechanisms of the court have been put into effect.

The court began in 1992 when the noted international criminal law scholar, M. Cherif Bassiouni, initiated investigations into war atrocities committed in the former-Yugoslavia through a five-member U.N. Commission.<sup>39</sup> Based on the Commission's findings that there was sufficient evidence to justify the establishment of a court, the U.N.

---

36. *Id.*

37. Clare Dyer, *Judge of Our Inactions*, THE GUARDIAN, Oct. 1, 1994 at 29.

38. *International Community Prepares Implementation of Peace Plan*, AGENCE EUROPE, Reuters, May 6, 1993, available in WL DIALOG, INT-NEWS-C.

39. Sharon Cohen, *Team Compiles Bosnia Atrocities for War Crimes Trial*, L.A. TIMES, May 1, 1994, at A1, available in LEXIS, NEXIS Library, INT'L File.

Security Council established the tribunal in May, 1993.<sup>40</sup> On April 16, 1994, the U.N. General Assembly voted to provide eleven million dollars to the military tribunal to charge and prosecute those responsible for crimes in Bosnia.<sup>41</sup>

The full panel of eleven judges was elected by the U.N. General Assembly on August 11, 1994. Six judges are to serve in two separate trial courts on panels of three, and the remaining five judges are to serve as an appeals court.<sup>42</sup> According to its Chief Prosecutor, Judge Richard Goldstone of South Africa, the first trials are scheduled to take place in early in 1995.

Once elected, the judges adopted ninety-one rules governing the detention of persons awaiting trial or appeal before the Tribunal, guidelines for the assignment of counsel, and a unique array of individual protections of witnesses and victims.<sup>43</sup> Upon completion of the trials, it has already been determined that the Tribunal will be prohibited from issuing a death penalty sentence, and prison sentences will be carried out in any of the countries which have offered use of prison space.<sup>44</sup> The Rules of Detention contain a series of basic principles, ranging from the management of the detention unit, the rights of detainees, and the removal and transportation of detainees.<sup>45</sup> Twenty-four Dutch prisons have been set aside for use of the tribunal to hold those under indictment.<sup>46</sup> The use of Dutch prisons for those under indictment will ensure that tribunal staff can oversee the treatment of prisoners to make certain that international standards of fair treatment of prisoners are upheld.

The Tribunal has also adopted Rules of Procedure and Evidence which relate to procedures for granting legal assistance, criteria for fees and expenses, facilities and guidelines for assigned counsel, and disciplinary measures for assigned counsel.<sup>47</sup> In particular, the Tribunal amended Rule 96 to include individual protection for victims of sexual assault or rape.<sup>48</sup>

The court is based on the premise that defendants must be pres-

---

40. *Id.*

41. Jean Michel Stoullig, *Commission of Experts Presents Yugoslav War Crime Report*, AGENCE FRANCE PRESSE, Apr. 16, 1994 (Geneva), available in LEXIS, NEXIS Library, INTL File.

42. David Lefensky, *3 Strikes and You're In — In an International Criminal Court*, N.Y.L.J., Aug. 11, 1994 at 2.

43. *International Tribunal for Prosecution of War Crimes in Former Yugoslavia*, FEDERAL NEWS SERVICE, May 13, 1994.

44. *Id.*

45. *Id.*

46. Robert Evans, *First Yugoslavia Crime Indictments Said Due Soon*, REUTERS, Sept. 9, 1994.

47. *Id.*

48. *Id.*

ent for trial. Although technically defendants will not be tried *in absentia*, if an accused fails to appear for trial, three judges will hear the evidence, and may elect to issue a warrant to Interpol to find the defendant.<sup>49</sup> Any convictions resulting from the tribunal are to be carried out in a state of the tribunal's choice.<sup>50</sup> As Chief Prosecutor Goldstone points out, the tribunal has an unfortunate Achilles heel. While the tribunal is proceeding on the assumption that all countries will comply with their international obligations, it has no ability to force states to surrender their accused war criminals for trial.<sup>51</sup> In fact, Serbia presently refuses to recognize any legitimacy of the court.<sup>52</sup> In light of this incapacity, a strong likelihood exists that some, perhaps many, defendants will flee to other states. The Tribunal realizes that this fact leaves a complicated task for Interpol, and perhaps will cause the court to function in name only.

Hopefully, now that most of the administrative and procedural concerns of the court have been addressed, more time can be spent seeking perpetrators in Bosnia. So far, only one defendant has been named, located, and charged. A former Bosnian Serb prison guard, Dusan Tadic, was arrested in Germany in February, 1994,<sup>53</sup> and officially charged at the Hague on November 8, 1994.<sup>54</sup>

#### B. *The International Law Commission Draft*

While the Bosnian *ad hoc* Court is an important interim step in the development of international criminal law, the U.N. has determined that the world ultimately still needs a *permanent* international criminal court. This decision followed the release of a report by the ILC in 1990, arguing that human rights violations were on-going mechanisms of state policy throughout the world. The report examined the options pertaining to the development of an international criminal court, and concluded that a permanent international criminal court must be created as part of the United Nations.<sup>55</sup> In 1991, at its forty-third session, the ILC adopted the draft articles of the Code of Crimes

---

49. *Id.*

50. *War-Crimes Investigator Set To Present Findings*, AGENCE FRANCE PRESSE, Oct. 10, 1994 (The Hague), available in LEXIS, NEXIS Library, INT'L File.

51. Dave Todd, *War Crimes Trials Set to Begin Soon: U.N. Tribunal About To Hand Down Indictments For 'Crimes Against Humanity' In Former Yugoslavia*, THE VANCOUVER SUN, Sept. 21, 1994, at A17, available in LEXIS, NEXIS Library, INT'L File.

52. Mark Fuller, *Yugoslavia: Croatia, Bosnia Set to Surrender War Crimes Suspects*, INTER PRESS, Oct. 11, 1994.

53. *Urgent*, AGENCE FRANCE PRESSE, Oct. 14, 1994. (The Hague), available in LEXIS, NEXIS Library, INT'L File.

54. *Id.*

55. *Draft Code Against the Peace and Security of Mankind: Report of the Working Group Established Pursuant To The Request From the General Assembly to The International Law Commission*, U.N. Doc. A/CN.4/L.454 (1990).

against the Peace and Security of Mankind and transmitted these articles, through the Secretary General, to the governments of the U.N. member states for comments, feedback and observations.<sup>56</sup> In 1992, the ILC set up a Working Group to consider further the issue of international criminal jurisdiction<sup>57</sup> and to incorporate the feedback from member states on the establishment of an international criminal court. These steps led the Security Council to adopt Resolution 780 on October 6, 1992, requesting the Secretary General to establish an impartial Commission of Experts to examine and analyze the information submitted, and to conduct such further investigations as necessary to report to the Secretary General its conclusions on the evidence of grave breaches of international humanitarian law committed in the territory of the former-Yugoslavia.<sup>58</sup>

#### IV. ARGUMENTS FOR AND AGAINST THE COURT

The key concerns raised by several nations who are reluctant to establish a permanent international criminal court include the following issues: 1) sovereignty; 2) jurisdiction (subject matter and personal); 3) the availability of *ad hoc* courts in its place; 4) cost and bureaucracy of the court; 5) enforcement; 6) court mechanisms and 7) procedural mechanisms of the court. Each is discussed separately below.

##### A. *Sovereignty*

Because sovereignty has long been viewed as the most fundamental right of a nation, many nations continue to believe that any infringement upon sovereignty is a threat to their livelihood. However, the internationalization of events and economics over time has created a world in which the sovereign rights of one nation do infringe upon the rights of another. For example, Bosnia's internal civil war has caused a mass exodus of Bosnians emigrating to other European nations, requiring medical attention, shelter, food, and other resources.<sup>59</sup> Bosnia's alleged "sovereign" rights over internal matters are impacting the domestic capabilities of other European nations.<sup>60</sup>

One way suggested to mitigate the sovereignty concern is by creating a court with "concurrent jurisdiction" between national courts and the international court. This allows the state to bring the defendant to trial, with the option of obtaining a domestic or an internation-

---

56. *Official Records of the General Assembly*, U.N. GAOR, 46th Sess., Supp. No. 10, at para. 173-174, U.N. Doc. A/46/10 (1993).

57. *Official Records of the General Assembly*, U.N. GAOR, 47th Sess., Supp. No. 10, at para. 98, U.N. Doc. A/47/10 (1993).

58. 75 U.N.T.S. 970-973; U.N. Doc. S/Res/780 (Oct. 6, 1992).

59. See generally IVANA NIZICH, *WAR CRIMES IN BOSNIA-HERZEGOVINA (HELSINKI WATCH)* (1992).

60. *Id.*

al proceeding. Although providing the state more sovereignty on this issue, there may be some other problems with "concurrent jurisdiction." In particular, "concurrent jurisdiction" may undermine the legitimacy of the international court, and/or it may restrict the procedural rights of individuals brought before another country's domestic court.

The absolute doctrine that a state is supreme in its own authority, and need not take into account the affairs of other nations, is no longer tenable.<sup>61</sup> In contrast, an international criminal court will help nations to protect their sovereign rights over domestic issues of crime committed by foreign individuals, because it empowers them to act on violations of criminal law that were previously out of their control. Therefore, it is more likely that "by limiting its sovereignty, a state proves that it is sovereign."<sup>62</sup>

## B. *Jurisdiction*

Jurisdictional issues raise the questions of: Which laws will be recognized in the international criminal court? (*subject matter jurisdiction*) and To whom the laws will apply? (*personal jurisdiction*). In order for an international criminal court to assert *subject matter jurisdiction* over an individual or state, one of the following must exist: 1) an international criminal code must exist enumerating crimes to which the country in question is not a 'persistent objector'; 2) a codification of international conventions relating to criminal law; or 3) some type of agreement or assent by the country to be bound to this law. In order for an international court to have *personal jurisdiction* over an individual, states must sacrifice some portion of their state sovereignty guaranteeing them rights to adjudicate acts which are: 1) committed by their citizens (nationality); 2) done to one of their citizens (protective interest); 3) committed on their territory (territoriality); 4) committed against their government (protective interest); or 5) deemed to be of universal interest to the world community (universal interest). The proposals for an international criminal court concern some nations because they seek to go beyond these internationally accepted bases of jurisdiction.

### 1. Subject Matter Jurisdiction

Any established court or criminal code must address: 1) which crimes will be subject to its jurisdiction; and 2) whether the court will have exclusive or concurrent jurisdiction with the national courts over these crimes. Each is discussed below.

---

61. John W. Bridge, *The Case for an International Court of Criminal Justice*, in INTERNATIONAL COURTS FOR THE TWENTY-FIRST CENTURY 225 (Mark W. Janis ed., 1992).

62. M. CHERIF BASSIOUNI & VED P. NANDA, A TREATISE ON INTERNATIONAL CRIMINAL LAW: VOLUME II, JURISDICTION AND COOPERATION 17 (1986).



a. Crimes

Currently, customary international law and conventions define the parameters of international criminal law. Although customary law is not codified, it forms international law because its crimes maintain a high level of universal condemnation. To date, twenty-two crimes have been codified in the international community through both custom and convention: 1) Aggression, 2) War Crimes, 3) Unlawful Use of Weapons, 4) Crimes Against Humanity, 5) Genocide, 6) Racial Discrimination and Apartheid, 7) Slavery, 8) Torture, 9) Unlawful Human Experimentation, 10) Piracy, 11) Aircraft Hijacking, 12) Threat and Use of Force Against Internationally Protected Persons, 13) Taking of Civilian Hostages, 14) Drug Offenses, 15) International Traffic in Obscene Publications, 16) Destruction and/or Theft of National Treasures, 17) Environmental Protection, 18) Theft of Nuclear Materials, 19) Unlawful Use of Mails, 20) Interference with Submarine Cables, 21) Falsification and Counterfeiting, and 22) Bribery of Foreign Public Officials.<sup>63</sup>

Because outrage in the world community has been so high against these throughout this century, these crimes have been identified and outlawed in the following: 1) Geneva Protocol of 1925, which outlawed the use of chemical and bacteriological weapons; 2) the Kellogg-Briand Peace Pact of 1928, which attempted to outlaw war as a means of state policy; 3) the Nuremberg and Tokyo trials, which punished violators of the international laws of war; and 4) League of Nations and the United Nations in their perseverance against acts of aggression by nations.

Through various Geneva Conventions, the world community has sought to regulate military conduct in armed conflicts by establishing the concept of 'just' and 'unjust' wars.<sup>64</sup> In particular, the War Convention codified articles to prevent rape, undue forced labor, prisoner of war mistreatment, and to set standards for noncombatant immunity, war against civilians, and guerilla warfare.<sup>65</sup> For any charges levied under these articles, the proportionality of the measure and the military necessity of the act both play critical roles in determining the level of culpability.<sup>66</sup>

The drafters of the War Convention granted Universal Jurisdiction over war crimes in Articles 49, 50, 129, and 146 of the Convention. However, to this day, the only two bases of jurisdiction used in allega-

---

63. M. CHERIF BASSIOUNI, *INTERNATIONAL CRIMINAL LAW, VOL I: CRIMES* 135 (1986).

64. M. CHERIF BASSIOUNI, *INTERNATIONAL CRIMINAL LAW, VOL. III: ENFORCEMENT* 205 (1987); see also MICHAEL WALZER, *JUST AND UNJUST WARS* (1977).

65. See generally WALZER, *supra* note 64.

66. *Id.*

tions of these crimes have been territoriality and nationality.<sup>67</sup> Perhaps these nations are reluctant to invoke Universal Jurisdiction out of fear that another nation may use it later "in kind" to obtain jurisdiction. While there is a need to regulate many other international crimes, such as environmental terrorism or carelessness, and international drug trafficking, these crimes have not achieved nearly the level of international condemnation as Crimes Against Peace and Crimes Against Humanity. The United Nations recently set up a Commission on Narcotic Drugs, and an International Narcotics Control Board, to set the framework for future codified international drug trafficking laws. These ongoing attempts at crime codification will prove fruitful when the international criminal court is well underway, and considers expanding its jurisdiction.

The 1992 MacPherson proposal sets out the creation of a complete international code of crimes as a long-term goal.<sup>68</sup> In the interim, MacPherson confers subject matter jurisdiction only over War Crimes and Crimes against Peace.<sup>69</sup> MacPherson suggests that jurisdiction over any other crimes be conferred through separate conventions, protocols or agreements as nations are willing to do. He thus suggests building international criminal law on a step-by-step basis, which could eventually lead to full consent by nations over all crimes. This proposal may be preferable to the ILC draft statute which calls for the immediate codification of a long list of international crimes because states may not be willing to buy-in to such a large infringement on sovereignty.

The 1992 A.B.A. Task Force, conversely, would expand jurisdiction to include crimes such as drug trafficking, genocide, and torture, arguing the need for regulation of these activities.<sup>70</sup> Although this plan is applauded for its brazen initiative, it is unlikely that many nations are currently willing to place limitations on their own drug trafficking practices.

The 1993 ILC proposal has not yet resolved its position on jurisdiction. It limits subject matter jurisdiction of the following Conventions: the Genocide Convention; the Geneva Conventions; the Unlawful Seizure of Aircraft Convention; the Apartheid Convention; the Convention Against the Taking of Hostages; and the Safety of Maritime

---

67. BASSIOUNI, *supra* note 64, at 230.

68. BRYAN F. MACPHERSON, AN INTERNATIONAL CRIMINAL COURT: APPLYING WORLD LAW TO INDIVIDUALS, Monograph #10, THE CENTER FOR U.N. REFORM EDUCATION, Washington, D.C., at 32 (1992).

69. *Id.*

70. American Bar Association Task Force on an International Criminal Court, New York State Bar Association Joint Report with Recommendations to the House of Delegates: Establishment of an International Criminal Court, 27 THE INT'L LAW. 270 (AMERICAN BAR ASSOCIATION, Spring 1993) [hereinafter A.B.A. Task Force].

Navigation;<sup>71</sup> and provides three ways that nations can accept such jurisdiction: 1) *comprehensive opt-in*, 2) *selective opt-in*, and 3) *selective opt-out*. Alternative A provides a *comprehensive opt-in* declaration to the court, stating that the state accepts the court's jurisdiction over all of its crimes.<sup>72</sup> Alternative B provides each member state a *selective opt-in* clause for every individual crime to which the state wishes to confer jurisdiction. Alternative C provides a *selective opt-out* provision for any crime to which a state does not wish to be party. Unfortunately, the commentary to the article shows the ILC leaning toward the second option, which allows states to *opt-in* only to those crimes they desire. This *opt-in* method would result in considerable confusion, leaving most nations wondering which crimes particular states were not supposed to violate, and causing the regulation of international crime to be little better off than it is under the current system. Additionally, the ILC Draft does not propose that any of the Conventions actually be codified into law, but rather that the states, on their own initiative, be allowed to choose their own obligations under the multilateral conventions. This approach may not send a strong enough message to international criminals to serve as an effective deterrent. What thief would *opt-in* to a law prohibiting theft?

Perhaps better in the global view would be a system under which only a few crimes were defined, such as genocide, apartheid, and hostage-taking, but were strictly enforced against ALL member states. Later, when the court gains the respect of its members, these members could agree to expand the court's jurisdiction to a larger number of crimes. This concept may be preferable to a court which is unable to obtain jurisdiction over a consistent body of international crime.

#### b. Exclusive or Concurrent Jurisdiction

The extent to which exclusive jurisdiction, concurrent jurisdiction, or transfer proceedings should apply to these international crimes is also of paramount importance to this discussion.

Under exclusive jurisdiction, states give up *all* jurisdictional rights over international crimes within the jurisdiction of the international criminal court.<sup>73</sup> Although exclusive jurisdiction would probably ensure the most coherent and consistent body of international criminal law, few states would sacrifice such a large portion of their sovereignty before the court gains any legitimacy.<sup>74</sup> It is possible that an international criminal court could have exclusive jurisdiction over some international crimes, but would reserve concurrent jurisdiction for others.<sup>75</sup>

---

71. *ILC Draft*, *supra* note 1, at 271-276.

72. *Id.* at 274-275 (art. 23).

73. A.B.A. Task Force, *supra* note 70, at 266-267.

74. *Id.*

75. M. Cherif Bassiouni and Christopher L. Blakesly, *The Need for an Interna-*

Concurrent jurisdiction, conversely, would allow a state to decide, on a case-by-case basis, if it would like to submit a criminal case to the international criminal court, or if it would prefer to make a domestic adjudication on the matter. A transfer of proceedings approach would allow the international criminal court to apply the laws of the state which also has jurisdiction in the international court, and merely transfer the location of the case to the international criminal court. This approach may be beneficial to maintain those national procedural laws in the international court, in the event that the international laws provide fewer procedural guarantees than the national laws. However, in some countries, such as the United States, this latter approach may violate the national constitution, which guarantees its citizens a judicial body established by the U.S. Congress.<sup>76</sup>

M. Cherif Bassiouni supports concurrent jurisdiction because it fulfills the states' sovereignty concerns and allows the member states either to transfer proceedings if they choose, or to retain them in the national court under its own jurisdiction.<sup>77</sup> To facilitate this process, Bassiouni proposes a mechanism, called a *de facto* default, which would transfer proceedings to the international court if the state has failed to exercise its own jurisdictional opportunity.<sup>78</sup> Further, if the state chooses to adjudicate the claim itself, and fails to prosecute adequately, then another state should be able to bring the action before the international criminal court as a challenge to the state's action.

Both the 1953 U.N. Draft, in Article 26,<sup>79</sup> and the 1992 A.B.A. Task Force<sup>80</sup> preferred the option of "concurrent jurisdiction" between the national courts and the international court.

MacPherson's 1992 Draft, in Article 6, proposes that exclusive jurisdiction and concurrent jurisdiction be blended so that the international criminal court would have exclusive jurisdiction over major war crimes, and concurrent jurisdiction with the national courts on other international law issues.<sup>81</sup> The exclusive jurisdiction over war crimes and heinous crimes, such as genocide, would alleviate the "Argentinean problem," where military members brought to trial were later pardoned by a new Administration.

---

*tional Criminal Court in the New International World Order*, 25 VAND. J. TRANSNAT'L L. 115, 170-172 (1992).

76. A.B.A. Task Force, *supra* note 70, at 266-67.

77. Bassiouni and Blakesly, *supra* note 75, at 171-174.

78. *Id.*

79. BASSIOUNI, *supra* note 64, at 251.

80. A.B.A. Task Force, *supra* note 70, at 268.

81. MACPHERSON, *supra* note 68, at 52.

## 2. Personal Jurisdiction

Personal jurisdiction determines who will be subject to the jurisdiction of the court. The 1992 A.B.A. Task Force and the 1953 U.N. Commission proposal both agree on personal jurisdiction. This proposal stated that both the state where the crime was committed and the state of nationality of the accused must consent to jurisdiction of the international criminal court in order for the court to obtain personal jurisdiction over the individuals.<sup>82</sup> These proposals are not very far reaching, however, because any nation unwilling to extradite an individual under the current international legal framework would likewise refuse to turn this individual over to the international court's jurisdiction. Even the 1992 A.B.A. Task Force recognized the likelihood that the U.S. would not grant jurisdiction to an international court if the crime was against the United States, and the offender could be located on its territory.<sup>83</sup> Establishing a tough bottom line on personal jurisdiction is necessary to prevent the international criminal court from following the ICJ's poor record of obtaining jurisdiction.

In 1992, the MacPherson proposal noted that personal jurisdiction must be competent over any natural person, whether the head of government, a public official, or a private individual, and that this jurisdiction may be conferred on the court by convention, agreement, or unilateral declaration.<sup>84</sup> In addition, this personal jurisdiction must be conferred either by the state wherein that accused is located, a state which is authorized to obtain custody, or any state which would have jurisdiction based on domestic or international law.<sup>85</sup> This proposal is more progressive in that it only requires one of the above mentioned parties to consent to jurisdiction, not both.

### C. Problems With An *Ad Hoc* Court

Many of those resistant to a permanent international criminal court recognize the need to regulate international crime, but they argue that *ad hoc* courts can be established as they are needed, eliminating the bureaucracy of a permanent international criminal court.

Supporters of a permanent court counter that, first, an *ad hoc* court, such as the Bosnian *ad hoc* War Crimes Tribunal, may violate the principle of legality: "Nullum Crimen Sine Lege, Nulla Poena Sine Lege" (no crime without law, no punishment without law).<sup>86</sup> It is difficult for an *ad hoc* court to place individuals on notice of its laws if it is not in existence. Also, these scholars argue that it would be a gross

---

82. A.B.A. Task Force, *supra* note 70, at 268.

83. *Id.* at 269.

84. MACPHERSON, *supra* note 68, at 52-3 (arts. 5, 6).

85. *Id.*

86. BASSIOUNI, *supra* note 64, at 226.

injustice to the international community *not* to hold an international criminal liable for egregious violations of international law.<sup>87</sup> In *U.S. v. Von List*, a case heard during the International Military Tribunal at Nuremberg, the court held that:

"it is not essential that a crime be specifically defined and charged in accordance with a particular ordinance, statute, or treaty if it is made a crime by international convention, recognized customs, and usages of war, or the general principles of criminal justice common to civilized nations generally."<sup>88</sup>

Thus, if it would be reasonable to assume that the individual would know that a particularly "heinous" crime would be punishable by law, then some individuals argue that the principle of legality is not violated with an *ad hoc* court.<sup>89</sup> These justifications have been used to justify prosecution in all of the *ad hoc* courts to date. However, an international criminal code and court is a highly effective way of providing notice to the international community of its subject matter jurisdiction (crimes), and to *deter* crime effectively at the outset.

Secondly, supporters of a permanent criminal court argue that *ad hoc* courts do not deter crime as effectively as a permanent court. An international criminal will not be afraid of a punishment institution that does not exist. There is a strong argument that Nuremberg and Tokyo, although highly effectively at an *ex post facto* punishment of war criminals, has failed to deter *ex ante* other international criminals from committing the same crimes. Proponents point out that one need only examine the existence of state repression and genocide in the last fifty years to sustain this argument.

Thirdly, *ad hoc* courts require more time and expense to create than it would take to maintain a permanent court. The current *ad hoc* military tribunal at the Hague demonstrates that it takes years to establish a court, select judges, secure funding, and initiate proceedings. Throughout history, these factors have kept all but three such courts from being created. The Nazi and Japanese atrocities had endured for years prior to the Allied victory and subsequent proceedings, and the Bosnians faced years of torture before the initiation of proceedings. In contrast to these three trials, the Kurds, subject perhaps to the longest repression in this century, have never warranted enough attention from the world community to establish an *ad hoc* court. Similarly, the Rwandans, Haitians, and Guatemalans will continue to suf-

---

87. ROBERT K. WOETZEL, *Nullum Crimen Sine Lege, Nulla Poena Sine Lege*, in TOWARD A FEASIBLE INTERNATIONAL CRIMINAL COURT 228-9 (Robert K. Woetzel & Julius Stone eds., 1970).

88. *Id.* at 229.

89. *Id.* at 228.

fer from unredressed violations of human rights if the world continues to rely on *ad hoc* courts. A permanent institution must be available on an on-going basis to try perpetrators of human rights violations in *all* nations of the world.

#### D. *Bureaucracy and Cost*

In addition to the issues of sovereignty, jurisdiction and *ad hoc* courts, scholars have argued that the establishment of an international criminal court would unduly increase the number of international organs, and augment accompanying expense and obligation. Instead, these states prefer to limit the number and scope of international institutions.<sup>90</sup> This solution, however, does not address the continuing threat of international criminals. In order to regulate international crime, full participation by all countries in the world is needed. Any reluctance on the part of nations to participate will damage the legitimacy of this court, and likely, the existence of other international organs. Besides, there would be little benefit from a court if most states refuse to participate in it.

Secondly, some fear that the court may become paralyzed by an overloaded court docket if all individuals are given the opportunity to bring their own cases to the court. A carefully drafted court, however, can include a Committing Chamber to screen applicants and cases prior to obtaining personal jurisdiction and proceedings.

Thirdly, some states, who support efforts to regulate international crime, believe that the International Court of Justice should house these international criminal proceedings, instead of creating a new court.<sup>91</sup> (This solution would obviously require the ICJ to expand its jurisdiction.) Since the International Court of Justice has limited means of enforcement available to it at present, however, this alternative may not be effective. Further, an amendment to the U.N. Charter to expand the ICJ's jurisdiction is no less complicated a procedure than a separate ratification process for the new international criminal court through the U.N. General Assembly. Fourth, a court specifically geared towards the resolution of international crime should be staffed with specialists in international criminal law, and not with the general jurisdiction judges of the ICJ.

#### E. *Enforcement*

Adequate enforcement of international criminal law is essential to the success of an ICC and its anticipated deterrent effect on international crime. As Robert A. Friedlander states: "the history of public

---

90. Robert A. Bloom, *Main Draft Statutes*, in TOWARD A FEASIBLE INTERNATIONAL CRIMINAL COURT 161 (Julius Stone & Robert K. Woetzel eds., 1970).

91. *Id.*

international law over the past three and a quarter centuries has demonstrated clearly and convincingly that direct enforcement in a community of mutually competing and unequal sovereignties has rarely occurred.<sup>92</sup> Friedlander also asserts that any criminal or penal statute without ample enforcement provisions is at best an 'indirect enforcement model,'<sup>93</sup> which will not adequately deter crime.

Many critics of the international criminal court argue that it would not be able to enforce its judgments, citing the International Court of Justice as an example. This argument only strengthens the case for an international criminal court separate from the ICJ. A newly created international criminal court can learn from the lesson of the ICJ in drafting its enforcement mechanisms. Similar to the current *ad hoc* Bosnian court, the international criminal court can use Interpol as a means of enforcing extradition to the court, and additionally, the international criminal court can sanction or suspend the U.N. voting rights of nations who harbor international fugitives. In order to break the stigmatization of international institutions as ineffective, an international criminal court with effective enforcement mechanisms must be created.

In discussing enforcement, scholars have tended to divide international crimes into two groups: 1) crimes perpetrated by states (state-led) and 2) crimes perpetrated by individuals (individual non-state actors). Whereas the sanctions in Chapter 7 of the U.N. Charter, such as interruption of economic relations, severance of diplomatic relations, blockades, and if necessary, the use of force, are typically levied for state-led crimes<sup>94</sup>, they often punish the population as a whole. Traditional penal sanctions, such as an international prison, international community service, or some form of international parole, on the other hand, may actually be more preferable because they are levied against the state actors responsible for the violations. Other, non-retributive forms of penal sanctions have been proposed, which would encourage the preventive and rehabilitative themes of justice. These penal sanctions include options such as fines, political and moral obligations, economic compensation, military or community service and public announcement of a proven crime character.<sup>95</sup> This may be a more functional way to punish criminals for crimes against the international community, because their punishment adds something back to the international community.

The 1992 MacPherson proposal argues that a wide list of punishments for individuals should be drafted into the court, such as fines, forfeiture of the proceeds of the crime, compensation to injured parties,

---

92. BASSIOUNI, *supra* note 64, at 13.

93. *Id.* at 14.

94. *Id.*, at 13.

95. *Id.*



work release, and probation.<sup>96</sup> Although capital punishment would be effective for crimes such as genocide, due to its controversy, it should probably not be included for most crimes.<sup>97</sup>

The 1992 A.B.A. Task Force also proposes that the penalties be severe, but that the death penalty should definitely not be used.<sup>98</sup> The Task Force offers provisions for a pre-trial detention in the state where the criminal was apprehended, but it recommends that the sentence be served out in the country where the crime was committed,<sup>99</sup> perhaps so that the this nation feels that justice has been served. The problem with this may be the administrative capacity of the tribunal to ensure that the accused or convicted are being treated in accordance with international fair standards of treatment. This monitoring is likely to become complicated when the rights granted are in the hands of a country who sees a non-national committing a crime on their territory. This problem brings to mind the 1994 caning of an American citizen in Singapore, for committing vandalism. This penalty received an onslaught of criticism from the Americans, which threatened the U.S.' otherwise peaceful relations with Singapore.

The 1992 A.B.A. Task Force stated that "it would seem neither feasible nor desirable to set up a 'Devil's Island' type of permanent detention center" for this court,<sup>100</sup> especially given the small number of cases likely to come before the court in its first years. The MacPherson proposal agreed, stating that such a facility would be expensive to maintain and unnecessary so long as state facilities could be used in its place. In the future, an international penal facility may become necessary and should then be created.

The 1993 ILC Draft proposes that: 1) imprisonment, up to, and including life terms, 2) monetary fines,<sup>101</sup> and 3) loss of property (the perpetrator may be required to return property or proceeds wrongly received in the course of the crime) should be the primary forms of punishment.<sup>102</sup> It states that the death penalty should never be used.

In determining prison terms, the laws governing the state of the defendant, the state where the crime was committed, and the state which has custody of and jurisdiction over the defendant<sup>103</sup> should all be taken into consideration. To enforce the sentences, the ILC proposed Article 66, making the court responsible for supervising the prison sentences to ensure compliance with the Standard Minimum Rules for the

---

96. MACPHERSON, *supra* note 68, at 45.

97. *Id.* at 45-46.

98. A.B.A. Task Force, *supra* note 70, at 276.

99. *Id.* at 277.

100. *Id.*

101. ILC Draft, *supra* note 1, at 317 (art. 53).

102. *Id.* at 318.

103. *Id.* at 317-8 (art. 53).

Treatment of Prisoners.<sup>104</sup> This would be true whether the sentence is served in the state where the crime was committed or in a voluntary state. The main concern with this proposal is that it would be difficult to implement, unless a full time employee of the court is assigned to each prison where a term is being served. The Draft also sets up a procedure for appeal to the seven judges of the court who did not take place in the original judgment.<sup>105</sup>

#### F. Court Mechanisms

In creating an international criminal court, three important issues to resolve are: (1) where to locate the court; (2) how to select its judges; and (3) whether the court will be "adversarial", following the U.S. model, or "inquisitorial", following the European model.

##### 1. The Court's Location

The court's sponsor and the responsibility for funding go hand-in-hand. If the international criminal court is established as a U.N. organ, the U.N. member states will be required to foot the bill as an "expense of the United Nations."<sup>106</sup> On the other hand, if the court is a separate organ from the U.N., nations would have to agree in a separate convention to support it financially.

The proposal offered by the 1953 U.N. Committee agreed unanimously that an international criminal court should be sponsored by the U.N.<sup>107</sup> The Committee discussed ways in which an International Criminal Court might be established under the United Nations Charter: 1) through an amendment of the International Court of Justice to create a criminal chamber in the I.C.J.; 2) through an action of the General Assembly, under authority conferred to it in Article 14 of the League of Nations, to draw up a statute for the court and have states sign and ratify the court; 3) through an amendment of the U.N. Charter to create a new organ for the International Criminal Court; or 4) through an amendment of the U.N. Charter to remove any difficulties which might impede the General Assembly from creating a court.<sup>108</sup> After analyzing these issues, the Committee favored, instead, creating an independent organ from the United Nations, which would be less likely to become politicized than a U.N. organ.<sup>109</sup>

The MacPherson proposal in 1992, in contrast, argued that the

---

104. *Id.* at 333.

105. *Id.* at 322 (art. 56).

106. *Certain Expenses of the United Nations (Advisory Opinion) I.C.J. REP.* 151, 156, 162 (1962).

107. BASSIOUNI, *supra* note 64, at 215.

108. *Id.* at 217.

109. *Id.*

international criminal court should be established as a subsidiary organ of the General Assembly or the Security Council under Articles 22 or 29.<sup>110</sup> The proposal favored the Security Council over the General Assembly because it is vested with broader authority to maintain international peace and security through whatever means are necessary, including the ability to create an international criminal court.<sup>111</sup> The General Assembly, in contrast, does not have this authority, but, to MacPherson, is still preferable to a non-U.N. entity.

MacPherson's proposal was considered, but no action was taken in 1993, when the ILC further reviewed the matter in its 1993 Draft Statute. The ILC failed to resolve this issue.<sup>112</sup>

## 2. The Selection of Judges

The next step is to determine how judges will be elected and how court proceedings will be administered.

The 1953 Committee proposed that 15 judges be elected. The Committee suggested that the Secretary-General should select candidates from a list of nation-nominated judges and submit these to all member states for a vote, with the caveat that no two judges be from the same nation. The judges would be elected for 9 year terms on a rotating basis, so that every 5 years, 3 judges would retire.<sup>113</sup>

MacPherson's proposal only differs from the 1953 approach in one respect; he proposed a two-tiered panel of senior and associate judges. Senior judges would administer the court, hear the proceedings and issue rules of procedures. Associate judges would preside over trials and preliminary hearings.<sup>114</sup> For each trial, three judges would be assigned by lot, and a majority rule would decide the case.<sup>115</sup> Mr. MacPherson suggested 9-15 Senior judges and an unspecified number of associate judges.

The 1993 ILC Draft Statute proposed an even larger number of judges than the other two proposals, 18 judges, and a longer term, 12 years, to compensate for their inability to be reelected.<sup>116</sup> Following the earlier two proposals, the judges would be elected from a list of nominees, one submitted from each state party to the tribunal, such that no two judges could be from any one state.<sup>117</sup> The major shortcoming of the ILC proposal was the Committee's decision to make the

---

110. MACPHERSON, *supra* note 68, at 22-26.

111. *Id.*

112. *ILC Draft, supra* note 1, at 33, 258 (art. 2).

113. BASSIOUNI, *supra* note 64, at 17.

114. MACPHERSON, *supra* note 68, at 248-49.

115. *Id.*

116. *ILC Draft, supra* note 1, at 260 (art. 5), 261 (art. 7).

117. *Id.* (art. 7).

"permanent" international criminal court one in which judges could sit only when called to hear a case.<sup>118</sup> Therefore, these judges would not receive a salary, but rather, a daily allowance during the period in which they performed their functions.<sup>119</sup> This aspect of the proposal contradicts the nature of a "permanent" court.

### 3. The Adversarial or Inquisitorial Model

The adversarial model of trial management provides separate defense counsel for the accused, in order to provide fair legal representation. The inquisitorial model uses only one impartial jurisconsult to present the case for both the prosecution and defense, and is often recognized as being more cost-efficient. One controversy over this issue rests on the requirement by some nations' constitutions, such as the United States', that the defendants have a right to personal counsel. Use of the inquisitorial approach could prevent these nations, particularly the U.S., from participating in the court, and thus, would undermine the court's existence.

For this reason, the 1953 ILC proposal, MacPherson's proposal, and the ILC draft, all advocate the use of the common law adversarial model for the court. The 1953 and the MacPherson proposals both stipulate that the defendant's counsel would be paid for by the court, at the defendant's choice.<sup>120</sup> The ILC Draft, however, placed an additional condition: if the court is to pay for the attorney, the court must select the attorney.<sup>121</sup>

#### G. Procedural Laws to Apply

Although M. Cherif Bassiouni states that the applicable procedural law is not of primary importance because "international human rights norms and standards on fairness have reached such a level that developing a common denominator of a sufficiently high standard to satisfy the requirements of most countries of the world is quite possible,"<sup>122</sup> some countries clearly provide more. For example, the international human rights norms and standards on fairness do not guarantee as many protections as U.S. citizens are guaranteed in their Constitution.<sup>123</sup> This problem leaves three options for procedural laws in the international criminal court: 1) to establish a code of international criminal procedure; 2) to use the procedures of one chosen nation; or 3) to transfer the procedural laws of the state bringing the action to the international criminal court.

---

118. *Id.* at 263-64.

119. *Id.* at 268 (art. 17).

120. BASSIOUNI, *supra* note 64, at 248-49; MACPHERSON, *supra* note 68, at 57.

121. *ILC Draft*, *supra* note 1, at 287 (Art. 30).

122. Bassiouni & Blakesly, *supra* note 75, at 174.

123. *Id.*

All of the proposals thus far have opted in favor of creating a code of criminal procedures for the court. The 1952 U.N. Draft Statute includes a chapter on Procedure pertaining to standards for indictment, right to a fair trial, and innocence until proof of guilt, but does not provide for the right to a jury trial.<sup>124</sup>

The ILC Draft Statute builds upon the 1952 chapter to include the largest number of rights to the accused as possible. It provides Miranda rights, the right to court-appointed counsel, and freedom from self-incrimination.<sup>125</sup> In addition, the Draft requires the Prosecution to initiate an investigation as to whether a *sufficient basis* exists for it to proceed with a case before issuing an indictment.<sup>126</sup> The indictment is then to be screened by the Bureau of the Court to ascertain whether a *prima facie* case exists before it issues a warrant.<sup>127</sup> The accused shall, therefore, receive a fair, expeditious, and public trial, having been informed of all of his/her individual rights in his/her own language.<sup>128</sup> In addition, a presumption of innocence in favor of the accused will exist.<sup>129</sup> Finally, the accused will not ordinarily be subject to double jeopardy under this statute, unless there was a lack of impartiality under a previous tribunal.<sup>130</sup> Not only does the ILC Draft afford protection to the accused, but also to victims and witnesses, which may be imperative for trying the alleged rape victims from the Bosnian war crimes.<sup>131</sup> The ILC Draft, section on Procedure, should be viewed as a model for the international criminal court.

In sum, the arguments in favor of an international criminal court clearly outweigh those against its establishment. An international criminal court is necessary to prevent the ongoing violations of international humanitarian law that are not addressed through the creation of *ad hoc* courts. Careful drafting of an international criminal court statute can address the concerns that nations present over sovereignty, jurisdiction, and enforcement, and still effectively adjudicate international crime.

#### V. A NEW PROPOSAL FOR THE ESTABLISHMENT OF A PERMANENT INTERNATIONAL CRIMINAL COURT

Drawing from the lessons learned from the proposals discussed in the previous sections, a competent and *permanent* international criminal court must still be created. This section creates such a proposal,

---

124. BASSIOUNI, *supra* note 64, at 253.

125. ILC Draft, *supra* note 1, at 287 (art. 30).

126. *Id.* at 287-89.

127. *Id.* at 290 (art. 32).

128. *Id.* at 301,304 (arts. 40, 44).

129. *Id.* at 304 (art. 43).

130. *Id.* at 307 (art. 45).

131. *Id.* at 309 (art. 46).

and is followed by a sample Draft Statute.

Although the *ad hoc* Bosnian War Crimes Tribunal is a positive step in the codification of international criminal law, its failure to deter ongoing abuses of human rights in Bosnia alone, demonstrates the need for a *permanent* international criminal court. Many of the following proposals find their roots in the 1993 International Law Commission Draft Statute, which should be rewarded for its thoroughness and rigid stance on enforcement. Several key areas, most importantly its lack of "permanency," however, are modified.

#### A. *Composition of the Proposed International Criminal Court*

##### 1. Framework of the Court

The international criminal court must be a *permanent* standing adjudicatory body available to: 1) nations which bring cases to its attention and 2) individuals filing complaints against their own nation, such as an ethnic minority or a political group. The court should have a preliminary body, a Committing Chamber, to investigate the charges prior to any official charging, similar to the body currently in use in the *ad hoc* military tribunal.

The court could be located in any one of several international cities, but it should be a separate and independent organ of the United Nations. This separation would serve several purposes: 1) the court would be less likely to become embroiled in U.N. politics if it were separate from the General Assembly or the Security Council; 2) the court would be less likely to receive the stigma of the International Court of Justice if it is a separate legal institution; 3) the codification of international crimes and criminal procedures could be administered or voted on through the General Assembly and the Security Council; and (4) all member states of the U.N. could then be required to contribute financially to the court pursuant to Article 17, paragraph 2 as "expenses of the organization."<sup>132</sup> Because criminal "stigma" in itself has value, the international community would benefit greatly from a large number of cases being brought early on in its tenure. This stigma may deter many countries from committing further violations of international humanitarian law. In addition, the court would benefit from addressing any administrative problems not foreseen in its creation, and could demonstrate to the world that it would take a rigid, but fair and impartial, stance on international crime.

In order to make this court a separate organ of the United Nations, the U.N. Charter could adopt Article 14 of the former League of Nations, allowing the General Assembly to create a court by statute

---

132. U.N. CHARTER art. 17; *See also* Certain Expenses of the United Nations, *supra* note 106.

upon a two-thirds majority vote. If the General Assembly does not reach consensus at first, the Secretary General could ask for comments from the member nations, and request the drafters of the court, likely the International Law Commission or the Working Group of the United Nations, to incorporate them. If political controversy inhibits the General Assembly from creating an effective court, the Secretary General should draft a statute and allow the Security Council to vote for the court.<sup>133</sup> Contrary to the bilingual status of the U.N., the international criminal court should recognize the increased importance of the Spanish-speaking world in making English, Spanish, and French all official languages of the court. Irrespective of the official languages of the court, any individual tried before the court should still have the right to all proceedings conducted in his/her own native language.

## 2. Selection and Responsibilities of Judges

The Court should have fifteen to eighteen independent judges from different nations, drawn from as many geo-political regions of the world as possible. This approach adopts the International Law Commission proposal that terms be long, such as twelve years, and that judges not be reelected. A long tenancy may assist judges in gaining the knowledge necessary to hear cases effectively. These judges should be elected on a four-year rotational basis, to maintain the highest level of judicial impartiality.

This approach rejects, however, the International Law Commission's proposal that the judges be present only when a case is brought to the court. In contrast, the judges should sit permanently, and be paid salaries as such. When the court is not in session, the judges could discuss, research, and write on the expansion of international criminal law. They should use their expertise in the field to advance public opinion and scholarly research on the principles of international criminal law. This will assure the international community that, in fact, the court is "permanent."

The election of the judges should be administered through the United Nations, which already has established voting and participatory procedures, and representatives from all of its member states. The Secretary General could screen nominations and then compile a list of candidates to submit to the General Assembly. The candidates with the highest number of votes from the General Assembly would be elected to the court, so long as no two of them are from the same country.

If a judge became incapacitated or withdraws at any time while

---

133. The five permanent members of the Security Council must unanimously agree, and a two-thirds majority of the remaining non-permanent members must agree.

seated on the court, another judge from his country could be nominated and approved by a majority vote of the remaining judges on the court. If the nominated judge did not meet this threshold number of votes, then any nation could nominate a judge immediately for approval by the General Assembly and the Security Council. In addition, any judge suspected of impropriety or partiality while exercising official duties would be removed from the court by a two-thirds majority of the other judges. No judge would be allowed to serve in any governmental or judicial position in his/her country while seated on the Court, because this might affect the impartial nature of the judge's position. A judge could, however, at any time, abstain from participation in a particular case before the court with no consequences.

Three judges should be selected, on an annual rotating basis to serve in a Committing Chamber. This Chamber would be responsible for examining the evidence presented by the complainants to determine if this evidence is sufficient to go to trial, or if further evidence is necessary and available.

Once personal jurisdiction over an accused was obtained, a panel of five new judges (none of which served in the Committing Chamber) would hear the case. Four of the five judges would have to agree in order to convict a defendant. Should a judge abstain from voting during a particular case, three of the four remaining judges must agree in order to convict a defendant. Finally, an appeals panel of three judges, who have served neither in the Committing Chamber, nor on the first panel, should be available to examine the final judgment if allegations of legal or procedural violation are alleged.

#### B. *Procedural Guarantees*

As suggested in the proposals set forth above, the adversarial model of the British-United States systems should be adopted for the court. This model would call for court appointed defense attorneys for indigent defendants, and a separate prosecutorial branch administered by the court, similar to the U.S. Attorney's office. This latter proposal would allow attorneys competent both in international criminal law and the court's procedures to bring the case. If nations rejected this option in the General Assembly, due to beliefs that the adversarial process was neither just, nor speedy enough, in favor of the inquisitorial approach, then an accused with the right to personal defense counsel in his/her own country should be allowed to retain this right in the international criminal court.

The high level of procedural guarantees laid out by the International Law Commission in its draft statute should be used as an example.<sup>134</sup> Miranda rights, freedom from self-incrimination, explana-

---

134. See *ILC Draft*, *supra* note 1, at 287-309.



tion of all individual rights in the language of the defendant, a presumption of innocence for the accused, protections for witness testimony, a speedy trial, a right to rebut all charges levied, and freedom from double jeopardy should all be incorporated into the code of procedural guarantees. In addition, the defendant should have a right to have all court proceedings translated into his/her native language, so that the defendant understands the judicial process, all testimony, and court decisions. There should not be, however, a jury trial in these proceedings, because the selection process would be far too complicated. The code of procedural guarantees should be drafted either by the first set of judges elected to the court, the International Law Commission, or the Working Group of the United Nations, subject to a two-thirds approval vote in the General Assembly.

### C. *Jurisdiction*

#### 1. Subject Matter Jurisdiction

Builders of the international criminal court should lay a solid foundation that is fully competent over a small number of highly legitimized crimes. The court must demonstrate its capacity to adjudicate these crimes effectively before increasing the number of codified crimes to its jurisdiction. M. Cherif Bassiouni states it well:

"An international criminal court is not to be considered as an all or nothing proposition. It can be developed incrementally as well, provided that it is given enough standing and competence to develop a record that will permit it to gain more and more confidence and therefore expand its beneficial role . . . Its success should be enough to reassure anyone who has had the doubts that were raised in 1950 when the (first) court was established and that are raised now in anticipation of an international criminal court."<sup>135</sup>

Following this approach, the international criminal court should initially have *exclusive* jurisdiction over the crimes already codified in international conventions, including, War Crimes, Genocide, Slavery, Diplomatic Immunity, Hostage-Taking and Piracy. The exclusive jurisdiction of the international criminal court is chosen to avoid the "Argentinean problem" mentioned earlier, and to monitor closely the procedural rights afforded to the accused. A "bottom-line", tough enforcement policy with respect to these crimes could help the court to build its international legitimacy, reputation, and functioning procedures.

After the court has demonstrated its legitimacy, it could begin the process of codifying new international crimes, eventually to include more controversial crimes such as drug-trafficking and terrorism. It is important to add these crimes later, showing respect for the high level

---

135. Bassiouni & Blakesly, *supra* note 75, at 171.

of state sovereignty still omnipresent in the international arena. Controversial crimes at the onset may weaken both the membership and effectiveness of the court. Codification of these crimes should be achieved, again, through a two-thirds majority of the General Assembly. However, in contrast with the exclusive jurisdiction crimes enumerated above, nations could *opt-out* of particular crimes.

Any newly codified crimes should be subject to concurrent jurisdiction between the international criminal court and a domestic court. No accused individual should be subject to "double jeopardy" in the international criminal court: a case adjudicated in the international court would serve as *res judicata* in the national courts. Similarly, if a national court has exercised its concurrent jurisdiction over a matter, the international court could not rule on the issue, but it could review the procedures for their partiality and potential error. The court's only recourse, in the event of error, would be to remand the case for further domestic proceedings. This aspect of the court would help to assure nations that they did maintain sovereign rights over crimes affecting their territory, as long as they provide fair and impartial judicial proceedings.

## 2. Personal Jurisdiction

The international criminal court should have personal jurisdiction over all national individuals, whether they are public or private individuals of a state. Allowing public officials both to bring cases and be tried would help to establish a heightened legitimacy to some governments, and would provide a check on their actions. Universal Interest Jurisdiction should continue to apply in the international community as it does now. In addition, however, the court should implement a system similar to that functioning in the Bosnian *ad hoc* Tribunal now. The Committing Chamber, upon deciding that enough basis exists to bring a case, should use Interpol to issue a warrant to a defendant wherever this defendant can be located. The court should also establish sanctions or the suspension of U.N. privileges for nations which refuse to extradite criminals within their borders to the court's jurisdiction. The combination of these resources should greatly increase the likelihood of *lawful* extraditions in the international community.

## D. *Enforcement Mechanisms*

Individuals convicted of the crimes within the court's exclusive jurisdiction should be subject to fines, international community service, and incarceration. The convicted criminal should serve out a pre-trial prison sentence in a prison devoted to the international criminal court. Similar to the Dutch prisons allocated to the Bosnian *ad hoc* Military Tribunal, this method should preserve and afford the greatest number of individual liberties for the accused. Once a sentence has been handed down, the sentence should be served out in a neutral prison

(not from the state of either party to the matter) designated for the court's use. If the treatment of this prisoner falls below established principles of international treatment, then this prisoner should be relocated to another prison. There should be no death penalty sentences handed down by the court. U.N.-sponsored executions may seem hypocritical to the purpose and scope of the court. Finally, this proposal does not advance the need for an international "Devil's Island" at present. A fairly small number of cases will probably be brought in the first few years, making this an unnecessary expenditure. Perhaps in the long run this idea should be reassessed.

The penalties for the concurrent jurisdiction crimes, to be determined in the future, should be slightly more lenient than those stipulated for exclusive jurisdiction. Life imprisonment should not be sanctioned until such time as the Member States and General Assembly elect otherwise, and the penalties should range from fines, reimbursement to the international community for profits gained from the crime (such as in the case of environmental, commercial, or expropriation crimes), international community service, and short incarceration terms.

## VI. CONCLUSION

For the past 500 years, scholars have devoted a large amount of time and effort to the creation of an international criminal court. Although the proposals themselves have contained excellent ideas, states have not been willing to cede sovereignty to an international body on criminal law, an issue believed to be of a domestic nature. The past *ad hoc* proceedings at Nuremberg and Tokyo did not deter the occurrence of international crime, nor have the current Bosnian proceedings put an end to human rights violations in Bosnia. One lesson must be remembered: a refusal to adjudicate violations of international humanitarian law encourages belligerents to threaten the peace and stability of the world. If one positive step for humanity can be achieved from the current atrocities in Bosnia, it should be the establishment of a *permanent* international criminal court. The time for a permanent international criminal court is now.

DRAFT STATUTE  
OF THE  
PERMANENT INTERNATIONAL CRIMINAL COURT

CHAPTER I  
GENERAL PROVISIONS

ARTICLE 1

PURPOSE

The purpose of this statute is to establish an International Criminal Court to try natural persons of crimes that are generally recognized under international law, or are widely accepted international conventions.

ARTICLE 2

TYPE OF LAW

The Court shall apply international criminal law for which the states have conferred jurisdiction to the court, or have assented to the law by agreement, convention, or otherwise.

ARTICLE 3

PERMANENT NATURE OF THE COURT

The court shall consist of a permanent body and locale. If there are no cases pending on the court's docket, its judges will dedicate their time to scholarly research in international criminal law, and any other endeavors necessary to further the development of international criminal law and the functioning of the court.

ARTICLE 4

LOCATION OF THE COURT

The court shall be established as a separate and independent organ of the United Nations.

- (1) As an organ of the United Nations, member states will be obligated financially to the court.
- (2) The International Criminal Court will not be linked in any way to the International Court of Justice.
- (3) United Nations voting procedures through the General Assembly and the Security Council may be used to codify additional international crimes, to alter any established mechanism of the court, and to select judges.

## ARTICLE 5

## LANGUAGES OF THE COURT

The official languages of the court shall be English, French, and Spanish.

## CHAPTER II

## ORGANIZATION OF THE COURT

## ARTICLE 6

## QUALIFICATIONS OF JUDGES

- (1) The Court shall be composed of independent judges who are recognized as experts in international criminal law or human rights, who possess qualifications to serve on the highest judicial bodies of their own respective countries.
- (2) Judges may be of any nationality, but no two judges from any one country shall serve on the court at the same time.
- (3) The judges must represent as many regions and geo-political systems of the world as possible.

## ARTICLE 7

## NOMINATION OF JUDGES

- (1) There shall be from 15-18 judges seated on court.
- (2) These judges shall be elected for 12 years, and their terms shall rotate such that every 4 years, 5-6 judges will retire. After the end of the term, these judges may not be reelected to the court.
- (3) Judges shall be nominated by their own respective nations which have respected the jurisdiction of the court. From these nominations, the Secretary-General will review these and comprise a list of potential candidates to the General Assembly for a vote. A two-thirds majority must be met, after which the candidates will be chosen by the highest number of votes, with no two judges from the same nation.
- (4) If a judge should resign or become incapacitated while seated on the court, another judge from his nation may be nominated and must be approved by a majority vote of the remaining judges on the court. If the nominated judge is not approved, other states may nominate judges for immediate acceptance by a majority vote of the General Assembly, and the Security Council.
- (5) A judge may be removed by the other members of the court by a majority vote only for reasons which might interfere with that judges impartial capacity on the court.
- (6) While serving on the court, no judge shall perform any govern-

mental or judicial function in that judge's respective state.

- (7) A judge may abstain from judgment on any matter within that judge's discretion.

#### ARTICLE 8

##### COMMITTING CHAMBER

- (1) Each year, three judges shall be appointed to examine all evidence offered by the Complainants.
- (2) If the evidence satisfies the Committing Chamber, the Chamber shall certify it to the court. If the Chamber is not satisfied with the evidence presented, it may request further support or dismiss the case until further satisfactory evidence is admitted.
- (3) These judges will not be permitted to take part in the decisions of the court on a particular case in which they served in the Committing Chamber.

#### ARTICLE 9

##### PROSECUTING ATTORNEY AND DEFENSE ATTORNEY

###### OPTION 1

###### THERE SHALL BE SEPARATE PROSECUTION AND DEFENSE ATTORNEYS

- (1) The Complainant shall appoint a prosecution attorney who will be responsible for filing an indictment and conducting prosecution before the court.
- (2) If the Defendant cannot afford private defense counsel, the court shall appoint one.

###### OPTION 2

###### THERE SHALL BE ONE JURISCONSULT

The court will appoint a juriconsult, elected by the judges of the court to examine the prosecution and defense, and present the case to the court. However, if the Defendant would have separate defense counsel in his/her own nation because of a Constitutional provision, then his/her own nation may appoint counsel, or the court can 'transfer the proceedings' of the court to the national court.

#### CHAPTER III

##### COMPETENCE OF THE COURT

###### ARTICLE 10

###### JURISDICTION OVER PERSONS

- (1) The Court shall be competent to judge natural persons, whether private individuals or public individuals.
- (2) Universal Interest Jurisdiction shall apply for any crimes with a uni-

versal interest, such that they threaten to undermine the foundations of the international community as a whole. These crimes need not be committed within the boundaries of the Complainant State, nor does the Defendant need to be found on the territory of the Complainant State.

- (3) In the event that a nation does not comply with an extradition request by the court, two penalties shall apply:
  - (a) that nation's United Nations privileges and voting rights shall be suspended; and
  - (b) the Committing Chamber may issue a warrant to Interpol to seek out the Defendant, and bring the Defendant to trial.

#### ARTICLE 11

##### SUBJECT MATTER JURISDICTION

Subject to further codification through convention as the member states of the United Nations agree:

- (1) The court shall exercise exclusive jurisdiction over War Crimes, Slavery, Genocide, Diplomatic Immunity, Piracy, Hostage-Taking, and any other crime which is codified into convention at such time as the court enters into effect.
- (2) The court shall exercise concurrent jurisdiction with national courts over all other international crimes which are later codified into law.
  - (a) A nation may decide if it will hear a case within its domestic courts, or submit it to the international court.
  - (b) No offender shall be subject to double jeopardy: If a case is submitted to the international court, it shall not be retried in a domestic court, and vice versa.
  - (c) If a nation with jurisdiction fails to adjudicate a case adequately according to international standards, another nation may submit this case to the international court for review. If the court finds the allegations valid, it may remand the case to the national court for further proceedings.
- (3) No provision stated herein shall prevent the nations of the world from conferring jurisdiction to the international court for a more expansive list of international crimes. International conventions and treaties may be codified by a two-thirds majority vote within the General Assembly.

CHAPTER IV  
JUDICIAL PROCEDURE

ARTICLE 12

RULES OF THE COURT

- (1) The court shall adopt rules and procedures which must, at a minimum, incorporate international general principles of law, norms, and standards of fair trial practice. The General Assembly shall decide if the rules and procedures established by the court are adequate with a two-thirds majority vote.
  - (a) Issues such as minimum age of the Accused, the necessary mental state for the commission of a crime, duress, and insanity should be incorporated in these rules.
  - (b) Privacy rights for individual witness testimony must be provided.
    - (1) In the case of rape, the victim shall have the right to privacy, including the right to testify in a separate room from the accusers in certain circumstances.
- (2) If the standards set forth in these rules does not reach the level of a nation's domestic standards, and may prejudice the case then the court may elect to "transfer the proceedings" from the national court to the international court, and apply the national court's procedures, or it may elect not to hear the case.

ARTICLE 13

RIGHTS OF THE DEFENDANT

- (1) There shall be innocence until proof of guilt. An Accused shall not be required to prove his/her innocence.
- (2) The Defendant shall have the right to freedom from self-incrimination.
- (3) The Defendant shall not be subject to lower standards of fair trial than he/she would receive in his/her own nation. If defense counsel is provided in his/her own nation, then it shall be provided by the court.
- (4) The Defendant has a right to all court proceedings translated into his/her native language.
- (5) If the Defendant is incarcerated during the pre-trial period, it shall be in a prison set aside for use by the international court.
- (6) The Defendant has the right to present and rebut all evidence.



- (7) The Defendant has the right to a just and speedy trial, as is possible in light of the court's docket.

#### ARTICLE 14

##### TRIAL

- (1) Five judges shall hear each case, and a majority vote is necessary for conviction. If one judge should abstain from judgment, and the other four judges are split, the remaining judges shall designate an impartial judge to cast the deciding vote.
- (2) If judicial error is committed during any part of the trial, the Accused shall have the right to a new trial.
- (3) The Defendant shall have the right to one appeal to a panel of three judges from the court.

#### ARTICLE 15

##### SENTENCING

- (1) For all "exclusive jurisdiction" crimes of the court, the court may impose a fine, life imprisonment or imprisonment for years in a prison dedicated for the use of the international court. This prison shall not be in the nation of the Complainant or the Defendant. In addition, the court may order the Defendant to surrender any profits gained in the commission of the crime charged.
- (2) For all "concurrent jurisdiction" crimes of the court, the court may impose a fine, imprisonment as stipulated above, international community service, or a surrender of profits from the crime.
- (3) The death penalty shall not be imposed by the international court.
- (4) Flogging, caning, or any other form of inhumane punishment shall not be imposed by the court.

