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ARTICLES

GETTING SERIOUS ABOUT AN INTERNATIONAL CRIMINAL COURT

Michael P. Scharf†

INTRODUCTION

In October 1993, the United States Government announced a major policy reversal concerning the establishment of a permanent International Criminal Court ("ICC"). Previously, the United States had sought to prolong without progressing the debate on an ICC. Under the new policy, the United States committed itself actively to work toward resolving the remaining legal and practical issues attendant to establishing an ICC.

From August 1989 to July 1993, I served as the lawyer at the U.S. Department of State with responsibility for drafting the Government's testimony, speeches, and reports to Congress and to the United Nations on the issue of an ICC. Although one commentator has asserted that I was the architect of the Government's position,¹ my role was really more of wordsmith, marshalling legal arguments to further policy directives from higher level officials at the State Department and the Department of Justice. Despite my personal support for the concept of an ICC,² these official statements expressed what Senator Spec-

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¹ See Benjamin B. Ferencz, *An International Criminal Code and Court: Where They Stand and Where They're Going*, 30 COLUM. J. TRANSNAT'L L. 375, 388 (1992).

² See, Michael P. Scharf, *The Jury is Still Out on the Need for An International Criminal Court*, 1991 DUKE J. COMP. & INT'L L. 135 (1991); hereafter ("The Jury is Still Out") cited in Report of the Senate Committee on Foreign Relations on an International Criminal Court, S. Rep. No. 103-71, 103rd Cong., 1st Sess., (1993); Report of the Judicial Conference of the United States on the Feasibility of and the Relationship to the Federal Judiciary of an International Criminal Court,

ter has characterized as "cautious skepticism" about the feasibility and desirability of establishing an ICC.³

The purpose of Part I of this article is to shed light (to the extent possible without violating post-government employment privileges) on the evolution of the U.S. Governments' position from one of cautious skepticism to qualified support for the establishment of an ICC. Part II of the article analyzes and suggests revisions to the proposed statute for an ICC recently prepared by the UN International Law Commission ("ILC"). The text of the relevant provisions of the draft statute are appended at the end of the symposium section of this issue.

I. THE EVOLVING U.S. GOVERNMENT POSITION: FROM CAUTIOUS SKEPTICISM TO QUALIFIED SUPPORT

Until quite recently, the U.S. Executive Branch had steadfastly maintained the position that it would not support the establishment of an ICC unless or until all the difficult legal and practical problems attendant to such an endeavor had been resolved to its complete satisfaction.⁴ While the U.S. Government's statements and reports to Congress and to the United

October 28, 1991; American Bar Association Task Force on An International Criminal Court (1992).

Prior to the publication of "The Jury is Still Out," the only commentary on the issue were advocacy pieces, expressing uncritical support for the creation of such a tribunal. See e.g., JULIUS STONE & ROBERT K. WOETZEL, TOWARD A FEASIBLE INTERNATIONAL CRIMINAL COURT (1970); BENJAMIN B. FERENCZ, AN INTERNATIONAL CRIMINAL COURT: A STEP TOWARD WORLD PEACE (2 vols. 1980); M. CHERIF BASSIOUNI, A DRAFT INTERNATIONAL CRIMINAL CODE AND DRAFT STATUTE FOR AN INTERNATIONAL CRIMINAL TRIBUNAL (1987); M. Cherif Bassiouni, *The Time Has Come for an International Criminal Court*, 1 IND. INT'L & COMP. L. REV. 1 (1991). As described below, the position of the United States Government, on the other hand, bordered somewhere between skepticism and opposition. "The Jury is Still Out" walked a middle ground, attempting objectively and thoroughly to analyze both the benefits and costs associated with establishing an international criminal court ("ICC"), and thereby to sharpen the issues and progress the debate.

³ Supplemental Statement of Senator Arlen Specter for the Congressional Record Regarding the Need for an International Criminal Court 5 (October 27, 1990), cited in Scharf, *supra* note 2 at 143.

⁴ See Letter from Janet G. Mullins, Assistant Secretary of State for Legislative Affairs, U.S. Department of State, to Dan Quayle, President of the Senate, and Thomas S. Foley, Speaker of the House of Representatives (Oct. 2, 1991); UNITED STATES MISSION TO THE UNITED NATIONS, STATEMENT BY THE HONORABLE EDWIN D. WILLIAMSON, UNITED STATES SPECIAL ADVISOR TO THE UNITED NATIONS GENERAL ASSEMBLY IN THE SIXTH COMMITTEE, USUN Press Release #113-(92) (1992) (hereafter STATEMENT BY EDWIN D. WILLIAMSON).

Nations enumerated the many problems that required attention, they quite purposely were silent as to any possible solutions. In this way, they furthered the goal of State and Justice Department officials who desired to stall international progress on the issue. Reading between the lines, the attitude of the U.S. Government reflected residual mistrust of international tribunals⁵ as well as a general concern that the establishment of an ICC would undermine the Government's existing international law enforcement efforts and authorities.⁶

Notwithstanding the repeated efforts of Senators Specter and Dodd (and especially Charles Bataglia and Matthew Hirsch of their respective staffs), as well as Congressmen Leach and Kastenmeier, the issue of an ICC never received serious consideration by top officials in the Bush Administration. Nor has the issue found its way on to Bill Clinton's list of priorities for the United Nations.⁷ Consequently, despite supportive statements about an ICC made during the confirmation hearings of the newly appointed Secretary of State, Department of State Legal Adviser, and Assistant Secretary of State for International Organizations Affairs in the Spring of 1993, the Government's po-

⁵ This mistrust stemmed in part from the adverse ruling in the *Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States)*, 1984 I.C.J. Rep. 392 (Jurisdiction of the Court and Admissibility of the Application). The Decision resulted in the United States' withdrawal from the compulsory jurisdiction of the World Court. See Statement by the Legal Adviser, Abraham D. Sofaer, to the Senate Foreign Relations Committee (December 4, 1985), reprinted in BARRY E. CARTER & PHILLIP R. TRIMBLE, *INTERNATIONAL LAW 1991* (In explaining the Government's decision to withdraw from the World Court's jurisdiction, Sofaer stated: "[The ICJ] betrayed a predisposition to find that it had jurisdiction and that Nicaragua's claims were justiciable, regardless of the overwhelming legal case to the contrary.").

⁶ See e.g., the United States' controversial authority to apprehend international criminals abroad without host country consent in *United States v. Alvarez-Machain*, 112 S.Ct. 2188 (1992) (Holding that United States' courts could try persons kidnapped by United States' agents from Mexico without Mexico's consent). For differing views on Alvarez-Machain, see Malvina Halberstam, *Agora: International Kidnapping*, 86 AM. J. INT'L L. 736, 746 (1992) and Louis Henkin, *Correspondence*, 87 AM. J. INT'L L. 100 (1993).

⁷ The World Federalist Association sponsored a nation-wide letter writing campaign urging President Clinton to endorse the establishment of an ICC during his Sept. 27, 1993, address to the General Assembly. Notwithstanding this effort, President Clinton did not mention the establishment of an ICC as one of the United States' priorities for the United Nations. For a text of President Clinton's remarks, see *Clinton: UN Must Adapt to Different World*, CHRISTIAN SCIENCE MONITOR (September 29, 1993) at 19.

sition did not dramatically change when the Clinton team came on board.⁸

During the summer of 1993, however, the convergence of various factors began to dislodge the United States Government from its earlier position. Senators Specter and Dodd kept up the pressure by holding hearings and introducing legislation which would put the United States Congress on record in support of the concept of an ICC and call on the Administration to support efforts of the United Nations to conclude an international agreement for the establishment of an ICC.⁹ At the same time, the attack on UN peacekeeping troops directed by Somali warlord Mohammed Farah Aidid suggested an entirely new need for an ICC. In response to the attack, the Security Council passed a resolution authorizing the Secretary-General "to arrest and detain for prosecution, trial and punishment" those responsible for the attack.¹⁰ But the resolution was largely symbolic since in the absence of an ICC there exists no UN forum in which to bring such perpetrators to justice. Similarly, despite two years of Security Council sanctions, the United States and United Kingdom were no closer to convincing Libya to surrender the two Libyan officials allegedly behind the bombing of Pan Am Flight 103. Libya continued to insist on their trial only before a neutral international tribunal. In the absence of an ICC, the United States was unable to call Libya's bluff.

The most important factor of all was the establishment of the international tribunal for Yugoslavia. Unable to act effectively to halt Serbian aggression in Bosnia, and faced with mounting political pressure to respond constructively to continuing reports of widespread atrocities, the United States Government decided to direct its energies to establishing an ad hoc international tribunal to prosecute persons responsible for serious violations of international humanitarian law committed in

⁸ See U.S. Department of State, "Comments of the United States on the Report of the Working Group of the International Law Commission on the Question of an International Criminal Jurisdiction," (May 1, 1993) (hereafter U.S. Department of State).

⁹ See Report of the Senate Committee on Foreign Relations on an International Criminal Court, *supra* at note 2.

¹⁰ S.C. Res. 837, U.N. Doc. S/RES/837 at para. 5, (1993).

the territory of the former Yugoslavia.¹¹ To this end, in less than four weeks time, the State Department's Office of Legal Adviser, working with several other agencies, developed a proposed statute for the Yugoslavia Tribunal which the United States provided to the UN.¹²

Most of the United States' proposals found their way into the Statute for the Yugoslavia War Crimes Tribunal that was approved by the Security Council on May 25, 1993. Having successfully, and quickly, tackled most of the same complex legal and practical issues that it had identified as obstacles to a permanent ICC, the United States Government was left with little basis to justify continued delay with regard to the ICC.

Meanwhile, due in no small part to the contributions of Robert Rosenstock,¹³ the ILC had made surprising progress in formulating realistic and workable proposals for an ICC. At the time my earlier article on this issue was published, the ILC was considering whether an ICC should have exclusive (compulsory) jurisdiction over a wide range of international crimes, many of which the United States did not recognize (such as economic aggression and colonial domination).¹⁴ The United States found this approach anathema to its interests.

The 1992 Report of the ILC's International Criminal Court Working Group greatly refined the ILC's earlier concept for an ICC.¹⁵ The Working Group recommended that an ICC be a "flexible and supplementary facility" for State parties to its statute and that the ICC not have exclusive jurisdiction.¹⁶ As

¹¹ See S.C. Res. 808, U.N. SCOR, 3175th mtg., at 2 (1993) (Deciding to establish Tribunal); S.C. Res. 827, U.N. Doc. S/25626 (1993) (Approving Statute for the Tribunal). For a detailed discussion, see James C. O'Brien, *The International Tribunal for Violations of International Humanitarian Law in the Former Yugoslavia*, 87 AM. J. INT'L L. 639-59 (1993).

¹² Later, the United States submitted a seventy-six page proposal for the Tribunal's Rules of Evidence and Procedure, with commentary. See submission accompanying Letter from Michael Klosson, Charge d'Affaires, United States Embassy at the Hague to UN Secretary-General Boutros Boutros Ghali (November 18, 1993).

¹³ See generally the comments of Mr. Rosenstock on the creation of an ICC at 6 PAGE INT'L L. REV.

¹⁴ See *Report of the International Law Commission on the Work of its Forty-Second Session*, U.N. GAOR, 45th Sess., Supp. No. 10, U.N. Doc. A/45/10 (1990).

¹⁵ See *Report of the International Law Commission on the Work of its Forty-Fourth Session*, U.N. GAOR, 47th Sess., Supp. No. 10, U.N. Doc. A/47/10 (1992).

¹⁶ *Id.* at 14-5.

so envisioned, the purpose of the ICC would be to provide a third alternative to States currently faced only with the choice to prosecute or extradite international criminals found within their territory. Parties to the Court's statute would select from a list of international offenses those for which they would be bound to provide assistance to the Court. An ICC would not be a full-time body, but rather an established structure (a paper court) which could be called into operation when required. In its May 1993 Report to the United Nations, the United States acknowledged that "the basic approach advocated in the [1992 ILC Working Group Report] . . . strikes a proper and realistic balance between the many competing interests at stake."¹⁷

During the 1992 session of the UN General Assembly, the United States found itself isolated in its position that more study was needed before the ILC should begin drafting a statute for an ICC.¹⁸ On November 25, 1992, the United States reluctantly joined consensus on a UN General Assembly resolution that requested the ILC to undertake "the elaboration of a draft statute for an international criminal court as a matter of priority as from its next session."¹⁹ The United States did manage to slow down the process, however, by insisting on the insertion of a clause in the resolution requiring the ILC to submit a "progress report," rather than a completed statute, to the 1993 session of the General Assembly.

Notwithstanding this clause, the ILC submitted a comprehensive draft statute to the General Assembly for consideration at its 1993 session. The ILC's draft statute was based in large part on the statute of the Yugoslavia Tribunal that had recently been approved by the Security Council. By the time the ILC's proposed statute came up for discussion in the United Nations Sixth (Legal) Committee in October 1993, the Clinton Administration had decided to take a more supportive approach to the creation of an ICC and to become actively involved in the effort to resolve the remaining obstacles. Thus, in his speech before the Sixth Committee on October 27, State Department Legal Adviser Conrad Harper stated:

¹⁷ See U.S. Department of State, *supra* note 8 at 2.

¹⁸ See STATEMENT BY EDWIN D. WILLIAMSON, *supra* note 4.

¹⁹ G.A. Res. 47/33 of November 25, 1992.

My government has decided to take a fresh look at the establishment of [an international criminal] court. We recognize that in certain instances egregious violations of international law may go unpunished because of a lack of an effective national forum for prosecution. We also recognize that, although there are certain advantages to the establishment of ad hoc tribunals, this process is time consuming and may thus diminish the ability to act promptly in investigating and prosecuting such offenses. In general, although the underlying issues must be appropriately resolved, the concept of an international criminal court is an important one, and one in which we have a significant and positive interest. This is a serious and important effort which should be continued, and we intend to be actively and constructively involved.²⁰

Though somewhat qualified, Harper's remarks constituted the announcement of a major U.S. policy and strategy reversal on the issue of an ICC. The importance of Harper's announcement cannot be overstated. Without active U.S. support, there is little chance for establishing an effective ICC.

III. ANALYSIS OF THE ILC'S DRAFT STATUTE

By borrowing liberally from the Statute of the Yugoslavia Tribunal, the ILC came up with what State Department Legal Adviser Conrad Harper characterized as a "thoughtful and serious" draft.²¹ As written, however, the draft statute contains several serious problems, which are discussed below.²²

A. *Structure of the Court*

Pursuant to Article 5 of the draft statute, the ICC would have three organs: a Trial Court, a Registry (administrative office), and a Procuracy (office of prosecutor). As written the draft

²⁰ UNITED STATES MISSION TO THE UNITED NATIONS, STATEMENT BY THE HONORABLE CONRAD K. HARPER, UNITED STATES SPECIAL ADVISOR TO THE UNITED NATIONS GENERAL ASSEMBLY IN THE SIXTH COMMITTEE, USUN Press Release #171-93) (1993) (hereafter STATEMENT BY CONRAD K. HARPER).

²¹ *Id.* at 1.

²² Some of the analysis that follows will be elaborated upon in greater detail in an upcoming Report of the American Bar Association Task Force on An International Criminal Court, which the author helped prepare. That Report will provide a lengthy line-by-line analysis of the ILC's draft statute for an ICC. In contrast, the following comments focus only on the most important areas in which the draft statute should be revised.

statute does not establish a separate office of Defense Counsel, although defendants, under Article 44, would have the right to court-appointed counsel. It is important that the ICC have an independent Office of Defense Counsel to ensure adequate representation of the accused and promote institutional balance. The Office of Defense Counsel could develop an expertise similar to that of the Procuracy, and would also enhance the adversarial nature of the Court. Both the Procuracy and Office of Defense Counsel would be able to monitor their counterpart's interaction with the Court and further ensure that the proceedings will be impartial.²³ If an Office of Defense Counsel is established as proposed, the staff of the Registry should be divided into three separate staffs for the Procuracy, the Office of Defense Counsel, and for the Court.

In addition, in contrast to the Yugoslavia War Crimes Tribunal, the draft statute does not provide the ICC with a separate appellate chamber. Rather, the appeals chamber envisaged in Articles 55 and 56 of the draft statute would be composed of seven trial judges who did not take part in the trial of the defendant. It is a fundamental principle of U.S. jurisprudence that judges of the same rank should not review each other's decisions. This principle is also codified in the International Covenant on Civil and Political Rights²⁴, which provides that "everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a *higher* tribunal according to law."²⁵ This principle reflects the concern that judges normally serving in a trial capacity have inherent difficulty overruling decisions by judges with whom they normally would serve as colleagues. Consequently, the statute should be revised to provide for the creation of a separate appeals chamber in addition to a separate office of Defense Counsel.

²³ See ABA Report on the International Tribunal to Adjudicate War Crimes Committed in the Former Yugoslavia (1993) at 19 for an elaboration of the justifications for an Office of Defense Counsel.

²⁴ G.A. Res. 2200, 21 U.N. GAOR, 21st Sess., Supp. No. 16 at 52, U.N. Doc. A/6316 (1967).

²⁵ *Id.* at Art. 14.5 (emphasis added).

B. *Subject Matter Jurisdiction*

The basic approach to the Court's subject matter jurisdiction contained within Article 22 of the ILC draft statute is sound. The Court would have jurisdiction over those crimes covered by international conventions that are widely accepted by States representing all of the world's major legal systems and that have an extradite or prosecute obligation. While most of the offenses listed are unlikely to engender much criticism²⁶, the inclusion of "apartheid" to the list seems inappropriate considering how far South Africa has come in dismantling the vestiges of that heinous practice. In addition, the list does not include torture and nuclear terrorism as those crimes are defined in the Torture Convention²⁷ and the Convention on the Protection of Nuclear Materials.²⁸ This is an unfortunate omission, and should be corrected.

²⁶ Such offenses include: genocide, grave breaches of the Geneva Conventions, aircraft hijacking, aircraft sabotage, hostage taking, attacks against internationally protected persons, and maritime terrorism. See Geneva Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 277 (signed December 9, 1948; entered into force Jan. 12, 1951); Geneva Convention for the Amelioration of the Condition of the Wounded, and Sick in Armed Forces in the Field, Aug. 12, 1949, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 1949, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287; Convention for the Suppression of Unlawful Seizure of Aircraft, 22 U.S.T. 1641, T.I.A.S. No. 7192, 860 U.N.T.S. 105 (Signed December 16, 1970; entered into force Oct. 14, 1971); Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, 24 U.S.T. 565, T.I.A.S. No. 7570, 974 U.N.T.S. 177 (Signed September 23, 1971; entered into force Jan. 26, 1973); International Convention Against the Taking of Hostages, G.A. Res. 34/146, 34 U.N. GAOR, 34th Sess., Supp. No. 46 at 245, U.N. Doc. A/34/146 (1979), (Signed December 17, 1979; entered into force June 4, 1983), *reprinted in* 18 I.L.M. 1456 (1979); Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, 28 U.S.T. 1975, T.I.A.S. No. 8532, 1015 U.N.T.S. 243 (Signed December 14, 1973; entered into force Feb. 20, 1977); Convention and Protocol on the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, *reprinted in* 27 I.L.M. 668 (1988).

²⁷ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, 39 U.N. GAOR, 39th Sess., Supp. No. 51, U.N. Doc. A/39/51 (1985).

²⁸ Convention on the Physical Protection of Nuclear Materials, done at Vienna on Oct. 26, 1979, entered into force on Feb. 8, 1987, T.I.A.S. No. 11,080. President Clinton used his first major foreign policy address on September 27, 1993, at the

In addition, the ILC should reconsider whether major drug crimes, as defined in the UN Convention Against Illicit Traffic in Narcotic Drugs²⁹ should be added to the list (especially if Article 26 is deleted as proposed below). It is true that drug trafficking is of an entirely different order from the other international crimes listed in Article 22; however, one of the major needs cited for an ICC has been the inability of Caribbean, Central American, and Latin American countries to prosecute major drug traffickers.³⁰

Article 21 of the draft statute provides for a review conference to examine the operation of the ICC's statute. The conference also considers possible additions to the list of crimes for which the ICC has subject matter jurisdiction including, "in particular, the addition to that list of the Code of Crimes against the Peace and Security of Mankind." The Draft Code of Crimes is like a bad penny that continues to turn up in relation to the ICC. Many States and commentators have strongly objected to the Code of Crimes.³¹ As they have pointed out, the Code is redundant with existing international conventions and would be disruptive of these conventions where the Code deviates from existing statements of the law. Moreover, it fails to specify the state of mind necessary to be charged with a criminal violation and neglects to define offenses with sufficient precision to inform people of what acts will be considered criminal.³² Consequently, the reference to the Code of Crimes should be deleted from Article 21.

Article 26 of the draft statute would give the ICC additional subject matter jurisdiction over other crimes "under general international law" and "under national law which give effect to provisions of a multilateral treaty," provided that the State on

United Nations General Assembly, to urge international cooperation to meet the growing threat of "nuclear terrorism". See *Clinton supra* note 7.

²⁹ Signed on December 19, 1988, U.N. Doc. E/CONF.82/15, reprinted in 27 I.L.M. 403.

³⁰ See Scharf, *supra* note 2 at 152-3.

³¹ See M. CHERIF BASSIOUNI, COMMENTARIES ON THE INTERNATIONAL LAW COMMISSION'S 1991 DRAFT CODE OF CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND (1993).

³² See generally, *Connally v. General Const. Co.*, 269 U.S. 385 (1926). The U.S. Supreme Court held that a criminal statute is void (as a constitutional law matter) when it is so vague and imprecise that "[m]en of common intelligence must necessarily guess at its meaning and differ as to its application." *Id.* at 391.

whose territory the suspect is present and the State where the offense occurred gives their consent. This is perhaps the most problematic provision of the entire statute. It would potentially give the ICC jurisdiction over uncodified, open-ended offenses that are not defined with sufficient specificity and precision to inform people of what acts will be considered criminal. In addition, it would give the ICC jurisdiction over offenses listed in regional conventions and international conventions that the United States and other countries have chosen not to ratify because of objections to their subject matter. This Article should be omitted altogether from the Statute.

The draft statute treats the crime of aggression as a special case. Under Article 27, the ICC would have jurisdiction over the offense of aggression if the Security Council has found that the suspect's State has been guilty of aggression. The crime of aggression is not defined in any international convention. The only officially adopted definition of aggression is that contained in General Assembly Resolution 3314 adopted in 1974. The history of that Resolution illustrates that it was intended only as a political guide and not a binding definition. Article 27 should also be omitted from the Statute.

C. *Personal Jurisdiction*

The issue of personal jurisdiction concerns whether a State should consent before the Court can obtain jurisdiction over a particular accused and the form of this consent. Under the ILC's draft statute, the ICC can prosecute a case if *any* State which had jurisdiction under the relevant treaty to try the accused consents to the ICC's jurisdiction. For most offenses, this would include the State of the perpetrator's nationality, the State of the victim's nationality, the State where the offense occurred, and the State where the perpetrator is found. Under this formula, the ICC could pursue prosecution even where the State with custody of the offender refuses to consent. This formulation departs radically from the sensible approach sketched out in the ILC Working Group's 1992 report. If the purpose of the court is to give States a third alternative to prosecution or extradition of international criminals found within their territory, then the consent of the State with custody of the offender should in all cases be required (with the exception of cases insti-

tuted by the Security Council under Chapter VII of the UN Charter³³ as envisaged by Article 25 of the draft statute). This consent can either be general or on a case-by-case basis. If that State does not consent, it would be obligated to either prosecute or extradite the offender under the relevant treaty.

However, as the American Bar Association Task Force recognized, "few, if any, states would be willing to agree to the jurisdiction of an international criminal court with the authority to try their nationals without their consent."³⁴ The United States, for example, would have a strong desire to prevent its former officials from being hauled before an ICC for internationally controversial actions such as the 1986 bombing of Libya, the invasions of Grenada and Panama, the downing of the Iranian Airbus, and the recent cruise missile attack on Baghdad.

While perhaps diminishing the effectiveness of an ICC, requiring the consent of the State of nationality (at least in cases involving officials and former officials) is probably the price to be paid for widespread international acceptance. Moreover, the negative effect of this consent requirement would be minimized if such consent were not required in cases instituted by the Security Council under Article 25 of the draft statute. Thus, for example, the Security Council could insist that Libya surrender to the ICC the two officials allegedly responsible for the bombing of Pan Am Flight 103 notwithstanding the consent provision. The ILC's proposed statute should be revised to incorporate this approach.

D. *Applicable Law*

If the ICC's subject matter jurisdiction is limited as recommended above, it would only have to turn to the relevant international conventions for the elements of the offenses over which it has jurisdiction. Article 28(c) of the draft statute directs the court to apply "as a subsidiary source, any applicable rule of national law." This is an important provision since the relevant conventions do not specify such issues as defenses, burden of

³³ Signed at San Francisco on June 26, 1945, entered into force on Oct. 24, 1945; reprinted in 1976 Y.B.U.N. 1043.

³⁴ See American Bar Association Task Force on An International Criminal Court, *supra* note 2 at 109.

proof, and mitigating circumstances. The statute, under Article 53, also envisages the court referring to national law to determine the length of a term of imprisonment or the amount of a fine to be imposed for a crime, and to specify laws as to pardon, parole or commutation of sentence under Article 67. The draft statute does not, however, specify which State's laws are to be applied for these purposes. This creates uncertainty and leaves the court with too much discretion. The solution would be for the statute to specify that the ICC would apply the supplemental law of the State in which the offender was found (including its choice of law rules)—a sort of international version of the Erie doctrine found in United States jurisprudence.³⁵

E. *Rules of Evidence and Procedure*

Article 19 of the draft statute provides that the Judges of the ICC will promulgate the Court's rules of evidence and procedure. For many States, these rules are likely to be critical to the acceptability of an ICC. Under Article 19, the ICC's judges have broad discretion to adopt rules that, for example, do not fully protect the rights of the accused. In this vein, the Nuremberg and Tokyo Tribunals have been subject to criticism for their use of ex parte affidavits against the accused at trial.

Instead, the Parties to the court's statute should assume the responsibility for developing rules of evidence and procedure and incorporate them into a protocol that would be adopted at the same time as the court's statute. They would by no means have to begin the process from scratch. The rules developed for the Yugoslavia War Crimes Tribunal could serve as the basis, with appropriate modifications, for the rules for a permanent ICC.

F. *Surrender of the Accused*

The draft statute is silent on the issue of whether surrender of the accused to the ICC should be deemed "extradition." In its 1992 Report, the ILC Working Group suggested the novel proposal that surrender of persons to the ICC would not need to be considered extradition. As characterized in that Report, this

³⁵ See *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938) (Holding that a federal court in a diversity suit should apply the law of the state in which it sits).

would enable the numerous States that have legislation or constitutional prohibitions against the extradition of their nationals nevertheless to surrender such persons to the ICC, on the theory that the ICC is, in effect, simply an extension of their own national courts. There is absolutely no evidence to suggest that the courts of such States would accept this theory. Moreover, in "The Jury is Still Out," I explained why such an arrangement would run afoul of Article III, Section 1 of the United States Constitution³⁶, which requires that any court exercising the judicial power of the United States must apply United States law, be established by Congress, and be composed of judges who are assured of life tenure during good behavior and who are appointed by the President with the advice and consent of the Senate.³⁷ Consequently, the statute should make clear that surrender of the accused to the ICC is an extradition.³⁸

The commentary to Article 63 of the draft statute indicates that the ILC would return during its 1994 session to the question whether a State party that decided not to surrender an accused to the ICC should also be allowed as an alternative to domestic prosecution to extradite the accused to another State for prosecution. If the object of an ICC is to ensure that the accused is prosecuted and to give States a third alternative to extradition and domestic prosecution, there is no good reason why a Party should not be able to choose instead to extradite the accused to a third State. When national prosecution is available, it has inherent advantages over prosecution before an international body. Moreover, preserving the extradition option is necessary if the ICC is to complement, rather than compete with, prosecution before national tribunals.

³⁶ U.S. CONST. art. III, sec. 1.

³⁷ See Scharf, *supra* note 2 at 163-4.

³⁸ Extradition is the surrender by the requested jurisdiction to the requesting jurisdiction of an individual accused or convicted of an offense within the authority of the latter. It requires the requesting jurisdiction to be competent to try and punish the fugitive and to seek his surrender for that purpose. See Michael P. Scharf, *Foreign Courts on Trial: Why U.S. Courts Should Avoid Applying the Inquiry Provision of the Supplementary U.S.-U.K. Extradition Treaty*, 25 STAN. J. INT'L L. 257 (1989).

G. *Legal Assistance*

The draft statute, under Article 23, allows States to designate from a list those offenses for which they accept the Court's jurisdiction. The draft statute nevertheless requires States that are Parties to the Court's statute but that have not accepted the Court's jurisdiction with respect to the type of offense involved in a particular case, to render various kinds of assistance to the Court. For example, under Article 33(2) of the draft statute, such States are required to ensure that the accused is arrested and detained. Article 46 provides that the Court has authority to "require any person to give evidence at trial," even if that person resides in and is a national of a State that has not accepted the ICC's jurisdiction with respect to the particular offense. The commentary to Article 58 provides that Parties have a "general obligation to cooperate with and provide judicial assistance" to the Court, even in cases over which they have not recognized the ICC's jurisdiction. Article 45 requires Parties not to try the accused if he/she has been acquitted or given a light sentence by the ICC even for offenses over which the State has not accepted the Court's jurisdiction.

It makes little sense for State parties that have not accepted the jurisdiction of the Court with respect to the particular crime under investigation or prosecution to be under any legal obligation to cooperate with the Court. Nor should those States be constrained with regard to their authority to institute their own prosecution or to extradite the offender to a third State rather than the ICC. Rather, such States should come within the terms of Article 59 of the draft statute, which calls for the voluntary cooperation of States not Parties to the statute "on the basis of comity, a unilateral declaration, an ad hoc arrangement or other agreement with the court." The only exception to this should be for cases initiated by the Security Council, as to which all States should be obligated to render assistance to the ICC.

H. *Appeals*

Article 55 of the draft statute provides that the Prosecutor may appeal the Court's judgment of acquittal by asserting commission of errors of fact that have "occasioned a miscarriage of justice." Similarly, Article 57 would allow the Prosecutor to ap-

ply for a review of judgment upon the discovery of a new fact, not known at the time of trial, "which could have been a decisive factor in reaching the decision." In either case, an appeal by the Prosecutor, resulting in a reversal of the judgment of the Trial Court, would necessitate a new trial for the same offense, thus violating the prohibition against double jeopardy as it is understood and applied in the United States. Thus, the language of these articles should be amended to permit only the person convicted by the Trial Court to request an appeal after final judgment or a review proceeding. However, either the defendant or the Prosecutor should be permitted to seek interlocutory appeals of issues of law.

III. CONCLUSION

The key to setting up a permanent ICC that is both acceptable and effective is to give the court two different types of jurisdiction. The first type would be consensual; surrendering offenders and providing assistance to the court would be completely voluntary on the part of the Parties to the court's Statute. Consent could be given either on a case-by-case basis or in advance by accepting the court's jurisdiction over certain specified international offenses. The second type of jurisdiction would be triggered by the Security Council acting under Chapter VII of the United Nations Charter. In such cases, cooperation with the ICC would be mandatory, backed up by the implicit threat of Security Council imposed sanctions for noncompliance.

I concluded my earlier article on this issue by stressing that the United States should "participate in the study and possible development of [an international criminal court] so that it can influence the structure, procedures, and substance of whatever results."³⁹ Having pushed for four years from within the State Department for a more forward-leaning policy toward the establishment of an ICC, it is particularly gratifying that the United States Government has finally decided to become "actively and constructively involved" in the endeavor.⁴⁰ Now that the United States Executive Branch is getting serious about the es-

³⁹ See Scharf, *supra* note 2 at 168.

⁴⁰ See STATEMENT BY CONRAD K. HARPER, *supra* note 20 at 2.

establishment of an ICC, the analysis and proposed revisions suggested above should prove useful both to the United States and the members of the International Law Commission as they return to the ICC project in the months ahead.