REPORT TO THE INTERNATIONAL COMMITTEE OF THE AMERICAN COLLEGE OF TRIAL LAWYERS ON THE PROSECUTION OF WAR CRIMES, CRIMES AGAINST HUMANITY AND GENOCIDE

Prepared by the Sub-Committee on International Criminal Courts

This August 2004 report is a research paper published by the American College of Trial Lawyers as a resource for those practitioners who are involved with the International Criminal Court.

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REPORT TO THE INTERNATIONAL COMMITTEE OF THE AMERICAN COLLEGE OF TRIAL LAWYERS ON THE PROSECUTION OF WAR CRIMES, CRIMES AGAINST HUMANITY AND GENOCIDE

A. Introduction

This report was prepared by a Sub-committee of the International Committee of the College which began its work in 2000 and submitted its first report in 2001. The report has been constantly updated pending its approval by the Regents of the College. This version was updated in August 2004.

The interest of the International Committee in War Crimes, Crimes Against Humanity and Genocide[1] was spurred by an initial inquiry into the lessons to be learned from the Pinochet extradition proceedings in the United Kingdom in 1999 .[2]

When the sub-committee began its inquiry, it asked whether national criminal law was tailored to meet the challenges that such a case poses to a national criminal law system. The much publicized and debated extradition proceedings launched in the U.K. against General Pinochet showed how difficult it is to obtain the extradition of a person who, such as General Pinochet, is charged with crimes allegedly committed in another country while serving as a Head of State of that country. In addition to difficult issues pertaining to jurisdiction and the substantive legal basis for extradition for such acts, no matter how hideous and revolting, the Pinochet Affair also raised difficult political issues of national and international significance that explain to a large measure the meander of legal and political proceedings that took place. At the end of the day, although it appeared that the U.K. Courts were ready to order extradition, the political process overtook the legal process, and Pinochet was sent back to his homeland.

As a result, the international community believed for a time that Pinochet would never be accountable for his actions given the immunity he had obtained when he decided to step down as the Head of the Government of Chile. At the time, Chile, his homeland where occurred most of the actions upon which the accusations against him were based, did not appear to be a willing and competent jurisdiction to arraign him. Although subsequent events seem to indicate that this assumption was erroneous, the sub-committee's initial inquiry had lead it to consider the broader issue of accountability for Crimes against Humanity wherever and however committed. As we will be seen later on in this report, many of the difficult questions raised by the Pinochet Affair are typical of questions that arise whenever consideration is given to the prosecution of such crimes.

This subject is all the more relevant now that the International Criminal Court (the "ICC") is a reality and that the Rome Treaty is now in force.

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[1] Unless stated otherwise, these crimes will be collectively called "Crimes against Humanity" in this report.

[2] Hereinafter "the Pinochet Affair". See Re: Pinochet Ugarte, [1999] H.L.J.12

The war against Iraq launched by the coalition led by the United States without the explicit approval of the United Nations, is a further reason for the relevancy of the subject given that it is quite possible that war crimes accusations could be made against participants in that war.

There is therefore a real possibility that some United States citizens could be arrested in Contracting States and brought to appear before the ICC even without the United States' ratification of the Rome Treaty. The ICC has already received several complaints against the United States for the crime of aggression against Iraq.

The efforts deployed by the current administration of the United States to exempt U.S. citizens from the application of the Convention, and to be beyond the reach of the International Criminal Court, show that this possibility is very real. Hence, the United States government has suspended military assistance to countries which refuse to sign bilateral immunity agreements.

B. Background

1. Justice and Accountability

In her Foreword to Richard J. Goldstone's book, *For Humanity Reflections of a War Crimes Investigator*, Justice Sandra Day O'Connor, Associate Justice of the Supreme Court of the United States, states that *"the rule of law is generally vindicated by holding transgressors accountable for their actions through prosecution and punishment"* but that *"this relatively straightforward approach becomes more complicated in certain contexts, however"*.[3] The contexts that she had in mind are precisely those associated with war crimes, genocide, crimes against humanity and similar criminal actions committed either under dictatorial regimes or during an armed conflict.

Although the rule of law is generally vindicated by holding transgressors accountable for their actions through prosecution and punishment, this relatively straightforward approach becomes more complicated when attempting to end an armed conflict by negotiating with the enemy or in states seeking to become democracies where the passage of power requires compromising with a regime that has committed crimes against humanity. The international community faces an enormous challenge in dealing with emerging democracies, which forces it to balance the moral obligation to prosecute criminals against the countervailing interest of securing either a peaceful and full transition to democracy or putting an end to an armed conflict by foregoing punishment.

Given the number of countries still under some form of authoritarian rule not conforming to human rights, and the increasing pressure put on these countries to move to a politically correct form of government, the number of contexts to which Justice O'Connor alludes is likely to increase. There are also a number of areas, especially in Africa, where ethnic cleansing and numerous regional conflicts (wars in reality) will serve to challenge the international community to achieve results of justice and accountability. Liberia provides a current example.

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[3] Richard J. Goldstone, *For Humanity Reflections of a War Crimes Investigator,* Yale University Press/New Haven & London, 2000 at 121.

The dilemma is too often prosecution vs. amnesty.

Throughout his book, Goldstone makes the point that it is sometimes difficult to achieve peace, to resolve a civil war or to replace a dictator by a democratic regime without granting amnesties to the former leaders that should be prosecuted. The author makes the point that "The Pinochet affair throws into stark relief the tensions between prosecutions and amnesties and demonstrates the necessity for a permanent international criminal court".[4]

Howard Ball, in "Prosecuting War Crimes and Genocide", focuses on the issue of how a pained, shocked and unbelieving civilised world community has struggled for a century to define the "whats" and understand the "whys" of war crimes, crimes against humanity, torture and genocide. He also makes the point that the problem of "what to do with the perpetrators has been a difficult, almost torturous one."

There have been four dominant types of responses: amnesty, exile, vengeance or criminal trial.[5]

Amnesty is chosen when it is felt that bringing the perpetrators to trial will not benefit the nation concerned but only mean a return to civil war. The choice of exile as a response is essentially based on the same premise.

Vengeance according to Ball was the preferred course of both President Roosevelt and Prime Minister Churchill:

> "*Certainly most of the Allied leaders in World War II, including Franklin D. Roosevelt but especially Winston Churchill (until the months preceding the Nuremberg trial), believed in the "bullet to the head" concept: summary capital punishment of the thousands of Nazi war criminals, without the benefit of trial."*[6]

As for a criminal trial, the proponents of that response argue that accountability through justice for the perpetrators is the best way to lead to peace.[7]

Judge Gabrielle Kirk McDonald, a prominent American jurist who sat as one of the judges in the Tadic Trial at The Hague and presided the Yugoslavia War Crimes Tribunal (the "ICTY") Trial Chambers, describes the twentieth century as one of split personality:

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4 *Ibid*.

5 Howard Ball, *Prosecuting War Crimes and Genocide The Twentieth – century experience*, University Press of Kansas, at 1 citing Seth Mydans, "Two Khmer Rouge Leaders Spend Beach Holiday in Shadow of Past", *New York Times*, January 1, 1999, at A1, 241.

6 *Ibid at 2: Quoted in AP "Senators urge Clinton to seek deal to remove Yugoslav Leader", New York Times, December 30, 1998.* [p. 241].

7 *Ibid* at 2 citing Seth Mydans, "Revenge or Justice? Cambodians Confront the Past", *New York Times*, December 31, 1998, pp. A1, A8 [p. 241]

> *"The twentieth century is best described as one of split personality: aspiration and actuality. The reality is that this century has been the bloodiest period in history. As improvements in communications and weapons technology have increased, the frequency and barbarity of systematic uses of fundamental rights have likewise escalated, yet little has been done to address such abuses…"*[8]

Faced with this problem, the international community could not remain passive for much longer. It chose the international criminal trial process as the answer to war crimes committed in Yugoslavia and genocide in Rwanda. In fact, current political ethics would not tolerate exile, immunity or vengeance as the proper means of dealing with the perpetrators of hideous crimes against humanity.

On a more permanent basis, the international community had three options on how to deal with the perpetrators of crimes against humanity. **First,** it could continue to proceed on a case by case basis and create *ad hoc* criminal tribunals in cases deemed appropriate. **Second,** it could leave the prosecution of war criminals to national initiatives**,** where a state would prosecute its own nationals or obtain the appearance of foreign nationals before its domestic criminal courts by extradition or forced removal. The extradition process is typified by the attempt by the government of Spain in the Pinochet Affair. The forced removal process is typified by the Noriega Affair where the government of the United States forcefully removed the former Head of State of Panama and brought him to the United States for trial.[9] Finally, the **third** option is that the international community create a permanent and universal criminal justice system.

2. The Principle of Universality

For Goldstone the essence of justice is its universality**,** and justice should not only be applied to some people and not to others:

> *"The essence of justice is its universality, both nationally and internationally. A decent and rational person is offended that criminal laws should apply only to some people and not to others in similar situations. I felt distinctly uncomfortable when, in October 1994, in Belgrade, I was asked by the Serb minister of justice why the United Nations had established a War Crimes Tribunal for the former Yugoslavia when it had not done so for Cambodia or Iraq. Why were the people of the former Yugoslavia being treated differently? Was this an act of discrimination? The only answer I could give was that the international community had to begin somewhere, but that if there was no follow-through and if other equivalent situations in the future were not treated comparably, then the people of the former Yugoslavia could justifiably claim discrimination."*[10]

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7 *Ibid* at 2 citing Seth Mydans, "Revenge or Justice? Cambodians Confront the Past", *New York Times*, December 31, 1998, pp. A1, A8 [p. 241]

8 *Ibid* at 215 citing "Gabrielle Kirk McDonald, "The Changing Nature of the Laws of War," (1998) 156 Military Law Journal 30, 32-33 [p. 266].

9 *United States of America* v. *Noriega* (1990) 746 F. Supp. 1506.

For Judge Gabrielle Kirk McDonald "*In the prospect of an ICC lies the promise of universal justice."*[11]

No lawyer will argue against the principle of universal justice. Yet it remains difficult to apply in many situations such as where the transfer of power from a delinquent ruler or the possibility of negotiating a peaceful solution to an armed conflict could more easily be achieved by negotiating with those responsible for the very crimes the universal criminal justice system is meant to punish. The events in Belgrade leading to the destitution of the Milosevic government provide a good illustration of the kind of compromise that needs to be made to obtain the departure of a despot without bloodshed that is immunity from prosecution. Fortunately, pressure from the International Community forced Belgrade to deliver Milosevic to the ICTY.

Goldstone speaks at length about the South African experience in this regard. Goldstone played an important part in the process that led South Africa from Apartheid to a functional democracy avoiding an outright civil war. The centre piece of accountability for criminal conduct linked to Apartheid was the creation of a Truth Commission where one could acknowledge his or her wrongdoings and obtain a pardon in appropriate circumstances. Goldstone speaks of the healing effect of public acknowledgement and of how the decision to create a Truth Commission was essential to the orderly transfer of power in his country. The truth Commission could refuse to pardon in which case the criminal process was free to take over and prosecute.

Drawing on his experience as a member of the commission in South Africa and as the first Chief Prosecutor for the ICTY, Goldstone writes:

> *"My experience in The Hague has taught me that the same healing effect can also come about through a credible judicial process. We needed evidence of war crimes committed against innocent civilians near the town of Tuzla, in Bosnia and Herzegovina. Our investigators approached some of the victims there, and as was our experience elsewhere with victims, they needed no persuading. They wished to testify not only on their own behalf but also on behalf of other victims.(...) By publicly exposing their own suffering and that of their families and friends, they had significantly contributed to the tribunal. They, like Mrs. Gcina, had received acknowledgment from a credible public forum.*"[12]

Finally, Goldstone believes that one can reconcile the objectives pursued by an international criminal court and those pursued by the creation of a domestic acknowledgement process to facilitate a transfer of power as follows:

> *"Although the relationship between such a truth-commission process and the Yugoslavia tribunal is not a simple one, I have no doubt that any*

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10 *Supra* note 3 at 122-123.

11 *Supra* note 5 at 215 citing Gabrielle Kirk McDonald, "The Changing Nature of the Laws of War," (1998) 156 *Military Law Journal* 30, 32-33.[p. 266].

12 *Supra* note 3 at 65-66.

problems could be resolved. For example, such a commission should not be empowered to grant amnesties for war crimes. Its purpose should be to provide a credible platform from which victims on all sides could tell their stories."

He does not say, however, how the principal participants of the South African apartheid government might have reacted if, in the name of universality, they would have had to submit to the jurisdiction of an international criminal court to answer for their criminal acts committed in support of Apartheid.

3. Realpolitics

This last observation leads to the following truism: the principle of universal justice may be easily agreed upon, but when the realities of politics are factored in, the principle becomes much more difficult to acknowledge as universally applicable.

Firstly, the reaction of nations to given situations, like the reaction of people, will depend on their political personalities and will vary depending on their political and economic interests.

In his book entitled "*Stay the Hand of Vengeance*", Bass concludes from his analysis of what took place during the 20th Century that the single best guarantee of a strong reaction from a state has been its own victimization. He adds that it will call for vengeance if it is an illiberal state or justice if it is a liberal state.[13]

Former U.K. Prime Minister Edward Heath is reported by Goldstone to have said to him that *"if people wished to murder one another, as long as they did not do so in his country, it was not his concern and should not be the concern of the British government."* [14]

Goldstone was startled by this opinion but he adds *that "Little did I realize that he was candidly stating what many leading politicians in major Western nations were saying privately – and what many of them still believe."*[15]

Secondly, the situations calling for an international reaction often occur in the context of armed conflicts and the military do not favorably view the intervention of lawyers and judges in these circumstances. The hostile reaction of NATO to the news of the indictment of Milosevic during the war in Bosnia supports this point. NATO had lost a pawn to play in its efforts to find a solution to the war. It is worth noting that NATO changed its approach when it realized that the indictment garnered broad public support.

Goldstone attributes to deference to the military what he qualifies as the *"unfortunate approach"* of the United States administration at the Rome conference which led to the adoption of the

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13 Gary Jonathan Bass, *Stay the Hand of Vengeance*, Princeton University Press, p. 276.

14 *Supra* note 3 at 74.

15 *Ibid*.

Treaty to create the ICC. Although Goldstone may be oversimplifying the rationale behind the position of the United States, he is undoubtedly pointing to an important consideration underlying it, that often American intervention is colored by competing and often less than universally acceptable factors. The global political and economic interests of the United States often compel it to either support or tolerate situations prevailing in well known current "hot spots". These "hot spots" will attract the attention of the ICC.[16]

The recent United States government decisions to attack Iraq and the urge to do so without the U.N. Security Council's explicit approval constitutes the pillar on which rest some forty complaints received by the ICC against the United States and its allies accusing them of the crime of aggression against Iraq. Other complaints have also been filed concerning alleged acts committed by the American troops in Iraq.

In June 2003, complaints made for war crimes were filed against George W. Bush, Tony Blair and General Franks under the 1993 Belgium Universal Competence Law, which permitted prosecution regardless as to where the alleged act took place or the accused's nationality. In July 2003, after the United States government warned Belgium that it could lose its host status for NATO headquarters, the Universal Competence Law was repealed. A new law was passed which now limits the jurisdiction of the Belgian Courts to Belgium citizens or to foreigners living on Belgian territory.

The military have had no objection in the past to the intervention of international courts once an armed conflict is over so long as the victor keeps control of the process. It is construed only as part of the victor's arsenal in the form of retribution. The Nuremberg and Japan War Crimes Tribunals are perfect examples of that position. The victor does not wish to have the process turned on its actions knowing full well that no matter how noble the cause pursued, the victors' actions are rarely entirely respectful of all of the tenets of the ethics of war. That concern is also true now that for a war to be legitimate, it is generally considered by prominent international jurists that the war must be led under the auspices of the United Nations. The new concept of the so-called "pre-emptive war" also introduces new opportunities for allegations of war crimes flowing from "illegitimate aggression" against sovereign States.

The ICC is now a reality and real politics will have to adapt and learn to live with the consequences of the court's interference. Chief Prosecutor Luis Moreno-Occampo has already announced the ICC priority to examine allegations of war crime in the Democratic Republic of Congo.

The existence of the ICC is a limiting factor in the choice of scenarios available to resolve armed conflicts or promote the peaceful transition to a democratic form of government. It should become a strong deterrent for delinquent leadership not to initiate armed conflicts or where they are a reality, to act in a more responsible fashion so as to avoid the commission of atrocities and expose itself to prosecution by the ICC. It will also likely act as a deterrent to leaders who may be tempted to resort to hideous actions to resolve internal conflicts or secure power over their countrymen at all costs.

Bass points to an interesting discussion that took place in 1918 in the Imperial War Cabinet (U.K.) that goes precisely to the deterring effect of the prospect of seeing war crimes in this instance, prosecuted and punished. The cabinet was discussing whether there was a legal foundation

to prosecute the German authorities for the atrocities committed during the First World War. Attorney General Smith concluded not only that there was ample support for the existence of the right to prosecute war criminals but that there was a good practical reason for it:

> *"(…) It is necessary for all time to teach the lesson that failure is not the only risk which a man possessing at the moment in any country despotic powers, and taking the awful decision between peace and war, has to fear. If ever again that decision should be suspended in nicely balanced equipoise, at the disposition of an individual, let the ruler who decides upon war know that he is gambling, amongst other hazards, with his own personal safety."*[17]
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> *Some twenty-seven years before Nuremberg, Smith had delivered an eloquent call for command responsibility."*[18]

4. Prior Tribunals

Although we are tempted to believe that the notion of prosecuting war criminals and perpetrators of Crimes against Humanity is an invention of the 20th century, the history of international justice goes back to the abortive treason trials of Bonapartists in 1815 after the Hundred Days War.[19]

The idea of creating a permanent international criminal court to enforce international justice dates to 1919 according to Ball:

> *"The concept of a permanent ICC emerged in 1919 when the Allies crafted the Versailles Peace Treaty, signed reluctantly by Germany that year. One of the hundreds of articles in the treaty called for the creation of an international criminal tribunal to try Germans accused of committing war crimes in violation of the Hague Treaties of 1899 and 1907*[20]*. Given the unwillingness of the United States to implement that and other war crimes articles in the treaty (Articles 227-230), as well as the desire of the victorious Allies, "in the interest of regional stability and political agendas," to forgo its implementation, no international criminal tribunal was created.*
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> *(…)*

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17 CAB 23/43, Imperial War Cabinet 39, 28 November 1918, 11:45 a.m., pp. 2-3. [p. 334][14] *Supra* note 3 at 74.

18 *Supra* note 13 at 70 citing Smith was not just taking a page out of Burke, but also out of Kant: "[U]nder a nonrepublican constitution, where subjects are not citizens, the easiest thing in the world to do is to declare war. Here the ruler is not a fellow citizen, but the nation's owner, and war does not affect his table, his hunt, his places of pleasure, his court festivals, and so on. Thus, he can decide to go to war for the most meaningless of reasons, as if it were a kind of pleasure party" (*Perpetual Peace*, p. 113). [p. 334].

19 *Supra* note 13 at 5 and 6.

20 *Supra* note 5 at 70 article 227 stated: "A special tribunal will be constituted to try the accused [Wilhelm II] … [The special tribunal] will be composed of five judges, one appointed by each of the following Powers: namely, the United States of America, Great Britain, France, Italy, and Japan… In its decision the tribunal will be guided by the highest motives of international policy, with a view to vindicating the solemn obligations of international undertakings and the validity of international morality. It will be its duty to fix the punishment which it considers should be imposed." [p. 263].

The United Nations was led to re-examining the possibility of a permanent international criminal court as a result of the horrors the world glimpsed at the end of the Second World War. The 1948 Genocide Convention provided that persons charged with genocide would be tried by a competent tribunal of the State in the territory of which the act was committed or by such international penal tribunal as may have jurisdiction.

In 1948, the General Assembly of the United Stations also invited the creation of the United Nations Committee to study the desirability and possibility of establishing an international judicial organ for the trial for persons charged with genocide.

Then, finally, in 1989, with the collapse of the Soviet Union's "evil empire", the idea of a permanent ICC was renewed.

We have already spoken of the creation in 1993 and 1994 by the United Nations Security Council of the *ad hoc* war crimes tribunal for the former Yugoslavia and Rwanda, but it is really in 1994 that the International Law Commission presented a draft treaty to the General Assembly of the United Nations proposing the creation of such an international tribunal.[21]

5. The Issues

When the subject of Crimes against Humanity is approached, the Nuremberg Trials immediately come to mind. Currently there are two functioning international tribunals that are investigating, charging and prosecuting suspected perpetrators of Crimes against Humanity: the ICTY and Rwanda War Crimes Tribunals (the "ICTR"), two tribunals created by the Security Council of the United Nations. Finally, the ICC now exists.

An entirely new area of criminal trial advocacy has emerged from the workings of the ICTY and ICTR and will continue to develop with the ICC. The difficult political and legal issues of national and international significance previously mentioned in connection with the Pinochet Affair and many others now face all members of the international community.

We have decided to attempt to identify the issues that could be usefully brought to the attention of the College as regards the prosecution by international criminal tribunals of crimes such as Crimes against Humanity.

The experience derived from the ICTY and ICTR has proven particularly useful to bring to light and anticipate what concerns the creation of the ICC should cause the College to entertain and consider.

The new form of advocacy emerging before these international criminal tribunals raises concerns on a wide variety of issues such as the fairness and independence of the prosecutorial process and of trials, the protection afforded to witnesses, suspects and accused before international criminal

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[21] *Supra* note 5 at 193 to 196.

courts, and how to best advise and represent Canadian and American nationals under investigation or summoned to appear before these courts. The quality and ethics of the Defense Bar and the means afforded the Defense Bar to ensure a full defense to its clients are also very real and important questions as will be seen later on in this report.

In its Preliminary Report at the Washington meeting on October 28, 2000, the sub-committee reported summarily its initial assessment of a number of issues that had come to its attention in the few months leading to the meeting. The assessment covered the following issues:

- the level of protection afforded to the accused before the ICC under the enabling convention and the draft rules of procedure: the view then expressed was that the protection seemed adequate and was largely inspired by the Anglo-American criminal tradition;

- the level of protection afforded to witnesses and victims of war crimes by the current international courts and the future ICC: the view expressed then was that this was a very difficult issue involving competing rights and interests;

- the quality of the Defense Bar practising before international courts: the view then expressed was that this has posed a serious problem in certain circumstances;

- the adequacy of the means granted the Defense to meet the prosecution's case: the point then made was that fact finders on both sides of the case faced very special difficulties;

- the definition of war Crimes, genocide and crimes against humanity: the point then made was that they involve sometimes vague concepts and problems foreign to criminal law as practised domestically; and

- the choice of forum to try Crimes against Humanity, i.e. the competing national and international jurisdictions over the perpetration of such crimes: the reservations of the government of the United States in relation to the Rome Treaty were underlined.

Since the Washington meeting, the sub-committee continued its review of these and other issues, and it is pleased to submit the following report for the consideration of the Committee and the College.

C. <u>The ICC</u>

1. Its Creation

Of the 185 member states of the UN, 161 sent representatives to Rome for the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court. There were 235 accreditated NGO's in attendance at the Rome deliberations that began on

June 15, 1998, and ended on July 17, 1998. These NGO's were all under one organizational roof: the Coalition for an Independent Criminal Court (CICC). The CICC continually lobbied for the strongest, most independent ICC that could be created.

When the representatives arrived in Rome, there were three major questions for the delegates to answer: (1) What would be the relationship of the ICC and the UN Security Council? (2) Was there to be the creation of a truly independent Prosecutor's Office? and (3) What were the core crimes that made up the jurisdiction of the ICC?

The Rome conference required, for passage of the treaty, a two-thirds vote of the 161 delegations. The minimum number required was 107; in the end, 120 voted in favor of the draft treaty. On the final day of the Rome conference, July 17, 1998, the U.S. delegation requested a roll-call vote on the treaty. Three permanent Security Council members, Russia, France, and Great Britain, voted for the statute; the United States and China voted against it. Five other nations also opposed the treaty – Israel,[22] Libya, Iraq, Qatar, and Yemen – "*leaving the U.S. in unfamiliar – and no doubt unwelcome – company.*"[23]

The treaty was open for nations to sign until December 31, 2000. On that day, President Clinton, on behalf of the United States, signed the Rome Statute of the International Criminal Court[24]. At that time, President Clinton issued a statement speaking of «serious flaws» in the treaty, which he hoped would be corrected in negotiations before the treaty is finally ratified.[25] In the U.S., a treaty must be ratified by the Senate[26]. President Clinton said he would not send the treaty to the Senate for ratification.

On April 11th 2002, more than the 60 required ratifications of the Rome Statute had been received. The Treaty finally came into force on July 1st 2002.

The adoption of the Rome Treaty and its ratification by a majority of nations is a clear sign that the international community has opted for a universal international criminal law system administered by a permanent criminal court.

2. Summary of the Rome Treaty

The PrepCom draft statute that the Rome deliberations were based on was 167 pages long. It was divided into 13 parts and contained 116 articles. The section headings for the 13 parts of the PrepCom draft suggest the agenda for those that attended in Rome:

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22 *Supra* note 2 at 209 citing Israel voted against the draft treaty because the omnibus war crimes definition in Article 8 (2) (b) (viii) included "the transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory." The Israeli delegation viewed this as a pro-Palestine Liberation Organization (PLO) section. [p. 265]

23 *Ibid* at 209 Jackson and Carter, "Public International Law", p. 24. [p. 265]

24 Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9 (1998) [hereinafter Rome Statute]

25 Myers, « U.S. backs war crimes court », *Chicago Tribune* (January 1, 2001).

26 Ratification of a treaty requires approval by two thirds of the Senators present. U.S. Constitution, Article II, section 2. Even though a treaty is signed by the U.S., the President must send it to the Senate before it can be considered by the Senate.

"*Part 1. Establishment of the Court* (Articles 1-4), including general observations about its relationship with the UN.

Part 2. Jurisdiction, Admissibility, and Applicable Law (Articles 5-20). This part contained many options for the delegates to discuss and choose among, regarding controversial issues such as the ICC's jurisdiction, core crimes, the trigger mechanism, the role of the prosecutor, complementarity, and the law to be applied by the ICC in deciding cases.

Part 3. General Principles of International Law (Articles 21-34), called *General Principles of Criminal Law* in the final draft. Individual responsibility for genocide and other war crimes, recognized at Nuremberg, was a conceptual anchor in this part of the draft statute. Draft Article 23 (final treaty Article 25) held that such individuals were individually responsible and liable for punishment for their crimes. Article 31 (in both versions) laid out exceptions to individual responsibility: mental illness, intoxication, and threats to one's life.

Part 4. Composition and Administration of the Court (Articles 35-53). This part essentially replicated the composition and administration of the two ad hoc tribunals of the 1990s: Yugoslavia and Rwanda. Articles in this section, borrowing from the two ICTs, discussed the role and functions of the Presidency, the Appeals Chamber, the Office of the Prosecutor, and the Registry and the qualification of ICC judges.

Part 5. Investigation and Prosecution (Articles 54-61). This section dealt with investigational and prosecutorial aspects of the international criminal justice process, including due process for those suspected of committing genocide and other crimes.

Part 6. The Trial (Articles 62-74). These articles addressed the various aspects of the trial proceedings, including the rights of the accused, the protection of witnesses and victims, and the issue of reparation for victims.

Part 7. Penalties (Articles 75-79). The segment limited punishment to imprisonment. The absence of the death penalty led to heated discussions in Rome.

Part 8. Appeal and Review (Articles 80-84), called *Appeal and Revision* in the final draft. This part addressed issues relating to the appeal and review of judicial decisions.

Part 9. International Cooperation and Judicial Assistance (Articles 85-92).

Part 10. Enforcement (Articles 93-101). States that were party to the treaty had to enforce the judgments of the ICC by providing, at their discretion, prison facilities for convicted defendants.

Part 11. Assembly of States Parties (Article 102) dealt with the oversight of the ICC divisions by states that ratified the Rome treaty.

Part 12. *Financing of the Court* (Articles 103-107).

Part 13. Final Clauses (Articles 108-116) created parameters for states to file reservations and amendments to the ICC statute, for review of the statute, and for its ratification and entry into force."[27]

In the final Rules of Procedure and Evidence draft, Prepcom mentioned, as an explanatory note, that "these rules are an instrument for the application of the Rome Statute of the International Criminal Court to which they are subordinated in all cases."[28]

The rights of the accused are ensured by both the Rome Statute and the Rules of Procedure and Evidence. The presumption of innocence is provided by Article 66 of the Rome Statute.

Article 55 of the Rome Statute ensures protection against self incrimination during the investigation. Also, the right to be present at trial, the protection against double jeopardy, the right to have legal assistance, the right for a public trial, the right to examine a witness during trial and the right to appeal are all provided by the Rome Statute.

Rule 20 mentions the responsibility of the Registrar toward defense counsel:

"*Responsibilities of the Registrar relating to the rights of the defense*

1. In accordance with article 43, paragraph 1, the Registrar shall organize the staff of the Registry in a manner that promotes the rights of the defense, consistent with the principle of fair trial as defined in the Statute. For that purpose, the Registrar shall, inter alia:

(a) Facilitate the protection of confidentiality, as defined in article 67, paragraph 1 (b);

(b) Provide support, assistance, and information to all defence counsel appearing before the Court and, as appropriate, support for professional investigators necessary for the efficient and effective conduct of the defence;

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27 *Supra* note 5 at 205 and 206.

28 Rules of Procedure and Evidence (PCNICC/2000/1/Add.1).

(c) Assist arrested persons, persons to whom article 55, paragraph 2, applies and the accused in obtaining legal advice and the assistance of legal counsel;

(d) Advise the Prosecutor and the Chambers, as necessary, on relevant defence-related issues;

(e) Provide the defence with such facilities as may be necessary for the direct performance of the duty of the defence;

(f) Facilitate the dissemination of information and case law of the Court to defence counsel and, as appropriate, cooperate with national defence and bar associations or any independent representative body of counsel and legal associations referred to in sub-rule 3 to promote the specialization and training of lawyers in the law of the Statute and Rules."

Also, defense counsel, according to Rules 21 and 22, must possess determined qualifications such as relevant experience and established competence in international law or criminal law and procedure. Immunity from personal arrest or detention and from legal process in respect of words spoken or written and all acts performed by counsel, is provided by Article 18 of the draft Agreement on the Privileges and Immunities of the Court.[29]

Concerning the prosecution, a situation where there is reasonable basis to believe that crimes have been committed or are being committed has to be referred by a State Party or the Security Council to the Prosecutor in order for him to start investigating the case, according to Article 12 of the Rome Statute. Article 13 provides that he may also receive information from other sources and that "*if the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or she shall submit to the Pre-Trial Chamber a request for authorization of an investigation, together with any supporting material collected. Victims may make representations to the Pre-Trial Chamber, in accordance with the Rules of Procedure and Evidence*."

According to Article 66 of the Rome Statute, the prosecution has the burden of proof and it must prove guilt beyond reasonable doubt to obtain a condemnation. Life imprisonment will be the maximum sentence and there will be no possibility of death penalty.

Article 15 of the draft Agreement on the Privileges and Immunities of the Court provides that the Judges, the Prosecutor and the Deputy Prosecutors "*enjoy the same privileges and immunities as are accorded to heads of diplomatic missions*...".

[29] An agreement on the privileges and immunities of the Court (PCNICC/2001/1/Add.3).

3. Establishment of Court

Since the entry into force of the Rome Statute, the ICC has adopted its primary legal instruments to govern the Court's operation by establishing a budget for the first financial period, Rules of Procedure and Evidence, Elements of Crimes, Agreement on Privileges and Immunities and Financial Regulations and Rules.

On March 11th 2003, the first 18 judges of the ICC were sworn into office for different mandates varying in length. The Canadian diplomat Philippe Hirsch was elected to assume the presidency of the Court.

In June 2003, the First Chief Prosecutor Luis Moreno Ocampo was sworn in. Mr. Bruno Cathala was elected to serve a five-year term as the Registrar of International Criminal Court which makes him responsible for the administrative aspects of the Court.

As of July 16, 2003, nearly five hundred complaints had already been referred to the Prosecutor's Office since the establishment of the Court. Chief Prosecutor Moreno has announced that investigations concerning war crime allegations in the Democratic Republic of Congo will be the ICC priority.

4. Complementarity

Prior to ratifying, states were required to modify their domestic laws to comply with the principle of complementarity stipulated in the Convention. The principle of complementarity provides that a Contracting State can elect to pre-empt the jurisdiction of the ICC and choose to prosecute one of its nationals charged of a crime by the ICC before its own domestic courts. In order to achieve that result, the criminal law of the state needs to include, as a criminal offence, the crimes covered by the Treaty so that these crimes, i.e. war crimes, genocide and crimes against humanity as defined, can be prosecuted under their own criminal justice system. The criminal laws of the ratifying states must include measures that allow them to accede to requests of the ICC to either arrest or detain suspected criminals or those criminals convicted by the ICC.

The principle of complementarity is a central concept to the Rome Treaty. This principle was first introduced into International Law in the Genocide Convention of 1948. According to the principle, a national authority has first opportunity at bringing to justice persons who commit war crimes, genocide or crimes against humanity. Complementarity and universal jurisdiction underscore the point that if national authorities are unwilling or unable to carry out a genuine investigation and prosecution, then a regional or an international penal tribunal has jurisdiction to investigate and, if appropriate, to prosecute in its stead.[30]

The principle of complementarity will be the source of protracted litigation because under the Rome Treaty, the ICC prosecutor can challenge before the ICC the willingness and ability of a national authority to bring nationals to justice for their alleged crimes. If the ICC agrees with the

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[30] *Supra* note 5 at 193 to 196.

prosecutor's position, then the national jurisdiction must defer to the ICC and co-operate with the prosecutor. Cooperation entails aiding in the conduct of the prosecutor's investigation, and the arrest and surrender of the accused into the custody of the ICC.

D. U.S. Participation

1. History

As previously stated, the U.S. actively participated in the Rome conference which led to the creation of the ICC. Its delegation was headed by Ambassador David Sheffer, who was a speaker at the 2003 spring meeting of the College.

Since taking office, the Bush administration has disavowed President Clinton's signing of the Treaty. It has taken rather aggressive action both to protect U.S. citizens and to circumvent the court itself. These have taken three forms.

a. On July 12, 2002, the UN Security Council adopted Resolution 1422, which was renewed June 12, 2003 by Resolution 1487. In this resolution the Security Council requests that the ICC not commence or proceed with investigation or prosecution of any case which involves personnel from a non-party to the Rome Statute concerning acts or omissions relating to a UN established or authorized operation. This is for a 12-month period starting July 1, 2003 with the expresses intention to renew each July 1.[31]

It is interesting to note that the Security Council simply «requests» that the ICC not commence or proceed. This is probably the most the Security Council can legally ask for. Query, whether the ICC would ever reject such a request?

b. In 2002, the U.S. began negotiating bilateral agreements with other countries, ostensibly pursuant to article 98(2) of the Rome Statute, not to surrender U.S. nationals to the ICC. The U.S. has expressed a desire to negotiate such an agreement with every country in the world, whether or not a party the ICC. As of June 13, 2003, 39 countries had signed such agreements, although few had been ratified. The list includes Egypt, India, Israel, and the Philippines, but does not include any major industrialized nation[32]. Article 98(2) of the Rome Statute provides that:

> "The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court."

Critics of the U.S. action argue that this provision was intended to apply only to pre-existing agreements.

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31 UN Doc. S/RES/1487 (2003).

32 Coalition for the International Criminal Court, *U.S. Bilateral Immunity or So-called « Article 98 » Agreements,* June 13, 2003, available at http://iccnow.org/pressroom/factsheets/FS-BIAsAug2004.pdf (last visited November 15, 2004).

c. The U.S. Congress passed, and on August 2, 2002, President Bush signed, the American Service members' Protection Act of 2002 («ASPA»),[33] which contains numerous restrictions on U.S. cooperation with the ICC. These are discussed in more detail below.

2. The American Government's Reservations about the ICC

The United States reservations over the creation of the ICC are both practical and legal. Certain factors underlying the United States' position have already been discussed but will now be explored in more depth.

The U.S. concerns are summarised in Murphy, "*The Quivering Gulliver: U.S. Views on a Permanent International Criminal Court*."[34] Not only does the United States have concerns about the statute itself, it is also concerned about the court exercising jurisdiction over United States citizens if the United States is a not a party. The United States tried unsuccessfully to insert a provision in the Relationship Agreement between the ICC and the UN that would prohibit the surrender of a national of a country over the objection of that country. The feeling is that such a requirement would totally gut the treaty, as no country would ever approve of such surrender.

From a legal standpoint, the United States is correct when it underlines the fact that the Convention creates a precedent in that it applies even to non-member states. This feature of the Convention, according to the United States, violates the fundamental principle of international law that a treaty cannot be applied to a state that is not a party to it. This argument has merit legally.

From a practical standpoint, no other state can match the extent of the United States' overseas military commitments through alliances and special missions. No one can ignore the breath of its economic and political influence, and the increased vulnerability of its nationals abroad given its international presence. Practically speaking, the United States undoubtedly has a national interest to control how the international criminal prosecution system will work since it is likely to affect the American people more than the people of any other western state.

The United States is the world's only superpower, providing the bulk of financial resources and military personnel for the various peacekeeping missions of the United Nations and peacemaking efforts of NATO. Because of their presence in Asia, Europe, the Middle East, and the Pacific, American personnel will be potentially more vulnerable to allegations and charges that they have committed grave crimes that fall under the ICC's jurisdiction. The bottom line for the Pentagon and hence for the United States is: "*It is in our collective interest that the personnel of our military and civilian commands be able to fulfill their many legitimate responsibilities without unjustified exposure to criminal legal proceedings.*"[35]

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[33] 116 Stat. 820 (2002), 22 U.S.C.§§ 7421-31 (2003).

[34] J. F. Murphy, "The Quivering Gulliver: U.S. Views on a Permanent International Criminal Court" (Spring 2000) 34 *International Lawyer* 45 (Spring 2000).See also Alter, "International Criminal Law: A Bittersweat Year for Supporters and Critics of the International Criminal Court," 37 *International Lawyer* 541 (Summer 2003).

[35] J. Podgers, "War Crimes Court under Fire",(1998) 84 *American Bar Association Journal* 65.

The key words here are "*legitimate responsibilities*" and "*unjustified exposure*". No one disagrees with the principles so formulated, but the questions are how and who should measure the legitimacy and the nature of missions being fulfilled? Can a same party determine its legitimate responsibilities and actions, and then decide whether prosecution is justified based on those actions? There lies in an affirmative answer to this question an obvious conflict of interests.

If universality is the acceptable approach to the sanction of Crimes Against Humanity, the core issue remains the credibility of the system adopted by the international community to apply universality. The United States' position seems to turn more on the issue of credibility of the system than on the issue of universality as will be seen from the discussion below.

At the heart of United States' policy is its resolve that no international criminal court would be allowed to exercise jurisdiction over a United States citizen without the consent of the United States. For that reason the United States pushed for a provision in the Rome Treaty whereby the prosecutor of the ICC would not be permitted to initiate any investigation without the consent of the Security Council of the United Nations where the United States could veto at will a decision to prosecute. The stated concern of the United States was that some renegade or malicious prosecutor might some day initiate unfounded political prosecutions against United States citizens.

In the end, the United States' position did not prevail but the drafters of the Convention went a long way towards alleviating the risk of renegade prosecutions. The Prosecutor is required to be elected by an absolute majority of the sixty signatory states. Furthermore, any decision by the Prosecutor to initiate an investigation or to issue an indictment must be confirmed by a panel of three trial judges. The judges, in turn, whose specialist credentials are also set out in the Convention, have to be elected by a majority of two-thirds of the members of the Assembly of States Parties.

Finally, as already discussed, the principle of complementarity deprives the ICC of jurisdiction if the country of the suspect's citizenship has conducted or is willing to conduct a good-faith investigation into the alleged criminal conduct – whether or not there has been a conviction of that person. Complementarity can only be refused if the prosecutor alleges that the investigation or the ensuing trial will not be conducted in good faith or will be a sham. To obtain such ICC jurisdiction the Prosecutor must prove to the Trial Chamber of the ICC that the trial could only proceed properly under the ICC. Only after a ruling by the ICC can it proceed under the ICC

Complementarity notwithstanding, the United States is standing firm on its position.

Prospects for U.S. ratification in the future are slim. Even if a new administration were to take office after the 2004 elections, it is unlikely that it would make any difference. It was a Democratic administration which negotiated the treaty at Rome in 1998 and then refused to sign it. Even if a new administration were to approve the treaty, prospects for Senate ratification would be poor. If the Democrats were to take control of the Senate, it would be by a very slim majority, nowhere near the two-thirds required for ratification, and the Democrats are by no means committed to the ICC.

The U.S. government's reservations are spelled out in detail in Congress' findings in ASPA, section 2002. For example, Congress found that "*the treaty purports to establish an arrangement whereby United States armed forces operating overseas could be conceivably prosecuted by the*

international court even if the United States has not agreed to be bound by the treaty...."[36] Congress also found that:

> "*In addition to exposing members of the Armed Forces of the [U.S.] to the risk of international criminal prosecution, the Rome Statute creates a risk that the President and other senior elected and appointed officials of the [U.S.] Government may be prosecuted by the [ICC]*."[37]

Considering the attitude of some countries and some people towards the Iraq war, this could be a real concern.

3. Ratification

The current United States government has chosen not to ratify the Convention.

In December 2000, on the eve of the deadline, the U.S. government signed the Convention. President Clinton said he made the decision to ''*reaffirm our strong support for international accountability and for bringing to justice perpetrators of genocide, war crimes and crimes against humanity.*''[38] This decision granted the United States standing in the PrepCom deliberations over the rules that will govern the procedures to be followed by the ICC.

As a practical matter, the only purpose of the United States signing the treaty is to keep its options open. It is not a member of the Assembly of States-Parties and so it has no influence on future interpretation of the Convention.

In signing the statute, President Clinton also spoke of "*serious flaws*", which he hoped would be corrected in negotiations before the Convention is finally ratified[39]. Considering the fate of U.S. attempts at "*correction*" in the past, prospects are doubtful. The Convention has a provision which prohibits a country from ratifying it with reservations.

Since the ICC has now come into existence, citizens of the United States will be at risk of prosecution before the ICC, whether the United States is a Contracting State or not. Because it is not a Contracting State however, it will not be allowed to pre-empt the ICC's jurisdiction by means of the complementarity system. This is clearly a worst case scenario that should be of concern not only to the politicians but even more so to advocates, such as follows of the College, who may be called upon to assist persons under investigation by the ICC or who are subject of an international warrant of arrest.

The Canadian government's decision to amend its domestic criminal law and to ratify the Convention was neither purely altruistic nor an international public relations ploy. It was a pragmatic decision which rests to a large degree in the belief that the ICC will become a reality and that Canada

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[36] ASPA, § 2002 (5).

[37] ASPA, § 2002 (9).

[38] B.Nichols, "Clinton backs world criminal court", *U.S.A Today*, January 1 2001.

[39] *Supra* note 25. .

would prefer to retain control over the prosecution of Canadian citizens in its reputable justice system via the system of complementarity. Thus, Canada will be certain that decisions to prosecute will comply with its standards of criminal justice and that the conduct of the judicial process will conform to its criminal justice traditions applied in light of its *Charter of Human Rights and Freedoms,* which affords a high degree of protection.

4. The Dependence of International Criminal Courts on the U.S.

The United States' opposition to the Rome Treaty may well create serious problems for the ICC. Section 2004 of ASPA is entitled "*Prohibition on Cooperation with the International Criminal Court,*" and contains several specific prohibitions.[40] For example, section 2004(b) provides that no court or state or local government agency "may cooperate with the ICC in response to a request for cooperation submitted by the [ICC] pursuant to the Rome Statute." *Section 2004(e) provides that no federal, state, or local agency or entity "may provide support to the ICC*." The President is given the power to waive the prohibitions of this section under certain circumstances.[41]

The experience derived from the ICTY and ICTR demonstrates that the international criminal justice system cannot function effectively without the support of those states who possess the best intelligence and military force.

Intelligence gathering ability is central to the investigation of Crimes against Humanity. It is also an essential tool to find and arrest suspected criminals in hiding.

Military force is necessary to provide access to the sites of criminal action and also to arrest the suspected felons.

Goldstone writes that one of the difficulties of obtaining military support stems from the fear entertained by military commanders that, if war crimes suspects are arrested, soldiers in the field involved in peacemaking or peacekeeping missions, will be subject to retaliation from the communities they are attempting to protect; and, of course, the criminal factions to which the felons belong. In addition, as mentioned previously, politicians fear that such actions will interfere with the practical realities of politics when one is trying to negotiate a peaceful resolution to a conflict:

> *"In his account of the Dayton negotiations, Richard Holbrooke frankly provides the following explanation for the failure to arrest Karadžić: "While the human-rights community and some members of the State Department, especially John Shattuck and Madeleine Albright, called for action, the military warned of casualties and Serb retaliation if an operation to arrest him took place. (...)"*[42]

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40 ASPA, § 2004 (b)-(h).

41 ASPA, § 2003 (c).

42 *Supra* note 3 at 128.

During his tenure as Chief Prosecutor of the ICTY and ICTR, Goldstone complained about the unacceptable amount of time it was taking for his office to receive responses to requests for intelligence information – information that would facilitate their investigations and occasionally help decide whether particular leads should be followed up. On a significant number of occasions his staff was the recipient of fabricated evidence.[43]

Bass offers similar comments on this issue as can be seen from the following quote:

> *"The single biggest challenge for international war crimes tribunals has been the unwillingness of even liberal states to endanger their own soldiers either by arresting war criminals or in subsequent reprisals. Holbrooke, among others, has explained the Pentagon's reluctance to pursue Bosnian war criminals as a product of what he calls Washington's "Vietmalia syndrome"*[44]*, referring to the casualties of Vietnam and Somalia. But the extreme willingness of Western leaders to put their soldiers at risk for the sake of international justice in Bosnia – what I have called the O'Grady phenomenon, after the American pilot rescued from Bosnia – is not simply a post-Vietnam or post-Somalia artifact. The roots go far deeper than that."*[45]

Madame Justice Louise Arbour, now a justice of the Supreme Court of Canada and former Chief Prosecutor of the ICTY and the ICTR after Goldstone, seems to have received better support from the military as appears from the following extract of a speech where she tells of her experience in the following terms[46]:

> *"As the Prosecutor for both the Rwanda and Yugoslav Tribunals, I have experience of working in a post conflict situation with a peace support type force such as SFOR*[47] *in Bosnia and in a situation without any peacekeepers such as Rwanda at the present time.(…)*
>
> *Members of my staff operating in Bosnia, and in the then UNTAES area, in Croatia have received enormous support from peacekeepers and we are very grateful for their assistance in providing a secure working environment, including escorts, on-site security for exhumation projects, and occasional assistance in communications matters. More recently, we have had invaluable assistance from SFOR concerning the execution of search warrants in Bosnia. (…)This assistance has helped to ensure a forthcoming attitude on the part of persons receiving the search warrants, which have yielded important evidence not otherwise accessible.*

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43 *Ibid* at 91-92.

44 *Supra* note 3 at 121. Citing Holbrooke, *To End a War*, p. 217. [p. 381].

45 *Supra* note 13 at 277.

46 Keynote Speech Open Road 1998 26 October 1998

47 SFOR is the Stabilization Force deployed in Bosnia and Herzegovina and Croatia by NATO to stabilise the peace.

As you well know, I consider that it is of critical importance that ICTY obtain assistance from peacekeepers to detain indicted war criminals. (...) A few relatively low level perpetrators have fled outside the territory of the former Yugoslavia. However, almost all of the persons we have indicted stayed in that territory. The governments or controlling authorities in the territory of the former Yugoslavia are essentially the same as they were during the conflict. With more or less grace, not to mention efficiency, we have received some co-operation from some of the former warring factions. From others, we have received very little. Indeed, certain states are currently providing sanctuary for indicted war criminals. Although political and economic pressure may compel the former warring factions to disgorge their important indictees over the long term, there is a growing frustration on the part of many in seeing prominent indictees borrowing their freedom against their expected life sentence.

I attended the Open Road 1997 here in Norfolk in the spring of 1997. At that time, I had 8 accused in detention in The Hague out of 74 indicted, and, it seemed, very little prospect for more. I was told by many that aggressive action to detain indicted war criminals in Bosnia would destabilise the political situation, reopen the war, and potentially cause SFOR to incur substantial casualties. More specifically, I was told that any apprehension of indictees by SFOR would be seen as comprising SFOR's impartiality, presumably as a gesture against the ethnic group to which the indictee belonged. This last rationale for inaction I always thought was particularly misguided. For one thing, it continued to reduce all issues to ethnicity, which led to the war in the first place. It is also unacceptable to play into the hands of those who suggest that to arrest a Serb is an anti-Serb act. It is not a Serb who is being arrested, it is an alleged criminal. If to arrest such a person is to take side, so be it. As far as I am concerned, it is taking the side of justice, which is the side that I would expect peacekeepers to be on."

The willingness to put soldiers at risk and to place the intelligence gathering and criminal investigation facilities of powerful states, such as the United States, at the disposal of the ICC is undoubtedly essential to ensure that Crimes against Humanity are properly investigated and criminals prosecuted and ultimately punished. It is also important to ensure that the investigations are performed with the highest standards of professionalism to avoid unwarranted prosecutions and prosecution of the innocent based on unreliable information or, worst, fabricated evidence, as a result of careless or incompetent investigations.

The quality of the investigation of such crimes and the reliability of the facts used to decide whether to prosecute and eventually determine guilt or innocence should be a major concern of advocates, such as members of the College. The quality of the investigation is probably the first rampart against what the United States fears most, the unwarranted prosecution of its nationals.

The preparation of a full Defense for a suspected criminal similarly requires access to facts and witnesses. Such access will often not be possible unless the Defense obtains access to dangerous sites and confronts a hostile environment. The means at the disposal of states as strong and influential as the United States can and should be put to contribution to ensure that the right to a full Defense is guaranteed. Let us not forget that the suspect may be an American citizen.

5. Effect on U.S. & U.S. citizens if non-member

As the prospects for U.S. approval of the treaty are slim, it is the possibility of the exercise of jurisdiction by the court over U.S. citizens when the U.S. is a non-party which is of concern to the U.S. and its lawyers. In ASPA, Congress found:

> "*It is a fundamental principle of international law that a treaty is binding upon its parties only and that it does not create obligations for non parties without their consent to be bound. The [U.S.] is not a party to the Rome Statute and will not be bound by any of its terms. The [U.S.] will not recognize the jurisdiction of the [ICC] over [U.S.] nationals.*"[48]

Critics feel this is an invalid concern since U.S. citizens present in other countries are already subject to the personal jurisdiction of the local courts, whose procedural safeguards may be less that those of the Rome statute.

Congress also expressed concern over the procedural safeguards of the ICC:

> "*Any American prosecuted by the [ICC] will, under the Rome Statute, be denied procedural protections to which all Americans are entitled under the Bill of Rights to the [U.S.] Constitution, such as the right to trial by jury.*"[49]

The elimination of trial by jury was, of course, one of the compromises necessary in drafting a treaty applicable to both common law and civil law countries. In some cases, the ICC safeguards are more extensive than those of the U.S. Bill of Rights. For example, the Rome Statute requires proof of guilt beyond a reasonable doubt. Although this is universally required in criminal cases in the U.S., it is not specifically required by the Bill of Rights.

Despite the aggressive efforts of the U.S. government, it will still be possible for U.S. citizens to be prosecuted by the ICC. Such people will need representation, which most likely will be provided by American lawyers. It is here that U.S. fellows of the college could easily become involved. As Canada is an active member of the ICC, Canadian fellows may also become involved.

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[48] ASPA, § 2002(11).

[49] ASPA, § 2002 (7).

E. Substantive Law and Procedure

1. Statement of Elements

Two tasks left undone by the Rome conference were the promulgation of Rules of Procedure and Evidence and the statement of the elements of the various offences within the jurisdiction of the court. A Preparatory Commission ("Prepcom") considered both of these tasks. Even though the United States had not then signed the Rome Statute, it was a member of Prepcom. The largest problem of the Working Group was reconciling the views of common law and civil law countries, both as to criminal procedure itself and as to procedural safeguards. Despite these obstacles, the Rules of Procedure and Evidence and the statement of elements have both been approved by Prepcom. These rules were adopted on July 1st 2002, when the Rome Treaty came into force following the 60th ratification given on April 11th 2002.

Madam Justice Arbour, stresses the importance of these rules as follows[50]:

> *"International Rules must at all costs not become a reflection of the political compromises between seemingly competing national approaches. The work of the Tribunals indicates that what is most needed is a body of Rules that facilitates the fulfilment of the Tribunals' mandate. It must constitute a system that creatively incorporates a diversity of fundamental concerns: the rights of the accused; the Prosecutor's independence; the interests of the victims and witnesses; and be accessible and understandable to the international community. But most of all, the Rules must work, and should not become an unwieldy obstacle to the achievement of international criminal justice."*

Those responsible for drafting the procedural framework and rules have devoted a good deal of thought and attention to the rights of defendants and victims. In some respects the protections are greater than what we typically experience in courts in the United States and Canada. Michel Bastarache, now a judge of the Supreme Court of Canada, discusses the references to victims in the Rome Statute.

> *"(…) Furthermore, where the Trial Chamber is of the opinion that a more complete presentation of the facts of the case is required in the interest of the justice, particularly in the interest of the victims, the trial chamber may… request the Prosecutor present additional evidence… and may order that the trial be continued even after an admission of guilt by the accused…*

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[50] "The Development of a Coherent System of Rules of International Criminal Procedure and Evidence before the ad hoc International Tribunals for the former Yugoslavia and Rwanda", a Speech by Judge Louise Arbour, Chief Prosecutor of the ICTY and ICTR to the ISISC meeting on Comparative Criminal Justice Systems: Diversity and Rapprochement, 18 December 1997

References to victims' interests can also be seen in less obvious contexts. Article 36 of the Rome Statute, which deals with the qualifications, nomination and election of judges stresses that states "*shall also take into account the need to include judges with legal expertise on specific issues, including but not limited to violence against women and children*". This reference to women and children emphasizes the growing understanding of the various types of sensitivities that must be addressed when examining victimization. (…)"[51]

As previously discussed, the issue of sovereignty is troubling American politicians. This leads to outright refusal to relinquish one's control over those who practice in its courts and affect the fortunes of its citizens.

2. The Right to a Full Defense and to Counsel

Kenneth S. Gallant provides insight into how, in practical terms, the right to a full Defense will be protected.[52] It appears that the right to have counsel, including appointed counsel for those unable to afford counsel, is provided earlier in the process than generally is true in the United States. In the United States, typically an accused is read his Miranda rights[53], including the right to be represented by counsel and to have counsel appointed if one cannot afford counsel, upon being placed in "custody". The term "custody", sometimes thought synonymously with "arrest" is not always easy to define, but broadly speaking it is the moment at which temporary detention passes to deprivation of the freedom to leave the scene. The ICC process appears to provide for counsel during the earlier investigatory stage including before and after the person is taken into custody. While there is some debate whether the ICC Statute explicitly guarantees the right to appointment of counsel, it appears that the intention of the Statute and procedural rules was to protect this right, and will probably be so interpreted.

The area of greatest concern to Professor Gallant is whether adequate funding will be provided for Defense counsel and Defense investigators to conduct an adequate investigation and preparation of the Defense. In the United States, both in the state and federal systems, public defenders are employed by the government. In cases where the public defenders have a conflict of interest, private counsels are retained at government expense. Investigators are also funded. The mechanism of providing such funding varies between federal and state and from state to state. In the United States public defenders typically have investigators on their staffs. Where funds are needed to hire additional expertise, such as medical doctors or expert witnesses from other fields of specialty, funding is generally provided at state or federal expense. There will be some system in place, such as review by the presiding judge, to be certain that necessary funds are provided but funding is not wasted. Plainly, the right to counsel has less meaning if counsel lacks the necessary resources to proceed. In Canada, similar provisions exist to help assure effective Defense counsel to the accused although they vary from province to province.

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[51] M. Bastarache, "The Protection and Rights of Victims under the International Criminal Law" (Spring 2000) 34 no. 1 *The International Lawyer* 7 at 17.

[52] K. S. Gallant, "The Role and Power of Defense Counsel in the Rome Statute and the international Criminal Court" (Spring 2000) 34 no. 1 *The International Lawye*r 21.

[53] *Miranda* v. *Arizona* 384 U.S. 436 (1966).

The area of funding the defense appears to be an issue that will have to be addressed at the ICC. Gallant proposes the creation of a Defense Bureau. He believes that it would strengthen the court's structure. He points out that having only an Office of the Prosecutor:

> *"has the potential to create an institutional bias in the Court towards the interest of prosecution…Eventually, such an office might possibly become a public defender's office for those defendants who could not afford their defense, or a central resource for defense investigators. Institutionalization of support for defense services through a bureau of Defense Counsel, though not a right of defendants by itself, would go far toward guaranteeing that the right to counsel truly means the right to adequate and effective counsel."*[54]

A somewhat related issue is that prosecutors and judges seem to enjoy greater privileges and immunities than Defense counsel. What exactly that means and how that might affect Defense counsel is not clear. It may, for example, come into play when counsel is attempting to operate in the territory of a foreign state. It is an area that deserves more attention. In the abstract, such discrimination appears to be contrary to the insistence that the right of defendants to counsel has been fully provided.

Apart from those issues, the Committee found find little to criticize in the rules.

3. International Humanitarian & Procedural Law

The United Nations Tribunals have allowed a tremendous advance of International Humanitarian Law and International Procedural Law, but the process of development of Humanitarian Law has been going on for over a century.

Goldstone, emphasises a major shift in focus of international humanitarian law:

> *"As was held by the appeals chamber, it makes little sense to protect people from murder, rape, and wanton destruction of their property in the case of an international war but not to do so merely because the warring parties do not cross any international borders. The court emphasized that international humanitarian law is moving away from the traditional state-centered approach toward an international approach oriented toward human rights. Unfortunately, the provisions of the Rome Statute relating to war crimes appear to have revived the distinction.*[55] *Although murder and rape are equally prohibited in international and internal armed conflict by the Rome Statute, the provisions relating to destruction of property are more onerous in international armed conflict than in internal armed conflict.*

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[54] *Supra* note 52.

[55] *Supra* note 3 at 124: Article 8(2)(c) and (e) provide for violations that occur "in an armed conflict not of an international character." [p. 140].

> *A further important development is that the approach to mass rape has been significantly transformed by the recognition that such abhorrent conduct constitutes not only a war crime but also a crime against humanity. The tribunals are setting important precedents with respect to gender-related crimes, because this is the first time that systematic rape has ever been charged and prosecuted as a war crime in itself. In 1998, a trial chamber of the Rwanda tribunal handed down the first conviction for systematic rape as a war crime."* [56]

One of the difficulties encountered in the development of international humanitarian or criminal law is defining precisely, as our criminal law tradition requires, the contents of the crimes that are to be sanctioned: the *actus reus*. Crimes such as war crimes, genocide or crimes against humanity are not easily categorized and defined. Because of the very special nature of circumstances leading to these crimes, a number of questions need to be addressed, such as:

- When does repression by a government within its borders of a violent protest or an attempt to secede by one of its regional states become an armed conflict subject to the laws of war?

- When does a civil war within a multiethnic country turn into genocide?

- When does the killing of residents by a state across its boarders in retaliation for acts of terrorism committed within its own boarders, become an international crime?

- Is the person pulling the trigger the only person accountable for the crime?

- Who is accountable for war crimes within a government or a command structure?

- Can war against terrorism be considered as an aggression leading to a war crime accusation?

The crime of aggression has not yet been defined by an international agreement. Article 5, paragraph 2 of the Rome Statute states that:

> "*2. The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.*"

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[56] *Supra note 3* at 123, 124-125.

Many propositions have been made by several countries to attempt to define the crime of aggression. During the last Assembly of States Parties, Cuba submitted a proposition that reads as follows:

> "*For the purpose of the present statute, "aggression" means an act committed by a person who being in the position of effectively controlling or directing the political, economic or military actions of a State, orders, permits or participates actively in the planning, preparation, initiation or execution of an act that directly or indirectly affects the sovereignty, the territorial integrity or the political or economic independence of another State, in a manner inconsistent with the Charter of the Unites Nations."*[57]

What will be interesting to watch is how the novel concepts of "*pre-emptive war*" and "*war against terrorism*" will be considered within the framework provided by the Rome Statute. Will these concepts afford legitimate defense against accusations of war crimes? Although that particular question has been addressed by the Prepcom, the responsibility to protect was analyzed during the Progressive Governance summit held in Bagshot in July 2003. Canada proposed guidelines on how the international community should intervene in a country's internal affairs to stop genocide or ethnic cleansing with or without the United National approval, in order to prevent tragedies like those experienced in Rwanda and Kosovo. Canada's position was based on the International Commission on Intervention and State Sovereignty's report which mentioned at page 138:

> "*There seems to be recognition that the fabric of world order can tolerate the occasional armed intervention justified on humanitarian grounds outside U.N. Charter. There is no enthusiasm for codifying a treaty on humanitarian intervention, because of the worry that this would lead to state's abusing it. Note incidentally, an additional problem for such development is the fact that a legal right of this nature would generate obligations to act in situations where states might well prefer a policy of inaction."*[58]

Despite the definitional limitations on what is a war crime or a crime against humanity Ball opines as follows:

> *"However, even the critics have to admit that some crimes are* universally *recognized as abominable – criminal actions that shock the conscience of all civilized societies, whether in Asia, Africa, Europe, North or South America. Potter Stewart, the late associate justice of the U.S. Supreme Court, had some difficulty defining pornography, "but", he said, "I know it when I see it!" (...) A quick glance at photos of the heads of seven Chinese lying neatly in a row, one with a cigarette in the mouth; the ovens at Auschwitz, with a mostly charred body of a victim still inside, smoldering; human skulls*

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[57] ICC-ASP/1/L.4, Proposal submitted by Cuba on the definition of the crime of aggression and conditions for the exercise of jurisdiction.

[58] The International Commission on Intervention and States Sovereignty, *the responsibility to protect, research, bibliography, backgrounds*, December 2001.

littering Cambodia's killing fields, popping up from their watery graves; emaciated Bosnians captured by Serbs, placed in concentration camps, and then executed and dumped into Bosnia's killing fields; the consequence of a machete blow to the head of a young girl, and one knows, universally, what constitutes war crimes, crimes against humanity, torture, and genocide. There is a universal shock to the world's conscience."[59]

The situations described by Ball are obviously criminal and do not provide fully satisfactory answers to the questions formulated above.

As regards the fifth question posed, that is who is accountable for war crimes within a government or a command structure, it appears to have been answered following the development of the so-called command responsibility that was invoked as early as in 1918 by the Imperial War Cabinet. The discussions of this body have been referred to earlier where Attorney General Smith stated that the law made leaders criminally accountable for the atrocities of war:

"Some twenty-seven years before Nuremberg, Smith had delivered an eloquent call for command responsibility."[60]

The Japanese War Crimes Tribunals at the end of the Second World War applied that principle when they convicted officials for failure to exercise adequately a command responsibility when no conclusive evidence directly linking the commander to the violation existed. [61]

The codification of the Nuremberg Principles by the United Nations in 1946 was the first real attempt to codify International Humanitarian Law and law codified in the Genocide Convention of 1948 continued in that vein.

The principles codified in 1946 define the following crimes:

"Crimes against the peace*: planning, preparing, participating in, or conspiring to wage a war of aggression or a war in violation of international treaties.*

War crimes*: violations of the laws and customs of war, including murder, ill treatment, or deportation to slave labor or for any other purpose of the civilian population of or in an occupied territory; murder or ill treatment of prisoners of war or persons on the seas; killing of hostages; plunder of public or private property; wanton destruction of cities, towns, or villages; or devastations not justified by military necessity.*

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[59] *Supra* note 5 at 8.

[60] *Supra* note 19.

[61] *Supra* note 5 at 74.

> Crimes against humanity*: murder, extermination, enslavement, or deportation before or during the war, or persecutions based on political, racial, or religious grounds in execution of or in connection with any crime within the jurisdiction of the tribunal, whether or not in violation of the domestic law of the country where perpetrated.*"

The codification of the Nuremberg Principles was, in effect, the codification of segments of the charter that had created the International Military Tribunals.

There were seven principles incorporated into International Law in December 1946. In addition to Principle VI, the others were:

> *"Principle I: There is individual responsibility for war crimes.*
>
> *Principle II: Individual responsibility lies in international law, regardless of whether domestic law has no such prohibition.*
>
> *Principle III: "Head of state" is no longer an immunizing defense against war crimes charges.*
>
> *Principle IV: "Superior orders" is no longer an immunizing defense against war crimes charges.*
>
> *Principle V: A person charged with war crimes has "the right to a fair trial on the facts and the law.*
>
> *Principle VII: Complicity in the commission of the above war crimes is a crime in international law."* [62]

This is an area that should be of great concern to the Defense Bar. The issues raised go to the very existence of a criminal act and to the elements required to be proven beyond reasonable doubt before a conviction can be obtained. The elements of these crimes are for the most part foreign to lawyers who are trained to defend common law type crimes. The College might consider sponsoring the preparation of tutorial material to educate those of its fellows who are interested in this new emerging area of criminal practice on the underlying special features of war crimes, crimes against humanity and genocide.

4. The Defense Bar

The ICTY and the ICTR have not functioned without encountering certain problems. Ball speaks of what he calls the "*weak sister*" of the ICTY, the ICTR, in the following terms.

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[62] *Supra* note 5 at 86-87.

"One writer noted that the ICTR "always seemed a shadow of its sister in the Hague, beset from its inception by a host of problems. [These difficulties involved] a lack of personnel, facilities for the trials, money mismanagement, and cronyism."[63]

(...)

Finally, given the demands for "quicker" justice in the genocide cases, in the spring of 1998, the ICTR Prosecutor's Office attempted to use a multiple joint trial. A "super-indictment" was prepared by the staff, charging twenty-nine Hutu defendants, including Theoneste Bagosora, with genocide and crimes against humanity. James Stewart, the senior trial attorney in the Prosecutor's Office, argued that the group trial was "the best and most efficient method of proceeding."[64]

The issue of group trials begins to address the negatives of the ICTR, which include a lack of funding and insufficient staff; the isolation of Arusha; problems raised by defense counsel (from not receiving prosecutorial data on witnesses or not having enough time to study new documents introduced by the prosecution, to not being able to cross-examine witnesses whose court appearances were in the form of written statements); clashes between the ICTR and the new Rwandan national government; and criticisms by NGOs, especially legal organizations and civil rights groups such as Amnesty International, about the quality of "justice" meted out by the ICTR and about its being "bogged down by procedural weaknesses."[65]

When the secretary-general of the UN, Kofi Annan, visited Arusha in May 1998, he experienced, first hand, the tribunal struggling with these problems. He attended the trial of Colonel Anatole Nsengiumva, where he heard "defense counsel argue that the charges were imprecise, vaguely drawn and backed by documents turned over to this client too late. He asked for an adjournment."[66]

This is not a flattering picture and certainly not one to emulate in the chambers of the ICC.

Madame Justice Arbour had this to say about the power of judges to change the rules of procedure governing each criminal trial[67]:

"(..) I am not convinced that the final decision concerning the adoption and amendment of the Rules for the Tribunals, should remain solely with the Judges, who of course have their own institutional interest in the application of these Rules. I am of the view that a more representative forum of all

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63 *Ibid* at 174 citing Steven Lee Myers, "In East Africa, Panel Tackles War Crimes, and Its Own Misdemeanors," *New York Times*, September 14, 1997, p. A6. [p. 260].

64 *Supra* note 5 at 182 citing *Ututabera*, no. 4 (April 13, 1998), p. 4. [p. 262].

65 *Supra* note 5 at 182-183 citing Barbara Crossette, "UN Chief Visits Rwanda Tribunal in Tanzania". [p. 262].

66 *Ibid*.

67 *Supra* note 46.

the parties concerned, including the Chambers, the Registry, the Office of the Prosecutor, and the Defense should be responsible for deciding on appropriate amendments to the Tribunals' Rules according to established procedures. I also believe that amendments to the Rules should as well as not prejudicing the accused, not disadvantage the Prosecutor and the victims and witnesses in any pending proceedings."

It is indeed rather disturbing to find that there is not a uniform set of rules governing trials held by the ICTY and the ICTR.

Although the Rome Statute that established the ICC contains concise language on structural and organizational facilities for the Prosecutor's Office and (within the Registry) a Victims and Witnesses Unit, it does not contain any reference to structural and organizational support for Defense attorneys. Whereas, at the national level one finds a bar association for the substantive and practical support of Defense attorneys and for Defense policy matters alongside the apparatus for the prosecuting and judicial authorities, a structure of this kind is missing at the ICC level. This gap had been noticed by several national delegations, as well as, by the International Criminal Defense Attorneys Association (ICDAA).

The question of whether this gap should and could still be repaired at the level of the Rules of Procedure and Evidence, was the subject of a conference in November, 1999, at the International Criminal Tribunal for the Former Yugoslavia in The Hague.

The relevance of this issue is obvious when one realizes that since the fall of 1998, accused persons facing serious charges, including genocide, have been refused the right to select counsel of their choice to represent them before the ICTR. It is clear that this refusal has nothing to do with the state of the law. Rather, it is based on a somewhat questionable "*policy*".

A situation where accused persons are assigned counsel whom they have not chosen has major repercussions on the fairness of court proceedings. To express its position on this important issue, the ICDAA submitted an *amicus curiae* brief to the ICTR in May 2000, with the support of the Quebec Bar, the Canadian Bar Association and the Paris Bar. The issue of the right to freely choose a Defense counsel affects the international justice system with respect to the transparency of the judicial process, procedural fairness and the full respect of the rights of accused persons, regardless of the nature of the charges.

During the Montreal Conference on the Creation of the International Criminal Bar held in June 2002 "*the need for an independent and truly international body to represent counsel before the International Criminal Court as a third pillar of the Court itself*"[68] was acknowledged, and the International Criminal Bar (ICB) was created. In accordance with the Montreal Resolution, the Steering Committee adopted a final draft of the Constitution of the International Criminal Bar after a conference held in Paris in November 2002. The general principles behind the creation of such a Bar are stated in Article 3 of the draft Constitution of the ICB :

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[68] Montreal Conference on the Creation of the International Criminal Bar final resolution, June 15, 2002.

*"**General Principles***

The ICB shall be based on the following principles:

1. It shall promote and defend the role and independence of counsel for the defense and for victims before the Court.

2. It shall promote the principle of freedom of choice of counsel.

3. It shall facilitate the work of counsel before the Court.

4. It shall promote effective communication between the organs of the Court and counsel.

5. It shall promote the acquisition of knowledge and skills of counsel before the Court.

6. It shall participate in regulating the practice of counsel before the Court.

7. It shall reflect the diversity of the legal systems and the geographical areas of the world.

8. It shall strive to promote the principle of complementarity in relation to the functions, rights and duties of national, regional and international associations of legal practitioners."[69]

A General Assembly of the International Criminal Bar was held in Berlin in March 2003, where a Council was elected and a draft of the Code of Conduct for Counsels was adopted. This Code pertains to the relationship between Counsel and client, third parties, other Counsel, the Office of the Prosecution, judges of the International Criminal Court and the Registry. It also deals with the applicable Disciplinary Regime.

F. Recommendations and Conclusions

The issue of ratification is a very sensitive political issue that the Sub-committee does not address in this report.

While the United States is not opposed to the creation of the ICC as such, it is not satisfied that the treaty creating the ICC provides sufficient safeguards against the risk that the ICC become a political tool in the hands of parties that have interests adverse to its interests bearing in mind, also the role the United States now plays as the only remaining super power. The fear of the maverick prosecutor permeates the whole United States position over ratification of the Convention.

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[69] Draft Constitution of the ICB, 14 February 2003.

The effect of the Unites States' decision not to ratify raises however, certain important concerns from a purely legal standpoint. Viewed from the point of view of trial lawyers, the fact that the United States has not ratified the Rome Statute does not mean that American citizens will not be brought before of the ICC on charges laid pursuant to the Statute. Since the United States is not a party to the Statute, it has had no role to play in the process of appointment of the judges to the Court and the prosecutors. If and when an American is indicted by the ICC, the United States will not be entitled to elect to take over the investigation of the matter and, in the proper case, the prosecution of the suspect. This is undoubtedly why the United States has taken diplomatic steps to exempt its nationals from the ICC process as previously mentioned. Their efficacy remains to be tested.

From the perspective of the objectives pursued by the creation of the ICC, the quality of the investigation of such crimes and the reliability of the facts used to decide whether to prosecute and eventually determine guilt or innocence should be a major concern of advocates, such as members of the College. It is to be hoped that the means at the disposal of states as strong and influential as the United States, possessing competent and reliable agencies for criminal investigations, can and will be put to contribution not only to ensure that those that are guilty of crimes falling under the jurisdiction of the court are made accountable therefore, but also, and as importantly, so that innocent persons are not unjustly prosecuted as a result of flawed investigations and that the right to a full Defense is guaranteed.

The rights of the Defense before the ICC and the other current war crimes tribunals, is an area that deserves attention by the College. The right to defense counsel of one's choice is a fundamental right**,** and the unfortunate experience witnessed in the Rwanda Tribunal points to a weakness in the system that cannot be tolerated. The College could address such questions as:

- How to ensure that the right to counsel is protected; and

- How to ensure the availability of competent counsel to assist suspects in the meanders of international criminal investigations to prepare a full Defense.

The College might wish to review the Rules of Procedure of the ICC and, where appropriate, propose modifications where they are not consistent with the high ethical standards that are contained in its Code of Trial Conduct.

The College might consider exploring also means of supporting the International Criminal Bar founded to promote high ethical standards for defense counsel appearing before the ICC. The ICB also serves as a counterweight to the powerful office of the Prosecutor of the ICC.

The College should not remain indifferent to the major developments occurring in the field of International Humanitarian Law. Not only can it contribute to the development and clarification of its content, but it can ensure that those persons who are exposed to its enforcement receive the best protection possible through competent counsel before a competent, independent and impartial court. The expertise and experience of Fellows of the College is needed in this area.

Finally, the fact that United States citizens and lawyers may be involved with the ICC whether the United States is a party or not, Fellows of the College should be educated as to the ICC and its workings. This educational function should be of interest to the College.

Ball qualifies the 20th Century as a century of paradox in that although it has been prolific in terms of producing international treaties that define and codify war crimes, crimes against humanity and genocide, it has evidenced a kind of brutality never before experienced in the violent history of the world:

> *"The paradox of the twentieth century is that although it has been prolific in terms of producing international treaties that define and codify war crimes, crimes against humanity, and genocide, it has evidenced a kind of brutality never before experienced in the violent history of the world. The treaties were efforts to diminish the evils of civil, regional, and world wars. Yet the bestiality evidenced in the wars of the twentieth century absolutely stunned, again and again, the world's conscience. The post-World War II war crimes trials at Nuremberg and Tokyo were an international response to the genocides discovered by the victors.*
>
> *Does the adoption and certain ratifications of the Rome statute of the ICC by at least sixty nation-states by December 31, 2000, close the circle that began with the creation of the Nuremberg IMT? Without major power support, the question is whether it will be an effective international criminal tribunal. And an answer will be forthcoming the next time a Hitler or a Karadzic or a Milosevic or a Pol Pot emerges from the depths and seizes power.*
>
> *Is the unfinished legacy of the World War II trials of Nazi Germany's and Japan's major war criminals finally finished? After the war ended in 1945, the victorious Allies vowed that the unimaginable atrocities committed by the Nazis and the Japanese would never occur again. "Even in war, there are limits as to what governments may use as means of killing and what they may do even to their own citizens."*[70]
>
> *Individual responsibility for planning and implementing "final solutions" for Jews, Gypsies, Russians, Chinese, and other targeted "demonized" groups was acknowledged in international law in 1945. Generals, admirals, and government leaders were brought to the dock of justice to face allegations that they were involved in unhuman and criminal actions. The concepts of "sovereign immunity," "military necessity," and "following a superior's orders" were of little help to the defendants in the post-World War II trials. Tyranny and savage behavior were on trial, and they lost. In the end, the*

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[70] *Supra* note 5 at 217 citing Neil A. Lewis, "Nuremberg Isn't Repeating Itself," *New York Times*, November 19, 1995, p. 5. [p. 266].

individual was held responsible in international law for his actions against others, either in peacetime or during war."[71]

Ball asks all of the right questions. Therein lies the challenge to the College.

[71] *Supra* note 5 at 217-218 citing Neil A. Lewis, "Nuremberg Isn't Repeating Itself," *New York Times*, November 19, 1995, p. 5. [p. 266].

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