

1-1-1999

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### Recommended Citation

Daniel Brown, *The International Criminal Court and Trial in Absentia*, 24 Brook. J. Int'l L. 763 (1999).

Available at: <https://brooklynworks.brooklaw.edu/bjil/vol24/iss3/4>

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# NOTES

## THE INTERNATIONAL CRIMINAL COURT AND TRIAL *IN ABSENTIA*

### I. INTRODUCTION

The atrocities committed during the past century evince the need for the establishment of a permanent international criminal court to investigate and prosecute those who would repeat such crimes in the next century. Indeed, the international criminal acts which were committed during the World Wars, and more recently in Rwanda and the former Yugoslavia, illustrate both the deficiencies of ad hoc tribunals and the unfortunate reality that international crimes will continue to plague the global community into the next century.<sup>1</sup> Accordingly, it is imperative that ongoing efforts by the International Criminal Court Preparatory Committee to finalize the text of a draft statute continue, so that an international treaty establishing the court will be ratified and entered into force as soon as possible.<sup>2</sup>

Ideally, the proposed International Criminal Court (ICC) will bring about a sharp decline, if not total cessation, of international criminal conspiracy. At the very least, the ICC will strengthen the resolve of the international community and put on notice those who may be contemplating commission of prohibited acts that the international community will no longer

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1. M. Cherif Bassiouni, *From Versailles to Rwanda in Seventy-Five Years: The Need to Establish A Permanent International Criminal Court*, 10 HARV. HUM. RTS. J. 11, 12 (1997).

2. *International Criminal Court Homepage* (visited Jan. 21, 1998) <<http://www.igc.apc.org/icc>>. At the conclusion of the Preparatory Committee's third session on February 21, 1997, "the Committee recommended that the United Nations General Assembly accepted Italy as host of a plenipotentiary conference on the creation of the proposed court, to be held in Rome in June 1998." See United Nations Press Release L/2837, Aug. 1, 1997.

tolerate such conduct. On a policy level, the existence of a permanent institution to prosecute international criminals in a timely manner will send a powerful message to the world community that abhorrent conduct will be dealt with in a swift and equitable manner. The result will be two-fold. First, ensuring that swift justice takes place will provide victims and the law-abiding international community with the security that the guilty will be made to answer for their actions. Second, the existence of a permanent institution to prosecute international crime will represent a significantly more powerful deterrent than the current response of creating ad-hoc tribunals.<sup>3</sup> For these reasons, the current initiative to bring the ICC onto the international arena should be given the strongest support from all nations.

Certain political realities must be faced in order for the tribunal to be a credible institution in the international community. Specifically, the unqualified support of a superpower like the United States will lend essential credibility to the ICC.<sup>4</sup> Significant American involvement within the ICC will not only encourage its allies to follow suit, but also advance U.S. national security interests by providing an international forum to prosecute those responsible for crimes such as the Lockerbie incident. Before the United States will submit its citizens to jurisdiction under an international criminal tribunal, the specific language of the ICC statute must be closely scrutinized to ensure that it contains adequate due process guarantees and is not in conflict with the U.S. Constitution.

This Note will discuss the issue of trial *in absentia*, which the ICC Draft Statute Article 37 permits under certain circumstances, and how this conflicts with existing U.S. law.<sup>5</sup> It is my position that U.S. opposition to trial *in absentia* should not stand in the way of U.S. membership in the ICC. First, U.S. opposition to trial *in absentia* is not absolute.<sup>6</sup> Second, the

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3. Sandra L. Jamison, *A Permanent International Criminal Court: A Proposal That Overcomes Past Objections*, 25 DENV. J. INT'L L. & POL'Y 419, 438 (1995).

4. See Michael P. Scharf, *Getting Serious About an International Criminal Court*, 6 PACE INT'L L. REV. 103, 109 (1994).

5. *Report of the Preparatory Committee on International Criminal Court*, U.N. GAOR, 51st Sess., Supp. No. 22, at 5, U.N. Doc. A/51/22 (1996), art. 37(a)(b) [hereinafter Draft Statute]. The Draft Statute also contains extensive commentary by the International Law Commission [hereinafter Commentary].

6. See generally FED. R. CRIM. P. 43.

importance of the policy objectives advanced by the ICC, which are shared by the United States, outweigh U.S. opposition to the objectionable ICC provisions for trial *in absentia*. Finally, the vast procedural guarantees the ICC provides for defendants demonstrates that the Court will not be a sham, and is thus worthy of U.S. support.

Part II will outline the history of the international criminal court, and recent efforts by the International Law Commission (ILC) acting at the direction of the General Assembly of the United Nations, to produce a draft statute establishing a permanent international criminal court. This section will also discuss the weaknesses of current and prior ad hoc tribunals, and the manner in which the current ICC Draft Statute responds. Part III will provide a structural overview of the ICC, and outline the policy considerations and practical arguments involving trial *in absentia* in the context of an international criminal court.<sup>7</sup> In addition, this Part will outline the procedural guarantees within the ILC Draft Statute which are designed to maximize individual rights for ICC defendants.

Part IV will consider the principle opposing trial *in absentia* within the United States legal system, and analyze the exceptions to this principle. These will be considered in light of specific ICC provisions allowing for trial *in absentia*. Finally, Part V will consider the weight of U.S. opposition to trial *in absentia* against the benefits of establishing an international criminal court equipped with *in absentia* authority. On a more practical level, this section will offer arguments in support of U.S. membership within the ICC in spite of apparent conflicts with specific ICC provisions for trial *in absentia*. Moreover, this Note will argue that specific policy considerations inherent to the establishment of a credible international tribunal outweigh American opposition to trials *in absentia*, and that suffi-

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7. Draft Statute, *supra* note 5, art. 37(2)(a)-(c) which states:

The Trial Chamber may order that the trial proceed in the absence of the accused if:

- (a) the accused is in custody, or has been released pending trial, and for reasons of security or the ill health of the accused it is undesirable for the accused to be present;
- (b) the accused is continuing to disrupt the trial; or
- (c) the accused has escaped from lawful custody under this Statute or has broken bail.

*Id.* See also *infra* Part III.

cient procedural safeguards are already present within the ICC Draft Statute to guarantee fairness to defendants.<sup>8</sup> In conclusion, this Note will argue that the need for a permanent international tribunal and necessity of securing U.S. involvement is imperative and does not violate any constitutional freedoms.

## II. THE HISTORY OF THE INTERNATIONAL CRIMINAL COURT

The notion of international criminal law is by no means a twentieth-century phenomenon. One of the earliest prosecutions for international criminal conduct took place during the fifteenth century, involving a 27 member tribunal of the Holy Roman Empire, which convicted a military commander for crimes his subordinates committed against civilians.<sup>9</sup> A more recent effort to establish an international criminal court, however, can be traced to Article 227 of the Treaty of Versailles which specifically named Germany's Kaiser Wilhelm II and accused him of "a supreme offence against international morality and the sanctity of treaties."<sup>10</sup> Despite calls for international prosecutions of war criminals, the zeal to prosecute alleged World War I criminals was defeated by political expedience and factors such as the Kaiser's flight to the Netherlands.<sup>11</sup> Although proponents of an international criminal tribunal made specific suggestions to League of Nations officials, no official action was taken during the inter-war period.<sup>12</sup>

Stories about the unspeakable atrocities being committed by the Nazis during and before the outbreak of World War II (1939-1945) were well known by Allied leaders at a relatively early period during the war.<sup>13</sup> Indeed, as early as 1941 the decision was made by British officials to create an international war tribunal to prosecute Nazi war criminals, ultimately leading to the International Military Tribunal at Nuremberg.<sup>14</sup> In response to claims that the Nuremberg tribu-

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8. *Id.* art. 41.

9. See Paul D. Marquardt, *Law Without Borders: The Constitutionality of an International Criminal Court*, 33 COLUM. J. TRANSNAT'L L. 73, 76-77 (1995).

10. *Id.* at 79 (quoting Treaty of Peace with Germany [Treaty of Versailles], June 28, 1919, 2 Bevans 43).

11. *Id.*

12. *Id.* at 80.

13. *Id.* at 81.

14. *Id.* See also 1 International Military Tribunal, Trial of the Major War

nal violated ex-post facto principles of law, the newly established United Nations created a committee which was responsible for "codifying and legitimizing those principles . . . " which had been articulated by the Nuremberg and Far East Tribunals.<sup>15</sup> Because of insurmountable problems having to do with enforcement provisions and reorientation, the prospect of establishing an international criminal tribunal was tabled.<sup>16</sup> No serious debate continued for the next three decades. Disagreements regarding jurisdictional issues, coupled with the increasing fridity of U.S.-Soviet relations culminated in 1957 when "the Sixth (Legal) Committee postponed consideration of both court and code *indefinitely* on the recommendation of the [International Law Commission]."<sup>17</sup>

The idea of an international criminal court nevertheless remained alive in academic circles and received new interest during the 1970s largely due to charges during the Vietnam War (1963-1974) that American servicemen involved in the notorious My Lai incident should be treated as war criminals.<sup>18</sup> Ironically, the most recent push for a permanent international criminal tribunal is not directly attributable to war crimes. Rather, international drug trafficking during the 1980's and the collateral violence it continues to generate throughout the world have been the central motivating forces for the most recent initiative to create an international criminal court.<sup>19</sup> In response to requests by the Government of Trinidad, the United Nations General Assembly has reconvened the International Law Commission and directed it to work on making "concrete proposals for consideration."<sup>20</sup> Revelations of the crimes being committed in the former Yugoslavia and later in Rwanda have undoubtedly added a sense of urgency to the ILC's efforts.<sup>21</sup> The grisly images from both Bosnia and Rwanda combined with the ending of the Cold War provide sobering illustrations

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Criminals 171 (1947).

15. See Marquardt, *supra* note 9, at 83-84.

16. *Id.* at 84. It should be noted, however, that Henri Donnedieu de Vabres, a French Representative, submitted concrete proposals for an international criminal court to the committee associated with the League of Nations. *Id.*

17. *Id.* at 86 (emphasis added).

18. *Id.* at 87. See also Calley v. Callaway, 519 F.2d 184 (5th Cir. 1975).

19. See Marquardt, *supra* note 9, at 90.

20. *Id.* at 91.

21. *Id.* at 92.

of the need to seize the current geopolitical climate and bring the International Criminal Court into existence.

In November 1994, the ILC's final version of the Draft Statute was presented to the Sixth Committee of the 49th session of the General Assembly of the United Nations.<sup>22</sup> A recommendation was included with the Draft Statute calling for a conference of plenipotentiaries to draft a treaty to enact the statute.<sup>23</sup> In December 1995, a Preparatory Committee was created by the General Assembly and directed to meet twice in 1996 in order to complete final revisions of the text for presentation to a treaty conference.<sup>24</sup> During the period between March 1996 and December 1997 the Preparatory Committee has convened on five occasions.<sup>25</sup> A sixth meeting took place in March 1998.<sup>26</sup> On December 17, 1997, the General Assembly of the United Nations adopted a resolution renewing the mandate calling for the convening of an international treaty conference to establish the International Criminal Court in 1998.<sup>27</sup> Italy has offered the city of Rome to serve as site for the conference which took place in July 1998.<sup>28</sup>

Although ICC proponents are eager to meet the 1998 target date, members have also been cautious to avoid incorporating past mistakes into the current ICC Draft Statute. In many respects, the ICC Draft Statute stands on the shoulders of the ground breaking work done at Nuremberg as well as the ongoing work being done at the Hague and in Tanzania under the auspices of the International Criminal Tribunal for the Former Yugoslavia (ICTFY) and the International Criminal Tribunal for Rwanda (ICTR), respectively. More importantly, the ICC Draft Statute addresses three critical weaknesses which have hindered the five ad hoc tribunals which have existed between 1919 and 1994.<sup>29</sup> These weaknesses are: lack of independence, logistical inefficiency, and credibility as an objective institution of justice.<sup>30</sup>

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22. See *International Criminal Court Homepage*, *supra* note 2.

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. See Bassiouni, *supra* note 1, at 58-62.

30. *Id.*

*A. Independence*

The permanence and independence of the ICC will arguably be its greatest strengths. These characteristics will most clearly distinguish the ICC from its predecessors which were hastily put together in the wake of events such as the signing of the Treaty of Versailles in 1919, the Holocaust, and the horrors recently visited upon citizens in the former Yugoslavia and Rwanda.<sup>31</sup> The ICC will ideally be immune from the political pressures which have historically been brought to bear on ad hoc tribunals and have impeded the search for justice.<sup>32</sup> Specifically, concerns about the stability of Germany's Weimar Republic following the signing of the Treaty of Versailles prompted the Allies to abandon proposed prosecutions of alleged German war criminals, including the German Emperor who never stood trial.<sup>33</sup> In addition, post-World War II U.S. foreign policy, which was designed both to foster an enduring peace and halt an expanding Soviet Union, took on a higher national priority than prosecuting alleged war criminals in Germany and Japan for acts committed during wartime.<sup>34</sup>

Most recently, the controversies surrounding the efforts of the ICTFY and ICTR illustrate the modern-day need for the establishment of a permanent independent tribunal at the earliest opportunity.<sup>35</sup> In 1992, the United Nations Security Council commissioned a panel of experts to look into reports of "grave breaches of the Geneva Conventions and other violations of international humanitarian law . . ." that were taking place in Yugoslavia.<sup>36</sup> In what would ultimately become the "world's largest rape investigation," the Commission, which also included governmental representatives and volunteers, amassed enough evidence to infer a conspiracy on the part of high ranking officials.<sup>37</sup> Pursuant to U.N. Security Council Resolution 808, the ICTFY was established on May 25,

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31. *See generally id.*

32. *Id.* at 58.

33. *Id.*; Jelena Pejic, *What Is An International Criminal Court? As Negotiations On the Establishment of An ICC Start, The Debate Heats Up*, 23 HUM. RTS. Q. 16, 16 (Fall 1996).

34. *See* Bassiouni, *supra* note 1, at 58-59.

35. *Id.* at 44-45.

36. *Id.* at 39.

37. *Id.* at 41.



1993.<sup>38</sup> Notably, one of the goals of the ICTFY was to serve as a model for a permanent international criminal court.<sup>39</sup> Although as a judicial institution the ICTFY is technically considered an independent entity, the Security Council's administrative control over the tribunal has prompted criticism. At least one critic has characterized the Security Council's administrative decision to abruptly end the Commission's investigations by April 30, 1994, as "an obstruction of justice."<sup>40</sup> This decision, along with the delay in appointing Chief Prosecutor Richard Goldstone, has been attributed by critics to the pursuit of "the political peace process"<sup>41</sup> which clearly had no prospect for success if the negotiators themselves were faced with criminal indictments.<sup>42</sup> Thus, a political climate favoring negotiations over the pursuit of justice, coupled with inefficient U.N. budgetary procedures, has resulted in few ICTFY prosecutions.<sup>43</sup>

It is logical, therefore, to infer that an international criminal tribunal charged with the difficult task of investigating and prosecuting alleged war criminals cannot operate effectively in an atmosphere where international pressure can be brought to bear in order to advance even the most well-intentioned goals. In other words, any tribunal which can be exploited as a bargaining chip in a negotiating process has the potential to be rendered moot. For this reason, it is hoped that the permanence and independence<sup>44</sup> of the ICC will shield it from having to compromise an investigation or prosecution in order to facilitate the achievement of urgent short-term objectives such as a cease-fire agreement or the brokering of a hostage release agreement.<sup>45</sup>

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38. *Id.* at 42-43.

39. See Michael P. Scharf, *The Politics of Establishing An International Criminal Court*, 6 DUKE J. COMP. & INT'L L. 167, 168 (1995).

40. Bassiouni, *supra* note 1, at 42.

41. *Id.* at 59.

42. *Id.* at 40.

43. *Id.* at 44-45.

44. It is important to note that the ICC will probably receive its funding from the United Nations, and/or from future treaty nations. See Draft Statute, *supra* note 5, art. 2(6). In addition, the U.N. Security Council does reserve the right to refer matters to the ICC for investigation as one of the methods for triggering an investigation. However, the ICC Draft Statute does not provide authority for the U.N. Security Council to terminate an investigation or prosecution, and has no authority to remove or influence the prosecutor.

45. *Id.* art. 10 which provides for the independence of ICC judges and prohib-

*B. Logistical Inefficiency*

The practical advantages which will be achieved by establishing a permanent international criminal tribunal cannot be overstated. Simply stated, the mere existence of the ICC will avert the time consuming political and logistical processes which invariably accompany calls for establishing an ad hoc tribunal following the revelation of atrocities.<sup>46</sup> Perhaps even more importantly, the existing framework providing for investigative, indictment and trial procedures within the ICC Draft Statute will reduce the chances of guilty parties fleeing prosecution and prevent ongoing hostilities from taking a greater human toll by eliminating the delay period between the decision to establish an ad hoc tribunal and its entry into force.<sup>47</sup> While the international community debates whether a set of circumstances warrants the establishment of an ad hoc tribunal, crucial time is lost. Bypassing this step will not only have the effect of removing a significant bureaucratic hurdle, but also will increase the effectiveness of investigations and the likelihood of apprehending suspects.<sup>48</sup>

Having a permanent tribunal already in place along with an administrative staff and investigators would probably have reduced significantly the ongoing difficulties faced by the ICTR. Issues as fundamental as selecting a suitable site for the ICTR and the logistics of transporting witnesses and defendants were met by protracted debate that not only spent limited resources, but also taxed the resolve of the Security Council.<sup>49</sup> Although there are 75,000 people in Rwandan jails awaiting trial, to date there has been only one conviction for the crime of genocide.<sup>50</sup> Moreover, the decision to have Chief

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its judges from holding office in "legislative or executive branches of a Government of a State, or of a body responsible for the investigation or prosecution of crimes." See also art. 23 which permits "jurisdiction . . . with respect to crimes . . . as a consequence of the referral of a matter to the Court by the Security Council . . . of the United Nations."

46. See Bassiouni, *supra* note 1, at 60.

47. See Jamison, *supra* note 3, at 438.

48. See Bassiouni, *supra* note 1, at 61.

49. See *id.* at 49. Senior counsel to then U.S. Ambassador to the United Nations, Madeline K. Albright, characterized the Council's experience "micromanaging" the ICTR as "Tribunal Fatigue." *Id.* For recent discussions on the logistical problems facing the ICTR, see, James C. McKinley Jr., *On 1994 Blood Bath In Rwanda, Tribunal Hews to a Glacial Pace*, N.Y. TIMES, Nov. 21, 1997, at A1; Barbara Crossette, *U.N. Told A Tribunal Needs Help*, N.Y. TIMES, May 24, 1998, at A4.

50. See James C. McKinley Jr., *Ex-Rwandan Premier Gets Life in Prison on*

Prosecutor Goldstone oversee prosecutions under the ICTFY and the ICTR has had the unintended effect of causing further delays. Specifically, critics have noted that the notion of requiring one person to "oversee two major sets of prosecutions separated by 10,000 miles . . . is nothing short of absurd."<sup>51</sup> While the Security Council's intentions to create a "unity of legal approach" and conserve resources are commendable, in practice the result has detrimentally affected the ICTR.<sup>52</sup>

In contrast, the ICC will avert having to "micromanage" the details of setting up a tribunal in remote corners of the globe as one will already be in place.<sup>53</sup> Additionally, valuable resources and time will not be wasted negotiating and constructing an acceptable site to hold trials.<sup>54</sup> Moreover, the ICC Prosecutor will be able to rely on Deputy Assistants and have the ability to seek additional aid in the event of multiple prosecutions.<sup>55</sup> Being able to provide swift justice will not only produce a greater deterrent effect on future international criminal conduct, but also will assist in providing closure for victim groups and their families. While the logistical issues the ICC will remedy are essential tools for it to accomplish its stated goals, the ICC as an institution of international justice carries with it significantly broader objectives: establishing precedent and credibility as legal authority for future prosecutions.

### C. *Credibility as Legal Authority*

A permanent international criminal court will establish concrete legal precedent as a foundation for future prosecutions against international criminal defendants. The Draft Statute sets forth its subject matter jurisdiction which allows it to prosecute those accused of crimes of genocide, crimes of aggression, crimes that constitute "serious violations of the laws and customs applicable in armed conflict [and] crimes against humanity."<sup>56</sup> Simply stated, the ICC will legitimize international criminal prosecution and put to rest the defense

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*Charges of Genocide in '94 Massacres*, N.Y. TIMES, Sept. 5, 1998, at A4.

51. Bassiouni, *supra* note 1, at 48.

52. *Id.* at 47-49.

53. *See* Draft Statute, *supra* note 5, art. 3(1).

54. *Id.*

55. *Id.* art. 12(2).

56. Draft Statute, *supra* note 5, art. 20.

of "*nullum crimen sine lege, nulla poena sine lege* (no crime without law, no punishment without law)" which has undermined the integrity of international criminal prosecutions.<sup>57</sup>

By establishing binding legal precedent within a permanent court which is confined to a limited and well defined subject matter jurisdiction, the ICC will render moot the enduring criticism initially leveled at the Nuremberg and Far East Tribunals that war crimes prosecutions are illustrations of victor's justice.<sup>58</sup> The fact that ICC judges will not answer to any individual nation, or group of nations should reduce the effect of bias charges.<sup>59</sup> Moreover, the Draft Statute specifically prohibits any judge from being a member of a trial chamber when that judge "is a national of a complainant State or of a State of which the accused is a national."<sup>60</sup> Finally, the provisions with regard to ICC investigations, the handing down of indictments, pre-trial discovery, and trial procedures ensures fair treatment for defendants.<sup>61</sup> Thus, over the long term the establishment of the ICC will strengthen the legal basis for future international criminal prosecutions by creating a body of law under a single court as opposed to having to rely on the findings of ad hoc tribunals each of which is governed by individual charters.

### III. OVERVIEW OF THE ICC AND TRIALS *IN ABSENTIA*

Prior to examining the constitutional implications of American participation within the ICC, and more particularly, grappling with the issue of permitting trials *in absentia*, an outline of the ICC's fundamental components is necessary. Accordingly, the following section will discuss the ICC's proposed structure, its subject-matter jurisdiction, triggering mechanisms and

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57. Jamison, *supra* note 3, at 437.

58. See, e.g., Joy Gordon, *The Concept of Human Rights: The History and Meaning of its Politicization*, 23 BROOK. J. INT'L L. 691, 763 (1998); Herbert Kraus, *The Nuremberg Trial of the Major War Criminals: Reflections After Seventeen Years*, 13 DEPAUL L. REV. 233, 243 (1964).

59. See Draft Statute, *supra* note 5, art. 10(1) which states "[i]n performing their functions, the judges shall be independent."; Draft Statute, *supra* note 5, art. 10(7) states "[n]o judge who is a national of a complainant State or of a State of which the accused is a national shall be a member of a chamber dealing with the case."

60. *Id.*

61. *Id.* at arts. 25-30, 37-41.

procedural guarantees to defendants.

#### A. *Structure of the ICC*

Article 5 of the Draft Statute identifies the four components of the court: "(a) a Presidency . . . ; (b) an Appeals Chamber, Trial Chambers, and other chambers . . . ; (c) a Procuracy . . . ; and (d) a Registry . . . ." <sup>62</sup> The President, as well as first and second Vice-Presidents, are elected by a majority of the eighteen ICC judges. The President's two main duties are to select and serve along with six ICC judges in an Appellate Chamber, and choose a panel of five ICC judges to form a Trial Chamber to hear individual cases. <sup>63</sup> The Procuracy serves as the independent prosecutorial branch of the ICC and consists of a Prosecutor and Assistant Deputy Prosecutors, who are elected by a majority of state parties for renewable five year terms. <sup>64</sup> Significantly, the Draft Statute commentary emphasizes the importance of maintaining the independence of the prosecutor's office, and expressly prohibits any ICC Prosecutor or Judge from involvement in a case dealing with an individual "of the same nationality." <sup>65</sup>

The Registry will function as the administrative wing of the ICC and serve as a liaison between the court and member states. <sup>66</sup>

#### B. *Crimes Under the ICC*

Article 20 of the Draft Statute enumerates five areas in which the ICC will assume subject-matter jurisdiction: "(a) the crime of genocide; (b) the crime of aggression; (c) serious violations of the laws and customs applicable in armed conflict; (d) crimes against humanity; [and] (e) crimes established under . . . treaty provisions [which] constitute exceptionally serious crimes of international concern." <sup>67</sup> With the exception of the crime of genocide, which has been defined and recognized throughout most of the international community, <sup>68</sup> each of the

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62. Draft Statute, *supra* note 5, art. 5.

63. See David Stoelting, *Report on the Proposed International Criminal Court*, 52 THE RECORD 79, 94-95 (1997). See Draft Statute, *supra* note 5, art. 8.

64. See Draft Statute, *supra* note 5, art. 8(2).

65. Commentary, *supra* note 5, art. 12(2) & 12(4).

66. See Draft Statute, *supra* note 5, art. 13.

67. *Id.* art. 20.

68. See Convention on the Prevention and Punishment of the Crime of Geno-

other crimes has generated issues for debate.<sup>69</sup>

### C. *ICC Jurisdiction and Complementarity*

The ICC Prosecutor may initiate an investigation only upon the filing of a complaint by a state that is a party to the ICC or in response to a referral from the United Nations Security Council.<sup>70</sup> As an "international penal tribunal,"<sup>71</sup> the ICC retains jurisdiction solely for the crime of genocide. However, with regard to the other crimes enumerated in Article 20, the ICC may exercise subject-matter jurisdiction only after a state has "expressed consent to be bound" under ICC jurisdiction in its entirety or has sought ICC jurisdiction for a particular crime under Article 20.<sup>72</sup> This method permits nation-states to declare either complete acceptance of ICC jurisdiction or "by way of a special declaration" provides nation-states the choice of "opting-in" for specific crimes.<sup>73</sup>

An anticipated consequence of requiring state consent to ICC jurisdiction is that it will be accompanied by significant state cooperation which was largely absent during the investigations in the former Yugoslavia.<sup>74</sup> This absence of state cooperation continues to hamper ongoing efforts to bring the guilty to justice in Rwanda.<sup>75</sup> The Preamble to the ICC Draft Statute sets forth some general guidelines for when the ICC should become involved in a matter. Specifically, it states:

The State parties to this Statute, desiring to further international cooperation to enhance the effective prosecution and suppression of crimes of international concern, and for that purpose to establish an international criminal court; *Emphasizing* that such a court is intended to exercise jurisdiction only over the most serious crimes of concern to the international community as a whole; *Emphasizing* further that such

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cide, Dec. 9, 1948, 78 U.N.T.S. 227, arts. II-III; Stoelting, *supra* note 63, at 101.

69. For an excellent synopsis of the ICC, its background, and the controversy regarding subject-matter jurisdiction under art. 20, see Stoelting, *supra* note 63, at 100-107.

70. See Draft Statute, *supra* note 5, at arts. 21(1)(a), 23(1), 25.

71. Convention on the Prevention and Punishment of the Crime of Genocide, *supra* note 68. See also Stoelting, *supra* note 63, at 108.

72. See Draft Statute, *supra* note 5, art. 22(1)(a).

73. Commentary, *supra* note 5, art. 22(2).

74. See Stoelting, *supra* note 63, at 110.

75. See Crossette, *supra* note 49.

a court is intended to be *complementary to national criminal justice systems* in cases where such *trial procedures may not be available or may be ineffective*.<sup>76</sup>

Although clauses such as "may not be available" or "may be ineffective" are superficially vague and open to several interpretations, the Commentary section to the Preamble states that the Court will intervene only where "there is no prospect of those persons being duly tried in national courts" and explicitly identifies itself as a "complement to existing national jurisdictions . . .".<sup>77</sup> Essentially, this means that ICC intervention should only occur after there has been a real opportunity for a national criminal investigation and/or trial to take place. A critical issue on this point is who decides whether an investigation or trial has been adequate.<sup>78</sup> At least one ICC delegate has expressed concern that this authority will be disproportionately applied against developing countries whose lack of resources are believed to limit their ability to prosecute certain crimes.<sup>79</sup> While other delegates have suggested that it is preferable "to risk infringing on national jurisdiction than . . . to allow perpetrators of crimes against humanity to go unpunished . . .", this issue is certain to resurface at future ICC Preparatory Conferences.<sup>80</sup>

#### D. ICC Guarantees to Defendants

ICC commentators generally agree that in order to promote the credibility of the court, the Draft Statute should provide significant procedural guarantees to those accused.<sup>81</sup> Accordingly, the Draft Statute incorporates a number of funda-

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76. Commentary, *supra* note 5, at preamble (emphasis added).

77. *Id.*

78. See W. Andy Knight, *Legal Issues*, in A GLOBAL AGENDA: ISSUES BEFORE THE 51ST GENERAL ASSEMBLY OF THE UNITED NATIONS 261, 269 (John Tessitore & Susan Woolfson eds., 1996).

79. *Id.*

80. *Id.*

81. See, e.g., Stoelting, *supra* note 63, at 112; Judge Gabrielle Kirk McDonald, Address to the Preparatory Committee on the Establishment of an International Criminal Court Regarding its Draft Statute (Aug. 11, 1997) (transcript available upon request from author); Lawyers Committee for Human Rights, Position Paper, Establishing an International Criminal Court: Major Unresolved Issues in the Draft Statute 22 (Aug. 1996) (paper available from Lawyers Committee for Human Rights).

mental procedural guarantees including the presumption of innocence, the burden of proof of guilt beyond a reasonable doubt, and the requirement that the accused receive prompt notification regarding charges in a language that he/she understands.<sup>82</sup> Defendants are also allotted "adequate time" to confer with an attorney, or have one appointed by the court to prepare and put forth a defense.<sup>83</sup> In addition, the Draft Statute provides for a speedy trial, the right to confront and cross-examine witnesses, a general right to be present at one's trial, the right to have proceedings conducted in a language the accused understands, and freedom from self-incrimination.<sup>84</sup> Moreover, Draft Statute Article 41(2) compels the Procuracy to produce any "exculpatory evidence" discovered before a verdict is reached.

Although right to trial by jury is not provided in the Draft Statute, any case brought before the ICC must be heard by a Trial Chamber consisting of five ICC judges designated by the Presidency.<sup>85</sup> To support a conviction or an acquittal, a minimum of three Trial Chamber judges must agree.<sup>86</sup> Under Draft Statute Article 47, the court's sentencing options include monetary fines and/or imprisonment either for a lifetime or a specified term of years. However, the court is expressly forbidden from imposing the death penalty in any matter.<sup>87</sup> Finally, the Draft Statute permits appellate review of Trial Chamber decisions for both the accused and Prosecutor on grounds of "procedural error, error of fact or law, or disproportion between the crime and the sentence."<sup>88</sup>

#### *E. The ICC and Trial in Absentia*<sup>89</sup>

Although the right to be present during one's own trial has been guaranteed by the International Covenant on Civil and

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82. See Draft Statute, *supra* note 5, at arts. 40, 41(1)(a).

83. *Id.* art. 41(1)(b).

84. *Id.* art. 41(c)-41(f). For further analysis of ICC provisions concerning the right to be present at one's trial and trials *in absentia*, see Draft Statute, *supra* note 5, art. 37; *infra* Parts III, IV.

85. *Id.* art. 45(2).

86. *Id.*

87. *Id.* art. 47. See also Commentary, *supra* note 5, 47(1) (expressly stating that the "Court is not authorized to impose the death penalty").

88. Draft Statute, *supra* note 5, art. 48(1).

89. *Id.* art. 37.



Political Rights,<sup>90</sup> the prohibition of trial *in absentia* is not considered a fundamental international human right in the criminal context.<sup>91</sup> A recent human rights analysis by Professor Cherif M. Bassiouni of 139 national constitutions noted that 25 nations prohibited trial *in absentia*; however, each nation provided specific exceptions for when trial outside the presence of the accused may occur.<sup>92</sup> Ultimately, Professor Bassiouni concludes that the right to be tried in one's own presence is not a "core" international human right.<sup>93</sup>

Unsurprisingly, the issue of permitting trial *in absentia* has generated a fair amount of controversy amongst ICC commentators. Indeed, the Commentary Section that follows Draft Statute Article 37 makes no effort to conceal the fact that the ILC delegates themselves hold divergent views on whether the court should permit trials outside the presence of the accused.<sup>94</sup> "The question whether trial *in absentia* should be permissible under the Statute has been extensively discussed in the Commission, in the Sixth Committee and in the written comments of Governments."<sup>95</sup> Specifically, Article 37 states:

1. As a general rule, the accused should be present during the trial.
2. The Trial Chamber may order that the trial proceed in the absence of the accused if:
  - (a) the accused is in custody, or has been released

90. See *International Covenant on Civil and Political Rights*, G.A. Res. 2200 (XXI), U.N. GAOR, 21 Sess., Supp. No. 16, U.N. Doc. A/6316 (1966), reprinted in 6 I.L.M. 368 (1967), at Pt. II, art. 14(3)(d).

91. See M. Cherif Bassiouni, *Human Rights In The Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions*, 3 DUKE J. COMP. & INT'L L. 235, 279-80 (1993). The "core rights" are the right to life, liberty, and security of person; recognition and equal protection before the law; freedom from arbitrary detention; freedom from torture; right to be presumed innocent; right to a fair and speedy trial; right to assistance of counsel; right to appeal; right to be protected from double jeopardy; and protection against ex-post facto laws. *Id.* at 292.

92. *Id.* at 279-80. For a discussion regarding the U.S. legal system's approach to trial *in absentia*, see FED. R. CRIM. P. 43. See also *infra* Part IV.

93. Bassiouni, *supra* note 91, at 292.

94. See Commentary, *supra* note 5, art. 37(1).

95. *Id.*

pending trial, and for reasons of security or the ill-health of the accused it is undesirable for the accused to be present;

- (b) the accused is continuing to disrupt the trial; or
  - (c) the accused has escaped from lawful custody under this Statute or has broken bail.
3. The Chamber shall, if it makes an order under paragraph 2, ensure that the rights of the accused under this Statute are respected, and in particular:
- (a) that all reasonable steps have been taken to inform the accused of the charge; and
  - (b) that the accused is legally represented, if necessary by a lawyer appointed by the Court.
4. In cases where a trial cannot be held because of the deliberate absence of an accused, the Court may establish, in accordance with the Rules, an Indictment Chamber for the purpose of:
- (a) recording the evidence;
  - (b) considering whether the evidence establishes a *prima facie* case of a crime within the jurisdiction of the Court; and publishing a warrant of arrest in respect of an accused against whom a *prima facie* case is established.
5. If the accused is subsequently tried under this Statute:
- (a) the record of evidence before the Indictment Chamber shall be admissible;
  - (b) any judge who was a member of the Indictment Chamber may not be a member of the Trial Chamber.<sup>96</sup>

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96. Commentary, *supra* note 5, art. 37.

The Draft Statute Commentary discusses three different views on this issue. One view "quite widely held" opposes any provisions allowing for trials *in absentia*.<sup>97</sup> Members of this group argue that the court should only act where its judgment and sentence can be implemented and that including provisions for trials *in absentia* within the ICC Draft Statute will ultimately tarnish the court's reputation as a legitimate penal tribunal.<sup>98</sup> While noting that the right to be present at one's own trial is guaranteed by the International Covenant of Civil and Political Rights, the Commentary Section states that "trial *in absentia*, to be consistent with human rights standards, must be carefully regulated, with provisions for notification of the accused, for setting aside the judgment and sentence on subsequent appearance."<sup>99</sup> The Commentary Section notes further that "the presence of the accused at the trial is of vital importance . . ." and that deviating from this guideline should occur " 'only in exceptional cases.' "<sup>100</sup>

There does not seem to be any dispute regarding the legitimacy of permitting trials to proceed in the absence of the accused when the accused is initially present at the beginning of the trial and subsequently flees before the end of trial.<sup>101</sup> Indeed, the American legal system permits trials to proceed under these circumstances outside the presence of the accused.<sup>102</sup> The ICC provisions which generate the most criticism in this area are those which permit a trial to continue outside the presence of the accused "for reasons of security or . . . ill-health . . . "<sup>103</sup> Aside from stating that the Trial Chamber shall have the authority to order trials *in absentia* pursuant to Article 37(2), the Draft Statute text and Commentary Section both fail to articulate precisely what conditions or findings are required to justify a trial *in absentia* pursuant to the "security risk" or "ill-health" provisions in Draft Statute

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97. *Id.*

98. *Id.*

99. Commentary, *supra* note 5, 37(2), 37(3). See also Draft Statute, *supra* note 5, art. 37(3)(a)-(b).

100. Commentary, *supra* note 5, arts. 37(4), 37(5).

101. *Id.* art. 37(2)(c).

102. See FED. R. CRIM. P. 43(b)(1). See also *Crosby v. United States*, 506 U.S. 255, 258 (1993). For discussion with regard to trials in absentia in the United States legal system see *infra* Part IV.

103. Draft Statute, *supra* note 5, art. 37(2)(a); see also *id.* art. 37(5).

Article 37.<sup>104</sup> Another provision which has prompted criticism permits the taking of evidence by an indictment chamber to establish a *prima facie* case under the Court's jurisdiction when the accused is intentionally absent.<sup>105</sup> This evidence may be used by the Prosecution against the accused in the event he/she is at some point apprehended.<sup>106</sup>

A number of legal commentators have voiced concerns regarding the legitimacy of providing for trial *in absentia* in the ICC Draft Statute. International law organizations such as The Committee on International Law criticize the language authorizing trials *in absentia* as "vague and overbroad . . . , " and favor instead the approach taken by the drafters of the Statute of the International Tribunal for Yugoslavia which did not include any provisions for trials *in absentia*.<sup>107</sup> Other organizations, like the Lawyers Human Rights Committee (Lawyers Committee), assert that trial *in absentia* "as provided for in the statute is especially troubling and would require substantial modification."<sup>108</sup> Nevertheless, the Lawyers Committee does not categorically oppose permitting trials to proceed outside the presence of the accused. For instance, the organization would favor the continuation of trials where the accused continually disrupts trial, but only "under strictly defined circumstances."<sup>109</sup>

In addition to internationally renowned legal organizations, some experts with professional experience as members of international criminal tribunals have questioned the provisions of Draft Statute Article 37. In a recent address to the Preparatory Committee on the ICC, the Honorable Gabrielle Kirk McDonald, a Judge of the International Criminal Tribunal for the former Yugoslavia, stated that the ICC "must comport with the highest standards of fairness."<sup>110</sup> Judge McDonald then remarked that in its present form Draft Statute Article 37 not

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104. Draft Statute, *supra* note 5, art. 37; Commentary, *supra* note 5, 37(5).

105. Commentary, *supra* note 5, art. 37(4)-(5).

106. *Id.* In what was undoubtedly an effort to counterbalance any unfairness caused by admitting incriminating evidence recorded outside the presence of the accused, any judge sitting in the indictment chamber is precluded from later sitting in a trial chamber for the accused.

107. Stoelting, *supra* note 63, at 113-114.

108. Lawyers Committee For Human Rights, *supra* note 81, at 23.

109. *Id.*

110. McDonald, *supra* note 81.

only permits the taking of evidence by an Indictment Chamber during the "deliberate absence of the accused," but also authorizes its admissibility at a subsequent trial which essentially denies the defendant's right to cross-examination guaranteed by Draft Statute Article 41(e).<sup>111</sup>

Despite the vociferous manner in which opponents to trial *in absentia* have come forward, this issue can hardly be characterized as one-sided. Indeed, some ICC commentators, including some ILC members and Government representatives, nevertheless favor trial *in absentia* under the specific circumstances outlined in the proposed ICC.<sup>112</sup> One argument states that the overall policy goals advanced by the ICC and the inevitable difficulties it will confront in bringing international criminals to justice support equipping the ICC with *in absentia* authority.<sup>113</sup> This position emphasizes the distinctions between national courts and the proposed international tribunal. Specifically, considerable power is allocated to national courts and prosecutors in legal systems such as the United States "to compel the defendant's presence at trial."<sup>114</sup> Aside from the wider array of resources available to national courts to ensure a defendant's appearance at trial, there is also acceptance by citizens within national legal systems that all crimes cannot be prosecuted.<sup>115</sup> In contrast, it is less likely that the world community will tolerate prosecutorial inaction in the case of genocide or crimes against humanity. Thus, the more difficult task of apprehending fugitives in the international context and the nature of the crime at issue provide strong arguments for permitting trials *in absentia*.<sup>116</sup>

A closer examination of the security risk provision in Draft Statute Article 37(2)(a) raises some interesting questions. Indeed, it is difficult to conceive of a situation in which the Court is able to marshal the resources necessary to initiate an investigation, apprehend and indict a suspect and yet somehow not

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111. *Id.* at 6-7; see also Draft Statute, *supra* note 5, art. 37.

112. See Commentary, *supra* note 5, art. 37(1).

113. Ilia B. Levitine, *Constitutional Aspects of An International Criminal Court*, 9 N.Y.U. J. INT'L L. & POL. 27, 45-47 (1996).

114. *Id.* at 47; Ruth Wedgwood, *War Crimes in the Former Yugoslavia: Comment on the International War Crimes Tribunal*, 34 VA. J. INT'L L. 267, 268 (1994).

115. See Wedgwood, *supra* note 114.

116. Levitine, *supra* note 113, at 46-47.

be able to guarantee that suspect's security at trial. The Draft Statute, however, reveals that many important issues such as the Court's relationship to the United Nations, the Court's location, and annual budget have been deferred pending a final treaty conference.<sup>117</sup> Presumably, the President of the Court will seek a State able to provide adequate facilities within the Court's budget, and more importantly, a secure environment for the Court to conduct its business. These lingering ambiguities may have contributed to the inclusion of a provision allowing for the Court to continue trial proceedings in the event a security problem arises. It should be noted that Article 2 Commentary (7) states that although there has been disagreement over the precise nature of the relationship between the ICC and the United Nations, it was agreed that the relationship will be a close one. Because this relationship necessarily invokes the credibility of the United Nations, it is likely that the site of the Court will be chosen with great care, and sufficient resources will be allocated to guarantee the security of the Court, its staff and the accused. Thus, absent extraordinary circumstances, like a global war, the chances of security problems are likely to be remote.

Other ICC proponents respond to critics opposed to trial *in absentia* by arguing that it is both unnecessary and unwise to apply rigid constitutional principles to the ICC.<sup>118</sup> Specifically, advocates of this position assert that such a narrow view would serve only to thwart the Court's objectives and permit "the accused who chooses not to appear before the court . . . [to] evade justice with impunity."<sup>119</sup> Indeed, *in absentia* authority seems aimed at targeting the accused who deliberately avoids prosecution either by hiding or receiving aid from a friendly government.<sup>120</sup>

Judicial and prosecutorial efficiency are additional factors to consider in support of trial *in absentia* authority.<sup>121</sup> Allowing the accused to halt an investigation or a trial because that person successfully evades capture or accepts protection from a non-participating government has several consequences. First,

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117. See Commentary, *supra* note 5, arts. 2(7) & 2(8).

118. See Levitine, *supra* note 113, at 47.

119. *Id.*

120. See Marquardt, *supra* note 9, at 134-35.

121. See Crosby v. United States, 506 U.S. 255, 261 (1993).

the more time that passes, the less likely a successful prosecution will take place. It is well-settled that delays during investigations or trials are costly and result in a reduction in the effectiveness of witness testimony which deteriorates as a result of memory loss or death.<sup>122</sup> Moreover, time delays provide greater opportunities for the loss, destruction and fabrication of evidence.<sup>123</sup> Overall, this position correctly notes that because of the ICC's "international character" and functions it should not be subjected to exacting constitutional analysis as if the ICC were equivalent to a domestic tribunal.<sup>124</sup>

#### IV. TRIAL IN ABSENTIA AND THE UNITED STATES LEGAL SYSTEM

In the United States, the right to be present at one's own trial is guaranteed by the confrontation clause within the Sixth Amendment to the United States Constitution which states:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; *to be confronted with the witnesses against him*, to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.<sup>125</sup>

Indeed, the confrontation clause, which guarantees criminal defendants the right to face their accusers, would substantially lose its meaning if banning criminal defendants from their own trials became a routine occurrence. Despite the constitutional foundation of the right to be present at one's trial, there are exceptions to this guarantee.<sup>126</sup> In *Crosby v. United States*,<sup>127</sup> the United States Supreme Court held that trials could take place in the absence of the accused provided that the accused was initially present and at some point "is volun-

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122. See Wedgwood, *supra* note 114, at 269.

123. *Id.*

124. See Levitine, *supra* note 113, at 43. *But cf.* Draft Statute, *supra* note 5, at preamble (discussing the complementary jurisdiction the court will have as an extension of national courts).

125. U.S. CONST. amend. VI (emphasis added).

126. See FED. R. CRIM. P. 43(b), 43(c).

127. 506 U.S. 255 (1993).

tarily absent after the trial has commenced.”<sup>128</sup> While declining to rule on the constitutionality of a conviction reached outside the presence of a voluntarily absent defendant, the Court unanimously determined that Federal Rule of Criminal Procedure 43, hereinafter Rule 43, “prohibits the trial *in absentia* of a defendant who is not present at the beginning of trial.”<sup>129</sup> Interestingly, the Court’s unequivocal holding in *Crosby* has created a bright line rule prohibiting trials when the defendant has not made an initial appearance and, created what some have derisively characterized as a “right to pre-trial flight.”<sup>130</sup>

Notably, Rule 43 does not merely govern exceptions to when a defendant’s presence at trial is required. Indeed, the first sentence of Rule 43 discusses the basic requirement that the defendant be present “at the arraignment, at the time of the plea, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of the sentence . . . .”<sup>131</sup> The relevant exceptions to this general requirement are when the defendant is voluntarily absent after the trial has commenced,<sup>132</sup> and when the defendant continues to interrupt court proceedings after being admonished by the court that such behavior will result in that defendant’s “removal . . . from the courtroom . . . .”<sup>133</sup>

Requiring the defendant’s presence at the beginning of trial allows the court to find that a subsequent voluntary absence represents an informed waiver of the defendant’s right to be present during trial.<sup>134</sup> In contrast, the *Crosby* Court found that the defendant who has never appeared in court should not be subjected to trial *in absentia* based on the possibility that the defendant could merely be unaware that a trial is proceeding in his/her absence.<sup>135</sup> Additionally, the Court put forth other policy arguments in favor of distinguishing between pre-

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128. *Id.* at 258.

129. *Id.* at 262.

130. See generally Christopher T. Igielski, *Washington Defendant’s New Right of Pre-Trial Flight*, 19 SEATTLE U. L. REV. 633 (1996).

131. See FED. R. CRIM P. 43(a).

132. *Id.* 43(b)(1).

133. *Id.* 43(b)(3); *Illinois v. Allen*, 397 U.S. 337 (1970); Draft Statute, *supra* note 5, art. 37(2)(b).

134. *Crosby v. United States*, 506 U.S. 255, 261 (1993).

135. *Id.* at 262.



trial and mid-trial flight. First, it is a greater drain on judicial resources to halt a trial already in progress compared to delaying a trial that has not begun.<sup>136</sup> Second, the distinction deprives defendants of the dual benefit of waiting for a possible acquittal or ending a trial headed for conviction by fleeing or disrupting court proceedings.<sup>137</sup>

Because the Supreme Court interpreted Rule 43 to provide an exclusive list of exceptions to the general requirement that defendants be present at all proceedings, a comparison between Rule 43 and Draft Statute Article 37 is necessary.<sup>138</sup> Both the ICC Draft Statute and Rule 43 permit trials *in absentia* when the accused has fled the jurisdiction after a trial has commenced, and when the conduct of the accused is disrupting court proceedings.<sup>139</sup> At that point, however, the similarities end. As discussed earlier, Draft Statute Article 37 permits trials *in absentia* upon a finding by the trial chamber that "for reasons of security . . . of the accused it is undesirable for the accused to be present."<sup>140</sup> With regard to security, no exception is incorporated into Rule 43. It should be recalled that the *Crosby* decision interpreted the exceptions enumerated in Rule

136. *Id.* at 262. See also Igielski, *supra* note 130, at 652 (distinguishing between pre-trial flight and mid-trial flight).

137. See Igielski, *supra* note 130, at 652.

138. See *Crosby*, 506 U.S. at 261. Specifically, the exceptions for when the presence of the defendant is not required include "whenever the defendant, initially present at trial, or having pleaded guilty or nolo contendere, (1) is voluntarily absent after the trial has commenced . . . , (2) in a noncapital case, is voluntarily absent at the imposition of the sentence, or (3) after being warned by the court that disruptive conduct will cause the removal of the defendant from the courtroom, persists in conduct which is such as to justify exclusion from the courtroom." FED. R. CRIM. P. 43(b)(1) to 41(b)(3). In addition, a defendant's presence is also not required "(1) when [defendant] represented by counsel and the defendant is an organization . . . ; (2) when the offense is punishable by fine or by imprisonment for not more than one year or both and the court, with the written consent of the defendant, permits arraignment, plea, trial and imposition of sentence in the defendant's absence; (3) when the proceeding involves only a conference or hearing upon a question of law; or (4) when the proceeding involves a correction of sentence . . . ." *Id.*

139. See Draft Statute, *supra* note 5, art. 37(2)(c). See also FED. R. CRIM. P. 43(b)(1) to 43(b)(3). Note that Rule 43 requires the federal judge to issue a warning to the disruptive defendant that his/her conduct is unacceptable and if it continues will result in removal from the courtroom; whereas the ICC Draft Statute does not require a warning to be issued before the accused may be removed from the courtroom. *Id.*

140. Draft Statute, *supra* note 5, art. 37(2)(a).

43 as being *exclusive* and not illustrative.<sup>141</sup> Based on the *Crosby* ruling, in the event a court held a trial or even part of a trial *in absentia* based on an inability to guarantee the defendant's security, a showing would have to be made that this situation is provided for under Rule 43. The omission of a security risk exception in Rule 43 can be attributed to the fact that American courts have access to powerful law enforcement agencies at the local, state and federal level, and recalls essential distinctions between national legal systems and international tribunals.<sup>142</sup> In contrast, the inclusion of the security risk provision in the ICC Draft Statute, which has been characterized as vague, may reflect a concern that the ICC will be unable to rely on such formidable enforcement agencies.<sup>143</sup>

There is also no provision within Rule 43 for continuing a trial outside the presence of the accused based on that person's ill-health which is authorized under the ICC Draft Statute.<sup>144</sup> Quite the contrary, a criminal trial taking place in the United States would almost certainly grind to a halt under such circumstances because the constitution "forbids trial of one who, for whatever reason, is unfit to assist in his own defense because the U.S. adversarial system of justice depends on vigorous defenses."<sup>145</sup> The Draft Statute does not elaborate on whether both physical and mental illness would be taken into consideration in determining whether "it is undesirable for the accused to be present."<sup>146</sup> Under the American legal system, however, such a distinction is unnecessary because it is prohibited to try defendants who are found to be mentally ill regardless of their ability to be present in the courtroom.<sup>147</sup>

A closer examination of the Rule 43 exceptions reveal an underlying theme of voluntary action on the part of the accused. Specifically, Rule 43(b)(1) states that "the defendant will

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141. *Crosby*, 506 U.S. at 258-59.

142. See Wedgwood, *supra* note 114, at 268.

143. See Lawyers Committee For Human Rights, *supra* note 81.

144. See Draft Statute, *supra* note 5, art. 37(2)(a).

145. *Edmonds v. Peters*, 93 F.3d 1307, 1314 (7th Cir. 1996). See also *Pate v. Robinson*, 383 U.S. 375, 378 (1966) (holding a defendant has a due process right not to be tried if he is unable to assist in his own defense).

146. See Draft Statute, *supra* note 5, art. 37(2)(a).

147. *Drope v. Missouri*, 420 U.S. 162, 171-72 (1975) (holding that "the mentally incompetent defendant, though physically present in the courtroom, is in reality afforded no opportunity to defend himself").

be considered to have waived the right to be present whenever a defendant . . . *is voluntarily absent* after the trial has commenced." Similarly, the exceptions authorizing trial *in absentia* during sentencing in a noncapital case and after the removal of a disruptive defendant focus on the voluntary conduct of the defendant.<sup>148</sup> Moreover, the notion of voluntary conduct on the part of the defendant who waives the right to be present was discussed by the *Crosby* Court during its interpretation of Rule 43.<sup>149</sup>

Application of the *Crosby* decision to the ICC security risk/ill-health provisions for trial *in absentia* might pass one *Crosby* hurdle if the ICC provisions specified that the security risk/ill-health provisions applied only *after* the accused makes an initial appearance. However, these ICC provisions are nevertheless in conflict with the rest of the *Crosby* analysis which emphasizes that the exceptions for permitting trial *in absentia* are limited to those expressly provided for in Rule 43.<sup>150</sup> Furthermore, it is unlikely that the security risk/ill-health provisions can be found to comport with the spirit of Rule 43 exceptions which all involve the accused demonstrating via conduct that he/she knowingly and voluntarily waives the right to be present for trial.<sup>151</sup>

#### V. RECONCILING ICC PROVISIONS FOR TRIAL *IN ABSENTIA* WITH U.S. LAW

The following section will argue that in spite of the apparent conflict between prevailing United States law and the ICC on provisions for trial *in absentia*, the United States can and should be a full-fledged member of the proposed international criminal court and can do so without having to sacrifice any constitutional guarantees. This section will propose the following three points in support of United States membership in the ICC pursuant to the current Draft Statute. First, the ICC is *not* an Article III Court pursuant to the U.S. Constitution and therefore the nation may pursue ICC membership without having to guarantee full constitutional rights afforded to U.S.

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148. See FED. R. CRIM. P. 43(b)(2) to 43(b)(3).

149. *Crosby v. United States*, 506 U.S. 255, 261 (1993); *Diaz v. United States*, 223 U.S. 442 (1912).

150. See *Crosby*, 506 U.S. at 258-59.

151. *Id.* at 261.

citizens in domestic Article III Courts.<sup>152</sup> Second, although the United States opposition to trial *in absentia* does have constitutional foundations, this is not an unconditional guarantee. A balancing test between the weight of U.S. opposition to trial *in absentia* and that of policy objectives advanced by U.S. participation within an ICC equipped with *in absentia* authority tips in favor of the ICC. Third, the security risk/ill-health provisions could be omitted from the final ICC charter, or at the very least, explicated in greater detail prior to a final treaty conference.

Perhaps the easiest way to solve the dilemma raised by the conflict between provisions for trial *in absentia* under the ICC and U.S. law is to avoid the issue in its entirety by describing the ICC as a non-Article III court which is therefore not required to adhere to U.S. law.<sup>153</sup> The U.S. Constitution states:

[t]he judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts *as the Congress may from time to time ordain and establish*. The judges, both of the Supreme and inferior courts, shall hold their offices during good behaviour, and shall . . . receive . . . a Compensation, which shall not be diminished during their Continuance in Office.<sup>154</sup>

Application of this criteria lends support to the above contention as the ICC is not created by the U.S. Congress, nor are ICC judges nominated by the U.S. President.<sup>155</sup> Furthermore, advocates of this view like Paul D. Marquardt assert that the ICC will operate under its own authority, or more generally, under the authority of the entire international community, and thus cannot be held to be an Article III Court.<sup>156</sup> Marquardt also argues that the ICC would not trigger Article III status even in the event the United States investigated and detained suspects for the ICC.<sup>157</sup> Finally, this argument stands on solid Supreme Court precedent established by *Hirota v.*

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152. See Levine, *supra* note 113, at 43.

153. *Id.* See Marquardt, *supra* note 9, at 104-106.

154. U.S. CONST. art. III, § 1 (emphasis added).

155. See generally Draft Statute, *supra* note 5.

156. See Marquardt, *supra* note 9, at 106.

157. *Id.*; but cf. Scharf, *supra* note 4, at 116.

*MacArthur*,<sup>158</sup> where the Court held that the Tokyo Tribunal, established under the authority of U.S. Supreme Allied Commander General Douglas C. MacArthur, "is not a tribunal of the United States."<sup>159</sup>

Although the above Article III argument puts forth a compelling argument that would effectively moot any constitutional claim against a international tribunal,<sup>160</sup> the ICC's complementary jurisdiction provision, as it is employed within the Draft Statute, characterizes the ICC as a projection of national courts, which in the United States require full constitutional protection to all criminal defendants.<sup>161</sup> The notion of complementary jurisdiction was included in the Draft Statute to allow States to circumvent constitutional or statutory barriers against surrendering their own nationals to a foreign tribunal.<sup>162</sup> With regard to the United States, such an interpretation essentially transforms the ICC into an Article III court by equating it with national courts which are, of course, governed by Article III. To avert this dilemma, ICC commentators suggest that the ICC declare that the "surrender of an accused to the ICC is an extradition."<sup>163</sup> Notwithstanding the attractive escape hatch this tactic offers, such a course would create a variety of other problems. For instance, deleting complementary jurisdiction from the ICC will tie the hands of nations for which the surrendering of an accused to a foreign tribunal is statutorily forbidden.<sup>164</sup> Complementary jurisdiction is also important on a policy level as it imparts a definite sense of national affiliation between the ICC and each member state's national court system. In essence, complementary jurisdiction is another method of promoting the ICC's legitimacy in the world community.<sup>165</sup>

A second argument in support of U.S. acceptance of ICC *in absentia* provisions utilizes a balancing test weighing U.S.

158. 338 U.S. 197 (1948) (per curiam).

159. See Marquardt, *supra* note 9, at 106 (quoting *Hirota*, 338 U.S. at 198).

160. See Marquardt, *supra* note 9, at n.132.

161. See Scharf, *supra* note 4; see also Draft Statute, *supra* note 5, at preamble, pt. III(11).

162. Draft Statute, *supra* note 5, at preamble, pt. III(11).

163. See Scharf, *supra* note 4. See also Levitine, *supra* note 113, at 41-42 (suggesting that the court's jurisdiction be interpreted as "*sui generis*").

164. See Levitine, *supra* note 113, at 41-42.

165. See generally *supra* Part II.

opposition to trial *in absentia* against the policy objectives in favor of equipping the ICC with *in absentia* authority.<sup>166</sup> On one side of this balancing scale is the American constitutional tradition which requires defendants to be present at criminal trials and affords them the opportunity to confront their accusers in public.<sup>167</sup> As noted above, however, this tradition, while significant, is by no means an iron-clad guarantee for all defendants in all situations.<sup>168</sup>

At the opposite end of the scale, the following factors collectively outweigh the infringement on U.S. law caused by ICC provisions for trial *in absentia*: (1) the political significance of securing U.S. membership in the ICC is critical to its effectiveness;<sup>169</sup> (2) the unique difficulties presented by prosecuting international criminal conspiracies, coupled with the distinctions between domestic and international legal systems, justifies flexible provisions for trial *in absentia*;<sup>170</sup> (3) the importance of establishing the ICC as a credible legal authority with the capability to finish trials should not be thwarted by defendants who would benefit from having a trial delayed or possibly halted indefinitely because of security problems or illnesses;<sup>171</sup> and (4) the significant procedural guarantees afforded to ICC defendants and the general requirement that defendants be present at all trial proceedings suggest that ICC defendants will receive fair trials and that the occurrence of trial *in absentia* will be rare.<sup>172</sup> Taken together, these four factors tip the scale in favor of U.S. membership in the ICC with the provisions for trial *in absentia* intact.

A final approach the ILC members could take to ensure U.S. agreement on the issue of trial *in absentia* is to amend

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166. U.S. judges frequently employ the balancing test as a judicial device which permits courts to consider public policy objectives and other factors in resolving multi-issue legal questions. *See, e.g., Barker v. Wingo*, 407 U.S. 514, 530 (1972) (setting forth a four factor balancing test to determine whether a defendant's right to a speedy trial pursuant to FED. R. CRIM. P. 48(b) had been violated. The four factors are "length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant"). *Id.*

167. *See, e.g., U.S. CONST. amend. VI; FED. R. CRIM. P. 43; see generally supra* Part IV.

168. *See supra* Part IV.

169. *See Scharf, supra* note 4, at 109.

170. *See Wedgwood, supra* note 114; *supra* Part III.

171. *See Wedgwood, supra* note 114, at 269.

172. *See Draft Statute, supra* note 5, arts. 37, 40 & 41(1)(a); *supra* Part II.

the language of Article 37. One possibility is to omit entirely the security risk/ill-health language.<sup>173</sup> Despite the logical appeal of this option, the fact that heated debate occurred over the issue indicates that a substantial number of ILC delegates would undoubtedly have strong reservations against deleting significant portions of Article 37.<sup>174</sup> Accordingly, a more realistic option would be to elucidate in greater detail what is meant by the security risk/ill health provisions in Draft Statute Article 37. For instance, with regard to ill-health, a provision may be proposed stating that a physically debilitated defendant who is unable to appear in court must be afforded appearance at his/her trial by video conference with access to counsel. Included in this provision should be language requiring a minimum level of mental and physical competence on the part of the defendant.<sup>175</sup> Thus, a defendant who is physically or mentally debilitated to the point that he/she cannot meaningfully comprehend what is happening, or assist in his/her defense should not be tried under such conditions. To accomplish this important objective, ILC delegates need to adopt provisions and standards for physical and mental evaluations.<sup>176</sup>

With regard to the security provision, the Draft Statute could be improved further by requiring a majority of the Trial Chamber judges to determine that circumstances had reached a point where security for the accused cannot be guaranteed before a trial could proceed *in absentia*. This procedure could be supplemented by mandatory appellate review of a security risk determination by either the ICC President or a special Appellate Chamber. Delays caused by including these procedural requirements will be negligible and significantly improve the Draft Statute in its current form.

Following completion of this Note, a final treaty conference was held in Rome, Italy from June 5, 1998 until July 17, 1998 at which a revised draft statute was created.<sup>177</sup> Interestingly, the Rome Statute's provision dealing with the presence of the accused at trial reads:

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173. See Lawyers Human Rights Committee, *supra* note 81.

174. See Commentary, *supra* note 5, art. 37(1).

175. See *Drope*, 420 U.S. 162.

176. *Id.*

177. See *International Criminal Court Homepage* (visited Nov. 14, 1998), *supra* note 2.

Trial in the presence of the accused

1. The accused shall be present during the trial.
2. If the accused, being present before the Court, continues to disrupt the trial, the Trial Chamber may remove the accused and shall make provision for him or her to observe the trial and instruct counsel from outside the courtroom, through the use of communications technology, if required. Such measures shall be taken only in exceptional circumstances after other reasonable alternatives have proved inadequate, and only for such duration as is strictly required.<sup>178</sup>

Notably, the ill-health/security risk provisions in Draft Statute Article 37 have been omitted. In addition, the revised language in the Rome Statute does not address the issue of trial *in absentia* in the event that the accused absconds after arrest and/or the commencement of proceedings. However, Rome Statute Article 61(2) authorizes the Pre-Trial Chamber on its own or on a motion from the Prosecutor to:

hold a hearing in the absence of the person charged to confirm the charges on which the Prosecutor intends to seek trial when the person has:

- (a) Waived his or her right to be present; or
- (b) Fled or cannot be found and all reasonable steps have been taken to secure his or her appearance before the Court and to inform the person of the charges and that a hearing to confirm those charges will be held. In that case, the person shall be represented by counsel where the Pre-Trial Chamber determines that is in the interests of justice.<sup>179</sup>

The Rome Statute thus retained *in absentia* authority for

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178. Rome Statute of the International Criminal Court, July 17, 1998, art. 63 [hereinafter Rome Statute].

179. *Id.* art. 61(2).



the Prosecutor to announce the charges against a defendant who has waived the right to be present either via an informed waiver or via intentional flight from justice. It is unclear whether this *in absentia* authority at the indictment stage would be available at the trial level. An examination of the Rome Statute and comparison to the previous ICC Draft Statute suggest that a trial could not proceed under the Rome Draft Statute if the accused fled during the indictment stage or even at some point after commencement of the trial proceedings.<sup>180</sup> In its current form, the Rome Statute has deleted express ICC authority to prosecute a defendant who flees after judicial proceedings have begun. It should be recalled that the Draft Statute expressly provided such *in absentia* authority.<sup>181</sup> Indeed, the only scenario contemplated in the Rome Statute for trial to continue outside the presence of the accused is when the accused disrupts the proceedings.<sup>182</sup> Moreover, this authority is limited to "exceptional circumstances" and entitles the accused to video conferencing and instruction from counsel during his/her absence "after other reasonable alternatives have proved inadequate, and for only such duration as is strictly required."<sup>183</sup> Accordingly, it appears from the most recent Draft Statute that the ICC delegates have opted against broad *in absentia* authority and limited its use to extremely narrow circumstances. The Court should retain *in absentia* authority to try defendants who abscond after initial judicial proceedings have commenced. This may be implicit in article 61(2) of the Rome Statute, or simply an oversight which should be amended.

## VI. CONCLUSION

Few will dispute the contention that the time for a permanent international criminal court is long overdue. The ongoing prosecutions and personal accounts of unspeakable crimes against mankind being recorded by the ICTFY and ICTR remind us that the specter of international atrocity is not confined to the World War II era and that it will undoubtedly rear

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180. Compare Rome Statute, *supra* note 178, art. 63, with Draft Statute, *supra* note 5, art. 37.

181. See Draft Statute, *supra* note 5, art. 37.

182. See Rome Statute, *supra* note 178, art. 63(2).

183. *Id.*

its ugly head in the twenty-first century. Accordingly, the recent campaign to establish a permanent international court should continue until the ICC becomes reality. In light of the United States' position as the sole global superpower, securing its membership is an absolute necessity for the ICC.<sup>184</sup>

In this Note, I have examined the right to be present at one's own trial. Notwithstanding the revised language in the Rome Statute, the Draft Statute provisions differ at certain points from U.S. exceptions for permitting trials to proceed outside the presence of the accused. While deserving serious scrutiny and amendments to shed additional light on their intent, these ICC provisions do not merit U.S. rejection of ICC membership. Apart from declaring a general requirement that defendants be present during *all* stages of trial, the ICC provides an impressive assortment of individual rights and procedural requirements which in many respects mirror U.S. procedural guarantees that criminal defendants receive fair trials. Finally, it should not be overlooked that an equally important ICC objective is to deter future international criminal conduct. It will be difficult, if not impossible, to attain this goal if defendants are permitted to benefit by intentional flight or security risks outside the control of the Court.

Over fifty years have passed since the end of the Second World War during which some of the most unimaginable crimes were perpetuated against humanity. Sadly, the horrific actions committed in Nazi Germany were essentially duplicated, albeit by different actors, in Cambodia, the former Yugoslavia and Rwanda during this last quarter of the twentieth-century. In light of these awful tragedies and the looming nuclear threat currently threatening Indonesia, it is indeed foolhardy for anyone to presume that the darkest chapters of this century cannot be repeated. The need for the ICC today and for the next century is, therefore, abundantly clear. With regard to United States membership in the ICC, the prospect of commit-

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184. See *Testimony Before the Senate Comm. on Foreign Relations*, 105th Cong., 2d Sess. (July 23, 1998) (Testimony of David J. Scheffer, Ambassador-at-Large for war crimes issues and head of the U.S. delegation to the U.N. Diplomatic Conference on the Establishment of a Permanent International Criminal Court. Scheffer attributes the U.S. delegation's failure to support the July 17 draft in Rome to unresolved jurisdictional concerns, the definition of the crime of aggression, and provisions allowing the ICC Prosecutor to unilaterally commence investigations with the consent of two judges).

ting the nation and its citizens to such an historic endeavor should not be taken lightly. Overall, the ICC is an institution which incorporates the essential components of the U.S. criminal justice system and recognizes the importance of ensuring fairness to defendants. Accordingly, the ICC is an institution which deserves the full support and membership of the United States.

*Daniel J. Brown*