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Preface

This paper, under the same title, was initially issued in August 1996, just before the first Preparatory Committee session on the establishment of a permanent International Criminal Court (ICC). It has been updated ahead of the June 1998 Diplomatic Conference in Rome at which a treaty establishing the court should be adopted. The current paper, like the previous one, examines the major outstanding issues in the draft Statute and includes the Lawyers Committee's comments and recommendations. A comparison between the two would show that, with the exception of several proposals, the major unresolved issues in the draft ICC Statute remain the same. This signifies that much work will need to be done in Rome to ensure the creation of an independent, effective and fair ICC, which is the Lawyers Committee's goal.

The reason for our commitment to the establishment of an ICC is that in the half century since the Nuremberg and Tokyo trials, massive human rights and humanitarian law abuses have been committed and continue to be committed worldwide. The Lawyers Committee believes that the time has come for the international community to demand official accountability for such acts. An International Criminal Court is necessary to help end impunity for egregious crimes under international law by providing a forum for adjudication when national criminal justice systems fail to do so. While we have been encouraged by the creation of ad hoc tribunals for the former Yugoslavia and Rwanda we are aware that, no matter how individually successful, ad hoc tribunals cannot be a substitute for a stable international judicial mechanism. The rule of law precludes selective justice and means that victims should be able to seek redress for crimes of concern to the international community as a whole where a domestic system cannot provide it. An ICC would provide such an opportunity and dispense justice according to the highest international standards of fair trial and due process.
The Lawyers Committee believes that an International Criminal Court must be independent and effective if it is to be credible. The Committee supports narrowing the proposed jurisdiction of the ICC to a set of core crimes comprising genocide, war crimes and crimes against humanity. The court should have automatic jurisdiction over those exceptionally serious crimes and the court's Prosecutor should be permitted to initiate proceedings of his or her own accord, subject to appropriate judicial scrutiny. This would ensure that justice is served in cases where both states parties to the Statute and the Security Council fail to act in bringing offenders before the court. While supporting the principle that the ICC's jurisdiction should be triggered only when a domestic judicial system is unwilling or unable to pursue a case, the Lawyers Committee believes that the court should be the arbiter of that capacity.

The international community will be in a unique position to uphold and strengthen the rule of law at the Rome Diplomatic Conference by creating an independent, effective and fair permanent International Criminal Court. Efforts that have been made to this end over the last several decades deserve to be brought to fruition and the reality of ongoing violations of basic human dignity also demand swift action. The Lawyers Committee for Human Rights urges governments to seize this historic opportunity to create an ICC, and remains committed to the successful conclusion of the Rome Diplomatic Conference.

I. THE INTERNATIONAL CRIMINAL COURT: INTRODUCTION

A. Background

The momentum for the creation of a permanent International Criminal Court has been slowly building since the end of World War I. The Treaty of Versailles provided for the establishment of an international tribunal to try the German Emperor for "a supreme offense against morality and the sanctity of treaties." Yet Kaiser Wilhelm never stood trial. The international tribunals set up following World War II at Nuremberg and Tokyo to try major war
criminals were far more successful. They set an important precedent, even though the tribunals themselves only lasted a couple of years and tried relatively few people. The Charter of the Nuremberg Tribunal adopted in August 1945 specified crimes that are still considered the key crimes under international law: crimes against peace, war crimes and crimes against humanity.

Nuremberg signaled the international community's resolve to hold individuals, whether they are government officials or others, individually accountable for acts deemed unacceptable to common standards of international law and morality. By establishing individual accountability, the Nuremberg and Tokyo trials and judgments forever shattered the notion that state sovereignty could be used as a defense for acts considered outrages on the conscience of mankind. Several principles on individual accountability arising from the Nuremberg trials were later enumerated in the 1950 UN Declaration on Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and the Judgment of the Tribunal.

The idea of establishing a permanent International Criminal Court has, with greater or lesser visibility, been on the international agenda ever since. In 1948 the UN General Assembly adopted the Genocide Convention. Apart from defining the crime of genocide, it provided that persons charged with genocide shall be tried either before a court of the state in which the act was committed, "or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction" (emphasis added). In 1949, the four Geneva Conventions were opened for signature, relating to: (I) the protection of the wounded and sick in armed forces in the field; (II) the protection of wounded, sick and shipwrecked members of armed forces at sea; (III) the protection of prisoners of war; (IV) the protection of civilians in war. While these Conventions did not envisage the creation of an International Criminal Court, they did oblige states parties to penalize, under domestic law, a number of acts considered "grave breaches" of their provisions. In 1977, two Additional Protocols were added which further elaborated on the duties of states to protect persons both in international and non-international armed
conflict.

Almost simultaneously with the drafting of the Genocide and Geneva Conventions, the United Nations General Assembly in 1948 asked the International Law Commission (ILC), an expert body entrusted with the codification and development of international law, to examine the possibility of creating a permanent International Criminal Court. Even though the ILC responded favorably and two draft Statutes were drawn up, in 1951 and 1953, further work became unfeasible during the political and ideological confrontations of the Cold War.

In 1989, it was the concern of a small nation that focused renewed attention within the United Nations on the establishment of a permanent International Criminal Court. That year Trinidad and Tobago proposed that efforts at drafting an ICC Statute be resumed in order to create an international judicial institution capable of dealing with the increase in crimes of international drug trafficking. The General Assembly’s first request to the ILC, in 1990, was reiterated in 1992, when the Commission was asked to complete the drafting of an ICC Statute as a matter of priority. That urgency was underscored, in part, by the widespread atrocities being committed in the war in the former Yugoslavia.

Reports of egregious violations of international humanitarian law in the former Yugoslavia precipitated a series of warnings by the Security Council that those responsible for abuses would be held personally accountable. In 1993, the Security Council created the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991 (ICTY). The tribunal’s subject-matter jurisdiction covers grave breaches of the Geneva Conventions, violations of the laws and customs of war, genocide and war crimes. Its establishment marked a turning point in the development of international law.

Treading on previously untested ground, the Security Council
drew on its Chapter VII powers to set up a judicial organ as one of its subsidiary bodies. It not only defined the tribunal's structure and jurisdiction, but obliged all UN member states to cooperate and comply with its requests and orders. The Council's unprecedented step paved the way, a year later, for the creation of an ad hoc tribunal empowered to prosecute persons responsible for genocide and other serious violations of international humanitarian law committed in Rwanda. By bringing the two tribunals into existence, the Security Council clearly signaled the international community's commitment to supporting the principle of individual accountability for crimes under international law. The creation of these ad hoc tribunals enhanced the prospects for establishing a permanent International Criminal Court.

The ILC submitted a draft Statute for an International Criminal Court to the General Assembly in 1993. Upon receiving comments from governments, a revised draft Statute was submitted by the ILC to the General Assembly in 1994, with the recommendation that it "convene an international conference of plenipotentiaries to study the draft Statute and to conclude a convention on the establishment of an International Criminal Court."/1/ Due to political differences on the desirability of creating an effective criminal court and on the pace at which work should proceed, the GA set up an Ad Hoc Committee to review the ILC's revised draft Statute. Member states and specialized agencies of the UN were invited to take part in the Ad Hoc Committee's debates and to submit comments on the draft Statute.

The Ad Hoc Committee met twice in 1995. After a thorough examination of the main substantive and procedural issues arising from the draft Statute, it, too, concluded that further discussions should be combined with the drafting of texts in preparation for a diplomatic conference. After the Sixth (Legal) Committee of the UN General Assembly endorsed the Ad Hoc Committee's approach, the General Assembly decided to establish a Preparatory Committee to begin negotiations on the text of the Statute. The Preparatory Committee, which has held six sessions in New York since 1996, was authorized by the General Assembly to
complete the drafting of a "widely acceptable consolidated text of a convention, to be submitted to a diplomatic conference of plenipotentiaries."/2/ In December 1997, the General Assembly adopted a resolution determining that a Diplomatic Conference to finalize and adopt a convention on the establishment of an ICC will be held in Rome from June 15 to July 17, 1998. Since then, the Preparatory Committee's work has been technically consolidated into a text known as the Zutphen draft Statute. It has 99 articles, most of which are in option form or are heavily bracketed, indicating a lack of agreement on the definitive content. The final session of the preparatory Committee was held in New York between March 16 and April 3, 1998. The Committee adopted a consolidated text of the entire draft Statute that superseded the Zutphen draft and will be the basis for negotiations at the Rome Conference.

While the preliminary negotiating phase on the establishment of an ICC has drawn to a close, the major unresolved issues of 1996 are still on the table. Their outcome will hinge much more on the political readiness of states to establish an effective and independent ICC than on the legal technicalities involved. Those issues are the subject of this paper.

B. Why an International Criminal Court is Necessary

The Lawyers Committee for Human Rights strongly supports the timely creation of an effective and just permanent International Criminal Court. The Committee believes that such a court is necessary for the following reasons, to name just a few:

To End Impunity. Despite the precedents of Nuremberg and Tokyo, most perpetrators of gross human rights abuses and violations of international humanitarian law are not punished by national or international bodies. The time has come to end impunity by creating a permanent court before which such individuals could be brought to justice. Human rights and the protections guaranteed under international humanitarian law will not be translated into practical behavior unless potential offenders become aware that a price for violations must be paid. Impunity not only encourages the recurrence of abuses against
human dignity, but also strips human rights and humanitarian law of their deterrent effect.

To Afford Redress. By prosecuting and trying violators of egregious crimes, an International Criminal Court could provide an important measure of relief to victims and their families and, more widely, to affected social communities. Even though judgments are always rendered after the fact, justice must be done and must be seen to have been done in order for individuals to regain confidence in the environment in which they live. For affected populations, individual accountability is of twofold significance. First, if the perpetrators of crimes under international law belonged to their ranks, bringing those responsible to justice would help remove the possible stigma of collective guilt. Second, where populations are the victims of atrocities, the punishment of perpetrators is crucial to enabling the process of reconciliation with other groups to begin.

To Counter the Failure of National Systems. Ideally, human rights and humanitarian law violations should be dealt with by the national authorities of the state in which they were committed. Practice has shown, however, that governments are rarely willing to call their own citizens to account, especially when the individuals involved occupy positions of political or military authority. War crimes are a case in point. The ad hoc tribunals for the former Yugoslavia and Rwanda were established precisely because domestic authorities would not or could not punish those responsible for committing or failing to prevent violations of both domestic and international law. Moreover, situations of international or internal conflict may lead to the disruption or even disintegration of domestic legal systems, with no government capable of dispensing justice at all. In such instances the international community needs an instrument through which it can act to restrain and punish offenders.

To Remedy the Limitations of Ad Hoc Tribunals. Ad hoc tribunals cannot be a substitute for a permanent International Criminal Court for both political and legal reasons. The establishment of temporary courts always gives rise to reasonable questions, such as why an ad hoc tribunal was set up in one
situation and not in another; and why a certain international or domestic crisis was dealt with differently from another. Looking forward, it would be unwise to predict that the Security Council will always have the political will or the logistical capacity to respond to massive human rights violations the way it did in the former Yugoslavia and Rwanda. It is, in fact, already widely acknowledged that the Security Council is experiencing "tribunal fatigue" and that it would probably not set up another ad hoc tribunal no matter what the scale of the crisis meriting it. In addition, establishment by Security Council decision, rather than by treaty, opens ad hoc tribunals up to accusations of political bias and to suspicion concerning their judicial independence. By ensuring evenhandedness in the international community's approach, a permanent International Criminal Court would eliminate such objections in the future.

From a legal standpoint, ad hoc tribunals cannot hope to achieve a desired level of consistency in the interpretation and application of international law because their Statutes are inevitably tailored to meet the demands of the specific situation that brought them into being. Quite another issue, and a hotly debated one, is the Security Council's authority to set up judicial bodies in the first place. An International Criminal Court, established by a treaty open to the voluntary participation of all states, would resolve this dilemma.

To Provide an Enforcement Mechanism. An International Criminal Court is needed to overcome one of the main failings of international criminal law—lack of a permanent and effective enforcement mechanism. The creation of an ICC is therefore a logical step in the development of the international legal order. Individual accountability for human rights and humanitarian law abuses is a well established principle. It should be concretely backed up by the creation of an institution that could punish perpetrators of serious crimes that are an affront to mankind.

To Serve as a Model. Finally, an International Criminal Court could serve as a model of justice and act as a standard-setting institution in the area of due process and fair trial rights at both the international and national levels. By
fulfilling its task in accordance with the highest international standards, it could help practically define due process criteria and strengthen the entire range of human rights associated with the right to a fair trial—from the presumption of innocence to freedom from double jeopardy./3/ Its interpretation of human rights provisions and standards could clarify existing ambiguities in the law and shed light on future developments, much the way the International Court of Justice has done in the area of public international law.

II. STRUCTURE AND FUNCTIONING OF THE INTERNATIONAL CRIMINAL COURT

Note: The provisions of the draft Statute on the organization and composition of the court, and particularly on the procedure it will follow, are so heavily bracketed that it is very difficult to predict what solutions will be finally adopted. This segment of the paper is meant to give a very broad outline of the ICC's structure and functioning as a necessary precondition to understanding the major unresolved issues. It in no way reflects the complexity of the drafting work that needs to be done in Rome and does not touch upon the minutiae of the ICC's structure and procedure that remain to be determined.

As envisaged in the draft Statute, the International Criminal Court would be established by treaty—an international agreement open to the voluntary participation of all interested states—which would come into force after the requisite number of states have ratified it. It would be a permanent institution, but initially would not operate on a full-time basis. With the demands of cost-reduction in mind, the ICC Statute provides that the judges would sit only when requested to consider a case./4/

The ICC would have between 18-24 judges, elected by an
absolute majority vote of the states parties to the treaty by secret ballot./5/ Judges would hold office for a term of nine years and would not be eligible for re-election./6/ No two judges could be nationals of the same state. The draft Statute also specifies that the representation of the principal legal systems of the world should be assured in the election of the judges. The court’s organs would be the Presidency, the Pre-Trial, Trial and Appeals Chambers, the Office of the Prosecutor and the Registry. Strictly judicial functions would be performed by the Presidency and the various chambers. Investigative and prosecutorial functions would be carried out by the Office of the Prosecutor, whereas the Registry would be the principal administrative organ of the court.

Members of the proposed court’s Presidency— the President, two Vice Presidents and two alternate Vice Presidents— would be chosen by an absolute majority of the court’s judges for a term of three years. They would have overall responsibility for the court’s management, and perform certain pre-trial and post-trial judicial functions. Under one proposal the Presidency would, for example, be charged with confirming indictments submitted by the Prosecutor and with establishing Trial Chambers. Post-trial, the Presidency would be authorized to decide on the pardon, parole and commutation of sentences. Under alternative proposals these functions would be performed by the Pre-Trial Chamber and the court, respectively. /7/

The ICC’s Trial Chambers would be composed of three/five judges and be set up by the Presidency on a case by case basis. The Appeals Chamber, elected by an absolute majority of the judges of the court, would consist of three/five/seven judges./8/ While the court would, as already mentioned, not operate as a full-time body from the start, the Statute leaves open the possibility of its becoming one if the workload were to require it. A decision to that effect would, under one proposal, be taken by a two-thirds majority of the states parties to the Statute, on a recommendation of the Presidency.

The Office of the Prosecutor would be composed of the Prosecutor, one or more Deputy Prosecutors and such other
qualified staff as may be required. Under one option the Prosecutor and his/her Deputies would be elected by secret ballot by an absolute majority of the states parties, from among candidates nominated by the states parties. Under another proposal the Deputy Prosecutors would be appointed by the Prosecutor. /9/ They would hold office for five/seven/nine years and (not) be eligible for re-election.

The Registrar, who would be elected by an absolute majority of the states parties/the judges, would be the principal administrative officer of the court. The Registrar has important functions under the draft Statute as a depositary of various notifications and a channel for communication with states.

The ICC Statute lays down only the main procedural provisions that would be applied by the court, as it is expected that the details would be provided for in the court's Rules of Procedure and Evidence. Whether the Rules will be an integral part of the Statute or whether they will be drafted after the treaty is adopted remains to be determined, although the latter scenario is more likely. Under the draft Statute the Prosecutor would initiate an investigation on receiving a complaint from a state party or upon the referral of a matter by the Security Council, or on his or her own motion./10/ S/he may decline to do so if s/he concludes that there is no basis for prosecution under the Statute, in which case s/he must inform the Presidency/Pre-Trial Chamber. /11/ The Prosecutor is authorized to request the presence of and question suspects, victims and witnesses, collect documentary and other evidence, conduct on-site investigations,/12/ ensure the confidentiality of information or the protection of any person and seek the cooperation of any state or the UN. At the Prosecutors' request the Presidency/Pre-Trial Chamber may issues such subpoenas and warrants as may be required for the purpose of an investigation.

If upon investigation the Prosecutor concludes that there is a prima facie case, s/he would file an indictment containing a concise statement of the allegations of fact and of the crimes(s) with which the suspect is charged./13/ After determining that a prima facie case exists and that the admissibility requirements
have been met (discussed below), the Presidency/Pre-Trial Chamber would confirm the indictment and establish a Trial Chamber. /14/ The Presidency/Pre-Trial Chamber may, alternatively, decide not to confirm the indictment and may also, at the Prosecutor's request amend it, provided the accused is notified of the amendment and given adequate time to prepare a defense./15/ The Presidency/Pre-Trial Chamber/Trial Chamber is authorized to make other orders required for the conduct of a trial relating to the disclosure of documentary and other evidence by the Prosecutor to the defense, the exchange of information between the Prosecutor and the defense, the protection of the accused, victims and witnesses and of confidential information. /16/At the request of the Prosecutor the Presidency/Pre Trial Chamber is authorized to issue warrants for the provisional arrest of a suspect (pre-indictment arrest) and for the arrest and transfer of an accused once an indictment has been confirmed (post-indictment arrest)./17/

An arrested person would be brought promptly before a judicial officer of the state where the arrest occurred. The officer would determine that the warrant has been duly served and that the rights of the suspect have been respected. An arrested person would have the right to apply to the court's Presidency/Pre-Trial Chamber for release pending trial—either unconditional or on bail—and could challenge the lawfulness of his or her arrest or detention. The draft Statute provides for the right to raise challenges to the court's jurisdiction prior to or at the commencement of the trial by an accused/suspect or any state/state party/interested state party or on the court's own motion./18/ Issues of admissibility may also be reviewed on application of the accused, at the request of a state/state party/interested state party or on the court's own motion./19/ In either situation the accused and the state have the right to be heard.

As a general rule the accused would be present during the trial./20/ A Trial Chamber would be obliged to ensure that the trial is fair and expeditious, that it is conducted in accordance with the Statute and the Rules and that the rights of the accused and the protection of victims and witnesses have been safeguarded./21/ On the application of a party or of its own
motion a Trial Chamber could, inter alia, issue a warrant for the arrest and transfer of an accused who is not already in the custody of the court, require the attendance and testimony of witnesses, require the production of documentary and other evidentiary materials, rule on the admissibility or relevance of evidence and protect confidential information.\textsuperscript{22} The draft Statute provides for the presumption of innocence \textsuperscript{23} and specifies that the accused is entitled to fair and public hearing. It lists the minimum guarantees of fair trial, generally following the provisions of Article 14 of the International Covenant on Civil and Political Rights (ICCPR).\textsuperscript{24}

Similar to the Yugoslavia Tribunal Statute, the draft ICC Statute provides that a person tried by the ICC may not be retried by another court for the same crime(s). Under the draft Statute a retrial before the ICC of a person tried by a national court would be permitted in two situations: if the proceedings in the other court were not impartial or independent or were designed to shield the accused from international criminal responsibility.\textsuperscript{25} Pending further elaboration in the Rules of Procedure and Evidence, the Statute contains only basic provisions on evidence: among them is the rule that evidence obtained by means of a violation of the Statute or of internationally recognized human rights shall not be admissible.\textsuperscript{26}

Under the provisions relating to judgments, the draft Statute provides that the decision of a Trial Chamber shall be taken unanimously/by a majority vote of the judges.\textsuperscript{27} At least three/all judges must concur in a decision on the conviction or acquittal of an accused and on the sentence to be imposed. A sentence would become final after the completion of proceedings on appeal.\textsuperscript{28} A revision procedure is also envisaged, inter alia in cases where new evidence is discovered, which could have been a decisive factor in the conviction.\textsuperscript{29} The death penalty is not provided for; the court could impose a term of life imprisonment or of imprisonment for a specified number of years, or a fine.\textsuperscript{30} A sentence of imprisonment would be served in a state designated by the court/Presidency or designated by them from a list of states willing to accept convicted persons.\textsuperscript{31} The court/Presidency would supervise the implementation of sentences.
and decide on applications for pardon, parole or commutation./32/

Given that a permanent International Criminal Court will have no enforcement officials or capacity at its disposal, state cooperation and judicial assistance will be absolutely vital to its functioning. The key political and legal issue that still has to be resolved is the extent of states' duties to cooperate and the permissible grounds, if any, for refusal of cooperation. /33/ The draft Statute provides that requests for cooperation issued by the court may, inter alia, involve the identification and location of persons, the taking of testimony and production of evidence, the service of documents and the arrest or detention of persons. /34/ The court would also be authorized to request a state to take provisional measuresÑto arrest a suspect, /35/ seize documents or other evidence and to prevent injury to or intimidation of a witness or the destruction of evidence.

The initial ILC draft Statute of 1994 did not contain any provisions on what would happen if a state party to the Statute failed to cooperate. /36/ Under proposals formulated at the December 1997 Preparatory Committee session, the court would be able to make a finding of non-compliance and refer the matter to the Assembly of States Parties, the UN General Assembly or the UN Security Council, so that "necessary measures" may be taken to enable the court to exercise its jurisdiction./37/ While excessively vague, it is encouraging that this language was incorporated into the text. As explained in a Lawyers Committee briefing paper on "Compliance with ICC Decisions," the Lawyers Committee considers it essential that a mechanism to effect compliance with the court's decisions be included in the Statute.

III. COMPLEMENTARITY

The concept of "complementarity," which defines the relationship between the ICC and national courts and determines who should have jurisdiction in a particular case, underpins the entire structure of the proposed International Criminal Court. It is laid down in the preamble to the Statute and has since been elaborated in several articles of the operative text as well,
particularly those pertaining to the admissibility of a case./38/
The basic principle is that the ICC will complement not replace
national courts. This creates a presumption that the Prosecutor
will be precluded from taking any action when a state has a
functioning judicial system. In this respect the ICC will
obviously differ, and be much weaker, than the International
Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda
(ICTR). The ICTY and the ICTR have concurrent jurisdiction with
national courts and may choose to exercise primacy over them by
requesting deferral to their competence./39/

The draft Statute (Article 15) defines situations in which
the ICC can assume jurisdiction over a case. It explicitly
establishes that a case will, inter alia, be inadmissible before
the ICC whenever it is being investigated or prosecuted by a state
which has jurisdiction, unless the state is "unwilling or unable
genuinely" to carry out the investigation or prosecution./40/
Similarly, a case would have to be declared inadmissible when it
has been investigated by a state with jurisdiction which has
decided not to prosecute the person concerned, unless the decision
resulted from the "unwillingness or inability" of the state
"genuinely" to prosecute. /41/ This means that whenever a state
properly carries out its obligation to investigate, even if it
decides not to prosecute, the case would be inadmissible before
the ICC. The court would, in effect, be able to intervene only
when it determines that a national judicial system is unable or
unwilling to prosecute in a specific case, or has collapsed. It is
important, however, that the draft Statute specifies that those
assessments will be made by the court itself.

The draft Statute provides a set of criteria to guide judges
in their determination of genuine "unwillingness" or "inability."
"Unwillingness" is defined as shielding an accused from criminal
responsibility for crimes within the jurisdiction of the court, or
undue delay or a lack of independence and impartiality in the
national proceedings./42/ "Inability" is defined as the inability
of a state to obtain the accused or necessary evidence and
testimony or otherwise to carry out criminal proceedings, due to
the total or partial collapse or unavailability of its national
judicial system./43/ Since these are exceptions to the principal
assumption—that a case will be inadmissible when a state has exercised its own jurisdiction—will be necessary to show that an exception applies before the ICC can exercise jurisdiction.

Various provisions of the draft Statute—and Article 17 in particular—ensure that the substantive provisions on admissibility are given practical effect. They provide that admissibility will be reviewed a number of times and that persons subject to investigation, as well as states parties to the Statute, will have ample opportunity to challenge an investigation or prosecution from the earliest stages of a case. /44/

In fact, even before the Prosecutor begins an investigation, he or she will have to determine that the case would be admissible under the complementarity provisions. At any time prior to the commencement of the trial, including the opening of the trial itself, an accused and any state, state party or interested state party would be able to take steps to block the investigation or prosecution by challenging its admissibility./45/ A Pre-Trial Chamber, composed of judges who would be excluded from sitting at the trial stage, would rule on the admissibility of a case until the indictment is confirmed. After confirmation, a Trial Chamber would rule on challenges to admissibility./46/

The effect of the admissibility provisions would be to prevent a functioning judicial system from coming under the ICC's scrutiny in a specific case. Even when a national investigation into a genocide, crimes against humanity or war crimes did not result in prosecution, the ICC could not claim jurisdiction unless it could be shown that the national proceedings were a deliberate attempt to forestall international justice. The text of Article 15 of the draft Statute was very carefully crafted at the August 1997 session of the Preparatory Committee and represented the consensus of participating states.

At the March-April 1998 Preparatory Committee session, a new US proposal on admissibility was introduced./47/ Its main effect would be to provide a state—not just a state party—with the opportunity of a second challenge to admissibility, even though this is not envisaged in Article 17. According to the proposal,
a state would be able to challenge admissibility as soon as it receives notice, including by public announcement, that the Prosecutor has determined that there is sufficient basis to commence an investigation. In this early phase, it should be noted, neither the Prosecutor nor a state will have identified a specific suspect. The Prosecutor could then be requested by a state to defer to a national investigation for a period of up to one year, unless the Pre-Trial Chamber decided otherwise. The state would, in addition, be authorized to challenge admissibility once a suspect has been identified, under the already existing provisions on challenges to admissibility provided for in Article 17.

While recognizing the centrality of the complementarity regime, the Lawyers Committee believes that it must not be used as a means of marginalizing the court. The complementarity provisions should not provide states with an opportunity to obstruct justice and to delay interminably ICC investigations, which is what the US proposal might lead to in practice. Any further elaboration of the complementarity regime—which the Lawyers Committee does not consider necessary—should be undertaken with these considerations in mind.

IV. THE INTERNATIONAL CRIMINAL COURT: MAJOR ISSUES ARISING FROM THE DRAFT STATUTE

A. Subject-Matter Jurisdiction

The proposed court's subject-matter jurisdiction is one of the principal issues that will need to be finally resolved at the Rome Diplomatic Conference. The categories of crimes that the ICC will be authorized to hear will determine both its profile and range of activities. The current catalogue of crimes comprised in the draft Statute is rather expansive; the Lawyers Committee supports narrowing the ICC's jurisdiction, for reasons that will be mentioned below.

The draft ICC Statute provides in Article 5 that the court
would have jurisdiction over the following crimes:

a) genocide;
b) aggression;
c) war crimes;
d) crimes against humanity;
e) crimes, established under or pursuant to treaty provisions which, depending on the conduct alleged, constitute exceptionally serious crimes of international concern. Among the treaties most often mentioned for inclusion are conventions dealing with international terrorism and drug trafficking.

In the discussions that have taken place within the Preparatory Committee a majority opinion has emerged that the court's jurisdiction should initially be limited to a set of serious ("core") crimes that are of concern to the international community as a whole. They are: genocide, war crimes and crimes against humanity. The Lawyers Committee endorses this view because it believes that restricting the court's jurisdiction in the initial phase would facilitate broader acceptance of the ICC, thereby strengthening its moral authority and credibility. It would also avoid overloading the court with cases that can be adequately dealt with at the national level and would ease the costs of starting up a new international institution.

Limiting the ICC's subject-matter jurisdiction to the three core crimes would simplify and expedite the resolution of a number of issues related to the court's operation. Among them are the exercise of the ICC's jurisdiction and the role of the Security Council, state consent requirements and mechanisms for bringing cases before the court. This would, in turn, enable the creation of a coherent and effective institution.

The Committee's acceptance of a narrower jurisdiction for the court should not be taken as a reflection on the desirability of including treaty-based crimes, if consensus on such treaties is reached. In addition, the LCHR strongly believes that the Statute should provide for a mechanism of periodic review that would enable states parties to consider the addition of other crimes to the court's jurisdiction at a later stage.
Aggression. The Lawyers Committee has not argued that aggression should be included in the draft Statute, because there is no legally binding definition of that crime for the purpose of determining individual criminal responsibility. General Assembly Resolution 3314 (XXIX) of December 1974, which is most often referred to as a possible source for a definition of aggression, deals with aggression by states and not with the crimes of individuals. It was intended as a guide for the Security Council, rather than as a definition for judicial use. As a result, a determination that an act of aggression has occurred remains an eminently political act.

Moreover, the Committee notes that the mechanism for establishing accountability for aggression under the draft Statute would undermine the independence of the court. Under Article 10 (2) of the draft Statute, a complaint of or directly related to an act of aggression could not be brought unless the Security Council has first determined that a state has committed the act of aggression which is the subject of the complaint. If the ICC cannot rule on individual responsibility unless that condition is fulfilled, the question arises whether the court could find an individual not guilty regardless of the Council's determination that aggression was committed. If it could not do so, the court would obviously be subject to the political will of the Security Council, an outcome detrimental both to its integrity and to the due process rights of defendants.

While a German proposal defining aggression, introduced at the February 1997 session of the Preparatory Committee, has garnered fairly wide support, the Lawyers Committee is concerned that disagreement over the inclusion of this crime might delay the adoption of the ICC Statute at the Rome Conference. At the March-April 1998 Preparatory Committee session, the German delegation tabled another, streamlined version of a possible definition of aggression, which will also be a basis for negotiations in Rome.

Genocide. The inclusion of genocide in the court's Statute is practically uncontested. This crime has been authoritatively defined in the 1948 Genocide Convention. Pursuant to Article 2 of the Convention, genocide means "any of the following acts
committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: killing members of the group, causing serious bodily or mental harm to members of the group, deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part, imposing measures intended to prevent births within the group, forcibly transferring children of the group to another group." The Convention has not only been widely accepted as treaty law, but is also considered to reflect customary international law. The Lawyers Committee supports the suggestion that the relevant provisions of the Convention be reproduced unchanged in the text of the Statute. While an expansion of the definition of genocide to include political and social groups as targets of the crime Ñ as has been suggested by some in the Preparatory CommitteeÑwould be desirable, it would most likely delay the negotiating process too long to justify such an effort. Many of the crimes directed against such groups could qualify as crimes against humanity, which do not require the same level of proof of intent as in the case of genocide.

War Crimes. The draft Statute also refers in Article 5 to war crimes. The text includes both violations of rules applicable in armed conflict, as provided for in the 1899 and 1907 Hague Conventions and Regulations, /48/ and under customary law, as well as acts listed as "grave breaches" under the 1949 Geneva Conventions /49/ and Additional Protocol I./50/

The Lawyers Committee believes that the Statute should exhaustively enumerate and define crimes considered to fall in this category in order to ensure respect for the principle of legality. At the December 1997 Preparatory Committee session, a comprehensive consolidated text on definition of war crimes was agreed to. The text is broader in scope than initially expected, but contains many options, reflecting a lack of consensus on the inclusion of the corresponding provisions. As there is no dispute that the ICC should have jurisdiction over grave breaches of the 1949 Geneva Conventions, most of the disagreement centers on the extent to which grave breaches of Protocol I should be included in the text. The Lawyers Committee recommends the broadest possible inclusion in the ICC Statute of acts characterized as grave
breaches under Protocol I. We also recommend that specific Protocol I language be replicated in the draft Statute, so as not to dilute or disrupt the definitions provided for in Protocol I. This instrument has been widely ratified and it can be argued that most of its grave breaches provisions constitute customary international law.

The Lawyers Committee also endorses the view that crimes committed in non-international armed conflict, currently covered by Common Article 3 of the Geneva Conventions/51/ and Additional Protocol II, /52/ should be included in the Statute. Neither of these instruments specifically provides for the international criminal responsibility of a party who commits the acts listed as prohibited. However, the reality of armed conflict today proves that mass-scale violations of international humanitarian law are being committed in conflicts which are not international, or at least did not begin as such.

The Appeals Chamber of the Yugoslavia Tribunal recently stressed the customary law status of Common Article 3. In a ruling in the Tadic case the Chamber specified that "customary international law imposes criminal liability for serious violations of Common Article 3, as supplemented by other general principles and rules on the protection of victims of internal armed conflict, and for breaching certain fundamental principles and rules regarding means and methods of combat in civil strife." /53/ Article 4 of the Rwanda Tribunal Statute also provides that the International Criminal Tribunal for Rwanda is authorized to prosecute persons "committing or ordering to be committed serious violations of Article 3 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, and of Additional Protocol II thereto of 8 June 1977."

The discussions within the Preparatory Committee have shown that there is broad support for the inclusion in the ICC Statute of crimes committed in non-international armed conflict. The key question is what the scope of such inclusion should be. While a minority of states consider that only acts listed in Common Article 3 to the Geneva Conventions have attained the status of customary international law, other delegations are urging the
inclusion of numerous acts provided for in Protocol II as well. The Lawyers Committee strongly favors the latter view. Unless crimes committed in internal conflict are included in the ICC Statute, the court will be precluded from dealing with the most widespread violations of humanitarian law that are taking place in the world today. It is untenable to argue that the perpetrators of atrocities committed in non-international armed conflict should be shielded from international justice just because their victims were of the same nationality. The Lawyers Committee believes that in addition to Common Article 3, which provides a minimum standard that must be adhered to in internal conflict, prohibited acts enumerated in Additional Protocol II should be incorporated in the draft Statute.

Crimes Against Humanity. The Lawyers Committee believes that crimes against humanity should also be exhaustively enumerated and defined in the draft Statute. As there is no valid treaty-based elaboration of these crimes, this category will also require a serious drafting effort at the Rome Diplomatic Conference. Precedents, however, do exist and may, inter alia, be found in the Nuremberg Charter /54/ and the Statutes of the international tribunals for the former Yugoslavia/55/ and Rwanda.

Further drafting work will entail reaching consensus on a specific list of crimes against humanity over which the ICC should have jurisdiction. It is generally accepted that crimes against humanity are inhumane acts of a very serious nature that involve a widespread or systematic attack against a civilian population, in whole or in part, and not isolated incidents. In the commentary to the initial 1994 draft Statute the ILC explained that the phrase "directed against a civilian population" should be taken to refer to acts committed as part of a widespread or systematic attack against a civilian population on national, political, ethnic, racial or religious grounds. It added that the specific acts constituting a crime against humanity are acts deliberately committed as part of such an attack.

The Lawyers Committee believes that an attack against a civilian population need not be undertaken on national, political, ethnic, racial or religious grounds to qualify as a crime against
humanity. The Nuremberg Charter, which first laid down this category of crimes, did not require that the acts be directed against a specific group. It lists "persecutions on political, racial or religious grounds" as a separate crime against humanity. Similarly, the Yugoslavia Tribunal Statute does not mandate that crimes against humanity be committed in persecution of any group. Introducing persecution against a particular group as an element common to all crimes against humanity, rather than limiting it to a specific crime would increase the level of proof required to determine guilt, and thus would limit the court's ability to bring the perpetrators of crimes against humanity to justice.

The Lawyers Committee believes that crimes against humanity should not be linked to armed conflict, regardless of its character. Once again, reference may be made to the reality, in which systematic attacks against civilian populations have occurred in peacetime. If the ICC's establishment is meant to deter and punish massive human rights violations, then the court should be empowered to try individuals responsible for committing them. Although the Yugoslavia Tribunal's Statute does not endorse that position, the view that crimes against humanity should be decoupled from armed conflict was expressed in a ruling of the International Tribunal for the former Yugoslavia in the Tadic case. According to the Appeals Chamber: "It is by now a settled rule of customary international law that crimes against humanity do not require a connection to international armed conflict". Customary international law may not require a connection between crimes against humanity and any conflict at all. The majority of delegations at the Preparatory Committee have endorsed this position, although the text of the draft ICC Statute on definition of crimes against humanity contains a nexus to armed conflict in brackets.

The Lawyers Committee believes that the list of specific acts constituting crimes against humanity should be expanded to include crimes other than murder, extermination, enslavement, deportation, and imprisonment. The Committee has recommended that widespread or systematic torture, extrajudicial executions, disappearances, rape, forcible transfers of population both across international borders and within a given territory and persecutions on
political, ethnic, racial and religious grounds, as a separate crime, also be included. Most of these proposals are currently contained in the text on definition of crimes against humanity.

B. Exercise of Jurisdiction and Role of the Security Council

The way in which the court will exercise its jurisdiction is another key issue on which its effectiveness, credibility and independence will hinge. The ICC’s caseload, as well as its practical functioning, will also be largely determined by the method in which cases come up before it. There are currently four proposals addressing the way in which the court should exercise jurisdiction:

1. Under the so-called "opt-in, opt-out" regime,/58/ the fact that a state becomes a party to the ICC treaty would not mean its automatic consent to the Court's jurisdiction over genocide, war crimes and crimes against humanity. A state would give such consent by means of a special declaration which would be of general application, or be limited to particular conduct, or conduct committed during a particular period of time. The court could open an investigation only if several states had previously consented to the Court's jurisdiction: the state which has custody of the accused (the custodial state), the state on whose territory the crime was committed (the territorial state), the state which has requested extradition of the suspect from the custodial state (requesting state), the state of nationality of the accused and the state of nationality of the victim(s).

These obviously complicated consent requirements could lead to absurd situations, as evidenced by the following example: state A, a party to the ICC Statute, which has consented to the court's jurisdiction over war crimes, has custody of a person suspected of such crimes committed in state B against C’s nationals. State A would like to surrender the suspect to the ICC rather than extradite him/her to states B or C, the latter of which has lodged an extradition request, for fear of complicating relations with either one of them. It does not have the capacity to try the suspect itself. In this situation, state A would be prevented from
surrendering the suspect to the ICC if either state B or C refused their consent.

The ILC draft Statute’s provisions on exercise of jurisdiction were structured to accommodate, among other things, the possibility that the court’s subject matter jurisdiction would include treaty-based crimes such as drug trafficking and terrorism, to which the consent regime would apply. However, if the court’s jurisdiction is initially limited to the three core crimes of genocide, war crimes and crimes against humanity, in the Lawyers Committee’s view there is no reason for maintaining the consent regime. The Committee has long urged that the three core crimes be subject to the court’s automatic jurisdiction, without any state consent required. Along with genocide, both war crimes and crimes against humanity comprise heinous acts of concern to the international community as a whole, over which the principle of universal jurisdiction has long been established.

2. Under a French-supported proposal, states would have to consent to the exercise of the court’s jurisdiction on a case-by-case basis, regardless of the crime involved. As mentioned above, the list of states whose consent might need to be obtained currently numbers five: the territorial state, the custodial state, the requesting state, the state of nationality of the accused and the state of nationality of the victim(s). Similar to the previous option, this proposal is untenable from both a legal and practical standpoint. Current international law provides for universal jurisdiction over genocide, war crimes and crimes against humanity, meaning that any state has the right to prosecute and try persons suspected of these crimes without the consent of any other state. If it is to be credible, an ICC should not have less authority than states to exercise jurisdiction over the three core crimes when a domestic criminal justice system is unable or unwilling to do so. As a practical matter, it is difficult to see how the ICC would ever obtain custody of a defendant if the consent of several states had to be obtained.

3. Under a UK proposal, ratification of the ICC Statute would signal a state’s acceptance of the court’s automatic jurisdiction over the three core crimes. However, the court could
exercise jurisdiction with respect to crimes committed in non-states parties only when both the territorial and custodial state have consented to its jurisdiction over the crime in question. This would mean that if genocide was committed in a country that was not a party to the ICC Statute (the territorial state), the perpetrators could not be prosecuted by the ICC even if they were arrested in the territory of a state party (the custodial state), without the territorial state's consent. Once again, under this proposal, the ICC would have less authority to try persons suspected of genocide, war crimes and crimes against humanity than the court of any state, pursuant to the principle of universal jurisdiction.

4. The fourth proposal on the exercise of ICC jurisdiction was introduced by Germany. It is identical to the UK proposal in that it, too, provides that ratification of the ICC treaty means a state's acceptance of automatic (inherent) ICC jurisdiction over the three core crimes. Where it differs is in the exercise of jurisdiction with respect to crimes committed in the territory of non-states parties. Under the German proposal, the ICC would exercise universal jurisdiction over genocide, war crimes and crimes against humanity regardless of any state consent, in keeping with the international law principle of universal jurisdiction. It should be remembered that the exercise of ICC jurisdiction, i.e. the opening of an investigation, does not impose any obligation on a non-state party to cooperate with the court. The court would be able to issue orders only to states that have ratified the Statute and only those states would be under an obligation to cooperate with the ICC. Other states would have the option of assisting the court on a voluntary basis, or of giving consent to be bound by its decisions on a case by case basis.

The Lawyers Committee supports this proposal. The establishment of a court with any state consent regime, as described in options 1, 2 and 3 above would, in the Lawyers Committee's view, represent a step backwards in the development of international law and would detrimentally affect the effort to end impunity for international crimes.
Universal ICC jurisdiction, it should also be emphasized, would not affect the application of the provisions on complementarity. As already explained, complementarity does not mean exclusive or primary jurisdiction. It does not imply that the court will have a better claim than national courts to exercise jurisdiction. In keeping with the principle of complementarity, the court would only be seized of a case when a national criminal justice system is genuinely unwilling or unable to pursue a case. As stated in a 1995 report of the Ad Hoc Committee, "the effect of the principle of complementarity could only be, at most, to defer the intervention of the court, whereas rejection of the inherent jurisdiction concept would result in the court's complete inability ab initio to be seized of a case." /62/

Role of the Security Council. The power of the Security Council over the exercise of the court's jurisdiction has been a contentious issue in the debates on the draft Statute. As currently provided for in Article 10, para 7, option 1 of the draft Statute, no prosecution could be commenced under the Statute arising from a situation which was being dealt with by the Security Council as a threat to or breach of the peace or an act of aggression under Chapter VII of the Charter, unless the Security Council otherwise decided.

Thus, the Council would effectively be able to preclude proceedings before the court by taking up a matter for consideration under its Chapter VII authority. Keeping in mind that Chapter VII situations are precisely those in which crimes within the court's proposed jurisdiction are most likely to be committed, it seems obvious that this mechanism would seriously affect the court's independent functioning.

Article 10, para 7, option 1 has been explained in the discussions within the Preparatory Committee as an acknowledgment of the Security Council's primary responsibility for the maintenance of international peace and security. The rationale for its inclusion is that the court should not be put in a position to interfere with steps that the Security Council might be taking to deal with a crisis, but rather, should defer to its judgment. The ILC's commentary to the initial draft statute
specified that the Security Council should be taking active steps with regard to an international problem for the bar on the court's proceedings to take effect.

Arguments to the contrary, which the Lawyers Committee endorses, have been offered as well. The most compelling one is that the operation of the court should not be stymied by decisions taken in another forum, regardless of which forum that might be. Concern has been widely expressed that the envisaged role of the Security Council would subordinate a judicial institution to eminently political considerations, thereby undermining its independence. The court could, in effect, be precluded from action by the mere placement of an item on the Security Council's agenda and could remain paralyzed as long as the item remained there. It was also pointed out that such a mechanism could be used to shield nationals or "allies" of the Council's five permanent members from criminal prosecution and that it would establish unwarranted inequality between the five permanent members and other states, as well as between states members of the Security Council and non-members.

It should also be noted that no similar obligation to defer to the Council's authority is provided for in the Statute of the International Court of Justice. In addition, the practice of existing international judicial institutions does not seem to justify the alleged fear that an ICC would behave disruptively or irresponsibly in the discharge of its functions, much less that it would unreasonably jeopardize the Security Council's performance of its Charter mandate.

A new proposal on the role of the Security Council was introduced by Singapore during the August 1997 session of the Preparatory Committee. Under the Singapore proposal, the ICC could always go forward with prosecutions of crimes within its jurisdiction unless requested not to do so by an affirmative vote of the Security Council (Article 10, para 7, option 2). In December 1997 the UK delegation publicly endorsed the Singapore proposal, thus becoming the first permanent Security Council member to do so. The UK in fact went a step further by suggesting that any Security Council request for non-intervention by the
court would in each case have to be resubmitted to a new Council vote every 12 months.

C. Mechanism for Bringing Cases Before the Court

Under the draft Statute, only states parties to the Statute and the Security Council could initiate — trigger — the investigation of an alleged crime within the court's jurisdiction. While fully supporting their power to do so, the Lawyers Committee believes that the trigger mechanism should be expanded and offers the following comments:

State Complaints. Pursuant to Article 11, para 1, option 1 of the draft Statute, in the case of genocide, a state party to the Statute that is also a party to the Genocide Convention may lodge a complaint with the Prosecutor alleging that a crime of genocide appears to have been committed. No additional requirements are provided for. With respect to all other crimes, a complaint may be lodged by a state party to the Statute only if it has also accepted the court's jurisdiction over the crime in question, by means of the declarations already referred to. An alternative proposal (Article 11, para 1, option 2), which does not differentiate between genocide and the other core crimes, would permit a state to file a complaint only if it has accepted the court's jurisdiction with respect to a particular crime.

Having in mind the proposed narrowing of the court's subject-matter jurisdiction to the three core crimes and the suggested elimination of the state consent regime, the Lawyers Committee recommends that the trigger mechanism be accordingly simplified. Any state party to the Statute should be able to file a complaint alleging that a crime within the court's jurisdiction has been committed if the court is to be an effective mechanism for dispensing justice.

Security Council Referral. In addition to states, the Security Council is also authorized to initiate proceedings. Pursuant to Article 10, para 1 the court would have jurisdiction over the crimes listed in the Statute as a consequence of the referral of a situation to the court by the Security Council.
acting under Chapter VII of the UN Charter. It would then be up to the Prosecutor to determine which individuals, if any, should be charged with crimes arising from that situation. It is important to note that a Security Council referral of a matter does not require the consent of any state for the court to exercise jurisdiction.

The Lawyers Committee supports the ability of the Council to bring matters before the court because this mechanism would dispense with the need to establish ad hoc criminal tribunals in the future. As Security Council referral would be based on Chapter VII of the UN Charter, the court would at least theoretically be able to call on the Council's enforcement capacity in case of state failure to cooperate. This is the only situation in which the court could rely on any type of mandatory enforcement measures.

The Prosecutor. The Lawyers Committee is convinced that the current procedure for initiating the ICC’s jurisdiction is deficient. Given that most massive human rights violations occur within a single state, it is probable that the majority of abuses will go unpunished if the court’s Prosecutor is not allowed to trigger the court’s jurisdiction. On the one hand, the experience of universal human rights treaty bodies which provide for a state-state complaint procedure has been abysmal to date, because that mechanism has never been utilized. States have proved unwilling to initiate proceedings against another state and/or its nationals because of the political and diplomatic ramifications involved. Their reluctance is also based on a fear of inviting retaliatory scrutiny of their own human rights practices. On the other hand, the Security Council, as an eminently political body, is likely to be even more burdened by such considerations and may exercise great caution in referring matters to the court.

The Lawyers Committee believes that the ICC Prosecutor must be allowed to trigger the jurisdiction of the court of his or her own accord, i.e., without being moved by the Security Council or a state party to the treaty. This is necessary in order to strengthen the effectiveness of the court in deterring and punishing serious crimes of concern to the international community.
as a whole. Concerns about necessary safeguards to the Prosecutor’s authority are already partially addressed in the current ICC draft Statute. As already described, the court's Presidency/Pre-Trial Chamber will review all indictments submitted by the Prosecutor to determine whether a prima facie case exists and whether the admissibility requirements under Article 15 have been met.

In an effort to further address state concerns about the powers of an ex officio Prosecutor, Germany and Argentina introduced a proposal at the last Preparatory Committee session that provides an additional check on prosecutorial discretion./63/ Under the German-Argentine text the Prosecutor would be obliged to seek the authorization of the Pre-Trial Chamber if he or she concludes that there is a reasonable basis to proceed with an investigation. The Pre-Trial Chamber would grant such authorization upon determining that: i) a reasonable basis exists, ii) that a case appears to fall within the ICC’s jurisdiction, and iii) taking into account the admissibility provisions of Article 15. The German-Argentine proposal is very similar to a solution outlined by the Lawyers Committee in a previous briefing paper entitled "The Accountability of an Ex Officio Prosecutor." The Committee supports the German-Argentine proposal as a viable way of enabling ex officio prosecutions and at the same time ensuring judicial review of the Prosecutor's actions.

D. Other Issues

Funding and Relationship to UN. The Lawyers Committee believes that the ICC, which is to be established by treaty, should be closely linked to the United Nations. This would ensure the court's universality and moral authority, as well as its administrative and financial viability. The modalities of the court's relationship with the UN should, in the Lawyers Committee's view, be dealt with in a special cooperation agreement between the court and the UN.

The 1994 ILC draft Statute did not address the issue of how the future International Criminal Court would be funded. The ILC commentary stressed that this would depend on the overall
willingness of states to proceed to the establishment of a court. Three models have so far been proposed: i) financing out of the regular UN budget; ii) costs borne by states parties to the treaty, and iii) a mixed regime, combining state party and UN financing in which the initial costs would be borne by the UN budget. The Lawyers Committee supports the first of these models.

Even if the main political issues surrounding the ICC's creation are resolved in a manner conducive to the Court's independence and effectiveness, the ICC could still in practice be crippled by a lack of adequate resources. Insufficient funding would force the Prosecutor to make difficult choices about which cases to pursue, and could expose him or her to accusations of politically biased proceedings. The quality of the investigations themselves could suffer due to lack of funding. Just as importantly, the rights of the defense, and witness and victim protection could be jeopardized by a poorly funded court.

Governments negotiating the draft ICC Statute have often mentioned informally the potential cost of ICC operation as a factor that will determine their readiness to become a party to the Statute. It can be argued that this is a misguided position for at least two reasons. First, it is well accepted that domestic criminal investigations require ample funding if they are to be conducted properly. Given the complex nature of the crimes that the ICC will be investigating and prosecuting it is only logical to expect that the ICC will come with a price tag. This was evident long before the negotiations reached the final stage.

The second and crucial reason, which governments often overlook, is that the deterrence of crimes always costs less than dealing with their consequences. The international crimes over which the ICC will have jurisdiction by definition entail massive loss of life and material destruction. Their magnitude can be such as evidenced by the events in the former Yugoslavia and Rwanda that they may even be characterized as threats to international peace and security. The cost of the ICC and its anticipated deterrence function pales in comparison to the billions of dollars that have been invested in multilateral
peacekeeping and nation building efforts in both ex-Yugoslavia and Rwanda over the past several years. It is this and similar calculations that should inform government positions when considering the cost of a future ICC.

In the view of the Lawyers Committee—despite current problems—funding from the regular UN budget would be the best way to secure the continuous and long-term operation of the ICC. It would enhance the court’s standing and contribute to its universal acceptance, particularly by smaller and financially weaker states. Along with UN funding as the primary means of covering the ICC’s expenses, the court should also be allowed to receive voluntary contributions from states, inter-governmental organizations, non-governmental organizations, companies and individuals through a trust fund. These entities should also be able to contribute to the ICC in kind, by supplying equipment and services, provided that adequate safeguards are built in to ensure the court’s impartiality and independence. It is important that the ICC have easy access to donated funds and not have to deal with bureaucratic hurdles similar to those faced by the ad hoc Criminal Tribunal for the former Yugoslavia, with respect to its own Trust Fund.

All the reasons in favor of regular UN financing for the ICC militate against the creation of a Court that would be funded exclusively by states parties to the ICC Statute. State funding would inhibit smaller and less developed states from joining the court. It would also make the court reliant on larger states, thereby potentially affecting its real or perceived independence. State funding is inherently insecure because the Court’s operation could be crippled or halted by the withdrawal of a major contributor to the ICC’s budget at any time. Finally, state funding has not proven to be a successful method of financing human rights treaty bodies. The example of the Committee against Torture and of the Committee on the Elimination of Racial Discrimination are often cited: while both were initially meant to be state supported, states’ failure to pay their dues eventually led to financing from the regular UN budget. Given the much higher costs of maintaining an ICC it is likely that in practice erratic state contributions would quickly paralyze the ICC’s
effective functioning.

The Lawyers Committee also does not support a mixed system of state party and UN financing. There is no precedent for such a mechanism and we are reluctant to recommend funding experiments for an institution as important as the ICC.

Since 1978, the Lawyers Committee for Human Rights has worked to protect and promote fundamental human rights. Its work is impartial, holding each government to the standards affirmed in the International Bill of Human Rights, including

¥ the right to be free from torture, summary execution, abduction and "disappearance";

¥ the right to be free from arbitrary arrest, imprisonment without charge or trial, and indefinite incommunicado detention; and

¥ the right to due process and a fair trial before an independent judiciary.

The Committee conducts fact-finding missions and publishes reports which serve as a starting point for sustained follow-up work within three areas: with locally-based human rights lawyers and activists; with policy makers involved in formulating U.S. foreign policy; and with intergovernmental organizations such as the United Nations, the Organization of American States, the Organization of African Unity and the World Bank.

The Committee's Refugee Project seeks to
provide legal protection for refugees including the right to dignified treatment and a permanent home. It provides legal representation, without charge, to indigent refugees in the United States in flight from political persecution. With the assistance of hundreds of volunteer attorneys, the Project's staff also undertakes broader efforts including participation in lawsuits of potential national significance to protect the right to seek political asylum as guaranteed by U.S. and international law.

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ENDNOTES:

/ 4 / Article 36.
/ 5 / This is the most likely outcome, based on the majority view expressed in the Preparatory Committee discussions. According to alternative proposals, the judges would be elected by a two thirds
majority of the states parties to the treaty, or the UN General Assembly, or the UN Security Council. See Article 37, para 5.

/6/ Under other options, the judges would hold office for five years and would be eligible for re-election for one further five year term. See Article 37, para 10.

/7/ See Articles 58 and 100.

/8/ See Article 40, para 1.

/9/ Article 43, para 4.

/10/ See Article 6.

/11/ See Article 54, para 1.

/12/ For the full range of options on this provision see Article 54, para 4(c).

/13/ Article 58, para 1.

/14/ Article 58, para 2.

/15/ Article 58, paras 5 and 7.

/16/ Article 58, para 10.

/17/ Article 59, paras 1 and 3.

/18/ Article 17, paras 1 and 2.

/19/ Article 17, para 2.

/20/ The issue of the legitimacy and appropriateness of trials in absentia has generated great controversy in the ICC debates. See Article 63.

/21/ Article 64, paras 1 and 2.

/22/ Article 64, para 6.

/23/ Article 66.

/24/ Article 67.

/25/ Article 18.

/26/ Article 69, para 6.

/27/ Article 72.

/28/ Article 80.

/29/ For the range of proposals on revision see Article 83.

/30/ It remains to be determined whether a fine could be imposed as an independent sentence. See Article 75.

/31/ Article 94.

/32/ Article 100.

/33/ See part 9 of the ICC draft Statute.

/34/ See Articles 90 and 87.

/35/ Article 89.

/36/ The exception would be matters referred to the court by the Security Council, which will be discussed below.
Article 86, para 6.
Articles 15 and 17.
Article 15, para 1 (a).
Article 15, para 1 (b).
Article 15, para 2.
Article 15, para 3.
Article 17.
Article 17, para 2.
Article 17, para 4.
Article 16.
Article 23 of the Regulations Respecting the Laws and Customs of War on Land, which is annexed to the IV Hague Convention of 1907 provides, inter alia, that belligerents are "especially forbidden" to employ poison or poisoned weapons, to kill or wound treacherously individuals belonging to the hostile nation or army, to kill or wound an enemy who, having laid down his arms, or having no longer means of defense, has surrendered at discretion, to declare that no quarter shall be given, to employ arms, projectiles, or material calculated to cause unnecessary suffering. The Regulations also prohibit the destruction or seizure of enemy property unless imperatively demanded by the necessities of war and to declare abolished, suspended, or inadmissible in a court of law the rights and actions of the nationals of the hostile party.
Under Article 147 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War (IV), the following acts constitute grave breaches if committed against persons or property protected by the Convention: "wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of a fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity
and carried out unlawfully and wantonly." See also Article 50 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (I); Article 51 of the Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (II), and Article 130 of the Geneva Convention Relative to the Treatment of Prisoners of War (III).

/50/ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I). See Articles 85 and 11.

/51/ Article 3 common to all the four Geneva Conventions of 1949 applies to situations of non-international armed conflict and prohibits certain acts against persons taking no active part in the hostilities such as:

"a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
   b) taking of hostages;
   c) outrages upon personal dignity, in particular humiliating and degrading treatment;
   d) the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples."


/54/ Crimes against humanity, as enumerated in Article 6 (c) of the Nuremberg Charter are: "murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions 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."

/55/ Under Article 5 of the Yugoslavia Tribunal Statute the
following acts constitute crimes against humanity when "committed in armed conflict, whether international or internal in character, and directed against any civilian population": a) murder; b) extermination; c) enslavement; d) deportation; e) imprisonment; f) torture; g) rape; h) persecutions on political, racial and religious grounds; and i) other inhumane acts.  
/56/ Article 3 of the Rwanda Tribunal Statute does, however, provide that persecution on national, political, ethnic, racial or religious grounds is a general element of crimes against humanity.  
/57/ See note 55.  
/58/ Article 7, option 1.  
/59/ Article 7, option 2.  
/60/ Further option for Article 7.  
/61/ Further option for Article 9.  
/63/ Article 13.  
/64/ Article 103.  
/65/ See Background Paper on Possible Types of Relationship Between the United Nations and a Permanent International Criminal Court prepared by the Codification Division of the UN Office of Legal Affairs dated December 12, 1997 at pp. 6-7 (no symbol, on file with the Lawyers Committee).