

SANCTUM FOR THE WAR CRIMINAL: EXTRADITION LAW AND THE INTERNATIONAL CRIMINAL COURT

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I. Introduction

¶1 The finalization of the treaty in Rome creating the International Criminal Court ("ICC" or "the Court") signaled a great step forward for international law¹ and represented the fruition of a fifty-year-old dream. According to Human Rights Watch:

[t]he potential impact of the ICC is enormous. By holding individuals personally accountable, the Court could be an extremely powerful deterrent to the commission of genocide, crimes against humanity and serious war crimes that have plagued humanity during the course of this century. Not only is the establishment of the Court an opportunity to provide critical redress to victims and survivors, but potentially to spare victims from the horrors of such atrocities in the future. If effective, the ICC will extend the rule of law internationally, impelling national systems to themselves investigate and prosecute the most heinous crimes-- thus strengthening those systems-- while guaranteeing that where they fail, the ICC can operate to ensure that justice prevails over impunity.²

Thus, the fundamental goals of the Court are to investigate and prosecute cases of gross human rights abuses where domestic systems do not or, in the alternative, to encourage domestic systems to investigate and prosecute in lieu of the Court.

¶2 Nevertheless, despite the creation of the Court, its actual effectiveness in bringing war criminals to justice is in serious doubt. This is because the statute that establishes the ICC contains provisions that may substantially hinder the apprehension of suspects indicted by the Court. While, in theory, the Court may have jurisdiction over horrendous acts such as genocide, war crimes, and crimes against humanity, in practice, the ability of the court to bring accused suspects before it is heavily restrained by national laws pertaining to extradition.

¶3 Extradition is normally defined as the surrender of a person charged or convicted of a criminal offense by one state to another state, not to an international body.³ Therefore,

¹ See Rome Statute of the International Criminal Court, United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, U.N. Doc. A/Conf.183/9 (1998) [hereinafter ICC Statute].

² Human Rights Watch, *Justice in the Balance: Recommendations for an Independent and Effective International Criminal Court* (June 1998), available at <http://www.hrw.org/reports98/icc/>.

³ See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §475 (1990); JOHN BASSETT MOORE, 1 TREATISE ON EXTRADITION AND INTERSTATE RENDITION P 1 (1891); BLACK'S LAW DICTIONARY 585 (6th ed. 1990).

theoretically, the normal questions raised by extradition requests such as the fairness of the proceeding and the legitimacy of the charge should not arise in the context of an international body created with the consent and approval of the majority of states. However, in reality, there are strong indications that states will treat the Court's requests to surrender an accused like an interstate extradition request. The deliberate failure of the statute to specifically prohibit the application of extradition procedures opens the door to a number of different defenses an accused may assert in the custodial state.

¶4 This article will explore how national extradition laws and procedures may provide Court-indicted suspects with a wide range of defenses that will no doubt bring forth the ire of the ICC's prosecutors seeking to obtain their arrest and surrender.

¶5 First, this article will explain how the ICC statute may obtain jurisdiction over cases and why the application of extradition laws may hinder the very purpose of the Court. Second, this article will reveal how the ICC statute may permit states to apply their extradition laws upon the Court's request for the surrender of an accused. Third, this article will examine, under the common and civil law systems, the various defenses and procedures under domestic extradition laws and how they may interact with an ICC's surrender request. Throughout, this article will also compare the statute with those of the existing international criminal tribunals to highlight the prohibitions each place on extradition procedures.

II. The Dilemma

¶6 The establishment of the Court was not without controversy. The final vote on the ICC statute in Rome was 120 in favor to 7 against, with 21 abstentions.⁴ The most vocal opposition came from the United States, Israel, and China.⁵ As of September 22, 2000, some 113 states have signed the ICC treaty, 21 of which have gone on to formally ratify the treaty.⁶ The Court will come into existence once the necessary 60 ratifications are obtained.⁷

⁴ See Press Release, United Nations, *UN Diplomatic Conference Concludes in Rome with Decision to Establish Permanent International Criminal Court*, available at <http://www.un.org/icc/pressrel/lrom22.htm> (July 17, 1998).

⁵ As requested by the U.S. delegation, the 120 to 7 vote was registered by a non-recorded electronic vote; therefore, there is no official record of which states voted for, against, or abstained. As a matter of public record, it is undisputed that the U.S., Israel, and China voted against adoption of the statute. See United Nations, *supra* note 4; see also Alessandra Stanley, *U.S. Dissents, but Accord Is Reached on War-Crime Court*, N.Y. TIMES, July 18, 1998, at A3. However, it is unclear exactly which of the remaining four states opposed the ICC Statute. See, e.g., Anthony Lewis, *At Home Abroad*, N.Y. TIMES, July 20, 1998, at A15 (including the United States, Israel, China, Libya, Iraq, Qatar, and Yemen as voting against); Phyllis Bennie, *U.S. Chooses Wrong Side of Tribunal Issue*, BALTIMORE SUN, July 26, 1998, at 4C (same); Jim Mann, *Don't Blame Helms for World Court Vote*, L.A. TIMES, July 22, 1998, at A5 (including seven states, Libya, China, Indonesia, Turkey, Mexico, and Israel, in addition to the United States); *All the News of the World Reaction to the New U.N.-Backed International Criminal Court*, INDEPENDENT (London), July 22, 1998, at 3 (including India and Algeria as voting against); David Ott, *U.S. is in the Dock over Treaty*, HERALD (Glasgow), July 25, 1998, at 15 (including Sudan as voting against). See also *Libya Denies Supporting U.S. Position on International Criminal Court* (BBC Summary of world broadcasts, July 21, 1998) (stating that Libyan News Agency officially denies Libya voted with the U.S. or against the ICC Statute) available in LEXIS, NEWS Library, BBCSWB File.

⁶ See ICC Statute, Ratification Status, available at <http://www.un.org/law/icc/statute/status.htm>

⁷ See ICC Statute, *supra* note 1, at art. 126.

¶7 The political and legal ramifications of the Court pose concerns for obvious reasons. The Court represents an effort to break impunity on a domestic level. The Court will address gross human rights violations where national forums fail to. Thus, the existence of the ICC raises the possibility that those accustomed to domestic impunity may be subject to criminal responsibility under an international forum. In addition, another concern is the Court's ability to be fair and impartial. Worries abound that the Court will be subject to political pressures influencing decisions about whom to prosecute or not to prosecute.

¶8 Historically and theoretically, extradition laws arose in order to counter just such fears. Extradition laws of the custodial state attempted to remove or address the political questions arising from an interstate transfer. States were often leery of foreign judicial systems, so extradition laws were created to either encourage domestic prosecutions or to ensure the accused would be fairly treated abroad. As a result, it seems intuitive for states to also apply the same extradition safeguards in dealing with an international forum like the ICC. After all, if individual state judicial systems may be tainted by flaws, ineptness, or political bias, why presume that the ICC could not fall victim to similar weaknesses?

¶9 There are two fundamental problems with this assumption. First, while the ICC has no record yet from which we can judge its fairness, the Court, in theory, was designed by the nations of the world to be an independent and impartial institution.

¶10 Second, and more importantly, the Court is designed to function only where the states involved are unwilling or unable to prosecute the accused. The ICC is premised on the theory of complementarity placing it in a position that is subordinate to national courts.⁸ The ICC can only admit a case where national courts are unwilling or unable to genuinely prosecute or investigate the case.⁹ Consequently, the ICC is designed to intervene only where the states involved refuse to take action.

¶11 The diagram below explains the processes required before the ICC can obtain jurisdiction over a case and may find it admissible. After a crime under Article 5 takes place, there are three different ways the Court can initiate an investigation: 1. Any state party to the ICC treaty may refer a case to the Court; 2. The ICC prosecutor may initiate a case; or 3. The UN Security Council may initiate a case.¹⁰ The first two methods of initiation further require that either the state where the crime took place or the state of the nationality of the accused consent to the ICC's jurisdiction (either by virtue of being a state party that has already ratified the ICC treaty or making a special registry with the ICC to consent to its jurisdiction).¹¹ A case initiated by the Security Council requires no such state consent.¹² Once these conditions are met, the ICC has jurisdiction over a case.

¶12 In addition, the case must pass an admissibility test before it may proceed. A case cannot proceed if it is being actively pursued by a domestic court with proper jurisdiction or if a domestic court has already tried the accused for the conduct in question.¹³ However, the case will be admissible where the domestic forum is "unwilling or unable" to "genuinely" prosecute the accused.¹⁴ A domestic forum is considered unable to

⁸ *See id.* at preamble, para. 10.

⁹ *See id.* at art. 17.

¹⁰ *See id.* at art. 13.

¹¹ *See id.* at art. 12 (2).

¹² *See id.*

¹³ *See id.* at art. 17 (1)(a) & (c).

¹⁴ *Id.* at art. 17 (1)(a) & (b).

genuinely prosecute or investigate where its national judicial system is unavailable or has substantially collapsed.¹⁵ A domestic forum is considered unwilling to genuinely prosecute where the domestic proceedings are delayed unjustifiably, not independent or impartial, for the purpose of shielding the accused from the ICC, or where no domestic proceedings are taking place.¹⁶ If these criteria are met, the ICC can then hear the merits of the case.

¶13 As the diagram below illustrates, the statute filters out the types of cases it may hear reserving jurisdiction and admissibility to cases where there are no domestic proceedings or the domestic proceedings are disingenuous. In such circumstances, it is not a leap of faith to conclude that these domestic forums would be hostile to the investigation and prosecution of the accused.

¶14 On the other hand, if an accused is found in a state that is not tied to the conduct in question or is not the state of nationality of the accused, there may not be the problem of the reluctant state. Thus, this state's application of extradition laws makes more intuitive sense.¹⁷ Provided that no other states with jurisdiction are able or willing to prosecute the accused, the custodial state may cautiously cooperate through its extradition safeguards.

¶15 However, it is perhaps more likely that an accused will remain in a state that is favorable to him, not one that is willing to extradite him. Therefore, it is more likely that the ICC will receive cases in which the states involved are reluctant to being cooperative because of their refusal to genuinely investigate and prosecute. In fact, knowing that a state is favorable to his interests and that traditional extradition law would be applicable, an indicted war criminal will specifically seek sanctum in one of these reluctant states. Consequently, allowing these states additional mechanisms under extradition law to prevent the ICC from hearing a case only exacerbates the exact problem the ICC was designed to thwart.

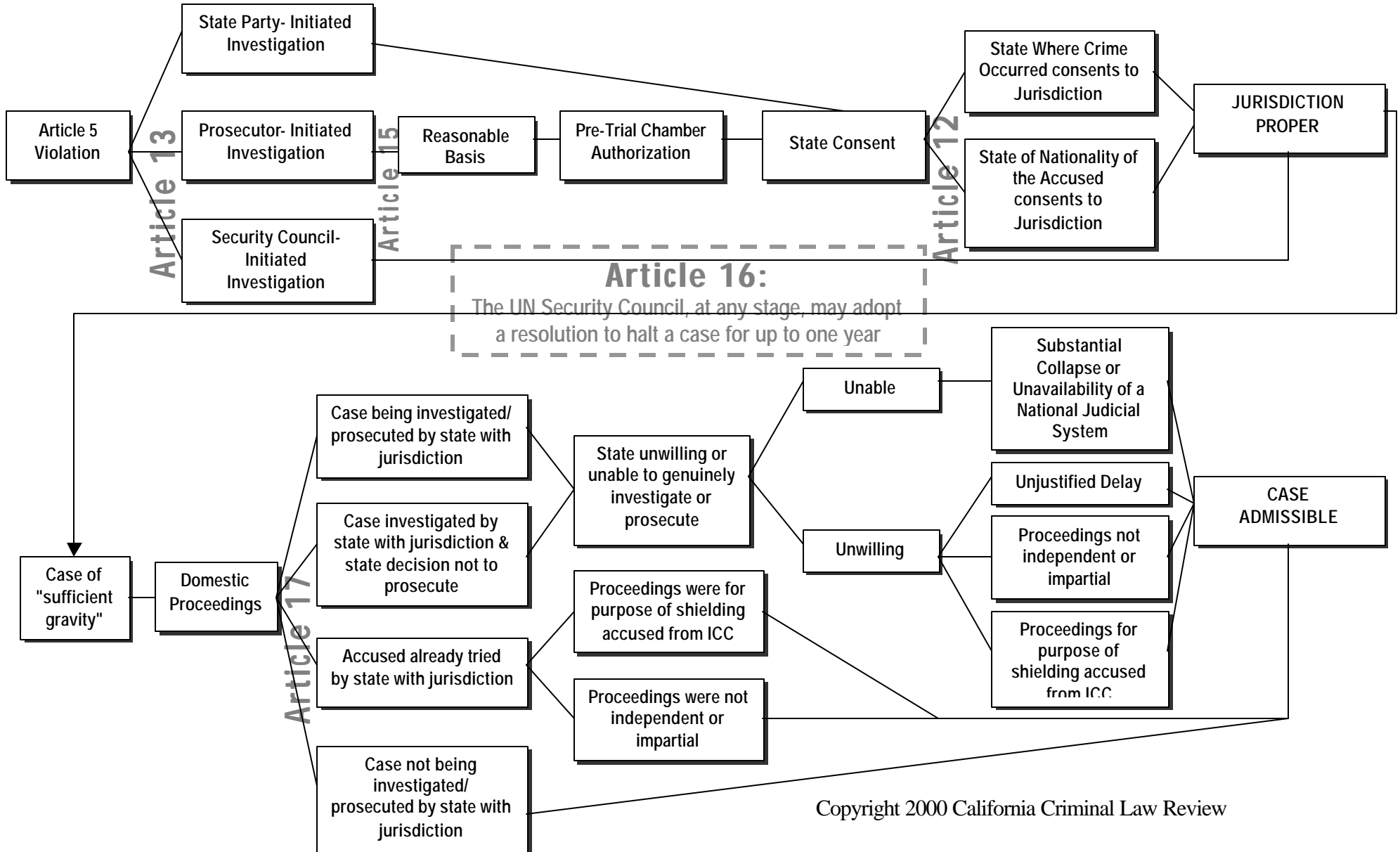
¹⁵ See *id.* at art. 17 (3).

¹⁶ See *id.* at art. 17 (2).

¹⁷ However, as we will point out in such a circumstance, it is possible for extradition law to wholly prevent the ability of the state to surrender an accused to the Court. See *infra* notes 103-105 and accompanying text.



DETERMINING JURISDICTION & ADMISSIBILITY



III. The Application of National Extradition Laws under the ICC Statute

A. Responsibilities and Rights of the Custodial State

¶16 Despite the seriousness of the crimes over which the Court has jurisdiction, the ICC statute contains a number of provisions deferring to national laws where an indicted suspect is arrested and transfer is sought to the Court.

¶17 A state party who has received a request for arrest and surrender has an obligation to “immediately take steps to arrest the person in question *in accordance with its laws...*” (emphasis added).¹⁸ The custodial state must bring the accused before “before the competent judicial authority” in that state which will determine whether: 1. “[t]he warrant applies to that person”; 2. “[t]he person has been arrested in accordance with the proper process”; and 3. “[t]he person's rights have been respected.”¹⁹ All three of these determinations will be conducted “*in accordance with the law of that State*” (emphasis added).²⁰ This provision, in particular, is especially problematic because many extradition laws are for the stated goal of protecting a person’s rights; and, therefore, may be deemed applicable under the ICC statute.

¶18 Article 89, more crucially reiterates the fact that, once the Court transmits the arrest warrant, “States Parties shall, in accordance with the provisions of this Part *and the procedure under their national law*, comply with requests for arrest and surrender” (emphasis added).²¹ While there are provisions regarding international cooperation and judicial assistance which emphasize that “States Parties shall ensure that there are procedures available under their national law for all of the forms of cooperation... ”²² and “States Parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court”,²³ the language of article 89 is troubling. While it could be argued that the ability to apply “procedure under their national law” might not attach to the substantive laws of extradition, the legislative history of article 89 reveals a different intention, if not conflicting intentions.

B. The Legislative History of Article 89

¶19 Initially, the drafters of the statute suggested using the term “extradition” in the statute and utilized the term “surrender” in order to stall application of extradition laws.²⁴ However, throughout the entire drafting process the terms “surrender”, “transfer”, and “extradition” remained as the possible lexicon for naming the process of releasing a

¹⁸ ICC Statute, *supra* note 1, at art. 59(1).

¹⁹ *Id.* at art. 59(2).

²⁰ *Id.*

²¹ *Id.* at art. 89(1).

²² *Id.* at art. 88.

²³ *Id.* at art. 86.

²⁴ *Report of the International Law Commission on the Work of its Forty-Fifth Session, Annex: Report of the Working Group on a Draft Statute for an International Criminal Court*, U.N. GAOR, 48th Sess., Supp. No. 10, at 324-30, U.N. Doc. A/48/10 (1993).

defendant to the Court.²⁵ This alone illustrates the controversy regarding the issue of bringing indicted suspects before the Court.

¶20 In 1994, the International Law Commission's draft statute, article 53 (the precursor to article 89), incorporated the following language: "a State party shall consider whether it can, *in accordance with its legal procedures*, take steps to arrest and transfer the accused to the Court, or whether it should take steps to extradite the accused to a requesting State or refer the case to its competent authorities for the purpose of prosecution." (Emphasis Added).²⁶

¶21 This language more ambiguously left open the possibility of states applying extradition law. Arguably, legal procedures may not encompass substantive extradition laws. However, as the drafting negotiations continued, it became clear that the delegations were divided into three camps. One camp favoring the application of national laws for transferring a defendant to the Court, another camp favoring a strict transfer regime with no application of national laws, and a third camp favoring a compromise between the opposing views.

¶22 In 1995, during the Ad Hoc Committee on the Establishment of an International Criminal Court, China made itself clear that it was in the first camp stating that the statute should afford states "the option of choosing whether or not to: ... (b) transfer documents and the accused to the international criminal court for adjudication..." and that the Court would be subordinate to national systems.²⁷

¶23 The United States' position at this same committee meeting was more ambiguous. The U.S. delegates criticized the use of the word "transfer", instead of "extradition", by stating "[c]alling the process a transfer does not mean that the ILC has effectively carved out a new area of law unencumbered by some of the difficulties associated with extradition law (including treaty practice) such as non-extradition of nationals and discretionary refusal of extradition (for reasons permitted by treaty or otherwise)."²⁸ However, the US did make clear that the systems of national prosecution and international extradition should in all cases prevail over the regime set up by the international criminal court.²⁹

¶24 The first Preparatory Committee to discuss the ILC's draft statute released a report in 1996 stating:

[I]t was noted that the system of apprehension and surrender under article 53 of the draft statute, which embodied a strict transfer scheme without contemplating any significant role of the national courts and other authorities on the matter,

²⁵ See *infra* notes 26-42.

²⁶ *Report of the International Law Commission on the Work of Its Forty-Sixth Session, Note by the Secretary General*, U.N. GAOR, 49th Sess., Agenda Item 140, at 26, art. 53(2)(c), U.N. Doc. A/49/355 (1 September 1994).

²⁷ *Comments Received Pursuant to Paragraph 4 of General Assembly Resolution 49/53 on the Establishment of an International Criminal Court, Report of the Secretary General*, Ad Hoc Committee on the Establishment of an International Criminal Court, at 11, para. 15, U.N. Doc. A/AC.244/1 (Mar. 20, 1995).

²⁸ *Comments Received Pursuant to Paragraph 4 of General Assembly Resolution 49/53 on the Establishment of an International Criminal Court. Report of the Secretary General*, Ad Hoc Committee on the Establishment of an International Criminal Court, at 28, para. 103, U.N. Doc. A/AC.244/1/Add.2 (Mar. 31, 1995).

²⁹ See *id.* at 10, para. 8, 13; at 28, para. 101-2.

was a departure from the traditional regime of cooperation between States established under the existing extradition treaties. In this regard, some delegations indicated that they were in favour of a system based exclusively on the traditional extradition regime, modified as necessary. Some other delegations supported the transfer regime as envisaged in the Statute. Some further delegations expressed their view in support of reconciling the two regimes so as to ensure the consistent application of the Statute. The suggestion was made also that, in order to facilitate its acceptance by States, the Statute should provide for a choice between a modified extradition regime and a strict transfer regime, subject to different national laws and practices.³⁰

By August of that same year, the Preparatory Committee met again and proposed various drafts that reflected and accommodated these three different viewpoints.³¹ The language provided for all three alternatives: unconditional surrender, the application of extradition laws, and the express inapplicability of some common extradition exceptions.³²

¶25 By the end of 1997, the fifth Preparatory Committee had jettisoned the third, compromise position. This was apparently due to a lack of agreement among the delegations to decide what common extradition exceptions should not apply to the Court.³³ The result was largely an all or nothing approach that either called for a strict transfer regime or the unchecked application of national extradition laws.³⁴ Draft statutes full of bracketed language and listed optional texts revealed the controversy.³⁵

¶26 By the end of the sixth Preparatory Commission, both camps remained divided on the issue with draft language that could have resulted in the application of traditional extradition laws or language that could expressly prohibit its application.³⁶ The draft article read “States Parties shall, in accordance with the provisions of this Part [and the procedure under their national law], comply with requests for arrest and [surrender] [transfer] [extradition] without [undue] delay.”³⁷ In addition, a bracketed section expressly provided for the application of national law “[The national law of a requested State shall govern the [conditions] [procedure] for granting or denying a request for [surrender] [transfer] [extradition] [except as otherwise provided in this Part].”³⁸ In contrast, another bracketed section offered a contrary provision not allowing any grounds for refusing to surrender a defendant or another option limiting refusal to a few specified grounds including where the defendant was a national of the custodial state.³⁹ However,

³⁰ *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, U.N. GAOR, 51st Sess., Supp. No. 22, at 66, para. 320, U.N. Doc. A/51/22 (1996).

³¹ *See id.*

³² *See id.* at art. 53, II. proposals (B)(2).

³³ *See Report of the Working Group on International Cooperation and Judicial Assistance*, Preparatory Committee on the Establishment of an International Criminal Court, art. 53, n.89, U.N. Doc. A/AC.249/1997/L.9/Rev.1 (1997).

³⁴ *See id.* at art. 53 (1 bis) or (Option 1) (A second bracketed option expressly allowed for a state to refuse surrender if the defendant was a national of the custodial state).

³⁵ *See id.*

³⁶ *See Report of the Preparatory Committee on the Establishment of an International Criminal Court*, Part I: Draft Statute for the International Criminal Court, art. 87, U.N. Doc. A/CONF.183/2/Add.1 (1998) available at gopher://gopher.igc.apc.org:70/00/orgs/icc/undocs/rome/statute.txt.

³⁷ *Id.* at art. 87(1).

³⁸ *Id.* at art. 87(2).

³⁹ *See id.* at art. 87(3) Option 1; *See also* Option 2 (allowing for some limited grounds to justify a refusal to

on this issue, the Preparatory Committee noted that “[t]here is no agreement on the list of grounds contained in this option.”⁴⁰ Yet another bracketed section provided:

[Where the law of the requested State so requires, the person whose [surrender] [transfer] [extradition] is sought shall be entitled to challenge the request for arrest and [surrender] [transfer] [extradition] in the court of the requested State on [only] the following grounds:

(a) lack of jurisdiction of the Court;]

[(b) non bis in idem; or]

[(c) the evidence submitted in support of the request does not meet the evidentiary requirements of the requested State as set forth in article 88, paragraph 1 (b) (v) and (c) (ii).]]”⁴¹

With the exception of *non bis in idem*, the adoption of this entire section and its bracketed text would have effectively precluded the application of national laws pertaining to extradition.⁴²

¶27 However, in the end, the complete lack of agreement among the delegations to decide what traditional extradition grounds a custodial state could assert resulted in the abandonment of language advocating both extreme provisions and the adoption of article 89’s more ambiguous language.

¶28 Nevertheless, the lack of consensus regarding this issue suggests that states will approach this issue on their own terms, on a state by state basis or, more troubling, utilize extradition laws where it is politically convenient. Thus, the failure to specifically exclude the use of extradition laws, the legislative history of the statute, and its plain language could effectively allow custodial states and accused defendants to assert extradition defenses in matters before the ICC.

¶29 In fact, the final statute appears to acknowledge the likelihood of the application of extradition laws when describing the documentation the Court must provide to support an arrest. Article 91 explains that arrest warrants will include: “[s]uch documents, statements or information as may be necessary to meet the requirements for the surrender process in the custodial State, except that those requirements should not be more burdensome than those applicable to requests for extradition pursuant to treaties or arrangements between the custodial State and other States and should, if possible, be less burdensome, taking into account the distinct nature of the Court.”⁴³

C. Comparing the ICC Statute with the ICTR & ICTY Statutes

¶30 There are fundamental differences in the laws surrounding the obligations of custodial states when one compares the ICC statute with the statutes of the International

surrender only one of which referred to traditional extradition law: the prohibition on the extradition of a state’s own national).

⁴⁰ *Id.* at art. 87(3) Option 2 n.235.

⁴¹ *Id.* at art. 87(7).

⁴² For a discussion on the meaning of *non bis in idem*, see *infra* notes 57-61 and accompanying text.

⁴³ ICC Statute, *supra* note 1, art. 91(2)(c).

Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR).⁴⁴

¶31 In stark contrast to the ICC statute, neither the ICTY nor the ICTR allow any deference to national laws in surrender matters. In fact, Article 29 of the ICTY and Article 28 of the ICTR declare: "[s]tates shall cooperate with the International Tribunal in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law."⁴⁵ Article 29(2) of the ICTY and Article 28(2) of the ICTR specify that such assistance requires compliance with orders of the Tribunal's trial chambers, including, but not limited to, the identification and location of persons, the arrest or detention of persons, and the surrender or transfer of defendants to the Tribunal⁴⁶. The Secretary-General's Report for the ICTY states an order of the Tribunal for the surrender or transfer of persons "shall be considered to be the application of an enforcement measure under Chapter VII of the Charter of the United Nations."⁴⁷

¶32 More specifically, The Rules of Procedure and Evidence for both Tribunals reiterate that the obligations regarding the surrender or transfer of a defendant prevail over "*the national law or extradition treaties of the State concerned*" (Emphasis Added).⁴⁸ The rules also provide for referral to the UN Security Council in the case of a state failing or refusing to execute an arrest warrant of the Tribunal.⁴⁹

¶33 The difference in surrender laws between the ICC and the Tribunals lies in their theories of concurrent jurisdiction. As explained above, the ICC is premised on the theory of complementarity, meaning that it may only admit a case where national courts are unwilling or unable to genuinely prosecute or investigate the case.⁵⁰

¶34 In contrast, the ICTY and ICTR hold primacy over national courts.⁵¹ Given that these courts do have primacy, language usurping national laws and extradition law regarding surrender seem justifiable. Nevertheless, despite the express prohibition to the contrary, states are viewing their cooperation with the ICTY and ICTR through the lens of extradition proceedings.⁵²

⁴⁴ See *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808*, U.N. Doc. S/25704 (1993) for ICTY statute and S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994) for ICTR statute.

⁴⁵ See ICTY Statute, *supra* note 44, art. 29; and ICTR Statute, *supra* note 44, art. 28.

⁴⁶ See *id.*

⁴⁷ Secretary-General's Report, *supra* note 44, ¶ 126.

⁴⁸ Int'l Tribunal for the Prosecution of Persons Responsible for Serious Violations of Int'l Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, Rules of Procedure and Evidence, U.N. Doc. IT/32/Rev.11, art. 29 (1997); Int'l Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of Int'l Humanitarian Law Committed in the Territory of Rwanda, Rules of Procedure and Evidence, U.N. Doc. IT/3/Rev.9, art. 28 (1996).

⁴⁹ See *id.* at art. 59.

⁵⁰ See ICC Statute, *supra* notes 8, 9 and accompanying text.

⁵¹ See ICTY Statute, *supra* note 44, art. 9(2); ICTR Statute, *supra* note 44, art. 8(2).

⁵² See Amnesty International, *International Criminal Tribunals: Handbook for Government Cooperation*, AI Index IOR 40/07/96, at 42 & n.73-75 (1996) *available at* <http://www.amnesty.it/ailib/aipub/1996/IOR/I4000796.htm>. As of August 1996, some 20 states have passed implementing legislation for cooperation with the ITCY and 11 states for the ICTR. Four states have informed the Tribunals that no implementing legislation was necessary. States with implementing legislation for the ITCY: Australia, Austria, Belgium, Bosnia and Herzegovina, Croatia, Denmark, Finland, France, Germany, Hungary, Iceland, Italy, Netherlands, New Zealand, Norway, Spain, Sweden, Switzerland, the United Kingdom and the United States. States with implementing legislation for the ICTR:

¶35 According to Amnesty International, "[t]he most serious problem of many of the laws which have been enacted is the failure to follow Article 6 of the Guidelines, which requires that the transfer of an accused to the custody of the tribunals be carried out 'without resort to extradition proceedings'.⁵³ Several states, including Austria, Denmark, Finland, Iceland, Italy, Norway, Sweden, Switzerland and the United States, have provided in their legislation for the transfer of accused persons to the tribunals through extradition or similar proceedings.⁵⁴

¶36 Some states explicitly call for the full use of extradition procedures or retain only some procedural aspects of extradition proceedings. For example, the United States implementing legislation for both tribunals states unequivocally that laws on extradition "shall apply in the same manner and extent to the surrender of persons" to both tribunals.⁵⁵ Similarly, Germany's article 2 of its implementing legislation provides for the transfer of criminal proceedings to the tribunal, but Article 3 applies most provisions of the law on international judicial cooperation in criminal cases, except for the political offence exception and the rule of specialty.⁵⁶

In any respect, the fact that many states are insisting to apply extradition laws, despite the express prohibition not to, portends an even worse fate for the ICC.

II. Defenses under Extradition laws

A. Extradition Laws provided for under the ICC Statute

¶37 While the ICC statute fails to directly tackle most domestic laws dealing with extradition, it does address two domestic laws commonly utilized under extradition procedures.

1. Ne Bis In Idem

¶38 *Ne bis in idem* literally means "not twice in the same thing". It is essentially an international protection against double jeopardy. It prevents extradition if the custodial state has already tried or is in the process of proceeding against the accused for the same

Australia, Austria, Belgium, Denmark, France, New Zealand, Norway, Sweden, Switzerland, the United Kingdom and the United States. States where implementing legislation was unnecessary: Republic of Korea, Russian Federation, Singapore and Venezuela.

⁵³ See *id.* at 62 (referring to the Registrar of the Yugoslavia Tribunal drafted Tentative Guidelines for National Implementing Legislation of United Nations Security Council Resolution 827 of May 25, 1993).

⁵⁴ See *id.*

⁵⁵ 18 U.S.C. § 3181, Judicial Assistance to the Int'l Tribunal for Yugoslavia and to the Int'l Tribunal for Rwanda,(a)(1), Pub.L. No. 104-106, Div. A, Title XIII, § 1342, Feb. 10, 1996, 110 Stat. 486. The US executive branch did initially sign a surrender agreement with the ICTY that excluded most of the usual exceptions extradition requirements and stated: "[t]he requirements for finding that a person is subject to surrender to the Tribunal are solely those articulated in this Agreement. No additional conditions regarding or defenses to surrender may be asserted by the person sought as barring such person's surrender to the Tribunal under this Agreement." Agreement on Surrender of Persons between the Government of the United States and the Int'l Tribunal for the Prosecution of Persons Responsible for Serious Violations of Int'l Humanitarian Law in the Territory of the Former Yugoslavia, Oct. 5, 1994. However, Congress overturned this two years later with its own implementing legislation.

⁵⁶ See Amnesty International, *supra* note 52, at 42-45.

conduct or if a third state has rendered judgment dealing with the same conduct.⁵⁷ *Ne bis in idem* is a principle recognized by “the penal laws of every civilized state.”⁵⁸

¶39 Article 20 of the ICC statute prohibits the Court from ever retrying the accused for the conduct in question.⁵⁹ It also prevents any other court from trying the accused after the Court has convicted or acquitted the accused.⁶⁰ Finally, article 20 blocks the Court from trying an accused already tried by another court provided that court did not try the case “for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court” or the trial was “not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.”⁶¹

¶40 This language appears to properly forestall states from avoiding surrender of a suspect through circus trials and does not allow states a simple device to avoid surrender.

2. Specialty

¶41 The requirement of specialty prevents an extraditing country from prosecuting an individual for crimes other than those specified in the extradition request. Many countries now hold that the specialty doctrine applies, regardless of whether it is explicitly mentioned in an extradition treaty. In fact, it is now a “universally accepted principle.”⁶²

¶42 Article 101 of the ICC statute states specifically “[a] person surrendered to the Court under this Statute shall not be proceeded against, punished or detained for any conduct committed prior to surrender, other than the conduct or course of conduct which forms the basis of the crimes for which that person has been surrendered.”⁶³ However, the statute also provides for the surrendering state parties to waive the rule of specialty.⁶⁴ This is a useful exception since the prosecutor and court may not find evidence of other crimes until after the accused has been surrendered.

B. Double Criminality

¶43 Double criminality poses a possible defense to an ICC surrender request in both common and civil law states. During the statute’s drafting unsuccessful attempts were made to specifically prohibit the application of double criminality to surrender proceedings.⁶⁵ Despite these efforts the ICC statute does not specifically preclude the use of double criminality as a defense to surrender. However, this defense applies only to states that have not ratified the ICC treaty, but where the Court has jurisdiction over a defendant in that state.⁶⁶

⁵⁷ See *id.*

⁵⁸ Schultz, *The Great Framework of Extradition and Asylum*, in 2 TREATISE ON INT’L CRIMINAL LAW 309, at 320 (1973).

⁵⁹ See ICC Statute, *supra* note 1, art. 20.

⁶⁰ See *id.*

⁶¹ *Id.*

⁶² Schultz, *supra* note 58, at 321.

⁶³ ICC Statute, *supra* note 1, art. 101(1).

⁶⁴ See *id.* at art. 101(2).

⁶⁵ See *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, *supra* note 30, para. 316.

⁶⁶ For an explanation as to how the ICC may have jurisdiction over a non-state party see *infra* notes 103-105 and accompanying text.

¶44 According to this principle, extradition may only be granted if the defendant's act constitutes a crime according to the laws of the both the requesting and the custodial state. This principle is one of the most universally recognized rules of extradition law under both the civil and common law systems. In fact, some commentators regard the notion of double criminality as a customary rule of international law that is applied even if such wording is omitted from an extradition treaty.⁶⁷

¶45 The ICC statute has built-in definitions of the crimes over which it has jurisdiction.⁶⁸ Therefore, a state party to the ICC statute has effectively consented to be governed by the ICC's definition of those crimes. As a result, a defendant present in a state party could not assert a double criminality defense. However, the defendant could assert such a defense if present in a state that is not party to the statute.

¶46 So far, only one state has abolished the rule of double criminality: Germany. German law is independent of the law of the country in which the criminal act was committed, thus eliminating the "double criminality" requirement.⁶⁹ The only relevant question in German law in relation to extradition is whether the requesting state's provision of criminal law would be constitutional if it were passed by the German legislature.⁷⁰

¶47 While the case of an ICC surrender request is not exactly analogous to a request for extradition from another sovereign state, the double criminality rule is founded on the maxim of *nulla poena sine lege* (no punishment without law).⁷¹ Therefore, the notion of double criminality does not rest on the relationship between two sovereigns, but on notions of fairness. It would be odd for a state to surrender a person to a forum for acts that would have brought no punishment in the custodial state. Therefore, it is extremely likely that an accused in non-state party to the ICC treaty could invoke the principle of double criminality in order to defend against a surrender request.

¶48 Under traditional extradition law, most courts look for domestic laws that similarly criminalize the actions that surround the basis of the extradition request. This reflects the obvious fact that no two states have the exactly same criminal laws. For example U.S. courts ruling on double criminality have not required statutes to be identical. They have required the crimes, as defined in the requesting and custodial nations, to be "substantially analogous" or "substantially similar".⁷² Crimes in different nations are substantially analogous "when they 'punish conduct falling within the broad scope' of the same 'generally recognized crime'."⁷³

⁶⁷ See I.A. SHEARER, EXTRADITION IN INTERNATIONAL LAW 138 (1971), and Schultz, *The Great Framework of Extradition and Asylum*, in 2 TREATISE ON INTERNATIONAL CRIMINAL LAW 309, 313 (1973).

⁶⁸ See ICC Statute, *supra* note 50, arts. 5-8 (with the exception of the crime of aggression which has yet to be defined).

⁶⁹ See Penal Code §6 (Ger.).

⁷⁰ See Christopher L. Blakesley & Otto Lagodny, *Finding Harmony amidst Disagreement over Extradition, Jurisdiction, The Role of Human Rights, and Issues of Extraterritoriality under International Criminal Law*, 24 VAND. J. TRANSNAT'L L. 1, 53 (1991).

⁷¹ See Shearer, *supra*, at 137, and Schultz, *supra*, at 313.

⁷² Blakesley & Lagodny, *supra* note 70, at 54, n. 224 *citing* *Brauch v. Raiche*, 618 F.2d 843, 851 (1st Cir. 1980); *see also* *United States v. Sensi*, 879 F.2d 888, 893-94 (D.C. Cir. 1989); *Theron v. United States Marshal*, 832 F.2d 492, 497 (9th Cir. 1987); *United States v. Wiebe*, 733 F.2d 549, 554 (8th Cir. 1984); *Messina v. United States*, 728 F.2d 77, 79-80 (2^d Cir. 1984) (conduct, "in nature of extorting," "similar"); *In re Tang Yee-Chun*, 674 F. Supp. 1058, 1067 (S.D.N.Y. 1987) ("substantially similar"); and RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES § 476(c).

⁷³ *Peters v. Egnor*, 888 F.2d 713, 719 (10th Cir.1989) (*quoting* *Brauch*, 618 F.2d at 848 n. 7, 852).

¶49 Similar standards prevail in Britain: "double criminality in our law of extradition is satisfied if it is shown: (1) that the crime for which extradition is demanded would be recognised as substantially similar in both countries, and (2) that there is a prima facie case that the conduct of the accused amounted to the commission of the crime according to English law."⁷⁴

¶50 The recent House of Lords March 24, 1999 decision regarding the extradition of General Augusto Pinochet illustrates British law on double criminality and forecasts how Britain may interact with the ICC.

¶51 Section 2 of Britain's Extradition Act 1989 defines extradition crimes and places them in two categories: a) conduct committed within the territory of the foreign state; and b) an extra-territorial offence against the law of the foreign state.⁷⁵ Therefore, if the act occurred in the requesting state, then the standard double criminality test applies.

However, if the requesting state is asserting jurisdiction over an act not committed on its soil (extraterritorial jurisdiction), the British Extradition Act 1989 applies a modified double criminality standard. Under the Act, British courts can extradite in this case if one of two conditions is met: i) the conduct would also "constitute an extra-territorial offence against the law of the United Kingdom"; or ii) where the act did not occur on British soil and the foreign state is basing its extraterritorial jurisdiction on the nationality of the offender.⁷⁶

¶52 In the Pinochet case, Spain was asserting extraterritorial jurisdiction for acts of torture committed outside its soil.⁷⁷ Because Pinochet was not a national of Spain, the UK could only extradite if Pinochet's acts of torture could also constitute an extraterritorial offense in Britain.⁷⁸ Since Pinochet's acts committed outside the UK did not become an offense under UK law until it ratified the Torture Convention on 29 September 1988, the House of Lords had to rely on the Torture Convention as being the only instrument to base double criminality on.⁷⁹ It could, therefore, not use the "substantially similar" standard and use UK laws on assault, murder, etc. to satisfy the double criminality requirement since those laws do not cover extraterritorial crimes.

¶53 Fortunately, the majority of crimes for which the ICC will have jurisdiction are likely to be considered customary international law that binds all states including non-state parties to the ICC statute. However, the ICC statute does modify some aspects of international law which are beyond the purview of customary international law and may not have been accepted by many states under conventional law.

¶54 In Article 5, the ICC statute provides for jurisdiction for the following crimes: genocide, crimes against humanity, war crimes, and aggression.⁸⁰ Since aggression has

⁷⁴ In re the Habeas Corpus Application of Morrison Budlong & Jane Kember, 1 W.L.R. 1110, 1122-23 (Q.B. 1980).

⁷⁵ Judgment - Regina v. Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet Regina v. Evans and Another and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet (On Appeal from a Divisional Court of the Queen's Bench Division), March 24, 1999, at para. 30, available at <http://www.parliament.the-stationery-office.co.uk/pa/1d99899/1djudgmt/jd990324/pino1.htm>.

⁷⁶ *Id.*

⁷⁷ *See id.* at para. 8.

⁷⁸ *See id.* at para. 3.

⁷⁹ *See id.*

⁸⁰ *See* ICC Statute, *supra* note 50, art. 5.

yet to be defined for integration into the statute, we will not attempt to evaluate its status under customary international law. However, some detailed aspects of the other offenses may not be fully accepted as customary international law; and therefore, these offenses may suffer from double criminality problems and extraterritorial limits on extradition, as the Pinochet case demonstrated.

1. Genocide

¶55 The International Court of Justice (ICJ) recognized in its Advisory Opinion on Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide that the Convention has become customary international law, binding all states regardless if they have signed the convention.⁸¹ Therefore, it is unlikely that this crime should suffer any problems on the issue of double criminality.

2. Crimes Against Humanity

¶56 Crimes Against Humanity has never been the focus of a “specialized international convention”.⁸² While it is considered customary international law, its actual scope has been a subject of debate.⁸³

¶57 The ICC Statute encompasses several different acts as crimes against humanity.⁸⁴ While most of these acts are not especially controversial in terms of being accepted as customary international law, it does explicitly proscribe deportation and imprisonment, which can, in some circumstances, be legal under domestic laws.⁸⁵ In addition, the definition of crimes against humanity includes a vague prohibition on “other inhumane acts. . .intentionally causing great suffering, or serious injury to body or to mental or physical health.”⁸⁶ This may also pose double criminality problems depending on the circumstance.

¶58 More importantly, however, is the fact that the ICC’s definition expands the definition of crimes against humanity to cover peacetime acts as well as acts committed by non-state actors.⁸⁷ Most jurisprudence and commentators appear to agree that the application of crimes against humanity is not limited to armed conflict under customary

⁸¹ See *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, 1951 I.C.J. 15, 23 (May 28).

⁸² M. Cherif Bassiouni, *The Normative Framework of International Humanitarian Law: Overlaps, Gaps and Ambiguities*, 8 TRANSNAT’L L. & CONTEMP. PROBS. 199, 211-212 (1998).

⁸³ See *id.*

⁸⁴ These acts include: (a) murder; (b) extermination; (c) enslavement; (d) deportation or forcible transfer of population; (e) imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; (f) torture; (g) rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender, or other grounds that are universally recognized as impermissible under international law; (i) enforced disappearance of persons; (j) the crime of Apartheid; and (k) other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health. ICC Statute, *supra* note 50, art.7.

⁸⁵ See *id.* at art. 7(d) & (e).

⁸⁶ *Id.* at art. 7(k).

⁸⁷ See Bassiouni, *supra* note 82, at 211.

international law.⁸⁸ However, the application of crimes against humanity to non-state actors is more controversial and is not clear.⁸⁹ This could pose double criminality problems if there is no analogous domestic law or conventional law criminalizing the act. ¶59 Foreshadowing the difficulties the ICC may experience, a problem of double criminality did arise with respect to the ICTY. Article 1 of the French legislation concerning the Yugoslavia Tribunal of 2 January 1995 stated that it applied “to any person who is charged with crimes or offences defined as such by French law” and constituting crimes under Articles 2 to 5 of the ICTY Statute.⁹⁰ However, articles 212-1 and 212-2 of the Code Pénal (1994) of France define crimes against humanity more restrictively than in Article 5 of the ICTY Statute.⁹¹ Therefore, if a surrender request entailed conduct covered by the ICTY statute but not by the French definition of crimes against humanity, France would not comply with the surrender. Fortunately, when the French law was amended on 15 May 1996 to include cooperation with the Rwanda tribunal, the double criminality provision was removed.⁹²

3. War Crimes

¶60 The expanded definition of war crimes under the ICC statute will almost certainly pose double criminality problems.

¶61 The four Geneva Conventions of 1949⁹³ have been recognized as customary international law defining war crimes.⁹⁴ Two additional protocols of 1977 (Protocols I

⁸⁸ According to the Appeal Chamber in the Tadic case, “it is by now a settled Rule of customary international law that crimes against humanity do not require a connection to international armed conflict. Indeed ... customary international law may not require a connection between crimes against humanity and any conflict at all.” Decision in Prosecutor v. Dusko Tadic, (IT-94-1-AR72), *reprinted in* 35 I.L.M. 32, at 72 (1996); *see also* John Dugard, *Symposium: International Human Rights at Fifty -Reconciliation and Justice: The South African Experience*, 277 TRANSNAT'L L. & CONTEMP. PROBS, 303 (1998); and Michael Scharf, *Accountability for International Crime and Serious Violation of Fundamental Human Right The Letter of the Law: The Scope of the International Legal Obligation to Prosecute Human Rights Crimes*, 59 LAW & CONTEMP. PROBS. 41, 53-4 (1996).

⁸⁹ *See* Bassiouni, *supra* note 82, at 212.

⁹⁰ *See* Amnesty International, *supra* note 52, at 48-50.

⁹¹ *See id.*

⁹² *See id.*

⁹³ *See* Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31, 4 Bevans 853, (entered into force Oct. 21, 1950), (entered into force with respect to the United States Feb. 2, 1956), *reprinted in* 2 International Law & World Order: Basic Documents at II.B.11 (Burns H. Weston ed., 5 vols., 1994); Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 (entered into force Oct. 21, 1950) (entered into force with respect to the United States Feb. 2, 1956) *reprinted in* 2 INTERNATIONAL LAW & WORLD ORDER: BASIC DOCUMENTS at II.B.12 (Burns H. Weston ed., 5 vols., 1994--); Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135, 47 AM. J. INT'L L. 119 (1953) (entered into force Oct. 21, 1950) (entered into force with respect to the United States Feb. 2, 1956), *reprinted in* 2 International Law & World Order: Basic Documents at II.B.13 (Burns H. Weston ed., 5 vols., 1994); 53 Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287, 50 AM. J. INT'L L. 119 (entered into force Oct. 21, 1950) (entered into force with respect to the United States Feb. 2, 1956), *reprinted in* 2 International Law & World Order: Basic Documents at II.B.14 (Burns H. Weston ed., 5 vols., 1994).

⁹⁴ *See* Bassiouni, *supra* note 82, 220.

and II) relating to "conflicts of an international character" and to "conflicts of a non-international character" are more controversial.⁹⁵ Protocols I and II are not as widely ratified as the four Geneva Conventions.⁹⁶ In addition, some governments, including the United States, argue that not all of Protocols I and II codify customary international law and remain as conventional law binding signatory states only.⁹⁷ The drafters of the ICC statute were aware of this controversy and cautiously drafted Article 8, defining war crimes, so as to incorporate some, but not all, provisions given under Protocols I & II. ¶62 Article 8(2)(a) incorporates most of the "grave breaches" all found common in the four Geneva Conventions, and, therefore, should not pose double criminality problems. Likewise, Article 8(2)(c), dealing with non-international armed conflicts, lists some of the most serious violations found in common article 3 of the four Geneva Conventions and are all part of customary international law. However, Articles 8(2)(b) and 8(2)(e) incorporate some violations found in the four Geneva Conventions as well as those found in the two Protocols.⁹⁸ Therefore, some of its provisions may not be customary international law.

¶63 For example, the Protocol I prohibitions regarding reprisals against civilian objects and dealing with works and installations containing dangerous forces are not necessarily regarded as customary international law.⁹⁹ This may pose problems for Articles 8(2)(b)(iv) & (v) which limit attacks on civilian objects and for 8(2)(b)(xi) which prohibits "[k]illing or wounding treacherously individuals belonging to the hostile nation or army."¹⁰⁰ In addition, more controversial Protocol II provisions, particularly those governing wars of national liberation and guerrilla warfare, may also not reflect customary international law.¹⁰¹

¶64 However, without a given context, it is uncertain how the ICC and national courts will treat these provisions. For instance, it is debatable as whether Article 8(e)(ix)'s prohibition against "[k]illing or wounding treacherously a combatant adversary" in non-international armed conflicts may constitute customary international law and will depend heavily on the given circumstance.¹⁰²

¶65 Therefore, while most of the crimes under the ICC statute probably constitute customary international law and will not pose double criminality concerns, problems

⁹⁵ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts of 8 June 1977 [Protocol I], *opened* for signature at Berne, Dec. 12, 1977, U.N. Doc. A/32/144 (1977) Annex I (entered into force Dec. 7, 1978), *reprinted* in 16 I.L.M. 1391, and 2 Weston, *supra* note 93, at II.B.20; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts [Protocol II], Dec. 12, 1977, U.N. Doc. A/32/144 (1977) Annex II (entered into force Dec. 17, 1978), *reprinted* in 16 I.L.M. 1391, and 2 WESTON, *supra* note 93, at II.B.21.

⁹⁶ See *Geneva Conventions and Additional Protocols*, International Review of the Red Cross No. 322 (March 1998).

⁹⁷ See Bassiouni, *supra* note 82, 220.

⁹⁸ See *id.* at 230-1.

⁹⁹ See Antonio Cassese, The Geneva Protocols of 1977 on the Humanitarian Law of Armed Conflict and Customary International Law, 3 U.C.L.A. PAC. BASIN L. REV. 55, 68-75, 89 (1984).

¹⁰⁰ ICC Statute, *supra* note 50, arts. 8(2)(b)(iv) & (v) & 8(2)(b)(xi).

¹⁰¹ See Message from the President of the United States Transmitting the Protocol II Additional to the Geneva Conventions, and Relating to the Protection of Victims of Non-International Armed Conflicts, Treaty Doc. No. 100-2 (1987), *reprinted* in 6 I.L.M. 561, 564 (1987).

¹⁰² ICC Statute, *supra* note 50, arts. 8(2)(e)(ix).

could arise regarding deportation, imprisonment, other inhumane acts, and non-state actors under the statute's definition for crimes against humanity. In addition, certain provisions dealing with civilian objects and dangerous forces may pose problems for the statute's definition of war crimes.

C. The Existence of a Treaty & Extraditable Offenses

¶66 Many states prohibit extradition in the absence of a prior treaty or agreement.

Therefore, if the ICC issues an arrest warrant to a non-state party, surrender may not be possible under domestic law. This is especially important since, under the ICC statute, it is possible for the Court to have jurisdiction over a case even though the defendant may be present in a state that is not party to the statute.

¶67 As touched on earlier, in order to trigger the ICC's jurisdiction over a crime, any of three conditions must be present. First, the crime must have occurred in the territory of a state party or a state that has accepted the Court's jurisdiction with respect to the crime.¹⁰³ For example, if a defendant commits a war crime in state X and flees to state Y, as long as state X has consented to the jurisdiction of the Court (by ratification or by *ad hoc* consent), it does not matter if the custodial state Y is a party to the statute or not. State Y has an obligation to surrender the defendant.

¶68 Second, jurisdiction can be triggered where the state of the nationality of the accused is a state party or a state that has accepted the Court's jurisdiction with respect to the crime.¹⁰⁴ For example, if a defendant is living in state Y but is a national of state X, as long as state X has consented to the Court's jurisdiction, then it does not matter if the custodial state Y is a party to the statute or not. State Y has an obligation to surrender the defendant.

¶69 Finally, jurisdiction is triggered whenever the UN Security Council refers a case to the prosecutor under Chapter VII of the UN Charter.¹⁰⁵ For example, a defendant may have committed a crime in state X, fled to state Y, and is a national of state Z. However, if the Security Council refers the case to a prosecutor, the fact that states X, Y, and Z are all non-parties is irrelevant. State Y, or *any* other state where the defendant is present, has an obligation to surrender the defendant.

¶70 Therefore, the state in which the accused is present does not have to be a state party or accept the jurisdiction of the Court in order for the Court to begin an investigation and prosecution. However, if non-state parties are called on by the Court to surrender an accused on its soil, the absence of an extradition treaty or surrender agreement may pose serious obstacles.

1. The Common Law States

¶71 Most common law countries generally do not extradite in the absence of a treaty.

Therefore, if the Court calls on a common law state to surrender an accused and that state has not ratified the ICC treaty, there may be serious legal impediments. Great Britain

¹⁰³ See *id.* at art. 12(2)(a).

¹⁰⁴ See *id.* at art. 12(2)(b).

¹⁰⁵ See *id.* at art. 13(b).

only allows extradition "where an arrangement has been made with any foreign state."¹⁰⁶ The United States also does not grant extradition unless bound to do so by a treaty.¹⁰⁷

¶72 The applicability of this common law rule to international tribunals became very clear in December 1997 when the United States tried to extradite Elizaphan Ntakirutimana to the International Criminal Tribunal for Rwanda.¹⁰⁸ In this case, the United States sought to extradite Ntakirutimana to the ICTR for participating in the Rwanda genocide of 1994.¹⁰⁹ However, the federal district court in Texas ruled that the extradition was invalid as a matter of United States law because the extradition agreement in force between the United States and the Tribunal had not been ratified with the advice and consent of the Senate under a two-thirds majority.¹¹⁰ The extradition agreement was not a treaty, but a statute, which Congress passed under a simple majority and the President signed into law.¹¹¹ Therefore, without a valid, full-fledged treaty in effect, the court refused to authorize Ntakirutimana's extradition, and he was released.¹¹² However, the US re-filed its request for extradition in another federal district court and successfully argued that either a treaty or a statute constituted sufficient congressional authorization for the extradition to proceed.¹¹³ The 5th U.S. Circuit Court of Appeals reversed finding that that the authority to surrender a person to a foreign government must be granted by law, either by the terms of a treaty *or* by an act of Congress.¹¹⁴ Therefore, the President had the authority to extradite Ntakirutimana without a full-fledged treaty but through a congressional statute. The Supreme Court just recently upheld this decision.¹¹⁵

¶73 However, the likelihood of a state not ratifying the ICC treaty, but instituting domestic legislation to provide for surrenders is virtually non-existent and would indeed be paradoxical. It would be self-contradictory for a state to refuse to ratify, but yet freely agree to surrender individuals on its soil to the court. The Ntakirutimana case was unique because the UN Security Council created the Rwanda Tribunal via a binding resolution and did not utilize a treaty mechanism to bind states. As a result, all states had an obligation to implement legislation to abide by the UN Resolution establishing the court.¹¹⁶

¶74 A few common law states do allow extradition in the absence of a treaty. Canadian law permitted extradition without treaty with the approval of the Governor General; however, this provision has never been utilized and may have been superseded by a 1970

¹⁰⁶ 33 & 34 Vict. c. 52, s.2 (1870); *See also* Reg. v. Wilson 3 Q.B.D. 42, 46 (1877).

¹⁰⁷ *See* 18 U.S.C. 3184; *Valentine v. United States ex rel. Neidecker*, 299 U.S. 5, 9-10 (1936); *Ivancevic v. Artukovic*, 211 F.2d 565, 566 (9th Cir. 1954); *In re Surrender of Ntakirutimana*, 988 F. Supp. 1038, 1041-42 (S.D. Tex. 1997); *Hoi-Pong v. Noriega*, 677 F. Supp. 1153, 1154 (S.D. Fla. 1988).

¹⁰⁸ *See In re Surrender of Ntakirutimana*, 988 F. Supp. 1038 (S.D. Tex. 1997).

¹⁰⁹ *See id.* at 1039.

¹¹⁰ *See id.* at 1040-42.

¹¹¹ *See* Pub.L. No. 104-106, § 1342(a)(1), 110 Stat. 486 (1996).

¹¹² *See Ntakirutimana, supra* n. 108 at 1042.

¹¹³ *See In re Surrender of Elizaphan Ntakirutimana*, 1998 WL 655708, at 16 (S.D.Tex. 1998).

¹¹⁴ *See Elizaphan Ntakirutimana v. Janet Reno*, U.S. Court of App. Fifth Cir., No. 98-41597, Aug. 5, 1999 (revised Aug. 23, 1999).

¹¹⁵ *See* Tony Mauro, *Justices OK Limits on Contributions*, THE RECORDER, January 25, 2000, p. 1. The case is *Ntakirutimana v. Reno*, 99-479.

¹¹⁶ *See* Secretary-General's Report, *supra* note 44, ¶ 23.

statute.¹¹⁷ Currently, Canada is making steps to revise its extradition law to make it possible to extradite defendants to both the Tribunals and the ICC.¹¹⁸ Also, South Africa can also extradite in the absence of a treaty with the approval of the President.¹¹⁹

¶75 Therefore, if a common law state fails to ratify the ICC treaty and has an indicted defendant on its soil, the failure to ratify or implement will provide the defendant an effective defense against surrender.

2. The Civil Law States

¶76 A failure to ratify the ICC treaty will not render a surrender request fatal in most civil law states. France, for example, has special extradition laws designed to operate with countries with which no treaty obligation exists.¹²⁰ An analogous statute can be found in German law.¹²¹ The tradition is also largely followed in Latin America.¹²²

¶77 However, a few civil law states prohibit extradition in the absence of a treaty and may pose problems for the ICC. These states include the Netherlands,¹²³ Norway,¹²⁴ Ethiopia,¹²⁵ Israel¹²⁶ and Turkey.¹²⁷

¶78 Therefore, in general, an arrest warrant issued to a civil law state that has not ratified the ICC statute will most likely not automatically render the surrender request fatal.

D. Nationality of the Offender & Place of Commission of Offense

¶79 The nationality of the defendant may serve as the biggest obstacle to the surrender of suspects to the ICC. In the civil and common law, the concepts of nationality and extraterritoriality are intertwined in extradition law and with other extradition concepts such as double criminality.¹²⁸ Each system holds its own theory regarding jurisdiction. These theories focus on judicial fairness and protecting the rights of the accused, but may also, in practicality, provide a convenient means by which a state may refuse to surrender a suspect to the ICC.

¹¹⁷ See R.S.C., 1952, c.322, Pt. II. Extradition Under Treaty R.S.C. ch. E-21.

¹¹⁸ See Cristin Schmitz, *Law Would Confirm Canada's Role in Int'l. Criminal Court*, THE LAWYERS WEEKLY, Sept. 3, 1999, Vol. 19, No. 16; and Allan Thompson, *Ottawa to Change Laws on Extradition*, THE TORONTO STAR, May 5, 1998, Tuesday, Pg. A22.

¹¹⁹ See Shearer, *supra* note 67, at 29, n.1 *citing* Extradition Act, No. 67 of 1962, § 3(2).

¹²⁰ See *id.* at 31, n.3 *citing* Law of Mar. 10, 1927, art. I.

¹²¹ See *id.* at 31, n.5 *citing* Law of Dec. 23, 1929, art. 4 (I).

¹²² See 6 MARJORIE M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 736 (1968).

¹²³ See Shearer, *supra* note 67, at 29, n.2 *citing* art. 4, Peaslee, CONSTITUTION OF NATIONS, II, 754 (2nd ed., 1956).

¹²⁴ See *id.* at 29, n.7 *citing* Lous, "World habeas corpus and international extradition- Norway" Int'l Bar Association: 10th Conference Report 164 (1964).

¹²⁵ See *id.* at 29, n.4 *citing* Const. Art. 50 & Extradition Law, Procl.. No. 149 of 1955.

¹²⁶ See *id.* at 29, n.5 *citing* Extradition Law, No. 56 of 1954, §2.

¹²⁷ See *id.* at 29, n.6 *citing* Penal Code, art. 9.

¹²⁸ See *supra* notes 66-102 and accompanying text.

1. Civil Law

¶80 With few exceptions, civil law countries do not extradite their own nationals. These states include Austria, France, Germany, Greece, the Netherlands, and Switzerland.¹²⁹ The tradition also holds true in Latin America,¹³⁰ except for Colombia, which now has begun to extradite its own nationals under pressure from the United States.¹³¹

¶81 Italy is the most prominent exception in the civil law world. After 1930, Italy began to allow the extradition of its own nationals if provided for in an international convention.¹³²

¶82 The civil law presumption against the extradition of its own nationals rests on the civil law tradition of allowing jurisdiction over nationals who commit extraterritorial crimes. Therefore, in the interests of fully protecting the rights of its own nationals, a civil law state would prefer to try the accused in its own forum rather than in a foreign forum where the accused may be at a disadvantage. Therefore, the civil law rejects the extradition of its nationals under the presumption that the custodial state already has jurisdiction to try the case domestically. In theory, civil law states are able to strictly adhere to the principle of *aut dedere, aut iudicare*- that is, they should either extradite or prosecute domestically.¹³³

¶83 In fact, more specifically, scholars have argued that for a crime of international law the principle of *aut dedere, aut iudicare* has become a *jus cogens* norm.¹³⁴ This argument has been accepted by at least one judge of the International Court of Justice.¹³⁵ In practice, however, the civil law the principle of *aut dedere, aut iudicare* often fails through either a lack of interest in prosecution or the difficulty in obtaining the necessary

¹²⁹ See Sheila O'Shea, *Interaction between International Criminal Tribunals and National Legal Systems*, 28 N.Y.U. J. INT'L L. & POL. 367, 391 n. 94 (1996) citing Austrian Judicial Assistance Statute, *Über die Auslieferung und die Rechtshilfe in Strafsachen*, sec. 12 (1979) (Aus.) translated in Edith Palmer, *The Austrian Law on Extradition and Mutual Assistance in Criminal Matters* 112 (1983) (an extradition of Austrian citizens shall not be allowed); Danish Extradition Law, *Om Udlevering af Lovovertraedere*, chap. 2, sec. 2 (1967) (Den.) (Danish citizens cannot be extradited); French Extradition Law, *Loi du 10 Mars 1927 Relative à l'Extradition des Etrangers*, art. 5 (Fr.) (extradition is not granted when the person, the object of the request, is a French citizen); Basic Law for the Federal Republic of Germany, art. 16 (no German may be extradited to a foreign country); Code of Criminal Procedure, art. 438 (Greece) (extradition is prohibited when the person claimed is a citizen of the custodial state at the time of the commission of the offense); Swiss Judicial Assistance Statute, *Loi federale sur l'entrae internationale en matiere penale* (Switzerland Law on International Judicial Assistance in Criminal Matters), art. 7 (1981) (Switz.) (no Swiss national may, without his written consent, be extradited or surrendered to a foreign State for prosecution or execution of a sentence).

¹³⁰ For example, Article 10 of Mexico's Extradition Law states, "No Mexican shall be surrendered to a foreign State, save in cases considered exceptional by the Executive, who may so determine." WHITEMAN, *supra* note 122, at 866 citing Article 10(II), Extradition Law of 1897 (Mexico).

¹³¹ See Ethan A. Nadelmann, *The Evolution of United States Involvement in the International Rendition of Fugitive Criminals*, 25 N.Y.U. J. INT'L L. & POL. 813, 855 (1993) (Interestingly, Colombia's 1991 constitution expressly forbids the extradition of its nationals).

¹³² See SHEARER, *supra* note 67, at 107-08.

¹³³ See Nadelmann, *supra* note 131, at 107-08.

¹³⁴ See M. CHERIF BASSIOUNI, INT'L EXTRADITION: UNITED STATES LAW AND PRACTICE, at 10, 13-24 (2d rev. ed. 1987).

¹³⁵ See Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (*Libyan Arab Jamahiriya v. United States*), 1992 I.C.J. 114, 217 (Apr. 14) (dissenting opinion of Judge Weeramantry) (relying upon BASSIOUNI, *supra* note 134).

evidence and witnesses.¹³⁶ Other times, the nation either acquits the individual or issues a lenient sentence.¹³⁷

¶84 As a result, if a civil law state refuses to extradite its own national, it is not entirely clear whether the state will prosecute the accused domestically even though it has an obligation to do so under international law.

¶85 The civil law prohibition on the extradition of nationals has provided a legal justification to refuse to surrender nationals to the ITCY and the ITCR.¹³⁸ For example, the 1990 Constitution of the Federal Republic of Yugoslavia explicitly prohibits the extradition of its own citizens.¹³⁹ The government of the former Yugoslavia has used this as a legal shield to refuse surrender of its indicted citizens. In addition, other states in the region have presented similar problems. Modeled to some extent on the old Yugoslavian Constitution, the post-independence constitutions of Croatia, Slovenia, and Macedonia all prohibit extradition of their nationals.¹⁴⁰ Macedonia will also not extradite foreign subjects without a ratified international agreement.¹⁴¹

¶86 The ICTR has encountered similar difficulties. Article 5 of the Mutual Assistance Treaty in force among Burundi, Rwanda, and Zaire contains a blanket prohibition against the extradition of a state's own nationals.¹⁴² The Burundian Constitution, for example, expressly forbids the extradition of its nationals under Article 24.¹⁴³ Similarly, Rwandan criminal law presented an immediate dilemma at the ICTR's onset because Article 16 of the Rwandan Penal Code also prohibited the extradition of Rwandan nationals.¹⁴⁴

2. Common Law

¶87 Most common law countries continue to extradite their citizens willingly. In contrast to the civil law systems, common law states generally do not recognize the nationality principle of jurisdiction, and, therefore, cannot exercise jurisdiction over extraterritorial crimes. As a result, the extradition of nationals is generally allowed because the alternative would result in the accused escaping his day in court. In addition, the theory holds that the justice is most fully and conveniently served by trying defendants where they committed their crimes.¹⁴⁵

¹³⁶ See *Report of the Task Force on an International Criminal Court of the American Bar Association*, A.B.A. INT'L L. & PRAC. 47 (1994).

¹³⁷ See *id.*

¹³⁸ See generally, Sheila O'Shea, *Interaction between International Criminal Tribunals and National Legal Systems*, 28 N.Y.U. J. INT'L L. & POL. 367 (1996).

¹³⁹ See O'Shea, *supra* note 138, at 389, n.82 *citing* Yugo. Const. art. 17.

¹⁴⁰ See *id.* at 390, n. 85 *citing* Croatian Const. art. 9; Slovenian Const. art. 47; and Macedonian Const. art. 4.

¹⁴¹ See *id.* at *citing* Macedonian Const. art. 29.

¹⁴² See *id.* at 412, n. 182, *citing* La Convention judiciaire entre la Republique du Burundi, la Republique Rwandaise et la Republique de Zaire, 21 June 1975, art.5.

¹⁴³ See *id.* at 412. See also *See id.* at 410, n.175 *citing* Le Decret du 12 Avril 1886, modifie par le Decret du 24 Avril 1922; and L. Strouvens et P. Piron, Codes & Lois Du Congo Belge 192 (1948) ("As former Belgian colonies, Rwanda, Burundi, and Zaire share the same extradition statute").

¹⁴⁴ See *id.* at 412, n.183, *citing* Le Code Penal Rwandais Commente, at 30 (1981) (Regrettably, the author did not have time to ascertain whether this law has been amended in light of the tribunal's birth).

¹⁴⁵ See Nadelmann, *supra* note 131, at 847.

¶88 However, there are a few exceptions. Israel in 1978 amended its penal code to expand Israeli jurisdiction over extraterritorial offenses, and forbids the extradition of its citizens.¹⁴⁶ In addition, Cyprus forbids the extradition of its nationals.¹⁴⁷

¶89 The United States does not have blanket laws prohibiting the extradition of its nationals. Where a treaty or agreement exists permitting the extradition of nationals, US courts have found that the executive holds discretion and final say on whether a US national may be extradited.¹⁴⁸ If the treaty or agreement is silent on the issue, the US Supreme Court has found that US nationals are still extraditable.¹⁴⁹ Canadian courts take the same view.¹⁵⁰ Therefore, common law states should not pose problems for ICC arrest warrants on the basis of the nationality of the offender.

¶90 During the statute's drafting unsuccessful attempts were made to specifically prohibit the application of nationality to surrender proceedings.¹⁵¹ While language was introduced to allow this traditional extradition exception to directly apply to the Court, it was not eventually adopted either.¹⁵² At the adoption of the final statute, a number of delegates publicly disapproved the deletion of this provision and affirmed that their respective states strictly prohibit the extradition of their nationals.¹⁵³ In addition, provisions for *aut dedere, aut iudicare* did not survive the drafting stage.¹⁵⁴

E. Evidence of Guilt

¶91 Many states require showing evidence of guilt before extradition may proceed. While the ICC statute demands that there be "reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court" for an arrest,¹⁵⁵ it is unclear how this language will be interpreted by the Court itself and by national courts. During the statute's drafting unsuccessful attempts were made to specifically prohibit the application of an evidence of guilt exception to surrender proceedings.¹⁵⁶

¹⁴⁶ See *id.* at 851.

¹⁴⁷ See *id.*

¹⁴⁸ See Blakesley & Lagodny, *supra* note 70, at 29, n. 121 citing *In re Lucke*, 20 F. Supp. 658, 659 (N.D. Tex. 1937).

¹⁴⁹ See *id.* at 29, n. 122 citing *Charlton v. Kelly*, 229 U.S. 447 (1913).

¹⁵⁰ See *In re Burley*, 1 CAN. L.J. 34 (1865).

¹⁵¹ See *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, *supra* note 30, para. 316, 324.

¹⁵² See *supra* notes 34 and 39 and accompanying text.

¹⁵³ See United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an Int'l Criminal Court, Committee of the Whole: Summary Record of the 38th Meeting, p.3-4, U.N. Doc. A/CONF.183/C.1/SR.38 (Nov. 20, 1998) (Algeria, Brazil, Egypt, Israel, Kuwait, Saudi Arabia, Sudan, Ukraine, and the United Arab Emirates protested the deletion of the provision expressly allowing states to refuse surrender based on the nationality of the defendant. Croatia, on the other hand, clearly advocated that the surrender provisions prevailed over any national legislation or constitutional provisions).

¹⁵⁴ See *supra* notes 26-41.

¹⁵⁵ See ICC Statute, *supra* note 1, art. 58(1)(a).

¹⁵⁶ See *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, *supra* note 30, para. 324.

1. Civil Law

¶92 In general, civil law jurisdictions have extremely liberal procedural standards for examining the proof of the offense in an extradition proceeding and may not pose problems for the ICC. The custodial state need only review documents provided by the requesting state supporting a request for extradition. These documents include a copy of the conviction or sentence, a warrant of arrest, a statement of offenses for which extradition is sought, a copy of the relevant enactments or laws violated, and a description of the accused.¹⁵⁷ If these documents establish that the accused is charged with an extraditable offense, then extradition will proceed.¹⁵⁸

¶93 However, some civil law states allow the accused to prove that he or she could not have committed the offense because the accused was, without a reasonable doubt, somewhere else at the time the offense was committed.¹⁵⁹ Though not formally part of its extradition law, the Swiss also allow a similar showing before the political authorities.¹⁶⁰

¶94 Other civil law states are exceptions to the rule and do require some evidence to establish a presumption of guilt. Among the exceptions found in Latin America are Chile, Mexico, and Venezuela.¹⁶¹ Israel, Lebanon, Libya, and Syria are also exceptions to the rule.¹⁶² Unless an extradition agreement otherwise states, Swedish law requires "reasonable grounds" for believing the accused committed the offense¹⁶³ which is the same language employed in the ICC statute.¹⁶⁴ Finally, Austria requires the requesting state to furnish, within a reasonable time, evidence of guilt which the accused is not able to clear his or herself on the spot.¹⁶⁵

¶95 In general, it appears as though the standards for the evidence of guilt in the civil law states are equivalent or lower than the "reasonable grounds" standard necessary for the ICC to issue an arrest warrant.¹⁶⁶

¶96 The experience with ICTY and the ICTR reveals that civil law states will not burden the surrender process with its own legal procedures. Spanish implementing legislation expressly forbids the application of extradition laws and requires only that the central examining court of the National High Court inform the accused of the charges.¹⁶⁷ In France, a court may only determine whether the arrest warrant contains conduct over which the ITCY has jurisdiction and that there is no obvious error.¹⁶⁸ Italian and Dutch legislation provide for a similar limited role for the judiciary.¹⁶⁹

¹⁵⁷ See Schultz, *supra* note 58, at 322.

¹⁵⁸ See *id.* at 322, n.71 *citing* Extradition laws of Belgium of 1874, art. 3; France of 1927, art. 9; the Netherlands of 1967, art. 18 a1.3, 26 a1.2; and Switzerland of 1892, art. 15 a1.2.

¹⁵⁹ See *id.* at 323, n.72 *citing* Extradition laws of Denmark of 1967, § 3 a1.5; France of 1927, art. 16, a1.2; the Netherlands of 1967, art.26 a1.3.

¹⁶⁰ See *id.* at 323, n.72.

¹⁶¹ See Shearer, *supra* note 67, at 157, n.3 *citing* Chile, Code of Criminal Procedure, art. 647; Mexico, Extradition Law, 19 May 1897, art. 16; and Venezuela, Code of Criminal Procedure, art. 182.

¹⁶² See *id.* at 157, n.4 *citing* Israel, Extradition Law, No. 5714 of 1954, art. 9; Lebanon, Penal Code, 1943, art. 35; Libya, Code of Judicial Procedure, 1953, art. 505; Syria, Law of 5 April 1955, art. 3.

¹⁶³ *Id.* at 157, n.6 *citing* Act of 6 December 1957, para. 9.

¹⁶⁴ See ICC Statute, *supra* note 155.

¹⁶⁵ See Shearer, *supra* note 67, at 157, n.7 *citing* Austria, *Strafprozessordnung*, 1960, § 59.

¹⁶⁶ See ICC Statute, *supra* note 155.

¹⁶⁷ See O'Shea, *supra* note 138, at 378.

¹⁶⁸ See *id.* at 389, n.47 *citing* Law for Implementing Security Council Resolution 827 Establishing an

2. Common Law

¶97 The common law states, in contrast, will only grant extradition where the requesting state produces enough evidence that would justify holding an accused for trial if the crime had been committed in the custodial state.¹⁷⁰

¶98 Under U.S. law, this standard is the same as the probable cause standard for arrests.¹⁷¹ The primary source of determining probable cause comes from evidence contained in the extradition request, which, in theory, is presumed to be the truth.¹⁷² Yet this requirement of finding sufficient probable cause has justified several in-depth investigations resulting in subsequent denials of extradition on the part of the United States.¹⁷³

¶99 A similar standard prevails under British law. Section 10 of the Extradition Act 1870 provides that if:

such evidence is produced as (subject to the provisions of this Act) would, according to the law of England, justify the committal for trial of the prisoner if the crime of which he is accused had been committed in England ... the ... magistrate shall commit him to prison but otherwise he shall order him to be discharged.¹⁷⁴

As in the U.S., the court reviews the evidence provided by the requesting state. "[T]he proper test for the magistrate to apply [is] whether, if this evidence stood alone at the trial, a reasonable jury properly directed could accept it and find a verdict of guilty."¹⁷⁵ Canada has similar provisions in extradition cases.¹⁷⁶

¶100 It is unclear as to whether the evidence submitted by the ICC (establishing reasonable grounds to believe that the accused committed the offense) will be enough to satisfy common law courts. If the experience between different common law states is any guide, the process will not be as smooth or swift as the ICC would like.¹⁷⁷

International Tribunal for the Punishment of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, at art. 12 (1995) (Fr.).¹⁶⁹ See *id.* at 389, n.48 citing Provisions Relating to the Establishment of 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, sec. 3(3) (1994) (Neth.); and Provisions on Cooperation with 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 1994, art. 11(3) (Italy).

¹⁷⁰ See 18 U.S.C.S. § 3184, and *Garcia-Guillern v United States*, 450 F.2d 1189 (5th Cir. 1971); *Then v Melendez*, 92 F.3d 851 (9th Cir. 1996); *DeSilva v DiLeonardi*, 125 F.3d 1110 (7th Cir. 1997); *Sayne v Shipley*, 418 F.2d 679 (9th Cir. 1969). *But see Parretti v United States*, 112 F.3d 1363 (9th Cir. 1997) (stating that all §3184 requires is showing that fugitive has been charged with committing an extraditable crime); and Great Britain, Extradition Act 1870, §10, a1.1.

¹⁷¹ See *Ntakirutimana*, *supra* note 108 at 1042-44.

¹⁷² See *Extradition of Greer*, 1991 WL 311924, at 5 (D. Vt. 1991).

¹⁷³ See *Extradition of Guillen*, 1991 WL 149623 (N.D. Ill. 1991); *Extradition of Contreras*, 800 F. Supp. 1462 (S.D. Tex. 1992). *But see Extradition of Garcia*, 802 F. Supp. 773 (E.D.N.Y. 1992).

¹⁷⁴ Extradition Act 1870, 33 & 34 Vict., ch. 52, § 7.

¹⁷⁵ *Schtraks v. Gov't of Israel*, 1964 A.C. 556, 580.

¹⁷⁶ See Extradition Act, R.S.C. 1985, ch. E-23, as amended by S.C. 1992, ch. 13.

¹⁷⁷ See *supra* note 173 and accompanying text.

F. The Political Offense Exception

¶101 The political offense exception to extradition may pose another formidable hurdle to the ICC surrender process. This exception effectively allows states to refuse to surrender a suspect if his or her crimes could be categorized as politically motivated. Unsuccessful attempts were made during the ICC's drafting to specifically prohibit the application of the political offense to surrender proceedings.¹⁷⁸

¶102 Scholars have traced back the origin of the political offense exception to the political revolutions of the eighteenth and nineteenth centuries, and the Enlightenment of the post- Industrial Revolution.¹⁷⁹ Newly democratic nations were unwilling to extradite free-thinkers and political ideologists forced from their homes and persecuted because of their beliefs.¹⁸⁰ In addition to protecting political dissent, other rationales for the political offense exception depict it as a means by which states can remain neutral in the internal power struggles of other states¹⁸¹ or as a way of ensuring that the accused will be treated fairly by the judiciary in the requesting state.¹⁸² However, of late, the political offense exception has been criticized as a political tool- utilized to protect solely the interests of states not of individuals.¹⁸³ This could be an especially acute problem for the ICC, since nearly all of its cases will carry with it some degree of political controversy and conflict with state interests.

¶103 Political offenses fall into distinct categories. There are both pure political offenses, which are directed against the state and have none of the elements of a normal crime, and relative political offenses, which include elements of crime but are inseparable from the political element.¹⁸⁴ Pure offenses rarely extraditable and can include acts of treason, sedition, or espionage.¹⁸⁵ Most claimed political offenses, however, fall into the second category of relative offenses, combining political goals with common, usually extraditable, crimes.¹⁸⁶ Most extradition treaties prohibit the extradition of fugitives charged with or convicted of relative political offenses.¹⁸⁷ The common law and civil law systems employ different tests to ascertain whether conduct constitutes a relative political offense.

¹⁷⁸ See *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, Volume II: Parts 6-8, art. 53, II. Proposals (B)(2), eighth unnumbered paragraph; *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, *supra* note 30, para. 316, 324, 334.

¹⁷⁹ See Shearer, *supra* note 67, at 166-7.

¹⁸⁰ See Gregory Chadwick Perry, Comment, *The Four Major Western Approaches to the Political Offense Exception to Extradition: From Inception to Modern Terrorism*, 40 MERCER L. REV. 709, 715 -16 (1989).

¹⁸¹ See *id.* at citing C. VAN DEN WIJNGAERT, *THE POLITICAL OFFENCE EXCEPTION TO EXTRADITION*, at 3 (1980).

¹⁸² See Schultz, *supra* note 67, at 315.

¹⁸³ See Terry Richard Kane, *Prosecuting International Terrorists in United States Courts: Gaining the Jurisdictional Threshold*, 12 YALE J. INT'L L. 294, 317 (1987).

¹⁸⁴ See *id.*

¹⁸⁵ See *id.* at 318.

¹⁸⁶ See Michael R. Littenberg, Comment, *The Political Offense Exception: An Historical Analysis and Model for the Future*, 64 TUL. L. REV. 1195, 1199 (1990).

¹⁸⁷ See Kane, *supra* note 183, at 318, citing Garcia-Mora, *The Nature of Political Offenses: A Knotty Problem of Extradition Law*, 48 VA. L. REV. 1226, 1239 (1962).

1. Civil Law

¶104 The tests employed in civil law states are extremely varied and tend to be very fact-specific.¹⁸⁸ The 1957 European Convention on Extradition incorporates the proportionality test.¹⁸⁹ Under the proportionality test, the ideological motive of the offender is balanced against her acts in proportion to the political gains sought.¹⁹⁰ The greater the degree of violence involved, the more closely related the political goals must be to the means used.

¶105 Swiss law is demonstrative of the proportionality test. Based on the Swiss Extradition Act of 1982 and developed by the courts, a political offense must have been committed in the course of a struggle for political power¹⁹¹ or in order to escape a repressive regime.¹⁹² In addition, the political element of the act must predominate over its common crime elements. This concept has been described as “the principle that the relation between the purpose and the means adopted for its achievement must be such that the ideals connected with the purpose are sufficiently strong to excuse, if not justify, the injury to private property, and to make the offender appear worthy of asylum.”¹⁹³ For example, more serious crimes, like murder, may automatically be disproportionate to their political goals¹⁹⁴.

¶106 The French use a mixture of the proportionality test along with the injured rights test.¹⁹⁵ The injured rights test establishes an act as a political offense where the conduct affects only the political organization of the nation, in contrast to a common crime that affects rights other than those of the nation.¹⁹⁶ However, where private rights are also injured a more subjective proportionality test is employed. In 1975, France, based on obscure references to their opposition to the Vietnam war and support for Angela Davis, refused a U.S. request for the extradition of hijackers and extortionists on political offense grounds.¹⁹⁷

2. Common Law

¶107 The United States and United Kingdom follow the political incidence test, as do some Latin American courts.¹⁹⁸ The political incidence test examines whether criminal acts were part of or incidental to a political purpose or struggle, such as a war, revolution, or rebellion.¹⁹⁹

¹⁸⁸ See *id.* at 322-23.

¹⁸⁹ See European Convention on Extradition, Dec. 13, 1957, art. 3, 359 U.N.T.S. 173, 178, Europ. T.S. No. 24, at 3.

¹⁹⁰ See M. CHERIF BASSIOUNI, INTERNATIONAL EXTRADITION AND WORLD PUBLIC ORDER 402 (1974).

¹⁹¹ See Kane, *supra* note 183, at 323, *citing* C. Van den Wijngaert, *supra* note 181, at 127.

¹⁹² See Shearer, *supra* note 67, at 183.

¹⁹³ Kane, *supra* note 183, at 323, *quoting* In re Kavic (1952), Int'l L. Rep. 371, 374 (No. 80) (Switz.).

¹⁹⁴ See *id.* *citing* C. Van den Wijngaert, *supra* note 181, at 129.

¹⁹⁵ See BASSIOUNI, *supra* note 190, at 401.

¹⁹⁶ See *id.*

¹⁹⁷ See Kane, *supra* note 183, at 322-23.

¹⁹⁸ See BASSIOUNI, *supra* note 190, at 389-91.

¹⁹⁹ See *id.* at *quoting* In re Castioni [1891] 1 Q.B. 149 (1890).

¶108 Under this broad common law approach, however, there were several cases in both the U.S. and Britain where acts of murder constituted a political offense, thus making the accused unextraditable.²⁰⁰

¶109 In recent years, as a result of criticism and increased concerns about terrorism, both states have imposed further restrictions on the political offense doctrine. The result was a US-UK Supplementary Extradition Treaty signed in June 1985, which restricts the political exception to non-violent acts and specifically exempts a number of crimes.²⁰¹

¶110 However, the treaty does allow for the political offense exception to apply if there is reason to believe the extradition request is based solely on political opinion.²⁰² Thus, the sole concern is whether the prosecution in the requesting state is based on the accused's political belief.

3. Application to the ICC

¶111 The relevance of the political offense exception to the ICC statute is extremely important given that, since World War II, internal political turmoil has caused some 170 million casualties.²⁰³ Internal political rebellions, uprisings, and revolutions are now responsible for the majority of human rights abuses. Therefore, the political offense exception could provide opportunities for states to withhold indicted suspects.

¶112 There are only two international instruments relevant to the ICC regarding international crimes and the obligation to extradite: the Genocide Convention and the Additional Protocol to the European Convention on Extradition.²⁰⁴ Genocide Convention provides that, for the purpose of extradition, "[g]enocide . . . shall not be considered as [a] political crime."²⁰⁵ Similarly, the Additional Protocol to the European Convention on Extradition provides that political offenses shall not be considered to include either

²⁰⁰ See *In re Castioni* [1891] 1 Q.B. 149 (1890) (accused unextraditable where he shot and killed member of the Swiss State Council because murder occurred in the course of a revolt of a Swiss canton); *In re McMullen*, No. 3-78-1899 MG (N.D. Cal. 1979) (accused unextraditable where he bombed British barrack because his crime was incidental to a uprising by the Provisional Irish Republican Army); *In re Matter of Doherty*, 599 F. Supp. 270 (S.D.N.Y. 1984), *aff'd sub nom.* *U.S. v. Doherty*, 782 F.2d 491 (2d Cir. 1986) (accused unextraditable for crimes of murder, attempted murder, and illegal possession of firearms and ammunition because crimes were incidental to IRA uprisings).

²⁰¹ The exempted crimes include: (1) offenses within the scope of the Convention on the Suppression of Unlawful Seizure of Aircraft; (2) offenses within the scope of the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Sabotage); (3) offenses within the scope of the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents; (4) offenses within the scope of the Hostages Convention; (5) murder and manslaughter; (6) malicious wounding or inflicting grievous bodily harm; (7) kidnapping, unlawful detention, and related offenses, including the taking of hostages; (8) offenses involving explosives, if accompanied by an intent to endanger life, or if causing serious damage to property; (9) offenses involving firearms and ammunition, if they are possessed with an intent to endanger life, or are used with an intent to resist or prevent arrest; and (10) damaging property with an intent to endanger life, or with reckless disregard of the likelihood of endangering life. Supplementary Treaty Concerning the Extradition Treaty Between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland, June 25, 1985, *reprinted in* I.L.M. 1104 (1985).

²⁰² See *id.*

²⁰³ See Bassiouni, *supra* note 82, at 224.

²⁰⁴ See O'Shea, *supra* note 138, at 388-9.

²⁰⁵ The Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, art. 7, 78 U.N.T.S. 277.

crimes against humanity specified both in the Genocide Convention or grave breaches of the Geneva Conventions.²⁰⁶

¶113 As for other ICC crimes, certain states do have laws removing the political offense exception for violations of the laws of war. The French Extradition Law of 1927 does not protect acts as political offense in the course of a civil war if they were “acts of odious barbarism and vandalism prohibited by the laws of war.”²⁰⁷ Some have argued this provision also applies to acts committed in the course of international conflict.²⁰⁸ Similarly, the Supreme Court of Argentina declared: “extradition will not be denied on grounds of the political or military character of the charges where we are dealing with cruel or immoral acts which clearly shock the conscience of civilized peoples.”²⁰⁹ More recently, the 1985 US-UK Supplementary Extradition Treaty does not allow the political offense exception for the commission or the attempt to commit violent acts.²¹⁰ While this is merely a bilateral treaty, it does reflect a major shift in the political offense doctrine that could be applied to the ICC.

¶114 Still, however, the political offense doctrine presents a simplistic way for a custodial state to refuse to surrender an accused, especially regarding assertions of war crimes and crime against humanity in internal armed conflicts. National courts could interpret such acts as being in furtherance of a domestic rebellion or uprising and refuse the ICC’s request.

G. Executive Discretion

¶115 The final hurdle remaining for the ICC surrender process is the fact that the executive branch of the custodial state’s government usually makes the ultimate decision whether or not to grant extradition. In many cases, the executive can have the authority to overturn a judiciary’s determination that the extradition is not legal.

1. Civil Law

¶116 While several civil law countries still retain exclusive executive control, most now require at least minimal judicial review of the extradition process. For example, Spain, Ecuador, and Portugal are the few remaining states whose executives retain exclusive control over the entire extradition process.²¹¹ The majority of civil law states allow the judiciary to make a non-binding determination as to the legality of the extradition, thus always affording the executive the final determination. These states include Belgium, India, Japan, Mexico, the Netherlands, and Peru.²¹² However, in practice, the executive in these states rarely overrules a judicial determination of nonextraditability.²¹³

¶117 A number of civil law states have abandoned this pattern and follow the common law tradition. Instead of the judiciary playing only a supervisory role, judicial

²⁰⁶ See Additional Protocol to the European Convention on Extradition, Oct. 15, 1975, Europ. T.S. No. 86.

²⁰⁷ Shearer, *supra* note 67, at 186, n.2 *citing* Act of Mar. 10, 1927, art. 5(2).

²⁰⁸ *See id.* at 186.

²⁰⁹ *Id.* at 186, n.3 *citing* *In the Argentine case of In re Bohme*, 62 AM. J. INT’L L., 784-5 (1968).

²¹⁰ *See* I.L.M. 1104 *supra* note 201.

²¹¹ *See* BASSIOUNI, *supra* note 190, at 505.

²¹² *See id.* at 505-6 and Kane, *supra* note 183, at 319.

²¹³ *See* Kane, *supra* note 183, at 319, *citing* C. Van den Wijngaert, *supra* note 181, at 38-39.

determination is controlling where extradition is deemed illegal and advisory where it is deemed permissible.²¹⁴ Therefore, even if a court finds that the suspect may legally be surrendered to the ICC, the state's executive could be influenced by political motivations and choose not to surrender the suspect. The states that follow this model include Argentina, Austria, Brazil, Chile, Costa Rica, Finland, France, Greece, Haiti, Italy, Luxembourg, Norway, Sweden, Switzerland, Turkey, and Uruguay.²¹⁵ In Germany, however, the judiciary makes the final determination on all extraditions with no executive veto power.²¹⁶

¶118 The experience with ICTY and the ICTR suggests that states will actively seek to preserve executive discretion in regards to the ICC. In Iceland, under Section 3 of its implementing legislation, after receiving the ICTY's surrender request the Minister of Justice "may turn down a request if the request or other evidence indicate that it is manifestly incorrect".²¹⁷ If the Minister of Justice immediately dismisses the request, the Director of Public Prosecution then conducts an investigation (Section 40), and after this investigation is complete, "the Minister of Justice shall decide whether extradition to the International Tribunal shall be granted, and if so in what manner" (Section 7)²¹⁸. Section 7 of Iceland's its implementing legislation probably permits the application of traditional extradition law since the accused may "request a district court resolution of whether the legal conditions for extradition are fulfilled."²¹⁹ This section also gives the Minister of Justice considerable leeway to refuse a surrender request.²²⁰ Other states have passed less intrusive implementing legislation for the ICTY, in particular. Australia and New Zealand passed implementing legislation allowing their respective attorney generals to refuse a request for surrender in "special" (Australia) or "exceptional" (New Zealand) circumstances²²¹. Finland and Sweden also place the authority for surrender in the hands of the executive with the courts only playing a consulting role.²²²

¶119 In contrast, the French implementing legislation expressly prohibits the application of extradition laws and completely removes any executive discretion.²²³

²¹⁴ See Shearer, *supra* note 67, at 199.

²¹⁵ See BASSIOUNI, *supra* note 190, at 506.

²¹⁶ See *id.* at 507.

²¹⁷ Amnesty International, *supra* note 52, at 63-4.

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ See *id.*

²²¹ See Int'l War Crimes Tribunals Act, cl. 16.(2) (1995) (Austl.); Int'l War Crimes Tribunals Bill, cl. 12.(2) (1994) (N.Z.).

²²² See O'Shea, *supra* note 138, at 377-8, n.41 *citing* Act on the Jurisdiction of the International Tribunal for the Prosecution of Persons Responsible for Crimes Committed in the Territory of the Former Yugoslavia and on Legal Assistance to the International Tribunal, sec. 2 (1994) (Fin.); *See also* Act Relating to the Establishment of an International Tribunal for Trial of Crimes Committed in Former Yugoslavia, sec. 4 (1994) (Swed.).

²²³ See *id.* at 379, n.46 *citing* Law for Implementing Security Council Resolution 827 Establishing an Int'l Tribunal for the Punishment of Persons Responsible for Serious Violations of Int'l Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, at 5 (1995) (Fr.).

2. Common Law

¶120 As stated earlier, in most common law nations, if the judiciary finds the extradition legal, the executive has the authority to decide whether to extradite; however, the executive must abide by the judiciary if it finds the extradition illegal.²²⁴

¶121 The judiciary often certifies that the crimes charged satisfy the particular extradition treaty's provisions. In the United States, for example, the Secretary of State always has discretion to refuse to extradite even after a court has ruled the defendant extraditable.²²⁵ This practice is largely followed in Britain and other commonwealth states.²²⁶ As a result, common law states may also be afforded the politically convenient option of refusing to surrender a suspect to the ICC despite a permissive judicial determination.

¶122 Therefore, even if all the legal hurdles are successfully defeated, an ICC request for surrender may, in the end, be squashed by the executive of the custodial state. However, this could have positive effects as well. In civil law states, if the judiciary makes the determination that surrender to the ICC is illegal under extradition law, then the executive still has the option of allowing the surrender, nonetheless. Therefore, if the executive of a civil law state is supportive of the ICC arrest warrant (where the judiciary and legislature is not), the executive could choose to assist the ICC. However, such an advantage cannot be enjoyed in common law states where the executive can only veto a positive judicial decision to surrender the accused.

¶123 The diagrams on the next pages summarize the defenses an accused may raise against an ICC arrest warrant under the national extradition laws of both civil and common law states.

²²⁴ See *supra* note 214 and accompanying text.

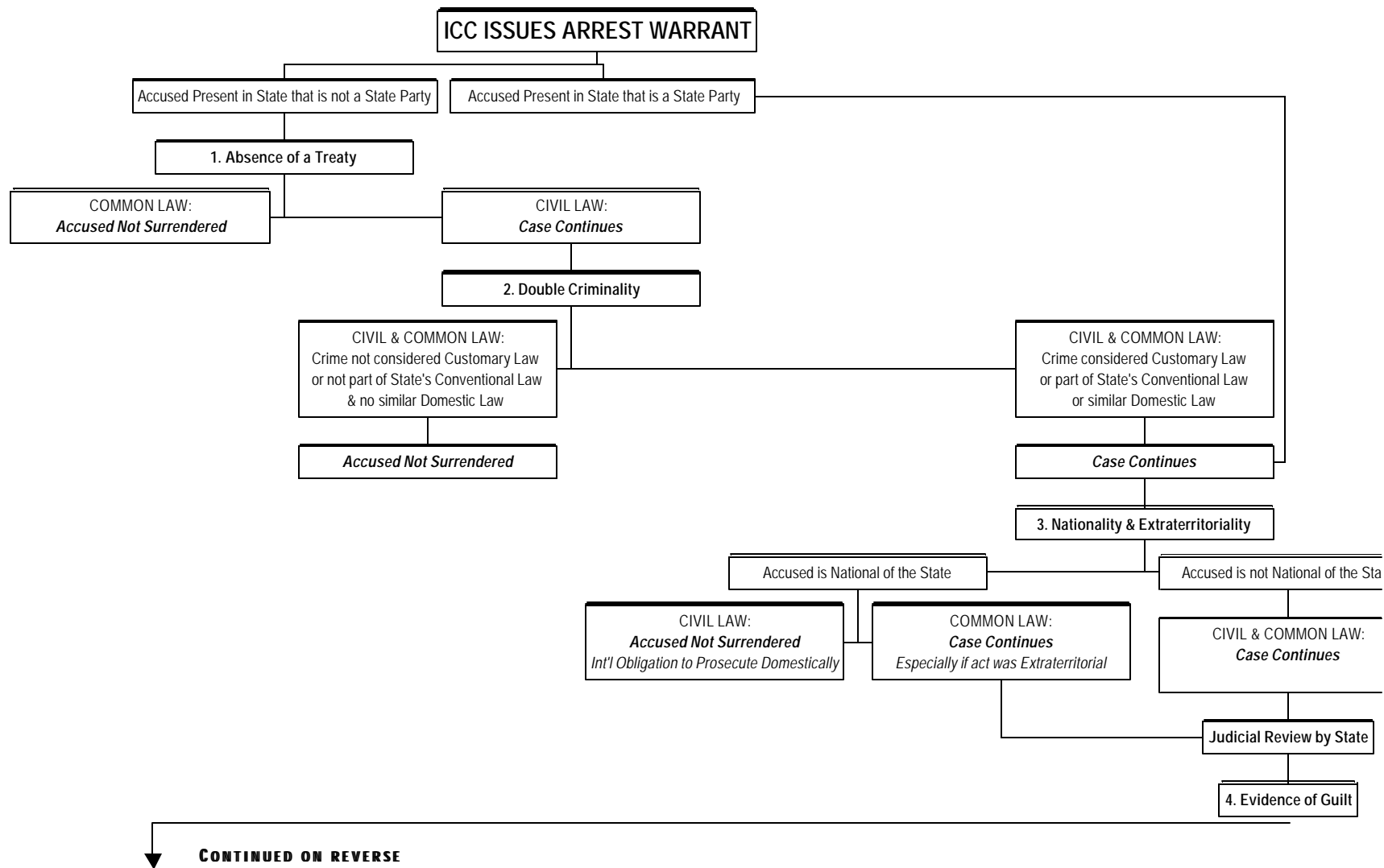
²²⁵ See 18 U.S.C. § 3184. See also *Escobedo v United States*, 623 F.2d 1098 (5th Cir. 1980).

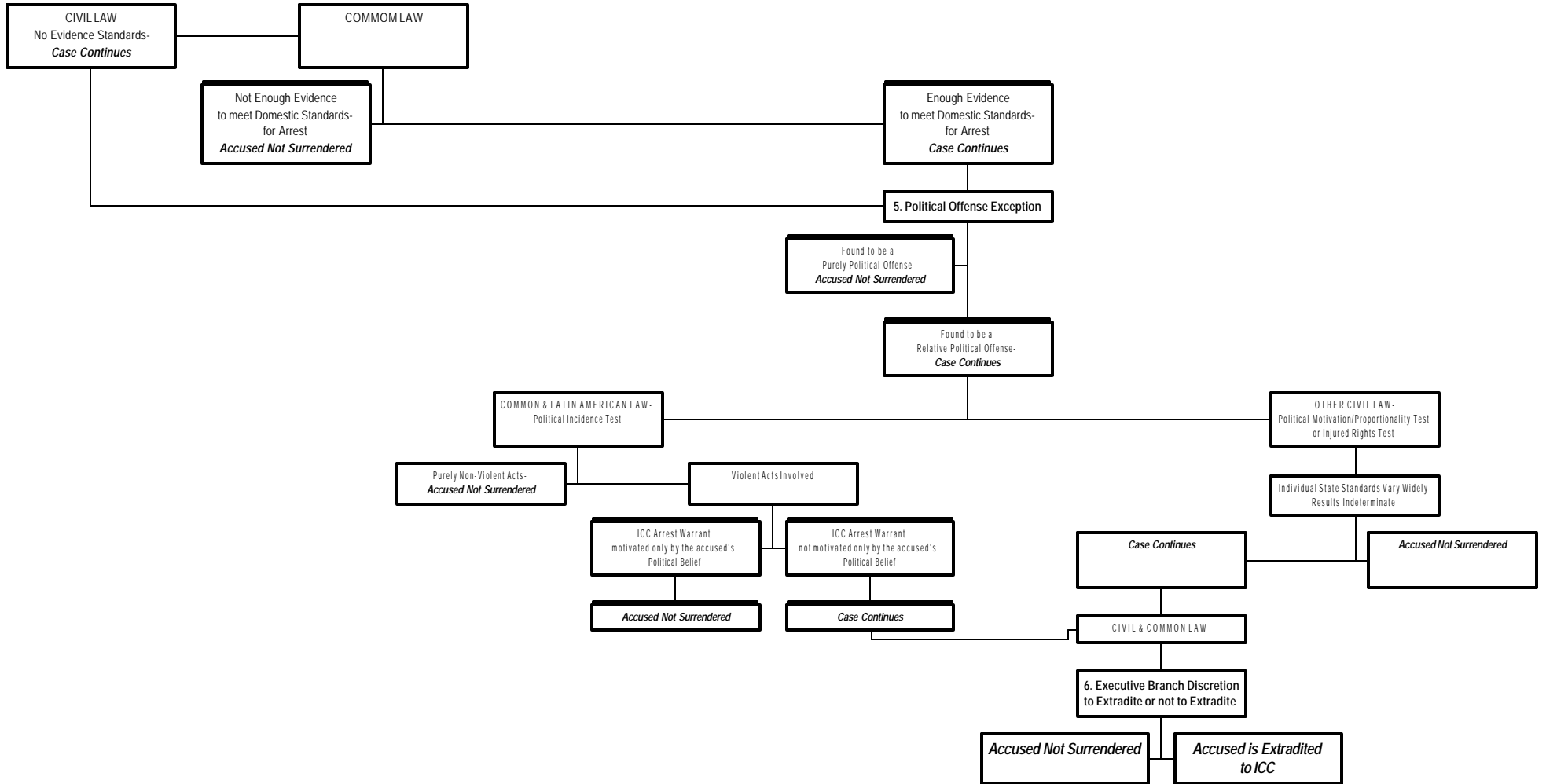
²²⁶ See BASSIOUNI, *supra* note 190, at 506-7.



ARRESTS UNDER THE INTERNATIONAL CRIMINAL COURT

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IV. Conclusion

¶124 The ICC statute's provisions allowing for the application of national laws in the apprehension and transfer of indicted suspects will create formidable defenses for an accused to avoid facing trial before the ICC. Despite the fact that the ICC is clearly distinguishable and different than a sovereign state, state practice regarding the existing international criminal tribunals reveal that extradition laws will be applied to the ICC, perhaps with even stronger force.

¶125 This poses unique opportunities for suspects to avoid the reach of the court. For example, an indicted suspect will most likely be able to find safe harbors in common states that have not ratified the treaty, in a civil law state within which the suspect is a national, or civil law state that has not ratified the ICC statute and does not recognize the conduct as a crime. In addition, if the suspect is in a common law state that has evidence requirements for arrest that are more stringent than the ICC standards, the suspect may escape surrender. Two other defenses would compel an indicted suspect to flee to a state that is politically sympathetic to her. The political offense exception is sufficiently vague and confusing to provide another variable that may fend off a surrender request. Finally, the executive branch of the custodial state may favor the accused and choose to refuse to extradite the suspect, often without judicial review.

¶126 All of these obstacles bode poorly for the successful operation of the Court. However, there are other possibilities that require further exploration that may bypass some of the restrictions found under extradition laws. For example, deportation and other immigration devices could be used to achieve "disguised extradition" where domestic laws prohibit surrender.²²⁷ The accused could then be deported to state that is capable of surrendering the suspect. In addition, since the ICC statute also provides for provisional arrests,²²⁸ this may serve as a useful tool to temporarily apprehend a suspect. The standards for provisional arrests in many countries are typically more lenient.²²⁹ While the normal standards for arrest will eventually need to be established,²³⁰ the provisional arrest could provide the crucial time needed to prevent further harm or to begin deportation proceedings.

¶127 Hope may also be found in extradition treaties regarding the punishment of international crimes, such as hijacking, hostage taking, attacks on diplomats and torture.²³¹ These treaties specifically require state parties either to extradite or to try suspects.²³² Therefore, even if the accused cannot be surrendered under national laws, it

²²⁷ See Kai I. Rebane, *Extradition and Individual Rights: The Need for an International Criminal Court to Safeguard Individual Rights*, 19 FORDHAM INT'L L.J. 1636, 1671 (1996).

²²⁸ See ICC Statute, *supra* note 1, art. 92.

²²⁹ See Shearer, *supra* note 67, at 200.

²³⁰ See *id.*

²³¹ See Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, arts. 4, 7, 22 UST 1641, 860 UNTS 105; Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, Sept. 23, 1971, arts. 4, 7, 24 UST 564, 10 ILM 1151 (1971); Int'l Convention against the Taking of Hostages, Dec. 17, 1979, Art. 9, TIAS No. 11,081, 1316 UNTS 205; Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, Dec. 14, 1973, arts. 3, 7, 28 UST 1975, 1035 UNTS 167; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened* for signature Dec. 10, 1984, 1465 UNTS 85.

²³² See *id.*

can be argued that the custodial state has an obligation to try the accused for international crimes.²³³

¶128 Finally, the international community could hope that states would treat surrenders to the ICC as an entirely different regime, separate from the traditions established by inter-state extraditions. This alternative would perhaps apply some existing extradition mechanisms and jettison others. However, without express guidance from the ICC statute, such compromises will no doubt vary greatly from state to state.

¶129 The issues we have raised are unavoidably complex. The only way to escape the complications and problems posed by extradition laws is to ensure that states ratify the treaty and implement legislation that specifically bypass the application of extradition laws. What is absent in the statute must be made up for on the state level. Without attention being given to this critical issue, the ICC's effectiveness will remain as much a dream as the Court's creation did over fifty years ago.

²³³ See *supra* notes 134-135 and accompanying text.