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Creating an International Criminal Court: Confronting the Conflicting Criminal Procedures of Iran and the United States

Rose Marie Karadsheh*

I. Introduction

The 1995 United Nations Fourth World Conference on Women in Beijing, China, brought to the forefront of international attention the difficulty of attaining a unified transnational effort to condemn and punish world-wide injustices. Most are familiar with the trying of war criminals, such as current attempts to bring to justice leaders of the Bosnian Serbs. Unknown to most, however, is the long history of attempts to establish an international criminal court (ICC) to try those accused of crimes, not traditionally defined as war crimes. This article discusses the evolution of the ICC and whether such a court is a realistic option for nations concerned with enforcing criminal justice against transnational criminals. For an ICC to exist and be successful, there must be international support. Therefore, the intent of the drafters must be to create a court and procedures that are acceptable to the nations of the world.

However, there are many different policies and ideologies governing criminal justice systems in every country. Two countries with differing foundations for criminal justice are Iran and the United States.

Iran is considered one of the most ardent Islamic systems for criminal law and procedure. Iranian judges are primarily religious clerics interpreting “God’s will.” In contrast, the United States maintains a secular and diverse criminal justice system. U.S. laws and procedures are likely the most developed and detailed in the

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world. When drafters for an ICC begin creating a proposal, they must keep in mind very different systems, such as Iran and the United States. As a result, a primary concern for drafters of an ICC must be how to reconcile conflicting principles and procedures that exist between such countries. Further, the drafters of an ICC must consider whether countries are willing to compromise or eliminate protections offered to their citizens, if their citizens are tried in an international forum.

Part II of this article presents the history of the ICC and Part III presents an analysis of a draft proposal for an ICC. The analysis focuses primarily on the structure of such a court, the pretrial process, the trial process and the procedural rights for a defendant in that court. Part IV summarizes the same aspects in the criminal justice system in Iran, and Part V compares and contrasts the criminal justice system proposed by one draft with the systems in Iran and the United States.

II. History of International Code and Court Drafts

A. History of The International Criminal Code

Generally, international criminal law has developed on an ad hoc basis and includes over 300 instruments evolving over the past 175 years. These instruments, known as treaties, define international crimes and place a duty upon participating states to criminalize the conduct proscribed by the treaties. Such state action includes the prosecution of accused offenders, punishing those convicted, or extraditing the accused to another state willing to prosecute.

International criminal law in the nineteenth century began with transnational cooperation for the return of fugitives (such as fleeing thieves and murderers) to justice. Eventually, agreements in multilateral treaties encouraged nations to cooperate with law enforcement of various nations to combat international crimes that were considered societal ills of international concern. For

2. BASSIOUNI, supra note 1, at 53.
4. Id.
example, as early as 1815, treaties existed to abolish slave trade.\(^5\) Later treaties included: abolishing the trade in women and children;\(^6\) trade in obscene publications;\(^7\) forgery of currency;\(^8\) and trade in illicit drugs.\(^9\)

International criminal laws continued to develop in the twentieth century to include “more politically charged items” such as: genocide;\(^10\) war crimes;\(^11\) apartheid;\(^12\) and terrorist offenses.\(^13\)

In spite of numerous treaties, however, few countries systematically supported such treaties. Thus, these countries became safe havens for transnational criminals.\(^14\) Furthermore, sanction mechanisms against countries were nonexistent except for the language in certain treaties which stated the maxim of *aut dedere aut punire*.\(^15\)

Other weaknesses in international law are described by Law Professor M. Cherif Bassiouni:

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5. *See, e.g.*, Declaration Relative to the Universal Abolition of the Slave Trade, Feb. 8, 1815, 2 Martens Nouveau Recueil de Traites 432; Clark, *supra* note 3, at 477.


15. “extradite or prosecute”
It places the sole duty on states to act in conformity with treaty obligations,
(2) it provides no authoritative control of the states to insure compliance,
(3) it fails to provide a mechanism for the resolution of conflicts that emerge between states,
(4) it fails to provide safeguards for those individuals who are the object of such cooperative undertaking between states,
(5) it does not have an overall framework,
(6) it does not have standard or general rules for the drafting of its specific proscriptions,
(7) it has no uniform standards or general rules applicable to the specific provisions of the system to insure compliance by enforcing agents, and
(8) its application and enforcement is uneven and subject to those domestic political considerations affecting the enforcing agent. 16

One proposal, drafted in 1954, was created to correct perceived failures in international criminal law. The “Draft Code of Offenses Against the Peace and Security of Mankind,” was created by an United Nations appointed committee, the International Law Commission (ILC). 17 The creation of an international criminal court accompanying this code was intended to provide an effective international enforcement mechanism. 18 However, the states involved never agreed on the draft code or court due to disagreement over its textual language. 19

As a result of these failed attempts at adopting a code of offenses or a court, countries entered into numerous treaties that stressed greater international cooperation. 20 The primary focus of these treaties were in the areas of drug offenses, economic crimes, and terrorism. 21 The most far-reaching treaty was the 1988 U.N. Convention Against Illicit Traffic in Narcotic Drugs and Psycho-

16. BASSIOUNI, supra note 1, at 53.
18. Id.
19. BASSIOUNI, supra note 1, at 8; Joel Cavicchia, The Prospects for an International Criminal Court in the 1990s, 10 DICK. J. INT’L L. 223, 227 (1992); Gianaris, supra note 17, at 95
20. BASSIOUNI, supra note 1, at 53; Gianaris, supra note 17, at 95.
tropic Substances. This treaty required signatory states to
criminalize a number of drug related offenses, assist in criminal
investigations, and extradite, if necessary. However, enforce-
ment of such treaties has been inadequate, as evidenced by the
growth in narcotics trafficking and use.

There are also several treaties employed in the fight against
economic crimes, including investment scams, money counterfeiting,
and money laundering. These treaties may require the coopera-
tion of several nations as the world economy grows more interde-
pendent. Nevertheless, many of these treaties have not been
ratified and several gaps in these treaties deter international
cooperation.

Additionally, treaties against terrorism have existed since the
1970s, yet have had little effect because signatory nations have not
complied with the terms. However, examples such as Libya's
release of individuals accused of bombing the 1988 Pan Am Flight
103 may prove there is some strength in the enforcement of these
treaties.

In the last ten years, proposals have again arisen attempting to
solve inadequacies of the current multilateral enforcement
mechanisms. These proposals include codifying multinational
treaties into one code and creating a court for uniform enforce-
ment. The focus of this article is not on the international code's

22. U.N. Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic
23. Id.; see also Gianaris, supra note 17, at 98.
24. Gianaris, supra note 17, at 99. See generally M. Cherif Bassiouni, Policy
Considerations on Inter-State Cooperation in Criminal Matters, 4 PACE Y.B. INT'L
25. M. Cherif Bassiouni & Christopher L. Blakesley, The Need for an
International Criminal Court in the New International World Order, 25 VAND. J.
TRANSNAT'L L. 151, 155 (1992); Gianaris, supra note 17, at 101.
27. Gianaris, supra note 17, at 103.
28. Id. at 104. See generally Bassiouni & Blakesley, supra note 25, at 156.
29. Id.
30. Bassiouni, supra note 1, at 54; Draft Articles on the Draft Code of
Crimes Against The Peace and Security of Mankind, Sept. 11, 1991, reprinted in
30 I.L.M. 1584 [hereinafter Draft Code]. See generally 2 BENJAMIN B. FERENCZ,
AN INTERNATIONAL CRIMINAL COURT 516-547 (1980) [hereinafter FERENCZ,
INTERNATIONAL COURT]; Benjamin B. Ferencz, An International Criminal Code
and Court: Where They Stand and Where They're Going, 30 COLUM. J.
TRANSNAT'L L. 375 (1992) [hereinafter Ferencz, International Code]; Gianaris,
supra note 17, at 108-111; Bernhard Graefrath, Universal Criminal Jurisdiction and
an International Criminal Court, 1 EUR. J. INT'L L. 67 (1990); John W. Rolph,
proposed drafts, but on the proposed drafts for a court. Nevertheless, a general overview of the latest official draft for an international code is necessary to better understand the purpose of the court.

Since the first draft of an international criminal code in 1954, the ILC has made slow progress in formulating a draft code, including reports from 1982-1984 and 1985-1986. Further, critics claim that the ILC has not sufficiently solved the problems associated with the Nuremburg and Tokyo trials, including an absence of clearly defined offenses, elements, and sanctions. However, in 1991, the 43rd session of the ILC developed what has been described as a promising draft code. This draft, among other things, criminalizes offenses such as: the recruitment, use, financing, and training of mercenaries; committing or ordering acts of international terrorism; engaging in illicit traffic of narcotic drugs; and any willful and severe damage to the environment. Professor John W. Rolph, described the ILC's efforts as having "capitalized on the changing world order that has created an environment in which consensus on an international criminal code is possible." While this code can be used without an international criminal court, critics claim that problems of uniformity will continue to exist without an international court enforcing the international code.

B. History of the International Criminal Court

The creation of an international tribunal largely coincided with the need to try persons accused of war crimes or military crimes against civilians. One of the first cited international tribunals to try individuals dates back to 1474 at the trial of Peter Von Hagenbush for crimes against "God and man" during his military occupation of a civilian community in Austria. After World War

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31. BASSIOUNI, supra note 1, at 10.
32. Id.
33. Rolph, supra note 30, at 528.
34. Draft Code, supra note 30, at 1591.
35. Id. at 1592.
36. Id. at 1593.
37. Id.
38. Rolph, supra note 30, at 528.
39. See generally BASSIOUNI, supra note 1, at 53; Gianaris, supra note 17, at 105-09.
40. BASSIOUNI, supra note 1, at 2; Cavicchia, supra note 19, at 224; M. Cherif Bassiouni, The Time Has Come for an International Criminal Court, 1 IND. INT'L
I, the first proposal for an international criminal tribunal emerged at the Paris Peace Conference in the Treaty of Versailles in 1919. While this tribunal was never established, its stated primary purposes were to prosecute Kaiser Wilhelm II for the “supreme offense against international morality and the sanctity of treaties” and for an international tribunal to try German war criminals.\(^4\)

Despite the failure to establish this tribunal for war crimes, organizations such as the International Law Association (ILA) continued to support the establishment of an international criminal tribunal.\(^4\) For example, the ILA endorsed its first draft statute in 1926 to correct perceived failures in the 1919 proposed draft tribunal.\(^4\)

Not only was there sustained support for an international criminal court, but a more expansive view of the purpose of the court was taken in 1937 after the assassinations of King Alexander I of Yugoslavia and French Prime Minister Louis Barthou.\(^4\) The League of Nations adopted a Convention Against Terrorism, which included a statute for an International Criminal Tribunal.\(^4\) However, because of the ineffectiveness of this organization and the outbreak of World War II, the Convention failed.\(^4\)

After World War II, the London Charters of 1945 and 1946 created the International Military Tribunal for the Prosecution and Punishment of Major War Criminals of the European Axis and the International Military Tribunal for the Far East.\(^4\) These Tribunals were held in Nuremberg and Tokyo. Questions arose regarding the fairness of prosecuting defendants in light of ill-

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\(^{41}\) Bassiouni, supra note 40, at 1; Germans criticized the criminal proceedings because they were only directed against them and did not apply to the Allies who also committed war crimes. Bassiouni, supra note 1, at 2.


\(^{43}\) Cavicchia, supra note 19, at 225.

\(^{44}\) Id.; Bassiouni, supra note 40, at 4.


\(^{46}\) India was the only country to ratify this Convention. See Bassiouni, supra note 40, at 4.

defined offenses, elements, and sanctions under international law. However, the war crimes trials proceeded.

In 1948, the United Nations General Assembly requested the ILC to study the possibility of establishing an international court to try those charged with genocide and other crimes. These other crimes included a number of multilateral treaties established to combat non-war transnational crimes. A special committee of the United Nations reviewed the reports from the ILC and submitted a draft proposal to the United Nations General Assembly in 1951. A revised draft was submitted in 1953.

According to the 1953 revised draft, the court would maintain jurisdiction over an individual only if the state instituting the proceedings confers jurisdiction upon the court over the offenses involved. The court could set bail and issue arrest warrants. States could assist the court in investigations or retrieving evidence. A prosecuting attorney would be appointed to file an indictment and a five member committee would then determine whether there was sufficient evidence to proceed. The defendant would be accorded many rights equivalent to United States constitutional rights, except the right to a jury trial.

However, because of the inability of the General Assembly to agree on what constituted an act of "aggression," which was made illegal in the draft, work on the draft was extensively delayed.

49. BASSIOUNI, supra note 1, at 4; Cavicchia, supra note 19, at 227; Scharf, supra note 48, at 139.
50. For a discussion on the evolvement of multinational treaties and its eventual inclusion in many draft code proposals for international criminal tribunal, see infra notes 1-40 and accompanying text.
52. See 1953 ILC Draft, supra note 51.
53. Id.
54. Id.
55. Id.
56. Id.
57. See 1953 ILC Draft, supra note 51. See generally Gianaris, supra note 17, at 94.
“Aggression” was finally defined in 1973, however, the General Assembly continued to table a vote on establishing a tribunal.58

Finally, in 1990 and 1991, the United Nations General Assembly indicated that the ILC could research what support an international criminal court would have among nations.59 At the 44th session of the United Nations General Assembly in 1992, the ILC concluded the analytical phase of its work and required a new mandate from the General Assembly to proceed with drafting a statute for an international criminal court.60

From this report, issued in 1992, the ILC indicated four major positions countries held on establishing an international criminal court. The first position was that most states supported the mandate to draft a statute for a court and to eventually establish such a court.61 Second, a substantial number of courts supported the creation of a new draft but reserved opinion on establishing a court until the draft was complete.62 Third, some states, including the United States, did not oppose a mandate to new draft statutes, but did request that states have the opportunity to submit comments and recommendations on the structure of the court.63 Finally, a few countries questioned the feasibility of establishing such a court.64 The main concerns regarding the feasibility of establishing the court were: the loss of state sovereignty, including the reluctance of states to relinquish their national criminal jurisdiction; the unlikelihood that states would confer jurisdiction to an international court over military officers who were often the perpetrators of international crimes; and the establishment of universally acceptable rules of criminal law and procedure in light of the diversity of national criminal laws and underlying policies.65

Since this ILC report, many unofficial proponents supporting the establishment of an international criminal code and an ICC have described the need for a court as “indispensable.”66 As the world becomes more interdependent and more concerned with

58. BASSIOUNI, supra note 1, at 8; Gianaris, supra note 17, at 94; Cavicchia, supra note 19, at 228.
61. Id.
62. Id.
63. Id.
64. Id.
66. Cavicchia, supra note 19, at 233.
similar problems of criminality, greater cooperation is required of nations. Many prominent leaders in the United States Congress are calling for the United States to pursue the establishment of an international criminal court in order to deal more effectively with crimes such as terrorism and drug trafficking. For example, with the strong support of Senator Arlen Spector, the United States Congress passed a bill declaring "the United States should explore the need for the establishment of an international criminal court on a universal or regional basis to assist the international community in dealing more effectively with criminal acts defined in international conventions . . . ." Many other proponents state that the court should provide a neutral, international forum for prosecuting international criminals, thus avoiding the ad hoc problems resulting from multilateral cooperation.

III. The Drafts of an International Criminal Tribunal

The modern-day draft proposals for an ICC and international criminal code are based upon the need for uniform treatment of numerous multilateral treaties. Accordingly, multilateral international treaties define "international criminal law." The ICC and the international criminal code are intended to provide the mechanisms to enforce and adjudicate violations of international criminal law. This section describes drafters' proposals for defining international criminal law: the purpose and establishment of the ICC, including the organization and trial proceedings; and the international criminal code, including the elements of the crime, penalties, exoneration and the rights of the accused. Drafts have been proposed for an ICC and international criminal code by a number of sources. However, because of the thoroughness of

70. BASSIOUNI, supra note 1, at 53; Gianaris, supra note 17, at 109.
71. See supra note 39 and accompanying text.
the draft by international scholar M. Cherif Bassiouni, this draft serves, for purposes of this Article, as the primary example of an ICC draft proposal.73

A. Defining International Criminal Law

Bassiouni provides twenty-two categories of international crimes which have evolved over a period of time, namely, from 1815 to 1984.74 As stated in Part II, the evolution of these multilateral agreements was not systematic, but ad hoc, based upon historical circumstances.75 Bassiouni lists 312 conventions under 22 categories of crimes. The categories are:
1) Aggression,76
2) War Crimes,77

73. In accompanying notes to the Bassiouni draft, references to the ILA drafts will be made occasionally to compare a different approach.

74. Bassiouni, supra note 1, at 30. The International Law Association’s (ILA) Draft differs from Bassiouni’s in that it only includes “non-political” treaties, specifically excluding the use of “aggression” as an international offence. The ILA commentators explain that political offenses such as “aggression” has not been firmly described and may be too general for international law. The current definition is “utterly unsuitable for application by an international criminal court.” Other treaties dealing with Unlawful Use of Weapons and Crimes Against Humanity are not included in the ILA draft. See 1984 ILA Draft, supra note 72, at 280-81.

75. See supra notes 1-39 and accompanying text.

76. Bassiouni, supra note 1, at 358-68.

77. Id. at 369-388.
3) Unlawful Use of Weapons/Unlawful Emplacement of weapons,\textsuperscript{78}

4) Crimes Against Humanity,\textsuperscript{79}

5) Genocide,\textsuperscript{80}

6) Racial Discrimination and Apartheid,\textsuperscript{81}

7) Slavery and Related Crimes,\textsuperscript{82}

8) Torture,\textsuperscript{83}

9) Unlawful Human Experimentation,\textsuperscript{84}

10) Piracy,\textsuperscript{85}

11) Aircraft Hijacking,\textsuperscript{86}

12) Threat and Use of Force Against Internationally Protected Persons,\textsuperscript{87}

13) Taking of Civilian Hostages,\textsuperscript{88}

14) Drug Offenses,\textsuperscript{89}

15) International Traffic in Obscene Publications,\textsuperscript{90}

16) Destruction and/or Theft of National Treasures,\textsuperscript{91}

17) Environmental Protection,\textsuperscript{92}

18) Theft of Nuclear Material,\textsuperscript{93}

19) Unlawful Use of the Mails,\textsuperscript{94}

20) Interference with Submarine Cables,\textsuperscript{95}

21) Falsification and Counterfeiting,\textsuperscript{96} and

22) Bribery of Foreign Public Officials.\textsuperscript{97}

The Bassiouni draft defines international crimes according to past multilateral treaties, based on the assumption that the international community has already substantially agreed upon the

\textsuperscript{78} Id. at 389-96.

\textsuperscript{79} Id. at 397-400.

\textsuperscript{80} Id. at 401-02.

\textsuperscript{81} BASSIOUNI, supra note 1, at 403-04.

\textsuperscript{82} Id. at 405-12.

\textsuperscript{83} Id. at 413-17.

\textsuperscript{84} Id. at 418-21.

\textsuperscript{85} Id. at 422-23.

\textsuperscript{86} BASSIOUNI, supra note 1, at 424-26.

\textsuperscript{87} Id. at 27-428.

\textsuperscript{88} Id. at 429-32.

\textsuperscript{89} Id. at 433-38.

\textsuperscript{90} Id. at 439-42.

\textsuperscript{91} BASSIOUNI, supra note 1, at 442-45.

\textsuperscript{92} Id. at 446-51.

\textsuperscript{93} Id. at 452.

\textsuperscript{94} Id. at 453-61.

\textsuperscript{95} Id. at 462.

\textsuperscript{96} BASSIOUNI, supra note 1, at 463-64.

\textsuperscript{97} Id. at 465.
The substantive law in these drafts codifies the language in the prior multilateral treaties. However, Bassiouni goes further in some provisions “to fill some gaps” in the textual language. This draft also leaves open the option to add past or future treaties to the international criminal code.

B. The International Criminal Tribunal

The International Criminal Tribunal (The Tribunal) consists of organs created by statute including: the Court; the Procuracy; the Secretariat; and the Standing Committee of States-Parties. The Tribunal is proposed to be a permanent body with the purpose of enforcing the international criminal code over State-Parties. The Tribunal would have universal jurisdiction to investigate, prosecute, adjudicate, and punish persons, legal entities,

98. BASSIOUNI, supra note 1, at 74. The ILA draft also codifies international multilateral treaties to define international criminal law. 1984 ILA Draft, supra note 72, at 257.
99. Bassiouni does not explain why he provides extra language in some of the treaties. However, his commentary does reflect the changes. BASSIOUNI, supra note 1, at 74.
100. Id.
101. See infra notes 108-109 and accompanying text.
102. This is the organ of the tribunal that investigates, prosecutes, and oversees the application of the decisions of the court. BASSIOUNI, supra note 1, at 218. For a more detailed discussion of the Procuracy, see infra notes 118-134 and accompanying text.
103. The Secretariat is the clerical and administrative organ of the tribunal. Its work consists of preparing budget requests for each organ of the tribunal and making and publishing an annual report on the activities of each organ of the tribunal. BASSIOUNI, supra note 1, at 240.
104. The Standing Committee is a body consisting of one representative appointed by each State-Party adopting the Statute. The Standing Committee may, among other things:
   1) offer to mediate disputes between States-Parties relating to the functions of the tribunal;
   2) encourage States to participate in the tribunal;
   3) exclude from participation representatives of States-Parties when States fail to provide the required financial support for the tribunal or fail to carry out other obligations;
   4) propose international instruments to enhance the functions of the tribunal; and
   5) grant a petition to mediate between the parties of the case, at which time the Court proceeding shall be stayed until the mediation and conciliation efforts conclude.
BASSIOUNI, supra note 1, at 241.
105. A State-Party is a country which has signed the treaty agreeing to the rules of the tribunal.
and states. Upon a finding of guilt, the court will have the power to do the following: deprive a person of liberty; fine a person, organization or state; impose injunctions against persons or legal entities; and order restitution and damages.

1. The Judiciary.— According to Bassiouni’s draft, the court would consist of twelve judges of separate nationality sitting in rotational panels of three. The judges would also hear cases en banc and individually as supervisors of sanctions. The judges cannot be of the same nationality. They are elected in brackets of four-year, six-year, and eight-year terms with four judges for each term. The judges would be elected through secret ballot by the Standing Committee from the nominations submitted by the State-Parties. Persons qualified to be nominated must be jurists qualified to serve on the highest courts of their State, distinguished experts in the fields of international criminal law or human rights.

Additionally, a judge may withdraw from a case because of a conflict of interest. A judge may be also be removed from the court for incapacity to fulfill his functions by a unanimous vote of the other judges. No action taken by the tribunal may be contested in any forum other than the court en banc. State-Parties must agree to enforce final judgments of the court in accordance with the provisions of this statute.

106. BASSIOUNI, supra note 1, at 222. The ILA only has jurisdiction to persons not legal entities (corporations, associations) and states. 1984 ILA Draft, supra note 72, at 259, 282.
107. BASSIOUNI, supra note 1, at 225.
108. Id. at 236-37. The ILA draft provides that the Court shall consist of nine members serving six years. The judges must be jurists of international repute and represent different countries. A Contracting State (similar to a State-Party) may nominate two candidates. The Contracting States will then elect the judges from their nominations. 1984 ILA Draft, supra note 72, at 259-260.
109. BASSIOUNI, supra note 1, at 236-37.
110. Id. at 236.
111. Id.
112. Id.
113. Id.
114. BASSIOUNI, supra note 1, at 236.
115. Id.
116. Id.
117. Id. at 236-37.
2. *The Pretrial Process.*— No criminal process can be initiated unless a complaint is communicated to the Procuracy.\textsuperscript{118} The Procuracy is the organ of the tribunal that investigates, prosecutes, and oversees the application of the decisions of the court.\textsuperscript{119} If a complaint is made by a State-Party, it is obligated to do anything and everything necessary to assist the tribunal in its proceedings, including transmitting relevant documents, information, and materials relevant to the accused.\textsuperscript{120}

The Investigative Division of the Procuracy undertakes an investigation to determine whether or not complaints are "manifestly unfounded."\textsuperscript{121} Once the complaint is deemed "not manifestly unfounded," the record will be transferred to the Prosecutorial Division of the Procuracy, and the accused and the State of the accused will be immediately informed.\textsuperscript{122} The prosecutor's communication shall be made in any of the official languages of the accused's country.\textsuperscript{123}

In cases of urgency, the competent authorities of the Tribunal may request the accused's State to provisionally arrest the person sought for extradition in order to prevent escape.\textsuperscript{124} This provisional arrest is only valid for thirty days while the prosecutor prepares the formal documents for the individual's extradition.\textsuperscript{125}

The prosecutor must also request orders from the appropriate chamber of the court for arrest warrants, subpoenas, injunctions, search warrants, and warrants for the surrender of the accused.\textsuperscript{126} All orders should be executed pursuant to the relevant laws of the

\textsuperscript{118} Id. at 226. The ILA states that only individuals or groups of a Contracting State may present a complaint. The alleged offender must be a citizen of a Contracting State. 1983 ILA Draft, supra note 72, at 427.

\textsuperscript{119} BASSIOUNI, supra note 1, at 239. The ILA created an International Commission of Criminal Inquiry (Commission) consisting of seven members who are "jurists of repute." 1983 ILA Draft, supra note 72, at 426.

\textsuperscript{120} BASSIOUNI, supra note 1, at 87.

\textsuperscript{121} The Procuracy cannot deem a complaint by a State-Party or Organ of the U.N. "manifestly unfounded." Other states and intergovernmental organizations can appeal a "manifestly unfounded" determination to the court. BASSIOUNI, supra note 1, at 226.

\textsuperscript{122} Id.

\textsuperscript{123} Id.

\textsuperscript{124} Id.

\textsuperscript{125} The formal documents necessary to inform the State of the investigation of the accused must include: the authority and jurisdiction of the Tribunal; the basis and legal reasons; the information concerning the individual; the facts underlying the request; and some evidence concerning the charges. This documentation also applies to a request for evidence. Id. at 183.

\textsuperscript{126} BASSIOUNI, supra note 1, at 183.
State in which they are executed. The prosecutor then presents the case to the court for a preliminary hearing. The accused is present with counsel at this preliminary hearing.

At the preliminary hearing, the court will determine whether the case is reasonably founded in law and fact, and whether there were any prior proceedings before this tribunal or elsewhere barring the process according to the principles of double jeopardy and fundamental notions of fairness. The court also determines whether any conditions exist that would render the adjudication unreliable or unfair.

The draft also states that due regard will be given to the principle of fairness and the concept of a “speedy trial” when scheduling the proceedings. A statute of limitations will also prohibit prosecution or punishment for international criminal code crimes, with the exception of war crimes and crimes against humanity. Other drafts, such as the ILA’s drafts provide more procedure during the preliminary hearings.

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127. Id.
128. Id.
129. If the accused, by reason of personal conditions, is unable to assume his own defense or to provide his own defense, counsel will be appointed ex officio. Id. at 246. See also infra notes 171-75 and accompanying text. This is the draft’s first provision for counsel for the accused.
130. The commentary explains that this clause “provides an opportunity for early consideration of whether misconduct in preparation of the case may have impugned the Tribunal’s integrity in such a way to impair the credibility or acceptability of its determinations.” BASSIOUNI, supra note 1, at 230.
131. The commentary states that this clause is intended to deal with the possibility that non-cooperation of States, particularly non-Parties, may render evidence (either incriminating or exculpatory) unavailable, so that a fair trial would be impossible. Early detection of these problems would tend to avoid double jeopardy questions regarding aborted proceedings. Id. at 230.
132. Id. at 229.
133. The Statute of Limitations bars prosecution or punishment by a period of limitations of lesser duration than the maximum penalty ascribed to the crime in question. Id. at 111.
134. The ILA provides that the Commission will investigate the complaint and can request national authorities to assist in the performance of its functions. The Commission may call witnesses, request evidence and call experts. The accused shall have the right to be assisted by counsel, submit evidence, cross examine witnesses and inspect any documents introduced in the inquiry. Where the Commission has a strong suspicion and belief, on reasonable and probable grounds, that the person committed the offense covered under the international criminal code, it may request the Contracting State to confer jurisdiction and take the person into custody. Upon a majority vote by the Commission, they may recommend an indictment. 1983 ILA Draft, supra note 72, at 429-430.

The indictment shall contain the statement of facts which constitute the offense and specific reference to the legal provisions under which the accused is
3. The Trial Process.— According to the draft proposal, cases shall be heard by a three judge panel without a jury. Hearings on the ultimate merits of the case will be conducted in public and the deliberations will be held in camera. The court will give equal weight to evidence and arguments presented in accordance with the principle of “equality of arms” of the party. Further, during the course of the proceedings, the accused would be entitled to certain basic rights, such as the presumption of innocence, the right to a speedy trial, the right to question the legality of obtained evidence, the right to remain silent, the right to assistance of counsel, and the right to question whether charges are based upon reasonable grounds.

This draft also recognizes principles of exoneration, justification, and excusability. This would allow the accused to be released from liability for his actions. These defenses include self-defense, necessity, coercion, obedience to superior orders, refusal to obey a superior order which constitutes a crime, mistake of law or fact, double jeopardy, insanity, intoxication or drugged condition, and renunciation.

Lay or expert witnesses may be called by both parties. The witnesses can only testify on their voluntary consent. Howev-

charged. The court is not bound to apply the legal provisions referred to in the indictment, but will give reasonable notice to the parties to enable them to prepare accordingly. 1984 ILA Draft, supra note 72, at 289.

135. BASSIOUNI, supra note 1, at 231.
136. Id. The ILA provides for hearings to be public unless private sessions are necessary in the international public interest. For example, sessions held in camera may become necessary in order to prevent methods of illicit traffic in dangerous drugs or methods of currency counterfeiting from being disclosed to the public. 1984 ILA Draft, supra note 72, at 288.
137. “Equality of arms” means the accused will have substantial parity in the proceedings. See infra notes 157-58 and accompanying text.
138. See infra notes 151-81 and accompanying text.
139. BASSIOUNI, supra note 1, at 109-112.
140. Bassiouni’s commentary explains:
While the civil law system would view the conditions of exoneration listed in this Article as a questionable combination of principles of responsibility and legal defenses, it was felt that a single Article containing all conditions which ultimately result in exoneration of responsibility, irrespective of their doctrinal or dogmatic basis should be placed together, as it gives these aspects a sense of cohesion and practical use by an international tribunal.

Id. at 109-112.
141. Id. at 198.
er, even if witnesses volunteer to testify, their State of residence may deny the transfer to testify before the ICC.  

The decisions of the Court are to be announced publicly and accompanied by written findings of fact and conclusions of law. Upon a determination of guilt, a separate hearing will be held regarding the sanctions to be imposed. This hearing will allow for evidence of mitigation and aggravation. The accused and the Procuracy may appeal questions of law to the court en banc. Decisions of the court en banc and unappealed determinations will be deemed final unless:

1. Evidence unknown at the time of the Determination has been discovered which would have had a material effect on the outcome of the said Determination or order; or
2. The Court or Chamber was flagrantly misled as to the nature of matters affecting the outcome; or
3. On the face of the record the facts alleged have not been proved beyond a reasonable doubt; or
4. The facts proved do not constituted a crime within the jurisdiction of the Tribunal; or
5. Other grounds the Court may provide by its Rules.

The punishment to be imposed upon an individual found guilty is determined by Sanction Supervising Judges of the ICC. The court may also call upon any State-Party to impose the sentence in accordance with the state’s laws.

4. Procedural Rights of the Accused.—— The rights of the accused provided for in the draft are the fundamental human rights enunciated in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. These rights include the presumption of innocence, “equality of arms,”

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142. Denial of transfer may be based upon the possible detrimental effect on the course or conduct of the legal proceedings or for reasons of the safety, welfare and well-being of the witness. Id. at 198.
143. Id. at 233.
144. BASSIOUNI, supra note 1, at 233.
145. Id.
146. Id. at 234. The ILA states that decisions are final and not appealable. 1984 ILA Draft, supra note 72, at 266.
147. BASSIOUNI, supra note 1, at 234.
148. Id. at 234-5.
149. Id. at 235.
speedy trial, evidentiary protections, the right to remain silent, assistance of counsel, prohibition of arrest and detention unless based on reasonable grounds, and protection of the rights and interests of the victim.\footnote{151}{BASSIOUNI, supra note 1, at 245-48. The ILA draft differs in that the procedural rights are limited to the presumption of innocence, the right to be present in all proceedings, the right to have the proceedings translated into his own language, the right to be heard and cross-examine witnesses, the right to remain silent, and the right not to take an oath. 1984 ILA Draft, supra note 72, at 265.}

The following provide descriptions and illustrations of Bassiouni's draft Article XXIX, "Standards for Rules and Procedures," of the protected rights for the accused under the international criminal code.

The presumption of innocence is a "fundamental principle of justice."\footnote{152}{Id.} One protection under this principle is that no one can be convicted or declared guilty unless he has been tried in a fair trial.\footnote{153}{Id.} A second protection is that no criminal punishment or any equivalent sanction may be imposed upon the accused unless he has been proven guilty according to the law.\footnote{154}{Id.} A third protection is that no person shall be required to prove his innocence.\footnote{155}{Id.} Finally, the decision must be in favor of the accused in cases of doubt.\footnote{156}{Id.}

"Equality of arms" is a procedural protection given to the accused to ensure substantial parity in proceedings and procedures.\footnote{157}{Id.} This includes giving the accused effective ways to challenge evidence produced by the prosecution and the right to present a defense.\footnote{158}{Id.}

Criminal proceedings shall be speedily conducted to protect the accused without interfering with the defendant's right to adequately prepare for trial.\footnote{159}{Id.} This protection provides for time limits for each stage of the proceedings and can only be extended by order of the court.\footnote{160}{Id.} Additionally, complex cases involving multiple defendants can be severed in the interests of time and fairness.\footnote{161}{Id.} Furthermore, administrative and disciplinary measures
will be taken against officials of the tribunal who negligently violate these rules.\textsuperscript{162}

Evidentiary protections ensure that all procedures and methods for securing evidence, which interfere with internationally guaranteed human rights, must be in accordance with the standards set forth by the ICC and the international criminal code.\textsuperscript{163} Likewise, evidence will not be admissible in court if it was obtained directly or indirectly by illegal means.\textsuperscript{164} If the evidence does not constitute a serious violation, it will be admissible upon the discretion of the judge.\textsuperscript{165} Finally, the admissibility of evidence must also take into account the “integrity of the judicial system, the rights of the defense, the interests of the victim, and the interests of the world community.”\textsuperscript{166}

The right to remain silent protects a person who is accused of a criminal violation. The accused must be informed of this right.\textsuperscript{167} However, the Bassiouni draft does not explain when the accused would be informed of this right. There is also no mention of whether that silence could be used against the accused.\textsuperscript{168}

The assistance of counsel is another protection provided to the accused at all stages of the proceedings, after the preliminary hearing. Anyone suspected of a criminal violation has the right to defend himself and to choose competent legal assistance.\textsuperscript{169} Counsel will be appointed if the accused is unable to assume a defense or provide for such a defense through counsel.\textsuperscript{170} The accused or counsel for the accused should be provided with all incriminating and exculpatory evidence available to the prosecution as soon as possible.\textsuperscript{171} The counsel or the accused must be given reasonable time to prepare a defense.\textsuperscript{172} Furthermore, if the accused is detained, counsel will have the right to access to the

\textsuperscript{162} Id.
\textsuperscript{163} Id.
\textsuperscript{164} Illegal means of obtaining evidence involves a serious violation of internationally protected human rights or a violation of this convention and rules of this tribunal. Id. at 246.
\textsuperscript{165} 1984 ILA Draft, supra note 72, at 245-46.
\textsuperscript{166} Id. at 246.
\textsuperscript{167} Id.
\textsuperscript{168} Id.
\textsuperscript{169} Id.
\textsuperscript{170} 1984 ILA Draft, supra note 72, at 246.
\textsuperscript{171} The counsel should have such information no later than the conclusion of the investigation or before adjudication. Id.; BASSIOUNI, supra note 1, at 246.
\textsuperscript{172} Id.
accused and communicate in private, subject only to reasonable security measures decided by a judge of the court.\textsuperscript{173}

The right against arbitrary arrest and detention protects the accused from being deprived of his or her liberty until there are reasonable grounds to believe that the accused committed an international crime.\textsuperscript{174} Additionally, a court must make the determination of whether a person can be deprived of his or her liberty.\textsuperscript{175} Any arrest and detention must be in conformity with the Standard Minimum Rules for Treatment of Prisoners and the Principles on Freedom from Arbitrary Arrest and Detention of the United Nations.\textsuperscript{176} Alternative measures to detention, such as bail, should be used whenever possible.\textsuperscript{177} Prior detention will be credited toward the fulfillment of the sanctions imposed by the Court.\textsuperscript{178}

The rights and interests of victims include giving the victim the opportunity to participate in the criminal proceedings and the right to protect his civil interests.\textsuperscript{179} Another right is access to prior records of a similar prosecution.\textsuperscript{180} However, as long as the records of any prior proceeding are taken into account, including any prior measures in respect to the guilt of the accused, the case will not be barred under double jeopardy.\textsuperscript{181}

This outline of Bassiouni's draft intends to provide a framework to compare a proposed court with other existing criminal justice systems. The next part of this article surveys the Iranian criminal justice system and its ideology. Afterward, Bassiouni's draft will be compared with the Iranian and American systems in order to predict Iranian and American reasons for supporting or opposing an ICC.

IV. A Survey of the Iranian Criminal Justice System

This part explains the judicial structure and criminal procedures provided for the accused in Iran. The reason this country is discussed and eventually compared with Bassiouni's draft is due to

\textsuperscript{173} Id.
\textsuperscript{174} Id.
\textsuperscript{175} Id.
\textsuperscript{176} See BASSIOUNI, supra note 1, at 247. Bassiouni's commentary provides a list of various treaties by which these standards will be determined.
\textsuperscript{177} Other measures include house arrest and work release. Id. at 247.
\textsuperscript{178} Id. at 246-47.
\textsuperscript{179} Id. at 246-48.
\textsuperscript{180} Id.
\textsuperscript{181} BASSIOUNI, supra note 1, at 246-48.
its radical adoption of Islamic Law. Moreover, studying the Islamic system of Iran may also reflect similar value systems of the forty-two other Muslim countries of the world.182

A. Relevant History of Iran

To understand the Iranian system, one must first understand the history and ideology underlying its criminal justice system. The Iranian Revolution of 1978-79 was the end of a long struggle between the Islamic revivalist movement and the secular Western ideas that were spreading throughout the region.183 The Ayatollah Yahya Noori, a Muslim scholar in Iran, described the revolution as “not a new phenomenon but a continuation of the age-long struggle between the forces of justice and injustice, piety and impiety, truth and falsehood, Islam and its enemies.”184

The victory of the Ayatollah Khomeini and the Islamic militants over the Pahlavi monarchy resulted in a dramatic upheaval of the governing infrastructure of Iran.185 The Constitution of 1906-07, which ensured that Iranian laws were to be largely imported from European countries, was abandoned.186 Also abandoned, was the Iranian Penal Code, which was first drafted by a French jurist and was heavily based upon French civil law.187 The Iranian Revolution replaced this secular, Western-styled government with an Islamic government which would rely on Traditional Islamic Law (Sharia)188 as the primary source of law. This replacement of secular law for Islamic law was especially prevalent in criminal justice cases.

182. For example, in the Middle East alone, Islamic Law is incorporated in the constitutions, civil codes, or national laws of countries such as: Bahrain, Kuwait, Qatar, Syria, the United Arab Emirates, Egypt, Iraq, Libya, Saudi Arabia, and Oman. S.H. AMIN, MIDDLE EAST LEGAL SYSTEMS 1 (1985).

183. See generally, Nader Entessar, Criminal Law and the Legal System in Revolutionary Iran, 8 B.C. THIRD WORLD L.J. 91 (1988). Other sources explain that the revolution had more to do with the corruption of the monarchy rather than the mass desire for a return to Islam. This opinion is based on the fact that many secular lawyers and judges were in support of the revolution. Michael M. J. Fischer, Legal Postulates in Flux: Justice, Wit, and Hierarchy in Iran, in LAW AND ISLAM IN THE MIDDLE EAST, at 115-116 (Daisy Hilse Dwyer ed., 1990).


185. AMIN, supra note 182, at 57; Fischer, supra note 183, at 117; Entessar, supra note 183, at 93.

186. Id.

187. Id.

188. Id.
Sharia is derived from the Koran, the holy book of Muslims.\textsuperscript{189} However, because the Koran states relatively few defined legal rules,\textsuperscript{190} three other sources have contributed to Islamic Law. The following sources are listed in order of importance when determining Islamic Law. Statements and deeds of the Prophet Mohammed and the Imams\textsuperscript{191} (Hadith) is the second main source of Islamic Law. The constitution created after the Iranian revolution states that in the absence of the Imam, all political and legal power emanates from a “Just Jurist.” The Jurist was Khomeini.

Another source of Islamic law is “ijma,” which refers to the consensus of Islamic legal scholars when interpreting the sources of law previously described.\textsuperscript{192} The last source of law is the “aql,” which is the sitting judge’s analogic reasoning when deciding a case.\textsuperscript{193} The interpretation of Sharia law could only be done by an Islamic cleric or persons with traditional Islamic educations.\textsuperscript{194} Therefore, all judges with Western training were removed from their positions.\textsuperscript{195}

Critics of this system cite the inherent arbitrariness of this law which has resulted in the elimination of due process, repression and intimidation of citizens.\textsuperscript{196} However, documents such as judicial opinions or other reports relating to the present-day interpretation and implementation of Sharia law in Iran are not readily available, particularly in the United States.\textsuperscript{197} As a result, it will not be feasible to dispute or affirm such criticisms in this paper. Therefore, the following discussion on the judicial structure, trial process, and procedural safeguards of an ICC will be based upon the laws Iran theoretically claims to follow. Whether the Iranian judiciary

\\textsuperscript{189} Fischer, supra note 183, at 117.
\textsuperscript{190} Approximately 600 lines would be defined as legal rules in the Koran.
\textsuperscript{191} Imams are considered the rightful successors to the Prophet in the Shi'a branch of Islam. Shi'ism is the dominant belief system in Iran. Entessar, supra note 183, at 92.
\textsuperscript{192} Entessar, supra note 183, at 94; Fischer, supra note 183, at 121.
\textsuperscript{193} Id.
\textsuperscript{194} Id.
\textsuperscript{195} AMIN, supra note 182, at 62-63; Entessar, supra note 183, at 92. The Western-influenced Bar was also dismantled in 1981-1982 when regarded as a roadblock to implementing Islamic law. ANN ELIZABETH MAYER, ISLAM AND HUMAN RIGHTS: TRADITIONS AND POLITICS 34-35 (1991).
\textsuperscript{196} MAYER, supra note 195, at 35; Entessar, supra note 183, at 101.
\textsuperscript{197} AMIN, supra note 182, at 64. Research by the author of this paper verifies this conclusion.
actually follows and implements these laws cannot be addressed because of resource limitations.

B. Defining Criminal Law

The criminal code of Iran was first ratified in 1936 and was replaced in 1982 and 1983 after the revolution. The criminal procedure code of 1932 was also replaced immediately after the revolution in 1979. The revolution repealed these codes and all rules and procedures related to investigation and punishment of crimes. The previous codes were modeled after the French civil code and were, therefore, considered a manifestation of western cultural imperialism.

Replacing the secular codes, Khomeini often preached that God was the sole legislator in Iran, leaving no room for human legislative activity. Ironically, and in spite of that rhetoric, Iranian law has continued to be made, just as it was under the Pahlavi monarchy, in the form of statutes and codes enacted by the Iranian Parliament (Majlis). The legislature still creates law and the judiciary applies such law in light of the power that Khomeini had over the regime. Professor Ann E. Mayer describes the continued adherence to legislative law as the following:

[T]here are Muslims who are aware of the incongruity of raising man-made laws to the stature of primary sources of law in legal systems purportedly designed to reinstate Islamic law. However, the idea that it is governmental enactments that determine what enjoys the status of "law" has become so well entrenched in modern legal systems that the arguments of those who insist that Islamization programs should preserve the traditional Shari'ah methodology have fallen on deaf ears.

Regardless of this incongruity, the legislature’s purpose is still to codify the Sharia and the judiciary’s purpose is to apply this law. Furthermore, judges are ordered to base their decisions on codified

198. AMIN, supra note 182, at 113.
199. Id.
200. Id.
202. Id.
203. Id.
204. Id.
205. Id. at 191.
laws and if they cannot do so, they must use reputable Islamic sources.\textsuperscript{206}

The Iranian Penal Code has divided crimes into four categories based upon the punishment for each offense called hudud, qisa, ta'zir and diyat.\textsuperscript{207} Hudud crimes are acts prohibited by God.\textsuperscript{208} These include theft, robbery, adultery, apostasy, drinking alcoholic beverages, and rebellion against Islam.\textsuperscript{209} Since the Koran explicitly provides the form of punishment to be meted out for each crime, the judge has no discretion regarding punishment. Forms of the death penalty include stoning for adultery, and crucifixion and death by sword for homicide during robbery.\textsuperscript{210} The most well known punishment is amputation of the arm or hand for theft.\textsuperscript{211}

Qisa crimes include murder, manslaughter, battery, mutilation to person, and damage to property.\textsuperscript{212} These crimes are the subject of private claims, and retaliation is allowed by the victim or the victim's family.\textsuperscript{213} There is no prosecution or execution, ex officio, only a guarantee of the right of personal vengeance coupled with safeguards against exceeding legal limits.\textsuperscript{214} However, settlements, other than physical acts of vengeance, are possible. These settlements include blood-money, amicable settlements, and forgiveness of the perpetrator.\textsuperscript{215}

Ta'zir offenses are those to which no specific penalties are mentioned in the Koran or other sources of law.\textsuperscript{216} Common ta'zir offenses include immodest clothing, immoral behavior, and public drunkenness.\textsuperscript{217} Since these offenses are not explicit in
Islamic law, the punishment is left to the discretion of the judge as to the range of punishments set out in the penal code. These punishments range from admonition to public flogging.

Diyat is not a crime, but a separate punishment referring to a form of compensation, or blood-money, which is to be paid to the victim or the victim's family as reparation for an injury or murder. This category is for those who choose to forgo their right of retribution under the qisa punishment.

C. Islamic Criminal Process and Procedure

The following is a discussion of the trial process, procedure, and structure of the Iranian criminal system. The first section will discuss the definition and role of the judiciary. The second and third sections will discuss the pretrial and trial processes for the criminally accused in Iran. The final section will list and explain the specific procedural protections provided for an individual who is accused of a crime.

1. The Judiciary.— The new constitution of 1979 delegates the administration of justice in Iran to the Ministry of Justice. The courts within the Ministry of Justice include the Supreme Judicial Counsel, Court of Cassation, Public Courts, and Special Criminal Courts. The following discussion will describe the purpose of each of these courts.

   a. Supreme Judicial Counsel The five members of this counsel have two purposes. As the supreme body of judicial authority, the counsel has wide latitude in interpreting the Sharia and ultimate authority over all judges in Iran. Specifically, the court determines the laws under which the lower courts operate. They also hear appeals from defendants sentenced to the death penalty. Counsel members must be learned scholars of

218. Id.
219. Id.
220. LIPPMAN, supra note 208, at 50; SCHACHT, supra note 208, at 181; Entessar, supra note 183, at 98.
221. Id.
222. The concept of a constitutional government is clearly a Western notion. Nevertheless, the Islamic revolutionaries acquiesced to political pressure and created a new constitution, although subordinate to the limits of Islamic Law. Mayer, supra note 201, at 191.
223. Entessar, supra note 183, at 98.
224. Id. at 99.
225. Id.
Islamic law who are called "mujtahid" and they must be confirmed by the "just jurist." They serve a five year renewable term. Three members are elected by sitting judges of various courts. Two members, including the Chief Justice, are appointed by the "Just Jurist."

b. The Court of Cassation (The Supreme Court) Before the revolution, the court of Cassation functioned as the highest appeals court in the country. However, after the revolution, all intermediate courts of appeals were abolished except this court. This court still hears criminal appeal cases, with the exception of death penalty appeals, which are heard by the Supreme Judicial Counsel. The main function of this court is to supervise the proper application of laws by the lower courts. The president of the Supreme Court must be a Mujtahid.

c. Public Courts After the revolution, public courts were established to deal with both civil and criminal cases. In the criminal area, the public courts are divided into two subcategories, First and Second Class criminal courts. The jurisdiction of First Class criminal courts covers major criminal cases where convictions normally carry a death sentence, long term imprisonment, and heavy fines. Decisions handed down in this court can theoretically be appealed to the Court of Cassation if the penalty involves over two months imprisonment. However, it is extremely difficult to take an appeal. Death penalty decisions are appealed to the Supreme Judicial Counsel. Second Class criminal

226. Id. at 98-99.
227. Id.
228. Entessar, supra note 183, at 99.
229. Id.
230. Id.
231. Id.
232. AMIN, supra note 182, at 134.
233. Id.; Entessar, supra note 183, at 99.
234. Entessar, supra note 183, at 99.
235. Id.
236. Id.
237. Id.
238. Id.; AMIN, supra note 182, at 131.
239. Entessar, supra note 183, at 99. Because the judges decided "God's Will" based on sources of law such as the Koran, appeals were considered unnecessary. While exceptions are made in criminal cases, there is not an appeals process in civil cases. Id.
240. Id.
courts have jurisdiction over minor crimes such as vagrancy, beggary, and failure to obey rules of the police or municipal officials. Since the sentences handed down are light, these decisions are final and cannot be appealed.

d. Special Criminal Courts Shortly after the revolution, a number of ad hoc courts were established to try and punish “offenders of the Islamic mores” and “enemies of the Islamic Republic.” One example of this type of court is the Revolutionary Court. This court conducted summary trials of officers and government officials of the former Pahlavi regime. These courts have survived after the initial stages of the revolution and have expanded their jurisdiction to hear all criminal cases including sexual and religious offenses. This court consists of a three judge panel: a religious judge, appointed by the “just jurist”; a civil judge, nominated by the Ministry of Justice and approved by the court’s religious judge; and an individual “trusted by the people” and approved by the religious judge. In practice, the court has been dominated by the religious judge. There is no right to appeal from this court.

2. The Pretrial Process— The following section on pre-trial process describes the treatment one would receive under Islamic Law. In 1979, the Iranian code of criminal procedure claimed to codify Sharia law. Because of the inaccessibility of the Iranian code, this discussion will describe Sharia law.

There are two ways to initiate a lawsuit in Iran. First, the plaintiff may initiate a lawsuit if he or she alleges a qisa crime was perpetrated against the plaintiff or the plaintiff’s family. Second, the state has exclusive right to commence criminal action in the case of Hudud and Ta’zir offenses. In the first instance,

241. Id.
242. Id.
243. Entessar, supra note 183, at 99-100.
244. During the early days of the Revolutionary Court, over 1000 executions occurred within an eleven-week span. These sentences were carried out less than twenty-four hours after the trial. Fischer, supra note 183, at 117.
245. AMIN, supra note 182, at 131.
246. Entessar, supra note 183, at 100.
247. Id. at 101.
248. See supra note 183 and accompanying text.
249. LIPPMAN, supra note 208, at 68; SCHACHT, supra note 208, at 189-90.
250. Id.
the plaintiff presents the complaint to the appropriate judge.\textsuperscript{251} The judge questions the accused concerning the claim.\textsuperscript{252} If the accused admits guilt, the lawsuit is decided. If the accused denies the claim, the judge asks the plaintiff to produce evidence for the trial.\textsuperscript{253} If the plaintiff declares that he or she has evidence such as witnesses, the judge may demand a surety for the defendant for three days, or the plaintiff may watch over the defendant, wherever he goes, without entering his house.\textsuperscript{254}

For all other crimes, the state initiates the action. If there is reason to believe the accused committed a crime, pretrial investigations begin.\textsuperscript{255} Pretrial detention is largely thought of as unnecessary given the collective obligations of the family and the easy recognition and distrust of strangers, making flight difficult or impossible for the accused.\textsuperscript{256} Pretrial interrogation is conducted by the minister of complaints, an arm of the judiciary, and the prosecutor. The Koran explicitly prohibits the use of beatings, torture, or inhumane treatment to extract a confession.\textsuperscript{257} Confessions must be freely, voluntarily, and truthfully given.\textsuperscript{258} The accused is to be treated humanely and is encouraged to deny his guilt.\textsuperscript{259} In theory, the majority of jurists would exclude from evidence confessions obtained by force or deceit.\textsuperscript{260}

During the investigatory stage, the individual, his home, and his possessions may be searched only by investigative officials, if required for social order and safety.\textsuperscript{261} The minister of complaints must authorize the warrant if there is sufficient evidence that the accused committed the crime.\textsuperscript{262} This evidence may be based upon testimony of a trustworthy witness or pressing circumstantial evidence.\textsuperscript{263}

\begin{footnotes}
\item 251. SCHACHT, supra note 208, at 190, 197.
\item 252. Id.
\item 253. Id.
\item 254. Id.
\item 255. Id.
\item 256. LIPPMAN, supra note 208, at 62.
\item 257. Id. at 63.
\item 258. Id.
\item 259. Id.
\item 260. Id.
\item 261. LIPPMAN, supra note 208, at 65-6.
\item 262. Id. at 66.
\item 263. Id. One example of pressing circumstantial evidence occurs when an official knows that there is a smell of alcohol and noise of intoxicated persons coming from a person's home. Id.
\end{footnotes}
In reality, the pretrial process in Iran was quite different in the early stages after the revolution. Full investigations, as just described, were thought of as a luxury.\textsuperscript{264} As a result, trials and executions were done swiftly to prevent counter-revolutions.\textsuperscript{265}

3. \textit{The Trial Process}.— The litigants and the judge are the focal points in the courtroom.\textsuperscript{266} The right to an attorney during the pretrial and trial stages varies depending on the offense. Counsel is not permitted for Hudud offenses, with the exception of theft and defamation.\textsuperscript{267} Counsel is likely permitted in the trial of Qisa and Ta'zir offenses.\textsuperscript{268} However, judges encourage direct litigant input even when lawyers are present.\textsuperscript{269}

Evidence is limited to three types: eyewitness testimony, confessions, and religious oaths.\textsuperscript{270} This limit is based on the assumption that such evidence possesses a high degree of reliability. One qualification is that an eyewitness must be male, although in isolated instances two women may substitute for one man.\textsuperscript{271} Four witnesses are required to establish the offenses of adultery and sodomy, while two witnesses are required for other offenses.\textsuperscript{272} Another primary requisite to be a witness is that the witness should be a Muslim of good character.\textsuperscript{273} The opposing party may present evidence to prove the witness does not have good character and, therefore, cannot testify.\textsuperscript{274} Once a witness

\begin{itemize}
\item \textsuperscript{264} See Fischer, \textit{supra} note 183, at 117-18.
\item \textsuperscript{265} Id. at 118.
\item \textsuperscript{266} Daisy Hilse Dwyer, \textit{Law and Islam in the Middle East: An Introduction}, in \textit{LAW AND ISLAM IN THE MIDDLE EAST}, at 4 (Daisy Hilse Dwyer ed., 1990).
\item \textsuperscript{267} LIPPMAN, \textit{supra} note 208, at 65.
\item \textsuperscript{268} Id.
\item \textsuperscript{269} Dwyer, \textit{supra} note 266, at 5
\item \textsuperscript{270} See LIPPMAN, \textit{supra} note 208, at 69-73.
\item \textsuperscript{271} These instances include matters to which women have special knowledge such as birth and virginity. Other areas have included property and employment matters. Otherwise, women are disqualified to testify as witnesses because they are viewed as having “weakness of understanding, want of memory and incapacity in governing.” LIPPMAN, \textit{supra} note 208, at 69; SCHACHT, \textit{supra} note 208, at 193.
\item \textsuperscript{272} LIPPMAN, \textit{supra} note 208, at 69.
\item \textsuperscript{273} A man of good character is one who is sane, the age of legal responsibility, free, neither dumb, mute or blind, and never punished for a serious offense or engaged in sinful behavior. LIPPMAN, \textit{supra} note 208, at 69; SCHACHT, \textit{supra} note 208, at 193.
\item \textsuperscript{274} For example, if the witness will benefit from the outcome of the proceedings or if he is a personal enemy of the accused or near relative of one of the parties, he will be disqualified. SCHACHT, \textit{supra} note 208, at 193-94.
\end{itemize}
is qualified, he can only testify to events he directly observed. Hearsay is inadmissible.\textsuperscript{275}

Confession is the second source of evidence used in trials. A confession must be in open court and must be repeated as many times as the number of witnesses required to prove guilt.\textsuperscript{276} As with pretrial interrogations, the admission must be free and voluntary.\textsuperscript{277} Interestingly, the requirement of "truthfulness" in confessions is not stated, although it is required during pretrial confessions.\textsuperscript{278} The confession must also describe the criminal act in detail and must be corroborated by other evidence.\textsuperscript{279}

Oaths are the last sources of evidence admissible at trial. The accused is asked to take an oath of innocence if a plaintiff cannot produce any other evidence that the accused committed the crime.\textsuperscript{280} If the accused takes the oath, the case is dismissed.\textsuperscript{281}

The judge is the fact-finder and decision-maker in the courtroom. No jury system exists in Islamic law.\textsuperscript{282} The judge has a secretary who commits the judgment into writing.\textsuperscript{283} Decisions are final and, under strict Islamic law, there is no appeal.\textsuperscript{284} However, when a judge is replaced, his successor takes over the records and the prison.\textsuperscript{285} This successor has the power to instruct two fiduciaries to review all records to determine whether prisoners were justly imprisoned.\textsuperscript{286} If the judge determines that any individual was improperly imprisoned, he can release that individual.\textsuperscript{287}

In reality, the trial process in Iran was not public and executions were swift, even though the government claimed to follow the Islamic rules of criminal procedure. Iranian scholar Michael M.J. Fisher described the initial realities of the revolution:

\textsuperscript{275} LIPPMAN, supra note 208, at 70.
\textsuperscript{276} Id.
\textsuperscript{277} Id.
\textsuperscript{278} See id.
\textsuperscript{279} Id.
\textsuperscript{280} SCHACHT, supra note 208, at 190.
\textsuperscript{281} Id.
\textsuperscript{282} Id.
\textsuperscript{283} Id. at 188-89.
\textsuperscript{284} Id. at 189.
\textsuperscript{285} SCHACHT, supra note 208, at 189.
\textsuperscript{286} Id.
\textsuperscript{287} Id. at 189. 195-196. LIPPMAN, supra note 208, at 68. Islamic judges, after the revolution, likely used this principal to release prisoners. AMIN, supra note 182, at 63.
Ayatollah Khominei directed the Minister of Justice that all decisions should be swift and final and that there should be no appeal processes in either civil or criminal cases. He reiterated that criminal had no right to lawyers. In part, he was reacting to the interested slowness of the Pahlavi regime's administration of justice, which allowed graft. In part, full investigations were felt to be a luxury, and executions had to be done swiftly in order to protect against a counterrevolution.\(^{288}\)

However, an outcry arose from the middle class population, including the clergy who fought against the brutality of the monarchy's police.\(^{289}\) Their complaints against Khomeini's summary executions caused him to halt the trials until a code of criminal procedure was established.\(^{290}\) The code still allowed Khomeini to appoint prosecutors, obligate sentences to be carried out within twenty-four hours of the trial, and deny criminals the right to an attorney.\(^{291}\) The code did allow trials to become slightly more public and allowed the accused to speak in his own defense.\(^{292}\)

4. Procedural Rights of the Accused.— The fundamental principles from the Koran regarding the rights of individuals include, but are not limited to, the following: all free men are equal before the law and are entitled to equal protection;\(^{293}\) all decisions must conform to the Sharia; laws cannot be applied

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288. Fischer, supra note 183, at 118.
289. Id. at 118.
290. Id.
291. Id.
292. Id. at 118-19. Khomeini also limited the persons who would qualify for executions. Included were those who killed people, issued the order to kill, or commit torture resulting in death. Most of these persons were officials of the monarchy. Executions also continued for sexual deviance, pornography, prostitution, political dissent (in the case of the Kurds), contact with Israel (in the case of prominent Jews), and religious beliefs (in the case of the Bahais). Fischer, supra note 183, at 118-19.
293. These interests are: the guarantee of an individual's right to freedom of religion; thought; expression; the right to have children and self preservation. Id. at 64.
294. LIPPMAN, supra note 208, at 60. As for non-muslims, they are not subject to Hudud punishments for drinking, fornication, or defamation. They also cannot testify against muslims. Women, as well, have an inferior status and are treated less harshly for apostasy and monetary damages. Certain exceptions also exist for slaves. Id.
and the accused is presumed innocent until proven guilty. Based upon these principles, the accused is to be free from pretrial detention, is free from warrantless search and seizures, is permitted to present evidence in court, has the right to remain silent during interrogation, and has the right to retain an attorney.

a. Pretrial Detention Pretrial detention is not used in Islamic law. This prohibition derives from the idea that the mere accusation of guilt is not sufficient to justify detention since the accused is presumed innocent. Some modern-day commentators in Muslim regions advocate the use of pretrial detention in some circumstances. However, it is not clear whether Iran today supports these opinions.

b. Warrantless Search and Seizures Warrantless search and seizures are prohibited in Islamic law. An investigative official can only search an individual, his home, and his possessions with a warrant. Evidence discovered in the course of an unauthorized search will not support the issuance of a warrant and is inadmissible at trial. Once the warrant is obtained, the extent of the search appears to have no limits.

c. The Right to Present Evidence The right to present evidence in court is a right provided for both the plaintiff, prosecutor, and the defendant. This evidence specifically includes the right to prove a witness is not qualified to testify. However, the right to present evidence to challenge the credibility of witnesses does not appear to mean that the defendant has the right to cross-examine the hostile witnesses.

d. The Right to Remain Silent The right to remain silent during interrogation is a protection afforded to the accused.

295. According to Lippman, most jurists contend that a law benefitting the accused may be applied retroactively. Id. at 61.
296. Id.
297. See id. at 62-69.
298. LIPPMAN, supra note 208, at 62.
299. Id.
300. Id. at 65-66.
301. Id. at 66.
302. Id.
303. LIPPMAN, supra note 208, at 64; SCHACHT, supra note 208, at 193.
304. Id.
This right allows the individual to refuse to answer questions and such silence may not be used as evidence of guilt. This protection appears only to be present during an interrogation, not at any other pretrial or trial proceedings. Therefore, if the accused remains silent at any other proceeding, besides interrogation, the silence may be used against him.

e. The Right to Retain an Attorney

The right to retain an attorney is a right based upon the principle of self-preservation. The accused has the right to receive assistance to protect his interest. This assistance includes counsel. The accused and his attorney must be informed of the charges and the supporting evidence. Further, the accused must be informed of the evidence the prosecution has indicating his innocence. The accused may be present during all proceedings against him and has the right to be informed of what occurred if he or his attorney fails to attend.

In sum, this discussion on criminal practices and procedures in Iran has only described the theoretical protections provided to the defendant. In reality, scholars have criticized the Iranian government and the courts for its highly arbitrary conduct regarding all criminal practice and procedure. Nevertheless, the theoretical adoption of Islamic law in Iran will be used to compare with Bassiouni’s proposed draft of an international criminal court. Comparing the criminal systems of Iran and the United States with the proposed draft will clarify possible areas of support and dissent. This result may shed light on why these countries may not support adoption of Bassiouni’s draft.

V. Comparing Iran and the United States With Bassiouni’s International Criminal Tribunal Draft Proposal

The purpose of this section is to compare the draft of the International Criminal Tribunal with two other systems, Iran, discussed supra, and the familiar, generalized system of the United

305. LIPPMAN, supra note 208, at 63.
306. Id.
307. Id.
308. Id.; SCHACHT, supra note 208, at 190.
309. LIPPMAN, supra note 208, at 64; SCHACHT, supra note 208, at 190.
310. LIPPMAN, supra note 208, at 65.
311. Id.
312. Id.
313. See Entessar, supra note 183, at 101; MAYER, supra note 195, at 34-49.
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States. Comparing the system of Iran and the United States with the draft reveals several apparent conflicts that may cause these countries to be adverse to adopting an International Criminal Tribunal. The Islamic underpinnings of the Iranian government and the complex procedural laws of the United States will certainly provide a basis for disputing the ICC. As such, this discussion will review the draft of the Tribunal with an eye toward the possible areas of support and dispute from the United States and other Muslim countries, exemplified by Iran.314

A. The Judiciary

Bassiouni’s international court draft provides that there will be twelve judges of different nationalities sitting in rotational panels of three.315 The judges would be elected by a secret ballot cast by Standing Committee of the state-parties.316 They would be distinguished experts in the fields of international criminal law or human rights and other jurists qualified to serve on the highest courts of their state.317 A judge may be removed from a case for conflict of interest or for incapacity to fulfill his functions.318 There would be no jury system, thus, decisions would be made solely by the judges.319

1. Comparison of the Draft with the Iranian Judiciary— The Iranian judiciary is generally divided into four chambers consisting of the Supreme Judicial Counsel, the Court of Cassation, the Public Courts and the Special Courts.320 A similarity between the Iranian and the proposed draft’s systems is the use of the judge as the sole fact-finder. The most obvious difference between the ICC’s judiciary and the Iranian judiciary is that the vast majority of the judges in Iran must be learned Islamic law scholars and confirmed by the “just jurist.”321 One of the most likely reasons for having religious judges in Iran is because they are interpreting

314. This paper will not discuss differing definitions for substantive criminal law in these countries. Assuming that the multilateral treaties will be sufficient to define substantive criminal law, this paper instead explores the procedural comparisons of the three systems.
315. See supra notes 108-09 and accompanying text.
316. Id.
317. Id.
318. See supra note 109 and accompanying text.
319. Id.
320. See supra note 222 and accompanying text.
321. Id.
Islamic law, not secular law. However, Bassiouni's draft of substantive criminal will consists of numerous multilateral treaties, which are not based on Sharia law. Instead, these treaties represent a span of countries with value systems ranging from Judeo-Christian to Marxist. Therefore, if the Iranians are to support the multilateral treaties, they must accept that such treaties are not solely based upon Islamic law. If they are not based upon Islamic Law, it would not be necessary to have all judges be learned scholars of Islamic Law. However, based on the early revolutionary tones of Khomeini, Western judges trying the alleged criminal actions of an Iranian would be perceived as returning to western "imperialism."

2. Comparison of Draft with the United States Judiciary.— When comparing the Bassiouni draft with the system in the United States it should first be noted that the United States Constitution does not preclude participation in an ICC. Professor Louis Henkin states that some element of fundamental fairness would be required in an ICC. Therefore, any comparison of the draft and the United States counterpart will assume the United States is not prohibited from participating. Instead, the issue will be whether the procedural safeguards in a draft statute of the ICC are sufficient to persuade the United States into participating.

The President of the United States, with Senatorial consent, appoints individuals to serve on the Supreme Court. The only constitutionally stated qualification to be a judge in the United States is citizenship. The ICC draft states that a qualification to be on the ICC is that a person must be qualified to serve on their nation's highest court. Since the draft allows for such general requirements, the result could be the appointment of an uneducated, unexperienced judge.

Another source of contention between the ICC judiciary and the United States judiciary is the jury system. In the United States, the deeply ingrained right to a jury trial is guaranteed by Article III, as well as the Sixth, Seventh, and Fourteenth Amendments of

322. See generally Entessar, supra note 183, at 91.
323. See infra note 402 and accompanying text.
325. BASSIOUNI, supra note 1, at 236 et seg.
the Constitution. Professor James J. Gobert described the importance of the jury system in the United States:

The strength of the jury lies in the fact that it is not totally circumscribed by legal rules; and that it has the practical power to do what is right, and not just what is technically required by law. While this power may on occasion have been abused, its proper exercise presents the jury in its finest light. The potential for abuse can and should be corrected by greater care in the selection and instructions of juries, but such potential may be an acceptable price for providing the jury the freedom to do justice in the individual case.327

The fact that the ICC draft does not provide a jury system will likely be a source of contention for the United States. It is clear that the ICC will not have to abide by the standards provided in the United States Constitution. However, a right that is a crucial part of the United States criminal justice system, may be a right too basic to forgo.

B. The Pretrial Process

In Bassiouni's draft of the International Criminal Tribunal, the criminal process is initiated by a complaint to the Procuracy.328 If the Investigative Division determines that the complaint is "not manifestly unfounded," the record will be transferred to the Prosecutorial Division.329 If a state-party or an organ of the U.N. makes a complaint, it cannot be deemed "manifestly unfounded."330

The prosecutor can request the accused's state to provisionally arrest the individual until the prosecutor prepares the necessary documents for extradition.331 The prosecutor may also request the court to issue arrest warrants, subpoenas, search warrants, and warrants for the extradition.332 Afterwards, the prosecutor presents the case to the court for a preliminary hearing.333 The court will determine a number of issues such as: the reasonable-

327. Id.
328. See supra note 121 and accompanying text.
329. Id.
330. Id.
331. See supra note 129 and accompanying text.
332. Id.
333. Id.
ness of the case in light of the law and facts; double jeopardy concerns; any violations of fundamental notions of fairness such as misconduct in preparing the case; and whether conditions exist that would render adjudication unreliable or unfair.\textsuperscript{334} The court will also give due regard to the statute of limitations, fairness, and the “speedy trial” principal.\textsuperscript{335}

1. \textit{Comparison of Draft with Iranian Pretrial Process}.— In Iran, under Sharia Law, there are two ways to initiate a lawsuit, depending on the alleged offense. If a qisa crime, that is, a violent crime against an individual,\textsuperscript{336} is the alleged offense, the victim or family of the victim must present the complaint to the judge.\textsuperscript{337} One major difference between the draft and the Iranian system is that violent crimes perpetrated against an individual are the subjects of private claims in Iran.\textsuperscript{338} For example, such crimes against individuals can be resolved by retaliation by the victim’s family.\textsuperscript{339} It seems highly unlikely that the ICC would sanction retaliation for international crimes.

In Iran, if the crime alleged is a hudud\textsuperscript{340} or tazir\textsuperscript{341} crime, the State initiates the action.\textsuperscript{342} If there is reason to believe the accused committed the crime, a pretrial investigation begins.\textsuperscript{343} Pretrial detention is considered largely unnecessary because of collective obligations of the family, easy recognition and distrust of strangers, making flight difficult or impossible.\textsuperscript{344} The lack of pretrial detention in Iran differs from the proposal in the draft for an International Tribunal. If an international prosecutor requested Iran to hold a possible defendant, this would directly contradict Iran’s rule against pretrial detention.

Further, during the investigatory stage, the investigative officials in Iran may search the individual, home, and possessions with a warrant from the Minister of Complaints.\textsuperscript{345} The draft of the International Criminal Tribunal will not conflict with these rules.

\begin{itemize}
\item \textsuperscript{334} Id.
\item \textsuperscript{335} Id. See supra note 132 and accompanying text.
\item \textsuperscript{336} See supra note 251 and accompanying text.
\item \textsuperscript{337} Id.
\item \textsuperscript{338} Id.
\item \textsuperscript{339} Id.
\item \textsuperscript{340} See supra note 256 and accompanying text.
\item \textsuperscript{341} See supra note 250 and accompanying text.
\item \textsuperscript{342} Id.
\item \textsuperscript{343} Id.
\item \textsuperscript{344} Id.
\item \textsuperscript{345} Id. See supra note 263 and accompanying text.
\end{itemize}
of search and seizure because the prosecutor will follow the laws of
the State in which the warrants are executed. However, unlike
Iran, the draft does not explicitly state that evidence will be
automatically excluded if obtained without a warrant. The
preliminary hearing envisioned in the draft does not exist in Iran.
However, in Iran, there is a requirement that a warrant be obtained
before any search or seizure and based upon testimony of a witness
or pressing circumstantial evidence. Therefore, Iran may
consider the added procedure of a preliminary hearing as a
needless roadblock to the prosecution of criminals.

2. Comparison of Draft with United States Pretrial Process.—
Since the pretrial process in the United States is more
complex, this article discusses the fundamental differences with
Bassiouni’s draft. The Fourth Amendment of the U.S. Constitution
provides, “The right of the people to be secure in their persons,
houses, papers, and effects, against unreasonable searches and
seizures, shall not be violated, and no Warrants shall issue, but
upon probable cause . . . .” There are two clauses within this
Amendment that likely conflict with the draft. The first is the
protection against unreasonable searches and seizures. If the
suspect can show that the search was unreasonable, the evidence
obtained as a result of the search will not be admissible at trial.
In Bassiouni’s draft, once the Prosecutorial Division gets a warrant
from the ICC, it must execute all orders pursuant to the relevant
laws of the country. Therefore, the International Prosecutor
will conduct a search according to the law of the United States
which prohibits unreasonable searches and seizures. However,
if the search was later to be found unreasonable, there are no
explicit provisions in the draft to exclude such evidence.

The second clause contained in the Fourth Amendment is that
no warrant shall be issued without probable cause. Probable
cause generally means that officials must have trustworthy evidence
that would make a reasonable person think it more likely than not
that the proposed arrest or search is justified. This applies to

346. See supra note 164-66 and accompanying text.
347. Id.
348. U.S. CONST. amend. IV.
350. See supra note 164-66 and accompanying text.
351. Id.
352. U.S. CONST. amend. IV.
353. See supra note 347.
warrantless arrests and searches as well.\textsuperscript{354} The draft proposal states that any provisional or pretrial arrest or detention shall only take place when the court determines that there are reasonable grounds to believe the accused committed the crime.\textsuperscript{355} If this standard is less than the standard of probable cause, the result may be the arrest or detention of an American who would not otherwise have been arrested or detained in the United States. In regards to search warrants, there is no standard of reasonableness required. The warrant is in the complete discretion of the judge.\textsuperscript{356} Furthermore, evidence obtained without a warrant is not necessarily excluded at trial.\textsuperscript{357}

The Fifth Amendment of the United States Constitution provides that no person "shall be compelled . . . to be a witness against himself."\textsuperscript{358} This privilege is available outside of court proceedings and other formal proceedings, and serves to protect persons during custodial interrogations from being compelled to incriminate themselves. Thus, when "an individual is taken into custody or otherwise deprived by the authorities in any significant way and is subjected to questioning, the privilege against self-incrimination is jeopardized."\textsuperscript{359} The procedural safeguards adopted required the police to inform an individual before questioning that he has the right to remain silent; anything he says can be used against him in court; he has the right to the presence of an attorney; and if he cannot afford an attorney, one will be appointed.\textsuperscript{360}

In Bassiouni's draft, the Prosecutor can obtain an arrest warrant and a warrant for the surrender of the accused.\textsuperscript{361} The Prosecutor or any other official is not prohibited from questioning the suspect during this time. The draft does not require officials to notify the accused of any protections against self-incrimination. Furthermore, the first mention of the right to counsel in the draft is at the preliminary hearing, a proceeding that occurs after the arrest and extradition of the accused.\textsuperscript{362} Therefore, under the draft proposal an individual can be taken into custody, subjected to

\textsuperscript{355.} See supra note 176 and accompanying discussion.
\textsuperscript{356.} See supra note 164-66 and accompanying text.
\textsuperscript{357.} Id.
\textsuperscript{358.} U.S. Const. amend. V.
\textsuperscript{360.} Id.
\textsuperscript{361.} See supra notes 118-29 and accompanying text.
\textsuperscript{362.} See supra note 166 and accompanying text.
questioning and compelled to be a witness against himself. While the Bassiouni draft does state that the accused has the right to remain silent, it does not state when the accused must be informed of that right. \textsuperscript{363} Furthermore, the clause does not explicitly state that such silence cannot be used against him. \textsuperscript{364}

In sum, while the draft proposal does provide some element of due process\textsuperscript{365} such as the Investigative Division's hearing to determine whether a complaint is "manifestly unfounded" and the preliminary hearing to determine whether the case is reasonable, the draft still falls short of Fourth and Fifth Amendment protections.

C. Trial Process

Bassiouni's draft provides that cases would be heard in public by a three judge panel and deliberations would be in camera. \textsuperscript{366} The accused will be entitled to certain rights such as equality of arms, the presumption of innocence, the right to a speedy trial, the right to question the legality of the obtained evidence, the right to remain silent, the assistance of counsel during all the proceedings, and the right to question whether the charges are based upon reasonable grounds. \textsuperscript{367} The draft also recognizes defenses, justifications, exoneration, and claims of excusibility. \textsuperscript{368} Regarding witnesses, a state can prohibit a resident witness from voluntarily testifying before the ICC. \textsuperscript{369}

Upon a determination of guilt, the draft proposal provides for a separate hearing to impose sanctions. \textsuperscript{370} This hearing will allow for evidence of mitigation and aggravation in sentencing. \textsuperscript{371} If the court en banc hears a case on appeal, that decision, along with

\begin{itemize}
  \item \textsuperscript{363} Id.
  \item \textsuperscript{364} Id.
  \item \textsuperscript{365} The Fifth and Fourteenth Amendments require that the government not deprive any person of "life, liberty, or property without due process of law." The central aim of this clause is to assure against arbitrary government actions and in favor of fair procedures towards an individual. U.S. CONST. amends. V, XIV, § 1.
  \item \textsuperscript{366} See supra note 136 and accompanying text.
  \item \textsuperscript{367} See supra notes 150-79 and accompanying text.
  \item \textsuperscript{368} These include: self-defense; necessity; coercion; obedience to superior orders; refusal to obey a superior order which constitutes a crime; mistake of law or fact; double jeopardy; insanity; intoxicating or drugged condition; and renunciation. See supra note 109 and accompanying text.
  \item \textsuperscript{369} See supra note 142 and accompanying text.
  \item \textsuperscript{370} See supra note 143 and accompanying text.
  \item \textsuperscript{371} Id.
\end{itemize}
unappealed decisions will be final unless evidence unknown at the
time of the trial is discovered to materially affect the outcome of
the case, the court was flagrantly misled, the facts have not been
proved beyond a reasonable doubt, the facts proved do not
constitute a crime, or other grounds the court determines in its
rules.\textsuperscript{372} Punishment can be imposed by the ICC or by the state-
party upon request of the ICC.

1. \textit{Comparison of Draft with Iranian Trial Process}.— In
Iran, the litigants are the focal point in the courtroom. This differs
from the ICC in that the accused's attorney is the likely focal point
in the courtroom. This assumption is based on the fact that the
draft largely adopts civil and common law principles of proce-
dure.\textsuperscript{373} Furthermore, in Iran, counsel is forbidden during prose-
cution of Hudud crimes.\textsuperscript{374} This is unlike the ICC because an
attorney before the ICC is allowed to be present for all formal
proceedings, beginning at the preliminary hearing.\textsuperscript{375} Another
difference between a trial in Iran and one taking place in the ICC
is the rules of evidence. Evidence in Iran is limited to eyewitness
testimony, confessions, and religious oaths.\textsuperscript{376} To be a qualified
witness in Iran, one must be a Muslim male, with certain exceptions
for the Muslim female.\textsuperscript{377} The draft, while not including rules of
evidence, which are determined by the court, will likely not exclude
women and non-Muslims as witnesses. Since the draft will not
likely adopt the Iranian rules on witnesses, Iran may find the draft
rules overbroad and unacceptable. For example, the inherent
unreliability of a woman to be a witness, under Islamic law, may be
a large area of dissention.\textsuperscript{378}

In regard to using religious oaths as evidence, the ICC will
likely not adopt such rules because of the religious diversity of its
jurisdictions. Excluding religious oaths as evidence during an ICC
trial may also result in another area of contention for Iranians.
During trial and sentencing, the Iranian system does allow for
generally similar defenses, justifications, and exonerations.\textsuperscript{379}

\footnotesize
\begin{itemize}
\item \textsuperscript{372} \textit{See supra} notes 146-47 and accompanying text.
\item \textsuperscript{373} \textsc{Bassiouni, supra} note 1, at 46-49.
\item \textsuperscript{374} \textit{See supra} note 268 and accompanying text.
\item \textsuperscript{375} \textit{See supra} note 169 and accompanying text.
\item \textsuperscript{376} \textit{Id.}
\item \textsuperscript{377} \textit{See supra} note 271 and accompanying text.
\item \textsuperscript{378} \textit{Id.}
\item \textsuperscript{379} For example, criminal liability is avoided or limited where there is
intoxication, infancy, insanity, or other conditions such as coercion, necessity,
Another difference between the Iranian trials and ICC trials is that most decisions are unappealable in Iran. Since the ICC does provide for a number of ways to appeal, Iran may find this aspect of the ICC too lax to be acceptable.

2. Comparison of Draft with United States Trial Process.— The Sixth Amendment provides that "in all criminal prosecutions, the accused shall enjoy the right to a ... public trial." The Bassiouni draft satisfies the requirements of this clause. The Sixth Amendment also gives any criminal defendant "the right ... to be confronted with the witnesses against him." While the draft does allow the defendant to be given effective ways to challenge the evidence produced by the prosecution, it does not explicitly say that the defendant has the right to cross-examine hostile witnesses, an essential ingredient interpreted from the Sixth Amendment's 'confrontation clause. This ambiguity could result in the loss of this protection for an American defendant. Furthermore, as previously discussed, the Sixth Amendment also provides a defendant with the right to a jury trial and denial of this right in the ICC will present a clear conflict between United States law and the ICC.

Each jurisdiction in the United States provides for a wide array of exonerations defenses, excuses, justifications, and mitigating and aggravating circumstances. Since these issues relate more to substantive criminal law, it is sufficient to simply note for the purposes of this paper, that the Bassiouni draft has similarly allowed for some of these principles. As a result, draft provisions may contribute to the overall fairness of the proceedings in the eyes of the United States.

Another difference between the United States' trial process and the ICC is that in the United States, if there is an acquittal, the

380. See supra note 284 and accompanying text.
381. There is a limited exception to this rule if the defendant's right is outweighed by a compelling state interest. This exception would be no broader than necessary. See Waller v. Georgia, 467 U.S. 39 (1984). This protections differs from the ILA draft which appears to allows a broader rule for a private trial, which is if necessary in the international public interest. See supra note 136.
382. U.S. CONST. amend. VI.
383. This is unlike the ILA draft which explicitly states that a defendant has the right to be heard and cross examine witnesses. See supra note 151.
384. See supra note 326 and accompanying text.
prosecution may not appeal because of the double jeopardy clause. This is unlike the ICC which allows both parties to appeal on questions of law. The order of the trial and evidentiary questions will not be discussed since the Bassiouni draft leaves those issues open for the Tribunal to determine when formulating rules of the court.

D. Procedural Rights of the Accused

In the Bassiouni draft, the rights of the accused are the fundamental human rights enunciated in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. These include the presumption of innocence, equality of arms, speedy trial, evidentiary protections, the right to remain silent, assistance of counsel, prohibition of arrest and detention unless based on reasonable grounds, and protection of the rights and interests of the victim.

1. Comparison of Draft with Iranian Procedural Rights.— In Iran, the fundamental principles upon which the procedural protections are based are Islamic and, thus, such principles will not be similar to a secular ICC. Another principle is that all free men are equal before the law and are entitled to equal protection. This excludes women, children, and others who are not considered “free.” The ICC provides no such restrictions. Another difference is that all decisions in Iran must conform to the Sharia. The ICC makes no claim to adopt Sharia Law. Iran also provides for the right for the accused to remain silent and such silence cannot be used as evidence of his guilt. However, the ICC only states that the accused has the right to remain silent. This ambiguity could severely harm the defense of the accused if the accused's silence could be used as evidence of guilt.

The draft includes other protections, not in Sharia law, which Iran may consider excessive protections and cause that nation to not participate. The first is the equality of arms protection which guarantees a defendant substantial parity when preparing a defense.

386. See supra notes 143-46 and accompanying text.
387. Id.
388. See supra notes 150-79 and accompanying text.
389. See supra note 294 and accompanying text.
390. Id.
391. Id.
The second is the speedy trial provision which allows time for the defendant to adequately prepare for trial. The right of the defendant to adequately prepare for trial is a protection not provided in Iran. Claims of swift trials and executions in the early days of the revolution, led the Iranian government to slow the entire trial process. However, giving the defendant adequate time to prepare for trial does not appear to be a priority in the Iranian system. Finally, unlike the draft, Iran has no protection regarding arbitrary arrest and detention of an individual.

2. Comparison of Draft with United States.——The United States’ fundamental procedural differences were discussed in earlier sections, regarding the Fourth, Fifth, and Sixth Amendments. However, there are similarities between the procedures of the United States and Bassiouni’s draft which include the requirement of the prosecution to disclose exculpatory evidence within the prosecution’s possession. This protection is read into the Due Process Clause of the Fifth and Fourteenth Amendments and is found in the draft clause of the ICC. This protection is stricter in the draft, in that the defense must receive the information before adjudication while the United States rules allows disclosure after the start of trial.

Another similarly provided protection between the United States and Bassiouni’s draft is the right to a speedy and public trial. The Sixth Amendment requires in part that “In all criminal cases the accused shall enjoy the right... to a speedy trial.” The draft also provides such protections without interfering with the defendant’s right to prepare for trial. Other similar protections not previously mentioned are the presumption of innocence, the right against arbitrary arrest and detention, and the guarantee against double jeopardy.

Differing provisions between the draft protections and United States’ protections include the equality of arms right. This protection provides substantial parity in proceedings and procedures which include granting the accused effective ways to challenge evidence produced by the prosecution and presenting a

392. See supra note 292 and accompanying text.
393. See supra note 292 and accompanying text.
394. See supra note 171 and accompanying text.
395. Brady, 373 U.S. at 83.
396. See supra note 162 and accompanying text.
397. See supra note 158 and accompanying text.
defense. This protection is not a United States constitutional guarantee. While the United States does guarantee the right to effective counsel, there is no right to equality of resources between defense counsel and the prosecution. Another provision which the ICC includes, that the United States does not provide, is the right of the victim to participate in the proceedings and have his civil interests protected. Other rights in the United States not included in the ICC draft is the right not to be subjected to excessive bail and the right to a grand jury.

In sum, the only procedures that are required by the United States constitution are those rights enumerated in the Bill of Rights which are necessary to fundamental fairness. Thus, procedures or lack of rights which violate this concept cannot be imposed.

While there are a number of similar rights between the ICC and the United States, there are potential conflicts with rights seen in the Fourth, Fifth, and Sixth Amendments of the United States Constitution which may be considered too "fundamental" to ignore by agreement with the ICC.

VI. Conclusion

The road to the establishment of an ICC has been very long. However, with the increased dependence countries have on one another and their mutual interests in criminality, the establishment of such a court may still be a valid option. Furthermore, the weak enforcement capabilities in multilateral treaties may also lead some countries into supporting an ICC.

Nevertheless, as this article attempted to prove, countries may not be willing to relinquish sovereignty and certain protections afforded to their citizens. For example, Bassiouni's draft proposal appeared too lax in some provisions and procedures, as compared with Iran and the United States. While it is clear that disputes over the rules of an ICC would be based upon differing grounds, both countries would likely reject the draft proposal.

398. Id.
400. See supra note 179 and accompanying text.
401. These rights are not imposed upon the states, only in federal cases. Although there is a good possibility that the right against excessive bail will be extended to the states. Nevertheless, this may be an argument against imposing such rights on an ICC. See Hurtado v. California, 110 U.S. 516 (1884).
The United States, one of the strongest nations of the world, has the capabilities to enforce any violations it believes to be committed against its country or citizens. This theory is similar to the theory behind the war trials after World War II. Therefore, the need for an ICC would not be as great. Iran, a country fairly isolated from Western principles, will only support an ICC if more moderate leaders could influence the government to reject support of a pure Islamic criminal system.

In sum, the Bassiouni draft leaves a number of procedural protections ambiguous and, as a result, many other countries may reject this proposal. Nonetheless, it is impossible for any draft proposal of an ICC to meet the criminal justice standards of every country. However, a system that will be predictable with detailed provisions as provided by Bassiouni should create a solid draft proposal for countries to seriously consider an ICC as a viable option to the current methods of enforcing multilateral treaties.

403. See supra note 41.