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**NOTE**

**THE INTERNATIONAL CRIMINAL  
COURT: WHY THE UNITED STATES  
SHOULD SIGN THE STATUTE (BUT  
PERHAPS WAIT TO RATIFY)**

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*In theory at least, setting up a permanent court to put the world’s worst criminals on trial should be a straightforward task. . . .*

. . . .

*. . . [But there is an] ambivalence that has always been felt by the world’s biggest powers about international law: they are keen to have it applied to others in the name of world order, but loathe to submit to restrictions on their own sovereignty.<sup>1</sup>*

*On a national level in any country, if it were asked whether murderers should be put on trial, whether mass rapists should be put on trial, whether torturers should be put on trial, and if found guilty, punished, only criminals or lunatics would not answer in the affirmative. Yet, when it comes to the murder and rape of tens of thousands of people, there seems to be a debate as to whether the perpetrators should be brought to justice.<sup>2</sup>*

1. *A New World Court*, ECONOMIST, June 13, 1998, at 16 (citation omitted).

2. Justice Richard Goldstone, *Conference Luncheon Address*, 7 TRANSNAT’L L. & CONTEMP. PROBS. 1, 2 (1997).

## INTRODUCTION

From June 15 to July 17, 1998, the city of Rome hosted the United Nations Conference of Plenipotentiaries on the Establishment of an International Criminal Court (ICC). One hundred and sixty states participated in addition to over 150 other organizations, including Intergovernmental Organizations (IGOs), specialized agencies, U.N. bodies, and Nongovernmental Organizations (NGOs).<sup>3</sup> By the end of the Conference, 120 states voted to sign the ICC statute with twenty-one abstentions and seven votes against the statute.<sup>4</sup> Despite the seven nay votes, including the United States,<sup>5</sup> China, and Libya, the conference participants established the ICC as a permanent court with the power to investigate and bring to justice individuals who commit the most serious crimes of concern to the international community, such as genocide, war crimes, and crimes against humanity.<sup>6</sup> As soon as sixty state signatories ratify the statute, the ICC will take effect.<sup>7</sup>

Since the countries that voted against the creation of the permanent court generally have the worst human rights records, it is interesting and surprising that the United States grouped itself in such a category by voting against the creation of the court. It is not too late, however, for the United States to change its mind. The ICC statute will stay open for signature until December 31, 2000, and a previous “no” vote does not mean that the United States is barred from signing up until that date.

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3. For a list of all the participants in the ICC, see *Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court*, Annexes II–IV, U.N. Doc. A/CONF.183/10 (1998). There were 160 States, one Organization, sixteen IGO and other entities, five Specialized Agencies and related organizations, eight U.N. programmes and bodies, and 130 Nongovernmental Organizations represented at the Conference by an observer for a grand total of 320.

4. But since the votes were not recorded, there is some disagreement as to who the seven “no” votes were. Compare *Amman Urges Countries to Sign International Criminal Court Statute*, AGENCE FRANCE PRESSE INT’L., Sept. 1, 1998 (citing seven “no” votes as China, India, Russia, Libya, Israel, Qatar, and the United States), with Leila Sadat Wexler, Panel Discussion, *Association of American Law Schools Panel on the International Criminal Court*, 36 AM. CRIM. L. REV. 223, 243 (1999) (stating that the seven “no” votes were the United States, Libya, Israel, Qatar, China, Yemen, and Algeria).

5. This Note concerns the United States as an international actor. The decision not to sign the ICC was made by President Clinton of the United States after consultation with his cabinet members. The actual “no” vote was given by Ambassador Scheffer, the U.S. representative at the ICC Conference.

6. See *Press Releases* (visited May 11, 2000) <<http://www.un.org/icc/pressrel/1rom22.htm>> [hereinafter *Press Releases*]. See Appendix B, *infra*, for definitions of key terms “genocide,” “war crimes,” and “crimes against humanity.”

7. See Rome Statute of the International Criminal Court, *opened for signature July 17, 1998*, art. 126, 37 I.L.M. 999 [hereinafter Rome Statute].

This Note analyzes why the United States decided to vote against the creation of a permanent international criminal court. Part I discusses why the United States supports ad hoc tribunals such as the Former Yugoslavia and Rwanda Tribunals, and why an international criminal court would only be a natural second step in what the United States already supports in these tribunals.

Part II sets out the background to the development of the ICC statute and what was achieved in draft statutes prior to the Rome Conference. The U.N. gave the International Law Commission (ILC) responsibility to draft a statute which would be the basis for the final treaty as voted on by the Rome Conference participants.<sup>8</sup> Before going into the Conference, the ILC agreed on the inclusion of three central crimes: aggression, crimes against humanity, and war crimes.<sup>9</sup> In addition, the ILC decided that the Security Council would have the power to initiate investigations and that the ICC would defer to national jurisdiction.<sup>10</sup>

Part III examines the disadvantages to the United States of not signing the Statute. First and foremost, according to Article 19 of the ICC statute, if the United States does not sign, it will not have standing before the ICC to argue that a case brought against one of its nationals is inadmissible. Second, by not signing, the United States loses a forum in which to fight unfavorable jurisdictional decisions. The Nicaragua case brought before the World Court resulted in the United States “walking out of court” after it lost its argument that the Court did not have jurisdiction. This case ultimately led to a decision against the United States. The United States was then forced to use its Security Council veto (in an 11-1-3 decision) to keep from being compelled to follow the Court’s ruling. Though the United States was able to escape compliance on that occasion, it was embarrassed by its actions and could not realistically repeat such a veto. Third, the ICC participants will likely ratify the statute with or without the United States. The United States must sign to guarantee its continued participation in activities such as defining the crime of aggression, appointing judges to the court, and nominating the independent prosecutor. Finally, and perhaps most importantly, genocide, war crimes, crimes against humanity, and crimes of aggression must not escape recognition

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8. See *The draft statute of the International Criminal Court* (visited May 11, 2000) <<http://www.un.org/icc/statute.htm>> [hereinafter Draft Statute Website]. The U.N. also established a Preparatory Committee and charged it with preparing a widely acceptable consolidated text of a convention for an International Criminal Court as a next step towards consideration by a conference of plenipotentiaries. See *id.*

9. See *id.*

10. See *id.*

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and punishment despite short-term national interests. The creation of the ICC will contribute much to punishing such atrocities and deterring future perpetrators from repeating the heinous crimes that filled the twentieth century.

Part IV critiques the United States' professed reasons for not signing the ICC statute. The reasons can be divided into two distinct groups: (A) practical considerations, and (B) legal considerations, such as jurisdiction, trigger mechanism, and inclusion of the undefined crime of aggression. Since the former category is not the focus of this Note, these practical concerns are treated only briefly in Appendix A. One of the United States' primary concerns is the possibility of the United States, or U.S. servicemen, being tried before the Court. Despite the intricate framework of safeguards built into the ICC, it is conceivable that the United States could be brought before the Court. Nevertheless, voting against the ICC cannot insulate the United States from this concern. Only one conclusion follows: If voting against the creation of the Court will not insulate the United States from its professed concerns, there must be some other reason or reasons for such a vote.

First, there is a real political concern that Senate Foreign Relations Committee Chairman Jesse Helms will never let the U.S. Congress approve of American participation in the ICC. More importantly, the United States does not want to submit to a court which, for now, it has the power to ignore. There are two positions the United States can take: it can either be indifferent and isolationist, or it can be an international player. If the latter represents the American viewpoint, the United States cannot simply ignore the Court.

Ultimately, the United States has no substantial reason to remain a non-signatory. As Part III shows, there are good reasons to sign the treaty. The safeguards built into the Statute protect against frivolous and unfounded suits. The United States has little to fear, because the crimes over which the Court has jurisdiction should never be committed by the United States or any of its citizens. If indeed such cases can legitimately be brought against the United States, it *should* be subject to international scrutiny and accountability. Moreover, there are many benefits to the ICC that the United States cannot realize without signing the Statute. Since, for the most part, the United States will be subject to the ICC whether or not it signs the Statute, there can be no explanation for the decision to vote against the ICC except perhaps hubris and hypocrisy. In order to legitimately continue in its role as the world's peacekeeper and sole superpower, the United States should sign the Statute creating the Court.

Moreover, it should act soon—before December 31, 2000—in order to continue participating in the growth of the ICC. Since signing and ratifying are two distinct steps, once the United States signs the Statute, ratification is secondary.<sup>11</sup>

## I. THE ICC AND U.S. SUPPORT OF AD HOC TRIBUNALS

### A. WHY THE UNITED STATES SUPPORTS AD HOC TRIBUNALS

The United States was a driving force in the creation of the Nuremberg, Tokyo, Rwanda, and Yugoslavia Tribunals. In February 1993, one of Madeleine Albright's first achievements at the U.N. was her leadership in the creation of the International Criminal Tribunal for the Former Yugoslavia (ICTFY).<sup>12</sup> American support for the ICTFY has been strong ever since.<sup>13</sup> In 1994 the Security Council, spearheaded by the United States, set up the International Criminal Tribunal for Rwanda (ICTR).<sup>14</sup> The recent participation and leadership of the United States in establishing these two ad hoc tribunals indicates its strong support for punishment of great human atrocities.

In fact, U.S. participation in these two tribunals demonstrates that ad hoc tribunals are not the best solution and that the ICC would fill the gaps created by their deficiencies. The Annual Reports to the ICTFY enumerate many of the deficiencies and problems faced by ad hoc tribunals. While

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11. Signing and ratifying are two distinct steps that can be separated with a considerable time gap if necessary. If the United States is worried that the Statute will not be ratified in the Senate, there is no reason that it cannot sign the Statute and wait for the appropriate time to ratify.

“Ratification’ is the term normally used to describe approval of the agreement when a state has previously signed it *ad referendum* [i.e., subject to later ratification]. That term is especially appropriate in legal systems where, as in the case of the United States, some parliamentary process may have to be completed after signature for the treaty to become binding.” RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 312 cmt. d (1987). Note that Article 15 the Vienna Convention on the Law of Treaties still requires the signatory state to act in accordance with the signature before ratification has been completed:

A State is obligated to refrain from acts which would defeat the object and purpose of a treaty when:

(a) it has signed the treaty . . . until it shall have made its intention clear not to become a party to the treaty; or  
 (b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.

Vienna Convention on the Law of Treaties, May 23, 1969, art. 18.

12. See S.C. Res. 827, U.N. SCOR, 48th Session, 3217th mtg., at 2, U.N. Doc. S/RES/827 (1993); Richard Boucher, *State Department Regular Briefing*, FED. NEWS SERVICE, Sept. 27, 1992.

13. See, e.g., David J. Scheffer, Address at Dartmouth College on U.N. Day (Oct. 23, 1998), available in Public Diplomacy Query (PDQ) database.

14. See S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg., U.N. Doc. S/RES/955 (1994).

the discovery of the worst atrocities committed during the Croatian and Bosnian wars took place during the second half of 1991 and the first half of 1992, the Security Council did not establish a tribunal until May 1993.<sup>15</sup> Moreover, it took the ICTFY over fourteen months to appoint a Prosecutor.<sup>16</sup> Perhaps the greatest practical problem faced by the Tribunal was the absence of any legal framework to enable the Tribunal to conduct its investigative and judicial tasks. As a result, the judges had to draft and adopt the Court's rules of procedure and evidence, rules of detention, and guidelines on the assignment of counsel which were "finalized" in February 1994.<sup>17</sup> The establishment of a permanent Court would correct many of these problems: a case could be brought to court instantly, the Court would have permanent prosecutors, and the rules of the Court would already be drafted and in place.<sup>18</sup>

While the United States has been working on the creation of a permanent court for well over a decade,<sup>19</sup> it only fully realized the need for such a court after experiences with the two ad hoc tribunals. U.S. leadership in establishing the ICTFY and ICTR strengthened its belief that the Security Council should have an immediately available standing tribunal to hold perpetrators of genocide, crimes against humanity, or serious war crimes accountable for their actions. President Clinton and Congress both agree that a permanent court would be an improvement over the current ad hoc tribunal system. President Clinton's public support for a

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15. It is important to note that these specific atrocities were the main catalyst for the creation of the tribunal. In other words, the delay in establishing the court cannot be attributed to, for example, a finding of greater atrocities during the *second* half of 1992. See Boucher, *supra* note 12.

16. While the ICTFY was established in May 1993, the first Prosecutor was not appointed until July 1994. See ICTFY, *The Annual Report of the International Tribunal 1994* (visited March 3, 2000) <<http://www.un.org/icty/rapportan/first-94.htm>>.

17. See *id.*

18. For further discussion, see *infra* Part I.B.2.

19. Since 1986, the U.S. Congress has repeatedly proposed legislation pointing to the need for the establishment of an international criminal court to prosecute individuals who have committed the most serious international crimes. The Foreign Operations, Export Financing, and Related Programs Appropriations Act of 1991 required the President and the Judicial Conference of the United States to report to the Congress on the desirability of establishing an international criminal court. See Pub. L. No. 101-513, 104 Stat. 1979 (1990). In 1993, Congress expressed that the establishment of an international criminal court would strengthen international rule of law greatly, that such a court would serve U.S. interests, and that the United States should advance this proposal at the United Nations. See Foreign Relations Authorization Act, Fiscal Years 1994 and 1995, Pub. L. No. 103-236, § 517(b), 108 Stat. 382, 469 (1994). Senate Joint Resolution 32 called for "the United States to support efforts of the United Nations to conclude an international agreement to establish an international criminal court." S.J. Res. 32, 103d Cong., 139 CONG. REC. S930 (1993). In 1995, the House introduced a bill to establish U.S. recognition for the punishment of war crimes. See War Crimes Act of 1995, H.R. 2587, 104th Cong. (1995).

permanent international court was demonstrated on six occasions prior to the diplomatic conference in Rome.<sup>20</sup> He summarized this viewpoint best when he acknowledged that the International Criminal Court would “send a strong signal to those who would use the cover of war to commit terrible atrocities that they cannot escape the consequences of such actions.”<sup>21</sup> Furthermore, “Rwanda and the difficulties we have had with this special tribunal underscores the need for [a permanent international] court.”<sup>22</sup>

## B. HOW THE ICC IMPROVES UPON AD HOC TRIBUNALS

The traditional reasons for the creation of an international criminal court are deterrence of future crimes<sup>23</sup> and remedying the deficiencies of ad hoc tribunals. Other rationales include justice for all, ending impunity, and assuming control when national criminal justice institutions are unwilling or unable to act.<sup>24</sup>

### 1. Deterrence

The nineteenth century witnessed many horrible cases of genocide, war crimes, and crimes against humanity. “In spite of the military tribunals following the Second World War and the two recent ad hoc international criminal tribunals for the former Yugoslavia and for Rwanda, the same holds true for the twentieth century.”<sup>25</sup> The Nuremberg, Tokyo, Yugoslavia, and Rwanda tribunals were the only war crimes trials that took

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20. See William Jefferson Clinton, Remarks at the University of Connecticut in Storrs, 31 WEEKLY COMP. PRES. DOC. 1840, 1843 (Oct. 23, 1995) [hereinafter Clinton, Remarks at the University of Connecticut]; Remarks Prior to a Meeting With Military Leaders and an Exchange With Reporters in Arlington, Virginia, 33 WEEKLY COMP. PRES. DOC. 118, 119 (Jan. 29, 1997); Remarks to the 52d Session of the United Nations General Assembly in New York City, 33 WEEKLY COMP. PRES. DOC. 1386, 1389 (Sept. 22, 1997); Remarks Celebrating the 50th Anniversary of the Universal Declaration of Human Rights in New York City, 33 WEEKLY COMP. PRES. DOC. 2002, 2003 (Dec. 9, 1997); Remarks on the Peace Process in Bosnia and an Exchange With Reporters, 33 WEEKLY COMP. PRES. DOC. 2071, 2074 (Dec. 18, 1997); Remarks Honoring Genocide Survivors in Kigali, Rwanda, 34 WEEKLY COMP. PRES. DOC. 495, 497 (Mar. 25, 1998) [hereinafter Clinton, Remarks to Genocide Survivors].

21. Clinton, Remarks at the University of Connecticut, *supra* note 20.

22. Clinton, Remarks to Genocide Survivors, *supra* note 20.

23. For an argument stating that an international criminal court would serve no deterrent purpose, see *Is a U.N. International Criminal Court in the U.S. National Interest?: Hearing Before the Subcommittee on International Operations of the Senate Committee on Foreign Relations*, 105th Cong. 2 (1998) [hereinafter Foreign Relations Hearing] (“[T]he fact remains, the most effective deterrent is the threat of military action; and this court is undermining the ability of the United States to do that very thing.”).

24. See generally *Establishment of an International Criminal Court – Overview* (visited July 1, 2000) <<http://www.un.org/law/icc/general/overview.htm>> [hereinafter *Establishment of an ICC*].

25. *Id.*

place during the twentieth century. Tribunals were not set up for a number of other crimes that occurred, such as those in Turkey, Cambodia, and East Timor.<sup>26</sup> Even when ad hoc tribunals were set up, the punishments were untimely and insufficient. Many perpetrators of such atrocities probably believed that they would not be held accountable and continue to believe that selective ad hoc tribunals will not punish them. Just as “[t]he mere existence of courts and legal systems was a major force in reducing crime;”<sup>27</sup> many hope that a permanent ICC would deter international crimes and atrocities from ever happening. In addition, if the ICC serves its deterrent purpose, those who would commit crimes would not likely find willing helpers.<sup>28</sup>

Furthermore, many scholars argue that lack of prosecution emboldens perpetrators. Adolf Hitler demonstrated the price paid for inaction. Just before Germany invaded Poland in 1939, the German generals questioned Hitler. He responded, “Who after all is today speaking about the destruction of the Armenians?”<sup>29</sup> In addition, Albert Speer, a trusted confidant to Hitler stated, “it would have encouraged a sense of responsibility on the part of leading political figures if after the First World War the Allies had actually held the trials they had threatened . . . .”<sup>30</sup> These statements are evidence that the immunity extended after World War I to the Turkish perpetrators of the Armenian genocide not only failed to deter, but provided some assurance of impunity to Hitler when he committed the atrocities of World War II. By setting up a permanent court, the world would finally make a statement to criminals and would-be criminals that the world is watching, ready to punish any and all serious aggressions.

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26. Turkey committed the first genocide of the twentieth century when, in 1915, it accomplished the systematic destruction of at least a million Armenians. In Cambodia, the Khmer Rouge party killed between one and three million (over one-third of their own population) during the mid-1970s. The Indonesian government has been responsible for the massacre of some 100,000 East Timorese. See *A Brief Listing of Some of the Genocidal Acts that Have Occurred During the 20th Century*, 24 SOC. SCI. REC., Fall 1987, at 94 [hereinafter *Genocidal Acts*].

27. *Press Briefing by USG for Legal Affairs and UN Legal Counsel* (visited May 11, 2000) <<http://www.un.org/icc/usgpress.htm>>. See also *International Criminals, Beware*, ECONOMIST, Dec. 6, 1997, at 47 (“The court’s very existence will send an important signal,” argues Christopher Hall, a legal adviser with Amnesty International. “People planning truly terrible crimes will know that the international community will eventually hold them to account.”).

28. See *Establishment of an ICC*, *supra* note 24.

29. Foreign Relations Hearing, *supra* note 23, at 72 (prepared statement of Michael P. Scharf).

30. ALBERT SPEER, SPANDAU: THE SECRET DIARIES 43 (Richard & Clara Winston trans., MacMillan Publ’g 1976).

## 2. *Remedying the Deficiencies of Ad Hoc Tribunals*

While the existence of any tribunal is better than no court at all, an ad hoc tribunal presents many problems that a permanent international court would resolve. Ad hoc tribunals extend after-the-fact punishment and do not serve their purpose as an adequate deterrent. Ad hoc tribunals also raise the question of selective, or victors', justice. Since ad hoc tribunals have not been set up in every case of a serious crime, many perpetrators have gone unquestioned and unpunished.<sup>31</sup> A permanent court would operate in a more consistent and systematic way, subjecting everyone to its jurisdiction and potential investigation.<sup>32</sup>

"Tribunal fatigue" poses another major problem. Establishing a tribunal every time the need arises, coming up with adequate funding, and deciding who will conduct the prosecutions is difficult.<sup>33</sup> Furthermore,

[t]he delays inherent in setting up an ad hoc tribunal can have several consequences: crucial evidence can deteriorate or be destroyed; perpetrators can escape or disappear; and witnesses can relocate or be intimidated. Investigation becomes increasingly expensive, and the tremendous expense of ad hoc tribunals may soften the political will required to mandate them.

Ad hoc tribunals are subject to limits of time or place.<sup>34</sup>

A permanent tribunal would "provide the international community with an existing mechanism that [could] promptly investigate and prosecute reported war crimes and other atrocities."<sup>35</sup> In addition, with consolidation and central organization of many functions and activities, a permanent court would also be more cost-efficient.<sup>36</sup> For example, valuable resources and time would not be wasted negotiating and constructing an acceptable site to hold trials.

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31. See *Genocidal Acts*, *supra* note 26 (listing of some of the crimes that have gone unpunished in the twentieth century).

32. See Goldstone, *supra* note 2, at 4; Leila Sadat Wexler, *The Proposed Permanent International Criminal Court: An Appraisal*, 29 CORNELL INT'L L.J. 665, 712 (1996); *Establishment of an ICC*, *supra* note 24.

33. See Judy Aita, *U.S. Actively Working on Statute for World Court (Interview with Ambassador David Scheffer)*, USIA, Aug. 22, 1997, available in Public Diplomacy Query (PDQ) database [hereinafter *USIA Interview*].

34. *Establishment of an ICC*, *supra* note 24.

35. Wexler, *supra* note 32. See also *USIA Interview*, *supra* note 33.

36. See David Scheffer, *Dept. of State – U.S. and the U.N.: Scheffer Congressional Testimony, July 23, 1998* (last modified Dec. 20, 1999) <<http://usinfo.state.gov/topical/pol/usandun/schef23.htm>> [hereinafter Scheffer, *Testimony*].

Furthermore, there is little possibility of building institutional memory and competence with ad hoc tribunals. "In each case, prosecutors must be found, staff assembled and trained, and judges procured who are willing and able to leave their existing commitments."<sup>37</sup> In addition, these judges may have little or no experience in international criminal law. This lack of experience "may impact not only the capacity of the ad hoc court to conduct an effective prosecution and trial, but also on the rights of the defendant."<sup>38</sup>

The ICC will legitimize international criminal prosecution and put to rest the defense of *nullum crimen sine lege, nulla poena sine lege* (no crime without law, no punishment without law) which undermines the integrity of the international criminal prosecutions.<sup>39</sup>

Perhaps most importantly, a permanent international court has the independent ability to act when the regular mode of justice cannot or will not act. The two present ad hoc tribunals are perfect examples of the failure of their respective national court systems. Sometimes governments lack the political will to prosecute their own citizens, who may be high-level officials, as with the former Yugoslavia. In the case of Rwanda, the national institutions collapsed, making it impossible for the criminals to be tried without an international forum available.<sup>40</sup>

These past experiences with ad hoc international tribunals confirm the advantages of a permanent system of international criminal justice. A permanent court is not necessarily the "perfect solution" since even the ICC could not prosecute every single individual who commits these types of crimes, but it would be an important step in the right direction.

### 3. *Miscellaneous Rationales*

In addition to the above rationales, the establishment of a permanent criminal court has been called the "missing link" in the international legal system since it could provide "justice for all."<sup>41</sup> Without an international criminal court which deals with individual responsibility as an enforcement mechanism, acts of genocide and egregious violations of human rights

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37. Wexler, *supra* note 32, at 713.

38. *Id.*

39. See Sandra L. Jamison, *A Permanent International Criminal Court: A Proposal That Overcomes Past Objections*, 23 DENV. J. INT'L L. & POL'Y 419, 437 (1995).

40. See *Establishment of an ICC*, *supra* note 24.

41. *Id.*

often go without punishment.<sup>42</sup> The International Court of Justice (otherwise known as the World Court) at The Hague, Netherlands handles only civil cases between states, not individuals. The establishment of a permanent criminal court would provide a forum and thus acknowledge the crimes that perpetrators commit. It would also reassure the victims of the crimes that the world recognizes what has befallen them and that it will not condone indifference any longer.<sup>43</sup>

Not only would a permanent court provide justice to all victims, it would end the impunity of all perpetrators.<sup>44</sup> Laws that forbid genocide and war crimes exist, but they exist in a vacuum unless the individuals who commit such atrocities are subject to punishment. While there are many national systems of punishment, no such consistent forum exists on an international scale. “We have lived in a golden age of impunity, where a person stands a much better chance of being tried for taking a single life than for killing ten thousand or a million.”<sup>45</sup> An international criminal court would establish the principle of individual criminal accountability for all who commit genocide, crimes against humanity, and war crimes.

While an ad hoc tribunal can serve some of these same goals of justice for all, ending impunity, and taking over in case national systems fail, it is only a temporary and incomplete solution. It would not serve the goal of deterrence since perpetrators might commit crimes based on the low probability of prosecution. Indeed, ad hoc tribunals fail to establish any kind of consistency and normalcy that the creation of a permanent court could accomplish. Thus, American support for the ad hoc tribunals should be seen only as a stepping stone to the ICC, which is akin to an ad hoc tribunal but with all of the weaknesses removed.

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42. See *id.*; Jamison, *supra* note 39, at 438–39.

43. See Goldstone, *supra* note 2, at 7.

44. Note that, for many reasons including those stated above, an ad hoc tribunal can only prosecute a small portion of perpetrators. A permanent court would be in a better position to prosecute *all* criminals, ending the impunity of *all* the perpetrators and bringing justice to *all* their victims. In this context, of course, “all” means “much greater percentage,” not necessarily one hundred percent.

45. Michael P. Scharf, *ASIL Insight: Results of the Rome Conference for an ICC* (August 1998) <<http://www.asil.org/insigh23.htm>>.

## II. DEVELOPMENT OF THE ICC THROUGH ROME

A. PAST EFFORTS TO DEVELOP AN INTERNATIONAL COURT<sup>46</sup>

Although the idea of an international criminal court has been in existence since 1474,<sup>47</sup> discussion of a permanent court essentially began after the First World War with the unsuccessful attempt to establish an international tribunal.<sup>48</sup> Following the Second World War, however, the world realized that the crimes committed during the war could not go without punishment, and therefore the Allies established the Nuremberg and Tokyo tribunals. These tribunals set the stage for efforts to create a permanent court.<sup>49</sup>

Genocide was first legally defined in the Genocide Convention, adopted unanimously by the U.N. General Assembly on December 8, 1948, after the Nuremberg and Tokyo trials.<sup>50</sup> The U.N. General Assembly unanimously adopted the Convention on December 9, 1948.<sup>51</sup> It became effective in 1951 after it was ratified by a sufficient number of countries.<sup>52</sup> In 1986, the United States finally ratified the Convention;<sup>53</sup> by 1989, 102 parties had ratified the Genocide Convention.<sup>54</sup> Under the Convention, the international community has two obligations: to attempt to prevent or suppress genocide, and to attempt to punish those responsible once genocide has been committed.<sup>55</sup>

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46. For an extensive history of the creation of the International Criminal Court see Jamison, *supra* note 39, at 421–28. See also Timothy L.H. McCormack, *Selective Reaction to Atrocity: War Crimes and the Development of International Criminal Law*, 60 ALB. L. REV. 681 (1997); Brook Sari Moshan, *Women, War, and Words: The Gender Component in the Permanent International Criminal Court's Definition of Crimes Against Humanity*, 22 FORDHAM INT'L L.J. 154, 164–71 (1998).

47. See M. Cherif Bassiouni, *The Time Has Come for an International Criminal Court*, 1 IND. INT'L & COMP. L. REV. 1, 1 (1991). But see McCormack, *supra* note 46, at 690–91 (stating that 1474 was not necessarily the first “international” trial).

48. See *Press Releases*, *supra* note 6.

49. See *id.*

50. See *U.N. Tribunal in First Such Trial Verdict, Convicts Rwanda Ex-Mayor of Genocide*, N.Y. TIMES, Sept. 3, 1998, at A14.

51. See Dorinda Lea Peacock, Comment, “It Happened and It Can Happen Again”: *The International Response to Genocide in Rwanda*, 22 N.C. J. INT'L L. & COM. REG. 899, 906 (1996).

52. See *id.*

53. See *id.*

54. See *id.*

55. Note that a person charged with committing genocide under the Genocide Convention should be brought to trial. But where? The reliance on domestic courts for punishment has widely been viewed as a major flaw in the Genocide Convention. See Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537, 2564 (1991).

In addition to the Genocide Convention, the U.N. General Assembly mandated the ILC, a U.N. General Assembly body, to study the possibility of establishing a permanent ICC. The political considerations that arose out of the Cold War, however, made any progress difficult. It was only forty-one years later, at the end of the Cold War in 1989, that the idea of a permanent court was reintroduced to the U.N. General Assembly.<sup>56</sup>

Subsequently, in 1992, the ILC started work on a draft statute for an international criminal court. The Security Council's establishment of the ICTFY in 1993 and the ICTR in 1994 created further public interest in an international court.<sup>57</sup> By the end of 1994, an ad hoc committee of all Member States and members of specialized agencies reviewed the final version of the ILC's draft statute. One year later, the Assembly created a preparatory committee to "discuss further the major substantive and administrative issues arising out of the draft statute prepared by the [ILC] and . . . to draft texts, with a view to preparing a widely acceptable consolidated text of a convention for an international criminal court."<sup>58</sup> In December 1996, on the recommendation of the ILC, the General Assembly decided that "a diplomatic conference of plenipotentiaries [would be held] in 1998, with a view to finalizing and adopting a convention on the establishment of an [ICC]."<sup>59</sup> The U.N. held a month-long conference in Rome and 120 of the participating states signed the ICC statute (draft version ten), with only seven countries voting against the creation of a permanent court. The United States was among the latter group.

To understand why the United States voted against the creation of the ICC, it is necessary to examine the achievements in Rome to ascertain what the United States perceived as the ICC's failures. The next step is to determine whether these perceived failures justify voting against the creation of a permanent international criminal court. I argue that they do not.

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56. See *CICC: Timeline for Formation of the International Criminal Court* (visited April 15, 2000) <<http://www.igc.apc.org/icc/html/timeline.htm>>. See generally *Establishment of an ICC*, *supra* note 24.

57. See *Press Releases*, *supra* note 6.

58. *Id.* (alterations in original).

59. Draft Statute Website, *supra* note 8.

## B. THE DRAFT ICC STATUTES

The ILC created nine drafts of the ICC Statute prior to the Rome Conference. These drafts contained many options or bracketed terms.<sup>60</sup> Nevertheless, there were some major points of agreement before the Rome Conference started.<sup>61</sup>

The Conference participants agreed upon and included certain crimes under the jurisdiction of the ICC.<sup>62</sup> They labeled these the “core crimes” and included the four crimes of genocide, crimes against humanity, war crimes, and crimes of aggression. The United States believed that the definitions of war crimes and crimes against humanity were viable.<sup>63</sup> The participants also agreed that the Security Council could initiate proceedings. This did not necessarily preclude anyone else from initiating proceedings; the question remained open and would be a major issue of contention for the United States. Lastly, the participants agreed on a policy of “complementarity.”<sup>64</sup> It was no one’s intention that the ICC supersede a national court that is willing and able to prosecute; rather the ICC should play a complementary role.<sup>65</sup> The question remained as to the degree of complementarity.

Though the international community was able to reach agreement on many of these points, including some of the main issues mentioned above, the United States had some key concerns before the start of the Rome conference. These concerns are outlined here and are discussed in more detail in Part IV.

The United States’ first main concern involved the broad extent of the ICC’s jurisdiction, allowing a national of a state to be brought before the court even if that state was a non-party to the treaty. The second issue involved the triggering of investigations.<sup>66</sup> Despite the agreement that the Security Council could bring a case before the ICC (“Track One”), the question remained whether anyone else should be able to do so. The

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60. See *Draft Statute for the International Criminal Court*, United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, art. 5, U.N. Doc. A/CONF.183/2/Add. 1 (1998) [hereinafter *Draft ICC Statute*] (footnote omitted).

61. For brevity purposes, I discuss only the major points of agreement. In fact, the United States agreed with about ninety-five percent of the ICC statute. See *infra* note 67.

62. See Rome Statute, *supra* note 7, art. 5.

63. See *USIA Interview*, *supra* note 33.

64. See *id.*

65. See Scharf, *supra* note 45.

66. “Triggering” means how a case gets to the court. See, e.g., *USIA Interview*, *supra* note 33.

participants in the Rome conference voted to establish an independent prosecutor – a second trigger mechanism (“Track Two”).

The final major area of discord concerned the inclusion of more than the core crimes. The most important of these were aggression, drug trafficking, and terrorism. The agreement reached in Rome would include the undefined crime of aggression, leaving it for future conferences to define by subsequent amendment. The ICC could consider adding the other crimes in a future conference if so chosen by the participants.

### III. WHY THE UNITED STATES *SHOULD* SIGN THE ICC

Most of the delegates to the ICC Conference were somewhat surprised when the United States did not agree to the final draft of the Statute.<sup>67</sup> After all, they argued, the United States got about ninety-five percent of what it wanted. In the end, though, the United States remained a non-signatory.

Why should the United States sign the ICC statute? First and foremost, according to Article 19 of the ICC statute, if the United States does not sign, it will not have standing to argue that a case brought against one of its nationals is inadmissible before the ICC. Second, the United States cannot afford to repeat the international embarrassment it suffered when it walked out of the ICJ in the Nicaragua case. Third, the participants to the ICC Conference will in all likelihood ratify the Statute with or without the United States. The United States should sign in order to continue its participation in the ICC. Otherwise the Statute will preclude U.S. participation in defining the crime of aggression, appointing judges to the court, and nominating the Prosecutor. Finally, and perhaps most importantly, the nations of the world must recognize and punish all genocide, war crimes, crimes against humanity, and crimes of aggression, despite short-term national interests. The ICC will guarantee punishment for, and deter, future perpetrators from repeating the atrocities of the twentieth century.

Admittedly, the United States is currently in a singular position as the world’s strongest military and economic power. The United States

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67. Professor Scharf commented,

I think the successes of the U.S. delegation were enormous and the rest of the countries in the world were surprised at the last minute that the U.S. could not accept those because when you go into a negotiation, no one thinks they are going to get everything, and the U.S. got about 95 percent.

Foreign Relations Hearing, *supra* note 23, at 38.

responds to acts of aggression and humanitarian crises around the world through both the U.N. and NATO. It is understandable that the United States is uniquely vulnerable to the potential jurisdiction of the ICC.<sup>68</sup> Nevertheless, the United States has little to fear, especially when balanced with all it has to gain by signing the Statute. In fact, by helping to deter atrocities, the Court “will reduce the chances that the American military will have to be deployed in response to future Bosnias.”<sup>69</sup> Prevention of such crimes will decrease the need for U.S. foreign deployment and military involvement, thus statistically decreasing the chance that the United States will become subject to the ICC.

#### A. ADMISSIBILITY AND CHALLENGES TO JURISDICTION OF THE COURT

A country can refer a matter to the ICC under two circumstances: (1) if the accused is a national of that country, or (2) if the conduct in question occurs in that country.<sup>70</sup> There are two primary ways to challenge such jurisdiction of the court. A country may argue that the case is inadmissible before the ICC because the country already has jurisdiction by virtue of its investigation or prosecution of the case.<sup>71</sup> In addition, the country of which the accused is a national may argue inadmissibility, but only if it is a signatory to the ICC statute.<sup>72</sup>

For example, assume that a U.S. peacekeeping soldier stationed in Iraq commits an act of genocide (over which the ICC has jurisdiction). Iraq refers the case to the ICC. Under Article 12(a), the ICC would have jurisdiction over the American soldier even if the United States is not a signatory to the ICC statute. The U.S. soldier may challenge the admissibility of the case.<sup>73</sup> The United States could challenge the jurisdiction of the ICC on the grounds that the United States is investigating and/or prosecuting the case.<sup>74</sup> However, if the United States does not perform its own investigation, it has no other recourse to challenge

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68. See Scharf, *supra* note 45.

69. Lawyers Committee for Human Rights, *The International Criminal Court: The Case for U.S. Support*, available in Gopher database [hereinafter LCHR, *Case for U.S. Support*].

70. See Rome Statute, *supra* note 7, art. 12, para. 2.

71. See *id.* art. 19, para. 2(b). There are minimum requirements as to what will constitute “investigation” of a case, but as long as it is not a total sham, the ICC cannot interfere. See *id.* art. 17, para. 1(a)–(b).

72. See Rome Statute, *supra* note 7, art. 19, para. 2(c).

73. See *id.* para. 2(a).

74. See *id.* para. 2(b). Unless the ICC could prove that the investigation was a total sham, it could not exercise jurisdiction. See *supra* note 71 for “sham” and “farce” requirements under the ICC statute.

the admissibility of the case. Since Iraq has personal jurisdiction over the U.S. soldier, it has the authority to refer a case to the ICC. The permission of the United States is not required to try this particular soldier. Thus an Article 19(2)(c) challenge to admissibility is precluded.<sup>75</sup>

The ramifications are clear. The United States must perform its own investigation to challenge the jurisdiction of the Court. Otherwise, the United States has no standing to challenge jurisdiction of the ICC. The trial of the U.S. soldier will continue with three possible outcomes: (1) the United States might attend the trial and win, in which case there is no issue; (2) the United States might attend the trial and lose; or (3) the United States might not attend the trial in which case they will likely lose. For obvious reasons, the latter two outcomes are undesirable. Thus, if under some unforeseen circumstance, the accused U.S. national cannot challenge the admissibility of the case, that national would be subject to the jurisdiction of the Court and the United States would be powerless to intercede unless it performed its own investigation.

#### B. NICARAGUA EXAMPLE

In 1984, the Republic of Nicaragua brought a proceeding in front of the ICJ against the United States, charging it with military and paramilitary activities against Nicaragua.<sup>76</sup> The United States denied the jurisdiction of the Court and, in January 1985, walked out in the middle of the proceedings.<sup>77</sup> The ICJ concluded that it did have jurisdiction to hear the case.<sup>78</sup> On June 27, 1986, the Court decided for Nicaragua and ruled that U.S. support of the military activities of the *contras* in their war against the Sandanista government of Nicaragua had broken international law and violated Nicaraguan sovereignty.<sup>79</sup>

The Reagan Administration decided to ignore the World Court's ruling. Though the ICJ has no mechanism for enforcement of its decisions, Article 94 of the U.N. Charter provides for some remedy through the Security Council.<sup>80</sup> A draft resolution by which the Security Council

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75. Unless, of course, in the unlikely event that Iraq wanted to challenge admissibility of its own case.

76. See *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14 (June 27), reprinted in 76 I.L.R. 5 (1986) [hereinafter *Nicaragua Case*].

77. See Paul Lewis, *World Court Supports Nicaragua after U.S. Rejected Judges' Role*, N.Y. TIMES, June 28, 1986, at 1, 4.

78. See *Nicaragua Case*, supra note 76, at 136-37, 140.

79. See *id.* at 452-84.

80. See U.N. CHARTER art. 94, para. 2. Article 94 states that each Member State of the U.N. undertakes to comply with the decision of the ICJ in any case to which it is a party. If any party to a

would have the ability to call for “full and immediate compliance” with the ICJ judgment was, however, vetoed by the United States in an 11-1 decision with three abstentions (France, Thailand, and the United Kingdom).<sup>81</sup>

The United States, nevertheless, did not entirely escape the ICJ ruling. On November 9, 1986, 130 political parties of the world issued the Managua Declaration, calling on the United States to heed the sentence of the ICJ.<sup>82</sup> The Declaration condemned the U.S. government for the violation of the ICJ’s order. It was signed by the heads of 130 delegations of political parties from Africa, Asia, Oceania, Europe, and North and South America when they convened in Managua for the twenty-fifth anniversary of the foundation of the Sandinista Front of National Liberation.

Perhaps more important than the Managua Declaration’s slap on the wrist, the United States faces the political reality of not being able to repeat its performance before the World Court. Like three magic wishes, political capital is a scarce resource that cannot be spent foolishly. In other words, although the United States currently has such power, it cannot keep using it in the international arena for fear of depleting such a scarce resource.

#### C. CONTINUED PARTICIPATION IN THE ICC DEPENDS UPON SIGNING THE STATUTE

The ICC Statute does not allow a non-signatory to participate in further conferences or discussion on remaining issues of the ICC.<sup>83</sup> Therefore, unless the United States signs the Statute, it cannot participate in the ICC’s selection of judges and prosecutors, in defining what constitutes aggression, in setting the Court’s budget or in establishing its rules of procedure. If the United States rejected the Statute because it is afraid of the undefined crime of aggression and does not like the independent Prosecutor, it should be important to the United States to play a role in defining the term, picking the prosecutor, and setting up the Court’s rules

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case fails to perform the obligations incumbent upon it under a Court Judgment, the other party “may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment.” *Id.*

81. See *Security Council Does Not Adopt Text Calling for Compliance with International Court Ruling Regarding Nicaragua Case*, UN CHRONICLE, February 1987, at 62, 62.

82. See *130 Political Parties ask U.S. to Heed International Court Sentence*, XINHUA GEN. OVERSEAS NEWS SERVICE, Nov. 10, 1986, available in LEXIS, News library, Xinhua General News Service file.

83. For example, Article 36(4)(a) provides, “[n]ominations of candidates for election to the Court may be made by any State Party to this Statute.” Rome Statute, *supra* note 7, art. 36, para. 4(a).

of procedure and evidence. If the United States does not sign, it will not get the opportunity to participate in these processes. It was only through partaking in and leading the Rome Conference that the United States achieved as much as it did. Now, it should sign the Statute and help refine the details of the Court.

D. ALL GENOCIDE, WAR CRIMES, AND CRIMES AGAINST HUMANITY  
MUST BE RECOGNIZED AND PUNISHED

History has taught the United States that lack of prosecution emboldens criminals. Hitler's phrase, "who . . . is speaking about the destruction of the Armenians" rings loudly in the ears of not only Armenians and Jews killed during the two world wars, but hundreds and thousands of victims in the twentieth century who have been subjected to perpetrators like Hitler.

A look at the particular case of the Armenians proves very instructive. The Russian, French, and British Governments issued a Joint Declaration to the Ottoman Empire in May 1915.<sup>84</sup> The Declaration accused the Ottoman Government of deliberately pursuing a policy of extermination of the Armenians and included a warning as follows: "In view of these crimes of Turkey against humanity and civilization, the Allied governments announce publicly . . . that they will hold personally responsible [for] these crimes all members of the Ottoman Government and those of their agents who are implicated in such massacres."<sup>85</sup> The Declaration did not deter the perpetrators, however, because of the lack of enforcement. The atrocities against the Armenian People continued unabated and over 1.5 million Armenians were killed in the twentieth century's first genocide.

Unfortunately, the Allied powers did not learn from their mistake. In 1919, the Allied Governments established a Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties. The Tribunal was never constituted despite the prevailing sentiment at the peace conference and the detailed work of the Commission in preparing for the establishment of the High Tribunal. The "international trials" envisaged by so many throughout the conduct of the war failed to materialize."<sup>86</sup>

The Treaty of Sèvres, which had its special provisions for the trial of those responsible for the massacre of Armenians, was replaced with the

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84. See McCormack, *supra* note 46, at 700.

85. *Id.* (second alteration in original).

86. *Id.* at 702.

Treaty of Lausanne. The latter included a “Declaration of Amnesty” for crimes committed during World War I. Thus, the trial the Allied Governments had threatened never materialized, and the perpetrators went unpunished.<sup>87</sup>

The failure to establish a tribunal at the end of World War I has not been corrected to this day. The establishment of the Nuremberg and Tokyo tribunals and the ICTFY and ICTR have not remedied this deficiency. Judge Gabrielle Kirk McDonald has commented:

To date, this [genocidal] destruction of [Armenian] human life has been a non-event. Neither the victims of these acts have been acknowledged, nor the perpetrators brought to justice. . . .

. . . .

With few, but notable, exceptions, there has been no reckoning for the great majority of mass violations of human rights throughout this century; perpetrators have either not been identified, or have not been required to account for their crimes. These crimes are committed against individuals, yet they are also crimes against all humanity; there must be respect for the principles of equality of all human life and for the universal application of justice and of the law.

. . . To undertake to protect rights and then fail to prevent or to redress their abuse is both inconsistent and an affront to that universality.<sup>88</sup>

Unless the world recognizes and punishes all such atrocities, they will continue to occur. The world evidenced that it has in part learned from its mistakes when it voted for the ICC Statute in Rome. This process cannot be complete, however, without the recognition of all past crimes (for example, admitting that the Armenian Genocide occurred) and the participation of the United States in such recognition.

In reality, it could be said that the United States would be furthering its national interests by signing the ICC Statute.

Although a nation cedes some sovereignty when it becomes a party to an international agreement, it also receives certain protections which broaden its sovereignty. If sovereignty is viewed as the power of a nation to protect its citizens, as it should, fortifying itself with the aid of the international community only enhances this objective. Therefore, the future development of international law, which includes an international

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87. *See id.* at 704.

88. *The Eleventh Annual Waldeman A. Solf Lecture: The Changing Nature of the Laws of War*, 156 MIL. L. REV. 30, 33 (1998).

criminal court, may hinge upon the continuing evolution of this rationale.<sup>89</sup>

Arguably, whatever sovereignty the United States loses to the jurisdiction of an international court, it regains by the protection that it provides.<sup>90</sup>

Moreover, by helping to deter atrocities, the ICC will reduce the chance that the United States will deploy its troops in response to future Bosnias. And when and if soldiers are deployed, it will help prevent the commission of war crimes against them.

#### IV. WHY THE UNITED STATES HAS NOT SIGNED THE ICC

Part IV focuses exclusively on the United States' decision to vote against the ICC Statute. Ambassador Scheffer, head of the U.S. delegation to Rome, explained that the present ICC statute is both over- and under-inclusive. "[T]he agreement that was reached puts at risk the vital efforts of the United States and others to promote international peace and security, while the worst perpetrators of atrocities may go unpunished. Such an outcome hardly promotes the interests of justice."<sup>91</sup> The United States fears that its own peacekeeping troops would be subject to the constant harassment and threat of prosecution before the ICC, tying up and overburdening the Court to such an extent that the Court will not have a chance to prosecute the "true" criminals.<sup>92</sup>

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89. Patricia A. McKeon, Note, *An International Criminal Court: Balancing the Principle of Sovereignty Against the Demands for International Justice*, 12 ST. JOHN'S J. OF LEGAL COMMENT. 535, 543-44 (1997) (footnotes omitted).

90. *See id.*

91. David J. Scheffer, *America's Stake in Peace, Security and Justice*, AMER. SOC. INT'L L. NEWSLETTER Sept.-Oct. 1998, at 1, 1 [hereinafter Scheffer, *America's Stake*].

92. For a counterargument to the United States' fears, see Marcella David, *Grotius Repudiated: The American Objections to the International Criminal Court and the Commitment to International Law*, 20 MICH. J. INT'L L. 337, 370-71 (1999):

Suppose, for example, U.S. forces were guilty of gross violations of crimes against humanity, and further suppose that the complaining state, guilty of similar crimes and not a party to the Statute, presented to the Prosecutor charges against the U.S. forces involved in the criminal activity. To permit the case to proceed might not be "fair" to the United States nationals involved, but to ignore the crimes in order to equalize the political impact on the governments involved would hardly be fair to the victims of the United States' actions—those to whom the protection of the Statute are intended to flow. . . . Moreover, there is precedent to such a lopsided approach: the Nuremberg and Tokyo Tribunals. In particular, in the Tokyo Tribunals the claim was made that the Tokyo defendants should be able to present, as part of their defense, evidence relating to alleged war crimes violations of the U.S., including the U.S. bombing of Tokyo, Hiroshima and Nagasaki. That argument was rejected.

*Id.* (footnotes omitted).

Thus far, the United States has expressed three main legal concerns. Since I conclude that these concerns are minimal at best, I discuss a fourth concern that the United States stated but never really emphasized: Senator Jesse Helms' very real threat, as Chairman of the Foreign Relations Committee, never to let the ICC statute pass through the Senate.

Ambassador Scheffer's speech before the Senate Foreign Relations Subcommittee outlines the heart of the U.S. argument. The three major legal problems are (1) jurisdiction, (2) trigger, and (3) the inclusion of aggression as a core crime. The United States believes that the jurisdiction of the Court is too broad; the trigger mechanism is too strong; and the inclusion of aggression is potentially too dangerous.

#### A. LEGAL REASONS

##### 1. *Jurisdiction*

The ICC treaty specifies that, as a precondition to the Court's exercise of jurisdiction, either the state of territory where the crime is committed *or* the state of nationality of the perpetrator of the crime must be a party to the treaty or grant its voluntary consent to the jurisdiction of the court.<sup>93</sup> The U.S. proposed an amendment that would require the Court to obtain at least the consent of the state of nationality of the perpetrator.<sup>94</sup> The Conference participants rejected the proposal almost unanimously. Thus, "a form of jurisdiction over non-party states was adopted by the conference despite [the United States'] strenuous objections."<sup>95</sup>

The United States reasons that because most crimes are committed internally and most internal conflicts are between warring parties of the same nationality, the worst offenders of international humanitarian law can choose never to join the treaty and insulate themselves from its reach absent a Security Council referral.<sup>96</sup> Yet multinational peacekeeping forces

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93. The Rome Statute specifies,

[T]he Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court . . . :

(a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;

(b) The State of which the person accused of the crime is a national.

Rome Statute, *supra* note 7, art. 12.

94. See Scheffer, *Testimony*, *supra* note 36.

95. *Id.*

96. While this is true, it is an ironic argument for two reasons. First, the system of jurisdiction proposed by the United States (consent of the state of nationality of the perpetrator) does nothing to

operating in a country that has joined the treaty remain exposed to the Court's jurisdiction, even if the individual peacekeeper's country has not joined the treaty. Thus, the treaty establishes an arrangement whereby the ICC could conceivably prosecute U.S. armed forces operating overseas even if the United States has not agreed to be bound by the treaty.<sup>97</sup>

First, the preceding argument simply means that the ICC is underinclusive. In fact, the United States seems to be arguing that the Court should be stronger. Interestingly, under the ICC proposed by the United States, "nobody would have been brought to justice for the massacres in the former Yugoslavia. Nobody would have been tried for filling mass graves with Rwandan children. And very few, if any, of the people responsible for killing 11 million civilians in the Holocaust would have paid for their crimes."<sup>98</sup> The United States proposed, fought for, and got a weaker Court. Subsequently, because it did not become a signatory, it cites the weakness of the Court as a reason for not becoming a signatory.

More importantly, what the United States claims is a problem with the ICC is already the international norm. These jurisdictional bases were selected because they are the most firmly established in international law. The core crimes included in the ICC treaty are crimes of universal jurisdiction.<sup>99</sup> In other words, any nation in the world has the authority to exercise jurisdiction over suspects and criminals committing these types of crimes, with or without the consent of that individual's state of nationality. Responding to Ambassador Scheffer's concerns over jurisdiction under the ICC statute, Philippe Kirsch writes,

In particular, the territorial basis is the primary jurisdictional link accepted in all domestic legal systems and confirmed in numerous conventions, including those on genocide, torture, hostage taking, and several forms of terrorism. This does not bind states that are not parties to the Statute. It simply confirms the recognized principle that individuals are subject to the substantive and procedural criminal laws

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alleviate the concern professed here by the United States. In addition, this concern means that the United States believes the ICC jurisdiction is too weak rather than too strong, and this flies in the face of its earlier arguments.

97. See Scheffer, *America's Stake*, *supra* note 91, at 9.

98. Heather M. Ross, *U.S. Should Not Object to Creating a Permanent International Criminal Court*, KNIGHT RIDDER/TRIB. NEWS SERVICE, July 16, 1998, available in LEXIS, News library, Knight Ridder/Tribune News Service file.

99. See Scharf, *supra* note 45 (citing a statement submitted to the Senate Foreign Relations Committee by Richard Dicker of Human Rights Watch).

applicable in the territories to which they travel, including laws arising from treaty obligations.<sup>100</sup>

If any individual state can try a war criminal, regardless of nationality, for these core crimes, then the conference participants rightfully empowered the ICC with these same rights. Moreover, despite the United States' contentions, the concept of universal jurisdiction is consistent with many U.S. positions in other areas of international law.<sup>101</sup>

In order to address U.S. concerns, jurisdiction of the ICC would be subject to a concept known as "complementarity"—national judicial systems would have jurisdiction unless it is clearly established that they are unwilling<sup>102</sup> or unable<sup>103</sup> to carry out the necessary proceedings.<sup>104</sup> For example, if a U.S. court acquits an individual that the ICC wishes to prosecute, the international court could not proceed unless it proved that

100. Philippe Kirsch, *The Rome Conference on the International Criminal Court: A Comment*, AMER. SOC. INT'L L. NEWSLETTER, Nov.–Dec. 1998, at 1, 8.

101. For example,

[T]he United States has for many years espoused the view that India and Pakistan should not develop nuclear weapons, even though neither country signed the Nuclear Non-Proliferation Treaty, and that China should observe certain universal norms of human rights regardless of the fact that China did not sign the relevant human rights treaties.

Gerard E. O'Connor, *The Pursuit of Justice and Accountability: Why the United States Should Support the Establishment of an International Criminal Court*, 27 HOFSTRA L. REV. 927, 959 (1999).

102. Article 17(2) specifies,

In order to determine unwillingness in a particular case, the Court shall consider . . . whether one or more of the following exists, as applicable:

- (a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility . . . ;
- (b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;
- (c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.

Rome Statute, *supra* note 7, art. 17, para. 2.

"Thus, 'unwillingness' in effect requires that national proceedings be undertaken in bad faith before the ICC can step in." LCHR, *Case for U.S. Support*, *supra* note 69.

103. Article 17(3) states,

In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.

Rome Statute, *supra* note 7, art. 17, para. 3.

'Inability' means 'a total or substantial collapse or unavailability' of the national courts. This exception would apply to countries in which the judiciary has ceased in whole or substantial part to function. It would not apply to a state with an independent and functioning judicial system.

LCHR, *Case for U.S. Support*, *supra* note 69 (citation omitted).

104. See Kirsch, *supra* note 100, at 1.

the U.S. trial was a sham or farce. Even Ambassador Scheffer acknowledges that complementarity essentially means that the ICC will only exert jurisdiction if there is a breakdown in the national system of prosecution.<sup>105</sup> This safeguard of complementarity should assuage U.S. fears, for if the United States is willing to prosecute its own “criminals,” there should be nothing to fear from a world criminal court which would be powerless to step in.

The inclusion of complementarity as a safeguard does not calm the opponents to the Court. They assert that the concept is “utterly unproven and untested. Since no one has any actual experience with the Court, of course, no one can say with complete certainty what will happen.”<sup>106</sup> They argue that a major change in U.S. foreign policy should not have basis in something that is not sound. The ICC can override the decision of a nation’s judicial system since safeguards can be easily overcome.<sup>107</sup> In fact, “if [complementarity] has any real substance, [it] argues against creating the ICC in the first place.”<sup>108</sup> If most states are going to have jurisdiction anyway, the only complement necessary is at most an ad hoc tribunal.<sup>109</sup>

This counterargument to the creation of the ICC is weak. First, the lack of history or experience with complementarity or safeguards built into the ICC does not mean that it is not a sound approach. The ICC is a completely new creation. In fact, almost everything about it is new and unproven. It was the obligation of the states participating in the conference to structure the ICC, in part based on their own national systems, in part based on what they believe would work best for a supra-national body. Each country can, and in fact has the duty to, investigate matters internally. After such an investigation, the state can decide to proceed or dismiss a

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105. Ambassador Scheffer states,

The Administration believes strongly that U.S. soldiers should be tried by U.S. authorities and not by the Court. The Court is supposed to assert jurisdiction only in the event of a fundamental break-down in national institutions, such that the national authorities do not investigate and prosecute the commission of these crimes. Since the United States does and will continue to investigate and, where there are grounds to do so, prosecute such crimes, intervention by such a Court would not be warranted.

Foreign Relations Hearing, *supra* note 23, at 47.

106. *Id.* at 63 (statement of John R. Bolton).

107. “[O]ur only way to prevent the case from going forward would be to have our own Justice Department investigate the President. If the U.S. Government then declined to prosecute, it would still be up to the judgment of the ICC whether to prosecute and pursue the case.” *Id.* at 2 (statement of Senator Grams).

108. *Id.* at 63 (statement of John R. Bolton).

109. *See id.*

case. If the national courts are unwilling or unable to prosecute, only then can the Prosecutor go forward, and then only after going through multi-level procedural steps that ensure fairness and equity to all.

Moreover, the safeguard of complementarity does not refute the necessity of the ICC in favor of ad hoc tribunals. As discussed above, ad hoc tribunals have many faults that a permanent court would correct.<sup>110</sup> Complementarity, then, is only meant to assure that the permanent court does not overstep its bounds by interfering with essentially national matters. The permanent court could complement the already-existing enforcement structure in a way that ad hoc tribunals have repeatedly failed to do, either because they were never set up, or because when set up, they were too costly, too lengthy, and led to tribunal fatigue.

In addition to the deference given national systems, according to Article 15 of the ICC Statute, the Prosecutor must inform states with a prosecutive interest in a case of her intention to commence investigation. If within one month of notification, such a state informs the Court that it is investigating the matter, the Prosecutor must defer to the state's investigation.<sup>111</sup> Furthermore, Article 8 of the ICC Statute specifies that the Court would have jurisdiction only over "serious" war crimes that represent a "policy or plan."<sup>112</sup> Thus, random acts of personnel involved in a foreign peacekeeping operation would not be subject to the Court's jurisdiction.<sup>113</sup>

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110. See *supra* Part I.B.2.

111. See Rome Statute, *supra* note 7, art. 18. The Pre-Trial Chamber can also authorize the investigation on the application of the Prosecutor. See *id.* para. 2. The decision of the Pre-Trial Chamber is subject to interlocutory appeal to the Appeals Chamber. See *id.* para. 4.

112. See Rome Statute, *supra* note 7, art. 8.

113. Senator Feinstein points out the high threshold when she states,

[Ambassador Scheffer, you] raise the issue that a United States soldier, for example, as part of a peacekeeping mission, might do something which could lead to charges being filed against him or her. . . . [T]he bar is set fairly high regarding the Court's ability to indict or try someone for war crimes. . . . Does this rule out the danger that a random incident, even one with genuine harm, could be prosecuted?

Or, if the concern is over a possible war crime charge because of civilian casualties resulting from a United States operation, Article 8[(b)(iv)] specifies that the offending nation would need to intentionally launch an attack with the knowledge that it would cause incidental civilian damage and that the use of force has to be clearly excessive to the military goal.

So, under what circumstances do you see a United States soldier, for example, or a United States policy subject to prosecution under this statute?

Foreign Relations Hearing, *supra* note 23, at 17. Ambassador Scheffer replied,

While we have great confidence that the U.S. armed forces are not in the business of committing these types of crimes—that is not what they are trained to do; that is not what we ask them to do—nonetheless, we know from hard experience that because of our global

Lastly, the Security Council can affirmatively vote to postpone an investigation or case for up to twelve months, on a renewable basis.<sup>114</sup> While this vote does not amount to the individual veto the United States had sought, it gives the United States and other members of the Security Council collective control over the Court.

## 2. *Trigger Mechanism*

In addition to jurisdictional concerns, the United States protested against the two-track trigger mechanism upon which the Rome conference participants eventually agreed. Under the first track, the Security Council would have a right to trigger an investigation and bring a case to court. But the treaty went further by creating a second track. In light of the recent domestic political fiasco raised by Independent Prosecutor Kenneth Starr's investigations of President Clinton,<sup>115</sup> the establishment of an independent ICC prosecutor especially concerned the United States. "The treaty . . . creates a *proprio motu*, or self-initiating prosecutor, who on his or her own authority, with the consent of two judges, can initiate investigations and prosecutions without referral to the Court of a situation either by a government that is party to the treaty or by the Security Council."<sup>116</sup> The United States fears that the Court would be overwhelmed with complaints

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deployments, because of the responsibilities that we take on overseas, there will inevitably be referrals to this court that seek to bring us to the bar of justice of this court simply because we have deployed our military and used it.

Now, we would hope that in response to any such referral, we could easily defeat it because it has not met that test that you just pointed out . . .

The problem is that it is not a guarantee, obviously, that frivolous and politically motivated charges will nonetheless be brought against us . . .

*Id.* at 17-18.

114. See Rome Statute, *supra* note 7, art. 16.

115. See David Scheffer, *Dept. of State - U.S. and the UN: Remarks to Washington Institute for Near East Policy* (May 21, 1998) <<http://usinfo.state.gov/topical/pol/usandun/schef21.htm>> (opposing an unchecked Prosecutor with broad power to direct the target and course of investigations).

116. Foreign Relations Hearing, *supra* note 23, at 14 (statement of Ambassador Scheffer). In testimony Scheffer said,

The prosecutor . . . will have to make judgments as to what he pursues and what he does not pursue for investigative purposes. In the end, those kinds of judgments by the prosecutor will inevitably be political judgments because he is going to have to say no to a lot of complaints, a lot of individuals, a lot of organizations that believe very strongly that crimes have been committed, but he is going to have to say no to them. When he says no to them and yes to others and he is deluged with these, he may find that he ends up making some political decisions. Even if he has to go to the Pretrial Chamber and get the approval of at least two of the three judges in the Pretrial Chamber, in the end you have three individuals making that decision.

Foreign Relations Hearing, *supra* note 23, at 23. See also Scheffer, *America's Stake*, *supra* note 91, at 9 (ICC statute "provides a recipe for politicization of the Court").

and risk diversion of its resources, and that the Court would be embroiled in controversy, political decisionmaking, and confusion.<sup>117</sup>

Instead, the United States supports a referral system. A State Party to the treaty or the Security Council can refer an armed conflict or an atrocity to the court. The Prosecutor would then investigate. This is the way the Yugoslav war crimes tribunal works currently. “[The United States] oppose[s] creation of a self-initiating Prosecutor who could investigate and prosecute anyone, anywhere, anytime and under any circumstances without the benefit of a referral that establishes some parameters.”<sup>118</sup>

But Ambassador Scheffer himself agrees that the issue is not so black and white. In his speech before the Senate Foreign Relations Subcommittee, the Ambassador stated that once the Prosecutor launches the investigation, there is

a wide range of provisions in the statute that check him along the way. The Pretrial Chamber itself has numerous opportunities to examine the course of his work and to influence the course of his investigative work.<sup>119</sup>

But in addition to that, we have a lot of provisions on cooperation with States, part 9 of the statute, which do provide him and the Court with a guide path for how to make requests for cooperation with States. That is a very detailed set of provisions, but it certainly is the case that the prosecutor cannot simply walk into other countries and start investigating. . . . He has to fulfill documentary requirements, and he has to work with other governments in order to achieve his investigative objectives. So, it is not a completely independent prosecutor with access throughout the world.<sup>120</sup>

In addition, as discussed in the previous section, the Security Council’s ability affirmatively to vote to postpone an investigation or case for up to twelve months can serve as a check on the powers of an independent prosecutor.

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117. See Foreign Relations Hearing, *supra* note 23, at 23.

118. Scheffer, *supra* note 115. But see Juan E. Mendez and Richard Dicker, *Creating an International Criminal Court: Lukewarm U.S. Support Hampers Prospects*, LEGAL TIMES, Sept. 18, 1995, at 24 (noting that this trigger mechanism would also give Council veto power). See also Cynthia Brown, *Human Rights and Wrongs—1995*, NATION, Dec. 25, 1995, at 830 (calling use of Security Council a “transparent attempt” to retain veto power so the U.S. government would remain off-limits to human rights scrutiny).

119. Article 15 of the Court’s Statute guards against spurious complaints by the ICC prosecutor by requiring the approval of a Pre-Trial Chamber before the prosecution can launch an investigation. The States Parties may appeal the Chamber’s decision to the Appeals Chamber. See Rome Statute, *supra* note 7, arts. 15, 18.

120. Foreign Relations Hearing, *supra* note 22, at 27 (statement of Ambassador Scheffer).

The ICC participants recognize that a trigger mechanism solely dependent on the Security Council is unworkable. The ICC should have a trigger mechanism that is free from the political obligations and considerations which the Security Council is subject to. Without an independent prosecutor to start an investigation, it is probable that the majority of abuses would go unpunished. "States have proved unwilling to initiate proceedings against another state and/or its nationals because of the political and diplomatic ramifications involved. Their reluctance is also based on a fear of inviting retaliatory scrutiny of their own human rights practices."<sup>121</sup> Thus, the existence of an independent prosecutor is actually necessary.

The U.N. High Commissioner for Refugees (UNHCR)<sup>122</sup> supports granting initiating power to the Prosecutor. The Commission believes that this grant of power would help "ensure the independent powers of the Court and guard against undue political influence in initiations of investigations."<sup>123</sup> Similarly, the American Bar Association supports the idea of an independent prosecutor. "The Task Force has reconsidered its earlier position and now would support the . . . Prosecutor[‘s ability to] initiate an investigation in the absence of a complaint if it appeared that a crime apparently within the jurisdiction of the court might otherwise not be properly investigated."<sup>124</sup>

Thus, similar to the ICC’s complementary jurisdiction to the national court systems, the two-track trigger mechanism allows an independent prosecutor to "complement" the Security Council in bringing cases before the ICC. The fact that multi-level safeguards are built into the independent prosecutor’s ability to function should assuage remaining concerns.

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121. Jelena Pejic, *The Need for an Independent Prosecutor*, available in Gopher database.

122. The UNHCR is a commission that deals with refugee situations wherever they may arise. See U.N. High Commissioner for Refugees, *UNHCR Mission Statement – Part I* (visited July 8, 2000) <<http://www.unhcr.ch/un&ref/mission/ms1.htm>>. Military conflict and other forms of violence are the main causes of refugee flows. See *id.* Thus, the UNHCR, like no other international organization, has accumulated expertise in this area, making its opinions very valuable.

123. U.N. High Commissioner for Refugees, *UNHCR and the Establishment of an ICC: Some Comments on the Draft Statute* (visited May 11, 2000) <<http://www.un.org/icc/unhcr.htm>>.

124. *American Bar Association Task Force on an International Criminal Court: Final Report*, 28 INT’L LAW. 475, 494 (1994).

### 3. *The Crime of Aggression*

The biggest fear of the United States is the inclusion in the ICC Statute of the undefined crime of “aggression.”<sup>125</sup> Customary international law has not yet embraced a “broadly acceptable definition . . . for purposes of individual criminal culpability.”<sup>126</sup> This lack of an accepted definition has created a concern that a later conference will reach a definition of aggression once the United States had already signed the Statute and regardless of whether the United States agrees with it.

The United States wants the U.N. Security Council to have sole determination of who has committed aggression. The United States also wants “a definition that, for purposes of the statute of the court, is confined to the most obvious and non-controversial acts constituting a full-scale war of aggression.”<sup>127</sup> This would provide a direct linkage between a prior Security Council decision that a state had committed aggression and the conduct of an individual of that state. Inclusion of the undefined crime of aggression provides “no guarantee that the vital linkage with a prior decision by the Security Council will be required by the definition that emerges, if in fact a broadly acceptable definition can be achieved.”<sup>128</sup>

Since the United States is the country with the most military and political involvement outside its borders, it potentially has the most to lose from the inclusion of aggression as a crime over which the ICC has jurisdiction. Even U.N. Secretary-General Kofi Annan recognized this concern when he stated that the United States has “an understandable and legitimate interest in ensuring that a court would not unfairly subject American citizens to politicized complaints.”<sup>129</sup> Specifically, the United States is afraid that its worldwide military and political activities, such as the invasion of Grenada, the invasion of Panama, and the bombing of Tripoli, might be considered aggression by the ICC, and as a result, the United States would find itself as a perpetual defendant before a rogue institution carrying out a political agenda.<sup>130</sup>

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125. See David Scheffer, *Dept. of State – U.S. and the U.N.: Scheffer Remarks to UN Committee, Oct. 21, 1998* (visited April 15, 2000) <<http://usinfo.state.gov/topical/pol/usandun/shcef21.htm>> [hereinafter Scheffer, *Remarks to U.N.*].

126. Scheffer, *supra* note 115.

127. *Id.*

128. Scheffer, *Testimony*, *supra* note 36.

129. *Annan Urges Countries to Sign International Criminal Court Statute*, *supra* note 4.

130. Prosecution for these particular activities would not actually happen. The ICC will not have retroactive jurisdiction; it will only have the power to prosecute crimes that occur after the statute goes into effect. See Rome Statute, *supra* note 7, arts. 11, 24.

To instill even more fear in the hearts of those concerned, extremist examples are given: “So, if [Congress] were to declare war, when aggression finally gets defined at some point down the road and it is determined to be an act of aggression and therefore a criminal element, conceivably Members of Congress who voted to declare war could be liable [to the ICC] as well.”<sup>131</sup> Without a Security Council veto, the United States would not be able to stop such an investigation. Admittedly, there are no guarantees that a U.S. citizen will never be brought before the Court, but there are a number of considerations that should calm U.S. fears.

The issue of aggression is not ripe for consideration since it is not yet defined. I will nevertheless address some of the United States’ concerns. First and foremost, the Statute specifically provides that the Court shall not exercise jurisdiction over the crime of aggression until the Assembly of States Parties develops a suitable definition and appropriate conditions.<sup>132</sup> This is “[i]n accordance with the principle *nullum crimen sine lege* [no crime without law]. . . . The definition must be consistent with the UN Charter.”<sup>133</sup> No amendment will be considered until seven years after the treaty’s entry into force; and even then, “[t]he definition must be accepted by 7/8 of States Parties, and . . . will bind only those who accept it.”<sup>134</sup> Essentially, more than 87.5% of those states that ratify the ICC Statute must also ratify the definition of aggression before the ICC can exercise jurisdiction. In addition, if the requisite number of states accept a definition which the remainder do not find acceptable, those states are given the opportunity to eschew jurisdiction of the Court over aggression. Thus, even if the United States does not approve of the definition of aggression ratified by 7/8 of the states, it still would not be subject to the Court for aggression if it opted out. The United States could simply opt out of a definition of aggression that it did not agree with and be *immune* from prosecution for that crime.<sup>135</sup>

Furthermore, the ICC would not deem every action taken by the United States to defend its national interest an act of aggression. The United States can insulate itself if it takes either of two approaches. First, the United States can proceed through the U.N. Security Council in accordance with the U.N. Charter. In addition, if a favorable U.N. Security

131. Foreign Relations Hearing, *supra* note 23, at 41 (statement of John R. Bolton).

132. See Kirsch, *supra* note 100.

133. *Id.*

134. *Id.* Note that this is not consistent with the rest of the ICC Statute, which states that the core crimes apply whether or not a state is a party to the statute. This opt-out for aggression was written into the statute solely to assuage U.S. fears. See generally *id.*

135. See Rome Statute, *supra* note 7, art. 121, paras. 5, 6.

Council vote is unlikely to be forthcoming and a timely action is of the essence, there is another option: Article 51 of the U.N. Charter can provide the necessary legal umbrella for unilateral action, without prior U.N. approval, if done in a limited matter and for self-defense purposes.<sup>136</sup> The real fear is the fact that the U.N. has not always been supportive of U.S. actions. In that case, supporters for the ICC would argue that the United States has no right to interfere. More importantly, however, this reveals one of the real reasons that the United States refuses to sign the Statute. The United States wants no potential limitation on its unilateral and sometimes arbitrary power to pursue whatever international actions it deems necessary and within U.S. interests.<sup>137</sup>

#### 4. *High Threshold of Definitions*

The ICC has built on existing definitions of the core crimes and does not really present any new “difficulties” for the United States. In addition, “[i]t is difficult to see a link between [U.N. peacekeeping] responsibilities and crimes of such magnitude as genocide, crimes against humanity or war crimes as defined in the Statute.”<sup>138</sup> The definitions already exist; the bar is

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136. The Charter states,

Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

U.N. CHARTER art. 51.

Article 52 provides a similar safe haven if action is taken by a regional agency in matters related to its regional security. *See id.* art. 52, para. 1.

137. See Part IV.B for a more complete discussion of the United States’ unstated reasons not to sign the ICC.

138. Kirsch, *supra* note 100. *But see* William F. Jasper, *Courting Global Tyranny*, NEW AMERICAN, Aug. 31, 1998, at 10. Jasper asks,

Can we really consider allowing a panel of UN judges to decide whether a U.S. military bombardment or other operation constitutes a crime of causing “great suffering” or “serious injury to health”? Can we truly contemplate allowing ICC “jurists” to determine if a Marine sniper or an Army patrol carrying out an ambush of an enemy force is guilty of “killing treacherously”? Is there a possibility that “outrages upon personal dignity” could be interpreted by an anti-American judiciary to our detriment? What shall constitute “knowledge” that an attack will cause “incidental loss of life or injury”? And what does “civilian objects” mean? If your mortar round overshoots and blows up a farmer’s haystack are you guilty of a war crime? Probably so, if you’re an American.

*Id.* at 14.

set so high that the definitions could never realistically apply to a U.S. peacekeeping force.

The ICC Statute replicates the definition of genocide as provided for in the 1948 Genocide Convention.<sup>139</sup>

Under the Convention and the ICC Statute, genocide ‘means any . . . acts committed with intent to destroy [any part of] a national, ethnical, racial or religious group [including] killing members of the group, causing serious bodily or mental harm, . . . deliberately inflicting on the group conditions of life calculated to bring about its physical destruction . . . [and] forcibly transferring children of the group to another group.’<sup>140</sup>

The ICC’s definition of crimes against humanity goes beyond the definition used in Nuremberg. The Nuremberg tribunal applied such a definition in the context of armed conflicts. In addition, only states could be accused of crimes against humanity. On the other hand, the ICC has jurisdiction during armed conflicts *or peacetime* and over states *and non-state actors*. The ICC Statute defines a crime against humanity as an act committed as part of a “widespread or systematic attack against any civilian population, with knowledge of the attack.”<sup>141</sup> These acts include “murder, extermination, enslavement and deportation, which were provided for in the Nuremberg Charter.”<sup>142</sup> Like the Statute of the ad hoc ICTFY, “the ICC Statute also provides that imprisonment, torture, rape and persecutions on political, racial, and religious grounds . . . when committed on a widespread or systematic basis” are also crimes against humanity.<sup>143</sup> In addition, the ICC Statute “updates the list of crimes against humanity by including “‘forcible transfer of population,’ ‘other severe deprivation of physical liberty in violation of fundamental rules of international law’ (apart from imprisonment), ‘sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity,’ ‘enforced disappearance of persons’ and ‘the crime of apartheid.’”<sup>144</sup>

Even though there are some “extra” crimes included under the ICC’s definition of crimes against humanity, “[t]he progress . . . is offset somewhat by the inclusion of high definitional and evidentiary thresholds

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139. See Lawyers Committee for Human Rights, *Frequently Asked Questions about the International Criminal Court*, available in Gopher database [hereinafter *ICC FAQ*].

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

that will restrict the Court's effective jurisdiction over these crimes."<sup>145</sup> The Rome Treaty sets a high bar to the Court's jurisdiction over crimes against humanity. The definition of "'attack directed against any civilian population' only covers conduct that is 'pursuant to or in furtherance of a State or organizational policy.'"<sup>146</sup> Thus, unless there is a showing that an act was committed in furtherance of a State or organizational policy, it will not fall under the scope of the ICC. In fact, "[b]ecause of this requirement, the Court's jurisdiction over crimes against humanity will not extend as broadly as customary international law."<sup>147</sup> These additions, therefore, should not concern the United States.

The ICC Statute reproduces the "grave breaches" provisions of the 1949 Geneva Conventions constituting war crimes in international armed conflict.<sup>148</sup> A list of twenty-six other acts considered to be "serious violations of the laws and customs applicable in international armed conflict" is also included.<sup>149</sup> Some of these acts include rape, sexual slavery, enforced prostitution, forced pregnancy or "any other form of sexual violence also constituting a grave breach of the Geneva Conventions."<sup>150</sup>

Thus, the only technical expansion of liability is in the explicit attachment of international criminal responsibility to certain war crimes committed in internal armed conflict. The United States is under current obligations to respect and refrain from any of these actions because it is a member to these previous treaties. The United States, therefore, will incur no new real obligations or liabilities.

In arguing against the ICC, the United States presents a parade of horrors and justifies its vote by pointing to a remote, albeit possible, situation in which an American can fall under investigation or be brought before the ICC. It is virtually impossible to make a blanket guarantee that the ICC will never prosecute an American soldier. Part IV clearly presents and explains the multi-level safeguards incorporated by the ICC that would substantially prevent such an occurrence from happening. Whether or not the United States signs the statute, it will be subject to the same issues. If the United States, having signed or not signed, would be subject to the same concerns of having even the President of the United States

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145. *Id.*

146. LCHR, *Case for US Support*, *supra* note 69.

147. *Id.*

148. *See id.*

149. Rome Statute, *supra* note 7, art. 8, para. 2(b).

150. *Id.* para. 2(b)(xxii).

prosecuted, for example, the only possible conclusion is that U.S. "concern" for these safeguards is merely pretextual.

#### B. UNSPOKEN REASONS BEHIND NOT SIGNING THE ICC

Senator Jesse Helms, Chairman of the Foreign Relations Committee, has vowed never to let the Statute pass through the Senate.<sup>151</sup> As Chairman, Helms is in a position to single-handedly bury the Statute. Not only does Helms reject the Rome treaty, but also he believes that the United States must fight the treaty.<sup>152</sup> He reasons that the Rome treaty will have serious implications for U.S. foreign policy whether or not the United States ever joins. According to Helms, the ICC contains irreparable flaws and is a dangerous document, due to broad jurisdiction, inclusion of an independent prosecutor, and inclusion of the undefined crime of aggression. He believes it should be quite clear what would constitute "aggression" in the eyes of this court. "It will be a crime of aggression when the United States of America takes any military action to defend the national interest of the American people unless the United States first seeks and receives the permission of the United Nations. And I say baloney to that."<sup>153</sup> Senator Helms points to the World Court's attempt to declare U.S. support for the Nicaraguan *contras* a violation of international law.<sup>154</sup> He

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151. See Jesse Helms, *We Must Slay This Monster: Voting Against the International Criminal Court Is Not Enough. The U.S. Should Try to Bring It Down*, FIN. TIMES, July 31, 1998, at 18.

152. Helms threatens,

The United States will not provide any assistance whatsoever to the Court or to any other international organization in support of the Court either in funding or in-kind contributions or other legal assistance.

The United States shall not extradite any individual to the Court or directly or indirectly refer a case to the Court.

The United States shall include in all of its bilateral extradition treaties a provision that prohibits a treaty partner from extraditing United States citizens to this court.

The United States shall renegotiate all of its status of forces agreements to include a provision that prohibits a treaty partner from extraditing U.S. soldiers to this court and will not station American forces in any country that refuses to accept such a prohibition.

The United States shall not permit a U.S. soldier to participate in any NATO, U.N., or other international peacekeeping mission until the United States has reached agreement with all of our NATO allies and the United Nations that no U.S. soldier will be subject to the jurisdiction of this court.

Foreign Relations Hearing, *supra* note 23, at 7.

153. *Id.* at 6. See also Helms, *supra* note 151.

154. See discussion *infra* Part III.B.

projects that, like the World Court, the ICC will constantly harass and interfere with U.S. foreign policy.<sup>155</sup>

Senator Helms not only dislikes the inclusion of the term aggression; he hates the dilution of the Security Council's power—and the dilution of the U.S. veto within the council.<sup>156</sup> Along with Senator Helms, Senator Grams has asserted that the treaty is a great victory for the critics of the Security Council.<sup>157</sup> However, this is not necessarily true. "In fact, the most vociferous critics of the Security Council such as India, Iraq and Libya refused to support the treaty, while three of the five permanent members of the Security Council voted for it."<sup>158</sup>

Perhaps the real reason for the U.S. position with respect to the ICC is its fear of Senator Jesse Helms, "who said any treaty exposing Americans even theoretically to such a court would be 'dead on arrival' in the Senate."<sup>159</sup> But this is the weakest reason of all not to sign the ICC statute. Helms' viewpoint is irrational and unfounded. He simply presents a parade of horrors in hopes of instilling fear of the ICC. Apparently, nothing will suffice in his eyes except for U.S. immunity in any international action it takes.

Even if Helms has the power to stop ratification, the United States has viable options to bypass Helms' vow: it can sign the statute and try to pass it through the Senate in defiance of Helms, or it can sign but wait to ratify the statute until after Helms has retired. The latter of the two options is the path that the United States should have chosen and still has time to choose.<sup>160</sup> The distinction between signing and ratifying an international statute must be fully exploited in this situation.<sup>161</sup> Thus, it seems that not even Senator Jesse Helms' disgust for the international court can explain the United States' hesitation to sign the Treaty.

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155. See Helms, *supra* note 151. See also Helms *Intimidating, but U.S. is the Loser for Not Signing Criminal Court Treaty*, FIN. TIMES, Aug. 4, 1998, Letters to the Editor, at 16 (responding to Helms).

156. See Helms, *supra* note 151.

157. See LCHR, *Case for US Support*, *supra* note 69.

158. *Id.*

159. Anthony Lewis, *At Home Abroad: A Turn in the Road*, N.Y. TIMES, July 20, 1998, at A15.

160. See *supra* note 11 and accompanying text for the distinction between ratifying and signing an international statute.

161. There is precedent for such an approach. Though the United States did not obtain all the concessions it desired in the Kyoto Global Warming Treaty, "[it] reluctantly decided at the last minute to sign the Kyoto agreement while stating its intention not to submit the Treaty for Senate ratification any time soon." Michael P. Scharf, *ASIL Insight: Rome Diplomatic Conference for an ICC* (visited April 15, 2000) <<http://www.asil.org/insigh20.htm>>.

U.S. dissatisfaction with the ICC is based on the possibility that an American can be brought before the Court. Ambassador Scheffer himself admitted, “[t]he problem is that it is not a guarantee . . . [that no] charges will . . . be brought against [the United States].”<sup>162</sup> There are only two ways the United States can be guaranteed it will never be brought before the Court: (1) if the United States never takes any action that can even remotely be labeled one of the core crimes, or (2) if the United States believes that it is somehow not subject to international law. Analyzing the U.S. proposals for the ICC, which all included Security Council vetoes that the United States could control, and looking at the comments made by Senator Helms, it seems that the United States believes that in fact, it should not be subject to international law if it does not wish to be.

Therefore, on some level, voting against the ICC can only be seen as a sign of hubris and hypocrisy on the part of the United States. It is in direct contradiction with the role that the United States is trying to play as the world’s “moral” superpower and peacekeeper. It is hypocritical of the United States unilaterally to declare other states in violation of international law and not subject itself to the same microscope. If the United States wants to continue such a role legitimately, it must be subject to the same accountability and vote for the creation of the Court.

#### CONCLUSION

Admittedly, there is a potential concern that the ICC could become a forum for politically motivated prosecutions of U.S. citizens. But safeguards included in the treaty, many of which the United States strongly pushed for, provide ample protection against such prosecutions. The United States needs to ask itself whether the benefit of eliminating the very last shred of risk justifies its opposition to the ICC. I argue that it does not. The United States should sign the Statute for the Establishment of an International Criminal Court.

Moreover, there are many benefits to the ICC that cannot be realized without signing the Statute. If the United States wants to minimize the “potential harms” of the ICC, the best way to address this concern is to participate in its continued formation by appointing judges, nominating prosecutors, and defining the crime of aggression.

Since U.S. concerns will continue to exist whether or not it signs the Statute, there can be no rational explanation for the decision to vote against

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162. Foreign Relations Hearing, *supra* note 23, at 18.

the ICC. It is time for the United States legitimately to continue its role as the world's peacekeeper by signing the Statute before the December 31, 2000 deadline. The United States must recognize that it is going to have to live with the ICC whether it signs or not, and that there is no way to bury it as Senator Helms proposes.

There is no way the world could accept the American demand that a loophole be inserted into the statute exempting U.S. citizens and soldiers. . . . It would be pointless to create a standing war-crimes court if the permanent members of the UN Security Council were allowed to veto any investigation that displeases them. . . . [A] sacrifice will ultimately be necessary if these countries—especially the U.S.—are serious about creating 'a new world order.'<sup>163</sup>

The United States obtained almost everything it wanted.<sup>164</sup> It is now time for it to subject itself to the same microscope that the rest of the world placed itself under and sign the ICC Statute. Once it signs, ratification is a secondary issue that can wait until Senator Helms can no longer affect the outcome.

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163. Editorial, *U.S. Trapped on Wrong Side of History*, HALIFAX HERALD, July 18, 1998, available in Halifax Herald database.

164. According to Ambassador Scheffer,

We sought a court that would be empowered by the UN Security Council to pursue those responsible for heinous crimes, whoever and wherever they are, but also a court whose ability to act without a Security Council mandate would be shaped in such a way as to protect against a misguided exercise of authority that might harm legitimate national and international interests.

It is difficult to see any meaningful way in which this goal was not completely achieved by the Rome Treaty. As the United States wanted, the ICC will have its greatest authority when the Security Council empowers it. And when the Court acts without a Security Council mandate, it will be severely circumscribed, most notably by being limited to cases involving the territory or nationals of countries that accept its jurisdiction.

Moreover, there are stringent safeguards against a 'misguided exercise of authority.' Indeed, protection against frivolous or politically motivated prosecutions was not just an American concern. Many of the Court's supporters deploy soldiers abroad, often as part of UN or NATO peacekeeping operations. They are as loath as the United States to expose their soldiers to unwarranted Court action.

LCHR, *Case for US Support*, *supra* note 69 (citation omitted).

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APPENDIX A – PRACTICAL, POLITICAL, AND CONSTITUTIONAL CONCERNS

The United States has stated a number of practical and political objections to the ICC statute. These concerns do not, in themselves, carry enough weight to justify voting against the treaty, nor are they the focus of this Note. Nevertheless, I summarize these concerns and address them briefly.

A. THE ICC AMENDMENT PROCESS

According to the United States, in its present form, the amendment process for adding new crimes to the jurisdiction of the Court or revising the definitions of existing crimes in the treaty is unacceptable:

After the States Parties decide to add a new crime or change the definition of an existing crime, any state that is a party to the treaty can decide to immunize its officials from prosecution for the new or amended crime. Officials of non-parties, however, are subject to immediate prosecution. For a criminal court, this is an indefensible overreach of jurisdiction.<sup>165</sup>

Even if this is a problem for non-signatories, voting for the statute should resolve this issue. It is no reason to vote against the statute; in fact, it is all the more reason to approve it.

B. THE “NO RESERVATION” CLAUSE

The “no reservation” clause is a significant problem for the United States. After all, almost every international treaty the United States has signed has been full of reservations.<sup>166</sup> The United States believed that “at a minimum there were certain provisions of the treaty, particularly in the field of state cooperation with the Court, where domestic constitutional requirements and national judicial procedures might require a reasonable opportunity for reservations that did not defeat the intent or purpose of the treaty.”<sup>167</sup> Allowing for reservations, furthermore, might have meant that

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165. Scheffer, *Remarks to U.N.*, *supra* note 125.

166. For example, the United States barely signed the Genocide Convention in 1986, and then only with a number of reservations that arguably defeated some of its purpose as applied to the United States. See James Kilpatrick, *A Symbolic Genocide Treaty*, SAN DIEGO UNION-TRIB., March 1, 1986, at B14.

167. Foreign Relations Hearing, *supra* note 23, at 15 (testimony of Ambassador Scheffer).

the United States could sign the ICC statute with a list of reservations addressing all its concerns.

The United States' stated concerns cannot be addressed with reservations. Allowing reservations, therefore, would only have crippled the Court with little to no comparable benefit since the United States still would have been unlikely to sign.

#### C. LACK OF OPPORTUNITY TO ASSESS THE COURT'S EFFECTIVENESS

The United States wanted an opportunity to assess the effectiveness of the Court before signing the treaty. The U.S. delegation proposed a ten-year transitional period following the treaty's entry into force. During this time, any state party could opt out of the Court's jurisdiction over crimes against humanity or war crimes.<sup>168</sup> The United States further proposed that at the end of the ten-year period, there would be three options: (1) accept the automatic jurisdiction of the court over all core crimes, (2) cease to be a party, or (3) seek an amendment to the treaty extending its opt-out protection.<sup>169</sup>

The United States argued that a transitional period is necessary in order to evaluate the performance of the court. The United States also stated that this opt-out provision would "attract a broad range of governments to join the treaty in its early years."<sup>170</sup> However, in the end, it was agreed to have only a seven-year opt-out provision for war crimes.<sup>171</sup>

A period to examine the effectiveness of the Court may have some benefits. This would, however, only delay the ability of the Court to function, as any potential perpetrators could simply opt out and be immune for ten years on a renewable basis according to the U.S. proposal. Accession to such a provision would cripple the Court, and thus, proponents took a hard-line stance so that the Court they established might be a sound one.

#### D. CONSTITUTIONAL CONCERNS

The ICC's jurisdiction over the core crimes is universal. Thus, the Court would have jurisdiction whether the crimes were committed in America or abroad. The United States argued that each of the four

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168. *See id.* at 13.

169. *See id.* at 13–14.

170. *Id.* at 14.

171. *See id.*

offenses—genocide, war crimes, crimes against humanity, and aggression—is currently within the legislative and judicial authority of the United States. The U.S. Constitution provides that only the state and federal governments have the authority to prosecute and try individuals for offenses committed in the United States, and that they may do so only in accordance with the guarantees contained in the Bill of Rights.<sup>172</sup> Because of this protection offered U.S. citizens, any body that is not a court of the United States cannot exercise jurisdiction over alleged U.S. criminals.<sup>173</sup>

The opponents to the ICC cite the U.S. Supreme Court case *Ex parte Milligan*,<sup>174</sup> striking down the conviction of a civilian by a military tribunal because the military tribunal was not established under Article III of the Constitution, and as such was not part of the judicial power of the country. Since the ICC is not part of the United States' judicial body, it would be unconstitutional for an American to be tried before such a court.<sup>175</sup> Proponents of the ICC claim that the ICC is in line with the U.S. Constitution. One of the leading experts on the ICC, Professor Scharf,<sup>176</sup> and the National Judicial Conference Report cite the case of *Ex parte Quirin*.<sup>177</sup> The U.S. Supreme Court found that there is no constitutional bar for the United States to participate in an international tribunal and even to send its citizens to the tribunal. In fact, several Yugoslavs who were of U.S. citizenship were sent to an international tribunal.<sup>178</sup> Therefore, at the very least, there is an open issue as to the constitutionality of U.S. participation in the ICC.

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172. As Lee Casey explained in the Senate hearings on the ICC,

After the revolution, the Founders ensured that Americans would never again be transported beyond the seas for trial by requiring in the Constitution that all crimes be tried by jury in the State where the said crime shall have been committed. This guarantee was stated not once but twice in the Constitution in Article II, Section 2 and in the sixth article of amendment.

American participation in the ICC treaty would have violated this fundamental principle.

*Id.* at 32 (statement of Lee A. Casey).

173. Foreign Relations Hearing, *supra* note 23, at 65 (statement of Lee A. Casey).

174. 71 U.S. (4 Wall.) 2 (1866).

175. See John Birch Society, *ICC versus the Constitution – The ICC Versus the Family* (visited April 15, 2000) <[http://www.jbs.org/un/icc/icc\\_versus\\_the\\_constitution.htm](http://www.jbs.org/un/icc/icc_versus_the_constitution.htm)>.

176. Professor Michael Scharf is currently Professor of Law and Director, Center for International Law and Policy, New England School of Law. From 1989 until 1993, he was in charge of war crimes issues at the State Department. He is also the author of several major books on the Yugoslavia Tribunal and the Rwanda Tribunal, including the Pulitzer Prize-nominated *Balkan Justice*. See Foreign Relations Hearing, *supra* note 23, at 72 (prepared statement of Michael P. Scharf).

177. 317 U.S. 1 (1942).

178. See Kenneth Roth, *Yes, a World Court*, WASH. POST, June 27, 2000, at A23.

## APPENDIX B – DEFINITIONS OF CORE CRIMES

## Genocide defined –

For the purpose of this Statute, ‘genocide’ means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.<sup>179</sup>

## Crimes against humanity defined –

For the purpose of this Statute, a ‘crime against humanity’ means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

- (a) Murder;
- (b) Extermination;
- (c) Enslavement;
- (d) Deportation or forcible transfer of population;
- (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- (f) Torture;
- (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization or any other form of sexual violence of comparable gravity;
- (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as

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179. Rome Statute, *supra* note 7, art. 6.

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impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;

(i) Enforced disappearance of persons;

(j) The crime of apartheid;

(k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.<sup>180</sup>

The Article goes on to define all of the relevant terms, such as “attack directed against any civilian population” and “extermination.” The term “gender” means “the two sexes, male and female, within the context of society.”<sup>181</sup>

This definition is almost identical to that of the Rwanda Tribunal, which includes murder, enslavement, deportation, imprisonment, torture, rape or persecution on political, racial or religious grounds, when committed as part of a widespread or systematic attack against a civilian population.<sup>182</sup>

War crimes defined –

For the purpose of this Statute, ‘war crimes’ means:

(a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

(i) Wilful killing;

(ii) Torture or inhuman treatment, including biological experiments;

(iii) Wilfully causing great suffering, or serious injury to body or health;

(iv) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;

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180. *Id.* art. 7, para. 1.

181. *Id.* para. 3.

182. See Konstantinos D. Magliveras, *An Examination of the U.N. International Tribunal for Rwanda*, INT’L ENFORCEMENT L. REP., July 1995, available in LEXIS, News library, International Enforcement Law Reporter file.

(v) Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;

(vi) Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;

(vii) Unlawful deportation or transfer or unlawful confinement;

(viii) Taking of hostages.

(b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:

(i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;

(ii) Intentionally directing attacks against civilian objects, that is, objects which are not military objectives;

(iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to protection given to civilians or civilian objects under the international law of armed conflict;

(iv) Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;

(v) Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives;

. . . .

(c) In the case of an armed conflict not of an international character, . . . any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention or any other cause:

(i) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(ii) Committing outrages upon person dignity, in particular humiliating and degrading treatment;

(iii) Taking of hostages;

(iv) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable.

(d) [Subsection] (c) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.<sup>183</sup>

Crime of Aggression – as yet remains undefined, but there are three options:

Option 1

[For the purpose of the present Statute, the crime [of aggression] [against peace] means any of the following acts committed by an individual [who is in a position of exercising control or capable of directing political/military action in a State]:

(a) planning,

(b) preparing,

(c) ordering,

(d) initiating, or

(e) carrying out

[an armed attack] [the use of armed force] [a war of aggression,] [a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of the foregoing] by a State against the [sovereignty] territorial integrity [or political independence] of another State [when this] [armed attack] [use of force] [is] [in contravention of the Charter of the United Nations] [[in contravention of the Charter of the United Nations as determined by the Security Council].]

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183. Rome Statute, *supra* note 7, art. 8, para. 2(a)–(d).

Option 2

1. [For the purposes of this Statute, the crime of aggression is committed by a person who is in a position of exercising control or capable of directing political/military actions in his State, against another State, in contravention to the Charter of the United Nations, by resorting to armed force, to threaten or violate the sovereignty, territorial integrity or political independence of that State.]

[2. [Acts constituting [aggression] [armed attack] include the following:] . . .

(a) the invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;

(b) bombardment by the armed forces of a State against the territory of another State . . . ,

(c) the blockade of the ports or coasts of a State by the armed forces of another State;

(d) an attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;

(e) the use of armed forces of one State which are within the territory of another State with the agreement of the receiving State in contravention of the conditions provided for in the agreement, or any extension of their presence in such territory beyond the termination of the agreement;

(f) the action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;

(g) the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed forces against another State of such gravity as to amount to acts listed above, or its substantial involvement therein.]]

Option 3

1. For the purpose of the present Statute [and subject to a determination by the Security Council referred to in article 10, paragraph 2, regarding the act of a State], the crime of aggression means either of the following acts committed by an individual who is in a position of exercising control or capable of directing the political or military action of a State:

(a) initiating, or

(b) carrying out

an armed attack directed by a State against the territorial integrity or political independence of another State when this armed attack was undertaken in [manifest] contravention of the Charter of the United Nations [with the object or result of establishing a [military] occupation of, or annexing, the territory of such other State or part thereof by armed forces of the attacking State.]

2. Where an attack under paragraph 1 has been committed, the

(a) planning,

(b) preparing, or

(c) ordering

thereof by an individual who is in a position of exercising control or capable of directing the political or military action of a State shall also constitute a crime of aggression.<sup>184</sup>

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184. *Draft ICC Statute, supra* note 60, art. 5.