

**A SUCCESSFUL, PERMANENT
INTERNATIONAL CRIMINAL COURT . . .
“ISN’T IT PRETTY TO THINK SO?”¹**

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1. ERNEST HEMINGWAY, *THE SUN ALSO RISES* 247 (Macmillan Publishing Co. 1986) (1926).

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I. INTRODUCTION

On September 30, 2002, the European Union (E.U.) assured the United States that it would not prosecute American military personnel and government officials in the International Criminal Court (ICC).² The Bush Administration³ continues to seek total immunity for all U.S. citizens through bilateral agreements with individual nations,⁴ in accordance with Article 98 of the Rome Statute.⁵ The Bush Administration is also

2. Paul Meller, *Europeans to Exempt U.S. From War Court*, N.Y. TIMES, Oct. 1, 2002, at A6. According to the E.U. agreement, ICC immunity would depend on the U.S. government trying any American soldier or official accused of war crimes in an American court. *Id.*

3. During this comment, unless otherwise indicated, all references to the Bush Administration and President Bush are to President George W. Bush, who was elected in 2000.

4. Elizabeth Becker, *U.S. Presses for Total Exemption From War Crimes Court*, N.Y. TIMES, Oct. 9, 2002, at A6.

5. Article 98 allows nation states to enter into immunity agreements that supercede the jurisdiction of the ICC. Rome Statute of the International Criminal Court, July 17, 1998, art. 98, 37 I.L.M. 999, 1059 [hereinafter Rome Statute].

attempting to revise current Status of Forces Agreements in order to obtain immunity of U.S. military personnel and officials from the ICC.⁶

Although the E.U. as a whole remains dedicated to the ideals of the ICC,⁷ its member nations vary in their agreeability to the idea of U.S. immunity.⁸ Countries with conservative governments, such as the United Kingdom, Italy, and Spain, have been more receptive to the idea of U.S. immunity.⁹ On the other hand, France, Germany, Belgium, and Sweden strongly oppose U.S. exemption from ICC jurisdiction.¹⁰

The E.U. compromise followed President Bush's signing the American Servicemembers' Protection Act (ASMPA).¹¹ This legislation prohibits the United States from providing military assistance to ICC member states and United Nations (U.N.) peacekeeping missions unless U.S. personnel first acquire ICC immunity.¹² Although the ASMPA provides exceptions for North American Treaty Organization (NATO) member nations and key non-member allies, it does not address nations assisted by NATO's Stabilization Force (SFOR) Mission.¹³ In July 2002, the United States used its U.N. Security Council status to stall an extension of U.N. peacekeeping forces in Bosnia and Herzegovina until its troops were granted a one-year immunity

6. Betsy Pisik, *Europeans Open Door to World Court Immunity; Note Importance of U.S. Alliances*, WASH. TIMES, Sept. 4, 2002, at A1 [hereinafter *Europeans Open Door*].

7. See Meller, *supra* note 2, at A6.

8. See Becker, *supra* note 4, at A6.

9. Meller, *supra* note 2, at A6; Pisik, *Europeans Open Door*, *supra* note 6, at A1. The U.K. stance with regard to giving the United States immunity under Article 98 has raised a number of British eyebrows, given the fact that the U.K. Labor Government was one of the principal supporters of the ICC. *Universal Justice: EU States Must Defend the International Criminal Court*, FIN. TIMES (London), Sept. 27, 2002, at 20.

10. Meller, *supra* note 2, at A6; Pisik, *Europeans Open Door*, *supra* note 6, at A1.

11. American Servicemembers' Protection Act of 2002, Pub. L. No. 107-206, 116 Stat. 820 (2002).

12. *Id.* §§ 2005, 2007, 116 Stat. at 903-05.

13. Ben Barber, *EU Applicants Told Not to Give U.S. Immunity; World Court's Writ at Issue*, WASH. TIMES, Aug. 13, 2002, at A1; Pisik, *Europeans Open Door*, *supra* note 6, at A1.

from ICC prosecution.¹⁴

In Part I, this comment conducts a historical examination of the international community's attempt to enforce and codify humanitarian law from 1945 to the present. Part II examines the structure of the ICC established by the Rome Statute. Part III outlines U.S. substantive and procedural objections, while Part IV discusses counterarguments and safeguards provided in the Rome Statute. Part V examines the underlying problem of a permanent, international tribunal having widespread jurisdiction: inevitable conflict with national sovereignty.¹⁵

II. TRACING THE HISTORY OF INTERNATIONAL CRIMINAL TRIBUNALS AND THE EVOLUTION OF CUSTOMARY INTERNATIONAL LAW FROM 1945 TO 1994

A. *The Emergence of Individual Accountability: The Nuremberg & Tokyo Tribunals*

Before 1945, the international community did not have a forum with jurisdiction to prosecute criminal offenses.¹⁶ Moreover, customary international law held government regimes—not individual actors—responsible for violations of international law that occurred during wartime.¹⁷ This allowed military personnel and most civilian leaders to defend

14. Pisik, *Europeans Open Door*, *supra* note 6, at A1.

15. A key concept in both this comment and international law, national sovereignty is the idea that except as constrained by customary international law and the treaties it has signed, every country has absolute control over its own territory. See Claudio Grossman & Daniel D. Bradlow, *Are We Being Propelled Towards a People-Centered Transnational Legal Order?*, 9 AM. U. J. INT'L L. & POL'Y 1, 1 (1993). National sovereignty effectively forbids countries from exercising jurisdiction over events occurring in other countries. Patricia McKeon, *An International Criminal Court: Balancing the Principle of Sovereignty Against the Demands for International Justice*, 12 ST. JOHN'S J. LEGAL CMT. 535, 535–36 (1997). In its charter, the United Nations provides that generally, “[n]othing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state.” U.N. CHARTER art. 2, para. 7.

16. See Alex Ward, Comment, *Breaking the Sovereignty Barrier: The United States and the International Criminal Court*, 41 SANTA CLARA L. REV. 1123, 1125 (2001).

17. Henry T. King & Theodore C. Theofrastous, *From Nuremberg to Rome: A Step Backward for U.S. Foreign Policy*, 31 CASE W. RES. J. INT'L L. 47, 52 (1999).

themselves by saying that they were merely following orders when carrying out war crimes and other offenses.¹⁸

After World War II, the United States, Great Britain, France, and the Soviet Union formed the International Military Tribunal at Nuremberg (Nuremberg Tribunal) in order to prosecute Nazi leaders for crimes against peace, war crimes, and crimes against humanity.¹⁹ Acting on behalf of the Allies, General Douglas MacArthur created the International Military Tribunal for the Far East at Tokyo (Tokyo Tribunal).²⁰

Although Allied forces created and ran the Nuremberg Tribunal, nineteen countries concurred with its establishment and holdings,²¹ thereby providing an additional air of international support.²² Although defendants could be tried on charges of crimes against peace, aggression, war crimes, and crimes against humanity,²³ Nazi leaders could not be convicted of genocide.²⁴ In 1945, a formal definition of genocide did not yet exist within the context of international law.²⁵ The elements of genocide were eventually established by the Genocide Convention of 1948.²⁶

Allied nations had exclusive control over the Nuremberg and Tokyo Tribunals and created them following the Allied victories in Europe and Japan.²⁷ The Tokyo Tribunal was not even

18. See Ward, *supra* note 16, at 1126.

19. I TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 8, 11 (1947) [hereinafter I TRIAL OF MAJOR WAR CRIMINALS].

20. ARNOLD C. BRACKMAN, *THE OTHER NUREMBERG* 59 (1987).

21. I TRIAL OF MAJOR WAR CRIMINALS, *supra* note 19, at 9.

22. See Leila Sadat Wexler, *The Proposed Permanent International Criminal Court: An Appraisal*, 29 CORNELL INT'L L.J. 665, 674–76 (1996).

23. I TRIAL OF MAJOR WAR CRIMINALS, *supra* note 19, at 11. Interestingly (and perhaps ironically), only the United States wanted to include aggression as a chargeable offense. ROBERT E. CONOT, *JUSTICE AT NUREMBERG* 21–23 (1983). The United Kingdom, France, and Russia were worried that their own activities during World War II would be interpreted as instances of aggression. *Id.* at 23.

24. Lt. Comm. Gregory P. Noone & Douglas William Moore, *An Introduction to the International Criminal Court*, 46 NAVAL L. REV. 112, 114 (1999).

25. *Id.*

26. *Id.*

27. See Ward, *supra* note 16, at 1125. In 1942, Allied Forces established the United Nations War Crimes Commission in order to investigate Axis war crimes; however, the extent of Nazi atrocities was not discovered until the liberation of German-

established by international treaty; General MacArthur was primarily responsible for its creation and direction.²⁸ As the Supreme Commander for the Allied Powers, he decided the Tribunal's substantive and jurisdictional law, chose its chief prosecutor, and even had the power to select its president and judges.²⁹ As a result of the way in which the tribunals were created and conducted, they have been criticized as being "fatally flawed from the beginning, from before the beginning; they were trials of the vanquished brought before the courts of the victors."³⁰

Although Nazi leaders were tried for war crimes, Allied actions taken during the war were never examined, much less prosecuted.³¹ Arguably, the Allied bombings of Dresden and Tokyo, as well as the nuclear strikes against Hiroshima and Nagasaki, might fit under the Nuremberg Charter's definition of war crimes.³² However, the Nuremberg Tribunal's jurisdiction was specifically limited to "German officers and men and members of the Nazi party" who had committed "atrocities in Occupied Europe."³³ The Tokyo Tribunal similarly focused on Japanese political and military leaders.³⁴

Even though the Nuremberg and Tokyo Tribunals have been

occupied territory. M. Cherif Bassiouni, *From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court*, 10 HARV. HUM. RTS. J. 11, 21, 22 (1997) [hereinafter *From Versailles to Rwanda*]. In the Moscow Declaration of 1943, Allied leaders declared their formal intent to prosecute Nazis responsible for war crimes. Paul D. Marquardt, *Law Without Borders: The Constitutionality of an International Criminal Court*, 33 COLUM. J. TRANSNAT'L L. 73, 81 (1995).

28. Matthew A. Barrett, *Ratify or Reject: Examining the United States' Opposition to the International Criminal Court*, 28 GA. J. INT'L & COMP. L. 83, 86 (1999).

29. *Id.*

30. EUGENE DAVIDSON, *THE NUREMBERG FALLACY* 285–86 (1973).

31. 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, 341, 346–49 (1999).

32. *Id.* at 348–49. War crimes included "wanton destruction of cities, towns, or villages, or devastation not justified by military necessity." I TRIAL OF MAJOR WAR CRIMINALS, *supra* note 19, at 11.

33. I TRIAL OF MAJOR WAR CRIMINALS, *supra* note 19, at 8.

34. See BRACKMAN, *supra* note 20, at 60.

criticized as being “victors’ justice,”³⁵ justice occurred nonetheless.³⁶ Allied prosecutors were highly aware that any appearance of impropriety would taint the Tribunal’s legitimacy.³⁷ Therefore, all defendants received full due process of law.³⁸ The twenty-four Nuremberg indictments resulted in twenty-two trials—nineteen guilty verdicts and three acquittals.³⁹

The Nuremberg and Tokyo Tribunals demonstrated the importance of enforcing and punishing violations of international law.⁴⁰ Following World War I, Allied leaders intended to prosecute the Ottoman-Turkish officials responsible for the 1915 genocide⁴¹ of 500,000–600,000 domestic Armenians.⁴² Not only did they fail to do so, but in the 1923

35. M. Cherif Bassiouni, *Establishing an International Criminal Court: Historical Survey*, 149 MIL. L. REV. 49, 55 (1995) [hereinafter *Establishing an International Criminal Court*].

36. At Nuremberg, Justice Robert H. Jackson remarked that “four great nations, flushed with victory and stung with injury stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of the law. . . .” II TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 99 (1947) [hereinafter II TRIAL OF MAJOR WAR CRIMINALS]. He also emphasized:

“The ultimate principle is that you must put no man on trial under the form of judicial proceedings, if you are not willing to see him freed if proven not guilty. If you are determined to execute a man in any case, there is no occasion for a trial. The world yields no respect to courts that are merely organized to convict.”

ALAN S. ROSENBAUM, PROSECUTING NAZI WAR CRIMINALS 21 (1993).

37. See King & Theofrastous, *supra* note 17, at 52–53.

38. *Id.* at 52.

39. Noone & Moore, *supra* note 24, at 114. Robert Ley committed suicide following his indictment. *Id.* at 114 n.6. Gustav Krupp von Bohlen und Halbach was indicted but found mentally incompetent and was therefore unable to stand trial. *Id.* Germany later prosecuted and convicted the three individuals acquitted at Nuremberg (Schacht, Von Papan, and Fritsche). *Id.*

40. See Bryan F. MacPherson, *Building an International Criminal Court for the 21st Century*, 13 CONN. J. INT’L L. 1, 9 (1998).

41. Vahakn N. Dadrian, *The Historical and Legal Interconnections Between the Armenian Genocide and the Jewish Holocaust: From Impunity to Retributive Justice*, 23 YALE J. INT’L L. 503, 504 (1998) (citing Vahakn N. Dadrian, *Genocide as a Problem of National and International Law: The World War I Armenian Case and Its Contemporary Legal Ramifications*, 14 YALE J. INT’L L. 221, 262 (1989)) [hereinafter *The Historical and Legal Interconnections*].

42. Robert Melson, *Provocation or Nationalism: A Critical Inquiry into the*

Treaty of Lausanne, Allied nations granted Turkish officials amnesty for genocide.⁴³ Years later, Albert Speer, a Hitler confidante,⁴⁴ stated that “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. . . .”⁴⁵ Indeed, while orchestrating the Holocaust in 1939, Adolf Hitler asked: “Who after all is today speaking of the destruction of the Armenians?”⁴⁶

The Nuremberg and Tokyo tribunals took great strides to make individuals accountable for violations of customary international law.⁴⁷ Defendants were not allowed to raise defenses of immunity based on national mandate or superior orders.⁴⁸ Otherwise, “practically everyone concerned in the really great crimes against peace and mankind” would be immune to prosecution.⁴⁹ The tribunals emphasized the proposition of “individual responsibility for . . . crimes punishable under international law This principle of personal liability is a necessary as well as logical one if international law is to render real help to the maintenance of peace.”⁵⁰ Moreover, if individuals either know or should know that atrocities such as genocide, war crimes, and crimes against humanity are taking place, they are

Armenian Genocide of 1915, in FRANK CHALK & KURT JONASSOHN, *THE HISTORY AND SOCIOLOGY OF GENOCIDE* 266, 270 (1990).

43. Bassiouni, *From Versailles to Rwanda*, *supra* note 27, at 17.

44. Gerard E. O'Connor, Note, *The Pursuit of Justice and Accountability: Why the United States Should Support the Establishment of an International Criminal Court*, 27 HOFSTRA L. REV. 927, 938 (1999). Speer was eventually convicted at Nuremberg for war crimes and crimes against humanity. *Id.*

45. ALBERT SPEER, SPANDAU: THE SECRET DIARIES 43 (Richard & Clara Winston trans. 1976) (referring to trials the Allies threatened for Germans involved in the forced-labor program of the World War I era).

46. Dadrian, *The Historical and Legal Interconnections*, *supra* note 41, at 538–39.

47. See Ward, *supra* note 16, at 1125–26. Prior to World War II, individuals were primarily prosecuted for violating international law in instances where they committed crimes against other individuals, such as piracy cases. See Louis B. Sohn, *The New International Law: Protection of the Rights of Individuals Rather than States*, 32 AM. U. L. REV. 1, 2 (1982).

48. Ward, *supra* note 16, at 1126.

49. II TRIAL OF MAJOR WAR CRIMINALS, *supra* note 36, at 150.

50. *Id.* at 149–50.

charged to “take such steps as [are] within their power to prevent the commission of such crimes.”⁵¹ Indeed, they may even be held responsible for failing to act.⁵² This idea of individual accountability is now accepted as a customary tenet of international law.⁵³

B. The Cold War’s Numbing Effect on Establishing a Permanent, International Criminal Court

Following the Nuremberg and Tokyo Tribunals, the focus of international law shifted toward multinational institutions.⁵⁴ The international community explored the possibility of creating a permanent court to address the types of crimes prosecuted at Nuremberg and Tokyo.⁵⁵ The United Nations codified the Nuremberg principle of individual responsibility for war crimes.⁵⁶ It also requested the International Law Commission (ILC) study the feasibility of creating an international criminal court.⁵⁷ While the International Court of Justice resolves only disputes between nations,⁵⁸ the proposed international criminal court would directly prosecute individuals.⁵⁹

The ILC commissioned studies from R.J. Alfaro and A.E.F. Sandstrøm to assist in this effort.⁶⁰ In their reports, Alfaro and Sandstrøm reached drastically different conclusions.⁶¹ While Alfaro determined that an international criminal court was a

51. The Tokyo War Crimes Trial, in 2 THE LAW OF WAR: A DOCUMENTARY HISTORY 1029, 1039 (Leon Friedman ed. 1972).

52. *Id.*

53. See G.A. Res. 95, U.N. GAOR, 1st. Sess., pt. 2, 55th plen. mtg. at 188 (1946).

54. Lynn Sellers Bickley, Comment, *U.S. Resistance to the International Criminal Court: Is the Sword Mightier Than the Law?*, 14 EMORY INT’L L. REV. 213, 231–32 (2000).

55. Barrett, *supra* note 28, at 85–86.

56. G.A. Res. 95, *supra* note 53, at 188.

57. Bickley, *supra* note 54, at 234.

58. Statute of the International Court of Justice, June 26, 1945, art. 34(1), 59 Stat. 1055, 1059, 3 Bevens 1153, 1186 (1945) [hereinafter ICJ Statute].

59. 1950 ANNUAL REVIEW OF UNITED NATIONS AFFAIRS 218 (Clyde Eagleton & Richard Swift eds., 1951).

60. Bernard Graefrath, *Universal Criminal Jurisdiction and an International Criminal Court*, 1 EUR. J. INT’L L. 67, 69 (1990).

61. See *id.* at 69–70.

beneficial, viable option,⁶² Sandstrøm concluded that such an institution was incompatible with national sovereignty, and that its failure would ultimately harm international law.⁶³

Specifically, Sandstrøm indicated that both the authority and impact of an international criminal court would be limited due to enforcement and jurisdictional problems.⁶⁴ Additionally, countries that had not ratified the treaty creating the court would resist giving up national sovereignty.⁶⁵ As a result, an international criminal court would not have the ability to force individuals to appear before it.⁶⁶ If the only defendants appearing before the court were citizens of signatory nations or the signatories' prisoners of war (as was the case in the Nuremberg Tribunals), the court's jurisdiction would appear restricted and random.⁶⁷

Despite the reports' contradictory findings, the ILC overwhelmingly supported the Alfaro Report.⁶⁸ The U.N. General Assembly then formed the Committee on International Criminal Jurisdiction (CICJ) to draft an international criminal court statute.⁶⁹ Although it was presented in 1951 and revised in 1953,⁷⁰ the CICJ draft failed to adequately address which crimes would fall under the proposed court's jurisdiction.⁷¹ Because the ILC was separately working on a list of offenses that an international criminal court would adjudicate, the U.N. General Assembly tied deliberation of the CICJ draft to the forthcoming ILC draft.⁷²

When the ILC finally submitted its offense list in 1954, however, the General Assembly discovered that the ILC had

62. *Id.*

63. James L. Taulbee, *A Call to Arms Declined: The United States and the International Criminal Court*, 14 EMORY INT'L L. REV. 105, 108–09 (2000).

64. *Id.*

65. *See id.*

66. *Id.*

67. *Id.*

68. Graefrath, *supra* note 60, at 69–70.

69. *See Bickley, supra* note 54, at 234; Taulbee, *supra* note 63, at 109.

70. Taulbee, *supra* note 63, at 109

71. *See id.*

72. *Id.*

included the crime of aggression.⁷³ Unfortunately, the United Nations had already assigned a Special Committee to prepare a formal definition of the crime of aggression.⁷⁴ As a result, the General Assembly once again tied deliberation of the CICJ/ILC draft to the forthcoming Special Committee Draft.⁷⁵

This decision effectively ended efforts to establish an international criminal court for the remainder of the Cold War.⁷⁶ Twenty years passed before the United Nations finally adopted the Special Committee's recommended definition of aggression in 1974.⁷⁷ In 1981, the U.N. General Assembly told the ILC to recommence drafting charges that could be brought before an international criminal court.⁷⁸

The intervention of the Cold War shifted international attention away from the cooperative effort fostered by the end of World War II.⁷⁹ Instead, pre-existing issues surrounding the creation of an international criminal court returned to the forefront.⁸⁰ With the onset of the Korean War, Soviet Bloc nations were concerned that if an international criminal court were formed, it would focus on Soviet Bloc activities.⁸¹ Given the Cold War's political climate, it was highly unlikely that governments "would agree upon an international body to prosecute and punish war crimes, many of which took place in conflicts between forces aligned with the opposing superpowers—which were not about to allow a panel of judges to pass judgment upon the conduct of those forces."⁸²

Moreover, Soviet Bloc nations were concerned about the

73. *Id.*

74. G.A. Res. 895, U.N. GAOR, 9th Sess., Supp. No. 21, at 49, U.N. Doc. A/2890 (1954).

75. G.A. Res. 897, U.N. GAOR, 9th Sess., Supp. No. 21, at 50, U.N. Doc. A/2890 (1954).

76. See Taulbee, *supra* note 63, at 109–10.

77. G.A. Res. 3314, U.N. GAOR, 29th Sess., Supp. No. 31, at 142, U.N. Doc. A/9631 (1974).

78. G.A. Res. 36/106, U.N. GAOR, 36th Sess., at para. 10 (1981).

79. See David, *supra* note 31, at 352; see discussion *supra* Part II.A.

80. See Bickley, *supra* note 54, at 234–35.

81. *Id.*

82. Aryeh Neier, *Waiting for Justice: The United States and the International Criminal Court*, WORLD POL'Y J., Oct. 1, 1998, at 33, 34.

potential effects such a court would have on national sovereignty.⁸³ Specifically, Communist nations wanted jurisdiction over any violations of international law that occurred domestically.⁸⁴ As Cold War tensions increased and the deadlock between opposing factions appeared insurmountable, the ILC postponed serious contemplation of forming an international criminal court.⁸⁵

During the Cold War, although widespread violations of humanitarian law occurred in places such as Cambodia, Guatemala, and Iraq, the individuals responsible were rarely tried, convicted, or punished.⁸⁶ For example, from 1975 to 1978, the Khmer Rouge committed genocide in Cambodia, resulting in over two million deaths.⁸⁷ Only one person—Pol Pot—was held responsible.⁸⁸ Even then, his “trial” was primarily for show purposes.⁸⁹ The international community was unfortunately unable to unite in forming criminal tribunals.⁹⁰

For the most part, non-governmental organizations (NGOs) and human rights groups were responsible for making people aware of acts of aggression, genocide, crimes against humanity, and war crimes.⁹¹ As the number of incidents increased, human

83. Bickley, *supra* note 54, at 235.

84. *Id.* at 235 n.72; see Eric Chenoweth, *Case Study in Political Development Poland: The Independent Society*, 60 TEMP. L.Q. 993 (1987) (stating that the Soviet Union retained characteristics of a communist country, including the control of the Communist party over the State).

85. Bickley, *supra* note 54, at 235.

86. Matthew D. Peter, Note, *The Proposed International Criminal Court: A Commentary on the Legal and Political Debates Regarding Jurisdiction That Threaten the Establishment of an Effective Court*, 24 SYRACUSE J. INT'L L. & COM. 177, 184 (1997).

87. CHALK & JONASSOHN, *supra* note 42, at 402; Noone & Moore, *supra* note 24, at 115.

88. Noone & Moore, *supra* note 24, at 115.

89. *Id.* at 115 n.11. Pol Pot died of natural causes shortly after his 1997 reappearance and “trial.” *Id.* After Vietnam expelled the Khmer Rouge in 1979, the United States declined to support Pol Pot’s trial for over a decade. GENOCIDE IN THE TWENTIETH CENTURY 443, 445 (Samuel Totten et. al eds., 1995). Note that U.S. support coincided with the end of the Cold War. *Id.*

90. Scott W. Andreasen, Note, *The International Criminal Court: Does the Constitution Preclude Its Ratification by the United States?*, 85 IOWA L. REV. 697, 703–04 (2000).

91. *Id.* at 704. For example, in 1983, the Argentinean government changed from a military dictatorship to a democracy. *Id.* Before military officials stepped down from

rights groups cultivated greater public support for creating a permanent international criminal court.⁹²

After the Cold War ended, the international community again focused its attention on combating human rights abuses.⁹³ In December 1989, the U.N. General Assembly once again charged the ILC with exploring the feasibility of establishing an international criminal court.⁹⁴

C. The Re-emergence of International Tribunals in Yugoslavia & Rwanda During the 1990's: A Precursor to the Rome Statute

While the ILC drafted the statute that would eventually become the basis for the Rome Statute,⁹⁵ the United Nations formed the International Tribunal for Yugoslavia (ICTY) in 1993.⁹⁶ The ICTY was a response to a program of ethnic cleansing which resulted in 500,000 Bosnian deaths.⁹⁷ Shortly thereafter, the United Nations again exercised its Chapter VII authority by establishing the International Criminal Tribunal for Rwanda (ICTR).⁹⁸ The purpose of the ICTR was to hold

power, they granted themselves amnesty for crimes, such as the “disappearance” of over 9,000 dissidents. *Id.* Influenced in part by NGOs’ efforts, President Raul Alfonsin created a “Truth Commission” to prosecute responsible military leaders. *Id.*

92. *Id.*

93. See O’Connor, *supra* note 44, at 945 (stating that the environmental and human atrocities committed in Iraq and the former Yugoslavia increased awareness among ICC supporters).

94. Barrett, *supra* note 28, at 86–87. Trinidad and Tobago’s demand that the United Nations assist in controlling Caribbean drug trafficking was the primary catalyst for renewed interest in establishing an international criminal court. See Noone & Moore, *supra* note 24, at 121.

95. Barrett, *supra* note 28, at 86–87.

96. S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th Mtg. at 1, 2, U.N. Doc. S/RES/827 (1993); United Nations: Secretary-General’s Report on Aspects of Establishing an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia, 32 I.L.M. 1159, 1167 (1993).

97. Noone & Moore, *supra* note 24, at 115.

98. S.C. Res. 955, U.N. SCOR, 49th Sess., 3433rd Mtg. at 1, 2, Annex, U.N. Doc. S/RES/955 (1994). U.N. Charter Chapter VII addresses “Action With Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression.” U.N. CHARTER art. 39. Specifically, Article 39 states that the Security Council “shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain

individuals accountable for the deaths of 800,000 Tutsis and Hutus.⁹⁹

Richard Goldstone, the ICTY's and ICTR's first Chief Prosecutor, declared that these tribunals were "the first real international attempt[s] to enforce international humanitarian law."¹⁰⁰ Unlike the Nuremberg and Tokyo Tribunals, the ICTY and ICTR could not be accused of being victors' justice, because the nations that established the tribunals were not involved in the underlying conflict.¹⁰¹ Moreover, the ICTY prosecuted individuals as the Yugoslavian conflict was ongoing.¹⁰² It was hoped this would help provide an international deterrence mechanism.¹⁰³ The ICTR was also groundbreaking because it was the first time the international community had fully prosecuted individuals under the terms of the Genocide Convention of 1948.¹⁰⁴ The ICTY and ICTR have been successful in bringing individuals to justice.¹⁰⁵

However, U.N. Security Council members were accused of having "political and strategic interests" in ICTY and ICTR outcomes.¹⁰⁶ The United Nations took action in these two instances but remained passive during other incidents of humanitarian atrocities.¹⁰⁷ As a result, critics allege that the formation of occasional, temporary tribunals results in selective, politicized justice.¹⁰⁸

This echoes criticism made following the Nuremberg and Tokyo Tribunals.¹⁰⁹ Between World War I and World War II,

or restore international peace and security." *Id.*

99. Noone & Moore, *supra* note 24, at 116.

100. Brigid O'Hara-Forster et al., *Justice Goes Global: Despite U.S. Dissent the World Community Finally Creates a New Court to Judge the Crimes of War*, TIME INT'L, July 27, 1998, at 46.

101. David, *supra* note 31, at 349; Bassiouni, *Establishing an International Criminal Court*, *supra* note 35, at 55.

102. Noone & Moore, *supra* note 24, at 116.

103. *Id.*

104. *Id.* at 116-17.

105. O'Connor, *supra* note 44, at 946-47.

106. David, *supra* note 31, at 349 n.35.

107. *Id.* at 349-50.

108. *See id.* at 349-51.

109. *See* Bassiouni, *From Versailles to Rwanda*, *supra* note 27, at 21-22.

humanitarian law did not change significantly.¹¹⁰ Because the United States granted immunity for Armenian genocide merely twenty-six years earlier, politics allegedly played a part in the Allied decision to prosecute Nazi leaders.¹¹¹

In addition, reliance on ad hoc tribunals arguably diminishes any possible deterrent effect because tribunals are created only *after* war crimes, genocide, aggression, or crimes against humanity have occurred. Even then, governmental leaders would be justifiably unsure of whether the United Nations would prosecute their human rights violations.¹¹² Because the United Nations establishes the tribunals, permanent members of the Security Council are able to veto any proposed action to be taken against them or their allies.¹¹³

On a practical level, the United Nations has experienced difficulties in setting up and maintaining ad hoc tribunals.¹¹⁴ Establishing a single tribunal is slow, difficult work.¹¹⁵ Creating additional tribunals is redundant, time-consuming work.¹¹⁶ It took the United Nations two years to establish the ICTY and the ICTR.¹¹⁷ Since their creation, both tribunals have suffered from financial and staffing limitations.¹¹⁸ For administrative and political reasons, some critics think that the United Nations would be extremely hesitant to create additional ad hoc tribunals in the near future,¹¹⁹ particularly if humanitarian violations occurred on a smaller scale than in Yugoslavia and Rwanda.¹²⁰

110. *Id.* at 20–21.

111. See *id.*; see also Dadrian, *The Historical and Legal Interconnections*, *supra* note 41, at 548–49.

112. David, *supra* note 31, at 350–51.

113. *Id.*

114. See Barrett, *supra* note 28, at 88.

115. *Id.*

116. Melissa K. Marler, Note, *The International Criminal Court: Assessing the Jurisdictional Loopholes in the Rome Statute*, 49 DUKE L.J. 825, 830 (1999).

117. O'Hara-Forster, *supra* note 100, at 46.

118. Noone & Moore, *supra* note 24, at 117 & n.22.

119. Jelena Pejic, *Creating a Permanent International Criminal Court: The Obstacles to Independence and Effectiveness*, 29 COLUM. HUM. RTS. L. REV. 291, 293 (1998).

120. Marler, *supra* note 116, at 830.

Finally, the ICTY tribunal confronts the enforcement problem that Sandstrøm addressed in 1950.¹²¹ Although the Bosnian government initially agreed to cooperate with the ICTY,¹²² it has refused to surrender former Bosnian Serb leaders for trial.¹²³ Additionally, NATO forces have been hesitant to take them into custody.¹²⁴ Finally, ICTY prosecutors even faced difficulty obtaining entry visas into Kosovo, rendering them unable to investigate reports of humanitarian violations.¹²⁵

D. Establishing Customary International Law—An International Consensus Defining Humanitarian Violations & Wartime Conduct

Following the Nuremberg and Tokyo Tribunals, in addition to exploring the formation of a permanent court,¹²⁶ the international community also sought to define acts that constitute a breach of customary humanitarian law.¹²⁷ These universally heinous crimes would trigger both a duty and a right to respond.¹²⁸ States may not deviate from *jus cogens*—“peremptory norm[s] of general international law.”¹²⁹ It binds all nations, even if a nation had not signed a relevant treaty.¹³⁰

In order for a general principle or specific acts to become customary international law, it or they must be “general practice *accepted as law*” accompanied by *opinio juris et necessitatis*—a general recognition that the nation is bound by the principle or

121. See David, *supra* note 31, at 351–52; see also *supra* notes 63–67 and accompanying text.

122. See Bosnia and Herzegovna-Croatia-Yugoslavia: General Framework for Peace in Bosnia and Herzegovina with Annexes, art. III, 35 I.L.M. 75, 120 (1996).

123. David, *supra* note 31, at 351.

124. *Id.*

125. Lindsay Zelniker, Note, *Towards a Functional International Criminal Court: An Argument in Favor of a Strong Privileges and Immunities Agreement*, 24 FORDHAM INT'L L.J. 988, 989–90 (2001).

126. Barrett *supra* note 28, at 86–88; Bickley, *supra* note 54, at 233–36.

127. See Marler, *supra* note 116, at 827, 829.

128. King & Theofrastous, *supra* note 17, at 57.

129. Vienna Convention on the Law of Treaties, May 23, 1969, art. 53, 1155 U.N.T.S. 331, 344 [hereinafter Vienna Convention].

130. Noone & Moore, *supra* note 24, at 120; see also Vienna Convention, *supra* note 129, at art. 38.

acts in question.¹³¹ *Opinio juris* arises from a state's general practices over the course of time.¹³² The Restatement (Third) Foreign Relations provides that the following state actions would assist in developing customary human rights law:

[V]irtually universal adherence to the United Nations Charter and its human rights provisions, and virtually universal and frequently reiterated acceptance of the Universal Declaration of Human Rights even if only in principle; virtually universal participation of states in the preparation and adoption of international agreements recognizing human rights principles generally, or particular rights; the adoption of human rights principles by states in regional organizations in Europe, Latin America, and Africa . . . ; general support by states for United Nations resolutions declaring, recognizing, invoking, and applying international human rights principles as international law; action by states to conform their national law or practice to standards or principles declared by international bodies, and the incorporation of human rights provisions, directly or by reference, in national constitutions and laws; invocation of human rights principles in national policy, in diplomatic practice, in international organization activities and actions; and other diplomatic communications or actions by states reflecting the view that certain practices violate international human rights law, including condemnation and other adverse state reactions to violations by other states. The International Court of Justice and the International Law Commission have recognized the existence of customary human rights law.¹³³

Therefore, if a nation engaged in some or all of the above activities for a significant period of time, it may inadvertently

131. See IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 6-7 (Oxford Univ. Press 5th ed. 1998).

132. *Id.*; King & Theofrastous, *supra* note 17, at 59.

133. RESTATEMENT (THIRD) FOREIGN RELATIONS § 701 reporter's note 2 (1987). While the Restatement is not binding, it is the American Law Institute's current assessment of U.S. foreign policy law. *Id.*

establish *opinio juris*.¹³⁴ This would set a future standard of conduct for the nation, even if it had never signed a relevant treaty codifying the code of conduct.¹³⁵

Of course, treaties, conventions, and U.N. resolutions may also establish customary international law.¹³⁶ These documents do more than bind their signatory nations; they may also demonstrate how the international community views a particular practice or principle.¹³⁷ At Nuremberg, Justice Jackson stated that, “while this law is first applied against German aggressors, . . . if it is to serve a useful purpose it must condemn aggression by any other nations, including those [who] sit . . . now in judgment.”¹³⁸

The Nuremberg Tribunal relied heavily on the Hague Convention and early Geneva Conventions when establishing its substantive laws.¹³⁹ Although none of these conventions contained explicit provisions regarding enforcement,¹⁴⁰ they envisioned legal action would be taken following treaty violations.¹⁴¹

The Hague Convention of 1907 establishes international rules regarding land warfare.¹⁴² The 1948 Genocide Convention defines genocide and holds that all individuals—regardless of governmental status—will be held liable for violating its provisions.¹⁴³ The Geneva Conventions of 1949 address the

134. See King & Theofrastous, *supra* note 17, at 59.

135. See *id.* (stating that customary international law may arise out of the practice of nations).

136. Arthur M. Weisburd, *Customary International Law: The Problem of Treaties*, 21 VAND. J. TRANSNAT'L L. 1, 10–11 (1998). In addition to international treaties, international customs, and principles of law generally “recognized by civilized nations,” the International Court of Justice considers “judicial decisions and the teachings of the most highly qualified publicists of the various nations” as a source of customary international law. ICJ Statute, *supra* note 58, at art. 38, para. 1.

137. Weisburd, *supra* note 136, at 10–11.

138. II TRIAL OF MAJOR WAR CRIMINALS, *supra* note 36, at 136, 154.

139. Marler, *supra* note 116, at 827.

140. Theodor Meron, *International Criminalization of Internal Atrocities*, 89 AM. J. INT'L L. 554, 563 (1995).

141. Marler, *supra* note 116, at 827 n.8.

142. Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631 (Hague Convention).

143. Convention on the Prevention and Punishment of the Crime of Genocide,

treatment of military personnel and citizens during armed conflicts.¹⁴⁴ Together, these conventions form the basis of “international humanitarian law.”¹⁴⁵

III. THE ROME STATUTE & THE INTERNATIONAL CRIMINAL COURT

The Rome Statute created the ICC—a permanent, judicial body which can prosecute “the most serious crimes of international concern.”¹⁴⁶ The ICC may arrest criminal defendants.¹⁴⁷ Following conviction, it has the power to impose fines, seize property, and imprison the guilty party.¹⁴⁸ At the Rome Conference, the Rome Statute was approved by a landslide margin.¹⁴⁹ The United States, Israel, Libya, China, Iraq, Qatar, and Yemen were the only countries at the Rome Conference that voted against ratification.¹⁵⁰

Dec. 9, 1948, 78 U.N.T.S. 277, 280.

144. See Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 3122, 75 U.N.T.S. 31, 38; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 3226, 75 U.N.T.S. 85, 86; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 3328, 75 U.N.T.S. 135, 146; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 3526, 75 U.N.T.S. 287, 296–98.

145. See Noone & Moore, *supra* note 24, at 119–20. Examples of subsequent humanitarian treaties include: International Convention on the Rights of the Child, Nov. 20, 1989, art. 37(a), 1577 U.N.T.S. 3 (signed by the United States on Feb. 16, 1995, but not ratified); Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85; and the Convention on the Elimination of All Forms of Discrimination Against Women, October 8, 1982, 1291 U.N.T.S. 309. King & Theofrastous, *supra* note 17, at 62.

146. Rome Statute, *supra* note 5, at art. 1.

147. David, *supra* note 31, at 358.

148. Rome Statute, *supra* note 5, at art. 77.

149. Shannon K. Supple, Note, *Global Responsibility and the United States: The Constitutionality of the International Criminal Court*, 27 HASTINGS CONST. L.Q. 181, 182–83 (1999). The final vote was 120 in favor of ratification, seven against, and twenty-one abstentions. *Id.* Israel was the only ally to join the United States in voting against the Rome Statute. John Seguin, Note, *Denouncing the International Criminal Court: An Examination of U.S. Objections to the Rome Statute*, 18 B.U. INT’L L.J. 85, 88 n.11 (2000); Ward, *supra* note 16, at 1137.

150. Ward, *supra* note 16, at 1137.

A. ICC Structure and Administration

The ICC is made up of the Presidency, the Registry, Pre-Trial, Trial, and Appeals Divisions, a Prosecutor, and the Assembly of States Parties.¹⁵¹ While the President's office is in charge of ICC management¹⁵² and the Registry controls the ICC's administration,¹⁵³ the Pre-Trial, Trial, and Appeals Divisions perform "judicial functions."¹⁵⁴ The Prosecutor's office is solely responsible for investigating and prosecuting charges under the ICC's jurisdiction.¹⁵⁵ Finally, the Assembly of States Parties—comprised of the Rome Statute's ratifying nations—has the power to amend the ICC Statute, adopt procedural and evidentiary rules, and provide "management oversight" regarding ICC administration.¹⁵⁶

B. Crimes Falling Under the ICC's Subject Matter Jurisdiction

The Rome Statute limits the ICC's focus to genocide, crimes against humanity, war crimes, and aggression.¹⁵⁷ The Rome Statute requires that definitions of crimes be "strictly construed;" they "shall not be extended by analogy."¹⁵⁸ Once a country ratifies the Rome Statute, it may opt out of war crimes' jurisdiction for a single, seven year term.¹⁵⁹

Although genocide,¹⁶⁰ crimes against humanity,¹⁶¹ and war

151. Rome Statute, *supra* note 5, at arts. 34, 112.

152. *Id.* at art. 38.

153. *Id.* at art. 43.

154. *Id.* at art. 39. The ICC has eighteen judges. *Id.* at art. 36. The judges elect a President from their ranks. *Id.* at art. 38. The President and four judges make up the Appeals Division. *Id.* at art. 39. The Trial and Pre-Trial Divisions must contain at least six judges each. *Id.*

155. *Id.* at art. 42.

156. *Id.* at art. 112. Nations that have merely signed the Rome Statute may observe the Assembly's proceedings but may not have a voting representative. *Id.*

157. *Id.* at art. 5.

158. *Id.* at art. 22. The ICC must interpret ambiguities in the defendant's favor. *Id.*

159. *Id.* at art. 124; Damir Arnaut, *When in Rome...? The International Criminal Court and Avenues for U.S. Participation*, 43 VA. J. INT'L L. 525, 539 (2003).

160. *See* Rome Statute, *supra* note 5, at art. 6.

161. *See id.* at art. 7.

crimes¹⁶² are specifically defined, the elements of aggression are not yet listed.¹⁶³ Thus, the ICC may not prosecute individuals for aggression until its member states pass an amendment which defines the element of the crime.¹⁶⁴ This will not occur until 2005 at the earliest, as the Rome Statute may not be amended until seven years after its initial passage.¹⁶⁵

Given the general level of satisfaction with the elements found in Article II of the Genocide Convention, genocide was the easiest ICC crime to define.¹⁶⁶ Within the Rome Statute, genocide does not contain a numerical threshold.¹⁶⁷ It does, however, require a specific *mens rea* of the “intent to destroy, in whole or in part, a national, ethnical, racial or religious group.”¹⁶⁸

At the Rome Conference, delegates had a difficult time codifying the chargeable offense of “crimes against humanity.”¹⁶⁹ Customary international law and existing treaties had not provided a generally accepted definition.¹⁷⁰ Eventually, delegates borrowed from the several existing versions to create a final list of criminal elements and acts.¹⁷¹ The various acts that may

162. See *id.* at art. 8.

163. *Id.* at art. 5.

164. See *id.* at arts. 1, 5.

165. See *id.* at arts. 121, 128. To amend crime elements, Rome Statute member states must amend the treaty by a two-thirds vote. *Id.* at art. 9; see also *id.* at art. 121 (declaring that all amendments require a two-thirds vote). An amendment may be proposed by any state assembly member, a majority of the ICC judges, or the Prosecutor. *Id.* at art. 9.

166. John F. Murphy, *The Quivering Gulliver: U.S. Views on a Permanent International Criminal Court*, 34 INT'L LAW. 45, 53 (2000).

167. See Rome Statute, *supra* note 5, at art. 6.

168. *Id.*; Barrett, *supra* note 28, at 92. Note that systematic, intentional destruction of a political or social group would not qualify as genocide under the Rome Statute. Murphy, *supra* note 166, at 53. These factions were specifically rejected from falling under genocide's umbrella. See *id.* Political persecution would instead qualify as a crime against humanity. *Id.*; Rome Statute, *supra* note 5, at art. 7.

169. Murphy, *supra* note 166, at 54.

170. *Id.*

171. *Id.* In defining “crimes against humanity,” Rome Conference delegates were influenced by the Nuremberg Charter, the ICTY, and the ICTR. Noone & Moore, *supra* note 24, at 138.

comprise “crimes against humanity”¹⁷² must be committed “as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.”¹⁷³ Crimes against humanity do not have to be targeted at a particular group or occur during armed conflict.¹⁷⁴

The Rome Conference looked to the Hague Convention, customary international law, and the Geneva Convention for guidance when categorizing war crimes.¹⁷⁵ In order to meet the ICC definition, actors must reach a threshold level to commit the offense.¹⁷⁶ Jurisdiction over war crimes exists only when they are “committed as a part of a plan or policy or as part of a large-scale commission of such crimes.”¹⁷⁷

C. *How the ICC Establishes Personal Jurisdiction*

As soon as a country ratifies the Rome Statute, it becomes subject to ICC jurisdiction.¹⁷⁸ In as many instances as possible, the Rome Statute seeks a connection between a state’s consent to be bound and the prosecuted offense.¹⁷⁹ In order to have jurisdiction over an individual, one of three conditions must be met: (1) the country in which the alleged crime occurred must be a member or accepting state, (2) the accused individual must be a national of a member or accepting state, or (3) the U.N. Security Council must refer the matter to the ICC Prosecutor under U.N. Charter Chapter VII.¹⁸⁰ A non-member state may

172. This list includes, but is not limited to: murder, apartheid, enslavement, deportation or forcible transfer of population, torture, and rape. Rome Statute, *supra* note 5, at art. 7. The inclusion of “deportation or forcible transfer of population” in the definitions of “crimes against humanity” and “war crimes” was aimed at Israel. Murphy, *supra* note 166, at 54. As a result, Israel voted against the Rome Statute. *Id.*

173. Rome Statute, *supra* note 5, at art. 7.

174. Noone & Moore, *supra* note 24, at 139.

175. *Id.*

176. Barrett, *supra* note 28, at 92.

177. Rome Statute, *supra* note 5, at art. 8.

178. Supple, *supra* note 149, at 183.

179. Mark A. Summers, *A Fresh Look at the Jurisdictional Provisions of the Statute of the International Criminal Court: the Case for Scrapping the Treaty*, 20 WIS. INT’L L.J. 57, 68 (2001).

180. Rome Statute, *supra* note 5, at arts. 12–13; *see also supra* note 98 (explaining the parameters of U.N. Chapter VII authority).

become an accepting state by allowing ICC jurisdiction on a case-by-case basis.¹⁸¹ In utilizing its Chapter VII authority to refer cases to the ICC, the Security Council's authority extends to any relevant situation, regardless of the actor's or victim's member state status.¹⁸²

In accordance with the standard originated in the Nuremberg and Tokyo Tribunals,¹⁸³ the Rome Statute promulgates individual accountability.¹⁸⁴ In addition to holding individuals responsible for state-mandated action,¹⁸⁵ the ICC has jurisdiction over an individual indirectly responsible for the commission of ICC crimes.¹⁸⁶

D. The ICC's Mechanisms For Investigation, Prosecution, Trial, and Punishment

The ICC Prosecutor does not need to wait for a charge to be brought by a member state, an accusing state, or the Security Council; she may act *proprio motu* by instigating an investigation or looking into charges brought by individuals or NGOs.¹⁸⁷

Once the Prosecutor receives a complaint or decides to begin a *proprio motu* investigation, she must obtain evidence to determine whether a "reasonable basis" exists to proceed with the case.¹⁸⁸ The Prosecutor then files a request, complete with supporting evidence, to the Pre-Trial Chamber, which reviews

181. Rome Statute, *supra* note 5, at art. 12.

182. *See id.* at art. 13. U.N. member states are automatically bound by Chapter VII Resolutions. *See* U.N. CHARTER art. 25. Chapter VII Resolutions bind non-member states as well, because they concern international peace and security. *See id.* at art. 2, para. 6.

183. *See supra* notes 47–51 and accompanying text (explaining the concept of individual accountability).

184. Rome Statute, *supra* note 5, at art. 25.

185. *See id.* at arts. 25, 27, 28.

186. *Id.* at art. 25. This may be accomplished in a number of ways, including—but not limited to—soliciting crimes, publicly inciting genocide, and facilitating crimes. *Id.*

187. *See id.* at art. 15. *Proprio motu* (or *motu proprio*) is defined as "of one's own accord." GABRIEL G. GADELEYE & KOFI ACQUAH-DADZIE, *WORLD DICTIONARY OF FOREIGN EXPRESSIONS* 252 (Thomas J. Siendewicz & James T. McDonough, Jr., eds., 1999). At the Rome Conference, Germany and Argentina initiated the proposal which would give the ICC Prosecutor *proprio motu* power. Seguin, *supra* note 149, at 99–100.

188. Rome Statute, *supra* note 5, at art. 53.

whether ICC jurisdiction exists and confirms whether the case has a reasonable basis.¹⁸⁹ If the Prosecutor decides to drop a case, she must explain the basis of her decision to both the Pre-Trial Chamber and the referring parties.¹⁹⁰ For the most part, the decision not to continue an investigation is final.¹⁹¹ The Pre-Trial Chamber may, however, ask the Prosecutor to reconsider.¹⁹² If the Prosecutor's justification for dropping the case was that the "interests of justice" would not be served by continued prosecution, her decision must be confirmed by the Pre-Trial Chamber.¹⁹³

Once an arrest warrant is issued by the Pre-Trial Chamber, a nation must immediately arrest and surrender the designated individual.¹⁹⁴ Although there was debate on whether defendants could be tried in absentia,¹⁹⁵ the Rome Statute requires a defendant's presence in court.¹⁹⁶

Generally, once a defendant is convicted by the Trial Chamber, he may be imprisoned for a maximum sentence of thirty years.¹⁹⁷ The Rome Statute does not permit the death penalty.¹⁹⁸ If a crime is found to be especially heinous, the court may impose a sentence of life imprisonment.¹⁹⁹ A convicted defendant may also have to pay a fine or forfeit any "proceeds,

189. *Id.* at art. 15.

190. *Id.* at art. 53.

191. Noone & Moore, *supra* note 24, at 128.

192. Rome Statute, *supra* note 5, at art. 53. The Prosecutor may re-open an investigation if new facts or evidence emerge. *Id.* at art. 15.

193. *Id.* at art. 53.

194. *Id.* at art. 58.

195. King & Theofrastous, *supra* note 17, at 91. This differs from the Nuremberg Charter; prosecutors tried and convicted Martin Bormann in absentia. *Id.* at 91 n.174.

196. Rome Statute, *supra* note 5, at art. 63. However, if the defendant is disruptive at trial, he may be compelled to leave. *Id.* In that case, the ICC will provide a mechanism by which he may view the proceedings from a remote location and communicate with his attorney. *Id.* However, this step should only be used as a last alternative and for as little time as necessary. *Id.*

197. *Id.* at art. 77.

198. Noone & Moore, *supra* note 24, at 134.

199. Rome Statute, *supra* note 5, at art. 77. After an individual has served two-thirds of his sentence (or twenty-five years in the case of a life sentence), the ICC has mandatory review to consider sentence reduction. *Id.* at art. 110.

property and assets derived directly or indirectly from that crime.”²⁰⁰ These penalties may be used for victim reparation.²⁰¹ A party may appeal his conviction based on errors of fact, law, or procedure.²⁰²

IV. U.S. OBJECTIONS TO THE ROME STATUTE AND ICC

The United States has criticized the ICC for a number of jurisdictional, procedural, and constitutional reasons.²⁰³ The Rome Statute does not allow nations to include reservations when adopting the treaty; the ratifying nation must accept the Rome Statute in its entirety.²⁰⁴

A. *Subject Matter and Personal Jurisdiction Issues*

As one of the “principal organs” of the United Nations,²⁰⁵ the Security Council has the “primary responsibility for the maintenance of international peace and security”²⁰⁶ and “shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations or decide what measures shall be taken.”²⁰⁷ The Rome Statute conflicts with this mandate because the ICC could circumvent the U.N. Security Council’s authority by investigating and taking action against violations of international law.²⁰⁸

200. *Id.* at art. 100.

201. *Id.* at art. 75.

202. *Id.* at art. 81. The Prosecutor may also appeal the Trial Chamber’s decision on similar grounds. *Id.* In response, the Appeals Division may “reverse or amend” a sentence, “order a new trial before a different Trial Chamber,” or “remand a factual issue to the original Trial Court.” *Id.* at art. 83. Both a convicted party and the Prosecutor may appeal the sentence length. *Id.* at art. 81.

203. See Bickley, *supra* note 54, at 215; see also *infra* notes 229–38 and accompanying text.

204. Rome Statute, *supra* note 5, at art. 120; John R. Bolten, *The United States and the International Criminal Court: The Risks and Weaknesses of the International Criminal Court from America’s Perspective*, 64 LAW & CONTEMP. PROBS. 167, 169–70 (2001).

205. U.N. CHARTER art. 7, para. 1.

206. *Id.* at art. 24, para. 1.

207. *Id.* at art. 39.

208. Diane Marie Amann & M.N.S. Sellers, *The United States of America and the International Criminal Court*, 50 AM. J. COMP. L. 381, 386 (2002).

U.S. delegates at the Rome Convention objected that ICC jurisdiction was too broad.²⁰⁹ Holding a nation to a treaty it did not sign violates a fundamental principle of international law²¹⁰—that “[a] treaty does not create either obligations or rights for a third State . . . without [its] consent.”²¹¹ In violation of the Vienna Convention,²¹² however, article 12 of the Rome Statute would allow the ICC to exercise jurisdiction over non-member nations.²¹³

In critiquing the final version of the Rome Statute, the United States objected to the seven-year opt-out provision for war crimes jurisdiction.²¹⁴ Because a nation may opt out of war-crimes jurisdiction for seven years once it ratifies the Rome Statute,²¹⁵ the ICC holds a larger jurisdiction over non-members than members.²¹⁶ Nations could theoretically ratify the Rome Statute and escape criminal liability, while non-members would remain open to ICC prosecution.²¹⁷

In addition, the ICC is arguably too weak to enforce its jurisdiction.²¹⁸ Internal conflicts resulted in instances of terrible atrocities during the twentieth century.²¹⁹ Examples include

209. Betsy Pisik, *Again, U.S. Voices Opposition to Structure of Proposed Court*, WASH. TIMES, Oct. 22, 1998, at A13.

210. See O'Connor, *supra* note 44, at 951 & n.148.

211. Vienna Convention, *supra* note 129, at art. 34.

212. See *id.*

213. Rome Statute, *supra* note 5, at art. 12.

214. David, *supra* note 31, at 356. Ironically (and arguably hypocritically), during the Rome Convention the United States was a major proponent of including the war-crimes opt-out provision. O'Connor, *supra* note 44, at 956. However, it supported a ten-, not seven-year, opt-out period for both war crimes and crimes against humanity. O'Hara-Forster, *supra* note 100, at 46. During the Rome Convention, U.S. delegates argued that a longer provision would allow nations to evaluate the Court's performance. O'Connor, *supra* note 44, at 956. Originally, the United States had argued that the ICC should have automatic subject matter jurisdiction for genocide only. Marler, *supra* note 116, at 833-34. Member nations would have an option of separately consenting to ICC jurisdiction over war crimes and crimes against humanity. *Id.* On an added ironic note, because it has a large number of troops involved in global peacekeeping missions, France supported this proposed jurisdictional “opt-in” provision. *Id.* at 834.

215. Rome Statute, *supra* note 5, at art. 126.

216. O'Connor, *supra* note 44, at 951.

217. David, *supra* note 31, at 356.

218. See O'Connor, *supra* note 44, at 950-51.

219. *Id.* at 951.

humanitarian violations in nations such as Iraq and Cambodia.²²⁰ Leaders of non-member states who committed atrocities within their own nations would never voluntarily submit to ICC jurisdiction.²²¹ Failing U.N. Chapter VII referral, the ICC would not have an adequate prosecutorial and enforcement mechanism against non-member nations,²²² rendering it ineffective in such cases.²²³

Even more, after escaping ICC jurisdiction, these offenders could file charges with the ICC Prosecutor, alleging that a NATO peacekeeper had committed war crimes while in their territory and accepting ICC jurisdiction for that one-time instance.²²⁴ Nations hostile to the United States could file wrongful, frivolous, or politically-motivated charges against government officials, military officers, and peacekeepers.²²⁵ U.S. enemies would attempt to show that American military actions were criminally disproportionate uses of force.²²⁶

The U.S. delegation at the Rome Convention argued that only member nations and the U.N. Security Council should be able to refer cases to the ICC.²²⁷ This would safeguard American citizens and American policy, as well as ensure that adequate enforcement mechanisms existed prior to ICC prosecution. The U.S. proposal would also guarantee that any time the ICC took on a case, it already had the international community's political

220. *Id.*; Peter, *supra* note 86, at 184.

221. O'Connor, *supra* note 44, at 950–51.

222. *See id.* at 951 & n.142.

223. Theodor Meron, *The Court We Want*, WASH. POST, Oct. 13, 1998, at A15.

224. Noone & Moore, *supra* note 24, at 151.

225. Ruth Wedgwood, *Fiddling in Rome: America and the International Criminal Court*, FOREIGN AFF., Nov.–Dec. 1998, at 20; *see also* Bruce W. Nelan, *The Pinochet Problem: With Courts Suddenly Taking Human-Rights Crimes Seriously, Is Every Leader Vulnerable?*, TIME, Dec. 14, 1998, at 42, 44.

226. *See* Noone & Moore, *supra* note 24, at 151.

227. O'Connor, *supra* note 44, at 994–95. Unsurprisingly, the permanent members of the U.N. Security Council supported this proposal. Taulbee, *supra* note 63, at 130. Germany, Mexico, and a number of “lesser developed countries” opposed the idea of Security Council involvement in initiating ICC cases. *Id.* In fact, the German delegates proposed that the ICC have universal jurisdiction. Seguin, *supra* note 149, at 97. Universal jurisdiction would allow a country to prosecute non-nationals for crimes regardless of where they took place. *See id.* at 90 n.24.

support.²²⁸

B. The ICC's Mechanisms for Initiating Investigations

The United States also objected to the ICC Prosecutor's *proprio motu* power.²²⁹ Specifically, a politically-motivated ICC could frivolously prosecute U.S. commanders and soldiers for actions undertaken during U.N. peacekeeping operations.²³⁰ David Scheffer—Ambassador-at-Large for War Crimes Issues and Head of the U.S. Delegation to the U.N. Diplomatic Conference on the Establishment of a Permanent International Criminal Court under former President Bill Clinton²³¹—admitted: “We just don’t accept a presumption that a prosecutor would be totally apolitical.”²³² The United States also questioned whether ICC judges could be relied on to act impartially—free of political bias or pressure.²³³

In addition, the United States expressed concerns regarding the Prosecutor's ability to investigate matters based on individual or NGO referral.²³⁴ In these instances, no state party would have complained about a crime.²³⁵ This could subject the ICC to “frivolous and politically-motivated complaints” or turn it

228. David J. Scheffer, *U.S. Policy on International Criminal Tribunals*, 13 AM. U. INT'L L. REV. 1389, 1397 (1998) [hereinafter *War Crimes Tribunals*].

229. David, *supra* note 31, at 355–56.

230. See O'Connor, *supra* note 44, at 952. In deciding to grant the Prosecutor the ability to initiate investigations and accept referrals, a majority of the Rome Conference delegates was trying to prevent the politization of the ICC. See Bartram S. Brown, *Primary or Complementarity: Reconciling the Jurisdiction of the National Courts and International Criminal Tribunals*, 23 YALE J. INT'L L. 383, 427 (1998); see also Barrett, *supra* note 28, at 95. These nations did not want the Prosecutor to have to gain approval from political structures such as the U.N. Security Council. *Id.*

231. Seguin, *supra* note 149, at 96.

232. Steven Keeva, *Global Justice Edges Closer: Creation of International Criminal Court Under Negotiation*, Nov. 1997, A.B.A. J. 22, 23. When testifying in front of the Senate Relations Committee regarding the ICC, Michael P. Sharf—Professor of Law and Director, Center for International Law and Policy, New England School of Law, Boston, MA—joked that U.S. officials were afraid that an independent ICC Prosecutor would result in an “international Ken Starr problem.” Seguin, *supra* note 149, at 100 & n.46.

233. King & Theofrastous, *supra* note 17, at 89.

234. See David, *supra* note 31, at 355–56 & n.71.

235. See *id.* at 355–56.

into a “human rights ombudsman,” constantly dealing with “complaints from well-meaning individuals in organizations that will want the court to address every wrong in the world.”²³⁶ Essentially, the United States supported mandatory approval by either a defendant’s home state or the U.N. Security Council in order for a case to come before the ICC.²³⁷ This would give the United States the power to quash investigations of its citizens or troops by not signing the Rome Statute, or by vetoing action through its permanent Security Council position.²³⁸

C. *Constitutional Issues—The Lack of Due Process Protection(s)*

ICC critics have stated that allowing a foreign court to have jurisdiction over U.S. citizens for actions performed within the United States would be unconstitutional,²³⁹ especially because the ICC does not contain the safeguards provided in the Bill of Rights.²⁴⁰ International treaties may not encroach upon the powers granted to the Executive, Legislative, and Judicial branches under the Constitution.²⁴¹ Because U.S. citizens are allowed a trial by jury for all crimes occurring within the United States,²⁴² the ICC arguably encroaches upon U.S. judicial power when it attempts to prosecute U.S. citizens for actions undertaken within the United States.²⁴³

When U.S. citizens are tried in foreign courts, Bill of Rights guarantees are usually not required.²⁴⁴ However, the Supreme Court has suggested in dicta that a foreign court could possibly trigger the Bill of Rights when prosecuting a U.S. citizen.²⁴⁵

236. *Id.* at 356 n.71 (quoting former U.S. Department of State Representative James Rubin).

237. King & Theofrastous, *supra* note 17, at 87.

238. Barrett, *supra* note 28, at 95–96.

239. Taulbee, *supra* note 63, at 137.

240. *See* Andreasen, *supra* note 90, at 726.

241. *See* Missouri v. Holland, 252 U.S. 416, 433 (1920) (holding that the federal government may only enter into a treaty that does not contradict constitutional provisions).

242. U.S. CONST. art. III, § 2, cl. 3.

243. *See* Andreasen, *supra* note 90, at 726.

244. U.S. v. Balsys, 524 U.S. 666, 666–67 (1998).

245. *Id.* at 698.

Specifically, an exception might exist if the United States relinquished its jurisdiction to a foreign tribunal on a case involving “offenses of [an] international character.”²⁴⁶ Should this occur, the Supreme Court acknowledged that the foreign court would essentially prosecute the accused on the behalf of the United States; therefore, the defendant would merit Bill of Rights protections.²⁴⁷

In addition, *Missouri v. Holland* held that the federal government may only enter a treaty that “does not contravene any prohibitory words to be found in the Constitution.”²⁴⁸ This may preclude the United States from ever adopting the Rome Statute.²⁴⁹ Ratification would mean that the United States, as a State Assembly member, was partially responsible for administering and amending a judicial body which was acting “on behalf of the United States,”²⁵⁰ but does not provide full constitutional protection.²⁵¹

V. ICC SAFEGUARDS & COUNTERARGUMENTS TO U.S. OBJECTIONS

A. *Pre-existing Jurisdiction Under Customary International Law*

Allowing ICC jurisdiction over U.S. citizens arguably would not violate the Vienna Convention by binding the United States to a treaty it did not sign.²⁵² Instead, ICC jurisdiction would merely extend over U.S. citizens.²⁵³ The United States itself would not be bound to the Rome Statute’s provisions.²⁵⁴

Regardless, the United States potentially has already subjected its citizens to ICC jurisdiction. The U.S. Army Field

246. *Id.*

247. *Id.* at 698–99.

248. *Missouri v. Holland*, 252 U.S. 416, 433 (1920).

249. Andreasen, *supra* note 90, at 729.

250. *Balsys*, 524 U.S. at 698; Andreasen, *supra* note 90, at 729.

251. Andreasen, *supra* note 90, at 729.

252. Barrett, *supra* note 28, at 102–03.

253. *Id.*

254. *Id.*

Manual on the Law of Land Warfare promotes the concept of individual responsibility for war crimes.²⁵⁵ In addition, the United States has indicated its support of this tenant of international law through ratification of the Nuremberg, ICTY, and ICTR Charters.²⁵⁶ Finally, the United States has indicated that it will prosecute foreign citizens “for transgressions of customary international law under a theory of universality.”²⁵⁷ Other nations and the ICC could consider these combined U.S. actions to be sufficient state practices to conform to *opinio juris*. This would subject U.S. citizens to ICC jurisdiction, regardless of the U.S. treaty obligations.²⁵⁸

B. The ICC’s Complementarity Prerequisite

The ICC was intended to be a “court of last resort.”²⁵⁹ Many prerequisites and procedures must be met in order for the ICC to obtain jurisdiction over a case.²⁶⁰ The ICC is based on the premise of complementarity to national courts.²⁶¹ The ICC may not have jurisdiction over a case that is being investigated or prosecuted by a nation that has jurisdiction over the accused “unless the State is unwilling or unable genuinely to carry out the investigation or prosecution.”²⁶² Even more, if a nation investigates a case then dismisses it for lack of evidence or prosecutes a case then finds the accused innocent of the charge, the ICC may not have jurisdiction “unless the decision resulted from the unwillingness or inability of the State genuinely to

255. See U.S. DEP’T OF THE ARMY, FIELD MANUAL, THE LAW OF LAND WARFARE FM 27-10, paras. 498, 510–11 (1956). “Any person, whether a member of the armed forces or a civilian, who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment.” *Id.* at para. 498.

256. King & Theofrastous, *supra* note 17, at 83.

257. *Id.* at 56. Given its unwillingness to subject its own citizens to ICC prosecution, the United States appears to invoke a double standard in this regard. See *id.* at 57.

258. See RESTATEMENT (THIRD) FOREIGN RELATIONS, *supra* note 133, § 701 reporter’s note 2; see also *supra* note 131 and accompanying text.

259. Taulbee, *supra* note 63, at 129.

260. *Id.*

261. Rome Statute, *supra* note 5, at art. 1.

262. *Id.* at art. 17.

prosecute.”²⁶³ This deference to national sovereignty indicates that the ICC is a court of last resort.²⁶⁴ The U.S. delegation, however, rejected ICC complementarity as a safeguard against frivolous prosecution of U.S. citizens, because the Pre-Trial Chamber could conceivably determine that a state has not carried out an investigation or prosecution in good faith.²⁶⁵

C. *The ICC’s Pre-Prosecution “Trigger Measure” & Other Safeguards*

The Pre-Trial Chamber may serve as an important check on the Prosecutor.²⁶⁶ Because the Pre-Trial Chamber must examine the evidence of each case to determine that a “reasonable basis” exists before authorizing the Prosecutor to proceed,²⁶⁷ it may stop any frivolous, politically-based investigations.²⁶⁸ In performing this duty, the Pre-Trial Chamber must consist of three judges²⁶⁹ and decide by majority.²⁷⁰ No two ICC judges may be from the same country.²⁷¹

Although the United Nations does not have the power to entirely quash ICC actions,²⁷² it has the power to stop an ICC investigation or prosecution by issuing a Chapter VII, twelve-month stay.²⁷³ In such a case, the Security Council would find that an existing “threat to the peace, breach of the peace, or act of aggression”²⁷⁴ would benefit from delaying ICC action.²⁷⁵ The United Nations can renew this stay every year for an indefinite period.²⁷⁶

263. *Id.*

264. Seguin, *supra* note 149, at 94.

265. *See id.*

266. King & Theofrastous, *supra* note 17, at 87.

267. Rome Statute, *supra* note 5, at art. 15.

268. King & Theofrastous, *supra* note 17, at 87.

269. Rome Statute, *supra* note 5, at arts. 15, 39, 57.

270. *Id.* at art. 57.

271. *Id.* at art. 36.

272. *See* David, *supra* note 31, at 367.

273. Rome Statute, *supra* note 5, at art. 16.

274. U.N. CHARTER art. 39.

275. David, *supra* note 31, at 367–68.

276. *See id.* at 367.

D. Constitutional Issues: Due Process Protection(s)

The United States has extradited its citizens and allowed them to be tried in foreign courts without Bill of Rights protections.²⁷⁷ This usually occurs, however, when the crime was committed either outside U.S. territory or within U.S. territory with the intent to create criminal effect abroad.²⁷⁸ The Rome Statute does give defendants a number of rights and “minimum guarantees” during the investigatory and trial process.²⁷⁹ Many of these are similar to the Due Process protections found in the U.S. judicial system²⁸⁰ and would provide an American citizen more rights than he would receive in a number of foreign courts.²⁸¹

VI. U.S. NATIONAL SOVEREIGNTY & THE ICC

The United States is accustomed to its own detailed judicial procedures and common law traditions.²⁸² On the other hand, European nations have more experience with transnational jurisprudence, partially because of their history with E.U. courts.²⁸³ Thus, European nations have more trust in the ICC and State Assembly’s ability to establish clear and fair rules of evidence and procedure over time.²⁸⁴

Individual accountability for violations of international law serves as a restriction on the concept of absolute national sovereignty.²⁸⁵ An individual’s obligations to his country may be

277. Andreassen, *supra* note 90, at 729.

278. See Neely v. Henkel, 180 U.S. 109, 110–11 (1901); see also U.S. v. Melia, 667 F.2d 300, 303–04 (2d Cir. 1981).

279. Rome Statute, *supra* note 5, at art. 67.

280. See *id.* For example, an individual accused of a crime is “presumed innocent until prove[n] guilty.” *Id.* at art. 66. A defendant has the right against self-incrimination, the right to counsel, and the right to call and examine witnesses. *Id.* at art. 67. The Rome Statute also prohibits ex post facto laws, double jeopardy, and undue delay. *Id.* at arts. 20, 67. Defendants must be proven guilty “beyond reasonable doubt.” *Id.* at art. 60.

281. Supple, *supra* note 149, at 185–86.

282. See Taulbee, *supra* note 63, at 134.

283. *Id.*

284. See *id.*

285. Bickley, *supra* note 54, at 229.

constrained and even overridden whenever national law or superior orders conflict with generally accepted tenets of international law.²⁸⁶ Moreover, an individual could be held accountable for violating customary international law even if he acted under government orders and remained within his own country while following those orders.²⁸⁷ A nation's right to aggressively wage war has been regulated; international standards establish the norms and limits of warfare.²⁸⁸

The United States has long-standing national sovereignty concerns regarding the establishment of a permanent, international criminal court.²⁸⁹ In general, the United States rarely signs or ratifies treaties which would open U.S. policy to international scrutiny.²⁹⁰ Following the end of the Cold War, when the international community resurrected the idea of a permanent, international criminal court,²⁹¹ the United States attempted to indefinitely delay its formation.²⁹² Michael Scharf, a State Department official under former President George H.W. Bush, admitted that "[o]ne of my jobs, which I did not enjoy . . . was to find ways to stall it forever."²⁹³ Government officials remain wary of an institution that would judge U.S. national security policy.²⁹⁴ They are especially concerned that ICC governance "will not be confined to those from democratic countries with the rule of law," because every nation that ratifies the Rome Statute has equal voting power within the

286. See *id.* at 229–30.

287. *Id.*

288. *Id.* at 230.

289. See Marler, *supra* note 116, at 831.

290. King & Theofrastous, *supra* note 17, at 62.

291. See *supra* notes 93–94 and accompanying text.

292. O'Hara-Forster, *supra* note 100, at 46.

293. *Id.*

294. See Jesse Helms, Editorial, *Slay This Monster: Voting Against the International Criminal Court Is Not Enough. The US Should Try to Bring It Down*, FIN. TIMES (LONDON), July 30, 1998, at 12 [hereinafter *Slay This Monster*]; see also Amann & Sellers, *supra* note 208, at 385–86. Senator Helms declared that the United States will "never . . . allow its national security decisions to be judged by an International Criminal Court." Helms, *Slay This Monster*, *supra*, at 12. Senator Rod Grams urged that the United States adopt an ICC policy of "total non-cooperation." Seguin, *supra* note 149, at 100–01.

Assembly of State Parties.²⁹⁵

The United States is justifiably concerned about its overseas personnel, given its dominant military position.²⁹⁶ As the world's sole superpower,²⁹⁷ the United States has many alliances and therefore greater military commitments than any other country.²⁹⁸ In July 2002, approximately 9,800 U.S. military and civilian personnel were involved in eight U.N. missions and three non-U.N. missions.²⁹⁹ Former Ambassador Scheffer has stressed that U.S. troops have been "deployed globally and need to be able to fulfill their legitimate responsibilities without unjustified exposure to criminal legal proceedings."³⁰⁰

On December 31, 2000, former President Bill Clinton approved U.S. signature of the Rome Statute.³⁰¹ The Clinton administration knew that the signed version of the Rome Statute would face stringent opposition in the U.S. Senate³⁰² and acknowledged that the United States still had "fundamental concerns" regarding "significant flaws in the treaty."³⁰³ However, the Clinton administration hoped that as a signatory nation, the United States would have leverage to effect further changes.³⁰⁴

Senator Jesse Helms strenuously opposed the Rome Statute and the creation of the ICC,³⁰⁵ and went as far as stating that any proposal "[w]ithout a clear U.S. veto . . . will be dead-on-

295. Amann & Sellers, *supra* note 208, at 388 (quoting Senator Rod Grams). Senator Grams has labeled the ICC as not only "bad," but "dangerous." Seguin, *supra* note 149, at 100. Former Senator John Ashcroft remarked that the ICC forms a "clear and continuing threat to the national interest of the United States." *Id.* at 101.

296. Barrett, *supra* note 28, at 84.

297. O'Connor, *supra* note 44, at 952.

298. James Podgers, *War Crimes Court Under Fire*, Sept. 1998, A.B.A. J., at 67.

299. Thom Shanker & James Dao, *U.S. Might Refuse New Peace Duties without Immunity*, N.Y. TIMES, July 3, 2002, at A1.

300. Scheffer, *War Crimes Tribunals*, *supra* note 228, at 1399.

301. David J. Scheffer, *Staying the Course with the International Criminal Court*, 35 CORNELL INT'L L.J. 47, 55 (2002) [hereinafter *Staying the Course*].

302. *See id.* at 67.

303. Amann & Sellers, *supra* note 208, at 381; *Clinton's Words: 'The Right Action'*, N.Y. TIMES, Jan. 1, 2001, at A6 (reprinting former President Clinton's statement regarding his signature of the Rome Statute).

304. Amann & Sellers, *supra* note 208, at 381.

305. Ward, *supra* note 16, at 1131.

arrival at the Senate Foreign Relations Committee.”³⁰⁶ In a letter to former Secretary of State Madeline Albright, he specifically addressed his concerns that a permanent court would “grant the UN a principal trapping of sovereignty” and more important, that “an American citizen could very well come under the jurisdiction of a UN criminal court, even over the express objections of the United States Government.”³⁰⁷

Scheffer acknowledged that members of Congress and the Executive branch opposed U.S. signature of the Rome Statute.³⁰⁸ He also felt that “[i]t had become utterly unrealistic to believe that the United States would obtain support, much less the necessary consensus, for the silver bullet of guaranteed 100 percent protection for U.S. service members . . . that had so long been a primary objective of the U.S. delegation.”³⁰⁹

The United States sought this goal through a number of different strategies.³¹⁰ Ideally, the United States wanted the U.N. Security Council to refer all cases to the ICC under Chapter VII.³¹¹ Alternatively, the United States recommended that both the victim’s home country and the nation in which the crime occurred must be parties to the Rome Statute.³¹² Finally, the United States suggested that the defendant’s nation state must first consent to ICC jurisdiction.³¹³

Given the ability of member states and non-member states to bring charges against a non-member,³¹⁴ the United States primarily fears politically-motivated charges will extend to government officials and senior military officers.³¹⁵ Legal action

306. Press Release, Jesse Helms, Helms Declares U.N. Criminal Court “Dead-On-Arrival” in Senate without U.S. Veto (Mar. 26, 1998), 1998 WL 7322525 [hereinafter U.N. Criminal Court “Dead-On-Arrival” in Senate]. Senator Helms has also declared that “[t]he ICC is indeed a monster—and it is our responsibility to slay it before it grows to devour us.” Helms, *Slay This Monster*, *supra* note 294, at 12.

307. Helms, U.N. Criminal Court “Dead-On-Arrival” in Senate, *supra* note 306.

308. Scheffer, *Staying the Course*, *supra* note 301, at 57.

309. *Id.*

310. See Andreasen, *supra* note 90, at 722–23.

311. Seguin, *supra* note 149, at 98; see U.N. CHARTER art. 39.

312. Andreasen, *supra* note 90, at 722.

313. *Id.*

314. Rome Statute, *supra* note 5, at art. 12.

315. O’Connor, *supra* note 44, at 952–53.

addressing state-sponsored activity would echo charges made in Chilean and U.S. courts against Former Secretary of State Henry Kissinger for his alleged involvement in advancing Chile's 1973 coup d'état.³¹⁶

The Bush Administration has criticized the ICC, favoring the establishment of temporary tribunals to prosecute violations of humanitarian law.³¹⁷ On May 6, 2002, the United States formally withdrew its interest in the Rome Statute.³¹⁸ Specifically noting that U.S. signature of the Rome Statute carried no legal obligations, the United States declared that it would not become a member nation of the ICC.³¹⁹

VII. CONCLUSION

As the world's only current superpower, the United States can flex its military muscle in an attempt to gain ICC exemptions through Article 98 exceptions. Given the ICC's safeguards, it is likely that only charges against U.S. senior civilian leaders and military officials could ever come to fruition; complementarity would adequately handle allegations made against U.S. troops. The primary U.S. motivation behind seeking Article 98 exemptions is to weaken the ICC's integrity. In doing this, though, the United States is merely being historically realistic.

As Sandstrøm recognized in his 1950 report,³²⁰ strong

316. Becker, *supra* note 4, at A6. Following the 1973 coup, General Augusto Pinochet held power for seventeen years. *Id.*

317. Amann & Sellers, *supra* note 208, at 384.

318. Press Release, Letter from John R. Bolton, Under Secretary of State for Arms Control and International Security, to Kofi Annan, U.N. Secretary General, (May 6, 2002). The body of the letter stated in its entirety:

"This is to inform you, in connection with the Rome Statute of the International Criminal Court adopted on July 17, 1998, that the United States does not intend to become a party to the treaty. Accordingly, the United States has no legal obligations arising from its signature on December 31, 2000. The United States requests that its intention not to become a party, as expressed in this letter, be reflected in the depositary's status lists relating to this treaty."

Id.

319. *Id.*

320. See *supra* notes 60–65 and accompanying text.

governments—especially military powers—will not want to subjugate national sovereignty to a “superior” governing or judicial body. International judicial tribunals are only effective when they can be adequately enforced. Nuremberg, Tokyo, ICTY, and ICTR were possible only because enforcement mechanisms existed when they were first created. As long as strong sovereign nations exist, a functioning, effective international criminal court will remain a noble, but ultimately unfeasible, ideal.

*Cassandra Jeu**

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