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The Pursuit of Justice and Accountability: Why the United States Should Support the Establishment of an International Criminal Court

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NOTE

THE PURSUIT OF JUSTICE AND ACCOUNTABILITY: WHY THE UNITED STATES SHOULD SUPPORT THE ESTABLISHMENT OF AN INTERNATIONAL CRIMINAL COURT

CONTENTS

I. INTRODUCTION................................................................. 928

II. A HISTORICAL PERSPECTIVE OF INTERNATIONAL LAW
    IN THE TWENTIETH CENTURY ............................................. 929
    A. The Rome Treaty: A Pivotal Moment in
       International Law ....................................................... 929
    B. War Crime Tribunals of the Twentieth Century ............... 935
       1. World War I .......................................................... 935
       2. World War II .......................................................... 939
       3. The Cold War and Recent Developments in
          International Law .................................................. 944

III. THE ARGUMENTS OF THE UNITED STATES AGAINST THE
     ICC STATUTE PASSED BY THE ROME CONFERENCE ........... 948
     A. Apprehension Over the ICC’s
        Jurisdiction and Fear for
        United States Peacekeepers ...................................... 949
        1. Jurisdictional Issues ............................................ 949
        2. The Vulnerability of United States Peacekeepers ...... 952
     B. Arguments Against an
        Independent ICC Prosecutor .................................... 954
     C. Additional Concerns of the United States .................. 956

IV. A CLOSER EXAMINATION OF THE
    ARGUMENTS OF THE UNITED STATES ............................ 957
    A. Safeguards and Protections
       Within the ICC Statute ............................................ 957

927
I. INTRODUCTION

Many thought, no doubt, that the horrors of the Second World War—the camps, the cruelty, the exterminations, the Holocaust—could never happen again. And yet they have. In Cambodia, in Bosnia and Herzegovina, and in Rwanda. Our time—this decade even—has shown us that man’s capacity for evil knows no limits. Genocide—the destruction of an entire people on the basis of ethnic or national origins—is now a word of our time. It is also a heinous reality that calls for a historic response.¹

The last one hundred years have seen an unprecedented advancement in international law, yet alarmingly, abstract notions of sovereignty can still shield violators of international criminal law. The current concerns expressed by the Clinton Administration should be carefully analyzed, but should not prevent the United States from supporting the establishment of the world’s first permanent International Criminal Court (“ICC”). The ICC will be an important and vital entity that will help ensure a prompt, reasonable, and just international re-

¹ Kofi Annan, Advocating for an International Criminal Court, Address Before the International Bar Association at its Fiftieth Anniversary, in 21 FORDHAM INT’L L.J. 363, 364-65 (1997). Another commentator, Christopher Keith Hall, states:

The twentieth century has been marred by crimes of a horror and magnitude unparalleled in history: concentration camps; systematic torture, including the use of rape as a weapon of war; bombardment of undefended villages, towns, and cities; mass expulsions and deportations; strafing of retreating refugees; “disappearances” and extrajudicial executions; and even exterminations of entire peoples.

response to heinous crimes. The crucial moment has arrived in which the United States must embrace and support the ICC, for “[t]here can be no global justice . . . unless the worst of crimes—crimes against humanity, [genocide, and war crimes]—are subject to the law.” Only when the individual perpetrators of such horrible crimes are held accountable for their actions can there exist true justice within the international community. It would be a sad commentary indeed if, as this millennium comes to a close, the United States chose not to join with the vast majority of the international community in the implementation of an effective system of international justice.

This Note addresses the development and history behind the establishment of the ICC, examines the current concerns of the United States towards a permanent ICC, and, finally, offers a critical assessment of the arguments of the United States against the ICC. Part II provides a brief overview of the results of the July 1998 United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an ICC and traces the history and recent development of international law, with an emphasis on war crime tribunals of this century. Part III focuses on the criticisms and legal arguments made by the United States against the ICC, and includes the arguments of the Clinton Administration and members of the United States Congress. The majority of the focus throughout this Note is on the key sections of the statute establishing the ICC (“ICC statute”) and the reasons why the United States lobbied and voted against it. Part IV contends that, upon closer examination, the concerns of the United States are unfounded because of numerous procedural safeguards within the statute, and takes a look forward in an attempt to evaluate the potential of the ICC as a deterrent to future war crimes, crimes against humanity, and genocide. Part V concludes that, despite these concerns, the United States should reverse course and support the ICC.

II. A HISTORICAL PERSPECTIVE OF INTERNATIONAL LAW IN THE TWENTIETH CENTURY

A. The Rome Treaty: A Pivotal Moment in International Law

On July 17, 1998, after years of planning and debate within the legal and diplomatic communities and amid much fanfare, 120 countries

2. Annan, supra note 1, at 364.
adopted a multilateral treaty, entitled the Rome Statute of the International Criminal Court, at a United Nations Conference in Rome ("Rome Conference" or "Rome Treaty"). The Rome Treaty emerged from a contentious and often stormy five week diplomatic conference that concluded with an overwhelming vote in favor of the statute which calls for the establishment of a permanent ICC.

Upon the ratification of sixty countries, the ICC will be established and will operate through an eighteen judge tribunal based at The Hague. The ICC—unlike the International Court of Justice, which resolves quarrels between countries—will punish individuals who commit the despicable acts of genocide, war crimes and crimes against humanity. Despite the fierce opposition of the United States to the ICC statute, United Nations Secretary-General Kofi Annan cut short a mission to Latin America to attend the signing ceremony, and declared that the establishment of a permanent ICC was a "giant step toward universal human rights."

The international legal community had looked forward to the Rome Conference with great anticipation, because the creation of an ICC had been debated by scholars for most of this century. At the conclusion of World War I, and in the years since, the formation of a permanent ICC has been seriously deliberated. Nevertheless, draft statutes for a permanent ICC written in 1951 and 1953 were postponed by the United

4. See James Podgers, War Crimes Court Under Fire, A.B.A. J., Sept. 1998, at 64, 65. The final vote was 120-7, with 21 abstentions. The United States cast one of the dissenting votes.
5. See Stoelting, supra note 3, at 1.
6. See id.
9. Id.
10. See Jelena Pejic, What is an International Criminal Court?, 23 HUM. RTS. Q. 16, 16 (1996). According to Pejic, the idea of creating an ICC
is by no means new. It was first mentioned in the 1919 Paris Peace Treaty, whose signatories envisaged trying the German Emperor for "a supreme offense against morality and the sanctity of treaties." (He never stood trial.) Based on the precedent of the Nuremberg and Tokyo Tribunals, the 1948 Genocide Convention provided that the perpetrators of this crime against humanity would be tried before an international penal tribunal, if and when one were set up. Draft Statutes for an ICC were prepared in 1951 and 1953 by the International Law Commission (ILC), a U.N. expert body, only to be laid to rest because of the advent of the Cold War.
Id.
11. See id.
Nations due to tensions emanating from Cold War hostilities. In 1989, the proposal for an ICC once again gathered momentum when Trinidad and Tobago called upon the United Nations General Assembly to create an ICC to support international efforts to prevent drug trafficking. Finally, a decisive step towards a permanent ICC was taken with the creation of ad hoc war crime tribunals in 1993 and 1994 in response to atrocities committed in the former Yugoslavia and Rwanda.

Throughout this century, a driving force behind the overwhelming international support of the ICC has been the disturbing number of victims from these crimes. In fact, in this century alone, it is estimated that purely internal, non-international conflicts and despotic regimes are responsible for more than 170 million deaths, as compared to an estimated thirty-three million casualties from international military conflicts.

The official vote from the Rome Conference was 120 countries voting in favor of the ICC statute and seven countries voting against it. The United States, Iraq, Iran, China, and India all opposed the implementation of the ICC. Ironically, the United States was a driving force towards the creation of the Nuremberg, Tokyo, Rwanda, and Yugoslavia Tribunals, and the United States was an early and loud proponent of a
permanent ICC. President Clinton, Secretary of State Madeleine Albright and other United States officials frequently spoke out in favor of the ICC. In fact, President Clinton took the unprecedented step of appointing David Scheffer as the first-ever Ambassador-at-Large for War Crimes Issues to lead the Administration's efforts in this area. Furthermore, in the years preceding the Rome Conference, representatives of the United States played an extensive and vital role in each phase of the preparatory negotiations, making extensive contributions and suggestions to the ICC draft statute.

Although the United States delegation, led by Ambassador Scheffer, took an active opposition to the ICC statute and voted against its adoption, the United States did sign the Rome Conference’s final act. This enables the United States to participate in the preliminary work to organize the ICC. Much of the hostility of the United States was fueled by the concerns of the United States military and members of Con-

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19. See id. at 66.

   President Clinton and Secretary of State Madeleine Albright have long called for the establishment of a permanent international court, and they want it done by the end of this century. Last week, in Kigali, the President pledged that “the United States will work to see that it is created.”

   As head of the United States delegation negotiating the permanent court, I am keenly aware that the road to Rome remains steep. But the critical need for a permanent court, and the vital role the United States can play in its establishment and operation, compels our best efforts.

   The Clinton Administration believes that a core purpose of an international criminal court must be to advance a simple norm: countries should bring to justice those who commit genocide, crimes against humanity, and war crimes, or turn suspects over to someone who will, such as an impartial and effective international court.

   Our long-term vision is the prevention of heinous crimes through effective national law enforcement buttressed by the deterrence of an international court.

Id. at 1396.
22. See Stoelting, supra note 3, at 1.
23. See Podgers, supra note 4, at 65, 66. “American officials made it clear in Rome and Washington that they may seek to dissuade other nations from ratifying the statute—and they expressed a willingness to use hardball tactics if necessary.” Id. at 66.

   While President Clinton was endorsing the new world court after meeting genocide
For example, Senator Jesse Helms, Chairman of the United States Senate Foreign Relations Committee, declared that any proposal for an ICC would be “dead on arrival” in his committee.27 Similarly, Senator Rod Grams stated that the ICC is “truly a monster . . . that must be slain,” and Senator John Ashcroft denounced the ICC “as a clear and continuing threat to the national interest of the United States.”28

During the Rome Conference the United States actively opposed the ICC statute and unsuccessfully attempted to convince its traditional allies to support its position.29 The United States delegation waged an isolated diplomatic battle against some of these traditional allies, such as Germany and Great Britain, who favored ratifying the statute.30 Ambassador Scheffer confirmed that during the Rome Conference United States officials discussed status of forces agreements and related secu-

... At the insistence of the Pentagon, the United States is resisting any proposal that would give the future court power to try American servicemen without an effective US veto over the proceedings.

The US military fears a repeat of previous threats by America’s foes to put US soldiers in the dock for war crimes allegedly committed in Vietnam, Central America and Iraq.

Id.


Looking over the administration’s shoulders is a Senate skeptical of new international institutions and still jealously protective of American sovereignty. While congressional aides predict that most senators will support a permanent court, they say that Sen. Jesse Helms, the North Carolina Republican who chairs the Foreign Relations Committee, will oppose it. His panel would have to approve U.S. participation in a court. A spokesman says Helms hasn’t taken a position but will resist any loss of U.S. sovereignty. That raises the prospect of another U.S.-backed treaty bottled up in the Senate.

Id. at 54.


29. See Podgers, supra note 4, at 66 (quoting Senator Helms’ prediction of “‘grave consequences for our bilateral relations with every nation that signs that treaty, and they’d better understand that right at the outset’”).

30. See Stoelting, supra note 3, at 1; see also Richard Owen, Britain Scuppers Plan For ‘Opt-Out’ Deal on War Crimes Court, TIMES (London), July 17, 1998, at 17 (explaining how Great Britain broke ranks with the United States at the Rome Conference).
rity agreements with some of these traditional allies. He insisted, however, that these talks were merely to clarify American interests and were not an attempt to twist arms in support of the American position against the ICC. By the end of the Rome Conference, diplomats from various countries were negotiating feverishly to convince the United States to vote for the ICC statute. Yet, even after five weeks of intense discussions, these diplomats were unable to overcome American resistance to the ICC.

Attempts by the United States to weaken the ICC statute through amendments were unsuccessful. One United States proposal provided that the ICC would only have the authority to prosecute alleged war criminals if the criminal’s home country consented to the ICC’s jurisdiction. The conference delegates firmly rejected this amendment by a vote of 113-17, with 25 abstentions. This amendment was an attempt to exempt United States soldiers from the jurisdiction of the ICC. A second amendment would have allowed states opposed to the ICC to exempt themselves from the court’s jurisdiction for a period of ten years, renewable at the end of each ten year period. The Rome Conference overwhelmingly rejected this amendment.

A key moment of the Rome Conference was when Great Britain turned away from the United States and joined forces with a group of so called “like-minded states” that were unified in their opposition to the proposals of the United States. These “like-minded states” included Canada, most of Europe, and many countries in Africa, Asia, and South

31. See Podgers, supra note 4, at 66.
32. See id. (explaining the United States position, Ambassador Scheffer stated: “[w]e never sought to mislead or play games with anyone . . . . Our bottom-line positions reflect key national security concerns of this government. If this treaty is passed, it has a bearing on those troops”).
34. See id.
35. See id.
36. See id.
37. See id.
38. See Podgers, supra note 4, at 67.
39. See Owen, supra note 30, at 17.
40. See Owen, supra note 33; see also Podgers, supra note 4, at 68 (quoting Jelena Pejic as stating that to allow states to exempt themselves would be the equivalent of a get out of jail free card and that “[t]he issue is justice now or justice deferred. . . . [T]he opt-out for war crimes and the restriction on the court’s jurisdiction will severely hamper its effectiveness for years, if not decades”).
41. See Owen, supra note 30, at 17. Britain had given cautious consent to the concept of the ICC before the start of the Rome Conference, but shared some of the same reservations as the United States. In the end, Britain sided with the like-minded states that favored an ICC prosecutor with extensive powers and full autonomy from the United Nations Security Council. See id.
America, all of which agreed with the idea that the ICC should be an independent court with wide jurisdiction. Thus, the ICC received strong worldwide support, and the United States, because of its concerns and objections, was left to vote with countries with which it is not normally associated.

B. War Crime Tribunals of the Twentieth Century

1. World War I

Over the course of the twentieth century there have been many proposals within the international community to create a permanent ICC that would hold accountable those individuals responsible for the most heinous crimes. Prior to the onset of World War I, the Hague Convention of 1907 was the first comprehensive agreement to codify international laws of war. The Hague Convention’s primary objective was to develop rules and procedures “that would eliminate unnecessary suffering by participants in war . . . and maintain, to the extent possible, the immunity of noncombatants and of nonmilitary targets.”

After World War I, the outrageous crimes committed by Germany led to a public outcry and a demand for justice. Prior to the Treaty of Versailles, which formally ended World War I, 895 Germans were identified by the Allied Powers as having committed war crimes. Although the Treaty of Versailles allowed for the victorious Allies to prosecute these criminals in ad hoc tribunals, the Allies chose not to create these tribunals. Instead, for political reasons, the Allies granted

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42. See Podgers, supra note 4, at 68.
43. See 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, 11 (1997) (explaining that since 1919 there have been five international investigation commissions, four ad hoc international criminal tribunals, and three internationally mandated prosecutions); see generally TOWARD A FEASIBLE INTERNATIONAL CRIMINAL COURT (J. Stone & R. Woetzel eds., 1970) (discussing the responsibility of individuals for international crimes, and the draft statutes for a permanent ICC).
48. See M. Cherif Bassiouni, Establishing an International Criminal Court: Historical Sur-
the German Supreme Court at Leipzig the authority to prosecute German war criminals. 49 The Allies wished to avoid any further German humiliation and did not want to jeopardize the durability and stability of the already fragile Weimar Republic. 50

After the extensive investigations which led to the list of 895 Germans being identified as war criminals, the Allies submitted only forty-five names to the German Supreme Court to be prosecuted. 51 The Court subsequently held that in only a few of these cases did sufficient evidence exist to actually prosecute. 52 Ultimately, only twelve Germans were brought to trial, and only six were convicted. 53 Sentences ranged from a few months to four years; though most prisoners were released prior to the completion of their sentences, and several were permitted to escape to freedom. 54

The Treaty of Versailles also called for Germany’s Kaiser Wilhelm to be prosecuted by an international tribunal. By the end of the war, however, the Kaiser had fled to the Netherlands and the Allies never formally petitioned for his extradition. 55 Although the Kaiser’s extradition was debated through diplomatic channels, 56 the Allies discovered that cooperation from the Netherlands was unlikely because the Kaiser’s cousin was the sitting monarch of the Netherlands. 57 Thus, the Kaiser was able to escape the prosecution called for by the Treaty of Versailles. 58 The official position of the Netherlands was that it would be illegal for the Allies to prosecute the Kaiser for a strictly political crime that was not punishable under Dutch law. 59 In the end, the international community allowed many Germans believed to be guilty of war crimes to escape prosecution. 60

49. See Bassiouni, supra note 47, at 1193.
50. See Bassiouni, supra note 43, at 19.
51. See id. at 20.
53. See BENJAMIN B. FERENCZ, AN INTERNATIONAL CRIMINAL COURT: A STEP TOWARD WORLD PEACE 33 (1980).
54. See Bierzanek, supra note 52, at 568.
56. See Bassiouni, supra note 43, at 18.
57. See id.
58. See id.
60. See Matthew Lippman, Nuremberg: Forty Five Years Later, 7 CONN. J. INT’L L. 1, 10-12 (1991). Lippman discusses these injustices and states:
   Some of the convictions were annulled. The most scandalous annulment occurred in the
Similarly, in the first case of genocide in this century, officials in the Ottoman-Turkish government responsible for the massacre of thousands of Armenians in Turkey in 1915 were never prosecuted or brought to justice. The Allies intended to prosecute the accused Turkish officials for crimes against the laws of humanity under the authority of the Treaty of Sevres, negotiated between the Allies and Turkey in 1920. The Treaty of Sevres, however, was never formally ratified, and was replaced in 1923 by the Treaty of Lausanne, which granted these same Turkish officials amnesty for the mass killings of the Armenian population.

In the end, the Allies chose not to prosecute Turkish officials in deference to a greater desire to return to normalcy. Similar to their concerns for the Weimar Republic in Germany, the Allies did not want to alienate the Turkish rulers who were now their valuable and much needed friends. The Turkish officials responsible for the Armenian genocide were granted blanket amnesty because new political concerns and international developments took precedence over the pursuit of justice. The decisions concerning the Turkish and German war criminals case of two submarine officers who directed the sinking of the lifeboats carrying the survivors of an illegal attack on the hospital ship Llandovery Castle. Only 24 of over 200 individuals on board survived the attack. On June 7, 1933, a few months after Adolf Hitler and the Nazis came to power, the Leipzig prosecutor formally quashed all war crimes proceedings arising from the sinking.

Id. at 11.

61. See 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). In 1915, the Allied Powers solemnly condemned “the connivance and often assistance of Ottoman authorities”: “In view of these new crimes of Turkey against humanity and civilization . . . the Allied governments announce publicly . . . that they will hold personally responsible all . . . members of the Ottoman government and those of their agents who are implicated in such massacres.”

Id. at 504.

62. See Bassiouni, supra note 43, at 17.

63. See id.

64. The resistance to hold national leaders liable for beginning the war was based upon the absence of any international agreement or convention that expressly criminalized the waging of an aggressive war and not upon the belief that such behavior could never be made criminal. See Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, Conference of Paris 1919, reprinted in 14 AM. J. INT’L L. 95, 118-20 (1920).

65. See FERENIZ, supra note 53, at 32-33.

66. See Bassiouni, supra note 43, at 17 (discussing how the new Turkish rulers were partial to the Western powers).

67. See id. Professor Bassiouni reveals the political concerns of the Allies:

Because the Allies were concerned about the stability of Turkey and eager not to alienate the new Turkish ruling elite which was partial to the western powers, Turkish
made in the years immediately following World War I illustrate the extent to which international justice can be compromised for the sake of political expedience.  

Today, some scholars believe that the failure to hold Turkish authorities and German military officials responsible after World War I led German leaders in World War II to believe they would not be punished for the Nazi organized Holocaust against the Jewish people. Albert Speer, a trusted confidante to Hitler who was convicted at Nuremberg for war crimes and crimes against humanity, later expressed chagrin that the criminals of World War I were never brought to swift and proper justice and that impunity was granted to the authors of the Armenian genocide. Speer believed such punishment “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.”

There is also clear evidence that Hitler himself was influenced by the impunity granted to the architects of the Armenian genocide. In 1939, while discussing his plans to exterminate Jews, Gypsies and other groups, Hitler was heard to say “[w]ho after all is

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officials were given impunity for war crimes. At that time, the Bolshevik Revolution of 1917 which toppled the Tsarist regime was causing concern in England and France. Turkey, on the border of the new communist regime, and the controlling power over the Bosphorus and Dardanelles Straits, through which the Russian Navy would have to transit to reach the Mediterranean from the Black Sea, was needed in the “western camp.” Political concerns, thus, prevailed over the pursuit of justice.

Id.

68. See id. at 20-21.
The Leipzig trials exemplified the sacrifice of justice on the altars of international and domestic politics of the Allies. The Treaty commitment to try and punish offenders if Germany failed to do so was never carried out. The political leaders of the major powers of that time were more concerned with ensuring the future peace of Europe than pursuing justice. Indeed, it was a common belief that World War I was “the war to end all wars,” and that the League of Nations would usher in a new world order that would prevent future wars. The Allies, however, missed the opportunity to establish an international system of justice that would have functioned independently of political considerations to ensure uncompromised justice.

Id.

69. See Dadrian, supra note 61, at 505 (stating that “[t]he worlds post-World War I torpor encouraged the Nazis to carry out their genocidal scheme during World War II”); see also Bassiouni, supra note 43, at 21 (explaining Professor Bassiouni’s view that the weak international criminal justice system following World War I not only failed to deter Nazi leaders in World War II, but actually contributed greatly to their cynicism of ever being prosecuted).

70. See Dadrian, supra note 61, at 556 (discussing how after Speer was convicted at Nuremberg for war crimes and crimes against humanity, he expressed his disappointment that, after World War I, the victorious Allies failed to punish war criminals).

today speaking of the destruction of the Armenians?"72

Despite the failure to achieve true justice after World War I, the years between World War I and World War II were important because the proponents of international law moved to establish a permanent system of international criminal justice and a standing court to try violators of international law.73 During this period, the League of Nations formulated plans for a Permanent Court of International Justice that would try "crimes constituting a breach of international public order or against the universal law of nations."74 The League of Nations also adopted a Convention to prevent and punish terrorism, which included a plan for a standing international court with jurisdiction over the crimes of terrorism.75

Unfortunately, ever-increasing political problems, including the outbreak of World War II, halted efforts to combat international crime and prevented most nations from ratifying the League of Nations Conventions.76 Nevertheless, the efforts to impose personal criminal liability for crimes arising out of World War I formed a foundation for the war crime trials that would follow the atrocities of World War II.77

2. World War II

During World War II, once the massacres and brutal acts committed by the Nazis became apparent to the world, the concept of a permanent international criminal tribunal was resurrected as an important international debate.78 The Allied Powers took the first step toward a post-

72. Dadrian, supra note 61, at 538. This statement is highlighted on a wall at the U.S. Holocaust Museum in Washington, D.C. and demonstrates a connection "between the Armenian genocide and Hitler’s subsequent genocidal initiatives." Id. Although for many years there was much dispute concerning the authenticity of this statement, convincing evidence has emerged since Nuremberg that substantiates its authenticity. See id. at 538-39.


75. See MacPherson, supra note 73, at 7 (stating that in “1937, the League of Nations adopted a Convention for the Prevention and Punishment of Terrorism”).

76. See id. (stating that only India had ratified the Terrorism Convention before the start of World War II); see also Paul D. Marquardt, Law Without Borders: The Constitutionality of an International Criminal Court, 33 Colum. J. Transnat’l L. 73, 80-81 (1995) (discussing how “[t]he high point of interest in an international court came too late to be of any practical use because” the outbreak of World War II marked the end of efforts to create an international criminal jurisdiction).

77. See MacPherson, supra note 73, at 7.

78. See Cavicchia, supra note 55, at 225-26 (discussing the protests against Nazi cruelties); see also Bassiuoni, supra note 43, at 21 (explaining how “[t]he atrocities of World War II com-
war tribunal as early as 1942 by establishing the United Nations War Crimes Commission ("UNWCC"), which was to investigate and obtain evidence of war crimes.\footnote{79} In the Moscow Declaration of 1943, Churchill, Stalin, and Roosevelt expressed their intention to hold Nazi leaders responsible for the Holocaust committed against the Jewish people.\footnote{80}

On August 8, 1945, with World War II drawing to a close, the four victorious Allies reached an agreement in London on a charter for an International Military Tribunal ("IMT").\footnote{81} The IMT was granted subject matter jurisdiction over the following crimes: (1) crimes against the peace; (2) war crimes; (3) crimes against humanity; and, (4) conspiracy to commit these crimes.\footnote{82} Subsequently, a similar type of tribunal, the

\begin{footnote}
\footnote{79} See Bassiouni, supra note 43, at 21-23. Professor Bassiouni describes the role of the United Nations War Crimes Commission ("UNWCC"): Only after the Allies liberated German-occupied territories did they realize the extent of the atrocities committed. Thereafter, British and U.S. forces began to develop a list of suspected war criminals in order to separate them from other liberated prisoners. At that point, the British Government began to press the UNWCC to complete its work. Despite the initial lack of cooperation from and among the various governments, the UNWCC was able to achieve remarkable results in amassing 8,178 "dossiers" on alleged war criminals and serving as a clearinghouse of information among governments.\footnote{Id. at 22.}

\footnote{80} See Lippman, supra note 60, at 20 ("The Allied resolve to prosecute German war criminals was formalized in the Moscow Declaration of October 30, 1943."); see also Marquardt, supra note 76, at 81 (explaining that in the Moscow Declaration, the Allies decided to prosecute high-level Nazi officials before an international court, and to try lesser war criminals in more local lower courts).


\footnote{82} See 1945 London Charter, supra note 81, at 1547. The crimes over which the Nuremberg Tribunal had jurisdiction were defined as follows: (a) CRIMES AGAINST PEACE: namely, planning, preparation, initiation or waging of 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 any of the foregoing; (b) WAR CRIMES: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity; (c) CRIMES AGAINST HUMANITY: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before
International Criminal Court for the Far East ("IMTFE"), was established in Tokyo for the trial of major Japanese officials accused of having committed war crimes during the course of hostilities in the Far Eastern Theatre of the war.85 The IMTFE was established in 1946 by General Douglas MacArthur in his role as Supreme Allied Commander for the Pacific Theatre.84

The victorious Allies, due to the inefficient justice handed down after World War I, were prompted to use more stringent methods of justice at Nuremberg and Tokyo.85 Although the Nuremberg and Tokyo Tribunals are often criticized as "Victor's Courts" because the victorious Allies sat in judgment over the defeated Germans and Japanese, these two tribunals were the first real efforts in the modern era to establish a valid and powerful international court. Despite some criticisms, the Nuremberg and Tokyo Tribunals stand as important precedents in modern international law and are oftentimes commended as "authoritative statements of individual accountability."86

Article 7 of the IMT allowed for the prosecution of Heads of State and, combined with the subsequent Nuremberg and Tokyo Tribunals, sent a message to the world that "the conduct of individuals under the

or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated. Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.

Id.

83. See Charter of the International Military Tribunal for the Far East, T.I.A.S No. 1589.

84. See Bassiouni, supra note 47, at 1196.

85. See Dadrian, supra note 61, at 548; see also Bassiouni, supra note 43, at 26-27 (discussing the United States change in position concerning crimes against humanity). It is evident from the text of the London Charter that the United States had completed changed its post-World War I position that crimes against the laws of humanity did not exist in international law. Bassiouni points out that "no legal development took place between 1919 and 1945 that could have explained this change of position. In the case of Nazi atrocities, the facts drove the law, and politics were also a consideration." Id. at 26.


87. Timothy C. Evered, An International Criminal Court: Recent Proposals and American Concerns, 6 PACE INT'L L. REV. 121, 127 (1994); In addition, Professor Bassiouni praises the IMT:

[The post-World War II experience revealed how effective international justice could be when there is political will to support it and the necessary resources to render it effective. Whether fully realized or not, these sets of experiences were one sided, as they imposed “victors” justice over the defeated; however, they were not unjust only because they were one sided. Among all historic precedents, the IMT, whatever its shortcomings may have been, stands as the epitome of international justice and fairness.

Bassiouni, supra note 48, at 55.
The color of official state action would no longer be immune from the reach of international law.\textsuperscript{88} The Tribunals, furthermore, were able to establish investigative and prosecutorial components and were also empowered to punish those found guilty as it saw fit, including punishment by death.\textsuperscript{89}

The results of the Nuremberg Tribunal were significant. Of the twenty-four senior Nazi officials indicted for war crimes, crimes against peace, and crimes against humanity, twelve were convicted and sentenced to death, three were acquitted, one committed suicide, and the rest were sent to prison for terms ranging from ten to twenty years.\textsuperscript{90} In addition to the IMT, the Allies enacted Control Council Law No. 10, "which permitted the Allies to prosecute German nationals in their respective zones of occupation."\textsuperscript{91} Immediately following the trials of the senior Nazi officials, the Allies prosecuted over 20,000 Germans in the war crime tribunals established in the zones of occupation.\textsuperscript{92}

Allied results in Italy were not nearly as encouraging as those in Germany.\textsuperscript{93} The Allies decided not to prosecute Italian war criminals, and then refused to extradite alleged Italian war criminals to those states that requested their presence.\textsuperscript{94} These alleged war criminals would avoid justice in later years because Italy would also refuse to extradite accused war criminals, even those whose crimes and actions were clearly established with evidence gathered by the UNWCC.\textsuperscript{95}

By bringing to justice both military and national government leaders for crimes committed during wartime, the Nuremberg and Tokyo Tribunals were an important advancement in the area of international law.\textsuperscript{96} Individuals, no matter their title, rank, position, or justification for their heinous acts, can now be held personally accountable for viola-
tions of international law."\textsuperscript{97} This remains true even if they commit these crimes "under cloak or compulsion of national law and even if the violations involve the central sovereign decisions of military action and internal governance."\textsuperscript{98} The Tribunals rejected defenses based on either state doctrine or superior orders and affirmed the idea that:

[Int]ernational law imposes duties and liabilities upon individuals as well as upon states has long been recognized . . . [T]he very essence of the Charter is that individuals have international duties which transcend the national obligations of obedience imposed by the individual state. He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the state, if the state in authorizing action moves outside its competence under international law.\textsuperscript{99}

The Tokyo and Nuremberg Tribunals were not only military courts of occupation, but also international courts with the overwhelming support of the international community.\textsuperscript{100} These Tribunals illustrate the adverse and oftentimes treacherous route future international courts will have to travel to overcome the inherent tension between international and national law, so as to legally hold gross violators of international law accountable for their actions.\textsuperscript{101}

Based upon the success of these Tribunals, the United Nations, in the years after World War II, aspired to develop a body of international law that could be applied during times of war and peace.\textsuperscript{102} Although the United Nations never formally adopted the "Nuremberg Principles," as

\textsuperscript{97} See Dadrian, supra note 61, at 552. Dadrian comments: [T]he legal precedents established at Nuremberg circumscribed the primacy and exclusivity of domestic laws concerning personal responsibility, international accountability, and criminal liability for wartime conduct. The Nuremberg principles extended criminal liability to the highest officials of a state, including the sovereign, imposing severe restrictions on such defenses as superior orders and immunity of heads of state.

\textsuperscript{98} Marquardt, supra note 76, at 83. Furthermore, Marquardt states: "the norms under which an individual is judged need not be spelled out with the specificity of a penal statute as long as fundamental principles of justice are not offended." Id.


\textsuperscript{100} See Dadrian, supra note 61, at 549.

\textsuperscript{101} See id.

they have come to be known, they have developed into accepted general principles of international law.\footnote{103}

3. The Cold War and Recent Developments in International Law

The lasting legacy of the Nuremberg and Tokyo Tribunals should have been a permanent system of international criminal justice to guarantee to all future generations that the savage crimes of World War II would not go unpunished.\footnote{104} For a variety of reasons, however, including the quick onset of the Cold War in the years immediately following World War II, this did not come to pass.\footnote{105} The Cold War and the opposition of the Soviet bloc countries were major hurdles to the formation of a permanent ICC.\footnote{106} Some critics point to the failure of the United Nations and the international legal community to capitalize on the success of these Tribunals and establish a permanent ICC as a contributing factor to the murder and bloodshed later allowed to go unpunished in places such as Cambodia, Guatemala, and Iraq.\footnote{107}

As the Cold War began to thaw in the late 1980's, the emphasis on an ICC within the international community shifted from war crimes and genocide to terrorism and drug trafficking.\footnote{108} The United States and the Soviet Union had both already voiced support for an ICC to combat terrorism and drug trafficking. The concept of an ICC returned to the United Nations by an unexpected route.\footnote{109} In 1989, seventeen Caribbean and Latin American countries, led by Trinidad and Tobago, succeeded in finally putting the ICC back on the United Nations agenda when they asked the United Nations General Assembly to consider creating an ICC to combat drug trafficking.\footnote{110}

\footnote{103. \textit{See} Lippman, supra note 102, at 212.}


\footnote{105. \textit{See id.}}

\footnote{106. \textit{See} Marquardt, supra note 76, at 85 (explaining that the outbreak of the Korean War hardened the tough stance of the Soviet bloc in relation to a permanent ICC because the Soviets feared that this court would be used against them).}

\footnote{107. \textit{See} Peter, supra note 104, at 184.}

\footnote{108. \textit{See} MacPherson, supra note 73, at 12.}


\footnote{110. \textit{See id.} at 156; \textit{see also} Marquardt, supra note 76, at 90. Marquardt discusses the revival of the concept of an ICC: A.N.R. Robinson, the Prime Minister of Trinidad and Tobago, became interested in the idea as a way to deal with international narcoterrorists who were overwhelming the re-
During the Persian Gulf War of 1991, environmental and human atrocities committed by Saddam Hussein and other Iraqi government and military officials led to demands for justice within the international community, and contributed to the ongoing debate concerning a permanent ICC. International legal specialists believed that enough evidence existed to prosecute Hussein and his military officers for war crimes, crimes against peace, and crimes against humanity, but there was no permanent ICC. Consequently, many of the questions and charges concerning Iraq were left unanswered.

Due to the barbaric deeds being committed on a daily basis in the former Yugoslavia, supporters of a permanent ICC received a significant amount of increased awareness for their argument. Each night, network news anchors reported undeniable proof of the atrocities of rape, ethnic cleansing, and genocide that occurred in the former Yugoslavia. In the end, the world community and the United Nations had little choice but to take decisive action.

On May 25, 1993 a unanimous vote of the United Nations Security Council approved the establishment of the first international war crimes tribunal since World War II—the International Criminal Tribunal for the former Yugoslavia ("ICTY"). To date, the ICTY has "issued 21 sources of small countries, outgunning national security forces and intimidating law enforcement and judicial officials through the threat of assassination. The Trinidian government gathered a coalition of Latin American and Caribbean states and, in 1989, requested a new General Assembly agenda item addressing the creation of an international criminal court with jurisdiction over international drug offenses.

Id. at 90-91.

111. See MacPherson, supra note 73, at 13 ("The human and environmental consequences of the Gulf War kept interest in an international criminal court alive.").

112. See Jill Smolowe, A Case of Nuremberg II, TIME, Mar. 11, 1991, at 36. Smolowe discusses how the lack of an ICC in 1991 was extremely detrimental since there was no forum available in which to prosecute Hussein:

Among U.S. legal experts, there is wide agreement that Saddam Hussein, his Revolutionary Command Council and his military officers should be held accountable for three types of transgressions identified and prosecuted in the Nuremberg trials of German leaders after World War II: crimes against peace, crimes against humanity, and war crimes. But since there is no permanent international criminal court, there are questions about who should conduct such prosecutions, what precise charges would be made—and whether the chief target, Saddam, could be brought to justice.

Id.

113. See MacPherson, supra note 73, at 13.

114. See id. (stating that the West could not ignore what was occurring in Europe).

115. See id. at 13-14 (explaining that under Chapter VII of the United Nations Charter, the Security Council established an ad hoc tribunal to address these crimes).

116. See Julia Preston, Balkan War Crimes Tribunal Established, WASH. POST, May 26, 1993, at A25 (explaining that the tribunal would prosecute those responsible for war crimes in Bosnia and the other former republics of Yugoslavia).
public indictments against 56 people from all three ethnic factions in Bosnia, and is determined to investigate crimes committed in Kosovo." Due to a recent surge in the number of arrests made, coupled with the fact that many defendants have voluntarily surrendered over the last twelve months, the ICTY is currently conducting three trials, with a total of eight defendants, and has a total of twenty-five of the accused war criminals in custody. Additionally, the ICTY continues to make great strides and recently convicted five defendants; though, Radovan Karadzic and Ratko Mladic, the former Bosnian Serb civilian and military leaders, remain in hiding due to their indictments by the ICTY. This recent evidence supports the idea that the grave difficulty the ICTY had obtaining custody of defendants in its earlier stages is now diminishing.

In the African country of Rwanda, late in 1994, the United Nations and the international community were again confronted with the bloodshed that accompanies gross and systemic violations of international law. The United Nations acted again and created the ad hoc International Criminal Tribunals For the Former Yugoslavia and Rwanda, 32 INT’L LAW. 509, 509 (1998); see also NATO Troops Kill Bosnian Suspected of War Crimes, N.Y. TIMES, Jan. 10, 1999, at 4 (explaining that NATO peacekeeping troops, from France, killed a Bosnian war crimes suspect wanted for the rape and torture of Muslim women after the suspect had tried to run them down with his car during an attempt to arrest him); 3 Convicted of War Crimes, NEWSDAY (Long Island, New York), Nov. 17, 1998, at A19 (describing the conviction of three defendants for the war crimes of murder, torture, and rape, and how this was the first time a tribunal handed down a war crimes conviction for rape); Charles Trueheart, Bosnian Serb General is Arrested: Held in Muslim Massacre, NEWSDAY (Long Island, New York), Dec. 3, 1998, at A7 (explaining that United States troops arrested the highest ranking war crimes suspect ever to be taken into custody, who is accused of committing genocide within a United Nations declared safe area).

In the spring and early summer of 1994, . . . a program of massacres decimated the Republic of Rwanda. Although the killing was low-tech—performed largely by machete—it was carried out at dazzling speed: of an original population of about seven and a half million, at least eight hundred thousand people were killed in just a hundred days.

Id.
national Criminal Tribunal for Rwanda ("ICTR"), patterned after the already sitting ICTY, to prosecute the contemptible murders and ethnic violence that had occurred in Rwanda.

At present, Rwandan authorities have arrested and jailed nearly 130,000 people on suspicion of killing or helping to kill more than 500,000 minority Tutsis and Hutus. As of late 1998, the ICTR had issued indictments against forty-five people and has proven quite successful at capturing senior figures, having thirty-two of them in custody.

Some of the ICTR’s more prominent indictees include the former Prime Minister, Jean Kambanda, and the former Minister of Defense, Thenest Bagosora, of the Hutu-led government that reportedly directed the genocidal massacres in Rwanda.

Kambanda, the highest ranking defendant in the ICTR’s custody, is hated in Rwanda for handing out weapons to Hutu civilians to hunt down and kill “Tutsi cockroaches.” In the first genocide sentence ever imposed by an international court, Kambanda was recently sentenced to life in prison. Moreover, Jean-Paul Akayesu, a former village mayor, was also convicted of genocide in September of 1998 and will be sentenced in the near future.

Although much hard work still needs to be done for true justice to be achieved in Yugoslavia and Rwanda, the ICTY and ICTR Tribunals have succeeded in holding accountable some of the worst and most prominent ethnic cleansers of this century. Supporters of a permanent ICC point to the progress and recent achievements of these Tribunals as evidence that a permanent ICC could work and would be effective in punishing the perpetrators of such brutal crimes. The great progress made by these courts constitutes indisputable proof that when the world community chooses to uphold the international rule of law, and gives

122. See MacPherson, supra note 73, at 14.
123. See id.
125. See Manasian, supra note 117, at 12.
126. See Leigh & Shenk, supra note 120, at 513.
127. Life Sentence for Genocide, supra note 124, at A12. ("[H]is crimes 'carry an intrinsic gravity, and their widespread, atrocious and systematic character is particularly shocking to the human conscience,' Chief Judge Laity Kama said, while reading the judgment").
128. See id.
129. See id.
130. See Manasian, supra note 117, at 12.
131. See Omestad, supra note 27, at 54.
these courts the resources and political support they deserve and vitally need, global justice can be achieved.  

III. THE ARGUMENTS OF THE UNITED STATES AGAINST THE ICC STATUTE PASSED BY THE ROME CONFERENCE

Before focusing on American concerns with the ICC statute, it is worthwhile to quickly examine those provisions that the United States did find acceptable. Although the United States did not accomplish everything that it wanted, and refused to vote for the adoption of the ICC statute, the United States delegation still accomplished much at the Rome Conference. Representatives from various non-governmental organizations, who were instrumental in the drafting of the ICC statute, praised the United States for important contributions, and Ambassador Scheffer claimed a number of United States victories in the final ICC statute.

While testifying before the United States Senate in the days immediately following the Rome Conference, Ambassador Scheffer made note of some of the key United States achievements. Among those he cited were: an improved definition of complimentarity (meaning a deferral by the ICC to the courts of national jurisdiction of the accused); a significant role for the United Nations Security Council, including the vital capability to intervene in order to halt the ICC’s work; coverage of solely internal national conflicts (such as in the current fighting in Kosovo), which in the years since World War II make up the vast majority of armed conflicts; viable and well thought out definitions of war crimes, genocide, and crimes against humanity; and, finally, the meticulous eligibility qualifications for the ICC judges.

132. See Bassiouni, supra note 47, at 1210; see also David P. Forsythe, Politics and the International Tribunal for the Former Yugoslavia, 5 CRIM. L.F. 401, 411 (1994) (explaining that the United States was one of the most enthusiastic supporters of the Yugoslavian tribunal, providing more supplemental funding, over thirteen million dollars, than any other state).

133. See Podgers, supra note 4, at 65, 69.

134. See id. at 69; see also Theodor Meron, The Court We Want, WASH. POST, Oct. 13, 1998, at A15 (noting that “[t]he U.S. imprint is, in fact, all over the statute: in ensuring due process in trials, in the priority given to national courts, [and] in the checks and balances on the powers of the prosecutor”).

135. See Is a U.N. International Criminal Court in the U.S. National Interest? Hearing Before the Subcomm. on Int’l Operations of the Comm. on Foreign Relations United States Senate, 105th Cong. 12 (1998) (statement of David J. Scheffer, United States Ambassador-at-Large for War Crimes Issues) [hereinafter Scheffer Statement]. Ambassador Scheffer’s statement discussed other areas where the United States was able to achieve its objectives. These areas included: sovereign protection of national security intelligence that may be sought by the ICC; broad recognition of national judicial procedures as a predicate for cooperation with the ICC; notable due proc-
Although these achievements signal that a significant amount of progress was made during the five-week conference, the United States still had concerns over issues it considered indispensable.\textsuperscript{136} When the Rome Conference proved unable to address these issues to the satisfaction of the United States delegation and the Clinton administration, Ambassador Scheffer voted against the ICC statute.\textsuperscript{137}

A. Apprehension Over the ICC's Jurisdiction and Fear for United States Peacekeepers

1. Jurisdictional Issues

The United States contends that there are three major problems with the jurisdiction of the ICC: (1) the statute grants the ICC a form of jurisdiction over non-party states that violates fundamental principles of international law; (2) this jurisdiction is not only dangerously broad, but in many instances will prove too weak as well; and (3) official actions of a non party state should not be subject to the ICC's jurisdiction if that state does not join the Rome Treaty, except by means of a Security Council action under the United Nations Charter.\textsuperscript{138}

Further, based on the way Article 12 of the ICC statute is written, United States citizens will be placed in grave danger. Article 12 spec-

\footnotesize\textsuperscript{136}. Podgers, supra note 4, at 69.
\footnotesize\textsuperscript{137}. See id. Ambassador Scheffer noted that the United States delegation and the other countries worked hard to come to a compromise and that these negotiations were very serious business. I think it was a mistake for any other government to have reached its decision by the last week with some kind of assumption that rejecting our most fundamental concerns would have little consequence.

\ldots

I don't know why other nations walked away when it would have increased chances that the United States would come on board. \ldots There were several states that got what they needed, and once they did, our concerns weren't important to them anymore.

\textit{Id. But see id.}, the comments of another Rome Conference participant, Professor M. Cherif Bassiouni, who argues that the United States achieved most of what it wanted "within the folds of the agreement" \ldots [but] did not get what they may have been really after, 'a stamp across the front of the treaty that says this will never apply to the United States, but the United States can use it whenever it wants.' Podgers, supra note 4, at 69.

\textit{138}. See Scheffer Statement, supra note 135; at 12-15; see also Betsy Pisik, Again, U.S. Voices Opposition to Structure of Proposed Court, WASH. TIMES, Oct. 22, 1998, at A13 (noting Ambassador Scheffer's comment that, "'[f]or a criminal court, this is an indefensible overreach of jurisdiction'").
ffies that, as a precondition to the jurisdiction of the ICC over a crime, when a state party or the ICC Prosecutor launches an investigation, either the state whose territory where the crime was committed, or the state of nationality of the perpetrator of the crime, must be a party to the Treaty or have granted its voluntary consent to the jurisdiction of the ICC.139 The United States argues that this means a United States citizen could be a defendant before the ICC even if the United States never ratifies or becomes a party to this Treaty.140 In the months since the Rome Conference, Ambassador Scheffer has made it clear that these flaws, especially the vulnerable position it places American military personnel in, renders the ICC statute unacceptable and that the United States will not sign the Rome Treaty until these problems have been addressed.141

The United States argues that the jurisdiction is also too weak to bring certain wrongdoers to justice.142 By granting the ICC jurisdiction only when accepted by the state where the crimes have been committed or the state of the accused, the Treaty lets free ruthless dictators, such as Saddam Hussein and Pol Pot, "who kill their own people on their own territory."143 In the case of Saddam Hussein’s killing of Iraqi Kurds

139. See Stoelting, supra note 3, at 1.
141. See United States Will Not Sign International Criminal Court Statute in Its Present Form, Sixth Committee Told, M2 PRESSWIRE, Oct. 23, 1998, available in 1998 WL 16529477 [hereinafter Will Not Sign]. This article states:

The United States would not sign the Statute establishing the International Criminal Court in its present form, nor was there any prospect of its doing so in the future, that country's representative told the Sixth Committee (Legal) this morning as it began discussion of the outcome of the Diplomatic Conference on the establishment of the Court held in Rome from 15 June to 17 July 1998.

Id.


The first set of objections is practical. As designed by the treaty-drafters in Rome, the court is probably too weak to bring wrongdoers to justice. Indeed, since most of the greatest crimes committed in contemporary wars go on during internal conflicts outside the purview of the Rome treaty, it is not clear what abuses the court will actually address. It would not have had jurisdiction over Saddam Hussein’s war against the Kurds, Pol Pot’s reign of terror, or the Rwandan genocide of 1994—much less the slow extermination of the animist peoples currently taking place in southern Sudan.

Id.

143. Meron, supra note 134, at A15; see also Aryeh Neier, Waiting For Justice: The United States and The International Criminal Court, WORLD POL’Y J., 1998, at 33, 33. Neier states:

If Saddam Hussein again gasses the Kurds, he cannot be prosecuted before the Court. That is because Iraq will not become a party to the treaty so long as he remains in power, and the Court will therefore lack jurisdiction over crimes committed by Iraqis against fellow Iraqi nationals on Iraqi territory. For similar reasons, Russia could again

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within Iraqi territory, the Iraqi government would never accept the ICC’s jurisdiction. Therefore, the United States argues, the ICC will be largely ineffective in dealing with those types of regimes unless the Security Council chooses to exercise United Nations Chapter VII authority over them. Absent such action by the Security Council, human rights abusers, such as General Augusto Pinochet of Chile, would never face trial before the ICC if Chile did not ratify the statute. This century, the United States points out, has proved that the most severe atrocities occur during internal conflicts between warring parties of the same nationality. Consequently, some of the worst offenders of international law, such as Iraq, can choose never to join the Treaty, and will be fully insulated from the jurisdiction of the ICC.

The United States also argues that the ICC statute overreaches in giving the ICC dangerously broad jurisdictional power by extending to the court power over countries that choose not to ratify the statute. Ambassador Scheffer has stated that this is contrary to the most fundamental principle of treaty law, which holds that a treaty cannot be applied to a country that is not a party to it. Therefore, the ICC statute actually imposes more obligations on non-parties that do not sign the Treaty than on parties that do sign it, because signing states may opt-out of the court’s jurisdiction for up to seven years, whereas those who do not sign it can never opt-out.

Towards the end of the Rome Conference the United States offered an amendment in an attempt to alleviate their concerns. The amendment required that both countries, meaning the country where the crime was committed and the state of nationality of the perpetrator, must be parties to the statute or, at a minimum, that the consent of the state of nationality of the perpetrator be obtained before the ICC could exercise jurisdiction over aggression and war crimes.

bombard Chechnya, or China could again launch a bloodbath in Tibet, as it did 40 years ago, without worrying about the Court.

Id.

144. See Rieff, supra note 142, at 16.
147. See id.
148. See id; see also Will Not Sign, supra note 141 (discussing Ambassador Scheffer’s comment that the “fundamental concern was that, in the absence of a Security Council referral of cases to the court, the court would be able to assert jurisdiction over non-party nationals”).
149. See Meron, supra note 134, at A15. Parties that sign the ICC statute may opt-out of the court’s jurisdiction over aggression and war crimes for a period of seven years. See id.
150. See Scheffer Statement, supra note 135, at 12.
jurisdiction. The subsequent vote against this amendment was not a surprise because most countries refused any proposal that a government's consent be required before its citizens could be prosecuted.

2. The Vulnerability of United States Peacekeepers

The United States points out that not only are United States soldiers stationed in foreign countries at risk, but that the overly broad jurisdiction of the ICC exposes military personnel serving in peacekeeping operations outside of the United States to prosecution. The United States government and military justify their hostilities towards the ICC's jurisdiction on the grounds that American peacekeepers stationed overseas, as representatives of the world's only remaining superpower, could become vulnerable to prosecution before a politicized court the United States is not a party to. The United States contends this violates the international law principle that a treaty cannot be applied to a state that is not a party to it.

The Pentagon fears that an independent ICC may invite frivolous prosecutions of military commanders or ordinary soldiers that are politically motivated by opponents of the United States. Hostile states could file complaints against senior civilian leaders, high ranking military officers, or peacekeepers in an attempt to settle old political

151. See id. After the United States asked for a vote on this amendment, a motion to take no action was overwhelmingly carried by a vote of the Rome Conference. See id.
152. See Meron, supra note 134, at A15.
153. See Scheffer Statement, supra note 135, at 13. Ambassador Scheffer notes: [M]ultinational peacekeeping forces operating in a country that has joined the treaty can be exposed to the court's jurisdiction even if the country of the individual peacekeeper has not joined the treaty. Thus, the treaty purports to establish an arrangement whereby U.S. armed forces operating overseas could be conceivably prosecuted by the international court even if the United States has not agreed to be bound by the treaty.
157. See Neier, supra note 143, at 33, 35; see also Lauren Comiteau 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 (explaining that the United States is concerned that soldiers serving overseas could become involved in confrontations that would make them vulnerable to what an administration official called "frivolous claims by politically motivated governments").
158. See Omestad, supra note 27, at 52-53; see also Pisik, supra note 138, at A13 (explaining that this flaw alone makes the Rome Treaty unacceptable to the United States).
scores. For example, under the present ICC statute, Ambassador Scheffer argues, the ICC could try a United States peacekeeper who accidentally shoots a civilian in a country that has joined the Treaty, even if the United States never agrees to be bound by the Treaty.

The United States notes that, currently, no other country's military commitments approach the scope and breadth of those of the United States, through various alliances and missions, such as the peacekeeping commitment in the former Yugoslavia. The United States military, more than any other organization, is required to carry out Security Council mandates, helps defend the borders of allies and friends, contributes to the battle against international terrorism and drug trafficking, comes to the aid of Americans in harm's way, prevents the proliferation or use of weapons of mass destruction, and defends our national security interests in every corner of the globe.

Because of these extensive commitments, the United States argues that it does not have the luxury to disregard jurisdictional problems. As Ambassador Scheffer has argued, "[o]ur armed forces are deployed globally and need to be able to fulfill their legitimate responsibilities without unjustified exposure to criminal legal proceedings." The jurisdictional structure of the ICC, Ambassador Scheffer argued, could hinder the power of the military forces of the United States to meet these various commitments, and may prohibit their participation in multinational peacekeeping operations, including humanitarian mis-


Id.


161. See Podgers, supra note 4, at 67.

162. See Scheffer Address, supra note 20, at 1399.

163. Id. Ambassador Scheffer argued: [T]he permanent court must not handcuff governments that take risks to promote peace and security and undertake humanitarian missions. It should not be a political forum in which to challenge legitimate actions of responsible governments by targeting their military personnel for criminal investigation and prosecution. Human rights groups advocating speedy military interventions to save human lives should be most sensitive to this reality. Otherwise, ironically, a permanent court would undermine efforts to confront the worst assaults on humankind.

Id. at 1398-99.
sions, where the entire reason and purpose of the mission is to save lives. 164

A proposal by the United States that would have protected American military personnel, through an amendment that required the state of the accused to consent to the ICC's jurisdiction, was definitively rejected by the Rome Conference. 165 In the months since Rome, the United States has not moved an inch from its original position. 166 For now, as long as there is the slightest possibility of a United States soldier being prosecuted by the ICC, no matter how remote the chance, the United States will not sign the Rome Treaty. 167

B. Arguments Against an Independent ICC Prosecutor

The United States believes that the ICC Prosecutor should not be able to independently initiate investigations and prosecutions without a referral to the ICC, either by a government that is a party to the Treaty or by the United Nations Security Council. 168 The Rome Treaty created a proprio motu, or self-initiating prosecutor, who has a great degree of independence and is subject only to certain controls by the ICC Judges. 169 The ICC Prosecutor may, on her own authority, and needing only the consent of two of the international judges elected to sit on the ICC, initiate investigations and prosecutions. 170 These actions can be taken without a referral to the ICC either by a government that is party to the Treaty or by the Security Council. 171 Therefore, the ICC Prosecutor does not need Security Council approval before launching a prosecution and she also has the capability to initiate investigations and prosecutions based on her own political motivations.

This potential for politically motivated prosecutions caused the United States to vehemently oppose the ICC statute because it would leave the Prosecutor free from the close supervision of the United Nations Security Council, of which the United States is one of five permanent members. 172 The United States wanted to keep the authority to ini-

165. See Podgers, supra note 4, at 67.
166. See Haq, supra note 145, at 1.
169. See id.
172. See Podgers, supra note 4, at 66; see also Bonino Wants Speedy ICC Ratification, supra note 155 (explaining that the Pentagon especially feared independent prosecutors who could...
tiate cases solely with the Security Council. Unfettered discretion for the ICC Prosecutor was a notion the United States was not comfortable with because the United States refused to "accept a presumption that a prosecutor would be totally apolitical." In the United States opposed the ICC because it could not use the Security Council veto to block an ICC prosecution. Ambassador Scheffer stated that the United States opposition was due to concern "that it will encourage overwhelming the court with complaints and risk diversion of its resources, as well as embroil the Court in controversy, political decision-making, and confusion." Thus, the United States argued that only a state that is a party to the Treaty or the Security Council should have the authority to refer a matter to the ICC. If the purported crimes were sufficiently grave, the ICC Prosecutor could then freely investigate the situation and prosecute the alleged criminals. The United States pointed out that just such an arrangement has proved workable in the Yugoslavian and Rwandan Tribunals and this would ensure that the ICC Prosecutor would enjoy the all important political support from the international community. If neither the Security Council nor any state party believes a situation is grave enough to be referred to the ICC, the United States argues, then that speaks volumes against any potential need for the ICC Prosecutor to get involved.
C. Additional Concerns of the United States

Two other major issues contributed to the United States voting against the ICC statute. The United States wanted these issues to be addressed before it would support the ICC statute.

Although the United States agreed that the ICC should have automatic jurisdiction in genocide cases, it argued that states should be given the power to "opt-out" of the court's jurisdiction for war crimes and crimes against humanity for a period of ten years. Instead, the Rome Conference rejected the United States position and established that only states who sign the Treaty may "opt-out" of the ICC's jurisdiction, for a period of seven years, and only for war crimes.

The United States argued that the ten year "opt-out" provision was a better idea because a longer transition period is essential so that the United States, and all governments, may evaluate the performance of the ICC. Thus, with the manner that jurisdiction is written into the ICC statute, combined with this "opt-out" provision, a major problem develops. A country that is currently committing war crimes may become a party to the Treaty, and then choose to opt-out of the ICC's jurisdiction for as long as seven years, whereas a non-party state, that has no intention of committing war crimes, could be brought under the ICC's jurisdiction immediately.

Finally, the United States was unhappy with the Rome Conference's ultimate decision concerning the crime of aggression and how it is defined. Ambassador Scheffer has firmly stated that there must be a "direct linkage between a prior [United Nations] Security Council decision that a state had committed aggression and the conduct of an individual of that state." The ICC statute currently includes aggression as a crime, but leaves the term to be more clearly defined and adopted by amendment seven years from now. The United States argued that

181. See Comiteau, supra note 157 ("The Washington negotiators—who rejected universal jurisdiction, subjecting any state, signatory or not, to the courts remit—agreed that the court should have automatic jurisdiction in the case of genocide, giving it the ability to prosecute individuals of any country that had signed the treaty.").
182. See id.
184. See id.
185. See Will Not Sign, supra note 141, at 1.
187. See id.

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there is no guarantee that, in any future definition, this important connection to a prior decision of the Security Council will be included.  

IV. A CLOSER EXAMINATION OF THE ARGUMENTS OF THE UNITED STATES

Upon closer examination of the ICC statute, many of the concerns of the United States are unfounded because of the manner in which the ICC statute was written and the safeguards contained within it. By closely examining provisions of the ICC statute, as well as the reasons why some language was written as it was, the arguments made by the United States no longer appear persuasive. In fact, many delegations in Rome were upset with the United States, not only because the United States ultimately refused to sign the Treaty, but also because the United States refused to sign even after the rest of the international community agreed to diminish the jurisdictional scope and power of the ICC through various concessions to the United States. Many of these countries now criticize these concessions and the United States because of the real possibility that the ICC jurisdiction may prove, in the future, to be too weak to be very effective.

A. Safeguards and Protections Within the ICC Statute

1. Why the ICC’s Jurisdiction Should Not Be a Concern for the United States

Despite arguments by the United States that the ICC should not have jurisdiction over those parties that do not sign the Rome Treaty, numerous provisions exist within the statute that will adequately ensure that the ICC’s jurisdiction will not become too powerful.

First, the United States argument that Article 12 violates international law because treaties can not be enforced against those states that are not a party to them is clearly wrong. Although, technically, the

188. See id.
189. See Podgers, supra note 4, at 68, 69; see also Haq, supra note 145, at 1 (explaining that many states had already paid a steep price to bring the United States on board, and that the future “ICC was significantly weakened by last-minute compromises in a futile attempt to placate the United States”).
190. See Haq, supra note 145, at 1.
192. See Podgers, supra note 4, at 67.
Rome Treaty allows for a defendant to be from a non-party state that has not ratified the Treaty, the 1949 Geneva Convention previously gave foreign courts permission to undertake prosecutions in international wars and "[c]urrent international law allows a state in custody of a suspect to try that person on charges of genocide, crimes against humanity and war crimes." Therefore, the actual risk to the United States is not new.

In addition, various treaties, agreements, and international codifications since the World War II Tribunals have confirmed the consensus opinion that war crimes, genocide, and crimes against humanity are criminal acts worthy of universal jurisdiction. Individual states are thus legally permitted to prosecute and punish these indefensible crimes wherever, and by whomever, they are committed. Universal jurisdiction is the idea that some crimes are so universally barbaric that those who commit such horrible crimes are "enemies of all people—and allows that jurisdiction may be based solely on securing custody of the perpetrator."

Under current international law, a state which experiences war crimes, crimes against humanity, or genocide committed within its borders not only may choose to prosecute these crimes, but also has a legal duty to investigate and prosecute any such crime once that state becomes aware of it. Thus, logic dictates that if any individual state can try a war criminal for these crimes, regardless of the criminal’s nationality, then surely an international institution such as the ICC should be empowered with the same rights. In fact, because of the intense legal negotiating and vast input from the United States in the drafting of this statute, an ICC trial would, in the great majority of cases, serve to elevate the due process standards for a soldier who may stand accused of war crimes.

193. *Id.*
196. *Id.* The principle of universal jurisdiction is "grounded in the assumption that the prosecuting state is acting on behalf of all states." *Id.*
198. See *id.*
Recently, the ICTY confirmed the principles of universal jurisdiction and international authority over sovereign states in one of its rulings because, if it had not, the ICTY would be powerless to execute the tasks assigned to it. Although the United States fought against universal jurisdiction at the Rome Conference, there is general agreement within the international community that these criminal laws can and should be applied to any state or person. Today, international law recognizes that genocide (as provided for in the 1948 Genocide Convention), war crimes (as defined in the 1949 Geneva Convention, as well as the Hague Conventions of 1899 and 1907), and crimes against humanity (as defined in the ICTY and the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity) are all punishable crimes under current international law.

Despite the contention of the United States, the concept of universal jurisdiction for the ICC is consistent with many United States positions in areas of international law separate from the ICC. For example, the 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.

In the years since Nuremberg, international law has affirmed the belief that war crimes, genocide, and crimes against humanity “are subject to universal jurisdiction.” Universal jurisdiction transcends the

199. See Leigh & Shenk, supra note 120, at 512.
201. See Manasian, supra note 117, at 11 (“Legal scholars claim that both war crimes and crimes against humanity enjoy ‘universal jurisdiction,’ which means that, in theory, any country has the right to try any perpetrator, no matter where the crime was committed or by whom.”).
202. See Robertson, supra note 26, at 18. Discussing the prosecutorial history of the crime against humanity Robertson states:

The crime against humanity was first defined in Article 6(c) of the Charter of the Nuremberg Tribunal, and the concept has been endorsed by most nations in treaties such as the Convention Against Genocide and Torture and Hostage-Taking. Except in the cases of Nazi stragglers like Eichmann and Barbie, the crime was not seriously prosecuted until the United Nations set up a tribunal in The Hague to try some of the barbarians of the Balkans. Last year Dusko Tadic was the first of them to be convicted for a rampage of torture inflicted on prisoners at Omarska concentration camp.

Id.

203. See Pejic, supra note 10, at 17 (stating that there “is general agreement that the first three categories should be within the court’s competence, as they constitute exceptionally serious offenses of concern to the international community as a whole”).
205. Diane F. Orentlicher, Putting Limits on Lawlessness: From Nuremberg to Pinochet,
borders of any one state and violations may be punished by any given state, much as in the years prior to Nuremberg when "international law allowed any state to punish [those who committed the crime of] piracy." More recently, various treaties have established that universal jurisdiction exists for the crime of terrorism. Many countries have now enacted laws based on the principle of universal jurisdiction and a number of these countries, such as Spain and England in the recent case of General Pinochet, are taking action to enforce these laws by themselves.

The United States contention that the Rome Treaty and ICC statute should not apply to the United States if the United States does not sign the Treaty has little support in international law. The Rome Conference carefully formulated the ICC statute so that it neither offends any current principle of treaty law, nor creates any entitlements or legal obligations that were not already a part of customary international law prior to the Rome Conference. Modern treaties banning genocide, torture, and terrorism support the idea that these treaties, and certain types of heinous crimes, go beyond boundaries; for true justice to be achieved, these treaties must apply to everyone.

The United States amendment, requiring that the state of the accused must always grant consent to the court's jurisdiction, had no possibility of being adopted because to do so would have gravely weakened the ICC's power. Opponents of this amendment argued that its adoption would have rendered most case referrals worthless because the home state of an accused criminal will rarely allow one of its citizens to be prosecuted.

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\text{WASH. POST, Oct. 25, 1998, at C1.}
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\text{206. Id.}
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\text{207. See id.}
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\text{208. See id.; see also Manasian, supra note 117, at 11. Discussing the recent case of General Pinochet, Manasian noted:}
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\text{The British judges explicitly rejected the idea that, as a former head of state, the general enjoyed absolute immunity for any act, including murder and torture, committed while in power. Extradition requests for the general from France, Switzerland, and Belgium, which followed the Spanish one, suggest that other countries now take a similar view.}
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\text{Id.}
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\text{209. See PUBLIC INFORMATION, supra note 197, at 3.}
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\text{210. See Kenneth Roth, No Defense of Pinochet, WEEKLY STANDARD, Dec. 14, 1998, at 4. ("[T]he Geneva Conventions, which define war crimes, require governments to bring offenders to justice "regardless of nationality." Nothing in the Genocide Convention—or other human rights treaties—suggests otherwise. Nor is there a hint, . . . that prosecutions must be conditioned on the consent of the targeted government.").}
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\text{211. See Podgers, supra note 4, at 67.}
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Furthermore, the jurisdiction of the ICC will not be allowed to become too broad because of the concept of complimentarity that exists between the ICC and the court systems of individual states.\(^{212}\) Instituted to ease American concerns that the ICC may someday become too powerful, complimentarity is the strongest layer of protection within the various provisions of the ICC that will ensure that the fears of the United States are never realized.

"The concept of complimentarity is based on the view that the exercise of police power and penal law is a state prerogative and that therefore national courts should have primacy over the ICC."\(^{213}\) Under this principle, the ICC must defer to national courts and may exercise jurisdiction only in those cases where national courts are "unwilling or unable" to take action.\(^{214}\)

Simply put, complimentarity means that national courts, such as those in the United States, have primacy over the ICC. This principle also can be used by states and individuals who have been accused of crimes to block court action and to challenge the investigation of the ICC Prosecutor.\(^{215}\) As a result, the jurisdiction of the ICC is purposefully designed to come into effect only when the judicial powers of the home state are "unwilling or unable" to provide an adequate measure of justice.

Under Article 17(2) of the ICC statute the term "unwilling" requires that national court proceedings be undertaken in bad faith before the ICC can step in.\(^{216}\) Additionally, a case is not within the jurisdiction of the ICC if the case has "been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned."\(^{217}\) Therefore, as long as the United States conducts fair and thorough investigations, the ICC is unable to intercede, even if, in the end, the United States decides not to prosecute one of its citizens.\(^{218}\)

"Inability" is defined under Article 17(3) as "a total or substantial collapse or unavailability of [a state’s] national justice system."\(^{219}\) Some of the Rome Conference participants stated that the fragile judiciaries of

\(^{212}\) See Wedgwood, supra note 159, at 22 (noting that domestic court systems will always maintain the right to handle any matter first, before any ICC jurisdictional claim).


\(^{214}\) See Rome Statute, supra note 170, art. 17 (1)(a)-(b), 37 I.L.M. at 1012.

\(^{215}\) See id. art. 18-19, 37 I.L.M. at 1012-14.

\(^{216}\) See id. art. 17(2), 37 I.L.M. at 1012.

\(^{217}\) Id. art. 17(1), 37 I.L.M. at 1012.

\(^{218}\) See id. art. 17(2), 37 I.L.M. at 1012.

\(^{219}\) Id. art. 17(3), 37 I.L.M. at 1012.
underdeveloped countries inspired this definition, as opposed to developed countries like the United States. Very few situations could ever be dreamed of in which the condition of the United States judiciary would ever fall within this definition of “inability.” Therefore, complementarity ensures that the United States will always be able to keep jurisdiction away from the ICC and in the hands of the United States, even in those cases where, after an investigation, the United States decides not to take action against an individual.

2. ICC Provisions Protecting the United States Military

The likelihood of American peacekeepers ever being brought under the ICC’s jurisdiction is minuscule because of the various safeguards and provisions within the ICC statute. As a global military power, the United States has a valid interest and the right to ensure that United States personnel serving far from home do not fall under illegitimate or politically driven ICC investigations or prosecutions.

At the Rome Conference, the United States fought to restrict both the ICC’s jurisdictional structure and the ICC Prosecutor’s independence in an attempt to gain an iron-clad assurance that no United States soldier could ever be subject to ICC jurisdiction. Yet the United States failed to realize that this was unnecessary because no one participating in the drafting of the statute wanted to bring American peacekeepers before the ICC. Rather, the ICC was created to address large scale conflicts and massacres such as those recently seen in Bosnia, Kosovo and Rwanda—and not individual American peacekeepers.

Despite the rigid position taken by the United States, enormous progress was made at the Rome Conference which resulted in layers of protection being written into the ICC statute that insulates United States military personnel to such a degree that the possibility of an American

220. See Halperin, supra note 204, at 24. Halperin states that the “goal was and is to bring the Iraqis and Sudanese of the world under the jurisdiction of the court. This provision certainly was not aimed at the United States, which the treaty’s drafters wanted to be a signatory and who no one believes will become subject to the jurisdiction of the court.” Id. at 26.

221. See Brown, supra note 213, at 428.


223. See Philip Smucker, Serbs Remove Massacre Victims: Block Investigation of Killings in Kosovo, NEWSDAY (Long Island, New York), Jan. 19, 1999, at A8 (describing how Serbian authorities defied demands for an international investigation into a massacre of Kosovo civilians and also forcibly barred a war crimes Judge from entering the embattled province); see also Mutilated Kosovo Bodies Found After Serb Attack, N.Y. TIMES, Jan. 17, 1999, at 1 (explaining that 45 ethnic Albanians were found shot or mutilated in the worst killing spree of the year old conflict between Serbia and Kosovo).

soldier ever coming before the ICC is now very remote.225 Philippe Kirsch, the Canadian diplomat who chaired the Rome Conference, observed that, although some countries may still fear that the ICC could take on politically motivated investigations, ""[t]he statute contains so many safeguards as to make this possibility extremely rare.""226

First, complimentarity ensures that United States courts will always have priority over the jurisdiction of the ICC.227 The ICC statute does not affect current arrangements with United Nations peacekeeping missions, so complimentarity ensures that countries presently contributing soldiers to any such peacekeeping effort will always maintain criminal jurisdiction over their own soldiers.228 This provision was obviously sufficient to convince most American allies, including England, France, and Germany, that their own soldiers would not be in danger, because these countries had also expressed skepticism concerning the safety of their peacekeepers, yet voted for the ICC statute.229

Second, since the ICC is not intended to replace national systems of law, but rather to act as an alternative to impunity only when independent and effective judicial systems are unavailable, the ICC would act only if United States authorities refused to investigate obvious cases of war crimes, genocide or crimes against humanity.230 Today, because of the serious manner in which the Unites States armed forces now treat humanitarian laws, it is hoped that the United States military never again engages in the war crime atrocities of the type it committed in Vietnam.231 Therefore, only if the United States completely abandoned

225. See Meron, supra note 134, at A15; see also Leopold, supra note 175 (explaining that most United States allies feel that the risk of American troops ever being prosecuted by the ICC is minimal).

226. Bonino Wants Speedy ICC Ratification, supra note 155, at 1 (quoting Philippe Kirsch, the Canadian diplomat who chairs the main committee at the Rome Conference). United States allies, who bent over backwards to satisfy United States demands, could not agree on an absolute exemption for U.S. soldiers. Even though many allies of the United States currently put their troops in harm's way as part of United Nations or NATO peacekeeping forces, these allies still managed to vote in favor of the ICC. See Manasian, supra note 117, at 13.

227. See Rome Statute, supra note 170, art. 17, 37 I.L.M. at 1010.

228. See PUBLIC INFORMATION, supra note 197.

229. See Wedgwood, supra note 159, at 21 (explaining that Germans, French, and British "went to Rome ready to abandon America in their race for European leadership").


231. See id. at 12. A recent survey on human rights law revealed:

[T]he armed forces of America and Europe, and a growing number of other established forces, certainly take humanitarian laws seriously.

. . . Military lawyers are attached to every divisional commander

. . . An informal group of military lawyers from Britain, the United States, Australia, New Zealand, Canada, and Denmark meet regularly to compare experience. Colonel Garraway insists that observance of the law and military effectiveness can go hand in
the Universal Code of Military Justice, and totally ignored the Geneva Convention by not investigating such crimes, would there be a chance of an American servicemember appearing before the ICC.\footnote{See id. at 13.}

Even if United States soldiers ignored their training and massacred innocent civilians, as happened at My Lai in Vietnam, the modern counterparts of Lieutenant William Calley and Captain Ernest Medina would not fall under ICC jurisdiction.\footnote{See Neier, supra note 143, at 35.} Complimentarity would block ICC involvement, the suspects would be investigated by United States authorities, and then tried by a United States Military Court, rather than the ICC.\footnote{See id.} Even if the United States decided not to try these suspects, the ICC would still be blocked from taking action as long as the United States conducted a proper investigation of the charges.\footnote{See Rome Statute, supra note 170, art. 17, 37 I.L.M. at 1012 (stating that the ICC will not prosecute a case after the case “has been investigated by a state which has jurisdiction over it and the state has decided not to prosecute the person concerned”).}

Furthermore, the high threshold of definitions within the ICC statute for war crimes and crimes against humanity would make any prosecution of United States peacekeepers very difficult.\footnote{See Podgers, supra note 4, at 68; see also Bonino Wants Speedy ICC Ratification, supra note 155 (explaining “the statute’s definition of crimes against humanity requires proof both of the commission of multiple crimes and of the existence of some policy to commit them is regarded as a high threshold to prove by many rights groups”).} An excellent example of this high threshold may be found in Article 7 of the Rome Treaty, which defines crimes against humanity not only as an “attack directed against any civilian population,” but the individual’s conduct must also be “in furtherance of a State or organizational policy to commit such attack.”\footnote{Rome Statute, supra note 170, art. 7(2)(a), 37 I.L.M. at 1004 (explaining that an “‘[a]ttack directed against any civilian population’ means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack”).}

Thus, an individual soldier, acting on his own, would not fall under this definition.

The definition of what constitutes a war crime was also a key debate at the Rome Conference. The United States and other large governments wanted broad language to ensure that the ICC could prosecute only large scale crimes, as opposed to smaller, more isolated in-
stances.\textsuperscript{239} In language similar to that found in the definition for crimes against humanity, the definition of war crimes under Article 8 grants the ICC jurisdiction only in those cases where the war crimes are "part of a plan or policy or as part of a large scale commission of such crimes."\textsuperscript{239}

The United States insisted on this strong language in order to restrict the ability of the ICC to take action against American soldiers for war crimes and crimes against humanity in only those incidences where the ICC could prove the soldiers were acting within, or as part of, a widespread United States policy or plan. Professor M. Cherif Bassiouni noted that this definition means that "the trigger-happy Marine wouldn't fall under that."\textsuperscript{240}

The ICC statute also serves to protect United States peacekeepers by outlawing attacks against soldiers or United Nations personnel involved in humanitarian assistance or peacekeeping.\textsuperscript{241} International observers and peacekeepers often serve under very dangerous conditions, and this provision could prove very important in conflicts such as the one currently occurring in Kosovo, where a United Nations cease-fire monitor and his translator were recently shot.\textsuperscript{242}

Still another layer of protection for United States soldiers is the United Nations Security Council. Although the Security Council will not have complete control over which investigations the ICC Prosecutor begins—due to the desire of the Rome Conference for an ICC capable of acting decisively without being tied down by the five permanent Security Council members politics\textsuperscript{243}—the Security Council will still play a pivotal and significant role.

Article 13 of the Rome Treaty permits the Security Council to refer situations to the ICC Prosecutor subject to its powers under the United Nations Charter, without preconditions.\textsuperscript{244} Absent this Security Council authorization to proceed, the ICC could only go forward if it gained the

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\textsuperscript{238} See Stoelting, supra note 3, at 1.
\textsuperscript{239} Rome Statute, supra note 170, art. 8(1), 37 I.L.M. at 1006 ("The Court shall have jurisdiction in respect of war crimes in particular when committed as a part of a plan or policy or as part of a large-scale commission of such crimes.").
\textsuperscript{240} Podgers, supra note 4, at 68.
\textsuperscript{241} See PUBLIC INFORMATION, supra note 197, at 3.
\textsuperscript{242} See Serbs Said to Kill Fifteen Kosovo Rebels; Monitor Wounded, N.Y. TIMES, Jan. 16, 1999, at 3 (discussing the American, French, and British response to the first attack that had wounded an international observer in this conflict).
\textsuperscript{243} See Stoelting, supra note 3, at 1 ("The Conference, however, overwhelmingly wanted a court able to proceed without being thwarted by the Security Council's whims.").
\textsuperscript{244} See Rome Statute, supra note 170, art. 13(b), 37 I.L.M. at 1011.
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consent of the state in which the crime was committed or the state the accused resides in. 245

Most importantly for the United States, although an ICC Prosecutor can go forward without the approval of the Security Council, the Security Council can defer investigations or prosecutions for a twelve month period. 246 This twelve month deferral is renewable at the Security Council’s discretion. 247 Therefore, in cases involving citizens of the United States, which the United States deems politically motivated, the United States will have the power of the Security Council behind it and the capability to defer any investigation for at least one year, if not considerably longer. This provision is imperative because the Security Council will have the power and capability to quickly decide when untimely investigations or prosecutions might destroy diplomatic efforts to end certain hostilities. 248

Still another safeguard for United States soldiers is the provision of the ICC statute guaranteeing that judges will not be the biased or prejudiced citizens of nations hostile to the United States interests. 249 "The judges and prosecutors, according to the statute, will be persons of high moral character, with extensive competence and experience either in criminal law and procedure, or in the relevant areas of international law." 250 The judicial section of the ICC will consist of eighteen judges who will be secretly elected by a two-thirds majority vote of the Assembly of States Parties to non-renewable nine year terms. 251 The two-thirds requirement ensures that only judges who are broadly acceptable to the international community, and not citizens from a rogue nation, will be elected to the ICC. 252 To guarantee fairness, and to ensure that no country gains too much power within the ICC, none of the eighteen judges may be from the same country, and when an accused is tried before five of these judges, none of the judges may be from the state of the accused or from the state of the complaining party. 253

245. See Bonino Wants Speedy ICC Ratification, supra note 155.
246. See Rome Statute, supra note 170, art. 16, 37 I.L.M. at 1012.
247. See id.
248. See Omestad, supra note 27, at 53.
250. United Nations Secretary General Kofi Annan, Address at the University of the Witwatersrand, Johannesburg (Sept. 2, 1998).
251. See Pejic, supra note 10, at 16.
252. See Rome Statute, supra note 170, art. 36(6), 37 I.L.M. at 1021.
253. See Krohne, supra note 249, at 173.
It is likely that for the ICC to be successful it will have to rely upon the support of the United States and the United Nations Security Council for the enforcement of its arrest warrants, financial backing, and much needed political support. Thus, there is no reason why the United States should fear frivolous prosecutions of United States soldiers. It would be both futile and irrational for the ICC to pursue such a course of action when it is likely to be so dependent on the United States for critical support.

It is virtually impossible for the international community to make a blanket guarantee that no American soldier would ever be prosecuted by the ICC. But, as is clear from the provisions in the ICC statute, any circumstance that would give rise to such a prosecution would have to be so extreme that it would literally border on the unforeseeable. Even if such a situation did occur, the United States would still be able to preempt ICC jurisdiction by taking action itself. Furthermore, as long as the judges chosen to sit on the ICC are competent people with integrity and common sense, most of the possible problems the United States has anticipated will likely never arise.

Tony Lloyd, the Foreign Office Minister who represented the United Kingdom at the Rome Conference, said that if English soldiers ever committed war crimes, it would be inconceivable “that we would not prosecute them ourselves.”\footnote{John Lloyd, \textit{The Dream of Global Justice}, \textit{New Statesman}, Sept. 25, 1998, at 28. The author quotes Tony Lloyd as stating: \textit{[I]t is inconceivable that if, in the UK, servicemen and women committed war crimes, that we would not prosecute them ourselves. Some African countries, Iraq, Serbia— these are the countries that will not prosecute their criminals. But we don’t expect it to happen here. Other countries may make allegations—but these would have to go through the court’s prosecutor. We would be confident that the judges would guarantee that any allegation would be looked at seriously.}} It is likely the United States would react in the same manner, thus virtually guaranteeing that no American soldier would ever be brought before the ICC. In addition, because it is not the policy of the United States government to commit genocide, war crimes, or crimes against humanity, these provisions, safeguards, and high threshold definitions prove that the fears of the Clinton Administration concerning peacekeepers are overstated.

\textbf{B. Restrictions on the ICC Prosecutor}

The ICC Prosecutor will not be able to undertake politically driven investigations because of firm judicial restrictions over any initiative...
taken by the Prosecutor. Originally, the United States wanted the Security Council to be the only triggering mechanism for case referrals to the ICC. This idea was roundly criticized by the vast majority of the international community because this would politicize the ICC by giving too much power to the five permanent Security Council members, thus restricting the freedom of the ICC Prosecutor. As an eminently political body, the Security Council was thought to be less effective than an independent Prosecutor who has no political fences to climb over before initiating an investigation. Similarly, for the Prosecutor to be effective she must be able to control her staff, and should not be encumbered with all of the tedious bureaucratic procedures of the United Nations. Although the United States was unable to win the battle to keep the ICC Prosecutor solely dependent for referrals on the Security Council, the United States was able to place within the statute stringent procedural safeguards to protect countries from misguided or frivolous exercises of authority by the ICC Prosecutor.

The combination of these various safeguards makes “[c]oncerns about a ‘rogue’ prosecutor ... groundless.” The first of these safeguards against undue prosecutions already discussed, complimentarity, protects defendants from politically motivated Prosecutors by automatically removing the defendant and the investigation back to the home country of the defendant.259

255. See Keeva, supra note 174, at 23.
256. See Bassiouni, supra note 47, at 1207.
257. See Wedgwood, supra note 159, at 21. Professor Wedgwood believes a contributing factor as to why the United States was not able to accomplish its goals at the Rome Conference was severe tension that exists in the United Nations between underdeveloped countries and the more developed countries, like the United States. See id. These underdeveloped countries are jealous of the Security Council’s expanding power in international security matters, and the recent failed attempt by middle ranking powers to expand the Security Council contributed to this tension. See id. Taken together, these factors made it impossible for the United States to preserve an American veto over prosecution decisions through the use of the Security Council. See id.

Lastly, if the rules on complimentarity are well crafted, it will be very unlikely that the Prosecutor can exceed his or her authority. Concerns about a “rogue” prosecutor are groundless. Thus, it is reasonable to assume that, if war crimes are well defined, complimentarity is followed, and the role of the prosecutor is subject to judicial safeguards, the risk of abuses are ... overstated and that the interests of the United States in having a ICC far outweigh the marginal and far-fetched concerns that have been articulated by political opponents of the ICC.

Id.
259. See Podgers, supra note 4, at 68.
To prevent a runaway Prosecutor, the Rome Treaty provides that advance notice must be given to a country before any of its citizens are subject to investigation, thus giving the country the ability to immediately take over jurisdiction in the case before the start of any investigation. Furthermore, the Prosecutor has little ability to bring an unwarranted prosecution because she can only take action with judicial approval. Under Article 15, the ICC Prosecutor may not begin an investigation on her own initiative unless able to convince the Pre-Trial Chamber of Judges that a reasonable basis exists to proceed and that the ICC has proper jurisdiction. This Pre-Trial Chamber functions as a check on the power of the ICC Prosecutor and is comparable to the grand jury in the common law system.

After an investigation, the Prosecutor can only obtain an arrest warrant by again persuading the ICC judges, through the evidence gathered in the investigation, that reasonable grounds exist to believe the suspect committed a crime and the crime falls within the jurisdiction of the ICC. Finally, after bringing a suspect into custody, the Prosecutor must use the evidence gathered to conduct a confirmation hearing to persuade a panel of judges that substantial grounds are present to believe the suspect committed each of the crimes charged.

Throughout this entire process, the United Nations Security Council, at any given time, can direct the ICC to defer an investigation or prosecution for up to twelve months, an action that is renewable an unlimited number of times. This provision enables the Security Council to take measures that maintain overall international peace and security, and affords powerful, and at often times unpopular, states like

260. See Rome Statute, supra note 170, art. 18, 37 I.L.M. at 1012; see also Halperin, supra note 204, at 26.
   If a country challenges the jurisdiction of the court over its citizens, the matter is brought before a special pretrial panel where the burden of proof is on the prosecutor. These safeguards, and the narrow definitions of the crimes for which the court has jurisdiction, should be more than sufficient to satisfy us that no Americans would be dragged before the court.

Id.


262. See id. art. 15(4), 37 I.L.M. at 1011.

263. See Stoelting, supra note 3, at 1.

264. See Rome Statute, supra note 170, art. 58(1), 37 I.L.M. at 1033; see also Stoelting, supra note 3, at 1 (explaining that it is the job of this panel of judges to come to a conclusion whether the evidence is sufficient to authorize an arrest warrant).

265. See Rome Statute, supra note 170, art. 61(1), 37 I.L.M. at 1035; see also Stoelting, supra note 3, at 1 (stating that the purpose of the confirmation hearing is to determine if the evidence supports each of the crimes with which the suspect is charged).

266. See Rome Statute, supra note 170, art. 16, 37 I.L.M. at 1012.
the United States the opportunity to slow or forestall unfair prosecutions of their citizens.\footnote{267}

The United States has little to fear from the scrutiny of an independent ICC Prosecutor. Because of provisions on complimentarity, the judicial restrictions that serve as a system of checks and balances on the Prosecutor, the high threshold definitions of war crimes and crimes against humanity, and the opportunity for the Security Council to defer any investigation indefinitely, there is little chance that the ICC Prosecutor could significantly harm the interests of the United States. It is more than likely that the ICC Prosecutor will depend upon the United States for essential financial and political support and for the assistance of the United States military for enforcement; thus, it would not be in the best interests of the ICC Prosecutor or the ICC judges to pursue or allow for frivolous prosecutions against United States citizens.\footnote{268} In fact, Justice Louise Arbour, the current Prosecutor for the ICTY and the ICTR, recently observed that there should be a greater fear that the ICC Prosecutor will be impotent instead of the fear that she will be too powerful.\footnote{269}

\section*{C. Counter-Arguments to the Additional Concerns of the United States}

In the months leading up to the Rome Conference, the United States proposed a ten year transitional period, during which time any state would be able to "opt-out" of the ICC's jurisdiction on war crimes and crimes against humanity.\footnote{270} The United States believed this transition was needed so states could evaluate the impartiality of the ICC.\footnote{271} A further purpose of the "opt-out" provision was to enable states to change their national laws to conform to the provisions of the statute.\footnote{272} While the majority of states present at the Rome Conference wanted a seven year period to be instituted, the United States delegation pushed to broaden the Treaty's transition period to ten years.\footnote{273}

\footnote{267. See Omestad, supra note 27, at 53 (explaining that the State Department wanted to protect the primacy of the United Nations Security Council because the Security Council must always have the power to determine if an investigation or prosecution is harming diplomatic progress towards ending hostilities).}

\footnote{268. See Brown, supra note 213, at 435.}

\footnote{269. See id.}

\footnote{270. See Comiteau, supra note 157.}

\footnote{271. See Scheffer Statement, supra note 135, at 13-14.}

\footnote{272. See PUBLIC INFORMATION, supra note 197.}

\footnote{273. See id.}
In the end, the United States lost this argument. The ICC statute established that a state, after it becomes a party to the statute, may declare that for a seven year period, it does not accept the jurisdiction of the ICC over war crimes committed by its nationals. Moreover, there was no “opt-out” provision for crimes against humanity, as the United States desired.

The difference between a ten year and a seven year opt-out period is not significant. Seven years should be more than enough time to evaluate the impartiality and effectiveness of the ICC. The ten year period and the exclusion of crimes against humanity from the opt-out provision of the statute would not have eliminated the risk to American troops overseas—a hostile state determined to upset the United States could still use any available tool to harass the United States and its soldiers. Similarly, there is no essential difference in the gravity between genocide, war crimes, and crimes against humanity. Thus, there remains no logical reason for the United States to stipulate to the ICC jurisdiction over genocide but not to its jurisdiction over the other two crimes. Each one is equally horrible in its own right, and the fact there is no “opt-out” for crimes against humanity should not significantly affect United States thinking.

Ambassador Scheffer stated that because the United States was rebuffed on these issues it could not vote for the ICC statute. However, because the difference between the proposal of the United States and the proposal that was ultimately enacted in the ICC statute is only three years, there is very little risk beyond what the United States was already willing to accept. Thus, it appears that this argument is little more than a red herring.

The final objection of the United States was to the definition of aggression. The United States wanted aggression clearly defined and a guarantee that there would be a direct link between a prior Security Council decision that a state had committed aggression and the conduct of an individual of that state.

Although there was widespread support to define aggression clearly, there was simply not enough time to agree on a precise defini-

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274. See Podgers, supra note 4, at 67.
275. See id.
276. See Wedgwood, supra note 159, at 23.
277. See id.
279. See id.
tion. The Rome Conference took the logical step of providing that crimes of aggression will be prosecuted by the ICC only after a future conference that will clearly define the elements and conditions of aggression. In addition, the argument of the United States concerning a direct link is invalid because the statute requires any future agreement on aggression to be consistent with the United Nations Charter, and the statute requires prior determination by the Security Council as to what constitutes an act of aggression.

D. The ICC as a Future Deterrent

A primary reason many countries voted in favor of the Rome Treaty was the belief that only a permanent ICC, rather than a series of ad-hoc tribunals, is capable of serving as a deterrent. In 1997, Ambassador Scheffer stated: "We firmly believe in the establishment of such a court, ... not only to ensure that when crimes of a certain magnitude occur the individuals responsible will be brought to justice, but we also support it as a major deterrent." By striving for the destruction of impunity, legal scholars believe that prevention and deterrence will be improved and any future atrocities arising out of genocide, war crimes, and crimes against humanity may be reduced. To allow the perpetrators of these vicious crimes to go unpunished enhances the likelihood of further violence and reduces the possibility of deterrence.

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280. See Public Information, supra note 197.
281. See id.
282. See id.
284. Keeva, supra note 174, at 22.
States which respect human rights are more likely to seek cooperation and not confrontation, tolerance and not violence, moderation and not might, peace and not war. States which treat their own people with fundamental respect are more likely to treat their neighbours with the same respect. From this proposition, it is clear that human rights—in practice, as in principle—can have no walls and no boundaries. By securing pluralism within States, we ensure peace between States. By protecting the human rights of one individual, we promote the peace of all humanity.
Id.
286. See Bassiouni, supra note 47, at 1210 ("Because all violence is on a continuum, what is permitted to go uncontrolled at one end of the continuum affects all other parts.").
Proponents hope that the ICC’s very existence will deter future Saddam Husseins, Pol Pots, and Idi Amins. Individuals who contemplate committing these crimes in the future, both those giving the orders and those carrying them out, might be deterred by the knowledge that there is a permanent court already in place with the resources, power, capability, and international political support to bring them to swift justice. Thus, only the firm resolve of the international community in establishing a permanent ICC will ensure that the perpetrators of such crimes will not disappear with the death of their victims. In fact, the need for a court such as the ICC gained attention last year when Pol Pot was finally captured and there was no system in place to punish him for genocide. Shortly thereafter, Pol Pot died after receiving a sentence of life imprisonment in an impromptu trial staged by his Khmer Rouge comrades.

Critics of the idea that the ICC can act as a deterrent argue that the only thing that will stop the next Bosnian or Rwandan tragedy from occurring is the threat of immediate force, not the prospect that somewhere down the line the criminals may find themselves indicted for crimes. These critics point to the Yugoslavian Tribunal, and the fact that numerous suspects are still free, as a prime example that a permanent ICC will be an empty gesture without a military force to back it up. Further evidence that criminals in the former Yugoslavia are not being deterred from committing these crimes can be found in the recent headlines from Kosovo.

To conclude that the ICC will have no deterrent effect is too pessimistic. Evidence clearly indicates that the armed forces of many countries already take humanitarian laws very seriously. The British

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287. See id.

When asked what they most value about the Tribunal, many from the former Yugoslavia reply, “it will remind people what happened here.”

By creating that record, we are presented with a chance to deter future crimes, yet deterrence is only achieved through dissemination and publication. We, or rather the States, must seize the day and support and promote the Tribunal.

Finally, the failure to act effectively implicates us all. To paraphrase Martin Niemoller, if we do not speak up while we can because we are not Slavic, or African, or Jewish, who will speak up for us when we cannot?

Id.
289. See Omestad, supra note 27, at 52.
290. See id.
291. See Rieff, supra note 142, at 17.
292. See Omestad, supra note 27, at 54.
army has revised its manuals to reflect recent developments in the area of international law.\textsuperscript{293} All British soldiers, before being sent outside the United Kingdom, are thoroughly briefed and given cards that detail the rules of war.\textsuperscript{294} Many modern armed forces are determined, through these manuals and training, to influence their soldiers conduct in wartime and to deter these atrocities.\textsuperscript{295}

Although there can be no definite answer concerning deterrence until the ICC is given the opportunity to work, it is clear that numerous massacres occurred this century without an ICC in place. Therefore, a permanent ICC would likely have a deterrent effect because the ICC would have a fixed staff capable of professionally and quickly addressing worldwide situations as they occur.\textsuperscript{296}

V. CONCLUSION

The decision of the United States to vote against the statute establishing a permanent ICC was a result of flawed legal analysis and the limited views and lack of vision on the part of United States government officials. It is not too late for the United States to reconsider its position on the ICC. The Clinton Administration should re-evaluate its arguments concerning the ICC and then actively support the ICC by joining with the sixty-seven countries that have already signed the ICC statute. At this moment in history, the United States should be leading the international community in wiping away the impunity that states and individuals have enjoyed during the twentieth century by vesting the ICC with the resources, dollars, and political support it will need to bring those who transgress international law to justice.\textsuperscript{297}

World War I taught the world that the worst mass murderers are rarely brought to justice for their despicable crimes. Hitler’s famous comment, “Who today remembers the Armenians?,” is evidence enough that the impunity permitted with respect to these atrocities contributed to the crimes committed by the Nazis during the Holocaust.\textsuperscript{298}

The Rome Treaty represents a significant step towards a fair and just international rule of law at the close of a century wracked by unparalleled crimes and injustice. The ICC provides a unique opportunity for the international community to stand together and declare that these

\textsuperscript{293} See Manasian, supra note 117, at 12.
\textsuperscript{294} See id.
\textsuperscript{295} See id.
\textsuperscript{296} See Halperin, supra note 204, at 26.
\textsuperscript{297} See Bassiouni, supra note 47, at 1210.
\textsuperscript{298} See Dadrian, supra note 61, at 504.
crimes will no longer be tolerated. With or without the support of the United States, the ICC will be the last major accomplishment in international law this century. The United States must take a long-term view and realize that opportunities to gain global acceptance of international institutions, especially one that promotes those values most fundamental to the United States, do not occur very often in history.

By breaking the vicious cycle of impunity, the ICC will deter the worst crimes, lessening the chance that United States soldiers will be forced to respond to future conflicts. In fighting for an absolute guarantee that no United States soldier will ever be brought before the ICC, the United States will pay the cost of sapping United States foreign policy of its moral strength and furthering the often heard criticism that the United States believes that what should apply to the rest of the world should not apply to it. Reversing its opposition to the ICC would allow the United States to join those countries who have voted in favor of a brighter future for international justice.

POSTSCRIPT

Since this Note was first written there have been numerous developments with respect to the crimes covered by the ICC statute. In addition, the ICTY has issued new indictments based upon crimes committed in Kosovo. These developments, and the overwhelming evidence of atrocities in Kosovo, proves once again that the crucial need for a permanent ICC has never been clearer.

On May 24, 1999, the North Atlantic Treaty Organization ("NATO"), led by the United States, began a bombing campaign of Yugoslavia in an attempt to halt the efforts of President Slobodan Milosevic to drive the ethnic Albanian population out of the Serbian province of Kosovo. NATO Secretary-General Javier Solana defined the purpose of the allied bombing campaign as "a mission of human rights and trying to preserve human values."

Prior to the start of this air campaign, the United States and NATO possessed evidence that Milosevic and his advisors were committing war crimes and crimes against humanity. These crimes included the mass deportation of civilians, willful killing, wanton destruction, rape

300. Id.
and pillaging.\textsuperscript{302} In fact, Kosovo was not the first time Milosevic was accused of these types of crimes. It is widely believed that Milosevic, more than any other person, was responsible for the atrocities committed in three earlier conflicts: the war with Slovenia in 1991, Serbia's seizure of Croatian territory in 1991, and the genocide against Muslims and Croats in Bosnia from 1992 through 1995.\textsuperscript{303} Although blamed for these earlier atrocities, Milosevic was granted impunity, allowed to escape justice, and never indicted by the ICTY.

In the middle of the NATO campaign to drive Milosevic out of Kosovo, the ICTY took the unprecedented step of indicting Milosevic and four of his closest advisors for their deadly campaign against the Kosovar Albanians.\textsuperscript{304} The Prosecutor of the ICTY, Louise Arbour, stated that the five had ""planned, instigated, ordered, committed, or otherwise aided and abetted" the deportation at gunpoint of 740,000 ethnic Albanians from the Serbian province and the murder of 340 named Albanians from seven villages around the province.""\textsuperscript{305} Part of the evidence supporting the allegations of civilian massacres was satellite imagery provided by the United States.\textsuperscript{306}

After eleven weeks of NATO bombing, Milosevic and the Yugoslavian military agreed to withdraw its forces from Kosovo, and to allow NATO troops to occupy Kosovo.\textsuperscript{307} Since the retreat of the Serb forces from Kosovo, and their replacement by NATO peacekeepers, overwhelming evidence has been gathered by the ICTY of the atrocities, despicable war crimes, and crimes against humanity committed by the Serb forces.\textsuperscript{308} Numerous reports, inspections, and examinations have confirmed ethnic cleansing, mass graves, the moving and burning of bodies, rape, civilian massacres, robbery, the burning of homes and entire villages, and the use of chemical weapons.\textsuperscript{309}

\begin{itemize}
\item \textsuperscript{302} See id.
\item \textsuperscript{303} See Roy Gutman, \textit{Milosevic Indicted}, NEWSDAY (Long Island, New York), May 28, 1999, at A5.
\item \textsuperscript{304} See Steven Erlanger, \textit{Belgrade Talks Go On, Clouded By Indictments}, N.Y. TIMES, May 29, 1999, at 1.
\item \textsuperscript{305} Gutman, \textit{supra} note 303, at A5.
\item \textsuperscript{306} See id.
\item \textsuperscript{307} See Steven Lee Myers, \textit{Serb Military Accepts Accord, Clearing Way To Halt Bombing}, N.Y. TIMES, June 10, 1999, at 1.
\item \textsuperscript{309} See Matthew McAllester, \textit{The Skeletons-Murder Victims are Unearthed}, NEWSDAY (Long Island, New York), June 15, 1999, at A5; see also John Kifner, \textit{How Serb Forces Purged One Million Albanians}, N.Y. Times, May 29, 1999, at 1 (describing the atrocities cited by the ICTY in its indictment of Milosevic); Michael Slackman, \textit{Neighbors, Then Killers}, NEWSDAY
\end{itemize}
Furthermore, shortly after the end of hostilities in Kosovo, the United States announced a reward program of up to five million dollars for information leading to the arrest and conviction of Milosevic and other criminals indicted by the ICTY. This list of Bosnian Serb leaders includes Radovan Karadzic and Ratko Mladic, wanted for their participation in the massacre of 6,000 Bosnian Muslims in 1995, but who continue to remain in hiding in Bosnia and Serbia.

These developments prove that a permanent ICC, rather than ad-hoc tribunals, is not only necessary, but in fact long overdue. The United States needs to join the majority of international states in support of a permanent ICC so that situations like Kosovo never happen again. The alternative—continued impunity for criminals like Slobodan Milosevic and those that committed these acts in Kosovo—is morally unacceptable, and is the equivalent of sitting idly by and doing nothing while the next Milosevic commits further massacres. We cannot let war criminals act in the twenty-first century with the same reckless disregard for human life that they did in the twentieth century. The time for the United States to support a permanent ICC has arrived.

*Gerard E. O'Connor*

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1999

International Criminal Court

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