Hostile Outsider or Influential Insider?
The United States and the International Criminal Court

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As the most powerful nation committed to the rule of law, we have a responsibility to confront these assaults on humankind. . . . Our legacy must demonstrate an unyielding commitment to the pursuit of justice.

—David J. Scheffer
U.S. Ambassador for War Crimes[1]

I. Introduction

Genocide.[2] Ethnic Cleansing.[3] Crimes against Humanity.[4] War Crimes.[5] The mere mention of these terms evokes chilling images of torture, suffering, and death. Yet beginning in 1899, with atrocities committed during the Anglo-Boer

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[1] David J. Scheffer, Ambassador-at-Large for War Crimes Issues, U.S. Dep't of State, Address on the 50th Anniversary of the Universal Declaration of Human Rights: Realizing the Vision of the Universal Declaration of Human Rights (Sept. 16, 1998), *available at* http://www.mtholyoke.edu/acad/intrel/scheffer1.htm [hereinafter Scheffer Address]. Ambassador Scheffer also served as the principal U.S. representative to the 1998 United Nations (UN) conference that was to consider the establishment of an international criminal court.

[2] Once the full horror of the concentration camps and extermination policies of Nazi Germany became known to the public, Winston Churchill called it "a crime with no name." ALAIN DESTEXHE, RWANDA AND GENOCIDE IN THE TWENTIETH CENTURY (1995), *reprinted in part in* FRONTLINE SPECIAL REPORT, THE CRIME OF GENOCIDE, *available at* http://www.pbs.org/wgbh/pages/frontline/shows/rwanda/reports/dsetexhe.html. "History was of little use in finding a recognised word to fit the nature of the crime. . . . There simply were no precedents in regard to either the nature or the degree of the crime." *Id.* Destexhe refers to Raphael Lemkin, a Polish-born adviser to the U.S. War Department who, in his book, *Axis Rule in Occupied Europe*, actually coined the term "genocide," which he derived from the Greek word for "race/tribe"—"Genos"—and the Latin suffix "-cide," which means "to kill." DESTEXHE, *supra* (citing RAPHAEL LEMKIN, AXIS RULE IN OCCUPIED EUROPE: LAWS OF OCCUPATION-ANALYSIS OF GOVERNMENT-PROPOSALS FOR REDRESS 80 (1944)). Lemkin actually defines the term as "the destruction of a nation or of an ethnic group, through the existence of a coordinated plan, aimed at total extermination, to be put into effect against individuals chosen as victims purely, simply and exclusively because they are members of the target group." *Id.* at 80–81. The United Nations, dating back to December, 1948, defines genocide as

> any of the following acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, whether committed in time of peace or time of war:
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> (a) Killing members of the group;
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> (b) Causing serious bodily or mental harm to members of the group;
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> (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
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> (d) Imposing measures intended to prevent births within the group;
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> (e) Forcibly transferring children of the group to another group.

U.N. Convention on the Prevention and Punishment of the Crime of Genocide art. 2, Dec. 11, 1948, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951) [hereinafter Genocide Convention]. This same definition has been used in the 1993 Statute of the International Criminal Tribunal for Yugoslavia (ICTY) and the 1994 Statute of the International Criminal Tribunal on Rwanda (ICTR), and is consistent with the definition of genocide contained within the Rome Statute of the International Criminal Court (ICC).

[3]

> Despite its recurrence, ethnic cleansing nonetheless defies easy definition. At one end it is virtually indistinguishable from forced emigration and population exchange while at the other it merges with deportation and genocide. At the most general level, however, ethnic cleansing can be understood as the expulsion of an "undesirable" population from a given territory due to religious or ethnic discrimination, political, strategic or ideological considerations, or a combination of these.

Andrew Bell-Fialkoff, *A Brief History of Ethnic Cleansing*, FOREIGN AFF., Summer 1993, at 110. Serb attempts to drive Bosnian Muslims out of towns all through the Balkans "have only recently lodged ethnic cleansing in the public mind. But in the annals of history such atrocities are far from new." *Id.* The U.S. State Department includes the following *systematic* actions within what it considers to be ethnic cleansing:

- Forcible displacement/expulsion of civilians;
- Looting of homes and businesses;
- Widespread burning of homes;

War, and continuing to present day with the bloodshed in Darfur, Sudan, the last century has produced deprivation, persecution, and carnage on an immense scale, incomparable with any other period in time.[6]

The instances of cruelty and mortality are legion. Following the Boer War,[7] the years 1915 to 1918 witnessed the Armenian Genocide in the early stages of World War I (WW I).[8] World War II (WW II) ushered in both the Nazi menace,

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• Use of civilians as human shields;

• Detentions;

• Summary Executions;

• Rape;

• Attacking medical facilities;

• Identity cleansing.

U.S. DEP'T OF STATE, ETHNIC CLEANSING IN KOSOVO: AN ACCOUNTING 2–3 (Dec. 1999), *available at* http://www.state.gov/www/global/human_rights/kosovoii/homepage.html. This report was prepared by the U.S. State Department with the express intent of "document[ing] the extent of human rights and humanitarian law violations in Kosovo, and to convey the size and scope of the Kosovo conflict." *Id.*

[4] The term "crimes against humanity" has been generally described as "[a] collective category of major inhumane acts committed against any (internal or alien) civilian population before or during the war." INT'L MILITARY TRIBUNAL, TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW, NO. 10, at 9–16 (1950) [hereinafter NUREMBERG TRIBUNAL]. The definition of the term first used internationally appeared in Article 6(c) of the 1945 London Charter of the International Military Tribunal (signed by the United States., Union of Soviet Socialist Republics, France and Britain), which was used in the trial of German war criminals in Nuremburg beginning in 1945:

> *Crimes Against Humanity*: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population before 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.

Charter of the International Military Tribunal art 6, *annexed to* the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, London, Aug. 8, 1945, 82 U.N.T.S. 279, 59 Stat. 1544 [hereinafter London Charter-Agreement]. The Charter was the first document establishing crimes against humanity. The International Military Tribunal for the Far East (Tokyo) followed suit, as did the international tribunals for Yugoslavia and Rwanda. The definition has been expanded in those tribunals to cover rape and torture. M. Cherif Bassiouni, *Crimes Against Humanity*, *in* CRIMES OF WAR 2.0: WHAT THE PUBLIC SHOULD KNOW (Anthony Dworkin et al. eds., rev. ed. 2007), *available at* http://www.crimesofwar.org/thebook/crimes-against-humanity.html. Crimes against humanity actually overlap with the definitions of war crimes and genocide. They are distinguishable from war crimes in that they need not occur in time of war, and from genocide in that there is no requirement for an intent to destroy "in whole or in part" a specific group of people. *Id.*; *see also* Yoram Dinstein, Address at the Science Center North-Rhine-Westphalia, Germany: Crimes Against Humanity and the Rome Statute of the International Criminal Court (Nov. 27, 2005) [hereinafter Dinstein Address].

[5] War crimes are defined in Article 147 of the Fourth Geneva Convention as the

> wilful killing, torture, or inhuman treatment, including . . . wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial . . . taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

Geneva Convention Relative to the Protection of Civilians in Time of War art. 147, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287. In short, Army Field Manual 27-10 captures the essence of a war crime well: "The term 'war crime' is the technical expression for a violation of the law of war by any person or persons, military or civilian. Every violation of the law of war is a war crime." U.S. DEP'T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE para. 499 (15 July 1976) [hereinafter FM 27-10].

[6] General estimates indicate that since the end of World War II, in more than 250 conflicts, anywhere from 70 to 170 million people have been killed. *See* M. Cherif Bassiouni, *Accountability for Violations of International Humanitarian Law and Other Serious Violations of Human Rights*, *in* POST CONFLICT JUSTICE 3, 6 (M. Cherif Bassiouni ed., 2002).

[7] The British Army in South Africa, experiencing significant difficulty in overcoming the guerilla tactics used by the Boers, resorted to a "scorched-earth policy," denying everything of sustenance to the Boers, including woman and children and, in so doing, uprooted a whole nation. Stanford University Libraries and Academic Information Resources (SULAIR), Concentration Camps During the South African/Boer War, 1899–1902, http://www-sul.stanford.edu/depts/ssrg/africa/boers.html. Lord Kitchener, Commander-in-Chief of the British Army in South Africa, ordered systematic "sweeps" of the countryside, burning farms, destroying homes, stealing food, and creating tens of thousands of refugees. Kitchener also ordered all Boer women and children into British "concentration camps," where they were greeted with neglect, suffering, and death.

> The British Army, unable to defeat the Boers using conventional tactics, adopt many of the Boer methods, and the war degenerates into a devastating and cruel struggle between British righteous might and Boer nationalist desperation. The British criss-cross the countryside . . . to flush the Boers into the open; they burn farms and confiscate foodstuffs . . . [and] they pack off Boer women and children to concentration camps as 'collaborators' . . . .

Tim Ice, The Boer War: South Africa, 1899–1902, http://www.geocities.com/Athens/Acropolis/8141/boerwar.html?20074 (last visited Apr. 20, 2009).

[8] The "Young Turks" perpetrated the Armenian Genocide in Turkey (what was known as the Ottoman Empire) from late 1914 through the end of World War I. A triumvirate of young military officers, the Young Turks represented a growing discontent in the early 1900s over the direction in which their country

replete with its Holocaust and countless similar atrocities,[9] and the Japanese Imperial Army, with its horrifying prisoner of war and civilian abuse, in the 1930s and 1940s.[10] The period from 1960 to 1980 saw shocking war crimes in Vietnam[11] and

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was headed under the absolutist rule of Sultan Abdul-Hamid. At the apex of the Young Turk Revolution was the Committee of Union and Progress, which promoted a Turkish nationalism "xenophobic and exclusionary" in nature. In January 1913, the Union and the triumvirate seized control of Turkey in a coup d'état. Rouben Paul Adalian, Armenian Nat'l Inst., Young Turks and the Armenian Genocide, http://www.armenian-genocide.org/young_turks.html (last visited May 18, 2009).

The advent of World War I, in which this new Turkish government joined with the Central Powers (Germany in particular), provided an opportunity for Turkey to finally solve the "Armenian question." United Human Rights Council, 20th Century Genocides: Armenian Genocide, http://www.unitedhumanrights.org/Genocide/armenian_genocide.htm (last visited May 18, 2009) [hereinafter Armenian Genocide]. In an effort to seize control of more land, and power, and consolidate Turkish rule, especially in lands held by Iran and Russia, the Union conceived a clandestine program to exterminate the Armenians. Adalian, *supra*. Acting under cover of war preparations, the Young Turks secretly ordered the mass arrest of Armenians throughout Turkey. Armenian Genocide, *supra.* The Armenian men were rousted from their homes, jailed, tortured, and then shot or bayoneted and left for dead on the outskirts of towns and cities. *Id.* The women and children were deported, forced to undertake grueling and horrific "death marches" into the Turkish mountains and Syrian desert, where they were attacked, raped, tortured, and either shot, burned alive, drowned, thrown off cliffs, or simply left for dead. *Id.* What is now known as the Armenian Genocide took the lives of an estimated two million people—men, women, and children. *Id.* This represented almost 80% of the Armenian population. *Id*. The U.S Ambassador to Turkey in 1918, Henry Morgenthau, reportedly advised the Administration that,

> When the Turkish authorities gave the orders for these deportations, they were merely giving the death warrant to a whole race . . . they understood this well, and, in their conversations with me, they made no particular attempt to conceal the fact. . . . I am confident that the whole history of the human race contains no such horrible episode as this. The great massacres and persecutions of the past seem almost insignificant when compared to the sufferings of the Armenian race in 1915.

Id. at 7. At the end of the war, the Young Turks triumvirate escaped to Germany and Italy, countries which granted them asylum. *Id.* Extensive efforts to obtain their return to stand trial for their crimes were to no avail, and ultimately they were assassinated by Armenian activists in 1921 and 1922. *Id.*; Adalian, *supra*.

[9]

> It would take many years for the whole story of the moral cost of the war to appear, but one vivid sign of it—and of what had been overcome—became immediately and horrifyingly visible as the allied Armies advanced into Germany and Central Europe. They found themselves overrunning camps where sadistic brutality and callous neglect had gone further than anyone had yet conceived. . . . The majority of those who had suffered were Jews condemned to inhuman treatment and death simply because of their race. The Nazis had made special efforts to wipe out those they deemed genetically undesirable. In the case of the Jews they had spoken glibly of a 'Final Solution' to a Jewish 'problem.' Rightly, the word 'Holocaust' has been given to what they did. Full figures may never accurately be known, but five, six million Jews perished, whether in gas chambers of extermination camps, or in factories and quarries where they died of exhaustion and starvation, or in the field where they were rounded up and shot by special extermination detachments.

J.M. ROBERTS, A SHORT HISTORY OF THE WORLD 462–63 (1993).

World War II also resulted in what is referred to as the "Malmedy Massacre" in 1944, in which German soldiers—Waffen SS, a regiment of the 1st SS Panzer Division, commanded by Lieutenant Colonel Jochen Peiper—operating under a concept called *Kreigsraison* (the doctrine of military necessity that justifies not only what is necessary to win, but also what is necessary to reduce the risks of losing, or simply to reduce losses or the likelihood of losses in war), killed eighty-one unarmed U.S. Prisoners of War (POW) from B Battery, 285th Field Artillery Observation Battalion, near the Belgian village of Malmedy. The History Place, World War II in Europe, The Malmedy Massacre (1997), http://www.historyplace.com/worldwar2/timeline/malmedy.htm. Once gathered in an open field, the SS troopers raked the American POW with machine-gun and pistol fire, until all victims fell dead or wounded into the snow. *Id.* Survivors were identified by English speaking SS who walked among the wounded asking if anyone needed medical attention. *Id.* Once identified, the SS murdered the survivors by a pistol shot to the back of the head, at close range. *Id.* Three survivors actually lived to tell of the massacre, and the bodies of the eighty Soldiers killed were subsequently located, identified, and examined. *Id.* All available evidence appeared to substantiate the allegations. *Id.* The German forces contended that such killing was permissible because the Germans were unable to provide food, water, and shelter for the POWs, and retaining them would have jeopardized the German operation. *Id.* Nevertheless, various German soldiers were subsequently tried by a U.S. Military Tribunal at Dachau in 1946, but any sentences obtained were either commuted or reduced, and the SS men were eventually released. *Id.*; *see also* MICHAEL WALZER, JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS 144 (1977).

[10] The Japanese Imperial Army was implicated in countless instances of war crimes and crimes against humanity in WWII. Robert Barr Smith, *Japanese War Crimes Trials*, WORLD WAR II, at 36 (Sept. 1996), *available at* http://www.historynet.com/magazines/ world_war_2/30.35796.html. The atrocities committed by Japanese troops were widespread, and included almost every type of torture, deprivation, and death imaginable. *Id.* China, Russia, the United States, the United Kingdom, Australia, France, the Philippines, Thailand, Burma, and Vietnam—no country or its personnel escaped the horror, pain, and suffering inflicted by the Japanese Army. *Id.* Names like the Bataan Death March, the Thai-Burma railroad (the "River Kwai"), the bombing of Manila, and the Nanking Massacre or "Rape of Nanking" became synonymous with, and representative of, the Japanese Imperial Army and its treatment of others. *Id.* Members of the *Kempeitai*, the Japanese secret police, known for its violence and cruelty, murdered victims through beatings, beheadings, and poisonings. *Id.* Records from a Japanese entity named Unit 731, a bacteriological and chemical warfare unit, demonstrated that unit members had used POWs and civilians for horrifying medical experiments, such as injecting live patients with bacteria to monitor results, or applying tourniquets to limbs for hours, sending the victims into shock. *Id.* Others engaged in vivisection, where live patients underwent medical experiments while awake and coherent—such as dissecting and removing various organs. *Id.* In the Philippines,

> Once the war had ended, details of the last hideous days . . . began to see the light of day. For three weeks, the Commission heard ghastly details of slaughter and rape, of beheadings and of those burned alive, of torture and wanton destruction, of the murders of the helpless—women and babies and priests and American prisoners of war.

the Khmer Rouge's brutal Cambodian Genocide.[12] The century closed with ethnic cleansing in the Balkans,[13] genocide in Rwanda,[14] and crimes against humanity in Sierra Leone.[15] The horror continues today in Sudan.[16]

Id.

Additionally, in what many consider to be the opening of the Second World War in the Pacific in 1937, the Japanese committed what subsequently became known as "The Rape of Nanking." United Human Rights Council, 20th Century Genocides: Nanking Massacre, http://www.unitedhumanrights.org/Genocide/nanking_massacre.htm (last visited Apr. 20, 2009) [hereinafter Nanking Massacre]. In December 1937, after the Imperial Army had resumed its attacks on China, beginning an eight-year struggle—what Japan referred to as "the China incident"—Japanese forces became mired in a fierce battle with Chinese soldiers in Shanghai. ROBERTS, *supra* note 9, at 448–49. Incensed over the difficulties encountered there, the Imperial Army thereafter marched into Nanking looking for revenge. Nanking Massacre, *supra*, at 1. The carnage that followed was later described by Western aid workers as "hell on earth." *Id.* at 4. Both film and photographic evidence produced by the Japanese themselves documented the widespread torture, rape, degradation, and killing by every conceivable means of the soldiers and civilians of Nanking. *Id.* Only the intervention by incredibly courageous American and European aid workers prevented the death toll from doubling. *Id.* Unfortunately, leaders in both America and Britain were becoming so increasingly concerned with Hitler's threats and actions in Europe—rearming and reoccupying the Rhineland—that they failed to adequately inquire about, and respond to, the horrific stories emanating from China. *Id.* Only much later were the stories confirmed by the West. *Id.*; ROBERTS, *supra* note 9, at 455. In the end, over 300,000—half the Nanking population—had been murdered.

[11] The incident in a commune named My Lai is commonly regarded as one of the most barbaric and well-publicized war crimes arising out of the Vietnam War.

> The villages of central Vietnam known collectively as My Lai have been stamped by history as places of horrific acts of war. More than 500 people, many of them women and children, were slaughtered here by American G.I.s on March 16, 1968. They were ordered out of their homes, lined up in ditches and shot. Soldiers tossed hand grenades into their bunkers and torched their thatched huts.

Tim Larimer, *Echoes of My Lai*, TIME, Mar. 16, 1998, at 10, *available at* http://www.time.com/time/magazine/1998/int/980316/vietnam.html.

> A young Army first lieutenant, William Laws Calley Jr., then stood accused of slaying at least 109 Vietnamese civilians in the rural village in South Viet Nam, and at least 25 of his comrades in arms on that day in March 1968 are also being investigated. . . .
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> . . . [M]en in American uniforms slaughtered the civilians of My Lai, and in so doing humiliated the U.S. and called in question the U.S. mission in Viet Nam in a way that all the antiwar protesters could never have done. . . .

My Lai: An American Tragedy, TIME, Dec. 5, 1969, at 5, *available at* http://www.time.com/time/magazine/article/0,9171,901621-1,00.html. "Two tragedies took place in 1968 in Viet Nam. One was the massacre by United States soldiers of as many as 500 unarmed civilians—old men, women, children—in My Lai on the morning of March 16. The other was the cover-up of that massacre." Douglas Linder, An Introduction to the My Lai Courts-Martial, http://www.law.umkc.edu/faculty/projects/ftrials/mylai/Myl_intro.html (last visited Apr. 20, 2009).

[12] Following the war's end in neighboring Vietnam, from 1975 to 1979 the Khmer Rouge (Red Cambodian) leader Pol Pot sought to build a Communist peasant farming society in Cambodia that resulted in the death of over twenty-five percent of the population—or over two million people—from a combination of starvation, overwork, and executions. United Human Rights Council, 20th Century Genocides: Cambodia Genocide (Pol Pot), http://www.unitedhumanrights.org/Genocide/pol_pot.htm (last visited Apr. 20, 2009). Pol Pot came to power in 1975 when his Khmer Rouge Army seized control of the country after the country's government fell, racked by political corruption and economic destabilization and lacking any military support from the U.S. government. *Id.* Once in control, he put into effect a "radical experiment to create an agrarian utopia inspired in part by Mao Zedong's Cultural Revolution, which he had witnessed first-hand during a visit to Communist China." *Id.* Calling his experiment the "Super Great Leap Forward" (after Mao's "Great Leap Forward"), Pol Pot sought to purify Cambodian society, torturing and purging the "class enemies," and extinguishing any ties to capitalism, Western culture, city life, and foreigners. *Id.* He banned education, health care, and religion, as well as currency, newspapers, radios, and bicycles, and effectively sealed the country from any outside influences. *Id.* He instituted a slave labor program, in which millions of Cambodians were forced to work in his "killing fields," where most died from malnutrition, disease, and overwork. *Id.* Finally, various ethnic groups—primarily Muslims, Chinese and Vietnamese—were targeted and attacked, resulting in the death of over 200,000 Chinese alone. *Id.*

[13] Once the West recognized an independent Bosnia in 1992—a primarily Muslim country which contained a Serb minority of almost one-third of the population—the Serbian leader, Slobodan Milosevic, responded by attacking the capitol city of Sarajevo (site of the 1984 Olympics) with artillery and snipers, killing almost 3500 children. United Human Rights Council, Genocide in Bosnia 1992–1995, http://www.unitedhumanrights.org/Genocide/bosnia_genocide.htm (last visited Apr. 20, 2009). As the Serbs gained territory in Bosnia, they began to methodically persecute and dispose of the Muslim inhabitants, either through mass murder, forced relocations, rape, and/or internment in WWII-style concentration camps. *Id.*

> [F]rom 1991 to 1995, the seething cauldron of what the world once knew as Yugoslavia erupted into a conflict of annihilation pitting former friends, neighbors, and even family members against each other along ethnic lines—Bosnian Serbs, Bosnian Muslims (Bosniacs), and Bosnian Croats. . . . Nearly four years of unchecked violence shocked the international communities' conscience and the results were staggering:
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> • Over 200,000 dead men, women, and children;
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> • Approximately 2,000,000 people displaced from their homes;
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> • Over 1,000,000 refugees spread across 25 countries;
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> • Almost 500,000 homes damaged or destroyed;
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> Allegations by all sides to the conflict of genocide, crimes against humanity, and other war crimes.

CTR. FOR LAW & MILITARY OPERATIONS, THE JUDGE ADVOCATE GENERAL'S SCH., U.S. ARMY, AFTER ACTION REPORT, LAW AND MILITARY OPERATIONS IN THE BALKANS, 1995–1998, at 15–16 (11 Dec. 1998) (citing International Crisis Group, *Going Nowhere Fast: Refugees and Internally Displaced Persons in Bosnia and Herzegovina* (1 May 1997), *available at* http://www.crisisgroup.org/home/index.cfm?l=1&id=1572).

Not surprisingly, at the conclusion of what ranks as the bloodiest century in history,[17] the international community met in Rome, Italy to discuss the formation of an independent and permanent International Criminal Court (ICC or Court) capable

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In Kosovo, "Today's conflict . . . is a child of centuries of conflict. Kosovo is a chronicle of refugees fleeing and returning to the area over generations. There have been dozens of wars over hundreds of years. Each generation remembers the wrongs done to the last and passes the bitterness on to the next." Chicago-Kent College of Law, A Historical View of the Conflict in Kosovo, http://pbosnia.kentlaw.edu/projects/warcrimes/history.html (last visited May 18, 2009).

> As a result of cultural and religious differences, Kosovo, a microcosm of the Balkan region, has been the stage for scenes of distrust, strife, hatred, and violence among and between its inhabitants and neighbors throughout its existence. It is extremely difficult to accurately portray the magnitude and constancy of the violence that has engulfed the entire region over the past two millennia.

CTR. FOR LAW & MILITARY OPERATIONS, THE JUDGE ADVOCATE GENERAL'S SCH., U.S. ARMY, AFTER ACTION REPORT, LAW AND MILITARY OPERATIONS IN KOSOVO, 1999–2001, at 8, 10 (15 Dec. 2001) [hereinafter KOSOVO AAR]. More recently, in 1998 a full-fledged civil war ensued in Kosovo, pitting the Serbian military and police forces against the Albanian's Kosovo Liberation Army (KLA), in which thousands died and hundreds of thousands sought refuge elsewhere. *Id.* at 34. Once additional massacres of civilians on both sides occurred, the United Nations Security Council (UNSC) stepped in, adopting UNSC Resolution 1199, which highlighted the "impending human catastrophe," calling for an immediate cease-fire, an international presence, and immediate withdrawal of Serbian troops from Kosovo. *Id.* at 34–35. Additional civilian massacres would occur before the international community stepped in with military force—in the form of a NATO air campaign against the Serbs—in March 1999. Overall, almost one million Albanians became refugees due to the Serbian atrocities, or threats of them. *Id*. at 37. Among the worst incidents to occur in this conflict were the "Serbs using the Albanians as human shields, raping women, burning and looting homes, devastating crops and livestock, and destroying ethnic Albanians' citizenship papers, in an effort to suppress their identity, origin, and property ownership." *Id.* at 39 n.152.

[14] On 6 April 1994, a small plane carrying Rwandan President Juvenal Habyalimana and Burundi President Cyprien Ntaryamira home from a conference in Tanzania, where they had been meeting with Tutsi rebels to discuss peace initiatives, was shot down close to Rwanda's airport in Kilgali by ground-fired missiles, killing both men. United Human Rights Council, 20th Century Genocides: Genocide in Rwanda, http://www.unitedhumanrights.org/Genocide/genocide_in_rwanda.htm (last visited May, 19, 2009). "Immediately following their deaths, Rwanda plunged into political violence as Hutu extremists began targeting prominent opposition figures on their death lists, including moderate Hutu politicians and Tutsi leaders." *Id.* What followed was a 100-day period of absolute genocide in which close to 800,000 Tutsis were killed in Rwanda by Hutu militia—using machetes, clubs, guns, and grenades, and typically hacking their victims to death—at a rate of almost 10,000 individuals killed each day. *Id*. Indiscriminate killing occurred, as the Hutu militia "engaged in genocidal mania." The militia compelled innocent Hutus to kill Tutsi neighbors, and Tutsis to kill their own family members. Survivors in hospitals were attacked, refugees in churches were slaughtered in mass, and bodies floating down the Kigara River became a common site. *Id.*

[15] Since 1991, Sierra Leone has endured over a decade of civil war, fueled by the diamond trade, in which the brutality was of unimaginable proportions. Marguerite Feitlowitz, Crimes of War Project, *UN War Crimes Court Approved for Sierra Leone*, Jan. 8, 2002, http://www.crimesofwar.org/onnews/news-sierra.html. Over one million civilians have been displaced, and close to 75,000 innocent individuals were killed in the conflict—not by accident, but as a result of massacres and summary executions. *Id.*; Press Release, Human Rights Watch, Shocking War Crimes in Sierra Leone: New Testimonies on Mutilation, Rape of Civilians (June 24, 1999), http://www.hrw.org/en/news/1999/06/24/shocking-war-crimes-sierra-leone. Families were slaughtered in broad daylight in the middle of the street, women and children had limbs hacked off with machetes, young women and girls were dragged off, raped or otherwise sexually abused, and then enslaved, and children were abducted for enlistment as soldiers. *Id.* "If there is a hallmark of this war, it is the forced amputation of human limbs, particularly the hands, arms, and legs of women and children." Feitlowitz, *supra.*

[16] The United Nations claims that since 2003 the Sudanese government, working closely with a Khartoum-backed Arab militia (Janjaweed), committed ethnic cleansing and crimes against humanity in the Darfur region of Sudan (a region roughly the size of France in Western Sudan), displacing more than 2.7 million African villagers and slaughtering almost 300,000 additional civilians. Colum Lynch, *International Criminal Court to Issue Arrest Warrant for Sudan's Bashir*, WASH. POST, Feb. 12, 2009, at A11, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2009/02/11/AR2009021103951_pf.html.

> The conflict has historical roots, but escalated in February 2003, when two rebel groups, the Sudan Liberation Army/Movement (SLA/M), and the Justice and Equality Movement (JEM) . . . demanded an end to chronic economic marginalization and sought power-sharing within the Arab-ruled Sudanese state. The government responded to this . . . by targeting the civilian populations from which the rebels were drawn. It brazenly engaged in ethnic manipulation by organizing a military and political partnership with some Arab nomads comprising the Janjaweed; armed, trained, and organized them; and provided effective impunity for all crimes committed.

HUMAN RIGHTS WATCH, SUDAN: DARFUR DESTROYED 1–2 (2004), *available at* http://hrw.org/reports/2004/sudan0504/2.htm. The combined Army and Janjaweed forces have driven civilians into camps outside of towns, where the Janjaweed have raped, pillaged, and murdered anyone of their choosing—to include emergency relief personnel and supplies. *Id*. To more accurately portray who is involved in these massacres, it is instructive to note that the literal translation of the term "Janjaweed" is "devil on a horse."

[17] Due to the atrocities of the Young Turks, Adolf Hitler, Joseph Stalin, Pol Pot, Idi Amin, Augusto Pinochet, the Hutus and Tutsis, Slobodan Milosevic, and the Janjaweed Militia, one could easily see *Time* magazine naming the twentieth century the "Generation of the Madman" or the "Era of Novel Ways to Torture and Kill Your Fellow Man."

Once a heavyweight boxing champion as well as a soldier in the British colonial army, Idi Amin, the former Ugandan military ruler who rose to power in a coup on 25 January 1971, was blamed for the death or disappearance of anywhere from 300,000 to 500,000 people during his brutal regime. *Idi Amin, "Butcher of Uganda,"* CNN, Aug. 16, 2003, http://www.cnn.com/2003/WORLD/africa/ 08/16/amin.obituary/index.html; Michael T. Kaufman, *Idi Amin, Murderous and Erratic Ruler of Uganda in the 70's, Dies in Exile*, N.Y. TIMES, Aug. 17, 2003, *available at* http://www.nytimes.com/2003/08/17/world/idi-amin-murderous-and-erratic-ruler-of-uganda-in-the-70-s-dies-in-exile.html?scp=1&sq=Idi%20Amin,%20Murderous%20and%20Erratic%20Ruler%20%of%20Uganda%20in%20the%2070s,%20Dies%20in%20Exile&st=cse. The dictator, who overthrew his successor, President Milton Obote, while Obote was out of the country, is alleged to have personally ordered the deaths of specific rival tribal groups in Uganda. *Id.* Some have alleged that he "kept severed heads in his refrigerator, fed corpses to crocodiles and had one of his many wives dismembered . . . [and] practised cannibalism." Paul Busharizi, *Uganda Dictator Amin Buried in Saudi Arabia*, ASIAN TRIBUNE, Aug. 17, 2003, *available at* http://www.asiantribune.com/oldsite/show_news.php?id=6065.

of investigating and prosecuting those who commit such heinous crimes.[18] The 1998 Rome Conference was the most recent, and aggressive, effort yet by the world community toward the establishment of a permanent, global criminal tribunal. The conference laid the Court's foundation, producing a treaty establishing the ICC initially adopted by more than two-thirds of the participating nations.[19] Subsequently ratified by more than the required sixty nations, the treaty became effective on 1 July 2002, finally making the Court—and justice for both perpetrators and victims—a reality.[20]

The United States, after participating significantly in Rome and signing the treaty, later formally renounced all obligations under the treaty based on several perceived "fundamental flaws." While the United Nations (UN), most democratic and allied nations, and countless human rights entities endorse the ICC,[21] the United States has strenuously opposed it, at times actively seeking to undermine its capability to perform as intended. As such, considerable discord and resentment has grown among the United States and the Court's many proponents. Having lost substantial international standing due to recent policy decisions—to include those concerning the conflict in Iraq—and a failed strategic communications strategy, the United States has also been subject to harsh criticism over its ICC opposition. Continued resistance only risks greater isolationism and lack of credibility and support, something at present the United States simply cannot afford. Moreover, history clearly demonstrates that absent the ICC's enforcement mechanisms to address individual responsibility, horrific crimes will continue and impunity will reign. Accordingly, the United States, which still has an opportunity to play a significant role with the Court—and regain its reputation for an unyielding commitment to promoting human rights, justice, and the rule of law—should ratify the Rome Statute or, at a minimum, adopt a strategy and policy of conciliation and cooperation instead of obstruction and antagonism.

In Part II, this article chronicles the evolution of the ICC concept from its inception, spanning more than a century.[22] Part III details the process by which the ICC operates, highlighting matters considered by the Court since July 2002. With this information as a necessary background, Part IV then identifies and analyzes, in detail, the U.S. objections to the Court's current charter and composition, while Part V examines the U.S. response to the Court's formation. Parts II through V are intended to encourage a greater awareness of the Court's strengths and weaknesses, and stimulate continued study and debate

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Slobodan Milosevic, a product of the Yugoslav Communist system, was the former manager of a state-owned gas company when he began his meteoric rise to power after Marshal Tito's death in 1980. Originally a protégé of Ivan Stambolic, who became prime minister after Tito, Milosevic eventually replaced Stambolic and became the president of Yugoslavia. It was in this position, and as the leader of the Serbian Communist Party, that Milosevic was alleged to have committed genocide in Bosnia and Herzegovina, and to have been at least partly responsible for the murder of thousands of civilians, and the ethnic cleansing/expulsion of over 750,000 Albanians from Kosovo and 250,000 non-Serbs from their homes and towns during the Serbs' war with Croatia. KOSOVO AAR, *supra* note 13, at 28, 40 (citing G. RICHARD JANSEN, ALBANIANS AND SERBS IN KOSOVO: AN ABBREVIATED HISTORY (2008), *available at* http://lamar.colostate.edu/~grjan/kosovohistory.html); Press Release, The Hague, President Milosevic and Four Other Senior FRY Officials Indicted for Murder, Persecution, and Deportation in Kosovo (May 27, 1999), *available at* http://www.un.org/icty/pressreal/p403-e.htm; *The Charges Against Milosevic*, BBC NEWS, Mar. 11, 2003, http://newsvote.bbc.co.uk/hi/english/world/europe/newsid_1402000/1402790.stm.

[18] HRW: International Criminal Court, http://hrw.org/campaigns/icc (last visited May 18, 2009). The diplomatic conference is commonly referred to as the "Rome Conference."

[19] Rome Statute of the International Criminal Court, 17 July 1998, U.N. Doc. A/CONF.183/9 (2002), *available at* http://www.un.org/law/icc/statute/romefra.htm [hereinafter Rome Statute]. Adopted on 17 July 1998, the statute in essence defines the ICC's scope of jurisdiction, operations, and duties, among other matters. *Id.*

[20]

> July 1, 2002, marked the birth of the International Criminal Court . . . meaning that crimes of the appropriate caliber committed after that date could fall under the jurisdiction of the ICC. . . . These include genocide, crimes against humanity, war crimes, and potentially the crime of aggression, if the Assembly of States Parties is able to reach an agreement defining it.

JENNIFER K. ELSEA, CONG. RES. SERV. REP., U.S. POLICY REGARDING THE INTERNATIONAL CRIMINAL COURT, RL31495, at 1 (Aug. 29, 2006), *available at* http://www.fas.org/sgp/crs/misc/RL31495.pdf; *see infra* notes 44–71 and accompanying text (providing a detailed discussion of the Rome Treaty and the Court's operations).

[21] Currently, 108 countries worldwide have become part of the ICC by ratifying the treaty, or statute, which established the Court, to include the United Kingdom, Canada, and France; the remainder of the European Union; and all of NATO save for Turkey. ICC, *Assembly of States Parties* 1, *available at* http://www.icc-cpi.int/Menus/ASP/ (last visited May 18, 2009); *see infra* notes 39–42 and accompanying text. "More than 1,000 associations have joined the Coalition for the International Criminal Court, including the [International Committee of the] Red Cross, American Bar Association, Amnesty International, Human Rights Watch, Lawyers Committee for Human Rights, and the International Commission of Jurists," among others. Kathryn Schiele, *US Ratification of the International Criminal Court*, J. INT'L REL. 63 n.20 (Spring 2004) (citing Robert C. Johansen, *U.S. Opposition to the International Criminal Court: Unfounded Fears* (Joan B. Kroc Inst. for Int'l Peace Stud., No. 7) (June 2001)).

[22] "Countries have long sought to establish suitable mechanisms for punishing individuals responsible for violent atrocities during conflict, and in the modern era, gross violations of international humanitarian law. Attempts to limit the behavior of military forces in war can be traced back hundreds of years." VICTORIA K. HOLT & ELISABETH W. DALLAS, ON TRIAL: THE US MILITARY AND THE INTERNATIONAL CRIMINAL COURT 21 (Henry L. Stimson Ctr. Report No. 55) (Mar. 2006).

of the concerns surrounding this misunderstood yet vital aspect of U.S. national security policy and strategy.[23] Finally, Part VI contains recommendations regarding the United States and the ICC, ultimately proposing that the U.S. policy toward the ICC become that of an influential insider vice hostile outsider.[24]

II. The Evolution of the International Criminal Court

> *For nearly half a century—almost as long as the UN has been in existence—the General Assembly has recognized a need to establish a court to prosecute and punish persons responsible for crimes like genocide. Many thought . . . that the horrors of the Second World War—the camps, the cruelty, the exterminations, the Holocaust—could not happen again. And yet they have. In Cambodia, in Bosnia and Herzegovina, in Rwanda. Our time—this decade even—has shown us that man's capacity for evil knows no limits. Genocide . . . is now a word of our time, too, a heinous reality that calls for a historic response.*[25]

That historic response was the Rome Statute of the ICC, adopted on 17 July 1998,[26] effectively establishing the Court and capping over a century of efforts on various fronts to create an international criminal court.[27] As early as 1872, following the Franco-Prussian War, advocates had appealed for a global court to prosecute grave crimes of significant concern to the worldwide community.[28] The pleas echoed again in 1919 following WWI, emanating from those involved in negotiating the

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[23] Recent polling supports two arguments: (1) that most Americans know very little about the specifics of the ICC and the U.S. relationship with the Court; and (2) of those who do, the majority are in favor of U.S. ratification of the Statute. "Americans generally support giving international courts broad authority to judge compliance with treaties and seven in ten reject the idea that the United States should receive exceptional treatment under such treaties. . . . Seventy-four percent favored U.S. participation in the ICC." PROGRAM ON INT'L POLICY ATTITUDES, AMERICANS ON INTERNATIONAL COURTS AND THEIR JURISDICTION OVER THE UNITED STATES 3–4 (May 11, 2006), *available at* http://www.amicc.org/docs/PIPA%20Poll%20May%202006.pdf [hereinafter PIPA Study]. Over 60% of Americans polled indicated that they have not heard anything about the Court; of the 39% that had, only 4% responded that they "know a lot." Notably, 71% of Americans polled agree that "given the events of September 11, 2001, it is more important for the United States to work in concert with other nations to establish an international criminal court." HUMAN RIGHTS FIRST, AMERICANS' ATTITUDES TOWARD AN INTERNATIONAL CRIMINAL COURT, US PUBLIC OPINION AND THE ICC 11–12 (Mar. 2005), *available at* http://www.globalsolutions.org/programs/law_justice/icc/resources/FINAL_ICC_Comm_Guide.pdf. A significantly large majority (76%) believes in the concept of an international body such as the Court to adjudicate compliance with international law, and an almost equally large majority (69%) believes that the United States should not claim a special exception so that it is not subject to that international body. PIPA Study, *supra*, at 7–10. Typical findings in these polls were that Americans perceived the potential benefits of the ICC as "prevention of atrocities, quicker justice for victims of terrorism, decreasing the likelihood of war, and lessening the global police burden on the [United States]." *Id.* A separate poll found a majority of Americans (60%) in favor of referring cases such as Darfur to the ICC rather than a temporary tribunal, such as the United States had previously proposed. CHI. COUNCIL ON FOREIGN RELATIONS & PROGRAM ON INT'L POLICY ATTITUDES, AMERICANS ON THE DARFUR CRISIS AND THE ICC 1–2 (Mar. 2005), *available at* http://www.amicc.org/docs/CCFR%20Darfur%20Referral%203-2005.pdf.

As a direct result of this lack of knowledge and information about the Court, Holt and Dallas found that the U.S. military was burdened with high anxiety about the Court and what effect it would have on the military, and individual servicemembers. In response, they recommended that the United States work to reduce this anxiety level by developing educational tools that would provide the military with information concerning the Court that, in turn, would clarify how the Court works and how it may affect military personnel. HOLT & DALLAS, *supra* note 22, at 74–75. As such, my primary intent is to add to that educational and informational process through this article.

[24] These terms were conceived by Professor Michael P. Scharf and set forth in an article that he penned for a written debate over the permanent international criminal court. *See* Michael P. Scharf, *The Case for Supporting the International Criminal Court*, *in* NAT'L SEC. L. 441 (John Norton Moore & Robert F. Turner eds., Carolina Academic Press 2005).

[25] Press Release, Secretary-General Kofi Annan, Protecting Human Rights of One Individual Promotes Peace of All Humanity, U.N.Doc. SG/SM/6825, HR/4391 (Dec. 8, 1998), *available at* http://www.un.org/News/Press/docs/1998/19981208.sgsm6825.html.

[26] During the fifty-second session of the U.N. General Assembly (UNGA), from 15 June through 17 July 1998, in Rome, Italy, the UN Conference of Plenipotentiaries on the Establishment of an International Criminal Court—commonly referred to as the "Rome Conference"—met to "finalize and adopt a convention on the establishment of an international criminal court." United Nations, Conference of Plenipotentiaries on the Establishment of an International Criminal Court, http://www.un.org/icc/index.htm (follow "Background Info" hyperlink) (last visited May 18, 2009) [hereinafter *ICC Background*]; *see also* United Nations, Establishment of An International Criminal Court—Overview, http://untreaty.un.org/cod/icc/general/overview.htm (last visited May 18, 2009) [hereinafter *ICC Overview*].

[27] M. Cherif Bassiouni, *Establishing an International Criminal Court: Historical Survey*, *in Nuremburg and the Rule of Law: A Fifty-Year Verdict*, 149 MIL. L. REV. 49 nn.1, 2 (Winter 1995). "[T]he world's major powers . . . progressively have recognized the aspirations of world public opinion for the establishment of an impartial and fair system of international criminal justice." *Id.* at 53.

[28]

> The "road to Rome" was a long and often contentious one. While efforts to create a global criminal court can be traced back to the early 19th century, the story began in earnest in 1872 with Gustav Moynier—one of the founders of the International Committee of the Red Cross—who proposed a permanent court in response to the crimes of the Franco-Prussian War. The next serious call for an internationalized system of justice came from the drafters of the 1919 Treaty of Versailles, who envisaged an *ad hoc* international

Treaty of Versailles, owing to concern over creating an international body to prosecute German war criminals.[29] World War II piqued interest yet again at the prospect of trying both German and Japanese war criminals.[30] This time, the international community heard the calls. In 1948, the UN General Assembly (UNGA) adopted the Genocide Convention, which reiterated the now rapidly growing demand for an "international penal tribunal" to investigate and prosecute the most heinous crimes. In Resolution 260, the UNGA indicated that, "[r]ecognizing that at all periods of history genocide has inflicted great losses on humanity; and being convinced that, in order to liberate mankind from such an odious scourge, international cooperation is required," the Assembly would adopt the Convention that characterized genocide as a crime under international law.[31] Further, the Convention stated that any person charged with such a crime would be "tried by a competent tribunal of the State in the territory of which the act was committed or by such international penal tribunal as may have jurisdiction."[32] The Convention "invited" the UN International Law Commission (ILC) to "study the desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide."[33] After much scrutiny, the ILC advocated developing a draft statute, which was completed by 1953.[34] Unfortunately, the UN then considered the ICC concept only periodically over the next forty years, ultimately delaying deliberation on this draft statute in an effort to first develop agreement on a definition of the "crime of aggression" as well as an international Code of Crimes.[35]

> court to try the Kaiser and German war criminals of World War I. Following World War II, the Allies set up the Nuremberg and Tokyo tribunals to try the Axis war criminals.

Coalition for the International Criminal Court, About the Court: History of the ICC, http://www.iccnow.org/?mod=icchistory (last visited May 18, 2009) [hereinafter *About the Court*].

[29] Treaty of Versailles art. 227, June 28, 1919, T.S. No 4. Articles 227 through 229 called for the trial of Kaiser Wilhelm II for "a supreme offense against international morality and the sanctity of treaties," and for *ad hoc* tribunals to try "persons accused of having committed acts in violation of the laws and custom of war." Bassiouni, *supra* note 27, at 53. However, the Allies acquiesced to German resistance to extradition and allowed Germany to conduct national prosecutions instead. These took place in Leipzig, where the accused individuals were treated as heroes, vice criminals, resulting in many acquittals despite strong evidence to the contrary. U.S. DEP'T OF ARMY, PAM. 27-161-2, INTERNATIONAL LAW VOL. II, at 221 (23 Oct. 1962) [hereinafter DA PAM. 27-161-2]. Additionally, the Kellogg-Briand Pact of 1928 banned, for the first time, aggressive war. It was this treaty that both captured the essence of the international move to attempt to prevent war and limit human suffering, and served to create an international legal basis for the post-WW II prosecution of those who had waged aggressive war. *Id*.; Treaty Providing for the Renunciation of War as an Instrument of National Policy, Aug. 27, 1928, 46 Stat. 2343, T.S. No. 796.

[30] Following WW II, the Allies established the International Military Tribunal (IMT) sitting in Nuremburg (1945), and the IMT for the Far East (IMTFE) sitting in Tokyo (1946). The Allies began an aggressive program to prosecute and punish, as applicable, all war criminals in both theaters. The combined trial of twenty-four German leaders occurred in Nuremburg, and the combined trial of twenty-eight Japanese leaders took place in Tokyo. There were twelve other trials under international authority in Nuremburg, and thousands of other trials before national courts and military commissions worldwide. DA PAM. 27-161-2, *supra* note 29**,** at 224–35. "[T]he post-WWII experience revealed how effective international justice could be when there is political will to support it and the necessary resources to render it effective. . . . Among all historical precedents, the IMT [Nuremburg], whatever its shortcomings may have been, stands as the epitome of international justice and fairness." Bassiouni, *supra* note 27, at 55; *see supra* note 4; London Charter-Agreement; International Military Tribunal for the Far East, Special Proclamation by the Supreme Commander for the Allied Powers at Tokyo, Jan. 19, 1946, T.I.A.S. 1589, 4 Bevans 27 (amending Charter dtd. Apr. 26, 1946). Importantly, both the IMT and IMTFE only had jurisdiction over individuals, vice states.

[31] G.A. Res. 260 (III) A, U.N. DOC. A/RES/3/260 (Dec. 9, 1948).

[32] *Id*.; Genocide Convention, *supra* note 2, at 277; *ICC Overview*, *supra* note 26, at 1. The 1972 Apartheid Convention also makes reference to an international criminal body that would have jurisdiction to prosecute apartheid crimes. Convention on the Suppression and Punishment of the Crime of Apartheid, Nov. 30, 1973, 1015 U.N.T.S. 243 (entered into force July 18, 1976).

[33] *ICC Overview*, *supra* note 26 (citing G.A. Res. 260 (III) A, *supra* note 31).

[34]

> Following the Commission's conclusion that the establishment of an international court to try persons charged with genocide or other crimes of similar gravity was both *desirable* and *possible*, the General Assembly established a committee to prepare proposals relating to the establishment of such a court. The committee prepared a draft statute in 1951 and a revised statute in 1953.

Id. (emphasis added).

[35] *About the Court*, *supra* note 28. "Although there were trials for aggression at Nuremberg, an acceptable definition for its elements has long eluded the international community, impeding earlier attempts to establish an international court." JENNIFER K. ELSEA, CONG. RES. SERVICE REP., INTERNATIONAL CRIMINAL COURT: OVERVIEW AND SELECTED LEGAL ISSUES 20 (June 5, 2002). The UNGA had also asked the ILC to develop a "Draft Code of Offenses Against the Peace and Security of Mankind" (later renamed the Draft Code of Crimes), which it completed in 1954. *Id*. The UNGA had asked a separate committee (actually, four committees) to develop a definition of the term "aggression," which took over twenty years to complete. *Id*. The UNGA finally adopted the definition provided by the committees in 1974, yet it has only been invoked once by the UNSC, in South Africa in 1977. *Id*. This definition was revised twice more in 1991 and 1995, yet the ICC has still not agreed on, nor adopted, a definition. Bassiouni, *supra* note 27, at 58–60. For the current state on the definition of the crime of aggression, see *infra* note 62 and accompanying text.

Following the Nuremburg and Tokyo Tribunals, significant human rights abuses still transpired.[36] Yet the world community could not resolve to create a court to address the senseless slaughter until the UN Security Council (UNSC) finally established *ad hoc* tribunals for Yugoslavia and Rwanda in 1993 and 1994—and this only in the face of indisputable evidence of millions being tortured and massacred. In light of the ethnic cleansing in Bosnia and Kosovo and the genocide in Rwanda, the international community placed substantial pressure on the UNSC to take decisive action. Allowing national authorities to conduct investigations and prosecutions had verified that this was a completely unrealistic alternative.[37] Somewhat simultaneously, the ILC resumed its work on the ICC.[38] In 1993 and 1994, the ILC presented a final draft statute to the UNGA, which then created two separate committees to prepare for an impending forum on the ICC. The UNGA established both an Ad Hoc and Preparatory Committee on the Establishment of an International Criminal Court—the former to study major substantive issues that surfaced out of the final draft statute, and the latter to prepare a "widely acceptable draft text for submission to a diplomatic conference."[39] The committees completed all of their work by 1998.[40]

Finally, in June to July 1998 representatives from 163 nations, to include the United States, came together in Rome as part of a UN Diplomatic Conference on establishing an ICC. Five tedious yet tumultuous weeks of intensive dialogue and debate ensued. What emerged was an overwhelming vote to adopt the Rome Statute, setting the stage for the first enduring global criminal court.[41] Once ratified,[42] the treaty entered into force on 1 July 2002[43]—establishing the Court a mere 130 years after the first calls, and over fifty years since the UN formally recognized its necessity. As of that date, the treaty

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[36] Cambodia saw millions perish, and "[t]housands of civilians, including horrifying numbers of unarmed women and children, lost their lives in armed conflicts in Mozambique, Liberia, El Salvador, and other countries." Hunt for Justice: The Louise Arbor Story, http://www.huntforjustice.com/4-icc-en.php (last visited May 18, 2009). In Mozambique, the people had endured a devastating civil war for over sixteen years, over one million died, three million became refugees or displaced persons, and the country's infrastructure was destroyed. James L. Woods, *Mozambique, The CIVPOL Operation*, *in* POLICING THE NEW WORLD DISORDER: PEACE OPERATIONS AND PUBLIC SECURITY 144 (Robert B. Oakley et al. eds., 1998), *available at* http://www.ndu.edu/inss/books/books%20-%201998/Policing%20the%20New%20World%20Disorder%20-%20May%2098/PNW.pdf. "From 1989 to 2003, Liberia was engulfed in two armed conflicts typified by egregious human rights violations." HUMAN RIGHTS WATCH, WORLD REPORT 2007: LIBERIA COUNTRY STUDY, *available at* http://hrw.org/englishwr2k7/docs/2007/01/11/liberi14716.htm. In El Salvador, a UN Commission on the Truth for El Salvador, which published a report in March 1993 concerning the civil war between an armed insurgency and the military-backed government, determined that Salvadoran armed forces and death squads bore principal responsibility for the murder, disappearance, and torture of countless Salvadoran civilians. HUMAN RIGHTS WATCH, ACCOUNTABILITY AND HUMAN RIGHTS: REPORT OF THE UN COMMISSION ON THE TRUTH FOR EL SALVADOR (Mar. 1993), *available at* http://hrw.org/doc/?t=americas_pub&c=elsalv.

[37] HOLT & DALLAS, *supra* note 22**,** at 23–24. The "former Yugoslavian and Rwandan conflicts led to one of the most profound developments in international humanitarian law since the end of WW I—the creation of international judicial mechanisms designed to bring to justice those who commit crimes against their own nationals." *Id*. at 24. On 22 February 1993, the UNSC created the first global war crimes tribunal since the IMT and IMTFE in WW II, establishing the ICTY via UNSCR 808. S.C. Res. 808, U.N. Doc. S/RES/808 (1993). On 8 November 1994, the UNSC created the ICTR via UNSCR 955, adopting all the rules of procedure and evidence from the ICTY, with applicable changes. S.C. Res. 955, U.N. Doc. S/RES/955 (1994). Additionally, and of note, on 14 August 2000, the UNSC established the Special Court for Sierra Leone, via UNSCR 1315, which approved a separate agreement between Sierra Leone and the UN Secretary-General (signed 16 January 2002) to create a hybrid international-domestic court. S.C. Res. 1315, U.N. Doc. S/RES/1315 (2000); Office of Press and Public Affairs, Special Court for Sierra Leone, *Special Court for Sierra Leone: Basic Facts* 1–2, *available at* www.sc-sl.org (last visited May 18, 2009); *Sierra Leone's War Crimes Tribunal*, BBC NEWS, AFRICA, Mar. 10, 2004, at 1–2, *available at* http://news.bbc.co.uk/go/pr/fr/-/2/hi/africa/3547345.stm.

[38] In 1989, at the request of Trinidad and Tobago, the UNGA asked the ILC to continue drafting the ICC statute. Trinidad and Tobago asked the UNGA to resurrect the draft statute for the ICC for the purpose of prosecuting individuals involved in drug trafficking. Bassiouni, *supra* note 27, at 61; *ICC Overview*, *supra* note 26.

[39] *ICC Overview*, *supra* note 26.

[40] *Id*. Following the Rome Conference, the Preparatory Committee was tasked with negotiating related, or complementary documents, such as the rules of evidence and procedure, elements of crimes, UN-ICC Relationship Agreement, and other documents of a similar nature. *Id*.

[41] On the last day of the Conference, while 120 member states voted in favor of the treaty, only 7 nations voted against adopting it—the United States, China, Israel, Iraq, Libya, Qatar, and Yemen. ELSEA, *supra* note 34, at 2. Twenty-one other nations abstained from voting. *Id.*

[42] The Statute set a deadline of 31 December 2000 for signing the treaty. Coalition for the International Criminal Court, *Ratification of the Rome Statute*, http://www.iccnow.org/?mod=romeratification (last visited May 18, 2009) [hereinafter *ICC Timeline*]. On the last day, the United States was joined by Israel and Iran in signing the treaty. *Id.* One hundred and thirty-nine states actually signed the treaty by the deadline. *Id.*

[43] The trigger for the Statute to enter into force was the sixtieth ratification of the Statute, which occurred on 11 April 2002. The Statute specifically provides in Article 126 that it will "enter into force on the first day of the month after the 60th day following the date on which the 60th nation submits its instrument of ratification to the UN." Rome Statute, *supra* note 19, art. 126. The first state to ratify the Rome Statute was Senegal, which notified the Secretary-General on 2 February 1999 of its ratification. On 11 April 2002, ten states simultaneously deposited their treaty instruments designating ratification of the treaty in a special ceremony at the UN headquarters in New York: Bosnia and Herzegovina, Bulgaria, Cambodia, Democratic Republic of the Congo, Ireland, Jordan, Mongolia, Niger, Romania, and Slovakia. Sixty-six countries, representing six more than was necessary to establish the Court, ratified the treaty by 11 April 2002. *ICC Timeline*, *supra* note 43. Notably, the sixtieth ratification came many years earlier than anyone had anticipated or predicted.

became binding on all countries that had ratified or acceded to the Rome Statute and for which it had entered into force.[44] Yet as the ICC at long last became operational, struggling to find its legs, violent storms were already brewing—tempests named Uganda, Congo, and Sudan.

III. The Operation of the International Criminal Court

[*F*]*or vigilance to be eternal, there must be persons who are vigilant*.[45]

The ICC is the first permanent, treaty-based world criminal court possessing international jurisdiction. The first standing court of its kind, the ICC is specifically designed to be an international treaty-based institution which allows all member states an opportunity to take part in its development and have an influence on its operations.[46] It is separate from and independent of the UN, unlike its predecessor international criminal tribunals in Yugoslavia and Rwanda, which were developed within the UN construct.[47] The Rome Statute established the Court's operations—including its structure, duties, and jurisdiction, as well as rules for limited oversight by the Assembly of States Parties, the Court's governing body.[48]

A. Structure and Duties

The Court is now a functioning judicial institution in its official seat in The Hague, the Netherlands. It is comprised of four organs—the Registry, the Prosecutor, the Presidency, and the Judicial Divisions, or Chambers. The Registry provides all administrative and operational support to the Court per the Presidency. The Prosecutor is responsible for receiving and evaluating referrals, information, evidence, and testimony concerning crimes within the ICC's jurisdiction, initiating investigations, and prosecuting cases before the Court. The Presidency, which is composed of three judges elected from within the Chambers by a simple majority vote, manages the Court's administration and judicial actions, and serves as the Court's primary representative and official voice. Finally, the Judicial Divisions includes six judges in each of three chambers—Pre-Trial, Trial, and Appeals.[49]

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[44] Rome Statute, *supra* note 19, art. 126; *ICC Timeline, supra* note 43, at 2. As of 30 March 2009, 139 countries have signed the treaty, and 108 have ratified it. The American Non-Governmental Organizations Coalition for the International Criminal Court (AMICC), Ratifications and Declarations, http://www.amicc.org/icc_ratifications.html (last visited Apr. 20, 2009) [hereinafter *Ratifications and Declarations*].

[45] WILLIAM A. SCHABAS, GENOCIDE IN INTERNATIONAL LAW 624 (2000).

[46] Rome Statute, *supra* note 19, arts. 1, 4–5; ELSEA, *supra* note 34, at 1.

[47] Although Article 2 of the Rome Statute indicates that the Assembly of States Parties will bring the Court into a "relationship with the United Nations through an agreement to be approved by the Assembly . . . and thereafter concluded by the President of the Court." Rome Statute, *supra* note 19, art. 2. This was accomplished through a memorandum of agreement between the UN and the ICC signed and entered into force on 4 October 2004. *ICC-UN Agreement Signed*, ICC NEWSLETTER #2 (Pub. Info. & Documentation Section, Int'l Criminal Court, The Hague, Neth.), Oct. 2004, at 2, *available at* http://www2.icc-cpi.int/NR/rdonlyres/4E898258-B75B-4757-9AFD-47A3674ADBA5/278481/ICCNL2200410_En.pdf. The memorandum identifies the role and mandate of each institution, and is designed to "strengthen[] the cooperation of the two organisations on matters of mutual interest relating to the exchange of information [and representatives], judicial assistance, cooperation on infrastructure and technical matters." *Id.* Moreover, the ICC is not connected to the International Court of Justice (ICJ or World Court), which is designed to address grievances or disputes between member states. Key Facts About the International Criminal Court (Jan. 29, 2007), http://www.reuters.com/article/idUSL21683125 [hereinafter *ICC Key Facts*].

[48] The Assembly, composed of State Parties to the Statute (those states that have ratified the Statute, one vote per state), among many other duties elect and remove both judges and prosecutors, address amendments to the Statute, approve the budget (while financing the budget through mandatory dues for each member state), and oversee all facets of the Court's work. Rome Statute, *supra* note 19, arts. 36, 46, 49, 112, 121; The American Non-Governmental Organizations Coalition for the International Criminal Court (AMICC), Basic Facts About the International Criminal Court, http://www.amicc.org/icc_structure.html (last visited Apr. 20, 2009) [hereinafter *ICC Basic Facts*].

[49] Rome Statute, *supra* note 19, arts. 3, 34. Key functions of the Registry include responsibility for the Court's financial management and for the field offices where investigations are being conducted, such as in Kinshasa, Democratic Republic of Congo, and Kampala, Uganda. *Id.* art. 43; HOLT & DALLAS, *supra* note 22, at 27 (citing UNGA, *Report of the International Criminal Court* 8 (A/60/177) (Aug. 1, 2005)). The first Prosecutor—elected by the Assembly on 21 April 2003 and sworn in on 16 June 2003 for a term of nine years—is Luis Moreno Ocampo of Argentina. His Deputy Prosecutor for Investigations is from Belgium, and his Deputy Prosecutor for Prosecutions is from The Gambia. *ICC Basic Facts*, *supra* note 48, at 1. Initially, Judge Philippe Kirsch of Canada was elected President, and his First Vice-President (VP) hailed from Ghana, while the Second VP was from Bolivia. *Id.* Currently, the President hails from the Republic of Korea, the First VP from Mali, and the Second VP from Germany. ICC: Structure of the Court, http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/ (last visited May 18, 2009) [hereinafter *Court Structure*]. Each of the eighteen judges elected in February 2003 were elected by a two-thirds vote of the Assembly to serve for staggered nine-year terms. *Id.*; Rome Statute, *supra* note 19, art. 36. Six new judges were elected in January 2009. *Court Structure*, *supra*. The Statute requires that judges be selected to represent the international community based on geography, legal systems and specialties, and gender. Judges may be removed by a two-thirds majority vote of the Assembly following a two-thirds majority recommendation from fellow judges that the judge in question be removed for serious misconduct or inability to perform functions of position. Rome Statute, *supra* note 19, arts. 36, 46.

B. Jurisdiction and Admissibility

The Statute provides three methods, on a two-track system of jurisdiction, for referring potential cases over which the Court may exercise jurisdiction.[50] The UNSC, acting pursuant to authority under Chapter VII of the UN Charter, may refer a matter to the Prosecutor—the first track. Second, a state party may refer the "relevant circumstances" of a matter, along with supporting documentation, if possible, to the Prosecutor. Third, absent such referral, the Prosecutor may initiate an investigation on the basis of credible information from victims, non-governmental organizations, or any other reliable individuals or sources. The second track comprises these last two methods.

The ICC is prospective in nature, capable only of taking cases involving crimes committed after it entered into force on 1 July 2002.[51] The Court's jurisdiction is anchored on the "universal jurisdiction" concept. In other words, "any nation may lawfully try any individual accused of such crimes in its domestic court system without regard to the nationality of the alleged perpetrator or the territory where the crime is alleged to have taken place."[52] However, Article 12 of the Statute imposes certain preconditions on the Court's exercise of that jurisdiction when not referred by the UNSC. For matters referred by a state party or the Prosecutor, the Court has jurisdiction if either the state on whose territory the conduct occurred, or the state of nationality of the person accused, is a party to the Statute, or voluntarily consents to the Court's jurisdiction. As such, the Court has jurisdiction over accused individuals from nations that are *not* parties to the Statute if the crime alleged occurred in the territory of a state that is a party (or consents if a non-party). This is an important point for U.S. interests.

In Track 2 cases where the Prosecutor has initiated the investigation on his own, under Article 15 the Prosecutor must obtain judicial review of his decision by two judges of a three-judge panel in the Pre-Trial Chamber before the Court issues an arrest warrant and continues the investigation.[53] If a case is referred by a state party or initiated by the Prosecutor with judicial approval, and the Prosecutor determines that an investigation is warranted, he must then notify all state parties and any other state that could reasonably assert jurisdiction. This notification is confidential, to protect evidence and the identity of those involved.[54] States with conventional jurisdiction may notify the Prosecutor within thirty days of their intent to investigate, and the Prosecutor must defer to that state or seek redress from the Pre-Trial Chamber.[55] Moreover, unless the UNSC refers the matter, the Court's jurisdiction is complementary to that of state (domestic) courts—that is, the Court will find a case admissible and will prosecute *only* if the state is either genuinely unwilling or unable to prosecute. As such, cases are inadmissible if the state with jurisdiction is either investigating or prosecuting the case, has investigated the case and has decided not to prosecute the matter, or has already prosecuted the case (for the subject matter that forms the basis of the complaint), and double jeopardy under Article 20 has attached.[56] The clear intent is for the ICC to serve as a "court of last resort," designed to complement national systems of justice, not divest them of authority.[57]

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[50] Articles 13, 14, and 15 set forth in detail the methods by which matters may be referred to the Court for consideration. Rome Statute, *supra* note 19, arts. 13, 14, 15. The Statute also allows the UNSC to defer an investigation for a renewable period of twelve months through a UNSC adopted resolution in accordance with Chapter VII of the UN Charter. *Id.* art. 16.

[51] *Id.* art. 11 ("The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole.").

[52] ELSEA, *supra* note 35, at 21; Rome Statute, *supra* note 19, pmbl. ("Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes"). For an in-depth analysis of the concept of universal jurisdiction, see M. Cherif Bassiouni, *Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice*, 42 VA. J. OF INT'L L. 81 (2001), and Lee A. Casey, *The Case Against the International Criminal Court*, 25 FORDHAM INT'L L. J. 840 (2002).

[53] Rome Statute, *supra* note 19, art. 15.

[54] *Id.* art. 18.

[55] *Id*.

[56] *Id.* art. 17 (Issues of Admissibility). To further determine admissibility, the Prosecutor will also consider whether the gravity of the crimes alleged warrants action by the Court, taking into account the number and nature of the crimes, the victim's interests, and the overall interests of justice. *Id*. art. 53.

[57] HOLT & DALLAS, *supra* note 22, at 28; ELSEA, *supra* note 35**,** at 22. This is known as the "Principle of Complementarity." Again, under the Statute, the Prosecutor has an obligation to "defer to the state's request to investigate and prosecute at that national level unless the Pre-Trial Chamber determines that the state is unable or unwilling to exercise jurisdiction effectively and decides to authorize the Prosecutor to investigate the claim." HOLT & DALLAS, *supra* note 22, at 28–29; Rome Statute, *supra* note 19, art. 18. How does the Pre-Trial Chamber determine if a state is *genuinely* unable or unwilling to investigate or prosecute? Article 17 sets forth a three-part test, any one of which will result in a finding of unwillingness:

- The state is attempting to shield the person concerned from criminal responsibility;
- There has been an unjustifiable delay, inconsistent with an intent to bring the person concerned to justice;
- The proceedings are not being conducted independently or impartially.

C. Crimes

With the benefit of hindsight, the Rome Statute has compiled a comprehensive list of crimes. The draft Statute was largely modeled after the statutes from the successful and popular *ad hoc* courts. The drafters were able to consider not only the IMT and IMTFE out of WWII, but the three more modern tribunals arising out of Yugoslavia (ICTY), Rwanda (ICTR), and the Special Court for Sierra Leone.[58] Each built on the lessons of the previous era and tribunals. The ICTY expanded the definition of war crimes and crimes against humanity to cover rape, persecution, and other inhumane acts (authorizing prosecution for persecution on political grounds); the ICTR focused on genocide and mass killings (again authorizing prosecution for persecution on political grounds); and the Special Court for Sierra Leone concentrated on offenses related to the abuse of girls and the conscription of children under fifteen-years old for military service.[59] The Rome Statute explicitly provides the Court with jurisdiction over genocide,[60] crimes against humanity,[61] war crimes,[62] and crimes of aggression—but as the Conference was unable to agree on the definition of "aggression," and the matter is yet to be resolved, the Court will not exercise jurisdiction over such crimes until adequately defined. The Statute added the caveat that a definition of aggression, as well as the conditions under which the Court would exercise jurisdiction with respect to the crime consistent with the UN Charter, must first be adopted in accordance with Articles 121 and 123 of the Statute. To date, this has not been accomplished, but a Special Working Group of the Court is currently reviewing the issue and has indicated that its proposals will likely be considered at a Review Conference for the Statute to be held in Kampala, Uganda, in 2010.[63]

D. Current Operations

As of 30 March 2009, four principal cases have been referred to the ICC since its inception[64]—three by a state party involving war crimes and one by the UNSC involving crimes against humanity in Darfur.[65] The Democratic Republic of the

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Id. art. 17. Such decisions of the Pre-Trial Chamber may be taken up to the Appeals Chamber by either the state involved or the Prosecutor. *Id*. arts. 18, 82.

[58] *See supra* note 38 and accompanying text (discussing these modern tribunals).

[59] HOLT & DALLAS, *supra* note 22**,** at 24; KRIANGSAK KITTICHAISAREE, INTERNATIONAL CRIMINAL LAW 17–27 (2001); *see supra* note 38 and accompanying text.

[60] Rome Statute, *supra* note 19, art. 6. The definition of genocide adopted by the Court is consistent with the definition contained in the Genocide Convention. Genocide Convention, *supra* note 2. There is no need to tie the crime to an armed conflict to be genocide. It is the *mens rea*, or intent, element of the crime that distinguishes genocide from crimes against humanity. KITTICHAISAREE, *supra* note 59, at 69. Note, too, that "every act of Genocide constitutes a Crime Against Humanity, although not every Crime Against Humanity amounts to Genocide . . . and ethnic cleansing is a Crime Against Humanity, but it is not *per se* Genocide." *See* Dinstein Address, *supra* note 4, at 1–2.

[61] Rome Statute, *supra* note 19, art. 7; *see* Dinstein Address, *supra* note 4, at 1–8; ELSEA, *supra* note 35, at 14–16.

[62] Rome Statute, *supra* note 19, art. 8. The Court's jurisdiction over war crimes is limited to those "in particular when committed as part of a plan or policy or as part of a large scale commission of such crimes." *Id*. The drafters intended this language to serve as a jurisdictional threshold to prevent the ICC from taking up relatively insignificant cases. However, a concern exists that if the elements within the Statute are "interpreted within the established framework of the international law of armed conflict," no proof of the existence of any "plan or policy" to commit a war crime will be required, thus lowering the threshold significantly. ELSEA, *supra* note 35, at 19. As discussed in detail later in this article, initial cases addressed by the Prosecutor make it quite evident that the Court is, in fact, applying a "gravity threshold," and rejecting cases that do not meet this threshold. Nevertheless, this significant concern over the interpretation of a critical portion of the Statute clearly demonstrates why the United States *must* stay engaged and cooperate with the Court to ensure that it properly carries out its duties to the world community. *See infra* notes 91–97 and accompanying text for a discussion of potentially "politicized" prosecutions and the Court's response to allegations concerning the United States and coalition forces in Iraq.

[63] Press Release, ICC, Special Working Group on the Crime of Aggression 1–3 (Feb. 13, 2009), *available at* http://www.icc-cpi.int/Menus/ASP/; Rome Statute, *supra* note 19, art. 5. Some, to include the United States, fear that the Statute may ultimately divest the UNSC of its prerogative in determining whether an act of aggression has occurred. This ultimately hinges on the interpretation of the "consistent with the UN Charter" language in the Statute. If the Statute definition requires a determination by the UNSC that a crime of aggression has occurred, then the UNSC obviously retains its prerogative—if not, then legitimate acts of self-defense could potentially be prosecuted as crimes of aggression. ELSEA, *supra* note 35, at 20–21. This is yet another reason why the United States *must* participate, to ensure that a final definition of aggression includes a determination by the UNSC that aggression has, in fact, occurred.

[64] The Court has actually received over 7900 "communications" since July 2002, from more than 170 different nations—with the United States, United Kingdom, Germany, and France submitting the majority—containing allegations regarding potential cases. ICC, Office of the Prosecutor, Communications, Referrals and Preliminary Analysis, http://www2.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Office+of+the+Prosecutor/Comm+and+Ref/ (last visited Apr. 20, 2009). Of the communications received, 80% were determined to be "manifestly outside" the Court's jurisdiction once an initial review was complete. *Id.* The Prosecutor has issued two response letters—one concerning allegations stemming from the Iraq conflict, and the other out of Venezuela—both on 9 February 2006. *Id*. The Prosecutor is currently in the process of a preliminary analysis of allegations raised in a number of countries to include Chad, Kenya, Afghanistan, Georgia, Colombia, and Palestine. *Court Structure*, *supra* note 49. The Statute requires the Prosecutor to consider the following when analyzing information provided to the Court to determine if a basis exists to conduct an investigation: "if a *reasonable basis* exists to believe that a crime within the jurisdiction of the Court has been committed [jurisdiction]; the gravity of the crimes [admissibility]; complementarity with national proceedings [admissibility]; and interests of justice." *Id.* (emphasis added); Rome Statute, *supra* note 19, arts. 5–8, 12–13, 17–18, 53.

Congo (DRC), the Republic of Uganda, and the Central African Republic (CAR) have all referred cases, all of which are still active.[66] In 2004, the ICC commenced its first investigations, looking into alleged crimes in the DRC and Northern Uganda after the governments of both the DRC and Uganda asked the Court to investigate and confirmed a willingness to assist and support the Court. The ICC then issued its first arrest warrants in July 2005, for five leaders of the Lord's Resistance Army in Uganda, accused of provoking and directing over twenty years of conflict, crimes against humanity, and war crimes, to include enslavement and sexual slavery, rape, murder, enlisting children as soldiers, and intentionally targeting civilians.[67] Conflict has raged in the DRC for almost as long, giving rise to a pattern of rape, torture, forced displacement, and the use of children as soldiers, among other crimes. From 2006 to 2007, the Court issued arrest warrants for four rebel group leaders in the DRC, to include Thomas Lubanga Dyilo, accused of war crimes and crimes against humanity.[68] In 2006, the Court opened up an investigation concerning Darfur,[69] which, given Sudan's status as a non-ICC party and unwillingness to consent to the Court's jurisdiction, would not have happened without the UNSC referral. On 2 May 2007, the Court issued arrest warrants for both the Sudanese Interior Minister and a Janjaweed leader.[70] Also in 2007, the Court opened up an investigation into the allegations arising primarily during the period of 2002 to 2003 within the CAR, which matter is now in the pre-trial stage, being heard by Pre-Trial Chamber III.[71] On 26 January 2009, the Court commenced its first trial, against

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[65] ICC, Office of the Prosecutor, Situations and Cases, http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/ (last visited Apr. 20, 2009) [hereinafter *ICC Situations and Cases*]. In March 2005 the UNSC, in Security Council Resolution 1593, made its first referral to the Court, directing it to investigate the situation in Darfur, Sudan. S.C. Res. 1593, U.N. DOC. S/RES/1593 (Mar. 31, 2005). In October 2004, the UN had established the International Commission of Inquiry on Darfur (Darfur Commission), which found the circumstances in Darfur to pose a threat to international security, and that what had taken place could potentially qualify as crimes against humanity and war crimes. UNITED NATIONS, REPORT OF THE INTERNATIONAL COMMISSION OF INQUIRY ON DARFUR TO THE UNITED NATIONS SECRETARY-GENERAL (25 Jan. 2005), *available at* http://www.un.org/News/dh/sudan/com_inq_darfur.pdf. The claims allege atrocities against women, extrajudicial executions, and torture, among many other claims. *Id.*

[66] The Prosecutor initially sent the third case, referred by the CAR government on 22 December 2004 to the Court for investigation, back to the CAR, encouraging it to use its national system to prosecute the case, and vowing to monitor the situation. The Cour de Cassation, the nation's highest judicial entity, then confirmed that the CAR would be unable to carry out such a prosecution—as required by the Statute—and the ICC then opened an investigation into the allegations, which centered, for the first time, on a majority of sex crimes vice murders. Press Release, ICC, Prosecutor Opens Investigation in the Central African Republic (Jan. 22, 2007), *available at* http://www.icc-cpi.int/; AMICC, *The Referral to the ICC by the Government of the Central African Republic* 1–3 (Aug. 30, 2005), *available at* http://www.amicc.org/docs/Central%20African%20Republic.pdf.

[67] In Uganda, a nine-month investigation revealed that at least 2200 killings and 3200 abductions occurred from July 2002 through June 2004—including men, women, boys, and girls from different localities; the destruction of various villages and camps and the burning/killing of families; and, after abducting children, forcing young boys to kill and young girls to be sex slaves. On 8 July 2005, the ICC indicted five individuals involved in the crimes in Uganda: Joseph Kony, the LRA Leader, who was charged with crimes against humanity and war crimes, and four of his top Lieutenants (one of these four, Raska Lukwiya, was killed on 12 August 2006, and thus the proceedings have been terminated against him). ICC, *Office of the Prosecutor, Prosecutions*, http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Office+of+the+Prosecutor/Prosecutions/ (last visited Apr. 20, 2009) [hereinafter *ICC Prosecutions*] (to include the Warrants of Arrest (Public Redacted Version) for the five LRA Leaders detailing their crimes).

[68] In the DRC, close to four million individuals have died and almost as many have been forced to flee the conflict, which dates back to the 1990s. On 10 February 2006, the Court issued an arrest warrant for Dyilo, the alleged founder, president, and commander-in-chief of the two rebel groups in the DRC. He was arrested in Kinshasa on 17 March 2006 and transferred to The Hague. On 29 January 2007, Pre-Trial Chamber I confirmed the charges against him for enlisting, conscripting, and using children under fifteen in active hostilities and referred his case to the Trial Chamber for trial. On 26 January 2009, he became the first defendant to stand trial. *ICC Prosecutions*, *supra* note 67, at 1; *see also* Press Release, ICC, The Office of the Prosecutor of the International Criminal Court Opens its First Investigation (23 June 2004), *available at* http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/2004/the%20office%20of%20the%20prosecutor%20of%20the%20international%20criminal%20court%20opens%20its%20first%20investigation. Three other arrest warrants were issued, and two have been executed against Germain Katanga and Mathieu Ngudjolo Chui, both former commanders of rebel forces, whose cases went before the Pre-Trial Chamber, which recently referred them for trial before Trial Chamber II. The trial is scheduled to begin on 24 September 2009. The fourth arrest warrant is for Bosco Ntaganda, a former associate of Dyilo, who remains at large. *ICC Situations and Cases*, *supra* note 65, at 1; Press Release, ICC, Trial of Germain Katanga and Mathieu Ngudjolo Chui to Commence on 24 September 2009 (27 Mar. 2009), *available at* http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/trial%20of%20germain%20katanga%20and%20mathieu%20ngudjolo%20chui%20to%20commence%20thursday_%2024%20september%202009.

[69] The Prosecutor, in conducting a thorough preliminary inquiry on Darfur, a severely troubled region in Sudan, reviewed over 2500 documents and a sealed list of fifty-one suspects provided by the Darfur Commission, as well as 3000 documents provided by the African Union, and interviewed over fifty independent experts on the situation. HOLT & DALLAS, *supra* note 22, at 33; *see also* Press Release, ICC, The Prosecutor of the ICC Opens Investigation in Darfur (6 June 2005), *available at* http://www2.icc- cpi.int/menus/icc/situations%20and%20cases/situations/situation%20icc%200205/press%20releases/otp%20the%20prosecutor%20of%20the%20icc%20opens%20investigation%20in%20darfur.

[70] Colum Lynch, *U.N. Panel Finds No Genocide in Darfur but Urges Tribunals*, WASH. POST, Feb. 1, 2005, at A1. On 27 February 2007, the Office of the Prosecutor formally requested summonses to appear, from Pre-Trial Chamber I, for two individuals—Ahmad Muhammad Harun, former Minister of State for the Interior of the Government of Sudan, and Ali Muhammad Ali Abd-Al-Rahman (Ali Kushayb), a Janjaweed leader. The Prosecutor indicated that he had found a reasonable basis to believe, on the evidence collected, that the two men were criminally responsible for "51 counts of alleged crimes against humanity and war crimes—including persecution, torture, murder, and rape committed in Darfur in 2003 and 2004." *ICC Prosecutions*, *supra* note 67. Two months later, the Court issued arrest warrants for both men. *Id*.

[71] *ICC Situations and Cases*, *supra* note 65.

Dyilo, who is accused of committing war crimes.[72] Finally, on 4 March 2009, the Court issued an arrest warrant for Sudanese President Omar Hassan Ahmad al Bashir, one of the three suspects in the two cases out of Darfur, currently pending before Pre-Trial Chamber III. The Court's action in so doing has unfortunately rekindled the flames of violence in this conflict-ravaged region, and caused the Sudanese government to expel some international humanitarian relief organizations from Darfur.[73]

IV. The U.S. Objections to the International Court

On the eve of the Rome Conference, President Clinton and many in Congress favored creating the ICC, just as the United States had championed the *ad hoc* war crimes tribunals of the 1990s.[74] Admittedly, the United States supported the *ad hoc* courts not just because of the lofty goals they served in terms of world justice, but because their jurisdiction was determined by the UNSC, over which the United States had a measure of control, lessening the risk to U.S. personnel.[75] Although these tribunals worked well, having three of them in operation at one time with others under consideration caused the UNSC to experience "Tribunal Fatigue."[76] The process of establishing a tribunal was extremely time, money, and resource-intensive and, as such, China and the other Permanent Members of the Security Council "let it be known that this would be the last of the UNSC-established *ad hoc* tribunals."[77] The lack of a permanent system to investigate and prosecute, coupled with an increase in devastating conflicts, meant the momentum for a permanent court intensified, with near unanimous UN support. This expressway of momentum led straight to Rome.

In Rome, the United States was a vital and energetic participant. Yet by the end of the conference, the United States voted against adopting the treaty. Although President Clinton eventually signed the treaty on 31 December 2000,[78] he simultaneously declared that the United States had "deep reservations" about the Statute's "fundamental flaws."[79] President

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[72] *Id.*; Press Release, ICC, Trial of Germain Katanga and Mathieu Ngudjolo Chui to Commence Thursday, 24 September 2009 (27 Mar. 2009), *available at* http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/trial%20of%20germain%20katanga%20and%20mathieu%20ngudjolo%20chui%20to%20commence%20thursday_%2024%20september%202009.

[73] *Id.* After a second investigation by the Office of the Prosecutor, and subsequent review by the Pre-Trial Chamber, the Court issued an arrest warrant for President al-Bashir on charges of war crimes and crimes against humanity. *ICC Prosecutions*, *supra* note 67, at 2; *The Newshour with Him Lehrer* (PBS television broadcast Mar. 4, 2009), *available at* http://www.pbs.org/newshour/bb/africa/jan-june09/sudananalysis_03-04.html (interview with Colum Lynch, Wash. Post columnist). All three cases out of Darfur are currently being heard before Pre-Trial Chamber I, and all three suspects remain at large. *See Catch Me if You Can: The President of Sudan Thumbs His Nose at the International Criminal Court* 1–2, ECONOMIST.COM, Mar. 28, 2009, http://www.economist.com/displaystory.cfm?story_id=13395465&CFID=57153563&CFTOKEN=82284846 (discussing, among other issues, the difficulties experienced by the Court in executing its search warrants); Christophe Fournier, Op-Ed., *Punishment or Aid?*, N.Y.TIMES, Mar. 28, 2009, *available at* http://www.nytimes.com/2009/03/28/opinion/28iht-edphelan.html..

[74] Scharf, *supra* note 24, at 441. Professor Scharf quotes David Scheffer, then-U.S. Ambassador-at-Large for War Crimes Issues, speaking before the Senate Foreign Relations Committee on 23 July 1998: "Our experience with the establishment and operation of the International Criminal Tribunals for the former Yugoslavia and Rwanda had convinced us all of the merit of creating a permanent court that could be more quickly available for investigations and prosecutions and more cost-efficient in its operation." *Id.* The United States clearly understood that an entity like the ICC "could help end impunity, bring about justice to some of the world's worst war criminals and provide a mechanism for encouraging national investigations and prosecutions of such crimes." HOLT & DALLAS, *supra* note 22, at 19 (citing a quote taken from Ambassador David Scheffer, *Article 98(2) of the Rome Statute: America's Original Intent*, 3 J. OF INT'L CRIM. JUST. 333, 353 (2005)).

[75] Scharf, *supra* note 24, at 440.

[76] HOLT & DALLAS, *supra* note 22, at 24. The UN had established the ICTY, ICTR, and Special Court for Sierra Leone, and there was a push to create *ad hoc* courts for Cambodia and East Timor. *Id.*

[77] Scharf, *supra* note 24, at 440. Reaching agreement on the statute governing the Court's operations, electing Prosecutors and judges, locating suitable courtrooms, offices, and prisons, and obtaining sufficient funding to finance the tribunal proved to be quite difficult and ultimately exhausting for the UNSC members to conduct on a repeated basis. *Id.*

[78] Although it voted against the Statute on 17 July 1998, the United States did sign the "Final Act of the Conference," which is essentially a presentation of what transpired during the Rome Conference. By so doing, the United States ensured that it would still serve as a voting member of the Preparatory Committee, which was charged with drafting the rules of procedure and evidence, elements of the crime, UN-ICC Memorandum of Agreement, budget, and more. ELSEA, *supra* note 35, at 6, 7 n.29; *see also* Final Act of the International Criminal Court, http://untreaty.un.org/cod/icc/statute/finalfra.htm (last visited Apr. 20, 2009) (providing copies of the listed documents).

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> Nevertheless, President Clinton signed the treaty on December 31, 2000—the last day it was open for signature without simultaneous ratification, at the same time declaring that the treaty contained "significant flaws" and that he would not submit it to the Senate for its advice and consent 'until our fundamental concerns are "satisfied."

Bush then echoed those concerns as the United States delivered to the UN both its intention to *not* ratify the Statute and formal renouncement of any obligations under the Statute.[80] As such, the United States and Turkey are the only NATO members not to join the Court, and the United States is the only democracy in the world to actively oppose it[81]—something that does not sit well with European Union countries, all of whom support the ICC, or the many other Court proponents.[82]

At the core of our opposition is a "fear that other nations will use the ICC as a political forum to challenge actions deemed legitimate by responsible governments."[83] In essence, the United States is concerned that the Court might assert jurisdiction over U.S. servicemembers charged with war crimes arising out of a legitimate use of force, or over U.S. civilian leaders in the course of making policy decisions, regardless of whether the United States is a party to the Statute.[84] In Rome, the United States sought an exemption from the Court's jurisdiction over these individuals, "based on the unique position the United States occupies with regard to international peacekeeping."[85] What it received was almost everything for which it asked, except what in essence was an "iron-clad veto of jurisdiction over U.S. personnel."[86] As such, the United States felt obligated to oppose the Court, and what follows are the major U.S. objections to the Court and an analysis of each.

ELSEA, *supra* note 35, at 3. As is evident, the United States' concerns over the Statute and its opposition to ratification predated the Bush Administration; this is not purely an issue or concern of those on President Bush's staff, as some advocacy groups and members of the media have suggested. However, the Bush Administration appears to have increased the level of opposition to the Court.

[80] "Although some in the media have described the act as an 'unsigning' of the treaty, it may be more accurately described as a notification of intent not to ratify." *Id*. at 1. The 6 May 2002 letter from Under Secretary of State John Bolton to the UN Secretary-General stated:

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

Letter from John Bolton, U.S. Under Sec'y of State for Arms Control and Int'l Sec., to Kofi Annan, UN Sec'y-Gen. (May 6, 2002), *available at* http://2001-2009.state.gov/r/pa/prs/ps/2002/9968.htm; *see also* U.S. Dep't of State, Off. of War Crimes Issues, The Int'l Crim. Ct: A Fact Sheet (May 6, 2002), *available at* http://www.policyalmanac.org/world/archive/state_international_criminal_court.shtml [hereinafter DOS Fact Sheet] (providing the U.S. decision, background information, a list of the significant problems with the treaty, and some alternate mechanisms to the ICC). Because the United States signed the Statute, it was required under international law to refrain from any activity that would contravene the purpose of the Statute. However, once the United States indicated its intent to not ratify, this requirement terminated. ELSEA, *supra* note 34, at 4 n.17.

[81] Human Rights Watch, Questions and Answers about the International Criminal Court, http://www.hrw.org/campaigns/icc/qna.htm (last visited Apr. 20, 2009) [hereinafter HRW *International Justice*]. There are currently nineteen members of NATO, all of which—save for Turkey and the United States—have ratified the Rome Treaty.

[82] A total of 108 nations have ratified the Statute and 139 are signatories. *Id*.; *About the Court*, *supra* note 28. One issue that may not sit well with some Americans is that the Court has no competence to impose the death penalty as a lawful sentence. When justified by the nature of the crime—and most crimes tried before the Court will clearly be of a serious nature—the Court may impose sentences ranging up to life imprisonment, as well as fines and forfeiture of proceeds, property, or assets derived from commission of the crime(s). In light of events in Europe, where many former Communist countries have joined the Council of Europe and signed on to the European Human Rights Convention—which requires, as part of becoming a signatory, that the nation abolish the death penalty within its borders—it was extremely unlikely heading into the deliberations and debates in Rome that the United States, or any other pro-death penalty nation, would succeed in convincing the Conference to adopt the death penalty as a permissible punishment. In the end, as with many contested issues regarding the Court, it becomes a balancing test. If the death penalty issue becomes a "red line" for the United States, and the choice becomes a Court with no death penalty, or no Court, the prudent decision is to opt for an operational and effective Court now, with a determination to work cooperatively to change those aspects of the Court that require such change. Note that the number of countries worldwide that have the death penalty as an authorized punishment is now down to 59 and, of those, only 25 actually execute individuals under such authorization. AMNESTY INT'L, CRUEL, DISCRIMINATORY, UNFAIR, AND DEGRADING: THE DEATH PENALTY IN 2008 (Mar. 23, 2009), *available at* http://www.amnesty.org/en/news-and-updates/cruel-discriminatory-unfair-and-degrading-%E2%80%93-death-penalty-2008-20090323. As such, it is unlikely that the Assembly of States Parties will ever vote to accept the death penalty as a permissible punishment.

[83] ELLEN GRIGORIAN, CONG. RESEARCH SERV. REP., THE INTERNATIONAL CRIMINAL COURT TREATY: DESCRIPTION, POLICY ISSUES, AND CONGRESSIONAL CONCERNS, RL30020, at 9 (Jan. 6, 1999).

[84] The United States believes that accountability for such crimes comes from national judicial systems and *ad hoc* international tribunals properly established by the UNSC. DOS Fact Sheet, *supra* note 80. However, this shortsighted and parochial perspective fails to account for the lack of properly functioning national courts in some countries, or an unwillingness to prosecute in rogue regimes, or the "Tribunal Fatigue" suffered by the UN and many member countries when attempting to establish numerous *ad hoc* tribunals. The ICC is a practical and responsible solution to all of these problems. Moreover, should the United States choose to so prosecute in its national courts, the ICC would defer such prosecution to the United States, as discussed at *infra* notes 91, 93–94 and accompanying text.

[85] ELSEA, *supra* note 20, at 4. The United States contends that the potential for prosecution could negatively affect foreign policy and military operations, which is an infringement of U.S. sovereignty. *Id*. "[A]s the world's greatest military and economic power, more than any other country the US is expected to intervene to halt humanitarian catastrophes around the world. This unique position renders US personnel uniquely vulnerable to the potential jurisdiction of an international criminal court." Scharf, *supra* note 24, at 441.

[86] Professor Scharf believes that the United States played "hard-ball" in Rome and came away with almost all it needed, but weakened the ICC in so doing. Scharf, *supra* note 24, at 442. To support this claim, he quotes Ambassador Scheffer's testimony before the Senate Foreign Relations Committee following the Rome Conference: "The US delegation certainly reduced exposure to unwarranted prosecutions by the international court through our successful efforts

A. Jurisdiction

The ICC asserts jurisdiction over certain crimes committed in a state party's territory, even if committed by non-party nationals. The impetus for the Court's more expansive reach was to ensure that it could assert jurisdiction over "rogue regimes," which would otherwise protect themselves simply by refusing to ratify the Statute, subverting the Court's primary purpose.[87] Yet notwithstanding this very reasonable rationale, the United States objects to this exercise of jurisdiction, because in casting this broad net, the Statute caught more than just rogue nations, it caught America.[88] However, as the United States is a party to treaties from which the Statute derived its definitions of crimes, U.S. nationals are already subject to crimes over which the Court will have jurisdiction.[89] The United States claims that the ICC's jurisdiction infringes on U.S. sovereignty, as the threat of prosecution may inhibit the conduct of U.S. foreign policy. But as one legal scholar notes, "Sovereignty does not provide a basis for exclusive jurisdiction over crimes committed by a State's nationals in a foreign country. Nor does a foreign indictment of a State's nationals for acts committed in a foreign country constitute an impermissible intervention in the State's internal affairs."[90] Finally, the Statute clearly intended to address the United States' concern through complementary jurisdiction.

B. Complementarity and "Politicized" Prosecution

Based on the ICC's construct, the United States alleges that some nations may use the Court to refer "trumped-up" charges against the United States, whose exposure is significantly greater than most due to its prominent role in international matters. Yet under the Statute, the Court must defer to national prosecution unless it finds that nation "unwilling or unable" to effect such investigation and prosecution. The United States fears that granting the Court this discretion will allow it to examine and potentially reject a sovereign state's decision not to prosecute, or the state's court's decision not to convict.[91] In response, Court proponents initially bristle at the notion that the United States is more susceptible to political maneuvering, especially when many nations contribute significant forces to peacekeeping operations and willingly subject them to the Court's jurisdiction, unlike the United States.

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to build into the treaty a range of safeguards that will benefit not only us but also our friends and allies." *Id*. Yet it is interesting to note that all of these concessions proved to be enough to satisfy 108 nations, to include the United Kingdom, Canada, France, and Russia, but not the United States. *Id*.

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> The ICC is intended to resolve the problem of impunity for perpetrators of atrocities, but has led to a different concern, namely, that the ICC may be used by some countries to make trumped-up allegations accusing other states' policymakers, or even implementers of disfavored policies, of engaging in criminal conduct. Probably the most divisive issue at the Rome Conference was the effort to reach a balance between the two extremes—how to bring perpetrators of atrocities to justice while protecting innocent persons from frivolous prosecution . . . .

ELSEA, *supra* note 35, at 21–22; Rome Statute, *supra* note 19, pmbl. ("Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished . . . ." and "[d]etermined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes . . . ." and "[r]ecalling that it is the duty of every state to exercise its criminal jurisdiction over those responsible for international crimes . . . .").

[88] Ambassador Scheffer, testifying before the Senate Foreign Relations Committee, indicated that "the treaty purports to establish an arrangement whereby US armed forces operating overseas could be conceivably prosecuted by the international court even if the US has not agreed to be bound by the treaty. . . . this is contrary to the most fundamental principles of treaty law." *Hearing on the Permanent International Criminal Court Before the Subcomm. on Int'l Operations, S. Comm. on Foreign Rel*., 105th Cong. 13 (23 July 1998). The Ambassador subsequently indicated that this ability represented the "single most fundamental flaw in the Rome Treaty that makes it impossible for the United States to sign the present text." David J. Scheffer, U.S. Ambassador for War Crimes, Address at the Annual Meeting of the American Society of International Law, International Criminal Court: The Challenge of Jurisdiction (Mar. 26, 1999). However, Professor Scharf contends that this argument "rests on shaky foundations," asserting that "the ICC's jurisdiction over nationals of non-party states . . . [is] . . . well-grounded in international law. The exercise of such jurisdiction can be based both on the universality principle and the territoriality principle." Michael P. Scharf, *The ICC's Jurisdiction Over the Nationals of Non-Party States: A Critique of the U.S. Position*, 64 L. & CONTEMP. PROBS. 71, 116 (2001).

[89] Moreover, the IMT (Nuremburg) and the ICTY (Yugoslavia) serve as precedent for the "collective delegation of universal jurisdiction to an international criminal court without the consent of the State of nationality of the accused." Scharf, *supra* note 24, at 443.

[90] *Id.* Professor Scharf believes that the argument presented by Court opponents concerning the Court's jurisdiction over non-party nationals, as stated in the treaty—that such jurisdiction violates the Vienna Convention on the Law of Treaties in that a treaty cannot bind a non-party—is actually an argument that the treaty affects the sovereignty interests of the United States. *Id*.

[91] Rome Statute, *supra* note 19, art. 17; ELSEA, *supra* note 20, at 7; DOS Fact Sheet, *supra* note 80, at 2.

Supporters of the ICC also view the claim as greatly exaggerated. With the following procedural protections built into the Statute, the belief is that the Court is not likely to experience success in any "politicized" prosecutions. First, the Prosecutor must receive authorization from the Pre-Trial Chamber to initiate any investigation on a matter not referred by the UNSC or a state party, which decision may be appealed to the Appeals Chamber.[92] Second, the Prosecutor must notify all states with an interest in prosecuting a case of the Court's intent to investigate. A state then has one month to notify the Court that it will investigate—a decision to which the Prosecutor must defer, unless he can convince the Pre-Trial Chamber that the state's actions are not genuine, which decision may again be appealed.[93] Third, the Statute raises the threshold for cases the Court may address, giving it jurisdiction over only those "grave" breaches executed as part of a "plan or policy or large scale commission of such crimes."[94] Last, the UNSC has authority under the Statute to defer, via a resolution, any investigation or prosecution for twelve months, on a renewable basis.[95] Additionally, with the benefit of hindsight, the United States may now review and assess the Court's almost seven years worth of decisions as a gauge of any inclination to make determinations for purposes contrary to the Court's intent—and it will observe none. Instead, it will see a Prosecutor who declined to investigate allegations concerning the conduct of our personnel in Iraq,[96] despite multiple submissions by public and private entities forcefully urging him to take action against the United States—the essence of political persuasion.[97] This obviously bodes well for the credibility of the institution as a whole, and the Prosecutor in particular, as not willing to bow to any pressure, real or perceived, especially when the tide of public opinion—to include that within the United States—had turned significantly against continued U.S. and coalition action in Iraq.

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[92] Rome Statute, *supra* note 19, art. 15; Scharf, *supra* note 24, at 442. As indicated above, both the Prosecutors and Judges are elected by the Assembly, which now comprises over 108 different countries—many allies and friends of the United States and democratic nations. It is indeed quite unlikely that the whole of the Assembly would "lose its good sense" and allow unfounded prosecutions or elect individuals who were anti-American and bent on dragging U.S. personnel before the Court. M. Cherif Bassiouni, *Court Is No Threat to Us*, CHI. TRIB., July 14, 2002, at 1.

[93] Rome Statute, *supra* note 19, art. 18. Again, this is the principle of complementarity. Speaking at a press conference in June 2002, former U.S. Secretary of Defense William Cohen admitted that the Court's limited authority would serve to protect U.S. troops and officials. Cohen indicated that "over the years" the United States has clearly demonstrated that "wherever there is an allegation of abuse on the part of a soldier we have a judicial system that will deal with it very effectively. As long as we have a respected judicial system then there should be some insulation factor." HRW *International Justice*, *supra* note 81, at 1.

[94] Rome Statute, *supra* note 19, art. 8.

[95] *Id.* art. 16. As such, the UNSC has a "collective veto" power over the Court.

[96] ELSEA, *supra* note 20, at 7.

> On February 9, 2006, the Chief Prosecutor issued a letter explaining his reasons for declining to launch an investigation despite multiple submissions by private groups urging action against the United States. In addition to acknowledging the limits of the Court's jurisdiction, which he noted precluded pursuing charges based on the legality of the decision to invade, the Prosecutor noted that the allegations . . . were "of a different order than the number of victims found in other situations under investigation," and concluded that the allegations were of insufficient gravity to warrant an investigation.

Id.; Letter from Luis Moreno-Ocampo, Chief Prosecutor, Int'l Criminal Court, The Hague (9 Feb. 2006), *available at* http://www2.icc-cpi.int/NR/rdonlyres/04D143C8-19FB-466C-AB77-4CDB2FDEBEF7/143682/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf [hereinafter Moreno-Ocampo Letter] (addressing over 240 communications from individuals and organizations regarding U.S. military operations in Iraq). Moreno-Ocampo explained that the Court does not have personal jurisdiction over non-state party nationals who allegedly committed crimes (the United States), in non-state party territory (Iraq). *Id.* More importantly, he determined that the gravity of the alleged offenses did not rise to the level of either the other crimes currently under investigation, or the threshold established by the Statute. *Id*. The basis of his decision to not investigate further shed significant light on the Court's method of analysis in reviewing allegations, and should significantly reduce U.S. anxiety over the likelihood of a politicized court with a politicized prosecutor.

[97] Golzar Kheiltash, *Ocampo Turns Down Iraq Case: Implications for the US*, GLOBAL POL'Y F., Feb. 2006, http://www.globalpolicy.org/intljustice/icc/2006/02ocampo.htm (describing the decision and reasoning as "critical to the Court's credibility" and "demonstrate[ing] to even the staunchest critics that the ICC is truly a Court of last resort," and that it "undermines the US administration's position that the ICC is a politicized Court that will be used to unfairly target US service members and personnel"); ELSEA, *supra* note 20, at 7–8. Prosecutor Moreno-Ocampo also appeared content with the United States' attempts to investigate and prosecute the alleged offenses.

> In light of the conclusion reached on gravity, it was unnecessary to reach a conclusion on complementarity. It may be observed, however, that the Office also collected information on national proceedings, including commentaries from various sources, and that national proceedings had been initiated with respect to each of the relevant incidents.

Id. at 7 n.33 (quoting Moreno-Ocampo Letter, *supra* note 96, at 1–2). It is critical to note that the system worked as intended in all respects—to include an analysis of jurisdiction, admissibility/gravity of the alleged offenses, and complementarity.

C. Overzealous or "Politicized" Prosecutor

Tied to the prior objection, the United States believes that the Prosecutor, however well-intentioned the individual may be, is ripe for "politicized prosecutions" because his decisions and actions are at his unchecked discretion. However, this argument also holds little sway. As previously detailed, the Prosecutor is bound to seek permission from the Pre-Trial Chamber for any self-initiated investigation, and that decision is subject to an interlocutory appeal to the Appeals Chamber. The Prosecutor is also subject to removal on vote by the Assembly for cause. Clearly, the Conference was attempting to again strike that delicate balance between enough independence and power, absent political (read: UNSC) control—over both Prosecutors and judges—to obtain a fair outcome, with the risk posed by an overzealous Prosecutor. At Rome, the United States attempted to obtain a UNSC check on the Prosecutor. Yet most nations perceived the UNSC as being just as politicized, if not more, such as to cause the typical stalemate and resulting impunity that frequently occurs in these cases. Finally, as set forth above, almost seven years of experience with the Court, and six with this Prosecutor, has demonstrated no evidence whatsoever of any willingness to politicize his, or the Court's, decisions.[98]

D. Constitutional Concerns and Lack of Due Process

The United States also argues that the Court will not afford U.S. personnel due process rights guaranteed under the U.S. Constitution, such as the right to a jury trial. However, the Statute actually provides a comprehensive array of procedural safeguards—negotiated by Department of Justice (DOJ) representatives in Rome—that track the Bill of Rights.[99] The DOJ's Office of Legal Counsel also opined that U.S. ratification of the Statute, and surrender of U.S. nationals for ICC prosecution, would not violate any provisions of the Bill of Rights, nor Article III of the Constitution. Moreover, there are any number of instances in which U.S. nationals do not receive all U.S. procedural protections: overseas trials by foreign governments, military courts-martial (bench trials), and *ad hoc* international tribunals are all good examples.[100] Finally, with the current U.S. policy on military tribunals, such U.S. claims will inevitably lead to accusations that the United States is applying a double standard.[101]

E. Aggression and Usurping the UNSC's Role

Finally, the United States contends that the Statute's grant to the Court of the authority to define and punish "aggression" usurps the UNSC's role as specified in the United Nations Charter.[102] The United States fears that the Court may ultimately divest the UNSC of its prerogative in determining whether an act of aggression has actually occurred—such as in cases like the US intervention in Iraq. Crimes of aggression—formerly referred to as "crimes against peace"—are within the Court's

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[98] Rome Statute, *supra* note 19, arts. 15, 46. Philippe Kirsch, the French-Canadian (former) President of the ICC, responded to this objection to the Court as follows: "This business about politically-motivated prosecutions . . . [f]irst of all is extremely difficult to substantiate on the basis of the legal requirements of the statute . . . But also, it has received no substantiation in practice . . . there is not a shred of evidence that the ICC has done anything of a political nature." Joshua Rozenberg, *The Court That Tries America's Patience*, GLOBAL POL'Y F., Jan. 12, 2006, *available at* http://www.globalpolicy.org/intljustice/icc/2006/0112patience.htm. "Concerns about a runaway prosecutor are out of place because any indictment has to be confirmed by a panel of three judges, subject to appeal before a different panel of five judges." Bassiouni, *supra* note 92, at 1. Thus, it would necessitate eight "runaway" judges, from different countries with different perspectives and agendas (if any), to confirm any unsubstantiated prosecution that one runaway prosecutor wanted to set in motion. *Id*.

[99] "The Procedures of the ICC contain more guarantees than the American criminal justice system. They provide for every right guaranteed in the US Constitution except for a jury trial." Bassiouni, *supra* note 92, at 1–2. These include rights to a *Miranda*-type warning, defense counsel, reciprocal discovery, speedy trial, presumption of innocence, confrontion of witnesses, exculpatory evidence, protection against double jeopardy, and a right to appeal. ELSEA, *supra* note 35, at 29–39. Some commentators contend that the Statute contains "the most comprehensive list of due process protections which has so far been promulgated." *Id*. at 29 n.146; Monroe Leigh, Editorial Comment, *The United States and the Statute of Rome*, AM. J. INT'L L. 124, 130–31 (2001). The only significant right not afforded is the right to a trial by jury. The Court will use three-judge panels for bench trials vice a jury, to have trained international law jurists who understand the law and can provide a very detailed, written opinion as to guilt or innocence. Further, a change permits the Prosecutor to appeal if a trial judge happens to misinterpret international law, either in favor of or against the defendant. Scharf, *supra* note 24, at 448.

[100] *See* Leigh, *supra* note 99, at 130–31; Paul C. Szasz, *The United States Should Join the International Criminal Court*, 9 USAFA J. LEG. STUD. 1, 15 (1999).

[101] ELSEA, *supra* note 20, at 9–10.

[102] U.N. Charter art. 39. As an *acceptable* definition of the elements of the term "aggression" has never been achieved, Article 39 of the Charter allows the UNSC to decide if aggression has occurred and, if so, to take action against "any threat to the peace, breach of the peace, or act of aggression." *Id*.; *see also* Jimmy Gurule, *United States Opposition to the 1998 Rome Statute Establishing an International Criminal Court: Is the Court's Jurisdiction Truly Complementary to National Criminal Jurisdictions?*, 35 CORNELL INT'L L. J. 1–4 (2002).

jurisdiction, but are not yet defined. The Statute calls for an amendment to eventually define aggression and specify conditions for the Court's exercise of jurisdiction.[103] Thus, all state parties will eventually debate and then ultimately vote on the definition. Of course, as the United States is *not* a party, it will *not* have the opportunity to cast such a vote. Moreover, Article 5 requires that any definition and jurisdictional conditions be consistent with the UN Charter's provisions. As a UNSC Permanent Member, the United States has more than ample influence to ensure that the ICC's eventual definition and conditions so comply. As long as the ICC language requires a UNSC determination that a crime of aggression has occurred, then the UNSC obviously retains its prerogative.[104]

These five topics comprise the most significant US objections to the Rome Statute and the ICC and, as demonstrated, none are irresolvable. Like any new institution, certain unknowns will only become recognized and understood by the United States through time, experience, effort, and a cooperative working relationship with the Court.

V. The U.S. Response to the International Criminal Court[105]

A person stands a better chance of being tried and judged for killing one human being than for killing 100,000.[106]

Having failed to obtain the "iron-clad veto" of ICC jurisdiction which it sought at Rome, the United States turned to other methods to lessen the Court's impact on U.S. personnel—namely, the American Servicemembers' Protection Act (ASPA), Article 98 Agreements, and restrictions on peacekeeping operations,[107] described and analyzed below.

A. The American Service-Members' Protection Act (ASPA)[108]

Once President Clinton signed the Rome Treaty on 31 December 2000, congressional ICC opponents immediately launched into high gear to pass legislation aimed at reducing U.S. cooperation with the Court.[109] The result was the ASPA,

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[103] Rome Statute, *supra* note 19, art. 5; DOS Fact Sheet, *supra* note 80, at 2; *see supra* note 63 and accompanying text.

[104] ELSEA, *supra* note 20, at 8–9; *see also* Marc Grossman, Under Sec'y for Pol. Aff., U.S. Dep't of State, Address at the Center for Strategic and International Studies (May 6, 2002), *available at* http://www.state.gov/p/9949.htm.

[105] When considering the U.S. response to the formation and operation of the ICC, we should reflect back on how we as a nation—and a world—felt after we witnessed the horrors perpetrated on our citizens, and those of the world, by "evil men with evil ambitions." For instance, consider this statement issued out of the Potsdam Conference in July, 1945:

> There must be eliminated for all time the authority and influence of those who have deceived and misled the people of Japan into embarking on world conquest, for we insist that a new order of peace, security and justice will be impossible until irresponsible militarism is driven from the world.
>
> . . . .
>
> . . . [S]tern justice shall be meted out to all war criminals, including those who have visited cruelties upon our prisoners.

Agreements of the Berlin (Potsdam) Conference, July 17–Aug. 2, 1945, Annex II, 3(b)(6), (10), *available at* http://www.pbs.org/wgbh/amex/annex/truman/psources/ps_potsdam.html.

[106] Jose Ayala Lasso, U.N. High Commissioner for Human Rights, Address at the Columbia School of International and Public Affairs, May 14, 1996 (on file with author).

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> After Rome, US concerns about the extended jurisdiction of the Court remained. Even with the deep involvement of US diplomats and military officials during the negotiations and their effective spearheading of numerous protections, the Rome Statute did not provide the US with an absolute guarantee that American uniformed personnel could not fall under the jurisdiction of the Court. Court critics [such as Senator Jesse Helms] began a heavy campaign opposing the Court, drafting legislation to ensure that the US would always maintain primacy over nationals serving overseas.

HOLT & DALLAS, *supra* note 22, at 58.

[108] 22 U.S.C. §§ 7421–7432 (2006). Congress' clear intent in the ASPA was to protect U.S. forces, and others, from the ICC's jurisdiction.

[109] Senator Jesse Helms, then-Chairman of the powerful Senate Foreign Relations Committee, a staunch treaty opponent, issued a press release following Clinton's signing, stating that,

signed into law just one month after the ICC officially opened. The Act effectively prohibits U.S. cooperation with the ICC by forbidding federal, state, or local assistance to the Court, in terms of support with arrest, extradition, asset forfeiture, service of warrants, searches and seizures, classified information, and other comparable assistance.[110] It prohibits certain types of military assistance to nations that are a party to the Statute—except NATO and major non-NATO allies—but have not negotiated a bilateral or executive agreement with the United States to protect U.S. personnel from prosecution by the Court.[111] The Act regulates U.S. participation in UN peacekeeping operations, by restricting U.S. peacekeeping roles when U.S. forces are at risk of ICC prosecution—such as when the host nation is a party to the Statute, and the United States has not negotiated an agreement with that country to avoid such prosecutions, and the UNSC has not permanently exempted U.S. personnel from prosecution (requiring formal waiver of the restriction by the President).[112] Finally, the Act authorizes the President to "use all means necessary to bring about the release" of U.S. and allied personnel detained by the Court.[113] With the ASPA, Congress made its intent to undermine the Court's efforts abundantly clear, as well as its fear of the threat posed by the Court. While, as argued above, that threat is not well-founded, the Act fails to actually protect U.S. nationals from this perceived threat, because the Act does nothing to influence the mechanisms and procedures of the Court from the *inside*.[114] In reality, the Act does more harm than good, as it has been counterproductive to U.S. national security and the fight against terrorism, as discussed below.

B. Article 98 Agreements

Pursuant to the ASPA, the United States also actively promoted agreements with various countries, under Article 98 of the Rome Statute, to protect American personnel from ICC prosecution. Article 98 states,

> The Court [ICC] may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.[115]

Properly translated, the terms of Article 98 prohibit the Court from requiring state parties to act contrary to their obligations under any international agreements concerning the surrender of individuals to the Court for prosecution. As such, the United States sought to enter into these international agreements, preventing countries that sign from aiding in the investigation or prosecution of a U.S. national. These bilateral accords certify that neither signing state will arrest, extradite, or otherwise surrender the other's personnel to the Court. The clear intent of the agreement is to ensure that these States will not surrender or transfer U.S. personnel to the Court for prosecution. As an example, the agreement between the Philippines and the United States indicates, in essence, that no personnel of one country in the territory of the other country may be

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> Today's action is a blatant attempt by a lame-duck President to tie the hands of his successor. . . . This decision will not stand. I will make reversing this decision, and protecting America's fighting men and women from the jurisdiction of this *international kangaroo court*, one of my highest priorities in the new Congress.

Scharf, *supra* note 24, at 445 (emphasis added). One gets a keen sense of the U.S. willingness to cooperate with the Court in its noble and groundbreaking purpose when a leading U.S. politician—who could dramatically impact the country's ability to support the Court—refers to the ICC in public, and on the record, as an "international kangaroo court."

[110] 22 U.S.C. § 7423; Lilian V. Faulhaber, *American Servicemembers' Protection Act of 2002*, 40 HARV. J. LEGIS. 537, 545 (2003).

[111] These agreements are discussed in detail in Part V.B *infra*. Faulhaber, *supra* note 110, at 547–48; HOLT & DALLAS, *supra* note 22, at 60. Military assistance is defined in Chapters 2 and 5 of the Foreign Assistance Act of 1961, as amended, and the Arms Export Control Act, as covering defense articles and services and international military education and training (IMET) of foreign personnel. The Act highlights the benefit of IMET funding in furthering the goals of "international peace and security, improving the recipient's self-defense capabilities, and increasing awareness of human rights." *Id*.; ELSEA, *supra* note 20, at 12–13 nn.57, 58.

[112] If the host nation is a non-party, or the President determines that it is in the best interests of the nation to participate, the restriction does not apply. 22 U.S.C. § 7422; Faulhaber, *supra* note 110, at 545–46; *see infra* notes 121–26 and accompanying text for a detailed discussion of peacekeeping operations.

[113] § 7428. This is without question the most compelling provision of an otherwise astonishing piece of legislation, a provision which earned the Act the nickname the "Hague Invasion Act." *The Hague Invasion Act*, ST. LOUIS POST DISPTACH, Oct. 24, 2001, at B6 (on file with author); *see also* Faulhaber, *supra* note 110, at 546.

[114] *See* M. Tia Johnson, *The American Servicemembers' Protection Act: Protecting Whom?*, 43 VA. J. INT'L LAW 405, 471–84 (2003) (arguing that the Act neither strengthens the United States nor protects U.S. nationals).

[115] Rome Statute, *supra* note 19, art. 98.

"surrendered or transferred by any means" to an international court that the UNSC did not establish.[116] To sign such "deals" means U.S. restrictions on military assistance under the ASPA no longer apply—obviously, a strong incentive for some states to sign.[117] The United States has sought these pacts with both party and non-party nations, and has signed over 100 to date.[118] However, many Court supporters view the use of Article 98 in this manner as an inappropriate interpretation and expansion of the provision, primarily intended to cover Status of Forces Agreements (SOFAs) and Status of Mission Agreements (SOMAs).[119] The United States responded to this criticism by enacting the Nethercutt Amendment which, like the ASPA, prevented additional funding—direct economic support—to party states that have not signed a bilateral agreement.[120]

C. Restrictions on UN Peacekeeping Operations

One of the primary concerns with the Court's expansive reach centered on U.S. forces serving in peacekeeping operations.[121] As noted, the ASPA prohibits U.S. participation in these missions unless no risk of prosecution exists.[122] So significant was this concern, in July 2002 the United States vetoed an extension of the UNSC mandate for the UN mission in Bosnia over the lack of protection from ICC prosecution for U.S. forces. To resolve the crisis and continue the mission, the UNSC relented, granting immunity from prosecution for one year under Article 16, and renewed it for a second.[123]

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[116] HOLT & DALLAS, *supra* note 22, at 58 n.144. Court proponents refer to these agreements as "Bilateral Immunity Agreements," but Ambassador Scheffer indicates that a more appropriate term would be "Bilateral Non-Surrender Agreements," as they do not provide immunity from prosecution so much as they provide protection from surrender for prosecution. *Id*. at 59–60. Note that the Congressional Research Service raises an interesting issue on this point, concerning how the United States can use Article 98 of the Statute as a basis for these agreements and the non-surrender of individuals, when it has formally notified the UN that it will "not be bound by any" of the terms and obligations of the Rome Statute. ELSEA, *supra* note 20, at 11, 12 n.52.

[117] Faulhaber, *supra* note 110, at 547–48. The President may also waive the restriction for certain countries if he finds doing so in the national interest.

[118] The United States has entered into bilateral agreements with 102 countries. Only 21 have been ratified by that nation's Parliament (or equivalent), and 18 qualify as executive agreements, which do not require ratification. As such, only 30 of the 102 agreements actually have the force and effect to protect U.S. personnel from being surrendered by that nation to the Court. Conversely, 63 do not have force and effect, and another 54 countries have publicly declared that they will not enter into any such agreement with the United States. Of the 108 nations to have ratified the Statute so as to become a state-party, more than half have not signed agreements with the United States. Coalition for the International Criminal Court (CICC), Status of US Bilateral Immunity Agreements (BIAs) 1 (11 Dec. 2006), *available at* http://www.iccnow.org/documents/CICCFS_BIAstatus_current.pdf. Accordingly, assuming that the "non-surrender" agreements actually provide a modicum of protection for U.S. personnel, state-parties as well as non-state parties are not lining up to sign these agreements, notwithstanding the heavy-handed tactics of the United States in threatening to deny, and actually denying, aid to those countries (twenty-four states-parties lost all aid and assistance because they would not sign an agreement). *Id*.

[119]

> There is an argument within the international community about the use of Article 98 agreements, as negotiated by the US since Rome, and whether they should be recognized as having precedent over the Court's authority. This provision when originally included in the Statute was intended to cover Status of Forces Agreements (SOFAs) and Status of Mission Agreements (SOMAs), which establish the responsibilities of a nation sending troops to another country, as well as where jurisdiction lies between the US and the host government over criminal and civil issues involving the deployed personnel."

HOLT & DALLAS, *supra* note 22, at 59 (SOFAs typically cover armed forces and civilians in an official capacity, while SOMAs cover peacekeeping forces.).

[120] Consolidated Appropriations Act, 2005, Pub. L. No 108-447, 118 Stat. 2809. This Act was termed the Nethercutt Amendment because it was introduced by Representative George Nethercutt, a Republican Congressman from the State of Washington. *Id.* He added a provision into the State Department foreign appropriations bill requiring that countries that cooperate with the ICC, but who fail to sign BIAs with the United States, would lose Economic Support Funds (ESFs). Coalition for the International Criminal Court, Nethercutt Amendment, http://www.iccnow.org/?mod=nethercutt (last visited May 12, 2009).

[121] One commentator notes, however, that notwithstanding the substantial concern it expressed, the United States has not had, since the Court's inception, more than a small contribution to any UN mission. In June 2002, the United States had only 756 personnel on such missions, 33 of who were unarmed observers, 722 of who were police officers in Kosovo, and 1 who was a Soldier. By January 2006, that number had dropped to 370, with only 6 Soldiers. HOLT & DALLAS, *supra* note 22, at 63. "As of November 2008, 120 countries contribute a total of 90 thousand military personnel to UN Peacekeeping missions around the world. The US gave just 212 personnel, 190 of whom are police. . . . In the absence of personnel, the US tends to give cash and infrastructure support." Kristen Cordell, *Combating Sexual and Gender-based Violence: A Key Role for US Women Peacekeepers*, OPEN DEMOCRACY 1 (Mar. 3, 2009), *available at* http://www.ypfp.org/content/key-role-us-women-peacekeepers.

[122] The President must report to Congress and certify that U.S. personnel are not at risk because either the UN has granted them immunity while participating in that particular mission, or there exists some type of agreement that the United States has negotiated with the host government, and other participating nations, protecting U.S. personnel. Faulhaber, *supra* note 110, at 545–56.

[123] In UN Resolution 1422, adopted 12 July 2002, the UNSC created a "blanket deferral of prosecution" by the Court, for a one-year period, for those forces from non-party states. S.C. Res. 1422, ¶ 1, U.N. Doc. S/RES/1422 (July 12, 2002). The Council contended that such immunity was permissible under Article 16 of the Rome Statute, which allows the UNSC to defer any investigation or prosecution for a period of up to twelve months via UNSC resolution, on a renewable basis. As such, UNSC Resolution 1487 thereafter renewed the immunity for an additional year. S.C. Res. 1487, U.N. Doc. S/RES/1487 (June 12, 2003). However, the Council, under significant pressure from many directions for wilting under the United States pressure, failed to renew the resolution beyond 2004. ELSEA, *supra* note 20, at 23–24; Rome Statute, *supra* note 19, art. 16.

Subsequent UN missions have created the same concern. United States forces participated in the UN Mission in Liberia in 2003 because the UNSC granted all personnel from non-party states permanent immunity from the Court regarding acts tied to the mission.[124] Similarly, in Haiti U.S. forces participated in the UN Stabilization Mission in 2004 based on a U.S.-Haiti Article 98 Agreement.[125] Not surprisingly, the international community became frustrated with, and opposed to, U.S. actions in threatening to impede peacekeeping missions, broadening the intent of Article 16, and circumventing the Court's purpose at every turn. Then-UN Assistant Secretary-General John Ruggie captured this sentiment best in stating: "The problem here is not US opposition to the ICC, but that UN peacekeeping has been hijacked as a tool to express America's opposition to the ICC."[126]

D. An Analysis of the U.S. Response

The U.S. response, with its harsh restrictions on assistance, participation, and cooperation, clearly added a "coercive element" to the U.S. policy toward, and relationship—or lack thereof—with, the Court. United States efforts, while successful (to U.S. ICC critics) only in minor respects, have created significant worldwide resistance.[127] Moreover, they have had many unintended consequences for the United States with very little benefit. First, the prohibition on military and economic assistance to state parties lacking a bilateral agreement has negatively affected U.S. Theater Security Cooperation (TSC) Programs—that is, its engagement strategies focused on alliances and partnerships through education, training, military sales and service, and direct aid.[128] Second, the insensitive and oppressive bilateral agreements are not a failsafe—they do not completely foreclose all prosecutions and cover only a limited number of nations. These agreements do not provide complete immunity from prosecution, but only prevent that particular nation from surrendering U.S. forces and officials to the ICC. If the Court obtains custody of the Americans through other means, the agreement does not prevent the ICC from prosecuting—that is, the Bilateral Immunity Agreements (BIAs) do *not* bind the ICC in any way. Moreover, the accords obviously cover only those nations with which the United States has negotiated an agreement, so unless the United States gets every nation to sign, it is not completely protected from the reach of the Court. Finally, the agreements have required a significant level of effort, energy which it could better focus on working with the Court to enact changes that would enhance the Court's overall effectiveness and relationship with the United States. Additionally, revoking U.S. cooperation and assistance does little to impact the Court's affect on America, but greatly impacts the overall perception, if not reality, of the ICC's ability to operate effectively.[129] Simultaneously, the *negative* perception of the United States created

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[124] In July 2003, fighting between government forces and a number of warring factions grew increasingly more violent, threatening a humanitarian tragedy. The UN Mission in Liberia (UNMIL), which began in September 2003, was formed to "support the implementation of the ceasefire and peace agreements, support humanitarian and human rights efforts, and protect UN staff, facilities, and civilians in Liberia." U.N. Dep't of Peacekeeping Operations, U.N. Mission in Liberia (23 Mar. 2007), *available at* http://www.un.org/depts/dpko/missions/unmil/.

[125] "Having determined that the situation in Haiti continued to constitute a threat to international peace and security in the region," as the result of armed insurgents taking over the northern portion of the country, forcing President Aristide to resign, the UNSC, pursuant to Chapter VII of the UN Charter, established the UN Stabilization Mission in Haiti (MINUSTAH) in April 2004. U.N. Dep't of Peacekeeping Operations, U.N. Stabilization Mission in Haiti, (23 Mar. 2007), *available at* http://www.un.org/depts/dpko/missions/minustah/.

[126] HOLT & DALLAS, *supra* note 22, at 63. Ruggie also happens to be an American advisor to the Secretary-General, and now serves as the UN Special Representative on Business and Human Rights.

[127] The U.S. European allies found the ASPA provision authorizing the President to "use all means necessary" to bring about the release of U.S. and allied personnel detained or tried by the Court to be particularly distasteful. The European Union initially opposed Article 98 Agreements for its members, but relented when it received concessions from the United States. Nevertheless, U.S. attempts to obtain immunity from the Court are seen as either unnecessary or an unwarranted attempt to diminish the Court's efforts. ELSEA, *supra* note 20, at 26–27. With regard to peacekeeping missions, the UN Secretary-General, UNSC, and many in the UNGA strenuously opposed the extension of U.S. immunity for the UN Mission in Bosnia because they believed that the United States had "hijacked" UN peacekeeping efforts for its own national interests. Human rights groups and many other non-governmental organizations (NGOs) vehemently objected to all US efforts to circumvent the Court's aims. *Id*. at i, 27 n.119; HOLT & DALLAS, *supra* note 22, at 61, 63; *see also id*. at 63 n.162 (citing Juan Forero, *Bush's Aid Cuts on Court Issue Roil Neighbors*, N.Y. TIMES, at A1 (Aug. 19, 2005)).

[128] The U.S. military, and other agencies and institutions, have been frustrated over the consequences of the U.S. policy. General Bantz Craddock, then-Commander of U.S. Southern Command, testified before Congress that "there are negative unintended consequences that impact one half of the 92 countries in Europe and Africa through lost opportunities to provide professional military training." *Testimony of General Bantz Craddock Before the H. Comm. on the Armed Serv.*, 109th Cong. 1–3 (16 Mar. 2006). He also testified that "using IMET to encourage ICC Article 98 Agreements may have negative effects on long-term US security interests in the Western Hemisphere, a region where effective security cooperation via face-to-face contact is absolutely vital to US interests. . . . Extra-hemispheric actors [read: China] are filling the void left by restricted US military engagement with partner nations." *Id.* Others, such as former U.S. Secretary of State Condoleezza Rice and General James Jones, former NATO Supreme Allied Commander, have made statements that mirrored those of General Craddock.

[129] Some scholars believe that continued U.S. opposition to the Court will "bring about its demise," just as its failure to join the League of Nations resulted in that body's termination. Leila Nadya Sadat & S. Richard Carden, *The New International Criminal Court: An Uneasy Revolution*, 88 GEO. L.J. 381, 392 (2000).

by its failure to ratify the Statute—and strenuous opposition to, and efforts to undermine, the Court—is significant, and demonstrates that the United States has yet to adequately enhance and refine its strategic communications capabilities,[130] preventing it from effectively utilizing the global information environment to its advantage.[131]

The perception of the United States internationally is negative, at best. Aptly stated, America has a "serious image problem."[132] World opinion of the United States has declined substantially in recent years,[133] as evidenced by violent anti-U.S. protests in Latin America and the Middle East, Russian President Vladimir Putin's condemnation of America, and the new view that the United States is somehow responsible for the global economic crisis.[134] The United States is viewed as the "neighborhood bully"[135]—"arrogant, hypocritical, self-absorbed, and contemptuous of others"[136]—with whom other nations

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[130] Strategic communications

> constitute focused U.S. Government efforts to understand and engage key audiences in order to create, strengthen, or preserve conditions favorable to the advancement of US Government interests, policies, and objectives through use of coordinated programs, plans, themes, messages, and products synchronized with the actions of all elements of national power.

JOINT CHIEFS OF STAFF, JOINT PUB. 3-13, INFORMATION OPERATIONS I-10 (13 Feb. 2006) [hereinafter JOINT PUB. 3-13].

[131] "Strategic communications will play an increasingly important role in a unified approach to national security. . . . However, we should recognize that this is a weakness across the US Government . . . ." U.S. DEP'T OF DEFENSE, THE NATIONAL DEFENSE STRATEGY OF THE UNITED STATES OF AMERICA 19 (June 2008) [hereinafter NAT'L DEFENSE STRATEGY]. Former U.S. Secretary of Defense Donald Rumsfeld, in a lecture given at the U.S. Army War College, was quoted as saying, "If I were grading, I would say that we probably deserve a 'D' or 'D-plus' as a country as to how we are doing in the battle of ideas that's taking place in the world today." Then-Secretary of Defense Donald Rumsfeld, Address at the U.S. Army War College, Carlisle Barracks, Pa. (Mar. 27, 2006) (remarks on file with author).

[132] Colonel Jeryl C. Ludowese, U.S. Army, *Strategic Communications: Who Should Lead the Long War of Ideas?*, *in* INFORMATION AS POWER 5 (2007) (a publication of the Center for Strategic Leadership, an education center for strategic communications, research, and the experiential education of strategic leaders, located on Carlisle Barracks, Pa.).

[133] PROGRAM ON INT'L POLICY ATTITUDES, WORLD PUBLICS REJECT US ROLE AS WORLD LEADER (Apr. 17, 2008), *available at* http://www.worldpublicopinion.org/pipa/pdf/apr07/CCGA+_ViewsUS_article.pdf. "A multinational poll finds that publics around the world reject the idea that the US should play the role of preeminent world leader" .and that the United States "plays the role of world policeman more than it should, fails to take their country's interests into account, and cannot be trusted to act responsibly." *Id*. at 1. This poll reinforces the conclusions of many other recent global surveys, which found that the US image abroad is bad and growing worse. *See id.* "The global view of the United States' role in world affairs has significantly deteriorated over the last year according to a BBC World Service poll of more than 26,000 people across 25 different countries." PROGRAM ON INT'L POLICY ATTITUDES, WORLD VIEW OF US ROLE GOES FROM BAD TO WORSE (2007), *available at* http://www.worldpublicopinion.org/pipa/articles /international_security_bt/306.php?nid=&id=&pnt=306.

> [A]n Arab American Institute/Zogby International poll released in December 2007 of Arabs in Saudi Arabia, Egypt, Morocco, Jordan and Lebanon found a majority in every country polled—with the exception of Lebanon (47%)—reported that their opinion of the US was worse than the year before. When asked how US Iraq policy shapes their overall opinion of the US, a majority in each of the countries said it had a negative impact.

Zogby Polling Shows Declining Support for Iraq War and President Bush, BBS News, Jan. 10, 2007, *available at* http://bbsnews.net/article.php/200701101 41714940 [hereinafter *Zogby Polling*].

[134] Just two short years ago, scenes of violent clashes in protest of President Bush's visit to Latin America flashed across the television screen—scores of individuals willing to subject themselves to "rough treatment," and even beatings, at the hands of the police, just to have their voices heard in opposition to the United States. "[President Bush's] real challenge, however, is that there is an enormous rejection of US foreign policy in the world, and America," said Arturo Valenzuela, Director of the Center for Latin American Studies at Georgetown University. Juan Carlos Lopez, *Bush Faces Widespread Opposition in Latin America*, CNN.com, Mar. 9, 2007, *available at* http://edition.cnn.com/2007/WORLD/americas/03/08/bush.latinamerica/index.html. "In other words, there is very little affinity for the president's policies in Iraq and the ways in which the US has conducted international relations over these years." *Id.* Russian President Vladimir Putin, in a speech to an international security conference in Munich, condemned the United States for a "unilateral, militaristic approach" that had made the world a more dangerous place. Thomas E. Ricks & Craig Whitlock, *Putin Hits US Over Unilateral Approach*, WASH. POST, Feb. 11, 2007, at A1, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2007/02/10/AR2007021000524.html. Putin indicated, "Nobody feels secure anymore, because nobody can take safety behind the stone wall of international law," a reference to claims that the United States violated the law when invading Iraq. *Id.* He concluded by alleging that the "almost uncontained hyper-use of force in international relations" was forcing countries opposed to Washington to seek to build up nuclear arsenals. *Id*. "It is a world of one master, one sovereign . . . it has nothing to do with democracy." *Id*.

> Five years after the start of the war in Iraq, the image of the US abroad remains far less positive than it was before the war and at the beginning of the century. However, the latest survey by the *Pew Global Attitudes Project* finds some encouraging signs for America's global image for the first time this decade. . . . However, around the world, people have a new concern: slumping economic conditions. And they have a familiar complaint—most think the US is having a considerable influence on their economy, and it is largely seen as a negative one.

Pew Global Attitudes Project, Overview, Global Economic Gloom (June 12, 2008), http://pewglobal.org/reports/display.php?ReportID=260 (providing overview of PEW GLOBAL ATTITUDES PROJECT, GLOBAL ECONOMIC GLOOM—CHINA AND INDIA NOTABLE EXCEPTIONS 1–2 (June 12, 2008), *available at* http://pewglobal.org/reports/pdf/260.pdf).

[135] Ludowese, *supra* note 132, at 5.

[136] Ricks & Whitlock, *supra* note 134, at A1.

frequently choose not to work, partner, or associate. The result is an inability to foster accord and form the necessary coalitions to address regional and international issues. This leaves the United States to essentially "go it alone," as we did in Iraq, making it difficult to claim legitimacy for the use of U.S. military force and more challenging to maintain support for operations abroad—domestic or international.[137] In 2007, American public and congressional support for operations in Iraq slipped to an all-time low.[138] International support, never particularly strong, was whittled down to a few staunch allies,[139] and even these allies now look for cover. The bottom line is that "if [U.S.] strategic communications . . . don't improve . . . disastrous consequences will follow."[140] The United States' ICC position is certainly not aiding the strategic communications cause.

Knowing all this, the United States must focus on selecting proper "audiences, messages, and means" to have "direct strategic implications."[141] In short, what message or image will the United States convey to the world regarding the Court?

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[137] "In the disparate literature on the meaning and sources of legitimacy, two characteristics stand out: first, that legitimacy is a subjective condition, a product of one's perceptions; second, that legitimacy matters." Edward C. Luck, *The United States, International Organizations, and the Quest for Legitimacy*, *in* MULTILATERALISM AND US FOREIGN POL'Y 47–48 (Steward Patrick & Shepard Forman eds., 2000).

> In public and scholarly discourse on US relations with international institutions, few terms are employed with greater frequency or less precision than "legitimacy." Everyone wants to have it, but there is little agreement on where it comes from, what it looks like, or how more of it can be acquired. Internationalists assert that US interventions abroad are seen, domestically and internationally, as more legitimate if they have been authorized by the UN Security Council or by a well-established regional agreement. Others, more skeptical of the utility and wisdom of international institutions, stress that legitimacy flows from domestic sources, that is, from the US constitutional structures and democratic principles.

Id. at 47.

> One indicator of . . . [legitimacy's] perceived value is the frequency with which leaders of nations and international organizations assert the legitimacy of their actions and of the processes that produced them. Nowhere has the struggle for legitimacy been more pointed than in debates over US relations with international organizations.

Id. at 48. This is true of both recent U.S. interventions concerning Iraq in 1990 and 2003. President George H.W. Bush worked tirelessly to construct a coalition of the willing, which coalition thereafter obtained a UN Resolution mandating that action be taken against Iraq. These actions conferred legitimacy to the use of force to expel Iraq from Kuwait, both internationally and domestically. Conversely, President George W. Bush attempted to do the same for Operation Iraqi Freedom in 2003, but was unable to form the type of coalition that the elder Bush had developed. His administration's significant attempts to provide a sound basis for the use of force in Iraq to depose Saddam never appeared to take root in either the international or domestic arena. As such, the second Bush Administration's use of force in Iraq never appeared to obtain the necessary legitimacy and, consequently, was never able to generate the type of support that was present in 1990 and 1991.

[138] Polls in 2007 showed that

> Bush's performance on the Iraq War shows . . . a majority of American's polled in December (74%) give Bush negative marks—the greatest level of dissatisfaction our polling has found since we began tracking Bush's performance on the war in 2003. Overall, the majority (54%) say Bush has performed poorly on the war and 20% say he has had fair performance—only 19% grade his performance as good and 5% as excellent."

Zogby Polling, *supra* note 133.

[139] "[T]here has been a striking change in opinion on this issue in Great Britain, the most important US ally in the conflict. Just 43% of the British believe their country made the right decision to use military force against Iraq, down sharply from 61% last May." THE PEW RESEARCH CENTER, THE IRAQ WAR: MISTRUST OF AMERICA IN EUROPE EVER HIGHER, MUSLIM ANGER PERSISTS 11 (Mar. 16, 2004), *available at* http://people-press.org/reports/pdf/206.pdf. In light of the United Kingdom's decision in late February 2007 to begin a phased withdrawal of all forces from Iraq, the United States had lost its strongest, and final, ally in the struggle for Iraq. Notwithstanding the arguments that the reasons behind the withdrawal were based on the improving security situation within the British sector in southern Iraq, and their need to divert these forces to Afghanistan to support the United Kingdom's NATO mission, the decision appeared to have more to do with the untenable situation within Iraq in general. And the Brits were not the only one leaving.

> President Bush's "coalition of the willing," long seen by much of the world as a shell for a largely US operation in Iraq, is quickly becoming a coalition of the unwilling. Even as Bush sends more American forces to Baghdad, longtime war ally Tony Blair is pulling out British troops. Denmark is leaving. Lithuania says it may withdraw its tiny 53 troop contingent.

Tom Raum, *British Pullout in Iraq Could Signal Final Breakup of 'Coalition of the Willing*,*'* SAN DIEGO UNION-TRIB., Feb. 21, 2007, at 1.

[140] This quote is from a former Bush Administration official responsible for stability operations, who clearly understands what it takes to compete and win in the contemporary information domain, and he acknowledged the bottom line in Iraq—a forecast that applies equally as well to the ICC. Lieutenant General Thomas F. Metz, U.S. Army, et al., *Massing Effects in the Information Domain: A Case Study in Aggressive Information Operations*, MIL. REV., May-June 2005, at 4 (citing to an open letter to President Bush, published in the January 2006 issue of *Armed Forces Journal*, written by Joseph Collins, a former Deputy Assistant Secretary of Defense for Stability Operations in the Bush Administration).

[141] JOINT PUB. 3-13, *supra* note 130, at I-10 to I-11; Ludowese, *supra* note 132, at 7. The Defense Science Board, an advisory committee that provides independent advice to the Secretary of Defense, described strategic communications as the method by which governments "understand global audiences and cultures, engage in a dialogue between people and institutions, advise policymakers, diplomats and military leaders on the *public implications of policy choices*, and *influence attitudes and behavior through communication strategies.*" *Id*. at 8 (citing DEFENSE SCI. BOARD, REPORT OF THE DEFENSE SCI.

That the United States is an "isolated, parochial, and hypocritical tyrant," reluctant to be held accountable to the standard established for the rest of the world?[142] Will it risk losing the moral high ground and damaging its influence worldwide, even more than it has? The answer, I believe, is clear. The United States is, and has always been, a world leader on human rights, justice, and the rule of law. Yet its current ICC position—advocating a clear double standard—runs counter to all that America represents, harming its reputation even further.[143] This position is inconsistent with U.S. values, interests, and institutions; its commitment to end impunity; and the many principles and policies set forth in U.S. national security and defense strategies concerning effective cooperative action, alliances, and partnerships—all focused on "establishing conditions conducive to a favorable international system."[144] The United States must reverse its ICC policy to send the proper strategic message to the world and regain its status as the vanguard in the quest for international justice. Our National Defense Strategy demands no less:

> Beyond our shores, America shoulders additional responsibilities on behalf of the world. For those struggling for a better life, there is and must be no stronger advocate than the United States. We remain a beacon of light for those in dark places, and for this reason we should remember that our actions and words signal the depth of our strength and resolve. For our friends and allies, as well as our enemies and potential adversaries, our commitment to democratic values must be matched by our deeds. The spread of liberty both manifests our ideals and protects our interests.[145]

Accordingly, the proper message is that U.S. actions *are* consistent with U.S. words; that is, that the United States "practices what it preaches," and in reality lives by the standards that it sets for the international community as a world leader.

VI. Recommendations

There can be no peace without justice, no justice without law, and no meaningful law without a Court to decide what is just and lawful under any given circumstance.

—Benjamin B. Ferencz
Former Nuremberg Prosecutor[146]

BOARD TASK FORCE ON STRATEGIC COMMUNICATIONS 11 (Off. of the Under Sec'y of Defense for Acquisition, Technology, and Logistics 2004) (emphasis added)).

[142] "Detractors of the US position depict the objection as reluctance on the part of the US to be held accountable for gross human rights violations or to the standard established for the rest of the world." ELSEA, *supra* note 20, at 5.

[143] "The U.S. has enjoyed a long reputation for leadership in the struggle against impunity and the quest for universal human rights and the rule of law." *Id.* at 22. Some commentators believe that U.S. actions regarding the ICC may very well harm, over the long-term, the United States' reputation and its ability to influence the development of international law. *Id.*; *see, e.g.*, Major Eric S. Kraus & Major Michael O. Lacey, *Utilitarian vs. Humanitarian: The Battle over the Law of War*, 32 PARAMETERS 73 (1 July 2002) (arguing that the United States' refusal to ratify the Rome Statute, the Ottawa Treaty, and Protocol I to the Geneva Conventions diminishes future U.S. influence on the development of customary international law).

[144] Colonel Kelly D. Wheaton, *Strategic Lawyering: Realizing the Potential of Military Lawyers at the Strategic Level*, ARMY LAW., Sept. 2006, at 11 (arguing that "[t]he authority and necessity to use preemptive or preventive war to defend the US does not negate the inconsistency between the national strategies and the current US policy towards the ICC"); OFF. OF THE PRESIDENT OF THE UNITED STATES., NAT'L SEC. STRATEGY OF THE UNITED STATES OF AMERICA 4–7 (Mar. 2006) (calling U.S. network of "alliances and partnerships" a "principle source of strength"). "Shared principles . . . and commitment to cooperation provide far greater security than we could achieve on our own." *Id.*; NAT'L DEFENSE STRATEGY, *supra* note 131, foreword at 1, 6 (emphasizing the "critical role that our partners play . . . in achieving our common goals" and recognizing that, "[t]o succeed, we must harness and integrate all aspects of national power and work closely with a wide range of allies, friends, and partners. We cannot prevail if we act alone," and the

> security of the US is tightly bound up with the security of the broader international system. As a result, our strategy seeks to build the capacity of fragile or vulnerable partners while improving the capacity of the international system itself to withstand the challenge posed by rogue states and would-be hegemons.

Id.

[145] NAT'L DEFENSE STRATEGY, *supra* note 131, at 1.

[146] *ICC Overview, supra* note 26, at 3. Professor Ferencz was the Chief Prosecutor at Nuremberg for the "Einsatzgruppen" case, and ultimately taught the International Law of Peace. *See* Ferencz Biography, UN Audiovisual Library of International Law 1, *available at* http://untreaty.un.org/cod/avl/pdf/ls/Ferencz_bio.pdf (last visited May 18, 2009).

It is common sense to take a method and try it. If it fails, admit it frankly and try another. But above all, try something.

—Franklin Delano Roosevelt[147]

The United States' approach to dealing with the ICC—that of hostile outsider—is not succeeding. In the seven years since Rome, this method has engendered only ill-will toward the United States, with absolutely no statutory compromises, designed to protect the Nation's interests, achieved. Accordingly, I recommend that the United States follow FDR's wise counsel to admit failure frankly and try another method. Alternatively, it must now become an *influential insider*—that is, ratify the Statute or, at a minimum, constructively engage and cooperate with the Court to resolve any differences and to move forward in the greater context of enhancing the Court's overall effectiveness, and achieving Professor Ferencz's ideal of a Court providing meaningful law that ensures justice and brings peace. Contrary to America's initial belief, the Court is now a *fait accompli* and, as such, it must "get on board." Ratifying the Statute should not be viewed as capitulation but, instead, as a recognition that the United States will actually gain more by working with the Court than against it. More importantly, the United States will achieve these significant gains, outlined above and below, even while substantially limiting the exposure of U.S. nationals, which is its primary stated concern.

A. A Seat at the Table

As the Statute grants the Court jurisdiction over a state's nationals regardless of whether the state is a party to the Statute, the United States actually gains little benefit, but suffers significant loss, by remaining a non-party. As U.S. personnel are extremely unlikely to engage in genocide or crimes against humanity, our primary concern involves war crimes allegations and the potential prosecution of our civilian leaders or military personnel based on such allegations.[148] Under Article 124 of the Statute, however, a ratifying state may "opt out" of the Court's jurisdiction for war crimes for a period of seven years after such ratification.[149] The United States can use that period to engage the Assembly of State Parties over any potential amendments to the Statute, making the Court more palatable to the United States, while its personnel will not be subject to the risks they are now as a non-party. After six years, if the United States is unable to obtain satisfactory compromises to the "flaws" it perceives in the Court, under Article 127 it may withdraw from the Statute.[150] Additionally, ratification gives the United States the right to participate completely in the Assembly and to vote on *all* critical issues, such as electing—or removing—Judges and Prosecutors, referring crimes to the Prosecutor for investigation, and defining potential crimes, such as the crime of aggression[151]—all critical elements of influence and control. In the end, it gains a "seat at the table," which is the only position from which it may effect the type of change, or assurances, it desires.

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[147] Franklin D. Roosevelt, *Address at Oglethorpe University*, *in* BARTLETT'S FAMILIAR QUOTATIONS 970 (Little Brown & Co. 14th ed. 1968).

[148] Note that early indications demonstrate that the Court will interpret the Statute's Article 8 provisions dealing with war crimes quite narrowly, requiring evidence that the crimes were "committed as a part of a plan or policy or as part of a large scale commission of such crimes." Rome Statute, *supra* note 19, art. 8; *see supra* notes 62, 91–97 (discussing Article 8 in greater detail), 94 (noting that the Prosecutor's decision concerning allegations against the United States arising out of its involvement in Iraq held that the allegations were not of such gravity, under Article 8, to be admissible before the Court).

[149] Rome Statute, *supra* note 19, art. 124. Known as the "Transitional Provision," this article permits states at the time of ratification to make a declaration that they do not accept the Court's jurisdiction over war crimes for a seven-year period, from the moment the Statute enters into force for that state. *Id.* Article 126 indicates that the Statute "enters into force" for a ratifying state "on the first day of the month of the 60th day following the deposit by such State of its instrument of ratification, acceptance, approval, or accession." *Id*. art. 126. This seven-year period was included in the Statute to give state-parties the necessary time to modify their domestic laws to comport with those in the Statute, so strengthening the principle of complementarity. HOLT & DALLAS, *supra* note 22, at 39.

[150] Rome Statute, *supra* note 19, art. 127 ("A State Party may, by written notification addressed to the Secretary-General of the United Nations, withdraw from this Statute. The withdrawal shall take effect one year after the date of receipt of the notification, unless the notification specifies a later date.").

[151] Ratification allows the United States to "opt out" of any new crimes that the Assembly may add by Amendment to the Statute in the coming years as well. *Id*. art 121.

B. Human Rights, Justice, and the Rule of Law

The Court represents justice for victims and perpetrators alike. It is a "forum for honoring the memory of those lost, as well as punishing those responsible,"[152] and signifies a moral commitment to human rights, justice, liberty and peace—all substantial U.S. interests that our nation should be pursuing in concert with the Court and the international community. Victims and families confront abusers, accused are justly tried and criminals punished, and societies re-establish the rule of law—all through the Court—while it also serves to deter potential war criminals.[153] Additionally, by supporting the Court and all for which it stands, the United States also begins the process of regaining the moral high ground that it so desperately seeks, and the concomitant legitimacy that this higher ground brings.

C. Mutual Need for Legitimacy and Support

Because the Court advances unquestionable American interests in promoting and developing international law and justice, the Court deserves U.S. support. While the United States can significantly assist the Court—offering increased authority, prestige, personnel, intelligence, funding, and more[154]—the Court will provide the United States with moral legitimacy, enhancing its damaged reputation. The ICC, short on resources, clearly needs the significant assets that the United States can provide, along with the legitimacy that it will lend to the Court through ratification of the Statute, substantial cooperation, or both. Doing so will gain the United States such legitimacy in kind. Accordingly, the United States needs the Court as much as the Court needs the United States. Ultimately, a balancing test applies, in which America attempts to strike that equilibrium between national interests and global concerns. How much perceived sovereignty will the United States sacrifice to strengthen the global rule of law? Will it place the needs of the many over the desires of the few?[155] As one noted scholar comments:

> While the world is grateful for the US role in the preservation of peace and will not target it with unwarranted efforts to prosecute its personnel, neither will it give it carte blanche to conduct military operations without submitting to the same standards to which the US holds all others accountable. *The problem is not with the Court, but with the US double standard.*[156]

Fortunately, it appears that the United States is at last beginning to acknowledge that it will not lead the world through military power alone; our actions on ASPA, Article 98 Agreements, Darfur and more in recent years provide optimism for our future posture and response.[157] Instead of military power alone, we must provide moral leadership and support to the

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[152] Chris McMorran, *International War Crimes Tribunals*, BEYOND INTRACTABILITY 1–3 (July 2003), *available at* http://www.beyond intractability.org/essay/int_war_crime_tribunals/?nid=1238.

[153] *Id*. at 2. Victims and their families will have a chance to face those responsible for such crimes, with the hope that they will be able to then let go of the horrors of what transpired. *Id.* at 1. Such Courts often help nations, attempting to move from a repressive regime that committed war crimes to a democratic one—such as in Germany—make the transition to "stable diplomatic relations and the road to peace." *Id.* Finally, such Courts, it is believed, act as a deterrent through trial and punishment, as well as through education on what transpired and why. *Id*. at 1–2. "Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced." Judgment of the International Military Tribunal for the Trial of Major German War Criminals, 6 F.D.R. 69, 110 (1946); NORMAN E. TUTOROW, WAR CRIMES, WAR CRIMINALS, AND WAR CRIMES TRIALS: AN ANNOTATED BIBLIOGRAPHY AND SOURCE BOOK 6 (1986).

[154] Ruth Wedgewood, *Improve the International Criminal Court*, *in* TOWARD AN INTERNATIONAL CRIMINAL COURT 57 (Council on Foreign Relations 1999) (indicating that the United States has substantially supported the ICTY with over $15 million per year, as well as lending "top-ranking investigators and lawyers from the federal government, the support of NATO ground forces . . . and even the provision of U-2 surveillance" assets).

[155] One look at the "few" with whom the United States is currently aligned should answer this question: Libya, Iraq (Saddam-era), Yemen, and China—certainly not the type of company that the United States ordinarily wants to keep. *See* David J. Scheffer, *Staying the Course with the International Criminal Court*, 35 CORNELL INT'L L.J. 47 (2000) (arguing that the best policy for the United States is one of cooperation rather than obstruction).

[156] Bassouini, *supra* note 92, at 2–3 (emphasis added).

[157] *Id.* In light of U.S. actions concerning Darfur, Sudan, and changes to the ASPA, some believed in recent years that a "fresh assessment of the court seems to be underway." Nora Boustany, *A Shift in the Debate on the International Court: Some US Officials Seem to Ease Disfavor*, WASH. POST FOREIGN SERV., Nov. 7, 2006, at A16. As to Darfur, the United States abstained from the UNSC vote on referring the case to the ICC. The United States sent a clear message in doing so—that although it could not vote in favor of referring a case to an institution that it publicly opposed, it supported what the Court had done so far and believed that it was appropriate to have the UNSC refer the case to the Court for resolution. *Id*.; Jess Bravin, *US Warms to Hague Tribunal*, WALL ST. J., June 14, 2006, at A4. On 26 March 2008, the President certified that U.S. peacekeeping and peace enforcement forces could participate in the United Nations-African Union Mission in Darfur (UNAMID) without risk of criminal prosecution. Press Release, Office of the Press Secretary, The White House, Memorandum for Secretary of State (Mar. 27, 2008), *available at* http://www.whitehouse.gov/news/releases/2008/03/200803/20080327-1.html. As to the ASPA and Article 98 Agreements, on 29 September 2006 and 27 November 2006 the President waived the prohibition on International Military Education and Training (IMET) funding to twenty-one nations and on Economic Support Funds (ESF) to fourteen nations. *See* Presidential Determination

newly-formed global justice structure that is the ICC. The Obama Administration's initial comments concerning the ICC, namely that "[t]he ICC, which has started its first trial this week, looks to become an important and credible instrument for trying to hold accountable the senior leadership responsible for atrocities committed in the Congo, Uganda, and Darfur," demonstrate a change in attitude toward the Court that will hopefully chart the path for our future.[158]

Finally, regardless of whether the United States ratifies the Statute or adopts a policy of conciliation and cooperation, it must ensure that it both appropriately strengthens U.S. law and establishes policies that require investigations into, and possible prosecution of, all potential war crimes violations, such that the ICC never has a basis to even consider prosecuting U.S. nationals.

1. Strengthen U.S. Law

The United States must identify any disparity between crimes within the Court's jurisdiction and existing U.S. law and immediately seek to eliminate these differences through legislation designed to expand U.S. federal court jurisdiction to cover all relevant offenses, to better shield U.S. personnel from the ICC's reach. Again, revisions to existing U.S. law to enlarge U.S. federal courts' jurisdiction to "cover all crimes over which the ICC might assert jurisdiction could enhance the implementation of complementarity by precluding a finding by the ICC that the US is 'unable' to prosecute one of its citizens."[159]

2. Investigate All Allegations

The United States should initiate procedures through policy changes that mandate a thorough investigation of all credible war crimes allegations and, if justified, prosecution of all crimes that fall within the ICC's jurisdiction. Current Department of Defense policy is that all reportable incidents—that is, possible, suspected, or alleged violations of the law of war—will be "reported promptly, investigated thoroughly, and, where appropriate, remedied by corrective action."[160] The United States must broaden this requirement, making it national policy to comprehensively investigate all allegations concerning all crimes within the ICC's jurisdiction. Although it should be the uncommon and, in fact, truly extraordinary circumstance where an American national is acting in his own capacity to commit a crime within such jurisdiction, the United States can protect that individual by investigating and, if appropriate and warranted, prosecuting him. Coupled with the recommendation above to implement changes to the law to cover all ICC crimes, the United States will effectively preempt the Court's jurisdiction based on the Statute's complementarity.[161]

The converse of U.S. cooperation and engagement is the status quo of hostility, unilateralism, and isolationism. This translates into the potential for continued restrictions on peacekeeping missions and repeated denial of aid to allies and partners, which engenders a corresponding harm to relationships, Theater Security Cooperation strategy, military operations,

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No. 2006-27 of Sept. 29, 2006, 71 Fed. Reg. 65,367 (Nov. 8, 2006); Presidential Determination No. 2007-5 of Nov. 27, 2006, 71 Fed. Reg. 74,453 (Dec. 12, 2006). On 20 June 2008 and 16 January 2009 President Bush again waived the prohibition on ESF to fourteen and seventeen nations, respectively. Presidential Determination No. 2008-21 of June 20, 2008, 73 Fed. Reg. 36,403 (June 26, 2008); Presidential Determination No. 2009-14 of Jan. 16, 2009, 74 Fed. Reg. 5099 (Jan. 29, 2009). Congress, in the National Defense Authorization Act for Fiscal Year 2007, removed the IMET restrictions for all nations. *See* John Warner National Defense Authorization Act for Fiscal Year 2007, Pub. L. No. 109-364, 120 Stat. 2083.

[158] *U.S. Envoy to UN Calls on Israel to Investigate Gaza War Crimes Claims*, REUTERS, Jan. 30, 2009, at 1, *available at* http://www.haaretz.com/hasen/spages/1060074.html (citing comments made by Ambassador Susan Rice, the new US Envoy to the United Nations, who hinted that the President had a different attitude toward the Court than did his predecessors). The Administration indicated that its long-term goals include, among others, enhancing global peace and security, and improving respect for human rights worldwide. *Id*.

[159] HOLT & DALLAS, *supra* note 22, at 18, 75 (citing Chief Judge Robinson O. Everett, *American Servicemembers and the ICC*, U.S. & THE INT'L CRIM. CT. 137, 142 (Sarah B. Sewall & Carl Kaysen eds., 2000)). The War Crimes Act of 1996 covers most of the crimes within the Statute. 18 U.S.C. § 2441 (2006). Moreover, "[s]ome observers have suggested that Congress should pass legislation to close jurisdictional gaps in US criminal law in order to ensure US territory does not become a safe haven for those accused of genocide, war crimes, and crimes against humanity." ELSEA, *supra* note 20, at 18. Again, the War Crimes Act of 1996 alleviated some of this concern by establishing U.S. federal jurisdiction to punish war crimes, but only against U.S. personnel. *Id*.; *see also* Douglass Cassel, *Empowering US Courts to Hear Crimes Within the Jurisdiction of the International Court*, 35 NEW ENG. L. REV. 421, 429 (2001).

[160] U.S. DEP'T OF DEFENSE, DIR. 2311.01E, DOD LAW OF WAR PROGRAM paras. 3.2, 4 (9 May 2006).

[161] Rome Statute, *supra* note 19, art. 17. The need here is for a consistent policy which demonstrates that U.S. efforts to investigate and, if necessary, prosecute are undeniably genuine. The Iraq referrals pertaining to the United States—rejected by the ICC Prosecutor—demonstrate that a thorough investigation and, if warranted, subsequent prosecution will assuredly result in a finding by the Court that U.S. efforts were, in fact, genuine. *See supra* notes 96–97 and accompanying text.

the overall security environment, and ultimately U.S. foreign policy and strategy. The United States must thoroughly contemplate these consequences when evaluating its vital relationship with the Court.

VII. Conclusion

Who still talks today about the Armenians?[162]

Hitler, noting well the world's tepid response to the Turk's genocidal campaign at the dawn of WWI, spoke these words as he launched his "Death's Head Units" into Poland in 1939 to "kill without pity or mercy all men, women, and children of Polish race or language."[163] The world needs no better proof that, left unchecked, men whose "capacity for evil knows no limits" will continue to inflict suffering and death on the weak and defenseless until the world community intercedes to end these assaults on mankind. These crimes, as Kofi Annan reminds us, are no longer remnants of the past, but are "of our time . . . heinous realities that call for a historic response."[164]

Today, the world finally has that historic response—found in the united efforts of the international community to hold the guilty accountable—through the effective operation of the ICC. The Court—even with its perceived imperfections—is an institution that clearly advances U.S. interests and affirms U.S. ideals in promoting international justice, universal human rights, and the global rule of law. As such, strenuous U.S. opposition to the Court is at times mystifying, and contradicts all U.S. duties, responsibilities, and moral obligations. Ambassador Scheffer accurately portrayed the responsibility of the most powerful nation committed to the rule of law to confront such deadly and destructive crimes against mankind:

> One response mechanism is accountability, namely to help bring the perpetrators of genocide, crimes against humanity, and war crimes to justice. If we allow them to act with impunity, then we will only be inviting a perpetuation of these crimes far into the next millennium. *Our legacy must demonstrate an unyielding commitment to the pursuit of justice*.[165]

These are powerful words from a nation long dedicated to the preservation of humanity through the rule of law. But are these just words on paper, or do they have real meaning? They ring hollow when taken in the context of the Nation's initial response to the ICC's formation. Yet should the United States now ratify the Statute and become an integral member of the Court, it will once again begin to demonstrate that unyielding commitment to the pursuit of justice. The world seeks a permanent, effective, and politically uncompromised system of international accountability. With U.S. cooperation and support—as an *influential insider*—this system can become a reality, and "only then will the innocents of distant wars and conflicts know that they, too, may sleep under the cover of justice; that they, too, have rights, and that those who violate those rights will be punished accordingly."[166]

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[162] Vigen Guroian, *Post-Holocaust Political Morality: The Litmus of Bitburg and the Armenian Genocide Resolution*, 3 OXFORD JOURNALS—HOLOCAUST AND GENOCIDE STUDS. 305–22 (1988).

[163] Armenian Genocide, *supra* note 8, at 9–10. Hitler's words and actions reflect the essence of the genocidal intent. He provided greater insight into his thought processes in ordering the slaughter of countless innocent Polish women and children when he told his officers that "Genghis Khan had millions of women and children killed by his own will and with a gay heart. History sees in him only a great state builder . . . ." CHRISTOPHER SIMPSON, THE SPLENDID BLOND BEAST (1995). Hitler's "Death's Head Units" were actually SS units initially formed to guard concentration camps, who later became elite combat troops. Shoah Resource Ctr., Int'l Sch. for Holocaust Studies, *Death's Head Unit*s 1, 1 (n.d.), *available at* http://www1.yadvashem.org/odot_pdf/Microsoft%20Word%20-%206261.pdf. Founded at Dachau and named for the skull-and-crossbones insignia worn on their uniforms, they were trained to be extraordinarily disciplined, but ruthless and cruel. *Id.* Taught to view POWs as enemies to be vanquished and destroyed, they became known for their extreme brutality. *Id.* In 1938, obviously impressed with their ferocity and malice, Hitler pulled them from guard duty and sent them off as combat units in Poland. *Id.* Acting on the field as they had in the camps with the POWs, they became known for being absolutely "cruel and vicious warriors." *Id.* For their part in the war, they were later identified as criminals and subjected to war crimes trials. *Id.*

[164] Press Release, United Nations, SG/SM/6257, International Criminal Court Promises Universal Justice, Secretary-General Tells International Bar Association (June 12, 2007) (quoting Secretary-General Kofi Annan remarks to the International Bar Association, in New York (June 11, 2007)), *available at* http://www.ngos.net/un/icc.html.

[165] Scheffer Address, *supra* note 1, at 1 (emphasis added). It is compelling, yet somewhat ironic, that these comments come from the U.S. Ambassador for War Crimes and the primary U.S. representative to the Rome Conference, spoken at a celebration of the Universal Declaration of Human Rights. The words certainly represent all for which America stands and, presumably, they represent the U.S. position concerning the ICC and all for which the Court stands.

[166] Press Release, Secretary-General, International Criminal Court Promises Universal Justice, Secretary-General Tells International Bar Association, U.N. Doc. SG/SM/6257 (June 12, 1997).