The Globalization of Justice: The Rome Statute of the International Criminal Court

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Introduction

Globalization has been called nothing more than the compression of time and space.[1] People, things, and information can now move around the globe so fast that the world is essentially becoming a smaller place. Because of this constant and rapid movement in all directions, the peoples of the world, like so many tectonic plates, are constantly bumping into one another and creating impacts on one another, intended or not. In this environment, with this ever-increasing interaction between states, governments, and their peoples, the Westphalian concepts of state sovereignty[2] are more frequently being put to the test. In the United Nations Security Council, the world community has created a coercive body, which has the power to tell sovereign states what to do, and the power to enforce those orders. While it cannot yet truly be called a "world government," the United Nations is certainly a step in that direction, or at least, as an organization, is moving in that direction. Because the free peoples of the world have accepted that their governments must be of laws and not of men, not of whims or caprices, but of set standards fairly applied, it stands to reason that the United Nations would at some point need legal institutions to help it as it takes steps toward being a part of a world government.

The International Court of Justice is one such legal institution, which is available to resolve disputes between states. The effectiveness of this institution has been called into question, however, because its jurisdiction is limited to cases in which all state parties consent, and because states have other means which they have preferred for settling international disputes.[3] The rule limiting jurisdiction to consenting state parties was a reflection of the customary international law concept, later embodied in the Vienna Convention on the Law of Treaties, that sovereign states can only be bound with their consent.[4] While states could agree to create a court with jurisdiction over them even in the absence of a case-by-case consent, they have not yet done so.

In the area of individual criminal jurisdiction, the international community has not been so reluctant to create courts with non-consensual jurisdiction. The ad hoc International Criminal Tribunals for the Former Yugoslavia and for Rwanda imposed jurisdiction over accused criminals, regardless of state consent, by the coercive power of the Security Council.[5] The new International Criminal Court concept, following in the footsteps of these tribunals, is yet a further move away from the traditional rules of international law, in that it purports to impose jurisdiction over some accused criminals from non-consenting states, even when those states are not parties to the treaty that created the Court.

The United States finds itself in an awkward position in this debate. As much as the Security Council may have set a precedent for coercive action without the consent of the sovereign states involved, it has always had to take that action with the consent of the United States and the other four permanent members of the Council, all of whom have the ability to exercise a veto.[6] Now, after the United States has spent much time and effort advocating the International Criminal Court concept and

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1. Dr. Louis Goodman, Lecture at the Inter-American Defense College (Feb. 20, 2002).

2. This refers to the Peace of Westphalia of 1648, which was one of the recognized origins of the multistate system, leading to the concept of sovereign nation-states. *See generally* INIS L. CLAUDE, JR., SWORDS INTO PLOWSHARES: THE PROBLEMS AND PROGRESS OF INTERNATIONAL ORGANIZATION 22 (4th ed. 1971). *See also* Lieutenant Colonel Michael A. Newton, *Comparative Complementarity: Domestic Jurisdiction Consistent With the Rome Statute of the International Criminal Court*, 167 MIL. L. REV. 20, 27-28 (2001) (describing the views of proponents of the International Criminal Court that state sovereignty should be subordinated to the greater good of the world community).

3. INIS L. CLAUDE, JR., STATES AND THE GLOBAL SYSTEM: POLITICS, LAW AND ORGANIZATION 160-72 (1988).

4. *See* Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, arts. 34-35, 8 I.L.M. 679 [hereinafter Vienna Convention].

5. *See The International Criminal Court*, U.N. Department of Public Information (June 1999) [hereinafter *The ICC*], *available at* http://www.un.org/News/facts/iccfact.htm; Philippe Kirsch, *Negotiating an Institution for the Twenty-First Century: Multilateral Diplomacy and the International Criminal Court*, 46 MCGILL L.J. 1141, 1146 (2001). *See infra* text accompanying notes 35-36.

6. *Security Council: Background*, U.N. Department of Public Information (Jan. 30, 2001), *available at* http://www.un.org/Docs/scinfo.htm#BACKGROUND; *see also* CLAUDE, *supra* note 2, at 120-22.

helping to shape its structure and procedures, the United States has been out-maneuvered in the international negotiations. The result is an agreement on a Court that is independent of the Security Council to a large degree and purports to have its own coercive power which can be exercised even without the consent of the permanent members of the Council.[7]

While the United States certainly has been an advocate of the International Criminal Court concept as a useful tool to help maintain basic standards of human decency in this increasingly globalized world, surely it had also envisioned a Court which would operate within the control of the Security Council and subject to similar constraints on its powers as were the ad hoc tribunals. The danger of a Court so unchecked by Security Council control has led to a host of visions of worst-case scenarios of rogue prosecutors or judges applying unfair standards to innocent U.S. peacekeepers in an effort to make a political statement against the hegemonic super-power. While it is easy to say these dangers are insignificant, a good lawyer must always protect the interests of the client, and any lawyer who did not point out these dangers would be committing malpractice.

It can also be argued this is but a small issue, since the International Criminal Court will be dealing with individuals (as opposed to states) charged with a relatively narrow spectrum of crimes, and the chances of this impacting on U.S. national power are very slim. On the other hand, if this Court is allowed to come into being with U.S. consent and with the power to act coercively independent of the Security Council, it will surely be a crack in the dam, which though small initially, will grow ever-larger. This can only lead to pressure for more international institutions that operate in the same manner and, ultimately, may signal the beginning of the end for the supreme power of the Security Council and, in particular, of its permanent members.

This is a huge concern for the United States. For as much as the United States wants world order, it does not want to fall victim to a world order that might not be representative of its values. Any student of U.S. history cannot doubt that the United States would react this way. It was, after all, our ancestors' desire to throw off the tyranny of unrepresentative government that led to our Revolutionary War. Surely our current crop of lawmakers will not want to go down in history as the people who returned our country to a state of imposed domination from outside our borders. For this debate to progress, the international community needs to understand the United States' concerns. Through greater understanding, compromises may be reached which will allow the Court to carry out its proper function, but at the same time will allay the U.S. fears that its power will be abused for a more sinister purpose.

This article examines the history and mechanics of the International Criminal Court. Part I reviews the history of the International Criminal Court concept.[8] Part II relates the significant events that occurred during the development of the Rome Statute of the International Criminal Court.[9] Part III provides a somewhat detailed look at the mechanics of the proposed Court, to include the Court structure and the Court procedures.[10] Finally, Part IV addresses the remaining concerns with the Statute and how they might be addressed in such a way that the Court can become the instrument of international justice that the world community needs in this day and age.[11]

Part I: History of the International Criminal Court Concept

The concept of international crimes is not new. As early as the sixteenth century, piracy was recognized as an international crime with universal jurisdiction. By the end of the nineteenth century, slavery was also widely recognized as an international crime.[12] Over the years, a number of other types of crimes have been added to the body of international law by various treaties and conventions. But while internationally recognized crimes have existed for centuries, and the concept of some sort of international tribunal to sanction these crimes has been discussed for almost as long, the realistic possibility of creating a permanent international criminal court is relatively new.[13]

Historically, these international crimes were crimes of universal jurisdiction, which meant that any nation that found itself in possession of a perpetrator of such a crime would have jurisdiction to try the accused person in its own national courts.[14] Conceptually, the main potential weakness of this approach

7. In fact, the Court appears to have no real coercive power of its own, which blunts this concern to some degree. *See infra* note 113 and accompanying text.

8. *See infra* text accompanying notes 12-36.

9. Rome Statute of the International Criminal Court, U.N. Doc. A/CONF. 183/9 (1998) (United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, July 17, 1998), *reprinted in* 37 I.L.M. 998 (1998) [hereinafter Rome Statute]; *see infra* text accompanying notes 37-48.

10. *See infra* text accompanying notes 49-102.

11. *See infra* text accompanying notes 103-31.

12. Newton, *supra* note 2, at 30 & n.36.

13. *Id.* at 24.

14. *Id.* at 30 & n.37.

might lie in the inability of an accused person's national courts to try the case fairly and objectively. This could create at least a perception in the international community that war criminals were enjoying what might be called a "home field advantage," or even worse, immunity.[15]

This weakness manifested itself clearly in the aftermath of World War I. Although the Treaty of Versailles specified that an international court would try the German Kaiser, this never occurred.[16] The treaty also provided that Allied tribunals would try other suspected German war criminals, but ultimately the Germans could not agree to the list of people the Allies requested for extradition. The German government was concerned that to appear overly submissive would undermine its already weak political standing with the German people.[17]

In the end, as a compromise, a German court was allowed to try a reduced number of the war crimes suspects originally identified by the Allied states, and the results appeared to many to have been excessively lenient.[18] In what came to be known as the Leipzig Trials (1921-1922), only a token representation of twelve of the originally listed 896 suspects was ever tried.[19] Of these twelve cases, six resulted in outright acquittals, and of the remaining six, three received sentences of less than a year of confinement.[20] Spectators at the trials noted the hostility toward the proceedings on the part of the German press and the German public, which apparently applied pressure to the tribunal and may have influenced the results.[21]

In the aftermath of these events, the international community first entertained serious discussions on the creation of a permanent international criminal court. Although the concept did not immediately gain support, it was at least raised as a possibility within the League of Nations. The first proposal called for a "High Court of International Justice," apparently intended to be a court of universal jurisdiction over international crimes.[22] In 1934, the term "International Criminal Court" was coined in conjunction with a French proposal for the adoption of an anti-terrorism convention. The Convention for the Creation of an International Criminal Court was adopted and opened for signature in 1937, but never went any further since it lacked ratification support among the member states.[23]

With the apparent miscarriage of justice of the Leipzig Trials as background, the Allied powers in World War II determined to do things differently the next time around. In the Moscow Declaration of 1943, the Allies announced that any Germans suspected of war crimes would be tried "by the people and at the spot where the crime was committed."[24] For those crimes with no specific location, the Allies also indicated that there would also be a general (as opposed to local) tribunal of some sort to be agreed on later.[25] This was the beginning of the process that led to the creation of the International Military Tribunals at Nuremberg and Tokyo. While national courts of the Allied powers conducted war crimes trials as well, these international tribunals did establish a precedent for international cooperation in these matters, at least on an ad hoc basis. Even the Department of the Army *Field Manual on The Law of Land Warfare*, published in 1956, documented this precedent and recognized the jurisdiction of international tribunals over war crimes.[26]

Ever since the unprecedented atrocities of World War II, the international community has looked for ways to avoid a recurrence of those terrible events. One of the first strong statements made by the United Nations on the subject was the adoption of the Convention on the Prevention and Punishment of the Crime of Genocide in 1948.[27] This convention specifically recognized the potential for an international court to have jurisdiction over this sort of crime. Article I of the convention confirmed that

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15. *See Establishment of an International Criminal Court: Overview*, U.N. Preparatory Commission for the International Criminal Court (1999) [hereinafter *ICC Overview*], *available at* http://www.un.org/law/icc/general/overview.htm; 13 HUMAN RIGHTS WATCH NO. 4(G), INTERNATIONAL CRIMINAL COURT: MAKING THE INTERNATIONAL CRIMINAL COURT WORK (2001), *available at* http://www.hrw.org/campaigns/icc/icc-main.htm.

16. Kirsch, *supra* note 5, at 1143-44.

17. U.S. DEP'T OF ARMY, PAM. 27-161-2, INTERNATIONAL LAW, vol. II, at 221 (Oct. 1962) [hereinafter DA PAM. 27-161-2].

18. *Id.* at 221-22; *see also* Kirsch, *supra* note 5, at 1144.

19. DA PAM. 27-161-2, *supra* note 17, at 221.

20. *Id.* at 221-22.

21. *Id.* at 222.

22. Kirsch, *supra* note 5, at 1144.

23. *Id.*; Newton, *supra* note 2, at 30 n.38.

24. DA PAM. 27-161-2, *supra* note 17, at 222.

25. *Id.*

26. U.S. DEP'T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE 180 (July 1956).

genocide, whether committed in time of peace or time of war, is indeed an international crime.[28] Article VI stated that this and related crimes could be prosecuted in competent national tribunals where the acts were committed or "by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction."[29]

In the same resolution that adopted this convention, the General Assembly also requested that the International Law Commission study the idea of establishing such an international tribunal. When the Commission reported that creating an international court to try persons accused of genocide and other similarly serious crimes was, in its opinion, an idea worth pursuing, the General Assembly appointed a committee to prepare proposals. In 1951, the committee delivered a draft statute, which was later revised in 1953.[30] At that point, however, the process was frozen in time, as the uneasy standoff between the two major powers in the cold war made reaching agreement on any issue a challenge.[31]

No real movement on the issue of creating an International Criminal Court occurred until 1989, when Trinidad and Tobago requested the United Nations to study the idea of an International Criminal Court to deal with drug traffickers.[32] By this time, the cold war was over and the time seemed right for a new look at this concept. The General Assembly requested that the International Law Commission reopen the study of establishing an International Criminal Court and that the study include the issue of drug trafficking jurisdiction.[33] In 1992, the General Assembly granted a mandate to the Commission to prepare a new draft statute for an International Criminal Court.[34]

In the next two years, world events again provided cause for the United Nations to realize the need for some sort of international criminal tribunal, when it became apparent that serious breaches of international humanitarian law were being committed in the Former Yugoslavia and in Rwanda.[35] As the work on the newest draft of the International Criminal Court plans was just beginning, the Security Council resorted to the much more rapidly deployable option of ad hoc tribunals to deal with these violations. The International Criminal Tribunal for the Former Yugoslavia was established in 1993, and the similar tribunal for Rwanda came into being in 1994. Like the Nuremberg and Tokyo tribunals, these were ad hoc bodies, but their very creation demonstrated the international political will to deal with these serious problems with an international institution. Furthermore, the implementation of these tribunals provided useful empirical data to feed the development of a permanent model.[36] The need to create two such institutions within such a short time-span also highlighted the potential efficiencies that could be gained from a permanent standing institution which would not require constantly reinventing the same wheel.

Part II: Development of the Rome Statute of the International Criminal Court

Having received the 1992 mandate of the General Assembly to prepare a new draft statute for the International Criminal Court, the International Law Commission was almost immediately provided with the experiences of the ad hoc tribunals being created for the Former Yugoslavia in 1993 and for Rwanda in 1994. These real-world developments further brought the issue of international criminal justice to center stage and invigorated the Commission's labors. In 1994, the Commission provided an ambitious draft statute to the General Assembly, envisioning a court with jurisdiction over the crimes of genocide and aggression, war crimes, crimes against humanity, and treaty crimes (including drug trafficking, as requested by Trinidad and Tobago in 1989).[37]

Before proceeding to a full-scale international diplomatic conference, the General Assembly first convened the Ad Hoc Committee on the Establishment of an International Criminal Court, which met in 1995 to address major issues being raised

27. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 [hereinafter Genocide Convention]; *ICC Overview, supra* note 15, at 1.

28. Genocide Convention, *supra* note 27, art. I.

29. *Id.* art. VI; *ICC Overview, supra* note 15, at 1; Kirsch, *supra* note 5, at 1145.

30. *ICC Overview, supra* note 15, at 1.

31. *See* Kirsch, *supra* note 5, at 1145.

32. *Id.*; *ICC Overview, supra* note 15, at 1.

33. *ICC Overview, supra* note 15, at 1.

34. Kirsch, *supra* note 5, at 1145-46.

35. *Id.* at 1146; *The ICC, supra* note 5, at 1.

36. Kirsch, *supra* note 5, at 1146.

37. *Id.*

in the draft and prepare the ground for further development of the concept. After receiving the work product of this committee, the General Assembly then moved to the next step by creating the Preparatory Committee on the Establishment of an International Criminal Court to develop the draft statute in more detail and "to prepare a widely acceptable consolidated draft text for submission to a diplomatic conference."[38] The Preparatory Committee held six sessions between 1996 and 1998, with the final session in March and April of 1998, culminating with a completed draft text.[39] Thus was laid the groundwork for Rome.

At this point, the General Assembly was ready to convene the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court in Rome, Italy, which ran from 15 June to 17 July 1998.[40] This was the big event: the negotiation, refinement, and ultimate adoption of the completed convention. Considering the many different areas for potential disagreement between so many nations, the fact that so much agreement was reached is remarkable. Just trying to develop a set of legal procedures that would accommodate all the diverse legal systems in the world was a daunting task.[41]

The United States negotiating team had many concerns about the draft text going into the Rome negotiations.[42] After much productive negotiation, many of the concerns raised by the United States were addressed and the problems solved in the final version of the Statute.[43] Unfortunately, significant U.S. objections were not resolved,[44] time was running out on the Diplomatic Conference, and the majority view was that it was better to leave the conference with an approved Statute than to defer a decision in an attempt to achieve greater consensus.[45] Chairman Philippe Kirsch of Canada apparently overcame numerous obstacles and worked tirelessly to piece together the best and most widely acceptable product possible in the short time remaining. Ultimately, the overall quality of the document (despite some flaws[46]) and its strong acceptance by a vote of 120 to seven (with twenty-one abstentions) must be attributed to his efforts.[47]

To his credit, Chairman Kirsch has said he would have preferred to have attained a Statute that could have been approved by consensus. In his mind, however, the United States had already gained so many protections that the resulting Statute was being criticized by some for being too weak, and the United States (and some other states as well) seemed unwilling to compromise on the few remaining issues, which meant that consensus was impossible.[48] Thus concluded the Diplomatic Conference on 17 July 1998, with the final result being the Rome Statute of the International Criminal Court, the key provisions of which will now be examined in some detail.

Part III: Mechanics of the Proposed Court

A. Court Structure

The mechanics of the International Criminal Court envisioned by the Rome Statute are remarkably simple and apparently efficient in theory, at least on the macro level.[49] The Court is made up of two independent parts. The judiciary part of the Court consisting of the judges and their administrative support personnel falls under the Presidency, and the prosecutorial arm of the Court, which includes the investigators, falls under an independent Prosecutor.[50] All of this structure, in turn, falls under the supervision of the Assembly of States Parties.

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38. *ICC Overview*, *supra* note 15, at 1.

39. *Id.*; Kirsch, *supra* note 5, at 1147.

40. *ICC Overview*, *supra* note 15, at 1.

41. Kirsch, *supra* note 5, at 1147-48.

42. William K. Lietzau, *International Criminal Law After Rome: Concerns from a U.S. Military Perspective*, 64 LAW & CONTEMP. PROB. 119, 121 (2001).

43. *Id.* at 124; Philippe Kirsch, *The International Criminal Court: Current Issues and Perspectives*, 64 LAW & CONTEMP. PROB. 3, 9-10 (2001).

44. *See infra* part IV.

45. Newton, *supra* note 2, at 22-24; Guy Roberts, *Assault on Sovereignty: The Clear and Present Danger of the New International Criminal Court*, 17 AM. U. INT'L L. REV. 35, n.18 & accompanying text (2001).

46. Lietzau, *supra* note 42, at 130-33.

47. *Id.* at 130; Kirsch, *supra* note 5, at 1148.

48. Kirsch, *supra* note 43, at 7.

49. *See infra* Appendix I for a diagram of the Court structure.

50. Rome Statute, *supra* note 9, pt. 4, arts. 34, 38, 42-43.

The Assembly of States Parties

Each State Party to the treaty will provide one representative to the Assembly, which will serve as the overall controlling body for the Court. This control will be exercised by way of a power to "[p]rovide management oversight to the Presidency, the Prosecutor and the Registrar regarding the administration of the Court."[51] The Assembly also maintains the power of the purse, as it will decide the budget for the Court.[52] As with many international organizations, the Assembly will have an executive agency, in this case called a Bureau. The Bureau will have a President, two Vice-Presidents, and eighteen members, all elected by the Assembly for three-year terms, and will meet at least once a year.[53] In addition to the Bureau, the Assembly may also establish other "subsidiary bodies" such as an independent oversight agency for the Court.[54]

The Presidency

The Court will have a total of eighteen judges, subject to a potential increase if needed on the vote of two-thirds of the Assembly of States Parties. These judges will vote among themselves to select the President and the First and Second Vice-Presidents, who, together, make up the Presidency.[55] The Presidency is responsible for the administration of the entire Court, except for the prosecutorial arm. This includes the Registry and the three Divisions of judges: Pre-Trial, Trial, and Appeals.

The eighteen judges are to be selected by a vote of the Assembly of States Parties from two lists of nominees, one containing candidates with a criminal law background and the other containing candidates with an international law background.[56] Each State Party may nominate one candidate for the election, who may appear on either list if qualified for both. The Statute also requires that the initial election select at least nine judges from the criminal law list and at least five from the international law list, and that future elections be organized to maintain the "equivalent proportion" of judges from the two lists. Only one serving judge is allowed from each state, and the term of office is generally nine years, subject to a phase-in period in which one-third of the judges will have terms expiring every three years. Judges may not be re-elected, except for those serving initial three-year phase-in period terms or those elected to fill a vacancy for a period of three years or less.[57]

The Chambers

Once judges are elected, they are to be subdivided into the three Divisions. The Appeals Division will be made up of the President and four other judges, while the Pre-Trial and Trial Divisions will be made up of at least six judges each. The qualifications of the judges will be a factor in assignment, with the requirement that the Pre-Trial and Trial Divisions be heavy in judges with criminal law experience. The functions of the Divisions will be executed by the Chambers, which are the working bodies of the Court. The Appeals Division will have but one Chamber, made up of all of the judges in the Division. The Pre-Trial and Trial Divisions may subdivide and operate in three-judge Chambers, and occasionally in the Pre-Trial Division, in one-judge Chambers. Based on the numbers of judges in each Division, both the Pre-Trial and Trial Divisions could have at least two Chambers each, operating simultaneously and independently on different cases.[58]

The Registry

The Registrar is to be elected by a majority vote of the judges of the Court for a five-year term, with the possibility of re-election once. The Registrar is the principal administrative officer of the Court, and runs the Registry, which is the organ responsible for the administration and servicing of the Court. The Registrar works for the President of the Court, and in addition to being responsible for a staff of administrative personnel, this officer is also tasked with establishing the Victims and Witnesses Unit. This Victims and Witnesses Unit will work with the Office of the Prosecutor to provide protection, counseling, and other support for victims, witnesses, and others who may be at risk due to the witnesses' testimony before the Court.[59]

51. *Id*. art. 112(2)(b).

52. *Id*. art. 112(2)(d).

53. *Id*. pt. 11, art. 112(3).

54. *Id*. art. 112(4).

55. *Id*. arts. 36, 38.

56. *Id*. art. 36(3).

57. *Id*. arts. 36-37.

58. *Id*. art. 39.

59. *Id*. arts. 43-44, 68.

The Office of the Prosecutor

As noted above, the Office of the Prosecutor operates independently from the rest of the Court. The Prosecutor is to be elected by a majority vote of the Assembly of States Parties for a nine-year term, without the possibility of re-election. The Prosecutor will then nominate candidates of different nationalities for one or more Deputy Prosecutor positions to be filled by a similar majority vote of the Assembly of States Parties for similar terms of office. These Deputy Prosecutors will then assist the Prosecutor and will have the authority to act in any capacity for the Prosecutor. The Prosecutor will also be responsible for an administrative staff, a team of investigators, and other issue advisors which he may appoint as a particular expertise is needed.[60]

B. Court Procedures[61]

Initiating an Investigation

There are three basic sources of information that can cause the Prosecutor to initiate an investigation under the Statute. The common element is that the Prosecutor receives information that a crime within the jurisdiction of the Court appears to have been committed. The jurisdiction of the Court is specifically limited to the crime of genocide, crimes against humanity, and war crimes, as defined in the Statute.[62] The allegation that such a crime has been committed may be referred by a State Party,[63] may be referred by the Security Council,[64] or may be received by the Prosecutor from any other source.[65] The Prosecutor, upon receiving this information, begins a preliminary examination to determine if there is a reasonable basis to investigate the allegation.[66]

If the Prosecutor determines that a reasonable basis to investigate exists, as one check on prosecutorial discretion, he must obtain authorization from the Pre-Trial Chamber before beginning an investigation. But before requesting that authorization, except in cases of Security Council referrals, the Prosecutor must first notify any states which would normally exercise jurisdiction over the crime alleged. The notified states have one month to respond, within which time any such state may request that the Prosecutor defer to the state's investigation.[67]

Upon receiving such a deferral request, the Prosecutor must defer to the state's investigation unless the Pre-Trial Chamber specifically authorizes the Prosecutor to proceed despite the deferral request.[68] This is part of the concept commonly referred to as "complementarity," which dictates that national courts should be the first choice for handling these cases.[69] Absent a deferral request, the Prosecutor submits the matter to the Pre-Trial Chamber for a decision on whether there is a reasonable basis to investigate the allegation and whether the alleged crime is within the jurisdiction of the Court. If the Pre-Trial Chamber finds in the affirmative on both issues, then it will authorize the Prosecutor to proceed with the investigation.[70]

If, on the other hand, the Prosecutor decides no reasonable basis to investigate exists, there are checks on this discretionary decision as well. The Prosecutor must notify the reporting or referring party that no investigation of the allegation will occur. A referring state or the Security Council may then request that the Pre-Trial Chamber review this decision. Upon review, the Pre-Trial Chamber may request that the Prosecutor reconsider his decision. If the Prosecutor did not base his decision on a lack of belief that the crime was committed or a lack of jurisdiction, but instead on a subjective determination that pursuing the matter would not serve the interests of justice, then the Pre-

60. *Id*. arts. 42, 44.

61. *See infra* Appendix II for flowcharts that may help illuminate this textual description.

62. Rome Statute, *supra* note 9, arts. 5-8. The crime of aggression is included as well, but the Court will have no jurisdiction over this crime until the Statute is amended with an agreed definition of the crime, which at last report was still being debated. *See Proceedings of the Preparatory Commission at Its Tenth Session (1-12 July 2002)*, U.N. Preparatory Commission for the International Criminal Court, 10th Sess., U.N. Doc. PCNICC/2002/L.4/Rev.1 (2002), *available at* http://www.un.org/law/icc/. Even if all parties agree on the definition of the crime of aggression, it now appears that they will be unable to amend the Statute until 1 July 2009, or seven years from the time the statute entered into force. *See* Rome Statute, *supra* note 9, arts. 5(2), 121, 123.

63. Rome Statute, *supra* note 9, arts. 13-14.

64. *Id*. art. 13; U.N. CHARTER, ch. VII.

65. Rome Statute, *supra* note 9, arts. 13, 15.

66. *Id*. art. 15.

67. *Id*. art. 18.

68. *Id*.

69. *See* Newton, *supra* note 2, at 24-28.

70. Rome Statute, *supra* note 9, art. 15(4).

Trial Chamber has the power to reverse the Prosecutor's decision.[71]

Investigation and Pre-Trial Procedures

Once the Pre-Trial Chamber authorizes an investigation, the Prosecutor may then pursue the full investigation of the allegation. During the investigation, the Prosecutor has a wide range of tools available to discover the facts of the matter, and the people being investigated or questioned have a wide range of rights specified in the Statute to ensure that they are treated fairly. Included are the rights against self-incrimination, coercion, duress, threats, and arbitrary arrest or detention. The person also has the right to be informed, before questioning, that he is suspected of a crime within the jurisdiction of the Court, and to be informed of his rights, including the right to counsel.[72]

At some point in the investigation process, the Prosecutor must examine what facts have been discovered and determine whether there is sufficient basis for a prosecution. If the determination is negative, then the Prosecutor must inform the Pre-Trial Chamber, and if the case was referred by a State Party or by the Security Council, he must also inform the referring party. At the request of one of these referring parties, the Pre-Trial Chamber may review this decision not to proceed and may request the Prosecutor to reconsider. As with the decision not to pursue an investigation, if the Prosecutor's decision not to prosecute is based on a subjective determination that the interests of justice would not be served by pursuing the matter, then the Pre-Trial Chamber again has the power to reverse the Prosecutor's decision.[73]

If, on the other hand, the Prosecutor determines that there is sufficient basis to prosecute the subject of the investigation, he must then determine whether or not arrest is necessary. If arrest appears to be necessary to ensure the accused person's presence at trial, or to prevent the accused from obstructing the investigation or continuing the criminal course of conduct of which he or she is accused, then the Prosecutor may request the Pre-Trial Chamber to issue an arrest warrant. If arrest does not appear necessary, the Prosecutor may request the Pre-Trial Chamber to issue a summons. In either case, the Pre-Trial Chamber will examine the request to decide its propriety. This analysis will include a determination as to whether there are reasonable grounds to believe the accused person committed a crime within the jurisdiction of the Court.[74]

If the Pre-Trial Chamber issues an arrest warrant, the Court may then request the State Party in whose territory the accused is located to arrest the person. The Court may request either a provisional arrest in urgent cases, with a promise that the proper request will follow, or an arrest and surrender with all the proper documentation provided at the outset.[75] Once arrested by the custodial state, the accused will be brought before the judicial authorities of that state to determine that the warrant does, in fact, apply to that person and that the arrest was properly conducted with respect for the rights of the accused. The custodial state authorities may grant interim release pending surrender to the Court, but may not contest the validity of the warrant itself.[76] In any case, the custodial state must surrender the accused to the Court when ordered to do so.[77]

If the Pre-Trial Chamber issues a summons, this document will specify the date the accused is to appear before the Court. The summons will be served on the accused, presumably using the procedures acceptable in the territory of the State Party where the accused is located.[78] In this case the accused person will be expected to present himself voluntarily on the date specified. Accordingly, this type of process should be reserved for suspects not considered flight risks.[79]

If the Pre-Trial Chamber refuses to issue the process requested (whether warrant or summons), then the Prosecutor must determine what course to take next. If at this point the Prosecutor decides not to proceed further, he can close the case, but must still inform the Pre-Trial Chamber and the referring party as indicated above. If, on the other hand, the Prosecutor decides to continue pursuing the case, he may either reopen the investigation to attempt to garner more facts to support the allegations, or, if the refusal to issue the process appears to have been based primarily on the Pre-Trial Chamber's belief that the Prosecutor requested the wrong process for the particular case,

71. *Id*. art. 53(3)(b).

72. *Id*. art. 55.

73. *Id*. art. 53(3)(b).

74. *Id*. arts. 58(1)(a), 58(7).

75. *Id*. arts. 91-92.

76. *Id*. art. 59(4).

77. *Id*. art. 59(7).

78. *Id*. arts. 58(7), 93(1)(d).

79. *Id*. art. 58(7).

the Prosecutor may simply submit a new request for the alternate process.[80]

Initial Proceedings, Trial, and Appeal Procedures

Whether brought before the Court by the process of warrant, arrest and surrender, or by summons and voluntary appearance, the accused will receive one more level of procedural protection before being tried on the charges alleged. At an initial appearance, the Pre-Trial Chamber will ensure that the accused has been informed of the charges and of his rights under the Statute, including the right to apply for interim release pending trial. Then, within a reasonable time after this initial appearance, the Pre-Trial Chamber will hold a hearing to "confirm" the charges.[81]

Essentially this would be what is commonly know in U.S. courts as a "preliminary hearing," and the procedures very much resemble the Uniform Code of Military Justice, Article 32,[82] Pretrial Investigation hearing used in the U.S. military. Rules of evidence are relaxed and witnesses need not testify in person, but the accused also has the opportunity to present evidence at this hearing. The Prosecutor's burden here is merely to "support each charge with sufficient evidence to establish substantial grounds to believe that the person committed the crime charged,"[83] which closely resembles the "probable cause" standard applied in U.S. courts.

If the Pre-Trial Chamber finds that the Prosecutor has met this burden, it will confirm the supported charges and commit the accused to a Trial Chamber for trial. If the Pre-Trial Chamber is not convinced the Prosecutor has met the burden, it has two choices. First, it may adjourn the hearing to allow the Prosecutor to consider providing additional evidence or amending charges to better fit the evidence. Alternatively, it may simply decline to confirm the charges. In this case, the Prosecutor may either close the case and take no further action, or he may reopen the investigation to attempt to better support the charges before trying again.[84]

When any charges have been confirmed against an accused person, a Trial Chamber will then take over the case from the Pre-Trial Chamber. When the Trial Chamber assumes control of the case, it will hold pre-trial conferences with the parties as necessary to resolve as many administrative and procedural issues as possible in advance of trial. This will include issuing whatever discovery orders are necessary to allow the parties to properly prepare for trial. The Trial Chamber may also choose to refer certain preliminary issues back to the Pre-Trial Chamber for decision.[85] Likewise, the Trial Chamber may also refer certain trial issues to the Appeals Chamber for interlocutory decision.[86] Chief among the duties of the Trial Chamber throughout the process is to protect the rights of the accused, the witnesses, and the victims.[87]

The list of the rights of the accused at a trial of the International Criminal Court is impressive. At least on paper, the due process offered to the accused seems every bit as extensive as the protections afforded under the U.S. Constitution, with the most noteworthy exception being the absence of the right to a jury trial. The accused has the right to be present at the trial, unless unduly disruptive, in which case he will be required to observe from a remote location. The accused has a right to a public trial, subject to limitations when the Trial Chamber determines a need to protect a witness, victim, or sensitive information. Echoing U.S. procedures, the accused is also presumed innocent until guilt is proven "beyond reasonable doubt," and the burden of proving this is on the Prosecutor, and may never be shifted to the accused.[88]

The exhaustive list of trial rights also includes concepts U.S. lawyers would recognize as rights to a speedy trial, to counsel, to confront the witnesses, to compel the testimony of witnesses, to remain silent, and to be provided with any exculpatory evidence in the possession of the Prosecutor.[89] Many of the rules of evidence included in the Statute also closely resemble rules applied in U.S. courts.[90] While the list of rights and rules appears to be quite similar to what would be afforded in a U.S. criminal court, it remains to be seen how the International Criminal Court applies these concepts, since national case law

80. *See id.* art. 58.

81. *Id*. arts. 60-61.

82. UCMJ art. 32 (2000).

83. Rome Statute, *supra* note 9, art. 61(5).

84. *Id*. arts. 61(7)-(8).

85. *Id*. art. 64(4).

86. *Id*. art. 82(1)(d).

87. *Id*. art. 64(2).

88. *Id*. art. 66.

89. *Id*. art. 67.

precedents interpreting these rules are not necessarily binding on the Court.[91]

On the other side of the coin, the Statute also provides for a well-developed system to protect victims and witnesses, and to respect their rights to participate in the proceedings. Specifically, the Court is tasked with taking "appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses,"[92] but is also required to apply these measures so that they do not prejudice the right of the accused to a fair and impartial trial. This inherent friction guarantees that the Court, like other courts in similar judicial systems, will be continually exercising a balancing process to ensure the adequate protection of conflicting interests. The Prosecutor and the Victims and Witnesses Unit within the Registry of the Court are likewise tasked to assist the Court in the protection of these often-fragile and under-represented parties in the case.[93]

After receiving all the admissible evidence offered by the parties, the judges of the Trial Chamber enter secret deliberations to decide the guilt or innocence of the accused. They are limited to the charges as alleged and to the evidence of record in the case. The Statute prefers unanimity, but failing that, the majority decides the case. The Trial Chamber must issue a single written decision supported by the rationale for the findings and conclusions reached, and including both majority and minority views, if any. The decision or a summarized version of it is then delivered in open court.[94]

If a finding of guilt has been made, except in the case of a guilty plea by the accused, the Trial Chamber may, on its own initiative, or must, at the request of either party, hold a sentencing hearing.[95] In deciding an appropriate sentence, the Trial Chamber will consider any relevant evidence submitted during the trial, as well as any additional information submitted at the sentencing hearing, if one is held. The Trial Chamber will announce the sentence in public, in the presence of the accused, if possible. The maximum sentence is life imprisonment, but this is to be awarded only in extreme cases. Imprisonment for a term of years is limited to a maximum of thirty. The Court may also impose a fine or a forfeiture of assets derived from the crimes of which the accused has been convicted.[96] Furthermore, the Court may order reparations for harm caused to victims, which can include restitution, compensation, and rehabilitation.[97]

Once the Trial Chamber has completed its work, further action, if any, will likely be in the realm of the Appeals Chamber. One stunning difference between the International Criminal Court and U.S. Court procedures is the fact that the Prosecutor may appeal an acquittal. Under the Statute, either side is permitted to appeal the guilt or innocence decision of the Court, based on procedural error, factual error, or legal error. The accused may also appeal based on any other issue that calls into question the fairness or reliability of the proceedings. Either side may also appeal the sentence imposed on the ground that it is disproportionate to the crime committed.[98] If only the decision or the sentence is appealed, but the Appeals Chamber believes the other should be appealed as well, the Court may invite the appropriate party to submit the additional appeal.[99]

After considering the matters submitted, the Appeals Chamber may confirm, reverse, or amend the decision or the sentence, or it may modify the sentence if found to be disproportionate to the crime. Alternatively, the Court may order a new trial before a different Trial Chamber, if the extent of the error warrants this remedy. In gathering information to make this decision, the Appeals Chamber may call for evidence to answer particular factual questions, or may refer the case back to the original Trial Chamber to answer the questions. The Appeals Chamber decides the appeal by a majority vote and, in a similar fashion to the results of trial, the decision is announced in open court with its supporting rationale, including the majority and minority views, if any. In this case, however, a judge may, if he wishes, also deliver a separate opinion on a particular legal question.[100]

90. *See, e.g., id.* art. 69.

91. *Id*. art. 21.

92. *Id*. art. 68.

93. *Id*. arts. 43(6), 68(4)-(5).

94. *Id*. art. 74.

95. *Id*. art. 76.

96. *Id*. art. 77.

97. *Id*. art. 75.

98. *Id*. art. 81.

99. *Id*. arts. 81(2)(b)-(c).

100. *Id*. art. 83.

Even after the final decision on the appeal, the Appeals Chamber may again be called upon to review the conviction or the sentence at some future time, if important new evidence is discovered, if it is later discovered that a fraud was committed upon the Court, or if one of the participating judges committed a serious breach of duty in the case.[101] The Appeals Chamber has substantial leeway to take remedial action if it finds the claim to be meritorious. It may reconvene the original Trial Chamber or constitute a new one, or it may retain jurisdiction of the case within the Appeals Chamber to hear the evidence submitted and decide the matter. In the event that a conviction is later reversed on the basis of some miscarriage of justice, the Statute even provides an enforceable right to compensation for the unjustly convicted person.[102]

Part IV: Objections to the Rome Statute and Potential Solutions

Having now examined in some detail the extensive, multi-layered due process apparently provided by the Rome Statute, some might find it difficult to understand how anyone could refer to this proposed International Criminal Court as a "kangaroo court."[103] But as the framers of the U.S. Constitution well understood, a detailed set of rules alone cannot guarantee due process. The integrity of the system depends in large part on the integrity of the people charged with implementing and enforcing the rules. Despite anyone's best intentions to pick only the best people to run the system, the only real way to guarantee the integrity of those people and, in turn, the integrity of the system, is to establish a solid framework of checks and balances to ensure that no official is ever operating without independent oversight.

This concept of checks and balances, which was the real genius of the U.S. Constitution, is an area in which the Rome Statute is apparently lacking. One important example of this is Article 119 of the Statute, which provides that "[a]ny dispute concerning the judicial functions of the Court shall be settled by the decision of the Court."[104] If the Court is the only check on itself, this is a recipe for disaster.

The best example of the lack of adequate checks in the Statute is in the role of the independent Prosecutor, and in particular, determining when the Prosecutor may overcome the Statute's general preference for handling these cases in national courts (the so-called "complementarity" principle).[105] A genuine concern exists that an independent and unchecked Prosecutor might manipulate the Court by pursuing politically motivated prosecutions. While it is true that several layers of procedures have been added to the Statute to create the appearance of checks on the system, most of these checks are within the Court itself. If the people in the roles assigned to be a check on the Prosecutor are from one of a group of "like-minded states" that is politically opposed to United States policies, these checks will not likely serve their intended purpose. The fear is that this structure will allow the smaller states to band together to impose their will on the United States, or as one commentator has put it, the "Lilliputians want a permanent system to strangle Gulliver."[106]

Of course, this view does reflect a certain degree of paranoia in the expectation that all of these appointees to the Court will elevate their countries' political agendas over their own notions of justice. But, the fact is that for many of these people, their own notions of justice have been formed in the crucible of their countries' politics and will likely be a reflection of their countries' political agendas. The United States cannot discount the impact of the cultural differences between the nations providing appointees to this Court. What may seem just to the United States may not seem just to others. This problem of political-cultural differences is especially troublesome because the law this Court is being created to enforce is in some ways highly subjective and open to a wide variety of interpretations. What may be destruction justified by "military necessity" in the eyes of some nations may be destruction carried out "unlawfully and wantonly" in the eyes of some others.[107]

The United States also objects to the fact that the Statute purports to assert jurisdiction over non-party nationals without the authority of the Security Council.[108] This would only occur with the consent of the state where the crime was committed or the state of the accused person.[109] In the latter case, the accused

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101. *Id.* art. 84.

102. *Id*. art. 85.

103. Senator Jesse Helms, *Helms Opposes Clinton's Signing of the ICC Treaty*, U.S. Dep't of State, Int'l Info. Programs (Dec. 31, 2000) [hereinafter Helms Testimony], *at* http://usinfo.state.gov/topical/pol/usandun/01010201.htm.

104. Rome Statute, *supra* note 9, art. 119(1).

105. *See supra* text accompanying notes 67-69.

106. *UN International Criminal Court*, The Conservative Caucus (June 30, 1998), *at* http://www.conservativeusa.org/UNcourt.htm.

107. *See* Rome Statute, *supra* note 9, art. 8(2)(a)(iv). The determination that incidental injury and collateral property damage are "clearly excessive in relation to the concrete and direct overall military advantage anticipated," *id.* art. 8(2)(b)(iv), is open to diverse interpretations. Likewise, what may be a lawful use of force to some may be "inhumane acts" to others. *See id.* art. 7(1)(k). These are but a few examples of the subjectivity of the law in this area.

108. Lietzau, *supra* note 42, at 128.

person's state could at least be said to be an ad hoc party to the treaty, but in the former case, a power is being granted to this Court that has previously been reserved exclusively to the Security Council.[110] While it is true that the Vienna Convention on the Law of Treaties prohibits a treaty from binding a non-consenting state,[111] this is a defeatist argument for the United States to make. It assumes that the United States will not be a party to the treaty.

This also makes it a somewhat circular argument. If a state objects to a treaty and therefore refuses to join the treaty because of a bad provision, fixing the provision should gain that country as a State Party. But if the state becomes a party, then the treatment of non-parties will not affect its status, so it is hard to see why that state would refuse to join the treaty only for that reason. Matters of principle are important, but the United States should not deceive itself into thinking the primary goal of a state is anything other than protecting its national interests.

This United States' objection merely highlights the greater issue in this debate, which is the proper role of the Security Council in the functioning of this Court. One of the checks on the discretion of the Prosecutor is the provision that allows the Security Council to defer investigation or prosecution of any case with a Chapter VII resolution.[112] Of course the "veto power" that usually protects the permanent members of the Security Council from collective actions that threaten that state, in this context, actually hurts the permanent members by making it that much harder to pass a deferment resolution. Since this is the only real check on the system that comes from outside the Court itself, all it would take is one of the permanent members aligning with the group of "like-minded states" for this check to be as ineffective as the others.

The United States should oppose the non-party jurisdiction provision because that is the purview of the Security Council, and this Court needs to have checks and balances on its actions that will actually work. The Security Council is that check, and this Court needs to be brought clearly within the control of the Security Council to prevent potential abuses. While it is true that Security Council control brings with it another potential for abuse (or impunity for a permanent member of the Council), this danger is no greater than it has always been. In fact this danger is no greater than it would be with the proposed independent Court because even as this Statute is drafted, the International Criminal Court has no teeth and little hope of backing up its orders without the approval of the Security Council.[113]

While there is apparently some general resentment about the power exercised by the permanent members of the Security Council,[114] it is important to remember that all these states consented to the Security Council's role when they joined the United Nations. This is, after all, a voluntary association. The Security Council's structure may be due for an update, but its role in international affairs, which has proven useful for many years, should not be diluted or abandoned in the interests of greater international "democracy." There is no legitimate reason to accept a "democratic" vote of nations. The only thing that can come of that is *less* fairness, as small sparsely populated nations gain the same voice and vote in the international community as the most populous, the most productive, and the most powerful.

Even if productivity and power are rejected as legitimate reasons for having a greater voice, anyone truly purporting to advance the cause of "democracy" must accept the fact that more populous nations should have a greater voice. This is the reason the United States republic model gives more populous states a greater voice in the House of Representatives, although all states are equally represented in the Senate. This type of arrangement was intended to address just this sort of paradox of the democratic republic. Of course, the United States probably should not pursue a completely population-based system of voting, as that would provide the wrong incentives to states that already have trouble supporting the populations they have.

As Professor Inis Claude has pointed out, the only reason the traditional international system allowed each state to have

109. Rome Statute, *supra* note 9, art. 12.

110. Some have argued that this is merely a delegation by the state where the crime occurred, which would normally have jurisdiction in its national courts over crimes committed within its territory. *See, e.g.*, Kenneth Roth, *The Case for Universal Jurisdiction*, FOREIGN AFF., Sept.-Oct. 2001, at 150. Others have argued that such a delegation of jurisdiction is unprecedented and violates basic principles of state sovereignty. *See, e.g.*, Lietzau, *supra* note 42, at 135.

111. Vienna Convention, *supra* note 4, arts. 34-35. The Genocide Convention even recognized states would have to consent to the jurisdiction of the international tribunal. Genocide Convention, *supra* note 27, art. VI. This point was conveniently omitted by the United Nations in a document using that treaty provision to support the concept of an International Criminal Court. *See ICC Overview*, *supra* note 15, at 1.

112. Rome Statute, *supra* note 9, art. 16. The United States has recently used this provision successfully to convince the Security Council to agree to a one-year deferment of any International Criminal Court action against United Nations peacekeepers from countries not accepting the Court. This concession would likely not have been gained, however, but for the pending renewal votes for ongoing peacekeeping missions which allowed the United States to leverage its veto power. *See Negroponte Calls Exemption for UN Peacekeepers "a First Step,"* U.S. Dep't of State, Int'l Info. Programs (July 12, 2002), *at* http://usinfo.state.gov/topical/pol/nato/02071207.htm; Serge Schmemann, *U.S. Peacekeepers Given Year's Immunity From New Court*, N.Y. TIMES, July 13, 2002, at A3.

113. *See, e.g.*, Rome Statute, *supra* note 9, arts. 87(7), 112(2)(f). This should not be read to mean the Court poses no danger to anyone. State Parties and other governments may still be quite willing to cooperate with the Court voluntarily in areas in which they do have their own enforcement powers.

114. Kirsch, *supra* note 5, at 1147; Ruth Wedgwood, *The Irresolution of Rome*, 64 LAW & CONTEMP. PROB. 193, 213 (2001).

equal voice and vote was because any state could effectively veto the action taken by the group by refusing to consent. This dual principle of "equal vote"—"bound only by consent" resulted in the rule of unanimity. The reason we have gotten away from this rule is that it is very hard to get anything done if all decisions have to be unanimous.[115] Thus, the international community has evolved a split personality of sorts, creating some institutions with equal vote for all nations, but reserving the most critical issues for the Security Council, in which international democracy is not the rule. The inherent problem with this Court is that it threatens to cross over from the international democracy realm into the critical issues that are the purview of the Security Council.

The United States has voiced other objections to the Rome Statute as well, including concerns about how the crime of aggression is ultimately defined and some of the other definitions of offenses that seem to be susceptible to political manipulation. The "no reservations" clause has also drawn an objection.[116] But in the final analysis, the United States could live with most of these problems if the complementarity regime were strengthened in the Statute. This would allow the United States to preempt any International Criminal Court prosecution that did not seem legitimate simply by asserting jurisdiction over the case in its national investigative agencies or courts. As currently drafted, the independent Prosecutor could foil this preemption by simply deciding that the national authorities are either "unwilling or unable genuinely to carry out the investigation or prosecution."[117] Of course, the Court would have to concur with this decision, but in such a subjective area, this concurrence is virtually assured if the judges are of the "like-minded group" with the Prosecutor.

The United States could more easily accept the Statute, even with its remaining defects, if this complementarity regime is changed so that the state's decision is controlling over the Prosecutor's for any United Nations recognized state, absent a Security Council decision to override complementarity. This state preference could even be limited to States Parties to encourage ratification, but this would not solve the non-party national jurisdiction issue.[118] This small change would likely gain U.S. support, and the international community would still reap all the benefits of establishing a standing court, perhaps even more benefits, since this modified version of the Court would actually have the teeth of Security Council action to back it up.

Chairman Philippe Kirsch has written that the United States should be reasonable in its requests for accommodation at this point, since the Preparatory Commission cannot change the Statute.[119] He makes a valid point, since the Statute itself places severe limitations on amendments, including a seven-year waiting period before an amendment can even be proposed.[120] If, however, fair-minded states want to gain U.S. support for this important endeavor, some avenue to fix this problem should be found, even if it means abandoning this first attempt and adopting a new, but slightly modified version of the Statute. On the other hand, with the negative rhetoric and outright opposition being heard from the U.S. government,[121] these fair-minded states are getting little assurance that their daunting task, if accomplished, would even achieve the intended goal.

Within Congress, this opposition has resulted in significant legislation designed to prevent any U.S. cooperation with the International Criminal Court. Already, Congress has included sections in at least two annual appropriations acts prohibiting the use of any funds to support the International Criminal Court.[122] The President has recently signed into law even more sweeping anti-cooperation legislation as part of a Supplemental Appropriations Act.[123] Called the "American Servicemembers' Protection Act of 2002," [124] this legislation not only prohibits

115. *See* CLAUDE, *supra* note 2, at 118-20.

116. Lietzau, *supra* note 42, at 125.

117. Rome Statute, *supra* note 9, art. 17.

118. *See supra* text accompanying notes 108-10.

119. Kirsch, *supra* note 43, at 11.

120. Rome Statute, *supra* note 9, art. 121.

121. *See, e.g.*, Helms Testimony, *supra* note 103; *U.K. Ratifies International Criminal Court as Bush Backs U.S. Ban*, LIFESITE DAILY NEWS, Oct. 2, 2001 [hereinafter *U.K. Ratifies*], *available at* http://www.lifesite.net/ldn/2001/oct/011002.html; Statement on Signing the Department of Defense and Emergency Supplemental Appropriations for Recovery from and Response to Terrorist Attacks on the United States Act, 2002, PUB. PAPERS, Jan. 14, 2002 (statement of Jan. 10, 2002), *available at* http://www.whitehouse.gov/news/releases/2002/01/print/20020110-8.html; Carol Giacomo, *Bush Presses for End to U.N. War Crimes Tribunals*, THE NEWS (Mexico), Feb. 27, 2002, at 8.

122. *See* Department of Defense and Emergency Supplemental Appropriations for Recovery from and Response to Terrorist Attacks on the United States Act, 2002, Pub. L. No. 107-117, § 8173, 115 Stat. 2230, 2289; Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 2002, Pub. L. No. 107-77, § 630, 115 Stat. 748, 805 (2001).

123. *See* 2002 Supplemental Appropriations Act for Further Recovery from and Response to Terrorist Attacks on the United States, Pub. L. No. 107-206, 116 Stat. 820.

124. Pub. L. No. 107-206, §§ 2001-2015, 116 Stat. 820, 899-909 (2002).

cooperation with the Court, but it also restricts U.S. participation in peacekeeping missions unless the President certifies that U.S. troops will not risk prosecution by the Court or that U.S. national interests justify accepting the risk of prosecution.[125] Furthermore, the legislation will, effective 1 July 2003, block U.S. military aid to certain countries[126] that are parties to the Court, unless the President waives this provision based either on U.S. national interests or on the other country's agreement to shield U.S. troops present in their territory from the actions of the Court.[127] Another provision authorizes the President to use "all means necessary and appropriate" to free covered persons being held by or on behalf of the Court.[128] Unless some change in the current direction of the Rome Statute occurs, this seems to be the type of position the United States will take regarding the Court.[129]

The United States will, of course, continue to advocate human rights and will continue to cooperate with enforcement mechanisms that it supports. But, if the international community chooses to implement this International Criminal Court regime in its current form, then the United States must curtail its international activities unless properly assured that its troops will be protected. The Statute does provide some protections that the United States can incorporate in its planning, most importantly, a provision that allows a receiving state to honor protections granted to sending state troops in a Status of Forces Agreement.[130] Unless the flaws in the Rome Statute are repaired, this type of protective provision should become a precondition to any future U.S. deployment of troops to the territory of a State Party to the International Criminal Court.[131]

Conclusion

On 11 April 2002, ten states added their ratifications to those of the fifty-six states which had already ratified the Rome Statute, and thereby became States Parties. This provided more than the required sixty ratifications to bring the Treaty into force on 1 July 2002, and initiated the process of bringing the International Criminal Court to life.[132] But even if the Court is brought into existence, without the full participation of the United States, the Court will never be able to realize its full potential as an instrument of justice and human decency. Unfortunately, the international community may be cutting off its nose to spite its face. Despite some differences with other nations on definitions and scope, the United States has always been a strong supporter of human rights and an opponent of tyrants who abuse their fellow human beings. Few, if any, nations would be a more useful ally for the International Criminal Court to have in helping to accomplish its mission. The sad truth is that the United States, whether justifiably or not, has become a power to be opposed for many of the smaller nations active in the international community today.

Whether comfortable with the label or not, the United States has been stuck with the title of "hegemonic world superpower," thanks in large part to the demise of the Soviet Union

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125. *Id.* §§ 2004-2006. The United States has already achieved some success in protecting its peacekeepers from the jurisdiction of the Court, and continues other efforts to enhance this protection. *See supra* note 112; *infra* note 131.

126. The Statute exempts NATO members, major non-NATO allies, and Taiwan from losing military assistance. American Servicemembers' Protection Act of 2002, § 2007(d).

127. *Id.* § 2007; *see also U.K. Ratifies*, *supra* note 121.

128. American Servicemembers' Protection Act of 2002, § 2008.

129. Other legislation addressing the issues raised by the International Criminal Court is still pending in Congress, including the American Servicemember and Citizen Protection Act of 2002, H.R. 4169, 107th Cong., 2d Sess. (2002), and the American Citizens' Protection and War Criminal Prosecution Act of 2001, S. 1296, 107th Cong., 1st Sess. (2001); H.R. 2699, 107th Cong., 1st Sess. (2001). The former adopts a stance more hostile to the International Criminal Court than the latter. *See* Jennifer Elsea, Congressional Research Service, The Library of Congress, U.S. Policy Regarding the International Criminal Court 11-15 (2002).

130. *See* Rome Statute, *supra* note 9, art. 98.

131. *See infra* Appendix III for a Status of Forces Agreement Model Provision that could be used to protect U.S. personnel. While critics argue that Article 98(2) was intended to apply only to pre-existing Status of Forces Agreements, the United States has already met with some success securing new "Article 98 Agreements." As of this writing (September 2002) the U.S. has reportedly signed agreements with Romania, Israel, East Timor, and Tajikistan and is actively pursuing others. *See Romania Agrees to Protect Americans from Surrender to ICC*, U.S. Dep't of State, Int'l Info. Programs, Washington File (Aug. 1, 2002), *at* http://usinfo.state.gov/topical/rights/law/02080202.htm; *U.S. Continues to Seek Article 98 Agreements on ICC*, U.S. Dep't of State, Int'l Info. Programs, Washington File (Aug. 14, 2002), *at* http://usinfo.state.gov/topical/rights/law/02081435.htm; Amnesty Int'l, International Criminal Court: US Efforts to Obtain Impunity for Genocide, Crimes Against Humanity and War Crimes 5-20 (2002); Elizabeth Becker, *U.S. Ties Military Aid to Peacekeepers' Immunity*, N.Y. Times, Aug. 10, 2002, at A1; Elizabeth Becker, *On World Court, U.S. Focus Shifts to Shielding Officials*, N.Y. Times, Sept. 7, 2002, at A4.

132. Edith M. Lederer, *World Crimes Tribunal to Debut*, AP, Apr. 12, 2002. As of this writing (September 2002) eighty-one states have become parties to the Rome Statute. *See Multilateral Treaties Deposited With the Secretary General: Rome Statute of the International Criminal Court*, U.N. Treaty Database (2002), *available at* http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty10.asp. On 1-12 July 2002, the Preparatory Commission held its tenth and final session, and on 3-10 September 2002, the Assembly of States Parties held its first session. Nominations for Judges and Prosecutor opened on 9 September 2002, with the election to be held at the first resumed session of the Assembly of States Parties scheduled for 3-7 February 2003. *Rome Statute of the International Criminal Court*, U.N. Office of Legal Affairs (2002), *available at* http://www.un.org/law/icc/index.html.

as a counter-balancing power. While the average U.S. citizen would probably view this role as one of world leadership, unfortunately many other nations' governments see only a bully. The U.S. can point to a strong record of foreign aid and assistance to other nations, but many of them see the aid as self-serving of U.S. interests instead of a freely given helping hand.

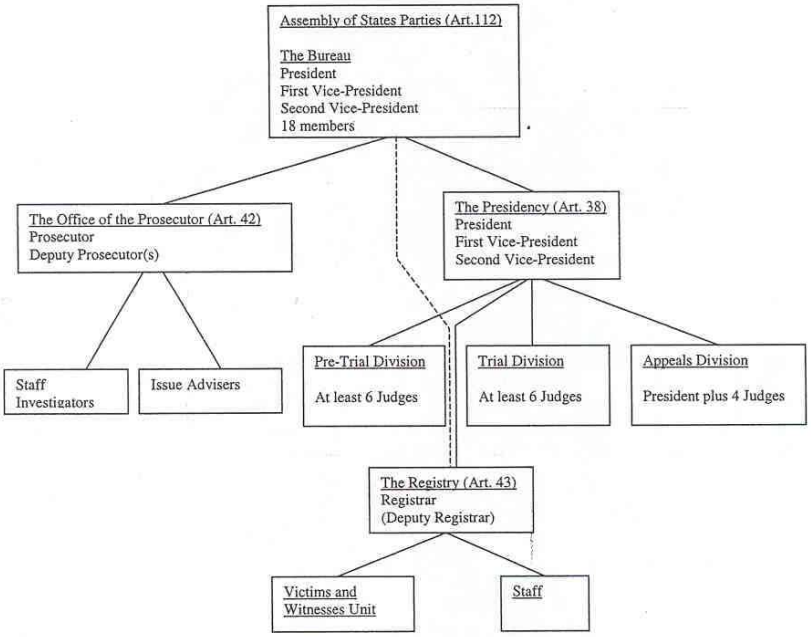
The bottom line is that the real truth is probably somewhere in between these two positions. The United States is truly a charitable country, but national interests do motivate most U.S. policies. The question then is whether it should be any other way. Governments exist to serve their people and their national interests. The international community is not a world government, but rather is a collection of competing national governments, each of which is supposed to be looking out for its national interests. The fact that the United States is as altruistic as it is stands as a tribute to the charity of its people. But it also serves a national interest in promoting free trade around the world. While a world government watching out for the whole world's interests does not yet exist, the increasing globalization of every aspect of people's lives is certainly driving in that direction. If nations can work out their differences and better understand each other's positions, this International Criminal Court could be a bold step in the direction of global institutions designed to promote global interests.

The reality is that as long as the world is made up of separate nations pursuing separate interests, the only likely areas of cooperative effort will be areas in which interests overlap. The objectives of the International Criminal Court should be one such area. The remaining differences are relatively small and can be harmonized with some relatively small (but maybe difficult to achieve) changes in the procedures of the Court. All the civilized nations of the world should be taking a stand for the stated purpose of this Court. To allow this whole effort to fail because of a desire to kick sand in the face of the hegemonic bully, while it might give some people temporary visceral pleasure, would not be worthy of the progress that has been made by the noble group who should rightly be called international statesmen.

It has been said that strong judicial institutions are the key to eliminating government corruption, which in turn will allow for better governance and economic and social development for the benefit of the human race. The scope of this proposed International Criminal Court is strictly limited to only the most serious crimes with the greatest international implications. The possibility remains, however, that if this experiment in international jurisprudence meets with some success, gaining the confidence of the international community, it may indeed serve as a useful model for a future institutional increase in the globalization of justice. With the ever-increasing pressure of economic and social globalization, a strong movement in that direction can certainly be expected.

Appendix I

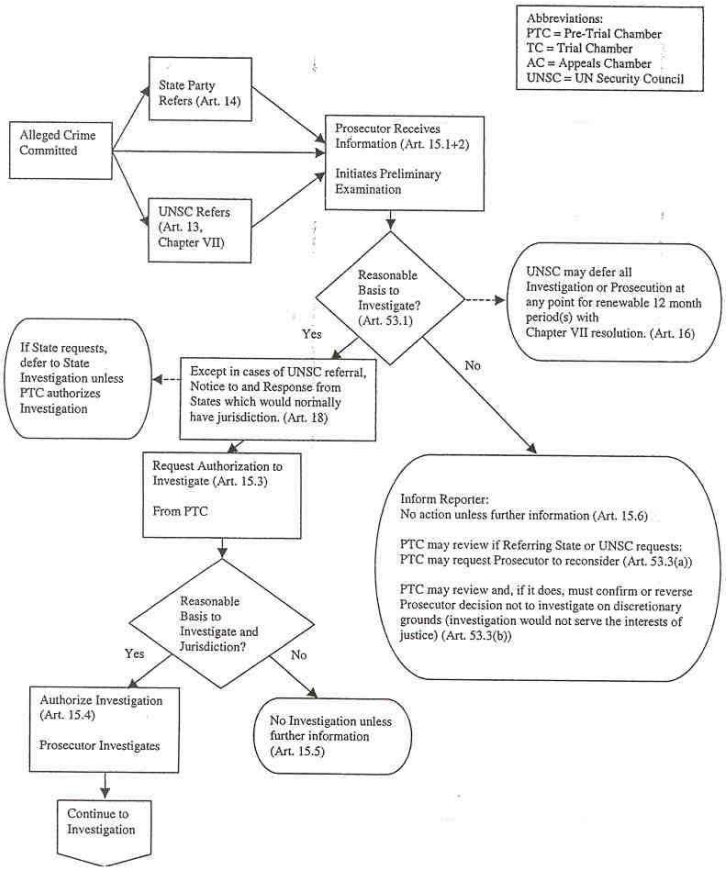
The International Criminal Court



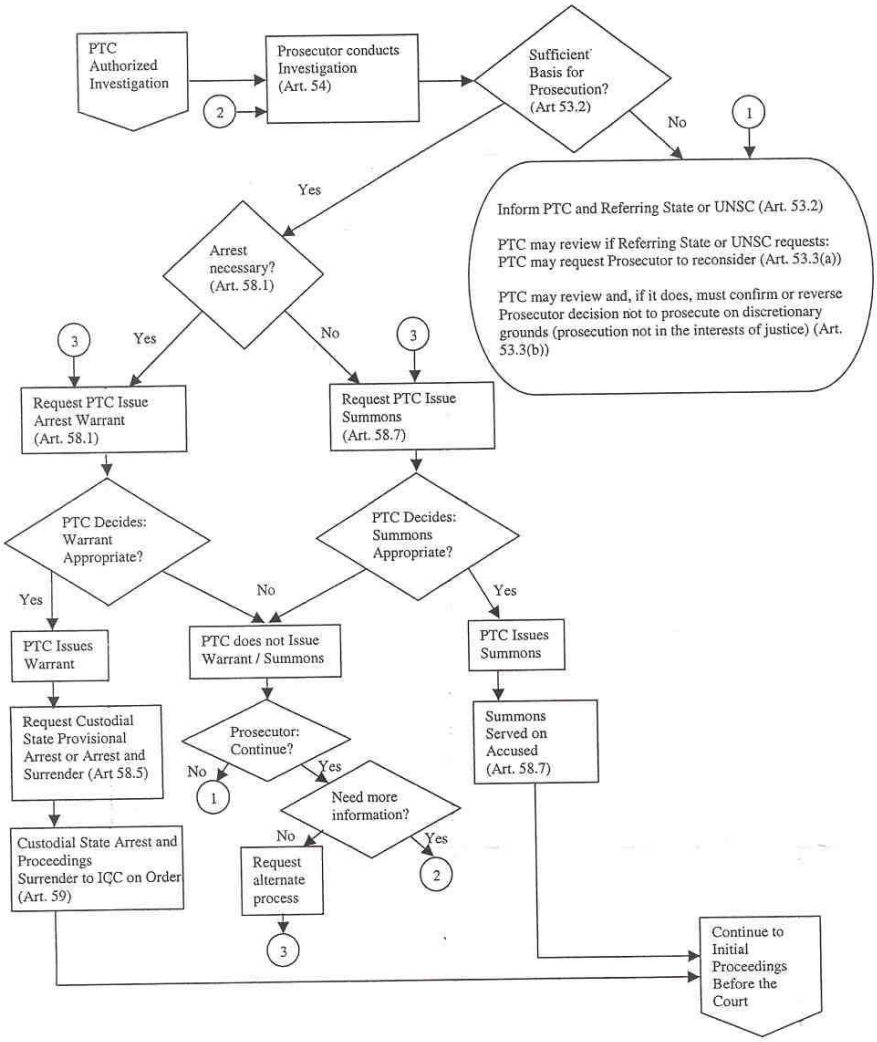
Appendix II

Flowcharts

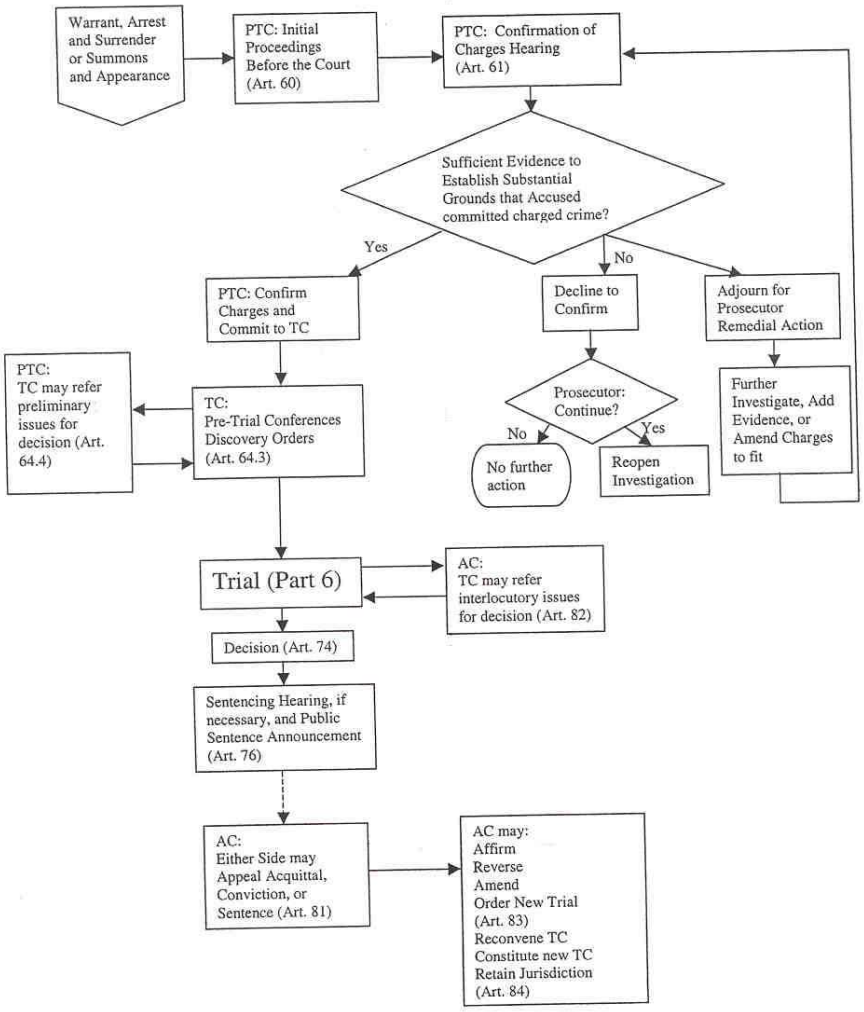
Initiating an Investigation



Investigation and Pretrial Procedures



Initial Proceedings, Trial, and Appeal



Appendix III

Status of Forces Agreement Model Provision[133]

United States as Sending State

(Note: This provision may be added as an amendment to Article VII of the NATO SOFA or to the appropriate section of any other pre-existing SOFA, or it may be used in the drafting of a new SOFA.)

The authorities of the receiving State shall have no authority over the members of a sending State force or civilian component or any of their dependents to arrest or hold any of them for or on behalf of the International Criminal Court without the consent of the sending State. Furthermore, in accordance with Article 98 of the Rome Statute of the International Criminal Court, the authorities of the receiving State will not honor any request by the International Criminal Court to arrest, hold or surrender any such person without the consent of the sending State.

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133. According to Amnesty International and the Coalition for the International Criminal Court (CICC), the following language has been used in Article 98 Agreements already signed between the United States and several other states. This may provide a useful example of the typical language being used in these agreements.

> A. Reaffirming the importance of bringing to justice those who commit genocide, crimes against humanity and war crimes,
>
> B. Recalling that the Rome Statute of the International Criminal Court done at Rome on July 17, 1998 by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court is intended to complement and not supplant national criminal jurisdiction,
>
> C. Considering that the Government of the United States of America has expressed its intention to investigate and to prosecute where appropriate acts within the jurisdiction of the International Criminal Court alleged to have been committed by its officials, employees, military personnel, or other nationals,
>
> D. Bearing in mind Article 98 of the Rome Statute,
>
> E. Hereby agree as follows:
>
> 1. For purposes of this agreement, 'persons' are current or former Government officials, employees (including contractors), or military personnel or nationals of one Party.
>
> 2. Persons of one Party present in the territory of the other shall not, absent the expressed consent of the first Party,
>
> (a) be surrendered or transferred by any means to the International Criminal Court for any purpose, or
> (b) be surrendered or transferred by any means to any other entity or third country, or expelled to a third country, for the purpose of surrender to or transfer to the International Criminal Court.
>
> 3. When the United States extradites, surrenders, or otherwise transfers a person of the other Party to a third country, the United States will not agree to the surrender or transfer of that person to the International Criminal Court by the third country, absent the expressed consent of the Government of *X*.
>
> 4. When the Government of *X* extradites, surrenders, or otherwise transfers a person of the United States of America to a third country, the Government of *X* will not agree to the surrender or transfer of that person to the International Criminal Court by a third country, absent the expressed consent of the Government of the United States.
>
> 5. This Agreement shall enter into force upon an exchange of notes confirming that each Party has completed the necessary domestic legal requirements to bring the Agreement into force. It will remain in force until one year after the date on which one Party notifies the other of its intent to terminate this Agreement. The provisions of this Agreement shall continue to apply with respect to any act occurring, or any allegation arising, before the effective date of termination.

AMNESTY INT'L, *supra* note 131, at 19 n.48 (numbering and lettering added by the CICC).