The International Criminal Court: The United States Should Ratify the Rome Statute Despite Its Objections

I. INTRODUCTION

On July 17, 1998 the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (ICC) opened the Rome Statute of the International Criminal Court for signature by all States.[1] In short order the Rome Statute boasted over one hundred signatories,[2] and remained open for signature in New York, at United Nations Headquarters, until December 31, 2000.[3] The United States is now a signatory of the Rome Statute; however, considering opposition to the Rome Statute in the United States Congress,[4] the prospects of ratification of the Rome Statute are currently bleak. In refusing to sign the Rome Statute the United States stood in the company of Iraq, China, Qatar, Sudan, Libya, and Israel.[5] One journalist even claimed such a voting record demonstrated "a humiliating failure for the U.S. delegation[,]" and that the United States joined with "such pariah states as Libya and Iraq."[6] The United States and Iraq may not share many goals in their foreign policy, but it may be true that ironically, in their views of the ICC, Senator Jesse Helms of the United States and Saddam Hussein of Iraq are of a similar mind – both want the future of international criminal law formed on their own terms.[7]

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1. See U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome Statute of the International Criminal Court, U.N. Doc. No. A/CONF.183/9 (1998) [hereinafter Rome Statute].

Widespread attendance at the Conference was possible in part by a voluntary trust fund for travel assistance. The fund "was important to facilitate the participation of those developing countries that were unable, for financial reasons, to send their experts to Rome[.]" M2 Presswire, U.N.: Steps to Full Functioning International Court Discussed as Sixth Committee Considers Rome Statute, Oct. 23, 1998 (available at 1998 WL 16529473).

2. See U.N., Rome Statute of the International Criminal Court – Ratifications, available at <http://www.un.org/law/icc/statute/status.htm (last updated Feb. 12 2001) [hereinafter Status of Rome Statute].

3. See id.

4. See American Servicemembers' Protection Act of 2000, S. 2726, 106th Cong. §2; See also H.R. 4654, 106th Cong. §§2,4 (2000), and Protection of United States Troops From Foreign Prosecution Act of 1999, H.R. 2381, 106th Cong. §§2-3 (1999).

5. See Status of Rome Statute, supra note 2. See also Scott W. Andreason, The International Criminal Court: Does the Constitution Preclude Its Ratification by the United States?, 85 IOWA L. REV. 697, 699 (2000).

6. Diane F. Orentlicher, U.S. Cheats Justice in Opposing World Court, L.A. TIMES, Aug. 30, 1998 at M2. (Author further criticizes U.S. delegation: "[T]he U.S. government's approach to the Rome conference was a study in ill-conceived strategy.").

7. See Jesse Helms, We Must Slay This Monster: Voting Against the International Criminal Court Is Not Enough. The U.S. Should Try to Bring It Down, FIN. TIMES, July 31, 1998, at 1 (Senator Helms declared "so long as there is breath in me, the US will never – I repeat, never – allow its national security decisions to be judged by an International Criminal Court."). See also John R. Schmertz & Mike Meier, By Large Majority, U.N. Conference in Rome Approves Permanent International Criminal Court, 4 INT'L L. UPDATE 99

Given that the United States often claims a role of international peacekeeper, and defender of human rights, this reluctance to sign the Rome Statute at first blush seemed antithetical to the proposed ideals by which the United States conducts its foreign affairs. This article reviews the primary objections of the United States to the Rome Statute, and counters them with the following proposition: The United States quite accurately believes that signing and ratifying the Rome Statute would render members of the United States' military vulnerable to the jurisdiction of the ICC; however, this vulnerability is mitigated by ample procedural protections, and is outweighed by the possibility, albeit unproven, that the ICC may function as a chilling influence on violence in the shadow of a century characterized by unspeakable atrocities and widespread suffering.

A. The United States' Signature of the Rome Statute

As a preliminary matter, one must note that the United States has signed the Rome Statute. "On December 31, with the country distracted by the New Year's revels, Bill Clinton announced that the U.S. would sign the [Rome Statute] to establish an International Criminal Court. He characterized his decision as an act of 'moral leadership'."[8] Perhaps Mr. Clinton's goal of leadership was realized as Israel also signed the Rome Statute on December 31, 2000.[9] "The move was prompted largely by President Bill Clinton's decision on Sunday night to join the more than 130 signatures [of the Rome Statue] . . . . Mr. Clinton's stance gave the Israelis the feeling that the U.S. would use its weight to protect the Jewish state within the new body."[10]

While some may claim United States' signature of the Rome Statue "is a significant development because it counters a growing trend of isolationism in U.S. foreign policy[,]"[11] and a step back from "a policy of constructive disengagement[,]"[12] such may not be the case. Rather, as December 31, 2000 marked the deadline for signature of the Rome Statute, the signature by the Clinton Administration may have been a strategic move by the government to enable United States involvement in the preparatory committees of the ICC without first ratifying that Rome Statute, as would be the case after

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(1998) ("Even if the executive branch had supported the Statute, Senator Jesse Helms, Chairman of the U.S. Senate Foreign Relations Committee, stated that a proposal for an international tribunal that could prosecute American soldiers for war crimes would be 'dead on arrival' at his Committee.").

8. Jeremy Rabkin, *A Dangerous Court*, WALL. ST. J., Jan. 3, 2001 at A14. (The author went on to describe the signature as "a betrayal of American interests.").

9. *See Status of Rome Statute, supra* note 2.

10. Ben Lynfield, *Israel Joins U.S. in Backing World Court*, SCOTSMAN, Jan. 2., 2001 at 9. As in the U.S., the Rome Statute did not receive whole-hearted support:

> 'It is pregnant with troubles for the future,' [Elyakim Rubenstein, attorney-general of Israel,] said, stressing that most of the signatories to the international court treaty would interpret Israel's large scale settlement of Jews in the West Bank and Gaza Strip as a 'war-crime'.

11. William J. Aceves, *It is Time to Abandon Constructive Disengagement as U.S. Foreign Policy*, SAN DIEGO UNION-TRIB., Jan. 5, 2001 at B7.

12. *Id.* at B7.

the deadline.[13] Although signature is often a prelude to Senate ratification, and ratification appears unlikely in the United States regarding the Rome Statute, the United States may now be committed, under existing international law, not to act in any way that would undermine [the Rome Statute]. That is the obligation of states that sign a treaty before they ratify it, according to the 1969 Vienna Convention on the Law of Treaties. And in general terms, the obligation makes sense: Countries should not sign treaties with their fingers tied behind their backs."[14]

The remainder of this article will begin with a brief discussion of twentieth century international criminal tribunals – from Nuremberg through the currently convened *ad hoc* Tribunals for the Former Yugoslavia and Rwanda. This discussion will serve to illustrate the scope of the Rome Statute in comparison, as well as one of the primary United States objections – the as of yet undefined crime of aggression.[15] Second, this article will attempt an explanation of the triggering mechanism and procedure of the ICC through an illustrative hypothetical situation with United States involvement. This discussion will highlight both the procedural objections of the United States, and the safeguards of the Rome Statute that make these fears understandable, but unnecessary. Third, this article will discuss remaining objections of the United States: Constitutional objections raised by various congressmen, and the fear of a politicized, litigious court. Finally, this article will demonstrate that while the ICC may not prove to be a perfect body, it will be more effective as it is now proposed, than it would be if the Conference of Plenipotentiaries had adopted either the P-5 or United States compromise proposals for Article 12 of the Rome Statute.

II. PREVIOUS INTERNATIONAL CRIMINAL TRIBUNALS COMPARED TO THE ICC

A. Previous International Criminal Tribunals

A tribunal with the goal of bringing individuals to justice for heinous international crimes is not without precedent. The United States played an important role in the Nuremberg[16] and Tokyo[17] prosecutions of Axis powers after World War II. The United

13. *See id.* at B7. (President Clinton stated: "We [sign the Rome Statute] to reaffirm our strong support for international accountability . . . [and] we do so as well because we wish to remain engaged in making the [ICC] an instrument of impartial and effective justice in the years to come.").

14. Rabkin, *supra* note 8, at A14.

15. In 1974 a United Nations General Assembly defined aggression as "the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this Definition." (G.A. Res. 3314, U.N. GAOR, 29th Sess., Supp. No. 31, at 142, U.N. Doc. A/9631, Annex (1974), *re-printed in* JORDAN J. PAUST ET. AL, INTERNATIONAL CRIMINAL LAW DOCUMENTS SUPPLEMENT 24 (2000). *See also* Benjamin B. Ferencz, *Aggression*, *in* I ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 58, 60-63 (Rudolph Bernhardt et al. eds., 1992). This definition did not prove sufficient for the Rome Conference, and aggression now plays an important role in United States' objections to the Rome Statute. *See infra* Section II(C), notes 29-48.

16. *See* The Charter of the International Military Tribunal at Nuremberg [hereinafter *Nuremberg Char-*

States also participated in the formation of *ad hoc* tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR).[18] A comprehensive discussion of these tribunals is beyond the scope of this paper, and has been undertaken by other authors.[19] However, certain aspects of these tribunals should be compared and contrasted with the proposed scope of the ICC to provide a better basis for understanding the United States' reservations.

B. Comparison Between the ICC and Other International Criminal Tribunals

The four tribunals mentioned above overlap in some of the crimes they claimed within their respective jurisdictions. Crimes against humanity were prosecuted by both WWII tribunals,[20] and are currently within the competence of the ICTY and ICTR.[21] The proposed ICC would also have competence over crimes against humanity,[22] although the definition of such crimes in the Rome Statute is of arguably wider scope than as contained in previous tribunals, regarding the subject of the offence.[23] While the definition in the Rome Statute is more expansive than those of past tribunals, it is not necessarily more clear. The ICC will have jurisdiction over "a course of conduct involving the multiple commission of acts referred to in paragraph 1 [of Article 7] against any civilian population, in furtherance of a State or organizational policy to commit such attack."[24]

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ter], Aug. 8, 1945), 82 U.N.T.S. 279.

17. *See* U.S. Dep't of the Army Pamphlet No. 27-161-2, II INTERNATIONAL LAW 233-34 (1962) *cited in* JORDAN J. PAUST ET AL., INTERNATIONAL CRIMINAL LAW: CASES AND MATERIALS 631 (2d ed. 2000):

> The basic policy for the trial and punishment of Japanese war criminals was the Potsdam Declaration of 26 July 1945 jointly issued by China, the United Kingdom, and the U.S.A. The U.S.S.R. subsequently adhered to it. By the Instrument of Surrender, signed on 2 September 1945, Japan accepted the provisions of the Potsdam Declaration. General MacArthur . . . was then directed by the United States to proceed with the trial of Japanese war criminals. Though approved by other nations this action was unilateral on the part of the United States.

18. *See* International Criminal Tribunal for the Former Yugoslavia, S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg. at 29, U.N. Doc. S/RES/827 (1993), *reprinted in* 30 I.L.M. 1159091 [hereinafter *ICTY Statute*]; *see also* International Tribunal for Rwanda S.C. Res. 955, U.N. SCOR, 48th Sess., 3453d mtg. at _____, U.N. Doc. S/RES/955 (1994), *reprinted in* 33 I.L.M. 1598 [hereinafter *ICTR Statute*]. The United States is a permanent member of the United Nations Security Council, and could have used its veto power to stop the formation of these *ad hoc* tribunals.

19. *See, e.g.*, THE TOKYO WAR CRIMES TRIAL – AN INTERNATIONAL SYMPOSIUM (C. Hosoya, N. Ando, Y. Onuma, R. Minear eds. 1986) *cited in* JORDAN J. PAUST ET. AL, INTERNATIONAL CRIMINAL LAW 632 (2d ed. 2000); *see also* Mary Margaret Penrose, *Lest We Fail: The Importance of Enforcement in International Criminal Law*, 15 AM. U. INT'L L. REV 321 (2000).

20. *See Nuremberg Charter*, *supra* note 16, art. 6(c); *see also* Tokyo Charter for the International Military Tribunal for the Far East (1946) [hereinafter *Tokyo Charter*] as amended by General Orders No. 20 (26 April 1946). T.L.A.S. No. 1589.

21. *See ICTY Statute*, *supra* note 18, art. 5; *ICTR Statute*, *supra* note 18, Art. 3.

22. *See Rome Statute*, *supra* note 1, art. 7.

23. *See ICTY Statute*, *supra* note 18, art. 5(g) (crimes against humanity include, *inter alia*, the crime of rape). *See Rome Statute*, *supra* note 1, art. 7(g) criminalizing rape, as well as "sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity[.]").

24. *Rome Statute*, *supra* note 1, art. 7(2)(a).

The question remains, though, just what numerosity requirement is to be inferred in the term "multiple commission of acts[,]" and just what nexus must be demonstrated between "a State or organizational policy" and the acts of one or more individuals accused of crimes against humanity. The issue could be clarified somewhat by the preamble to the Rome Statute, which states the court shall have complimentary "jurisdiction over the most serious crimes of concern to the international community as a whole." But while this statement of purpose may relieve the court of one case of murder *simplicitor* committed during a war, the international community as a whole is surely concerned with torture against a civilian population.[25] Thus, although it may be an unlikely and extreme result of this ambiguous definition, according to one jurist from the United Kingdom, "[i]f countries the world over ratified the Rome Statute then torturers alone could make the ICC much busier than an inner-city magistrates' court on a Monday morning."[26]

No other single crime covered by the Rome Statute has been included in the statutes of all four international tribunals mentioned above. The ICTY and the ICTR have jurisdiction over a distinct crime of genocide, while the post WWII tribunals considered it within crimes against humanity.[27] The post WWII tribunals made an offence of war crimes, as does the ICTY, but not the ICTR. And the post WWII tribunals had jurisdiction over crimes against peace, much as the ICC will have jurisdiction over the crime of aggression, but the ICTY and ICTR do not. While all of the crimes, as defined in the Rome Statute, contain some ambiguity, surely none has met with more controversy than the crime of aggression, as witnessed by the fact that the Rome Conference did not include a definition of this crime within the statute.[28]

C. The Undefined Crime of Aggression

Few United States citizens may realize the importance of this missing definition, and even fewer, outside of lawyers, may realize the extreme difficulty in defining this

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25. While torture and murder are both crimes, international agreements and decisions certainly highlight torture as particularly heinous, and an international offence; isolated cases of murder may not rise to this level. *See* Convention Against torture and Other Cruel, Inhuman or Degrading Treatment of Punishment, G.A. Res. 832, U.N. GAOR, 39th Sess., Supp. No. 51, at 197, U.N. Doc. A/39/51 (1984), *reprinted in* JORDAN J. PAUST ET AL., INTERNATIONAL CRIMINAL LAW DOCUMENTS SUPPLEMENT 278 (2000). *See also* Regina v. Bow Street Metropolitan Stipendiary Magistrate and others, *ex parte* Pinochet Ugarte (Amnesty International and others intervening) (No. 3) 2 All ER 97, 166 (1999) (Lord Hutton states: "Therefore I consider that a single act of torture carried out, or instigated by, a public official, or other person acting in an official capacity constitutes a crime against international law, and that torture does not become an international crime only when it is committed or instigated on a large scale.").

26. John Holbrook, *'World Court' is a Creature of Politics Rather Than Justice*, THE TIMES (London), Sept. 26, 2000.

27. *Compare* ICTY Statute, *supra* note 18, art. 4 *and* ICTR Statute, *supra* note 18, art. 2, *with* Nuremberg Charter, *supra* note 16, art. 6.

28. *See Rome Statute*, *supra* note 1. (claims jurisdiction over the crime of aggression in article 5, but then fails to define it within later articles. It has been left for further debate, and eventual amendment by the processes set out in articles 9 and 121).

crime.[29] While individuals or states across the globe may occasionally blame the United States of committing any one of the crimes listed in the Rome Statute, the issue of a statutory definition of the crime of aggression bears heavily on the conscience of United States policy makers.[30] The strongest international criminal claims against the United States *may* be that the United States has recently engaged in illegally aggressive activities, in both Iraq and Kosovo.[31]

United States and allied action in the defence of Kuwait was premised on a state's inherent right of collective self defence as embodied in the Charter of the United Nations.[32] Although the Security Council did direct member states to effect its mandates by using "all necessary means" in restoring "international peace and security to the area," it did not specifically authorize the use of force[33] – an option surely within its powers.[34] Assuming for the moment that the use of force itself did not violate international law, the coalition force was nonetheless limited in its actions of collective self-defence. The United States and its allies were bound by the principle of proportionality to the goal desired.[35] In essence, the force used should not have exceeded that required to establish the safety of Kuwait. The United States, in bombing major Iraqi cities, industry and infrastructure, may have exceeded this limit imposed by norms of international law.[36] The ICC will never have the opportunity to hear such a case made by Iraqi statesmen. The Rome Statute provides that the ICC will only have jurisdiction over situations that

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29. *See* JORDAN J. PAUST ET AL., INTERNATIONAL CRIMINAL LAW: CASES AND MATERIALS 708 (2d ed. 2000). (An early attempt at the creation of an international criminal court "was permanently shelved due to the absence of an internationally accepted definition of the crime of 'aggression'[.]").

30. *See* Bruce Fein, *Torching the Constitution*, THE WASHINGTON TIMES, Aug. 01, 2000 at A18:

> Many nations accused the United States of aggression in the Vietnam War and aggression in the 1961 Bay of Pigs fiasco launched against Fidel Castro's Cuba. And some accuse us today of aggression against Slobodon Milosevic's Yugoslavia for our bombing in retaliation for internal ethnic cleansing and Saddam Hussein's Iraq by establishing *de facto* protectorates for Iraqi Kurds and Shi'ites. . . . The United States fire-bombed Tokyo, killing tens of thousands of civilians . . . and dropped atomic bombs on Hiroshima and Nagasaki with similar gruesome consequences. Many to this day claim the civilian carnage was clearly excessive in relation to the goal of Japanese surrender.

See also David J. Scheffer, *Developments in International Criminal Law: The United States and the International Criminal Court*, 93 AM. J. INT'L .L. 12, 21 (1999). ("This political concession to the most persistent advocates of a crime of aggression without a definition and without the linkage to a prior Security Council determination that an act of aggression has occurred deeply concerns the United States.").

31. *See infra* notes 32-41.

32. *See* U.N. Charter art. 51 [*hereinafter* U.N. Charter] "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security." *Id.*

33. S.C. Res. 678, U.N. SCOR, 45th Sess., 2963d mtg. at 27, U.N. Doc. S/RES/678 (1990).

34. *See* U.N. Charter, *supra* note 32, art. 42.

35. *See* Shaw J. Dallal, *International Law and the United Nations' Role in the Gulf Crisis*, 18 SYRACUSE J. INT'L L. & COM. 111, 138 (1992).

36. *See id.*

arise after the court is finally formed.[37] Coalition action in Kuwait is, however, the type of case that could easily draw the scrutiny of the ICC if repeated in the future, and implicate officials and politicians of the United States government under the doctrine of command responsibility as enshrined in the Rome Statute.[38]

If the ICC were functioning two years ago, the Former Republic of Yugoslavia may have had more luck in prosecuting NATO members than it did before the International Court of Justice.[39] The NATO allies commenced the bombing of the Former Yugoslavia in a humanitarian mission in 1999. This action, though, was of questionable legality. The 1945 UN Charter arguably reaffirmed the pre-WWII sentiment that prohibited intervention by one nation into the internal affairs of another, whether committed in the name of humanitarian concern or not.[40] And, while the Security Council effectively ratified NATO's action in Kosovo after the fact in Resolution 1244,[41] had the ICC been in existence it may have heard loud calls for examination from Yugoslavia. If Yugoslavia were a member of the ICC at the time of the attacks, or accepted ICC jurisdiction after the attacks, these cries would be difficult for the ICC to ignore. Of course, in situations similar to those above the Prosecutor or Trial chamber may decide not to hear the case, but the possibility remains of United States involvement as a defendant in an international criminal trial.

United States involvement would not mean, though, that the United States itself would be listed as the defendant. Rather, the ICC will have jurisdiction over individuals.[42] This personal liability is extended through the doctrine of command responsibility to military commanders, those acting as military commanders, and those superiors of subordinates under his or her effective control that commit a crime under the Rome Statute.[43] Although it will remain to be seen how the ICC deals with the issue of command responsibility, an informed American judgment regarding the Rome Statute should consider that trials of international criminals have convicted non-governmental and non-military individuals.[44] This may not arise regarding the crime of aggression, per se, but surely functions to cast the net wider in the search for criminals.

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37. *See Rome Statute*, *supra* note 1, art. 11 ("The Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute.").

38. *See Rome Statute*, *supra* note 1, art. 27 ("Irrelevance of official capacity"), 28 ("Responsibility of commanders and other superiors"); *see infra* notes 42-44.

39. The International Court of Justice found that it lacked jurisdiction, unless explicitly accepted for that matter, by the NATO members. *See* Peter H. F. Bekker, *International Decision: Legality of the Use of Force, International Court of Justice, June 2, 1999*, 93 AM. J. INT'L .L. 928 (1999).

40. *See* Louis Henkin, *NATO's Kosovo Intervention: Kosovo and the Law of "Humanitarian Intervention"*, 93 AM. J. INT'L .L. 824 (1999).

41. *See id.* at 827.

42. *See Rome Statute*, *supra* note 1, art. 25(1) ("The Court shall have jurisdiction over natural persons pursuant to this Statute.").

43. *See* id. at art. 28.

44. *See* U.S. Dept. of Army Pamphlet No. 27-161-2, II International Law 224, 226-33 (1962), *reprinted in* JORDAN J. PAUST ET. AL, INTERNATIONAL CRIMINAL LAW 288 (2d ed. 2000). (Pursuant to Allied Control Council Law No. 10, German industrialists, *inter alia*, were brought to trial and convicted as war criminals.).

One commentator counters American concerns about aggression with the assertion that the crime of aggression may only be defined by amendment to the Rome Statute after seven years of operation.[45] While this is certainly true according to the explicit terms of Article 121 of the Rome Statute, the further assertion that "it is important to bear in mind that *any* amendment under Article 121 is binding only on those state parties that explicitly consent to it,"[46] – and thus the United States need not fear a definition of aggression – may not be completely true. Article 121(4 and 5) of the Rome Statute states:

> Except as provided in paragraph 5, an amendment shall enter into force for all States Parties one year after instruments of ratification or acceptance have been deposited with the Secretary-General of the United Nations by seven-eighths of them.
>
> Any amendment to Article 5, 6, 7, and 8 of this Statute shall enter into force for those States Parties which have accepted the amendment one year after the deposit of their instruments of ratification or acceptance. In respect of a State Party which has not accepted the amendment, the Court shall not exercise its jurisdiction regarding a crime covered by the amendment when committed by that State Party's nationals or on its territory.[47]

The above provisions indicate that an amendment to Article 5 of the Rome Statute may not bind all states, even in the face of overwhelming support. But paragraph 4 of Article 121 shows that amendments ratified by seven-eighths of States Parties will bind all States Parties so long as they do not amend Article 5. Article 5 already includes the crime of aggression, and the inclusion of a definition of aggression would not require an amendment of Article 5.[48] Although amendment of Article 5 may be desired in such

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45. *See* Scott W. Andreasen, *The International Criminal Court: Does the Constitution Preclude Its Ratification by the United States?*, 85 IOWA L. REV. 697, 717 (2000).

46. *Id.* at 717, *emphasis added.*

47. *Rome Statute*, *supra* note 1, art 121.

48. *See id.* art. 5:

> 1. The jurisdiction of this Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes:
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> . . .
>
> (d) The crime of aggression.
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> 2. The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime an setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.

If a definition of the crime of aggression is presented at the close of seven years it may be desirable, but not necessary, to remove Paragraph 2 from article 5. Thus, a definition of aggression would take effect under article 121(3 and 4). Note that the term "States Parties" is used in previous Paragraphs of article 121 to refer to States Parties to the Rome Statute. While one may stretch the wording of Paragraph 4 to bind only "States Parties" to one particular amendment, this would run contrary to the use of the term in other provisions of the Rome Statute, and within article 121 itself.

circumstances, it would still function adequately as it currently stands. Thus, a definition of aggression may be promulgated under article 121(4), and would require only seven-eighths of States Parties to ratify the amendment for it to become binding on all States Parties, whether they ratify it or not. It may be important to notice the irony, though, embodied in the terms of Article 121. As states party to the Rome Statute may add new crimes to Article 5 of the Rome Statute they may also opt out of ICC jurisdiction on such crimes. Non-parties to the Rome Statute may not. Thus a state may hypothetically limit its liability for damnable action by pledging alliance to the ICC.[49]

The differences between the ICC and the tribunals discussed above may be in large part because the ICC is meant to be a proactive body.[50] The other tribunals were all created in reaction to particular events. In the case of post WWII tribunals the war had already concluded, and the victors were in the position to mete out justice to the defeated. The ICC will thus avoid claims of "victors' justice" leveled against the Nuremberg and Tokyo prosecutions.[51] While the *ad hoc* ICTY and ICTR were convened after the beginning of conflict in their respective regions, they are surely contemporary to their respective conflicts, and may eventually avoid the label given to the previous tribunals. The ICTY and ICTR are still, nonetheless, essentially reactions to situations in the former Yugoslavia and Rwanda, and the statute of each body displays its nature as such.[52] Beyond a remedy to the accusation of "victors' justice," the ICC has also been presented as a cost-effective alternative to *ad hoc* tribunals, and a forum for the consistent development of case law regarding international criminal law.[53]

Finally, the triggering mechanism of the ICC, discussed in the next section, is different from that of the ICTY or ICTR. The ICTY and ICTR are both tailored to fit their respective conflicts, and claim primacy over national courts;[54] in contrast, the ICC at-

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49. *See* Scheffer,, supra note 30, at 20.

50. *See Rome Statute*, *supra* note 1, art. 24 ("Non-retroactivity *ratione personae*").

51. See Mary Margaret Penrose, Lest We Fail: The Importance of Enforcement in International Criminal Law, 15 AM. U. INT'L L. REV 321, 334-35 (2000):

> In many regards, Nuremberg is a dark shadow ominously clouding the history of international criminal law. Nuremberg still stands as a testament to the fact that the laws of war are meted out by the victors of war. Hence, modern scholars of international law attempt to ignore and minimize the concerns regarding "victors' justice" and the application of *ex post facto* laws.

See also M2 Presswire, *U.N.: Steps to Full-Functioning Int'l Criminal Court Discussed as Sixth Committee Considers Rome Statute*, Oct. 23, 1998 available in 1998 WL 16529473 (Report on Croation U.N. Representative Ivan Simonovic's comment: "[A]herence to the principle of 'victors' justice [has] been broken with the establishment of the International Criminal Tribunals for Rwanda and for the Former Yugoslavia, as those bodies [have] jurisdiction over perpetrators from all sides to the conflict.").

52. The conflicts in the former Yugoslavia and Rwanda were to a large extent internal, and thus neither respective statute contains the crime of aggression. Likewise, as Rwanda was almost exclusively an internal conflict, the ICTR Statute criminalizes violations of article 3 common to the Geneva Conventions and of Additional Protocol II (*see ICTR Statute*, *supra* note 18, art. 3), but does not mention war crimes – more applicable in primarily international conflict.

53. *See* Scheffer, *supra* note 30, at 13.

54. *See ICTY Statute*, *supra* note 18, art. 9; *ICTR Statute*, *supra* note 18, art. 8.

tempts to maintain the flexibility to deal with all possible future conflicts, and makes a dubious claim of complementarity to national courts.[55]

III. THE TRIGGERING MECHANISM OF THE ICC

Upon completion of the Rome Statute many states made commentary relating their positions on the International Criminal Court as it is now conceived. The United States, as a non-signatory, presented the following hypothetical situation in an attempt to discredit the complementarity regime of Article 12 as an inhibition of efforts to help protect international peace and security:

> A state not party to the treaty launched a campaign of terror against a dissident minority inside its territory. Thousands of innocent civilians were killed. International peace and security were imperiled. The United States participated in a coalition to use military force to intervene and stop the killing. Unfortunately, in so doing, bombs intended for military targets went astray. A hospital was hit. An apartment building was demolished. Some civilians being used as human shields were mistakenly shot by United States troops. The State responsible for the atrocities demanded that United States officials and commanders should be prosecuted by the International Criminal Court. The demand was supported by a small group of other States.[56]

A. Obtaining Jurisdiction Over a Situation Under the Rome Statute

To understand the implications of the above hypothetical for the United States one must examine it from three potential permutations in which countries involved are, or are not members to the Rome Statute. First, where either the United States, or both the United States and the territorial state have ratified or acceded to the Rome Statute. Second, where the United States has not, but the territorial state has ratified or acceded to the Rome Statute. And finally, where neither the United States nor the territorial state has acceded to the Rome Statute.

If only the United States, or both the United States and the territorial country of the above hypothetical, were members to the Rome Statute the question of jurisdiction would be easily answered. The ICC would undoubtedly have the opportunity to examine, and possibly hear the case, if they believed it was meritorious, subject only to the constraints of complementarity, discussed below. This jurisdiction would be based in the universal jurisdiction provision of the Rome Statute – a blanket acceptance of the court's jurisdiction for the crimes defined in Article 5.[57]

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55. *See Rome Statute*, *supra* note 1, art. 17 ("Issues of admissibility"); *see also* id. at Preamble. ("*Emphasizing* that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions . . . .").

56. THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE 633 (Roy S. Lee ed., 1999) (citing A/C.6/53/SR.9, 21 October 1998).

57. *See Rome Statute*, *supra* note 1, art. 12(1) ("A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5.").

If the state where the situation occurred (i.e. the territorial state) were a member to the Rome Statute, the Court would have jurisdiction if any State Party to the Statute referred the situation to the prosecutor, if the Security Council, operating under its Chapter VII powers refers the situation to the prosecutor, or if the prosecutor initiated an investigation *propio motu*.[58] According to representatives of the United States department of State, this power of the court, its ability to bring non-party states within its jurisdiction, may be beyond the auspices of international law.[59] This is not to say that acts by non-party states proscribed by the Rome Statute would be legal simply because the state is a non-party. Rather, "[w]hile certain conduct is prohibited under customary international law and might be the object of universal jurisdiction by a national court, the establishment of, and a state's participation in, an international criminal court are not derived from custom but, rather, from the requirements of treaty law."[60] This statement may find support in the jurisprudence of the International Court of Justice (ICJ). In the North Sea Continental Shelf [61] the ICJ provided three criteria for application to multilateral conventions to determine whether they have attained the status of customary international law. The first criterion states that the provisions of the convention must be "of a fundamentally norm-creating character such as could be regarded as forming the basis of a general rule of law."[62] The two remaining criteria required widespread and representative state practice and *opinio juris*.[63] While the Rome Statute boasts wide signature and may eventually make a similar claim of wide adherence, it is doubtful that the procedural requirements and rules of a tribunal are of a "norm creating" character, and thus binding on non-member states. The same contention applies also to the following permutation, in which the ICC might obtain jurisdiction over a situation involving two or more non-party states.

If neither the United States, nor the territorial state of the above hypothetical were

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58. *See Rome Statute*, *supra* note 1, art. 12(2):

> In the case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3:
>
> (a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;
>
> (b) The State of which the person accused of the crime is a national.

59. *See* David J. Scheffer, *Developments at Rome Treaty Conference*, Testimony Before the Senate Foreign Relations Committee, July 23, 1998 (visited Nov. 11, 2000); <http://www.state.gov/www/policy_ remarks/1998/980723_scheffer_icc.html> United States Participation in the United Nations, REPORT BY THE PRESIDENT TO CONGRESS FOR THE YEAR 1998 at 85 (Dep't of St. publication 10623) ("First, and most objectionable, is the purported extent of the court's jurisdiction, which would reach nationals, and thus the official acts, of states that have not consented to the treaty.") available in <http://www.state.gov/www/isues/unpart /1998/98part6.pdf>.

60. Scheffer, *supra* note 48 at 18.

61. (W. Ger. v. Den., W. Ger. v. Neth.), 1969 I.C.J. 3 (Feb. 20).

62. *Id.* at 42.

63. *See id.*

members to the Rome Statute, it is still possible that the ICC could obtain jurisdiction over the situation. The Rome Statute provides that a state that is not party to the statute may accept the exercise of jurisdiction by the court with respect to the crime in question.[64] In operation, then, provided that the Security Council does not take action, this state may commit questionable conduct with respect to its own citizens and then accept the jurisdiction of the court only with respect to crimes allegedly committed by any force attempting humanitarian intervention. Thus, in relation to the above hypothetical, "in the absence of a Security Council referral, the Court could not investigate those responsible for killing thousands, yet the United States officials, commanders and soldiers [who tried to stop the killing] could face an international investigation and even prosecution."[65] From a United States perspective, regarding the latter two of the three permutations above, the prospect of Security Council reference of the hypothetical case to the ICC is very nearly a moot point, as the United States has veto power conferred under United Nations Charter.[66]

B. Bars to the Exercise of ICC Jurisdiction

Simply because the ICC has jurisdiction over a situation does not mean that the case will be held automatically admissible and tried before the trial chamber. As a preliminary issue, the prosecutor may decide to take no action on a referral from a state if there is not a "reasonable basis to proceed with an investigation."[67] If the prosecutor decides that there is a reasonable basis to continue with an investigation, she will notify all states that would normally have jurisdiction over the situation in question. In the above hypothetical, the United States would have three possible courses of action: proceed with the case in the ICC; petition the Security Council for a one year deferral of the case;[68] or take jurisdiction of the case upon itself, under the doctrine of complementarity.[69] The following discussion assumes that the United States legal system is the only system outside of the ICC that has a valid jurisdictional claim over the actions in question. It is possible, though, that a situation may arise in which two nations have equally valid claims of jurisdiction over the accused, as well as the ICC. Thus, the question may still remain, with little guidance from the Rome Statute, of which system or body should have jurisdiction over the accused if the state of nationality declines the case.

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64. *See Rome Statute*, *supra* note 1, art. 12(3).

65. THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE 633 (Roy S. Lee ed., 1999) (citing A/C.6/53/SR.9, 21 October 1998).

66. *See* U.N. Charter, *supra* note 32, art. 27(3).

67. *Rome Statute*, *supra* note 1, art. 15(3); *see also* art. 18(1).

68. *See Rome Statute*, *supra* note 1, art. 16.

69. *See Rome Statute*, *supra* note 1, Preamble paragraph 10, art. 1, 17.

1. United States Acquiescence to the Jurisdiction of the ICC

In the unlikely event that the United States voluntarily submitted to the jurisdiction of the ICC, the United States would not be without option to challenge the validity of the charges before a referring nation. Before the prosecutor could begin an investigation she must present her intentions, and supporting evidence, to the Pre-Trial Chamber of the ICC.[70] Only if the Pre-Trial Chamber authorizes the investigation – satisfied that there is reasonable basis to proceed with an investigation and that the case appears to fall within the jurisdiction of the court – will the investigation continue.[71] Such a determination by the Pre-Trial chamber, though, will not prejudice later determinations by the court regarding the jurisdiction or admissibility of the case.[72]

Upon completion of the prosecutor's investigation the court must satisfy itself that it has jurisdiction in any case brought before it. Objections to this jurisdiction may come from either an accused person summoned before the court, a state which has jurisdiction over the case and is investigating the case on its own, or a state from which acceptance of jurisdiction is required under Article 12.[73] Thus the Untied States, if it believed that the actions for which it was accused of a crime under the Rome Statute were not illegal or beyond of the jurisdiction of the court, would have one opportunity to challenge its prosecution on such grounds.[74] If the court found the case to be admissible, the United States, or more precisely, those accused, would continue in an adversarial manner prescribed by the Rome Statute, and the recently published rules of procedure and evidence.

2. Security Council Intervention in the Jurisdiction of the ICC

If the United States was opposed to the ICC exerting its jurisdiction over one of its nationals it may be afforded a period of respite through Security Council action. Although it may be difficult to garner adequate support,

> No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.[75]

Such a resolution by the Security Council would require the consent of all five permanent members, though, and a majority of at least nine votes from the fifteen Security Council members.[76] Furthermore, as the resolution must fall within the auspices of

70. *See id.* art. 15(3).
71. *See id.* art. 15(4).
72. *See id.*
73. *See id.*, *supra* note 1, art. 19.
74. *See id.*
75. *See id.*at art. 16.
76. *See* U.N. Charter, *supra* note 32, art. 27.

Chapter VII of the United Nations Charter the United States would be faced with the task of demonstrating how deferral of prosecution would be a necessary action pursuant to a determination of "any threat to the peace, breach of the peace, or act of aggression" and necessary "to maintain or restore international peace and security."[77] It may not be impossible for the United States to gain such support, given the realties of international politics, but from a legal point of view, justification for such action may prove quite thin. Furthermore, such action would only buy the United States time,[78] with renewal of the deferral facing the same challenges mentioned above.

3. Deferral to the United States based on Complementarity

The provisions of the Rome Statute embodying its early claims of creating a complimentary court, rather than a primary court, are embodied in Article 17. The idea is simply stated, although its application may remain mysterious: That the ICC will defer jurisdiction in all cases to domestic proceedings "unless the State is unwilling or unable genuinely to carry out the investigation or prosecution."[79] This caveat to the principle of complementarity has the obvious goal of overcoming sham prosecutions, designed to either protect or railroad those accused of heinous crimes. And although the Statute does provide some criteria by which to judge the validity of proceedings,[80] or the ability of a national court system,[81] it threatens to undermine the principle as a whole. The Rome Statute simply does not state what burden of proof shall be used in determining inability or unwillingness. Furthermore, the Rome Statute does not state on whom such a burden shall lay – must states defend their jurisdictional claims, or must the Prosecutor prove inability or unwillingness? The Rome Statute does refer to "principles of due process recognized by international law[,]" but doesn't define just what these principles are.[82]

Finally, within a military tribunal classified information may prove to be exculpatory. Should such information be made available to the public, or the ICC, the United States military may fear a breach of national security. Thus, and individual exculpated by sensitive materials may still face skepticism from the international community, as he or she cannot reveal the justification for a dismissal of charges. Should that individual be brought before the ICC, the United States government may refuse to provide sensitive information,[83] thus creating an unpleasant dilemma between defending an individual and defending important information.

77. *Id.* at art. 39.
78. *See Rome Statute*, *supra* note 1, art. 16.
79. *Id.* at art. 17(1)(a).
80. *See id.* art. 17(2).
81. *See id.* art. 17(3).
82. *Id.*at art. 17(2).
83. *Id.* art. 72.

IV. REMAINING UNITED STATES OBJECTIONS TO THE ROME STATUTE AND THE ICC

Through proposed legislation United States Congressmen have raised a number of constitutionally based objections to the Rome Statute.[84] United States representatives also remain fearful of the inclusion of the crimes of aggression and drug trafficking within the proposed jurisdiction of the ICC.[85] Finally, fears of a highly politicized court have heightened the resolve of some in opposition to the ICC.

A. Constitutional Objections

1. Contention: The ICC does not provide Americans their constitutional right to a jury trial

Proposed legislation in both houses of Congress claims, in similar terms, that "[a]ny American prosecuted by the International Criminal Court will, under the Rome Statute, be denied many of the procedural protections to which all Americans are entitled under the Bill of Rights to the United States Constitution, including, among others, the right to trial by jury[.]"[86] While it is true that the ICC will not try defendants before a jury of their peers, the proposed legislation may mischaracterize a defendant's rights. While the Sixth Amendment to the United States Constitution does state that "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed,"[87] the jurisprudence of United States courts has displayed that a jury may not always be an inviolable Constitutional right.

In *Ex parte Quirin*[88] the United States Supreme Court considered *habeas corpus* petitions by German submariners who arrived by submarine to the eastern coast of the United States. The German High Command had armed these would-be saboteurs with explosive and instructions to destroy American war facilities.[89] Upon apprehension, the President convened a military commission to try the defendants for charges, among others, that they, "being enemies of the United States and acting for . . . the German Reich, a belligerent enemy nation, secretly and covertly passed, in civilian dress, contrary to the law of war . . . ."[90] The issue decided by the Supreme Court was "whether it

84. *See* American Servicemembers' Protection Act of 2000, S. 2726, 106th Cong. (2000); *see also* H.R. 4654, 106th Cong. (2000), *and* Protection of United States Troops From Foreign Prosecution Act of 1999, H.R. 2381, 106th Cong. (1999).

85. *See* Scheffer, *supra* note 30, at 13.

86. American Servicemembers' Protection Act of 2000, S. 2726, *see also* H.R. 4654, *and* Protection of United States Troops From Foreign Prosecution Act of 1999, H.R. 2381.

87. U.S. CONST. amend. VI.

88. 317 U.S. 1 (1942).

89. *See id.* at 21.

90. *See id.* at 36.

is within the constitutional power of the National Government to place petitioners upon trial before a military commission for the offences with which they are charged."[91] After reviewing the history of trials regarding violations of the law of war, the Court found that "these petitioners were charged with an offence against the law of war which the Constitution does not require to be tried by a jury."[92] The Court held that:

> [T]he Fifth and Sixth Amendments did not restrict whatever authority was conferred by the Constitution to try offences against the law of war by military commission, and that petitioners, charged with such an offence not required to be tried by jury at common law, were lawfully placed on trial by the Commission without a jury.[93]

The United States Court for Berlin later commented on the decision of *Ex parte Quirin* in the case of *United States v. Tiede*.[94] The court stated:

> *Quirin* does *not* stand for the proposition that the nature of the tribunal dictates whether defendants must be accorded a trial by jury or that individuals tried before a military commission are never entitled to a jury. *Quirin* holds that whether an individual is entitled to a jury trial is determined by the nature of the crime with which he is charged.[95]

It is instructive to note that the Rome Statute describes crimes that are far from "garden-variety" felonies. The crimes within the competence of the ICC, with the possible exception of drug trafficking, if it is included in the near future, are violations of the laws of war, international customary law, and in some cases, *jus cogens*.[96]

a. The "Extradition Analogy"

Even Americans charged with "garden-variety" felonies in peacetime may not always receive a jury trial. The United States has formed bilateral extradition treaties with over one hundred other nations,[97] not all of which guarantee the right to a trial by jury in felony proceedings.[98] Furthermore, in respect of the national sovereignty of other nations, citizens of the United States who commit crimes in foreign countries are subjected

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91. *Id.* at 29.

92. *Id.*

93. *Id.* at 45.

94. Crim. Case No. 78-001A (U.S. Ct. for Berlin Mar. 14, 1979), 85 F.R.D. 227 (1979), *reprinted in* 19 I.L.M. 179 (1980).

95. *Id.* at 199 (emphasis in the original).

96. Principles *jus cogens*, simply stated, are peremptory norms in international law, from which states may not derogate in their actions or treaty relations. The international condemnation of Genocide has often been cited as an example of *jus cogens*. *See* JORDAN J. PAUST ET AL., INTERNATIONAL CRIMINAL LAW 5 (2d ed. 2000).

97. *See* JORDAN J. PAUST ET AL., INTERNATIONAL CRIMINAL LAW DOCUMENTS SUPPLEMENT 371 (2000).

98. *See e.g.*, 32 UST 1485 (1978). The United States has a bilateral extradition treaty with the Federal Republic of Germany 32 UST 1485 (1978). Neither the German Code of Criminal Procedure (*Strafprozessordnung*), nor the German Constitution *(Grundgesetz)* provides a felony defendant the right to a trial by jury.

to the criminal law and procedure of the prosecuting state, and are not guaranteed the right of a jury.

This analogy to extradition was strongly criticized by one commentator: "The extradition analogy . . . provides no support to those commentators who claim that the U.S. Constitution could not bar American participation in the ICC."[99] In support of the proposition that the Bill of Rights may apply to Americans before the ICC he cites the following language from *United States v. Balsys*:[100]

> If it could be said that the United States and its allies had enacted substantially similar criminal codes aimed at prosecuting offences of international character, and if it could be shown that the United States was granting immunity from domestic prosecution for the purpose of obtaining evidence to be delivered to other nations as prosecutors of a crime common to both countries, then an argument could be made that the [Bill of Rights] should apply . . . The point would be that the prosecution was as much on behalf of the United States as of the prosecuting nation.[101]

While the Supreme Court decided that *Balsys* did not present such a situation, one commentator claims the ICC would provide an analogous situation, assuming United States participation in the court, selection of judges, financing of its operation and sitting on the Assembly of State Parties.[102] This would supposedly create a situation in which "any prosecutions undertaken by the court – whether involving the actions of Americans in the United States or overseas – would be 'as much on behalf of the United States as of' any other state party."[103]

While it is possible that the United States will provide information to the ICC for the prosecution of its citizens this will likely occur only after the United States has been shown unwilling or unable to carry out its own prosecution[104] – thus casting doubt on a claim that the United States is as much a part of the prosecution as the ICC itself. Also, *Balsys* dealt heavily with the Fifth Amendment rights of an alien, living in the U.S., fearful that information exchanged for immunity would be used in foreign prosecution. The Court actually addressed these dicta to the Fifth Amendment, and did not explicitly extend them to include the rest of the Bill of Rights, the Sixth Amendment included. The actual statement of the court states that "an argument could be made that the *Fifth Amendment* should apply based on fear of foreign prosecution simply because that prosecution was not fairly characterized as distinctly 'foreign.'"[105] Furthermore, the

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99. *See* Andreasen, *supra* note 45, at 730 n.2.

100. 524 U.S. 666 (1998).

101. *Id.* at 698, *quoted in* Andreasen, *supra* note 45, at 728.

102. *See* Andreasen, *supra* note 98, at 729.

103. *Id.* at 729, (quoting *Is a U.N. International Criminal Court in the U.S. National Interest?: Hearings on the U.N. Int'l Criminal Court Before the Subcomm. on Int'l Operations of the Senate Comm. on Foreign Relations*, 105th Cong. (1998)).

104. *See Rome Statute*, *supra* note 1, art. 17.

105. 524 U.S. at 698 (*emphasis added*).

"extradition analogy" may gain more support regardless of the *Balsys* dicta, as extradition treaties and mutual legal assistance treaties do not appear to be mutually exclusive – the first provides for extradition from the United States, the second provides for expedited United States assistance in the collection of evidence and information.

The extradition analogy received it strongest criticism by a commentator arguing from the Supreme Court decision in *Neely v. Henkel*:[106]

> When an American citizen commits a crime in a foreign country, he cannot complain if required to submit to such modes of trial and to such punishment as the laws of that country may prescribe for its own people, unless a different mode be provided for by treaty stipulations between that country and the United States.[107]

"Theoretically, the ICC could obtain jurisdiction over a crime committed by an American, on American soil, against other Americans[,]"[108] and this would supposedly not fulfill the *Neely* criterion of international effect. While it is true that a crime on American soil may draw the ICC's attention, it disregards opinion in the international community that although an action may be of a domestic nature, its effects may be international. For example, NATO action in Kosovo was premised on humanitarian intervention – the offences taking place there were an offence against all humanity. Also, a number of international conventions and statements create the duty of *aut dedere aut judicare* creating universal jurisdiction over the perpetrators of particularly heinous crimes wherever they may be found.[109] The action proscribed by the Rome Statute is of international concern:

> [I]nternational law permits any state to apply its laws to punish certain offences although the state has no links of territory with the offence, or of nationality with the offender (or even the victim). Universal jurisdiction over the specified offences is a result of universal condemnation of those activities and general interest in cooperating to suppress them, as reflected in widely-accepted international agreements and resolutions of international organisations.[110]

Finally, in any case, the purported complementary jurisdiction of the ICC will pro-

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106. 180 U.S. 109 (1901).

107. *Id.* at 123, *quoted in* Andreasen, *supra* note 45, at 729.

108. Andreasen, *supra* note 45, at 730.

109. *See, e.g.* International Convention Against the Taking of Hostages, 1316 U.N.T.S. 205, art. 5 (1979); International Convention for the Suppression of the Financing of Terrorism, adopted by U.N. G.A. Res. 54/109 (December 9, 1999).

110. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 cmt. a (1987). Section 404 states:

> A state has jurisdiction to define and prescribe punishment for certain offences recognized by the community of nations as of universal concern, such as piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism, even where none of the bases of jurisdiction indicated in § 402 is present.

vide the United States first opportunity to try the case of an American accused of a crime under the Rome Statute.[111] This trial would presumably take place in the United States, and would most likely involve a military or jury trial.

2. Contention: The ICC does not provide Americans their constitutional right to a "speedy trial"

The Protection of United States Troops from Foreign Prosecution Act of 1999,[112] introduced in the House of Representatives on June 29, 1999, made a claim that has been removed from later bills of a similar nature,[113] but still warrants address, lest any who read the bill believe its claims to be damning to the Rome Statute. It claimed "a defendant would face a judicial process almost entirely foreign to the traditions of the United States and be denied the right to . . . a speedy trial[114][.]"[115]

While the Rome Statute does not guarantee defendants a "speedy trial" it does make provisions to avoid inappropriately lengthy and arduous litigation. The Rome Statute explicitly states: "The Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses."[116] Furthermore, the Rome Statute states, "[i]n the determination of any charge, the accused shall be entitled ... to the following minimum guarantees, in full equality: . . . to be tried without undue delay."[117] Also, the Pre-Trial Chamber has the power not only to dismiss a case, for various reasons, but may review the justifications and length of a defendant's detention before trial.[118] Thus, although the ICC may lack the *terminology* of American courts, it will surely have at its disposal a procedure to protect the *right* of a "speedy trial."

3. Contention: The ICC does not provide Americans their constitutional right not to be compelled to provide self-incriminating testimony

While the two most recent bills damning the ICC have wisely declined to criticize the Rome Statute for lacking the guarantee of a "speedy trial," they do level a new accusation against the constitutionality of the Rome Statue. Both bills, introduced in the House of Representatives and the Senate on June 14, 2000, claim: "Any American

111. *See Rome Statute, supra* note 1, art. 17(1).

112. H.R. 2381, 106th Cong. (1999).

113. Whereas H.R. 2381 § 2(3)(B) claims defendants would not be afforded a speedy trial, both H.R. 4654 and S. 2726 lack this assertion.

114. *See* U.S. CONST. amend. VI.

115. H.R. 2381 § 2(3)(B).

116. *Rome Statute, supra* note 1, at art. 64(2).

117. *Rome Statute, supra* note 1, at art. 67(1)(c).

118. *See Rome Statute, supra* note 1, art. 60(4) ("The Pre-Trial Chamber shall ensure that a person is not detained for an unreasonable period of time prior to trial due to inexcusable delay by the Prosecutor. If such delay occurs, the Court shall consider releasing the person, with or without conditions.").

prosecuted by the International Criminal Court will, under the Rome Statute, be denied . . . the right not to be compelled to provide self-incriminating testimony."[119]

The Rome Statute may be vague in some areas, but others areas are fairly difficult to misconstrue. It quite explicitly states the following: "In respect of an investigation under this Statute, a person shall not be compelled to incriminate himself or herself or to confess guilt[.]"[120] Accordingly, the Rome Statute goes on to protect defendants against coercion, duress or threat;[121] defendants are guaranteed the right to remain silent without such silence being considered when the Court decides guilt or innocence;[122] and, defendants are provided the right of legal assistance, without payment if necessary,[123] and to be questioned in the presence of counsel, unless the defendant waives such right.[124] Finally, in describing the rights of the accused, the Rome Statute states that a defendant has the right "[n]ot to be compelled to testify or to confess guilt and to remain silent, without such silence being a consideration in the determination of guilt or innocence[.]"[125]

However, the fears enshrined in the congressional bills referred to above may hold more weight if it appeared the ICC would deal with coerced confessions very differently from United States courts. Following a rule established long ago in *Brown v. Mississippi*,[126] and further modified by United States jurisprudence, courts in the United States will exclude from evidence confessions made in violation of a defendant's Fifth Amendment rights through either coercion or failure to fulfill the much lauded, and recently reaffirmed, *Miranda* requirements.[127] While, for obvious reasons, the ICC has not yet had reason to deal with this issue directly, it appears that a similar exclusionary rule may be followed in ICC decisions. Support for this contention is found in the Rome Treaty itself:

> Where the Trial Chamber is not satisfied that the [confession is not informed, voluntary, and supported by the evidence], it shall consider the admission of guilt as not having been made, in which case it shall order that the trial be continued under the ordinary trial procedures provided by this Statute and may remit the case to another Trial Chamber.[128]

This protection appears not only to remove the involuntary confession from evi-

119. H.R. 4654, 106th Cong. § 2(6) (2000); S. 2726, 106th Cong. § 2(6) (2000).

120. *Rome Statute*, *supra* note 1, at art. 55(1)(a).

121. *See id.* art. 55(1)(b).

122. *See id.* art. 55(2)(b).

123. *See id.* art. 55(2)(c).

124. *See id.* art. 55(2)(d).

125. *See id.* at art. 67(1)(g).

126. 297 U.S. 278 (1936).

127. *See* Dickerson v. United States, 530 U.S. 428 (2000) (affirming Miranda v. Arizona, 384 U.S. 436 (1966)).

128. *Rome Statute*, *supra* note 1, art. 65(3).

dence, but also attempts to attenuate any effect it may have had on those deciding the case. As one trial chamber may remit the case to another trial chamber it is possible that the taint of the involuntary confession will not follow the defendant. This mechanism may only prove effective if there is a sufficient barrier to transfer of information, either formally or by rumor, between chambers, but unless the ICC construes this provision in a very liberal manner it appears to pass United States Fifth Amendment muster.

4. Contention: The ICC does not provide Americans their constitutional right to confront and cross-examine all witnesses for the prosecution

All three bills introduced in Congress in direct opposition to the Rome Statute claim that the ICC will not afford defendants the right to confront and cross-examine all witnesses for the prosecution.[129] This statement, claiming a violation of defendant's Sixth Amendment rights,[130] is true only in so far as it as stated as an absolute. While defendants may not have the opportunity to cross-examine all witnesses against him or her, they will, pursuant to the Rome Treaty, be entitled to "[e]xamine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her."[131]

Thus, the accused will have an equality of arms with the Prosecutor, except in very limited circumstances. The section of the Rome Treaty, immediately following that which describes the rights of the accused, describes the protection of the victims and witnesses and their participation in the proceedings.[132]

While the prosecution and defence will stand on equal statutory grounds regarding the examination of witnesses these grounds will be subject to a potentially troubling limitation. Article 64(6)(b) vests in the Trial Chamber of the ICC the power to "[r]equire the attendance and testimony of witnesses and production of documents and other evidence by obtaining, if necessary, the assistance of States as provided in this statute."[133] Article 93(1) of the Rome Statute, though, appears to take the teeth from this power of the court by obliging states to facilitate only the *voluntary* appearance of witnesses or experts before the court.[134] The Rome Statute does provide a tool to compensate for this

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129. *See supra* notes 114, 118.

130. *See* U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with witnesses against him . . . .").

131. *Rome Statute*, *supra* note 1, at art. 67(1)(e).

132. *See id.* art. 68(4).

133. *Id.* at art. 64(6)(b).

134. *See id.* at art. 93(1)(e). The statute states:

> States Parties shall, in accordance with the provisions of this Part and under procedures of national law, comply with requests by the Court to provide the following assistance in relation to investigations or prosecutions: . . . .
>
> (e) Facilitating the *voluntary* appearance of persons as witnesses or experts before the Court[.]

Id. (emphasis added).

apparent weakness in the form of the Victims and Witnesses Unit (VWU).[135] The VWU will likely fill two roles: First, "the unit's services will facilitate effective investigation, prosecution and defence by encouraging them to come forward. Second, the VWU is essential not to make victims and witnesses unnecessarily suffer twice."[136] Thus, although witnesses may not be subpoenaed before the ICC in a traditional understanding of the action, reasonable action will be taken to protect their interests, as well as the interests of justice.

B. Fears of a Politicized, Litigious ICC

Beyond the (somewhat ambiguous) protection of the doctrine of complementarity, parties before the ICC will also receive the protection of statutorily mandated judicial and prosecutorial integrity. Part 4 of the Rome Statute governs the composition and administration of the ICC. Throughout these provisions the Rome Statute demands that judges of the ICC be of "high moral character, impartiality and integrity who possess the qualifications required in their respective States for appointment to the highest judicial offices."[137] While the qualifications of judges in the nations that are now signatories the Rome Statute may vary widely such qualification will nonetheless carry with them a widely available of public rulings or commentary. Voting parties will thus be able to critique the impartiality of candidates, as well as assess their qualification in either criminal law and procedure or international law – the dual alternative substantive qualifications of judicial candidates.[138]

Furthermore, the Rome Statute makes provision for judges to recuse themselves from cases in which they may have a vested interest,[139] and challenges to a judge's impartiality by the Prosecutor or the person being investigated or prosecuted.[140] The Prosecutor and Deputy Prosecutors of the ICC shall be held to similar standards, and subject to similar evaluation.[141]

While political reality may rob the provisions of the Rome Statute of some of their

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135. *See id.* at art. 43(6). The statute states:

> The Registrar shall set up a Victims and Witnesses Unit within the Registry. This Unit shall provide, in consultation with the Office of the Prosecutor, protective measures and security arrangements, counseling and other appropriate assistance for wit nesses, victims who appear before the Court and others who are at risk on account of testimony given by such witnesses. The Unit shall include staff with expertise in trauma, including trauma related to crimes of sexual violence.

Id.

136. Thordis Ingadottir et al., *The International Criminal Court: The Victims and Witnesses Unit (Article 43.6) of the Rome Statute), a Discussion Paper*, ICC Discussion Paper #1, PICT (PROJECT ON INTERNATIONAL COURTS AND TRIBUNALS). Available at University of London's Institute of Advanced Legal Study; information regarding PICT available at <http://www.pict-pcit.org>.

137. *Rome Statute*, *supra* note 1, art. 36(3)(a).

138. *See id.* at art. 36(3)(b)(i – ii).

139. *See id.* at art. 41(1).

140. *See id.* at art. 41(2)(b).

141. *See id.* at art. 42.

effect, any claims that the United States would be a target without friends on the court would surely be overstated. NATO powers and other developed nations may not form a majority of nations party to the Rome Statute,[142] and each nation will have only one vote in electing judges and the prosecutor, but such nations may form a strong enough voting block to promote a politically neutral court and prosecutor.[143] The United States may not possess a numerical advantage in the formation of the ICC, but the United States was successful in achieving some of its goals in the preparatory meetings of the Rome Statute,[144] and may find similar success in the formation of the Court.

V. CONCLUSION

While the ICC and its much criticized complementarity regime may not prove to be a perfect body, it will function more effectively as now proposed than if the preparatory committee had accepted the two jurisdictional regimes as proposed by the permanent five (P-5) members of the Security Council, and independently by the United States.

A. The Flawed P-5 Proposal

The P-5 powers – the United States, Russia, France, the United Kingdom, and China "met intensively to arrive at a compromise package that could be presented to the conference."[145] They "arrived at a joint proposal that would permit a ten-year transitional period following entry into force of the treaty during which any state party could opt out of the court's jurisdiction over crimes against humanity or war crimes."[146] The P-5 proposal would also reserve the ICC's jurisdiction over non-parties unless the Security Council were to decide otherwise.[147] The proposal ultimately failed, for good reason. While a ten-year transitional period may woo more nations to sign and ratify the Rome Statute, it would also severely limit the effectiveness of the court. Not only would cautious nations, such as the United States, surely take advantage of the opt-out provision, but also would a number of states with pernicious reason, due to questionable practices. This would effectively delay the start-up of this much-lauded new era in international criminal law for an additional ten years, excepting Security Council intervention. Security Council intervention, of course, would then furthermore be limited by its political nature, and the requirements of the Charter of the United Nations.[148]

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142. *See Status of Rome Statute*, *supra* note 2. A number of NATO nations have signed, and some have already ratified the Rome Statute.

143. See Rome Statute, supra note 1, art. 36(6)(a). Judges will be elected by a two-thirds majority of the Assembly of States Parties present and voting by secret ballot.

144. *See* Scheffer, *supra* note 30 at 17 ("[A]ccomplishments in negotiating the Rome treaty were significant.").

145. *Id.* at 19.

146. *Id.*

147. *See id.*

148. *See supra* Section III(B)(2), notes 75,76. The Security Council would need to garner the requisite

B. The Flawed United States Proposal

"The [United States] delegation [(independent of the P-5 proposal)] also offered a fresh approach to the court's jurisdiction over any particular crime."[149] The United States proposal would require, under Article 12 of the Rome Statute, that either *both* the territorial state of the crime and the state of the accused approve of the investigation and prosecution, or to exempt from the ICC's jurisdiction conduct arising from official actions non-party states if those states should acknowledge the conduct in question as such.[150] The former of the two proposals would attempt to curb a slide toward universal jurisdiction by the ICC, and the latter would force states to acknowledge potentially illegal actions as state sponsored.[151] This latter proposal would enable the United States to take part in humanitarian interventions, such as that in Kosovo, as official actions and avoid prosecution of government officials and service members.[152] However, while both proposals are appealing from a United States point of view, it is apparent that the former would divest the ICC of nearly all jurisdictional scope outside of Security Council intervention, and the latter may allow a demagogue set on crimes against humanity free reign without Security Council intervention. Thus the flaws of the P-5 proposal reappear in the United States proposal, and would subject the ICC to the unpredictable, political workings of the Security Council rather than the unpredictable legal workings of the ICC. Although trading political uncertainty for legal uncertainty may not prove a wholly satisfactory answer to United States concerns, at least a legal procedure provides the participants with greater voice and a wider base of authority from which to act.[153]

Although much speculation has been offered regarding the justifications for, and effectiveness of, an international criminal court, surely no one may claim the clairvoyance to predict the reception of its first judgment in the realm of international criminal law. For fear of adding useless conjecture to this debate, this article has attempted a reasoned explanation of the Rome Statute both in relation to international criminal law, and the domestic law of the United States. This discussion has demonstrated that the Rome Statute does contain flaws, yet none so grave as to warrant the skepticism expressed by many prominent Americans. Rather, the complementarity regime, while imperfect, is

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nine votes, acceptance by all five permanent members, and act in the interest of international peace and security. Truly domestic offences, although heinous, may not meet this threshold.

149. Scheffer, *supra* note 30, at 20.

150. *See id.* (citing UN Doc. A/CONF.183/C.1/L.70 (1998), UN Doc. A/CONF.183/C.1/L.90 (1998)).

151. *See id.*

152. *See id.*

153. Individuals from states without a Security Council presence will be given the opportunity to refute the court's jurisdiction according to the Rome Statute, and addressing the court itself, rather than through diplomatic relations with the United Nations. Furthermore, although an international tribunal, such as the ICC, does not follow the principle of *stare decisis* found in American jurisprudence, participants will have access to decisions by former, similar international tribunals such as the ICTY and ICTR. The judgments of these tribunals may provide guidance in regards to the construction of the Rome Statute itself and the extension of liability to individuals. Security Council resolutions, although often laden with righteous indignation, rarely go to such lengths to explain the process behind decisions, or the decisions themselves.

sufficient. Americans will not lose the protection of the Constitution through the existence of the ICC. And while the United States may have to consider international military actions in light of a new international environment, a legally justified decision by American military leaders and government officials will be demonstrated as such both in spite of, and because of, an International Criminal Court with United States participation. Furthermore, the United States can send a message of commitment to the ideals espoused in the Rome Statute, support for the present and future victims of such crimes, and conviction to bring the perpetrators of such crimes to justice.

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