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UNITED STATES OBJECTION TO THE INTERNATIONAL CRIMINAL COURT: A PARADOX OF “OPERATION ENDURING FREEDOM”

REMIGIUS CHIBUEZE*

I. INTRODUCTION

One of the most historic events of the last century was the establishment of a permanent International Criminal Court (ICC) after almost five decades of failed efforts.¹ About 160 countries and a wide representation of nongovernmental organizations converged at the UN Diplomatic Conference of Plenipotentiaries (held in Rome, Italy, from June 15 to July 17, 1998) to finalize and adopt a statute to establish an international criminal court.² At the end of the conference, on July 17, 1998 members

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1. See CHERIF BASSIOUNI, *THE STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A DOCUMENTARY HISTORY* 3 (1998), where he noted that “since the end of World War I (1919), the world community has sought to establish a permanent international criminal court.”

2. For a complete list of states and organizations represented at the Conference, see *Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court*, July 17, 1998, U.N. Doc. A/CONF.183/10, Annex II, III (1998) [hereinafter *Diplomatic Conference*].

of the diplomatic conference voted 120 to 7 in favor of adopting the Rome Statute of the International Criminal Court (ICC Statute).³

There has been tremendous success in the signing and ratification of the ICC Statute. To date, 139 countries have signed and 89 countries, encompassing countries from all regions of the globe, have ratified the statute,⁴ which took effect on July 1, 2002 after being ratified by more than 66 countries.⁵ This remarkable support for the ICC demonstrates the direction of a new world order and the recognition that international justice and the fight against impunity require the cooperation and consensus of nations.

The Court will exercise complementary jurisdiction with national courts over individuals accused of committing egregious international crimes of genocide, war crimes, and crimes against humanity.⁶ The ICC is a permanent adjudicatory institution for the crimes contained in the Genocide and the four Geneva Conventions, and related international instruments as particularized in the ICC Statute.⁷ The Court's jurisdiction over the crime of aggression is suspended until an acceptable definition is agreed upon by member states.⁸ Terrorism and drug-related crimes were adopted into the text in an annexed resolution and will become part of the crimes under the Court's jurisdiction once it is defined at a review conference in the future.

3. *The Rome Statute of the International Criminal Court*, U.N. Doc. A/CONF. 183/9 (July 17, 1998), reprinted in 37 I.L.M. 999 (1998) [hereinafter *ICC Statute*].

4. The countries that have ratified the Statute are: Afghanistan, Albania, Andorra, Antigua & Barbuda, Argentina, Australia, Austria, Barbados, Belgium, Belize, Benin, Bolivia, Bosnia-Herzegovina, Botswana, Brazil, Bulgaria, Cambodia, Canada, Central African Republic, Colombia, Costa Rica, Croatia, Cyprus, Democratic Republic of Congo, Denmark, Djibouti, Dominica, Ecuador, Estonia, Fiji, Finland, France, Gabon, Gambia, Germany, Ghana, Greece, Honduras, Hungary, Iceland, Ireland, Italy, Jordan, Latvia, Lesotho, Liechtenstein, Luxembourg, Malawi, Mali, Malta, Marshall Islands, Mauritius, Mongolia, Namibia, Nauru, Netherlands, New Zealand, Niger, Nigeria, Norway, Panama, Paraguay, Peru, Poland, Portugal, Republic of Korea, Romania, Saint Vincent and the Grenadines, Samoa, San Marino, Senegal, Sierra Leone, Slovakia, Slovenia, South Africa, Spain, Sweden, Switzerland, Tajikistan, The Former Yugoslav Republic of Macedonia, Timor-Leste, Trinidad and Tobago, Uganda, United Kingdom of Great Britain and Northern Ireland, United Republic of Tanzania, Uruguay, Venezuela, The Federal Republic of Yugoslavia, and Zambia. See Multilateral Treaties Deposited with the Secretary-General, available at <http://untreaty.un.org/English/bible/englishinternetbible/partI/chapterXVIII/treaty10.asp> (visited Feb. 18, 2003) [hereinafter *Multilateral Treaties*].

5. *ICC Statute*, *supra* note 3, art. 126, provides that the Statute shall come into force when ratified by 60 countries.

6. *Id.*, art. 1.

7. *Id.*, art. 5(1).

8. *Id.*, art. 5(2).

The ICC is built upon the principles enunciated in the Nuremberg,⁹ Yugoslavia,¹⁰ and Rwandan ad hoc tribunals.¹¹ The ICC is not expected to bring an automatic end to these abominable crimes, but will offer a permanent forum to prosecute those accused of gross international crimes when national systems are unable or unwilling to prosecute. Therefore, the ICC as a permanent institution will serve as a constant reminder to violators of international crimes that they will be held accountable for their actions.¹²

While most countries declared their support for the ICC, the U.S. was not in favor of signing the statute and therefore voted against it, along with six other states, including China, Iran, Iraq, Israel, and Libya.¹³ However, in his last days in office, former President Bill Clinton authorized U.S. signature on December 31, 2000 in order to reaffirm U.S. “strong support for international accountability and for bringing to justice perpetrators of genocide, war crimes, and crimes against humanity.”¹⁴

This reaffirmation of strong support for international accountability was, however, not backed with a commitment to ratify the statute. The former president indicated that his administration had no intention of submitting the statute to the Senate for ratification.¹⁵ Notwithstanding the President’s assurance that he would not seek senate ratification, Senator Jesse Helms (R-NC), who was the Senate Foreign Relations Committee Chairman at that time, was reported to have informed then Secretary of

9. See Judgment of the International Military Tribunal for the Trial of German Major War Criminals (Nuremberg, September 30 – October 1, 1946), 41 AM. J. INT’L L. 172 (1947) [hereinafter Nuremberg Judgment].

10. See *The Statute of the International Criminal Tribunal for the former Yugoslavia*, 3217th mtg., U.N. Doc. S/25704 (1993), reprinted in 32 I.L.M. 1192 (1993) [hereinafter *ICTY Statute*]. The *ICTY Statute* was unanimously adopted by the Security Council at its 3217th meeting, May 25, 1993, for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia. See also S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/RES/827(1993), reprinted in 32 I.L.M. 1203 (1993).

11. See *Security Council Resolution Establishing the International Criminal Tribunal for Rwanda*, S.C. Res. 955, U.N. SCOR, 49th Sess., 3453rd mtg., U.N. Doc. S/RES/955 (1994), reprinted in 33 I.L.M. 1598 (1994) [hereinafter *ICTR Statute*]. The ICTR was set up to prosecute those responsible for the genocidal war in Rwanda.

12. David J. Scheffer, *Staying the Course with the International Criminal Court*, 35 CORNELL INT’L L.J. 47, 51-52 (2002).

13. Ruth Wedgwood, Harold K. Jacobson & Monroe Leigh, *The United States and the Statute of Rome*, 95 AM. J. INT’L L. 124 (2001). See also, *Diplomatic Conference*, supra note 2.

14. William Jefferson Clinton, Statement on the Signature of the International Criminal Court Treaty, Washington, D.C. 1 (Dec. 31, 2000), at http://www.state.gov/www/global/swci/001231_clinton_icc.html (visited Apr. 10, 2002).

15. *Id.*

State Madeline Albright that the ICC treaty “will be dead on arrival.”¹⁶ He boasted that “if I do nothing else this year, I will make certain that President Clinton’s outrageous and unconscionable decision to sign the Rome Treaty establishing the International Criminal Court is reversed and repealed.”¹⁷

The U.S. position has not changed under the current administration of President George W. Bush who has indicated an even stronger unwillingness to cooperate with the ICC. The Bush administration carried out a policy review of the International Criminal Court, and on May 6, 2002, the administration took the controversial step of nullifying the United States’ signature to the ICC Statute.¹⁸ Also, on August 5, 2002, President Bush signed into law the American Service-members’ Protection Act (ASPA).¹⁹ ASPA forbids the government from cooperating with the Court and authorizes “any necessary action” including the use of force to free any American soldiers who may be held in custody by the Court.²⁰ The ASPA is now referred to in international circles as the “Hague Invasion Act” because of the possibility of the use of force against the Court.²¹

United States opposition to the ICC raises many questions, as it contradicts the U.S. record as a leading participant in the Nuremberg trials of accused war criminals following World War II; as a key supporter of the tribunals trying those that committed genocide, war crimes, and crimes against humanity in Rwanda and the former Yugoslavia; and as an early proponent of creating a permanent court.²² It should be recalled that on March 25, 1998, when President Bill Clinton visited genocide survivors in Rwanda, he explained that the problems of ad hoc tribunals demonstrated the need for a permanent international

16. Senator Jesse Helms, *Towards a Compassionate Conservative Foreign Policy*, Address to the American Enterprise Institute 10 (Jan. 11, 2001) at <http://www.senate.gov/~foreign/2000/pro011201.htm>.

17. *Id.*

18. Also, on August 28, 2002 Israel informed the U.N. Secretary-General that it has no legal obligations arising from its signature of the Rome Statute on December 31, 2000. See *Multilateral Treaties*, *supra* note 4.

19. See Richard Dicker, *Hague Invasion Act’ Becomes Law – White House Stops at Nothing in Campaign Against War Crimes Court*, HUMAN RIGHTS WATCH – HUMAN RIGHTS NEWS (Aug. 3, 2002) available at <http://www.hrw.org/press/2002/08/aspa080302.htm>.

20. *Id.*

21. *Id.*

22. Lynn Sellers Bickley, *U.S. Resistance to the International Criminal Court: Is the Sword Mightier Than the Law?*, 14 EMORY INT’L L. REV. 213, 239-240 (2000); Roseann M. Latore, *Escape Out the Back Door or Charge in the Front Door: U.S. Reactions to the International Criminal Court*, 25 B.C. INT’L & COMP. L. REV. 159, 160 (2002).

court to deal with crimes like the Rwandan genocide.²³ He, therefore, pledged that “the United States will work to see that it is created.”²⁴

The Bush administration’s hostility to the ICC contrasts sharply with its efforts to create a coalition to combat terrorism in the wake of the September 11, 2001 attacks. As a build up for the war, “Operation Enduring Freedom,” President Bush divided the world into two; those with America and the countries opposing it.²⁵ It is ironic that while those countries the U.S. abandoned at the Rome Conference are in coalition with the Bush administration to fight impunity (the very reason they support the ICC Statute), some of the countries that voted with the U.S. against the ICC Statute are today on the other side of “Operation Enduring Freedom.”

The coming together of allies to support the U.S. in pursuit of “Operation Enduring Freedom” is another indication that this is not the kind of action that the ICC was meant to undermine. In a White House memorial marking six months since the September 11 terrorist attacks, President George W. Bush acknowledged the efforts of these nations that deployed forces or provided logistics and other supports for “Operation Enduring Freedom” and declared that the United States could not have done its work without support from these countries.²⁶ However, his administration has not deemed it necessary to cooperate with the same countries that support the U.S.’s “Operation Enduring Freedom” by building support for the ICC towards creating a permanent institution of justice to punish the likes of the perpetrators of the September 11 attack.

There is no doubt that the September 11, 2001 attacks on the United States were crimes against humanity as contained in the Rome Statute.²⁷ Therefore, if the ICC had existed on that date, it would have had jurisdiction to punish those responsible for the terrorist assaults on the

23. Remarks of President Clinton to Genocide Survivors, Assistance Workers, and U.S. and Rwandan Government Officials (Mar. 28, 1998) (transcripts available at Lawyers Committee for Human Rights - The Case for U.S. Support, <http://www.lchr.org/feature/50th/uspos.htm>) (visited Mar. 6, 2002).

24. *Id.*

25. President George W. Bush, Address to a Joint Session of Congress and the American People (Sept 20, 2001) (transcript available at <http://www.whitehouse.gov/news/releases/2001/09/20010920-8.html>). *See also*, President George W. Bush, No Nation Can be Neutral in this Conflict, Remarks by the President to the Warsaw Conference on Combating Terrorism (Nov. 06, 2001) (transcript available at <http://www.whitehouse.gov/news/releases/2001/11/20011106-2.html>).

26. President George W. Bush, President Thanks World Coalition for Anti-Terrorism Efforts, Remarks by the President on the Six-Month Anniversary of the September 11th Attacks (Mar. 11, 2002) (transcript available at <http://www.whitehouse.gov/news/releases/2002/03/20020311-1.html>).

27. *ICC Statute*, *supra* note 3, art 6.

United States.²⁸ Paradoxically, while the United States is leading the rest of the world in the war against terrorism after the wake of September 11, 2001,²⁹ it is also leading and instigating opposition to frustrate the effective operation of the ICC.³⁰

This inconsistent position taken by the United States is the thesis of this paper. Part II of the paper summarizes the background and scope of the ICC. In part III, the paper discusses U.S. grounds for opposing the ICC and argues that those grounds offer no valid reason for the United States refusal to join the international community effort to establish a permanent criminal court to ensure that those who commit the crimes of genocide, crimes against humanity, and war crimes are held accountable for their actions. Part IV examines specific steps taken by the United States to undermine the court, and evaluates the effect of U.S. opposition to the ICC. Part V concludes *inter alia*, that U.S. desire for a unipolar superpower regime will adversely affect United States interest in the long run, even if it provides any short term benefits.

II. BACKGROUND AND SCOPE OF THE INTERNATIONAL CRIMINAL COURT

A. BACKGROUND TO THE CREATION OF THE ICC

As Dr. Koffi Annan UN Secretary-General observed:

For nearly half a Century ... almost as long as the United Nations has been in existence ... the General Assembly has recognized the need to establish such a court to prosecute and punish persons responsible for crimes such as genocide. Many thought ... that the horrors of the Second World War ... the camps, the cruelty, the exterminations, the Holocaust ... could never happen again. And yet they have. In Cambodia, in Bosnia and Herzegovina, in Rwanda. Our time ... this decade even ... has shown us that man's capacity for evil knows no limits. Genocide ... is now a word of our time, too, a heinous reality that calls for a historic response.³¹

28. Scheffer, *supra* note 12, at 49.

29. *Id.* at 54.

30. See discussions *infra* Part IV.

31. Rome Statute of the International Criminal Court – Overview, at <http://www.un.org/law/icc/general/overview.htm> (visited Nov. 13, 2001) [hereinafter ICC Overview].

Commentators trace the history of an international criminal court to the early nineteenth century. In 1872, Gustav Moynier, one of the founders of the International Committee of the Red Cross, proposed a permanent court in response to the crimes of the Franco-Prussian War.³² There was little effort in this regard until the events of World War II and its aftermath reminded the international community that a permanent criminal court is a requirement of our society. After the Nuremberg Judgment of 1946 there was renewed interest which resulted in the establishment of an International Law Commission (ILC).³³ Through resolution 260 of December 9, 1948, the UN General Assembly invited the ILC “to study the desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide.”³⁴

After preliminary findings, the Commission came to the conclusion that the establishment of an international court to try persons charged with genocide or similar crimes was both desirable and possible. The UN General Assembly established a committee to prepare proposals relating to the establishment of such a court. The committee prepared a draft statute in 1951 which was revised in 1953. The General Assembly decided to postpone consideration of the draft statute ostensibly pending the adoption of a definition of aggression. However, it was understood that the then-prevailing Cold War stymied efforts at moving ahead with such a project.

In 1989, the UN General Assembly was once again called to reconsider the issue of a permanent court following the request of Trinidad and Tobago for an international court with jurisdiction to try international drug traffickers. In response to that request, the General Assembly mandated the ILC to recommence its work on the proposed Court with jurisdiction to include drug trafficking.³⁵

Meanwhile, gross acts of ethnic cleansing were taking place in the former Republic of Yugoslavia, while genocidal war continued unabated in Rwanda. These developments shocked the conscience of the international community and jolted them into action. Thus, in an effort to bring an end to widespread disregard of the laws of war which leads to unprecedented war crimes, crimes against humanity, and genocide, the

32. Beth K. Lamont, *The International Criminal Court*, 58 HUMANIST (1998) available at www.corliss-lamont.org/hsmny/icc.htm (last revised Jan. 22, 2003).

33. G.A. Res. 260 (III), U.N. Doc. A/810, at 174 (1948).

34. *Id.*

35. Jelena Pejic, *Creating a Permanent International Criminal Court: The Obstacles to Independence and Effectiveness*, 29 COLUM. HUM. RTS. L. REV. 291, 297 (1998).

UN Security Council established an ad hoc International Criminal Tribunal for the former Yugoslavia in 1993 and for Rwanda in 1994, to hold individuals accountable for those atrocities and to deter similar crimes in the future.³⁶

On the other hand, the inability of the United Nations to create additional ad hoc tribunals to adjudicate international crimes committed in Cambodia during the Pol Pot regime of 1975–79,³⁷ during the factional and guerilla warfare for the ouster and replacement of Samuel Doe in Sierra Leone from 1996 to the present,³⁸ and in East Timor in 1999³⁹ suggests that ad hoc tribunals may not always be available when needed.⁴⁰

These developments engendered a state of urgency for the ILC, considering that the twentieth century has been the bloodiest in human history. The conflicts that took place in the last decade which are primarily internal, demonstrated tragically that there was a continuing need to take measures to put an end to abominable crimes.⁴¹ Thus, in 1994 the ILC presented a draft statute on an international criminal court (ICC) to the UN General Assembly.⁴² The General Assembly then set up an Ad Hoc Committee on the Establishment of an International

36. *ICTY Statute*, *supra* note 10. Also see, *ICTR Statute*, *supra* note 11.

37. See G.A. Res. 52/135, U.N. GAOR, 52nd Sess., at 2, U.N. Doc. A/52/644/Add.2 (1997), available at <http://www.un.org/ga/documents/gares52/res52135.htm>. The resolution requested the UN Secretary General and the Cambodian government work together in order to address past serious violations of Cambodian and international law. See also Report of the Group of Experts for Cambodia Established Pursuant to G.A. Res. 52/135, U.N. Doc. A/53/400 (1998), available at <http://www1.umn.edu/humanrts/cambodia-1999.html> (Feb. 18, 1999). The Report recommended that members of the Pol Pot regime could be held criminally responsible through domestic trials, a tribunal under Cambodian law, a United Nations tribunal, and a Cambodian tribunal under United Nations administration.

38. See S.C. Res. 1315, U.N. SCOR, 55th Sess., at 2, U.N. Doc. S/RES/1315 (2000). The Resolution requested the UN Secretary General to issue a report concerning the establishment of a special court in order to prosecute perpetrators of international crimes in Sierra Leone. See also Report of the UN Secretary General on the Establishment of a Special Court for Sierra Leone, U.N. Doc. S/2000/915, at 13 (2000) providing the legal framework and requisite administrative elements for the creation of a Sierra Leonean special court. Also see Res. 1370, U.N. SCOR, 56th Sess., at 3, U.N. Doc. S/RES/1370 (2001). The Resolution encourages the UN Secretary General, the government of Sierra Leone and others involved "to expedite the establishment of ... the Special Court envisaged by resolution 1315 (2000) of 14 August 2000."

39. See U.N. Transitional Administration in East Timor, Reg. 2000/15, at 1, U.N. Doc. UNTAET/REG/2000/15 (2000) available at <http://www.un.org/peace/etimor/untaetR/Reg0015E.pdf> establishing a special panel of judges to address serious criminal offences committed in East Timor.

40. Various reasons were offered for the failure – financial burden to lack of cooperation from successive governments in these countries.

41. Phillippe Kirsch, Q.C., *The International Criminal court: Current Issues and Perspectives*, 64 L. & CONTEMP. PROBS. 3, 4 (2001).

42. Pejic, *supra* note 35, at 298.

Criminal Court to consider major substantive issues arising from the ILC draft.⁴³

After the Ad Hoc Committee's report, the General Assembly set up a Preparatory Committee on the Establishment of an International Criminal Court (PreCom) to prepare a consolidated draft text for submission to a diplomatic conference. PreCom organized several meetings from 1996 to 1998 which were attended by governments, international law experts, and non-governmental organizations (NGOs). In its final session, held in March and April of 1998, the Committee completed the drafting of the ICC text.

Since Italy had in 1996 offered to host an ICC Conference, the General Assembly, at its fifty-second session decided to convene the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court in Rome, Italy, from June 15 to July 17 1998, "to finalize and adopt a convention on the establishment of an international criminal court." In his opening speech to the Conference, the UN Secretary General, Dr. Kofi Annan, noted as follows:

In the prospect of an international criminal court lies the promise of universal justice. That is the simple and soaring hope of this vision. We are close to its realization. We will do our part to see it through till the end. We ask you ... to do yours in our struggle to ensure that no ruler, no State, no junta and no army anywhere can abuse human rights with impunity. Only then will the innocents of distant wars and conflicts know that they, too, may sleep under the cover of justice; that they, too, have rights, and that those who violate those rights will be punished.⁴⁴

Unlike the previous ad hoc tribunals -- Nuremberg, Yugoslavia and Rwanda -- the groundwork for the ICC Statute was done by the UN General Assembly and the International Law Commission rather than individual states. Their aim was to develop a code of offenses and to elaborate a statute for an independent international criminal jurisdiction.⁴⁵ Although the U.S. signed the statute at the last opportunity on December 31, 2000, the United States' vote against the adoption of the statute leaves a sour taste.

43. *Id.*

44. ICC Overview, *supra* note 31.

45. Jonathan Stanley, Focus: International Criminal Court: A Court that Knows No Boundaries?: The International Criminal Court Treaty is a Big Achievement but Can it Deliver what it Promises?, *THE LAWYER*, Aug. 11, 1998, available at 1998 WL 9167987.

B. JURISDICTIONAL SCOPE OF THE ICC

1. Genocide

Article 6 of the Rome Statute provides that an accused shall be guilty of the crime of genocide as defined in the Statute if committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious groups. The definition corresponds to the pertinent provisions of the Geneva Conventions of 1948. It has been argued that the crimes of former Chilean dictator Augusto Pinochet would not meet the ICC Statute's definition of Genocide because he allegedly targeted individuals due to their politics rather than their race or religion.⁴⁶ For this reason, the Rome Conference should have considered the need to expand the definition of Genocide beyond that of the 1948 Geneva Convention to include acts of genocide directed against members of an opposing political group and social groups.⁴⁷

2. Crimes against Humanity

For an act to be considered as a crime against humanity, Article 7 of the Rome Statute states that it must have been committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack. Article 7(2)(a) defines "attack directed against any civilian population" as applied in Article 7(1) to mean a course of conduct involving the multiple commission of acts referred to in paragraph one pursuant to or in furtherance of a State or organizational policy to commit such attack.

3. War Crimes

Article 8 provides that the Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.⁴⁸ With pressure from the U.S. and other permanent members of the Security Council, the Conference approved Article 124 under the Transitional Provision, which allows ratifying states to declare that they "opt out" of the Court's jurisdiction for war crimes committed by its nationals or on its territory for a non renewable period of seven years.⁴⁹

46. Diane F. Orentlicher, *Putting Limits on Lawlessness: From Nuremberg to Pinochet*, WASH. POST, Oct. 25, 1998, at C1.

47. *Id.*

48. *ICC Statute*, *supra* note 3, art 8.

49. *Id.*, art 124.

C. TRIGGERING THE COURT'S JURISDICTION

Article 12 provides that the court has jurisdiction to prosecute individuals suspected of committing any of the crimes contained in the Rome Statute when the crimes have been committed in the territory of state which has ratified the Rome Statute or when the crimes have been committed by a citizen of a state which has ratified the Rome Statute. Further, the Court may exercise jurisdiction over crimes committed in the territory of a non-party state or crimes committed by a citizen of a non-party states if the state which has not ratified the Rome Statute makes a declaration accepting the court jurisdiction over the crime. The court may also exercise jurisdiction when the crimes have been committed in a situation which threatens or breaches international peace and security, and the UN Security Council has referred the situation to the Court pursuant to Chapter 7 of the UN Charter.

Article 13 provides three mechanisms to trigger the Court's exercise of jurisdiction for the crimes listed in Articles 6 to 8 of the Statute.

1. Referral by a State

Under Article 13(a), a State party to the Court may refer a situation to the prosecutor in which one or more of the crimes covered by the statute appears to have been committed. The prosecutor is obliged to investigate such referrals for the purpose of determining whether one or more specific persons should be charged with the commission of such crimes.⁵⁰

Under Article 12(3) a non party State in whose territory a crime subject to the jurisdiction of the court occurred, or of which the accused person is a national may, by declaration lodged with the registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. Thus, it follows that such a non party state may refer on ad hoc basis, a case to the prosecutor who shall in turn treat the referral in accordance with Article 14.

2. Initiation by the Independent Prosecutor

Article 15 allows the Court's Independent Prosecutor to initiate investigations proprio motu based on information from victims, non-governmental organizations, or any other source. Despite the controversy surrounding this provision occasioned by the United States' objection, its advantage cannot be overemphasized because one cannot

50. *Id.*, art 13(a).

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always rely on national governments and the Security Council to bring matters to the Court.

In any event, the prosecutor's exercise of discretion is subject to the approval of the pretrial judges who determine whether there is a reasonable basis for the investigation.⁵¹ If the pre-trial judges are of the view that there is a reasonable basis to proceed with the investigation, and that the case appears within the jurisdiction of the Court, it shall authorize the prosecutor to proceed with investigation. On the other hand, if the pretrial judges are of the opinion that there is no sufficient basis to proceed with investigation, they shall decline authorization. The Prosecutor may subsequently represent the case based on new facts or evidence regarding the same situation.⁵²

Article 16 of the Rome Statute allows the Security Council by resolution to stop a prosecution initiated by a state party, or stop the prosecutor from going forward, for an initial period of twelve months if in the opinion of the Security Council the prosecution will interfere with the Council's efforts to maintain international peace and security under Article VII of the UN Charter. The Security Council can renew its request indefinitely, in twelve month segments, under the same conditions.

3. Referral by the Security Council

In a situation in which one or more of the crimes covered under the ICC Statute appears to have been committed, the Security Council, acting under Chapter VII of the UN Charter, may refer such matter to the prosecutor. Since the Security Council is exercising its power under Article VII of the UN Charter, it has been suggested that the ICC, acting under Security Council's direction, shall have jurisdiction over nationals of State parties and non-state parties without their consent. In other words, the UN Security Council may confer jurisdiction on the Court even when the alleged crimes occurred in the territory of a state which has not ratified the Rome Statute or the crime was committed by the national of such a state. Also, when the Security Council refers a matter to the ICC, it is expected that it will avail the court with its enforcement mechanism should a state fail to cooperate with the court.⁵³

51. *Id.*, art. 15(2).

52. *Id.*, art. 15(5).

53. Pejic, *supra* note 35, at 325.

III. GROUNDS OF UNITED STATES' OBJECTIONS TO THE ICC

A. ICC JURISDICTION OVER NON-PARTIES

The main objection of the United States to the ICC Statute is based on a compromised Article 12 which set out the "preconditions" for the Court's jurisdiction in cases where the Security Council does not trigger the Court's jurisdiction. Absent submission of a case to the ICC by the UN Security Council, the Court can act only if the case occurs in the territory of a state party, or if the crime is committed by a citizen of a state party.

Thus, the Court may only exercise jurisdiction over a citizen of a non-party state if he or she commits a crime in the territory of a state party and the state party elects to surrender the accused to the jurisdiction of the Court rather than trying him or her in its national court. For this to occur, the accused must remain in the territory of a state party or be otherwise lawfully apprehended by the state party. This provision sharply limits the Court's jurisdiction absent Security Council initiative, as rogue nations will be the last to ratify the statute in order to shield them from the reach of the Court.

Throughout the Conference, the U.S. sought to limit the Court's jurisdiction by arguing that the Court should exercise jurisdiction only against citizens of member states or territorial states on claims of official acts. The United States wanted a situation in which no U.S. citizen would ever be brought before the ICC without U.S. consent.⁵⁴ It demanded a guarantee that no U.S. servicemen or women would be investigated or prosecuted by the ICC without U.S. consent.⁵⁵

It has been suggested that the justification for the U.S. position was that "more than any other country the United States is expected to intervene to halt humanitarian catastrophes around the world."⁵⁶ It was therefore argued that this position renders U.S. personnel "uniquely vulnerable to the potential jurisdiction of an international criminal court."⁵⁷ The U.S. position was not acceptable to most countries at the Conference who

54. Wedgwood et al., *supra* note 13, at 126.

55. *Id.*

56. Michael P. Scharf, *Rome Diplomatic Conference for an International Criminal Court*, ASIL INSIGHTS (June 1998), available at <http://asil.org/insights/insigh20.htm> (accessed Mar. 15, 2002).

57. *Id.*

voted to adopt Article 12.⁵⁸ However in order to accommodate some of the concerns of the U.S., the states rejected the proposal by Korea that the Court should also exercise jurisdiction if the victim's state or the custodial state has ratified the statute.⁵⁹

It should be noted that in most cases, the state of nationality and the territorial state are likely to be the same, as occurred with Pol Pot of Cambodia, Idi Amin of Uganda, Pinochet of Chile.⁶⁰ The inclusion of the custodial state would have made it possible to apprehend an accused while traveling outside his or her country, or in the alternative, make it difficult for the accused to travel outside his or her country, thereby denying a safe haven anywhere. But, given the way Article 12 was drafted, a country in whose territory an accused is residing will have no legal basis under the statute to surrender the accused to the Court. This is because Article 12 only requires a state party to submit to the Court's jurisdiction if the crime was committed on its territory, or the person accused of the crime is a national.⁶¹ In other words, a situation in which a person commits a crime in state A and then enters state B, state B is not obliged to surrender him or her to the Court because the crime was not committed in state B's territory and the accused is not a national of state B.

Article 12 also makes it impossible for the victim's state to initiate a case to the ICC if its citizens were victims of international crimes in the territory of another state or by nationals of a non-state party. It has been suggested that if victim's state is allowed to submit a case to the Court, the Spanish government would have been in a position to petition the ICC (if it were then in existence) for the "disappearance" of some Spaniards in Argentina in the 1970s and 80s.⁶²

Notwithstanding the compromise to limit the court's jurisdiction only to situations in which the crime was committed in the territory of a state party or by a national of a state party, the U.S. representatives claimed that ICC jurisdiction overreaches, and violates fundamental principles of international law because it binds non-state parties.⁶³ The U.S. argued that under customary international law, a treaty-based international court

58. Human Rights Watch, *Text Analysis International Criminal Court Treaty*, July 17, 1998 available at <http://www.hrw.org/press98/july/icc-anly.htm> (last modified Apr. 4, 2002) [hereinafter *ICC Treaty Text Analysis*].

59. *Id.*

60. *Id.*

61. *ICC Statute*, *supra* note 3, arts. 12(2)(a-b).

62. *ICC Treaty Text Analysis*, *supra* note 58.

63. David Scheffer, *The United States and the International Criminal Court*, 93 AJIL 12, 18 (1999).

cannot exercise jurisdiction over the nationals of a non-party state when acting under the direction of such a non-party state.⁶⁴

According to Ambassador David Scheffer:

The illogical consequence imposed by Article 12, particularly for non-parties to the treaty, will be to limit severely those lawful, but highly controversial and inherently risky, interventions that the advocates of human rights and world peace so desperately seek from the United States and other military powers. There will be significant new legal and political risks in such interventions⁶⁵

Another commentator has suggested that, by conferring upon the ICC jurisdiction over non-party nationals, the ICC Statute would abrogate the pre-existing rights of non-parties which, in turn, would violate the law of treaties.⁶⁶ This commentator suggested that a state has a right to be free from the exercise of exorbitant jurisdiction over its nationals which cannot be abrogated by a treaty to which it is not a party.⁶⁷ Cited in support were the ILC official Commentaries on the Vienna Convention to the effect that “[i]nternational tribunals have been firm in laying down that in principle treaties, whether bilateral or multilateral, neither impose obligations on States which are not parties nor modify in any way their legal rights without their consent.”⁶⁸ Furthermore, it was argued that because of the gravity of the outcome, member states cannot delegate to the ICC their territorial or universal jurisdiction.⁶⁹

Those who make the argument that the Court cannot exercise jurisdiction over individuals if his or her state has not ratified the statute confuse and/or equate the position of a non-party state with that of its nationals. As would be expected, this argument has been rejected by international law commentators on the simple basis that while a non-party state is not itself obligated under a treaty to which it has not consented, the same cannot be said of its nationals if they commit an offense in the territory of a state that is a party.⁷⁰ Article 34 of the Vienna Convention on the Law of Treaties provides that “a treaty does not create either obligations

64. *Id.*

65. *Id.* at 19. Ambassador Scheffer has since abandoned this position. See Scheffer, *supra* note 12, at 60.

66. Madeline Morris, *High Crimes and Misconceptions: The ICC and Non-Party States*, 64 L. & CONTEMP. PROBS. 13, 26 (2001).

67. *Id.* at 27.

68. *Id.*

69. *Id.*

70. Wedgwood et al., *supra* note 13, at 127.

or rights for a third state without its consent.”⁷¹ Also, Article 35 states that a treaty cannot establish an obligation on a non-party state unless it “expressly accepts that obligation in writing.”⁷²

No provision of the Rome Statute expressly created obligations to non-party states. It cannot therefore be argued that the Court’s exercise of treaty-based jurisdiction over the nationals of non-party state for international crimes contravenes this rule of international law.⁷³ Therefore, the argument that the statute is “overreaching” because it purportedly obligates non-party states through the exercise of jurisdiction over their nationals is a gross distortion of customary international law.⁷⁴

In addition, the U.S. is a party to many treaties that are globally binding on nationals of party and non-party states because they reflect the common interests of humanity.⁷⁵ Similarly, U.S. legislative practice recognizes that the first and best established jurisdictional principle is “territoriality.” Territoriality is considered the normal, and nationality the exceptional, basis for the exercise of jurisdiction.⁷⁶ Also, U.S. legislative practice recognizes that a state may exercise universal jurisdiction to define and punish certain offenses of universal concern which are recognized by the community of nations, such as piracy, the slave trade, attacks on or hijacking of an aircraft, genocide, war crimes,

71. Vienna Convention on the Law of Treaties, May 23, 1969, art. 34, U.N. Doc. A/CONF.39/27 (1969), reprinted in 25 I.L.M. 543 (1969).

72. *Id.*, art. 35.

73. Michael P. Scharf, *Application of Treaty-Based Universal Jurisdiction to Nationals of Non-Party States*, 35 NEW ENG. L.R. 363, 376 (2001).

74. See Human rights Watch, *The ICC Jurisdictional Regime; Addressing U.S. Arguments*, available at <http://www.hrw.org/hrw/campaigns/icc/docs/icc-regime.htm> (last modified Apr. 4, 2002).

75. See Convention on Offenses and Certain Other Acts Committed on Board Aircraft, *done* Sept. 14, 1963, 20 U.S.T. 2941; Convention for the Suppression of Unlawful Seizure of Aircraft *done* Dec. 16, 1970, 22 U.S.T. 1641 (“Hague Convention”); Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, *done* Sept. 23, 1971, 24 U.S.T. 565 (“Montreal Convention”); The International Convention Against the Taking of Hostages, *done* Dec. 17, 1979, 1979 U.S.T. LEXIS 186; The Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, *adopted* Dec. 14, 1973, 28 U.S.T. 1975 (“Protected Persons Convention”); The Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, *adopted* Dec. 10, 1984, 1988 U.S.T. LEXIS 202 (“Torture Convention”); The International Convention on the Suppression and Punishment of the Crime of Apartheid, *opened for signature* Nov. 30, 1973, 1015 U.N.T.S. 243 (“Apartheid Convention”); The Convention on the Physical Protection of Nuclear Material *done* Oct. 26, 1979, 1979 U.S.T. LEXIS 187. These treaties provide for and obligate states, both states of nationality and territorial states, to exercise jurisdiction or extradite. Furthermore, the Montreal Convention, the International Convention Against the Taking of Hostages, the Protected Persons Convention, the Torture Convention and the Apartheid Convention allow for the victim’s state to either exercise jurisdiction or extradite. The U.S. is a member of all except the Apartheid Convention.

76. Restatement (Third) of Foreign Relations of the United States, § 402 cmt. (American Law Institute, 1987).

and perhaps terrorism, even where none of the bases of jurisdiction indicated in section 402 are present.⁷⁷

United States courts have given judicial support to these statutory provisions, recognizing national courts' power to exercise jurisdiction in circumstances identical to those set forth in the provisions of Article 12 of the ICC Statute.⁷⁸ Therefore, it is preposterous for the U.S. to argue

77. *Id.* ¶ 404.

78. *See Filartiga v. Pena-Irala*, 630 F.2d 876, 883 (2d Cir. 1980) the U.S. Supreme Court recognized that instruments not binding upon states as a treaty, "create an expectation of adherence, and insofar as the expectation is gradually justified by State practice ... may by custom become recognized as laying down rules binding upon states"; *Attorney General of Israel v. Eichmann*, 36 I.L.R. 50 (Israel S.Ct. 1962) where the Israeli Supreme Court found that there was "full justification for applying here the principle of universal jurisdiction since the international character of "crimes against humanity" ... dealt with in this instant case is no longer in doubt ..." acts alleged happened before the existence of the state of Israel; *In re Demjanjuk*, 612 F.Supp. 544 (N.D. Ohio 1985), *aff'd*, 776 F.2d 571 (6th Cir. 1985) the court allowed the extradition to Israel of a German concentration camp guard. The Court invoked universal jurisdiction, noting: "international law does not generally prohibit the application of national laws over non citizens for acts committed outside its territory". The Court noted that "Israel has brought charges ... asserting jurisdiction based on a statute that penalizes "war crimes" and "crimes against humanity" among other acts. The international community has determined that these offenses are crimes over which universal jurisdiction exists." The Court quoted with approval the case of *United States v. Otto*, Case No. 000-Mauthausen-5 (DJAWC, July 10, 1947), to the effect that "international law provides that certain offenses may be prosecuted by any state because the offenders are common enemies of all mankind and all nations have an equal interest in their apprehension and punishment"; *Dir. of Pub. Prosecutions v. T.*, 83 AM. J. INT'L L. 334, 341 (1999) noting a Denmark court trial of defendant in 1994 for war crimes committed against Bosnians in the territory of the former Yugoslavia; *Kadic v. Karadzic*, 70 F.3d 232, 240 (2d Cir. 1995) where a U.S. Second Circuit Court of Appeals relied on universal jurisdiction to assert jurisdiction in a tort case arising under the Alien Tort Claims Act and the Torture Victim Protection Act against Radovan Karadzic, the Bosnian Serb leader accused of crimes against humanity and war crimes in Bosnia; *United States v. Yunis*, 681 F. Supp. 896 (D.C. Cir. 1988), *aff'd*, 924 F.2d 1086 (C.A.D.C. 1991) – treaty-based jurisdiction over offenders found in their territory, the court upheld the U.S. court's subject matter jurisdiction, based on the Hague Convention and the Taking of Hostages Convention, that the victim's state of nationality may exercise jurisdiction holding this to be consistent with customary international law, even when the perpetrator was lured or brought into the territory of a State party. The U.S. exercised jurisdiction as the state of nationality of two U.S. passengers who were among the victims of the alleged crime; *United States v. Layton*, 519 F.Supp. 942 (N.D. Cal. 1981), *aff'd*, 855 F.2d 1388 (9th Cir. 1988). The U.S. exercised jurisdiction on the basis of being the state of the victim's nationality. This case involved the murder of a U.S. congressman by a Guyanan citizen in Guyana – Internationally Protected Persons Convention; *U.S. v. Yousef*, 927 F. Supp. 673 (S.D.N.Y. 1996), where jurisdiction was based on the Montreal Convention to try the defendants with various charges in connection with alleged conspiracy to bomb United States commercial airliners operating overseas and roles in the bombing of the World Trade Center in 1993; *United States v. Rezaq*, 134 F.3d 1121 (D.C. Cir. 1998), the U.S. apprehended and prosecuted a Palestinian national for hijacking an Egyptian airliner, despite the fact that Palestine is not a party to the Hague Hijacking Convention; *United States v. Wang Kun Lue*, 134 F.3d 79, 82 (2d. Cir. 1998) for attempted abduction of Chang Fung Chung on April 24, 1992; *United States v. Chen De Yian*, 905 F.Supp. 160 (S.D.N.Y. 1995); *United States v. Chen De Yian*, 1995 WL 614563 (S.D.N.Y.) – indictment alleging defendants and others conspired to take Chan Fung Chung hostage in order to compel Chung's relatives to pay ransom to obtain release from 1991 on or about April 24, 1992); *United States v. Santos-Riviera*, 183 F.3d 367, 368 (5th Cir. 1999), charging that accused "knowingly and intentionally seize, detain, threaten to injure and continue to detain Jocelyn Tehya Garrido in order to compel Ricardo Garrido and Maria Elliott

that the Court's exercise of jurisdiction against nationals of non-party states is overreaching, or that it is a violation of fundamental principles of international law.

It should be noted that U.S. is not opposed to the Court's subject matter jurisdiction, i.e. genocide, war crimes and crimes against humanity.⁷⁹ Presently, any individual state may try perpetrators of these crimes under the universal or territorial jurisdiction principle.⁸⁰ That state would not need consent from another nation.⁸¹ Thus, if individual states can exercise universal jurisdiction over the same crimes contained in the ICC Statute, there has not been any convincing legal argument to deny a group of states joining together to set up a court that does the same thing. Indeed, the Nuremberg tribunal set the precedent for this situation when it stated: "[the Allied Powers] have done together what any one of them might have done singly; for it is not to be doubted that any nation has the right thus to set up special courts to administer law."⁸²

The reality is that the Rome Statute cut down on the ability of the Court to exercise universal jurisdiction through the principle of complementarity. Also, absent U.N. Security Council action, the court must obtain the consent of either the state on whose territory a crime is committed or the state of nationality of the accused.⁸³ Furthermore, the UN Security Council has authority to halt prosecutions if in its opinion such prosecution will not be compatible with its responsibilities under Article VII of the UN Charter.⁸⁴ Therefore, the flawed argument by the United States that the ICC should not exercise jurisdiction over nationals of non-state parties is only an excuse to keep its nationals insulated from the Court.

B. POLITICALLY MOTIVATED PROSECUTION

Another of the U.S.'s grounds for opposing the ICC is that it could be used by its enemies to initiate politically motivated prosecutions against U.S. nationals. Article 15 of the ICC allows the ICC prosecutor to

Garrido to pay a cash ransom for the release of Jocelyn Tehya Garrido, in violation of 18 U.S.C. §§ 2, 1203 (2002).

79. Scheffer, *supra* note 63, at 12-13.

80. Paul Arnell, *International Criminal Law and Universal Jurisdiction*, 11 INT'L LEGAL PERSP. 53, 60-63 (1999). *Also see* Attorney-General of Israel v. Adolf Eichmann, 36 I.L.R. 5, 26 (Israel S.Ct. 1962).

81. *Id.* *Also see*, Demjanjuk v. Petrovsky, 776 F. 2d 571, 582-583 (6th Cir. 1985).

82. Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis and Establishing the Charter of the International Military Tribunal, Aug. 8, 1945, annex, 59 Stat. 1544, 82 U.N.T.S. 279, *reprinted in* 39 AM. J. INT'L L. 257 (Supp. 1945).

83. *ICC Statute*, *supra* note 3, art. 12.

84. *Id.*, art.16.

undertake investigations on his or her own initiative.⁸⁵ The U.S. was concerned that the Office of the Independent Prosecutor might be used to bring politically motivated prosecutions against U.S. soldiers.⁸⁶

It would appear that the U.S.'s objection to an independent Prosecutor stems from its experience with the virtually unlimited investigative and prosecutorial powers of the Office of U.S. Independent Prosecutor as orchestrated by Independent Counsel Kenneth Starr during the Clinton Administration.⁸⁷ It was suggested by one anonymous U.S. official that the United States feared that an independent ICC Prosecutor "would turn out to be an 'international Ken Starr.'"⁸⁸ As a result of the wide discretionary powers of the U.S. independent prosecutor, there is now an attempt in the United States to allow the independent counsel law to lapse.⁸⁹ However, in the case of the ICC, this fear is unfounded because of the various provisions in the statute to check the exercise of the powers of the ICC Independent Prosecutor. These checks are discussed below.

1. Pre-Trial Panel

Article 15 of the statute provides that the prosecutor will exercise his/her discretion subject to the supervision and approval of a three member pre-trial panel of eminently qualified judges.⁹⁰ The judges will determine whether there is a reasonable basis for the investigations.⁹¹ The decision of the pre-trial panel is subject to appeal.⁹²

Even if it is admitted that the prosecutor's job will be influenced by political considerations, the prosecutor's discretion must be guided by the statute. Thus, even where the prosecutor concludes there is not sufficient evidence to proceed, the pre-trial panel can review that decision on request or on its own initiative.⁹³ Thus, in every situation, the prosecutor is required to establish whether the ICC has jurisdiction in

85. *Id.*, art 15.

86. Scheffer, *supra* note 63, at 19.

87. Scott Andreasen, Note, *The International Criminal Court: Does the Constitution Preclude Its Ratification by the United States?*, 85 IOWA L. REV. 697, 723 (2000).

88. *Id.*, at n.198.

89. 28 U.S.C.A. §§ 591-599 (2002).

90. *ICC Statute*, *supra* note 3, art. 36(5). Also see, David Scheffer, U.N. International Criminal Court, Statement Before the Committee on Foreign Relations of the U.S. Senate (July 23, 1998) available at 1998 WL 12762512 [hereinafter David Scheffer Testimony]. David Scheffer, Ambassador-at-Large for War Crimes Issues and Head of the U.S. Delegation to the UN Diplomatic Conference on the Establishment of a Permanent International Criminal Court, cited the "rigorous qualifications for judges" as one of the U.S. objectives achieved at the Conference.

91. *ICC Statute*, *supra* note 3, art. 15(4).

92. *Id.*, art 18(4).

93. *Id.*, art. 53(3) (a) (b).

the case; whether there is a reasonable prospect of conviction; and the merit of the case.⁹⁴ Therefore, these legal hurdles will make it difficult for political consideration to overshadow the prosecutor's decision on which case to prosecute, and make it a priority on his/her part to prosecute the most serious crimes.

2. Security Council Intervention

Under Article 16 of the ICC Statute, the U.N. Security Council may by unanimous vote delay a prosecution for twelve months if it believes the ICC would interfere with the Council's efforts to further international peace and security. Article 16 further allows the UN Security Council to renew the request on the same grounds. In other words, the UN Security Council may perpetually intervene to suspend a case before the ICC at every twelve month interval on same grounds because Article 16 does not limit the number of times the UN Security Council may request the suspension of a case for security reasons.⁹⁵ This provision was a result of a compromise suggestion by Singapore to placate the U.S.⁹⁶ As one of the permanent members of the Security Council, it is plausible to suggest that the United States stands in a better position to use this provision to perpetually forestall the prosecution of a case concerning its nationals.

3. The Principle of Complementarity

The principle of complementarity which permeates the ICC Statute confers primacy on domestic courts over the ICC. In other words, the Court's jurisdiction is complementary to domestic courts, and it can exercise jurisdiction only when national criminal courts are not available or are unable to perform.⁹⁷ National sovereignty concerns informed the introduction of the principle of complementarity in the operation of the ICC.⁹⁸ Article 17 provides that the ICC will defer its jurisdiction to a national court except in situations where national courts have been genuinely unable or unwilling to investigate and/or prosecute the accused.⁹⁹ Article 17 is applicable even when the state's leaders are

94. *Id.*, art 53.

95. *Id.*, art 16.

96. John Washburn, *The International Criminal Court Arrives -- The U.S. Position: Status and Prospects*, 25 *FORDHAM INT'L L.J.* 873, 878 (2002) citing Lionel Yee, *The International Criminal Court and the Security Council*, in *THE INTERNATIONAL CRIMINAL COURT, THE MAKING OF THE ROME STATUTE* 143 (Roy S. Lee ed., 1999).

97. *ICC Statute*, *supra* note 3, pmb1., ¶10.

98. Article 1 of the Statute provides that the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be complementary to national criminal jurisdiction.

99. *ICC Statute*, *supra* note 3, art. 17(a).

themselves implicated.¹⁰⁰ The prosecutor is duty-bound to notify all states that might normally exercise jurisdiction of his or her intention to continue with an investigation.¹⁰¹ Thereupon, any state, whether a state party or not, may then inform the Court that it is investigating the situation domestically.¹⁰² In such an event, the prosecutor must defer to that investigation.¹⁰³

However, the pre-trial chamber can authorize an investigation by the prosecutor if it determines that the state is unable or unwilling to adequately carry out an effective investigation.¹⁰⁴ Such finding is subject to challenge by the state.¹⁰⁵ The statute places the onus on the ICC prosecutor to prove that a state is unable or unwilling to prosecute, or that investigations and trials carried out by a state are fraudulent.¹⁰⁶

It has been suggested that a state may be unable to prosecute if it lacks the required manpower and institutions to carry out a meaningful criminal prosecution.¹⁰⁷ Such a situation could have arisen after the genocide in Rwanda, where very few lawyers and judges survived the 1994 massacre.¹⁰⁸ On the other hand, a state may be unwilling to prosecute a perpetrator if it demonstrates that it lacks the political will to do so. This may occur where the accused is a member of the state government, or exerts influence over or accepts favors from those in government.

Article 17 was ostensibly drafted to accommodate and protect the United States' interest.¹⁰⁹ Under the complementarity provision, the United States may actually prevent the ICC from exercising jurisdiction over its citizens by informing the Court of its willingness to investigate the

100. *Id.*, art. 28.

101. *Id.*, art. 18(1).

102. *Id.*, art 18(2) provides that within one month of receipt of notification, a state may inform the Court that it is investigating or has investigated its nationals or others within its jurisdiction with respect to criminal acts which may constitute crimes referred to in Article 5 and which relate to the information provided in the notification to States. At the request of that State, the Prosecutor shall defer to the State's investigation of those persons unless the Pre-Trial Chamber, on the application of the Prosecutor, decides to authorize the investigation.

103. *Id.*

104. *Id.*, art 19.

105. *Id.*, art 18(4). The State concerned or the Prosecutor may appeal to the Appeals Chamber against a ruling of the Pre-Trial Chamber, in accordance to Article 82. Such appeal may be heard on an expedited basis.

106. *Id.*, art. 17(2)(3).

107. David Rider, *Canadian Judge Pans New International Court: Arbour says Rules Shield World's Worst Criminals*, THE OTTAWA CITIZEN, Jan. 21, 2002, at A7 (quoting Justice Louise Arbour of the Supreme Court of Canada and former ICTY/ICTR prosecutor).

108. *Id.*

109. Scheffer, *supra* note 12, at 59-60.

allegation under Article 18(2).¹¹⁰ In the event that the pre-trial chamber rejects such request, Article 18(4) allows the requesting state to appeal an adverse ruling of the pre-trial chamber to the appeals chamber.¹¹¹ In addition, under Article 18(7) a state which has challenged a ruling of the pre-trial chamber may challenge the admissibility of the case under Article 19 on grounds of additional significant facts or significant change of circumstances.¹¹² With these arrangements, the possibility that the United States or any state party to the Rome Statute would not maintain control over a case involving its citizen is exceedingly remote.¹¹³

In view of this possibility, critics have suggested that the complementarity provisions have watered down the jurisdiction of the court, and worry that a state party may use the complementary provisions to shield its nationals from the court's jurisdiction.¹¹⁴ At a press conference on June 12, 2001 then U.S. Secretary of Defense William Cohen, while opposing the ICC, admitted that the Court's limited authority would protect U.S. troops and officials.¹¹⁵ He said that the U.S. has "demonstrated over the years wherever there is an allegation of abuse on the part of a soldier we have a judicial system that will deal with it very effectively."¹¹⁶ He correctly asserted that "as long as we have a respected judicial system then there should be some insulation factor."¹¹⁷ Thus, this fact has not been lost on the U.S. government.

The United States has court-martialed its own soldiers in the past for criminal activities, and there is no reason to believe it would not continue to do so. Also, the United States' judicial system is well advanced and can try almost all war crimes committed by U.S. nationals. In deserving circumstances, the United States has enacted law requiring courts to hear cases of nationals who have allegedly violated the law of nations as contained in the ICC Statute. It is inconceivable that the U.S. will refuse to try or at least investigate a U.S. soldier accused of indictable war

110. *ICC Statute*, *supra* note 3, art 18(2).

111. *Id.*, art 18(4).

112. *Id.*, art. 19(2) (b), provides that Challenges to the admissibility of a case under Article 17 or challenges to the jurisdiction of the Court may be made by a State which has jurisdiction over a case, on the ground that it is investigating or prosecuting the case or has investigated or prosecuted the case.

113. *Id.*

114. Jimmy Gurule, *United States Opposition to the 1998 Rome Statute Establishing an International Criminal Court: Is the Court's Jurisdiction Truly Complementary to National Criminal Jurisdictions?*, 35 CORNELL INT'L L.J. 1 (2002).

115. See Human Rights Watch, *Questions and Answers About the ICC*, at www.hrw.org/campaigns/icc/qna.htm (last visited on Feb. 17, 2003).

116. *Id.*

117. *Id.*

crimes. Failure to do so would reflect adversely upon the credibility of U.S. leadership, thus making it unlikely that it would take such a step.

With such an advanced judicial system and history of criminal prosecution, it is difficult to imagine a situation where an investigation or prosecution carried out by the U.S. will be considered fraudulent. Therefore, if the U.S. exercises jurisdiction over its nationals, the ICC will be estopped from prosecuting its nationals under the principle of complementarity.¹¹⁸ Thus, the international legal community is puzzled over the U.S.' opposition to the ICC because of possible politically motivated prosecution.

On the contrary, developing countries are less likely to benefit from the complementarity provision as their legal systems and political climate will be more unable or unwilling to undertake satisfactory and successful prosecutions. As has been observed by Justice Arbour, "states with relatively developed legal systems will have a 'major trump card' to evade justice and will clash with developing countries that don't."¹¹⁹ She posits that such a clash will be intensely political so that the ICC risks becoming the true default jurisdiction for developing countries, subjecting the court to major political legal battles with everyone else.¹²⁰ Therefore, developing countries should be the ones complaining of politically motivated prosecution, not advanced democracies like the U.S., whose legal system would easily satisfy the precondition for exercising jurisdictional primacy as provided under the complementarity principle.

However, an assessment that a government is unwilling to prosecute should not be based on lack of action in a single case, but on a systematic pattern of judicial inaction in pertinent cases.¹²¹ Where a judicial system is considered unable to conduct trials, the ICC should not concern itself with assuming jurisdiction; rather the international community should offer assistance and training to overcome any shortcomings.¹²² In this way, the ICC would retain the integrity of governments' judicial systems. This is necessary, considering the fact that governments constitute the

118. *ICC Statute*, *supra* note 3, art. 20(3).

119. *Rider*, *supra* note 107.

120. *Id.*

121. *See* Wilton Park Conference, *Towards Global Justice: Accountability and the International Criminal Court (ICC)*, Feb. 4-8, 2002, at <http://www.wiltonpark.org.uk/web/welcome.html> (last visited Feb. 17, 2003).

122. *Id.*

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Court's national partners, and their cooperation and compliance are integral to its functioning.¹²³

4. Nature of Crime/Mental Element

The nature of the crimes for which the court will exercise jurisdiction must be of such degree that they shock the conscience of nations. Thus, the court will only exercise jurisdiction over horrific crimes of genocide, crimes against humanity, and war crimes. The evidentiary threshold of establishing these crimes is enormous and the onus is on the independent prosecutor to establish that the accused has committed crimes in the degree provided in the statute.

a. Genocide

For the crime of genocide, Article 5 of the Rome Statute adopted from the 1948 Geneva Convention¹²⁴ provides that the accused must have committed the crime with "intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such, through killing members of the group, causing serious bodily or mental harm to members of the group, deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part, imposing measures intended to prevent births within the group, forcibly transferring children of the group to another group."¹²⁵

b. Crimes Against Humanity

Article 7, which creates crimes against humanity, is a multilateral codification of the Nuremberg Charter.¹²⁶ It is not, however, as broad as customary international law because it limits the court's jurisdiction only to the most serious crimes of international concern such as murder, extermination, and enslavement in peacetime or during war.¹²⁷ Also listed are crimes of sexual assault such as "rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity."¹²⁸ To be found guilty of crimes against humanity, the statute requires that the accused commit any of the listed acts "as part of a widespread or systematic attack

123. *Id.*

124. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277, 280. The United States is a party to this statute.

125. *ICC Statute*, *supra* note 3, art. 6.

126. *See* Nuremberg Judgment, *supra* note 9.

127. *ICC Statute*, *supra* note 3, art. 7.

128. *Id.*, art. 7(1)(g).

directed against any civilian population” and “pursuant to or in furtherance of a state or organizational policy.”¹²⁹

In *Prosecutor v. Akayesu*,¹³⁰ the tribunal defined widespread as “massive, frequent, large scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims.”¹³¹ Systematic was defined as “thoroughly organized and following a regular pattern on the basis of a common policy involving substantial public or private resources.”¹³²

Therefore, for a U.S. service member to be found guilty of crimes against humanity, the accused must have carried out any of the listed crimes repeatedly against civilians and on the basis of a common public or private organizational policy. It is hard to imagine a situation where the U.S. would authorize and/or allow a U.S. service man or woman to engage in any of the acts listed in Article 7 and in such magnitude as is required to bring the act within the jurisdiction of the ICC. In other words, isolated attacks carried out by a trigger-happy service member without superior directive will not suffice. Thus, the U.S. concern for politically motivated prosecution of its service members is difficult to rationalize.

c. War Crimes

Article 8, which provides for grave breaches of war crimes committed in both international and internal armed conflicts, incorporates (with narrower definitions and an exhaustive list) the four Geneva Conventions of 1949, as well as, conventional and customary laws of war.¹³³ The Court’s jurisdiction attaches for war crimes in international armed conflict only when “in particular” those crimes are “part of a plan or policy or part of a large-scale commission of such crimes.”¹³⁴ On the other hand, for internal armed conflict,¹³⁵ the Court will exercise jurisdiction only when “there is protracted armed conflict between

129. *Id.*

130. *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgments Int’l Criminal Trib. Rwanda Trial Chamber 1, at ¶ 580 (Sept. 2, 1998).

131. *Id.*

132. *Id.* See *ICC Statute*, *supra* note 3, art. 20(3).

133. *ICC Statute*, *supra* note 3, art. 8(2).

134. *Id.*, art. 8(1).

135. Internal armed conflict includes organized armed opposition, or “freedom fighters,” engaged in armed struggle within the territory of the state for either control of the government or self-governance.

governmental authorities and organized armed groups or between such groups."¹³⁶

United States nationals are unlikely to engage in internal armed conflict. With regard to international armed conflict, Dr. Cherif Bassiouni, Chair of the Drafting Committee at the ICC Conference, noted that a situation in which war crimes charges were brought against U.S. military personnel on peacekeeping missions would not hold up because the statute defines war crimes as primarily acts committed "as part of a plan or policy or as part of a large scale commission of such crimes."¹³⁷ Therefore, he argued that "the trigger-happy Marine wouldn't fall under that."¹³⁸ Thus, a politically motivated prosecution of U.S. service personnel would be difficult, if not impossible.

Even at that, Article 124 of the Rome Statute allows a state party to opt out of the Court's jurisdiction for seven years after becoming a party to the ICC Statute over war crimes committed on its territory or by its nationals in internal armed conflict.¹³⁹ Article 124 was inserted in the statute to accommodate the U.S.'s interest. The United States' representatives to the Rome Conference had sought a ten years "opt out" from the court's jurisdiction over war crimes, but the conference agreed only to a seven year opt-out period for war crimes.¹⁴⁰ Article 124 provides a compromise capable of "undermining the status of war crimes as truly universal crimes [that might] result in a court with a fragmented jurisdiction."¹⁴¹ It has therefore been criticized as creating a loophole to evade justice which is legally and morally unjustifiable.¹⁴² The "opt out" clause is an unwarranted restriction on the court's jurisdiction which will severely hamper its effectiveness for years, if not decades."¹⁴³

These checks notwithstanding, the American government insisted that the Rome statute must contain an ironclad guarantee that no American would ever come before the Court.¹⁴⁴ Apart from the apparent inequality of this request, its obvious implication is that a guarantee for America

136. *Id.*

137. See James Podgers, *War Crimes Court Under Fire*, 1998 ABA JOURNAL 68 (Sept. 1998).

138. *Id.*

139. *ICC Statute*, *supra* note 3, art. 124. Article 124 provides that a state party to the ICC may elect to exempt its nationals from the jurisdiction of the Court for a non-renewable period of seven years from the date of ratification of the statute for war crimes.

140. See David Scheffer Testimony, *supra* note 90.

141. Stanley, *supra* note 45.

142. Kirsch, *supra* note 41, at 10.

143. Jelena Pejic, Senior Program coordinator at the Lawyers Committee for Human Rights in New York City, *cited in* Podgers, *supra* note 137, at 68.

144. See Thomas W. Lippman, *America Avoids the Stand: Why the U.S. Objects to a World Criminal Court*, WASH. POST, July 26, 1998, at C01.

would mean a de jure and de facto exemption of all other countries which would effectively render the purpose of the Court moribund.

C. INCLUSION OF THE CRIME OF AGGRESSION

The United States opposes the inclusion of the crime of aggression under the court's jurisdiction. It insists on an affirmative determination by the Security Council prior to bringing a complaint for aggression before the Court.¹⁴⁵ The statute, however, provides that the Court cannot exercise jurisdiction until the statute is amended to define aggression and establish the conditions.¹⁴⁶ Such amendment "shall be consistent with the relevant provisions of the Charter of the United Nations."¹⁴⁷ Article 5(2) of the Statute is intended to ensure that the Statute's definition of aggression does not depart from Security Council duties under Article VII of the UN Charter. The United States' objection to the inclusion of the crime of aggression within the Court's jurisdiction is therefore premature. A consensus on the definition of the meaning of aggression is required, and may never happen in the near future.¹⁴⁸

D. ABSENCE OF THE RIGHT TO JURY TRIAL

Although the ICC statutory provisions for the protection of the right of an accused very much duplicates the traditional constitutional protections in the U.S. Bill of Rights, some have argued that the absence of the right to jury trial is fatal to U.S. ratification of the ICC Statute.¹⁴⁹ The United States argues that the ICC procedure does not include the right to speedy trial and the right to confront and cross-examine witnesses.¹⁵⁰ This argument is hardly correct, as the ICC contains adequate protections of an accused's right to speedy trial and to cross-examine witnesses as provided in Articles 59, 60, and 67.¹⁵¹

Article 66(1) of the statute contains the principle that all accused persons shall be presumed innocent until proven guilty before the ICC. Article 66(2) clearly provides that the prosecution bears the burden of proof

145. David Scheffer Testimony, *supra* note 90.

146. *ICC Statute*, *supra* note 3, art. 5(1)(d).

147. *Id.*, art. 5(2).

148. The cold war era and the debate whether actions by non-state organs only may qualify as aggression were some of the issues that had militated against an acceptable definition of aggression. Some states oppose the inclusion of state action in the definition of aggression.

149. John Seguin, Note, *Denouncing the International Criminal Court: An Examination of U.S. Objections to the Rome Statute*, 18 B.U. INT'L L.J. 85, 107-08 (2000) quoting David Scheffer Testimony, *supra* note 140.

150. *Id.* See also, Diane Marie Amann, *Harmonic Convergence? Constitutional Criminal Procedure in an International Context*, 75 IND. L.J. 809, 812 (2000).

151. *ICC Statute*, *supra* note 3.

throughout the trial. To discharge this burden, Article 66(3) states that in order to convict, the ICC must be convinced beyond reasonable doubt that the accused is guilty. Article 67(i) provides that the accused must not bear “any reversal of the burden of proof or any onus of rebuttal,” and Article 67(1)(g) expressly states that an accused has the right to remain silent at trial without silence being a consideration in the determination of guilt or innocence. Thus, the fundamental tenets of a fair trial in any civilized state are adequately provided for in the statute.¹⁵²

It must be noted that the purpose of a jury system in the American justice system is to ensure a fair trial. Thus, the U.S. Supreme Court noted in *Palko v. Connecticut*¹⁵³ that while the right to trial by jury is important, it is “not of the very essence of a scheme of ordered liberty.”¹⁵⁴ The Court opined that to abolish it is not to violate a “principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.”¹⁵⁵ It is submitted that the ICC Statute contains sufficient provisions that guarantee a fair trial to the accused. Therefore, the U.S. should not be fixated on the requirement of a jury trial, but must be amenable to any arrangement that contain substantial guarantee of fairness to the accused.¹⁵⁶

Furthermore, the United States has allowed American citizens to be tried abroad without a guarantee of American constitutional protections, or

152. Human Rights Watch lists the following rights, contained in the Rome Statute, as relevant to guarantee a fair trial and treatment of an accused:

Rights not to incriminate oneself, not to be subject to any form of coercion, to an interpreter, not to be subject to arbitrary arrest or detention, to be informed of the grounds to believe he or she committed a crime, to remain silent, without silence being a consideration in guilt or innocence, to legal assistance, to have counsel present during questioning, to be heard before charges are confirmed, to be informed of the evidence on which the prosecutor intends to rely at the confirmation hearing, to be present at trial. Similarly, defendants have their fundamental rights guaranteed, including the right to be informed promptly and in detail of the charges, to have full time and facilities for the preparation of one's defense and free communication with counsel, to trial without delay, to cross examine witnesses and obtain attendance of witnesses, not to incriminate oneself, to be presumed innocent until proven guilty beyond a reasonable doubt, to have evidence disclosed which shows or mitigates the guilt of the accused or affects the credibility of prosecution evidence. See *Myths and Facts About the International Criminal Court*, at www.hrw.org/campaigns/icc/facts.htm (last visited Feb. 18, 2003).

153. *Palko v. Connecticut*, 302 U.S. 319 (1937).

154. *Id.* at 325.

155. *Id.*

156. For further discussions see, Diane Holcombe, *The United States Becomes a Signatory to the Rome Treaty Establishing the International Criminal Court: Why Are So Many Concerned By This Action*, 62 MONT. L. REV. 301, 329-335 (2001).

specifically, a jury trial.¹⁵⁷ “In other words, merely because an offense occurred in the United States involving an American national, extradition of that individual does not violate the United States Constitution.”¹⁵⁸ This is usually the case when the U.S. accedes to extradition requests from countries that have bilateral extradition treaties with the U.S. In *Neely v. Henkel*,¹⁵⁹ Justice Harlan of the U.S. Supreme Court opined that:

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.¹⁶⁰

However, those who object to United States ratification of the ICC Statute have argued that *Neely* applies only in situations where the crimes were either committed abroad, or were intended to achieve criminal consequences abroad.¹⁶¹ Even accepting this construction of the *Neely* decision, it should be pointed out that so far the U.S. has indicated concern over the trial of its servicemen for crimes committed while on peacekeeping operations abroad. Therefore, the war crimes would have been committed by Americans in a foreign territory which would have effect in a foreign country, thereby making the decision in *Neely* applicable.

In addition, it must be recalled that in *United States v. Melia*,¹⁶² the court upheld extradition of a U.S. citizen to Canada for conspiring by telephone from Connecticut with persons in Canada to commit a murder in the United States.¹⁶³ Also, in *Austin v. Healy*,¹⁶⁴ the Court upheld extradition of U.S. citizen to the U.K. for conspiring from New York to arrange a murder in the U.K.¹⁶⁵ Similarly, in *Valencia v. Scott*,¹⁶⁶ the

157. *Id.* at 335 (citing *Melia v. United States*, 667 F.2d 300 (2d Cir. 1981) (accused extradited for crimes committed in U.S. with intended criminal effects in another country)). In *United States v. Melia*, the Second Circuit Court of Appeals stated that although the accused never entered Canada to conspire or commit the murder, his telephone calls to Canada were enough to allow his extradition to Canada to stand trial.

158. Holcombe, *supra* note 156, at 335.

159. *Neely v. Henkel*, 180 U.S. 109 (1901).

160. *Id.*

161. Robert Christensen, *Getting to Peace by Reconciling Notions of Justice: The Importance of Considering Discrepancies Between Civil and Common Legal Systems in the Formation of the International Criminal Court*, 6 UCLA J. INT'L L. & FOREIGN AFF. 391, 419 (2002).

162. *Melia v. United States*, 667 F.2d 300 (2d Cir. 1981).

163. *Id.*

164. *Austin v. Healy*, 5 F.3d 598 (2d cir. 1993).

165. *Id.*

court upheld extradition of U.S. citizens to France for conspiracy to export cocaine from New York to France.¹⁶⁷ Therefore, trying U.S. nationals before the ICC without the participation of a jury would be neither unique nor unconstitutional.

IV. AFFIRMATIVE STEPS TAKEN BY THE U.S. TO UNDERMINE THE ICC

Since the ICC Statute took effect, the United States has taken several steps to continue its opposition to the court and to try to prevent the court from exercising jurisdiction over U.S. nationals. Some of these steps are discussed below.

A. UN-SIGNING OF THE STATUTE

On May 6, 2002, the Bush administration formally notified the Secretary-General of the United Nations that the United States would not become a party to the International Criminal Court statute.¹⁶⁸ By virtue of section 18 of the Vienna Convention on the Law of Treaties,¹⁶⁹ the effect of this unusual act is that the U.S. government, having made clear its intention not to become a party to the ICC Statute, is relieved of its obligations as a signatory state to the ICC to refrain from acts which would defeat the object and purpose of the ICC Statute.¹⁷⁰ Beyond this, however, the United States' signature will remain on the original of the statute in the custody of the Secretary-General, and it could still be followed by U.S. ratification of the ICC Statute anytime the U.S. is predisposed to become a state party.¹⁷¹

B. AMERICAN SERVICE-MEMBERS' PROTECTION ACT OF 2002

In December 2001, Congress passed the American Service-members' Protection Act (ASPA) which in part bans the U.S. from cooperating with the court in any way, and permits the president to use "all means necessary" to free American citizens if they are detained for or on behalf

166. Galen Valencia v. Scott, 1992 WL 75036 (E.D.N.Y. 1992).

167. *Id.*

168. See Multilateral Treaties, *supra* note 4, at n.6.

169. Vienna Convention on the Law of Treaties, May 23, 1969, art. 18, U.N. Doc. A/CONF.39/27 (1969), reprinted in 25 I.L.M. 543 (1969). Article 18 provides that "a State is obliged to refrain from acts which would defeat the object and purpose of a treaty when it has signed the treaty [...] until it shall have made its intention clear not to become a party thereto."

170. See Jacques Roman, *Treaty Signatures Can't be Withdrawn*, BANGKOK POST, May 11, 2002, available at 2002 WL 18165663. See, however, *ICC Statute, supra* note 3, art. 127, which provides that withdrawal will take effect one year after the date of receipt of the notification, unless notification specifies a later date.

171. *ICC Statute, supra* note 3, art. 126(2).

of the court and to block extradition of U.S. nationals accused of war crimes to the court.¹⁷²

However, before Congress went on its 2001 annual recess, it decided not to submit the ASPA for the president's signature, but the Defense Appropriations bill adopted by Congress for the Fiscal Year 2002 contains a provision adopted by the House which prohibits the use of FY2002 funds to cooperate with the Court.¹⁷³ This provision was offered by House International Relations Committee Chairman Henry Hyde (R-II).¹⁷⁴ A similar amendment offered by Senator Larry Craig (R-Id) applying to the FY2002 budgets for the State, Commerce, and Justice Departments, was approved by Congress in November and has been signed into law by President Bush.¹⁷⁵

The effects of these bills were merely symbolic, as there was little likelihood that any country would be called upon to make financial contributions to the Court during the fiscal year covered by the bills. However, the actions taken by the United States Congress and President Bush is significant because it clearly sent the message that the Bush administration does not intend to support the ICC.

The final version of the ASPA was signed into law on August 03, 2002, by President Bush.¹⁷⁶ The ASPA authorizes the president "to use all means necessary and appropriate to bring about the release" of any American or citizen of a United States ally being held by the ICC and to provide legal assistance for such persons.¹⁷⁷ The ASPA also provides for the withdrawal of U.S. military assistance from countries ratifying the ICC, and allows for U.S. participation in U.N. peacekeeping missions to be contingent upon immunity.¹⁷⁸

The President may, however, waive this provision on "national interest" grounds.¹⁷⁹ In essence, the Act gives the administration discretion to override the ASPA's effects on a case-by-case basis. But, as Richard Dicker observed, the U.S. government "may try to use this to strong-arm

172. See *Conferees Drop ASPA from FY2002 Defense Appropriations Bill; Retain Hyde Provision Precluding Assistance to ICC* (Jan. 9, 2002) at www.unausa.org/newindex.asp.

173. *Id.*

174. *Id.*

175. *Id.*

176. Dicker, *supra* note 19.

177. American Service-members' Protection Act of 2002, 22 U.S.C.A. §§ 7401-7432 (2002) [hereinafter ASPA].

178. *Id.*, §§ 2005, 2007.

179. *Id.*, § 2003.

additional concessions from the states that support the court.”¹⁸⁰ Dicker therefore urged states supporting the ICC “not to fall into the U.S. trap,” noting that ASPA does not require any punitive measures.¹⁸¹

C. BILATERAL ICC IMMUNITY DEALS

In July 2002, the Bush administration sought permanent immunity from the court, but obtained a one-year deferral from the Security Council of ICC’s jurisdiction over U.S. service members on peacekeeping operations.¹⁸² Although the UN Security Council granted the U.S. only one year, it is likely that the one-year deferral will be renewed again.¹⁸³ The Security Council should, however, be mindful of creating a precedent that may be latched onto by other states to demand similar exemptions in the future.

After obtaining a one-year deferral, the U.S. is now trying, on a country-by-country basis, to get countries (especially those that have American troops stationed in their territory) to sign bilateral ICC immunity deals, arguably under Article 98 of the ICC Statute. U.S. State Department officials confirm that the Bush administration has asked U.S. embassies around the world to approach host governments about negotiating such bilateral agreements with the U.S.¹⁸⁴ Yugoslavia and Norway government officials have confirmed that their governments have been approached by the U.S. to sign an ICC immunity agreements.¹⁸⁵

The ICC immunity agreement is an undertaking by both countries not to extradite each other’s citizens to the International Criminal Court without mutual consent. The Bush administration has threatened ICC state parties with withdrawal of military aid, including education, training, and financing the purchases of equipment and weaponry, if they fail to protect Americans serving in their countries from ICC reach.¹⁸⁶

180. Dicker, *supra* note 19.

181. *Id.*

182. S.C. Res. 1422, U.N. SCOR, 4572nd mtg., U.N. Doc. S/RES/1422 (2002), available at <http://www.un.org/Docs/Scres/2002/sc2002.htm>.

183. *ICC Statute, supra* note 3, art. 16, allows the Security Council to defer an investigation or prosecution by the Courts for periods of one year, renewable annually, if the Council decides that such deferral is in the interest of international peace and security.

184. U.S. Dept. of State Daily Press Briefing, Philip T. Reeker, Deputy Spokesman (Aug. 8, 2002) available at <http://www.diplomacy.org/art0020.html>.

185. *U.S. Asks Yugoslavia to Sign Non-Extradition Pact for ICC Court Cases*, ASSOC. PRESS WORLDSTREAM, Aug. 8, 2002, available at <http://www.iccnw.org/html/pressart98db20020924.pdf> (on file with author). See also, *USA Asks Norway to Sign Non-Extradition Pact on Hague Court*, AGENCE FR. PRESSE, Aug. 8, 2002, (Int’l News), available at LEXIS, News Library, AFP File.

186. Elizabeth Becker, *U.S. Ties Military Aid to Peacekeepers’ Immunity*, N.Y. TIMES, Aug. 10, 2002, at A1.

Since July 2002, when the ICC Statute came into effect, the United States has signed immunity deals with 18 countries, including, Afghanistan, Djibouti, the Dominican Republic, East Timor, El Salvador, Gambia, Honduras, India, Israel, the Marshall Islands, Mauritania, Micronesia, Nepal, Palau, Romania, Sri Lanka, Tajikistan, and Uzbekistan.¹⁸⁷ Although the European Union had initially resisted the United States' request for a so-called Article 98 bilateral agreement,¹⁸⁸ the 15 member EU governments agreed to prevent the extradition of American government employees accused of war crimes to the Court.¹⁸⁹ The only condition is that the United States government guarantees that such a suspect would be tried in an American court. The immediate effect of this decision is that any European Union nation is now free to sign a separate bilateral agreement with the United States over the Court.¹⁹⁰

The conclusion of a bilateral agreement between ICC state parties and the United States is objectionable, as it contradicts the customary international law principle of *pacta sunt servanda*, which obligates a state party not to do anything that will undermine its treaty obligations.¹⁹¹ State parties to the ICC agreed in Article 88 to "ensure that there are procedures available under their national law for all forms of cooperation" listed in Part 9 of the Rome Statute. In addition, Article 59(1) requires state parties to comply immediately with requests by the ICC to arrest and surrender accused persons in their territories.

State parties to the ICC have an affirmative duty to assist in locating and extraditing an accused within its territories. Therefore, these state parties should be concluding agreements that will expedite this obligation under Article 59(1) of the Rome Statute. However, the essence of a bilateral treaty with the United States is to insulate U.S. nationals from the jurisdiction of the ICC, which will directly affect the ability of the Court to prosecute those accused of committing international crimes. The ICC was created to ensure that anyone, no matter what his or her position, who commits an international crime is held accountable for his or her actions. The existence of bilateral immunity deals excluding citizens of

187. *U.S. Seals 18th ICC Immunity Deal as Djibouti Agrees to Pact*, AGENCE FR. PRESSE, Jan. 24, 2003, (General News), available at LEXIS, News Library, AFP File.

188. *EU Concerned Over Romanian Deal With United States on Immunity From International Criminal Court*, ASSOCIATED PRESS WORLDSTREAM, Aug. 8, 2002, available at <http://www.derechos.org/nizkor/icc/euomania.html>.

189. Paul Meller, *Europeans to Exempt U.S. From War Court*, N.Y. TIMES, Oct. 1, 2002, at A6.

190. *Id.*

191. Among the states that have signed bilateral agreements with the United States, Afghanistan, Djibouti, East Timor, Gambia, Honduras, the Marshall Islands, Romania, and Tajikistan have ratified the Rome Statute.

certain countries from the ICC gives the impression of a license to kill. This kind of accommodation will make the court partial to non-party states such as the United States.

V. CONCLUSION

Most U.S. objections to the ICC are unfounded, premature, and speculative, and do not justify its refusal to ratify the Rome Statute. As demonstrated, the U.S. seems to equate ICC jurisdiction over nationals of a state to mean the same thing as jurisdiction over the United States as a country. This grave misconstruction of the law is regrettable as it does not operate from ignorance of the law but from a deliberate distortion of international law.

While Americans are worried that the ICC may become a tool in the hands of its enemies to prosecute United States servicemen deployed for peacekeeping operations, advocates of the ICC see it as an institution that will help save the lives of American soldiers. It is envisaged that the Court will serve as an avenue to promote international justice and individual accountability. Thus, the ICC will deter gross human rights violators by confronting them with the threat of punishment. In this way, the ICC will help to put a stop to future "ethnic cleansing" as occurred in Bosnia and Rwanda.

Therefore, if the U.S. supports and strengthens the Court, it will no longer be necessary to put American servicemen's lives in danger by deploying them to such war-torn areas. Today, American soldiers in Bosnia and indeed all over the world are safer because the leading Bosnian Serb racists and their like in the former Republic of Yugoslavia are either in hiding or in prison, instead of inciting their followers to violence against U.S. peacekeepers.¹⁹²

Most of the delegates at the ICC Conference were concerned that efforts to accommodate the United States demands may provide loopholes for the Pol Pots, Saddam Husseins, and Milosevices of tomorrow.¹⁹³ The general feeling of most of the nations at the Rome Conference, as expressed by Adriaan Bos,¹⁹⁴ is that delegates have gone far enough to placate the U.S.. According to Mr. Bos, "efforts to reach compromises

192. Jerry Fowler, *U.S. Has Wounded International Justice*, NAT'L L.J., Aug. 10, 1998, at A21.

193. Kirsch, *supra* note 41, at 11.

194. Mr. Adriaan Bos, a Dutch Diplomat, was supposed to be the Chair of the Conference's primary deliberative body, the Committee of the Whole, but was diagnosed as having cancer weeks before the conference started and replaced by Canadian Phillippe Kirsch.

have been used to the maximum.”¹⁹⁵ He cautioned that “we cannot let ourselves destroy the essentials of an International Criminal Court ... a new institution that gives hope to the entire world that we can hope to bring to justice those who transgress the most basic human principles.”¹⁹⁶

A similar view was expressed in Professor Bassiouni’s suggestion that the United States got most of what it wanted “within the folds of the agreement,” if not explicitly.¹⁹⁷ He opined that U.S. officials did not get what they may really have been after, “a stamp across the front of the treaty that says this will never apply to the United States, but the United States can use it whenever it wants.”¹⁹⁸ Considering that most of the U.S.’ objections are unfounded, this author cannot but agree with this view. Also, in an opinion piece published in the Washington Post, U.N. Secretary-General Dr. Kofi Annan noted that all signatories to international accords agree to assume similar risks.¹⁹⁹ He proffered that the contradiction in U.S. foreign policy²⁰⁰ stems from the American attitude that says, “one law for us, another for everybody else.”²⁰¹

It would therefore appear that the U.S. prefers to stand outside a collective framework of international law to pursue its policies without hindrance by the rule of law which the majority of other democratic nations have accepted, and which it had introduced to others. The United States played a prominent role in the promulgation and enforcement of the Nuremberg principles, and it continues to play a significant role in the ad hoc tribunals in Rwanda and the former Republic of Yugoslavia. Therefore, for the U.S. to turn around and antagonize the ICC because it seeks jurisdiction over U.S. citizens is hypocritical.

As eloquently opined by Justice Jackson, U.S. chief prosecutor for the Allies in the Nuremberg trials, if certain offenses are crimes, “they are crimes whether the United States does them or whether Germany does them, and we are not prepared to lay down a rule of criminal conduct against others which we would be unwilling to have invoked against

195. John Hooper, *U.S. Plan to Thwart War Crimes Court*, GUARDIAN WEEKLY, July 26, 1998.

196. *Id.*

197. Podgers, *supra* note 137, at 69.

198. *Id.*

199. William Raspberry, *Reflections in a Gentle Mirror*, WASH. POST, Aug. 12, 2002 at A15.

200. For example, America’s tendency to reach out internationally when it suits its purposes (as in the fight against terrorism – “Operation Enduring Freedom”), but to assume a go-it-alone posture when international cooperation seems inconvenient (as in U.S. baseless opposition to the ICC).

201. *Id.*

us.”²⁰² He then declared that: “While the law is first applied against German aggressors, the law includes, and if it is to serve any useful purpose it must condemn aggression by any other nations, including those who sit here now in judgment.”²⁰³

The United States cannot aspire to world leadership without holding the high moral ground. The assumption that its military and economic might are sufficient to lead the rest of the world amounts to naïve political computation. If there is any lesson to be learned from the events of 9/11 and its aftermath, it is that a unilateral superpower structure cannot succeed in today’s world. Rather than alienate itself from the ICC, the U.S. should team up with the rest of the world to enable the Court to proceed effectively, and assist in every way possible to bestow the strength and credibility required by the Court to achieve its objectives. The United States should rise to its responsibility as a country that cherishes freedom by cooperating with a system that will serve the profound needs of the international community to stigmatize criminal regimes and their policies in order to further the goals of international justice and morality.

202. Christopher J. McGrath, *Today’s Transnational Crime Epidemic: The Necessity of an International Criminal Court to Battle Misdeeds Which Transcend National Borders*, 6 J. INT’L & PRAC. 135, 149 (1997).

203. *Id.*