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United States Opposition to the 1998 Rome Statute Establishing an International Criminal Court: Is the Court's Jurisdiction Truly Complementary to National Criminal Jurisdictions?

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I. Introduction

In an historic event, on July 17, 1998, 120 nations adopted and opened for signature the Statute Creating an International Criminal Court at the United Nations Diplomatic Conference on the Establishment of an International Criminal Court held in Rome, Italy.[1] Most commentators believe that a permanent International Criminal Court is necessary to ensure that acts of mass murder, rape, and torture are not committed with impunity, and individuals responsible for such heinous acts and serious violations of international humanitarian law are brought to justice and severely punished for their crimes. In support of a permanent International Criminal Court, one commentator has noted:

> Armed conflicts and serious violations of human rights and humanitarian law continue to victimize millions of people throughout the world. As a result, more than 86 million civilians have died, been disabled or been stripped of their rights, property and dignity since the end of World War II. The world community has done very little for them or their families. Most victims have been forgotten and few perpetrators have been brought to justice. A culture of impunity seems to have prevailed.[2]

At the same time, the creation of a permanent International Criminal Court is not a new or novel idea. The international community has studied the possibility of establishing such a court for at least fifty years.[3] In 1948, the United Nations General Assembly invited the International Law Commission (ILC) to study the matter with respect to the prosecution of per-

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1. 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 Rome Statute]. The Treaty has since been signed by 139 States, and ratified by 48, including: Argentina, Austria, Belgium, Belize, Botswana, Canada, Croatia, Fiji, Finland, France, Gabon, Germany, Ghana, Iceland, Italy, Lesotho, Luxembourg, Mali, Marshall Islands, Netherlands, New Zealand, Norway, San Marino, Senegal, Sierra Leone, South Africa, Spain, Sweden, Tajikistan, Trinidad and Tobago, and Venezuela. Rome Statute Ratification Statute, *at* http://www.igc.apc.org/icc/rome/html/ratify.html (last visited January 11, 2002) [hereinafter Ratification Status]. The Statute shall enter into force after ratification by sixty nations. Rome Statute, *supra*, art. 126(1).

2. Roy S. Lee, *Introduction* to THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE 1 (Roy S. Lee ed., 1999) [hereinafter THE MAKING OF THE ROME STATUTE].

3. The creation of a permanent international criminal court was envisioned by the State Parties to the Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 277 (1948) [hereinafter Crime and Punishment Convention]. This Convention was adopted by the U.N. General Assembly on December 9, 1948 and entered into force on January 12, 1951. *Id.* In 2001, there were 132 State Parties to the Genocide Convention. Convention on the Prevention and Punishment of the Crime of Genocide, U.N. Treaty Collection, *available at* http://www.unhcr.ch/html/menu3/b/treaty1gen.htm. Article VI provides:

> Persons charged with genocide or any other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such *international penal tribunal* as may have jurisdiction with respect to those Contracting Parties which shall accepted its jurisdiction. (emphasis added).

sons charged with genocide.[4] The ILC concluded that the establishment of such a court was both desirable and possible. As a result, in 1950 the General Assembly set up a Committee on International Criminal Jurisdiction consisting of representatives of seventeen member states to prepare a concrete draft on the establishment of a permanent international court.[5] The Committee submitted a draft statute in 1951, which it subsequently amended in 1953. However, the General Assembly permanently shelved the 1953 Draft Statute primarily due to the absence of an internationally accepted definition of the crime of aggression.[6]

With the end of the Cold War in the late 1980s, the United Nations returned in earnest to the project of creating a permanent International Criminal Court. In 1989, a coalition of sixteen Caribbean and Latin American nations, perceiving the court as an effective way of dealing with the difficulties encountered in prosecuting and extraditing narco-terrorists, reintroduced the issue in the agenda of the General Assembly.[7] In 1990, as requested, the ILC submitted an interim report to the General Assembly on the issue of establishing an International Criminal court.[8] The General Assembly responded by asking the ILC to further consider the issues raised in their 1992 report and to make concrete proposals for resolving them. The ILC formed a Working Group to address questions regarding the scope of the international criminal jurisdiction of the proposed court. Among other things, the Working Group recommended that the court should be a "flexible and supplementary facility" for State Parties to the statute and that it should not have exclusive jurisdiction.[9] On the basis of the Working Group's proposals, on November 25, 1992, the General Assembly adopted a resolution calling on the ILC to formally draft a statute for an Interna-

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Id. art. VI.

4. The International Law Commission was established by the General Assembly in 1947 pursuant to its obligation to encourage the codification and progressive development of international law as required by Article 13(1) of the United Nations Charter. The ILC consists of 34 members who are persons of recognized competence in international law, who are elected by the General Assembly.

5. Draft Statute for an International Criminal Court (Annex to the Report of the Committee on International Criminal Jurisdiction), 7 U.N. GAOR, Supp. No. 11, at 21, U.N. Doc. A/2136 (1952) [hereinafter Draft Statute].

6. *Report of the ILC, 42d Sess., May 1-July 28, 1990*, 45 U.N. GAOR, Supp. No. 10, at 41-42, U.N. Doc. A/45/10 (1990).

7. *International Criminal Responsibility of Individuals and Entities Engaged in Illicit Trafficking in Narcotic Drugs Across National Frontiers and Other Transnational Criminal Activities: Establishment of an International Criminal Court with Jurisdiction over Such Crimes*, U.N. G.A. Res. 44/39, 44 U.N. GAOR, Supp. No. 49, at 1, U.N. Doc. A/44/49 (1989), *available at* http://www.un.org/documents/ga/res/44/a44r039.htm.

8. *See Report of the International Law Commission on the Work of Its Forty-Second Session (1990): Topical Summary of the Discussion Held in the Sixth Committee*, paras. 119-156, U.N. Doc. A/CN.4/L.456 (1991).

9. *Report of the Working Group on the Question of International Criminal Jurisdiction, in Report of the ILC*, 44th Sess. May 4-July 24, 1992, 47 U.N. GAOR, Supp. 10, annex, at 162, U.N. Doc. A/47/10 (1992).

tional Criminal Court "as a matter of priority."[10]

Additionally, the Security Council's steps to address the war crimes and other atrocities committed in the former Yugoslavia and Rwanda hastened the efforts of the General Assembly to create a permanent International Criminal Court. Moreover, the Security Council's establishment of the Yugoslavia and Rwanda ad hoc tribunals in May 1993 removed any question as to the political and legal feasibility of creating an International Criminal Court. Finally, at the United Nation's forty-fifth session, in 1993, the ILC reconvened its Working Group on an International Criminal Court, and completed a preliminary draft statute for a permanent court, relying heavily on the newly established Yugoslavia Tribunal.[11] The Statute of the International Criminal Court was thereafter adopted, in 1998, at the Rome conference.[12]

The United States signed the treaty establishing a permanent International Criminal Court.[13] However, strong objections remain and the prospects for ratification by the United States Senate appear dim.[14] While the United States generally supports the creation of a permanent International Criminal Court (ICC or Court), it opposes such a court as set forth in the 1998 Rome Statute because it leaves open the potential for United States military personnel and government officials to be hailed before the ICC in situations such as the following:

> A State not a party to the treaty launched a campaign of terror against a dissident minority inside its territory. Thousands of innocent civilians were killed. International peace and security were imperiled. The United States participated in a coalition to use military force to intervene and stop the killing. Unfortunately, in so doing, bombs intended for military targets

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10. *Report of the International Law Commission on the Work of Its Forty-Fourth Session*, G.A Res. 47/33 (Nov. 25, 1992), U.N. Doc. A/47/584, *available at* http://www.un.org/documents/ga/res/47/a47r033.htm.

11. *See Report of the International Law Commission on the Work of Its Forty-Fifth Session*, 48 U.N. GAOR, Supp. No. 10, at 258, U.N. Doc. A/48/10 (1993).

12. For a comprehensive discussion of significant events leading to the adoption of the Statute Creating a Permanent International Criminal Court at the Rome Conference, see THE MAKING OF THE ROME STATUTE, *supra* note 2, at 1-39.

13. The White House Office of Communications, Statement by the President, 2001 WL 6008 (Jan. 2, 2001).

14. Initially, the United States, along with Algeria, China, Iraq, Israel, Libya, and Yemen voted against the Rome Treaty. However, on December 31, 2000, the last day the Rome Statute remained open for signature at the United Nations Headquarters in New York, the United States and Israel became signatories to the Statute. Ratification Status, *supra* note 1. Additionally, on December 28, 2000, Algeria and Yemen signed the Rome Statute. *Id.* China, Iraq, and Libya have yet to sign. However, legislation has been introduced into Congress which would prohibit the United States Government or a State or local government, including any court, from cooperating with the ICC relating to arrest, extradition and transit of suspects, seizure of property, asset forfeiture, execution of searches and seizures, service of warrants and other judicial process, and taking of evidence. *See* American Servicemembers' Protection Act of 2000, H.R. 4654, 106th Cong., (2d Sess. 2000) (sponsored by Congressman Delay, Armey, Watts, Blunt, Fowler, Pryce, Cox, Dreier, Spence, Gilman, Goss, Hyde, Stump, Smith, Barr, and Aderholt; the Senate version of the bill is S 2726, sponsored by Senators Helms, Lott, Warner, Hatch, Grams, and Shelby).

> went astray. A hospital was hit. An apartment building demolished. Some civilians being used as human shields were mistakenly shot by United States troops. The State responsible for the atrocities demanded that United States officials and commanders should be prosecuted by the International Criminal Court. The demand was supported by a small group of other States. Under the terms of the Rome treaty, in the absence of a Security Council referral, the Court could not investigate those responsible for killing thousands, yet the United States officials, commanders and soldiers could face an international investigation and even prosecution.[15]

Although the loss of innocent civilian life in such a situation would be highly regrettable, and perhaps even condemnable, the United States maintains that the conduct would not rise to the level of a war crime or other offence within the jurisdiction of the proposed ICC.[16] Thus, the United States adamantly maintains that the ICC should not be permitted to exercise its jurisdiction over such conduct.

The problem with the United States' position is that its argument against the Rome Statute is outcome-based. In other words, the United States opposes an ICC that could exercise jurisdiction over United States soldiers, military commanders, and political leaders for the inadvertent, unintended loss of innocent civilian life caused during an international peace-keeping operation. That outcome is simply unacceptable to the United States. However, what is the *legal* basis, if any, for the United States' opposition to the Rome Statute? Stated another way, can the United States' outcome-based argument be converted into a legal argument? If so, perhaps the United States could more effectively persuade other State Parties to embrace its view, and provide a further basis for addressing the United States' concerns when the ICC's Draft Rules of Procedure and Evidence are submitted for consideration at the first meeting of the Assembly of States Parties.[17]

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15. U.N. GAOR, 53d Session, Agenda Items, 153: Establishment of an International Criminal Court, U.N. Doc. A/C.6/53/SR.9 (1998); *see also* Steven Lee Myers, *U.S. Signs Treaty for World Court to Try Atrocities*, N.Y. TIMES, Jan. 1, 2001, at A1 ("While administration officials have strongly supported the creation of an international court, Mr. Clinton had until today heeded warnings from the Pentagon that such a court would subject American troops, diplomats and other officials to frivolous or politically motivated prosecutions.").

16. At the very least, the conduct pales in comparison to the barbarous atrocities committed against the Jewish people as part of Nazi Germany's "final solution" during World War II, or the mass murders and systematic rapes perpetrated against innocent civilians during armed conflict in the former Yugoslavia and Rwanda.

17. The United Nations Conference on the Establishment of an International Criminal Court has established a Preparatory Commission for the International Criminal Court tasked with preparing draft texts of Rules of Procedure and Evidence, Elements of Crimes, and a relationship agreement between the Court and the United Nations. Final Act of the U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Court, Annex I, Res. F, U.N. Doc. A/conf. 183/10 (1998), *available at* http://www.un.org/law/icc/n9824185.pdf [hereinafter Final Act]. The Preparatory Commission finalized and approved the Draft Rules of Procedure and Evidence on June 30, 2002. *Report of the Preparatory Commission for the ICC–Addendum Finalized Draft Text of the Rules of Procedure and Evidence*, U.N. Doc. PCNICC/2000/1/Add.1 (2000). The Assembly of State Parties may "consider and adopt, as appropriate, recommenda-

The United States' opposition to the Rome Statute could be construed as an objection to the exercise of the ICC's jurisdiction, which directly implicates the principle of complementarity.[18] In short, the complementarity regime established by the Statute does not adequately limit the ICC's ability to intervene with respect to matters properly within a State's jurisdiction. Stated another way, the Court is not sufficiently deferential to national criminal jurisdictions.

A fundamental question facing the drafters of the Rome Statute was the role the ICC would play with respect to national courts. Several States, while supporting the establishment of an ICC, were reluctant to create a court with primary or peremptory jurisdiction, requiring a State to defer or surrender jurisdiction to the ICC with respect to the commission of certain serious international crimes. In their view, such action would infringe on national sovereignty by limiting a State's ability to prosecute persons located in their territory suspected of committing international crimes. Furthermore, under existing customary international law and various multi-lateral treaties, States are obligated to prosecute many of the crimes included in the Court's jurisdiction.[19] These obligations are deemed paramount and should not be pre-empted or challenged by the ICC, acting as a "super" or "supreme" international criminal court.

Ultimately, the drafters of the Rome Statute decided that national courts should have primary jurisdiction.[20] Under the Rome Statute, the proper role of the ICC is to *complement* national court jurisdictions and

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tions of the Preparatory Commission." Rome Statute, *supra* note 1, art. 112(2)(a). The Preparatory Commission will "remain in existence until the conclusion of the first meeting of the Assembly of State Parties." Final Act, *supra*, Res. F, para. 8. Perhaps the United States' reasons for opposing the Rome Statute can be addressed at the first meeting of the Assembly of State Parties.

18. The Preamble of the Rome Statute states that the ICC "shall be complementary to national criminal jurisdictions." Rome Statute, *supra* note 1, pmbl., para. 10; *accord id.* art. 1.

19. *E.g.*, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. GAOR, 39th Sess., Annex, U.N. Doc. A/RES/39/46 (1984) (establishing universal jurisdiction over acts of state-sponsored torture and requiring a State Party to the Convention to prosecute or extradite if the offender is found within its territory); International Convention Against the Taking of Hostages, G.A. Res. 34/146, U.N. GAOR 34th Sess., Annex, U.N. Doc. A/C.6/34/L.23 (1979) (establishing universal jurisdiction over acts of hostage-taking and requiring a State Party to the Convention to prosecute or extradite if the offender is found within its territory); Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 277 (1948) (imposing an affirmative duty on the territorial state to prosecute persons responsible for the commission of acts of genocide).

20. *See* Rome Statute, *supra* note 1, art. 17. In this respect, the proposed ICC stands in stark contrast from the International Criminal Tribunals for the Former Yugoslavia and Rwanda which are vested with primary jurisdiction over national courts. Statute of the International Criminal Tribunal for Former Yugoslavia, S.C. Res. 827, U.N. SCOR, 48th Sess. 3217th mtg. art. 9(2) U.N. Doc S/Res/827 (1993), *reprinted in* 32 I.L.M. 1159 (1993); *see also* The Prosecutor v. Dusko Tadic, ICT for Former Yugoslavia (1995) (discussing the primacy of the jurisdiction of the Yugoslavia Tribunal); International Tribunal for Rwanda, S.C. Res. 955, U.N. SCOR, 49th Sess. 3453d mtg., art. 8(2) U.N. Doc. S/Res/955 (1994) (establishing primary jurisdiction of the Rwanda Tribunal over domestic courts).

"fill the gap" when States fail to comply with their obligations to prosecute perpetrators of serious international crimes.[21] Consequently, if a national court with jurisdiction is investigating or prosecuting an offence within the ICC's jurisdiction, the ICC should defer to the State's jurisdiction.[22]

The Statute uses the term "complementary" to describe the relationship between the ICC and national courts.[23] One commentator has described the complementary relationship between the ICC and national criminal jurisdictions established by the Rome Statute as follows:

> The complementarity regime is one of the cornerstones on which the future International Criminal Court will be built. Throughout the negotiating process, States made clear that the most effective and viable system to bring perpetrators of serious crimes to justice was one which must be based on national procedures complemented by an international court. Such a system would reinforce the primary obligation of States to prevent and prosecute genocide, crimes against humanity and war crimes - obligations which existed for all States under conventional and customary international law. At the same time, the system would create a mechanism, through a permanent international criminal court, to fill the gap where States could not or failed to comply with those obligations.[24]

At the same time, the Statute recognizes two exceptions to the rule of complementarity, authorizing ICC prosecution despite pending State proceedings. The ICC is not required to defer its jurisdiction if a State with jurisdiction is either (1) "unwilling" or (2) "unable" to undertake its obligations to prosecute serious international crimes within the jurisdiction of the ICC.[25] The complementarity regime established by the Statute autho-

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Article 9(2) of the Statute of the International Criminal Tribunal for the Former Yugoslavia provides: "The International Tribunal shall have primacy over national courts. At any stage of the procedure, the International Tribunal may formally request national courts to defer to the competence of the International Tribunal in accordance with the present Statute and the Rules of Procedure and Evidence of the International Tribunal." Statute of the International Criminal Tribunal for the Former Yugoslavia, *supra*, art. 9(2).

21. John T. Holmes, *The Principle of Complementarity*, *in* THE MAKING OF THE ROME STATUTE, *supra* note 2, at 73-74; *see also* Rome Statute, *supra* note 1, pmbl., para. 10 ("*Emphasizing* that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions.") (emphasis in original); *id.* art. 1 (stating that the ICC "shall be complementary to national criminal jurisdictions").

22. *See* Rome Statute, *supra* note 1, art. 17(2)(a) (permitting the ICC to exercise its jurisdiction when the State proceedings were undertaken with the purpose of "shielding" the offender).

23. To underscore the importance of this principle with respect to the ICC's exercise of jurisdiction, it is set forth in the Preamble, as well as art. 1 of the Rome Statute. *See* Rome Statute, *supra* note 1, pmbl., para. 10 & art. 1. The International Law Commission placed the principle of complementarity in the preamble of the Draft Statute. The third paragraph in the Preamble stated that the ICC was "intended to be complementary to national criminal justice systems in cases where such trial procedures may not be available or may be ineffective." Draft Statute, *supra* note 5, pmbl.

24. Holmes, *supra* note 21, at 73-74.

25. *See* Rome Statute, *supra* note 1, art. 17(2)(a) (ICC may exercise its jurisdiction if the State proceedings were or are being undertaken for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court).

rizes the ICC to intervene when national criminal investigations or judicial proceedings are or were a sham aimed at shielding perpetrators from criminal responsibility, or when a State cannot carry out its proceedings due to a "total or substantial collapse of its national judicial system."[26]

With respect to a State's unwillingness to prosecute, application of the principle of complementarity to State proceedings conducted in bad faith presents the easy case. If a State, acting in bad faith, refuses to prosecute, the ICC should exercise its jurisdiction to ensure that persons do not commit serious international crimes with impunity. A more difficult question, however, is to what extent the principle of complementarity requires the ICC to defer to State judgments on questions of legal and factual sufficiency, resulting in a decision not to prosecute. For example, under the complementarity regime established by the Rome Statute, could the ICC properly exercise its jurisdiction over United States nationals if, after conducting a full investigation of the situation, United States prosecutors concluded that the alleged misconduct did not constitute an offence under the Statute, and therefore decided not to prosecute the persons concerned? In such a case, could the ICC intervene in the matter anyway if it believed that the United States misapplied or interpreted the law in a manner inconsistent with the aim of bringing the persons concerned to justice?[27]

The dilemma is whether the ICC should be permitted to intervene only when the evidence demonstrates that the State proceedings were not conducted independently or impartially (sham proceedings intended to shield the perpetrator), or whether the ICC should exercise jurisdiction to correct a perceived miscarriage of justice for any reason. In the latter situation, exercise of ICC jurisdiction turns on whether the ICC may substitute its judgment for that of State prosecutors on questions of legal and factual sufficiency or other matters involving the exercise of prosecutorial discre-

26. *See id.* art. 17(3); *see also id.* art. 17(2).

27. Under the United States' criminal justice system, the prosecutor is afforded wide discretion regarding whether to file criminal charges. Absent a finding that the decision to prosecute was based on impermissible factors such, as race or religion, the courts are not permitted to interfere with the exercise of that discretion. United States v. Armstrong, 517 U.S. 456, 465 (1996) ("In order to dispel the presumption that a prosecutor has not violated equal protection, a criminal defendant must present clear evidence to the contrary."). Furthermore, the exercise of prosecutorial discretion not to prosecute could be based on any number of legitimate factors, including, for example, questions on the sufficiency of evidence, whether important probative evidence would likely be excluded at trial, whether the government can prove that the defendant had the requisite intent to support a criminal conviction, the application of a legal defense to the criminal charges, and the presence of mitigating factors justifying the non-prosecution decision. If a decision not to prosecute was based on any of the above-described reasons, a United States court would not intervene and require prosecution. Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978) ("[S]o long as the prosecutor has probable cause to believe that the accused committed an offence defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion."); Wayte v. United States, 470 U.S. 598, 607 (1985) ("Such factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake.").

tion. Stated differently, in the case of a good faith disagreement on questions of law or the proper exercise of prosecutorial discretion, should a State's decision not to prosecute be afforded deference by the ICC? If not, then the ICC's role with respect to national criminal jurisdictions would be more analogous to that of a "super" international appellate court, vested with de novo review authority, rather than a court intended to complement States with primary jurisdiction.[28] If this is in fact the case, perhaps the concerns voiced by the United States are warranted. At the very least, the Rome Statute appears to have fallen short of realizing the objective of establishing a complementary relationship between the ICC and State jurisdictions.

One possible solution to the dilemma would be to require the ICC to apply a deferential standard of review when determining whether a State was unwilling to prosecute because it determined that prosecution was legally or factually unwarranted. For example, a "clearly erroneous" standard of review could be applied to questions of legal and factual sufficiency. Finally, the ICC should defer to State proceedings if there exists a reasonable basis for the State's exercise of prosecutorial discretion not to prosecute. An objective standard to determine whether the ICC should assert jurisdiction when a State decides not to prosecute clearly would strengthen the complementarity regime.

In addition to concerns with respect to whether the jurisdiction of the ICC is truly complementary, the United States' opposition to the Statute also could be based on its fears that the definition of "war crimes" contained in Article 8 of the Statute is so broad that it could be construed to cover negligent acts resulting in death or serious bodily injury to innocent civilians committed during a United Nations peace-keeping mission.[29] Finally, the United States' position might further stem from an objection to the scope of criminal liability permitted under the doctrine of command responsibility found in Article 28.[30] Under Article 28, criminal liability could attach to military commanders, as well as government officials for failing to prevent the acts of military subordinates that caused civilian fatal-

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28. *See* Holmes, *supra* note 21, at 49 ("Many delegations were sensitive to the potential for the Court to function as a kind of court of appeal, passing judgments on the decisions and proceedings of national judicial systems.").

29. Rome Statute, *supra* note 1, art. 8. The Rome Statute also includes genocide, crimes against humanity and crimes against aggression within the Court's jurisdiction. *Id.* art. 5. However, what constitutes a crime of aggression has yet to be defined under the Statute. *Id.* art. 5(2). Genocide requires a specific intent to destroy, in whole or in part, a national, ethnical, racial or religious group, which could not be proved under the facts outlined in the United States hypothetical. *See id.* art. 6. Finally, crimes against humanity would require proof of the "multiple commission" of acts referred to in paragraph 1, which describes the conduct prohibited under the statute, against a civilian population, committed pursuant to or in furtherance of a State policy to commit such attack. *See id.* art. 7. Therefore, a single incident involving the inadvertent bombing of a hospital would not suffice. Furthermore, the evidence in the United States hypothetical fails to demonstrate that the bombing was committed pursuant to or in furtherance of a State policy to engage in such bombings against the victimized nation.

30. *See id.* art. 28 (entitled "Responsibility of commanders and other superiors").

ities.[31] Furthermore, under Article 28, criminal liability may attach even if the military commander or government official lacked actual knowledge, but "should have known" that subordinates were committing or about to commit such crimes.[32]

Part II of this Article discusses the complementarity regime established by the Rome Statute. Part III examines whether the complementarity principle would require the ICC to defer to a decision by the United States not to prosecute persons responsible for alleged crimes committed during a United Nations-sanctioned peace-keeping operation. Part IV analyses whether the conduct set forth in the United States' hypothetical case would constitute a "war crime" as defined in Article 8 of the Statute. Part V examines the doctrine of command responsibility as codified by Article 28, and the extent to which criminal liability might extend to military commanders and government officials. Finally, Part VI concludes that the ICC as constituted in the Rome Statute in its current form does not sufficiently respect national sovereignty and therefore should not be ratified by the United States.

II. The Complementarity Regime

Paragraph 10 of the Preamble of the Rome Statute of the International Criminal Court and Article 1 of the Statute explicitly provide that the ICC shall be complementary to national criminal jurisdictions.[33] To determine whether the United States' concerns are warranted with respect to the ICC's complementary status, we must examine the complex procedural scheme that has been established under the Statute for triggering the jurisdiction of the ICC.

A. Referral of a Situation by a State Party, the U.N. Security Council, or Initiation of an Investigation by the ICC Prosecutor *Proprio Motu*

Pursuant to Article 13, a criminal investigation may be initiated with

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31. *Id.*

32. *Id.* Additional concerns have been raised that United States nationals prosecuted before the ICC would not benefit from the same procedural protections as they would under the Bill of Rights of the United States Constitution, including among other things, the right to a trial by jury, the right not to be compelled to provide self-incriminating testimony, and the right to confront and cross-examine witnesses. *See* The American Servicemembers Protection Act of 2000, H.R. 4654, 106th Cong. (2nd Sess. 2000). It is also maintained that fear of prosecution of United States servicemen operating overseas could inhibit the ability of the United States to use its military to meet alliance obligations and participate in multinational operations including humanitarian peacekeeping operations. *Id.*

33. Paragraph 10 of the Preamble to the Rome Statute to the International Criminal Court states that "the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions." Rome Statute, *supra* note 1, pmbl., para. 10. Article 1 provides that the International Criminal Court "shall be complementary to national criminal jurisdictions." *See id.* art. 1.

respect to a crime referred to in Article 5 in one of three ways.[34] The "situation"[35] in which one or more of the charged crimes appear to have been committed may be (1) referred to the Prosecutor by a State Party in accordance with Article 14;[36] (2) referred to the Prosecutor by the United Nations Security Council acting under Chapter VII of the United Nations Charter;[37] or (3) an investigation may be initiated by the ICC Prosecutor *proprio motu*.[38]

During the Conference debates preceding the adoption of the Rome Statute, the Prosecutor's power to initiate an investigation *proprio motu* proved controversial. The delegates advanced strong arguments both in favor and against. Proponents offered two principal arguments in support of an expanded role for the Prosecutor. First, authorizing the Prosecutor to initiate criminal investigations would enhance his or her autonomy and independence, as well as the independence and credibility of the Court as a whole. Second, the Prosecutor of the ad hoc International Criminal Tribunal for the Former Yugoslavia and Rwanda was granted *ex officio* powers, and, proponents maintained, there was no good reason to deny the same power to the Prosecutor of the ICC.[39] However, several States feared abuse of this power and believed that some limiting measures were needed to ensure the Prosecutor's accountability.[40] Ultimately, the delegates decided that the Statute should implement a system of checks and balances. Thus, in the absence of a State Party or U.N. Security Council referral, the Statute requires the Prosecutor to obtain the approval of the Pre-Trial Chamber to proceed with an investigation.[41]

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34. Article 5 vests the ICC with jurisdiction over genocide, crimes against humanity, war crimes, and crimes of aggression. *Id.* art. 5.

35. At the early stages of the proceedings, the exact nature of the offence(s) or identify of the offenders may be unknown. Therefore, Article 13 uses the term "situation" which was intended to be broader in scope than referring a criminal case or matter for investigation by the ICC Prosecutor. *Id.* art. 13.

36. *See id.* art. 13(a). Article 14 further provides:

> 1. A State Party may refer to the Prosecutor a situation in which one or more crimes within the jurisdiction of the Court appear to have been committed requesting the Prosecutor to investigate the situation for the purpose of determining whether one or more specific persons should be charged with the commission of such crimes.
>
> 2. As far as possible, a referral shall specify the relevant circumstances and be accompanied by such supporting documentation as is available to the State referring the situation.

Id. art. 14.

37. *Id.* art. 13(b).

38. *See id.* art. 13(c). In deciding whether to proceed *proprio motu*, the Prosecutor may consider evidence from States, organs of the United Nations, intergovernmental or non-governmental organizations, victims, or other reliable sources of information. *Id.* art. 15(2).

39. Silvia A. Fernández de Gurmendi, *The Role of the International Prosecutor*, *in* THE MAKING OF THE ROME STATUTE, *supra* note 2, at 176-81.

40. *Id.* at 181.

41. Rome Statute, *supra* note 1, art. 15(4). The Rome Statute creates an Appeals Division comprised of the President and four other judges, a Trial Division of not less that six judges and a Pre-Trial Division of not less than six judges. *Id.* art. 39. Additionally, the Appeals Chamber shall be composed of all the judges of the Appeals Division,

Pursuant to Article 15(3), if after conducting a preliminary investigation, the Prosecutor concludes that there is a "reasonable basis to proceed with an investigation," she is required to submit to the Pre-Trial Chamber a request for formal authorization of an investigation.[42] At the same time, if the Prosecutor concludes that the information provided does not constitute a reasonable basis for an investigation, he or she shall inform those persons who provided the information of the decision.[43] However, a decision not to proceed with an investigation does not preclude the Prosecutor from considering new information or evidence submitted to him or her regarding the same situation. If the Pre-Trial Chamber agrees with the Prosecutor's assessment that a "reasonable basis" exists to proceed with an investigation, and that the case appears to fall within the jurisdiction of the Court, a formal investigation shall be authorized.[44] If, on the other hand,

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meaning a single panel of five judges. However, the Trial Division is divided into two Trial Chambers of three judges each. Finally, the functions of the Pre-Trial Chamber are carried out by three judges of the Pre-Trial Division or a single judge of that division in accordance with the Statute and the Rules of Procedure and Evidence. *Id.* art. 39(2)(a), (b). For example, orders or rulings of the Pre-Trial Chamber issued under Articles 15, 18, 19, 54, paragraph 2, 61 paragraph 7, and 72 must be decided by a three-judge panel. *Id.* art. 57. In all other cases, a single judge of the Pre-Trial Chamber may decide the matter, unless otherwise provided for in the Rules of Procedure and Evidence. *Id.* Article 36 outlines the qualifications and process for nomination and election of judges. Article 36(3)(a) provides that the "judges shall be chosen from among persons of high moral character, impartiality and integrity who possess the qualifications required in their respective States for appointment to the highest judicial offices." *Id.* art. 36(3)(a). Additionally, every candidate for election to the Court shall:

> (i) Have established competence in criminal law and procedure, and the necessary relevant experience, whether as judge, prosecutor, advocate or in other similar capacity, in criminal proceedings; or
>
> (ii) Have established competence in relevant areas of international law such as international humanitarian law and the law of human rights, and extensive experience in a professional legal capacity which is of relevance to the judicial work of the Court.

Id. art. 36(3)(b)(i)(2).

Finally, "[e]very candidate for election to the Court shall have an excellent knowledge of and be fluent in at least one of the working languages of the Court." *Id.* art. 36(3)(c).

Judicial candidates may be nominated by any State Party to the Statute. The judges shall be elected by secret ballot at a meeting of the Assembly of States Parties convened for that purpose. The persons elected shall be the eighteen candidates who obtain the highest number of votes and a two-thirds majority of the States Parties present and voting. Finally, no two judges may be nationals of the same State, and the States Parties, in the selection of judges shall take into account representation of the principal legal systems of the world, equitable geographical representation, and a fair representation of female and male judges. *Id.* art. 36.

42. *Id.* art. 15(3). Article 15(3) provides:

> If the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or she shall submit to the Pre-Trial Chamber a request for authorization of an investigation, together with any supporting material collected. Victims may make representations to the Pre-Trial Chamber, in accordance with the Rules of Procedure and Evidence.

Id.

43. *Id.* art. 15(6).

44. *Id.* art. 15(4). It is interesting to note that Article 15(3) does not require the Pre-Trial Chamber to find that there is a "reasonable basis" to believe that a particular person has committed a crime within the jurisdiction of the ICC. Instead, the Statute

the Pre-Trial Chamber denies the Prosecutor's request, the denial is without prejudice. The Prosecutor may resubmit a request based on new facts or evidence regarding the same situation.[45]

B. Acceptance of Jurisdiction (Article 12)

If a State Party refers a situation to the Prosecutor or if the Prosecutor initiates the investigation *proprio motu*, the ICC may exercise its jurisdiction only if the territorial State - the State where the crime was committed – or the nationality State of the nationality of the accused, has consented to the jurisdiction of the Court. However, the referral of a situation by the U.N. Security Council acting under its Chapter VII authority does not require the consent of either the territorial or nationality State.[46]

Acceptance of jurisdiction is governed by Article 12, which states in relevant part:

> 1. A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5.
> 2. In the case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3:
>
> (a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;
> (b) The State of which the person accused of the crime is a national.
>
> 3. If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9.[47]

Article 12(1) confers automatic jurisdiction, permitting the Court to exercise its jurisdiction if either the territorial State or the State of nationality of the accused is a Party to the Statute.[48] However, if neither is a Party to the Rome Statute, and the case is referred to the Prosecutor by a State Party, or the investigation has been initiated by the Prosecutor *proprio motu*, the territorial State *or* the State of nationality must consent to the jurisdiction of the ICC.[49] Thus, if both the State where the alleged criminal acts occurred, and the State where the accused is a national object to the Court's jurisdiction, the ICC is denied jurisdiction over the complaint.

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merely requires the Pre-Trial Chamber to find that there is a reasonable basis "to proceed with an investigation," and the case appears to fall within the jurisdiction of the Court. Thus, the standard for authorizing the continuation of the investigation and, apparently, the filing of criminal charges is quite low. *Id.* art. 15(3).

45. *Id.* art. 15(5).

46. Under Article 12(2), acceptance by a non-State Party of the exercise of the ICC's jurisdiction is only required when the referral is made by a State Party or when the Prosecutor has initiated the investigation. *Id.* art. 12(2).

47. *Id.* art. 12.

48. *Id.* arts. 12(1), 12(2)(b).

49. *Id.* art. 12(3).

Acceptance of the exercise of the ICC's jurisdiction may be demonstrated by a declaration lodged with the Registrar.[50]

C. Issues of Admissibility (Article 17)

Central to the principle of complementarity is the concept of "inadmissibility" embodied in Article 17 of the Rome Statute.[51] Article 17 provides that a case is "inadmissible," meaning the Court is barred from considering it, if any of four circumstances exist: (1) the case is being investigated or prosecuted by a State that has jurisdiction over it; (2) the case has been investigated by a State that has jurisdiction over it and the State has decided not to prosecute the persons concerned; (3) the person concerned has already been tried for conduct that is the subject of the complaint, and a trial by the ICC is not permitted under Article 20, paragraph 3 (*ne bis in idem* principle); or (4) the case is not of sufficient gravity to justify further action by the Court.[52]

However, with respect to the first three reasons for finding a case inadmissible, Article 17 recognizes an exception to the rule if a State with jurisdiction is "unwilling or unable" to carry out an investigation or prosecution.[53] The Statute does not require deferral to State jurisdiction when the decision not to prosecute resulted from (1) the "unwillingness or inability of the State genuinely to prosecute,"[54] or (2) in the case of a person who has already been prosecuted, the State proceedings were for the purpose of "shielding" the person concerned from criminal responsibility, or (3) otherwise were not conducted independently and impartially.[55]

Under the Statute, the words "unwilling" and "unable" carry special meaning. With respect to whether the State is "unwilling" "genuinely" to carry out the investigation or prosecution, or the decision not to prosecute resulted from the "unwillingness" of the State "genuinely" to prosecute, Article 17(2) provides:

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50. *Id.*
51. *Id.* art. 17(1).
52. Article 17 states in relevant part:

> 1. Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:
>
> (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;
>
> (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;
>
> (c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3;
>
> (d) The case is not of sufficient gravity to justify further action by the Court.

Id. art. 17.
53. *Id.* art. 17(1)(a).
54. *Id.* art. 17(1)(b).
55. *Id.* arts. 17(1)(c), 20.

> 2. In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable:
>
> (a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5;
>
> (b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;
>
> (c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.[56]

Thus, under Article 17(2), the term "unwilling" has three related meanings. First, under subparagraph (a), a State may be found unwilling to carry out a pending investigation or prosecution when the State proceedings were undertaken or are being undertaken, or the decision not to prosecute was made for the purpose of "shielding" the suspect from criminal responsibility.[57] In such a case, the ICC is not required to defer. Second, pursuant to subparagraph (b), the ICC is not required to defer if a State is unwilling to undertake its obligations to investigate or prosecute a particular case if there has been an "unjustified delay" in the State proceedings, which under the circumstances is inconsistent with an intent to bring the suspect to justice.[58] Finally, pursuant to subparagraph (c), the ICC is not required to defer if the State proceedings were not or are not being conducted "independently or impartially," and were or are being conducted in a manner inconsistent with an intent to bring the person concerned to justice.[59]

The reasons advanced under Article 17(2) for finding that a State is "unwilling" to investigate or prosecute, i.e., "shielding," "unjustified delay," and lack of "independent or impartial" proceedings, are not mutually exclusive. For example, evidence that there has been an unjustified delay in the State proceedings could be relevant to prove that the proceedings were for the purpose of "shielding" the offender from justice, as well as demonstrate that the proceedings were not being conducted "independently or impartially."

It should be emphasized that to determine "unwillingness" in a particular case, the ICC must apply "principles of due process recognized by international law."[60] Thus, whether the State attempted to "shield" the offender, the proceedings were "unjustifiably delayed," or the proceedings were not conducted "independently or impartially" should be measured

56. *Id.* art. 17(2).
57. *Id.* art. 17(2)(a).
58. *Id.* art. 17(2)(b).
59. *Id.* art. 17(2)(c).
60. *Id.* art. 17(2).

against "principles of due process recognized by international law."[61]

With respect to a State's inability to prosecute or carry out an investigation, the Court shall consider whether "due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings."[62]

D. Preliminary Rulings Regarding Admissibility (Article 18)

When the Prosecutor has determined that there is a "reasonable basis" to commence an investigation based upon a State Party referral, or has initiated an investigation *proprio motu* pursuant to Articles 13(c) and 15, Article 18 requires the Prosecutor to provide notice of the pending investigation to all State Parties and those non-Party States that would normally have jurisdiction over the crimes concerned.[63] Upon receipt of such notice, a State may file a motion in the Pre-Trial Chamber requesting that the Prosecutor defer to the State's investigation or prosecution. Article 18(2) provides that within one month of receipt of notice from the Prosecutor, a State may inform the Court that it is investigating or has investigated its nationals or other persons within its jurisdiction with respect to criminal acts within the Court's jurisdiction, and request that the Prosecutor defer to the State's investigation.[64] However, under the Statute, the ICC is not required to defer to the State's investigation or criminal proceedings, but may defer subject to its discretion.[65] Pursuant to Article 18(2), the Prosecutor either *may* defer to the State's investigation or petition the Pre-Trial Chamber to authorize the investigation.[66]

If the ICC Prosecutor petitions the Pre-Trial Chamber to authorize a continuation of the investigation under Article 18, the Pre-Trial Chamber may authorize the action with a majority ruling. Article 57(2)(a) states that a simple majority of the Pre-Trial Chamber judges must concur in rul-

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61. *Id.* This language was added to paragraph 2 of Article 17 in response to concerns raised by some delegations that the article gave the Court unduly broad discretion to determine unwillingness and no objective criteria on which the Court should base its ruling. *See* United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Committee of the Whole, 42d Meeting, A/CONF.183/C.1/L.76, add. 1-14 (July 17, 1998), *available at* http://www.un.org/icc/journal/717joue.htm. However, whether this provides sufficient objective criterion for determining a State's unwillingness to conduct fair and impartial proceedings remains highly questionable. In fact, the meaning to be given the language "principles of due process recognized by international law" is uncertain at best.

62. *See* Rome Statute, *supra* note 1, art. 17(3).

63. *Id.* art. 18(1). Article 18 further provides that the Prosecutor may notify such States on a confidential basis and, where necessary to protect persons, prevent destruction of evidence or prevent flight of suspects and potential witnesses, may limit the scope of the information provided to the States. *Id.*

64. *Id.* art. 18(2).

65. *Id.*

66. *Id.*

ings issued under Articles 15, 18, and 19.[67] Thus, an application by the Prosecutor to authorize the investigation, despite a request for deferral to the State proceedings, may be granted based on an affirmative vote of two judges of a three judge panel of the Pre-Trial Chamber. Furthermore, either party, the State concerned, or the Prosecutor, may appeal to the Appeals Chamber an adverse ruling by the Pre-Trial Chamber with respect to deferral of proceedings.[68]

If the Prosecutor defers to a State's investigation, the matter may be reviewed "by the Prosecutor six months after the date of deferral, or at any time when there has been a significant change of circumstances" that implicate the State's "unwillingness or inability to carry out the investigation or prosecution."[69] Additionally, when the Prosecutor has deferred an investigation, she may request that the State periodically update the Prosecutor on the progress of its investigation.[70] Furthermore, under the Statute, State Parties shall respond to such requests "without undue delay."[71] Finally:

> [p]ending a ruling by the Pre-Trial Chamber, or at any time when the Prosecutor has deferred an investigation under [Article 18], the Prosecutor may . . . seek authority from the Pre-Trial Chamber to pursue necessary investigative steps for the purpose of preserving evidence where there is a unique opportunity to obtain important evidence or there is a significant risk that evidence may not be subsequently available.[72]

Thus, a decision to defer to a State's investigation does not necessarily terminate or suspend the Prosecutor's investigation. The Prosecutor may seek authority from the Pre-Trial Chamber to pursue investigatory steps to obtain and preserve important evidence.[73]

E. Challenges to the Admissibility of a Case (Article 19)

Under Article 19, the Court may, on its own motion, determine the admissibility of a case in accordance with Article 17.[74] Under Article 19(2), challenges to admissibility may be brought by: (1) "[a]n accused or a person for whom a warrant of arrest or summons to appear has been issued

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67. *Id.* art. 57(2)(a). Additionally, Pre-Trial Chamber rulings under Article 54, paragraph 2, and Article 61, paragraph 7, and Article 72 must be concurred in by a simple majority of judges. *Id.* arts. 54, 61, 72.

68. *Id.* art. 18(4). If the Prosecutor defers to the State's investigation, the Prosecutor may review the investigation six months after the date of deferral or at any time when there is a significant change of circumstances suggesting that the State is not conducting its investigation in good faith. Additionally, the Prosecutor may request that the State concerned periodically inform the Prosecutor of the progress of its investigation and any subsequent prosecutions. *Id.* art. 18(5). Under Article 18(5), the concerned State is required to respond to such requests without undue delay. *Id.*

69. *Id.* art. 18(3).

70. *Id.* art. 18(5).

71. *Id.*

72. *Id.* art. 18(6).

73. *Id.*

74. *Id.* art. 19(1). Pursuant to Article 19(1), the Court shall also satisfy itself that it has jurisdiction over any case brought before it. *Id.*

under Article 58;" (2) "a State which has jurisdiction over a case, on the ground that it is investigating or prosecuting the case or has investigated or prosecuted;" and (3) "[a] State from which acceptance of jurisdiction is required under article 12" (the territorial or nationality State).[75] Additionally, pursuant to Article 19(3), "the Prosecutor may seek a ruling from the Court regarding a question of jurisdiction or admissibility."[76] Thus, in a given case, the accused, the State investigating or prosecuting the matter, the territorial State, as well as the ICC Prosecutor may be parties to a motion on admissibility.

As a general rule, the admissibility of a case or the jurisdiction of the Court may be challenged only once.[77] However, a State that has challenged a ruling of the Pre-Trial Chamber under Article 18 may challenge the admissibility of a case under Article 19 on the grounds of "additional significant facts or significant change of circumstances."[78] Additionally, even in the absence of a challenge filed under Article 18, the Court may grant leave for a challenge to be brought more than once under exceptional circumstances.[79]

The challenge to the admissibility of a case shall take place prior to or at the commencement of trial.[80] Challenges at the commencement of trial, or subsequently with the leave of the Court, may be based only on Article 17(1)(c), on grounds that the person concerned has already been prosecuted in State judicial proceedings, and prosecution by the ICC would violate the principle of *ne bis in idem*.[81] If the challenge takes place prior to the confirmation of criminal charges, the challenges to admissibility shall be filed with the Pre-Trial Chamber.[82] If, on the other hand, the challenge to admissibility is made after confirmation of charges, the challenges shall be referred to the Trial Chamber.[83] Furthermore, if a challenge is made by a State, the Prosecutor is required to suspend the investigation until such time as the Court makes a determination in accordance with Article 17.[84] However, once again, the Court's decision to defer to the State's investigation or prosecution is discretionary. Decisions with respect to admissibility may be appealed to the Appeals Chamber.[85] Finally, if the Court

75. *Id.* art. 19(2).
76. *Id.* art. 19(3). On questions of jurisdiction or admissibility, those who have referred a situation under Article 13, as well as victims may submit observations to the Court. *Id.*
77. *Id.* art. 19(4).
78. *Id.* art. 18(7).
79. *Id.* art. 19(4).
80. *Id.*
81. *Id.*
82. *Id.* art. 19(6).
83. *Id.*
84. *Id.* art. 19(7). However, pending a ruling by the Court, the Prosecutor may seek authority from the Court to: pursue necessary steps for the purpose of preserving evidence where there is a unique opportunity to obtain important evidence or there is a substantial risk of loss of evidence; take a statement or testimony from a witness; and to prevent the absconding of persons with respect to whom the Prosecutor has already requested a warrant of arrest under Article 58. *Id.* art. 19(8).
85. *Id.* art. 19(6).

decides that a case is inadmissible under Article 17, the Prosecutor may submit a request for a review of the decision based upon new facts and evidence, "which negate the basis on which the case had previously been found inadmissible."[86]

III. Application of the Complementarity Principle to a Decision by the United States Not to Prosecute Persons for Alleged War Crimes Committed During a U.N. Peace-Keeping Operation

Under the Rome Statute, a decision to investigate and prosecute United States nationals for the inadvertent bombing and killing of innocent civilians during an international peace-keeping mission involves a four-step process: (1) a referral of the situation for investigation to the ICC Prosecutor either by a State Party or the United Nations Security Council acting under Chapter VII of the United Nations Charter,[87] or initiation of an investigation by the Prosecutor *proprio motu*;[88] (2) acceptance of the Court's jurisdiction by the State where the alleged criminal acts were committed (the territorial State) or the State of nationality of the accused (the nationality State);[89] (3) a judicial finding that the Court has jurisdiction;[90] and (4) a ruling that the case is admissible under Article 17.[91]

The first three steps in the process do not pose serious obstacles to an ICC investigation and the filing of criminal charges against United States nationals. First, while the United States' status and influence as a permanent member of the U.N. Security Council would make it highly unlikely that the situation would be referred to the Prosecutor by the U.N. Security Council, any State Party that believes that the facts constitute an offence within the Court's jurisdiction could refer the situation to the Prosecutor for investigation. The quantum of proof required under the Statute for a State Party referral is unclear. The only reference made to the subject is found in Article 13(a), which merely provides that a State Party may refer a situation to the Prosecutor when one or more of the crimes referred to in Article 5 "appears to have been committed."[92] The Article 13(a) standard

86. *Id.* art. 19(10). If the Prosecutor defers an investigation, he or she may request that the relevant State apprise the Prosecutor of progress made in the State proceedings. *Id.* art. 19(11).

87. Under the United Nations Charter, decisions of the Security Council on *procedural* matters are made by an affirmative vote of nine members. U.N. CHARTER art. 27, para. 2. Decisions of the Security Council on all other matters are made by an affirmative vote of nine members including the concurring votes of the permanent members. *See* U.N. CHARTER art. 27, para. 3. Additionally, Chapter VII only applies if the Security Council determines that there is "a threat to the peace, breach of the peace or act of aggression." U.N. CHARTER art. 39.

88. Rome Statute, *supra* note 1, art. 13.

89. *Id.* art. 12.

90. *Id.* art. 19(1).

91. *Id.*

92. *Id.* art. 13(a). Article 14(2) further provides that "[a]s far as possible, a referral shall specify the relevant circumstances and be accompanied by such supporting documentation as is available to the State referring the situation." *Id.* art. 14(2).

does not even require that the referral be based on credible evidence or a reasonable basis to believe an offence within the Court's jurisdiction has been committed. Thus, under Article 13(a), a State Party referral could be made based on hearsay, multiple hearsay, little or no evidence, as well as purely political reasons.

Upon receipt of a State Party referral, the Statute affords the Prosecutor wide discretion to decide whether to proceed with a formal investigation.[93] Pursuant to Article 18(1), the Prosecutor may commence an investigation if she has determined that a "reasonable basis" exists to believe that a crime within the jurisdiction of the Court has been or is being committed.[94] Therefore, a State Party referral to the Prosecutor based upon a minimal quantum of evidence, followed by the Prosecutor's finding that a "reasonable basis" exists to believe that United States nationals have committed crimes within the Court's jurisdiction, is sufficient to commence a formal investigation under the Statute. In short, the statutory threshold to commence an ICC investigation based on a State Party referral is quite low.

The Statute also permits the initiation of a formal investigation against United States nationals even in the absence of a referral by a State Party or the U.N. Security Council. Pursuant to Article 15, if after analysing the seriousness of information received from States, intergovernmental or non-governmental organizations, or other reliable sources, the Prosecutor concludes that there is a "reasonable basis" to believe that a crime has been committed within the jurisdiction of the Court, she shall request authority from the Pre-Trial Chamber to proceed with an investigation.[95] The standard applied by the Pre-Trial Chamber is whether a "reasonable basis" exists to proceed with the investigation.[96] However, a unanimous ruling by the Court is not required. Instead, a decision to proceed can be granted by the concurrence of two members of the three-member panel of the Pre-Trial Chamber.[97] In light of the relatively low threshold required for the Court to authorize an investigation, an ICC investigation of United States military personnel and government officials would likely be authorized by the Court.[98]

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93. Unlike the case where the Prosecutor initiates an investigation *proprio motu* and is required to obtain approval from the Pre-Trial Chamber prior to proceeding with an investigation, if a State Party refers the matter, Court authorization is not required as a precondition to initiating a formal investigation. *Id.* arts. 15(3), 18(1). In other words, in the case of a State Party referral, the Prosecutor rather than the Pre-Trial Chamber has the final say on whether to authorize an investigation.

94. *Id.* art. 18(1); *see also id.* art. 53(1)(a).

95. *Id.* art. 15(3). In this case, the investigation would focus on whether the inadvertent bombing of the hospital, which resulted in the killing of innocent civilians, constituted a war crime or perhaps even a crime against humanity. *Id.* arts. 7, 8. Victims can also "make representations to the Pre-Trial Chamber, in accordance with the Rules of Procedure and Evidence." *Id.* art. 15(3).

96. *Id.* art. 15(4).

97. *See id.* art. 57(2)(a).

98. *See id.* art. 15 (requiring Prosecutor to obtain authority of Pre-Trial Chamber to proceed with a prosecutor-initiated investigation); *see also id.* art. 57(2)(a) (providing

The next step in the process would be to determine whether either the State of nationality of the accused or the State where the conduct in question occurred has accepted the jurisdiction of the Court.[99] On this point, it should be emphasized that even if the United States, the State of nationality of the alleged offenders, is not a Party to the Statute nor consents to the Court's jurisdiction, the ICC may still exercise jurisdiction if the territorial State is a State Party to the Statute (automatic jurisdiction) or consents to the Court's jurisdiction with respect to the crimes in the question (acceptance of jurisdiction).[100] In this case, the territorial State is not a Party to the Treaty, but has demanded that United States officials and military commanders be prosecuted by the ICC. Acceptance of the Court's jurisdiction by the territorial State is therefore a foregone conclusion.

Next, the Court must have subject matter jurisdiction over the case. Article 19 provides that "[t]he Court shall satisfy itself that it has jurisdiction in any case brought before it," and "on its own motion, determine the admissibility of a case in accordance with article 17."[101] Assuming that the territorial State accepts the Court's jurisdiction, and the investigation involves allegations that war crimes have been committed, an offence within Article 5, it appears that U.S. military personnel who were sent abroad would be subject to the jurisdiction of the Court.

Ultimately, the critical issue with respect to an ICC investigation and prosecution of United States military and government personnel turns on issues of admissibility and complementarity. Article 18(1) triggers the principle of complementarity. In the case of a referral to the Prosecutor by a State Party, and the Prosecutor has determined that there is a reasonable basis to commence an investigation, or the Prosecutor has initiated an investigation *proprio motu* pursuant to Articles 13(c) and 15, Article 18(1) would require the Prosecutor to notify the United States that its nationals are the target of an ICC investigation.[102] After receipt of such notice, the United States would have limited recourse to attempt to halt, or even temporarily suspend the ICC investigation. First, pursuant to Article 16, an ICC investigation could be temporarily suspended if the U.N. Security

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that rulings on Article 15 may be made by a concurrence of the members of the Pre-Trial Chamber, unanimity not required).

99. *See id.* art. 12.

100. *Id.* Professor Halberstam points outs the irony in this case. She states that U.S. military personnel who are sent abroad would be subject to the jurisdiction of the Court, even if the United States does not ratify the Treaty, if the State on whose territory they acted is either a party to the Statute or consents to the Court's jurisdiction. Paradoxically, Professor Halberstam states, the Court may not have jurisdiction over perpetrators of war crimes who are nationals of a State that is a party to the Statute because it permits a State, on becoming a Party, to declare that it does not accept the jurisdiction of the Court with respect to war crimes alleged to have been committed by its nationals or on its territory, for a period of seven years. *Id.* art. 124. However, by contrast, a country that does not join the treaty but deploys its soldiers abroad to restore international peace and security could be vulnerable to the Court's jurisdiction over the acts of those soldiers. Colloquy, *Association of American Law Schools Panel on the International Criminal Court*, 36 AM. CRIM. L. REV 223, 257-58 (1999) (remarks by Malvina Halberstam).

101. Rome Statute, *supra* note 1, art. 19(1).

102. *Id.* art. 18(1).

Council, in a resolution adopted under Chapter VII of the United Nations Charter, requested the Court to postpone the ICC investigation.[103] Article 16 further provides that the investigation could be suspended for a period of twelve months, but the request could be renewed by the Security Council under the same conditions.[104] However, several problems arise through use of Article 16. First, the Security Council must act under Chapter VII of the United Nations Charter.[105] Chapter VII only applies if the Security Council determines that there is "a threat to the peace, breach of the peace or act of aggression . . . ."[106] Second, a Security Council resolution would require an affirmative vote of nine members, including the concurring votes of the permanent members.[107] Thus, an attempt to suspend the ICC investigation could be vetoed by a negative vote of one of the permanent members or by the United States' failure to garner an affirmative vote of nine members of the Security Council.

A second avenue of recourse afforded the United States would be to initiate its own investigation of the conduct in question. After initiating an investigation, pursuant to Article 18(2), the United States could file a motion with the Pre-Trial Chamber requesting that the Prosecutor defer to its jurisdiction.[108] To be timely, the United States' motion would have to file its motion within one month of receipt of the Prosecutor's notice of a pending ICC investigation.[109] However, the Statute does not mandate deferral. Instead, the Prosecutor is vested with wide discretion whether to grant the request for State deferral or petition the Pre-Trial Chamber to authorize the investigation.[110] Assuming that the Prosecutor granted the United States' request to defer, the ICC would not be divested of jurisdiction over the matter. Under the Statute, the Prosecutor's deferral to the United States' investigation could be reviewed by the Prosecutor six months after the date of deferral, or any time when there has been a significant change of circumstances that suggest the United States' "unwillingness or inability to genuinely carry out the investigation."[111] Additionally, under the Statute the Prosecutor could request that the United States periodically inform her of the progress of its investigation.[112] Pursuant to Arti-

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103. *Id.* art. 16. Article 16 states:

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

Id.

104. *Id.* art. 16.

105. *Id.*

106. U.N. CHARTER art. 39.

107. *Id.* art. 27.

108. Rome Statute, *supra* note 1, art. 18(2). However, the State's motion to defer must be filed within one month of receipt of notification by the Prosecutor that an ICC investigation has been initiated. *Id.*

109. *Id.*

110. *Id.*

111. *See id.* art. 18(3).

112. *See id.* art. 18(5).

cle 18(5), the United States would be required to respond to such a request without undue delay.[113] Finally, a decision to defer to the United States' jurisdiction would not necessarily stop the ICC Prosecutor from continuing to investigate the matter. Under Article 18(6), the Prosecutor could seek authority from the Pre-Trial Chamber to pursue necessary investigative steps for the purpose of preserving evidence when there is a unique opportunity to obtain important evidence or prevent such evidence from being lost or destroyed.[114]

The ultimate test of the principle of complementarity would arise if, after the United States concluded its investigation, it decided not to file criminal charges against the persons concerned. The United States' decision not to prosecute could be based on its reading of relevant legal authority, which it determines does not support prosecution of persons concerned for crimes within the ICC's jurisdiction. In other words, United States prosecutors might conclude that the conduct in question, albeit perhaps negligent, preventable, and even a dereliction of duty by military commanders, does not satisfy the elements of the offence needed to prove a war crime as defined by Article 8 of the Statute.

Alternatively, the decision not to prosecute also could be based on the proper exercise of prosecutorial discretion. For example, United States prosecutors might find that the quantity or quality of the evidence is insufficient to convince a unanimous jury of the accused's guilt beyond a reasonable doubt.[115] Additionally, federal prosecutors may decide that, due to possible mitigating circumstances, the case should be resolved pursuant to a plea bargain which might include a promise by the government not to prosecute or permit the accused to enter a guilty plea to reduced charges. In any event, under this scenario the United States' decision would be based on a good faith assessment of the relevant law, facts, and evidence, and not made for the purpose of shielding the accused from criminal responsibility.

Under the circumstances described above, the ICC would determine whether the United States' investigation and decision not to prosecute rendered the case inadmissible under Article 17 of the Rome Statute. If so, the principle of complementarity would require the ICC to defer to the United States' handling of the matter. If not, the ICC could exercise its jurisdiction over United States military personnel despite a completed investigation and decision by United States officials not to prosecute. In other words, if the Court determines the case is admissible, the ICC need not defer to the United States' proceedings.

Pursuant to Article 19(1), the Court may determine the admissibility

113. *See id.*

114. *See id.* art. 18(6).

115. The Rome Statute does not authorize jury trials nor require unanimity to convict. Instead, a criminal conviction under the Statute may be based on a concurrence of two judges of a three-judge panel of the Trial Chamber. *Id.* art. 74. It states, "The judges shall attempt to achieve unanimity in their decision, failing which the decision shall be taken by a majority of the judges." *Id.* art. 74(3).

of a case sua sponte.[116] Additionally, challenges to the admissibility of a case may be made by an accused, or "[a] State which has jurisdiction over a case, on the ground that it is investigating or prosecuting the case or has investigated or prosecuted."[117] A State from which acceptance of jurisdiction is required under Article 12 can also make a challenge.[118] Finally, "[t]he Prosecutor may seek a ruling from the Court regarding a question of . . . admissibility."[119] Thus, the United States and the accused could file separate motions under Article 19 challenging the admissibility of the case based on the United States' investigation and decision not to prosecute, requesting deferral of jurisdiction.[120] At the same time, the Prosecutor and the State where the alleged criminal conduct occurred, which accepted the jurisdiction of the Court, could file a response claiming that the case is admissible under Article 17.[121]

Pursuant to Article 17(1), a case may be inadmissible for four reasons. First, the case is being investigated or prosecuted by a State with jurisdiction.[122] Second, the State has investigated the case and concluded that there is no basis to prosecute.[123] Third, the person has already been tried for the conduct at issue.[124] Finally, the case is of insufficient gravity to proceed.[125] In this situation, only the second (State decision not to prosecute), and perhaps the fourth (insufficient gravity) basis for determining that a case is inadmissible, would be implicated by the United States' decision not to prosecute. Because the United States' investigation has been completed and no one has been prosecuted, the reasons for finding a case inadmissible under Article 17(1)(a) and (c) would not apply.

However, pursuant to Article 17(2), when a case has been investigated by a State with jurisdiction over it and the State has decided not to prosecute the persons concerned, the Court may find the case admissible if the investigation and decision resulted from the State's "unwillingness or inability" "genuinely to prosecute."[126] A finding of admissibility based on the United States' inability genuinely to prosecute is not implicated in the situation described above. Under Article 17(3), inability means that due to a "total or substantial collapse of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or

116. *Id.* art. 19(1).
117. *Id.* arts. 19(2)(a), (b).
118. *Id.* art. 19(2).
119. *Id.* art. 19(3).
120. *Id.* art. 19(2)(a), (b).
121. *Id.* arts. 19(2)(c), 19(3).
122. *Id.* art. 17(1)(a).
123. *Id.* art. 17(1)(b).
124. *Id.* art. 17(1)(c).
125. *Id.* art. 17(1)(d). Under this theory of inadmissibility, the United States could argue that prosecution before the ICC should be reserved for the most egregious violations of international criminal law, such as the situations in Rwanda and the former Yugoslavia. Furthermore, however unfortunate and condemnable, the killing of innocent civilians in the inadvertent hospital bombing does rise to the level of seriousness necessary to implicate the ICC's jurisdiction.
126. *Id.* art. 17(1)(b).

otherwise unable to carry out its proceedings."[127] This provision, it seems, would cover a situation, such as that in Rwanda, in which the State's national judicial system was unable to carry out its proceedings due to political turmoil, armed conflict, and the resultant damage and destruction to the infrastructure and governmental institutions. Obviously, this provision is inapplicable in the present hypothetical case.

With respect to whether the United States' investigation and decision not to prosecute resulted from its unwillingness to genuinely prosecute, pursuant to Article 17(2), the Court could find the case *admissible* and not defer to the United States' proceedings if: (1) the State proceedings were undertaken or the national decision was made for the purpose of "shielding" the persons concerned from prosecution before the ICC;[128] (2) there has been an "unjustified delay" in the proceedings which is inconsistent with an intent to bring the persons concerned to justice;[129] or (3) the proceedings were not conducted "independently or impartially," and were conducted in a manner inconsistent with an intent to bring the persons concerned to justice.[130]

Assuming that the United States conducted its investigation expeditiously and decided not to prosecute in a timely fashion, "unjustified delay" could not serve as a legal basis to support a finding of "unwillingness" to prosecute. Furthermore, under Article 17(2)(c), whether the United States made its decision not to prosecute for the purpose of "shielding" the persons concerned would require proof that the investigation and proceedings were corrupt, a sham, and conducted in bad faith. Moreover, the Court would have to find that United States officials had the specific intent to shield the persons accused from criminal responsibility and thereby undermine the judicial process. In short, the Court would have to find that United States prosecutors were involved in corruption of justice.[131] Thus, Article 17(2)(b) imposes a heavy burden on the Court, the Prosecutor, and the territorial State to prove the case admissible on these grounds.[132] It is highly unlikely that the Prosecutor could sustain such a heavy burden based on the reasons given by the United States for its decision not to prosecute.

Finally, the Court could rule that the case is admissible if the proceedings were *not* conducted "independently or impartially," and were conducted in a manner inconsistent with the intent to bring the accused to justice.[133] A finding of admissibility arguably could be based on these grounds. The problem lies with language contained in Article 17(2). When determining whether a State is "unwilling" to prosecute based on

127. *Id.* art. 17(3).
128. *Id.* art. 17(2)(a).
129. *Id.* art. 17(2)(b).
130. *Id.* art. 17(2)(c).
131. Obstruction of justice is a serious offence under United States law. It is governed by 18 U.S.C. § 1503, and imposes a penalty of no more than 10 years imprisonment, a fine, or both. 18 U.S.C. § 1503 (2000).
132. Rome Statute, *supra* note 1, art. 17(2)(b).
133. *Id.* art. 17(2)(c).

one or more of the grounds articulated in Article 17(2), the Court must consider "principles of due process recognized by international law."[134] However, the proper application of "principles of due process recognized by international law" in determining whether a State is "unwilling" to genuinely prosecute is unclear. More specifically, the use of the term "due process" within the context of whether the State proceedings were conducted "independently or impartially" is particularly perplexing.

Under the United States Constitution, the Fifth Amendment Due Process Clause guarantees that no person shall "be deprived of life, liberty, or property without due process of law."[135] In the American judicial system, due process is a right afforded the defendant in criminal proceedings and guarantees that he shall not be deprived of life, liberty, or property unless the proceedings against him comported with fundamental principles of fairness.[136] In contrast, under Article 17(2)(c), if the national proceedings were not conducted independently and impartially, and as a result the State decided not to prosecute, the accused would not be prejudiced thereby. In fact, in such a case, the proceedings would inure to his benefit. Of course, if the opposite occurred, and the defendant was convicted in a domestic trial, "principles of due process recognized by international law" would be relevant to determine whether the defendant's State prosecution was conducted consistent with due process principles.

Assuming that the drafters of the Statute included this language as an objective way to measure whether the national proceedings were conducted fairly with respect to *all* parties concerned, several issues arise. First, what do "principles of due process recognized by international law" say about plea-bargaining and the proper exercise of prosecutorial discretion? Second, what if a prosecutor's decision not to prosecute is based on a legal analysis that certain critical evidence is inadmissible at trial because the evidence was seized in violation of the defendant's constitutional rights, and without such evidence a criminal conviction cannot be obtained? On such issues, international principles of due process are not instructive with respect to whether the national proceedings were conducted "independently or impartially."[137]

Of course, the United States may be concerned that the ICC could find that the national proceedings were not conducted "independently or impartially" because the United States' interpretation of relevant legal authority was inconsistent with "principles of due process recognized by international law" (whatever that means). Thus, the ICC might conclude that the

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134. *Id.* art. 17(2).

135. U.S. CONST. amend. V.

136. *E.g.*, Mooney v. Holohan, 294 U.S. 103, 112 (1935) (conviction obtained through deliberate deception of the court and jury by introduction of known perjured testimony violates due process); Brady v. Maryland, 373 U.S. 83 (1963) (Due Process Clause imposes an affirmative obligation to disclose to defendant materials in possession of government that are exculpatory and material to defendant's defence); Brown v. Mississippi, 297 U.S. 278 (1936) (due process violated when defendant's conviction was based on involuntary confession).

137. *See* Rome Statute, *supra* note 1, art. 17(2)(c).

United States' decision against prosecution resulted from its "unwillingness" to genuinely prosecute the case. The case is therefore admissible and deference to the United States' proceedings is not required. Likewise, the ICC could second-guess the United States and conclude that the reasons advanced for exercising prosecutorial discretion not to prosecute were inconsistent with "principles of due process recognized by international law," and therefore the proceedings were not conducted "independently or impartially."[138] The ICC could therefore find the case to be admissible under Articles 17 and 19.

However, in both scenarios, when the decision not to prosecute is based on questions of law or the exercise of prosecutorial discretion, the United States was able and willing genuinely to prosecute, and did conduct a criminal investigation in good faith.[139] Furthermore, in neither case could the United States' proceedings properly be characterized as a sham aimed at shielding the perpetrators from justice. Nonetheless, an analysis of the relevant Articles of the Statute suggests that the Court could find the cases admissible and exercise its jurisdiction, rather than defer to the United States proceedings conducted in good faith.

If the Rome Statute permits such a result, whether the ICC is truly complementary to national criminal jurisdictions must be seriously reexamined. If the Court may substitute its judgment any time it disagrees with the outcome of the State proceedings, the relationship of the ICC with respect to national criminal jurisdictions is substantially more than to serve as a complementary court that fill the gap when a State is either unwilling or unable to prosecute perpetrators of serious international crimes. Despite declarations in the Preamble and Article 1 of the Rome Statute that the ICC shall be a complementary court, Articles 17 through 19 merely *permit* a State to prosecute persons who have allegedly committed crimes within the jurisdiction of the Court. The ICC simply defers to State criminal jurisdictions in the first instance, but *reserves the right*, and *possesses the authority*, to intervene as it sees fit. Plainly speaking, if the Court disagrees with the outcome in the State proceedings, it has the final say on the matter. The Court may override the complementarity principle, and trump the State proceedings if it concludes that they were not conducted "independently or impartially" because such proceedings were inconsistent with "principles of due process recognized by international

138. United States courts are reluctant to intervene with respect to the exercise of prosecutorial discretion. *But see* United States v. Armstrong, 517 U.S. 456, 464-65 (1996) (federal court may review prosecutor's decision to prosecute if based on race, religion, or other arbitrary classification, in violation of the equal protection component of the Due Process Clause of the Fifth Amendment); Wade v. United States, 504 U.S. 181 (1992) (holding a federal court may review a government decision not to file a motion to reduce a defendant's sentence only if there has been a threshold showing that the Government based its decision on the defendant's race or religion).

139. The term "genuinely" was added to Article 17 to satisfy concerns of many delegations that the Court's decision on questions of admissibility should be based on objective criteria. These States argued very forcefully for the deletion of any perceived subjective criteria. "Genuinely" was ultimately adopted because it was believed to reflect an objective connotation. Holmes, *supra* note 21, at 49-50.

law."[140] Thus, in essence, the Court functions as a super or supreme international appellate court, passing judgments on the decisions and proceedings of national judicial systems. The jurisdiction of the Court is not truly complementary to national criminal jurisdictions. Rather, it is peremptory.

The problem, however, is not insurmountable. The principle of complementarity should draw a distinction between sham proceedings conducted for the purpose of protecting persons from criminal responsibility for crimes within the jurisdiction of the ICC, and those where the ICC merely disagrees with the outcome. If the State officials who conducted the national criminal proceedings had the specific intent to obstruct justice, as demonstrated by evidence that the proceedings were a sham or involved an unjustifiable delay suggesting a lack of intent to bring the perpetrators to justice, the ICC should find the case admissible and exercise its jurisdiction.[141] Simply stated, the ICC should not defer to sham State proceedings conducted in bad faith.

However, in the absence of a finding that State officials had the specific intent to "obstruct justice" by conducting a sham investigation or criminal prosecution, the principle of complementarity should require the ICC to grant "substantial deference" to the national proceeding. The ICC is not a super-international appellate court vested with de novo review authority over national criminal judgments. Thus, the ICC should not be permitted to exercise its jurisdiction merely because it disagrees with the final outcome in the State proceedings.

Additionally, when a decision not to prosecute is based on the exercise of prosecutorial discretion, absent a finding of intent to corrupt the process of justice, the ICC should be even less willing to exercise its discretion. On this point, the ICC should be guided by the position adopted by the United States Supreme Court. In *United States v. Armstrong*, the Supreme Court rejected a selective prosecution claim, holding that respondents failed to make a threshold showing that the Government declined to prosecute similarly situated suspects based on race.[142] In reaching its conclusion, the *Armstrong* Court posited that a "presumption of regularity supports" prosecutorial decisions and, "in the absence of clear evidence to the contrary, courts presume that [prosecutors] have properly discharged their official duties."[143] The Court further emphasized that "the decision whether or not to prosecute, and what charge to file or bring . . . generally rests entirely in [the prosecutor's] discretion."[144]

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140. *See* Rome Statute, *supra* note 1, art. 17(2).

141. This principle is captured in Article 17(2)(a), which provides that the ICC may determine that a case is admissible where the national proceedings were or are being undertaken or the national decision made for the purpose of shielding the perpetrator from criminal responsibility. *Id.* art. 17(2)(a).

142. United States v. Armstrong, 517 U.S. 456 (1996).

143. *Id.* at 464 (citing United States v. Chemical Foundation, Inc., 272 U.S. 1, 14-15 (1926)).

144. *Id.* at 464 (citing Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978)).

Prosecutorial decisions to prosecute are afforded judicial deference based on an assessment of the relative competence of prosecutors and courts. The Supreme Court has consistently stated that "[s]uch factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake."[145] Thus, with respect to a State decision not to prosecute, the ICC should withhold its jurisdiction if there is a reasonable basis for the prosecutor's decision. If the State prosecutor is able to articulate a legitimate reason for exercising his discretion not to file criminal charges, absent a showing that the State proceedings were conducted for the purpose of shielding the concerned persons from criminal responsibility, the ICC should defer jurisdiction.

At the same time, perpetrators of serious international crimes should not be afforded a windfall when the investigating State's decision not to prosecute was clearly erroneous. The ICC should not be required to defer when the State judgment on factual or legal sufficiency was clear error.[146] Limiting the exercise of the ICC's jurisdiction to cases where the State decisions were "clearly erroneous" would impose a much higher standard of review than that found in Article 17(2), which permits a finding of admissibility if the Court determines that the national proceedings were not conducted "independently or impartially" because they were inconsistent with "principles of due process recognized by international law."[147] Under the proposed rule, a determination that the national proceedings were inconsistent with rules of international due process, by itself, would be insufficient to support a ruling of admissibility.

In sum, the ICC should be permitted to exercise its jurisdiction following the completion of a State criminal investigation and decision not to prosecute only if the State proceedings were a sham and conducted for the purpose of shielding the perpetrator from criminal responsibility, or the national judgment on findings of fact or questions of law was clearly erroneous. Such a standard would afford State judgments reasonable deference, which is more consistent with the principle of complementarity than a procedural scheme that permits the ICC to act as a super international appellate court and conduct a de novo review of State proceedings.

Finally, the insertion of the language in Article 17(2) that a State's "unwillingness" to prosecute should be measured by "principles of due process recognized by international law" should be deleted from the Statute because it provides the ICC with a legal loophole to overrule national judgments when the Court disagrees with the outcome in the national proceed-

145. *Id.* at 465 (citing Wayte v. United States, 470 U.S. 598, 607 (1985)).

146. United States appellate courts generally grant substantial deference to a trial court's findings of fact and only reverse in the case of clear error. *E.g.*, Koon v. United States, 518 U.S. 81 (1996) (holding that the appropriate standard of review of Sentencing Guideline departures is an abuse of discretion standard rather than de novo). While federal appellate courts generally apply a de novo standard of review on questions of law, appellate courts are not considered complementary to trial courts.

147. Rome Statute, *supra* note 1, art. 17(2).

ings. Vesting the ICC with such discretion is both inconsistent and incompatible with the principle of complementarity.

IV. Prosecution Under Article 8 for Alleged War Crimes Committed by United States Nationals During a United Nations Peace-Keeping Mission

Having determined that under the Rome Statute the ICC could exercise its jurisdiction over United States nationals despite a completed United States investigation that resulted in a decision not to prosecute, the issue becomes whether under Article 8 American soldiers, military commanders, and government officials may be convicted of war crimes for the unintentional killing of innocent civilians committed during a United Nations peace-keeping operation.[148] As the following analysis will demonstrate, several subsections of Article 8 arguably could support a criminal conviction.

A. The So-Called "Threshold Clause"

Article 8(1) states 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."[149] At first glance, Article 8(1) appears to establish a jurisdictional threshold which limits the ICC's jurisdiction to war crimes committed as part of a "plan or policy" or when committed on a "large-scale."[150] However, a closer examination of the statutory language reveals that the "in particular when" language of Article 8(1) merely suggests a guideline for the Court's exercise of jurisdiction over war crimes.[151]

Under Article 8(1), the Court's jurisdiction is implicated "in particular when," not "only when," the condemned acts are committed as part of a plan or policy or committed on a large-scale.[152] Article 8(1) therefore does not impose a requirement that war crimes be committed in a systematic manner or on a large-scale. Consequently, it would be no defence to charges brought under Article 8 that the killing of innocent civilians by American soldiers was not part of a governmental plan or policy or that the incident occurred on a single occasion.[153] The so-called "threshold

148. Under Article 124, the so-called "opt-out" provision, a State Party may declare, for a period of seven years after the entry into force of the Statute, that it does not accept the jurisdiction of the ICC with respect to the category of crimes referred to in Article 8 with respect to war crimes committed by its nationals or on its territory. *Id.* art. 124. Thus, the United States could agree to support the International Criminal Court, but declare that it does not accept the Court's jurisdiction over war crimes allegedly committed by its nationals.

149. *Id.* art. 8(1).

150. *Id.*

151. *Id.*

152. *Id.*

153. At the Rome Conference, delegates were divided over the necessity of a threshold clause. Those in favor of such a clause argued that the international community should be concerned only with systematic or large-scale occurrences of war crimes. These delegates supported inclusion of a threshold clause that provided that the Court shall have jurisdiction over war crimes "only when committed as part of a plan or policy or as part

clause" is therefore more aptly characterized as a "non-threshold threshold."[154]

The failure to require that war crimes be committed as part of a plan or policy or committed on a large-scale is inconsistent with the definition of crimes against humanity under the Rome Statute. Crimes against humanity, as defined by Article 7, require proof that the prohibited conduct was committed "as part of a widespread or systematic attack directed against a civilian population."[155] Article 7(2)(a) further provides that, for purposes of Article 7(1), an "[a]ttack directed against any civilian population" means a course of conduct involving "the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack."[156] Thus, to convict a person for the commission of crimes against humanity, the ICC Prosecutor must prove that the crimes were committed on a large-scale, and pursuant to or in furtherance of a State or organizational policy. It is unclear why the definition of war crimes under Article 8 does not contain a similar large-scale and organizational policy requirement.[157]

B. Norms Applicable to "International Armed Conflicts"

To be convicted of "war crimes" under Article 8, the prohibited conduct must have occurred during the commission of either an international or internal "armed conflict."[158] Furthermore, in the case of an "international armed conflict," Article 8(2) distinguishes between two different types of war crimes, "grave breaches" of the 1949 Geneva Conventions, and "other serious violations of the law and customs applicable in armed conflict."[159]

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of large-scale commission of such crimes." Herman von Hebel & Darryl Robinson, *Crimes within the Jurisdiction of the Court*, *in* THE MAKING OF THE ROME STATUTE, *supra* note 2, at 108. A majority of delegations opposed any threshold provision. The language "in particular when committed" was considered an acceptable compromise over the requirement that the ICC exercise jurisdiction over war crimes "only when committed" in a systematic manner or on a large scale. *Id.*

154. Von Hebel & Robinson, *supra* note 153, at 124.

155. Rome Statute, *supra* note 1, art. 7(1).

156. *Id.* art. 7(2)(a).

157. It should further be noted that Article 5(1) states that "[t]he jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole." *Id.* art. 5(1).

158. Leila Nadya Sadat & S. Richard Carden, *The New International Criminal Court: An Uneasy Revolution*, 88 GEO. L. J. 381, 434 (2000) ("[I]n spite of some ambiguity in article 8(2)(b), it appears that war crimes cannot be committed within the meaning of the Rome Statute unless an armed conflict exists.").

159. Rome Statute, *supra* note 1, art. 8(2). The 1949 Geneva Conventions include: Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention Relative to Prisoners of War]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention Relative to Civilians]; Geneva Convention Relative to Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Geneva Convention Relative to Wounded and Sick]; Geneva Convention Relative to Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85

Moreover, under principles of customary international law, it is well settled that "grave breaches" can occur only when committed during an "international" armed conflict.[160] With respect to "[o]ther serious violations of the laws and customs" of armed conflict, Article 8(2)(b) explicitly requires that such violations occur in "international armed conflict."[161]

Article 8(2)(a) incorporates by reference the "grave breaches" provisions of the four 1949 Geneva Conventions, prohibiting any of the following acts against persons or property protected under the relevant provisions of the 1949 Geneva Conventions:

> (i) Wilful killing;
> (ii) Torture or inhuman treatment, including biological experiments;
> (iii) Wilfully causing great suffering, or serious injury to body or health;
> (iv) Extensive destruction and appropriation of property . . . ;
> (v) Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;
> (vi) Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;
> (vii) Unlawful deportation or transfer or unlawful confinement;
> (viii) Taking of hostages.[162]

[hereinafter Geneva Convention Relative to Wounded and Sick at Sea]. It should be emphasized that the "grave breaches" provisions of the 1949 Geneva Conventions establish universal mandatory jurisdiction only with respect to those breaches of the Conventions committed in international armed conflicts. For example, Article 146 of the Geneva Conventions Relative to Civilians provides: "Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts." Geneva Convention Relative to Civilians, *supra*, art. 146. Each of the Geneva Conventions of 1949 have similar provisions. *See* Geneva Convention Relative to Prisoners of War, *supra*, art. 129; Geneva Convention Relative to Wounded and Sick, *supra*, art. 49; Geneva Convention Relative to Wounded and Sick at Sea, *supra*, art. 50.

160. In *The Prosecutor v. Dusko Tadic*, Case No. IT-94-1-T, Opinion and Judgment (Trial Chamber, Int'l Crim. Trib. Former Yugo., May 7, 1997), *reprinted in* 36 I.L.M. 908 (1997), the International Tribunal for the Former Yugoslavia held that Article 2 of the Statute of the International Criminal Tribunal for the Former Yugoslavia, which establishes jurisdiction over "grave breaches" of the Geneva Conventions of 1949, only applies to offences committed within the context of international armed conflicts. *Id.* While the Yugoslavia Tribunal recognized a growing trend towards extending the "grave breaches" system to internal armed conflicts, the Court concluded that *opinio juris* of States does not yet support that view. *Id.*

161. Rome Statute, *supra* note 1, art. 8(2)(b).

162. *Id.* art. 8(2)(a). Each of the four Geneva Conventions of 1949 contain a grave breaches provision. For example, Article 147 of the Geneva Convention Relative to the Protection of Civilians provides that "grave breaches" involve any of the following acts if committed against persons or property protected by the present Convention:

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

Geneva Convention Relative to Civilians, *supra* note 159, art. 147.

C. "Other Serious Violations of the Laws and Customs Applicable in International Armed Conflict"

Under Article 8(2)(b), war crimes also include "[o]ther serious violations of the laws and customs applicable in international armed conflict."[163] Article 8(2)(b) enumerates twenty-six different types of conduct prohibited under customary or conventional international law. These prohibited acts fall under three general categories: (1) acts directed at protected persons,[164] (2) acts directed at protected property,[165] and (3) limitations imposed on the methods and means of warfare. For example, with respect to protected persons, Article 8(2)(b) makes it a war crime to (i) intentionally attack civilian populations;[166] (ii) intentionally attack against humanitarian assistance personnel or United Nations peacekeepers;[167] (iii) intentionally launch an attack knowing that the attack will cause clearly excessive incidental loss of life or injury to civilians in relation to the overall military advantage anticipated;[168] (iv) kill or wound combatants who have laid down arms or surrendered;[169] (v) transfer parts of the Occupying Power's own civilian population into the territory it occupies, or the populations of the occupied territory within or outside this territory;[170] (vi) perform medical or scientific experiments not justified by medical treatment;[171] (vii) treacherously kill or wound individuals part of a hostile nation or army;[172] (viii) commit outrages of humiliation and degradation;[173] (ix) commit any form of sexual violence including rape, sexual slavery, forced prostitution, forced pregnancy, forced sterilization, or other forms of sexual violence "constituting a grave breach of the Geneva Conventions;"[174] and (x) enlist children less than the age of 15 years old into the national armed forces utilizing their participation in hostilities.[175]

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163. Rome Statute, *supra* note 1, art. 8(2)(b).

164. As a general rule, "protected persons" under the 1949 Geneva Conventions include persons not taking direct part in the hostilities, such as prisoners of war, the wounded and sick, and innocent civilians. *See generally* Geneva Convention Relative to Prisoners of War, *supra* note 159, art. 4; Geneva Convention Relative to Civilians, *supra* note 159, art. 4; Geneva Convention Relative to Wounded and Sick, *supra* note 159, art. 49; Geneva Convention Relative to Wounded and Sick at Sea, *supra* note 159, art. 50.

165. As a general rule, "protected property" under the 1949 Geneva Conventions includes property which does not have a military objective, and property against which the launching of an attack will knowingly cause incidental destruction which would be clearly excessive in relation to the overall military objective. *See generally* Geneva Convention Relative to Civilians, *supra* note 159, art. 144; Geneva Convention Relative to Wounded and Sick, *supra* note 159, art. 146; Geneva Convention Relative to Wounded and Sick at Sea, *supra* note 159, art. 50.

166. Rome Statute, *supra* note 1, art. 8(2)(b)(i).

167. *Id.* art. 8(2)(b)(iii).

168. *Id.* art. 8(2)(b)(iv).

169. *Id.*

170. *Id.* art. 8(2)(b)(viii).

171. *Id.* art. 8(2)(b)(x).

172. *Id.* art. 8(2)(b)(xi).

173. *Id.* art. 8(2)(b)(xxi).

174. *Id.* art. 8(2)(b)(xxii).

175. *Id.* art. 8(2)(b)(xxvi).

Article 8(2)(b) also makes it a war crime to direct attacks against certain protected property, including (i) "[i]ntentionally directing attacks against civilian objects . . . which are not military objectives;"[176] (ii) "[i]ntentionally directing attacks against personnel installations, material, units or vehicles involved in a humanitarian or peace-keeping mission . . . ;"[177] (iii) "[i]ntentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected . . . ;"[178] (iv) "[i]ntentionally launching an attack knowing that such attack will cause incidental damage to civilian objects which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;"[179] (v) "[a]ttacking or bombarding . . . towns, villages, dwellings or buildings which are undefended and which are not military objectives;"[180] (vii) "[d]estroying or seizing the enemy's property unless such destruction or seizure be demanded by the necessities of war;"[181] (viii) "[p]illaging a town or place, even when taken by assault";[182] and (ix) "[i]ntentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law."[183]

Finally, under Article 8(2)(b) certain means and methods of conducting warfare are condemned as war crimes, including, (i) "[e]mploying poison or poisoned weapons;"[184] (ii) "[e]mploying asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;"[185] (iii) "[e]mploying bullets which expand or flatten easily in the human body . . . ;"[186] and (iv) "[i]ntentionally using starvation of civilians as a method of warfare."[187] Paragraph (xx) contains a general clause allowing for an additional list of prohibited weapons. This paragraph states:

> Employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict, provided that such weapons, projectiles and material and methods of warfare are the subject of a comprehensive prohibition and are included in an annex to this Statute, by an amendment in accordance with the relevant provisions set forth in Articles 121 and 123.[188]

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176. *Id.* art. 8(2)(b)(ii).
177. *Id.* art. 8(2)(b)(iii).
178. *Id.* art. 8(2)(b)(ix).
179. *Id.* art. 8(2)(b)(iv).
180. *Id.* art. 8(2)(b)(v).
181. *Id.* art. 8(2)(b)(xiii).
182. *Id.* art. 8(2)(b)(xvi).
183. *Id.* art. 8(2)(b)(xxiv).
184. *Id.* art. 8(2)(b)(xvii).
185. *Id.* art. 8(2)(b)(xviii).
186. *Id.* art. 8(2)(b)(xix).
187. *Id.* art. 8(2)(b)(xxv).
188. *Id.* art. 8(2)(b)(xx); *see also* Von Hebel & Robinson, *supra* note 153, at 113-16, for a discussion of the controversy surrounding whether the Statute should contain a general clause on prohibited weapons or a closed list of such weapons.

D. Norms Applicable to "Internal Armed Conflicts"

Article 8(2)(c) and (e) proscribe conduct that constitutes a war crime when committed during an "internal conflict."[189] Subsections (d) and (f) of Article 8 provide both a negative and positive definition of what constitutes an "armed conflict not of an international character."[190] Section (d) sets forth the negative definition and reads: "Paragraph 2(c) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature."[191]

In effect, subsection (d) limits the scope of application of subsection (c) by excluding from it certain situations that are not within the concept of internal armed conflict, and therefore is described as a negative definition.

Section (f) of the statute also contains a "positive" definition that describes what a non-international armed conflict entails. Article 8(f) provides: "It applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups."[192]

This additional sentence was included in subsection (f) as a compromise to those States that sought the inclusion of the whole of Article 1(1) of Additional Protocol II, which requires that the dissident armed forces or other organized armed groups "exercise such control over a part of the territory as to enable them to carry out sustained and concerted military operations."[193] It also requires that such forces or groups act "under responsible command" and are able to implement the obligations under Protocol II.[194]

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189. Rome Statute, *supra* note 1, art. 8(2)(c). It states:

> In the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention or any other cause:
>
> (i) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
>
> (ii) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;
>
> (iii) Taking of hostages;
>
> The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable.

Id.

190. *Id.* arts. 8(2)(d), 8(2)(f).

191. *Id.* art. 8(2)(d).

192. *Id.* art. 8(2)(f).

193. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, adopted June 8, 1977, 1125 U.N.T.S. 609, art. 1(1) [hereinafter Protocol II]; *see also* Von Hebel & Robinson, *supra* note 153, at 121.

194. Protocol II, *supra* note 193, art. 1(1).

Article 8(2)(c) basically restates Common Article 3 to the 1949 Geneva Conventions, criminalizing any of the following acts committed against persons taking no active part in the hostilities:

> (i) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
> (ii) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;
> (iii) Taking of hostages;
> (iv) The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable.[195]

Article 8(2)(e) enumerates "[o]ther serious violations of the laws and customs applicable in armed conflicts not of an international character."[196] These norms stem from a variety of sources, such as the Hague Conventions, the 1949 Geneva Conventions, and Additional Protocol II. The list in subsection (e) is very similar to the prohibited acts enumerated in subsection (b), reflecting the view that these norms equally apply to internal armed conflicts.[197]

E. Application of Article 8 to Loss of Life and Property During a U.N. Peace-Keeping Operation

If the United States participated in a United Nations peace-keeping mission and a U.S. launched missile inadvertently missed its target, causing loss of civilian life, the matter could arguably be prosecuted as a war crime under Article 8 of the Rome Statute. The use of military force by the United States directed against a foreign State would constitute an "international armed conflict" within the meaning of Article 8(2) even if sanctioned by the U.N. and intended to deter the aggrieved State from committing terrorist attacks against a dissident minority inside its territory.[198] Consequently, any prosecution of American soldiers, military commanders, and government officials would be limited to violations of Articles 8(2)(a) and (b), which punish the commission of "grave breaches" and "other serious violations of the law and customs applicable in" an "international armed conflict."[199] More specifically, with respect to the "grave breaches" provision, a war crimes prosecution arguably could be based on a violation of Article 8(2)(a)(iv), which proscribes the "[e]xtensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly."[200]

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195. Rome Statute, *supra* note 1, art. 8(2)(c).
196. *Id.* art. 8(2)(e).
197. Von Hebel & Robinson, *supra* note 153, at 119.
198. Under Common Article 2 common to the 1949 Geneva Conventions, an international armed conflict may arise between two or more High Contracting Parties, "even if the state of war is not recognized by one of them." *E.g.*, Geneva Convention Relative to Prisoners of War, *supra* note 159, art. 2.
199. Rome Statute, *supra* note 1, art. 8(2)(a), (b).
200. *Id.* art. 8(2)(a)(iv). Neither subsections (i) or (iii) are applicable because each requires that the prohibited conduct was committed "wilfully." In the hypothetical case

A conviction under Article 8(2)(a)(iv) would require proof of three elements: (1) the bombing resulted in the "extensive destruction . . . of property;" (2) the destruction of such property was "not justified by military necessity;" and (3) the bombing was carried out "unlawfully and wantonly."[201] Under the facts of the hypothetical case, the first two elements are easily satisfied. First, the accidental bombing of a hospital and apartment complex would constitute the "extensive destruction . . . of property."[202] Second, the destruction of the civilian property did not serve any military purpose and thus was "not justified by military necessity."[203] Therefore, successful prosecution under Article 8(2)(a)(iv) would ultimately turn on whether the U.S. military attack was carried out "unlawfully and wantonly."[204] The aggrieved State would argue that the military strike was conducted wantonly because the United States acted with reckless indifference to whether civilian property would be destroyed.[205] However, Article 8(2)(a)(iv) requires that the prohibited conduct was committed both wantonly *and* unlawfully.[206] Thus, the ICC Prosecutor would have to prove that the military attack also was unlawful" – lacking legal authority.[207]

The United States would argue that the use of military force within the territory of the aggrieved State constituted the *lawful* use of force under the U.N. Security Council's Chapter VII powers. Pursuant to Chapter VII of the U.N. Charter, the Security Council is delegated the responsibility of maintaining and restoring international peace and security.[208] Specifically, Article 42 provides that if economic measures authorized under Article 41 would be inadequate or have proven inadequate, the Security Council "may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security."[209] The United States would maintain that the use of military force was authorized by the Security Council, acting pursuant to Chapter VII of Article 42. Because the military strike was intended to deter violent attacks by the aggrieved State against a dissident minority in its territory, and thereby restore international peace and security, the use of force was lawful under Article 42. Thus, the use of military force was not unlawful under Article 8(2)(a)(iv). A conviction under Article 8(2)(a)(iv) therefore could not be sustained.

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at issue, the killing and causing of great suffering or serious bodily injury to innocent civilians was, at most, the result of negligent, not wilful conduct. *Id.* art. 8(2)(a)(i), (iii).

201. *Id.* art. 8(2)(a)(iv).

202. *Id.*

203. *Id.*

204. *Id.*

205. "Wanton" is defined as "[r]eckless, heedless, malicious; characterized by extreme recklessness, foolhardiness; recklessly disregardful of the rights or safety of others or of consequences." BLACK'S LAW DICTIONARY 1582 (6th ed. 1990).

206. Rome Statute, *supra* note 1, art. 8(2)(a)(iv).

207. *Id.*

208. U.N. CHARTER art. 39.

209. *Id.* art. 42.

However, under Article 8(2)(b), which proscribes "[o]ther serious violations of the laws and customs" applicable in international armed conflict, several provisions could apply.[210] First, it could be argued that the United States violated subsection (iv) which punishes "[i]ntentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects . . . which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated."[211] A conviction under subsection (iv) would require proof that the United States intentionally launched a military attack with knowledge that the incidental loss of civilian life or damage to civilian property was clearly excessive in relation to the military objective sought.[212] In the hypothetical case, there is no question that the United States intended to launch the attack. However, it is unclear whether U.S. military officials had the requisite knowledge that incidental loss of civilian life or damage to civilian property would result, which would be "clearly excessive in relation to the concrete and direct overall military advantage anticipated."[213]

The critical issue is whether the mens rea knowledge requirement of Article 8(2)(b)(iv) could be proven. Article 30(3) of the Rome Statute defines "knowledge" to mean an "awareness that a circumstance exists or a consequence will occur in the ordinary course of events."[214] If Article 8(2)(b)(iv) requires subjective or actual knowledge, the ICC Prosecutor would have to prove that American soldiers and military commanders had actual knowledge that the military strike would cause incidental loss of life or injury to civilians or damage to civilian property, or were practically certain that the conduct would cause that result.[215] Also, the ICC Prosecutor would have to prove that the defendants had actual knowledge that such collateral loss of life or damage to civilian property was clearly excessive to the direct overall military advantage anticipated. As a practical matter, an actual or subjective knowledge standard would impose a heavy burden of proof on the ICC Prosecutor.

On the other hand, if the knowledge requirement of subsection (iv) was measured by an objective standard, the ICC Prosecutor could sustain a conviction on proof that the American soldiers and military commanders acted negligently. A person acts negligently if he is unaware of a substan-

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210. Rome Statute, *supra* note 1, art. 8(2)(b).

211. *Id.* art. 8(2)(b)(iv).

212. Article 30(1) states that "[u]nless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge." *Id.* art. 30(1). Article 8(2)(b)(iv) is consistent with Article 30(1), requiring that the military launch was carried out intentionally with knowledge that the attack would cause collateral civilian loss of life and property damage excessive to the overall military objective. *Id.* art. 8(2)(b)(iv).

213. *Id.*

214. *Id.* art. 30(3).

215. A person acts "knowingly" with respect to a result if it is not his conscious object, yet he is practically certain that the conduct will cause that result. PAUL H. ROBINSON, CRIMINAL LAW § 4.1 (1997).

tial risk, but *should have* perceived it.[216] Thus, U.S. soldiers could be convicted of war crimes under Article 8(2)(b)(iv) if they "should have known" that the military attack would cause collateral loss of civilian life and damage to civilian property, and "should have known" that this would be "clearly excessive in relation to the concrete and direct overall military advantage anticipated."[217] Thus, under an objective standard of knowledge, even if the defendants lacked actual knowledge of the collateral consequences of their conduct, they could be found guilty if they should have known of the risk.[218] Of course, the objective standard represents a much lower level of culpability than the subjective knowledge standard, making it much easier to obtain a criminal conviction.[219]

The hypothetical U.S. military strike also could violate Article 8(2)(b)(v), which prohibits "[a]ttacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives."[220] The actus reus of the offence can be easily satisfied because the American soldiers bombed a hospital and apartment complex which were "undefended and . . . not military objectives."[221] Because the statute is silent regarding the relevant mens rea required to support a conviction, Article 30(1) would require that the material elements of the offence were committed with intent and knowledge.[222]

"Intent" is defined under Article 30(2)(b), when "[i]n relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events."[223] Because the bombing of the hospital and apartment complex was accidental, U.S. soldiers did not mean to cause that consequence. "Knowledge" is defined under Article 30(3) as being "aware" that collateral damage would occur "in the ordinary course of events."[224] Thus, U.S. soldiers could be convicted for war crimes under Article 8(2)(b)(v) upon proof that they were "aware" that the military strike likely would cause the resultant collateral damage to civilian property. Furthermore, because Article 30(3) focuses on the defendant's awareness of the ordinary consequences of his actions, the statute appears to require proof of a subjective standard of knowledge, rather than an

216. *Id.* It is generally agreed that negligence represents a lower level of culpability than recklessness, in that the negligent actor fails to recognize, rather than consciously disregards, the risk. *Id.*

217. Rome Statute, *supra* note 1, art. 8(2)(b)(iv).

218. In either case, gathering evidence to satisfy the knowledge element of the offence would likely generate highly contentious litigation over whether the United States should be required to turn over to the ICC Prosecutor sensitive military files and documents that arguably could shed light on the defendants' knowledge of the collateral consequences of launching a military attack. *See id.* art. 15(2).

219. The ordinary negligence standard of "should have known" is sufficient to sustain a conviction of military commanders under the doctrine of command responsibility. *See* discussion *infra* at Part V.

220. Rome Statute, *supra* note 1, art. 8(2)(b)(v).

221. *Id.*

222. *Id.* art. 30(1).

223. *Id.* art. 30(2)(b).

224. *Id.* art. 30(3).

objective standard of "should have known." Thus, a conviction for a violation of Article 8(2)(b)(v) would require proof of actual knowledge that the collateral damage would "occur in the ordinary course of events."[225]

V. Criminal Responsibility for Military Commanders and Government Officials Under the Doctrine of Command Responsibility

The criminal responsibility of military commanders and other superiors for the commission of war crimes is significantly expanded by Article 28, which codifies the doctrine of command responsibility. Article 28 dramatically reduces the burden of proof, providing that a military commander or government superior can be convicted of war crimes and other crimes within the jurisdiction of the ICC based on proof of ordinary negligence – a showing that he "should have known" that the forces under his command were committing or about to commit such offences, and failed to take reasonable measures to prevent their commission.

Article 28(a) provides:

> A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control . . . as a result of his or her failure to exercise control properly over such forces, where:
>
> (i) That military commander or person either knew or, owing to the circumstances at the time, *should have known* that the forces were committing or about to commit such crimes; and
>
> (ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.[226]

Pursuant to Article 28(a), a military commander faces conviction for war crimes if he (1) assumed a position of "effective command and control, or effective authority and control" over subordinates; (2) knew or "should have known" that the forces were committing or about to commit war crimes; and (3) failed to take all necessary and reasonable measures within his power to prevent their commission.[227] Furthermore, criminal responsibility is not limited to the commander with direct supervisory responsibility over subordinates, but extends up the chain of command to hold criminally liable any person with "effective command and control, or effective authority and control," who "should have known" that subordinates were committing or about to commit crimes within the jurisdiction of the ICC.[228] Thus, Pentagon officials could be indicted for war crimes and prosecuted before the ICC based on a simple negligence standard.

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225. *Id.* arts. 8(2)(b)(v), 30(2)(b).
226. *Id.* art. 28(a) (emphasis added).
227. *Id.*
228. *Id.* arts. 28(a), (a)(i).

The doctrine of command responsibility further extends to persons who assume a de facto position of command, including government officials and other civilians. Article 28(b) states:

> With respect to superior and subordinate relationships not described in paragraph (a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her *effective authority and control*, as a result of his or her failure to exercise control properly over such subordinates, where:
>
> (i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;
>
> (ii) The crimes concerned activities that were within the *effective responsibility and control* of the superior; and
>
> (iii) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.[229]

Thus, even in the absence of a formal superior-subordinate relationship, a person may be held criminally responsible for war crimes if (1) the crimes were committed by subordinates within his "effective authority and control;" (2) he either knew or consciously disregarded information that indicated that subordinates were committing or about to commit such crimes; (3) the crimes concerned activities within his "effective responsibility and control;" and (4) he failed to take all necessary and reasonable measures to prevent the commission of such crimes.[230]

To determine whether a government official or some other civilian may be held criminally responsible for war crimes, the critical issue is whether the accused exercised "effective authority and control" over the subordinates who actually engaged in the proscribed acts. Unfortunately, Article 28 fails to define "effective authority and control." The statute is further silent on the degree of "authority and control" that the de facto superior must exercise over the subordinates.

The issue, however, has arisen in several cases before the Ad Hoc International Tribunals for the Former Yugoslavia[231] and Rwanda.[232] The

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229. *Id.* art. 28(b) (emphasis added).

230. *Id.*

231. *Secretary-General's Report on Aspects of Establishing an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law in the Territory of the Former Yugoslavia*, U.N. SCOR, 48th Sess. U.N. Doc. S/25704 (1993), *reprinted in* 32 I.L.M. 1159 (1993). Article 7(3) provides:

> The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

Id. art. 7(3); *see also* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 1125 U.N.T.S. 3, *reprinted in* 16 I.L.M. 1391 (1977) (imposing an affirmative duty on military commanders who are aware that subordinates under their command and other persons

Yugoslavia and Rwanda Tribunals have liberally construed the requirement finding that the de facto superior exercised "effective authority and control" over subordinates. In *The Prosecutor v. Delalic*, the Trial Chamber posited that the doctrine of command responsibility "extends beyond the responsibility of military commanders to also encompass political leaders and other civilian superiors in positions of authority."[233] In order for the principle of superior responsibility to apply, "[i]t is necessary that the superior have effective control over the persons committing the underlying violations of international humanitarian law, in the sense of having the material ability to prevent and punish the commission of these offences."[234] Thus, the *Delalic* Court equated "effective control" over subordinates with the ability of the de facto superior to prevent and punish the condemned conduct. However, the Court suggested that possessing the ability to prevent an offence, regardless of whether the defendant possessed any authority to do so, is a sufficient basis for the imposition of command responsibility.[235]

In *The Prosecutor v. Zlatko Aleksovski*, the Trial Chamber reaffirmed the principle that superior responsibility is not limited to military commanders but may apply to civilian authorities as well.[236] The Court retreated, however, from the view espoused in *Delalic* that having the ability to prevent *and* punish criminal conduct is a prerequisite for command responsibility to attach. Although the power to sanction is a necessary corollary of the power to issue orders within the military hierarchy, the Trial Chamber in *Aleksovski* posited that it does not apply to civilian authorities. The de facto superior's ability to impose sanctions therefore is not essential.[237] Instead, the Court focused on the ability to prevent the criminal conduct, positing that the possibility of transmitting reports to the appropriate authorities might suffice, if in light of the defendant's position, "the likelihood that those reports will trigger an investigation or initiate disciplinary or even criminal measures is extant."[238] Thus, the failure of a government official to submit a report disclosing the commission of crimes within the jurisdiction of the ICC may be sufficient to support a conviction for war crimes under the doctrine of command responsibility.

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under their control to take all necessary and reasonable steps to prevent and suppress violations of the Geneva Conventions and Protocol I); *In re* Yamashita, 327 U.S. 1 (1946) (holding that the law of war imposes a duty on a military commander to prevent acts in violation of laws of war).

232. Security Council Resolution Establishing the International Criminal Tribunal for Rwanda, adopted by S.C. Res. 955, U.N. SCOR 49th Sess., 3453d mtg., U.N. Doc. S/Res/955 (1994), *reprinted in* 33 I.L.M. 1598 (1994).

233. Prosecutor v. Delalic, Case No. IT-96-21-T, Judgment, para. 356, Trial Chamber, Int'l Crim. Trib. Former Yugo. (1998).

234. *Id.* para. 378.

235. *See id.* paras. 342, 348.

236. Prosecutor v. Zlatko Aleksovski, Case No. IT-95-14/1-T, Judgment, para. 75, Trial Chamber, Int'l Crim. Trib. Former Yugo. (1999).

237. *Id.* para. 78.

238. *Id.*

Finally, in *The Prosecutor v. Musema*, the Rwandan Trial Chamber expanded the scope of criminal responsibility for de facto superiors even further. The Court opined that "influential power, which is not power of formal command, [is] sufficient basis for charging one with superior responsibility."[239] In other words, merely possessing the ability to influence others in preventing proscribed criminal activity may be sufficient to establish that the defendant exercised "effective authority and control" over subordinates.

In support of this startling proposition, the *Musema* Court cited the *Herman Roechling* judgment.[240] In that case, civilian industrial leaders were found guilty of war crimes for failing to take action against abuses committed by members of the Gestapo against forced laborers, based on de facto influence, which would have allowed defendants to arrange with the factory police for better treatment of the workers.[241] *Musema* therefore establishes a remarkably low threshold for subjecting government officials and other civilians to criminal liability under the doctrine of command responsibility. Under *Musema*, merely possessing the ability to influence others to prevent criminal activity, and then failing to do so, is sufficient for criminal responsibility to attach for crimes within the jurisdiction of the ICC.

The implications of *Musema* are mind-boggling. Under the Trial Chamber's ruling, it is conceivable that a high-ranking government official could be convicted of war crimes under the doctrine of command responsibility based on his personal relationship with a military commander, who had actual command authority, because the government official failed to use his ability to influence the commander to prevent the proscribed criminal conduct. Furthermore, under the Rome Statute, criminal liability could attach despite the absence of any formal authority or responsibility over the subordinates.

In short, the sweep of criminal responsibility under Article 28(b) blurs any meaningful distinction between a legal duty and moral obligation. The civilian who fails to exercise his ability to influence persons in power to prevent criminal activity may lack moral courage, but surely he should not be convicted of war crimes or other serious humanitarian offences within the jurisdiction of the ICC.

VI. Conclusion

The United States has voiced its concerns of the International Criminal Court through its outcome-based argument in which the ICC could subject U.S. military personnel to prosecution for inadvertent casualties and prop-

239. Prosecutor v. Musema, Case No. ICTR-96-13-T, para. 139, Int'l Crim. Trib. Rwanda Trial Chamber I, Jan. 27 (2000).

240. The Government Commissioner of the General Tribunal of the Military Government for the French Zone of Occupation in Germany v. Herman Roechling and Others, Law Reports, Vol. XIV, Appendix B, p. 1075, para. 1092 (*cited in Musema*, No. ICTR-96-13-T, para. 142).

241. *Musema*, No. ICTR-96-13-T, para. 142.

erty damage during a military operation. The United States has reason to fear this outcome because (1) the Court's jurisdiction is not complementary to national prosecutions, (2) the Statute's mens rea requirements for war crimes under Article 8 are often unclear and diminutive, and (3) the Statute's doctrine of command responsibility extends war crime liability to upper-level military and civilian commanders based on findings of simple negligence.

First, the ICC's exercise of jurisdiction violates the text and spirit of the preamble and Article 1, which declare that the ICC "shall be complementary to national criminal jurisdictions."[242] The ICC's jurisdiction is *not* complementary, as the statute does not mandate the ICC prosecutor to defer to national prosecutions conducted in good faith. Rather, the ICC's exercise of jurisdiction is ultimately based on the court's ability to second-guess national prosecutions by faulting the independence and impartiality of national prosecutions, predicated on the vague notion of "principles of due process recognized by international law." The Court's exercise of jurisdiction is therefore outcome-based - the Court simply defers to State criminal jurisdictions in the first instance, but reserves the right, and possesses the authority, to intervene as it sees fit.

To be truly complementary, the ICC should exercise its jurisdiction only when the State criminal proceedings were a sham intended to shield the alleged offenders from prosecution, or when the State's decision not to prosecute was based on a clearly erroneous application of the law. In the absence of bad faith or a clearly erroneous decision, the ICC should, at the very least, afford substantial deference to a State's decision not to prosecute.

Second, the mens rea requirements for proving a war crime under Article 8 are often unclear. Under Article 8(2)(b)(v), for example, the Statute does not specify whether the element of knowledge constitutes an objective or subjective standard. The less stringent standard of objective knowledge could convict soldiers of war crimes under a theory of simple negligence. The United States should not allow its soldiers to be tried or convicted for serious humanitarian violations based on prosecutions that require such a paltry standard of mens rea.

Third, the Rome Statute expands traditional notions of command responsibility by allowing the Court to try and convict military commanders or government superiors for serious breaches of humanitarian law based on proof of ordinary negligence. Article 28 extends criminal responsibility to any person with effective or de facto control over subordinates and even those with the mere ability to influence or prevent others from engaging in criminal activity. As a result, Article 28 blurs any meaningful distinction between legal and moral duty, and subjects those with little or no direct or formal authority over subordinates to prosecution for violations of serious humanitarian offenses.

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242. Rome Statute, *supra* note 1, pmbl., para. 10; *accord id.* art. 1

The Rome Statute creates a super-international appellate court with unchecked de novo review over national jurisdictions. In its current form, the Statute threatens national sovereignty, and, without additional jurisdictional guarantees that defer to good-faith national prosecutions and doctrinal guarantees that protect soldiers and their civilian and military commanders from serious humanitarian violations based on simple negligence, the Statute should not be ratified by the United States.