U.S. OBJECTIONS TO THE STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A BRIEF RESPONSE

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I. INTRODUCTION

On July 17, 1998, at the end of a five-week diplomatic conference in Rome,[1] 120 States voted to approve the text of a treaty creating a permanent International Criminal Court (ICC). It will prosecute those accused of genocide, crimes against humanity, and the most serious war crimes if no national legal system can take up the case. As delegates from around the world celebrated, the United States, the world's sole remaining superpower, was isolated as one of only two democracies voting against the text of that treaty, known as the Rome Statute.[2]

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1. The United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, Italy, July 15-17, 1998. For the official website (visited Mar. 8, 1999), see <http://www.un.org/icc>.

2. ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, U.N. Doc. A/CONF.183/9 (reissued for technical reasons) (1998) [hereinafter ROME STATUTE]. The final vote on the Statute in Rome was 120 in favor to seven against, with 21 abstentions. The vote was registered by a non-recorded electronic vote as requested by the U.S. delegation; therefore, there is no official record of the way any particular state voted. One measure of the isolation of the U.S. is that the seven countries who voted "no" have not all stepped forward to acknowledge this fact. Major newspapers and other media sources have offered varying lists of the seven states voting "no" in Rome. It is undisputed that the U.S., Israel, and China voted "no," but it is less clear which of the other states commonly appearing on these lists actually opposed the ICC Statute. *See, e.g.*, Anthony Lewis, *At Home Abroad*, N.Y. TIMES,

The U.S. government has concluded that the treaty is fatally flawed and has announced that it will neither sign nor ratify the treaty in its present form.[3] Some U.S. officials have suggested that U.S. policy may go beyond mere non-participation to "actively opposing" the ICC. Nonetheless, over seventy countries have signed the Rome Statute and, when sixty of them have ratified it, the ICC officially will be born. This essay catalogues some of the principal U.S. government objections to the Rome Statute and considers their validity. It concludes that the treaty does raise some real problems which must be addressed before the United States can accept it, but that these are not so serious as to justify active U.S. opposition to this important and potentially useful institution.

A. *Background Factors*

A number of background factors set the stage for the present U.S. policy towards the ICC. The United States has long been a supporter of human rights and the rule of law in international affairs.[4] U.S. initiatives led to the creation of the In-

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July 20, 1998, at A15 (naming the United States, Israel, China, Libya, Iraq, Qatar, and Yemen as "no" votes); Phyllis Bennie, *U.S. Chooses Wrong Side of Tribunal Issue*, THE SUN (Baltimore), July 26, 1998, at 4C (same); Jim Mann, *Don't Blame Helms for World Court Vote*, L.A. TIMES, July 22, 1998, at A5 (naming, for some reason, seven states in addition to the United States: Iraq, Libya, China, Indonesia, Turkey, Mexico, and Israel); *All the News of the World Reaction to the New U.N.-Backed International Criminal Court*, THE INDEPENDENT (London), July 22, 1998, at 3 (including India and Algeria); David Ott, *U.S. is in the Dock over Treaty*, THE HERALD (Glasgow), July 25, 1998, at 15 (including Sudan among the "no" votes). *See also Libya Denies Supporting U.S. Position on International Criminal Court*, BBC SUMMARY OF WORLD BROADCASTS, July 21, 1998, *available in* LEXIS, NEWS Library, BBCSWB File (stating that Libyan News Agency officially denies Libya voted with the U.S. or against the ICC Statute).

3. *See* David J. Scheffer, Statement in the Sixth Committee of the General Assembly on the International Criminal Court, Oct. 21, 1998, U.S. Mission to the United Nations Press Release No. 179 (98) (visited Mar. 8, 1998) <http://www.undp.org/missions/usa/98_179.htm>. ("Mr. Chairman, having considered the matter with great care, the United States will not sign the treaty in its present form. Nor is there any prospect of our signing the present treaty text in the future.") [hereinafter Scheffer Statement in Sixth Committee].

4. For an excellent review of past U.S. efforts in support of international justice, see David J. Scheffer, *International Judicial Intervention*, FOREIGN POLICY, Spring 1996, at 34.

ternational Criminal Tribunal for the Former Yugoslavia[5] (ICTY) and the International Criminal Tribunal for Rwanda[6] (ICTR) as ad hoc[7] responses to regional crises. Save for the Nuremberg[8] and Tokyo[9] war crimes tribunals of the post World War II era, these institutions were unprecedented. Their success made it clear that the international community, acting through the Security Council, can create fair and credible international criminal tribunals. President Clinton himself was among those who stated that the next logical step would be a permanent international criminal court.[10]

International negotiations began after the U.N. International Law Commission (ILC) prepared a first draft ICC statute to serve as the basis for international negotiations on this issue.[11] In 1993, the General Assembly requested government

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5. The International Criminal Tribunal for the Former Yugoslavia was created by U.N. Security Council Resolution 827 of May 25, 1993. U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/RES/827 [hereinafter ICTY Resolution].

6. The International Criminal Tribunal for Rwanda was created by U.N. Security Council Resolution 955 of November 8, 1994. U.N. SCOR, 49th Sess., 3453d mtg., U.N. Doc. S/RES/955 (1994) [hereinafter ICTR Resolution].

7. The ICTY and ICTR are ad hoc institutions in the sense that each was created by the Security Council as a temporary measure to deal with a specific situation held by the Council to constitute a threat to international peace and security. *See* ICTY Resolution, *supra* note 5, at para. 2; ICTR Resolution, *supra* note 6, at para. 1. The geographic and temporal limits upon the jurisdiction of these two institutions, and efforts to create a permanent International Criminal Court which would supersede the need for such ad hoc tribunals in the future, are discussed *infra* in Part III of this article.

8. The International Military Tribunal at Nuremberg was established by an agreement among four victorious Allied Powers at the end of World War II. *See Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis*, Aug. 8, 1945, 59 Stat. 1544, *reprinted in* 39 AM. J. INT'L L. 257 (1945).

9. The International Military Tribunal for the Far East was established in Tokyo pursuant to the *Special Proclamation by the Supreme Commander for the Allied Powers at Tokyo, Establishment of an International Tribunal for the Far East*, Jan. 19, 1946, T.I.A.S. No. 1589.

10. President Clinton first announced his support for an ICC in a speech at the University of Connecticut. *See* Daniel P. Jones and Katherine Farrish, *Clinton Backs Permanent World Court*, THE HARTFORD COURANT, Oct. 17, 1995, at A1.

11. *Report of the International Law Commission on the Work of its Forty-Sixth Session*, U.N. GAOR, U.N. Doc. A/49/355, Annex, Draft Statute for an International Criminal Court (1994) [hereinafter ILC Draft Statute].

comments on the ILC draft,[12] and, after creating an Ad Hoc Committee to review the issues involved,[13] the General Assembly created a Preparatory Committee on the Establishment of an International Criminal Court (PrepCom).[14] After six PrepCom sessions held over three years, the General Assembly decided to convene the Rome Diplomatic Conference. The goal was to reach agreement on the final text of a treaty creating the last great international organization of the twentieth century.

The task of negotiating a treaty acceptable to the United States was daunting from the start.[15] In March 1998, four months before the Rome Conference, Senator Jesse Helms made public his letter to Secretary of State Madeleine Albright stating that any treaty establishing a permanent U.N. International Criminal Court "[w]ithout a clear U.S. veto . . . will be dead-on-arrival at the Senate Foreign Relations Committee."[16] He flatly stated that U.S. ICC negotiators "do not have any flexibility" on this issue.[17] This threat placed the delegation in a very difficult position. The "Helms standard" on the jurisdiction of the ICC could only be achieved in two ways, each of which was unacceptable to the vast majority of the other negotiating States.

One way would require prior authorization from the United Nations Security Council for all ICC prosecutions. As incorporated into the Draft Statute prepared by the ILC in 1994, this approach would have allowed the United States, as a permanent member of the Council, to veto any proposed prosecution of U.S. citizens. But the Security Council veto privilege, so cherished by the United States and the other permanent members of the Council, is resented by many of the de-

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12. G.A. Res. 48/31, U.N. GAOR, 48th Sess., Supp. 49, at 328, U.N. Doc. A/48/49 (1993).

13. G.A. Res. 49/53, U.N. GAOR, 49th Sess., Supp. 49, at 293, U.N. Doc. A/49/49 (1994).

14. G.A. Res. 50/49, U.N. GAOR, 50th Sess., Supp. 49, at 307, U.N. Doc. A/50/49 (1995).

15. *See* Betsy Pisik, *Global Court is No Done Deal; Conferees on Criminal Tribunal Confront "Difficult Issues,"* WASH. TIMES, June 15, 1998, at A15.

16. *Helms Declares U.N. Criminal Court "Dead-on-Arrival" in Senate without U.S. Veto*, CONG. PRESS RELEASES, Mar. 26, 1998.

17. *Id.*

veloping countries of the South.[18] Even many U.S. allies believed that extending veto privilege to ICC investigations and prosecutions would compromise the principle of a uniform global standard of justice. The United Kingdom, a close U.S. ally and Permanent Member of the Council, had agreed during the December 1997 PrepCom[19] to accept a compromise formulation which would require a decision by the Security Council to delay ICC investigations or prosecutions.[20]

The Helms standard also could be satisfied by bestowing upon every State the right to veto the prosecution of its nationals. This would leave the ICC powerless to pursue most violators, save for the continuing authority of the Security Council, acting under the U.N. Charter, to authorize international

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18. Political tensions between North and South at the United Nations also complicated the bargaining. Developing countries feel a new jealousy of the Security Council's exclusive authority over international security matters. The recent, failed attempt of middle-rank powers to expand the Council has exacerbated the mood. Together, these factors made it impossible for the United States to preserve an American veto over prosecution decisions by using the requirement of Council approval.

Ruth Wedgwood, *Fiddling in Rome: America and the International Criminal Court*, FOREIGN AFF., Nov.-Dec. 1998, at 20.

19. William Pace, the convenor of the Coalition for an International Criminal Court, a coordinated group of non-governmental organizations supporting the creation of the ICC, summarized this development during the December 1997 PrepCom as follows:

> One of the most important developments during the PrepCom, though not part of the official negotiations, was a dramatic shift in the position of the United Kingdom on the issue of the role of the Security Council. At this PrepCom, the United Kingdom confirmed its decision to oppose the provision in the draft Statute of the ILC which would require prior approval by the Security Council before the Court could proceed with investigations and trials. This provision in effect gave the Security Council veto power over the ICC. Instead the UK indicated it will support a modified formulation of the 'Singapore proposal' which would require a positive decision to be taken by the Council to prevent or delay or block the ICC, and then only for a limited length of time.

See William R. Pace, *Initial Summary Reports on December 1-12 Meetings of the United Nations Preparatory Committee on the Establishment of an International Criminal Court, Note to the NGO Coalition for an ICC and Others Interested*, Dec. 18, 1997 (visited Mar. 8, 1998) <http://www.lchr.org/icc/q&aic.htm>.

20. A version of this compromise formulation ultimately was incorporated into the Rome Statute. *See* ROME STATUTE, *supra* note 2, art. 16.

prosecutions. To satisfy Senator Helms, all roads in Rome would have to lead through the Security Council.

B. *The Rome Conference*

The official U.S. assessment of the ICC Statute (that it contains many positive elements but is seriously flawed)[21] could be a metaphor for the U.S. policy process displayed at the Rome Conference. The problem can be traced back to differences between the positions of the Defense Department, the State Department, and the Justice Department on ICC issues.[22] The failure to resolve these differences in Washington delayed the receipt of viable instructions for the U.S. delegation until the fourth week of the five-week Rome Conference.[23] It had become evident weeks earlier that burdensome state-consent requirements, allowing any State to block the prosecution of its citizens, would be unacceptable to the Con-

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21. "The treaty negotiated in Rome this year, and which a large number of governments have now signed, has many provisions that we support, though we have reluctantly had to conclude that the treaty, in its present form, contains flaws that render it unacceptable." Scheffer Statement in Sixth Committee, *supra* note 3.

22. Before the Rome conference, the Washington Times summarized the views of the three principal government departments involved as follows: "The Pentagon, which routinely schools officers in the laws of war, holds a position similar to the senator's [Helms] and has conducted informal briefings about the court with foreign military representatives . . . . The State Department appears willing to accept a slightly higher element of risk to U.S. soldiers overseas. The Justice Department is closer to State than Defense on the question of the court." Pisik, *supra* note 15, at A15.

23. [T]he administration failed to think through or effectively articulate its position on the court. Throughout the negotiations, wary of a skeptical Congress, the White House dithered. Though international meetings on the ICC began in 1994, the United States failed to set its bottom line—Would it back the court or not? Under what terms?—until the President's return from China in early July. Only then, four weeks into the five-week U.N. final conference in Rome, were cabinet debates resolved and instructions issued to the American negotiating team. But by then it was too late for American diplomats to convince frustrated friends and allies to accommodate new U.S. demands—a case study in how not to conduct multilateral diplomacy. A historic opportunity to shape the court in America's image was lost.

Wedgwood, *supra* note 18, at 20.

ference as a whole,[24] but the United States did not formulate a proposal for compromise on this issue until the time for substantive negotiations had passed. One observer described it as "a case study in how not to conduct multilateral diplomacy,"[25] another as "a study in ill-conceived strategy."[26]

While awaiting instructions on sensitive political issues such as the jurisdictional regime, U.S. delegates in Rome nonetheless worked tirelessly on the technical details of the Statute. These delegates, especially those from the Justice Department, identified and helped find solutions for a number of problems in the text of the draft ICC Statute. As a result of their efforts, and the consensus they built with delegates from other States sharing the same fundamental values and perspectives, the Rome Statute bears the strong imprint of the U.S. legal system.[27]

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24. Early on, it became clear that the conference would not accept proposals that a government's consent be required before its nationals could be prosecuted. In the last few days of the conference, the United States submitted a narrowly crafted amendment limiting the requirement of consent by a national state that has not ratified the treaty only to cases involving 'acts of officials or agents of a state in the course of official duties acknowledged by the state as such.'

Theodor Meron, *The Court We Want*, WASH. POST, Oct. 13, 1998, at A15.

25. Wedgwood, *supra* note 18, at 20.

26. Diane Orentlicher, *U.S. Cheats Justice in Opposing World Court*, L.A. TIMES, Aug. 30, 1998, at M2.

27. The United States deserves more credit than it has been given. Without this country, the Yugoslav and Rwanda tribunals would not have been established or would have failed for lack of political or material support. Were it not for our action in Rome, the definition of "crimes against humanity" would have been emasculated and possibly made applicable only to war situations. The applicability of war crimes to internal conflicts would have been drastically narrowed.

The U.S. imprint is, in fact, all over the statute: in ensuring due process in trials, in the priority given to national courts, in the checks and balances on the powers of the prosecutor. These are some of the remarkable achievements of the U.S. delegation to Rome, ably led by Ambassador David Scheffer.

Enormous progress was made in advancing the goal of protecting U.S. personnel from politically motivated international prosecutions—to the point that such prosecutions of U.S. military personnel would be quite improbable.

Meron, *supra* note 24.

Ambassador David Scheffer, who led the U.S. delegation in Rome, has observed that many critical U.S. objectives were achieved in the ICC negotiations.[28] The Statute incorporates the presumption of innocence[29] and other due process guar-

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28. Among the objectives we achieved in the statute of the court were the following:

- An improved regime of complementarity (meaning deferral to national jurisdictions) that provides significant protection, although not as much as we had sought.
- A role preserved for the UN Security Council, including the affirmation of the Security Council's power to intervene to halt the court's work.
- Sovereign protection of national security information that might be sought by the court.
- Broad recognition of national judicial procedures as a predicate for cooperation with the court.
- Coverage of internal conflicts, which comprise the vast majority of armed conflicts today.
- Important due process protections for defendants and suspects.
- Viable definitions of war crimes and crimes against humanity, including the incorporation in the statute of elements of offenses. We are not entirely satisfied with how the elements have been incorporated in the treaty, but, at least, they will be a required part of the court's work. We also were not willing to accept the wording proposed for a war crime covering the transfer of population into occupied territory.
- Recognition of gender issues.
- Acceptable provisions based on command responsibility and superior orders.
- Rigorous qualifications for judges.
- Acceptance of the basic principle of state party funding.
- An Assembly of States Parties to oversee the management of the court.
- Reasonable amendment procedures.
- A sufficient number of ratifying states before the treaty can enter into force; namely, 60 governments have to ratify the treaty.

Hearing on the United Nations International Criminal Court Before the Senate Committee on Foreign Relations, 105th Cong. (1998) (statement of David J. Scheffer, Ambassador at Large for War Crimes Issues and Head of the U.S. Delegation to the U.N. Diplomatic Conference on the Establishment of a Permanent International Criminal Court), *available in* LEXIS, LEGIS Library, HEARNG File [hereinafter Scheffer Statement before Senate Foreign Relations Committee].

29. Article 66 of the Statute sets out the presumption of innocence in the following terms:

antees paralleling those required by the U.S. Constitution.[30]

Article 66
Presumption of innocence

1. Everyone shall be presumed innocent until proved guilty before the Court in accordance with the applicable law.
2. The onus is on the Prosecutor to prove the guilt of the accused.
3. In order to convict the accused, the Court must be convinced of the guilt of the accused beyond reasonable doubt.

ROME STATUTE, *supra* note 2, art. 66.

30. Article 67 of the Statute restates the rights of the accused as recognized by Article 14 of the International Covenant on Civil and Political Rights, a treaty ratified by the United States in 1992:

Article 67
Rights of the accused

1. In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing conducted impartially, and to the following minimum guarantees, in full equality:
(a) To be informed promptly and in detail of the nature, cause and content of the charge, in a language which the accused fully understands and speaks;
(b) To have adequate time and facilities for the preparation of the defence and to communicate freely with counsel of the accused's choosing in confidence;
(c) To be tried without undue delay;
(d) Subject to article 63, paragraph 2, to be present at the trial, to conduct the defence in person or through legal assistance of the accused's choosing, to be informed, if the accused does not have legal assistance, of this right and to have legal assistance assigned by the Court in any case where the interests of justice so require, and without payment if the accused lacks sufficient means to pay for it;
(e) To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her. The accused shall also be entitled to raise defences and to present other evidence admissible under this Statute;
(f) To have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness, if any of the proceedings of or documents presented to the Court are not in a language which the accused fully understands and speaks;
(g) Not to be compelled to testify or to confess guilt and to remain silent, without such silence being a consideration in the determination of guilt or innocence;
(h) To make an unsworn oral or written statement in his or her defence; and,
(i) Not to have imposed on him or her any reversal of the burden of proof or any onus of rebuttal.

The Statute also provides for the eventual negotiation, adoption, and use of two additional documents which will solidify and extend these guarantees. The ICC's Rules of Procedure and Evidence[31] will help to ensure procedural due process, and detailed "Elements of Crimes"[32] will elaborate upon the detailed definitions of crimes already contained in the Statute. The formulation of supplemental Elements of Crimes[33] was seen as unnecessary by most of the negotiating States but was agreed to because the U.S. delegation stressed the need for the highest possible degree of definitional clarity. Negotiations on these two documents began at the first session of the post-Rome PrepCom negotiations in February 1999.

The U.S. also was successful in strengthening the definitions of crimes in the Statute. Some other countries hoped to exclude their domestic human rights practices from the juris-

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> 2. In addition to any other disclosure provided for in this Statute, the Prosecutor shall, as soon as practicable, disclose to the defence evidence in the Prosecutor's possession or control which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence. In case of doubt as to the application of this paragraph, the Court shall decide.

Id. art. 67. *See also* International Covenant on Civil and Political Rights, Dec. 19, 1966, art. 14, 999 U.N.T.S. 171.

31. *See* ROME STATUTE, *supra* note 2, art. 51.

32. Article 9 of the Rome Statute, on the elements of crimes, reads as follows:

> Article 9
> Elements of Crimes
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> 1. Elements of Crimes shall assist the Court in the interpretation and application of articles 6, 7 and 8. They shall be adopted by a two-thirds majority of the members of the Assembly of States Parties.
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> 2. Amendments to the Elements of Crimes may be proposed by:
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> (a) Any State Party;
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> (b) The judges acting by an absolute majority;
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> (c) The Prosecutor.
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> Such amendments shall be adopted by a two-thirds majority of the members of the Assembly of States Parties.
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> 3. The Elements of Crimes and amendments thereto shall be consistent with this Statute.

Id. art. 9.

33. On the need to define the elements of international crimes under international fair-trial standards, see Bartram S. Brown, *Nationality and Internationality in International Humanitarian Law*, 34 STAN. J. INT'L L. 347, 360-63 (1998).

diction of the ICC by narrowing the Statute's definitions of crimes against humanity and war crimes. The United States, along with other liberal democracies, opposed this artificial limitation. U.S. anxiety about the Statute relates to possible ICC prosecution of U.S. personnel after U.S. military activity abroad.

II. Legal Issues

A. *The Definition of War Crimes*

The definition of war crimes in the Rome Statute combines in one five-page article crimes defined under the Hague Conventions of 1899 and 1904, the four Geneva Conventions of 1949, and the two Additional Protocols to the 1949 Geneva Conventions.[34] With one principal exception, the United States is quite happy with this definition. That exception is Article 8(2)(b)(viii), which defines as a war crime:

> The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory. . . .[35]

Although it is unlikely to face this situation itself, the United States is concerned that this language may be directed against Israel and its settlements in the West Bank. What is new in the Statute's formulation (earlier forms of which are codified in both the Geneva Convention (IV)[36] and in Protocol I,[37] defined *infra*) is the language referring to the transfer

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34. *See* Rome Statute, *supra* note 2, art. 8.

35. *Id.*

36. "The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies." Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 49, para. 6, 75 U.N.T.S. 287 [hereinafter Geneva Convention (IV)].

37. Protocol I bans:

> (a) The transfer by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory, in violation of Article 49 of the Fourth Convention.

Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Proto-

of civilian population to occupied territory "directly or indirectly."

Allowing or authorizing Israeli settlements in the West Bank arguably could be classified as "indirectly" transferring Israel's own civilian population to "occupied territory." Even without this new wrinkle, the United States most likely would oppose including this matter within the jurisdiction of the ICC. The Statute clarifies that the ICC is to focus upon the most serious war crimes,[38] particularly those "committed as part of a plan or policy or as part of the large scale commission of such crimes,"[39] and it is debatable whether the transfer of population to occupied territory ever could qualify as one of the "most serious war crimes."

Another part of the article on War Crimes that concerned the United States defines as a war crime the intentional launching of an attack knowing that it will cause excessive collateral damage to civilians. The essential content of this article is nothing new. Additional Protocol I to the 1949 Geneva Conventions prohibits indiscriminate attacks, defined as those expected to cause excessive incidental loss of civilian life.[40] The U.S. delegation convinced the Rome Conference to add a few key words limiting ICC jurisdiction over this crime to cases where collateral damage "would be *clearly* excessive in relation to the concrete and direct *overall* military advantage anticipated."[41] Thus the elements of this crime will include the "in-

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col I), Dec. 12, 1977, art. 85, para. 4(a), 1125 U.N.T.S. 3 [hereinafter Protocol I].

38. The Rome Statute's Preamble affirms "that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation." ROME STATUTE, *supra* note 2, Preamble, para. 4.

39. "The Court shall have jurisdiction in respect of war crimes in particular when committed as a part of a plan or policy or as part of a large-scale commission of such crimes. " *Id.* art. 8, para. 1.

40. Protocol I, which has not been ratified by the United States, prohibits:

> (b) An attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.

Protocol I, *supra* note 37, art. 51, para. 5.

41. The final version of this part describes as a punishable act only the following:

tentional launching" of an attack and "knowledge" that the incidental loss of life or damage would be "clearly excessive."

Given the length and complexity of the war crimes provisions of the Rome Statute, it presents remarkably few problems for the United States. The process of elaborating the elements of crimes, which began at the February 1999 PrepCom meeting in New York, provides an ongoing opportunity to remedy these problems.

B. *The Issue of Aggression*

The Rome Statute lists "aggression" as a crime within the jurisdiction of the ICC, but it does not include a definition of that crime. Instead, it bars the exercise of ICC jurisdiction over aggression until such time as the Statute has been amended both to define the crime and to specify the procedures and prerequisites for its prosecution.[42]

The U.S. government understandably is troubled by this lack of definition. The Charter of the United Nations gives the Security Council the authority to determine the existence of an act of aggression,[43] and the United States has always insisted that the prosecution of an individual for the crime of aggression would require a decision by the Security Council, pursuant to the U.N. Charter,[44] that such individual's State

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> (iv) *Intentionally* launching an attack *in the knowledge* that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be *clearly excessive* in relation to the concrete and direct *overall military advantage anticipated.*

ROME STATUTE, *supra* note 2, art. 8, para. (2)(b)(iv) (emphasis added).

> 42. The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.

Id. art. 5, para. 2.

43. "The Security Council shall determine the existence of any threat to the peace, breach of the peace or act of aggresssion and shall make recommendations or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security." U.N. CHARTER, art. 39.

> 44. [W]e are disappointed with the treatment of the crime of aggression. We and others had long argued that such a crime had not been defined under customary international law for purposes of

had committed aggression. The terms of the U.N. Charter are controlling, and thus neither the Rome Statute nor any other treaty can reduce the authority of the Security Council.[45] The Rome Statute itself states that provisions of the ICC Statute concerning the crime of aggression "shall be consistent with the relevant provisions of the Charter of the United Nations."[46]

The definition of aggression long has been a contentious issue in international relations,[47] and it will be very difficult for the States to resolve this matter now. Even assuming that they can do so, no definition of aggression can be adopted until seven years after the Rome Statute enters into force.[48] If and when this important issue is decided, the United States will want to be a key participant in the process.

C. *Does the Statute Violate the Law of Treaties?*

One of the basic aspects of the law of treaties is the rule that "[a] treaty does not create either obligations or rights for

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> individual criminal responsibility. We also insisted, as did the International Law Commission in 1994, that there had to be a direct linkage between a prior Security Council decision that a state had committed aggression and the conduct of an individual of that state. The statute of the court now includes a crime of aggression but leaves it to be defined by a subsequent amendment to be adopted 7 years after entry into force. There is no guarantee that the vital linkage with a prior decision by the Security Council will be required by the definition that emerges if, in fact, a broadly acceptable definition can be achieved. We will do all we can to ensure that such linkage survives.

Scheffer Statement before Senate Foreign Relations Committee, *supra* note 28.

45. "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail." U.N. CHARTER, art. 103.

46. ROME STATUTE, *supra* note 2, art. 5, para. 2.

47. The 1974 U.N. General Assembly resolution on the definition of aggression provides a starting point, but that resolution focuses on State responsibility for aggression and not upon individual criminal responsibility for this crime. G.A. Res. 3314, U.N. GAOR, 29th Sess., Supp. No. 31, at 142, U.N. Doc. A/9631 (1974).

48. Articles 121(1) and 123(1) of the Rome Statute both recognize this as the earliest time when any amendments may be considered. *See* ROME STATUTE, *supra* note 2, art. 121, para. 1, and art. 123, para. 1.

a third State without its consent."[49] The U.S. government claims that the Statute violates this rule[50] because, in some cases,[51] it could allow the ICC to try individuals for serious international crimes without the consent of their national governments.[52] The theory apparently is that if the ICC tries an *individual* for a crime, that individual's home *State* in some extended sense is being subjected to obligations under the Statute.[53] This is a novel theory.

Equating potential ICC jurisdiction over individuals with the idea that States are being inappropriately "bound" is a clever rhetorical device, but as legal reasoning it is completely untenable. Like any treaty, the Statute creates obligations for

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49. Vienna Convention on the Law of Treaties, May 23, 1969, U.N. Doc. A/CONF.39/27, art. 34 [hereinafter Vienna Convention].

50. I can tell you that it would be bizarre, utterly bizarre consequence for governments to think that this treaty can be adopted and brought into force with the presumption that it will cover governments that have not joined the treaty regime. That is bizarre. That's weird. That is unheard of in treaty law.

Ambassador-at-Large For War Crimes Issues Holds News Conference at National Press Club, FDCH POLITICAL TRANSCRIPTS, July 31, 1998, *available in* LEXIS, NEWS Library, ALLNWS File.

51. Article 12(2) of the Statute allows the ICC to exercise jurisdiction with the consent of either the State of which the accused is a national or the State upon whose territory the act has been committed. *See* ROME STATUTE, *supra* note 2, art. 12, para. 2. Since States automatically consent to the jurisdiction of the ICC upon becoming party to the Statute, the nationals of non-party States may be investigated and/or prosecuted for acts committed on the territory of any State Party. *See id.* art. 12, para. 1. The more troubling problems with the acceptance of ICC jurisdiction by non-party States are discussed in the later part of this paper. *See infra* notes 113 through 121 and the accompanying text.

52. [W]hile we successfully defeated initiatives to empower the court with universal jurisdiction, a form of jurisdiction over non-party states was adopted by the conference despite our strenuous objections . . . . Our position is clear: Official actions of a non-party state should not be subject to the court's jurisdiction if that country does not join the treaty, except by means of Security Council action under the UN Charter. Otherwise, the ratification procedure would be meaningless for governments.

Scheffer Statement before Senate Foreign Relations Committee, *supra* note 28.

53. Professor Theodor Meron, who served as a public (private citizen) member of the U.S. Delegation in Rome, argues that "the Statute overreaches in extending the court's sway over states that choose not to ratify the Statute." Meron, *supra* note 24.

States Parties: these include the obligations to comply with requests for the surrender and transfer of suspects to the Court,[54] to provide requested evidence,[55] to give effect to fines or forfeitures ordered by the Court,[56] and to pay assessments for the regular budget of the Court.[57] None of these obligations applies to any non-party State, nor does the exercise of criminal jurisdiction against an accused individual bind that individual's home State.

The ICC treaty will not bring about a radical change in international law or in the international system. Whether they become parties to the treaty or not, all countries will retain their fundamental rights, including the right to try those accused of committing crimes on their territory and to try their own nationals for crimes committed anywhere. It will remain true that if a foreign national is accused of committing a crime on the territory of the United States, either this country or his home country legitimately could try him.

Every State has certain legal rights with regard to its nationals, but these are neither unlimited nor exclusive. General international law does not grant States exclusive jurisdiction over crimes committed by their nationals. Instead, it recognizes that States may have concurrent jurisdiction when the crimes committed affect the interests of more than a single State.[58]

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54. *See* ROME STATUTE, *supra* note 2, art. 89, para. 1.

55. *See id.* art. 93.

56. *See id.* art. 109, para. 1.

57. *See id.* art. 117.

58. In 1927, in the *S.S. Lotus Case*, France challenged the right of Turkey to try a French national for crimes committed on the high seas aboard a French merchant ship which produced effects on a Turkish ship. The French government argued that "the State whose flag is flown has exclusive jurisdiction." S.S. Lotus Case (Fr. v. Turk.), 1927 P.C.I.J. (Ser. A) No. 10, at 24 (Sept. 7). The Permanent Court of International Justice rejected this French argument in terms that apply equally well to the U.S. claim of exclusive jurisdiction:

> Neither the exclusive jurisdiction of either State, nor the limitations of the jurisdiction of each . . . would appear calculated to protect the interests of the two States. It is only natural that each should be able to exercise jurisdiction and to do so in respect of the incident as a whole. It is therefore a case of concurrent jurisdiction.

Id. at 30-31.

No State, whether a party to the Statute or not, has a legitimate interest in shielding its nationals from criminal responsibility for genocide, crimes against humanity or serious war crimes. Suggestions to the contrary evoke a colonialist concept of exclusive extraterritorial rights that was prevalent in earlier centuries but has little relevance to modern practice.[59]

Reid v. Covert,[60] a case familiar to international lawyers and to military lawyers alike, contains a detailed review of the history of the extraterritorial rights of a State to try its nationals for crimes committed abroad.[61] More relevant here, this case also explains how Western states used treaties in the Middle Ages to protect their nationals from the application of foreign law and the jurisdiction of foreign courts even when they traveled and lived on foreign soil.[62] When the nation-state system emerged in Europe, this aspect of extraterritorial rights was weakened by the doctrine of absolute territorial sovereignty. Thus, in the 19th century, the principle was generally applied only to legal systems seen as "inferior" to those of Western Christian countries.[63] During this period, the British and

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59. The remaining relevance of extraterritorial jurisdiction in the context of Status of Forces Agreements (SOFAs) will be considered briefly below. *See infra* note 66.

60. 354 U.S. 1 (1957). This case involved the wife of an Air Force sergeant, accused of the murder of her husband in England, who was tried by a U.S. court-martial in that country. Her conviction was set aside when the Supreme Court ruled that, as a civilian, her Constitutional right to trial by jury had been violated.

61. *Id.* at 56-61.

62. Regarding the cultural hostility between Christian and Muslim countries during the Middle Ages, the Supreme Court noted that:

> [I]t was a matter of deep interest to Christian governments to withdraw the trial of their subjects, when charged with the commission of a public offence, from the arbitrary and despotic action of the local officials. Treaties conferring such jurisdiction upon these consuls were essential to the peaceful residence of Christians within those countries and the successful prosecution of commerce with their people.

Id. at 57 (quoting *In re* Ross, 140 U.S. 453, 463 (1891)).

63. The emergence of the nation-state in Europe and the growth of the doctrine of absolute territorial sovereignty changed the nature of extraterritorial rights. No longer were strangers to be denied the advantages of local law. Indeed, territorial sovereignty meant the exercise of sovereignty over all residents within the borders of the state, and the system of extraterritorial consular jurisdiction tended to die out among Christian nations in the 18th and 19th

Americans negotiated treaties with China extending British and U.S. consular jurisdiction to shield their nationals in that country from the jurisdiction of the local courts.[64]

Treaties granting broad exclusive extraterritorial rights are a relic of the 19th century colonial era in which a more "state-centric"[65] concept of international law prevailed, and they have no relevance to the debate on the ICC.[66] The arrest of Chilean General Augusto Pinochet demonstrates widespread recognition that any state has jurisdiction to try those accused of certain serious international crimes.[67] In light of

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> centuries. But a new justification was found for the continuation of that jurisdiction in those countries whose systems of justice were considered inferior . . . .

Id. at 60.

64. Until 1842, China had asserted control over all foreigners within its territory . . . but, as a result of the Opium War, Great Britain negotiated a treaty with China whereby she obtained consular offices in five open ports and was granted extraterritorial rights over her citizens. On July 3, 1844, Caleb Cushing negotiated a similar treaty on behalf of the United States. In a letter to Secretary of State Calhoun, he explained: 'I entered China with the formed general conviction that the United States ought not to concede to any foreign state, under any circumstances, jurisdiction over the life and liberty of a citizen of the United States, unless that foreign state be of our own family of nations,—in a word, a Christian state.' Later treaties continued the extraterritorial rights of the United States . . . .

Id. at 60 (internal citations omitted).

65. *See* Bartram S. Brown, *The Protection of Human Rights in Disintegrating States: A New Challenge*, 68 CHI.-KENT L. REV. 203, 204 (1992) (discussing the "state-centric" nature of international law before the development of the international law of human rights).

66. Status of Forces Agreements (SOFAs) between the United States and host countries where U.S. forces are based or deployed may be highly relevant to the debate on the ICC. These agreements frequently include a waiver by the host State of criminal jurisdiction over specified U.S. personnel. *See* Mark R. Ruppert, *Criminal Jurisdiction Over Environmental Offenses Committed Overseas: How to Maximize and When to Say "No,"* 40 A.F. L. REV. 1, 2 (1996) (discussing "United States authorities' . . . pervasive practice of maximizing foreign jurisdiction waivers" through SOFAs).

67. "France, Switzerland and Belgium have joined Spain in seeking General Pinochet's extradition for crimes committed against their citizens." Tim Weiner, *US Will Release Files on Crimes Under Pinochet*, N.Y. TIMES, Dec. 2, 1998, at A1. Although the Law Lords in the United Kingdom limited the crimes for which Pinochet could be extradited, the British Home Secretary nevertheless ruled that the extradition hearings could proceed. *See* Warren Hoge, *Britain Decides to Let the Pinochet Extradition Case Proceed*, N.Y. TIMES, Apr. 16,

these developments there is little *legal* substance to the argument that ICC jurisdiction over U.S. nationals would violate the rights of the United States.

D. *Universal Jurisdiction and the ICC*

International law rises above the narrow interests of any state in recognizing the universal jurisdiction of all states to prosecute those believed to be responsible for certain special crimes of concern to the entire international community.[68] This extraordinary jurisdiction was first applied to pirates who were recognized as *hostes humani generis*, enemies of all humankind,[69] and was extended to slave traders in the 19th century when international law forbade that commerce. Today, this universal jurisdiction applies to the core crimes defined in the ICC Statute.[70]

Critics of the Rome Statute have suggested that it overreaches in extending the principle of universal jurisdiction to the prosecution of non-party nationals.[71] There are a number of problems with this argument, the first of which is that the

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1999, at A3, *available in* 1999 WL 9879832; Ray Moseley, *Court Clears Way to Extradite Pinochet but Law Lords Void Most Charges Against Ex-Ruler*, CHI. TRIB., Mar. 25, 1999, at 3, *available in* 1999 WL 2856813.

68. Brownlie notes, "A considerable number of states have adopted, usually with limitations, a principle allowing jurisdiction over acts of non-nationals where the circumstances, including the nature of the crime, justify the repression of some types of crime as a matter of international public policy." IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 304 (3d ed. 1979).

69. *See* J.L. BRIERLY, THE LAW OF NATIONS: AN INTRODUCTION TO THE INTERNATIONAL LAW OF PEACE 311 (6th ed. 1963).

70. The U.S. Restatement endorses a very long list of crimes subject to universal jurisdiction. "A state has jurisdiction to define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern, such as piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism . . ." RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 (1987). Brownlie distinguishes the generally accepted right of any state to try and punish war criminals from the principle of universality which in his view is still disputed. He notes that "[i]n so far as the invocation of the principle of universality in cases apart from war crimes and crimes against humanity creates misgivings, it may be important to maintain the distinction." BROWNLIE, *supra* note 68, at 305.

71. [T]he delegates in Rome included a form of "universal jurisdiction" in the Court statute. This means that, even if the United States never signs the treaty, and even if the U.S. Senate refuses to ratify it, the countries participating in this Court will regard Ameri-

jurisdiction of the ICC will not be based on the concept of universal jurisdiction.[72]

The jurisdiction of the ICC, as set out in the Rome Statute, is built upon the unquestioned right of States to prosecute crimes committed on their territory or by their nationals. Either the territorial State or the State of nationality of the accused must consent to every case prosecuted by the ICC, except for those referred under the authority of the United Nations Security Council.[73] This is a very conservative jurisdictional base[74] that does not depend upon the principle of universal jurisdiction. In a broader sense, however, the ICC builds upon the same considerations that lie behind the concept of universal jurisdiction, namely that every State has an interest in the prosecution of certain of the most serious international crimes. At least sixty States must ratify the Statute before the ICC comes into existence, and in doing so they will invest the ICC with its basic jurisdiction. The large number of states required ensures that the ICC will not be a sham institution created by a couple of rogue States.[75]

> can soldiers and citizens to be within the jurisdiction of the International Criminal Court. That, Mr. Chairman, is nonsense[.]

Hearings on the United Nations International Criminal Court Before the Senate Committee on Foreign Relations, 105th Cong. (1998) (statement of Senator Jesse Helms), *available in* LEXIS, LEGIS Library, HEARNG File.

72. U.S. Ambassador Scheffer concedes this much when he notes that "while we successfully defeated initiatives to empower the court with universal jurisdiction, a form of jurisdiction over non-party states was adopted by the conference despite our strenuous objections." Scheffer Statement before Senate Foreign Relations Committee, *supra* note 28.

73. *See* ROME STATUTE, *supra* note 2, art. 12, para. 2, and art. 13.

74. Theodor Meron refers to this strict state consent requirement when he asserts that the Statute "suffers . . . from timidity." Meron, *supra* note 24.

75. The requirement of 60 ratifications remedies one problem anticipated by U.S. Ambassador David Scheffer:

> Official actions of a non-party state should not be subject to the court's jurisdiction if that country does not join the treaty, except by means of Security Council action under the UN Charter. Otherwise, the ratification procedure would be meaningless for governments. In fact, under such a theory, two governments could join together to create a criminal court and purport to extend its jurisdiction over everyone, everywhere in the world.

Scheffer Statement before Senate Foreign Relations Committee, *supra* note 28, at 8.

At a time when even individual states claim the right to try a former head-of-state for international crimes committed against his own people, the jurisdictional reach of the ICC Statute appears to be quite modest and reasonable.[76]

The broad strokes of the U.S. attack upon the jurisdiction of the ICC gloss over the fact that, in theory, every State has the right to try U.S. citizens for serious international crimes. It would surely be better to be investigated by the ICC, which represents sixty countries, than by a single rogue state such as Iraq, Libya, Cuba or North Korea.

Another curious legal argument advanced against the Statute concerns the compromise allowing a special seven-year transitional period during which a State ratifying the Statute may opt out of accepting jurisdiction over war crimes.[77] The United States has criticized this provision as unfair because it would supposedly favor parties over non-parties.[78] Such a neg-

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76. Arguing before the Law Lords against their client's extradition to Spain, Pinochet's lawyers suggested that a single country's right to try Pinochet was less than that of an international court acting for the international community:

> Lawyers for Gen. Augusto Pinochet told Britain's Law Lords yesterday Spain must prove it is carrying out the will of the international community before the former Chilean dictator can be denied immunity and extradited. . . . 'Spain must assert it is prosecuting an international crime under the rights of international law,' lawyer Clare Montgomery told the seven-judge panel.

Pinochet Lawyers Claim Onus Squarely On Spain, LONDON FREE PRESS, Jan. 27, 1999, at A7.

77. The transitional article reads as follows:

> Article 124
> Transitional Provision
>
> Notwithstanding article 12 paragraph 1, a State, on becoming a party to this Statute, may declare that, for a period of seven years after the entry into force of this Statute for the State concerned, it does not accept the jurisdiction of the Court with respect to the category of crimes referred to in article 8 when a crime is alleged to have been committed by its nationals or on its territory. A declaration under this article may be withdrawn at any time. The provisions of this article shall be reviewed at the Review Conference convened in accordance with article 123, paragraph 1.

ROME STATUTE, *supra* note 2, art. 124.

78. "Unfortunately, because of the extraordinary way the court's jurisdiction was framed at the last moment, a country willing to commit war crimes could join the treaty and 'opt-out' of war crimes jurisdiction for 7 years, while a non-party state could deploy its soldiers abroad and be vulnerable to

ative attitude towards this device seems inconsistent since the United States itself was pushing for a ten-year opt-out period. In any case, the suggestion that non-parties are disadvantaged by this provision is completely mistaken. This transitional provision does not allow a State to opt out of all ICC jurisdiction over war crimes by its nationals. Instead, that State merely opts out of its "acceptance" of jurisdiction over war crimes. The practical effect of exercising this option is to place the opting state in the same position as a non-party state with regard to war crimes.

Many oft-repeated *legal* arguments against the ICC Statute dissolve under close examination, but these arguments, however specious, respond to very real underlying *political* concerns. The concept of universal jurisdiction over serious international crimes may be well-established as a matter of law, but that does not necessarily mean that the United States, as an "indispensable"[79] global power[80] likely to remain a non-party, will readily accept ICC jurisdiction over its nationals. It will be

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assertions of jurisdiction." Scheffer Statement before Senate Foreign Relations Committee, *supra* note 28.

79. Secretary of State Madeleine Albright has described the "indispensable" U.S. role as follows:

> But if we have to use force, it is because we are America. We are the indispensable nation. We stand tall, and we see further than other countries into the future, and we see the danger here to all of us. And I know that the American men and women in uniform are always prepared to sacrifice for freedom, democracy, and the American way of life.

The Today Show: Secretary of State Madeleine Albright Discusses Her Visit to Ohio to Get Support from American People for Military Action Against Iraq (NBC television broadcast, Feb. 19, 1998), *available in* 1998 WL 5261596.

80. These concerns were summed up in the following terms by David Scheffer, the Clinton Administration's Special Envoy dealing with war crimes:

> [T]he reality is that the United States is a global military power and presence . . . . Our military forces are often called upon to engage overseas in conflict situations, for purposes of humanitarian intervention, to rescue hostages, to bring out American citizens from threatening environments, to deal with terrorists. We have to be extremely careful that this proposal does not limit the capacity of our armed forces to legitimately operate internationally . . . that it does not open up opportunities for endless frivolous complaints to be lodged against the United States as a global military power.

Barbara Crossette, *World Criminal Court Having a Painful Birth*, N.Y. TIMES, Aug. 13, 1997, at A10, *available in* LEXIS, NEWS Library, NYT File.

a loss for the entire international community if concern about possible ICC jurisdiction deters the United States from contributing to international peacekeeping forces and other essential humanitarian missions.

III. The Political Issue: Is Complementary Jurisdiction Still Too Much for the United States?

The ICC Statute does present some dangers to the legitimate political interests of the United States. These are summarized in the "worst case" scenario outlined by Ambassador David Scheffer before the U.N. General Assembly:

> Consider the following. A State not a party to the treaty launches a campaign of terror against a dissident minority inside its territory. Thousands of innocent civilians are killed. International peace and security are imperiled. The United States participates in a coalition to use military force to intervene and stop the killing. Unfortunately, in so doing, bombs intended for military targets go astray. A hospital is hit. An apartment building is demolished. Some civilians being used as human shields are mistakenly shot by U.S. troops. The State responsible for the atrocities demands that U.S. officials and commanders be prosecuted by the international criminal court. The demand is supported by a small group of other states. Under the terms of the Rome treaty, absent a Security Council referral, the court could not investigate those responsible for killing thousands, yet our senior officials, commanders, and soldiers could face an international investigation and even prosecution. The complementarity regime is often offered as the solution to this dilemma. However, complementarity is not the answer, to the extent it involves States investigating the legality of humanitarian interventions or peacekeeping operations that they already regard as valid official actions to enforce international law. The court could decide there was no genuine investigation by a 2-to-1 vote.[81]

81. Scheffer Statement in Sixth Committee, *supra* note 3.

A number of important points can be made in response to this hypothetical scenario. The first is that the Statute's complementarity regime comes close to answering the concerns raised. The second is that the ICC will depend de facto upon the Security Council, and upon the United States, for support. This dependence will ensure ICC moderation in any case involving the United States. Lastly, the scenario reveals that there is a real and practical problem with the Statute's rule for the acceptance of jurisdiction by a non-party State.

A. *The Complementarity Regime*

The ad hoc international tribunals for Yugoslavia and Rwanda were granted a sweeping, and controversial,[82] jurisdictional priority over national courts[83] based on the authority of the Security Council under Chapter VII of the U.N. Charter. The ICC takes a far more timid approach to international criminal jurisdiction.

U.S. military personnel and other U.S. nationals are unlikely to face investigation or prosecution by the ICC because, under the principle of "complementary" jurisdiction, the ICC must defer to investigations or prosecutions conducted by national governments. The Statute's modest goal is to establish a judicial "safety net" in place for those rare cases where no national court system is willing and able to investigate allegations of serious international crimes. Accordingly, the ICC will be able to act only when no State with jurisdiction has investigated or prosecuted the case.[84] Any state, whether a party to the Statute or not, can assert a superior right to deal with a case simply by investigating and/or prosecuting it. The ICC must defer to national proceedings even when they have concluded that no prosecution is warranted.[85] The only exception is where the state concerned "is unwilling or unable genuinely to carry out the investigation or prosecution."[86] Few countries, and certainly not the United States, will fall within

82. *See* Bartram S. Brown, *Primacy or Complementarity: Reconciling the Jurisdiction of National Courts and International Criminal Tribunals,* 23 YALE J. INT'L L. 383, 398-402 (1998).

83. *See id.* at 394-98.

84. *See* ROME STATUTE, *supra* note 2, art. 17, para. 1.

85. *See id.* art. 18, para. 2, and art. 19, para. 2(b).

86. *Id.* art. 17, para. 1(a)-(b).

these exceptions. As long as the legal system has not totally collapsed, there is no possibility that the United States could be considered unable to prosecute.[87] The United States could be found "unwilling" to prosecute only if the proceedings were found to be a complete sham by a first panel of judges[88] and if that finding was confirmed on appeal.[89]

The principle of ICC deferral to national criminal proceedings is to be put into effect through a very elaborate set of procedural requirements limiting the ICC Prosecutor's authority to proceed with a case. These requirements enable any State that has investigated or is investigating a case to challenge, at the very outset, any investigation of that case by the ICC. The ICC Prosecutor must notify all States with jurisdiction of any investigations commenced except those based on a Security Council referral.[90] After receiving this notice, States have one month to notify the Prosecutor of their own investigation. The ICC Prosecutor must defer to any State's investigations, even that of a non-party State, unless a Pre-Trial

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87. "In order to determine inability in a particular case, 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." *Id.* art. 17, para. 3.

88. The relevant Article provides as follows:

> 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.

Id. art. 17, para. 2.

89. *See id.* art. 19, para. 6.

90. Due to the special authority of the Security Council under Chapter VII of the U.N. Charter, a different regime, which will be briefly considered below, apparently applies to situations referred to the ICC Prosecutor by the Security Council.

Chamber decides otherwise based on the rules of complementarity.

B. *The ICC Prosecutor*

The ICC Prosecutor's power to initiate investigations on his or her own authority itself has been the focus of criticism.[91] Some have expressed fear that the Prosecutor will target the U.S. President and other top civilian and military officials.[92] But the Statute contains many safeguards against prosecutorial abuse. First of all, it specifies that the ICC is to prosecute only "the most serious crimes of international concern"[93] and that a case is inadmissible, even when there is clear evidence of a technical violation, unless it is "of sufficient gravity to justify further action."[94]

A three-judge Pre-Trial Chamber will supervise the decisions of the Prosecutor concerning admissibility[95] and must also rule upon any request for orders or warrants.[96] No accused person can be tried until a Pre-Trial Chamber has ruled

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91. The treaty also creates a proprio motu or self-initiating prosecutor who, on his or her own authority with the consent of two judges, can initiate investigations and prosecutions without referral to the court of a situation either by a government that is party to the treaty or by the Security Council. We opposed this proposal, as we are concerned that it will encourage overwhelming the court with complaints and risk diversion of its resources, as well as embroil the court in controversy, political decision-making, and confusion.

Scheffer Statement before Senate Foreign Relations Committee, *supra* note 28.

92. Our main concern here, from the American perspective, is not that the Prosecutor will target for indictment the isolated U.S. soldier who violates our own laws and values, and his or her military training and doctrine, by allegedly committing a war crime. Our main concern should be for the President, the Cabinet officers who comprise the National Security Council, and other senior civilian and military leaders responsible for our defense and foreign policy. They are the real potential targets of the politically unaccountable Prosecutor created in Rome.

Hearing on the United Nations International Criminal Court Before the Senate Committee on Foreign Relations, 105th Cong. (1998) (statement of John R. Bolton, Senior Vice President, American Institute), *available in* LEXIS, LEXIS Library, HEARNG File [hereinafter Bolton Statement].

93. ROME STATUTE, *supra* note 2, art. 1.

94. *Id.* art. 17, para. 1(d).

95. *See id.* arts. 18, 19.

96. *See id.* art. 57, para. 3, and art. 58.

that the charges brought by the Prosecutor are supported by sufficient evidence.[97] These checks and balances are comparable to those found in the judicial procedures of the United States.

Perhaps the best protection against any hypothetical excesses of the Prosecutor lies in the complementarity regime as discussed above. The United States will retain the first right to investigate and deal with any case directed against a U.S. citizen whether this country decides to accept the ICC treaty or not, and by doing so can divest the ICC of jurisdiction.[98]

The practical considerations discussed in the following section will provide an additional major safeguard for U.S. interests.

C. *Practical Considerations: Should the United States Fear the ICC?*

The overall design of the Statute anticipates that in any particular case the ICC will operate along one of two separate tracks.[99] Cases initiated by the complaint of a State Party or by the Prosecutor will follow one track, while the other track will be reserved for cases initiated by the Security Council. The authority of the Security Council will make the Court more effective in a number of ways.

The consent of either the territorial state where relevant crimes allegedly have been committed or the state of nationality of the accused is required in all ICC cases except for those based on a Security Council referral.[100] An especially strict procedural regime, based on a U.S. proposal, ensures ICC deference to national investigations or prosecutions, but it does

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97. *See id.* art. 61.

98. *See* footnotes 84 to 90, *supra*, and the accompanying text.

99. Article 13 of the Statute provides that a case may be initiated by any of three different means, but one of them, referral of a situation to the Prosecutor by the Security Council acting under Chapter VII of the U.N. Charter, would allow the ICC to operate in an especially strong mode. *See* ROME STATUTE, *supra* note 2, art. 13. On the "two" tracks of ICC jurisdiction, see *Hearing on the United Nations International Criminal Court Before the Senate Committee on Foreign Relations*, 105th Cong. (1998) (prepared statement of Professor Michael P. Scharf), *available in* LEXIS, LEGIS Library, HEARNG File [hereinafter Scharf Statement].

100. *See* ROME STATUTE, *supra* note 2, art. 12, para. 2. This provision refers to Article 13, which reads as follows:

not apply to cases initiated by decision of the Security Council.[101] The Statute even anticipates possible funding from the United Nations, "in particular in relation to the expenses incurred due to referrals by the Security Council."[102]

The ICC itself will have no army, no police force, nor any power to impose economic sanctions on States. From the arrest of suspects to the production of evidence it will depend entirely upon the cooperation of States in order to function. States ratifying the Statute accept the obligation to "cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court."[103] Enforcement of this obligation will fall in the first instance to the Assembly of States Parties, the governing body of the ICC. The Statute does not grant this Assembly any specific powers of enforcement; it merely refers to the Assembly any State Party failing to cooperate as required by the Statute.[104] When a case has been referred to the ICC by the Security Council, the Statute provides for non-compliant States Parties to be referred to the Se-

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Article 13
Exercise of jurisdiction

The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if:

(a) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14;

(b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; or

(c) The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15.

Id. art. 13.

101. *See id.* art. 18.

102. *Id.* art. 115, para. b.

103. *Id.* art. 86.

104. Where a State Party fails to comply with a request to cooperate by the Court contrary to the provisions of this Statute, thereby preventing the Court from exercising its functions and powers under this Statute, the Court may make a finding to that effect and refer the matter to the Assembly of States Parties or, where the Security Council referred the matter to the Court, to the Security Council.

ROME STATUTE, *supra* note 2, art. 87, para. 7.

curity Council.[105] Under the U.N. Charter, the Council has the authority to impose sanctions or even to authorize the use of force if it considers this to be necessary for the maintenance of international peace and security.[106] At times, the ICC may need this muscular support.

The fact that the ICC will depend upon the support of the Security Council will influence strongly relations between the two bodies. As a permanent member of the Security Council capable of vetoing any proposed decision, the United States has little reason to fear frivolous international prosecutions. It would be both futile and irrational for the ICC to provoke an indispensable patron. The safeguards implicit in this situation ensure that the United States will be able to protect its legitimate interests without compromising the independence of the ICC.[107]

The political negotiations of the Rome Conference could go only so far towards achieving consensus on the jurisdiction of the ICC. The key obstacles to U.S. participation in the ICC have been identified, but not resolved. Only the practical experience of successful cooperation between states and the ICC can cement an international consensus in favor of strong and

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105. *See id.*

106. U.N. CHARTER, arts. 39-42.

107. Even the Washington Times, which strongly opposes the ICC, concludes in an editorial that it essentially will be symbolic due to ineffectiveness:

> The ICC now has to be ratified by 60 countries. Without the support of the United States, which has in fact pledged to work against its ratification with other governments, it is unlikely to have very much power when—or if—it does get up and running. Too bad. It is hard enough for properly empowered war crimes tribunals to do their work when there is full support for their cause. Look at the tribunal at the Hague for Bosnian war crimes. No one disputes the fact that the crimes were committed or that those who committed them should be punished. And yet, where is Radovan Karadzic? Where is Ratko Mladic? Where is Slobodan Milosevic? These men are the perpetrators of egregious war crimes—in the case of Milosevic, on-going war crimes in Kosovo. The same "international community" is unwilling to arrest them. Without that willingness and the muscle to enforce it, the International Criminal Court will be symbolic more than anything else. That is not particularly likely to serve the course of justice.

Editorial, *The World Court: Symbolism vs. Reality*, WASH. TIMES, Aug. 9, 1998, at B2.

effective ICC jurisdiction. The ICC will experience a long probationary period during the early years of its operations. During this time, it either will gain the credibility it needs to operate effectively, or it will squander that opportunity by attempting to overreach its practical limitations.

If the experience of the ICTY is any indication, the ICC will be too timid rather than too bold.[108] Witness the fact that after years of investigations into the events in the Former Yugoslavia, the ICTY has only recently indicted Slobodan Milosevic,[109] even though Judges in a separate case suggested several years ago that the Prosecution should investigate decision-making at a higher echelon than that of the Bosnian Serb leadership.[110]

Justice Louise Arbour, the Prosecutor of the ICTY and the ICTR, recently observed that there is more reason to fear that the international prosecutor will be impotent than there is to fear that she will be overreaching.[111] The ICC prosecutor, like Justice Arbour, will depend upon the United States and the

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108. *See* David L. Bosco, *Sovereign Myopia*, THE AMERICAN PROSPECT, Nov.-Dec. 1998, at 26 (criticizing the inconsistent attitudes of former U.S. Assistant Secretary of State John Bolton, and noting that "in Bolton's suspicious eyes, the court—so meek in facing down small-time dictators and thugs—assumes threatening proportions when facing the world's only superpower").

109. The text of the official statement announcing the indictment is summarized in *The Indictment of Milosevic*, GUARDIAN (London), May 28, 1999, at 4, *available in* 1999 WL 18927336.

110. "[T]he Trial Chamber, in thus determining the type of responsibility incurred by the accused, namely governmental or military-command responsibility, can but invite the Prosecutor's office to investigate decision-making responsibility at the same—or higher—echelons." Prosecutor v. Karadzic and Mladic, Review of the Indictment Pursuant to Rule 61, Case Nos. IT-95-5-R61 and IT-95-18-R61, para. 85 (T.Ch.I July 11, 1996), *summarized in* Olivia Swaak-Goldman, *International Decision*, 91 AM. J. INT'L L. 523 (1997). Since the decision related to charges already brought against Radovan Karadzic and Radko Mladic, the highest civilian and military leaders respectively, of the Bosnian Serbs, the only higher echelon that could referred to is that of Milosevic's Yugoslavia. *But see* MICHAEL P. SCHARF, BALKAN JUSTICE 154-55 (1997) (referring to this comment by Presiding Judge Jorda as "surprising" and noting that the Deputy Prosecutor of the ICTY stated that making public comments about ongoing cases is "just not appropriate").

111. *See Statement by Justice Louise Arbour on Establishment of an International Criminal Court*, M2 PRESSWIRE, December 10, 1997, *available in* LEXIS, NEWS Library, ALLNWS File. In a statement before the ICC PrepCom, Justice Arbour observed:

Security Council for essential political support and enforcement and will have no reason to pursue frivolous prosecutions against the citizens of any state.[112]

D. *Problems with the Acceptance of Jurisdiction by a Non-Party State*

Perhaps the most valid U.S. complaint about the Rome Statute is the problem that could result from the application of Article 12.[113] Under that Article, the normal precondition

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> Turning then to the powers of the Prosecutor of the permanent Court, I would like to expand on my earlier remarks that it may be unwarranted for States to fear the possible overreach, or simply the untrammelled power of the Prosecutor of the permanent Court. Despite the fact that the *ad hoc* Tribunals' powers originate in Chapter VII of the United Nations Charter, the taxing experience of my Office suggests that it is more likely that the Prosecutor of the permanent Court could be chronically enfeebled by inadequate enforcement powers combined with a persistent and widespread unwillingness of States Parties to cooperate. The existence of jurisdiction will not necessarily correspond to the reality facing the Prosecutor of the permanent Court on a day-to-day basis.

Id.

112. *See id.* Justice Arbour noted:

> In my experience, based on the work of the two Tribunals to date, I believe that the real challenge posed to a Prosecutor is to choose from many meritorious complaints the appropriate ones for international intervention, rather than to weed out weak or frivolous ones. Our experience to date suggests that we can dispose quickly of even large quantities of unsubstantiated allegations. In any event, an appropriate process of vigorous internal indictment review, such as we presently have in place at the two Tribunals, confirmation by a competent judge, and the inevitable acquittal that would result from an unfounded prosecution, should alleviate any fear that an overzealous or politically-driven Prosecutor could abuse his or her powers.

Id.

113. Article 12 reads as follows:

> Article 12
>
> Preconditions to the exercise of jurisdiction
>
> 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:

to the exercise of ICC jurisdiction is the consent of either the territorial State or the State of nationality of the accused, but if neither is available it allows a non-party State to "accept the exercise of jurisdiction by the Court with respect to the crime in question."[114] This language is ambiguous, but one consequence might be the unfair and asymmetrical result included in the hypothetical scenario outlined by Ambassador David Scheffer before the General Assembly. A non-party State should not be able to extend ICC jurisdiction to the troops of another non-party State on its territory without extending that jurisdiction to any crimes being committed by its own nationals. This potential inequity eventually will need to be addressed.[115]

Another area of concern for the United States is the regime governing amendments to the Statute. Amendments may be proposed seven years after the Statute enters into force,[116] and for adoption must be accepted by a two-thirds majority of the States Parties.[117] Any amendment must be ratified, and it will enter into force for a State Party one year after that country has ratified it.[118] Amendments enter into force for all parties only when ratified by seven-eighths of the States Parties.[119] If a State Party declines to ratify an amendment re-

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(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.

ROME STATUTE, *supra* note 2, art. 12.

114. *Id.* art. 12, para. 3.

115. It might be possible to resolve the problem by interpreting the word "crime" in Article 12, paragraph 3 to refer to any similar criminal acts committed on the territory of the State or by its nationals.

116. *See* ROME STATUTE, *supra* note 2, art. 121, para. 1.

117. The decision to adopt an amendment may be taken either at a meeting of the Assembly of States Parties or at a special Review Conference of the Parties. *Id.* art. 121, para. 3.

118. *See id.* art. 121, para. 5.

119. *See id.* art. 121, para. 4.

lating to a specific crime, the ICC is precluded from prosecuting that State's nationals or those committing crimes on its territory for that crime.[120] This privilege, the right to opt out of amendments relating to crimes, is reserved exclusively to States Parties. The United States objects to this as unfair.[121] This could be characterized as an appropriate prerogative of States Parties and as an incentive to join the Court. The U.S. government, which expects to remain a non-party for the foreseeable future, takes a different view consistent with its argument that the treaty unfairly binds non-party States.

E. *Constitutional Obstacles to U.S. Signature and Ratification*

A number of important problems will need to be addressed before the United States can consider becoming a party to the ICC Statute. One critic has formulated a generalized constitutional critique of the Statute by suggesting that the Court creates "authority outside of (and arguably superior to) the U.S. Constitution; and inhibits the full autonomy of all three branches of the U.S. government."[122] He has character-

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120. *See id.* art. 121, para. 5.

121. [U]nder the amendment procedures states parties to the treaty can avoid jurisdiction over acts committed by their nationals or on their territory for any new or amended crimes. This is protection we successfully sought. But as the jurisdiction provision is now framed, it purports to extend jurisdiction over non-party states for the same new or amended crimes.

Scheffer Statement before Senate Foreign Relations Committee, *supra* note 28.

122. As John R. Bolton argued before a Senate Subcommittee:

> [A] seeming paradox stems from the nature of the authority sought to be transferred to the ICC by the Statute of Rome. This would be a transfer that, at least according to some, simultaneously purports to (1) create authority outside of (and arguably superior to) the U.S. Constitution; and (2) inhibit the full constitutional autonomy of all three branches of the U.S. government, and, indeed, of all states party to the Statute. Advocates of the ICC do not often publicly assert that these transfers are central to their stated goals, but in fact they must be for the Court and Prosecutor to be completely effective. While the Statute of Rome appears indistinguishable from other international treaties such as those creating NATO and the WTO, it is in fact quite different. And it is precisely for these reasons that, strong or weak in its actual operations, the ICC has unacceptable consequences for the United States. It is, in fact, a stealth approach to eroding constitutionalism.

Bolton Statement, *supra* note 92.

ized this as a "stealth approach to eroding constitutionalism."[123]

The essential due process rights protected by the U.S. Constitution have been incorporated into the Statute,[124] but it does not provide for trial by jury.[125] It has been suggested that the Constitutional right of every American to a jury trial[126] should preclude U.S. ratification of the Statute.[127] In *Reid v. Covert,* the Supreme Court declared that when the United States acts against its citizens, whether at home or abroad, it must respect their rights under the Constitution.[128] But the right to a jury trial has not been interpreted to preclude the extradition of Americans to face trial in other jurisdictions.[129]

These and other potential constitutional issues are of fundamental importance for the United States and must be addressed before the United States can consider ratification of the Statute. It would be impossible, however, to imbed solutions to all these issues within the text of the Statute itself. The Statute raises constitutional concerns for many other countries as well and cannot accommodate them all. The national debate over the Statute has only just begun. If a consensus should emerge favoring eventual acceptance of the Statute, these constitutional issues might be addressed by interpreta-

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123. *Id.*

124. *See supra* notes 29 and 30 and the accompanying text.

125. The Statute provides for trial before a panel of three Judges who will decide the case. *See* ROME STATUTE, *supra* note 2, art. 74.

126. See U.S. CONST. art. III, § 2; amend. V; and amend. VI.

127. *See* Thomas Lippman, *America Avoids the Stand; Why the US Objects to a World Criminal Court*, THE WASH. POST, July 26, 1998, at C1.

128. 354 U.S. 1, 6 (1957).

129. Regardless of what constitutional protections are given to persons held for trial in the courts of the United States or of the constituent states thereof, those protections cannot be claimed by an accused whose trial and conviction have been held or are to be held under the laws of another nation, acting according to its traditional processes and within the scope of its authority and jurisdiction.

Gallina v. Fraser, 177 F. Supp. 856, 866 (D. Conn. 1959), *aff'd*, 278 F.2d 77 (2d Cir.), *cert. denied*, 364 U.S. 851 (1960). *See also* Gregory Gelfand, *International Penal Transfer Treaties: The Case for an Unrestricted Multilateral Treaty*, 64 B.U. L. Rev. 563, 614 (1984) (noting that "[T]he courts [of the United States], recognizing the limits of their competence, have held that all the Constitution guarantees is 'due process' in the extradition proceeding itself.").

tive declarations or understandings to be issued upon ratification (which, unlike reservations, are not barred by the terms of the Statute),[130] by implementing legislation containing safeguards,[131] or perhaps even by constitutional amendment. Similarly, concerns about the exposure of U.S. forces abroad could be alleviated to some extent by renegotiation of SOFAs with host States where U.S. troops are stationed abroad.[132]

IV. Conclusion

Over seventy countries have already signed the ICC Statute, including fourteen members of the NATO alliance.[133] Sometime within the next several years, when sixty States have ratified the treaty, the ICC will become a reality. The most

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130. Article 120 of the Statute bars all reservations to the Statute, but when accepting treaties the United States has successfully used other devices such as declarations of U.S. intent and interpretative understandings to clarify the scope of the obligations being accepted even in the case of constitutional issues. *See* Senate Comm. on Foreign Relations, Report on the International Covenant on Civil and Political Rights, S. Exec. Rep. No. 102-23 (2d Sess. 1992), *reprinted in* 31 I.L.M. 645, 658-60 (1992) (including the Senate's resolution of ratification of the International Covenant on Civil and Political Rights, (ICCPR) and setting out five understandings, four declarations and a proviso, in addition to five formal reservations to the ICCPR).

A declaration, understanding, or proviso would not qualify as a "reservation" unless it "purports to exclude or modify the legal effect of certain provisions of the treaty in their application" to the State formulating them. Vienna Convention, *supra* note 49, art. 1, para. d. There is room for some flexibility in drawing the line between reservations and interpretative statements.

131. The Statute generally provides for States Parties to cooperate with the ICC consistent with their national laws and procedures. *See, e.g.*, Rome Statute, *supra* note 2, art. 89, para. 1, and art. 91, para. 2(c) (directing the ICC to meet the requirements of domestic law in formulating its requests for cooperation). Article 93, paragraph 3 goes considerably further, providing that a State may refuse to assist the ICC whenever doing so would conflict with "an existing fundamental legal principle of general application." *Id.* art. 93, para. 3.

132. For a brief discussion of SOFAs, see *supra* note 66.

133. As of January 30, 1999, the United States and Turkey were the only members of the NATO alliance not to have signed the ICC Statute. Belgium, Canada, the Czech Republic, Denmark, France, Germany, Greece, Hungary, Iceland, Italy, Luxembourg, the Netherlands, Norway, Poland, Portugal, Spain and the United Kingdom were all signatories. For a list of the NATO Member Countries, see <http://www.nato.int/family/countries.htm> (visited July 1, 1999). For a list of ratifications, see <http://www.un.org/law/icc/statute/status.htm> (visited July 1, 1999).

important question for U.S. policy should be how to make the best of this situation. Some policy-makers have suggested that the United States should embark on an active crusade against the ICC.[134] This purely reactive policy, based on fear of the ICC, might appeal to certain interests, but it will not serve the broader national interest. Instead, it will raise unnecessarily the stakes for the United States in a renewed confrontation with its closest allies.

The creation of the ICC, even with its limited complementary jurisdiction, does involve some risk of exposure for the United States and its nationals, but that risk is not new or unique. The case against General Pinochet demonstrates that U.S. citizens are already theoretically subject to trial abroad for crimes against international law. U.S. opposition to the ICC will not change this reality.

The jurisdiction of the ICC, as presently conceived, will not infringe upon the rights of the United States even if it does not ratify the Statute. A State has no right, under international law, to shield its nationals from criminal responsibility for serious international crimes. It is both irresponsible and counterproductive to endorse misleading legal arguments to the contrary.

The United States does have every right to express its objections to and concerns about the Statute and, like any State, it need not sign or ratify a treaty it finds unacceptable. It probably will be years before the Statute enters into effect, so the United States has some time to evaluate the practical and constitutional issues it raises. Critics stress the risks involved in exposure to the jurisdiction of the ICC. While there are risks involved in any new development, the possible benefits to be gained from working with the ICC also must be factored into the equation.

The ICC may help to deter some of those who might otherwise commit genocide, crimes against humanity or other crimes within its jurisdiction. If so, this will reduce the need to send U.S. troops around the world in the aftermath of such atrocities. The ICC also could eliminate the need to create

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134. Senator Helms has stated, "Rejecting this treaty is not enough . . . . The United States must . . . be aggressively opposed to this court." Toni Marshall, *Helms Vows Retaliation for New World Court*, WASH. TIMES, July 24, 1998, at A1.

expensive new ad hoc international tribunals on the model of those created to deal with crises in the Former Yugoslavia and Rwanda. It will be available for use at any time based on a referral by the Security Council.[135]

Some opponents of the ICC have suggested that 120 States voted for the Statute as an indulgence in "anti-American" sentiment.[136] This is a remarkable conceit. In reality, the broad international support for the Statute is motivated by a shared desire to take a dramatic, if modest, step forward in promoting justice and accountability under international law.

The U.S. government has decided that it cannot support the Rome Statute at this time. This is a regrettable development because U.S. support would strengthen the ICC immeasurably. Attitudes could change as final aspects of the ICC, such as the rules of procedure and the elements of crimes, are negotiated. It may be that, for constitutional or other reasons, the United States will never sign and ratify the Statute. Even so, it should avoid taking an entirely negative attitude towards the ICC. Positive engagement with the ICC can serve the U.S. national interest by improving the quality and effectiveness of the emerging institution, by cementing a positive U.S. relationship with it, and by demonstrating U.S. leadership on an issue that may come to symbolize the transition to the 21st Century.

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135. Burdensome requirements of complementary jurisdiction and state consent were incorporated into the Statute in a vain attempt to render it acceptable to the United States. Because of these requirements, the ICC's primary utility is likely to be as a standing body available to act on Security Council referrals.

136. According to one report, "the Rome delegates voted down American compromises and amendments amid scenes of anti-American cheering and jeering reminiscent, according to witnesses, of the worst U.N. excesses of the 1970s." David Frum, *The International Criminal Court Must Die*, THE WEEKLY STANDARD, Aug. 10, 1998, at 27.