Cleveland State Law Review

Volume 51 | Issue 2 Note

2004

# The Modern Version of the Shot Heard 'Round the World: America's Flawed Revolution against the International Criminal Court and the Rest of the World

Sasha Markovic

# THE MODERN VERSION OF THE SHOT HEARD 'ROUND THE WORLD: AMERICA'S FLAWED REVOLUTION AGAINST THE INTERNATIONAL CRIMINAL COURT AND THE REST OF THE WORLD

## I. INTRODUCTION

Over the last 150 years, war and political zeal have caused the death of millions of innocent civilians around the world. The civilized world agreed that those deaths required justice and accountability. Unfortunately, achieving justice and accountability has always proved more difficult than calling for it. Nonetheless, the United States has always been the leading advocate for accountability and justice for crimes committed against civilian populations. However, at a time when the rest of the world finally stepped forward and declared that crimes against civilian populations will not be tolerated, the United States has decided to take a giant step backward.

At a conference in Rome, nations from around the globe created the International Criminal Court to hold accountable and punish those responsible for genocide, war crimes and crimes against humanity. When the moment of truth arrived for the United States, the United States opposed the formation of the International Criminal Court. Moreover, in response to the existence of the Court, the United States took measures to insulate itself from the jurisdiction of the Court by enacting the American Servicemembers' Protection Act. The United States justified its opposition and actions against the Court by stating that the Court was a fatally flawed system. The United States alleged the jurisdiction of the Court was too broad, that there were no checks on the Court to prevent politically motivated prosecutions and that the Court did not have the obligation to respect the Constitutional rights of U.S. citizens.

An examination of the American Servicemembers' Protection Act reveals that it is ineffective in protecting U.S. citizens from the jurisdiction of the Court. Furthermore, the Rome Statute's articles, which established the International Criminal Court, do not support the legal arguments presented by the United States against the International Criminal Court. In sum, the United States does not have a valid basis for its opposition to the International Criminal Court.

## II. HISTORICAL BACKGROUND OF THE INTERNATIONAL CRIMINAL COURT

### *A. Warfare – Impetus for the Creation of an International Criminal Court*

The creation of a court to deal with war crimes or crimes against humanity is not a novel idea. Evidence exists that *ad hoc* tribunals tried enemy combatants for transgressions committed during the course of war as early as the fifth century B.C.[1] Calls for international criminal courts have generally been the loudest and the most desperate in the aftermath of wars or conflicts that resulted in atrocities perpetrated upon civilian populations.

The drafting of the Rome Statute, its ratification by eighty-seven countries, and the subsequent creation of a permanent International Criminal Court can be seen as a delayed response to the calls for justice following the wars waged in Europe in the nineteenth and twentieth century.[2] The first proposal for a permanent international criminal court occurred in January of 1872 in response to atrocities committed by both sides of the Franco-Prussian war. Gustav Moynier, a founding member of the International Committee of the Red Cross, proposed the establishment of a permanent court to adjudicate violations of the 1864 Geneva Convention.[3] A second proposal to establish an international criminal tribunal came on the heels of the First World War.[4] In the aftermath of the First World War, a commission of inquiry for the 1919 Versailles Peace Conference recommended that the Allies establish an *ad hoc* criminal tribunal with limited jurisdiction over war crimes and crimes against humanity.[5] In 1937, a third bid to establish the international criminal court was made to the League of Nations by France in response to the 1934 assassination of France's Prime Minister.[6] France's proposal failed to establish a permanent court with jurisdiction over attacks upon government officials and civilians.[7] The last

---

[1] *See generally* Christopher Keith Hall, *The Origins of the ICC Concept (1872-1945),* THE INTERNATIONAL CRIMINAL COURT MONITOR 6 (November 1997), *at* http://icc.igc.org/publications/monitor/06/monitor06.199711.pdf (last visited Jan. 6, 2003) (on file with author). *Ad hoc* tribunals were established by the victor of a battle or war and dealt with breaches of acceptable behavior on the battlefield and acceptable treatment of military and civilian prisoners of war.

[2] *Id.*

[3] *Id.* Moynier's proposal was to establish a court by treaty with automatic court activation upon the commencement of hostilities between combatant states. *Id.* The proposal was overwhelmingly rejected by international lawyers of Moynier's era. *Id.*

[4] *Id.* World War I hostilities ceased on Nov. 11, 1918 and the Peace Treaty of Versailles came into force June 28, 1919. The Peace Treaty of Versailles, June 28, 1919, art. 440.

[5] *Id.* More specifically, the tribunal was proposed in order to prosecute William II of Hohenzollern, the former German Emperor, for the "supreme offence against international morality and the sanctity of treaties." The Peace Treaty of Versailles, June 28, 1919, art. 227. The Allies never adopted the Commission's recommendations and consequently, neither an *ad hoc* tribunal nor Allied military tribunal was created. *Id.*

[6] *See generally* Hall, *supra* note 1. France convinced the League of Nations Assembly to adopt a treaty creating a permanent court but ultimately, the treaty was ratified by only one country. *Id.*

[7] *Id.*

significant historical appeal for a permanent international criminal court came after the close of the Second World War.[8] Once again, the proposal was in response to atrocities committed upon various civilian populations by German officials and the German military over the course of the Second World War. However, the victorious Allies quickly chose to establish and convene *ad hoc* tribunals in Nuremberg and Tokyo rather than delay the trials until a permanent criminal court could be established.[9]

The proposals for a permanent criminal court having jurisdiction over war crimes and crimes against humanity did not end with the rendering of the judgments at Nuremberg. However, the rare opportunity for a unified coalition to establish an international court in response to unprecedented crimes against humanity would not present itself again.[10] Consequently, proposals made after the close of the Nuremberg Trial were entirely rejected or supplanted by temporary *ad hoc* tribunals with limited jurisdiction over specified conflicts until the adoption and ratification of the Rome Statute.[11]

### *B. Stepping-Stones Toward Establishing a Permanent International Criminal Court*

In hindsight, the Allied forces probably made the correct decision by quickly establishing the *ad hoc* Nuremberg and Tokyo tribunals. More than fifty-five years of defining, drafting, preparatory committees, and atrocities against civilian populations would pass before the creation of a permanent international criminal court.[12] However, under the direction of the United Nations, the building blocks necessary to create an effective permanent criminal court were slowly being set in place.

Approximately two years after the Nuremberg Trial, on December 9, 1948, the General Assembly of the United Nations adopted the *Convention on the Prevention and Punishment of the Crime of Genocide.*[13] The Convention defined the crime of genocide and called for the prosecution of the accused by "a competent tribunal of the State in the territory of which the act was committed, or by such *international penal tribunal* as may have jurisdiction."[14] Even with the adoption of the convention

---

[8] *Id.*

[9] *Id.*

[10] *See generally* Michael P. Scharf, *The Politics Behind U.S. Opposition to the International Criminal Court,* The Brown Journal of World Affairs (Winter/Spring 1999), *available at* http://www.brown.edu/Students/Journal_of_World_Affairs/scharf61.pdf (last visited Jan 12, 2003) *archived at http://www.watsoninstitute.org/bjwa/archive.cfm?targetpage =6.1* (on file with author).

[11] *See generally* Hall, *supra* note 1. Examples of the *ad hoc* tribunal solution are the International Criminal Tribunals created in response to war crimes committed in Rwanda and the former Yugoslavia. *See generally*, Punishing War Crimes: International Criminal Tribunals, *at* http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/57JQB5/FILE/Punishing_ War_Crimes.pdf. (last visited Jan. 30, 2003).

[12] *Id.*

[13] *See generally* A History of the ICC, *available at* http://iccnow.org/documents/ iccbasics.html (last visited Jan. 12, 2003) (on file with author).

on genocide, the movement toward the International Criminal Court was stifled by the political climate of the Cold War and was not to be revisited until 1989.[15]

After 1989, a succession of events, in a relatively short span of time, appeared to drive the creation of the International Criminal Court. In June of 1989 the United Nations General Assembly asked the International Law Commission ("ILC") to prepare a draft statute for the International Criminal Court.[16] As the ILC worked on the draft statute, war in the former Yugoslavia broke out bringing renewed calls for the creation of a permanent criminal court.[17] The Yugoslav war produced atrocities in Bosnia and Croatia that were compared to the atrocities committed by the German military during the Second World War.[18] In May of 1993, in response to the atrocities in the former Yugoslavia, the United Nations adopted a Security Council resolution establishing a temporary *ad hoc* tribunal to deal specifically with the prosecution of those responsible for atrocities in the former Yugoslavia.[19] Then in 1994, two events occurred that seemed to accelerate the creation of the International Criminal Court. First, on the heels of the formation of the Yugoslav tribunal, large-scale massacres during the Rwandan civil war culminated in the creation of a second temporary *ad hoc* tribunal with specific jurisdiction over the atrocities committed in Rwanda.[20] The second event in 1994 was the ILC's submission to the United Nations General Assembly of its final statutory draft for establishment of the International Criminal Court and its recommendation that a conference be convened to draft a treaty enacting the statute.[21] The General Assembly appointed a committee to review the ILC's final draft statute and in December of 1995 it established a three

[14] *See* Convention on the Prevention and Punishment of the Crime of Genocide, *opened for signature* Dec. 9, 1948, art. 6, 78 U.N.T.S. 277, *available at* http://www1.umn.edu/humanrts/instree/x1cppcg.htm (last visited Jan. 12, 2003) (emphasis added). The United States ratified the Convention and accepted its articles with two reservations; one significant reservation was that United States' consent was necessary for the International Court of Justice to exert jurisdiction over U.S. citizens. Similar to the convention on genocide, the Rome Statute allows for prosecution by national courts or by the International Criminal Court. *See* Rome Statute, *infra* note 26, at art. 17(1)(a).

[15] *See generally* Benjamin B. Ferencz, *Getting Aggressive About Preventing Aggression,* The Brown Journal of World Affairs (Spring 1999), *available at* http://www.iccnow.org/html/ferencz199907.html (last visited Jan. 12, 2003) (on file with author).

[16] *See generally* A History of the ICC*, supra* note 13. Prior to 1989, the waging of the Cold War put the International Criminal Court on hold. Conversely, the end of the Cold War fosters a climate more amenable to the establishment of an International Criminal Court. During the Cold War the major powers were unwilling to create a court with the authority to investigate and punish aggressive national behavior, especially since it was likely that one of the major powers was likely to be the aggressor. *See* Scharf, *supra* note 10 at 97.

[17] *Id.*

[18] *See generally* Ferencz, *supra* note 15.

[19] *See generally* S.C. Res. 827, U.N. SCOR, 3217th Sess., U.N. Doc. S/RES/827 (1993), *available at* http://www.un.org/icty/basic/statut/S-RES-827_93.htm (last visited Dec. 20, 2002). (Editors note: this site is restricted.)

[20] *See generally* A History of the ICC*, supra* note 13.

[21] *Id.*

year Preparatory Committee to finalize the statute to be presented to a conference of plenipotentiaries.[22] By June of 1998, the Preparatory Committee's work was completed and presented to a United Nations Diplomatic Conference held in Rome, Italy.[23] In Rome, the participating members amended the ILC's draft to address deficiencies and the concerns of member states, including those of the United States. At the close of the conference, the 160 members overwhelmingly voted to adopt the final draft and the statute became known as the Rome Statute.[24] Only, the United States, Israel, China, Libya, Iraq, Qatar and Yemen actually voted *against* the Statute.[25]

Although the United Nations Conference adopted the Rome Statute in July of 1998, the treaty entered force and established a permanent International Criminal Court on July 1, 2002, after the requisite sixty countries acceded to or ratified the Statute.[26]

## III. THE UNITED STATES POSITION AGAINST THE INTERNATIONAL CRIMINAL COURT

During the Rome Conference of Plenipotentiaries, the United States objected to several provisions of the Rome Statute and attempted to address those concerns at the conference.[27] Having been unable to garner support for its proposed changes to the Rome Statute, the United States voted against the Rome Statute and did not sign it at the close of the Rome Conference.[28] However, the U.S. delegation continued to participate in U.N. Preparatory Commission meetings in an attempt to rectify the perceived flaws in the Rome Statute.[29] Ultimately, despite reservations, President Clinton hoped that U.S. concerns could be addressed in future preparatory meetings and signed the Rome Statute on the final day that it was open for signatures.[30] However, when further U.S. efforts to modify and restrict the Rome Statute met with strong opposition and ultimate failure, the United States began to take action against

---

[22] *Id.* Plenipotentiary is a diplomatic agent with power to negotiate on behalf of their country. *See* www.hyperdictionary.com/dictionary/plenipotentiary.

[23] *Id.*

[24] *Id.* 120 Countries voted to adopt the Rome Statute at the conference in Rome.

[25] *See* Scharf, *supra* note 10, at 101. Eventually, 139 Countries signed the Rome Statute prior to the closing date on Dec. 31, 2000, including the United States. *See infra* note 26.

[26] *See generally* Rome Statute of the International Criminal Court, United Nations Diplomatic Conference of Plenipotentaries on the Establishment of the International Criminal Court, 10th Session, U.N. Doc. A/Conf. 183/9 (1998) *available at* http://www.un.org/icc. [hereinafter Rome Statute]. As of December 18, 2002, eighty-seven countries ratified the Rome Statute and became member states bound by its Articles and the International Criminal Court's jurisdiction. *Id.*

[27] *See generally* Under Secretary for Political Affairs Marc Grossman, Remarks to the Center for Strategic and International Studies (May 6, 2002), *available at* http://state.gov/p/9949.htm (last visited Jan. 12, 2003) (on file with author).

[28] *Id.*

[29] *Id.*

[30] *See generally U.S. Signs ICC on Final Day for Signing*, INT'L ENFORCEMENT LAW REPORTER, Feb. 2001 (on file with author).

the International Criminal Court ("ICC").[31] United States hostility toward the ICC became official in a May 6, 2002, letter to the Secretary-General of the United Nations that declared the United States did not intend to become a party to the Rome Statute despite its signature of the Statute.[32]

*A. Ineffective U.S. Measures Taken Against the International Criminal Court*

1. American Servicemembers' Protection Act: Patriotic Title, Minimal Legislative Firepower

The first attack on the ICC came in June of 2000 when U.S. Senators decided to take a proactive approach to the inevitable establishment of the ICC. [33] Legislation was introduced and eventually enacted prohibiting extradition, funding, and cooperation with the ICC, as well as restricting U.S. participation in U.N. peacekeeping operations, prohibiting military assistance to ICC member States and allowing the President to use "all means necessary and appropriate" to free U.S. personnel held by the ICC.[34] The legislation came to be known as the American Servicemembers' Protection Act ("Servicemembers' Act") and was enacted to counter the Rome Statute and its potential ability to exert jurisdiction over American military personnel and senior U.S. officials.[35] While the title is very patriotic, the numerous exceptions and waivers contained in the Act remove its potential to achieve its stated goal of "protecting" U.S. military personnel from the ICC. The number and scope of the waivers contained within the Servicemembers' Act have fueled speculation that the Act was specifically enacted to intimidate countries that have ratified or are contemplating ratification of the Rome Statute.[36]

---

[31]President Clinton's hope that the Rome Statute would be modified to the satisfaction of the United States never materialized. The election of George W. Bush as President of the United States seemed to hasten and intensify U.S. opposition to the ICC.

[32] *See* Letter from John R. Bolton, Under Secretary of State for Arms Control and International Security, Washington, to Kofi Annan, Secretary General, United Nations (May 6, 2002), *at* http://www.newsmax.com/archives/articles/2002/5/6/114156.shtml (last visited Jan 12, 2003) (on file with author).

[33]See Colum Lynch, *GOP Bill Would Bar U.S. Cooperation in War Crimes Tribunal*, Washington Post, June 14, 2000, at A14.

[34]*See* American Servicemembers' Protection Act, 22 U.S.C. §§ 7422-7433 (2002). The Act allows for waivers to almost every prohibition contained in the Act; allowing for appearances at the ICC to challenge jurisdiction over cases or investigations before the ICC. *Id.* The Act even allows the U.S. to assist in international efforts to apprehend Saddam Hussein, Slobodan Milosevic, Osama bin Laden, members of Al Qaeda and Islamic Jihad, *and other foreign nationals "accused of genocide, war crimes, crimes against humanity*." 22 U.S.C. § 7433 (2002) (emphasis added).

[35]*Id.* at § 7421 et seq.

[36] *See generally U.S.: "Hague Invasion Act" Becomes Law, White House "Stops at Nothing" in Campaign Against War Crimes Court*, *at* http://www.hrw.org/press/2002/08/aspa080302.htm (last visited Jan. 14, 2002) (on file with author).

*a. Ineffective Prohibition on Extradition and Consent to Extradition*

A provision found within the Servicemembers' Act is the prohibition against extradition or transfer of United States citizens to the ICC.[37] The extradition prohibition provision states the United States may neither extradite nor give its consent to a third country to extradite U.S. citizens to a country that is a member of the Rome Statute.[38] However, the provision contains significant exceptions to the prohibition on extradition. The Servicemembers' Act allows for extradition to a Rome Statute member State if assurances are given that there will be no further extradition to the ICC.[39] Essentially, the United States will allow extradition of U.S. citizens to an ICC State having proper jurisdiction over a crime, as long as the State assures the United States that the State will prosecute the case in its national courts and not through the ICC. A comparison of the language contained in the Servicemembers' Act with the Rome Statute reveals the Servicemembers' Act does not grant the United States any more authority than it already has under the Rome Statute. For example, the Rome Statute states the only avenue available for the ICC to gain possession of a suspect located in a non-member country is to "request" cooperation for the arrest and surrender of the suspect.[40] Since the ICC is limited to "requesting" the surrender of a suspect in the custody of non-member States, the language in the Rome Statute establishes that the United States, as a non-member, is under no obligation to surrender or extradite U.S. citizens in U.S. custody. Secondly, the Rome Statute provides for, and encourages, national courts with jurisdiction over the committed crime to prosecute the crimes specified by the Statute.[41] By having custody of its own citizen, the articles of the Rome Statute concede the United States would have jurisdiction over the suspect and could prosecute the case in U.S. courts. Arguably, the extradition prohibition provision of the Servicemembers' Act does nothing to limit the actual jurisdiction of the ICC; it merely restates the rights of the United States contained within the Rome Statute. Consequently, the prohibition against the U.S. extradition of U.S. citizens to the ICC can be seen as completely unnecessary and redundant to the articles of the Rome Statutes.

---

[37] *See* 22 U.S.C. § 7402.

[38] *Id.* at § 7402(a), (b).

[39] *Id.*

[40] *Compare* 22 U.S.C. § 7423(d) *with* Rome Statute, *supra* note 26, at art. 89(1). Article 89 clearly states the court may "request" the cooperation of any State where the person may be found in order to obtain the arrest and surrender of the person. Although the Servicemembers' Act expressly prohibits cooperation with the ICC under § 7423(d), it also provides for several waivers to the prohibitions against cooperation. For example, the United States may cooperate with the ICC if: 1) there is reason to believe the suspect actually committed a crime falling under ICC jurisdiction; 2) no U.S. citizen will be investigated or prosecuted as a result of the cooperation; or 3) cooperation with the ICC is in the national interest of the United States. 22 U.S.C. § 7422(c)(2).

[41] *See* Rome Statute, *supra* note 26, at art. 17(1)(a), (b), (c). Article 17 allows any country, including non-member States with jurisdiction, to prosecute the case. The United States has the option to exert jurisdiction and investigate or prosecute if it desired.

The Servicemembers' Act also states that consent will not be given for a third country to extradite a U.S. citizen to the ICC.[42] The prohibition against consent to extradition by a third country is also ineffective in deterring ICC jurisdiction. In the situation where an ICC member State has custody of a U.S. citizen and refers a case to the ICC, the lack of U.S. consent for extradition could not actually stop the extradition from taking place. Similarly, where the ICC has physical custody of a U.S. citizen, the Servicemembers' Act only reiterates the rights of the United States under the Rome Statute. For instance, the Servicemembers' Act authorizes the United States to appear before the ICC and use the articles of the Rome Statute to challenge the courts jurisdiction and remove the case to U.S. courts.[43] Once again, this option is already available to the United States under the Rome Statute regardless of the fact the United States is not a member to the Statute. Yet again, nothing in the Servicemembers' Act significantly differs from the Rome Statute or actually affects ICC jurisdiction once the court obtains custody of a U.S. citizen.

Consequently, the Servicemembers' prohibition on extradition and consent to extradition can be characterized as nothing more than a restatement of the rights available to the United States under the Rome Statute. While it is a forgone conclusion the United States will not extradite U.S. citizens to countries within ICC jurisdiction, the prohibition on granting extradition consent to a third country is likely to have little affect once that country decides to extradite U.S. citizens to the ICC. Therefore this portion of the Servicemembers' Act is wholly unnecessary as well as ineffective in protecting U.S. citizens from extradition to the ICC.

### *b. Ineffective Restrictions on Participation in United Nations Peacekeeping Operations*

The Servicemembers' Act also restricts United States military personnel from participation in any peacekeeping operations authorized by the United Nations Security Council, under Chapter VII of the U.N. Charter.[44] Although the language indicates the United States will not participate in U.N. peacekeeping operations unless absolute immunity is granted, in reality the waivers to the conditions contained in the provision make the prohibition ineffective.[45]

Comparable to the Servicemembers' Act concerning extradition, the first condition allowing for peacekeeping participation is nothing more than a reiteration of an article found in the Rome Statute. Similar to the Rome Statute, this condition states the United States will not participate in United Nations peacekeeping operations unless U.S. military personnel are *permanently* exempted from ICC investigation and prosecution through a Security Council resolution.[46] While a

---

[42] *See* 22 U.S.C. § 7402(b).

[43] *Compare* 22 U.S.C. § 7427(c)(3) *with* Rome Statute, *supra* note 26, at art. 18, 19. Section 7427(c)(3) permits the United States to challenge ICC jurisdiction under Articles 18 and 19 of the Rome Statute.

[44] *See* 22 U.S.C. § 7424(b).

[45] *Id.*

[46] *Compare* Rome Statute, *supra* note 26, at art. 16 *with* 22 U.S.C. § 7424(b). ICC jurisdiction over Security Council approved operations can be deferred by a Security Council resolution.

permanent exemption would be very effective in protecting U.S. military personnel from ICC prosecution, the Rome Statute does not recognize a permanent Security Council deferral. Instead, the Rome Statute provides for a twelve-month Security Council deferral that can be renewed by the Security Council, if the Council sees fit.[47]

A permanent Security Council exemption would be effective in protecting U.S. troops from ICC prosecutions if the U.S. made it an absolute prerequisite to participation of U.S. military personnel in U.N. peacekeeping operations. Unfortunately, a waiver to the permanent exemption exists which permits the President to commit U.S. troops without obtaining Security Council deferral if the "national interest" of the United States justifies its participation in U.N. peacekeeping operations.[48] The presence of the waiver actually exposes the weakness of the restriction against peacekeeping operations and the lack of valid concern over potential ICC jurisdiction over U.S. troops. The weakness of the restriction on peacekeeping is evidenced by the absence of a definition of "national interest" in the Servicemembers' Act.[49] According to the language of the Servicemembers' Act, all that is necessary to invoke the "national interest" waiver is a Presidential certification to a Congressional committee stating that U.S. peacekeeping participation is in the nation's interest.[50] Furthermore, the Servicemembers' Act does not state the President must get Congressional approval over his decision that U.S. peacekeeping participation is in the nation's interest.[51] Together, the lack of definition and the lack of required Congressional approval suggest the President has wide discretion to determine what constitutes "national interest." Consequently, the President could decide to commit U.S. personnel upon his subjective opinion of "national interest," thereby expanding the opportunities for U.S. participation in peacekeeping operations despite the absence of permanent immunity as called for in the Servicemembers' Act.

In theory, it can be argued the U. S. will pursue the Security Council deferments specified in the Rome Statute prior to U.S. participation in peacekeeping or enforcement action. However, a Security Council deferral may be difficult to obtain. Under United Nations guidelines, all that is necessary to defeat a deferral resolution by the Security Council is one veto by a permanent member of the Security Council.[52] Keeping in mind the United Nations and the Security Council are

---

[47] *See* Rome Statute, *supra* note 26, at art. 16. The Rome Statute recognizes a twelve-month deferral when issued by the United Nations Security Council that can be renewed by the Security Council.

[48] *See* 22 U.S.C. § 7424(c)(3).

[49] *Compare* Rome Statute, *supra* note 26, at art. 17 *with* 22 U.S.C. § 7424(c)(3). The American Servicemembers' Protection Act does not undertake to define "national interest" in order to clarify its application. Conversely, the Rome Statute does define "unwillingness" and "inability" thereby, giving some basis for challenges to the jurisdiction of the court for both a State and the ICC Prosecutor.

[50] *See* 22 U.S.C. § 7424(b), (c)(3).

[51] *Id.*

[52] *See* U.N. Charter art. 27, ¶ 3, *available at* http://www.un.org/aboutun/charter/ (last visited Jan 14, 2003) ("[d]ecisions of the Security Council on all other matters shall be made by an affirmative vote of nine members *including the concurring votes of the permanent*

basically political bodies, a veto based on political pressure or tactics would certainly not be surprising. For example, while France and Great Britain are U.S. allies, they are also members of the Rome Statute and the European Union. Consequently, France and Britain are susceptible to European Union pressure not to undermine the ICC by voting for U.S. immunity through a Security Council resolution.[53] Moreover, Russia and China, the remaining permanent members of the Security Council and frequent political rivals of the United States, may also vote against a resolution granting U.S. immunity. A single veto would defeat the deferral resolution and force the United States to choose between non-participation, resulting in minimized influence over global conflicts, or participating in peacekeeping operations despite exposing U.S. personnel to ICC jurisdiction.

The language of the Servicemembers' Act is intended to suggest the United States will not participate in United Nation peacekeeping operations without *permanent* immunity for its military personnel. However, the potential hurdles facing a Security Council deferral, the Rome Statute's *twelve-month* limitation on Security Council deferrals and the expansive Presidential power to invoke the "national interest" waiver significantly weaken the impact and protective potential of the prohibition against participation in U.N. peacekeeping operations.

*c. Ineffective Prohibition on Military Assistance to Rome Statute Member States*

The Servicemembers' Act also purports to prohibit United States military assistance to those countries that are parties to the Rome Statute.[54] The very first provision of this section ominously states "no United States military assistance may be provided to the government of a country that is a party to the International Criminal Court."[55] At first glance, this language would seem to suggest an absolute bar to U.S. military assistance to Rome Statue countries. But once again, significant waivers contained in this section of the Servicemembers' Act manage to eviscerate the potential effectiveness of the Act to protect U.S. military personnel from ICC jurisdiction.

---

*members"*) (emphasis added). If a permanent member casts a negative vote, the draft resolution being voted on does not pass. *Id.* This is known as the "great Power of unanimity", often referred to as "veto" power. The five permanent members of the Security Council are China, France, the Russian Federation, United Kingdom of Great Britain and Northern Ireland, and United States of America. *Id.* at art 23, ¶ 1.

[53]See generally Mathew Lee, *US Rebukes Europe for Warning EU Aspirants Not to Sign ICC Immunity Deals*, Agence France Presse, August 13, 2002, General News (on file with author); *see also EU Council Approves Common Position Rejecting U.S. Bi-lateral Agreements: Fifteen Member States Articulate Political Benchmarks Regarding Non-Surrender to ICC*, *at* http://www.iccnow.org/pressroom/ciccmediastatements.html (last visited Jan 14, 2003) (on file with author). As is evident by the headlines, the present prevailing European attitude toward U.S. impunity in regard to the ICC is not favorable. The probability of obtaining a Security Council resolution approving U.S. immunity from ICC investigation and prosecution may be difficult to pass due to the occurrence of a permanent member veto. *See* U.N. Charter, *supra* note 52.

[54]*See* 22 U.S.C. § 7426.

[55]*Id.*

The most significant waiver is found in section 7426(d) of the Servicemembers' Act, which covers all the "exemptions" to the prohibition of military aid.[56] Simply stated, the countries that will continue to receive U.S. military assistance whether or not they are members of the ICC are: 1) NATO members, 2) major non-NATO allies ("including Australia, Egypt, Israel, Japan, Jordan, Argentina, the Republic of Korea, and New Zealand") and 3) Taiwan.[57] The NATO exemption itself is a significant reduction in protection for U.S. military personnel since sixteen of the eighteen NATO allies are parties to the ICC.[58] Of the sixteen NATO allies, fifteen are located in Europe and surround the seat of the ICC, the Netherlands.[59] In and of itself the NATO exemption manages to undermine the effectiveness of the military aid prohibition. However, by combining the "major non-NATO" and NATO exemptions, the total number of ICC countries exempted is twenty and allows for nearly global U.S. military assistance.[60] Furthermore, while the "non-NATO" clause lists only eight countries as "major non-NATO" allies, the language in the text suggests the list could be expanded, potentially increasing the number of exemptions for ICC member States.[61] In essence, the NATO and non-NATO combination truly renders the military aid prohibition virtually meaningless.

While the NATO and non-NATO exemption encompasses the countries that are universally important to the United States, the Servicemembers' Act provides yet another waiver that exempts countries from the military aid prohibition as they become important to the United States. The "national interest" waiver found in this section of the Servicemembers' Act is nearly identical to the "national interest" waiver found in the prohibition on participation in U.N. peacekeeping operations.[62] As before, the language of the "national interest" waiver grants the President broad powers to determine what constitutes "national interest" and allows him to render U.S. military assistance to countries despite their participation in the ICC.

In effect, the prohibition on military aid will only affect countries whose present significance to the United States is minimal. The NATO and "major non-NATO"

---

[56]The exemptions to the prohibition against military assistance should not be confused with the "national interest" waiver of the prohibition on military assistance contained in this section of the Servicemembers' Act. *Id.*

[57]*See* 22 U.S.C. § 7426(d).

[58] *See generally* Rome Statute, *supra* note 26, *available at* http://untreaty.un.org/ENGLISH/ bible/englishinternetbible/partI/chapterXVIII/treaty10.asp (last visited Jan 16, 2003) (website displays signatories and ratifications of the Rome Statute). The NATO members that are parties to the Rome Statute are: Belgium, Canada, Denmark, France, Germany, Greece, Hungary, Iceland, Italy, Luxembourg, Netherlands, Norway, Poland, Portugal, Spain, and Great Britain. *Id.*

[59]*Id.* The European NATO members that are party to the Rome Statute are: Belgium, Denmark, France, Germany, Greece, Hungary, Iceland, Italy, Luxembourg, Netherlands, Norway, Poland, Portugal, Spain, and Great Britain. *Id.*

[60]*See* 22 U.S.C. § 7426(d)(2). Argentina, Australia, Jordan, and New Zealand are non-NATO allies that are also ICC member States. *Id.*

[61]*Id.* The text uses the word "including" when listing the eight "major non-NATO" allies, inferring the list is not limited to those countries enumerated in the text.

[62]*Compare* 22 U.S.C. § 7426(b) *with* 22 U.S.C. § 7424(c)(3).

exemptions provide military assistance to countries that are politically and militarily important to the United States while the "national interest" waiver insures U.S. military assistance to countries as they *become* important to the United States. Arguably, the "national interest" waiver completely destroys what little effectiveness the military aid prohibition had following the NATO and non-NATO exemptions. The breadth of the waiver and exemptions indicate that in effect, no prohibition on military assistance actually exists, thus making the prohibition meaningless and further diminishing the protective potential of the Servicemembers' Act. Therefore, the prohibition on military aid can be properly categorized as a tool of "persuasion" rather than an effective ban on military aid.[63]

*d. Improbable Use of Military Force to Free Detained or Imprisoned U.S. Personnel*

The Servicemembers' Act also contains a section titled the "Authority to Free Members of the Armed Forces of the United States and Certain Other Persons Detained or Imprisoned by or On Behalf of the International Criminal Court" ("Authority to Free").[64] This section contains a provision conferring authority to the President of the United States to use "all means necessary and appropriate" to free U.S. personnel being "detained or imprisoned by, on behalf of, or at the request of the International Criminal Court."[65] This section of the Servicemembers' Act has been read as authorizing the President of the United States to use military force to free ICC detained personnel.[66] Furthermore, nothing in the Servicemembers' Act even remotely suggests the President would require the approval or consent of any other political body prior to using military force to free detainees.[67] Although this provision seems to grant the President the authority to use force against the ICC, the actual use of force to free ICC detainees is highly improbable considering the legal

---

[63] *See generally* Lee, *supra* note 53 (quoting United States Secretary of State Colin Powell who admitted the U.S. had used the threat of withdrawing military aid as a means to persuade countries to sign non-extradition treaties with the U.S. while conversely admitting the U.S. was not "bludgeoning or threatening any of our friends"). *See also* Press Release, Asian Forum for Human Rights and Development, *Reject Impunity for U.S. War Criminals* (Sept. 5, 2002), *at* http://www.iccnow.org/html/pressforumasia20020905.pdf (last visited Jan. 19, 2003) (stating the U.S. has threatened its Asian allies with "the withdrawal of military aid" if they ratify the Rome Statute) (on file with author). The discrepancy in the use of the Servicemembers' Act's prohibition on military assistance exemplifies the intended use of the prohibition as a tool to achieve bilateral impunity agreements with Rome Statute countries rather than a complete ban on military aid to countries that are members of the ICC.

[64] *See* 22 U.S.C. § 7427.

[65] *See id.* at § 7427(a).

[66] *See generally U.S.: "Hague Invasion Act" Becomes Law, supra* note 36.

[67] *See* 22 U.S.C. § 7427. Along with granting the President the power to use military force to attain the freedom of detainees, this section of the Servicemembers' Act does not require the President to notify or obtain the approval of Congress prior to using military force. *Id.* Furthermore, no other sections of the Act place any restrictions on the "Authority to Free" section. *See generally* American Servicemembers' Protection Act, *supra* note 34. Therefore, the Servicemembers' Act seems to grant the President unfettered discretion on the use of military action when it pertains to the ICC and U.S. detainees. *Id.*

alternatives available to the United States through the Rome Statute and the potential repercussions of such action.

The "Authority to Free" section of the Servicemembers' Act also contains the more innocuous alternatives to the use of military force by permitting legal assistance to an ICC detainee.[68] Arguably, this is one of the few provisions in the Servicemembers' Act that actually offers "protection" to U.S. personnel in the custody of the ICC. Under the "Authority to Free" section, the President may authorize the following: 1) legal representation for the detainee; 2) production of exculpatory evidence on behalf of the detainee; and 3) the appearance before the ICC to challenge the admissibility or jurisdiction of the court under Articles 18 and 19 of the Rome Statute.[69] Oddly enough, while the United States has declared the Rome Statute and the ICC to be fatally flawed, this section of the Servicemembers' Act permits, if not advocates, the utilization of the "flawed" Articles of the Rome Statute and its mechanisms to gain the freedom of U.S. personnel.[70] One possible inference from this scenario is that perhaps the Rome Statute is not as flawed as the United States would have the world believe.

Politically, the use of military force to free U.S. detainees from ICC custody would be hard to justify and would surely have repercussions. First, with the exception of the Czech Republic and Turkey, every European member of NATO is a party to the Rome Statue.[71] Consequently, it is highly unlikely the governments of those countries would approve or allow U.S. military action against a court endorsed by those governments.[72] Secondly, the ICC is located in the Netherlands, a NATO member and Rome Statute participant. It is highly unlikely the NATO membership would approve of an invasion of another NATO member's territory in order to free persons accused of crimes against humanity.[73] Third, it is almost certain the United

---

[68] *Id.* at § 7427(c); *see also* § 7423(a)(2)(A) (Conversely allowing the use of §7427, and its legal assistance provision, despite being titled "Prohibition on Cooperation with the International Criminal Court").

[69] *See* 22 U.S.C. § 7427(c)(1),(2),(3).

[70] *See id.* at § 7427(c)(3). It should be noted that in order for the United States to utilize Articles 18 and 19 of the Rome Statute, at minimum, the United States would have to have investigated (or be willing to investigate) the defendant. *Id.*

[71] *Compare* Rome Statute (signatories), *available at* http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty10.asp (last visited Jan. 16, 2003), *with* North Atlantic Treaty Organization (membership), *available at* http://www.nato.int/welcome/home.htm (last visited Jan. 16, 2003). Belgium, Denmark, France, Germany, Greece, Hungary, Iceland, Italy, Luxembourg, Netherlands, Norway, Poland, Portugal, Spain and Great Britain are members of both NATO and the Rome Statute.

[72] *See generally Council Common Position of 11 June 2001 on the International Criminal Court*, Council of the European Union, June 11, 2001 (on file with author). The common position of the EU indicates that it favors the establishment of the ICC, which further impedes any European approval of U.S. military action against the ICC. *Id.* Of the European NATO and Rome Statute member countries, eleven are also members of the European Union ("EU"). *See supra* note 71; www.eurunion.org/states/home.htm (listing the European Union's member states).

[73] *See generally Council Conclusions on the International Criminal Court (ICC) and the Draft US American Servicemembers' Protection Act (ASPA)*, Council of the European Union,

Nations Security Council would not approve the use of force against the ICC, especially given France and Great Britain's participation in the ICC and their "veto" power over such a resolution.[74] Consequently, were the United States to employ force in freeing American detainees rather than pursuing peaceful alternatives available under Articles 18 and 19 of the Rome Statute, it would likely have to act unilaterally, without the assistance or political support of its major European allies. Unilateral action would not be in the "national interest" of the United States; it would surely hamper the ability to sustain European support for future military operations, such as the war against terrorism.[75] For these reasons, the potential use of military force by the United States to free ICC detained personnel is virtually non-existent.

It cannot be disputed the United States has the military capability to obtain the freedom of detainees being held by the ICC.[76] However, the use of military force in place of legal assistance, against a defenseless court located in the midst of European and NATO allies, would have broad negative ramifications on the relationship between the United States and its European allies. Consequently, those ramifications make the use of force highly unlikely and tend to support speculation that the threat of force was included in the Servicemembers' Act to intimidate countries that ratified or are contemplating ratification of the Rome Statute.[77]

*e. Hitting the ICC Where it Hurts - Prohibition on Funding to the International Criminal Court*

Another prohibition found scattered throughout sections of the Servicemembers' Act prohibits the United States from contributing funding or support to the ICC.[78]

---

July 11, 2002 (on file with author). The European Council also expressed concern regarding the Servicemembers' authorization to the President to use "all means necessary" to free persons detained "on the territory of EU Member States." *Id.* Politically, the confluence of NATO membership, Rome Statute participation, and European Union membership would make European approval of U.S. force almost a certain impossibility.

[74] *See generally Council Common Position of 11 June 2001 on the International Criminal Cour*t, *supra* note 72. Given France and Great Britain's membership in the European Union and the EU's endorsement of the ICC, their failure to veto a resolution allowing U.S. forces to enter Europe and the ICC would likely result in serious repercussions from the European community. *Id.*

[75] *See generally* Anita Ramasastry, *The Problem with the American Servicemembers' Protection Act: Why We Should Not Punish Countries that Participate In the International Criminal Court*, Wednesday, Nov. 07, 2001, *at* http://writ.news.findlaw.com/commentary/20011107_ramasastry.html (last visited Jan. 17, 2003) (on file with author) (stating the American Servicemembers' Protection Act could hamper U.S. efforts to build a coalition in the fight against terrorism).

[76] The ICC is a court of law backed by the Rome Statute membership. *See generally* Rome Statute, *supra* note 26. It is an entity without a military and without the ability to defend itself against attack. *Id.* (the Rome Statute does not obligate, nor mandate, the member states to provide military assistance or protection to the ICC).

[77] *See generally U.S.: "Hague Invasion Act" Becomes Law, supra* note 36.

[78] *See, e.g.,* 22 U.S.C. §§ 7401(b), 7423(e). The Servicemembers' Act also authorizes withholding funds from the United Nations that are intended for the ICC. *See generally id.* at §7429.

Although the funding prohibition is not an independent section within the Servicemembers' Act, it may indeed prove to be the most effective prohibition in an otherwise ineffective Servicemembers' Act.

The Articles of the Rome Statute clearly provide that funding for the operation of the ICC will be derived from assessments to Rome Statue member States,[79] the United Nations (for expenses incurred in cases referred to the ICC by the Security Council),[80] and voluntary contributions to the ICC.[81] At this point in time the annual operating budget of the ICC is unknown, though initial estimates placed the annual budget between $10 million and $150 million dollars.[82] However, the actual ICC budget will most likely mirror the approximately $100 million annual budgets of the International Criminal Tribunals for Rwanda and Yugoslavia.[83] It should be noted that unlike the International Criminal Tribunals of Rwanda and Yugoslavia who benefit from U.S. participation in United Nations funding,[84] the Servicemembers' Act prohibits the U.S. from contributing directly to the ICC or paying any United Nations assessment in connection with the ICC.[85]

As a result of the prohibition against U.S. funding of the ICC, the entire cost of the ICC would be funded by the ICC member States or the United Nations, without the participation of the United States, the largest contributor to the United Nations.[86] This could ultimately result in a shortage of operating funds for the ICC. Consequently, the absence of U.S. funding would affect the ICC's ability to investigate and prosecute the full range of perpetrators and may limit the ICC's focus

---

[79] *See* Rome Statute, *supra* note 26, at art. 115(a).

[80] *Id.* at art. 115(b).

[81] *Id.* at art. 116. The ICC will accept contributions from governments, international organizations, corporations, and individuals. *Id.*

[82] *See generally* Cesare Romano, *Financing the ICC: what can be learned from the ad hoc tribunals?*, *at* http://www.odihpn.org/report.asp?ReportID=1090 (last visited Jan. 18, 2003) (on file with author).

[83] *See generally* Jess Bravin, *Bush Presses for Closing of Tribunals*, Wall Street Journal, February 28, 2002, *available at* http://www.globalpolicy.org/intljustice/general/2002/0228.htm (last visited Jan. 18, 2003) (on file with author). In discussing the potential end of the criminal tribunals for Rwanda and Yugoslavia, Pierre-Richard Prosper, U.S. ambassador at large for war-crimes issues, stated the annual operating budgets for each tribunal was $100 million dollars. *Id.*

[84] *See generally U.S. Support for the United Nations: Engagement, Innovation and Renewal* (September 6, 2000), *at* http://clinton4.nara.gov/WH/new/html/Wed_Oct_4_133755_2000.html (last visited Feb. 14, 2003) (stating the United States is the largest contributor to the International Criminal Tribunals) (on file with author).

[85] *See* 22 U.S.C. § 2010; *see generally* 22 U.S.C. § 7401(b), § 7423(e).

[86] *See generally* Press Release, United Nations Administrative and Budgetary Committee, *Financial Situation in 2001 'Overall Better,' Says Under-Secretary-General for Management* (Mar. 13, 2002), *at* http://www.un.org/News/Press/docs/2002/GAAB3500.doc.htm (last visited Jan. 19, 2003) (detailing U.S. contributions to the United Nations and in particular the international tribunals) (on file with author).

to high profile suspects such as the architects of the crimes.[87] This would force lower profile defendants, such as soldiers or peacekeepers, to be tried in national courts.[88] By prohibiting the funding of the ICC, the Servicemembers' Protection Act may actually limit the ICC's ability to investigate and the scope of its investigations; thereby, indirectly protecting U.S. military personnel from ICC prosecution.

### 2. Article 98 Agreements – Limited Success Attempting to Circumvent the Jurisdiction of the International Criminal Court

The second U.S. attack on the ICC came in the form of attempted bi-lateral impunity agreements between the United States and ICC member States. The bi-lateral agreements would prohibit ICC member States from transferring U.S. personnel to the ICC without the expressed consent of the United States.[89] The United States is pursuing these bi-lateral agreements under Article 98 of the Rome Statute, thereby, giving rise to the name Article 98 Agreements.[90]

A great deal of debate has centered on whether the Article 98 Agreements being pursued by the United States are permissible under the Rome Statute. However, these debates are likely to continue long past any decision regarding the Agreements, therefore, the legality of the Agreements will not be analyzed. Regardless of their legality, the United States approached its allies with requests that they sign bilateral impunity agreements. Of the countries reported to have reached bilateral agreements with the United States, only eight are Rome Statute member States.[91] Of the eight ICC member States having agreements with the United States only Romania is located within Europe, and its Parliament has refused to ratify the agreement until

---

[87] *See generally* M. Cherif Bassiouni, *Combating Impunity for International Crimes,* 71 U. COLO. L. REV. 409, 411 (Spring 2000) (explaining how political views and politicians can affect the justice system by imposing financial constraints or bureaucracy).

[88] This would be similar to the operation of the Nuremberg Trials, the high profile culprits of the German atrocities were tried at Nuremberg while lower level guards of death camps were prosecuted in national courts. Another example would be the Israeli prosecution of John Demjanjuk for his participation as a guard at the Treblinka death camp. The process of prosecuting high ranking officials through international courts while leaving the lower level officials to national courts is a position advocated by the Bush administration for the International Criminal Tribunals. *See* Bravin, *supra* note 83.

[89] *See generally US to Focus on South Asia, Mideast Seeking ICC Immunity Deals,* Agence France Presse, Nov. 14, 2002, General News (on file with author). As of Nov. 14, 2002, the United States has managed to conclude fourteen bi-lateral agreements with El Salvador, Afghanistan, the Dominican Republic, East Timor, Gambia, Honduras, Israel, the Marshall Islands, Mauritania, Micronesia, Palau, Romania, Tajikistan and Uzbekistan. *Id.*

[90] *See* Rome Statute, *supra* note 26, at art. 98(2).

[91] *See generally U.S. Impunity Agreements: A Summary*, *at* http://www.wfa.org/issues/wicc/article98/art98factsheet.html (last visited Feb. 10, 2003) (stating the 21 countries that have engaged in bi-lateral agreements with the United States are Afghanistan, Bahrain, Djibouti, Dominican Republic, East Timor, El Salvador, Gambia, Georgia, Honduras, India, Israel, the Marshall Islands, Mauritania, Micronesia, Nepal, Palau, Romania, Sri Lanka, Tajikistan, Tuvalu, and Uzbekistan) (on file with author). Afghanistan, Djibouti, East Timor, Gambia, Honduras, the Marshall Islands, Romania, Tajikistan, and Uzbekistan are member States to the ICC. *See generally* Rome Statute, *supra* note 26.

the European Union and the United States come to a compromise over the Article 98 Agreements. While the United States has had limited success in obtaining a preliminary agreement with Romania, some European allies stated publicly that they will not sign the Article 98 Agreements with the United States. Canada, France, Germany, the Netherlands and Norway are NATO members that publicly stated they are unlikely to sign bi-lateral agreements with the United States.[92] Furthermore, the European Council issued guiding principles as to the acceptable form of the Article 98 Agreements. The European Council's principles state that any bi-lateral agreement as presently drafted by the United States was inconsistent with the Rome Statute. The Council also stated that any future agreement must not allow impunity for the accused, may not exempt nationals of ICC member States, may only include persons sent by a sending state, and approval of the Agreement must be in accordance with the constitution of the State.[93]

Whether the Article 98 Agreements are within the letter and spirit of the Rome Statute may be a moot issue. Judging from the several key NATO allies that have spoken out against the Agreements and the position of the European Union, it seems likely the United States will experience some difficulty in arranging bilateral agreements with many of its key military and European allies. The difficulty or success by the United States in arranging these bilateral impunity agreements may shape the future position of the United States toward the ICC. However, at this early stage of the negotiations it is impossible to anticipate the outcome of the ongoing negotiations.

### *B. Unfounded U.S. Concerns Regarding the Rome Statute*

#### 1. The Jurisdictional Scope of the ICC

During the Rome Conference, the U.S. delegation's multifaceted concerns regarding the ICC's jurisdictional scope were at the forefront of negotiations. Publicly, the United States stated the Rome Statute allows the ICC to exert jurisdiction over citizens of States that did not ratify the Statute and interferes with the sovereignty of non-party States.[94] Furthermore, the United States read the Rome Statute as allowing the ICC to reassert jurisdiction over a defendant that has been tried by a national court when the ICC does not agree with the outcome of the proceeding.[95] However, the Rome Statute and the existing basis of international jurisdiction expose the weaknesses in the United States' jurisdictional arguments in refusing to ratify the Rome Statute.

---

[92] *See generally US bilateral "non-surrender" agreements regarding the International Criminal Court*, M2 Presswire, Oct. 1, 2002, 2002 WL 26803083 (on file with author).

[93] *See generally* European Council's External Relations (Provisional Version) 12134/02, Sept. 30, 2002 (on file with author).

[94] *See generally* Grossman, *supra* note 27. U.S. concerns are based on the ICC exerting its jurisdiction over U.S. military members or U.S. government officials over authorized military actions. *Id.*

[95] *See generally* Press Briefing by Pierre-Richard Prosper, *U.S. Ambassador-at-Large for War Crimes Issues, in London, England* (Sept. 20, 2002), *at* http://www.uspolicy.be/issues/icc/prosper.092402.htm (last visited Jan 12, 2003) (on file with author).

*a. The International Criminal Court's Jurisdiction Does Not Interfere with State Sovereignty*

The United States' assertion that the Rome Statute interferes with U.S. sovereignty is baseless. First, the ICC's subject matter jurisdiction is limited in the types of criminal cases that it can investigate or prosecute; those crimes are genocide, crimes against humanity, war crimes and the crime of aggression.[96] Furthermore, the Rome Statute provides that the ICC can exercise personal jurisdiction over a non-party State citizen without the State of nationality's consent in only the following three situations: 1) if the citizen commits a crime on the territory of a party State, 2) if the citizen commits a crime on the territory of a non-party State that accepts ICC jurisdiction or 3) if the United Nations Security Council refers a case to the ICC under Chapter VII of the Charter of the United Nations.[97] For example, because the United States is not a party to the Rome Statute, the ICC can only exert jurisdiction over a U.S. citizen, without U.S. consent, if the U.S. citizen commits a crime in a country that is a member of the Rome Statute or has accepted the ICC's jurisdiction. However, if the U.S. citizen returns to the United States after commission of a crime, the United States has no obligation to cooperate with the ICC and extradite the suspect.[98] Simply stated, the eighty-seven ratifying countries have decided that specified crimes committed on their soil will be referred to the ICC for investigation and prosecution. The Rome Statute does not claim "universal jurisdiction," whereby it could investigate or prosecute crimes committed anywhere in the world without regard to the perpetrator's citizenship and regardless of whether a country ratified the Rome Statute.[99] It should be noted with curiosity that while the United States objects to the ICC's *limited* jurisdiction, the United States is a ratifying party to the Geneva Convention Relative to the Protection of Civilian Persons In Time of War, whose provisions allow the United States to exercise "universal jurisdiction" for atrocities committed against civilians.[100]

---

[96] *See* Rome Statute, *supra* note 26, at art. 5. The crime of aggression has not been defined by the Statute. Therefore, the ICC cannot exert jurisdiction over the crime of aggression until it is defined and properly adopted by the Assembly of States Parties. *Id.* at art 5(2).

[97] *Compare* Rome Statute, *supra* note 26, at arts. 12(2)(a) *and* 13(b), *with* Int'l Shoe v. State of Washington, 326 U.S. 310 (1945). Except for the referral of a case to the ICC by the United Nations Security Council, the Rome Statute's personal jurisdiction can be compared to the "minimum contacts" doctrine set forth in *Int'l Shoe*, 326 U.S. 310.

[98] *See* Rome Statute, *supra* note 26, at art. 89(1). Article 89 clearly states the court may "request" the cooperation of any State where the person may be found in order to obtain the arrest and surrender of the person. The ICC has no mechanisms in place to force or compel the "requested" country (i.e. the United States) to cooperate. *Id.*

[99] *See, e.g.,* Demjanjuk v. Petrovsky, 776 F.2d 571, 582 (6th Cir. 1985) (defining "universal jurisdiction" as a country's exertion of jurisdiction over an individual who committed a crime so universally condemned that any country in custody of the perpetrator could punish him according to their laws despite the fact the criminal activity occurring outside that country's territory); *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW §§ 404, 423 (1987).

[100] *See, e.g.,* Geneva Convention Relative to the Protection of Civilian Persons In Time of War, Aug. 12, 1949, art. 146, 75 U.N.T.S. 287, *available at* http://193.194.138.190/html/

Therefore, it is inconsistent, if not hypocritical, for the United States to object to the ICC's limited jurisdiction for crimes that the United States could exercise "universal" jurisdiction over (under the provisions of the Geneva Convention). However, the United States responds to the ICC's limited jurisdiction by maintaining that the Rome Statute interferes with U.S. sovereignty because the United States has never recognized an international organization's right to prosecute U.S. citizens without obtaining U.S. consent prior to the prosecution.[101]

The argument that the Rome Statute interferes with U.S. sovereignty simply cannot be supported by accepted principles of law. While it may be accurate that the United States has never recognized the right of an international organization to prosecute a U.S. citizen, international law recognizes a State's right to prosecute foreign citizens who commit crimes within that State's borders under the doctrine of *territoriality*.[102] In fact, U.S. employment of the *territoriality* doctrine is evident by the United States' prosecution of Zacarias Moussaoui, a French citizen charged in the United States for his involvement in the September 11, 2001 terrorist attacks on the United States.[103] Given that a country has the right to prosecute foreign nationals for crimes committed within its borders, the fact that the country may utilize a judicial forum not favored by the United States simply cannot be seen as an interference with the sovereignty of the United States.

Furthermore, evidence of the Rome Statute's respect for national sovereignty can be found within the Statute itself. Respect for State sovereignty is apparent in the concept of *complementarity*, whereby the ICC would defer an investigation or prosecution of a crime to national courts.[104] Article seventeen of the Rome Statute clearly states the ICC would find a case to be inadmissible to ICC jurisdiction if the

---

menu3/b/92.htm (last visited Jan 12, 2003) [hereinafter Geneva Convention]. With regard to the crimes specified in the Treaty, the second paragraph states:

> Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, *regardless of their nationality, before its own courts*. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another.

*Id.* (emphasis added). *See also* Convention on the Prevention and Punishment of the Crime of Genocide, *supra* note 14, at art. 6.

[101] *See generally* Grossman, *supra* note 27.

[102] *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 403(1)(a) (1987) (providing that "a state has jurisdiction to prescribe law with respect to conduct that . . . takes place within its territory . . . .") (this principle is referred to as *territoriality* and is the most common basis for exercising jurisdiction to prescribe an activity within a State's borders); *see also id.* at § 421(2)(a) (allowing "a state's exercise of jurisdiction to adjudicate with respect to a person, . . . is reasonable if, at the time jurisdiction is asserted; the person . . . is present in the territory of the state,. . . ."). The *territoriality* principle allows a State to exert criminal jurisdiction if the offense was committed within the forum State. *Id.*

[103] *See, e.g.*, United States v. Moussaoui, Criminal No. 01-455-A, *available at* http://www.usdoj.gov/ag/moussaouiindictment.htm (last visited Jan 12, 2003) (stating that Moussaoui's indictment is based on conspiracy to commit terrorist acts within the borders of the United States) (on file with author).

[104] *See* Rome Statute, *supra* note 26, at art. 17(1)(a),(b),(c).

case were investigated or prosecuted by a State having jurisdiction over it.[105] In addition, the ICC would only exert jurisdiction if the State were "unwilling or unable to genuinely carry out the investigation or prosecution."[106] Consequently, the Rome Statue actually encourages the investigation and prosecution by the State of nationality rather than through the ICC. The Rome Statute accomplishes this by directing the Prosecutor to notify all States having jurisdiction over a crime for every case referred to the ICC or initiated by the ICC Prosecutor.[107] Moreover, the Rome Statute provides that if the State of nationality informs the ICC that it is investigating its own citizen and requests jurisdiction over the crime specified, the Prosecutor *must* defer the case to the requesting State.[108] By allowing States the opportunity to undertake investigations and prosecutions over their citizens who have committed crimes on foreign soil, the Rome Statute can hardly be characterized as infringing on State sovereignty.

An examination of the Rome Statue reveals that indeed the ICC has the potential to exercise jurisdiction over citizens of States that have not ratified the Statute. However, the ICC's limited subject matter and personal jurisdiction along with the Rome Statute's deferral of cases to national courts nullify the U.S. contention that the Statute binds non-member States and thereby threatens their sovereignty. The Rome Statute's articles and the ratifying members of the ICC insure the sovereignty of States that refrain from perpetrating atrocities on civilians and abide by international laws that respect human rights. Furthermore, the United States is not refusing to ratify the Rome Statute because the U.S. would find it offensive to be a party to a treaty that exerted jurisdiction over citizens of non-member States.[109] Exactly the contrary is true. The United States is concerned simply because *it is not a member* of the ICC and therefore, future conflicts involving the U.S. could expose U.S. soldiers and senior officials to ICC prosecution if atrocities are committed during those conflicts. Therefore, it is inaccurate for the United States to attempt to justify its refusal to ratify the Rome Statute based on the fact that the ICC can exert jurisdiction over citizens of a non-party States.

---

[105] *Id.* at art. 17(1). A State would have jurisdiction over a case if a crime was committed within its borders or one of its citizens committed the crime specified by the Rome Statute. *Id.* at art. 12(2)(a).

[106] *Id.* at art. 17(2), (3). The Statute goes on to define "unwillingness" in Article 17(2), and "inability" in Article 17(3).

[107] *Id.* at art. 18(1) (stating the "prosecutor *shall* notify all State Parties and those States which . . . would normally exercise jurisdiction over the crimes . . . .") (emphasis added). A case referred to the ICC through the United Nations Security Council under Chapter VII of the U.N. Charter will not be deferred to the State of Nationality. However, this should not impinge on U.S. sovereignty because the United States is a permanent member of the Security Council and could veto any referral to the ICC. *See* U.N. Charter, *supra* note 52.

[108] *Id.* at art. 18(2) (stating "[A] State may inform the Court that it is investigating or has investigated its nationals . . . [a]t the request of that state, the Prosecutor *shall defer to the State's investigation* . . . .") (emphasis added).

[109] *See* Geneva Convention, *supra* note 100, at art. 146. The United States is already a member the Geneva Convention Relative to the Protection of Civilian Persons In Time of War, a treaty that actually allows countries to exert jurisdiction over non-member citizens. *See generally id.*

*b. Reassertion of Jurisdiction by the International Criminal Court After a Trial by a National Court System*

The United States also objects to the ICC because it believes the ICC could reassert jurisdiction over a case that has already been tried in a national court.[110] The United States' concern is focused on the situation whereby a suspect is either investigated or prosecuted by a national court and is acquitted of the crime specified by the ICC. The United States fears the possibility of "double jeopardy" if the ICC disagrees with the outcome of an investigation or a trial by a national court and attempts to reassert jurisdiction over the case in order to prosecute the accused a second time.[111] However, the Rome Statute directly addresses the United States' concern over the ICC's ability to reassert jurisdiction and illustrates that those concerns are without merit.

First, under Article 20(3), the Rome Statute expressly provides that any person who has been tried in a national court for crimes specified under Articles 6, 7 or 8 of the Rome Statute will not be tried by the ICC for the conduct that gave rise to those crimes.[112] In effect, this is the Rome Statute's prohibition against ICC prosecution of a suspect following a national court trial; no "double jeopardy" is permitted under the Rome Statute. Furthermore, Article 17 of the Rome Statute provides that the case becomes inadmissible to the ICC if the State having jurisdiction over the case has investigated and decided not to prosecute, as long as its decision is not due to an "unwillingness" or "inability" to prosecute.[113] In addition, Article 17 states that a case is inadmissible to the ICC where a defendant has already been prosecuted by a national court for a Rome Statute violation.[114] Consequently, in order to read Article 20(3) and 17 consistently, the Rome Statute's prohibition against "double jeopardy" must also apply if the national court acquits the accused of the crimes specified. Therefore, the ICC could not re-exert jurisdiction over the case after a national trial and the question of "double jeopardy" is avoided.

The actual United States concern stems from the two qualifications to the prohibition against "double jeopardy." The Rome Statue provides that the ICC can assert jurisdiction and prosecute a suspect after a national court trial if: 1) the national court proceedings were for the purpose of shielding the accused from

---

[110] *See generally* Prosper Press Briefing, *supra* note 95.

[111] *Id.*

[112] *See* Rome Statute, *supra* note 26, at art. 20(3). Article 20(3) refers to Articles 6, 7, and 8 in the provision. Article 6 defines and states the elements necessary for the crime of "genocide;" Article 7 defines and states the elements necessary for "crimes against humanity;" and Article 8 defines and states the elements necessary for "war crimes."

[113] *Id.* at art. 17(1)(b). The language of Article 17 clearly indicates that if a good-faith investigation results in a decision not to prosecute and if the decision was not an attempt to shield the accused from being brought to justice, the decision not to prosecute would make the case inadmissible to the ICC. Therefore, the ICC could not re-exert jurisdiction over the case and the question of "double jeopardy" is avoided. Articles 17(2) and 17(3) define "unwillingness" and "inability," which the ICC prosecutor would have to prove to the justices of the ICC prior to any attempts to re-exert ICC jurisdiction over a case.

[114] *Id.* at art. 17(1)(c). This paragraph of the Rome Statute specifically mentions Article 20(3) and its prohibition against "double jeopardy."

criminal responsibility for the crimes within the jurisdiction of the ICC[115] or 2) the national court proceedings were not done impartially or independently in accordance with due process and were conducted in a manner inconsistent with an intent to bring the accused to justice.[116] The two exceptions were enacted to prevent a State from requesting jurisdiction from the ICC in order to prosecute one of its citizens and then either declining to prosecute or conducting a sham prosecution for the purpose of providing impunity for the accused.[117] However, under a situation enumerated by the two exceptions, the accused is never actually exposed to a valid prosecution by the national court system; therefore, no "double jeopardy" truly exists if the ICC reasserts its jurisdiction and prosecutes the accused.

The United States is concerned the ICC may attempt to employ one of the two exceptions and reassert jurisdiction over a case after a U.S. investigation found no basis for a trial or after a trial in which the accused was acquitted. Considering the respected reputation of the courts of the United States, this would be a dangerous path for the ICC to take for several reasons. First, the judicial branch of the United States functions independently from the executive and legislative branches of the government.[118] In order to achieve a fair trial, it is imperative that the judicial branch not be influenced by the political will of the remaining branches of government. The entire justice system of the United States is based upon the independence of the judiciary, ostensibly assuring the citizens of the United States a fair and impartial trial by the national courts of the United States. Secondly, criminal prosecutions in the United States are generally conducted in a public forum.[119] Since prosecutions are conducted in public, opportunity exists for intense scrutiny over trials to ensure the veracity of the prosecution. The United States can pride itself on having an

---

[115] *Id.* at art. 20(3)(a).

[116] *Id.* at art. 20(3)(b).

[117] A State could gain jurisdiction over an ICC case in one of two ways. First, the State may employ the Rome Statute's concept of "complementarity," found in Article 17, if the State is in custody of the suspect and makes its intention to investigate or prosecute known to the ICC. *See* Rome Statute, *supra* note 26, at art. 17. Or secondly, if a case were already referred to the ICC, the State could gain jurisdiction over the case under Article 18(2) by notifying the ICC that it is investigating or has investigated the case. *Id.* at 18(2). Under Article 18(2) the ICC Prosecutor must defer to the State's investigation. *Id.*

[118] *See* U.S. CONST. art. III, § 1 ("*The judicial Power* of the United States, *shall be vested in* one supreme Court, and in such inferior courts as the Congress may . . . establish."); *see also* U.S. CONST. art. III, § 2, cl. 1 ("*The judicial Power shall extend* to all Cases, in Law and Equity, . . . to Controversies to which the United States shall be a party; . . . and between a State, or citizens thereof, and foreign States, Citizens or Subjects."); *see,* e.g., Phil Hirschkorn, *Judge grants Moussaoui access to key detainee*, *at* http://www.cnn.com/2003/LAW/02/02/moussaoui/index.html (last visited Jan. 7, 2003) (on file with author). An example of the independence of U.S. courts apart from the Executive branch of the government can be seen in the prosecution of Zacarias Moussaoui. The federal judge in the Moussaoui case has granted Moussaoui access to the alleged ringleader of the Sept. 11 terrorist attacks despite the objections of the U.S. government. *Id.* Although prosecution of Moussaoui is an emotionally charged prosecution, the U.S. courts will not yield to the political will of the U.S. prosecution and insists on adhering to the rule of law. *Id.*

[119] *See* U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and *public trial*, . . . . ").

independent criminal justice system. Consequently, it would be difficult to envision any U.S. court participating in a sham trial for the purpose of shielding a U.S. defendant from prosecution or justice. Participation by a U.S. court in a proceeding that could legitimately be characterized as a "sham" would denigrate the trust and reputation of U.S. courts in the eyes of U.S. citizens and the rest of the world. A global perception of U.S. courts as disreputable is a heavy price to pay in light of the potential future prosecution of foreign terrorists by U.S. courts or U.S. military commissions and the present criminal prosecution of Zacarias Moussaoui.[120] Therefore, it is highly unlikely that U.S. courts would undertake a criminal prosecution of a defendant accused of violating the Rome Statute with anything less than an independent and legitimate prosecution and adjudication in accord with due process of the law and the Constitution of the United States.

Furthermore, in order for the ICC Prosecutor to challenge a U.S. court proceeding under Article 20(3), he must prove the U.S. trial was conducted for the purpose of shielding the defendant from criminal responsibility or that the trial was not conducted with the intent to bring the defendant to justice.[121] If the ICC Prosecutor could not accomplish this and the ICC Pre-Trial Chamber of Judges proceeded to reassert jurisdiction over a case previously tried by a national court, the United States would have the right to appeal the Pre-Trial Chamber's decision to the Appeals Chamber of the ICC.[122] Naturally, the Appeals Chamber is composed of entirely different Judges than those on the Pre-Trial Chamber and those justices would have to agree with the findings of the Pre-Trial Chamber. Moreover, if the Pre-Trial Chamber approved the reassertion of jurisdiction without establishing the U.S. trial was a "sham," the Prosecutor and the Pre-Trial Judges could be subject to removal from office under the Rome Statute for allowing the reassertion of jurisdiction to proceed.[123] Most importantly, if the ICC reasserts jurisdiction

[120] *See generally U.S. Seeks Delay in Moussaoui Case*, CLEVELAND PLAIN DEALER, Feb. 8, 2003, at A4; *see also* Joanne Mariner, *A Fair Trial for Zacarias Moussaoui*, *at* http://www.cnn.com/2003/LAW/02/03/findlaw.analysis.mariner.moussaoui/index.html (last visited Jan. 7, 2003) (on file with author). Alleged Sept. 11th terrorist Zacarias Moussaoui has stated that alleged Sept. 11th terrorist ringleader Ramzi bin al-Shibh's testimony could exonerate him and has requested access to the ringleader. *Id.* In response, the U.S. government maintains the Moussaoui trial may introduce national secrets into evidence and therefore may drop the federal prosecution in favor of conducting a secret military tribunal. *Id.* Oddly enough the act of moving a trial from an open forum to a secret military tribunal may raise doubt about the U.S. justice system's impartiality. *Id.* The act of moving the Moussaoui trial to a U.S. military tribunal could also be used to justify the contention that the United States judicial system was no less an unchecked political system than that of the ICC. However, while the U.S. government has the luxury of dropping its case against Moussaoui and pursuing it in a military tribunal, the ICC does not have such an option. *See generally* Rome Statute, *supra* note 26. The ICC's option is limited to holding certain proceedings in closed sessions in order to protect confidential or sensitive material. *See* Rome Statute, *supra* note 26, at art. 64(7).

[121] *See* Rome Statute, *supra* note 26, at art. 20(3)(a), (b).

[122] *Id.* at art. 18(4).

[123] *Compare* Rome Statute, *supra* note 26, at art. 46 *with* U.S. CONST. art. I, §§ 2-3. This article of the Rome Statute is comparable to the impeachment power of the House of Representatives and removal power of the Senate over federal court judges as prescribed by the U.S. Constitution. *Id.*

following a national court proceeding without conclusively establishing a sham national trial, the ICC risks the ability to develop trust and confidence among Rome Statute member States. The ICC's reassertion of jurisdiction in that situation would illustrate to ICC member States that *complementarity* does not actually exist in the Rome Statute. That fact alone should be enough to convince America's European allies that the ICC is indeed as flawed as the United States suggests and would facilitate their withdrawal from the Rome Statute, which ultimately would mean the failure of the ICC.[124] Just as it would be imprudent for a U.S. court to participate in a sham trial, it would be unwise for the ICC to reassert jurisdiction following a national trial without irrefutable evidence the trial was undertaken to shield the defendant from criminal responsibility or avoid bringing the defendant to justice.

The independence of U.S. courts protects against manipulation by the executive and legislative branches of the U.S. government and provides a system based on the application of law rather than the political will of the government. That independence makes U.S. courts an unlikely forum for a sham prosecution. Consequently, a case adjudicated by an independent U.S. court should preclude the ICC from contending that the trial was conducted for the purpose of shielding a defendant from criminal responsibility or as an effort to avoid bringing the defendant to justice. However, if the ICC attempted to reassert jurisdiction over a trial conducted in the United States, the ICC would have to conclusively prove the U.S. trial was a "sham." Without conclusive proof of a sham trial prior to reasserting jurisdiction, the ICC risks exposing itself to criticism which inhibits building confidence in the concept of *complementarity* and the ICC itself.

In conclusion, the combined burden of conclusively establishing a sham trial and the risk of criticism upon a newly formed court that desires international confidence should prevent the ICC from reasserting jurisdiction over a case previously adjudicated by a U.S. court.

### 2. The Rome Statute Provides Sufficient Checks Over the International Criminal Court

The United States maintains that it has U.S. military forces in over 100 nations around the globe in various activities ranging from humanitarian operations, peacekeeping, and fighting against terrorism.[125] The United States contends this worldwide deployment of U.S. troops exposes the United States to politically motivated prosecution by the ICC.[126] The United States argues that the Rome Statute has created an unchecked court that allows for politically motivated prosecutions of U.S. officials and servicemen.[127] While it is true the ICC does not have the traditional checks and balances associated with the judicial system of the United States, there are sufficient checks contained within the Rome Statute to invalidate the United States' argument that the ICC could pursue politically motivated prosecutions.

---

[124] *See* Rome Statute, *supra* note 26, at art. 127. Article 127 of the Rome Statute provides for the withdrawal of a member State from the Rome Statute. Presumably, a member State could withdraw for any reason. *Id.*

[125] *See generally* Grossman, *supra* note 27.

[126] *Id.*

[127] *Id.*

The Rome Statute's Articles contain a number of checks on the ICC Prosecutor that deter politically motivated investigations or prosecutions. The first check on the ICC Prosecutor is the Court's limited subject matter jurisdiction.[128] The ICC and the Prosecutor have jurisdiction over only four crimes, of which only three are actually prosecutable since "aggression" has yet to be defined.[129] However, the Rome Statute goes further and institutes a check on the power of the Prosecutor to initiate investigations.[130] In order for the Prosecutor to initiate an investigation into a situation of his own volition, the Prosecutor must obtain the permission of the Pre-Trial Chamber.[131] As with the Prosecutor, all of the ICC judges must possess the highest moral character, impartiality, and integrity as well as be qualified for appointment to the highest judicial offices of their States.[132] Moreover, the Rome Statute requires that none of the eighteen judges elected to the ICC be from the same State.[133] The Pre-Trial Chamber consists of a pool of six judges with criminal trial experience; three of the six judges will hear investigation requests brought before the Pre-Trial Chamber by the Prosecutor.[134] Furthermore, approval for the Prosecutor to initiate an investigation requires that two of the three Pre-Trial judges approve the investigation.[135] The judges may refuse the Prosecutor's request [136] or they may approve the commencement of an investigation and reserve the right to refuse

---

[128] *See* Rome Statute, *supra* note 26, at art. 5. The ICC has jurisdiction over the crimes of genocide, war crimes, and crimes against humanity. *Id.* Furthermore, the ICC's personal jurisdiction is limited to those crimes committed on a member State's soil, by member State citizens, or referred to the ICC by the U.N. Security Council. *See id.* at arts. 12(2)(a), 12 (2)(b), 13(b).

[129] *See* Rome Statute, *supra* note 26, at art. 5(2). Not only is the crime of aggression not defined by the Rome Statute, the Rome Statute provides that the definition must be consistent with the Charter of the United Nations. *Id.* Moreover, the crime of aggression cannot be incorporated into the Rome Statute until seven years after the date the Statute entered into force. *See id.* at arts. 5(2), 121.

[130] *Id.* at art. 42(3). The Rome Statute requires the Prosecutor to be of high moral character, highly competent, and experienced in the prosecution of criminal cases. *Id.*

[131] *Id.* at art. 15(3) (stating that once the Prosecutor has determined that there is a reasonable basis to proceed with an investigation, he *shall* submit the material supporting his belief to the Pre-Trial Chamber and request authorization for an investigation).

[132] *Id.* at art. 36(3)(a).

[133] *Id.* at art. 36(7). The requirement that no two judges come from the same State ostensibly lessens the possibility of similar political views and helps reduce the possibility of politically motivated investigations or prosecutions.

[134] *See* Rome Statute, *supra* note 26. Article 39(1) of the Statute states the Pre-Trial Chamber will be composed of six judges with predominately criminal trial experience.

[135] *See generally* Rome Statute, *supra* note 26. Article 39(2)(b)(ii) and 57(2)(a) combine to provide that three Pre-Trial Chamber judges must hear the initiation of investigation request of the Prosecutor. Article 57(2)(a) sets out the requirement that two of the three judges must concur in the request for initiation of an investigation.

[136] *See* Rome Statute, *supra* note 26, at art. 15(5). A refusal to permit an investigation does not preclude the Prosecutor from future requests for the same case if more information becomes available to the Prosecutor. *Id.*

jurisdiction or admissibility over the case at a future time.[137] It may be possible for a Prosecutor to request an investigation based on political motivations. However, it is highly improbable that three judges of high moral character and integrity, from diverse backgrounds, would share the same political motivation or permit the initiation of an investigation without sufficient supporting evidence. Lastly, as mentioned previously, both the Prosecutor and ICC judges are subject to removal from office by the member States for serious misconduct or serious breaches of their duties.[138] The limited subject matter jurisdiction of the Court, the approval requirement of the Pre-Trial Chamber prior to investigation initiation, the qualifications necessary to become an ICC prosecutor and the possibility of removal from office should be more than sufficient to deter politically motivated prosecutions of U.S. troops or citizens.

Additionally, the Rome Statute has checks on cases referred to the ICC by member States and for cases resulting from approved prosecutorial investigations. First, for cases resulting from member State referral or prosecutorial investigation, the Prosecutor must notify all member State parties and non-member State parties that would normally have jurisdiction over the crime.[139] The Prosecutor must provide all of the States with information and evidence regarding the crime, provided the evidence does not jeopardize witnesses, other evidence, or the apprehension of the suspect(s).[140] Second, a State has one month in which to notify the ICC that it is investigating or has completed its investigation into the crime and request jurisdiction over the case.[141] In the event that a State requests jurisdiction over a case, the Prosecutor must defer to the State's investigation unless the Pre-Trial Chamber authorizes an ICC investigation upon application from the Prosecutor.[142] Third, any decision made by the Pre-Trial Chamber with regards to jurisdiction may be appealed by a State to the Appeals Chamber.[143] The Appeals Chamber is composed of five judges who will serve on the Appeals Chamber their entire terms and shall be distinct from the Pre-Trial and Trial Chamber judges.[144] The decision of the Appeals Chamber must be by a majority of the judges and the judgment of the Chamber must state the reasons on which the decision was based and be delivered in open court.[145] When unanimity among the Appeals Chamber is not present, the

---

[137] *Id.* at art. 15(4). The Pre-Trial Chamber would refuse the case if the evidence was lacking. *Id.*

[138] *Id.* at art. 46(2). A Prosecutor may be removed from office by an absolute majority vote of the member States. *Id.* at art. 46(2)(b). Whereas an ICC judge may be removed upon a two-thirds majority vote by the member States. *Id.* at art. 46(2)(a).

[139] *Id.* at art. 18(1).

[140] *Id.*

[141] *See* Rome Statute, *supra* note 26, at art. 18(2).

[142] *Id.* Article 18(2) states that upon request of the State, the prosecutor *shall* defer to the State's investigation.

[143] *Id.* at art. 18(4).

[144] *Id.* at art. 39(3)(b).

[145] *Id.* at art. 83(4).

views of both the majority and minority must be published as well as any separate or dissenting opinion.[146]

Furthermore, the Rome Statute provides several checks on the ICC's judicial system for cases referred to the ICC by member States or the Prosecutor. Once again, the Prosecutor is required to notify any State with jurisdiction over the case that a case has been referred to the ICC and must provide the evidence that gave rise to the case.[147] Yet again, in response to the notification, States have the option of requesting jurisdiction over the case.[148] Once a State has requested to take jurisdiction of the case from the ICC, the Prosecutor must defer jurisdiction to the requesting State.[149] The only possible impediment to a State's request for jurisdiction is the Pre-Trial Chamber of the ICC, which could deny the State's request.[150] The United States could plausibly contend that a Prosecutor is politically motivated in bringing a case to the ICC and may even attempt to suggest the Pre-Trial judges share the same political motivation as the Prosecutor if they were to deny the U.S. jurisdiction. However, it would be a difficult proposition to support that the ICC Prosecutor, along with at least two Pre-Trial Judges, and at least three Appeals Judges, share enough common political motivation to permit a politically motivated prosecution to proceed without justification. The possibility that six individuals from diverse backgrounds, cultures, and areas of the globe would share the same political view is tenuous at best. Admittedly, while the checks on the ICC's jurisdiction may not be identical to those imposed on the courts of the United States, the mechanisms in place which verify proper and justified prosecutions seem adequate to defeat the U.S. claim that the ICC is an unchecked Court.

Additionally, the Rome Statute supplies an external check on the ICC through the United Nations Security Council. The Rome Statute provides that the United Nations Security Council may prevent an ICC investigation or prosecution by passing a Security Council resolution deferring the investigation or prosecution.[151] Once the Security Council passes the resolution, the ICC may not commence an investigation or prosecution for a period of twelve months.[152] The Security Council may continue to defer the investigation or prosecution by renewing the resolution after the expiration of the twelve-month period.[153] This provision may be used by the Security Council to protect military forces engaged in United Nations approved

---

[146] *Id.*

[147] *Id.* at art. 18(1).

[148] *Id.* at art. 18(2).

[149] *Id.*

[150] *Id.* at arts. 18(2), 18(4). The ICC prosecutor could petition the Pre-Trial Chamber to deny deferring jurisdiction to the State, however any decision to deny jurisdiction by the Pre-Trial Chamber could be brought before the Appeals Chamber of the ICC for review. *Id.* at art. 18(4). Any Pre-Trial Chamber denial of jurisdiction would require the utmost justification in order to avoid defeating the ICC's concept of *complementarity* and to bolster the trust and faith in the ICC as an institution of law instead of a political body.

[151] *See* Rome Statute, *supra* note 26, at art. 16.

[152] *Id.*

[153] *Id.*

military operations such as those deployed in the Gulf War and in the aftermath of the Yugoslav breakup. While the Security Council deferral provision would seem to be the type of check on the ICC that the United States would welcome, exactly the opposite is true. During the conference in Rome, the United States lobbied the conference members against the creation of an independent court and prosecutor.[154] Instead, the United States advocated the creation of a court that depended upon the United Nations Security Council to grant it jurisdiction over cases. Although this seems like a subtle difference, in actuality it created an enormous chasm between the United States and the Rome Statute member States which ultimately contributed to the United States "unsigning" the Rome Statute. The Rome Statute created a court that forces the Security Council to act in order to *defer* a case from ICC jurisdiction rather than having to act in order to *confer* jurisdiction upon the ICC. The United States contends the difference between *deferring* and *conferring* jurisdiction leads to politicized prosecutions.[155] However, had the Rome conference members adopted a court controlled by the United Nations Security Council, all ICC prosecutions and investigations would have required a unanimous vote of the Security Council's permanent members prior to commencement. Considering the political nature of the United Nations, and the Security Council in particular, the ICC would be rendered ineffective if it were to depend on the permanent members of the Security Council to unanimously agree on ICC jurisdiction. With U.S. troops deployed around the world, it is more likely the United States did not relish the prospect of convincing the other permanent members of the Security Council to defer jurisdiction in the event that U.S. personnel were brought before the ICC.

While the ICC's Security Council deferral provision may not be the check the United States hoped to achieve at the Rome conference, nonetheless, it is a method that guarantees protection for military personnel engaged in United Nations operations. Therefore, the United States contention that the ICC is an unchecked power cannot be sustained given the Rome Statute's allowance for a Security Council deferral of ICC investigations and prosecutions.

### *3. The Rome Statute is Obligated to Respect the Constitutional Rights of U.S. Citizens*

The United States contends that the ICC has no obligation to respect the Constitutional rights of U.S. citizens.[156] That contention is absolutely without merit, the Rome Statute contains virtually every Constitutional right afforded a citizen of the United States.

The following chart compares the rights derived from the Constitution of the United States with the rights afforded the accused by the Rome Statute:

---

[154]*See* Grossman, *supra* note 27.

[155]*Id.*

[156]*See* American Servicemembers' Protection Act, 22 U.S.C. § 7421(7) (2002); s*ee also* Press Release, *Secretary Rumsfeld Statement on the ICC Treaty* (May 6, 2002), *at* http://www.defenselink.mil/news/May2002/b05062002_bt233-02.html (last visited Feb. 8, 2003) (on file with author).

Table: Comparison of U.S. Constitutional Rights vs. Rome Statute Rights[157]

| Constitutional Rights | U.S. Constitution | Rome Statute |
|---|---|---|
| Presumption of Innocence | Presumption of innocence in favor of the accused. *Coffin v. United States*, 156 US 432, 453 (1895). | "Everyone shall be presumed to be innocent until proven guilty before the Court…" (Art. 66(1)) |
| **Constitutional Rights** | **U.S. Constitution** | **Rome Statute** |
| Speedy and Public Trial | "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial…" (Amend. VI) | "…the accused shall be entitled to a public hearing…" (Art. 67(1))<br><br>"…the accused shall be entitled…to be tried without undue delay…" (Art. 67(1)(c)) |
| Assistance of Counsel | "In all criminal prosecutions, the accused shall enjoy the right…to have the Assistance of Counsel for his defense." (Amend. VI) | "…the accused shall be entitled…to communicate freely with counsel of the accused's choosing…" (Art. 67(1)(b))<br><br>"…the accused shall be entitled…to have legal assistance assigned by the Court where the interests of justice so require, and without payment if the accused lacks sufficient means to pay for it…" (Art. 67(1)(d)) |
| Right to Remain Silent and Privilege Against Self-Incrimination | "No person…shall be compelled in any criminal case to be a witness against himself…." (Amend. V) | "…the accused shall be entitled…not to be compelled to testify …and to remain silent, without such silence being a consideration in the determination of guilt or innocence…." (Art. 67(1)(g)) |

[157] *See generally* Monroe Leigh, Compatibility of the United States Constitution and the Rome Statute of the International Criminal Court, *at* http://www.wfa.org/issues/wicc/factsheets/iccusconst.pdf (last visited Feb. 8, 2003) (on file with author). Table compiled by Monroe Leigh of the American Bar Association.

| | | |
|---|---|---|
| Right to Written Statement of Charges | "In all criminal prosecutions, the accused shall enjoy the right…to be informed of the nature and cause of the accusation…."<br>(Amend. VI) | "…the person shall be provided with a copy of the…charges…."<br>(Art. 61(3)) |
| Right to Examine Adverse Witnesses | "In all criminal prosecutions, the accused shall enjoy the right…to be confronted with the witnesses against him…."<br>(Amend. VI) | "…the accused shall be entitled…to examine, or to have examined…the witnesses against him or her…"<br>(Art. 67(1)(e)) |
| Right to Obtain Witnesses | "In all criminal prosecutions, the accused shall enjoy the right…to have compulsory process for obtaining witnesses in his favor…."<br>(Amend. VI) | "…the accused shall be entitled…to obtain the attendance and examination of witnesses on his or her behalf…."<br>(Art. 67(1)(e)) |
| Prohibition Against Ex-Post Facto Crimes | "No Bill of Attainder or ex post facto law shall be passed."<br>(U.S. Const. art. I., § 9, cl. 3) | "A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court."<br>(Art. 22(1)) |
| Prohibition Against Double Jeopardy | "…nor shall a person be subject for the same offence to be twice put in jeopardy of life or limb…"<br>(Amend. V) | "No person who has been tried by another court…tried by the Court with respect to the same conduct…."<br>(Art. 20(3)) |
| **Constitutional Rights** | **U.S. Constitution** | **Rome Statute** |
| Freedom from Warrantless Arrest and Searches | "[N]o Warrants shall issue, but upon probable cause…"<br>(Amend. IV) | "…the Pre-trial Chamber may…issue…warrants as may be required…."<br>(Art. 57(3)(a))<br><br>The Pre-Trail Chamber shall issue a warrant if "it is satisfied that…[t]here are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court and the arrest of the person appears necessary…."(Art. 58) |
| Prohibition Against Trials in Absentia | The language, history, and logic of Rule 43 support a straightforward interpretation that prohibits the trial in absentia of a defendant who is not present at the beginning of the trial.<br>*Crosby v. United States*, 506 U.S. 255, 262 (1993) | "The accused shall be present during the trial."<br>(Art. 63) |

| | | |
|---|---|---|
| Right to be Present at Trial | "[O]ne of the most basic of the rights guaranteed by the Confrontation Clause is the accused's right to be present in the courtroom at every stage of his trial."<br>*Illinois v. Allen*, 397 U.S. 337, 338 (1970) (citing *Lewis v. United States*, 146 U.S. 370 (1892))<br><br>When defendant knowingly absents himself from court during trial, court may "proceed with trial in like manner and with like effect as if he were present."<br>*Diaz v. United States*, 223 U.S. 442, 455 (1912) | "The accused shall be present during the trial."<br>(Art. 63)<br><br>"If the accused, being present before the Court, continues to disrupt the trial, the Trial Chamber may remove the accused...[s]uch measures shall be taken only in exceptional circumstances after….<br>(Art. 63(2)) |
| Exclusion of Illegally Obtained Evidence | "When evidence is obtained in violation of the Fourth Amendment, the …exclusionary rule usually precludes its use … against the victim of the illegal search and seizure."<br>*Illinois v. Krull*, 480 U.S. 340, 347 (1987) (citing *Weeks v. United States*, 232 U.S. 383 (1914); *Mapp v. Ohio*, 367 U.S. 643 (1961)) | "Evidence obtained by means of a violation of this Statute or internationally recognized human rights shall not be admissible…."<br>(Art. 69(7)) |

Additional trial rights common to U.S. criminal courts and the Rome Statute:

| | **U.S. Criminal Courts** | **Rome Statute** |
|---|---|---|
| Burden of Proof in a Criminal Trial | "The Fifth Amendment …and the Sixth, that "[i]n all criminal prosecutions, …have held that these provisions require criminal convictions to rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt.<br>(Amend. V & VI); *U.S. v. Gaudin*, 515 U.S. 506, 509-10 (1995) (citing Sullivan v. Louisiana, 508 U.S. 275, 277-78 (1993)) | "In order to convict the accused, the Court must be convinced of the guilt of the accused beyond reasonable doubt."<br>(Art. 66(3)) |

| | | |
|---|---|---|
| Prosecution Must Provide Exculpatory Evidence | "…the suppression by the prosecution of evidence favorable to an accused upon request violates due process…." (Amend. V) *Brady v. Maryland*, 373 U.S. 83, 87 (1963) | "…the Prosecutor shall… 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." (Art. 67(2)) |

Two significant differences exist between trials held in U.S. criminal courts and the ICC. First, the ICC will determine a defendant's guilt or innocence by the Trial Chamber judges whereas U.S. criminal courts employ a jury system to determine a defendant's guilt.[158] Second, a defendant in an ICC prosecution can be found guilty by a majority of the Trial Chamber's judges as opposed to the requirement of unanimity in U.S. criminal cases.[159] On the surface, citizens of the United States would have a difficult time reconciling a criminal trial conducted without a jury that allows a conviction in the absence of a unanimous verdict. However, it should be noted that the ICC will function in exactly the same manner as the International Criminal Tribunals established by resolution of the United Nations Security Council. The Rwandan and Yugoslav tribunals prosecute crimes of genocide, war crimes and crimes against humanity; the very crimes the ICC will prosecute. Trial judges instead of a jury adjudicate the cases heard by the Rwandan and Yugoslav tribunals and a guilty verdict requires a majority vote of the trial judges.[160] As a permanent member of the Security Council, the United States voted for the establishment of the Rwandan and Yugoslav tribunals. Therefore, the United States expressly approved of the absence of a jury and the conviction of a defendant by less than a unanimous verdict for trials that involved the crimes of genocide, war crimes and crimes against humanity. Consequently, it is extremely illogical, from a legal perspective, for the United States to maintain that the ICC's system of adjudication is somehow flawed, especially since the ICC mirrors the U.S. approved International Criminal Tribunal system. However, considering that the ICC's jurisdiction is not constrained to a specific conflict, as are the jurisdictions of the International Criminal Tribunals, perhaps the best arguments to support the contention that the ICC's system of adjudication is flawed are political arguments rather than legal ones.

Furthermore, the Bush administration has advocated prosecuting foreigners accused of terrorism by U.S. military tribunals as opposed to the criminal courts of the United States.[161] The defendant's rights in a U.S. military tribunal are impinged

---

[158]*Compare* Rome Statute, *supra* note 26, art. 39(2)(b)(ii) *with* U.S. CONST. amend. VI.

[159]*Compare* Rome Statute, *supra* note 26, art. 74(3) *with* Andres v. United States, 333 U.S. 740, 748 (1948) (stating "[u]nanimity in jury verdicts is required where the Sixth and Seventh Amendments apply. In criminal cases this requirement of unanimity extends to all issues--character or degree of the crime, guilt and punishment--which are left to the jury").

[160]*See*, *e.g.*, S.C. Res. 827, *supra* note 19, at art. 23.

[161]*See generally* Mariner, *supra* note 120.

upon to a greater extent than the ICC's lack of a jury and conviction by a majority of the trial judges. U.S. military tribunals will consist of a commission composed of military officers instead of a jury of the defendant's peers.[162] In addition, a U.S. military tribunal allows the introduction of evidence that would not be permitted by a civilian criminal court. For example, "chain of custody" of the evidence need not be established and secondhand evidence, along with hearsay evidence, will also be permitted.[163] Moreover, a conviction by a U.S. military tribunal requires only a two-thirds majority vote of the commission's officers instead of a unanimous verdict.[164] The U.S. military tribunal's two-thirds majority conviction standard is consistent with the ICC's conviction requirement.[165] Most shocking of all is that President Bush's Executive Order creating the U.S. military tribunals declared that the principles of law and rules of evidence generally recognized in civilian trials are "*not practicable to apply*" to the military commissions.[166] By comparison, a trial by the ICC is far more respectful of a defendant's Constitutional rights then a military tribunal.[167]

By comparing the rights afforded a defendant under the Rome Statute with those afforded by the U.S. Constitution, it is evident the Rome Statute provides all of the rights contained in the U.S. Constitution with the exception of a jury trial and a conviction by unanimous decision. However, genocide, war crimes and crimes against humanity can be equated to acts of terrorism in terms of their wanton disregard for human life. By classifying those heinous crimes as affronts to humanity, the ICC's lack of a jury trial and conviction by two-thirds majority can be reconciled with the United States' use of military tribunals. Furthermore, the ICC's adjudicative procedure is consistent with that employed by the International Criminal Tribunals of Rwanda and Yugoslavia, which the United States explicitly approved and ratified through its Security Council vote establishing the tribunals. Having placed its stamp of approval on the procedures of the International Criminal Tribunals, it is hypocritical for the United States to label that same procedure, embodied by the ICC, as flawed and disrespectful of the rights of U.S. citizens. If

---

[162] *See* Exec. Order No. 222, 66 Fed. Reg. 57833 (Nov. 13, 2001) at § 4(C)(2) (providing for a military commission that will be *both the trier of fact and law*) (emphasis added), *available at* http://www.whitehouse.gov/news/releases/2001/11/print/20011113-27.html (last visited Feb 9, 2003) (on file with author). The ICC's panel of judges can be characterized as a civilian version of the military tribunal commission. *See, e.g.,* Rome Statute, *supra* note 26, at art. 39(2)(b)(ii) (trial chamber is composed of three judges).

[163] *See generally* Exec. Order No. 222, *supra* note 162, at § 4(c)(3) (allowing admission of evidence that is of probative value as judged by the *opinion* of the presiding officer) (emphasis added).

[164] *See id.* at § 4(c)(6) (allowing a conviction by a two-thirds majority of the commission that is present at the time of voting).

[165] C*ompare* Exec. Order No. 222, *supra* note 162, at § 4(C)(6) (two-thirds majority of the commission members for conviction), *with* Rome Statute, *supra* note 26, at art. 74(3) (two of three Trial Chamber judges must vote to convict).

[166] *See* Exec. Order No. 222, *supra* note 162, at § 1(f) (emphasis added).

[167] *See supra* note 157 and accompanying charts in the text (showing that the ICC provides the defendant the same trial rights granted by the U.S. Constitution).

this were actually the case, the United States would be justified, if not obligated, to "unsign" the United Nations Security Council resolution that created the International Criminal Tribunals just as it "unsigned" the Rome Statute. Taken as a whole, the ICC's respect for U.S. Constitutional criminal trial rights and its procedural consistency with U.S. military tribunals and the International Criminal Tribunals clearly establish that the ICC is a system obligated to respect the Constitutional rights of U.S. citizens.

## IV. CONCLUSION: LEGAL PRINCIPLES AND THE ROME STATUTE DO NOT SUPPORT THE UNITED STATES POSITION OPPOSING THE INTERNATIONAL CRIMINAL COURT

The United States contends that the ICC's jurisdiction interferes with national sovereignty, that the ICC can reassert its jurisdiction over a defendant following a national court trial, that there are no checks upon the ICC to prevent politically motivated prosecutions, and that the ICC does not respect the Constitutional rights of U.S. citizens. If the legal arguments were accurate, the United States would be justified in rejecting the ICC. However, the arguments posed by the United States do not find support in the Rome Statute and consequently do not justify the United States' position against the ICC.

The ICC's jurisdiction does not interfere with the sovereignty of the United States. The Rome Statute's provisions impart national priority over cases and investigations through the concept of *complementarity*.[168] Additionally, the Rome Statute provides that the ICC is a court of limited subject matter jurisdiction, concerning itself with genocide, war crimes and crimes against humanity[169] and bases its personal jurisdiction over defendants on the international law principle of *territoriality*, which the United States has employed in the past and is employing in it prosecution of Zacarias Moussaoui.[170] By recognizing the priority of the United States to try cases in its own courts, the ICC is respectful of national sovereignty as opposed to interfering with sovereignty.

The United States is correct when it states that the Rome Statute provides for the ICC to reassert jurisdiction over a defendant following a national trial. However, first and foremost the Rome Statute expressly prohibits double jeopardy.[171] Second, jurisdiction reassertion by the ICC is applicable only in cases where a national prosecution was a sham trial, undertaken to shield a defendant from criminal responsibility or performed in a manner inconsistent with the intent to bring the perpetrator to justice.[172] The public prosecution of U.S. criminal trials[173] and the independence of U.S. courts from the executive and legislative branches of the

---

[168] *See* Rome Statute, *supra* note 26, at art. 17.

[169] *See id.* at art. 5.

[170] *See id.* at art. 12; *see, e.g.,* United States v. Noriega, 746 F. Supp. 1506, 1513 (S.D. Fla. 1990) (finding U.S. jurisdiction based on extraterritorial actions with deleterious effects within the United States).

[171] *See* Rome Statute, *supra* note 26, at art. 20.

[172] *Id.*

[173] *See* U.S. CONST. amend. VI.

government,[174] give little opportunity or justification for the ICC to reassert jurisdiction following a U.S. trial. Finally, in order to reinforce *complementarity* and avoid the suggestion of a politicized prosecution, the ICC would have to do more than suggest that a national trial was a sham. Prior to reasserting jurisdiction, the ICC Prosecutor must provide proof a national trial was conducted for the *purpose* of shielding the defendant or conducted inconsistent with the intent of bringing the defendant to justice. In summation, the ICC's ability to reassert jurisdiction over a case was intended for nations whose court systems are without the ability or desire to actually conduct a legitimate trial, neither of which characterize the court system of the United States.[175]

The United States' contention that the Rome Statute provides insufficient checks over the ICC is also not supported by the provisions of the Statute. The Rome Statute provides both internal and external checks on investigations and prosecutions. The Rome Statute places internal checks on the ability of the Prosecutor to initiate investigations[176] and on cases referred to it by Rome Statute member States.[177] Additionally, the Rome Statute provides an external check on the ICC's ability to prosecute a case by allowing the United Nations Security Council to defer ICC jurisdiction by resolution.[178] The United States' contention of an unchecked Court misinterprets the ICC's need for political independence as the ICC's desire to conduct political prosecutions upon the United States. While the checks placed upon the ICC by the Rome Statute are not the same as those exerted on the courts of the United States, the ICC is not the unchecked power that the United States would have the rest of the world believe.

The last U.S. argument against the ICC maintains that the ICC is not bound to respect the rights found in the U.S. Constitution. In fact the exact opposite is true. The Rome Statute guarantees every trial right granted by the U.S. Constitution and the decisions of the Supreme Court of the United States with the exception of a jury trial and conviction by unanimous decision.[179] Upon first impression the absence of a trial by jury and the absence of a conviction by unanimous decision seem to be the ICC's fatal flaws. However, the U.S. military tribunals proposed to prosecute terrorists are also devoid of both a jury and a unanimous decision for conviction, yet the military tribunals have been deemed constitutional by the Supreme Court[180] and

---

[174] *See* U.S. CONST. art. II, § 1, cl. 1 *and* art. II, § 2, cl. 1.

[175] *See*, *e.g.*, Rome Statute, *supra* note 26, at art. 17 (defining "unwillingness" and "inability" to investigate or prosecute).

[176] *Id.* at art. 15(3), 15(4) (stating the Prosecutor must obtain the authorization of the Pre-Trial Chamber prior to initiating an investigation).

[177] *Id.* at art. 18(1), 18(2) (providing that upon referral of a case to the ICC, the Prosecutor must give notice to States with bases of jurisdiction over the case and defer to those States' investigation or prosecution).

[178] *Id.* at art. 16 (allowing for twelve-month renewable deferrals by the Security Council).

[179] A complete comparison of rights between the U.S. Constitution and the Rome Statute is available on pages 30-33 of this note.

[180] Ex parte Quirin, 317 U.S. 1 (1942) (stating that the President had the Constitutional authority to utilize military tribunals to try violations of international law of war).

justified by the President of the United States.[181] Moreover, the International Criminal Tribunals for Rwanda and Yugoslavia are also conducted without juries and without unanimous verdicts for conviction.[182] The United States approved the formation of the International Criminal Tribunals and their method of adjudication over genocide, war crimes and crimes against humanity, and therefore, expressly endorsed those courts as fair and equitable courts despite the lack of juries and unanimous verdicts. Therefore, from a legal perspective, it would be inconsistent for the United States to argue that while the Rome Statute provides virtually every trial right found in the Constitution of the United States, the lack of a jury trial and unanimous decision represents disrespect for the U.S. Constitution.

All indications are that the United States' legal arguments opposing the ICC are without merit and cannot support the its adverse position against the ICC. Consequently, the actual justification for U.S. opposition to the ICC may be found in political justifications as opposed to legitimate jurisprudential concerns. Nonetheless, the United States' concerns regarding the ICC and its jurisdiction are valid concerns for a global superpower. As a superpower, the United States has military forces stationed around the world. By ratifying the Rome Statute the United States exposes U.S. troops and senior government officials to the ICC's jurisdiction for violations of the Rome Statute regardless of where the transgression occurred.[183] However, by not ratifying the Rome Statute, the United States is immune from ICC jurisdiction for Rome Statute violations that occur outside the borders of ICC member States.[184] Therefore, the United States could easily justify its stance against the ICC by proclaiming that as an economic, military and political superpower it cannot afford to be restrained from pursuing its foreign policy and acting in its best interest by submitting its citizens to the jurisdiction of the ICC. While this position would hardly be popular with the international community, it is a far superior justification for opposing the ICC when compared to the impotent legal arguments posited by the United States in its opposition to the International Criminal Court.

SASHA MARKOVIC[185]

---

[181] *See generally* Exec. Order No. 222, *supra* note 162, at § 1.

[182] *See* S.C. Res. 827, *supra* note 19.

[183] *See* Rome Statute, *supra* note 26, at art. 12.

[184] An example of immunity from ICC jurisdiction would be if the United States were to attack Iraq and violate the Rome Statute's prohibition against genocide, war crimes or crimes against humanity. *See generally* Rome Statute, *supra* note 26, at art. 12(2). Since neither the United States nor Iraq is a member to the Rome Statute, the ICC could not exert jurisdiction over any U.S. personnel that engaged in the illegal act or for that matter any U.S. government official that may have approved of the illegal action. *Id.*

[185] Cleveland-Marshall College of Law, 2004 Juris Doctorate candidate. The author would like to thank his wife, Eva, and his daughters, Juliana and Jordana, for their patience and understanding during the research and writing of this note.