U.S. NATIONAL SECURITY AND THE INTERNATIONAL CRIMINAL COURT: SHOULD THE OBAMA ADMINISTRATION CONSIDER REENGAGEMENT?

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INTRODUCTION

The twentieth century was the bloodiest century in human history.[1] With advancements in warfare and weaponry, no longer were diseases or natural disasters the greatest threat to the safety and health of humankind.[2] Instead, ruthless military leaders and power hungry despots could exterminate entire religious groups or cultures. This frightening possibility led to the need for international accountability of government officials, military commanders, and lawless warlords. By the end of World War II ("WWII"), it was clear to many that a new entity was necessary to help deter and prevent the next war, and to never allow atrocities such as genocide, war crimes, and crimes against humanity to occur again.[3] It is no coincidence then that the twentieth century ended with the creation of the world's first permanent International Criminal Court ("ICC" or "Court").

On July 17, 1998, at the United Nations' Rome Diplomatic Conference, the Rome Statute of the International Criminal Court was adopted ("Rome Statute" or "ICC Statute").[4] By the terms of the Rome Statute, the ICC could not enter into force until sixty countries ratified it.[5] This occurred on July 1, 2002.[6] The primary purpose of the ICC, as set out in the Rome Statute, is to "have the power to exercise its jurisdiction over persons for the *most serious crimes of international concern*."[7] Those crimes are: genocide; crimes against humanity; war crimes; and the crime of aggression.[8] As the Rome Statute's preamble asserts, the State Parties to the statute are "determined to put an end to impunity for the perpetrations of

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[1] *See* John M. Czarnetzky & Ronald J. Rychlak, *An Empire of Law?: Legalism and the International Criminal Court*, 79 NOTRE DAME L. REV. 55, 55 (2003) (citing sources stating that conflicts during the twentieth century are responsible for an estimated 170 million deaths).

[2] *See id*.

[3] M. Tia Johnson, *The American Servicemembers' Protection Act: Protecting Whom*?, 43 VA. J. INT'L L. 405, 406 (2003) (supporting formation of International Criminal Court and United Nations in 1945 because it echoes reasoning of Winston Churchill when he said, "Civilization will not last, freedom will not survive, peace will not be kept, unless a very large majority of mankind unite together to defend them").

[4] *See* Gregory P. Noone & Douglas William Moore, *An Introduction to the International Criminal Court*, 46 NAVAL L. REV. 112, 113 (1999).

[5] *See* Rome Statute of the International Criminal Court, art. 17, July 12, 1998, 2187 U.N.T.S. 900 [hereafter Rome Statute].

[6] *See* Jennifer K. Elsea, CONG. RES. SERV., *U.S. Policy Regarding the International Criminal Court 2* (Aug. 26, 2006), *available at* https://www.policyarchive.org/bitstream/handle/10207/1461/RL31495_20020709.pdf?sequence=1.

[7] Rome Statute, *supra* note 5, art. 1 (emphasis added).

[8] *See id.* art. 5. Note, however, that the crime of aggression had not been defined at the Rome Conference because an agreed upon definition could not be reached. The crime may be defined as early as seven years after the Rome Statute took effect by a vote of the Assembly of State Parties to the ICC. *See id.* art. 123.

these crimes and thus to contribute to the prevention of such crimes."[9]

The Rome Statute is a unique development in international law, establishing, for the first time, a permanent international criminal court. With all of its ambitions, much controversy has surrounded its enactment, its jurisdictional reach, and its future in global politics and jurisprudence. Much of the negative reaction to the Court has come from the United States, which, ironically, was initially an advocate for the creation of an international criminal tribunal to help increase accountability and prevent genocide. Without support from the United States,[10] however, the ICC may never achieve its goals and flourish as a legitimate international institution.

This paper will discuss the ICC and its role within the international legal system, as well as whether President Obama should consider engaging the Court as part of his foreign policy and national security agenda. Part I will discuss the historical development of international criminal law and the ICC, the American reaction to the Court, as well as the cases currently before it. Part II will discuss the major relevant provisions of the Rome Statute: its purpose, scope, codified crimes, and jurisdictional attributes, including the complementarity provision. Part III will analyze the Rome Statute to determine whether members of the United States' military are subject to the ICC's jurisdiction and the current implications for national security policy. Part IV will address gestures given by the Obama Administration that weigh favorably on the Court, as well as the positive and negative aspects of the United States joining the ICC. Finally, I will end the discussion with a summary and concluding thoughts.

I. HISTORICAL DEVELOPMENT OF THE ICC

A. Evolution of international criminal law and tribunals

The first international criminal court in history was assembled when the Holy Roman Empire tried Peter von Hagenbach in 1474 for "crimes against the laws of God and the laws of men," the equivalent of modern war crimes and crimes against humanity.[11] The notion of an international criminal court did not hold, however. The world would not see the reemergence of an international criminal court until the twentieth century.

During the 1907 Hague Conventions, the concept of an international

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[9] *Id.* pmbl.

[10] President Clinton signed the ICC treaty on December 31, 2000, but did not send the treaty to the Senate for ratification. President Bush notified the United Nations Secretary General of the United States' withdrawal from the treaty in May of 2002. *See infra* Part I(D).

[11] M. Cherif Bassiouni, *The International Criminal Court in Historical Context*, 99 ST. LOUIS-WARSAW TRANSATLANTIC L.J. 55, 56 (1999).

criminal court was discussed.[12] It was intended to coincide with the Court of Arbitral Justice created under the Hague Conventions of 1899.[13] The idea again failed.[14] An international criminal court almost emerged after World War I when the Treaty of Versailles provided for the establishment of an international tribunal to try Kaiser Wilhelm, the German Emperor, for "a supreme offense against morality and the sanctity of treaties."[15] This act was equivalent to today's crime of aggression.[16] However, the tribunal never came to fruition.[17] The first functional international tribunals would not be established until after WWII, which would ultimately lay the groundwork for individual accountability of international crimes and for the establishment of a permanent international criminal court fifty years later.[18]

In 1945, after WWII devastated Europe, the Allied powers decided to try the defeated Germans in an international military tribunal[19] and drafted the Charter of the International Military Tribunal at Nuremburg.[20] The drafters wrestled with the types of crimes the tribunal would be allowed to charge, and decided upon the following three: crimes against the peace, crimes against humanity, and war crimes.[21] Not long after the Nuremburg tribunal was established, the International Military Tribunal for the Far East in Tokyo was created to try the defeated Japanese for the crimes committed in the Pacific theater of WWII.[22] General Douglas McArthur issued a military proclamation that modeled the Far East Tribunal almost identically to the Nuremburg Charter.[23]

The key legal power established by the WWII tribunals was the ability to hold individuals personally accountable for their crimes. This was done by precluding the use of affirmative legal defenses to the defendant's personal criminal culpability, such as the principle of state sovereign immunity and the Act of State doctrine, a rule that requires domestic courts

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[12] *See* Johnson, *supra* note 3, at 414.

[13] *See id.*

[14] *See id.*

[15] Noone & Moore, *supra* note 4, at 113.

[16] *See* Bassiouni, *supra* note 11, at 56.

[17] *See* Noone & Moore, *supra* note 4, at 113.

[18] *See* Hans-Peter Kaul, Symposium, *The International Criminal Court: Current Challenges and Perspectives*, 6 WASH. U. GLOBAL STUD. L. REV. 575, 580 (2007) (referring to the International Military Tribunal at Nuremburg as genesis for concept of the ICC).

[19] *See* Bassiouni, *supra* note 11, at 60.

[20] *See id.*

[21] *See* Noone & Moore, *supra* note 4, at 114 (asserting that crimes against peace are crimes of aggression).

[22] *See* Bassiouni, *supra* note 11, at 61.

[23] *See id.*

to presume that actions taken by foreign countries are valid.[24] Thus, the jurisprudence that emerged from these tribunals shifted criminal responsibility and accountability away from the states and towards their nationals.[25] Those who committed grave crimes during war or armed conflict could not shield themselves behind a state's autonomy and sovereign immunity. This allowed for individual accountability, retribution, and future deterrence in a new international criminal justice paradigm. Prior to the concept of individual international criminal responsibility, states could only receive punishment in less satisfactory forms. Some of these punishments, which are still used today, are economic sanctions, including trade embargoes, and more symbolic measures. Examples of symbolic punishment include denouncing the offending country's actions by pulling ambassadors from that country, severing diplomatic relations, or bringing the matter to the attention of the United Nations General Assembly for international discussion and exposure. Such sanctions allowed those most responsible for grave injustices to escape personal punishment because only the host government was held legally or politically accountable. This important shift in accountability became crucial to the development of international criminal law jurisprudence, which flourished, at least in concept, during the latter half of the twentieth century.

After the United Nations was created in 1945, a permanent international criminal court was discussed, but was effectively halted due to the Cold War. Thus, no such court resulted despite the successful prosecutions of military leaders tried at the Nuremburg and Tokyo tribunals,[26] and the recognition of the power of individual criminal responsibility as a measure of accountability, deterrence, and retribution for possible future atrocities.

An international tribunal would not emerge again until 1993,[27] when the United Nations Security Council created an ad hoc tribunal pursuant to its Chapter VII powers to try crimes that occurred during the conflict in the Former Republic of Yugoslavia.[28] Chapter VII of the United Nations Charter gives the Security Council the power to determine threats to, or breaches of, international peace or acts of military aggression, and allows the Council to take measures to "restore international peace and security."[29] In

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[24] *See* BARRY E. CARTER, PHILLIP R. TRIMBLE & ALLEN S. WEINER, INTERNATIONAL LAW 628 (5th ed. 2007).

[25] *See* Johnson, *supra* note 3, at 417.

[26] *See id.*

[27] It is important to note that the Cold War officially ended with the fall of the Soviet Union in 1991 making decisions by the Security Council no longer disrupted by the conflicting national security interests and veto powers of the United States and the Soviet Union. Thus, international tribunals could now reoccur.

[28] *See* Bassiouni, *supra* note 11, at 64. Ad hoc tribunals are limited in time and scope.

[29] *See* U.N. Charter art. 39 *et seq.*

an effort to address these crimes, a temporary tribunal, the International Criminal Tribunal for the former Yugoslavia ("ICTY"), was created to "contribute to ensuring that violations of international humanitarian law [were] halted and effectively addressed."[30] Personal accountability for violations of international law held those who committed the acts criminally responsible.[31]

In 1994, the Security Council similarly responded to the atrocities occurring in Rwanda by creating another ad hoc tribunal, the International Criminal Tribunal for Rwanda ("ICTR").[32] The ICTY and ICTR exemplify efforts by the international community to support the rule of law and enforce respect for international humanitarian law and human rights.[33] It was during the late 1980s and early 1990s that the prospect of a permanent international criminal court became a reality.[34] The United States was a strong supporter of these ad hoc tribunals, as well as some type of permanent international criminal court that could handle all future international conflicts and crimes.

B. Emergence of the ICC

The United Nations International Law Commission first started looking into drafting a charter for the creation of a permanent international criminal court in 1989.[35] In 1994, the United Nations General Assembly established an ad hoc committee to review a draft charter.[36] The United Nations formed a Preparatory Committee on the Establishment of an International Criminal Court to create an open forum for states to make comments on a "widely accepted" statute that would form the basis for an international diplomatic conference. The international diplomatic conference was then to finalize

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[30] Johnson, *supra* note 3, at 417.

[31] *See generally* United Nations International Criminal Tribunal for the former Yugoslavia, http://www.icty.org/ (last visited Mar. 15, 2010) (containing headlines of various criminal cases against individuals for violations of international law).

[32] *See, e.g.*, Johnson, *supra* note 3, at 417; United Nations International Criminal Tribunal for Rwanda, http://www.ictr.org/ (last visited Mar. 15, 2010).

[33] *See* Johnson, *supra* note 3, at 418.

[34] *See* Matthew A. Barrett, Note, *Ratify or Reject: Examining the United States' Opposition to the International Criminal Court*, 28 GA. J. INT'L & COMP. L. 83, 88 (1999) (discussing possible problems with ad hoc, temporary, tribunals, such as the ICTY and ICTR and citing such problems as "tribunal fatigue," insulation of permanent members on the Security Council from accountability due to their veto power, and limited or regional deterrence power); *see also* Noone & Moore, *supra* note 4, at 117 (citing problems such as temporary forums with limited jurisdiction and life spans, difficulty in apprehending indicted persons, selective justice, and funding shortfalls). These issues only solidified the need for a permanent institution.

[35] *See* Johnson, *supra* note 3, at 417.

[36] *See* Noone & Moore, *supra* note 4, at 122.

and adopt an ICC statute.[37] From June 15, 1998, to July 17, 1998, the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court was held in Rome.[38] One hundred and twenty states voted in favor of the Rome Statute on July 17, 1998.[39] Seven nations did not sign the treaty at that time, including the United States.[40]

The ICC's subject matter jurisdiction covers crimes recognized under customary international law – a general practice of states recognized as binding international law,[41] that developed over the course of the twentieth century and were embodied in four major treaties: the Genocide Convention; the Geneva Conventions of 1949; the Hague Conventions of 1899 and 1907; and the Nuremburg Charter.[42] The Rome Statute's preamble emphasizes that "people are united by common bonds," that "grave crimes threaten the peace, security and well-being of the world," and that "the most serious crimes of concern to the international community as a whole must not go unpunished."[43] Further, the preamble adds that the parties to the ICC are "determined to put an end to impunity for the perpetrators of these crimes and thus contribute to the prevention of such crimes."[44]

The ICC is not an organ of the United Nations, but under Article 2, the Assembly of State Parties to the Rome Statute shall approve the relationship of the court to the United Nations at a later time.[45] The Court is thus an independent institution[46] with an "international legal personality."[47] The seat of the Court is at The Hague in the Netherlands.[48] Under Article 126, the Rome Statute would not come into force until sixty nations ratified it.[49] This occurred on July 1, 2002.[50] Thus, the Court is currently in full legal effect, and has already begun prosecuting international criminals alleged to

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[37] *Id.*

[38] *See id.* at 123.

[39] *See id.*

[40] *See id.*; *infra* Part I(D).

[41] *See* Statute of the International Court of Justice, art. 38(1)(b), June 26, 1945, 59 Stat. 1055.

[42] *See* Noone & Moore, *supra* note 4, at 118 (discussing briefly each treaty).

[43] Rome Statute, *supra* note 5, pmbl.

[44] *Id.*

[45] *Id.* art. 2; *see also* Noone & Moore, *supra* note 4, at 124.

[46] *See* ICC – Structure of the Court, http://www.icc-cpi.int/Menus/ICC/Structure+of+ the+ Court (last visited Mar. 15, 2010).

[47] Rome Statute, *supra* note 5, art. 4.

[48] *Id.* art. 3.

[49] *See id.* art. 126.

[50] *See* ICC – About the Court, http://www.icc-cpi.int/Menus/ICC/About+the+Court (last visited Mar. 15, 2010).

have committed atrocities in Africa.

C. Pending ICC cases during the spring of 2009

There are seven cases from four different countries pending before the ICC.[51] In Uganda, the case of *The Prosecutor v. Joseph Kony, et al.* is being heard in Pre-Trial Chamber II[52] against members of the Lords Resistance Army ("LRA").[53] The LRA is said to "ha[ve] established a pattern of brutalization of civilians by acts including murder, abduction, sexual enslavement, mutilation . . . [and] abducted civilians, including children, are said to have been forcibly recruited as fighters, porters and sex slaves."[54] Out of five LRA suspects charged, four of them remain at large while one has been confirmed dead.[55]

Three cases from the Democratic Republic of the Congo ("DRC") are being heard: *The Prosecutor v. Thomas Lubanga Dyilo*; *The Prosecutor v. Bosco Ntaganda*; and *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*.[56] The case of Lubanga Dyilo is the first case at the ICC to enter into the trial stage.[57] In the DRC, it is reported that "thousands of deaths by mass murders and summary execution[s]", as well as "rape, torture, forced displacement and the illegal use of child soldiers" have occurred since the ICC came into force in 2002.[58] Dyilo, Katanga, and Chui are in custody while Ntaganda remains at large.[59]

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[51] *See* ICC – Situations and cases, http://www.icc-cpi.int/Menus/ICC/Situations +and+ Cases/ (last visited Mar. 15, 2010).

[52] *Id.*

[53] *Id. See also* Press Release, ICC, Prosecutor of the International Criminal Court opens an investigation into Northern Uganda (Jul. 29, 2004), *available at* http://www.icc-cpi.int/Menus/ICC/Press+and+Media/Press+Releases/2004/ (follow "Page 2" hyperlink, then follow Prosecutor of the International Criminal Court opens an investigation into Northern Uganda " hyperlink").

[54] Press Release, ICC, Warrant of Arrest unsealed against five LRA Commanders (Oct. 14, 2005), *available at* http://www.icc-cpi.int/Menus/ICC/Press+and+Media/Press+Releases/ 2005/ (follow "Warrant of Arrest unsealed against five LRA Commanders" hyperlink).

[55] *See* ICC – Situations and cases, *supra* note 51.

[56] *See id.*

[57] *See id.*; s*ee also* Marlise Simons, *International Court Begins First Trial*, INT'L HERALD TRIB., Jan. 26, 2009 (asserting Lubanga is accused of war crimes, which occurred during 2002-03 ethnic fighting in Ituri region of Eastern Congo).

[58] Press Release, *supra* note 53. Note the ICC does not have retroactive effect and cannot prosecute crimes that occurred before it came into effect on July 1, 2002. *See, e.g.,* Rome Statute, *supra* note 5, art. 11(1) ("The Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute."); art. 24(1) ("No person shall be criminally responsible under this Statute for conduct prior to the entry into force of this Statute."). This limitation reflects the principle of legality discussed *infra* Part II(B).

[59] *See* ICC – Situations and cases, *supra* note 51.

In Darfur, Sudan, there are two cases before the Pre-Trial Chamber I: *The Prosecutor v. Ahmad Muhammad Harun and Ali Muhammad Ali Abd-Al-Rahman* and *The Prosecutor v. Omar Hassan Ahmad Al Bashir*.[60] All three suspects are at large.[61] There is intense controversy over the third case, involving the President of Sudan, Omar Al Bashir, in particular because this is the first time the ICC has indicted a sitting head of state.[62] As such, Bashir's case will likely be a defining moment in the ICC's history, and may contribute to the Court's ultimate rise or fall.[63] In theory, if a country is unable or unwilling to detain and extradite a sitting head of state to the ICC (likely because he is in control of the military and police forces), the legitimacy and effectiveness of the Court will be doubted and its relevance in international criminal justice may be questioned. In addition, the political ramifications of indicting a sitting head of state has put many leaders of African countries in opposition to the ICC's decision to prosecute Bashir, and has placed pressure on the ICC to turn its back on the pursuit of justice in such cases.[64] Thus, Bashir's case represents an important and decisive moment in determining whether the ICC has legitimacy as an institution, and whether it will be influenced by international politics during the pursuit of justice.

From the Central African Republic, the case of *The Prosecutor v. Jean-Pierre Bemba Gombo* is in the pre-trial stage before the Pre-Trial Chamber III.[65] The criminal allegations involve civilian deaths and rapes that occurred during an armed conflict between "the government and rebel forces."[66] Upon investigating the matter, the ICC prosecutor stated: "The information we have now suggests that the rape of civilians was committed in numbers that cannot be ignored under international law."[67]

The situations in Uganda, the DRC, and the Central African Republic have all been referred by those states to the ICC pursuant to Article 14 of the

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[60] *See id.*

[61] *See id.*

[62] *See* Marlise Simons, *International Criminal Court Issues Arrest Warrant for Sudan President*, N.Y. TIMES, Mar. 4, 2009 (asserting warrant created fears of a violent backlash against the people in Sudan, that humanitarian organizations in region would be removed, and that warrant may cause difficulty in negotiating a peace settlement).

[63] *See* Tom Ginsburg, *The Clash of Commitments at the International Criminal Court*, 9 CHI. J. INT'L L. 499, 501-04 (2009).

[64] *See* Desmond Tutu, *Will Africa Let Sudan Off the Hook?*, N.Y. TIMES, Mar. 3, 2009 (discussing negative reaction from the African community).

[65] *See* ICC – Situations and cases, *supra* note 51.

[66] Press Release, ICC, Prosecutor opens investigation in the Central African Republic (May 22, 2007), *available at* http://www.icc-cpi.int/Menus/ICC/Press+and+Media/Press+Releases/2007/ (follow "Page 4" hyperlink, then follow "Prosecutor opens investigation in the Central African Republic" hyperlink).

[67] *Id.*

Rome Statute.[68] The case of Sudan's President Bashir is the first to be referred to the ICC by the United Nations Security Council pursuant to Article 13 of the Rome Statute, which authorizes such a referral.[69]

D. The United States and its historical relationship to the ICC

The United States' main objection to the ICC was the fear that the United States' military would be subject to the ICC's jurisdiction, thereby intruding upon American sovereignty.[70] This fear of diminished sovereignty comes from the ICC's authority to try cases that occur on the territory of a State Party, regardless of whether the actor is a national of a State Party to the ICC.[71] In other words, the fear was that if an American soldier committed a crime, as defined by the ICC, on the territory of a State Party, then the ICC could indict that soldier regardless of the United States' objection, custody of the soldier, or diplomatic efforts. Thus, a foreign court could exercise jurisdiction and judgment over actions of American forces, and thereby impede national security and foreign policy objectives. Intrusion into state sovereignty led the ICC's opponents to argue that United States' foreign policy could be chilled by the restriction of military operations and foreign policy goals abroad.[72] The United States argued against the ICC's territorial provision of jurisdiction during the Rome Conference and instead requested for cases to be referred to the ICC from the Security Council only, giving the United States a veto power in the event its soldiers were accused of crimes under the Court's jurisdiction.[73]

A second main objection to the Rome Statute was the fear of politicized prosecutions.[74] In other words, the United States was concerned that if a state did not like the way Americans conducted operations in their territory, then that state could ask the ICC to investigate, drawing the United States

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[68] *See* ICC – Situations and cases, *supra* note 51; s*ee also* Rome Statute, *supra* note 5, art. 14 ("A State Party may refer to the Prosecutor a situation in which one or more crimes within the jurisdiction of the Court appear to have been committed request the Prosecutor to investigate the situation for the purpose of determining whether one or more specific persons should be charged with the commission of such a crime.").

[69] *See* Rome Statute, *supra* note 5, art. 13 ("The Court may exercise jurisdiction . . . if: . . . (b) a situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations.").

[70] *See* Elsea, *supra* note 6, at 5 (introducing historical backdrop to the ICC's beginnings and arguments for and against the ICC).

[71] *See* Rome Statute, *supra* note 5, art. 12 (stating territorial principle).

[72] *See* Elsea, *supra* note 6, at 5.

[73] *See* Barrett, *supra* note 34, at 95.

[74] *See* Elsea, *supra* note 6, at 7.

into litigation.[75] The United States raised several other central objections to the Rome Statute as well. First, the prosecutor was unaccountable and not controlled by any separate political authority. Second, the ICC usurps the role of the United Nations Security Council because it can define aggression, which is within the prerogative of only the Security Council under the United Nations Charter. Finally, the Court lacks the guarantees of due process, specifically the right to a jury trial.[76] These objections will be discussed in more detail in Part IV(C).

These arguments are not met without criticism. There are built-in safeguards within the Rome Statute that alleviate most of these concerns. The most important of these is the principle of complementarity, which makes cases inadmissible to the ICC if the case is being investigated or prosecuted by the state to which the offender is a national.[77] The complementarity safeguard will be discussed further in Part II(D). In addition, the ICC was created to help "end impunity, afford redress [to victims], counter the failure of national systems, remedy the limitations of ad hoc tribunals, provide an enforcement mechanism, and serve as a model of justice."[78] Thus, the Court was created to ensure justice rather than to act as a political body. When asked why the Rome Statute must be adopted, United Nations Secretary General Kofi Annan stated that "there can be no global justice unless the worst crimes, crimes against humanity, are subject to law . . . [The ICC] will ensure that humanity's response will be swift and will be just."[79] Thus, while the Court was necessary, safeguards were built into the Rome Statute to create an effective check against abuse.

Regardless of whether the arguments for or against the ICC during the 1998 Rome Conference had merit, President Clinton did not sign the treaty until December 31, 2000.[80] President Clinton declared that the treaty had "significant flaws" and that he would not send the treaty to the Senate for ratification.[81] However, President Clinton believed that his signature would

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[75] *See id.*

[76] *See id.; see also* Noone & Moore, *supra* note 4, at 147 (listing additional reasons such as uncertainty of standards used by the court in applying its principle of complementarity in determining when a country is "unwilling" to prosecute an alleged crime, the fact that rules of procedure and evidence had not been established, and others).

[77] *See, e.g.*, Elsea, *supra* note 6; Patricia McKeon, Note, *An International Criminal Court: Balancing the Principle of Sovereignty Against the Demands for International Justice*, 12 ST. JOHN'S J. LEGAL COMMENT. 535 (1997); Rome Statute, *supra* note 5, art. 17.

[78] Noone & Moore, *supra* note 4, at 144.

[79] Kofi Annan, Address to the Rome Treaty Conference for the International Criminal Court (Jul. 17, 1998) (on file with ICC).

[80] *See* Elsea, *supra* note 6, at 3.

[81] *Id.* (making it clear that Senate would not ratify ICC treaty even if it was sent to it for ratification since Senator Jess Helms (R-NC), Chairman of the United States Senate's Foreign Relations Committee, stated in a letter to U.S. Secretary of State Madeleine Albright that the

put the United States in a "position to influence the evolution of the court."[82] Clinton's belief likely rested on the fact that his signature would allow the United States to enter and influence the developing stages and direction of the dormant court. Without his signature, the United States would likely have been voiceless. If the ICC developed into a court heavily influenced by the United States, perhaps Senate ratification would become not only a possibility, but even politically favored.[83]

On May 6, 2002, President Bush sent a letter to the United Nations Secretary General stating the United States' desire to withdraw from the treaty.[84] This was done in order to comply with the Vienna Convention on the Law of Treaties' obligation on signatories not to defeat a treaty's "object and purpose" prior to its entry into force.[85] Marc Grossman of the United States Department of State announced President Bush's decision to withdraw, citing such factors as: the ICC's undermining of the United Nations Security Council; inadequate checks and balances on the prosecutorial system; the assertion of jurisdiction over non-party nationals; the undermining of United States' sovereignty; and the potential for politically motivated prosecutions.[86]

When the ICC entered into force in July of 2002, Congress reacted quickly by passing the American Servicemembers' Protection Act ("ASPA").[87] The ASPA contains many controversial, and some argue unconstitutional, provisions that restrict the President's power to engage in peacekeeping missions without an exemption from the Security Council mandating that the ICC cannot prosecute United States' personnel for acts committed during a specified conflict.[88] Other sections restrict the provision of military assistance to any country that is a member of the ICC, except NATO countries and certain major allies, or they require the president to get

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International Criminal Court would be "dead on arrival" if sent to Senate); Noone & Moore, *supra* note 4, at note 240. *See also* Johnson, *supra* note 3, at 432.

[82] William J. Clinton, *Clinton's Statement on War Crimes Court*, BBC NEWS, Dec. 31, 2000.

[83] *See generally* Elsea, *supra* note 6.

[84] *See* CARTER ET AL., *supra* note 24, at 102.

[85] *Id. See* CARTER ET AL., *supra* note 24, at 102 (indicating that despite fact that United States is not a party to treaty, the Vienna Convention on the Law of Treaties is considered by United States to be customary international law and therefore its requirements are obligatory on all states). *See also* Vienna Convention on the Law of Treaties art. 18, May 23, 1969, 1155 U.N.T.S. 331.

[86] *See* Marc Grossman, *American Foreign Policy and the International Criminal Court*, POL'Y PAPERS (2002).

[87] American Servicemembers' Protection Act, Pub. L. No. 107-206 (2002). *See, e.g.*, Johnson, *supra* note 3; Elsea, *supra* note 6.

[88] *See* Elsea, *supra* note 6, at 11. For a discussion of the potential unconstitutional provisions, see *id*. at 11-17.

waivers that certify to Congress that the ICC will not seek jurisdiction in respect to American activities abroad.[89] One of the most controversial provisions of the ASPA is Section 2008, which authorizes the president to use "all means necessary and appropriate" to free Americans or American allies who are detained by the ICC.[90] Such a swift and severe congressional response to the ICC caused many in the global community to believe that the United States was taking a unilateral approach to its foreign policy, thus offending many European allies and other countries throughout the world.[91]

In response to the ICC taking effect and the enactment of the ASPA, President Bush entered into over 100 bilateral agreements with ICC State Parties and non-parties in order to limit the possibility of Americans coming into the custody of the ICC.[92] These bilateral agreements asked the foreign state not to surrender American nationals to the ICC if that national was within the territorial jurisdiction of that foreign state, thus disregarding the ICC requirement for surrender by that state under Article 89.[93] These agreements were made pursuant to Article 98 of the Rome Statute, which prevents the ICC from proceeding with a request for surrender from a State Party if that request would "require the requested State to act inconsistently with its obligations under international agreements."[94] In other words, the ICC cannot force a member state to violate any treaties or international obligations into which that state has entered. These Article 98 agreements therefore arguably provided an effective countermeasure to the ICC's ability to gain custody over Americans.

II. THE ROME STATUTE

A. Purpose and scope

As discussed above, the Rome Statute's purpose is to "put an end to impunity" and "contribute to the prevention" of the "most serious crimes of international concern."[95] However, the ICC does not take on this task alone.

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[89] *See id.* at 12.

[90] *Id.* at 13. This provision offended the Dutch (The Hague is located in the Netherlands) and the act has become derisively known as the "Invasion of the Hague Act." *See* Robert Marquand, *Dutch still wincing at Bush-era Invasion of the Hague Act*, HAMILTON SPECTATOR, Feb. 21, 2009 (2009 WLNR 3398213).

[91] *See, e.g.*, Johnson, *supra* note 3 (arguing ASPA does not protect U.S. servicemembers and criticizes its position in American foreign policy); Elsea, *supra* note 6 (concurring).

[92] Elsea, *supra* note 6, at 26.

[93] *See id.* at 12; *see also* Rome Statute, *supra* note 5, art. 89 ("surrender of persons to the Court").

[94] Rome Statute, *supra* note 5, art. 98.

[95] *Id.* pmbl, art. 1.

Instead, the State Parties to the ICC recognize that it is the "duty of every State to exercise its criminal jurisdiction over those responsible for international crimes."[96] Thus, the Rome Statute "shall be *complementary* to national criminal jurisdictions."[97] This means that the ICC will not have "original jurisdiction" over crimes occurring under its jurisdiction.[98] The Court was created to act in cases in which domestic courts have failed, rather than superseding the court systems of State Parties whenever the Court pleases.

B. The principle of legality and the most serious crimes of international concern

The principle of legality is a concept rooted in fundamental fairness in the prosecution and punishment of criminal offenders. The concept arose during the 18th Century Enlightenment movement.[99] It prevents one from being prosecuted for a crime that is not codified by a legislative body elected by the people.[100] It also prevents punishment for a crime that was not established when the crime occurred.[101] In other words, it would be unfair to attempt to punish someone for a crime that was unknown at the time of the offense, and for which a punishment was not then prescribed. This has become a well-established principle of international law, perhaps even rising to the status of customary international law.[102] In order to satisfy the principles of legality, the Rome Statute's crimes are carefully delineated, as are the associated penalties for convictions.[103]

Article 5 lists the crimes within the jurisdiction of the Court: "the crime of genocide; crimes against humanity; war crimes; the crime of aggression."[104] However, due to a lack of consensus on the definition of the

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[96] *Id.* pmbl.

[97] *Id. See also id.* art. 17 ("issues of admissibility") (emphasis added). The concept of complementarity is a central feature to the Rome Statute and will be discussed in further detail below.

[98] Bassiouni, *supra* note 11, at 65. The ICC's website calls the Court a "court of last resort." *See infra* note 129.

[99] *See generally* CESARE BECCARIA, ON CRIMES AND PUNISHMENTS ch. 3 (American ed., Philip H. Nicklin 1819) (1764).

[100] *See generally id*

[101] *See generally id.*

[102] *See generally* Convention for the Protection of Human Rights and Fundamental Freedoms, art. 7, para 1, Nov. 4, 1950, E.T.S. 5 (codifying "principle of legality").

[103] *See* Bassiouni, *supra* note 11, at 65-66. The principle of legality is defined by two basic maxims: *nullum crimen sine lege* (no crime without law); and *nulla poene sine lege* (no punishment without a law authorizing it) which are codified in the Rome Statute in Articles 22 and 23.

[104] Rome Statute, *supra* note 5, art. 5(1).

crime of aggression, the Court currently has no jurisdiction over that crime. The crime of aggression will not be included in the Court's jurisdiction until a definition is adopted pursuant to the amendment procedure under Article 121.[105] Pursuant to the requirement in Article 123, the Rome Statute may be reviewed and amended after seven years of its entry into force.[106] Thus an amendment is possible in the near future.

Each crime is defined in great detail, but a thorough analysis of what meets the definition of each crime is outside the scope of this paper. Moreover, an analysis of each crime's definition will become more important once the ICC has set precedent through its interpretation of the Rome Statute in current and future cases.[107] More specifically, genocide is defined in Article 6.[108] Crimes against humanity are defined in Article 7.[109] War crimes are defined in Article 8.[110] The *mens rea* requirements for criminal responsibility are "intent and knowledge," unless otherwise provided.[111] Since 110 countries have ratified the Rome Statute,[112] the ICC statute is likely the leading and most credible source for the definitions of these crimes under international law today.

C. Jurisdiction

The most controversial aspect of the ICC is its jurisdictional reach. The Court has jurisdiction over crimes referred to in Article 5 of the Rome

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[105] *Id.* art. 5(2). *See e.g. id.* art. 121 ("Amendment").

[106] *Id.* art. 123 ("Review of Statute"). Since the Rome Statute entered into force in July of 2002, it can be reviewed and amended as of July 2009.

[107] As discussed in *supra* Part I(C), the ICC is just hearing its first cases and no decisions have yet been rendered.

[108] *See* Rome Statute, *supra* note 5, art. 6 ("[G]enocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part" and others such as "prevent[ing] births" and "forcibly transferring children of the group to another group.").

[109] *See id.* art. 7 ("[C]rimes against humanity means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: (a) Murder; (b) Extermination; (c) Enslavement;" and many others.).

[110] *See id.* art. 8 ("[W]ar crimes means: (a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected . . . (i) Wilful killing; (ii) Torture or inhuman treatment, including biological experiments;" and many others.).

[111] *Id.* art. 30.

[112] *See* ICC – The States Parties to the Rome Statute, http://www.icc-cpi.int/Menus/ASP/states+parties/The+States+Parties+to+the+Rome+Statute.htm (last visited Mar. 15, 2010).

Statute when: a referral is made to the Prosecutor by a State Party;[113] when a situation is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations;[114] or when the Prosecutor has initiated an investigation.[115]

The bases of the Court's jurisdiction are the "principle of territoriality" and the "active nationality principle."[116] The principle of territoriality allows a state to claim jurisdiction over crimes that occur within its territorial limits or crimes that occur outside of its territory but that substantially affect something within the state's territory. The active nationality principle gives a state jurisdiction over the conduct of its nationals acting in other states. Under Article 12, the ICC has jurisdiction over crimes committed on the territory of a State Party or over a person who is a national of a State Party.[117] Note, however, that the Court will have jurisdiction regardless of territoriality or nationality if the United Nations Security Council refers the case to the ICC.[118] Actions taken by the Security Council are mandatory[119] and thus bind states regardless of whether they are parties to the Rome Statute.[120] Much controversy has surrounded the ICC's jurisdiction over crimes committed on the territory of a State Party because this allows the ICC to claim jurisdiction over persons who are nationals of states that are not parties to the Rome Statute, but who allegedly commit crimes within the Court's jurisdiction. This was a major issue of contention for the United States because treaties are typically only binding on consenting states. While the Rome Statute does not bind the United States in any affirmative way, the ICC can still claim jurisdiction over its nationals without the government's consent. Thus, the jurisdictional reach of the Rome Statute is controversial both as a principle of international law, generally, and in its applicability to the conduct of United States' nationals specifically.

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[113] *See* Rome Statute, *supra* note 5, art. 13(a). Article 14 governs referrals by State Parties.

[114] *See id.* art. 13(b).

[115] *See id.* art. 13(c). The Prosecutor's investigation must conform to Article 15.

[116] Kaul, *supra* note 18, at 577.

[117] *See* Rome Statute, *supra* note 5, art. 12 (2) ("preconditions to the exercise of jurisdiction").

[118] The language of Article 12 produces this result. The court may exercise its jurisdiction based on a crime occurring in the territory of a State Party or over the national of a State Party only if referred to by a State Party or by the Prosecutors own initiation under Article 15. *See e.g.* Rome Statute, *supra* note 5, art. 12(2); art. 13(a, c).

[119] As of June 28, 2006, 192 countries were members of the United Nations. *See* United Nations Member States, http://www.un.org/News/Press/docs/2006/org1469.doc.htm (last visited Mar. 15, 2010).

[120] *See* Johnson, *supra* note 3, at 435; s*ee also* Czarnetzky & Rychlak, *supra* note 1, at 91.

D. Complementarity

Hans-Peter Kaul, judge and Vice President of the Court, has said that complementarity is the "decisive basis of the entire ICC system."[121] This principle "recognizes the primacy of national prosecutions" and "reaffirms state sovereignty."[122] The principle of complementarity determines whether a case is inadmissible to the ICC. Under Article 17, "a case is inadmissible where . . . the case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is *unwilling or unable* genuinely to carry out the investigation or prosecution."[123] A case will also be inadmissible when "the State has decided not prosecute, unless the decision resulted from the *unwillingness or inability* of the State to genuinely prosecute"[124] or when the person "has already been tried."[125]

To determine whether a State is "unwilling" to prosecute after an investigation, the Court will look to see whether the proceedings shielded the person concerned, whether the proceedings were unjustifiably delayed inconsistently with the principles of justice, or whether the proceedings were not impartially or independently decided in accordance with bringing the accused to justice.[126] These provisions prevent sham proceedings from insulating an alleged offender from the ICC's jurisdiction.

"Inability" to prosecute is determined by the following factors: "a total or substantial collapse or unavailability of [a state's] national judicial system;" inability to obtain the accused or evidence and testimony; or, the state being "otherwise unable to carry out its proceedings."[127] In other words, "inability" will be found where the state is in no position to prosecute or investigate criminals through its domestic capacity.

This complementarity regime led Judge Kaul to conclude that "if states generally discharge their primary duty to prosecute crimes, the Court will not be given anything to do and will have no cases."[128] The ICC's website states that the principle of complementarity makes the ICC a "court of last resort."[129] Therefore, absent a State Party or Security Council referral, the Court will only hear cases when the situation reveals that the State Party is

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121 Kaul, *supra* note 18, at 577.

122 *Id. See generally* Rome Statute, *supra* note 5 pmbl.

123 *See* Rome Statute, *supra* note 5 art. 17(1)(a) (emphasis added).

124 *Id.* at (1)(b) (emphasis added).

125 *Id.* at (1)(c). Note, this Article provides for double jeopardy protection.

126 *Id.* at (2)(a-c).

127 *Id.* art. 17(3).

128 Kaul, *supra* note 18, at 577.

129 *See* ICC – ICC at a glance, http://www.icc-cpi.int/Menus/ICC/About+the+Court/ICC+at+a+glance/ (last visited Mar. 15, 2010).

unwilling or unable to prosecute the alleged offender.[130] This provision promotes state sovereignty and respects and encourages domestic prosecutions. The Court steps in when domestic institutions fail due to strife.

III. CURRENT IMPLICATIONS FOR THE UNITED STATES AND NATIONAL SECURITY

A. Are members of the United States military subject to the ICC's jurisdiction?

Despite the fact that the United States is not a party to the ICC, members of its military or other American citizens, including government officials, could come under the ICC's jurisdiction. This constituted one of the main objections of President Clinton and Bush, as well as members of the Senate, to the ICC during its formation and subsequent entry into force in 2002.[131]

Members of the United States military are in fact subject to the jurisdiction of the ICC, but only if they commit crimes under the ICC's jurisdiction within the territory of a State Party.[132] Under Article 12, the Court "may" exercise jurisdiction over crimes occurring on the territory of a State Party regardless of the nationality of the offender.[133] Thus, if a United States military member (or national) commits a war crime, a crime against humanity, or genocide on the territory of one of the State Parties, that individual's conduct falls within the jurisdiction of the ICC. The State Party on whose territory the criminal act occurs could refer the matter to the ICC prosecutor pursuant to Article 14,[134] or alternatively, the ICC prosecutor could initiate an investigation pursuant to his Article 15 powers.[135] This

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[130] To meet the complementarity requirements, a state may have to enact domestic legislation significantly similar to the Rome Statute's definition of war crimes, crimes against humanity, and genocide in order to adequately prosecute defendants in domestic courts to prevent ICC jurisdiction. *See* Czarnetzky & Rychlak, *supra* note 1, at 97; s*ee also* Jann K. Kleffner, *The Impact of Complementarity on National Implementation of Substantive International Criminal Law*, 1 J. INT'L CRIM. JUST. 86 (2003) (concurring).

[131] *See supra* Part I(D).

[132] *See* Rome Statute, *supra* note 5, art. 12(2)(a).

[133] *Id.*

[134] *See id.* art. 14 ("referral of a situation by a State Party").

[135] *Id.* art. 15(1) ("The Prosecutor may initiate investigations *proprio motu* on the basis of information on crimes within the jurisdiction of the Court."). In other words, if the Prosecutor determines that a "reasonable basis" exists that a crime occurred within the ICC's jurisdiction, he can initiate proceedings on his own initiative. *See id.* at (3). However, he must submit his reasons for doing so to the Pre-Trial Chamber and get an authorization to continue. *See id.* at 15(3-4).

would grant the Court jurisdiction under Article 13.[136] In addition, the United Nations Security Council could refer the case to the prosecutor pursuant to Article 13.[137] However, the United States, as a permanent member of the Security Council,[138] could veto any referral, and thus effectively kill the case.[139]

The Court, however, cannot automatically hear cases. The principle of complementarity must be satisfied before the Court can exercise jurisdiction and hear a case. Thus, if the United States were to initiate an investigation of its own accused national, even if it decided not to prosecute, it would effectively prevent the ICC from bringing a case against the accused.[140] As long as the decision not to prosecute was not due to the "unwillingness or inability" of the United States to prosecute the individual, the ICC could not try the case..[141] In addition, if the United States decided to prosecute, and either acquitted or convicted the defendant, then the ICC would not have jurisdiction over that defendant for those crimes.[142] The defendant is also protected by the Rome Statute's provision against double jeopardy, and therefore could not be tried twice for the same crime.[143] Thus, an acquittal or conviction would end the matter before the Court. However, the conviction or acquittal must not have been for the purpose of "shielding the person from criminal responsibility for crimes within the jurisdiction of the Court," and must have been "conducted independently or impartially in accordance with the norms of due process recognized by international law."[144]

B. Other safeguards and limitations of the ICC

There are other safeguards built into the ICC system that help decrease the likelihood, or even prevent the prosecution of an American national. First, there are no secret investigations or prosecutions. Under Article 18, the ICC prosecutor must provide notice that an investigation will be initiated to all State Parties, and to the United States, when the prosecution concerns

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136 *Id.* art. 13 ("exercise of jurisdiction").

137 *See id.* art. 13(b).

138 *See* U.N. Charter art. 23 (describing membership in Security Council).

139 *See id.* art. 27(3) (voting).

140 *See* Rome Statute, *supra* note 5, art. 17(1)(a).

141 *See id.* at (b). Unwillingness is determined under Article 17(2) and is also discussed in *supra* Part II(D). It generally means that the investigation cannot shield the person from accountability to the ICC.

142 *Id.* art. 17(1)(a), (c).

143 *See id.* art. 20(3) (asserting defendant cannot be tried by both U.S. and ICC for same crime).

144 *Id.* art. 20(a-b).

an American.[145] If the state notifies the Court within one month that it is beginning an investigation or prosecution into the matter, then the Prosecutor must defer to that state's investigation.[146] Under the complementarity principle, this removes jurisdiction from the Court.[147]

Second, the defendant, or the state that has jurisdiction over the defendant, can challenge the Court's jurisdiction if that defendant or state believes that the ICC has no jurisdiction under the rule of complementarity.[148]

Third, "no investigation or prosecution may be commenced . . . for a period of 12 months" after the United Nations Security Council issues a resolution to that effect, and that resolution may be renewed indefinitely.[149] Thus, if the Security Council issues a resolution stating that the ICC cannot prosecute any individual for any of the ICC's crimes that occurred in a specified territory within the Court's jurisdiction, the ICC is without jurisdiction until that resolution expires. This may be an effective measure for the United States since it is a permanent member of the Security Council, and wields a significant amount of influence over international diplomacy issues. However, since deferral requires an affirmative vote, the veto power is inapplicable to the United States' ability to prevent a prosecution in this manner.

Fourth, the trial must be conducted in the presence of the defendant.[150] Therefore, if a military member or American national is in the territory of the United States, the Court would not be able to gain custody and prosecute that person without the United States arresting and surrendering them to the Court.[151] Thus, prosecutions and convictions will not occur without the defendant receiving their day in court, thereby removing this due process concern.

Fifth, in an attempt to prevent erroneous or malicious arrests or detentions, the Rome Statute provides that, "anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation."[152] This limits politicized prosecutions, as well as prosecutions based on reprisals by State Parties using their referral ability.

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[145] *See id.* art. 18(1).

[146] *See id.* at 18(2).

[147] *See id.* art. 17(1)(a).

[148] *See id.* art. 19(2)(a-b); s*ee also id.* art. 17(a-b).

[149] *Id.* art. 16.

[150] *See id.* art. 63(1).

[151] Since the United States is not a party to the statute, it is not obligated to surrender individuals who have been indicted by the Court or who have arrest warrants or subpoenas outstanding. *See generally id.* art. 89 (laying out rules regarding surrender of persons to the ICC).

[152] *Id.* art. 85.

Ideally, this measure will act as an effective deterrent against any potential malicious or politically motivated prosecution.

Lastly, the Court cannot interfere with treaty obligations that a State Party has entered into under Article 98.[153] As discussed *supra*, President Bush has entered into over one hundred Article 98 agreements, which prevent other states from surrendering Americans to the ICC.[154] Article 98 agreements demonstrate how international diplomatic efforts can be effective tools against unwarranted prosecutions.

C. Practical considerations

Since the Court only seeks to prosecute the most serious international crimes, there is a threshold check on the nature and extent of the crimes that the ICC will pursue. The Court does not have the money or resources to investigate soldiers who have committed crimes that may or may not meet this threshold.[155] The Court's monetary and resource limitation is a practical safeguard that may result in the Court's choice not to pursue individuals who are not heavily involved with the planning or execution of the crimes within the Court's jurisdiction.[156] In other words, the Court is more likely to target group leaders or heads of state who either order that the crimes be committed, or who orchestrate or plan the criminal conduct. Such targeting limits the number of individuals who may be tried by the Court, and the typical soldier is therefore unlikely to face prosecution.[157] In addition, orders given by top United States government officials will likely be from the Pentagon, the White House, a military base, or other location on American soil. Arguably, this means that their conduct would not have occurred on the territory of a State Party. Thus, the order would be an act committed outside of the ICC's jurisdiction. Note, however, that the ICC may interpret an order given outside of the ICC's jurisdiction under a territorial jurisdictional approach. Under this approach, the Court may then argue that the act (the order) had an illegal and substantial effect (i.e. genocide, crimes against humanity, or war crimes) within the territory of the

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153 *See, e.g., id.* art. 98; *supra* Part I(D).

154 *See supra* at Part I(D) (discussing Article 98 agreements).

155 *See* William W. Burke-White, *Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice*, 49 HARV. INT'L L.J. 53, 66 (2008) (indicating that current financial situation of Court means it can only prosecute two cases per year). *See also* Kaul, *supra* note 18, at 578 (stating that scarcity of resources inhibits investigations and prosecutions).

156 *See* Burke-White, *supra* note 155, at 66.

157 Fatou Bensouda, Deputy Prosecutor, International Criminal Court, Fatou Bensouda Class Videoconference, in Chapell Hill, N.C. (Mar. 4, 2008) (confirming the ICC does not have the resources to go after low-level soldiers and government officials).

ICC, and that jurisdiction is therefore valid. How the Court interprets its jurisdictional limitations in such situations is yet to be seen.

The greatest practical safeguard may be the inability of the Court to arrest or detain individuals without cooperation from the State Parties or other non-members.[158] This leaves the ICC without an enforcement power. Unlike domestic institutions, there is no international executive branch that must carry out the orders of the Court. Without cooperation and effort provided by State Parties, the ICC cannot independently gain custody over indicted suspects.

Yet despite these built-in safeguard provisions and practical considerations, it is still theoretically possible that a United States national could be tried by the Court, however unlikely that may be. This slim chance continues to motivate the United States' opposition to the ICC.

D. National security implications

The above discussion leaves many top government officials to question whether the existence of the ICC will have a "chilling effect" on foreign operations conducted by the United States.[159] Since it is possible that the ICC could claim jurisdiction over Americans, particularly American servicemen acting in a foreign theater, the Court's jurisdictional reach may implicate American operations in Afghanistan, Iraq, and elsewhere, or even impede future peacekeeping operations in countries around the world.[160] However, given that the United States can prosecute those who commit crimes during armed conflict through military commissions and courts martial, the ICC would be unable to hear those cases due to complementarity.

One could speculate that the possibility of future conflicts between the United States and Iran or North Korea, two countries that wish to obtain nuclear weapons, may decrease because the United States may become more hesitant to enter into armed conflict on those states' territories for fear of prosecutions by the Court for wrongful conduct committed by Americans during a military campaign. While neither Iran nor North Korea is a State Party to the ICC,[161] either country could temporarily accept the jurisdiction of the Court with respect to any crime within the Court's jurisdiction that those countries allege occurred on their soil. This would satisfy the

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158 *See* Burke-White, *supra* note 155, at 65.

159 *See* Johnson, *supra* note 3, at 450.

160 Although one may wonder why Americans are committing crimes so heinous as to warrant the ICC's attention.

161 *See* ICC – The States Parties to the Rome Statute, http://www.icc-cpi.int/Menus/ASP/states+parties/ (last visited Mar. 15, 2010).

territorial requirement under Article 12.[162]

Given this possibility, the United States should consider either engaging the Court or becoming a State Party in order to reassert influence over the Court's direction and operations. This influence could be especially important when amendments are proposed to the Rome Statute..[163] The Bush Administration also sought blanket protection from the United Nations Security Council prior to engaging in armed conflicts and peacekeeping missions in countries such as Bosnia, Liberia, and Haiti by issuing a resolution that defers investigations or prosecutions of any Americans engaged in those missions and conflicts.[164] The Obama Administration could do the same when future events leave open the possibility of direct military conflict with Iran or North Korea. This leaves the negative national security ramifications somewhat minimal or exaggerated and unduly pessimistic.

IV. SHOULD THE UNITED STATES JOIN THE ICC?

A. The Obama Administration

The Obama Administration has already indicated that the United States might be reconsidering joining the ICC, or at least may be more willing to work with the Court than the prior Bush Administration. Susan Rice, United States Representative to the United Nations, spoke highly of the United States' commitment to international humanitarian law in a speech to the United Nations Security Council.[165] When commenting on the ICC, Rice stated that the Court "looks to become an *important and credible* instrument for trying to hold accountable the senior leadership responsible for atrocities committed in the Congo, Uganda, and Darfur."[166] Subsequently, President Obama supported the ICC's indictment of Sudan's President Omar Al Bashir.[167] The spokesman for President Obama's national security advisor,

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[162] *See* Rome Statute, *supra* note 5, art. 12(3). There is a major concern that this provision will cause politicized prosecutions by the ICC because a State that has been engaged in armed conflict with the United States may simply claim ICC jurisdiction and then refer cases pursuant to Article 14 of the Rome Statute.

[163] *See id.* art. 121 ("After expiry of seven years from the entry into force of this Statute, any State party may propose amendment thereto."). The ICC went into effect July, 2002. Seven years later is July, 2009. Thus, amendments may now be proposed.

[164] *See* Elsea, *supra* note 6, at 23-24.

[165] Press Release, Susan Rice, U.S. Permanent Representative to the U.N., U.S. Mission to the U.N., Respect for International Humanitarian Law, USUN Press Release #020, (Jan. 29, 2009), *available at* http://www.state.gov/p/io/rls/rm/2009/115579.htm.

[166] *Id.* (emphasis added).

[167] *See* Jon Ward & Betsy Pisik, *Obama Back Indictment of Sudan Leader*, WASH. TIMES, Feb. 5, 2009, *available at* http://www.washingtontimes.com/news/2009/feb/05/obama-backs-

Ben Chang, when speaking of President Bashir's indictment, stated that the Obama Administration supports the "pursuit of those who've perpetrated war crimes."[168] These are early indications that the new administration may be reconsidering the ICC, and becoming more supportive of the permanent international criminal court acting in international legal affairs. Whether President Obama will actually reconsider the United States' membership, however, remains to be seen.

B. Positive aspects of joining the ICC

There are many arguments in favor of the United States becoming a party to the Court. First, the United States has long supported, both in theory and concept, the ICC's objective of ending impunity for the "most serious crimes of international concern," and has long respected international humanitarian and human rights law.[169] Further, without support from the country with the greatest wealth and the strongest military, the ICC may not be as effective at achieving its goal. The United States could aid the ICC by taking an active role in capturing individuals who have been indicted by the Court, but whose country is unable to detain them. The United States could also provide necessary financial support and resources to help the ICC function as an institution.[170] The United States national security network, including the military, could provide information on the whereabouts of individual suspects, and allocate resources to the ICC or State Parties trying to capture suspects indicted by the Court.

Second, without membership in the ICC, the United States has only limited and indirect influence on the activities of the Court.[171] With membership, the United States would be able to vote as a member of the Assembly of State Parties and initiate amendments to the Rome Statute.[172] In addition, American judges and lawyers would have the opportunity to serve on or for the Court, bringing a wealth of knowledge and experience along with them. Such involvement could be crucial to the direction and future of the Court, and may even help squelch American opposition to the ICC.

Third, joining the ICC may actually increase national security. If the ICC, with the help of the United States, can become more effective at

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indictment-of-sudan-leader/.

[168] *Id.*

[169] *See* Johnson, *supra* note 3, at 424.

[170] *See e.g.* Rome Statute, *supra* note 5, art. 115 (describing contributions from State Parties); art. 116 (describing voluntary contributions from any government or organization).

[171] This was the main reason President Clinton signed the Rome Statute. *See* Clinton, *supra* note 82.

[172] *See* Rome Statute, *supra* note 5, art. 112.

indicting, detaining, and prosecuting serious criminals that threaten international peace and security, a more peaceful and stable world may follow.[173] This can indirectly affect the national security of the United States. For instance, it is known that many terrorist groups train in African countries or other destabilized areas where the host governments are unable to control terrorist organizations.[174] Prosecuting serious criminals and removing the leadership of their organizations may help increase regional stability and aid foreign governments in maintaining peace. Governments could capture, detain, and try suspected terrorists, prevent terrorist camps from forming, and freeze assets and funding being funneled to regional terror groups. In addition, governments that are able to provide jobs and stable economic markets may be less prone to terrorist recruitments within their communities.[175]

An increase in indictments and convictions of group leaders who commit crimes under the Court's jurisdiction may also have a deterrent effect, although empirical research in this area is slim.[176] Effectively deterring serious crimes could be an important factor in bringing peace to certain areas of the world.[177] The risk of capture may also have a further deterrent effect. When an indictment or arrest warrant is issued, the states party to the ICC are required to capture and surrender that individual to the Court.[178] The risk of capture effectively limits the individual offender's ability to travel to other countries.[179] If the threat of capture and ICC

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[173] One commentator suggests the Court develops a system of "proactive complementarity" where the ICC uses its political influence to encourage domestic prosecutions and, if necessary, aid in those prosecutions. *See* Burke-White, *supra* note 155.

[174] *See, e.g.*, Scott Johnson, *Africa Turns Away the Troops*, NEWSWEEK, Nov. 16, 2009, at 10 (stating that Africa's "combination of failed states, poverty, and pockets of religious extremism offer the perfect breeding ground for terrorists"); Eric Schmitt, *Threats and Responses: Expanding U.S. Presence – Pentagon seeking New Access Pacts for Africa Bases*, N.Y. TIMES, Jul. 5, 2003; Raymond Bonner & Don Van Natta Jr., *Regional Terrorist Groups Pose Growing Threat, Experts Warn*, N.Y. TIMES, Feb. 8, 2004.

[175] This regional stabilization argument is purely speculative in nature but seems logical from at least a theoretical point of view. One would think that functioning governments would allow for better resource allocation to combat terror groups and that a stable economy would be inimical to the presence of local terror camps.

[176] *See* Ginsburg, *supra* note 63, at 503 (discussing deterrence of international criminal prosecutions).

[177] *See* Johnson, *supra* note 3, at 419 (discussing war avoidance and deterrence).

[178] *See* Rome Statute, *supra* note 5, art. 88.

[179] However, as indicated in the case against Sudan's President Bashir, problems arise such as President Bashir's avowal to kick humanitarian organizations out of the country if his indictment is not rescinded thereby hurting the already destitute people in the Darfur region. *See* Ginsburg, *supra* note 63, at 503 (discussing problem of ICC interfering in foreign policy, namely ability of international community to negotiate for amnesty if crimes cease and arguing that ICC cannot grant amnesty to individuals who have committed acts in violation of the

prosecutions contributes to a worldwide deterrence of serious crimes, then this may increase regional stability, international peace, and possible threats to America's national security.

Fourth, the United States can contribute necessary experience and political support to the ICC, thereby increasing the Court's legitimacy on the world stage, and supporting the institution as a model of justice for other countries to follow in their domestic capacities.[180] Legitimacy is important for any legal institution. Without it, criminal prosecutions can be challenged as arbitrary, unfair, and unlawful, thus destroying the institution and any faith in the judicial system.

Fifth, one of the Court's goals is to counter the failure of domestic legal systems.[181] When countries are unable to prosecute serious criminals who have committed atrocities that have led to economic collapse or instability in a country or region, the United States may be able to more effectively aid these areas by allocating its resources, expertise, and knowledge through the ICC system. Support for domestic legal systems is crucial for increasing worldwide prosecutions, and the ICC cannot do it alone.[182]

Lastly, the ICC may prevent the "threat or use of force against the territorial or political independence" of another state, thereby affirming a goal of the United Nations Charter.[183] This mandate may help prevent war and ultimately lead to an increase in global security as a whole. A logical argument can be made that war or armed conflict lead to regional destabilization, and that destabilization leads to further recruitment for terrorist organizations that act to counter perceived deficiencies in government action or inaction, political processes, and foreign diplomacy.[184] Furthermore, instability from the aftermath of war also leads to problems such as poverty, unemployment, refugee exodus, and other factors that disrupt economic and social progress. Arguably, these factors may too lead to terrorist recruitment. Preventing war would help thwart these consequences, and thereby increase regional peace and decrease terrorist formation and recruitment. This effect may increase the national security of

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Rome Statute due to prosecutor's statutory mandate, thus impeding international efforts at peacekeeping).

[180] At least one commentator believes resource allocation is better for improving domestic institutions rather than promoting a strong and permanent international criminal court. *See* Elena Baylis, *Reassessing the Role of International Criminal Law: Rebuilding National Courts through Transnational Networks*, 50 B.C. L. REV. 1 (2009).

[181] *See* Noone & Moore, *supra* note 4, at 144.

[182] *See* ICC Press Release, Complexity of Creating Legal Systems as Part of Peace-Building Process, Sept. 2002, *available at* http://www.icc-cpi.int/NR/rdonlyres/5A9EF044-B8DA-4C12-B842-C05C4CFFADDA/274382/42041.pdf.

[183] Rome Statute, *supra* note 5, pmbl.

[184] *See generally* ICC Press Release, Complexity, *supra* note 182.

the United States.

C. Negative implications

The ICC is not without controversy, as indicated by the statements and actions of Presidents Clinton and Bush. The primary issue pervading the argument against the ICC is that it intrudes too heavily on United States' sovereignty.[185] Americans are not inclined to have their government officials or military members subject to a foreign court. Second, Americans who are tried under the ICC will not be granted their due process rights under the United States Constitution, which raises fears of unfairness and arbitrariness, and appears generally at odds with Western democratic principles.[186]

A third objection to the ICC is the belief that the prosecutor is unaccountable since he is not held to answer to any political entity.[187] Some fear this could lead to unjust prosecutions of Americans.[188] If the United States became a State Party, the nationality principle would give the ICC jurisdiction over all Americans.[189] Therefore, membership would increase the likelihood of a future charge being brought against an American, and despite the safeguards of complementarity and other provisions, a trial may proceed against that American defendant.[190]

Lastly, entering into an international treaty of this magnitude and scope could effectively limit the ability of the United States in its peacekeeping missions or armed conflicts in the future, and thus prevent effective national security decisions from being made at the White House and Pentagon. Fear of indictment for orders given or acts taken in pursuit of United States' foreign policy objectives could have a chilling effect on national security and thereby make the United States less safe.[191] These are by no means small concerns. However, the closer one scrutinizes these arguments, the weaker they become.

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[185] *See generally* McKeon, *supra* note 77 (discussing fear of a permanent international criminal court's potential to intrude on sovereignty of states and concluding, however, that states must balance sovereignty and international community's concern for punishing most serious international crimes).

[186] *See* Noone & Moore, *supra* note 4, at 144.

[187] Elsea, *supra* note 6, at 8.

[188] *See* Johnson, *supra* note 3, at 450.

[189] *See generally* Rome Statute, *supra* note 5, art. 12.

[190] However, a trial conducted by the ICC is likely to be much fairer and much more likely to conform to western legal principles than a trial by a foreign domestic court, especially in the third world. *See* Johnson, *supra* note 3, at 469-70.

[191] *Id.* at 450.

D. Weighing the options

In examining the positive and negative implications together, there appears to be more merit to the United States reengaging the Court, either by signing onto the ICC treaty or by substantially improving its relationship with the Court through greater cooperation, engagement in legal conversations and development, positive outreach, and aiding in the capture and surrender of indicted individuals who remain at large.[192] The latter option may prove more tenable in the current American political sphere since it does not involve signing the Rome Treaty and creating new legal obligations under international law. However If the United States were to sign, the Court may then have a better chance of success in trying defendants accused of committing egregious international crimes, and, in turn, aid in the process of attaining American national security objectives.

Complementarity was built into the structure of the ICC in order to support state sovereignty and promote the role of domestic institutions in handling the investigation and prosecution of the most serious criminals.[193] Furthermore, engaging the Court would arguably help alleviate concerns over American indictments, as the United States and the ICC could use diplomatic means to address any future issues. Regardless, since American nationals are already subject to the ICC for crimes committed in a State Party's territory, it would be more prudent to join the Court and influence it from within than to fight it from the outside.

The due process concerns over the ICC are largely confined to the lack of a jury trial. While it is true that there is no right to a jury trial, the Rome Statute codifies many of the most important due process rights: double jeopardy;[194] the right to appeal;[195] the presumption of innocence;[196] the right to an attorney;[197] the right to a speedy trial;[198] freedom from warrantless

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[192] One gesture that could improve the United States' relationship would be to rescind the potentially unconstitutional and arguably offensive statute, the American Servicemembers Protection Act. *See, e.g.*, Johnson, *supra* note 3; Elsea, *supra* note 6; *supra* Part I(D).

[193] The idea that Americans cannot be tried in other states for crimes committed within those state territories fails on another ground. There is no rule in international law that Americans cannot be tried and convicted for crimes which occurred in another state's territory in that state's domestic courts. This fact makes this objection to the ICC seem a little disingenuous. What is the difference between the other state trying an American in their domestic courts for a war crime versus sending that American to an international court to be tried? The state has simply chosen the Rome Statute as governing law and the Court as a forum for trial. *Cf.* Barrett, *supra* note 34 (arguing a similarity to laws of extradition).

[194] *See* Rome Statute, *supra* note 5, art. 20.

[195] *See id.* art. 81-83.

[196] *See id.* art. 66.

[197] *See id.* art. 67(d).

[198] *See id.* art. 67(c) (asserting that trial is to proceed without "undue delay").

searches and arrests;[199] the ability to exclude evidence illegally obtained;[200] and the right against self-incrimination.[201] In addition, the judges are elected to the bench from the Assembly of State Parties, and can be removed for misconduct.[202] The judges are experts in the areas of criminal law, criminal procedure, and international law,[203] and must be of "high moral character,"[204] impartial,[205] and independent.[206] Fear of abusive judges rendering arbitrary decisions is thus severely minimized.[207] Finally, members of the United States' military are tried by the courts martial system under the Uniform Code of Military Justice, which itself has no jury requirement.[208] Since American soldiers are not tried by juries in their own military courts, they too lack the fundamental due process protection that opponents to the ICC use in their arguments against trying American soldiers at the ICC. Therefore, the due process argument is largely without merit.

The fear of an unaccountable prosecutor can be criticized as well.[209] First, if the prosecutor initiates his own investigation,[210] he is checked by the Pre-Trial Chamber, which must grant the prosecutor permission to continue with the investigation.[211] The prosecutor can also be removed by an "absolute majority"[212] vote from the Assembly of State Parties.[213] The United States originally wanted referrals to the ICC to be made by a vote from the Security Council.[214] However, with the veto powers of the permanent members, and the history of the Security Council as a political

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199 *See id.* art. 57, 58.

200 *See id.* art. 69(7).

201 *See id.* art. 67(g), 55(a).

202 *See id.* art. 46, 47 (indicating judges are also subject to disciplinary measures).

203 *See id.* art. 36(3)(b)(i-ii).

204 *Id.* art. 36(3)(a).

205 *Id.*

206 *See id.* art. 40.

207 The judges will also be held accountable to world opinion, as the Court's opinions will be widely distributed and discussed among states and legal scholars. The judges will also be more qualified to handle cases of this complexity and severity. *See* Steven W. Krohne, Comment, *The United States and the World Need an International Criminal Court as an Ally in the War against Terror*, 8 IND. INT'L & COMP. L. REV. 159, 175 (1997).

208 Elsea, *supra* note 6, at 9.

209 *See id.* at 8; *cf.* Czarnetzky & Rychlak, *supra* note 1, at 93 (stating that an unaccountable prosecutor is a "threat to liberty").

210 Rome Statute, *supra* note 5, art. 15(1).

211 *Id.* art. 15(3-4). *See also* Barrett, *supra* note 34, at 97 (arguing that Pre-Trial Chamber will less likely by politicized due to national composition of the Court).

212 *Id.* art. 46(2)(b).

213 *See* Rome Statute, *supra* note 5, art. 46.

214 *See supra* Part I(D).

institution, the Security Council would be similarly unaccountable for its actions through such a process.[215] The ICC prosecutor also cannot bring a case without a "reasonable basis."[216] Without a reasonable basis for prosecution, the Court is without jurisdiction, and the case cannot proceed.[217] Thus, the ICC prosecutor has a similar burden to meet to that of an American prosecutor who needs probable cause in order to indict a suspect and proceed to trial. This similarity substantially weakens the unaccountable prosecutor argument.

Lastly, the fears of creating a chilling effect on American national security and foreign policy goals are largely exaggerated. The United States has sought blanket United Nations resolutions shielding its troops from detention and prosecution by the ICC, as well as Article 98 agreements that prevent surrender of American soldiers to the ICC by foreign countries.[218] The United States' perceived inability to prevent an American detention and prosecution is largely countered by the complementarity provision, as well as practical and political concerns. Engaging the Court should only increase the ability of the United States to pursue future peacekeeping missions and armed conflicts in defense of our nation's security.[219] If members of the United States' military engage in crimes under the Rome Statute, it is likely that their trials would, and should, be conducted by courts martial, thus shielding them from the ICC through complementarity. Regardless of what the future may hold, being an active member of the Court, rather than an isolationist in this new international legal system, advances the prospects of increased national security and improved foreign relations with other nations around the world.

The goal of establishing a legitimate international criminal court that would help end impunity, afford redress to victims, and remove some of the world's most dangerous criminals from terrorism and other destabilizing activities, outweighs the fears expressed by the United States in joining the ICC. While there are few legitimate arguments to counter the positive implications of the ICC, there are numerous arguments to counter the negative implications. Weighing the United States' options should convince most careful observers to conclude that joining or engaging the ICC is not only wise as a matter of national security, but also important in advancing larger goals, such as ensuring justice and stability in regions fraught with conflict and turmoil. It should also be noted that, in general, Americans

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[215] *See* Elsea, *supra* note 6, at 8 (stating that permanent members could shield their activities through veto power).

[216] *See* Rome Statute, *supra* note 5 art. 15(3); art. 53.

[217] *See generally id.*

[218] *See* Elsea, *supra* note 6, at 23.

[219] *See, e.g.*, Barrett, *supra* note 34; McKeon, *supra* note 77.

have started viewing the Court more favorably, which could help the Obama Administration make a decision regarding reengagement soon.[220]

CONCLUSION

International criminal law and international criminal tribunals have largely emerged and developed during the last 100 years of human history. The atrocities committed during the twentieth century, and the potential magnitude of future conflicts, has contributed to the notion that certain crimes are so severe that they become an offense against the entire international community. The idea that people could be held individually accountable for their actions now has a solid foundation in international criminal jurisprudence. These advancements have led to the creation of the world's first permanent international criminal court. However, for the reasons outlined in this article, the United States has chosen not to become a member of the ICC. Despite the historical tension between the United States and the Court, a practical view supports the conclusion that the United States stands to benefit from reengaging or joining the Court. The Obama administration has given indications that it may reconsider the United States' position with regard to the Court, but only time will tell.

[220] As a matter of American political will, opinion polls are showing Americans wanting the United States to engage the ICC as well as to support its mission to try criminals in Darfur. *See* AMICC: Public Opinion Polls, http://www.amicc.org/usinfo/opinion_polls.html (last visited Mar. 15, 2010) (listing recent polling; support is generally above 60%).