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THE UNITED STATES BECOMES A SIGNATORY TO THE ROME TREATY ESTABLISHING THE INTERNATIONAL CRIMINAL COURT: WHY ARE SO MANY CONCERNED BY THIS ACTION?

A. Diane Holcombe

I. INTRODUCTION

On December 31, 2000, the United States became a signatory to the 1998 Rome Treaty establishing the International Criminal Court (hereinafter “ICC”). President Bill Clinton defended this controversial action by stating that the United States became a signatory in order to “reaffirm [its] strong support for international accountability” and to “remain engaged in making the ICC an instrument of impartial and effective justice…” He acknowledged the Treaty has


3. Id.
"significant flaws," and recommended President George Bush not submit the Treaty to the Senate for advice and consent on ratification of the Treaty.\textsuperscript{4} In an address given shortly after the signing, United States Senator Jesse Helms (R-N.C.), one of the strongest opponents of the ICC, stated, "if I do nothing else this year, I will make certain that President Clinton's outrageous and unconscionable decision to sign the Rome Treaty establishing the International Criminal Court is reversed and repealed."\textsuperscript{5}

Due to the bitter disagreement over United States involvement in the ICC, the future of the establishment of a permanent international criminal court is uncertain.\textsuperscript{6} Because there are many misconceptions about how the permanent international criminal court will operate, this Article will provide information regarding the ICC system, while highlighting valid concerns regarding current and future cooperation with and participation by the United States in the ICC. Part Two of this Article will detail the movement to establish a permanent international criminal court, describing the progression toward the passage of the Rome Statute of the International Criminal Court (hereinafter "Rome Statute") and focusing on the concerns expressed by the American Delegation to the Rome Conference. Part Three will take the reader through the provisions of the Rome Statute, specifically concentrating on those provisions which have been misconstrued by the public since the inception of the Rome Treaty in 1998 and addressing valid concerns by the Court's opponents to the Court's broad jurisdictional authority. Part Four will analyze the constitutional concerns expressed by opponents of the ICC as well as indicating the position of those who support United States involvement in the ICC. Finally, Part Five of this Article will discuss the future of the ICC and potential ways to address the concerns held by opponents of the ICC.

This Article concludes that although the Rome Statute remains a flawed document with serious constitutional inadequacies and violations, the United States should remain a

\textsuperscript{4} Id.


\textsuperscript{6} Without U.S. involvement and support, it is doubtful the court will have the international power to achieve its intended goals.
signatory, working diligently to remedy these flaws by proposing amendments which include safeguards sought by the United States. Specifically, the Rome Statute should be amended to include the following provisions: implementing safeguards for peacekeeping troop deployment; restricting the jurisdiction of the ICC to State Parties only; and, limiting the jurisdiction of the Court over State Party nationals to only those nationals who commit crimes abroad unless an agreement is entered into by the State Party and the ICC allowing the ICC to exercise jurisdiction over the State Party’s nationals committing crimes in its own territory.

II. ALL ROADS LEAD TO ROME

The movement to establish a permanent international criminal court can be traced to the Nuremberg Trials following World War II. During these trials, the world community discovered the atrocities committed by the Nazis and realized there was a failure of individual countries to bring their leaders to justice for the genocidal nature of their crimes. As a result, the United Nations adopted the 1948 Genocide Convention which expressed the desirability to establish a permanent international criminal court which would be endowed with the task of trying persons charged with genocide. In order to make this court a reality, the United Nations General Assembly requested that the International Law Committee (ILC) examine


In resolution 260 of 9 December 1948, the General Assembly, ‘Recognizing that at all periods of history genocide has inflicted great losses on humanity; and being convinced that, in order to liberate mankind from such an odious scourge, international co-operation is required’, adopted the Convention on the Prevention and Punishment of the Crime of Genocide. Article I of that convention characterizes genocide as ‘a crime under international law’, and article VI provides that persons charged with genocide ‘shall be tried by a competent tribunal of the State in the territory of which the act was committed or by such international penal tribunal as may have jurisdiction . . . ’. In the same resolution, the General Assembly also invited the International Law Commission ‘to study the desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide . . . ’. Establishment of an International Criminal Court: Overview (visited June 2, 2001) <http://www.un.org/law/icc/general/overview.htm> [hereinafter Rome Statute Overview].
the creation of an international criminal court. The ILC completed a draft statute in 1951 and presented it to the U.N. General Assembly. However, "[f]ueled by the outbreak of the Korean War, the Soviet bloc States feared this [international criminal] court would be used against them . . ." Consequently, the draft statute was tabled, in part because of the advent of the cold war, but also because of the refusal of individual governments to accept international legal jurisdiction.

Nearly 40 years later, Trinidad and Tobago requested the U.N. readdress the international criminal court, specifically requesting that the court be implemented to combat international drug trafficking. However, real movement on this issue did not take place until the world witnessed the horrific events which took place in the former Yugoslavia and Rwanda. In response to these events, the U.N. Security Council, under its Chapter VII powers granted by the U.N. Charter, established ad hoc tribunals in Rwanda and the former Yugoslavia to try those suspected of war crimes. However,
these ad hoc tribunals were viewed by many countries, including members of the U.N. Security Council, as too limited. In fact, the lack of successful prosecutions under these tribunals serve as proof that the need to establish a permanent international criminal court is paramount.

In 1994, the ILC submitted its final draft statute to the General Assembly. In addition, the ILC recommended to the General Assembly that a conference of plenipotentiaries be convened to negotiate a treaty to enact the statute. As a result, the General Assembly established an ad hoc committee on the International Criminal Court to review the draft statute. After the ad hoc committee completed its work, the General Assembly established a Preparatory Committee to finalize a text of the statute for presentation to a convention of plenipotentiaries. This committee was established to prepare a consolidated draft text which would be acceptable to the plenipotentiaries of the final diplomatic conference.

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17. Bickley, supra note 12, at 213. The ad hoc tribunals' "remoteness in time and space from the scene of the original crimes" and the fact that foreign judges and international systems of justice are being utilized have made the tribunals seem illegitimate to the people of the country in which the court has jurisdiction. Daniel Johnson, THE DAILY TELEGRAPH (LONDON) March 7, 2001, at 28.

18. Bickley, supra note 12, at 242. "Nuremberg remains the only successful international war crimes tribunal. It worked thanks to unusual circumstances: the unique and undeniable enormity of Germany's crimes, the fact that most of the surviving Nazi leaders could be tried together within a year of the war, the consensus of the wartime Allies about what had to be done." Daniel Johnson, THE DAILY TELEGRAPH (LONDON) March 7, 2001, at 28.

The delays inherent in setting up an ad hoc tribunal can have several consequences: crucial evidence can deteriorate or be destroyed; perpetrators can escape or disappear; and witnesses can relocate or be intimidated. Investigation becomes increasingly expensive, and the tremendous expense of ad hoc tribunals may soften the political will required to mandate them.

Rome Statute Overview, supra note 9.


20. Timeline, supra note 13. A "plenipotentiary" is a diplomatic agent, such as an ambassador, fully authorized to represent his or her government.

21. Id.

22. Id.

The Final United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (hereinafter "Conference") was conducted from June 15 to July 17, 1998 in Rome, Italy, to finalize a treaty for the creation of a permanent international criminal court. Delegates to the Conference represented states, non-governmental organizations and regional organizations from all over the world.

David J. Scheffer, head of the United States Delegation (hereinafter "American Delegation"), stated that the American Delegation arrived at the Conference with two goals regarding the establishment of a permanent international criminal court. The United States wished to continue the progress toward international justice, while still protecting the critical role of the United States and other States in peacekeeping and other "collective military action." To accomplish this, the United States, according to Scheffer, sought a Court which would be "empowered by the U.N. Security Council to pursue those responsible for heinous crimes . . ." However, this Court would also, when acting without a U.N. Security Council mandate, contain safeguards to protect against any "misguided exercise of authority that might harm legitimate national and international interests." One such safeguard was the right of a government to "assess the court's fairness and impartiality" before deciding that its citizens would come under the ICC's jurisdiction. This would allow a government to engage its troops in "life-saving missions" without fear that individual soldiers would be subjected to prosecution by "a tribunal that had yet to stand the

27. Id.
28. Id.
29. Id.
Unfortunately, the American Delegation was not successful in achieving its goals. Individuals from the American Delegation were, and still are, under the impression that a minority of States to the Conference made “backroom” deals producing a “seriously flawed take-it-or-leave-it text,” thereby creating a Court which may become a politicized organ, detrimental to international actions promoting peace and security.

On July 17, 1998, the Conference adopted the Rome Statute. Although delegates from 120 states voted to approve its adoption, 21 states abstained and seven states, including the United States and Israel, voted against the adoption of the Rome Treaty. Once the Rome Treaty is ratified by 60 states, the Rome Statute will come into effect. As of July 2, 2001, the Treaty had 139 Signatories, with 36 States becoming Parties to the Treaty by ratification. Most recently, Sweden, on June 28, 2001, ratified the Treaty.

Although the Treaty’s ratification process remains ongoing, the United States continues to be concerned over some of its

30. Id.
31. Id.
33. Id. Upon the request of the United States, the vote was not recorded. UN Diplomatic Conference Concludes in Rome with Decision to Establish Permanent International Criminal Court: Statute of Court Adopted by Non-Recorded Vote of 120 in Favour, 7 Against, 21 Abstentions, July 17, 1998, (visited May 31, 2001) <http://www.un.org/iccfindex.htm> [hereinafter Rome Decision].
34. Edward M. Wise, Essay, The International Criminal Court: A Budget of Paradoxes, 8 TUL. J. INT'L & COMP. L. 261, 262 (2000). The Rome Statute will become effective the first day of the month, sixty days after the 60th instrument of ratification, acceptance, approval or accession is deposited with the United Nations' Secretary-General. Rome Statute, supra note 1, at art. 126.
36. Id. A State Party may withdraw from the Rome Statute by sending written notification to the Secretary-General of the United Nations. This withdrawal will become effective one year after the date of notification. Rome Statute, supra note 1, at art. 127(1). However, withdrawal will neither discharge outstanding financial obligations on the part of the State, nor affect ongoing criminal investigations in which the State is a party. Id. at art. 127(2). Therefore, a State Party cannot withdraw to shield its nationals from ongoing criminal investigations or adjudications.
provisions. Specifically, Ambassador Scheffer identified six principal U.S. objections to the Rome Statute. First, in contradiction to the Vienna Convention on the Law of Treaties, the Rome Statute includes a provision which would allow the Court to exercise jurisdiction over non-party States. Second, although the Statute creates a seven-year opt-out period for State Parties over war crimes committed by its nationals or on its territory, the American Delegation sought a ten-year opt-out period for State Parties over crimes against humanity and war crimes. Third, the Statute provides for overbroad prosecutorial authority. Fourth, the Statute does not require U.N. Security Council approval over complaints brought against an individual for acts of aggression. Fifth, the United States refuses to support a last-minute resolution to the Statute which proposed that terrorism and drug crimes be brought within the Court's jurisdiction in the near future. The United States opposed the inclusion of these crimes on the grounds that investigation and not prosecution is needed to combat these crimes and the ICC is not well equipped to perform this function. Finally, the Rome Statute prohibits reservations to the Treaty. This decision to forbid reservations grew out of the fear that if reservations were allowed they would weaken the Court's uniform application to all States. However, some United States Senators argue that reservations are necessary to protect the constitutional prerogatives of the U.S. Senate. It should be noted that the ability to make reservations to a treaty is not required under the United States Constitution.

37. A full discussion of these concerns will be discussed infra.
40. Rome Decision, supra note 33.
41. Leila Nadya Sadat & S. Richard Carden, The New International Criminal Court: An Uneasy Revolution, 88 GEO. L.J. 381, 448-49 (2000) [hereinafter Sadat & Carden]. See also Rome Statute, supra note 1, at art. 120. The inclusion of reservations in the treaty-making context is very important in that it allows states to sign onto and subsequently ratify a treaty while objecting to and not being bound by provisions in the treaty which may violate the state's constitution or not conform to the state's international operations.
42. Sadat & Carden, supra note 41, at 452.
43. Id at 452. A state may formulate a reservation unless the reservation is prohibited by the treaty, the treaty provides that only specific reservations may be made, or the reservation is not compatible with the purpose of the treaty. VIENNA CONVENTION ON THE LAWS OF TREATIES, 1969, at art. II (visited May 31, 2001) <http://www.un.org/law/ilc/texts/treaties.htm>.
44. Sadat & Carden, supra note 41, at 452.
III. CLARIFYING THE MISCONCEPTIONS: PROVISIONS OF THE ROME STATUTE

The Rome Statute contains 128 articles which establish the ICC and defines its legal status, jurisdiction, binding laws, defenses which may be used by an accused, its investigatory authority, and other framework and functions.45 The ICC will be financed from three distinct sources: 1) assessed contributions by signatory state parties; 2) U.N. contributions as approved by the General Assembly; and 3) voluntary contributions.46 Voluntary contributions may be made to the court by States, international organizations, individuals, corporations, and other entities.47 A State Party failing to make its assessed financial contributions may be prevented from exercising its vote in the Assembly of State Parties (hereinafter “Assembly”) and the Bureau.48 However, the Assembly may allow a State Party to continue to vote if it is satisfied that the failure to pay is beyond the State Party’s control.49 Sitting in the Hague, Netherlands,50 the court will only exercise jurisdiction over the “most serious crimes of international concern.”51 The ICC will have the legal capacity to prosecute individuals for crimes recognized by the international community for their

47. Rome Statute, supra note 1, at art. 116.
48. Id. at art. 112(8). According to the Rome Statute, the Assembly will be comprised of one member from each State which has ratified the ICC Treaty. Those States signing the Rome Statute, but failing to ratify, will be allowed to observe the Assembly. Id. at art. 112(1). Each State Party will have one vote in the Assembly. Id. at art. 112(7). A two-thirds majority is required for decisions on matters of substance, and a simple majority is required for decisions on matters of procedure. Id. The Assembly will have the power to consider and adopt recommendations by the Preparatory Commission; provide oversight of the administration of the Court; make decisions regarding the budget; consider and make decisions regarding non-cooperation of State Parties; take action upon advice of the Bureau; and make decision to increase or decrease the number of judges. Id. at art. 112(2). The Bureau will be comprised of a President, two Vice-Presidents, and eighteen members elected by the Assembly. Each will serve three-year terms. Id. at art. 112(3)(a).
49. Id. at art. 112(8).
50. Id. at art. 3(1).
51. Id. at art. 1. Crimes which come under the jurisdiction of the ICC will be discussed infra Part III.B.2.
heinous nature.52

A. Administration of the Court and Composition

The ICC is composed of: 1) the Presidency; 2) an Appeals Division, a Trial Division and a Pre-Trial Division; 3) the Office of the Prosecutor; and 4) the Registry.53

The Presidency will be headed by the President, along with the First and Second Vice Presidents, who are elected from the judge corps by an absolute majority of the judges.54 The President and Vice Presidents are responsible for administration of the Court, although the Office of the Prosecutor is considered an independent office and is not included in this administration.55 In addition to the administration of the Court, the President may waive the privileges and immunities of the Registrar;56 excuse a judge from presiding over a case at the judge's request;57 excuse the Prosecutor or Deputy Prosecutor from taking part in a particular case if requested;58 and propose to increase the number of judges serving on a full-time basis as required by the Court.59

Eighteen judges will serve on the Court60 on a full-time basis61 with salaries decided upon by the Assembly.62 The judges will be elected by secret ballot at a meeting of the Assembly.63 Of the eighteen judges elected to serve on the Court, at least nine must have established competence in criminal law and procedure, and at least five must have established competence in international human rights law.64

Every candidate for election to the Court must be fluent in

52. Id. at art. 4.
53. Id. at art. 34.
54. Id. at art. 38(1). The President and Vice Presidents will serve a term of three years, unless their terms as judges expire earlier. They may be re-elected only once. Id.
55. Id. at art. 38(3)(a).
56. Id. at art. 48(5)(b).
57. Id. at art. 41(1).
58. Id. at art. 42(6).
59. Id. at art. 36(2)(a).
60. Id. at art. 36(6)(a).
61. Id. at art. 35(1).
62. Id. at art. 49.
63. Id. at art. 36(6)(a).
one of the working languages of the Court. Nominations to the Court may only be made by a State Party, which may nominate a national of its own State or a national of another State Party. However, no two judges may be nationals of the same State. In order to provide for staggered terms at the first election, one third of the judges will serve a term of three years, one third will serve a term of six years, and the remaining third will serve a term of nine years. A judge selected at the first election to serve a term of three years will be eligible for re-election to a full nine-year term. Once elected, the judges will serve in one of the three ICC Divisions: the Pre-Trial Division; the Trial Division; or the Appeals Division. These Divisions will be made up of “persons of high moral character, impartiality and

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65. Rome Statute, supra note 1, at art. 36(3)(c). The official languages of the Court include Arabic, Chinese, English, French, Russian, and Spanish. The working languages of the Court are English and French unless the Court authorizes the use of another language as requested by a participating party or State. Id. at art. 50. Scholars contend that because the Statute is written in six different languages, this will lead to confusion due to the fundamental differences in each language. George Fletcher, Panel, The International Criminal Court: Contemporary Perspectives and Prospects for Ratification, 16 N.Y.L. SCH. J. HUM. RTS. 521 (2000). For example, Professor Fletcher points out that by comparing the Spanish and English versions of the Statute, he discovered fundamental differences in the texts. He concludes that this may lead to confusion by judges from “diverse countries, diverse legal systems, and presumably use [of] different official versions of the Statute.” Id. at 522. It is hoped that fundamental differences between the texts can be rectified by the Preparatory Commission.

66. Rome Statute, supra note 1, at art. 36(4)(a) & (4)(b).

67. Id. at art. 36(7).

68. Id. at art. 36(9)(b).

69. Id. at art. 36(9)(c).

70. A majority of the judges in the Pre-Trial Division must possess criminal trial experience. Id. at art. 39(1). The functions of the Pre-Trial Division may either be performed by a three-judge panel or single judge from the Pre-Trial Division. Id. at art. 39(2)(b)(iii). If needed, judges from the Pre-Trial Division may be required to serve temporarily in the Trial Division. Id. at art. 39(4).

71. The Trial Division will be comprised of no fewer than six judges. Rome Statute, supra note 1, at art. 39(1). A majority of the judges in this Division must possess criminal trial experience. Id. The judges of the Trial Division serve for a three year period in that Division unless they are required to complete a case begun during their term. Id. at art. 39(3)(a). The functions of the Trial Chamber are performed by a three-judge panel from the Trial Division. Id. at art. 39(2)(b)(ii). If needed, judges from the Trial Division may be required to serve temporarily in the Pre-Trial Division. Id. at art. 39(4).

72. The Appeals Division will be comprised of the President and four other judges. Id. at art. 39(1); see also Rancilio, supra note 7, at 186. Judges assigned to the Appeals Chamber will serve their entire term of office in that Division. Rome Statute, supra note 1, at art. 39(3)(b). The functions of the Appeals Chamber will be carried out by all the judges of the Appeals Division. Id. at art. 39(2)(b)(i).
integrity."73

In the event of a vacancy, an election will be held in accordance with the terms set out above.74 A judge elected to fill a vacancy will serve the remainder of the term left vacant and shall be eligible for re-election only if the term inherited was three years or less.75

The Office of the Prosecutor is an independent organ of the Court. The Prosecutor is selected by an absolute majority of the Assembly via secret ballot.76 After the Prosecutor takes office, he or she must submit a list of three candidates to the Assembly for each Deputy Prosecutor position. Once this list is submitted, the Assembly will vote by secret ballot. The Prosecutor and Deputy Prosecutors are only eligible to hold office for one nine-year term.77

The Office of the Prosecutor receives referrals from the U.N. Security Council and State Parties78 on the commission of crimes within the jurisdiction of the Court.79 The Prosecutor is charged with investigating the referrals and prosecuting if warranted.80

The Prosecutor and the Deputy Prosecutors may not engage in any activities which would lead others to doubt their impartiality.81 In fact, they may be disqualified if the person being investigated or prosecuted requests they be disqualified based on lack of impartiality. This question is decided by the Appeals Chamber.82 If it is found that the Prosecutor committed serious misconduct, breached his or her duties, or is unable to function under the Statute, the Prosecutor may be removed from office by an absolute majority of the Assembly by secret ballot.83 A Deputy Prosecutor may be removed for like reasons by an absolute majority of the Assembly upon the recommendation of the Prosecutor.84 In either proceeding, the Prosecutor or Deputy Prosecutor is allowed to present and receive evidence in order to

73. Rome Statute, supra note 1, at art. 36(3)(a).
74. Id. at art. 37(1).
75. Id. at art. 37(2).
76. Id. at art. 42(4).
77. Id.
78. Moralez, supra note 64, at 144.
79. Rome Statute, supra note 1, at art. 42(1).
80. Id.
81. Id. at art. 42(7).
82. Id. at art. 42(8).
83. Id. at art. 46(1) & (2)(b).
84. Id. at art. 46(1)(c).
dispute the charges.\textsuperscript{85} The Office of the Registry is responsible under the Rome Statute for the non-judicial administration of the Court.\textsuperscript{86} The Registrar will head the Registry as the chief administrative officer of the Court.\textsuperscript{87} The Registrar is elected by an absolute majority of the judges by secret ballot after considering the Assembly's recommendations.\textsuperscript{88} The Registrar may serve two five-year terms on a full-time basis.\textsuperscript{89}

One of the Registrar's many duties is to create the Victims and Witnesses Unit. This Unit is to provide protection, counseling, and assistance to witnesses and victims who appear before the Court and others who are at risk due to testimony given by other witnesses.\textsuperscript{90} The Rome Statute requires the staff of the Unit have expertise in trauma, including expertise in dealing with the trauma related to crimes of sexual violence.\textsuperscript{91}

\textbf{B. General Provisions of the Rome Statute}

1. \textit{When is the Jurisdiction of the ICC Triggered and Why is the United States So Concerned?}

Arguably, "[t]he greatest danger of the ICC lies in its broad jurisdiction and the possible expansion and abuse of that jurisdiction."\textsuperscript{92} The Rome Statute provides that the court will have complementary jurisdiction with national courts.\textsuperscript{93} "This system of complementarity is a threshold of admissibility, which applies to ensure that the ICC will have jurisdiction only in exceptional cases, as a sort of international safety net to prevent impunity for serious international crimes."\textsuperscript{94} Because the ICC is complementary to state court systems, a State with "jurisdictional competence" has original jurisdiction over crimes falling under the Rome Statute.\textsuperscript{95}

\begin{itemize}
\item \textsuperscript{85} \textit{Id.} at art. 46(4).
\item \textsuperscript{86} \textit{Id.} at art. 43(1).
\item \textsuperscript{87} \textit{Id.} at art. 43(2).
\item \textsuperscript{88} \textit{Id.} at art. 43(4).
\item \textsuperscript{89} \textit{Id.} at art. 43(5).
\item \textsuperscript{90} \textit{Id.} at art. 43(6).
\item \textsuperscript{91} \textit{Id.}
\item \textsuperscript{92} Ailslieger, \textit{supra} note 32, at 87.
\item \textsuperscript{93} \textit{Id.}
\item \textsuperscript{94} Supple, \textit{supra} note 25, at 193.
\end{itemize}
To determine whether a State is jurisdictionally competent to make the case inadmissible to the ICC, the Court will look at a number of things. First, if the case is being investigated or prosecuted by the State in which the individual resides, the ICC will not prosecute an individual and will defer to the State. However, if this decision not to prosecute is due to a State's unwillingness or inability to carry out the prosecution, the ICC may exercise jurisdiction over the individual. In addition, if the person has already been tried for the conduct, the ICC will not exercise jurisdiction, unless the trial was specifically held to shield the person from the Court's jurisdiction or was not conducted impartially or independently. Finally, the ICC will not exercise jurisdiction if the case is not of sufficient gravity.

Once the case is deemed admissible by the ICC, the Court can only exercise jurisdiction over those individuals who satisfy both the personal and subject matter jurisdictional requirements of the Court. The Rome Statute provides the Court may exercise personal jurisdiction over an individual if either the State on whose territory the crime was committed or the State in which the person accused is a national is a party to the Statute or has accepted the jurisdiction of the Court. Even if a State is not party to the Rome Statute or has not accepted the jurisdiction of the Court, the ICC may still exercise jurisdiction over its nationals. Consequently, unlike other treaties which have been ratified by the United States, American nationals can be prosecuted by the ICC even if the United States never ratifies the treaty or agrees to be bound by it. This seems to run counter to the Vienna Convention on the

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[hereinafter McCormack & Robertson].

96. Rome Statute, supra note 1, at art. 17(1).

97. Id. The Rome Statute defines the inability of a State to prosecute as the result of "a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or necessary evidence and testimony or otherwise unable to carry out its proceedings." Id. at art. 17(3).

98. Id. at art. 20(3).

99. Id. at art. 17(1)(d).

100. Id. at art. 12.


[The presumption that, upon ratification by 60 states, the newly-established ICC could try, absent a Security Council referral, to reach anyone anywhere in the world based only on the consent of the state of territory is an untenable

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Law of Treaties which states that treaties cannot bind non-parties.  

Under Article 13, the Court may only exercise subject matter jurisdiction over the crimes listed in the Rome Statute if the case is: referred by a State Party to the Prosecutor pursuant to Article 14; referred by the U.N. Security Council to the Prosecutor pursuant to Chapter VII of the U.N. Charter; or the Prosecutor instigates an investigation pursuant to Article 15. 

In order for a State Party referral to be considered under the Rome Statute, the referral must request that the Prosecutor investigate the matter, provide specifics regarding the crimes committed, and be accompanied by any available supporting documentation. Alternatively, should the Prosecutor wish to initiate an investigation on his own, he must submit findings to the Pre-Trial Chamber which will then consider whether there is a reasonable basis for the Prosecutor to proceed with his investigation. If the Pre-Trial Chamber refuses to authorize the investigation, the Prosecutor may re-submit his case to the Pre-Trial Chamber if new facts or evidence come to light. In addition to the role of the Pre-Trial Chamber, the Security Council may request that the Court defer an investigation or prosecution of a matter for a period of twelve months under its Chapter VII powers. 

Opponents of the ICC's broad jurisdiction argued that the U.N. Security Council must play a role in authorizing prosecutions in the ICC. The most vocal critic, Senator Jesse Helms (R-N.C.), Chairman of the U.S. Senate Foreign Relations

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103. A full discussion of the crimes listed in the Rome Statute will be discussed in Part III.B.2. 

104. Rome Statute, supra note 1, at art. 13. 
105. Id. at art. 14. 
106. Id. at art. 15(3) & (4). 
107. Id. at art. 15(5). 
108. Id. at art. 16.
Committee, stated that if the American Delegation was unable to secure U.N. Security Council veto power over cases brought before the Court, the Rome Statute would be “dead on arrival” in the Senate. 109 In order to address these concerns and ensure the ratification of the Rome Statute, the American Delegation sought an amendment during the Conference which provides the ICC could only exercise jurisdiction if the State on whose territory the crime was committed AND the State of nationality of the accused had ratified the treaty and consented to the jurisdiction of the Court over the crime. 110 In the alternative, the American Delegation stated a willingness to accept a minimum guarantee that the consent of the State of nationality of the accused must be obtained before the Court could exercise jurisdiction. 111 The American Delegation was unsuccessful in getting either proposal adopted by Conference Delegates.

On June 14, 2000, in retaliation for the failure of the Conference to adopt the U.S. sponsored proposals and to show that the United States Congress is intent on securing these safeguards prior to ratification or cooperation with the ICC by the United States, Senator Helms and Representative Tom Delay (R-TX) introduced The American Servicemembers’ Protection Act. 112 This legislation would bar any U.S. cooperation with the ICC as long as the United States has not signed or ratified the Rome Treaty. 113 In addition, the legislation provides the United States must receive permanent immunity for American personnel before the U.S. would

110. Andreasen, supra note 46, at 722.
111. Grant, supra note 19, at 348.
113. H.R. 4654, 106th Cong. § 4(b) & (c) (2000). In addition, Senator Jesse Helms, at the Senate Hearing on the proposed legislation, stated:

This legislation does not prevent the U.S. from cooperating with current or future ad hoc tribunals created through the Security Council—it will not prevent the prosecution of future Pol Pots and Saddam Husseins. What it will do is make certain that the U.S. does not acknowledge the legitimacy of the ICC’s bogus claim of jurisdiction over American citizens.


https://scholarship.law.umt.edu/mlr/vol62/iss2/3
participate in any United Nations peacekeeping missions. Additionally, the Act provides that the United States will not allow transfer of any national security information to the ICC. Finally, the legislation provides that no State that has ratified the Rome Treaty would receive U.S. military assistance unless the State enters into agreement with the U.S. to protect U.S. personnel from extradition to the ICC.

Many have come out in support of this legislation. Specifically, on November 29, 2000, Henry Kissinger, Lawrence Eagleburger, George Shultz, Jeane Kirkpatrick and other former Secretaries of State, former Secretaries of Defense, former National Security Advisors, and former Directors of the CIA authored a letter endorsing the American Servicemembers' Protection Act. The letter asserts the ICC will have a chilling effect on national government decisionmaking and "could limit the willingness of our national leadership to respond forcefully to acts of terrorism, aggression, and other threats to American interests." In addition, the authors contend that the U.S. has a "far better record" of enforcing its laws against human rights violations and war crimes than many of the states that support the ICC. The authors expressed hope that this legislation would strengthen the position of the American negotiators as they try to remedy the most egregious provisions of the Rome Treaty. Although this letter expresses hope that the treaty's most serious flaws will be remedied, it does nothing to propose ways to remedy the treaty and only relies upon the supported legislation as a wall meant to keep out the long-arm of the ICC.

However, all do not agree with this legislation. Ambassador Scheffer, speaking on behalf of the former Clinton Administration, has publicly opposed the legislation. Scheffer

114. H.R. 4654, 106th Cong. § 5(b) & (c).
115. Id. § 6.
116. Id. § 7.
118. Id.
119. Id.
120. Id.
believes that the legislation is "misguided" and infringes on the
President's constitutional authority as Commander-in-Chief and
diplomatic negotiator. In addition, he states:

[By requiring that the U.N. Security Council grant immunity to
U.S. personnel to participate in U.N.-authorized military activity,
the legislation could effectively prevent U.S. military engagement
on issues of critical national security concern.

Unlike signatories to the November 29, 2000 letter to
Congressman Delay, Ambassador Scheffer believes the
legislation would "undermine the efforts of the U.S. negotiators
and diminish the likelihood of obtaining... additional
protections for U.S. service members." Specifically, he argues
that in order to negotiate the protection of service members from
prosecution, the United States must offer to cooperate fully with
the ICC while it is still a non-party.

In addition to concerns over the ICC's broad exercise of
personal jurisdiction, the United States expressed concerns
during the Conference over the Prosecutor's power to refer cases
to the ICC. The United States, India and Pakistan all
expressed concerns "about the potential for abuse of the
Prosecutor's power and the instigation of politically motivated
complaints." Other Conference participants believed that
without an independent prosecutor to start investigations, a
large number of abuses would go unpunished because politics
would play a role in shielding the nationals of powerful states
from prosecution.

Although the United States may have justifiable fears, some
scholars have pointed out that safeguards have been put in place
to protect states from prosecutorial misconduct. For example,
authorization must be received from the Pre-Trial Chamber

122. Id.
123. Id.
124. Id. at 3.
125. Id. Even though the United States voted against the treaty and did not become a signatory until recently, delegates from the United States have been in negotiation with other states to make the definitions of crimes within the Court's jurisdiction more precise. In addition, these delegates, along with delegates from other states, have implemented procedures which limit the "likelihood of politicized prosecutions." Clinton Statement on Signature, supra note 2, at 1.
126. Grant, supra note 19, at 348.
127. McCormack & Robertson, supra note 95, at 643.
129. McCormack & Robertson, supra note 95, at 643.
before the Prosecutor may proceed with an investigation.\textsuperscript{130}

2. \textit{Who Can Be Prosecuted By The ICC And For What?}

The ICC will exercise jurisdiction over \textbf{individuals} who commit serious crimes\textsuperscript{131} after the Rome Statute comes into force,\textsuperscript{132} "unlike the International Court of Justice, where prosecution \textit{is} limited to disputes between countries."\textsuperscript{133} To prosecute a person under the Rome Statute, that person must be at least 18 years of age.\textsuperscript{134} The Statute requires that "a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge."\textsuperscript{135} Therefore, a person with mental disease or defect, a person in a state of involuntary intoxication, a person acting in self-defense, or a person acting under a threat of imminent death or bodily harm will be excluded from criminal liability under the Rome Statute.\textsuperscript{136}

In addition to holding a person criminally liable for the actual commission of a crime, a person can also be prosecuted for

\begin{footnotesize}
\begin{enumerate}
\item[130.] Id.; Rome Statute, supra note 1, at art. 15(3) & (4).
\item[131.] Rome Statute, \textit{supra} note 1, at art. 1.
\item[132.] Id. at art. 24(1). Although a person cannot be prosecuted for crimes committed prior to the effective date of the statute, there is no statute of limitations for crimes which are prosecuted under the statute. \textit{Id.} at art. 29.
\item[133.] James L. Taulbee, \textit{A Call to Arms Declined: The United States and the International Criminal Court}, 14 \textit{Emory Int'l L. Rev.} 105, 107 (2000).
\item[134.] Rome Statute, \textit{supra} note 1, at art. 26.
\item[135.] Id. at art. 30(1). The Statute provides:

\textbf{[A]} person has intent where:

(a) \textit{In relation to conduct,} that person means to engage in the conduct;

(b) \textit{In relation to a consequence,} that person means to cause that consequence or is aware that it will occur in the ordinary course of events.

\textit{Id.} at art. 30(2).

For the purposes of this article, "knowledge" means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. "Know" and "knowingly" shall be construed accordingly.

\textit{Id.} at art. 30(3).
\item[136.] \textit{Id.} at art. 31(1).
\end{enumerate}
\end{footnotesize}
ordering or soliciting the commission of the crime, aiding and abetting an individual committing a crime, or contributing to the commission of the crime.\footnote{137} Regarding the crime of genocide, a person may also be held criminally liable if he directs or publicly incites others to commit genocide.\footnote{138}

Unlike other international or state courts, a person may not claim head of state immunity in order to escape criminal liability under the Rome Statute.\footnote{139} In addition, "[a] military commander or person effectively acting as a military commander shall be criminally responsible for crimes . . . committed by forces under his or her effective command and control . . ."\footnote{140} It must be shown that the military commander knew about the crimes or ignored information which proved the commission of crimes by subordinates; had control or responsibility over the activities which gave rise to the crimes; and failed to take the measures necessary to prevent the crimes or stop them.\footnote{141}

Although a superior can be held individually liable, this does not relieve the person acting under orders of a government or superior from criminal liability. In order to escape culpability, the subordinate must show that he or she had a legal obligation to obey the order from the superior, did not know the order was unlawful, and in fact the order was not manifestly unlawful.\footnote{142}

The ICC has subject matter jurisdiction over the crimes of genocide, crimes against humanity, war crimes, and the crime of aggression.\footnote{143} However, the Court may exercise jurisdiction

\footnote{137. \textit{Id.} at art. 25(3)(a)-(3)(d).}
\footnote{138. \textit{Id.} at art. 25(3)(e).}
\footnote{139. \textit{Id.} at art. 27.}
\footnote{140. \textit{Rome Statute}, \textit{supra} note 1, at art. 28(a).}
\footnote{141. \textit{Id.} at art. 28(a) & (b).}
\footnote{142. \textit{Id.} at art. 33(1). For example, a person cannot claim he or she lacked knowledge that the order was unlawful if the order was to commit genocide or crimes against humanity. \textit{Id.} at art. 33(2).}
\footnote{143. \textit{Id.} at art. 5(1). Genocide includes killing members of a group, causing serious physical or mental harm to members of a group, inflicting conditions on a group
with respect to these crimes only after a State has become a party to the Statute. Although the Rome Statute provides deliberately intending to cause complete or partial physical destruction, imposing measures with the intent to prevent births in a group, or the forcible transfer of children from a group to another group. Id. at art. 6.

In order to qualify as a “crime against humanity” under the ICC, the Statute requires that several “pre-conditions” be met before jurisdiction of the Court attaches: 1) The crimes must be committed as a part of a “widespread or systematic attack”; 2) the attack must be against civilian populations; 3) the perpetrators must have knowledge of the attack; and 4) the attack must involve multiple commission of acts in furtherance of a State or organizational policy to commit such an attack. John F. Murphy, The Quivering Gulliver: U.S. Views on a Permanent International Criminal Court, 34 INT’L LAW. 45, 54 (2000).

The acts included in the ICC Statute are: 1) murder; 2) extermination, defined as the deprivation of food and medicine calculated to bring about destruction of part of a population; 3) enslavement, which includes attaching the right of ownership over a person and trafficking in persons, especially women and children; 4) deportation or forcible transfer of population, defined as forced displacement by expulsion or coercion from an area in which they are lawfully present; 5) imprisonment or other severe deprivation of liberty; 6) torture, defined as the intentional infliction of severe pain or suffering - both physical and mental - but not including pain or suffering arising from lawful sanctions; 7) rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; 8) persecution, defined as the intentional and severe deprivation of fundamental rights of a particular group; 9) enforced disappearance of persons, defined as the arrest, detention or abduction of persons with the support or acquiescence of the State or political organization with the intent to remove them from the protection of the law for a long period of time; 10) the crime of apartheid, defined as inhumane acts carried out by a system aimed at oppressing and dominating a particular racial group with the intent to maintain this oppressive system; and 11) other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health. Rome Statute, supra note 1, at art. 7(1) & (2).

Under the ICC Statute, a “war crime” cannot be committed unless there exists an armed conflict. Murphy, supra, at 54. The Statute defines “war crimes” occurring in an international armed conflict as “[g]rave breaches of the Geneva Conventions of 12 August 1949,” and “[o]ther serious violations of the laws and customs applicable in armed conflict, within the established framework of international law . . . .” Rome Statute, supra note 1, at art. 8(2)(a) & (2)(b). These acts include: willful killing; torture; unlawful deportation; intentionally directing attacks against civilian population; employing poison or poisoned weapons; pillaging; and transfer by a State of its own civilian population into occupied territory. This final act, transfer by a State of its own civilian population into occupied territory, led to the Israeli Delegation’s vote against and its initial refusal to sign the Rome Treaty. Id.; see also Murphy, supra, at 54; Ayelet Levy, Comment, Israel Rejects its Own Offspring: The International Criminal Court, 22 LOY. L.A. INT’L & COMP. L. REV. 207, 209 (1999). [This list is in no way exhaustive. Please see Rome Statute, supra note 1, for complete list of acts.]

In addition to crimes committed in international armed conflicts, the Statute also includes crimes committed in internal armed conflicts when they are serious violations of Article 3 of the Geneva Conventions and other serious violations of laws and customs of international law. Murphy, supra, at 54. For a complete list of crimes included in armed internal conflicts see Rome Statute, supra note 1, at art. 8(2)(c)-(2)(f).
that the Court may exercise jurisdiction over the crime of aggression, negotiators to the Conference were not able to agree upon a definition for this crime.\textsuperscript{145} During the Conference, the American Delegation proposed that the Rome Statute grant the U.N. Security Council authority to determine whether a State has committed an act of aggression.\textsuperscript{146} This would allow the United States to prevent any of its actions from being tried as acts of aggression by utilizing its veto power in the Council.\textsuperscript{147} Because the United States exercises extensive military involvement outside its borders, it has the most to fear if the crime of aggression is included under the ICC's jurisdiction.\textsuperscript{148} The proposal put forth by the American Delegation was not adopted by the Conference.

Consequently, because no definition for aggression has been adopted, before an individual can be prosecuted for this crime a definition must be decided upon and the Statute must then be amended.\textsuperscript{149} Should the Statute be amended to include the definition of aggression, the United States, if a State Party, can decide not to accept the amendment. Thus, the ICC will not exercise jurisdiction over the crime of aggression committed in the United States or by its nationals.\textsuperscript{150} However, as noted previously, another State Party may request an investigation into acts of aggression committed by an American national in the State Party's territory.\textsuperscript{151} If the United States refuses to accept the amendment, it may even withdraw from the Rome Treaty.\textsuperscript{152} In the event that the United States fails to ratify the Rome Treaty, it may find its nationals subjected to greater threat of prosecution for aggression due to the ICC's sweeping

Non-Party State if the crime alleged was committed on the soil of a State Party or committed in a State which has accepted the jurisdiction of the Court over the crime alleged. \textit{Id.} at art. 12(2) \& (3). State Parties may opt-out of the Court's jurisdiction over war crimes for seven years if the crimes are committed by its nationals or on its own territory. However, this provision does not apply to Non-Party States. \textit{Id.} at art. 124.

\textsuperscript{145} Seguin, \textit{supra} note 8, at 97.
\textsuperscript{146} \textit{Id.}
\textsuperscript{147} \textit{Id.}
\textsuperscript{148} Sinanyan, \textit{supra} note 128, at 1201.
\textsuperscript{149} Rome Statute, \textit{supra} note 1, at art. 5(2). The Rome Statute provides that the statute may not be amended until seven years after it comes into force. Therefore, it is unlikely that the crime of aggression will be prosecuted in the near future. \textit{Id.} at art. 121(1).
\textsuperscript{150} \textit{Id.} at art. 121(5).
\textsuperscript{151} \textit{Id.} at art. 12(2)(a).
\textsuperscript{152} \textit{Id.} at art. 121(6).
jurisdiction over Non-Party States.153

3. How Does It All Work?: Investigation, Prosecution and Appeal

a. The Investigation

As stated in Part III.B.1, a case will not be admissible to the ICC if it is shown that the State is willing and able to prosecute the offense even when the alleged crime falls under the crimes included in the Rome Statute.154 However, this does not limit the ICC's supervision over the matter. Once the Prosecutor has deferred to a State's investigation, the Prosecutor has six months to reverse this decision on the grounds that the State is unwilling or unable to carry out the investigation.155 In addition, the Prosecutor may request that a State provide periodic updates of the progress of its investigation and prosecution.156 If the Prosecutor has reason to believe the State is unwilling to investigate or prosecute, the Prosecutor, on an exceptional basis, may seek authority from the Pre-Trial Chamber to pursue an investigation in order to preserve important evidence.157

In the event the ICC assumes jurisdiction over an individual, the Rome Statute gives the Court authority to request State Party cooperation with the investigation and prosecution.158 The Court may request that any State arrest and surrender an accused person.159 After this request is made, the accused may challenge the surrender in a court of the requested State on the grounds that the accused has already been prosecuted for the crime alleged. If an admissibility ruling is pending before the ICC, the State may postpone the execution of the request.160

Under the Rome Statute, if both the ICC and a State Party request arrest and surrender, the requesting State Party will

154. Supple, supra note 25, at 194.
155. Rome Statute, supra note 1, at art. 18(3).
156. Id. at art. 18(5).
157. Id. at art. 18(6).
158. Id. at art. 87(1)(a).
159. Id. at art. 89(1).
160. Id. at art. 89(2).
receive priority unless the Court has determined that the State Party is unwilling or unable to prosecute the individual.\textsuperscript{161} However, if the competing party is not a State Party to the Statute, the ICC will have priority unless the requested State has an international obligation to extradite the person to the requesting State.\textsuperscript{162} In addition to arrest and surrender, the ICC may request State Party cooperation by assisting the Court with the identification of persons, the taking of evidence, the execution of searches and seizures, and the protection of witnesses and victims.\textsuperscript{163} If a State Party fails to honor a request by the ICC to cooperate or provide assistance, the Court has the authority to refer the matter to the Assembly.\textsuperscript{164} If the Security Council referred the original case, the Court may refer the matter to the Security Council for further action due to non-compliance.\textsuperscript{165}

Before being questioned by the Prosecutor, a person must be informed of the charges, informed of the right to remain silent, and informed of the right to an attorney - one of the person’s choosing or one appointed by the Court - and of the right to have this attorney present during the questioning.\textsuperscript{166} Although guaranteed this right to counsel during the interrogation, the accused is not guaranteed a general right to counsel during the investigative process.\textsuperscript{167} In addition, although the Court may have to appoint counsel to serve the accused, there is no funding guaranteed in the Statute for the defense to investigate the charges leveled against the client.\textsuperscript{168}

While a person is being investigated under the Rome Statute, that person cannot be compelled to self-incriminate or confess.\textsuperscript{169} In addition, a person cannot be subjected to threat, torture, arbitrary arrest or detention.\textsuperscript{170} Finally, if the person is being questioned in a language other than the person’s own, a

\begin{itemize}
  \item \textsuperscript{161} Id. at art. 90(2).
  \item \textsuperscript{162} Id. at art. 90(4).
  \item \textsuperscript{163} Id. at art. 93(1).
  \item \textsuperscript{165} Id.
  \item \textsuperscript{166} Rome Statute, \textit{supra} note 1, at art. 55(2).
  \item \textsuperscript{168} Id. at 29.
  \item \textsuperscript{169} Rome Statute, \textit{supra} note 1, at art. 55(1)(a).
  \item \textsuperscript{170} Id. at art. 55(1)(b) & (1)(d).
\end{itemize}
"competent interpreter" will be furnished without cost.\textsuperscript{171} The Rome Statute does guarantee defense counsel the right to "adequate time and facilities for the preparation of the defence [sic],"\textsuperscript{172} but there exists no language guaranteeing funding for factual investigations by the defense or defense experts.\textsuperscript{173} To remedy this inadequacy, the Assembly must establish an Office of Defense housed under the Office of the Registry.\textsuperscript{174} This Office would be charged with developing lists of defense counsel for appointment, working with States to gain clearance for defense counsel and personnel, establishing funding for defense counsel, and educating defense counsel on ICC procedures.\textsuperscript{175} Without the establishment of an Office of Defense Counsel, the accused may not have an effective voice on the issues of fairness and justice in the ICC system.\textsuperscript{176}

\textit{b. The Trial}

The Trial procedure in the ICC is similar to trial procedures in the United States,\textsuperscript{177} although the rights of the victims and witnesses are considered throughout the ICC process.\textsuperscript{178} Under the Rome Statute, the Court is required to protect the well-being — both physical and mental — of any witnesses or victims in a proceeding.\textsuperscript{179} This includes conducting part of the proceeding \textit{in camera} if the witness has been a victim of sexual violence or if the victim or witness is a minor.\textsuperscript{180} The Victims and Witnesses Unit, organized under the Registry, will work closely with the Court to ensure appropriate measures are taken to protect victims and witnesses from either mental or physical violence.\textsuperscript{181}

Although the victims and witnesses are considered throughout the process, as with the United States' judicial system, the accused before the ICC is presumed innocent until

\begin{enumerate}
\item Id. at art. 55(1)(c).
\item Id. at art. 67(1)(b).
\item Gallant, \textit{supra} note 167, at 36.
\item Id. at 42.
\item Id.
\item Id.
\item For a discussion of the rights provided the accused and the differences between the ICC and the U.S. Court system, see \textit{infra} Part IV.
\item Rome Statute, \textit{supra} note 1, at art. 68(3).
\item Id. at art. 68(1).
\item Id. at art. 68(2).
\item Id. at art. 68(4).
\end{enumerate}
proven guilty beyond a reasonable doubt.\footnote{Id. at art. 66.} Article 63 provides that the accused is required to be present during the trial unless the accused continues to disrupt the trial.\footnote{Id. at art. 63.} If for any reason the accused is removed for disruption, then the accused will be allowed to observe the trial and instruct counsel from outside the courtroom.\footnote{Id. at art. 63(2).} In addition, the Rome Statute provides for public trials unless special circumstances warrant a closed proceeding.\footnote{Id. at art. 64(7).}

If a State becomes aware that information to be disclosed during the trial would prejudice any national security interest, the State may intervene in the proceeding.\footnote{Id. at art. 72(4).} In this case, the Court may find that the information could be sought from another source or the original information may be redacted, summarized, or viewed \textit{in camera}.\footnote{Id. at art. 72(5).} However, if after reasonable means are taken to resolve the matter with the State and the State still considers disclosure prejudicial to its national security interests, the Court must determine whether the information is relevant and necessary to the proceeding.\footnote{Id. at art. 72(6) & (7).} If the Court determines that it is and that the State is not acting in a cooperative fashion, the Court may refer the non-cooperative State to the Assembly.\footnote{Id. at art. 74(1).} Finally, the Court may order the State to disclose the information.\footnote{Id. at art. 74(3).}

During the trial proceeding, judges, not juries, will decide upon the guilt or innocence of the accused. Therefore, all judges of the Trial Chamber must be present at each stage and throughout the deliberations. However, the President may designate an alternate judge to remain present during the entire proceeding when a member of the Trial Chamber is unable to continue.\footnote{Id. at art. 72(7)(a)(ii); see also id. at art. 87(7).} A majority decision is required, although a unanimous decision is preferred.\footnote{Id. at art. 72(7)(b).} The Court will issue a written judgment — including the majority and minority decisions — in addition to an oral summary of the decision.\footnote{Id. at art. 74(1).}
delivered in open court.193

When deciding a case, the ICC will first apply the Rome Statute, the Elements of Crimes, and its own Rules of Procedure and Evidence.194 The Elements of Crimes195 and the Rules of Procedure and Evidence196 have been drafted by the Preparatory Commission for the International Criminal Court,197 which is comprised of those States which have signed the Rome Statute and also those states which have been invited to participate.198 The United States is currently an active participant in the Preparatory Commission and has played a significant role in advocating measures which will render the Rome Statute more palatable to Court detractors in the United States.

In addition to applying the Rome Statute, Element of Crimes, and Rules of Procedure and Evidence, the ICC may also apply treaties and the principles and rules of international law.199 Subsequently, the ICC may apply the national laws of States that would normally exercise jurisdiction over the crime, if those laws are consistent with the Rome Statute.200 Finally, the ICC may apply principles and rules of law as interpreted in its previous decisions.201

Under the Rome Statute, a person is guaranteed protection against double jeopardy. A person tried and convicted in a State court for a crime included in Rome Statute cannot be tried by the ICC unless it can be proven that the original proceeding was carried out to shield the defendant from prosecution or not carried out "independently or impartially."202 Alternatively, a person convicted or acquitted by the ICC for a crime under its jurisdiction cannot be tried for the same crime by another

193. Id. at art. 74(5).
194. Id. at art. 21(1)(a).
197. Rome Statute, supra note 1, at annex I.F.5.
198. Id. at annex I.F.2.
199. Id. at art. 21(1)(b).
200. Id. at art. 21(1)(c).
201. Id. at art. 21(2).
202. Id. at art. 20(3).
c. **Sentencing of the Convicted Person and The Appeal Process**

Under the Rome Statute, the Court may sentence a convicted person to imprisonment for a specified number of years depending on the gravity of the crime; or may sentence the person to life in prison if the crime is of an extreme nature. If a person is convicted and sentenced to imprisonment by the ICC, the sentence is served in a State designated by the Court from a list of States which have indicated a willingness to house ICC prisoners. When considering which State to designate, the Court will take into account the nationality and views of the convicted person, the treatment of convicted persons by the requesting State, the circumstances of the crime, and the effective enforcement of the sentence by the State.

In addition to imprisonment, a convicted person may be fined or made to forfeit proceeds, property, or assets derived directly or indirectly from the commission of the crime. The Court may order these fines or forfeited assets be paid directly to a Trust Fund established for the benefit of the victims or families of victims. Finally, in addition to fines imposed under the Rome Statute, the Court may order a convicted individual to pay reparations to its victims. This may include restitution, compensation, and rehabilitation. If the victims are no longer alive, the convicted person may be required to pay the reparations to a Trust Fund established by the Rome Statute.

The Prosecutor or the convicted person may appeal a decision if there was a procedural, factual or legal error in the original proceeding. In addition, the convicted person may appeal the conviction on "[a]ny other ground that affects the fairness or reliability of the proceedings or decision." A person awaiting appeal is to remain in custody unless the Trial

203. *Id.* at art. 20(2).
204. *Id.* at art. 77(1).
205. *Id.* at art. 103(1)(a).
206. *Id.* at art. 103(3).
207. *Id.* at art. 77(2).
208. *Id.* at art. 79(1) & (2).
209. *Id.* at art. 75(2).
210. *Id.* at art. 75(2); see also *id.* at art. 79 for discussion of Trust Fund.
211. *Id.* at art. 81(1)(a) & (1)(b(i)-(iii).
212. *Id.* at art. 81(1)(b)(iv).
Chamber orders otherwise.\textsuperscript{213} However, execution of sentence is suspended for the duration of the appeal.\textsuperscript{214}

Upon deciding that an original proceeding was unfair in a way that affected the reliability of the sentence, the Appeals Chamber has two options. It may reverse or amend the decision or the sentence or order a new trial before a different Trial Chamber.\textsuperscript{215} Like the Trial Chamber, the Appeals Chamber will deliver its opinion in open court, including both the majority and minority opinions.\textsuperscript{216} If it is found that a person has been wrongfully convicted due to a miscarriage of justice, the person will, with certain exceptions, have a right to be compensated under the Rome Statute.\textsuperscript{217} In addition, if it is found that there has been a “grave and manifest miscarriage of justice” the Court may award compensation to the convicted person.\textsuperscript{218}

IV. ADDITIONAL UNITED STATES CONCERNS WITH THE ROME STATUTE: IS THE ICC CONSTITUTIONAL?

The United States cannot ratify the Rome Treaty if it is found to violate the United States Constitution.\textsuperscript{219} Opponents of the Rome Treaty argue it is unconstitutional and cannot be entered into by the United States. Two arguments have been put forth. First, as a tribunal in which the U.S. serves as a full participant, the ICC does not provide adequate protections to accused Americans who are alleged to have committed crimes abroad, as required by the Constitution.\textsuperscript{220} If the United States were a State Party to the ICC Statute, its involvement with the Court - selecting its judges, financing the operations of the Court, and participating in the Assembly of Parties - would implicate the requirements of the Bill of Rights.\textsuperscript{221} In United

\textsuperscript{213} Id. at art. 81(3)(a).
\textsuperscript{214} Id. at art. 81(4).
\textsuperscript{215} Id. at art. 83(2).
\textsuperscript{216} Id. at art. 83(4). It should be noted that the convicted person need not be present during the delivery of the opinion of the Appeals Chamber. Id. at art. 83(5).
\textsuperscript{217} Id. at art. 85(2).
\textsuperscript{218} Id. at art. 85(3).
\textsuperscript{219} Missouri v. Holland, 252 U.S. 416 (1920). In Holland, Justice Holmes stated:

It is said that a treaty cannot be valid if it infringes the Constitution, that there are limits, therefore, to the treaty-making power, and that one such limit is that what an act of Congress could not do unaided, in derogation of the powers reserved to the States, a treaty cannot do.

Holland, 252 U.S. at 432.
\textsuperscript{220} U.S. CONST. amends. IV, V & VI.
\textsuperscript{221} Andreasen, supra note 46, at 728.
States v. Balsys, the Court acknowledged that although the Bill of Rights did not apply to defendants being prosecuted in a foreign court:

If it could be said that the United States and its allies had enacted substantially similar criminal codes aimed at prosecuting offenses of international character, and if it could be shown that the United States was granting immunity from domestic prosecution for the purpose of obtaining evidence to be delivered to other nations as prosecutors of a crime common to both countries, then an argument could be made that the Fifth Amendment should apply based on fear of foreign prosecution simply because that prosecution was not fairly characterized as distinctly "foreign." The point would be that the prosecution was as much on behalf of the United States as of the prosecuting nation, so that the division of labor between evidence gatherer and prosecutor made one nation the agent of the other, rendering fear of foreign prosecution tantamount to fear of a criminal case brought by the Government itself.

Scholars argue that if the United States ratifies the Rome Treaty it would become a full participant in establishing the ICC and any prosecutions of Americans in the Court would be "as much on behalf of the United States as of the prosecuting nation." This participation by the United States would implicate the Bill of Rights guaranteed by the Constitution. Consequently, if it is found that the United States is indeed acting as a full participant in the Court, the constitutional rights guaranteed to American citizens which are currently not guaranteed by the Rome Statute — the right to jury trial, the right to speedy trial, or the right to confront or cross-examine witnesses — must be provided for in the Rome Statute.

The United States Constitution guarantees an individual a right to trial by jury. However, the Rome Statute does not allow for trial by jury. Instead, the Statute provides that judges appointed to the Trial Chamber must decide each case. It can be argued that although defendants in the ICC are not afforded the right to trial by jury, the implementation of such a right would be unworkable. For example, since the Court will sit at the Hague, the jury would likely be composed of citizens of the

224. Andreasen, supra note 46, at 729.
225. U.S. CONST. amend. VI.
226. Rome Statute, supra note 1, at art. 74. For a full discussion of the Trial Chamber see infra Part III.A.
Netherlands or citizens of neighboring European countries. In the alternative, the Court could employ jurors from around the world which be extremely expensive – taking into account the cost for transporting, boarding, and interpreting the cases for this “global court.”

In addition to the right to trial by jury, the Rome Statute does not provide the right to speedy trial as required by the United States Constitution. In United States v. Baker, the Ninth Circuit Court of Appeals stated that although there exists no specific time period within which a trial must occur, Sixth Amendment speedy trial claims will be assessed by considering a combination of factors. These factors include: (1) the length of the delay; (2) the reason for the delay; (3) whether the defendant asserted his right to a speedy trial; and (4) the prejudice to the defendant.

Regarding the reason for the delay, the Supreme Court has stated that “[a] deliberate attempt to delay the trial in order to hamper the defense should be weighted heavily against the government.” The Court went on to find that a neutral reason such as negligence or overcrowded courts should be weighted less heavily, although this should be considered since the ultimate responsibility for this rests with the government not the defendant. Finally, the Court posited that if the government has a valid reason for the delay then this would serve to justify an appropriate delay.

When determining whether the accused has been prejudiced by the delay, the court must make its assessment focusing on the interests of the defendant. The Court identified three of these interests: “(i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired.” Although the Rome Statute does not provide a specific time period in which a defendant is guaranteed a trial date, it does

227. Supple, supra note 25, at 186.
228. Id. at 186-87.
229. U.S. CONST. amend. VI.
231. Baker, 63 F.3d at 1497.
233. Id.
234. Id.
235. Id. at 532 (citing United States v. Ewell, 383 U.S. 116, 120 (1966); Smith v. Hooey, 393 U.S. 374, 377-78 (1969)).
provide that an accused will be “tried without undue delay.”

Opponents of the Rome Treaty argue that the Rome Statute also fails to provide an accused person the right to confront or cross-examine witnesses. However, this argument seems to be without merit. The Rome Statute does provide an accused the right to “examine, or have examined, the witnesses against him or her . . . .” In addition, the Statute provides that testimony by a witness must be given in person, although certain measures like in camera examinations of witnesses may be allowed in order to protect the safety of the witness. However, these measures will not be utilized if they are found to be “prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.”

As in the Rome Statute, the United States Supreme Court has recognized the need for protection of witnesses in criminal trials. In Maryland v. Craig, the Court stated if the child witness would be subject to trauma which would impair his or her ability to communicate if required to testify in the presence of the accused, the use of a one-way closed circuit television would not violate the Confrontation Clause of the U.S. Constitution. The use of this device, despite not allowing for face-to-face confrontation, would allow the reliability of the testimony to still be subjected to “rigorous adversarial testing.” Therefore, the argument that the Rome Statute fails to provide confrontation and cross-examination of witnesses by the accused is incorrect; in fact, the Rome Statute provides the same safeguards and procedures for protection of witnesses which have been found constitutional by the United States Supreme Court.

Although the Rome Statute fails to provide all rights guaranteed in the Bill of Rights, proponents of the ICC argue that the U.S. is not a “participant” as defined by the Court, meaning the ICC must only guarantee those rights guaranteed by international law which have been provided for in

236. Rome Statute, supra note 1, at art. 67(1)(c).
237. Supple, supra note 25, at 188.
238. Rome Statute, supra note 1, at art. 67(1)(e).
239. Id. at art. 69(2).
240. Id. at art. 68.
241. Id. at art. 68(1).
244. Id.
international treaties and other international sources." The United States Supreme Court in Neely v. Henkel stated that if an American citizen commits a crime in a foreign country, he or she must submit to the trial and punishment methods afforded in that state unless a different method is provided for in a treaty entered into by that state and the United States. Therefore, the decision to surrender a person to the ICC should be made on the same basis as any extradition proceeding. When taking into account extradition requirements, the Rome Statute meets and exceeds the "minimum requirements of the rule of non-inquiry in extradition cases." The Rule of Non-Inquiry states that the United States will not examine the procedural or substantive rights provided an accused in a foreign court as long as the extradition has been authorized by a treaty between the United States and the foreign state. The mere existence of this treaty assumes that the trial will be fair. Therefore, if the United States, as a Non-Party to the Rome Treaty, enters into an extradition agreement with the ICC, United States courts will not be required to examine the rights provided to the accused and will presume that the trial is valid.

Thus, an American national committing crimes abroad cannot seek shelter under the United States Constitution, and can be prosecuted under the Rome Statute, even though not all requirements of the Bill of Rights are met. However, the question remains as to whether prosecution by the ICC of an American national who commits a crime in the United States is constitutional.

Opponents of the Rome Statute argue that the ICC would violate the United States Constitution by trying American nationals for crimes committed within United States jurisdiction. Because the ICC is not an inferior court as defined in Article III of the United States Constitution, it would be unconstitutional for that Court to exercise jurisdiction over Americans for crimes committed in the United States. In Ex...
parte Milligan,\textsuperscript{251} the Supreme Court held that a military court during the Civil War could not exercise jurisdiction over the accused because it was not an "inferior" court which had been established by Congress.\textsuperscript{252} In that case, the Court found that because the petitioner was a civilian, he did not come under the jurisdiction of the military tribunal. Therefore, the tribunal's prosecution of him was unconstitutional as Congress did not authorize this tribunal to prosecute civilians.\textsuperscript{253}

Like Milligan, the Court in Reid \textit{v.} Colvert\textsuperscript{254} found that although the United States and Great Britain entered into an international agreement, an American civilian could not be tried in a United States military court overseas.\textsuperscript{255} In that case, Colvert had been charged with killing her husband, a Sergeant in the United States Air Force, in Great Britain.\textsuperscript{256} The United States and Great Britain had previously entered into an agreement which provided that military courts would exercise exclusive jurisdiction over offenses committed in Great Britain by American service members or their dependents.\textsuperscript{257} Consequently, Colvert was tried by court martial and found guilty. Her judgment was reversed by the Court of Military Appeals. While awaiting retrial, Colvert petitioned for a writ of habeas corpus.\textsuperscript{258} The Supreme Court found that because Colvert was not a member of the armed services she could not be tried by a military tribunal. Although an agreement had been reached allowing prosecution of civilians by a military tribunal, the Court stated that "it seems clear that the Founders had no intention to permit the trial of civilians in military courts, where they would be denied jury trials and other constitutional protections."\textsuperscript{259}

Although it is well settled that American nationals will not be subject to prosecution for crimes committed in the United States in courts not defined as "inferior" courts (i.e. military tribunals), prosecution of American nationals for crimes committed in the United States to achieve criminal

\textsuperscript{251} 71 U.S. 2 (1866).
\textsuperscript{252} \textit{Milligan}, 71 U.S. at 121-22.
\textsuperscript{253} \textit{Id.} at 130.
\textsuperscript{254} 354 U.S. 1 (1957).
\textsuperscript{255} \textit{Reid}, 354 U.S. at 5.
\textsuperscript{256} \textit{Id.} at 3.
\textsuperscript{257} \textit{Id.} at 15.
\textsuperscript{258} \textit{Id.} at 3-4.
\textsuperscript{259} \textit{Id.} at 30.
consequences abroad has been permitted.\textsuperscript{260} In \textit{United States v. Melia}, the Second Circuit Court of Appeals stated that although the accused never entered Canada to conspire or commit the murder, his telephone calls to Canada were enough to allow his extradition to Canada to stand trial.\textsuperscript{261} In fact, Melia's telephone calls to Canada were sufficient for the court to find detrimental effect in Canada.\textsuperscript{262} In other words, merely because an offense occurred in the United States involving an American national, extradiction of that individual does not violate the United States Constitution.

Thus, because the ICC is not an inferior court as envisioned by the United States Constitution, it would be unconstitutional to allow it try an American national for a crime committed in the United States unless the crime was committed with the intention to achieve criminal consequences abroad.

V. CONCLUSION: WHAT IS THE STATUS OF THE INTERNATIONAL CRIMINAL COURT TODAY?

Today, the Rome Treaty is still in limbo, with the United States maintaining its position of non-ratification, yet becoming a signatory. Some of the concerns expressed by the United States are justified. First, because the term “aggression” is extremely ambiguous and as yet undefined, its inclusion in the subject matter jurisdiction of the ICC will continue to be a problem for States wishing to ratify.\textsuperscript{263} This is especially true as it pertains to peacekeeping missions. Many States participating in peacekeeping missions around the world will be reluctant to subject their nationals to a court which could prosecute with such an ambiguously defined crime. However, scholars have pointed out that because the definition of aggression will have to be adopted as an amendment to the original treaty, it is unlikely that an individual will be prosecuted for this crime in the immediate future.\textsuperscript{264}

Second, the United States has legitimate concerns regarding the exercise of jurisdiction by the ICC over non-parties.

\textsuperscript{260} Melia v. United States, 667 F.2d 300 (2d Cir. 1981) (accused extradited for crimes committed in U.S. with intended criminal effects in another country).
\textsuperscript{261} \textit{Melia,} 667 F.2d at 304.
\textsuperscript{262} \textit{Id.}
\textsuperscript{263} Murphy, \textit{supra} note 143, at 59.
\textsuperscript{264} \textit{Id.} Amendments will not be considered by the Assembly until the Rome Statute has been in force for seven years. In order to amend the Rome Statute, it must be adopted by two-thirds of the State Parties and ratified by seven-eighths. \textit{Id.}
Recently, the United States proposed that the ICC be prevented from requesting the surrender or accepting jurisdiction over a non-party national who acted under the direction of its State, as long as that State has acknowledged the action was taken on its behalf.\(^{265}\) However, those “irresponsible nations” would not be allowed to exercise this option. The proposal, which would not require amendment to the Rome Statute,\(^{266}\) would allow “responsible” non-party States “to perform their international responsibilities while continuing to subject to the Court’s jurisdiction those individuals from states whose actions prompted the call for the very establishment of the ICC.”\(^{267}\)

Finally, there are legitimate constitutional concerns regarding American nationals being tried for crimes committed in the United States which have no criminal effect abroad. Under Article III of the United States Constitution, a court not defined as an “inferior” court cannot exercise jurisdiction over an American citizen committing a crime in the United States unless the crime was committed with the intent to create a criminal effect abroad. Should the United States Senate ratify the Rome Treaty, it is likely the jurisdiction of the ICC over American citizens committing crimes in the United States will be found unconstitutional. Therefore, American delegates to the Preparatory Commission must do everything to ensure that the ICC’s jurisdiction is curtailed as it applies to nationals committing crimes in their own states, unless there exists an agreement between the state and the ICC pertaining to this exercise of jurisdiction by the ICC.

The United States remains committed to support a treaty that is “fairly and realistically constituted.”\(^{268}\) The United States continues to support the establishment of a permanent international court whose main objective is to hold individuals accountable for crimes against humanity, genocide, and war crimes.\(^{269}\) This support is evident by the remarks made by

\(^{266}\) Scheffer, supra note 121, at 2.  
\(^{267}\) Reeker, supra note 265.  
\(^{269}\) Reeker, supra note 265.
David Scheffer to the Congressional Human Rights Caucus:

The world needs a permanent international criminal court. We need it because the perpetrators of these heinous crimes must be brought to justice . . . . The international system simply cannot continue to deal with these problems in an ad hoc manner indefinitely.\textsuperscript{270}

In fact, the United States has remained actively involved in the Preparatory Commission, negotiating the Elements of Crimes and Rules of Procedure and Evidence.\textsuperscript{271} These actions do not seem to be the actions of a government which does not intend to remain fully committed to the establishment of such a court, while actively negotiating compromises to reflect United States interests.

It is the hope of this author that the United States will continue to work closely with the ICC Preparatory Commission, negotiating to include provisions and procedures in the Rome Statute and other documents, to make ratification of the Rome Treaty more palatable to both the Administration and to Congress and inline with the requirements of the United States Constitution. At a minimum, the United States should remain a “good neighbor”\textsuperscript{272} to the ICC whether or not full party status is achieved, thereby ensuring that individuals, whether American nationals or not, are held accountable for the heinous crimes they commit.

\textsuperscript{270} Scheffer, \textit{supra} note 121, at 2.
\textsuperscript{271} \textit{Id.} at 1.
\textsuperscript{272} \textit{Id.}