

ARTICLE 124, WAR CRIMES, AND THE DEVELOPMENT OF THE ROME STATUTE

SHANA TABAK*

The Rome Statute is the founding document of the International Criminal Court (ICC), a court created to prosecute, among other crimes, the most serious crimes of war. Article 124 of the Rome Statute, however, permits States Parties to refuse ICC jurisdiction over war crimes committed on their territory or by their own nationals for a period of up to seven years. Article 124, also known as the “transitional provision” or “opt-out provision,”¹ reads:

Notwithstanding article 12, paragraphs 1 and 2, a State, on becoming a party to this Statute, may declare that, for a period of seven years after the entry into force of this Statute for the State concerned, it does not accept the jurisdiction of the Court with respect to the category of crimes referred to in article 8 when a crime is alleged to have been committed by its nationals or on its territory. A declaration under this article may be withdrawn at any time. The provisions of this article shall be reviewed at the Review Conference convened in accordance with article 123, paragraph 1.²

David Scheffer, who headed the U.S. delegation to the Rome Conference to establish the ICC, called Article 124 the war crimes “opt-out,”³ a term which has gained traction among human rights advocates and critics of the article. Despite the trepidation expressed by critics of

* J.D. Candidate, Georgetown University Law Center, 2009. Many thanks to Professor Julie O’Sullivan for her guidance and encouragement in developing an earlier version of this paper during her course in International Criminal Law. I would also like to thank the editors and staff of *The Georgetown Journal of International Law* for their skillful assistance. © 2009, Shana Tabak.

1. See Andreas Zimmerman, *Article 124*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS’ NOTES, ARTICLE BY ARTICLE 1281, 1281, 1285 (Otto Triffterer ed., 1999).

2. See Rome Statute of the International Criminal Court, July 17, 1998, 37 I.L.M. 999 [hereinafter Rome Statute], available at <http://untreaty.un.org/cod/icc/statute/romefra.htm>.

3. *Developments at the Rome Treaty Conference: Hearing Before the S. Foreign Relations Comm., 105th Cong. (1998)* (statement of David J. Scheffer, Head of the U.S. Delegation to the U.N. Diplomatic Conference on the Establishment of a Permanent International Criminal Court), available at www.iccnw.org/documents/USscheffer_Senate23July98.pdf [hereinafter Scheffer statement].

Article 124, to date only two countries have invoked it to opt-out of ICC war crimes jurisdiction: France⁴ and Colombia.⁵ Notably, on August 13, 2008, France withdrew its invocation of Article 124, and Colombia's seven-year period of curtailed jurisdiction will end on October 31, 2009.⁶ Although Article 124 permits States Parties, for a period of seven years, to refuse ICC jurisdiction over war crimes, nationals of countries that opt-out may still be prosecuted for genocide or crimes against humanity under separate statutory provisions. Article 124 is the only article that, under the terms of the Rome Statute, must undergo mandatory review at the 2009 Review session.⁷ This Note examines some of the many questions raised by the existence of the war crimes opt-out within the Statute, including: How did a war crimes opt-out come to exist in the Statute? What has been its effect thus far? Why has it only been adopted by two countries? And, should it be struck from the Statute when it is reviewed in 2009?

Section I examines the drafting of Article 124 and its impact on other provisions of the Rome Statute. This section discusses the influence of the States Parties that pressed for Article 124's inclusion in the Statute. It considers how Article 124 intersects with three other articles of the

4. See France Declarations to the Rome Statute of the International Criminal Court, pt. III, June 21, 2000, available at <http://treaties.un.org/doc/Treaties/1998/11/19981110%2006-38%20PM/Related%20Documents/CN.404.2000-Eng.pdf> ("Pursuant to Article 124 of the Statute of the International Criminal Court, the French Republic declares that it does not accept the jurisdiction of the Court with respect to the category of crimes referred to in Article 8 when a crime is alleged to have been committed by its nationals or on its territory.").

5. See Colombia Declarations to the Rome Statute of the International Criminal Court, para. 5, Aug. 16, 2002 ("Availing itself of the option provided in article 124 of the Statute and subject to the conditions established therein, the Government of Colombia declares that it does not accept the jurisdiction of the Court with respect to the category of crimes referred to in article 8 when a crime is alleged to have been committed by Colombian nationals or on Colombian territory."), available at <http://treaties.un.org/doc/Treaties/1998/11/19981110%2006-38%20PM/Related%20Documents/CN.834.2002-Eng.pdf>.

6. See France Withdrawal of Declaration, Reference: C.N.592.2008.TREATIES-5 (Depositary Notification) August 13, 2008 available at <http://treaties.un.org/doc/Publication/CN/2008/CN.592.2008-Eng.pdf> (last visited March 20, 2009); see also Non-Paper by the Facilitators on the Mandatory Review of Article 124 of the Rome Statute, March 11, 2009, on file with author.

7. Rome Statute, *supra* note 2, art. 124 ("The provisions of this article shall be reviewed at the Review Conference convened in accordance with article 123, paragraph 1."); see also Rolf Einar Fife, Review Conference: Scenarios and Options (Int'l Crim. Ct., ICC-ASP/5/Inf.2, Nov. 21, 2006), available at www.iccnw.org/documents/Review_Conference_Scenarios_and_Options_Rolf_Fife.pdf; see also Coalition for the International Criminal Court, Review Conference of the Rome Statute, available at <http://www.iccnw.org/?mod=review> (last visited Mar. 20, 2009). States parties have accepted a proposal from Uganda to host the Review Conference; it will be held in Kampala during the first semester of 2010.

Statute: Article 120, which addresses States Parties' capacity to make reservations to the Statute; Article 12, which addresses the subject-matter jurisdiction of the ICC; and Article 8, which provides the Statute's definition of war crimes. It explores the temporal and jurisdictional confusion that may result from adoption of Article 124. This section concludes by examining arguments in favor and against Article 124 itself. Section II explores France's decision to invoke (and then to withdraw) Article 124 to opt-out of the ICC's war crimes jurisdiction, and the effect of those decisions in France. Section III addresses the invocation of Article 124 by Colombia, a country that has been torn apart by civil war for nearly half a century, and offers an in-depth examination of how invocation of the Article may affect the potential for ICC prosecution of war criminals there. Section IV considers why other countries may or may not have considered invoking the Article. Finally, Section V considers the question that will be addressed at the 2009 Review session: should Article 124 remain in the Rome Statute?

This Note argues that the war crimes opt-out provision embodied in Article 124 should be deleted from the Statute. Although Article 124 played an important role during the drafting and negotiation of the Rome Statute, it has outlived its usefulness. Specifically, the availability of a transitional provision appears to have shaped the development of articles within the Rome Statute that address the Court's jurisdiction, reservations to the Statute, and the definition of war crimes. Article 124's limitations on jurisdiction sufficiently relieved France's concerns regarding the ICC, and appear to have led France to ratify the Statute. Indeed, the article may have the potential to encourage other countries to ratify the Statute if it is retained at the Review Session. Despite Article 124's influence on the Statute's drafting history, and its potential for enticing other countries to ratify the treaty, this Note argues that Article 124 should not be renewed. It has had little practical effect in Colombia and France. Additionally, although at the Rome Conference Article 124 may have served to assuage the concerns of some countries, potential States Parties no longer need to rely on an opt-out provision to allay their fears of an untested Court. Now, in order to determine whether the Court behaves responsibly with regard to its prosecutions, countries can assess several years of the ICC's performance in deciding whether they are willing to entrust their nationals to its jurisdiction. Finally, although human rights activists' concern that Article 124 could lead to impunity has not been realized, this concern remains plausible. Based on this rationale, States Parties should strike Article 124 from the Rome Statute.

I. ARTICLE 124

A. *History and Development*

A brief overview of the negotiating history of the Rome Statute contextualizes the place of Article 124 within the Statute. The Rome Statute entered into force on July 1, 2002.⁸ It is a complex document that reflects many carefully crafted compromises among its drafters.⁹ The International Law Commission of the United Nations prepared a concise draft statute in 1994, and representatives of negotiating states formed Ad Hoc¹⁰ and Preparatory¹¹ Committees, which had been negotiating various drafts since 1994.¹² From June 15 to July 17, 1998, representatives of the negotiating states met in Rome with the goal of adopting the text of the Statute. Throughout the negotiation processes, negotiating states organized themselves into various thematic working groups to draft different sections of the Statute, and also into several informal discussion groups, aligning regionally and politically. One of these informal groupings became known as the “like-minded” states.¹³ This group of countries initially emerged from the Ad Hoc Committee, as several Latin American and Western European countries coalesced around their shared frustration with the domination of the negotiations by the major powers, including the five permanent members of the United Nations Security Council (the P-5), which were skeptical of the establishment of the ICC.¹⁴ Although a final tally of these like-minded nations was never issued, they numbered close to sixty countries,¹⁵ and eventually included Great Britain, which joined

8. Web site of the Rome Statute of the International Criminal Court, <http://untreaty.un.org/cod/icc/index.html> (last visited Mar. 6, 2009); see also Rome Statute, *supra* note 2, art. 126.

9. Mauro Politi, *The Rome Statute of the ICC: Rays of Light and Some Shadows*, in *THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A CHALLENGE TO IMPUNITY* 7, 7–8 (Mario Politi & Giuseppe Nesi eds., 2001).

10. See International Law Commission, *Report of the International Law Commission on the Work of Its Forty-Sixth Session*, 11, 12, U.N. Doc. A/49/10 (1994), available at http://untreaty.un.org/ilc/documentation/english/A_49_10.pdf.

11. See United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Court, June 15–July 17, 1998, *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, U.N. Doc. A/51/22 (Apr. 14, 1998) [hereinafter Preparatory Committee Report].

12. Mahnouch H. Arsanjani, *The Rome Statute of the International Criminal Court*, 93 AM. J. INT’L. L. 22, 22 (1999).

13. *Id.* at 23.

14. *Id.*

15. Jelena Pejic, *The International Criminal Court Statute: An Appraisal of the Rome Package*, 34 INT’L LAW. 65, 67 n.10 (2000).

after the newly-elected Labour Party expressed support for the Court's establishment.¹⁶ The like-minded countries did not agree on every aspect of the Statute, yet they were united in their determination to realize the existence of an independent, effective, and permanent criminal court, as opposed to a court that was politically directed and dominated by the P-5.¹⁷

The initial draft of the Rome Statute presented by the International Law Commission in 1994 did not contain an opt-out provision on war crimes.¹⁸ The presence of Article 124 in the Statute reflects multiple proposals from countries that were concerned that the ICC's jurisdiction would be too broad. The final text of Article 124 was an amalgamation of various countries' proposals, and this compromise was not reached until the last day of negotiations in order to secure France's signature.¹⁹

Article 124 reflects the desire of the major world powers to protect their nationals from ICC jurisdiction by limiting the Court's subject matter jurisdiction. In particular, the United States and France were of the perspective that their nationals would be exposed to disproportionate risk because of high levels of troop involvement in overseas peace-keeping missions, and were therefore adamant that they required additional protections for their nationals through limitations on the ICC's jurisdiction.²⁰ Toward the end of the conference when jurisdictional issues were discussed, it became clear that the issue of mandatory jurisdiction could be the deciding factor for securing the ratification of the Rome Statute by the P-5, especially by France and the United States.

Three days before the end of the conference, France informally proposed that in order for the ICC to exercise jurisdiction, the state of the accused individual should give its consent, either by general declaration or *ad hoc* consent.²¹ This proposal outraged the like-minded states and also the NGO community, which were adamant that only a court with mandatory jurisdiction would have the capacity to

16. Arsanjani, *supra* note 12, at 23.

17. Pejic, *supra* note 15, at 66.

18. See Zimmerman, *supra* note 1, at 1281; Pejic, *supra* note 15, at 66; Preparatory Committee Report, *supra* note 11, ¶ 20.

19. See Zimmerman, *supra* note 1, at 1281.

20. David J. Scheffer, *Staying the Course with the International Criminal Court*, 35 CORNELL INT'L L.J. 47, 70 (2001) ("The United States shoulders responsibilities worldwide that no other nation comes even close to undertaking."); see also Zimmerman, *supra* note 1 at 1281 ("the idea of such a transitional provision only appeared during the very last days of the Conference in order to secure the acceptance of the Statute by certain States, but in particular that of France.").

21. Zimmerman, *supra* note 1, at 1281.

become a truly effective mechanism to end impunity for international crimes.²² Although the like-minded states rejected this proposal, the P-5 unanimously approved of some form of an opt-out provision.²³ Building on this sentiment, the United Kingdom offered an informal proposal that became known as the “optional protocol.”²⁴ Under this proposal, reluctant states could shield their nationals from the Court’s jurisdiction for crimes against humanity and war crimes for ten years, after which the protocol was renewable.²⁵ Soon after, the United States formalized this proposal, with the consent of other P-5 members.²⁶ Scheffer bemoans this proposal’s “failure to attract sufficient support quickly enough to be sustainable,” because all subsequent proposals were not protective enough for the United States to approve them.²⁷ Two days before the end of the conference, Germany offered a counter-proposal that would have created an opt-out provision for war crimes only, and for a shorter, non-renewable period of three-years.²⁸ The Bureau of the Conference, the group of state representatives facilitating the text negotiations, engaged in intensive consultation with interested parties, and finally proposed Article 124 in its final incarnation.²⁹ This version of Article 124 apparently met the threshold requirements for France, which signed and ratified the treaty, but not for the United States, which signed the treaty but then refused to ratify it, and ultimately nullified its signature.³⁰ The text was voted upon on July 17, 1998; 120 states voted in favor, twenty-one abstained, and seven countries voted against the version of the Rome Statute that was finalized that day.³¹

B. *Article 120 Ban on Reservations to the Rome Statute*

The drafters of the Rome Statute recognized a need to balance

22. Politi, *supra* note 9, at 12.

23. Zimmerman, *supra* note 1, at 1282.

24. *Id.*

25. Scheffer, *supra* note 20, at 71.

26. *Id.*

27. *Id.* at 71–72.

28. Zimmerman, *supra* note 1, at 1282.

29. *Id.*

30. DAVID SHEFFER & JOHN HUTSON, CENTURY FOUNDATION, STRATEGY FOR U.S. ENGAGEMENT WITH THE INTERNATIONAL CRIMINAL COURT, 4–5, 8 (2008) available at <http://www.tcf.org/list.asp?type=PB&pubid=662> (last visited March 20, 2009); see also Scheffer, *supra* note 20, at 71–72.

31. Pejic, *supra* note 15, at 69.

simultaneously the dual goals of (1) treaty integrity and (2) a high level of participation from states, including states with varying political motivations. Reflecting the inherent tension between these two goals, the issue of reservations was highly contentious among the negotiators. Many of the like-minded states argued that because the Rome Statute falls into a category of legal texts known as constitutive treaties, reservations should not be permitted.³² Signatories to a constitutive treaty not only create a new body, but also agree to be regulated by that body in strict accordance with the terms of the treaty. The like-minded countries worried that reservations could undermine the authority of the Statute, and therefore preferred a complete ban on reservations.³³

Other states (including the United States, France, and Russia) demanded the ability to make reservations in the interest of self-protection. They also expressed concern that an inability to make reservations might jeopardize national legal procedures. Scheffer explains, “we believed that at a minimum there were certain provisions of the treaty . . . where domestic constitutional requirements and national judicial procedures might require a reasonable opportunity for reservations that did not defeat the intent or purpose of the treaty.”³⁴ Notwithstanding these concerns, a majority of the drafters agreed to Article 120’s ban on reservations.

The final text of Article 120 of the Rome Statute favors the goal of treaty integrity, stating simply, “[n]o reservations may be made to this Statute.”³⁵ Nevertheless, it became clear during the negotiations that elsewhere in the Statute, more flexible language was required to secure the support of states that felt the need to modify their treaty obligations.³⁶ Accordingly, although the Rome Statute forbids reservations, it

32. Constitutive treaties provide for the creation of an organization and lay the foundation for how it will operate, such as the Treaty on European Union and the United Nations Charter. Each of these treaties created a body or an organization to which its signatories became parties, just as did the Rome Statute in creating the ICC. See Edward Gordon, *The World Court and the Interpretation of Constitutive Treaties: Some Observations on the Development of an International Constitutional Law*, 59 AM. J. INT’L L. 794, 797 (1965) (“[T]hese constitutive treaties share a similar distinction from non-constitutive treaties; namely, that they establish an institution with an objective existence.”).

33. Gerhard Hafner, *Article 120*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS’ NOTES, ARTICLE BY ARTICLE 1270, 1270 (Otto Triffterer ed., 1999).

34. Scheffer statement, *supra* note 3.

35. Rome Statute, *supra* note 2, art. 120.

36. Dwight G. Newman, *The Rome Statute, Some Reservations Concerning Amnesties, and a Distributive Problem*, 20 AM. U. INT’L. L. REV. 293, 322–23 (2005).

does not prohibit interpretive declarations.³⁷ Although one scholar argues that Article 124 permits an otherwise forbidden reservation to the Rome Statute,³⁸ in fact, Article 124 allows a state to make an interpretive declaration that temporarily removes that state from the ICC's war crimes jurisdiction. Since Article 120 and Article 124 are both part of the Rome Statute and therefore hold equal weight, neither can be deemed illegitimate. Their combined effect, however, creates tension within the Statute by permitting states to limit the extent of their treaty obligations. Indeed, some States Parties have attempted to dilute their ratifications so dramatically through the use of interpretive declarations, that they are arguably very similar to reservations.³⁹

It appears that Article 124 was included in the Statute in order to secure the signature of certain countries that, in the absence of statutory permission to opt-out of the ICC's war crimes jurisdiction for a number of years, would not have ratified the treaty.⁴⁰ Ruth Wedgwood highlights the importance of permitting states to make reservations because of the desirability of wider participation in multilateral treaties: "all-or-nothing packages will predictably make it harder to gain ratification in countries that would like nothing better than to be the treaty regime's strongest supporters."⁴¹ Her argument lends support for the inclusion of Article 124, although it permits interpretive declarations rather than reservations, in the Rome Statute.

As discussed above, the Article's presence in the Statute was the result of much deliberation among the members of the P-5, whose

37. A distinction is drawn in international law between reservations and interpretive declarations. A reservation is "a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State." Vienna Convention on the Law of Treaties art. 2(d), May 23 1969, 1155 U.N.T.S. 331, 222. An interpretive declaration is "a unilateral statement, however phrased or named, made by a State or by an international organization whereby that State or that organization purports to specify or clarify the meaning or scope attributed by the declarant to a treaty or to certain of its provisions." *Report of the International Law Commission on the Work of its Fifty-First Session, 3 May–23 July 1999*, [1999] 2 Y.B. Int'l L. Comm'n 1, U.N. Doc. A/54/10, Chapter VI, 1 (2), available at http://untreaty.un.org/ilc/documentation/english/A_54_10.pdf.

38. HUGO RELVA, AMNESTY INT'L, INTERNATIONAL CRIMINAL COURT: DECLARATIONS AMOUNTING TO PROHIBITED RESERVATIONS TO THE ROME STATUTE 9 (2005), available at <http://www.amnesty.org/en/library/asset/IOR40/032/2005/en/1b2c6038-d483-11dd-8743-d305bea2b2c7/ior400322005en.pdf>.

39. Newman, *supra* note 31, at 325.

40. Arsanjani, *supra* note 12, at 53.

41. Ruth Wedgwood, *The International Criminal Court: An American View*, 10 EUR. J. INT'L L. 93, 106,107 (1999).

participation in the ICC was presumably desirable. Of the P-5, only Great Britain and France have ratified the treaty, but it appears that the presence of Article 124 allowed France to support the Statute, whereas it might not have done so without an opt-out clause. Furthermore, had the United States been allowed more time to consider Article 124, the seven-year opt-out provision might have induced it to ratify the treaty. Scheffer indicates that his delegation was only made aware of Article 124 until the final day of the Conference. He states that “we will never know what might have transpired if the conference had afforded us more time, as we requested, to consider the provision and discuss it both within the U.S. government and with other governments.”⁴² Early support from the United States would have added crucial legitimacy to the fledgling ICC.

But although Article 124 was pivotal to securing the support of France, and nearly secured that of the United States, today 108 countries are parties to the Rome Statute.⁴³ Now that the ICC has been established for several years, it is less clear that an opt-out provision is needed to entice other states to ratify the Rome Statute.

C. Article 8: War Crimes

Article 8 of the Rome Statute⁴⁴ provides a definition of war crimes that many commentators agree is more comprehensive than had been defined previously by international treaty because it includes war crimes committed in both internal and international conflicts.⁴⁵ Traditionally, “war crimes were held to embrace only violations of international rules regulating war proper, that is international armed conflicts and not civil wars.”⁴⁶ Article 124’s war crimes opt-out provision offers insight into how this definition found its way into the Statute.

The ICC has subject-matter jurisdiction over three “core” crimes: genocide, crimes against humanity, and war crimes.⁴⁷ The Court also has jurisdiction over the crime of aggression, but the contours of that crime were left to be defined at a later date.⁴⁸ Prior to the Rome

42. Scheffer, *supra* note 20, at 72.

43. International Criminal Court, The States Parties to the Rome Statute, <http://www.icc-cpi.int/Menus/ASP/states+parties/> (last visited Mar. 6, 2009).

44. Rome Statute, *supra* note 2, art. 8.

45. ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW, 47-63 (2003); Pejic, *supra* note 15, at 70-73.

46. CASSESE, *supra* note 45, at 48.

47. Rome Statute, *supra* note 2, art. 5(1).

48. *Id.* art. 5(2).

Conference, the negotiating states had not established whether war crimes would be included in the Statute at all, and the crime remained undefined in the draft Statute.⁴⁹ At the conference itself, however, the drafters agreed on both a definition of war crimes and on threshold requirements for war crimes, representing a pair of victories for the like-minded countries that aimed to secure ICC jurisdiction over a wider selection of crimes.

The first victory for the like-minded countries was that the Rome Statute became the first international treaty to attach individual criminal responsibility to war crimes committed in internal conflicts, as opposed to only criminalizing war crimes committed in international conflicts.⁵⁰ Although the more expansive definition first gained acceptance in the *Tadic (Interlocutory Appeal)* of 1995 at the International Criminal Tribunal for the Former Yugoslavia,⁵¹ the Rome Statute was the first time it was codified in an international treaty. This watershed definition was the result of protracted debate among the negotiators. Negotiating states disagreed on whether war crimes should include anything beyond the “grave” breaches of the Geneva Convention, and whether internal conflicts should be included.⁵² In the final draft of the Statute, “war crimes” includes four areas: (1) *grave* abuses in an *international* armed conflict, as defined in the Geneva Conventions of 1949;⁵³ (2) *serious* violations of laws and customs of international law in *international* armed conflict;⁵⁴ (3) *serious* violations of Common Article

49. Pejic, *supra* note 15, at 71.

50. *Id.* Although the International Criminal Tribunal for Rwanda and the International Criminal Tribunal for the Former Yugoslavia had jurisdiction over crimes committed in internal armed conflict, these were not permanent bodies created by international treaty, but rather, were created by the UN as *ad hoc* tribunals.

51. See Prosecutor v Tadic, Case No IT-94-1-T, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶¶ 96–97 (October 2 1995). In Tadic, the Appeals Chamber of the ICTY a majority of the Appeals Chamber determined that the previous distinction between international and internal armed conflicts was not a sensible one. They opined that previously, “States preferred to regard internal strife as rebellion, mutiny and treason coming within the purview of national criminal law and, by the same token, to exclude any possible intrusion by other States into their own domestic jurisdiction. This dichotomy was clearly sovereignty-oriented and reflected the traditional configuration of the international community, based on the coexistence of sovereign States more inclined to look after their own interests than community concerns or humanitarian demands.”

52. Timothy L.H. McCormack & Sue Robertson, *Jurisdictional Aspects of the Rome Statute for the New International Criminal Court*, 25 MELB. U. L. REV. 635, 661–62 (1999).

53. Rome Statute, *supra* note 2, art. 82(a).

54. *Id.* art. 8(2)(b).

3 of the Geneva Conventions in *non-international* armed conflict;⁵⁵ and (4) *serious* violations of laws and customs applicable in *non-international* armed conflict.⁵⁶ The inclusion of two definitions of war crimes that occur in internal conflicts is a “significant consolidation of the principle that inhuman conduct contrary to applicable law in internal conflicts (and not only in international conflicts) deserves repression as a war crime.”⁵⁷

The drafters also debated when the ICC would have jurisdiction if Article 8 crimes occurred.⁵⁸ The like-minded countries supported a lower threshold, in which these crimes had to occur either systematically *or* be widespread. The P-5 argued that the Court should have jurisdiction only if crimes were both systematic *and* widespread.⁵⁹ The final draft of the *chapeau* of Article 8 reads: “The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.”⁶⁰ Gabriella Venturini considers this definition to be a victory for the progressive like-minded nations.⁶¹ Therefore, the final definition of the threshold for war crimes in the Rome Statute is the lower threshold desired by the like-minded states, resulting in broader jurisdiction for the Court over war crimes.

How then, do we reconcile the existence of this expansive definition of war crimes in Article 8, when the Statute also permits States Parties to opt-out of the ICC’s jurisdiction over these same crimes by invoking Article 124? Some theorists discuss these two components of the Statute in isolation of each other, yet do not offer an explanation for this apparent inconsistency within the Statute.⁶² Venturini, however, argues that if Article 124 had not been included in the Statute, Article 8’s threshold of war crimes would likely have been much higher.⁶³ Although the like-minded states were certainly unhappy with the inclu-

55. *Id.* art. 8(2)(c).

56. *Id.* art. 8(2)(e).

57. Politi, *supra* note 9, at 11.

58. Gabriella Venturini, *War Crimes in International Armed Conflicts*, in *THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A CHALLENGE TO IMPUNITY* 95, 95 (Mario Politi & Giuseppe Nesi ed., 2001).

59. *Id.* at 95.

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

61. Venturini, *supra* note 58, at 95–99.

62. See Politi, *supra* note 9, at 12; see also Remigius Chibueze, *United States Objection to the International Criminal Court: A Paradox of “Operation Enduring Freedom”*, 9 ANN. SURV. INT’L & COMP. L. 19, 28 (2003); McCormack & Robertson, *supra* note 52, at 666.

63. Venturini, *supra* note 58, at 95.

sion of Article 124, they may have been placated by the inclusion of such a broad threshold for jurisdiction over war crimes. This argument supports this Note's larger argument that Article 124 served an important role in facilitating compromise between different factions of negotiators who disagreed on the Statute's text.

D. *Article 12: Jurisdiction*

Article 124 refers to Article 12,⁶⁴ entitled "Preconditions to the exercise of jurisdiction." The content of these two articles is linked within the Rome Statute: Article 12 outlines how the ICC gains jurisdiction over States Parties, and Article 124 severely restricts the Court's capacity to gain jurisdiction over states that opt-out of the Court's war crimes jurisdiction pursuant to Article 124. Article 124's presence in the Statute reflects the varied opinions of negotiating states regarding how the ICC should exercise jurisdiction.

Article 12 provides for a system of automatic jurisdiction for the three core crimes; in ratifying the Statute, States Parties *ipso facto* accept the jurisdiction of the ICC for these crimes.⁶⁵ For the ICC to exercise jurisdiction over a case, consent must be granted by one of two states: either the state in whose territory the alleged crime was committed, or the state of the nationality of the accused individual.⁶⁶ A state that is not a party to the Statute may also consent to ICC jurisdiction by granting consent on an *ad hoc* basis.⁶⁷

The ICC's jurisdiction became an incredibly contentious issue at the Rome Conference. The like-minded states demanded automatic jurisdiction for all the core crimes in the Statute.⁶⁸ The P-5, lead by the United States and France, sought more narrow parameters for the Court's jurisdiction. The United States had two primary concerns regarding jurisdiction of the Court.⁶⁹ First, the Article 12 provisions on jurisdiction allowed jurisdiction to be exercised over non-Party States. Thus, if non-Party State A sent peacekeepers to State Party B, and State B had adopted the war crimes opt-out, State B could accuse State A's nationals of war crimes while State B's own nationals would remain

64. Rome Statute, *supra* note 2, art. 12.

65. *Id.*, see also Zimmerman, *supra* note 1, at 1282.

66. Rome Statute, *supra* note 2, arts. 12–19.

67. *Id.* art. 12(2).

68. Arsanjani, *supra* note 12, at 26.

69. Scheffer statement, *supra* note 3, at 3. (According to Scheffer, the U.S. delegation "sought to achieve other objectives in Rome that are critical," and because these objectives were not met, the United States was unable to ratify the Rome Statute.)

immune to war crimes prosecution. The United States considered this level of exposure for non-States Parties to be unacceptable.⁷⁰

Secondly, the United States felt that it was necessary that states have an opportunity to assess the effectiveness and impartiality of the ICC before agreeing to its jurisdiction over all crimes.⁷¹ From the beginning of the negotiations in Rome, the United States was prepared to accept universal ICC jurisdiction over the crime of genocide, but not over war crimes and crimes against humanity. Scheffer proposed a transitional opt-out provision that met the United States' requirements for jurisdiction, including a ten-year opt-out of jurisdiction over war crimes and crimes against humanity. While that specific proposal was rejected, a modified version ultimately became Article 124.⁷²

In the final days of the Rome Conference, these disagreements over jurisdiction threatened to cause a stalemate. Numerous scholars stress the political importance of negotiation and compromise in the development of treaties such as the Rome Statute.⁷³ Broad-based support for the treaty might not have existed at Rome had it not been achieved at "the cost of a substantial exception to the principle of the Court's automatic jurisdiction."⁷⁴ This logic explains the need for a provision such as Article 124.

Finally, the chronology of when articles were discussed at the Rome Conference sheds light on the relationship between Articles 12 and 124. Despite the centrality of jurisdictional concerns at the ICC, Article 12 was not negotiated until the end of the last day of the session.⁷⁵ Mahnoush Arsanjani argues that as a consequence there are ambiguities within the Statute as a whole when considering Article 12 jurisdictional issues in relation to other articles. She offers Article 124 as one example. A conflict of jurisdiction could arise in which it is unclear how these two articles intersect.⁷⁶ Imagine the following scenario: a state in whose territory a war crime occurred has consented unconditionally to ICC jurisdiction, but the state of the accused individual has adopted the war crimes opt-out. In this situation, it is unclear whether the ICC: (a) gains jurisdiction because Article 12 permits either the State of territory *or* the State of the accused perpetrator's nationality to consent to

70. Scheffer, *supra* note 20, at 70.

71. *Id.*

72. *Id.*

73. See Politi, *supra* note 9, at 7, 12; see also Wedgwood, *supra* note 41, at 93, 106.

74. See Politi, *supra* note 9, at 12.

75. See Arsanjani, *supra* note 38, at 52–53.

76. *Id.* at 53.

jurisdiction; or (b) the Court has no jurisdiction because the State of the accused has opted out of jurisdiction over war crimes. The Statute is silent as to what would occur were such a scenario to arise.

Although it is not clear what the practical application of Article 124 would be, scholars tend to agree that because countries that advocated for a war crimes opt-out were motivated by the desire to protect their nationals from prosecution, this militates in favor of the argument that the ICC would not gain jurisdiction over them in this situation.⁷⁷ Still, ambiguity remains regarding the practical intersection of these two articles.

E. *Temporal Confusion in Article 124*

In addition to the confusion over whether the intersection of Articles 12 and 124 would lead to ICC jurisdiction, further uncertainty results from Article 124's "seven-year" opt-out period. Within the Article itself, it is unclear whether this provides that crimes committed during the seven-year period after Article 124 is invoked are forever immune, or whether after seven years, the ICC may retroactively gain jurisdiction over these crimes. According to Andreas Zimmerman, the seven-year period begins to run when the treaty enters into force for that state,⁷⁸ in accordance with the Statute's provisions.⁷⁹ Yet Zimmerman fails to predict what occurs after the seven years are complete.

Imagine that State A ratifies the Rome Statute in 2002, lodges a declaration of Article 124's opt-out provision and, in 2004, a national of State A commits war crimes on its own territory. Several scenarios are possible: (1) State A's national has immunity from prosecution for the crimes of 2004, and in 2009, State A remains a Party to the Statute and does not renew its Article 124 immunity; (2) State A's national has immunity for the crimes of 2004, and in 2009 State A remains a Party and renews its Article 124 opt-out; (3) State A's national has immunity for crimes of 2004 and State A later decides to void its signature to the treaty; or (4) State A has no immunity for crimes of 2004, remains a Party to the Statute, and the ICC has jurisdiction to try these crimes. It is only in the last scenario that the ICC has clear jurisdiction. In the first three scenarios it is unclear whether the ICC has jurisdiction over the crimes, and whether the protection from prosecution afforded to a country that invokes Article 124 endures beyond the seven-year opt-out

77. *Id.*; see also Zimmerman, *supra* note 1, at 1282.

78. Zimmerman, *supra* note 1, at 1283–84.

79. Rome Statute, *supra* note 2, art. 126.

period.

The main reason cited by the United States and France for wanting a provision such as Article 124 was the need for adequate time to assess the performance of the ICC. This rationale suggests that if a state invokes Article 124, and then decides that it does not trust the Court, it may either choose to nullify its ratification of the treaty after it has already signed—as did the United States—or if renewal is an option offered at the 2009 Review Conference, renew its war crimes opt-out. The treaty provides no clear indication as to how these scenarios might be resolved, most likely due to the hurried manner in which Article 124 was included in the Statute.

F. *Criticism and Support of Article 124*

Many groups and individuals in the NGO and human rights community denounced the finalized text of Article 124.⁸⁰ Amnesty International dubbed the provision a “license to kill,”⁸¹ and launched an aggressive “naming and shaming” campaign to publicly humiliate any potential subscribers. The organization published an open letter urging states to refrain from invoking Article 124, and demanded that the United Nations ban peacekeepers from any country that deposited an opt-out declaration.⁸² A representative from the Lawyers Committee for Human Rights offered a more tempered critique, stating that the opt-out provision would “ensure that the ICC will not be able to exercise jurisdiction over war crimes committed by troops or peacekeepers. . . in a situation where the territorial state might be willing to surrender them to the ICC.”⁸³ Other NGOs dismissed the provision as contrary to the object and purpose of the Rome Statute.⁸⁴

Some scholars have critiqued Article 124 in softer language. The Article has been regarded as having an “unfortunate” impact on the

80. WORLD VISION, *THE INTERNATIONAL CRIMINAL COURT: FINDING JUSTICE FOR VICTIMS, ENDING IMPUNITY FOR PERPETRATORS* 34 (2002), available at [http://www.globalempowerment.org/PolicyAdvocacy/pahome2.5.nsf/allreports/5CB57476E1D6F9CF88256EFA0082016E/\\$file/ICC.pdf](http://www.globalempowerment.org/PolicyAdvocacy/pahome2.5.nsf/allreports/5CB57476E1D6F9CF88256EFA0082016E/$file/ICC.pdf); see also FEDERACION INTERNACIONAL DE DERECHOS HUMANOS, COLOMBIA, LA DESMOVILIZACIÓN PARAMILITAR, EN LOS CAMINOS DE LA CORTE PENAL INTERNACIONAL (2007), available at <http://www.fidh.org/spip.php?article4751>.

81. OPEN LETTER BY AMNESTY INTERNATIONAL’S SECRETARY GENERAL TO ALL GOVERNMENTS TO RATIFY THE STATUTE OF THE INTERNATIONAL CRIMINAL COURT AS SOON AS POSSIBLE, (1998), available at <http://asiapacific.amnesty.org/library/Index/ENGIOR400231998?open&of=ENG-393>.

82. *Id.*

83. Pejic, *supra* note 15, at 72.

84. RELVA, *supra* note 38, at 11; see also Pejic, *supra* note 15 at 72, 84.

ICC's jurisdictional competence with regard to war crimes,⁸⁵ as reflective of an overly deferential approach to the desires of certain powerful states;⁸⁶ or as a "shadow hanging over the statute."⁸⁷ Politi argues that Article 124 represents a substantial concession to conservative influences at the negotiating table, and "establishes precisely that system of jurisdiction 'à la carte' that the like-minded states had opposed during the entire preparatory process."⁸⁸ Critics of the war crimes opt-out provision remain optimistic that States Parties will terminate the agreement in the 2009 Review Conference.⁸⁹ Despite this optimism, although Article 123 mandates review of Article 124, it in no way dictates what this review will entail. Signatories may consider striking the provision from the Statute, but may also decide to maintain or even broaden the scope of the current exemption.⁹⁰

The U.S. delegation to the Rome Conference also criticized Article 124, but from a contrasting theoretical perspective. The U.S. delegation's critique of Article 124 does not attack the concept of an opt-out provision, as the United States was very much in favor of a provision allowing skeptical countries a period of time to assess the ICC's work. Rather, the United States delegation criticized the potentially troubling intersection between Article 12 jurisdictional issues and the transitional provision. Scheffer argues that the Article poses a danger to the soldiers of the multiple peacekeeping missions the United States sends overseas. He claims that if the United States sent soldiers to a state that had adopted Article 124, under Article 12 that state could accuse U.S. peacekeepers of war crimes committed on its territory, while its own nationals would be immune from the ICC's war crimes jurisdiction.⁹¹

Despite these critiques of Article 124, the provision has its supporters. Scheffer highlights it as an example of a way to circumvent the Article 120 ban on reservations, as it has allowed several state parties to push "as close as possible to the cliff of reservations not permitted under the Rome Statute."⁹² Another scholar suggests that expansion of

85. McCormack & Robertson, *supra* note 52, at 666.

86. CASSESE, *supra* note 45, at 62.

87. Politi, *supra* note 9, at 12.

88. *Id.*

89. Pejic, *supra* note 15, at 84 ("It is hoped that this 'Transitional Provision' will be omitted from the ICC Statute at the first Review Conference, which is when an examination of Article 124 is scheduled to take place.").

90. McCormack & Robertson, *supra* note 52, at 643; *see also* UN Non-Paper, *supra* note 6.

91. Scheffer, *supra* note 20, at 81.

92. David Scheffer, Keynote Address: The Future U.S. Relationship with the International Criminal Court, (October 14, 2005), *reprinted in* 17 PACE INT'L L. REV. 161, 176 (2005).

this provision to protect non-state parties might address the concerns of the United States while still retaining the integrity of the Statute.⁹³

Notwithstanding the debate surrounding Article 124, only two countries have invoked the provision to opt-out of the ICC's war crimes jurisdiction, France (which has withdrawn its Article 124 declaration) and Colombia. In order to evaluate whether the fears and predictions regarding the use of Article 124 were merited, this Note will examine what impact the opt-out declaration has had for these two nations.

II. ARTICLE 124 AND FRANCE

A. *Potential Liability for War Crimes in France*

France's interest in protecting its soldiers from war crimes prosecution stems from its strong post-colonial ties to the African continent, especially in Francophone countries. These connections are not only linguistic, France also maintains approximately 6,000 troops in Africa, and over 240,000 French citizens live there.⁹⁴ Because of its military presence in unstable regions prone to internal conflict, during negotiations France was particularly interested in shielding its nationals from any potential judicial action by the ICC.⁹⁵ Article 124 provided France with a layer of insulation from the ICC Prosecutor's reach. France accepted ICC jurisdiction for genocide and crimes against humanity because it was less concerned about potential liability of its military for

93. BRYAN MACPHERSON, AM. SOC'Y OF INT'L LAW, AUTHORITY OF THE SECURITY COUNCIL TO EXEMPT PEACEKEEPERS FROM INTERNATIONAL CRIMINAL COURT PROCEEDINGS (2002), *available at* <http://www.asil.org/insigh89.cfm>.

94. ANDREW HANSEN, COUNCIL ON FOREIGN RELATIONS, THE FRENCH MILITARY IN AFRICA (2008), *available at* <http://www.cfr.org/publication/12578/>. According to the Council on Foreign Relations, in addition to its major military bases in Djibouti, Senegal, and Gabon, France has engaged in three recent military engagements in Africa. In Chad, where in February 2008 Sudanese-backed rebels attempted to overthrow the French-allied government of Chad, French troops may have engaged rebel forces. In the Central African Republic, the French military props up the government against warlords and rebel groups. In the Ivory Coast, French troops, acting pursuant to a UN mandate, monitor the border between the government-controlled region in the South and the rebel-controlled region in the North. *Id.*

95. Politi, *supra* note 9, at 12; Telephone interview with anonymous representative of the Legal Counsel of the French Mission to the United Nations, in New York, NY (March 1, 2009). This source indicated that "France, being a state with soldiers with peace operations, we were wary of soldiers being indicted for crimes of war; we didn't really know how the Court would work. (Notes on file with author.)

these crimes.⁹⁶

B. *French Considerations in Adopting Article 124*

It was at France's insistence that the final version Article 124 became part of the Rome Statute, although within France its adoption was controversial. France's Foreign Minister defended his country's stance on the provision because it provided protection from a potentially unaccountable ICC Prosecutor.⁹⁷ France also expressed concern that it "could be the target of unfounded complaints tainted with hidden political motives because it was engaged in numerous external theatres, notably in connection with peace-keeping operations."⁹⁸ Some French groups, however, voiced concerns about the possible repercussions that might follow in other countries if France were to lodge a declaration pursuant to Article 124.⁹⁹ Left-wing parliamentarians and international NGOs worried that opting-out of war crimes jurisdiction would result in a domino effect of impunity if other countries followed suit.¹⁰⁰ French NGOs, which opposed Article 124, predicted that invocation of the clause would politically isolate France from the rest of the European Union, as it became apparent that France was the only European country strongly considering invocation of the Article.¹⁰¹

C. *Influence of Article 124 in France*

Despite concerns that countries which invoked the opt-out provision would commit human rights abuses with impunity, little controversy has arisen since France's ratification of the Statute and its invocation of

96. John Rosenthal, *A Lawless Global Court: How the International Criminal Court undermines the U.N. system*, HOOVER INST. POL'Y REV., Feb.–Mar. 2004, n.4, available at <http://www.hoover.org/publications/policyreview/3439981.html>.

97. A spokesperson for the French Ministry of Foreign Affairs of France explained, "Once the Rome Statute enters into force, the transitional period will let us observe the functioning of the new system, intervene at assemblies of states parties to find solutions if there are problems, and monitor the validity of guarantees to prevent frivolous complaints." Remarks at the International Criminal Court (Apr.11, 2002), http://www.un.int/france/documents_anglais/020411_mae_presse_juridique.htm (last visited Mar. 6, 2009).

98. Ruth Wedgwood, *The Irresolution of Rome*, 64 LAW & COMTEMP. PROBS. 193, 203 (2001).

99. See Coalition for an International Criminal Court, Newsletter #4, p. 6 (Mar. 3, 2000), available at <http://www.iccnw.org/documents/euroupdate04.200003.pdf> (stating that France was, at the time, the only country considering recourse to Article 124, which risked isolating France within the European Union).

100. See *id.*

101. *Id.*

Article 124. The ICC Office of the Prosecutor has never received a referral regarding any crime, war crimes or otherwise, committed by French nationals or on French soil, nor has the Prosecutor used his *proprio motu* powers to bring a case against a French national.¹⁰² Therefore Article 124 has not been put to any practical test in the French context.¹⁰³

France's invocation of Article 124 reflects that country's uncertainty about how the ICC would function.¹⁰⁴ In light of this uncertainty, France was inclined to be cautious and sought to protect French troops abroad. Wedgwood interprets France's support of Article 124 as a classic example of legal realism: rather than trust the text of the Rome Statute, France decided to wait and see how the ICC performed. She defends France's position, stating that "watching the Court in action is a far more rigorous test."¹⁰⁵ Compared to relying on the text of the Statute. Therefore, any state with increased exposure due to international presence of its troops is justified in adopting this "wait and see" approach.

With the benefit of hindsight, however, it appears that France adopted an overly cautious role in demanding an opt-out provision to protect its nationals from the ICC's reach. This argument is supported by France's recent withdrawal of its declaration under Article 124, on August 13, 2008.¹⁰⁶ Upon lodging the withdrawal with the UN, France offered no explanation of its decision, but country representatives indicated that they determined that the article was no longer necessary.¹⁰⁷ Additionally, although France has still not passed implementing laws conforming with Article 8 of the Rome Statute, an approved draft statute would provide the nation with protection from ICC

102. Rome Statute, *supra* note 2, art. 15(1), states, "The Prosecutor may initiate investigations *proprio motu* on the basis of information on crimes within the jurisdiction of the Court."

103. *See generally* ICC Office of the Prosecutor, Update on Communications Received by the Prosecutor of the ICC (February 1, 2006), *available at* <http://www2.icc-cpi.int/menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/reports%20and%20statements/statement/update%20on%20communications%20received%20by%20the%20prosecutor> (last visited March 20, 2009).

104. Wedgwood, *supra* note 98, at 203 n40.

105. *Id.* at 193.

106. France Declaration, *supra* note 6; *see also* La Coalition française pour la Cour pénale internationale [The French Coalition for the International Criminal Court], La France a retiré la "déclaration de l'article 124" [France withdraws declaration of Article 124] *available at* <http://www.cfpci.fr/spip.php?article238> (June 13, 2008) (last visited March 20, 2009).

107. Interview with French Mission to the United Nations, *supra* note 95. This source stated, "from our experience, we don't need article 124." (Notes on file with author.)

prosecution rooted in another protection of the Statute, the Article 17 principle of complementarity. Complementarity, a central theme of the Rome Statute, articulates that the ICC should act as a complement to domestic jurisdiction when domestic authorities are “unwilling or unable genuinely to carry out the investigation or prosecution.”¹⁰⁸ Even if French nationals were accused of war crimes, assuming that France had the proper implementing legislation in accordance with the requirements of the ICC, the Rome Statute would require the ICC Prosecutor to defer to France’s functioning justice system, thereby leaving the Article 124 opt-out for war crimes with little purpose. It appears somewhat incongruous that France would withdraw its protection under Article 124 before its war crimes law was fully implemented. Arguably this action is a testament to France’s confidence in the propriety of the ICC’s operations.

The most important function of Article 124 in the French context, however, is not the actual protection from prosecution it grants French nationals. More vitally, the provision served as a vehicle for securing French commitment to the ICC. Had the opt-out provision granted even more leeway for states to protect their citizens, other countries may also have chosen to ratify the Statute as well, as suggested by Scheffer’s remarks concerning the U.S. delegation’s concerns regarding subject matter jurisdiction.¹⁰⁹

III. ARTICLE 124 AND COLOMBIA

A. *Potential liability for War Crimes in Colombia*

While an examination of Article 124’s influence in France appears to be no more than an academic exercise, in Colombia, the second country to invoke the opt-out provision, there appears to be a real possibility of investigation by the ICC.¹¹⁰ Colombia is currently en-

108. Rome Statute, *supra* note 2, art. 17.

109. Scheffer, *supra* note 92, at 168–69.

110. ICC Office of the Prosecutor, Press Release, ICC Prosecutor Visits Colombia, (2008), available at [http://www2.icc.cpi.int/Menus/ICC/Press+and+Media/Press+Releases/Press+Releases+\(2008\)/ICC+Prosecutor+visits+Colombia.htm](http://www2.icc.cpi.int/Menus/ICC/Press+and+Media/Press+Releases/Press+Releases+(2008)/ICC+Prosecutor+visits+Colombia.htm) (last visited March 20, 2009). (“From 25 to 27 August, the ICC Prosecutor, Luis Moreno Ocampo, will conduct an official visit to Bogota at the invitation of the Government of Colombia and the country’s Public Prosecutor’s Office. The Prosecutor paid an earlier visit to Colombia in October 2007.”) [hereinafter Colombia Visit 2008]; ICC Office of the Prosecutor, *Media Advisory: ICC Prosecutor Visits Colombia*, (October 18, 2007), available at http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/2007/otp%20media%20advisory_%20icc%20prosecutor%20visits%20colombia (last visited March 20, 2009) [hereinafter Colombia Visit 2007].

trenched in the longest running internal conflict in the Western Hemisphere.¹¹¹ Colombia's complex politics, domestically and internationally, offer insight into why Colombia might have chosen to invoke Article 124 to opt-out of the ICC's war crimes jurisdiction. The conflict has internally displaced nearly 4 million people, second only to the conflict in the Sudan.¹¹² Throughout this conflict, an average of 700 civilians each month have lost their lives to violence,¹¹³ and multiple armed groups have committed war crimes and crimes against humanity.¹¹⁴

The current conflict originated during a period called *La Violencia*, (1948–1953) when two political parties competed for supremacy.¹¹⁵ The parties agreed upon a power-sharing government in 1958 that placated the political majority, yet did not include the ultra-left wing communist factions. The exclusion of these factions sparked the rise of leftist guerilla groups, including the most prominent, the FARC (*Fuerzas Armadas Revolucionarias de Colombia*, or the Revolutionary Armed Forces of Colombia) and the ELN (*Ejército de Liberación Nacional*, or the National Liberation Army). The FARC advocates for social protection of lower classes, agricultural reform, and local autonomy. The FARC promotes its mission through guerilla warfare consisting of armed territorial conquest, kidnappings, and occasional direct combat with government troops. In response to a perceived incapacity or unwillingness of the government to protect its citizens adequately, various paramilitary groups formed, each of which have sporadically benefited from state sponsorship. When several paramilitary groups joined forces in 1997 under the umbrella group of the AUC (*Auto-Defensas Unidas de Colombia*, or the United Self-Defense Forces of Colombia), each were already notorious for committing rampant violations of human rights and for being financially dependent on narco-trafficking. In 2005, the

111. See Marc Chernick, *Negotiating Peace amid Multiple Forms of Violence: The Protracted Search for a Settlement to the Armed Conflicts in Colombia*, in *COMPARATIVE PEACE PROCESSES IN LATIN AMERICA* 159, 196 (Cynthia J. Arnson ed., 1999); see generally HUMAN RIGHTS WATCH, *BREAKING THE GRIP: OBSTACLES TO JUSTICE FOR PARAMILITARY MAFIAS IN COLOMBIA* (2008), available at <http://www.hrw.org/en/news/2008/10/23/colombia-government-hampers-justice-efforts>.

112. INTERNAL DISPLACEMENT MONITORING GROUP, *INTERNAL DISPLACEMENT, GLOBAL OVERVIEW OF TRENDS, 2007* (2008), available at [http://www.internal-displacement.org/8025708F004CE90B/\(httpPages\)/22FB1D4E2B196DAA802570BB005E787C?OpenDocument&count=1000](http://www.internal-displacement.org/8025708F004CE90B/(httpPages)/22FB1D4E2B196DAA802570BB005E787C?OpenDocument&count=1000).

113. Chernick, *supra* note 111, at 196.

114. See generally INTERNATIONAL CRISIS GROUP, *TOUGHER CHALLENGES AHEAD FOR COLOMBIA'S URIBE* (2006), available at http://www.crisisgroup.org/home/index.cfm?action=login&ref_id=4455.

115. *Id.*

Colombian Congress approved the Peace and Justice Law,¹¹⁶ which provided for the demobilization of the paramilitaries in exchange for amnesty or significantly reduced sentences.¹¹⁷ Human rights groups have severely criticized this law for granting human rights abusers impunity in exchange for an end to the violence; among the concerns is the fear that the Peace and Justice Law was passed only because war criminals would prefer to be tried under its standards, which are much less severe than those at the ICC.¹¹⁸

B. *Colombian Considerations in Adopting Article 124*

The administration of Colombian President Andrés Pastrana ratified the Rome Statute on August 5, 2002.¹¹⁹ On the same day, just two days before handing over power to his successor (current President Alvaro Uribe), Pastrana opted out of the ICC's war crimes jurisdiction pursuant to Article 124.¹²⁰ This Note offers three possible explanations for Colombia's decision to invoke Article 124, all of which may have played intersecting roles.

First, Colombia's important relationship with the United States might have influenced Colombia's invocation of Article 124. In South America, Colombia has remained a bastion of support for U.S. efforts to combat drug trafficking.¹²¹ President Uribe's government receives significant financial support from the United States.¹²² This financial support, combined with political pressure from the United States, has led Uribe to make other domestic political choices in order to comply with U.S. wishes. For example, in 2007 he suggested allowing politicians who had collaborated with paramilitaries to avoid prosecution. When the United States criticized this proposal on the basis that it would promote impunity, Uribe tabled the plan in order to protect the

116. Human Rights Watch, *supra* note 111, at 22.

117. *Id.*

118. See INTERNATIONAL CRISIS GROUP, COLOMBIA: TOWARDS PEACE AND JUSTICE?, LATIN AMERICA REPORT N°16, p. 2 (March 2006), available at <http://www.crisisgroup.org/home/index.cfm?id=4020>.

119. Press Release, Human Rights Watch, *Colombia's ICC Declaration a "Prelude to Impunity"* (Sept. 4, 2002), available at <http://www.hrw.org/en/news/2002/09/04/colombias-icc-declaration-prelude-impunity>.

120. Yadira Ferrer, *War Crimes in Limbo*, INTER PRESS SERVICE, Sept. 4, 2002, available at <http://www.commondreams.org/headlines02/0904-05.htm>.

121. *Free Trade in Thugs: Getting Tougher with Right-wing Warlords*, THE ECONOMIST, May 15, 2008, available at http://www.economist.com/world/la/displaystory.cfm?story_id=11376365&CFID=6684090&CFTOKEN=4207207.

122. Human Rights Watch press release, *supra* note 119.

important U.S.-Colombia Free Trade Proposal.¹²³ Therefore, it appears that Colombia may have adopted Article 124 as a means to placate the United States and demonstrate its shared skepticism of the Court.

Second, historically, Colombia has viewed prosecuting its own criminals as a matter of national pride. Multiple armed groups have threatened the sovereignty of the central government, and Uribe was elected and has gained popularity as a leader who has cracked down on the political opposition.¹²⁴ As a leader, he goes to great lengths to demonstrate publicly that the Colombian government is strong enough to handle its opposition.¹²⁵ This desire to demonstrate that Colombia is strong enough to handle opposition as a matter of national pride may also persist with regard to human rights abusers. The Colombian government may want to prosecute these criminals in its own courts as a means of demonstrating to its citizens that it retains political power as a dominant central government.

Finally, extensive connections between the paramilitaries and the government may explain Colombia's decision to adopt Article 124. Despite the political threat that the AUC posed to the government before its official demobilization in 2006, connections between the paramilitaries and the government have been widely recognized.¹²⁶ Historically, there has been an important functional alliance between the paramilitaries and the government because both were engaged in combating the left-wing opposition led by the FARC.¹²⁷ Additionally, Uribe's government is currently embroiled in what has become known as the "para-political" scandal.¹²⁸ This scandal has escalated as paramilitaries, through the process of demobilization under the Peace and Justice Law, have begun to provide confessions implicating many politicians to Colombian prosecutors. These confessions have lent

123. Human Rights Watch, *supra* note 111, at 15.

124. Juan Forero, *Colombians Travel More Freely as Leader's Policies Pay Off*, N.Y. TIMES, Aug. 11, 2003, at A3 ("Mr. Uribe is also known for sometimes quirky, symbolic acts that have struck a chord with Colombians. Last month, he moved his entire cabinet to Colombia's most violent province for three days to demonstrate that he could govern in the most ungovernable of regions.").

125. *Id.*

126. See Hugh Bronstein, *Colombian Court Accuses Uribe of Obstruction*, REUTERS, Oct. 9, 2007, available at <http://www.alertnet.org/thenews/newsdesk/N09408411.htm>.

127. See generally HUMAN RIGHTS WATCH, THE "SIXTH DIVISION," MILITARY-PARAMILITARY TIES AND U.S. POLICY IN COLOMBIA (2001), available at www.hrw.org/reports/2001/colombia/1.htm.

128. See *Confundido por la Para-Politica?*, [Confused by Para-Politics?] SEMANA, Apr. 28, 2008, <http://www.semana.com/multimedia-politica/confundido-parapolitica/580.aspx> (last visited Mar. 6, 2009).

credence to the paramilitaries' claim that AUC support had brought about the election of over a third of Congress.¹²⁹ As a result, prosecutors have pressed charges against more than sixty congressmen, most of whom are from Uribe's coalition.¹³⁰ Over thirty have been imprisoned, and they currently await trial for suspected links to paramilitary militias who were responsible for widespread violations of human rights. In April 2008, the President's cousin and closest political ally, Mario Uribe, was arrested on charges of involvement with paramilitaries, bringing the scandal even closer to the President.¹³¹

This ongoing scandal suggests that Colombia's invocation of Article 124 aims to protect not only the paramilitaries who have committed some of the worst abuses, but also powerful politicians who could potentially be prosecuted for crimes at the ICC.¹³² If this is the case, then criticism from the human rights community that Article 124 was included in the Rome Statute in order to provide immunity for criminals may be accurate.

C. *Influence of Article 124 in Colombia*

Although Colombia opted out of ICC war crimes jurisdiction pursuant to Article 124, the ICC may still have jurisdiction over crimes committed by Colombian nationals on Colombian territory. In November of 2007, and in August of 2008, ICC Prosecutor Luis Moreno-Ocampo paid preliminary investigatory visits to Colombia.¹³³ These visits increased speculation that the next case on the ICC's docket may involve Colombian nationals.¹³⁴ Surprisingly, some members of the Colombian press seem to have misunderstood Colombia's invocation of Article 124 as providing immunity for Colombian nationals of *all* prosecution before the ICC.¹³⁵ Yet, the ICC's subject-matter jurisdic-

129. *Cousin Mario: "Parapolitics" Touches the First Family*, THE ECONOMIST, Apr. 24, 2008, available at http://www.economist.com/world/la/displaystory.cfm?story_id=11089566.

130. *Id.*

131. *Id.*

132. See William Bourdon, *Prosecuting the Perpetrators of International Crimes: What Role May Defence Counsel Play?*, 3 J. INT'L CRIM. JUST. 434, 444 (2005); see also RELVA *supra* note 38, at 18–20.

133. ICC Office of the Prosecutor, *Colombia Visit 2008*, *supra* note 110; see also ICC Office of the Prosecutor, *Colombia Visit 2007* *supra* note 110.

134. *Por 'patrocinio de genocidas', Colombia denunciará a Hugo Chávez ante la Corte Penal Internacional*, [For 'sponsorship of genocides', Colombia will denounce Hugo Chávez before the International Criminal Court] EL TIEMPO, Mar. 8, 2008, available at http://www.eltiempo.com/politica/2008-03-04/ARTICULO-WEB-NOTA_INTERIOR-3985482.html (last visited Mar. 17, 2009).

135. *Id.*

tion permits prosecution of crimes against humanity, genocide *and* war crimes. If Colombian nationals commit human rights violations classifiable only as war crimes, they may be protected under Article 124; however, if they commit genocide or crimes against humanity, they will still be susceptible to the Court's jurisdiction for those crimes.

Examination of the Rome Statute's definitions of the three "core" crimes reveals that few of the war crimes committed in Colombia are classifiable solely as war crimes. As a result of the overlapping definitions of these crimes in the Rome Statute, it has become less clear into which category certain crimes should fall.¹³⁶ For example, both genocide¹³⁷ and crimes against humanity¹³⁸ may occur in peacetime, whereas prior to their definitions in the Rome Statute, other treaties had limited them to wartime. War crimes may occur in a non-international context, whereas before the Rome Statute, other treaties limited war crimes to international conflicts. Roger S. Clark argues that the "expanding turf" of these definitions will leave prosecutors with "ample overlapping possibilities from each of the three categories in the Statute."¹³⁹ One scholar has even suggested a complete merging of the two categories of war crimes and crimes against humanity, and eliminating the category of war crimes.¹⁴⁰

An examination of actual human rights abuses in Colombia provides an evaluation of what categories of crimes may have occurred there. In one such incident:

On 18 April 2004, paramilitaries reportedly raided the indigenous community of Bahía Portete, in the department of La Guajira, whose inhabitants are members of the indigenous Wayúu people. They killed at least 12 people. They are reported to have tortured a number of adults before killing them. Several of the victims were dismembered. The paramilitaries also abducted several people, including three young girls. Their whereabouts, and whether they are dead or alive, remains

136. Roger S. Clark, *Crimes against Humanity in ICC, in THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A CHALLENGE TO IMPUNITY* 75, 92 (Mario Politi & Giuseppe Nesi eds., 2001).

137. Rome Statute, *supra* note 2, art. 6.

138. *Id.* art. 7.

139. Clark, *supra* note 136, at 92.

140. See William J. Fenrick, *Should Crimes Against Humanity Replace War Crimes?*, 37 COLUM. J. TRANSNAT'L L. 767, 769 (1999); see also Theodor Meron, *War Crimes Law Comes of Age*, 92 AM. J. INT'L L. 462, 468 (1998). Although he does not advocate eliminating the category of war crimes, Meron has indicated that the Rome Statute's definitions reflect a "blurring" between categories of crimes.

unknown. More than 500 Wayúu sought refuge across the border in Venezuela.¹⁴¹

This is an example of an abuse that could be categorized either as a war crime or as a crime against humanity.¹⁴² The category “war crimes” includes “willful killing,”¹⁴³ “when committed as part of a plan or policy or as part of large-scale commission of such crimes.”¹⁴⁴ The category “crimes against humanity” entails “murder”¹⁴⁵ “when committed as part of a widespread or systemic attack directed against any civilian population with knowledge of the attack.”¹⁴⁶ Torture¹⁴⁷ and forced displacement¹⁴⁸ also fall under both categories. Therefore, events that occurred in Bahía Portete are examples of crimes that could be tried either as war crimes or as crimes against humanity. One scholar has argued that most war crimes in Colombia would also qualify as crimes against humanity.¹⁴⁹ Colombia’s opt-out from the ICC’s war crimes jurisdiction, therefore, would not protect Colombian nationals from the Court’s jurisdiction over these abuses, since many of the crimes could be tried as crimes against humanity rather than as war crimes.

IV. ARTICLE 124’S POTENTIAL RELEVANCE FOR OTHER NATIONS

Despite the deliberation that preceded the adoption of Article 124, only two States Parties opted out of the ICC’s war crimes jurisdiction, and one of those has already revoked the declaration. Why is it that more countries did not take advantage of the opportunity to shield their nationals from the ICC’s war crimes jurisdiction?

The example of Burundi may be instructive in understanding why more countries did not invoke the article. Burundi publicly contemplated invoking Article 124. The proposition was defeated internally

141. AMNESTY INTERNATIONAL, *THE PARAMILITARIES IN MEDELLIN: DEMOBILIZATION OR LEGALIZATION?* (2005), available at <http://www.amnesty.org/en/library/asset/AMR23/019/2005/en/W9Uu9-sIE0AJ>.

142. Melissa Marler, *The International Criminal Court: Assessing the Jurisdictional Loopholes in the Rome Statute*, 49 *DUKE L.J.* 825, 849 (1999).

143. Rome Statute, *supra* note 2, art. 8(2) (a) (i).

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

145. *Id.* art. 7(1) (a).

146. *Id.* art. 7(1).

147. *See id.* art. 8(2) (a) (ii); *id.* art. 7(1) (f).

148. *See id.* art. 8(2) (e) (viii); *id.* art. 7(2) (d).

149. *See* Margaret Popkin, *Latin America: The Court and the Culture of Impunity*, *THE CRIMES OF WAR PROJECT MAGAZINE*, Dec. 2003, available at http://www.crimesofwar.org/icc_magazine/icc-popkin.html.

due to strong opposition among left-leaning cabinet members of the government. Burundi signed the Rome Statute, with no declaration invoking Article 124, on September 14, 2004.¹⁵⁰

In addition to domestic disagreement, other factors may have prevented Burundi and other nations from adopting this provision. First, NGOs launched “name and shame” campaigns that publicly shamed countries that contemplated opting out of the ICC’s war crimes jurisdiction,¹⁵¹ which may have been influential. Second, like-minded countries staunchly opposed this provision, and their perspective may have held sway as individual countries internally deliberated whether to invoke Article 124.¹⁵²

Members of the P-5 were initially supportive of Article 124 at the Rome Conference, yet France was the only member of this group to invoke it. Ultimately, France and the United Kingdom were the only members of the P-5 to ratify the Statute. Additionally, the election of the Labour party in the United Kingdom resulted in stronger support for the ICC, and the country rejected the need to opt-out of ICC jurisdiction for war crimes.¹⁵³ Because the United States was so involved in the deliberations surrounding Article 124, had the U.S. version of the opt-out provision been accepted at Rome, and had other U.S. concerns regarding the Statute been met,¹⁵⁴ it seems probable that the United States would have both ratified the treaty and opted-out of jurisdiction for war crimes and from crimes against humanity as well, if it had been made an option.

Some scholars have argued that retaining Article 124 in the Rome Statute might attract new States Parties that have not yet signed, by

150. See Press Release, Coalition for the International Criminal Court, *International Coalition Calls for Burundi’s Support of the ICC; Groups Urge the Burundian Government to Ratify the Rome Statute of the ICC* (Feb. 19, 2004), available at <http://www.iccnw.org/documents/02.18.04-BurundiENG.pdf>.

151. Pejic, *supra* note 15, at 84; see also, Amnesty International, *supra* note 81, at 2.

152. The Parliamentary Assembly of the Council of Europe, *Risks for the Integrity of the Statute of the International Criminal Court* (September 24, 2002), available at: <http://www.iccnw.org/?mod=search&cx=003302854834585804974%3Ajwhg5vl7cho&cof=FORID%3A11&q=Article+124&sa=+SEARCH+ICCNW.ORG#1047>, (Last visited March 20, 2009). In a request from the Assembly of States Parties (representing the majority view of the “like-minded” states) the Assembly “recommended that the Committee of Ministers invite member and observer States, inter alia, “not to avail themselves of the clause in Article 124 which makes it possible to escape the Court’s jurisdiction for seven years.” Although this suggestion was not acted upon by the Committee of Ministers, it reflects the like-minded states’ vocal opposition and campaigning against the invocation of Article 124,

153. Arsanjani, *supra* note 12, at 23.

154. Scheffer statement *supra* note 3, at 5.

offering them a means to allay their fears of prosecutorial overreach.¹⁵⁵ Scheffer criticizes Article 124 as it presently exists in the Statute (due to its intersection with Article 12) but suggests that opt-out provisions such as Article 124 may lead countries to ratify a treaty to which they otherwise might not be amenable. He proposes that the United States and other nations might follow France's lead by adopting declarations to opt-out of the ICC's war crimes jurisdiction. Despite his criticisms of Article 124, Scheffer explains that the United States only learned of the final version of Article 124 on the last day of the conference. He implies that had he been granted the additional time he requested to consider this option, the Rome Conference might have concluded with the support of additional countries, including that of the United States.¹⁵⁶

V. THE FUTURE OF ARTICLE 124

This Note has considered the ways in which Article 124 has affected the work of the ICC thus far. It is clear that the presence of Article 124 influenced the development of the Rome Statute itself. Not only did Article 124 lead to France's ratification of the Statute, but it may have contributed to the development of other parts of the Statute, most significantly the provisions on reservations, on jurisdiction, and on the definitions of war crimes.

Although Article 124 affected the drafting of the Statute, it has had limited impact in practice. Neither of the two countries that opted-out of the ICC's war crimes jurisdiction has been referred to the ICC for crimes of any sort. Therefore, the Prosecutor has not had to undergo a determination of whether alleged crimes fell within the exception to ICC jurisdiction carved out by Article 124, and neither country has been faced with an option to "opt-out" of jurisdiction in the face of an actual prosecution. Even if Colombian nationals were prosecuted for human rights violations, it is likely that the opt-out provision would be of little consequence because of the high degree of overlap between crimes against humanity and war crimes. The most significant contribution of Article 124, therefore, was as a vehicle for compromise during the drafting of the Rome Statute. There, it played an important, yet

155. Scheffer, *supra* note 92 at 177–78, *see also* Remigiuz Chibueze, *The International Criminal Court: Bottlenecks to Individual Criminal Liability in the Rome Statute*, 12 ANN. SURV. INT'L & COMP. L. 185, 208 (2006).

156. Scheffer, *supra* note 20, at 72 ("Of course, we will never know what might have transpired if the conference had afforded us more time, as we requested, to consider the provision and discuss it both within the U.S. government and with other governments.").

finite role. In the end, however, it was not enough of a safeguard to compel more nations to ratify the Statute.

In 2010, the transitional provision will be reviewed at the Review Conference, as mandated by Article 124.¹⁵⁷ Will a transitional provision still be necessary to assuage the concerns of skeptical states? At that time, States Parties will have already witnessed seven years of the ICC's performance. Fear of frivolous prosecution was a major concern prior to the entry into force of the Rome Statute. The way in which the ICC has functioned during its short tenure thus far should make these concerns moot. The ICC has opened four cases in African countries torn apart by conflict. Although the Prosecutor has received references of war crimes allegedly committed by U.S. soldiers in Iraq, he has rejected these based on the legal analysis that is required of him according to the Rome Statute.¹⁵⁸ In addition to this analysis, based on lack of jurisdiction over the United States, and on the rationale that these crimes do not meet the threshold requirements for gravity of crimes, the Prosecutor notes that even if these crimes were deemed grave enough for investigation, he would be prohibited from examining these cases due to the Rome Statute's central principle of "complementarity."¹⁵⁹ This evidence of the ICC's practice will serve to minimize

157. Rome Statute, *supra* note 2, art. 124; *see also* Fife, *supra* note 7 ("It should be noted that there is only one legally mandatory review to be carried out at the first Review Conference. This concerns the Transitional Provision in article 124, on deferred acceptance of jurisdiction of the Court for war crimes. With this sole exception, it is entirely up to the States Parties to decide whether other provisions will be reviewed at the Conference.").

158. Rome Statute, *supra* note 2, art. 51(1)(a-c). According to the Statute, the Prosecutor is required to review each situation with regard to whether the ICC has jurisdiction over the crime, whether the crimes surpass the threshold of gravity required by the statute, and whether the crimes have been addressed by the local judicial systems in the country of the accused.

159. ICC Office of the Prosecutor, Letter regarding Communications Received on the Situation in Iraq (February 9, 2006) *available at*, <http://www2.iccpi.int/menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/reports%20and%20statements/statement/update%20on%20communications%20received%20by%20the%20prosecutor> (last visited March 20, 2009) *see also* Rome Statute, *supra* note 2, art. 17(1)(a). Although it is beyond the scope of this paper to address the principle of complementarity embodied in Article 17 of the Rome Statute, this principle indicates a case is inadmissible at ICC if "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." Rome Statute, *supra* note 2, art. 17(1)(a). This principle was invoked in Prosecutor Luis Moreno-Ocampo's rejection of claims against U.S. soldiers in Iraq, because the U.S. has a functioning justice system that is capable of carrying out prosecutions if necessary, *Id.* at 9 ("In light of the conclusion reached on gravity, it was unnecessary to reach a conclusion on complementarity. It may be observed, however, that the Office also collected information on national proceedings, including commentaries from various sources, and that national proceedings had been initiated with respect to each of the relevant incidents.").

potential States Parties' fears of prosecutorial overreach, limiting the need for an opt-out provision. France's experience should be instructive for the other members of the P-5 who may be contemplating joining the ICC. France decided that, based on its track record, there was no longer any reason for suspicion of the court. The rest of the P-5, including the United States, should sign and ratify the Rome Statute as soon as possible so that they too can join in the multiple issues to be discussed at the Review Conference and help to shape the future of the ICC.¹⁶⁰ Accordingly, Article 124 should not be maintained simply to assuage the fears of skeptical nations.

Criticism from the progressive like-minded countries and human rights organizations that Article 124 would lead to greater impunity appears to have been overstated. Yet, this doesn't imply that these groups should have refrained from their objections. Human rights groups criticized the principle that the article reflected a lenient attitude toward war crimes, and allowed a country to effectively protect its nationals from being held accountable for human rights abuses. They feared that Article 124 represented a failure to achieve the objective stated in the preamble of the Rome Statute: "Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished."¹⁶¹ Critics of the opt-out provision felt that this principle was too important to be compromised simply to convince other nations to ratify the Statute. Indeed, there is a moral dimension in determining whether a war crimes opt-out is advisable. These moral considerations, agreed upon by States Parties, send a message to the rest of the world regarding the seriousness with which the international community addresses human rights abuses.

It appears that Colombia's invocation of Article 124 will yield little protection for war criminals from the ICC; many could still be prosecuted at the ICC for crimes against humanity.¹⁶² However, the concern that impunity will reign may be relevant in the context of crimes that fall only into the category of war crimes. For example, the taking of hostages,¹⁶³ or the use of poisonous weapons¹⁶⁴ are categorized only as

160. Sheffer & Hutson, *supra* note 30, at 20.

161. Rome Statute, *supra* note 2, pmb1.

162. While many war criminals in Colombia could still be prosecuted for crimes against humanity at the ICC, it is likely that Colombia will argue that its enactment of the Peace and Justice Law satisfies the requirements of complementarity articulated in Article 17 of the Rome Statute, *see infra* note 159.

163. *Id.* art. 8(2)(a)(vii).

164. *Id.* art. 8(2)(b)(xvii).

war crimes, and are not considered crimes against humanity. In situations that clearly and singularly fall within Article 8's definition of war crimes, an opt-out under Article 124 will result in a real threat to the ICC's capacity to punish these serious crimes.

The date for the Review Committee is fast approaching. When the States Parties come together as mandated by Article 123 to examine Article 124, they must determine whether to continue to allow States Parties to avoid ICC jurisdiction for war crimes. They may even be asked to consider an expanded provision that could secure participation in the ICC by other countries, but would demand immunity from prosecution for war crimes and crimes against humanity. Despite the importance that Article 124 had in garnering support for the Rome Statute amongst some signatories, States Parties should no longer fear frivolous accusations at the ICC. They should, however, be concerned about the presence of a provision that permits continued immunity for perpetrators of war crimes, whether or not it has come to fruition as of yet. At the Review Session, if States Parties are committed to promoting the interests of the victims of war crimes across the globe, they will strike Article 124 from the Rome Statute.