Slaying the Monster: Why the United States Should Not Support the Rome Treaty

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For this court truly is a monster, and it is a monster that must be slain.¹

INTRODUCTION

On July 17, 1998, one hundred twenty nations voted in favor of creating a powerful international court² that would be able to prosecute individuals for genocide,³ crimes against humanity,⁴ war crimes,⁵ and aggression.⁶ The International Criminal Court ("ICC") will enter into force when sixty countries ratify the Rome Statute of the International Criminal Court ("Rome Treaty").⁷ The ICC will be the last major international institution created in this millennium.⁸


³ See infra Part II.B.1 (discussing the Rome Treaty’s definition of genocide as “committing acts with the intent to destroy in whole or in part a national, ethnic, racial or religious group”).

⁴ See infra Part II.B.2 (introducing the Rome Treaty’s definition of crimes against humanity as crimes committed “as part of widespread or systematic attack directed against any civilian population with knowledge of the attack”).

⁵ See infra Part II.B.3 (presenting the Rome Treaty’s definition of war crimes as acts “committed as part of a plan or policy or as a large scale commission of such crimes”).

⁶ See infra Part II.B.4 (analyzing the inclusion of aggression in the Rome Treaty). Although the delegates at the Rome Treaty did not define aggression, this section bases its analysis on the definition set out in the 1991 ILC Draft Code of Crimes Against the Peace and Security of Mankind. See 1991 Draft Code On Crimes Against the Peace and Security of Mankind, art. 16, in SUNGA infra note 29, at 346 (defining aggression as “the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any manner inconsistent with the Charter of the United Nations").

The significance of the creation of the ICC is immense, since the end of World War II, the international community has not been able to prosecute those responsible for massive human rights abuses. Since there has never been an international court able to try individuals, the international community has been unable to prosecute such notorious human rights abusers as Idi Amin and Pol Pot. Many nations, therefore, consider the ICC the missing component of an effective international legal system. Proponents of the ICC believe that this court, established on the fiftieth anniversary of the Universal Declaration of Human Rights, will greatly deter human rights violators. Despite the good intentions behind the establishment of the

8. See Mary Robinson, A Permanent International Criminal Court At Last, INT'L HERALD TRIB., June 15, 1998, at 10 (discussing how the ICC will be the culmination of the fifty-year endeavor to build institutions that protect human rights).

9. See United Nations Press Release, supra note 2 (remarking that many delegates believe that the ICC is a “giant step in the history of mankind”).

10. See Kofi Annan, Statement by the United Nations Secretary-General at the Ceremony Held at Campidoglio Celebrating the Adoption of the Statute of the International Criminal Court (July 18, 1998) (visited Sept. 6, 1998) <http://www.un.org/icc> (declaring that until the creation of the Rome Treaty, powerful leaders knew they could get away with committing crimes against humanity because there was no international court to judge them).

11. See Robinson, supra note 8, at 10 (noting that in the last fifty years it was easier to escape accountability for murdering 100,000 people instead of just one).

12. See Conference on Establishing an International Criminal Court Concludes Four Days of General Statements, M2 PRESSWIRE, June 19, 1998, available in 1998 WL 12975656 (statement of Frank Jensen, Minister of Denmark) (arguing that there should be an international court that acts the same way as a national justice system); see also Diplomatic Conference Begins General Statements on the Establishment of a Criminal Court, M2 PRESSWIRE, June 17, 1998, available in 1998 WL 12975145 (statement of Tony Lloyd, United Kingdom Minister of State) (remarking that if there were an effective permanent international court, it would make the world more just, safe, and peaceful); see id. (statement of Mary Robinson, United Nations High Commissioner for Human Rights) (suggesting that the ICC provides the world with a chance to overcome the past atrocities and establish a court that will not only be effective but will demand universal respect).


ICC, serious concerns remain regarding the text of the Rome Treaty.\textsuperscript{15} The United States, in particular, is concerned that creation of the ICC may substantially affect the United States and its citizens regardless of whether it chooses to ratify the Rome Treaty.\textsuperscript{16}

This comment explores the Rome Treaty and evaluates the impact it could have on the United States—with or without the country's ratification. Part I of this comment explores the background of the ICC, particularly the historical use of international tribunals and the international legal concepts included in the Rome Treaty. Part II evaluates the Rome Treaty itself, in terms of its constitutionality and the language setting forth the crimes under its jurisdiction. This section also addresses the United States' concern that the ICC will be a politically-motivated institution. Part III presents and analyzes the solutions available to the United States concerning the Rome Treaty. Finally, this comment recommends that the United States should not sign, ratify, or tacitly accept the Rome Treaty unless the international community significantly amends it.

\textsuperscript{15} See Eli Nathan, \textit{Statement by the Head of the Delegation of Israel} (July 17, 1998) (visited Sept. 6, 1998) <http://www.un.org/icc> (arguing that the Treaty is flawed in its enumeration of serious crimes because it includes the transportation of a population into occupied territory); see also Dilip Lahiri, \textit{Remarks Explaining the Vote on the Adoption of the Statute of the International Court} (July 17, 1998) (visited Sept. 6, 1998) <http://www.un.org/icc> (characterizing the scope of the ICC as too broad and easily used for political purposes); S. REP. NO. 103-71, at 104 (1993) (statement by the American Bar Association) (listing the arguments against the ICC). But see Leila Sadat Wexler, \textit{The Proposed Permanent International Court: An Appraisal}, 29 C\textsc{ornell} INT'L L.J. 665, 705-14 (1996) (discussing the duty that governments owe to citizens who suffer from international crimes not to argue over legal technicalities when they are of "no importance in the long run"). These governments have a responsibility to establish an impartial, credible, and independent adjudicatory institution. See \textit{id}.

I. BACKGROUND OF THE ICC

There is a significant amount of history leading up to the establishment of a permanent tribunal to adjudicate international crimes. In the late nineteenth century, the Franco-Prussian War atrocities hastened the calls for an international criminal court. Later, after World War II, the Nuremberg and Tokyo Trials prosecuted many perpetrators of war crimes and crimes against humanity, thereby renewing this concept. It appeared that a permanent criminal court was a step closer to reality when, in 1948, the Genocide Convention called for a permanent tribunal. The Cold War, however, delayed the creation of this type of institution.


18. See Carroll Bogert, Pol Pot’s Enduring Lesson, FIN. TIMES, Mar. 16, 1998, at 16 (discussing that in 1870-71, the gruesome atrocities of the Franco-Prussian war prompted the international community to call for an international tribunal to try the perpetrators).

19. See Brian Mitchell, One Court for all the World?, INVESTOR’S DAILY, July 16, 1998, at A1 (discussing the Nuremberg legacy). Many proponents of the ICC have compared it to the Nuremberg Tribunals following World War II. See id. But see Gary T. Dempsey, Reasonable Doubt: The Case Against the Proposed International Criminal Court (last modified July 16, 1998) <http://www.cato.org/> (arguing that the Nuremberg Tribunal is different from the ICC because the Nuremberg Tribunal followed an unconditional military and political surrender, the defendants were in custody, the evidence was readily available, and the allies shared a common vision of what the post-occupation government should look like). At the Nuremberg trials, the Allies tried twenty-two Nazi leaders both for waging an aggressive war and crimes against humanity. See id. The British and American leaders, however, were not accused of crimes against humanity for killing 35,000 civilians in the Dresden firebombing and 100,000 civilians in Hiroshima and Nagasaki. See id.


22. See MacPherson, supra note 17, at 12 (discussing how the easing of the Cold War renewed interest in an permanent international tribunal).
As a result of an increase in internal strife at the end of this century, the face of conflict has changed. Consequently, in the wars of ethnicity and nationalism, there have been tremendous civilian casualties. The massive human rights abuses of the Bosnia-Herzegovina and Rwanda conflicts in the early 1990s represent this change in warfare. Thus, the United Nations Security Council responded to the conflicts in Bosnia-Herzegovina and Rwanda by ordering the creation of ad hoc tribunals to try the accused.

Nevertheless, the United Nations wanted to find a more permanent solution instead of resorting to ad hoc tribunals. Since the ad hoc

23. See David J. Scheffer, *International Judicial Intervention*, FOREIGN POL’Y, Mar. 1, 1996, at 34 (listing numerous recent occurrences of internal strife). Recent examples of conflict include: the Iraqi assault against its Kurdish and Shiite populations and the invasion of Kuwait; ethnic cleansing in Bosnia and Croatia; genocide in Burundi and Rwanda; genocide in Cambodia; and widespread terror and murder in Angola, Chechnya, Ethiopia, Haiti, Liberia, Somalia and Sri Lanka. See id. (announcing that together these atrocities spark the call for international remedies); see also Barbara Crossette, *Violation: An Old Scourge of War Becomes Its Latest Crime*, N.Y. TIMES, June 14, 1998, at 4:1 (explaining the prevalence of attacks on civilians).

24. See Crossette, supra note 23, at 4:1 (remarking that modern wars are fought in neighborhoods rather than on battlefields). As a result, a new style of warfare has emerged targeting women in organized sexual assaults as a means of terrorizing and humiliating the civilian population. See id.

25. See McCormack, supra note 23, at 638 (describing the ethnic cleansing and mass atrocities in the Balkans); *Rwanda War Crimes* (National Public Radio “All Things Considered” radio broadcast Sept. 2, 1998) (discussing the genocide in Rwanda that left 500,000 people dead).

26. See MacPherson, supra note 17, at 13-14 (explaining how the media’s portrayal of the mass human rights violations in Bosnia and Rwanda stimulated the international community’s response).

27. See Scheffer, supra note 23 (characterizing ad hoc tribunals as an emerging trend in international judicial intervention); see also *Serious War Crimes Should Be Dealt With By Permanent Criminal Court, Says Justice Richard Goldstone*, 33 UN CHRON. 35 (1996), available in 1996 WL 10924350 (discussing how the ad hoc tribunals are the first attempt to enforce international humanitarian law and how they mark a milestone in international law). The Security Council created each ad hoc tribunal as a chapter VII United Nations entity. See Scheffer, supra note 23.

tribunals were limited to the jurisdiction of their respective countries, the United Nations recognized that it would be too costly to create an ad hoc tribunal for every internal conflict where there are claims of human rights violations. In December 1995, the General Assembly established the Preparatory Committee on the Establishment of a Criminal Court. Using the International Law Commission’s draft statute as a basis for discussion, the Preparatory Committee met several times in the past few years, modifying and adjusting the draft statute, which resulted in the July 1998 Rome Treaty.

The international community argues that the ICC has several purposes. First, the ICC should stand as a deterrent. The ICC, by its very creation, is supposed to encourage individuals—from a country’s leader to the common soldier—to realize that they will be held accountable for their actions. Second, the ICC should complement
national criminal judicial systems when they fail. In a country where the internal mechanism to try perpetrators of heinous crimes has failed, the ICC would have jurisdiction to prosecute these people. Finally, the establishment of the ICC will provide a permanent record for the survivors of such atrocities.

The Rome Treaty is precedent-setting for several reasons. First, the Rome Treaty signifies the fusion of international law and criminal law. The ICC enforces criminal law, which traditionally is a domestic matter, at the supranational level. The Rome Treaty exemplifies the growing trend of implementing international remedies for human rights violations. Second, the Rome Treaty also com-

international Criminal Tribunals and an International Criminal Court, 13 AM. U. INT’L L. REV. 1413, 1431 (presentation by Gabrielle Kirk MacDonald, Judge and President of the ICTY) (“For the abused, forgiveness is possible only when they know, and in exceptional circumstances, understand the reasons for their suffering. For the abusers, forgiveness is possible only when they accept accountability.”)

36. See World Criminal Court Questions: An Interview With Ambassador David J. Scheffer (National Public Radio “All Things Considered” radio broadcast, July 15, 1998), available in 1998 WL 3645689 (explaining that the United States is opposed to specific text in the Draft Statute because in practice the court will be very different than in theory).

37. See Paul D. Marquardt, Law Without Borders: The Constitutionality of an International Criminal Court, 33 COLUM. J. TRANSNAT’L L. 73, 100 (1995) (describing the role of a permanent international tribunal not only as a last resort, but as representing legitimacy); Wexler, supra note 15, at 711 (discussing the importance of the ability of an international tribunal to take over a matter when a national criminal justice system proves inadequate).

38. See Wexler, supra note 15, at 712, 714 (suggesting that the ICC can provide a mechanism that can promptly investigate and prosecute war crimes and other atrocities). One way to prevent reoccurrence of genocide and state-sponsored mass brutality is to cultivate and share the memories of enduring horrors. See id. at 715.

39. See S. REP. NO. 103-71, at 120 (1993) (statement by M. Cherif Bassiouni, President, Human Rights Law Institute) (noting that the ICC will combine international law with domestic criminal law); see also Kitty Felde et al., The Prosecutor v. Dusko Tadic, 13 AM. U. INT’L L. REV. 1441, 1461-62 (presentation by Gabrielle Kirk MacDonald, Judge and President of the ICTY) (describing the application of several different legal systems during trials before the ICTY).

40. See Wexler, supra note 15, at 724 (explaining the trend of national offenses with international consequences and how the ICC will address this trend).

41. See Scheffer, supra note 23 (explaining the need for international remedies because of the failure to prosecute domestically). The theme of the universal accountability is echoed in the Treaty’s preamble. See Rome Treaty, supra note 7,
bines international human rights law with international humanitarian law. Since these two areas of international law have traditionally been discrete, it is quite remarkable that the Rome Treaty merges them into one instrument. The Rome Treaty itself provides for a new international organization that, once it enters into force, will wield substantial power within the international community.

II. WHY THE UNITED STATES SHOULD NOT RATIFY THE ROME TREATY

Since the Rome Treaty has a benevolent purpose, it is not surprising that it has received tremendous support from many human rights advocates. There are, however, factors other than a just purpose that a country must consider before giving support to an international

Preamble (describing that "all peoples are united by common bonds, their cultures pieced together in shared heritage, and concerned that this delicate mosaic may be shattered at any time").

42. See M.J. Peterson, On the Inadequate Reach of Humanitarian and Human Rights Law and the Need for a New Instrument, 77 AM. J. INT'L L. 589, 589 (1983) (questioning if there is a "lacuna" where "human rights law meshes with humanitarian law"). The individual should be protected by a continuum of norms from both areas of the law. See id. Although both sectors of international law have expanded immensely in the last fifty years; in the past, the international community was more willing to accept humanitarian law instruments rather than human rights instruments as positive law. See id. at 590.

43. See S. REP. No. 103-71, at 120 (statement of M. Cherif Bassiouni, President, Human Rights Law Institute) (observing the erosion of the historical distinctions between international humanitarian law and international human rights law).

44. See 1998 Hearing, supra note I (statement of Sen. Rod Grams) (criticizing the Treaty as making the ICC more powerful at the expense of the United Nations Security Council). But see Louise Arbour & Aryeh Neier, History and Future of the International Criminal Tribunals for the former Yugoslavia and Rwanda, 13 AM. U. INT'L L. REV. 1495, 1503 (presentation by Louise Arbour, Chief Prosecutor, The Ad Hoc International Criminal Tribunals for the former Yugoslavia and Rwanda) ("I do not want to short change history by short changing ourselves for the capacity to show the true magnitude of criminal organizations or the criminal drive that is behind these atrocities").

45. See generally HUMAN RIGHTS WATCH, JUSTICE IN THE BALANCE: RECOMMENDATIONS FOR AN INDEPENDENT AND EFFECTIVE CRIMINAL COURT (1998) (supporting the creation of the ICC). See United Nations Press Release, supra note 2 (statement by Austrian delegation) (praising the ICC as the opportunity to take a concrete step towards defeating human rights abuses); see also id. (statement by the South African delegation) (asserting that the ICC will send a clear message that perpetrators of heinous crimes will not get away with impunity).
treaty. Specifically, before it gives its support to the ICC, the United States must weigh the constitutional impact on American citizens, the potential for misinterpretation of the text defining the crimes within the ICC's jurisdiction, and the potential misuses of the organization.

A. CONSTITUTIONAL ISSUES

There are two major constitutional issues implicated by the Rome Treaty. First, if the United States ratifies the Rome Treaty, the ICC has the potential to subordinate federal jurisdiction. This dilemma arises because the ICC would have the power to try United States nationals for crimes committed within the United States. The Constitution, however, vests sole authority to prosecute and try citizens for offenses committed within the United States to the state and federal governments. The "judicial power" of the United States may not be exercised by a tribunal that is not a court of the United States. Furthermore, the Rome Treaty does not give countries the

46. See Scheffer, supra note 23 (listing the United States' concerns regarding a permanent international criminal tribunal).

47. See infra Part II.A (discussing the constitutional issues implicated by the Rome Treaty).

48. See infra Part II.B (analyzing the crimes and their potential implication on the United States).

49. See infra Part II.C (critiquing the Rome Treaty's potential for politicization).

50. See 1998 Hearing, supra note 1 (statement by Lee A. Casey & David B. Rivkin, Jr.) (listing the constitutional objections to the ICC).

51. See 1998 Hearing, supra note 1 (statement by Lee A. Casey & David B. Rivkin, Jr.) (emphasizing that the court’s jurisdiction covers offenses that may take place domestically, thus infringing upon the legislative and judicial authority of the United States).

52. See id. (describing how the international community could question certain uses of force by the United States government against its citizens).

53. See id.; see also U.S. CONST. art. III, sec. 1 ("The judicial power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."); U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.")

54. See 1998 Hearing, supra note 1 (statement by Lee A. Casey & David B. Rivkin, Jr.) (citing Ex parte Milligan, 71 U.S. (4 Wall.) 2, 119-21 (1866)).
opportunity to rectify potential constitutional issues, such as this one, by allowing any reservations to the treaty.55

Second, the Rome Treaty lacks a crucial link to the Bill of Rights.56 The right to a trial by jury,57 a fundamental right of American citizens, is not mentioned in the Rome Treaty.58 Moreover, the Rome Treaty does not provide protections against privacy, such as unlawful searches and seizures.59 These provisions, which are fundamental to the American legal system, are noticeably absent from the Rome Treaty.60

55. See Rome Treaty, supra note 7, art. 120 (forbidding reservations to the Treaty); see also infra notes 151-156 and accompanying text (describing the need for reservations to the Treaty).

56. See 1998 Hearings, supra note 1 (statement by Sen. John Ashcroft) (noting that the proposed court does not guarantee or reflect the Bill of Rights); see also id. (statement by Lee A. Casey & David B. Rivkin, Jr.) (concluding that the Bill of Rights is not guaranteed in the Rome Treaty). In addition, the ICC does not guard the Sixth Amendment's right to a speedy trial. See id. (statement by Lee A. Casey & David B. Rivkin, Jr.) (finding that the Rome Treaty does not guarantee the same level of protection as the Sixth Amendment).

57. See U.S. CONST. amend. VI.

58. See Rome Treaty, supra note 7, art. 67 (omitting the right to trial by jury as an enumerated right); see also 1998 Hearing, supra note 1 (statement by Lee A. Casey & David B. Rivkin, Jr.) (describing a right to trial by jury as a “fundamental check on the use and abuse of power vis-à-vis the individual”). The Sixth Amendment distinctly protects this right by requiring that “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed.” U.S. CONST. amend. VI.

59. See Rome Treaty, supra note 7, art. 69(8) (providing that when the court is deciding on the relevance or admissibility of evidence, the court should not rule on the applicability of the State’s national law). But see id. art. 69(7)(b) (prohibiting evidence obtained in violation of the Treaty or internationally recognized human rights if the evidence would “seriously damage the integrity of the hearings”).

60. See Major William K. Lietzau, A Comity of Errors: Ignoring the Constitutional Rights of Service Members, 1996 ARMY LAW. 3, 8 (1996) (reporting that the strength of the United States is grounded in individual liberty and the rule of law). But see HUMAN RIGHTS WATCH, supra note 45, at 147 (emphasizing that national laws should not be used to restrict the ICC). There are, however, protections inherent in the Treaty: Article 20 (creating a clause to prevent double jeopardy); Article 24 (establishing that one cannot be tried for crimes that occurred before the Treaty enters into force); Article 55 (listing basic rights of the accused during an investigation); Article 66 (providing for an presumption of innocence); and Article 67 (detailing the rights of the accused). See Rome Treaty, supra note 7.
In addition to the two constitutional problems discussed above, there is also a concern with the structural safeguards of the ICC. The international community created the ICC based on a system of complementarity, which imposes a burden on the ICC to determine that no “just” domestic proceeding exists. Proponents of a strong

61. See Marquardt, supra note 37, at 106 n.132 (mentioning the concerns of the international community that the ICC could become a “sham court”).

62. See Rome Treaty, supra note 7, art. 17. The Treaty sets forth the rules on whether the court may initiate a case in the following manner:

1. The court shall determine that a case is inadmissible where:

   (a) 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;

   (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;

   (c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under Article 20, paragraph 3;

   (d) The case is not of sufficient gravity to justify further action by the court.

2. In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable:

   (a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5;

   (b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;

   (c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances is, inconsistent with an intent to bring the person concerned to justice.

3. In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.

Id.; see also Patricia A. McKeon, Note, An International Criminal Court, Balancing the Principles of Sovereignty Against the Demands for International Justice, 12 St. John's J. Legal Comment. 535, 555 (1997) (stating that such a system allows for the ICC “to complement or take over prosecutions only when national courts are unwilling or unable to function effectively”).

63. See Human Rights Watch, supra note 45, at 70 (finding that this principle ensures the ICC will not interfere with domestic jurisdiction when a state is
ICC argue that this safety mechanism will allow the ICC to function only in situations where a domestic legal system cannot or will not prosecute human rights violators.\textsuperscript{64} This determination, however, rests solely on the discretion of the court.\textsuperscript{65} Without oversight of this complementarity provision by a source outside the ICC,\textsuperscript{66} the potential for mishap is great.\textsuperscript{67} Thus, the principle of complementarity, as outlined in the Rome Treaty, does very little to protect American citizens' constitutional rights.\textsuperscript{68}

Furthermore, not only does the Rome Treaty fail to address these constitutional and safeguards issues, it is also inconsistent with customary international law. The Rome Treaty's wording allows the ICC to prosecute nationals whose country did not ratify the Rome Treaty.\textsuperscript{69} As a result, United States armed forces stationed abroad willing and able to prosecute). \textit{But see} McKeon, \textit{supra} note 62, at 555-56 (discussing that nations fear that a court with too much power will criticize the procedure of national courts).

\textsuperscript{64}. \textit{See} HUMAN RIGHTS WATCH, \textit{supra} note 45, at 70 (praising the complementarity principle as safeguarding a state's sovereignty).

\textsuperscript{65}. \textit{See} Rome Treaty, \textit{supra} note 7, art. 19(1) (setting forth that "[t]he Court shall satisfy itself that it has jurisdiction in any case brought before it").

\textsuperscript{66}. \textit{See} Rome Treaty, \textit{supra} note 7, arts. 18, 19, 82 (explaining that a state's only recourse to challenge the ICC's determination of admissibility is to appeal to the Appeal Chamber within the ICC).

\textsuperscript{67}. \textit{See infra} Part III (describing the likelihood of a politicized court); \textit{see also} 1998 Hearing, \textit{supra} note 1 (statement by Lee A. Casey & David B. Rivkin, Jr.) (commenting that this provision is an "open invitation" for the ICC to examine every decision made by the United States not to prosecute offenses). For example, many people criticized the United States for only convicting one person responsible for the massacre at My Lai in Vietnam. \textit{See} RICHARD LILLICH & HURST HANNUM, INTERNATIONAL HUMAN RIGHTS, PROBLEMS OF LAW, POLICY, AND PRACTICE 861-62 (3d ed. 1995) (discussing the background and implications of the Calley case).

\textsuperscript{68}. \textit{See} Re Yamashita, 327 U.S. 1, 16 (1946) (stating that the Court respects the laws of war as long as they do not conflict with the laws of Congress or the Constitution).

\textsuperscript{69}. \textit{See} Rome Treaty, \textit{supra} note 7, art. 12. The preconditions to the exercise of jurisdiction are:

\begin{enumerate}
\item A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5.
\item In the case of article 13, paragraph (a) [referral to the Prosecutor by a State Party] or (c) [Prosecutor initiates the investigation] the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the ju-
could potentially face prosecution by the ICC for any of the crimes under its jurisdiction, despite United States opposition to the Rome Treaty. For example, if American soldiers are participating in a peacekeeping mission in a country that has ratified the Rome Treaty, the soldiers could be called before the ICC for violations alleged by that country. Therefore, in this scenario, the ICC would impact the United States and its citizens even without ratification. This goes against the principle of international law that rejects the notion that States can be bound by a treaty without consent.

The jurisdiction of the Court in accordance with paragraph 3:
(a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State or registration of that vessel or aircraft;
(b) The State of which the person accused of the crime is a national.
(3) If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9.

Id. (emphasis added). Thus, Article 12(2) does not require a state to ratify the Treaty in order for the ICC to hold its nationals accountable. See id.

70. See Scheffer, supra note 16 (comparing the ICC’s jurisdiction over nonsignatory parties abroad); see also World Criminal Court Questions: An Interview With Ambassador David J. Scheffer, supra note 36 (mentioning the American delegation’s concern that American law enforcement officials should be the first to investigate and prosecute any American in question).

71. See 1998 Hearing, supra note 1 (statement by David J. Scheffer, Ambassador-at-Large for War Crimes Issues) (criticizing the Rome Treaty text as allowing multinational peacekeeping forces to come under the jurisdiction of the ICC even if the soldiers’ country did not ratify the Treaty and arguing that this broad jurisdictional reach conflicts with fundamental principles of treaty law). For example, this theory would allow two countries to form a treaty and the jurisdiction of the treaty could extend to the entire world. See id. (explaining the Clinton Administration’s position that official actions of a nonparty state are not subject to the ICC’s jurisdiction if the state does not join the Treaty).

72. See id. (criticizing the Rome Treaty as affecting the United States’ ability to participate in multinational operations, including humanitarian interventions); see also 1998 Hearing, supra note 1 (statement of Sen. Jesse Helms) (threatening to renegotiate military agreements).

73. See 1998 Hearing, supra note 1 (statement by Lee A. Casey and David B. Rivkin, Jr.) (basing this universal principle on the Vienna Convention on Treaties); see also Restatement (Third) of Foreign Relations Law of the United States sec. 324 (1987) (“An international agreement does not create either obli-
B. CRIMES WITHIN THE COURT’S JURISDICTION

The Rome Treaty limits the crimes over which it has jurisdiction to “the most serious crimes of concern to the international community as a whole.” These crimes include genocide, crimes against humanity, war crimes, and the crime of aggression. Although these crimes are of a grave nature and great importance, the definitions used in the Rome Treaty are vague and problematic.

1. Genocide

The Rome Treaty adopted the Genocide Convention’s definition of genocide, which is still somewhat controversial and creates spe-
cific problems.\textsuperscript{83} First, the Genocide Convention omitted political
groups from the types of potentially persecuted groups,\textsuperscript{84} thus leaving
domestic leaders internationally unaccountable for the disappearance
of their political opponents.\textsuperscript{85} By adopting the Genocide Conven-
tion’s definition, the genocide of political groups could go unpun-
ished.\textsuperscript{86} This is unfortunate considering that national leaders often
perpetrate violence against political opponents in order to intimidate
and force them into submission.\textsuperscript{87}

Second, the Genocide Convention left “cultural genocide”\textsuperscript{88} out of
the definition.\textsuperscript{89} Since Article 121 of the Rome Treaty allows for

\begin{itemize}
\item Imposing measures intended to prevent births within the group;
\item Forcibly transferring children of the group to another group.
\end{itemize}

\textit{Id.}

83. \textit{See} STEVEN R. RATNER \& JASON S. ABRAMS, ACCOUNTABILITY FOR
HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG
LEGACY 31 (1997) (mentioning that the Genocide Convention does not address the
attributes that define a “group” and there is a flimsy distinction between racial and
ethnic groups).

84. \textit{See id.} at 33 (explaining the opposition to the inclusion of political groups
as based upon the fact that political groups do not have stable and permanent attrib-
utes).

85. \textit{See id.} at 41 (arguing that it is possible that Saddam Hussein’s defense to
his campaign against the Iraqi Kurds could be that the victims were his political
opponents).

86. \textit{See Rome Treaty, supra} note 7, art. 6 (defining the protected groups as na-
tional, ethnical, racial, or religious). \textit{But see} RATNER \& ABRAMS, \textit{supra} note 82, at
33 (mentioning that perhaps the arena of human rights would be a more appro-
priate place to deal with attacks on political groups).

87. \textit{See} Klaus Kinkel, \textit{Rare Chance to Make the World Safer, More Just,
BALTIMORE SUN, June 23, 1998, at 13A (stressing the need for an international
criminal justice system to prevent, among other things, the mass execution of po-
litical opponents). \textit{See, e.g.,} Melvin L.M. Mbao, \textit{Zambia; Our Shared Aspirations,
AFR. NEWS SERV., Sept. 7, 1998 (noting that African countries are notorious for
summary executions, involuntary detentions, and disappearances of political oppo-
nents); U.S. Committee for Refugees Statement on Congo/Zaire, U.S. NEWSWIRE,
Aug. 7, 1998 (discussing the Committee’s plea to the leader of Congo to stop the
mass detention of political opponents).

88. \textit{See} Richard D. Bilder \& Felice D. Gaer, \textit{Book Review: Genocide: Con-
-cultural genocide as the “suppression of culture, religion and language of the tar-
geted group, leading to its forced assimilation rather than its physical destruction”).

89. \textit{See} Matthew Lippman, \textit{The Convention on the Prevention and Punishment
amendments seven years after its entry into force,\textsuperscript{90} there is the possibility that cultural genocide may be added to the list of prosecutable offenses\textsuperscript{91}—a scenario that may affect the United States. During the discussions at the Genocide Convention, the United States expressed opposition to the inclusion of cultural genocide.\textsuperscript{92} There are forms of discrimination still prevalent in the United States,\textsuperscript{93} and some scholars argue that the United States is guilty of perpetrating cultural genocide against certain minority groups.\textsuperscript{94}

\textit{of the Crime of Genocide: Fifty Years Later}, 15 ARIZ. J. INT'L & COMP. L. 415, 458 (1998) (discussing that many countries feared that the international community would interpret “cultural genocide” as prohibiting the assimilation of minority groups). A preliminary draft of the Genocide Convention defined cultural genocide as forbidding prohibited groups from using their own language in daily interactions and in schools, and from printing and circulating publications in their own language. \textit{See id.} Although the United Nations left “cultural genocide” out of the Genocide Convention, the United States took over thirty-five years to ratify the Convention, and even then, the Senate attached a number of reservations and understandings. \textit{See Levitine, supra note 21, at 36} (explaining that the delay in the ratification of the Genocide Convention was a result of some opposition to the Convention by influential organizations and individual senators).

90. \textit{See Rome Treaty, supra note 7, art. 121.}

91. \textit{See id.}

92. \textit{See Lippman, supra note 89, at 479} (describing the United States opposition to the inclusion of cultural genocide in the convention). Many countries feared that the inclusion of cultural genocide would be interpreted as prohibiting the assimilation of minority groups. \textit{See id.} at 458. In particular, the United States feared that the international community could perceive some of their domestic and foreign policies as perpetrating a cultural genocide. \textit{See, e.g., id.} at 476-78 (discussing the possibility that the United States’ involvement in Vietnam could be the subject matter of a claim of cultural genocide). \textit{But see M. Cherif Bassiouni et al., War Crimes Tribunals: The Record and the Prospects: Conference Convocation, 13 AM. U. INT’L L. REV. 1383, 1396} (presentation by David J. Scheffer, United States Ambassador-at-Large for War Crimes Issues) (explaining that the United States supports the inclusion of genocide in the Rome Treaty).


Third, the Genocide Convention and the Rome Treaty define genocide as an "act intended to destroy a group in whole or in part."95 Scholars disagree about the size of a "part" of the group.96 This is significant because one can interpret "part" as a portion of an entire population, such as a million people, or as a small border village comprised of fifty people.97 This disparity in interpretation could lead to a non-uniform system of prosecution.98

Finally, the vagueness of the definition of genocide makes difficult the subjective determination of the "intent" requirement.99 It will therefore be hard for a prosecutor to prove that one intended to commit genocide100 because of the differing opinions on whether ac-


95. Genocide Convention, supra note 20, art. 2; Rome Treaty, supra note 7, art. 6.

96. See RATNER & ABRAMS, supra note 83, at 37 (distinguishing different interpretations of the number requirement in the definition of genocide). Some scholars argue that "part" should be interpreted as "substantial," while others argue that it should be interpreted as "proportional." See id. The consensus, however, is that the amount must be "substantial." See id.

97. See id.

98. See 1998 Hearing, supra note 1 (statement by Lee A. Casey & David B. Rivkin, Jr.) (discussing the broad definitions of crimes and the potential for interpretation problems).

99. See Rome Treaty, supra note 7, art. 6 (setting forth a requirement of genocide as the "intent to destroy"); see also Genocide Convention, supra note 20, art. II (declaring an intent to destroy necessary for the crime of genocide); Lippman, supra note 89, at 477 (noting that genocidal intent can be inferred from the facts). Some commentators argue that American conduct in Vietnam in the 1960s and 1970s amounted to genocide. See RATNER & ABRAMS, supra note 83, at 42 (intimating that the United States may have intended to destroy part of the nation of Vietnam through the bombing attacks on the countryside during the conflict); see also Lippman, supra note 89, at 476-78 (noting that Jean-Paul Sartre said that the United States' imperialist actions in Vietnam constituted genocide by the very nature of the imperialism).

100. See RATNER & ABRAMS, supra note 82, at 33 (commenting that intent has to be imputed to the individual).
tions can infer "intent." Thus, it is problematic for an entire claim to be based upon circumstantial evidence.

2. Crimes Against Humanity

The Rome Treaty lists eleven crimes as "crimes against humanity" when they are committed "as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack." These crimes include: murder; extermination; enslavement; deportation or forcible transfer of population; imprisonment; persecution of any group; forcedICO

101. See id. at 34 (citing a United Nations Genocide Study that says that where documentary evidence is lacking, one can infer intent from actions or omissions).

102. See id. at 35 (using the Tribunal for Rwanda as an example of imputing intent by actions). To infer genocidal intent, the Tribunal looked at dispersed propaganda leaflets, the number of Tutsis killed, and the common practice of separating the ethnic groups at road blocks. See id.

103. See id. at 45-46 (summarizing the history of crimes against humanity building up to the Rome Treaty). After World War I, the notion of imputing individual criminal responsibility for crimes against humanity surfaced. See id. (noting that even though there was a committee established to investigate the Turkish Massacre of the Armenians, the committee did not take any action, concluding the incident was more a matter of morality than international law). The Nuremberg Charter, following World War II, was the turning point in the history of the prosecution of crimes against humanity. See SUNGA, supra note 30, at 161. From that point forward, the interpretation of crimes against humanity became less stringent because the international community removed the previous requirement of the existence of an international armed conflict. See id. In addition, the international community expanded its definition of "crimes against humanity" through the inclusion of the phrase in multilateral human rights conventions. See id. (showing the positive effect that the Genocide Convention and Apartheid Convention had on expanding the "crimes against humanity" norm to apply in both times of war and peace).

104. Rome Treaty, supra note 7, art. 7.

105. See id. art. 7(1)(a).

106. See id. art. 7(2)(b) (including the deprivation of access to food and medicine, calculated to bring about the destruction of part of the population).

107. See id. art. 7(2)(c) (defining "enslavement" as "the exercise of any or all the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children").

108. See id. art. 7(2)(d) (explaining forcible transfer as "forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law").
onment or other severe deprivation of physical liberty in violation of fundamental rules of international law;\textsuperscript{109} torture;\textsuperscript{110} rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;\textsuperscript{111} persecution\textsuperscript{112} against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender or other grounds that are universally recognized as impermissible under international law;\textsuperscript{113} enforced disappearance of persons;\textsuperscript{114} apartheid; and other inhumane acts of similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.\textsuperscript{116}

\textsuperscript{109} See Rome Treaty, supra note 7, art. 7(1)(e).

\textsuperscript{110} See id. art. 7(2)(e) (setting forth "torture" as "the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to lawful sanctions"). The Article 3 that is common to the four 1949 Geneva Conventions prohibits parties from committing at any time or in any place acts of "violence to life and person, . . . mutilation, cruel treatment, and torture" or "outrages against human dignity, in particular humiliating and degrading treatment." See SUNGA, supra note 29, at 129-30 (discussing that the common Article 3 establishes standard of treatment and applies both in times of international and non-international armed conflict).

\textsuperscript{111} See Rome Treaty, supra note 7, art. 7(2) (limiting the definition to the confinement of a woman forcibly impregnated with the "intent of affecting the ethnic composition of any population or carrying out other grave violations of international law").

\textsuperscript{112} See id. art. 7(2)(g) (defining "persecution" as the "intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity").

\textsuperscript{113} See SUNGA, supra note 29, at 148 (discussing how the Rome Treaty specifically omits identifying persecution based on social grounds). The Rome Treaty is broader than Article 6(c) of the Nuremberg Charter, which covers only persecution based on political, racial, and religious grounds). See id.

\textsuperscript{114} See Rome Treaty, supra note 7, art. 7(2)(i) (defining "enforced disappearance" as "the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time"); see also RATNER & ABRAMS, supra note 83, at 74 (stating that the Organization of American States created this category as a new international norm).

\textsuperscript{115} See Rome Treaty, supra note 7, art. 7(j).

\textsuperscript{116} See id. art. 7(k).
Unfortunately, the Rome Treaty does not define these crimes in such a way as to avoid potential interpretation problems. For example, the definition of murder varies from country to country. For deterrence—a major goal of the ICC—to be effective, the potential violator must have a firm understanding of the law. In the United States, a statute must warn the individual of the criminality of her actions. Furthermore, under American jurisprudence, statutes that fail to give notice are unconstitutional deprivations of due process. Many of the crimes included in the Rome Treaty are not settled matters in international law, leaving those subject to the jurisdiction without full knowledge of what is an actionable offense. Thus, the provision outlining crimes against humanity is too vague to give adequate notice.

117. See Sunga, supra note 29, at 149 (emphasizing that many words have ambiguous meanings). For example, the word "persecution" is elastic. See id. A broad reading of the term could make the unequal distribution of public financial assistance persecution based on social or cultural grounds. See id. at 148. A narrow reading may only cover serious acts such as murder, torture, or apartheid. See id. at 149. There is no uniform definition of persecution in international criminal law. See id. In addition, there is the possibility of crimes overlapping. See Theodor Meron, International Criminalization of Internal Atrocities, 89 Am. J. Int'l L. 554, 588 (1995) (describing that genocide fits into the crimes against humanity category).

118. See Sunga, supra note 29, at 127 (discussing the absence of international norms for individual responsibility for mass murder). Israel, for example, equates starvation with deliberate killing. See id. at 68.

119. See Christopher Keith Hall, Current Development: The Third and Fourth Sessions of the UN Preparatory Committee on the Establishment of an International Criminal Court, 92 Am. J. Int'l L. 124, 126-27 (1998) (outlining the difficulties in defining crimes against humanity). The definition of crimes against humanity has evolved considerably since the Nuremberg Charter. See id. In the process of defining crimes against humanity, different views emerged regarding the scale and gravity of the crimes. See id. Most of the states agreed, nevertheless, that the definition would be too restrictive if the crimes were required to be both widespread and systematic. See id. Therefore, there is tremendous leeway in the interpretation of the Rome Treaty.


121. See Dempsey, supra note 19 (discussing the unconstitutionality of the provisions within the ICC).

122. See id. (explaining the lack of generally-accepted treaties on some of the crimes against humanity).

123. See id. (explaining why the Rome Treaty is unconstitutional).
3. War Crimes

Article 8 of the Rome Treaty gives the ICC jurisdiction over war crimes when "committed as a part of a plan or policy or as part of a large-scale commission of such crimes." A substantial difference between war crimes, crimes against humanity, and genocide, is that war crimes can be committed on a smaller scale. Even if there is no pattern of such crimes, the ICC could classify as a war crime the murder of a civilian or a single rape committed in connection with an internal or international armed conflict or military occupation of a country. With approximately 200,000 United States military personnel permanently stationed in forty countries around the world, there are potentially significant consequences to the United States because of this expansive definition of war crimes. This large

124. See Ratner & Abrams, supra note 83, at 79 (discussing the evolution of war crimes). The concept of war crimes appeared as early as 1899 and 1907 in the Law of the Hague, which established guidelines for weaponry in war. See id. Following suit, the Law of Geneva established guidelines for the treatment of noncombatants during war. See id. The face of war has now become more internal than international, and, as a result, its new nature poses many problems for the establishment of international norms guiding wartime procedures. See id.; see also supra notes 18-20 and accompanying text (discussing the evolution of modern warfare).

125. Rome Treaty, supra note 7, art. 8. Specifically, war crimes include: (1) grave breaches of the Geneva Conventions of 1949; (2) other serious violations of the laws and customs of international law applicable in international conflict; (3) in the case of an internal armed conflict, serious violations of Article 3 common to the four 1949 Geneva Conventions committed against noncombatants; and (4) other serious violations of the laws and customs applicable in internal armed conflicts. See id.


127. See id. (discussing that Canada prosecuted soldiers for war crimes in Somalia, even though their crimes were not pursuant to a government policy). But see 1998 Hearings, supra note 1 (statement of Michael P. Scharf, Director, the Center for International Law and Policy, New England School of Law) (arguing that, for example, the ICC would not have jurisdiction over an incident such as the accidental downing of an Iranian Airbus by the U.S.S. Vincennes because the incident did not represent a "policy" - it was a random act).

128. See Craig Turner, Battle for World Court Heats Up; More than 100 Nations Try to Hammer Out Pact on a Permanent War Crimes Tribunal, U.S. is Assailed for Seeking Restrictions, L.A. TIMES, Apr. 4, 1998, at A9 (noting that since the United States has such a large military presence overseas, it has the largest
commitment means that there is a greater likelihood that the ICC could bring United States soldiers before it for allegations of war crimes. For example, if the international community created the Rome Treaty before the Vietnam War, it is possible that the ICC could have indicted United States citizens for war crimes.

Since the Vietnam War, there have been other claims that the United States violated humanitarian law. One claim asserts that during the Vietnam War, United States forces destroyed entire provinces when they believed that the inhabitants supported the National Liberation Front. See Hersh, supra note 130, at 411-12 (relating an investigation of the “war crimes” committed during the Vietnam Conflict, which included individual and group acts of murder, rape, sodomy, maiming, and assault on noncombatants). By late 1967, seventy percent of the villages in Quang Ngai province had been destroyed by the American offensive. See id. at 411; see also Young, supra note 130, at 259-60 (arguing that if the laws of war were applied to American conduct in Vietnam, the leaders of the United States may be guilty of war crimes). Of the six servicemen prosecuted for the My Lai incident, five were acquitted by a military court. See Lillich & Hannum, supra note 67, at 861. Lieutenant Calley, the only person who was not acquitted, was found guilty of murder in April 1971. See United States v. Calley, 46 C.M.R. 1131 (1973).
ing the Persian Gulf War, the coalition forces targeted Iraq’s economic infrastructure—communication, transportation systems, and water-pumping plants—and thereby targeted the civilian population. A more recent example is the allegations put forth by Sudan that the United States’ use of force in the missile strike against a factory was disproportionate to its goal. If Sudan had ratified the Rome Treaty and the ICC did not believe the United States properly investigated its own actions, the ICC potentially could indict United States officials.

4. Aggression

The Rome Conference delegates did not decide on a definition of aggression at the time that they drafted the Rome Treaty. This presents several problems. First, the crime of aggression is difficult to define. Similar to the vagueness in the definition of crimes against humanity, the crime of aggression should have a clear definition in order to have a deterrent effect. Second, if the international com-

131. See Michael Walzer, Justice and Injustice in the Gulf War, in BUT WAS IT JUST? REFLECTIONS ON MORALITY IN THE PERSIAN GULF WAR 13 (David E. Dekosse ed., 1992) (questioning the attack on the civilian society); see also LILICH & HANNUM, supra note 67, at 879 (discussing how the Iraqis accused the United States of targeting civilian installations, including a “munitions” factory that purportedly produced milk powder and a shelter serving as a civilian morgue). See also William Schultz, Remarks at News Conference held by Amnesty International (June 17, 1998), available in 1998 WL 318000 (discussing the United States’ “untold human rights violations” such as the growing use of special operations forces overseas and training offered to Indonesian and Colombian military units).


133. See id. (mentioning that in a potential ICC investigation, a further problem would be that the United States would have to produce its military intelligence reports to prove that the attack was warranted).

134. See Podgers, supra note 16 (stating that the most substantive task ahead is to develop a narrow definition of aggression).


136. See Dempsey, supra note 20 (describing the “void for vagueness” doctrine). The Supreme Court ruled that criminal statutes need to give due notice in
munity decides to use the 1991 ILC Draft Code on Crimes Against the Peace and Security of Mankind ("Draft Code Provisions on Aggression") as a model for the definition of aggression, the national security objectives of individual states will be affected drastically. Article 15 of the Draft Code Provision on Aggression defines aggression as "the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations." It further provides accountability for "an individual who as a leader or organizer plans, commits or orders the commission of an act." Therefore, since aggression is a national policy involving the top policy makers, the inclusion of this crime in the ICC will pose a direct threat to the country's leaders. This is in comparison to other crimes, such as crimes against humanity, that can be committed by those in all levels of the chain of command.

Furthermore, in Article 16 of the Draft Code Provision on Aggression, "threats of aggression" are also loosely defined. Under Article 16, a prosecutor must prove the threat of aggression by showing the following elements: (1) the perpetrator had the requisite intent to make the threat; (2) the act in question was such that it constituted a threat to the government and the government was reasonable in per-

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138. See 1998 Hearing, supra note 1 (statement of David J. Scheffer, Ambassador-at-Large for War Crimes Issues) (arguing that aggression is not part of customary international law for the purposes of criminal responsibility).

139. SUNGA, supra note 29, at 346.

140. Id.

141. See SUNGA, supra note 29, at 31-32 (discussing how aggression, intervention, and colonial domination are crimes involving government leaders, whereas war crimes can involve anyone—from a commander to an individual soldier).

142. See id.

143. See 1991 ILC Draft Code On Crimes Against the Peace and Security of Mankind, art. 16, in SUNGA, supra note 29, at 348 (providing that the threat of aggression consists of declarations, communications, demonstrations of force, or any other measures "which would give good reason to the Government of a State to believe that aggression is being seriously contemplated against that State"); see also SUNGA, supra note 29, at 61-62 (discussing the difficulty in enforcing the draft code).
ceiving it as a threat; and (3) the state against which the threat was
directed actually felt threatened by the act.\textsuperscript{144} It will be difficult to
meet this burden of proof.\textsuperscript{145} Thus, under this interpretation, aggres-
sion would be a tough legal concept to apply in practice.\textsuperscript{146}

There is also a gray area in the interpretation of this test. The in-
ternational community could now perceive actions as aggression that
they did not deem so in the past.\textsuperscript{147} For example, states recognize a
right to test armaments, to the extent that an international treaty does
not prohibit the testing or that the testing does not directly affect an-
other state.\textsuperscript{148} If the international community adopts the Draft Code
Provisions on Aggression’s definition, however, one state may use
this provision to lodge a claim against another state, alleging that an
aggressive war is being contemplated against them.\textsuperscript{149} Not only
would this lower the credibility of the ICC in the international arena,
but it also would lead to a scenario where the international commu-
nity would not take the crime of aggression seriously.\textsuperscript{150}

\textsuperscript{144} See SUNGA, supra note 29, at 60 (discussing the need for certainty in de-
fining crimes); see 1998 Hearing, supra note 1 (statement of Sen. Jesse Helms)
(noting that the Rome Conference delegates could not reach an agreement on the
definition). Before the Senate subcommittee, Sen. Helms declared:

\begin{quote}
I think I can anticipate what will constitute a crime of "aggression" in the eyes of this
Court: it will be a crime of aggression when the United States of America takes any
military action to defend its national interests, unless the U.S. first seeks and receives
the permission of the United Nations.
\end{quote}

\textit{id.} (imagining a parade of horrible scenarios, specifically if the court were judging
the United States’ invasions of Panama and Grenada).

\textsuperscript{145} See SUNGA, supra note 29, at 62-63 (explaining that an inconsistent ruling
could trivialize the ICC).

\textsuperscript{146} See id. at 62 (describing the elasticity in the definition of aggression, which
poses problems with enforcement).

\textsuperscript{147} See United States Department of Defense, \textit{News Briefing}, M2 Presswire,
Apr. 16, 1998 (disclosing the Defense Department’s fear that the ICC would be
established in a way that would give it broad authority to pursue a vague definition
of aggression, and thus creating for confusion between aggression and legitimate
defensive action to protect security interests).

\textsuperscript{148} See SUNGA, supra note 29, at 60 (describing how a State may claim that
their sovereignty was in jeopardy as a result of another State’s ostentatious display
of military armaments).

\textsuperscript{149} See id.

\textsuperscript{150} See id. at 62-63 (warning about the possibility of incongruous rulings from
the Security Council and a permanent court could trivialize the court and criminal
Intervention\textsuperscript{151} is another policy that may fall under the rubric of aggression.\textsuperscript{152} When a foreign country invites another government to aid in its defense, a problem in interpretation may arise.\textsuperscript{153} The ICC may charge leaders of the invited nation with aggression, reasoning that the invited nation is infringing upon another nation’s sovereignty.\textsuperscript{154} In the twentieth century, the United States has been involved in Cuba, Grenada, Nicaragua, and other strictly internal conflicts.\textsuperscript{155} If the international community adopts the Draft Code Provisions on Aggression’s definition, with intervention contained therein, the foreign policy of the United States would fall into a pre-culpability of individuals before the court).

\textsuperscript{151} See 1991 ILC Draft Code of Crimes Against the Peace and Security of Mankind, art. 16, in SUNGA, supra note 29, at 348. It provides that:

An individual who as leader or organizer commits or orders the commission of an act of intervention in internal or external affairs of a State shall, on conviction thereof, be sentenced [to . . .].

Intervention in the internal or external affairs of a State consists of fomenting [armed] subversive or terrorist activities or by organizing, assisting or financing such activities, or supplying arms for the purpose of such activities, thereby [seriously] undermining the free exercise by that State of its sovereign rights.

Nothing in this article shall in any way prejudice the right of peoples to self-determination as enshrined in the Charter of the United Nations.

\textit{Id.}

\textsuperscript{152} See UN CHARTER art. 2(7) (establishing that nothing in the charter authorizes the United Nations to intervene in a nation’s domestic matters). See SUNGA, supra note 29, at 67-68 (mentioning how the United Nations rejected arguments to limit United Nations’ actions based on art. 2(7)).

\textsuperscript{153} See SUNGA, supra note 29, at 73 (describing the complications involved with the concept of intervention). See Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 4 (June 27) (holding that where collective self-defense is invoked, it is to be expected that the state for whose benefit this right is used should have declared itself to be the victim of an armed attack).

\textsuperscript{154} See SUNGA, supra note 29, at 74 (discussing whether an invitation is valid depends on the recognition of the legitimacy of the government by the international community).

The United States government would then have to determine how its actions would be perceived in the international community before it could aid any of its allies.

5. Expanded Jurisdiction

The Rome Treaty and the creation of the ICC mark the stepping off point for international criminal prosecution. More crimes can be placed under the umbrella of the ICC’s jurisdiction since Article 121 of the Rome Treaty allows for amendments to the categories of crime under the jurisdiction of the court. In the final days of the Rome Conference, the delegates added a Final Act, expressing the community’s desire to include international drug trafficking and international terrorism to the crimes under the jurisdiction of the court at a later date. The difficulty with the addition of these and other crimes is that they would infringe upon a nation’s sovereignty

156. See SUNGA, supra note 29, at 103 (discussing how the international community also is contemplating including colonial domination under the crime of aggression). This also presents a dangerous position for United States’ foreign policy. See Edgardo Rodriguez Julia, A Look at Puerto Rico: Escaping a Colonial State of Mind, WASH. POST, July 26, 1998, at C3 (discussing how many critics argue that the United States relationship with Puerto Rico amounts to nothing less than colonial domination); see also 1991 ILC Draft Code of Crimes Against the Peace and Security of Mankind, art. 18, in SUNGA, supra note 29, at 348 (identifying a leader as the guilty party if he establishes or maintains by force colonial domination or any other alien domination contrary to the United Nations Charter).

157. See Dempsey, supra note 19 (stating that the Rome Treaty is just the beginning of a greater supranational jurisdiction); see also Kofi Annan, New International Court Fulfills a U.N. Dream that Began in 1948, BOSTON GLOBE, July 31, 1998, at A19 (remarking that many proponents of the ICC would like the court to have even farther reaching powers).

158. See Rome Treaty, supra note 7, art. 121 (“After the expiry of seven years from the entry into force of this Statute, any State Party may propose amendments thereto.”).


160. See MacPherson, supra note 17, at 23 (describing the push by smaller states for the inclusion of drug trafficking out of the fear of corruption inhibiting domestic procedure).

161. See id. at 44 (arguing that the court will not have the technology and resources required to investigate acts of terrorism).
and ability to try crimes that affect domestic policy in their home setting.\textsuperscript{162} The potential for jurisdictional expansion of the Rome Treaty is virtually limitless.\textsuperscript{163} Expanding the ICC's jurisdiction even further diminishes the possibility of the ICC being effective in any area because states could shift their responsibilities to adjudicate crimes to the ICC.\textsuperscript{164}

C. POLITICIZATION OF THE COURT

The United States has a valid fear that the ICC will not be free from politicization.\textsuperscript{165} From the outset, the ICC has been already politically motivated.\textsuperscript{166} There are several ways in which political cont-

\textsuperscript{162} See 1998 Hearing, supra note 1 (statement of David J. Scheffer, Ambassador-at-Large for War Crimes Issues) (stating that the United States opposes the addition of terrorism and drug crimes to the jurisdiction of the court "on the grounds that this could undermine more effective national efforts"); see also Wexler, supra note 15, at 724 (discussing the addition of these crimes as complicating the Rome Treaty and undermining the prosecution of international humanitarian law and crimes against humanity).

\textsuperscript{163} See Dempsey, supra note 19 (describing the potential for the ICC to become a "jurisdictional leviathan").

\textsuperscript{164} See MacPherson, supra note 17, at 44 (commenting that if the court were not limited to serious offenses, states would shirk their responsibilities by dumping insignificant matters on the court).

\textsuperscript{165} See S. REP. NO. 103-71, at 23-24 (1993) (statement by Edwin D. Williamson) (commenting that in other forums, the United States has been unsuccessful in creating non-politicized agencies). The fact that Cuba, Iran, and Libya all sit on the United Nations Human Rights Commission demonstrates this concept. See id.; see also Fred Hiatt, The Trouble With the War Crimes Court, WASH. POST, July 26, 1998, at C7 (criticizing the United States for not being forthright enough in opposition to the ICC); S. REP. NO. 103-71, at 27 (1993) (Letter by United States Department of State) (stating the concern that the ICC will develop into a politicized body). Since the judgment of an international criminal court could preclude a state from subsequently prosecuting or extraditing a suspected criminal for the same or a closely related offense, the ICC could inhibit a country from bringing new charges based on the same facts. See id.

\textsuperscript{166} See Nathan, supra note 15 (discussing Israel’s position that the Rome Treaty is politicized). Many people assert that the inclusion of "population transfers" as a war crime directly targets the state of Israel. See Editorial: The World Court: Symbolism vs. Reality, WASH. TIMES, Aug. 9, 1998, at B2 (observing that this idea came courtesy of Egypt, who reaped much admiration among the Arab states); see also Hiatt, supra note 165, at C7 (questioning the potential for an unbiased and impartial court based on the seemingly pointed attack on Israel). Since critics have accused Israel of encouraging Israeli Jews to settle in the occupied ter-
Considerations can hamper the elements of justice that the ICC seeks to create.

First, according to Article 13 of the Rome Treaty, the ICC can exercise jurisdiction in three instances: if a state party refers a claim to the prosecutor; if the Security Council refers a claim to the prosecutor; or if the prosecutor herself initiates the investigation. The prosecutor has the power to determine whom to indict and when. It is conceivable that political considerations could be a motivating factor.

167. See Rome Treaty, supra note 7, art. 13(a)-(c); see also id. arts. 14, 15, 16 (describing the procedure to exercise jurisdiction).

168. See id. art. 15 (describing the role of the prosecutor). The Treaty sets forth the prosecutor's powers and duties as follows:

1. The Prosecutor may initiate investigations proprio motu on the basis of information on crimes within the jurisdiction of the Court.

2. The Prosecutor shall analyze the seriousness of the information received. For this purpose, he or she may seek additional information from States, organs of the United Nations, intergovernmental or non-governmental organizations, or other reliable sources that he or she deems appropriate, and may receive written or oral testimony at the seat of the Court.

3. If the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or she shall submit to the Pre-Trial Chamber a request for authorization of an investigation, together with any supporting material collected. Victims may make representations to the Pre-Trial Chamber, in accordance with the Rules of Procedure and Evidence.

4. If the Pre-Trial Chamber, upon examination of the request and the supporting material, considers that there is a reasonable basis to proceed with an investigation, and the case appears to fall within the jurisdiction of the Court, it shall authorize the commencement of the investigation, without prejudice to subsequent determinations by the Court with regard to the jurisdiction and admissibility of a case.

5. The refusal of the Pre-Trial Chamber to authorize the investigation shall not preclude the presentation of a subsequent request by the Prosecutor based on new facts or evidence regarding the same situation.

6. If, after the preliminary examination referred to in paragraphs 1 and 2, the Prosecutor concludes that the information provided does not constitute a reasonable basis for an investigation, he or she shall inform those who provided the information. This shall not preclude the Prosecutor from considering further information submitted to him or her regarding the same situation in light of new facts or evidence.

Id.
factor in the decision. Exacerbating matters further is the fact that there is no body of law to which the ICC will be responsible to, nor any judicial organization to hear the appeals of ICC decisions.

Second, despite United States objections, the Rome Treaty only requires the ratification by a state where the crime was committed, the state of the nationality of the perpetrator, or for the state to have granted consent, in order for the ICC to have jurisdiction of the accused. This definition is problematic not only because it potentially gives the court jurisdiction over citizens of nonsignatory states, but also because its exercise of jurisdiction may not be consistent. Since internal conflicts are so prevalent, and if the country embroiled in an internal conflict did not ratify the Rome Treaty, the persecutors will be beyond the reach of the court.

The third potentially worrisome area is the determination of who fits within the definition of “criminal.” One would hope that the court will not be swayed by political interests and only prosecute those persons actually responsible for the crimes under its jurisdic-

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169. See SUNGA, supra note 29, at 61 (discussing how high profile cases involving criminal responsibility of a top leader may intensify pressure on the prosecutor to select that individual for indictment); see also Gerry J. Simpson, War Crimes: A Critical Introduction, in THE LAW OF WAR CRIMES, NATIONAL AND INTERNATIONAL APPROACHES 8 (Timothy L.H. McCormack & Gerry J. Simpson eds., 1997) (indicating there is a partiality of decision making). For example, there is a tribunal for the former Yugoslavia and Rwanda but not for Guatemala or Somalia. See id.

170. See Dempsey, supra note 19 (agreeing with the Defense Department’s concern that the ICC lacks the appropriate checks and balances).


172. See Rome Treaty, supra note 7, art. 12.

173. See 1998 Hearing, supra note 1 (statement of David J. Scheffer, Ambassador-at-Large for War Crimes Issues) (clarifying the point that the jurisdictional reach of the court exposes multinational peacekeepers, but not those responsible for internal conflicts).

174. See Scheffer, supra note 16 (criticizing the Rome Treaty’s potential inequities in justice).

175. See 1998 Hearing, supra note 1 (statement by Lee A. Casey & David B. Rivkin, Jr.) (arguing that the person most likely to be indicted would be the President, due to his capacity of commander-in-chief).
The International Criminal Tribunal for the former Yugoslavia ("ICTY"), an ad hoc tribunal, demonstrates the possibility of politically-motivated indictments or the lack thereof. The ICTY has yet to hold Slobodan Milosevic, the Serbian leader responsible for much of the violence in the former Yugoslavia, accountable for his war crimes and crimes against humanity.

On the other hand, political motivations may tempt the ICC to indict high level officials since those leaders are often responsible for planning or ignoring the perpetration of crimes. Article 27 of the Rome Treaty provides a basis for such charges, stating that the statute shall apply to all persons regardless of one's official capacity. This will pose a direct threat to the leaders of many nations. Thus, these leaders could be motivated by fear of prosecution by the ICC, and as a result, may not always act in the best interest of their coun-

176. See Robinson, supra note 8, at 10 (concluding that by obtaining the best jurists to sit on the court, the ICC will uphold the highest standards of international law).

177. See James R. Hooper, U.N. Prosecutor Must Go To Kosovo, TORONTO STAR, Sept. 16, 1998, at 1 (discussing that it is troubling that the United Nations War Crimes Tribunal Chief Prosecutor is keeping a low profile regarding Kosovo while she has the power to prevent ethnic cleansing).

178. See id. (suggesting that the prosecutor should state publicly that Milosevic will be held accountable for his crimes).

179. See Dempsey, supra note 19 (discussing concerns raised with bringing top political and military leaders to trial). If the court tries political and military leaders, it will undermine efforts to resolve international conflicts. See id. For example, if the ICC indicts a wartime leader, he may become angry with the ICC and decide to cancel negotiations for peace. See id.

180. See Rome Treaty, supra note 7, art. 27(1) (stating that "official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence").

181. See S. REP. NO. 103-71, at 24 (1993) (statement of Edwin D. Williamson) (testifying that he remembered hearing about "reports of a proposal to establish a tribunal in Tunis in late 1990 to try President Bush for war crimes in the Gulf"); see also, Hiatt, supra note 165, at C7 ( remarking that if the ICC would render a decision on transgressions during the system of apartheid in South Africa, former President DeKlerk himself could be held responsible).
try. Moreover, a country’s best interest may not be the same as the ICC’s perception of how a country should act.

Fourth, the United States is skeptical of the ICC’s intended impartiality. At the Rome Conference, the United States sought to include protections against potentially biased actions, allowing the United Nations Security Council the power to initiate investigations. In addition to advocating for a strong role for the Security Council, the United States delegation argued for a ten-year transitional period where a party could “opt out” of the jurisdiction of the court for crimes against humanity and war crimes. Delegates at the Rome Conference, however, rejected both the “opt out” provision for crimes against humanity and a prosecutorial role for the Security Council.

Finally, the cost of an international criminal court could be enormous. The ICC’s funds will derive partially from voluntary contributions by governments, international organizations, individuals, and corporations. Voluntary contributions, however, could lead to a

182. See Hiatt, supra note 165, at C7 (observing the broad power of prosecutors to initiate investigations whenever they choose).

183. See 1998 Hearing, supra note 1 (statement of Michael P. Scharf, Director, Center for International Law and Policy, New England School of Law) (noting that the United States is in a particularly “vulnerable” position because of its many peacekeeping and humanitarian missions).


185. See id. (statement of David J. Scheffer, Ambassador-at-Large for War Crimes Issues) (discussing the need for evaluation of the performance of the court within the international community). The delegation believed that this review would give the United States an appropriate amount of time to determine whether the court would function as an unbiased court administering international justice or if it would be used as a politicized tool. See id.

186. See id. (criticizing the opt-out provision for war crimes but not for crimes against humanity).

187. See Adrian Karatnycky, Don’t Worry War Criminals—New Court Won’t Work, WALL ST. J., July 27, 1998, at A15 (suggesting that since the Rome Conference itself was expensive, the cost of the ICC will be immense).

188. See Rome Treaty, supra note 7, art. 116 (determining voluntary contributions).
more politicized court. If there is a country or bloc of countries that donates a significant amount of money, those countries may be likely to influence the prosecutor to exercise his or her discretion in their favor. For example, if the European Union donated a large percentage of the ICC’s budget, it is plausible that the prosecutor, fearing that the European Union would not contribute as much the following year, would be more sensitive to its claims.

All of these factors illustrate the possibility of a court that overlooks its primary goal of justice and becomes driven by political motivations. Since it is possible for these fears to turn into reality, the United States has no way to protect itself from becoming the victim of the international community’s political motivations.

IV. RECOMMENDATIONS

Criminal law has traditionally existed in the realm of national governments. The ICC seeks to expand criminal law to a supranational level. The problem with this expansion, however, is that individual states must acquiesce, and forfeit part of their sovereignty in order to

189. See MacPherson, supra note 17, at 48 (discussing that it would be reasonable to have the complainant pay because then it would remove the economic incentive to dump cases on the court).

190. See Dempsey, supra note 19 (describing the mismanagement of the Rwanda Tribunal). Since large tribunals have fallen prey to mismanagement of funds in the past, the same may happen to the ICC. See id. (listing the financial abuses of the Rwanda Tribunal).

191. See id. (noting some potential problems with voluntary contributions). If the ICC is funded by mandatory contributions, twenty-five percent of the court’s cost may be passed on the United States. See id.

192. See 1998 Hearing, supra note 1 (statement of Sen. John Ashcroft) (“if there is one component of sovereignty, it is the authority to define crimes and punishment”); see also David Stoelting, International Courts Flourish in 1990s, N.Y. L.J., Aug. 4, 1997, at S2 (discussing how the right to apply punitive sanctions is "inextricably linked with sovereignty").

193. See Sandra L. Jamison, A Permanent International Criminal Court: A Proposal that Overcomes Past Objections, 23 DENV. J. INT’L L. & POL’Y 419, 447 (advocating the expansion of international criminal law through the research, discussion and writings of judges on an international criminal tribunal); see also Wexler, supra note 15, at 717-18 (elaborating on the growth of international criminal law leading up to the formation of ICC).
adjudicate matters of criminal law in this manner. Often, the interests of domestic governments may not coincide with the interests of the international community. Proponents of the ICC argue that the ICC is supposed to complement national criminal justice systems instead of replacing them. Yet, Article 17 of the Rome Treaty gives the ICC the ability to step in and carry out an investigation "if a state is unwilling or unable to." Many advocates of supranational organizations believe that the ICC is "an essential building block in the slowly-growing edifice of international law." In its current form, however, this court is too powerful and would have too much control over the inner workings of the domestic and foreign policies of sovereign states.

The international community needs to alter the Rome Treaty significantly. First, the definitions of the crimes over which the court has jurisdiction need to be concrete with very little room for inter-

194. See Levitine, supra note 21, at 28 (noting that the United States, in the past, recognized the need to keep heads of state free from individual prosecution for the good of the state).

195. See Sunga, supra note 29, at 300 (explaining that the interests of the international community may not be the same as those of a particular country). For example, the Rwandan judiciary wanted to try all persons responsible for the genocide, while the Tribunal focused on only those who planned and executed the genocide. See id. at 301.

196. See Dempsey, supra note 19 (arguing that the ICC will be an "avoidable participant of the national legal process"); see also Pentagon Briefing, available in 1998 WL 171033 (Apr. 14, 1998) (asserting the importance of a clear differentiation between a sovereign nation’s legal system and the international court).

197. Rome Treaty, supra note 7, art. 17; see also 1998 Hearing, supra note 1 (statement by Lee A. Casey & David B. Rivkin, Jr.) (describing this as an "open invitation" to attack American decisions).

198. A Criminal Court for the World, ECONOMIST, Dec. 6, 1997, at 20 (predicting that the court will fail "if too much is expected from it").

199. See 1998 Hearing, supra note 1 (statement of Sen. John Ashcroft) (stating "we must never trade away American sovereignty and the Bill of Rights so that international bureaucrats can sit [in] judgment of the United States military and our criminal justice system"); see also id. (statement of Sen. Jesse Helms) (finding that the ICC "represents a massive dilution of the UN Security Council’s powers—and of the United States’ veto power within the Security Council").

200. See id. (statement of Sen. Jesse Helms) (concluding that the "Rome Treaty is irreparably flawed").
pretation. Since the delegations are going to meet to establish the specific elements of the crimes, they can tailor the definitions to avoid the possibilities of frivolous claims. Although there is the possibility that by narrowing the definitions some crimes will be left out, the presence of broad definitions would also not be beneficial. Broad definitions allow for too much discretion on the part of the court. Furthermore, by spreading out its resources by prosecuting a large range of crimes, the court may not be able to effectively promote justice any area.

Second, the Rome Treaty should allow states to attach reservations to the Rome Treaty. Perhaps if countries could attach reservations, the United States would not have voiced its opposition to the Rome Treaty. For example, the United States ratified Genocide Convention after attaching a reservation that stated that the Convention is not self-executing and cannot require legislation or other action that

201. See MacPherson, supra note 17, at 50 (discussing the need for clear, unambiguous definitions).

202. See Rome Treaty, supra note 7, art. 9(1) (allowing for the elements of the crimes to be adopted by a two-thirds majority of the members of the Assembly of States Parties).

203. See McKeon, supra note 62, at 551 (mentioning the need for the final statute to not leave any doubt as to what constitutes a crime).

204. See Dempsey, supra note 19 (criticizing the inclusion of aggression as tying the hands of the United States policy makers and noting that “aggression” could be interpreted to criminalize preemptive military strikes and naval blockades); see also MacPherson, supra note 17, at 51 (stating “fairness demands that due notice be given of what is required before punishment can be meted out”).

205. See Dempsey, supra note 19 (explaining that expanding the court’s jurisdiction would not be beneficial); see also Jamison, supra note 193, at 435 (arguing that it would be better to have only a few crimes defined, and make sure that all member states are bound by them).

206. See 1998 Hearing, supra note 1 (statement of David J. Scheffer, Ambassador-at-Large for War Crimes Issues) (stressing the need for reservations to rectify conflicts with domestic constitutional requirements).

207. See Lillich & Hannum, supra note 67, at 239 (stating that the United States has a poor ratification record of human rights treaties); see also Thomas W. Lippman, Worldwide War Crimes High Court is Approved Delegates Overrule US Objections, WASH. POST, July 18, 1998, at A1 (mentioning that this is second time in two years the United States rejected major international humanitarian agreement). The Clinton Administration also rejected the treaty that banned the use of antipersonnel land mines, arguing that United States troops still need such mines in some places for protection. See id.
the Constitution prohibits. Unfortunately, Article 120 of the Rome Treaty prevents the United States from protecting its constitutional interests with a reservation. Even though the attachment of reservations may weaken the ICC in some respects, forbidding them limits the number of signatories. Since the Clinton Administration has pledged its support for the principles behind the ICC, the allowance of such reservations would facilitate permanent support from and ratification by the United States.

Third, the ICC should be responsible to a higher authority. For instance, the five permanent Security Council members could retain veto rights over the prosecutor's indictments. A Security Council veto right would allow for supervision over the ICC. The United States could ensure that frivolous and politically-motivated claims, which would serve to inhibit the United States from maintaining its peacekeeping role in the world, would not be filed. This would


209. See Rome Treaty, supra note 7, art. 120 (forbidding reservations to the Treaty).

210. See 1998 Hearing, supra note 1 (statement of David J. Scheffer, Ambassador-at-Large for War Crimes Issues) (citing the provision forbidding reservations as one reason why the United States did not sign the Treaty).

211. See Kenneth Roth, Sidelined on Human Rights: America Bows Out, 77 FOREIGN AFF., Mar./Apr. 1998, at 2, 3 (discussing that President Clinton endorsed the ICC in principle). The United States played an integral role in drafting trial procedures and defining the rights of the defendants. See id.

212. See 1998 Hearing, supra note 1 (statement of David J. Scheffer, Ambassador-at-Large for War Crimes Issues) (noting that the United States is obliged to object to some provisions due to constitutional and judicial concerns).

213. See McKeon, supra note 62, at 559 (emphasizing the need to prevent the arbitrary use of the court).

214. See id. (arguing that subordinating the court to the Security Council would be a good idea because the court can ensure the obligation of the ICC to maintain international peace and security).

215. See id. (reasoning that the Security Council would provide political backing to the court's decisions).

216. See Christopher Lockwood, International: US Fails to Halt War Crimes Court, DAILY TELEGRAPH (London), July 18, 1998 (discussing how the United States faces a real danger of other countries using the ICC for propaganda purposes); see also Mitchell, supra note 19, at A1 (reporting that even with the veto
protect the United States against the possibility of rogue states banding together against it in this international forum.\textsuperscript{217} Although critics of this veto power argue that it could hamper the ICC,\textsuperscript{218} the Security Council effectively established the ad hoc tribunals without this problem.\textsuperscript{219} The prosecutor would still be strong and the court could effect justice even if the Security Council retained veto power.\textsuperscript{220} In this scenario, all parties could benefit from the ICC. There would be a greater chance that the United States would participate in the ICC’s establishment, adding financial stability and international credibility in return.\textsuperscript{221}

These three suggestions would serve to ensure more protection for the interests of the United States. Since the treaty has not entered into force yet, it is possible that the international community can still amend the articles. In that case, the world would benefit by a court that would be free from politicization.\textsuperscript{222}

CONCLUSION

The United States has maintained the firm position that the ICC, as created by the Rome Treaty, would not be in the nation’s interest.\textsuperscript{223}

\textsuperscript{217} See Scheffer, supra note 23 (emphasizing that the Security Council is the United Nations’ primary body to deal with peace and security). In cases where the ICC will undermine the Security Council’s authority, there should be some protection to prevent this result. See id.

\textsuperscript{218} See Roth, supra note 211, at 4 (explaining that the veto power would leave little room for the prosecutor to make contemporaneous and independent decisions). The veto power also has the potential of making the indictment process political. See id. But see supra notes 162-186 and accompanying text (explaining that the veto power may actually prevent the prosecutor from acting out of political considerations).

\textsuperscript{219} See Scheffer, supra note 23 (discussing the shift in judicial intervention). The United States was at the forefront of creating the ad hoc tribunals. See id.

\textsuperscript{220} See McKeon, supra note 62, at 559 (discussing how the Security Council veto would alleviate concerns that the ICC could infringe upon state sovereignty).

\textsuperscript{221} See Roth, supra note 211, at 6 (stressing the importance of United States in financially and politically backing the court).

\textsuperscript{222} See generally 1998 Hearing, supra note 1 (statement of David J. Scheffer, Ambassador-at-Large for War Crimes Issues) (listing the United States’ concerns regarding a strong independent prosecutor).

\textsuperscript{223} See id. (discussing the changes that the international community needs to
It is crucial that the United States not waver on its position and continue to demand change. Whereas some critics argue that this "hard-line" position will only result in the United States' absence in the establishment of the court's procedure and selection of the judges, it is important that, in the eyes of the international community, the United States not appear to be giving in to pressure. The United States needs to maintain a strong image in the international arena. In turn, the need for maintaining its position, coupled with make before the United States can support the Treaty).

224. Many legislators have already voiced their stringent opposition to the ICC. See Jesse Helms, COMMENT & ANALYSIS: We Must Slay This Monster, FIN. TIMES, July 31, 1998, at 18 ("we must be aggressively opposed [to the Treaty] because, even if the U.S. never joins the court, the Rome Treaty will have serious implications for U.S. foreign policy"); see also 1998 Hearing, supra note 1 (statement of Sen. Rod Grams) (urging that the Clinton Administration actively oppose the Rome Treaty, so that it fails like the League of Nations). Senator Helms has gone as far as to threaten to renegotiate the United States military commitments abroad. See Eric Schmitt, Pentagon Plans for International War Crimes Tribunal, N.Y. TIMES, Apr. 14, 1998, at A11 (discussing how in early April, the Defense Department called more than 100 foreign military attachés to warn of the dangers of a permanent international criminal court). The Defense Department cautioned the attachés that if the court was set up and not properly restrained, the court could target their own soldiers. See id. (emphasizing that the Defense Department fears that the soldiers would be in jeopardy when they are acting in a peacekeeping capacity); see also 1998 Hearing, supra note 1 (statement of Sen. Jesse Helms) (threatening that the Clinton administration will have to renegotiate the military agreements with every ICC signatory state where American soldiers are stationed). Furthermore, some argue that the international community should defer to the United States' wishes due to its oft-deployed military assistance. See Lippman, supra note 207, at A1 (describing the American position as "we're the ones who respond when the world dials 911, and if you want us to keep responding, you should accommodate our views").

225. See 1998 Hearing, supra note 1 (statement of Michael P. Scharf, Director, Center for International Law and Policy, New England School of Law) (warning that even though the United States did not sign the Treaty, United States citizens will be bound by it when they go abroad). By not signing the Treaty, however, the United States cannot participate in the preparatory committee that will draft the Court's rules and procedure and further define the elements in the jurisdiction. See id. In addition, the United States will be unable to nominate a candidate for the court. See id. (determining that the United States has lost more than its won by voting against the Treaty).

226. See Kofi Annan, UN-Secretary General Urges "Like-Minded" States to Ratify the Statute of the International Criminal Court, M2 PRESSWIRE, Sept. 2, 1998 (calling for the United States and other countries to sign the Treaty).

the importance of its military role, should encourage the United States to continue to negotiate with the international community to change the Rome Treaty appropriately.\textsuperscript{228}

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\textsuperscript{228} See 1998 Hearing, supra note 1 (statement of David J. Scheffer, Ambassador-at-Large for War Crimes Issues) (expressing hope for potential United States participation in the future if changes are made in the Treaty).