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Human "Wrongs"?: The U.S. Takes an Unpopular Stance in Opposing a Strong International Criminal Court, Gaining Unlikely Allies in the Process

I. INTRODUCTION

There can be no global justice unless the worst of crimes—crimes against humanity—are subject to the law. In this age more than ever we recognize that the crime of genocide against one people truly is an assault on us all—a crime against humanity. The establishment of an International Criminal Court will ensure that humanity's response will be swift and will be just.¹

In July of 1998, the General Assembly of the United Nations, in the interest of human rights and a greater peace, made a decision which has the potential for making a lasting mark against tyranny, serious crimes against humanity, and the atrocities associated with war and armed conflict.² The International Criminal Court (ICC) was intended to be, and will be, a forum designated to try war criminals of the worst degree: those who are accused of committing genocide, crimes against humanity, and the gravest of war crimes.³ The new tribunal was given life in the Rome Statute of the International Criminal Court, which also lays the foundation for its jurisdiction, its powers, its makeup, and the rules by which it will operate.⁴ In theory, of course, the ICC is a welcome addition to the world's arsenal to combat serious human rights violations. This ideal is backed by the overwhelming worldwide support for the ICC.⁵ Reportedly, as it became evident that the ICC would be voted in by the United Nations (U.N.) General Assembly,

1. Kofi Annan, Secretary-General of the United Nations, *United Nations Conference of Plenipotentiaries on the Establishment of an Int'l Criminal Court*, (visited January 2, 1999). <<http://www.un.org/icc/main.htm>>.

2. On July 17, 1998, by a plenary assembly, the Rome statute of the International Criminal Court (ICC Statute) was adopted by a vote of 120 for and 7 against, with 21 abstentions. See Candace Hughes, War Crimes Court Approved, ABCNews.com. (July 17, 1998) <<http://www.abcnews.com/sections/world/Daily News/intl court 980717.html>>.

3. See *Rome Statute of the International Criminal Court*, A/Conf.183/9, art. 5 (July 17, 1998) [hereinafter ICC Statute].

4. See *infra* notes 43-79 and accompanying text.

5. See Hughes, *supra* note 2.

the floor erupted into spontaneous cheers and applause.⁶ Its supporters have reveled in the story of success, encouraged by the overwhelming victory of its framers.⁷ By contrast, the United States has joined with a few unlikely allies in its opposition of the ICC.⁸ Ironically, allied with its traditional military foes Iraq, Syria, and Libya, the United States has opposed and attempted to undermine the ICC from the birth of its concept.⁹ As this Comment will explore in full, there seems to be no legitimate humanitarian justification for the United States' decision to oppose this tribunal. The United States has, historically, and to this day, continued to label itself as a protector of human rights and the leader of the free world.¹⁰ Although these facts contradict each other on their face, one must acknowledge that the United States has historically kept an air of determination to bring human rights violators to justice.¹¹ The reason for this apparent discrepancy

6. Although its approval was met with cheers and applause, the U.S. Delegates were not among those making noise, as it meant that their strenuous objections to the ICC were being ignored by the rest of the world. *See id.*

7. *See, e.g.,* William R. Pace, *WE WON!*, ROME TREATY CONF. MONITOR, Issue 26, (July 18, 1998) <<http://www.igc.apc.org/icc/html/monitor.htm>>.

8. *See* Jørgen Wouters, *America vs. Its Allies*, ABCNEWS.COM, (July 17, 1998) <http://www.abcnews.com/sections/world/DailyNews/ICC_980715.html>.

9. *See id.*

10. In January, 1998, for example, the U.S. Secretary of State Madeline Albright was quoted as saying, "We have an obligation that we must meet, as members of organizations we helped build, to abide by rules we helped write, to further goals of law, peace and prosperity that Americans deeply support." AMNESTY INTERNATIONAL, UNITED STATES OF AMERICA, RIGHTS FOR ALL 123 (1998) [hereinafter RIGHTS FOR ALL]. This ideal, of course, is more rhetoric than policy, and although the United States tends to think of itself as a human rights mecca, even it has a troubled history of human rights violations. *See id.* For example, police brutality continues to be reported at alarming rates. *See id.* The United States has a less than stellar record when it comes to the treatment of people seeking asylum within its boundaries. *See id.* The death penalty, long abolished in most of the Western World and denounced by the International Courts which have addressed human rights violations involved in the enforcement thereof, is being employed at an all-time high rate in the United States. *See id.*

11. For example, the United States played a large role at the Nuremberg Trials, in which Nazi war criminals were prosecuted for the macabre acts they helped commit. *See* J.A.S. GRENVILLE, A HISTORY OF THE WORLD IN THE TWENTIETH CENTURY 333 (1994). At the trials, as my article will shed light on, an affirmative defense taken by the war criminals at Nuremberg was the famous "superior orders" defense. *See infra* notes 75-77 and accompanying text. This defense seeks to avoid culpability in the alleged crime due to the fact that the defendant was merely obeying orders of a superior officer at the time of the violation. *See id.* It is more than a bit ironic that the United States, at Nuremberg, fiercely opposed the Nazis' right to claim such a defense, and fifty years later, the United States has refused to support the Statute of the International Criminal Court, largely because the United States wishes to enable its own nationals to rely on the superior orders defense. U.S. officials have been outspoken about the country's leadership in the area of international human rights. In addition to recent critique for its international stances which are the subject of this article, however, the United States also has a questionable human rights record on the domestic front. *See generally* RIGHTS FOR ALL, *supra* note 10. Recent studies have shown that the United States has committed grave violations in the following areas: police brutality; violations in prisons and jails; treatment of asylum-seekers within the United States; and enforcement of the death penalty. *See id.* Capital punishment, of course, is the fodder for a separate article on its own. *See id.* The death penalty continues to have overwhelming public and political support within the United States, but has been held to be unnecessarily cruel and even torturous

may best be explained by factors which have no real place in international humanitarian law: political closed-mindedness, nationalistic distrust of international law, and fear that U.S. nationals are committing grave violations of human rights and are thus particularly susceptible to prosecution by the ICC.¹² This Comment proposes to arrive at a reconciliation of the discrepancy suggested above. Section II provides a historical perspective to the creation of the ICC, outlining the justifications therefore and the United States' historical role in human rights law.¹³ Section III gives the reader the framework of the ICC, as derived from the Statute of the International Criminal Court and other materials.¹⁴ Section IV provides the United States' position on the ICC and illuminates the reader regarding the conflicts espoused by the Statute.¹⁵ Section V attempts to reconcile the conflict with a counter-point to the United States' position.¹⁶

II. HISTORICAL PERSPECTIVE

The events that occurred leading up to and during the Second World War changed the world's common perceptions about the horrific acts of which the human race is capable. After the atrocities committed by Nazi war criminals were revealed to the world in the Nuremberg Trials, the U.N. recognized a need to establish a permanent international criminal court, to be separate from the U.N., and to be aimed at prosecuting exactly what World War II had shown was a real threat.¹⁷ The General Assembly of the U.N., in December of 1948, made the following statement: "Recognizing that at all periods of history genocide has inflicted great losses on humanity; and being convinced that, in order to liberate mankind from such an odious scourge, international co-operation is required."¹⁸ While the Assembly was undoubtedly correct that genocide and crimes against humanity have occurred throughout history, it is clear that it was World War II which led to the immediate creation of the U.N., and it is equally clear that the Nuremberg trials gave a united world its first glimpse at the horrors that the Holocaust showed were real, legitimate, and likely to recur if left unchecked.¹⁹

by the international courts addressing the matter. *See id.*

12. *See* Wouters, *supra* note 8.

13. *See infra* notes 17-42 and accompanying text.

14. *See infra* notes 43-79 and accompanying text.

15. *See infra* notes 80-167 and accompanying text.

16. *See infra* notes 168-212 and accompanying text.

17. *See ICC Background Information* [hereinafter United Nations Document] (visited January 2, 1999) <<http://www.un.org/icc/overview.htm>>.

18. *See id.*

19. *See id.*

A. *The Nuremberg Trials*

The Nuremberg trials began in November 1945, and were intended at the outset to bring the leaders of Hitler's state to justice.²⁰ Eleven months later, twelve of the accused were convicted and sentenced to death.²¹ The trials themselves represented more than bringing finality to the macabre episode which was the Third Reich; Nuremberg revealed the barbaric nature of what few had suspected was the truth.²² Moreover, the trials showed that this barbarism was possible in a western population which had built itself through capitalistic ventures.²³ In short, it assigned a recognizable face to the previously foreign concepts of war crimes, crimes against humanity, and genocide. But to many people living in the relatively isolated United States of America, that face was foreign; it would be twenty years before the My Lai story showed them how close it really was.

B. *The My Lai Massacre*

If anything at all has been learned from history regarding humanity's capability for evil, it is the notion that such capability is universal. On March 16, 1968, at 7:30 a.m., the U.S. Army showed the world that any fighting force is capable of committing atrocious war crimes.²⁴ On that morning, the "Charlie Company," Task Force Baker, Eleventh Brigade of the American Division, entered the tiny village of My Lai, which is located on the northeastern coast of Vietnam.²⁵ The Charlie Company entered My Lai by helicopter, and before they left, the American troops had massacred between 374 and 504²⁶ civilian women, children, and old men.²⁷ According to village residents, the day started with the familiar sound of gunfire — no shock to the area's inhabitants who knew what it was like to live in a war zone.²⁸ But this day was different, to say the least. Young American soldiers gathered civilians together, ordered them into ditches, and pelted them with machine gunfire.²⁹ The only exceptions to the practice of immediate death were young women, who were raped before they were murdered.³⁰ Reportedly, the

20. See GRENVILLE, *supra* note 11, at 333.

21. *See id.*

22. *See id.*

23. *See id.*

24. *See* Lisa Grant, *My Lai* (last visited January 2, 1999) <http://204.249.212.251/ushvietnam96/Grant/my_lai.html>.

25. *See id.*

26. The low figure represents the army's estimate, the high represents that of the village residents. Paul Alexander, *Thirty Years Later, Memories of My Lai Massacre Remain Fresh*, NEW STANDARD, March 15, 1998.

27. *See id.*; *see also* Grant, *supra* note 24.

28. *See* Alexander, *supra* note 26.

29. *See* Grant, *supra* note 24.

30. *See id.*

Americans took a lunch break at approximately eleven o'clock a.m., and followed through with their misdeeds by scorching the village, killing livestock, and destroying food supplies and freshwater wells.³¹ The event has been called "one of the U.S. Army's blackest days."³²

There is no doubt that these facts give a sobering and disturbing account of what seems at first glance to be an isolated incident in the history of the U.S. military. But what is equally sobering is what one sees when one peers into the events leading up to the incident, as well as what transpired following the massacre. It is astonishing, first of all, that no commanding officers at My Lai ever tried to stop the murders of women or children as they watched from above in their helicopters.³³ Indeed, it was not until Warrant Officer Hugh Thompson, Jr. threatened to start shooting the GI's if he saw them "kill one more woman or child," that the murders ceased.³⁴ Then there was the cover-up. "Initial military reports claimed that the massacre began when two Americans were killed and 10 wounded by booby traps."³⁵ Actually, the only U.S. casualty occurred when one American soldier shot himself in the foot during the murders.³⁶ Although he had never served in My Lai, an ex-GI, Ronald Ridenhour, who had heard stories from friends in My Lai, contacted his Congressman a year after the My Lai massacre and demanded an investigation.³⁷ Slowly, the investigation began, revealing bribery, strong-arm tactics by high-end military officials to promote a cover-up, and an unwillingness to acknowledge any wrongdoing.³⁸ Eventually, however, several officers were charged, and only one of them, Lieutenant L. Calley, was eventually convicted.³⁹ The panel in charge of the investigation arrived at a conclusion to the question, "How could something like this happen?" The answer they reached was that "My Lai was the result of individuals who shouldn't have been given command responsibility."⁴⁰ Mike Boehm, a veteran of the U.S. military who was not involved at My Lai, had a different answer to what went wrong: "The Army

31. *See id.*

32. *See Alexander, supra* note 26.

33. *See Grant, supra* note 24.

34. *See* SEYMOUR M. HERSH, *MY LAI*, 103, Random House, New York (1995).

35. *Alexander, supra* note 26.

36. *See id.*

37. *See Grant, supra* note 24.

38. *See id.*

39. *See id.*

40. *See id.* The testimony of Salvadore LaMartina was as follows:

Q: Did you obey your orders?

A: Yes, sir.

Q: What were your orders?

A: Kill anything that breathed.

Id. (quoting Tim O'Brien, *The Vietnam in Me*, N.Y. TIMES SUNDAY MAGAZINE).

tried to portray [the massacre] as an aberration of poor leadership, that somehow these people were evil in a way that no one else was It could have been me. We all have the capacity to do evil.”⁴¹

Recently, Kofi Annan, Secretary-General of the U.N., conveyed a similar sentiment, acknowledging mankind’s universal capability of atrocities. In his statement, Annan heralded the creation of the ICC:

For nearly half a century — almost as long as the U.N. has been in existence — the General Assembly has recognized the need to establish . . . a court to prosecute and punish persons responsible for crimes such as genocide. Many thought . . . that the horrors of the Second World War — the camps, the cruelty, the exterminations, the Holocaust — could never happen again. *And yet they have.* In Cambodia, in Bosnia, and Herzegovina, in Rwanda. Our time — this decade even — has shown us that *man’s capacity for evil knows no limits.* Genocide . . . is now a word of our time, too, a heinous reality that calls for a historic response.⁴²

III. THE INTERNATIONAL CRIMINAL COURT

A. *The Statute of the ICC*

Adopted by the U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, the piece of legislation which creates the ICC is the “Rome Statute of the International Criminal Court” (ICC Statute).⁴³ The ICC Statute, made up of 128 Articles, not only establishes the ICC, it also defines its legal status, its jurisdictional parameters, the laws which shall bind it, the defenses which exculpate its defendants, its investigatory authority, as well as other framework and functions.⁴⁴ This Comment briefly discusses the first three Parts to the ICC Statute, as they illustrate the makeup of the court, the crimes which fall under its jurisdiction, and the substantive rules of the court.⁴⁵

1. Preamble

The Preamble to the ICC Statute, significantly, details the policy for the ICC.⁴⁶ Some of the principles arising from the Preamble are the duty of States to exercise their own criminal jurisdiction over international criminals, reaffirmation of the principles of the U.N. Charter, determination to create a permanent ICC, and emphasis on the ICC’s nature as a complement to the States’ domestic criminal

41. See Alexander, *supra* note 26.

42. *United Nations Document*, *supra* note 17 (quoting Kofi Annan, U.N. Secretary-General) (emphasis added).

43. See generally ICC Statute *supra* note 3.

44. See *id.*

45. See *infra* notes 46-78 and accompanying text.

46. See ICC Statute, *supra* note 3, Preamble.

systems.⁴⁷

2. Establishment of the Court

Part One of the ICC Statute establishes the ICC as a permanent institution which shall have power to exercise jurisdiction over the “most serious crimes of international concern.”⁴⁸ The court will be located in The Hague, Netherlands, and will have international legal personality so as to enable it to fulfill its functions and purposes in the international legal system.⁴⁹

3. Jurisdiction, Admissibility and Applicable Law

According to the ICC Statute, the ICC will have jurisdiction over the “most serious crimes of concern to the international community as a whole.”⁵⁰ Article 5 enumerated this concept to include genocide, crimes against humanity, war crimes

47. *See id.* The Preamble, representing the policy behind the ICC, states the following:
Conscious that all peoples are united by common bonds, their cultures pieced together in a shared heritage, and concerned that this delicate mosaic may be shattered at any time,
Mindful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity,
Recognizing that such grave crimes threaten the peace, security and well-being of the world,
Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation,
Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes,
Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes,
Reaffirming the Purposes and Principles of the Charter of the U.N., and in particular that all States shall refrain from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the U.N.,
Emphasizing in this connection that nothing in this Statute shall be taken as authorizing any State Party to intervene in an armed conflict in the internal affairs of any State,
Determined to these ends and for the sake of present and future generations, to establish an independent permanent International Criminal Court in relationship with the U.N. system, with jurisdiction over the most serious crimes of concern to the international community as a whole,
Emphasizing that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions,
Resolved to guarantee lasting respect for the enforcement of international justice, Have agreed as follows: [followed by the body of the Statute].

Id.

48. *See id.*, art. 1.

49. *See id.*, arts. 3 & 4.

50. *See id.*, art. 5.

of the most serious nature, and the crime of aggression.⁵¹

Under the category of genocide, the ICC Statute defines such acts as those “committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group”⁵² The particular acts which may comprise a crime of genocide under this definition include “killing members of the group, causing serious bodily or mental harm to members, deliberately inflicting on the group conditions so as to physically destroy the group, preventing births within the group, and forcibly removing the children of a group.”⁵³ With regard to crimes against humanity, the ICC Statute addresses acts which are “committed as part of a widespread or systematic attack directed against any civilian population”⁵⁴ While the ICC Statute does list specific acts which may constitute crimes against humanity, it should be noted that, as with all of the crimes within the jurisdiction of the ICC, they will only fall under the court’s gambit if they rise to the level of widespread or persistent attacks on a civilian population.⁵⁵ Individuals who commit war crimes will also fall under the control of the court when the crimes are committed as “part of a plan or policy or as part of a large-scale commission of such crimes.”⁵⁶ Article 9 of the ICC Statute describes how elements of the crimes

51. *See id.*

52. *See id.*, art.6.

53. *See id.*

54. *See id.*, art. 7. The specific acts under this category which are contemplated by the Statute are: murder; extermination; enslavement; deportation; imprisonment; torture; rape or other sexual crimes; persecution; enforced disappearances; apartheid; and other acts intended to cause suffering or serious injury. *See id.*

55. *See id.*, art. 7(1).

56. *See id.*, art. 8. “War crimes” for the purposes of this article are defined as:

- (i) Wilful killing;
- (ii) Torture or inhuman treatment, including biological experiments;
- (iii) Wilfully causing great suffering or serious injury to body or health;
- (iv) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
- (v) Compelling a prisoner of war . . . to serve for a hostile Power;
- (vi) Wilfully depriving a Prisoner of war . . . of the rights of fair and regular trial;
- (vii) Unlawful deportation . . .
- (viii) Taking of hostages.
- (b) . . .
- (i) Intentionally directing attacks against the civilian population . . .
- (ii) Intentionally directing attacks against civilian objects;
- (iii) Intentionally directing attacks against [the instrumentalities] involved in a humanitarian assistance or peacekeeping mission;
- (iv) Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or widespread, long-term and severe damage to the environment . . .
- (v) Attacking or bombarding . . . towns, villages, dwellings or buildings which are undefended and not military objectives;
- (vi) Killing or wounding a [surrendered soldier];
- (vii) Making improper use of a flag of truce, of the flag . . . of the enemy, or of the U.N., . . . resulting in death or serious personal injury;

which will be handled by the ICC shall be decided.⁵⁷ Specifically, “they shall be adopted by a two-thirds majority of the members of the Assembly of States Parties.”⁵⁸ Amendments to the elements of a particular crime may be proposed by state parties, judges and the prosecutor, and will be adopted by two-thirds of the members of the Assembly of States Parties, provided they are consistent with the ICC Statute.⁵⁹ Article 12 is an extremely powerful and significant provision because it gives the court jurisdiction over an individual defendant if a State agrees, if the conduct was committed on the territory of a signature State, or if a signatory State is the citizenship nation of the alleged perpetrator.⁶⁰

4. General Principles of Criminal Law [As applied to the ICC]

Uniquely, the ICC Statute does not merely set up the institution and authorize its basic powers. It actually determines the precise principles of law which will bind its defendants, effectively acting as its own criminal code.⁶¹ This confinement to its own internal law applies not only to the crimes’ elements and nature, but also

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- (ix) Intentionally directing attacks against buildings of religion, education, art, science, or [charity], historic monuments, hospitals, . . . provided they are not military objectives;
 - (x) Subjecting persons who are in the power of an adverse party to physical mutilation or to medical or scientific experiments . . . which are neither justified by the medical, dental or hospital treatment of the person nor carried out in his or her interest . . .
 - (xi) Killing or wounding treacherously individuals belonging to the hostile nation or army;
 - (xii) Declaring that no quarter will be given;
 - (xiii) Destroying or seizing the enemy’s property unless such destruction or seizure be imperatively demanded by the necessities of war;
 - (xiv) Declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party;
 - (xv) Compelling [hostile] nationals to take part in the operations of war directed against their own country;
 - (xvi) Pillaging . . . ;
 - (xvii) Employing poison or poisoned weapons
 - (xix) Employing bullets which expand or flatten easily in the human body . . . ;
 - (xx) Employing weapons . . . which . . . cause superfluous injury or unnecessary suffering or which are inherently indiscriminate . . .
 - (xxi) Committing outrages on personal dignity;
 - (xxii) Committing rape, sexual slavery . . .
 - (xxv) Intentionally using starvation of civilians . . . ;
 - (xxvi) . . . enlisting children under fifteen . . . or using them to participate actively in hostilities.

Id.

57. *See id.*, art. 9.

58. *Id.*

59. *See id.*

60. *See id.*, art. 12.

61. *See id.*, arts. 5-125.

to any punishment which is to be initiated by the court.⁶² Article 27 declares that it is irrelevant whether a person holds official capacity; the jurisdiction of the ICC applies regardless.⁶³ This status neither exempts an individual from punishment, nor does it entitle the defendant to a reduced sentence or immunity therefrom.⁶⁴ Similarly, Article 28 places responsibility onto the part of commanding officers for the actions of their inferiors if that commanding officer knew or should have known of the commission of the crimes and failed to take all reasonable action to prevent the actions.⁶⁵ Article 29 provides that no statute of limitations shall apply to these gravest of all international crimes.⁶⁶ Intent, a necessary element to the crimes falling within the Statute, is defined in Article 30 as a meaning to cause the consequences or awareness that they will occur in the normal course of events.⁶⁷

Grounds for excusing criminal liability for acts committed are laid out in Article 31.⁶⁸ If a person suffers from a mental disease or defect which renders a person unable to appreciate the unlawfulness of the conduct or the capacity to control the conduct, there will be no criminal culpability.⁶⁹ Similarly, where the defendant was intoxicated to the same mental state, liability will be extinguished.⁷⁰ One should point out the leniency of this provision.⁷¹ Additionally, reasonable self-defense or defense of others, or serious duress caused by the threat of imminent death or serious injury, where the defendant has acted necessarily and reasonably to extinguish the threat, shall shield the defendant from liability.⁷²

As to whether a mistake of fact shall exclude culpability for a crime otherwise within the Statute's contemplation, the ICC Statute provides that it shall only exclude criminal responsibility if the mistake negates the necessary *mens rea* of the particular crime.⁷³ Mistakes of fact, as well, are no justification for the crime, unless they mistake the requisite mental element.⁷⁴

Article 33 of the ICC Statute is particularly relevant to this Comment in that it fosters a major disagreement between the U.S. Delegates and those of most of the rest of the U.N. General Assembly and, therefore, the world. The Article specifically addresses the defense of "superior orders."⁷⁵ Stated simply, such a

62. *See id.*, art. 23.

63. *See id.*, art. 27.

64. *See id.*

65. *See id.*, art. 28.

66. *See id.*, art. 29.

67. *See id.*, art. 30.

68. *See id.*

69. *See id.*

70. *See id.*

71. It seems odd for a tribunal, which is solely geared at prosecuting the world's worst offenders of human rights, to abdicate all culpability because a military commander was intoxicated when, for example, he ordered the extermination of a population.

72. *See ICC Statute, supra* note 3, art. 31.

73. *See id.*, art. 32.

74. *See id.*

75. *See id.*, art. 33.

defense argues the proposition that a defendant who commits an act otherwise within the contemplation of the ICC Statute⁷⁶ should be exculpated by the mere fact that the crime was committed as a result of a superior officer's orders. Stated plainly, it is the "I was just following orders" defense which was asserted by Nazi war criminals at Nuremberg.⁷⁷ Article 33 of the ICC Statute states, "[t]he fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless . . ." the defendant was under a legal obligation to follow the orders, the individual did not know that the order was unlawful, and the order was not manifestly unlawful.⁷⁸ What is the logic behind U.S. opposition to across-the-board application of ICC jurisdiction? Section IV seeks to shed light on the topic.⁷⁹

IV. THE UNITED STATES' POSITION WITH REGARD TO THE ICC

Generally speaking, the United States has had a troubled history with regard to accepting the authority of international tribunals. Perhaps the best recent example of this is the *Nicaragua case*.⁸⁰ In April of 1984, Nicaragua filed charges against the United States in the International Court of Justice (ICJ)⁸¹, accusing the Reagan administration of trying to overthrow the government in force.⁸² The ICJ, a month later, ordered the United States to respect Nicaragua's borders and halt the mining of its harbors.⁸³ The U.S. administration announced in response, however, that the United States would refuse to respect any World Court rulings on Central America for the next two years.⁸⁴ The following year, Washington declared that it would no longer obey the ICJ at all unless it chose to.⁸⁵ "It's simply arrogance,"

76. In other words, the defendant committed genocide, a crime against humanity, or a crime of aggression or war which was directed toward the destruction of a civilization. *See id.*, art. 5.

77. *See supra* notes 20-23 and accompanying text.

78. *See ICC Statute, supra* note 3, art. 33.

79. *See infra* notes 80-167 and accompanying text.

80. *See infra* notes 81-89 and accompanying text.

81. The International Court of Justice (ICJ) is also known as the World Court. It is based in The Hague, Netherlands, and is the principal judicial body of the U.N.. The ICJ was formed in 1946, and since then has presided over more than 96 cases, 60 judgments, 23 advisory opinions, and 290 orders. It is distinguishable from the recently-approved ICC in that the ICC will hear only the gravest of all international criminal violations, whereas the ICJ's docket is much less confined. The ICJ currently deals mostly with civil compensatory suits between nations. *See United Nations Document, supra* note 17.

82. *See Wouters, supra* note 8.

83. *See id.*

84. *See id.*

85. *See id.*

said Ken Roth, executive director of Human Rights Watch.⁸⁶ “We don’t want to play by the same rules as everyone else.”⁸⁷ In 1986, the court found the United States guilty of violating international law through its support of contra rebels, and ordered the payment of reparations to Nicaragua.⁸⁸ The United States has not heeded the ruling.⁸⁹

With regard to the ICC specifically, from the very beginning of the negotiations involving the drafting of the ICC Statute and creation of the ICC, the U.N. Delegates from the United States had postured under the guise of being in favor of the ICC, often claiming that they wanted it to be “strong,” but taking measures to in fact weaken it.⁹⁰ The position of the United States is quite complicated, hence the necessity for this Comment. Officially, the United States claims it supports the idea of an independent international forum in which to prosecute perpetrators of the gravest international crimes.⁹¹ Why then was it among the seven members of the opposition, up against 120 others, when the vote was finally cast?⁹² Why has it been widely reported that the applause which met the vote was just as much geared at making a statement to the United States, the superpower “bully,” as it was to cheer the outcome of the vote?⁹³

The United States, clearly, has a long and distinguished history of acting as the world’s premier peace-keeping force.⁹⁴ It is from this history, and the inevitable self-image which arises therefrom, that the conflicts with regard to the ICC surface. Generally speaking, the consensus has been, first of all, that “despite posturing [with regard to the proposals it has made to weaken the ICC] . . . the United States in general is committed to the creation of a strong and effective International Criminal Court.”⁹⁵ Yet what has happened runs somewhat counter to this general statement.

On July 23, 1998, six days after the ICC was approved 120 to 7 by the U.N. General Assembly, David J. Scheffer, Head of the U.S. Delegation to the U.N. Diplomatic Conference on the Establishment of a Permanent International Criminal

86. *Id.*

87. *Id.*

88. *See id.*

89. *See id.*

90. *See generally Statement of David J. Scheffer, Ambassador-at-Large for War Crimes Issues and Head of the U.S. Delegation to the U.N. Diplomatic Conference on the Establishment of a Permanent International Criminal Court before the Committee on Foreign Relations of the U.S. Senate, July 23, 1998, <gopher://gopher.igc.apc.org/oo/orgs/icc/natldocs/rome/scheffer0798.txt>* (stating that the world has a “responsibility to confront . . . assaults on humankind” but advocating a Court which allows permanent members of the U.N. Security Council – the United States included – to veto any action taken by the ICC) [hereinafter *Scheffer Statement*].

91. *See id.*

92. *See supra* notes 5-9 and accompanying text.

93. *See Floy Lilley, The Superpower the World Loves to Hate*, (visited Nov. 28, 1998) <<http://www.sovereignty.net/p/gov/rome7-6.htm>>.

94. For example, the United States pays for approximately 25% of the U.N.’s efforts. *See id.*

95. *See id.* (quoting Jerome Shestack, president of the American Bar Association).

Court, returned to Washington in order to report the results of the Conference to members of Senate.⁹⁶ Addressing the Committee on Foreign Relations of the U.S. Senate, Scheffer first highlighted the official United States position regarding the need for an international criminal tribunal.⁹⁷ Scheffer noted that, “we live in a world where entire populations can still be terrorized and slaughtered by nationalistic butchers and undisciplined armies,” and further asserted that the United States, “as the most powerful nation committed to the rule of law, . . . [has] a responsibility to confront these assaults on humankind.”⁹⁸ He went on to state that through accountability, perpetrators of genocide, crimes against humanity, and war crimes may be brought to justice.⁹⁹

Scheffer continued to acknowledge the difficulty of the task of “fusing the diverse criminal law systems of nations and the laws of war into one functioning courtroom in which [the United States] and others had confidence criminal justice would be rendered fairly and effectively.”¹⁰⁰ He labeled the challenge of creating a treaty-based tribunal “daunting” in that sovereign governments will naturally disagree as to terms regarding jurisdiction and other areas of content of the document.¹⁰¹ Scheffer also noted that the United States took a “methodical” approach to drafting the ICC Statute, as opposed to certain other governments who wanted to “rush to conclude” the task.¹⁰² In this regard, Scheffer asserted that the United States’ approach had prevailed.¹⁰³

Next, Scheffer outlined the precise objectives of the U.S. Delegates when they arrived in Rome on June 13, 1998.¹⁰⁴ The delegation, made up of members of the Departments of State and Justice, the Office of the Secretary of Defense, the Joint Chiefs of Staff, the United States Mission to the U.N., and “the private sector,” all contributed to the negotiations.¹⁰⁵ Specifically, Scheffer listed the objectives which he claimed he and his comrades successfully gleaned out of the negotiations, visible concepts in the finished ICC Statute.¹⁰⁶ Those principles which he laid claim to were the following: a structure of the ICC which defers, through the concept of complementarity, to national jurisdictions, eliciting “significant protection” of nationals (though he was quick to point out that the delegates had

96. See *Sheffer Statement*, *supra* note 90.

97. See *id.*

98. See *id.*

99. See *id.*

100. See *id.*

101. See *id.*

102. See *id.*

103. See *id.*

104. See *id.*

105. See *id.*

106. See *id.*

not received as much protection as they had sought);¹⁰⁷ an effective veto power by members of the U.N. Security Council¹⁰⁸ giving it the power to “intervene to halt the court’s work;¹⁰⁹ sovereign protection of national security information which may become relevant in a prosecution;¹¹⁰ acknowledgment by the court of national judicial procedure;¹¹¹ ICC treatment of internal domestic conflicts;¹¹² extensive due process protections for defendants and suspects;¹¹³ incorporation of elements into the definitions of crimes which the court will prosecute;¹¹⁴ ICC treatment of gender issues;¹¹⁵ provisions in the ICC Statute which treat command responsibility and superior orders in an acceptable fashion;¹¹⁶ rigorous qualification requirements for judges;¹¹⁷ allowance for state party funding of the ICC;¹¹⁸ a panel of state parties whose function it will be to oversee the workings of the ICC;¹¹⁹ reasonable amendment procedures;¹²⁰ and a high number of ratifications necessary to gain full entry into force of the ICC Statute.¹²¹ The foregoing list of concepts represents those which the U.S. Delegates helped to frame with regard to the ICC Statute. In general, one may notice that the United States has openly nurtured a distrust for a powerful ICC, expressing concern that its nationals may be prosecuted for a crime falling within its jurisdiction committed while on a “peace-keeping” mission.¹²² These concerns are equally apparent in the text which follows, representing those objectives which Scheffer was disappointed to report were not accepted by the

107. *See id.* This is perhaps the most crucial of the United States’ gripes with the ICC: the fact that it is still too powerful and independent of an institution, despite efforts to weaken and disperse that power by Scheffer and his staff.

108. The five permanent members of the U.N. Security Council are the United States, France, the United Kingdom, China, and Russia.

109. *See Scheffer Statement, supra* note 90.

110. *See id.*

111. *See id.*

112. *See id.*

113. *See id.*

114. *See id.* Scheffer, however, pointed out that the delegation was not satisfied with the elements which made it into the ICC Treaty, and also that, specifically with regard to war crimes, the United States was unwilling to accept that a forcible transfer of a population into an occupied territory would constitute such a crime. *See id.*

115. *See id.*

116. *See id.* Recall the discussion, *supra*, regarding superior orders. The United States, through the Statement of Scheffer, is acknowledging primary responsibility for the limiting language of Article 33 of the Statute, which negates criminal liability on the basis of superior orders if certain criteria are met. This was one of the key disagreements between the United States and the vast majority of the Conference, and is discussed further *infra*.

117. *See id.*

118. *See id.*

119. *See id.*

120. *See id.*

121. *See id.* The number required is sixty. Regardless of the overwhelming number of signatories, sixty parties will have to ratify fully the Statute of the ICC for it to enter into force, binding parties and non-parties alike. *See id.*

122. Scheffer warned that a scheme that “ignored [the] responsibilities” of U.S. peacekeeping forces “is not going to serve the vital interest of the [ICC].” *See id.*

Conference and will thus be absent from the final ICC Statute. The “critical” nature of these objectives probably speaks to the fact that the United States voted “no” at the conclusion of the Conference.¹²³

Scheffer first noted that while the United States was successful in avoiding “universal jurisdiction” of the ICC, the form of jurisdiction eventually agreed upon by the overwhelming majority of delegates was unacceptable.¹²⁴ Specifically, the ICC Statute asserts that in order for the court to have jurisdiction over a particular crime, either the state of territory where the act was committed, or the state of the nationality of the perpetrator of the crime must be either a party to the treaty or have granted its voluntary consent to jurisdiction of the ICC.¹²⁵ During negotiations the United States sought to include a provision which required both of these countries to be a party to the treaty, or a provision which stated that in order for jurisdiction to prevail, consent of the state of the nationality of the perpetrator would be necessary.¹²⁶ This proposal, by all accounts, was hissed, booed, and overwhelmingly defeated by most of the rest of the world.¹²⁷

Scheffer went on to state that the resulting jurisdictional scheme which is cradled by the ICC Statute leaves in place a system that “do[es] not serve the cause of international justice.”¹²⁸ Most of the atrocities which the ICC will address, he asserted, are the result of “internal conflicts between warring parties of the same nationality.”¹²⁹ For this reason, he pointed out, if there are two non-parties to the treaty who are in conflict, both can be fully insulated from ICC jurisdiction.¹³⁰ Scheffer next contemplated the situation in which the U.S. armed forces, as a non-signatory, operate in a signatory state’s territory and commit a violation of the ICC

123. *See id.*

124. *See id.*

125. *See id.*

126. *See id.* It is sufficiently clear that this proposal by the U.S. delegation was an attempt to shield its nationals from the reach of the ICC. By requiring both states to be parties to the treaty, the United States is effectively rendering its own nationals immune from prosecution if the United States does not sign the treaty, which, of course, it did not. As an alternate strategy, by requiring the consent of the state of the nationality of the perpetrator, the United States would have created an ICC Statute under which states could choose whether or not their nationals would be held accountable. Some commentators have pointed to the outrageousness of this proposal in that it would shield the worst perpetrators of all: the Saddam Husseins of the world, as well as giving isolationist states such as the United States an opportunity to refuse consent whenever one of their soldiers was put up on a charge. *See Lilley, supra* note 93; *see also Wouters, supra* note 8.

127. *See Scheffer Statement, supra* note 90; *see also supra* notes 5-8 and accompanying text.

128. *See Scheffer Statement, supra* note 90.

129. *See id.*

130. *See id.* While Scheffer and his delegates are correct at first glance, it should be pointed out that this scenario does not consider a situation under Article 13(b) or 13(c), in which the Security Council itself initiates a proceeding. Recall that the United States itself is a permanent member of the Security Council, giving it vast powers to conduct such an initiation.

Statute.¹³¹ Since the ICC Statute warrants prosecution by the ICC in such a scenario, Scheffer claimed, it is not only contrary to fundamental principles of treaty law, but could also “inhibit the ability of the United States to use its military to meet alliance obligations and participate in multinational operations, including humanitarian interventions to save civilian lives.”¹³²

A second objective which was taken to Rome by U.S. Delegates and eventually limited by the Conference is the idea that “states should have the opportunity to assess the effectiveness and impartiality of the court before considering whether to accept its jurisdiction.”¹³³ Thus, Scheffer and his delegates proposed a 10-year “opt-out” period, in which the United States or any state party could negate jurisdiction of the court with respect to crimes against humanity or war crimes.¹³⁴ Furthermore, at the end of the ten years, states would have had the opportunity “to accept . . . automatic jurisdiction . . . over all of the crimes, to cease to be a party [to the treaty], or to seek an amendment to the treaty extending its ‘opt-out’ protection.”¹³⁵ In justifying the proposal’s credibility, Scheffer claimed that the period was important for the United States to evaluate the ICC’s performance¹³⁶ and assess whether it is performing its goals.¹³⁷ Eventually, a somewhat diluted opt-out provision was adopted: a seven-year period to object to jurisdiction for war crimes only.¹³⁸ Additionally, Scheffer expressed dismay at the principle that, under the current ICC Statute, both signatory and non-signatory states may be susceptible to jurisdiction for crimes which are newly adopted or newly amended.¹³⁹

The United States was also disappointed by the fact that the ICC Statute enables a prosecutor to initiate investigations and prosecutions without referring the matter to the court.¹⁴⁰ Opposition to this ability stems from the idea that it will “encourage overwhelming the court with complaints,” at the expense of the ICC’s financial resources, as well as fostering the possibility that the ICC will become

131. *See id.* It is crucial to understand fully the depth of this statement. A violation of the ICC Statute, the reader will recall, is the gravest of all international crimes, reserved solely for crimes such as genocide, crimes against humanity, severe crimes of aggression, and severe and willful war crimes. *See supra* notes 50-79 and accompanying text.

132. *See Scheffer Statement, supra* note 90. Scheffer, however, did not expand on exactly why the threat of prosecution would be sufficiently real in this situation. It remains puzzling to this author why, for instance, genocide, crimes against humanity, or other grave, willful violations of human rights, would be incidental to meeting alliance obligations or humanitarian aid.

133. *See id.*

134. *See id.*

135. *See id.*

136. For a discussion on what some commentators call the “arrogance” of the United States when it comes to purely international matters, *see infra* notes 168-212 and accompanying text.

137. *See Scheffer Statement, supra* note 90.

138. *See id.*

139. *See id.*

140. *See id.*

fixated with "controversy, political decision-making, and confusion."¹⁴¹

As for the crime of aggression in particular, the United States' position is that the crime has not been sufficiently defined in customary international law¹⁴² to warrant criminal responsibility.¹⁴³ Currently, the ICC Statute includes the crime of aggression as within the parameters of the ICC's jurisdiction, but it leaves the definition to an amendment which will be adopted seven years after the Statute's entry into force.¹⁴⁴ Scheffer and the United States are somewhat disillusioned by the fact that this proposed amendment, to date, is not to be linked to a Security Council finding that a state had committed the crime of aggression.¹⁴⁵ If such a linkage does not exist, the United States will oppose the amendment.¹⁴⁶

Additionally, the United States, as well as other countries, continues to oppose the jurisdiction of the ICC over crimes of terrorism and drug crimes.¹⁴⁷ The reasoning for this opposition, according to Scheffer, is that national efforts in these regard are simply more effective, and an international presence will only undermine them.¹⁴⁸ As it stands, the current ICC Statute includes the crimes within the jurisdiction of the court, subject to future definition of the two offenses.¹⁴⁹ This fact "greatly concerned" the U.S. Delegates, and they made a public explanation for their opposition, claiming that the problem lay in the investigatory abilities national and international efforts will have in their future quest to combat the crimes.¹⁵⁰ Specifically, Scheffer explained, the ICC "will not be equipped effectively to investigate and prosecute these types of crimes," and, therefore, should completely defer to domestic systems already in place.¹⁵¹

Another area in which U.S. negotiators were defeated in the end was that of liability of commanding officers.¹⁵² During negotiations, U.S. Delegates argued that military commanders were to be held to the full rigors of international law,

141. *See id.*

142. Customary international law is considered to be one of the principal sources of international law, given the same effect as treaties which are in writing. To become customary international law, a principle must have sufficient usage (i.e., the idea that the principle is followed in a sufficient number of nations in the world), and there must be *opinio juris* (i.e., the nations following the principle must believe they are following the principle because of some international obligation).

143. *See Scheffer Statement, supra* note 90.

144. *See id.*

145. *See id.*

146. *See id.*

147. *See id.*

148. *See id.*

149. *See id.*

150. *See id.*

151. *See id.*

152. *See id.*

while their civilian commanders should not.¹⁵³ This attempt was based on the natural protection that would have been given by the U.S. Constitution, which requires a system where civilians control the military.¹⁵⁴ In the end, the majority did not agree to these tactics.¹⁵⁵

The last fodder for United States' opposition to the ICC Statute is in regards to reservations to the treaty.¹⁵⁶ Under Article 120, no reservations to the ICC Statute are to be allowed.¹⁵⁷ The United States took the position that, at the very least, where domestic constitutional requirements and national judicial procedures conflict to the point of mandating a reservation, such a reservation should be allowed, provided they do not defeat the intent or purpose of the treaty.¹⁵⁸ This, as well as the foregoing list of U.S. objections, was considered and defeated by the vast majority of the U.N. delegates.¹⁵⁹

In addition to the statements made by Scheffer when he addressed the Senate, many accounts of the drafting sessions from Rome supported the contention that the United States sought to limit the power of the ICC. With regard to the definitions of genocide and crimes against humanity, while most states did not wish to limit the ICC's jurisdiction to cases where the defendant intended to destroy a particular number of individuals in the group, a small number of states agreed with the United States that the ICC should have jurisdiction only when the accused intended to destroy a substantial part of a particular group.¹⁶⁰

Additionally, U.S. Delegates were reported to differ greatly with the International Committee of the Red Cross (ICRC), which was represented in proposals by New Zealand and Switzerland with regard to what should be included in the list of crimes which may make up genocide and crimes against humanity.¹⁶¹ The ICRC specifically mentioned the crime of rape, making it clear that it was to be considered a grave breach of the Geneva Convention and thus to be within the ICC's contemplation.¹⁶² By contrast, the United States was much more restrictive in its proposals.¹⁶³ It urged that the ICC Statute should employ the wording of the 1907 Hague Convention.¹⁶⁴ In addition, the United States argued that there should have been an opening paragraph to the crime against humanity section of the ICC Statute which outlines that jurisdiction would be restricted to those crimes

153. See Francis Boyle, *Reversing the Gains of Nuremberg* (visited Nov. 2, 1998) <<http://www.atlantic.net/~odin/netline/hypocrisy.html>>.

154. See *id.*

155. See Scheffer Statement, *supra* note 90.

156. See *id.*

157. See ICC Statute, *supra* note 3, art. 120.

158. See Scheffer Statement, *supra* note 90.

159. See ICC Statute, *supra* note 3, art. 120.

160. See Christopher Keith Hall, *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 (Jan. 1998).

161. See *id.* at 128.

162. See *id.*

163. See *id.* at 128-29.

164. See *id.*

“committed as part of a systemic plan or policy or as part of a large-scale commission of such offenses,”¹⁶⁵ as opposed to the wording proposed by the ICRC, which used the term “serious breaches.”¹⁶⁶ In the end, the ICC Statute included language from both proposals.¹⁶⁷

V. COUNTER-POINT: FAVORING A STRONG ICC

In contrast to the efforts of Scheffer and the other U.S. Delegates, the vast majority of the representatives at the U.N. favor a strong ICC.¹⁶⁸ This tendency had its origin in December 1948, when the General Assembly of the U.N. stated that “[r]ecognizing that at all periods of history genocide has inflicted great losses on humanity; and being convinced that, in order to liberate mankind from such an odious scourge, international co-operation is required.”¹⁶⁹ At that point, the General Assembly adopted the Convention on the Prevention and Punishment of the Crime of Genocide, and invited the International Law Commission (ILC) “to study the desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide”¹⁷⁰ That project was placed on hold until 1994, when the ILC submitted a draft statute to the General Assembly.¹⁷¹ Almost fifty years after the idea of the ICC sprouted, Kofi Annan, Secretary-General of the U.N., recently made the following statement, summarizing in idealistic prose the goals of the “other side,” the vocal majority in support of a strong ICC:

In the prospect of an international criminal court lies the promise of universal justice. That is the simple and soaring hope of this vision. We are close to its realization. We will do our part to see it through till the end. We ask you . . . to do yours in our struggle to ensure that no ruler, no State, no junta and no army anywhere can abuse human rights with impunity. Only then will the innocents of distant wars and conflicts know that they, too, may sleep under the cover of justice; that they, too, have rights, and that those who violate those rights will be punished.¹⁷²

To the majority of the delegates at the Rome Conference, the new ICC

165. *See id.* at 128 n.22.

166. *See id.* at 128.

167. *See id.*

168. *See supra* notes 5-8 and accompanying text.

169. *See United Nations Document*, *supra* note 17.

170. *See id.*

171. *See id.*

172. *Id.*

represents the proverbial “missing link” in the international legal system.¹⁷³ The ICJ only has jurisdiction over states, not individuals who breach an international obligation.¹⁷⁴ Heretofore, individual acts of genocide and crimes against humanity have gone virtually unpunished.¹⁷⁵ In Cambodia in the 1970’s, an estimated two million people were butchered by the Khmer Rouge.¹⁷⁶ Similarly, conflicts in Mozambique, Liberia, and El Salvador elicited a staggering loss of civilian lives, including overwhelming numbers of unarmed women and children.¹⁷⁷ In Algeria and the Great Lakes region of Africa, such civilian massacres continue today.¹⁷⁸

Historically, the lack of an international mechanism such as the ICC has created the situation under which commentators have explained, “[a] person stands a better chance of being tried and judged for killing one human being than for killing 100,000.”¹⁷⁹ The lack of a mechanism by which to try individual violators of human rights violates the general principle gained from Nuremberg, whose tribunal stated that “crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.”¹⁸⁰ This concept was echoed by Benjamin B. Ferencz, former Nuremberg prosecutor, who said, “There can be no peace without justice, no justice without law and no meaningful law without a Court to decide what is just and lawful under any given circumstance.”¹⁸¹

There remains little doubt that setting up a permanent international criminal court is the answer to these concerns. One issue which remains, however, is that expressed most often and most strongly by the U.S. Delegates, that the court should require the consent of the perpetrator’s country of origin.¹⁸² Those who oppose this sentiment maintain that “[c]rimes under international law by their very nature often require the direct or indirect participation of a number of individuals at least some of whom are in positions of governmental authority or military command.”¹⁸³ In times of conflict, domestic criminal systems are often either unwilling or unable to act as they should, usually for one of two reasons.¹⁸⁴ As was the case in the former Yugoslavia, states often lack the political will to prosecute their own citizens.¹⁸⁵ Other times, the national institutions have collapsed to the point of inability to

173. *See id.*

174. *See id.*

175. *See infra* notes 179-81 and accompanying text.

176. *See United Nations Document, supra* note 17.

177. *See id.*

178. *See id.*

179. *See id.* (quoting José Ayala Lasso, former U.N. High Commissioner for Human Rights).

180. *See id.*

181. *See id.*

182. *See supra* notes 125-27 and accompanying text.

183. *See United Nations Document, supra* note 17 (quoting Report of the International Law Commission, 1996).

184. *See id.*

185. *See id.*

address the prosecution of offenders, as in the case of Rwanda.¹⁸⁶ The ICC's complementary nature addresses these concerns. The court will only be called upon when one of two situations arises: unwillingness or inability to act by domestic institutions.¹⁸⁷

Some U.N. Delegates have expressed concern that without the support of the United States, the world's sole remaining superpower, the ICC's effectiveness will be limited:¹⁸⁸ "I'm afraid we will have a court that may not work. It may be like the League of Nations or certainly will take a very, very long time to be effective."¹⁸⁹ So what exactly is the disagreement all about?

The first area of disagreement to be discussed is the U.S. proposal that, if it had been adopted, would have exempted peacekeepers and others from war-crimes prosecution for actions committed while on official duty, unless the home country consented to prosecution.¹⁹⁰ Human rights organizations, of course, fiercely opposed the proposal, and ultimately won on the floor. "It would mean that if you wanted to ever investigate or prosecute Saddam Hussein, you would have to ask Iraq's permission to go ahead."¹⁹¹ Reminiscent of the final vote, the proposal was struck down 113 to 17, and the defeat was met with a "prolonged rhythmic applause."¹⁹²

Another major area of disagreement between delegates from the United States and the supporters of a strong ICC is that of the United States' "unique" peacekeeping obligations worldwide.¹⁹³ Specifically, the Pentagon fears that its soldiers abroad on such missions will face politically motivated prosecutions, and also worries about charges arising from civilian deaths in peace-keeping operations.¹⁹⁴ Scheffer argued that "[t]he United States . . . ha[s] . . . responsibilities around the world that are critical to the protection of civilian populations."¹⁹⁵ In opposition to such arguments, the majority argues however, that the structure of the ICC, with its complementary jurisdictional scheme, prevents politically motivated prosecutions as well as trying individuals for incidental losses of human life while on peace-keeping missions.¹⁹⁶ A case in point is the My Lai Massacre,

186. *See id.*

187. *See id.*

188. *See* Gayle Young, "Treaty creating war-crimes court gets preliminary nod." (last visited July 17, 1998) <<http://cnn.com/WORLD/europe/9807/17/international.court/index.html>>.

189. *Id.* (quoting Muhammed Sacirbey, Bosnian delegate to the U.N. treaty conference).

190. *See supra* notes 125-127 and accompanying text.

191. Young, *supra* note 188 (quoting Jelena Pejic of the Lawyers Committee for Human Rights).

192. *See id.*

193. *See supra* notes 122-24 and accompanying text.

194. *See* Wouters, *supra* note 8.

195. *See id.*

196. *See supra* notes 122-24 and accompanying text.

discussed *supra* in Part II.B.¹⁹⁷ What existed there was an extreme case of flagrant and wanton breaches of human rights by the U.S. military. Yet even in such a case, U.S. servicemen would not have been brought before the ICC. Recall that commanding officers were tried domestically, and that one conviction — that of Lt. William Calley — was achieved.¹⁹⁸ Because the prosecution was initiated domestically, ICC jurisdiction would never have come into effect.¹⁹⁹ Ken Roth, Executive Director of Human Rights Watch, summarizes the United States' position as follows: "The Pentagon is terrified that a United States soldier may be brought before this court — it's a fictitious fear [because of complementary jurisdiction]."²⁰⁰ Still, the words of Senator Jesse Helms addressed the concerns of U.S. lawmakers in the days before the final vote on the ICC. Helms, Chairman of the Senate Foreign Relations Committee, warned that the ICC Statute would be "dead on arrival" if the possibility existed that an American could ever be brought before the court.²⁰¹

In addition to exemplifying arrogance in their treatment of ICC negotiations, U.S. Delegates have also been accused of bullying other nations. Pierre Sane, Secretary-General of Amnesty International, stated that "a few powerful countries appeared willing [in negotiations] to hold justice hostage by threatening and bullying other states, and seemed sometimes to be more concerned with shielding possible perpetrators from trial rather than producing a charter for victims."²⁰² Others were more up-front in their criticism of U.S. tactics in the negotiations. Candice Hughes wrote that "the United States wanted a loophole effectively putting Americans out of the court's reach."²⁰³ Hughes went on to describe American pressure as "intense."²⁰⁴ "[I]ts delegation wielded virtually every carrot—and —stick at its disposal. It threatened poor nations with a loss of aid and allies like Germany with the rupture of key military alliances."²⁰⁵ Similar tactics were recounted by a delegate:

[The United States] tries to tell us all what to do The United States is a bully. They have tried to destroy this important effort by denying the prosecutor true independence from the superpowers' grasp. The P-5 [Permanent Five members of the Security Council] will never turn over their own people and they are the criminals using weapons of mass destruction. They have twisted the words of the document. In French the words meant an opt-out within the initial seven years, not

197. See *supra* notes 24-41 and accompanying text.

198. See *supra* notes 38-39 and accompanying text.

199. See Wouters, *supra* note 8.

200. See *id.*

201. See *id.*

202. See Amnesty International, *USA Crippled at Birth*, (last visited July 17, 1998) <<http://www.amnesty-usa.org/lsn/iccreports/071798.html>>.

203. See Hughes, *supra* note 2.

204. See *id.*

205. *Id.*

an opt-out for seven years, as it was translated.²⁰⁶

Ferencz, a former prosecutor at Nuremberg, explained a likely reason for the United States' blatantly coercive tactics to attempt to create a watered-down ICC. A strong ICC, he says, "will trample on America's sovereignty Antiquated notions of absolute sovereignty are absolutely obsolete in the interconnected and interdependent global world of the 21st Century."²⁰⁷ This statement, of course, applies a modern view of sovereignty. Ferencz's assertion ignores the fact that America would never have been a nation if the ICC had been in place.²⁰⁸ "[The] Revolutionary War would have been regarded as a "criminal act" by [the ICC]."²⁰⁹

Then again, there may be some truth to the suspicion that the United States is merely seeking to continue its isolationism and shield its nationals from inevitable prosecutions by the ICC. Non-Governmental Organizations such as Amnesty International have publicly called the United States on its military conduct.²¹⁰ For instance, Former President George Bush has been accused of ordering U.S. troops, during the Gulf War, to massacre some 100,000 retreating Iraqi civilians on the "Highway of Death" a day after Saddam Hussein agreed to a cease-fire involving withdrawal from Kuwait.²¹¹

Despite widespread claims that the ICC, as it stands currently, is a watered-down institution which appears strong on paper but is weak in reality, some observers, such as "William Pace, the coalition's coordinator, praised the treaty as 'one of the greatest victories for peace in the last 100 years This is the rule of law prevailing over the rule of brute force.'"²¹² Watered-down tribunal? Victory for peace? Stay tuned.

TOMAS A. KUEHN

206. Lilley, *supra* note 93 (quoting an unnamed advisor to the Lebanese delegation).

207. *See id.*

208. *See id.*

209. *Id.*

210. *See id.*

211. *See id.* (citing the conference publication *Terra Vista*).

212. *See Hughes, supra* note 2.

