

# Global Responsibility and the United States: The Constitutionality of the International Criminal Court

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*As with astronomy the difficulty of recognizing the motion of the earth lay in abandoning the immediate sensation of the earth's fixity and of the motion of the planets, so in history the difficulty of recognizing the subjection of personality to the laws of space, time, and cause, lies in renouncing the direct feeling of the independence of one's own personality.<sup>1</sup>*

## I. Introduction

On July 17, 1998, delegates to the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, meeting in Rome, Italy, established a permanent international criminal court.<sup>2</sup> The Rome Statute of the International Criminal Court ("ICC") was created to facilitate trying individuals responsible for the most serious crimes of global concern, such as genocide, war crimes, and crimes against humanity.<sup>3</sup> The delegates came from states, regional organizations, and non-governmental organizations all over the world, and most of the states' representatives signed this statute with a promise to take it back to their countries for ratification.<sup>4</sup> At the end of the conference, however, the signature of the delegates from one country, the United States, was noticeably absent.<sup>5</sup> The United States has been criticized both at home and abroad for its failure to sign the document. The Clinton

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1. LEO TOLSTOY, *WAR AND PEACE* 1351 (Louise and Aylmer Maude trans., W. W. Norton & Company, Inc. critical ed. 1966).

2. United Nations, *Setting the Record Straight: The International Criminal Court*, at 1, U.N. Doc. DPI/2012 (1998). (Hereinafter, "*Setting the Record Straight*.")

3. *See id.*

4. *See* United Nations, *Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court*, at 9-14, U.N. Doc. A/CONF.183/10 (1998).

5. *See* United Nations, *Rome Statute of the International Criminal Court, Ratification Status* (visited Oct. 12, 1999) <<http://www.un.org/law/icc/statute/status.htm>>.

Administration, Congress, and many American commentators take the view that, in its present form, many provisions of the ICC statute violate the due process clause of the United States Constitution. This Note will review various provisions of the ICC statute and argue that the ICC statute comports with due process requirements. Moreover, this Note will also advocate that the United States sign and ratify the ICC statute and continue to lead the way toward global responsibility for human rights.

## II. The International Criminal Court Statute

The need for an international criminal court was recognized even before World War II.<sup>6</sup> But the Nuremberg and Tokyo war crimes tribunals following that war were the first manifestations of this recognition.<sup>7</sup> The war crimes tribunals marked the first time that the international community attempted to hold individuals and states accountable for serious violations of international law.<sup>8</sup> Unfortunately, the tribunals were also seen as unfair, arising out of post-war victor's justice.<sup>9</sup> Though talk of a permanent criminal court did not end, political indecision stalled possibilities of creating such a tribunal throughout the Cold War era.<sup>10</sup> But serious violations of international law on two continents again renewed interest in creating a permanent court.<sup>11</sup> The recent atrocities committed in the former Yugoslavia and Rwanda horrified the international community to such an extent that the United Nations Security Council created *ad hoc* tribunals to investigate the atrocities and prosecute those individuals allegedly responsible for them.<sup>12</sup> These events led the international community to realize the need for a permanent mechanism through which such atrocities may be investigated and individuals committing crimes of global concern prosecuted.<sup>13</sup>

The preamble of the ICC statute states that "the most serious crimes of concern to the international community as a whole must not go unpunished and . . . their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation."<sup>14</sup> The delegates representing the international commu-

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6. See Paul Marquardt, *Law Without Borders: The Constitutionality of an International Criminal Court*, 33 COLUM. J. TRANSNAT'L L. 73, 80-81 (1995).

7. See *id.* at 81-83.

8. See *id.* at 83.

9. See *id.*

10. See *id.* at 83-84.

11. See *Setting the Record Straight*, *supra* note 2, at 1.

12. See *id.*

13. See *id.*

14. United Nations, *Rome Statute of the International Criminal Court*, July 17, 1998, U.N. Doc. A/CONF.183/9, preamble. (Hereinafter, "ICC statute.")

nity of nations at the Rome Conference voted in favor of the ICC statute overwhelmingly by a margin of 120 in favor to 7 against, with 21 abstentions.<sup>15</sup> This decision stood on a foundation of hope that the vote would usher in a new era of global responsibility and acknowledged that the world's worst human rights criminals must be brought to justice. Thus far, 86 states have signed the ICC statute and four have ratified.<sup>16</sup> The ICC statute will not enter into force until it is ratified by 60 states.<sup>17</sup>

The ICC statute is long and complex, with many clauses providing for a variety of international concerns. Because of this breadth, only a few key provisions will be addressed here. The first is the jurisdiction of the court. When a state ratifies the ICC statute, it accepts the ICC's jurisdiction over all crimes within the scope of the statute.<sup>18</sup> There is, however, one exception to this automatic jurisdiction. This exception allows states to opt out of ICC jurisdiction over war crimes committed on its territory or by its nationals for a period of seven years after the ICC statute enters into force for that particular state.<sup>19</sup> There are preconditions to the ICC's exercise of jurisdiction. Under the ICC statute, the ICC may only exercise its jurisdiction over a matter if the state on whose territory the conduct in question occurred is a party to the statute, or if the state of nationality of the accused is a party to the statute, or if both states are parties.<sup>20</sup> It is important to note, however, that as more states ratify the ICC statute, the closer the ICC statute will come to conferring global jurisdiction over genocide, crimes against humanity, and war crimes.<sup>21</sup>

A second key provision in the ICC statute regards the ICC's relationship to the United Nations Security Council. The Security Council has one specific power over the ICC: it can suspend any investigation or prosecution by the ICC for a twelve-month period,

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15. See United Nations, *U.N. Diplomatic Conference Concludes in Rome with Decision to Establish Permanent International Criminal Court*, U.N. Press Release L/ROM/22 (1998), (visited Oct. 12, 1999) <<http://www.un.org/icc/pressrel/lrom22.htm>>.

16. See United Nations, *Rome Statute of the International Criminal Court, Ratification Status*, *supra* note 5.

17. ICC statute, *supra* note 14, art. 126 (1).

18. See ICC statute, *supra* note 14, art. 120. The ICC statute requires that "[n]o reservations may be made" by any state to any portion of the ICC statute. *Id.*

19. See ICC statute, *supra* note 14, art. 124. The ICC statute enters into force for a particular state either on the first day of the month after the sixtieth day following deposit of the state's ratification or, if the state ratifies before the sixtieth instrument of ratification is deposited with the United Nations, on the day that the statute enters into force generally. ICC statute, *supra* note 14, art. 126. This opt out provision is transitional only, allowing states to come into ICC compliance, and is not renewable after the seven year cut off. ICC statute, *supra* note 14, art. 124.

20. See ICC statute, *supra* note 14, art. 12 (2).

21. See ICC statute, *supra* note 14, art. 5 (1).

which may be renewed.<sup>22</sup> This deferral requires a decision by the Security Council as a whole, so that one state's veto cannot block ICC jurisdiction. Allowing a single veto would cripple the ICC, giving Security Council members control over what matters the ICC may and may not investigate.<sup>23</sup>

A third key provision in the ICC statute deals with protections for accused persons. These protections are numerous, including prohibitions against *ex post facto* laws,<sup>24</sup> double jeopardy,<sup>25</sup> and undue delay;<sup>26</sup> and the rights to counsel<sup>27</sup> and an interpreter.<sup>28</sup> Though it was a hotly debated issue at the Rome Conference and was not included as a protection in the United Nations' *ad hoc* tribunals for the former Yugoslavia and Rwanda, the ICC statute prohibits trials in absentia.<sup>29</sup> The ICC statute permits trials to proceed without the accused in attendance only if the accused is disruptive.<sup>30</sup> But if this occurs, the ICC must take measures to allow the accused to "observe the trial and instruct counsel from outside the courtroom."<sup>31</sup> Because the United States has criticized the ICC statute for lacking other specific constitutional protections, those criticisms are discussed below, so that they may be more fully addressed.

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22. See ICC statute, *supra* note 14, art. 16.

23. See *id.* See also U.N. CHARTER, art. 27.

24. See ICC statute, *supra* note 14, art. 24 (1). The ICC statute states that "[n]o person shall be criminally responsible under this Statute for conduct prior to the entry into force of the Statute." *Id.*

25. See ICC statute, *supra* note 14, art. 20 (1). The ICC statute states that "no person shall be tried before the Court with respect to conduct which formed the basis of crimes for which the person has been convicted or acquitted by the Court." *Id.*

26. See ICC statute, *supra* note 14, art. 67 (1) (c). The ICC statute states that "the accused shall be entitled to . . . be tried without undue delay." ICC statute, *supra* note 14, art. 67 (1) and 67 (1) (c).

27. See ICC statute, *supra* note 14, art. 67 (1) (b). The ICC statute states that the accused is entitled to "have adequate time and facilities for the preparation of the defen[s]e and to communicate freely with counsel of the accused's choosing in confidence." *Id.*

28. See ICC statute, *supra* note 14, art. 67 (1) (f). The ICC statute states that the accused is entitled to "have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness, if any of the proceedings of or documents presented to the Court are not in a language which the accused fully understands and speaks." *Id.*

29. See ICC statute, *supra* note 14, art. 63 (1). See also ICC statute, *supra* note 14, art. 67 (1) (d).

30. See ICC statute, *supra* note 14, art. 63 (2).

31. *Id.*

### III. Specific Concerns of the United States

#### A. United States Constitutional Concerns

##### 1. *Constitutional Criticisms within the United States*

The following sections will analyze particular constitutional concerns articulated by various members of the United States government.<sup>32</sup> Included in these criticisms are arguments that the ICC statute does not guarantee an accused the right to a jury trial,<sup>33</sup> the right to confront witnesses against her,<sup>34</sup> and the privilege against self-incrimination.<sup>35</sup> Additional United States concerns regarding the ICC statute will be addressed in the next section. As discussed below, however, these important constitutional concerns are addressed by the ICC statute and thus do not preclude United States signature and ratification.

Before proceeding, it should be noted that the constitutional guarantees provided to accused persons by the United States Constitution do not apply to persons accused in other nations.<sup>36</sup> The Supreme Court has held that American constitutional rights have no relation to crimes either committed outside the jurisdiction of the United States or to crimes that violate laws of foreign nations.<sup>37</sup> In addition, United States federal courts have also held that the Sixth Amendment does not apply to extradition proceedings, because they are not "criminal prosecutions," as the Sixth Amendment, by its terms, requires.<sup>38</sup> Thus, American citizens accused of crimes in foreign jurisdictions are not guaranteed their rights under the United States Constitution. However, the ICC statute does offer anyone subject to its jurisdiction "minimum guarantees" which are very similar to the United States' Bill of Rights and which may not be available to

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32. See Ambassador David J. Scheffer, *The Establishment of a Permanent International Criminal Court: Testimony Before the Senate Foreign Relations Committee* (visited Mar. 16, 1999) <[http://www.state.gov/www/policy\\_remarks/1998/980723\\_scheffer\\_icc.html](http://www.state.gov/www/policy_remarks/1998/980723_scheffer_icc.html)>; see also 144 CONG. REC. S8554 (daily ed. July 20, 1998) (statement of Sen. Ashcroft).

33. See 144 CONG. REC. S8554 *supra*, note 32.

34. See *id.*

35. See *id.*

36. See U.S. CONST. amend. XI; see also Kenneth J. Harris and Robert Kushen, *Prosecuting International Crime: Surrender of Fugitives to the War Crimes Tribunals for Yugoslavia and Rwanda: Squaring International Legal Obligations with the U.S. Constitution*, 7 CRIM. L.F. 561, 597 (1996).

37. See *Neely v. Henkel*, 180 U.S. 109, 122 (1901).

38. See *Martin v. Warden*, 993 F.2d 824, 825 (11th Cir. 1993) (holding that there is no due process right to a "speedy extradition"); *Oen Yin-Choy v. Robinson*, 858 F.2d 1400, 1406 (9th Cir. 1988) (confirming that the right to confront adverse witnesses does not apply to extradition); *Taylor v. Jackson*, 470 F. Supp. 1290, 1292 (S.D.N.Y. 1979) (holding that the right to counsel does not apply to extradition).

American citizens tried in foreign national courts.<sup>39</sup> Thus, the ICC statute may, in many cases, offer accused persons more protections than if they were to be tried in various national courts. These protections are similar to the protections offered to accused persons in the United States.

## 2. *Right to a Jury Trial*

The first major constitutional criticism articulated by the United States is that the ICC statute does not offer an accused person the right to a jury of his peers.<sup>40</sup> The United States Constitution guarantees the accused the right to “an impartial jury.”<sup>41</sup> The Supreme Court has stated that “a general grant of jury trial for serious offenses is a fundamental right, essential for preventing miscarriages of justice and for assuring that fair trials are provided for all defendants.”<sup>42</sup> The ICC statute, however, does not allow for a trial by jury. Rather, the ICC statute provides that a judicial Trial Chamber decide each case.<sup>43</sup>

The Trial Chamber, made up of an unspecified number of judges, “shall attempt to achieve unanimity in their decision, failing which the decision shall be taken by a majority of the judges.”<sup>44</sup> The Trial Chamber of the ICC works the way a federal appellate court works in the United States. The Trial Chamber’s decision must be in writing and “contain a full and reasoned statement of the Trial Chamber’s findings on the evidence and conclusions.”<sup>45</sup> When the decision is not unanimous, the decision must contain both the views of the majority and the dissenting minority.<sup>46</sup>

A jury trial is often considered a fundamental right in the United States. But it is not feasible in the context of the ICC. First, the ICC will be located at the Hague in the Netherlands.<sup>47</sup> Of whom would the jury be composed? A jury would have to be composed solely of Dutch citizens or, perhaps, citizens of the Netherlands and nearby European countries. A composition such as this would not be representative of a global court. Yet, to have jurors from all over the world would be astronomically expensive. The jurors would have to be transported from their home countries, given room and board while jurors at the Hague, and transported back again. This would have to be done for every case tried before the ICC.

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39. ICC statute, *supra* note 14, art. 67 (1).

40. See 144 CONG. REC. S8554 (daily ed. July 20, 1998) (statement of Sen. Ashcroft).

41. U.S. CONST. amend. VI.

42. *Duncan v. Louisiana*, 391 U.S. 145, 157-58 (1968).

43. See ICC statute, *supra* note 14, art. 74.

44. ICC statute, *supra* note 14, art. 74 (3).

45. ICC statute, *supra* note 14, art. 74 (5).

46. See *id.*

47. See ICC statute, *supra* note 14, art. 3 (1).

Second, if the above were possible, there would be many additional concerns, both financial and judicial, such as the cost of interpreters for each juror. An interpreter for each juror would be very expensive, especially because they would have to be paid in each case and for every juror. And even with interpreters, how would the defense and the prosecution be able to articulate fully their cases to the jurors through the additional funnel of these varying interpretations of their words? Surely, these considerations show that jury trials in the ICC would not “preven[t] miscarriages of justice and . . . assur[e] . . . fair trials”<sup>48</sup> but could, in fact, themselves create unjust and unfair trials.

Finally, bench trials within the United States are not considered fundamentally unfair.<sup>49</sup> Rather, the decisions reached by judges in criminal bench trials stand just as strongly in the eyes of the law as those reached through jury trials.<sup>50</sup> The Supreme Court has stated that it “would not assert . . . that every criminal trial – or any particular trial – held before a judge alone is unfair or that a defendant may never be as fairly treated by a judge as he would be by a jury.”<sup>51</sup> Also, American citizens tried in foreign jurisdictions would not necessarily be guaranteed rights such as those in the ICC statute.<sup>52</sup> In accord with the view of the United Nations, the ICC statute “establishes the highest international standards and guarantees of due process and fair trial.”<sup>53</sup> Given all of these considerations, the ICC statute’s use of a bench trial with a panel of judges comports with the United States’ standard of due process so this portion of the statute does not compel a finding of unconstitutionality.

### 3. *Right to Confront Witnesses Against the Accused*

The second major constitutional criticism articulated by the United States is that the ICC statute does not offer an accused person the right to confront witnesses against him.<sup>54</sup> The United States Constitution guarantees an accused person the right “to be confronted with the witnesses against him.”<sup>55</sup> The Supreme Court has concluded that the right to confront the witnesses against an accused is “a fundamental right.”<sup>56</sup> Critics of the ICC statute claim that this right is not guaranteed by the ICC statute, which renders the statute unconstitu-

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48. *Duncan*, 391 U.S. at 158.

49. *See id.*

50. *See id.*

51. *Id.*

52. *See Harris and Kushen, supra* note 36, at 598.

53. *Setting the Record Straight, supra* note 2, at 2.

54. *See* 144 CONG. REC. S8554 (daily ed. July 20, 1998) (statement of Sen. Ashcroft).

55. U.S. CONST. amend. VI.

56. *Pointer v. Texas*, 380 U.S. 400, 403 (1965).

tional.<sup>57</sup> But the ICC statute does give an accused the right to confront witnesses against her. The ICC statute provides, among its minimum guarantees, that an accused has the right “[t]o examine, or have examined, the witnesses against him or her.”<sup>58</sup> The statute also provides that the “testimony of a witness at trial shall be given in person.”<sup>59</sup> There is a limited exception to this guarantee, but it only applies “to protect the safety, physical and psychological well-being, dignity, and privacy of victims and witnesses.”<sup>60</sup> In limited circumstances, to protect victims and witnesses, the statute allows in camera testimony by electronic or other special means.<sup>61</sup> To emphasize the limited nature of this exception, the ICC statute itself states that “[i]n particular, such measures shall be implemented in the case of a victim of sexual violence or a child who is a victim or a witness, unless otherwise ordered by the Court, having regard to all the circumstances.”<sup>62</sup> In addition, and most importantly, the ICC statute notes after each mention of this exception that “[t]hese measures shall not be prejudicial to or inconsistent with the rights of the accused.”<sup>63</sup> The United States’ own judicial system allows for this type of limited exception in criminal trials.<sup>64</sup> For example, the Supreme Court held in *Maryland v. Craig* that

where necessary to protect a child witness from trauma that would be caused by testifying in the physical presence of the defendant, at least where such trauma would impair the child’s ability to communicate, the Confrontation Clause does not prohibit use of a procedure that, despite the absence of face-to-face confrontation, ensures the reliability of the evidence by subjecting it to rigorous adversarial testing and thereby preserves the essence of effective confrontation.<sup>65</sup>

In *Craig*, the Court allowed the use of a one-way closed circuit television to protect a child victim of sexual abuse during the child’s testimony.<sup>66</sup> The *Craig* court even used the same language as used in the limited exception of the ICC statute: “a State’s interest in the *physical and psychological well-being* of child abuse victims may be sufficiently important to outweigh, at least in some cases, a defend-

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57. See 144 CONG. REC. S8554 (daily ed. July 20, 1998) (statement of Sen. Ashcroft).

58. ICC statute, *supra* note 14, art. 67 (1) (e).

59. ICC statute, *supra* note 14, art. 69 (2).

60. ICC statute, *supra* note 14, art. 68 (1).

61. See ICC statute, *supra* note 14, art. 68 (2). These means include video or audio technology, documents, and written transcripts. See ICC statute, *supra* note 14, art. 69 (2).

62. ICC statute, *supra* note 14, art. 68 (2).

63. ICC statute, *supra* note 14, art. 69 (2); see also ICC statute, *supra* note 14, art. 68 (1); and ICC statute, *supra* note 14, art. 68 (2).

64. See *Maryland v. Craig*, 497 U.S. 836, 844 (1990).

65. *Id.* at 857.

66. See *id.* at 852.



ant's right to face his or her accusers in court."<sup>67</sup> The ICC statute does offer the right for an accused to confront witnesses against her. Therefore, this portion of the statute does not compel a finding of unconstitutionality.

#### 4. *Privilege Against Self-incrimination*

The third major constitutional criticism articulated by the United States is that the ICC statute does not offer an accused person the privilege against self-incrimination.<sup>68</sup> The United States Constitution guarantees that the accused shall not be compelled in any criminal case to be a witness against himself.<sup>69</sup> The Supreme Court has reinforced the importance of "the Fifth Amendment's exception from compulsory self-incrimination."<sup>70</sup> The ICC statute likewise offers this protection, both to a suspect and to an accused.<sup>71</sup> First, the ICC statute requires that a suspect of an investigation "[s]hall not be compelled to incriminate himself or herself or to confess guilt."<sup>72</sup> Similarly, the ICC statute also requires that an accused person is "[n]ot to be compelled to testify or to confess guilt and [be allowed] to remain silent, without such silence being a consideration in the determination of guilt or innocence."<sup>73</sup> The ICC statute's guarantee is virtually identical to the guarantee offered by the United States constitution. Because the ICC statute offers an accused the privilege against self-incrimination, this portion of the statute likewise does not compel a finding of unconstitutionality.

#### 5. *Criminal Liability for Ill-defined Crimes*

The fourth major constitutional criticism articulated by the United States is that the ICC statute imposes criminal liability for crimes which are not well-defined or specific enough to meet constitutional standards.<sup>74</sup> The United States Constitution prohibits criminal liability for ill-defined crimes as a due process violation.<sup>75</sup> Due process requires statutory specificity "to give due notice that an act has been made criminal before it is done and to inform [an] accused of the

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67. *Id.* at 857 (emphasis added); *cf.* ICC statute, *supra* note 14, art. 68 (1).

68. See 144 CONG. REC. S8554 (daily ed. July 20, 1998) (statement of Sen. Ashcroft).

69. See U.S. CONST. amend. V.

70. *Mallory v. Hogan*, 378 U.S. 1, 6 (1964).

71. See ICC statute, *supra* note 14, art. 55 (1) (a) and ICC statute, *supra* note 14, art. 67 (1) (g).

72. ICC statute, *supra* note 14, art. 55 (1) (a).

73. ICC statute, *supra* note 14, art. 67 (1) (g).

74. See 144 CONG. REC. S8554 (daily ed. July 20, 1998) (statement of Sen. Ashcroft).

75. See U.S. CONST. amend. V; *Jordan v. De George*, 341 U.S. 223, 230 (1951) (citing *Lanzetta v. New Jersey*, 306 U.S. 451 (1939)) (noting that the "Court has repeatedly stated that criminal statutes which fail to give due notice that an act has been made criminal before it is done are unconstitutional deprivations of due process of law.").

nature of the offense charged, so that he may adequately prepare and make his defense.”<sup>76</sup> This is not an issue under the ICC statute because the crimes under its jurisdiction are limited, specific, and well-defined. The ICC statute states that a “person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court.”<sup>77</sup> There are only four crimes within the jurisdiction of the ICC; its jurisdiction is limited to only “the most serious crimes of concern to the international community as a whole.”<sup>78</sup> The four crimes within ICC jurisdiction are the crime of genocide,<sup>79</sup> crimes against humanity,<sup>80</sup> war crimes,<sup>81</sup> and the crime of aggression.<sup>82</sup>

The delegates at the Rome Conference, however, were unable to agree upon a definition for the crime of aggression, so they deferred defining it as a crime within the statute until a working definition can be determined.<sup>83</sup> This makes the crime of aggression merely exhibitory, because the ICC can only exercise jurisdiction over aggression once the ICC statute is amended to include a definition of the crime and the circumstances in which it can be prosecuted.<sup>84</sup> Yet, according to the ICC statute, any crime may be added to the statute by amendment, so this provision has little actual effect other than as an expression of the delegates’ intent to include the crime of aggression in the future.<sup>85</sup> In regard to a future definition of the crime of aggression, the ICC statute requires that a provision “be consistent with the relevant provisions of the Charter of the United Nations.”<sup>86</sup> Under the

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76. *Screws v. United States*, 325 U.S. 91, 128 (1945) (Rutledge, J., concurring).

77. ICC statute, *supra* note 14, art. 22 (1).

78. ICC statute, *supra* note 14, art. 5 (1).

79. See ICC statute, *supra* note 14, art. 5 (1) (a). The ICC statute defines genocide as one or more of five acts “committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group.” ICC statute, *supra* note 14, art. 6. These five acts are (1) “[k]illing members of the group,” (2) “[c]ausing serious bodily or mental harm to members of the group,” (3) “[d]eliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part,” (4) “[i]mposing measures intended to prevent births within the group,” and (5) “[f]orcibly transferring children of the group to another group.” *Id.*

80. See ICC statute, *supra* note 14, art. 5 (1) (b). The ICC statute defines a crime against humanity as one or more of 11 acts, such as murder, “committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.” ICC statute, *supra* note 14, art. 7(1).

81. See ICC statute, *supra* note 14, art. 5 (1) (c). The ICC statute defines war crimes as “[g]rave breaches of the Geneva Conventions” and other serious violations of the laws and customs surrounding armed conflict “committed as a part of a plan or policy or as part of a large-scale commission of such crimes.” ICC statute, *supra* note 14, art. 8.

82. See ICC statute, *supra* note 14, art. 5 (1) (d).

83. See *Setting the Record Straight*, *supra* note 2, at 1.

84. See ICC statute, *supra* note 14, art. 5 (2).

85. See ICC statute, *supra* note 14, art. 121.

86. ICC statute, *supra* note 14, art. 5 (2).

United Nations Charter, a crime of aggression could not be investigated or prosecuted until the Security Council makes a prior determination that an act of aggression has occurred.<sup>87</sup> As a permanent member of the Security Council, the United States holds enormous power to determine whether any act would be prosecuted under the ICC statute as a crime of aggression.<sup>88</sup> This provision moots any concern on the part of the United States that its troops stationed in foreign lands might be prosecuted by the ICC for crimes of aggression. If this situation ever surfaced, the United States could easily use its power on the Security Council to find that no crime of aggression had occurred.

The three other crimes listed above are defined within the ICC statute.<sup>89</sup> The ICC's definition of genocide<sup>90</sup> is the same as the definition contained in the 1948 Genocide Convention<sup>91</sup> and is well established in international law.<sup>92</sup> The ICC's definition of crimes against humanity<sup>93</sup> is culled from many existing legal instruments<sup>94</sup> and is also well established in international law.<sup>95</sup> In fact, the thresholds required

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87. See U.N. CHARTER, art. 39.

88. See U.N. CHARTER, art. 23, para. 1.

89. See ICC statute, *supra* note 14, art. 6 (definition of genocide); ICC statute, *supra* note 14, art. 7 (definition of crimes against humanity); and ICC statute, *supra* note 15, art. 8 (definition of war crimes).

90. See ICC statute, *supra* note 14, art. 6.

91. See Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277. The United States ratified this convention on Nov. 25, 1988. See United Nations Treaty Database (visited Oct. 12, 1999) <[http://www.un.org/Depts/Treaty/final/ts2/newfiles/part\\_boo/iv\\_boo/iv\\_1.html](http://www.un.org/Depts/Treaty/final/ts2/newfiles/part_boo/iv_boo/iv_1.html)>.

92. The Genocide Convention has been ratified by 129 nations. See United Nations Treaty Database (visited Oct. 12, 1999) <[http://www.un.org/Depts/Treaty/final/ts2/newfiles/part\\_boo/iv\\_boo/iv\\_1.html](http://www.un.org/Depts/Treaty/final/ts2/newfiles/part_boo/iv_boo/iv_1.html)>.

93. See ICC statute, *supra* note 14, art. 7.

94. These include the Universal Declaration of Human Rights, Dec. 10, 1948, G.A. Res. 217A, U.N. GAOR, 3d Sess., Pt. 1, at 71, U.N. Doc. A/810 (1948); the International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3; and the International Covenant on Civil and Political Rights, Dec. 16, 1966, 993 U.N.T.S. 171. The United States representative to the United Nations voted for the Universal Declaration of Human Rights on Dec. 10, 1948. See United Nations, *Fiftieth Anniversary of the Universal Declaration of Human Rights, Press Kit* (visited Oct. 12, 1999) <<http://www.un.org/rights/50/carta.htm>>. The United States signed the International Covenant on Economic, Social and Cultural Rights on Oct. 5, 1977, but has not yet ratified it. See United Nations Treaty Database (visited Oct. 12, 1999) <[http://www.un.org/Depts/Treaty/final/ts2/newfiles/part\\_boo/iv\\_boo/iv\\_3.html](http://www.un.org/Depts/Treaty/final/ts2/newfiles/part_boo/iv_boo/iv_3.html)>. The United States ratified the International Covenant on Civil and Political Rights on June 8, 1992. See United Nations Treaty Database (visited Oct. 12, 1999) <[http://www.un.org/Depts/Treaty/final/ts2/newfiles/part\\_boo/iv\\_boo/iv\\_4.html](http://www.un.org/Depts/Treaty/final/ts2/newfiles/part_boo/iv_boo/iv_4.html)>.

95. The members of the United Nations' General Assembly voted 48 to zero, with eight abstentions, for the Universal Declaration of Human Rights on Dec. 10, 1948. See United Nations, *Fiftieth Anniversary of the Universal Declaration of Human Rights, Press Kit* (visited Oct. 12, 1999) <<http://www.un.org/rights/50/carta.htm>>. The International Cov-

for any act to constitute a crime against humanity under the ICC statute are actually more restrictive than existing legal documents on the subject. The ICC statute requires that there be “multiple commission of acts” and that they be carried out “pursuant to or in furtherance of a State or organizational policy.”<sup>96</sup> These dual requirements, coupled with the requirement that the acts be carried out “with knowledge of the attack,”<sup>97</sup> impose a very high threshold for acts to be considered crimes against humanity in the context of the ICC. Thus, any act prosecuted under the ICC statute as a crime against humanity must meet standards stricter than those imposed in existing international legal instruments.

The ICC’s definition of war crimes<sup>98</sup> is also taken from established provisions of international law, principally the Hague Convention<sup>99</sup> and the four Geneva Conventions,<sup>100</sup> and their optional protocols.<sup>101</sup> All of these documents show that the definition of war crimes in the ICC statute is a well-established definition in interna-

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enant on Economic, Social and Cultural Rights has been ratified by 142 nations. See United Nations Treaty Database (visited Oct. 12, 1999) <[http://www.un.org/Depts/Treaty/final/ts2/newfiles/part\\_booviv\\_booviv\\_3.html](http://www.un.org/Depts/Treaty/final/ts2/newfiles/part_booviv_booviv_3.html)>. The International Covenant on Civil and Political Rights has been ratified by 144 nations. See United Nations Treaty Database (visited Oct. 12, 1999) <[http://www.un.org/Depts/Treaty/final/ts2/newfiles/part\\_booviv\\_booviv\\_4.html](http://www.un.org/Depts/Treaty/final/ts2/newfiles/part_booviv_booviv_4.html)>.

96. ICC statute, *supra* note 14, art. 7 (2) (a).

97. ICC statute, *supra* note 14, art. 7 (1).

98. See ICC statute, *supra* note 14, art. 8.

99. See Convention (No. IV) Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 1 U.S.T.S. 539, entered into force Jan. 26, 1910. The United States ratified this convention on Nov. 27, 1909. See University of Minnesota Human Rights Library (visited Oct. 12, 1999) <<http://www1.umn.edu/humanrts/instree/1907c.htm>>.

100. See Convention (No. I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 75 U.N.T.S. 31, 6 U.S.T.S. 3114, entered into force Oct. 21, 1950; Convention (No. II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 75 U.N.T.S. 85, 6 U.S.T.S. 3114, entered into force Oct. 21, 1950; Convention (No. III) relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S. 135, 6 U.S.T.S. 3114, entered into force Oct. 21, 1950; and Convention (No. IV) relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287, 6 U.S.T.S. 3114, entered into force Oct. 21, 1950. The United States ratified these conventions on Aug. 2, 1955. See University of Minnesota Human Rights Library (visited Oct. 12, 1999) <<http://www1.umn.edu/humanrts/instree/auoy.htm>>.

101. See Protocol Additional (No. I) to the Geneva Conventions of August 12, 1949, and relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 16 I.L.M. 1391 (1977), entered into force Dec. 7, 1978; and Protocol Additional (No. II) to the Geneva Conventions of August 12, 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 16 I.L.M. 1442 (1977), entered into force Dec. 7, 1978. The United States signed both protocols on Dec. 12, 1977, but has not yet ratified them. See University of Minnesota Human Rights Library (visited Oct. 12, 1999) <<http://www1.umn.edu/humanrts/instree/1977a.htm>>. Yet the first protocol has been ratified by 147 nations and the second by 139 nations. See *id.*

tional law.<sup>102</sup> Thus, all three of the crimes currently defined within the ICC statute meet the requirements of notice and specificity demanded by the United States Constitution.

## **B. Other Aspects of the ICC Statute Addressing United States Concerns**

### *1. Complementarity to National Legal Systems*

Perhaps the most important provision of the ICC statute is its relationship to national legal systems. The ICC statute provides that the ICC “shall be complementary to national criminal jurisdictions.”<sup>103</sup> This system of complementarity is a threshold of admissibility, which applies to ensure that the ICC will have jurisdiction only in exceptional cases, as a sort of international safety net to prevent impunity for serious international crimes.<sup>104</sup> The ICC statute requires that cases “being investigated or prosecuted by a State which has jurisdiction over [them]”<sup>105</sup> and cases that already “ha[ve] been investigated by a State which has jurisdiction over [them] and the State has decided not to prosecute the person[s] concerned”<sup>106</sup> are not admissible to the ICC. Those cases do not meet the ICC statute’s threshold of admissibility because those cases are already being dealt with by national legal systems.

There is, however, an exception to this threshold of admissibility. Under the ICC statute, the ICC may determine that a case is admissible before it if the state concerned “is unwilling or unable genuinely to carry out the investigation or prosecution.”<sup>107</sup> The ICC statute defines the first standard, “unwillingness,” in one of three ways.<sup>108</sup> First, a state is unwilling when its proceedings were made “for the purpose of shielding the person concerned.”<sup>109</sup> Second, a state is unwilling when there is “an unjustified delay” in proceedings by the state under circumstances “inconsistent with an intent to bring the person concerned to justice.”<sup>110</sup> And third, a state is unwilling when its proceedings “were not or are not being conducted independently or impartially” but were or are being conducted under circumstances “in-

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102. The four Geneva Conventions have each been ratified by 188 nations. See United Nations Treaty Database (visited Mar. 16, 1999) <<http://www.un.org/Depts/Treaty>>. As stated above, the two protocols have each been ratified by approximately 140 nations. See *id.*

103. ICC statute, *supra* note 14, art. 1. See also ICC statute, *supra* note 15, preamble.

104. See ICC statute, *supra* note 14, art. 17.

105. *Id.* art. 17 (1) (a).

106. *Id.* art. 17 (1) (b).

107. *Id.* art. 17 (1) (a) and (b).

108. See *id.* art. 17 (2).

109. *Id.* art. 17 (2) (a).

110. *Id.* art. 17 (2) (b).

consistent with an intent to bring the person concerned to justice.”<sup>111</sup>

The ICC statute defines the second standard, “inability,” as a situation in which, “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.”<sup>112</sup> Thus, a state that is both willing and able to investigate and, if required, prosecute a matter may proceed, even if the matter concerned would otherwise fall into one of the crimes under the ICC statute’s limited jurisdiction.

The main and most salient concern of the United States is that its armed forces could conceivably be brought before the ICC and prosecuted for acts they commit abroad while involved in humanitarian assistance or peacekeeping.<sup>113</sup> This concern is without merit for three reasons. First and foremost, the ICC statute’s system of complementarity and its deference to national legal systems provide the best assurance for the United States that United States citizens are unlikely ever to be tried by the ICC, unless the United States government itself allows it.<sup>114</sup>

Second, as commentators have stated, the United States government’s peacekeeping and humanitarian interventions are generally recognized by the international community as in the general interest and respectful of international law.<sup>115</sup> If there is no violation of international law by American troops abroad, there is no crime and thus no need to bring anyone to trial. The ICC would not be relevant in such a situation because no crime was committed that need be prosecuted. Nevertheless, when the United States does act with strong-arm tactics and violates international law in pursuit of narrow American interests while not maintaining international world order, why should Americans who commit atrocities not be tried and held accountable for their actions? Why should the citizens of one state be immune from standards applicable to the rest of the global community? Under the complementary system of the ICC statute, the United States can try their own nationals within the United States. The horror of atrocities such as genocide, crimes against humanity, and war crimes is not lessened if they are committed by persons who happen to be American citizens. Sheltering such persons under an umbrella of military might simply because they are American citizens would allow the political powers of the world to dominate every determination, rather than allow the entire international community, through the ICC, to

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111. *Id.* art. 17 (2) (c).

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

113. See Scheffer, *supra* note 32; see also 144 CONG. REC. S8554 *supra*, note 32.

114. See ICC statute, *supra* note 14, art. 17.

115. See William Pfaff, *U.S. Policy on U.N. Court Gives Tacit Approval to Lawlessness*, BALTIMORE SUN, Aug. 12, 1998, at 15A.

bring justice to matters involving "the most serious crimes of international concern."<sup>116</sup> Allowing sheer power to determine right would certainly be wrong.

Third, the ICC statute is meant to protect persons working with international humanitarian assistance programs as well as international peacekeepers.<sup>117</sup> The ICC statute specifically states that it is a war crime to attack "personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict."<sup>118</sup> Intentionally directing attacks against such personnel or objects is considered a war crime under the ICC statute.<sup>119</sup> If the United States is truly concerned about the members of its armed forces serving abroad, the United States should accept the ICC statute to ensure that they are adequately protected.

In conclusion, it must again be emphasized that the ICC statute's complementary system and its deference to national legal systems provide the best assurance for the United States that its citizens are unlikely ever to be tried by the ICC without United States approval. It is hard to imagine a situation in which the United States would be unwilling or unable to investigate or prosecute a crime within its national legal system, the threshold required for a crime to be admissible into the jurisdiction of the ICC. Interested states, under the ICC statute, have primacy over the ICC when they are willing and able to genuinely proceed.<sup>120</sup>

## 2. *Limitations on the Authority of the Prosecutor*

The ICC is composed of four organs, one of which is the office of the prosecutor.<sup>121</sup> The ICC prosecutor is elected through a secret ballot by an absolute majority of the states party to the ICC statute.<sup>122</sup> The United States has criticized the ICC statute by claiming that there are few or no limits on the ICC prosecutor.<sup>123</sup> The United States has claimed that the independence of the ICC prosecutor "will encourage

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116. ICC statute, *supra* note 14, art. 1.

117. See ICC statute, *supra* note 14, art. 8 (2) (b) (iii) & (xxiv); ICC statute, *supra* note 14, art. 8 (2) (e) (ii) & (iii).

118. ICC statute, *supra* note 14, art. 8 (2) (b) (iii).

119. See *id.*

120. See ICC statute, *supra* note 14, art. 17 (1).

121. See ICC statute, *supra* note 14, art. 34. The four organs are (a) the Presidency, (b) an Appeals Division, a Trial Division, and a Pre-Trial Division, (c) the Office of the Prosecutor, and (d) the Registry. *Id.* See also ICC statute, *supra* note 14, art. 42.

122. See ICC statute, *supra* note 14, art. 42 (4).

123. See Scheffer, *supra* note 32; see also 144 CONG. REC. S8554 (daily ed. July 20, 1998) (statement of Sen. Ashcroft).

overwhelming the court with complaints and risk diversion of its resources, as well as embroil the court in controversy, political decision-making, and confusion."<sup>124</sup> This is not true.

There are numerous limitations on the authority of the prosecutor. For example, the ICC prosecutor is prohibited from participating in any matter in which her impartiality "might reasonably be doubted on any ground."<sup>125</sup> In such cases, the prosecutor must be disqualified, as determined by the Appeals Chamber of the ICC.<sup>126</sup>

There are three entities that may initiate an investigation.<sup>127</sup> The prosecutor may investigate when a state party to the ICC statute refers the matter,<sup>128</sup> when the United Nations Security Council refers the matter,<sup>129</sup> or when the prosecutor herself initiates investigation of the matter.<sup>130</sup> The prosecutor's *proprio motu* power is the United States' biggest criticism of the ICC prosecutor.<sup>131</sup> But there are checks and balances built into this process. First, the prosecutor cannot begin an investigation until she has permission from the Pre-trial Chamber, composed of three judges.<sup>132</sup> Second, the prosecutor's investigations at the site of alleged crimes are only possible where the relevant national authorities are unavailable themselves to take the necessary investigative steps.<sup>133</sup> Third, the prosecutor may be present and assist national authorities in their investigations only if such is not prohibited by the applicable national law.<sup>134</sup> Fourth, the suspect and any interested states may challenge the prosecutor's investigation.<sup>135</sup> Fifth, the accused and all interested states may challenge the jurisdiction of the ICC or the admissibility of the matter at issue at the trial stage.<sup>136</sup> Sixth, as discussed above, the prosecutor is obliged to defer to states willing and able to pursue their own investigations.<sup>137</sup> And finally, the United Nations Security Council may request the ICC to defer the investigation or prosecution of a particular case for renewable periods of 12 months.<sup>138</sup>

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124. *Id.*

125. ICC statute, *supra* note 14, art. 42 (7).

126. *See id.*; *see also* ICC statute, *supra* note 14, art. 42 (8).

127. *See* ICC statute, *supra* note 14, art. 13.

128. *See* ICC statute, *supra* note 14, art. 13 (a).

129. *See* ICC statute, *supra* note 14, art. 13 (b).

130. *See* ICC statute, *supra* note 14, art. 13 (c); *see generally* ICC statute, *supra* note 14, art. 15.

131. *See* Scheffer, *supra* note 32.

132. *See* ICC statute, *supra* note 14, art. 15 (3).

133. *See* ICC statute, *supra* note 14, art. 57 (3).

134. *See* ICC statute, *supra* note 14, art. 99 (1).

135. *See* ICC statute, *supra* note 14, art. 18.

136. *See* ICC statute, *supra* note 14, art. 19 (2).

137. *See* ICC statute, *supra* note 14, art. 17 (1).

138. *See* ICC statute, *supra* note 14, art. 16.



A *proprio motu* prosecutor is necessary to ensure that international crimes are investigated and prosecuted, especially when states and the Security Council fail to respond to matters for political reasons. Given all of the limitations above, the *proprio motu* prosecutor actually protects against “controversy, political decision-making, and confusion,”<sup>139</sup> the United States’ pronounced concerns.

#### IV. Conclusion

The ICC has enormous potential to limit impunity for “the most serious crimes of international concern,”<sup>140</sup> to provide justice for victims, and to deter future atrocities. The ICC statute itself, given its overwhelming support in the international community, represents a major achievement for international human rights. It offers accused persons a myriad of protections, conforms to the requirements of the United States Constitution, and comports with “the highest international standards and guarantees of due process and fair trial.”<sup>141</sup> As the most powerful nation in the world, and one that advocates human rights within the world forum, the United States should sign and ratify the ICC statute. This would ensure that the United States maintains its role as a leader in promoting international human rights. It would also ensure that the United States has a voice in the evolution of the ICC as a strong and effective global court, a court that is an essential stride toward global responsibility for human rights.

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139. Scheffer, *supra* note 32.

140. ICC statute, *supra* note 14, art. 1.

141. *Setting the Record Straight*, *supra* note 2, at 1.

