The Challenge To Create A System Of International Criminal Justice

By Vanessa von Struensee*

The United States and the International Criminal Court: National Security and International Law, Edited by Sarah B. Sewall and Carl Kaysen, Oxford, England: Rowman and Littlefield Publishers, Inc., 2000. 288pp.

The reasons for the United States government's opposition to the International Criminal Court (ICC) are presented in this book as well as counterarguments in support of U.S. participation, all in an accessible way to the layperson. The book was published in the context of legislation that would have outlawed American participation in the ICC, "the American Serviceman Protection Act of 2000", which ultimately, narrowly, did not pass. Legal, political, and military experts examine the relationship of the International Criminal Court to U.S. national security interests. The work frames the ongoing debates about the U.S. position toward the ICC and contains all of the practical information a citizen needs to evaluate the International Criminal Court. It is not hypertechinical, but is comprehensive. Ambassador's Scheffer's role and the U.S. shaping of the ICC is interesting reading. Americans seeking to understand how the United States should view the proposed ICC will be primed on the opposing views dominating public debate about the Court.

The volume is dated and it is time for a second edition which will discuss the ICC now that it actually exists. The International Criminal Court (ICC) was created on July 17, 1998 under the Rome Statute adopted by the United Nations Diplomatic Conference on Plenipotentiaries on the Establishment of an International Criminal Court.[1] Under the Statute, the ICC has jurisdiction over crimes of genocide, certain crimes against humanity, and certain war crimes, leaving the crime of aggression for further definition.[2]

A second edition would also contain examinations and analyses of the signing by the Clinton administration on December 31, 2001 and subsequent unsigning[3] of the ICC treaty on May 6, 2002, when the Bush Administration delivered a letter to the Secretary-

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[1] United Nations: Rome Statute of the International Criminal Court, U.N. Doc. No. A/CONF.183/9 (July 17, 1998), *reprinted in* 37 INT'L LEGAL MATERIALS 999 (1998) [hereinafter ICC Statute].

[2] *See id.* art. 5.

[3] The United States signed the SICC in January 2001 just before the UN deadline expired. *See* Scottish Parliament, *The Permanent International Criminal Court*, January 18, 2001, available at http://www.scottish.parliament.uk/business/ research/pdf_res_notes/rn01-08.pdf (last visited February 3, 2005). The Bush Administration later unsigned it in May 2002.

General of the United Nations giving formal notice that the U.S. has no intention of becoming a party to the Rome Statute of the International Criminal Court. The letter also requested that the U.S. declaration be reflected in the Rome treaty's official status list canceling out the U.S. signature to the treaty that was entered by the Clinton administration. This measure referred to as "unsigning" [4] set the United States in opposition to the ICC, which came into existence on July 1 2002.[5] Since the book' s 2000 publication other key events have occurred: September 11, the Iraq War, detainee abuse at Abu Ghraib, detainee abuse at Guantanamo Bay[6] and the Bush administration's [7]cutting aid to those who support the ICC. [8]

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[4] On 6 May 2002, the United States formally renounced its signature of the Rome Statute of the ICC, authorized on 31 December 2000 under former President Bill Clinton. Speaking on behalf of the Bush Administration, Under Secretary for Political Affairs Marc Grossman described the Rome Statute as a "flawed outcome," built on a "flawed foundation." Mr. Grossman outlined, in considerable detail, the objections of the United States towards the Rome Statute, claiming these reservations were serious enough for the US to withdraw its participation in the process. While reaffirming the commitment of the United States to justice and international law, Grossman expressed the Bush administration's disapproval of the ICC by raising a variety of concerns about the Court and its functioning. Marc Grossman, Under Secretary for Political Affairs, Remarks to the Center for Strategic and International Studies, *American Foreign Policy and the International Criminal Court*, Washington, DC, May 6, 2002 available at http://www.state.gov/p/9949.htm (last visited February 4, 2005).

[5] Rome Statute of the International Criminal Court, July 17, 1998, Arts. 17-20, UN Doc. A/CONF.183/9*, 37 ILM 1002 (1998), corrected through Jan. 16, 2002, at <http://www.icc-cpi.int/> [hereinafter ICC Statute]. For an analysis of these provisions, see John T. Holmes, Complementarity: National Courts Versus the ICC, in 1 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 667 (Antonio Cassese, Paola Gaeta, & John R. W. D. Jones eds., 2002) [hereinafter THE ROME STATUTE]; Jann K. Kleffner, The Impact of Complementarity on National Implementation of Substantive International Criminal Law, 1 J. INT'L CRIM. JUST. 86 (2003).

[6] *See generally* Human Rights Watch, *Abu Ghraib, Darfur: Call for Prosecutions*, January 13, 2005, available at http://www.hrw.org/english/docs/2005/01/07/global9968.htm (last visited February 4, 2005). Winston Nagan, "*The New Bush National Security Doctrine and the Rule of Law*." Berkeley Journal of International Law 22: 375-438 (2004); *See also* Dana Priest, "*Detainees Secretly Taken Out of Iraq: Practice Called Breach of Geneva Conventions*." The Washington Post (October 24, 2004); *See, e.g.*, James R. Schlesinger, *Final Report of the Independent Panel to Review Department of Defense Detention Operations*, 2004 available at http://www.dod.gov/releases/2004/nr20040824-1160.html ; U.S. Department of the Army, Inspector General*, Detainee Operations Inspection,* 2004, available at http://www4.army.mil/ocpa/reports/ArmyIGDetaineeAbuse/ 14; U.S. Department of Defense. *Guantanamo Detainee Processes*, 2004, available at http://www.defenselink.mil/news/commissions.html.

[7] For the U.S. State Department's official statement on the ICC *see Fact Sheet, Frequently Asked Questions About the U.S. Government's Policy Regarding the International Criminal Court (ICC)*, Bureau of Political-Military Affairs, Washington, DC, July 30, 2003, available at http://www.state.gov/t/pm/rls/fs/23428.htm.

[8] One of the main problems occupying the attention of the many government and nongovernmental delegates attending the first session of the Assembly of States Parties of the International Criminal Court (ICC) held in September 2002 was the bilateral impunity agreements the U.S. government had been attempting to impose since August 2002. *See* Miguel Concha, *Eviscerating International Justice (ICC)*, Sept. 21, 2002 available at www.thirdworldtraveler.com/International_ War_Crimes/Eviscerating_Justice_ICC.html. The purpose of these agreements is to exempt from the ICC's complementary jurisdiction U.S. soldiers and personnel who are alleged to be responsible for genocide, war crimes, and crimes against humanity, including those in operations not established or authorized by the United Nations. As part of the United States' campaign to exclude its citizens and military personnel from

Marc Grossman [9](2002) spoke on the occasion of the Bush administration's decision to 'unsign' the Rome Treaty, saying that the Court would have tried to take jurisdiction over Americans. In response to Grossman, the ICC's proponents would point to the principle of complimentarity on which the ICC is founded. [10] Under the principle of complimentarity the Court will only assume jurisdiction where states are 'unwilling or unable genuinely to carry out the investigation or prosecution' into an alleged core crime (Art.17, Rome Statute). In other words, the ICC defers to states that are able and willing to conduct their own investigation.[11] States remain the primary agent responsible for the prosecution of international justice.

Yet the Court does aim to address those situations where the society of states is unresponsive to humanity's demand for justice. While complimentarity does not challenge the responsibility of the state for prosecuting core crimes it does not leave the final judgement with the state. The Court can assume jurisdiction over a case if it detects unjustified delay in national proceedings or if those proceedings were not conducted independently or impartially, or deemed to have been 'for the purpose of shielding the

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the jurisdiction of the ICC, the Bush administration approached countries around the world seeking to conclude Bilateral Impunity Agreements (BIAs), or so called "Article 98" agreements. These agreements prohibit the surrender to the ICC of a broad scope of persons including current or former government officials, military personnel, and US employees (including contractors) and nationals. These agreements, which in some cases are reciprocal, do not include an obligation by the US to subject those persons to investigation and/or prosecution. *See* Irune Aguirrezabal Quijera, *The United States' Isolated Struggle Against the ICC,* International Criminal Court Monitor, September 2003 available at http://www.globalpolicy.org/intljustice/icc/2003/0804usicc.htm. Under a provision in a sweeping spending law signed by President George W. Bush, Washington will freeze aid to nations that don't sign pacts with Washington exempting U.S. nationals from prosecution before the International Criminal Court. *See* Letta Tayler, *U.S. Law Assailed as Risk to Terror Fight: Freezes Aid to Some Nations over ICC*, December 10, 2004 available at http://www.thirdworldtraveler.com/Bush_Gang/Bush_ICC_signers_aid.html; *See also* Colum Lynch *Congress Seeks to Curb International Court* The Washington Post, November 26, 2004 available at http://www.thirdworldtraveler.com/International_War_Crimes/Congress_Curb_ICC.html. The ban, was inserted into the omnibus Appropriations bill. It also sought and initially obtained a UN Security Council resolution that provided blanket exemption from the ICC for soldiers and officials serving in UN peacekeeping operations whose home country had not signed the treaty. Congress passed a law in 2002 that gave the administration the discretion to cut off military aid to non-NATO countries that ratified the ICC. The Nethercutt Amendment would deprive the same nations of economic support funds (ESF), a category of economic assistance that accounts for about US$2.5 billion in the current foreign-aid bill. As written, the legislation could waive the ban for national-security reasons for Washington's NATO or "non-NATO allies," which include Australia, New Zealand, Egypt, Israel, Japan, Jordan, Argentina, and South Korea. The amendment also exempts from the ban beneficiaries of the new Millennium Challenge Account (MCA), which goes to poor countries that adhere to political and economic policies approved by Washington. *See* Jim Lobe, *Congress Moves to Cut Aid to Allies That Support World Criminal Court*, December 8, 2004 available at http://www.independent-media.tv/item.cfm?fmedia_id=10077&fcategory_desc=Breaking%20International%20Law.

[9] Grossman, M. (2002) 'American Foreign Policy and the International Criminal Court', Remarks to the Center for Strategic and International Studies, Washington, DC, 6 May. Found at: <http://www.state.gov/p/9949.htm>.

[10] Everett *infra* note 11.

[11] Robinson O. Everett, 'American Servicemembers and the ICC', in Sarah B. Sewall and Carl Kaysen (eds.), The United States and the International Criminal Court (London: Rowman and Littlefield), 137-151. (2000).

person concerned from criminal responsibility' (Art.17, Rome Statute). Given the complimentarity principle the possibility of an American appearing before the ICC is remote. The proper functioning of American law, notably the 1996 War Crimes Act [12]and the 1997 Genocide Convention Implementation Act [13]would be enough to prevent an American citizen appearing before the Court.

After the ICC assumed jurisdiction over core crimes on July 1, 2002,[14] the U.S. began negotiating bilateral agreements that exempt US citizens from possible extradition to the Court. [15] In the summer of 2002 the Security Council used Article 16 to negotiate a blanket exemption of American personnel from all peacekeeping missions. To prevent the withdrawal of the U.S. from the peacekeeping mission in Bosnia the Security Council passed the Chapter VII Resolution 1422 which requested that the ICC refrain from pursuing, for one year, any former official or personnel from a UN contributing state that was not a party of the Rome Statute.

The International Criminal Court prosecutes the most egregious human rights violators. The ICC prosecutes individuals, (as opposed to the state jurisdiction of the International Court of Justice), for violations of international human rights and humanitarian law. The Court's doctrine include responsibilities of leaders for actions of subordinates, not being retroactive, a statute of limitations, and responsibilities for actions of omission for crimes against humanity include murder, extermination, enslavement, deportation, forcible transfer, deprivation of liberty, torture, and rape.[16] The ICC does not prosecute all possible human rights violations under international treaties.[17] It has jurisdiction only over "the most serious crimes of concern to the international community."[18]

The U.S. initially championed the creation of an ICC. Yet later opposed the ICC for fear of its potential trumping up and politicizing charges against the military forces for the contingencies of war. [19]The national security and constitutional issues involved with joining the Court, are detailed lucidly in this book, which concludes that there are no hazards for the U.S. in joining the court and the greatest risks are in opposing joining the ICC.

The book is divided into four sections. The first gives background on the ICC and summarizes U.S. views toward it. The second describes the way the Court is supposed to

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[12] Everett *supra* note 11 at 143-144.

[13] Ruth Wedgewood 'The Constitution and the ICC' in Sarah B. Sewall and Carl Kaysen (eds) *The United States and the International Criminal Court*, London: Rowman and Littlefield, 129 (2000).

[14] THE TREATY OF THE INTERNATIONAL CRIMINAL COURT ENTERED INTO FORCE ON 1 JULY 2002 www.iccnow.org/pressroom/ciccmediastatements/ 2002/07.01.2002EntryintoForce.pdf.

[15] Johnson *infra* note 47.

[16] ICC Statute supra note 1, Article 7.

[17] *Id.* at Article 93.

[18] *Id.* at Article 5.

[19]Sarah B. Sewall, Carl Kaysen and Michael P. Scharf, 'The United States and the International Criminal Court: An Overview' in Sarah B. Sewall and Carl Kaysen (eds) *The United States and the International Criminal Court*, London: Rowman and Littlefield, 1-27 (2000).

work. The third section analyzes the ICC in light of American national security interests. The final section explores the choices facing the United States.

Background and U.S. Views

Public international law regulates relations between nations. That part which relates to military action is generally known as the Law of Armed Conflict, or as the Laws of War. [20]

The instigation and conduct of war has since the very earliest times been subject to some degree of regulation or control. In the thirteenth century Thomas Aquinas wrote, "[I]n order that a war may be just three things are necessary. In the first place, the authority of the prince, by whose order the war is undertaken ..." [21]His second and third requirements for a just war, like those of his predecessor St Augustine, bishop of Hippo, were a just cause and right intent. The ICC Statute is not a novel idea. The concept of an ICC was first discussed in the late nineteenth century incident to the Hague Conventions.[22] The United Nations Charter, designed to promote peace, framed a growing tendency to prohibit all wars not waged in self-defense, was a force behind the debate on the merits of establishing a permanent International Criminal Court (ICC) since the Nazi War Crime Trials at Nuremberg following the Second World War.[23]

History of the International Criminal Court

On August 8, 1945, the four allied powers signed the London Agreement,[24] establishing an International Military Tribunal.[25] Unlike World War I, the United States, through the Justice Department,[26] took the principal leadership role by demanding that Germany's leaders be held accountable for war crimes.[27] The Nuremberg Tribunal, as it was commonly called, indicted twenty-four high ranking Nazi officials on October 16, 1945, for war crimes, crimes against peace, and crimes against humanity.[28]

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[20] Hugo Grotius, De Jure Belli ac Pacis (1625).

[21] St Thomas Aquinas, *Summa theologica*, Secunda secundae, Quaestio XL (de bello), *quoted in* John Eppstein, The Catholic Tradition of the Law of Nations 83 (1935).

[22] Convention (II) with Respect to the Land and Customs of War on Land and its annex: Regulation concerning the Laws and Customs of War on Land, The Hague, July 29, 1899: 32 Stat. 1803; Hague Convention (IV) Respecting the Laws and Customs of War on Land, with Annex of Regulations, Oct. 18, 1907, 36 Oct. 18, 1907, 26 Stat. 2277, T.S. 539. See also Sadat *infra* at 31.

[23] Bryan F. MacPherson, *Building An International Criminal Court for the 21st Century*, 13 Conn. J. Int'l L. 1, 11 (Winter, 1998).

[24] London Agreement, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279.

[25] Charter of the International Military Tribunal, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279; MacPherson, *supra* note 10, at 8.

[26] Timothy C. Evered, *An International Criminal Court: Recent Proposals and American Concerns*, 6 Pace Int'l L. Rev. 121, 126 (Winter, 1994).

[27] MacPherson, *supra* note 23 at 8-9.

[28] *Id.*

Following the Nuremberg Trials, the Allied Powers agreed to prosecute alleged German war criminals apprehended within their respective zones of occupation.[29] Thereafter, war criminals were tried by international tribunals called "Control Council 10" courts, created by agreement and largely following the Nuremberg precedent. The courts held that crimes against humanity must be connected to a war crime or crime against peace.[30]

In addition to the Control Council 10 courts, United States General Douglas MacArthur established war crimes tribunals[31] for Southeast Asia in Japan.[32] Since the United States controlled the Pacific Theater during the war, an international agreement similar to the London Agreement was not required to establish the Japanese tribunals.[33]

The Tribunals set up at Nuremberg and Tokyo are recognized as the first international tribunals to bring war criminals to justice. The Charter for the Nuremberg Tribunal became a piece of the foundation for a permanent ICC. For example, article 6(a) of the Nuremberg Charter provided for the punishment of crimes against peace;[34] Article 6(b) of the Nuremberg Charter provided for the punishment of war crimes;[35] and Article 6(c)[36] of the Nuremberg Charter provided the first formal definition and punishment of crimes against humanity.[37] These Tribunals signaled the international community's resolve to hold individuals, including government officials personally accountable for war crimes and in creating individual accountability, rejected the World War I position that state sovereignty is a defense for egregious crimes committed against humanity.

The United Nations Charter, formed simultaneously with the Nuremberg Charter, also embodies several of the Nuremberg Principles. For example, the United Nations Charter states that "all Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state...."[38] The ICC's creation evolved primarily from the Nuremberg Tribunals and the United Nations, which encouraged the progress of international criminal law.

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29 *See* Control Council Law No. 10, in IV TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILIT. TRIB. UNDER CONTROL COUNCIL LAW No. 10 XVIII (1952).

30 *Id.*

31 Charter of the International Military Tribunal for the Far East, Jan. 19, 1946, T.I.A.S. No. 1589.

32 MacPherson, *supra* note 23 at 8-9.

33 *See* Joseph Berry Keenan and Brendan Francis Brown, *Crimes Against International Law* 1-2 (1950); M. Cherif Bassiouni, The International Criminal Court in Historical Context, 1999 *St. Louis Warsaw Trans. L.* 55, 62 (1999).

34 *See* Nuremberg Charter, *supra* note 33, at Art. 6(a) states that crimes against peace are namely the planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.

35 *Id.*, at Art. 6(b) provided punishment for violations of the laws or customs of war.

36 *See* Nuremberg Charter, *supra* note 33, at Art. 6(c), which provides for the punishment of crimes against humanity.

37 *Id.*

38 Charter of the United Nations, June 26, 1945, 59 Stat. 1031, T.S. NO. 993, art. 2, para. 4 (entered into force Oct. 24, 1945).

In 1948, the General Assembly of the United Nations appointed the International Law Commission (ILC) to investigate the possibility of establishing a permanent ICC. In addition, the United Nations General Assembly recognized "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," and adopted the Convention on the Prevention and Punishment of the Crime of Genocide, which called for the creation of an ICC. [39]

During the 1960's, concern over international crime continued to escalate in the context of apartheid and racial discrimination. In 1978, a report of the American Bar Association argued for a court with jurisdiction limited solely to crimes associated with the acts of terrorism, war crimes, crimes against peace, drug trafficking, genocide, and torture. The report was designed to accommodate the perceived need to protect national sovereignty by calling for an ICC whose subject matter jurisdiction encompassed criminal acts solely recognized by international law. In the late 1980's, the Soviet Union, which had long opposed the idea of an ICC, began advocating the concept of an ICC to deal with terrorism.[40] A group of Caribbean States revitalized the proposal for a permanent ICC at the United Nations General Assembly in 1989,[41] agreeing with the Soviet position and argued that an international judicial institution could help address narcotics trafficking in the Caribbean. A majority of member States joined in, arguing that drug trafficking, global terrorism, and the birth of new nations created serious new problems in international law. [42]

In 1991, the ILC adopted draft articles called the Code of Crimes Against the Peace and Security of Mankind.[43] The ILC transmitted these articles to the Secretary General of the United Nations, who submitted the articles to all of the governments of the United Nation member States for review. In 1992, the General Assembly established a working group to discuss the proposed international criminal jurisdiction of the ICC. [44]

The Former Yugoslavia and Rwanda Ad Hoc Tribunals

The increased prevalence of wars fought within, not between, States is a complicating factor for international law. In the former Yugoslavia, in the Republic of Bosnia, a civil war began in the early 1990's where Muslims, Croatians, and Serbians were involved in a situation of genocide. This bitter civil war, sparked by ethnic differences, destabilized an entire region of Europe. [45] In the African State of Rwanda, the death of the Rwandan President touched off a bloody civil war where countless Tutsi and Hutus who were massacred at the hands of the extremist Hutus. In response the international community

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[39] Sadat *infra* note 63 at 36.

[40] MacPherson, *supra* note 23 at 12.

[41] See U.N. GAOR. 6th Comm., 44th Sess., 38th-41st mtgs., U.N. Doc. A/C.6/44/SR.38-41 (1989).

[42] Johnson *infra* note 47; *See also* Sadat *infra* note 63 at 47 n.63.

[43] Official Records of the General Assembly, U.N. GAOR., 46th Sess., Supp., No. 10, at para. 173-174, U.N. Doc. A/46/10 (1993).

[44] Sadat *infra* note 63 at 38.

[45] Johnson *infra* note 47.

established the International Ad Hoc Tribunals for the former Yugoslavia in 1993 and Rwanda in 1994.

The Former Yugoslavia and Rwanda Ad Hoc Tribunals, the first such international courts to be set up since World War II, issued indictments and international arrest warrants, held fair and judicious trials, and handed down well conceived and just judgements and sentences. The creation of the Ad Hoc Tribunals, however, was difficult. The major difficulty was mobilizing the political will amongst the international community, and the resources necessary to establish the Ad Hoc Tribunals.[46]

By June 1992, the situation in Bosnia had deteriorated into chaos. On July 29, 1992, Muhamed Sacirbey, Ambassador and Permanent Representative of Bosnia-Herzegovina, sent a letter to the United Nations Security Council requesting intervention. In response, the Security Council passed Resolution 771, requesting that all States and humanitarian organizations to provide information relating to human rights violations in the former Yugoslavia. [47] The Security Council adopted Resolution 780[48] in October of 1992, which created an impartial commission of experts to examine and analyze the information collected through Resolution 771.[49] After repeated demands that the warring parties in the former Yugoslavia refrain from violating international law, the Security Council on February 22, 1993 created an international tribunal to prosecute offenders.[50]

Unlike the former Yugoslavia situation in which the Bosnia Ambassador sought help from the Security Council, the Security Council acted unilaterally in the Rwanda case. [51]On July 1, 1994, the Security Council adopted Resolution 935, requesting the Secretary General to establish a commission to determine whether serious violations of humanitarian law had occurred in Rwanda, including genocide.[52] The Commission concluded genocide and systematic and widespread violations of humanitarian law had been committed in Rwanda.[53] The International Criminal Tribunal for Rwanda Statute was submitted to the Security Council in November of 1994, with the recommendation

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[46] Goldstone and Bass *infra* note 59 at 51-53, 55-59; *See also* Elisa C. Massimino, *Prospects For The Establishment Of An International Criminal Court*, 19 Whittier L. Rev. 317, 319 (Winter, 1997).

[47] Lieutenant Brett W. Johnson, JAGC, USNR, *The Future Constitutional Battle If The United States Ratifies The International Criminal Court Treaty*, Volume 3, Spring 2003 Chicago-Kent Journal of International and Comparative Law available at http://www.kentlaw.edu/jicl/articles/spring2003/Brett%20Johnson.doc.

[48] S.C. Res. 780, U.N. SCOR, 47th Sess., 1992 S.C. Res. & Dec. at 36, para. 2, U.N. Doc. S/INF/48 (1992), *reprinted* in 5 *Crim. L. F.*, Appendix A.

[49] M. Cherif Bassiouni, The Commission of Experts Established Pursuant to Security Council Resolution 780: Investigating Violations of International Humanitarian Law in the Former Yugoslavia, 5 *Crim. L. F.* 279 (1994).

[50] *See* S.C. Res. 808, U.N. SCOR, 48th Sess., 3175th mtg. at 28, U.N. Doc. S/INF/49 (1993); Statute of the International Tribunal for the Former Yugoslavia, in Report of the Secretary-General Pursuant to Paragraph 2 of the Security Resolution 808, U.N. SCOR. 48th. Sess., Annex, art.1, U.N. Doc. S/25704 (1993).

[51] Johnson *supra* note 47.

[52] S.C. Res. 935, U.N. SCOR, 3400th mtg. At 2, U.N. Doc. S/RES/935 (1994).

[53] U.N. SCOR, at 1, U.N. Doc. S/1994/1125 (1994).

that the Security Council create an International Tribunal for Rwanda under the authority of Chapter VII of the United Nations Charter.[54] In response the Security Council passed Resolution 955 creating the tribunal responsible for bringing those responsible for the most serious violations of international humanitarian law to justice.[55] At the time Resolution 955 was passed, Rwanda was sitting on the Security Council as one of the non-permanent members and was the only vote against the resolution.[56]

The failure to prevent genocide in Bosnia [57] and Rwanda [58]demonstrated that the rhetoric of international community was much stronger than the commitment to fulfilling international responsibilities. As a consequence actions on behalf of individual justice became retroactive, taking the form of criminal prosecutions in the creation of ad hoc criminal tribunals for the former Yugoslavia and Rwanda. The ad hoc nature of these courts was a cause for criticism among supporters and opponents. While the former pointed to the inefficiencies and duplication of creating different courts for each new area, the latter argued that if the ad hoc Courts did not necessarily reflect 'victor's justice' they were tainted by the political agenda of the great powers.[59] In an attempt to address these points the permanent and independent ICC was created.

Preparatory Committee on the Establishment of an International Criminal Court (PrepCom)

In response to the inadequacies of the Ad Hoc Tribunal,[60] (the Yugoslavia and Rwanda courts are considered as one ad hoc tribunal) the International Law Commission of the United Nations completed a draft statute for an ICC in 1993 and submitted it to the United Nations. The 1993 ILC proposal limited the ICC's jurisdiction to recognized Conventions,[61] and adopted the Ad Hoc Tribunal's procedures governing the detention of a person awaiting trial or appeal. The Ad Hoc Tribunals, therefore, paved the way for the establishment of a criminal procedure for the ICC. In 1994, the ILC completed its

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54 *Id.*

55 Statute of the International Tribunal for Rwanda, S.C. Res. 955, U.N. SCOR, 49th Sess., 3453rd mtg. at 1, U.N. Doc. S/RES/955 (1994).

56 Julia Preston, *Tribunal Set on Rwanda War Crimes: Kigali Votes No on U.N. Resolution*, Washington Post, November 9, 1994, at A44.

57 United Nations (1999), Report of the Secretary-General pursuant to General-Assembly Resolution 53/35. The Fall of Srebrenica. Found at: http://www.un.org/peace/srebrenica.pdf.

58 United Nations (1999b) Report of the Independent Inquiry into the Actions of the United Nations During the 1994 Genocide in Rwanda. Found at: http://www.un.org/News/dh/latest/rwanda.htm

59 Richard J. Goldstone and Gary Jonathan Bass, 'Lessons from the International Criminal Tribunals' in Sarah B. Sewall and Carl Kaysen (eds.), *The United States and the International Criminal Court* (London: Rowman and Littlefield), pp.51-60 (2000).

60 The Ad Hoc Tribunals were inadequate because they were only temporary forums with limited; funding and staffing inadequacies.

61 The ICC's jurisdiction would be limited to the (1) Genocide Convention, (2) Geneva Convention, (3) Unlawful Seizure of Aircraft Convention, (4) Apartheid Convention, (5) Convention Against Taking Hostages, and (6) Safety of Maritime Navigation Convention.

work on the draft statute and again submitted it to the United Nations General Assembly,[62] whereupon the General Assembly established the Ad Hoc Committee on the Establishment of an International Criminal Court, which met twice in 1995. After considering the Committee's report, the General Assembly created the Preparatory Committee on the Establishment of an International Criminal Court (PrepCom) to prepare a text for submission to a diplomatic conference.

In July 1998 a five-week international conference was held in Rome to discuss the establishment of a permanent ICC. [63] The conference culminated in the adoption of a treaty, '"the Statute of the International Criminal Court"' (SICC). A clear majority of the countries participating in the conference voted in favor of the Treaty (120) with 7 countries, including the United States and China, voting against and 21 abstentions. No reservations to the SICC are allowed and amendments to the Treaty can only be made a minimum of 7 years from the date the ICC is first established and must be agreed to by at least two-thirds of participating states. [64]

Many of the crimes defined by the Rome Conference were considered to have universal jurisdiction[65] under customary international law. The U.S. later objected that

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[62] Report of the International Law Commission, U.N. GAOR., 49th Sess., Supp. No. 10, U.N. Doc. A/49/10 (1994), *reprinted* in 33 I.L.M. 253.

[63] L.N. Sadat 'The Evolution of the ICC: From Hague to Rome and Back Again', in Sarah B. Sewall and Carl Kaysen (eds.), *The United States and the International Criminal Court* (London: Rowman and Littlefield), 31-50. (2000).

[64] Brown *infra* note 67 at 61.

[65] Scharf *infra* note 81 at 215. The notion that certain crimes are so universally abhorred that they constitute crimes against international law is now widely recognized. War crimes, crimes against humanity, genocide and torture are examples of such crimes. The need to hold individuals accountable for such atrocities has also become an accepted part of international law. Since the Nuremberg and Tokyo trials following World War II, the principle that it is the right or even the duty of states to bring to justice those responsible for international crimes when they are not prosecuted in their own countries has gathered momentum. Certain international treaties place states parties under a duty to ensure that suspects who come within their borders are brought to justice, either by prosecuting them in their own courts or by extraditing them to stand trial elsewhere. This duty to either prosecute or extradite is contained in the four Geneva Conventions of 1949. Geneva Conventions for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Relative to the Treatment of Prisoners of War, and Relative to the Protection of Civilian Persons in Time of War. States parties to the Geneva Conventions are obliged to seek out and either prosecute or extradite those suspected of having committed " grave breaches " of those Conventions. " Grave breaches ", as defined in the Conventions, includes willful killing, torture or inhuman treatment, causing great suffering or serious injury to body or health, and other serious violations of the laws of war. " Each High Contracting Party shall be under the obligation to search for persons alleged to have committed or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party. This Article is contained in each of the four Geneva Conventions, for instance in Article 146 of the Fourth Geneva Convention. A serious weakness in the Conventions is that they only require the exercise of universal jurisdiction for offences committed in international armed conflict, and not in internal armed conflict. However the Statutes of the International Criminal Court and the International Criminal Tribunal for Rwanda do specifically give jurisdiction for these courts over violations committed in an internal armed conflict. Articles 8.2c of the ICC Statute and 4 of the ICTR Statute. Parties to the UN Convention against

these innovations had not been accepted under customary international law and could not therefore not be invoked against citizens of states not party to the Rome Treaty. [66]

There was little controversy on the definition of genocide. Recognising the broad support for the 1948 Genocide Convention, the ICC Statute incorporated its definition verbatim. According to this definition, genocide occurs when killing, or other listed forms of mistreatment, are 'committed with intent to destroy in whole or in part, a national, ethnical, racial, or religious group, as such' (Art.6 Rome Statute). [67]

In addition to these treaties which impose obligations on states parties in relation to specific offences, it is widely recognised that customary international law permits the exercise of universal jurisdiction for genocide[68] and crimes against humanity[69], and possibly for serious violations of the laws of war in internal armed conflicts. All of these are within the jurisdiction of the International Criminal Court in the Rome Statute of July 1998 and this may encourage states to provide for universal jurisdiction for these offences. The exercise of universal jurisdiction, whereby a state prosecutes a person regardless of where the crime was committed, or against whom, is an example of extra-territorial jurisdiction, and an exception to the normal situation where a state prosecutes for crimes committed within its own territory. Extra-territorial jurisdiction is becoming increasingly common. Typically, states have legislated to provide extra-territorial jurisdiction for offences such as terrorism, hijacking and hostage taking[70] and, more recently, to tackle international paedophile rings.

Under current international law, all states may exercise universal jurisdiction over genocide, war crimes and crimes against humanity, regardless of the nationality of the offender, the nationality of the victims and the place where the crime was committed. This means that, in a given case of genocide, each and every state can exercise its own national criminal jurisdiction, regardless of whether the custodial, territorial or any other state has consented to the exercise of such jurisdiction beforehand. [71]

The definition of 'crimes against humanity' covers a long list of prohibited acts including murder, forcible transfer of population and rape. However, the Court is concerned when such an act is committed 'as part of a widespread or systematic attack directed against any civilian population.' The U.S. had initially sought assurance that a US military action involving civilian casualties would not be interpreted as a crime by

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Torture are similarly obliged to either extradite or prosecute alleged torturers who come within their borders. Article 7.1 UN Convention against Torture.

66 Wechsler *infra* note 74 at 98-153.

67 B. S. Brown, 'The Statute of the ICC: Past, Present and Future', in Sarah B. Sewall and Carl Kaysen (eds.), *The United States and the International Criminal Court* (London: Rowman and Littlefield), 61, 68-84.

68 Restatement (Third) of the Foreign Relations Law of the United States, para. 404.

69 UN General Assembly Resolution 95(1) of 1946, reiterating the principles in the Nuremberg Charter and Judgement.

70 Scharf *infra* note 81 at 215.

71 The Rome Statute for the ICC, Article 1, states that the Court shall be complimentary to national criminal jurisdictions.

changing the word 'and' for 'or'. It later accepted the original definition when the Conference rejected its amendment (Rome Statute, Art.7). [72]

Similar limitations applied to the definition of 'war crimes'. Again, the definition includes a long list of prohibited acts including mistreatment of civilians or prisoners of war and intentional attacks on civilians, humanitarian workers and UN peacekeeping missions. To claim such actions constitute 'war crimes', however, the ICC prosecutor must prove that they were 'committed as part of a plan or as part of the large scale commission of such crimes' (Art.8 Rome Statute).[73] These limitations were compromises granted to the American delegation at Rome. Informed by its own peacekeeping experience, the U.S. was concerned that their troops would be bought before the Court for the inadvertent killing of civilians while on a peacekeeping mission.[74]

How particular cases were triggered was much more controversial than defining the actual crimes. At issue was whether the permanent Security Council would surrender their capacity to determine when and where international justice was done. By widening the process of referral beyond the Security Council by creating an Independent Prosecutor that could pursue cases based on evidence gathered by non-governmental organisations (Rome Statute Art.15), the Statute enabled individuals and groups who were not represented by states to have their claims heard in a court of law. The US opposed the Court's independence arguing that an overzealous pursuit of justice could undermine international peace and security. It argued that the Court should be authorised to pursue a case by the Security Council alone. [75] With the Independent Prosecutor able to pursue a case without UN authorisation the US could not, by itself, stop proceedings. It would have to at least make the case and convince a majority on the Security Council that the pursuit of justice was a threat to international peace and security.

Core American Objections

At the Rome Conference the so-called 'like-minded' group of states favoured a strong Independent Prosecutor. This group did not dispute the Security Council's role as the primary institution on matters of international order. [76] It supported the Council's right to refer cases to Court (Rome Statute Art.13) and to veto cases that could be considered a threat to international peace and security. It feared that the Security Council would abuse that right and the permanent five would pursue their own particular interests behind the rubric of 'international peace and security' and at the expense of international justice. Delegations recalled times when human rights abusers had been able to hide behind the

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[72] Brown *supra* note 67 at 70.

[73] Brown *supra* note 67 at 69.

[74] L. Weschler, 'Exceptional Cases in Rome: The United States and the Struggle for an ICC', in Sarah B. Sewall and Carl Kaysen (eds.), *The United States and the International Criminal Court* (London: Rowman and Littlefield), 85-114 at 97 (2000).

[75] Wechsler *supra* note 74 at 92.

[76] Wechsler *supra* note 74 at 93-95.

veto that their great power patron exercised on the Security Council. [77] The U.S. concern was that an Independent Prosecutor would not only threaten international peace and security, but also abuse his or her authority by pursuing a political agenda. [78] Yet arguing that the Security Council could guarantee judicial independence according to Samantha Power was unreasonable. [79] Many view the Security Council a politically motivated institution and demanded an independent ICC precisely for that reason.

It was essential to many, therefore, that the Security Council not be the sole means of referring a case to the Court. The like-minded group, which included the UK as its only Security Council permanent member, agreed on the so-called 'Singapore compromise: [80]the Security Council would be allowed to postpone proceedings with an affirmative resolution that required a majority vote. The U.S., however, remained committed to maintaining the unilateral capacity to stop the Independent Prosecutor by exercising its Security Council veto. Rather than accept the Singapore compromise it, along with China, Libya, Israel, Iraq, Qatar, and the Yemen, voted against the ICC Statute. Having failed to prevent the Court's independence, the US sought to exclude its citizens by limiting the Court's jurisdiction. It sought a consent regime that limited the Court's jurisdiction to nationals of state parties and later argued that the Rome Statute violated Article 34 of the Vienna Convention on the Law of Treaties, which stated that a Treaty would not be legally binding on non-Party States. It rejected the arguments of some that the crimes covered by the Rome Statute were already considered crimes of universal jurisdiction under customary international law. [81]While this position had been pushed by the German delegation at Rome, the U.S. argued that the Statute expanded upon the definitions of crimes accepted by customary international law. Given these 'innovations' the US argued that the Statute as whole could not be invoked against non-state parties by virtue of genuine universality. The Conference considered it appropriate to negotiate the Court's jurisdiction in order to increase the U.S. support for the Rome Treaty. [82] The US argument that the Court's jurisdiction be limited to cover nationals of state parties gained little support at Rome. As the Korean delegate put it, 'what applies to America also applies to [Saddam] Hussein; and simply by not signing, he could buy himself a pass'. [83]

Despite arguing that the Rome Statute violated Article 34 of the Vienna Convention on the Law of Treaties, which stated that a Treaty would not be legally binding on non-party states, there was nothing new about American citizens being subject to laws not directly approved by the American people. As Ruth Wedgewood wrote, 'when activities

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[77] Weschler *supra* note 74 at 85-114.

[78] Weschler *supra* note 74 at 92-3.

[79] Samantha Power, 'The United States and Genocide Law', in Sarah B. Sewall and Carl Kaysen (eds.), *The United States and the International Criminal Court* (London: Rowman and Littlefield), pp.165-178 at 171 (2000).

[80] Weschsler *supra* note 74 at 93-99.

[81] M. Scharf, 'The ICC's Jurisdiction over the Nationals of Non-Party States,' in Sarah B. Sewall and Carl Kaysen (eds.), *The United States and the International Criminal Court* (London: Rowman and Littlefield), 213-236 (2000).

[82] Wechsler *supra* note 74.

[83] Wechsler *supra* note 74 at 101.

have occurred abroad and would otherwise fall within foreign national jurisdiction or when the actors are military, the basis for comparison is not the ordinary trial procedure of a common law court.' [84]

Yet the U.S. did seriously object to the idea that states could delegate territorial jurisdiction to an international institution. They recognised the concept of universal jurisdiction but argued that it could only be exercised by states. [85]

The Clinton Administration supported early efforts to create an ICC. The United States probably would have backed the Rome Statute had it allowed for a state (or specifically a U.S.) veto over the Court's actions. [86] Other nations argued that giving all or any states such a veto would fatally weaken the Court. The majority of states felt that even UN Security Council control over the Court constituted external political control. Thus the Rome Statute gave the Court a greater degree of independence than the United States had sought.

The core Administration objection to joining the ICC was that it American citizens, those in the armed forces, American governmental officials, and American foreign policy could be subjected to the judgment of an international body that the United States cannot control. Yet, the authors argue, the Statute specifies that the Court is intended only to "complement" national judicial systems.[87]

The strongest ICC critics in the U.S. Congress are opposed to the Court in principle. These US critics may not deny the universality of the crimes nor the universal community of humankind but they also defend the absolute right of particular societies to govern themselves. They view the Court as part of a emerging system of world government and their objections are rooted in a desire to protect American sovereignty. Many congressional and administration critics see a permanent international criminal court as an assault on U.S. freedoms.[88]

Administration reservations about the specific workings of the Court and widespread congressional opposition to the very concept of an ICC since the publication of the book has turned the debate from whether the United States should join the Court, to whether the United States will be able to co-exist with the Court. [89]

How the Court Will Work

The ICC is intended to complement national judicial systems, acting only where national judicial systems are unable or unwilling to consider individual criminal

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[84] Ruth Wedgewood *supra* note 13.

[85] Scharf *supra* note 81 at 214-230.

[86] The United States supported several options on this theme: requiring that the state of nationality consent to prosecution of a suspect; requiring that the United Nations Security Council (where the U.S. has a veto) act to initiate any ICC proceedings; allowing a state to assume responsibility for individual actions; and requiring negotiation of an agreement with the UN regarding the circumstances under which a suspect could be transferred to the ICC. Wechsler *supra* note 74.

[87] Wechsler *supra* note 74.

[88] Wechsler *supra* note 74 at 91, 110-11; Power *supra* note 79 at 166.

[89] See *supra* notes 4-9.

responsibility for specific crimes. A series of substantive and procedural thresholds would have to be crossed before an American could be even investigated by the ICC. [90]Any criminal allegation against an American would have to involve a core crime under ICC jurisdiction. Not simply a horrible act, but a crime of the most serious concern to the international community. A genocide charge against an American acting in an official capacity (e.g. a member of the armed forces) seems impossible. An American might more conceivably be charged with war crimes or crimes against humanity. The Court is to consider crimes against humanity when they form part of a known widespread or systematic attack against civilians, and war crimes "in particular" when part of a plan or policy, or as part of a large-scale commission of war crimes. These thresholds in effect require that any individual American actions be part of a larger process of intentional human rights violations. Bombing targets that were presumed to be legitimate, even if it resulted in civilian casualties, would not fall under these definitions.

If an American's alleged criminal actions did fall within the Court's jurisdiction, a state could refer a case to the ICC or the ICC Prosecutor could initiate an investigation (with the approval of the Pre-Trial Chamber).[91] The state in which the crime allegedly was committed would have to accept ICC jurisdiction. The ICC Prosecutor would then be required to notify the United States of its intent to commence an investigation. The United States would have a month in which to inform the Prosecutor of any American investigation of the case. The Prosecutor would be required to defer to any U.S. investigation—and respect a U.S. decision not to proceed to prosecution—unless a Pre-Trial Chamber nonetheless authorized the investigation.

The ability of the Pre-Trial Chamber to overrule a U.S. claim to handle a case is a circumstance in which the stated fears of the United States might be realized. [92] This is why American officials express concern about a "politicized" Court. [93] This is why the Administration sought a procedural guarantee that the United States could exempt Americans from ICC jurisdiction. [94]

For this to occur, a majority of Judges would have to determine that the United States "is unwilling or unable genuinely to carry out the investigation or prosecution." Since America's literal ability to administer justice is unquestioned, the ICC's judgment would hinge upon "willingness." The terms are further defined in the Statute: unwillingness can be found only where the proceedings or decision not to prosecute were intended to shield the person from criminal responsibility, where there has been an unjustified delay inconsistent with an intent to bring the suspect to justice, or where the proceedings were not independent or impartial and were conducted in a manner inconsistent with an intent to bring the suspect to justice.[95]

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[90] Wedgewood *supra* note 13 at 119-130.

[91] Brown supra note 67 at 73

[92] *Id.*

[93] *Id.*

[94] Sewall *supra* note 19 ; Nash *infra* note 118.

[95] Nash *infra* note 118.

The seriousness with which the modern U.S. military justice system treats international humanitarian law makes this according to the authors[96] a virtual impossibility in the case of a military investigation. Moreover, actions official or unofficial of a U.S. citizen that approached the gravity of an international crime would be addressed within the American judicial system.

The ICC's Complementary Jurisdiction

The ICC Statute emphasizes that the Court will only operate in a complementary nature to national jurisdictions.[97] The ICC may not obtain personal jurisdiction if a member State has its own investigation, has decided not to prosecute, or the prosecution has already taken place.[98] However, if a State does not genuinely carry out its prosecutorial powers pursuant to Article 20(3),[99] the ICC may assume jurisdiction.[100] In determining whether a State has genuinely carried out its duties, the Court looks at the purpose, timing, and impartiality of the national investigation or hearing.[101] If the ICC takes jurisdiction over a matter, a State may object to the ICC at the earliest opportunity after the ICC's assumption of jurisdiction.[102] With a few exceptions,[103] in that circumstance, ICC investigations are suspended until the jurisdictional dispute is resolved.[104] The ICC Statue also allows the accused to avoid the ICC's jurisdiction if they have been successfully prosecuted in a State for one of the inherent crimes.[105]

Extradition and Personal Jurisdiction

A major point of contention surrounding sovereignty and personal jurisdiction of the ICC is the issue of extradition. Extradition from States to the ICC, raises issues of constitutionality for the United States which the book examines thoroughly.[106]

Member States to the ICC Statute, upon the written request by the ICC, are required to "surrender," not extradite, a suspected criminal.[107] Extradition operates under a type of treaty formally called "rendition." Illegal rendition, such as abduction,

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96 Sewall *supra* note 19; Nash *infra* note 118.

97 ICC Statute, *supra* note 1, art.1 and ¶10 of the Preamble.

98 ICC Statute, *supra* note 1, art. 17(1).

99 *Id.*, art. 20(3).

100 *Id*., art. 17(1)(a) and (1)(b).

101 *Id*., art. 17(2).

102 ICC Statute, *supra* note 1, art. 19(5).

103 *Id*., art. 19(8).

104 *Id*., art. 19(7).

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

106 Wedgewod *supra* note 13 at 124-25.

107 ICC Statute, *supra* note 1, at Art. 89(1).

arises from the concept of reprisal and occurs outside the provisions of a treaty.[108] In the United States, the extradition process requires an extraditing judge to "either deny extradition or commit for extradition, and then places the authority to extradite in the hands of the Secretary of State, who may or may not extradite."[109] The Secretary of State cannot extradite an accused if the extradition judge denies such action.[110]

The extradition of American citizens for trial abroad has been common practice for two hundred years, established by treaties in which the United States has delegated the trial of Americans to foreign states. Ruth Wedgewood argues that the ICC can be viewed as another type of court to which the prosecution of Americans is delegated, and, again, in many cases the ICC will feel far more similar to a U.S. court than a foreign court. [111]

The ICC and American National Security Interests

The book described how other leading powers, allies including Germany, France, and the U.K., shared many U.S. concerns about the Court but concluded that the Court's larger value outweighed any residual risks it might pose to their nationals or foreign policy.[112]

The Use of Force

The Court is to act only to the extent necessary to prevent impunity for the core international crimes. These core crimes are genocide, war crimes and crimes against humanity.[113] The Statute places aggression under its jurisdiction. This is problematic from the U.S. perspective. The Iraq War was declared illegal by Kofi Annan. [114]Virtually any definition of a crime of aggression would infringe upon UN Security Council prerogatives unless that definition specifically recognized and preserved the UN Security Council's primacy in determining international aggression. The Statute stipulates that the Security Council's role will have to be addressed, but more importantly, that the Court cannot assume jurisdiction over the crime of aggression until a definition is agreed upon by two-thirds of the Parties to the Treaty. Given the historical difficulties states have had

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[108] *See* Kristin Berdan Weissman, Extraterritorial Abduction: *The Endangerment of Future Peace*, 27 U.C. Davis L. Rev. 459, 465 (1994).

[109] M. Cherif Bassiouni, *International Criminal Law*, 198 (2nd ed. 1998).

[110] *Id*.

[111] Wedgewood *supra* note 13.

[112] Brown *supra* note 67; Wechsler *supra* note 74 .

[113] The use of nuclear, chemical, or biological weapons was specifically excluded from the jurisdiction of the ICC.

[114] BBC, *Iraq War Illegal, Says Annan, The United Nations Secretary-General Kofi Annan has told the BBC the US-led invasion of Iraq was an illegal act that contravened the UN charter,* September 16, 2004 available at http://news.bbc.co.uk/1/hi/world/middle_east/3661134.stm.

in agreeing upon such a definition, agreement for the purposes of the ICC seems unlikely to occur. [115]

American officials have indicated that the existence of the ICC in claiming jurisdiction over individuals even if their government is not a party to the treaty[116] might dampen U.S. military participation in certain contingencies.[117] The Clinton and Bush Administration expressed concern that an ICC could question the legality of actions by American troops or military and political leaders. This additional risk could preclude U.S. military action on behalf of non-vital interests, such as humanitarian or peace operations.[118]

But the authors note that the ICC has no independent enforcement powers; it cannot compel even the weakest states unless the UN Security Council, in which the United States has a veto, decides to do so. Apprehending suspects will fall to states, which already have the authority to apprehend suspects within their borders. The ICC will have power that is derived from its moral and legal authority. [119]

The book describes how United States feared that the legitimacy of its military actions could be undermined by an ICC raising questions about the American use of force, particularly with regard to issues such as the proportional use of force, the legitimacy of targets, and civilian casualties. [120] The author to allay this fear argues that the International Criminal Tribunal for Former Yugoslavia (ICTY) provided a precedent with regard to the most potentially contentious issues concerning the U.S. use of force. The ICTY had jurisdiction over Serbia and Kosovo at the time of the 1999 NATO bombing. The ICTY Prosecutor, in response to requests from private parties, directed her staff to provide an internal assessment of NATO's actions. While the Prosecutor specifically denied that the tribunal was launching a formal investigation, the ICTY submitted a raft of questions to the Pentagon and other relevant actors, stirring up internal controversy about the legitimacy of the tribunal's actions. [121] Yet the Prosecutor concluded that "there was no deliberate targeting of civilians or unlawful military targets by NATO," and that there was "no basis for opening an investigation into any of those allegations or into other incidents related to the NATO bombing."[122] This was not a peacekeeping or humanitarian operation; it was a coercive bombing campaign in which hundreds of civilians allegedly died as a result of the coercive use of force. [123] Yet even

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[115] Brown *supra* note at 67-68.

[116] Wecshler *supra* note 74.

[117] Nash *infra* note 118.

[118] William Nash, "The ICC and the Deployment of U.S. Armed Forces," in *The United States and the International Criminal Court: National Security and International Law*, Sarah Sewall and Carl Kaysen, eds., (Boulder, Colo.: Rowman and Littlefield) at 156-163. (2000).

[119] Brown *supra* note 67 at 78-79.

[120] Nash *supra* note 118 at 156-163.

[121] Nash *supra* note 118 at 158-59; Sewall *supra* note 19 at 17-18.

[122] Barbara Crossette, "*U.N. War Crimes Prosecutor Declines to Investigate NATO*," New York Times, June 3, 2000.

[123] *See* Human Rights Watch, "*Civilian Deaths in the NATO Air Campaign*," Vol.12, No.1 (D) February 2000; *See also* Amnesty International, "*Collateral Damage or Unlawful Killings*?," June 7, 2000.

in this case, a transparent international tribunal reasoned that mistakes or unintended consequences do not constitute war crimes.

Constitutional Protections

Because the international Court reflects a mix of common and civil law traditions, it lacks the requirement of a trial by jury and other cherished U.S. Constitutional protections for the accused. [124]Yet even in an Administration skeptical of the ICC, the Justice Department has ruled that there are no constitutional barriers to joining the ICC. [125]

Wedgewood persuasively argues that the constitutionality issue is best evaluated by means of comparison. For actions that occur abroad and otherwise would fall within foreign national jurisdiction, ICC proceedings should be compared with those of a foreign state, not an American court. [126]

Another comparative basis for judging the ICC's constitutionality is the American military justice system. American service members are subject to courts martial that employ fundamentally different procedures than those available in a civilian court. Some of the most cherished American rights (e.g. trial by jury) do not extend to active duty members of the Armed Forces. [127]

Sovereignty

The book presents certain preconditions to the exercise of jurisdictional competence, as noted especially in Articles 12-14 of the ICC Statute. In general, the Court can exercise jurisdiction if a "situation" or case (1) is referred to the Prosecutor by a State Party to the treaty, (2) is referred to the Prosecutor by the U.N. Security Council, or (3) is under an investigation initiated by the Prosecutor *proprio motu*.[128] Article 12 adds that when a State Party has referred a case to the Prosecutor or the Prosecutor has initiated an investigation, "the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court" by special declaration: "(a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft; [or] (b) The State of which the person accused of the crime is a national."[129]

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[124] Wedgewood *supra* note 13.

[125] Power *supra* note 79 at 169.

[126] Wedgewood *supra* note 13.

[127] Wedgewood *supra* note 13.

[128] ICC *supra* note 1 art. 13.

[129] *Id*. art. 12(2)-(3).

The Executive Branch of the United States considers that a U.S. national could not be tried before the ICC if the United States does not ratify the treaty.[130] But Scharf and others argue that this is an incorrect interpretation of the ICC treaty or of international law. [131] They argue that even if the United States does not ratify the treaty, its nationals can still be subject to prosecution before the Court. Normally, nonsignatory nationals are not bound by crimes or norms newly created by a treaty.[132] However, according to Scharf [133]that is not what is involved when a new tribunal is established in order to prosecute what admittedly are alleged violations of customary international law—that is, law already extant at the time of an alleged offense and that had created crimes over which there is a universal jurisdictional competence and responsibility.[134]

The argument is that circumstances might arise in which an accused U.S. national is actually being prosecuted in a U.S. military court-martial under the North Atlantic Treaty: Status of Forces Agreement (SOFA).[135] In such a case, Article 17(1)(a) of the Statute would be applicable, as the United States would have both concurrent prescriptive and enforcement jurisdictional competencies. In the situation of an accused U.S. national, the United States could request pursuant to NATO SOFA that the other NATO country hand over such an individual who is a member of the "force" (including "personnel belonging to the land, sea, or air armed services . . . in the territory . . . in connexion [sic] with their official duties")[136] because, although under customary international law both states have a prescriptive jurisdictional competence, under NATO SOFA Article VII(3)(a)(ii), the United States has primary concurrent jurisdiction over "offences arising out of any act or omissions done in the performance of official duty."[137] It can be recognized that international crime is not properly classifiable under the SOFA as an act or omission done in the performance of "official duty."[138] On the other hand, it might be argued that the phrase "arising out of" might reach beyond acts actually classifiable as "official duty" activities.[139] Yet even then the act or omission out of which the offense arises must be "done in the performance of official duty," and international

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130 *See* David J. Scheffer, *The United States and the International Criminal Court*, 93 AM. J. INT'L L. 12, 18 (1999).

131 Scharf *supra* note 8.; *See also* Jordan J. Paust, *The Reach of ICC Jurisdiction Over Non-Signatory Nationals*, 33:1 Vanderbilt Journal of Transnational Law (January 2000) available online at http://law.vanderbilt.edu/journal/33-01/33-1-1.html (last visited January 28, 2005).

132 Paust *supra* note 131.

133 Scharf *supra* note 81.

134 JORDAN J. PAUST, INTERNATIONAL LAW AS LAW OF THE UNITED STATES 392-93, 405-07 (1996).

135 Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces, June 19, 1951, 4 U.S.T. 1792 [hereinafter SOFA]. *See also* Nash *supra* note 118; *See also* Wedgewood *supra* note 13.

136 ICC Statute *supra* note 1 art. I(1)(a); *see also id*. art. VII(5)(a).

137 *Id*. art. VII(3)(a)ii).

138 Paust *supra* note 131.

139 *Id.*

criminal acts cannot properly be classified as acts done in performance of official duty.[140]

The Court can exercise jurisdiction over the national of a non-signatory in many circumstances and can exercise a form of limited universal jurisdiction. Thus, whether or not the United States ratifies the Rome treaty, ICC jurisdiction over an accused U.S. national is possible. For this reason, Scharf and others argue, concern about possible prosecution of U.S. nationals is not a valid reason for refusing to ratify the treaty.[141]

Proponents of the ICC treaty believe that adhering to it could provide greater options for protection of U.S. nationals than nonadherence. It could also provide the United States flexibility with respect to prosecution or extradition of foreign nationals accused of international crimes committed outside the United States.

Conclusion

The book concludes that international courts and tribunals can be a useful tool for advancing both specific American objectives regarding a particular conflict and overarching international legal and security goals. Since Nuremberg, the United States occasionally has supported international tribunals as a means of punishing those responsible for genocide and war crimes and the rule of law. A standing ICC will symbolize an ongoing and nearly universal commitment to prosecuting those who commit gross human rights abuses and be more effective than past ad hoc tribunals because it will have a continuing existence staff, offices, procedures, precedents, and be able to respond more swiftly and effectively to allegations of criminal acts.

The ICC is designed to bring to justice individuals who commit genocide, war crimes, and crimes against humanity and is representative of increasing internationalization of institutions. The book is persuasive that the U.S. absence from the ICC membership and impacts adversely perceptions of the legitimacy of American leadership and values and prevents the United States' ability to shape the future of this influential institution.

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140 *Id.*

141 Scharf *supra* note 81.