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## The International Criminal Court Treaty: Description, Policy Issues, and Congressional Concerns

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## **ABSTRACT**

The United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (ICC) concluded five weeks of negotiations on July 17, 1998 in Rome, Italy, by adopting an agreement to establish a permanent international war crimes court. This report discusses the events leading to the creation of a permanent international criminal tribunal and U.S. perspectives on the Court including: problematic provisions in the ICC Treaty, congressional considerations, and potential implications for U.S. foreign policy. This report will be updated as events warrant.

# The International Criminal Court Treaty: Description, Policy Issues and Congressional Concerns

## Summary

The United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (ICC) concluded five weeks of negotiations on July 17, 1998 in Rome, Italy, by adopting an agreement to establish a permanent international criminal court. Of the more than 160 nations that participated in the Rome Conference, 120 nations voted to adopt the Rome Statute of the International Criminal Court, 7 nations voted against it, while 21 nations abstained. The United States rejected the final document primarily because of the broad jurisdictional powers granted to the Court.

The Court's powers would include the authority to prosecute people from countries that do not sign and ratify the ICC Treaty. As a result, U.S. military personnel stationed on foreign soil might be subject to investigations and prosecutions by the ICC even if the United States does not become a party to the ICC Treaty. Due to the fact that the global deployment of U.S. military personnel exceeds any other country, U.S. officials are apprehensive over whether American armed forces may be likely candidates for frivolous or politically motivated referrals.

Advocates of the ICC Treaty assert that sufficient safeguards exist to limit the Court's jurisdiction. Notwithstanding this assertion, the Clinton Administration is not prepared to sign the ICC Treaty in its current form. Ultimately, the Administration will have to determine what role, if any, the United States should assume concerning its relationship to the ICC Treaty and the Court. Even though the Administration has not submitted the ICC Treaty to the U.S. Senate for its advice and consent, several members of the Senate Foreign Relations Committee have expressed their strong opposition to it. Any subsequent consideration of the ICC Treaty is unlikely unless corrective measures are taken to amend the Court's jurisdictional powers.

Before the ICC can begin operating, 60 nations must become parties to the treaty through formal ratification or accession procedures - a process that may take years.

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# The International Criminal Court Treaty: Description, Policy Issues, and Congressional Concerns

## Introduction

Propelled in part by recent reports of genocide and other alleged war crimes, efforts to establish a permanent international criminal court have moved forward with the finalization of the Rome Statute of the International Criminal Court. Although the United States generally supports the concept of an ICC, the United States objects to the current form of the Court and refused to sign the ICC Treaty. In addition, several members of the Senate Foreign Relations Committee have stated their objections to the text of the ICC Treaty. After a brief discussion of the events leading to the creation of a permanent international criminal tribunal, this report will explore U.S. perspectives on the Court, problematic provisions in the ICC Treaty, political considerations being evaluated by the United States toward the ICC Treaty, and potential implications for U.S. foreign policy.

The world community convened at a United Nations sponsored Diplomatic Conference in Rome, Italy, from June 15 to July 17, 1998 to establish an ICC to investigate and prosecute allegations of war crimes. The document, known as the Rome Statute of the International Criminal Court,<sup>1</sup> was overwhelmingly adopted by the participating governments. The Statute sets out the provisions of the Court and comprises the body of the ICC Treaty. The Clinton Administration originally supported the creation of such a tribunal during the three years of preparatory discussions, but the final statute adopted by the plenipotentiaries was rejected by the United States. Although 71 nations have signed the ICC Treaty, the United States is not one of the signatories and must decide what action, if any it will take toward the ICC Treaty.<sup>2</sup>

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<sup>1</sup>The Rome Statute can be found in its entirety on the United Nations website, <http://www.un.org/icc/>. For information and developments from proponents of the Court, the following websites are also useful: <http://igc.apc.org/icc/> (the Coalition for an International Criminal Court) and [http://www.lchr.org/icc/icc\\_bro.htm](http://www.lchr.org/icc/icc_bro.htm) (the Lawyers Committee for Human Rights). For articles from opponents of the Court, see <http://www.cato.org/pubs/pas/pa-311.html> (the Cato Institute).

<sup>2</sup>Adopting a treaty signifies an agreement by the participating States to the final language of the document, whereas signing a treaty indicates a State's preliminary intent to assent to the provisions of the document.

## Origin of the ICC

### The Purpose of a Permanent International Criminal Tribunal

The impetus to create a standing war crimes tribunal began as a response to World War II and the disruption it brought to international peace and security. Individual criminal responsibility for war crimes, genocide, and crimes against humanity was first adjudicated in the Nuremberg and Tokyo military tribunals. These trials determined that individuals have international duties that transcend their national obligations and as a result should be held accountable for their actions. Recognizing the international dimension of these crimes in conjunction with these historic trials, there were calls to create a standing war crimes tribunal to adjudicate future incidences of such atrocities. Many envisioned a permanent tribunal as perhaps a partial solution to deter future violations and punish those responsible for committing widespread and systematic killing. Bringing perpetrators of war crimes to justice was also intended to diminish the threat their actions pose to international peace and security. The legacy of internal civil wars in the 1970s<sup>3</sup> and the subsequent creation in the 1990s of U.N. Security Council ad hoc tribunals for the former Yugoslavia<sup>4</sup> and Rwanda<sup>5</sup> exemplified the necessity for a deterrent judicial institution to ensure that perpetrators of war crimes could no longer act with impunity. These events coupled with the political convergence of internationally-minded groups including humanitarian, legal, and non-governmental organizations, helped forge transnational pressure to enhance international humanitarian law.

The international community initially attempted to address war crimes through agreements aimed at mitigating wartime behavior. The codification of international rules to govern armed conflict and to outlaw attacks on civilians began in the nineteenth century.<sup>6</sup> These efforts significantly progressed in 1899, when twenty-six sovereign States convened at the Hague for the International Peace Conference and again eight years later, in 1907, when the Second Hague Peace Conference was held. These conferences produced a series of Hague Conventions and Declarations detailing the laws and customs of war.<sup>7</sup> Although the U.S. delegation during both conferences

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<sup>3</sup>Such as the internal conflicts in Cambodia, Burundi, Algeria, Congo, and Iraq.

<sup>4</sup>For a more general discussion, see *Bosnia War Crimes: The International Criminal Tribunal for the Former Yugoslavia and U.S. Policy*, (name redacted), Raphael Perl, and (name redacted), CRS Report 96-404 F, updated April 23, 1998.

<sup>5</sup>For background information, see *Rwanda: U.N. Security Council Resolutions Texts and Votes -- 1993-1994*, Marjorie Ann Brown, CRS Report 94-602 F, July 26, 1994 and *Rwandan Crisis: a Chronology*, Theodoros Dagne, CRS Report 95-773 F, July 5, 1995.

<sup>6</sup>Examples of unilateral sovereign attempts to address war crimes dates back to the 4<sup>th</sup> century B.C. where Indian writings refer to the treatment of prisoners of war. The United States first addressed war crimes during the American Civil War. In 1863, President Lincoln issued war instructions as General Orders No. 100, *Instructions for the Government of Armies of the United States in the Field*. These instructions, commonly referred to as The Lieber Code, are regarded as a model for the humane laws of warfare.

<sup>7</sup>Convention (I) on the Pacific Settlement of Disputes (July 29, 1899); Convention (II) with Respect to the Laws and Customs of War on Land (29 July 1899); Declaration (I) to Prohibit for the Term (continued...)

advocated that international disputes should be settled by binding arbitration or judicial process, minimal consideration was given to such suggestions.

A serious initiative to establish an international criminal tribunal first arose in the treaties ending World War I. The 1919 Treaty of Versailles<sup>8</sup> provided for the creation of a multinational tribunal to try the German Emperor, Kaiser Wilhelm II, “for a supreme offense against morality and the sanctity of treaties.” This Treaty also granted the Allies the power to try 21,000 German citizens for war crimes.<sup>9</sup> However, no transnational tribunal was created and limited war crimes trials were conducted by German courts -- only 13 out of the 901 accused were convicted. Kaiser Wilhelm II fled to Holland and was never tried because the Dutch refused to extradite him. Contemporaneously, the Treaty of Sèvres<sup>10</sup> attempted to expand war crimes trials to include crimes against humanity.<sup>11</sup> This Treaty contained provisions allowing *any* State to prosecute these crimes, regardless of its involvement in World War I. This was unprecedented. The Treaty of Sèvres, however, was never ratified and ultimately was superceded by the 1923 Lausanne Peace Treaty<sup>12</sup> which abandoned these penal provisions.

These early attempts to create international tribunals to address criminal acts committed during wartime did little to deter such crimes or encourage compliance with the laws of war. The lack of enforcement of the Hague Conventions coupled with the reality that no judicial body existed to adjudicate these international crimes led the League of Nations to consider establishing a High Court of International Justice to try individuals for international crimes. The proposed court never came to

<sup>7</sup>(...continued)

of Five Years the Launching of Projectiles and Explosives from Balloons, and other New Methods of a Similar Nature (July 29, 1899); Declaration (II) Concerning Asphyxiating Gases (July 29, 1899); Declaration (III) Concerning Expanding Bullets (July 29, 1899); Convention (III) Relative to the Opening of Hostilities (October 18, 1907); Convention (IV) Respecting the Laws and Customs of War on Land (October 18, 1907); Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land (October 18, 1907); Convention (VI) Relating to the Status of Enemy Merchant Ships at the Outbreak of Hostilities (October 18, 1907); Convention (VII) Relating to the Conversion of Merchant Ships into War-Ships (October 18, 1907); Convention (VIII) Relative to the Laying of Automatic Submarine Contact Mines (October 18, 1907); Convention (IX) Concerning Bombardment by Naval Forces in Time of War (October 18, 1907); Convention (X) for the Adaption to Maritime War of the Principles of the Geneva Convention (October 18, 1907); Convention (XI) Relative to Certain Restrictions with Regard to the Exercise of the Right of Capture in Naval War (October 18, 1907); Convention (XIII) Concerning the Rights and Duties of Neutral Powers in Naval War (October 18, 1907); and Declaration (XIV) Prohibiting the Discharge of Projectiles and Explosives from Balloons (October 18, 1907).

<sup>8</sup>Treaty of Peace Between the Allied Powers and Germany (Treaty of Versailles), June 28, 1919, 2 Bevans 43.

<sup>9</sup>*Id.* The penal clauses of Part VII, Articles 227-230 provided for the punishment of war criminals.

<sup>10</sup>Treaty of Peace Between the Allied Powers and Turkey (Treaty of Sèvres), Aug. 10, 1920, (never entered into force).

<sup>11</sup>*Id.* Article 230 conferred prosecution for those “responsible for the massacres committed during the continuance of the state of war on territory which formed part of the Turkish Empire,” namely, against the Armenians.

<sup>12</sup>Treaty of Peace Between the Allied Powers and Turkey (Treaty of Lausanne), June 24, 1923, 28 L.N.T.S. 11.

fruition.<sup>13</sup> Recognition of individual responsibility for crimes against humanity was not realized until the end of World War II.

After World War II, the Nuremberg and Tokyo military war crimes tribunals set the stage for efforts to create a permanent court. The Allied Powers after World War II reached an agreement on a Protocol for establishing an International Military Tribunal aimed at punishing those responsible for committing crimes against peace, war crimes, and crimes against humanity.<sup>14</sup> Individual responsibility for "egregious" violations of human rights was adjudicated for the first time in history. The recognition of crimes against humanity was one of Nuremberg's legacies as was the development of substantive norms and principles of international criminal law.

However, the principles of international law recognized by the Charters and the Tribunals of Nuremberg and Tokyo remained to be adopted by the rest of the international community. In 1947, the U.N. General Assembly established the International Law Commission (ILC) designating the ILC's objective as "the promotion of the progressive development of international law and its codification." The ILC was directed to formulate principles of international law that were recognized in the Charter of the Nuremberg Tribunal and to prepare a draft code of offences against the peace and security of mankind.<sup>15</sup> Shortly thereafter, the U.N. General Assembly "invite[d] the International Law Commission to study the desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide or other crimes . . . [and] request[ed] the International Law Commission . . . to pay attention to the possibility of establishing a Criminal Chamber of the International Court of Justice."<sup>16</sup>

After preliminary consideration of the ILC's report on international criminal jurisdiction, the U.N. General Assembly formed a 17-Member Special Committee to draft proposals for an international criminal court.<sup>17</sup> A draft statute for an ICC was completed in 1951 and revised in 1953. The following year, the Special Committee submitted its draft statute of an ICC concurrently with the ILC's Code of Crimes Against the Peace and Security of Mankind to the U.N. General Assembly. Consideration of both proposals was postponed because the legal definition of the

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<sup>13</sup>Other attempts by the League of Nations also failed. The 1937 Convention for the Prevention and Punishment of Terrorism called for the creation of an international criminal court as did the Convention for the Creation of an International Criminal Court. Neither entered into force. 19 LEAGUE OF NATIONS O.J. 23 (1938), 19 LEAGUE OF NATIONS O.J. 37 (1938).

<sup>14</sup>On January 12, 1942, a public declaration by the "governments in exile" of nations overrun by the Nazis made clear that one of the principal aims of the war was "the punishment through the channel of organized justice, of those guilty or responsible for these crimes."

<sup>15</sup>Although the ILC was initially asked to prepare a *Code of Crimes Against the Peace and Security of Mankind*, the following year its task was expanded to study the possibility of creating an international judicial organ. U.N. General Assembly Resolutions 177(II) (Nov. 21, 1947) and 260(III)(B) (Dec. 9, 1948).

<sup>16</sup>*Id.* The 1948 Genocide Convention, the 1949 Geneva Conventions and the 1977 Additional Protocols called for establishment of a permanent court, but such action was hindered for decades by the highly polarized international atmosphere and the reluctance of governments to accept international legal jurisdiction.

<sup>17</sup>U.N. General Assembly Resolution 489 (V)(Dec. 12, 1950).



“crime of aggression,” was deemed a necessary antecedent condition to their completion; a definition for which there was no consensus. Consequently, the U.N. General Assembly formed a 19-Member Special Committee to define “aggression.”<sup>18</sup> An agreeable definition did not result from this endeavor. Subsequent committees were established in 1967 and 1971 to undertake the task of defining “aggression.”<sup>19</sup>

Efforts to establish an ICC were stalled during the Cold War and eventually waned. In the ensuing political climate, nations were reluctant to subject themselves to international criminal judicial review. In 1989 Trinidad and Tobago reignited the campaign to create a permanent international criminal court when it requested that establishment of such a court be placed on the agenda of the U.N. General Assembly.<sup>20</sup> International interest intensified in the 1990s with the outbreak of hostilities and allegations of egregious crimes and atrocities in the former Yugoslavia and Rwanda. The U.N. Security Council resolutions establishing the ad hoc tribunals of the former Yugoslavia<sup>21</sup> and Rwanda<sup>22</sup> further supported arguments for a standing war crimes court.<sup>23</sup> During this period, work resumed on drafting a new ICC statute.

The U.N. General Assembly in 1995 established a Preparatory Committee to continue drafting a statute for an international criminal court to be taken up by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court in Rome, Italy.<sup>24</sup>

## **International Conference in Rome**

Meeting from June 15 to July 17, 1998, delegates from 160 nations worked to create a permanent international criminal court to prosecute suspected perpetrators of war crimes. Following contentious negotiations, 120 nations voted to adopt the Rome Statute of the ICC, seven nations voted against it, and 21 nations abstained. Prior to the vote, the U.S. delegation made a final attempt to introduce an

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<sup>18</sup>U.N. General Assembly Resolution 895 (IX) (Dec. 4, 1954).

<sup>19</sup>U.N. General Assembly Resolutions 2330 (XXII) (Dec. 18, 1967) and 2781 (XXVI) (Dec. 3, 1971).

<sup>20</sup>At the time, Trinidad and Tobago was looking for help with the country’s international drug trafficking problem.

<sup>21</sup>The International Criminal Tribunal for the Former Yugoslavia (ICTY) was created by U.N. Security Council Resolution 827 on May 23, 1993. According to the Statute of the Tribunal, which is appended to Resolution 827, the Tribunal has the power to prosecute “persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991.” S.C. Res 827, U.N. SCOR, 3217<sup>th</sup> mtg., U.N. Doc. S/RES/827 (1993).

<sup>22</sup>The International Criminal Tribunal for Rwanda (ICTR) was created by U.N. Security Council Resolution 955 on November 8, 1994. The ICTR’s mandate, as laid out in its Statute (an annex to Resolution 955), is to prosecute persons responsible for “serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighboring states” during 1994. S.C. Res. 955, U.N. SCOR, 3453<sup>rd</sup> mtg., U.N. Doc. S/RES/955 (1994).

<sup>23</sup>The political and logistical problems posed by the ad hoc tribunals of the former Yugoslavia and Rwanda have led some observers to contend that this form of judicial intervention has not been fruitful. Other observers have viewed the ICTY and the ICTR as an appropriate testing ground for a permanent criminal international judicial body.

<sup>24</sup>Yearbook of the United Nations 1995 (Vol. 49) at 1328.

amendment<sup>25</sup> seeking to limit the application of the Court's jurisdiction over non-States Parties. A non-action vote was requested by Norway and granted: by a vote of 113-17 with 25 abstentions, no action was taken to consider the U.S. amendment.

During the Rome Conference, the United States found itself at odds with most of its allies, many of them part of a group colloquially referred to as the "60 Like-minded States (LMS)."<sup>26</sup> This group of nations advocated a powerful and independent Court that was not dependant on the United Nations Security Council. The positions put forward by the group of "60 Like-minded States" in conjunction with the influence of the non-governmental organization community<sup>27</sup> created an atmosphere that isolated the United States and its proposals.<sup>28</sup> The contributions of the non-governmental organization community were instrumental in forging this historic document. More than 200 non-governmental organizations were represented worldwide. Collectively, these organizations were viewed as the largest delegation at the Rome Conference, albeit without any voting power.

The Rome Statute will remain open for signature in New York, at United Nations Headquarters, until December 31, 2000.<sup>29</sup> As of January 6, 1999, 71 States have signed the Statute: Albania, Andorra, Angola, Antigua and Barbuda, Australia, Austria, Belgium, Bolivia, Burkina Faso, Cameroon, Canada, Chile, Colombia, Congo, Costa Rica, Cote d'Ivoire, Croatia, Cyprus, Denmark, Djibouti, Ecuador, Eritrea, Finland, France, Gabon, Gambia, Germany, Georgia, Ghana, Greece, Honduras, Iceland, Ireland, Italy, Jordan, Kyrgyzstan, Lesotho, Liberia, Liechtenstein, Lithuania, Luxembourg, Macedonia, Madagascar, Mali, Malta, Mauritius, Monaco, Namibia, Netherlands, New Zealand, Niger, Norway, Panama, Paraguay, Portugal, Samoa, San Marino, Senegal, Sierra Leone, Slovakia, Slovenia, Solomon Islands,

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<sup>25</sup>Two amendments were proposed prior to the final vote. India also put forward an amendment which consisted of two proposals regarding 1) the role of the U.N. Security Council and 2) the inclusion of a list of weapons in the war crimes definition. India opposed the U.N. Security Council powers to bind non-Party States and to block case investigations for 12 month periods. It also sought to ban weapons it considered a serious violation to the laws and customs of international armed conflict. Incorporation of weapons of mass destruction into the Rome Statute would have made the use of nuclear, chemical and biological weapons a prosecutable war crime. Consideration of this amendment was also defeated by a non-action vote of 114-16 with 20 abstentions.

<sup>26</sup>There is no definitive listing of this group, but the following nations are deemed to have participated in this coalition: Andorra, Argentina, Austria, Belgium, Benin, Bosnia-Herzegovina, Brazil, Brunei, Bulgaria, Burkina Faso, Burundi, Canada, Costa Rica, Chile, Congo (Brazzaville), Cote d'Ivoire, Croatia, Czech Republic, Denmark, Egypt, Estonia, Finland, Gabon, Georgia, Germany, Ghana, Greece, Hungary, Iceland, Ireland, Italy, Jordan, Latvia, Lesotho, Liechtenstein, Lithuania, Luxembourg, Malawi, Malta, Namibia, Netherlands, New Zealand, Norway, Phillippines, Poland, Portugal, Republic of Korea, Romania, Samoa, Senegal, Sierra Leone, Slovakia, Slovenia, Solomon Islands, South Africa, Spain, Swaziland, Sweden, Switzerland, Trinidad and Tobago, United Kingdom, Venezuela, and Zambia.

<sup>27</sup>An example of the influence of non-governmental organizations during the Rome Conference is illustrated by the approval of an independent prosecutor. During the preparatory meetings and during the Rome negotiations, they were strong advocates that the prosecutor should be allowed to initiate an investigation based on his or her own findings.

<sup>28</sup>See Appendix A for a comparison of the positions advocated by the United States and the 60 LMS.

<sup>29</sup>The Rome Statute remained in Rome at the Ministry of Foreign Affairs of Italy for signature until October 16, 1998; thereafter it was moved to the United Nations.

South Africa, Spain, Sweden, Switzerland, Tajikistan, United Kingdom, Venezuela, Zambia, and Zimbabwe. For the ICC Treaty to enter into force, 60 States must ratify it.<sup>30</sup>

Although the long standing U.S. position has been the promotion of the rule of law in both domestic and international systems of justice, the international community pushed the jurisdictional and investigative powers of the Court further than the Clinton Administration was willing to accept. The United States objected to, among other things, the broad powers of the Court to prosecute U.S. military personnel. Regardless of whether the United States becomes a party to the ICC Treaty, this Court, as constituted, would have the authority to claim jurisdiction over U.S. citizens in matters pertaining to allegations of war crimes. Consent of a citizen's country was a provision the United States strongly advocated, but that effort was rebuffed by other delegations. The United States attempted to offset this provision by backing a proposal giving the permanent members of the U.N. Security Council veto power over case investigations, but the international community also rejected this proposal in favor of a more independent court, free from the control of major governments, creating what some see as an international superordinate organization. Had its proposal been accepted, the United States could have used its veto power to protect U.S. servicemen from what it perceived to be politically motivated prosecutions.

## **Composition and Administration of the ICC**

If constituted, the ICC will have judicial authority over international criminal matters and individuals. The mandate of the Court will be to investigate and enforce international law concerning allegations of genocide, crimes against humanity, war crimes, and aggression (Article 5). Individuals are to be brought before the Court only for these war-related charges when nations are unable or unwilling to adjudicate these crimes under their national judicial systems. Adjudication of these crimes is not retroactive;<sup>31</sup> only crimes committed after the ICC Treaty enters into force are within the purview of its jurisdiction (Article 24). The maximum penalty the Court may impose on an individual is life imprisonment (Article 77).<sup>32</sup>

The 128-article ICC Treaty is comprised of the Preamble and thirteen parts: 1) Establishment of the Court; 2) Jurisdiction, Admissibility and Applicable Law; 3) General Principles of Criminal Law; 4) Composition and Administration of the Court; 5) Investigation and Prosecution; 6) The Trial; 7) Penalties; 8) Appeal and Revision; 9) International Cooperation and Judicial Assistance; 10) Enforcement; 11) Assembly of States Parties; 12) Financing; and, 13) Final Clauses.

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<sup>30</sup> Instruments of acceptance, approval or accession are also valid. All instruments must be deposited with the Secretary General of the United Nations (Article 125).

<sup>31</sup>Consequently, suspected war crimes committed prior to the creation of the Court such as those in the territories of Cambodia under Pol Pot's regime or in Iraq under Saddam Hussein would not be subject to ICC adjudication.

<sup>32</sup>In addition to the penalty of imprisonment, the Court may also order fines and the forfeiture of proceeds, property, and assets derived from the crime.

Article 34 divides the administration of the ICC into four organs: 1) the Presidency; 2) three judicial chambers; 3) the Office of the Prosecutor; and, 4) the Registry. Eighteen judges from eighteen different countries will be elected by parties to the Treaty to serve in the three judicial chambers (Article 36). The Chambers include the Pre-Trial Division with a minimum of six judges, the Trial Division with a minimum of six judges, and the Appeals Division which will consist of the President and four judges (Article 39). Judges must be nationals of a State party to the ICC Treaty. When electing judges, consideration is to be given to the representation of principal legal systems of the world, equitable geographical distribution, gender balance, and expertise on violence against women<sup>33</sup> and children (Article 36). The Prosecutor will also be elected and may be assisted by Deputy Prosecutors so long as they are not of the same nationality (Article 42). The Registry serves as the principal administrator of the Court (Article 43). For an illustration of the administrative structure of the Court, see Appendix B.

Prior to the operation of the Court, Annex I of the Addendum to the Rome Statute calls for the establishment of a Preparatory Commission.<sup>34</sup> The role of the Preparatory Commission is to provide the practical arrangements for the establishment of the Court and to prepare draft texts.<sup>35</sup> The drafts pertain to provisions outlined in the ICC Treaty which remain undefined, but are necessary prior to a functioning Court.

The seat of the ICC will be in the Hague, Netherlands, where the World Court, (formally known as International Court of Justice (ICJ)), also resides. The ICJ is currently the principal permanent international judicial institution and has jurisdiction to hear disputes between countries<sup>36</sup> on civil matters. In addition to adjudicating interstate cases, the ICJ gives advisory opinions on international legal questions when

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<sup>33</sup>This qualification corresponds with the inclusion of violent crimes against women in the definition of crimes against humanity. The issue of violence against women has received greater political visibility in the international arena since such acts were reported in Bosnia. As a result, rape was listed as a crime in the ICTY and ICTR Statutes as well as enforced prostitution in the ICTR Statute. The Rome Statute further specified sexually related crimes; Article 7 (g) lists crimes such as rape, sexual slavery, forced pregnancy, enforced sterilization, enforced prostitution, and other forms of sexual violence of comparable gravity.

<sup>34</sup>The addendum to the Rome Statute is known as the Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court. The Preparatory Commission is scheduled to meet from February 16-26, 1999, July 26-August 13, 1999, and November 29-December 17, 1999.

<sup>35</sup>These draft texts include: 1) rules of procedure and evidence; 2) elements of crimes; 3) relationship between the ICC and the United Nations; 4) agreement governing the headquarters of the Court; 5) financial regulations and rules; 6) agreement on the privileges and immunities of the ICC; 7) first year budget; 8) rules of procedure for the Assembly of States Parties; and, 9) definition and elements of the crime of aggression. Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Annex I (F)(5), July 17, 1998.

<sup>36</sup>Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1055, T.S. No. 993, 3 Bevans 1179. Article 34(1) stipulates that "only States may be parties in cases before the Court." The ICJ Statute is an integral part of the Charter of the United Nations. States must consent to ICJ jurisdiction.

requested by an organ or agency of the United Nations. These advisory opinions are consultative and nonbinding.

## U.S. Role and Perspective

The United States has historically supported efforts to establish a permanent war crimes tribunal in addition to being an avid proponent of past ad hoc war tribunals. The military tribunals of Nuremberg and Tokyo, and more recently, the ICTY and the ICTR were U.S. backed efforts. During the formation of these tribunals, the United States consistently worked with its European and U.N. Security Council allies to bring perpetrators of war crimes to justice. The United States continued this effort during the preparatory drafting of the ICC Statute and played a significant role in formulating numerous provisions of the draft statute. The aim of the United States, along with its allies, was to develop a permanent international criminal judicial institution to replace ad hoc war crimes tribunals, to augment the existing rule of international law, and to prevent the repetition of the types of outrages committed in Bosnia, Rwanda, Cambodia, and Iraq.

The Clinton Administration endorsed the general idea of an ICC during the preparatory stages of the Court's formulation. While speaking at the United Nations in September of 1997, President Clinton stated that “[b]efore the century ends, we should establish a permanent international court to prosecute the most serious violations of humanitarian law.”<sup>37</sup> However, the Administration withdrew its support for the final statute because it concluded that the treaty failed to sufficiently protect U.S. interests. This claim rested on the purported political implications of the Court for the United States.

David Scheffer, the United States Ambassador-at-Large for war crimes<sup>38</sup> led the U.S. delegation<sup>39</sup> at the 1998 Rome Conference. Even though the U.S. delegation was successful in achieving many of its objectives,<sup>40</sup> key provisions of the Rome Statute raised concerns about the impartiality of the Court. At the core of the U.S. objection to the ICC Treaty is the fear that other nations would use the ICC as a political forum to challenge actions deemed legitimate by responsible governments.

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<sup>37</sup>White House Office of the Press Secretary, Remarks by the President to the 52<sup>nd</sup> session of the U.N. General Assembly, September, 22, 1997.

<sup>38</sup>David Scheffer was appointed by President Clinton in June of 1997 to be the first United States Ambassador-at-Large for war crimes issues.

<sup>39</sup>Officials from the Office of the Secretary of Defense, the Joint Chiefs of Staff, Department of State, Department of Justice, the U.S. Mission to the United Nations, and individuals from the private sector were members of the U.S. negotiating team.

<sup>40</sup>Some of these objectives included: 1) protection of national security information; 2) judicial rules of procedure; 3) coverage of internal conflicts; 4) comprehensive definitions of crimes; 5) amendment procedures; 6) stringent judicial qualifications; 7) State Party funding of the Court; 8) gender issue recognition; 9) due process protections; 10) U.N. Security Council power to intervene in a case; 11) greater protection to defer a case to national jurisdictions; 12) incorporation of elements of crimes; 13) sufficient number of ratifying States for the treaty to enter into force; 14) reasonable command responsibility and superior orders provisions; and, 15) management of the Court by an Assembly of States Parties.

Pentagon officials are particularly apprehensive over the ICC's jurisdiction over the U.S. armed forces.<sup>41</sup> They are concerned that U.S. military personnel will be targeted for criminal investigation by adversaries. This is disconcerting since the United States has the largest number of troops deployed overseas who are often the first to be utilized in troubled areas around the globe--periodically at the request of the international community. This makes possible a situation in which the United States would be drawn into a hostile region and then become subject to court action. Therefore, this places U.S. servicemen potentially more at risk for frivolous referrals or politically motivated attacks vis-à-vis the ICC.

The jurisdictional provisions of the Court are pivotal to many of the interrelated U.S. concerns. The provisions of the ICC Treaty extend the Court's jurisdiction to nonparticipating countries. Therefore, if the United States does not ratify this Treaty, its troops could still be subject to the Court's jurisdiction. Hypothetically, such complaints could be lodged against U.S. personnel serving in multinational peacekeeping operations overseas. For instance, if U.S. peacekeepers stationed in a foreign country are alleged to have committed war crimes, that country could refer the case to the ICC. The country would have the authority to refer the case because the alleged crimes occurred on its territory. Therefore, the Court could claim jurisdiction over U.S. nationals because the country where the alleged crimes transpired is a party to the ICC Treaty or, if it is not a party to the treaty, voluntarily consents to the ICC's jurisdiction for that particular case.<sup>42</sup>

The United States has maintained that a country's consent to the prosecution of its nationals should be required unless the Security Council refers the case to the Court. Typically, situations may come before the U.N. Security Council when they pose a threat to international peace and security.<sup>43</sup> When deciding which situations the U.N. Security Council will consider, the United States, along with four other permanent members of the U.N. Security Council, has a determinative influence.<sup>44</sup> The United States sought to require U.S. Security Council case referral to the ICC so it could exercise its veto power when deliberating over potential cases. This case referral deference to the U.N. Security Council was one of the assurances the United States sought to avoid what it feared could be the politicization of the Court. In the U.S. view, granting case referral authority to countries without the consent of the national's government and to the independent prosecutor dilutes the role of the Security Council and increases the possibility of potentially unwarranted legal charges.

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<sup>41</sup>Prior to the Rome Conference, the Pentagon distributed a memorandum to more than 100 foreign military attaches in Washington, D.C. A reproduction of this memorandum is available in Appendix C.

<sup>42</sup>Not in all cases would current U.S. Status of Forces Agreements (SOF) protect U.S. troops; such determinations are dependent on existing SOF provisions. The issue of renegotiating SOF is discussed later in this report.

<sup>43</sup>Pursuant to its powers under Chapter VII of the U.N. Charter, the Security Council can adopt binding resolutions on Member States in the interest of maintaining or restoring international peace and security.

<sup>44</sup>In accordance with Article 27 (3) of the United Nations Charter, "[d]ecisions of the Security Council . . . shall be made by an affirmative vote of nine members including the concurring votes of the permanent members . . . ."

Critics contend that allowing U.S. veto authority would have created the very politicization the United States finds objectionable.

The ineligibility of nonparticipating States to adopt a 7-year immunity from the prosecution of war crimes is another effect of the Statute's jurisdictional provisions. Stated plainly, countries that are bound by the treaty are given the option of adopting a transitional provision. This provision allows them to “opt-out” of any investigations or prosecutions for war crimes for the first 7 years after the treaty enters into force. Conversely, nationals of States not party to the treaty are immediately subject to war crimes prosecutions because nonparticipating States are not entitled to this transitional opt-out provision. For instance, if a country is a party to the treaty, it can choose to adopt the transitional provision anytime during the first 7 years the treaty is in force and its citizens will be immune from war crimes prosecutions via the ICC during that 7-year period. Whereas if the U.S. does not participate in the treaty, it will not be eligible for this immunity resulting in possible war crimes prosecutions by the ICC of U.S. citizens if the treaty enters into force.

Furthermore, the amendment procedures would allow States that are bound to the ICC Treaty to reject jurisdiction on crimes that may subsequently be added to the Treaty. Again, countries that are not bound to the ICC Treaty would be subject to the Court's jurisdiction over these new crimes. Ambassador Scheffer maintains that the ICC does not afford nonparticipating nations the same jurisdictional protections as party States. A related point of contention for the United States was the scope and timeframe of the opt-out provision. The United States supported a longer transitional provision so countries could assess the effectiveness and impartiality of the Court. A 10-year time period was advocated in which countries could elect to opt out of the war crimes and crimes against humanity provisions. This would give countries sufficient time to make such a determination.

Finally, the jurisdictional provisions of the Court raise questions about the international treaty regime. One of the basic tenets of international treaty law is that treaties are binding on parties to the agreement.<sup>45</sup> To assert that a treaty extends beyond the parties, as is proposed by the ICC Treaty, essentially nullifies the ratification process required to assent to the terms of a treaty.

## **International Response to U.S. Concerns**

International perspectives regarding the U.S. position on the ICC vary, but many feel that U.S. fears are overblown. Some countries contend that even if unwarranted charges were lodged, the ICC Treaty has sufficient built-in safeguards to protect against such frivolous claims. Frequent references are made to the predominant U.S. role in meting out justice in the military tribunals following WWII, as well as its advocacy of the ad hoc tribunals for the former Yugoslavia and Rwanda. Other nations contend that given the current U.S. position, the United States has relinquished its position as a global moral leader. Lastly, the United States has been criticized for arrogance in subordinating international justice in favor of its own

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<sup>45</sup>Vienna Convention on the Law of Treaties, U.N. Doc. A/CONF. 39/27, May 23, 1969, (entered into force Jan. 27, 1980), Articles 34-38.

national interests. U.S. citizens have been accused of and are capable of committing atrocities.<sup>46</sup> Supporters of the Court contend that it would be unfair to hold the United States to a different standard of justice.

As a result, U.S. policymakers are left with the consequences of a document which is internationally supported.<sup>47</sup> Statements made by representatives such as Ernst Sucharipa of Austria who spoke on behalf of the European Union and its associated States of Bulgaria, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, Slovakia and Slovenia, Cyprus, and Iceland is indicative of the prevailing international sentiment. "The Rome Statute represented a great achievement . . . the Court would make the world a safer, more just and a more peaceful place. The culture of impunity had no place in the world. The purpose of the Court was not only to prosecute and punish those who perpetrated heinous crimes but, through its existence, it would deter and prevent individuals from committing them in the first place. The Court, indeed, would add a new dimension to international relations, in general, and to the effectiveness of international law, in particular."<sup>48</sup> Other statements further exemplified international support for the ICC Treaty, specifically, Trevor Pascal Chimimba, representing Malawi said "the international community had managed to put in place the missing link in the international legal order. While the Rome Statute was not a perfect document, it was nevertheless a product of well crafted compromises; an outcome of laborious negotiations; and above all, an instrument that signified in a clear and unequivocal way the political will of all to bring an end to impunity. The process itself was as significant as the outcome was monumental."<sup>49</sup>

## Potential Politicization of the Court

Despite laudatory international views, U.S. disagreement with the expansion of criminal jurisdiction reflects concerns that the Court will function in a political rather than judicial capacity.<sup>50</sup> Some U.S. officials are concerned that the ICC could provide

<sup>46</sup>On March 16, 1968, more than 400 Vietnamese civilians were killed by American ground troops in the My Lai massacre during the Vietnam War. Charges were brought against numerous individuals, but most were dismissed. Only commanding officer Lt. Calley was court-martialed and convicted. In 1971, he was sentenced to life imprisonment. Shortly thereafter, his sentence was reduced to 20-years and then to 10-years. Three years after his conviction, Lt. Calley was paroled. John P. MacKenzie, *Calley Appeal Rejected*, The Washington Post, April 6, 1976, A1, A6.

<sup>47</sup>A prevailing international perspective of many countries is that the ICC Treaty supports the necessary framework of a permanent tribunal, one that can evolve and be modified. For comments by country representatives, see generally, U.N. Press Releases GA/L/3077-78, October 21, 1998 and GA/L/3079-80, October 22, 1998.

<sup>48</sup>U.N. Press Release GA/L/3077, October 21, 1998.

<sup>49</sup>*Id.*

<sup>50</sup>The current controversy regarding the case of former Chilean President Augusto Pinochet is particularly demonstrative regarding the potential expansion of international judicial jurisdiction. Spain has requested the arrest and extradition of Augusto Pinochet from England so it may try him for the crimes of genocide, terrorism and torture associated with his rule. Spain asserts the right to try Augusto Pinochet based on various international conventions and its domestic laws which allow for the prosecution of specific crimes no matter where they occurred or the nationality of the victims.

(continued...)



countries or individuals<sup>51</sup> harboring anti-American sentiments with a venue to denounce its military or peacekeeping activities. This fear would have been minimized if not for the Court's judicial authority to claim jurisdiction over U.S. citizens based on the consent of other countries. For example, countries disagreeing with responsible U.S. military actions on their territory could lodge charges against American troops in an attempt to avert international attention from the conflict or to hamstring U.S. military or foreign policy initiatives. Another possible political manipulation could arise if a failing leader levied charges in an attempt to energize support or regain political power. Hypothetically, in an attempt to subvert U.S. diplomatic efforts to end the fighting in Kosovo, U.S. peacekeepers stationed in the region could become the target of politically motivated charges.

Regardless of these assertions, the potential that nations may elect to wage their political battles in this judicial forum has the United States assessing how to safeguard American legal rights overseas. One outcome might be the restriction of future U.S. foreign policy initiatives involving military alliance obligations and multinational operations. Protection of U.S. troops from frivolous, false or politically motivated accusations is paramount to the current U.S. position.

### **Proponent's Perspectives Towards the ICC**

Proponents of the Court while acknowledging that the Rome Statute is flawed, nonetheless, hail it as an historic agreement that can be amended to improve its effectiveness. Advocates of the Court also maintain that there are enough safeguards to allay U.S. concerns. Some observers have commented that the interests of U.S. citizens would be better protected if the United States became a party to the ICC Treaty. Under this scenario, the United States could adopt the opt-out provision protecting U.S. citizens from war crimes for 7 years and be eligible to reject the Court's jurisdiction over newly added crimes. Seven years after the ICC Treaty enters into force, amendments to the treaty may be proposed. At that time, they argue, the United States could work within the framework of the agreement to address its concerns over contentious provisions.<sup>52</sup> Currently, the United States does not consider this a viable option.

Backers of the ICC Treaty additionally contend that U.S. adamance during the negotiations strengthened many provisions, specifically: the priority given to national

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<sup>50</sup>(...continued)

Critics maintain that Spain's claim of jurisdiction over Augusto Pinochet amounts to judicial activism framed under the rubric of international humanitarian law.

<sup>51</sup>For example, in 1967, anti-war activist Bertrand Russell assembled a like-minded coalition of international observers and created The International War Crimes Tribunal to adjudicate alleged American war crimes during the Vietnam War. These proceedings were held under the auspices of the Bertrand Russell Peace Foundation. It had no international authority over governments or individuals. See generally, John Duffett, ed., introduction by Bertrand Russell, foreword by Ralph Schoenman, *Against the Crime of Silence: Proceedings of the Russell International War Crimes Tribunal: Stockholm, Copenhagen*.

<sup>52</sup>In accordance with Article 127, a State may withdraw from the ICC Treaty one year after receipt of written notification by the Secretary-General of the United Nations unless a longer timeframe is otherwise specified by the withdrawing State.

courts to prosecute cases, due process protections, and Pre-Trial Chamber approval of the actions of the Prosecutor. These factors in conjunction with the assertion that the crimes to be adjudicated before the ICC are not those typically committed by U.S. forces further reduces the probability of the prosecution of U.S. nationals.

Advocates also point to three factors that threaten to weaken the Court in bringing alleged perpetrators to justice. The first is U.S. nonparticipation in this international criminal judicial institution, the second is the problem of “traveling dictators” and the third is the 7-year opt-out clause for war crimes. Without U.S. backing, many fear that the ICC will not achieve the legitimacy needed to carry out its mandate. Additionally, the Rome Statute lacks a provision to allow a country that has custody of an accused perpetrator to initiate a case. Heads of State or former Heads of State may be free to travel to other countries without fearing capture and surrender to the ICC. For instance, if Saddam Hussein commits war crimes against his own people in Iraq, and then travels on vacation to a neighboring State or seeks medical care in a sympathetic country, the custodial State has no authority to surrender Saddam Hussein to the Court for prosecution. Because the crimes were committed in Iraq, Saddam Hussein would either have to consent to his own prosecution or Iraq would have to be a party to the ICC Treaty. Both scenarios appear unlikely. Finally, allowing countries to opt out of war crimes prosecutions for 7 years gives governments immunity from these crimes during the 7-year period. As mentioned previously, if a country were a party to the ICC Treaty, its citizens could arguably commit war crimes for the first 7 years of the Court's existence, and they would be immune from prosecution for these crimes by the ICC.

In spite of the provisional weakness of the ICC Treaty, the international community overwhelmingly voted to adopt the Rome Statute. Although 71 States have signed it, ratification by the requisite number of States may be complicated and time consuming.<sup>53</sup> Some outstanding factors that may prove decisive include whether the ICC provisions comply with the municipal law of States<sup>54</sup> and whether countries are willing to confront the political<sup>55</sup> implications presented by the provisions of the ICC Treaty.

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<sup>53</sup>Signing a treaty is an indication of a State’s preliminary intent to assent to the provisions of the document. It must be followed by ratification in accordance with each country’s domestic procedures for ratification.

<sup>54</sup>A frequently cited example is a country’s laws pertaining to extradition. For example, some countries have very strict laws regarding extradition while others countries are not parties to extradition treaties and/or conventions. This consideration is significant because the Court will have to rely on international cooperation when it requests the delivery or transfer of alleged perpetrators for prosecution. A recent illustration of the complexities of extradition is the case of former President Augusto Pinochet of Chile. Pinochet’s extradition rests on whether the requirements of British extradition law are met. Consideration will be given to “whether the offenses are extradition crimes, whether the request is properly authenticated, whether the offenses are of a political character, and any compassionate circumstances.” For more about the Pinochet case, see *supra* 50.

<sup>55</sup>One frequently cited example pertains to Israel. The inclusion of “[t]he transfer *directly or indirectly* [emphasis added] by the Occupying Power of parts of its own civilian population into the territory it occupies . . .” in the definition of war crimes would arguably make Israel’s settlement in the West Bank and Gaza Strip a war crime. Article 8(2)(b)(viii).

## Problematic Provisions

The following section describes the major provisions of the ICC Treaty. These provisions focus on the determinations made by the plenipotentiaries in Rome and are distinguished from the U.S. position during the Rome negotiations.<sup>56</sup>

### Crimes within the Court's Jurisdiction

Before the ICC can hear a criminal case, it must have jurisdiction over both the crime and the alleged perpetrator of the crime. Crimes which can be brought before the ICC (subject matter jurisdiction) are limited to "serious crimes of concern to the international community," namely, genocide, crimes against humanity,<sup>57</sup> war crimes,<sup>58</sup> and "aggression." If the ICC Treaty enters into force, these crimes will not be subject to any statute of limitations (Article 29). For a complete listing of the actual acts that determine these crimes, see Appendix D.<sup>59</sup> In addition to these core crimes, international terrorism and illicit drug trafficking may come within the purview of the Court 7 years after the ICC Treaty enters into force.<sup>60</sup>

**U.S. Rationale.** While the United States supported the core crimes of genocide, war crimes, and crimes against humanity as within the Court's jurisdiction, it opposed the inclusion of the crime of "aggression" because of the lack of a generally accepted

#### U.S. Position during the Rome Conference

- ▶ Opposed the inclusion of "aggression" as a crime within the Court's jurisdiction.
- ▶ Opposed the inclusion of international terrorism and illicit drug trafficking within the Court's jurisdiction.

<sup>56</sup>This information has been gathered from U.N. documents, State Department materials, and the non-governmental organization community.

<sup>57</sup>Precedents for the definition of crimes against humanity can be found in the Nuremberg Charter, the Tokyo Charter, the Yugoslavia Tribunal Statute, and the Rwanda Tribunal Statute.

<sup>58</sup>Precedents for the definition of war crimes can be found in the 1899 and 1907 Hague Conventions and Regulations and the four 1949 Geneva Conventions and Additional Protocols.

<sup>59</sup>In accordance with Article 8, war crimes may occur during international armed conflicts (Article 8(2)(b)) as well as internal conflicts (Article 8(2)(c-f)). The United States along with a majority of countries supported the inclusion of internal conflicts, but differed as to the circumstances under which the ICC would have jurisdiction. For a comparison, see Appendix A.

<sup>60</sup>The Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, otherwise referred to as the Addendum to the Rome Statute, recognizes that the crimes of international terrorism and illicit drug trafficking pose a serious threat to international peace and security. Based on the lack of a consensus during the Rome negotiations on acceptable definitions for these crimes, the Final Act recommends that a Review Conference be convened 7 years after the treaty enters into force. Its role is to define these crimes for their inclusion in the list of crimes that may be adjudicated by the Court. Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Annex I (E), July 17, 1998.

definition.<sup>61</sup> Pursuant to the U.N. Charter, acts of ag-gression fall within the mandate of the U.N. Security Council.<sup>62</sup> As a result, the application of this crime when determining an individual's accountability is problematic. The United States also sought to exclude the crimes of international terrorism and illicit drug trafficking from the Court's jurisdiction asserting that the Court's scope should be limited to the most egregious crimes. U.S. opposition to the inclusion of these crimes was also predicated on the position that national law enforcement efforts to adjudicate these crimes are more effective. In this view, nations are better equipped to investigate these complex crimes by using their own domestic legal agencies and intelligence resources to uncover crime organizations.

## **The ICC's Jurisdiction and U.S. Sovereignty**

Jurisdiction over an individual is dependent on whether the ICC can exercise its authority to prosecute the alleged perpetrator of the crime. The manner in which the ICC would be able to employ its jurisdictional powers is based on the three preconditions set out in Article 12 of the Rome Statute:

1. A State which becomes a Party to this Statute accepts the jurisdiction of the Court with respect to the [core] crimes referred to in article 5.
  
2. In the case of article 13, paragraph (a) or (c),<sup>63</sup> 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 in accordance with paragraph 3:
  - (a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;
  
  - (b) The State of which the person accused of the crime is a national.
  
3. If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question.<sup>64</sup>

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<sup>61</sup>The importance of this definition should not be overlooked. It might ultimately redefine or modify both the concept and conduct of warfare.

<sup>62</sup>General Assembly Resolution 3314 (XXIX) is frequently cited as a source for the definition of aggression. This resolution only determines acts of aggression by States and *not* individuals.

<sup>63</sup>Article 13(a) states "[a] situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14." Article 13(c) states "[t]he Prosecutor has initiated an investigation in respect of such a crime in accordance with Article 15."

<sup>64</sup>Three types of jurisdiction are evident in this provision: 1) inherent jurisdiction, 2) jurisdiction by state consent, and 3) universal jurisdiction. Article 12(1) is an example of inherent jurisdiction. A State automatically accepts the Court's jurisdiction over the core crimes upon ratification of the ICC

**U.S. Rationale.** The most contentious issue the United States addressed in Rome was the preconditions to jurisdiction, because it directly affects national sovereignty. The U.S. position was advocated to protect U.S. military personnel stationed on foreign soil from prosecution without the consent of the U.S. government. Allowing case investigations of U.S. citizens based on the consent of other countries was an unacceptable outcome for the United States. The requirement of nonratifying State consent was to prevent the Court from proceeding if the government of the accused refused to accede to ICC jurisdiction.<sup>65</sup> The U.S. positions on automatic jurisdiction and the opt-out provision were advocated to allow countries to assess the effectiveness and impartiality of the Court before committing to its absolute jurisdiction. The United States' position that automatic jurisdiction be applicable only to genocide was based on its belief that the most egregious crime should not be subject to State consent. Support for assenting to automatic jurisdiction for the most egregious crime while providing a transitional period for war crimes and crimes against humanity also had national sovereignty implications. It was argued that by preserving voluntary acceptance of the Court's jurisdiction for 10 years, countries would be given sufficient time to objectively observe the neutrality of the ICC. The United States proposed that at the end of this period, States party to the ICC would have to either: 1) accept automatic jurisdiction over all core crimes, 2) cease to be a party to the ICC Treaty, or 3) seek to amend the opt-out provision.

#### U.S. Position during the Rome Conference

- ▶ Supported consent of non-party States prior to the prosecution of their nationals.
- ▶ Supported automatic jurisdiction only for the crime of genocide for States that ratify the ICC Treaty.
- ▶ Proposed a 10-year transitional provision to opt-out of the Court's jurisdiction for crimes against humanity and war crimes.

### Limits Placed on the ICC's Jurisdiction

To allay concerns over the erosion of national sovereignty, limits were placed on the Court's claim of jurisdiction over a specific case. Paragraph 10 of the Preamble and Article 1 ensure that nations are the primary adjudicators of their own citizens by

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<sup>64</sup>(...continued)

Treaty. Article 124, referred to as the opt-out provision, gives States Parties the option of temporarily opting out of war crimes. If a State chooses to adopt this provision, the ICC would have inherent jurisdiction over genocide and crimes against humanity for that State until the opt-out period lapses. Thereafter, it would have inherent jurisdiction over all core crimes. Articles 12(2) and 12(3) are comprised of consent jurisdiction and a form of universal jurisdiction. State consent jurisdiction mandates that interested States give their consent to be bound while the principle of universal jurisdiction extends the power to exercise jurisdiction over a State regardless of whether it voluntarily accedes to jurisdiction. *It is this form of de facto universal jurisdiction that the United States vehemently opposes.*

<sup>65</sup>During the negotiations, this position was reserved by the United States pending the decision on the role of the U.N. Security Council.

declaring the Court as "complementary to national criminal jurisdictions." This concept of complementarity basically holds that a country's national criminal system has the principal responsibility for adjudicating alleged perpetrators of war crimes. Cases will only be brought before the ICC when national systems are not functioning or are ineffective, thereby complementing, not replacing national courts. For instance, when a State is unwilling to administer the law or unable to do so due to State collapse, the ICC can step in to adjudicate.<sup>66</sup>

Article 18 of the Rome Statute grants States the right to challenge the Court's jurisdiction. This right can be asserted if a State that has primary jurisdiction is currently prosecuting or investigating the case. This challenge is also applicable for previously investigated or prosecuted cases.<sup>67</sup> The Statute requires that any challenge must be made prior to the ICC's trial of the accused.

The power to defer prosecutions for a period of twelve months is granted to the U.N. Security Council under Article 16 of the Rome Statute. The five permanent members of the U.N. Security Council must unanimously agree to defer a prosecution. Following agreement, a resolution must be adopted in accordance with Chapter VII of the Charter of the United Nations. These deferral periods are renewable on an unlimited basis.

**U.S. Rationale.** To protect American military personnel from politically motivated prosecutions, the United States sought to assure that the U.N. Security Council maintain case referral authority. U.N. Charter Chapter VII powers pertain to threats or breaches of international security. Since such "situations" would come before the U.N. Security Council, the United States as one of five permanent members could withhold approval, thereby vetoing and ultimately halting an investigation. This would grant any of the permanent U.N. Security Council members veto power over case-related investigations. Additionally, the United States wanted to preserve the U.N. Security Council's role and its powerful position on the Council in the work of the Court without marginalizing the permanent member's powers.

#### U.S. Position during the Rome Conference

- ▶ Advocated that the ICC should be prohibited from proceeding with a "situation" that the U.N. Security Council is addressing under its Chapter VII powers, unless the UN Security Council expressly states otherwise.

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<sup>66</sup>Article 17 of the Rome Statute declares under what circumstances the ICC can exercise complementarity as well as when a case is inadmissible before the Court. The decision to deem a nation's trial limited in its extent or invalid will rely on factual determinations to be made by the Court. No standards for such a determination are included in this provision.

<sup>67</sup>This provision in conjunction with Article 20 protects individuals against double jeopardy (being tried for the same crime twice). Another effect of this provision should not be dismissed, the possibility for potential manipulations of the judicial process. Some have questioned whether this challenge will be used by governments to shield alleged perpetrators by either delaying an ICC prosecution or conducting so-called sham trials.

## The ICC's Procedural Structure

Some procedural aspects of the Court were patterned after its predecessors, but many procedural provisions were expanded to enhance the effectiveness of the judicial process. For a comparison of the ICC's organizational and procedural structure with prior tribunals, see Appendix E.

### Case Referrals

In accordance with Article 13, cases may be referred to the Court by a State Party to the ICC Treaty, the U.N. Security Council or the Prosecutor. Although the Prosecutor is granted authority to trigger an investigation, this authority is constrained by compulsory judicial approval. Prior to proceeding with an investigation, the Prosecutor must present case evidence to the judges in the Pre-Trial Chamber for review.

**U.S. Rationale.** Prosecutorial autonomy was rejected by the United States on the grounds that one individual with so much power may take up frivolous or politically motivated complaints. An analogous contention was that legitimate actions taken by responsible governments should not be subject to case determinations made by a potentially overzealous prosecutor. Furthermore, the possibility of overwhelming the court with complaints is also likely because information for alleged crimes may come from various sources, i.e. case referrals are no longer limited to States or the U.N. Security Council. Consequently, the Prosecutors Office could become embroiled in political decision-making.<sup>68</sup>

#### U.S. Position during the Rome Conference

- ▶ Advocated that only the U.N. Security Council or a State Party to the ICC Treaty should have the authority to trigger investigations. The Prosecutor's role is to investigate cases that have been referred.

### Rights of the Accused

Articles 20, 55, 63, 66, and 67 grant criminal justice safeguards to the alleged perpetrator, many of which were modeled after the due process protections guaranteed to defendants by the U.S. judicial system. Although the United States fervently advocated the inclusion of these rights, potential problems may arise as to whether these rights afford synonymous rights as those guaranteed to U.S. citizens under the First and Fourth Amendments of the U.S. Constitution. Under the Rome Statute, the rights of the accused become effective once an investigation by the Prosecutor is commenced. Such assurances include the right:

- not to incriminate one's self;

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<sup>68</sup>This position is perhaps an international reflection of the domestic debate occurring in the United States over the prosecutorial powers of the Independent Counsel.

- to an attorney;
- to remain silent;
- not to be compelled to testify or confess guilt;
- not to be subjected to coercion;
- not to be subjected to arbitrary arrest or detention;
- to be awarded an interpreter;
- to a public hearing;
- to be present at trial;
- to be informed of the charges brought against one;
- to be questioned in the presence of counsel;
- to be presumed innocent at trial;
- not to be tried twice for the same crime (double jeopardy);
- to an appeal;
- to adequate time to prepare one's defense;
- to be tried without undue delay; and
- to confront one's accuser.<sup>69</sup>

## **Financial Obligations of the Court**

In accordance with Article 100, the Court will bear costs relating to travel, security, transfer of individuals in custody, transport of an individual being surrendered, translation, interpretation, transcription, expert opinions, and expert reports.<sup>70</sup> Travel fees apply to witnesses, experts, and the staff of any organ of the Court. States will bear the costs when executing requests from the Court. Projections for the effective functioning of the ICC range from US\$10 to \$80 million a year, depending on whether the Court is adjudicating a situation. For comparative purposes, collectively, the ICTY and ICTR operate on approximately \$100 million annually. They are funded from U.N. General Assembly assessments. The ICJ operates on roughly \$10 million annually, its operating costs are apportioned in the United Nations' regular budget. The ICC's funding will be derived from multiple sources which are discussed in the following section.

## **The Relationship between the ICC and the United Nations**

The Court's ultimate relationship with the United Nations was left undetermined. Article 2 of the Rome Statute maintains that the ICC's relationship with the United Nations will be addressed in a subsequent "agreement to be approved by the Assembly of States Parties to . . . [the Rome] Statute and thereafter concluded by the President of the Court . . . ." The four outstanding possibilities are 1) a treaty body of the United Nations; 2) an independent international organization; 3) a subsidiary body of the United Nations; or, 4) a principal organ of the United Nations. Many delegations

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<sup>69</sup>Article 68 provides for an exception to the right to confront one's accusers. Witnesses may be protected when the alleged crime involves sexual violence, gender violence, and violence against children. In such cases, the Court may conduct closed proceedings or the presentation of evidence by electronic or other special means. In addition to these victims rights, Article 75 establishes principles of reparations to victims in the form of restitution, compensation and rehabilitation. Article 79 establishes a trust fund for such reparations.

<sup>70</sup>The Court will also bear costs related to staffing. These amounts have yet to be determined.



during the Rome Conference advocated a close relationship between the ICC and the United Nations arguing that such a relationship would enhance the Court's effectiveness, but no consensus among the delegations was reached.

Another factor that will influence the ICC's relationship with the United Nations is the source of the ICC's funding. Articles 115-117 of the Treaty adopted a hybrid approach whereby financing for the Court may come from three sources: 1) assessed contributions from by States Parties, 2) funds provided by the United Nations which is funded by Member Nations, and 3) voluntary contributions made by Governments, international organizations, individuals, corporations and other entities. The assessment of contributions from States Parties is to be in accordance with an agreed scale of assessment predicated on the scale adopted by the United Nations for its regular budget.

**U.S. Rationale.** Primarily, the United States sought to avoid subjecting the Court to possible political manipulation. A Court closely linked with the United Nations might become mired in its bureaucracy and give the United Nations, a political institution, some control over a judicial institution. Additionally, any dependence on the U.N. regular budget for

#### U.S. Position during the Rome Conference

- ▶ Supported the ICC as an independent treaty-based organization.
- ▶ Supported the position that the ICC should be funded by States party to the ICC Treaty.

funding might compromise the independent functioning of the Court. Sole funding by States Parties would arguably guard against any such manipulations.

## Congressional Considerations

The dual objectives of the United States during the Rome Conference were to continue to promote international justice while securing legal protection for American citizens. The end result of the Rome Conference in the opinion of many U.S. politicians was a flawed statute<sup>71</sup> which may pose unfortunate consequences to U.S. national interests. The Administration is left to consider what options are available to protect U.S. military personnel during peacekeeping and multilateral military action. Can the U.S. prevent its citizens from being brought before the Court without U.S. government consent? Although the Administration has not submitted the ICC Treaty to the U.S. Senate for consideration, several Members have expressed their views toward the ICC.

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<sup>71</sup>Article 120 of the Statute forbids reservations to the treaty. Therefore, the United States must either adopt or reject the treaty in its entirety. Reservations are specific qualifications or stipulations which change a country's obligations to a treaty without altering the actual language of the treaty.

Most recently, the Omnibus Appropriations Act of 1998<sup>72</sup> expressed congressional misgivings about the ICC. It restricts U.S. accession to any new international tribunal except pursuant to a treaty or congressional statute. It reflects the wariness many Members have toward the Rome Statute. It is distinctive from previous legislative measures relating to an international criminal court in that it grants no legal effect to the jurisdiction of a tribunal. Basically, the Act seeks to protect U.S. citizens, U.S. property, and acts committed on U.S. territory from the jurisdiction of an international criminal court.

Prior to enactment of this legislation, the Senate Foreign Relations Committee held a post-conference hearing on the ICC on July 23, 1998. The Senate Foreign Relations Committee is the Committee of jurisdiction in matters of advice and consent to treaty ratification. Committee members uniformly agreed that the U.S. delegation correctly concluded to vote against the Rome Statute. A bipartisan group of lawmakers aired their concerns regarding:

- the infringement of U.S. sovereignty by trying citizens of countries that do not participate in the treaty;
- the effectiveness of the ICC in trying suspected perpetrators of war crimes;
- insufficient due process protections accorded to U.S. citizens before this tribunal;
- the diminished role of the U.N. Security Council;
- U.S. funding for this newly created international legal body; and
- U.S. ally support for the Rome Statute.<sup>73</sup>

Senator Rod Grams (R, MN) stated that the ICC Treaty is not “sufficient to safeguard our nation’s interests. The United States must aggressively oppose this Court each step of the way, because the treaty establishing the International Criminal Court is not just bad, it is dangerous.” Senator Diane Feinstein (D, CA) expressed concern that the Court would act politically and not on behalf of justice. Although acknowledging the need for an ICC, she was ultimately concerned about the exposure of U.S. military personnel to the jurisdiction of the Court. “Would random incidents and civilian casualties subject them to frivolous prosecutions?” She recommended that the United States seek to amend this document. Committee Chairman Senator Jesse Helms (R, NC) declared that the “Rome Treaty is irreparably flawed.” He advised that “rejecting this treaty is not enough. The United States must fight this treaty.” He suggested that the United States seek assurances from allies that they would not hand over U.S. military personnel to the Court and proposed renegotiating U.S. Status of Forces Agreements (SOF). Senator Joseph Biden (D, DE) reiterated this concern. He questioned whether the Administration was planning to review current SOF agreements.<sup>74</sup> Senator John Ashcroft (R, MO) was dismayed by the

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<sup>72</sup>P.L.105-277, § 2502.

<sup>73</sup>Specifically, Germany, Canada, the Netherlands, Britain, and France.

<sup>74</sup>The renegotiation of SOF agreements has been identified as one of the few affirmative actions the United States could take to protect its servicemen if the Statute is implemented. Article 98 (2) of the Rome Statute prohibits the Court from proceeding "with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant

jurisdictional provisions of the Rome Statute and said it “smacks of arrogance” and was framed without adequate consideration for the U.S. Constitution. As Chairman of the Senate Judiciary Subcommittee on Constitution, Federalism, and Property Rights, he stated his plans to address these constitutional issues in that subcommittee.

Some of the suggested options that emerged from the hearing include:

- continue to negotiate for more favorable provisions;
- amend objectionable provisions in 7 years;
- ignore the court by no further participation;<sup>75</sup>
- block the treaty by deterring other governments from ratifying the treaty;
- alter U.S. diplomatic posture towards governments that ratify the treaty;
- renegotiate SOF agreements;
- reconsider the commitment of U.S. troops to international missions; and
- disregard the Court and its decisions once it begins to operate.

In a speech to the U.N. General Assembly on October 21, 1998, Ambassador Scheffer confirmed that "the United States will not sign the treaty in its present form. Nor is there any prospect of our signing the present treaty text in the future." As to the options that were being considered, he stated that "we have heard it suggested that the United States should exercise 'benign neglect' or that we should wait until the Review Conference 7 years after entry into force of the treaty -- a conference to which the United States, as a non-party, would not be entitled to fully participate. We have rejected both of these options . . . [w]e would prefer, however, a policy of positive and forward-looking engagement. . . ." One possible venue in which the United States could continue its dialogue with other governments would be U.S. participation in the ICC Preparatory Commission. As a signatory to the Final Act in Rome,<sup>76</sup> the United States is eligible to participate in the Commission. Any possible participation was qualified by Ambassador Scheffer, asserting that "it is essential that the Preparatory Commission afford the opportunity for governments to address their more fundamental concerns."

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<sup>74</sup>(...continued)

to which the consent of a sending State is required . . . ." The ICC provisions do not supersede or negate Status of Forces Agreements between the United States and a host nation.

<sup>75</sup>Regardless of whether the United States acquiesces to the provisions outlined in the Rome Statute, an international effort continues toward the establishment of the ICC. A signing ceremony was held in Rome, Italy on October 7, 1998. Two weeks later, the U.N. General Assembly met on October 21 and 22, 1998 to discuss the Rome Statute. Another meeting was held the following month at Westminster Palace in England for States that have already signed the document. This is not the first time that the international community has worked to establish a multilateral treaty without the support of the United States. The Rome Conference was the second time in less than one year that the U.S. found itself isolated from the consensus of the international community; the first was during the negotiations for a land mine treaty. The international community forged ahead without the United States to create the Ottawa Landmine Treaty.

<sup>76</sup>The Final Act is a document that was signed by the nations that participated in conference negotiations. It acknowledges the events that transpired at the Rome Conference.

In evaluating available options, the Administration will likely consider prior congressional legislation and resolutions. H.J. Resolution 89,<sup>77</sup> introduced in the 105<sup>th</sup> Congress, called on the President "to support and fully participate in negotiations at the United Nations and especially in the preparatory committee to establish an international criminal court with jurisdiction over international crimes . . . [and] provide any assistance necessary to expedite the establishment of such a court." In addition, the Foreign Relations Act for Fiscal Years 1994 and 1995,<sup>78</sup> contained three sections pertaining to the establishment of an international criminal court. Section 517 expressed the sense of the Senate supporting the establishment of an international criminal court. It declared that such a court would serve American and world interests and instructed the U.S. delegation to advance this proposal at the United Nations. Sections 518 and 519, introduced by Senator Helms,<sup>79</sup> prohibited U.S. consent to any international criminal court treaty under the following conditions:<sup>80</sup>

#### SEC. 518. INTERNATIONAL CRIMINAL COURT PARTICIPATION

The United States Senate will not consent to the ratification of a treaty providing for United States participation in an international criminal court with jurisdiction over crimes of an international nature which permits representatives of any terrorist organization, including but not limited to the Palestine Liberation Organization, or citizens, nationals or residents of any country listed by the Secretary of State under section 6(j) of the Export Administration Act of 1979 as having repeatedly provided support for acts of international terrorism, to sit in judgement on American citizens.

#### SEC. 519. PROTECTION OF FIRST AND FOURTH AMENDMENT RIGHTS

The United States Senate will not consent to the ratification of any Treaty providing for United States participation in an international criminal court with jurisdiction over crimes of an international character unless American citizens are guaranteed, in the terms establishing such a court, and in the court's operation, that the court will take no action infringing upon or diminishing their rights under the First and Fourth Amendments of the Constitution of the United States, as interpreted by the United States.

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<sup>77</sup>This joint resolution was introduced on July 30, 1997 by Representatives Joseph P. Kennedy, James A. Leach, William D. Delahunt, Fortney Pete Stark, Michael R. McNulty, Lane Evans, and Lynn C. Woolsey. H.J. Res. 89 was referred to the House Committee on International Relations. It received no further action.

<sup>78</sup>P.L. 103-236, §§ 517-519 (April 30, 1994).

<sup>79</sup>Sen. Helms initially introduced three amendments, but the first was defeated. It would have stricken the provision that supports the establishment of an international criminal court.

<sup>80</sup>Legislation relating to an international criminal court began with the 99<sup>th</sup> Congress and typically incorporates two themes: 1) support for the establishment of an ICC and 2) the protection of U.S. Constitutional guarantees. For a discussion of congressional action from the 99<sup>th</sup> -102<sup>nd</sup> Congress (1985-1992), see *An International Criminal Court?*, Daniel Hill Zafren, CRS Report 93-298 A, revised March 9, 1993.

Sen. Helms's concerns were based on his objections to the "internationalization of justice" and encroachment upon the constitutional liberties of U.S. citizens.<sup>81</sup> He reiterated these concerns prior to the Rome Conference. In a letter to Secretary of State, Madeline Albright, he again raised the issues of constitutional due process and the judicial make-up<sup>82</sup> of a court that would have the power to sit in judgment of U.S. citizens.

## **Implications**

Despite U.S. efforts, some observers contend that many of the compromises made to finalize the key provisions of the Rome Statute place U.S. national interests at risk. As a result, the Clinton Administration is not prepared to sign the ICC Treaty in its current form. Additionally, any subsequent consideration is unlikely unless corrective measures are taken to amend the jurisdictional powers of the Court.

The political paradox created by the ICC provisions may have a direct consequence on U.S. military alliance participation. The United States, as a major contributor to international peacekeeping missions, is often called upon to commit U.S. forces to such missions. Because the jurisdictional reach of the ICC may extend to American citizens without U.S. consent, U.S. military leaders may be apprehensive about future commitment of troops. Legal assurances by U.S. allies not to surrender U.S. citizens to the Court via protective SOF provisions might abate this concern. How might this affect our NATO military commitments? What effect will this have on future U.S. peacekeeping and military operations? How will this effect our relationship with allies or other treaty obligations? How will America respond if its citizens are summoned before this international judicial institution?

The gap in international criminal justice has been repeatedly acknowledged as have the complexities of creating a transnational tribunal melding various legal and political systems. The efforts in Rome were a testament to these difficulties. Although there is widespread agreement that individuals responsible for genocide, ethnic cleansing, mass killings, torture, and other crimes against humanity should be punished, the outstanding question is whether the Rome Statute in its present form creates the proper judicial body to adjudicate these cases. If the ICC Treaty does not come into force or takes years to establish, the sole international avenue to address occurrences of war crimes or future cases of egregious international crimes remains U.N. Security Council establishment of ad hoc tribunals as was done in the cases of

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<sup>81</sup>The debate as to whether the creation of an international criminal court is unconstitutional is beyond the scope of this report. However, the treatment of extradition proceedings under United States law is frequently cited as an example of the constitutionality of U.S. citizens being charged and adjudicated by foreign legal systems.

<sup>82</sup>Of particular concern is the possible eligibility of individuals from rogue countries to sit in judgment of Americans. Article 36(4) of the ICC Treaty maintains that only nationals of States Party to the treaty can be nominated to be judges. Rogue countries would first have to consent to the jurisdiction of the Court. Additionally, before representatives of these countries could judge citizens of other nations, they would have to be deemed qualified (Article 36 (3)) and elected by other States Parties to the ICC Treaty (Article 36(5-6)).

the ICTY and the ICTR.<sup>83</sup> Although these ad hoc tribunals provide a venue to prosecute suspected perpetrators, the deterrent effect associated with a permanent institution is not achieved. Some proponents argue that a permanent institution would eliminate the need to continually establish ad hoc tribunals. They are concerned about the effectiveness of conflict specific, ad hoc bodies created long after atrocities have been committed.

The Administration must decide how to proceed during this interim period. What course of action, if any, should it take toward the ICC Treaty? Although Congress has no immediate direct role,<sup>84</sup> it will expect to be consulted during this decision making process. Expressions of congressional attitude toward various policies can occur directly through legislation concerning the role of the United States vis-à-vis the Court or indirectly via the “power of the purse.” Aside from these possible congressional considerations, the Administration must consider its remaining alternatives. Can the United States renegotiate problematic provisions of this document before it enters into force? Can the United States influence its allies or come to an understanding regarding the workings of the Court? What will result if the United States chooses to do nothing by ignoring or not participating in the Court? What type of relationship will result between the United States and an established ICC? Ultimately, the Administration is left with the consequences of a document that it views as flawed and a threat to U.S. national sovereignty.

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<sup>83</sup>The United States continues to look at ad hoc tribunals as a way to address war crimes, particularly in Iraq. In the 102<sup>nd</sup> Congress, the U.S. Senate passed the Persian Gulf War Criminals Prosecution Act of 1991. It called for the “Permanent Representative of the United States to the United Nations, to propose to the Security Council the establishment of an international criminal tribunal for the prosecution of Persian Gulf criminals . . . .” If this effort fails, as an alternative, “the Congress urges the President to work with the partners in the coalition of nations participating in Operation Desert Storm to establish such a tribunal.” This bill was referred jointly to the House Committees on Foreign Affairs and the Judiciary. Additionally, three congressional resolutions were introduced in the 105<sup>th</sup> Congress pertaining to Iraq. All called for the adoption of a U.N. Security Council resolution to establish an international criminal tribunal to prosecute Saddam Hussein. H. Con. Res. 137 was introduced on January 27, 1998, S. Res. 179 was introduced on February 23, 1998, and S. Con Res. was introduced on March 2, 1998. None was adopted.

<sup>84</sup>If the Administration submits this treaty or an amended version of it, the Senate will ultimately decide whether to give its advice and consent to ratification.

## APPENDICES

### Appendix A: Comparison of the U.S. position with the 60 LMS

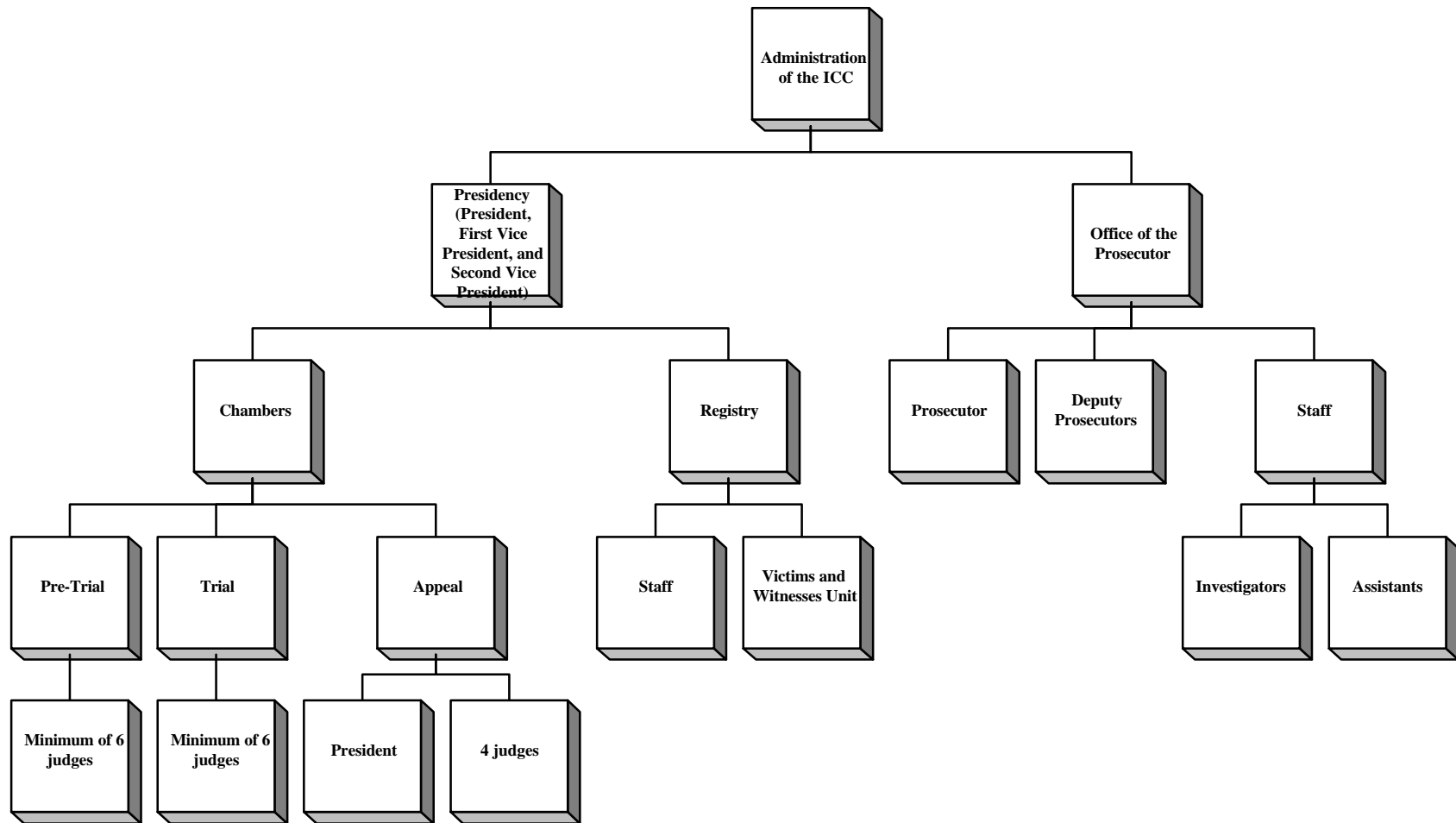
<b>PRINCIPAL ISSUES DIVIDING THE UNITED STATES AND THE “60 LIKE-MINDED STATES”</b>		
	United States	“Like-minded” nations
Role of the U.N. Security Council	Seeks to prohibit the ICC from proceeding with a “situation” that the U.N. Security Council is addressing under its Chapter VII powers, unless the UN Security Council expressly states otherwise. As a result, each permanent member of the U.N. Security Council would have veto authority over U.N. Security Council case-related investigations.	Supported what is referred to as the Singapore proposal which allows the U.N. Security Council to delay or forestall an investigation with the support of all of the five permanent members of the U.N. Security Council.
Independent Prosecutor	Only the U.N. Security Council or an individual State should have the authority to trigger case investigations. The role of the ICC Prosecutor should be to investigate cases that are referred by States or the U.N. Security Council.	The ICC prosecutor should have the same authority as individual States and the U.N. Security Council to trigger case investigations. The prosecutor may use information obtained from various sources to proceed with an investigation. This includes, but is not limited to individuals and non-governmental organizations.

<b>PRINCIPAL ISSUES DIVIDING THE UNITED STATES AND THE “60 LIKE-MINDED STATES”</b>		
	United States	“Like-minded” nations
Internal Conflicts	War crimes committed during internal conflicts in pursuit of a "plan or policy" should be within the ICC’s jurisdiction, but isolated incidents should be excluded from the purview of the Court.	The ICC should have the jurisdictional power to investigate and prosecute all war crimes committed in internal conflicts.
Universal Jurisdiction	The ICC should not have universal jurisdiction over alleged war criminals if their home State is not a party to the ICC Treaty or does not give its consent to an investigation. <sup>85</sup>	The ICC should have universal jurisdiction over alleged war criminals.
Automatic Jurisdiction	The ICC should only have automatic jurisdiction for the crime of genocide. Advocated a 10-year opt-out provision allowing States that ratify the treaty to "opt out" of investigations pertaining to war crimes or crimes against humanity during the opt-out period.	The ICC should have automatic jurisdiction to prosecute all of the core crimes, i.e. genocide, war crimes and crimes against humanity.

<sup>85</sup>The U.S. delegation officially reserved its position on acquiring State consent during the Rome Conference pending the outcome of the role of the U.N. Security Council.



## Appendix B: Administrative Structure of the ICC



## Appendix C: Pentagon Letter to Military Attaches

The Pentagon distributed a memorandum to more than 100 foreign military attaches in Washington, D.C. on March 31 and April 1, 1998. Ministries of Defense worldwide were asked to support the Pentagon's positions on various proposed ICC provisions. A reproduction follows.

### Urgent Request for Engagement with Counterparts on the International Criminal Court (ICC)

Rmks/1. This message has been cleared by the Department of State.

2. The USG [United States Government] supports in principle the creation of a standing International criminal court to prosecute perpetrators of war crimes, Genocide, and crimes against humanity. However, the proposed court, if not constituted properly, could profoundly affect military troops and commanders. International negotiations on the treaty to create the court are ongoing and will culminate in a full diplomatic Conference to conclude negotiations on the treaty in Rome in June-July 1998. JS/OSD [Joint Staff/Office of the Secretary of Defense] have been closely involved in the work of the US delegation. However, internationally this is the exception rather than the rule, as most delegations are made up exclusively of MFA [Ministry of Foreign Affairs] representatives, with little if any military participation.

3. Purpose: the intent of this message is to request addressees to engage their high level military and ministry of defense contacts to facilitate maximum MOD/CHOD [Ministry of Defense/Chief of Defense] and host nation command awareness of the ICC issues and to garner support on key equities that are critical to all militaries. CINCS [Commander-in-Chiefs] are asked to raise this issue during meetings with their military counterparts and other appropriate foreign officials. Request CINCS pass this message and guidance to USDRS [United States Defense Representatives]/country reps to facilitate engagement with their military and MOD contacts. DATTS [Defense Attaches], in coordination with chiefs of mission, should discuss the issue with military commanders and high-level ministry of defense officials.

4. Background: with impetus from the Nuremberg trials, the concept of a permanent ICC has been discussed since WWII. However, the effort was derailed by cold war politics. Recent events, such as the UN Security Council forming war crimes tribunals after the atrocities in Rwanda and the former Yugoslavia, provided momentum for creating a permanent court. President Clinton (in two speeches at the UN and recently in Kigali) and senior administration officials have publicly supported the creation of the court.

5. Military equity: the primary military equity is to protect troops and commanders from inappropriate investigation and prosecution. Unlike most treaty regimes, the ICC would directly affect individual troops vice governments. Individual servicemen and women could be vulnerable to inappropriate investigation and prosecution even if a country had not joined the treaty, and even if their own military justice system had

investigated and acquitted or determined not to prosecute them. Therefore, troops of all militaries could be affected, not just of those countries that sign the treaty.

6. The following talking points are provided to highlight critical issues and the US positions on them in your discussions with counterparts:

A. Preventing and prosecuting war crimes, crimes against humanity and genocide is a critically important priority for the U.S.

-- every nation has responsibility to prevent and punish war crimes. We should all take our national and international responsibilities seriously, and hold others accountable for doing the same.

-- we should also support international efforts in this regard. For example, the US, and others, have provided important resources and personnel in support of the Bosnia and Rwanda war crimes tribunals.

-- the U.S. is committed to replace the ad hoc approach to international war crimes tribunals with a standing court that can address future Cambodias or Yugoslavias.

B. States bear primary responsibility for prosecuting and punishing these crimes, but this international system has been supplemented by ad hoc international tribunals. The US supports complementing this system by establishing a permanent tribunal for these crimes, which could fill gaps in national jurisdiction in those situations (such as Bosnia or Rwanda) where a functioning national legal system is not available, whether because of civil war, collapse of government or other breakdown. The ICC would be available in such a circumstance, helping to deter war criminals who might otherwise believe that the breakdown of government will allow them to evade accountability.

C. Negotiations for an ICC are being conducted in New York 16 March to 3 April, and will culminate in a diplomatic conference to conclude a treaty in Rome in July 1998. The US is committed to the successful establishment of a court. But we are also intent on avoiding the creation of the wrong kind of court.

D. We are concerned that an ICC lacking appropriate limits and checks and balances could be used by some governments and organizations for politically motivated purposes. Since war crimes make up the majority of offenses subject to the jurisdiction of the court, actions of armed forces are the most likely target of frivolous referrals or politically-targeted or otherwise inappropriate prosecutions. We are concerned about proposals that could subject military personnel of countries that abide by the laws of armed conflict and have national mechanisms to enforce compliance with them by their service members to ICC criminal investigation for actual or threatened military action. We must preclude the creation of a so-called 'proprio motu' (independent) prosecutor with unbridled discretion to start investigations. We are also especially concerned that some delegations have supported overly broad and vague definitions of war crimes. We strongly recommend that you take an active interest in the negotiations regarding an international criminal court.

E. We have several specific concerns in the current negotiations:

**Jurisdiction**

States with highly developed national legal systems -- who have the right and duty to investigate and, if appropriate, prosecute crimes the ICC will deal with -- should not be overruled by the court.

-- the relationship of states to the court is one of central importance to the United States. We have reserved on whether the state of the nationality of the accused should have a prior right of consent to a prosecution. The draft treaty must ensure that citizens are protected from arbitrary or frivolous charges, or any other form of inappropriate investigation or prosecution.

-- appropriate jurisdictional provisions (complementarity) would require that the ICC defer to a responsible state's right and duty to investigate and, if merited, prosecute its nationals. We ask that you support our positions in this regard.

-- overall, the ICC scheme must ensure that the ICC cannot be a vehicle for interfering with responsibilities of states with demonstrated ability to investigate and discipline their service members who break the laws of armed conflict, or for advancing politicized or controversial charges.

-- for example, many nations have well-developed systems of military and civilian justice, and they take seriously preventing and prosecuting war crimes. If the negotiations yielded a structure that allowed these nations' personnel to be brought before the ICC in spite of the determinations of these nations' justice systems, they would not have produced a well-conceived court. We would oppose a structure that yielded such a result.

-- there should be an appropriate role in the exercise of ICC jurisdiction for the UN Security Council, on which the members of the United Nations have conferred primary responsibility for the maintenance of international peace and security. These are crimes which by their nature implicate issues of international security.

-- the prosecutor should act only on cases that have been properly referred to the ICC. However, he or she should have the necessary leeway to fully investigate and prosecute cases that have been properly referred.

**Definition of crimes**

-- we also must protect the legitimacy of the court by limiting it to crimes that are universally recognized as crimes and are firmly established in international law. It must not be used to push the envelope of international law, or to advance the definition of crimes that are themselves politically controversial.

-- the list of crimes must be limited to (1) war crimes, (2) genocide, and (3) crimes against humanity. Moreover, a mere reference to customary norms is insufficient and fosters excessive ambiguity. We ask that you specifically support the inclusion of an annex listing specific elements for each crime.

-- we understand the laudable intent of some who would support inclusion of the offense of aggression in the statute. However, this offense is necessarily political in nature, and its inclusion only encourages use of the court as a political tool. The concept of aggression as a crime by a person inevitably would be the subject of dispute. Aggression can best and most effectively be handled by the UN Security Council and international structures currently in place.

### **State cooperation and national security**

The draft statute for an ICC naturally encourages state cooperation with court requests for documents and evidence. However, the ICC's jurisdiction is primarily over individuals, not states. A state's legitimate right to assert national security reasons for refusing to turn over sensitive material should not be subject to a contravening court order by the ICC. We encourage you to support a strong national security exception to the statute's state cooperation regime.

### **Rules of evidence and procedure**

Obviously this court will represent an amalgam of various criminal law traditions. Rules of evidence and procedure are the nuts and bolts of justice. Regardless of the substance of rules, we ask you to support us in recommending that they be made a constituent part of the statute prior to its opening for signature, so that the rights of potential defendants are not left to the vagaries of disparate judges.

F. We ask you to support these critical positions. MOD engagement is particularly important because military personnel would be significantly affected by an ICC.

(End talking points)

7. There remains only a short amount of time before the Rome Diplomatic conference in June-July to raise awareness of this issue in the international military community and ensure broad support for our concerns.

8. For DIA [Defense Intelligence Agency]. Request retransmit this message on DIA AIGS [refers to selected group designations] 7008 and 7017 to all DIA DATTS.

9. OSD/JCS POCS [points of contact] for additional information: OSD: Pedrozo/CDR/OUSSDP/ [Office of the Under Secretary of Defense (Policy)](703) 614-9710; JCS: LTCOL Koslov, J-5[ Director for Strategic Plans and Policy], Global Div, [redacted], dsn 227-5738, unclassified fax [redacted] {dsn 224}; or MAJ Lietzau, OCJCS [Office of the Chairman of the Joint Chiefs of Staff] {Legal Counsel}, [redacted] dsn 227).

## Appendix D: Subject Matter Jurisdiction of the ICC

<b>ICC Subject Matter Jurisdiction</b>	
<i>Crime</i>	<i>Definition</i>
<p>Genocide</p> <p style="text-align: center;">(Article 6)</p>	<p>Any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:</p> <ul style="list-style-type: none"> <li>(a) Killing members of the group;</li> <li>(b) Causing serious bodily or mental harm to members of the group;</li> <li>(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;</li> <li>(d) Imposing measures intended to prevent births within the group;</li> <li>(e) Forcibly transferring children of the group to another group.</li> </ul>

<b>ICC Subject Matter Jurisdiction</b>	
<i>Crime</i>	<i>Definition</i>
<p>Crimes Against Humanity  (Article 7)</p>	<p>Any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:</p> <ul style="list-style-type: none"> <li>(a) Murder;</li> <li>(b) Extermination;</li> <li>(c) Enslavement;</li> <li>(d) Deportation or forcible transfer of population;</li> <li>(e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;</li> <li>(f) Torture;</li> <li>(g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;</li> <li>(h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;</li> <li>(i) Enforced disappearance of persons;</li> <li>(j) The crime of apartheid;</li> <li>(k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.</li> </ul>

<b>ICC Subject Matter Jurisdiction</b>	
<i>Crime</i>	<i>Definition</i>
<p>War Crimes</p> <p style="text-align: center;">(Article 8)</p>	<p>1. The Court shall have jurisdiction in respect of war crimes in particular when committed as a part of a plan or policy or as part of a large-scale commission of such crimes.</p> <p>2. For the purpose of this Statute, "war crimes" means:</p> <p>(a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:</p> <p>(i) Wilful killing;</p> <p>(ii) Torture or inhuman treatment, including biological experiments;</p> <p>(iii) Wilfully causing great suffering, or serious injury to body or health;</p> <p>(iv) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;</p> <p>(v) Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;</p> <p>(vi) Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;</p> <p>(vii) Unlawful deportation or transfer or unlawful confinement;</p> <p>(viii) Taking of hostages.</p> <p>(b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:</p> <p>(i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;</p> <p>(ii) Intentionally directing attacks against civilian objects, that is, objects which are not military objectives;</p>



<b>ICC Subject Matter Jurisdiction</b>	
<i>Crime</i>	<i>Definition</i>
	<p>(iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;</p> <p>(iv) Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;</p> <p>(v) Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives;</p> <p>(vi) Killing or wounding a combatant who, having laid down his arms or having no longer means of defence, has surrendered at discretion;</p> <p>(vii) Making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury;</p> <p>(viii) The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory;</p> <p>(ix) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;</p> <p>(x) Subjecting persons who are in the power of an adverse party to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the</p>

<b>ICC Subject Matter Jurisdiction</b>	
<i>Crime</i>	<i>Definition</i>
	<p>persons;</p> <p>(xi) Killing or wounding treacherously individuals belonging to the hostile nation or army;</p> <p>(xii) Declaring that no quarter will be given;</p> <p>(xiii) Destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war;</p> <p>(xiv) Declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party;</p> <p>(xv) Compelling the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war;</p> <p>(xvi) Pillaging a town or place, even when taken by assault;</p> <p>(xvii) Employing poison or poisoned weapons;</p> <p>(xviii) Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;</p> <p>(xix) Employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions;</p> <p>(xx) Employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict, provided that such weapons, projectiles and material and methods of warfare are the subject of a comprehensive prohibition and are included in an annex to this Statute, by an amendment in accordance with the relevant provisions set forth in articles 121 and 123;</p> <p>(xxi) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;</p>

<b>ICC Subject Matter Jurisdiction</b>	
<i>Crime</i>	<i>Definition</i>
	<p>sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions;</p> <p>(xxiii) Utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations;</p> <p>(xxiv) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;</p> <p>(xxv) Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions;</p> <p>(xxvi) Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities.</p> <p>(c) In the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause:</p> <p>(i) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;</p> <p>(ii) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;</p> <p>(iii) Taking of hostages;</p> <p>(iv) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable.</p>

<b>ICC Subject Matter Jurisdiction</b>	
<i>Crime</i>	<i>Definition</i>
	<p>(d) Paragraph 2 (c) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.</p> <p>(e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts:</p> <p>(i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;</p> <p>(ii) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;</p> <p>(iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the law of armed conflict;</p> <p>(iv) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;</p> <p>(v) Pillaging a town or place, even when taken by assault;</p> <p>(vi) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, and any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions;</p> <p>(vii) Conscripting or enlisting children under the age of fifteen years into armed forces or</p>

<b>ICC Subject Matter Jurisdiction</b>	
<i>Crime</i>	<i>Definition</i>
	<p>(viii) Ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand;</p> <p>(ix) Killing or wounding treacherously a combatant adversary;</p> <p>(x) Declaring that no quarter will be given;</p> <p>(xi) Subjecting persons who are in the power of another party to the conflict to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;</p> <p>(xii) Destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict;</p> <p>(f) Paragraph 2 (e) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.</p> <p>3. Nothing in paragraphs 2 (c) and (d) shall affect the responsibility of a Government to maintain or re-establish law and order in the State or to defend the unity and territorial integrity of the State, by all legitimate means.</p>

<b>ICC Subject Matter Jurisdiction</b>	
<i>Crime</i>	<i>Definition</i>
Aggression	The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime.

### Appendix E: War Tribunal Comparison Chart

<b>Organizational and Procedural Distinctions between War Crimes Tribunals</b>					
	Nuremberg	Tokyo	ICTY	ICTR	ICC
<i>Organization</i>					
Creating Entity	Allied Powers of World War II	Special proclamation by the Supreme Commander of the Allied Powers, Douglas MacArthur	U.N. Security Council	U.N. Security Council	U.N. Diplomatic Conference
Creation Method	Charter	Charter	U.N. Security Council Resolution 827	U.N. Security Council Resolution 955	Treaty
Mandate	To prosecute German atrocities committed in Occupied Europe during World War II.	To prosecute Far Eastern atrocities committed during World War II.	To prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991.	To prosecute persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighboring states during 1994.	To prosecute persons responsible for the most serious crimes of international concern.

<b>Organizational and Procedural Distinctions between War Crimes Tribunals</b>					
	Nuremberg	Tokyo	ICTY	ICTR	ICC
Subject Matter Jurisdiction	1) Crimes against peace <sup>a</sup> 2) War crimes 3) Crimes against humanity	1) Crimes against peace <sup>b</sup> 2) Conventional war crimes 3) Crimes against humanity	1) Grave breaches of the 1949 Geneva Conventions 2) Violations of the laws or customs of war 3) Genocide 4) Crimes against humanity	1) Genocide 2) Crimes against humanity 3) Violations of Article 3 common to the Geneva Conventions and of Additional Protocol II.	1) Genocide 2) Crimes against humanity 3) War crimes 4) Aggression
Established	August 8, 1945	January 19, 1946	May 23, 1993	November 8, 1994	Not in force
Adjudication Period	November 1945-October 1946	1946-1949	Ongoing	Ongoing	Not in force
Chambers	1) Military Tribunal	1) Military Tribunal	1) Trial 2) Appeals	1) Trial 2) Appeals	1) Pre-Trial 2) Trial 3) Appeals
Judges	4 <sup>c</sup>	11 <sup>d</sup>	14 <sup>e</sup>	14 <sup>e</sup>	18
Prosecutor(s)	4	1 <sup>f</sup>	1 <sup>g</sup>	1 <sup>g</sup>	1

<sup>a</sup>Crimes against peace included "[the] planning, preparation, initiation or waging of a war of aggression."

<sup>b</sup>This definition was expanded to include "[the] planning, preparation, initiation or waging of a *declared or undeclared* war of aggression."

<sup>c</sup>The tribunal consisted of four judges from the four Allied Powers, the United States, Great Britain, France, and the Soviet Union.

<sup>d</sup>The tribunal was composed of judges from the eleven nations that had been at war with Japan, namely: Australia, Canada, China, Great Britain, the Netherlands, New Zealand, Soviet Union, United States, France, India, and the Phillipines.

<sup>e</sup>The ICTY and ICTR share the same Appeals Judges.

<sup>f</sup>The Chief Commander of the Allied Powers appointed an American as Chief Counsel. Each of the countries that had been at war with Japan could appoint an Associate Counsel.

<sup>g</sup>The ICTY and ICTR share the same Chief Prosecutor, currently Justice Louise Arbour (Canada).



<b>Organizational and Procedural Distinctions between War Crimes Tribunals</b>					
	Nuremberg	Tokyo	ICTY	ICTR	ICC
Funding	Allied Powers	Allied Nations	1) U.N. regular budget 2) Voluntary contributions	1) U.N. regular budget 2) Voluntary contributions	1) State Parties 2) United Nations 3) Voluntary contributions <sup>h</sup>
Location	Nuremberg, Germany	Tokyo, Japan	Hague in the Netherlands	Arusha, Tanzania	Hague in the Netherlands
<i>Procedures</i>					
Statute of limitations	none	none	none	none	none <sup>i</sup>
Case referrals	Allied Powers	Allied Nations	1) U.N. Security Council 2) Prosecutor	1) U.N. Security Council 2) Prosecutor	1) State Parties 2) U.N. Security Council 3) Prosecutor
Trials in absentia	Yes	Yes	No	No	No
Right against self-incrimination	No	No	Yes	Yes	Yes
Right to confront accuser(s)	No <sup>j</sup>	No	Yes <sup>k</sup>	Yes	Yes
Right to examine evidence	No	No	Yes	Yes	Yes

<sup>h</sup>Voluntary contributions may be made by Governments, international organizations, individual, corporations, and other entities.

<sup>i</sup>Once the treaty enters into force.

<sup>j</sup>The extensive use of ex parte affidavits did not give the accused the opportunity to test the veracity of his accusers.

<sup>k</sup>Although the resolution grants the defendant the right to confront his or her accuser, the Trial Chamber has ruled in the Dusko Tadic case that the identity of several witnesses could be withheld indefinitely.

<b>Organizational and Procedural Distinctions between War Crimes Tribunals</b>					
	Nuremberg	Tokyo	ICTY	ICTR	ICC
Rules of procedure and evidence	Yes	Yes	Yes <sup>l</sup>	Yes <sup>l</sup>	Yes <sup>m</sup>
Protection against double jeopardy	No	No	Yes <sup>n</sup>	Yes	Yes
Specified crimes against women	No	No	Yes	Yes	Yes
Right to an appeal	No	No	Yes	Yes	Yes
Court of Appeals	No	No	Yes <sup>o</sup>	Yes	Yes
Maximum Penalty	Death	Death	Life imprisonment	Life imprisonment	Life imprisonment

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<sup>l</sup>The ICTY and ICTR share the same Rules of Procedure.

<sup>m</sup>Article 51 of the Rome Statute provides for Rules of Procedure. A two-thirds majority of members of the Assembly of States must approve the rules prior to its entry into force.

<sup>n</sup>Although the Statute protects against double jeopardy, the Prosecutor may appeal an acquittal creating a scenario where an individual may be tried twice.

<sup>o</sup>A separate Court for Appeals is provided for in the Statute, but because judges rotate between chambers, arguably the Appeals Court is inherently invalid.

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