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WAR ON THE INTERNATIONAL CRIMINAL COURT

*Mark D. Kielsgard**

INTRODUCTION

A permanent international criminal tribunal has been the subject of debate and resolutions in the United Nations General Assembly for many years. In December 1994, General Assembly Resolution 49/53 established an ad hoc committee to review the major substantive and administrative issues arising from the draft statute prepared by the International Law Commission pursuant to the establishment of a permanent international criminal court.¹ In

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¹ The origins of an international criminal court can be traced back to a proposal made by Gustav Moynier, a founder of the International Committee of the Red Cross, who recommended a permanent court in 1872 in response to the crimes of the Franco-Prussian war. See Remigius Chibueze, *United States Objection to the International Criminal Court: A Paradox of "Operation Enduring Freedom,"* 9 ANN. SURV. INT'L & COMP. L. 19, 25 (2003). 1899 saw the First Hague Convention for the Pacific Settlement of International Disputes designed to discuss an international forum for the enforcement of internationally recognized norms. See M. Cherif Bassiouni & Christopher L. Blakesley, *The Need for an International Criminal Court in the New World Order,* 25 VAND. J. TRANSNAT'L L. 151, 152 (1992). Other commentators trace the idea of an international criminal court to a debate following Germany's defeat in the First World War. E.g., Leila Nadya Sadat, *Summer in Rome, Spring in the Hague, Winter in Washington? U.S. Policy Towards the International Criminal Court,* 21 WIS. INT'L L.J. 557, 562 n.17 (2003). At that debate, during the Preliminary Peace Conference, it was suggested that the Kaiser, inter alia, be held for trial for "offences against the laws and customs of war and the laws of humanity." *Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties: Report Presented to the Preliminary Peace Conference,* 14 AM. J. INT'L L. 95, 123 (1920). Following the Second World War, an international criminal tribunal was established at Nuremberg and effectively employed the rule of law in trying those accused of war crimes among the German High Command. The United States opposed the trials after World War I because of the vagueness of the term "laws of humanity," and because the trials would impose extraterritorial liability on heads of state and thus circumvent state sovereignty. *Treaty of Peace with Germany,* June 28, 1919, art. 227, reprinted in 13 SUPPLEMENT AM. J. INT'L L. 250 (1919). The position of the United States (along with Great Britain) concerning an international criminal court following World War II was initially hostile, instead leaning toward summary execution. However, the United States' position subsequently changed, and the court was actually embraced by the Truman Administration. See Sadat, *supra*, at 564, citing ANN TUSA & JOHN TUSA, *THE NUREMBERG TRIAL* chs. 2-6 (1990). See generally ROBERT

December 1998, General Assembly Resolution 53/105 called for the Secretary General to convene the preparatory commission to discuss ways to enhance the effectiveness and acceptance of the Court established under the Statute of Rome.² The International Criminal Court was heralded as “a global commitment to hold dictators and other perpetrators of gross [human rights] violations accountable for their crimes.”³

Despite overwhelming approval by the world’s nation states, with 139 nations voting in favor of the Rome Statute and 97 nations subsequently ratifying the Statute (as of October 2004),⁴ the United States has taken extraordinary steps to exempt itself from the jurisdiction of the Court. This is ironic in light of the fact that “[t]he United States played a key role in negotiating the original treaty—particularly in ensuring due process and the rights of the accused.”⁵ In the last few years, the United States has undertaken unprecedented diplomatic, legislative, and executive measures designed to diminish the effectiveness of the Court. These measures have not only damaged the reputation of the United States interna-

E. CONOT, *JUSTICE AT NUREMBERG* (Harper & Row 1983); WHITNEY R. HARRIS, *TYRANNY ON TRIAL* (Southern Methodist University Press 1954 (1999) (1954)); BRADLEY F. SMITH, *THE AMERICAN ROAD TO NUREMBERG: THE DOCUMENTARY RECORD 1944-45* (1982); BRADLEY F. SMITH, *REACHING JUDGMENT AT NUREMBERG* (1977).

² Subsequent to Resolution 49/53 in December 1994 and prior to Resolution 53/105 in December 1998, the General Assembly passed three additional resolutions dealing with the proposed International Criminal Court: Resolution 50/46 (December 1995) establishing the Preparatory Committee; Resolution 51/207 (December 1996) reaffirming the Preparatory Committee and directing it to submit a draft statute of the international criminal court for consideration and finalization by a diplomatic conference of plenipotentiaries to be held in 1998; and Resolution 52/160 (December 1997) accepting the offer of the government of Italy to host the conference in accordance with Resolution 51/207. Resolutions 54/105 (December 1999), 55/155 (December 2000), and 56/85 (December 2001) all called for the Preparatory Committee to, among other things, reconvene and “discuss ways to enhance the effectiveness and acceptance of the Court,” and Resolution 57/23 (November 2002) dealt with the performance of ministerial functions. Rome Statute of the International Criminal Court, General Assembly Resolutions, *available at* <http://www.un.org/law/icc/gares/gares.htm>.

³ Human Rights First, *The International Criminal Court*, *at* http://www.humanrightsfirst.org/international_justice/icc/icc.htm (last visited May 1, 2005) [hereinafter Human Rights First].

⁴ *See* United Nations Rome Statute of the International Court, *at* <http://www.un.org/law/icc/> (last visited Oct. 21, 2004).

⁵ Human Rights First, *supra* note 3. Additionally, the United States backed an International Criminal Court from Truman’s enthusiasm for the Nuremberg tribunals to the significant role the U.S. played in supporting the Rome Conference including sending delegates to assist in developing the Rules of Procedure and Evidence, and the Elements of Crimes. John Washburn, *The International Criminal Court Arrives – The U.S. Position: Status and Prospects*, 25 *FORDHAM INT’L L.J.* 873, 878 (2002),

tionally, but have irreparably harmed the protection and promotion of human rights worldwide.

The terrorist attacks on September 11, 2001 resulted in a fundamental policy shift with regard to U.S. military aid. The new criteria for receipt of military aid emphasize the worldwide war on terrorism at the cost of international human rights. Previously, countries which engaged in massive human rights violations have been denied U.S. military aid, but “[t]he modifications in the U.S. foreign military assistance program make it easier for known violators to acquire the tools of abuse, thus implicating the United States in abuses that result.”⁶ One new prerequisite to military aid is the execution of bilateral immunity agreements exempting the parties from the jurisdiction of the International Criminal Court (with certain enumerated exceptions).⁷ Accordingly, states with the worst human rights records may be given military aid if they agree to sign treaties that will exempt them (and the United States) from scrutiny of human rights violations by the ICC. Recent developments in the war against terrorism, including events during the Iraqi occupation and elsewhere, give credence to the proposition that the current administration has drastically de-prioritized prohibitions against human rights violations, paying them little more than lip service. These policies toward the war on terrorism and the anti-ICC treaties are two pieces of a mosaic of indifference that guarantee an increase of human suffering and a lack of accountability for brutal leaders and other human rights violators.

This paper will briefly discuss the background and development of the International Criminal Court including its historic context, jurisdiction, and scope, and will explore the hostile actions taken by the United States calculated to render the Court powerless. It will consider the legal basis of these actions and delve into the official U.S. criticisms of the Court along with rebuttals and attempt to identify the real motives for this antagonism. Finally, this paper will assess the implications of the current administration’s anti-ICC policies for international human rights.

⁶ Human Rights Watch, *Dangerous Dealings: Changes to US Military Assistance After September 11*, 14 U.S. 1, 2 (Feb. 2002), available at <http://hrw.org/reports/2002/us-mil/> (last visited Dec. 20, 2004) [hereinafter HRW, *Dangerous Dealings*].

⁷ American Servicemembers’ Protection Act of 2002 (ASPA), Pub. L. No. 107-206, § 2007, 116 Stat. 899, 905.

I. BACKGROUND

1. *Historical Context*

Modern international criminal law began in the aftermath of World War II at Nuremberg and Tokyo, introducing the concept of individual liability for state offenders. Prior to Nuremberg all prosecutions, if any, were conducted in the domestic courts.⁸ At Nuremberg, the allies tried the German High Command to create a historical record, to begin to establish a legal precedent for the international imposition of individual criminal liability, and to deter future human rights violations. Since Nuremberg and Tokyo, there have been 274 multilateral treaties ratified that require states to criminalize certain conduct. However, for many years after Nuremberg, military tribunals and domestic courts continued to conduct criminal trials of international scope.

In 1993 and 1995 the Security Council formed two ad hoc tribunals for trial of serious violations of humanitarian law in Yugoslavia (ICTY)⁹ and Rwanda (ICTR).¹⁰ These tribunals were the first of their kind since Nuremberg and Tokyo. Recently, the United

⁸ Sadat, *supra* note 1, at 562 n.17. While the Treaty of Versailles did reach a compromise position allowing the arraignment of the Kaiser, along with others, for the "offense against international morality and the sanctity of Treaties" before an international tribunal, he was not tried for crimes against humanity and ultimately never faced trial; of the handful of people that were brought before the tribunal all but a few were acquitted. Thus, this cannot seriously be considered an international criminal tribunal in the modern sense as there was no accountability for the perpetrators, no reference to international criminal violations beyond the vague allegation of "international morality," no defined terms or elements of the crime(s) and no significant international recognition of the tribunal's authority. Both Holland and post-war Germany successfully refused to extradite individuals (including the Kaiser) to the tribunals. See *id.*; Matthew Lipman, *Nuremberg: Forty Five Years Later*, 7 CONN. J. INT'L L. 1, 10-11 (1991); L.C. Green, *The Law of Armed Conflict and the Enforcement of International Criminal Law*, 22 CAN. Y.B. INT'L L. 3, 10-12 (1984); Telford Taylor, *The Anatomy of the Nuremberg Trials*, 16-18, 29 (1982).

⁹ The International Criminal Tribunal for the former Yugoslavia is located in The Hague and was established by Security Council Resolution 827 on May 25, 1993. It has jurisdiction to hear criminal matters occurring in the former Yugoslavia since 1991 that involve egregious violations of the 1949 Geneva Conventions, violations of the laws or customs of war, genocide, and crimes against humanity. United Nations, *The ICTY at a Glance: General Information*, at <http://www.un.org/icty/glance/index.htm> (last visited Dec. 13, 2004).

¹⁰ The International Criminal Tribunal for Rwanda (ICTR) is located in Arusha, United Republic for Tanzania and was established by Security Council Resolution 955 on November 8, 1994. United Nations, *The ICTR at a Glance, General Information*, at <http://www.ictor.org/ENGLISH/geninfo/index.htm> (last visited Oct. 25, 2004). It assumes jurisdiction over criminal matters involving genocide and serious violations of international humanitarian law that took place on the territory of Rwanda and neighboring states between January 1, 1994 and December 31, 1994. *Id.*

Nations has formed a “hybrid” tribunal in Sierra Leone and East Timor (with plans for Cambodia)¹¹ to try crimes against humanity in a forum that facilitates collaboration with the domestic authority, as directed by the U.N. Security Council.¹² These tribunals are new expressions of previously accepted principles of the inalienability of human rights and the individual accountability of violators who commit atrocities.

The International Criminal Court was formed during a rare moment of multilateral cooperation and expands the primacy of international criminal law by giving permanence to the tribunal and attempting to make all member states accountable. Moreover, the ICC is different from its predecessor courts because it was created by treaty and is not an organ of the U.N.

2. Structure of the ICC

The Court is composed of 18 judges,¹³ six in each of the three departments of pretrial, trial, and appeals. There are nine-year term limits that are non-renewable.¹⁴ Pretrial judges authorize and oversee the investigations conducted by the prosecutor’s office¹⁵ and issue warrants.¹⁶ Trial judges conduct trials.¹⁷ Appellate judges hear appeals¹⁸ and establish a body of precedent as well as dissent. The Appellate judges must remain in that division all nine years, while the judges from the other divisions may rotate. In picking the judges, the Assembly of States will select no more than two judges from any single state¹⁹ and will attempt to establish a gender balance in the Court.

Prosecutors initiate and investigate allegations²⁰ and are ar-

¹¹ James Crawford et al., *In the Matter of the Statute of the International Criminal Court and in the Matter of Bilateral Agreements Sought by the United States Under Article 98(2) of the Statute, A Joint Opinion at the Behest of the Lawyers Committee on Human Rights*, at 13 n.7 (June 5, 2003), at http://www.humanrightsfirst.org/international_justice/Art98_061403.pdf

¹² See Public Affairs Section, U. S. Embassy, Vienna, Aus., Fact Sheet: United States Policy on the International Criminal Court, at <http://www.usembassy.at/en/download/pdf/icc.pdf> (last visited May 1, 2005) [hereinafter Fact Sheet: U.S. Policy on the ICC].

¹³ Rome Statute of the International Criminal Court, July 17, 1998, art. 36(1), U.N. Doc. A/CONF.183/9 (1998) [hereinafter Rome Statute].

¹⁴ *Id.* at art. 36(9)(a).

¹⁵ *Id.* at arts. 53(3)(a)(b) and 56(1)(c).

¹⁶ *Id.* at art. 57(3)(a).

¹⁷ *Id.* at art. 64.

¹⁸ *Id.* at art. 83.

¹⁹ *Id.* at art. 36(7).

²⁰ *Id.* at art. 15.

guably the most vulnerable to political pressures. Indeed, the current Chief Prosecutor Luis Moreno Ocampo has already received (and declined) requests to inquire into U.S. conduct in the most recent war against Iraq.²¹ The prosecutors represent the Assembly of States at trial.²² The Assembly of States votes on management, budget, elements of the crimes, and rules of procedure in evidence, and elects judges and prosecutors.²³ The Judges elect the President, and the Registry is set up like a clerk's office to oversee the administrative and personnel matters.²⁴

Among the most significant features of the ICC is its autonomy. This design, which includes investigation, trial, and appeal inclusive in four organs (1. The Presidency; 2. The Office of the Prosecutor; 3. The Registry; and 4. The Appeals Division, Trial Division, and Pre-Trial Division)²⁵ under one international rubric, insulates the Court from U.N. Security Council scrutiny. The quasi-legislative function of the Assembly of States is unique among international organizations because, while working groups of the U.N. may draft particularized resolutions on an ad hoc basis, the Assembly of States permanently sits and "legislates" both substantive and procedural rules for the ICC. In neither case, however, is there a complete break from traditional understandings of the authority of international organizations. The ICC attempts to incorporate general accountability for all states, fundamental fairness, and a permanent structure in which to operate.

3. *Jurisdiction and Scope*

One factor limiting the ICC is the narrow scope of its jurisdiction. Indeed, the Court assumes jurisdiction only under unusual circumstances and is unwilling to encroach upon state sovereignty.

²¹ Ocampo has had both formal and informal discussions with various countries relating to early complaints sounding in the crime of aggression for illegally waging war against Iraq. The Court has not defined aggression and therefore cannot prosecute these crimes. James Podgers, *An Unused Weapon*, 37 A.B.A. J. E-REP. 1, Sept. 19, 2003. Moreover, according to an editorial in the *Christian Science Monitor* dated June 25, 2004, more than 100 complaints have been filed before the Court against Americans. The editorial postulates that Americans are in danger of political prosecution from the ICC based largely on the U.S. action against Iraq and the Abu Ghraib prison scandal, but ignores the fatal jurisdictional constraints of a prosecution of U.S. personnel in Iraq as neither the U.S. nor Iraq are signatories to the Rome Statute. See *Wary US Eye on UN Court*, Commentary: The Monitor's View, June 25, 2004, at <http://www.csmonitor.com/2004/0625/p08s03-comv.html>.

²² Rome Statute, *supra* note 13, art. 42.

²³ *Id.* at art. 112.

²⁴ *Id.* at arts. 43-44.

²⁵ *Id.* at art. 34.

The Court will only hear four criminal charges: genocide, crimes against humanity, war crimes, and crimes of aggression.²⁶ Of the four, crimes of aggression have not been defined (and thus are not currently enforceable), and there is a seven-year delay for the enforcement of war crimes. The offenses of crimes against humanity and genocide only include acts that have occurred subsequent to July 1, 2002.²⁷ Therefore, complaints lodged with the ICC calling for the prosecution of U.S. personnel for illegally waging war against Iraq sounding in the crime of aggression (or war crimes) are outside the scope of the Court's jurisdiction and beyond the reach of the prosecutor's office.

The Court observes treaty-based jurisdiction that authorizes international authority over certain offenses on the basis of their egregious nature. The Court will assume jurisdiction of nationals from member states, even if the alleged crimes were committed in the territory of non-member states, and nationals from non-member states if the alleged crimes were committed in the territory of member states.²⁸ The United States has consistently maintained its opposition to this jurisdictional basis as it could theoretically create liability for U.S. personnel accused of crimes committed in ICC jurisdictions, despite official U.S. opposition to the Court.²⁹ With respect to fears of U.S. military personnel being prosecuted for their actions in the war in Iraq, neither Iraq nor the U.S. are signatories to the Rome Statute which creates an incurable jurisdictional defect for allegations of crimes against humanity or genocide (aggression and war crimes are irrelevant as previously discussed). The Court's jurisdiction must be grounded either in the accused's state of origin or in the state in which the offense allegedly occurred.³⁰

The Court will hear all cases referred by the Security Council and accept cases from non-member states that voluntarily consent to the Court's jurisdiction.³¹ This basis for jurisdiction could only imperil U.S. personnel in Iraq with the consent of the U.S. govern-

²⁶ *Id.* at art. 5.

²⁷ *Id.* at arts. 11, 24.

²⁸ *Id.* at art. 12.

²⁹ See Fact Sheet: U.S. Policy on the ICC, *supra* note 12.

³⁰ Personnel from Great Britain do not enjoy the same impunity from the ICC as the U.S. because they are signatories to the Rome Statute and can be held accountable for any atrocities committed by British troops in Iraq. See generally Rome Statute, *supra* note 13, arts. 5-8.

³¹ *Id.* at arts. 12-13. The ICC received its first referral from the Security Council in the matter of Darfur, Sudan on March 31, 2005 pursuant to SC Resolution 1593. See Press Release SC/8351 at <http://www.un.org/News/Press/docs/2005/SC8351.doc.htm>.

ment as any Security Council referral can be vetoed by the United States.

The ICC observes the principle of complementarity. This principle, sometimes referred to as “default jurisdiction,”³² allows the state to prosecute the offender if it chooses, (in accordance with state sovereignty), and only allows the Court to hear the matter if the state is unwilling or unable to investigate and prosecute in good faith.³³ The ICC will assume jurisdiction over previously tried nationals only if their national trials were conducted in a biased manner designed to allow them to evade criminal responsibility.³⁴ Thus, the ICC will not act as a court of fourth instance,³⁵ but neither will it recognize the validity of sham trials. By conceding to the states the right to prosecute their own cases involving jus cogens crimes, i.e., by giving them “the first bite of the apple,” the ICC is acknowledging the state’s sovereign authority. However, by determining if the state is acting in good faith vis-à-vis the prosecution, the Court is extending heretofore-accepted norms.

The scope of the ICC’s jurisdiction is one of the more subtle features of its design. It is careful to limit its scope to a narrow focus and yet extend its jurisdiction to nationals of non-member states. It allows states to flex their muscles and defers to their authority through the doctrine of complementarity, but reserves the right to look over their shoulders and assume jurisdiction if they fail in their duty to conduct appropriate investigations and prosecutions.

4. *Enforcement Difficulties*

An initial observation of enforcement issues reveals the lack of an ICC police force. It does not have local investigators or prosecutors; in fact, it does not have any local presence at all. A collateral

³² Leila Sadat Wexler, *Panel Discussion: Association of American Law Schools Panel on the International Criminal Court*, 36 AM. CRIM. L. REV. 223, 250 (1999).

³³ Rome Statute, *supra* note 13, art. 20.

³⁴ *Id.*

³⁵ The Preamble to the Rome Statute states, inter alia, “nothing in this Statute shall be taken as authorizing any State Party to intervene . . . in the internal affairs of any State.” Arguably, complementarity could be construed as permitting interference in the internal affairs of states and thus violating the principles in the Preamble and those of the Charter to the United Nations (Article 2[7]). However, the Rome Statute prohibits *state part[ies]* from interfering in the internal affairs of any state and not the International Criminal Court. This provision makes sense as a safeguard to prevent state parties from committing acts of aggression on other states in an effort to bring them into compliance with the requirements of the Rome Statute but was not intended to tie the hands of the Court in taking jurisdiction over a case.

issue is the ICC's limited funding, which is inadequate to conduct thorough investigations around the globe. Also, the ICC has inferior claim to existing extradition treaties. Accordingly, many theorists postulate that the chief enforcement problem of the ICC is the hostility from the U.S. and its attempts to undermine the Court's effectiveness.

The first two problems are two sides of the same coin. Under normal circumstances, local authorities are better equipped to deal with local matters because they have superior resources and experience in dealing with them. Often, however, because of the nature of the crimes prosecuted by the ICC, normal circumstances do not prevail and the local authority is incompetent or unable to proceed. In many cases local authorities are per se biased because they are the political allies of either the accused or their victims. Under either scenario a fair and unbiased tribunal is impossible. Additionally, many localities victimized by horrific crimes no longer have an infrastructure, owing to years of protracted war and conflict. Some localities lack the funds to engage in lengthy and expensive trials of mass defendants. Impoverished states are likely to take shortcuts in conducting trials in order to save money, resulting in probable deprivation of the accused's right to a fair trial.³⁶

Some commentators postulate that the U.S. opposition to the Court has grave consequences for its viability and enforcement capabilities. They opine that without U.S. assistance the Court will be

³⁶ One example of a lack of funds and depleted infrastructure was the attempted response to the genocide of Rwanda, which ultimately necessitated international intervention in the form of the ad hoc tribunal. Even with the intervention, Rwanda has had to resort to the *Gacaca* court, a traditional tribal court named after the grass upon which the tribal judges sit in judgment of the accused. The judges usually have no formal training in the law and judge persons accused, inter alia, of less egregious offenses involved in the genocide. They hear cases of complicity in genocide matters that took place in their villages—villages of typically less than 100 persons. These tribunals are frequently prima facie biased because the judges are usually close relatives or friends of the victims (or of the perpetrators). The lack of funds in Rwanda precludes changes of venue or the procurement of impartial, trained judges. See generally BBC News, *Rwanda killers face local justice*, Mar. 10, 2005, available at <http://news.bbc.co.uk/1/hi/world/africa/4335405.stm> (last visited Apr. 6, 2005). See also UK Embassy of Rwanda, *Genocide in Rwanda*, available at <http://www.ambarwanda.org.uk/genocide/index.htm> (last visited Apr. 6, 2005). Additionally, a lack of funds and infrastructure has required the formation of the hybrid ad hoc tribunals in Sierra Leone and East Timor, and it is foreseeable that the same problems and needs may exist in Cambodia, Liberia, and the Congo, as well as other countries. See Richard Dicker & Elise Keppler, *Beyond the Hague: The Challenges of International Justice*, in HUMAN RIGHTS WATCH: WORLD REPORT 2004: HUMAN RIGHTS AND ARMED CONFLICT, at 194 (Jan. 2004), available at <http://hrw.org/wr2k4/download/wr2k4.pdf> (last visited Apr. 6, 2005).

unable to secure the presence of the accused and suggest that the International Criminal Court “lacks the institutional resources to ensure that the defendants actually show up in The Hague.”³⁷ The U.S. could provide increased funding, international prestige, and widespread acceptance of the ICC’s jurisdictional authority, thereby legitimizing the fledgling Court in the international community, giving teeth to its mandate and facilitating effective enforcement. Instead, many argue that the Bush administration has employed tactics designed to immobilize the Court and limit its jurisdiction. The principal U.S. objections sound in state sovereignty and are predicated upon a lack of control by the U.S. because of the autonomous design of the Court.

5. *United States’ Objections to the ICC*

While testifying before the Senate Foreign Relations Committee, David J. Scheffer,³⁸ head of the United States Delegation in Rome, indicated that the government had six principal objections to the Rome Statute.³⁹ These objections included the pervasive jurisdiction of the Court, failure to provide a 10-year opt-out period for crimes against humanity and war crimes, an autonomous prosecutor who can (with the consent of two judges) initiate investigations and prosecutions in a politically motivated fashion, the lack of a requirement that the Security Council make a determination prior to bringing a complaint for aggression, the possibility of expanding the subject matter jurisdiction of the Court (to include terrorism and drug crimes), and the prohibition against reservations.⁴⁰

³⁷ Jack Goldsmith, *The Self-Defeating International Criminal Court*, 70 U. CHI. L. REV. 89, 92 (2003). These commentators point to the ad hoc tribunal for the former Yugoslavia and argue that without the “U.S. military, diplomatic, and financial might” the ICTY would not have enjoyed its modest success in bringing war criminals to The Hague. *Id.* at 92-93. See also Cosmos Eubany, *Justice for Some? U.S. Efforts Under Article 98 to Escape the Jurisdiction of the International Criminal Court*, 27 HASTINGS INT’L & COMP. L. REV. 103, 127 (2003) (generally indicating that if the U.S. is successful in negotiating Article 98 treaties it “could sound the death knell for the ICC”).

³⁸ While articulating the United States’ concerns regarding the International Criminal Court, Mr. Scheffer nonetheless recommended that President Clinton sign the treaty in order to work out its flaws as a signatory and noted that, “[a]s a signatory, the United States now is well armed to improve the treaty regime and advance our commitment to international justice.” David J. Scheffer, *A Negotiator’s Perspective on the International Criminal Court*, 167 MIL. L. REV. 1, 5 (2001).

³⁹ Leila Nadya Sadat & S. Richard Carden, *The New International Criminal Court: An Uneasy Revolution*, 88 GEO. L.J. 381, 448-49 (2000).

⁴⁰ *Id.* See also Robert T. Alter, *International Criminal Court: A Bittersweet Year for Supporters and Critics of the International Criminal Court*, 37 INT’L L. 541, 543-44 (2003).

Some of these objections were memorialized in a fact sheet distributed by the Public Affairs Section of the United States Embassy to Vienna, Austria.⁴¹ In that fact sheet, the U.S. cites additional opposition on the basis of state sovereignty because the doctrine of complementarity allows the ICC to make a determination regarding a State's willingness to initiate investigation and prosecution.⁴² The U.S. position states that there are suitable alternatives to the ICC in the field of international justice. These alternatives include domestic accountability, foreign assistance for political, financial, legal and logistical support designed to implement domestic legal institutions, and ad hoc international tribunals under the auspices of the U.N. Security Council.⁴³

The counter argument postulates that the International Criminal Court cannot try defendants if they have been tried in another forum, in good faith, under the general principles of double jeopardy (*ne bis in idem*) as stipulated in Article 20(3).⁴⁴ Under the doctrine of complementarity, prosecutors can only bring cases previously heard in domestic tribunals if those defendants were never truly placed in jeopardy.⁴⁵ The burden of proving that a person was not placed in jeopardy when she has been tried for atrocities in a national court is an extremely difficult one. The difficulty of meeting this burden and overcoming the double jeopardy issues will allegedly discourage investigations and prosecutions in all but the most obvious sham domestic trials. Double jeopardy issues re-

⁴¹ See Fact Sheet: U.S. Policy on the ICC, *supra* note 12.

⁴² *Id.*

⁴³ *Id.* at 2. The reliance upon ad hoc tribunals seems insufficient as they are created after the fact and have apparently done little to stem the tide of egregious human rights violations. They do not deter massive violations because there is no surety that the Security Council will form such tribunals in any but the most notorious cases and then only if politically expedient. Ad hoc tribunals seem to be neither efficient nor fair as "law must apply equally to everyone, everywhere" and "a proliferation of special ad hoc tribunals created by the Security Council after the harm had been done, and covering only crimes committed in a limited area during a specific time, was hardly a fair or efficient way to deter international criminality." Benjamin B. Ferencz, *Misguided Fears About the International Criminal Court*, 15 PACE INT'L L. REV. 223, 228 (2003).

⁴⁴ Article 20(3) states, "No person who has been tried by another court for conduct also proscribed under article 6, 7 or 8 shall be tried by the Court with respect to the same conduct unless the proceedings in the other court: (a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or (b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice." Rome Statute, *supra* note 13, art. 20(3).

⁴⁵ *Id.*

present a significant limitation on the discretion of the prosecutor's office and should have a deterrent effect on politically motivated prosecutions.

Moreover, critics charge that the U.S. contest of ICC jurisdiction is without merit because the Court's jurisdiction is synonymous with that of the territorial state. Under the internationally recognized territorial jurisdiction,⁴⁶ foreign nationals can be prosecuted by the State in which they commit a crime; thus, if a U.S. national committed a crime in a foreign country, she would be subject to the law of that country and under the jurisdiction of its courts.⁴⁷ If the same U.S. national committed genocide or crimes against humanity in a foreign signatory country, and that country chose to relinquish jurisdiction to the ICC (or refused to prosecute and the ICC assumed jurisdiction pursuant to complementarity), then the jurisdiction would still be grounded in the foreign country's seizure of jurisdiction in accordance with the territorial principle,⁴⁸ but in no case would the U.S. retain jurisdiction.⁴⁹

⁴⁶ "The first of five general principles of jurisdiction is 'the territorial principle,' [which] determine[s] jurisdiction by reference to the place where the offence is committed, [and] is everywhere regarded as of primary importance and of fundamental character." Lilian V. Faulhaber, *American Servicemembers' Protection Act of 2002*, 40 HARV. J. ON LEGIS. 537, n.118 (2003) (citing Research in International Law of the Harvard Law School, *Draft Convention on Jurisdiction with Respect to Crime*, 29 AM. J. INT'L L. 435, 445 (1935)).

⁴⁷ This jurisdictional priority can be altered by agreement between states such as in the case of SOFA and SOMA agreements, *infra*, involving U.S. military personnel abroad and other extradition agreements specifically negotiated between states, but these agreements generally determine the order of prosecution and not whether or not the accused is to be prosecuted at all. Crawford et al., *supra* note 11, at 17-23.

⁴⁸ Acceptance by states of the jurisdiction of the ICC is analogous to changes in domestic legislation because once a state has accepted the jurisdiction of the Court, that jurisdiction becomes the law of the land and therefore binding upon foreign nationals when they enter the territory (absent an agreement to the contrary between the state and the origin state of the foreign national).

⁴⁹ See Sadat & Carden, *supra* note 39, at 404. Some members of Congress expressed concerns that Americans tried by the International Criminal Court would be deprived of their constitutional rights, such as the right to refrain from self-incrimination and the right to a jury trial. See Faulhaber, *supra* note 46, at 549-50. These criticisms are disingenuous as the constitutional rights of American citizens have no extraterritorial application for foreign prosecutions of offenses committed abroad and thus the International Criminal Court would not constitute any greater deprivation to the rights of U.S. citizens abroad than foreign national courts. Ambassador David J. Scheffer stated, "The fact that the treaty requires trial by judges and not by jury is not surprising in an international criminal court that merges common and civil law practice. It is well settled extradition practice to accept trial without jury outside the United States." Scheffer, *supra* note 38, at 13. Additionally, American servicemembers face no deprivation of rights under the jurisdiction of the International Criminal Court as the United States military justice system does not afford the accused the right to a jury trial or many other Constitutional rights enjoyed by civilians.

Therefore, under generally recognized international principles of criminal jurisdiction, the U.S. would not lose any sovereign rights, as its primary jurisdiction would never have vested.

The ICC's jurisdiction is grounded in the primary territorial jurisdiction of the state in which the alleged offenses took place and the accused is entitled to the same protections afforded therein. Indeed, some commentators argue that this jurisdictional scheme would provide more protections to the accused than current international law, as the International Criminal Court is under the scrutiny of multiple nations and the substantive and procedural safeguards resulting from multilateral negotiations will provide greater protections than those provided by many national courts.⁵⁰

The U.S. contends that the office of the prosecutor is subject to abuse as it could initiate investigations based upon political motivations and that it will target the U.S. and U.S. nationals.⁵¹ The U.S. Department of Defense has unwaveringly maintained its opposition to the Court, ostensibly grounded in the fear that U.S. military personnel may fall under its jurisdiction; hence, the Pentagon seeks to deny the ICC any "operational impact."⁵² This position is grounded in the United States' vulnerability due to its wide scale peacekeeping missions and military presence. On the other

See Faulhaber, *supra* note 46, at 550; *see also* United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 18 (1955).

⁵⁰ Faulhaber, *supra* note 46, at 552.

⁵¹ The United States and other NATO military leaders were the subject of an inquiry by the prosecutor's office of the International Criminal Tribunal for the former Yugoslavia in connection with allegations that the seventy-eight-day bombing raid on Kosovo during the Spring of 1999 involved war crimes. However, in a report issued by the Chief Prosecutor Carla Del Ponte, a committee established on May 14, 1999 by the Chief Prosecutor to assess criminal allegations and material accompanying them found that the allegations did not merit full investigation. *See Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia*, ICTY Doc. PR/P.I.S./510-E, June 13, 2000, available at <http://www.un.org/icty/pressreal/nato061300.htm>. The prosecutor then adopted the findings of the report and decided not to open a criminal investigation into any aspect of NATO's 1999 air campaign against the Federal Republic of Yugoslavia. Press Release, Office of the Prosecutor, Prosecutor's Report on the NATO Bombing Campaign (June 13, 2000), available at <http://www.un.org/icty/pressreal/p510-e.htm>. This report was widely criticized as politically motivated in favor of NATO and as a departure from normal substantive and procedural practices employed by that office. The report subjected NATO to an uncritical appraisal and took verbatim representations made by its spokespersons, thus casting doubt on the prosecutor's impartiality. *Cf.* Timothy William Waters, *Unexploded Bomb: Voice, Silence, and Consequence at The Hague Tribunals; A Legal and Rhetorical Critique*, 35 N.Y.U. J. INT'L L. & POL. 1015, 1122 (2003) (noting the prosecutor's excessive discretion *not* to act given the particular "political and institutional atmosphere" of the Tribunal).

⁵² Kenneth Roth, *Fight the Good Fight*, *Guardian* (London), Oct. 22, 2002, at 8.

hand, the Statute places extensive constraints on the power of the prosecutor (many of which reflect U.S. government proposals) including review of all investigations by an independent judiciary and limited subject matter jurisdiction, which includes only a small number of very serious offenses. Additionally, while it has not yet occurred, many observers believe that the Assembly of States will make a determination under Article 5(2) that the U.N. Security Council should decide when the crime of aggression has taken place.⁵³ If this occurs, it would further restrict the prosecutor's discretion.

In the course of negotiations, the U.S. proposed a ten-year opt-out period for war crimes and a seven-year compromise was achieved. Critics contend that it is disingenuous for the U.S. to cite this three-year difference as a cause for its refusal to ratify, as it was a product of a compromise in which representatives of the U.S. took an active part. The United States' assertion that the Statute's prohibition against reservations from its terms is a departure from accepted practice is incompatible with the fact that the crimes in the Statute are universally condemned.⁵⁴ Additionally, it is a misstatement of international law as the Restatement of Foreign Relations expressly articulates the capability of those drafting treaties to prohibit reservations.⁵⁵

It is significant to note that the United States never espoused great fears concerning the formation of the ad hoc Tribunal for the atrocities committed in the former Yugoslavia when, in fact, the same criticisms that the current administration is leveling against the International Criminal Court could be leveled against the ICTY. The ICTY affords no right to a jury trial and investigations and prosecutions are initiated solely at the discretion of the prosecutor.⁵⁶ While the ICTY requires that indictments be confirmed by only one judge⁵⁷ prior to becoming effective, the ICC prosecutor is required to satisfy two judges before initiating an investigation,⁵⁸ and the case is subject to judicial review, including interlocutory review,⁵⁹ throughout the entire prosecution. Moreover, the ICC

⁵³ Sadat & Carden, *supra* note 39, at 450.

⁵⁴ *Id.* at 451.

⁵⁵ *Id.* at 452.

⁵⁶ See *ICTY At a Glance, General Information, Proceedings*, at <http://www.un.org/icty/glance/index.htm> (last visited Oct. 22, 2004) ("Investigations are initiated by the Prosecutor at her own discretion or on the basis of information received from individuals, governments, international organisations or non-governmental organisations.")

⁵⁷ *Id.* ("Indictments must be confirmed by a judge prior to becoming effective.")

⁵⁸ Rome Statute, *supra* note 13, arts. 15(3), 57(2)(a).

⁵⁹ *Id.* at art. 82.

prosecutor must refrain from prosecution for one year if so ordered by the Security Council,⁶⁰ and is constantly subject to the scrutiny of the Assembly of States.⁶¹ Overall, the restraints on the ICC prosecutors far exceed those on the prosecutors for the ICTY.⁶²

Another distinction between the two bodies is that the ICTY is empowered to exercise superior jurisdictional authority compared to the ICC. At its discretion, the ICTY can assert primacy over national courts⁶³ without cause, while under the doctrine of complementarity, the ICC can only assume jurisdiction if the national court is unable or unwilling to prosecute.⁶⁴ The ICC prosecutors' hands are tied unless they can satisfy the considerable burden of showing that the national court trial is a sham. Yet, despite the immensely greater discretionary powers of the ICTY and its greater imposition on state sovereignty, the United States has never voiced the same concerns or mounted the kind of venomous attack against the ICTY that it has against the ICC.⁶⁵ The ICTY operates

⁶⁰ *Id.* at art. 16.

⁶¹ *Id.* at art. 112.

⁶² Some argue that the current administration should not fear the ICC prosecutors' political motivations based upon the experience of the ICTY's timid treatment of the 1999 NATO bombing campaign. See Waters, *supra* note 51, at 1124-26. See also Bartram S. Brown, *U.S. Objections to the Statute of the International Criminal Court: A Brief Response*, 31 N.Y.U. J. INT'L L. & POL. 855, 884 (1999). However, despite the ICTY prosecutors' wider discretion than the ICC, the ICTY is funded by the Security Council and therefore arguably lacks the autonomy of the ICC, which is funded by the member states. Whether or not this lack of autonomy affects the judgment of the prosecutors' office is subject to speculation, but some theorists contend that the ICC would be subject to the same results (i.e., bias in favor of U.S. interests instead of against them). Those theorists argue that the ICC would operate "in a political and institutional atmosphere that encourages caution, conciliation, and co-optation, creating incentives for the Prosecution to reach the kinds of conclusions it does in the [ICTY] Inquiry . . ." Waters, *supra* note 51, at 1122. In either event, the prospect of U.S. personnel being targeted for political persecution appears remote.

⁶³ U.N. International Criminal Tribunal for the Former Yugoslavia, *Fact Sheet: General Information*, at www.un.org/icty/cases/factsheets/generalinfo-e.htm (last updated Dec. 10, 2004) ("The ICTY and national courts have concurrent jurisdiction over serious violations of international humanitarian law committed in the former Yugoslavia. However, the ICTY can claim primacy over national courts, and may take over national investigations and proceedings at any stage if this proves to be in the interest of international justice.").

⁶⁴ Rome Statute, *supra* note 13, art. 20.

⁶⁵ In a synopsis, *infra*, of the statement issued by Jean David Levitte, Security Council representative from France, regarding Resolution 1422 (exempting U.N. peacekeeping forces from liability from the ICC as a condition of the renewal of peacekeeping forces in Bosnia (2002)), Mr. Lavitte stated that the Rome Statute had given the U.S. much more meaningful safeguards than the safeguards of the ICTY, which had never elicited the slightest concern in Washington. U.N. Press Release, *Bosnia Mission Mandate in Question, As Security Council Debates Legal Exposure of*

with the blessing of the United States and the United States was instrumental in its formation. However, the U.S. military is not exempt from prosecution by the ICTY.⁶⁶ This is noteworthy given the fact that the United States contributed the most peacekeepers and had a significant military presence in the former Yugoslavia. It is no more far-fetched that U.S. military personnel would be prosecuted for their peacekeeping activities in the former Yugoslavia than that they would be prosecuted in the International Criminal Court.⁶⁷ This analysis suggests that the U.S. opposition to the International Criminal Court is not predicated on fears of the liability of its soldiers, but on perceived threats to state sovereignty and contemporary policy initiatives.

II. U.S. EFFORTS TO CIRCUMVENT THE COURT

1. U.S. Reaction to the Rome Statute

Throughout his term of office, George W. Bush has taken several affirmative steps to quash the viability of an autonomous International Criminal Court. Recently, these steps have proven increasingly vitriolic and effective. Through domestic legislation, diplomatic maneuvers, and what some describe as shameless bullying, this administration and other U.S. officials have taken steps that seriously threaten to undermine the Court. On November 3, 2003, in remarks given to the American Enterprise Institute, John R. Bolton, then Under Secretary for Arms Control and International Security, stated that “[T]he United States is engaged in a

UN Peacekeepers, July 10, 2002, 4568th Meeting (AM & PM) – SC/7445/Rev.1, available at <http://www.un.org/News/Press/docs/2002/SC7445Rev1.doc.htm> (last visited May 1, 2005) [hereinafter U.N. Press Release: Bosnia].

⁶⁶ See *Fact Sheet: General Information*, *supra* note 63. The ICTY is charged with prosecuting natural persons who may have committed one or more of the enumerated offenses on the territory of the former Yugoslavia since 1991. *Id.* There is no disclaimer or limitation on the tribunal’s mandate regarding the nationality of the target of the prosecution and thus anyone present on the territory after 1991 is liable, whether it be a U.S. soldier or a native. *See id.*

⁶⁷ Although the main thrust of the ICTY prosecutors’ inquiry into the 1999 bombing raid was to review the propriety of the decisions of the NATO leadership, the actions of individual soldiers came under scrutiny. Waters, *supra* note 51, at 1023, 1047-48. One of the allegations concerned the bombing of a bridge over the Grdelica Gorge (while a passenger train was crossing) and suggested the possibility of the pilot’s individual liability. *Id.* In that case two laser-guided bombs fired sequentially struck the train. *Id.* The Committee declared no liability for the first missile, but was divided as to whether the pilot was reckless in firing the second. *Id.* Ultimately, the Committee agreed not to call for an investigation, and found that the pilot could not react quickly enough to prevent the propulsion of either of the weapons in time to save the passengers. *Id.*

worldwide effort . . . that would prohibit the surrender of U.S. persons to the Court,” and “a global campaign . . . that will ensure U.S. persons are not subjected to the ICC’s jurisdiction.”⁶⁸

Even before the conference in Rome, U.S. actions reflected opposition to the concept of a permanent international criminal tribunal. Accordingly, as the Conference approached “the attacks on the Court in the United States grew increasingly shrill,”⁶⁹ and “[U.S.] Senator Jessie Helms (R-N.C.) has declared war on the ICC for not giving ‘100 percent protection’ from prosecution to American GIs.”⁷⁰ Additionally, Senator Helms, who was the Chair of the Senate Foreign Relations Committee,⁷¹ stated that the ICC would be “dead on arrival” absent an allowance for United States veto over cases being brought before it.⁷² The U.S. Delegation to Rome apparently retained this attitude.

David Scheffer was the former Ambassador-at-Large for War Crimes Issues and was the head of the U.S. Delegation to Rome. While working in this capacity he negotiated, inter alia, the inclusion of Article 98(2) to the Statute, which states:

⁶⁸ John R. Bolton, American Justice and the International Criminal Court, Remarks at the American Enterprise Institute, Washington DC, at <http://www.state.gov/t/us/rm/25818.htm> (Nov. 3, 2003) [hereinafter Bolton, Remarks at AEI]. John Bolton was subsequently nominated by President Bush for the position of U.N. Ambassador in March 2005. See CNN.com, *Bush Nominates Bolton as U.N. Ambassador*, March 8, 2005, at <http://www.cnn.com/2005/US/03/07/bolton/> (last visited Apr. 11, 2005).

⁶⁹ Sadat & Carden, *supra* note 39, at 447.

⁷⁰ Ruth Wedgwood, *Fiddling in Rome: America and the International Criminal Court*, 77 FOREIGN AFFAIRS 20, 21 (1998).

⁷¹ The fledgling ICC has suffered a series of domestic legislative challenges in the United States. Two earlier drafts of the American Servicemembers’ Protection Act, designed to withhold military aid to any country that is a signatory to the ICC, were proposed but defeated. S. 2726, 106 Cong. § 7 (2000) and S. Amdt. 1690 to National Defense Authorization Act for Fiscal Year 2002, S. 1438, 107 Cong. (2001). A similar bill passed in the House. H. Amdt. 31 to Foreign Relations Authorization Act, H.R. 1646, 107 Cong. (2001). Ultimately, however, in 2002 the third version of the American Servicemembers’ Protection Act passed as an amendment to the 2002 Supplemental Appropriations Act for Further Recovery From and Response to Terrorist Attacks on the United States, Pub. L. No. 107-206 (codified as 22 U.S.C. §§ 7421-7432 (2002)). Additionally, bills were proposed recommending that the United States’ signature be withdrawn from the Rome Statute and that all support be withheld from participating in the ICC. See American Servicemember and Citizen Protection Act of 2002, H.R. 4169, 107th Cong. (2002); Presidential Order Limitation Act of 2001, H.R. Con. Res. 23, 107th Cong. (2001); H. Amdt. 408, 107th Cong. (2002) to Bob Stump National Defense Authorization Act for Fiscal Year 2003, H.R. 4546, 107th Cong. (2002). The Departments of Commerce, Justice and State, the Judiciary, and Related Agencies Appropriations Act of 2002, Pub. L. No. 107-77 (to be codified as 16 U.S.C. 1856), § 630, 115 Stat. 748, 805 (2001), successfully passed and provides that no United States funds will go to the International Criminal Court or the Preparatory Commission.

⁷² Sadat & Carden, *supra* note 39, at 448.

The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.⁷³

Accordingly, this provision precludes the jurisdiction of the Court over foreign nationals in a territory if their surrender would violate existing treaties between the two states, unless the rights under those treaties were waived. The reference to “international agreements” in the Article has been interpreted both narrowly and broadly to include or exclude different types of agreements.⁷⁴ The narrow interpretation argues that the use of the term “sending

⁷³ Rome Statute, *supra* note 13, art. 98(2). It should be noted that the statute uses the term “may” instead of “shall” when conceding superior jurisdiction to existing international agreements, which arguably suggests discretionary rather than mandatory adherence to this provision, but its use as a negative (i.e., “may not”) precludes the term’s discretionary application. Article 31(1) of the Vienna Convention on the Law of Treaties requires that the “ordinary meaning” be applied in the statutory construction of treaties. 1155 U.N.T.S. 331 [hereinafter Vienna Convention]. The ordinary meaning of “may not” is one of unqualified prohibition without allowance for discretion and is therefore indistinguishable from “shall not” or “must not.” In the Report of the Preparatory Committee on the Establishment of an International Criminal Court, the issue of a state’s responsibility concerning surrender, transfer, and extradition of suspects is discussed in Article 87. In that report, the drafters recommended that a “State Party may deny a request for [surrender] [transfer] [extradition] only if: (e) compliance with the request would put it in breach of an existing obligation that arises from [a peremptory norm of] general international law [treaty] obligation undertaken to another state.” *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Apr. 14, 1998, U.N. Doc. A/Conf.183/2/Add.1, at 134. Therefore, the final version of the Rome Statute states that the Court “may not” request the transfer of persons if it would require the requested state to act inconsistently with pre-existing treaties, and the Preparatory Committee report states that a State Party “may deny” the Court’s request, thus stating the rule both positively and negatively. *Id.* On the other hand, the report notes that “the options in this subparagraph are not clear” and that “there is no agreement on the list of grounds contained in this option.” *Id.* at n.13. Subsequently, the report suggests tension between the discretionary prioritization of requesting states and the Court by stating “a State Party [shall] [may] accord priority to a request of a state over a request by the Court for the extradition, transfer or surrender of a person to the requesting state under the provisions of any existing bilateral or multilateral agreement,” but this only modifies the discretion of the state and does not address the authority of the Court to proceed with a request. *Id.* at 136. Rather than illuminating the intent of the drafters, the notes of the Preparatory Committee raise more questions than answers and reaffirm recourse to the plain language construction, which leads to the conclusion that there is no difference between “may not” and “shall not.”

⁷⁴ For a complete discussion of this distinction, see generally, Crawford et al., *supra* note 11.

state” modifies the scope of the provision⁷⁵ and limits its applicability to agreements involving nationals sent to the foreign territory by their governments, such as U.S. military personnel sent abroad.

The broad interpretation, championed by the U.S., provides a more pervasive deference and makes no distinction between nationals being sent by the government or not. This interpretation also allows for the subsequent negotiation of treaties limiting the Court’s jurisdiction.⁷⁶ Mr. Scheffer asserted that “[w]hen the U.S. delegation successfully negotiated the inclusion of Article 98(2) in the Rome Treaty, we had in mind our own SOFAs [“Status of Forces Agreements”] and their applicability.”⁷⁷ This concern about SOFAs (an agreement “between the United States and a host nation which establishes uniform rules for handling legal matters involving U.S. military personnel serving overseas”⁷⁸) was modified by Mr. Scheffer’s additional observations: “Perhaps more importantly, even as a non-party, under Article 98(2) we can negotiate agreements with other governments that would prevent any American [sic] being surrendered to the ICC from their respective jurisdictions without our consent.”⁷⁹

From Mr. Scheffer’s representations, it is apparent that the United States came to Rome with the intent to exempt its citizens from liability to the Court⁸⁰ and proceeded to negotiate for this during the Conference. Failing to acquire universal exemption or veto authority, the U.S. delegation managed to negotiate a provision in the Statute providing a failsafe whereby it could individually negotiate with State parties to the Conference achieving the same result. This provision was Article 98(2).

At the Conference in Rome there were many concessions made to the U.S. delegation.⁸¹ Indeed, these concessions began prior to the Conference pursuant to U.N. resolution 50/46 of December 11, 1995, which established a committee preparatory to the

⁷⁵ *Id.* at para. 43.

⁷⁶ “The United States takes the view that these [bilateral] agreements are ‘expressly contemplated’ by Article 98(2) of the Rome Statute.” *Id.* at para. 10, citing a statement made by Ambassador Negroponte, United States Permanent Representative to the U.N., July 12, 2002 (subsequently U.S. Ambassador to Iraq).

⁷⁷ Scheffer, *supra* note 38, at 17.

⁷⁸ Erik Rosenfeld, *Application of U.S. Status of Forces Agreements to Article 98 of the Rome Statute*, 2 WASH. U. GLOBAL STUD. L. REV., 273, 276 n.30 (2003).

⁷⁹ Scheffer, *supra* note 38, at 18.

⁸⁰ *Id.*

⁸¹ There was some concern that the delegates had gone too far to accommodate the United States in making concessions and that the final result would be a statute so loosely formulated that major human rights violators would evade prosecution. See Chibueze, *supra* note 1, at 52-53.

formation of the International Criminal Court. At the Conference, the concessions included the incorporation of the doctrine of complementarity, affording the ICC jurisdiction only if national courts are unable or unwilling to investigate and, if necessary, prosecute, and the exemption for the prosecution of war crimes for seven years (the U.S. was negotiating for ten years). However, the United States failed to win support for its amendments to the statute to achieve exemption for U.S. citizens or, alternatively, exclusive U.N. Security Council authority for prosecutions.⁸² Other amendments proffered by the U.S. delegation were overwhelmingly voted down in the closing hours of the Conference.⁸³ In the concluding moments of the Conference “[a]s delegates clapped, cheered, hugged and took snapshots to commemorate the moment, dejected members of the United States delegation sat stonily in their seats.”⁸⁴ Of 160 nations present, 120 countries voted for the Rome Statute, 7 voted against it,⁸⁵ and 21 abstained.

Shortly after its passage, the Rome Statute was ratified by 89 countries (ratification currently stands at ninety-seven states). The U.S. reaction was, at first, benign. Then-President Clinton provided a qualified endorsement by signing the Treaty in his last days in office without necessary Congressional authorization.⁸⁶ Subsequently, the succeeding administration sent a letter to the U.N. de-

⁸² The requirement of U.N. Security Council approval for all ICC prosecutions would provide the United States, as a permanent member, with the capability of vetoing any unwanted prosecutions, and would therefore be analogous to the ICTY.

⁸³ See Lawrence Weschler, *Exceptional Cases in Rome: The United States and the Struggle for an ICC*, in *THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT: NATIONAL SECURITY AND INTERNATIONAL LAW* 85-111 (Sarah B. Sewall & Carl Kaysen eds., 2000).

⁸⁴ Alessandra Stanley, *U.S. Dissents, but Accord is Reached on War-Crime Court*, N.Y. TIMES, July 18, 1998, at A3.

⁸⁵ The United States was among the only democracies to vote against the statute and was joined by Libya, Israel, Qatar, Yemen, Algeria, and China. Among the abstaining countries were India, Pakistan, Indonesia, Saudi Arabia, Cuba, North Korea, Afghanistan, Iraq, and Iran. Faulhaber, *supra* note 46, at 538. Collectively, these nations have among the worst human rights records (*Id.* at 538 n.15) on the globe, leading some to believe that if there is any truth to the adage that one is judged by the company one keeps, then the United States will be judged harshly.

⁸⁶ President Clinton also left a recommendation to his successor not to endorse the Treaty as drafted because it contained flaws. However, his approach suggested a willingness to further work with the ICC in order to forge a document that could be mutually agreeable. President Clinton's actions reflected a desire to reform the treaty and remain in the debate. This position is espoused by David Scheffer, Clinton's Ambassador-at-Large for War Crimes Issues, who concluded that the remaining flaws in the treaty could be best resolved if the United States were a signatory. Scheffer also eschewed “[d]eclaring war on the treaty or just monitoring further talks with studied indifference, which appears to be the Bush Administration's chosen course.” Scheffer, *supra* note 38, at 5.

claring its intent not to ratify the Rome Statute⁸⁷ and seemingly began a campaign to circumvent its implementation. The Lawyer's Committee for Human Rights (now called Human Rights First) concluded that "[d]espite President Clinton having signed the Rome Treaty, giving the Court his qualified support, the U.S. has now completely disengaged from the ICC. This disengagement was signaled powerfully in May this year [2002] by the U.S.'s 'un-signing' of the Rome Statute."⁸⁸

On May 17, 2002, the U.S. threatened to veto the Security Council renewal of the East Timor peacekeeping mission if U.S. soldiers were not given immunity from ICC prosecutions, but then relented temporarily.⁸⁹ The Rome Treaty was to take effect on July 1, 2002.⁹⁰ On June 21, 2002, just 10 days before the effective date of the Statute, the U.S. threatened to veto a renewal of the peacekeeping mission to Bosnia,⁹¹ absent its sought-after immunity

⁸⁷ The U.S. declaration not only served to disengage the U.S. symbolically from the jurisdiction of the Court, but also served to symbolically circumvent any proposed U.S. obligations in accordance with Article 18 of the Vienna Convention on the Laws of Treaties. Article 18 states that "A state is obliged to refrain from acts that would defeat the object and purpose of a treaty when (a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, *until it shall have made its intention clear not to become a party to the treaty.*" Vienna Convention, *supra* note 73, art. 18 (emphasis added). Once the Bush administration made its intentions clear by virtue of the declaration, the U.S. was no longer subject to criticism for failing to abide by Article 18 and for defeating the object and purpose of the ICC treaty.

⁸⁸ Lawyers Committee for Human Rights, *Article 98 Agreements: The EU's Guiding Principles in Context*, at http://www.humanrightsfirst.org/international_justice/icc/us_role/us_role_01.htm (last visited Dec. 20, 2004) [hereinafter LCHR, *Article 98*].

⁸⁹ The U.S. attempted to amend the Security Council's resolution calling for a peacekeeping mission in East Timor in order to exempt U.N. troops from prosecution by the ICC, but "dropped the amendment in the face of strong opposition from other council members – including Britain and France which both have veto power in the council and support the court." Subsequently, U.S. Ambassador John Negroponte stated on May 20th, "We definitely want to make clear that when we participate in peacekeeping missions that we intend to seek some kind of exception to international criminal court jurisdiction." Edith M. Lederer, *U.S. Makes Int'l Court Demands*, Associated Press, May 20, 2002, available at http://www.globalsolutions.org/programs/law_justice/icc/icc_home.html. See Colum Lynch, *U.S. Seeks Court Immunity for E. Timor Peacekeepers*, WASH. POST, May 16, 2002, at A22; Somini Segupta, *U.S. Fails in UN to Exempt Peacekeepers from New Court*, N.Y. TIMES, May 17, 2002, cited in The Washington Working Group on the ICC: *US Fails to Win Exemption; East Timor Peacekeeping Will Continue* (May 17 2002), available at http://www.globalsolutions.org/programs/law_justice/icc/icc_home.html.

⁹⁰ Rome Statute, *supra* note 13, art. 126.

⁹¹ As reported in the New York Times, Richard S. Williamson, the United States representative to the United Nations for special political affairs stated, "In the Security Council this morning, I said there should be no misunderstanding that if there is not adequate protection for U.S. peacekeepers, there will be no U.S. peacekeepers." Serge Schmemmann, *U.S. Links Peacekeeping to Immunity From New Court*, N.Y. TIMES,

from the ICC,⁹² but agreed to a 10-day extension. Thereafter, on June 30, 2002 the U.S. vetoed an extension of the peacekeeping mission in Bosnia in a U.N. Security Council vote of 13 to one.⁹³ This action prompted U.N. Secretary-General Kofi Annan to declare that the world could not afford the Security Council's deep divide on such important issues and the implications it may have on all U.N. peace operations.⁹⁴ Three days later the U.S. agreed to another extension to allow for reconsideration of the issue.⁹⁵

Numerous states weighed in on the issue, with the overwhelming majority against the U.S. position, and raised such concerns as whether the Security Council has the authority to adopt resolutions that circumvent treaties which are in compliance with the United Nations Charter; whether the exemptions backed by the U.N. would be in violation of the U.N. Charter according to Chapter VII; what the impact of these exemptions on customary interna-

June 19, 2002, at A3. See Anwar Iqbal, *U.S. Seeks Amnesty for Peacekeepers*, UNITED PRESS INT'L, June 20, 2002, available at <http://www.wfa.org/issues/wicc/unsc1422/upi062002.html>; Carola Hoyos, *US Seeks to Exempt Peacekeepers from International Criminal Court*, FIN. TIMES, June 18, 2002 (The Americas), at 9, available at http://www.global-solutions.org/programs/law_justice/icc/icc_home.html; *US Threat to Pull Troops; Row over New UN Court*, HERALD SUN, June 21, 2002, at 33, available at http://www.global-solutions.org/programs/law_justice/icc/icc_home.html.

⁹² The proposed text of the U.S. draft resolution for inclusion in the renewal of the U.N. Security Council Bosnia Peacekeeping Mandate states, in relevant part, "that persons from contributing states acting in connection with such operations shall enjoy in the territory of all member states, other than the contributing states, immunity from arrest, detention and prosecution with respect to all acts arising out of the operation and that this immunity shall continue after the termination of their participation in the operation for all such acts." *Reported Text Submitted by U.S. to be Included in the Renewal of the U.N. Security Council, Bosnia Peacekeeping Mandate*, June 19, 2002, cited in *The Washington Working Group on the I.C.C.: U.S. Efforts to Obtain Exemption for U.N. Peacekeepers Draft Security Council Resolution*, at www.wfa.org/issues/wicc/unsc1422/UNSCdraftres.html (June 21, 2002).

⁹³ Ambassador Negroponte stated that the United States was committed to Bosnia, but "[t]he fact that we are vetoing this resolution in the face of that commitment, however, is an indication of just how serious our concerns remain about the risks to our peacekeepers." Colum Lynch, *U.S. Wields Veto in Clash Over War Crimes Court*, WASH. POST, July 1, 2002, at A1, available at <http://www.wfa.org/issues/wicc/unsc1422/wp-veto.html>. See Betsy Pisik, *U.S. Ready to Pull Troops Out of Bosnia; No Deal Reached Over World Court*, WASH. TIMES, June 29, 2002, at A5; United Press International, *US OKs 72-hr Extension for Bosnia Mission*, wire service (June 30, 2002), at <http://www.wfa.org/issues/wicc/unsc1422/upi-extend.html>.

⁹⁴ U.N. Press Release, *World Cannot Afford Security Council's Deep Divide on Such Important Issue, Says Secretary-General, on Failure to Extend Bosnia Mission*, Jan. 7, 2002, SG/SM/295 SC/7440, at <http://www.un.org/News/Press/docs/2002/sgsm8295.doc.htm> (last visited May 1, 2005).

⁹⁵ Washington Working Group on the International Criminal Court, *U.S. Agrees to Temporary Extension of Peacekeeping*, at <http://www.wfa.org/issues/wicc/unsc1422/july3.html> (last visited Oct. 23, 2004).

tional law might be; and what corresponding message such resolutions send out (i.e., that peacekeepers are above the law).⁹⁶ On July 12, 2002 the Security Council succumbed to the relentless U.S. pressure and approved a one-year exemption for U.S. peacekeepers, shielding them from the jurisdiction of the ICC.⁹⁷

This compromise was widely regarded with bitterness from Security Council members. The U.N. representative from Mexico stated, “The general opinion of the international community is

⁹⁶ Don Mackay, the U.N. Security Council representative from New Zealand, stated that the issue before the Council had implications for peacekeeping, fundamental issues of international law, the international treaty-making process, and the role of the Council itself, and that there was no justification or need for the exemption of peacekeepers which would “seem to enshrine an unconscionable double standard, placing peacekeepers above the law.” U.N. Press Release: Bosnia, *supra* note 65. The representative from Canada, Paul Heinbecker, stated that fundamental principles of international law were in question and that the circulated resolution contained elements that exceeded the Council’s mandate. *Id.* Stefan Tafrov, representative from Bulgaria, articulated that peacekeeping missions were vital to the U.N. and the Council and that Chapter VII of the U.N. Charter should not be linked to the weakening of any international treaty. *Id.* Maria Elena Chassoul, representative from Costa Rica speaking on behalf of the Rio group stated that the resolution exceeded the Council’s authority and might undermine its credibility and legitimacy. *Id.* The representative from Jordan, Zeid Ra’ad Zeid al-Hussein, stated that the only discussion the Security Council should be having a week after the ICC statute entered into force was on how best to assist the Court, to contemplate anything short of that would be offering comfort to the criminals of tomorrow, and that the resolution would edge beyond the Council’s authority under the United Nations Charter. *Id.*

⁹⁷ The authority for the exemption of peacekeepers from potential prosecution is grounded in Article 16 of the Rome Statute which states, “No investigation or prosecution may be commenced or proceeded with under the Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.” Rome Statute, *supra* note 13, art. 16. This authority was contested by many of the representatives to the Security Council during and immediately after the vote on Resolution 1422 authorizing the exemption. U.N. Press Release: Bosnia, *supra* note 65. They contended that Article 16 of the Rome Statute was not meant to apply blanket coverage before the fact but to be determined on an ad hoc basis, and that the United States’ interpretation unreasonably expanded the Security Council’s authority by limiting targets of ICC prosecution. *Id.* Claudia Fritsche, of Liechtenstein, argued that the approach contemplated would effectively amend Article 16 of the Rome Statute, and Brazil’s representative, Gelson Fonseca, stated that the provisions of Article 16 of the Rome Statute were applicable only on a case-by-case basis. *Id.* These critiques suggest that the applicability of Article 16 must be observed in a historical/specific manner and not in a preemptive/generic context. Some representatives, including Adolfo Aguiler Zinser of Mexico, cautioned that the Council’s broad interpretation of Article 16, presupposed by Resolution 1422, created a dangerous precedent of using its resolutions to amend treaties in contravention of the Vienna Convention on the Law of Treaties, and suspension [of liability] could not be granted concerning events that had not occurred, nor could such a suspension be unlimited. *Id.*

that this is wrong.”⁹⁸ The representative from Canada commented, “This is a sad day for the United Nations,”⁹⁹ and the representative from South Africa declared that the actions of the United States held disturbing implications for the rest of the member states, and the world in general.¹⁰⁰ The result was (a renewable) Resolution 1422 which states in relevant part:

if a case arises involving current or former officials or personnel from a contributing State not a Party to the Rome Statute over acts or omissions relating to a United Nations established or authorized operation, [the ICC] shall for a twelve-month period starting 1 July 2002 not commence or proceed with investigation or prosecution.

Thus, all U.N. peacekeepers from any countries that are not parties to the Rome Statute are not subject to ICC prosecutions for at least one year.

In June 2003 the exemption was extended for another year under U.S. pressure.¹⁰¹ However, under subsequent domestic and international political pressure, in June of 2004 the United States withdrew its proposed resolution to further renew the immunity for the peacekeepers.¹⁰² In a press release dated June 23, 2004, Ambassador James B. Cunningham, Deputy U.S. Representative to the United Nations stated, “We believe the draft and its predecessors fairly meet the concerns of all. Not all Council Members agree, however, and the United States has decided not to proceed with further consideration and action on the draft at this time to avoid a prolonged and divisive debate.”¹⁰³ This sensitivity to the concerns of other Council Members reflects a decisive change from those considerations espoused by the administration two years earlier when it stood alone in the Security Council on Resolution 1422 and vetoed renewal of peacekeeping in Bosnia.

Contemporaneous with the diplomatic efforts taking place in the U.N. Security Council was the domestic debate in the U.S. leg-

⁹⁸ Washington Working Group on the International Criminal Court, *UN Security Council Grants One-Year Exemption for Peacekeepers* (July 12, 2002), at <http://www.wfa.org/issues/wicc/unsc1422/july12.html>.

⁹⁹ *Id.*

¹⁰⁰ U.N. Press Release: Bosnia, *supra* note 65.

¹⁰¹ See S.C. Res. 1487, UN SCOR, 58th Sess., 4772d mtg. at 1, U.N. Doc. S-INF/59 (2003), available at <http://daccessdds.un.org/doc/UNDOC/GEN/N03/394/51/PDF/N0339451.pdf?OpenElement>. See also Jim Lobe, *U.S. Slashes Military Aid to Friendly Nations* (Oct. 1, 2003), at <http://us.oneworld.net/article/view/69348/1>.

¹⁰² Press Release, Ambassador James B. Cunningham, Remarks on the International Criminal Court, at http://www.un.int/usa/04print_111.htm (June 23, 2004) [hereinafter Cunningham].

¹⁰³ *Id.*

islature regarding the American Servicemembers' Protection Act of 2002 (ASPA). This legislative attack on the Court was passed and signed into law on August 2, 2002, just 21 days after the compromise was reached on Resolution 1422. ASPA precludes United States' participation in U.N. peacekeeping activities unless one of the following conditions exists: U.S. soldiers are expressly exempt from ICC jurisdiction by U.N. resolution; the countries in which the troops are operating are outside the jurisdiction of the ICC; the troops are in countries that have concluded bilateral agreements with the U.S. exempting them under Article 98(2) of the Rome Statute; or the national interests of the U.S. justify participation.¹⁰⁴

ASPA also prohibits U.S. cooperation with the International Criminal Court by such parties as the United States Courts, or local governments, and United States agencies. It prohibits any federal, state, or local government from providing support to the ICC; prohibits the extradition of any person to the ICC; prohibits the use of United States funds to assist in the investigation, arrest, detention, or prosecution of any United States citizen by the ICC; and prohibits any investigative activity of the ICC in the United States and its territory.¹⁰⁵

This Act further prohibits the transfer of any classified national security information and law enforcement information to the ICC.¹⁰⁶ ASPA expressly grants the President authority "to use all means necessary and appropriate to bring about the release" of persons of the Armed Forces of the United States and certain other persons being detained or imprisoned by or on behalf of the International Criminal Court.¹⁰⁷ The fear that the United States may use force to protect its soldiers if prosecuted at the Hague inspired ASPA's nickname, "The Hague Invasion Act."¹⁰⁸ The authority afforded under this Section extends its protection beyond United States military personnel to include other individuals, even non-Americans.¹⁰⁹ The exact extent of the protection and who is cov-

¹⁰⁴ American Servicemembers' Protection Act of 2002 (ASPA), Pub. L. No. 107-206, § 2005, 116 Stat. 899, 903-904 [hereinafter ASPA].

¹⁰⁵ *Id.* at § 2004.

¹⁰⁶ *Id.* at § 2006.

¹⁰⁷ *Id.* at § 2008.

¹⁰⁸ See Faulhaber, *supra* note 46, at 546 n.77 (citing *The Hague Invasion Act*, ST. LOUIS POST-DISPATCH, Oct. 24, 2001, at B6).

¹⁰⁹ ASPA, *supra* note 104, § 2008. Section 2008(b) of the American Servicemembers' Protection Act states, "Persons authorized to be freed—the authority of subsection (a) shall extend to the following persons: (1) Covered United States persons; (2) Covered allied persons; (3) Individuals detained or imprisoned for official actions taken while the individual was a covered United States person or a covered

ered under the Law is unclear but the administration is clearly assuming an expansive interpretation. Regarding this protection, Undersecretary Bolton opined,

This broad scope of coverage is essential to ensuring that the ICC will not become an impediment to U.S. activities around the world. We must guarantee the necessary protection to our media, delegations of public and private individuals traveling to international meetings, private individuals accompanying official personnel, contractors working along side official personnel (particularly in the military context), participants in exchange programs, former governmental officials, arms control inspectors, people engaged in commerce and business abroad, students in government sponsored programs, to name just a few categories of persons.¹¹⁰

Additionally, ASPA bars all U.S. military assistance to states who are members of the ICC and allows exceptions only for certain countries (including NATO members), where it is in the U.S. national interest to continue military aid and who have executed an Article 98 treaty.¹¹¹ These provisions make up some of the sections with the greatest bearing on the ICC.

Thus, the American Servicemembers' Protection Act of 2002 mandates the restriction of legitimate peacekeeping forces;¹¹² the obstruction of the ICC in its investigatory capacity in the U.S.¹¹³ (regardless of the gravity of the offenses investigated); the refusal to share any classified national security or law enforcement information¹¹⁴ whether or not it concerns Americans and/or involves matters relating to U.S. territory; the deprivation of military aid to State parties to the ICC that have been traditional U.S. allies unless they endorse Article 98 of the Rome Statute;¹¹⁵ and the authority of the president to "use all means necessary" to remove specific U.S. and allied personnel from detention by the ICC.¹¹⁶

The Netherlands, host State of the ICC, apparently has nothing to fear however, as a U.S. Embassy communication dated June 12, 2002 reassured that, "we would expect to resolve these controversies in a constructive manner . . . [and] we cannot envisage

allied person, and in the case of a covered allied person, upon the request of such government." *Id.*

¹¹⁰ Bolton, Remarks at AEI, *supra* note 68.

¹¹¹ ASPA, *supra* note 104, § 2007.

¹¹² *Id.* at § 2005.

¹¹³ *Id.* at § 2004.

¹¹⁴ *Id.* at § 2006.

¹¹⁵ *Id.* at § 2007.

¹¹⁶ *Id.* at § 2008.

circumstances under which the United States would need to resort to military action against the Netherlands or another ally.”¹¹⁷ Despite its language, the statement itself could be construed as an implicit threat to the U.S.’s traditional allies, and the otherwise ridiculous notion of attacking The Hague may not be as far-fetched as conventional wisdom might suggest. In any event, the fact that the U.S. Department of State found it necessary to clarify this point is troubling.

The steps taken by ASPA not only attempt to remove the Court’s jurisdiction over U.S. servicepersons, ASPA’s purported purpose, but are clearly designed to stymie the Court’s ability to function. Prohibiting cooperation with law enforcement regarding all matters does not serve to protect servicepersons per se, nor does the refusal to allow investigation on U.S. territory. Cooperation with law enforcement is essential for competent prosecution as is the sharing of information—particularly in cases that cross state boundaries. The drafting of the ASPA statute overreaches the protection it seeks to afford and could be rationally limited to denial of cooperation in cases involving U.S. servicepersons or citizens only. Instead the drafters’ intent is manifest in its breadth—to eliminate the ICC.¹¹⁸

This conclusion is consistent with the public statements of several U.S. government spokespersons and representatives.¹¹⁹ Am-

¹¹⁷ *The International Criminal Court & Reaction to the American Servicemembers’ Protection Act, Statement of the US Embassy* (June 12, 2002), available at <http://www.usemb.nl/061202.htm>.

¹¹⁸ This goal is reflected in public statements made by Undersecretary Bolton who has repeatedly maintained a “no compromise” position on the International Criminal Court and stated, “Specifically, I propose for the United States policy . . . no financial support, directly or indirectly; no collaboration; and no further negotiations with other governments to improve the statute. This approach is likely to maximize the chances that the ICC will wither and collapse, which should be our objective.” *Is a U.N. International Criminal Court in the U.S. Interest?: Hearing before the Subcommittee on International Operations of the Committee on Foreign Relations*, 105th Cong. 28-31 (1998) (statement of Hon. John Bolton, Former Assistant Secretary of State for International Organization Affairs; Senior Vice President, American Enterprise Institute, Washington, D.C.), *quoted in* Sadat, *supra* note 1, at 590.

¹¹⁹ Indeed, the feared vulnerability to the ICC seems to represent a dominate theme in U.S. foreign policy, as seen in this U.S. Senate Committee on Foreign Relations report:

COMM. ON FOREIGN REL., THE OPTIONAL PROTOCOL TO THE CONVENTION ON THE RIGHTS OF THE CHILD ON THE SALE OF CHILDREN, CHILD PROSTITUTION AND CHILD PORNOGRAPHY AND THE OPTIONAL PROTOCOL TO THE CONVENTION ON THE RIGHTS OF THE CHILD ON THE INVOLVEMENT OF CHILDREN IN ARMED CONFLICT, S. REP. NO. 107-4 (2002). In that report, the U.S. Senate Committee on Foreign Relations made specific determinations concerning the impact a U.S. ratification of the

ambassador Lawrence G. Rossin stated that the International Criminal Court is “an organization that we believe is flawed, discriminatory and weakens established norms of international law.”¹²⁰ In a speech delivered by Charge’ d’ Affaires Douglas A. Davidson on May 16, 2002 to the Permanent Council in Vienna he stated that “[t]here is only one United States position on the International Criminal Court Treaty. It is simple and it is this: we are opposed to it.”¹²¹

2. *Article 98 Treaties and Military Aid*

Undeniably, the most effective weapons in the United States’ arsenal to circumvent the ICC are the Article 98 treaties. Article 98 treaties refer to Article 98(2) of the Rome Statute and are purportedly designed to provide protection to United States personnel. “Dubbed ‘impunity agreements’ by leading legal experts, these bilateral agreements, if signed, would provide that neither party to the accord would bring the other’s current or former government officials, military or other personnel (regardless of whether or not they are nationals of the state concerned) before the jurisdiction of the Court.”¹²² Initially, the United States’ success with the Article 98 treaties was modest. By fall of 2002, the United States had convinced only 13 States to enter into bilateral agreements.¹²³

However, a year later the number of countries that were signatories soared to 70. According to a speech made by John R. Bolton to the American Enterprise Institute, 70 countries had signed Article 98 agreements with 50 of them being signatories to the Rome Statute.¹²⁴ These numbers are refuted, however, in a letter to for-

Optional Protocol on the Convention on the Rights of the Child would have regarding the applicability of ICC jurisdiction (finding that ratification does not establish “a basis for jurisdiction by any international tribunal, including the International Criminal Court”). *Id.* at 17. Only after determining that ratification would not subject the U.S. to ICC jurisdiction would the Committee recommend conditional approval of the Optional Protocol. *See id.* at 36.

¹²⁰ Letter from Ambassador Lawrence G. Rossin, Article 98-The American Perspective, to Zagreb Press (May 2003) (on file with the New York City Law Review).

¹²¹ Charge d’ Affaires Douglas Davidson, United States Mission to the OSCE Statement on the International Criminal Court, Remarks delivered by Charge d’ Affaires Douglas A. Davidson to the Permanent Council, Vienna, at <http://www.usosce.rpo.at/archive/2002/05/16icc.htm> (May 16, 2002).

¹²² Coalition for the International Criminal Court, *US Bilateral Immunity or So-called “Article 98” Agreements available at* <http://www.globalpolicy.org/intjustice/icc/2003/0606usbilaterals.htm> (Apr. 18, 2003) [hereinafter CICC, Bilateral Immunity].

¹²³ *See* LCHR, *Article 98*, *supra* note 88.

¹²⁴ Bolton, Remarks at AEI, *supra* note 68.

mer Secretary of State Colin Powell from Human Rights Watch dated December 9, 2003, urging Powell to ignore the statement of some U.S. public officials, and asserting that only one-third of ICC states have signed Article 98 agreements (out of 92 state parties).¹²⁵ Human Rights Watch further avers that less than 20 (total) have entered into force and that only nine of those are ICC states.¹²⁶ Given the confidential nature of these agreements, it is difficult to determine the exact number of signatories, however, in a press release dated July 21, 2003, there were 48 publicly identified signers.¹²⁷

One reason the United States has recently enjoyed success with Article 98 treaties is its threat to withhold military aid to virtually all nations who are signatories to the Rome Statute. According to Section 2007 of the American Servicemembers' Protection Act, military aid is cut from states that are party to the Rome Statute (with some exceptions) unless they have executed Article 98 treaties.¹²⁸ This provision did not come into effect until July 1, 2003 (one year after the Rome Statute's passage) and the rise in Article 98 treaty ratifications corresponds to the proximity of the effective date of this statute.

Of all the categories in United States foreign aid, the largest portion is earmarked for military aid,¹²⁹ which accounts for almost 30% of all U.S. budgeted aid funds (excluding supplemental funds).¹³⁰ This aid principally consists of loans and grants to foreign governments for the purchase of military equipment from the United States and, to a lesser degree, for training foreign military officers and personnel.¹³¹ Military aid is an important component of United States' diplomatic efforts and has been described as "the best way to win friends and influence people around the globe."¹³²

¹²⁵ Human Rights Watch, *US and the ICC: Extend Article 98 Agreement Waivers*, Letter to US Secretary of State Colin Powell, available at <http://www.hrw.org/press/2003/12/US120903-ltr.htm> (Dec. 9, 2003).

¹²⁶ *Id.*

¹²⁷ Announcement, Embassy of the United States of America, Croatia, International Criminal Court (ICC) Article 98 Agreement Signatory Countries, at <http://www.usembassy.hr/issues/030722.htm> (July 21, 2003).

¹²⁸ ASPA, *supra* note 104, § 2007.

¹²⁹ See U.S. DEP'T OF STATE, CONGRESSIONAL BUDGET JUSTIFICATION: FOREIGN OPERATIONS, FISCAL YEAR 2004, at vii (released Feb. 13, 2003), available at <http://www.state.gov/documents/organization/17779.pdf>.

¹³⁰ *Id.*

¹³¹ U.S. CONG. BUDGET OFFICE, THE ROLE OF FOREIGN AID IN DEVELOPMENT 7-8 (May 1997), available at <http://www.cbo.gov/showdoc.cfm?index=8&sequence=3>.

¹³² Kathy Kiely, *Importance of Foreign Aid is Hitting Home*, USA TODAY, Dec. 4, 2001, at A11.

In this light, the denial of the largest component of U.S. aid based solely on the issue of membership in the ICC reveals an unprecedented hostility. According to Heather Hamilton of the World Federalist Association (WFA), "This is the first sanction in U.S. diplomatic history targeted exclusively at democracies."¹³³ In the Commentary section of the Washington Post, activist Tom Malinowski stated that "[t]his may be the only sanction in American diplomatic history aimed almost exclusively at governments that share American values."¹³⁴

Of the publicly disclosed signatories to the Article 98 treaties, the majority are from poor, developing nations in Africa and Asia (and most are also non-ICC members). According to the Coalition for the International Criminal Court:

A number of countries have reportedly received large sums of U.S. financial assistance upon signature of the bilateral immunity agreements. In the case of Sierra Leone, upon signature of a bilateral immunity agreement it was announced that the U.S. would invest \$25 million in the Sierra Rutile mines. In other instances, pressure for signature of a bilateral immunity agreement has included threats such as restricted accession to NATO, as has been reported in some of the Balkan states, and the withdrawal of 'dual use' funding, such as in the case of the Bahamas, where American Ambassador J. Richard Blankenship warned on public television that an 'unfavorable' response could result in the loss of funding for the paving and lighting of an airport runway.¹³⁵

The developing nations are particularly vulnerable to this type of pressure, as the amounts of foreign aid have increased dramatically in the aftermath of 9/11 in support of the U.S. administration's "war on terrorism."

In spite of the single-mindedness of the assault on the Court by this administration, unprecedented sanctions of democratic states, political exploitation of under-developed nations and the international resentment this approach has fostered, administration officials proffer that they are not employing undue coercion. In response to a question inquiring whether the U.S. was using military aid as a weapon to force nations to sign Article 98 treaties,

¹³³ Lobe, *supra* note 101.

¹³⁴ Tom Malinowski, *Bush's Court Crusade*, THE WASH. POST, Aug. 16, 2002, at A25.

¹³⁵ Press Release, Coalition for the International Criminal Court, U.S. Threatens to Cut Military Assistance to Nations Supporting the International Criminal Court: Law Pressures Non-U.S. Allies to Sign ICC Immunity Pacts, at <http://www.iccnw.org/pressroom/ciccmediastatements/2003/06.30.03ASPAdedline.pdf> (June 30, 2003) [hereinafter CICC Press Release].

then-Secretary of State Colin Powell replied, “[W]e’re not bludgeoning or threatening any of our friends. . . . Article 98 is a way of dealing with those [ICC] concerns, and I hope that all of our friends and allies will view Article 98 as a positive, constructive way of dealing with those concerns.”¹³⁶ In a Department of Defense news release dated May 6, 2002, Secretary of Defense Donald Rumsfeld stated, “there maybe [sic] mechanisms within the treaty by which we can work bilaterally with friends and allies, to the extent they are willing, to prevent the jurisdiction of the treaty.”¹³⁷

Subsequently, Secretary Bolton claimed that “[t]he U.S. decision to seek these bilateral agreements originated during the open debate in the U.N. Security Council on Resolution 1422.”¹³⁸ He indicated that the U.S. was encouraged to use individual bilateral agreements by member states of the European Union, and “[f]ollowing this advice from our European friends, we began in the late summer of 2002 to seek Article 98 agreements.”¹³⁹ These disingenuous assertions were made in spite of Secretary Rumsfeld’s prior reference to bilateral remedies and (prior) statements by the head of the U.S. delegation to Rome, David Scheffer, who specifically asserted that the primary reason for the U.S. negotiation of Article 98 treaties was to subsequently enter bilateral immunity agreements.¹⁴⁰

Ambassador Lawrence G. Rossin stated that the U.S. was not “blackmailing Croatia” while urging them to sign a bilateral immunity agreement and simultaneously threatening them with the removal of military assistance if they refused.¹⁴¹ This would mean that Croatia would lose nineteen million dollars in military equip-

¹³⁶ Press Release, U.S. Department of State, Powell, New Spanish Foreign Minister on Iraq, International Criminal Court: Remarks after Ana Palacio’s courtesy call on US Secretary of State, at <http://usinfo.state.gov/dhr/Archive/2003/Oct/15-441853.html> (Aug. 13, 2002).

¹³⁷ News Release, U.S. Dep’t of Def., Secretary Rumsfeld Statement on the ICC Treaty, at http://www.defenselink.mil/releases/2002/b05062002_bt233-02.html (May 6, 2002).

¹³⁸ Bolton, Remarks at AEI, *supra* note 68.

¹³⁹ *Id.* Far from being a friendly suggestion by the EU, the heavy-handed intimidation tactics employed by the administration have caused considerable discord between European-American relations, “European Union countries have been ‘warned’ by U.S. officials to cease lobbying Eastern European countries not to sign individual pacts, declaring that lobbying against the signature of Article 98 agreements would be considered ‘unfriendly’ and ‘very damaging’ to U.S.–E.U. relations.” Sadat, *supra* note 1, at 559-60 (quoting Brian Knowlton & Thomas Fuller, *U.S. Says It Will Cut Aid If Countries Fight Pacts: Deals Support Exception from Court*, INT’L HERALD TRIBUNE, June 11, 2003, at 1).

¹⁴⁰ Scheffer, *supra* note 38, at 17.

¹⁴¹ Rossin, *supra* note 120.

ment and training assistance, and Rossin admitted, such assistance would “help[] prepare the Croatian Armed Forces for NATO membership.”¹⁴² Rossin also stated that “[b]oth the U.S. and the European Union agree that non-surrender agreements are consistent with [Article 98 of] the Rome Statute . . . that created the International Criminal Court.”¹⁴³ Yet, according to the EU, the U.S.-endorsed bilateral treaty violates Article 98 of the Rome Statute.¹⁴⁴ Further, in June of 2003 the EU Presidency affirmed the EU Common Position that rejected the bilateral immunity deals offered by the U.S.¹⁴⁵ The EU Counsel does maintain that non-surrender agreements could be consistent with the ICC statute under limited circumstances (e.g., assurance of investigation and, where appropriate, prosecution, if the agreements only cover persons who are not nationals of an ICC state party and only apply to persons who are present on the territory of the requested state because they have been sent by a sending state), but the U.S. agreements meet none of these requirements.¹⁴⁶

In spite of the pressure applied to sign and ratify Article 98 treaties, many states and regional bodies have stood up to this U.S. administration and refused to submit. These nations include, inter alia, all 15 nations of the European Union (and 10 Accession states), Argentina, Canada, New Zealand, South Africa, Trinidad and Tobago, Venezuela, Ecuador and several other African and Latin American countries. In an official press release dated July 7, 2003 the Brazilian government stated, “[Brazil has] taken cognizance of the U.S. decision to cut off military aid to Brazil and some 50 other countries that are not prepared to sign a bilateral agreement exempting United States citizens from prosecution by the International Criminal Court” and “such an agreement runs counter to the letter and spirit of the Rome Statute and constitutes a threat to the judicial equality of States.”¹⁴⁷ Furthermore, Brazil opined that it was legally estopped from signing the Article 98 treaty because it “cannot bilaterally fail to comply with an obligation assumed at a multilateral level.”¹⁴⁸

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ CICC Press Release, *supra* note 135.

¹⁴⁵ *Id.*

¹⁴⁶ Crawford et al., *supra* note 11, at para. 14.

¹⁴⁷ Press Release, Embassy of Brazil in London, Brazilian government press release number 033/2003, US Military Aid and the International Criminal Court, *available at* <http://www.brazil.org.uk/page.php?cid=1606&offset=11> (Feb. 7, 2003).

¹⁴⁸ *Id.*

Brazil is not the only state to postulate that the Article 98 treaties are in violation of international law. Despite the erroneous assertion made by Undersecretary Bolton, the European Union has also maintained the position that these agreements are prohibited. According to the Coalition for the International Criminal Court (“CICC”), “States that sign these agreements would breach their obligations under the Rome Statute, the Vienna Convention on the Law of Treaties and possibly their own extradition laws.”¹⁴⁹

Article 18 of the Vienna Convention on the Law of Treaties provides that “[a] state is obliged to refrain from acts, which would defeat the object and purpose of a treaty.”¹⁵⁰ The object of the Rome Statute is to avoid the impunity of perpetrators of crimes which fall within the rubric of the Court’s jurisdiction. “The overriding aim is thus not international prosecution as such, it is avoidance of impunity.”¹⁵¹ The principle of complementarity supports this aim as it allows for domestic prosecution and only takes jurisdiction in cases where states are unable or unwilling to prosecute, but Article 98 Treaties thwart this purpose. U.S.-proposed bilateral immunity agreements “have been constituted solely for the purpose of providing individuals or groups of individuals with immunity from the ICC. Furthermore, the agreements do not ensure that the U.S. will investigate and, if necessary, prosecute alleged crimes. Therefore, the intent of these U.S. bilateral immunity agreements is contrary to the overall purpose of the ICC.”¹⁵²

On the other hand, when the Bush administration sent documents expressing its intent “not to become a party,”¹⁵³ Article 18(a) of the Vienna Convention became operative and the U.S. was no longer “obliged to refrain from acts which would defeat the object and purpose of [the] treaty.”¹⁵⁴ Moreover, Article 18 does not bind the U.S. as it has never ratified the Vienna Convention on the Law of Treaties. This does not, however, relieve other Rome Statute signatories of their obligations. Those state signatories, whether or not they have ratified, must still refrain from defeating the object and purpose of the Rome Statute under Article 18 of the Vienna Convention, and participation in bilateral immunity agreements arguably defeats the object and purpose and therefore violates international law.

¹⁴⁹ CICC, *Bilateral Immunity*, *supra* note 122.

¹⁵⁰ Vienna Convention, *supra* note 73, at art. 18.

¹⁵¹ Crawford et al., *supra* note 11, at para. 26.

¹⁵² CICC, *Bilateral Immunity*, *supra* note 122.

¹⁵³ Vienna Convention, *supra* note 73, at art. 18(a).

¹⁵⁴ *Id.*

Alternatively, advocates assert that the bilateral immunity agreements are incompatible with Article 98 obligations. This position maintains that the purpose of Article 98 was to preclude the circumvention of existing SOFA's and contemplated a narrow exception predicated on the reason for the individual's presence and not his status. Thus, foreign military personnel would fall under Article 98 and not all persons of a particular nationality (who could be in the foreign state for any reason).¹⁵⁵ "Both the drafting history and the words of Article 98(2) indicate that the provision was intended to cover SOFAs and like agreements. Only this interpretation is consistent with the principle of complementarity that underlies the Rome Statute."¹⁵⁶

But the U.S. bilateral immunity agreements cover a "considerably broader class of persons" and go "well beyond the scope of the agreements envisaged by Article 98(2)."¹⁵⁷ According to the CICC, "[T]he U.S.-proposed bilateral immunity agreements seek immunity for a wide-ranging class of persons, without any reference to the traditional sending-state receiving-state relationship of SOFA and SOMA agreements," (the phrase "sending state" refers to a state that is deploying troops).¹⁵⁸ The CICC goes on to say:

This wide class of persons would include anyone found on the territory of the state . . . who works or has worked for the U.S. government. Government legal experts have stated that this could easily include non-Americans and even citizens of the state in which they are found, effectively preventing that state from taking responsibility for its own citizens.¹⁵⁹

Additionally, Article 98 agreements could violate existing extradition treaties as they provide a narrower focus than traditional extra-

¹⁵⁵ Crawford et al., *supra* note 11, at para. 43.

¹⁵⁶ See LCHR, *Article 98*, *supra* note 88.

¹⁵⁷ Crawford et al., *supra* note 11, at para. 44.

¹⁵⁸ CICC, *Bilateral Immunity*, *supra* note 122. For further discussion on the language of Article 98(2) and the term "sending state," see Amnesty Int'l, *International Criminal Court: U.S. Efforts to Obtain Impunity for Genocide, Crimes Against Humanity and War Crimes* (Sept. 2, 2002) (AI Index: IOR 40/025/2002), at <http://web.amnesty.org/library/index/engior400252002> (cited in Eubany, *supra* note 37, at 118). As a term of art, its use could not be inadvertent and the intent of the drafters to limit its application to SOFA and like agreements is clear. When applying the "ordinary meaning" construction to Article 98 in light of the object and purpose of the treaty, in accordance with the Vienna Convention on the Law of Treaties, exemption under this provision is only intended to apply to members of the armed forces under SOFA agreements. *Id.* See also Alisha D. Telci, *The International Criminal Court: Is the United States Overlooking an Easier Way to Hold Saddam Hussein and Osama Bin Laden Accountable for Their Actions?*, 38 NEW ENG. L. REV. 451, 478 (2004).

¹⁵⁹ CICC, *Bilateral Immunity*, *supra* note 122.

dition and surrender agreements.¹⁶⁰ This is particularly relevant when the United States is seeking to protect foreign nationals from extradition to third-party states who are signatories to the Rome Statute.

Furthermore, there are policy reasons against bilateral immunity agreements. These agreements create a dangerous precedent whereby one set of rules would apply to U.S. citizens and another to the citizens of the rest of the world. The success of the U.S. in ratifying Article 98 treaties also may encourage other states to seek immunity for their own citizens and “would fundamentally undermine the Court.”¹⁶¹ Finally, it has been observed that Article 98(2) was conceded by other delegates to Rome at the insistence of the United States and these concessions were made with the understanding that the U.S. would remain involved in the ICC project,¹⁶² not take all available steps to render the Court impotent.

III. THE ADMINISTRATION’S MOTIVES

The International Criminal Court was established in order to hold perpetrators of gross human rights violations accountable. It was designed to punish monsters parading as heads of state and to deter other governmental officials from succumbing to savagery. The ICC has not yet prosecuted its first case; however it announced in June 2004 that its test case will involve the atrocities committed in the Congo.¹⁶³ Prior to that announcement, in a recent on-site visit to the Congo, Dr. Iulia Motoc, the U.N. Special Rapporteur for the Congo, found that the existence of the Court was having a deterrent effect there, potentially resulting in fewer human rights violations.¹⁶⁴

Few international treaties have enjoyed the overwhelming pluralistic groundswell of support that the Rome Statute received. The ICC has been described as “the last great international institution of the Twentieth Century.”¹⁶⁵ Yet, in the midst of the opti-

¹⁶⁰ *Id.*

¹⁶¹ Human Rights Watch, *United States Efforts to Undermine the International Criminal Court, Legal Analysis of Immunity Agreements*, at <http://www.hrw.org/campaigns/icc/docs/art98analysis.htm> (last visited Dec. 16, 2004).

¹⁶² *Id.*

¹⁶³ See Press Release No. ICC/OTP/2004.013-EN, Int’l Criminal Court: The Office of the Prosecutor of the International Criminal Court Opens its First Investigation (June 23, 2004), available at <http://www.icc-cpi.int/press/pressreleases/26.html>.

¹⁶⁴ Iulia Motoc, U.N. Special Rapporteur for the Congo, Statements made during a lecture at Saint Thomas University School of Law, Oct. 2003 (Author Present).

¹⁶⁵ Sadat & Carden, *supra* note 39, at 385. Secretary-General Kofi Annan hailed the Rome Statute as “the hope of future generations,” and Committee Chairman Philippe

mism that characterized the Court's inception, the disapproval of the United States foreshadowed difficulties to come. Since the Rome Conference, the U.S. has taken extraordinary measures to circumvent the ICC. It has taken the unprecedented step of "un-signing" the treaty, which bore the signature of a previous U.S. president. It threatened to withhold essential peacekeeping troops from East Timor and Bosnia. The U.S. Congress passed the American Servicemembers' Protection Act, which can only be viewed as hostile to the Court and is clearly designed to eliminate the Court's effectiveness. Most significantly, this administration has engaged in a campaign of promoting bilateral immunity agreements, fundamentally circumventing the jurisdiction of the Court. The implementation of these agreements is backed by one of the biggest guns in the U.S. diplomatic arsenal: the threat of withholding military aid.

These immunity agreements, viewed by many as prohibited under international law, came about as a result of a premeditated negotiation strategy at Rome designed to ensure that the U.S. would retain absolute control over the Court or keep it from functioning. The current administration has indicated that it has taken these steps in order to protect the U.S. military, but the military is already exempt under existing SOFA's, and the breadth of the coverage included in the immunity agreements grossly contradicts this assertion. Such glaring contradictions and apparent single-mindedness of purpose lead the thoughtful observer to ponder alternative reasons that would lead a U.S. administration to institute sanctions against exclusively democratic states, many of whom have been traditional and close allies.

Despite the administration's allegation that the anti-ICC policy is grounded in the protection of U.S. military personnel, its actions suggest that its motivations are to immunize and insulate U.S. government officials and other designees and U.S. foreign policy from international oversight. Inclusive in this protection is a policy precluding outside scrutiny of U.S. agenda matters, particularly economic interests and the war on terrorism. Section 2002(9) of ASPA provides further evidence by stating,

[T]he Rome Statute creates a risk that the President and other senior elected and appointed officials of the United States Government may be prosecuted by the International Criminal Court. Particularly if the Preparatory Commission agrees on a

Kirsch of Canada described the Statute's passage as "humanity's finest hour." Ferencz, *supra* note 43, at 229.

definition of the Crime of Aggression over United States objections, senior United States officials may be at risk of criminal prosecution for national security decisions involving such matters as responding to acts of terrorism, preventing the proliferation of weapons of mass destruction, and deterring aggression.¹⁶⁶

This Act specifically references current foreign policy initiatives (e.g., the war on terrorism and the then-anticipated preemptive strike on Iraq), which strongly suggests that protection for U.S. military personnel is a pretext, particularly considering the protections already afforded under existing SOFA's, and the administration's unquestioned acquiescence to the ICTY.¹⁶⁷

Some attribute particularly nefarious motives to the current administration's war on the International Criminal Court and postulate that the Bush administration either anticipated the commission of atrocities in the name of its war on terrorism, or gave tacit approval by turning a blind eye toward war crimes and other massive human rights violations committed by allies and subordinates.¹⁶⁸ Such foreseeable human rights violations include torture

¹⁶⁶ ASPA, *supra* note 104, § 2002(9).

¹⁶⁷ In the debate over Resolution 1422, the United States threatened to veto a renewal of the extension of the peacekeeping mission in Bosnia/Herzegovina, and argued that this was necessary in order to provide protection for its military from prosecution by the ICC. *See* U.N. Press Release: Bosnia, *supra* note 65. This argument ignores the mandate of the ICTY in Bosnia/Herzegovina whose jurisdiction continues unabated under Resolution 1422 and which, as previously seen, offers far less protections for U.S. servicemembers than the ICC. Nor is this rebutted by a supposed safety-valve sounding in a lack of ICTY autonomy (as it receives its funding from the Security Council) because a compromise position was proffered during the (Resolution 1422) debate by France, which proposed that the ICTY be given primary jurisdiction vis-à-vis peacekeeping in the former Yugoslavia. *Id.* This compromise is arguably consistent with complementarity and with the generally pervasive jurisdiction of the ICTY. The U.S. refusal to accept the compromise (which essentially has the same effect as Resolution 1422 in former Yugoslavia of exempting ICC jurisdiction) illustrates that the administration's arguments are pretextual. U.S. military personnel would not need protection from political prosecution from the ICC owing to the pervasive jurisdiction of the ICTY. To put it another way, protection from the ICC would be pointless as U.S. peacekeepers would still be subject to greater or equal risk of prosecution by the ICTY. Clearly, Resolution 1422 was a proactive attempt to destroy the credibility of the Court and not an attempt to protect U.S. peacekeepers. Another probable reason the U.S. refused the compromise was Resolution 1422's extension of ICC immunity to peacekeepers in all of the world's peacekeeping theatres. This broad extension of immunity was agreed to despite being tied to a vote on the extension of peacekeeping solely in Bosnia/Herzegovina. Nonetheless, this fails to explain the administration's inconsistent treatment of the ICC as juxtaposed with the ICTY, as it took no steps to provide protection from the ICTY to U.S. peacekeepers in former Yugoslavia.

¹⁶⁸ Given the massive military and diplomatic resources at the disposal of the Commander-in-Chief, it is unlikely that criminal liability would go very high up the chain of command even if the International Criminal Court assumed jurisdiction and the

(particularly during interrogation of those suspected of possessing information relevant to terrorist activities), unlawful detention of civilians, war crimes, crimes against humanity, and the crime of aggression.¹⁶⁹ This view was reflected by a member of the European Parliament who asked, in reference to the U.S. policy regarding Article 98 treaties, whether “the United States values the ability of its military to commit war crimes such that it devalues a safer world and would threaten violence on its long-time allies.”¹⁷⁰

Though this view has generally been considered extreme and criticized as either an insupportable exaggeration or a mischaracterization of the administration’s motives, it is interesting to note the poignant observation of Mr. Ferencz, Chief Prosecutor in the Nuremberg trial against Nazi extermination squads (*Einsatzgruppen*), concerning Guantanamo detainees. “It is sadly ironic that those who oppose the ICC as a ‘kangaroo court’¹⁷¹ raise no objection to [the] United States detaining suspected terrorists under conditions that deny them rights that would exist for any American tried by the ICC.”¹⁷² Some critics of the International Criminal Court suggest that if the U.S. were a signatory to the treaty then it would be liable for the treatment of the detainees at Guantanamo Bay (and other locations) because, under Article 8(2)(a)(vi) of the Rome Statute, it is a crime to willfully deprive a POW “or other protected person of the rights to a fair and regular trial.”¹⁷³

United States was a signatory. Even so, an international criminal trial, even of low level offenders, would usher in protracted negative publicity that the Bush administration would find politically disadvantageous. Absent international scrutiny, the administration can rely on “imbedded journalists” and others to keep the activities performed in its name out of view and beyond public debate. This fear has been echoed in conclusions declaring that “[T]he ICC can affect the United States by merely investigating alleged crimes and engaging in public criticism and judgment of U.S. military actions.” See Goldsmith, *supra* note 37, at 97.

¹⁶⁹ As the crime of aggression has not been defined by the Assembly of States, it carries no extant liability. However, forward-looking administration officials fear that its anticipated viability would impinge upon the ability of future American leaders to wage war, as evidenced by Undersecretary of State John Bolton’s concerns that the U.S. might be accused of aggression.” See Ferencz, *supra* note 43, at 235.

¹⁷⁰ Telci, *supra* note 158, at 486.

¹⁷¹ Senator Jessie Helms referred to the ICC as an “international kangaroo court.” See Diane Marie Amann & M.N.S. Sellers, *The United States of America and the International Criminal Court*, 50 AM. J. COMP. L. 381, 385 n.25 (2002).

¹⁷² See Ferencz, *supra* note 43, at 233

¹⁷³ See Goldsmith, *supra* note 37 at 96 n.27, who further argued that if Afghanistan were a signatory to the Rome Statute, then the U.S. might be liable to the ICC for denying the detainees their rights to a trial, “unlawfully confining” them and allegedly treating them “inhumanely” or for “willfully causing them great suffering.” (citing ICC Art. 8(2)(a)(ii)-(iii)).

In spring, 2004, certain events came to light that rebut the classification of this view as an insupportable exaggeration or a mischaracterization of the administration's motives. On April 28, 2004, the American TV program "60 Minutes II" aired photos of hooded Iraqi detainees "piled in a human pyramid and simulating sex acts, as U.S. soldiers celebrated. One photo showed a hooded prisoner standing on a box with wires attached to his hands; the prisoner was told, falsely, that he would be electrocuted if he fell off the box."¹⁷⁴ These atrocities and more were committed in the prison of Abu Ghraib and other Coalition-run detention facilities. The allegations, some admitted by the administration, expose practices of degradation, humiliation, torture, unlawful detention, and other violations of the third and fourth Geneva Convention of 1949.¹⁷⁵

Initially, spokespersons for the U.S. attempted to minimize the allegations by suggesting that the abuses were confined to a small number of prisoners in the Abu Ghraib prison at the hands of only a few members of the U.S. armed forces.¹⁷⁶ However, these limitations were deceptive as the International Committee of the Red Cross ("ICRC") had previously documented hundreds of examples of abuse and violations of the Geneva Conventions¹⁷⁷ at a mini-

¹⁷⁴ Dana Milbank, *US Tries to Calm Furor Caused by Photos: Bush Vows Punishment for Abuse of Prisoners*, WASH. POST, May 1, 2004, at A1.

¹⁷⁵ Geneva Convention relative to the Treatment of Prisoners of War, Aug. 12, 1949, arts. 3 & 4, 75 U.N.T.S. 135, available at <http://www.unhchr.ch/html/menu3/b/91.htm>.

¹⁷⁶ Brigadier General Mark Kimmitt, a military spokesperson, stated that the abuses involved fewer than twenty prisoners out of approximately 8,000 at Abu Ghraib prison. Milbank, *supra* note 174, at A16. Additionally, in that same newspaper article, Michael Rubin, the former political adviser to the U.S.-led Coalition Provisional Authority and resident scholar at the American Enterprise Institute, was quoted stating, "It is a disaster. Five or six people have managed to soil the reputation of American soldiers worldwide." *Id.*

¹⁷⁷ In addition to the humiliating and degrading treatment noted in the world press, the ICRC documented practices of the misuse of lethal force resulting in death or injury; threats against family members (particularly wives and daughters); hooding; tight handcuffing; use of stress positions (kneeling, squatting, standing with arms raised over the head) for three or four hours; striking prisoners with rifle butts; slaps; punches; prolonged exposure to the sun; isolation in dark cells; being urinated upon; kicks to the head, lower back and groin; and in one case, an individual was force-fed a baseball which was secured to his mouth by a scarf and then deprived of sleep for four consecutive days. Additional abuses include burnings; electric shocks (after being doused with water); threats to rape a detainee's wife; simulated Russian roulette practices; confiscation of personal property; solitary confinement (in the dark) for twenty-three hours a day; starvation and deprivation of clothing; being paraded (and sometimes photographed) naked in front of other detainees and guards, sometimes hooded or with women's underwear over their heads (several prisoners were only given women's underwear to wear); and being kept hooded in temperatures of 122

num of 14 U.S.-run Iraqi detention facilities, and had informed those members of the U.S. military responsible both orally and in the form of a confidential written report provided in February, 2004.¹⁷⁸ The report of the ICRC was intended to be confidential as is customary,¹⁷⁹ so the U.S. spokespersons' false statements were made with the assumption that the contradictory ICRC report would never be made public.¹⁸⁰ Subsequently, the Army has an-

degrees or higher. Some prisoners were kept in compounds where they were vulnerable to shelling and others were given hazardous duty which, in one case exposed prisoners to exploding cluster bombs that resulted in the double amputation of two men's legs and the single amputation of a third's. According to the ICRC report, these practices were evidenced not only by allegations but were confirmed by medical examinations conducted by ICRC staff and, in some cases, by statements from the guards, interrogators and members of military intelligence. Some of the abuses were witnessed by representatives of the ICRC, and the ICRC medical staff found, inter alia, marks, scars, psychological symptoms, broken bones, sensory loss, hematomas, blood in the urine and deaths. Other evidence comes from U.S. medical reports including autopsies and the now famous pictures distributed worldwide. See International Committee of the Red Cross, *Report of the International Committee of the Red Cross (ICRC) on the Treatment by the Coalition Forces of Prisoners of War and Other Protected Persons by the Geneva Conventions in Iraq During Arrest, Internment and Interrogation*, Feb. 2004, available at http://www.globalsecurity.org/military/library/report/2004/icrc_report_iraq_feb2004.htm [hereinafter ICRC Report].

¹⁷⁸ The ICRC began monitoring the conditions in Iraq beginning in March 2003 and found that "ill-treatment during capture was frequent," and concluded that the abuses took place at multiple times and locations including, inter alia, Baghdad, Basrah, Ramadi, and Tikrit. *Id.* at 3. The ICRC conducted twenty-nine visits in fourteen detention facilities and at the end of each visit, ICRC personnel "[held] a final talk with the detaining authorities to inform them about the ICRC's findings and recommendations." *Id.* at 1. In February 2004 the ICRC completed its report, detailing numerous violations, and submitted it to the Coalition forces. See generally *id.*

¹⁷⁹ In a press release issued by the ICRC's Director of Operations Pierre Krahenbuhl, the ICRC emphasized "that the report (excerpts of the report) was made available to the public without the consent of the ICRC," as they contain confidential information and are "intended only for the authorities to which they are presented." Press Release, Pierre Krähenbühl, Director of Operations, International Committee of the Red Cross, Iraq: ICRC Explains Position Over Detention Report and Treatment of Prisoners (May 8, 2004), available at www.icrc.org/Web/eng/siteeng0.nsf/html/5YRMYC?OpenDocument.

¹⁸⁰ In addition to statements made prior to the release of the ICRC report, some U.S. officials continue to mischaracterize the report even after it has been leaked to the public. Brig. Gen. Janis L. Karpinski, Commander of the 800th Military Police Brigade who was admonished over the Abu Ghraib scandal, alleged in an on-line interview sponsored by the Washington Post, that the abuses were not corrected after the ICRC report because the ICRC made no prior mention of the abuses. *Prison Abuse Scandal*, Live Online discussion, May 14, 2004, at <http://www.washingtonpost.com/wp-dyn/articles/A24845-2004May13.html>. This ignores the ICRC practice of debriefing all prison authorities immediately following all on-site visits (total of twenty-nine visits at fourteen detention facilities since March 2003), and the fact that the report was provided to authorities in February 2004 and the abuses continued until at least May 2004. Moreover, Brig. Gen. Karpinski claimed that "[t]here was nothing specific in the ICRC report – just some potential areas of concern." *Id.* This falla-

nounced that they are purportedly investigating the deaths of 127 prisoners in Iraq and Afghanistan.¹⁸¹

In response to these atrocities, U.N. Secretary-General Kofi Annan stated that he was “deeply disturbed by the pictures of Iraqi prisoners being mistreated and humiliated.”¹⁸² UNICEF reported that the organization was “profoundly disturbed by news reports alleging that children might have been among those abused in detention centers and prisons in Iraq . . . [and] that any mistreatment, sexual abuse, exploitation or torture of children in detention is a violation of international law.”¹⁸³ Kenneth Roth, Executive Director of Human Rights Watch, stated that the administration’s policy regarding interrogation techniques resulted in the sexual abuse of the prisoners and “is a logical consequence of [the] system put in place after Sept. 11, 2001.”¹⁸⁴ He also stated that “[c]oupled with anger at other lawless practices, such as the Bush administration’s refusal to apply the Geneva Conventions to the Guantanamo detainees, that revulsion has contributed to America’s plummeting esteem.”¹⁸⁵

Yet in light of the repeated revelations of abuses and the deleterious effect it has had on the international reputation of the United States, the Bush administration seems content to do little

cious assertion ignores, inter alia, the hundreds of examples of documented abuses in the report specifying at which facilities the on-going abuses occurred, when they occurred and, in many cases, the specific provisions of the Geneva Convention being violated and recommended remedial actions. See ICRC Report, *supra* note 177.

¹⁸¹ James Kuhnenn and Sumana Chatterjee, *Abuse Inquiry Seeks Wider Pattern*, MIAMI HERALD, June 13, 2004, at 26A.

¹⁸² U.N. Press Release, Secretary-General ‘Deeply Disturbed’ by Media Pictures of Iraqi Prisoners Being Mistreated, SG/SM/9283 IK/432, at <http://www.un.org/News/Press/docs/2004/sgsm9283.doc.htm> (Apr. 30, 2004).

¹⁸³ U.N. News ServiceCentre, *Iraq: UNICEF ‘Profoundly Disturbed’ by Allegations of Abuse of Detained Children*, available at <http://electroniciraq.net/news/1493.shtml> (May 11, 2004) (on file with New York City Law Review). In addition, acting U.N. High Commissioner for Human Rights, Bertrand Ramcharan “expressed revulsion regarding the reports and photographs,” *id.*, and the Special Rapporteur on Torture, also expressed “serious[] concern[]” about recent reports of torture and other cruel, inhuman or degrading treatment of Iraqi detainees by the United States of America and United Kingdom military forces serving under the Coalition Provisional Authority.” U.N. Press Release, Special Rapporteur on Torture Seriously Concerned About Reports of Abuse of Iraqi Prisoners by Coalition Forces, HR/4740 IK/434, at www.un.org/News/Press/docs/2004/hr4740.doc.htm (May 3, 2004).

¹⁸⁴ Kenneth Roth, Editorial, *Time to Stop ‘Stress and Duress,’* WASH. POST, May 13, 2004, at A29. See also Human Rights Watch, *Timeline of Detainee Abuse Allegations and Responses*, at http://hrw.org/english/docs/2004/05/07/usint8556_txt.htm (last visited May 7, 2005), which partially details reports of US instigated torture and mistreatment of detainees by US forces in Iraq, Afghanistan and other undisclosed locations since December 25, 2002.

¹⁸⁵ Roth, *Time to Stop*, *supra* note 184.

more than to make public condemnations. Indeed, the administration's response has been to bring in Major General Geoffrey D. Miller, the commander of the Guantanamo Bay detention facility to take charge of the Iraqi facilities.¹⁸⁶ This appointment is a slap in the face to all those who suffered abuses at the hands of the American military and reflects a complete lack of sensitivity to their plight and the views of the international human rights community.

These disturbing images of the United States as a major human rights violator, whose national policy condones torture, eschews the rule of law and holds itself above the mandate of international law including, inter alia, the Geneva Conventions and the Convention Against Torture,¹⁸⁷ should come as no surprise as the U.S. took affirmative steps to put these images in motion. The civilian authorities at the Pentagon changed official military policy concerning interrogation of prisoners including the removal of JAG (Judge Advocate General) oversight of interrogation of prisoners and the use of private contractors¹⁸⁸ not subject to "The Uni-

¹⁸⁶ Milbank, *supra* note 174.

¹⁸⁷ There is also a notion that the U.S. violates domestic federal law, such as the War Crimes Act, 18 U.S.C. § 2441, enacted in 1996, which prohibits the commission of war crimes (including torture) by or against U.S. personnel (including officials) with respect to, inter alia, detainees. In certain circumstances, the penalty for violations of this Act includes the death penalty.

¹⁸⁸ According to Scott Horton, a human rights activist and a partner at Patterson, Belknap, Webb and Tyler and chairperson of the Committee on International Law of the New York City Bar Association, "senior officers" of the Judge Advocate General's Office (JAG) approached him with these concerns in the spring of 2003 and "expressed apprehension over how their political appointee bosses were handling the torture issue" and that they were creating "an atmosphere of legal ambiguity" that would allow mistreatment of prisoners in Iraq and Afghanistan. Joe Conason, *Lack of Protection, Long Before Abu Ghraib, U.S. Senior Officers Warned of Prisoner Abuse*, SALON (May 7, 2004), at <http://www.salon.com/opinion/conason/2004/05/07/rights/index.html>. The New York City Bar Association Committee on International Human Rights authored a 110-page report citing Defense Undersecretary for Policy, Douglas Feith, as quoted by subordinates, who made an "offhand" remark that the "'Geneva Accords' on the treatment of prisoners are laws 'in the service of terrorists.'" Arnaud de Borchgrave, *Commentary: The blame shuffle in Iraq*, UNITED PRESS INT'L (May 11, 2004), at <http://www.upi.com/view.cfm?StoryID=20040511-072104-3118r>. Additionally, "one Deputy Counsel at the Pentagon, a staunch Republican, recently resigned because, as he explained not for attribution, 'right-wing ideologues are putting at risk the reputation of the U.S. military.'" *Id.* See Association of the Bar of the City of New York, Committee on International Human Rights, Committee on Military Affairs and Justice, *Human Rights Standards Applicable to the United States' Interrogation of Detainees*; Conason, *supra*; *Letters to Leaders: Is Torture a Few Isolated Incidents?*, Congress.org, at http://congress.org/congressorg/bio/userletter/?letter_id+90441006 (last visited May 24, 2004). Cf. CBSNEWS.com, *New Military Interrogation Rules*, May 14, 2004 at <http://www.cbsnews.com/stories/2004/05/15/iraq/main617653.shtml?CMP=ILC-SearchStories> (last visited Jan. 31, 2005) (discussing Pentagon response to outcry against harsh interrogation tactics).

form Code of Military Justice.”

In the autumn of 2002, Secretary of Defense Donald Rumsfeld approved a harsher set of guidelines for the interrogation of prisoners specifically targeted at the detainees at Guantanamo Bay.¹⁸⁹ In response to concerns raised by military lawyers, a new set of norms replaced these guidelines in April 2003.¹⁹⁰ In June 2004 a previously classified memo (Working Group Report), which served as the basis for the April 2003 guidelines was made public¹⁹¹ and disclosed what some consider “ways of conducting interrogations in the war on terror that would allow guards to evade future prosecutions for torture.”¹⁹² The Working Group Report articulates that because torture is a specific intent crime, liability requires that “the infliction of pain” must be the interrogator’s “precise objective,”¹⁹³ instead of obtaining information. Thus, extreme infliction of pain and humiliating and degrading treatment incidental to the objective of obtaining intelligence are not torture.¹⁹⁴ This impossibly narrow interpretation has been highly criticized by legal scholars.¹⁹⁵ If this narrow interpretation was applicable in domestic courts it would probably serve to free a substantial population of convicted felons as prosecutors would never be able to prove intent,¹⁹⁶ and it seems to fly in the face of the common law principle

¹⁸⁹ Bradley Graham, *Interrogation Techniques Tactics Evolved, Rumsfeld Approved Harsh Procedures at Guantanamo, Officials Say*, WASH. POST, May 21, 2004, at A16.

¹⁹⁰ *Id.*

¹⁹¹ The report is titled, Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy, and Operational Considerations, at <http://www.ccr-ny.org/v2/reports/docs/PentagonReportMarch.pdf> (Mar. 6, 2003) (on file with the New York City Law Review) [hereinafter Working Group Report]. See Michael Hirsh, *New Torture Furor: A Defense Department Memo Provides a Legal Roadmap for Prisoner Interrogation*, NEWSWEEK, Web Exclusive (June 8, 2004), available at <http://www.msnbc.msn.com/id/5167122/site/newsweek/>.

¹⁹² Hirsch, *supra* note 191.

¹⁹³ Working Group Report, *supra* note 191, at 8.

¹⁹⁴ Even under the narrow definition of torture in the Working Group Report, some of the atrocities detailed in the ICRC report suggest that certain behavior committed by U.S. guards in Iraqi detention facilities were perpetrated solely for “malicious and sadistic” purposes and not to gather information, albeit the distinction is a seemingly impossible one to draw. See Hirsch, *supra* note 191.

¹⁹⁵ These scholars include Scott Horton, *supra*, of New York and Phillip Heymann of Harvard Law School who concluded that “[t]he country has a right to expect far better from the [government] lawyers who are responsible for keeping the president’s actions legal.” *Id.*

¹⁹⁶ Under this definition, the torturers during the famous Spanish Inquisition would not be guilty because their “precise objective” was to save souls through the attrition of confession, which is further evidenced by their practice of giving a quick (relatively painless) death to those last minute confessors instead of burning them at the stake. See 3 HENRY CHARLES LEA, A HISTORY OF THE INQUISITION OF SPAIN, Book 7.4, at 192 (1906-07), available at <http://libro.uca.edu/lea3/lea3.htm> (last visited Apr.

that the accused are presumed to have intended the natural consequences of their acts. This construction only serves to encourage the practices exhibited in the Iraqi detention facilities.

Perhaps equally disturbing, the Working Group Report states, "The Department of Justice has concluded that customary international law cannot bind the Executive Branch under the Constitution because it is not federal law."¹⁹⁷ Additionally, the Report cites another memo¹⁹⁸ stating that "any presidential decision in the current conflict, concerning the detention and trial of al Qaeda or Taliban militia prisoners would constitute a 'controlling' Executive act that would immediately and completely override any customary international law norms."¹⁹⁹ This denial of even the most sacrosanct international norms exposes the current administration's contempt for international oversight and reveals the predicate attitudes behind its war on the International Criminal Court.

This brief recitation of facts is not intended to exhaustively discuss the Bush administration's unilateral approach to international relations or hostility to generally recognized human rights policy; rather this broad stroke treatment is designed to illustrate the culture within which this administration operates in order to more fully explain the approach it has taken regarding the International Criminal Court. An administration that considers itself above international law and justifies the use of torture, denigrates the Geneva Conventions,²⁰⁰ deprives (alleged enemy combatant) suspects of due process, decries transparency, and adheres to impossible self-serving interpretations of treaty obligations and domestic legislation, would naturally be opposed to the operation of

6, 2005). Of course this conclusion is unreasonable, but the example serves to illustrate the sophistry of the government's narrow construction of the mens rea expressed in the Working Group Report.

¹⁹⁷ Working Group Report, *supra* note 191, at 6.

¹⁹⁸ Memorandum for Alberto R. Gonzales, Counsel to the President, and William J. Haynes II, Gen. Counsel of the Dep't. of Defense, Re: Application of Treaties and Laws to al Qaeda and Taliban Detainees (Jan. 22, 2002), *available at* http://www.aclu.org/torturefoia/released/DOJ_Memo_012202.pdf (last visited Jan. 31, 2005).

¹⁹⁹ Working Group Report, *supra* note 191, at 6.

²⁰⁰ See Draft Memorandum from Alberto R. Gonzales, White House Counsel, to George W. Bush, President, Decision Re: Application of the Geneva Convention on Prisoners of War to the Conflict with al Qaida and the Taliban (Jan. 22, 2002) (on file with the New York City Law Review) [hereinafter *Draft Memorandum*]; Michael Isikoff, *Memos Reveal War Crimes Warnings*, NEWSWEEK (May 19, 2004), *at* <http://www.msnbc.msn.com/id/4999734/site/newsweek/>. In this memorandum, White House Counsel Gonzales describes some of the provisions of the Geneva Convention as "quaint" and advises against adherence to other provisions because "this new paradigm [war on terror] renders obsolete Geneva's strict limitations on questioning of enemy prisoners." *Draft Memorandum, supra*.

an autonomous permanent international criminal tribunal that assumes jurisdiction without exemption of U.S. personnel and officials.

Indeed some have suggested that President Bush fears future prosecution of himself and administration officials for war crimes²⁰¹ based upon a memo issued by then White House Counsel Alberto R. Gonzales.²⁰² This memo advised the President to continue to assert that the al Qaeda and Taliban suspects are not covered by the Geneva Convention²⁰³ based upon their status as non-state actors or officials of a non-recognized government because it “substantially reduces the threat of domestic criminal prosecution under the War Crimes Act (18 U.S.C. 2441).”²⁰⁴ Mr. Gonzales also discusses the threat of domestic prosecution of administration officials by independent counsel under the War Crimes Act.²⁰⁵ The threat of the politically motivated prosecutor (domestic or international) seems to be a recurring fear of the Bush administration. While Counsel’s frank discussion of the White House avoiding prosecution for war crimes deals with domestic liability, its applicability to foreign liability is apparent. It is particularly relevant in light of the Iraq war where administration officials cannot resort to the precedent of the Afghanistan campaign (whose non-recognized Taliban government was treated as a non-state actor in order to avoid liability under the Geneva Convention), because the U.S. has officially recognized the Iraqi government and cannot now assert the inapplicability of the Geneva Convention.²⁰⁶ To insulate administration officials, they must operate beyond the scrutiny of an international criminal tribunal. The presence and language of this memo serves to reveal the seriousness with which White House Counsel and the President take the threat that administration officials may be subject to prosecution for war crimes.

Furthermore, the current administration’s policy of engaging

²⁰¹ Isikoff, *supra* note 200.

²⁰² *Draft Memorandum*, *supra* note 200.

²⁰³ Secretary of State, Colin Powell, firmly opposed the administration’s refusal to provide the detainees with prisoner of war status as provided by the Geneva Conventions, and this view was also expressed by Mr. Powell’s legal advisor. *See id.* at 1.

²⁰⁴ *Id.* at 2.

²⁰⁵ “[I]t is difficult to predict the motives of prosecutors and independent counsels who may in the future decide to pursue unwarranted charges based on Section 2441. Your determination would create a reasonable basis in law that Section 2441 does not apply, which would provide a solid defense to any future prosecution.” *Id.*

²⁰⁶ However, it must be noted that because neither the United States nor Iraq are member states of the ICC, they would not fall within the jurisdiction of the Court in spite of the applicability of the Geneva Convention.

in massive human rights violations, or knowingly approving violations by subordinates in the fight against terrorism, is self-defeating and counter-productive as it only serves to fan the flames of terrorism such that “[a]llies are less willing to cooperate in combating terrorism, and terrorist recruiters must be having a field day.”²⁰⁷ Additionally, by making its war on the ICC second only to its war on terrorism, the administration is alienating allies whose cooperation is essential to effectively combat terrorism. Closer cooperation with allies can lead to mutual access to information vital in the investigation of terrorist activity and thwarting future terrorist attacks.

Legislation like ASPA and diplomatic sanctions tied to Article 98 treaties “contradicts the goal of establishing allied support.”²⁰⁸ By not only opposing the ICC but attempting to “actively thwart it, America seems to be going in the exact opposite direction and alienating its allies just when it claims to need them most.”²⁰⁹ Instead, quasi-unilateralism and resort to massive human rights violations (by employing immoral and unethical means of investigation such as torture and unlawful detention of innocents)²¹⁰ only increases terrorist activity and does not serve to make the world a safer place.²¹¹

In spite of the polarized actions previously undertaken by the administration, certain recent developments tend to suggest that the administration is taking a more moderate approach to the ICC and the observation of human rights generally. In June 2004 the administration distanced itself from the Working Group Report, claiming that it is overbroad and, according to the Washington Post, the CIA has announced that it will halt the use of some “enhanced interrogation techniques” previously approved by the

²⁰⁷ Roth, *Time to Stop*, *supra* note 184.

²⁰⁸ Faulhaber, *supra* note 46, at 556.

²⁰⁹ *Id.*

²¹⁰ In its report on the humanitarian violations in Iraq, the ICRC noted that they were informed by certain Coalition Forces intelligence officers that they “estimate between 70% and 90% of the persons deprived of their liberty in Iraq had been arrested by mistake,” and “sometimes they arrested all adult males present in a house, including elderly, handicapped or sick people.” ICRC Report, *supra* note 177, at 7-8.

²¹¹ If the U.S. had been a signatory to the Rome Statute, then the terrorist attack on September 11, 2001 could have come under the jurisdiction of the International Criminal Court as the attacks qualify as a crime against humanity, yet “[p]aradoxically, while the United States is leading the rest of the world in the war against terrorism after the wake of September 11, 2001, it is also leading and instigating opposition to frustrate the effective operation of the ICC.” Chibueze, *supra* note 1, at 23-24.

White House.²¹² Moreover, the reversal of the Secretary of Defense on acceptable military standards for aggressive interrogation techniques and the administration's backing down from the renewal of the U.N. resolution granting blanket immunity for peacekeepers²¹³ are both encouraging indications consistent with the goals of the ICC and the international observation of human rights.

Unfortunately, optimism may be premature as the administration's assertions minimizing the Working Group Report are self-serving and probably the product of international political pressure in the context of acquiring NATO support for Iraqi rebuilding efforts and domestic political pressures during a re-election campaign. The optimism surrounding the changes in interrogation techniques instituted by both the CIA and military intelligence are tempered by the administration's refusal to provide details concerning the exact nature of the changes. Furthermore, the administration's decision not to pursue a renewal of the immunity for peacekeepers may also be grounded in the aforementioned political pressures rather than a new vision of the ICC. Ambassador Cunningham stated that the U.S. will "continue to negotiate bilateral agreements consistent with Article 98 of the Rome Statute to further protect U.S. persons from the exercise of jurisdiction by the ICC."²¹⁴ In addition, Ambassador Cunningham made the ominous statement that "the United States will [now] need to take into account the risk of ICC review when determining contributions to U.N. authorized or established [peacekeeping] operations,"²¹⁵ thus suggesting that the U.S. may make good on its previous threat to withhold peacekeepers.

Fears of international interference and scrutiny of its military endeavors around the world may not be the only motive the administration has for destroying the International Criminal Court. It may fear interference with other U.S. activities, notably economic ones. As indicated by the remarks of Secretary Bolton, the current administration seeks to discourage interference with its activities around the world and requires "blanket coverage" from the reach of the ICC.²¹⁶ Bolton expresses the need for protection of "eco-

²¹² "Enhanced interrogation techniques" include feigned drowning and refusal to provide pain medication for injuries, among other techniques. BBC News, *CIA 'halts interrogation tactics'*, June 27, 2004, at <http://news.bbc.co.uk/2/hi/americas/3843939.stm> (last visited Jan. 31, 2005).

²¹³ Cunningham, *supra* note 102.

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ Bolton, Remarks at AEI, *supra* note 68.

conomic activity” around the world,²¹⁷ and includes a long list of others in need of exemption from the court’s jurisdiction (although it is difficult to see why exchange students and weapons inspectors need protection from prosecution of the most atrocious international crimes).²¹⁸ These sentiments suggest that the current U.S. administration anticipated massive foreign resistance to its proposed policy initiatives on the war on terrorism and the invasion of Iraq. Additionally, U.S. policy attempts to circumvent potential liability of U.S. economic interests abroad but begs the question as to why government officials and corporate representatives would need protection from prosecution sounding in genocide and crimes against humanity.

In an editorial in the June 25, 2004, edition of the *Christian Science Monitor* the author suggests that the chief prosecutor, Luis Moreno-Ocampo, “wants to go after corporate officials who do any business with nations that have committed mass atrocities.”²¹⁹ The editorial provides no proof of this allegation but is instructive as it reflects a vision of ICC persecution of U.S. economic interests that is consistent with the remarks made by Secretary Bolton. There are examples of U.S. corporations acting in complicity with human rights violators abroad in the interest of increasing profits, as illustrated by the sharp rise in recent years of cases brought under the Alien Torts Claims Act.²²⁰ However, there is no evidence that the

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Wary US Eye on UN Court*, *supra* note 21.

²²⁰ Recently, the Unocal Corporation settled an Alien Tort Claims Act (“ATCA”) case (for an undisclosed amount) alleging the company’s complicity in human rights abuses with its partner, the brutal military regime of Burma/Myanmar known as SLORC (The State Law and Order Restoration Council). The complaint alleges coerced labor, forced removal of villagers, murder, rape, and torture. See Center for Constitutional Rights, *Corporate Accountability*, Doe v. Unocal, *Synopsis*, at http://www.ccr-ny.org/v2/legal/corporate_accountability/corporateArticle.asp?ObjID=LRRSEKnmnm&Content=45 (last visited Apr. 11, 2005). Other examples of alleged corporate complicity in human rights atrocities include, inter alia, Royal Dutch/Shell oil group’s conspiracy with the Nigerian government in an attempt to suppress the Ogoni peoples’ opposition to the defendants’ longstanding history of environmental and human rights abuses in the Ogoni region pursuant to their efforts to build a pipeline. These abuses include the extra-judicial execution of Ken Saro-Wiwa and John Kpuinen (environmental and community leaders) by hanging and torturing, and unlawfully detaining others and shooting a woman who was peacefully protesting the destruction of her crops. *Wiwa v. Royal Dutch Petroleum Co.*, 2002 U.S. Dist. LEXIS 3293 (S.D.N.Y. Feb. 22, 2002). Other similar examples include: *Fresh Del Monte Produce, Inc.’s conspiracy in the alleged intimidation of union leaders in Guatemala by torture, kidnapping, unlawful detention, crimes against humanity, denial of the right to association/organize, and extra-judicial killing*; *Aldana v. Fresh Del Monte Produce, Inc.*, 305 F. Supp. 2d 1285 (S.D. Fla. 2003); *Chevron’s alleged sup-*

ICC is targeting U.S. corporations, nor would it assume jurisdiction over a corporation merely conducting business unless it could show actual complicity in the commission of atrocities.

Unfortunately, many nations with the worst human rights records possess natural resources greatly prized by U.S. economic interests or are located in the most strategic geographic locations for U.S. military purposes. It could be perceived as contrary to national interests (though a boon to human rights protection) if the leaders of these states were tried and removed by the ICC, and their relationship with U.S. economic and military interests were disrupted. Furthermore, in the course of independent investigation it is foreseeable that ICC prosecutors could unravel examples of complicity in human rights abuses by U.S. government officials or U.S. corporate leaders who, though immune from prosecution by virtue of the ASPA legislation and the threat of U.S. military might, could nonetheless suffer massive negative publicity with the resultant political and diplomatic ramifications. Accordingly, exemption from ICC jurisdiction alone is not enough to completely insulate U.S. interests; its operation in any form is perceived as a threat.

Coincidental to these developments, and in its post 9/11 war against terror, the United States has drastically enlarged its spending on military aid. This new policy has degraded human rights "by lifting sanctions on arms transfers to countries with poor

pression of peaceful protests against its environmental practices in Parabe, Opia and Ikenyan, Nigeria by systematic violations of human rights including summary execution, torture and cruel, inhuman and degrading treatment; *Bowoto v. Chevron Texaco Corp.*, 312 F. Supp. 2d 1229 (N.D. Cal. 2004); DynCorp's spraying of toxic herbicides in an effort to eradicate cocaine and heroin crops in Ecuador, causing medical problems including congenital birth defects, permanent skin irritations, blisters and death, loss of subsistence crops and livestock as well as torture, crimes against humanity, genocide, and extra-judicial killing; *Arias v. DynCorp*, No. 1:01CV01908 (D.D.C. filed Sept. 11, 2001); villagers from Aceh, Indonesia allegedly suffered extra-judicial killing, torture, and crimes against humanity at the hands of Indonesian military who, although responsible for the massacres in East Timor, were hired by Exxon Mobil to provide security for its natural gas facilities, despite the fact that executives of Exxon Mobil had specific knowledge of atrocities committed by its security forces; *Doe v. Exxon Mobil*, No. 01CV01357 (D.D.C. filed June 19, 2001); Coca-Cola managers' consent to the targeting and extermination of trade union leaders by Columbian paramilitaries; *Sinaltrainal v. Coca-Cola Co.*, 256 F. Supp. 2d 1345 (S.D. Fla. 2003); the extra-judicial killing of trade union leaders by paramilitaries allegedly hired by Drummond Company, Inc., in Colombia; *Estate of Rodriguez v. Drummond Co.*, 256 F. Supp. 2d 1250 (N.D. Ala. 2003); corporate complicity in South Africa, *In re S. African Apartheid Litig. v. Citigroup, Inc.*, 346 F. Supp. 2d 538 (S.D.N.Y. 2004); alleged illegal testing of drugs on children in Kano, Nigeria; *Abdullahi v. Pfizer, Inc.*, 77 Fed. Appx. 48 (2d Cir. 2003); and environmental and human rights abuses in Papua New Guinea, *Sarei v. Rio Tinto Plc*, 221 F. Supp. 2d 1116 (C.D. Cal. 2002).

human rights records and by cutting required approval times for such transfers.”²²¹ While the U.S. is cutting military aid to traditional democratic allies, it has been lifting bans on military aid to, among others, states with particularly heinous human rights records. Among these States are Uzbekistan, Tajikistan, the Philippines, Oman,²²² Indonesia, Pakistan, and the United Arab Emirates.²²³ The current administration is, in effect, providing heretofore denied military aid to some of the worst human rights violators in the world on the condition that they endorse a bilateral treaty which, owing to its reciprocity, precludes their criminal liability for continued human rights violations.

This military aid will serve to increase the human rights violations perpetrated against citizens of these regimes. This mass suffering caused by the change in U.S. policy can only be predicated on protecting U.S. military and economic interests abroad. By assuring the U.S. military and American corporations a free hand in their States, certain foreign leaders can perpetrate the most wanton human rights violations without this arrangement being impeded by an international criminal tribunal. In the words of John R. Bolton, “This broad scope of coverage [from Article 98 agreements] is essential to ensuring that the ICC will not become an impediment to U.S. activities around the world.”²²⁴

IV. CONCLUSION

In the political chasm created by the fall of the former Soviet Union, a rare moment of international unity gave birth to the ICC and witnessed an unprecedented global commitment to human rights. The scope, jurisdiction, and permanence of this Court distinguished it from all former and existing tribunals. Yet, despite this celebration of the rights of humanity, the United States in general, and the Bush administration in particular, has undertaken extraordinary efforts to dismantle the Court. By making this effort the cornerstone of its foreign policy, by threatening to withhold military aid and desperately needed peacekeeping forces, by imposing Article 98 treaties as a prerequisite to normal relations, and by implementing the American Servicemembers Protection Act that grossly overcompensates for greatly exaggerated or nonexis-

²²¹ Human Rights Watch, *U.S.: Military Aid After 9/11 Threatens Human Rights*, (Feb. 15, 2002), at <http://www.hrw.org/press/2002/02/usmil0215.htm> (last visited Feb. 7, 2005).

²²² *Id.*

²²³ HRW, *Dangerous Dealings*, *supra* note 6, at 9, 12-13.

²²⁴ Bolton, Remarks at AEI, *supra* note 68.

tent threats, the Bush administration is squarely seeking to destroy the Court.

In response, the administration has sought to diminish its culpability by downplaying the extent of its efforts against the Court and relying upon several official U.S. criticisms. Some of these criticisms such as the seven-year delay in the enforcement of war crimes (instead of ten years) are specious and disingenuous as they were the product of negotiation and compromise in which U.S. representatives took a leading role. Principally however, the salient issue as it relates to the United States is state sovereignty. As the world's lone superpower, the U.S. finds this issue to be especially important. The real motives do not lie in jurisdictional issues or threats to U.S. servicemembers but rather in a perceived fear of a diminution of U.S. global power and influence militarily, diplomatically, and economically. Opponents of the Court argue that embracing it would serve to subordinate U.S. power and autonomy to one vote amongst many without veto capabilities. The bedrock supposition of this argument is that a world order based on force instead of the rule of law is preferable to those in possession of the greatest force.

Additionally, it is imminently foreseeable that the ICC could cause some difficulties for the Bush administration's foreign policy by curbing the excesses of the U.S. forces and leadership in its quest for continued military and economic world dominance. It is foreseeable that the ICC would encumber the administration's efforts in such initiatives as the "war on terror," and the largely unilateral invasion and occupation of Iraq. The administration seeks to avoid international scrutiny of such practices as unilateral war, an impossibly expanded notion of the doctrine of preemption, liability for the commission of war crimes, and the mistreatment and torture of detainees held in Guantanamo, Abu Ghraib, Afghanistan and other "shadow" facilities. Moreover, the administration seeks to protect American economic interests and the oftentimes corrupt and inhuman foreign leaders with whom they do business. The seriousness with which the administration takes the threat of this international scrutiny is manifest in the severity of the steps it has taken to dismantle the Court.

The implications of the U.S. policy with respect to the ICC in terms of human carnage are grave. In attempting to disenfranchise international efforts to bring about a new global order mandating individual accountability and rule of law, the U.S. may have callously condemned millions of souls to misery and death.

By lifting the ban on military aid to nations with poor human rights records in conjunction with hostile attempts to circumvent the ICC, the Bush administration's practices of justifying and perpetrating torture, eschewing transparency, and employing a unilateralist protocol, will undoubtedly reap dividends of human suffering for years. Like Nuremberg before it, the ICC is a Court whose time has come, but the dire peril in which it finds itself as a consequence of U.S. activities may sound a death knell to the hopes of an order of human dignity.