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Loyola University Chicago International Law Symposium Keynote Address

When You Get to the Fork in the Road, Take It: Reflections on Fifteen Years of Developments in Modern International Criminal Law

David M. Crane*

It is a real pleasure to be here, and I want to thank the sponsors: Professor Moses, thank you for that nice introduction, and also thank you to the Loyola University Chicago International Law Review and the students who work so hard to make this happen, particularly Paula Moreno and the Symposium Editor Tracie Pretet, who has worked so hard to get me here.

What I really want to do here is step back and reflect on modern international criminal law, which as I'm talking about is the fifteen years since 1993-94, in general. And then I want to talk about the International Criminal Court, which is seven years old, almost eight years old as we speak. The title of my remarks is "When You Get to the Fork in the Road, Take It," and I'll explain that a little more as we go along, but I think we're kind of at a situation here where this can go very well or this can go. . . differently.

Modern international criminal law - it has been an amazing fifteen years. I mean just an absolutely amazing 15 years. But it hasn't been a perfect fifteen years. In fact, all of this started at the end of what I call The Bloody Century, the 20th Century. Just think, historians in the room, of the horror that took place during that century. I've done some calculations, it's certainly not scientific by any means, and I'm probably off fifteen to twenty-five percent, but I calculate about 215 million human beings were killed by various means other than natural causes or disease in the 20th Century.

You know we started out the 20th Century with a king in Europe, King Leopold II of Belgium, who along with other cynical monarchs, carved up various portions of the world, including Africa. He wanted the Congo for his own personal fiefdom and during the decades that he controlled that part of the world, between eight and fifteen million Congolese were killed by various means during this time frame. You know then we had World War I, and we had the three pashas as they began to merge politically in Turkey and we saw the Armenian Genocide. What was done to these individuals? Well not really very much. Though we see at the Armenian Genocide period some discussion about investigations and doing something. In fact, we even see the words "crime against civilization" for the first time. But still, the only way the world knew about most of these were through authors actually, Mark Twain, Sir Arthur Conan Doyle,

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Joseph Conrad wrote novels about some of these horrors, particularly in the Congo.

The world paused for a little bit after World War I; in the 1920's we even thought about outlawing war. We even created a family of nations called the League of Nations to maybe try to settle our disputes peacefully. Of course, throughout all this time, Russia has imploded, it's now the Soviet Union and we have a new individual who is starting to destroy his own people, and that is Joseph Stalin. Now throughout his reign, in the 30's all the way up to the early 50's, we calculate that about 34 million Russians and various other members of the Soviet Union were destroyed during his reign. Of course we had World War II and the obvious horror that that was. And then the world paused.

The reason I'm giving you this history lesson is because I think it's really important for all of us to stop for a moment and reflect, to use this as the cornerstone as we continue to discuss the rest of the story today. Right in the middle of this darkness, and I certainly underscore darkness, for a period of four years we see the international military tribunal at Nuremburg. The world actually said wait a minute, I think we have to do something about this. So they assembled at Nuremburg and prosecuted individuals for new crimes, crimes that had never been put together, crimes that in reality had never been charged before. And we know the history of the Nuremburg trials.

But also during this time frame we see the creation of the United Nations, the U.N. charter, another attempt to settle our disputes peacefully, and followed very quickly by the Universal Declaration of Human Rights. You know, for the first time in the history of mankind, we had international precedent that said a human being that is born has a right to exist. And that truly is an amazing concept. These are all cornerstones to modern international criminal law and precedents that my colleagues, the Chief Prosecutors in Rwanda, Yugoslavia, Cambodia, what they have used to prosecute individuals for gross violations of international humanitarian law.

So we have the Universal Declaration of Human Rights, we also have the Genocide Convention, which specifically highlights a specific international crime, never again, no more. Well we'll see about that. Then again of course we had the Geneva Conventions of 1949, the cornerstone of applying the rule of law on the battlefield, and I might say as an aside it's the only international treaty that all nations of the world have actually signed. It's absolutely essential to modern international criminal law. And then after 1949 the world went to hell in a hand basket.

Mutually assured destruction, the Cold War, two major powers having a death grip on each other, looking at each other and hoping that the other one would blink. What this did is it locked the world into one side or the other and the challenge was that we as one side would accept countries and regimes that had terrible records of violations of human rights, yet they declared they were pro-Western versus pro-Soviet. And we would accept these individuals, and the list is a little bit embarrassing. But these individuals, they understood this too by the way, that as long as I mouth the words that I'm anticommunist, then I can get away with what I'm doing in my little corner of the world. And so this went on

for decades, until amazingly we found out that the Soviet Union was somewhat a Potemkin village. Remember those heady days, when we watched the wall fall? I can remember when I was in the military, standing there at Checkpoint Charlie, with the tanks, the guards, the guns, the smell and tension of the place, but to see that - and I've been back to Berlin many times now, and walked through the Brandenburg Gate, as opposed to just look at it, because there was a minefield there - it was just incredible. So the wall falls and the world begins to reconsider what do we do with individuals who commit these horrific crimes.

And this was put on our plate immediately with Yugoslavia and the Balkans. And we see that the I.C.T.Y., the International Criminal Tribunal for the Former Yugoslavia is created. One year later, we had no idea this was going to happen, but we have a horrific situation in Rwanda, and we created another tribunal, but largely under the wing of the I.C.T.Y, because the Chief Prosecutor was the Chief Prosecutor of both. The appellate court was essentially the same. I really wasn't pleased with that, frankly. It made for some inefficiencies as far as organizational management, to have the Chief Prosecutor in the Hague with the I.C.T.R. down in Arusha, it caused some problems, and that particular court drifted. Then of course we develop along, we see other problems in Sierra Leone, we have to account for the killing fields in Cambodia, the world is now starting to build precedent, the world is starting to build a methodology, a willingness, a political willingness to create these courts. And of course throughout all of this we have the International Criminal Court, which we'll talk about in a few minutes.

Now, the panelists that you're going to see here - I like coming to these because it's in some ways old home week, we have an alumni, we've been around for fifteen years, so we have Minna Schrag, and Sara Criscitelli and David Scheffer, these people were at the beginning. These people are like the people who were at the American Constitutional Convention, and they were there when they set up the I.C.T.Y. I mean that's going to be fascinating, and I encourage you to ask them what it was like. Because the last time, in 1993, the last time we considered crimes against humanity, or doing something against people who do bad things was at Nuremberg, and frankly Nuremburg was the only time before them. What a fascinating thing to do. We had the same issues related to Sierra Leone – a brand new court, different concept, different perspective – where do you go to find the law?

We've got some good news here. So what are the legal victories? The first one is, frankly, that we're doing something. I know that sounds trite. But we're doing something, right or wrong, and it isn't perfect, and I really want to footnote here: don't put any of these institutions so high on the pedestal that they're always, in your mind, failing. We tend to put it: Robert Jackson, opening statement, Nuremburg. You know, it's just a group of dedicated human beings with a statute, procedures, and a willingness to step forward and seek justice for victims of atrocity. It's not complicated, it's not magical, nothing happens when you're appointed to these places, you don't get an ash mark on your forehead or a secret handshake. You're just lawyers, investigators, paralegals, clerks who have the privilege - well, you think you have the privilege, until you really start getting

into it and some days you don't think it's much of a privilege at all - but you do have the real, true privilege to seek justice for individuals.

That same feeling is the same way here if you're prosecuting in Cook County. It's the same thing, and the rules really aren't that different. It's a familiar feel when you stand in the courtroom, it looks like this – and this would be a great international tribunal I might add. But again, nothing magical. I'm always asked "What do I need to do to be a prosecutor in the International Criminal Court? I have a PhD in human rights, I've been a social worker, et cetera." I say I don't need you. I need somebody from Cook County who has been an Assistant State's Attorney, who has been prosecuting from Loyola School of Law, starting with D.U.I.s and working up to major felony cases in a period of ten to fifteen years, and is a damned good trial lawyer. Those are the people I was hiring in Sierra Leone, and I will tell you that's what they're hiring even to this day.

I hope I'm not bursting too many bubbles here, but take a lot of criminal procedure, get in the courtroom, do moot court work, because if you really want to get in there and put bad guys in jail, that's what you've got to do. You can take courses in international humanitarian law, and it's important because you have to understand this concept, but certainly what we're hiring is trial lawyers, defense as well as prosecutors. So moving along, we're doing something, right or wrong. The thing that I'm particularly excited about, now that we've moved beyond the early days of 1993, we have robust rules of evidence and procedure, we have rules we can count on and more importantly count on the judges to actually follow them! I can remember going into the courtroom in Sierra Leone thinking that my tribunal is not actually working from the same rules that I am. They were, but sometimes the sophistication of the judiciary at the international level is potentially problematic. But again, we do have consistent, robust rules of procedure and evidence and that is so critical for many reasons. One is it gives the appearance that the tribunals are up and running; two, that they're fair and there will be a fair result. That's absolutely critical when you're prosecuting in places where there is absolutely no respect for the law. So if you have good, solid rules of procedure and evidence, that goes a long way. And of course along with this you have solid jurisprudence now. In 1993, there was nothing other than Nuremburg, and there were some great stories we were telling last night about the books we used to create the I.C.T.Y – there weren't any, were there? The form book, the rules of procedure and evidence, where was that? Again, we have come a long way in fifteen years. Now we really do have quantifiable law and procedure, which we can prosecute individuals with, and those individuals can be assured of a fair trial. We're not making it up anymore. It is there, it is open, defense counsel and accused have it in front of them, they can rely on it, they can use it to defend themselves openly and fairly in court.

The truth is the jurisprudence is amazing. Concepts like war crimes apply to both internal and international armed conflict. We kind of knew that with the Geneva Conventions and the protocols, but in reality that hadn't been jurisprudentially settled. We see that that actually applies now, and that's important because we don't have much international armed conflict any more. You're not going to see the United States Army and sixty-two other nations in Iraq taking on

the Iraqi National Guard tank to tank. Armies in the field maneuvering, the World War II scenario, those aren't the conflicts we're going to be fighting in the 21st century. A lot of these dirty little wars are internal, but that doesn't mean anything, because we can still choose to prosecute those who choose not to follow the laws of armed conflict, which is essentially if you violate that, a war crime. We've been fleshing out crimes against humanity, which in my mind is one of the key international crimes by which we hold people accountable. You can prosecute a great deal based on the principles of crimes against humanity, the widespread and systematic actions of governments against their own people, and we've been fleshing that out since 1993 and that is so important.

We have some exciting developments. We have an initiative going on where we might even be putting together a convention related to crimes against humanity. This is a very important step forward. One that I am particularly pleased to see is that we're really starting to get serious about gender crimes and prosecuting people for gender crimes. We've had some incredible cases come out that have solidified principles like rape as a tool of genocide, which is absolutely critical, and I think over time a huge deterrent. The bottom line is we're not going to let these individuals, particularly in these dirty little wars, these internal armed conflicts, get away with this, because really the true victims, I have found, and I certainly saw it in spades in Sierra Leone, the true victims in this are always women and children. It's the non-combatants that suffer the most. And up to the 1990's we all acknowledged that, we all knew that, we did it somewhat in Nuremburg, but we never went after these individuals individually and held them individually criminally responsible for what they did to children and women.

We see the development of that particularly in Rwanda, and then in Sierra Leone where really almost all of the victims, casualties in this horror story, were women and children. So I had the opportunity, jurisprudentially, to do something about that, and I announced when I was going to Sierra Leone, that the cornerstone of my indictments against these individuals who bear the greatest responsibility was going to be gender crimes. And we had in the statute an ability to do that. We had rape, we had sexual slavery, we had terror, we had those things that you could prosecute somebody for - what they were doing to the women by the tens of thousands in that war-torn country. All of a sudden, as we began to develop the facts, about a year into our work we realized that something different happened in Sierra Leone. You may recall the term "bushwives" where they would gather women and girls and herd them into the bush like cattle, they would brand them, they would breed them, they would work them, they would trade them, and then like any animal, they put them down when they were no longer of use. In fact we don't know how many, but there are still bushwives today. Is that just rape? Is that just sexual slavery? So we were sitting around a conference room one day, we had round table discussions with my trial counsels and investigators and we asked, "What do we do with this?" This was more, we had already indicted most of those who bore the greatest responsibility, so the indictments were already out. We were starting to come up with facts that we just couldn't fit. It was bigger than rape, bigger than sexual slavery. So what do we do about that? We went back to the statute, went back to the law, looked at crimes against

humanity, and in the statute there's paragraph J and it says "and other inhumane acts." Whoa, that sounds like a huge door you could drive a Mack Truck through if you think it through.

So instead of just using it as a category we actually use it as a force of law, and so we amended the indictments to reflect other inhumane acts, in what has now become and has been appealed and upheld both at the trial level and the appellate level, we now have a new gender crime called forced marriage in times of armed conflict. So when we have the bushwives or we have a situation when women are being herded around like cattle, we now have a new crime against humanity. So again, these are important developments.

Head of state immunity, my goodness gracious! If a head of state decides to eat his own people and destroy them – both literally and figuratively – he's not immune. That was a theory in a law review article ten years ago. But starting with the I.C.T.Y., through to the Court for Sierra Leone, we've taken some pretty bad guys down. Heads of state - the cornerstone principle of this now is *Prosecutor v. Charles Taylor.* He made, I think, a huge error when we charged him with seventeen war crimes and crimes against humanity and he contested it at the pre-trial level, even though he was still sitting head of state, and guess what, he lost. So it was only a matter of political time before he was handed over to the court for a fair and open trial. This is a huge development, in my mind this is one of the biggest developments, because now it's the head of state. Remember all of the heads of state I talked about historically? You know, they destroyed, and I don't know if I gave you the number, but at the end of the Cold War the number of people killed by their own governments is around 115 million of that 215 million I told you about from the Bloody Century. Now we can go after sitting heads of state, we're doing this, and it's so important.

Another one that's so important is child soldiers. If you're going to take children and force them to kill, rape, maim, mutilate, pillage and plunder, you're going to be charged for that, be you a head of state or someone who bears the greatest responsibility. So now we have the Special Court for Sierra Leone, which was the first time this crime was charged, since it was the first time we had the crime itself, the unlawful recruitment of children into an armed force under the age of 15. Basically child soldiers. Even though I had the statutory authority to prosecute children between the ages of 15 and 18, I chose not to, because in my mind no child has the mens rea to commit a war crime, not at the international level. Children can do horrible things, but I did not prosecute anybody from the 35,000 child soldiers in Sierra Leone, I chose not to prosecute anybody of that age, and I think I was correct in that.

There were challenges in all of this too, besides some very important steps forward. We've learned, as we learned at Nuremburg, and as we learned throughout the 20th century, that the bright red thread throughout all of this is politics. You know, the decision to do something, to create the court, to develop the statute, to appoint a prosecutor and judges and to actually hand somebody over for trial, that's not a legal decision, that's a political decision. We have to understand that, we have to respect that, and we have to work with that, because I think its naive to not respect that or understand it or work with it. If you keep

lashing out about it and beating your chest about it instead of working with the issue you fail. You wont get your work done. The bright red thread is politics and we have to keep moving that down the road. We have to keep working it. Because at the end of the day we get good results and we get bad results. Rwanda was really a political decision to finally stop it. Handing over Charles Taylor was a political decision – we were ready to take him, that wasn't an issue. But for the majority of my tenure as the Chief Prosecutor, my work was political, building the groundwork to have him actually handed over. And that actually happened when I was speaking at Valerie Oosterveld's university, I think it was March of 2006. I was speaking, my phone rang, it was my former special assistant saying "I'm looking at Charles Taylor being escorted into the jail cell," and she was crying. It was pretty dramatic stuff, when I announced it the whole room stood up and applauded. But that was a political decision, that was not a legal decision, the legal groundwork had been done. So that is a challenge. And that's a potential threat to the whole system we have all put together.

Another problem is, as they found at Nuremburg, when it was called "victor's justice," is we're finding in the modern era the idea of "white man's justice." I remember Charles Taylor ranting and raving "This redneck racist is going after me! The white man is again back in Africa going after the black man!" And that has to be respected, and we always have to be mindful of that. We don't want to be accused of white man's justice. I have this rhetorical question, and I think it's an important one: is the justice we seek, the international community, the Western World, the justice they want? I would posit there are other alternatives to justice than international justice, and we have to be mindful and respectful of that and we have to use it if it allows us to have justice ultimately. Remember, international law is a system of justice, not the system of justice – that's critical in our thinking.

Another challenge we have is peace versus justice. Should we have peace first, and then justice, or justice first, and then peace? Well, that's a dog chasing its tail, and I'm not going to get into it as a specific point this morning, because that could be a whole conference in and of itself and we would still at the end of the day not agree. All I'm saying is that's an issue that is used for and against modern international criminal law. You have to be mindful of it as well. And that's all I'm doing here, is highlighting these issues.

Other related issues I think that are subtle, but important in modern international criminal law are old rules (not that old, 1949) and new battlefields. In other words, as I alluded to at the beginning of my remarks, it's not tank on tank, it's not the United States Army taking on the Imperial Japanese Army. It is subtle combatants who all look the same as civilians. Lawful combatants, unlawful combatants, what do we do about that? Do we apply the Geneva Conventions and international humanitarian law to these individuals? Have the rules changed? I'm not sure. Like peace versus justice, there are important arguments on both sides, but this is going to test and strain our system of modern international criminal law because we prosecute individuals for war crimes, in violation of the laws of armed conflict. So again, be mindful of that.

A lot of the actors are non-state actors, and I'm not just talking about the Taliban or Al-Qaeda, but they are also criminal cartels, multinational corporations, pirates, etc. Again, a question, only rhetorical, but one that we have to address someday, and that is, can a multinational corporation be individually criminally liable for international crimes? Now we have case law and discussion on the civil side, but can we indict a multinational corporation for war crimes and crimes against humanity? I think that's an emerging doctrine, a fascinating discussion, and again possibly a great conference. But again, we're going to have to do something, because I certainly ran smack dab into corporations in Sierra Leone. You see them a lot around Valentine's Day. I won't mention the name, but certainly I considered whether I could indict a certain corporation, but it's like tobacco litigation, you've got to have the right facts. I don't have the law on my side. The facts were probably there, and in these situations you don't want to take on something like this and lose. But someday, some Chief Prosecutor somewhere, is going to have the right facts, with the right law, to do something about it. Because it is a subtle problem that we ran smack dab into in West Africa.

Now the concern is that these entities and others don't follow the norms, the norms that we set up in the 1940's. They're either above it and immune or not even in the scheme, never even considered. But again, we have to be thinking about clever ways, us lawyers, to bring them in appropriately to hold them accountable, should they violate the law.

Another challenge is new technologies. What if we have a battle that's only in cyberspace and people die? What if it's a widespread and systematic attack against a particular group of human beings, but it's only done through cyberspace, and you can run through all kinds of scenarios. Does the law apply? Do the rules apply? Again, these are issues that we're going to be facing in the 21st century. And another challenge, and I think this is subtle and may not be an issue but I'm just starting to feel it, and that is the actual application of international humanitarian law. All the hard work we've done over the past 15 years, is it starting to be perceived as applied equally?

Do we prosecute non-Western nations but don't prosecute modern Western nations? Who is actually held accountable? Is justice applied equally, or are we going back to the refrain we heard at Nuremburg of victor's justice? Or might makes right? It's a subtle kind of thought, I'm not saying it's going to be a problem, but if you talk to people south of the equator they raise this question. They ask you very hard questions along the lines of "you're certainly all over us, but what about you?" And you don't really have much of an answer.

Another issue is responsibility to protect – it's a great idea, but I would caution because it's being perceived by some as another tool by which larger Western nations can, for their own morals or what have you, or for some cynical political reason, can use it to intervene in the sovereignty of a nation. I'm not saying that's true, but it's an issue that has to be considered.

So now we've kind of set the general modern international criminal law four corners. Right in the middle of all this is the permanent court. The world has decided that we're going to have a permanent court, like it or not. Who would have thought it? Even in 1993, 1994, did we really think that we would have

within ten years a running international criminal court, working, with over one hundred nations a part of that court? We were probably thinking about it but it was really almost a pipe dream at the time. As they said in the Frankenstein movie, "It's alive!" It's up, it's walking, some people say it's not real pretty, but it is moving and crashing about the village. Again this issue of the International Criminal Court, it's this Holy Grail. When you go to the Hague you always know where the I.C.C. is because there's this light that always shines. . . No. It's a group of people who have an important job, in a very good looking building, but there's nothing magical about it. I have to tell you nobody walks around with a halo. They're taking baby steps. And the reason I overdramatize this is because we've taken the I.C.C. and put it on some pedestal and it isn't going to meet it – we've put the bar so high that everybody is kind of getting frustrated now. This is a permanent court, it's going to be here a hundred years, it has to work its way through it. It has to do what it is going to do.

I love politicians and diplomats because they ask you questions, and I remember talking to the Security Council and talking to the president of the Security Council, and he asked me "If we gave you more money, could you prosecute more people?" How do you answer that in a way that you don't just start laughing? Because again it shows you a mindset of it's cash, money, logistics, when are you going to be over it? It's a war crimes weary world and we'd like to move on. Politicians like to move on. But they've realized with the I.C.C. that it isn't moving on. It'll take it's own time. But it's alive, it's moving forward. In the scenario of crawl/walk/run it's still crawling but someday and certainly soon it will be running. But it needs the luxury of time to spread its wings.

It has survived a rather serious onslaught by the United States of America – boy did we go after it. Can you imagine, it just seems like yesterday Article 98 agreements. That Frankenstein monster, we were running at it with a stake to drive into its heart! It survived, and one of the interesting things about it was that the commanders in chief of the various combatant commands were actually telling the Bush administration you're killing us here. We can't cooperate with nations because we may 1) be violating the law and 2) no one is working with us anymore. And most of these commanders in chief of these various regions do more than just war, they work with armies to try to teach them the laws of armed conflict and how to modernize themselves and how to conduct themselves appropriately on the battlefield, and people stopped working with us. The American Service Protection Act, the Invasion of the Hague Act, I remember President Bush standing before the 10th Mountain Division in New York (I was in the Hague at the time) when he mouthed the words that if anyone seizes an American soldier he will invade the Hague - boy did I have a testy morning. I'm at the international level but I have American written all over my forehead and I also had a bull's eye on me that day.

Again, the court is up and running, it's investigating, it's referring cases, there are indictments and trials. It's doing what its rules of procedure and evidence call for. What are the challenges? One of the biggest challenges, and this is like any tribunal: support. They give you the authority, they give you the mandate, and then they say they don't like what you're doing. "Why did you indict

Charles Taylor? You're screwing everything up, dust is in the air. You've screwed up the peace!" It's a strange feeling, they give you the authority and send you off and then they get mad at you for doing what they ask you to do. Well, that's a real problem. And it continues even with the I.C.C. We certainly can use the Al-Bashir case as an example – head of state, peace versus justice, we can't just take him down. But I'll guarantee you, it might not be this month, it might not be this year, but President Bashir will be prosecuted before the International Criminal Court. If they don't, then they might as well just go ahead and close the doors. I'll guarantee you if they're serious about it they'll make a political decision to hand him over. It took almost two years for them to hand over Charles Taylor, but they did, and some time they'll hand over Omar Al-Bashir.

Another challenge is the United States of America. We want to do something with it, we quietly support it, we even have exceptions to ASPA, the Dodd Amendment, we can support it in certain ways, but the U.S. is not part of it. And throughout all of this, as we move towards Kampala and the seven year discussion on aggression through the Princeton Process, the long-term important process of defining the crime itself and setting up a jurisdictional triggering arrangement, the U.S. has not been a part of that. A lot of great U.S. citizens have been a part of it, but officially the United States government has not been a part of it. Now all of a sudden we have a move toward possible cooperation, and they're showing up now. Kampala is three months from now. So you have a 900-pound gorilla showing up in the room with their own opinions. There's going to be some real delicate dancing going on and there's going to be a real challenge because we can't go to Kampala and walk away with a failure – it can't be seen as a failure. What will be seen as success? There's a stock taking exercise that will take place, but I think we should de-link that from the rest of it, from the aggression issue, and work those issues. But the aggression definition and triggering mechanism is going to be a huge problem. I represent the section for International Law at the American Bar Association's efforts on this, and we've been working with both sides, the assembly of state parties and the U.S. government having dialogues back and forth, along with our colleagues at the American Society for International Law. We're trying to find opportunities for the U.S. to compromise, because the bottom line right now is the U.S. will not buy off on the current situation, the definition and the triggering mechanism. What we're trying to do is get them to agree to say we agree with the definition, because really the definition is largely the 1973 General Assembly definition of aggression. Let's just agree what aggression is and have working groups to study further the jurisdictional and triggering mechanisms. The United States will not buy off on the current situation. What that means is this could be used by naysayers of the court as a way to back further away from the court itself versus trying to stay subtly engaged throughout the process.

So, this is only the beginning. Modern international criminal law has been evolving for fifteen years. The International Criminal Court, together with the regional courts and domestic courts will move slowly forward to seek justice for those victims of atrocity around the world. The International Criminal Court will

be the center point for the evolution of modern international criminal law, the standardization of rules of procedure and evidence, and jurisprudence, that will tackle the new circumstances that we will face in the 21st century. It remains to be seen whether any of this will have a direct effect on deterring future atrocities. It remains too soon to tell. I would like to think that in the past fifteen years the rule of law has begun to shine its light into dark corners of the world that are the seedbeds of future atrocity, and shrink back atrocity. I am cautiously optimistic. From Nuremburg, to the ad hoc tribunals, to the international hybrids and the domestic international courts, the International Criminal Court is the new kid on the block. It represents the hard work of the past, the challenges of today and a hope that the future that mankind will be ruled by law and not by the gun.

The International Criminal Court and the Closure of the Time-Limited International and Hybrid Criminal Tribunals

Valerie Oosterveld*

I. Introduction

The International Criminal Court (ICC) and the international and hybrid criminal tribunals – such as the International Criminal Tribunals for the Former Yugoslavia and Rwanda (ICTY and ICTR) and the Special Court for Sierra Leone (SCSL) - are all part of an interlinked network of international criminal justice. One significant difference between the ICC and these other tribunals is that the ICC is a permanent institution while the ICTY, ICTR and SCSL are time-limited. The SCSL will be the first of these tribunals to close. It is currently hearing its final trial, that of the former President of Liberia, Charles Taylor.[1] The SCSL will wind up its operations after the conclusion of the Taylor trial and any associated appeal, likely in late 2011 or early 2012.[2] Under the latest estimates, the ICTY and ICTR expect to complete their work in 2014.[3] Two tribunals – the Extraordinary Chambers in the Courts of Cambodia and the Special Tribunal for Lebanon – are also time-limited. Both originally estimated that proceedings would cease after approximately three years, putting their potential closure dates in 2012, but these dates will likely be extended.[4]

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1 Prosecutor v. Charles Taylor, Case No. SCSL-2003-01-T, (May 4, 2009), http://www.sc-sl.org/LinkClick.aspx?fileticket=GT0Wz4egOV0%3D&tabid=160.

2 U.C. Berkeley War Crimes Studies Center, The Open Society Justice Initiative, Charles Taylor Monthly Trial Report: May 2010 (Jun. 30, 2010), http://www.charlestaylortrial.org/2010/06/30/monthly-report-may-2010/ (The prosecution phase of the trial is completed and it is estimated that the defense phase of the trial will be completed in October 2010, with a judgment expected in early-to-mid-2011. Judgment on any appeal would follow within approximately six months, bringing the likely closing date for the Special Court for Sierra Leone to late 2011 or early 2012).

3 Letter from the President of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 to the President of the Security Council (June 1, 2010), U.N. Doc. S/2010/207, Enclosures VIII-IX [hereinafter ICTY Letter] (Current estimates in the ICTY's *Karadzic* case indicate an end-date for that case of June 2014; while there is an estimated end-date for the ICTR's *Karemera et al.* case of December 2013, note that closure would not happen immediately after the end of the case).

4 Extraordinary Chambers in the Courts of Cambodia Frequently Asked Questions, http://www.eccc.gov.kh/english/faq.view.aspx?doc_id=48 (last visited June 30, 2010) (This potential for a date extension is indicated on the website of the court); Agreement between the United Nations and the Lebanese Republic on the establishment of a Special Tribunal for Lebanon, S.C. Res. 1757, art. 21, U.N. Doc. S/Res/1757 (May 30, 2007) ("[T]he Agreement shall remain in force for three years from the date

The establishment of temporary international criminal tribunals has given rise to complex legal, technical, and political questions regarding the legal and practical obligations that continue after closure. These obligations are usually referred to as "residual issues" or "residual functions." This article will begin by discussing four central residual functions. The first residual function relates to the trials of fugitives. The ICTY, ICTR and SCSL have indicted individuals who have not yet been captured. The international community is currently planning for what will happen to both high-level and lower-level fugitives caught after the physical closure of these tribunals. The second residual function is the protection of victims and witnesses. There are a large number of individuals who are under the protection of the ICTY, ICTR and SCSL as a result of their assistance to and testimony before these tribunals. This protection cannot simply end because the tribunals close their doors, as this would greatly undermine the progress made in securing the cooperation of victims and witnesses and eliminating impunity. In addition, it is not hard to imagine that victims and witnesses would stop cooperating with the ICC if those appearing before other tribunals were harassed, injured or killed following the closure of the ICTY, ICTR and SCSL. The third residual function is the supervision of enforcement of sentences. Each of the tribunals has sentenced many individuals to lengthy prison terms, and these tribunals have a continuing responsibility to ensure that these sentences are carried out in accordance with international standards. The fourth residual issue is one of the most hotly debated: the preservation, protection, and provision of controlled access to, the tribunal archives. Current debates address how to best provide access to tribunal archives to affected communities, including consideration of where to locate the tribunal archives.

After discussion of the residual issues facing the time-limited tribunals, this article will address the residual issues which are also of concern to the ICC. While the ICC is a permanent institution and therefore does not face the same residual issues as the ICTY, ICTR and SCSL, it will, at some point, end its involvement in each of its situation countries and cases. As it does so, the ICC will face some of the same residual issues as the time-limited tribunals. For example, the ICC will need to address how it will continue to provide victim and witness protection once it closes its field office(s) in the situation country. The ICC will also need to consider how to provide continued access to public archival information to the affected populations, without necessarily assuming that they have internet access or can travel to the ICC's headquarters in The Hague, Netherlands.

This article concludes that the ICC's planning for its own residual issues can be assisted by considering the lessons learned from similar planning for the ICTY, ICTR and SCSL. Specifically, the ICC may benefit by keeping a field presence in or near the affected communities in the years following the completion of its investigations and cases in a situation country. This field presence can continue witness protection work and provide access to public archival informa-

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of commencement of functioning of the Tribunal and that the Parties will, in consultation with the Security Council, review the progress of the work of the Tribunal.").

tion. In so doing, the ICC can also help to protect its legacy. Proper "completion" planning by the ICC for its situation countries and cases is important: just as for the ICTY, ICTR and SCSL, if the ICC simply terminates operations and walks away from a situation country, the positive effects of its work could be undermined and future cooperation by witnesses and others with the Court (including in other situations countries) could be jeopardized.

II. Residual Issues Facing the ICTY, ICTR and SCSL

Due to their judicial nature, the ICTY, ICTR and SCSL cannot simply cease operations once their current trial and appeals activities are completed. The tribunals have continuing legal and practical obligations that must be addressed at the point of closure and for years into the future. The four main residual issues are explored in this section: trial for indicted fugitives, ongoing protection for victims and witnesses, supervision of enforcement of sentences and management of archives. In addition, other residual functions are briefly mentioned, including review of judgments and assistance to national authorities.

A. Trials for Fugitives and Referral of Cases to National Jurisdictions

What should be done with those individuals who have been indicted by the time-limited tribunals but who still remain at large at the time of the closure of the ICTY, ICTR and SCSL? The Security Council and the tribunals have clearly articulated their common position: there can be no impunity for fugitives.[5] The Council has indicated that high-level fugitives will be tried at the international level, if caught.[6] These high-ranking accused are, for the ICTY, Ratko Mladić and Goran Hadžić, and for the ICTR, Augustin Bizimana, Félicien Kabuga and Protais Mpiranya.[7] The cases of lower-level accused are to be referred to domestic jurisdictions.[8] The Special Court for Sierra Leone has one indictee who has not yet been brought to justice, Johnny Paul Koroma. Koroma is suspected to have died in Liberia in 2003, but his indictment remains open absent proof of his

[5] The Secretary-General, Report of the Secretary-General on the administrative and budgetary aspects of the options for possible locations for the archives of the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda and the seat of the residual mechanism(s) for the Tribunals, para. 74, U.N. Doc. S/2009/258 (May 21, 2009) [hereinafter The Secretary-General Report] (on the views of the Security Council's Informal Working Group on International Tribunals); ICTY Letter, *supra* note 3, para. 88 (on the views of the ICTY); Letter from the President of the International Criminal Tribunal for Rwanda to the President of the Security Council (May 28, 2010), U.N. Doc. S/2009/687, para. 15 [hereinafter ICTR Letter] (on the views of the ICTR); SPECIAL COURT FOR SIERRA LEONE, SIXTH ANNUAL REPORT OF THE PRESIDENT OF THE SPECIAL COURT FOR SIERRA LEONE: JUNE 2008-MAY 2009 51 (2009) [hereinafter SCSL REPORT] (on the views of the SCSL).

[6] Letter from the Chargé d'affaires a.i. of the Permanent Mission of Austria to the President of the Security Council, para. 15, U.N. Doc. S/2009/687 (Dec. 31, 2009) [hereinafter Chargé d'affaires].

[7] The Secretary-General Report, *supra* note 5, para. 18; ICTR Letter, *supra* note 5, paras. 23, 24 and Annexes 2 and 3 (note that The Secretary-General Report refers to four high-level accused among 13 ICTR fugitives. Since the report was issued, two fugitives were caught and transferred to the ICTR, reducing the number of fugitives to 11. One of these fugitives was high-level accused Idelphonse Nizeyimana).

[8] Chargé d'affaires, *supra* note 6, para. 15.

death.[9] In May 2008, the Special Court's judges amended the SCSL Rules of Procedure and Evidence to allow the Koroma case to be referred for trial in another jurisdiction.[10] The SCSL is currently considering its transfer to a competent national jurisdiction.[11]

In order to be able to hold fugitives accountable, the tribunals' residual mechanisms will need to continually track fugitives and seek cooperation from states and organizations for their arrest and transfer. If a fugitive is captured, the relevant residual mechanism must be able to quickly transform into a functioning criminal tribunal. Specifically, the tribunal must be able to try a high-level accused, or in the case of a lower-level accused, refer the case to a ready and willing domestic jurisdiction, in a state in the territory of which the crimes were committed or in which the accused was arrested or which has jurisdiction and is willing and adequately prepared to accept the case.[12] If the latter course is taken, the residual mechanism must also be able to monitor the referred case to ensure that it meets international standards.[13] The latter option mainly affects the ICTR, which currently has eight lower-level fugitives.[14] However, it is not clear if this is a realistic option. To date, the Prosecutor of the ICTR has attempted to refer lower-level cases to domestic jurisdictions, especially Rwanda, but has not been successful.[15] The Prosecutor has also indicated that he intends to continue to seek the referral of fugitives not deemed necessary to try at the international level but has "indicated difficulties in finding States willing and adequately prepared to accept these cases."[16] This residual function could persist for decades, depending on the lifespan of the fugitives and how long they remain at large.

B. Protection of Victims and Witnesses and Contempt Trials

One of the most crucial issues relating to residual functions is the need to ensure continued protection of victims and witnesses (and, in some instances,

[9] *War Crimes Court Probes Death Report*, BBC News, Jun. 16, 2003, http://news.bbc.co.uk/2/hi/africa/2992462.stm (reporting on Koroma's suspected death); Tracey Gurd, The Open Society Justice Initiative, *Stephen Rapp, Special Court Chief Prosecutor Answers your Questions, Part II* (Sep. 2, 2009), http://www.charlestaylortrial.org/2009/09/03/stephen-rapp-special-court-chief-prosecutor-answers-your-questions-part-ii/ (reporting that Koroma's death has not been definitively proven by the Office of the Prosecutor, so the indictment remains active).

[10] Special Court for Sierra Leone Rules of Procedure and Evidence, Rule 11*bis*, http://www.sc-sl.org/LinkClick.aspx?fileticket=YNjqn5TIYKs%3d&tabid=176 [hereinafter SCSL Rules of Procedure].

[11] SCSL Report, *supra* note 5, at 51.

[12] International Criminal Tribunal for Rwanda Rules of Procedure and Evidence, Rule 11*bis*, U.N. Doc. ITR/3/Rev.19 (2009), [hereinafter ICTR Rules of Procedure]; International Criminal Tribunal for the Former Yugoslavia Rules of Procedure and Evidence, Rule 11*bis*, UN Doc. IT/32/Rev.44 (2009) [hereinafter ICTY Rules of Procedure]; SCSL Rules of Procedure, *supra* note 10, at Rule 11*bis* (noting that the SCSL Rules only provide for referral to "a State having jurisdiction and being willing and adequately prepared to accept such a case").

[13] The Secretary-General Report, *supra* note 5, paras. 33-34 (international standards include, for example, the rights of the accused to a fair trial and safety from the imposition of the death penalty).

[14] ICTR Letter, *supra* note 5, paras. 54, 59.

[15] Letter from the President of the International Criminal Tribunal for Rwanda to the President of the Security Council (May 14, 2009), U.N. Doc. S/2009/247, paras. 29, 69.

[16] The Secretary-General Report, *supra* note 5, para. 35.

their dependents) who have appeared before the ICTY, ICTR and SCSL.[17] Many of these individuals put their lives, and the lives of their immediate family members, at risk by providing evidence to the time-limited tribunals. If there is an interruption or an arbitrary stoppage of this protection due to the closure of the tribunals, these witnesses and their families may again be at risk for harassment, injury or death. A failure to provide uninterrupted protection not only puts witnesses at risk and damages the credibility of the tribunals, it also endangers the work of other existing tribunals, such as the ICC, and any future time-limited tribunals.[18] Witnesses will be less likely to assist the ICC or other tribunals if they have heard that witnesses were put at risk following the closure of the ICC's operations in a situation country or of the time-limited tribunals.

Currently, judges of the ICTY, ICTR and SCSL issue orders for the protection of victims or witnesses during the proceedings of a case, and these orders may be revisited as needed.[19] This protection can range from non-disclosure to the public of identifying information about a victim, witness, or their relatives; expunging names and identifying information from the tribunals' public records; hearing witnesses in closed session; and assigning pseudonyms; to physical relocation of a witness and his or her family to another country (for example, insider witnesses).[20] These orders are implemented through the work of the Registry of each tribunal.[21] There are more than 1,400 ICTY witnesses and 2,300 ICTR witnesses subject to protective orders.[22] The Office of the Prosecutor may also carry out protective measures for the purpose of investigations and trials (such as for informants and their families).[23]

Residual mechanisms for the ICTY, ICTR and SCSL will need to be able to carry out all of these judicial and administrative tasks after the closure of these tribunals. In doing so, the mechanism will, inter alia: (1) keep track of the victims and witnesses to inform them of relevant developments (such as the release

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[17] Int'l Ctr. for Transitional Justice & The Univ. of W. Ont. Faculty of Law, Report of the Residual Issues Expert Meeting on Planning for Residual Issues for International and Hybrid Criminal Tribunals (2007), para. 5, *available at* http://www.ictj.org/static/Prosecutions/ICTJ_ResidIssues_2010rp_Final.pdf [hereinafter Expert Meeting Report]; *see also* Cecile Aptel, Planning for Residual Issues and Mechanisms for International and Hybrid Criminal Tribunals: Briefing Paper 4 (2007).

[18] Expert Meeting Report, *supra* note 17, para. 5; The Secretary-General Report, *supra* note 5, para. 29.

[19] Statute of the International Criminal Tribunal for the Former Yugoslavia, U.N. SC Res. 827 U.N. Doc. S/Res/827 (1993), 32 I.L.M. 1159, 1184-85 [hereinafter ICTY Statute]; Statute of the International Criminal Tribunal for Rwanda, U.N. SC Res. 955, U.N. Doc. S/Res/955 (1994), 33 I.L.M. 1598, 1608, 1610 (1994) [hereinafter ICTR Statute]; SCSL Rules of Procedure, *supra* note 10, at Rule 75.

[20] The Secretary-General Report, *supra* note 5, paras. 26, 28 (stating that the ICTY has "concluded 13 agreements under which States accept in principle to consider the relocation of witnesses to their country").

[21] Annex to the Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, art. 16(4), Jan. 16, 2002, 2178 U.N.T.S. 138 [hereinafter SCSL Statute]; The Secretary-General Report, *supra* note 5, para. 27.

[22] The Secretary-General Report, *supra* note 5, para. 28 (as of May 2009— this number is likely to have increased in the interim).

[23] *Id.* para. 25.

of a convicted person);[24] (2) keep track of the observance and variation of the protective measures;[25] (3) address requests for assistance with respect to existing protective measures or new measures requested in a trial of a captured fugitive or other residual proceeding;[26] (4) serve as a contact point for states in which victims and witnesses have been relocated;[27] (5) monitor and assess threats to ensure that protective measures for specific witnesses remain effective, or have a third party do so, and revise protective orders as necessary;[28] and (6) review the necessity for continued relocation of witnesses and assist with their transfer to another state if relocation is no longer required.[29]

After the physical closure of the ICTY, ICTR and SCSL, court orders must continue to be respected, including those related to the protection of victims and witnesses. Should a victim or witness be threatened, he or she must be able to rely on the residual mechanism for continued protection and investigation of the threat, and launch, if necessary, of proceedings for contempt. This is crucial to ensuring both the safety of victims and witnesses and the integrity of the tribunals' work. Under the Rules of Procedure and Evidence of the tribunals, each tribunal may hold in contempt anyone who knowingly and willfully interferes with the administration of justice.[30] The residual mechanisms must be provided with similar judicial powers.[31] The victim and witness protection residual function, including the ability to hold contempt proceedings, will be required for many years and could last for the lifetime of any particular convicted person, victim, or witness.[32]

C. Supervision of Enforcement of Sentences

Residual mechanisms will also be required to monitor and review the sentences of individuals convicted by the tribunals. The international and hybrid criminal tribunals do not have their own prisons and thus individuals convicted by these bodies must serve their sentences in the prisons of willing states. The

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[24] Gabriël Oosthuizen, *Open Society Justice Initiative, The Residual Functions of the UN International Criminal Tribunals of the former Yugoslavia and Rwanda and the Special Court for Sierra Leone: The potential role of the International Criminal Court*, para. 27, (Sept. 30, 2008) (unpublished manuscript), http://www.iclsfoundation.org/wpcontent/uploads/2009/05/iccpotentialresidualfunctionrole-briefing-paper-icls-to-osji-final-websitero2.doc.

[25] The Secretary-General Report, *supra* note 5, para. 26 (The residual mechanisms may need to issue varying judicial protection orders if, for example, national immigration authorities request access to information because a protected person seeks asylum or immigration to that country).

[26] Oosthuizen, *supra* note 24, para. 27.

[27] *Id.*

[28] *Id.*

[29] *Id.*

[30] ICTY Rules of Procedure, *supra* note 12, at Rule 77; ICTR Rules of Procedure, *supra* note 12, at Rule 77; SCSL Rules of Procedure, *supra* note 10, at Rule 77.

[31] The Secretary-General Report, *supra* note 5, paras. 23-24. There have been many motions for contempt at the ICTY and ICTR and it can be expected that a residual mechanism would also face such motions.

[32] Oosthuizen, *supra* note 24, para. 9 (such protection could, in certain circumstances, last beyond the lifetime of a convicted person (for example, if retaliatory threats stem from that person's family).

ICTY, ICTR and SCSL have entered into sentence enforcement agreements with a number of states.[33] The Statutes of the ICTY, ICTR and SCSL state that sentences of imprisonment are to be served in accordance with the applicable laws of the state in which the convicted person is imprisoned, subject to the supervision of the tribunals.[34] This means that if the convicted person is eligible for pardon, early release or commutation of sentence in the state of imprisonment, then the state must notify the tribunal. In the ICTY, ICTR and SCSL, the President consults with the judges and decides whether or not to grant pardon, early release or commutation of sentence, "on the basis of the interests of justice and the general principles of law."[35] In making a decision, the President takes into account "the gravity of the crime or crimes for which the prisoner was convicted, the treatment of similarly situated prisoners and the prisoner's demonstrated rehabilitation, as well as any substantial cooperation of the prisoner with the Prosecutor."[36] A May 2009 report of the Secretary-General noted that, of 39 applications for early release submitted to date, the ICTY President granted 22, while the 6 applications submitted to date at the ICTR were all denied.[37] Thus, the residual mechanisms for these tribunals will need to be able to provide for such consultation and Presidential decision-making on an ongoing basis.

The residual mechanisms for the ICTY, ICTR and SCSL will also need to provide supervision of the prison conditions for all convicted persons, to ensure that they meet international standards. In many of the sentence enforcement agreements entered into with the States, the ICTY, ICTR and SCSL have entrusted the International Committee of the Red Cross with the task of conducting regular and unannounced visits to the prisons, and presenting confidential reports on their findings.[38] It is expected that similar arrangements will continue with the residual mechanisms of the tribunals. Other responsibilities under this residual function include: negotiating enforcement agreements with states (for example, with respect to the conviction of a captured fugitive); transferring convicted individuals to the state of enforcement or from one state of enforcement to another; making arrangements for the relocation of a prisoner once he or she has served the sentence; and, in the case of death while serving sentence, arranging to repatriate the body of the deceased person.[39]

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33 The Secretary-General Report, *supra* note 5, para. 39 (referring to sentence enforcement agreements entered into with the ICTY and ICTR); SPECIAL COURT FOR SIERRA LEONE HOMEPAGE, http://www.sc-sl.org/HOME/tabid/53/Default.aspx (click on "Documents" tab and then scroll down to "Sentence Enforcement Agreements." Referring to sentence enforcement agreements entered into by Finland, Rwanda, Sweden and the United Kingdom with the SCSL).

34 ICTY Statute, *supra* note 19, art. 27; ICTR Statute, *supra* note 19, art. 26; SCSL Statute, *supra* note 21, art. 22.

35 ICTY Statute, *supra* note 19, art. 28; ICTR Statute, *supra* note 19, art. 27; SCSL Statute, *supra* note 21, art. 23.

36 The Secretary-General Report, *supra* note 5, para. 37.

37 *Id.*

38 *Id.* para. 39; Amended Agreement on the Enforcement of Sentences of the Special Court for Sierra Leone, Spec. Ct. of Sierra Leone-Rwanda, art. 6, Jan. 16, 2002, *available at* http://www.sc-sl.org/LinkClick.aspx?fileticket=WNTKRbIUNNc%3d&tabid=176 (last visited Oct. 11, 2010).

39 The Secretary-General Report, *supra* note 5, para. 38.

This residual function will likely need to be exercised for many decades. For example, the ICTY has sentenced Milomir Stakić to 40 years,[40] the ICTR has sentenced Juvénal Kajelijeli to 45 years,[41] and the SCSL has sentenced Issa Hassan Sesay to 52 years of imprisonment.[42]

D. Management of Archives

The fourth residual issue is the preservation and protection of the archives of the ICTY, ICTR and SCSL. The tribunals hold and manage vast amounts of public and confidential records, evidence, data and other materials in paper, electronic, audio, video, physical and other formats. There are two main reasons why the archives must be carefully preserved and protected indefinitely. First, the archives will be required to conduct all of the other residual functions, such as trials of captured high-level fugitives, victim and witness protection and sentence enforcement monitoring.[43] Second, the archives will also be used, in the future, for research, for the preservation of memories and for education (including the prevention of historical revisionism).[44] The archives are not only a set of documents for the tribunals: they also constitute a historical record for Sierra Leoneans, Rwandans, and the people of the states of the former Yugoslavia.

The management of the tribunals' archives as a residual function is complex. The tribunals' records are both public and confidential. Confidential records include transcripts of closed trial sessions, documents containing identifying information and information provided to the Prosecutor on a confidential basis (which cannot be disclosed without the consent of the person or entity providing the initial information).[45] Over time, certain records may be declassified and made publicly available.[46] While confidential records must be kept separate from public records and under strict security conditions, the principle of archival integrity requires that public and confidential documents remain in the same location and not be transferred to separate locations.[47] Thus, the management of the archives following the closure of the time-limited tribunals must simultaneously preserve all relevant material – public and confidential – as well as protect the confidential material (and therefore, the protected victims and witnesses), and provide varying levels of access to officials of the residual mechanisms (including judges, Prose-

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[40] Prosecutor v. Stakić, Case No. IT-97-24-A, Judgment, at 142 (Int'l Crim. Trib. for the Former Yugoslavia March 22, 2006).

[41] Prosecutor v. Kajelijeli, Case No. ICTR-98-44A-A, Judgment, at 119 (Int'l Crim. Trib. for Rwanda May 23, 2005).

[42] Prosecutor v. Sesay, Case No. SCSL-04-15-A, Judgment, at 480 (Spec. Ct. for Sierra Leone Oct. 26, 2009).

[43] The Secretary-General Report, *supra* note 5, paras. 54-55.

[44] *Id.* para. 42.

[45] *Id.* para. 43.

[46] *Id.*

[47] *Id.* paras. 43, 195.

cutors, Registrars, respective staff members and defense counsel),[48] as well as other relevant individuals such as state officials pursuing domestic prosecutions, academic researchers, affected populations and others.[49] Of course, the residual mechanisms will generate more archives due to their work, especially if there are trials of high-level captured fugitives.[50]

One contentious issue has been where to locate the archives of the tribunals. The dual nature of the archives – as working documents for officials of the residual mechanisms and as documents intended to preserve memories and promote education – creates difficulties if the work of the residual mechanism is in one jurisdiction and the affected population is in another. For example, if the SCSL residual mechanism is hosted by the Special Tribunal for Lebanon in the Netherlands,[51] then it makes sense for the archives to be in the Netherlands in order for SCSL officials to access them. On the other hand, locating the archives in Europe could make it difficult for Sierra Leoneans to access the documents. One potential solution would be to have an information center with copies of relevant public documents in Sierra Leone.[52]

While the need to preserve archives for tribunal residual functions will last until the death of the longest-serving convicted person or the longest-living protected victim or witness, the need to preserve records and materials for historical, research, policy, academic and other related purposes is virtually unending. The management of the ICTY, ICTR and SCSL archives could therefore prove to be one of the most difficult residual functions.

E. Other Residual Functions (Review of Judgments, Assistance to National Authorities)

The residual functions outlined above can be supplemented with other, less obvious but also important, residual functions. The Statutes of the ICTY, ICTR

[48] *Id.* para. 54 (noting that "[J]udges, Prosecutors, Registrars, respective staff members and defense counsel are the primary users of the Tribunal's records and gain value from them).

[49] *Id.* para. 59 ("victims, witnesses and their families, the populations of the affected countries, [g]overnment officials, other international tribunals and courts, such as the International Criminal Court, journalists, historians, legal researchers, political scientists and persons interested in memorializing an event or creating educational materials" should all be provided access to the material).

[50] *Id.* para. 58.

[51] The SCSL's Charles Taylor Trial is currently being hosted by the Special Tribunal for Lebanon. *See* Special Tribunal for Lebanon, "Courtroom for Special Tribunal to Host Taylor Trial (May 17, 2010), http://www.stl-tsl.org/sid/189 [hereinafter Special Tribunal] (The Special Tribunal for Lebanon has indicated openness to hosting the SCSL's residual mechanism). *See* Giorgia Tortora, *The Special Tribunal for Lebanon and the Discussion on Residual Mechanisms*, 104 AM. SOC'Y INT'L L. PROC. (forthcoming 2010).

[52] The idea of supplementing tribunal archives with regionally based information centers has been discussed within the Security Council's Informal Working Group on International Tribunals, but the creation of such information centers is not considered by Council members to be a residual issue (rather, it is considered a legacy issue). *See* Anne Joyce, *The Role of States in the Closure of the International and Hybrid Criminal Tribunals, in Getting to Closure: Winding Up the International and Hybrid Criminal Tribunals*, 104 AM. SOC'Y INT'L L. PROC. (forthcoming 2010). The May 2009 Report of the Secretary-General discusses the creation of information centers, such as those that already exist in various districts in Rwanda (currently funded by the European Union, ICTR and Government of Rwanda). *See* The Secretary-General Report, *supra* note 5, paras. 235-37.

and SCSL provide that, where a new fact is discovered which was not known at the time of the trial or appeals proceedings, and which may have been a decisive factor in reaching the judgment, the convicted person or the Prosecutor may submit an application for review of the judgment.[53] For the Prosecutor, this right is limited to a period of 12 months after the delivery of the judgment.[54] For the convicted person, this right does not have a time limit. This open-ended right is linked to the possibility that evidence exonerating convicted individuals could be discovered (for example, in state archives) decades after conviction by the tribunal. The Tribunals consider the review of judgments to be an essential residual function, the unavailability of which would impinge on the rights of the convicted individuals.[55] This residual function must be available for the lifespan of the convicted individuals.

Another residual function is the provision of assistance to national and international authorities. The tribunals respond to requests for assistance from national authorities such as immigration departments and domestic prosecutors, and from United Nations agencies. The ICTY and ICTR consider this assistance to be essential "to maintain the ability of the national legal systems to prosecute those not subject to proceedings before the Tribunals."[56] In order to assist the national authorities, a decision may be needed to vary a protective order for a protected witness.[57] This residual function will be required for at least the next three or four decades because domestic prosecutions or other domestic action (such as citizenship revocation) related to the conflicts in Rwanda, Sierra Leone and the former Yugoslavia may take place many years from now.[58]

There are other potential residual functions that have been identified by commentators, such as: assistance in return of proceeds of crime,[59] compensation to victims,[60] preventing double jeopardy in future domestic proceedings,[61] fulfillment of the continuing prosecutorial duty to disclose exculpatory material to the defense[62] and continuing human resources obligations.[63] Like the functions described above, each of these functions could potentially be required for decades.

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[53] ICTY Statute, *supra* note 19, art. 26; ICTY Rules of Procedure, *supra* note 12, at Rules 119-21; ICTR Statute, *supra* note 19, art. 25; ICTR Rules of Procedure, *supra* note 12, at Rules 120-23; SCSL Statute, *supra* note 21, art. 21(2); SCSL Rules of Procedure, *supra* note 10, at 120-22.

[54] ICTY Rules of Procedure, *supra* note 12, at Rule 119; ICTR Rules of Procedure, *supra* note 12, at Rule 120; SCSL Rules of Procedure, *supra* note 10, at Rule 120.

[55] The Secretary-General Report, *supra* note 5, para. 32.

[56] *Id.* para. 40.

[57] *Id.*

[58] Such a time delay is not unheard of. For example, Canada launched a domestic prosecution in 1987 against an individual alleged to have committed war crimes during World War II. *R. v. Finta,* [1994] 1 S.C.R. 701 (Can.).

[59] Oosthuizen, *supra* note 24, para. 46.

[60] *Id.*

[61] Expert Meeting Report, *supra* note 17, para. 10.

[62] Oosthuizen, *supra* note 24, para. 43.

[63] VALERIE OOSTERVELD & TRACEY GURD, SPECIAL COURT FOR SIERRA LEONE RESIDUAL ISSUES EXPERT GROUP MEETING, THE SPECIAL COURT FOR SIERRA LEONE: OPTIONS FOR ADDRESSING RESIDUAL FUNCTIONS AFTER PHYSICAL CLOSURE 6 (Feb. 21, 2008).

III. The International Criminal Court and Residual Issues

There are two ways in which residual issues of the time-limited international and hybrid criminal tribunals touch upon the ICC. First, the ICC is currently being considered as a possible host for one or more of the residual mechanisms created to implement ICTY, ICTR, or SCSL residual issues. Second, the ICC is going to face residual issues itself as it completes its work on specific cases and in specific countries; therefore, it may be able to learn from the experiences of the time-limited tribunals. Similarly, if residual issues are not adequately addressed for the time-limited tribunals, these failures could have a negative impact upon the ICC's work.

A. The ICC as a Possible Host of Residual Mechanisms

Turning to the first issue, the ICC is being discussed as a possible future host institution for the joint ICTY-ICTR or SCSL residual mechanism. Initially, some states that were considering the question of how to address the ICTY, ICTR and SCSL's residual issues, raised the possibility of simply incorporating them into the role and function of the ICC, such that the ICC would perform all of the residual functions in its own name.[64] One can understand why this idea would be quite attractive as a potential solution: the ICC is permanent; it has jurisdiction over the same general types of crimes as the time-limited tribunals (genocide, crimes against humanity and war crimes); and it contains experts who understand how to track fugitives, oversee sentence enforcement, protect witnesses and preserve and protect archives. However, almost immediately, it became apparent that the residual functions of the time-limited tribunals could not simply be folded into those of the ICC. The ICC is a treaty body created by the Rome Statute of the ICC.[65] In contrast, the ICTY and ICTR were established by the UN Security Council,[66] and the SCSL was created through an agreement between the UN Secretary-General and the Government of Sierra Leone.[67] Thus, each of the time-limited tribunals has a different legal mode of creation. There are also other legally important differences between the ICC and the time-limited tribunals. The ICC has different temporal and geographic jurisdiction than the time-limited tribunals;[68] some of the crimes are defined differently in the Rome Stat-

[64] *See* U.N. SCOR, 5697th mtg. at 16-17, U.N. Doc. S/PV.5697 (June 18, 2007) (Statement by Mr. Arias (Pan.)).

[65] The Rome Statute of the ICC required 60 ratifications in order to enter into force. *See* Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9, art. 126 (July 17, 1998) [hereinafter Rome Statute of the ICC], 37 I.L.M. 1002, 1068 (1998).

[66] *See generally* ICTY Statute, *supra* note 19 *and* ICTR Statute, *supra* note 19.

[67] *See generally* SCSL Statute, *supra* note 21.

[68] *See* Rome Statute of the ICC, *supra* note 65, art. 126 (The ICC's temporal jurisdiction began on July 1, 2002, whereas the jurisdiction of the ICTY began in 1991, the ICTR in 1994 and the SCSL in 1996); *see also* International Criminal Court, About the Court, http://www2.icc-cpi.int/Menus/ICC/About+the+Court/ (last visited Oct. 15, 2010); ICTY Statute, *supra* note 19, art. 1; ICTR Statute, *supra* note 19, art. 1; SCSL Statute, *supra* note 21, art. 1; *see also* Rome Statute of the ICC, *supra* note 65, arts. 12-13 (The ICC's jurisdiction extends to States Parties, and to countries or situations referred by

ute than in the time-limited tribunals;[69] some of the states with deep interests in the time-limited tribunals are not States Parties to the Rome Statute;[70] and the procedures used by each of the time-limited tribunals differ from those of the ICC.[71] In order to address these crucial differences, the ICC's Rome Statute and other instruments would need to be amended.

The changes required for the ICC to perform residual ICTY, ICTR or SCSL residual functions in its own name would go beyond relatively straightforward amendments of "an exclusively institutional nature" permitted by article 122.[72] Rather, amendments under article 121 – the general amendments provision - would be required. These amendments require consensus among the ICC States Parties or, failing that, approval by a two-thirds majority with entry-into-force occurring one year after instruments of ratification or acceptance have been deposited by seven-eighths of the States Parties.[73] If the crime provisions of the Rome Statute are amended, then there is a slightly different mode of entry-into-force.[74] Article 121 creates a high threshold for entry-into-force of substantive amendments. This complexity,[75] combined with the fact that there is unlikely to be any appetite in the near future among ICC States Parties to consider the kinds of amendments required to transfer ICTY, ICTR or SCSL residual issues to the jurisdiction of the ICC,[76] makes complete absorption by the ICC of residual func-

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the UN Security Council. A non-State Party may also lodge a declaration accepting jurisdiction under art. 12(3)).

[69] ICTR Statute, *supra* note 19, art. 3; Rome Statute of the ICC, *supra* note 65, art. 7 (for example, the ICTR Statute requires an overarching element of discrimination on national, political, ethnic, racial or religious grounds in all crimes against humanity, while the Rome Statute does not).

[70] For example, the United States is a strong supporter of the ICTY, ICTR and SCSL, but is not a State Party to the Rome Statute of the ICC.

[71] International Criminal Court, R. Proc. & Evid., paras. 121-26, *available at* http://www.icc-cpi.int/NR/rdonlyres/F1E0AC1C-A3F3-4A3C-B9A7-B3E8B115E886/140164/Rules_of_procedure_and_Evidence_English.pdf (The Rules of Procedure and Evidence of the ICTY, ICTR and SCSL differ slightly from each other, but differ significantly in many respects from the Rules of Procedure and Evidence of the ICC. For example, the ICC's Rules cover a procedure called a "confirmation of charges" hearing that is not a procedure used by any of the time-limited tribunals).

[72] Rome Statute of the ICC, *supra* note 65, art. 122 (covering amendments to provisions of an institutional nature, which may be proposed at any time and which, if adopted, enters into force for all States Parties).

[73] *Id.* arts. 121(3), (4).

[74] *Id.* art. 121(5) (under the amendment procedure for the crime provisions, amendments enter into force only for those States parties which accept the amendment through deposit of instruments of ratification or acceptance. For those States Parties which do not accept the amendment, "the Court shall not exercise its jurisdiction regarding a crime covered by the amendment when committed by that State Party's nationals or on its territory.").

[75] International Center for Transitional Justice ,University of Western Ontario Faculty of Law, Permanent Mission of Canada to the United Nations, Final Report of the Expert Group Meeting on "Closing the International and Hybrid Criminal Tribunals: Mechanisms to Address Residual Issues," (Mar. 24, 2010) [hereinafter Report on Closing the Int'l Tribunals], *available at* http://www.ictj.org/static/Prosecutions/ICTJ_ResidIssues_2010rp_Final.pdf.

[76] *See* Review Conference of the Rome Statute of the International Criminal Court, Kampala, Uganda, May 31-June 11, 2010, *Amendments to Article 8 of the Rome Statute*, RC/Res.5 (Jun. 16, 2010) *and* Review Conference of the Rome Statute of the International Criminal Court, Kampala, Uganda, May 31-June 11, 2010, *The Crime of Aggression*, RC/Res.6 (Jun. 28, 2010) (amendments were made to the Rome Statute to extend the war crimes provision to prohibit the use of certain weapons during non-

tions unrealistic. Similar complexities exist for options such as transferring only some of the residual issues to the ICC, outsourcing some residual functions to the ICC, or having ICC personnel double- or multi-hatting (performing functions both as ICC personnel and as ICTY, ICTR and/or SCSL personnel).[77]

Attention has since shifted to whether the ICC's facilities could be used to perform some or all of the residual functions for the time-limited courts. For example, could the ICC's facilities be used to provide courtroom, detention or archiving space for the ICTY, ICTR or SCSL's residual mechanisms to perform their functions? This has been described as a feasible option for ICC involvement.[78] There is already precedent in place for this option – the SCSL used the ICC's facilities from mid-2006 until May 2010 for the trial of Charles Taylor.[79] Under the SCSL's agreement with the ICC, the SCSL reimbursed the ICC for its use of the ICC's facilities, services and support.[80] Thus, perhaps a similar approach could be used for the ICTY, ICTR or SCSL's residual mechanism. The ICC's Assembly of States Parties has indicated a willingness to consider this option. In November 2009, the ICC's Assembly adopted a resolution "[e]ncourag[ing] the Court to continue the dialogue with other international courts and tribunals to assist with their planning on residual issues and to report to the Assembly of States Parties on this dialogue."[81] This issue was addressed, for example, at a February 2010 expert group meeting in New York on "Closing the International and Hybrid Criminal Tribunals: Mechanisms to Address Residual Issues".[82] Furthermore, in March 2010, the President of the ICC met with the United Nations Under-Secretary-General for Legal Affairs, Patricia

international armed conflict and to adopt a definition and modalities for the exercise of jurisdiction over the crime of aggression.) There was some discussion that the next Review Conference would likely take place in seven years, by which all of the time-limited international and hybrid criminal tribunals would be closed.

77 Oosthuizen, *supra* note 24, at 13-18.

78 Coalition for the International Criminal Court, *Residual Functions and the ICC* 3, 9 (Aug. 30, 2007) [hereinafter CICC Non-paper] (categorized as a "non-paper" that was not published on the CICC website, on file with the Loyola University Chicago International Law Review).

79 United Nations, *The situation in Sierra Leone*, U.N. SC Res. 1688, UN SCOR 61st sess., 5467th mtg., U.N. Doc. S/Res/1688 (2006) para. 3 (nothing that the SCSL used the ICC facilities for the Taylor trial); *see also* International Criminal Court, *Memorandum of Understanding regarding Administrative Arrangements between the International Criminal Court and the Special Court for Sierra Leone*, ICC Doc. ICC-PRES/03-01-06, (April 13, 2006) [hereinafter SCSL-ICC Agreement], *available at* http://www.icc-cpi.int/NR/rdonlyres/66184EF8-E181-403A-85B8-3D07487D1FF1/140161/ICCPRES030106_en.pdf; *see also* Special Tribunal, *supra* note 51 (noting that the Taylor trial was moved to the facilities of the Special Tribunal for Lebanon when the ICC's trial docket became heavier than it had been in 2006).

80 Oosthuizen, *supra* note 24, para. 65 (This reimbursement is quite detailed, as it includes all "clearly identifiable direct and indirect costs that the ICC may incur" including a component for any depreciation in the value of ICC equipment and property); SCSL-ICC Agreement, *supra* note 79, arts. 3, 5, 13.

81 International Criminal Court, Strengthening the International Criminal Court and the Assembly of States Parties, para. 3, ICC-ASP/8/Res.3 (2009).

82 Report on Closing the Int'l Tribunals, *supra* note 75, at 4 (Participants "noted that it would be helpful to determine earlier rather than later whether the ICC might play a role with respect to hosting one or more residual mechanisms, as the ICC's permanent premises are scheduled to be completed in 2014. The issue of joint administrative tasks and their space requirements ought to be considered and, ideally, communicated by the end of this year.").

O'Brien, to express "the Court's openness to discussing how it could support the residual mechanisms and archives of the closing ad hoc tribunals [–] the ICTY and ICTR."[83]

While recognizing the benefits that could emerge from the ICC hosting some or all of the residual mechanisms for the time-limited tribunals, some commentators have indicated concern with such an idea. They are worried that the ICC may not have the capacity to both meet its own needs and provide assistance to other institutions: "the ICTY, ICTR, and SCSL's residual functions will likely be the most demanding in the first few years after they have completed their mandates, which[,] according to available estimations of completion strategies, will coincide with a period when the ICC is engaged in a high volume, and perhaps continuous, pattern of work."[84] Thus, they caution that, before the ICC agrees to host any residual mechanism for the ICTY, ICTR or SCSL, it must determine as accurately as possible what resources it can realistically offer to these institutions.[85] This is why, at a February 2010 expert group meeting, participants discussed the possibility that the ICC's permanent premises – which have not yet been constructed – be planned in such a way that they may accommodate hosting residual mechanisms.[86] This concern regarding the capacity of the ICC to host other institutions is echoed in the recent experience of the SCSL. Under the SCSL-ICC agreement, the ICC's own requirements take priority over those of the SCSL.[87] Thus, as the ICC became busier, the SCSL's Taylor trial had to reduce its use of one of the ICC's courtrooms.[88] As a result, the SCSL moved the Taylor trial to the facilities of the Special Tribunal for Lebanon in nearby Leidschendam.[89]

Among other concerns, the ICC is located in The Hague, far from the former Yugoslavia, Rwanda, and Sierra Leone. If the ICC was used as a hub for the residual mechanisms of the ICTY, ICTR and SCSL, it may be difficult for those residual mechanisms to carry out their work in victim protection, sentence enforcement, and providing access to the affected populations to the archives.[90] Others reply that some functions could be performed in or near affected societies, perhaps via satellite or field offices.[91] The current discussion within the Security

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[83] International Criminal Court, *Weekly Update #28* at 3 (April 6, 2010), http://www.icc-cpi.int/NR/rdonlyres/66246BE8-CDCB-4895-80FF-F10B2CFF73ED/281720/ed28_engl.pdf.

[84] CICC Non-paper, *supra* note 78, at 3.

[85] *Id.*

[86] Report on Closing the Int'l Tribunals, *supra* note 75, at 4.

[87] SCSL-ICC Agreement, *supra* note 79, arts. 2(2), 2(3).

[88] Prosecutor v. Taylor, Case No. SCSL-2003-01-T, Transcript, at 40486, lines 5-7 (May 3, 2010) (The time pressures on the SCSL's Taylor trial are evident in the transcript. For example, in the transcript of May 3, 2010, the Presiding Judge notes that the Taylor trial needed to adjourn for the day at 1:00 p.m. as the courtroom was needed for an ICC trial that afternoon).

[89] *See* Special Tribunal, *supra* note 51.

[90] Oosthuizen, *supra* note 24, para. 42(v).

[91] *Id.*

Council is to establish one residual mechanism for the ICTY and ICTR, with two branches, one in Europe (this one could be at the ICC) and one in Africa.[92]

On the other hand, commentators also note that, by using ICC facilities for ICTY, ICTR and/or SCSL residual matters, there may be a reduction in operation cost.[93] These savings would stem from the fact that the residual mechanisms would not need to have, among other things, their own courtrooms (including attendant personnel such as interpreters and security), but could instead use the ICC's courtrooms. Similarly, if the residual mechanisms could use the ICC's detention facilities and archive space, this would also reduce the need for the residual mechanism to have and maintain such similar space. The main difficulty is that, at present, the ICC does not have extra courtroom and archive space.[94] The estimated construction completion date of the new ICC premises is 2014,[95] but unless additional space is planned for prior to construction, the same issues (at least with respect to courtrooms and archives) may arise even after the move. For example, the ICTY has estimated that, by the end of 2010, its physical records will require 3,704 shelf meters and electronic records will amount to 8,000 terabytes or more (which require specific server rooms).[96] The ICTR has estimated that, by the end of 2010, its paper records will require 2,336 shelf meters and digital storage requirements will amount to 1,020 terabytes (also requiring specific server rooms).[97] These requirements will clearly necessitate a great deal of additional physical and digital space.

B. The ICC's Residual Issues

The ICC will face residual issues even though it is a permanent international court as opposed to a time-limited court. The ICC will eventually complete its work in each of the current situation countries: Central African Republic, Democratic Republic of the Congo, Kenya, the Darfur region of Sudan and Uganda.[98] Following the completion of proceedings linked to those situation countries, the ICC will have continuing obligations to protect victims and witnesses, ensure enforcement of sentences and allow for access to archives to affected populations in order to prevent historical revisionism and to facilitate historical research. Similarly, it will be important for the ICC to protect and promote its legacy in the situation countries even after the ICC's field offices have closed their doors. Thus, as Boas and Oosthuizen point out, the ICC will need to plan for many 'post-case' residual issues.[99] The Committee on Budget and Finance of the ICC's Assembly of States Parties has recognized this, noting that "appropriate consider-

[92] Chargé d'affaires, *supra* note 6, para. 12.

[93] Oosthuizen, *supra* note 24, para. 67; Expert Meeting Report, *supra* note 17, para. 19.

[94] Oosthuizen, *supra* note 24, para. 67; CICC Non-paper, *supra* note 78, at 3.

[95] *Permanent Premises*, ICC-ASP/6/Res.1 (2007) para.14.

[96] The Secretary-General Report, *supra* note 5, para. 51.

[97] *Id.*

[98] International Criminal Court, Situations and Cases, http://www2.icc-cpi.int/Menus/ICC/Situations+and+Cases/ (last visited Nov. 3, 2010).

[99] Boas and Oosthuizen discuss this issue in some detail, by asking these questions:

ation should be given to the role that the field offices are expected to play and how, at the conclusion of Court proceedings in a given area, any residual issues should be handled."[100]

IV. Conclusion: Lessons for the ICC from the Closure of the ICTY, ICTR and SCSL

Given that the residual mechanisms for the ICTY, ICTR and SCSL have not yet been established, and the role of the ICC in these mechanisms is still undecided, are there any lessons at this early stage that can assist the ICC? The answer to this question is undeniably "yes." While the post-World War II International Military Tribunals in Nuremberg and Tokyo provide little guidance to the current-day tribunals about, for example, how to address victim and witness protection obligations, electronic archival needs or fugitive indictments,[101] the work done to date on the post-closure options for the ICTY, ICTR and SCSL on these issues has been invaluable. The ICTY, ICTR and SCSL, along with the Security Council and others, have had to consider how to address the *sui generis* scenario of post-closure legal existence and operation. These institutions have not only clarified the residual issues that must be planned for by the Security Council, ICTY, ICTR and SCSL, they have identified issues that must also be consid-

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> After the completion of trials and appeals, should the Court keep in The Hague the originals of Registry-registered written evidence and other materials such as physical exhibits that may be used again in other cases or in post-case proceedings such as reviews? Would the public have physical access to the non-confidential archive in The Hague, and under what procedure, and would online web-based access be generally provided? Or should the Court retain copies of public materials with their originals being transferred to the relevant authorities in the situation country for archiving and public-memory-related purposes, for example? How and where would the Court store the originals or copies, as the case may be? Who would be authori[z]ed to declassify Registry-held confidential materials? To which national prosecuting authorities and other bodies may and should the OTP [Office of the Prosecutor] provide access to OTP-held confidential materials, and for what purpose and under which procedure? What would be the situation in relation to materials collected for preliminary investigations that did not result in Pre-Trial Chamber-authori[z]ed investigations? Who would be responsible for contacting victims and witnesses for whom protected measures were ordered – in some instances many years earlier – by judges about the possible lifting of those measures? What procedures would the Court have to follow in relation to reports that someone convicted or acquitted by it is being tried again for the same conduct at national level? How would the role of the Court change in relation to other legacy issues such as countering misinformation about completed cases and helping to ensure a positive and lasting impact on national healing, truth and justice efforts and justice-sector reform efforts?;

Gideon Boas & Gabriël Oosthuizen, International Criminal Law Services, *Suggestions for Future Lessons-Learned Studies: The Experience of Other International and Hybrid Criminal Courts of Relevance to the International Criminal Court*, at 15 n.41, (2010), *available at* http://www.iccnow.org/documents/ICLS_REPORT_Lessonslearnedgapsstudy_FINAL.pdf.

[100] International Criminal Court Assembly of States Parties, Report of the Committee on Budget and Finance on the work of its twelfth session (May 13, 2009), ICC-ASP/8/5, para. 73.

[101] *See* Kevin Jon Heller, *Completion Strategies and the Office of the Prosecutor*, Leuven Centre for Global Governance Stud. Working Papers, 7-9 (2009) (describing the relatively abrupt completion of the International Military Tribunal and the International Military Tribunal for the Far East); *see also* Guido Acquaviva, *"Best Before the Date Indicated": Residual Mechanisms at the ICTY, The Legacy of the International Criminal Tribunal for the Former Yugoslavia*, at 4-6, *in* The Legacy of the International Criminal Tribunal for the Former Yugoslavia, (Göran Sluiter, Bert Swart & Alexander Zahar eds.) (forthcoming 2010) (outlining the residual mechanisms put into place for the Nuremberg Military Tribunals, which provide some interesting lessons learned on archival integrity).

ered by the ICC in the future (even if the ICC will need to address residual issues in a somewhat different manner due to the permanent nature of the institution). Thus, the very fact that individuals and states have considered which obligations continue past the closure of the time-limited tribunals, will assist the ICC in identifying ways to provide for its own continuing obligations when a situation moves from being "live" to being "dormant."

For example, consider the issue of fugitives. While the ICC is a permanent institution and therefore does not need to consider how to prosecute fugitives post-closure, the ICC does need to consider and make policy decisions about when it will scale down its investigatory and outreach presence in a situation country in response to a lack of international action on arrest warrants. These pressures were already evident in the ICC's eighth session of the Assembly of States Parties in November 2009, in which there was some corridor discussion regarding whether the Uganda field office of the ICC might be scaled down due to lack of action on the arrests of Joseph Kony and other indicted individuals.[102] If the ICC does scale down its presence in a situation country, it must also plan for future rapid scaling up of investigatory, defense and outreach presence if fugitives are captured and transferred to the ICC. The ideas arising from the discussions on how the joint ICTY and ICTR residual mechanism will scale up using a roster mechanism should be of assistance.[103]

How will the ICC continue to protect victims and witnesses in situation countries after all of the trials are concluded, or in situation countries where lack of arrests have led to a scaling down of ICC activity and presence? This is the same difficulty presented to the ICTY, ICTR and SCSL residual mechanisms. For both the ICC and the time-limited tribunals, the answer will depend on whether funding is provided for an office in the relevant country. For example, many of the SCSL's protected victims and witnesses are located in Sierra Leone. Therefore, there has been discussion that the SCSL's residual mechanism will have an office or focal point person in Freetown, which would make ongoing victim and witness protection (and assessment of risks) in that country more straightforward than managing such protection from the Netherlands. The ICTY and ICTR joint residual mechanism, on the other hand, is not likely to be located in the former Yugoslavia or Rwanda.[104] If the ICC decides to close its field office, it will be in a similar position to that of the ICTY and ICTR, and will need to rely on regional coordination, perhaps from field offices in nearby countries. This issue becomes more difficult if there are no nearby offices.

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[102] This discussion was linked, in part, to: International Criminal Court, *Report of the Court on the Enhancement of the Registry's Field Operations for 2010*, (Nov. 4, 2009), ICC-ASP/8/33 para. 11, which states: "It should be noted that the life span of a field office is dictated by the progress of the Court's judicial proceedings in a given situation and/or case. . . . There are various development in a situation which may trigger a review of operations on the ground and, as a consequence, the scaling up or down of field offices, such as, for example . . . where arrest warrants have been issued but not implemented for a number of years."

[103] See The Secretary-General Report, *supra* note 5, para. 258 for a discussion of the use of rosters.

[104] Chargé d'affaires, *supra* note 6, para. 12.

A third lesson that the ICC can learn from discussions on how to address ICTY, ICTR and SCSL residual functions, is to adopt archiving policies from the beginning of each situation that take into account how the archives will be dealt with after a situation closure. For example, the ICTY and ICTR did not adopt common public/confidential security classification systems from the beginning of their existence. This has made preparing these tribunals' archives for closure more difficult. The Special Tribunal for Lebanon has learned from this experience and has employed an archivist to work on policies to keep track of the sources of Tribunal documents,[105] and ensure consistency in the way information is classified and processed within the different organs.[106] Similarly, while it can be assumed that the ICC will hold the archives of the situations and related cases at its headquarters in The Hague, the experience of the time-limited tribunals suggest that a decision should also be made early on as to where copies of public archival documents should be housed. This should avoid or lessen the kinds of debates that have taken place around the location of the ICTY and ICTR archives.[107]

One final lesson that the ICC can extract from the discussions around the ICTY, ICTR and SCSL residual mechanisms has to do with funding. Unlike the time-limited tribunals, the ICC is funded through assessed contributions of its States Parties and its budget is decided each year by the States Parties. This relieves one major concern that the SCSL continually faces – where funds will come from to pay for its residual mechanism.[108] However, it does not relieve another potential concern: pressure from or decisions of the States Parties to eliminate field offices for budgetary reduction purposes once all of the cases in a situation have been dealt with, or in situations where there is lack of action on arrest warrants.[109] If such decisions are made, the ICC will need alternative via-

[105] The Special Tribunal for Lebanon's documents currently include not only Tribunal-generated documents, but also documents from the International Independent Investigation Commission and the Government of Lebanon.

[106] Special Tribunal, *supra* note 51.

[107] For example, Bosniak victim groups and some officials from Bosnia and Herzegovina (including the Mayor of Sarajevo) have requested that the ICTY's archives be located in Sarajevo or Srebrenica; however, representatives from Serbia and Croatia have strongly opposed placing the archives anywhere in the region, fearing for their security, accessibility of the materials and misuse of the materials for political purposes. *See Report of the President on the Conference Assessing the Legacy of the ICTY* to the United Nations, para. 7 (Apr. 27, 2010), *available at* http://www.icty.org/x/file/Press/Events/100427_legacyconference_pdt_report.pdf (last visited July 15, 2010).

[108] The SCSL is funded through voluntary contributions. It already has difficulty raising enough funds to cover its regular operations, despite the ongoing, high-profile trial of Charles Taylor. There is a concern that it will be much more difficult for the SCSL to secure voluntary contributions once it completes its work and transitions to a much lower-profile residual mechanism. We need a citation here stating the SCSL is having trouble raising funds despite the Charles Taylor trial. SPECIAL COURT FOR SIERRA LEONE, SEVENTH ANNUAL REPORT OF THE PRESIDENT OF THE SPECIAL COURT FOR SIERRA LEONE: JUNE 2009-MAY 2010 36 (2010) ("Despite these greatly appreciated contributions [of almost $15 million US], the Court faces a funding gap of $11.1 million to close the Court."). "In spite of the significant budgetary reductions by the Court, the Court continues to experience serious difficulties in securing adequate funding to complete its mandate. This is due to the funding mechanism, which relies solely on the voluntary contributions of the international community." *Id.* at 40.

[109] The ICC will need to carry a budget line for addressing residual issues for completed situations and cases. The ICC will also need to consider how it will retain institutional knowledge of the situations

ble plans for ongoing victim and witness protection and archival access for affected populations.[110]

In the future, it may be that all of these considerations will come together if the ICTY, ICTR, SCSL and Special Tribunal for Lebanon (and any similar future time-limited tribunals) are attached to the ICC as a common administrative hub.[111] In the meantime, the ICC should continue to be involved in, and kept apprised of, developments and decisions related to the creation of the ICTY, ICTR and SCSL residual mechanisms.

and cases after they are completed. *See* Eric Møse, *The ICTR's Completion Strategy – Challenges and Possible Solutions*, 6 J. INT'L CRIM. JUST. 667, 678 (2008) (voicing similar concern about loss of institutional knowledge post-ICTR closure).

110 This article is focused on residual functions, but a legacy issue also exists: the ICC needs to have a plan as to how it will continue to reach out to individuals and protect, promote and enhance its legacy absent field presence.

111 The Secretary-General Report, *supra* note 5, para. 248 ("Rather than establish a series of stand-alone and potentially costly residual mechanisms, a longer term strategic view may suggest leaving the door open for them each to be attached to one common administrative hub at some point in the future. This might be . . . the International Criminal Court . . . as the only permanent international criminal court.").

Prosecuting Charles Taylor's Son for Torture: A Step Toward the Domestication of International Law

Thomas J. G. Scott*

Introduction

Several federal statutes criminalize conduct by foreigners that has no relation to the United States.[1] These statutes, and the prosecutions conducted pursuant to them, raise questions about Congress's legislative authority and individuals' Due Process rights in a globalized world.[2] In part to avoid thorny issues about the relationship between constitutional law and international law, the U.S. has not pursued any atrocity prosecutions based purely on universal jurisdiction.[3] But despite these challenges, human rights activists remain hopeful that U.S. courts will soon exercise jurisdiction over – and thus end impunity for – atrocities committed abroad. The 2008 conviction of Charles McArthur Emmanuel, son of Liberian warlord Charles Taylor, for his role in torture committed against Liberians in Liberia represents a major step toward this goal.

The Extraterritorial Torture Statute, 18 U.S.C. § 2340A [ETS], makes it a crime for a U.S. citizen or person present in the United States, regardless of whether they are a U.S. citizen, to commit, attempt or conspire to commit torture abroad.[4] The statute applies regardless of the nationality of the victim.[5]

In passing the ETS, Congress incorporated into domestic law the country's obligations as a state party to the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment [CAT].[6] Skepticism

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1 Maritime Drug Law Enforcement Act (MDLEA), 46 U.S.C.A. §§ 70501-07 (West 2008) (establishing jurisdiction over stateless vessels); 18 U.S.C. § 2339B(a)(1) (2006), *invalidated by* Humanitarian Law Project v. Mukasey, 509 F.3d 1122, 1123 (9th Cir. 2007) (allowing extraterritorial jurisdiction over individuals providing material support to terrorist groups, even when neither the support nor the group has any connection to the United States); Child Soldiers Accountability Act of 2008, 18 U.S.C.A. § 2442(c)(3) (West 2008) (allowing extraterritorial jurisdiction over individuals charged with recruiting child soldiers); Genocide Accountability Act of 2007, 18 U.S.C.A. § 1091 (West 2009).

2 Eugene Kontorovich, *The "Define and Punish" Clause and the Limits of Universal Jurisdiction*, 103 Nw. U. L. Rev. 149, 150 (2009).

3 "There is an expansive use of extraterritorial jurisdiction for terrorism, narcotics trafficking, and hostage-taking criminal laws, but similar extraterritorial applications have not yet reached atrocity crimes under U.S. law." David Scheffer, *Closing the Impunity Gap in U.S. Law*, 8 Nw. U. J. Int'l Hum. Rts. 30, 35 (2009). Further, even these expansive uses of extraterritoriality doctrine have thus far entailed some plausible, if strained, nexus to the United States, such as intent to violate its laws or enter its territory. *See, e.g.*, United States v. Ledesma-Cuesta, 347 F.3d 527, 530-32 (3d Cir. 2003) (affirming the conviction of a man found in international waters and accused of attempting to smuggle drugs into the United States because he had taken a "substantial step" toward committing the crime, and overcoming Due Process concerns because drug-trafficking is universally condemned by law-abiding nations).

4 18 U.S.C. § 2340A (2001).

5 *See id.* § 2340A(b)(2).

6 S. Rep. No. 103-107, at 58-59 (1994); *see* United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* Feb. 4, 1985, S. Treaty

about the U.S.'s commitment to ending impunity for torture grew, however, as more than a decade passed without a single ETS prosecution.[7] One commentator writing in 2002 described the ETS as "a ghost provision that satisfies the United States' obligations under the Torture Convention but does not generate a viable means of meting out individual accountability."[8]

Though most attention to the federal torture statute has centered on prospects for convicting U.S. officials for their role in the so-called War on Terror,[9] *Emmanuel* stands out as the sole case prosecuted under the torture statute since its enactment in 1994.[10] Surprisingly, no one has closely examined the case.[11] Such criticisms subsided on October 30, 2008, when Charles McArthur Emmanuel, the son of former Liberian president Charles Taylor, became the first person convicted under the ETS.[12] The indictment accused Emmanuel of burning victims with molten plastic, cigarettes and an iron; severely beating victims with a firearm; stabbing them; and shocking victims with an electrical device, including on their genitalia.[13] The jury, sitting in federal district court in Miami, found Emmanuel guilty of one count of torture, one count of conspiracy to commit torture, and one count of possession of a firearm during the commission of a violent crime.[14] Three months after Emmanuel's conviction, U.S. District Judge Celia Altonaga sentenced Emmanuel to ninety-seven years in prison, saying that his

Doc. No. 100-20 (1988), 1465 U.N.T.S. 85 (entered into force June 26, 1987) [hereinafter Convention Against Torture], *available at* http://treaties.un.org/pages/ViewDetails.aspx?src=UNTSONLINE&tabid=2&mtdsg_no=IV-9&chapter=4&lang=en.

[7] *See, e.g.*, William J. Aceves, Amnesty Int'l, United States of America: A Safe Haven for Torturers 22 (Amnesty Int'l USA 2002), *available at* http://www.amnestyusa.org/stoptorture/safehaven.pdf.

[8] Ellen Y. Chung, *A Double-Edged Sword: Reconciling the United States' International Obligations Under the Convention Against Torture*, 51 Emory L.J. 355, 374 (2002).

[9] *See, e.g.*, Claire Finkelstein & Michael Lewis, *Should Bush Administration Lawyers Be Prosecuted for Authorizing Torture?*, 158 U. Pa. L. Rev. 195, 199 (2010); Benjamin G. Davis, *Refluat Stercus: A Citizen's View of Criminal Prosecution in U.S. Domestic Courts of High-Level U.S. Civilian Authority and Military Generals for Torture and Cruel, Inhuman or Degrading Treatment*, 23 St. John's J. Legal Comment. 503, 627 (2008); Scott Horton, *Justice After Bush: Prosecuting an Outlaw Administration*, Harper's Mag., Dec. 2008, at 53-54; Jordan J. Paust, *Prosecuting the President and His Entourage*, 14 ILSA J. Int'l & Comp. L. 539, 545 (2008); John Sifton, *United States Military and Central Intelligence Agency Personnel Abroad: Plugging the Prosecutorial Gaps*, 43 Harv. J. on Legis. 487, 496-501 (2006).

[10] Scheffer, *supra* note 3, at n.10.

[11] Though the mainstream media covered the case fairly closely, there seems to be only one article on the subject. It is only a general update on the case and was written before the case was decided. *Charles Taylor Jr. Indicted in United States for Torture Committed in Liberia*, 101 Am. J. Int'l L. 492 (2007). Thus, this Comment will make an important contribution to the literature by highlighting this case as an important, albeit incremental, step in the development of universal jurisdiction doctrine in the United States.

[12] Though the press often refers to Emmanuel as "Charles 'Chuckie' Taylor," I have, for the sake of accuracy, abstained from doing so here because Emmanuel is the defendant's legal name and is used by the Court.

[13] Second Superseding Indictment, United States v. Belfast Jr. a/k/a Charles McArthur Emmanuel, No. 06-20758-CR-Altononga(s)(s), 2007 WL 4969379 (S.D. Fla. Nov. 8, 2007).

[14] John Couwels, *Ex-Liberian president's son convicted of torture*, CNN, Oct. 30, 2008, http://edition.cnn.com/2008/CRIME/10/30/taylor.torture.verdict/.

"sadistic, cruel, atrocious past . . . constituted unacceptable, universally condemned torture."[15]

The United States government and the human rights community hailed the conviction as a major achievement. Then-Attorney General Michael Mukasey said the conviction "provides a measure of justice to those who were victimized by the reprehensible acts of Charles [Emmanuel] and his associates. . . . It sends a powerful message to human rights violators around the world that, when we can, we will hold them fully accountable for their crimes."[16] Elise Keppler of Human Rights Watch, who cooperated with the Department of Justice in preparing the Emmanuel case, called the trial "necessary to demonstrate the U.S.'s commitment to apply laws prohibiting human rights violations committed abroad."[17] She later stated, "when terrible abuses have been committed, justice is critical, not just for the victims but also for rebuilding a society based on the rule of law."[18]

Despite the fanfare, however, the *Emmanuel* case should have been a fairly routine application of U.S. law to an American citizen – a signal of U.S. commitment to prosecuting human rights abuses – and not the impetus behind any notable development in American law. Nevertheless, the *Emmanuel* prosecution may prove an important vehicle for doctrinal consolidation. The Emmanuel defense claimed that the ETS "impermissibly expands the scope and authority of the federal government beyond constitutional parameters" because:

> (1) Congress lacked the authority to pass the ETS, especially since it exceeds the scope of the Convention it implements (prescriptive jurisdiction),
> (2) American courts may not apply the ETS to crimes committed overseas (adjudicative jurisdiction), and
> (3) the ETS violates the accused's constitutional rights.[19]

In addressing the defense's arguments, the court took two major steps: finding the Offences against the Law of Nations Clause as a second constitutional basis for the ETS, and describing torture as a *jus cogens* offence.[20]

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15 John Couwels, *Son of ex-Liberian leader sentenced to 97 years in prison*, CNN, Jan. 9, 2009, http://www.cnn.com/2009/CRIME/01/09/taylor.torture.sentencing/index.html.

16 Couwels, *supra* note 14.

17 Human Rights Watch, *Q & A: Charles 'Chuckie' Taylor, Jr.'s Trial in the United States for Torture Committed in Liberia*, Sept. 23, 2008, http://www.hrw.org/en/news/2008/09/23/q-charles-chuckie-taylor-jr-s-trial-united-states-torture-committed-liberia.

18 Human Rights Watch, *A Trial Sends a Message Around the World*, Dec. 24, 2008, http://www.hrw.org/en/news/2008/12/24/trial-sends-message-around-world.

19 Defendant's Motion to Dismiss the Indictment, and Memorandum of Law in Support Thereof, Based on the Unconstitutionality of 18 U.S.C. § 2340A, Both on its Face and as Applied to the Allegations of the Indictment, United States v. Emmanuel, No. 06-20758-CR-Altononga, 2007 WL 980550 at *6 (S.D. Fla. Mar. 2, 2007) [hereinafter Defendant's Motion to Dismiss Indictment]. The Emmanuel defense also asserted sovereign immunity, on the grounds that Emmanuel headed Liberia's Anti-Terrorist Unit during his father's presidency. The defense claimed the prosecution amounted to a U.S. government effort "to oversee, through the open-ended terms of federal criminal law – the internal and wholly domestic actions of a foreign government." *Id.*

20 United States v. Emmanuel, No. 06-20758-CR, 2007 WL 2002452 at *9 (S.D. Fla. July 5, 2007).

Taken together, these two steps enable future courts to link the international legal doctrine of *jus cogens* with the congressional lawmaking authority under the Constitution's Offences Clause. Linking *jus cogens* to the Offences Clause would "overcome any potential constitutional obstacles to the extraterritorial application of U.S. law to the perpetrators of 'universal' crimes under international law."[21]

The *Emmanuel* court's findings make possible a coherent, expansive, extraterritoriality doctrine. This would be a major doctrinal development enabling prosecutions in the "harder" atrocity cases, such as when a non-U.S. citizen perpetrator commits acts entirely abroad against other non-U.S. citizens. The hardest of these cases would be exercises of universal jurisdiction where the prohibition of conduct has "no obvious treaty basis," as is the case with MDLEA or the child soldier statute.[22] These prosecutions would need to rely solely on Offences Clause.[23] Thus, if adopted by future courts, the *Emmanuel* approach will dramatically expand the U.S. government's ability to prosecute human rights abuses abroad.

The first section of this article reviews the court's finding of dual constitutional bases for Congress's enactment of the ETS. The second section describes the court's analysis of Congress's ability to apply the ETS to conduct committed entirely outside the U.S. and evaluates the court's reasoning in light of prior precedent on the subject of extraterritorial criminal law. The third section explains how the court's findings overcome concerns about the individual's Due Process rights. The next section links these strands and argues that *Emmanuel* paves the way for future applications of the ETS against non-citizens and perhaps for jurisdiction to be imposed for other universally condemned crimes as well. The final section considers how this doctrinal innovation would impact America's national interest, particularly as the U.S. continues its resistance to the application of universal jurisdiction against its own citizens for their actions abroad.

I. Congress' Power to Enact the ETS

All statutes, including those regulating in the realm of foreign affairs, must be passed pursuant to a valid exercise of congressional power.[24] The Emmanuel court found two constitutional bases for the ETS: the Necessary and Proper

[21] Anthony J. Colangelo, *Constitutional Limits on Extraterritorial Jurisdiction: Terrorism and the Intersection of National and International Law*, 48 HARV. INT'L L.J. 121, 123 (2007).

[22] INTERNATIONAL COUNCIL ON HUMAN RIGHTS POLICY, HARD CASES: BRINGING HUMAN RIGHTS VIOLATORS TO JUSTICE ABROAD 38 (1999), *available at* http://www.ichrp.org/files/reports/5/201_report_en.pdf.

[23] Kontorovich, *supra* note 2, at 155.

[24] *See, e.g.*, Ex Parte Quirin, 317 U.S. 1, 25 (1942) ("Congress and the President, like the Courts, possess no power not derived from the Constitution."); *see also* Reid v. Covert, 354 U.S. 1, 18 (1957) ("It would be completely anomalous to say that a treaty need not comply with the Constitution when such an agreement can be overridden by a statute that must conform to that instrument."); *but see* US v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 318 (1936) (stating that the "investment of the federal government with the powers of external sovereignty did not depend upon affirmative grants of the Constitution").

Clause and the Offences against the Law of Nations Clause.[25] By including the Offences Clause as a second basis for the ETS, the court fashioned a broader textual basis from which Congress can project laws such as the ETS extraterritorially.

A. The Necessary and Proper Clause

The Necessary and Proper Clause allows Congress to enact legislation pursuant to the country's treaty obligations.[26] The *Emmanuel* court found the ETS valid under the Necessary and Proper Clause, passed as an adjunct to the Executive's Art. II Treaty Power.[27] The court noted that the ETS is intended to effectuate the CAT, and that Article V of the Convention specifically requires states to establish jurisdiction over offenders regardless of where their conduct occurred.[28] According to the court, treaties "can authorize Congress to deal with 'matters' with which otherwise 'Congress could not deal.'"[29] Validity under the Necessary and Proper Clause means that, at the very least, the ETS can claim extraterritorial jurisdiction over torture (as defined in the CAT) occurring in CAT signatory states.[30] The court's findings seem largely consistent with precedent, which suggests a strong presumption in favor of the validity of legislation passed pursuant to a treaty.[31]

i. A Broad View of Holland*'s Demarcation of the Treaty Power*

The Emmanuel court heavily cited *Missouri v. Holland* – the 1920 Supreme Court case containing some of the broadest language regarding Congress' power pursuant to treaties – in reaching its decision.[32] *Holland* is generally cited for the proposition that, so long as a treaty is valid, "there can be no dispute about the validity of the statute [passed pursuant to the treaty] under Article I, § 8, as a necessary and proper means to execute the powers of the government."[33] But

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25 *Emmanuel*, 2007 WL 2002452 at *6.

26 U.S. CONST. art. I, § 8, cl. 18 (granting Congress the power "to make all Laws which shall be necessary and proper for carrying into Execution . . . all other Powers vested by this Constitution in the Government of the United States, or in any Department of Officer thereof.").

27 *Emmanuel*, 2007 WL 2002452 at *6.

28 *Id.* at 3.

29 *Id.* at 6 (citing U.S. v. Lara, 541 U.S. 193, 201 (2004)).

30 Colangelo, *supra* note 21, at 152 ("[B]ecause the aim of the treaty is to prohibit the conduct in question within the territories of all the signatory states, Congress legitimately may extend the prohibition into the foreign territories of other states parties to the treaty, even absent any direct U.S. connection to the conduct.") (citing U.S. v. Yousef, 327 F.3d 56, 108-10).

31 *See* Asakura v. City of Seattle, 265 U.S. 332, 341 (1924) (citing De Geofroy v. Riggs, 133 U.S. 258, 266 (1890)) ("The treaty-making power of the United States is not limited by any express provision of the Constitution, and, though it does not extend 'so far as to authorize what the Constitution forbids,' it does extend to all proper subjects of negotiation between our government and other nations.").

32 *Emmanuel*, 2007 WL 2002452 at *6; *see also* Missouri v. Holland, 252 U.S. 416, 432 (1920).

33 *See, e.g.*, Edward T. Swaine, *Putting Missouri v. Holland on the Map*, 73 MO. L. REV. 1007, 1010 (2008); Nicholas Quinn Rosenkranz, *Executing the Treaty Power*, 118 HARV. L. REV. 1867, 1868 (2005) (acknowledging that "the canonical *Missouri v. Holland* holds that Congress has power to enact legisla-

Holland could also be construed to limit the application of the ETS extraterritorially.[34]

Holland's precedent is limited to matters of "the sharpest exigency for the national well-being" implicating "national interest[s] of very nearly the first magnitude" which "can be protected only by national action in concert with that of another power."[35] Thus, a narrow reading of *Holland* could be interpreted to mean that, as a practical matter, the U.S. does not possess an interest "of the first magnitude" in preventing torture committed against Liberians in Liberia.[36]

The U.S. may, though, have an interest in complying with (or at least in being viewed internationally as complying with) the CAT. Supreme court jurisprudence provides little guidance as to whether that type of second-order effect is sufficient to constitute a matter of the "sharpest exigency" under *Holland.* In an analogous context, the Supreme Court hinted that compliance with international law could be recognized as establishing the compelling interest required to vindicate content restrictions in the First Amendment context.[37] Given the volume of materials discussing *Holland*'s relevance to human rights treaties, the dearth of authority on this point comes as something of a surprise.

The *Emmanuel* court seems to have made the plausible inference that such a second-order effect would be sufficient. This might be because, in another passage in *Holland,* Justice Holmes also argued for the necessity of the treaty because it was "not sufficient to rely on the states" to protect migratory bird species.[38] If this passage is construed broadly to refer to the "insufficiency" of alternative enforcement methods, rather than the insufficiency of state efforts without federal intervention, Liberia's inability to prosecute Emmanuel may further bolster the argument for the ETS under the Necessary and Proper Clause.

tion to implement a treaty, even if it would lack the power to enact the same legislation absent the treaty" but arguing that it was wrongly decided).

[34] 252 U.S. at 432.

[35] *Id.* at 433-34.

[36] Due to the difficulty of determining whether broader humanitarian concerns are indeed of "the first magnitude," and the separation of powers consequences for such decisions, some scholars hold the view that human rights treaties are analytically distinct from more traditional bilateral treaties, such as those involving joint military, environmental or economic interests, and that the constitutionality of human rights treaties should therefore be evaluated differently. *See, e.g.*, Brad R. Roth, *Understanding the "Understanding": Federalism Constraints on Human Rights Implementation*, 47 WAYNE L. REV. 891, 899-900 (2001) ("The real question is . . . under what circumstances a Congressional interpretation of human rights treaty obligations can serve to extend federal authority over matters otherwise reserved to the states."); Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390, 402 (1998) ("There are numerous instances in which Congress might use human rights treaties to overcome federalism restraints on its lawmaking power.").

[37] Peter J. Spiro, *Treaties, International Law and Constitutional Rights*, 55 STAN. L. REV. 1999, 2019-20 (1988) (citing Boos v. Berry, 485 U.S. 312, 324 (1988) (suggesting but not deciding that an interest recognized by international law could give rise to a compelling interest in support of a speech restriction, while striking down a measure limiting protests within range of foreign embassies in Washington on the ground that the speech restriction was not narrowly tailored)).

[38] 252 U.S. at 435.

ii. Extending the ETS Beyond the CAT

The defense also argued that the ETS cannot rely solely on the Necessary and Proper Clause because the definition of "torture" in the ETS is broader than that in the CAT, encompassing conduct regardless of whether it was "inflicted for purposes of obtaining a confession, for punishment, or for intimidation or coercion."[39] The court rejected this argument, and similarly dismissed the argument that Emmanuel cannot be found guilty of torture committed during Liberia's civil war since the CAT is not intended to apply in times of conflict.[40]

In allowing the ETS to apply more broadly, the *Emmanuel* court followed a long line of precedent stretching back 190 years to the Supreme Court's opinion in *McCulloch v. Maryland.* Describing the test for legislation implementing treaties, Justice Marshall wrote in that case: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."[41] The courts have since construed *McCullough*'s language to permit implementing legislation to regulate more broadly than its underlying treaty so long as the legislation bears some rational relationship to a permissible constitutional end.[42] The *Emmanuel* court further asserted that this decision makes practical sense because Congress should be afforded some measure of flexibility in carrying out its delegated foreign affairs responsibilities.[43]

More controversially, the *Emmanuel* court stated a second (albeit, perhaps *dicta*) basis for allowing the ETS to extend to cases beyond that covered by the

39 The ETS incorporates into domestic law the CAT, not as it is understood internationally, but as it is understood according to the reservations and understandings—including the statutory definition of torture—under which it garnered the consent of the Senate. *Cf.* Convention Against Torture, *supra* note 6, art. 1 (requiring that torture be committed "for such purposes as obtaining a confession, for punishment, or for intimidation or coercion"), *with* Extraterritorial Torture Statute, *supra* note 4 (imposing no requirement that torture be committed for any functional purpose).

40 In its Reply Brief, the defense quoted a U.S. government official for the proposition that the CAT does not apply in times of armed conflict. As a doctrinal matter, the opinion of this U.S. official would only bear on this issue if the opinion reasonably sheds light on Congress' intent and understanding of the scope of the CAT in passing the ETS. Thus, the court reached the right result on this question. Even if the CAT itself does not apply during situations of armed conflict, Congress can certainly pass a statute pursuant to that treaty that exceeds its scope and covers armed conflicts as well. It is interesting to note, though, the ways in which the court tried to avoid political entanglement on such questions. For instance, here, the court somewhat puzzlingly said it could not consider the claim because the facts underlying the argument had not been included in the initial indictment. *See Emmanuel*, 2007 WL 2002452 at *9.

41 McCulloch v. Maryland, 17 U.S. 316, 421 (1819).

42 *See* United States v. Lue, 134 F.3d 79, 84 (2d Cir. 1998) (finding that the "plainly adapted" standard of *McCullough* "requires that the effectuating legislation bear a rational relationship to a permissible constitutional end"). Though largely correct as a matter of legal precedent, the use of the "rational relationship" standard for finding congressional authority under the Necessary and Proper Clause warrants further consideration. By covering a broader spectrum of conduct than the CAT itself, the ETS starts to resemble prophylactic legislation from the 14th Amendment, § 5, context. Indeed, the language of congressional "flexibility" is reminiscent of that context as well. If this perspective were adopted in evaluating instances when Congress exceeded the scope of the treaties under which they passed legislation, that legislation would then be subject to a heightened standard requiring the measure to be "congruent" and "proportional"—rather than just rationally related—to its goal.

43 *Emmanuel*, 2007 WL 2002452 at *7.

CAT. The court states that the ETS's broader definition of torture "is consistent with the international community's near universal condemnation of torture," and with "repeated calls for the international community to be more effective in the struggle against torture."[44] Critics might contend that, if the international community did support a broader definition of torture, the definition should be found in the CAT itself (or some progeny thereof). Most likely, the court relies on the development of the definition of "torture" in finding a "rational relationship" and justifying the ETS's reach beyond the CAT. In doing this, the court probably determined that the international community's view of torture has evolved in the roughly twenty-five years since the CAT was opened for signature."[45]

Aside from that more debatable finding, the Necessary and Proper Clause provides a firm basis for the ETS. It affords future courts with a developed body of jurisprudence from which to draw in making the vast majority of ETS decisions, extending its reach at a minimum to the conduct covered in the CAT and to the CAT's 146 signatory countries. But the Necessary and Proper Clause alone does not provide a satisfactory blueprint for other exercises of extraterritorial jurisdiction, particularly for the harder questions that emerge when the prohibited conduct occurs in a foreign state not party to the underlying treaty.

B. The Offences Against the Law of Nations Clause

The Offences Clause represents another means by which Congress can claim prescriptive jurisdiction abroad, and can permit extraterritorial jurisdiction beyond that provided by the Necessary and Proper Clause.[46] Though "the subject of little commentary and judicial treatment,"[47] the Offence Clause is most commonly viewed as vesting in Congress the power "to either enact regulatory statutes governing the conduct of individual persons who violate international law, or to constitute tribunals to adjudicate the conduct of such individuals."[48] Significantly for extraterritoriality doctrine, "[n]othing on the face of the Offences

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[44] *Id.* at 8.

[45] The notion that customary international law surrounding torture has evolved, expanding to encompass a wider set of conduct, in the last quarter century seems reasonable. *See* Allison Marston Danner & Jenny S. Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law*, 93 CAL. L. REV. 75, 134 (2005) ("At the ICTY and ICTR, several trial chambers have adopted this definition but have also unilaterally expanded its list of prohibited purposes."). Further, the statutes of the International Criminal Tribunals for the Former Yugoslavia and Rwanda, as well as the ICC's Rome Statute, affirmatively list torture as a crime against humanity. Statute of the International Criminal Tribunal for the Former Yugoslavia, S.C. Res. 827, art. 5, U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/RES/827 (May 25, 1993); Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955, art. 3, U.N. SCOR, 49th Sess., 3453rd mtg., U.N. Doc. S/RES/955 (Nov. 8, 1994); Rome Statute of the International Criminal Court, art. 7, U.N. Doc. A/CONF.183/9 (July 17, 1998).

[46] U.S. CONST. art. I, § 8, cl. 10 (granting Congress the power to "define and punish . . . offences against the Law of Nations.").

[47] Colangelo, *supra* note 21, at 137.

[48] J. Andrew Kent, *Congress' Under-appreciated Power to Define and Punish Offenses Against the Law of Nations*, 85 TEX. L. REV. 843, 849 (acknowledging that the Offences Clause is a tool for punishing individuals, but also arguing that the clause empowers Congress to punish foreign states who violate international law).

Clause, or that might be built into it judicially, suggests extraterritorial [sic] restrictions on Congress'[s] lawmaking authority."[49]

Congress can legislate universally under the Offences Clause "only when international law has made punishment of the regulated conduct universally cognizable" through the general consent of nations.[50] By hinging on universal cognizability, the Offences Clause relies on customary international law[51] – composed of both treaties *and* state practice – in delineating the bounds of Congressional lawmaking power. The clause can therefore allow for a wider claim of prescriptive jurisdiction abroad than the Necessary and Proper Clause alone. To find this, a judge must "undertake a rigorous and bona fide inquiry into the status of customary law" and find that international norms have, since the signing of the CAT, evolved in such a way as to permit that further reach.[52] The most plausible exposition of the Offences Clause, therefore, "suggests that Congress can fill in interstitial questions or resolve particular disputes and uncertainties about the elements of an offense, but it cannot punish primary conduct that is not an international crime."[53] In *Emmanuel*, if the ETS exceeds some rational relationship to the CAT, applying to states not party to the CAT or to a much wider set of conduct than that covered in the CAT, the Offences Clause can form the ETS's Constitutional basis.[54]

This approach to the Offences Clause accords with the international notions of universal jurisdiction, in which universal prescriptive jurisdiction (authorizing all states to subject an offender to judicial process) depends upon the definition of the crime as contained in customary international law.[55] Currently, this category of crimes includes piracy, slavery, genocide, crimes against humanity, war crimes, and "perhaps certain acts of terrorism," such as the hijacking and bombing of aircraft.[56] Though this process is uncertain in its direction and pace, the

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[49] Colangelo, *supra* note 21, at 137; *see* H.R. Rep. No. 48-1329, at 1-2 (1884) ("[T]he Constitution vests in Congress power to define and punish offences against the law of nations, everything . . . which is contrary to the integrity of the foreign country in its essential sovereignty, or which would disturb peace and security."); *see also* Curtis A. Bradley, *Universal Jurisdiction and U.S. Law*, 2001 U. Chi. Legal F. 323, 335 (2001) ("Although the founders may not have envisioned that this power would be used to regulate conduct on foreign soil, I am not aware of any evidence showing that they meant to disallow such power if and when international law evolved to allow for its exercise.").

[50] Kontorovich, *supra* note 2, at 151 (arguing for two possible interpretations of the Offences Clause, namely, that "Congress can legislate only when international law has made punishment of the regulated conduct universally cognizable" or, most narrowly, that Congress' power under the clause is limited solely to piracy).

[51] *Id.* at 203.

[52] Anthony J. Colangelo, *The Legal Limits of Universal Jurisdiction*, 47 Va. J. Int'l L. 149, 180 (2006).

[53] Eugene Kontorovich, *Beyond the Article I Horizon: Congress' Enumerated Powers and Universal Jurisdiction over Drug Crimes*, 93 Minn. L. Rev. 1191, 1222 (2009).

[54] *Id.* at 1224 ("The Offenses Clause is implicated when there is no treaty basis for the law, and so one must determine whether Congress's offense roughly corresponds to CIL."); Restatement (Third) of Foreign Relations Law § 404 (1987) ("International agreements have provided for general jurisdiction for additional offenses. . . . Such agreements are effective only among the parties, unless customary law comes to accept these offenses as subject to universal jurisdiction.").

[55] Colangelo, *supra* note 21, at 158.

[56] *Id.* at 151.

category may also expand to include "human sex trafficking, nuclear arms smuggling, and perhaps other characteristically transnational offenses."[57]

Emmanuel's defense, surely aware of the Offence Clause's potentially expansive nature, objected vigorously to the clause as a basis for the ETS.[58] Calling its application to the ETS "unprecedented and contrary to the context and ordinary meaning of the terms used in the clause," the defense argued that the actions of foreign governments within their own jurisdiction are beyond the scope of the Offences Clause and that the clause only covers offences taking place within the United States or on the high seas.[59] The issue, then, is whether, under the clause, torture committed in another country constitutes an offence against the Law of Nations.[60]

i. Torture as an Offence Under the Law of Nations

In its admittedly limited treatment of the clause, the Supreme Court suggests that the "Law of Nations" encompasses "an evolving body of norms against which congressional action is measured at the time Congress legislates."[61] For example, the Court found in the *Arjona* case of 1887 that, although currency counterfeiting was not an offense against the law of nations at the time of the Founding, developments in international finance required that the law of nations be "extended to the protection of this more recent custom among bankers of dealing in foreign securities."[62] The *Arjona* standard for recognizing an offence is liberal: "If the thing made punishable is one which the United States are required by their international obligations to use due diligence to prevent, it is an offence against the law of nations."[63]

More recently, the Court in *Sosa v. Alvarez-Machain* interpreted the Alien Tort Statute [ATS] to allow claims based on the present-day law of nations, though it required that those claims possess a specificity equal to that of claims recognized when the statute was passed in 1789.[64] In particular, the majority in *Sosa* stated that "any claim based on the present-day law of nations" must "rest on a norm of international character accepted by the civilized world and defined with specificity comparable to the features of the 18th century paradigms."[65]

If applied beyond the ATS, the Court's approach in *Sosa* could limit *Arjona*'s deferential view of the Offences Clause, restricting Congress' power to define offenses only to those already exhibiting a "specificity comparable to the features

[57] *Id.*

[58] Defendant's Motion to Dismiss Indictment at 3, *Emmanuel*, 2007 WL 980550.

[59] *Id.*

[60] *Id.*

[61] Colangelo, *supra* note 21, at 138.

[62] United States v. Arjona, 120 U.S. 479, 486 (1887).

[63] *Id.* at 488.

[64] 542 U.S. 692, 724 (2004) ("The jurisdictional grant is best read as having been enacted on the understanding that the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time.").

[65] *Id.* at 725.

of 18th century paradigms."[66] This heightened standard would make it much more difficult for recent human rights statutes to pass constitutional muster. It is not at all clear, though, that this will happen. In *Sosa*, the Court described the law of nations as "a body of judge-made law regulating the conduct of individuals situated outside domestic boundaries and consequently carrying an international savor."[67] The notion of "judge-made" causes of action surely raised separation-of-powers concerns among some conservatives on the Court.[68] But laws passed pursuant to the Offences Clause do not raise this separation of powers concern. They represent instances when a political department creates a right of action pertaining to a specific determination of the substantive law on certain conduct.[69] Such a step by the legislature is also arguably less problematic from the comity perspective.[70] For instance, Anthony Colangelo argues that, "if the judicial competence to recognize offenses against the law of nations comprehends an evolving notion of that law in the 'cautious' context of the Alien Tort Statute, Congress'[s] legislative power to do the same in enacting anti-terrorism laws must be at least equally as large."[71] If Colangelo is correct, Congress would have an equally expansive power to define international crimes in other realms, including crimes grounded in international human rights law.

Despite the liberality of the *Arjona* standard, congressional power under the Offences Clause is not unlimited. Congress may not simply manufacture certain offenses, labeling them "offences against the law of nations."[72] Rather, Congress has a "second-order authority to assign more definitional certainty to those offenses already existing under the law of nations at the time it legislated."[73] Thus, in *United States v. Furlong*, the Court rebuffed Congress's attempt to label a murder, committed by a foreigner upon foreigners aboard a foreign vessel on the

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66 *Id.*

67 *Id.* at 715.

68 *Id.* at 739 [Scalia, J., concurring in part and concurring in judgment] ("There is not much that I would add to the Court's detailed opinion, and only one thing that I would subtract: its reservation of a discretionary power in the Federal Judiciary to create causes of action for the enforcement of international-law-based norms. . . . [T]he judicial lawmaking role [the majority opinion] invites would commit the Federal Judiciary to a task it is neither authorized nor suited to perform.").

69 Mark K. Moller, *Old Puzzles, Puzzling Answers: The Alien Tort Statute and Federal Common Law in Sosa v. Alvarez-Machain*, CATO SUP. CT. REV. 2004, 209, 223-26 (arguing that "textual evidence suggests *Congress* has the primary power to incorporate international law into our domestic law"); *see also* James G. Vanzant, *No Crime Without Law: War Crimes, Material Support for Terrorism, and the Ex Post Facto Principle*, 59 DEPAUL L. REV. 1053, 1074 (2010).

70 *See generally Alvarez-Machain*, 542 U.S. at 761 (2004) (Breyer, J., concurring) (suggesting that the Court should consider whether asserting jurisdiction would be consistent with the principle of comity); Banco Nacional v. Sabbatino, 376 U.S. 398, 416 (1964) (citing Underhill v. Hernandez, 168 U.S. 250, 252 (1897)) ("the courts of one country will not sit in judgment on the acts of the government of another, done within its territory."); U.S. v. Belmont, 301 U.S. 324, 328 (1937) (citing Oetjen v. Cent. Leather Co., 246 U.S. 297, 303 (1918)) (finding the conduct of foreign relations committed to the political departments, and stating "that the conduct of one independent government cannot successfully be questioned in the courts of another").

71 Colangelo, *supra* note 21, at 138.

72 United States v. Arjona, 120 U.S. 479, 488 (1887) ("[W]hether the offence as defined is an offence against the law of nations depends on the thing done, not on any declaration to that effect by Congress.").

73 Colangelo, *supra* note 21, at 141.

high seas, as "piracy."[74] As the Court put it, "If by calling murder 'piracy,' it might assert a jurisdiction over that offence committed by a foreigner in a foreign vessel, what offence might not be brought within their power by the same device?"[75]

More infamously, in the case of *The Antelope*, Justice Marshall concluded that slaves captured from Portuguese and Spanish ships must be returned to the slave-holding nations, despite Congress's prohibition of the slave trade.[76] Though Chief Justice Marshall, writing for a unanimous Court, "did not clearly disentangle the international and constitutional strands" of his argument,"[77] he asserted that a sufficient consensus among civilized nations had not yet emerged that would allow slave trading to be considered an offense against the law of nations.[78]

Within these limits though, Congress still possesses "substantial flexibility" in deciding whether to regulate an activity under the Offences Clause.[79] In a recent case considering Congress's ability to label terrorism as an offence against the law of nations, a federal court required only that "some members of the international community" recognize the conduct as such.[80] This liberal standard corresponds to the sentiment expressed by the *Emmanuel* court in its analysis of the Necessary and Proper Clause that Congress should have some flexibility in this realm.[81]

If courts approach atrocity cases in the same narrow way the *Sosa* Court approached the ATS, the statutes would be evaluated according to the paradigms of international law at the time the laws were passed. For the ETS, passed in 1994,[82] this is a particularly favorable time at which to evaluate the state of international law regarding torture. It lies after roughly eighty countries had already adopted the CAT but before any international consensus was arguably ruptured by the post-9/11 emphasis on the necessity of torture (or, at least, techniques

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[74] United States v. Furlong, 18 U.S. 184, 184-85 (1820).

[75] *Id.* at 198.

[76] 23 U.S. 66, 124 (1825).

[77] Kontorovich, *supra* note 2, at 198.

[78] 23 U.S. at 122 ("A right, then, which is vested in all by the consent of all, can be devested only by consent.").

[79] Bradley, *supra* note 36, at 335 n.51.

[80] United States v. Bin Laden, 92 F. Supp. 2d 189, 220-21 (S.D.N.Y. 2000) ("[E]ven assuming that the acts [of terrorism] . . . are not *widely* regarded as violations of international law, it does not necessarily follow that these provisions exceed Congress's authority under Clause 10. Clause 10 does not merely give Congress the authority to punish offenses against the law of nations; it also gives Congress the power to "define" such offenses. Hence, provided that the acts in question are recognized by at least some members of the international community as being offenses against the law of nations, Congress arguably has the power to criminalize these acts pursuant to its power *to define* offenses against the law of nations.").

[81] *See* Colangelo, *supra* note 21, at 142 ("We might assume nonetheless that Congress, representing the United States' sovereign lawmaking body within the international system, has at least some leeway to aid in the development of the category of international offenses by pushing the envelope beyond where it already is.").

[82] 18 U.S.C.A. § 2340 (1994); *see also* 1994 U.S. Code Cong. and Adm. News at 302 (describing Senate Report No. 103-107 and House Conference Report No. 103-482).

ence in the United States.[86] The *Emmanuel* case stretches the doctrine in a way that will make these tough cases easier to prosecute in the future.

Citizenship is a well-established basis for exerting jurisdiction over an individual accused of committing a crime abroad. As early as 1808, the Supreme Court virtually assumed as much, stating "It is conceded that the legislation of every country is territorial; that beyond its own territory, it can only affect its own subjects or citizens."[87] The Court confirmed this view in *United States v. Bowman*,[88] a case described as marking the "emergence of a modern theory of extraterritorial jurisdiction."[89] Since *Bowman*, jurisdiction has been imposed over U.S. nationals for committing extraterritorial sexual exploitation,[90] assisting in the illegal immigration of alien contract laborers,[91] and even for a murder committed on an uninhabited guano island.[92] Thus, alongside territorial jurisdiction, nationality jurisdiction of the type applied in the *Emmanuel* case remains on the firmest of doctrinal footing.[93]

The court found nationality alone sufficient to apply the ETS against Emmanuel.[94] Other bases for applying criminal laws abroad did not seem to apply. Though territoriality jurisdiction has been broadened to apply almost prophylactically in contexts such as drug trafficking, where it has been used even where a defendant only intended to violate U.S. law or enter U.S. territory,[95] it would not

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86 18 U.S.C.A. 2340A(b)(2).

87 Rose v. Himley, 8 U.S. 241, 279 (1808).

88 United States v. Bowman, 260 U.S. 94, 102 (1922) (allowing jurisdiction over fraudulent acts committed by three U.S. citizens on the high seas). The Court in *Bowman* stated that "[t]he three defendants who were found in New York were citizens of the United States . . . Clearly it is no offense to the dignity or right of sovereignty of Brazil to hold [the defendants] for this crime against the government to which they owe allegiance." *Id.* Interestingly, *Bowman* itself seems to suggest that the state must also possess a protective motive in order to claim jurisdiction over a national for crimes committed abroad. The Court refers to "the right of the government to defend itself against obstruction, or fraud wherever perpetuated" and later finds the defendants "subject to such laws as [the United States] might pass to protect itself and its property." *Id.* Such a requirement would, of course, have made claiming jurisdiction over Emmanuel more difficult. Regardless, subsequent precedent has since indisputably extended nationality jurisdiction beyond merely protective statutes; *see also* Blackmer v. United States, 284 U.S. 421, 437-38 (1932); Skiriotes v. Florida, 313 U.S. 69, 73.

89 Christopher Blakesley & Dan Stigall, *The Myopia of U.S. v. Martinelli: Extraterritorial Jurisdiction in the 21st Century*, 39 GEO. WASH. INT'L L. REV. 1, 11 (2007).

90 United States v. Clark, 435 F.3d 1100, 1106-07 (9th Cir. 2006) (upholding a statute making it illegal for U.S. citizens to travel to a foreign country and engage in commercial sex acts with minors).

91 United States v. Craig, 28 F. 795, 797 (E.D. Mich. 1886).

92 Jones v. United States, 137 U.S. 202, 224 (1890).

93 *See* Nieman v. Dryclean U.S.A. Franchise Co., Inc., 178 F.3d 1126, 1129 (11th Cir. 1999) ("[I]t is undisputed that Congress has the power to regulate the extraterritorial acts of U.S. citizens."); *see also* United States v. Harvey, 2 F.3d 1318, 1329 (3d Cir. 1993) ("No tenet of international law prohibits Congress from punishing the wrongful conduct of citizens, even if some of that conduct occurs abroad.").

94 *Emmanuel*, 2007 WL 2002452 at *3.

95 *See, e.g.*, United States v. DeWeese, 632 F.2d 1267, 1271-72 (5th Cir. 1980) (upholding the conviction of an alleged drug trafficker after finding sufficient a ship's navigational charts and prior course as evidence establishing the United States as his intended destination); *but see* Hartford Fire Ins. Co. v. California, 509 U.S. 764, 820 (1993) (Scalia, J., dissenting) (arguing in a transnational antitrust case that the majority, in concluding that concerns about adjudicative jurisdiction would only exist where "compliance with United States law would constitute a *violation* of another country's law," is a "breathtakingly

be appropriate given that Emmanuel's actions occurred entirely in Liberia. Nor would the effects doctrine likely apply since acts of torture in Liberia cannot be said to have had any impact within the United States.[96] Nor do the protective[97] or passive personality[98] principles apply since the torture conducted in Liberia posed no threat to the United States and the victims were not U.S. citizens. Last, and perhaps because it did not need to, the court expressly disclaims that it finds universal jurisdiction as a basis for jurisdiction in the case.[99]

Yet, despite claiming not to find universal jurisdiction, the court seems to base its work on an assumption that universal jurisdiction applies. With the exception of universal jurisdiction, all jurisdictional bases are subject to a "reasonableness" standard of application.[100] As it was put in a recent Foreign Commerce Clause case: "Even if principles of international law serve as bases for extraterritorial application of the law, international law also requires that such application of the law be reasonable."[101] Though the jurisdictional basis in *Emmanuel* is indisputa-

broad proposition, which contradicts [precedent], will bring the Sherman Act and other laws into sharp and unnecessary conflict with the legitimate interests of other countries-particularly our closest trading partners."); *see generally* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402(1)(c) (1987) (stating that "a state has jurisdiction to prescribe law with respect to conduct outside its territory that has or is intended to have substantial effect within its territory").

96 Official torture has been said to entail a "complete disregard for the will of the people" that "undermines the very foundations and principles of the current world order." Winston P. Nagan & Lucie Atkins, *The International Law of Torture: From Universal Proscription to Effective Application and Enforcement*, 14 HARV. HUM. RTS. J. 87, 90 (2001). From that consequentialist perspective, any instance of official torture impacts the United States in some way. Nonetheless, the links between torture committed in Liberia and downstream effects felt in the United States would be far too remote for legal purposes.

97 The protective principle allows jurisdiction over conduct posing a threat to the interests or functions of the state, often those related to sovereignty or security. "Its purpose is to safeguard the political independence of the state exercising jurisdiction but not to serve as a means of enforcing the state's policy abroad." Recently, it has been used as a basis for jurisdiction in terrorism cases. Puttler Adelheid, *Extraterritorial Application of Criminal Law: Jurisdiction to Prosecute Drug Traffic Conducted by Aliens Abroad, in* EXTRATERRITORIAL JURISDICTION IN THEORY AND PRACTICE 108 (Karl M. Meessen ed., 1996); *see, e.g.*, United States v. Plummer, 221 F.3d 1298, 1305 (11th Cir. 2000) ("finding jurisdiction over "foreign offenses that cause domestic harm," such as importing drugs); *see also* United States v. Pizzarusso, 388 F.2d 8, (2d. Cir. 1968) (applying protective principle to allow jurisdiction over individual making false statements to a U.S. consular official in Canada); United States v. Yunis, 924 F.2d 1086,1091-92 (D.C. Cir. 1991) (affirming the convictions of an alleged airplane saboteur because two victims were U.S. citizens, but also mentioning that aircraft piracy and hijacking are regarded as among the offenses that the international community condemns under the universality principle); United States v. Layton, 509 F. Supp. 212, 216 (N.D. Cal. 1981) (applying protective principle to allow jurisdiction over those who attacked Congressional fact-finding delegation at Jonestown, Guyana).

98 The passive personality principle applies when the victim is a national of the state asserting jurisdiction. *See, e.g.*, United States v. Neil, 312 F.3d 419, 422-23 (9th Cir. 2002) (upholding, under the passive personality principle, the conviction of a foreign cruise ship employee for engaging in sexual conduct with an American minor while the ship was in international waters).

99 *Emmanuel*, 2007 WL 2002452 at *15. Universal jurisdiction exerts jurisdiction solely on the basis of "the nature of the crime, without regard to where the crime was committed, the nationality of the alleged or convicted perpetrator, the nationality of the victim, or any other connection to the state exercising such jurisdiction." THE PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION, para. 1 (2001), *available at* http://lapa.princeton.edu/hosteddocs/unive_jur.pdf.

100 Colangelo, *supra* note 21, at 130.

101 *E.g.*, United States v. Clark, 315 F. Supp. 2d 1127, 1132 (W.D. Wash. 2004) (undertaking reasonableness inquiry in upholding conviction of U.S. citizen in foreign commerce, stating "Even if principles of international law serve as bases for extraterritorial application of a law, international law also requires

bly subject to this reasonableness requirement, the court does not even address the question.[102]

In part, the court did not address the reasonableness requirement because Congress so clearly evinced an intent that the ETS apply extraterritorially.[103] But this intent would not alone have dispatched with the reasonableness question since, after a court determines that Congress intended a statute to apply extraterritorially, it must still address whether the defendant's specific conduct falls within Congress' intent.[104]

More significantly, the court engages in an elision of sorts, the type of which often drives doctrinal innovation. At this stage in its analysis, the court has already described torture as a *jus cogens* offence and established the Offences Clause as a constitutional basis for Congress' power to enact the statute.[105] By glossing over the reasonableness requirement, which does not apply for offences subject to universal jurisdiction, the Emmanuel court seems to suggest that universality can be a basis for jurisdiction in future ETS, and perhaps other human rights-based, cases. Thus, even under a conservative approach viewing the propriety of exercising universal jurisdiction as exclusively determined by Congress, the Emmanuel court's opinion can be viewed as creating an important precedent – or at least the opportunity – for future U.S. usage of universal jurisdiction.[106]

III. Due Process under the ETS: An Opportunity Born

Due process interests, embodied in the Fifth Amendment, do not restrict Congress's authority to make and project law abroad, but "act instead to shield the individual accused from the application of an otherwise constitutional enact-

that such application of the law be reasonable."); *see generally* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 403 (1987).

[102] *Emmanuel*, 2007 WL 2002452 at *11.

[103] Though the defense disputed this point, the text of the statute itself—applying to offences "outside the United States"—and the fact that the law was passed pursuant to a treaty requiring states to combat torture wherever it takes place, leave little doubt that Congress intended § 2340 to apply extraterritorially. Courts will enforce statutes intended by Congress to apply extraterritorially, even where the exercise of jurisdiction conflicts with customary international law. *See, e.g., Yunis*, 924 F.2d at 1091 ("[O]ur duty is to enforce the Constitution, laws and treaties of the United States, not to conform the law of the land to norms of customary international law."); United States v. Yousef, 327 F.3d 56, 86 (2d Cir. 2003) ("In determining whether Congress intended a federal statute to apply to overseas conduct, an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains. Nonetheless, in fashioning the reach of our criminal law, Congress is not bound by international law. If it chooses to do so, it may legislate with respect to conduct outside the United States in excess of the limits posed by international law.").

[104] *See* F. Hoffman-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 165-68 (2004). The *Emmanuel* court does not seem to have engaged in an *Empagran*-style analysis of whether it is reasonable, to paraphrase *Empagran*, to apply "this law to conduct that is significantly foreign insofar as that conduct causes independent foreign harm and that foreign harm alone gives rise to the" action. *Id.* at 167.

[105] *Emmanuel*, 2007 WL 2002452 at *9.

[106] Bradley, *supra* note 36, at 333.

ment."[107] The Due Process analysis in the extraterritorial context parallels the 14th Amendment's choice of law doctrine, and generally requires that there be a sufficient nexus between the defendant and the United States so that application of the law would not be "arbitrary or fundamentally unfair."[108]

In *Emmanuel*, the Defendant's nationality provided a sufficient nexus to fulfill the constitutional requirements of Due Process.[109] But establishing adjudicative jurisdiction in future human rights abuse cases may not prove so simple.[110] It is in the Due Process context, then, where the *Emmanuel* court's seemingly superfluous intermediate conclusions – its promulgation of the Offences Clause as a second basis for the ETS and its description of torture as *jus cogens* – hold their real value for future atrocity cases.

To the extent that the proscription of certain conduct is *jus cogens* and a defendant's actions fall squarely within the bounds of the international community's understanding of what constitutes that conduct, the defendant can be said to be on notice for Due Process purposes:"[O]n notice not only of the illegality of his conduct and the governing law, but also that he is subject to the adjudicative jurisdiction of all states' courts."[111] For this approach to hold, "the offense must in fact be universal, and the U.S. law must reflect faithfully the international prohibition – that is, it must embody the substantive definition of the crime as prescribed by international law."[112] Still, while other federal courts are moving in this direction for cases involving stateless vessels,[113] applying universality

[107] Colangelo, *supra* note 21, at 136; *see also* Boos v. Berry, 485 U.S. 312, 324 (1988) (finding that Congressional efforts to implement treaty obligations remain subject to individual rights provisions of the Bill of Rights).

[108] The Eleventh Circuit, whose precedent controls in the Southern District of Florida where the *Emmanuel* court sat, applies the less stringent "notice test" when deciding whether a particular extraterritorial application of a statute conforms to Due Process. Nonetheless, the *Emmanuel* court applied the more stringent "nexus test" used by the Ninth and Second Circuits. The nexus test requires a territorial nexus between the proscribed conduct and the defendant, while the notice test only requires that the defendant had notice that his conduct was illegal. *See* Brian A. Lichter, *The Offences Clause, Due Process, and the Extraterritorial Reach of Federal Criminal Law in Narco-terrorism Prosecutions*, 103 Nw. U. L. Rev. 1929, 1941 (2009).

[109] *Emmanuel*, WL 2002452 at *11 (citing United States v. Clark, 435 F.3d 1100, 1108 (9th Cir. 2006) (stating "the longstanding principle that citizenship alone is sufficient to satisfy Due Process concerns still has force.")).

[110] Colangelo, *supra* note 21, at 164-65 (citing Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 426 (2003)) ("Even the defendant's voluntary presence or residence at some later point in the United States would not create sufficient contacts to allow the application of U.S. law to conduct that otherwise had no U.S. nexus.").

[111] *Id.* at 165 n.262. *Cf.* Flatow v. The Islamic Republic of Iran, 999 F. Supp. 1, 14 (D.D.C. 1998) ("As international terrorism is subject to universal jurisdiction, Defendants had adequate notice that their actions were wrongful and susceptible to adjudication in the United States.").

[112] Colangelo, *supra* note 21, at 125.

[113] *See, e.g.*, United States v. Martinez-Hidalgo, 993 F.2d 1052 (3d Cir. 1993) (holding that the Maritime Drug Law Enforcement Act meets Fifth Amendment Due Process requirements when applied to a stateless vessel, since the crime of drug smuggling is "universal in nature"); United States v. Caicedo, 47 F.3d 370, 372 (9th Cir. 1995) (finding that Due Process was met for a stateless vessel); United States v. Vargas-Medina, 203 Fed.Appx. 298 (11th Cir. 2006); *see also* 46 U.S.C. 70501 (West 2008) ("trafficking in controlled substances aboard vessels is a serious international problem and is universally condemned").

principles to an individual for offenses committed on foreign soil would surpass these previous applications in the scope of conduct over which it potentially allows Congress to exert legislative control.

The *Emmanuel* court's review of the ETS's dual constitutional bases, along with its description of torture as a *jus cogens* offense, ensures that these Due Process requirements are securely met. In short, this incorporation of international law into the Fifth Amendment Due Process analysis has the potential to greatly expand the United States' ability to extend its laws to conduct occurring outside U.S. territory.[114] Though the *Emmanuel* court did not need to go that far itself, it has provided the doctrinal material for future courts who decide to take this groundbreaking step.

IV. A Pause to Consider Whether We Ought To: Possible Consequences of U.S. Exercise of Universal Jurisdiction In Criminal Cases

Extraterritoriality doctrine, as consolidated by the *Emmanuel* court, seems poised to allow the application of American criminal law (at least insofar as that law reflects universally condemned practices) against non-U.S. citizens acting against non-U.S. citizens outside the United States. But should U.S. courts take this step? There are at least three reasons that should offer some pause. The first, perceived hypocrisy on human rights, is unique in its relevance for the United States; while the second and third, the potential for politically-driven prosecution and the undermining of domestic judicial capacity development, are commonly levied against the International Criminal Court and other employers of universal jurisdiction.[115] Indeed, these final two critiques have been made by the United

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[114] Colangelo, *supra* note 21, at 167.

[115] *See, e.g.*, Henry Kissinger, *The Pitfalls of Universal Jurisdiction*, FOREIGN AFFAIRS, July-Aug. 2001, at 94 (expressing concern that the "prosecutorial discretion without accountability" could "turn into an instrument of political warfare"); Laura A. Dickinson, *The Promise of Hybrid Courts*, 97 AM. J. INT'L L. 295, 304 (2003) ("[A] purely international process that largely bypasses the local population does little to help build local capacity. . . . [A] system run completely by the international community—whether physically located inside or outside the territory in question—will do little to help improve the capacity of the local population to establish its own justice system."); Géraldine Mattioli & Anneka van Woudenberg, *Global Catalyst for National Prosecutions? The ICC in the Democratic Republic of Congo* 55, 58, 62 *in* ROYAL AFRICAN SOCIETY, COURTING CONFLICT? JUSTICE, PEACE AND THE ICC IN AFRICA (Nicholas, Waddell & Clark ed., 2008), *available at* http://www.globalpolicy.org/images/pdfs/0301courting.pdf (describing Congolese judicial officials' "disappointment and frustration" that cooperation with the ICC has thus far "been in only one direction," and pointing to "a broader need for the ICC to determine, whenever possible, how to promote credible investigations and fair trials for serious crimes in the national courts of countries where it is active"); William Burke-White, *The Domestic Influence of International Criminal Tribunals: The International Criminal Tribunal for Yugoslavia and the Creation of the State Court of Bosnia & Herzegovina*, 46 COLUM. J. TRANSNAT'L L. 279, 317 (2008) (observing that, in its first decade, the ICTY had little impact on the development of domestic judiciaries due to "the incentives created by jurisdictional relationships of international primacy and then absolute international primacy, the shared interests of domestic and international officials in a weak national judiciary, and a lack of norm leadership"); Eileen Simpson, *Stop to the Hague: Internal Versus External Factors Suppressing the Advancement of Rule of Law in Serbia*, 36 GA. J. INT'L & COMP. L. 1255, 1266-67 (2005) (arguing that international tribunals can disempower domestic courts, allowing them to "forfeit" the resolution of thorny national questions to outsiders while diminishing public confidence in the local judiciary); *but see* Mark S. Ellis, *The International Criminal Court and its Implication for Domestic Law and National Capacity Building*, 15 FLA. J. INT'L L. 215, 222-35 (2002) (setting forth arguments for the ICC's contribution to domestic judicial capacity building).

States in arguing against the potential application of universal jurisdiction against its own citizens.[116] By employing universal jurisdiction, the United States may undercut its ability to continue objecting to such uses of universal jurisdiction.

First, the United States may worry, at least in the short-term, about the apparent hypocrisy of prosecuting crimes against humanity while itself being suspected of committing those same crimes. Though the *Emmanuel* court reached a fairly sound outcome doctrinally, the Prosecution's task was surely made more difficult by Bush Administration officials' parsing of the definition of "torture." The Defense tried to raise this issue, citing the so-called Torture Memos to claim that Administration officials disputed the applicability of the CAT to situations of armed conflict and that certain threats to national security permitted the "infliction of mental and related pain, such as simulated drowning (waterboarding)."[117] After all, Emmanuel himself claimed that his actions related to putting down the Liberians United for Reconciliation and Democracy (LURD) rebel movement.[118] The arguments were significant enough to the Prosecution that, during jury selection, prosecutor Karen Rochlin felt compelled to ask potential jurors their opinions on allegations of torture by U.S. officials, asking, "Is it okay for the U.S. to investigate torture overseas, if parts of the U.S. government, according to reports, have not behaved so well?"[119]

Second, there exists some concern about the potential for such prosecutions to be influenced by political considerations. The Department of Justice [DoJ], part of the executive branch, "has wide discretion to decide not to prosecute a given case, and a decision to prosecute or not to prosecute is non-reviewable" in all atrocity cases.[120] For instance, the first attempt to invoke the ETS actually involved a former Peruvian intelligence officer, Maj. Tomas Ricardo Anderson Kohatsu, who entered the U.S. to attend a human rights conference in 2000.[121] That prosecution was ultimately abandoned because of "political sensitivities."[122]

There is, in fact, some speculation that political considerations helped make prosecuting Emmanuel a DoJ priority. For instance, Emmanuel may have been suspected of recruiting Liberian immigrants to destabilize the new pro-American

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116 John B. Bellinger, III, *Enforcing Human Rights in U.S. Courts and Abroad: The Alien Tort Statute and other Approaches*, 42 Vand. J. Trans. Law 1, 8 (2009) (noting "the fact that the U.S. often argues vigorously against the assertion by foreign courts of universal jurisdiction to hear cases involving U.S. officials").

117 Defendant's Motion to Dismiss the Indictment, *Emmanuel*, 2007 WL 980550 at 4.

118 *Defendant's* Second Motion to Dismiss the Indictment on Grounds of Sovereign Immunity and Act of State, United States v. Emmanuel, 2007 WL 5159003; *see generally* Johnny Dwyer, *American Warlord*, Rolling Stone, Sept. 18, 2008, at 91, *available at* http://johnnydwyer.net/clips/pdf/American_Warlord_Johnny_Dwyer.pdf (describing Emmanuel's establishment and administration of the Anti-Terrorist Unit beginning in 1999, when the LURD rebel group, "intent on unseating [President] Taylor, crossed over the Guinean border").

119 John Couwels, *Taylor Jr. to Stand Trial on Charges of Torture Abroad*, CNN, Sept. 27, 2008, http://www.cnn.com/2008/CRIME/09/27/taylor.torture.trial/index.html.

120 Human Rights Watch, *supra* note 17.

121 Siobahn Morrissey, *Torture Law Gets First Test*, 5 No. 49 A.B.A. J. E-Report 3, Dec. 15, 2006 (quoting former U.S. Immigration and Customs Enforcement official Bill West).

122 *Id.*

Liberian government.[123] And, according to Emmanuel himself, the DoJ was angered and decided to pursue a criminal prosecution because he declined offers of use immunity in exchange for information implicating his father in his trial before the Special Court for Sierra Leone.[124] With torture universally condemned and still practiced by some, the risk of selective prosecution remains a concern.[125] But the perception of selectivity, well-grounded or otherwise, could damage long-term efforts to end impunity for human rights abuses.

Third, such a broad expansion of extraterritorial jurisdiction may be undesirable from the perspective of participation. Though there was domestic pressure (primarily from NGOs such as Human Rights Watch) in the United States to arrest and prosecute Emmanuel, this type of extraterritorial jurisdiction has the potential to pervert ordinary channels of accountability within the country where the violation occurred.[126] Even if they regret the decimated state of Liberia's justice system,[127] they nevertheless argue that diverting political pressure away from domestic institutions will only prolong this regrettable situation – reorienting "populations from demanding change on the national level to appealing for intervention on the international level"[128] and creating the possibility of "perpetual international oversight—at once unsustainable in practical terms, and dubious in moral terms, given its inherent imperialism."[129]

Despite these three concerns – perceived hypocrisy, politically-driven prosecution, and participation – it may very well be that the United States' pursuit of atrocity prosecutions is still desirable. Thought these concerns are legitimate, they should not be overblown. There are at least two reasons to expect that American use of universal jurisdiction in atrocity cases will be incredibly rare.

[123] Human Rights Watch, *supra* note 17 ("While it is not clear why he was detained, he may have been on a US watch list as there had been reports that he was involved in arms trafficking or might be looking to recruit Liberian immigrants to destabilize the new Liberian government.").

[124] Dwyer, *supra* note 118, at 92 (quoting a letter from Emmanuel to the article's author, in which Emmanuel writes, "Clearly this indictment is meant to smoke me out . . . for me to talk or to create a clearer picture, there is intense anger due to my declines, based upon there Several request, thru what is called queen for a day letter aka use of immunity, a five day debrief, before this indictment was ever pursued.").

[125] Mirjan Damaska, *What Is the Point of International Criminal Justice?*, 83 CHI.-KENT L. REV. 329, 360-63 (2008) (expressing concern about selectivity in the "sense that international prosecutions are instituted mainly against citizens of states that are weak actors in the international arena or fail to enjoy the support of powerful nations"); William A. Schabas, *Prosecutorial Discretion vs. Judicial Activism at the International Criminal Court*, 6 J. INT'L CRIM. JUST. 731, 736-48 (2008) (discussing criticisms of ICC case selection).

[126] *See, e.g.*, Adam Branch, *International Justice, Local Injustice*, 51 DISSENT 22, 24 (2004) (arguing that ICC pressure to amend Uganda's Amnesty Law contradicted the will of the people of northern Uganda and made subduing the Lord' Resistance Army more difficult).

[127] Chernor Jalloh & Alhagi Marong, *Ending Impunity: The Case for War Crimes Trials in Liberia*, 1 AFR. J. OF LEG. STUD. 53, 68-72 *available at* http://www.africalawinstitute.org/ajls/vol1/no2/Jallohand Marong.pdf (arguing that the "devastation of legal institutions and structures in Liberia" makes it "unrealistic" to rely on domestic courts to prosecute atrocities committed during the civil war).

[128] Adam Branch, *Uganda's Civil War and the Politics of ICC Intervention*, 21 ETHICS & INT'L AFF. 179, 196 (2007).

[129] Etelle R. Higonnet, *Restructuring Hybrid Courts: Local Empowerment and National Criminal Justice Reform*, 23 ARIZ. J. INT'L & COMP. L. 347, 358 (2006).

First, there seems in these cases to be a tacit assumption of passive complementarity – the notion that American atrocity laws will only be applied in instances where no international tribunal or appropriate domestic forum can bring the perpetrators to justice.[130] For instance, proponents of Emmanuel's prosecution claimed that Liberia's civil war "had devastated the Liberian judicial system, leaving no immediate prospect of any prosecution in Liberia for past human rights abuses, and no international court could try the case."[131] Significantly, though, this passive complementarity requirement is not contained in the text of the ETS itself.

Second, atrocity laws will prove much less relevant for crimes committed after the start of the International Criminal Court's mandate on July 1, 2002.[132] For post-2002 crimes, the availability of ICC jurisdiction over cases where domestic courts are "unable or unwilling" to prosecute crimes will make it harder to argue that the intervention of U.S. courts is necessary.[133] U.S. prosecutors attempting to prosecute human rights abuses will need to focus on cases that the international community (insofar as the ICC represents the will of the international community) has declined to prosecute. Or, they will seek to prosecute cases that the ICC could otherwise handle, and will thus have to assert that prosecution in U.S. courts is somehow more appropriate. Neither of these options seems particularly desirable for the United States' international relations. It seems more likely that, if the United States wanted to prosecute a case not being considered by the ICC prosecutor, it would pursue United Nations Security Council referral rather than act unilaterally.[134] If nothing else, the U.S. DoJ would probably try to muster at least some support in the international community before pursuing the prosecution.[135]

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[130] *Cf.* William W. Burke-White, *Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice*, 49 HARV. INT'L L. J. 53, 56 (2008) ("Passive complementarity suggests that the ICC would step in to undertake its own prosecutions only where national governments fail to prosecute and where the Court has jurisdiction.").

[131] Human Rights Watch, *supra* note 18.

[132] Rome Statute of the International Criminal Court, art. 126, U.N. Doc. A/CONF.183/9 (July 17, 1998) (providing that the Statute would enter into force "on the first day of the month after the 60th day following the date" that the sixtieth State party ratified the instrument). On April 11, 2002, ten states ratified the Statutes, crossing the sixty signature threshold and causing the Statute to enter into force on July 1, 2002. Amnesty International, *The International Criminal Court – a historic development in the fight for justice*, AI Index IOR 40/008/2002, *available at* http://www.amnesty.org/en/library/asset/IOR40/008/2002/en/13d7a383-fafa-11dd-9fca-0d1f97c98a21/ior400082002en.pdf.

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

[134] David J. Scheffer, *Staying the Course with the International Criminal Court*, 35 CORNELL INT'L L.J. 47, 90 (2002) (outlining the ways in which the Security Council can shape ICC action, and arguing that the U.S. would be able to exert greater influence on this process if it were to ratify the Rome Statute); *see also* Rome Statute of the International Criminal Court, art. 13(b) U.N. Doc. A/CONF.183/9 (July 17, 1998) (allowing ICC jurisdiction in a "situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations").

[135] *Cf.* Sasha Markovic, *The Modern Version of the Shot Heard 'Round the World: America's Flawed Revolution Against the International Criminal Court and the Rest of the World*, 51 CLEV. ST. L. REV. 263, 279-80 (2004) (detailing earlier U.S. efforts to undermine the effectiveness of the ICC by accumulating bilateral immunity agreements with allies pursuant to Article 98 of the Rome Statute).

Thus, the most likely set of ETS cases comes from crimes committed prior to the start of the ICC mandate. The crimes committed by Emmanuel in Liberia fall into this category, of course. Numerous other potential prosecutions may lie ahead for crimes committed in Latin America during the 1980s and 1990s, especially since there is no statute of limitations for acts of torture that "resulted in, or created a foreseeable risk of, death or serious bodily injury to another person."[136] However, as time passes, causing the perpetrators of those pre-2002 crimes to die or disappear and public attention to shift, the need to prosecute this set of crimes will diminish.

However, even if American use of universal jurisdiction to prosecute perpetrators of human rights violations is limited, the U.S. DoJ should be mindful of the downstream consequences of pursuing human rights prosecutions. For instance, the possibility that American citizens (especially U.S. soldiers) could be prosecuted before foreign courts or tribunals such as the ICC might be "the United States' most serious concern" about the increasing use of extraterritorial prosecutions.[137] The decision for U.S. courts to employ universal jurisdiction to criminal matters may impact the U.S.'s ability to object to the application of universal jurisdiction against its own citizens for their actions abroad.[138]

V. Conclusion

In July 2010, a three-judge panel on the Eleventh Circuit Court of Appeals affirmed Emmanuel's conviction, finding that the ETS was a valid exercise of Congress' power to effectuate the CAT under the Necessary and Proper clause.[139] The Eleventh Circuit's decision confirms that the value of the *Emmanuel* prosecution lies not in any doctrinal innovation *per se*. How could it, in a case that was by most accounts relatively straightforward? Instead, the *Emmanuel* District Court used the occasion of the first ETS prosecution to consolidate two strands of doctrine: the constitutional doctrine pertaining to the extraterritorial application of U.S. law and the international legal principle of *jus cogens*. The Offences Clause enables Congress to legislate beyond America's borders, and *jus cogens* has the potential to overcome any Due Process constraints. Oper-

[136] Elizabeth de la Vega, *Prosecuting Torture: Is Time Really Running Out?*, ANTEMEDIUS, May 10, 2009, *available at* http://www.antemedius.com/content/prosecuting-torture-time-really-running-out (citing 18 U.S.C. Section 2332b(g)(5)(B)).

[137] Elizabeth C. Minogue, *Increasing the Effectiveness of the Security Council's Chapter VII Authority in the Current Situations Before the International Criminal Court*, 61 VAND. L. REV. 647, 677 (2008) (citing BUREAU OF POLITICAL AND MILITARY AFFAIRS, U.S. DEPT. OF STATE, THE INTERNATIONAL CRIMINAL COURT, FACT SHEET (Aug. 2, 2002), *available at* http://www.state.gov/t/pm/rls/fs/23426.htm (listing the objections that the United States has to the Rome Charter)).

[138] Regina Horton, *The Long Road to Hypocrisy: The United States and the International Criminal Court*, 24 WHITTIER L. REV. 1041, 1062-64 (2003) (citing examples where the U.S.' exercise of federal jurisdiction over actions committed abroad to argue that the U.S. position is "contradictory and exaggerated," and ultimately constitutes hypocrisy; *but see* Michael Ignatieff, *No Exceptions? The United States' Pick-and-Choose Approach to Human rights is Hypocritical: But that's not a Good Reason to Condemn it*, LEGAL AFF., May-June 2002, ("[I]t's not clear that the effective use of American power in fact depends on being consistent, or on being seen by others as legitimate. . . Being seen as hypocritical or double-dealing may impose some costs on a superpower, but these costs are rarely prohibitive.").

[139] U.S. v. Belfast, 611 F.3d 783, 807 (11th Cir. 2010).

ating together, these doctrines would potentially enable the United States' first true exercise of universal jurisdiction. With the pieces put in place by *Emmanuel*, future courts handling atrocity cases could allow the reach of American law to be limited only by the extent to which Congress acknowledges – and courts concur with the acknowledgement of – offenses against the law of nations. Concerns about perceived hypocrisy and consequences for domestic participation argue that courts should tread carefully in taking such a step.

The International Criminal Court: Will it Succeed or Fail? Determinative Factors and Case Study on this Question

Thomas Thompson-Flores*

I. Introduction

On July 1, 2010, the International Criminal Court (ICC) celebrated its seventh birthday. In its first eight years of existence the ICC has had to overcome many obstacles, some of which have stemmed from the very creation of the Court itself. Consequently, the ICC's new and unique rules and procedures have required its judges to fill in any gaps throughout each step of the process.[1] Other obstacles have been created by state actors, such as the United States, that view the ICC as a threat to their sovereignty and ability to engage in international matters with *carte blanche* authority.[2] Several states have criticized the ICC for appearing to focus its prosecutions solely on the African continent.[3]

The first ICC trial, concerning the matter of Thomas Lubanga Dyilo only began on January 26, 2009, after numerous delays, most of which arose due to the Prosecution's lack of disclosure of confidential information to the Defense.[4] Though the issue was finally resolved, the case illustrates the difficulty involved in prosecuting a foreign national for violating newly recognized international norms under the new, untested, International Criminal Court. In terms of the future success of the ICC, however, procedure is a rather minor issue. The aim

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[1] *See, e.g.*, Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06 OA 9 OA 1, Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008 (July 11, 2008), *available at* http://www.icc-cpi.int/NR/exeres/C1033BFB-9FF9-4B9F-A54D-04D8F57B0F46.htm (outlining the scope of victims participation before ICC proceedings); Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008 (June 13, 2008), *available at* http://www.icc-cpi.int/NR/exeres/E9A43552-9F36-4B0D-945F-67A15AC1F74A.htm (issuing a stay in the Lubanga proceedings because the Prosecution had not disclosed to the Defense exculpatory evidence that it collected subject to Article 54(3)(e)).

[2] National Security Strategy of the United States of America 31 (2002), *available at* http://merln. ndu.edu/whitepapers/USnss2002.pdf (rejecting the jurisdiction of the ICC).

[3] Kofi Annan, Op-Ed., *Africa and the International Court*, N.Y. Times, June 29, 2009, http://www.nytimes.com/2009/06/30/opinion/30iht-edannan.html.

[4] The conflict arose over the failure by the Prosecutor to disclose to the Defense all its evidence and the identities of witnesses testifying against Lubanga. Under the rules and regulations that govern the court, the prosecutor is supposed to pass over exculpatory evidence, which he finds in the course of his investigations, to defense lawyers and judges. Finally, on November 18, 2008, ICC judges lifted the formal "stay of proceedings" and set the Lubanga trial for January 26, 2009. Wairagala Wakabi, *Timeline: Lubanga's War Crimes Trial at the ICC*, Sept. 14, 2010, http://www.lubangatrial.org/2010/09/14/timeline-lubanga's-war-crimes-trial-at-the-icc/.

of this paper is to discuss two main challenges facing the ICC, the outcomes of which will help determine the future success or failure of the ICC. The first obstacle is the lack of involvement from major states, especially the United States. The second involves complementarity—the conflicts between national jurisdictions and the ICC's jurisdiction. Within this legal conflict, there are certain social considerations as well, such as the balance between peace and justice. To illustrate their effect and importance, and the considerable disagreement that these issues have caused, this article will present a case study of the situation in Darfur, Sudan, specifically focusing on the ICC arrest warrant of Omar Al-Bashir, the current President of Sudan. In order to properly contextualize this discussion, however, it is essential to begin with some background on international criminal law and the creation of the ICC. Accordingly, Part II discusses the history of international criminal law. Part III outlines the history of the ICC. Part IV briefly details the basic structure and rules of the ICC. Part V discusses the lack of U.S. support for the ICC ranging from the administrations of Presidents Clinton to Obama. Part VI deals with the issue of complementarity between the ICC and national governments. Part VII is a case study of the situation in Darfur, Sudan. Finally, Part VIII concludes with this author's opinion on the future of the ICC.

II. History of International Criminal Law

The last 100 years of globalization have seen the proliferation and acceptance of international criminal law throughout the majority of nation states. The idea, however, had already been proposed in various forms by legal scholars centuries earlier. The first international criminal trial, in 1474, was that of Peter von Hagenbach who was convicted of rape, murder and perjury by an ad hoc international criminal tribunal made up of twenty-eight judges from throughout Europe.[5] The tribunal claimed his crimes were crimes that "trampled under foot the laws of God and man."[6] From that point until the 19th Century, there was no progress in the field of international criminal law.[7]

By the 19th Century, the International Red Cross was one of several groups advocating for the creation and enforcement of international criminal law. In 1872, Switzerland's Gustave Moynier, a founder of the International Committee of the Red Cross (ICRC), proposed a system whereby each party to a conflict would, after the cessation of hostilities, choose a judge to join three other neutral judges sitting on a panel.[8] This ad hoc panel would pass sentences, which would be implemented by the states themselves.[9] The idea, however, was largely op-

[5] The prosecution of Peter von Hagenback still presented issues. The trial was considered by some as victor's justice: Did the judges really form an international panel? Who was the rightful prince of Breisach, the town where Peter von Hagenback committed his actions? *See* MARLIES GLASIUS, THE INTERNATIONAL CRIMINAL COURT: A GLOBAL CIVIL SOCIETY ACHIEVEMENT 5 (Routledge 2006).

[6] *Id.*

[7] *See id.* at 5-6 (Marlies Glasius' book, as well as others, fail to mention any developments in the field of international criminal law until the 19th Century).

[8] *Id.* at 6.

[9] *Id.*

posed by both states and international lawyers and the notion of any international criminal prosecution was left at the wayside for many years.[10]

At the turn of the century, with the adoption of 'The Hague Conventions' in 1899 and 1907, a new movement began, aimed at the codification of the laws of war.[11] Unfortunately, although diplomats at these conferences were successful in codifying these legal norms, they were not able to establish a judicial institution with the power to enforce them. A convention establishing an international criminal court was proposed at the second Hague Conference of 1907 and signed by 39 states but was never ratified due to a failure to codify specific laws that the court could enforce.[12] Even after the horrors of World War I, an international criminal court never materialized.[13] While the Treaty of Versailles treaty provided for ad hoc tribunals, it afforded jurisdiction only over military officials.[14] Even then, Germany refused to hand anyone over for prosecution and the Allies were reluctant to press the matter.[15] During the 1920's and 30's many Nongovernmental Organizations (NGOs) promoted the creation of an international criminal court but with little success.[16] Benjamin Ferencz, who later became one of the prosecutors in the Nuremberg Tribunal stated, "despite the almost universal support of scholars all over the world. . .the powerful nations of the world were simply not ready for a Court with compulsory jurisdiction."[17] This fear is still present today among several of the most powerful nations.[18]

After the Second World War there were two prominent ad hoc tribunals created for the prosecution of war criminals: the Nuremburg Tribunal[19] and Tokyo War Tribunal.[20] Not surprisingly however, these tribunals have, over the years, received mixed reactions. Some have hailed the trials as an example of justice at work,[21] while others have dubbed them mere show trials, imposed by the victors

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[10] *Id.*

[11] *Id.* at 7.

[12] This would be an appellate court that would review the decisions of national courts on the seizure of ships and cargo during times of war. MICHAEL J. STRUETT, THE POLITICS OF CONSTRUCTING THE INTERNATIONAL CRIMINAL COURT: NGOS, DISCOURSE, AND AGENCY 51 (Palgrave Macmillan 2008).

[13] YUSUF AKSAR, IMPLEMENTING INTERNATIONAL HUMANITARIAN LAW: FROM AD-HOC TRIBUNALS TO A PERMANENT INTERNATIONAL CRIMINAL COURT 44-45 (Routledge 2004).

[14] GLASIUS, *supra* note 5, at 7.

[15] ID.

[16] *Id.*

[17] *Id.* at 7-8.

[18] *See, e.g.*, Eric A. Posner, *All Justice, Too, Is Local,* N.Y. TIMES, Dec. 30, 2004, http://query.nytimes.com/gst/fullpage.html?res=9803E5D81739F933A05751C1A9629C8B63&sec=&spon=&pagewanted=all.

[19] The Nuremburg Tribunal was created after the end of Second World War by the Allies to prosecute Nazi leaders for committing crimes against peace, war crimes, and crimes against humanity. *See generally* THE INTERNATIONAL CRIMINAL COURT: GLOBAL POLITICS AND THE QUEST FOR JUSTICE 11-12 (William Driscoll, et al. eds., 2004) [hereinafter GLOBAL POLITICS]

[20] *Id.* at 13. A similar tribunal, known as the Tokyo War Tribunal, was established after the Second World War to prosecute Japanese war criminals.

[21] David Tolbert, *International Criminal Law: Past and Future,* 30 U. PA. J. INT'L L. 1281, 1284 (2009).

of war against the defeated states (i.e. victor's justice).[22] As the philosopher Jean-Paul Sartre stated, "The Nuremberg Tribunal, an ambiguous body, was no doubt born of the right of the strongest, but at the same time it opened a perspective for the future by setting a precedent, the embryo of a tradition."[23]

The creation of the United Nations Organization (UN) was a major step toward the establishment of a permanent international criminal court. In Resolution 260, passed on December 9, 1948, the UN General Assembly adopted the Convention on the Prevention and Punishment of the Crime of Genocide.[24] The Convention characterizes genocide as a crime under international law.[25] More importantly, in the same resolution, the General Assembly invited the International Law Commission (ILC) "to study the desirability and possibility of establishing an international judicial organ to prosecute individuals charged with genocide."[26] Even with the passage of the convention, nothing materialized for forty years, mainly because powerful states feared the creation of an international judicial organ would usurp their role in the international arena.[27] The ILC ultimately advocated the creation of an international criminal court, prepared a draft statute in 1951,[28] and a revised draft statute in 1953,[29] but it was never passed by the UN General Assembly.[30] It was not until the 1990's that events occurred which helped sway public opinion in favor of the creation of a permanent international criminal court to try major war criminals.[31]

III. History of the International Criminal Court

During the 1990's, a confluence of factors helped create enough momentum to overcome the obstacles that had impeded the creation of an international criminal court in the past. During this period, war broke out in Yugoslavia and Rwanda.[32] Both wars were extremely brutal, prompting accusations of several instances of rape, torture and genocide.[33] In response, the UN Security Council in 1993

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22 *Id.*

23 GLASIUS, *supra* note 5, at 8 (quoting Jean-Paul Sartre, a 20th-century French philosopher, novelist and political activist).

24 GLOBAL POLITICS, *supra* note 19, at 24.

25 *Id.*

26 *Id.*

27 *See* Patricia A. McKeon, *An International Criminal Court: Balancing the Principle of Sovereignty Against the Demands for International Justice*, 12 ST. JOHN'S J. LEGAL COMMENT 535, 538 (1997).

28 International Law Commission, *Question of International Criminal Jurisdiction*, http://untreaty.un.org/ilc/summaries/7_2.htm (last visited Nov. 15, 2010).

29 *Id.*

30 *Id.* The General Assembly postponed consideration of the draft statute pending the adoption of a definition of aggression.

31 Cassandra Jeu, *A Successful, Permanent International Criminal Court . . . "Isn't it Pretty to Think So?"*, 26 HOUS. J. INT'L L. 411, 421-24 (2004). There are several events; however, the most important ones are the end of the Cold War, and the wars that erupted in Yugoslavia and Rwanda.

32 *See* Amy Palmer, *An Evolutionary Analysis of Gender-Based War Crimes and the Continued Tolerance of Forced Marriage*, 7 NW. U. J. INT'L HUM. RTS. 128, at *17-20 (2009).

33 *Id.*

adopted a UN Resolution 827, which established an ad hoc tribunal to prosecute the perpetrators of atrocities committed in Yugoslavia.[34] This tribunal became known as the International Criminal Tribunal for Yugoslavia (ICTY).[35] In the winter of the following year, in response to the genocide that had occurred in Rwanda,[36] the UN Security Council adopted Resolution 955, which established another ad hoc tribunal with similar powers, which became known as the International Criminal Tribunal for Rwanda (ICTR).[37] These *ad hoc* tribunals were temporary entities that were created to deal with issues arising from specific conflicts.[38] The results of these tribunals have been mixed.[39] They would, however, prove useful as examples for the soon to be created ICC.

A second important factor which helped spur states into finally coming together to form an international criminal court, was the influence of NGOs. A group of NGOs first came together in 1995 to form a coalition, called the Coalition for the International Criminal Court (CICC), in an effort to coordinate their efforts to ensure the establishment of the ICC.[40] The CICC was able to use the resources and expertise (media, legal, etc.) of its members in order to engage in direct lobbying, produce position papers, and publish media editorials in the hope of informing states and the public at large about the need for an international criminal court.[41] The conference that resulted from these lobbying efforts, called the Rome Conference, was attended by 160 states, 33 intergovernmental organizations, and a coalition of 236 NGOs.[42] After the creation of the ICC, the CICC not only continued to exist, but expanded to include over 2,500 organizations worldwide. Today, its goal is to "ensure that the Court is fair, effective and independent."[43]

In the early 1990's, at the request of the UN General Assembly, the ILC resumed its work of creating a draft statute for an international criminal court. Eventually, in 1994, it submitted a draft statute for an international criminal court

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34 S.C. Res. 827, ¶ 3, U.N. Doc. S/RES/508 (May 25, 1993), http://www.icty.org/x/file/Legal%20 Library/Statute/statute_827_1993_en.pdf.

35 *Id.*

36 PALMER, *supra* note 32, at 19. During a period of three months in 1994 genocide raged in Rwanda between the Hutu majority against the Tutsi minority which killed between 500,000 and one million Rwandan men, women and children.

37 S.C. Res. 955, ¶ 10, U.N. Doc. S/RES/955 (Nov. 8, 1994), http://www.un.org/ictr/english/Resolu tions/955e.htm

38 ROBERT S. LEE, THE INTERNATIONAL CRIMINAL COURT – THE MAKINGS OF THE ROME STATUTE: ISSUES, NEGOTIATIONS, AND RESULTS 6 (Springer 1999).

39 GLASIUS, *supra* note 5, at 12-13. These courts have been hindered by lack of funds and diplomatic wrangling over appointments. However, they have been successful in bringing high-level war criminals to justice such as Milosevic and Karadzic.

40 COALITION FOR THE INTERNATIONAL CRIMINAL COURT, OUR HISTORY, http://www.iccnow.org/ ?mod=cicchistory (last visited Nov. 15, 2010).

41 STRUETT, *supra* note 12, at 71-81.

42 Eric M. Meyer, *International Law: The Compatibility of the Rome Statute of the International Criminal Court with the U.S. Bilateral Immunity Agreements Included in the American Servicemembers' Protection Act*, 58 OKLA. L. REV. 97, 103 (2005).

43 COALITION FOR THE INTERNATIONAL CRIMINAL COURT, ABOUT THE COALITION, http://www. iccnow.org/?mod=coalition (last visited Nov. 15, 2010).

to the General Assembly.[44] The draft was very conservative in the scope and power that the Court could yield, especially in comparison to the ultimate structure of the ICC formed at the 1998 Rome Conference."[45] Before the 1998 Rome Conference, the General Assembly created a preparatory committee to complete the drafting of the text.[46] Further changes were made during the Rome Conference, which took place from June 15, 1998 to July 17, 1998. On July 17, 1998, 120 countries voted in favor of the Treaty containing the Statute for the ICC.[47] Twenty-one countries abstained, while the United States joined China, Libya, Iraq, Israel, Qatar, and Yemen as the only seven countries that voted in opposition to the Treaty.[48] The Court itself came into existence on July 1, 2002, when the 60th country ratified it.[49] Presently 114 states have ratified the Rome Statute thereby becoming state parties.[50] Another 39 have signed but not ratified the Treaty, including the United States.[51]

IV. Basic Structure and Rules of the Court

Before reviewing the main obstacles standing in the way of the ICC's success, a brief description of some of the articles of the Rome Statute is needed to provide a context for later discussion.

Article 1 of the Rome Statute explains that the ICC is only a court of complementarity (complementary to national criminal jurisdictions) with jurisdiction over serious international crimes.[52] Article 5 of the Rome Statute lays out the crimes over which the ICC has jurisdiction over. These include: (a) the crime of genocide; (b) crimes against humanity; (c) war crimes; and, (d) the crime of

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[44] GLOBAL POLITICS, *supra* note 19, at 24-25.

[45] The ICL draft did not define or develop the definitions of what constitutes a crime under international law as compared to the final draft of the Rome Statute. The ICL draft permitted states to accept the court's jurisdiction with respect to some crimes and not others. The final draft of the Rome Statute does not allow the states such discretion. STRUETT, *supra* note 12, at 71-72.

[46] U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Report of the Preparatory Committee, U.N. Doc. A/CONF 183/2 (April 14, 1998), *available at* http://www.un.org/icc/prepcom.htm

[47] Michael P. Scharf, *ASIL Insights: Results of the Rome Conference for an International Criminal Court*, (Aug. 1998), *available at* http://www.asil.org/insigh23.cfm.

[48] *Id.*

[49] INTERNATIONAL CRIMINAL COURT, ABOUT THE COURT, http://www.icc-cpi.int/Menus/ICC/About+the+Court/ (last visited Nov. 13, 2010).

[50] United Nations Treaty Collection, *Status of the Rome Statute of the International Criminal Court, available at* http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&lang=en. [Hereinafter *Status of the Rome Statute*]

[51] *Id.*

[52] Rome Statute of the International Criminal Court, adopted by the U.N. Diplomatic Conference of Plenipotentiatics on the Establishment of an International Criminal Court on 17 July 1998, pmbl., U.N. Doc. A/CONF. 183/9, 37 I.L.M. 999 (1998) [hereinafter Rome Statute], *available at* http://www.icc-cpi.int/NR/rdonlyres/EA9AEFF7-5752-4F84-BE940A655EB30E16/0/Rome_Statute_English.pdf.

aggression.[53] The ICC's jurisdiction over these crimes does not apply retroactively.[54]

Unlike the ICTY or the ICTR, Article 11 states that the ICC only has jurisdiction with respect to crimes committed after the implementation of the Rome Statute, July 1, 2002.[55] Article 12 outlines the preconditions to the exercise of jurisdiction by the ICC, both with respect to states that are a party to the Rome Statute and to those that are not.[56] Article 13 lists the three instances when the court may exercise jurisdiction over the crimes mentioned in Article 5: (a) when a state party refers a case to the Prosecutor in accordance with Article 14; (b) when the security counsel refers a case to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; or (c) when the Prosecutor has initiated an investigation himself, in accordance with Article 15 (*propio motu*).[57]

Article 16 grants the UN Security Council the power to suspend ICC investigations or prosecutions for a period of twelve months.[58] Article 17 addresses the issue of admissibility, stating most importantly, that a case is determined to be inadmissible if it is already being investigated or prosecuted by a state that has jurisdiction over it, unless that state is unwilling or unable to do so.[59] Article 17 lays out several determining factors as to whether a state is genuinely unwilling or unable to carry out an investigation or prosecution.[60] Article 86 explains that state parties must cooperate fully with the ICC in its investigation and prosecution of crimes within the ICC's jurisdiction.[61] Article 87 deals with request for cooperation by the ICC to both state parties and non-state parties.[62] Lastly, Article 98 explains that the ICC may not request the surrender of an individual if it would require the requested state to act inconsistently with: (a) its obligations under international law with respect to diplomatic immunity, or (b) its obligations under international agreements with a third-party state.[63]

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[53] *Id.* art. 5. The definition of what constitutes a crime of aggression has lead to disputes between countries. Article 5 itself states that "the Court shall exercise jurisdiction over the crime of aggression once a provision is adopted. . ."

[54] *Id.* art. 11.

[55] *Id.*

[56] *Id.* art. 12.

[57] *Id.* art. 13.

[58] *Id.* art. 16.

[59] *Id.* art. 17(1).

[60] *Id.* art. 17(2), (3).

[61] *Id.* art. 86.

[62] *Id.* art. 87.

[63] *Id.* art. 98.

V. Lack of U.S. Support

A. The United States' position on international criminal law, generally

Historically, the United States has been generally supportive of the international prosecution of war crimes.[64] In fact, after the end of WWII, the United States was the driving force behind the war tribunals at Nuremberg and Tokyo.[65] However, because of the United States' position today as the sole world power,[66] and with its military extended into conflicts around the world,[67] in states that are parties to the Rome Statute,[68] its exposure to the ICC's jurisdiction is much greater than any other country. Consequently, the U.S. consistently opposed to the idea of universal jurisdiction.[69] The United States' position is that the prosecution of its nationals for crimes committed outside of U.S. territory can only be carried out with its permission.[70]

Nevertheless, the United States' position on this issue has softened over the years. In *Demjanjuk v Petrovsky*, a U.S. Court of Appeals held that "some crimes are so universally condemned that the perpetrators are the enemies of all people. Therefore, any nation which has custody of the perpetrators may punish them according to its law."[71] Just last year in Miami, Florida, the United States convicted Chuckie Taylor (the son of former Liberian President Charles Taylor) for torture that he committed while serving as the head of the former Liberian President's Anti Terrorist Unit (ATU).[72] Taylor's indictment marked the first time that anyone had been charged under the Torture Victim Protection Act (TVPA) of 1994,[73] which grants U.S. federal courts universal jurisdiction to prosecute individuals found within the U.S. who are suspected of torture committed anywhere in the world.[74] While these examples may highlight the subtle change in U.S. policy toward recognizing universal jurisdiction, the U.S. has been reluctant to completely shed its fears and concerns of having its citizens prosecuted abroad under the doctrine of universal jurisdiction.[75]

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[64] William A. Schabas, *United States Hostility to the International Criminal Court: It's all About the Security Council*, 15 Eur. J. Int'l L. 701, 702 (2004).

[65] *Id.*

[66] *Id.* at 720.

[67] *See, e.g.*, Department of Defense, Active Duty Military Personnel Strengths by Regional Area and by Country, (Dec. 31, 2007), http://siadapp.dmdc.osd.mil/personnel/MILITARY/history/hst0712.pdf (last visited Nov. 15, 2010).

[68] International Criminal Court, The State Parties to the Rome Statute, http://www.icc-cpi.int/Menus/ASP/states+parties/ (last visited Nov. 15, 2010).

[69] Meyer, *supra* note 42, at 98.

[70] 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, 585 (2003).

[71] 776 F.2d 571, 582 (6th Cir. 1985).

[72] World Organization of Human Rights, *Victims of Chuckie Taylor*, http://www.humanrightsusa.org/index.php?option=com_content&task=view&id=167&Itemid=150 (last visited Nov. 15, 2010).

[73] Amnesty Int'l, *Liberia/USA: Indictment of Chuckie Taylor for Torture*, http://www.amnesty.org.au/news/comments/646/ (last visited Nov. 15, 2010).

[74] *Id.*

[75] *See* Schabas, *supra* note 64, at 706-07.

B. The Clinton Era (1993-2001)

Even though the U.S. historically was supportive of international criminal prosecutions of war criminals, it was one of seven nations to vote against the creation of the ICC at the Rome Conference in 1998.[76] In truth, the U.S. was originally supportive of the ILC's final draft of the ICC statute submitted to the UN General Assembly in 1994, which included a section that recommended that the ICC be subordinate to the UN Security Council.[77] That provision would have given the Security Council a final say over any ICC prosecution, barring the ICC Prosecutor from initiating a case without the Security Council's approval.[78] Bill Richardson, the former U.S. Ambassador to the United Nations, echoed the United State's desire that the Security Council must play an important role in the work of the ICC.[79]

The provision was not included in the final version of the Rome Statute, however, and in response, the U.S. delegation, lead by Ambassador David Scheffer, expressed several concerns including: the risk that U.S. peacekeepers might be subject to ICC prosecution; the power of the ICC Prosecutor to initiate investigations unilaterally; the inclusion of the crime of aggression; and, the inability of signatory parties to ratify with reservations.[80]

However, several of the concerns expressed by the United States were merely half-hearted arguments in justification of its vote against the adoption of the Rome Statute. While the Statute does impose some control over the ICC Prosecutor's discretion to prosecute individuals, these are only judicial constraints, not political.[81] Under Article 16 of the Rome Statute, the Security Council may not halt ICC prosecutions, but may defer them for a period of twelve months, renewable upon request.[82]

In addition, one must remember that the ICC is a court of complementarity. As such, it would be unable to prosecute U.S. nationals for crimes committed in a foreign state, as that state would have jurisdiction over the matter – unless they are unwilling or unable to prosecute the U.S. nationals.[83] The U.S. could also halt an ICC investigation by opening up one of its own, though the United States' record on prosecuting American servicemen for crimes committed abroad has

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[76] Meyer, *supra* note 42, at 98.

[77] *See* Schabas, *supra* note 64, at 712-13.

[78] *Id.* at 713.

[79] *Id.* at 713-14.

[80] *Is a U.N. International Criminal Court in the U.S. National Interest? Hearing before the Subcommittee on International Operations of the S. Comm. on Foreign Relations*, 105 Cong. 10-5 (1998) (Statement of David J. Scheffer, US Ambassador-At-Large for War Crimes Issues) *available at* http://frwebgate.access.gpo.gov/cgibin/getdoc.cgi?dbname=105_senate_hearings&docid=f:50976.pdf (These are just some of the examples cited by Ambassador Scheffer during his statement.).

[81] Sharf, *supra* note 47. Article 15 of the Rome Statute guards against the ICC prosecutor's power by requiring the approval of a three-judge pre-trial chamber before the prosecution can launch an investigation. In addition, the decision of the chamber is subject to interlocutory appeal to the Appeals Chamber.

[82] Rome Statute, *supra* note 52, art. 16.

[83] *Id.* art. 17(1).

been underwhelming. From the My Lai Massacre in 1972 in Vietnam to the 2004 Abu Ghraib torture and prison abuse in Iraq, the U.S. government regularly failed to properly prosecute those responsible and instead focused on the soldiers on the ground,[84] and even when a soldier is convicted the U.S. government reduces the sentence.[85]

Although Ambassador Scheffer outlined the United States' concerns about the Rome Statute, he remarked that the experience with the tribunals for the former Yugoslavia and Rwanda has "convinced us of the merit of creating a permanent court that could be more quickly available for investigations and prosecutions and more cost efficient in its operation."[86] On December 31, 2000, in his last day in office, President Clinton signed the Rome Statute; that day also marked the deadline for states to be able to sign the Statute without having ratified it.[87] After January 1, 2001, any state could only sign the Statute if it had already been formally ratified.[88]

In signing the Rome Statute, President Clinton expressed his support for the creation of an international criminal court and maintained the United States' long history of commitment to the principal of accountability and tradition of moral leadership.[89] President Clinton made clear, however, that even though he was signing the Rome Statute he still had concerns and reservations about certain aspects of it.[90] Therefore, he maintained that he would not submit the statute to the U.S. Senate for ratification, and urged his successor to take the same position.[91]

C. The Bush Era (2001-2009)

While the "Clinton policy towards the International Criminal Court can be described as an attitude of cautious engagement, meaning that the U.S. would stay committed to the Court in principle, but work aggressively to protect American national interests during the negotiating process, the U.S. policy under the Bush administration [was] to 'isolate and ignore' the ICC as well as to punish countries ratifying the Court's Statute."[92] After the events of September 11, 2001, the U.S. wanted the ability to use its military force to act unilaterally, when necessary around the world and without any reservations or fears of prosecution for its

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84 Major Deon M. Green, *The Vietnam War on Trial: The My Lai Massacre and the Court-Martial of Lieutenant Calley*, 184 MIL. L. REV. 202, 210 (2005).

85 Laura Szumanski Steel, Michael R. Belknap, *The Vietnam War on Trial: The My Lai Massacre and the Court-Martial of Lieutenant Calley*, 46 AM. J. LEGAL HIST. 344, 344 (2004).

86 Meyer, *supra* note 42, at 102 (quoting Ambassador David J. Scheffer at a hearing before the Subcommittee on International Operations of the Committee on Foreign Relations).

87 GLOBAL POLITICS, *supra* note 19, at 20.

88 *Id.*

89 President's Statement on Signing the Rome Treaty on the International Criminal Court, 37 WEEKLY COMP. PRES. DOC. 4 (Dec. 30, 2001), *available at* http://frwebgate2.access.gpo.gov/cgi-bin/PDFgate.cgi?WAISdocID=lpujcR/0/2/0&WAISaction=retrieve.

90 *Id.*

91 *Id.*

92 Sadat, *supra* note 70, at 590.

soldiers engaged in foreign conflicts.[93] Therefore, in keeping with the stated policies of the Bush administration, the U.S. attempted to "unsign" the Rome Statute.[94]

In May 2002, John R. Bolton, then the Under Secretary of State for Arms Control and International Security, sent a letter to U.N. Secretary General Kofi Annan stating that "the United States does not intend to become a party to the [Rome Statute]. Accordingly, the United States has no legal obligations arising from its signature on December 31, 2000."[95] Later that year, the Bush administration went one-step further when it signed the American Servicemembers' Protection Act (ASPA).[96] This legislation is also known by its nickname, the "The Hague Invasion Act" because it authorizes the use of military force to rescue any members of the armed forces of the United States detained by or on behalf of the ICC.[97] The Bush administration adopted many of the same concerns as the Clinton administration, but they cast them in an extreme ideological manner, arguing that the existence of the ICC itself undermined the United States' sovereignty.[98]

As part of the ASPA, the United States government began applying pressure on other states to sign bilateral immunity agreements (BIAs).[99] The Bush administration argued that these BIAs had the effect of being Article 98(2) waivers.[100] Article 98(2) of the Rome Statute specifies that the Court may not order a state to surrender an individual of a third state if, in so doing, the sending state would be violating its obligations under international agreements with the third state.[101] The U.S. threatened to withdraw military aid to states that were parties to the ICC unless they signed a BIA, which would prohibit these countries from handing over U.S. citizens to the ICC.[102] Senator Jesse Helms, in a hearing discussing the effect of the creation of the ICC on America's national interests, explained succinctly the majority opinion of the U.S. government at the time by stating that, "if other nations are going to insist on placing Americans under the ICC's jurisdiction against their will, then Congress has a right and responsibility to place a cost on their obstinacy, and to ensure our men and women in uniform are pro-

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93 *Id.* at 591 (stating that in a September 2002, National Security Strategy document, the ICC was viewed a constraint on the use of US military force).

94 Press Statement, U.S. Department of State, Richard Boucher, Spokesman, International Criminal Court: Letter to UN Secretary General Kofi Annan, (May 6, 2002), *available at* http:// www.state.gov/r/pa/prs/ps/2002/9968.htm. The term "unsigning" refers to the procedure by which President Bush attempted to reverse or undo the effects of a prior treaty signature, in this case the signing of the Rome Statute by President Clinton.

95 Press Statement, U.S. Department of State, International Criminal Court: Letter to UN Secretary General Kofi Annan from Under Secretary of State for Arms Control and International Security, John R. Bolton (May 6, 2002), *available at* http://www.state.gov/r/pa/prs/ps/2002/9968.htm.

96 *Id.* at 99 (Congress passed the American Servicemembers' Protection Act on August 2, 2002).

97 Sadat, *supra* note 70, at 557-58.

98 *See id.* at 593.

99 Meyer, *supra* note 42, at 132-33.

100 *Id.* at 110.

101 Rome Statute, *supra* note 52, art. 98(2).

102 Lilian V. Faulhaber, *American Servicemembers' Protection Act of 2002*, 40 HARV. J. ON LEGIS. 537, 554-55 (2003).

tected."[103] By the end of 2004, the U.S. had signed BIAs with over 90 states, both state parties and non-state parties.[104]

These BIAs have proven to be the most contentious part of the ASPA. The Bush administration's position was that BIAs fall neatly under the definition of other international treaty obligations specified in Article 98(2).[105] Opponents of the Bush administration have argued that the use of BIAs undermine the ICC.[106] Others have cited the use of BIA's as evidence of the United States' trend toward unilateralism and non-cooperation.[107] In addition, critics argued that BIAs were not the types of international agreements contemplated by the drafters of the Rome Statute.[108] The drafters realized that by the time of the Rome Conference in the summer of 1998, many states had already signed international agreements with each other that governed the duties that each state owed to the other's nationals, such as extradition treaties or Status of Force Agreements (SOFAs).[109] While SOFAs are limited to armed military personnel, the scopes of BIAs are much broader.[110] This difference has been cited as a reason why BIAs do not fall under the intended "international agreements" provided for in Article 98(2).[111] In addition, the fact that BIAs do not provide any guarantee that the U.S. would prosecute their own nationals once handed over to U.S. authorities suggests that the sole purpose of BIAs are to grant impunity to Americans abroad.[112]

Opponents of the ASPA and its accompanying BIAs often point to the Vienna Convention on the Law of Treaties (VCLT) for support.[113] Article 18, of the VCLT provides that "A State is obliged to refrain from acts which 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; or (*b*) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed."[114] The U.S. signed the VCLT in 1970, but because the U.S. Senate has not yet given its advice and consent, the U.S. is not yet a party.[115] The U.S. State

103 Meyer, *supra* note 42, at 112.

104 *Id.* at 99.

105 *Id.* at 110.

106 *Id.* at 99.

107 Faulhaber, *supra* note 102, at 554.

108 Meyer, *supra* note 42, at 111.

109 *Id.* at 110 (A SOFA is "a treaty governing the legal status of members of armed forces of one state (the sending state) stationed in another state (the receiving state) pursuant to that agreement.").

110 *Id.* at 111.

111 *Id.*

112 *Id.* at 127.

113 *Id.* at 117.

114 *See* Vienna Convention on the Law of Treaties art. 18 (May 23, 1969), *available at* http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf. [Hereinafter Vienna Convention].

115 United Nations Treaty Collection, *Status of the Vienna Convention on the Law of Treaties*, http://treaties.un.org/Pages/ViewDetailsIII.aspx?&src=TREATY&mtdsg_no=XXIII~1&chapter=23&Temp=mtdsg3&lang=en (last visited Nov. 15, 2010).

Department has stated, however, that "[t]he United States considers many of the provisions of the Vienna Convention on the Law of Treaties to constitute customary international law on the law of treaties."[116] Article 18, as noted earlier, does not require that the interim obligation only be observed "until [the signatory] shall have made its intention clear not to become a party to the treaty." The problem is that there is no guidance on how this intention should be manifested.[117] The obligation not to defeat the object and purpose of a treaty imposed by Article 18, resulted in the U.S. submitting its letter of May 2002, in which it stated that it was withdrawing from its obligations under the Rome Statute.[118] However, the pressure placed on states by the U.S. to sign BIAs effectively forces these state, if they decide to sign a BIA with the US, to violate their international obligations under the Rome Statute.[119]

The Bush administration's hostility toward the ICC did soften in Bush's second term of office. One clear example of this subtle shift was in 2005 when the situation in Darfur came before the UN Security Council.[120] As a permanent member of the Security Council, the U.S. was in a position to veto the resolution that would refer alleged atrocities in Darfur to the ICC Prosecutor.[121] But, the U.S. abstained in the vote, thereby allowing the resolution to pass.[122] Despite U.S. concerns about the power of the Court to exert its jurisdiction over non-state parties – in this case Sudan – it allowed the exertion of jurisdiction even though such approval ran counter to their previous opposition of the Court.[123]

D. The Obama Era (2009 - Present)

The election of Barack Obama has created great excitement among legal scholars, politicians, and human rights activists, both within the United States and abroad.[124] Many NGOs have called on the Obama administration to engage in a

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[116] U.S. Department of State, Frequently Asked Questions on the Vienna Convention on the Law of Treaties, http://www.state.gov/s/l/treaty/faqs/70139.htm (last visited Nov. 15, 2010).

[117] Edward T. Swaine, *Unsigning,* 55 Stan. L. Rev. 2061, 2082 (2003).

[118] US officials cited a desire for "flexibility" to pursue alternative judicial mechanisms that may be different to the object and purpose the Rome Statute. Citizens for Global Solutions, Pierre-Richard Prosper, *U.S. Has No Legal Obligation to the International Criminal Court* (May 6, 2002), http://archive1.globalsolutions.org/programs/law_justice/icc/resources/prosper_unsigning.html (last visited Nov. 15, 2010).

[119] Meyer, *supra* note 42, at 133.

[120] Nsongurua J. Udombana, *Pay Back Time in Sudan? Darfur in the International Criminal Court,* 13 Tulsa J. Comp. & Int'l L. 1, 9-10 (2005).

[121] *Id.*

[122] Resolution 1593 was adopted in 2005 with 11 votes in favor and 4 votes abstaining. The resolution referred the situation in Darfur to the ICC Prosecutor. Press Release, Security Council, Security Council Refers Situation in Darfur, Sudan, to Prosecutor of International Criminal Court, U.N. Press Release SC/8351 (Mar. 31, 2005).

[123] Udombana, *supra* note 120, at 9-10.

[124] Interview with Archbishop Desmond Tutu, Nobel Prize winner, *available at* http://www.usatoday.com/news/opinion/personal-reflections.htm (last visited Nov. 15, 2010) (Archbishop Tutu expressed the hope that President Obama will ratify the Rome Statute.)

policy of positive engagement with the ICC.[125] By involving itself with the ICC, the U.S. would get a seat at the table and have the ability to shape and influence the Court in ways that meet its concerns.[126] These NGOs have also called on the Obama administration to repeal, or at least amend, the ASPA because the law hinders any discussions with the ICC and states parties.[127] On the other hand, some have called for the Obama administration to adopt a more cautious approach toward the ICC, claiming that the Court has yet to complete its first trial, thereby making it premature to view the ICC as a success.[128]

Although in his time as President, Obama has not yet ratified the Rome Statute, he has taken major steps in international human rights and criminal law which are very different from his predecessor.[129] In May 2010 the White House produced The National Security Strategy of the United States of America, in which it stated that although the U.S. is not at present a party to the Rome Statute it is "engaging with State Parties to the Rome Statute on issues of concern and are supporting the ICC's prosecution of those cases that advance U.S. interests and values, consistent with the requirements of U.S. law."[130] In addition, as a senator, Mr. Obama did respond in the affirmative when asked whether the United States should ratify the Rome Statute of the International Criminal Court.[131]

In addition to President Obama, other members of the Obama administration have commented on the issue of U.S. involvement with the ICC, showing so far, a willingness to engage in discussion.[132] On January 29, 2009, U.S. Ambassador to the UN Susan Rice, in her first appearance in the Security Council, spoke about the importance of the ICC as an instrument to prosecute those responsible for committing atrocities, winning her the praise of many of the other envoys

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[125] Bruce Zagaris, *Obama Administration Signals Engagement with the ICC*, 25 INT'L ENFORCEMENT L. REP. 157 (2009)

[126] Roseann M. Latore, *Escape out the Back Door or Charge in the Front Door: U.S. Reactions to the International Criminal Court*, 25 B.C. INT'L & COMP. L. REV. 159, 174-75 (2002).

[127] Zagaris, *supra* note 125.

[128] According to Stephen Rademaker, former assistant secretary of state in the Republican Bush administration, President Obama should move cautiously toward full support of the ICC. Bill Varner, *Obama's Envoy Voices Support for International Court*, BLOOMBERG NEWS, Jan. 29, 2009, http://www.bloomberg.com/apps/news?pid=20601103&sid=AYK_ULgi3Ix0&refer=us.

[129] In President Obama's address on national security at the National Archives in Washington: "Rather than keep us safer, the prison at Guantanamo has weakened American national security." Ed Henry et al., *Obama defends plan to close Gitmo*, CNN, May 21, 2009, http://www.cnn.com/2009/POLITICS/05/21/obama.speech/index.html.

[130] The National Security Strategy of the United States of America is a document prepared periodically by the White House which addresses the major national security concerns facing the U.S. and how the administration plans to deal with these concerns. THE WHITE HOUSE, NATIONAL SECURITY STRATEGY 48 (May 2010), *available at* http://www.whitehouse.gov/sites/default/files/rss_viewer/national_security_strategy.pdf.

[131] Citizens for Global Issues, *Elections and Candidates: Responses from Barack Obama (D-IL)*, http://archive2.globalsolutions.org/politics/elections_and_candidates/questionnaire/2004?id=20 (last visited Nov. 15, 2010).

[132] Zagaris, *supra* note 125.

who were present that day.[133] At her confirmation, Secretary of State Hilary Clinton also spoke very highly of the ICC as well, stating, "we will end hostility towards the ICC, and look for opportunities to encourage effective ICC action in ways that promote U.S. interests by bringing war criminals to justice."[134] Later, in the fall of 2009 US envoy for war crimes Stephen Rapp announced that his country will for the first time attend, as an observer, the annual ICC meeting in The Hague from 18 to 26 November 2009.[135] Recently, the Administration sent a U.S. delegation to participate at the first-ever Review Conference on the Rome Statute of the International Criminal Court (ICC) in Kampala, Uganda from 31 May to 11 June 2010. [136]

VI. Complementarity

A. What is Complementarity?

The principal of complementarity in international criminal law seeks to strike a balance between the ability to prosecute individuals for international crimes while safeguarding the sovereignty of states.[137]

One of the major points of contention at the Rome Conference in 1998 surrounded the issue of complementarity.[138] Previous international criminal tribunals such as the ICTY and the ICTR were only ad hoc tribunals created by and under the authority of the UN Security Council, with the sole task of investigating and prosecuting those responsible for mass atrocities committed during those specific conflicts in the former Yugoslavia[139] and Rwanda.[140] The ICC, by contrast, is a permanent criminal court with worldwide jurisdiction over any person, provided that the crime in question is one mentioned in Article 5 of the Rome Statute, and that the Court exercises its jurisdiction in one of the methods enumerated in Article 13.[141] Consequently, as a result of the ICC's broad jurisdiction, the question arose as to when the ICC should defer to national courts in the prosecutions of war criminals.[142]

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[133] The list of envoys who praised Ambassador Rice include French Ambassador Jean-Maurice Ripert, Croatian Ambassador Neven Jurica, and Costa Rican Ambassador Jorge Urbina. Varner, *supra* note 128.

[134] Zagaris, *supra* note 125.

[135] *U.S. to Resume Engagement with ICC*, BBC News, http://news.bbc.co.uk/2/hi/8363282.stm (last visited Nov. 15, 2010).

[136] State Department Press Conference with Legal Advisor Harold Koh and Ambassador-at-Large for War Crime Issues Stephen Rapp (June 15, 2010), *available at* http://www.state.gov/s/wci/us_releases/remarks/143178.htm [Hereinafter State Department Press Conference]

[137] Jo Stigen, The Relationship Between The International Criminal Court and National Jurisdictions: The Principle of Complementarity 17 (Martinus Nijhoff Publishers 2008).

[138] *See* Mohamed M. El Zeidy, The Principle of Complementarity in International Criminal Law: Origin, Development and Practice 131-32 (Brill 2008).

[139] S.C. Res. 827, *supra* note 34; *see also* Lee, *supra* note 38, at 6.

[140] S.C. Res. 955, *supra* note 37; *see also* Lee, *supra* note 38, at 6.

[141] Rome Statute, *supra* note 52, art. 13.

[142] Zeidy, *supra* note 138, at 131-32.

To determine whether the ICC's jurisdiction should supersede that of national courts, there are several considerations that must be taken into account. For example, national courts in the territorial state where the incident occurred would have greater access to evidence and witnesses.[143] These national courts would also have a greater interest in the prosecution because the crimes occurred in their territory.[144] However, this greater interest can lead to questions of impartiality and fairness.[145] The ICC is a nonpartisan court made up of judges from around the world, with rules and procedures that ensure fairness and impartiality.[146] Since the Second World War it has been common practice of national courts prosecuting serious human rights violations committed anywhere in the world.[147] However, the idea of a permanent international criminal court with broad jurisdiction caused concern among at the Rome Conference in 1998.[148] Therefore, the representatives in attendance at the Rome Conference came to an agreement on a system of complementarity.[149] Under this system the role of the ICC is to complement national courts and function solely as a court of last resort.[150] The ICC is intended to supplement, rather than supplant, the domestic punishment of international violations.[151] ICC Prosecutor Luis Moreno-Ocampo has stated that "[a]s a consequence of complementarity, the number of cases that reach the Court should not be a measure of efficiency. On the contrary, the absence of trials before this Court, as a consequence of the regular functioning of national institutions, would be a major success."[152]

Several articles in the Rome Statute lay out this system of complementarity. Article 1 of the Rome Statute maintains that the ICC only compliments national criminal jurisdictions; it does not take their place.[153] Article 17, which deals with admissibility, states that a case is inadmissible if the case is being investigated by a state that has jurisdiction over it (i.e. where the incident occurred, where the defendant is from, etc.), unless the state is unwilling or unable to investigate or

143 William W. Burke-White, *Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice*, 49 HARV. INT'L L. J. 53, 68 (2008).

144 *See* Louise Arbour, *Will the ICC have an Impact on Universal Jurisdiction?*, 1 J. INT'L CRIM. JUST. 585, 586 (2003).

145 Rome Statute, *supra* note 52, art. 17(2)(c); *see also* Mba Chidi Nmaju, *Violence in Kenya: Any Role for the ICC in the Quest for Accountability?*, 3 AFR. J. LEGAL STUD. 78, 92 (2009).

146 *See* Rome Statute, *supra* note 52, art. 36.

147 AMNESTY INTERNATIONAL, UNIVERSAL JURISDICTION, http://www.amnesty.org/en/international-justice/issues/universal-jurisdiction (last visited Nov. 15, 2010).

148 ZEIDY, *supra* note 138, at 131-32.

149 *See* Rome Statute, *supra* note 52, art. 17.

150 Nsongurua J. Udombana, *Pay Back Time in Sudan? Darfur in the International Criminal Court*, 13 TULSA J. COMP. & INT'L L. 1, 30 (2005).

151 Michael A. Newton, The Complementarity Conundrum: *Are We Watching Evolution or Evisceration?*, 8 SANTA CLARA J. INT'L L. 115, 116 (2010).

152 Luis Moreno-Ocampo, Prosecutor of the ICC, Statement Made at the Ceremony After Election as the Chief Prosecutor of the International Criminal Court (June 16, 2003), *available at* http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Office+of+the+Prosecutor/Reports+and+Statements/Press+Releases/Press+Releases+2003/.

153 Rome Statute, *supra* note 52, art. 1.

prosecute.[154] A failure to prosecute may stem, for example, from political instability in the national jurisdiction or from a non-independent judiciary.[155] As the party asserting jurisdiction, the ICC Prosecutor bears the burden of proving that the state is unwilling or unable to carry out the investigation or prosecution.[156] The Court considers several factors in determining whether a state is unwilling or unable to prosecute. These include; (1) whether the national proceedings undertaken are or were for the purpose of shielding the accused from ICC criminal prosecution; (2) whether there is an unjustifiable delay in the proceedings; and (3) whether the proceedings were being conducted independently or impartially.[157]

In the case of *The Prosecutor v. Thomas Lubanga Dyilo,* the ICC was confronted with the issue of complementarity.[158] The Court determined that a case before the ICC will only be declared inadmissible under the complementarity principle when the "[concurrent] national proceeding encompass both the person and the conduct which is subject of the case before the Court."[159] That means that the national proceeding must be charging the same person, pursuing the same charges, and involving the same criminal conduct, as the ICC proceeding. The problem is that the Court's ruling on complementarity is much narrower than the definition found in Article 17 of the Rome Statute. The ruling interpretation on complementarity is very stringent and favors prosecution by the ICC over national courts.[160]

States that have signed and ratified the Rome Statute have tried to bring their domestic laws into harmony with the ICC provisions by passing legislation. However, every state has done so differently. In Australia, there can be no prosecution without the consent of the Attorney General.[161] In Denmark, it is the Minister of Justice that decides the matter upon a request from the ICC for the extradition of an individual.[162] Portugal can prosecute any perpetrators of ICC crimes, but only within the provisions of the Portuguese criminal legislature.[163] Even though each of these states passed its own unique implementing legislation,

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

155 Id. art. 17(2), (3); *see also* Christopher D. Totten & Nicholas Tyler, *Arguing for an Integrated Approach to Resoling the Crisis in Darfur: The Challenges of Complementarity, Enforcement, and Related Issues in the International Criminal Court,* 98 J. Crim. L. & Criminology 1069, 1080-81 (2008).

156 Megan A. Fairlie, *Establishing Admissibility at the International Criminal Court: Does the Buck Stop with the Prosecutor, Full Stop?,* 39 Int'l Law. 817, 823-24 (2005).

157 Rome Statute, *supra* note 52, art. 17(2).

158 Decision Concerning Pre-Trial Chamber I's Decision of 10 February 2006 and the Incorporation of Documents in to the Record of the Case Against Mr. Thomas Lubanga Dyilo, Situation in the Democratic Republic of the Congo, Case No. ICC-01/04-01/06, ¶ 31 (Feb. 24, 2006).

159 *Id.*

160 *See* Robert Cryer, Hakan Friman, Darryl Robinson, Elizabeth Wilmshurst, An Introduction to International Criminal Law and Procedure 155 (Cambridge Univ. Press 2007).

161 Dragana Radosavljevic, *An Overview of the ICC Complementarity Regime,* J. Turkish Weekly, Sept. 12. 2007, http://www.turkishweekly.net/article/235/an-overview-of-the-icc-complementarity-regime.html.

162 *Id.*

163 *Id.*

they all share a common concern; not wanting their own sovereignty compromised by the ICC.[164] With the exception of a Security Council resolution (e.g Resolution 1593 referring the situation in Darfur, Sudan, to the ICC), national courts maintain a great deal of power under the complementarity principle.[165]

B. Balance Between Peace and Justice

In the summer of 2008, Judge Mauro Politi of the ICC, speaking at the International Criminal Law Network Lecture on the 10th anniversary of the adoption of the Rome Statute, stated that one of the major challenges facing the ICC is the issue of trying to balance the sometimes dueling interests of peace and justice.[166]

The Rome Statute was established on the conviction that the most serious crimes of concern to the whole international community as a whole threaten the peace, security, and well-being of the world[167] and that their effective prosecution contributes to the prevention of such crimes.[168] In other words, one of the founding principles of the Rome Statute is that justice ensures, reinforces, and paves the way for long lasting peace.

Accordingly, the effective prosecution of atrocities not only enables the rehabilitation, reintegration, and resocialization of victims and the affected communities, but also greatly contributes to the deterrence of similar crimes in the future by ending impunity for perpetrators.[169] Thus, according to this line of reasoning, "there can be no peace without justice, no justice without law and no meaningful law without a Court to decide what is just and lawful under any given circumstance."[170]

Others disagree, however, and argue that ICC's investigations and prosecutions will actually harm local populations in conflict territories.[171] By prosecuting militia leaders or central political figures that are actively engaged in ongoing conflicts, the Court's actions can drive a wedge into peace negotiations.[172] The tension between peace and justice during reconciliation talks is most apparent when militia leaders and government heads claim that they will not agree to any peace settlement until they are granted impunity from ICC prosecution,[173] which

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164 *Id.*

165 *Id.*

166 Mauro Politi, Former Judge of the International Criminal Court, address at the ICLN Conference in the Hague, Netherlands (June 25, 2008).

167 Rome Statute, *supra* note 52, pmbl. ¶ 3.

168 *Id.* ¶ 5.

169 *See* M. Cherif Bassiouni, *Combating Impunity for International Crimes,* 71 U. Colo. L. Rev. 409, 410 (2000).

170 Global Politics, *supra* note 19, at 27 (quoting Benjamin B. Ferencz, a former Nuremberg prosecutor).

171 Daniel Wallis, *Rwanda Genocide Court Poses Questions on Justice*, Reuters, Aug. 7, 2008, http://www.reuters.com/article/idUSL768889220080807?pageNumber=1.

172 *Id.*

173 Council on Foreign Relations, Stephanie Hanson, *In Uganda, Peace Versus Justice* (Nov. 17, 2006), http://www.cfr.org/publication/12049/in_uganda_peace_versus_justice.html?breadcrumb=%2findex.

is something the ICC has not shown a willingness to do so far.[174] Since the ICC only has jurisdiction over crimes occurring after July 2002, it is often dealing with crimes that are associated with ongoing conflicts, thus creating a conflict between peace and justice.[175]

The fear that prosecutions may do more harm than good and destabilize the state has caused some states, like Argentina, Chile, El Salvador, South Africa, and even Sierra Leone, to form Truth Commissions and grant amnesties in order to ensure peace and stability.[176] A discussion of the relationship between peace and justice is relevant today in light of the situation in several states where ICC arrest warrants have been handed down. The two regions where this issue has taken center stage are Northern Uganda and most recently Darfur, Sudan. For over 20 years, in Northern Uganda, the Ugandan government has been fighting a civil war in Northern Uganda against the Lord's Resistance Movement (LRA), led by Joseph Kony.[177] Recently peace talks have taken place between the LRA and the Ugandan government, hosted by the government of Southern Sudan in Juba.[178] However, these peace talks have not run smoothly because Mr. Kony has indicated that he is not prepared to sign an agreement until the ICC's arrest warrant against him is lifted.[179] Similarly, the ICC arrest warrant of Sudanese President Al-Bashir has caused debate among analysts about whether the issuance of this arrest warrant will only further destabilize the situation in Darfur causing more suffering for the people in the region.[180] President Al-Bashir, Mr. Kony, and even President Robert Mugabe of Zimbabwe have been reluctant to agree to any sort of amnesty after watching the former President of Liberia, Charles Taylor, end up being tried for war crimes at the Special Court of Sierra Leone after agreeing to an amnesty in exchange for peace.[181] Legal experts have stated that war crimes charges supersede any amnesty.[182]

The Rome Statute gives the ICC Prosecutor the discretion not to pursue investigations if, after taking into account all the circumstances, he or she determines that it is not in the interest of justice.[183] However, weighing the interests of peace against those of justice puts the Prosecutor in a difficult position. U.N.

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174 Louis Charbonneau, *ICC Prosecutor won't back down on Sudan's Bashir*, REUTERS, July 18, 2008, http://www.reuters.com/article/idUSN16398099200807l8?pageNumber=2.

175 George H. Norris, *Closer to Justice: Transferring Cases from the International Criminal Court*, 19 MINN. J. INT'L L. 201, 202 (2010).

176 Some Truth and Reconciliation Commissions have functioned well (e.g. South Africa), others have had mixed results (e.g. Argentina) and yet others have been usurped by criminal prosecutions (e.g. Sierra Leone). Milena Sterio, *Rethinking Amnesty*, 34 DENV. J. INT'L L. & POL'Y 373, 380-85 (2006).

177 Katie Glassbrow, *Peace Versus Justice in Uganda*, INST. FOR PEACE REPORTING, Feb. 15, 2010, http://iwpr.net/report-news/peace-versus-justice-uganda.

178 *Id.*

179 *Id.*

180 Tsegaye Tadesse, *Sudan expects African support on ICC warrant*, REUTERS, July 21, 2008, http://www.reuters.com/article/idUSMCD135937.

181 Simon Robinson, *Choosing Justice over Peace in Darfur*, TIME, July 14, 2008, http://www.time.com/time/world/article/0,8599,1822529,00.html.

182 Hanson, *supra* note 173.

183 Rome Statute, *supra* note 52, art. 53.

Secretary-General Ban Ki-Moon has himself spoken about the relationship between peace and justice, "We must seek to strike the correct balance between the duty of justice and the pursuit of peace."[184] The Security Council has not yet used Article 16 of the Rome Statute to suspend prosecutions, but there might be situations in the future, where international pressure for peace may one day persuade the Security Council to suspend the prosecution of certain individuals; however that seems unlikely at the moment, even in the case of Sudanese president Omar al-Bashir.[185] Balancing the relationship between peace and justice has also received a lot of attention from NGOs who work in these conflict zones. Some NGOs fear that their work on peace initiatives will be damaged by these investigations,[186] while others feel that the ICC arrest warrants have actually had a positive effect on conflicts by putting pressure on the parties to come to a peace agreement.[187]

The ICC has found itself placed in a delicate and difficult situation with the need to balance peace and justice. Its investigations may lead to the destabilization of conflict zones because those with arrest warrants against them may become reluctant to agree to any sort of peace agreement unless they are granted immunity from prosecution. If the ICC relents and grants immunity to those individuals then the ICC's work will be perceived as negotiable, which will undermine its role as a deterrent against future crimes.[188]

VII. Case Study: Darfur, Sudan

A. Background of the Situation in Darfur

The situation in Darfur addresses the issues of complementarity and the relationship between peace and justice. The resolution of these issues as applied to the situation in Darfur will bear serious implications for the Court's future effectiveness and legitimacy.[189]

The conflict in Sudan involves two main groups: (a) the government of Sudan and the Popular Defense Forces (PDF), a militia called the 'Janjaweed' that the government employs to supplement its forces; and (b) the resistance forces, including the Sudan Liberation Movement/Army (SLM/A) and the Justice and Equality Movement (JEM).[190] In response to attacks by resistance forces in 2003, the Sudanese army, with the help of the Janjaweed, launched a counter

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[184] Charbonneau, *supra* note 174.

[185] Zachary Manfredi, ICC Observers Commentary: The Perils of an Article 16 Deferral, ICC OBSERVERS (Mar. 6, 2009), http://iccobservers.org/2009/03/06/icc-observers-commentary-the-perils-of-an-article-16-deferral/.

[186] Tadesse, *supra* note 180.

[187] International Crisis Group, *Sudan: Justice, Peace, and the ICC* (July 17, 2009), http://www.crisisgroup.org/en/regions/africa/horn-of-africa/sudan/152-sudan-justice-peace-and-the-icc.aspx.

[188] INTERNATIONAL CRISIS GROUP, GETTING THE UN INTO DARFUR (Oct. 12, 2006), http://news.bbc.co.uk/2/shared/bsp/hi/pdfs/un_darfur11_10_06.pdf.

[189] Totten & Tyler, *supra* note 155, at 1071.

[190] *Id.* at 1083.

insurgency campaign to wipe out the resistance forces.[191] In September 2004, after the death and displacement of hundreds of thousands of people, the UN Security Council mandated a commission to investigate and report on the situation in Sudan.[192] The Darfur Commission found that the governmental forces and the Janjaweed, who were financially and militarily supported by the government, had committed several crimes such as rape, looting, and massacres.[193] Their actions led to the death of thousands of civilians and to the mass displacement of the population.[194]

On March 31, 2005, in response to the Darfur Commission findings, the UN Security Council passed Resolution 1593 referring the Darfur case to the ICC Prosecutor.[195] The Security Council's referral was historic; it was the first time that the Security Council referred a case to the ICC.[196] After analyzing the evidence, the ICC Prosecutor determined that sufficient evidence existed to initiate a full investigation.[197] On February 27, 2007, ICC Prosecutor Luis Moreno-Ocampo filed an application for an arrest warrant with the Court against two Sudanese nationals; Ahmed Harun, the Minister of Interior, and Ali Kushayb, the leader of the Janjaweed militia in West Darfur.[198] On April 27, 2007, the Pre-Trial Chamber issued warrants for the arrest of both men.[199] Neither of them have, as of yet, been handed over to the Court.[200]

On July 18, 2008, the Prosecutor filed another application for an arrest warrant involving the conflict in the Sudan. On March 3, 2009, the Pre-Trial Chamber issued the arrest warrant for President Al-Bashir, which listed seven counts; five counts of crimes against humanity and two counts of war crimes.[201] This marked the first time that the ICC had issued an arrest warrant for a sitting head of state.[202] The Prosecutor had also sought three counts of genocide, but the Court

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[191] *Id.* at 1086.

[192] *Id.* at 1083.

[193] *Id.* at 1086.

[194] *Id.*

[195] S.C. Res. 1593, U.N. Doc. S/RES/1593 (Mar. 31, 2005), *available at* http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N05/292/73/PDF/N0529273.pdf?OpenElement.

[196] Totten & Tyler, *supra* note 155, at 1072.

[197] *Id.* at 1088-89.

[198] *Id.* at 1090-91.

[199] *See generally* Warrant of Arrest for Ali Kushayb, Situation in Darfur, Sudan In the Case of the Prosecutor v. Ahmad Muhammad Harun and Al Muhammad Al Abd-Al-Rahman, Case No. ICC-02/05-01/07 (Apr. 27, 2007); Warrant of Arrest for Ahmad Harun, Situation in Darfur, Sudan In the Case of the Prosecutor v. Ahmad Muhammad Harun and Al Muhammad Al Abd-Al-Rahman, Case No. ICC-02/05-01/07-2 (Apr. 27, 2007).

[200] The International Criminal Court, The Prosecutor v. Ahmad Muhammad Harun ("Ahmad Harun") and Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb"), http://www.icccpi.int/menus/icc/situations%20and%20cases/situations/situation%20icc%200205/related%20cases/icc%200205%200107/darfur_%20sudan?lan=en-GB.

[201] *See generally* Warrant of Arrest for Omar Hassan Ahmad Al Bashir, Situation in Darfur, Sudan In the Case of the Prosecutor v. Omar Hassan Ahmad Al Bashir, Case No. ICC-02/05-01/09 (Mar. 4, 2009) [hereinafter Bashir Arrest Warrant].

[202] Tom Ginsburg, *The Clash of Commitments at the International Criminal Court*, 9 CHI. J. INT'L L. 499, 503 (2009).

found that the Prosecutor had failed to prove that the government of Sudan had acted with the intent (*dolus specialis*) to destroy the Fur, Masalit, and Zaghawa tribes.[203] The issuance of the arrest warrant of Harun, Kushayb, and especially Al-Bashir, has caused significant discussion as to whether the arrest warrants serve a higher purpose of holding even heads of states accountable for their actions, or whether, in issuing these arrest warrants, the ICC has only inflamed and destabilized an already precarious situation.[204]

B. Issues

One important issue raised by the proceedings is whether the ICC may legally enforce its jurisdiction upon Sudan and President Al-Bashir taking into account complementarity. Part IX of the Rome Statute, entitled "International cooperation and judicial assistance," addresses issues of cooperation of state parties and non-state parties.[205] State parties must cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court.[206] The fact that Sudan is a non-state party to the ICC creates a problem of enforcement.[207] The Rome Statute does mention that, in situations that involve a non-state party, the Court may invite the state to cooperate with the terms of an ad hoc agreement.[208] After an agreement has been reached and the state does not comply then the Court can inform the UN Security Council, but only if it was the Security Council that first referred the situation to the ICC.[209] So far Sudan has refused to cooperate with the ICC's arrest warrants.[210] Even though Sudan is a non-state party, it is a signatory to the Rome Statute,[211] and as such had certain obligations to refrain from "acts which would defeat the object and purpose" of the Rome Statute[212] up until the time that made its intention clear that it did not want to become a party to the Rome Statute.[213] Therefore, an argument could be made that by committing acts of war crimes and crimes against humanity Sudan has violated its obligations.[214]

After the arrest warrants for Harun and Kushayb were issued, the government of Sudan did take certain steps. For example, President Al-Bashir established a National Commission of Inquiry (NCOI) to investigate the Darfur crimes.[215] The

[203] Bashir Arrest Warrant, *supra* note 201.

[204] Robinson, *supra* note 181.

[205] Rome Statute, *supra* note 52, art. 86-102.

[206] *Id.* art. 86.

[207] Totten & Tyler, *supra* note 155, at 1070.

[208] Rome Statute, *supra* note 52, art. 87(5)(a).

[209] *Id.* art. 87(5)(b).

[210] Totten & Tyler, *supra* note 155, at 1107.

[211] *Status of the Rome Statute*, *supra* note 50.

[212] Vienna Convention, *supra* note 114, art. 18.

[213] On Aug. 26, 2008, the Government of Sudan informed the Secretary-General that Sudan no longer intended to become a party to the Rome Statute. *Status of the Rome Statute*, *supra* note 50.

[214] Totten & Tyler, *supra* note 155, at 1085.

[215] *Id.* at 1095.

commission did acknowledge acts of killings and bombings of civilians by government forces, but underemphasized their magnitude and severity.[216] A Special Court of Darfur was established, though it was later replaced by three regional special courts, and completed several criminal cases.[217] However, the prosecutions only involved low-level suspects on charges that were not nearly as severe as those that Harun and Kushayb were accused of.[218] Kushayb was eventually arrested by local authorities, then released,[219] then re-arrested.[220] Harun has never been arrested, but rather now serves as the Minister of State for Humanitarian Affairs.[221] Many human rights groups were, and still are, questioning whether Sudan's national courts will ever prosecute senior government officials for violations of war crimes, crimes against humanity, and genocide.[222]

In December 2007, the ICC Prosecutor submitted to the Security Council that Sudan had not complied with its obligations stemming from UN Security Council Resolution 1593.[223] In May 2008, the ICC Prosecutor informed the Pre-Trial Chamber that Sudan had failed to cooperate in response to the arrest warrants.[224] In response, in June 2008, the Security Council sent a mission to Africa where it met with President Al-Bashir.[225] "The Security Council members urged the government of Sudan to cooperate with the ICC's investigations of Ahmad Harun and Ali Kushayb."[226] However, the Sudanese government refused to hand over both individuals on the grounds that Sudan is not a state party and thus is not bound by any ICC decisions.[227] President Al-Bashir could escape indictment if he handed over Harun and Kushayb.[228] But, Sudan rejected any deal that would send any Sudanese citizen to the ICC.[229]

In a report on the Sudan, the Security Council stated,"[t]here may indeed be instances where a domestic system operates in an effective manner and is able to deal appropriately with atrocities committed within its jurisdiction. However, the

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216 *Id.* at 1096.

217 *Id.*

218 *Id.*

219 Wasil Ali, *Sudan releases Darfur war crime suspect wanted by ICC*, SUDAN TRIB., Oct. 2, 2007, http://www.sudantribune.com/spip.php?article24036.

220 Jeffrey Gettleman, *Sudan Arrests Militia Chief Facing Trial*, N.Y. TIMES, Oct.13, 2008, http://www.nytimes.com/2008/10/14/world/africa/14darfur.html?_r=1.

221 Council on Foreign Relations, *Session Three: The Darfur Case*, Oct. 17, 2008, http://www.cfr.org/publication/17580/session_three.html.

222 Totten & Tyler, *supra* note 155, at 1098.

223 Göran Sluiter, *Obtaining Cooperation from Sudan – Where is the Law?*, 6 J. INT'L CRIM. JUST. 871, 872-73 (2008).

224 *Id.* at 873.

225 Ginsburg, *supra* note 202, at 504.

226 *Id.*

227 *Id.*

228 Louis Charbonneau, *Sudan's Bashi could escape ICC Indictment*, REUTERS, July 16, 2008, http://www.reuters.com/article/idUSN16398099200807l6?pageNumber=1.

229 Opheera McDoom, *Sudan Rules out Deal with ICC Over Bashir Warrant*, REUTERS, July 17, 2008, [hereinafter McDoom – Sudan Rules out Deal], *available at* http://www.alertnet.org/thenews/newsdesk/L1735882.htm.

very nature of most international crimes implies, as a general rule, that they are committed by State officials or with their complicity; often their prosecution is therefore better left to other mechanisms."[230]

In summary, it appears that the ICC can lawfully exercise its jurisdiction over Sudan and its president. Even though Sudan is not a state party, the fact that it is a signatory to the Rome Statute [231] and that the situation was referred to the ICC by a Chapter VII Security Council Resolution[232] lends supports to ICC having jurisdiction over the conflict in Darfur as long as the complementarity principle is followed.[233] First, Sudan has not complied with Security Council Resolution 1593, nor with ICC arrest warrants of Harun, Kushayb, and Al-Bashir.[234] Therefore, under the principle of complementarity, a core principle of the Rome Statute, the ICC can enforce its jurisdiction over these individuals because Sudan is "unwilling" to prosecute.[235] Although the ICC exercised its jurisdiction in accordance with the Rome Statute,[236] a more compelling question is whether its issuance is desirable given the current situation.

The ICC is sometimes confronted with prosecuting criminals engaged in ongoing conflicts. In so doing, the Court is confronted with weighing the interests of peace and justice in determining whether to proceed with a prosecution.[237] The prosecution of Omar Al-Bashir, the President of Sudan, showcases the tension that exists between peace and justice.[238]

In response to the ICC arrest warrant, Al-Bashir argued that the ICC's case was a western ploy to target Sudan's oil and gas resources.[239] Al-Bashir stated, "we have refused to kneel to colonialism, that is why Sudan has been targeted . . . because we only kneel to God."[240] He then expelled ten of the largest international aid agencies from Darfur,[241] drawing criticism from foreign states and the

[230] Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, 144, ¶ 568 (Jan. 25, 2005), *available at* http://www.un.org/News/dh/ sudan/com_inq_darfur.pdf.

[231] Status of the Rome Statute, *supra* note 50.

[232] S.C. Res. 1593, *supra* note 195.

[233] Article 53 of the Rome Statute limits the exclusive powers granted to the Security Council acting under its Chapter VII powers by making the Security Council's assessment contingent on the Prosecutor deciding to pursue the case. In addition, Article 19 confirms the application of complementarity to referrals by the Security Council by providing an opportunity to States, even non-party States, to stop a prosecution by challenging the admissibility on the grounds set out in Article 17, even when a situation is referred by the Security Council. *See* Mohamed M. El Zeidy, *The Principle of Complementarity: A New Machinery to Implement International Criminal Law*, 23 MICH. J. INT'L L. 869, 959-60 (2002).

[234] McDoom – Sudan Rules out Deal, *supra* note 229.

[235] Rome Statute, *supra* note 52, art. 17.

[236] *Id.* art. 13(b).

[237] Politi, *supra* note 166.

[238] *See* Robinson, *supra* note 181.

[239] Mike Pflanz, *Bashir calls ICC arrest warrant a 'conspiracy'*, TELEGRAPH, Mar. 5, 2009, http:// www.telegraph.co.uk/news/worldnews/africaandindianocean/sudan/4942470/Sudan-President-Omar-al-Bashir-calls-ICC-arrest-warrant-a-conspiracy.html.

[240] *Id.*

[241] *Id.*

UN.[242] Supporters of Al-Bashir marched in the city streets chanting his name and criticizing the ICC.[243] Others, who have suffered as a result of the conflict, support his arrest but ultimately want peace above all else.[244] The situation has resulted in mixed opinions from governments as to the prudence of the ICC's arrest warrant.[245]

While there is support among many states for an investigation into the crimes that were being committed in Sudan, other states, such as South Africa and China, have been critical of the ICC indictment of President Al-Bashir, fearing the indictment could damage the peace talks.[246] Jakaya Kikwete, the President of Tanzania and the current head of the African Union, recently announced that "justice has to be done. Justice must be seen to be done. What the AU is simply saying is that what is critical, what is the priority, is peace. That is priority number one now."[247] Even the government of Southern Sudan which was originally in favor of the ICC, is now concerned that Al-Bashir's arrest warrant will curtail the peace process.[248] Security Council Resolution 1828 (2008) mentioned that several members had expressed concern regarding potential developments that have subsequently occurred after the ICC Prosecutor submitted an application for an arrest warrant of Al-Bashir.[249]

American support has been mixed. Former U.S. envoy to Sudan, Andrew Natsios, stated that the ICC arrest warrant of President Al-Bashir will damage peace negotiations because leaders will be reluctant to compromise for fear that they will face trial at the ICC.[250] However, it appears that the Obama administration will be more supportive of the arrest warrant. For example, U.S. Ambassador to the UN Susan Rice and State Department Spokesman Robert Wood have both spoken in support of ICC's investigation and prosecution of those responsible for the atrocities committed in Sudan.[251]

ICC Prosecutor Ocampo faced the dilemma of weighing the interests of peace against that of justice when he submitted a request for an arrest warrant for Presi-

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242 *US, France unhappy about Arab & African support to Sudan's Bashir: report*, SUDAN TRIB., Apr. 5, 2009, *available at* http://www.sudantribune.com/spip.php?article30763.

243 McDoom - Sudan Rules out Deal, *supra* note 229.

244 *Sudanese want peace more than indictment*, SUDAN TRIB., July 20, 2008, http://www.sudantribune.com/spip.php?article27938.

245 "A number of governments including France, the United Kingdom, Norway, Denmark, Canada, and the United States expressed support for the ICC's warrant decision. . .In contrast to these statements, reactions by the Arab League, African Union, Russia, and China were characteristically critical of the court's decision." Golzar Kheiltash, *ICC Issues Historic Arrest Warrant for Sudanese President Over Darfur*, 5 INT'L ENFORCEMENT L. REP. 213 (2009).

246 McDoom - Sudan Rules out Deal, *supra* note 229.

247 Christopher Gosnell, *The Request for an Arrest Warrant in Al Bashir; Idealistic Posturing or Calculated Plan?*, 6 J. INT'L CRIM. JUST. 841, 845-46 (2008).

248 Opheera McDoom, *Justice clashes with peace on Dafur Bashir warrant*, REUTERS, July 14, 2008, *available at* http://www.reuters.com/article/topNews/idUSMCD42464620080714 [hereinafter McDoom - Justice clashes with peace].

249 Sluiter, *supra* note 223, at 871.

250 McDoom - Justice clashes with peace, *supra* note 248.

251 Kheiltash, *supra* note 245.

dent Al-Bashir.[252] Mr. Ocampo explained how the evidence collected clearly shows the guilt of President Al-Bashir and that justice must be done for the victims of the conflict.[253] He expressed concern for the situation of the peace talks in Sudan but explained that he has to perform his judicial duties regardless of any political factors.[254]

VIII. Conclusion

As to the situation of Al-Bashir it will probably be many years before Al-Bashir will ever be tried by the ICC, when considering the delicate balance of peace versus justice within Darfur and the fact that he is the current head of state of Sudan. However, speed in the area of criminal prosecution under international law has never been very fast. Radovan Karadzic evaded custody for 13 years, without causing serious damage to the ICTY's credibility. Since the ICC does not have a police force, it will be up to the states to act. The ICC should not rescind the arrest warrant nor negotiate an amnesty. The Court must stay true to its mandate and prosecute major war criminals or it risks becoming irrelevant. The risk of granting impunity for a major war criminal would undermine the effectiveness and need of the ICC.

While the U.S. still has many concerns about the ICC, its participation at the 2010 Review Conference and the recent statements and actions of the Obama administration suggests a shift in U.S. policy toward the ICC. Since the days of the Second World War, the U.S. has proclaimed its position as a supporter and leader in humanitarian law and in the prosecution of war criminals. The U.S. has finally realized that by sitting down at the table they gained the ability to shape and influence the Court in ways that meet their concerns. However, there is still a long to go before U.S. support for the Court is complete and unconditional.

While the Court has yet to complete one trial, and has failed to garner the support of several of the most powerful states, especially the U.S., it is still in operation, pursuing heads of states for war crimes, while continually adding more state parties as the years go by. Harold Hongju Koh, Legal Advisor at the U.S. Department of State, stated at a State Department Press Conference on June 15, 2010, "There are now 111 states parties. It's [Rome Statute] not going to go away."[255]

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[252] Charbonneau, *supra* note 174.

[253] Luis Moreno-Ocampo, *Now end this Darfur denial*, GUARDIAN, July 15, 2010, http://www.guardian.co.uk/commentisfree/libertycentral/2010/jul/15/world-cannot-ignore-darfur.

[254] Charbonneau, *supra* note 174.

[255] State Department Press Conference, *supra* note 136.

The International Criminal Court: An Informal Overview

Jerry E. Norton†

Introduction

International criminal law has been around for a long time. However, before the mid-twentieth century, international criminal law was basically a branch of national laws administered by national courts. For example, piracy was viewed as an international crime, yet enforcement of this crime, committed on the high seas beyond their national borders, required that nation states give extraterritorial jurisdiction to their domestic criminal courts.[1] National courts around the world had to determine the jurisdictional basis for extraterritorial prosecutions before them. The subject matter jurisdiction for prosecutions of piracy on the high seas became known as the universality principle— that is, certain crimes against humanity may be so universal that all civilized nations have jurisdiction to punish them regardless of where they were committed.[2] The number of international crimes for which universal jurisdiction is recognized by at least some states has expanded over time to include war crimes, crimes against humanity, genocide, and torture.[3] This expansion is not solely because of practices among nations, but also because of the increased use of international treaties and conventions. In addition, national courts have expanded their jurisdiction to crimes committed outside the territories of their states by other jurisdictional enhancers such as nationality, passive personality, and national protective jurisdiction.[4]

However, to this point, international law remained a matter of national law and national courts. There was still no model for international courts applying international criminal laws. With the twentieth century this began to change. The Treaty of Versailles in 1919 ending World War I would have created an international tribunal to try the German Kaiser and others, but the United States did not support this tribunal and Germany was permitted to try the accused war criminals in domestic courts.[5] The first international criminal court was created August

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[1] *See generally* M. Cherif Bassiouni, Introduction to International Criminal Law 109-10 (Transnational Publishers 2003) *and* David Luban, Julie O' Sullivan & David Stewart, International and Transnational Criminal Law 208-12 (Wolters Kluwer 2010).

[2] At least one writer has argued that the crime of piracy does not provide justification for a more expanded universality jurisdiction. *See* Eugene Kontorovich, *The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation*, 45 Harv. Intl. L. J. 183 (2004).

[3] Robert Cryer, Hakan Friman, Darryl Robinson & Elizabeth Wilmshurst, An Introduction to International Criminal Law and Procedure 44 (Cambridge University Press 2007).

[4] *See id.* at 40-43.

[5] Eric K. Leonard, The Onset of Global Governance: International Relations Theory and the International Criminal Court 22 (Ashgate Publishing Company 2005).

8th, 1945— The International Military Tribunal at Nuremberg.[6] A similar tribunal was also created in Tokyo.[7] These military tribunals were criticized by human rights lawyers and others as being "'victors' justice"— administered against only the vanquished, and using rules and courts created only after the fact.[8] Whatever the strengths and shortcomings of the World War II international military tribunals, the movement toward creating international courts to try international crimes that these courts may have signaled ended with the Cold War.[9] During that time the world was divided into two competing spheres of state sovereignty. As one scholar put it, "[D]uring the Cold War, violations of human rights by the Enemy went unpunished because of its power, while violations by Friends were excused or justified on essentially strategic-diplomatic grounds."[10]

With the end of the Cold War, the 1990s witnessed a strong resurgence in the quest for international criminal tribunals. Old ethnic, tribal and religious rivalries and new independence movements challenged the established spheres of control of the Cold War era.[11] In response to massive human rights violations in the Balkans, an International Criminal Tribunal for the Former Yugoslavia (ICTY) was created in 1993. A similar tribunal, the International Criminal Tribunal for Rwanda (ICTR) was created the following year. Unlike the Nuremburg tribunal in 1945 which was created by victorious allies, these tribunals were created by the United Nations Security Council. They could not be accused of being the products of "'victors' justice." Nevertheless, the ICTY and ICTR are ad hoc tribunals created under charters drafted after the alleged crimes. Critics urge that these tribunals and the charters defining the crimes are ex post facto laws or violations of jurisdiction ratione temporis,[12] frowned upon in virtually all legal systems.[13]

Beginning even before the creation of the ICTY and ICTR, a third approach to trying international crimes was advanced— a permanent international court operating under general rules defining both the crimes and the court procedures.[14] In 1994 the United Nations General Assembly created an *ad hoc* committee to study such a permanent international court. This led in turn to the creation of a U. N. Preparatory Committee (PrepCom) in 1996 designed to prepare a proposal for a

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[6] *See* Bassiouni, *supra* note 1, at 405-12, for an account of Nuremberg Tribunal creation and operation.

[7] *See id.* at 414-20.

[8] LEONARD, *supra* note 5, at 25-26.

[9] *Id.* at 26-30.

[10] LEONARD, *supra* note 5, at 151 (quoting Chris Brown, *Universal Human Rights: A Critique*, 1 INT'L J. HUM. RTS. 41 (1997)).

[11] *Id.*

[12] *See, e.g.*, Rome Statute of the International Criminal Court, art. 11(1), 17 July 1998, A/CONF.183/9 (July 1, 2002) [hereinafter Rome Statute] ("The Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute.").

[13] *See* LEONARD, *supra* note 5, at 152-53 *and* David Tolbert, *International Criminal Law: Past and Future*, 30 U. PA. J. INT'L L. 1281, 1285-88 (2009), for further discussions of the shortcoming of the *ad hoc* tribunals.

[14] BASSIOUNI, *supra* note 1, at 444-57.

statute creating a permanent international criminal court. Based on a draft statute prepared by PrepCom, a major diplomatic conference was held in Rome from June 15 to July 17, 1998.[15] Dozens of states were represented by 5,000 delegates. As described by participants, the states divided themselves into two principal groups— the "like-minded" ones supporting the proposed international criminal court, which increased to about 60, and a small group of opposing states among which the United States played a prominent role.[16] With the assistance of 238 non-governmental organizations (NGOs) coordinated by the Coalition for the ICC, the delegates were able to work through many major differences to reach a proposed statute in 33 days. The final vote on July 17, 1998, was 120 yes, seven no and 21 abstentions. The Rome Statute entered into force on July 1st, 2002 after ratification by 60 countries. As of August, 2010, 113 countries are States Parties.[17]

In spite of the ambiguity of the United States in negotiations leading to the Rome Statute, President Bill Clinton signed the resulting treaty. However, after he took office, President George W. Bush withdrew President Clinton's initial signature to the treaty creating the ICC.[18] Hostile reactions to the statute were immediately expressed in some quarters in the United States, including Congress, which passed the American Service-members' Protection Act of 2002.[19]

The act authorizes the President to use force to rescue covered Americans held by the ICC.[20] More recent reflections on the threat of the Rome Statute to American interests have suggested that the fears leading to passage of the American Service-members' Protection Act were not only overstated but also counter-productive. As one military attorney has recently stated, "[T]he Act fails to actually protect U.S. nationals from this perceived threat, because the Act does nothing to

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[15] See *id.* at 462-94 *and* LEONARD, *supra* note 5, at 38-42, for this summary of the Rome Conference.

[16] "More particularly, the U.S. had exhibited greater obstinacy than anyone had expected. In fact, most delegations, particularly the 'like-minded states,' were bending over backwards to accommodate the U.S., which secured broad concessions on almost everything that it had requested until then. . . . Many delegations were dismayed at such lack of diplomatic flexibility, which seasoned diplomats believed to be a weakness in the American negotiating approach. Many delegations, however, saw it as another sign of American intransigence." BASSIOUNI, *supra* note 1, at 477.

[17] INTERNATIONAL CRIMINAL COURT, THE STATE PARTIES TO THE ROME STATUTE, http://www2.icc-cpi.int/Menus/ASP/states+parties/ (last visited Nov. 5, 2010).

[18] Diane Marie Amann & M.N.S. Seller, *The United States of America and the International Criminal Court*, 50 Am. J. Comp. L. 381, 384 (2002).

[19] "In addition to exposing members of the Armed Forces of the United States to the risk of international criminal prosecution, the 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 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." *See* 22 U.S.C.A. § 7421.

[20] "The President is authorized to use all means necessary and appropriate to bring about the release of any person . . . who is being detained or imprisoned by, on behalf of, or at the request of the International Criminal Court." 22 U.S.C.A. § 7427. This law was also called the "Invade the Hague" statute. ELIZABETH VAN SCHAAK & RONALD C. SLYE, INTERNATIONAL CRIMINAL LAW AND ITS ENFORCEMENT: CASES AND MATERIALS 81 (Foundation Press 2007). See Amann & Sellers, *supra* note 18, for additional discussions of the American reaction to the ICC.

influence the mechanism and procedures of the Court from the *inside*. In reality, the Act does more harm than good, as it has been counterproductive to U.S. national security and the fight against terrorism. . . ."[21]

Crimes and Jurisdiction

Only three general crimes are defined under the Rome Statute: Genocide, Crimes against Humanity, and War Crimes, although each is quite broad in coverage. The Crime of Aggression, which caused such concern for the United States Congress when it passed the American Service-members Protection Act of 2002, is not yet a defined crime and could not be prosecuted as such under Article 22 of the Rome Statute. A Review Conference for the Statute was held in June 2010, at which a proposed definition of the crime of Aggression was submitted to the States Party for ratification.[22] It will become part of the Rome Statute only when ratified. The three previously existing crimes— Genocide under Article 6, Crimes Against Humanity under Article 7, and War Crimes under Article 8— follow generally accepted definitions found in international treaties and conventions, including the Genocide Convention and the Geneva Conventions of 1949, all of which the United States has ratified.

Until a crime of aggression is included in the Rome Statute, the most controversial feature of the 1998 statute is not its definition of crimes, but its jurisdiction. The International Criminal Court may have jurisdiction over the three covered crimes if these crimes are committed in the territories of states which are parties to the Rome Statute (State Parties) or are committed by nationals of State Parties.[23] In addition to these two, where the crime is committed on the territory of a state not a party to the ICC, the state may opt to accept the territorial or nationality jurisdiction of the ICC. Finally, the court will have jurisdiction over cases referred to it by the Security Council, apparently regardless of whether a State Party is involved. However, the jurisdiction of the ICC is always complementary to national criminal jurisdiction, meaning no investigation or prosecution can be commenced or proceed if it is being investigated or prosecuted by a state with jurisdiction unless this investigation or prosecution is not genuine.[24]

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[21] Stuart W. Risch, *Hostile Outsider or Influential Insider? The United States and the International Criminal Court*, Army Law., May 2009, at 61, 80 (2009).

[22] The proposed Crime of Aggression is defined as:

> [T]he planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.

International Criminal Court, Review Conference of the Rome Statute, Draft Resolution Submitted by the President of the Review Conference: The Crime of Aggression 2, June 11, 2010, http://www.icc-cpi.int/iccdocs/asp_docs/RC2010/RC-10-ENG.pdf. The fact that such a crime is being considered without the inside participation by the United States, which would be so concerned with the resulting definition of Aggression, is one factor that led Colonel Risch to conclude that the Service-Members Protection Act of 2002 was counterproductive and that national interests would be most advanced by having a seat at the table. Risch, *supra* note 21, at 72.

[23] Rome Statute, *supra* note 12, art. 12.

[24] *Id.* arts. 1, 17(1)(a).

This jurisdictional language caused concern to the American representatives at the Rome Conference and later in Congress, since it is easy to see the prospect that American armed forces may be involved in states which are either signatories to the Rome Statute or would be willing to accept the jurisdiction of the ICC. Jurisdiction would then be exercised over American service-members and military and political commanders. Concern with the potential liability of Americans to ICC jurisdiction has caused the United States to enter into agreements with more than 100 countries under which those countries agree not to surrender Americans to the International Criminal Court. Such agreements are effective, the United States urges, under Article 98 of the Rome Statute.[25]

Prosecutors' Discretion and the Pre-Trial Chamber

Related to the concern with the jurisdiction of the International Criminal Court is concern with the powers of the Prosecutor. The Prosecutor under the Rome Statute has substantial discretion in investigating and prosecuting the three crimes under the statute. In that regard, his powers are not that different from the powers American prosecutors possess and exercise.[26] However, critics of the Rome Statute argue that American state and federal prosecutors are directly or indirectly limited by the political accountability built into the American prosecutorial system. Most state prosecutors are politically elected and accountable to the electorate for their decisions. Federal prosecutors are accountable to the United States Attorney General, who serves at the pleasure of the elected president. The ICC Prosecutor is not elected by popular vote, but by vote of a majority of the Assembly of States Parties and for a term of nine years.[27] In other words, he or she may be elected by, based on the current membership, 56 nations, regardless of their population and regardless of their fidelity to democracy.[28] He or she is subject to removal from office only for cause and only by the same absolute majority vote of the Assembly of States Parties.[29] One point of conflict at the 1998 Rome Conference was the suggestion by the United States and others that the United Nations Security Council play a larger role in controlling the Prosecutor's discretion. Some urged that certain prosecutions be limited to cases referred by the Security Council, thus effectively maintaining the power of the United States, as a permanent member of the Security Council, to veto prosecutions. Short of that, it was urged that the Security Council be given the power to prohibit prosecutions on the initiative of the Prosecutor. Article 16 of the Rome Statute, as finally adopted, permits the Security Council, by resolution,

[25] See International Criminal Court - Article 98 Agreements Research Guide, *available at* http://www.ll.georgetown.edu/guides/article_98.cfm (last visited Nov. 5, 2010) for a discussion of these Article 98 agreements and a list of countries with which these agreements have been concluded.

[26] *See* 4 LaFave Israel, King & Kerr, Criminal Procedure §13.2 (Thomson/West 3d ed., 2007.)

[27] Rome Statute, *supra* note 12, art. 42(4).

[28] See Amann & Seller, *supra* note 18, at 388-89 and Risch, *supra* note 21, at 78, for a discussion of the concern with politically motivated prosecutions in the ICC. "[A]lmost seven years of experience with the Court, and six with this Prosecutor, has demonstrated no evidence whatsoever of any willingness to politicize his, or the Court's decisions." Risch, *supra* note 21, at 78.

[29] Rome Statute, *supra* note 12, art. 46(2).

to defer investigations and prosecutions for up to 12 months at a time, but it cannot prohibit them.

However, the International Criminal Court Prosecutor is not given unchecked power to initiate criminal investigations and prosecutions. Where the Prosecutor initiates an investigation, rather than having it referred by the Security Council or a State Party, he or she must submit an authorization for the investigation to the Pre-Trial Chamber ("PTC") of the International Criminal Court.[30] At one level the Pre-Trial Chamber fulfills a function akin to a preliminary hearing in an American courtroom. At an ICC hearing, the PTC determines whether there is "sufficient evidence to establish substantial grounds to believe that the persons committed the crime charged."[31] If the Pre-Trial Chamber declines to confirm a charge, the Prosecutor may submit the matter again, but only if supported by additional evidence.[32] The Pre-Trial Chamber also plays important roles in the investigation, such as issuing arrest warrants and other orders dealing with witnesses and gathering of evidence.[33] Under detailed Rules of Procedure and Evidence adopted by the States Parties the Pre-Trial Chamber maintains many controls over the prosecutor beyond that available to American courts.[34]

Luis Moreno-Ocampo of Argentina was unanimously elected as the first Prosecutor of the Court in 2003. He is not a timid advocate. Between 1984 and 1992, as a prosecutor in Argentina, Mr. Moreno-Ocampo was involved in precedent-setting prosecutions of top military commanders for mass killings and other large-scale human rights abuses.[35] He is currently investigating four situations: Northern Uganda, the Democratic Republic of Congo, Darfur, Sudan, and the Central African Republic, with preliminary analyses in a number of other countries including Chad, Kenya, Afghanistan, Georgia, Colombia, and Palestine.[36]

The Trial

While the International Criminal Court has yet to complete a trial, the Rome Statute of 1998 creates a system most resembling a trial under the European Civil Law system, yet incorporating some Anglo-American Common Law features. Some of these features are very recognizable to the American lawyer. Article 66 expressly states that the accused "shall be presumed innocent" and that the proof of guilt must be "beyond reasonable doubt." The accused has other rights Americans associate with the Fifth and Sixth Amendments to the United States Consti-

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30 *Id.* art. 15(4).

31 *Id.* art. 61(7).

32 *Id.* art. 61(8).

33 *Id.* art. 57.

34 Rome Statute, R. Proc. & Evid., *available at* http://www.icc-cpi.int/NR/rdonlyres/F1E0AC1C-A3F3-4A3C-B9A7-B3E8B115E886/140164/Rules_of_procedure_and_Evidence_English.pdf (last visited Nov. 5, 2010).

35 International Criminal Court, The Prosecutor, http://www2.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Office+of+the+Prosecutor/Biographies/The+Prosecutor.htm (last visited Nov. 5, 2010).

36 International Criminal Court, Office of the Prosecutor, http://www2.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Office+of+the+Prosecutor (last visited Nov. 5, 2010).

tution, including speedy trial;[37] assistance of counsel, including appointed counsel for the indigent;[38] production, confrontation, and cross-examination of witnesses;[39] freedom from compelled self-incrimination;[40] and *Brady* disclosures of information favorable to the accused on issues of guilt or punishment.[41] In addition, the accused is given the right to a free interpreter[42] and a right rarely found in the Common Law to "make an unsworn oral or written statement" in his or her defense.[43] This right, commonly found in Civil Law countries, gives the accused the right to make a statement without being subject to cross-examination or perjury prosecution. It also relieves the defense attorney of the ethical responsibility for assessing the credibility of his or her client in making such a statement.

The trial itself will also bear greatest resemblance to a trial in a Civil Law country. There will be no jury and the case will be tried before a panel of three judges of the Trial Chamber.[44] These judges are elected by the Assembly of States Parties, the member states of the ICC.[45] Because the matter is tried before judges, not jurors, the rules of evidence are surprisingly casual to the eyes of an American lawyer. The testimony of each witness must be in open court, with certain exceptions for recorded or video testimony, and each witness must testify under oath. Beyond this, the Trial Chamber judges are largely free of formal restrictions. "The Court may rule on the relevance or admissibility of any evidence, taking into account, *inter alia*, the probative value of the evidence and the prejudice that such evidence may cause to a fair trial. . . ."[46] When a verdict is reached by the three judges it will not be in the form of a simple finding of "guilty" or "not guilty." Consistent with Civil Law countries, "The decision shall be in writing and shall contain a full and reasoned statement of the Trial Chamber's findings on the evidence and conclusions."[47] In other words, the court must state its conclusions and justify them in writing by the evidence presented. While rules of evidence appear relaxed, the Trial Chamber judges must assess the weight and credibility of evidence in a written opinion.

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37 Rome Statute, *supra* note 12, art. 67(1)(c).

38 *Id.* art. 67(1)(d).

39 *Id.* art. 67(1)(e).

40 *Id.* art. 67(1)(g).

41 *Id.* art. 67(2). The requirement is the same as that in Brady v. Maryland, 373 U.S. 83 (1963).

42 *Id.* art. 67(1)(f).

43 *Id.* art. 67(1)(h).

44 *Id.* art. 39(2)(b).

45 *Id.* art. 36.

46 *Id.* art. 69(4). In addition to Article 69 of the Rome Statute, judges are also subject to Rules of Procedure and Evidence for the International Criminal Court. Rule 64 of the procedure rules requires that, "A Chamber shall give reasons for any rulings it makes on evidentiary matters. These reasons shall be placed in the record of the proceedings. . . ." ROME STATUTE, R. PROC. & EVID. 64, para. 2, *available at* http://www2.icc-cpi.int/NR/rdonlyres/F1E0AC1C-A3F3-4A3C-B9A7-B3E8B115E886/140164/Rules_of_procedure_and_Evidence_English.pdf. As with other determinations, these rulings are subject to review by the Appeals Chamber.

47 Rome Statute, *supra* note 12, art. 74(5).

Other features of the trial are more mixed, with elements of both the Civil Law and Common Law traditions. The accused is given the right to be present and to cross-examine witnesses— a feature common to the adversarial Common Law tradition, yet Article 64 (8) gives inquisitorial-type powers to the presiding judge. "At the trial, the presiding judge may give directions for the conduct of proceedings, including to ensure that they are conducted in a fair and impartial manner."[48] Another mixed feature is the way in which plea bargaining is treated. "The crucial difference between the common law and civil law view is whether the court must accept the facts as the parties have agreed them or whether it will conduct a further inquiry and perhaps require additional evidence."[49] Article 65 of the Rome Statute and the supporting Rule 139 of the Rules of Procedure and Evidence allow the court to receive an admission of guilt once it has determined that it is voluntary and "supported by the facts of the case." However, it also allows the court to demand additional evidence when the court "is of the opinion that a more complete presentation of the facts of the case is required in the interests of justice . . . ."[50]

The Trial Chamber decision must be in writing and must contain a reasoned statement of the evidence and conclusions.[51] The three judges are admonished to "attempt" to reach unanimity, but failing that a majority is enough.[52] The decision or a summary of it is to be delivered in open court, and should contain the views of the minority judge, along with those of the majority.[53] In addition to finding guilt or innocence, the judges of the Trial Chamber are also directed to address restitution and compensation to the victim by a convicted person.[54] Since the convicted person may not have sufficient resources for reparations, the court may direct that reparations be paid from a trust fund created by the Assembly of States Parties.[55]

Appeals and Chambers of the ICC

Of the stages in prosecutions before the International Criminal Court, the one that will be most foreign to American Lawyers is the appellate stage. The powers of the Appeals Chamber almost entirely follow Civil Law traditions. First, *both* the prosecution and the defense can appeal, and not only can they appeal procedural errors and errors of law, but also factual errors.[56] Both can also ap-

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48 See CRYER, FRIMAN, ROBINSON & WILMSHURST, *supra* note 3, at 386-87, for a discussion of the mix of adversarial and inquisitorial models in the ICC trial rules.

49 *Id.* at 385.

50 Rome Statute, *supra* note 12, art. 65(1), (4). The extent to which plea bargaining is accepted under the ICC is still an open question. *See* CRYER, FRIMAN, ROBINSON & WILMSHURST, *supra* note 3, at 386.

51 Rome Statute, *supra* note 12, art. 74(5).

52 *Id.* art. 74(3).

53 *Id.* art. 74.

54 *Id.* art. 75.

55 *Id.* art. 75. The trust fund is authorized under Article 79. *See id.* art. 79.

56 *Id.* arts. 81(1)(a)-(b). The only difference between the rights on appeal of the prosecution and the defense is that the defense may raise "any other ground that affects the fairness or reliability of the

peal the sentence.[57] These rules are significantly different from those found in American courts, where appellate courts rarely review factual determinations, and acquittals are rarely appealable at all. The Appeals Chamber of the ICC has "all the powers of the Trial Chamber" in an appeal.[58] It can either reverse or amend a Trial Chamber decision or sentence, or it can order a new trial if it finds that the lower court was "materially affected by error of fact or law or procedural error."[59] The appellate chamber may sit, in effect, as a second trial court.

As the prior discussion has indicated, the judges of the International Criminal Court are organized in three largely independent chambers. All judges are elected by the States Parties to a term of nine years and may not be reelected.[60] The judges then elect the President of the court and two Vice-Presidents, who are in charge of administering the Court.[61] They serve three year terms, and may be reelected once.[62] The Appeals Chamber is made up of the President and four other judges who sit together.[63] They serve the full term of their office in this chamber.[64] Judges in the Trial Chamber sit in panels of three, and those in the Pre-Trial Chamber work either alone or in panels of three.[65] Judges in the Pre-Trial and Trial Chambers may move between these two chambers, but those in the Appeals Division must serve their entire term in that chamber.[66]

The Rome Statute as a Criminal Code

While the focus of this informal overview has been on the procedural stages in prosecutions in the International Criminal Court, no examination of the Rome Statute should overlook the fact that the statute is both a code of criminal procedure and a code of criminal law. Articles 7, 8, and 9 define the specific crimes covered by the Code: genocide, crimes against humanity, and war crimes. These articles constitute the criminal code. Beyond the Rome Statute itself, the States Parties have adopted detailed Elements of Crimes designed to "assist the Court in the interpretation and application of articles 6, 7 and 8."[67]

Part III of the code, including articles 22 through 33, is what many scholars would call "the general part," the general principles of criminal law. For the first

proceedings or decision." *Id.* art. 81(1)(b)(iv). A similar right is not given to the prosecutor, unless he or she is acting on the defendant's behalf.

57 *Id.* art 81(2).

58 *Id.* art 83(1).

59 *Id.* arts. 83(1)-(2).

60 *Id.* art. 36(9).

61 *Id.* art. 38.

62 *Id.* art. 38.

63 *Id.* art. 39(2).

64 *Id.* arts. 39(1)-(2).

65 *Id.* art. 39(2).

66 *Id.* arts. 39(3)-(4).

67 *Id.* art. 9; *see also* ROME STATUTE, ELEMENTS OF CRIMES, http://www.icc-cpi.int/NR/rdonlyres/9CAEE830-38CF-41D6-AB0B-68E5F9082543/0/Element_of_Crimes_English.pdf (last visited Nov. 5, 2010).

time among international criminal tribunals the principles of *nullum criminal sine lege* and *nulla poena sine lege,* central to advanced national criminal law, are adopted.[68] Under these principles, convictions and punishment under the statute may only be for crimes defined by the statute, and the statute is to be interpreted in favor of the accused.[69] In addition, no person may be prosecuted for conduct prior to the date when the statute goes into effect.[70] The military tribunals at the end of World War II and the ad hoc tribunals for the former Yugoslavia and for Rwanda were not similarly restricted by these principles.

Article 30 of the Rome Statute prescribes the mental elements necessary for conviction under the code. Only intent and knowledge will suffice for convictions, and these two terms are defined in ways very similar to "purposely" and "knowingly" under the American Law Institute's Model Penal Code.[71] Reckless and negligent conduct is normally not sufficient for conviction under the Rome Statue. However, military commanders may be responsible for forces under their control if the commander "either knew or, owing to the circumstances at the time, should have known" these forces were committing crimes.[72] Thus, for these commanders, only something more closely related to negligence need be shown.

The code also recognizes certain defenses. No one who was under 18 when the crime was committed may be prosecuted.[73] However, there is no head of state or other official exemption or defense,[74] nor is there a statute of limitations.[75] Article 31 contains rules defining defenses of insanity, intoxication, self-defense, and duress. The last two in particular may often be serious issues in prosecutions for war crimes and genocide.[76] The definitions of the defenses of mistake of law and of fact are very similar to the A.L.I. Model Penal Code.[77]

The most troubling defense in international criminal law is obedience to superior orders. Many individuals who commit acts that would amount to a war crime are acting under orders. Military organizations in particular function on the basis of commands which legally must be obeyed by inferiors. The punish-

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68 *Id.* arts. 22-23. The statute creating the International Criminal Tribunal for the former Yugoslavia, in contrast, contains an Article 3, providing that the ICTY may "prosecute persons violating the laws or customs of war." The article continues, "such violations shall include, but not be limited to" enumerated acts. *See* United Nations, Updated Statute of the International Criminal Tribunal for the Former Yugoslavia, art. 3 (2009), *available at* http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf (last visited Nov. 5, 2010).

69 Rome Statute, *supra* note 12, art. 22(2).

70 Rome Statute, *supra* note 12, art. 24.

71 Model Penal Code § 2.02(2).

72 Rome Statute, *supra* note 12, art. 28(a). Article 28(b) also expands the potential responsibility of non-military superiors in more restricted ways. *Id.* art. 29(b).

73 *Id.* art. 26.

74 *Id.* art. 27.

75 *Id.* art. 29.

76 See Cryer, Friman, Robinson & Wilmshurst, *supra* note 3, at 332-40, for a discussion of the defenses provided in Article 31.

77 *Cf.* Rome Statute, *supra* note 12, art. 32, *with* Model Penal Code § 2.04(1)(a).

ment for failure to obey may be severe.[78] Against this is a belief articulated in the statute creating the Nuremberg military tribunal in 1945 that the fact that one acts "pursuant to an order of his government or of a superior shall not free him from responsibility."[79] Article 33 of the Rome Statute takes a more nuanced position. Obedience to an unlawful order may be a defense if there is a legal obligation to obey, but subject to two conditions: first, if the accused did not know the order was unlawful and second, if the order was not "manifestly unlawful."[80] As a further limit on the defense, Article 33 also says that orders to commit genocide or crimes against humanity are always manifestly unlawful, so anyone obeying these orders will be guilty, regardless of his or her belief that the orders were lawful.

Conclusions

The International Criminal Court is less than a decade old and has yet to complete its first trial. Nevertheless, its influence is being felt throughout the world and throughout the field of international law. It offers a forum for the prosecution of those who would commit war crimes, crimes against humanity, and genocide. But even beyond the cases directly adjudicated in its chambers, it will provide an incentive for national prosecutors and courts throughout the world to investigate and punish these crimes in order to preempt the complementary jurisdiction of the ICC.[81] A third influence likely to result from the creation of the ICC is its influence on mixed national and international criminal courts frequently created to help developing nations move past genocides and oppressive regimes. These "hybrid" tribunals use both local and international laws, prosecutors, and judges.[82] The ICC will encourage these mixed local-international solutions and also provide a framework for the definition of the three crimes that may be applied by these hybrid courts. One day the United States may determine that the interests and ideals of this nation will be most effectively promoted by becoming an influential insider in this movement, rather than remaining a hostile outsider.

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[78] For example, under the American Uniform Code of Military Justice, one who willfully disobeys a lawful command of his superior commission officer in time of war may be sentenced to death. UNIFORM CODE OF MILITARY JUSTICE, art. 90.

[79] CRYER, FRIMAN, ROBINSON & WILMSHURST, *supra* note 3, at 343 (citing Charter of the International Tribunal, art. 8 (1945), *available at* http://www.icls.de/dokumente/imt_statute.pdf (last visited Nov. 5, 2010)).

[80] Rome Statue, *supra* note 12, art. 33(1).

[81] Rome Statute, *supra* note 12, art. 17.

[82] Examples of hybrid courts are found in Sierra Leone, Cambodia, East Timor, Kosovo, and arguably other countries as well. *See* Tolbert, *supra* note 13, at 1287. See BASSIOUNI, *supra* note 1, at 545-81, for a more extended discussion of these courts.

A New Forum for the Prosecution of Terrorists: Exploring the Possibility of the Addition of Terrorism to the Rome Statute's Jurisdiction

Angela Hare*

Introduction

The International Criminal Court ("ICC") is "the first permanent, treaty based, international criminal court established to help end impunity for the perpetrators of the most serious crimes of concern to the international community."[1] On July 17, 1998, 120 states adopted the Rome Statute to establish the ICC.[2] Subsequently, the Rome Statue was ratified by 60 countries and became effective on July 1, 2002.[3] Currently, there are 113 states that are parties to the ICC.[4] However, it is important to note that the U.S., China, India, and Russia have refrained from joining the ICC.[5]

The Rome Statute's jurisdiction includes: genocide, crimes against humanity, and war crimes.[6] Crimes of aggression are also included in the court's jurisdiction; however, these crimes were just recently defined on June 11, 2010.[7] Heretofore, the international community has failed to include terrorism in the Rome Statute. In light of that failure terrorist acts have not been brought to the ICC because member states could not agree on a definition for terrorism.[8] There has been continuous discussion regarding whether terrorism should be added to the Rome Statute's jurisdiction since "terrorism is one of the biggest and most challenging threats the world is facing in the twenty-first century."[9] As of June 11, 2010, ICC members developed a definition for crimes of aggression so that these cases can be heard by the international tribunal.[10] However, the ICC will not be

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1 About the Court, The International Criminal Court, http://www.icc-cpi.int/menus/ICC/About+the+Court/ (last visited Mar. 25, 2010).

2 *Id.*

3 *Id.*

4 Assembly: States Parties, http://www.icc-cpi.int/Menus/ASP/states+parties/.

5 *Id.*

6 United Nations: Rome Statute of the International Criminal Court, 37 I.L.M 999(5), (1998) [hereinafter Rome Statute].

7 *Id.*

8 Thalif Deen, *Politics: UN Member States Struggle to Define Terrorism*, Inter Press Service, July 25, 2005, http://ipsnews.net/news.asp?idnews=29633.

9 ICC Report of the Working Group on the Review Conference, ICC Res 8/20, app. III, ICC ASP/8/20 (Nov. 2009) [hereinafter Working Group].

10 Coalition for the International Criminal Court, *Delivering on the Promise of a Fair, Effective and Independent Court: The Crime of Aggression*, http://www.iccnow.org/?mod=aggression (last visted Oct. 17, 2010).

able to exercise jurisdiction until January 1, 2017.[11] The ICC should follow similar steps in order to include terrorism to the Rome Statute.

The focus of this article will be to examine the reasons why terrorism should be included in the Rome Statute's jurisdiction. First, it will examine the steps that must be taken by ICC members to amend the Rome Statute to include terrorism. The analysis will focus on how terrorism can be added to the Rome Statute by following the steps used to include crimes of aggression. The article will examine the actions taken by member states to have crimes of aggression included in the Rome Statute and apply that process to the crime of terrorism. Secondly, this article will address the reasons why terrorism should be added to the ICC's jurisdiction. Finally, this article will discuss the United States stance on the ICC and why the US will likely not become a member state.

I. Jurisdictional Amendments to the Rome Statute

A. Adoption of a definition for crimes against aggression

On November 26, 2009, the Special Working Group on the Crime of Aggression presented a proposed amendment on the crime of aggression. The amendment puts forth the definition, elements, and jurisdiction conditions for the crime of aggression.[12] The proposal was considered at the ICC Review Conference held May 31 to June 11, 2010 and a definition was established.[13]

It has taken many years for the ICC to develop a definition for crimes of aggression. The Special Working Group on the Crime of Aggression started working with the U.N. General Assembly Resolution 3314's definition of aggression, which was adopted in 1974.[14] However, the road to the development of this definition by the U.N. was anything but smooth. It took numerous special committees and almost 24 years for the U.N. to develop the definition for aggression.[15]

As of June 11, 2010, a definition for crimes of aggression has been established. Article 8 defines the individual crime of aggression as "the planning, preparation, initiation or execution by a person in a leadership position of an act of aggression."[16] Most notably, the definition requires that the act of aggression constitute an explicit violation of the Charter of the United Nations.[17] Article 8 further states:

An act of aggression is defined as the use of armed force by one State against another State without the justification of self-defense or authorization by the Security Council. The definition of the act of aggression, as well as the actions qualifying as acts of aggression contained in the amendments [for example inva-

[11] *Id.*

[12] ICC-ASP Res. 8/6, art. 8-15, 8th Sess., ICC-ASP/8/Res.6 (Nov. 26, 2009).

[13] Coalition for the International Criminal Court, *supra note* 10.

[14] GA Res. 3314 (XXIX), U.N. Doc A/9890) (Dec. 14, 1974).

[15] Coalition for the International Criminal Court, *supra note* 10.

[16] *Id.*

[17] *Id.*

sion by armed forces,[18] bombardment and blockade], are influenced by the UN General Assembly Resolution 3314 (XXIX) of 14 December 1974.[19]

The history of the crime of aggression is an important factor with respect to the addition of terrorism to the ICC's jurisdiction. If ICC member states want to include terrorism in the jurisdiction, they have a road map to follow. The ICC has made significant progress because it will be able to prosecute crimes of aggression starting in 2017.[20] Member states should follow the steps used to add crimes of aggression to the Rome Statute in order to have terrorism added to the ICC's jurisdiction.

B. Addition of Terrorism to Rome Statute

In contrast to the crimes of genocide, crimes against humanity and war crimes, crimes of terrorism have never been defined in a widely recognized international treaty. Furthermore, the U.N. has failed to develop a definition for terrorism. Although the history of the crime of aggression lays out a path for developing a definition for terrorism, the development of the definition of terrorism will take time and significant effort similar to the development of a definition for crimes of aggression.

1. Development of an Internationally Accepted Definition of Terrorism

In order to add terrorism to the Rome Statute, the U.N. must first adopt a definition for terrorism. The reason the U.N. has not yet adopted a definition for terrorism is because there is no internationally agreed upon definition. Worldwide, states vary on what acts they consider to be terrorism. For instance, states disagree on whether activities of national armed forces could be considered acts of terrorism and whether certain acts should be allowed because of a state's right to self-determination.[21] The aphorism "one man's terrorist is another man's freedom fighter" seems to apply here. One state may consider an act of terrorism with political motives to be a legitimate act of aggression, while another state does not. For example, the Arab leaders believe that Israel is guilty of terrorism against the Palestinians in the occupied territories, while Israel condemns the "freedom fighting" acts of Palestinians against Israelis as terrorism.[22]

Furthermore, while some nations "unequivocally condemn all terrorist attack[s], that sentiment is not universal. Indeed, the nations of the world are so divisively split on the legitimacy of such aggression as to make it impossible to pinpoint an area of harmony or consensus."[23] Therefore, the U.N. has a large hurdle in developing a definition that will be universally accepted. This obstacle has a significant impact on the ICC's ability to add terrorism to its jurisdiction.

[18] *Id.*

[19] *Id.*

[20] *Id.*

[21] Deen, *supra* note 8.

[22] *Id.*

[23] Tel-Oren v. Libyan Arab Rep., 726 F.2d 774, 795 (D.C. Cir. 1984).

The U.N. has been working to adopt a definition.[24] In 2005, a U.N. panel proposed the following definition: "any action constitutes terrorism if it is intended to cause death or serious bodily harm to civilians or non-combatants with the purpose of intimidating a population or compelling a Government or an international organization to do or abstain from doing any act."[25] However, this definition was rejected by U.N. member states.[26] The U.N. took another step forward at the 2005 World Summit when the Outcome Document, which was unanimously endorsed by world leaders, included an "unqualified condemnation of terrorism."[27] The U.N. continues to work on the development of a definition for terrorism that will be accepted by member states in the Comprehensive Convention of International Terrorism.[28] There have been no recent developments regarding the addition of terrorism to the ICC. At the ICC Review Conference ending June 11, amendments proposing the addition of terrorism to the ICC were not reviewed.[29]

The addition of terrorism to the Rome Statute is dependent upon the development of an international definition of terrorism. Considering that it often takes many years to develop a definition that will be accepted, similar to the adoption of the definition of crimes of aggression by the U.N., the U.N. should not yet give up hope on the ability to develop a definition. Although a "substantial political push will be needed to reach a consensus [on terrorism]," the U.N. seems optimistic in its pursuit to define terrorism.[30]

2. *Creation of an ICC Special Working Group on the Crime of Terrorism*

Secondly, the ICC needs to create a Special Working Group on the Crime of Terrorism. This working group could then use the U.N.'s definition of terrorism to develop a definition that could be included in the Rome Statute. Similar to the development of the definition for crimes of aggression, a Special Working Group should be able to develop the definition, elements, and jurisdictional conditions for the crime of terrorism.

In the Report of the Working Group on the Review Conference, the Netherlands has proposed that the same technique used to include the crime of aggression in the Rome Statute should be used for the inclusion of terrorism.[31] The proposal states that terrorism should be included under article 5, with the condi-

[24] Deen, *supra* note 8.

[25] U.N. Secretary-General, *In Larger Freedom: Towards Development, Security and Human Rights for All*, para. 91, U.N. Doc. A/59/2005 (March 21, 2005).

[26] *Id.*

[27] Ibrahim A. Gambari, *A Multilateral Response to Terrorism, in* COMMONWEALTH MINISTERS REFERENCE BOOK (Henley Media Group, 2006), *available at* http://www.un.org/terrorism/docs/gambari_med-final.pdf.

[28] G.A. Res, 63/129, U.N. Doc. A/RES/63/129 (Jan. 15 2009) *available at* http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N08/478/53/PDF/N0847853.pdf?OpenElement.

[29] The Hague Justice Portal, *ICC Review Conference concludes in Kampala*, http://www.haguejusticeportal.net/smartsite.html?id=11779 (last visited October 17, 2010).

[30] Gambari, *supra* note 26.

[31] Working Group, *supra* note 9, art. 42.

tion that there should be a deferral of the exercise of jurisdiction until a definition for the crime can be developed.[32] It also suggests that a working group should be created similar to the Special Working Group on the Crime of Aggression.[33] The proposal states that terrorism should not be excluded from the Rome Statute simply because there is no universal definition of terrorism.[34] The special working group would not have any effect on the development of a definition of terrorism by the U.N. The special working group would only be tasked with determining whether other changes would need to be made to the Rome Statute as a result of the inclusion of a definition of terrorism. Therefore, the proposal includes the addition of the crime of terrorism to Article 5 of the Rome Statute along with the following:

> The Court shall exercise jurisdiction over the crime of terrorism once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.[35]

In the end, the addition of terrorism to the Rome Statute will lie in the hands of the U.N. The crime cannot be added to the Rome Statute without an internationally agreed upon definition. The ICC can speed up the process of adding terrorism to the Rome Statute by appointing a special working group now, rather than after a definition is established. If the proposal by the Netherlands is not accepted, the ICC members should still follow the path used to include crimes of aggression. Once the U.N. develops a definition, a special working group can be commissioned. However, the former option would likely encourage the U.N. to develop a definition with greater celerity. By following the technique used to include crimes of aggression in the Rome Statute, member states can certainly have terrorism included in the future.

III. Why Terrorism Should be Added to the Rome Statute

Terrorism should be added to the Rome Statute so that those responsible for terrorist acts can be held accountable internationally. The ICC was developed to prosecute the most serious crimes of concern to the international community, such as terrorism. "In 1998, the Rome Conference adopted Resolution E, which specifically regards terrorist acts as such [one of the most serious crimes of concern to the international community]."[36] Furthermore, the international community specifically condemns acts of terrorism. "We strongly condemn terrorism in all its forms and manifestations, committed by whomever, wherever and for

[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] Working Group, *supra* note 9, app. III.

[36] *Id.*

whatever purposes, as it constitutes one of the most serious threats to international peace and security."[37]

The ICC should be allowed to prosecute terrorists because the state with jurisdiction over the criminal is oftentimes unable or unwilling to do so. The ICC is a court of last resort. It has jurisdiction only when a state is unwilling or unable to investigate or prosecute the crime. Therefore, the ICC can ensure that serious crimes, such as terrorism, do not go unpunished.

One instance where the ICC would be a better forum for the prosecution of terrorists is when a state would prefer to surrender a suspect to the ICC rather than to another state with a legal system it has concerns over. Furthermore, "the ICC does not have to rely on complicated extradition and cooperation treaties in order to obtain evidence and suspects."[38]

For example, the ICC could have prosecuted the Lockerbie situation if terrorism was added to the ICC's jurisdiction. In this case, two Libyan nationals were accused of assisting in the bombing of Pan AM Flight 103.[39] Libya refused to extradite its nationals to stand prosecution in the U.S.[40] Libya did not want to extradite its nationals to the U.S. because "it was uncertain what treatment the United States would afford to the suspected terrorists."[41] On the other hand, the U.S. was concerned that if the suspected terrorists were not extradited to the U.S. then "there would be a significant risk that those individuals would not face national sanctions to the crimes committed or, worse yet, no punishment at all."[42] In this situation, the ICC could have been the best forum for the trial in order to quell the concerns of both the U.S. and Libya.[43] Therefore, referral of a terrorist case to the ICC could be helpful when "governments are deadlocked over the surrender of suspected terrorists."[44]

The ICC should be given jurisdiction over terrorism cases. States should not be worried about their own efforts to prosecute terrorism because the court will only be used when a state is unwilling or unable to prosecute a terrorist crime. The addition of terrorism to the ICC's jurisdiction will also help countries deal with difficult extradition issues. Therefore, "the greater international cooperation which is possible through the ICC should give rise to greater international stability and efficacy in the fight against terrorism."[45]

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[37] G.A. Res. 60/288, U.N. Doc. A/RES/60/288 (Sept. 20, 2006).

[38] Richard J. Goldstone, *Evaluating the Role of the International Criminal Court as a Legal Response to Terrorism*, 16 HARV. HUM. RTS. J. 13, 23 (2003).

[39] Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising From the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. U.K.), Request for the Indication of Provisional Measures, 1992 I.C.J. 3, 4 (Apr. 14, 1992).

[40] *Id.*

[41] Vincent-Joël Proulx, *Rethinking the Jurisdiction of the International Criminal Court in the Post-September 11th Era: Should Acts of Terrorism Qualify as Crimes Against Humanity*, 19 AM. U. INT'L L. REV. 1009, 1015 (2004).

[42] *Id.*

[43] *Id.*

[44] *Id.* at 1016.

[45] Goldstone, *supra* note 37, at 23-24.

IV. U.S. Involvement in the ICC

Since the creation of the Rome Statute, the U.S. has avoided becoming involved with the ICC. The U.S. signed the Rome Statute in 2000; however, Bill Clinton did not submit it to the Senate for ratification because there were "significant flaws in the treaty.[46] In 2002, George Bush notified the U.N. that the U.S. would not ratify the Rome Statute and stated, "[T]he United States has no legal obligations arising from its signature [of the Rome Statute]."[47]

Bush took further steps to ensure that Americans would not be subject to the ICC. The U.S. negotiated bilateral agreements, which are known as Article 98 agreements, which prevent states from turning U.S. nationals over to the ICC.[48] These agreements "prohibit the surrender to the ICC of a broad scope of persons including current or former government officials, military personnel, and U.S. employees (including contractors) and nationals."[49] In addition, in 2002, the American Servicemembers' Protection Act ("ASPA") was adopted by the U.S. Congress, which restricts U.S. cooperation with the ICC.[50] The ASPA grants the President "permission to use any means necessary to free U.S. citizens and allies from ICC custody" as well as refusing U.S. military assistance to states that do not sign a bilateral agreement with the U.S.[51] The Bush administration clearly opposed U.S. involvement in the ICC.

In contrast, the Obama administration appears to be more open to the idea of the ICC. In November 2009, Stephen Rapp, U.S. Ambassador-at-Large for War Crimes, was sent by the Obama administration to a meeting of the ICC member states.[52] This indicates a shift of policy from the Bush administration. Rapp stated that the United States' attendance at the meeting was aimed at "gaining a better understanding of the issues being considered and the workings of the court."[53] Hillary Clinton has even expressed her regret that the U.S. is not a signatory of the ICC.[54] However, Rapp did acknowledge that the U.S. is still

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[46] Bill Clinton, President of the United States, Statement on the Rome Treaty on the International Criminal Court (December 31, 2000), *in* BNET, *available at* http://findarticles.com/p/articles/mi_m2889/is_1_37/ai_71360100.

[47] Letter from John R. Bolton, U.S. Undersecretary General for Arms Control and International Security, to Kofi Annan, U.N. Secretary-General, Regarding the Rome Statute of the International Criminal Court (May 6, 2002), *available at* http://asil.org/ilib0506.cfm#r3.

[48] Marion Smith, The Heritage Found., *An Inconvenient Founding: America's Principles Applied to the ICC,* BACKGROUNDER, (February 18, 2010), *available at* http://www.Heritage.org/research/internationalorganizations/bg2370.cfm.

[49] OVERVIEW OF THE UNITED STATES' OPPOSITION TO THE INTERNATIONAL CRIMINAL COURT, COALITION FOR THE INTERNATIONAL CRIMINAL COURT, http://www.coalitionfortheicc.org/documents/CICCFS_US_Opposition_to_ICC_11Dec06_final.pdf (last visited Oct. 15, 2010).

[50] *Id.*

[51] *Id.*

[52] Smith, *supra* note 47, at 1.

[53] Aaron Gray-Block, U.S. Makes Debut Attendance at Hague War Crimes Court, REUTERS, Nov. 19, 2009, http://www.reuters.com/article/idUSTRE5AI3G20091119.

[54] *Id.*

concerned that "U.S. officials or servicemen and women could risk ICC investigation for their roles in wars due to politically inspired prosecutions."[55]

Moreover, the U.S. does not believe that terrorism is a crime that should be dealt with in international courts and would not be accepting of the addition of terrorism to the ICC's jurisdiction. The U.S. adheres to the belief that there is no universal jurisdiction over terrorism because it is not in violation of the laws of nations.[56] In contrast, the U.S. court does find that torture is in violation of the law of nations.[57] If the U.S. cannot recognize terrorism as the law of nations in domestic courts they similarly would not participate in the international prosecution of such crimes.[58] Clearly, the U.S. condemns terrorist acts, but this belief is not held by all nations worldwide.[59] Therefore, the U.S. view is that terrorist acts should be prosecuted domestically by the states that are affected by the act.

The U.S. has made some contradictions to their stance against the ICC. The "Dodd Amendment" to the ASPA allows "the U.S. to cooperate with international efforts, including the ICC, in order to bring to justice against a foreign national accused of genocide, war crimes or crimes against humanity such as Saddam Hussein, Slobodan Milosevic, Osama Bin Laden and other members of Al Qaeda or the Islamic Jihad."[60] It appears that the U.S. will make exceptions for cooperating with the ICC when it comes to prosecuting nationals of other countries for terrorism. However, the U.S. will most likely continue their opposition of the ICC in order to protect U.S. nationals and military personnel from prosecution.

The addition of terrorism to the ICC will promote international stability and efficiency in the fight against terrorism.[61] U.S. opposition to the ICC may affect the ability of the ICC to effectively fight terrorism. U.S. bilateral agreements and the ASPA may prevent certain criminals from being turned over to the ICC. For instance, a U.S. national who commits a terrorist attack on a Rome Statute members' territory could be excluded from prosecution in the ICC because of the aforementioned U.S. agreements. Furthermore, there will continue to be no court available to prosecute a case that quells both parties concerns when a situation arises between the U.S. and another country similar to the Lockerbie situation. If the U.S. does not use the ICC for terrorist cases, then it is possible that other states will not see the ICC as a viable court for dealing with terrorist crimes. The ICC would be most effective with the participation of the U.S.

The U.S. will continue to have to deal with the ICC despite opposition to its principles. In 2009, the ICC began an investigation into U.S. and NATO actions

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55 *Id.*

56 Tel-Oren, *supra* note 21, at 798.

57 *Id.* at 797.

58 *Id.* at 797.

59 *Id.*

60 *No to American Exception: Under Cover of War Against Terrorism, a Destruction Offensive Against the ICC*, http://www.coalitionfortheicc.org/documents/fidh200209english.pdf (last visited Mar. 31, 2010).

61 *See* Goldstone, *supra* note 35, at 23.

in Afghanistan.[62] Since Afghanistan is a member of the Rome Statute, the ICC has jurisdiction over crimes that are committed within its territory.[63] The U.S. will continue to possibly be subjected to the ICC. Not all ICC states have bilateral agreements with the U.S. and "these protections are imperfect."[64] Therefore, the U.S. may still play a role in the ICC despite its opposition and unwillingness to ratify the Rome Statute.

V. Conclusion

The creation of the ICC was a "historic milestone" for the international community, which "has long aspired to the creation of a permanent international court."[65] The ICC's current jurisdiction does not include terrorism, which is a serious crime of international concern. Although controversial, many nations have rallied for the inclusion of terrorism in the Rome Statute's jurisdiction.

Certain steps must be taken before terrorism can be added to the ICC's jurisdiction. First, the U.N. will need to develop a definition for terrorism that will be both functional and accepted in the international community. Second, the ICC will need to establish a Special Working Group on the Crime of Terrorism to develop the definition, elements, and jurisdictional conditions for the crime of terrorism in the Rome Statute. Furthermore, the ICC should consider adding the crime of terrorism to the Rome Statute similar to the way crimes of aggression are included. The Rome Statute can list terrorism as a crime within the jurisdiction of the ICC with a clause that limits the prosecution of crimes of terrorism until a definition for terrorism can be established.

Most likely, it will take a great deal of time and effort to establish a definition for terrorism. However, there will be many benefits in equipping an international court with the ability to prosecute crimes of terrorism. The ICC will ensure that terrorists are prosecuted when a state is unwilling or unable to prosecute the crime.

Unfortunately, the United States will likely continue to oppose the ICC. It seems the U.S. will never agree to have U.S. nationals or military personnel prosecuted in an international court. However, the U.S. has shown that it is willing to cooperate with the court in certain areas. The ICC will continue to effectively prosecute crimes without the membership of the U.S.; however, U.S. membership would lend the institution greater legitimacy. In certain scenarios, the U.S. may be forced to cooperate with the ICC if a U.S. national becomes subject to ICC jurisdiction for actions committed in a member states' territory,

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[62] Brett Schaefer & Steven Groves, The Heritage Found., *The ICC Investigation in Afghanistan Vindicates U.S. Policy Toward the ICC*, (Sep. 14 2009), *available at* http://www.heritage.org/research/reports/2009/09/the-icc-investigation-in-afghanistan-vindicates-us-policy-toward-the-icc; *see also* Michael Peel, *ICC Examines Possible Afghan War Crimes*, FIN. TIMES, Sept. 10, 2009, http://www.ft.com/cms/s/0/43060b66-9d?cc-11de-8de8-00144feabdc0.html.

[63] *See* Assembly: States Parties, *supra* note 4.

[64] Smith, *supra* note 47, at 7.

[65] ABOUT THE COURT, *supra* note 1.

and provided the member state is one that does not have a bilateral agreement with the U.S.

The development of a definition of crimes of aggression in 2010 gives hope to the development of an international definition for terrorism. Although the ICC will not have jurisdiction over crimes of aggression until 2017, the development of a definition is a great feat. In the future, the ICC should similarly add terrorism to the jurisdiction of the ICC.