From Nuremberg to Rome: A Step Backward for U.S. Foreign Policy

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Some people are concerned that pursuing peace... and prosecuting war criminals are incompatible goals. But I believe they are wrong. There must be peace for justice to prevail, but there must be justice when peace prevails.

— William Jefferson Clinton¹

International law is more than a scholarly collection of abstract and immutable principles... [it is] an outgrowth of treaties and agreements between nations and of accepted customs... [U]nless we are prepared to abandon every principle of growth in international law we cannot deny that our own day has the right to institute customs and to conclude agreements that will themselves become sources of new and strengthened international law.

— Justice Robert H. Jackson²

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TABLE OF CONTENTS

INTRODUCTION .................................................................................................49

I. CARRYING JACKSON’S TORCH ..............................................................................49
   A. The Rule of Law and Nuremberg .................................................................51
   B. International Crime as Defined by Treaty ..................................................57
   C. The United States and the Evolution of International Law .........................61
   D. Why Do We Need a Court? ........................................................................64
   E. International Crime in the Years Since Nuremberg .....................................66

II. THE UNITED STATES AND THE COURT ..........................................................70
   A. Establishing U.S. Support for the Court .....................................................70
   B. Progress in the Senate ................................................................................70
   C. Progress Towards Executive Action ............................................................73
   D. The State Department ..................................................................................75

III. THE ROME CONFERENCE ..............................................................................77
   A. U.N. Preparatory Conferences and the Issues on the Table in Rome ..........77
   B. Defending U.S. Interests in Rome ...............................................................78
   C. The Elusive Senator Helms ..........................................................................79
   D. Influence from the Pentagon .......................................................................82

IV. THE STATUTE AND SUBSTANTIVE U.S. CONCERNS ....................................83
   A. Jurisdiction ..................................................................................................85
   B. Trigger Mechanisms ....................................................................................86
   C. Complementarity ........................................................................................89
   D. Protections for the Accused .........................................................................91
   E. The United States Position Does Not Hold the Day ......................................95

V. SUBSTANCE AND FUSION ..............................................................................98
   F. Mr. Scheffer Comes Home ..........................................................................99
   G. What Harm is Done? ..................................................................................102

VI. EPILOGUE — BREAKING WITH OUR PAST AND FORGETTING A HEROIC VISION OF THE WORLD .................................................................104

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2 Trial of the Major War Criminals Before the International Military Tribunal 147 (1949) [hereinafter Trial of Major War Criminals].
INTRODUCTION

The time was November 21, 1945. The world’s attention was focused on the large courtroom at Nuremberg when Justice Robert H. Jackson rose to deliver the opening statement for the Prosecution in the trail blazing trial of the leaders of Nazi Germany for crimes against the peace of the world and for war crimes. Jackson’s unforgettable words that fateful day ring with meaning. They reflect his determination that the world must end the anarchy that had previously characterized international relations and that it now enter a new era in which an international Rule of Law reigned supreme, characterized by peace and justice. Jackson sought a world in which reason would prevail over force. The world will never forget his statement at Nuremberg “that four great nations flushed with victory and stung with injury stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of the law is one of the most significant tributes that power has ever paid to reason.”

The scope of Jackson’s vision extends far beyond Nuremberg. He knew that, to be lasting and credible, the legal principles established to try Nazi war criminals must apply to all mankind — not only to the Nuremberg defendants. Through his actions and convictions, Jackson set in motion a new era of international law — one where world peace and security rest firmly upon a binding system of law.

I. CARRYING JACKSON’S TORCH

The wisdom and vision of Justice Jackson’s eloquent words resonate today. In the years since the Nuremberg tribunals, the international community has embraced the key concepts Jackson and the tribunals stood for: the universal unacceptability of certain crimes and accountability of both individuals and heads of state for the commission of such crimes. During this same time period, however, the U.S. acceptance of an international Rule of Law phrased in these terms has begun to falter. One must wonder what Justice Jackson would have

3 Id. at 99.

4 For this reason, Nuremberg can be seen as the point of inception for the legal regime of modern human rights. See, e.g., MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 245-65 (1993).
thought to see the foreign policy of his own nation questioning the validity of the path he helped to blaze on its behalf.

Over fifty years later, on July 17, 1998, and after years of preparation (as well as five final weeks of grueling debate), 120 nations approved an historic document which presents the world with a realization of Justice Jackson's dream: a permanent and independent institution for maintaining international peace and justice by means of an international Rule of Law. This document, the Rome Statute of the International Criminal Court (the Rome Statute),\(^5\) serves as the legal foundation upon which a new international criminal tribunal will be formed — one that, like the Nuremberg tribunals, emphasizes individual responsibility over state sovereignty.\(^6\)

For nearly a decade, the United States has demonstrated a consistent level of executive and congressional interest in the concept of a permanent International Criminal Court.\(^7\) Surprisingly (or not), the United States has elected not to join the overwhelming coalition\(^8\) of states in favor of the formation of this new body.\(^9\) Further, not only did the United States elect not to sign the Rome Statute, but, towards the end of the treaty conference, it identified ideological and political differences with the Statute which draw into question the actual U.S. agenda at Rome.

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\(^6\) See generally Henry T. King, Jr., Nuremberg and Sovereignty, 28 CASE W. RES. J. INT'L L. 135, 137 (1996) (arguing that individuals have obligations under international law that cannot be avoided by state authorization).

\(^7\) See Clinton/Stores, supra note 1; see also infra note 108.


\(^9\) Though the vote was unrecorded, the United States, China, and Israel said they had voted against the Statute. Among the countries abstaining were India and Mexico (others rumored to have abstained include Libya, Iran, Iraq, and either Qatar or Yemen).
At this time it is not clear that the permanent International Criminal Court adopted at Rome will ever be perceived as compatible with U.S. foreign policy interests. If this is true, the United States seems destined to find itself at odds with the rest of the world by failing to acknowledge and consent to the jurisdiction of this new court. Implicit in current U.S. policy is the concept that the Court is fundamentally inconsistent with the international Rule of Law it so frequently promotes—but is that implication supported by international law?

In an attempt to address this issue, this Article will examine 1) the history of the United States' role in the movement towards an international Rule of Law, beginning with its leadership in establishing the Nazi war crimes tribunals; 2) the history of the U.S. position on the court; and 3) a substantive legal analysis of the treaty options opposed by the United States. By tracing these threads, we hope to identify whether the concept of an international Rule of Law is actually compatible with U.S. interests, whether those interests have changed, and whether the concept of an international Rule of Law itself has changed since articulated by Justice Jackson and in the London Charter, pursuant to which the International Military Tribunal was established.

A. The Rule of Law and Nuremberg

Looking at the Rome agenda in historical perspective, one should appreciate that the proposed jurisdiction of the International Criminal Court has roots in 20th and indeed 19th century concepts of transnational and international justice. The core crimes at Nuremberg: Crimes against Peace, War Crimes, and Crimes Against Humanity, can all be found in the corpus of international law set forth throughout this century and before. Nuremberg contributed significantly to the

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10 War crimes were also condemned in the Geneva Conventions of 1864 and 1906 and the Hague Conventions of 1899 and 1907.

11 See Charter of the International Military Tribunal, Aug. 8, 1945, 59 Stat. 1546, 1547, 82 U.N.T.S. 279, 286; Robert H. Jackson, THE NUREMBERG CASE (1947); see generally Telford Taylor, Nuremberg Trials, War Crimes and International Law, International Conciliation No. 450 (1949); see also Robert A. Friedlander, Who Put Out the Lamps?: Thoughts on International Law and the Coming of World War I, 20 DUQ. L. REV. 570-71 (1982) (discussing the era of modern international law as beginning in 1815 with Congress of Vienna, establishing international war and peace as governed by law). Many of the concepts wrestled with so vigorously since Nuremberg extend far enough back into our history to be irrefutably part of our law: e.g., State responsibility in terms of international crime was framed from Grotius' 17th century maxim *aut dedre aut punire* ("extradite or prosecute"). M. Cheriff Bas-
expansion of international law by holding heads of state personally accountable for crimes, including aggressive war, initiated by them.\textsuperscript{12}

Pre-Nuremberg, the basic tenets of international law pertained only to states,\textsuperscript{13} as individuals were not the proper subjects of international law.\textsuperscript{14} Therefore, the foundation of the proposed court — individual criminal responsibility — was at odds with Pre-Nuremberg tradition. However, international law following Nuremberg witnessed a change in thinking regarding the rights, obligations, and duties of the individual and the state in the international context.

At Nuremberg, the trials were run according to published law and procedure and even the most heinous defendants were given reasonable due process of law.\textsuperscript{15} At Nuremberg, Justice Jackson reminded

\begin{itemize}
  \item\textsuperscript{12} See Whitney Harris, \textit{Tyranny on Trial} 23, 35 (1995).
  \item\textsuperscript{13} See, e.g., L. Oppenheim, \textit{International Law: A Treatise} 362 (1912). To the extent that states had any international legal obligations relating to individuals, these obligations extended only insofar as individuals were the property of states, thus each might or might not pursue the injury of one of its subjects at its own discretion, and the parent state was the sole possessor of a cause of action. See Mavrommatis Palestine Concession (Greece v. U.K.), 1924 P.C.I.J. (Ser. A) No. 2 (Aug. 30) (discussing the jurisdiction given to the Permanent Court of International Justice. Thus, under the most general tradition, one state has no legal right to assert a cause of action against another state for the treatment of its own nationals. See generally Advisory Opinion No. 4, Dispute Between France and Great Britain as to Nationality Decrees Issued in Tunis and Morocco, 1923 P.C.I.J. (Ser. B) No. 4 (Oct. 4) (considering the application of nationality degrees issued in Tunis and Morocco to British subjects).
  \item\textsuperscript{14} See, e.g., Concerning the Barcelona Traction, Light and Power Company, Ltd. (Belgium v. Spain), 1970 I.C.J. 3, at 231 (Feb. 5) ("It is only within the State legal order that the interests of foreign nationals may acquire protection by means of the attribution to the latter either of rights or of other personal legal situations in their favour (faculties, legal powers or expectations").
  \item\textsuperscript{15} For instance, the Nuremberg Charter and Judgment, as later restated by the International Law Commission, and adopted by the United Nations codifies the concept of individual responsibility:
  
  Any person who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment.
  
  The fact that international law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under International Law.
\end{itemize}
the world that "we must never forget that the record on which we judge these defendants today is the record on which history will judge us tomorrow . . . . To pass these defendants . . . a poisoned chalice is to put it to our own lips as well. We must summon such detachment and intellectual integrity to our task that this trial will commend itself to posterity as fulfilling humanity's aspirations to do justice."\(^{16}\)

Thus, rather than meting out a summary form of "victors' justice," the United States took the lead in establishing a system of law by which certain categories of international criminals would be brought to justice through a fair trial where the defendants' rights were respected.\(^{17}\)

Following Nuremberg, the principles of international law recognized in the Nuremberg Charter and Judgment were unanimously affirmed in 1946 by the United Nations General Assembly in a resolution proposed by the United States.\(^{18}\) In 1948, upon invitation by the United Nations, the International Law Commission (ILC) studied the "desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide or other crimes over which jurisdiction will be conferred upon that organ by international conventions."\(^{19}\)

This evolution has effected a gradual widening of the exceptions to the general rule of absolute national sovereignty\(^{20}\) and support for

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The fact that a person who committed an act which constitutes a crime under international law acted as Head Of State or responsible Government official does not relieve him from responsibility under international law.


\(^{16}\) *Trial of Major War Criminals, supra* note 2, at 101.

\(^{17}\) As professor and former Nuremberg prosecutor Benjamin Ferencz so aptly puts it, these trials "were meant to marshal in a new era which made [the core crimes] punishable under binding International Law that would apply equally to nations and their leaders." Benjamin B. Ferencz, *International Criminal Courts: The Legacy of Nuremberg*, 10 PACE INT'L L. REV. ___ (199_) (forthcoming).


\(^{20}\) See, e.g., U.S. v. Von Leeb (High Command Case) *Judgement of the International Military Tribunal, Nuernberg [sic], XI Trials of the Major War Criminals 462, 489 (1950): "International law operates as a restriction and limitation on the sovereignty of nations. It may also limit the obligations which individuals owe to their
the notion that universal jurisdiction should be extended over perpetrators of criminal activities condemned by all states, such as war crimes, genocide, torture, and even drug trafficking — regardless of the nationality of those accused. This extension of jurisdiction is justified by the international community's recognition and prescription of punishment for certain offenses recognized by the community of nations as of universal concern, such as piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism.


See Paust, Universality, supra note 21.


See Filartiga v. Pena-Irala, 630 F.2d 876, 878 (2d Cir. 1980). The Court indicated it was construing the First Congress’ establishment of “original district court jurisdiction over ‘all cases where an alien sues for a tort only [committed] in violation of the law of nations,’” and held that “deliberate torture perpetrated under color of official authority violates universally accepted norms of the international law of human rights, regardless of the nationality of the parties.” Id. “In the modern age, humanitarian and practical considerations have combined to lead the nations of the world to recognize that respect for fundamental human rights is in their individual and collective interest . . . . [T]he torturer has become like the pirate and slave trader before him, hostis humani generis, an enemy of all mankind. Our holding today, giving effect to a jurisdictional provision enacted by our First Congress, is a small but important step in the fulfillment of the ageless dream to free all people from brutal violence.” (emphasis added). Id. at 890. The authors note that universality was discussed here only terms of a civil suit.

See United States v. Noriega, 746 F. Supp. 1506, 1514 (S.D. Fla. 1990) (citing with approval the Restatement (Third) Foreign Relations § 403:

[N]arcotics offenses provide the strong justification meriting criminal jurisdiction: “Prosecution for activities committed in a foreign state have generally been limited to serious and universally condemned offenses, such as treason or traffic in narcotics, and to offenses by and against military forces. In such
less of whether or not the criminal acts are argued to have been committed in the pursuit of some state interest. However, the question is not limited to whether a state can impose punishment upon individuals charged with universally condemned behavior, but whether it must, as a function of state responsibility, punish or extradite such individuals, either as general state obligation or as a function of international comity.

Among which, defenses such as superior orders are no longer considered valid per se. See generally, Jordan J. Paust, Superior Orders and Command Responsibility, in 3 INTERNATIONAL CRIMINAL LAW: ENFORCEMENT 73 (M. Cherif Bassiouini ed., 1987) [hereinafter Paust, Superior Orders]. Neither is a sovereign free from culpability under international law. See Jordan Paust, Aggression Against Authority: The Crime of Oppression, Politicide and Other Crimes Against Human Rights, 18 CASE W. RES. J. INT’L L. 283, 284-85 (1986) [hereinafter Paust, Aggression].

Making them “hostis humani generis, an enemy of all mankind.” Filartiga v. Pena-Irala, 630 F.2d at 890.

For example, a state that captures an indicted war criminal may “surrender the alleged criminal to the state where the offense was committed, or . . . retain the alleged criminal for trial under its own legal processes.” Hostage Case (U.S. v. List), 11 Trials of the Major War Criminals 757, 1242 (U.S. Mil. Trib. - Nuremberg 1948).

See, e.g., RESTATEMENT (THIRD) FOREIGN RELATIONS § 701. Under the Restatement, a state is obligated to respect the human rights of persons subject to its jurisdiction that it has undertaken to respect by international agreement; that states generally are bound to respect as a matter of customary international law; and that it is required to respect under general principles of law common to the major legal systems of the world. Id.

Similarly, Article 8(a) of the 1979 Hostage Convention states: “the State Party in the territory of which the alleged offender is found shall if it does not extradite him be obligated without exception whatsoever and whether or not the offense was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution, although proceedings in accordance with the laws of the State.”

“[C]haracterized most accurately as a golden rule among nations — that each must give that respect to the laws, policies and interests of others that it would have others give to its own in the same or similar circumstances.” Harold G. Maier, Resolving Extraterritorial Conflicts or “There and Back Again,” 26 VA. J. INT’L L. 7, 14 (1984). “This principle informs decisions whose goal is to reconcile the fact of national territorial authority with an international system in which persons and goods must move across national borders.” Id.

Comity is a recognition which one nation extends within its own territory to the legislative, executive, or judicial acts of another. It is not a rule of law,
The thrust of important international agreements signed by the United States is that cooperation in the prosecution of universal crimes committed by individuals is a function of state responsibility.\(^3\) Further, the United States has repeatedly demonstrated in its courts that it reserves the right to prosecute foreign nationals for transgressions of customary international law under a theory of universality.\(^3\)

but one of practice, convenience, and expediency . . . . It is a nation's expression of understanding which demonstrates due regard both to international duty and convenience and to the rights of persons protected by its own laws.


It makes little sense for State parties that have not accepted the jurisdiction of the Court with respect to the particular crime under investigation or prosecution to be under any legal obligation to cooperate with the Court. Nor should those States be constrained with regard to their authority to institute their own prosecution or to extradite the offender to a third State rather than the ICC. Rather, such States should come within the terms of Article 59 of the draft statute, which calls for the voluntary cooperation of States not Parties to the statute "on the basis of comity, a unilateral declaration, an ad hoc arrangement or other agreement with the court." The only exception to this should be for cases initiated by the Security Council, as to which all States should be obligated to render assistance to the ICC.

Michael P. Scharf, Getting Serious About An International Criminal Court, 6 PACER INT'L L. REV. 103, 117 (1994).

\(^3\) For instance, the four Geneva Conventions, which the United States became party to in 1956, obligate the United States to assert universal jurisdiction with respect to violations of the four Conventions. The Geneva Conventions provide that "each party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed . . . grave breaches, and shall bring such persons, regardless of their nationality, before its own courts." Geneva Convention For the Amelioration of the Condition of the Wounded and Sick in Armed Forced in the Field, Aug. 12, 1949, at art. 49, 6 U.S.T. 3114, 3146, 75 U.N.T.S. 31, 62; Geneva Convention For the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, at art. 50, 6 U.S.T. 3214, 3250, 75 U.N.T.S. 85, 116; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, at art. 129, 6 U.S.T. 3316, 3418, 75 U.N.T.S. 135, 236; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, at art. 146, 6 U.S.T. 3517, 3616, 75 U.N.T.S. 287, 386.

\(^3\) See Tel-Oren v. Libyan Arab Republic, 726, F.2d 774, 781, 788 (D.C. Cir. 1984) (per curiam) (Edwards J. concurring) (voting to dismiss the action, but making several references to domestic jurisdictions over extraterritorial offenses under the universality principle), cert. denied, 470 U.S. 1003 (1985); Filartiga v. Pena-Irala, 630 F.2d. at 890 (analogizing the defendant, a Paraguayan official accused of committing torture, to a pirate and slave trader); United States v. Yunis, 681 F. Supp. 896
It would seem axiomatic that U.S. nationals would also be subject to indictment by foreign states under the same theory. Here, however, is where the most significant double standard begins to emerge.33

B. International Crime as Defined by Treaty

The modern approaches to limiting national sovereignty have either been through the traditional approach (e.g., via treaty), or by re-conceptualizing the limit of a state's discretion over the treatment of individuals (e.g., through expanded concepts of humanitarian law).34 Following the Nuremberg trials, a core set of international crimes began to emerge in agreements between states, declaring that nations have an obligation and a right to take enforcement action against criminals who have committed universally deplorable acts. For instance, in dealing with war crimes, the four Geneva Red Cross Conventions of 1949 establish that “[e]ach party shall be under the obligation to search for personas alleged to have committed, or to have ordered to be committed . . . grave breaches [of the conventions], and shall35 bring such persons, regardless of their nationality, before its own courts.”36


33 "The United States shall not permit a U.S. soldier to participate in any NATO, U.N., or other international peacekeeping mission, until the United States has reached agreement with all of our NATO allies, and the U.N., that no U.S. soldier will be subject to the jurisdiction of this court.” Statement of Senator Jesse Helms at a hearing of the International Operations Subcommittee of the Senate Foreign Relations Committee, on Jul. 23, 1998, exactly one week after the signing of the Rome Treaty.


35 Notable here is that fact that, even in early agreements, the exercise of universal jurisdiction over individuals was declared both a right and an obligation. See generally Paust, Universality, supra note 21, at 337 (arguing that customary international
Also exemplary is the Genocide Convention. The Convention declares that genocide, whether committed in time of peace or time of war, is a crime under international law for which an individual perpetrator is culpable, and for which, as under the Geneva Conventions, states have a duty to prosecute.


See generally Raphael Lemkin, Genocide as a Crime Under International Law, 41 AM. J. INT’L L. 145 (1947) (discussing the characteristics, development, and implications of the crime of genocide). Article IV of the Genocide Convention provides that “persons committing genocide . . . shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.” Convention on the 1948 Genocide Convention, supra note 38, at art. IV. The Convention defines “genocide” as the commission of certain enumerated acts “with intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such.” Id. at art. II. The acts constituting genocide are:

(a) killing members of the group; (b) causing serious bodily or mental harm to members of the group; (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) imposing measures intended to prevent births within the group; (e) forcibly transferring children of the group to another group.
As the Restatement [Third] of the Foreign Relations Law of the United States (hereinafter "Restatement (Third)") states, customary international law also arises out of the practice of nations. Thus, international treaty instruments all contribute to the growing body of customary international law by which state action might now be judged. A number of recent UN-sponsored conventions and treaties demonstrate a sense that the world is committed to rethinking state sovereignty, jurisdiction, and enhanced individual rights and responsibilities — thus revising customary international law as it pertains to state responsibility and individual rights. These instruments include,

Id. at art. IV. The authors note that, to be guilty of the crime of genocide, an individual must have committed one of the foregoing acts with the specific intent of destroying, in whole or in part, a national, ethnic, racial, or religious group. Thus, the killing of some members of a group could consequently amount to genocide if carried out with the intent of destroying the group or a substantial part thereof.

40 "Persons charged with genocide . . . shall be tried by a competent tribunal of the State in the territory of which the act was committed or by such international penal tribunals as may have jurisdiction." 1948 Genocide Convention, supra note 38, at art. VI.

41 According the reporter of the Restatement (Third) Foreign Relations:

[P]ractice accepted as building customary human rights law includes: virtually universal adherence to the United Nations Charter and its human rights provisions, and virtually universal and frequently reiterated acceptance of the Universal Declaration of Human Rights even if only in principle; virtually universal participation of states in the preparation and adoption of international agreements recognizing human rights principles generally, or particular rights; the adoption of human rights principles by states in regional organizations in Europe, Latin America, and Africa (see Introductory Note to this Part); general support by states for United Nations resolutions declaring, recognizing, invoking, and applying international human rights principles as international law; action by states to conform their national law or practice to standards or principles declared by international bodies, and the incorporation of human rights provisions, directly or by reference, in national constitutions and laws; invocation of human rights principles in national policy, in diplomatic practice, in international organization activities and actions; and other diplomatic communications or action by states reflecting the view that certain practices violate international human rights law, including condemnation and other adverse state reactions to violations by other states. The International Court of Justice and the International Law Commission have recognized the existence of customary human rights law.

Restatement (Third) Foreign Relations § 701, Reporter's Note 2.


A trend is evident in these international agreements — in recent decades, most of the world has demonstrated its continued embrace of an ever tightening international Rule of Law. Perhaps the boldest recent innovation in international law, that of attempting to create an entirely new obligation for states to interact peacefully, came about with the 1974 General Assembly Consensus Resolution Defining Aggression.49 Here, Justice Jackson’s vision that aggressive war be rec-

48 International Convention on the Suppression and Punishment of the Crime of Apartheid, Jul. 18, 1976, 1015 U.N.T.S. 243. Although universal jurisdiction is permissive rather than mandatory, individuals charged with the crime of apartheid “may by tried by a competent tribunal of any State Party to the Convention which may acquire jurisdiction over the persons of the accused or by an international penal tribunal...” Id. at 246. The United States is not a party to this Convention.
49 G.A. Res. 3314 (XXIX), U.N. GAOR, 29th Sess., Supp. No. 31, at 142-43, U.N. Doc. A/9631 (1974). Article 1 defines aggression as “the use of armed force by a state against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations...” Article 2 provides that “the first use of armed force by a state in contravention of the United Nations charter is prima facie evidence of an act of aggression,” defined in article 3 to include the invasion by armed forces of another state. Article 3 lists some acts which qualify as acts of aggression, and includes the sending of armed bands to carry out acts of armed force against a state of sufficient gravity to be tan-
ognized as the "the supreme international crime" was recognized for the first time in an international declaration. Thus, the trend would seem to indicate that much of the world has come to embrace the ambitious tenets of Nuremberg.

C. The United States and the Evolution of International Law

Much of the emerging international law embraced by the rest of the world has been carefully recognized by the American Law Institute in its Restatement (Third). In particular, Section 701, which defines a state’s obligations to respect individual rights and Section 702 defines elements violative of the customary law of international individual rights. Under these two sections, U.S. practice appears to amount to an invasion or attack against the state itself. Finally, Article 5 adopts the Nuremberg Principles, making armed aggression a crime against peace, and prohibiting territorial acquisition by virtue of such aggression. Id.

As in the judgment of the Nuremberg Tribunal. See HARRIS, supra note 12, at 536.

The Restatement notes that “[t]he difference in history and in jurisprudential origins between the older law of responsibility for injury to aliens and the newer law of human rights should not conceal their essential affinity and their convergence.” RESTATEMENT (THIRD) FOREIGN RELATIONS, Part VII, Introductory Note. The Restatement goes on to point out that “as the law of human rights developed, the law of responsibility for injury to aliens, as applied to natural persons, began to refer to violations of their ‘fundamental human rights,’ and states began to invoke contemporary norms of human rights as the basis for claims for injury to their nationals.” Id. See generally F.V. GARCiA-AMADOR ET AL., RECENT CODIFICATION OF THE LAW OF STATE RESPONSIBILITY FOR INJURIES TO ALIENS (1974).

Section 701, entitled “Obligation to Respect Human Rights,” states:

A state is obligated to respect the human rights of persons subject to its jurisdiction

(a) that it has undertaken to respect by international agreement;
(b) that states generally are bound to respect as a matter of customary international law; and
(c) that it is required to respect under general principles of law common to the major legal systems of the world.

RESTATEMENT (THIRD) FOREIGN RELATIONS § 701.

Section 702, entitled “Customary International Law of Human Rights,” states:

A state violates international law if, as a matter of state policy, it practices, encourages, or condones

(a) genocide,
(b) slavery or slave trade,
(c) the murder or causing the disappearance of individuals,
recognize bases under which a nation should, under international law, be placed under the scrutiny of other states for its treatment of individuals. 54

The United States has, however, signed and/or ratified very few accords which open its actions to foreign scrutiny. 55 This is not to say that the United States, in its foreign policy, has not acknowledged a few important and controversial human rights conventions, such as the International Convention on the Rights of the Child, 56 the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, 57 and the Convention on the Elimination of All Forms of Discrimination Against Women. 58 Participation in these compacts evidences a continued commitment on the part of the United States to raise the standard of behavior acceptable under international law.

A particularly encouraging demonstration of U.S. commitment to international humanitarian law and war crimes can be found in its initiation and support, via its U.N. Security Council votes, of ad hoc war crimes tribunals. These votes, cast in favor of the United Nations Se-

(d) torture or other cruel, inhuman, or degrading treatment or punishment,
(e) prolonged arbitrary detention,
(f) systematic racial discrimination, or
(g) a consistent pattern of gross violations of internationally recognized human rights.

RESTATEMENT (THIRD) FOREIGN RELATIONS § 702.

54 The authors note that, though this controversial Restatement is by no means binding as law, it is a scholarly assessment on the part of the ALI, of the active regimes of law affecting foreign policy.

55 For instance, in the case of the UNCLOS, the United States did not want to give any rights to mine for deep seabed nodules, thereby placing its own economic interest above the interest to establish an important global legal order.

56 Declaration of the Rights of the Child, adopted by the General Assembly of the United Nations on Nov. 20, 1959, states that "the child shall not be admitted to employment before an appropriate minimum age; he shall in no case be caused or permitted to engage in any occupation or employment which would prejudice his health or education, or interfere with his physical, mental, or moral development." 1959 U.N.Y.B. 192, U.N. Sales No. 60.1.1 (signed by the United States in 1959).


58 President Clinton has urged the ratification of this treaty since 1993. See, e.g., Pres. Proc. No. 6637, 58 F. Reg. 65527 (Dec. 10, 1993) The Administration's consent package was submitted to the Senate in 1994 and is still pending there.
Security Council Resolution 808 adopted on May 23, 1993, establishing an International Criminal Tribunal for the Former Yugoslavia to prosecute persons responsible for committing Nuremberg-type war crimes in the territory of the former Yugoslavia demonstrates an acknowledgement by the United States that at least non-U.S. international criminals must be brought to justice. This support was echoed in Resolution 955 in 1994, establishing the International Criminal Tribunal for Rwanda.

Other treaties and conventions, like the Land Mine Convention,\(^{59}\) appear too controversial for U.S. participation, and demonstrate an apparent schism between U.S. foreign policy and emerging international legal concepts embraced by our international friends and allies. Further, the interface between the foreign policy of the United States executive branch and that of Congress often indicates the likelihood that the treaty will enter into effect without advice and consent of the Senate. Thus, unless a controversial treaty is found to be self-executing\(^{60}\) under U.S. law,\(^{61}\) it may have no effect if adequate support is not found.

\(^{59}\) Of the 120 signatories to the convention, the United States and Cuba stand alone as non-signatories in the Western Hemisphere, and the United States and Turkey stand alone among NATO members who refused to sign. See Landmine Treaty Ratified, Set to Take Effect in Six Months, AGENCE FR.-PRESSE, Sept. 17, 1998, available in 1998 WL 16601056.


can not be mustered in the U.S. Senate to supply advice and consent in favor of ratification.

D. Why Do We Need a Court?

One of the traditional limitations of international law is its lack of self-contained, binding effect and enforcement mechanisms. Public international law merely persuades states, as its subjects, to act as rationally calculating hedonists, balancing the discomfort of verbal or economic rebuke against national interests. Thus, any state actor who prefers the somewhat anarchical system of effectively unenforceable international law to a structured, independent tribunal with enforcement power would likely see the court as a direct threat to its national sovereignty.

Even states which prefer the rule of the jungle to the Rule of Law will probably support actions to punish a state which has become unable to defend its own political and territorial sovereignty. Thus, the international community's approach to the core crimes of the Court has been to establish *ad hoc* tribunals. Here, what is termed as *ad hoc*, usually ends up meaning *post hoc*, and justice is done only in hindsight.

Under the current approach, even when an active criminal is identified, there are no effective mechanisms for intervention and apprehension. By lacking the authority to intervene, and without established ties to national judiciaries and enforcement agencies, *ad hoc* tribunals lack what many argue to be the most important feature of an effective system of law — *deterrence*.

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63 Although Bentham and Mill saw the utilitarian dynamic of the political pleasure-over-pain in domestic terms, the same equation applies here, presuming that states operate as individuals in a global order.

64 “If we truly believe that we are a society that value [sic] the established rules of the international community — if we truly, believe in the rule of law and not in the rule of the jungle — then of one thing there should be no doubt: the perpetrators of these crimes must be brought to justice.” 139 CONG. REC. S 10315, 10316 (daily ed. Aug. 4, 1993) (statement of Senator Christopher Dodd).

65 Save in the case of Yugoslav President Slobodan Milosevic, who continues to commit serious breaches of international law even after his indictment by the Yugoslav Tribunal.

66 Even the U.S. State Department seemed to recognize this important function of the court: “Our long-term vision is the prevention of heinous crimes through effec-
Along with an effective system of law, there must also be an effective and independent institution. With a permanent International Criminal Court in place, employing an active and independent prosecutor and pre-trial chamber, legal intervention becomes an option. A permanent institution, properly managed, means efficiency, expertise, and respect. As an institution, the Court has a level of authority, competence, and respect that could never be gained by an ad hoc tribunal. The Court’s application of international criminal law, cultivating the expertise of its staff and strengthening communications and enforcement ties with individual states, can only cut the amount of time and momentum needed to engage in an investigation (as compared to an ad hoc tribunal, where delay and logistical problems would seem inevitable).

In addition to the systemic and institutional benefits of a permanent court, the lessons learned from the two independent tribunals are numerous and greatly inform the decision-making process. In fact, a strong argument in favor of a permanent institution can be made on the basis of logistics and effectiveness alone. For instance, in the case of the International Criminal Tribunal for Rwanda (ICTR), the United Nations had to face nearly impossible logistics required to establish an effective foreign tribunal. The time and effort required to “micro-manage” such concerns lead to open speculation as to whether the U.N. Security Council would likely engage in such activities in the future. Similarly, the International Criminal Tribunal for the Former Yugoslavia (ICTFY) was burdened by numerous political logistics including the appointment of a prosecutor, establishing support for the tribunal’s statute, and electing judges.


68 Such factors include the fact that defendants and witnesses had to come to Tanzania from Rwanda, the lack of a local infrastructure for the tribunal, and the time required to negotiate a U.N. host country agreement with Tanzania. *Id.*


70 See *id.* at 33-34.
Thus, the need for a system of international criminal law, the justifications for a permanent institution (in terms of respect, effectiveness, and efficiency), and the deterrent effects\(^\text{72}\) of a force for independent intervention all lend credence to the decision made at Rome.

### E. International Crime in the Years Since Nuremberg

Without some level of circumspection, one might be led to believe that the purpose of Nuremberg was served by prosecuting Nazi war criminals, and that the need to deter and intervene in recent decades has been extremely rare. One might ask "deter what?" and "intervene where?" But Hitler and the butchers of the Third Reich were not the only international criminals of this century.

To the contrary, the years since Nuremberg are replete with consistent indicia that the individual may be at peril in his or her own state. The laws of war\(^\text{73}\) and universal declarations in favor of human rights have met with egregious enforcement failures on too many occasions. Worse, though, is the growing sense that these failures of law and international agreement pass without inciting the world, let alone the United States, to anything like the outrage surrounding the Holocaust.

Hitler perhaps put it best when uttering the now well-worn phrase "who remembers the Armenians?",\(^\text{74}\) speaking of the 500-600 thou-

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\(^{71}\) See id. at 144-45.

\(^{72}\) "Successful prosecutions in such a court would not only result in punishment for the perpetrators, but would help deter behavior repulsive to the international community." 140 CONG. REC. S105 (daily ed. Jan. 26, 1994) (final report of the United States Commission on Improving the Effectiveness of the United Nations).


sand domestic Armenians slaughtered by the Turkish government in 1915. In a moment of brazen candor, Hitler reassured his commanders that time would erode the horror of their actions. Fortunately, the proceedings at Nuremberg proved him terribly wrong. The summary cry from Nuremberg was "never again."

Still, acts of mass violence litter the landscape of the 20th century. The genocidal acts of the Japanese, Russians/Soviets, and Cambodians occupy a place in the minds of many. Most of the world condemns Pol Pot, and more recently Saddahm Hussein, as interna-

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75 See also Robert Melson, Provocation or Nationalism: A Critical Inquiry in the Armenian Genocide of 1915, in FRANK CHALK & KURT JONASSOHN, THE HISTORY AND SOCIOLOGY OF GENOCIDE 266, 270 (1990) (providing statistics on the numbers of Armenians killed or deported).

76 "The motto 'never again' belongs to the entire world community, not as a vindictive slogan, but as a reflection of our moral-ethical values and of our intellectual commitment to protect future generations from events similar to those that led to Nuremberg (and Tokyo). If Nuremberg did nothing else, that is indeed a worthy legacy." M. Cherif Bassiouni, Nuremberg: Forty Years After, 80 AM. SOC'Y INT'L L. 65 (1988).


78 As Rummel reminds us:

> Out of a 1970 population of probably nearly 7,100,000, Cambodia probably lost almost 4 million people to war, rebellion, manmade famine, genocide, politicide, and mass murder. From democide alone, almost all concentrated in the years 1970 to 1980, successive governments and guerrilla groups murdered almost 3,300,000 men, women and children (including 35,000 foreigners). Most of these, probably close to 2,400,000 were murdered by the communist Khmer Rouge.

R.J. RUMMEL, DEATH BY GOVERNMENT, 160 (1994). For more than a decade after the Khmer Rouge were ousted by Vietnam in 1979, the United States refused to lend its backing to a trial of Pol Pot for genocide, nor take any action that might lead to such an outcome. See id.

79 Saddahm Hussein could be indictable under number of theories. For instance, many have called for a war crimes indictment. See, e.g., 138 CONG. REC. H8578 (daily ed., Sept. 16, 1992) (statement of Congressman Weldon) (expressing frustration that a war crimes indictment, while clearly supported, seemed impracticable). Others have advocated charges for the commission of genocide for using poison gas against the Kurds. See Theodore Meron, International Criminalization of Internal Atrocities, 89 AM. J. INT'L L. 554, 554 (1995). Additionally, the authors note that
tional criminals. Yet, one must ask to what end? What effect does this 
condemnation carry?

Other horrors of this century spring less readily to mind: the 
death and displacement of millions in Bangladesh, the murder of 
750,000 in Uganda, the slaughter of 250,000-500,000 members of the 
Communist Party in Indonesia, the massacre of some 200,000 in 
East Timor, annihilation of at least 70,000 peasants by death squads 
in El Salvador, the deaths of as many as 50,000 Tutsis in Burundi, and 
some 30,000 state-sponsored “disappearances” in Argentina’s 
“Dirty War.” Most recently the criminal acts in the former Yugoslavia and Rwanda have occupied the minds of the world and, finally, 
inspired a call to action both asked and answered by the international 
community.

The massive number of deaths blurs the human horror of these 
events. Terms such as murder, torture, gender-specific persecution, 
and starvation do not come close to capturing the unspeakable in-
humanity committed in the name of the state, and under the auspices 
arguments could obviously be made that Saddam Hussein is, depending on the defi-
nition, guilty of committing acts of unprovoked aggressive war against the territory of Kuwait.

“The devastation wrought by the Pakistani army was enormous, although esti-
mates of casualties vary widely. Between one million and three million were killed; 
about two million were rendered homeless; and about ten million fled across the 
border to India, where they had to live in conditions of unimaginable hardship, in 
spite of India’s best efforts.” CHALK & JONASSOHN, supra note 75, at 396.

Id. at 381.

The Government of Indonesia occupied East Timor with a brutal hand, resettling 
hundreds of thousands of East Timorese in camps in the late 1970’s, and has been 
charged by the International Red Cross of deliberately starving more than 100,000 
East Timorese during the same period. See 139 Cong. Rec. S12311, 12345 (daily 

tor Dodd).

CHALK & JONASSOHN, supra note 75, at 387.

Prepared Remarks by Professor Michael P. Scharf before the International Op-
erations Subcommittee of the U.S. Senate Committee on Foreign Relations, infra 
note 218.

E.g., “individual or mass rape, forced pregnancy, forced abortion, enforced prosti-
tution, any form of indecent assault or act of violence against refugee women, 
girls, and children.”

See George Alfred Mudge, Starvation as a Means of Warfare, 4 INTL LAW. 228, 
of some system of authority. Behind each of these disasters, individu-
als made the choices and carried out acts of hideous carnage, but their
names are lost or forgotten.

Most disturbingly, the lists and statistics somehow fail to convey
a simple message — despite our best efforts at Nuremberg, acts of
unbelievable criminal impunity have happened, are happening, and, appa-
rently, will happen again.

We must also remember that the savagery committed by indi-
viduals in other countries in this century does not leave the United
States free from concern. One must ask whether the acts of William L.
Calley and the de minimus punishment he ultimately received put
the United States on adequate footing to casually immunize itself
from the Nuremberg principles.

Thus, for all of the above reasons, both the legal foundation of
and the functional necessity for the Court seem clear.

88 U.S. Army Lieutenant William Calley was convicted for the "premeditated mur-
der of 22 infants, children, women, and old men, and of assault with intent to murder
a child of about 2 years of age" in the My Lai massacre. His defense was that he
misunderstood his superior's orders. See U.S. v. Calley, 46 C.M.R. 1131 (1973),
aff'd, 48 C.M.R. 19 (1973). Captain Medina, his superior officer, was also prose-
ced.

89 Overall, Calley was implicated in the intentional killing of some four hundred
Vietnamese civilians at My Lai. As a result, he was

... imprisoned for only a short time before having his sentence commuted by
President Nixon. Many of his associates, meanwhile, were not charged with
any crime at all while others were acquitted by military courts. Former Nur-
emberg Chief Prosecutor Telford Taylor has stated that General William C.
Westmoreland, a former Commander of U.S. forces in Vietnam, might be
convicted as a war criminal if he were held to the same standard established at
the Nuremberg and Tokyo Trials.

S. REP. No 103-71 at 383938 (1993).

90 Senator Helms seems at ease in clarifying this divergence. As his spokesman,
Marc Thiessen, said at Rome "We see no reason to put American citizens or Ameri-
can foreign policy up to the judgment of the world." Mark Matthews, Court Has to
Get By Without U.S.; Tribunal: Denied the Right to Exempt its Nationals from the
Jurisdiction of the Planned International Criminal Court, America Opt Out of the
II. THE UNITED STATES AND THE COURT

A. Establishing U.S. Support for the Court

U.S. involvement in the development of the proposed court currently spans over twenty years. In 1978, the American Bar Association adopted a resolution urging the Department of State to open negotiations for a convention to establish an international criminal court with jurisdiction over international crimes of hijacking, violence aboard aircraft, crimes against diplomats and internationally protected persons, murder, and kidnapping.  

Since 1986, the U.S. Congress has repeatedly proposed legislation pointing to the need for the establishment of an international criminal court to prosecute individuals who have committed the most serious international crimes and called on the United States to pursue the possible establishment of such a court. In the 101st Congress, in the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1991, Congress required the President and the Judicial Conference of the United States to report to the Congress on the desirability of establishing an international criminal court.

In 1992, the American Bar Association adopted a follow-up resolution calling on the U.S. government to work toward solving the legal and practical issues regarding the establishment of an international criminal court.

B. Progress in the Senate

In 1993, the 103d Congress, in section 517(b) of the Foreign Relations Authorization Act, Fiscal Years 1994 and 1995, expressed as

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91 Professor Henry T. King worked on this resolution and played a key role in its passage. Eds.
92 H.R. 5114, 101st Cong., 104 Stat. 1979 (1990). In the Foreign Operations Appropriations Bill passed by the Congress and signed into law by the President in 1990, there was a provision for the exploration by the President of the creation of an international criminal court which was signed into law in the 101st Congress as Public Law 101-09513. Id. at 2066-67.
93 Id.
the sense of the Senate that the establishment of an international criminal court would greatly strengthen an international Rule of Law, that such a court would serve United States interests, and that the United States should advance this proposal at the United Nations.

Senators Christopher Dodd,^{96} Arlen Specter, and, to a lesser degree, Dianne Feinstein have all provided support and leadership in the movement towards establishing a permanent court. This support culminated in the 1993 Senate Joint Resolution 32^{97} "calling for the United States to support efforts of the United Nations to conclude an international agreement to establish an international criminal court."^{98} The Senate Resolution sponsoring the International Criminal Court Act of 1993, proposed a sense of the Congress that:

1. the establishment of an international criminal court with jurisdiction over crimes of an international character would greatly strengthen the international Rule of Law;
2. such a court would thereby serve the interests of the United States and the world community; and
3. the United States delegation should make every effort to advance this proposal at the United Nations.

In Senate Report 103-71, the Senate found

1. the freedom and security of the international community rests on the sanctity of the Rule of Law;

* * *

3. the prosecution of individuals suspected of carrying out such acts is often impeded by political and legal obstacles such as disputes over extradition, differences in the structure and capabilities of national courts, and the lack of uniform guidelines under which to try such individuals;

4. the war crimes trials held in the aftermath of World War II at Nuremberg, Germany, and Tokyo, Japan, demonstrated that fair and effective prosecution of war criminals could be carried out in an international forum;

^{96} Note that Senator Dodd's Father, Thomas J. Dodd, served as Executive Trial Counsel for the U.S. prosecution team at Nuremberg.

^{97} In 1991, section 599E(b) & (c) of the Foreign Operations Act directed the United States to explore the need for the establishment of an international criminal court and report on the results of efforts to establish an international criminal court. H.R. 5114, 101st Cong., 104 Stat. 2066-67 (1990).

(5) since its inception in 1945 the United Nations has sought to build on the precedent established at the Nuremberg and Tokyo trials by establishing a permanent international criminal court with jurisdiction over crimes of an international character;

(6) United Nations General Assembly Resolution 44/39, adopted on December 4, 1989, called on the International Law Commission to study the feasibility of an international criminal court;

(7) in the years after passage of that resolution the International Law Commission has made great strides in establishing a framework for such a court, including

(A) the adoption of a draft Code of Crimes Against the Peace and Security of Mankind;

(B) the creation of a Working Group on an International Criminal Jurisdiction and the formulation by the Working Group of several concrete proposals for the establishment and operation of an international criminal court; and

(C) the determination that an international criminal court along the lines of that suggested by the Working Group is feasible and that the logical next step would be to proceed with the formal drafting of a statute for such a court;

* * *

(9) given the developments of recent years, the time is propitious for the United States to lend its support to this effort.

The Joint Resolution, passed by the Foreign Relations Committee in an eleven to seven vote on May 20, 1993, called for a response from the President by October of that same year. In the words of Senator Dodd, this act did not bind the United States to any particular proposal. It, rather, asked the Senate to decide whether it would be "in the interest of the United States, which has had a long standing commitment to the Rule of Law, to try to adopt those basic principles

99 In the words of Senator Dodd:

The operative language of this legislation-and I have read it to my colleagues in this Chamber is very clear. It does not bind us to any particular proposal. It merely says, do you think this is worth doing? Do you see it as being in the interest of the United States, which has had a longstanding commitment to the rule of law, to try to adopt those basic principles on an international level?

on an international level." In January of 1994, the Department of State Authorization Act was amended, in section 170A, to provide further support for a court, again, without supporting any particular proposal.

C. Progress Towards Executive Action

In 1995, the House introduced a resolution to establish U.S. recognition for the punishment of war crimes. Following a heated Senate debate over whether or not to support court negotiations, the House introduced a parallel resolution in the summer of 1997. Though no direct action was taken beyond referring the resolution to the House Committee on International Relations, the House made it clear that it expected executive action on this proposal.

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100 Id.

101 Section 170A, Policy With Respect to the Establishment of an International Criminal Court:

The purpose of this provision is to place the United States Congress on record in support of the concept of an international criminal court.

Section 170A(a) contains congressional findings regarding international crimes and the international community's response.

Section 170A(b) expresses the Sense of the Congress that the establishment of an international criminal court would strengthen the international Rule of Law and would thereby be in the best interests of the United States and the international community.

Section 170A(c) requires the Administration to report to Congress by no later than February 1, 1994, on developments relating to and U.S. efforts in support of the establishment of such a court.


103 H.R.J. Res. 89, 105th Cong. (1997) (a "joint resolution calling on the President to continue to support and fully participate in negotiations at the United Nations to conclude an international agreement to establish an international criminal court"). The resolution was introduced by Representative Kennedy and thirty-six cosponsors, including Representatives Leach, Delahunt, Stark, McNulty, Evans, and Woolsey. Id.
In October 1995, President Clinton presided over the inauguration of the Dodd Center at the University of Connecticut. During the ceremony, President Clinton expressed support for a permanent war crimes tribunal, stating "all nations around the world who value freedom and tolerance [should] establish a permanent international criminal court to prosecute, with the support of the United Nations Security Council, serious violations of humanitarian law." 

The President went on to call the proposed permanent court "the ultimate tribute to the people who did such important work at Nuremberg." Beyond a tribute, the President acknowledged that the court would "send a strong signal to those who would use the cover of war to commit terrible atrocities that they cannot escape the consequences of such actions." 

During and following 1995, the Clinton Administration continued to speak in favor of the establishment of the Court, without stating

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104 The program spanned three days. Professor King spoke on day two and President Clinton spoke on day one. When Clinton made these remarks, he was met with sustained cheering by the audience in attendance.

105 Clinton, supra note 1.

106 Id.

107 Id.

108 In the months before the Rome conference, President Clinton made several statements which inspired the optimism of those in favor of the Court:

> In Rwanda, we must hold accountable all those who may abuse human rights, whether insurgents or soldiers. Internationally, as we meet here, talks are underway at the United Nations to establish a permanent international criminal court. Rwanda and the difficulties we have had with this special tribunal underscores the need for such a court. And the United States will work to see that it is created.

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President Clinton, Remarks by the President to Genocide Survivors, Assistance Workers, and U.S. and Rwanda Government Officials, Mar. 25, 1998, available in 1998 WL 135516; “The President . . . talked about how slow the International Tribunal had been on Rwanda and once again repeated what he has been talking about since 1994, I believe, at the United Nations, which is the need for a permanent international criminal court.” Press Briefing by National Security Advisor Sandy Berger Mar. 25, 1998; “In 1995, President Clinton announced U.S. support for a Permanent International Criminal Court, and we are committed to the establishment of a Court with broad-based support before the end of the Century.” Fact Sheets on U.S. Efforts to Promote Human Rights, The White House, Office of the Press Secretary, Dec. 9, 1997, available in 1997 WL 760980; “[b]efore the century ends, we should establish a permanent international court to prosecute the most serious violations of humanitarian law.” President Bill Clinton, Remarks to the 52nd U.N. General Assembly, Sept. 22, 1997, available in 1997 WL 586481.
specific reservations regarding any of the proposals submitted for consideration by the United Nations. In 1997, the Congress expressed a compelling desire to move forward:

The crimes under negotiation for inclusion in the international criminal court’s jurisdiction are the most serious and horrendous of international crimes, such as genocide and crimes against humanity, and the failure to punish such crimes offends worldwide standards of law and morality and threatens the establishment of peace and reconciliation.

The time is right for the creation of a permanent international criminal court and the United States should continue to support strongly its establishment and participate fully in the preparation of provisions under which such a court can be established and can operate fairly and effectively.¹⁰⁹

Thus, having passed through extensive debate in both the House and Senate, the U.S. Congress clearly indicated that the formation of a Court was generally in line with U.S. foreign policy and domestic interests.

D. The State Department

When speaking before the Senate Foreign Relations committee one year before the Rome conference, David Scheffer, nominated by President Clinton as Ambassador-at-Large Designate for War Crimes Issues, stated his firm commitment to both the punishment and the deterrence of international crime as a part of the international Rule of Law.¹¹⁰ As a seasoned international lawyer and a ten-year veteran of the foreign affairs community, Scheffer promised the Senate that, if confirmed, he would work tirelessly as a non-partisan to confront “atrocities, or those crimes which define the most extreme human

¹¹⁰ On the brink of his appointment, Mr. Scheffer stated:

[W]ar crimes has [sic] become a growth industry in international affairs. Genocide, crimes against humanity, and violations of the laws and customs of war are the currency of modern conflict across the globe. My job, if I have the privilege to serve our country, will be to help bring war criminals to justice and to deter aspiring genocidists from committing their heinous crimes . . . . The President and the Secretary of State have asked me to undertake these duties because of the importance they attach to the Rule of Law.

rights abuses against peoples." His speech appeared to be honest and sincere, and his conviction to promoting an international Rule of Law seemed unquestionable. In general, the appointment of Mr. Scheffer to this post inspired optimism that the court would become a reality with U.S. support.

The following year, the State Department continued to declare its support for the proposed court. As the Rome conference drew near, however, it became clear that, while "strongly support[ing] the establishment of a fair, effective and properly constituted International Criminal Court," the State Department was using careful language to convey something more, and that the devil would be in the details.

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111 "If confirmed, I would focus immediately on the former Yugoslavia, the Great Lakes region of central Africa, Cambodia, and Iraq as areas where serious violations of international humanitarian law have occurred and demand our most serious attention." Id.

112 This is evidenced also by his support for the Independent War Crimes Tribunals, and his four-year tour at the Carnegie Endowment for International Peace where he maintained an active involvement with war crimes issues, particularly during the Gulf war.


Thus, as the Rome Conference drew near, U.S. support for the Court was strong and resolute.

III. THE ROMA CONFERENCA

A. U.N. Preparatory Conferences and the Issues on the Table in Rome

The United Nations General Assembly adopted Resolution 44/39 on December 4, 1989, calling on the ILC to study the feasibility of an International Criminal Court. The draft report of the International Law Commission issued in July 1990 expressed the Commission's agreement in principle with the idea of establishing a permanent international criminal court. Subsequently, the United Nations General Assembly adopted Resolution 47/33 on November 25, 1992, calling on the ILC to begin the process of drafting a statute for an international criminal court at its next session.

Based upon the report of the ad hoc committee, the United Nations General Assembly adopted Resolution 50/46 on December 18, 1995, establishing a preparatory committee on the establishment of an international criminal court to further review the substantive issues arising out of the draft statute of the ILC and draft texts, with a view towards preparing a widely acceptable consolidated text of a convention for an international criminal court as a next step toward consideration by a conference of plenipotentiaries. The work of this preparatory committee in 1996 and 1997 made, in the words of Congress, "encouraging and substantial progress toward achieving such a consolidated text." The ILC presented a draft statute for an international criminal court at its 46th session on September 1, 1994.

The United Nations General Assembly adopted Resolution 49/53 on December 9, 1994, establishing an ad hoc committee, open to all states, which met for four weeks in 1995 to review the major substantive and administrative issues arising out of the draft statute prepared by the ILC and to consider arrangements for the convening of an international conference of plenipotentiaries.

The United Nations General Assembly adopted Resolution 51/207 calling for up to nine weeks of negotiations by the preparatory committee in 1997 and the beginning of 1998 to complete the drafting of a widely accepted consolidated text of a convention for a diplomatic conference in June 1998.

Ultimately, a total of five preparatory conferences would lead up to the Rome conference, out of which national and Non-governmental Organization (NGO) delegations managed to produce a draft statute
that embraced the gambit of state interests discussed since the ILC first examined the court in the 1950s.\textsuperscript{116} The Statute,\textsuperscript{117} consisted of thirteen parts and 116 articles. Most articles in the statute were heavily bracketed with a number of options, each of which would be discussed at Rome. Given the ambitious agenda, it could be reasonably anticipated that five weeks would not be enough time to establish consensus on every issue.

B. Defending U.S. Interests in Rome

During the preparatory conferences, some of the United States bargaining points began to crystallize, and it appeared that there were inevitable differences of opinion between the United States and its allies on key issues. Still, the negotiations began at Rome with a guardedly optimistic sense that a compromise could be reached.

The first area of concern was the general jurisdiction of the court. The United States posed serious questions regarding the subject matter over which the court should have automatic jurisdiction — the issue of aggression and the three core crimes,\textsuperscript{118} including whether or not the court would respond to crimes committed during internal armed conflict.\textsuperscript{119} Second were the "trigger mechanisms" by which an indictment would be brought, including the relative roles of the prosecutor, the U.N. Security Council, the pre-trial chamber, and the involved State’s consent. Third were concerns over the possible codification of new definitions of international crime (e.g., rape, murder, war crimes, crimes against humanity, and genocide. See supra note 11 and accompanying text.

\textsuperscript{116} In 1950, the United Nations General Assembly set up a Committee on International Criminal Jurisdiction consisting of representatives of seventeen member states. The Committee was charged with preparing concrete proposals on the establishment of an International Criminal Court that could administer the draft Code of Crimes Against the Peace and Security of Mankind (Draft Code), which the International Law Commission was simultaneously drafting. The Committee submitted a draft statute in 1951, which was amended by a Second Committee in 1953. G.A. Res. 489, U.N. GAOR, 9th Sess., Supp. No. 12, at 1-2, U.N. Doc. A/2645 (1954).


Fourth, the concept of "complementarity," meaning that the court must respect good faith domestic efforts to prosecute individuals who have been charged with international crime. Other issues included the sources of funding for the court and its relationship with the United Nations, judicial cooperation and compliance with decisions of the court, the national security exception to compliance, and double jeopardy.

On the whole, before the Rome Conference, the list of issues concerning the United States positions did not appear to be prospectively irresolvable. As the time drew near to signing, however, the rigidity of the U.S. posture on key issues and the growing obstructionist role it played proved it to be otherwise. The question naturally arises, if the State Department had an agenda other than the one elaborated above, what was it and who authored it?

C. The Elusive Senator Helms

Obviously, an issue as politically contentious as an International Criminal Court will result in a significant diversity of opinions and agendas in Washington. The State Department's agenda (at least its formal one) must be viewed in perspective with the various congressional and departmental agendas. In retrospect, an important element of the U.S. position in Rome was apparently framed by influential members of the Senate Foreign Relations Committee. As early as 1993, it became apparent that the powerful chairman of the Senate Foreign Relations Committee, Senator Jesse Helms, would not support an International Criminal Court in any form. This was flatly conveyed in his Amendment No. 1254 to the Department of State Authorization Act of 1994, which stated as its purpose "[t]o strike all language in Section 170A relating to support for an international criminal court." Ultimately, Senator John Kerry moved to table the Helms amendment to strike section 170a. The motion was carried fifty-five to forty-five in favor of tabling the amendment.

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122 S-123 (Temp. Rec.) 103d CONG. (1993). This is not to say that the endorsement of the court did not remain conservative. As the motion was carried, after a second vote, those favoring tabling the Helms' amendment contended

[Endorsing the language in this bill in favor of establishing an international criminal court is in no way an endorsement of any current proposals, and is certainly not an endorsement of any of the frightening scenarios painted by the proponents of the Helms amendment. Quite simply, the language that the
In the exchanges on his proposed amendment, Senator Helms suggested three bases for not supporting the court. First, "who would sit in judgment?" In this regard, he clearly doubted that the judges of the Court could ever be free from political influence. Second, "what constitutes an international crime?" He feared the potential substantive jurisdiction of the court, though no Senate bill or resolution had yet established support for a specific jurisdiction of the court. Finally "what constitutional questions are raised?" Again, without adopting an actual statute, the Senate had not proposed a course of action which was inherently constitutional or unconstitutional. It had merely proposed that the United States support and participate in the development of the court. Certainly Senator Helms did not miss the ultimate importance that any proposed treaty would have to come back through the Senate for advice and consent. Even more unfortunately, the Senator's insights into potential problems would not ultimately be addressed by him, in that, by merely posing these questions, he appeared to have already decided against the Court.

Ultimately, the Senator's objections boiled down to a single word: "sovereignty." As Senator Dodd pointed out, the Court would require facing the "age-old struggle between the rights of individuals, Helms amendment would strike merely urges that we work to create an international criminal court.

Id. The conservative approval remained grounded in a preservation of U.S. legal tenets:

[W]e do not take lightly the concerns of our colleagues. A politicized, anti-American international court would be extremely dangerous. We, like they, do not support the creation of a court that infringes on constitutional rights, that pursues vague charges, or that allows terrorists to sit in judgment of our citizens. We are all rightly committed to preventing the creation of any such court. However, the language in this bill does not support any of those results. All it supports is the establishment of an international court. We strongly favor that end, and thus support the motion to table the Helms amendment.

Id.

123 "These crimes and these cases would be tried before judges who could be from North Korea, Cuba, or other unfriendly places." 140 CONG. REC. S96, 101 (daily ed. Jan. 26, 1994) (statement of Senator Helms).

124 The "permanent international criminal court to try individuals, potentially including American citizens, for such vague crimes as 'colonialism,' or 'environmental crimes.'" Id.

125 "And yo [sic] may recall with the Genocide Treaty in particular we finally managed to get that through . . . . We pulled all of its teeth, and it was a toothless tiger and therefore it has done no damage." S. REP. NO. 103-71, at 61-62 (1994).
the sovereignty of nations, and the relentless demands of the global community,”126 in the interest of preserving the “the sanctity of justice and the international Rule of Law.”127 The question here, at least in Senator Helms’ terms would be whether a binding international Rule of Law is at all compatible with the sovereign interests of the United States.

Senator Helms made no bones about his position, drafting a letter to Secretary of State Madeline Albright in the spring of 1998, which stated that the Court treaty would be “dead on arrival” at the Senate Foreign Relations Committee if the United States did not retain the power to veto an indictment.128 Once the treaty conference began, Senator Helms sent a spokesman, Marc Thiessen, on a surprise fact-finding mission to the Food and Agricultural Organization in Rome.129 In a simple statement, Mr. Thiessen reduced Senator Helms’ position to a simple succinct message: “We are not willing to put the United States up to the justice of the world.”130

After the treaty signing, Senator Helms came out with his strongest statement to date. Not only was he opposed to the United States signing the treaty, but was actively opposed to the very existence of the court,131 and would fight the court’s progress.132

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127 Id. at 930.
128 Helms Declares U.N. Criminal Court “Dead-on-Arrival” in Senate Without U.S. Veto, GOV’T PRESS REL. (Mar. 26, 1998), available in 1998 WL 7322525; Helms told Madeline Albright that he is “unalterably opposed to the creation of a permanent U.N. criminal court because any permanent judiciary within the U.N. system would be totally inappropriate, insomuch as like the creation of a standing army, or the power to collect taxes, it would grant the U.N. a principal trapping of sovereignty.” “The UN,” he added, “is not now — nor will it ever be so long as I have breath in me — a sovereign entity.” Id.
129 The U.N. Food and Agricultural Organization served as the site of the Rome Conference.
132 For instance, by removing funding and military support, Helms supports keeping U.S. forces in Germany — “but not if Germany insists on exposing them to the jurisdiction of the ICC.” Id.
D. Influence from the Pentagon

In addition to the various congressional agendas driving the State Department, the Pentagon played its own hand at Rome. Here it would appear that Secretary of Defense William Cohen "absolutely dug in his heels." During the third week of the conference, rumors abounded that Secretary Cohen had, or least that a member of his staff had, faxed several "talking points" to his German counterparts. This alleged communiqué suggested that if Germany continued to press against the U.S. position, overseas American troop support, including those in Europe, would hang in the balance. Though the Pentagon flatly denied having made such a threat, there was ample evidence from Senator Helms' office that the U.S. position would now entail a "re-thinking" of U.S. overseas defense arrangements, depending on the outcome of the treaty conference.

136 Kenneth M. Bacon, DOD News Briefing, M2 PRESSWIRE, Jul. 16, 1998, available in LEXIS, Market Library, IACNWS file. In a Department of Defense press conference on Jul. 16, Pentagon spokesman Kenneth Bacon stated, "I can tell you that the reports about his conversation are flat wrong. [Mr. Cohen] has expressed concerns about the international criminal court publicly and he has privately, but not in the terms that have been reported over the last day or so." Id. The State Department, via James Rubin, had made a similar denial in a press conference the day before:

I think the fact that he didn't say it, means it doesn't reflect the position of the U.S. government, and that somebody may have written some sentence that wasn't used. And I can assure you, that happens every day. They write sentences for me all the time that I throw out. And that doesn't constitute American policy, the thrown-out sentences.


137 "'In theory we will have to renegotiate all our status-of-forces agreements with every country where we station troops,' said Marc Thiessen, spokesman for Jesse Helms, chairman of the Senate Foreign Relations Committee." Betsey Pisik, World Criminal Court Created, U.S. Takes Stand, but Loses in Rome, WASH. TIMES, Jul. 18, 1998, at A1; "Indeed, the Clinton administration will now have to renegotiate our the [sic] status of forces agreements not only with Germany, but with every other signatory state where American soldiers are stationed. And we must make clear to these governments that their refusal to do so will force us to reconsider our ability to station forces on their territory, participate in peacekeeping operations, and
IV. THE STATUTE AND SUBSTANTIVE U.S. CONCERNS

The fundamental outcome of the Rome convention was very much in line with the concepts established at Nuremberg. The primary thrust of the treaty is to establish individual accountability, including the acceptance of "Superior Orders" as a defense only when crimes are not "manifestly unlawful"; and the responsibility of civilian and military commanders for the crimes of their subordinates.

Individual responsibility for war crimes, which flows directly from Nuremberg, has been repeatedly and openly promoted by the United States. Important evidence of this embrace can be found in the text of the U.S. Army Field Manual on the Law of Land Warfare. More recently, the United States (by its Security Council vote) has affirmed individual responsibility as the proper basis for jurisdiction in the Yugoslav War Crimes Tribunal and the Rwandan War Crimes Tribunal.

meet our Article Five commitments under the NATO charter." Helms, Slay This Monster, supra note 131.

138 See Rome Statute, supra note 5, at art. 25 (establishing individual criminal responsibility).
139 See id. at art. 33 ("Superior Orders and Prescription of Law"). Article 33(2) notes that, "[f]or the purposes of this article, orders to commit genocide or crimes against humanity are manifestly unlawful." Id.
140 Id. The authors note that at Nuremberg, Superior Orders was no defense, but could be considered in mitigation if moral choice was not possible.
141 See Rome Statute, supra note 5, at art. 28 (delineating the responsibilities of military commanders and other supervisors).
142 See Principles of International Law, supra note 15, at 11-14 (discussing the Nuremberg Principles).
143 Sections 510 and 511 of the U.S. Army Field Manual specifically recognize the lack of a defense for government officials for such crimes. U.S. DEP’T OF THE ARMY, FIELD MANUAL, supra note 73. Section 498 states that:

Any person, whether a member of the armed forces or a civilian, who commits an act which constitutes a crime under international law is responsible therefore and liable to punishment. Such connection with war crimes: a. Crimes against peace.; b. Crimes against humanity.; and c. War crimes. Although this manual recognizes the criminal responsibility of individuals for those offenses which may comprise any of the foregoing types of crimes, members of the armed forces will normally be concerned only with those offenses constitutes "war crimes."

Id. at 178.
144 "The Security Council has reaffirmed on several occasions that persons who commit or order the commission of grave breaches of the 1949 Geneva Conventions
Thus, at least this central concept of the court would seem to be in line with stated U.S. concepts of international law.

in the territory of the former Yugoslavia are individually responsible for such breaches as serious violations of international humanitarian law.” United Nations: Secretary-General’s Report on Aspects of Establishing an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory Of The Former Yugoslavia, 32 I.L.M. 1159, 1171 (1993).

Article 6 of the Rwandan Statute echoes the Nuremberg definitions of individual responsibility:

A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 4 of the present Statute, shall be individually responsible for the crime.

The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.

United Nations: Security Council Resolution 955 Establishing the International Tribunal for Rwanda, 33 I.L.M. 1598, 1604 (1994). Articles 2 of the Yugoslav tribunal statute and Article 4 of the Rwandan statute lay out an extensive list of criminal bases for bringing an indictment (far broader than either Nuremberg or the proposed ICC). Article 2 of the Yugoslav statute includes:

wilful killing;
torture or inhuman treatment, including biological experiments;
willfully causing great suffering or serious injury to body or health;
extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
compelling a prisoner of war or a civilian to serve in the forces of a hostile power;
willfully depriving a prisoner of war or a civilian of the rights of fair and regular trial;
unlawful deportation or transfer or unlawful confinement of a civilian; and
taking civilians as hostages.
32 I.L.M., at 1609.

Article 4 of the Rwandan statute includes:

Violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;
A. Jurisdiction

The basic jurisdiction of the ICC is limited to the "most serious crimes of concern to the international community as a whole," and more specifically limited to (a) the crime of genocide; (b) crimes against humanity; (c) war crimes; and (d) the crime of aggression.

The court will have automatic jurisdiction for genocide and crimes against humanity for states that ratify the ICC.

A number of specifics are elaborated in the statute, drawing from the brutal litany of egregious acts that individuals have committed un-

Collective punishments;
Taking of hostages;
Acts of terrorism;
Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;
Pillage;
The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples; and
Threats to commit any of the foregoing acts.


Rome Statute, supra note 5, at art. 5 ("Crimes within the jurisdiction of the Court").

See id. The inclusion of aggression was hotly debated, despite its central role in the Nuremberg trials and the growing consensus of what acts define aggression. For now, Article 5 specifies that the Court’s jurisdiction over the crime of aggression will not begin until a provision is adopted at a later date by a 7/8th majority of the treaty’s signatories. See id. arts. 5 & 121(4). The Final Act states that:

The Commission shall prepare proposals for a provision on aggression, including the definition and Elements of Crimes of aggression and the conditions under which the International Criminal Court shall exercise its jurisdiction with regard to this crime. The Commission shall submit such proposals to the Assembly of States Parties at a Review Conference, with a view to arriving at an acceptable provision on the crime of aggression for inclusion in this Statute. The provisions relating to the crime of aggression shall enter into force for the States Parties in accordance with the relevant provisions of this Statute.

The Final Act, supra note 5, at art. 7.

Rome Statute, supra note 5, arts. 5, 12(1).
der military campaigns during this century. For instance, rape, forced pregnancy, and forced sterilization are listed as both crimes against humanity\(^{149}\) and war crimes.\(^{150}\) It is interesting to note that even this new recognition of gender-specific crimes as falling under universal jurisdiction has been proposed in the U.S. Congress.\(^{151}\)

**B. Trigger Mechanisms**

Perhaps the most controversial issue at Rome was the proposal for a *proprio motu*\(^{152}\) Prosecutor. Despite the best efforts on the part of the United States to persuade\(^{153}\) (then ultimately perform an end-

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\(^{149}\) Article 7 also includes "[r]ape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity." *Id.* art 7(1)(g). Article 7 further provides that "forced pregnancy" means the unlawful confinement, of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy." *Id.* at art. 7(2)(f).

\(^{150}\) Article 8(2)(b)(xxii) includes as a war crime "committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in Article 7, paragraph 2 (f), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions." *Id.* at art. 8(2)(b)(xxii).

\(^{151}\) For instance, § 758 of the 1994 Foreign Relations Authorization proposed that forced sterilization should serve as a mandatory basis for providing sanctuary to Chinese nationals, stating that "the Attorney General shall protect from deportation or exclusion to the People’s Republic of China nationals of the People’s Republic of China who demonstrate a reasonable likelihood that they will be forced to abort a pregnancy or will be subjected to forced sterilization under Chinese Communist Party directives and/or government directives of the People’s Republic of China on population or will suffer other severe harm for refusal to comply with such directives, or who demonstrate that they have experienced severe harm on account of their refusal to comply with such directives." 140 Cong. Rec. 559 (1994). However, the final enactment completely omits this section, retaining instead a general treatment of China’s MFN status with the United States. Pub. L. No. 103-236, 108 Stat 382 (1994).

\(^{152}\) "On one’s own initiative," *Webster’s Unabridged Dictionary* 1154 (1983).

\(^{153}\) *See* Rubin, *Self-Initiating Prosecutor, supra* note 114. Rubin stated that:

It is our firm view that proposals for a self-initiating prosecutor complicate and perhaps compromise the prosecutor’s central mandate — investigating thoroughly those crimes of most concern to the international community: genocide, crimes against humanity and the most serious war crimes. The prosecutor’s office must not become a human rights ombudsman responsive to any and all complaints. Doing so will only flood the Court’s docket, hinder its investigations into the most serious crimes, create controversy over the outer
run around) the states friendly to this idea, Article 15 of the statute provides for an independent prosecutor who can act on complaints by State Parties or upon information tendered via NGOs, intergovernmental organizations or, presumably, even individuals. The major provision added to allay the fears of the United States and others that the Prosecutor might be overwhelmed with frivolous or overly politicized suits, was the inclusion of a Pre-Trial Chamber to authorize investigations, which provides a critical check on the actions of the Prosecutor. The issue lost by the United States here was mandatory approval by the Security Council or home state consent for all pending indictments. Instead, the Security Council can refer cases limits of the Court's jurisdiction, and undermine the core consensus and international support that is essential to an effective Court.

Id.


Article 15(2) requires that:

[T]he Prosecutor shall analyse the seriousness of the information received. For this purpose, he or she may seek additional information from States, organs of the United Nations, intergovernmental or non-governmental organizations, or other reliable sources that he or she deems appropriate, and may receive written or oral testimony at the seat of the Court.

Id. at art. 15(2).

See Rubin, Self-Initiating Prosecutor, supra note 114. "If neither the Security Council nor any state endorses action by the Court, the prosecutor would act without a critical and essential base of international consensus." Id.

Article 15(4) provides that:

If the Pre-Trial Chamber, upon examination of the request and the supporting material, considers that there is a reasonable basis to proceed with an investigation, and that the case appears to fall within the jurisdiction of the Court, it shall authorize the commencement of the investigation, without prejudice to subsequent determinations by the Court with regard to the jurisdiction and admissibility of a case.

Rome Statute, supra note 5, at art. 15(4).

Article 6 of the conference draft proposed that:

[T]he Court [may exercise its] [shall have] jurisdiction [over a person] with respect to a crime referred to in article 5, paragraph [(a) to (e), or any combination thereof] [and in accordance with the provisions of this Statute] if: [(a) the [matter] [situation] is referred to the Court by the Security Council, [in accordance with article 10] [acting under Chapter VII of the Charter].]

to the Prosecutor, and can withhold cases for a year if a consensus can be reached among the permanent five members of the Council under Chapter 7 of the U.N. Charter. Therefore, while approval by the Security Council is not a requisite for prosecution, there is still a significant check in place for cases where the Security Council believes that prosecution is either premature or unwise.

In an attempt to satisfy the predominantly U.S. desire for home state ratification for prosecutions, consent of the territorial state where the crimes were committed or the state of nationality of the accused, but not the custodial state, is required for prosecution of core crimes. Also, internal armed conflict was included, with a broad array of criminal acts elaborated in the statute. Further, States are

\[\text{See Rome Statute, supra note } 5, \text{ at art. } 13(b). \text{ The authors note that these use the same Article VII powers upon which the Yugoslav and Rwandan War Crimes Tribunals were established.}\]

Article 16, "Deferral of Investigation or Prosecution," provides that:

No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.

\[\text{Id. at art. } 16.\]

\[\text{See id. at art. } 12 ("Preconditions to the Exercise of Jurisdiction").\]

\[\text{Article 8(2)(e) includes:}\]

\[\text{(e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts:}\]

\[\text{i. Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;}\]
\[\text{ii. Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;}\]
\[\text{iii. Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the law of armed conflict;}\]
\[\text{iv. Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;}\]
\[\text{v. Pillaging a town or place, even when taken by assault;}\]
able to withhold cooperation on grounds of national security,\textsuperscript{163} upon application to the Pre-Trial Chamber.\textsuperscript{164} Thus the Statute provides a number of clear protections against self-interested abuses on the part of the independent prosecutor.

Still, the primary bases for challenge presented by the United States were fears that 1) the staff (judges and prosecutor) of the court would not operate impartially; and 2) that frivolous claims would be brought on the basis of political animus against the United States

\textbf{C. Complementarity}

In order for the court to operate in accordance with critical national sovereignty requirements, it must serve a complementary role

\begin{itemize}
\item[vi.] Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in Article 7, paragraph 2 (f), enforced sterilization, and any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions;
\item[vii.] Consscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities;
\item[viii.] Ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand;
\item[ix.] Killing or wounding treacherously a combatant adversary;
\item[x.] Declaring that no quarter will be given;
\item[xi.] Subjecting persons who are in the power of another party to the conflict to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;
\item[xii.] Destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict.
\end{itemize}

\textit{Id.} at art. 8(2)(e).

\textsuperscript{163} See \textit{id.} at art. 72 (providing for protection of national security information).

\textsuperscript{164} Article 57(2)(a) states that “[o]rders or rulings of the Pre-Trial Chamber . . . must be concurred in by a majority of its judges.” \textit{Id.} art 57(2)(a). Article 57(3)(c) states that, “[w]here necessary, [the Pre-Trial Chamber may] provide for the protection and privacy of victims and witnesses, the preservation of evidence, the protection of persons who have been arrested or appeared in response to a summons, and the protection of national security information.” \textit{Id.} at art. 57(3)(c).
in the prosecution of international criminals. The complementarity regime of the statute is the most targeted response to state sovereignty concerns. Under the complementarity provisions in Article 18, the prosecutor will notify states (confidentially, if appropriate) of the pending investigation. Within one month of such notice, the notified state may request that the investigation be deferred, pending its own investigation, and subject to a six-month review by the prosecutor. This mechanism allows each state to conduct its own investigation, and provides that the Prosecutor of the ICC may not intervene unless such states are "unwilling" or genuinely unable to prosecute the case. Further, following a U.S. proposal, states can challenge the admissibility of a case "at the earliest opportunity."

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165 "We want to ensure, however, that an international criminal court complements national investigations and prosecutions and does not undermine them. That is why we have been deeply engaged in discussions at the U.N. this year to examine key issues relating to a statute for such a court and to protect the legitimate law enforcement interests of the United States." U.S. Department of State, Speech: Madeleine Albright, Enforcing International Law (June 15, 1995). Then U.N. Ambassador Albright spoke before the Philadelphia Bar Association under the auspices of the Bureau of International Organization Affairs. (visited on Aug 1, 1998) Available at <http://dosfan.lib.uiuc.edu/> (document search of state department archives for "Philadelphia Bar Association" and "Albright" and "1993").

166 See Rome Statute, supra note 5, at art. 18(1).

167 See id. at art. 18(2) ("[a]t the request of that State, the Prosecutor shall defer to the State's investigation of those persons unless the Pre-Trial Chamber, on the application of the Prosecutor, decides to authorize the investigation").

168 See id.

169 Despite the logical and historically supported concern presented by most states that a nation might fail to prosecute its own nationals, the State Department continued to press for home state consent. "The United States rejects the notion that states will fail to respond to atrocities." Rubin, Self-Initiating Prosecutor, supra note 114.

170 Rome Statute, supra note 5, at art. 17.

Our long-term vision is the prevention of heinous crimes through effective national law enforcement buttressed by the deterrence of a permanent court. The court must ensure that national legal systems with the will and ability to exercise jurisdiction are permitted to do so, and the court should act when national legal systems fail.

Rubin, Establishing International Court, supra note 66 (emphasis added).

171 See Rome Statute, supra note 5, at art. 17(1) ("Issues of Admissibility"). This article provides that:

[T]he Court shall determine that a case is inadmissible where: (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or
D. Protections for the Accused

A major part of the U.S. criticism of the statute is that it would be “unconstitutional.” Certainly, there is no presumption that the United States (by means of advice and consent) may not bind itself by treaty to supra-nationally cooperative ventures. The assumption, then, would be that somehow subjecting U.S. nationals to the jurisdiction of the court would be violative of constitutional Procedural Due Process guarantees.

To be sure, due process is a fundamental element of an international Rule of Law, but one must query whether the Rule of Law means that U.S. constitutional standards must be adopted by the rest of the world, or whether generally accepted principles of just treatment will not both suffice and promote a greater respect for the court.

A major debate in this area was whether the court would try defendants in absentia. In response to this, the statute provides that the

or prosecution; (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute; (c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3; (d) The case is not of sufficient gravity to justify further action by the Court.

Id.

172 Id. at art. 19(5). Note that a challenge can also be brought by “[a] State from which acceptance of jurisdiction is required under article 12.” Id. at art. 19(2)(c).

173 Indeed, in the Trial of Joseph Alstötter & Ors, UNITED NATIONS WAR CRIMES COMMISSION, LAW REPORTS OF TRIALS OF WAR CRIMINALS 103 (1948), the War Crimes Tribunal established minimum criteria in the subsequent proceedings by which a criminal trial would operate according to the Rule of Law if:

i) the right of accused persons to know the charge against them, and this is a reasonable time before the opening of trial, was denied; ii) the right of accused to full aid of counsel, of their own choice was denied, and sometimes no counsel at all was allowed to defend the accused; iii) the right to be tried by an unprejudiced judge was denied to accused persons; iv) the right of the accused to give or introduce evidence was wholly or partially denied; v) the right of the accused to know the evidence against them was denied; vi) The general right to a hearing adequate for a full investigation of the case was denied.

Id.

174 At Nuremburg, Martin Bormann was tried in absentia. The Nuremburg Charter did not require his presence at trial.
defendant must be present in order for the trial to proceed.\footnote{175 See Rome Statute, \textit{supra} note 5, at art. 63 ("Trial in the presence of the accused").} Further, the accused may appeal the decision of the court based on challenges to the substantive outcome, procedural application, or unfairness of the sentence imposed.\footnote{176 See \textit{id.} at art. 81 ("Appeal against decision of acquittal or conviction or against sentence").}

The death penalty was not included as an option for the court.\footnote{177 See \textit{United Nations Diplomatic Conference, supra} note 117, at 121. Proposed in Article 75 of the conference draft: "[(e) (Death penalty)] Option 1 [death penalty, as an option, in case of aggravating circumstances and when the Trial Chamber finds it necessary in the light of the gravity of the crime, the number of victims, and the severity of the damage]." \textit{Id.} (brackets in original).} Also, the maximum sentence is thirty years,\footnote{178 See Rome Statute, \textit{supra} note 5, at art. 77(1)(a) ("Applicable penalties").} although a life sentence is permitted in extreme cases,\footnote{179 Article 77(1)(b) states that "[the Court may impose] a term of life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person." \textit{Id.} at art. 77(1)(b).} and the sentence will be enforced voluntarily by the member states,\footnote{180 See Rome Statute, \textit{supra} note 5, at art. 103(1)(a) (Role of States in enforcement of sentences of imprisonment).} or, if necessary, in the Netherlands at the Court's expense.\footnote{181 \textit{See id.} at art. 3. \textit{See also Id.} at art. 103(4).} Meanwhile, the court will strictly control both the sentence and parole.\footnote{182 \textit{Id.} at art. 103(4).}

In addition to the requirement that the accused be present during trial, there are numerous American-style provisions designed to protect an accused from mistreatment in the statute. These include a presumption of innocence,\footnote{183 \textit{See id.} at art. 66(1) ("Presumption of innocence").} a right to avoid self incrimination,\footnote{184 \textit{See id.} at art. 55(1)(a) ("Rights of person during an investigation").} and a
prosecutorial burden of proving guilt beyond a reasonable doubt.\textsuperscript{185} An accused has the right to remain silent "without such silence being a consideration in the determination of guilt or innocence," during investigation,\textsuperscript{186} as well as during the trial.\textsuperscript{187} An accused has the right to be questioned in the presence of counsel unless they have voluntarily waived such right.\textsuperscript{188} Article 67 also provides a full set of protections during the trial, designed to ensure that the process is conducted fairly and effectively.\textsuperscript{189} Perhaps the only U.S.-style provision not contemplated by the statute is a jury trial.\textsuperscript{190}

\textsuperscript{185} See Rome Statute, supra note 5, at art. 66(2) and (3) ("Presumption of innocence").

\textsuperscript{186} See id. at art. 55(2)(b).

\textsuperscript{187} See id. at art. 67(1)(g).

\textsuperscript{188} See id. at art. 55(2)(d); Article 55(2)(c) provides the right
\begin{quote}
[T]o have legal assistance of the person's choosing, or, if the person does not have legal assistance, to have legal assistance assigned to him or her, in any case where the interests of justice so require, and without payment by the person in any such case if the person does not have sufficient means to pay for it.
\end{quote}

\textit{Id.} at art. 55(2)(c).

\textsuperscript{189} Id. at art. 67.

\begin{quote}
In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing conducted impartially, and to the following minimum guarantees, in full equality: (a) To be informed promptly and in detail of the nature, cause and content of the charge, in a language which the accused fully understands and speaks; (b) To have adequate time and facilities for the preparation of the defence [sic] and to communicate freely with counsel of the accused's [sic] choosing in confidence; (c) To be tried without undue delay; (d) Subject to article 63, paragraph 2, to be present at the trial, to conduct the defence [sic] in person or through legal assistance of the accused's [sic] choosing, to be informed, if the accused does not have legal assistance, of this right and to have legal assistance assigned by the Court in any case where the interests of justice so require, and without payment if the accused lacks sufficient means to pay for it; (e) To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her. The accused shall also be entitled to raise defences [sic] and to present other evidence admissible under this Statute; (f) To have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness, if any of the proceedings of or documents presented to the Court are not in a language which the accused fully understands and speaks; (g) Not to be compelled to testify or to confess guilt and to remain silent, without such silence being a consideration in the determination of guilt or innocence; (h) To
As regards the substance to be applied by the court, the guaranties and provisions of the statute are exceptional in their conciseness and embrace of the proper role of the court. The first of these provisions, *nullum crimen sine lege*\(^1\) requires that 1) an accused may be charged only with a crime within the jurisdiction of the Court, 2) applicable law is to be strictly construed by the court.\(^2\) The second provision, *nulla poena sine lege*\(^3\) limits punishment to the provisions of the statute.

Beyond providing a strict legal basis for prosecution, these articles set an important limitation on the court — it does not re-define international law,\(^4\) rather, it positively applies international law as established by the laws, treaties and customs of the world.\(^5\)

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\(^1\) Literally, "no crime without a corresponding law." *See* Rome Statute, *supra* note 5, at art. 22.

\(^2\) See id. at art. 22(2) (providing that "the definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted").

\(^3\) Literally, "no punishment without legal basis." *See* id. at art. 23.

\(^4\) See id. at art. 22(3) (stating that the articles "shall not affect the characterization of any conduct as criminal under international law independently of this Statute").

\(^5\) See id. at art. 21.
E. The United States Position Does Not Hold the Day

One might think that the number of creative concessions made to accommodate U.S. concerns about the court would have led to a statute acceptable by all. However, it became clear early in the negotiations that goals expressed on key issues by the coalition of "friendly nations" and those expressed by the United States would not be compatible — regardless of concessions made during the negotiations. The resulting rift left the United States isolated, and ultimately in position of irretrievable opposition to the court.

Interestingly enough, individuals and NGOs\textsuperscript{196} ultimately stemmed the tide of U.S. influence and created the strongest bulwark against the pressure and alleged threats tendered by the U.S. delegation and the Pentagon. Without this influence, it is not at all clear that the delegations at Rome would have reached sufficient level of consensus to produce a treaty which would have any force.

\begin{itemize}
\item 1. The Court shall apply: (a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence; (b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict; (c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.
\item 2. The Court may apply principles and rules of law as interpreted in its previous decisions.
\item 3. The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender, as defined in Article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.
\end{itemize}

\textit{Id.}

\textsuperscript{196} For example, the Committee of Former Nuremberg Prosecutors participated in the Rome conference and the Preparatory Conferences leading up to Rome. Committee members Henry King and Ben Ferencz attended opening and closing ceremonies and committee coordinator Whitney Harris attended intervening sessions working with the German and other delegations for the successful inclusion of aggressive war as a core crime.
The major roles played by NGOs during the conference were: influence via working groups;\(^{197}\) keeping unofficial tallies of delegation positions on key issues;\(^{198}\) and publicizing conference progress on a nearly daily basis.\(^{199}\) The effect of the NGOs at the conference was remarkable. National delegations (and the world) remained well-informed as final positions began to emerge, and the well-organized and extremely professional efforts of the NGOs kept the conference focussed on the key issues that would needed to be resolved in order for consensus to be reached.

In addition to the incredibly effective efforts of the NGOs a number of individuals were able to keep the conference moving in a direction that made the conference outcome sustainable and meaningful. In particular, Phillipe Kirsch\(^ {200}\) and M. Cherif Bassiouni\(^ {201}\) deserve he-


\(^{198}\) In particular, a report issued over the Internet on Jul. 10, 1998 (roughly two weeks before the treaty signing) outlined the level of support for the numerous options presented in the draft statute. See NGO Coalition Special Report on Country Positions, The Numbers (visited Oct. 19, 1998) <gopher://gopher.igc.org/00/orgs/icc/ngodocs/rome/numbers.txt>.

\(^{199}\) NGO groups published short newsletters which were printed and distributed at the conference, published on the Internet, and available via e-mail list server. The two most consistent of these were On the Record "conceived by The Advocacy Project, an informal association that seeks to promote respect for humanitarianism . . . [and] supported by the Coalition for an International Criminal Court (CICC) and the Washington-based Coalition for International Justice," <http://www.advocacynet.org>, and Terra Viva, published by the IPS - Interpress service, <http://www.ips.org/icc/>.

\(^{200}\) Due to a regrettable illness, Adriaan Boos, the highly effective chairman of the preparatory sessions, was unable to attend the Rome conference. In his place, Philippe Kirsch of Canada served as conference chairman. Mr. Kirsch did an outstanding job of building consensus among the "like-minded" countries and bravely held out against U.S. pressure to derail the conference.

\(^{201}\) Professor M. Cherif Bassiouni of the DePaul University College of Law attended the conference as a delegate of Egypt and headed up the drafting committee. The
roes' laurels for their ability to achieve results at Rome. Rome was a place for individuals to stand up and be heard, and these two, along with many others, made the most of this pivotal moment. The portion of the world which supports the establishment of this court owes them a debt of gratitude.

The best testimony to the work done by the NGOs and the individuals in favor of the court at Rome was their ability to withstand the final efforts of the United States to influence the outcome of the conference. While the U.S. delegation had maintained a fairly constructive and conciliatory tone throughout the initial weeks of the conference, it "laid down its cards" eight days before the end of the conference. On July 9th, David Scheffer let the rest of the delegations know that the United States did not intend to alter its opposition to a court which did not require state consent and security council ratification of indictments.\(^{202}\) He further stressed an unwillingness to confer automatic jurisdiction upon the court for more than the crime of genocide.\(^{203}\) Despite the ire this provoked among other nations and NGOs,\(^{204}\) the United States continued to press its opposition, urging the rest of the delegates to simultaneously consider how much the United States could help a court it favored, and how much it could impede a court which failed to meet its objectives.\(^{205}\)


\(^{203}\) \textit{Id.}


\begin{quote}
authors note that his list of credentials includes: President, International Human Rights Law Institute, DePaul University; President, International Association of Penal Law; President, International Institute of Higher Studies in Criminal Sciences; Vice-Chairman, United Nations Preparatory Committee on the Establishment of an International Criminal Court; Former Chairman, Commission of Experts Established by the Security Council to Investigate Violations of International Humanitarian Law in the Former Yugoslavia. Mr. Bassiouni's contributions to the establishment of the court seem limitless. He has authored treatises, texts, and numerous law review articles on the subject of international crime. Further, he authored the original draft Court Statute for the ILC and testified before Congress in support of the Court. See 139 Cong. Rec. S10773 (daily ed. Aug. 6, 1993) (statement of Professor Bassiouni, as corrected by Senator Dodd). Only a man with such a deep and illustrious involvement in the creation of a regime of international criminal law could have successfully guided the Rome drafting committee to such a workable and effective outcome in such a short period of time.
\end{quote}
In response to the U.S. efforts to sway the clear majority, Phillipe Kirsch made two very effective moves. First, he forced the committee of the whole to make its final recommendations by July 15th at noon, quelling the desire to extend the negotiations. Second, he held off on introducing the final draft statute until July 16th (the day before the conference ended), forcing a vote on a single proposal.

The end result was surprising and impressive. In the face of considerable resistance from the United States, 120 nations voted for a treaty that was very much not in line with stated U.S. objectives.

V. SUBSTANCE AND FUSION

In the aftermath of the Statute's adoption, the United States stands alone as the one great power unwilling to contribute to the institutionalization of international criminal law through an independent International Criminal Court. U.S. challenges to the substance of the court are generalized, politicized, and lack a proper grounding in both domestic and international law. Rather than try to guide its allies to a mutually acceptable compromise, which would allow it to both promote an international Rule of Law and protect its nationals, the United States has declared the court dangerous and defunct.

The end result of the Rome conference was perhaps as positive as any stalwart pragmatist could hope for. Genocide, War Crimes, and

208 The very concept of a Rule of Law implies the dynamic at play here. Somewhere along a continuum of Power and Law, a middle ground must be reached and one end of the spectrum informs the other as to just and effective operation of society — either national or international. *See, e.g., The Meaning of the Rule of Law in Geoffrey De Q. Walker, The Rule of Law, Foundation of Constitutional Democracy, 1-48 (Melbourne University Press 1988), suggesting a “Twelve-Point Institutional Definition” of the Rule of Law, consisting of 1) Laws against private coercion; 2) Government under law; 3) Certainty, generality, equality; 4) General congruence of law with social values; 5) Enforcement of laws against private coercion; 6) Enforcement of government under law principle; 7) Independence of the Judiciary; 8) Independent legal profession; 9) Natural justice, impartial tribunals; 10) Accessibility of courts; 11) Impartial and honest enforcement; and 12) An attitude of legality. All of these organize under the rubric that 1) people (including the government) should be ruled by the law and obey it and 2) that the law should be such that the people will be able (and willing) to be guided by it. At a minimum, these general parameters stress the importance of institutional independence, established laws, and enforcement.
Crimes Against Humanity were passed with language that both echoes well-established twentieth century traditions and acknowledges lessons learned during recent decades. The crime of Aggression was included, though the definition was left to a later date, at which point a 7/8th majority will be needed to pass the amendment. In reviewing the substantive outcome of Rome, it is difficult to see where the new court will either violate generally accepted concepts of criminal law or impose an unacceptable infringement on national sovereignty.

F. Mr. Scheffer Comes Home

Upon his return to Washington, Mr. Scheffer sat before a special hearing of the International Operations subcommittee of the Senate Foreign Relations Committee. At this hearing, the U.S. position was presented more clearly than ever. Senators Helms and Grams made it clear that they must challenge the jurisdiction of the court, should it come into existence, and Senator Helms went so far as to challenge the validity of universal jurisdiction, crediting the German delega-

209See generally id.; “I hope that now the Administration will actively oppose this Court to make sure that it shares the same fate as the League of Nations — and collapses without U.S. support. For this Court truly is a monster, and it is a monster that must be slain.” Hearing on The United Nations International Criminal Court, Federal Document Clearing House, Jul. 23, 1998 available in 1998 WL 12762521. [hereinafter Hearing on United Nations International Criminal Court] (statement of Senator Rod Grams).

210“While I am relieved that the Administration voted against the treaty in Rome — I am convinced that is not — in itself — sufficient to safeguard our nation’s interests. The United States must aggressively oppose this Court each step of the way, because the treaty establishing the International Criminal Court is not just bad, it is dangerous.” Id.


You see, the delegates in Rome included a form of “universal jurisdiction” in the Court statute. This means that, even if the U.S. never signs the treaty, and even if the U.S. Senate refuses to ratify it, the countries participating in this Court will regard American soldiers and citizens to be within the jurisdiction of the International Criminal Court. That, Mr. Chairman, is nonsense, and it is an outrage that it will have grave consequences for our bilateral relations with every single country that signs and ratifies this treaty. Now, I understand that Germany was the intellectual author of this universal jurisdiction provision. Mr. Chairman, we have thousands of American soldiers stationed in Germany today. Will the German government now consider those American forces under the jurisdiction of the International Criminal Court?

Id.
tion with the invention of this form of jurisdiction. Senator Helms went on to discuss the crime of aggression as a new and capricious attempt to reign in U.S.' unilateral actions such as Grenada, Panama, and Tripoli — completely ignoring or at least temporarily forgetting the central role played by the United States in defining aggression as the ultimate crime at Nuremberg.212 The coup de grâce came from Senator Grams, who seemed to indicate that the United States would block investigation and enforcement action by the court213 — directly shunning the United States' state responsibility to assist in the prosecution of international criminals under the Geneva conventions and under customary international law.214

One must speculate whether Mr. Scheffer, who finds himself now thoroughly embraced by the more conservative members of the Senate Foreign Relations Committee knew at all what he was getting into. Time will tell whether his silence and lack of rebuttal during his post-conference examination at the hearing indicate tacit agreement, or a

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213 Senator Grams reminds us that the United States is willing to go its own way when international law does not suit U.S. Foreign Policy.

A decision by the International Criminal Court to prosecute Americans for military actions wouldn't be the first time that an international court tried to undercut our pursuit of our national security interests. In 1984 the World Court ordered the U.S. to respect Nicaragua's borders and halt the mining of its harbors by the CIA. In 1986 the World Court found our country guilty of violations of international law through its support of the Contras and ordered the payment of reparation to Nicaragua. Needless to say we ignored both rulings.


214 Indeed, such obstruction may, in itself, be actionable before the court. Article 70 describes as a cause of action: "(d) Impeding, intimidating or corruptly influencing an official of the Court for the purpose of forcing or persuading the official not to perform, or to perform improperly, his or her duties." See Rome Statute, supra note 5, at art. 70.
belief that he can enter and exit the conservative camp with trivial effort.\textsuperscript{215}

Beyond speculation by Senators Helms and Grams that the court will not, should not, and must not come into existence,\textsuperscript{216} the review of the legal substance of the court statute was left to the lone court protagonist speaking before the panel, Michael Scharf.\textsuperscript{217} Professor Scharf spoke evenly of the gains made by the U.S. delegation and the numerous compromises attempted by the conference.\textsuperscript{218} In the end, "But in the end, there were a few very fundamental issues which either have to be accommodated within the treaty text or they present very severe difficulties for the United States government. And that is exactly what happened. Those accommodations were not achieved in the negotiations, and therefore we were not in a position to support the text as it came out of Rome. That's disappointing. It's not the end of the world. There's obviously a period of time now before entry into force of this treaty that will offer various opportunities for dealing with the outcome of the Rome conference, and we'll certainly be exploring those." On the Record Briefing at Foreign Press Center, Federal Document Clearing House, Jul. 31, 1998, available in 1998 WL431804 (statement of David Scheffer, Ambassador-At-Large Designate For War Crimes Issues) (emphasis added).

\textsuperscript{216} Hearing on the United Nations International Criminal Court, supra note 209. Senator Helms added: "Mr. Ambassador, I commend you for voting "no" on this fatally flawed treaty. But I must also be clear: Rejecting this treaty is not enough. The United States must fight this treaty . . . we must be aggressively opposed to this Court." Id. Of course, one must question what exactly is being withheld. Given the current U.S. obligations to the United Nations and the likelihood that Mr. Helms will continue to fight U.N. funding, it seems unlikely that the United States would have supported the court, even if Mr. Scheffer's delegation had signed the statute.

\textsuperscript{217} Professor of Law and Director of the Center for International Law and Policy at the New England School of Law. From 1989-1993, Professor Scharf served as the Attorney-Adviser in the Office of the Legal Adviser of the U.S. Department of State with responsibility for the issue of a permanent international criminal court, making him Mr. Scheffer's predecessor in this venture.


The United States Delegation played hard ball in Rome and got just about everything it wanted. These protections proved sufficient for other major powers including the United Kingdom, France and Russia. But without what would amount to an iron clad exemption for U.S. servicemen, the United States felt compelled to force a vote, and ultimately to vote against the Court . . . I understand that the delegates loudly cheered for fifteen minutes when the tally was announced. I'm told that a few of the members of the U.S. Delegation had tears in their eyes.

Id.
there was little more to say than that the United States must not miss
further opportunities to participate in the court.219 The reactions of the
more outspoken members of the subcommittee seem more grounded
in political rhetoric than in either established or desirable international
law, leaving the question open as to what exactly the United States
means by “Rule of Law” as an international policy objective.

G. What Harm is Done?

As of this writing, sixty-seven countries have signed the Rome
statute.220 The U.N. has set the date for the next conference,221 which
will deal with the structure of the court.222 There is still much to do in
clarifying the financing of the court.223 As no reservations were per-
mitted to the treaty,224 and no amendments will be permitted before
seven years after the ICC’s entry into force,225 the statute as it stands
today will be the fundamental document upon which the institution
will be built. By opting out at this early stage, let alone establishing an
adversarial relationship with the rest of the world on this issue, the

219 See id.

In the final analysis, the U.S. may have lost far more than it gained by voting
against the ICC Statute. After having won so many battles in Rome, it is not
clear why the U.S. Delegation did not declare victory and vote in favor of the
Court (though ratification may have had to await a more favorable political
climate). There’s still time for a change of heart. After all, it took the United
States over thirty years to ratify the 1948 Genocide Convention. But we fi-
nally did the right thing.

220 For a complete list of countries which have signed the statute, see the CICC’s
Rome Statute Signature and Ratification Chart, (last modified Dec. 3, 1998)

221 The next conference is tentatively set for March, 1999.

222 By resolution F adopted at the Rome Conference, a preparatory commission must
take all possible measures to ensure the coming into operation of the Court, without
undue delay, and to make the necessary arrangements for the commencement of its
functions. (e.g., preparation of rules of procedure and evidence, elements of crimes,
a relationship agreement between the Court and the United Nations, and basic prin-
ciples governing a headquarters agreement). The draft texts of the rules of procedure
and evidence and of the elements of crimes must be finalized before June 30, 2000.

223 The statute provides that costs will be borne by the states’ parties and the court,
but details and proportions were left unresolved. See Rome Statute, supra note 5, at
art. 100.

224 See id. at art. 120 (“Reservations”).

225 See id. at art. 121 (“Amendments”).
United States preempted its own participation in the critical negotiations which will shape the early days of the court.\textsuperscript{226} The mechanisms for inter-nation state cooperation, the procedure of the court, and, most importantly, the world consensus on the crime of aggression will presumably be negotiated without the guidance and grounding of the United States.\textsuperscript{227}

Further, if the term "Rule of Law" means anything, it means that all are equally bound and protected by law. The implicit reciprocity of this concept is apparently lost on the State Department and those in Congress, who would rather reserve the right to protect U.S. interests directly via unilateral action than to rely on the world legal community. The message this conveys to the rest of the world cuts both ways—both to our fellow states and to the individuals within them.\textsuperscript{228}

Clearly U.S. foreign policy has changed since World War II. By failing to promote a binding international Rule of Law now, the United States appears to the world to be intent on breaking its ties with Nuremberg—a body of its own creation and, at least at one

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\textsuperscript{226} See Scharf, Prepared Remarks, supra note 218.
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Within five years the world will have a permanent international criminal court even without U.S. support. As a non-party, the U.S. will not be bound to cooperate with the Court. But this does not guarantee complete immunity from the Court. It is important to understand that U.S. citizens, soldiers, and officials could still be indicted by the Court and even arrested and surrendered to the Court while they are visiting a foreign country which happens to be a party to the Court's Statute. Moreover, by failing to sign the Statute, the U.S. will be prevented from participating in the preparatory committee which will draft the Court's Rules of Procedure and further define the elements of the crimes within the Court's jurisdiction.

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\textsuperscript{227} See id.
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[B]y failing to sign the Statute, the U.S. will be prevented from nominating a candidate for the Court's bench, participating in the selection of the Court's Prosecutor and judges, or voting on its funding. The most important question, which cannot be answered at this time, is whether the adverse diplomatic fallout from the United States' action in Rome will ultimately prevent it from being able to utilize the first track of the Court's jurisdiction: that is, Security Council referral of cases.

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\textsuperscript{228} "The U.S. action may be viewed as evidence that the world's greatest power does not support the international effort to bring such persons to justice. A future Adolf Hitler may point to the U.S. action in telling his followers that they need not fear being held accountable." \textit{Id.}
\end{flushleft}
time, reflective of its view of world justice. Yet, as reflected in the actions of forward-looking nations at Rome, it does not appear that the concept of an international Rule of Law as envisioned by Justice Jackson has changed in the minds of the rest of the world during this period. Moreover, members of the U.S. judiciary, the executive branch, and the legislature have all stated the fundamental wisdom of a such a rule — that, in order for true global peace and prosperity to exist, the nations and individuals of the world must adhere to a binding and universally applicable code of legal behavior. Throughout the latter half of this century, this concept has time and again trumped questions of basic political sovereignty.

VI. EPILOGUE — BREAKING WITH OUR PAST AND FORGETTING A HEROIC VISION OF THE WORLD

Robert Jackson’s heroic vision of a better world was implemented in the Nuremberg charter and judgment. Jackson knew what had to be done to create a world where a Rule of Law based on new concepts of international justice would prevail. He knew that justice had to be universal for it to be effective and that Nuremberg had to be institutionalized for its precepts to last.

Jackson saw that the key to a better world was individual responsibility — even on the very highest levels. He knew that for international law to be effective it must impact the obligations of individuals and their behavior. Jackson also asserted for the first time in any court—that individuals had international human rights which could not be limited by state action.

In Jackson’s view, the supreme international crime was aggressive war. He saw this as crucial to the long-term significance of Nuremberg. The institutionalizing of punishment for this and the other core crimes would for Jackson — had he lived — been critical.

Most of the world has moved forward since Nuremberg and, through the Rome Statute, has given a ringing endorsement to the concepts expressed so eloquently by Jackson at Nuremberg. But, the United States — like Iraq and Libya — has rejected the Rome Statute and in so doing has signaled a desire to move backward to the anarchic world of pre-Nuremberg — where the nation state remains supreme and there is no permanent institution in place concerned with the enforcement of rules designed to punish and prevent Nuremberg-type crimes. If Nuremberg was the most impressive moral advance emanating out of World War II, it is indeed a great tragedy that the United States has now turned its back on its achievements there.
To its discredit, the United States has backed away from Robert Jackson’s vision of a world at peace, and has reserved its right to withhold itself and its citizens from the international Rule of Law. By breaking away now, the court, and indeed the concept of an International Rule of Law, will grow without us. Military and economic might aside, the conference at Rome proved that, in the post-cold war era, the United States cannot demand that the rest of the world accord it special treatment. Therefore, in the decades to come, the United States will be faced with a critical question — are the doctrines of universal jurisdiction and individual and State responsibility compatible with U.S. foreign policy? If so, how will we, as a nation and great power of the world, re-integrate ourselves into the community of forward-looking nations, and, more importantly, do they really need us as badly as we suppose? This begs the ultimate question of whether the United States will ever achieve an ideological shift in its concept of sovereignty, preparing to live in a cooperative world fundamentally at peace — as opposed to a world which is simply between wars.

Hopefully, in time, the United States will remember the wisdom of the Nuremberg principles, working to implement them by enacting a permanent and viable International Criminal Court. When that occurs — we shall know that the voice of reason so brilliantly reflected

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229 Ambassador Scheffer continues to believe so. While affirming that the United States would not sign the treaty in its current form, he plainly believes the United States will continue to participate in future discussions regarding the Court. In October he stated before the U.N. General Assembly that the “United States preferred a policy of positive and forward-looking engagement in the hope of ensuring a treaty that would stand for values and goals common to all.” Press Release: GA/L/3077 (Oct. 21 1998). Meanwhile, Senator Helms is hard at work against the court, using his power on the Senate Foreign Relations Committee to insert boilerplate language into a number of recent treaty ratifications which opposes the court. See, e.g., Resolution of Ratification of Treaties (including ratification of WIPO, numerous treaties for “Mutual Legal Assistance in Criminal Matters,” and a number of extradition agreements, all presented in series) which include the following text as an “understanding,” implicit in the ratification of the treaties:

“PROHIBITION ON ASSISTANCE TO THE INTERNATIONAL CRIMINAL COURT.-The United States shall exercise its rights to limit the use of assistance it provides under the Treaty so that any assistance provided by the Government of the United States shall not be transferred to or otherwise used to assist the International Criminal Court agreed to in Rome, Italy, on July 17, 1998, unless the treaty establishing the court has entered into force for the United States by and with the advice and consent of the Senate, as required by Article II, section 2 of the United States Constitution.”

in Jackson’s opening statement at Nuremberg has not been permanently silenced in the shaping of U.S. foreign policy, but has again been heard.