

4-27-2004

Abstention and Exemption: American Exceptionalism and the International Criminal Court

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ABSTENTION AND EXEMPTION:
AMERICAN EXCEPTIONALISM AND THE INTERNATIONAL CRIMINAL COURT

AN HONORS THESIS
PRESENTED BY
REBECCA C. HUGHES

TO
THE DEPARTMENT OF GOVERNMENT
IN PARTIAL FULFILLMENT OF THE REQUIREMENT FOR
HONORS IN THE MAJOR FIELD

CONNECTICUT COLLEGE
NEW LONDON, CONNECTICUT
APRIL 27, 2004

Abstention and Exemption:

American Exceptionalism and the International Criminal Court

By
Rebecca Hughes

To those who have suffered at the hands of others.

To the pursuit of a society in which respect for human life reigns supreme.

ACKNOWLEDGEMENTS

To those who have guided and supported me throughout the past four years, I owe immeasurable thanks...

TRISTAN BORER

Throughout the past year you have taught me the basics of writing a political science paper, but also more about myself than I ever could have imagined. Thank you for allowing me the opportunity to work with you, and for the guidance, patience, and support you have offered. You are an absolute inspiration to me. For everything, thank you a million times.

ALEX HYBEL

My most sincere gratitude for your time and comments.

MOM AND DAD

Words cannot suffice...You are my role models and my inspiration in everything that I do. Thank you for everything you have done to help me get to where I am today, for pushing me to do the things that scare me, and for helping me to have learned who I am throughout the course of the past 22 years. I love you.

GARETH

You cannot begin to understand the role you have played in my life. From the days of sailor suits, Shamrock Shakes, paper routes, and Legos, you have been far more than a brother to me—you have been a constant best friend. I love you.

BONNIE

For sharing in this madness with me in a wonderfully ridiculous way, and for the sanity and serenity you have a way of carrying with you wherever you go, I owe you more thanks than you could ever imagine.

AND...

To the countless people to whom I owe my utmost gratitude and indescribable thanks: I cannot even begin to name all of you, or the ways in which you have each inspired me to do what I do and to love what I love. All I can offer are countless thanks and crazy love.

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ABBREVIATIONS

ASPA.....	American Service-Members' Protection Act
CAT.....	Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment
CEDAW....	Convention on the Elimination of All Forms of Discrimination Against Women
CERD.....	Convention on the Elimination of All Forms of Racial Discrimination
GA.....	General Assembly
ICC.....	International Criminal Court
ICCPR.....	International Covenant on Civil and Political Rights
ICESCR....	International Covenant on Economic, Social, and Cultural Rights
ICTR.....	International Criminal Tribunal for Rwanda
IMT.....	International Military Tribunal
ICTY.....	International Criminal Tribunal for the Former Yugoslavia
IMTFE.....	International Military Tribunal for the Far East
LMG.....	Like-Minded Group
NAM.....	Non-Aligned Movement
NATO.....	North Atlantic Treaty Organization
NGO.....	Non-Governmental Organization
SC.....	Security Council
SOFAs.....	Status of Forces Agreements
SOMAs.....	Status of Mission Agreements
UDHR.....	Universal Declaration of Human Rights
UN.....	United Nations

INTRODUCTION

An International Criminal Court ("the Court") is hereby established. It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be complementary to national criminal jurisdictions.¹

Following the international conflicts in the beginning of the 20th century, the international community began to push for the creation of a permanent international legal body responsible for trying individuals who had committed acts that would later come to be referred to as war crimes and crimes against humanity. Decades later, after having repeatedly encountered obstacles and objections, the goal of establishing a permanent international criminal justice system was realized when the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court²—

¹ *Rome Statute of the International Criminal Court*, article 1.

² Held in Rome, Italy, 15 June-17 July 1998.

commonly referred to as the Rome Conference—drafted and opened for signatory the Rome Statute of the International Criminal Court (Rome Statute) in 1998. Whereas the International Court of Justice had previously been established to try states for violations of international law, the International Criminal Court, as defined by the Rome Statute, was the first permanent international legal body created to try individuals for the crimes of genocide, crimes against humanity, and war crimes.

The three crimes currently covered in the Rome Statute were defined as follows by Rome Conference participants: genocide consists of “acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group;”³ crimes against humanity (CAH) are those acts committed during either war or peace time that are part of a “widespread and systematic attack directed against any civilian population, with knowledge of the attack [by the perpetrators];”⁴ war crimes (WC) are “serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law”⁵as explicitly laid out in the Geneva Conventions. Having defined these crimes, Rome Conference participants voted in favor of their inclusion in the ICC’s jurisdictional realm; however, the potential inclusion of the crime of aggression proved to be much more controversial as a result of the inability of Conference participants to reach a consensus regarding its precise definition. Still, it is important to note that a skeletal definition of the crime was included in the text of the Rome Statute, with the intention of including it in the jurisdiction of the Court once satisfactorily defined by states parties—a process which has been delayed until 2009. Despite unavoidable controversy during the

³ *Rome Statute*, article 6; the Rome Statute’s definition of genocide was based largely upon the 1948 Convention on the Prevention and Punishment of the Crime of Genocide.

⁴ *Ibid.*, article 7; The definition of CAH and WC included in the Rome Statute are based primarily on the Geneva Conventions covering conduct during times of war.

⁵ *Ibid.*, article 8, section (2), paragraph (b).

course of the Rome Conference regarding definitions, jurisdiction, and other issues, the Rome Statute drafted by the Conference's end passed in a landslide vote of 120(for)-7(against), with approximately 30 abstentions. The United States was one of the seven states to vote against the adoption of the Rome Statute. US hostility toward the Rome Statute and the ICC centered around fear of politicization of the Court, noting that "in addition to exposing members of the Armed Forces of the United States to the risk of international criminal prosecution, the Rome Statute creates a risk that the President and other senior elected and appointed officials of the United States Government may be prosecuted by the International Criminal Court."⁶ The United States, in its dissent, was left in opposition to all of its major allies, and was left only in the company of Iraq, Iran, China, Israel, Sudan, and Libya.⁷

Despite the United States' initial public opposition to the International Criminal Court and the Rome Statute, on the recommendation of several advisors, President William Clinton directed that the US sign the Rome Statute on 31 December 2000, the last day the Statute was open for signatories, thereby initiating the process of US ratification. Despite a signature demonstrating involvement and tentative approval of the ICC, the United States remained cautious of the ICC, as well as the jurisdiction and structure of the Court. As a result, regarding US signature of the Rome Statute, President Clinton declared:

We do so to reaffirm our strong support for international accountability and for bringing to justice perpetrators of genocide, war crimes, and crimes

⁶ US Congress, House, *Title I: Supplemental Appropriations Act for Further Recovery From and Response to Terrorist Acts on the United States; Title II: American Service-Members' Protection Act [ASPA]*, 107th Cong., 2nd sess., H.R. 4775; at <http://www.state.gov/t/pm/rls/othr/misc/23425.htm>

⁷ Monroe Leigh, "The United States and the Statute of Rome," *American Journal of International Law* 95.2 (2001): 124; however, in regards to the naming of the seven states which voted in opposition to the Rome Statute in the following work it is stated that, "As the final vote was unrecorded, it is not known with certainty which States voted in favour or against or abstained" from this vote: Phillippe Kirsch and Darryl Robinson, "Reaching Agreement at the Rome Conference," in Antonio Cassese, Paolo Gaeta, and John R.W.D. Jones., eds, *The Rome Statute of the International Criminal Court*, Vol. 1 (Oxford: Oxford UP, 2002), 77.

against humanity. We do so as well because we wish to remain engaged in making the ICC an instrument of impartial and effective justice in the years to come...The Treaty requires that the ICC not supercede or interfere with functioning national judicial systems; that is, the ICC Prosecutor is authorized to take action against a suspect only if the country of nationality is unwilling or unable to investigate allegations of egregious crimes by their national... In signing, however, we are not abandoning our concerns about significant flaws in the Treaty. In particular, we are concerned that when the Court comes into existence, it will not only exercise authority over personnel of states that have ratified the Treaty, but also claim jurisdiction over personnel of states that have not. With signature, however, we will be in a position to influence the evolution of the Court. Without signature, we will not... But more must be done. Court jurisdiction over U.S. personnel should come only with U.S. ratification of the Treaty. The United States should have the chance to observe and assess the functioning of the Court, over time, before choosing to become subject to its jurisdiction. *Given these concerns, I will not, and do not recommend that my successor submit the Treaty to the Senate for advice and consent until our fundamental concerns are satisfied.*⁸

Despite the United States' uncertainties about the ICC, by attaching its signature to the Rome Statute, the US signaled an apparent movement toward becoming a state party to the International Criminal Court. However, on 1 July 2002, after having reached the 60 state minimum ratification threshold in April, and immediately prior to the Statute's entering into force, President Clinton's successor, President George W. Bush, notified the United Nations of his administration's intent to, in effect, "unsign" the treaty. In doing so, the United States government declared that they were removing themselves from any further obligations arising from US signatory status in regards to the Rome Statute,⁹ and made clear the fact that the state had absolutely no intention of ratifying the treaty and becoming a state party to the ICC. The stated reason for this unprecedented act of "unsigning" was that it had been

⁸ US White House, Office of the Press Secretary, Statement by the President, *Signature of the International Criminal Court Treaty*, 2000; available online at <http://usinfo.state.gov/topical/pol/usandun/00123101.htm>; emphasis added.

⁹ The unsigning of the Rome Statute, a completely unprecedented act in international politics, was undertaken by the United States as a way of removing itself from any obligation to comply with the Rome Statute. This was significant for the United States and the ICC as it lifted any responsibility that the United States felt that it had toward allowing the Court jurisdiction over its nationals, and has aided in the movement toward the creation of Bilateral Immunity Agreements and public objections to US citizens being subjected to ICC jurisdictional power.

determined that the ICC “undermined the role of the UN Security Council in maintaining international peace and security, it created a prosecutorial system that is an unchecked power, it purports to assert jurisdiction over nationals of states that have not ratified the treaty, and it is therefore built on a ‘flawed foundation.’”¹⁰ In essence, the same politicized fears that initially prohibited the United States from voting in favor of the Rome Statute led the US to remove its signature only 19 months later.

Since withdrawing its signature from the Rome Statute, the United States has remained wary of the power and political implications of the creation of the International Criminal Court. As a result, the Bush administration has undertaken efforts to wholly exempt US citizens from the jurisdiction of the ICC. Often these efforts at US exemption from any and all jurisdiction of the ICC are related to the purported possibility of ICC politicization, with the possibility that United States nationals—particularly with the large presence of United States military and humanitarian personnel worldwide—will be unfairly exposed to ICC prosecution. In reference to the concerns of exposing US troops engaged in peacekeeping operations worldwide, former Ambassador-at-Large for War Crimes Issues—and the United States’ Rome Conference representative—David J. Scheffer noted:

Multinational peacekeeping forces operating in a country that has joined the treaty can be exposed to the Court’s jurisdiction even if the country of the individual peacekeeper has not joined the treaty. Thus, the treaty purports to establish an arrangement whereby United States armed forces operating overseas could be conceivably prosecuted by the international court even if the United States has not agreed to be bound by the treaty. Not only is this contrary to the most fundamental principles of treaty law, it could inhibit the ability of the United States to use its military to meet alliance obligations and participate in multinational operations, including humanitarian interventions to save civilian lives. Other contributors to peacekeeping operations will be similarly exposed.¹¹

¹⁰ “US Notification of Intent Not to Become a Party to the Rome Statute,” *American Journal of International Law* 96.3 (2002): 724.

¹¹ *ASPA*.

Consequently, the United States has made an agreement with the United Nations Security Council that US soldiers serving as part of UN Peacekeeping missions will not be turned over to the ICC for any crimes committed during their period of service. This was done via the declaration that

Members of the Armed Forces of the United States may not participate in any peacekeeping operation under Chapter VI of the charter of the United Nations or peace enforcement operation under Chapter VII of the charter of the United Nations, the creation of which is authorized by the United Nations Security Council on or after the date that the Rome Statute enters into effect pursuant to Article 126 of the Rome Statute, unless the President has submitted to the appropriate congressional committees a certification described in subsection (c)¹² with respect to such operation.¹³

Through this declaration, the United States government made clear the fact that United States military personnel would no longer be an active part of UN peacekeeping missions on ICC states parties' territories unless granted immunity from ICC jurisdiction by the United Nations Security Council. In a similar vein, the United States has further attempted to withdraw its citizens from ICC jurisdiction through the establishment of bilateral agreements

¹² Ibid; subsection (c) refers to a "certification by the President that

1. members of the Armed Forces of the United States are able to participate in the peacekeeping or peace enforcement operation without risk of criminal prosecution or other assertion of jurisdiction by the International Criminal Court because, in authorizing the operation, the United Nations Security Council permanently exempted, at a minimum, members of the Armed Forces of the United States participating in the operation from criminal prosecution or other assertion of jurisdiction by the International Criminal Court for actions undertaken by them in connection with the operation.
2. members of the Armed Forces of the United States are able to participate in the peacekeeping or peace enforcement operation without risk of criminal prosecution or other assertion of jurisdiction by the International Criminal Court because each country in which members of the Armed Forces of the United States participating in the operation will be present either is not a party to the International Criminal Court and has not invoked the jurisdiction of the International Criminal Court pursuant to Article 12 of the Rome Statute, or has entered into an agreement in accordance with Article 98 of the Rome Statute preventing the International Criminal Court from proceeding against members of the Armed Forces of the United States present in that country; or
3. the national interests of the United States justify participation by members of the Armed Forces of the United States in the peacekeeping or peace enforcement operation.

¹³ Ibid.

with a number of states, made in accordance with Article 98 of the Rome Statute¹⁴ targeted at keeping US citizens from being extradited and tried by the ICC. Additionally, 2002 marked the implementation of the controversial *American Service-Members' Protection Act*, under which the United States withdrew all direct and indirect support for the International Criminal Court, going so far as to threaten the use of “all means necessary and appropriate”¹⁵ to remove US citizens from confinement in The Hague if threatened with an ICC trial. Commonly referred to as “The Hague Invasion Act,” this legislation, in conjunction with the Article 98 bilateral agreements, is intended to keep United States nationals unequivocally outside the realm of ICC jurisdiction, as will be discussed in further detail in chapter four.

As human rights continue to be violated as a result of international conflict, and images of violence have become increasingly accessible by the media, issues related to fundamental human rights and continuing efforts to move toward their universal observation have moved toward the forefront of international politics. As a result, the issue of individual accountability for gross violations of human rights through war crimes trials has become increasingly salient, and has resulted in renewed support for a permanent international legal justice system, which includes the International Criminal Court. The fact that a permanent International Criminal Court has been established after decades of proposals and debate is an important milestone in the realm of international human rights law. However, because the Court is still in its early stages as a functioning, legitimate international legal entity, it is not yet clear what the Court’s ultimate impact on human rights

¹⁴ Article 98 of the Rome Statute appears in its full form as an appendix; Bilateral Immunity Agreements are discussed in further detail in chapter four.

¹⁵ Ibid., section 2008, paragraph (a); grants the US President the authority to invade The Hague in order to release any and all US citizens being “detained or imprisoned by, on behalf of, or at the request of the International Criminal Court.”

in the international community will be. Additionally, several questions have already arisen, the answers to which many the world over await, related to both the short- and long-term effects of the United States' position with regard to the ICC. It is yet to be determined in what ways the lack of US support, not to mention its active undermining of the ICC, will affect the functioning of the Court, as well as whether US self-exclusion from ICC jurisdiction will more greatly impact the US or the ICC. Essentially, the US has taken risks in placing itself in a position of such vehement opposition to the ICC, and has subsequently succeeded in raising questions regarding the viability of the future of the International Criminal Court without support of what is arguably the only superpower state in existence today. It is this conundrum that is the focus of this thesis: whether lack of US support and funding will prove to be detrimental to the functioning of the Court and its legitimacy, or to the United States' own relations with the international community, including necessary and historical political and economic allies.

This thesis is divided into five chapters. The first chapter provides a general introduction to the current debates surrounding the relationship between the United States and the International Criminal Court, primarily through description of the negotiation process that occurred during the Rome Conference. The second chapter serves as a background to the ICC and to the conditions under which it was created by examining the history of international criminal tribunals, as well as the ways in which other international legal bodies and events influenced the creation of the Court. The third chapter is largely theoretical in nature, focusing on the theory of "American exceptionalism" and the US's claims that its foundation on a Constitution, its Bill of Rights, its history of promoting civil and political rights, as well as its current superpower status and widespread international military involvement have created a state that is exceptional in the realm of international law,

relieving it of the necessity of abiding by international norms and customs. Having defined and discussed this theory, this chapter then examines the ways in which this belief has influenced US-ICC relations, as well as international perception of the United States as a whole. The fourth chapter examines the specifics of the coercive methods the United States has used to discourage states from supporting the ICC, and focuses largely on the Article 98 bilateral agreements that have been concluded with various states regarding ICC jurisdiction over US citizens. Furthermore, the fourth chapter highlights statements and opinions of several individuals, states, and non-governmental organizations (NGOs) regarding US policy toward the ICC and the ways in which these stances have affected both the United States and the ICC thus far. The fifth chapter serves as an analysis and general summary, investigating the possible implications of policies currently in effect. This then leads to tentative conclusions that the nature of current US relations with the International Criminal Court may prove to be quite harmful to the future functioning of the Court, as well as to the United States' role in international relations. .

1. INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT: ROME CONFERENCE NEGOTIATIONS

Distinguished Representatives:

Through your collective efforts you have created a Statute that will establish the international criminal court that has long been recognized as the missing link in the international legal system. You have deliberated with great care and patience and have negotiated through very difficult passages. That you had to overcome great obstacles was not a surprise. The questions that you successfully resolved have posed a challenge to the United Nations for more than 50 years – a challenge that you now have met.¹

This is easily the most complex international negotiation I have ever been involved in...There's the simple linguistic complexity of the undertaking. There's the way we have to interweave all sorts of different legal procedural traditions...and it goes on and on...How will the judges be chosen? Who will pay for the entire operation? With everything to be resolved in just five weeks. Some countries want the use or even the threat of using nuclear weapons included as a war crime...Others, such as the United States, would storm out of the conference were that to happen...What [some states] wanted [the ICC] to address was drug crimes...Others want it to cover the crime of aggression, which nobody at the U.N. has been able to define in fifty years. Others want to include terrorism—but how do you define that? Some favor a strong, robust Court; others say they do but clearly don't; while others say they don't and mean it...They all look at matters differently, and

¹¹ Hans Corell, "Statement at the Conclusion of the Rome Conference and the Adoption of the Statute of the International Criminal Court," 17 July 1998; available online at <http://www.un.org/icc/speeches/717crl.htm>, accessed 2 December 2003.

differently than they might have a few years ago or might a few years from now. It's incredibly dispersed.²

As demonstrated by ICC President Philippe Kirsch's observations about the nature of Rome Conference negotiations, those present at the Conference were faced with numerous contentious issues regarding the creation and adoption of the Rome Statute of the International Criminal Court. Throughout the negotiation process, while such debates occurred between all participating states, the repeated strong and unilateral stances adopted by the United States garnered the most attention and controversy. Interestingly, when examining the historical progression to the establishment of the current ICC, the United States was, in theory, always a strong supporter of the creation of an International Criminal Court possessing broad international and jurisdictional power, which would fully bring an end to the horrific atrocities and gross violations of human rights that had haunted the past century. Indeed, historically the United States had been one of the key proponents of the establishment of a permanent international legal institution targeted at the prosecution of individuals for the commission for the gravest violations of human rights. However, several issues arose during the Rome Conference on which the United States adopted particularly strong—and often controversial—stances in opposition to the vast majority of participating states. With the debate centering primarily on questions of prosecutorial and jurisdictional strength, the United States proved to be fighting a difficult battle almost wholly on its own. The issues addressed by the US in the Rome debates were largely focused on two characteristics of the ICC: the system of prosecution and the scope of jurisdiction—as well as the perceived possibility of overt politicization of both.

² ICC President and Rome Conference Chairman Philippe Kirsch, in: Lawrence Weschler, "Exceptional Cases in Rome: The United States and the Struggle for an ICC," 85-86; in Sarah B. Sewall and Carl Kaysen, eds., *The United States and the International Criminal Court: National Security and International Law*, (New York: Rowman & Littlefield, 2000).

US OBJECTIONS TO THE ROME STATUTE

Prosecutorial strength was an issue in which the United States became deeply involved as a result of the US's apprehension regarding the creation of a position giving unchecked power to one individual, who, it was purported, would have the potential of become the "most powerful man in the world."³ The United States claimed that by structuring the Court in such a way that the so-called "independent" prosecutor was wholly responsible for presenting cases and indicting individuals to be tried before the ICC, US nationals may be unfairly targeted for prosecution as a result of global anti-US sentiment. The US was wary as well of politicization not only of the prosecutor's role, but also of the Court as a whole. Anxious about this possibility, the United States exerted pressure on the other participating states, pushing for inclusion of provisions in the Statute targeted at granting the UN Security Council an equally large role in ICC procedures, thereby providing the US with representation in the process, and counterbalancing the role of the independent prosecutor. Ambassador Scheffer explained the United States' position further:

the United States believed that the court would not be well served by a prosecutor with the power to initiate investigations and prosecutions of crimes falling within the jurisdiction of the court, in the absence of a referral of an overall situation by either a state party to the treaty or the Security Council.⁴

However valiant its efforts may have been, this was a battle that the United States was fighting virtually alone.

Although the United States disagreed with the power of the prosecutor, nearly all other participating states found little reason to support the movement to weaken the

³ Monroe Leigh, 128.

⁴ David Scheffer, "The United States and the International Criminal Court," *The American Journal of International Law* 93.1 (1999): 15.

prosecutorial position. The bulk of participants recognize that there are specific limitations included in the text of the Rome Statute as a means of prohibiting the type of abuse of power and politicization that the United States suggested would be prevalent. Furthermore, ICC supporters repeatedly have pointed out the existence of the general safeguard of complementarity—that which refers to the ICC’s complementary relationship with national jurisdiction, allowing for the independent investigation and prosecution of individuals by national legal systems to supercede trials occurring at the hands of the ICC.⁵ As a result, the United States was unequivocally defeated in its effort to combat the strength of the independent prosecutorial power.

Whereas the proposal of a strong and independent prosecutor was decidedly opposed by the United States, this debate was by no means the only point of contention existing between the United States and the majority of Rome participants. In fact, the levels of tension and controversy surrounding issues of the Court’s jurisdictional power may have superceded those surrounding the role of the independent prosecutor. As in its perception of unchecked prosecutorial power, the United States often took a lonely unilateral stance in matters related to ICC jurisdiction. Jurisdictional arguments initially were focused on substantive jurisdiction: what crimes were to be included in the Rome Statute as prosecutable by the ICC. In this vein, the Rome Conference’s participating states spent much effort debating whether those crimes covered by the Statute would be limited to genocide, crimes against humanity, and war crimes, or whether the Court’s jurisdiction would be stretched to include crimes of aggression and additional “treaty crimes”—acts such as international drug trafficking, terrorism, or the use of nuclear arms. It was these very treaty crimes—so-called as a result of their prior coverage under “a variety of multilateral

⁵ William A. Schabas, *An Introduction to the International Criminal Court*, (Cambridge: Cambridge UP, 2001).

conventions dealing with terrorist crimes, drug crimes and crimes against United Nations personnel”⁶—which had initially inspired a rising interest in the establishment of an International Criminal Court in the late 20th century. However, debates over the inclusion of drug trafficking and terrorist acts in the Rome Statute were resolved as a result of the realization that the majority of participating states viewed the treaty crimes as of a fundamentally different nature than the so-called “core crimes,” leading Rome Conference participants to exclude the former crimes from the Rome Statute for fear of the possibility of overburdening the Court with widespread substantive jurisdiction.⁷

Treaty crimes were by no means the only crimes debated concerning their proposed coverage under the Rome Statute. Indeed, many points of controversy arose throughout the course of the Rome Conference on which participating states adopted strong stances, leading the conference’s participants to divide themselves into several loosely-defined groups in order to create systems of collective strength and opinion to influence the conference’s end result. Several large factions, as well as numerous other small blocs, were created on both political and regional grounds, largely in reaction to highly political topics of debate, centering primarily on questions of ICC jurisdiction over various crimes and over non-state party nationals. The largest and most prominent of these factions was the Like-Minded Group, (LMG) a collective of approximately 60 states committed to the establishment of a Court that would be effective and independent.⁸

⁶ Ibid., 29.

⁷ Ibid., 78.

⁸ Philippe Kirsch and Darryl Robinson, “Reaching Agreement at the Rome Conference,” 70; the states comprising the LMG were: Andorra, Argentina, Australia, Austria, Belgium, Brunei, Benin, Bosnia-Herzegovina, Bulgarian, Burkina Faso, Burundi, Canada, Chile, Congo (Brazzaville), Costa Rica, Croatia, Czech Republic, Denmark, Egypt, Estonia, Finland, Gabon, Georgia, Germany, Ghana, Greece, Hungary, Ireland, Italy, Jordan, Latvia, Lesotho, Liechtenstein, Lithuania, Luxembourg, Malawi, Malta, Namibia, the Netherlands, New Zealand, Norway, the Philippines, Poland, Portugal, Republic of Korea, Romania, Samoa, Senegal, Sierra Leone, Singapore, Slovakia, Slovenia, Solomon Islands, South Africa, Spain, Swaziland, Sweden, Switzerland, Trinidad and Tobago, United Kingdom, Venezuela and Zambia; Schabas, 17.

The LMG eventually came to be viewed as a group that had the potential to be extraordinarily powerful in Rome Conference negotiations, causing the collaboration of states comprising the LMG to be described as even superceding the interstate bonds created in North Atlantic Treaty Organization (NATO) states.⁹ The LMG was formed largely as a means of contesting the United States' opposition to the creation of a Court with jurisdiction over non-state parties' nationals, and found extraordinary strength and negotiating power in the collective frustration towards the US. The LMG, eventually recognized as the dominant voting bloc at the Rome Conference, played a large role in the approval and implementation of the Rome Statute at the Conference's end, as well as in the defeat of several measures unilaterally proposed by the United States in order to reduce ICC jurisdictional and prosecutorial power.

A second group, representative of the coalitions that were smaller and more loosely defined than the LMG, was that representing the international political Non-Aligned Movement (NAM), comprised of states both inside and outside the Like-Minded Group.¹⁰ Unlike the LMG, organized primarily as a method of battling the United States' efforts to create a Court with limited jurisdiction and dependency on the United Nations, the NAM was a diverse group of states working to advocate one particular issue: the inclusion of the hotly-debated crime of aggression in the Rome Statute, which was contested on two grounds during the course of Rome negotiations. The first point of contention centered on the negotiators' difficulty in reaching a consensus as to the definition of the crime, while the second was comprised of controversy centering on whether the crime of aggression is

⁹ Ramesh Jaura, "ICC a Step Toward Global Governance," *Interpress Service*, 19 July 1998; Lexis-Nexis internet database, available online at <http://www.lexis-nexis.com>.

¹⁰ Schabas, 16; the NAM was comprised of numerous states worldwide, and in this case was spearheaded largely by a number of Middle-Eastern and African states concerned with the commission of crimes of aggression, as well as nuclear proliferation.

inherently different in nature than the other crimes considered for inclusion and should, therefore, not be included in the scope of ICC jurisdiction. Because the strength of the NAM centered around calls for the ICC's jurisdiction over the crime of aggression, several present during Rome negotiations raised concerns regarding the fact that "all the members on the Non-Aligned Movement favoured the inclusion of aggression in the Statute, and as they represented a majority in the United Nations, it was wondered why aggression had been excluded from the draft text submitted by the officers of the Conference."¹¹ The answer to this, however, lies in the difficulty that Rome Conference participants had in satisfactorily defining the crime. As a result, the proposed inclusion of the crime of aggression remained a point of particular contention that lingered throughout the duration of the Rome Conference and, in fact, has not yet been resolved.

Although it was ultimately decided during the Rome Conference that the crime of aggression was worthy of inclusion in the Rome Statute, and consequently under ICC jurisdiction, the participating states proved unable to define the crime. Throughout the aborted process of attempting to construct a definition of aggression, Conference participants repeatedly referred to prior definitions of the crime of aggression as precedent. However, the states determined that the definition reached by the United Nations General Assembly in the early 1970's would serve only as a basis for a future ICC definition, and as defined therein was not a means for international legal prosecution.¹² A question that had long been contemplated in the international sphere, the proposed definitions of the crime of aggression underwent renewed scrutiny following World War I (WWI) and World War II (WWII) and were repeatedly examined throughout the remainder of the 20th century. In

¹¹ "UN Representative urges all-out effort to achieve consensus on International Criminal Court," *M2 Presswire*, 25 July 1998; Lexis-Nexis internet database, available online at <http://www.lexis-nexis.com>.

¹² Schabas, 27.

1974, the UN General Assembly attempted to clarify the recurring dispute through its statement that the crime of aggression is related to:

the use of armed forces 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 U.N., as set out in this definition...The first use of armed force by a State in contravention of the Charter shall constitute *prima facie* evidence of an act of aggression although the Security Council may, in conformity with the Charter, conclude that a determination that an act of aggression has been committed would not be justified in the light of other relevant circumstances, including the fact that the acts concerned or their consequences are not of sufficient gravity.¹³

Despite working with the UN definition as the prime international law related to the crime of aggression, a satisfactory consensus still was not reached regarding the best definition of the crime in relation to prosecutable international criminal law and the International Criminal Court. However, in spite of the negotiators' failure to reach agreement on the international legal definition of the crime of aggression, the majority of participating states agreed that the crime should be justiciable under the ICC. As a result, the crime of aggression was included in the Rome Statute in a skeletal form as a crime over which the ICC holds jurisdiction, but which may not be invoked in ICC cases until a definition is successfully written into the Rome Statute. Subsequently, the Preparatory Commission (PrepCom) has been given a mandate to continue its efforts at developing an acceptable definition of the crime of aggression to present at a 2009 conference, with hopes of its eventual inclusion in the Court's jurisdiction.¹⁴

The unresolved disagreement over the definition and inclusion of the crime of aggression was a point of contention in which the United States was particularly opinionated and deeply involved. Whereas several states held that aggression exists as "the mother of all

¹³ United Nations General Assembly, A/RES/3314 (XXIX), *Definition of Aggression*, 14 December 1974.

¹⁴ Philippe Kirsch, "From Rome to The Hague: How the Court Was Created" (lecture at the Irish Centre for Human Rights' Summer Course on the International Criminal Court, Galway, Ireland, 22 July 2003).

crimes,” opening the door for the commission of other heinous crimes against a states’ people,¹⁵ and therefore should be covered in ICC jurisdiction, the United States strongly and publicly opposed inclusion of the crime of aggression in the Rome Statute. Again, the US was suspicious of political prosecution of United States nationals on accusations of acts constituting crimes of aggression. This concern resulted from the fact that the United States government viewed the crime of aggression as one in which prosecution had the potential to unfairly target US nationals acting on the foreign policy decisions related to the US’s extensive involvement in international peacemaking, peacekeeping, humanitarian intervention, and international and domestic conflict. This fear was so prevalent among government representatives that it was specifically noted in the United States’ primary piece of anti-ICC legislation, the *American Service-Members’ Protection Act of 2002*:

Particularly if the Preparatory Commission agrees upon a definition of the Crime of Aggression over United States objections, senior United States officials may be at risk of criminal prosecution for national security decisions involving such matters as responding to acts of terrorism, preventing the proliferation of weapons of mass destruction, and deterring aggression. No less than members of the Armed Forces of the United States, senior officials of the United States Government should be free from the risk of prosecution by the International Criminal Court, especially with respect to official actions taken by them to protect the national interests of the United States.¹⁶

As a result of the hostile stance adopted towards inclusion of the crime of aggression, and in an effort to protect its own citizens and international military presence, the United States headed the movement for the exclusion of the crime of aggression from ICC jurisdiction.

It is clear that discussion over whether to include use of nuclear weapons, treaty crimes, and crimes of aggression in the Rome Statute was at times tense; on the contrary, there was relatively little controversy surrounding proposals to include the crimes of

¹⁵ Ibid.

¹⁶ *ASPA*.

genocide, crimes against humanity, and war crimes under ICC jurisdiction. This, in combination with the degree of opposition surrounding most other proposed crimes, has left these three crimes as the “core crimes” currently jurisdictionally exercisable by the ICC. However easy it may have been to reach an agreement to include these crimes, only that of genocide was met with little debate surrounding the subsequent need to reach a consensus definition for inclusion in the Rome Statute. Article 6 of the Rome Statute, addressing genocide, was adopted nearly verbatim from Article II of the Convention on the Prevention and Punishment of the Crime and Genocide of 1948, and with immediate and unanimous support.¹⁷

While there was little conflict between Rome Conference participants regarding the *inclusion* of war crimes and crimes against humanity, achieving consensus on *definitions* of crimes against humanity (CAH) and war crimes did not prove to be quite as simple. The difficulties encountered in defining CAH resulted primarily from the nature of negotiations: large-scale multilateral negotiations, involving 160 strong-willed states. Previously CAH and WC had been defined by smaller groups of powerful states, imposed by victors in the case of the Nuremberg and Tokyo Trials, or by the United Nations Security Council, as in the Statutes of the Yugoslavia and Rwanda *ad hoc* tribunals,¹⁸ which are discussed further in chapter two. Indeed, it seems largely a result of the unprecedented scale of multilateral and multifaceted negotiations occurring during the Rome Conference that conflict occurred as to how best define CAH.

The points of dispute arising around the definition of crimes against humanity first centered on the debated nexus to armed conflict, questioning whether armed conflict would

¹⁷ Mahnouch Arsanjani, “The Rome Statute of the International Criminal Court,” *American Journal of International Law* 93.1 (1999): 30.

¹⁸ Darryl Robinson, “Defining ‘Crimes Against Humanity’ at the Rome Conference” *The American Journal of International Law* 93.1 (1999): 48.

be necessary in order for an individual's acts to constitute crimes against humanity. During these negotiations, a minority of participating states argued that armed conflict must be present in order for crimes against humanity to be committed. However, the general consensus was that crimes against humanity as defined only in relation to instances of armed conflict would be redundant, simply restating the definition of acts categorized as war crimes.¹⁹ Despite the controversial stance that the United States took on many issues throughout the Rome Conference, the debate surrounding the proposed nexus to armed conflict in regards to crimes against humanity was one in which the US was a part of the general consensus. Throughout this debate, the United States indeed actively advocated the need to recognize the potential commission of crimes against humanity in times of both war and peace. As a result, the United States submitted a statement to the Preparatory Committee several months before the Rome Conference was to begin, stating that "The United States believes that crimes against humanity must be deterred in times of peace as well as in times of war and that the ICC Statute should reflect this principle. The United States is eager to work with other delegations to build strong consensus on these matters."²⁰ At the end of negotiations, the United States—as well as the majority of states in attendance—was satisfied, as the Rome Statute

makes no reference to a nexus to armed conflict, affirming that crimes against humanity can occur not only during armed conflict but also during times of peace or civil strife. This outcome was essential to the practical effectiveness of the ICC in responding to large-scale atrocities committed by governments against their own populations.²¹

¹⁹ Ibid.

²⁰ US Congress, Senate, "Statement of the United States Delegation to the Preparatory Committee on the Establishment of an International Criminal Court, March 23, 1998," hearing Before the Subcommittee on International Operations of the Committee on Foreign Relations: "Is a U.N. International Criminal Court in the U.S. National Interest?" 105th Cong., 2nd sess., 23 July, 1998 (Washington: U.S. Government Printing Office, 1998).

²¹ Robinson, 46

Having reached the important decision regarding the relationship of crimes against humanity as not being limited to the presence of armed conflict, however, questions still remained as to what the threshold was at which CAH were to be defined.

Rome participants argued at what threshold the definition of CAH should exist: whether the definition of crimes against humanity should be written so as to include acts committed as part of “widespread *or* systematic attacks,”²² or whether it necessitated conjunctive qualifiers to narrow the definition to those acts which are part of a “widespread *and* systematic attack directed against any civilian population...”²³ An intensely disputed matter, this very specific question of wording and threshold level was ultimately resolved through inclusion of the final definition of crimes against humanity as acts committed “as part of a widespread *or* systematic attack directed against any civilian population, with knowledge of the attack.”²⁴ However, this broader definition of CAH was coupled with a clear statement defining an “attack directed against any civilian population” as a “course of conduct involving the multiple commission of acts...against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack.”²⁵ In conjunction with one another, these two provisions of the Rome Statute were determined to establish an appropriate threshold, over which CAH would be deemed to have been

²² The recent ICTR decision, *Prosecutor v. Akayesu*, Judgement, No. ICTR-96-4-T (1998), www.ictor.org, clarifies the definitions of these terms as follows: “The concept of ‘widespread’ may be defined as massive, frequent, large scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims. The concept of ‘systematic’ may be defined as thoroughly organised and following a regular pattern on the basis of a common policy involving substantial public or private resources. There is no requirement that this policy must be adopted formally as the policy of a state. There must however be some kind of preconceived plan or policy. The concept of ‘attack’ maybe defined as a unlawful...like murder, extermination, enslavement etc. An attack may also be non violent in nature, like imposing a system of apartheid, which is declared a crime against humanity in Article 1 of the Apartheid Convention of 1973, or exerting pressure on the population to act in a particular manner, may come under the purview of an attack, if orchestrated on a massive scale or in a systematic manner.”

²³ Robinson, 47.

²⁴ *Rome Statute*, article 7.

²⁵ *Ibid.*, article 7, section (2), paragraph (a).

committed. Together with the decision to separate the definition of CAH from the necessitated presence of armed conflict, the conclusion of the threshold debate created a definition of CAH that was deemed acceptable by the majority of Rome Conference participant states, allowing for the conclusion of the CAH definition debate.

Similar to the debates encountered in reaching a precise, widely accepted, definition of crimes against humanity, Rome negotiations surrounding the definition and scope of war crimes proved controversial. Whereas the debate related to CAH had centered largely on whether there was to be a requirement for the presence of armed conflict in order for an act to qualify as a crime against humanity, in the case of war crimes the focus of the disagreement related to the question of whether there was a necessity for *international* armed conflict in order for the commission of war crimes (WC), or if they could be prosecutable as such during internal armed conflict as well. Whereas the majority of states favored inclusion of internal armed conflict in the definition of war crimes, several states were strongly opposed to this proposal. In a similar vein to its stance in the debate surrounding CAH, the United States adopted the position of the majority, pushing for a broad definition of WC that would allow for prosecution of individuals in instances of internal, as well as international, armed conflict. The United States representative to the Rome Conference, Ambassador David Scheffer, lauded the US efforts to push for inclusion of coverage of instances of internal armed conflict in Article 8 of the Rome Statute regarding war crimes:

A major achievement of Article 8 of the treaty is its application to war crimes committed during internal armed conflicts. The United States helped lead the effort to ensure that internal armed conflicts were covered by the statute...Also, in order to widen acceptance of application of the statute to war crimes committed during internal armed conflicts, the United States helped broker language that, *inter alia*, excludes situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence, and other acts of a similar nature.²⁶

²⁶ Scheffer, "The United States and the International Criminal Court," 16.

Whether a direct result of US support or not, Rome participants did eventually reach a consensus regarding the definition of WC, in which both international and internal armed conflicts were included in Article 8.

Clearly, throughout the debates focusing on the scope of crimes against humanity and war crimes, the United States viewed itself as playing an instrumental role in widening the scope of ICC jurisdiction. Having made public this push for the broadest definitions possible of both war crimes and crimes against humanity, it would again appear that the United States was moving towards supporting a Court with broader jurisdictional powers. However, contrasting this with the dissent related to jurisdiction over the crime of aggression, it is apparent that the United States' support for strong jurisdictional powers of the ICC was strictly limited to instances of crimes against humanity and war crimes. This becomes particularly clear when examining the US stance adopted regarding proposals of universal jurisdiction and ICC jurisdiction over non-states party nationals.

Universal jurisdiction “provides every state with jurisdiction over a limited category of offenses generally recognized as of universal concern, regardless of where the offense occurred, the nationality of the perpetrator, or the nationality of the victim.”²⁷ Customary international law has defined these crimes as piracy, slave trade, and the trafficking of women and children.²⁸ Additionally, recent multilateral international treaties have granted universal jurisdiction for the commission of specific crimes such as “hijacking and other threats to air travel, piracy, attacks upon diplomats, nuclear safety, terrorism, apartheid, and torture.”²⁹ Furthermore, universal jurisdiction is widely recognized regarding the crime of

²⁷ Michael P. Scharf, “ICC Jurisdiction Over US Nationals;” in Sewall and Kaysen, 214.

²⁸ Schabas, 60.

²⁹ Ibid.

genocide, crimes against humanity, and war crimes.³⁰ Whereas many Rome Conference participants viewed the possibility of extending the recognized universal jurisdiction of the ICC's core crimes into the Rome Statute as a positive step forward for international human rights law, the United States understood this issue to be one that would leave the US and its nationals extraordinarily vulnerable to the authority of the ICC. While universal jurisdiction was eventually rejected by the Rome participants, the alternative jurisdictional limitations imposed by the Rome Statute were still viewed by the United States as being too broad. The Rome Statute defines the final jurisdiction of the ICC as covering crimes committed on states parties' territory, by state parties' nationals, and those instances in which a non-state party has accepted temporary jurisdiction of the Court over specific criminal act:

1. A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes [of genocide, crimes against humanity, and war crimes].
2. ...[The] Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court:
 - (a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;
 - (b) The State of which the person accused of the crime is a national.
3. [Non-state parties] may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question...³¹

Under international law, it is often true that a state must be a party to a treaty before being held accountable for acts included therein—although it is important to note that this is not true in the case of crimes against humanity, genocide, or torture. The United States, however, found the breadth of ICC jurisdiction to be disconcerting in that it includes jurisdiction over non-state party nationals, provided that the individuals committed crimes of genocide, crimes against humanity, or war crimes on the physical territory of a state party.

³⁰ Ibid.

³¹ *Rome Statute*, article 12.

The United States noted that it seemed likely that US attempts to keep its citizens and military personnel free from ICC jurisdiction would result in a drop in United States' international involvement and military aid. Ambassador David Scheffer explained the importance of the strong international military presence of the United States, and the need for US amnesty from ICC jurisdiction:

It is simply and illogically untenable to expose the largest deployed military force in the world, stationed across the globe to help maintain international peace and security and to defend U.S. allies and friends, to the jurisdiction of a criminal court the U.S. Government has not yet joined and whose authority over U.S. citizens the United States does not yet recognize...The theory that an individual U.S. soldier acting on foreign territory should be exposed to ICC jurisdiction if his alleged crime occurs on that territory, even if the United States is not party to the ICC treaty and even if that foreign state is also not a party to the treaty but consents *ad hoc* to ICC jurisdiction, may appeal to those who believe in the blind application of territorial jurisdiction.³²

As a result of its deep commitment to international involvement—politically, financially, and militarily—the United States believed the presence of US officials and servicemen and women stationed throughout the world would unnecessarily and unfairly leave these individuals open for indictment by the ICC, based possibly on almost wholly political grounds as a result of both current and historical international animosity towards US international involvement. As a result, ICC jurisdiction as laid out in the Rome Statute was deemed unsuitable for the United States and its sovereignty, and was therefore unacceptable to the US delegation in Rome. Having previously threatened rejection of the Rome Statute if not satisfied by the resolution of jurisdictional issues allowing for prosecution of non-state party nationals,³³ the United States followed through on this threat, and unequivocally refused to vote for the approval of the Rome Statute at the Conference's end.

³² Ibid., article 18.

³³ Ibid., article 19.

With unavoidable controversies arising between the 160 states participating in Rome Conference negotiations, it is impressive, and perhaps even somewhat surprising, that the Conference ended with a vote overwhelmingly supportive of adopting the Rome Statute for the International Criminal Court. Having been defeated on its two strongest points of contention—those regarding prosecutorial powers and jurisdictional scope—the United States was left with little company in its negative vote: six states, all with questionable human rights records. Since the vote at the Conference's end, and the subsequent ratification of the Rome Statute, controversy regarding the United States and the International Criminal Court has not subsided, and has given rise to questions regarding the potential effects of the United States' abstention from the Rome Statute, and the ICC as a whole.

2. “ALL ROADS LEAD TO ROME:”

A HISTORY OF INTERNATIONAL CRIMINAL JUSTICE

*It is said that all roads lead to Rome. But not all lead there directly. The road that has led us to this Conference in the Eternal City [to negotiate the establishment of a permanent International Criminal Court] has been a long one. It has led through some of the darkest moments in human history. But it has also been marked by the determined belief of human beings that their true nature is to be noble and generous. When humans maltreat each other, they call it 'inhuman.'*¹

The push for the creation of the permanent International Criminal Court, ultimately established in 1998, began in the first half of the 20th century, largely as a result of the widespread atrocities committed during World War I and World War II; this desire for a standing court often reemerged in the international political sphere throughout the remainder of the century. Having witnessed the commission of acts that would later be clearly defined as instances of genocide and gross violations of the most fundamental human

¹ Kofi Annan, Address at the Inaugural Meeting of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court; press release, 15 June 1998; available online at <http://www.un.org/icc/pressrel/lrom6r1.htm>, accessed 2 December 2003.

rights, states worldwide began to express their desire for the implementation of a permanent international justice system intended to try individuals for such acts committed against other human beings. The recurring interest in international criminal justice that was present throughout the 20th century led to the creation of several important international criminal tribunals, all of which were important in establishing precedents that eventually allowed for the establishment of the International Criminal Court created by 1998's Rome Statute. Beginning with war crimes trials related to both WWI and WWII—and executed with varying levels of success—and concluding with the implementation of United Nations' *ad hoc* international criminal tribunals that directly influence the ICC, the 20th century was a watershed period in regards to international criminal law. Whether WWII's Nuremberg and Tokyo Trials or the 1990's International Criminal Tribunal for the Former Yugoslavia and International Criminal Tribunal for Rwanda, the structures of international legal justice created during the 1900s undoubtedly set legal precedents that were important in the drafting of the Rome Statute.

WWI AND WWII

The first modern attempts at prosecuting international war criminals produced the Leipzig Trials, established in WWI's Treaty of Versailles. These trials were initially designed to try German officials and military personnel accused of war crimes committed in relation to the brutal murders that had occurred during WWI. However, largely resulting from a strong US objection to the creation of an international criminal tribunal to carry out the proposed trials, the victorious states granted German courts the power of prosecution over their own accused war criminals. In the trials that were subsequently carried out in the

domestic German legal system, only twelve individuals out of an accused 900 ever faced trial at the hands of the Leipzig court; six were acquitted and six were convicted, the latter receiving only light sentences and quick pardons.² As a result, the Trials were the focus of much international scrutiny, eventually coming to be recognized as an “ill-starred enterprise,” “abominable,” and little more than “a fiasco.”³ Despite the failure of the Leipzig Trials to set a precedent as to the positive and effective nature of international criminal justice trials, the commission of genocide and gross violations of human rights during WWII (which were soon defined in the Universal Declaration of Human Rights) led the international community to put forth another effort at bringing war criminals to justice through an international court system.

At the end of WWII, the states having been involved in the war—and, in particular, the victors—were again forced to grapple with questions regarding how best to bring accused war criminals to justice. WWII was fought on an unprecedented scale and with technological advancements that drastically increased the death toll and brutality associated with war. Resulting from massive air bombings, the brutality of the Japanese during the Asian War (1937-1945), and Nazi policies of genocide carried out throughout Europe, the victors of WWII demanded the punishment of the individuals who had carried out such horrific atrocities. Furthermore, the Allied Powers believed it necessary to hold individuals responsible for the commission of war crimes, crimes against humanity, and genocide associated with WWII as a means of deterring the future execution of similar crimes.⁴ When proposing the creation of an international legal justice system targeting prosecution of

² Howard Ball, *Prosecuting War Crimes and Genocide: The Twentieth-Century Experience* (Kansas: UP of Kansas, 1999): 24.

³ Gary Jonathon Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* (Princeton: Princeton UP, 2000): 58.

⁴ Ball, 37.

WWII's war criminals, the Allied Powers faced ethical dilemmas not often publicly discussed. Whether referring to the United States' internment of tens of thousands of Japanese-American citizens, the Soviet Union's 1939 brutal invasion of Poland or maltreatment of prisoners, or the massive bombings executed by the Allies that undoubtedly destroyed many non-military targets and innocent civilians, it is clear that the Allied states were by no means absolved from guilt resulting from violations of human rights and customary international law during WWII.⁵ In spite of the fact that the Allies quietly recognized their own commission of acts deemed unacceptable under customary international law, the Allied Powers determined that the brutal war crimes and methodical execution of genocide by Germany and Japan during WWII were of a fundamentally different nature.

Having recognized the need for a system to bring WWII's accused war criminals to trial, the Allied states began working towards its implementation. In doing so, the Allies divided the trials of accused Germans and Japanese into two separate entities, referred to as the International Military Tribunal (IMT or Nuremberg Trials) and the International Military Tribunal for the Far East (IMTFE or Tokyo Trials), respectively, reviving earlier efforts to prove the effectiveness of international criminal justice systems in enforcing humanitarian law and the laws of war. The creation of both the IMT and the IMTFE was immediately recognized as important and influential for the future of international criminal justice. Robert H. Jackson, American representative to the London Conference and, subsequently, the American prosecutor at Nuremberg, noted the importance of the precedence being established through the post-WWII criminal justice systems in his opening statement delivered before the Nuremberg Tribunal:

⁵ Ibid.

The privilege of opening the first trial in history for crimes against the peace of the world imposes a grave responsibility. The wrongs which we seek to condemn and punish have been so calculated, so malignant and devastating, that civilization cannot tolerate their being ignored because it cannot survive their being repeated. 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 ever has paid to Reason.

This tribunal, while it is novel and experimental, is not the product of abstract speculations nor is it created to vindicate legalistic theories. This inquest represents the practical effort of four of the most mighty of nations, with the support of fifteen more, to utilize International Law to meet the greatest menace of our times – aggressive war. The common sense of mankind demands that law shall not stop with the punishment of petty crimes by little people. It must also reach men who possess themselves of great power and make deliberate and concerted use of it to set in motion evils which leave no home in the world untouched. It is a cause of this magnitude that the United Nations will lay before your honors.⁶

This eloquent speech signals the recognition of the importance of the international trials, and their potential to greatly impact the future of international law and criminal justice.

Despite the recognized importance of establishing war crime tribunals in the wake of WWII, the Allied states serving as the negotiating parties in drafting charters establishing the precise structure and function of the tribunals found themselves often at odds with one another during the negotiations. Discussions regarding the structure of the proposed international tribunals, the crimes to be covered therein, and the most appropriate location for the trials to be held proved to be contentious issues in establishing the International Military Tribunal and the International Military Tribunal for the Far East. Throughout the debates preceding the establishment of the IMT and the IMTFE, the United States was often in direct opposition to the British, French, and Russian delegations. One of the most controversial and important issues that the negotiating states encountered in establishing these early institutions of international criminal justice related to the unprecedented necessity

⁶ Richard H. Minear, *Victors' Justice: The Tokyo War Crimes Trials* (Princeton: Princeton UP, 1971): 10-11.

of resolving the differences in trial methods employed in the states' respective criminal justice systems. Similar to debates encountered during Rome Conference negotiations 50 years later, during post-WWII negotiations the Allied states found it difficult to compromise on matters of what system of criminal justice to employ in the IMT and IMTFE trials. Conflicting opinions as to whether the trials should be juried and how much evidence should be disclosed to the defense prior to a trial's beginning had no legal predecessors within international law to aid in the Allied negotiations, which resulted in conflict between the four negotiating states. Indeed, the differences between the Continental inquisitorial and the Anglo-American adversarial systems of justice caused dissent among the negotiating Allied states on how best to compromise the systems in order to create an effective international tribunal.⁷ Because a large portion of the international community understood criminal justice to be based upon the inquisitorial norms, those states were accustomed to a system of justice in which

most of the documentary and testimonial evidence is presented to an examining magistrate, who assembles all of it in a dossier. If this process establishes a sufficient basis for prosecution, copies of the dossier and the indictment based on it are given to the defendant and to the court which is to try the case, and the trial then proceeds with both the court and the concerned parties fully informed in advance of the evidence for and against the defendant. If the court, on its own motion or at the request of one of the parties, decides to take further testimony, the witnesses are usually questioned by the judges, rather than the lawyers, so that cross-examinations by opposing counsel, which play so large a part in Anglo-American trials, do not often occur. The defendant is not allowed to testify under oath, but may make an unsworn statement to the court.⁸

On the contrary, the adversarial system of criminal justice emphasizes the lawyer's role in examining witnesses and presenting the limited required evidence to a trial judge, allowing for the exploitation and confrontation of elements of surprise in examination and cross-

⁷ Telford Taylor, *Anatomy of the Nuremberg Trials: A Personal Memoir* (New York: Knopf, 1992): 63.

⁸ Ibid.

examination.⁹ Only with negotiations and compromise, referred to as “crude” but “workable,”¹⁰ did the Allied states come to a consensus combining the two criminal justice systems, moving forward in the establishment of the IMT’s as two of the earliest institutions devoted solely to international criminal justice.

In spite of the discord and tension existing between the Allied Powers during IMT Charter negotiations, the IMT Charter was promulgated on 8 August, 1945. It was at this point that the International Military Tribunal was officially established as an Inter-Allied legal entity to be located in Nuremberg, serving to try German military and political leaders accused of committing war crimes, crimes against humanity, and crimes against peace,¹¹ defined in the Charter of the International Military Tribunal as follows:

- (a) Crimes Against Peace: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;
- (b) War Crimes: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;
- (c) Crimes Against Humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.¹²

⁹ Ibid.

¹⁰ Ibid., 64.

¹¹ Crimes against peace, as defined in the IMT Charter, closely resemble the contemporary definition for crimes of aggression in international law.

¹² Charter of the International Military Tribunal, section 2, article 6, paragraphs (a)(b)(c); available online at “The Avalon Project,” <http://www.yale.edu/lawweb/avalon/imt/proc/imtconst.htm>; accessed 6 January 2004.

Following the adoption of the IMT charter, the IMTFE was officially established on 19 January 1946. The charter of the IMTFE was clearly drawn directly from the text of the Nuremberg IMT; however, the creation of the IMTFE differed from that of the IMT in that it was created almost solely by the United States acting under the auspices of the Supreme Commander for Allied Powers before being distributed to the other participating Allied states. Despite the unilateral drafting of the IMTFE charter, particularly as compared to its recent predecessor in the form of the IMT charter, the jurisdiction and power granted to the tribunal were essentially identical to those of Nuremberg. The IMT and IMTFE charters' references to crimes against peace, war crimes, and crimes against humanity were important in creating early concrete examples of their jurisdiction under international law, as well as establishing international legal definitions thereof. Indeed, the post-WWII International Military Tribunals were instrumental in the establishment of a number of precedents related to international law and international criminal justice, by no means limited to defining international crimes. Rather, the Tribunals' judgments reaffirmed the right of international legal justice systems to try individuals for the commission of crimes, overriding the rights of individuals or a state's sovereignty, setting important precedents for the potential creation of other *ad hoc* and permanent international criminal justice systems.

The post-WWI Leipzig Trials were designed by the victorious Allied States in such a way that the trials of accused German war criminals were carried out by the Germans themselves. Members of the international community have since speculated that this assessment played a large role in the subsequent failure of the Leipzig Trials to be viewed as at all effective or legitimate. As a result, the Allied states were careful to avoid making a similar mistake in establishing the structures of the IMT and the IMTFE. Rather, in the case of the Nuremberg and Tokyo Trials, the establishment of the Tribunals and the associated

trials were subject to careful oversight by the Allied powers then occupying Germany and Japan, without turning power and jurisdiction over to the defeated states. Despite the extensive attention paid to the creation and execution of the IMT and IMTFE by the Allies and the indisputable fact that they served as important precedents in the field of international criminal justice, the extent to which they were ultimately viewed as having succeeded in their attempts to create fair and effective means of bringing the accused to justice and in deterring future commission of war crimes is not particularly clear.

The Nuremberg and Tokyo Trials were unprecedented in size and scope, each tribunal being forced to simultaneously contend with operating in multiple languages, indicting thousands of defendants, carrying out nineteen hangings,¹³ interviewing hundreds of witnesses, reviewing thousands of pages of testimony, and undergoing constant international scrutiny. However, in spite of all the similarities between the Nuremberg and Tokyo Trials, a major difference between the two Tribunals, one which resulted in vastly different international perception as to their legitimacy, was the setting in which the trials took place. Whereas the IMT located in Nuremberg “had used simpler furnishings, [and] relied on the majesty of the concept to set the tone,” the IMTFE in Tokyo chose to magnify the enormity of the trials through the creation of a courtroom setting that was compared to a Hollywood premiere in décor and theatricality, creating an air of showmanship and drama that left many individuals questioning whether there was legal substance or legitimacy to such lavish theatrical trials.¹⁴

Challenges to the legitimacy of the IMT and IMTFE were not limited solely to the aesthetic appearance of their settings. Rather, whether appearing as a Hollywood premiere or not, both the Nuremberg and Tokyo Tribunals were forced to contend with questions

¹³ Yves Beigbeder, *Judging War Criminals: The Politics of International Justice* (Wiltshire: Palgrave): 58.

¹⁴ Minear, 3.

posed by the international community—in particular by Germany and Japan—as to the motivation behind the creation of the IMT and IMTFE.

One of the principal challenges facing the post-WWII International Military Tribunals—and, in particular, the Tokyo Trials—was the accusation that the trials were being carried out unfairly, and were solely created as a means of retribution and retaliation employed by the Allied states; in essence that they were nothing more than a well-organized system of victors' justice. As a result of the global destruction and widespread instances of murder, genocide, and brutality which had occurred throughout the course of the War, retrospective scholarly examination has questioned whether the Tokyo trials were conducted as retribution for the losses of human life and physical property suffered by the Allied states during the Pacific War. The primary cause of questions regarding the possible invocation of victors' justice is largely related to the fact that, despite the blatant commission of human rights violations and brutal acts, including the unprecedented deployment of nuclear weapons by the Allied Powers, only the Axis Powers—Germany and Japan in particular—were ever forced to trial for such acts.¹⁵ Assertions of the IMTFE as a system established as victors' justice resulting from the Allies' self-granted amnesty from responsibility for crimes committed in conjunction with WWII were compounded by the extent to which the Tribunal prosecuted those brought to trial. The International Military Tribunal for the Far East prosecuted all 25 Japanese men accused of the most heinous war crimes, including the plotting and initiation of the Pacific War. Further, during this period, 5,000 Japanese individuals tried in smaller local war crimes trials occurring as a part of the Allied IMTFE in

¹⁵ Timothy L.H. McCormack, "Selective reaction to atrocity: war crimes and the development of international criminal law. (Conceptualizing Violence: Present and Future Developments in International Law)," *Albany Law Review* 60.3 (1997); Expanded Academic Index internet database, available online at http://web4.infotrac.galegroup.com/itw/infomark/508/719/50702298w4/purl=rc1_EAIM_0_A19490998&dyn=4!xrn_1_0_A19490998?sw_aep=a03cc.

Japan were found guilty of the commission of specific crimes, more than 900 of whom were executed by the Allies.¹⁶

Beyond the challenges exerted by the Japanese and German governments regarding the legitimacy of the justice employed by the Allied states following WWII, the IMT and IMTFE were forced to contend with questions being posed—again, primarily by Japan and Germany—as to whether the jurisdiction that the Tribunals claimed over accused nationals was in fact legal under customary international law. Examining the Tokyo Tribunal as a specific example of this, throughout the course of the IMTFE trials the accused Japanese raised seven challenges directly related to the legality of the Tribunal’s jurisdiction as of its November 1948 judgment. The first four read as follows:

1. The Allied Powers acting through the Supreme Commander have no authority to include in the Charter of the Tribunal and to designate as justiciable ‘Crimes against Peace;
2. Aggressive war is not *per se* illegal and the Pact of Paris of 1928 renouncing war as an instrument of national policy does not enlarge the meaning of war crimes nor constitute war a crimes;
3. War is the act of a nation for which there is no individual responsibility under international law;
4. The provisions of the [Tokyo] Charter are ‘ex post facto’ legislation and therefore illegal.¹⁷

Taking these points as examples of the numerous challenges facing the IMTFE during its tenure, it is clear that the Allied states were constantly forced to defend the legality and processes associated with the IMTFE, as well as the IMT at Nuremberg. Whatever challenges may have been made against the legal status or legitimacy of the post-WWII international military tribunals established by the Allied states, the implementation and execution of IMT and IMTFE trials marked a watershed event in the history of international criminal legal justice. The ‘Tribunals’ contributions to contemporary international criminal

¹⁶ Joanne M. Dufour, “War crimes: an end in sight?” *Social Education* 65.7; Expanded Academic Index internet database, available online at http://web4.infotrac.galegroup.com/itw/infomark/508/719/50702298w4/purl=rc1_EAIM_0_A80710644&dyn=8!xrn_1_0_A80710644?sw_aep=a03cc.

¹⁷ The International Military Tribunal for the Far East, judgment, 4-12 November 1948; in Minear, 26-27.

law can be viewed through the modern adoption of the definitions of crimes against humanity and war crimes developed during the post-WWII trials, or through the Allied rejection of “immunity,” “just following orders,” or “military necessity” as acceptable legal defenses,¹⁸ decisions that are still referenced in contemporary international law. Perhaps most fundamentally, however, the Nuremberg and Tokyo Trials succeeded in establishing important historical precedence regarding the creation of international legal systems furthering individual accountability through trials of individuals accused of committing genocide, war crimes, and associated gross violations of human rights.

THE 1990S: YUGOSLAVIA, RWANDA, AND ROME

Despite the important role that the International Military Tribunal and the International Military Tribunal for the Far East played in establishing international legal precedents, following the closure of the Tribunals’ trials, the global attention paid to international criminal justice during the first half of the 20th century faded away. Only in the 1990s did the establishment of systems of international criminal justice—whether temporary or permanent—reemerge as an important focus of international relations and global foreign policy. Indeed, within a span of only several years in the mid-1990s, the international community embraced the concept of international criminal law based largely on humanitarian law and human rights, demonstrated primarily by the creation of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), as well as through trials of accused war criminals in Sierra Leone and Cambodia. Simultaneously, international interest in the creation of a

¹⁸ Ball, 91.

permanent International Criminal Court reemerged with an unprecedented level of global support. As states worldwide began to work together in efforts to secure the establishment of a standing international criminal justice system, the ICTY and ICTR—the so-called “*ad hoc* tribunals”—served as important predecessors to the ICC, building upon the historical precedents set forth by the IMT and IMTFE. Further, in addition to the high profile establishment of the *ad hoc* tribunals, the creation of lower profile war crimes courts in both Cambodia and Sierra Leone during the mid- and late-1990s, respectively, demonstrates a continued interest in international criminal justice in all corners of the world.

CAMBODIA

Even before the establishment of the ICTY and ICTR under the United Nations, the international community initiated a push in the 1990s for punitive international criminal justice through the prosecution of those individuals accused of carrying out gross violations of human rights in Cambodia, which culminated in the massive genocide occurring between 1975 and 1978. During this period, Pol Pot, “the Butcher of Cambodia,” gained control of the Khmer Rouge—Cambodia’s Communist Party—and of Cambodia, while declaring his intentions to “turn back the clock [in Cambodia] to ‘Year Zero.’ In the name of the bizarre blend of peasant romanticism and radical Maoism, the Khmer Rouge conducted a reign of terror to give birth to an agrarian utopia.”¹⁹ Indeed, by May of 1975, Pol Pot had constructed an eight-point agenda for the Communist Party to implement as a means of restructuring Cambodian society:

1. Evacuate the people (over 3 million of Cambodia’s 8 million) from the cities
2. Abolish all markets
3. Abolish currency

¹⁹ Ibid., 94.

4. Defrock all Buddhist monks
5. Execute the leaders of Lon Nol's government and army
6. Establish cooperatives across Cambodia, with communal eating
7. Expel the entire ethnic Vietnamese population
8. Dispatch Khmer rouge troops to the Thai and Vietnamese borders to secure the integrity of the revolution from encroachment from Cambodia's traditional rivals²⁰.

The abject horror that confronted the Cambodian citizens during this time was a result of Pol Pot's attempts to destroy the Cambodian society as it had previously existed in order to create a classless agrarian "utopia." In order to carry out these political aims, Pol Pot oversaw a system of brutal totalitarianism in which nearly 2 million Cambodians were killed in order to create "a collectivist society of peasant slaves, watched over by [Pol Pot's army of] gun-toting illiterates."²¹ As such, Pol Pot's violent reign—and the 1975 to 1978 genocide, in particular—was described as "a bequest of fanaticism and of 'killing fields' where millions of Cambodians were slaughtered, for example, for wearing 'glasses...because it was assumed that they could read.'"²² Only after a military skirmish following the end of the 1975-1978 genocide did the Vietnamese emerge victorious, exiling Pol Pot's Communist party. However, even following the Communists' official exile, a large portion of the international community supported Pol Pot, essentially ignoring the widespread brutality and death that had plagued Cambodia under the despot's rule, even following the genocidal period, when international citizens were permitted entrance into Cambodia and, for the first time, witnessed the absolute horror that Cambodia's citizens had faced.²³ Indeed, it was not until the early 1990s that the international community began to officially recognize Cambodia's violent history as having included the perpetration of crimes against humanity and genocide. In the mid 1990s, two decades after Pol Pot's heinous commission of crimes,

²⁰ Ibid., 101.

²¹ Ibid.

²² Ibid., 96.

²³ Ibid., 116.

the international community chose to confront the reality of what had occurred and began to push for the establishment of international criminal trials for those involved in the atrocities. The Cambodian government generally was in agreement on this matter, but after much debate determined that the trials of accused war criminals would be most effectively carried out in a domestic court setting, as “a trial should proceed without waiting for these foreign countries to spend money and waste time until [the defendants] die.”²⁴ In essence, while it is important that the Cambodian genocide retrospectively drew attention to the commission of war crimes and genocide in the international political sphere, the Cambodians’ desire to establish a domestic system of punitive justice demonstrated a lack of faith and confidence in the international community’s ability to expediently and legitimately carry out Cambodia’s war crimes trials.

SIERRA LEONE

Sierra Leone’s desire to confront international war criminals with punitive justice demonstrates that contemporary war crimes trials have not been limited only to those of the well-known ICTY and ICTR *ad hoc* tribunals. In spite of its establishment after that of the ICC, the Special Court for Sierra Leone—intended to try those responsible for heinous crimes committed in association with the civil war occurring in Sierra Leone during the 1990s—is a result of the recurrence in international emphasis on international punitive justice in recent years. Sierra Leone’s civil war, the reason for which the Special Court was formed, was not simply a case of civil tension, but was comprised of extraordinary violence, incomprehensible to a large portion of the international community. Throughout the duration of the civil war, children were drugged and forced to be soldiers with the Armed

²⁴ Hun Sen, Cambodian Prime Minister; in Ball, 120.

Forces Revolutionary Council (AFRC) and Revolutionary United Front (RUF), the Sierra Leonean rebel alliance attempting to regain power through war with the state's citizenry.²⁵ Furthermore, men and women have been mutilated, raped, beaten, forced to undergo amputations, and brutally murdered on a large scale.²⁶ While the international community initially did little to provide humanitarian or peacekeeping aid to Sierra Leone, on 10 August 2000, the president of Sierra Leone approached the United Nations, requesting the establishment of a special court intended to prosecute those deemed responsible for the violence occurring in the 1990s.²⁷ Under the agreements reached that established such a court, the Special Court for Sierra Leone was created with a combination of United Nations and Sierra Leonean input, and with the limited jurisdictional capability to try those deemed to have exercised the "greatest responsibility" for the crimes against humanity, violations of international humanitarian law, and other specifically named crimes that were carried out during the period of conflict.²⁸ While the composition of the Court, its given jurisdiction, and its structure of oversight vary from its *ad hoc* predecessors, the extent to which the ICTR influenced the Special Court's creation is exemplified by the fact that the ICTR's Rules of Procedure and Evidence were directly adopted by the Sierra Leone Court. Indeed, the establishments of both the ICTY and ICTR have been highly influential on the field of contemporary international criminal law.

²⁵ "Sowing Terror: Atrocities Against Civilians in Sierra Leone," Human Rights Watch 10.3 (1998) A; available online at http://www.hrw.org/reports98/sierra/Sier988-01.htm#P88_2258, accessed 24 April 2004.

²⁶ Ibid.

²⁷ Daryl A. Mundis, "New Mechanisms for the Enforcement of International Humanitarian Law," *The American Journal of International Law* 95.4 (Oct., 2001): 935.

²⁸ Ibid.

YUGOSLAVIA AND THE ICTY

The International Criminal Tribunal for the Former Yugoslavia was established on 25 May 1993 under United Nations Security Council Resolution 827 in response to atrocities and gross violations of human rights committed in the former Yugoslav territory beginning in 1991. Preceding this violent period, the Balkan states witnessed an insurgence of political and military turmoil as a result of the end of the Cold War, the dissolution of the Yugoslav state, and a rise in Yugoslav nationalism encouraged by the Serbian Communist Party led by Slobodan Milosevic. As a result of historical tensions between the regions' ethnic groups—in combination with the political upheaval facing the former Yugoslavia during the early 1990s—violence simultaneously broke out between several independent states and ethnic groups, signaling the beginning of the Balkan wars. All told, the concurrent wars occurring between Slovenia and Yugoslavia, the Serbs and Croats, Bosnia-Herzegovina and the Serbs, and Bosnia-Herzegovina and the Croats led to the displacement of more than 2 million civilians from the Balkan battle zones, as well as the deaths of over 300,000 individuals resulting from policies of ethnic cleansing²⁹ and genocide.³⁰ During this period, the Serbs and Bosnian Serbs were the primary aggressors; several international legal scholars, NGOs and heads of state have described the atrocities carried out against the Muslims of Bosnia-Herzegovina as “four years of bloody and violent aggression”³¹ during which

entire villages—homes, mosques, schools, ball fields, hospitals—were destroyed by the paramilitary Serb units. [The Serbs] terrorized “residents with random killings, rapes, looting; local Serb ‘crisis committees’ took charge to detain, beat, and imprison anyone who did not flee, collecting them into camps where abuse and mass killings were routine. Finally the units

²⁹ Ethnic cleansing is closely linked to genocide as an extension thereof, in that it is a systematic policy implemented for “the killing, rape, and forced removal of people from their homes on the basis of their ethnic background. Both Muslims and Croats were targets of [such] Serb brutality;” Ball, 129.

³⁰ Ball, 125.

³¹ Ibid., 129.

would massacre any remaining ethnic rivals until no one was left but the Serbs.”³²

This period of brutality and destruction could only be described as being composed of “scenes of unimaginable savagery...truly scenes from hell.”³³ There is no other way to describe a war in which innocent civilians were “buried alive, children [were] killed in front of their mothers’ eyes, and a man [was] forced to eat the liver of his own grandchild.”³⁴

During this period in which the former Yugoslavia was faced with the constant presence of extraordinary political instability and violence, the international community responded in largely inconsistent, ineffective ways. At the outset of the war, states outside the Balkan region paid little heed to the massive gross violations of human rights being carried out within. However, in 1993, after two years of warfare and human rights violations, the United Nations and NATO states became involved in the Balkan war. April 1993 marked United Nations’ military involvement in attempts to protect Yugoslav civilians through the establishment of the UN Protection Forces (UNPROFOR), which established several designated “safe areas” intended to safeguard Muslims from Serbian brutality. In spite of the well-intentioned appearance of these efforts, the established safe areas, the most infamous of which was Srebrenica, essentially encapsulated concentrated populations of Muslims who were subsequently targeted as a part of “one of the last and worst genocides that occurred” in Bosnia-Herzegovina. Srebrenica was established in order to “provide people with food and medicines they needed in places where security was guaranteed.’ The safe area was to be free from any armed attack, or any other hostile act.”³⁵ However, in Srebrenica, purportedly safeguarded by international peacekeeping troops, thousands of men

³² Ibid., 132.

³³ Ibid., 129.

³⁴ Ibid.

³⁵ Steven L. Lamy, “The Dutch in Srebrenica: A Noble Mission Fails” (Washington, DC: The Institute for the Study of Diplomacy, 2001): 1.

and boys were brutally murdered and buried in mass graves.³⁶ The violence that resulted from these attacks was unimaginable, as the Serb armed forces took the opportunity to further their attempts at ethnic cleansing through the large-scale murders of those inhabiting Srebrenica. Accounts of the ensuing violence estimate the number of dead at over 6,500, with more than 20,000 being forced to flee as refugees. The manner in which the Serbs carried out these murders was unimaginably cold and brutal:

[Serb troops] bragged about how they had murdered people and raped women. They were proud of what they were doing. I didn't get the feeling that they were doing it out of anger or revenge, more for fun. They seemed pleased with themselves in a sort of professional, low-key way.³⁷

Despite the undeniable failure of UN troops in their mission to protect Srebrenica as a safe area, only a month after the deployment of UNPROFOR troops, the United Nations became deeply involved in the Balkan war in another, entirely non-militaristic, way—through the implementation of the International Criminal Tribunal for the Former Yugoslavia as a method of bringing those individuals to justice who were accused of carrying out the continuing gross violations of human rights during the course of war. For the first time since the period immediately following WWII the international community was directly involved in efforts to create an international system of punitive justice based upon trials and accountability of individuals.

Since its 1993 establishment by the United Nations under Chapter VII of the United Nations Charter,³⁸ the International Criminal Tribunal for the Former Yugoslavia has grown into an international criminal justice system currently employing over 1200 individuals and

³⁶ Ball, 137.

³⁷ Ball, 136.

³⁸ Chapter VII of the UN Charter sets forth the right of the United Nations to intervene in situations in which international peace and security is deemed to be at stake. In the establishment of the ICTY under UN Resolutions 808 and 827, the Security Council had determined that the conflict occurring in Bosnia-Herzegovina constituted a threat to international peace, and that the establishment of a related international criminal tribunal would serve to aid in the restoration of peace. Theodor Meron, "War Crimes in Yugoslavia and the Development of International Law," *The American Journal of International Law* 88.1 (1994): 79.

operating with a budget of over \$220,000,000.³⁹ Furthermore, the Yugoslav Tribunal has been successful in hearing six cases at a given time, rendering judgments on dozens of cases since its 1993 inception. The establishment and subsequent growth of the ICTY has signaled the reemergence of international efforts to establish systems of individual criminal accountability for the commission of gross violations of human rights. Additionally, as a result of its status as the first system of international criminal justice established since the closing of the post-WWII IMT and IMTFE, the ICTY has played an important role in reestablishing legal precedence for the structure and procedure of international criminal justice systems and their role in enforcing international law. The International Criminal Tribunal for Rwanda, established little more than a year after that of the ICTY, has played a similar role in contemporary international law.

RWANDA AND THE ICTR

On 8 November 1994, the United Nations established the ICTR to prosecute individuals accused of violating international humanitarian and criminal law in Rwanda between 1 January 1994 and 31 December 1994. Although the temporal jurisdiction of the ICTR was limited to the events occurring in the span of only twelve months, the scope and brutality of the genocidal crimes carried out during this period were nothing short of horrific. Caused by tension existing between the Hutu and Tutsi ethnic groups, the 1994 Rwandan genocide proved to be one of the most brutal and frighteningly efficient genocidal policies known to have occurred throughout history. The statistics of this yearlong period are simply staggering:

³⁹ Website of the International Criminal Tribunal for the former Yugoslavia; available online at <http://www.un.org/icty/index.html>, accessed 9 February 2004.

Very little about the Rwandan genocide is comprehensible. A Hutu elite came to believe that Hutu salvation necessitated Tutsi extermination. The Hutus enacted their conspiracy with startling efficiency. In one hundred days, between April 6 and July 19, 1994, they murdered roughly eight hundred thousand individuals. For the statistically inclined, that works out to $333\frac{1}{3}$ deaths per hour, $5\frac{1}{2}$ deaths per minute. The rate of murder was even greater during the first four weeks, when most of the deaths occurred. The Rwandan genocide, therefore, has the macabre distinction of exceeding the rate of killing attained during the Holocaust. And unlike the Nazis, who used modern industrial technology to accomplish the most primitive of ends, the perpetrators of the Rwandan genocide employed primarily low-tech and physically demanding instruments of death that required an intimacy with their victims. The genocide was executed with a brutality and sadism that defy imagination.⁴⁰

Not only were statistics or methods of killing horrific, but the mentality of the Hutu killing units, the *interahamwe*, is describable only as incomprehensible. It is demonstrated by a commonly sung battle hymn of the April genocide described as a “hurricane of death:”

Is it a sin to kill a Tutsi? No. Let’s exterminate them, exterminate them, exterminate them, kill them and bury them in the forests, let’s chase them out of the forests and bury them in the caves, let’s chase them out of the caves and massacre them. Stop so that we can kill you, don’t cause problems because your god fell at Ruhengera, while he was on his way to the market to buy sweet potatoes. Don’t even spare the babies, don’t spare the old men, nor the old women.⁴¹

The incomprehensibility of the mentality, scope, and violence associated with the Rwandan genocide was compounded by the global response—silence.

Despite intelligence signaling the preparations for, and imminent executions of, hundreds of thousands of innocent civilians, the global community remained detached from Rwanda’s internal conflict, making the conscious decision not to intervene. In 1998, President Bill Clinton acknowledged the mistakes the international community, and the United States in particular, made in allowing for the execution of thousands of innocent

⁴⁰ Michael Barnett, *Eyewitness to Genocide: The United Nations and Rwanda* (Ithaca: Cornell UP, 2002): 1.

⁴¹ Ball, 164.

civilians while standing by, idly watching. During the 1994 genocide, the Clinton administration's official policy toward the Rwandan conflict was that

The U.N. should get out of Rwanda completely, and the original force of 2,500 men was reduced to an ineffectual squad of 270....[after receipt of urgent requests from the UN's military commander in Rwanda for additional military forces], the U.S. successfully obstructed the Security Council from heeding [the commander's] call.⁴²

The United States' hesitance to intervene in the Rwandan conflict was largely a result of the violent public murders of several US military troops engaged in a Somali peacekeeping mission immediately prior to Security Council debates regarding Rwandan peacekeeping.⁴³ Fearing that engagement in additional African peacekeeping missions would result in further humiliation and danger for US nationals, the United States took an active interest in remaining disengaged from Rwandan military action. Only four years later, upon his arrival in Kigali, Rwanda, did President Clinton acknowledge the horrors of the Rwandan genocide, and offer his apologies on behalf of the United States and the international community as a whole for not having played a greater role during this period:

The international community, together with the nations in Africa, must bear its share of responsibility for this tragedy....We did not act quickly enough after the killing began. We should not have allowed the refugee camps [in Zaire] to become safe haven for the killers. We did not immediately call these crimes by their rightful name: genocide....All over the world there were people like me sitting in offices, day after day after day, who did not fully appreciate the depth and the speed with which [the Rwandan people] were being engulfed by this unimaginable terror.⁴⁴

Because of the international community's unwillingness to intervene in the Rwandan genocide until well after the initial and most horrific periods of killing, Rwanda, the United Nations, and the international community were forced to contend with the aftermath of the murder of hundreds of thousands of innocent civilians, and the internal and external

⁴² Ibid., 155.

⁴³ Melvern, 79.

⁴⁴ US President William Clinton, public address, 24 March 1998; Ball, 155.

displacement of millions. On the recommendation of a UN special rapporteur for Rwanda, and at the bequest of the newly-established Rwandan government, the United Nations Security Council proposed and subsequently passed Resolution 955, establishing the International Criminal Tribunal for Rwanda.⁴⁵ Interestingly, despite the government's desire for the establishment of a justice system to try individuals accused of war crimes and genocide, the Rwandan UN delegate cast the only negative vote at the 8 November 1994 Security Council vote regarding the proposal for the creation of the ICTR, citing the weakness of the ICTR in terms of structure and temporal jurisdiction as the justification for Rwanda's opposition to the Tribunal's creation.⁴⁶ In spite of the Rwandan government's numerous objections to the structure and functioning of the ICTR as proposed by the Security Council, Resolution 955 was passed with a near-unanimous supporting vote on 18 December 1994,⁴⁷ and has since functioned in direct accordance with the provisions contained therein, establishing the Tribunal's intent to

prosecute persons responsible for genocide and other serious violations of international humanitarian law [such as crimes against humanity and violations of Article III of the 1949 Geneva Conventions]⁴⁸ committed in the territory of Rwanda, and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994.⁴⁹

Seated in Arusha, Tanzania, the International Criminal Tribunal for Rwanda issued the first indictments against accused individuals on 28 November 1995. Since then, at least 70 individuals have faced ICTR indictments, with a dozen or more of these cases having

⁴⁵ Ball, 171.

⁴⁶ Ibid., 171-172.

⁴⁷ Indeed, the *only* negative vote was that of Rwanda's own government.

⁴⁸ Ball, 171.

⁴⁹ *Statute of the International Tribunal for Rwanda (As Amended)*, Preamble; available online at <http://www.icttr.org/basicdocs/statute.html>, accessed 10 April 2004.

ended in convictions.⁵⁰ Notable on the list of those convicted is one Jean Kambanda, Rwandan Prime Minister during the 1994 genocide. His indictment and subsequent conviction on charges of genocide were highly important in establishing international legal precedents regarding international criminal jurisdiction over high-ranking individuals and heads-of-state.⁵¹ In spite of the important decisions handed down by the Rwandan Tribunal, the ICTR has encountered numerous problems throughout its existence. As such, “one writer noted that the ICTR ‘always seemed a shadow of [the ICTY,] its sister in The Hague, beset from its inception by a host of problems. [These difficulties involved] a lack of personnel, facilities for the trials, money mismanagement, and cronyism.’”⁵² The ICTR has struggled even with the most fundamental of supply and procedural difficulties, largely as a result of its location in Arusha, notably described by the ICTR registrar as not serving as a “global media station,” rather, it is an area in which “phone service, especially overseas, is spotty at best.”⁵³ One observer has stated openly that Arusha is “‘not equipped to handle the technical needs of a staff [of 400 in Arusha] and in Kigali.’”⁵⁴ However, in spite of all the difficulties the ICTR encountered as a result of a lack of funding and its relatively isolated location, the ICTR, in conjunction with the 1993 ICTY *ad hoc* tribunal, has played an important role in the recent reemergence of international criminal justice and was particularly influential in the renewed global interest in establishing the current permanent International Criminal Court.

⁵⁰ International Criminal Tribunal for Rwanda: Achievements of the ICTR; available online at <http://www.ictt.org/default.htm>, accessed 10 April 2004.

⁵¹ Ibid.

⁵² Ball, 174.

⁵³ Ibid.

⁵⁴ Ibid., 175.

CONTRIBUTIONS TO INTERNATIONAL LAW AND THE ICC

The ICTY and ICTR were the first large-scale international criminal justice trials organized since the post-WWII era. As such, their subsequent expansion into relatively successful large-scale undertakings by the United Nations and the international community has vastly aided the global society in its attempts to establish the International Criminal Court as a permanent entity. Although the *ad hoc* tribunals were of a fundamentally different nature than the ICC, in that they were established as a part of the United Nations and were therefore wholly dependent on the UN for their establishment, functioning, and funding (as opposed to the relative independence of the International Criminal Court),⁵⁵ this does not diminish the impact that the Tribunals had on the establishment of the International Criminal Court. In this vein, one of the most important aspects of the ICTY and ICTR was their ability to prove that the international community was capable of creating systems of international criminal justice viewed generally as legitimate and effective in their attempts at bringing accused criminals to justice.⁵⁶ Particularly following the lackluster attempts at establishing punitive systems of international criminal justice in the post-WWI and WWII eras, the success and international support of the ICTY and ICTR were important in encouraging global cooperation and assistance with the international law of war—and with the International Criminal Court in particular. Furthermore, the specific experiences and challenges that the Yugoslavia and Rwanda Tribunals have encountered to date have proven to be highly influential on specific provisions—both structural and jurisdictional—included in the ICC’s Rome Statute.

⁵⁵ The ICC, while maintaining some ties with the UN—such as the Security Council’s ability to refer some cases to the ICC, as well as the assessments to be paid by the UN—the ICC was created independently of the UN or a UN resolution, established instead under an international treaty.

⁵⁶ Daryl Mundis, “The *ad hoc* Tribunals: Contribution to the ICC Process,” (lecture at the Irish Centre for Human Rights’ Summer Course on the International Criminal Court, Galway, Ireland, 20 July 2003).

As previously discussed in reference to the ICTR, one of the most important facets of the ICTR and ICTY was that they established precedence regarding the legality of trying heads-of-states accused of war crimes. Whether it was the ICTR trial of former Prime Minister Jean Kambanda, or the ongoing trial of former Yugoslavian President Slobodan Milosevic, the *ad hoc* tribunals' indictments of heads-of-state paved the way for the ICC's Rome Statute to include a provision regarding the "irrelevance of official capacity," stating that

[The] Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under [the Rome] Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.⁵⁷

Having played a role in the establishment of precedence for the Rome Statute's inclusion of ICC jurisdiction over individuals worldwide, regardless of past or present official capacity, the *ad hoc* tribunals further provided important influence regarding the manner in which ICC trials—and in particular the treatment and testimony of trial witnesses—would be conducted.

Following the *ad hoc* tribunals' trials, it quickly became apparent that the ICC must provide victims and witnesses with protective measures in order to ensure their safety, as well as the integrity of the trials. The basis for this influence is exemplified by the structure of ICTY and its associated rules of procedure and evidence, in that the right of the accused to a "fair and public hearing" is subject to the commitment of the Tribunal to fully provide

⁵⁷ *Rome Statute*, article 27, section (1): Irrelevance of official capacity.

for the “protection of victims and witnesses.”⁵⁸ An example of the manner in which the ICTY invoked these safeguards is as follows:

In the *Tadić* trial, the prosecutor called seventy-six witnesses during its case in chief, of whom five were assigned pseudonyms. One witness was granted full anonymity, which the trial chamber permitted after assessing certain criteria: whether there was a real fear for the safety of the witness and his or her family, the importance of the witness’s testimony, whether there was *prima facie* evidence that the witness was untrustworthy, whether other means of witness protection were available, and whether full anonymity was strictly necessary. Even in this instance, however, the courtroom was arranged so that the defense counsel (but not the defendant) could view the witness.⁵⁹

The above description of the *Tadić* case⁶⁰ is an example the ways in which the ICTY stressed the importance of witness protection. As such, the Tribunal laid the groundwork for the Rome Statute provisions mandating the Court’s invocation of measures offering “Protection of the victims and witnesses and their participation in the proceedings.”⁶¹ What is notably absent from these provisions, however, is the ability of witnesses to testify anonymously, as was mentioned in reference to the ICTY *Tadić* case. The exclusion was undoubtedly greatly influenced by difficulties encountered during the *Tadić* case and its aforementioned anonymous testimony. The individual allowed to testify anonymously in the case—Dragan

⁵⁸“Briefing Paper on Legal Issues and Witness Protection in Criminal Cases,” *Scottish Executive*, available online at <http://www.scotland.gov.uk/cru/kd01/green/briefing-09.htm>, accessed 10 April 2004.

⁵⁹ Sean D. Murphy, “Progress and Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia,” *The American Journal of International Law* 93.1 (1999): 84.

⁶⁰ “Dusko Tadić is a Bosnian Serb who participated in ‘ethnic cleansing’ operations against Bosnian Muslims in the Serb-controlled Prijedor region of Bosnia and Herzegovina in 1992. He was the first detainee of the International Criminal for the Former Yugoslavia (ICTY). In 1995, the ICTY Appeals Chamber affirmed jurisdiction over Tadić and the crimes of which he was accused. In 1997, he was convicted by an ICTY Trial Chamber on various counts, but acquitted on others. Both the defendant and the prosecution appealed. In its landmark judgment of July 15, 1999 (Appeal Judgment), the appeals chamber held, with respect to the four grounds of cross-appeal by the prosecution, that (1) Tadić had acted in an international armed conflict and that his victims were ‘protected persons’ under international humanitarian law; (2) he was guilty of crimes that were committed by other members of his group, that went beyond the common plan, but were foreseeable consequences of it; (3) acts committed for purely personal motives can be crimes against humanity when committed in the context of widespread or systematic crimes; and (4) not all such crimes require a discriminatory intent;” in the sentencing judgment of January 26, 2000, received a of imprisonment of twenty years; in Marco Sassoli and Laura M. Olson; “Prosecutor v. Tadić (Judgement), Case No. IT-94-a-A. 38 ILM 1518 (1999),” *The American Journal of International Law* 94.3 (Jul., 2000): 571.

⁶¹ *Rome Statute*, article 68, sections (1)-(6).

Opacic, or “Witness L”—was discovered to have provided false information in his testimony, and was subsequently charged with perjury under the ICTY Rules of Procedure and Evidence.⁶² As such, Opacic’s anonymous testimony was the first and last example of this in recent international criminal legal systems.

An additional area in which the *ad hoc* tribunals—as exemplified by the ICTY in particular—provided legal precedence for the establishment of customary international law as referenced in the Rome Statute was that of the qualification of rape as a crime against humanity. Rape was widespread during the Balkan wars on which the ICTY is focused, as a part of the Serb ethnic cleansing policies.⁶³ As a result, during its formation, those working to draft the ICTY Statute deemed it necessary to include the crime of rape under the Tribunal’s jurisdiction. The ICTY Statute specifically refers to rape as a crime against humanity “when committed in armed conflict and directed against a civilian population.”⁶⁴ Following this definition, however, it seems that it would be difficult “to prove that one such assault is part of an orchestrated plan to carry out mass rapes, which has left the prosecutor typically charging rape as either a grave breach or a violation of the laws and customs of war.”⁶⁵ The definition is further complicated by the fact that rape is not explicitly mentioned in either the ICTY Statute or the 1949 Geneva Conventions as falling into either of these categories.⁶⁶ Regardless, the willingness of ICTY prosecutors and justices to recognize the act of rape set an important legal precedence regarding the necessity of the international community to recognize sexual assault as a crime in the field of international humanitarian and criminal law. As a result, the Rome Statute specifically includes acts of “rape, sexual

⁶² “Briefing Paper,” *Scottish Executive*.

⁶³ Murphy, 88.

⁶⁴ Ibid.

⁶⁵ Ibid.

⁶⁶ Ibid.

slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity”⁶⁷ under the definition of crimes against humanity covered under ICC jurisdiction.

One additional way in which the ICTY contributed to international criminal justice and the permanent International Criminal Court resulted from one of the Tribunal’s cases: that of *Prosecutor v. Erdemović*. This trial was unique to international criminal law, in that the defendant pled guilty. An unprecedented act, Erdemović’s guilty plea astounded and perplexed the justices and attorneys involved in the trial. However, he expounded upon his guilty plea with the following explanation:

Your Honour, I had to do this. If I had refused, I would have been killed together with the victims. When I refused, they told me: "If you are sorry for them, stand up, line up with them and we will kill you too". I am not sorry for myself but for my family, my wife and son who then had nine months, and I could not refuse because then they would have killed me.⁶⁸

As a result of this explanation before the ICTY, the individuals involved in the trial were forced to contend with questions regarding how best to deal with guilty pleas in international criminal justice systems. While initially the defendant’s guilty plea was accepted, after having undergone a psychiatric and psychological examination, he was determined to suffer from the effects of post-traumatic stress disorder, and therefore was not mentally capable of standing trial. However, when his mental condition was deemed to have improved after three months time, and officials had determined that he was “sufficiently able to stand trial,” Erdemović resubmitted his initial guilty plea.⁶⁹ At this point, the Trial Chambers accepted his guilty plea regarding the charge of crimes against humanity. This decision by the Trial

⁶⁷ *Rome Statute*, article 7, section (1), paragraph (g).

⁶⁸ International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Judgment, *Prosecutor v. Erdemović*, 7 October 1997; available online at <http://www.un.org/icty/erdemovic/appeal/judgement/erd-aj971007e.htm>, accessed 10 April 2004.

⁶⁹ *Ibid.*

Chambers to accept a guilty plea was particularly important in encouraging Rome Conference participants to include Article 65 of the Rome Statute, regarding “Proceedings on an admission of guilt,” essentially stating that a guilty plea must be met with the Trial Chambers’ examination of whether the accused understands the plea being made and its potential consequences, whether it has been made entirely voluntarily, and whether it is supported by the facts of the case.⁷⁰

Having examined several of the ways in which the ICTR and the ICTY have influenced the creation, structure, and procedure of the International Criminal Court, as well as important international legal precedents set by the Tribunals, it is important to recognize the fact that the above examples of *ad hoc* Tribunal contributions to international criminal law are only a few of the countless cases which have served to influence and encourage the establishment of the permanent ICC under the Rome Statute. However, for all of the important similarities between the *ad hoc* tribunals and the ICC, a number of substantial differences also exist between the institutions, largely influenced by retrospective examination of the *ad hoc* Tribunals’ structural and trial experiences when drafting the ICC Rome Statute. One of the most obvious differences between the ICC and its *ad hoc* predecessors is the difference in structure and oversight of the UN-run *ad hoc* Tribunals and the International Criminal Court, created as a relatively autonomous international organization under an independent treaty. Furthermore, while a readily apparent difference between the two sets of institutions exists, it is essential to understand the fact that the *ad hoc* tribunals of the ICTY and ICTR were established *ex post facto*, as temporary institutions with specific geographic and temporal limitations on jurisdictional power. The International Criminal Court, however, is now a permanent international legal body. It will not deal with

⁷⁰ *Rome Statute*, article 65, section (1).

crimes that have already been committed, but will deal with the present and future commission of crimes as a standing Court as of 1 July 2002. The permanence of the ICC as a mechanism of holding individuals accountable for the commission of crimes against humanity, war crimes, and genocide is hoped to act as a deterrent for future perpetration of such crimes. Furthermore, the permanent nature of the ICC is a direct result of the fact that, while the 1993 and 1994 *ad hoc* tribunals have been viewed by the international community as relatively successful in their goals of holding individuals accountable for the commission of international crimes, the repeated establishment of entire international legal justice systems—from scratch each time—for such trials has been extraordinarily time-consuming and expensive. The ICC, therefore, was established in recognition of the necessity for similar international justice systems to bring the world's worst international criminals to justice, while improving upon the long start-up periods and high operational costs associated with the ICTY and ICTR.

Whether referring to the international war crimes trials taking place in the aftermath of WWII, or the *ad hoc* criminal tribunals established during the 1990s, it is apparent that each of these systems of international criminal justice has established important legal precedents leading to the establishment of the permanent International Criminal Court. Through trial and error of various structural and procedural legal systems, the recent history of international criminal justice has encountered trials which have exhibited varying levels of success and international approval. Whatever the outcome, however, each of these bodies, and the associated trials and experiences, has contributed to the establishment of the current norms of international criminal and humanitarian law. The collective experiences of the IMT, IMTFE, ICTY, and ICTR have encouraged a continuous growth in international interest in humanitarian law, human rights, and the necessity for retributive justice and

accountability in the field of international criminal law. The establishment of a permanent International Criminal Court was undoubtedly at least partially born of these predecessors. As such, the international community has, with few exceptions, embraced the ICC, and the permanent system of international criminal justice established therein, as a necessary step forward in deterring the future commission of crimes against humanity, war crimes, and genocide by creating a permanent system of international justice based on the principles of individual accountability and human rights.

3. THE UNITED STATES AS AN INTERNATIONAL ANOMALY: AMERICAN EXCEPTIONALISM & THE ICC

Although the United States actively engages in drafting multinational treaties to constrain unbecoming conduct of individuals and nations, it insists on singling itself and its nationals out from enforced compliance with those norms. The United States claims a right to be above the dictates of international law. American exceptionalism has thus become the name of the game.¹

Throughout its short history, the International Criminal Court has endured a strange and often stressful relationship with the United States. Initially an important proponent for the establishment of a permanent international criminal justice system, the United States withdrew much of its support for the ICC during 1998 Rome Conference negotiations. Subsequently, the foreign policy decisions of the United States' Clinton administration as related to the Court, as well as those of his successor, George W. Bush, have caused the United States to become the center of substantial international criticism.

¹ Johan D. van der Vyver, "International Human Rights: American Exceptionalism: Human Rights, International Criminal Justice, and National Self-Righteousness," *Emory Law Journal* 775 (2001); Lexis-Nexis internet database, available online at <http://www.lexis-nexis.com>.

The controversy that the US policy related to the ICC has produced is not unique, however. Rather, the United States has historically made numerous highly contentious decisions regarding foreign policy and international relations, in particular related to human rights and related international treaties. As a result of such decisions, states worldwide have repeatedly raised questions as to why the United States has historically been so boldly willing to stand alone as a unilateral actor in an increasingly global system of power politics often necessitating multilateral actions, and as to what motivates the United States to stand steadfastly, defiantly, independently and, some would say, arrogantly on foreign policy issues. The answers to this query, many would argue, lie in the theory of American exceptionalism.

French aristocrat Alexis de Tocqueville was the first to coin the term “American exceptionalism” in the text *Democracy in America*,² his famed work of 1835, in which he sought to examine the reasons for the United States’ success in establishing a democracy out of revolution while efforts to do the same in France then remained futile.³ After its appearance in the vernacular, the concept of American exceptionalism was initially examined in an effort to determine why the United States was—and still is—the only industrialized state with a significantly weak “working-class radicalism,” reflected in the lack of socialist political movement.⁴ Since its initial preoccupation with the void of socialism within the United States, American exceptionalism has developed into a full-fledged political theory, seeking to explain the political, economic, social, and cultural characteristics of American society in comparison to those of various states worldwide. The theory of American exceptionalism holds that the United States has possessed qualities that have caused the state to fundamentally differ from its international counterparts since its recognition as a state by

²Samuel Krislov, “American Federalism as American Exceptionalism,” *Publius* 31.1 (2001): 9.

³ Seymour Martin Lipset, *American Exceptionalism: A Double-Edged Sword* (New York: W.W. Norton, 1996): 17.

⁴ *Ibid.*, 33.

the international community. The domestic and international perception of the United States as “exceptional,” however—even in de Tocqueville’s initial description of American society as such—is not intended to suggest that America is a “superior culture.” Rather, the term is used to note that the United States is “qualitatively different” from its international counterparts,⁵ a belief that has consequently affected the manner in which the US has enacted domestic and foreign policies. Whether defining the United States as a “superior culture,” or simply “qualitatively different,” the effects of American exceptionalism can be seen in the United States’ repeated implementation of foreign policies that defy international norms and customary international law. Indeed, this exemplifies the way in which the US views international law and customs as inapplicable to the US because of the “exceptional” nature of the United States. Two ways in which this exceptionalism has manifested itself are through the extraordinary level of US international military and political involvement, as well as through the moral roots from which the US developed and its implications for human rights and US foreign policy.

AMERICA’S EXCEPTIONAL MILITARY MIGHT

In recent years, the United States has invoked claims of American exceptionalism based on the unparalleled military power and international presence of the US. The extraordinary level at which the United States is currently involved in the international community, although being touted as beneficial to the international community by the US, has caused significant controversy and criticism worldwide. Former Ambassador-at-Large for War Crimes Issues David Scheffer explained the relationship of widespread international

⁵ Ibid., 18.

military involvement to the theory of American exceptionalism, as well as to unavoidable international scrutiny and controversy:

The United States has special responsibilities and special exposure to political controversy over our actions. This factor cannot be taken lightly when issues of great international peace and security are at stake. We are called upon to act, sometimes at great risk, far more than any other nation. This is a reality in the international system.⁶

As a result of the United States' recognition of the fact that its exceptional levels of international military involvement, and the inevitable controversy surrounding high profile military engagement, have the potential to leave US nationals highly exposed to the realm of international criminal justice, the United States has recently attempted to wholly remove US armed forces from the reach of international jurisdiction. Such clear efforts to exempt United States armed forces and official personnel from the jurisdiction of customary international law and international humanitarian law are exemplified by US negotiations regarding the structure and jurisdiction of the ICTY and, most notably, the ICC.

Declarations of American exceptionalism in relation to the recent widespread international military and humanitarian involvement of the United States center on assertions such as the following, provided by Yale Law Professor Ruth Wedgwood during Congressional debate regarding the potential ICC jurisdiction over US nationals:

As Americans, we do have unique concerns. The United States has global security obligations that no other country will undertake—in our steadfast commitments in Europe, the Middle East, and Asia. We have over 200,000 troops stationed abroad. We spend more money on international security than Germany, France, the United Kingdom, Italy, Spain, Belgium, the Netherlands, Canada, Australia, Japan, and South Korea combined. We pull the heavy load in peace enforcement and anti-terrorist actions, as well as participating in peacekeeping and freedom of navigation exercises. Each time the United Nations has called for nation states to use force against an aggressor, the United States has been at the center of the coalition. We are

⁶ David J. Scheffer, "The United States and the International Criminal Court," *The American Journal of International Law* 93.1 (1999); JSTOR internet database, available online at <http://www.jstor.org>, accessed 6 October 2003.

the only nation capable of sustained transcontinental operations, able to make unique contributions in airlift, logistics, and intelligence. The deterrent power of American military force provided the backbone of the free world during the Cold War, and is still the spine of post-Cold-War security. But the unique nature of American power, and its long reliability, means that at times, even our friends take us for granted.⁷

In recent years, the United States has clearly deemed the powerful role that it plays in the global political sphere to be highly important to furthering peace, security, and human rights. As a result, having recognized the extraordinary power that the US has in the international community, the United States government has made a concerted effort to protect its citizens—military and official personnel, in particular—from the realm of international jurisdiction, in order to allow for a continuation of policy and current international military and humanitarian aid. In addition to the United States' view of itself as unequalled in military strength and importance, the US has repeatedly refused to comply to international law because the US essentially feels that its moral roots supercede the morals and laws of the international community.

Historically, the United States has claimed to be a champion of advancing international respect for human rights, discussed in further detail below. The United States has been particularly active in creating systems of international criminal justice, having driven the movement toward the creation of the *ad hoc* tribunals following WWII, the more recent ICTY, ICTR, as well as the permanent International Criminal Court. However, despite historical precedents and the early support the US provided for the ICC, when faced with the reality of the Court and its widespread jurisdictional powers, the United States immediately reversed its support for the ICC upon the realization that its own citizens would

⁷ US Congress, Senate, "The International Criminal Court: Protecting American Servicemen and Officials from the Threat of International Prosecution," Hearing before the Committee on Foreign Relations, 106th Cong., 2nd sess., 14 June 2000; available online at http://216.239.41.104/search?q=cache:o17HHyM46IUJ:www.amicc.org/docs/SFRCJune14_00.pdf+%22international+criminal+court%22+and+%22realism%22&hl=en&ie=UTF-8, accessed 17 April 2004.

be directly subject to its jurisdiction and law. In doing so, not only did United States implement a high-profile policy of non-ratification of the Rome Statute, but the US has taken the additional steps of enacting domestic legislation and international bilateral treaties that are intended to further restrict the level of ICC jurisdiction over US nationals in the form of the *American Service-Members' Protection Act* and Article 98 Bilateral Immunity Agreements, as will be discussed in detail in the following chapter. Indeed, United States policy toward the ICC shifted from having provided clear and strong support for the ICC in order to ensure the universal respect for human rights to the exhibition of indisputable contempt for the ICC and its attempts at holding US citizens accountable for their actions on states parties' territories. Such a drastic change in policy, resulting in US abstention from the Rome Statute, clearly demonstrates the principles behind American exceptionalism, and the desire for the United States to be exempt from international law and jurisdiction because of those characteristics that the US perceives as having created its society as anomalous in the international political sphere.

The bulk of the United States' discontent with the ICC, as previously discussed in chapter one, was publicly stated to be related to misgivings regarding the potential jurisdictional power of the ICC over the US, despite its not being a state party to the Rome Statute. The United States claimed that exemption from ICC jurisdiction was necessary under the guise that, by holding the United States military and citizenry accountable to international law under the jurisdiction of the Court, US armed forces would face risk unfair prosecution resulting from politicization of the ICC. As a result of the politicization, the United States felt that its citizens would be unfairly targeted for ICC prosecution, rendering the international legal body illegitimate in the international arena for its potential ability to

prosecute those individuals associated with peacekeeping missions on purely political grounds. Fear of such a situation arising was expressed as follows:

The concern of the United States in the ongoing negotiations concerning the permanent international court is to make sure that the court knows how to exercise its power wisely...The permanent court is designed to target the atrocities of the bloody civil conflicts of our age, not to interfere with the legitimate exercise of military power for the protection of our common interests. Even a schoolboy can distinguish between the atrocities committed by rogue actors, and the legitimate military operations that sustain our security.⁸

As related to the previous testimonies regarding the absolute importance of US military involvement in maintaining the stability of world affairs, the United States held that by subjecting US officials and military personnel to the jurisdiction of the ICC, concern of political prosecution would fundamentally change the future of US foreign policy, to one that first and foremost protects its own citizens from the jurisdiction of international law. The United States has touted its international military and political involvement as unmatched in scope or importance, a reduction which will result from ICC laws, alluding to the fact that a reduction in US military presence worldwide, would prove detrimental to the entire international community.

As noted in chapter two, the United States has historically been supportive of the creation of an International Criminal Court, as well as its international judicial predecessors, and was instrumental in the establishment of such institutions,⁹ but immediately withdrew its support for the current permanent ICC upon recognizing that the Court could potentially exercise jurisdiction over US nationals. Claiming that jurisdictional exemption from the ICC would be necessary in order for the United States to continue to function in its role as

⁸ Ibid.

⁹ van der Vyer.

superpower and important provider of international humanitarian and military aid, the US was attempting to present itself as “exceptional” in terms of its role in the international political arena in order to explain why the United States should not be subject to the same international legal standards or jurisdictional provisions as the rest of the global community.

AMERICA’S EXCEPTIONAL RIGHTS CULTURE

In explaining the United States’ view of its own exceptional history as rooted in a culture emphasizing the recognition of rights, David Forsythe observed, “from the early settlers in New England to the rhetoric of Ronald Reagan in the 1980s, the United States has seen itself not as an ordinary nation but as a great experiment in personal liberty that has implications for the planet.”¹⁰ Indeed, the United States has, since its move to statehood in the late 18th century, emphasized the necessity and recognition of personal freedoms for all of its peoples.¹¹ The ability of the American people to defend the right of integrity and independence of their colonized territory set important precedents and ideological norms for the United States as a state based on freedom from oppression, tyranny, and despotic rule, as well as on the importance of individual opportunity and sovereign free will. As a result, on emergence from the rule of the British monarchy, the founding fathers of the United States created a constitutional system of government that clearly outlined the principles of the new state as those that, first and foremost, recognized the freedoms and rights of all of its

¹⁰ David P. Forsythe, “Human Rights and Foreign Policy in Comparative Perspective,” *Human Rights in International Relations* (Cambridge: Cambridge UP, 2000): 141

¹¹ It is difficult to dispute the fact that, at the time of the adoption of the United States Constitution, even with the best of intentions of creating a democratic and free society, the rights and freedoms theoretically bestowed upon the entire population were, in practice, limited almost solely to the white male population; however, throughout the course of the United States’ history, the Constitution and ideals of the state have evolved in such a way as to allow for a relative increase in equality for all citizens in the eyes of the state and the law.

peoples. The members of the Second Continental Congress made clear the desire to establish the United States as a state based on the recognition of such freedoms:

We hold these truths to be self-evident, that all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness. That, to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed; that whenever any form of government becomes destructive of these ends, it is the right of the people to alter or to abolish it, and to institute a new government, laying its foundation on such principles, and organizing its powers in such form, as to them shall seem most likely to effect their safety and happiness.¹²

In essence, this statement—the preamble to the United States Declaration of Independence—broadly defined the fundamental rights to which humans were believed to be entitled, with regard to US citizens in particular, immediately upon establishing the United States as a sovereign state. In a similar vein, the United States Constitution, on which the entire governing system of the United States was based, was fitted with ten amendments comprising the Bill of Rights, intended as a method of more specifically defining the fundamental rights guaranteed to all US citizens.

Since this early period of the United States' history, the emphasis placed on equality, liberties, and rights rhetoric in American society has changed little. As a result of the United States' long-standing emphasis on human rights and freedoms, the global perception of the US is one of a society that emphasizes the ideals of opportunity, personal liberties and protections, and sovereign free will. Individuals worldwide have turned to the United States for opportunity and freedom, recognizing the US as representative of personal liberties and rights.¹³ The international and domestic perceptions of the United States as a “beacon of

¹² US, Second Continental Congress, *The United States Declaration of Independence*, 1776.

¹³ Forsythe, 141.

freedom to the world”¹⁴ reflect the strength of the moral principles that have been embraced and embodied as a part of the United States’ national identity and ideology.¹⁵

Having disseminated such a moral and rights-based perception both domestically and internationally, the United States eventually came to view its roots as contributing to its exceptional nature in the field of human rights. This widespread conception of the United States led to the US declaring itself and its citizenry to be “exceptional,” not only in the qualities that define the state and its populace, but exceptional to the extent of deserving exemption from international human rights law as a result of the pre-established moral norms. US foreign policies that have been implemented and successful in demonstrating such an exceptional human rights foundation have been widely criticized, however, by the international community. Accusing the United States of setting double standards in terms of international human rights laws and norms, the international response to the manner in which the US relates to the international community has recently been reflected in growing frustration and lack of respect, while the US continues to maintain claims of American exceptionalism. International legal and human rights scholar Michael Ignatieff explains:

Americans don’t see it this way, but the country with the most puzzling human rights record in the world is their own. The global ascendancy of human rights would not have happened without American leadership, yet the United States refuses to comply with important international rights covenants. Even as it criticizes the human rights records of dozens of countries, the United States resists when its own human rights performance—on capital punishment, for example—is called into question.

This is the hypocrisy that America is often accused of, by its foes and sometimes by its friends. For most Americans the charge is insulting: Why

¹⁴ Ibid.

¹⁵ Lipset, 19; herein, Lipset refers to what he calls the “American Creed,” the ideology on which the American people have based their national identity—as opposed to the common culture or history upon which states have built their nationalism; he describes the American Creed in five terms: “liberty, egalitarianism, individualism, populism, and laissez-faire,” all of which can be traced to the roots of the US and its founding upon a political ideology that emphasized democracy, rights, and freedoms.

should the land of Thomas Jefferson and Abraham Lincoln allow others to lecture it about rights?¹⁶

Within this explanation of American exceptionalism, it is possible to view the fundamental arguments related to the theory: that United States' deeply moral historical roots have greatly impacted the culture and ideology that define the state today, subsequently creating an American society that views itself as being elevated above international legal and human rights standards. In spite of the international recognition of the United States as a society centered on a nationalistic identity based on opportunity, equality, and rights, which has arguably benefited US citizens on the whole, the "exceptional" rights-based and moral nature of the United States has often impacted US international human rights policy negatively. Indeed, the United States has pointedly distanced itself from the global norms and views on human rights by exempting itself from important international human rights treaties, while simultaneously encouraging the rest of the international community to adhere to international humanitarian law, as well as the standards that are claimed to be exemplified by the US and its moral history.

American Exceptionalism, Exemption, and Abstention

In examining the treaties and organizations from which the United States has abstained, it is necessary to understand the US definition of human rights in comparison to that of much of the rest of the world as *one* explanation for its abstention. From its inception, the United States has focused on human rights in terms of their civil and political components. This was exemplified from an early date in the inclusion of rights guaranteeing

¹⁶ Michael Ignatieff, "No Exceptions? The United States' pick-and-choose approach to human rights is hypocritical. But that's not a good reason to condemn it," *Legal Affairs* (May/June 2002); accessible online at http://www.legalaffairs.org/issues/May-June-2002/review_ignatieff_mayjun2002.html, accessed 14 April 2004.

personal rights and freedoms pertaining primarily to the civil and political aspects of life in the United States Constitution's Bill of Rights.¹⁷ Despite guarantees of religious, political, and legal freedoms for its citizens, the Bill of Rights makes no concrete mention of the economic, social, and cultural rights that the majority of the international community includes in the definition of human rights. Indeed, the International Bill of Rights—comprised of the UN Charter, the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social, and Cultural Rights (ICESCR)—sets forth a much broader definition of human rights than that generally associated with US domestic policy.¹⁸ Globally there is far more emphasis on the guarantees to adequate housing, healthcare, and social welfare that economic, social, and cultural rights provide than one would ever expect if exposed only to United States' human rights rhetoric.¹⁹ The inherent differences in views on human rights existing between the United States and the international community has been the cause of many controversial human rights foreign policies implemented by the US. Often, the justification behind the United States' minimal support of, or unequivocal abstention from, key international human rights treaties has been rooted in the following five principles:

1. The United States will not undertake any treaty obligation that it will not be able to carry out because it is inconsistent with the United States Constitution.
2. United States adherence to an international human rights treaty should not effect—or promise—change in existing U.S. law or practice.
3. The United States will not submit to the jurisdiction of the International Court of Justice to decide disputes as to the interpretation or application of human rights conventions.

¹⁷ Forsythe, 141.

¹⁸ Ibid.

¹⁹ Jack Donnelly, *International Human Rights* (Boulder: Westview, 1998): 24.

4. Every human rights treaty to which the United States adheres should be subject to a 'federalism clause' so that the United States could leave implementation of the convention largely to the states.
5. Every international human rights agreement should be 'non-self-executing'.²⁰

Essentially, these standards set by the United States Congress, regarding the manner with which international human rights treaties would be dealt, have provided further evidence of the United States' employment of American exceptionalism. Through such provisions, the US has successfully developed an image of itself as a state that will exempt itself from important and widely accepted human rights treaties if they require any action or amendment to be taken by the United States—a policy that directly contradicts the fundamental concepts of international treaties, in which it is expected that when a state signs a treaty, it is to amend its domestic law to comply with the treaty's superceding international law. This policy, in combination with the United States' continued efforts at international democratization and recognition of human rights, serves to support the concept of American exceptionalism and the United States' view of itself as an exceptional champion of morals and human rights in the international arena.

Despite the United States' holding itself in the highest esteem in terms of its status of human rights and foreign policy, in the case of several key human rights treaties and organizations, the US has become the focus of intense international scrutiny regarding the methods employed to avoid the scope of international jurisdiction. The United States' primary means of avoiding commitment to the international community have been through

²⁰ Louis Henkin,, "U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker," *The American Journal of International Law* 89.2 (April 1995): 341; the term "non-self-executing" is intended to indicate that no one is able to sue for violations of the treaty's provisions: Douglas Cassel, "The United States and the Torture Convention: A Useful Dialogue," Center for International Human Rights, *World View Commentary* 69 (24 May 2000); available online at http://www.law.northwestern.edu/depts/clinic/ihr/display_details.cfm?ID=252&document_type=commentary

implementation of associated reservations, understandings, and declarations (RUDs),²¹ delayed signatory or ratification, blatant noncompliance, and non-ratification of a number of important treaties.²² In assessing these methods in relation to specific international treaties, it is readily apparent the extent to which the United States has attempted to exempt itself from the norms of international law based on claims of its purported exceptional status. Through such actions, the United States has repeatedly undermined the ideals and goals of key international and human rights treaties.

The United States signed the Convention on the Prevention and Punishment of the Crime of Genocide only three days after its 9 December 1948 General Assembly adoption.²³ Having played a leading role in drafting the Convention following the genocidal horrors of WWII, both the international and domestic community expected an immediate ratification to follow. Instead, the Genocide Convention was faced with political roadblocks that delayed US ratification by nearly 40 years, until 25 November 1988. Additionally, at the time of ratification, the US attached a series of RUDs that exempted the United States from the jurisdiction of the International Court of Justice (ICJ) for crimes of genocide despite the fact that “this directly undermined the act of ratifying the Convention, which is intended to supply *advance* consent and to empower the ICJ to interpret and apply the Genocide Convention without requesting a state’s permission.”²⁴ Senator Jesse Helms, long-time chair of the Senate Foreign Relations Committee, which must approve of treaties before they go to the full Senate for ratification, described the “success” of the RUDs in restricting the

²¹ As defined at http://people.hofstra.edu/staff/lisa_a_spar/intlfam/intlfam.htm, reservations are attachments a state may make to a treaty that “exclude or change [the] legal effect of certain provisions;” understandings are other statements that a state may make regarding the treaty, while declarations are those attachments that are in reference to the “intention of the state party in applying terms” contained in a given treaty.

²² Harold Hongju Koh, “Foreword: on American Exceptionalism,” available online at <http://www.questia.com/PM.qst?a=o&d=5001997668>, accessed 15 April 2004.

²³ George A. Finch, “The Genocide Convention,” *The American Journal of International Law* 43.4 (Oct, 1949): 732.

²⁴ Samantha Power, “The United States and Genocide Law,” in Sewall and Kaysen, 166.

power of the Genocide Convention over US nationals when stating: “[T]he treaty has been defanged in terms of the dangerous defects in its original version....[T]his Genocide Convention upon which we are about to vote is purely symbolic. We might as well be voting on a simple resolution to condemn genocide—which every civilized person does.”²⁵ While Senator Helms may have regarded this weakening of the Convention as a positive protection of US power and moral ideals, international perception of the RUDs was substantially more negative, deeming them to have “combined to reduce the U.S. signature to a hortatory expression of disapproval for the crime,”²⁶ and “[gutted] the treaty of any meaningful effect.”²⁷

The Convention on the Prevention and Punishment of the Crime of Genocide is by no means the only example of the United States applying controversial RUDs to international conventions. Additional examples of this practice include the International Convention on the Elimination of all Forms of Racial Discrimination (CERD), the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT), and the International Covenant on Civil and Political Rights (ICCPR), treaties to which the United States has attached such a great number of substantial reservations, understandings, and declarations so as to render their belated ratifications essentially meaningless. In regard to these conventions, the United States passed RUDs that were intended to have the same result as those associated with the Genocide Convention—to “deprive the Convention[s] of [their] enforcement life-line[s],”²⁸ as well as to restrict the definitions of the crimes contained in the Conventions to mirror the scope of the United States’ definitions.

²⁵ Ibid.

²⁶ Ibid.

²⁷ van der Vyver, 775.

²⁸ Ibid.

Further exemplifying the United States' exceptionalist human rights policies, there are several major treaties that the United States has thus far steadfastly refused to ratify, despite widespread international support. As of the date of this writing, it appears as if the United States has no intention of ratifying the International Covenant on Economic, Social, and Cultural Rights (ICESCR)—one of the most fundamental and widely-accepted human rights treaty, comprising a portion of what is known as the “International Bill of Rights”—nor the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), despite the strong international support for these treaties.²⁹ Additionally, the US's non-ratification of the 1989 Convention on the Rights of the Child has proven to be particularly contentious within the international political arena. Currently, only two states worldwide have not ratified the Convention on the Rights of the Child: the United States and Somalia—which, incidentally, since 1992 has not had a government in place capable of ratifying the treaty.³⁰ Each of the above examples, whether exemplifying US overuse of RUDs or non-ratification of human rights treaties, has served to prove that the United States' foreign policy is based on the US domestic perception that the United States remains “exceptional” in the field of human rights. Indeed, in spite of all of the purported military, financial, and political aid that various administrations have dedicated to the advancement of universal recognition of human rights and international criminal justice, the United States has taken any and all means necessary to exempt its citizens from international jurisdiction related to fundamental human rights violations. Indeed, the case of the United States' abstention from the Rome Statute of the International Criminal Court is simply one more example of the United States' continued efforts to exempt itself from the norms of international law on the basis of its purported exceptional status.

²⁹ Ibid.

³⁰ Ibid.

MORAL AMERICAN EXCEPTIONALISM AND THE ROME STATUTE

US claims to exceptionalism in relation to the ICC have been made primarily in two different ways. Throughout the Rome negotiations, the overtly public US claims of exceptionalism were rooted in the US's unique status as the world's only superpower state, the high level of US military aid deployed throughout the world, and the related need for special exemption from international jurisdiction in order to ensure the perpetuation of such important humanitarian military intervention. Simultaneously, however, it is possible to see the way in which the public claims of US exceptionalism were simply part of the United States' more discreet continued effort to fully remove itself from the norms and jurisdiction of international law on the basis of US claims of moral exceptionalism and the related unwillingness to face judgment on human rights issues by the international community.

The United States' perception of itself as deserving of exception and exemption from the ICC as a result of the prevalence of international involvement comprised the public aspect of American exceptionalism presented by the US throughout Rome negotiations. Indirect references to the traditional theory of American exceptionalism rooted in the moral foundations of American rights culture—and the subsequent desire of the United States to exempt itself from the judgment of international law—were also underlying the open claims referencing the US's purported “exceptional” military and political intervention in the global sphere and the need for protecting such actions. Indeed, the United States' abstention from the Rome Statute of the International Criminal Court, as well as domestic legislation and international treaties intended to further distance the US from the ICC, seems likely to have been based on United States' democratic structure and emphasis on human rights and

freedoms as the unspoken justification for historical attempts to remove itself from the realm of international law and jurisprudence.

Resulting from the US perception of its state as absolutely exceptional in terms of morals and history, US officials were adamant that the United States should not have to submit itself to judgment by other states, particularly those with markedly questionable human rights records. The US remained determined that, particularly as a result of the extraordinary international involvement of the United States, if politicization of the Court were to occur, that US citizens would be subject to trial for questions of military doctrine that US officials felt should not be judged by the rest of the international community. The concern over US military personnel facing such judgment was voiced during Congressional debates regarding potential US policy toward the International Criminal Court:

[In terms of] the United States' concern about protecting American GPs, I think any of us can make the distinction between the kind of atrocities that Foday Sankoh commits in Sierra Leone—when he goes lopping off people's forearms and their legs, including little girls and women and civilians of all stripe—the kind of atrocities Foday Sankoh commits as quite a different thing from the sometimes contentious and close cases about military doctrine...On those kinds of questions, close questions of doctrine, a criminal court has no business.³¹

In addition to the self-righteous stance the US took in defending its military doctrine and international military presence, the United States was highly contemptuous of the fact that, were US nationals to be indicted by the ICC and subsequently face trial, the accused would face judgment by members of the international community representing states that the United States viewed as having marginal records in terms of observation of fundamental human rights. Indeed, Johan D. van der Vyver, international legal and human rights scholar, noted during the same Congressional debates:

³¹ US Congress, Senate, "The International Criminal Court: Protecting American Servicemen and Officials from the Threat of International Prosecution."

The Senate [determined] that it would not ratify a treaty establishing a court “which permits representatives of any terrorist organization, including but not limited to the Palestine Liberation Organization, or citizens, nationals or residents of any country listed by the Secretary of State...as having repeatedly provided support for acts of international terrorism, to sit in judgment on American citizens.”³²

The United States’ treatment of the Rome Statute is a case reminiscent of those described above—that is, similar to the way in which the United States handled the international Conventions on Genocide, the Rights of the Child, the Elimination of All Forms of Discrimination Against Women, Torture, and the International Covenant on Social, Economic, and Cultural Rights. Indeed, international frustration has grown out of the fact that the United States has described the ICC as an international body that could be highly beneficial to the entire international community, while itself steadfastly rejecting the Rome Statute and any extension of ICC jurisdiction over US citizens on the grounds of the United States’ exceptional ideals of morality and rights for which it does not want to be subject to international scrutiny or law. Indeed, the conclusion of the Rome Conference, and the United States’ concurrent unilateral rejection of the ICC, resulted in

growing resentment of the US government’s unwillingness to subject itself to international human rights law. The cheers heard in the Rome conference hall partly reflected indignation at the US government’s arrogance in dealing with human rights, particularly its belief that ‘universal’ international human rights law applies only to other governments, not to itself. The administration cannot afford to be indifferent to this growing resentment. Anger over US highhandedness on human rights can only make American allies less willing to compromise on other matters of importance to the United States.³³

Whatever the international response, the United States has not eased back on arguments of American exceptionalism as necessitating US impunity from ICC jurisdiction. Indeed, the lengths to which the United States has gone to avoid the jurisdiction of the International

³² van der Vyer.

³³ Kenneth Roth, “The Court the US Doesn’t Want,” *The New York Review of Books* 45.18 (19 November 1998); available online at http://www.nybooks.com/articles/article-preview?article_id=676.

Criminal Court are completely unprecedented in the modern history of international criminal law and international human rights law. Not only has the US steadfastly refused to ratify the Rome Statute, but the United States has additionally “unsigned the treaty”—a historical first—as well as enacted domestic legislation and international treaties that some believe go so far as to wholly undermine the fundamental purpose of the Rome Statute.

4. THE ANTI-ICC UNITED STATES:

DOMESTIC LEGISLATION AND INTERNATIONAL AGREEMENTS

This is to inform you, in connection with the Rome Statute of the International Criminal Court adopted on July 17, 1998, that the United States does not intend to become a party to the treaty. Accordingly, the United States has no legal obligations arising from its signature on December 31, 2000. The United States requests that its intention not to become a party, as expressed in this letter, be reflected in the depositary's status lists relating to this treaty.¹

Largely as a result of United States' animosity towards the International Criminal Court created at the Rome Conference in 1998, the US has remained publicly critical of the Court's role in the international community and has refused to lend any aid or support to the ICC, despite its widespread international acceptance. While the very refusal of the United States—particularly under the Bush administration—to abstain from any involvement with the ICC has raised international controversy over the unilateral and exceptional nature adopted by the US government in its foreign policy, this controversy was elevated to

¹ "U.S. Notification of Intent Not to Become a Party to the Rome Statute," *American Journal of International Law* 96.3 (Jul., 2002): 724.

extraordinary levels by the unmistakably anti-ICC measures employed to block the jurisdiction and effectiveness of the Court. Whether through economic and military threats or international negotiating efforts, the United States has made numerous public and deliberate efforts not only to withdraw its own support for such an international legal body, but to additionally undermine the Court's jurisdiction and legitimacy within the international community.

Prior to discussing the extremes to which the United States has gone to limit the power of the International Criminal Court, it is necessary to reexamine the precise threats that the US viewed the ICC as posing to its sovereignty and power. Essentially, the primary reasons for the United States' abstention from the International Criminal Court can be most closely linked to four types of perceived threats: threats of US prosecution based wholly on the politicization of the ICC; threats to US international involvement and unilateral foreign policy; threats posed to the power of the state as a whole and its status as the only international superpower; and threats to the United States' sovereign judicial power. Although each of these may be broken down into a separate reason for the United States' objection to the International Criminal Court, they are also each inextricably linked to one another in that they represent the United States' concerns regarding the potential prosecution of US nationals by the ICC, whether on legitimate or wholly political grounds. Long having been in a position of extraordinary military involvement in the international community, the US seemingly views the ICC—and perhaps any strong international body which would attempt to claim jurisdiction over US citizens—as a threat to the future of US military aid and humanitarian intervention. As a result, the United States claimed that it would prove necessary for US nationals to be exempt from ICC jurisdiction in order to guarantee a continuation of US international aid programs, helping to explain the US's clear

attempts to minimize the power and legitimacy of the Court's jurisdiction over non-states parties.

At an introduction to the 2000 United States Senate Hearing before the Committee on Foreign Relations regarding the then-proposed International Criminal Court, Chairman Jesse Helms asserted that “With the establishment of a prominent International Criminal Court [ICC] drawing nearer and nearer, the fact that American servicemen and officials may one day be seized, extradited and prosecuted for war crimes is growing. And indeed, that day may already have arrived.”² Having reiterated the perceived necessity for the US to undertake measures to avoid prosecution and jurisdictional coverage at the hands of the ICC, Senator Helms proceeded to introduce and describe one of the most prominent and contentious anti-ICC motions: The *American Service-Members' Protection Act* (ASPA).

THE AMERICAN SERVICE-MEMBERS' PROTECTION ACT

Introduced to the United States Congress in 2000—two years after the conclusion of the Rome conference and prior to the US's brief stint as a Rome Statute signatory—the ASPA was passed in 2002, as Title II of the “Supplemental Appropriations Act for Further Recovery From and Response to Terrorist Attacks on the United States.” Within this span of two years, the United States signed the Rome Statute, underwent a change in administration, experienced the September 11th, 2001 terrorist attacks, and “unsigned” the Rome Statute, unequivocally rejecting United States cooperation with the International Criminal Court. Throughout this time, the proposed American Service Members' Protection Act was viewed by US officials as a method intended to isolate the United States servicemen

² US Congress, Senate, hearing before the Committee on Foreign Relations “The International Criminal Court: Protecting American Servicemen and Officials from the Threat of International Prosecution,” 14 June 2000, 106th Cong, 2nd sess. (Washington: GPO, 2000): 1.

and select nationals from any potential ICC jurisdiction, so as to allow for a continuation of strong international involvement and often-controversial foreign policy measures without threat of prosecution or politicization. The bill was eventually passed in 2002, following official public statements of US discontent with the parameters of jurisdiction outlined for the ICC. Exemplary of this sentiment, one of the first statements within the ASPA refers to the fact that

it is a fundamental principle of international law that a treaty is binding upon its parties only and that it does not create obligations for nonparties without their consent to be bound. The United States is not a party to the Rome Statute and will not be bound by any of its terms. The United States will not recognize the jurisdiction of the International Criminal Court over United States Nationals.³

Directly following this assertion, the ASPA includes key provisions that would explicitly demonstrate to the international community the extent to which the United States government is unwilling to cooperate with the ICC. The ASPA goes far beyond declaring the United States' desire to ignore ICC jurisdiction over US nationals, also setting forth policy with the clear intent to pressure other states to drop their support for the ICC at the risk of losing important United States financial and military support.

The Senate Foreign Relations hearings regarding the International Criminal Court and the proposed American Service Members' Protection Act resulted in statements of contempt from some members of the United States Congress. Again in a cynical reference to the ICC, Senator Jesse Helms criticized the Court, as well as the Clinton administration's policy toward it, when stating:

Secretary Albright has declared that the United States intends to pursue a 'good neighbor' policy with the ICC. Now then, I want to know how can we be a good neighbor to a court that insists on its so-called right to prosecute American servicemen and officials, even though the United States has

³ *ASPA*.

refused to join the court. If other nations are going to insist on placing Americans under the ICC's jurisdiction against her will, then Congress has a right and responsibility to place a cost on their obstinacy, and to ensure that our men and women in uniform are protected.⁴

While such feelings of contempt toward the ICC were by no means unanimous in the United States Congress in 2000, it is apparent through public statements such as that of Senator Helms that there were concerns about the legitimacy and jurisdiction of the Court and its power over United States nationals. Yale University's Dr. Jeremy Rabkin even ventured so far as to bluntly refer to the International Criminal Court as "a bad idea"⁵ in his testimony before the Senate committee. However, in spite of this early opposition to the ICC, and the related advocating for the passage of the ASPA, there was enough support for the ICC and its goals that the ASPA was rejected by the Clinton Administration. Former Ambassador-at-Large for War Crimes, and Head of the U.S. Delegation to the United Nations Preparatory Commission for the International Criminal Court, David J. Scheffer, expressed the official opposition to the ASPA, and the anti-ICC measures it contains, to the House International Relations Committee as follows:

...As the chief negotiator for the United States on the ICC Treaty of July 17, 1998, and its supplemental agreements still being negotiated in the ICC Preparatory Commission, I believe that this legislation will cripple our ability to achieve our common objective. Indeed, [the ASPA] will worsen our negotiating position at the very moment when we stand the best chance of securing agreement with other governments to protect our soldiers and government officials and continue our support for international justice.

The Administration opposes this legislation. [The ASPA] infringes on the President's constitutional authority as Commander-in-Chief and to conduct foreign relations. It is counter productive not only because of its direct impact on critical negotiations relating to the International Criminal Court, but also because [the ASPA] would seriously damage U.S. national policy objectives. It would hold national security and foreign policy interests hostage to the fate of our relationship with governments that support the

⁴ US Congress, "The International Criminal Court: Protecting American Servicemen and Officials from the Threat of International Prosecution," 12.

⁵ Ibid., 9.

ICC and to the willingness of other members of the Security Council to immunize our armed forces personnel from ICC jurisdiction.⁶

Despite some support within the US Congress at its inception in 2000, the public and official opposition to such legislation led the American Service Members' Protection Act down a long road of debate. It was, however, indeed adopted two years later.

The first three measures included in the ASPA refer specifically to the United States' unwillingness to cooperate with the International Criminal Court. Entitled "Prohibition on Cooperation with the International Criminal Court," "Restriction on United States Participation in Certain United Nations Peacekeeping Operations," and "Prohibition on Direct or Indirect Transfer of Classified National Security Information and Law Enforcement Information to the International Criminal Court" respectively, each of these sections clearly outlines the United States' forthright refusal to cooperate with the International Criminal Court in any way whatsoever. The extent to which these statements refer solely to restricting ICC jurisdiction over United States' nationals, as opposed to international citizens as a whole, is readily apparent through statements such as Sec. 2004(a)(1), and its declaration that the strict prohibitions on cooperation with the ICC "shall not apply to cooperation with an *ad hoc* international criminal tribunal established by the United Nations Security Council before or after the date of the enactment of this Act to investigate and prosecute war crimes committed in a specific country or during a specific conflict."⁷ Indeed, through the inclusion of this article, the United States government has

⁶ David J. Scheffer, "Statement before the House International Relations Committee," 26 July 2000, Washington, DC; available online at http://www.state.gov/www/policy_remarks/2000/000726_scheffer_service.html, accessed 22 March 2004.

⁷ *ASPA*, section 2004, paragraph (a), subsection (1); The text of this article reads: "(a) APPLICATION—The provisions of this section—(1) apply only to cooperation with the International Criminal Court and shall not apply to cooperation with an *ad hoc* tribunal established by the United Nations Security Council before or after the date of the enactment of this Act to investigate and prosecute war crimes committed in a specific country or during a specific conflict," and also specifically outline the "(b) Prohibition on Responding to Requests for Cooperation" from other state agencies, "(c) Prohibition on Transmittal of Letters Rogatory

clearly outlined the fact that it is not opposed to the administration of international criminal law as a whole, but rather is adamantly opposed to the jurisdiction of such law directly influencing its own nationals and the resulting potential impact this could have on foreign policy decisions, thereby exhibiting tenants of American exceptionalism.

While the first three sections of the ASPA—the prohibition of ICC support, restrictions on transfer of national security information, and prohibition of participation in UN peacekeeping effort—can each be understood as explicitly precluding the United States government from any support or cooperation whatsoever with the International Criminal Court, these measures did not greatly surprise the international community, as the legislation was likely seen merely as an extension of US opposition to the Court’s purported jurisdiction over non-state party nationals as contested at the Rome Conference. However, the provision restricting United States’ military aid was a far more blatant attempt to not only demonstrate United States’ objections to the ICC and its jurisdictional power, but to more directly undermine the effectiveness of the International Criminal Court as a whole by disrupting the overwhelming international support already in place. It seems that while the provision was included under the guise of protecting the US Armed Forces from ICC jurisdiction, it also seems possible that it was essentially created as a method of encouraging the states that have already become party to the ICC—a large portion of the international community—to withdraw their support for the international legal body by threatening to withhold all United States military aid to them. In reading the entirety of the text of Section 2007, specifically outlining this prohibition, there is no specific reason given for the perceived necessity of withdrawal of military support, and no justification made in the name

from the International Criminal Court,” “(d) Prohibition on Extradition to the International Criminal Court,” “(e) Prohibition on Provision of Support to the International Criminal Court,” “(f) Prohibition on Use of Appropriated Funds to Assist the International Criminal Court,” “(g) Restriction on Assistance Pursuant to Mutual Legal Assistance Treaties,” and “(h) Prohibition on Investigative Activities of Agents.”

of protecting United States troops from ICC jurisdiction;⁸ rather, the section merely enacts the prohibition. It is important to note, in regard to this prohibition of military aid, however, that it is able to be waived “with respect to a particular country if [the President] determines and reports to the appropriate congressional committees that it is important to the national interest of the United States to waive such prohibition.”⁹ The prohibition of military support may also be waived if a bilateral agreement regarding treatment of US nationals in respect to the International Criminal Court has been reached by the United States and the state seeking a waiver,¹⁰ as will subsequently be discussed in further detail. Furthermore, several states were explicitly granted exemption from this prohibition: NATO states, major non-NATO allies (Australia, Egypt, Israel, Japan, Jordan, Argentina, the Republic of Korea, and New Zealand), and Taiwan,¹¹ each as a direct result of the important relations between these states and the United States. However, the exempted states aside, a large portion of the international community has been left threatened with the refusal of United States military aid, which often plays an important—if not always desired—role in international affairs, and could drastically alter future armed conflicts or humanitarian crises.

Perhaps the most extreme and contentious provision included in the ASPA is what has been commonly referred to as the “Hague Invasion Act.” Defined as the “Authority to Free Members of the Armed Forces of the United States and Certain Other Persons Detained By or On Behalf Of the International Criminal Court,”¹² the President of the

⁸ Ibid., section 2007, paragraph (a); this provision reads: “Prohibition of Military Assistance—Subject to Subsections (b) and (c), and effective 1 year after the date on which the Rome Statute enters into force pursuant to Article 126 of the Rome Statute, no United States military assistance may be provided to the government of a country that is a party to the International Criminal Court.”

⁹ Ibid., section 2007, paragraph (b).

¹⁰ Ibid., section 2007, paragraph (c). This article refers to bilateral agreements as made under Article 98 of the Rome Statute, which have been another method employed by the United States to reduce ICC jurisdictional powers over US nationals. See subsequent text for further explanation and discussion.

¹¹ Ibid., section 2007, paragraph (d).

¹² Ibid., section 2008.

United States was granted the authority to use “all means necessary and appropriate to bring about the release of any person described in subsection (b)¹³ who is being detained or imprisoned by, on behalf of, or at the request of the International Criminal Court.”¹⁴ This declaration has been viewed by the international community not only as an extraordinary measure against the ICC, but also potentially damaging to the relations between the US and its allies and furthering negative opinions about the unilateral nature of US foreign policy. Essentially, by reserving the right to invade The Hague to remove detained US citizens, the United States government succeeded in threatening invasion of one of its close allies and a NATO member state. The United States Embassy located in the Netherlands made a quick and concerted effort to maintain positive relations by releasing the following statement:

Should matters of legitimate controversy develop with the ICC’s host-country, the Netherlands, we would expect to resolve these controversies in a constructive manner, as befitting relations between close allies and NATO partners. Obviously, we cannot envisage circumstances under which the United States would need to resort to military action against the Netherlands or another ally.¹⁵

Even with the United States’ immediate effort to maintain positive relations with the Dutch government, obvious concern on the part of the Netherlands was exhibited when the Dutch ambassador to the United States stated that

¹³ Ibid., section 2008, paragraph (b); this section describes those “Persons Authorized to be Freed,” as referred to 2008(a). This does not cover all United States nationals, but rather “members of the Armed Forces of the United States, elected or appointed officials of the United States Government, and other persons employed by or working on behalf of the United States Government, for so long as the United States is not a party to the International Criminal Court,” as well as “military personnel, elected or appointed officials, and other persons employed by or working on behalf of the government of a NATO member country, a major non-NATO ally (including Australia, Egypt, Israel, Japan, Jordan, Argentina, the Republic of Korea, and New Zealand), or Taiwan, for so long as that government is not a party to the International Criminal Court and wishes its officials and other persons working on its behalf to be exempted from the jurisdiction of the International Criminal Court;” these definitions of “Covered United States Persons” and “Covered Allied Persons” are covered under Sec. 2013(3)&(4).

¹⁴ Ibid., section 2008, paragraph (a).

¹⁵ “American Servicemembers’ Protection Act,” *The American Journal of International Law* 96.4 (2002): 976. at <http://link.jstor.org/sici?sici=002-9300%28200210%2996%3A4%3C975%3AASPA%3E2.0.CO%3B2-M>.

[A]s you will understand, The Netherlands—a NATO partner and close ally of the United States—was not particularly amused by Section [2008], which has led some to refer to ASPA as the “Hague Invasion Act.” Even though we do not deem an American invasion of The Netherlands to be an imminent threat, we do think the language used in Section [2008] was ill-considered, to say the least.¹⁶

The anger expressed by the Netherlands’ government seemed fairly justifiable to the international community, as the United States’ claim to the right of invasion was a bold move, and perhaps one that many would have considered unwise to take in regard to an important international ally. Regardless, it appears that the United States government viewed the International Criminal Court as enough of a threat and enemy that it was willing to endure international criticism in its efforts to wholly separate itself from the ICC’s jurisdiction.

US WITHDRAWAL FROM UN PEACEKEEPING MISSIONS

Despite the fact that ASPA Sec. 2005, regarding the restrictions placed upon the United States’ willingness to participate in UN international peacekeeping missions, would initially seem to be designed so as to remove the US Armed Forces from the jurisdiction of the ICC, the measure would also undoubtedly greatly impact the whole of the international community. Unquestionably, the removal of the world’s only superpower, along with the state’s strong military forces, from all UN peacekeeping operations without prior immunity being granted to all US troops by the UN Security Council¹⁷ would have the potential to

¹⁶ Ibid., 977.

¹⁷ *ASPA*, section 2005, paragraph (a); this provision outlines the policy regarding lack of US participation in UN peacekeeping missions; the remainder of the section clearly outlines that in order for US troops to be permitted to participate, the President of the United States must submit a certification to Congress clearly outlining the measure taken precluding US troops from ICC jurisdiction; this certification can be granted if troops have gained immunity from the UN Security Council, each of the countries in which the troops will be serving are not party states, and have not invoked Article 12 jurisdiction of the ICC, or “the national interests

greatly impact the future of peacekeeping missions. Having been deployed to many states worldwide, UN peacekeeping troops are an important part of today's tumultuous world, and threatening to remove one of the world's largest and most effective military operations from them could prove to have a detrimental effect on the future of peacekeeping and peace enforcement. Largely as a result of this perceived necessity of maintaining positive US relations with UN Peacekeeping operations, the UN Security Council acquiesced to US demands and adopted a resolution stating that

If a case arises involving current or former officials or personnel from a contributing State not a Party to the Rome Statute over acts or omissions relating to a United Nations established or authorized operation, [the ICC] shall for a twelve-month period starting 1 July 2002 not commence or proceed with investigation or prosecution of any such case, unless the Security Council decides otherwise.¹⁸

When this twelve-month period was on the brink of expiring, the United States pushed for an extension or re-adoption of a similar resolution, to allow for the continued immunity of US nationals (as non-state party citizens) from ICC jurisdiction when acting under UN authority. After lengthy discussion, the movement was passed with a 12-0 Security Council vote (three states abstaining), and the Security Council's request—in appeasement of the US—to the ICC for another twelve months of immunity was passed. Following this landmark vote, Ambassador John D. Nagraponte, the United States representative to the Security Council, explained the state's desire for such an extension of immunity with the following statement:

The resolution is consistent with a fundamental principle of international law: the need for a State to consent if it is to be bound. That principle is respected by exempting from ICC jurisdiction personnel and forces of States that are not parties to the Rome Statute. It is worth noting that the

of the United States justify participation by members of the Armed Forces of the United States in the peacekeeping or peace enforcement operation.”

¹⁸ “U.S. Efforts to Secure Immunity from ICC for U.S. Nationals,” *The American Journal of International Law* 97.3 (2003): 710.

resolution does not in any way affect parties to the Court, or the Rome Statute itself. Nor does it, as some today have suggested, elevate an entire category of people above the law. The ICC is not the law.

The provisions of this resolution are as relevant and necessary today as resolution 1422 (2002) was a year ago. We all know that United Nations operations are important if the Council is to discharge its primary responsibility for maintaining or restoring international peace and security. We also all know that it is not always easy to recruit contributors, and that it often takes courage on the part of political leaders to join military operations established or authorized by the Council. It is important that Member States not add concern about ICC jurisdiction to the difficulty of participating.

We have heard the argument that this resolution is not necessary, and we do not agree. I would suggest that even one instance of the ICC attempting to exercise jurisdiction over those involved in a United Nations operation would have a seriously damaging impact upon future United Nations operations. We are disappointed, of course, that not every Council member shares our view, but we are not at all persuaded that our concerns are overstated or that they lack validity.¹⁹

Even with obvious discontent from other states within the international community, the United States had managed to win this battle in the Security Council as a result of the recognition of the necessity of retaining strong ties between the United States and the United Nations' peacekeeping operations. This series of Security Council resolutions seems to have effectively laid the groundwork for superceding the prohibition of US participation in UN peacekeeping operations as declared in the ASPA—at least for the time being.

It is important to recognize that the US's stated limitations on involvement with United Nations peacekeeping missions were made under the guise of protecting their own nationals and Armed Forces from the transfer to, or prosecution by, the International Criminal Court. In a similar vein, the ASPA provision referring to the threatened withdrawal of US military aid from states parties to the Rome Statute is also meant to be a means of shielding the US Armed Forces from the jurisdiction of the ICC. However, it seems likely that there is also a dual purpose to this measure, in that by threatening to withdraw military

¹⁹ Ibid., 711.

aid, many states have been left with little feasible option but to sign the proposed Bilateral Immunity Agreements with the United States as a means to retain military aid.

ARTICLE 98 BILATERAL IMMUNITY AGREEMENTS

The United States' rejection of the International Criminal Court, and subsequent attempts to undermine the jurisdiction and legitimacy of the ICC in the international sphere, has not been limited to the aforementioned provisions laid out in the ASPA. One of the major avenues taken by the United States in opposing and avoiding the jurisdiction of the ICC has been through numerous bilateral international treaties made with various states worldwide, as allowed under Article 98 of the Rome Statute.²⁰ It is this article that clearly outlines the fact that states parties are not required to commit any actions that would place them in direct violation with other international agreements. The United States has subsequently utilized the inclusion of this article within the Rome Statute to seek international treaties that would therefore supercede the power of the Rome Statute in terms of jurisdiction. By granting immunity to United States citizens through a Bilateral Immunity Agreement, states would no longer be obliged under international law to turn over accused US citizens to the ICC.

Bilateral Immunity Agreements (BIAs) have been sought by the United States with states parties and non-states parties alike, with varying degrees of success. Taking the state's

²⁰ *The Rome Statute*, article 98, regarding "Cooperation with respect to waiver of immunity and consent to surrender" reads:

1. The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.
2. The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.

obvious discontent with the International Criminal Court to an unprecedented level, the BIAs have caused much controversy within the international community, largely as a result of the perception that they are not only blocking ICC jurisdiction over US nationals, but are essentially undermining the entirety of the Court and its ideals. As a result of this perception, the mere inclusion of Article 98—allowing for such bilateral agreements—was a contentious issue dealt with by Rome Conference participants, and in meetings of the UN Preparatory Commission for the International Criminal Court (Preparatory Commission), designed to help transition the Court from a body laid out in the Rome Statute to a working international legal body. When the concept of Article 98 Agreements providing immunity for US nationals was proposed at the fourth meeting of the Preparatory Commission,²¹ it immediately caused dissent with the majority of states present. The original proposal, however, was comprised of two parts, only the first of which was a rule based on immunity achieved through Article 98 BIAs. The second part of this proposal was based on a provision requiring approval of non-state parties' governments before ICC jurisdiction would be exercisable over those states' nationals.²² Having proposed this complex two-part method of removing US nationals from ICC jurisdiction, the United States utilized the time between the fourth and fifth meetings of the Preparatory Commission to campaign for international approval of the measures. Despite having made concerted efforts to gain support for the two-part proposal, at the beginning of the fifth session, the United States chose to officially propose only the first half of the two-part measure, referring to the Article 98 bilateral agreements. While the Commission did eventually adopt the draft rule to be included in the Rules of Procedure and Evidence, vis-à-vis Article 98, allowing for bilateral

²¹ Christopher Keith Hall, "The First Five Sessions of the UN Preparatory Commission for the International Criminal Court," *The American Journal of International Law* 94.4 (2000): 786.

²² Ibid.

agreements to provide immunity for non-states parties' nationals, this adoption did not occur without the discontent of much of the international community present. Originally, in the working group, the proposal was challenged by 45 states (87 percent of participants) for compatibility with the Rome Statute. However, with the simultaneous proposal of the American Service Members' Protection Act, the working group realized that adopting the proposal was a necessary means of appeasing the United States, in the hopes of maintaining ties between the US and the Preparatory Commission, as well as the ICC as a whole.²³

In seeking Bilateral Immunity Agreements with states worldwide, the United States has approached over 100 states in the hopes of gaining immunity from ICC jurisdiction. As reported by the Coalition for the International Criminal Court, as of 2 March 2004 there had been 72 BIAs signed, with only 13 state ratifications. Less than half of the states that had, at that point, signed BIAs with the United States were actually states parties to the Rome Statute, while 59 of the 92 Rome Statute states parties have bluntly refused US pressure to sign BIAs—23 of which have lost US military aid as a result.²⁴ When examining a complete list of current signatories and BIA states parties, the extent to which the threat of withdrawal of aid may play in United States' success in reaching BIAs with other states is easily discerned. Currently, the bulk of states who have become signatories to the US Bilateral Immunity Agreements are those located in Africa, Asia, Central and South America, and Eastern Europe—those states that have historically been most dependent on United States aid. Altogether, on the 1 July 2003 deadline set forth by the ASPA, 35 ICC states parties

²³ Ibid.

²⁴ The Coalition for the International Criminal Court, "Status of Bilateral Immunity Agreements (BIAs)," accessed online at http://www.iccnw.org/documents/otherissues/impunityart98/BIAsByRegion_current.pdf, accessed 23 March 2004.

lost United States military aid, a total of \$46 million worth of military assistance, with 22 states parties being granted temporary waivers allowing for a continuation of military aid.²⁵

Despite the fact that there are currently approximately 70 states that have consented to the United States' Article 98 bilateral agreements, a large portion of the international community has voiced concern as to the intent and legitimacy of these BIAs. Indeed, many governmental and non-governmental organizations worldwide have stated that the Article 98 Agreements are contrary to the intention of the Rome Statute's drafters, that they violate the intent of the text of Article 98 of the Rome Statute, and, furthermore, that the agreements essentially undermine the entire purpose of the ICC.²⁶ The first of these concerns is based primarily on an understanding of Article 98 that the intent of the drafters was to clarify the power of pre-existing international treaties between states parties in relation to a state's commitment to extradition and participation with the ICC. The delegates involved in negotiating the inclusion of Article 98 have argued that their intent was not to allow for the drafting of entirely new treaties as a means of avoiding ICC jurisdiction, but were focused primarily on avoiding legal entanglements resulting from conflicting existing treaties, Status of Forces Agreements (SOFAs), and Status of Mission Agreements (SOMAs)²⁷, defined as a "common and specific type of international agreement that outlines States' rights and duties with respect to military personnel of one State (the sending State) stationed on the territory of another (the receiving State)."²⁸ The United States, however, has interpreted the meaning of Article 98 in such a way as to allow for the adoption of new international treaties and agreements to attempt to remove its citizens from the jurisdiction of the International

²⁵ Ibid.

²⁶ Ibid.

²⁷ Ibid.

²⁸ Human Rights First, "Human Rights First Criticizes U.S. Attempts to Exempt its Nationals from the ICC," available online at http://www.humanrightsfirst.org/international_justice/icc/us_role/us_role_02.htm, accessed 18 April 2004.

Criminal Court. Indeed, this attempt at universal exemption of United States citizens from ICC jurisdictional power is the second reason for which the Article 98 BIAs have been challenged by the international community.

The generic text proposed by the United States to comprise the Article 98 BIAs, which has since been utilized in the vast majority of agreements signed thus far, is exemplified in the BIA signed between the US and Romania, reading in part as follows:

Reaffirming the importance of bringing to justice those who commit genocide, crimes against humanity and war crimes,

Recalling that the Rome Statute of the International Criminal Court done at Rome on July 17, 1998 by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court is intended to complement and not supplant national criminal jurisdiction,

Considering that [a state party], by becoming a State Party to the Rome Statute of the International Criminal Court, has expressed its commitment to be bound by the rules and principles embodied therein,

Considering that the Government of the United States has expressed its intention to investigate and to prosecute where appropriate acts within the jurisdiction of the International Criminal Court alleged to have been committed by its officials, employees, military personnel or other nationals of the United States of America,

Bearing in mind Article 98 of the Rome Statute,

Hereby agree as follows:

1. For purposes of this agreement, “persons” are current or former Government officials, employees (including contractors), or military personnel *or nationals of one Party*...
2. Persons of one Party present in the territory of the other shall not, absent the expressed consent of the first Party,
 - (a) Be surrendered or transferred by any means to the International Criminal Court for any purpose, or
 - (b) Be surrendered or transferred by any means to any other entity or third country, or expelled to a third country, for the purpose of surrender to or transfer to the International Criminal Court.²⁹

²⁹ “Agreement between the Government of the United States of America and the Government of Romania regarding the surrender of persons to the International Criminal Court,” available online at http://www.amicc.org/docs/Romania_98_2.pdf, accessed 24 March 2004.

As a result of the wording of the BIA document, members of the international community have raised questions regarding the validity of the universal exemption that the United States is seeking for its nationals. Under SOFAs and SOMAs, it is traditionally understood that immunity will be granted to those individuals serving in the capacity of an official state-sponsored mission or position. The bilateral agreements that the United States are invoking, however, extend the call for immunity beyond US officials or members of the Armed Forces to include the entirety of the US civilian population, therein referred to as “other nationals of the United States of America.” This extension of impunity to the United States’ entire population, and not solely to those serving in an official capacity as a part of a state-sponsored mission, was immediately seen as problematic in the international sphere. The European Union Council officially criticized the United States’ actions in demanding this widespread immunity, claiming that US claims of absolute impunity violate the text of Article 98(2) as related to the following definitions of customary international law:

Whatever else Article 98 (2) may be construed to mean, it is clear that these words require for a situation to be present in which a certain individual is “sent” by one State (probably, but not necessarily that of which he is a national) to another State for a certain purpose. To construe the words “sending State” as simply meaning “the State with which they have some connection” would be to depart from the ordinary meaning of the words, which is the basic criterion for their interpretation under international law. The word “send” does not have the same meaning as the words “to be connected to or with.” Moreover, this condition...is necessary but no sufficient. It should be noted that adherence to this principle would not solve the problem that any new agreement by a State Party limiting or excluding the surrender of persons to the Court would also be incompatible with the Statute.³⁰

³⁰ European Union Council, “Annotated EU Council Conclusions on the International Criminal Court,” *ICC- Supportive Interpretation of and Commentary on the EU General Affairs Council Conclusions on the International Criminal Court of 30 September 2002*, published 24 October 2002; available online at <http://www.endgenocide.org/ceg-icc/article98/germany98.pdf>.

While the EU's statement is representative of a primary concern of the entire international community—dealing with the United States' attempts to extend jurisdictional immunity beyond the precedent as set in international law—concerns have also been voiced regarding even the exemption of the state officials and Armed Forces.

Under Rome Statute Article 27, regarding the “Irrelevance of Official Capacity” in terms of ICC jurisdiction, the Court maintains jurisdictional rights over the entire global population, regardless of official capacity or diplomatic status. Indeed, the article explicitly states that “Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.”³¹ Essentially, much of the debate that has arisen over the immunity granted United States nationals through the Article 98 Bilateral Immunity Agreements has centered on disagreement over whether such blanket immunity can be granted to a state's population while maintaining consistency with the text of the Rome Statute. However, the opposition to the Article 98 Agreements because of apparent contradiction with the Rome Statute has been seconded by international dissatisfaction with the agreements for their ability to undermine the most fundamental ideals and principles of the International Criminal Court.

Based on the perceived need for an international legal body intended to try the perpetrators of the most heinous war crimes, crimes against humanity, and crimes of genocide, one of the primary goals of the ICC from its inception was to create a system of

³¹ *Rome Statute*, article 27, paragraph (2); the entirety of Article 27, regarding the “Irrelevance of official capacity,” reads as follows:

1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.
2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.

justice that would create a global society based on the principles of recognition of human rights and respect for humanity. Although attempts at creating a system of universal jurisdiction were abandoned early on as a result of a lack of consensual support, those involved in drafting the Rome Statute created the treaty based upon the desire to recognize a universal respect for the ICC, and its humanitarian objectives. With the invocation of numerous Article 98 Bilateral Immunity Agreements, however, a number of governmental, non-governmental, and legal organizations worldwide have accused the United States of undermining not only the jurisdiction of the ICC as laid out in the Rome Statute, but also the ICC's goals of achieving universal accountability for human rights violations.

Through the establishment of international treaties that are designed solely to exempt individuals from the jurisdiction of the International Criminal Court, the basic jurisdictional premises set forth in the Rome Statute are being intentionally altered so as to grant immunity to the United States' population. While under the original text of the Rome Statute the principle of complementarity made provisions for trials falling under ICC jurisdiction to be superseded by national trials, the Article 98 Agreements flatly guarantee immunity of US nationals within other states' territories, with no regard to whether national trials for accused violations of international humanitarian law will occur. As a result, the United States, through the establishment of the Article 98 BIAs, is not only avoiding the jurisdiction of the ICC directly, but is further undermining the principle of complementarity, and the ICC's primary goal of ensuring that all crimes of humanity, war crimes, and genocide will be tried by an established legal body, either at the international or national level.

As a result of the aforementioned disputes regarding the legality and legitimacy of the United States' Article 98 BIAs, the Bush administration has received criticism from all corners of the globe, regarding accusations of disregarding the integrity of international law

and the International Criminal Court, as well as in opposition of the pressure tactics used to engage other states in such immunity agreements. Despite the best efforts of the United States to convey to the international community that efforts to remove its citizens from ICC jurisdiction were rooted in the exceptional nature of US involvement in international affairs, the global response to the Article 98 Agreements nonetheless expressed sentiments of frustration. The official response of the European Parliament, as expressed in the “European Parliament Resolution on the International Criminal Court (ICC),” requests that

...the current worldwide political pressure being exerted by the government of the United States to persuade States Parties and Signatory States of the Rome Statute, as well as non-signatory states, to enter into bilateral immunity agreements which seek, through misuse of its Article 98, to prevent US government officials, employees, military personnel or nationals from being surrendered to the International Criminal Court should not succeed with any country, in particular with the Member States, the candidate countries, the countries involved in the Stabilisation and Association Process, the countries associated with the EU in the Euro-Mediterranean partnership, the Mercosur, Andean Pact and San Jose Process countries or the ACP countries... [Furthermore, there is deep disappointment at] the decision of the Romanian government to sign an agreement with the United States *contradicting the spirit of the Status of the ICC*.³²

The European Union, as reflected in the above official documentation, has unequivocally opposed the United States’ attempts to wholly remove its citizenry from the jurisdiction of the ICC. The public European contempt for US actions related to Article 98 Agreements was further demonstrated in the Parliamentary Assembly of the Council of Europe’s statement that “The Assembly considers that these “exemption agreements” are not admissible under the international law governing treaties, in particular the Vienna

³² “International Criminal Court: European Parliament resolution on the International Criminal Court (ICC);” available online at <http://www.endgenocide.org/ceg-icc/article98/euoparl.pdf>, accessed 23 March 2004; emphasis added.

Convention on the Law of Treaties, according to which States must refrain from any action which would not be consistent with the object and the purpose of a treaty.”³³

The public expressions of disdain and contempt expressed by European officials and governmental bodies are representative of the vast majority of global opinions regarding the United States’ pursuit of Article 98 BIAs. Further, it is important to note that the negative international response to the United States’ position in these matters is not based solely on the treaties being implemented by the United States, but also largely as a result of the methods that US representatives have purportedly utilized to force states into such bilateral agreements. Going beyond even the questioned tactic of threatening loss of military support to states refusing to sign BIAs with the US, the international community has submitted various reports of diplomatic tactics that further threaten the wellbeing of citizens and societies as a means of negotiation. The United States has been accused of invoking unconscionable threats such as the withdrawal of aid to the New Horizons program, including funds for hurricane relief and rural dental and veterinary aid within the Caribbean community, withdrawal of funds for constructing a Bahaman airport runway, and questioning the viability of Croatian accession to NATO unless a BIA is established. The extent to which these threats are true or have been exaggerated is impossible to determine, but they have nonetheless compounded the already existent contempt exhibited by the international community toward US efforts to challenge ICC jurisdiction and undermine the original ideals and intent of the Court.

The United States’ actions regarding Article 98 Bilateral Immunity Agreements, in conjunction with the aforementioned international dissent and derision regarding the extraordinary measures employed by the United States to avoid ICC jurisdiction through the

³³ Parliamentary Assembly of the Council of Europe, “Risks for the integrity of the Statute of the International Criminal Court,” 29th sitting, adopted 25 September 2002.

invocation of the American Service Members' Protection Act, have placed an additional level of stress upon the delicate state of contemporary international relations. The International Criminal Court is a newly-formed international organization that has been highly politicized by international participation and debate. At the center of this politicization lies the controversial stance taken by the United States, and the as-yet unforeseen outcomes of continued negotiations for Bilateral Immunity Agreements, matched by further withdrawal of United States' military and international aid. Having employed unequivocally unilateral policy in relation to the ASPA, Article 98 Bilateral Immunity Agreements, and the International Criminal Court as a whole, the US treatment of the ICC undoubtedly has the potential to negatively affect both the United States and the International Criminal Court.

5. US REJECTION OF THE ROME STATUTE: POTENTIAL IMPLICATIONS FOR THE US AND THE ICC

The long-term effects of [the United States' rejection of the Rome Statute] are very serious for the court and perhaps even more serious for the United States, which will be persisting in not-so-splendid isolation from the most important international juridical institution that has been proposed since the San Francisco Conference in 1945.¹

By invoking legislation that some states and international legal scholars have considered to be blackmail, and by attempting to strong-arm the international community into opposing the International Criminal Court, many states, non-governmental organizations, and individuals worldwide have perceived the United States as exercising an abuse of power that exhibits arrogant and unilateral foreign policy. Accordingly, the United States has faced widespread international criticism for its policies regarding its unequivocal rejection and undermining of the ICC. The US has

¹ Leigh, 124.

enacted legislative and policy measures that have had, and will continue to have, the ability to greatly impact both the International Criminal Court and the United States by ostracizing the US not only from the ICC, but also from the entire international community. Indeed, as a result of the United States' blatant rejection of the ICC and the attempts to undermine the widespread support that the Court has garnered thus far, it is difficult to see the ways in which the current state of US-ICC relations could benefit either the US or the ICC. However, in spite of the latent negative effects on the United States and the Court resulting from the United States' direct opposition to the ICC, it does not appear as if the immediately-recognizable consequences will fundamentally alter the views or position of either body, likely leaving the US and the ICC in an ongoing political stalemate, resolvable only through a shift in political needs or self-interest of either the United States or the ICC.

US-ICC Policy: Implications for the ICC

The implications for the ICC of the United States' non-involvement are primarily related to the Court having lost vital support, both politically and financially, of the United States — the world's only superpower state. One immediate controversy and criticism that the United States has faced regarding its policies of non-involvement and non-support of the International Criminal Court seem to be focused primarily around the international community's frustration at the US's withdrawal of unparalleled international power and aid from a widely supported international organization. Having lost the political and military support of the United States, some questions have been raised as to whether the ICC will encounter greater than expected difficulty in arresting accused criminals and enforcing ICC

verdicts as a result of the loss of US personnel support in such matters.² Because the ICC was designed to rely heavily on the ability of states parties to carry out these necessary logistical procedures,³ the United States' withdrawal of armed forces to aid in such matters has been the cause of international concern. The international community's worry about US abandonment of the ICC, however, has not been limited solely to issues relating to personnel aid and the logistics of the Court's trials, but has additionally been focused on the United States withholding its substantial wealth from the ICC. However, the extent to which the US rejection of the ICC could affect the Court is not only limited to the results of US non-ratification of the Rome Statute. Additionally, the domestic legislation and international treaties that the United States has invoked in order to weaken ICC jurisdiction over US nationals have raised questions in the international community as to whether the legitimacy and entire purpose of the ICC is being placed in jeopardy by such actions.⁴

The provisions of the Rome Statute and the ICC's Rules of Procedure and Evidence clearly state that the Court's funding is to be drawn from a combination of states parties' and United Nations' contributions. The assessment of the states parties' contributions is based primarily on the precedence of the United Nations scaled assessments already in place, while those contributions expected to be made directly by the UN are intended to particularly focus on the expenses encountered as a result of cases tried due to UN Security Council recommendations to the Court.⁵ The United Nations' assessment of United States'

² Jennifer Elsea, "U.S. Policy Regarding the International Criminal Court," *Congressional Research Service* (The Library of Congress: 2002): 22.

³ Ibid.

⁴ Elsea, 22.

⁵ *Rome Statute*, articles 116-118.

contributions to the UN has been set as 25% of the overall assessed funding,⁶ and therefore reflects the substantial financial contributions that the US would have been requested to make to the ICC if it were a state party; consequently, the largest portion of the states parties' funding has been lost as a result of the US refusal to ratify the Rome Statute. With respect to the financial relationship between the United States and the International Criminal Court, the extent to which withdrawal of United States funding can affect an international organization is proven by the way in which the United States' accrual of massive arrears hindered the United Nations' efforts at maintaining international peace and order. Having repeatedly refused to pay its dues in full since the early 1980s until specific demands made to the UN were met, the United States had acquired over \$1 billion in back dues owed to the United Nations by 2000⁷—a large portion of which were paid only after the September 11, 2001, terrorist attacks encouraged the United States to mend its relationship with the UN in order to seek the organization's aid in fighting terrorism worldwide.⁸ As a result of the extent to which the US was in arrears to the UN—in conjunction with the relatively smaller amounts of back dues owed by various other states—the UN was forced to draw on its peacekeeping accounts in order to fund its general functioning, hampering UN efforts at international peacekeeping and maintenance of international order.⁹ Given the large role that lack of US funding played in disrupting the United Nations and its ability to carry out the fundamental ideals and missions related to international peace, it seems as if the ICC, an international institution reliant on the funding by states parties in a manner similar to the

⁶ "US General Accounting Office Report Recognizes Arrears as Primary Cause of Financial Problems at UN," *Global Policy Forum: News Bulletin*, 18 June 1998; available online at <http://www.globalpolicy.org/finance/news/news33.htm>, accessed 18 April 2004; hereinafter [US General Accounting Office Report].

⁷ Ibid.

⁸ Karen Ann Gajewski, "U.S. representatives also took a positive step forward when they approved payment of \$582 million in back dues to the United Nations," *The Humanist* 61.6 (2001): 46.

⁹ "US General Accounting Office Report."

UN, will be forced to contend with financing an exorbitant operating budget without the monetary support of the world's wealthiest state. As such, if the lack of US financial support to the ICC affects the Court as it did the United Nations, the effectiveness of the International Criminal Court may be compromised largely as a result of financial strains. Additionally, recalling that the annual budgets of each of the contemporary *ad hoc* tribunals have reached hundreds of millions of dollars, it is possible to predict that the budget of the ICC will similarly reflect the extraordinarily high costs of establishing and maintaining an entire international criminal justice system. Therefore, as a result of the expected large budget of the ICC, in combination with the withdrawal of the US's sizeable financial support of the Court, the ICC will likely be forced to confront its states parties with significantly larger assessments in order to meet budgetary requirements, undoubtedly placing increased financial strain on many of those states — and, as a result, on the ICC.

The action taken by the United States in opposition to the ICC has not only resulted in a loss of substantial financial and personnel aid to the Court; it has also been thought by some to undermine the fundamental purpose and ideals behind the establishment of a permanent international system of punitive justice.¹⁰ Indeed, the ICC was established in order to continue the modern movement towards universal recognition of human rights, as well as to aid in the transformation of global society from its culture of impunity to one focused on individual accountability for the violation of international law. In that vein, the ICC was designed to grant the Court as wide a scope of jurisdiction as possible, while simultaneously maintaining sufficient international support to allow for the promulgation of the Rome Statute. The United States, however, publicly expressed its disdain for the ICC's broad jurisdiction from the early days of the Rome Conference — particularly over non-state

¹⁰ Elsea, 22.

party nationals— subsequently leading to the establishment of domestic legislation and international agreements intended to shield all US nationals from the scope of ICC jurisdiction. In doing so, the *American Service-Members' Protection Act* and Article 98 Bilateral Immunity Agreements clearly used the threatened removal of US military and financial aid to strong-arm states worldwide into supporting the United States' stance regarding the International Criminal Court, encouraging those states to withdraw their support from the ICC, as well as to exempt United States citizens from trial by the ICC. Much to the chagrin of many ICC states parties, as well as to a large portion of the international community as a whole, the US is making a staunch effort to obtain states' signatures on Article 98 BIAs, and has upheld the previously-made threat of withdrawal of foreign aid if states will not submit to the United States' demands for US nationals' immunity from the ICC. In this vein, the *ICC Monitor*, a quarterly newspaper published by the Coalition for the International Criminal Court, determined that, because a primary motive in creating a permanent system of punitive criminal justice was focused on the intent to increase individual accountability for violations of international law, "the impunity agreements proposed by the United States are in direct contravention to the immense hope of an independent national and international justice system."¹¹

As a result of the United States' complete withdrawal of support for the ICC, some individuals were initially worried that the Court might lose legitimacy within the international community. However, despite any international uneasiness, it seems that — thus far — these fears are unfounded, and may have been replaced by such strong international opposition to the US so as to increase the ICC's international support and perceived legitimacy, ultimately serving to strengthen the Court. Undoubtedly, Rome Statute

¹¹ Pascal K. Kambale, "The United States attacks the International Criminal Court: Africa must consolidate its resistance," *The ICC Monitor* 23 (Feb., 2003): 7.

ratification by the United States would have also contributed to an international perception of the ICC as a legitimate international legal body — clearly important in the formative years of any international organization — as a result of receiving the public political, military, and financial support of the world’s only superpower state. However, as Rik Panganiban, Special Advisor to the World Federalist Movement, observed, the international community’s widespread frustration with the arrogance of the United States in relation to Rome negotiations and the ICC succeeded in “galvanizing several countries into banding together to support the Court, perhaps in a stronger fashion than if the U.S. was a supporter.”¹² The extent to which other negotiating states opposed US objections to the Rome Statute and the ICC was indeed clearly demonstrated by the formation of state coalitions during Rome negotiations and, particularly, the establishment of the Like-Minded Group described in chapter one, founded almost wholly on the basis of widespread shared frustration regarding US unilateralism and arrogance. The LMG has since been recognized by Rome participants and international observers as one of the key negotiating blocs taking part in Rome negotiations, and a primary contributor to the establishment of the current Rome Statute.¹³ Indeed, the Conference resulted in a landslide vote of support for the Rome Statute; owing at least partially to the LMG, international support of the ICC remained extraordinarily strong in spite of continued US protests. The subsequent entry into force of the Statute — and the continued increase in the number of states parties — has proven that the US’s policy of abstention from the ICC has not substantially compromised the legitimacy of the ICC thus far.

¹² Interview: Rik Panganiban, 26 April 2003; as cited in: Rushing, Lizzie. “The International Criminal Court and American Exceptionalism.” Independent Study, The School for International Training (Geneva, 5 May 2003): 26.

¹³ Kirsch and Robinson, 70.

US-ICC Policy: Implications for the US

The ways in which the United States may be affected by its policy of non-involvement with the ICC are primarily centered on the potential effects of having adopted an absolute unilateral stance in regards to the Court. By voluntarily withdrawing from participation in some of the most important and formative years of the ICC in terms of procedure and implementation of Rome Statute provisions, the United States has limited its ability to exert influence over decisions made during this period.¹⁴ Additionally, and perhaps even more detrimental to the US, if the United States continues to exhibit blatant disregard and disrespect for the institution of the ICC — as well as the ICC's widespread international support — by enacting measures such as the *American Service-Members' Protection Act* and Article 98 Bilateral Agreements, the US risks the further deterioration of international opinions regarding the United States, and in particular its coercive methods of influencing the international political sphere.

Upon making the conscious decision to exclude itself from any participation or cooperation with the International Criminal Court, the United States additionally chose to voluntarily withdraw its influence over the ICC during the Court's formative years. In doing so, important decisions that are to be made during these years will be made without the direct influence of the United States. Indeed, the US has succeeded in removing itself from playing any significant or direct role within either the Preparatory Commission or the Assembly of States Parties (Assembly), the two primary bodies designed to transition the Court from its appearance on paper in the form of the Rome Statute into a functioning

¹⁴ Leigh, 125.

international court of justice.¹⁵ As a result, since the adoption of the Rome Statute in 1998, the United States has had no direct influence over the subsequent adoption of the Rules of Procedure and Evidence and the Elements of Crimes, both of which were designed to expound upon procedural, evidentiary, and definitional provisions contained in the Rome Statute in order to clearly outline their practical implications on the functioning of the ICC.¹⁶

One particularly important matter which the United States has consequently lost any influence over by excluding itself from the Assembly of States Parties' debates is that of the negotiation of the definition of the crime of aggression.¹⁷ Because of the controversial nature of the Rome debate over whether to include the crime of aggression under ICC jurisdiction, as well as subsequent disputes over how to define the crime, the Assembly's role in reaching a consensus definition of the crime will be vital to the future of ICC criminal jurisdiction. By effectively removing itself from having any official role in such debates, the United States has withdrawn any of its potential influence over the matter. Particularly as a result of the extent to which the United States' faces constant criticism and questioning by the international community for the constant US military, political, and financial involvement in global affairs, the US has voiced particularly strong concerns regarding the possible politicization of charges of crimes of aggression against US nationals. Consequently, if desiring to further its own political aims, it would have benefited the United States to be in a position in which it could have exerted influence over the final definition of the crime of aggression, in order to limit the possibility of politicization. Without US involvement in the ICC, however, the US has not and—barring any change in US foreign policy toward the ICC—will not be privy to influencing the definition, thereby limiting the extent to which the US

¹⁵ Ibid.

¹⁶ Schabas, 18.

¹⁷ Ibid.

can protect its foreign policy and its citizens from future accusations regarding the commission of crimes of aggression.¹⁸

The Assembly of States Parties, in addition to the future responsibility of reaching a consensus definition of the crime of aggression, was also given the extraordinary responsibility of electing the Court's justices and independent prosecutor. Indeed, the Assembly of States Parties' election of the prosecutor seems likely to be a matter in which the United States would have been highly interested in playing a large role. Because of the United States' public contempt for the liberties granted to the ICC's prosecutor, it seems as if the US would have desired the opportunity to play a role in the election of the individual filling this position as a means of exerting some form of political power over the ICC's independent prosecutorial position. Such influence was not possible, however, after the US forfeit of power in post-Rome negotiations regarding the future of the ICC. As a result, the matters considered by the Preparatory Commission and the Assembly of States Parties, all of which influence the way in which the ICC will function, as well as in the overall standards and procedures to be employed by the Court in its early years and forthcoming trials, were decided upon without any direct influence from the United States'.

In addition to the fact that the United States' rejection of the Rome Statute has forced its withdrawal from important debates regarding matters of ICC structure and procedure, the US decision to unequivocally oppose the ICC — and the US foreign policy intended to reflect this decision — has served to alienate the United States from much of the international community in furtherance of its historical unilateral policies. In essence, the United States' unilateralism is largely related to the previous discussion regarding the manner in which US abstention from the ICC has contributed to the creation of powerful caucuses

¹⁸ Leigh, 125.

of states formed in opposition to the United States, and in support of the ICC. In this vein, the United States' abstention from the Rome Statute, in combination with the subsequent implementation of its domestic and international anti-ICC policies, was described by former United States Ambassador Alvin P. Adams as the end result of "the latest in a series of recent treaty conferences in which Washington has isolated itself from the rest of the world."¹⁹ As such, the US's decision to abstain from all direct involvement with the ICC was a signal to the international community of the United States' willingness to continue its highly controversial unilateralist foreign policy, intentionally separating itself from historical allies. Perhaps the most direct way in which the United States has chosen to alienate itself from a large portion of the international community, however, is through the invocation of the *American Service-Members' Protection Act* and, in particular, the Article 98 Bilateral Immunity Agreements. This domestic legislation and international treaties were designed in such a way as to focus solely on US self-interest and the perception of the exceptional nature of the US as opposed to the needs and wants of the international community. Most notably, however, the establishment of international bilateral immunity agreements and the domestic legislation intended to shield US nationals from ICC jurisdiction represent the determination of the US to not only unilaterally reject the Court, but also to place direct economic and military threats on even the US's important and historical allies for failing to comply with US demands that they do the same.

Currently, the international community is contending with rising globalization and modernization, which have often been accompanied by extreme violence. Additionally, the United States has, in recent years, been confronted with violence on its own territory—

¹⁹ Alvin P. Adams, in "A United Nations Association-USA statement on the United States' Position," 23 July 1998; in "Perspectives on the Rome Statute," *ICC Monitor* 9 (Aug., 1998): 7.

something that has, historically, been extraordinarily rare. After the terrorist attacks of September 11, 2001, in which nearly 3,000 civilians were killed, the United States gained widespread support from the international community in the form of an outpouring of shock and sympathy, as well as political backing. Since 2001, however—particularly after the United States’ unilateral and pre-emptive attack on Iraq in the name of liberation and democracy—the international perception of the US has shifted to become largely negative, focused on the unilateral, exceptionalist, and hegemonic policies that have become the United States’ norm. The widespread frustration that has confronted the United States in the post-September 11th era was clearly demonstrated in a *New York Times* article, dated 11 September 2003, examining the growing global anti-US phenomenon. The author interviewed individuals from various international locations, and analyzed their perceptions of Americans:

In the two years since Sept. 11, 2001, the view of the United States as a victim of terrorism that deserved the world’s sympathy and support has given way to a widespread vision of America as an imperial power that has defied world opinion through unjustified and unilateral use of military force...

To some degree, the resentment is centered on the person of President Bush, who is seen by many of those interviewed, at best, as an ineffective spokesman for American interests and, at worst, as a gunslinging cowboy *knocking over international treaties* and bent on controlling the world’s oil, if not the entire world...

‘The fact is that the United States can’t run the world by itself, and the problem is, we’ve done a lot of damage in our relationships with allies, and people are not terribly enthusiastic about helping us now.’²⁰

²⁰ Richard Bernstein, “Two Years Later: World Opinion: Foreign Views of U.S. Darken After Sept. 11,” *The New York Times*, 11 September 2003; Lexis-Nexis internet database, available online at <http://www.lexis-nexis.com>, accessed 22 April 2004; emphasis added.

Indeed, individuals both domestically and internationally have recently recognized that the exceptionalist view that the United States holds of itself, and the unilateralist foreign policies to which this view has alienated the United States in a position of alienation from the international community to an unparalleled degree. The case of the United States' rejection of the Rome Statute and enactment of domestic legislation and foreign treaties designed to further undermine the ICC's jurisdiction further exemplify the extent to which US foreign policy has become unprecedented in its level of public unilateralism.

By threatening the global society with the withdrawal of vital US peacekeeping forces, military troops, and monetary aid if states are not willing to sign US BIAs, the United States displayed its willingness to forego strength in ties of international alliance in favor of furthering its own political aims and beliefs in American exceptionalism. Additionally, it must not be forgotten that the provision of the ASPA referred to as "The Hague Invasion Act" served to threaten the Netherlands—an important US ally—with direct military invasion if US nationals are held for investigation or trial by the ICC. Having succeeded in distancing itself from the international community and reaffirming the United States as a unilateral actor in an increasingly global and multilateral world, "this perception could undermine US efforts at coalition-building to gain international support for the present war against terror as well as future international endeavors."²¹ In essence, the policies the United States has enacted in regards to the ICC have succeeded in further removing the US from the norms of international law and close relations with its international counterparts. Clearly the United States, in determining its policy toward the ICC, has held that US exemption from ICC jurisdiction is in the best interest of the United States. However, the nature of contemporary society and the necessity of states' interdependence and cooperation in

²¹ Elsea, 24.

maintaining peace and security in a world confronted with the realities of terrorism, war, and genocide may eventually force the US to realize that its unilateral policies and disregard and disrespect for the international community could prove detrimental when the US next seeks international support and aid.

THE CURRENT STATE OF AFFAIRS

The road to the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court was clearly long and highly contentious. Despite the conflicts and controversies surrounding the decades of proposals and debates regarding the establishment of the ICC as a means of establishing a global society based on a system of punitive justice, the international community has exhibited overwhelming support for the Court and the ideals that it embodies. A notable exception to the near-universal support that the ICC has garnered has been the overtly-negative stance of the United States in its unequivocal opposition to the International Criminal Court in its current form. Having cited the ICC's independent nature and jurisdictional scope as most problematic, the United States has repeatedly harshly criticized the Court and made a concerted effort to undermine the widespread international support for the ICC. In doing so, the United States has placed itself in a perilous position of unilateralism and isolation, while threatening the viability of ICC through the withdrawal of its funding and personnel support.

Even having provided several examples of the ways in which US abstention from the International Criminal Court has the potential to negatively affect both the ICC and the United States, it is particularly difficult to assess the ways in which these effects may or may not manifest themselves as a future reality. Indeed, the level to which US abstention will

affect the functioning and integrity of the ICC, or the United States' international relations and foreign policy, remains unclear.

The International Criminal Court is a young entity and, as such, the effects of the controversial relationship between the US and ICC — or complete lack thereof — have not yet fully been manifested. Rather, the discord between the United States and the Court seems to have reached a static point in which there exists an obvious potential for negative consequences for both the US and the ICC, but without an immediate threat of such. Ultimately, this has left the US and ICC in what would currently appear to be a political stalemate, each entity cautiously awaiting the answers to the many questions the international community has posed regarding the ways in which the United States' attempts to undermine the structure and authority of the ICC will help or hinder both parties. The reality is this: there is, as of yet, little evidence of the negative effects of the United States' undermining of the International Criminal Court. Only when the ICC is faced with the task of apprehending and trying accused war criminals will the international community be forced to deal with the reality of operating without the vital consent or support of the world's foremost power; only when the United States is confronted with undesirable isolation from the international community resulting from the US's continued exceptionalist and unilateral foreign policies will the support of states worldwide be deemed necessary enough to warrant appeasing the global political sphere through accession to the Rome Statute. Until the current state of world affairs shifts in such a way as to weaken the position of either the US or the ICC in respect to the other, it appears as if the political standoff between the United States and the International Criminal Court will have no immediate end.

APPENDIX

APPENDIX:

ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT

Preamble

The States Parties to this Statute,

- Conscious that all peoples are united by common bonds, their cultures pieced together in a shared heritage, and concerned that this delicate mosaic may be shattered at any time,
- Mindful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity,
- Recognizing that such grave crimes threaten the peace, security and well-being of the world,
- Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation,
- Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes,
- Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes,
- Reaffirming the Purposes and Principles of the Charter of the United Nations, and in particular that all States shall refrain from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations,
- Emphasizing in this connection that nothing in this Statute shall be taken as authorizing any State Party to intervene in an armed conflict or in the internal affairs of any State,
- Determined to these ends and for the sake of present and future generations, to establish an independent permanent International Criminal Court in relationship with the United Nations system, with jurisdiction over the most serious crimes of concern to the international community as a whole,
- Emphasizing that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions,
- Resolved to guarantee lasting respect for and the enforcement of international justice,

Have agreed as follows:

PART 1 ESTABLISHMENT OF THE COURT

ARTICLE 1 THE COURT

An International Criminal Court ("the Court") is hereby established. It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be complementary to national criminal jurisdictions. The jurisdiction and functioning of the Court shall be governed by the provisions of this Statute.

ARTICLE 2 RELATIONSHIP OF THE COURT WITH THE UNITED NATIONS

The Court shall be brought into relationship with the United Nations through an agreement to be approved by the Assembly of States Parties to this Statute and thereafter concluded by the President of the Court on its behalf.

ARTICLE 3 SEAT OF THE COURT

1. The seat of the Court shall be established at The Hague in the Netherlands ("the host State")
2. The Court shall enter into a headquarters agreement with the host State, to be approved by the Assembly of States Parties and thereafter concluded by the President of the Court on its behalf.
3. The Court may sit elsewhere, whenever it considers it desirable, as provided in this Statute.

ARTICLE 4 LEGAL STATUS AND POWERS OF THE COURT

1. The Court shall have international legal personality. It shall also have such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes.
2. The Court may exercise its functions and powers, as provided in this Statute, on the territory of any State Party and, by special agreement, on the territory of any other State.

PART 2 JURISDICTION, ADMISSIBILITY AND APPLICABLE LAW

ARTICLE 5 CRIMES WITHIN THE JURISDICTION OF THE COURT

1. The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes:
 - (a) The crime of genocide;
 - (b) Crimes against humanity;
 - (c) War crimes;
 - (d) The crime of aggression.
2. The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.

ARTICLE 6 GENOCIDE

For the purpose of this Statute, "genocide" means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (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.

ARTICLE 7 CRIMES AGAINST HUMANITY

1. For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:
 - (a) Murder;
 - (b) Extermination;
 - (c) Enslavement;
 - (d) Deportation or forcible transfer of population;
 - (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
 - (f) Torture;
 - (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
 - (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
 - (i) Enforced disappearance of persons;
 - (j) The crime of apartheid;
 - (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.
2. For the purpose of paragraph 1:
 - (a) "Attack directed against any civilian population" means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack;
 - (b) "Extermination" includes the intentional infliction of conditions of life, *inter alia* the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population;
 - (c) "Enslavement" means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children;
 - (d) "Deportation or forcible transfer of population" means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law;
 - (e) "Torture" means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions;
 - (f) "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;

- (g) "Persecution" means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity;
 - (h) "The crime of apartheid" means inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime;
 - (i) "Enforced disappearance of persons" means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.
3. For the purpose of this Statute, it is understood that the term "gender" refers to the two sexes, male and female, within the context of society. The term "gender" does not indicate any meaning different from the above.

ARTICLE 8 WAR CRIMES

1. The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.
2. For the purpose of this Statute, "war crimes" means:
 - (a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:
 - (i) Wilful killing;
 - (ii) Torture or inhuman treatment, including biological experiments;
 - (iii) Wilfully causing great suffering, or serious injury to body or health;
 - (iv) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
 - (v) Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;
 - (vi) Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;
 - (vii) Unlawful deportation or transfer or unlawful confinement;
 - (viii) Taking of hostages.
 - (b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:
 - (i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;
 - (ii) Intentionally directing attacks against civilian objects, that is, objects which are not military objectives;
 - (iii) Internationally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;

- (iv) Intentionally launching an attack in the knowledge that such an attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;
- (v) Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives;
- (vi) Killing or wounding a combatant who, having laid down his arms or having no long means of defence, has surrendered at discretion;
- (vii) Making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury;
- (viii) The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside the building;
- (ix) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;
- (x) Subjecting persons who are in the power of an adverse party to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the 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;
- (xi) Killing or wounding treacherously individuals belonging to the hostile nation or army;
- (xii) Declaring that no quarter will be given;
- (xiii) Destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war;
- (xiv) Declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party;
- (xv) Compelling the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war;
- (xvi) Pillaging a town or place, even when taken by assault;
- (xvii) Employing poison or poisoned weapons;
- (xviii) Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;
- (xix) Employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions;
- (xx) Employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict, provided that such weapons, projectiles and material and methods of warfare are the subject of a comprehensive prohibition and are

- included in an annex to this Statute, by an amendment in accordance with the relevant provisions set forth in articles 121 and 123;
- (xxi) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;
 - (xxii) 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;
 - (xxiii) Utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations;
 - (xxiv) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;
 - (xxv) Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions;
 - (xxvi) Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities.
- (c) In the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause:
- (i) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
 - (ii) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;
 - (iii) Taking of hostages;
 - (iv) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable.
- (d) Paragraph 2 (c) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.
- (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:
- (i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;
 - (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;
 - (iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;
 - (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;

- (v) Pillaging a town or place, even when taken by assault;
 - (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;
 - (vii) Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities;
 - (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;
 - (ix) Killing or wounding treacherously a combatant adversary;
 - (x) Declaring that no quarter will be given;
 - (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;
 - (xii) Destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict;
- (f) Paragraph 2 (e) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.
3. Nothing in paragraph 2 (c) and (e) shall affect the responsibility of a Government to maintain or re-establish law and order in the State or to defend the unity and territorial integrity of the State, by all legitimate means.

ARTICLE 9 ELEMENTS OF CRIMES

1. Elements of Crimes shall assist the Court in the interpretation and application of articles 6, 7 and 8. They shall be adopted by a two-thirds majority of the members of the Assembly of States Parties.
2. Amendments to the Elements of Crimes may be proposed by:
 - (a) Any State Party;
 - (b) The judges acting by an absolute majority;
 - (c) The Prosecutor.Such amendments shall be adopted by a two-thirds majority of the members of the Assembly of States Parties.
3. The Elements of Crimes and amendments thereto shall be consistent with this Statute.

ARTICLE 10

Nothing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute.

ARTICLE 11 JURISDICTION RATIONE TEMPORIS

1. The Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute.
2. If a State becomes a Party to this Statute after its entry into force, the Court may exercise its jurisdiction only with respect to crimes committed after the entry into force of this Statute for that State, unless that State has made a declaration under article 12, paragraph 3.

ARTICLE 12 PRECONDITIONS TO THE EXERCISE OF JURISDICTION

1. A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5.
2. In the case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3:
 - (a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;
 - (b) The State of which the person accused of the crime is a national.
3. If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9.

ARTICLE 13 EXERCISE OF JURISDICTION

The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if:

- (a) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14;
- (b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; or
- (c) The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15.

ARTICLE 14 REFERRAL OF A SITUATION BY A STATE PARTY

1. A State Party may refer to the Prosecutor a situation in which one or more crimes within the jurisdiction of the Court appear to have been committed requesting the Prosecutor to investigate the situation for the purpose of determining whether one or more specific persons should be charged with the commission of such crimes.
2. As far as possible, a referral shall specify the relevant circumstances and be accompanied by such supporting documentation as is available to the State referring the situation.

ARTICLE 15 PROSECUTOR

1. The Prosecutor may initiate investigations proprio motu on the basis of information on crimes within the jurisdiction of the Court.
2. The 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.

3. If the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or she shall submit to the Pre-Trial Chamber a request for authorization of an investigation, together with any supporting material collected. Victims may make representations to the Pre-Trial Chamber, in accordance with the Rules of Procedure and Evidence.
4. 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.
5. The refusal of the Pre-Trial Chamber to authorize the investigation shall not preclude the presentation of a subsequent request by the Prosecutor based on new facts or evidence regarding the same situation.
6. If, after the preliminary examination referred to in paragraphs 1 and 2, the Prosecutor concludes that the information provided does not constitute a reasonable basis for an investigation, he or she shall inform those who provided the information. This shall not preclude the Prosecutor from considering further information submitted to him or her regarding the same situation in the light of new facts or evidence.

ARTICLE 16 DEFERRAL OF INVESTIGATION OR PROSECUTION

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.

ARTICLE 17 ISSUES OF ADMISSIBILITY

1. Having regard to paragraph 10 of the Preamble and article 1, the 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 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.
2. In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable:
 - (a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5;
 - (b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;

- (c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.
- 3. In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.

ARTICLE 18 PRELIMINARY RULINGS REGARDING ADMISSIBILITY

1. When a situation has been referred to the Court pursuant to article 13 (a) and the Prosecutor has determined that there would be a reasonable basis to commence an investigation, or the Prosecutor initiates an investigation pursuant to articles 13 (c) and 15, the Prosecutor shall notify all States Parties and those States which, taking into account the information available, would normally exercise jurisdiction over the crimes concerned. The Prosecutor may notify such States on a confidential basis and, where the Prosecutor believes it necessary to protect persons, prevent destruction of evidence or prevent the absconding of persons, may limit the scope of the information provided to States.
2. Within one month of receipt of that notification, a State may inform the Court that it is investigating or has investigated its nationals or others within its jurisdiction with respect to criminal acts which may constitute crimes referred to in article 5 and which relate to the information provided in the notification to States. At 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.
3. The Prosecutor's deferral to a State's investigation shall be open to review by the Prosecutor six months after the date of deferral or at any time when there has been a significant change of circumstances based on the State's unwillingness or inability genuinely to carry out the investigation.
4. The State concerned or the Prosecutor may appeal to the Appeals Chamber against a ruling of the Pre-Trial Chamber, in accordance with article 82. The appeal may be heard on an expedited basis.
5. When the Prosecutor has deferred an investigation in accordance with paragraph 2, the Prosecutor may request that the State concerned periodically inform the Prosecutor of the progress of its investigations and any subsequent prosecutions. States Parties shall respond to such requests without undue delay.
6. Pending a ruling by the Pre-Trial Chamber, or at any time when the Prosecutor has deferred an investigation under this article, the Prosecutor may, on an exceptional basis, seek authority from the Pre-Trial Chamber to pursue necessary investigative steps for the purpose of preserving evidence where there is a unique opportunity to obtain important evidence or there is a significant risk that such evidence may not be subsequently available.
7. A State which has challenged a ruling of the Pre-Trial Chamber under this article may challenge the admissibility of a case under article 19 on the grounds of additional significant facts or significant change of circumstances.

ARTICLE 19 CHALLENGES TO THE JURISDICTION OF THE COURT OR THE ADMISSIBILITY OF A CASE

1. The Court shall satisfy itself that it has jurisdiction in any case brought before it. The Court may, on its own motion, determine the admissibility of a case in accordance with article 17.

2. Challenges to the admissibility of a case on the grounds referred to in article 17 or challenges to the jurisdiction of the Court may be made by:
 - (a) An accused or a person for whom a warrant of arrest or a summons to appear has been issued under article 58;
 - (b) A State which has jurisdiction over a case, on the ground that it is investigating or prosecuting the case or has investigated or prosecuted; or
 - (c) A State from which acceptance of jurisdiction is required under article 12.
3. The Prosecutor may seek a ruling from the Court regarding a question of jurisdiction or admissibility. In proceedings with respect to jurisdiction or admissibility, those who have referred the situation under article 13, as well as victims, may also submit observations to the Court.
4. The admissibility of a case or the jurisdiction of the Court may be challenged only once by any person or State referred to in paragraph 2. The challenge shall take place prior to or at the commencement of the trial. In exceptional circumstances, the Court may grant leave for a challenge to be brought more than once or at a time later than the commencement of the trial. Challenges to the admissibility of a case, at the commencement of a trial, or subsequently with the leave of the Court, may be based only on article 17, paragraph 1 (c).
5. A State referred to in paragraph 2 (b) and (c) shall make a challenge at the earliest opportunity.
6. Prior to the confirmation of the charges, challenges to the admissibility of a case or challenges to the jurisdiction of the Court shall be referred to the Pre-Trial Chamber. After confirmation of the charges, they shall be referred to the Trial Chamber. Decisions with respect to jurisdiction or admissibility may be appealed to the Appeals Chamber in accordance with article 82.
7. If a challenge is made by a State referred to in paragraph 2 (b) or (c), the Prosecutor shall suspend the investigation until such time as the Court makes a determination in accordance with article 17.
8. Pending a ruling by the Court, the Prosecutor may seek authority from the Court:
 - (a) To pursue necessary investigative steps of the kind referred to in article 18, paragraph 6;
 - (b) To take a statement or testimony from a witness or complete the collection and examination of evidence which had begun prior to the making of the challenge; and
 - (c) In cooperation with the relevant States, to prevent the absconding of persons in respect of whom the Prosecutor has already requested a warrant of arrest under article 58.
9. The making of a challenge shall not affect the validity of any act performed by the Prosecutor or any order or warrant issued by the Court prior to the making of the challenge.
10. If the Court has decided that a case is inadmissible under article 17, the Prosecutor may submit a request for a review of the decision when he or she is fully satisfied that new facts have arisen which negate the basis on which the case had previously been found inadmissible under article 17.
11. If the Prosecutor, having regard to the matters referred to in article 17, defers an investigation, the Prosecutor may request that the relevant State make available to the Prosecutor information on the proceedings. That information shall, at the request of the State concerned, be confidential. If the Prosecutor thereafter decides to proceed with an investigation, he or she shall notify the State to which deferral of the proceedings has taken place.

ARTICLE 20 NE BIS IN IDEM

1. Except as provided in this Statute, no person shall be tried before the Court with respect to conduct which formed the basis of crimes for which the person has been convicted or acquitted by the Court.
2. No person shall be tried by another court for a crime referred to in article 5 for which that person has already been convicted or acquitted by the Court.
3. No person who has been tried by another court for conduct also proscribed under article 6, 7 or 8 shall be tried by the Court with respect to the same conduct unless the proceedings in the other court:
 - (a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or
 - (b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.

ARTICLE 21 APPLICABLE LAW

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.
2. The Court may apply principles and rules of law as interpreted in its previous decisions.
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.

PART 3 GENERAL PRINCIPLES OF CRIMINAL LAW

ARTICLE 22 NULLUM CRIMEN SINE LEGE

1. A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court.
2. 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. This article shall not affect the characterization of any conduct as criminal under international law independently of this Statute.

ARTICLE 23 NULLA POENA SINE LEGE

A person convicted by the Court may be punished only in accordance with this Statute.

ARTICLE 24 NON-RETROACTIVITY RATIONE PERSONAE

1. No person shall be criminally responsible under this Statute for conduct prior to the entry into force of the Statute.
2. In the event of a change in the law applicable to a given case prior to a final judgement, the law more favourable to the person being investigated, prosecuted or convicted shall apply.

ARTICLE 25 INDIVIDUAL CRIMINAL RESPONSIBILITY

1. The Court shall have jurisdiction over natural persons pursuant to this Statute.
2. A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute.
3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:
 - (a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;
 - (b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;
 - (c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;
 - (d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:
 - (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
 - (ii) Be made in the knowledge of the intention of the group to commit the crime;
 - (e) In respect of the crime of genocide, directly and publicly incites others to commit genocide;
 - (f) Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.
4. No provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law.

ARTICLE 26 EXCLUSION OF JURISDICTION OVER PERSONS UNDER EIGHTEEN

The Court shall have no jurisdiction over any person who was under the age of 18 at the time of the alleged commission of a crime.

ARTICLE 27 IRRELEVANCE OF OFFICIAL CAPACITY

1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no

case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.

2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.

ARTICLE 28 RESPONSIBILITY OF COMMANDERS AND OTHER SUPERIORS

In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court:

- (a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:
 - (i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and
 - (ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.
- (b) With respect to superior and subordinate relationships not described in paragraph (a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:
 - (i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;
 - (ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and
 - (iii) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

ARTICLE 29 NON-APPLICABILITY OF STATUTE OF LIMITATIONS

The crimes within the jurisdiction of the Court shall not be subject to any statute of limitations.

ARTICLE 30 MENTAL ELEMENT

1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.
2. For the purposes of this article, a person has intent where:
 - (a) In relation to conduct, that person means to engage in the conduct;
 - (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.
3. For the purposes of this article, "knowledge" means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. "Know" and "knowingly" shall be construed accordingly.

ARTICLE 31 GROUNDS FOR EXCLUDING CRIMINAL RESPONSIBILITY

1. In addition to other grounds for excluding criminal responsibility provided for in this Statute, a person shall not be criminally responsible if, at the time of that person's conduct:
 - (a) The person suffers from a mental disease or defect that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law;
 - (b) The person is in a state of intoxication that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law, unless the person has become voluntarily intoxicated under such circumstances that the person knew, or disregarded the risk, that, as a result of the intoxication, he or she was likely to engage in conduct constituting a crime within the jurisdiction of the Court;
 - (c) The person acts reasonably to defend himself or herself or another person or, in the case of war crimes, property which is essential for the survival of the person or another person or property which is essential for accomplishing a military mission, against an imminent and unlawful use of force in a manner proportionate to the degree of danger to the person or the other person or property protected. The fact that the person was involved in a defensive operation conducted by forces shall not in itself constitute a ground for excluding criminal responsibility under this subparagraph;
 - (d) The conduct which is alleged to constitute a crime within the jurisdiction of the Court has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided. Such a threat may either be:
 - (i) Made by other persons; or
 - (ii) Constituted by other circumstances beyond that person's control.
2. The Court shall determine the applicability of the grounds for excluding criminal responsibility provided for in this Statute to the case before it.
3. At trial, the Court may consider a ground for excluding criminal responsibility other than those referred to in paragraph 1 where such a ground is derived from applicable law as set forth in article 21. The procedures relating to the consideration of such a ground shall be provided for in the Rules of Procedure and Evidence.

ARTICLE 32 MISTAKE OF FACT OR MISTAKE OF LAW

1. A mistake of fact shall be a ground for excluding criminal responsibility only if it negates the mental element required by the crime.
2. A mistake of law as to whether a particular type of conduct is a crime within the jurisdiction of the Court shall not be a ground for excluding criminal responsibility. A mistake of law may, however, be a ground for excluding criminal responsibility if it negates the mental element required by such a crime, or as provided for in article 33.

ARTICLE 33 SUPERIOR ORDERS AND PRESCRIPTION OF LAW

1. The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless:
 - (a) The person was under a legal obligation to obey orders of the Government or the superior in question;
 - (b) The person did not know that the order was unlawful; and
 - (c) The order was not manifestly unlawful.

2. For the purposes of this article, orders to commit genocide or crimes against humanity are manifestly unlawful.

PART 4 COMPOSITION AND ADMINISTRATION OF THE COURT

ARTICLE 34 ORGANS OF THE COURT

The Court shall be composed of the following organs:

- (a) The Presidency;
- (b) An Appeals Division, a Trial Division and a Pre-Trial Division;
- (c) The Office of the Prosecutor;
- (d) The Registry.

ARTICLE 35 SERVICE OF JUDGES

1. All judges shall be elected as full-time members of the Court and shall be available to serve on that basis from the commencement of their terms of office.
2. The judges composing the Presidency shall serve on a full-time basis as soon as they are elected.
3. The Presidency may, on the basis of the workload of the Court and in consultation with its members, decide from time to time to what extent the remaining judges shall be required to serve on a full-time basis. Any such arrangement shall be without prejudice to the provisions of article 40.
4. The financial arrangements for judges not required to serve on a full-time basis shall be made in accordance with article 49.

ARTICLE 36 QUALIFICATIONS, NOMINATION AND ELECTION OF JUDGES

1. Subject to the provisions of paragraph 2, there shall be 18 judges of the Court.
2.
 - (a) The Presidency, acting on behalf of the Court, may propose an increase in the number of judges specified in paragraph 1, indicating the reasons why this is considered necessary and appropriate. The Registrar shall promptly circulate any such proposal to all States Parties.
 - (b) Any such proposal shall then be considered at a meeting of the Assembly of States Parties to be convened in accordance with article 112. The proposal shall be considered adopted if approved at the meeting by a vote of two thirds of the members of the Assembly of States Parties and shall enter into force at such time as decided by the Assembly of States Parties.
 - (c)
 - (i) Once a proposal for an increase in the number of judges has been adopted under subparagraph (b), the election of the additional judges shall take place at the next session of the Assembly of States Parties in accordance with paragraphs 3 to 8, and article 37, paragraph 2;
 - (ii) Once a proposal for an increase in the number of judges has been adopted and brought into effect under subparagraphs (b) and (c) (i), it shall be open to the Presidency at any time thereafter, if the workload of the Court justifies it, to propose a reduction in the number of judges, provided that the number of judges shall not be reduced below that specified in paragraph 1. The proposal shall be dealt with in accordance with the procedure laid down in subparagraphs (a) and (b). In the event that the proposal is adopted, the number of judges shall be progressively decreased

as the terms of office of serving judges expire, until the necessary number has been reached.

3.

- (a) The judges shall be chosen from among persons of high moral character, impartiality and integrity who possess the qualifications required in their respective States for appointment to the highest judicial offices.
- (b) Every candidate for election to the Court shall:
 - (i) Have established competence in criminal law and procedure, and the necessary relevant experience, whether as judge, prosecutor, advocate or in other similar capacity, in criminal proceedings; or
 - (ii) Have established competence in relevant areas of international law such as international humanitarian law and the law of human rights, and extensive experience in a professional legal capacity which is of relevance to the judicial work of the Court;
- (c) Every candidate for election to the Court shall have an excellent knowledge of and be fluent in at least one of the working languages of the Court.

4.

- (a) Nominations of candidates for election to the Court may be made by any State Party to this Statute, and shall be made either:
 - (i) By the procedure for the nomination of candidates for appointment to the highest judicial offices in the State in question; or
 - (ii) By the procedure provided for the nomination of candidates for the International Court of Justice in the Statute of that Court.

Nominations shall be accompanied by a statement in the necessary detail specifying how the candidate fulfils the requirements of paragraph 3.

- (b) Each State Party may put forward one candidate for any given election who need not necessarily be a national of that State Party but shall in any case be a national of a State Party.
 - (c) The Assembly of States Parties may decide to establish, if appropriate, an Advisory Committee on nominations. In that event, the Committee's composition and mandate shall be established by the Assembly of States Parties.
5. For the purposes of the election, there shall be two lists of candidates:

List A containing the names of candidates with the qualifications specified in paragraph 3 (b) (i); and

List B containing the names of candidates with the qualifications specified in paragraph 3 (b) (ii).

A candidate with sufficient qualifications for both lists may choose on which list to appear. At the first election to the Court, at least nine judges shall be elected from list A and at least five judges from list B. Subsequent elections shall be so organized as to maintain the equivalent proportion on the Court of judges qualified on the two lists.

6.

- (a) The judges shall be elected by secret ballot at a meeting of the Assembly of States Parties convened for that purpose under article 112. Subject to paragraph 7, the persons elected to the Court shall be the 18 candidates who obtain the highest number of votes and a two-thirds majority of the States Parties present and voting.
- (b) In the event that a sufficient number of judges is not elected on the first ballot, successive ballots shall be held in accordance with the procedures laid down in subparagraph (a) until the remaining places have been filled.

7. No two judges may be nationals of the same State. A person who, for the purposes of membership of the Court, could be regarded as a national of more than one State shall be deemed to be a national of the State in which that person ordinarily exercises civil and political rights.
8.
 - (a) The States Parties shall, in the selection of judges, take into account the need, within the membership of the Court, for:
 - (i) The representation of the principal legal systems of the world;
 - (ii) Equitable geographical representation; and
 - (iii) A fair representation of female and male judges.
 - (b) States Parties shall also take into account the need to include judges with legal expertise on specific issues, including, but not limited to, violence against women or children.
9.
 - (a) Subject to subparagraph (b), judges shall hold office for a term of nine years and, subject to subparagraph (c) and to article 37, paragraph 2, shall not be eligible for re-election.
 - (b) At the first election, one third of the judges elected shall be selected by lot to serve for a term of three years; one third of the judges elected shall be selected by lot to serve for a term of six years; and the remainder shall serve for a term of nine years.
 - (c) A judge who is selected to serve for a term of three years under subparagraph (b) shall be eligible for re-election for a full term.
10. Notwithstanding paragraph 9, a judge assigned to a Trial or Appeals Chamber in accordance with article 39 shall continue in office to complete any trial or appeal the hearing of which has already commenced before that Chamber.

ARTICLE 37 JUDICIAL VACANCIES

1. In the event of a vacancy, an election shall be held in accordance with article 36 to fill the vacancy.
2. A judge elected to fill a vacancy shall serve for the remainder of the predecessor's term and, if that period is three years or less, shall be eligible for re-election for a full term under article 36.

ARTICLE 38 THE PRESIDENCY

1. The President and the First and Second Vice-Presidents shall be elected by an absolute majority of the judges. They shall each serve for a term of three years or until the end of their respective terms of office as judges, whichever expires earlier. They shall be eligible for re-election once.
2. The First Vice-President shall act in place of the President in the event that the President is unavailable or disqualified. The Second Vice-President shall act in place of the President in the event that both the President and the First Vice-President are unavailable or disqualified.
3. The President, together with the First and Second Vice-Presidents, shall constitute the Presidency, which shall be responsible for:
 - (a) The proper administration of the Court, with the exception of the Office of the Prosecutor; and
 - (b) The other functions conferred upon it in accordance with this Statute.
4. In discharging its responsibility under paragraph 3 (a), the Presidency shall coordinate with and seek the concurrence of the Prosecutor on all matters of mutual concern.

ARTICLE 39 CHAMBERS

1. As soon as possible after the election of the judges, the Court shall organize itself into the divisions specified in article 34, paragraph (b). The Appeals Division shall be composed of the President and four other judges, the Trial Division of not less than six judges and the Pre-Trial Division of not less than six judges. The assignment of judges to divisions shall be based on the nature of the functions to be performed by each division and the qualifications and experience of the judges elected to the Court, in such a way that each division shall contain an appropriate combination of expertise in criminal law and procedure and in international law. The Trial and Pre-Trial Divisions shall be composed predominantly of judges with criminal trial experience.
2.
 - (a) The judicial functions of the Court shall be carried out in each division by Chambers.
 - (b)
 - (i) The Appeals Chamber shall be composed of all the judges of the Appeals Division;
 - (ii) The functions of the Trial Chamber shall be carried out by three judges of the Trial Division;
 - (iii) The functions of the Pre-Trial Chamber shall be carried out either by three judges of the Pre-Trial Division or by a single judge of that division in accordance with this Statute and the Rules of Procedure and Evidence;
 - (c) Nothing in this paragraph shall preclude the simultaneous constitution of more than one Trial Chamber or Pre-Trial Chamber when the efficient management of the Court's workload so requires.
3.
 - (a) Judges assigned to the Trial and Pre-Trial Divisions shall serve in those divisions for a period of three years, and thereafter until the completion of any case the hearing of which has already commenced in the division concerned.
 - (b) Judges assigned to the Appeals Division shall serve in that division for their entire term of office.
4. Judges assigned to the Appeals Division shall serve only in that division. Nothing in this article shall, however, preclude the temporary attachment of judges from the Trial Division to the Pre-Trial Division or vice versa, if the Presidency considers that the efficient management of the Court's workload so requires, provided that under no circumstances shall a judge who has participated in the pre-trial phase of a case be eligible to sit on the Trial Chamber hearing that case.

ARTICLE 40 INDEPENDENCE OF THE JUDGES

1. The judges shall be independent in the performance of their functions.
2. Judges shall not engage in any activity which is likely to interfere with their judicial functions or to affect confidence in their independence.
3. Judges required to serve on a full-time basis at the seat of the Court shall not engage in any other occupation of a professional nature.
4. Any question regarding the application of paragraphs 2 and 3 shall be decided by an absolute majority of the judges. Where any such question concerns an individual judge, that judge shall not take part in the decision.

ARTICLE 41 EXCUSING AND DISQUALIFICATION OF JUDGES

1. The Presidency may, at the request of a judge, excuse that judge from the exercise of a function under this Statute, in accordance with the Rules of Procedure and Evidence.

2.

- (a) A judge shall not participate in any case in which his or her impartiality might reasonably be doubted on any ground. A judge shall be disqualified from a case in accordance with this paragraph if, inter alia, that judge has previously been involved in any capacity in that case before the Court or in a related criminal case at the national level involving the person being investigated or prosecuted. A judge shall also be disqualified on such other grounds as may be provided for in the Rules of Procedure and Evidence.
- (b) The Prosecutor or the person being investigated or prosecuted may request the disqualification of a judge under this paragraph.
- (c) Any question as to the disqualification of a judge shall be decided by an absolute majority of the judges. The challenged judge shall be entitled to present his or her comments on the matter, but shall not take part in the decision.

ARTICLE 42 THE OFFICE OF THE PROSECUTOR

- 1. The Office of the Prosecutor shall act independently as a separate organ of the Court. It shall be responsible for receiving referrals and any substantiated information on crimes within the jurisdiction of the Court, for examining them and for conducting investigations and prosecutions before the Court. A member of the Office shall not seek or act on instructions from any external source.
- 2. The Office shall be headed by the Prosecutor. The Prosecutor shall have full authority over the management and administration of the Office, including the staff, facilities and other resources thereof. The Prosecutor shall be assisted by one or more Deputy Prosecutors, who shall be entitled to carry out any of the acts required of the Prosecutor under this Statute. The Prosecutor and the Deputy Prosecutors shall be of different nationalities. They shall serve on a full-time basis.
- 3. The Prosecutor and the Deputy Prosecutors shall be persons of high moral character, be highly competent in and have extensive practical experience in the prosecution or trial of criminal cases. They shall have an excellent knowledge of and be fluent in at least one of the working languages of the Court.
- 4. The Prosecutor shall be elected by secret ballot by an absolute majority of the members of the Assembly of States Parties. The Deputy Prosecutors shall be elected in the same way from a list of candidates provided by the Prosecutor. The Prosecutor shall nominate three candidates for each position of Deputy Prosecutor to be filled. Unless a shorter term is decided upon at the time of their election, the Prosecutor and the Deputy Prosecutors shall hold office for a term of nine years and shall not be eligible for re-election.
- 5. Neither the Prosecutor nor a Deputy Prosecutor shall engage in any activity which is likely to interfere with his or her prosecutorial functions or to affect confidence in his or her independence. They shall not engage in any other occupation of a professional nature.
- 6. The Presidency may excuse the Prosecutor or a Deputy Prosecutor, at his or her request, from acting in a particular case.
- 7. Neither the Prosecutor nor a Deputy Prosecutor shall participate in any matter in which their impartiality might reasonably be doubted on any ground. They shall be disqualified from a case in accordance with this paragraph if, inter alia, they have previously been involved in any capacity in that case before the Court or in a related criminal case at the national level involving the person being investigated or prosecuted.
- 8. Any question as to the disqualification of the Prosecutor or a Deputy Prosecutor shall be decided by the Appeals Chamber.
 - (a) The person being investigated or prosecuted may at any time request the disqualification of the Prosecutor or a Deputy Prosecutor on the grounds set out in this article;

- (b) The Prosecutor or the Deputy Prosecutor, as appropriate, shall be entitled to present his or her comments on the matter;
- 9. The Prosecutor shall appoint advisers with legal expertise on specific issues, including, but not limited to, sexual and gender violence and violence against children.

ARTICLE 43 THE REGISTRY

- 1. The Registry shall be responsible for the non-judicial aspects of the administration and servicing of the Court, without prejudice to the functions and powers of the Prosecutor in accordance with article 42.
- 2. The Registry shall be headed by the Registrar, who shall be the principal administrative officer of the Court. The Registrar shall exercise his or her functions under the authority of the President of the Court.
- 3. The Registrar and the Deputy Registrar shall be persons of high moral character, be highly competent and have an excellent knowledge of and be fluent in at least one of the working languages of the Court.
- 4. The judges shall elect the Registrar by an absolute majority by secret ballot, taking into account any recommendation by the Assembly of States Parties. If the need arises and upon the recommendation of the Registrar, the judges shall elect, in the same manner, a Deputy Registrar.
- 5. The Registrar shall hold office for a term of five years, shall be eligible for re-election once and shall serve on a full-time basis. The Deputy Registrar shall hold office for a term of five years or such shorter term as may be decided upon by an absolute majority of the judges, and may be elected on the basis that the Deputy Registrar shall be called upon to serve as required.
- 6. The Registrar shall set up a Victims and Witnesses Unit within the Registry. This Unit shall provide, in consultation with the Office of the Prosecutor, protective measures and security arrangements, counselling and other appropriate assistance for witnesses, victims who appear before the Court, and others who are at risk on account of testimony given by such witnesses. The Unit shall include staff with expertise in trauma, including trauma related to crimes of sexual violence.

ARTICLE 44 STAFF

- 1. The Prosecutor and the Registrar shall appoint such qualified staff as may be required to their respective offices. In the case of the Prosecutor, this shall include the appointment of investigators.
- 2. In the employment of staff, the Prosecutor and the Registrar shall ensure the highest standards of efficiency, competency and integrity, and shall have regard, mutatis mutandis, to the criteria set forth in article 36, paragraph 8.
- 3. The Registrar, with the agreement of the Presidency and the Prosecutor, shall propose Staff Regulations which include the terms and conditions upon which the staff of the Court shall be appointed, remunerated and dismissed. The Staff Regulations shall be approved by the Assembly of States Parties.
- 4. The Court may, in exceptional circumstances, employ the expertise of gratis personnel offered by States Parties, intergovernmental organizations or non-governmental organizations to assist with the work of any of the organs of the Court. The Prosecutor may accept any such offer on behalf of the Office of the Prosecutor. Such gratis personnel shall be employed in accordance with guidelines to be established by the Assembly of States Parties.

ARTICLE 45 SOLEMN UNDERTAKING

Before taking up their respective duties under this Statute, the judges, the Prosecutor, the Deputy Prosecutors, the Registrar and the Deputy Registrar shall each make a solemn undertaking in open court to exercise his or her respective functions impartially and conscientiously.

ARTICLE 46 REMOVAL FROM OFFICE

1. A judge, the Prosecutor, a Deputy Prosecutor, the Registrar or the Deputy Registrar shall be removed from office if a decision to this effect is made in accordance with paragraph 2, in cases where that person:
 - (a) Is found to have committed serious misconduct or a serious breach of his or her duties under this Statute, as provided for in the Rules of Procedure and Evidence; or
 - (b) Is unable to exercise the functions required by this Statute.
2. A decision as to the removal from office of a judge, the Prosecutor or a Deputy Prosecutor under paragraph 1 shall be made by the Assembly of States Parties, by secret ballot:
 - (a) In the case of a judge, by a two-thirds majority of the States Parties upon a recommendation adopted by a two-thirds majority of the other judges;
 - (b) In the case of the Prosecutor, by an absolute majority of the States Parties;
 - (c) In the case of a Deputy Prosecutor, by an absolute majority of the States Parties upon the recommendation of the Prosecutor.
3. A decision as to the removal from office of the Registrar or Deputy Registrar shall be made by an absolute majority of the judges.
4. A judge, Prosecutor, Deputy Prosecutor, Registrar or Deputy Registrar whose conduct or ability to exercise the functions of the office as required by this Statute is challenged under this article shall have full opportunity to present and receive evidence and to make submissions in accordance with the Rules of Procedure and Evidence. The person in question shall not otherwise participate in the consideration of the matter.

ARTICLE 47 DISCIPLINARY MEASURES

A judge, Prosecutor, Deputy Prosecutor, Registrar or Deputy Registrar who has committed misconduct of a less serious nature than that set out in article 46, paragraph 1, shall be subject to disciplinary measures, in accordance with the Rules of Procedure and Evidence.

ARTICLE 48 PRIVILEGES AND IMMUNITIES

1. The Court shall enjoy in the territory of each State Party such privileges and immunities as are necessary for the fulfilment of its purposes.
2. The judges, the Prosecutor, the Deputy Prosecutors and the Registrar shall, when engaged on or with respect to the business of the Court, enjoy the same privileges and immunities as are accorded to heads of diplomatic missions and shall, after the expiry of their terms of office, continue to be accorded immunity from legal process of every kind in respect of words spoken or written and acts performed by them in their official capacity.
3. The Deputy Registrar, the staff of the Office of the Prosecutor and the staff of the Registry shall enjoy the privileges and immunities and facilities necessary for the performance of their functions, in accordance with the agreement on the privileges and immunities of the Court.
4. Counsel, experts, witnesses or any other person required to be present at the seat of the Court shall be accorded such treatment as is necessary for the proper functioning of the Court, in accordance with the agreement on the privileges and immunities of the Court.
5. The privileges and immunities of:
 - (a) A judge or the Prosecutor may be waived by an absolute majority of the judges;

- (b) The Registrar may be waived by the Presidency;
- (c) The Deputy Prosecutors and staff of the Office of the Prosecutor may be waived by the Prosecutor;
- (d) The Deputy Registrar and staff of the Registry may be waived by the Registrar.

ARTICLE 49 SALARIES, ALLOWANCES AND EXPENSES

The judges, the Prosecutor, the Deputy Prosecutors, the Registrar and the Deputy Registrar shall receive such salaries, allowances and expenses as may be decided upon by the Assembly of States Parties. These salaries and allowances shall not be reduced during their terms of office.

ARTICLE 50 OFFICIAL AND WORKING LANGUAGES

1. The official languages of the Court shall be Arabic, Chinese, English, French, Russian and Spanish. The judgements of the Court, as well as other decisions resolving fundamental issues before the Court, shall be published in the official languages. The Presidency shall, in accordance with the criteria established by the Rules of Procedure and Evidence, determine which decisions may be considered as resolving fundamental issues for the purposes of this paragraph.
2. The working languages of the Court shall be English and French. The Rules of Procedure and Evidence shall determine the cases in which other official languages may be used as working languages.
3. At the request of any party to a proceeding or a State allowed to intervene in a proceeding, the Court shall authorize a language other than English or French to be used by such a party or State, provided that the Court considers such authorization to be adequately justified.

ARTICLE 51 RULES OF PROCEDURE AND EVIDENCE

1. The Rules of Procedure and Evidence shall enter into force upon adoption by a two-thirds majority of the members of the Assembly of States Parties.
2. Amendments to the Rules of Procedure and Evidence may be proposed by:
 - (a) Any State Party;
 - (b) The judges acting by an absolute majority; or
 - (c) The Prosecutor.
 Such amendments shall enter into force upon adoption by a two-thirds majority of the members of the Assembly of States Parties.
3. After the adoption of the Rules of Procedure and Evidence, in urgent cases where the Rules do not provide for a specific situation before the Court, the judges may, by a two-thirds majority, draw up provisional Rules to be applied until adopted, amended or rejected at the next ordinary or special session of the Assembly of States Parties.
4. The Rules of Procedure and Evidence, amendments thereto and any provisional Rule shall be consistent with this Statute. Amendments to the Rules of Procedure and Evidence as well as provisional Rules shall not be applied retroactively to the detriment of the person who is being investigated or prosecuted or who has been convicted.
5. In the event of conflict between the Statute and the Rules of Procedure and Evidence, the Statute shall prevail.

ARTICLE 52 REGULATIONS OF THE COURT

1. The judges shall, in accordance with this Statute and the Rules of Procedure and Evidence, adopt, by an absolute majority, the Regulations of the Court necessary for its routine functioning.

2. The Prosecutor and the Registrar shall be consulted in the elaboration of the Regulations and any amendments thereto.
3. The Regulations and any amendments thereto shall take effect upon adoption unless otherwise decided by the judges. Immediately upon adoption, they shall be circulated to States Parties for comments. If within six months there are no objections from a majority of States Parties, they shall remain in force.

PART 5 INVESTIGATION AND PROSECUTION

ARTICLE 53 INITIATION OF AN INVESTIGATION

1. The Prosecutor shall, having evaluated the information made available to him or her, initiate an investigation unless he or she determines that there is no reasonable basis to proceed under this Statute. In deciding whether to initiate an investigation, the Prosecutor shall consider whether:
 - (a) The information available to the Prosecutor provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed;
 - (b) The case is or would be admissible under article 17; and
 - (c) Taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.

If the Prosecutor determines that there is no reasonable basis to proceed and his or her determination is based solely on subparagraph (c) above, he or she shall inform the Pre-Trial Chamber.
2. If, upon investigation, the Prosecutor concludes that there is not a sufficient basis for a prosecution because:
 - (a) There is not a sufficient legal or factual basis to seek a warrant or summons under article 58;
 - (b) The case is inadmissible under article 17; or
 - (c) A prosecution is not in the interests of justice, taking into account all the circumstances, including the gravity of the crime, the interests of victims and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime;

the Prosecutor shall inform the Pre-Trial Chamber and the State making a referral under article 14 or the Security Council in a case under article 13, paragraph (b), of his or her conclusion and the reasons for the conclusion.
3.
 - (a) At the request of the State making a referral under article 14 or the Security Council under article 13, paragraph (b), the Pre-Trial Chamber may review a decision of the Prosecutor under paragraph 1 or 2 not to proceed and may request the Prosecutor to reconsider that decision.
 - (b) In addition, the Pre-Trial Chamber may, on its own initiative, review a decision of the Prosecutor not to proceed if it is based solely on paragraph 1 (c) or 2 (c). In such a case, the decision of the Prosecutor shall be effective only if confirmed by the Pre-Trial Chamber.
4. The Prosecutor may, at any time, reconsider a decision whether to initiate an investigation or prosecution based on new facts or information.

ARTICLE 54 DUTIES AND POWERS OF THE PROSECUTOR WITH RESPECT TO INVESTIGATIONS

1. The Prosecutor shall:
 - (a) In order to establish the truth, extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute, and, in doing so, investigate incriminating and exonerating circumstances equally;
 - (b) Take appropriate measures to ensure the effective investigation and prosecution of crimes within the jurisdiction of the Court, and in doing so, respect the interests and personal circumstances of victims and witnesses, including age, gender as defined in article 7, paragraph 3, and health, and take into account the nature of the crime, in particular where it involves sexual violence, gender violence or violence against children; and
 - (c) Fully respect the rights of persons arising under this Statute.
2. The Prosecutor may conduct investigations on the territory of a State:
 - (a) In accordance with the provisions of Part 9; or
 - (b) As authorized by the Pre-Trial Chamber under article 57, paragraph 3 (d).
3. The Prosecutor may:
 - (a) Collect and examine evidence;
 - (b) Request the presence of and question persons being investigated, victims and witnesses;
 - (c) Seek the cooperation of any State or intergovernmental organization or arrangement in accordance with its respective competence and/or mandate;
 - (d) Enter into such arrangements or agreements, not inconsistent with this Statute, as may be necessary to facilitate the cooperation of a State, intergovernmental organization or person;
 - (e) Agree not to disclose, at any stage of the proceedings, documents or information that the Prosecutor obtains on the condition of confidentiality and solely for the purpose of generating new evidence, unless the provider of the information consents; and
 - (f) Take necessary measures, or request that necessary measures be taken, to ensure the confidentiality of information, the protection of any person or the preservation of evidence.

ARTICLE 55 RIGHTS OF PERSONS DURING AN INVESTIGATION

1. In respect of an investigation under this Statute, a person:
 - (a) Shall not be compelled to incriminate himself or herself or to confess guilt;
 - (b) Shall not be subjected to any form of coercion, duress or threat, to torture or to any other form of cruel, inhuman or degrading treatment or punishment;
 - (c) Shall, if questioned in a language other than a language the person fully understands and speaks, have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness; and
 - (d) Shall not be subjected to arbitrary arrest or detention, and shall not be deprived of his or her liberty except on such grounds and in accordance with such procedures as are established in this Statute.
2. Where there are grounds to believe that a person has committed a crime within the jurisdiction of the Court and that person is about to be questioned either by the Prosecutor, or by national authorities pursuant to a request made under Part 9, that person shall also have the following rights of which he or she shall be informed prior to being questioned:
 - (a) To be informed, prior to being questioned, that there are grounds to believe that he or she has committed a crime within the jurisdiction of the Court;

- (b) To remain silent, without such silence being a consideration in the determination of guilt or innocence;
- (c) To 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; and
- (d) To be questioned in the presence of counsel unless the person has voluntarily waived his or her right to counsel.

ARTICLE 56 ROLE OF THE PRE-TRIAL CHAMBER IN RELATION TO A UNIQUE INVESTIGATIVE OPPORTUNITY

1.
 - (a) Where the Prosecutor considers an investigation to present a unique opportunity to take testimony or a statement from a witness or to examine, collect or test evidence, which may not be available subsequently for the purposes of a trial, the Prosecutor shall so inform the Pre-Trial Chamber.
 - (b) In that case, the Pre-Trial Chamber may, upon request of the Prosecutor, take such measures as may be necessary to ensure the efficiency and integrity of the proceedings and, in particular, to protect the rights of the defence.
 - (c) Unless the Pre-Trial Chamber orders otherwise, the Prosecutor shall provide the relevant information to the person who has been arrested or appeared in response to a summons in connection with the investigation referred to in subparagraph (a), in order that he or she may be heard on the matter.
2. The measures referred to in paragraph 1 (b) may include:
 - (a) Making recommendations or orders regarding procedures to be followed;
 - (b) Directing that a record be made of the proceedings;
 - (c) Appointing an expert to assist;
 - (d) Authorizing counsel for a person who has been arrested, or appeared before the Court in response to a summons, to participate, or where there has not yet been such an arrest or appearance or counsel has not been designated, appointing another counsel to attend and represent the interests of the defence;
 - (e) Naming one of its members or, if necessary, another available judge of the Pre-Trial or Trial Division to observe and make recommendations or orders regarding the collection and preservation of evidence and the questioning of persons;
 - (f) Taking such other action as may be necessary to collect or preserve evidence.
3.
 - (a) Where the Prosecutor has not sought measures pursuant to this article but the Pre-Trial Chamber considers that such measures are required to preserve evidence that it deems would be essential for the defence at trial, it shall consult with the Prosecutor as to whether there is good reason for the Prosecutor's failure to request the measures. If upon consultation, the Pre-Trial Chamber concludes that the Prosecutor's failure to request such measures is unjustified, the Pre-Trial Chamber may take such measures on its own initiative.
 - (b) A decision of the Pre-Trial Chamber to act on its own initiative under this paragraph may be appealed by the Prosecutor. The appeal shall be heard on an expedited basis.
4. The admissibility of evidence preserved or collected for trial pursuant to this article, or the record thereof, shall be governed at trial by article 69, and given such weight as determined by the Trial Chamber.

ARTICLE 57 FUNCTIONS AND POWERS OF THE PRE-TRIAL CHAMBER

1. Unless otherwise provided in this Statute, the Pre-Trial Chamber shall exercise its functions in accordance with the provisions of this article.
2.
 - (a) Orders or rulings of the Pre-Trial Chamber issued under articles 15, 18, 19, 54, paragraph 2, 61, paragraph 7, and 72 must be concurred in by a majority of its judges.
 - (b) In all other cases, a single judge of the Pre-Trial Chamber may exercise the functions provided for in this Statute, unless otherwise provided for in the Rules of Procedure and Evidence or by a majority of the Pre-Trial Chamber.
3. In addition to its other functions under this Statute, the Pre-Trial Chamber may:
 - (a) At the request of the Prosecutor, issue such orders and warrants as may be required for the purposes of an investigation;
 - (b) Upon the request of a person who has been arrested or has appeared pursuant to a summons under article 58, issue such orders, including measures such as those described in article 56, or seek such cooperation pursuant to Part 9 as may be necessary to assist the person in the preparation of his or her defence;
 - (c) Where necessary, 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;
 - (d) Authorize the Prosecutor to take specific investigative steps within the territory of a State Party without having secured the cooperation of that State under Part 9 if, whenever possible having regard to the views of the State concerned, the Pre-Trial Chamber has determined in that case that the State is clearly unable to execute a request for cooperation due to the unavailability of any authority or any component of its judicial system competent to execute the request for cooperation under Part 9.
 - (e) Where a warrant of arrest or a summons has been issued under article 58, and having due regard to the strength of the evidence and the rights of the parties concerned, as provided for in this Statute and the Rules of Procedure and Evidence, seek the cooperation of States pursuant to article 93, paragraph 1 (k), to take protective measures for the purpose of forfeiture, in particular for the ultimate benefit of victims.

ARTICLE 58 ISSUANCE BY THE PRE-TRIAL CHAMBER OF A WARRANT OF ARREST OR A SUMMONS TO APPEAR

1. At any time after the initiation of an investigation, the Pre-Trial Chamber shall, on the application of the Prosecutor, issue a warrant of arrest of a person if, having examined the application and the evidence or other information submitted by the Prosecutor, it is satisfied that:
 - (a) There are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court; and
 - (b) The arrest of the person appears necessary:
 - (i) To ensure the person's appearance at trial,
 - (ii) To ensure that the person does not obstruct or endanger the investigation or the court proceedings, or
 - (iii) Where applicable, to prevent the person from continuing with the commission of that crime or a related crime which is within the jurisdiction of the Court and which arises out of the same circumstances.

2. The application of the Prosecutor shall contain:
 - (a) The name of the person and any other relevant identifying information;
 - (b) A specific reference to the crimes within the jurisdiction of the Court which the person is alleged to have committed;
 - (c) A concise statement of the facts which are alleged to constitute those crimes;
 - (d) A summary of the evidence and any other information which establish reasonable grounds to believe that the person committed those crimes; and
 - (e) The reason why the Prosecutor believes that the arrest of the person is necessary.
3. The warrant of arrest shall contain:
 - (a) The name of the person and any other relevant identifying information;
 - (b) A specific reference to the crimes within the jurisdiction of the Court for which the person's arrest is sought; and
 - (c) A concise statement of the facts which are alleged to constitute those crimes.
4. The warrant of arrest shall remain in effect until otherwise ordered by the Court.
5. On the basis of the warrant of arrest, the Court may request the provisional arrest or the arrest and surrender of the person under Part 9.
6. The Prosecutor may request the Pre-Trial Chamber to amend the warrant of arrest by modifying or adding to the crimes specified therein. The Pre-Trial Chamber shall so amend the warrant if it is satisfied that there are reasonable grounds to believe that the person committed the modified or additional crimes.
7. As an alternative to seeking a warrant of arrest, the Prosecutor may submit an application requesting that the Pre-Trial Chamber issue a summons for the person to appear. If the Pre-Trial Chamber is satisfied that there are reasonable grounds to believe that the person committed the crime alleged and that a summons is sufficient to ensure the person's appearance, it shall issue the summons, with or without conditions restricting liberty (other than detention) if provided for by national law, for the person to appear. The summons shall contain:
 - (a) The name of the person and any other relevant identifying information;
 - (b) The specified date on which the person is to appear;
 - (c) A specific reference to the crimes within the jurisdiction of the Court which the person is alleged to have committed; and
 - (d) A concise statement of the facts which are alleged to constitute the crime.

The summons shall be served on the person.

ARTICLE 59 ARREST PROCEEDINGS IN THE CUSTODIAL STATE

1. A State Party which has received a request for provisional arrest or for arrest and surrender shall immediately take steps to arrest the person in question in accordance with its laws and the provisions of Part 9.
2. A person arrested shall be brought promptly before the competent judicial authority in the custodial State which shall determine, in accordance with the law of that State, that:
 - (a) The warrant applies to that person;
 - (b) The person has been arrested in accordance with the proper process; and
 - (c) The person's rights have been respected.
3. The person arrested shall have the right to apply to the competent authority in the custodial State for interim release pending surrender.
4. In reaching a decision on any such application, the competent authority in the custodial State shall consider whether, given the gravity of the alleged crimes, there are urgent and

exceptional circumstances to justify interim release and whether necessary safeguards exist to ensure that the custodial State can fulfil its duty to surrender the person to the Court. It shall not be open to the competent authority of the custodial State to consider whether the warrant of arrest was properly issued in accordance with article 58, paragraph 1 (a) and (b).

5. The Pre-Trial Chamber shall be notified of any request for interim release and shall make recommendations to the competent authority in the custodial State. The competent authority in the custodial State shall give full consideration to such recommendations, including any recommendations on measures to prevent the escape of the person, before rendering its decision.
6. If the person is granted interim release, the Pre-Trial Chamber may request periodic reports on the status of the interim release.
7. Once ordered to be surrendered by the custodial State, the person shall be delivered to the Court as soon as possible.

ARTICLE 60 INITIAL PROCEEDINGS BEFORE THE COURT

1. Upon the surrender of the person to the Court, or the person's appearance before the Court voluntarily or pursuant to a summons, the Pre-Trial Chamber shall satisfy itself that the person has been informed of the crimes which he or she is alleged to have committed, and of his or her rights under this Statute, including the right to apply for interim release pending trial.
2. A person subject to a warrant of arrest may apply for interim release pending trial. If the Pre-Trial Chamber is satisfied that the conditions set forth in article 58, paragraph 1, are met, the person shall continue to be detained. If it is not so satisfied, the Pre-Trial Chamber shall release the person, with or without conditions.
3. The Pre-Trial Chamber shall periodically review its ruling on the release or detention of the person, and may do so at any time on the request of the Prosecutor or the person. Upon such review, it may modify its ruling as to detention, release or conditions of release, if it is satisfied that changed circumstances so require.
4. The Pre-Trial Chamber shall ensure that a person is not detained for an unreasonable period prior to trial due to inexcusable delay by the Prosecutor. If such delay occurs, the Court shall consider releasing the person, with or without conditions.
5. If necessary, the Pre-Trial Chamber may issue a warrant of arrest to secure the presence of a person who has been released.

ARTICLE 61 CONFIRMATION OF THE CHARGES BEFORE TRIAL

1. Subject to the provisions of paragraph 2, within a reasonable time after the person's surrender or voluntary appearance before the Court, the Pre-Trial Chamber shall hold a hearing to confirm the charges on which the Prosecutor intends to seek trial. The hearing shall be held in the presence of the Prosecutor and the person charged, as well as his or her counsel.
2. The Pre-Trial Chamber may, upon request of the Prosecutor or on its own motion, hold a hearing in the absence of the person charged to confirm the charges on which the Prosecutor intends to seek trial when the person has:
 - (a) Waived his or her right to be present; or
 - (b) Fled or cannot be found and all reasonable steps have been taken to secure his or her appearance before the Court and to inform the person of the charges and that a hearing to confirm those charges will be held.

In that case, the person shall be represented by counsel where the Pre-Trial Chamber determines that it is in the interests of justice.

3. Within a reasonable time before the hearing, the person shall:
 - (a) Be provided with a copy of the document containing the charges on which the Prosecutor intends to bring the person to trial; and
 - (b) Be informed of the evidence on which the Prosecutor intends to rely at the hearing.

The Pre-Trial Chamber may issue orders regarding the disclosure of information for the purposes of the hearing.
4. Before the hearing, the Prosecutor may continue the investigation and may amend or withdraw any charges. The person shall be given reasonable notice before the hearing of any amendment to or withdrawal of charges. In case of a withdrawal of charges, the Prosecutor shall notify the Pre-Trial Chamber of the reasons for the withdrawal.
5. At the hearing, the Prosecutor shall support each charge with sufficient evidence to establish substantial grounds to believe that the person committed the crime charged. The Prosecutor may rely on documentary or summary evidence and need not call the witnesses expected to testify at the trial.
6. At the hearing, the person may:
 - (a) Object to the charges;
 - (b) Challenge the evidence presented by the Prosecutor; and
 - (c) Present evidence.
7. The Pre-Trial Chamber shall, on the basis of the hearing, determine whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged. Based on its determination, the Pre-Trial Chamber shall:
 - (a) Confirm those charges in relation to which it has determined that there is sufficient evidence, and commit the person to a Trial Chamber for trial on the charges as confirmed;
 - (b) Decline to confirm those charges in relation to which it has determined that there is insufficient evidence;
 - (c) Adjourn the hearing and request the Prosecutor to consider:
 - (i) Providing further evidence or conducting further investigation with respect to a particular charge; or
 - (ii) Amending a charge because the evidence submitted appears to establish a different crime within the jurisdiction of the Court.
8. Where the Pre-Trial Chamber declines to confirm a charge, the Prosecutor shall not be precluded from subsequently requesting its confirmation if the request is supported by additional evidence.
9. After the charges are confirmed and before the trial has begun, the Prosecutor may, with the permission of the Pre-Trial Chamber and after notice to the accused, amend the charges. If the Prosecutor seeks to add additional charges or to substitute more serious charges, a hearing under this article to confirm those charges must be held. After commencement of the trial, the Prosecutor may, with the permission of the Trial Chamber, withdraw the charges.
10. Any warrant previously issued shall cease to have effect with respect to any charges which have not been confirmed by the Pre-Trial Chamber or which have been withdrawn by the Prosecutor.
11. Once the charges have been confirmed in accordance with this article, the Presidency shall constitute a Trial Chamber which, subject to paragraph 9 and to article 64, paragraph 4, shall be responsible for the conduct of subsequent proceedings and may exercise any function of the Pre-Trial Chamber that is relevant and capable of application in those proceedings.

PART 6 THE TRIAL

ARTICLE 62 PLACE OF TRIAL

Unless otherwise decided, the place of the trial shall be the seat of the Court.

ARTICLE 63 TRIAL IN THE PRESENCE OF THE ACCUSED

1. The accused shall be present during the trial.
2. If the accused, being present before the Court, continues to disrupt the trial, the Trial Chamber may remove the accused and shall make provision for him or her to observe the trial and instruct counsel from outside the courtroom, through the use of communications technology, if required. Such measures shall be taken only in exceptional circumstances after other reasonable alternatives have proved inadequate, and only for such duration as is strictly required.

ARTICLE 64 FUNCTIONS AND POWERS OF THE TRIAL CHAMBER

1. The functions and powers of the Trial Chamber set out in this article shall be exercised in accordance with this Statute and the Rules of Procedure and Evidence.
2. The Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses.
3. Upon assignment of a case for trial in accordance with this Statute, the Trial Chamber assigned to deal with the case shall:
 - (a) Confer with the parties and adopt such procedures as are necessary to facilitate the fair and expeditious conduct of the proceedings;
 - (b) Determine the language or languages to be used at trial; and
 - (c) Subject to any other relevant provisions of this Statute, provide for disclosure of documents or information not previously disclosed, sufficiently in advance of the commencement of the trial to enable adequate preparation for trial.
4. The Trial Chamber may, if necessary for its effective and fair functioning, refer preliminary issues to the Pre-Trial Chamber or, if necessary, to another available judge of the Pre-Trial Division.
5. Upon notice to the parties, the Trial Chamber may, as appropriate, direct that there be joinder or severance in respect of charges against more than one accused.
6. In performing its functions prior to trial or during the course of a trial, the Trial Chamber may, as necessary:
 - (a) Exercise any functions of the Pre-Trial Chamber referred to in article 61, paragraph 11;
 - (b) Require the attendance and testimony of witnesses and production of documents and other evidence by obtaining, if necessary, the assistance of States as provided in this Statute;
 - (c) Provide for the protection of confidential information;
 - (d) Order the production of evidence in addition to that already collected prior to the trial or presented during the trial by the parties;
 - (e) Provide for the protection of the accused, witnesses and victims; and
 - (f) Rule on any other relevant matters.
7. The trial shall be held in public. The Trial Chamber may, however, determine that special circumstances require that certain proceedings be in closed session for the purposes set forth in article 68, or to protect confidential or sensitive information to be given in evidence.

8.
 - (a) At the commencement of the trial, the Trial Chamber shall have read to the accused the charges previously confirmed by the Pre-Trial Chamber. The Trial Chamber shall satisfy itself that the accused understands the nature of the charges. It shall afford him or her the opportunity to make an admission of guilt in accordance with article 65 or to plead not guilty.
 - (b) At the trial, the presiding judge may give directions for the conduct of proceedings, including to ensure that they are conducted in a fair and impartial manner. Subject to any directions of the presiding judge, the parties may submit evidence in accordance with the provisions of this Statute.
9. The Trial Chamber shall have, inter alia, the power on application of a party or on its own motion to:
 - (a) Rule on the admissibility or relevance of evidence; and
 - (b) Take all necessary steps to maintain order in the course of a hearing.
10. The Trial Chamber shall ensure that a complete record of the trial, which accurately reflects the proceedings, is made and that it is maintained and preserved by the Registrar.

ARTICLE 65 PROCEEDINGS ON AN ADMISSION OF GUILT

1. Where the accused makes an admission of guilt pursuant to article 64, paragraph 8 (a), the Trial Chamber shall determine whether:
 - (a) The accused understands the nature and consequences of the admission of guilt;
 - (b) The admission is voluntarily made by the accused after sufficient consultation with defence counsel; and
 - (c) The admission of guilt is supported by the facts of the case that are contained in:
 - (i) The charges brought by the Prosecutor and admitted by the accused;
 - (ii) Any materials presented by the Prosecutor which supplement the charges and which the accused accepts; and
 - (iii) Any other evidence, such as the testimony of witnesses, presented by the Prosecutor or the accused.
2. Where the Trial Chamber is satisfied that the matters referred to in paragraph 1 are established, it shall consider the admission of guilt, together with any additional evidence presented, as establishing all the essential facts that are required to prove the crime to which the admission of guilt relates, and may convict the accused of that crime.
3. Where the Trial Chamber is not satisfied that the matters referred to in paragraph 1 are established, it shall consider the admission of guilt as not having been made, in which case it shall order that the trial be continued under the ordinary trial procedures provided by this Statute and may remit the case to another Trial Chamber.
4. Where the Trial Chamber is of the opinion that a more complete presentation of the facts of the case is required in the interests of justice, in particular the interests of the victims, the Trial Chamber may:
 - (a) Request the Prosecutor to present additional evidence, including the testimony of witnesses; or
 - (b) Order that the trial be continued under the ordinary trial procedures provided by this Statute, in which case it shall consider the admission of guilt as not having been made and may remit the case to another Trial Chamber.
5. Any discussions between the Prosecutor and the defence regarding modification of the charges, the admission of guilt or the penalty to be imposed shall not be binding on the Court.

ARTICLE 66 PRESUMPTION OF INNOCENCE

1. Everyone shall be presumed innocent until proved guilty before the Court in accordance with the applicable law.
2. The onus is on the Prosecutor to prove the guilt of the accused.
3. In order to convict the accused, the Court must be convinced of the guilt of the accused beyond reasonable doubt.

ARTICLE 67 RIGHTS OF THE ACCUSED

1. 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 and to communicate freely with counsel of the accused's 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 in person or through legal assistance of the accused's 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 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 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 make an unsworn oral or written statement in his or her defence; and
 - (i) Not to have imposed on him or her any reversal of the burden of proof or any onus of rebuttal.
2. In addition to any other disclosure provided for in this Statute, the Prosecutor shall, as soon as practicable, disclose to the defence evidence in the Prosecutor's possession or control which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence. In case of doubt as to the application of this paragraph, the Court shall decide.

ARTICLE 68 PROTECTION OF THE VICTIMS AND WITNESSES AND THEIR PARTICIPATION IN THE PROCEEDINGS

1. The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. In so doing, the Court shall have regard to all relevant factors, including age, gender as defined in article 7, paragraph 3, and health, and the nature of the crime, in particular, but not limited to, where the crime involves sexual or gender violence or violence against children. The Prosecutor shall take such measures particularly during the investigation and prosecution of such crimes. These

measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

2. As an exception to the principle of public hearings provided for in article 67, the Chambers of the Court may, to protect victims and witnesses or an accused, conduct any part of the proceedings in camera or allow the presentation of evidence by electronic or other special means. In particular, such measures shall be implemented in the case of a victim of sexual violence or a child who is a victim or a witness, unless otherwise ordered by the Court, having regard to all the circumstances, particularly the views of the victim or witness.
3. Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence.
4. The Victims and Witnesses Unit may advise the Prosecutor and the Court on appropriate protective measures, security arrangements, counselling and assistance as referred to in article 43, paragraph 6.
5. Where the disclosure of evidence or information pursuant to this Statute may lead to the grave endangerment of the security of a witness or his or her family, the Prosecutor may, for the purposes of any proceedings conducted prior to the commencement of the trial, withhold such evidence or information and instead submit a summary thereof. Such measures shall be exercised in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.
6. A State may make an application for necessary measures to be taken in respect of the protection of its servants or agents and the protection of confidential or sensitive information.

ARTICLE 69 EVIDENCE

1. Before testifying, each witness shall, in accordance with the Rules of Procedure and Evidence, give an undertaking as to the truthfulness of the evidence to be given by that witness.
2. The testimony of a witness at trial shall be given in person, except to the extent provided by the measures set forth in article 68 or in the Rules of Procedure and Evidence. The Court may also permit the giving of viva voce (oral) or recorded testimony of a witness by means of video or audio technology, as well as the introduction of documents or written transcripts, subject to this Statute and in accordance with the Rules of Procedure and Evidence. These measures shall not be prejudicial to or inconsistent with the rights of the accused.
3. The parties may submit evidence relevant to the case, in accordance with article 64. The Court shall have the authority to request the submission of all evidence that it considers necessary for the determination of the truth.
4. The Court may rule on the relevance or admissibility of any evidence, taking into account, inter alia, the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness, in accordance with the Rules of Procedure and Evidence.
5. The Court shall respect and observe privileges on confidentiality as provided for in the Rules of Procedure and Evidence.
6. The Court shall not require proof of facts of common knowledge but may take judicial notice of them.
7. Evidence obtained by means of a violation of this Statute or internationally recognized human rights shall not be admissible if:

- (a) The violation casts substantial doubt on the reliability of the evidence; or
 - (b) The admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings.
8. When deciding on the relevance or admissibility of evidence collected by a State, the Court shall not rule on the application of the State's national law.

ARTICLE 70 OFFENCES AGAINST THE ADMINISTRATION OF JUSTICE

1. The Court shall have jurisdiction over the following offences against its administration of justice when committed intentionally:
 - (a) Giving false testimony when under an obligation pursuant to article 69, paragraph 1, to tell the truth;
 - (b) Presenting evidence that the party knows is false or forged;
 - (c) Corruptly influencing a witness, obstructing or interfering with the attendance or testimony of a witness, retaliating against a witness for giving testimony or destroying, tampering with or interfering with the collection of evidence;
 - (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;
 - (e) Retaliating against an official of the Court on account of duties performed by that or another official;
 - (f) Soliciting or accepting a bribe as an official of the Court in connection with his or her official duties.
2. The principles and procedures governing the Court's exercise of jurisdiction over offences under this article shall be those provided for in the Rules of Procedure and Evidence. The conditions for providing international cooperation to the Court with respect to its proceedings under this article shall be governed by the domestic laws of the requested State.
3. In the event of conviction, the Court may impose a term of imprisonment not exceeding five years, or a fine in accordance with the Rules of Procedure and Evidence, or both.
4.
 - (a) Each State Party shall extend its criminal laws penalizing offences against the integrity of its own investigative or judicial process to offences against the administration of justice referred to in this article, committed on its territory, or by one of its nationals;
 - (b) Upon request by the Court, whenever it deems it proper, the State Party shall submit the case to its competent authorities for the purpose of prosecution. Those authorities shall treat such cases with diligence and devote sufficient resources to enable them to be conducted effectively.

ARTICLE 71 SANCTIONS FOR MISCONDUCT BEFORE THE COURT

1. The Court may sanction persons present before it who commit misconduct, including disruption of its proceedings or deliberate refusal to comply with its directions, by administrative measures other than imprisonment, such as temporary or permanent removal from the courtroom, a fine or other similar measures provided for in the Rules of Procedure and Evidence.
2. The procedures governing the imposition of the measures set forth in paragraph 1 shall be those provided for in the Rules of Procedure and Evidence.

ARTICLE 72 PROTECTION OF NATIONAL SECURITY INFORMATION

1. This article applies in any case where the disclosure of the information or documents of a State would, in the opinion of that State, prejudice its national security interests. Such cases include those falling within the scope of article 56, paragraphs 2 and 3, article 61, paragraph 3, article 64, paragraph 3, article 67, paragraph 2, article 68, paragraph 6, article 87, paragraph 6 and article 93, as well as cases arising at any other stage of the proceedings where such disclosure may be at issue.
2. This article shall also apply when a person who has been requested to give information or evidence has refused to do so or has referred the matter to the State on the ground that disclosure would prejudice the national security interests of a State and the State concerned confirms that it is of the opinion that disclosure would prejudice its national security interests.
3. Nothing in this article shall prejudice the requirements of confidentiality applicable under article 54, paragraph 3 (e) and (f), or the application of article 73.
4. If a State learns that information or documents of the State are being, or are likely to be, disclosed at any stage of the proceedings, and it is of the opinion that disclosure would prejudice its national security interests, that State shall have the right to intervene in order to obtain resolution of the issue in accordance with this article.
5. If, in the opinion of a State, disclosure of information would prejudice its national security interests, all reasonable steps will be taken by the State, acting in conjunction with the Prosecutor, the defence or the Pre-Trial Chamber or Trial Chamber, as the case may be, to seek to resolve the matter by cooperative means. Such steps may include:
 - (a) Modification or clarification of the request;
 - (b) A determination by the Court regarding the relevance of the information or evidence sought, or a determination as to whether the evidence, though relevant, could be or has been obtained from a source other than the requested State;
 - (c) Obtaining the information or evidence from a different source or in a different form; or
 - (d) Agreement on conditions under which the assistance could be provided including, among other things, providing summaries or redactions, limitations on disclosure, use of in camera or ex parte proceedings, or other protective measures permissible under the Statute and the Rules of Procedure and Evidence.
6. Once all reasonable steps have been taken to resolve the matter through cooperative means, and if the State considers that there are no means or conditions under which the information or documents could be provided or disclosed without prejudice to its national security interests, it shall so notify the Prosecutor or the Court of the specific reasons for its decision, unless a specific description of the reasons would itself necessarily result in such prejudice to the State's national security interests.
7. Thereafter, if the Court determines that the evidence is relevant and necessary for the establishment of the guilt or innocence of the accused, the Court may undertake the following actions:
 - (a) Where disclosure of the information or document is sought pursuant to a request for cooperation under Part 9 or the circumstances described in paragraph 2, and the State has invoked the ground for refusal referred to in article 93, paragraph 4:
 - (i) The Court may, before making any conclusion referred to in subparagraph 7 (a) (ii), request further consultations for the purpose of considering the State's representations, which may include, as appropriate, hearings in camera and ex parte;
 - (ii) If the Court concludes that, by invoking the ground for refusal under article 93, paragraph 4, in the circumstances of the case, the requested State is not acting in accordance with its obligations under this Statute, the Court may refer the matter in

accordance with article 87, paragraph 7, specifying the reasons for its conclusion;
and

- (iii) The Court may make such inference in the trial of the accused as to the existence or non-existence of a fact, as may be appropriate in the circumstances; or
- (b) In all other circumstances:
 - (i) Order disclosure; or
 - (ii) To the extent it does not order disclosure, make such inference in the trial of the accused as to the existence or non-existence of a fact, as may be appropriate in the circumstances.

ARTICLE 73 THIRD-PARTY INFORMATION OR DOCUMENTS

If a State Party is requested by the Court to provide a document or information in its custody, possession or control, which was disclosed to it in confidence by a State, intergovernmental organization or international organization, it shall seek the consent of the originator to disclose that document or information. If the originator is a State Party, it shall either consent to disclosure of the information or document or undertake to resolve the issue of disclosure with the Court, subject to the provisions of article 72. If the originator is not a State Party and refuses to consent to disclosure, the requested State shall inform the Court that it is unable to provide the document or information because of a pre-existing obligation of confidentiality to the originator.

ARTICLE 74 REQUIREMENTS FOR THE DECISION

1. All the judges of the Trial Chamber shall be present at each stage of the trial and throughout their deliberations. The Presidency may, on a case-by-case basis, designate, as available, one or more alternate judges to be present at each stage of the trial and to replace a member of the Trial Chamber if that member is unable to continue attending.
2. The Trial Chamber's decision shall be based on its evaluation of the evidence and the entire proceedings. The decision shall not exceed the facts and circumstances described in the charges and any amendments to the charges. The Court may base its decision only on evidence submitted and discussed before it at the trial.
3. The judges shall attempt to achieve unanimity in their decision, failing which the decision shall be taken by a majority of the judges.
4. The deliberations of the Trial Chamber shall remain secret.
5. The decision shall be in writing and shall contain a full and reasoned statement of the Trial Chamber's findings on the evidence and conclusions. The Trial Chamber shall issue one decision. When there is no unanimity, the Trial Chamber's decision shall contain the views of the majority and the minority. The decision or a summary thereof shall be delivered in open court.

ARTICLE 75 REPARATIONS TO VICTIMS

1. The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. On this basis, in its decision the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting.
2. The Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation.

Where appropriate, the Court may order that the award for reparations be made through the Trust Fund provided for in article 79.

3. Before making an order under this article, the Court may invite and shall take account of representations from or on behalf of the convicted person, victims, other interested persons or interested States.
4. In exercising its power under this article, the Court may, after a person is convicted of a crime within the jurisdiction of the Court, determine whether, in order to give effect to an order which it may make under this article, it is necessary to seek measures under article 93, paragraph 1.
5. A State Party shall give effect to a decision under this article as if the provisions of article 109 were applicable to this article.
6. Nothing in this article shall be interpreted as prejudicing the rights of victims under national or international law.

ARTICLE 76 SENTENCING

1. In the event of a conviction, the Trial Chamber shall consider the appropriate sentence to be imposed and shall take into account the evidence presented and submissions made during the trial that are relevant to the sentence.
2. Except where article 65 applies and before the completion of the trial, the Trial Chamber may on its own motion and shall, at the request of the Prosecutor or the accused, hold a further hearing to hear any additional evidence or submissions relevant to the sentence, in accordance with the Rules of Procedure and Evidence.
3. Where paragraph 2 applies, any representations under article 75 shall be heard during the further hearing referred to in paragraph 2 and, if necessary, during any additional hearing.
4. The sentence shall be pronounced in public and, wherever possible, in the presence of the accused.

PART 7 PENALTIES

ARTICLE 77 APPLICABLE PENALTIES

1. Subject to article 110, the Court may impose one of the following penalties on a person convicted of a crime referred to in article 5 of this Statute:
 - (a) Imprisonment for a specified number of years, which may not exceed a maximum of 30 years; or
 - (b) A term of life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person.
2. In addition to imprisonment, the Court may order:
 - (a) A fine under the criteria provided for in the Rules of Procedure and Evidence;
 - (b) A forfeiture of proceeds, property and assets derived directly or indirectly from that crime, without prejudice to the rights of bona fide third parties.

ARTICLE 78 DETERMINATION OF THE SENTENCE

1. In determining the sentence, the Court shall, in accordance with the Rules of Procedure and Evidence, take into account such factors as the gravity of the crime and the individual circumstances of the convicted person.
2. In imposing a sentence of imprisonment, the Court shall deduct the time, if any, previously spent in detention in accordance with an order of the Court. The Court may deduct any time otherwise spent in detention in connection with conduct underlying the crime.
3. When a person has been convicted of more than one crime, the Court shall pronounce a sentence for each crime and a joint sentence specifying the total period of imprisonment.

This period shall be no less than the highest individual sentence pronounced and shall not exceed 30 years imprisonment or a sentence of life imprisonment in conformity with article 77, paragraph 1 (b).

ARTICLE 79 TRUST FUND

1. A Trust Fund shall be established by decision of the Assembly of States Parties for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims.
2. The Court may order money and other property collected through fines or forfeiture to be transferred, by order of the Court, to the Trust Fund.
3. The Trust Fund shall be managed according to criteria to be determined by the Assembly of States Parties.

ARTICLE 80 NON-PREJUDICE TO NATIONAL APPLICATION OF PENALTIES AND NATIONAL LAWS

Nothing in this Part affects the application by States of penalties prescribed by their national law, nor the law of States which do not provide for penalties prescribed in this Part.

PART 8 APPEAL AND REVISION

ARTICLE 81 APPEAL AGAINST DECISION OF ACQUITTAL OR CONVICTION OR AGAINST SENTENCE

1. A decision under article 74 may be appealed in accordance with the Rules of Procedure and Evidence as follows:
 - (a) The Prosecutor may make an appeal on any of the following grounds:
 - (i) Procedural error,
 - (ii) Error of fact, or
 - (iii) Error of law;
 - (b) The convicted person, or the Prosecutor on that person's behalf, may make an appeal on any of the following grounds:
 - (i) Procedural error,
 - (ii) Error of fact,
 - (iii) Error of law, or
 - (iv) Any other ground that affects the fairness or reliability of the proceedings or decision.
2.
 - (a) A sentence may be appealed, in accordance with the Rules of Procedure and Evidence, by the Prosecutor or the convicted person on the ground of disproportion between the crime and the sentence;
 - (b) If on an appeal against sentence the Court considers that there are grounds on which the conviction might be set aside, wholly or in part, it may invite the Prosecutor and the convicted person to submit grounds under article 81, paragraph 1 (a) or (b), and may render a decision on conviction in accordance with article 83;
 - (c) The same procedure applies when the Court, on an appeal against conviction only, considers that there are grounds to reduce the sentence under paragraph 2 (a).
- 3.

- (a) Unless the Trial Chamber orders otherwise, a convicted person shall remain in custody pending an appeal;
- (b) When a convicted person's time in custody exceeds the sentence of imprisonment imposed, that person shall be released, except that if the Prosecutor is also appealing, the release may be subject to the conditions under subparagraph (c) below;
- (c) In case of an acquittal, the accused shall be released immediately, subject to the following:
 - (i) Under exceptional circumstances, and having regard, *inter alia*, to the concrete risk of flight, the seriousness of the offence charged and the probability of success on appeal, the Trial Chamber, at the request of the Prosecutor, may maintain the detention of the person pending appeal;
 - (ii) A decision by the Trial Chamber under subparagraph (c) (i) may be appealed in accordance with the Rules of Procedure and Evidence.
- 4. Subject to the provisions of paragraph 3 (a) and (b), execution of the decision or sentence shall be suspended during the period allowed for appeal and for the duration of the appeal proceedings.

ARTICLE 82 APPEAL AGAINST OTHER DECISIONS

- 1. Either party may appeal any of the following decisions in accordance with the Rules of Procedure and Evidence:
 - (a) A decision with respect to jurisdiction or admissibility;
 - (b) A decision granting or denying release of the person being investigated or prosecuted;
 - (c) A decision of the Pre-Trial Chamber to act on its own initiative under article 56, paragraph 3;
 - (d) A decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.
- 2. A decision of the Pre-Trial Chamber under article 57, paragraph 3 (d), may be appealed against by the State concerned or by the Prosecutor, with the leave of the Pre-Trial Chamber. The appeal shall be heard on an expedited basis.
- 3. An appeal shall not of itself have suspensive effect unless the Appeals Chamber so orders, upon request, in accordance with the Rules of Procedure and Evidence.
- 4. A legal representative of the victims, the convicted person or a bona fide owner of property adversely affected by an order under article 75 may appeal against the order for reparations, as provided in the Rules of Procedure and Evidence.

ARTICLE 83 PROCEEDINGS ON APPEAL

- 1. For the purposes of proceedings under article 81 and this article, the Appeals Chamber shall have all the powers of the Trial Chamber.
- 2. If the Appeals Chamber finds that the proceedings appealed from were unfair in a way that affected the reliability of the decision or sentence, or that the decision or sentence appealed from was materially affected by error of fact or law or procedural error, it may:
 - (a) Reverse or amend the decision or sentence; or
 - (b) Order a new trial before a different Trial Chamber.

For these purposes, the Appeals Chamber may remand a factual issue to the original Trial Chamber for it to determine the issue and to report back accordingly, or may itself call evidence to determine the issue. When the decision or sentence has been appealed only by

the person convicted, or the Prosecutor on that person's behalf, it cannot be amended to his or her detriment.

3. If in an appeal against sentence the Appeals Chamber finds that the sentence is disproportionate to the crime, it may vary the sentence in accordance with Part 7.
4. The judgement of the Appeals Chamber shall be taken by a majority of the judges and shall be delivered in open court. The judgement shall state the reasons on which it is based. When there is no unanimity, the judgement of the Appeals Chamber shall contain the views of the majority and the minority, but a judge may deliver a separate or dissenting opinion on a question of law.
5. The Appeals Chamber may deliver its judgement in the absence of the person acquitted or convicted.

ARTICLE 84 REVISION OF CONVICTION OR SENTENCE

1. The convicted person or, after death, spouses, children, parents or one person alive at the time of the accused's death who has been given express written instructions from the accused to bring such a claim, or the Prosecutor on the person's behalf, may apply to the Appeals Chamber to revise the final judgement of conviction or sentence on the grounds that:
 - (a) New evidence has been discovered that:
 - (i) Was not available at the time of trial, and such unavailability was not wholly or partially attributable to the party making application; and
 - (ii) Is sufficiently important that had it been proved at trial it would have been likely to have resulted in a different verdict;
 - (b) It has been newly discovered that decisive evidence, taken into account at trial and upon which the conviction depends, was false, forged or falsified;
 - (c) One or more of the judges who participated in conviction or confirmation of the charges has committed, in that case, an act of serious misconduct or serious breach of duty of sufficient gravity to justify the removal of that judge or those judges from office under article 46.
2. The Appeals Chamber shall reject the application if it considers it to be unfounded. If it determines that the application is meritorious, it may, as appropriate:
 - (a) Reconvene the original Trial Chamber;
 - (b) Constitute a new Trial Chamber; or
 - (c) Retain jurisdiction over the matter,with a view to, after hearing the parties in the manner set forth in the Rules of Procedure and Evidence, arriving at a determination on whether the judgement should be revised.

ARTICLE 85 COMPENSATION TO AN ARRESTED OR CONVICTED PERSON

1. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.
2. When a person has by a final decision been convicted of a criminal offence, and when subsequently his or her conviction has been reversed on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him or her.
3. In exceptional circumstances, where the Court finds conclusive facts showing that there has been a grave and manifest miscarriage of justice, it may in its discretion award compensation, according to the criteria provided in the Rules of Procedure and Evidence, to a person who

has been released from detention following a final decision of acquittal or a termination of the proceedings for that reason.

PART 9 INTERNATIONAL COOPERATION AND JUDICIAL ASSISTANCE

ARTICLE 86 GENERAL OBLIGATION TO COOPERATE

States Parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court.

ARTICLE 87 REQUESTS FOR COOPERATION: GENERAL PROVISIONS

1.

- (a) The Court shall have the authority to make requests to States Parties for cooperation. The requests shall be transmitted through the diplomatic channel or any other appropriate channel as may be designated by each State Party upon ratification, acceptance, approval or accession.

Subsequent changes to the designation shall be made by each State Party in accordance with the Rules of Procedure and Evidence.

- (b) When appropriate, without prejudice to the provisions of subparagraph (a), requests may also be transmitted through the International Criminal Police Organization or any appropriate regional organization.
2. Requests for cooperation and any documents supporting the request shall either be in or be accompanied by a translation into an official language of the requested State or one of the working languages of the Court, in accordance with the choice made by that State upon ratification, acceptance, approval or accession.
- Subsequent changes to this choice shall be made in accordance with the Rules of Procedure and Evidence.
3. The requested State shall keep confidential a request for cooperation and any documents supporting the request, except to the extent that the disclosure is necessary for execution of the request.
4. In relation to any request for assistance presented under this Part, the Court may take such measures, including measures related to the protection of information, as may be necessary to ensure the safety or physical or psychological well-being of any victims, potential witnesses and their families. The Court may request that any information that is made available under this Part shall be provided and handled in a manner that protects the safety and physical or psychological well-being of any victims, potential witnesses and their families.
- 5.
- (a) The Court may invite any State not party to this Statute to provide assistance under this Part on the basis of an ad hoc arrangement, an agreement with such State or any other appropriate basis.
 - (b) Where a State not party to this Statute, which has entered into an ad hoc arrangement or an agreement with the Court, fails to cooperate with requests pursuant to any such arrangement or agreement, the Court may so inform the Assembly of States Parties or, where the Security Council referred the matter to the Court, the Security Council.
6. The Court may ask any intergovernmental organization to provide information or documents. The Court may also ask for other forms of cooperation and assistance which may be agreed upon with such an organization and which are in accordance with its competence or mandate.

7. Where a State Party fails to comply with a request to cooperate by the Court contrary to the provisions of this Statute, thereby preventing the Court from exercising its functions and powers under this Statute, the Court may make a finding to that effect and refer the matter to the Assembly of States Parties or, where the Security Council referred the matter to the Court, to the Security Council.

ARTICLE 88 AVAILABILITY OF PROCEDURES UNDER NATIONAL LAW

States Parties shall ensure that there are procedures available under their national law for all of the forms of cooperation which are specified under this Part.

ARTICLE 89 SURRENDER OF PERSONS TO THE COURT

1. The Court may transmit a request for the arrest and surrender of a person, together with the material supporting the request outlined in article 91, to any State on the territory of which that person may be found and shall request the cooperation of that State in the arrest and surrender of such a person. States Parties shall, in accordance with the provisions of this Part and the procedure under their national law, comply with requests for arrest and surrender.
2. Where the person sought for surrender brings a challenge before a national court on the basis of the principle of ne bis in idem as provided in article 20, the requested State shall immediately consult with the Court to determine if there has been a relevant ruling on admissibility. If the case is admissible, the requested State shall proceed with the execution of the request. If an admissibility ruling is pending, the requested State may postpone the execution of the request for surrender of the person until the Court makes a determination on admissibility.
3.
 - (a) A State Party shall authorize, in accordance with its national procedural law, transportation through its territory of a person being surrendered to the Court by another State, except where transit through that State would impede or delay the surrender.
 - (b) A request by the Court for transit shall be transmitted in accordance with article 87. The request for transit shall contain:
 - (i) A description of the person being transported;
 - (ii) A brief statement of the facts of the case and their legal characterization; and
 - (iii) The warrant for arrest and surrender;
 - (c) A person being transported shall be detained in custody during the period of transit;
 - (d) No authorization is required if the person is transported by air and no landing is scheduled on the territory of the transit State;
 - (e) If an unscheduled landing occurs on the territory of the transit State, that State may require a request for transit from the Court as provided for in subparagraph (b). The transit State shall detain the person being transported until the request for transit is received and the transit is effected, provided that detention for purposes of this subparagraph may not be extended beyond 96 hours from the unscheduled landing unless the request is received within that time.
4. If the person sought is being proceeded against or is serving a sentence in the requested State for a crime different from that for which surrender to the Court is sought, the requested State, after making its decision to grant the request, shall consult with the Court.

ARTICLE 90 COMPETING REQUESTS

1. A State Party which receives a request from the Court for the surrender of a person under article 89 shall, if it also receives a request from any other State for the extradition of the same person for the same conduct which forms the basis of the crime for which the Court seeks the person's surrender, notify the Court and the requesting State of that fact.
2. Where the requesting State is a State Party, the requested State shall give priority to the request from the Court if:
 - (a) The Court has, pursuant to article 18 or 19, made a determination that the case in respect of which surrender is sought is admissible and that determination takes into account the investigation or prosecution conducted by the requesting State in respect of its request for extradition; or
 - (b) The Court makes the determination described in subparagraph (a) pursuant to the requested State's notification under paragraph 1.
3. Where a determination under paragraph 2 (a) has not been made, the requested State may, at its discretion, pending the determination of the Court under paragraph 2 (b), proceed to deal with the request for extradition from the requesting State but shall not extradite the person until the Court has determined that the case is inadmissible. The Court's determination shall be made on an expedited basis.
4. If the requesting State is a State not Party to this Statute the requested State, if it is not under an international obligation to extradite the person to the requesting State, shall give priority to the request for surrender from the Court, if the Court has determined that the case is admissible.
5. Where a case under paragraph 4 has not been determined to be admissible by the Court, the requested State may, at its discretion, proceed to deal with the request for extradition from the requesting State.
6. In cases where paragraph 4 applies except that the requested State is under an existing international obligation to extradite the person to the requesting State not Party to this Statute, the requested State shall determine whether to surrender the person to the Court or extradite the person to the requesting State. In making its decision, the requested State shall consider all the relevant factors, including but not limited to:
 - (a) The respective dates of the requests;
 - (b) The interests of the requesting State including, where relevant, whether the crime was committed in its territory and the nationality of the victims and of the person sought; and
 - (c) The possibility of subsequent surrender between the Court and the requesting State.
7. Where a State Party which receives a request from the Court for the surrender of a person also receives a request from any State for the extradition of the same person for conduct other than that which constitutes the crime for which the Court seeks the person's surrender:
 - (a) The requested State shall, if it is not under an existing international obligation to extradite the person to the requesting State, give priority to the request from the Court;
 - (b) The requested State shall, if it is under an existing international obligation to extradite the person to the requesting State, determine whether to surrender the person to the Court or to extradite the person to the requesting State. In making its decision, the requested State shall consider all the relevant factors, including but not limited to those set out in paragraph 6, but shall give special consideration to the relative nature and gravity of the conduct in question.

8. Where pursuant to a notification under this article, the Court has determined a case to be inadmissible, and subsequently extradition to the requesting State is refused, the requested State shall notify the Court of this decision.

ARTICLE 91 CONTENTS OF REQUEST FOR ARREST AND SURRENDER

1. A request for arrest and surrender shall be made in writing. In urgent cases, a request may be made by any medium capable of delivering a written record, provided that the request shall be confirmed through the channel provided for in article 87, paragraph 1 (a).
2. In the case of a request for the arrest and surrender of a person for whom a warrant of arrest has been issued by the Pre-Trial Chamber under article 58, the request shall contain or be supported by:
 - (a) Information describing the person sought, sufficient to identify the person, and information as to that person's probable location;
 - (b) A copy of the warrant of arrest; and
 - (c) Such documents, statements or information as may be necessary to meet the requirements for the surrender process in the requested State, except that those requirements should not be more burdensome than those applicable to requests for extradition pursuant to treaties or arrangements between the requested State and other States and should, if possible, be less burdensome, taking into account the distinct nature of the Court.
3. In the case of a request for the arrest and surrender of a person already convicted, the request shall contain or be supported by:
 - (a) A copy of any warrant of arrest for that person;
 - (b) A copy of the judgement of conviction;
 - (c) Information to demonstrate that the person sought is the one referred to in the judgement of conviction; and
 - (d) If the person sought has been sentenced, a copy of the sentence imposed and, in the case of a sentence for imprisonment, a statement of any time already served and the time remaining to be served.
4. Upon the request of the Court, a State Party shall consult with the Court, either generally or with respect to a specific matter, regarding any requirements under its national law that may apply under paragraph 2 (c). During the consultations, the State Party shall advise the Court of the specific requirements of its national law.

ARTICLE 92 PROVISIONAL ARREST

1. In urgent cases, the Court may request the provisional arrest of the person sought, pending presentation of the request for surrender and the documents supporting the request as specified in article 91.
2. The request for provisional arrest shall be made by any medium capable of delivering a written record and shall contain:
 - (a) Information describing the person sought, sufficient to identify the person, and information as to that person's probable location;
 - (b) A concise statement of the crimes for which the person's arrest is sought and of the facts which are alleged to constitute those crimes, including, where possible, the date and location of the crime;
 - (c) A statement of the existence of a warrant of arrest or a judgement of conviction against the person sought; and
 - (d) A statement that a request for surrender of the person sought will follow.

3. A person who is provisionally arrested may be released from custody if the requested State has not received the request for surrender and the documents supporting the request as specified in article 91 within the time limits specified in the Rules of Procedure and Evidence. However, the person may consent to surrender before the expiration of this period if permitted by the law of the requested State. In such a case, the requested State shall proceed to surrender the person to the Court as soon as possible.
4. The fact that the person sought has been released from custody pursuant to paragraph 3 shall not prejudice the subsequent arrest and surrender of that person if the request for surrender and the documents supporting the request are delivered at a later date.

ARTICLE 93 OTHER FORMS OF COOPERATION

1. States Parties shall, in accordance with the provisions of this Part and under procedures of national law, comply with requests by the Court to provide the following assistance in relation to investigations or prosecutions:
 - (a) The identification and whereabouts of persons or the location of items;
 - (b) The taking of evidence, including testimony under oath, and the production of evidence, including expert opinions and reports necessary to the Court;
 - (c) The questioning of any person being investigated or prosecuted;
 - (d) The service of documents, including judicial documents;
 - (e) Facilitating the voluntary appearance of persons as witnesses or experts before the Court;
 - (f) The temporary transfer of persons as provided in paragraph 7;
 - (g) The examination of places or sites, including the exhumation and examination of grave sites;
 - (h) The execution of searches and seizures;
 - (i) The provision of records and documents, including official records and documents;
 - (j) The protection of victims and witnesses and the preservation of evidence;
 - (k) The identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crimes for the purpose of eventual forfeiture, without prejudice to the rights of bona fide third parties; and
 - (l) Any other type of assistance which is not prohibited by the law of the requested State, with a view to facilitating the investigation and prosecution of crimes within the jurisdiction of the Court.
2. The Court shall have the authority to provide an assurance to a witness or an expert appearing before the Court that he or she will not be prosecuted, detained or subjected to any restriction of personal freedom by the Court in respect of any act or omission that preceded the departure of that person from the requested State.
3. Where execution of a particular measure of assistance detailed in a request presented under paragraph 1, is prohibited in the requested State on the basis of an existing fundamental legal principle of general application, the requested State shall promptly consult with the Court to try to resolve the matter. In the consultations, consideration should be given to whether the assistance can be rendered in another manner or subject to conditions. If after consultations the matter cannot be resolved, the Court shall modify the request as necessary.
4. In accordance with article 72, a State Party may deny a request for assistance, in whole or in part, only if the request concerns the production of any documents or disclosure of evidence which relates to its national security.
5. Before denying a request for assistance under paragraph 1 (l), the requested State shall consider whether the assistance can be provided subject to specified conditions, or whether the assistance can be provided at a later date or in an alternative manner, provided that if the

- Court or the Prosecutor accepts the assistance subject to conditions, the Court or the Prosecutor shall abide by them.
6. If a request for assistance is denied, the requested State Party shall promptly inform the Court or the Prosecutor of the reasons for such denial.
 7.
 - (a) The Court may request the temporary transfer of a person in custody for purposes of identification or for obtaining testimony or other assistance. The person may be transferred if the following conditions are fulfilled:
 - (i) The person freely gives his or her informed consent to the transfer; and
 - (ii) The requested State agrees to the transfer, subject to such conditions as that State and the Court may agree.
 - (b) The person being transferred shall remain in custody. When the purposes of the transfer have been fulfilled, the Court shall return the person without delay to the requested State.
 8.
 - (a) The Court shall ensure the confidentiality of documents and information, except as required for the investigation and proceedings described in the request.
 - (b) The requested State may, when necessary, transmit documents or information to the Prosecutor on a confidential basis. The Prosecutor may then use them solely for the purpose of generating new evidence.
 - (c) The requested State may, on its own motion or at the request of the Prosecutor, subsequently consent to the disclosure of such documents or information. They may then be used as evidence pursuant to the provisions of Parts 5 and 6 and in accordance with the Rules of Procedure and Evidence.
 9.
 - (a)
 - (i) In the event that a State Party receives competing requests, other than for surrender or extradition, from the Court and from another State pursuant to an international obligation, the State Party shall endeavour, in consultation with the Court and the other State, to meet both requests, if necessary by postponing or attaching conditions to one or the other request.
 - (ii) Failing that, competing requests shall be resolved in accordance with the principles established in article 90.
 - (b) Where, however, the request from the Court concerns information, property or persons which are subject to the control of a third State or an international organization by virtue of an international agreement, the requested States shall so inform the Court and the Court shall direct its request to the third State or international organization.
 10.
 - (a) The Court may, upon request, cooperate with and provide assistance to a State Party conducting an investigation into or trial in respect of conduct which constitutes a crime within the jurisdiction of the Court or which constitutes a serious crime under the national law of the requesting State.
 - (b)
 - (i) The assistance provided under subparagraph (a) shall include, *inter alia*:
 - a. The transmission of statements, documents or other types of evidence obtained in the course of an investigation or a trial conducted by the Court; and
 - b. The questioning of any person detained by order of the Court;
 - (ii) In the case of assistance under subparagraph (b) (i) a:

- a. If the documents or other types of evidence have been obtained with the assistance of a State, such transmission shall require the consent of that State;
- b. If the statements, documents or other types of evidence have been provided by a witness or expert, such transmission shall be subject to the provisions of article 68.
- (c) The Court may, under the conditions set out in this paragraph, grant a request for assistance under this paragraph from a State which is not a Party to this Statute.

ARTICLE 94 POSTPONEMENT OF EXECUTION OF A REQUEST IN RESPECT OF ONGOING INVESTIGATION OR PROSECUTION

- 1. If the immediate execution of a request would interfere with an ongoing investigation or prosecution of a case different from that to which the request relates, the requested State may postpone the execution of the request for a period of time agreed upon with the Court. However, the postponement shall be no longer than is necessary to complete the relevant investigation or prosecution in the requested State. Before making a decision to postpone, the requested State should consider whether the assistance may be immediately provided subject to certain conditions.
- 2. If a decision to postpone is taken pursuant to paragraph 1, the Prosecutor may, however, seek measures to preserve evidence, pursuant to article 93, paragraph 1 (j).

ARTICLE 95 POSTPONEMENT OF EXECUTION OF A REQUEST IN RESPECT OF AN ADMISSIBILITY CHALLENGE

Where there is an admissibility challenge under consideration by the Court pursuant to article 18 or 19, the requested State may postpone the execution of a request under this Part pending a determination by the Court, unless the Court has specifically ordered that the Prosecutor may pursue the collection of such evidence pursuant to article 18 or 19.

ARTICLE 96 CONTENTS OF REQUEST FOR OTHER FORMS OF ASSISTANCE UNDER ARTICLE 93

- 1. A request for other forms of assistance referred to in article 93 shall be made in writing. In urgent cases, a request may be made by any medium capable of delivering a written record, provided that the request shall be confirmed through the channel provided for in article 87, paragraph 1 (a).
- 2. The request shall, as applicable, contain or be supported by the following:
 - (a) A concise statement of the purpose of the request and the assistance sought, including the legal basis and the grounds for the request;
 - (b) As much detailed information as possible about the location or identification of any person or place that must be found or identified in order for the assistance sought to be provided;
 - (c) A concise statement of the essential facts underlying the request;
 - (d) The reasons for and details of any procedure or requirement to be followed;
 - (e) Such information as may be required under the law of the requested State in order to execute the request; and
 - (f) Any other information relevant in order for the assistance sought to be provided.
- 3. Upon the request of the Court, a State Party shall consult with the Court, either generally or with respect to a specific matter, regarding any requirements under its national law that may apply under paragraph 2 (e). During the consultations, the State Party shall advise the Court of the specific requirements of its national law.

4. The provisions of this article shall, where applicable, also apply in respect of a request for assistance made to the Court.

ARTICLE 97 CONSULTATIONS

Where a State Party receives a request under this Part in relation to which it identifies problems which may impede or prevent the execution of the request, that State shall consult with the Court without delay in order to resolve the matter. Such problems may include, inter alia:

- (a) Insufficient information to execute the request;
- (b) In the case of a request for surrender, the fact that despite best efforts, the person sought cannot be located or that the investigation conducted has determined that the person in the requested State is clearly not the person named in the warrant; or
- (c) The fact that execution of the request in its current form would require the requested State to breach a pre-existing treaty obligation undertaken with respect to another State.

ARTICLE 98 COOPERATION WITH RESPECT TO WAIVER OF IMMUNITY AND CONSENT TO SURRENDER

1. The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.
2. The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.

ARTICLE 99 EXECUTION OF REQUESTS UNDER ARTICLES 93 AND 96

1. Requests for assistance shall be executed in accordance with the relevant procedure under the law of the requested State and, unless prohibited by such law, in the manner specified in the request, including following any procedure outlined therein or permitting persons specified in the request to be present at and assist in the execution process.
2. In the case of an urgent request, the documents or evidence produced in response shall, at the request of the Court, be sent urgently.
3. Replies from the requested State shall be transmitted in their original language and form.
4. Without prejudice to other articles in this Part, where it is necessary for the successful execution of a request which can be executed without any compulsory measures, including specifically the interview of or taking evidence from a person on a voluntary basis, including doing so without the presence of the authorities of the requested State Party if it is essential for the request to be executed, and the examination without modification of a public site or other public place, the Prosecutor may execute such request directly on the territory of a State as follows:
 - (a) When the State Party requested is a State on the territory of which the crime is alleged to have been committed, and there has been a determination of admissibility pursuant to article 18 or 19, the Prosecutor may directly execute such request following all possible consultations with the requested State Party;
 - (b) In other cases, the Prosecutor may execute such request following consultations with the requested State Party and subject to any reasonable conditions or concerns raised by that State Party. Where the requested State Party identifies problems with the execution of a

request pursuant to this subparagraph it shall, without delay, consult with the Court to resolve the matter.

5. Provisions allowing a person heard or examined by the Court under article 72 to invoke restrictions designed to prevent disclosure of confidential information connected with national security shall also apply to the execution of requests for assistance under this article.

ARTICLE 100 COSTS

1. The ordinary costs for execution of requests in the territory of the requested State shall be borne by that State, except for the following, which shall be borne by the Court:
 - (a) Costs associated with the travel and security of witnesses and experts or the transfer under article 93 of persons in custody;
 - (b) Costs of translation, interpretation and transcription;
 - (c) Travel and subsistence costs of the judges, the Prosecutor, the Deputy Prosecutors, the Registrar, the Deputy Registrar and staff of any organ of the Court;
 - (d) Costs of any expert opinion or report requested by the Court;
 - (e) Costs associated with the transport of a person being surrendered to the Court by a custodial State; and
 - (f) Following consultations, any extraordinary costs that may result from the execution of a request.
2. The provisions of paragraph 1 shall, as appropriate, apply to requests from States Parties to the Court. In that case, the Court shall bear the ordinary costs of execution.

ARTICLE 101 RULE OF SPECIALITY

1. A person surrendered to the Court under this Statute shall not be proceeded against, punished or detained for any conduct committed prior to surrender, other than the conduct or course of conduct which forms the basis of the crimes for which that person has been surrendered.
2. The Court may request a waiver of the requirements of paragraph 1 from the State which surrendered the person to the Court and, if necessary, the Court shall provide additional information in accordance with article 91. States Parties shall have the authority to provide a waiver to the Court and should endeavour to do so.

ARTICLE 102 USE OF TERMS

For the purposes of this Statute:

- (a) "surrender" means the delivering up of a person by a State to the Court, pursuant to this Statute.
- (b) "extradition" means the delivering up of a person by one State to another as provided by treaty, convention or national legislation.

PART 10 ENFORCEMENT

ARTICLE 103 ROLE OF STATES IN ENFORCEMENT OF SENTENCES OF IMPRISONMENT

1.
 - (a) A sentence of imprisonment shall be served in a State designated by the Court from a list of States which have indicated to the Court their willingness to accept sentenced persons.

- (b) At the time of declaring its willingness to accept sentenced persons, a State may attach conditions to its acceptance as agreed by the Court and in accordance with this Part.
 - (c) A State designated in a particular case shall promptly inform the Court whether it accepts the Court's designation.
- 2.
 - (a) The State of enforcement shall notify the Court of any circumstances, including the exercise of any conditions agreed under paragraph 1, which could materially affect the terms or extent of the imprisonment. The Court shall be given at least 45 days' notice of any such known or foreseeable circumstances. During this period, the State of enforcement shall take no action that might prejudice its obligations under article 110.
 - (b) Where the Court cannot agree to the circumstances referred to in subparagraph (a), it shall notify the State of enforcement and proceed in accordance with article 104, paragraph 1.
- 3. In exercising its discretion to make a designation under paragraph 1, the Court shall take into account the following:
 - (a) The principle that States Parties should share the responsibility for enforcing sentences of imprisonment, in accordance with principles of equitable distribution, as provided in the Rules of Procedure and Evidence;
 - (b) The application of widely accepted international treaty standards governing the treatment of prisoners;
 - (c) The views of the sentenced person;
 - (d) The nationality of the sentenced person;
 - (e) Such other factors regarding the circumstances of the crime or the person sentenced, or the effective enforcement of the sentence, as may be appropriate in designating the State of enforcement.
- 4. If no State is designated under paragraph 1, the sentence of imprisonment shall be served in a prison facility made available by the host State, in accordance with the conditions set out in the headquarters agreement referred to in article 3, paragraph 2. In such a case, the costs arising out of the enforcement of a sentence of imprisonment shall be borne by the Court.

ARTICLE 104 CHANGE IN DESIGNATION OF STATE OF ENFORCEMENT

- 1. The Court may, at any time, decide to transfer a sentenced person to a prison of another State.
- 2. A sentenced person may, at any time, apply to the Court to be transferred from the State of enforcement.

ARTICLE 105 ENFORCEMENT OF THE SENTENCE

- 1. Subject to conditions which a State may have specified in accordance with article 103, paragraph 1 (b), the sentence of imprisonment shall be binding on the States Parties, which shall in no case modify it.
- 2. The Court alone shall have the right to decide any application for appeal and revision. The State of enforcement shall not impede the making of any such application by a sentenced person.

ARTICLE 106 SUPERVISION OF ENFORCEMENT OF SENTENCES AND CONDITIONS OF
IMPRISONMENT

1. The enforcement of a sentence of imprisonment shall be subject to the supervision of the Court and shall be consistent with widely accepted international treaty standards governing treatment of prisoners.
2. The conditions of imprisonment shall be governed by the law of the State of enforcement and shall be consistent with widely accepted international treaty standards governing treatment of prisoners; in no case shall such conditions be more or less favourable than those available to prisoners convicted of similar offences in the State of enforcement.
3. Communications between a sentenced person and the Court shall be unimpeded and confidential.

ARTICLE 107 TRANSFER OF THE PERSON UPON COMPLETION OF SENTENCE

1. Following completion of the sentence, a person who is not a national of the State of enforcement may, in accordance with the law of the State of enforcement, be transferred to a State which is obliged to receive him or her, or to another State which agrees to receive him or her, taking into account any wishes of the person to be transferred to that State, unless the State of enforcement authorizes the person to remain in its territory.
2. If no State bears the costs arising out of transferring the person to another State pursuant to paragraph 1, such costs shall be borne by the Court.
3. Subject to the provisions of article 108, the State of enforcement may also, in accordance with its national law, extradite or otherwise surrender the person to a State which has requested the extradition or surrender of the person for purposes of trial or enforcement of a sentence.

ARTICLE 108 LIMITATION ON THE PROSECUTION OR PUNISHMENT OF OTHER OFFENCES

1. A sentenced person in the custody of the State of enforcement shall not be subject to prosecution or punishment or to extradition to a third State for any conduct engaged in prior to that person's delivery to the State of enforcement, unless such prosecution, punishment or extradition has been approved by the Court at the request of the State of enforcement.
2. The Court shall decide the matter after having heard the views of the sentenced person.
3. Paragraph 1 shall cease to apply if the sentenced person remains voluntarily for more than 30 days in the territory of the State of enforcement after having served the full sentence imposed by the Court, or returns to the territory of that State after having left it.

ARTICLE 109 ENFORCEMENT OF FINES AND FORFEITURE MEASURES

1. States Parties shall give effect to fines or forfeitures ordered by the Court under Part 7, without prejudice to the rights of bona fide third parties, and in accordance with the procedure of their national law.
2. If a State Party is unable to give effect to an order for forfeiture, it shall take measures to recover the value of the proceeds, property or assets ordered by the Court to be forfeited, without prejudice to the rights of bona fide third parties.
3. Property, or the proceeds of the sale of real property or, where appropriate, the sale of other property, which is obtained by a State Party as a result of its enforcement of a judgement of the Court shall be transferred to the Court.

ARTICLE 110 REVIEW BY THE COURT CONCERNING REDUCTION OF SENTENCE

1. The State of enforcement shall not release the person before expiry of the sentence pronounced by the Court.
2. The Court alone shall have the right to decide any reduction of sentence, and shall rule on the matter after having heard the person.
3. When the person has served two thirds of the sentence, or 25 years in the case of life imprisonment, the Court shall review the sentence to determine whether it should be reduced. Such a review shall not be conducted before that time.
4. In its review under paragraph 3, the Court may reduce the sentence if it finds that one or more of the following factors are present:
 - (a) The early and continuing willingness of the person to cooperate with the Court in its investigations and prosecutions;
 - (b) The voluntary assistance of the person in enabling the enforcement of the judgements and orders of the Court in other cases, and in particular providing assistance in locating assets subject to orders of fine, forfeiture or reparation which may be used for the benefit of victims; or
 - (c) Other factors establishing a clear and significant change of circumstances sufficient to justify the reduction of sentence, as provided in the Rules of Procedure and Evidence.
5. If the Court determines in its initial review under paragraph 3 that it is not appropriate to reduce the sentence, it shall thereafter review the question of reduction of sentence at such intervals and applying such criteria as provided for in the Rules of Procedure and Evidence.

ARTICLE 111 ESCAPE

If a convicted person escapes from custody and flees the State of enforcement, that State may, after consultation with the Court, request the person's surrender from the State in which the person is located pursuant to existing bilateral or multilateral arrangements, or may request that the Court seek the person's surrender, in accordance with Part 9. It may direct that the person be delivered to the State in which he or she was serving the sentence or to another State designated by the Court.

PART 11 ASSEMBLY OF STATES PARTIES

ARTICLE 112 ASSEMBLY OF STATES PARTIES

1. An Assembly of States Parties to this Statute is hereby established. Each State Party shall have one representative in the Assembly who may be accompanied by alternates and advisers. Other States which have signed this Statute or the Final Act may be observers in the Assembly.
2. The Assembly shall:
 - (a) Consider and adopt, as appropriate, recommendations of the Preparatory Commission;
 - (b) Provide management oversight to the Presidency, the Prosecutor and the Registrar regarding the administration of the Court;
 - (c) Consider the reports and activities of the Bureau established under paragraph 3 and take appropriate action in regard thereto;
 - (d) Consider and decide the budget for the Court;
 - (e) Decide whether to alter, in accordance with article 36, the number of judges;
 - (f) Consider pursuant to article 87, paragraphs 5 and 7, any question relating to non-cooperation;
 - (g) Perform any other function consistent with this Statute or the Rules of Procedure and Evidence.

3.
 - (a) The Assembly shall have a Bureau consisting of a President, two Vice-Presidents and 18 members elected by the Assembly for three-year terms.
 - (b) The Bureau shall have a representative character, taking into account, in particular, equitable geographical distribution and the adequate representation of the principal legal systems of the world.
 - (c) The Bureau shall meet as often as necessary, but at least once a year. It shall assist the Assembly in the discharge of its responsibilities.
4. The Assembly may establish such subsidiary bodies as may be necessary, including an independent oversight mechanism for inspection, evaluation and investigation of the Court, in order to enhance its efficiency and economy.
5. The President of the Court, the Prosecutor and the Registrar or their representatives may participate, as appropriate, in meetings of the Assembly and of the Bureau.
6. The Assembly shall meet at the seat of the Court or at the Headquarters of the United Nations once a year and, when circumstances so require, hold special sessions. Except as otherwise specified in this Statute, special sessions shall be convened by the Bureau on its own initiative or at the request of one third of the States Parties.
7. Each State Party shall have one vote. Every effort shall be made to reach decisions by consensus in the Assembly and in the Bureau. If consensus cannot be reached, except as otherwise provided in the Statute:
 - (a) Decisions on matters of substance must be approved by a two-thirds majority of those present and voting provided that an absolute majority of States Parties constitutes the quorum for voting;
 - (b) Decisions on matters of procedure shall be taken by a simple majority of States Parties present and voting.
8. A State Party which is in arrears in the payment of its financial contributions towards the costs of the Court shall have no vote in the Assembly and in the Bureau if the amount of its arrears equals or exceeds the amount of the contributions due from it for the preceding two full years. The Assembly may, nevertheless, permit such a State Party to vote in the Assembly and in the Bureau if it is satisfied that the failure to pay is due to conditions beyond the control of the State Party.
9. The Assembly shall adopt its own rules of procedure.
10. The official and working languages of the Assembly shall be those of the General Assembly of the United Nations.

PART 12 FINANCING

ARTICLE 113 FINANCIAL REGULATIONS

Except as otherwise specifically provided, all financial matters related to the Court and the meetings of the Assembly of States Parties, including its Bureau and subsidiary bodies, shall be governed by this Statute and the Financial Regulations and Rules adopted by the Assembly of States Parties.

ARTICLE 114 PAYMENT OF EXPENSES

Expenses of the Court and the Assembly of States Parties, including its Bureau and subsidiary bodies, shall be paid from the funds of the Court.

ARTICLE 115 FUNDS OF THE COURT AND OF THE ASSEMBLY OF STATES PARTIES

The expenses of the Court and the Assembly of States Parties, including its Bureau and subsidiary bodies, as provided for in the budget decided by the Assembly of States Parties, shall be provided by the following sources:

- (a) Assessed contributions made by States Parties;
- (b) Funds provided by the United Nations, subject to the approval of the General Assembly, in particular in relation to the expenses incurred due to referrals by the Security Council.

ARTICLE 116 VOLUNTARY CONTRIBUTIONS

Without prejudice to article 115, the Court may receive and utilize, as additional funds, voluntary contributions from Governments, international organizations, individuals, corporations and other entities, in accordance with relevant criteria adopted by the Assembly of States Parties.

ARTICLE 117 ASSESSMENT OF CONTRIBUTIONS

The contributions of States Parties shall be assessed in accordance with an agreed scale of assessment, based on the scale adopted by the United Nations for its regular budget and adjusted in accordance with the principles on which that scale is based.

ARTICLE 118 ANNUAL AUDIT

The records, books and accounts of the Court, including its annual financial statements, shall be audited annually by an independent auditor.

PART 13 FINAL CLAUSES

ARTICLE 119 SETTLEMENT OF DISPUTES

1. Any dispute concerning the judicial functions of the Court shall be settled by the decision of the Court.
2. Any other dispute between two or more States Parties relating to the interpretation or application of this Statute which is not settled through negotiations within three months of their commencement shall be referred to the Assembly of States Parties. The Assembly may itself seek to settle the dispute or may make recommendations on further means of settlement of the dispute, including referral to the International Court of Justice in conformity with the Statute of that Court.

ARTICLE 120 RESERVATIONS

No reservations may be made to this Statute.

ARTICLE 121 AMENDMENTS

1. After the expiry of seven years from the entry into force of this Statute, any State Party may propose amendments thereto. The text of any proposed amendment shall be submitted to the Secretary-General of the United Nations, who shall promptly circulate it to all States Parties.
2. No sooner than three months from the date of notification, the Assembly of States Parties, at its next meeting, shall, by a majority of those present and voting, decide whether to take up the proposal. The Assembly may deal with the proposal directly or convene a Review Conference if the issue involved so warrants.

3. The adoption of an amendment at a meeting of the Assembly of States Parties or at a Review Conference on which consensus cannot be reached shall require a two-thirds majority of States Parties.
4. Except as provided in paragraph 5, an amendment shall enter into force for all States Parties one year after instruments of ratification or acceptance have been deposited with the Secretary-General of the United Nations by seven-eighths of them.
5. Any amendment to articles 5, 6, 7 and 8 of this Statute shall enter into force for those States Parties which have accepted the amendment one year after the deposit of their instruments of ratification or acceptance. In respect of a State Party which has not accepted the amendment, the Court shall not exercise its jurisdiction regarding a crime covered by the amendment when committed by that State Party's nationals or on its territory.
6. If an amendment has been accepted by seven-eighths of States Parties in accordance with paragraph 4, any State Party which has not accepted the amendment may withdraw from this Statute with immediate effect, notwithstanding article 127, paragraph 1, but subject to article 127, paragraph 2, by giving notice no later than one year after the entry into force of such amendment.
7. The Secretary-General of the United Nations shall circulate to all States Parties any amendment adopted at a meeting of the Assembly of States Parties or at a Review Conference.

ARTICLE 122 AMENDMENTS TO PROVISIONS OF AN INSTITUTIONAL NATURE

1. Amendments to provisions of this Statute which are of an exclusively institutional nature, namely, article 35, article 36, paragraphs 8 and 9, article 37, article 38, article 39, paragraphs 1 (first two sentences), 2 and 4, article 42, paragraphs 4 to 9, article 43, paragraphs 2 and 3, and articles 44, 46, 47 and 49, may be proposed at any time, notwithstanding article 121, paragraph 1, by any State Party. The text of any proposed amendment shall be submitted to the Secretary-General of the United Nations or such other person designated by the Assembly of States Parties who shall promptly circulate it to all States Parties and to others participating in the Assembly.
2. Amendments under this article on which consensus cannot be reached shall be adopted by the Assembly of States Parties or by a Review Conference, by a two-thirds majority of States Parties. Such amendments shall enter into force for all States Parties six months after their adoption by the Assembly or, as the case may be, by the Conference.

ARTICLE 123 REVIEW OF THE STATUTE

1. Seven years after the entry into force of this Statute the Secretary-General of the United Nations shall convene a Review Conference to consider any amendments to this Statute. Such review may include, but is not limited to, the list of crimes contained in article 5. The Conference shall be open to those participating in the Assembly of States Parties and on the same conditions.
2. At any time thereafter, at the request of a State Party and for the purposes set out in paragraph 1, the Secretary-General of the United Nations shall, upon approval by a majority of States Parties, convene a Review Conference.
3. The provisions of article 121, paragraphs 3 to 7, shall apply to the adoption and entry into force of any amendment to the Statute considered at a Review Conference.

ARTICLE 124 TRANSITIONAL PROVISION

Notwithstanding article 12, paragraphs 1 and 2, a State, on becoming a party to this Statute, may declare that, for a period of seven years after the entry into force of this Statute for the State

concerned, it does not accept the jurisdiction of the Court with respect to the category of crimes referred to in article 8 when a crime is alleged to have been committed by its nationals or on its territory. A declaration under this article may be withdrawn at any time. The provisions of this article shall be reviewed at the Review Conference convened in accordance with article 123, paragraph 1.

ARTICLE 125 SIGNATURE, RATIFICATION, ACCEPTANCE, APPROVAL OR ACCESSION

1. This Statute shall be open for signature by all States in Rome, at the headquarters of the Food and Agriculture Organization of the United Nations, on 17 July 1998. Thereafter, it shall remain open for signature in Rome at the Ministry of Foreign Affairs of Italy until 17 October 1998. After that date, the Statute shall remain open for signature in New York, at United Nations Headquarters, until 31 December 2000.
2. This Statute is subject to ratification, acceptance or approval by signatory States. Instruments of ratification, acceptance or approval shall be deposited with the Secretary-General of the United Nations.
3. This Statute shall be open to accession by all States. Instruments of accession shall be deposited with the Secretary-General of the United Nations.

ARTICLE 126 ENTRY INTO FORCE

1. This Statute shall enter into force on the first day of the month after the 60th day following the date of the deposit of the 60th instrument of ratification, acceptance, approval or accession with the Secretary-General of the United Nations.
2. For each State ratifying, accepting, approving or acceding to this Statute after the deposit of the 60th instrument of ratification, acceptance, approval or accession, the Statute shall enter into force on the first day of the month after the 60th day following the deposit by such State of its instrument of ratification, acceptance, approval or accession.

ARTICLE 127 WITHDRAWAL

1. A State Party may, by written notification addressed to the Secretary-General of the United Nations, withdraw from this Statute. The withdrawal shall take effect one year after the date of receipt of the notification, unless the notification specifies a later date.
2. A State shall not be discharged, by reason of its withdrawal, from the obligations arising from this Statute while it was a Party to the Statute, including any financial obligations which may have accrued. Its withdrawal shall not affect any cooperation with the Court in connection with criminal investigations and proceedings in relation to which the withdrawing State had a duty to cooperate and which were commenced prior to the date on which the withdrawal became effective, nor shall it prejudice in any way the continued consideration of any matter which was already under consideration by the Court prior to the date on which the withdrawal became effective.

ARTICLE 128 AUTHENTIC TEXTS

The original of this Statute, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations, who shall send certified copies thereof to all States.

IN WITNESS WHEREOF, the undersigned, being duly authorized thereto by their respective Governments, have signed this Statute.

DONE at Rome, this 17th day of July 1998.

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