

April 1999

Politics, International Justice, and the United States: Toward a Permanent International Criminal Court

Giulio M. Gallarotti

Wesleyan University, ggallarotti@wesleyan.edu

Arik Preis

Follow this and additional works at: <http://wescholar.wesleyan.edu/div2facpubs>



Part of the [International Relations Commons](#)

Recommended Citation

Gallarotti, Giulio M. and Preis, Arik, "Politics, International Justice, and the United States: Toward a Permanent International Criminal Court" (1999). *Division II Faculty Publications*. Paper 63.

<http://wescholar.wesleyan.edu/div2facpubs/63>

This Article is brought to you for free and open access by the Social Sciences at WesScholar. It has been accepted for inclusion in Division II Faculty Publications by an authorized administrator of WesScholar. For more information, please contact dschnaidt@wesleyan.edu, ljohnson@wesleyan.edu.

Politics, International Justice, and the United States: Toward a Permanent International Criminal Court

*Giulio M. Gallarotti and Arik Y. Preis**

UCLA Journal of International Law and Foreign Affairs

Revised and submitted March 29, 1999

*The authors are grateful to John Finn, Jerry Fowler, William Pace, Jelena Pejic, and John Washburn for their helpful comments on this article.

I. Introduction

At an address at Carleton University in 1995 Secretary General of the United Nations Boutros Boutros-Ghali declared the need for a “renaissance of international law” as states face the new challenges of the post-Cold War world. According to Ghali, it is only through international law that the world can “secure a basis for cooperation” and “a lasting foundation for peace.”¹ Aspirations for the realization of this lofty rhetoric have centered on the creation of a permanent international criminal court (ICC). The sentiment for an ICC emanates from dissatisfaction with the prevailing practice of international criminal law. Supporters of the court argue that individuals are not being held sufficiently accountable for the most serious crimes against the international community (genocide, war crimes, and crimes against humanity). The use of international tribunals in the 20th century has been *ad hoc* and temporary, while the present practice of extradite-or-prosecute does not function effectively when states experience bottlenecks in the prosecution of suspected criminals (i.e., because the suspect is a former head of state, because of civil war, because of refusal to extradite suspects, or because the requisite judicial institutions are missing). Under such conditions, there is lacking an effective deterrent against criminal acts in the global community because individuals are not being held systematically accountable for their transgressions. An ICC, according to supporters, would provide an ongoing deterrent and thus consolidate a global order based on the respect for international law. To the extent that an ICC became the central player in the prosecution and adjudication of international crime, there would indeed be a major qualitative change in the practice of international criminal law, which has heretofore been principally administered through sovereign states.² A permanent court has been created by way of a treaty signed in Rome: Rome Statute of the International Criminal Court, July 17, 1998. The treaty, which will come into force after 60 states ratify it, was passed by a vote of 120 in favor, 7 against, and 21

¹ U.N. Press Release, U.N. Doc. SG/SM/5819/Rev.1, at 1 (November 22, 1995).

² See Nagan, *International Criminal Law*, 6 DUKE J. COMP. & INT’L L. 127, 134 (1995) and the comments of Kolodkin in U.N. Press Release, U.N. Doc. GA/L/2879, at 7 (November 2, 1995).

abstentions. While the vote was unrecorded, it has been widely reported that the United States along with China, Iraq, Israel, Libya, Qatar, and Yemen voted against the treaty.

This article is an analysis of the ICC. In it we explore both the institutional weaknesses and strengths of the Court, as well as the sea of political realities within which the Court must navigate, and which ultimately will determine its effectiveness. Finally, we analyze the impact (i.e., advantages and disadvantages) of the Court on the U.S. national interest. As an agent which has the capacity to play a preponderant role in making the ICC either effective or ineffective, the U.S., through its support (or lack of), will be in a crucial position for determining the fate of the Court. Through this analysis we hope to shed light on the potential impact which the ICC will have on the administration of international criminal law.

II. Historical Background

Historically, laws and norms regarding international crime have traditionally pertained to the conduct of war. Principles governing international criminal conduct can be traced as far back as ancient Roman customary law which made a distinction between combatants and non-combatants in wars within the Empire: slaves, heralds and ambassadors were protected, as were women from rape and dead bodies from mutilation. Similarly, the ancient Greeks recognized limits on war and the means by which it was carried out.³ During the middle ages, chivalric code and Christian ethics bolstered and modified Roman custom regarding just and unjust acts in war.⁴ Grotius' *De Jure Belli Ac Pacis* ([1646] 1925) secularized and documented these principles defining the constraints on warfare. The first international criminal tribunal was held in 1474 when Peter von Hagenbach was tried and convicted by Austrians for crimes against God and man in connection with his occupation of Breisach. The 19th and early 20th centuries saw the first formal codes on the conduct of warfare with the Red Cross conventions on the treatment of the sick and wounded, and the famous conventions on the conduct of land warfare signed at the Hague in 1899 and 1907. The Hague Conventions created the world's first penal code and called for the creation of a Court of Justice (the Court was never ratified).⁵

While the Versailles Treaty which ended World War I made explicit provisions for the prosecution of war crimes, which ranged from the sack of Louvain to the mistreatment of citizens in occupied-territories, it was in the interest of a stable peace that the Allies allowed Germany to try its own suspected war criminals in the Supreme Court at Leipzig.⁶ Kaiser Wilhelm II himself escaped prosecution by taking refuge in the Netherlands. With the end of World War II came the first international war crime tribunals in Nuremberg and Tokyo. The

³P. KARSTEN, *LAW, SOLDIERS, AND COMBAT* 9 (1978).

⁴*Id.* at 15.

⁵T. TAYLOR, *THE ANATOMY OF THE NUREMBERG TRIALS* 11,12 (1992); Jamison, *A Permanent International Criminal Court*, 23 DEN. J. INT'L L. & POL. 419,421 (1995); and Rosenstock, *Mclean Lecture on World Law*, 56 U. PITT. L. REV. 271, 271 (1994).

⁶ Article 14 of Wilson's Peace Plan proposed a Permanent Court of Justice, while the League of Nation's Commission on the Responsibility of the Authors of the War called for a high tribunal to prosecute war crimes. Neither effort was realized. In the Leipzig proceedings, of 900 indicted suspects, only 6 were ever tried (all 6 receiving light sentences). See Jamison, *supra* note 5, at 423 and Rosenstock, *supra* note 5, at 273.

Nuremberg principles, which would fundamentally shape the fabric of international criminal justice thereafter, expanded the menu of crimes beyond simple war crimes to new areas such as crimes against peace (mainly war of aggression) and crimes against humanity (inhumane acts perpetrated against civilian populations and genocide). In expanding the jurisdiction of international criminal law, the Nuremberg principles became the first articulation of general international human rights: the U.N. human rights conventions which followed the tribunals embodied their essential ideas (i.e., the 1948 Genocide Convention, the Geneva Conventions of 1949 and their additional protocols in 1977, and the 1984 U.N. Convention Against Torture especially). The principles also introduced the expectation that political leaders could no longer hide behind national sovereignty, but were accountable to the international community at large for violations of human rights, and that following orders was not an acceptable defense for perpetrating criminal acts.⁷

With the momentum of Tokyo and Nuremberg, the fledgling United Nations took the initiative in instituting a permanent international criminal tribunal with a mandate to the Commission of International Jurists to draft a set of statutes for a permanent international criminal court (ICC). The draft statutes drawn up in 1951 and 1953 could not produce a binding agreement, the most contentious issue being what crimes would fall under its jurisdiction. Cold War rivalry ended progress on the issue as any such binding statutes would have to pass as a substantive resolution through the Security Council. The 1970s saw a brief renewal of interest in an ICC as détente was able to deflect some of the contentious roadblocks to debate on the issue. Talk slowed once more with an intensification of the Cold War in the 1980s.⁸

A crucial window of opportunity opened in 1989 as the collapsing Eastern bloc was bringing an end to East-West rivalry. In that year Trinidad and Tobago, animated by the problem of drug trafficking, revived the issue of an ICC in the U.N. for the prosecution of narcotics crimes. The General Assembly consequently directed the International Law Commission (ILC) to consider producing a draft for the establishment of an ICC within its ongoing work on a Draft Code of Crimes. The momentum toward an ICC was increased by the genocide in Cambodia as well as the Security Council's mandate to create *ad hoc* tribunals to address crimes perpetrated in the conflicts in the former Yugoslavia in 1993 and in Rwanda in 1994.⁹ In 1994 the ILC produced a draft statute for an International Criminal Court. In 1995 the General Assembly established an Ad Hoc Committee composed of more than 120 country representatives to review the statute. After two meetings of the Ad Hoc Committee, the General Assembly established a Preparatory Committee on the Establishment of an International

⁷ B. SMITH, ROAD TO NUREMBERG 32 (1981) and Bland, *An Analysis of the United Nations International Tribunals to Adjudicate War Crimes*, 2 IND. J. GLOBAL LEGAL STUD. (1994).

⁸ Rosenstock, *supra* note 5, at 275.

⁹ *Id.* at 276. The Tribunals for Rwanda and the former Yugoslavia are the very first international tribunals to bring individuals to trial for international human rights violations since Tokyo and Nuremberg. Through its jurisdiction over initiatives involving matters of peace and security (Chapter VII of the U.N. Charter), the Security Council instituted the Tribunals to address atrocities in the prolonged conflicts which plagued both Rwanda and the former Yugoslavia. With respect to Rwanda, the Tribunal has addressed crimes of genocide, crimes against humanity and violations of Article 3 of the Geneva Conventions. The Yugoslavia Tribunal has addressed crimes in all three categories as well as violations of the laws or customs of war.

Criminal Court to start negotiations on the text of a statute for an ICC. The Committee's work finished in April of 1998 and produced a statute that became the basis of negotiations in Rome from June 15 to July 17, 1998. Negotiations ended with the passage of a treaty creating an ICC on July 17. A special Preparatory Commission will be convened to fine tune and operationalize the statute. Principal among its tasks will be to devise a set of Rules of Procedure and Evidence.

III. The Institutional Structure of the ICC

Basic Structure

The statute, which creates a permanent international criminal court with a seat in the Hague, Netherlands, is comprised of 13 parts, totaling 128 articles. The statute establishes an "Assembly of States Parties" to manage and administer the ICC (Article 112). Each state party has one representative in the Assembly, and one vote. The Assembly of States Parties elects the 18 judges of the ICC in accordance with the procedures listed in Article 36, and elects the Prosecutor in accordance with the procedures listed in Article 42. The Assembly of States Parties has other responsibilities, including amending the draft statute in accordance with Articles 121-123, providing management and administration of the Court, and considering any questions relating to non-cooperation by states (Articles 112, 87). The Assembly must meet at least once a year, and whenever it takes action, must have two-thirds majority approval for matters of "substance", and majority approval for matters of "procedure"(Article 112). The terms "substance" and "procedure" are not defined.

With respect to national courts, the role of the ICC is envisioned as "complementary" according to the Preamble as well Articles 1 and 17. This places the ICC in a secondary role vis-à-vis national legal systems. The Court is not intended to involve itself in cases where suspects will be satisfactorily tried in national courts with jurisdiction over such cases. In such cases, satisfactorily means that states which have jurisdiction over a case have been both "willing" (have not tried to shield suspects from justice) and "able" (the requisite legal institutions exist) to administer justice. According to Article 17, such cases would be "inadmissible" in the ICC.¹⁰ Given that the principal motivation for a permanent court has emanated from bottlenecks in national judicial systems (i.e., national systems either lacked the means or faced circumstances--such as civil war--which made prosecution and trial difficult or impossible), it is expected that states would opt to exhaust all of their own appropriate legal means in addressing serious international transgressions. States with a legitimate claim to jurisdiction over a case can challenge the jurisdiction of the Court on grounds of complementarity at any time prior to or at the commencement of the trial. This of course is fully consistent with customary international law which underscores national sovereignty over police action and penal law. Much debate has been generated in attempting to specify the exact nature of the complementary relationship. As it now stands, the provisions governing complementarity are sufficiently vague that a number of possible roles may emerge in the ICC. The possible roles are bounded by two extreme types of complementary role: a more restricted "corollary" role where the Court would function only in rare circumstances such as when domestic institutions cannot function or there are obvious attempts to shield the accused, and a broader role where the Court would be activated in the face

¹⁰ In this respect, the ICC is weaker than the Tribunals for Rwanda and Yugoslavia, given that the latter two have had "concurrent jurisdiction" (i.e., the right to contest national jurisdiction).

of a wider set of deficiencies at the national level. An especially contentious issue will be how to structure a monitoring system which assesses the effectiveness of national courts.¹¹

The ICC itself is comprised of four organs: (1) the Presidency; (2) the Chambers: Appeals, Trial and Pre-Trial Divisions; (3) the Office of the Prosecutor; and (4) the Registry (Article 34). After the Assembly of States Parties elects the eighteen judges of the Chambers, the judges elect, by a majority, the President and first and second Vice Presidents, which constitute the Presidency (Article 38). The Presidency is responsible for the proper administration of the court, as well as any other functions that the statute ultimately confers upon it (Article 38).

The Chambers include a Pre-Trial, Trial, and Appeals section (Article 39). The eighteen judges divide themselves into an appeals division (the President and four judges); a Trial Division of not less than six judges; and a Pre-Trial Division of not less than six judges (Article 39). The Appeals division acts only *en banc*. The Trial Chamber acts only in groups of three, and the Pre-Trial Chamber may carry out its functions through a three-judge panel or a single judge (Articles 39, 64). The Pre-Trial chamber can (1) issue orders for investigation and arrest warrants, and (2) authorize the Prosecutor's investigation in territories of state parties if those states don't cooperate and the Pre-Trial Chamber feels this uncooperative posture is due to a lack of authority or lack of a competent judicial system to execute such a request (Article 57).

The Assembly of States Parties elects the Judges based on nominations by state parties, and the judges must meet the qualifications listed in Article 36, including having established competence in (1) criminal law, or (2) relevant areas of international law (Article 36). No two judges can be members of the same state, and the Assembly, when electing the judges, is to take into consideration equitable membership for the various legal systems of the world, for geographical distribution, and for male and female representation (Article 36). Judges serve nine year terms (except for the first set of judges, which are divided into three, six and nine year terms), cannot be re-elected, and are to hold office on a full-time basis, meaning they cannot have any other professional occupation during their term (Articles 36, 40).

The Prosecutor, who holds the position full time, is independent of the other organs of the Court (Article 42). The Prosecutor receives referrals for information on crimes, examines information, investigates, and conducts prosecutions before the Court. The Prosecutor may also seek cooperation from any party with an investigation, enter into agreements to facilitate investigations, and keep evidence confidential when he/she feels it necessary (Article 54). A Deputy Prosecutor, who must be of different nationality than the Prosecutor, assists the Prosecutor (Article 42). Both the Prosecutor and/or the Deputy Prosecutor can be excused from a case if the Appeals Chamber decides that their impartiality is in doubt.

¹¹ U.N. GAOR Supp. (No. 22) Report of the Preparatory Committee on the Establishment of an International Criminal Court V. I & II, [hereinafter PrepComm] at 36,37, U.N. Doc. A/51/22 (1996) and Politi, *The Establishment of an International Criminal Court*, in INTERNATIONAL ASSOCIATION OF PENAL LAW, THE INTERNATIONAL CRIMINAL COURT, 115, 141-47 (1997).

The Registry, headed by a Registrar elected by the judges of the Court, is responsible for the non-judicial aspects of administration and service of the Court (Article 43). A Deputy Registrar assists the Registrar; both of these positions are full-time. The Registrar must set up a Victims and Witnesses Protection Unit as part of the Registry: to aid, counsel, provide security, and other assistance to victims and witnesses who testify before the Court and who may be in danger because of such testimony.

Other important structural features of the statute include processes for adding staff to the Registrar and the Prosecutor's offices (Article 44), processes for removal from office of any of the officers of the various organs of the Court (Article 46), and disciplinary measures for any of the officers (Article 47). The statute declares that the official languages of the Court shall be Arabic, Chinese, English, French, Russian, and Spanish. However, only English and French shall be working languages (Article 50).

Jurisdiction of the Court

1. Crimes

The ICC has jurisdiction over four broad categories of crimes: (1) genocide, (2) crimes against humanity, (3) war crimes, and (4) aggression (Article 5). The definitions of genocide, crimes against humanity, and war crimes are provided in Articles 6, 7, and 8 and include a wide range of acts. As clear as this jurisdiction may seem, the statute does include two important features that limit the applicability of these crimes. First, Article 124 allows a state, upon becoming a party to this statute, to refuse to accept the jurisdiction of the ICC over war crimes for the first seven years after ratifying the treaty. Second, the crime of aggression is not defined in the statute. Rather, a definition of that crime must be adopted by the Assembly of States Parties (Articles 5 and 121). This definition, however, must, by way of Article 5, be compatible with the United Nations Charter (Articles 39 and 103), which states that the Security Council has an uncontested jurisdiction over determining whether an act of aggression has taken place. Also, if a state does not accept an Amendment to Article 5 (the list of crimes for which the ICC has jurisdiction), 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" (Article 121).

The main core crime of genocide is the least problematic, as it has been authoritatively defined by the Genocide Convention of 1948 (i.e., acts intended to destroy or harm a national, ethnical, racial or religious group). War crimes also have a well established niche in international law as well. As such the ICC statute relies on a long legacy: the 1907 Hague Convention on the laws and customs of war, the Nuremberg Charter, the Geneva Conventions of 1949, and Additional Protocol I of 1977. Principal crimes in this category include: use of illegal weapons (poisonous); wanton destruction of settlements not justified by military necessity; attack on undefended settlements; plunder of public or private property; and seizure or damage of institutions dedicated to religion, education, culture, science, or charity.¹² Like other international instruments, this statute makes internal conflict subject to war crimes.

¹² The present statute adds an array of sex-related offences (rape, forced prostitution) to present international instruments.

Crimes against humanity cover inhumane acts of a very serious nature which involve widespread or systematic violations committed against civilians on a large scale (against large groups--or entire populations); and which are committed on national, racial, political, ethnical, or religious grounds.¹³ The statute takes its list of such crimes principally from the Nuremberg Charter, for example: murder, extermination, enslavement, deportation, imprisonment, torture, rape, persecution, and other inhumane acts.¹⁴

The ICC emphasizes that people must be individually responsible for any crimes they commit (Article 25). The statute includes as crimes the ordering, aiding and abetting, commission, or even just contribution (if intentional and done with knowledge of the perpetrator's intent or done with the intent to further a crime) to one of the prohibited activities (Article 25). The statute recognizes that authority figures may be guilty of command responsibility, and deems irrelevant the official capacity of the accused (Articles 27, 28).

Only offences perpetrated after the treaty comes into force (*nullum crimen sine lege*) can be prosecuted. Furthermore, crimes are not subject to a statute of limitations.

2. Admissibility of Crime for ICC Jurisdiction and Triggering Mechanism

Every state party to the ICC must automatically accept the ICC's jurisdiction over the crimes of genocide, war crimes, and crimes against humanity (Article 12). However, void of a situation referred to the ICC by the Security Council, the ICC only has jurisdiction over the crimes if they are committed on the territory of a state which is a member, or if the accused person is a national of a member state. In the event that neither of the two states is a member, at least one of them must give their consent (again, only if the case is not referred by the Security Council). Additionally, the crime must have been committed *after* the state accepts the ICC statute, unless a state declares a *post hoc* acceptance of jurisdiction.

It is not enough, however, for the suspected crime to fall within the ICC's jurisdiction. Rather, for the case to be admissible in the ICC, it must be triggered in one of three ways: (1) a state party refers a matter to the Prosecutor; (2) the United Nations Security Council, acting under its Chapter VII powers, refers the situation to the Prosecutor; or (3) the Prosecutor initiates the investigation *proprio motu* (Articles 13, 14). The Prosecutor's *proprio motu* power may be exercised if the Prosecutor gains information, analyzes it, and, after concluding that there is a reasonable basis to proceed with an investigation, submits a request for authorization of an investigation to the Pre-Trial Chamber, and the Pre-Trial Chamber approves it (Article 15).

If the Prosecutor receives a referral from a state or the United Nations Security Council, and after the Prosecutor conducts an initial investigation and feels that the case is not suitable for the ICC, he/she shall so inform the Pre-Trial Chamber and the party making the referral (Article

¹³ U.N. GAOR Report of the International Law Commission [hereinafter Report of the ILC] at 75, 76 U.N. Doc. A/49/10 (1994).

¹⁴ PrepComm V. I, *supra* note 11, at 23 and Committee on International Law, *Report on the Proposed International Criminal Court*, 52 REC. OF THE A. OF THE B. OF THE CITY OF NEW YORK 79, 104 (1997).

53). The Pre-Trial Chamber, upon review of the Prosecutor's report, can ask the Prosecutor to reconsider his/her decision.

Most importantly, any time a Prosecutor begins an investigation, the United Nations Security Council can, under Chapter VII authority of the U.N. Charter, make the Prosecutor defer the investigation or prosecution for a period of twelve months (Article 16). The Security Council need not present any reasons for so doing; rather, the statute just contemplates that the Security Council "request the Prosecutor" to defer such an investigation. Moreover, the request may be renewed by the Security Council under the same conditions, meaning that the Security Council can block any case from ever reaching ICC investigation or prosecution as long as can continue to muster a majority and avoid a permanent-member veto.

Three types of parties can challenge the admissibility of a case: (1) the accused, (2) the state which has jurisdiction over the case, or (3) a state whose acceptance of jurisdiction is necessary under Article 12 (Article 19). The ICC shall determine that a case is inadmissible where: 1) the case is being investigated and prosecuted by a state which has jurisdiction over it, 2) the case has been investigated by a state which has jurisdiction over it and that state has decided not to prosecute, 3) the person has been satisfactorily tried for the conduct which is the subject of the complaint, and 4) the case is not of sufficient gravity to justify action by the Court.

According to Article 17, prior or present investigation/prosecution must be "genuine" in order for the ICC to declare the case inadmissible. In order to qualify as genuine, a national investigation or prosecution must demonstrate "willingness" and "ability." Willingness is defined as a situation in which there are no attempts to shield the suspect from justice. Ability is defined as a situation where national courts are able to secure the accused and the necessary evidence, and successfully carry out proceedings against the suspect. In the case national efforts are deemed not to be genuine (e.g., shield a suspect from justice), the Court could prosecute a suspect after an acquittal by a national court.¹⁵

If the Prosecutor initiates an investigation *proprio motu*, or if a situation is referred to the Prosecutor, the Prosecutor must inform those states with jurisdiction over the situation (Article 18). If one of those states then decides to take control of the investigation, the Prosecutor must defer to that state. However, if the Court is not satisfied with the state's efforts in conducting judicial proceedings, the ICC can "take back" the investigation and conduct the investigation and proceedings itself, similar to its ability to decide that previous state actions in investigations/prosecutions/trials are not genuine (Article 18).

The statute does allow the Prosecutor to appeal an acquittal. Hence even an acquitted suspect faces the possibility of being prosecuted once more.

Investigation

¹⁵ Many of the negotiators did not see such a situation as double jeopardy because sham trials, according to them, never place the accused in jeopardy.

After one of the three triggering mechanisms mentioned above has initiated an investigation, the Prosecutor has the power to investigate. The Prosecutor can ask for cooperation of member states, and if those member states do not cooperate, the Prosecutor can alert the Assembly of State Parties, or the United Nations Security Council if the matter was referred to the Prosecutor by the latter.

During the course of an investigation, an accused person has the following rights: (1) to refrain from confessing guilt; (2) to be free from coercion, or duress, in questioning; (3) to receive an interpreter, free of cost; (4) to be free of arbitrary arrest or detention; (5) to remain silent; (6) to be informed of the accusation against him/her; and (7) to have legal assistance (Article 55).

Arrest

Before an arrest warrant can be issued, the Prosecutor must submit to the Pre-Trial Chamber a request for a warrant, complete with various details such as the name of the accused, the crimes which the accused is charged with, and the reasons why arrest of the person is necessary (Article 56). If the Pre-Trial Chamber issues an arrest warrant, the custodial state (state where the accused is located) must immediately take steps to execute the warrant (or summons, whatever the case may be), if the custodial state is a state party (Article 59). Importantly, the custodial state *has no authority to consider* whether the arrest warrant is properly issued (Article 59). Rather, the custodial state, should it want to, can challenge the admissibility of the case to the Pre-Trial Chamber.

A state party must comply with the arrest order in almost all circumstances. A problem arises, however, when the person who is warranted for arrest is requested for extradition from a non-member state, and the custodial state (which is a member) has an international obligation with the non-member state. In that situation, the state party (custodial state) must decide, weighing all the factors, to which body to extradite the accused person.

If an accused person is transported to the ICC, and the transport of the person includes the passage through a member state, then the member state must cooperate with the transit, after being given documentation of the arrest warrant. This cooperation, however, is unnecessary when the transport only occurs through air or water.

If the custodial state is a non-member state, then the ICC can make a request for cooperation with that state. The non-member state can then enter into agreements with the ICC. However, if that non-member state decides not to cooperate after having entered into an agreement, the ICC can inform the United Nations Security Council if that body referred the situation to the Court, or the ICC may just inform the Assembly of State Parties that a non-party is not cooperating (Article 87 [5]).

Pre-Trial

Once the accused person is brought before the Court for a pre-trial hearing, he/she has the

right (as with the investigation stage) to hear the grounds for his/her accusation, and may present a defense in the form of evidence, testimony, etc. (Article 61). After the hearing, the Pre-Trial Chamber decides whether there is enough evidence to go forward with a trial, similar to the Grand Jury function in the United States. But under the ICC, the defendant is better off as he/she can present and argue his/her case and present evidence.

The accused person has the right not to be detained for an unreasonable period of time after his/her arrest (Article 60). The accused, in fact, has a right to apply for an interim release (similar to bail in the United States) to the Pre-Trial Chambers, and will be so released, unless there is good grounds to keep him/her in detention (Article 60). Furthermore, if the accused person proves to be disruptive at the Pre-Trial hearing, or if in fact he/she escapes or is hard to find, then the Pre-Trial hearing can occur without his/her presence (his/her lawyer may be present, however--Article 61). These Pre-Trial hearings - *in absentia* - provide the basis for accelerating the legal process when suspects cannot be apprehended.

Trial

ICC trials include a number of aspects that are very similar to trials under the American legal system. First, the trials, in almost all circumstances, will be public and will not be conducted without the presence of the accused (Articles 63, 64). The statute does mention, however, that if the accused is disruptive at trial, the Court can make provisions for him/her to be held outside the courtroom, where he/she can watch the proceedings and instruct counsel via communications technology (Article 63). The Court may also feel it necessary to close the proceedings to protect confidential or sensitive information given in evidence (Article 64). For instance, the statute provides for information that a state may deem important to its national security interest to be shielded through various mechanisms (Article 72). In that situation, the Court and the interested state are to work together to come to an agreement concerning what part of the information may be revealed. However, if no agreement can be reached, the statute contemplates that where the information will not be brought into evidence, the Court may *infer* certain facts based on what it perceives that the state is hiding

Second, the accused enjoys extensive rights at trial, which include the right to: 1) be innocent before proven guilty, 2) have the standard of proof be beyond a reasonable doubt, 3) be informed of the charges against him/her, 4) have legal assistance, 5) be tried without delay, 6) examine witnesses against him/her, 7) have an interpreter free of cost; and 8) refrain from self-incrimination without such refrain being negatively interpreted (Article 67). Additionally, “the accused has the right not to have imposed on him or her any reversal of the burden of proof or any onus of rebuttal” (Article 67). This is important when considering the burden of proof necessary to convict a commanding officer, because a commander’s orders are often vague so as to shield him/her from direct responsibility. In the ICC, the Prosecutor will not simply be able to lay out facts of transgressions by soldiers coupled with an amorphous direction from the leaders and then put the burden of proof on the commander to prove the absence of guilt.

Third, the defendant has the right to claim certain defenses to any accusations, besides just basically denying their commission. These defenses include intoxication, abandonment, lack of mental element necessary to commit the crime, and self defense that is proportional to the

threat received. However, following orders will not be an acceptable defense if the accused knew that the orders were unlawful (Articles 32, 33).¹⁶

At trial, specific “Rules of Procedure and Evidence” will be followed. These rules have yet to be drafted. The Preparatory Commission will be entrusted with this task. When they are drafted, they will need to be approved of by two-thirds of the Assembly of States Parties.

Decisions of the Trial Chamber shall be by a majority of the judges (Article 74). While the deliberations are secret, the decisions must be written, with reasoning. Any judge disagreeing with the decision must also give his/her reasons for doing so (Article 74). If an accused person is found guilty, a sentencing hearing will ensue, where evidence can be presented, and the accused will be given an opportunity to speak. The Court has the authority to impose imprisonment for either a specified number of years (no longer than thirty years) or for life. There is no death penalty (Article 77). The Court can also impose fines, and/or forfeiture of proceeds gained by the criminal during the crime. This money will go into a Trust Fund that is used to compensate the victims of crimes (Articles 77, 79).

Appeal

The Appeals Chamber can hear appeals from a defendant and/or the Prosecutor based on the Trial Court’s decision (Article 81). While both can appeal based on errors of fact, law, or procedure, only the convicted person can appeal based on grounds that “affect the fairness or reliability of the proceedings or decision”(Article 81). Not only can the Prosecutor appeal an acquittal, but, in select circumstances – such as the probability of flight of the defendant – an acquitted defendant can be held at the ICC pending appeal (Article 81).

The Appeals Chamber has all the powers of the Trial Chamber (Article 83). This includes, for instance, calling evidence to determine an issue. This is contrary to the American system, which contemplates appellate reversal based on factual review only when the trial court decision is against the great weight of the evidence. The Appeals Chamber can reverse or amend a decision or sentence, or order a new trial before a different Trial Chamber (Article 83). Decisions of the Chamber shall be by majority.

The ICC and the UN

The ICC is not a part of the United Nations. Rather, it is to 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 2). The statute does specifically mention the United Nations and the Security Council with respect to a number of provisions.

¹⁶ The ICC statute deviates from the Nuremberg Principles as well as the Rwanda and Yugoslavia Tribunals with respect to provisions on superior orders.

The definition of the crime of aggression has not yet been defined. Moreover, the statute contemplates that any definition of the crime will be “consistent with the relevant provisions of the Charter of the United Nations”(Article 5). This means that the ICC will not contest the Security Council’s jurisdiction over defining the crime of aggression.

The United Nations Security Council, acting under Chapter VII of the U.N. Charter, can refer matters to the ICC (Article 13). Where ICC member states refuse to cooperate with the ICC, the ICC has the right to alert the Security Council to such lack of cooperation (Article 87).

In very clear language, the statute maintains that no investigation or prosecution can proceed for a period of twelve months if, after a resolution adopted under Chapter VII of the United Nations Charter, the Security Council requests the Court to that effect. Moreover, this request can be renewed as many times as the Security Council wants to (Article 16).

Additionally, the Prosecutor, when investigating crimes, may seek the assistance of the United Nations. (Articles 15, 54).

Finally, it shall be a war crime to commit intentional acts of violence against United Nations personnel involved in peacekeeping or humanitarian missions (Article 8).

Financing the ICC

The ICC shall pay its expenses from the “funds of the Court” (Article 114). These funds shall be provided by: (a) assessed contributions made by state parties and (b) the United Nations, subject to General Assembly approval (Article 115). The funds paid by the state parties will be assessed according to the United Nations formula governing its regular budget (Article 117). The UN funds will be used to pay for expenses incurred “in particular” from referrals by the Security Council (Article 115).

The Court also has the power to receive additional funds and voluntary contributions from governments, international organizations, individuals, corporations, and other entities (Article 116).

IV. Institutional Analysis of the ICC

As a permanent court, the ICC is an exception to the prevailing regime of administering international criminal law in the 20th century. This regime has mainly depended on the legal systems of sovereign states to administer laws against international transgressions. Occasionally, domestic legal systems have been supplemented, but rarely, by *ad hoc* tribunals which emanated from initiatives led by powerful states during periods of large-scale conflict and violence. The tribunals set up at Nuremberg and Tokyo, in the aftermath of World War II, and the Yugoslavia and Rwanda Tribunals during the 1990s were just such *ad hoc* tribunals. As for providing a

substitute for domestic legal systems, proponents of an international court have underscored the various ways in which such a court would solve the problems involved in allowing states to be self-policing. The extradite-or-prosecute system which relies on sovereign states cannot function effectively in the presence of various bottlenecks. For instance, territorial crimes may be perpetrated by heads of state, or other influential persons, whose domestic political support renders them immune from individual criminal liability within their own national legal apparatus. Even when legal procedures are initiated, they may not undertake a genuine administration of international or national law (i.e., shield a suspect from justice). Nations may be reluctant to cooperate in such efforts by being unwilling to honor extradition requests for suspects in hiding. Moreover, prevailing practices under extradite-or-prosecute tend to exempt what are considered to be “political” offences.¹⁷ In theory, a permanent court would make a dent into such bottlenecks by providing an umbrella of accountability from which states will find it difficult to sustain pockets of injustice that cannot be addressed through extradition-or-prosecution. In reality, however, the effectiveness of ICC in providing this umbrella depends on the specific ways in which its “complementary functions” will be operationalized in the future (more on complementarity below).

As a substitute for *ad hoc* tribunals, the ICC features numerous advantages. Logistically, temporary tribunals have proved extremely costly and difficult to construct. According to the Lawyers Committee for Human Rights, the “tribunal fatigue” created by the difficulties involved in running the Yugoslavia and Rwanda Tribunals has made the Security Council less enthusiastic about undertaking such initiatives in the near future. While start-up costs for a permanent court would be high, maintenance costs would be much less. Hence, a permanent court would be inexpensive relative to a chain of temporary tribunals. Moreover, since temporary tribunals have tended to function in environments of large-scale violence and conflict (major war and civil war), such institutions would not be created to impose accountability in environments in which transgressions have been even more numerous (i.e., where national and international disturbances have been small). The reason for this is that it takes great political will to create tribunals, and such will would be lacking where political-military disturbances are considered minor. Hence, while the high-profile conflict and violence that has taken place in the former Yugoslavia and Rwanda has led to tribunals there, the cases of smaller-scale disturbances (Angola, Burundi, Cambodia, Uganda, Haiti, Yemen, Sudan, Ethiopia, East Timor, Iraq, El Salvador, Honduras, Tadjikistan) have not been addressed at the international level. To the extent that states relied exclusively on temporary tribunals to address international crimes, the deterrence generated by such institutions would be at a low level in such situations since perpetrators, knowing such disturbances are too small to call forth an international solution, would act with greater impunity.¹⁸

¹⁷ A recent well-known example has been Lybia’s refusal to extradite the suspected bombers of Pan Am flight 103 over Lockerbie. Refusal to extradite for reasons of “political” infractions has recently occurred between the U.S. and Mexico in the case of William Morales. *See* S. Rep. No. 71 [hereinafter U.S. Senate], 103d Cong., 1st Sess. at 11 (1993); Ellington, *United States v. Noriega* 11 DICK. J. INT’L L. 451 (1993); and Marquardt, *Law Without Borders* 33 COL. J. TRANSNAT’L L. 73, 98 (1995).

¹⁸ *See* Lawyers Committee for Human Rights, *Establishing an International Criminal Court*, 1 INTERNATIONAL CRIMINAL COURT BRIEFING SERIES (1998). Scharf, Seminar presented at the University of Connecticut on the International Criminal Court (April 5, 1997)

Another virtue which a permanent court enjoys relative to a temporary tribunal is the *post hoc* nature of the latter. First, the fact that tribunals are reactive in nature makes the development of international criminal law discontinuous. General principles of criminal law would be modified according to random situations which happen to occur. This would render the development of law inconsistent and lumpy at best.¹⁹ A permanent court would allow a much more continuous and integrated development and application of international criminal law. Second, tribunals have been historically criticized for “justice after the fact.” Since tribunals have been created in response to transgressions, critics have questioned whether justice was carried out according to the generally accepted principles of *nulum crimen* and *peona sine lege* (no crime or punishment without prior laws). Nuremberg and Tokyo have been portrayed by such critics as cases of justice by the victors. Rwanda and Yugoslavia incurred similar disapproval for the development of law during the actual trial process. Jamison and Perera note that during the Yugoslavia proceedings judges were creating laws and procedures during the trials themselves.²⁰ Furthermore, the fact that the ICC, unlike tribunals of the past, is not the result of great-power police actions renders it more legitimate in the eyes of both developed and underdeveloped states.²¹

As the product of an independent treaty, rather than an organ of the U.N., the ICC enjoys several advantages. The statute was easier to negotiate since it did not have to be integrated with the U.N. Charter, hence the Charter itself did not have to be amended (an extremely difficult undertaking politically). Furthermore, unlike the product of a U.N. resolution, a treaty, once ratified, is accorded the force of law. Resolutions themselves could be amended, and such a possibility would conflict with the quest to create a permanent institution as the structure of the Court could be changed. In terms of the ICC’s budget, fundamental independence removes it from the vagaries of U.N. financing which in recent years have created major roadblocks for the effective operationalization of U.N. programs.²²

and Podgers, *The World Cries for Justice*, 82 A.B.A.J. 52,54 (1996) emphasize the importance of providing extensive deterrence through international accountability created by a permanent court. According to Scharf, Hitler’s genocidal rampage was fueled by the fact that no institution nor state addressed the Armenian genocide of the early 1900s.

¹⁹ This was a major concern at various stages of negotiation over a permanent court. *See* PrepComm V. I, *supra* note 11, at 8.

²⁰ Jamison, *supra* note 5, at 437,438 and Perera, *Toward the Establishment of an International Criminal Court*, 20 COMMONWEALTH L. BULL. 298, 300 (1994). On the Tribunals, *see also* Meron, *Answering for War Crimes*, 76 FOREIGN AFFAIRS 2 (1997); Nagan, *supra* note 2; Preis, *The Politics of Unfairness*. Thesis presented to the Department of Government, Wesleyan University (available at Olin Library, Wesleyan University) (1997); Bucyana, *The International Penal Tribunal for Rwanda*, 8 INT’L J. REFUGEE L. 622 (1996); and New York Times, Jan. 9, 1997, at A-3.

²¹ Negotiators who favored independence from the institutional apparatus of the Security Council were strongly moved by such considerations. A court too closely tied to the Council might be seen as an extension of an institution dominated by great powers. *See* PrepComm V. I, *supra* note 11, at 8.

²² Article 115 (B) also mentions funding through the U.N. for cases referred by the Security Council. Hence, the budget is not completely independent from the U.N.

The statute makes some major strides in establishing jurisdiction over international crimes. Through Article 5, it is the first international instrument that calls for a definition of the crime of aggression with respect to establishing individual criminal liability. Article 5 further calls for codifying specific conditions under which the ICC can claim jurisdiction over acts of aggression. While a General Assembly resolution in 1974 defined aggression for the purpose of state-to-state relations, no definition has established individual criminal responsibility for such acts. Hence, present instruments have left a visible void in creating accountability for acts of aggression since individuals themselves have faced no systematic possibilities for retribution as a consequence of their transgressions. A formal definition and formal codes of jurisdiction in a permanent court would fill this void.

Similarly, in crimes against humanity and war crimes the statute does expand on present instruments in terms of jurisdiction. Its list of core crimes goes beyond present instruments by including such transgressions as forcible transfer, sexual slavery, and forced disappearance. Provisions on enforced prostitution, forced pregnancy, and sexual slavery have greatly expanded on the imposition of criminal accountability in the area of sex-related offenses, thus filling important and quite visible gaps (as Bosnia demonstrated) in present codes on war crimes and crimes against humanity. The statute has also expanded the range of humanitarian law by prohibiting the conscription of youth. ICC provisions reinforce provisions of the Geneva Conventions, Protocol II, and the precedents set in the Rwanda and Yugoslavia Tribunals with respect to the extension of jurisdiction in situations of peace and internal conflict. Jurisdiction over war crimes extends over both situations of international and internal conflict, while crimes against humanity apply in conditions of peace as well as armed conflict.²³

With respect to the provisions guiding the investigation and adjudication of suspected crimes, the statute more than satisfies expectations for procedures which can produce an unbiased, thorough, and careful consideration of international criminal cases. The statute is strongly grounded in the International Covenant on Civil and Political Rights, which itself reflects widely respected canons of Western law. The investigation, pre-trial, trial, and appeal functions are effectively independent from one another. Pre-trial and investigation functions are elaborate and infuse a high level of accountability onto the individuals conducting cases. The trial process, in the tradition of Western law, provides sufficient opportunities for defendants to conduct their cases under fair and non-arbitrary procedures and laws. Penalties will be both sensitive to national standards, and will be proportional to the crimes committed. Specific Rules of Procedure and Evidence have yet to be instituted, yet it is to be expected that such Rules will be consistent with the legal tradition which the statute contemplates.

While the statute does formally create an independent institution (i.e., not part of the U.N. network), and such an institution is in fact an exception to the prevailing system of administering international criminal law (in that it is a permanent court and that it provides a substitute for national courts), both the statute itself and the U.N. Charter carry provisions that

²³ Committee on International Law, *supra* note 13, at 102-04; International Law Association, *First Committee Report on Jurisdiction* in INTERNATIONAL ASSOCIATION OF PENAL LAW, THE INTERNATIONAL CRIMINAL COURT, 159, 169 (1997); Report of the ILC, *supra* note 13, at 75; and PrepComm V. 1, *supra* note 11, at 20.

limit both the independence and the jurisdiction of the ICC within the prevailing regime governing international law. The provisions on the “complementary role” (Preamble and Articles 1 and 17) which the ICC will play vis-à-vis national legal systems places the Court in a secondary or auxiliary position in attending to international crime.²⁴ The provisions on admissibility (Articles 17-19) give states with jurisdiction “first crack” at dealing with international criminal transgressions. Should states with jurisdiction claim a right to investigate and/or prosecute, the ICC would have to step aside unless (according to Article 17) the Court declared that the state with jurisdiction was either shielding a suspect from justice or in fact lacked the necessary institutions to provide an effective investigation or fair trial. Ultimately, under Article 19 (1) the statute does give the ICC the right to determine its own jurisdiction in any situation in which it involves itself. However, any competing claim over a case marshaled by the Court would have to be founded on accusations (sham investigations and trials) or on claims that states lack the requisite institutions to administer justice. Both of these would be politically difficult to do since they rely on claims that are embarrassing for the rival states.²⁵ Both trigger mechanism and consent requirements are consistent with the spirit of complementarity. A case is triggered with a complaint from either the Security Council or a member state under Article 13 (A) and (B). An exception to this system of national filtering is the *proprio motu* power of the Prosecutor to initiate an investigation. Implicit and explicit consent requirements under Article 12 establish further preconditions for the exercise of jurisdiction. In cases not referred by the Security Council (such cases carry no consent requirements), the ICC would enjoy jurisdiction over crimes committed either on the territory of member states or by a citizen of a state member (implicit consent). In the event that the crime committed exhibited no such characteristics (non-member territory, while suspect was not a national of a member state), explicit consent of either the territorial or nationality state would be required as a pre-condition for the ICC’s jurisdiction. While the Prosecutor does enjoy *proprio motu* power to investigate a case, any such investigations would still be subject to admissibility requirements which give states first right to investigate and prosecute.

Although the ICC is not formally connected to the institutional apparatus of the U.N., the Security Council still wields substantial influence over the ICC. This influence renders the Court far less independent and autonomous than many advocates of separation would have desired. Article 13 (B) gives the Security Council the right to involve the ICC in a situation without jurisdictional conditions dictated by Article 12 (i.e., jurisdiction emanating from territoriality and nationality). This is quite consistent with the U.N. Charter as Security Council resolutions automatically impose an obligation on U.N. members. Article 16 grants the Council broad powers to interrupt the initiatives of the ICC at any stage in the legal proceedings of a case. The Security Council, acting under its Chapter VII responsibilities, could obtain a twelve-month deferral of any case if it so requests. The deferral can be renewed if the Security Council requests such a renewal. There are no provisions limiting the number of renewals, hence a case

²⁴ Interestingly, the *ad hoc* Tribunals of Rwanda and Yugoslavia have greater jurisdiction vis-à-vis states than the ICC in that the Tribunals claim concurrent jurisdiction over international crimes (i.e., can contest the jurisdiction of national legal systems without such limitations), while the ICC is not so empowered.

²⁵ PrepComm V. 1, *supra* note 11, at 36,37 and Politi, *supra* note 11, at 141-47.

may be deferred indefinitely if the Security Council can continue to muster the votes.²⁶ This too is consistent with provisions of the U.N. Charter. Under Chapter VII of the Charter the Security Council has an uncontested jurisdiction over matters related to keeping the peace. Under Article 39 of the Charter, the Council also has the right “to determine the existence to any threats to the peace.” Article 103 of the Charter clearly states that in the case of a conflict between U.N. obligations and those dictated by any other international agreement, obligations under the U.N. Charter will prevail. Hence, if the Security Council were to take up a situation under its Chapter VII responsibilities, it would clearly supercede the authority of the ICC. While the potential for Security Council intervention may appear limited because such intervention would have to be marshaled on the existence of some threat to the peace (i.e., instances of aggression), the lack of a clear definition of aggression in existing instruments (with respect to establishing criminal liability) grants the Council broad powers of interpretation which could be used to initiate involvement in a wide variety of cases, even those involving core crimes.²⁷

The positive strides made in the extension of jurisdiction over crimes of aggression, war crimes, and crimes against humanity are accompanied by some serious limitations in the statute regarding these crimes. While the statute mandates that the Assembly of States Parties define the crime of aggression with respect to individual criminal responsibility and establish conditions for the exercise of jurisdiction by the ICC, any such provisions would have to come via an amendment. The amendment process contemplated by the statute is fairly cumbersome. Amendments require, *de jure*, two-thirds of a majority of state parties, however the language in Article 121 (3) suggests that a consensus will be vigorously sought on each amendment. But even after having been voted in, amendments will only come into force one year after seven-eighths of the state parties have ratified them. Furthermore, no amendment can even be proposed until seven years after the treaty formally comes into force as a result of national ratification (at least 60 ratifications are required). Moreover, under Article 121 (5), states are not accountable for actions under the said amendment (i.e., not accountable for acts of aggression) if they did not

²⁶ Article 16 represents a compromise position between those negotiators who wanted a stronger and more direct gatekeeping function on the part of the Security Council over the ICC (they would have preferred a provision which required the Council’s consent before the ICC could take up a situation) and those negotiators who wanted complete independence. While the Council can in principle defer a case and continue to do so, great burdens are placed on states that favor such an action to muster the political will necessary to encourage nine of the fifteen members of the Security Council to support such a deferral year after year. Given that a vote on such a matter would qualify as “substantive” under the procedures of the Council, the vote would also have to avoid a veto from any of the permanent members. Hence, while deferral is a possibility, it would be difficult to engineer in practice.

²⁷ This would be due to the fact that core crimes often take place in environments of armed conflict and wide-scale violence, which would give the Council sufficient justification for claiming jurisdiction. But, moreover, given the Council’s right (under Article 39 of the Charter) to determine what constitutes a threat to the peace, possibilities for intervention would extend to situations of lower-scale conflict and violence as well. Hence, it would appear that the intervention potential of the Council would be more a function of the political will of the Council members (i.e., they will intervene if support for intervention is strong) than a function of pre-existing statutes addressing aggression.

consent to the amendment. This would also apply to any new crimes which were placed under the jurisdiction of the ICC (such as terrorism or hijacking) through such an amendment.

Jurisdiction over war crimes has been suspended for a period of seven years for each member state. According to Article 124, each member state is exempt from accountability regarding war crimes for seven years following its ratification of the treaty. Furthermore, provisions against the use of biological and chemical weapons, as well as weapons of mass destruction, are missing from the statute.

The language in Articles 7 and 8, while it does expand the list of core crimes, in fact restricts the definitions of war crimes and crimes against humanity in ways that are inconsistent with present international instruments. Both are defined in ways that suggest acts which are widespread and systematic. Article 7 (1) defines crimes against humanity as acts which are committed “as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.” In fact, while Article 7 (1) uses the word “or,” acts must be both systematic and widespread given the language in Article 7 (2) (A), which provides that any such attack must derive from a “State or organizational policy”(systematic) as well as entail “multiple commissions” (widespread). Specifying civilian populations and prior knowledge create further restrictions, as such acts will not cover combatants and will place a burden on the Court to prove that transgressions were contemplated. Article 8 (1) defines war crimes as acts which result from “a plan or policy or as part of a large-scale commission of such crimes.” The prior knowledge restriction appears in paragraph (2) (A) (IV) where attacks on civilian populations must be committed “in the knowledge” of the potential damage inflicted. Paragraph (2) (C) and (F) also depart from present international instruments in establishing that violations in the cases of domestic (i.e., not between states) conflict must be “serious” and “protracted.” The term “serious” is not defined in current instruments of international law. Moreover, paragraph (2) (F) excludes such “situations of internal disturbances and tensions” as riots and isolated acts of violence.

While an institutional analysis of the Court suggests a mixed bag, the statute creates a more than sufficient platform for the fair and effective administration of international criminal law. The effectiveness of the Court will, however, depend more upon political will and cooperation than on the institutional strength of its organizational structure. In this sense, the Court operates within the same context that the present extradite-or-prosecute regime operates. Ultimately, the form which justice takes will be the outcome of diplomacy. Individuals suspected of international crimes will be arrested, extradited, prosecuted, and penalized in ways that are consistent with the balance of diplomatic power. The jurisdiction and operation of the Court is absolutely founded on the consent of sovereign states. Hence, the Court can be no stronger, nor any weaker, than the will of sovereign states (both part and non-party) to administer international criminal law through the venue of an ICC. This makes politics absolutely integral to the functioning of the Court.

V. The Politics of the ICC

That politics will essentially determine the course of international justice through the proposed ICC follows naturally from a “weak” statute. Weak, in this respect, means that the Court lacks the internal institutional mechanisms to impose its will on sovereign nation-states. In this sense, the ICC is typical of international organizations: the limits on national sovereignty are not severe, there are many loopholes for national discretion, the penalties for noncompliance are vague and unthreatening, and the process of reform is difficult and cumbersome. Hence, the ICC statute does not replace a system of international politics with a supranational judicial institution, but infuses politics into the process of international justice. The statute infuses politics into the process of justice in two ways: a) it opens up many opportunities for politics to configure the actual administration of justice (i.e., the politicization of justice), and b) makes the effectiveness of the Court in achieving its mandates dependent upon political will and cooperation. As for the latter, the Court depends upon the compliance of states at virtually every stage of a legal procedure. The need for such support is especially evident in Part IX (see Article 93) of the statute. The Court relies on sovereign states for consent, the provision of evidence, arrest, the identification and location of witnesses and suspects, on-site investigations, transfer of accused, recognition of judgements, extradition, enforcement of judgements, and the protection of witnesses. The statute provides states with great leeway in providing assistance since such measures must be carried out in ways that conform to national laws. According to Article 93 (3), where national laws or practices prevent a state from complying with an ICC request, the Court shall change the request. This respect for national laws in carrying out supporting functions is another manifestation of the norm of complementarity: national laws will take precedence in handling cases when it is within the jurisdiction of a state.²⁸

While the statute lays out various obligations for state parties, it lacks the level of specificity necessary to insure compliance with the spirit of the Court’s mandates. Furthermore, internal mechanisms governing compliance are all the more deficient because the statute lacks 1) rules for cooperation with non-party states (Article 87 merely says that non-party states “may be invited” to cooperate with the Court), 2) specific penalties which address noncompliance by both non-party and party states (noncompliance leads to, at worst, a referral to the Assembly of States Parties), and 3) rules specifying the precise complementary role of the Court *vis-a-vis* national courts. Such an institutional make-up forces states to unilaterally or multilaterally step up against such things as sham trials, refusals to adjudicate, harboring suspects, and refusals to allow investigations.²⁹ The track record for both the Yugoslavia and Rwanda Tribunals has shown that lack of cooperation from states can prove a serious impediment to the fair and effective protection of human rights in those regions: suspects were sheltered and protected, governments sought to impose their own procedures on the Tribunals, and investigations and the collection of evidence were seriously hampered.³⁰

²⁸ The statute also allows states to directly deny requests for cooperation if the requests compromise national security.

²⁹ International Law Association, *supra* note 23, at 246; Committee on International Law; *supra* note 14, at 137; and PrepComm V. I, *supra* note 11, at 65-72.

³⁰ New York Times, *supra* note 20; Meron, *supra* note 20, at 3; Warrick, *Organization of the International Criminal Court* in INTERNATIONAL ASSOCIATION OF PENAL LAW, THE INTERNATIONAL CRIMINAL COURT 37, at 41 (1997); and Scheffer, *International Judicial Intervention*, 102 FOREIGN POLICY 34, 45 (1996).

It is not clear that even where the *de jure* jurisdiction of the Court is least problematic (in the area of genocide), that the Court can independently pursue its mandates. First, the Court will depend on sovereign states for the operationalization of its rulings. Second, the Security Council's jurisdiction under the U.N. Charter and the statute give it the power to block even cases of genocide (as long as they declare that the incident involves issues of peace and war). In fact, the statute does not even prevent the Security Council from creating tribunals. Finally, as the complementary role of the Court is unspecified, the Court would have the right to defer to other states in the prosecution of genocide. Such could occur, for example, as the result of strong competing claims over jurisdiction.³¹

When combined with the actual institutional mechanisms in the statute that empower both individuals and states to play a role in cases, the general lack of guidelines for compliance and cooperation open up a plethora of opportunities for the politicization of the Court. The Security Council has significant power in terms of referring cases and blocking the Court from considering cases. The President (who appoints judges to the Trial Chamber and sits on the Appeals Chamber) and Prosecutor (aside from the wide latitude he/she enjoys in investigating a case, he/she can appeal acquittals without limit) are strategically positioned in ways so as to fundamentally shape the judicial process through its various phases. Moreover, sovereign states have numerous points of entry into the process. Member states, of course, can make complaints against individuals, or refer specific situations to the ICC. For example, under Article 13 (A) any state party hostile to the U.S. could have issued complaints against individual American soldiers involved in a hospital (which was flying the wrong flag) bombing during the invasion of Grenada. If states are directly involved in a case (nationality, territorial, custodial), they could withhold consent (if they are non-party states), or they could claim jurisdiction themselves as Libya did in the Lockerbie dispute. Article 53 (3) even allows state parties to challenge a Prosecutor's decision not to investigate a case. States can of course also politicize cases through indirect pressure: influencing involved parties or Security Council members to withhold jurisdiction, or to withhold compliance.³²

Insofar as states are reluctant to allow major inroads into the sovereignty they enjoy over extraterritorial crimes, it would be impossible, of course, to construct a statute that was significantly divorced from politics. As Scheffer notes, "international judicial intervention can never be completely isolated from politics." Given the inescapable reality of the potential for the politicization of justice under such conditions, many critics of a weak statute have underscored the detrimental consequences of endogenizing politics in the operationalization of justice. For them, any deviation from blind justice represents a devolutionary change.³³ Such a legal-purist position is hardly defensible given the realities of international politics (i.e., international politics is situated in an anarchic structure) and the potentially destabilizing consequences which the

³¹ PrepComm V. I, *supra* note 11, at 28.

³² Grant and Dickinson, *The Lockerbie Stalemate*, 4 JURID. REV. 250 (1996) and Rosenstock, *supra* note 5, at 281.

³³ Scheffer, *supra* note 30, at 38,39. Algerian diplomat Ramtane Lamamra notes that we should strive for a practice of criminal law which was a "departure from [the] summary judgements of customary power politics." Libyan diplomat Mohamed Marti confirms the sentiment that we must not "co-mingle" justice and politics. See U.N. Press Releases, U.N. Doc. GA/L/2880 at 3 (November 2, 1995) and U.N. Doc. GA/L/2879 at 8 (November 2, 1995).

execution of blind justice could have. Hence, that the Court allows various points of entry for politics can actually facilitate the attainment of even the most sacred of the Court's mandates: the promotion of retribution and reconciliation in ways that preserve order and stability in the international community. While some political considerations might lead to undesirable outcomes in terms of the Court's mandates, not all politics are necessarily bad. Some modicum of politics is necessary to insure that blind justice does not create cures which are worse than the diseases. Under such a decision rule, deviations from the consideration of the pure merits of a case may be excusable if the deviations serve the spirit of justice (creating orderly communities out of anarchy). Simply put, some deviations from pure considerations of justice may have to be tolerated for the purpose of saving lives.³⁴ In fact, if the goals of justice are considered within the context of broader social objectives (e.g., a judicial system that minimizes social disorder), then such practices need not even be antithetical to principles of justice.

While in theory courts are essentially substitutes for private acts of vengeance, they may also function in ways that generate acts of vengeance or reprisal. Within the context of criminal law, that the ICC seeks to involve itself in such cases will invariably bear on this issue because most of the crimes under consideration are perpetrated in environments of high political stakes (aggression, large-scale violence against groups, ethnic conflict). Since the crimes are inextricably tied to political considerations, purely legal solutions void of any sort of political sensitivity could lead to undesirable outcomes. In the Yugoslavia Tribunal, for example, the fact that the indictments were preponderantly against Serbs actually intensified the hostility and siege mentality of the Serbs, thus rendering the peacemaking process more daunting.³⁵ Other incidents involving the enforcement of the Tribunal's rulings have generated conflict and threatened to destabilize the peace forged at Dayton. In February of 1996, for example, the arrest of two Serbs indicted for war crimes shook the peace to such an extent that the Bosnian government agreed to refrain from arresting further suspects. Problems with arrests and a shooting of indicted Bosnian Serb war criminals led to publicity from Bosnian television which portrayed the NATO presence as directed toward the assassination of Serbs. Violent responses to this publicity were immediately forthcoming: a British base in Bosnia was rocketed and a U.S. soldier stabbed.³⁶ The safety of peacekeeping forces in Bosnia has been absolutely necessary to guaranteeing the continuation of the peace.

That the administration of criminal law can have major impacts on issues of war and peace has essentially animated supporters of keeping the Security Council in a gatekeeping position *vis-a-vis* the Court in matters of armed conflict. Since conflict involves the highest political stakes, any judicial solutions to criminal problems occurring in such environments

³⁴ Even national systems of law deviate from expectations of legal purists, since each society systematically tolerates a variety of injustices for goals which comprise a broad set of social objectives. For example, American due process has not evolved in a fashion that promotes perfect justice (i.e., everyone getting what they deserve), but in fact operates so as to minimize type-I error. More specifically, the system allows many guilty parties to go free so as to minimize the number of innocent parties who are convicted. The granting of immunity to minor offenders for the purpose of convicting major offenders deviates from purist standards as well.

³⁵ Bucyana, *supra* note 20 and Meron, *supra* note 20, at 6.

³⁶ Wall Street Journal, Jul. 17, 1997, at A1 and Jul. 18, 1997, at A1; Podgers, *supra* note 18, at 62; and Hartford Courant, Jul. 11, 1997, at A1.

would have to filter through the institution which has been specifically designed to address issues of war and peace in a way which accords with the deep structure of international politics.³⁷ That the Court's solutions cannot be completely divorced from politics is all the more necessitated by all of the ways in which politics can enter into the judicial process in the first place (e.g., politicized complaints need to be assessed within a political as well as judicial context). In this sense, while politics carries certain dangers for the Court, it also carries the means of attending to justice in ways that accords with broader goals of the international community. Hence, there is the potential for both good and bad politics in the ICC.³⁸

Critics might argue that political responses would be far less necessary if politics were not endogenized into the statute in the first place. Furthermore, the model of co-mingling justice and politics would lead to a selective administration of justice, and therefore would be antithetical to the promotion of justice since political imperatives may necessitate injustices. Such a selective administration of justice would undermine the deterrent effect of a Court since potential criminals would not be faced with unconditional accountability for their transgressions (i.e., there may be perceptions that politics are not conducive to prosecution and therefore individuals will act with impunity).³⁹

Responses to these points are several. First, there is no way in which this particular iteration of a permanent court will be divorced significantly from politics. Co-mingling politics and justice is an absolute pre-requisite for the birth and national ratification of such a Court in the present time (nations are not prepared to compromise their sovereignty to such an extent that would produce a regime of blind justice). Hence, the vision of purists is an impossibility. Second, while it would seem tempting to consider an administration of international law that is politically-sensitized to be merely trading justice for political expediency, such a characterization seems far too simple minded and inconsistent with the administration of law even at the national level. No prevailing conception of justice which exists in any state is totally divorced from political considerations. Since the administration of national laws is directed toward broader socio-political goals (e.g., preserving a constitution, protecting society from major offenders), justice is inherently political. Furthermore, to pursue justice in a politically-sensitive way is not necessarily commensurate with tolerating injustices. The administration of international law, even under the present statute for an ICC, is sufficiently flexible so as to allow a configuration that is sensitive to political imperatives without necessarily renouncing the quest for what might be considered a pure form of justice. The outcomes of the Yugoslavia Tribunal surrounding the Dayton Peace Accords is a case in point (see discussion below). Moreover, to say that what

³⁷ In this respect, during negotiations, the U.S. continued to be at the forefront in configuring the operation of the Court to the realities of power politics. See U.S. Mission to the U.N., *Agenda Item 142* (statement by Jamison Borek) 142 U.S.U.N. Press Release (Nov. 1, 1995) and U.S. *Statement on the International Criminal Court Sixth Committee*, 51st General Assembly (Oct. 31, 1996), URL: gopher.igc.apc.org:70/100/orgs/icc/natldocs/ga51/us1096.

³⁸ Gallarotti and Preis, *Toward Universal Human Rights and the Rule of Law*, forthcoming AUSTRALIAN J. INT'L AFF. (1999), from which this analysis draws heavily, introduce the idea of good and bad politics in the ICC.

³⁹ See Committee on International Law (1997, pp. 80,81) and the comments of Ambassador Matthew Joseph of Singapore in U.N. Press Release, U.N. Doc. GA/L/3009 at 6 (October 28, 1996).

constitutes selective justice has lower deterrence value suggests that actors can systematically forecast the outcomes of justice under a co-mingled regime. This would be quite difficult because political developments do not arise and enter into the judicial process in systematic ways (i.e., because one individual was not prosecuted under certain conditions does not assure others that they will not be prosecuted under different or even similar conditions). Each process unfolds in numerous stages involving politics and justice in ways that allows for quite a variety of outcomes, and no one case could be exactly like another. Uncertainty works in favor of deterrence rather than against deterrence.

While it is true that politics could work both against the interests of justice and peace, the job of purging politics from the Court is a very delicate process because you would not want to purge functions that allow for good politics: i.e., considering political issues bearing on criminal acts for the purpose of abating conflict and saving lives. Since each way in which politics enters into the Court carries potential for both good and bad politics, any initiative directed to restricting political considerations in the administration of justice would limit opportunities for politics which are stabilizing as effectively as it limited politics which are destabilizing. The provisions of the statute governing the role of the Security Council offer a great many important opportunities for good politics. Since the Council has a right to consider any matter it wishes under the jurisdiction of its peacekeeping functions, it can take up any situation involving large-scale conflict. It is in such cases that the negative consequences of justice (i.e., dispute intensification) are greatest because the level of conflict is most pronounced. That sensitivity to the politics of conflict when administering international criminal law can create desirable outcomes with respect to stability and conflict resolution is evident in events involving the Dayton Accords and the Yugoslavia Tribunal.

The Yugoslavia Tribunal operated in a manner that was generally conducive to enhancing the peace process in the former Yugoslavia. A preponderant number of indictments were targeted toward “small fish.” Of the important political/military players, only two were indicted: General Mladic and Radovan Karadzic. Indicting “big fish” presented a major problem for the peace effort since the leaders of the warring factions enjoyed extremely strong political support. Indicting them would intensify the already pronounced hostility between warring factions, would eliminate those actors best positioned to conclude a peace accord, and would set the entire multilateral peacekeeping initiative (from where the Tribunal emanated) in an adversarial role *vis-a-vis* the factions connected with the indicted political/military leaders. When decisions to issue indictments of major political/military players were issued, it was Karadzic (leader of the Bosnian Serb faction) and Mladic (his ranking military officer) who were indicted. Leaders of the other factions Milosevic (Serbia), Tudjman (Croatia), Izetbegovic (Bosnian Muslims) were not prosecuted notwithstanding the fact that atrocities were widespread during hostilities and certainly not restricted to any one faction.⁴⁰ Such an outcome, however, best facilitated the peace initiative forged in the Dayton Accord. Milosevic, Tudjman and Itzetbegovic were considered absolutely necessary for a stable peace as all three groups (Serbs, Croats and Muslims) had to be represented in any viable peace settlement. Indicting any one of them would have eliminated a crucial link in forging the Accord.⁴¹ It is here that the indictment of Karadzic actually served to

⁴⁰ Preis, *supra* note 20.

⁴¹ Lawrence Eagleberger himself defended the failure to prosecute Milosevic on these grounds. “You’re between a rock and a hard place. If you want to make the peace work, you need

bolster the peace. Karadzic had emerged as an intransigent player in the pre-Dayton peace process. His potentially hard-line position at the Dayton negotiations promised to seriously threaten any effective peace settlement. Milosevic had been a far more moderate negotiator and held diplomatic priorities that better accorded with promoting a stable peace. Since Milosevic had signed an agreement with Bosnian Serb leaders in August of 1995 that would allow him to negotiate for them at Dayton, Karadzic became redundant for the peace process. Hence, with the Bosnia Serbs represented, indicting Karadzic served the purpose of eliminating a potential roadblock to the peace. The indictment, which carried the provision that Karadzic could not hold political office, also paved the way for Milosevic to emerge as leader of the Serbs, thus positioning him to solidify the peace he was instrumental in building.

Administering the indictment was also orchestrated in a way that preserved the peace plan. NATO forces did not go out of their way to arrest Karadzic, notwithstanding the fact that he repeatedly passed through official NATO checkpoints and was recognized. Such an arrest would have evoked a strong response from Bosnia Serbs, among which Karadzic has enjoyed great popular and political support. Indicting but not arresting Karadzic promoted the peace accord and served to diffuse a potential powder keg in the region.⁴²

Has justice been compromised for the peace in the former Yugoslavia? Even Justice Goldstone has argued that such was the case with the Tribunal.⁴³ While it may be too early to answer such a question definitively, it is clear that the quest for justice in the region is far from being abandoned. The administration of the indictment has continued to unfold, albeit in ways that have been consistent with the preservation of peace. The administration appears to have been temporally diversified so as to create windows of opportunity for prosecution with limited political spillover. The provision that Karadzic could not hold political office was designed to get him out of the political forefront (in fact he stepped down as Bosnian Serb President in July of 1996), thus limiting the political splash which would result from an arrest. While Karadzic's continuing support among the Bosnia Serb people and in the Bosnian Parliament made arrest difficult even after he stepped down from office, the U.S. and NATO continued to work toward his political demise in their efforts to consolidate the political leadership of Biljana Plavsic. According to this strategy arrest attempts would become more pronounced as he continued to fall from political grace. In fact, arrests of indicted criminals in general have become more numerous as the peace has been further consolidated.⁴⁴ Moreover, it is not certain that all of the other leaders of the warring factions will go unprosecuted in the future, as there is no statute of limitations against such indictments. Justice has not been abandoned, but only diversified in a manner such that the administration has taken place within windows of opportunity that minimized conflict. Hence, in the long run, the Tribunal may well attend to a judicial mandate that is favorable even to legal purists.

Milosevic, or you stand firm on principle, and the war goes on.” Quoted in Gutman, *Federal Army Tied to Bosnia Crimes*, Nov. 1, 1995 *NEWSDAY*, at A4.

⁴² On the impact of developments of the Karadzic case on the peace process, *see id.*; Brock, *The Hague*, 7 *MEDITERRANEAN Q.* 1 (1996); Scheffer, *supra* note 30; and Meron, *supra* note 20.

⁴³ The official position of the American government is that no such trade-off occurred, and that the Tribunal acted out of purely legal considerations. *See* Scheffer, *supra* note 30.

⁴⁴ *Hartford Courant*, Aug. 10, 1997, at A1 and Aug. 21, 1997, at A1.

Similarly, the Security Council is empowered to address situations of conflict involving crimes in a way that is also conducive to such a delicate orchestration of justice under an ICC. Security Council involvement need not necessarily mean that justice will not or cannot be pursued. There appears to be sufficient flexibility under the present statute to allow for both justice and politics to co-mingle. The flexibility in the operationalization of justice which emanates from co-mingling can open up opportunities for pursuing justice even within a politically-sensitive framework. This is not to say that the two are perfectly compatible, but it is clear that it is difficult to administer international criminal law in regions where there is no peace under a statute that relies on sovereign states for the operationalization of justice. The model of “politics before the peace and justice after the peace” pursued in former Yugoslavia is one way of serving such a dual mandate.⁴⁵

The statute allows opportunities for both good and bad politics. Where does the balance of politics then fall? Irrespective of where it falls, the Court will be in a no-win situation. If bad politics reigns and states use the Court to attack erstwhile enemies, or individuals in the Court (Prosecutor, President, judges) use the institutions of the Court for similar purposes, the Court will be strongly criticized, lose legitimacy, and ultimately lack the compliance and cooperation necessary to maintain any important influence in international criminal law. If good politics configures justice in ways that deviate from purist expectations, the Court will be resoundingly criticized for sacrificing justice for peace. Either way, the road ahead appears rocky for the Court. It is clear however that if the balance skews more toward bad politics, this will create far more devastating outcomes in terms of the effective functioning of the Court. Without national support it cannot function as it depends on sovereign states to enforce its mandates. The Court would be more robust in the face of a skew toward good politics because it would not under these conditions be as much of a potential weapon. But even good politics can undermine the Court in the long run if the politics themselves are not accompanied by efforts to correct injustices which are tolerated in the short run for the sake of peace. In this case the Court would be redundant since it would be functioning in the undercurrent of peacekeeping which requires only the Security Council. Hence we would not be significantly better off even with such a Court.

Most probably the Court will carry on with both types of politics and there is no systematic way of forecasting which will prevail, or whether in fact one will prevail more often than the other. It is clear however that there are some significant limitations on the prevalence of bad politics in the ICC. Using the Court as a diplomatic weapon on a large scale would render it impotent in rapid fashion, or at least serve to marginalize states which used the Court in such a manner. This would be self-destructive behavior on the part of states that are manipulating the Court in such ways. Hence, one should not expect such extreme manipulations of the Court. However, there is no guarantee that states will not engage in actions because they bear negatively on their national interests. One could argue that if states conducted their affairs in organizations that were important to them in ways that were not self-destructive, states would have behaved far differently in the UN and UNESCO when threatened with the withdrawal of U.S. financial and diplomatic support.

⁴⁵ As President Clinton put it, “There must be peace for justice to prevail, but there must be justice when peace prevails.” Quoted in Scheffer, *supra* note 30, at 42.

VI. The ICC and the United States

Given the tumultuous path which politics promises to create for the Court, the support of the U.S. will be crucial in determining whether the Court can emerge and remain a central player in international criminal law. Aside from the logistical support (money, staff), the diplomatic weight of the U.S. would play an essential role in operationalizing the Court when national sovereignty and the Court's mandates conflict.⁴⁶ In such cases (e.g., rogue behavior, noncompliance), the Court's effectiveness becomes a diplomatic rather than legal question. Having the most powerful state in the world on board would position the Court to challenge the many hurdles of national sovereignty which will confront it. Although the U.S. was second to none in its support of the ICC through most initiatives and negotiations prior to Rome, it did not sign the treaty. While diplomacy under Bush showed little support for a permanent court, under Clinton the U.S. had emerged as a leader in the ongoing negotiation process.⁴⁷ U.S. diplomats had been in the forefront of participation in the Ad Hoc and Preparatory Committees: actively supporting the Court and helping to define the debate over the provisions of the statute.⁴⁸ Aside from both diplomatic and executive support of an ICC, Congress had shown significant pockets of support. Congress has consistently voted to contribute money and resources to the ongoing Yugoslavia and Rwanda Tribunals. A joint resolution adopted by the Committee on Foreign Relations on May 20, 1993 placed the Congress on record as supporting the concept of a permanent international criminal court, and called on the administration to support U.N. efforts in establishing such a court.⁴⁹ Most of this support has withered at the time of the writing of this article. This is quite a significant, and for many unforeseen, shift in the political mood in Washington. While the U.S. has not signed the treaty, and political support for the ICC appears to be at a low in Washington, this is not to say that support cannot be revived. In fact, trying to forecast the outcomes of political contests between supporters and detractors in the government relies on political mood changes that are difficult to predict. A more systematic way of trying to determine the long-run U.S. position would be to judge how the existence of a permanent court would bear on the American national interest.

To begin such an analysis, we consider the validity of the principal points of opposition to the Court within the U.S. government. Opposition to the Court within governmental circles

⁴⁶ Financially, contributions will be assessed according to the U.N. scale, which would make the U.S. the principal contributor.

⁴⁷ The support has been especially evident in the Presidency itself. In a speech in October of 1995 Clinton underscored the need to prosecute "serious violations of humanitarian law" through the venue of a permanent court. Quoted in Committee on International Law, *supra* note 14, at 115. Under the Bush administration, the official position of the U.S. was summarized in the statement of Assistant Secretary of State for Legislative Affairs Janet Mullins: that because of potential politicization and the technical difficulties of operating a permanent court, such a court "would both undermine the efficacy of [the current prosecute-or-extradite] approach and impair ongoing efforts to foster administration of justice reforms in other countries." Quoted in U.S. Senate, *supra* note 17, at 8,9.

⁴⁸ See U.S. Mission to the U.N., *supra* note 37.

⁴⁹ See U.S. Senate, *supra* note 17.

has converged onto three ways in which the Court might cut against the American national interest: 1) it is incompatible with the U.S. Constitution, 2) it compromises the sovereignty of the U.S., and 3) it provides a venue through which erstwhile enemies can marshal political assaults against the U.S.⁵⁰

The constitutional critique centers on two contentions: that for the U.S. to participate in the Court, the ICC would have to guarantee defendants all of the rights granted under the U.S. Constitution and U.S. criminal law (which the Court does not); and that international laws are insufficiently precise to fulfill the *nullem crimen sine lege* expectations of the Constitution. Constitutional critics argue from an absolutist interpretation of the extraterritorial applicability of the Constitution, which avers that the U.S. must consider constitutional expectations even in instruments of international criminal law.⁵¹ It would seem that a more contextual interpretation of the issue of constitutional expectations governing foreign legal instruments would provide sufficient grounds for allowing the U.S. to sign the treaty and maintain its obligations under the statute. In fact, a contextual interpretation would be far more favorably positioned with respect to the balance of precedent and interpretation of U.S. law. Hence, the absolutist position would not serve as a significant barrier to U.S. participation. The contextual argument is founded on a long train of legal practices. First, as the Court would not be an instrument of the U.S. government, it would not be subject to U.S. law. Legal precedent has clearly established the independence of foreign and international tribunals from the U.S. Constitution. The U.S. has routinely extradited U.S. citizens as well as non-citizens having committed crimes in the U.S. without expectations that foreign tribunals observe American constitutional principles. Since under U.S. law extraditions are only marginally judicial functions, they do not carry the same constitutional guarantees as trials in U.S. courts. In constitutional terms, giving up a suspect to a permanent international court under a treaty obligation would not fundamentally differ from extradition. With respect to the issue of *nullem crimen sine lege*, the pre-established code of crimes in the statute would solve the problem of *ex-post facto* laws. Furthermore, the U.S. itself accepts international laws as sufficiently precise. The Court would be very consistent with American practices involving international law, as the U.S. has historically supported international conventions of international criminal law (Geneva, Hague, Nuremberg, Genocide Conventions). The present statute codifies these conventions within the instrument of the ICC. In fact, individual international criminal responsibility has long been recognized in U.S. law. The armed forces, for example, criminalize and prosecute breaches of international humanitarian law.⁵²

⁵⁰ Jesse Helms (*see* London Financial Times, Jul. 31, 1998, at 18) has emerged as the leading voice against the ICC. *See* also U.S. Senate, *supra* note 17, at 18-26, 77-87 and Marquardt, *supra* note 17, at 142-47.

⁵¹ *See* especially Helms' and Williamson's statements in U.S. Senate, *supra* note 17, at 18-25 and Marquardt, *supra* note 17, at 120,121. The political criticism of the ICC in American government appears to be strongly entrenched in a Republican agenda in Congress, as well as in the Pentagon's fears of the impact of an ICC on American military ventures overseas. Clinton, who had been highly supportive of the ICC, has recently been besieged by the Starr investigation, and therefore has lacked both the motivation and political capital to take on the enemies of the Court both in Congress and in the Pentagon.

⁵² Marquardt, *supra* note 17 and L.HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION (1972).

The concern over sovereignty relates to the possibility that the U.S. might lose some of the extra-territorial jurisdiction it presently has. The fears here relate to losing jurisdiction to prosecute Americans that have committed extraterritorial crimes and non-Americans having committed territorial crimes. Many of the specific fears center around American soldiers and their commanders being targets of ICC investigations as a result of military activities overseas. Under the statute's complementarity norm, the U.S. could legitimately claim jurisdiction over territorial crimes as well as over American's committing extra-territorial crimes. Still, the chances that an American can be tried outside of the U.S. without the U.S.' consent do increase if the U.S. signs the treaty (such an occurrence is still possible even if the U.S. is not a member and the ICC does not recognize American jurisdiction). Much of the Congressional resistance to the ICC, in fact, emanates from the possibility of Americans being tried in foreign tribunals which do not provide the full range of constitutional guarantees.⁵³ But such occurrences already take place under the present system of international criminal law. Under the present extradite-or-prosecute system, Americans having committed extraterritorial offences and hiding outside the U.S. could be withheld by a foreign state and prosecuted therein. Fighting for jurisdiction over such case would be quite similar to contesting the jurisdiction of the ICC: in both cases it would be a diplomatic matter that was contested on similar grounds and marshaled with the same means of foreign policy (threats of sanctions, coercive rhetoric, etc).

Under an ICC regime, if the Court's jurisdiction is blocked, then the case becomes governed by the present extradite-or-prosecute system. If the Court cannot be blocked by the U.S., then the outcome would be the same as a case where the U.S. tried but failed to obtain the extradition of a national or a territorial offender who is being prosecuted in a foreign court. In both cases an American national or territorial offender will be tried in a foreign tribunal which does not guarantee the full range of constitutional guarantees. But if the U.S. is an involved party (territorial, custodial, or nationality state), it will have an extremely strong claim against the Court, one which the spirit of the statute appears to render compelling. Under an ICC, therefore, the U.S. would not have any less jurisdiction over international criminal prosecution than it already enjoys under the present system of extradite-or-prosecute. Under the present statute the only cases over which the U.S. will surely not have any leverage will be those involving non-Americans perpetrating extraterritorial crimes and who are not hiding in the U.S. But even under the present extradite-or-prosecute regime, the U.S. has no legitimate jurisdiction over such cases either.

In fact, losing jurisdiction to the ICC would often be far preferable to losing jurisdiction to individual states. Since the Court's statute is strongly grounded in Western law, and especially faithful to American due process, then administration through the Court would provide suspects far more American constitutional guarantees than would the foreign legal systems whose principles and practices deviate significantly from a Western style. Furthermore, the U.S. would have greater *de jure* leverage over the Court as a possible opponent than it would over another state. The statute provides a variety of opportunities for involved parties to contest cases.

⁵³ Interestingly, the U.S. objections to the statute based on the threat to American sovereignty underscore the impact of ICC jurisdiction on members as well as non-members. Aside from the jurisdictional challenges it might face as a member of the ICC, the U.S. is also concerned with such challenges as a non-member. The statute presently has no provisions for forcing non-members to comply with the ICC's requests. *See* U.S. Senate, *supra* note 17, at 18-25.

National legal systems do not have such provisions. In addition, the U.S. has the possibility of resorting to the Security Council to block cases. If a national tribunal were involved, the Council could not be so used. Security Council jurisdiction over cases involving war and peace gives the U.S. a powerful wedge for contesting the Court. Once a matter was deferred by a Council request, the U.S. could attempt extradition of a suspect or prosecute him/her directly since there is no provision in the statute suspending normal extradite-or-prosecute practices while a case is deferred by the Council.

The various points of entry within the statute give the U.S. legal recourse to contest a case if it feels that international criminal law is not being adequately administered. Article 19 would allow it, as either a territorial or nationality state, or any state with a claim to jurisdiction, to challenge the admissibility of a case. In the extreme, if the U.S. feels that justice is not being served by the Court and that such a circumstance would justify a violation of the provisions or spirit of the statute, the U.S. could marshal formidable weapons to preserve its autonomy. Since no specific mechanisms to punish noncompliance exist in the statute, whatever actions the U.S. took in this direction (not complying itself, or convincing other states to withhold compliance) would have to be addressed diplomatically by state parties that are challenging U.S. actions. Again, this would not differ fundamentally from a dispute over extradition in terms of diplomatic procedures. Should the diplomatic weight be sufficient, the statute itself would not prohibit the Court from transferring even a genocide case to a national Court. While the statute gives the Court automatic jurisdiction over core crimes, there is nothing in the statute that forces the Court to prosecute such crimes to the end, as the statute would allow the ICC to give up a case at any time. In as much as the complementary role of the Court is undefined, such a transfer would be well in keeping with the guidelines of the statute.

The final reservation on the part of critics in the U.S. concerns the use of the Court as an instrument of political conflict; more specifically, erstwhile enemies using the Court to launch political assaults against the U.S. Politically motivated complaints and politicization of the Court's functions would be the principal means of assault in this regard. Overly politicizing one's use of the Court, however, could seriously jeopardize the functioning of the Court. It would be hard to envision its ongoing effectiveness and legitimacy if states were intent on using it as a diplomatic weapon. Hence, there seems to be a built-in mechanism against such abuse: if it occurs, it will debase the Court as a potential weapon. In short, resort to such a means of diplomacy would cause it to be taken away. Since the Court would depend on the U.S. for both logistical and diplomatic support (both being crucial to its effectiveness), the mechanism of self-constraint against political abuse will work all the more strongly with respect to targeting the U.S.⁵⁴ Of course, states may abuse the Court in this regard as far as they can without threatening U.S. support. But any sort of systematic dependence on the Court in this way will undermine its influence over international criminal law. Even so, such an outcome is no guarantee against what amounts to self-destructive behavior. States may abuse it until it withers out of the global scene. In this regard, the Court would appear to hold some downside risk for the U.S. However,

⁵⁴ Marquardt, *supra* note 17, at 144. The problems which the U.S. has caused in the U.N. by continuing to withhold its dues serves to sensitize us regarding the power of destabilization which inheres in the withdrawal of super-power support from an organization. *See* New York Times, Nov 14, 1997.

widespread abuse of the Court would justify non-compliance by the U.S., so that the U.S. would be in a strong position to protect its sovereignty against a capricious Court.

It would appear that U.S. opposition to the Court is founded on exaggerated perceptions of the Court's potential threat to U.S. national interests, and that therefore the downside risks for the U.S. created by the existence of the Court are not great. The risks comprise losing jurisdiction over an occasional case and the possibility of being the target of some degree of diplomatic aggression. Properly assessing the Court's impact on the national interest, however, involves analyzing the upside as well. From this vantage point, it would appear that the Court carries many opportunities for facilitating important foreign policy goals of the U.S.⁵⁵ Secretary of State Albright (in *The U.N., the U.S., and the World*, 7 DISPATCH Sept 23, 1996) has recently proposed the pursuit of peace, democracy, and human rights as the principal foreign policy goals of the U.S. in the post-Cold War era. These goals depend upon the maintenance of political and economic stability in regions which affect the U.S. national interest: Middle East (U.S. dependence on its oil), East Europe (economic and democratic transition), South and Central America (trade and economic interdependence), Africa (economic development and democratization), and Asia (financial interdependence and the Communist threat). Pursuing U.S. diplomatic goals after the Cold War essentially involves diffusing potential regional powder kegs both within and between states. Such powder kegs are set off as a result of social upheavals, ethnic conflict, and political transition. Prosecuting international crimes is often inextricably tied to stabilizing upheavals, managing conflict, and promoting political transition. Prosecution of war crimes deters ethnic violence as well as violent upheavals, and political transitions can be promoted and consolidated by removing heads of state via indictments. While the U.S. could unilaterally intervene to promote change (in transition and upheaval) and limit conflict on grounds of administering international criminal law, the Court could substitute in ways that promote such U.S. objectives while limiting the negative consequences of unilateral intervention.

Unfortunately, the U.S. has too many stakes and too much involvement in the global political economy to be a neutral referee in managing conflict and promoting change via the administration of criminal law. In fact, the policeman function which the U.S. has played in such scenarios systematically conflicts with its diplomatic functions of stabilization. Attempts to promote political change and peacekeeping in former Yugoslavia and Panama, for example, were hindered by attempts to administer international criminal law. NATO forces disrupted the peace in former Yugoslavia when they tried to enforce the rulings of the Yugoslavia Tribunals. This seriously compromised their effectiveness as means of promoting peaceful change because they themselves became targets and lost legitimacy as a neutral broker of peace and political transition. In Panama, unilateral attempts to administer international treaty law (drug trafficking) had a strong political element: eliminate Noriega and facilitate political consolidation in the post-Noriega regime. The strong unilateralism engaged in by the U.S., while it eliminated Noriega (i.e., arrested and brought him to the U.S. for trial), was in the form of an invasion. The invasion incited supporters of Noriega, thus making transition less stable, and it stimulated anti-imperialist sentiments against the U.S. that hurt its image (and concomitantly diminished its effectiveness as an initiator of peaceful economic and political transition) not only in Panama, but throughout

⁵⁵ This assumes of course that the Court will emerge as an important institution in international criminal law. If it does not, neither will it provide such opportunities in abundance. Of course, if it is not a central player than neither will it carry any significant downside risk.

South and Central America. The invasion cost the U.S. much political capital which has been essential to attending to U.S. interests in Latin America. Similarly, spearheading initiatives to promote international humanitarian law in China has made it more difficult for the U.S. to facilitate Chinese political and economic transition. Strong economic ties to capitalist states is the key to such transition in China, something the U.S. desperately desires. To the extent that the U.S. has adopted the role of guardian of human rights in China, it has threatened the economic interpenetration which has been promoting change in China. The Court would offer the U.S. a means of distancing itself from law enforcement so that it could more effectively pursue its goals of transition and peace in such crucial regions.⁵⁶

In the post-Cold War world, one of the major threats to America's goals of stable political/economic transition and regional conflict resolution has been rogue leaders. The U.S. has actively worked toward their demise in a variety of ways. Insofar as the U.S. has attempted to deal with such destabilizing elements through aggressive unilateralism, the negative political spillover of such attempts has made it more difficult for the U.S. to pursue its foreign policy goals in those regions. Such attempts have invariably involved menacing gestures or acts on the part of the U.S. which were used by rogue leaders to galvanize condemnation of the U.S. Such condemnation has created domestic and international outcomes that have actually made the position of the leaders stronger. Domestic support increased, domestic political competition was placed in a weaker position, and a wedge was driven between the U.S. and its traditional allies in those regions. The crusades against Quaddafi, Hussein and Noriega are all cases in point. To the extent that international criminal prosecution would be sufficient to fulfill U.S. objectives with respect to addressing the threat of rogue leaders, administration through a Court would limit the loss of political capital that the U.S. would sustain if it went after such leaders unilaterally.⁵⁷ In fact, international prosecution could be more effective in dislodging rogue leaders from their positions. First, suspected criminals would be more likely to give themselves up to an international tribunal than to an erstwhile enemy. Second, if the position of the leader is weak domestically, competing regimes trying to usher their demise would have an easier time getting a populace to give a suspected criminal up to an international tribunal than to a state that has had an historically negative image in their country (i.e., the rationale of retribution is more legitimate than what appears to be persecution).⁵⁸

Aside from attending to central foreign policy goals in the post-Cold War world, the Court would also carry some advantages for the U.S. in terms of allowing it to escape other common negative consequences of unilateral prosecution of suspected criminals. Such

⁵⁶ Podgers, *supra* note 18, at 54; Shattuck, *Human Rights and Democracy in Africa*, 6 DISPATCH Feb. 22, 1995); Christopher, Wirth, and Shattuck, *Promoting Human Rights Reflects U.S. Ideals, Advances Interests*, 7 DISPATCH Mar. 11, 1996; Bassiouni and Blakesley, *The Need for an International Criminal Court*, 25 VAND. J. TRANSNAT'L L. 151, 173 (1992); and Nagan, *supra* note 2.

⁵⁷ Ellington, *supra* note 17 and Marquardt, *supra* note 17, at 100. In this respect, the Yugoslavia Tribunal carried advantages for the U.S. position in the region. The neutral peacekeeping role of the U.S. in the region was compromised far less by indicting Karadzic through the Tribunal than it would have been through a unilateral police action. This allowed the U.S. to effectively broker the peace at Dayton.

⁵⁸ Bassiouni and Blakesley, *supra* note 56.

prosecutions generate retaliation. Shifting the source of prosecution from a unilateral to a multilateral context would serve to disperse the blame, thus reducing the propensity to target the specific state and its citizens in acts of terrorism. German citizens in Lebanon, for example, were the unfortunate targets of retaliation when the hijackers of TWA flight 783 in Lebanon were prosecuted in Germany. Similarly, Greece was coerced by terrorist threats to deny a U.S. request for extraditing a suspected bomber of a jet. In fact, an historical deterrent to U.S. involvement in administering drug trafficking law in Latin America has been the potential threat to American citizens.⁵⁹

Such unilateral enforcement initiatives also create diplomatic problems which impact negatively on alliance relations. In the Achille Lauro hijacking, which involved the killing of an American, Egypt intervened in the prosecution of the terrorists. While transporting the suspects out of Italy to Egypt, the plane carrying the suspects was forced to land by an American military aircraft. The act caused great consternation on both the parts of Egypt and Italy. Such diplomatic fallout has also followed U.S. acts of abduction. The abduction of suspected drug trafficker Juan Matta-Ballesteros from Mexico, for example, angered the Mexican government which responded by threatening to reduce its cooperation with the U.S. over trans-border law enforcement. The act also caused rioting at the U.S. embassy in Tejuicgalpa.⁶⁰

Moreover, the U.S. sometimes runs into bottlenecks in administering international laws unilaterally that might be solved by the existence of a permanent court. Administering laws that are a special priority for the U.S. is difficult to do when there are no alternatives to national courts. The control of drug trafficking has proved difficult because some national systems are not strong enough to do so, but these states are reluctant to ask the U.S. to intervene. In Colombia, for example, prosecuting drug lords risks grave political and social consequences, and the historic bitterness of the population toward the U.S. has made it difficult to ask the U.S. for help. Interestingly, diplomatic momentum that revived the issue of the ICC in the U.N. in 1989 emanated from just such a problem. Trinidad and Tobago initiated the revival because they lacked the means to enforce laws against narco-terrorism, but were reluctant to invite stronger anti-drug states like the U.S. in to solve the problem. Bottlenecks can also be caused by problems with extradition. As with rogue leaders, states might be more reluctant to extradite suspects to the U.S. than to a multilateral court. In the Lockerbie case, Libya refused to extradite the suspected bombers of Pan Am flight 103 to the U.S. on the grounds that an enemy of Libya was incapable of giving the suspects a fair trial. Furthermore, there is even a loophole in the current extradition regime that does not exist within the Court's statute. The loophole would pertain both to ordinary suspects as well as rogue leaders: political offences are exempt. In an interesting recent case, Mexico refused a U.S. request for the extradition of suspected criminal William Morales on the grounds that he was a Puerto Rican freedom fighter. In the Noriega case, the U.S. had to confront motions that challenged prosecution based on Noriega's political functions.⁶¹

While the U.S. would be losing control over cases on which it deferred to the Court, the principles and procedures governing the process would still be very close to American practices.

⁵⁹ *Id.*, at 166,167 and U.S. Senate, *supra* note 17, at 10.

⁶⁰ U.S. Senate, *supra* note 17, at 12 and Marquardt, *supra* note 17, at 141.

⁶¹ Ellington, *supra* note 17; Marquardt, *supra* note 17, at 98; and U.S. Senate, *supra* note 17, at 11.

Hence, with the exception of the lack of some constitutional guarantees, prosecution and adjudication through the Court would be the closest alternative to an actual U.S. court, as the Court more closely mirrors U.S. criminal law than virtually any other national system. Furthermore, any process by which international criminal law is harmonized will have to make the Court centrally important. This of course would serve to export American practices throughout the world, such that outcomes of international criminal law will more likely fall in a range that accords with American practices.⁶²

That the U.S. faces many potential opportunities through the instrument of a permanent court is clear. The existence of such opportunities may very well encourage the U.S., assuming a change in the present political posture in Washington, to sign onto the ICC, as the U.S. would be likely to support an institution that served its national interests. Support would seem all the more promising when one considers that the downside risk for the U.S., as analyzed above, appears rather small. Hence, looking at the prospects for the Court within the constellation of American national interest, one would have to say that the Court represents a low-cost investment with limited downside risk but significant upside potential (or, alternatively, a low-wager bet with significant payoff potential). Such a careful assessment of the political ledger would lead us to expect that the working of the Court should become a priority for the U.S. However, the benefits of the Court are contingent on it functioning as an important player in the game of international criminal law. While the U.S. could greatly facilitate such an outcome, it most assuredly cannot guarantee it. Other states may oppose the Court to an extent that even the U.S. cannot counteract. Furthermore, the Court may generate politically-motivated outcomes that cut against the U.S., and therefore cause the U.S. to withhold or withdraw support. Such withdrawal could seriously undermine the influence of the Court, so that the U.S. need not worry about what sorts of outcomes it is generating.⁶³ Alternatively, the U.S. might not support the Court even though it may have every reason to support it, or Americans' assessments of costs and benefits might underscore the sacrifices while downplaying the advantages. This appears to have been the case in Rome. After all, the composition of U.S. Congressional opposition to the Court reflects concerns that might be considered trivial when viewed from a greater geo-political vantage point (i.e., the occasional possibility of Americans being tried without full constitutional guarantees), but that opposition was enough to withhold U.S. support in Rome. Whether the U.S. supports the Court at crucial periods in its infancy as well as down the road will ultimately be determined by the ebbs and flows of the political tide that prevail in Washington, and these ebbs and flows not only prove difficult to influence but also difficult to foresee.⁶⁴

⁶² Marquardt, *supra* note 17, at 99.

⁶³ One possible argument for attributing some significant downside risk to a weak Court would center around moral hazard. If the existence of the Court deterred other states from unilaterally attending to the administration of international law, but the Court was too weak to administer the law itself, then administration would be at a minimum. This would assume however that states are too unobservant to determine that the Court is not working. If the Court were not effective then surely states would pursue justice themselves, especially under the present statute which designates the Court as complementary to the national administration of extraterritorial law. On moral hazard and international organization, see Gallarotti, *The Limits of International Organization*, 45 INTERNATIONAL ORGANIZATION 183 (1991).

⁶⁴ American politics hardly moves in predictable patterns. Even political initiatives that appear to have substantial momentum can sometimes be unraveled by unforeseen linkages which emerge

VII. Conclusions

The ICC, as constructed in the Rome Treaty, promises neither to be the renaissance nor the revolution in international justice that Mr. Boutros Boutros-Ghali called for in his speech at Carleton University in 1995. To be a rebirth means that at some point in the past international criminal justice was administered at a greater level than it is presently. Such is not the case, as virtually all the progress in the evolution of international criminal law has occurred in this century. To be revolutionary, the statute would have to propose an institution that diverts the administration of criminal law significantly away from the sovereign nation-state. This statute does not do that. In creating a complementary institution that relies heavily on the compliance and cooperation of states, the statute creates a weak supranational organization. Weakness in this respect means that it lacks the institutional infrastructure to coerce recalcitrant nation-states. It fundamentally lacks the institutional means to challenge the sovereignty of states. Still, this is not to say that the Court could not emerge as an important player in the prevention of international crime. For this to happen however, it would have to be done through the consent of nation-states rather than through the autonomous institutions of the Court. Hence, its strength will ultimately depend on the will of states. Given the vagaries of international politics (that the convergence and structure of national interests in the world are dynamic and complex), one should expect that the Court's influence will vacillate according to changes in the configuration of national interests. It will be more influential under conditions where it is supported by powerful states, and will have little influence in circumstances where such states actively oppose its involvement. Hence, an ICC will be both strong and weak according to the moment.⁶⁵

Speaking in terms of the global community, is it worth having a Court under either scenario (i.e., as a major or marginal player)? As a major player the question of desirability revolves around a comparative assessment of the benefits of coverage against the costs of political abuse. As an influential administrator, the Court could take up a far greater amount of slack in terms of injustices which are not addressed under the present regime of criminal justice (the sovereign nation-state *cum* occasional *ad hoc* tribunals). However, the costs could be perceived as significant if states politicize the Court in destabilizing ways (bad politics over good politics). While abuse of the Court as a political weapon is ultimately self-destructive behavior (i.e., states would lose such a weapon if they abuse it), there is no assurance that this will deter states from doing so. States concerned with becoming such targets may be reluctant to tolerate such risk for the sake of greater coverage, even if the risk is short-run. For the U.S. specifically, the upside potential from an influential Court should make it appealing since it would facilitate

with force and lightning speed. In 1997, the President's initiative to allocate additional funds to the IMF and pay back dues to the U.N., for example, was upset by conservative Congressmen who sought, of all things, Presidential concessions on abortion. *New York Times*, Nov. 14, 1997.
⁶⁵ Given the current anarchic structure of world politics, where states are more protective of their sovereignty than not, and the fact that the statute does not possess the instruments to coerce states, one would expect that the overall balance of the Court's influence will remain on the weak side. This could change somewhat according to the resolve of the U.S. to support the Court. But even with strong U.S. support, challenging the sovereignty of states will prove a daunting task.

some important foreign policy goals. Alternatively if the Court is marshaled as a diplomatic weapon against the U.S., the U.S. is in a position to weaken it. Since the upside potential is significant but the downside risks are marginal, one would expect the U.S. to eventually sign onto the Court, and continue to support it if bad politics does not prevail. But there is no assurance that the U.S. will measure the impact of the Court in terms that encourage support.

A weak Court would be less of a weapon, because it would not handle as many cases and be less autonomous in the cases it did handle, but would also only serve to cover fewer unaddressed pockets in international criminal law. Is it worth having such a marginal player? It appears that the verdict on this question has been rendered by a great many states that have supported the current statute. The present statute is in fact oriented around building such an institution. Those on the side of the Court appear happy to cover only some of the pockets in the international landscape, thus rendering the Court a small island of enlightenment in a greater sea of deprivation. At this iteration of the statute, the price to pay in terms of sovereignty appears too great for states to institute an autonomous Court. Starting at this low common denominator seems sufficiently prudent to states for several reasons. First, once momentum for a Court has begun, then any significant opposition to such an institution would be perceived as indefensible because the Court's mandate of protecting human rights is fairly unassailable. The U.S. itself will find it quite difficult not to support a Court given its place in the forefront of the cause to increase the respect for human rights in the world.⁶⁶ In fact, any state which claims that it is law respecting would face similar pressures. Second, starting at a low level of influence would assure states that they could preserve their sovereignty in an uncertain environment. No one knows exactly how the Court will conduct itself, so states can sit back and observe outcomes in a safe position. Finally, instituting the Court serves to sooth the collective conscience. In this respect, supporting states find the existence of even a very weak Court preferable to no Court at all, though outcomes would not be significantly better under the former than under the latter. Even the weakest Court would be an affirmation, albeit symbolic, by states that they are committed to moving toward a world where reconciliation and retribution are guided by a respect for the rights of humans under law, and away from an anarchic world where justice is tempered by the sword or not administered at all. Hence, for these states, a commitment to the Court is a commitment to humanity itself. Ultimately, support for such a Court is founded on the belief that we must punish the living with due respect for the rights of all individuals so that we can bury the dead.⁶⁷ But even such lofty ideals cannot alone impose justice in an anarchic world. History has taught us that while ideals may move the heart, it is only when ideals are backed by power that they become truly compelling.

⁶⁶ Shattuck; and Christopher, Wirth, and Shattuck; *supra* note 56.

⁶⁷ Paraphrase of a statement by Robert Kravchuk, Workshop at the University of Connecticut on the International Criminal Court (Apr. 5, 1997).