IN THE BEST INTEREST:
WHY THE UNITED STATES NEEDS TO RATIFY THE ICC

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ABSTRACT

The International Criminal Court (ICC) will try individuals responsible for genocide, crimes against humanity and war crimes. The ICC needs 60 countries to ratify the 1998 Rome Statute to come into creation. The United States has played an integral part in writing the language of the Rome Statute. While hesitant about the ICC and its possible effects on the U.S., former President Bill Clinton signed the Rome Statute in order to pave the way for the U.S. to ratify the Court some time in the future. In signing the Rome Statute, Clinton did not recommend its ratification to President George W. Bush. In the Senate, Jesse Helms has vowed never to allow ratification of the Court.

The purpose of this paper is to review United States concerns with the Rome Statute in order to dispel U.S. fears and show why ratification of the ICC is in the best interests for the U.S. Using the Rome Statute I will answer the concerns of the U.S. After showing that U.S. concerns
are safeguarded within the Statute, I will make the argument that the ICC provides benefits for the U.S. in the realms of national security, politics and economy.

This abstract accurately represents the content of the candidate’s thesis. I recommend its publication.

Signed
Steve Thomas
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CHAPTER 1
INTRODUCTION

On July 17, 1998, 120 countries adopted the Rome Statute aimed at ending impunity for violators of human rights. The Rome Statute is the foundation of a permanent international criminal court seated at The Hague. The International Criminal Court (ICC) will use individual accountability and preside over cases of genocide, crimes against humanity and war crimes. Currently, 139 countries have signed the statute, while thirty of those countries have ratified the Court. Once the statute is ratified by sixty countries, the ICC is enabled. However, the United States Pentagon and Congressional leaders have concerns about ratifying the Court. In fact, the U.S. was one of the seven countries to vote against adoption of the Statute, placing them in the company of Iraq, China, Libya, Israel, Qatar and Yemen. The ICC has sparked such a debate in Congress, the Senate Foreign Relations Committee created a bill called the American Servicemembers Protection Act of 2000 to sever any ties with the ICC.

Yet, while acknowledging those concerns, a reluctant President Bill Clinton approved signature of the Rome Statute as one of his final acts in office. That signature allows the U.S. to continue in further ICC discussions.
The concerns of these U.S. government agencies focus upon the Court's ability to try non-party States, the risks of U.S. nationals being tried in the Court and fear of politically-motivated lawsuits against the U.S. This thesis examines the Rome Statute to find if the U.S. concerns override the benefits of ratifying of the Court.

The concept of a permanent international criminal court is not new. Since the Hague Convention of 1898, many steps have been forged toward the idea of such a Court. The Hague Conventions aimed at regulating warfare but did not entertain the notion of individual criminal responsibility for acts against such regulations. The state parties to the Hague Conventions held the belief of state sovereignty over individual responsibility.

In the days just before World War I, Turkish Armenian Christians were brutally killed in acts of genocide by the Young Turk leaders. During meetings of the Versailles Peace Treaty, the Allied Powers discussed holding a trial to try Kaiser Wilhelm II for his involvement in beginning the war as well as Turkish leaders for their role in the Armenian genocide. However, with harsh sanctions already in place on the Germans and political instability in Turkey, the Allies dropped further discussions of the Court.

After World War II, the Allies created tribunals, known as the Nuremberg and Tokyo Trials, to try leaders of the Axis Powers for their
wrongful acts committed during the war. Axis leaders criticized the trials, calling them "Victor's Justice." The Tokyo Trials were darkened with questionable legal proceedings. In light of the issues surrounding the Asian Court, the Nuremberg Trial more closely represents a precedent to the International Criminal Court.

With the war over and the shock of the human rights atrocities that happened, the Allied Powers proposed an international convention to establish standards against genocide. The 1948 Genocide Convention defined genocide. The United States, however, debated ratification for over forty years. Article X of the Genocide Convention outlined an international court to try those who commit genocide, following the path of the Nuremberg Trial. Yet, agreement was unreachable by the state parties over such a court. Some states supported the idea of creating such a court while others pushed the need of state sovereignty to the forefront of any such discussion. With the Cold War developing, further talks broke down on the basis of differing ideologies and opinions.

The draft, however, did not go away. For the next four decades, it remained on the United Nations docket waiting for the end of the Cold War. During the late 1980s and early 1990s, the Berlin Wall came down, the Soviet Union collapsed and the Cold War ended. In 1989, Trinidad and Tobago approached the United Nations for a court to preside over drug.
trafficking. Once again, the idea for an international criminal court came to light. This time, the discussions continued and eventually the Rome Statute was drafted in 1998. The discussions stuck this time due to the human rights atrocities committed in the early 1990s in Bosnia and Rwanda. Two ad hoc tribunals were created to try individuals accused of human rights atrocities in both instances. The creation of these two tribunals sparked interest in establishing a permanent court with standards and precedents for future cases of human rights abuses.

While President Bill Clinton and Secretary of State Madeline Albright initially spoke publicly of their support for an international criminal court, that support waned as the Pentagon and Congressional leaders aired concerns. Those concerns center around two major arguments. First is the fear of U.S. nationals being tried in the Court in politically-motivated cases. As the world’s superpower, the U.S. has more servicemembers deployed overseas than any other State. Since the U.S. sends servicemembers overseas on peacekeeping missions, the U.S. fears other states will take advantage of the Court to try those nationals. Due to this peacekeeping role, U.S. negotiators in Rome argued for exceptions of jurisdiction for the U.S. The second concern argues that the Rome Statute violates international treaty law as established in the Vienna Convention. The Rome Statute may affect
non-party States. President Clinton called the Rome Statute “flawed” due to this violation.

This paper focuses on two factors of the ICC. First, it explores the two U.S. arguments to find if enough protections do exist within the Rome Statute. Then, the U.S. foreign policy toward human rights treaties is examined to determine overlying factors behind the objections raised by the U.S. toward the Rome Statute. Using the root causes of the U.S. concerns, this paper can then compare U.S. concerns to the Rome Statute to examine their validity. Do enough protections exist with the Statute to meet U.S. concerns? Second, it determines if ratification of the Court is within the best interests of U.S. foreign policy.
CHAPTER 2
REVIEW OF LITERATURE

This chapter reviews the literature surrounding the Rome Statute. The Review of Literature examines three different areas: U.S. foreign policy toward human rights, U.S. concerns about the Court, and critiques on those concerns. Most of the literature was written before the United States signed the Rome Statute, but remains relevant in the debate over ratifying the Court. The background literature focuses on important movements within human rights to further explain how the Rome Statute came to fruition. The background information is important for future discussions of the U.S. attitude and role in the upholding of human rights.

Background Literature on U.S. Foreign Policy

In his book, Prosecuting War Crimes and Genocide, The Twentieth Century, Howard Ball provides an historical account of human rights beginning with the 1898 Hague Convention. After detailing accounts of the world wars and the events leading up to the tribunals for Rwanda and Bosnia, Prosecuting War Crimes and Genocide evolves into a chapter on the Rome Statute and concludes with a discussion on future problems and prospects on the upholding of human rights. Ball supports the creation of the
ICC based on arguing for the need for justice for victims. The following quote tells of the numbers of victims that have died due to genocide in the past century:

Many acts of genocide have been committed in the twentieth century: the attempted destruction of the native Herero in 1904 in South-West Africa (now central Namibia), where, in over two years, 10,000 German soldiers killed 70,000 of the 80,000 members of that Bantu tribe; the Nazi slaughter of over 6 million European Jews, as well as the Nazi genocide against Gypsies, Poles, and Russians in 1939-1945; the Cambodian “killing fields” genocide, when between 1975 and 1979, almost 2 million of the 8 million people in Cambodia were killed by the Khmer Rouge under the leadership of Pol Pot; the events that took place in Bosnia in the early to mid-1990s, where state leaders “operat[ed] within the vortex of the fiercest ethnic war in Europe in the second half of the 20th century”, the machete genocide of the Tutsi in Rwanda, where over 800,000 Tutsi were slaughtered by the Hutu in three months in 1994; and Serbia’s efforts to destroy or force out of Kosovo province millions of ethnic Albanians, who constitute 90 percent of the population of Kosovo (Ball 26).

Arguing morality, Ball feels states must join forces to end the killing. While he states his position that adequate protections must exist, he does support the relinquishing of some state sovereignty to achieve the Court. A balance of realpolitik and justice is necessary to end impunity, according to Ball. Noting the concerns of the U.S., Ball finds that U.S. policy-makers and military leaders must overcome their “fears about the loss of sovereignty, because it is a risk that must be taken” (Ball 229).

Ball’s book is important to the study of the Rome Statute in that it provides the history leading up to and including the drafting of the statute.
As Ball weaves through human rights events within the twentieth century, he often notes the United States position. Written in 1999, the chapter on the Rome Statute was written before the U.S. signature. Also, as a historical account, Ball only interjects his beliefs on the Court and the U.S. role during his final chapter in which he evaluates the "Problems and Prospects" lying ahead for the upholding of human rights in the twenty-first century. As a historical account, the facts surrounding the Nuremberg, Bosnia and Rwanda tribunals are valuable to my research on the background leading to the creation of the Rome Statute.

While Ball's book encompasses important precedents to the Rome Statute, such as the war crimes tribunals of the past century, Lawrence J. LeBlanc's book is a detailed look at the forty-year debate in the U.S. over ratifying the 1948 Genocide Convention. Lawrence J. LeBlanc dedicated a chapter in his book, The United States and the Genocide Convention, to the debate around the creation of a permanent international criminal court to try crimes of genocide. In the early Senate hearings on the Genocide Convention in the 1950s, concern over Article VI. Article VI states:

Persons charged with genocide or any other acts enumerated in Article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction (Article VI Genocide Convention).
LeBlanc's reasoning for U.S. opposition to the creation of the court is the fear of U.S. nationals being tried in such a court. Opposition of the Genocide Convention and especially Article VI interpreted a need for U.S. ratification of a separate treaty approved by the Senate before any such tribunal could come into creation. Senator Orrin Hatch stated in a floor debate on the subject:

Considering that President Daniel Ortega of Nicaragua has already accused the United States of supporting genocide in Nicaragua, the consequences of such jurisdictional authority vested in an international penal court would be disastrous from the standpoint of constitutional protections and guarantees. That is why the requirement of a treaty approved by the Senate prior to any U.S. adherence to, and participation in, a penal tribunal is so important (LeBlanc 170).

Senate opposition wanted to ensure that future U.S. presidents could not ratify a treaty creating such a tribunal without Senate approval. The opposition pushed through an understanding to that effect in his adopted ratification to the Genocide Convention.

LeBlanc states that the debates over the Genocide Convention show a fight between "the relative benefits and costs of an internationalist as opposed to a unilateralist foreign policy stance on human rights issues" (LeBlanc 238). Samantha Power's title for her article, "The United States and Genocide Law: A History of Ambivalence", depicts that same struggle.
"A History of Ambivalence" shows the questions the U.S. must overcome within its foreign policy. Power writes in her study’s conclusion:

The task is to convince Americans that their mothers and compatriots—because they have been protected from unfair prosecution to the greatest extent that is reasonably possible—would accept that risk to achieve the Court’s purpose (Power 173).

She notes that the benefits of international justice seem abstract to the U.S. Power makes the argument of perception in the international community for when the U.S. does not place signatures or ratification on human rights treaties. Power argues the failure to ratify the Genocide Convention “deprived the U.S. leaders of a useful tool of diplomacy” (Power 166). Power states:

For forty years, American diplomats had weaker moral and political standing to speak out against genocide. Failure to ratify also made it impossible for the United States to bring genocide charges to the ICJ. And even after ratification, the Senate’s reservations to the Convention continued to deprive the United States of legal standing to bring another state before the ICJ on genocide charges. In at least two cases (the Khmer Rouge’s Cambodia and Saddam Hussein’s Iraq), American presidents have urged legal proceedings against genocidal regimes. And in both cases, the United States was relegated to hoping that some other nation would file a case at the ICJ. The failure of the United States to heartily endorse the Treaty weakened the Convention’s potential effect on individual and state behavior (Power 167).

Power’s point about the legitimacy of U.S. concerns about genocide are at issue with this belief. If the U.S. does not ratify the ICC, they will not be able to create international tribunals with the international community’s
support. Failure to ratify the ICC once again raises questions about the U.S. in the international community, according to Power.

Links between the thinking of the past when the Genocide Convention was first drafted to the debates that took place then and now are definite. The U.S. will continually question international institutions because of a threat to their national sovereignty and nationals. LeBlanc depicts the history behind the United States and the Genocide Convention while Power shows the parallel arguments in the debate of the past and present.

Senate members argued against ratifying the convention due to issues of national sovereignty as seen in the arguments to the ICC. In her article, Samantha Power writes:

Although the Genocide Convention appeared destined for quick Senate approval, it would in fact yield only controversy, skepticism, and defeat. When it made its way to the U.S. Senate, American leadership evaporated. It took forty years for the U.S. Congress to ratify the Convention, and that ratification included five understandings, a declaration, and two reservations, which combined to reduce the U.S. signature to a hortatory expression of disapproval of the crime (Power 166).

Power notes the issues that took the United States forty years of debate before coming to conclusion center around two key areas: (1) the definition of genocide and (2) threats to U.S. sovereignty when giving power to international organizations. Power uses historical accounts of the debate
over these two issues to bring to light a historical perspective of why the U.S. is concerned about the ICC.

The term *genocide* as defined within the Genocide Convention raised concerns in the Senate about the possibility of making the U.S. answer for its own troubled past. However, since the Convention was meant for crimes committed prospectively, the other rising fear over the term genocide fell on the fact that American servicemembers overseas would be held accountable for “fighting under the flag of their country” (Power 168).

Power finds the debate over the Genocide Convention is a parallel argument to the one against the ICC. In both cases she finds:

Some court supporters act as if opponents are taking issue with the ICC’s purpose. But as Senator Helms pointed out during consideration of the Genocide Convention, every civilized person condemns genocide. Even opponents of the ICC abstractly oppose impunity for the worst international crimes. The reality is that they accord greater weight to the costs and risks of joining the Court that they do the value of international justice (Power 172).

In analogy, Power closes with a quote from Albert Camus, “I believe in justice, but I will defend my mother before justice” (Power 173). Power’s main finding in the paralleling of the Genocide Convention with the ICC is in that both cases, the U.S. is reluctant put the value of an international organization over its own self-interests.

support the creation of international war crimes tribunals. He finds the "politics of war crimes tribunals" reflects "the constant tension between liberal ideas and cruder self-interest" (276). While liberal states like America may not agree with genocide, if no strategic interest is involved or if their soldiers are not impacted, they are less likely to move quickly to create a court, if at all, according to Bass. However, what Bass calls "The Power of Selfishness" does have some positive outcomes. For instance, states may wish to share their ideologies universally. Humanitarianism, Bass finds, is a "potent force" for liberal states. When liberal states involve themselves in a matter on the basis of humanitarianism, the moral ideologies of those states may spread and strengthen globally.

If the ICC is to work, Bass finds that the liberal governments must make a stronger pledge to international justice than what was seen in Bosnia and Rwanda. The resources put toward the Nuremberg trial made it strong. The Allied powers were directly affected by the war that took place before those trials. On the other hand, Bosnia and Rwanda did not affect the U.S. in the same manner. Therefore, the resources available for those tribunals are not as great as Nuremberg. Bass finds the multiethnic societies like America benefit from a legalist world where ethnic conflict is tamed (282).
Bass also collaborated with Richard J. Goldstone in an article on the same subject, "Lessons from the International Criminal Tribunals." This article concludes in the same manner as his book. For Bass, the ICC may be limited in jurisdiction, only trying high-level members accused of committing atrocities, but it is still the most significant step that can be taken now. Bass does not argue against U.S. concerns, rather, he looks at liberal states on the whole to find what peaks their interests in creating these tribunals. What he hopes is that the ICC will alleviate many of the problems that face the Bosnia and Rwanda tribunals. Those problems include lack of resources, delays and loss of evidence.

As the executive director of Human Rights Watch in 1998, Aryeh Neier campaigned vigorously for an international tribunal to try a list of perpetrators of human rights violations in the former Yugoslavia. In his work, *Rethinking Truth, Justice, and Guilt after Bosnia and Rwanda*, Neier compares the two phases of the human rights movement: the truth phase and the justice phase. The truth phase establishes "the nature and extent of the crimes, the identities of the victims, and the identities of those who victimized them" (Neier 39). Within this phase, an official body acknowledges the wrongful acts of the state. The second phase, justice, brings those responsible for causing the crimes to prosecution and punishment. The belief in justice is the foundation for creating a permanent
international criminal court. The truth phase is critical in that it recognizes the
target and the victim’s loved ones. Truth commissions were used in
Argentina, El Salvador and South Africa. However, when the United Nations
reviewed the case in Bosnia in the early 1990s, they found a truth
commission would not serve this scenario. As Human Rights Watch began
the campaign establishing a war crimes tribunal for the ex-Yugoslavia, Roy
Gutman, a Newsday reporter, published articles about the atrocities taking
place at the Omarska detention camp. His reports added credibility and
publicity to the call for a tribunal. Critics of the tribunal found its proceedings
would be an uphill battle—from obtaining evidence to bringing the accused
into the tribunal’s custody. Yet, a truth commission would be a “meaningless
gesture.” The crimes in Bosnia were not undercover; ethnic cleansing was a
national policy. “The facts in Bosnia were thus never in dispute,” Neier said.
“Not only were abuses known, but they were also acknowledged by their
authors” (Neier 43).

Shortly after the UN established a tribunal for the ex-Yugoslavia, the
genocide in Rwanda occurred. “Far from concealing their crimes, the killers
broadcast appeals for the slaughter over the radio” (43). This case once
again tested the truth commission idea. A tribunal was needed to bring
those to justice who had started the killings.
Neier then studies how the justice process can aid in the healing of a nation. In the justice process, guilt is individualized. For examples, he relies on Germans in World War II, the Truth and Reconciliation Committee in Chile that avoided pinpointing people, and Serbs after the human rights atrocities. In these cases, it is not all of the members of the ethnicity on trial who are to blame. Not all Germans or all Serbs or all Chileans took part in the violation of human rights. By individualizing guilt through the justice phase, the culpability for the atrocities is not left for future generations to handle.

One of the supporting arguments in favor of a permanent international criminal court is the possibility of the threat of prosecution acting as a deterrent for future human rights atrocities. In using this argument, some have stated the ICC will aid the United States in having less peacekeeping abroad due to fewer occurrences of such crimes. The argument of deterrence is limited until the Court is actually in place. Neier writes in "Rethinking Truth, Justice, and Guilt after Bosnia and Rwanda":

...the significance of what the tribunal achieves in deterring additional crimes against humanity is unlikely to be great. Its contributions will have to be measured by what it does for the victims; what it does in advancing the principle that international rules against barbarism matter; and what it can contribute to restoring the possibility that Croats, Serbs, and Muslims in ex-Yugoslavia and Hutus and Tutsis in Rwanda may again live alongside each other (Neier 49).
John R. Bolton, Senior Vice President of the American Enterprise Institute and an opponent of the Rome Statute, finds the main point of the ICC is deterrence for future heinous crimes. However given no sufficient evidence in international law that the Court will act as a deterrence, he does not believe the Court has the ability to stop heinous crimes from occurring.

"Recent history is unfortunately rife with cases where strong military force or the threat of force failed to deter aggression or gross abuses of human right," Bolton said. "Why should we believe that bewigged judges in The Hague will prevent what cold steel has failed to prevent remains entirely unexplained."

Bolton cites Yugoslavia as an example of a state that should have found deterrence in that Serbs were already facing charges for human rights violations before air strikes occurred. Instead, Slobodan Milosevic and his army continued their ethnic cleansing in full force even after the bombing began. "It defies credulity to believe that a regime not deterred by precision-guided bombs and missiles literally falling on its head will somehow be deterred by the threat of war-crimes prosecutions at some distant, hazy point down the road," Bolton said.
Madeline Morris writes in “Complementarity and Conflict” that she finds the definition of complementarity lacking because of its broad scope. Given that the Prosecutor will have a significant role in deciding what cases the ICC will hear, she finds the Prosecutor will be attentive to the majority states and the broader international community. Morris believes that because of the Prosecutor’s attentiveness to these two agents, only a few cases will be heard. Therefore, the voice of the victims is quieter than the voice of politics. She states:

Failure to develop the needed policies to guide the work of the ICC could substantially undermine its likely value and effectiveness. In the absence of carefully developed and articulated policies to guide the ICC practice on complementarity, there exists the very real risk that the ICC will create injustice rather than justice as it fails to serve the interests of states and victims and perhaps even impedes the fulfillment of those interests in state proceedings (Morris 208).

Madeline Morris concludes in her article “Complementarity and Conflict: States, Victims”, and the ICC that complementarity is not sufficiently defined within the Rome Statute. Failure to establish provisions for complementarity, Morris believes, will lead to more politically-charged prosecutions. Morris finds the complementarity clause will weaken the Court. Morris asks the fundamental question, “Whose interests is the Court intended to serve?” (Morris 196). This article notes the three players who stand to gain from the creation of the Court: majority states, principally affected states and victims.
Because of these three interests, Morris finds the Treaty needs further clarification for complementarity.

Because the Treaty is silent on the overall priority of interests to be served by the Court and on major policy issues such as the number and array of defendants to be protected, appropriate relations with active national courts, and the like, decisions on these fundamental issues will fall by default largely to the ICC Prosecutor (Morris 197).

Giving the Prosecutor the responsibility to decipher the policy behind complementarity, Morris finds it will lead to more politically-motivated cases. The Prosecutor will answer to the majority states on matters that the majority states wish to have investigated. Therefore, the voice of the victims is lessened. Morris explains:

The Prosecutor is likely also to be somewhat attentive to the views of the Court's broader international audience. That broader audience would include media that cover the Court's work and thereby shape international public opinion about the Court (and about the Prosecutor). It would include also the international legal and diplomatic communities, of which the Prosecutor will be a member. Nongovernmental organizations (NGOs) also will watch the Court and attempt to influence its policies. The broader audience to which the Prosecutor will be attentive may also even include states (especially powerful states) that are not parties to the Rome Treaty, particularly when their cooperation with the Court may be important. None of those influences on the Prosecutor, with the possible exception of some NGO lobbying, is likely to represent the interests of victims or principally affected states. The tendencies set in place by the Treaty's accountability structure and the Prosecutor's likely attentiveness to the Court's broader international audience thus are unlikely to favor the interests of principally affected states or victim populations. The net result is that the ICC may largely fail to serve the interests of two of its three intended categories of beneficiaries—victims and
principally affected states—and . . . may even impede efforts by states to serve those interests (Morris 198).

Morris paints a bleak picture of the benefits of complementarity and the Court for victims. If the Prosecutor is mostly attentive to the broader audience, only the top level of criminals will be tried in the Court. The leaders of the crimes will be tried over the middle to lower level of individuals responsible for human rights atrocities. Morris finds that for the Court to be successful, all three levels of criminals should be investigated. By investigating on all levels, the Court has a better chance at deterrence of future crimes.

In former president Bill Clinton’s “Statement on Signature of the International Criminal Court Treaty” on December 31, 2000, Clinton says the reason for signing the Statute is “to reaffirm our strong belief support for international accountability and for bringing to justice perpetrators of genocide, war crimes and crimes against humanity” (Clinton 1). Yet, he then recommends that his successor, President George W. Bush, not “consent until our fundamental concerns are satisfied” (Clinton 1). He states that the signature of the Statute is an effort to keep the United States involved. He states:

In signing, however, we are not abandoning our concerns about significant flaws in the Treaty. In particular, we are concerned that when the Court comes into existence, it will not only exercise
authority over personnel of states that have ratified the Treaty, but also claim jurisdiction over personnel of states that have not. (Clinton 1).

Clinton does not believe U.S. personnel should come under jurisdiction of the ICC unless the U.S. ratifies the Treaty. Clinton's advice to President Bush is to assess the functioning of the Court, and, over time, choose whether or not to become a member. In signing, Clinton says he made the right choice in order to keep the U.S. in further talks about the Court. He notes the importance of the work U.S. negotiators have already accomplished with the Statute in efforts to craft a tighter version. Yet, he feels "more must be done" (Clinton 1).

Nonetheless, signature is the right action to take at this point. I believe that a properly constituted and structured International Criminal Court would make a profound contribution in deterring egregious human rights abuses worldwide, and that signature increases the chances for productive discussions with other governments to advance these goals in the months and years ahead (Clinton 2).

Clinton's statement is interesting is showing the conflicting position the U.S. is in when it comes to the ICC. On the one hand, Clinton signs the Statute, on the other hand, his statement undermines the current Statute. However, throughout the statement, he reaffirms the U.S. commitment to accountability, noting U.S. involvement in creating the Nuremberg, Yugoslavia and Rwanda tribunals. The statement stops short of proposing
solutions for the Court or even ideas as to how the Court should work to answer the fundamental concerns the U.S. has.

In a 1999 speech, David J. Scheffer, former U.S. Ambassador at Large for War Crimes Issues, explains some of the fundamental concerns Clinton spoke of. In that speech, America's Stake in Peace, Security and Justice, he explains the compromises the Court has made on certain U.S. objections, yet he notes those compromises are not enough to warrant U.S. signature on the Rome Statute. "These accomplishments and others in the Rome Treaty are significant," Scheffer said. "But the United States delegation was not prepared at any time during the Rome conference to accept a treaty text that represented a political compromise on fundamental issues of international criminal law and international peace and security. We could not negotiate, as if certain risks could be easily dismissed or certain procedures of the permanent court would be infallible" (Detroit College of Law 4).

The treaty brings under its jurisdiction states that have not ratified it—the risk Scheffer speaks about. Therefore, even if the United States does not ratify the court, its nationals may still be brought under its jurisdiction. Scheffer concludes that the United States will not ratify the treaty as long as it violates international treaty law as established in the Vienna Convention on the Law of Treaties. That convention established that states that are not a party to a treaty are not bound by that treaty. Scheffer contends Article 12

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rejects the idea of universal jurisdiction, instead operating on consent jurisdiction. The established jurisdiction of the Court is based on the consent of one or both involved parties. Given the need for consent by one of those parties, the Court is not based on universal jurisdiction over these crimes.

Scheffer moves forward with his arguments against universal jurisdiction by focusing on the crimes themselves. He states, "... not all of the crimes within the subject matter jurisdiction of the Court in fact enjoy universal jurisdiction under customary international law" (6). Crimes established as universal jurisdiction through treaty include torture, international terrorism and hostage taking. Enforcement of these crimes takes place typically in national courts in party states. Scheffer cites Yale Law School Professor Ruth Wedgwood to make his argument against universal jurisdiction in the following passage. Wedgwood's findings conclude the war crimes mentioned in the Rome Statute stem from the Hague relations or from customs or war, neither of which directly provides for universal jurisdiction" (6).

Scheffer's final argument on this subject aims at treaty law. Under the Vienna Convention on the Law of Treaties, treaties cannot bind states not party to it. Furthermore, Scheffer concludes, "A state that recognizes universal jurisdiction for a political crime may not, even as a state party, wish to delegate such jurisdiction to an international court. By becoming a party to
the treaty, a state makes a one-time delegation of such jurisdiction to the court” (6).

The United States found that only one way for the Court to try a national from a non-party state was under the direction of the Security Council. Without this one exception, the United States views the Court as a dangerous international power. To alleviate the risk with this stipulation of the Rome Statute, the U.S. and Norway proposed an amendment providing an exemption for nonparty states to the Court if those states acknowledge and take responsibility for the atrocity committed. Scheffer believed this proposal was not a limitation to the treaty in that states who “usually” commit these crimes would not accept responsibility. However, the conference rejected the proposal, leaving the United States in the same position—unwilling to sign the Statute. Yet, to accept the U.S.-Norway provision the Court conference participants believed the Court would lose influence. “We look forward to the problem of Article 12 being solved because by solving it, the interest of international law and justice that we all share will be served” (Scheffer 2).

In “The Global Challenge of Establishing Accountability for Crimes against Humanity,” Scheffer defined the baseline issue that surrounds the aspect of a universal jurisdiction over these crimes. Following are his remarks from that speech in which he said of the Rome Treaty:
That fundamental difficulty is the exposure of our armed forces, which are deployed by the hundred of thousands around the world at the request of governments and to ensure international peace and security, to prosecution before the Court before the United States becomes a party to the Rome Treaty. The possibility that a U.S. soldier fighting to halt genocide could be accused by the other side of war crimes and brought before the Court, before we have even joined the Court, is untenable to the American people. It is untenable because we are at a vital crossroads in world history right now, when the resolve of the international community to confront evil is being tested every day. In any military action, we have to accept the possibility that things will not go as planned; missiles might go off target, and human error could result in unintended destruction. But fear of being accused of war crimes for honest mistakes should not prevent us from acting. We are sometimes criticized for not confronting that evil immediately, for letting it fester too long until too many innocent civilians are slaughtered by fearless, thuggish leaders of tyranny. We are determined to confront the perpetrators of human misery, but we must do so recognizing the risks and the necessary balance that must be struck between our pursuit of international justice and our common quest to achieve international peace and security and respond to humanitarian calamities (Scheffer 9).

Scheffer defends the U.S. position saying that the U.S. is not "shirking" from its responsibilities to uphold human rights. The amendments the U.S. needs before ratifying the Court should not weaken the Court, according to Scheffer. Instead, he finds that States that commit these atrocities should not be under the same protection wanted for U.S. nationals. He states the importance of having the United States be a partner to the Court and does not want that opportunity to be lost because of these concerns. Scheffer's remarks are a plea for others to understand the "unique" position of the U.S. in relation to the ICC.
John R. Bolton, Senior Vice President, American Enterprise Institute, gave support for the bill in a prepared statement before the House International Relations Committee on July 25, 2000. Bolton finds the ICC is based solely on emotional pleas for justice, unsupported by precedents or meaningful evidence of its soundness for international law.

Regrettably, the Clinton Administration's na"ıve support for the concept of an ICC has left the U.S. in a worse position internationally than if we simply declared our principled opposition in the first place (Bolton 9).

His conclusion for the United States is a policy of "Three Noes:" (1) no financial support, directly or indirectly; (2) no collaboration and; (3) no further negotiations with other governments to 'improve' the Statute (11).

His conclusion is based on three arguments directed to the point that the ICC is a "fundamentally bad idea."

Bolton states:

The ICC's advocates mistakenly believe that the international search for 'justice' is everywhere and always consistent with the attainable political resolution of serious political and military disputes, whether between or within states, and the reconciliation of hostile neighbors. In the real world, as opposed to theory, justice and reconciliation may be consistent—or they may not be. Our recent experiences in situations as diverse as Bosnia, Rwanda, South Africa, Cambodia and Iraq argue in favor of a case-by-case approach rather than the artificially imposed uniformity of the ICC (Bolton 4).

By a case-by-case approach, Bolton cites the South African Truth and Reconciliation and the post-communist regimes in Europe using
amnesty to overcome years of harsh government tactics. While Bolton sites these alternatives to prosecution, he finds they are not answers for every incident, but do support his idea that each incident may require a different approach than the ICC.

Bolton also supports the right of Chile to handle General Augusto Pinochet in the manner in which it did over the view that Spain has rights over Chile to try him. His reasoning stems from opposing theories to universal jurisdiction for genocide, war crimes and crimes against humanity. Resolution for Pinochet and his regime, he believes, is primarily a question for Chile. Bolton finds Spain’s request to the United Kingdom to extradite Pinochet is to assert Spain’s law over the people of Chile. In his following words, he states the avenue he believes in more correct for Spain:

Spain does have a legitimate interest in justice on behalf of Spanish citizens who may have been held hostage, tortured, or murdered by the Pinochet regime. And the Spanish government may take whatever steps it ultimately considers to be in the interest of Spanish citizens, but its recourse lies with the government of Chile, and certainly not with that of the United Kingdom. If the government of Spain—as opposed to a loose cannon magistrate—were truly serious, it would have approached the government of Chile directly. Whether Spain proceeded by a judicial action or through diplomatic channels (or both, or through military means) would, of course, have been up to Spain; in turn, Chile could have responded as it chose. But in this proper bilateral context, the Pinochet question would have been primarily a political matter. In actuality, the attempt to extradite Pinochet while he was in London was thus not the exercise of law; it was political theater (Bolton 6).
This quote explains Bolton's fundamental difference with the ICC—universal jurisdiction for these crimes does not exist and matters should be kept within the state when possible. He moves toward Indonesia's right to try its own leaders for the human rights abuses in East Timor. A UN panel recommended to the Secretary General for the Security Council to establish a tribunal for East Timor.

To abort Indonesia's assumption of responsibility for its citizens' actions is not just elitist and paternalistic, but fundamentally violates the assumptions of democratic government. Indonesia should be given the breathing space it needs to confront what happened in East Timor, and neither spared the pain of so doing, nor the lesson of living with whatever it decided (Bolton 6).

With the possibility of disallowing Indonesia to try its own nationals, Bolton finds the concept of universal jurisdiction is expanding. He argues this expansion to include genocide, war crimes and crimes against humanity under universal jurisdiction will not stop at just these crimes. Under his belief, universal jurisdiction applies historically to piracy equating to crimes in the seas and slave trading both of which solicited international interest in ending. Bolton cites Gentili in the right of states to wage war against piracy:

Romans justly took up arms against [pirates] even though those people had touched nothing belonging to the Romans, to their allies, or to any one connected with them; for they had violated the common law of nations . . . Piracy is contrary to the law of nations and the league of human society. Therefore war should be made against pirates by all men (Bolton 5).
Bolton finds a difference in piracy and these crimes given the
"universal jurisdiction" meant in the case of piracy is the justification for the
use of force—not criminal prosecution. Though Bolton believes the future of
the Court is a weak and ineffective institution, he notes the possibility of it
being strong and effective, and, therefore, a detriment to the United States
and its nationals. That detriment is the Prosecutor established under the
Rome Statute. Along with the fear Bolton has about the power of the
Prosecutor, he questions the weakened state of the Security Council where
the ICC is concerned. An independent Court within the international system
is "unacceptable." "There is real vagueness over the ICC's substantive
jurisdiction, although one thing is emphatically clear; this is not a court of
limited jurisdiction," Bolton said. The vagueness he refers to is threefold: (1)
the definition of genocide used in the Rome Statute does not utilize the
reservations stated by the United States; (2) "War crimes has enormous
definitional problems concerning civilian targets. Would the United States,
for example, have been guilty of 'war crimes' for its WWII bombing
campaigns, and the use of atomic weapons, under the Rome Statute?"; (3)
definitions of phrases such as "knowledge," "incidental loss of life or injury to
civilians," long-term and severe damage to the natural environment," clearly
excessive damage."
Article 119 of the Rome Statute states, "Any dispute concerning the judicial functions of the Court shall be settled by the decision of the Court."

Due to this article and the vagueness of the Court, Bolton believes the Court is potentially dangerous for the United States. With constant criticism of the United States foreign policy, Bolton believes the Court is an extension of NGOs looking to change the Pentagon and international standards. To make these changes, he finds the NGOs will lobby the Prosecutor, to "adopt[ing] their world view."

**Critiques of U.S. Arguments**

John F. Murphy's article, "The Quivering Gulliver: U.S. Views on a Permanent International Criminal Court," critiques U.S. arguments about the ICC. Murphy believes the U.S. arguments are a "microcosm of a much larger phenomenon" (46). Based on provincialism, triumphalism and exceptionalism, the U.S. is unable "to adhere to the rule of law in international affairs," according to Murphy (45).

Provincialism is evidenced, inter alia, by the increasingly limited amount of attention devoted to foreign affairs by the executive branch, the Congress, and the media. Triumphalism is reflected most vividly by the oft-proclaimed statement that the United States is the sole-remaining superpower, the United States has special burdens to bear—burdens that are different in kind as well as degree from those borne by other countries—and is subject to special risks from persons and countries that are adversaries. Exceptionalism also takes the form of an attitude that U.S. law and legal procedures are clearly superior to those found in other countries (46).
Murphy begins his article with this declaration, but then leaves it to prove enough safeguards exist to combat U.S. concerns. The reader may infer that U.S. concerns, since they are based on these underlying principles, are not significant enough to keep the U.S. from ratifying the Rome Statute.

The one U.S. argument that Murphy finds valid is the Statute's reign over non-party state nationals. The proposal created the opt-out period in which a party-state to the Treaty could leave the Court's jurisdiction during a ten-year transitional period. Yet, because the United States worked on the proposal that eventually led to this factor, Murphy dismisses the U.S. right to argue against it.

In the end, Murphy concludes that even if the ICC only makes a small contribution to the punishment of human rights abusers, it will be significant. Therefore, he finds the U.S. should be a member of the ICC since the protections exist against the U.S. concerns. However, an important note of his article gets lost in the debate over the U.S. arguments. The three foundations around the arguments are not answered. The actual arguments have been addressed, which is important. Yet, he does not move forward to address or prove the question of triumphalism, provincialism and exceptionalism.
The Lawyers Committee for Human Rights devoted pages on their Web site to the ICC. In one report, "The Case for U.S. Support," LCHR argues for the U.S. to ratify the Court based on moral integrity. By imposing the values the Rome Statute incorporates, the U.S., in effect, benefits by allying itself with other States adhering to those values. "At a time when American engagement and leadership in the world is more important than ever in order to protect all U.S. interests, it is counterproductive to seek self-imposed isolation on a vital issue of principle" (LCHR 1). The reference to isolationism is interesting in that it is not mentioned by the U.S. By not ratifying the Court, the LCHR believes the U.S. will isolate itself from the international community. However, U.S. arguments steer clear of calling for an isolationist role. Is isolationism an underlying cause in U.S. arguments? Will failure to ratify the Treaty lead to isolationism for the U.S. in further foreign policies? This report does not answer those questions. Instead, the report looks at the U.S. arguments and quickly finds that enough safeguards exist given that the U.S. had plenty of influence in drafting the Statute. On the concern of the future jurisdiction over the crime of aggression, the LCHR report suggests the U.S. position in more advantageous to draft that definition if they are a participating member in the ICC. However, if the U.S. finds any future amendment unacceptable, it can withdraw. While the opt-
out option is often used in reports arguing for U.S. ratification, it is not the strongest point to be used. Right now, the U.S. finds issues with the Court. Telling the policy-makers that they can ratify and then opt-out would lead supporters of the Court to the same arguments once again as they plead their case as to why the U.S. should ratify.

Instead, the most effective argument the LCHR report makes is to call on the root of the issue with U.S. ratification.

With all the safeguards sufficient to satisfy the United Kingdom and France, to name but two other nations, will justifiably conclude that the United States is happy to set and enforce rules for other countries as long as the rules do not apply to it (LCHR 13).

Yet, the LCHR report leaves this point rapidly and focuses once again on the power of allies and a global morality. “The most corrosive effect on the U.S. vote against the Rome Treaty is the damage done to the moral dimension of U.S. international leadership” (LCHR 13). By requiring guarantees that U.S. soldiers will not be brought before the Court, the U.S. undermines the great potential the ICC could have on the world and the benefits it could have for the U.S. as a member, according to the report.

While the LCHR report provides a sufficient overview into U.S. arguments against the Court, it does not reach down into the core of those arguments. Noting that safeguards are in place to answer U.S. concerns, and noting that the U.S. took a great part in creating the Statute, the report
seems to miss the next piece of such a study. If the U.S. negotiators created a Statute ripe in the protections they insisted upon but then voted against it at adoption, do the LCHR believe the U.S. will ever ratify the Court? Are the safeguards they mention really enough to answer U.S. underlying concerns and what are those underlying concerns? By writing the word isolate, do the LCHR believe the U.S. wishes to practice a method of isolationism?

Actually, the purpose of this report is more to influence new readers about the Court to reasons why the U.S. can ratify it. Perhaps, by adding the next dimension of what lies behind U.S. arguments, new readers to this issue would miss the first layer of the debate.

On December 12, 2000, a "Letter to the Editor" by Robert S. McNamara and Benjamin B. Ferencz ran in The New York Times titled "For Clinton's Last Act . . ." Clinton was facing the December 31, 2000 deadline to sign the Rome Statute. Any signature after that date would also require ratification. This deadline allowed the U.S. to sign the Statute without deciding whether or not to ratify it, therefore leaving the Bush administration with the ability to remain in dialogue about the Court. While calling U.S. concerns about the Treaty "unfounded," the authors argue the need for such a Court. "Genocide is universally condemned but there is no universal court competent to try all perpetrators" (McNamara 1). The authors find the tribunals for Yugoslavia and Rwanda are "very limited and retroactive" in
their jurisdiction. They do not believe those tribunals are "adequate" to deter such human rights abuses. The final push for signature is a plea to our "moral standing in the world." By not signing, "we will look like a bully who wants to be above the law. If [Clinton] signs, however, he will reaffirm America's inspiring role as leader of the free world in its search for peace and justice" (McNamara 1).

This article is persuasive in playing on America's role as the leader of peace and justice. By mentioning the Nuremberg trials, the authors tug on the nostalgia behind Word War II where the U.S. stopped the atrocities and promised "never again." Keeping with that same feeling of pride for helping to stop genocide, the authors continually use the word deter, implying that the ICC will deter future atrocities. A key piece of their argument, however, is slightly exaggerated. In talking about the problems facing the ad hoc tribunals, the authors say the ICC will be the answer to the hole of justice surrounding the universal condemnation around genocide. Yet, most scholars of the Court believe the number of cases the ICC will be able to try is quite limited. Therefore, the statement calling for the universal court to "try all perpetrators" may falsely allude to the fact that the ICC established by the Rome Treaty can do just that. Clinton did sign the Rome Treaty on December 31, the final day to do so, but he still called the Treaty "flawed."
Whether or not this "Letter to the Editor" effected that decision or not, it is an important piece in that it brought more attention to this issue in the media.

"Denouncing the International Criminal Court: An Examination of U.S. Objections to the Rome Statute," written by John Sequin presents U.S. objectives achieved in the Rome Statute and the remaining U.S. arguments in order to prove those arguments are "unfounded." Based on the objective achieved by the U.S. in negotiating safeguards within the Rome Statute, Sequin finds the U.S. can ratify the Treaty. Those safeguards Sequin notes include limited jurisdiction, the rule of proportionality and the recognition of Status of Forces Agreements. After defining those safeguards, Sequin lists the remaining arguments the U.S. poses against the Court. Those arguments include the vulnerability of U.S. personnel, jurisdiction over non-party States, lack of future definitions, the opt-out period and the role of the prosecutor. After briefly explaining the arguments, Sequin responds stating that enough safeguards are in place, no danger exists in ratifying before each future crime is defined and failure to ratify will leave the U.S. with no control over the future shape of the Court. Most notably, Sequin makes a case against the issue of non-party State jurisdiction. He notes that customary international law may accept delegation of territorial jurisdiction when 120 states ratify the Treaty. In conclusion of his article, Sequin finds the main benefits the ICC will provide the U.S. as a party member are the
reduction on military force for peacekeeping and the alleviation of "tribunal fatigue." For the atrocities the Court may deter, the U.S. will not have to send its military forces. Further, the problems associated with creating tribunals are settled by a statute already in place with resources.

Sequin's article is a good starting point for explanations of what the U.S. arguments are. The article is stocked with decent responses to those U.S. arguments. Yet, the arguments are not detailed. The article moves quickly over all of the arguments and Sequin's own response. As a taste about the debates around the Court, this article is invaluable. The issues are laid out one by one and the article serves as a springboard to further research. Sequin does not attempt to delve deeper into the U.S. concerns. Rather, he takes them at their word and answers them with quick ideas of why the arguments are unfounded in his opinion. He concludes that the Rome Statute is "not a perfect document" (Sequin 109). However, he argues the U.S. should ratify the Rome Statute in order to end impunity for those who commit human rights atrocities, according to Sequin.

Robinson O. Everett writes in his article, "American Servicemembers and the ICC", ways in which the United States can take further precautions to protect its nationals from ending up before the Court. Besides complementarity, Everett finds, America can protect its men and women serving internationally by updating its own treaties and laws. The Status of
Forces Agreement (SOFA), Article 7, written to accompany the North Atlantic Treaty Organization, is an example of such a protection. Everett states:

Under the provisions of that article, an American servicemember who engages in conduct that violates military law but that is not punishable under the law of the host country is subject to the exclusive jurisdiction of U.S. courts-martial. On the other hand, courts of the host country have exclusive jurisdiction to try American servicemembers for conduct prohibited by the law of that country but not prohibited by U.S. military law (Everett 138).

The example of SOFA demonstrates Everett's main point, that the U.S. has the ability to protect its servicemembers while also becoming a party to the Rome Treaty. Since complementarity creates an ICC subservient to domestic jurisdictions, the U.S. needs to confirm that all of the provisions subject to trial by the Rome Treaty are well established in their own legal system. “Accordingly,” Everett said, “it is important to ascertain when conduct by a servicemember that would constitute a crime under the ICC Statute would also be a crime in a U.S. court” (Everett 142). Current U.S. jurisdiction over such crimes is found within the writing of the Uniform Code of Military Justice, the 1996 War Crimes Act and the 1997 Expanded War Crimes Act. Everett believes some of the crimes under the ICC jurisdiction are covered by Article 133 of the Uniform Code as it pertains to officers. Article 133 prohibits “conduct unbecoming an officer and a gentleman.”
Everett then cites Article 134 of the code as another protection against outside jurisdiction. Article 134 forbids "all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital." Everett states, "Almost any conduct by a servicemember that could warrant trial in the ICC could also justify the preferring of charges for trial by court-martial. A good faith investigation of those charges and a trial by court-martial—if warranted by the evidence discovered in the investigation—would then preclude a trial in the ICC (Everett 143). Everett finds the history of the War Crimes Act may show its original intent to try those committing war crimes against Americans also works in trying Americans who committed war crimes.

In his conclusion, Everett finds that complementarity is not enough of a safeguard to ease U.S. fears but it does provide the means for the U.S. to answer its own concerns and ensure its own protections. His recommendation to Congress follows:

Thus, in preparation for deciding whether to join with other nations in ratifying the Statute, Congress should undertake a careful review of existing U.S. legislation concerning the jurisdiction of U.S. courts—civil or military—to deal with conduct that would come within the jurisdiction of the ICC. To the extent such conduct is not currently subject to punishment by any U.S. tribunal, Congress should then determine whether the Uniform Code of Military Justice and other federal penal statutes need to be amended to prohibit such conduct (Everett 147).
Everett's angle in this article is unique to literature on the ICC. He takes one of the key elements precluding U.S. ratification and finds alternative answers. By using and updating existing U.S. laws, the U.S. can find further protections for its nationals. The question is will Congress take this step?

Michael P. Scharf wrote "ICC Jurisdiction over Nationals" which concludes that the U.S. argument based on the Vienna Convention "rest on shaky foundations" (Scharf 215). Further, Scharf finds the U.S. can hurt its foreign policy that relies on treaties that do rely on universal jurisdiction. He finds the U.S. has more to gain than to lose by ratifying the Rome Statute. Micheal P. Scharf's article, "ICC Jurisdiction over Nationals", takes a look at Scheffer's arguments and finds they misinterpret the Rome Statute. Scharf also finds evidence that the U.S. already participates in other treaties that would also hold accountable non-party states. Scharf interprets the Rome Statute as having a layered jurisdiction—one that includes both principles of universality and territoriality. Scheffer, on the other hand, argues that the use of the territoriality principle eliminates the principle of universality.

Scharf's paper on this subject aids in establishing a good argument for the U.S. to abandon its blanket statement that the Rome Statute is against international law. Scharf concludes:
In its refusal to recognize this reality, the executive branch of the U.S. government has resorted to a legal interpretation that is not only based on selective use of historic record and incomplete analysis of the guiding precedents, but also has the potential of undermining important U.S. law enforcement modifies its legal argument, Ambassador Scheffer’s sweeping statement that a treaty cannot legitimately provide the basis for jurisdiction with respect to nationals of non-party states will almost certainly be cited by accused terrorists, torturers, war criminals, and drug traffickers to block U.S. efforts to exercise treaty-based jurisdiction over such persons who are nationals of non-party states (Scharf 230).

By opposing the Rome Statute based on the Vienna Convention on the Law of Treaties, the United States encounters problems. Scharf calls on cases of the United States participating in treaty-based universal jurisdiction such as United States v. Yunis (1991) and United States v. Ali Rezaq (1998). Yunis involved hostage taking and hijacking which were not recognized under international law as crimes of universal jurisdiction while Rezaq involved hijacking. In both cases, the United States apprehended and prosecuted those accused. In Yunis, the United States used the Hostage Taking Convention and in Rezaq, the United States used the Hague Hijacking Convention though in both cases, the States of the accused were not a party to the treaties. Scharf also notes as in the quotation above, that the U.S. position against the ICC based on universal jurisdiction will lead to adverse affects to the U.S.
Scharf also contends that the Nuremberg trials were an extension of universal jurisdiction. In that extension, war crimes and crimes against humanity were analogized to piracy, a crime within universal jurisdiction. The Nazi and Japanese offenses were committed in locations where the criminals did not need to worry about punishment.

Scharf examines the ramifications of using the Vienna Convention argument. Scharf's argument supports the arguments in my paper that show that the U.S. opposition is not founded given the Rome Statute and other protections afforded to the U.S. and its nationals.

Summary of Review of Literature

The work studied in the Review of Literature presents the number of factors involved in the creation of the International Criminal Court. These factors include the changing role of the international community in relation to human rights, the questions of international justice for crimes against humanity, U.S. concerns about the Court and arguments in favor of the U.S. ratification of the Court. My paper uses the knowledge provided in these studies to go a step further. After comparing the two main U.S. concerns about the Court to the safeguards within the Rome Statute, I will then move to discuss the root cause behind U.S. concerns about the Court. By utilizing the background information, I will establish the U.S. perspective on
international human rights foreign policy. After establishing the root cause behind the arguments, I then look into different possible benefits the Court will provide the U.S.
CHAPTER 3
UNITED STATES CONCERNS

The troubling areas of the Rome Statute for the United States develop into two main arguments. One, the U.S. cannot ratify a treaty that would endanger its military members. Two, the U.S. cannot ratify a treaty that contradicts customary treaty law. In this section, these two arguments will be reviewed in relation to the Rome Statute and relevant precedents.

Protection of U.S. Nationals

United States politicians are concerned that the International Criminal Court may put one of its nationals on trial. As the world's superpower, the U.S. has military stationed all over the world on different strategic or humanitarian missions. Due to that fact, U.S. politicians are wary of the vulnerability of U.S. servicemembers to the Court. As noted in David J. Scheffer's speech, "The U.S. Perspective on the ICC," the U.S. military are not infallible. Missiles might go off target, mistakes may be made and innocent people may die at the hands of the U.S. military. Yet, he does not believe the U.S. military personnel or officials should be tried in the ICC for those matters. As the superpower, the U.S. is called into countries on
peacekeeping missions. If an accident occurs during one of those missions, the U.S. military personnel should not be tried under the Court, according to Scheffer. This fear will keep the U.S. from ratifying the Treaty unless exceptions are made to guarantee that no U.S. nationals will be tried in the ICC.

However, this fear is unfounded for six reasons. First, Scheffer made the matter of complementarity an extremely important negotiating point during the statute drafting. The inclusion of this point is even cited in the Preamble of the Rome Statute. The Preamble states, “Emphasizing that the International Criminal Court established under this Statute shall be complementarity to national criminal jurisdictions.” Complementarity refers to the belief that the International Criminal Court serves as a compliment to the domestic jurisdictions of the states involved in the matter. States involved include the state of which the accused person is a national or the state where the situation at hand occurred. Article 17 of the Rome Statute deciphers the *Issues of admissibility*. It first reads:

. . . the Court shall determine that a case is inadmissible where: (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation of prosecution; (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute (Rome Statute Article 17).
Given these provisions, the U.S. has the opportunity to investigate and/or try its own nationals for crimes that fall under the jurisdiction of the ICC. In all likelihood, the U.S. will not commit genocide in the near future, if at all. The crimes, therefore, that the U.S. are concerned with are crimes against humanity and war crimes. If a U.S. national is accused of allegedly committing one of those crimes, the U.S. would most likely hold a hearing regardless of whether or not the ICC existed. Provisions in the Universal Code of Military Justice and the War Crimes Acts warrant the investigation and/or trial if crimes of this magnitude are suspected. As long as any U.S. investigation and/or trial are proved legitimate, the ICC would not try that specific case in its court. The U.S. does hold trials for such cases as it did in the My Lai case. It will continue to do so. The ICC defers to the national courts when seen as genuine investigations for justice.

Secondly, the U.S. further supports the language of the Rome Statute within its own laws. Therefore, complementarity is ensured. For instance, the Uniform Code of Military Justice establishes the jurisdiction for court-martial. "General courts-martial also have jurisdiction to try any person who by the law of war is subject to trial by a military tribunal and may adjudge any punishment permitted by the law of war" (818. Art. 18 UCMJ). Crimes considered offenses under the jurisdiction of the court-martial parallel crimes under the jurisdiction of the ICC. Beside the general, broadly-encompassing
Article 133 and Article 134, the Code also defines behavior such as murder, manslaughter, rape and carnal knowledge, maiming and assault as crimes under jurisdiction. Article 133, *Conduct Unbecoming an Officer and a Gentleman*, then states, "Any commissioned officer, cadet, or midshipman who is convicted of conduct unbecoming an officer and a gentleman shall be punished as a court-martial may direct" (933. Art. 133 UCMJ). *Conduct unbecoming an officer* is a loosely-defined term that enables the U.S. to claim jurisdiction in its domestic courts for matters within the Rome Statute.

Article 134, *General Article*, then states:

Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court (934. Art. 134 UCMJ).

Both Articles 133 and 134 of the Code aid in establishing jurisdiction over the defined crimes in the Rome Statute and, thus, provide for trials within the U.S. in many cases.

The War Crimes Acts are also supportive of the language in the Rome Statute. The initial War Crimes Act stated that any person, inside or outside of the United States, who commits a war crime shall be fined or imprisoned. When a victim of a war crime dies, the accused killer may also
be subject to capital punishment under this Act. Those under the Act include American servicemembers and those who commit a crime against American servicemembers. In 1997, a revised version of the War Crimes Act became known as the Expanded War Crimes Act. The Act defined war crime as any conduct found within the Geneva Conventions of 1949, the Annex to the Hague Convention IV and of the Protocol on Prohibitions of Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended at Geneva in 1996. These definitions coincide with the crimes under the jurisdiction of the Rome Statute; therefore providing more protections to the subject of complementarity.

By establishing a court secondary to national jurisdictions, the Rome Statute not only creates a court answering concerns of the U.S., but also establishes reason for other States to develop their own national laws similar to the Statute. By raising the bar on States to incorporate human rights protections into their national laws, the international community is strengthened.

The U.S. opposition believes the Court will be used for frivolous lawsuits against the U.S. Madeline Morris's contention that lack of policy behind the complementarity clause will favor the majority states supports the belief that the U.S. need not fear frivolous lawsuits against its nationals and
leaders. The U.S. will have stronger political ties to the Court than the rogue states it fears.

The third protection the U.S. will have for its nationals is political. The concern that U.S. nationals will be tried due to politically-motivated cases is ironic. Mostly, the U.S. will have more political say then any of its enemies. Madeline Morris wrote about the potential political problems with the Court in "Complementarity and Conflict." She found that the undeveloped role of the Prosecutor would lead to a position susceptible to political pressures of public opinion and the majority states. While the most favored Court will have no political ties to its docket, unfortunately, it may not be the way of the international community. Yet with a standard international court, the chances of politically-motivated tribunals are lessened. No longer will the tribunals be seen as the United States against another State, but as the international community against human rights atrocities. The United States will also not always have reason or resources to create tribunals for all human rights atrocities. This Court will aid in creating a voice for the victims who the U.S. may not be able to help find justice.

The fourth protection of U.S. nationals is based on the Rome Statute definitions of crimes themselves. Article 5 of the Statute, Crimes within the jurisdiction of the Court, states, "The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community"
(Article 5 Rome Statute, emphasis added). This phrase, the *most serious crimes of concern*, repeats itself throughout the articles defining each of the categories of crimes. It proves another safeguard to the U.S. in that the U.S. already claims to have the moral stability to prevent crimes of such a serious nature.

The first crime, *Genocide*, is defined as in the 1948 Genocide Convention:

any of the following acts committed with intent to destroy, *in whole or in part*, national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group (Article 6 Rome Statute).

*Crimes Against Humanity*, as defined in Article 7 of the Rome Statute, are only inclusive of acts "when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack" (Article 7 Rome Statute). Crimes against humanity include murder, extermination, enslavement, torture, rape, enforced disappearance, other inhumane acts of similar character when "intentionally causing great suffering, or serious injury to body or to mental or physical health" (Article 7 Rome Statute). *War Crimes* are defined "in particular when committed as part of a plan or policy or as part of a large-scale commission of such
crimes" (Article 8 Rome Statute). The definition of war crimes within the Rome Statute equals "grave breaches of the Geneva Conventions of 12 August 1949" (Article 8 Rome Statute). In describing the acts that constitute war crimes, the Rome Statute uses the word intentionally. Therefore, if an act equating a war crime is done so unintentionally, that act is not under the provisions of the Statute.

The U.S. most likely will not take part in atrocities intentionally, or as policy on a large-scale commission nor as any widespread or systematic attack directed against any civilian population. In the future, as in the past, it is certain that U.S. forces will make mistakes or follow unpopular decisions affecting civilians. As the Lawyers Committee for Human Rights states:

The ICC does not impose new international law on U.S. military action. Each military targeting decision made by the U.S. armed forces is already subject to strict legal scrutiny by international lawyers in the employ of the U.S. military. Although U.S. law could be improved, existing procedures are broadly sufficient to meet the standards of the International Criminal Court (LCHR).

If any of the acts of the U.S. do raise concerns from ICC State Parties, the U.S. may take it upon itself to investigate. The definitions of war crimes and crimes against humanity may also serve to protect U.S. servicemembers when held as prisoners. Article 8, War Crimes, goes to great lengths to define every type of war crime. Those include treatment of Prisoners of War. Those protections are that quarter be given, humane
treatment of a combatant when they have surrendered and laws against medical or scientific experiments on prisoners. Plus, the war crimes article establishes protections for the armed forces when they are on active duty. For instance, the outlawing of poison, gases, expanding bullets and "all other weapons that cause superfluous injury or unnecessary suffering" (Article 8 Rome Statute). While some may argue against the likelihood of deterrence, State Parties to the Rome Statute are reviewing their own national laws to incorporate these standards. If even one nation makes a change in its war crimes definitions, the moral standards of the international community have been protected and lives will be saved from heinous torture and killing.

The fifth protection for the United States is to be its own watchdog. Though the U.S. finds itself as the moral superpower, times within U.S. history might have proven differently if the court was allowed to try cases before its creation. For the U.S. to continue to see itself as a champion of human rights, it must continually review its policies and strategies against the standards set in the Declaration of Human Rights, the Genocide Convention and the Rome Statute. In the unlikely event that a U.S. national is tried under the ICC, Article 72 ensures the Protection of national security information. "If, in the opinion of a State, disclosure of information would prejudice its national security interests, all reasonable steps will be taken by
the State, acting in conjunction with the Prosecutor, the defense or the Pre-Trial Chamber or Trial Chamber . . . " (Article 72 Rome Statute).

The final protection encompasses the role of the ICC Prosecutor and the role of the U.S. in the Security Council and as the superpower. The United States made the argument that the International Criminal Court may be used for politically-motivated or frivolous lawsuits. This concern is addressed and given protection against in a number of ways throughout the Rome Statute. Also, fear of the Prosecutor becoming a Kenneth Starr on the international level led the United States to question the authority of such a role. However, the results of my study find the checks and balances established with the ICC enable fairness and unbiased judgment. The Prosecutor is not allowed free reign over all cases. The Pre Trial Chamber decides if a Prosecutor has enough evidence to warrant an investigation. Therefore, the Prosecutor needs substantial facts before a case can be brought before the Court.

As mentioned in the arguments about National Security concerns, the U.S. is once again protected by the criminal definitions of the Rome Statute. A frivolous lawsuit cannot take place if the U.S. did not commit one of the crimes under the ICC’s jurisdiction. Within Article 17, the Rome Statute states under Issues of admissibility that a case is inadmissible if it is not of "sufficient gravity to justify further action by the Court" (Article 17 Rome
Statute, emphasis added). This disclaimer further supports the definitions of the crimes. It once again checks that the alleged crime committed fits into one of the statements judging the most serious crimes of concern to the international community as a whole. By establishing a credential of sufficient gravity and most serious crimes of concern, the Rome Statute provides leeway for the international community to shape the type of cases the ICC hears. For the U.S., these statements are more than a protection against frivolous lawsuits; these statements are its opening to influence. The U.S. as the world’s superpower and as a majority State will have more political control over the Court when ratifying the Court than other State Parties. The drafters of the Court have shown the U.S. its belief that U.S. participation is essential. Even though the U.S. waited until the last minute to sign the Statute, David Scheffer was allowed to continue in discussions and negotiations for the Court.

As the world’s superpower and a permanent member of the United Nations Security Council, the U.S. will have ample ability to shape the Court’s docket. Article 13 of the Rome Statute states:

The Court may exercise its jurisdiction with respect to article 5 in accordance with the provisions of the Statute if: (b) A situation which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations (Article 13 Rome Statute).
Therefore, a case may only be brought to the Court in one of three ways: through the Security Council, referral by a State-Party or by the Prosecutor. Referral by the Security Council enables the Court to gain jurisdiction over non-party members. John Sequin provided this example in "Denouncing the International Criminal Court: An Examination of U.S. Objections to the Rome Statute."

Without Article 13(b), for example, the Court would be powerless to prosecute a leader like Pol Pot whose crimes were committed in Cambodia if Cambodia was not a party to the Court or refused to consent to the Court’s jurisdiction. With the adoption of Article 13(b), however, the Court could obtain jurisdiction over Pol Pot if referred by the Security Council, regardless of Cambodia's status as a non-party to the Court (Sequin 95).

Adding power to the Security Council, Article 16 establishes another type of complementarity. The article states:

No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions (Rome Statute Article 16).

Chapter VII of the UN Charter, *Action with Respect to the Threats to the Peace, Breaches of the Peace, and Acts of Aggression*, is the gateway to the peacekeeping missions of today. The Security Council makes its recommendations to situations considered to hinder peace. This chapter
establishes the interest of the Security Council nations to take action against a breach of peace. The ICC is an extension of the thoughts written in that chapter. The ICC is the justice after such an action.

If the U.S. was in the middle of a peacekeeping mission or discussions with the State in question, the U.S. could make a case for the ICC to postpone investigation. Article 13 and Article 16 establish a strong role of the Security Council in regards to the Court’s docket. The Council may request the cases the Court hears and does not hear. As for the other two methods when a case may be referred to the Court, do protections exist for the U.S.?

In the instance of the State-Party referral against the U.S., protections to the U.S. exist in that the State-Party’s case must meet the *sufficient gravity* clause. Plus, the aforementioned protection of complementarity would provide the case be taken into the jurisdiction of the U.S. If a case against a U.S. national does make it to the ICC, the U.S. national will be afforded a greater chance of a fair trial than if the case is taken to another country’s courts. Basic international law already allows for an American national to be tried in another country if accused of committing a crime there. The ICC stands as an unbiased overseer of the case. Therefore, an American national may be better served in the ICC, whose structure follows
more of the U.S. Bill of Rights, than in the hands of a foreign court without similar protections to the accused.

As for the third method, the Prosecutor, checks and balances over this position are strengthened throughout the Rome Statute. The Prosecutor may initiate investigations pertaining only to behavior listed in Articles 5, 6, 7 and 8. If the Prosecutor finds reasonable basis for proceeding with the investigation, they must request authorization from the Pre-Trial Chamber. If the Prosecutor gains authorization, they must inform all States with jurisdiction over the case. Supporting complementarity, those States have one month to inform the Prosecutor if it will manage its own investigation or not.

Complementarity and the definitions of the crimes once again protect the U.S. from the ICC’s jurisdiction. The protections of the definitions that pertain only to grave and systematic human rights atrocities protect States like the U.S. In its peacekeeping and overseas missions, under the codes of the Uniform Code of Military Justice, acts such as the ones defined in Articles 5, 6, 7 and 8, the U.S. should already be preventing such allegations. The ICC also contains many protections to the defendant such as a presumption of innocence, speediness of trial, the right to remain silent and to have the burden of proof on the prosecution. In many other countries’ court systems, these safeguards may not be found. Should an American be
tried under the ICC, the rights they are granted resemble the ones of their country.

**Jurisdiction over Non-Party States**

David Scheffer negotiated many points into the Rome Statute to protect the United States interests. In the argument above, complementarity is the strongest factor answering the concern about U.S. nationals. However, Scheffer’s next fundamental argument finds the complementarity clause violates international treaty law as defined at the Vienna Convention on the Law of Treaties. It is this factor that made former president Bill Clinton call the Treaty flawed. It is also this factor that makes the Treaty impossible to ratify for the U.S. This section takes a closer look at this issue in order to determine its validity.

Cases can come before the Court in one of three ways: referral by a State-Party, referral by the U.N. Security Council and/or referral by the Prosecutor. Article 12 of the Rome Statute provides the *Preconditions to the exercise of jurisdiction*. These preconditions are the determining factors of whether or not a case may come before the Court. Before the ICC can try a case, its jurisdiction must be accepted either by the State of which the alleged crime was committed or by the State of the defendant. For example, say Canada, a state party to the ICC, referred a case in which a United
States national allegedly committed a war crime in China. If China accepts ICC jurisdiction over the case, the case can be brought before the Court even if the U.S. does not accept the Court. As mentioned in the previous argument, the U.S. can choose to investigate the matter on its own. And, if that U.S. investigation is legitimate, the case is not brought before the Court. Yet, Scheffer's argument has a number of factors. One, still utilizing the former hypothetical scenario is if the U.S. believes the actions of its national are right and therefore chooses not to investigate, why should they be brought before the Court? The second factor pertains to international treaty law. Citing the Vienna Convention on the Law of Treaties, a State cannot be bound by a Treaty it is not a party to. As seen in the example above, the Court can preside over non-party States. To further this part of his argument, Scheffer argues the Rome Statute does not establish universal jurisdiction over the crimes it defines.

The first answer to this concern once again relates to the definitions of the crimes under the Court's jurisdiction. The crimes listed in the Rome Statute are grave violations of human rights. If a U.S. national allegedly commits such a crime, the U.S. will want to investigate the matter. Even if the U.S. engages in covert operations beyond our imagination, NGO's like Amnesty International or Human Rights Watch along with public opinion would warrant a U.S. investigation. If an alleged crime against humanity of
that magnitude is publicized, public pressure will be great enough for the U.S. to want to investigate the matter itself.

Plus, if a U.S. national is under suspicion of committing a crime against humanity in another country, U.S. nationals may be tried in that country's legal system. That legal system may be quite different from the U.S. legal system whether or not the U.S. believes its national was correct in their actions. That U.S. national may be better served in a trial before the ICC than in another country's legal system. The protections of defendants before the ICC is similar to the U.S. Bill of Rights.

Scheffer's argument that the Rome Statute violates customary international treaty law is only valid if the Rome Statute proposed to impose the responsibilities of the Court on non-party States. Rather, the Rome Statute provides jurisdiction over non-party States when alleged human right crimes of grave magnitude are committed. Scheffer argued that the Rome Statute itself rejects the notion of universal jurisdiction since Article 12 provides preconditions of territorial jurisdiction—either the State where the crime occurred or the State of the accused.

However, in negotiating the Rome Statute, the crimes under the jurisdiction were reviewed as matters of universal jurisdiction since it is within the best interest for all of the international community. The 1948 Genocide Convention demonstrated a universal declaration that the crime of
genocide was not accepted by the international community. John Seguin found the number of States signing the Rome Statute was enough to find universal jurisdiction for such crimes, while Michael P. Scharf found the U.S. has already noted the universality of protecting such crimes when it created the Nuremberg, Tokyo and Yugoslavia tribunals.

Article 12 of the Rome Statute does allow for territorial jurisdiction, but that does not alleviate the claim to universal jurisdiction for such crimes as well. Scharf notes that the territorial provision was added to the Treaty to make it more broadly acceptable. The U.S. proposals to amend Article 12 would make it impossible for a crime to come before the Court if the State of the national accused confirmed that the action was official business of that State. That proposal was not accepted. Instead, the two-layer jurisdiction of territorial and universal was adopted. While the Rome Statute does not use the exact language calling on the universality of the crimes, historic actions do support that these crimes are under universal jurisdiction. As more tribunals are created, with support of the U.S., the notion that crimes against humanity and war crimes are not accepted becomes more and more universal.

The act of piracy was the first action under universal jurisdiction. Genocide, crimes against humanity and war crimes are the new acts or piracy. Since World War II, the movement toward individual responsibility
demonstrates accountability for such grave acts. Without that accountability and universal jurisdiction, the tribunals of Yugoslavia and Rwanda could not occur.

Michael P. Scharf also notes that the United States currently participates in treaties that have universal jurisdiction over non-party States. Those treaties include the Genocide Conventions of the 1940s, the 1958 Law of the Sea Convention, the 1970 Hijacking Convention, the 1971 Aircraft Sabotage Convention and the 1984 Torture Convention.

Summary of U.S. Concerns

The U.S. can ratify the ICC because protections exist within the Rome Statute and within U.S. laws to try its own nationals when necessary. The U.S. can continue protecting its nationals by incorporating more language involving its civilians in its current standards and by continuously reviewing its codes and ethics to ensure the U.S. finds wrongdoing in the same light as the ICC. The crimes under the Court's jurisdiction are within the global interest. The Nuremberg and Tokyo trials used universal jurisdiction. The tribunal for Yugoslavia also uses this same universal jurisdiction.
CHAPTER 4
UNITED STATES POLICY AND HUMAN RIGHTS

On May 3, 2001, the United States lost re-election for its seat on the United Nations Commission on Human Rights that it held since the Commission's creation in 1947. The loss of this seat reflects the current struggle the United States faces toward human rights policies. Some observers, like Human Rights Watch, have associated the loss of the seat with the perceived resentment of other countries to U.S. human rights policies. Those policies in question include the ICC and the treaty to ban landmines. While the United States leaders often talk of its commitment to human rights, its foreign policy decisions do not always support that commitment. Chapter 3 argued the concerns the U.S. voices about the Court are protected by safeguards. The critiques about U.S. concerns studied in Chapter 2 also demonstrate the ability of the U.S. to ratify the Court safely. Yet, even with international pressures and pressures from non-governmental organizations, the United States stands firm with its opposition to the Court in its current form. Yet, would the U.S. ratify the Court even if changes were made to further protect its interests? What are the true reasons the United States does not want to ratify the Court? Is there any
type of Court the U.S. would find acceptable? Would that type of Court be effective?

Chapter 4 looks at these questions and establishes the root causes of the United States concerns about the Rome Statute. A study of past U.S. foreign policy aids in finding the true reasoning. Looking at the type of Court the U.S. may ratify provides further understanding of U.S. concerns. Finally, an examination of the benefits the Court offers the U.S. in comparison to the root cause determines if ratifying the Court is in the best interest of U.S. foreign policy.

Given the recent U.S. involvement in creating the tribunals for the former Yugoslavia and Rwanda, one would surmise the U.S. would openly accept the help the ICC could provide. As was the case with the League of Nations, the U.S. probably would accept the ICC if it did not hold them accountable. The main arguments the U.S. makes in opposing the Court stem from the fact that the U.S. is the sole remaining superpower. As a superpower, the U.S. finds its role in the international community is significantly different than any other country. Yet, history depicts this superpower as one that often questions supporting international organizations. Unless the U.S. has built-in controls and protections for its interests, the U.S. will find reasons not to participate in treaties and organizations.
A look at United States debates around the League of Nations and the Genocide Convention provides background into the debates and views of American politicians toward international organizations. These two backgrounds provide information into the future of the U.S. and the ICC. One can find significant parallels between the U.S. objections to the Rome Statute and the sporadic forty-year debate in the U.S. over the Genocide Convention. When the U.S. finally did sign the Genocide Convention, it was with five understandings, a declaration and two reservations. One resolution amended the definition of genocide. The resolution added the word substantial so the definition would read, "...with intent to destroy, in whole or in substantial part, a national, ethnical, racial, or religious group as such" (Article II (1) Resolution of Ratification Lugar-Helms-Hatch Sovereignty Package).

An important resolution component from this package depicts a history behind the U.S. and international human rights. It states:

That with regard to the reference to an international penal tribunal in Article VI of the Convention, the United States declares that it reserves the right to effect its participation in any such tribunal only by a treaty entered into specifically for that purpose with the advice and consent of the Senate (Article II (5), Sovereignty Package).

The controversial history of the United States and the Genocide Convention shows the importance given to each and every word within the Rome Statute. The opponents of ratification of the Genocide Convention
feared relinquishing some State sovereignty to international institutions. Since the Nuremberg and Tokyo trials, the U.S. has been involved in peacekeeping missions proving the face of genocide showed itself many times after the Holocaust. Even with the UN Declaration on Human Rights and the Genocide Convention, genocide happened in Rwanda, East Timor and the former Yugoslavia. The U.S. was instrumental in establishing tribunals to try individuals for their part in the human rights atrocities in Rwanda and the former Yugoslavia.

And, though opponents may champion the American Servicemembers' Protection Act of 2000 bill, they still want tribunals on a case-by-case basis to try people like Saadam Hussein. This case-by-case basis is problematic. One cannot establish tribunals for conduct in one part of the world and ignore the same conduct in another part of the world. Genocide continues and U.S. involvement overseas continues. In those forty years it took to ratify the Genocide Convention, the world moved toward a global society. The media showed the world the atrocities in Rwanda and wondered why the U.S. did not help prevent it. The U.S. does not need to fear the word genocide by definition any longer. It needs to fear its inaction to prevent it and/or its inaction to find justice after it. In establishing any international organization, some State sovereignty must be sacrificed—
without that sacrifice, we would have no United States of America, just fifty separate states all with their sovereignty in tact.

After World War I, Woodrow Wilson wrote "The Fourteen Points Address" in which he called for an "association of nations" eventually leading to the League of Nations. Wilson then struggled with Congress for years to ensure United States inclusion into the League. His struggle took him across the country on campaigns to solicit support to join the international association. However, for all Wilson’s work, the United States never did join the League of Nations.

The idea for the League of Nations was truly revolutionary. The theories behind its Covenant lead the way to the International Criminal Court. In his address, Wilson said:

We entered this war because violations of right had occurred which touched us to the quick and made the life of our own people impossible unless they were corrected and the world secured once for all against their recurrence. What we demand in the war, therefore, is nothing peculiar to ourselves. It is that the world be made fit and safe to live in; and particularly that it be made safe for every peace-loving nation which, like our own, wishes to love its own life, determine its own institutions, be assured of justice and fair dealing by the other peoples of the world as against force and selfish aggression. All the people of the world are in effect partners in this interest, and for our own part we see very clearly that unless justice be done to others it will not be done to us (Human Rights Reader 301).
Wilson's words are the backbone to the International Criminal Court. The ICC is based upon an idea that the nations of the world are partners that should share a vision of peace. The opposition rallied around Article X of the Covenant that pertained to territorial integrity of other countries and the commitment to band together when that integrity was in jeopardy. Opposition did not believe it was the responsibility of the U.S. to have its servicemembers called in on matters that did not directly concern them. Instead, the U.S. encouraged the work of the League of Nations and attended meetings, but never became a member.

If the U.S. once again could only be a good neighbor to the Court, they would. However, with the way the Rome Statute is written, it makes it more difficult for the U.S. to only be a good neighbor. The U.S. does not want the ICC to touch any of its nationals. Without more control over the Court, the U.S. will not ratify it. The U.S. does not want to relinquish any of its sovereignty to an organization it cannot control. While the U.S. supports the creation of tribunals for individuals of other countries, it does not believe it needs to fall under the same jurisdiction.

The type of Court the U.S. would ratify would create a weak international organization. The Court would need the acceptance of the States of the nationals under investigation. If that happened, the leaders who the U.S. is most concerned with would never see the inside of the
courtroom of the ICC. The U.S. would rather continue to develop its own tribunals with the help of the United Nations on a case-by-case basis. By doing that, the U.S. ensures it will not have to answer to the international community for its actions.

However, with the anger over losing the seat in the U.N. Commission of Human Rights, the U.S. most see that this mentality is only hurting its legitimacy on human rights issues abroad. By establishing its difference as a superpower, the U.S. is in effect saying it needs to be above the law. Yet, ratifying the Court has many potential benefits for the U.S. that should not be overlooked.

Benefits of Ratification

By ratifying the International Criminal Court, the United States gains benefits in the areas of national security, politics and economics. As an international association dedicated to human rights, the ICC may change the climate of the international community. More nations will adopt the laws established within the Rome Statute. Though the benefits of the Court for the U.S. will not happen overnight, its impact over the long term should not be overlooked.

The ICC also benefits U.S. national security in the long term. The United States decides when to engage in a peacekeeping operation by
analyzing those objectives in relation to the risks and gains involved. Therefore, the U.S. is not going to establish tribunals for all cases of human rights abuses as they championed for the former Yugoslavia and Rwanda. The U.S. will not always find reason to intervene in a human rights crisis looking for justice. However, when cases of severe human rights abuses happen, it is within the U.S. national interest that the international community establishes a trial. By letting such impunity reign after atrocities, countries may often cast blame at the U.S. Why does the U.S. intervene in some cases and not in others? That blame is dangerous to the U.S. national security. And if human rights abusers are left alone by the international community, they will remain a constant problem for international security.

By trying those who create a culture of or commit human rights violations on an individual basis, a country can find a way to overcome its past. Germany after World War I proves this example. By burdening and humiliating the Germans with heavy sanctions, Adolf Hitler was able to rise to power. He created a scapegoat for what went wrong in the nation's recent history. His propaganda was what the nation wanted to hear—they were not to blame. It led to the heinous genocide of millions. The Nuremberg Trial after World War II was important for the world to document what happened. People needed answers. However, had a permanent international criminal court been in place at the time, fewer people would claim the trial was
simply victor's justice. By establishing a permanent court with standards for justice and eventually precedents, the hearings will have legitimacy. Not to say that Nuremberg was not a legitimate source of justice, but had a court already existed, the Germans would have known the international community, not just the Allied Forces, was trying the case.

If, for example, Saddam Hussein was tried by the ICC for human rights abuses before the 1991 Persian Gulf War, the U.S. would not have had to go to war. It would seem less like the U.S. against Iraq. Instead, the international community would decide what wrongful actions were taken. When a superpower uses its threats and force on other nations, martyrdom can occur. Having the international community decide what is right and wrong protects against a leader seemingly becoming a martyr against the superpower.

Actions by the United States and the commitment to create tribunals to try leaders for human rights abuses show a policy that believes in the importance of justice. Questions arise about why the United States finds a value in pursuing justice through tribunals. Does justice deter future criminals? Or is it that the U.S. finds tribunals as a substantial symbolic measure? The ICC will be a deterrent to future crimes given the long-term effect new definitions of human rights abuses may have when contained in a nation's laws. By more nations adopting the words of the Rome Statute for
their own national law, the deterrence of future human rights atrocities occurring lessons.

John R. Bolton, Senior Vice President, American Enterprise Institute, as stated in Chapter 2, believes deterrence is not a valid claim in support of the ICC. To reiterate, Bolton said:

Recent history is unfortunately rife with cases where strong military force or the threat of force failed to deter aggression or gross abuses of human right. Why should we believe that bewigged judges in The Hague will prevent what cold steel has failed to prevent remains entirely unexplained (Bolton 9).

Bolton cites Yugoslavia as an example of a state that should have found deterrence in that Serbs were already facing charges for human rights violations before air strikes occurred. Instead, Slobodan Milosevic and his army continued their ethnic cleansing in full force even after the bombing began. Bolton stated:

It defies credulity to believe that a regime not deterred by precision-guided bombs and missiles literally falling on its head will somehow be deterred by the threat of war-crimes prosecutions at some distant, hazy point down the road (Bolton 9).

Yet Aryeh Neier in his article, "Rethinking Truth, Justice, and Guilt after Bosnia and Rwanda", that in order for deterrence to be a valid claim, it must come from precedents of strong trials. Neier writes:

As no international tribunal was convened for nearly half a century after Nuremberg and Tokyo, there is little prospect that those
committing such crimes will come to believe any time soon that punishment is likely or imminent (Neier 49).

Since the international community has not shown a commitment to tribunals after such abuses, the fear of punishment is not prevalent. After generations of impunity for such abuses have reigned, it is difficult to move into a world where leaders will have to fear for punishment when they commit these heinous crimes.

John Gary Bass finds significant examples of why the *ad hoc* tribunals that were created for Bosnia and Rwanda do not act as a deterrent now. Bass sees the ineffectiveness of tribunals on an *ad hoc* basis, noting the challenges of collecting evidence so far after the fact as well as establishing a place and finding resources to conduct a tribunal. The tribunals for Bosnia and Rwanda are not strong enough to establish fear of punishment for future perpetrators of these crimes. A strong permanent international criminal court will provide the international community with precedents and standards to establish the belief that if one of these crimes occurs, justice will follow.

Bass and Richard J. Goldstone find four major lessons the two tribunals provide: (1) Timely justice is impossible on an *ad hoc* basis; (2) Trials provide historical record to the atrocities; (3) The tribunals are proof against opponents who believe the Court would be out of control and (4)
“renegade regimes must not be allowed to defy a legitimately created international tribunal; when they do, the tribunal risks becoming a token gesture, not a genuine step toward some kind of international justice” (Goldstone 54). The four lessons depict a need for a stable, permanent court. With that permanent court comes a legitimacy that can establish deterrence. If the tribunals are only symbolic measure, they will not aid in deterring human rights atrocities.

Neier finds that without the fear of justice for these atrocities, tribunals will need to be measured by what they do for the victims. Bass and Goldstone also note the importance of the victims. The historical evidence they find of salient issue provides victims with acknowledgment of their plight. The reason I do not use this argument is because of what Samantha Power also finds—“The United States does not fear the types of mass violence that the ICC is designed to counter will occur in the United States or against Americans” (Power 173). Americans will most likely not be victims of genocide or crimes against humanity in need of the ICC’s jurisdiction. In arguing the benefits of the ICC to the U.S., the voice of victims is too far removed from American policy-makers establishing U.S. concerns and policy. However, the victims’ voice is significant in creating the ICC. The ICC will have legitimacy to eventually deter would-be criminals following orders of crimes against humanity or genocide. It will also provide help when these
atrocities do unfortunately occur. The international community can provide an account for the victims of the crimes. The ICC can provide justice for the victims. And, the ICC can give the victims the knowledge that they matter in the international community.

The United States armed forces engage in military operations all over the world. Many of those operations are on humanitarian or peacekeeping missions. In deciding whether or not to engage in a peacekeeping mission, factors are studied involving the need for the U.S., the risks versus gains for national interests and the amount of resources needed along with availability of such resources. The U.S. looks for a clear objective to the mission before sending troops. Yet, often times, that clear objective is not easily found, as in the case of Vietnam and Somalia. Peacekeeping missions are not always easily definable. Most struggles in today's society date back centuries. Many struggles occur over land taken during the colonization, over racial prejudice or for self-determination.

Allocating resources for peacekeeping missions is costly. The trend in the 1990s showed increases from $1 billion in 1991 to $4 billion in 1994 for peacekeeping missions (Jordan 519). With the creation of the ICC, forces to keep the peace will still be required. However, the ICC will aid in finding long-term peace. Too often, peacekeeping missions are deployed with the objective to end the violence. Yet, those objectives do not address the long
term and as soon as forces leave the State, the violence will begin again. In

American National Security, the authors write:

Unless accompanied by a sincere commitment of political will among
the contending parties for real peace, abetted by U.N and major
power diplomacy, the business of peacekeeping can become difficult
to terminate (511).

How does this information relate to the U.S. economy? First, in
establishing whether or not to engage in a peacekeeping mission, spending
millions of dollars, the ICC can investigate cases of human rights abuses.
Where there is no want of peace, the ICC can at least investigate matters of
human rights abuses. Where there is want of peace, the ICC can provide
justice and give a nation the chance of longer-term peace, not just some
time before more bloodshed.

The ICC can also prevent the U.S. from repeat missions. When the
U.S. engaged in the 1991 Persian Gulf War, it was at great monetary cost.
One has to look at the long-term objectives that cost created. Were those
costs enough? Hussein was unable to build the nuclear arsenal he wanted.
That definitely is a positive outcome, but once again in the year 2001,
American finds itself again wondering what Hussein's next action will be.
The long-term effects of that mission are unclear. It seems Hussein was only
temporarily hindered from further action, while the people of Iraq received
the brunt of the punishment.
Imposing economic sanctions on a State places that State in a troubling position. The people of the State believe they are being punished and taking all of the blame for actions that were out of their control. By weakening the economy of another State, the international community suffers. In a time of emerging global economies, the U.S. improves the global economy. Many of the struggles in today’s society are within developing nations. Nations face new governments from the end of the Cold War or from the end of colonization. If these developing nations are ignored by the global economy, the economy will not strengthen. Decision-makers for the U.S. need to take into account the long-term effects of the peacekeeping mission. By ensuring long-term objectives, a better chance for stability in that region prevails. The ICC will help provide that stability. By finding justice and hearing the cases of the individuals who allegedly committed human rights abuses, the people of that troubled State will see the effects of international law. They will see the human rights abuses are not acceptable. By trying those who propagate that it is okay to kill or injure a certain type of people, the State who listened to them will see from the international community the wrong in those actions. The victims in that State will know the international community heard their cries. Enabling documentation of the truth and empowering victims to overcome tragedy, the ICC is a stepping stone for stability. Stable nations that adopt the
ideology of international human rights laws will eventually strengthen the global economy.

Many U.S. Politicians do not want to see the U.S. as the global police for human rights struggles. On the other side, some see that policing as the moral responsibility of the U.S. as the superpower in an emerging global market. The ICC can establish fewer peacekeeping missions when possible. Many nations have already adopted the Rome Statute as national policy. The effect of those laws over time may reduce the need for U.S. policing actions.

The U.S. should also look into the legitimacy of its foreign policy. Trading with nations with poor human rights records hurts the U.S. Human rights need protecting to ensure a stronger global economy. By trading with China, the U.S. looks double-sided. On one side, the U.S. makes claims of upholding human rights. On the other side, it secures national economic interests by trading with countries with poor human rights records. Economic sanctions only hurt the people of that State and hurt the global economy. Instead, by raising the level of human rights and establishing the ICC, the U.S. enables stronger developing nations with human rights laws similar to its own. It also places international pressure on those government that condone human rights abuses.
Summary of U.S. Policy and ICC Benefits

Enough safeguards exist not only to protect the U.S. from its fears of the ICC but also to benefit the U.S. The negotiations that the U.S. made during the drafting of the Statute provide a permanent court that leans heavily to the wants of the United States. Given the adjustments the U.S. was able to make to the Statute, it would not be in its best interest not to ratify. In the future, when the ICC looks at establishing new definitions for crimes under its jurisdiction, like Crimes of Aggression, the U.S. can once again make its arguments known. National Security is aided by the fact that other countries are updating their human rights standards. Politically, the U.S. has more to gain then to lose given the role as a superpower, majority state and permanent member of the Security Council. Economically, the ICC may establish a world with fewer peacekeeping missions needed, therefore less deployment of U.S. forces.

The work presented in Chapter 2 is invaluable in any discussion concerning the ICC. From the authors, I found understanding behind the U.S. arguments, the case for ratification and the predictions of loopholes in the Statute. As the ICC gets closer to creation, all of these studies will be put to the test. And, when the ICC extends its jurisdiction in the future, no doubt debate in the U.S. will once again reign. Once the ICC is created, it will be
interesting to explore this study further to find the benefits the Court has had for the U.S. foreign policy.
CHAPTER 5

CONCLUSION

Given the checks and balances of the International Criminal Court, I believe the United States will eventually ratify the Court. The United States gains more by ratifying the International Criminal Court than by opposing it. The consideration by some that the U.S. could at least simply be a "good neighbor" to the Court misses the purpose of the Court. The ICC creates an international partnership that does not condone human rights abuses. The time to end impunity for these actions is now. All of the U.S. arguments about the Court have been answered within the Rome Statute and within U.S. national laws. Considering the benefits the Court will have for the U.S. in the future, ratifying the ICC is good policy for the U.S.

In the interests of U.S. national security, the ICC can aid in the healing after human rights abuses do occur. By providing documents of truth and letting the regime guilty of committing the offenses see the international community condemns its actions, a country has a better chance at a peaceful future. By allowing those acts to go unpunished or unanswered, the constant threat of more violence remains. If a cruel regime believes they are right and the international community allows its violent acts to happen, those
violent acts will not end. Also, by ratifying the Court, the U.S. protects its national interests by continuing its participation in the future of the court when further jurisdiction is added. A Court with international standards, resources and legitimacy is the first step to international security.

Politically, the U.S. is on safe ground. The checks and balances of the Court ensure that no U.S. servicemembers will be tried under frivolous or questionable allegations. In the event that an American is under investigation, the U.S. may take over that investigation and keep it out of the ICC. The U.S. typically investigates its own people when violations of national laws occur. The U.S. national laws also prohibit the acts under the ICC's jurisdiction. Therefore, if the U.S. continues to review its own national laws in relation to the Rome Statute, it will be protected from the Court.

As other nations also change their national laws to reflect that of the Rome Statute, the international community leads the way to a better future of human rights. As more countries add laws against human rights abuses to their national laws, fewer violations of those laws will occur over time. In the long term, the U.S. will hopefully have less peacekeeping missions due to the raised bar in human rights.

With fewer peacekeeping missions, funds are opened in the U.S. budget for other interests. With nations changing their human rights laws, a more stable international economy is created. Countries not weakened by
fighting human rights violations have a better chance at strengthening international trade and focusing on a stable future.

By ratifying the Court, the United States establishes credibility in the international community. Committing to the end of impunity for those who commit genocide, crimes against humanity or war crimes is good policy for the U.S. The human rights atrocities committed throughout the world must end. This Court is another step in that direction. People are dying inhumane deaths and the U.S. cannot have that on its conscience. As the superpower, the U.S. needs to join forces with the international community to set the standard—if human rights abuses occur, there will be punishment.
APPENDIX A

THE GENOCIDE CONVENTION


The Contracting Parties,

Having considered the declaration made by the General Assembly of the United Nations in its resolution 96 (I) dated 11 December 1946 that genocide is a crime under international law, contrary to the spirit and aims of the United Nations and condemned by the civilized world;

Recognizing that at all periods of history genocide has inflicted great losses on humanity; and

Being convinced that, in order to liberate mankind from such an odious scourge, international co-operation is required;

Hereby agree as hereinafter provided.

Article 1. The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.

Art. 2. In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

(4) Killing members of the group;
(b) Causing serious bodily or mental harm to members of the group; © Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
(d) Imposing measures intended to prevent births within the group;
(e) Forcibly transferring children of the group to another group.
Art. 3. The following acts shall be punishable:

(4) Genocide;
(b) Conspiracy to commit genocide;
© Direct and public incitement to commit genocide;
(d) Attempt to commit genocide;
(e) Complicity in genocide.

Art. 4. Persons committing genocide or any of the other acts enumerated in Article 3 shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.

Art. 5. The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in Article 3.

Art. 6. Persons charged with genocide or any of the other acts enumerated in Article 3 shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.

Art. 7. Genocide and the other acts enumerated in Article 3 shall not be considered as political crimes for the purpose of extradition.

The Contracting Parties pledge themselves in such cases to grant extradition in accordance with their laws and treaties in force.

Art. 8. Any Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in Article 3.

Art. 9. Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or any of the other acts enumerated in Article 3, shall be submitted to the International Court of Justice at the request of any of the parties to the
dispute.

Art. 10. The present Convention, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall bear the date of 9 December 1948.

Art. 11. The present Convention shall be open until 31 December 1949 for signature on behalf of any Member of the United Nations and of any non-member State to which an invitation to sign has been addressed by the General Assembly.

The present Convention shall be ratified, and the instruments of ratification shall be deposited with the Secretary-General of the United Nations.

After 1 January 1950, the present Convention may be acceded to on behalf of any Member of the United Nations and of any non-member State which has received an invitation as aforesaid.

Instruments of accession shall be deposited with the Secretary-General of the United Nations.

Art. 12. Any Contracting Party may at any time, by notification addressed to the Secretary-General of the United Nations, extend the application of the present Convention to all or any of the territories for the conduct of whose foreign relations that Contracting Party is responsible.

Art. 13. On the day when the first twenty instruments of ratification or accession have been deposited, the Secretary-General shall draw up a proces-verbal and transmit a copy of it to each Member of the United Nations and to each of the non-member States contemplated in Article 11.

The present Convention shall come into force on the ninetieth day following the date of deposit of the twentieth instrument of ratification or accession.

Any ratification or accession effected subsequent to the latter date shall become effective on the ninetieth day following the deposit of the instrument of ratification or accession.
Art. 14. The present Convention shall remain in effect for a period of ten years as from the date of its coming into force.

It shall thereafter remain in force for successive periods of five years for such Contracting Parties as have not denounced it at least six months before the expiration of the current period.

Denunciation shall be effected by a written notification addressed to the Secretary-General of the United Nations.

Art. 15. If, as a result of denunciations, the number of Parties to the present Convention should become less than sixteen, the Convention shall cease to be in force as from the date on which the last of these denunciations shall become effective.

Art. 16. A request for the revision of the present Convention may be made at any time by any Contracting Party by means of a notification in writing addressed to the Secretary-General.

The General Assembly shall decide upon the steps, if any, to be taken in respect of such request.

Art. 17. The Secretary-General of the United Nations shall notify all Members of the United Nations and the non-member States contemplated in Article 11 of the following:

(4) Signatures, ratifications and accessions received in accordance with Article 11;
(b) Notifications received in accordance with Article 12;
© The date upon which the present Convention comes into force in accordance with Article 13;
(d) Denunciations received in accordance with Article 14;
(e) The abrogation of the Convention in accordance with Article 15;
(f) Notifications received in accordance with Article 16.

Art. 18. The original of the present Convention shall be deposited in the archives of the United Nations.

A certified copy of the Convention shall be transmitted to all Members of the United Nations and to the non-member States contemplated in Article 11.
Art. 19. The present Convention shall be registered by the Secretary-General of the United Nations on the date of its coming into force.
APPENDIX B

WAR CRIMES ACT

US Code as of: 01/23/00

Sec. 2441. War crimes

(4) Offense. — Whoever, whether inside or outside the United States, commits a war crime, in any of the circumstances described in subsection (b), shall be fined under this title or imprisoned for life or any term of years, or both, and if death results to the victim, shall also be subject to the penalty of death.

(b) Circumstances. — The circumstances referred to in subsection (a) are that the person committing such war crime or the victim of such war crime is a member of the Armed Forces of the United States or a national of the United States (as defined in section 101 of the Immigration and Nationality Act).

© Definition. — As used in this section the term "war crime" means any conduct —

(4) defined as a grave breach in any of the international conventions signed at Geneva 12 August 1949, or any protocol to such convention to which the United States is a party;

(2) prohibited by Article 23, 25, 27, or 28 of the Annex to the Hague Convention IV, Respecting the Laws and Customs of War on Land, signed 18 October 1907;

(3) which constitutes a violation of common Article 3 of the international conventions signed at Geneva, 12 August 1949, or any protocol to such convention to which the United States is a party and which deals with non-international armed conflict; or

(4) of a person who, in relation to an armed conflict and contrary to the provisions of the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended at Geneva on 3 May 1996 (Protocol II as amended on 3 May 1996), when the United States is a party to such Protocol, willfully kills or causes serious injury to civilians.
APPENDIX C

ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT* **

PREAMBLE

The States Parties to this Statute,

Conscious that all peoples are united by common bonds, their cultures pieced together in a shared heritage, and concerned that this delicate mosaic may be shattered at any time,

Mindful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity,

Recognizing that such grave crimes threaten the peace, security and well-being of the world,

Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation,

Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes,

Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes,

Reaffirming the Purposes and Principles of the Charter of the United Nations, and in particular that all States

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shall refrain from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations,

Emphasizing in this connection that nothing in this Statute shall be taken as authorizing any State Party to intervene in an armed conflict or in the internal affairs of any State,

Determined to these ends and for the sake of present and future generations, to establish an independent permanent International Criminal Court in relationship with the United Nations system, with jurisdiction over the most serious crimes of concern to the international community as a whole,

Emphasizing that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions,

Resolved to guarantee lasting respect for and the enforcement of international justice,

Have agreed as follows

PART 1. ESTABLISHMENT OF THE COURT

Article 1
The Court

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

Article 2
Relationship of the Court with the United Nations

The Court shall be brought into relationship with the United Nations through an agreement to be approved by the Assembly of States Parties to this Statute and thereafter concluded by the President of the Court on its behalf.
Article 3
Seat of the Court

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

Article 4
Legal status and powers of the Court

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

PART 2. JURISDICTION, ADMISSIBILITY AND APPLICABLE LAW

Article 5
Crimes within the jurisdiction of the Court

1. The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes:

(a) The crime of genocide;
(b) Crimes against humanity;
(c) War crimes;
(d) The crime of aggression.

2. The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.
Article 6
Genocide

For the purpose of this Statute, "genocide" means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
(a) Killing members of the group;
(b) Causing serious bodily or mental harm to members of the group;
(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
(d) Imposing measures intended to prevent births within the group;
(e) Forcibly transferring children of the group to another group.

Article 7
Crimes against humanity

1. For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

(a) Murder;
(b) Extermination;
(c) Enslavement;
(d) Deportation or forcible transfer of population;
(e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
(f) Torture;
(g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other Form of sexual violence of comparable gravity;
(h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
(i) Enforced disappearance of persons;
(j) The crime of apartheid;
(k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.
2. For the purpose of paragraph 1:

(a) "Attack directed against any civilian population" means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack;

(b) "Extermination" includes the intentional infliction of conditions of life, inter alia the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population;

(c) "Enslavement" means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children;

(d) "Deportation or forcible transfer of population" means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law;

(e) "Torture" means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions;

(f) "Forced pregnancy" means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy;

(g) "Persecution" means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity;

(h) "The crime of apartheid" means inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime;

(i) "Enforced disappearance of persons" means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.
3. For the purpose of this Statute, it is understood that the term "gender" refers to the two sexes, male and female, within the context of society. The term "gender" does not indicate any meaning different from the above.

Article 8
War crimes

1. The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.

2. For the purpose of this Statute, "war crimes" means:

(a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

(i) Wilful killing;

(ii) Torture or inhuman treatment, including biological experiments;

(iii) Wilfully causing great suffering, or serious injury to body or health;

(iv) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;

(v) Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;

(vi) Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;

(vii) Unlawful deportation or transfer or unlawful confinement;

(viii) Taking of hostages.

(b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:

(i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;

(ii) Intentionally directing attacks against civilian objects, that is, objects which are not military objectives;

(iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;

(iv) Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe
damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;

(v) Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives;

(vi) Killing or wounding a combatant who, having laid down his arms or having no longer means of defence, has surrendered at discretion;

(vii) Making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury;

(viii) The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory;

(ix) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;

(x) Subjecting persons who are in the power of an adverse party to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;

(xi) Killing or wounding treacherously individuals belonging to the hostile nation or army;
(xii) Declaring that no quarter will be given;

(xiii) Destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war;

(xiv) Declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party;

(xv) Compelling the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war;

(xvi) Pillaging a town or place, even when taken by assault;

(xvii) Employing poison or poisoned weapons;

(xviii) Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;

(xix) Employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions;

(xx) Employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict, provided that such weapons, projectiles and material and methods of warfare are the subject of a comprehensive prohibition and are included in an annex to this Statute, by an amendment in accordance with the relevant provisions set forth in articles 121 and 123;
(xxi) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;

(xxii) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, or any other form of sexual violence also
constituting a grave breach of the Geneva Conventions;

(xxiii) Utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations;

(xxiv) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;

(xxv) Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions;

(xxvi) Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities.

(c) In the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause:

(i) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and
torture;

(ii) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;

(iii) Taking of hostages;

(iv) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable.

(d) Paragraph 2 (c) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.

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

(i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;

(ii) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;

(iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian
objects under the international law of armed conflict;

(iv) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;

(v) Pillaging a town or place, even when taken by assault;

(vi) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, and any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions;

(vii) Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities;

(viii) Ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand;

(ix) Killing or wounding treacherously a combatant adversary;

(x) Declaring that no quarter will be given;

(xi) Subjecting persons who are in the power of another party to the conflict to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;

(xii) Destroying or seizing the property of an adversary unless such destruction or seizure be
imperatively demanded by the necessities of the conflict;

(f) Paragraph 2 (e) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.

3. Nothing in paragraph 2 (c) and (e) shall affect the responsibility of a Government to maintain or re-establish law and order in the State or to defend the unity and territorial integrity of the State, by all legitimate means.

Article 9
Elements of Crimes

1. Elements of Crimes shall assist the Court in the interpretation and application of articles 6, 7 and 8. They shall be adopted by a two-thirds majority of the members of the Assembly of States Parties.

2. Amendments to the Elements of Crimes may be proposed by:

(a) Any State Party;

(b) The judges acting by an absolute majority;

(c) The Prosecutor.

Such amendments shall be adopted by a two-thirds majority of the members of the Assembly of States Parties.

3. The Elements of Crimes and amendments thereto shall be consistent with this Statute.
Article 10

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

Article 11

Jurisdiction ratione temporis

1. The Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute.

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

Article 12

Preconditions to the exercise of jurisdiction

1. A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5.

2. In the case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3:

   (a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;

   (b) The State of which the person accused of the crime is a national.
3. If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9.

Article 13
Exercise of jurisdiction

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

(a) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14;

(b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; or

(c) The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15.

Article 14
Referral of a situation by a State Party

1. A State Party may refer to the Prosecutor a situation in which one or more crimes within the jurisdiction of the Court appear to have been committed requesting the Prosecutor to investigate the situation for the purpose of determining whether one or more specific persons should be charged with the commission of such crimes.

2. As far as possible, a referral shall specify the relevant circumstances and be accompanied by such
supporting documentation as is available to the State referring the situation.

Article 15
Prosecutor

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

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

3. If the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or she shall submit to the Pre-Trial Chamber a request for authorization of an investigation, together with any supporting material collected. Victims may make representations to the Pre-Trial Chamber, in accordance with the Rules of Procedure and Evidence.

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

5. The refusal of the Pre-Trial Chamber to authorize the investigation shall not preclude the presentation of a subsequent request by the Prosecutor based on new facts or evidence regarding the same situation.

6. If, after the preliminary examination referred to in paragraphs 1 and 2, the Prosecutor concludes that the
information provided does not constitute a reasonable basis for an investigation, he or she shall inform those who provided the information. This shall not preclude the Prosecutor from considering further information submitted to him or her regarding the same situation in the light of new facts or evidence.

Article 16
Deferral of investigation or prosecution

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

Article 17
Issues of admissibility

1. Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:

   (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;

   (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;

   (c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3;
(d) The case is not of sufficient gravity to justify further action by the Court.

2. In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable:

   (a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5;

   (b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;

   (c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.

3. In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.
WORKS CITED

Human Rights Watch. www.hrw.org

Lawyers Committee for Human Rights. www.lchr.org


Official Site of the International Criminal Court www.iccnow.org


Status of Forces Agreement (SOFA)