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When a Good Idea Is Poorly Implemented: How the International Criminal Court Fails to Be Insulated from International Politics and to Protect Basic Due Process Guarantees

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WHEN A GOOD IDEA IS POORLY IMPLEMENTED:  
HOW THE INTERNATIONAL CRIMINAL COURT Fails TO BE INSULATED FROM INTERNATIONAL POLITICS AND TO PROTECT BASIC DUE PROCESS GUARANTEES

Andrew J. Walker*

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I. INTRODUCTION

The twenty-first century has begun with the most dramatic terrorist attacks in the history of the world. The United States can no longer isolate itself from the world and maintain the security necessary to protect its people, its enterprises, and the Constitution that governs them. The United States must instead be an active leader committed to dialogue with other countries about individual liberty and national responsibility. This dialogue must include discussion about the merits and capabilities of the International Criminal Court, and the weaknesses of its governing statute. A good discussion should start at home, with conversation about the United States' criminal system in the context of international relations, and then expand to parties around the world ready to join in the discussion.

The International Criminal Court ("ICC") began its operations in 2003 after years of preparation and many more years of need for such an institution. This Article discusses the Rome Statute of the International Criminal Court ("ICC Statute") written to direct the prosecution of future war criminals at this institution. The primary objective of this Article is to discuss minimal guarantees necessary to secure a legitimate ICC. Moreover, this Article is organized for an audience made up of American practitioners who have an interest in foreign relations and international law but do not have a significant international component in their practice.1 It is also written to address issues raised by spe-

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1 Many commentators have written about the ICC, but most of these articles are in specialized journals published primarily for a limited community of international scholars. See, e.g., Joel F. England, The Response of the United States to the International Criminal Court: Rejection, Ratification or Something Else?, 18 ARIZ. J. INT'L & COMP. L. 941 (2001); Monroe Leigh, The United States and the Statute of Rome, 95 AM. J. INT'L L. 124 (2001); Cara Levy Rodriguez, Slaying the Monster: Why the United States Should Not Support the Rome Treaty, 14 AM. U. INT'L L. REV. 805 (1999). There is a lack of materials that presents both strong legal arguments about the tribunal's flaws and supports its underlying necessity. This Article attempts to fill this gap by addressing these issues and appealing to a wider audience of American practitioners. For a wider discussion of the gap between international law and legal education in the United States, see Charlotte Ku & Christopher J. Borgen, American Lawyers and International Competence, 18 DICK. J. INT'L L. 493 (2000).
sionalists in the field of international criminal law. This Article is based on the premise that a fair and effective ICC will help to ensure that war criminals are held accountable for their actions\(^2\) and that such a tribunal has the capability to be an important check on the use of power.\(^3\) However, as the law promulgating the ICC currently is written, the ICC does not provide a structure obligatory for the basis of any institution of such great prestige, strength and necessity. The statute that created the court does not meet basic legal expectations held by practitioners in the courts of the United States. Most notably, the due process standards under the statute are deficient because of their ambiguities and omissions, and the statute permits raw political manipulation of legal issues. This article is meant to encourage discussion of these problems within broader segments of the United States bar.

The United States is not currently a part of the ICC and cannot join it until these flaws are addressed. Although it is in the best interest of the United States and the rest of the world to create a permanent international war crimes tribunal, the current tribunal will not be legitimate or effective without some basic reforms. This Article is a discussion of various flaws in the statute, flaws in the process by which the statute was drafted, and of recommended revisions to address these flaws.

Part II of this Article provides an overview of what the ICC is and the framework provided for it within the body of international criminal law. This part includes a discussion of the limited precedent that exists in world history for this tribunal, the relationship between domestic sovereignty and international institutions, differing views of the court from different parts of the world, and an explanation of how a properly drafted statute could benefit the United States. Part III discusses the need for reform. It provides an overview of the ICC Statute's flaws and discusses their significance. Specifically, this section focuses on the two most prominent deficiencies: the role of political influences and the lack of due process guarantees. Part IV discusses the need for express guarantees of the rights of individuals brought before the ICC for prosecution and for

\(^2\) It is possible to have a private cause of action against war criminals. See Christopher Munro, *Tribe Sues Germany for Colonial Genocide: We Want Justice for 1904 Campaign, Say Herero People*, DAILY TELEGRAPH (London), Jan. 31, 2003, at 17 (discussing a suit filed by representatives of the Hereros, a native tribe from Namibia, against a German bank for alleged assistance in attempted genocide that took place between 1904 and 1907), available at 2003 WL 12076658. However, this Article will only address public mechanisms for the accountability of war criminals.

\(^3\) This Article agrees with the American Bar Association's recommendations that there should be a fair and effective international criminal court created by multilateral treaty and that the United States should continue an active role in negotiating an international criminal court, but disagrees with wording in the Association's recommendation that rights afforded to accused persons and defendants merely meet "internationally recognized standards of fairness and due process," in light of the deficiencies in the statute discussed below. A.B.A. TASK FORCE ON AN INT'L CRIMINAL COURT, N.Y. STATE BAR ASS'N JOINT REPORT WITH RECOMMENDATIONS TO THE HOUSE OF DELEGATES, ESTABLISHMENT OF AN INTERNATIONAL CRIMINAL COURT (1993), reprinted in 27 INT'L LAW. 257, 268 (1993).
express limitations on the power of the justices of the tribunal. Part V places some of these flaws in context by discussing the problematic drafting process and the incohesive conditions under which the statute was designed. The final section contains a prospective glance at potential prosecutions in the court and conclusions regarding the necessity for the United States and its allies to proceed towards a more universal court that is more stable and less prone to abuse.

II. BACKGROUND

A. International Criminal Law: The Stage that Supports the International Criminal Court

This discussion must be placed in the context of the application of international criminal law.4 There are many great works of religious scholarship about the regulation of war,5 but, unlike most areas of the law, there is no broad tradition of secular legal interpretation.6 International criminal law has existed almost entirely in theory for centuries.7 In international relations, rarely does authority exist, other than through the use of force or political manipulation, particularly in regions where there is a weak domestic legal system. It should therefore be of no surprise that this is among the least developed areas of the

4 International criminal law is a body of law that provides criminal responsibility for grave breaches of international law. It is a cousin to international human rights law, which centers on protecting human dignity of the individual. See STEVEN R. RATNER & JASON S. ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY 9 (1997).


6 War criminals have historically been prosecuted since at least the time of the Ancient Greeks, and in isolated prosecutions in Europe. See Timothy L.H. McCormack, Selective Reaction to Atrocity: War Crimes and the Development of International Criminal Law, 60 ALB. L. REV. 681, 684-86 (1997). Examples include the 1268 trial in Naples of Conrad von Hohenstaufen, for initiating an unjust war and the 1474 trial of Peter von Hagenbach, governor of territories in what is now western Germany, for murder, rape, pillage and other crimes violating the “law of God and man.” Id. at 689-93. Individuals in the United States have been prosecuted for slaughtering Native Americans. See Captain Jordan J. Paust, My Lai and Vietnam: Norms, Myths and Leader Responsibility, 57 MIL. L. REV. 99, 116 n.60 (1972). However, there were very few war crimes trials documented until the twentieth century. For an overview of some early international criminal prosecutions, see 1 GEORG SCHWARZENBERGER, INTERNATIONAL LAW 462-66 (3d ed. 1957).

7 But see FRANCIS LIEBER, U.S. WAR DEP’T., INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE U.S. IN THE FIELD, GENERAL ORDERS No. 100 (1863) (codifying laws of war; drafted at order of President Lincoln and commonly referred to as Lieber Code), reprinted in NAVAL WAR COLLEGE, INTERNATIONAL LAW DISCUSSIONS, 1903: THE UNITED STATES NAVAL WAR CODE OF 1900, at 115 (1904).
law. For these reasons, a meaningful discussion of the ICC Statute must be placed in the context of basic legal precedent that exists, the environment in which the law will be enforced, and the relations amongst the parties affected by the law.

Recent history, particularly in the wake of the Cold War, has brought a complete end to colonialism and shows strengthened ties of global economic interdependence that mandate peaceful relations and dispute resolution mechanisms worldwide. Since the fall of the Soviet Union and the worldwide order imposed by the political realities of the Cold War, numerous sovereigns, free of the international alliances of the Cold War, have readily adapted to a different paradigm for the management of international relations. Between 1989 and 1999, almost a dozen international judicial institutions became active or were extensively reformed, compared to only about six or seven prior international judicial bodies.\(^8\) Countries worldwide have sought stable institutions that act under the rule of law and voluntarily have accepted broad international legal structures that cut deeply into their domestic sovereignties.\(^9\) The enforcement of basic human rights violations has moved from nonbinding expectations of sovereign nations without enforcement mechanisms and rare ad hoc war crime tribunals to complex doctrines designed to supercede and modify the very bases of domestic legal systems.\(^10\)

Any effective foundation for a legal standard governing international conduct must be drafted and implemented in a realistic way to prevent its irrelevance. Until the end of the Cold War, legalism was regularly estranged from major events in international relations and provided little insight towards the resolution of international crises.\(^11\) Since the Cold War, in the American acad-

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\(^11\) The fall of the Iron Curtain has brought an attempt at legalism never seen before in past milestones in Western history, such as the emergence of multi-polar world politics in wake of Napoleonic defeat at the Peace of Vienna in 1815, the failed peace in wake of German defeat at the Peace of Versailles in 1919 and the emergence of bipolar world politics in wake of war in Europe in the Yalta Conference in 1945. See David J. Bederman, *Constructivism, Positivism, and Empiricism in International Law: Legal Rules and International Society*, 89 GEO. L.J. 469, 470 (2001) (reviewing ANTHONY CLARK AREND, LEGAL RULES AND INTERNATIONAL SOCIETY (1999) and discussing its attempts to place the state’s role in international affairs within the conceptual framework that there is a rule of law for international relations).
eny there has been an unprecedented intersection of the rule-based idealism of international law and the methodological realism of international policy. This injection of relevancy and accountability into international law has led to ambitious agendas outside of the academy, unthinkable less than a generation ago.

The potential for the implementation of a system of positivist legal stability amongst the world’s sovereigns is comparable to the use of law to stabilize the western United States during its early development. The West evolved from being a region characterized by assault, murder, and ethnic cleansing to a safe and stable region that is a primary component to the peaceful leadership position held by the United States in the world today. This transformation was accomplished by drawing together a system of law and upholding it with strong due process guarantees. With respect for a rule of law that includes strong due process guarantees, a structural vacuum of lawlessness can be filled. This includes the power of politics in contemporary international relations. It nonetheless remains difficult to picture a broad legal system for basic war crimes having any legitimacy over the world’s diverse thought paradigms, communication styles, and cultural expectations. While the ICC Statute is not the Magna

12 Anne-Marie Slaughter et al., International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship, 92 AM. J. INT’L L. 367, 367 (1998) (discussing interdisciplinary literature at the convergence of the study of the international law and the study of international relations, and the relationships between international structures and the processes which govern them).


14 Compare C.L. Sondichsen, The El Paso Salt War, 1877 (reprint ed. 1973) (chronicling race war that killed approximately ten percent of the population of El Paso, Texas, after which no one was tried for any of the crimes that took place during the fighting), and Charles M. Robinson III, The Men Who Wear the Star: The Story of the Texas Rangers (2000) (reviewing both the heroism and the abuse of power by authorities who were establishing the basis for a legal system amongst the chaos of South Texas in the nineteenth century), with Andrew Walker, Mexican Law and the Texas Courts, 55 BAYLOR L. REV. 225 (2003) (tracing history of jurisprudence in Texas, from chaos of the nineteenth century to its current status as a very stable guarantor of individual rights, through the fusion of law that is foreign to the eastern United States and the law that was the basis of the legal system in the East), and Yuanchung Lee, Rediscovering the Constitutional Lineage of Federal Indian Law, 27 N.M. L. REV. 273 (1997) (tracing history of interpretation of United States Constitution through application of federal Indian law). Despite the gains that may be held out as a model for the world, it cannot be stressed strongly enough that the United States has considerable challenges remaining to create an equitable system of law in the wake of its westward expansion. See, e.g., Christine A. Klein, Treaties of Conquest: Property Rights, Indian Treaties, and the Treaty of Guadalupe Hidalgo, 26 N.M. L. REV. 201, 218 (1996) (drawing together histories of treaties made to protect Native Americans and Mexican Americans as the basis for fuller implementation of treaty guarantees).

15 See George F. Kennan, American Diplomacy 1900-1950, at 99 (1951) (discussing traditional argument that any attempt to regulate international relations through the application of law ignores the “significance of political problems and the deeper sources of international instability”).
Carta, it is an initial step towards real limits on the most serious abuses of power by lawless authorities. All legal systems must start at some point.  

B. What is the International Criminal Court?

The ICC is a permanent institution that is intended to have power to exercise jurisdiction complementary to national criminal jurisdictions for the most serious crimes of international concern, as set out in the statute promulgating the court. 17 The ICC is governed by the provisions in its enacting statute, customary international law, 18 and the principles and guidelines developed by the various treaties that make up the loose structure of international criminal law. The ICC Statute outlines the scope of the court’s mandate and is divided into thirteen primary parts. 19 The court has a trial division, an appellate division, and a pre-trial division; each division with its own judges. 20 It currently claims jurisdiction over the offense of genocide, crimes against humanity, and war crimes. 21

C. Sovereignty and the Development of the International Criminal Court

During the early twentieth century, the Permanent Court of International Justice 22 stated in dictum, “International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law.” 23 Implicit in this statement is the concept that international law is based upon the respect for state sovereignty. The concept of sovereignty has been the legitimizing force for all theories of international law

16 See generally THE FEDERALIST NO. 14 (James Madison) (Benjamin Fletcher Wright ed., 1961) (presenting the United States as being a republic of unprecedented size bound together in the libertarian ideals of its Constitution).


18 See id. art. 22.

19 Sections of the statute include: (1) Establishment of the Court; (2) Jurisdiction, Admissibility and Applicable Law; (3) General Principles of Criminal Law; (4) Composition and Administration of the Court; (5) Investigation and Prosecution; (6) The Trial; (7) Penalties; (8) Appeal and Revision; (9) International Cooperation and Judicial Assistance; (10) Enforcement; (11) Assembly of States Parties; (12) Financing; and (13) Final Clauses. See generally id.

20 Id. arts. 34(b), 39.

21 Id. art. 5, § 1(a)-(d).

22 The Permanent Court of International Justice was created by the League of Nations for the peaceful resolution of international disputes and is the basis on which the United Nations created the International Court of Justice. For an historic overview of early international courts, see Fred L. Morrison, The Future of International Adjudication, 75 MINN. L. REV. 827, 828-33 (1991).

23 S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (scr. A) No. 10, at 18 (Sept. 7).
since the Peace of Westphalia attempted to end the European tradition of interference in other states' affairs.\(^{24}\) However, even during the seventeenth century, there was a Hobbsian need for alliances to restrain foreign hostilities. The strengthened ties and interdependence that grew with technological advances in communication and transportation of the twentieth century has led to a greater need in the twenty-first century for alliances and for non-state organizations that infringe on the traditional concepts of relations amongst states.

The most basic limitations on state sovereignty since the creation of the United Nations are the principles of international law recognized by the Charter and Judgment of the Nuremberg Tribunal.\(^{25}\) The Charter of the Nuremberg Tribunal placed limits on the traditional concept of sovereignty when it determined that basic international legal standards included crimes against humanity, such as the prohibition against the extermination of a civilian population, and then applied this law under the theory of universal jurisdiction.\(^{26}\) Before World War II, state sovereignty was accepted as a barrier to outside prevention of such crimes, and as the basis for colonial efforts to abuse and extinguish native peoples. Since World War II it has been generally accepted by the United

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\(^{26}\) The Nuremberg Charter defined crimes against humanity as:

- murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

Chart of the International Military Tribunal, annexed to Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, art. 6(c), 59 Stat. 1544, 1547, 82 U.N.T.S. 279, 288, reprinted in 1 Trial of the Major War Criminals Before the International Military Tribunal 10, 11 (1947); see F.B. Schick, The Nuremberg Trial and the International Law of the Future, 41 Am. J. Int'l L. 770, 783 (1947) (noting controversial conclusion of the Nuremberg Trial that aggressive war is not only illegal in international law but also that individuals as well as states may be prosecuted); see also U.S. Dep't of the Army, Pamphlet No. 27-161-2, 2 International Law 233-34 (1962) (Far Eastern Counterpart of the Nuremberg Tribunal based on Potsdam Declaration of July 26, 1945 jointly issued by China, the United Kingdom, the United States and subsequently adhered to by the Soviet Union).

\(^{27}\) See Samantha Power, A Problem from Hell: America and the Age of Genocide 4-20 (2002) (discussing state sovereignty shielding individuals in the government of Turkey from being held accountable for the mass murder of approximately one million Armenian people, and other systematic abuses of this population during World War I).

\(^{28}\) See generally Adam Hochschild, King Leopold's Ghost: A Story of Greed, Terror, and Heroism in Colonial Africa (1998) (discussing a carefully documented review of a geno-
States, and around the world, that basic standards of civility in which a sovereign state respects the human rights of individual people fall under the rule of international law.\textsuperscript{29} These limitations have been reinforced by the creation of the ad hoc International Criminal Tribunals for the former Yugoslavia\textsuperscript{30} and Rwanda.\textsuperscript{31}

Even at the beginning of the Cold War, there was discussion of an international criminal court.\textsuperscript{32} Early in the Cold War, the United Nations drafted rules for war crimes trials for the Korean conflict,\textsuperscript{33} but there were no trials following the conflict because the prisoners held by the United Nations Command were repatriated.\textsuperscript{34} Like the Korean conflict, there is very little development of the law that came from the American intervention in Vietnam.\textsuperscript{35} From a global perspective, the largest failings of the international community came after the genocides in Cambodia,\textsuperscript{36} Uganda,\textsuperscript{37} Bangladesh,\textsuperscript{38} and the demise of Bangla
cide, much larger than that committed against the Jewish people in World War II, committed by nineteenth-century Belgian colonists in the Congo).


\textsuperscript{31} \textit{See} S.C. Res. 955, U.N. SCOR, 49th Sess., 3453rd mtg., U.N. Doc. S/RES/955 (1994) (resolution establishing International Criminal Tribunal for Rwanda). The story of Rwanda is still largely obscure. It is truly amazing that there is any rule of law in Rwanda after its mind-boggling national pogrom of mechanized but manual, physical dismemberment of ten percent of its population. \textit{See} Mark A. Drumbl, \textit{Rule of Law Amid Lawlessness: Counseling the Accused in Rwanda's Domestic Genocide Trials}, 29 COLUM. HUM. RTS. L. REV. 545, 561-64 (1998) (discussing "hard work" by thousands of machete-wielding killers, killing approximately one million people, by hand, in a one hundred day period; of the captured, only those who could afford to pay their killers to be shot escaped the machetes).


\textsuperscript{34} JORDAN J. PAUST ET AL., INTERNATIONAL CRIMINAL LAW CASES AND MATERIALS 638 (2d ed. 2000).

\textsuperscript{35} \textit{But see} United States v. Calley, 22 C.M.A. 534 (1973) (discussing prosecution relating to the My Lai massacre).

Desh International Crimes Tribunals due to raw political pressure at the peak of the Cold War.\textsuperscript{39}

D. Acceptance of an International Criminal Court in the United States and Abroad

In light of the failings in Cambodia, Uganda, Bangladesh, and elsewhere, a permanent and independent ICC is important because international politics do not always permit a legal analysis of crimes against humanity. The ICC has the potential to place the voice of reason outside of the roar of politics. But reason, as the basis of law or in any social interaction, is but an amoral servant of private interests.\textsuperscript{40} It is due to this reality that most war criminals act without being held responsible, and that international criminal law has rarely stood for more than weakly persuasive authority. The ICC is important because it offers the possibility of a stable and legal alternative to the traditional use of Machiavellian politics and brute force as the guide to international relations,\textsuperscript{41} and because it offers a forum for the use of reason to hold war criminals accountable for their acts.

The idealism of the importance of the ICC is most easily accepted from the perspective of European countries. Upon its military pacification, Europe’s traditional concepts of international relations were rejected. Europe has the

\textit{Court’s Definition of Genocide}, 16 EMORY INT’L L. REV. 351 (2002). However, under the definition of genocide accepted in the world, murder on the basis of political identification or level of education does not enhance simple murder to genocide, even if it is mass murder. See Alexander K.A. Greenawalt, \textit{Rethinking Genocidal Intent: The Case for a Knowledge-Based Interpretation}, 99 COLUM. L. REV. 2259, 2288-94 (1999) (calling for definition of genocide based on effects of act, rather than intent of act). For genocide to exist, murder must be conducted on the basis of religious, ethnic, racial or national identification, but not political or educational identification. See Convention on the Prevention and Punishment of the Crime of Genocide, \textit{supra} note 32, art. 2; ICC STATUTE, \textit{supra} note 17, art. 6; see also Jordan J. Paust, \textit{Congress and Genocide: They’re Not Going to Get Away With It}, 11 MICH. J. INT’L L. 90, 94-95 (1989) (discussing the intersection of politics and the definition of genocide).


\textsuperscript{38} See JAHANARA IMAM, OF BLOOD AND FIRE: THE UNTOLD STORY OF BANGLADESH’S WAR OF INDEPENDENCE (Mustafizur Rahman trans., 1989) (chronicling of the slaughter, torture and rape of millions of people during Bangladesh’s war for independence from Pakistan).


\textsuperscript{40} See REINHOLD NIEBUHR, MORAL MAN AND IMMORAL SOCIETY, at xiv-xv (1934) (discussing the limitations of human reason to solve social injustice by moral and rational means in the context of Christian theologian’s response to the existence of evil).

unique historical experience of having moved from a world of Hobbsian strength and through self-destruction, to a rejection of the concept of balanced powers imbedded in the Peace of Westphalia. Europe’s Cold War geopolitical placement allowed it to develop a rule-based political culture not possible in parts of the world more susceptible to outside influences. Europe resists unilaterally because its rejection of militarism has thus far been successful and because this rejection has left it with little capacity to act.\textsuperscript{42} For Europe, international law is not idealism; it is pragmatic policy that has little cost.\textsuperscript{43} Outside of the political constraints of the Cold War, there is a strong European confidence that international law has application in areas where there has been no military pacification of international power politics.

In other parts of the world, such as in Latin American countries, the ICC represents a check against foreign intervention. Across the developing world, participation in the ICC represents the possibilities of having a voice in international affairs and more peaceful regional development. In many countries, such as Chili and Fiji, the ICC represents added security as a check against non-democratic forces.\textsuperscript{44} In some nations, participation is simply a statement of aspirational goals for their domestic legal system, respect for the rule of law, or of commitment to the underlying ideals of the court.\textsuperscript{45} For extremely repressive countries, such as Cuba, the act of simply signing the treaty that creates the ICC could be an attempt to appear more peaceful and law abiding, an attempt to make itself less isolated from the free world, or simply pure politics.

Around the world, many countries could resist the creation of the court for several justifications. Countries such as Mexico or Columbia, that have active rebel forces, may want to resist joining the ICC out of concern that its governance could allow prosecution upon the recognized government for its treatment of the forces seeking to overthrow it. In addition, Israel has a unique history, a lack of trust in the world community, and a geopolitical position that shows how an after-the-fact prosecution does not necessarily bring peace or security. Other Middle Eastern states may be reluctant to accept the court because they question some international human rights principles.\textsuperscript{46} Outside of


\textsuperscript{43} \textit{Id.}

\textsuperscript{44} See Andrew Moravcsik, \textit{The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe}, 54 \textsc{Int’l Org.} 217, 228 (2000) (discussing the desire of some democracies to use international commitments as a check on non-democratic forces in their own countries).


\textsuperscript{46} See generally \textsc{Kevin Dwyer, Arab Voices: The Human Rights Debate in the Middle East} (1991) (anthropologist’s study of relationship between human rights principles and broader cultural aspects of life in Egypt, Morocco, and Tunisia).
Europe and the Americas, many cultures have historically not always placed individual rights above other cultural traditions and communal needs.\textsuperscript{47}

The existence of a strong ICC is in the United States' best interest. On a primary basis, while the United States cannot rely on most states to carry out their international obligations and must be able to protect itself from international outlaws, it cannot be required to take on all of the world's burdens. An effective international criminal court is capable of alleviating this burden by maintaining security abroad where the United States cannot or should not act. Ideally, it can force the elites of a country to respect the severity of the consequences to be imposed by political risks of international criminal acts. Furthermore, it can compel national leaders to recognize the need for an international system of multilateral accountability to replace the former bipolar political status of the Cold War. This deterrence capability remains even if it is unrealistic to expect an institution based on the Kantian ideal of interdependence amongst sovereigns\textsuperscript{48} to serve as a reliable prophylactic to crimes against humanity.\textsuperscript{49}

On a secondary basis, since the end of the Cold War, the United States can attack virtually with impunity. For example, the United States has recently overthrown Iraq, a large country six thousand miles away that showed only contempt for international law. The United States accomplished this with limited international support, in a short amount of time, and with relatively little negative effect on its economy or military capabilities. Despite the legal arguments in support of military action in this situation\textsuperscript{50} and the need to deter Iraqi aggression with both force and legalism, this display of the capabilities of American power is contrary to the basis of reciprocal self-interest that underlies international peace.

The War in Iraq exposes a power gap between the United States and most of the world. This power gap, when coupled with a perceived lack of self-interest the United States has in maintaining a peaceful world, encourages fear

\textsuperscript{47} See generally Samuel P. Huntington, The Clash of Civilizations and the Remaking of World Order (1996) (discussing clash of Western values with the traditions and economic needs of the non-Western world).

\textsuperscript{48} See generally Immanuel Kant, To Perpetual Peace: A Philosophical Sketch, in Perpetual Peace and Other Essays 111, 119 (Ted Humphrey trans., Hackett Publ'g Co. 1983) (discussing belief that human nature will eventually force the creation of a peaceful global community).

\textsuperscript{49} See generally Alfred P. Rubin, A Critical View of the Proposed International Criminal Court, Fletcher F. World Aff., Fall 1999, at 139 (arguing that the ICC's concentration on the use of a binding positive law to provide a tribunal to enforce basic morals makes it impossible to fulfill its purpose); Michael L. Smidt, The International Criminal Court: An Effective Means of Deterrence?, 167 Mil. L. Rev. 156, 157 (2001) (arguing that application of international law will not deter criminal state-actors at the international level as well as military force). A combination of the legal and military solutions may be the best alternative.

and distrust of American power, even when there are very compelling reasons for the United States to exercise its power. This fear and distrust underlies the reason why many educated and freedom-loving peoples take exception to the role that the United States has earned in the world. Therefore, if the ICC served as a mechanism to enforce the basic norms of international law, there would be less fear and distrust, and more international cooperation.

The world today has few mechanisms of any strength for enforcing the norms of international humanitarian law other than simple moral suasion and raw force. International regulatory agreements have traditionally not been necessary to keep non-rogue states in line with international expectations.\(^51\) However, any state, if there exists no more than moral norms, may more easily set aside such expectations in the name of political or military necessity or efficiency.\(^52\) This is especially true in light of the United States’ ability to make massive military strikes from a ‘distance and this country’s political tectonics: introverted, but positioned at the epicenter of the global order of our era. The United States therefore has an interest in showing that it respects the rule of law by taking the lead in the creation of a mechanism that enforces basic moral conduct on the world stage and that is not plagued by flaws in basic procedure.

III. THE NEED FOR REFORM

A. Significance of the Flaws in the ICC Statute

If the ICC does not fall into oblivion, it will necessarily claim the privilege of a wide jurisdiction. This broad jurisdiction extends over crimes under customary international law,\(^53\) beyond the United States Constitution,\(^54\) and, in

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52 This is a primary reason why international law exists beyond basic punishment of evil. During the Cold War, when the United States faced brute totalitarian force of unprecedented magnitude, a responsible check on American policies may have prevented results that are not congruent with international (or American) expectations, such as the organized mass killings of civilian populations by a Guatemalan government supported by the United States. While it may not have been politically realistic to seek such a design during the Cold War without hindering victory, it is currently more realistic to seek an international watchdog during the War on Terrorism because the nature of the enemy is a philosophy that does not have power over any sovereign state. For a review of the status of possible war crimes prosecutions in Guatemala, see Nathanael Heasley et al., Impunity in Guatemala: The State’s Failure to Provide Justice in the Massacre Cases, 16 AM. U. INT’L L. REV. 1115 (2001).

53 Customary international law is a limited body of law defined by the expectations of all human beings as set out by their interactions over long periods of time. See generally Jordan J. Paust, Customary International Law: Its Nature, Sources and Status as Law of the United States, 12 MICH. J. INT’L L. 59 (1990) [hereinafter Paust, Customary International Law]. It is the weakest form of international law and does not always control the outcome of a case. See, e.g., Garcia-Mir v. Meese, 788 F.2d 1446, 1447-48 (11th Cir. 1986) (no due process right recognized under customary international law for unadmitted aliens seeking parole revocation hearings). It has long
some circumstances, over United States citizens regardless of whether the United States agreed to the treaty that created the statute.\textsuperscript{55} Universal jurisdiction exists only for a limited number of crimes that are of a nature of such seriousness that any state should be able to prosecute the perpetrator without regard to where the crime took place or where the perpetrator is located.\textsuperscript{56} As a result, universal jurisdiction exists only for offenses that include genocide and crimes against humanity.\textsuperscript{57} Such jurisdiction may be exerted unless the treaty that provides statutory authority for a court precludes a country from rendering specific groupings of individuals to the court.\textsuperscript{58} This assertion of jurisdiction was most famously applied at Nuremberg over German citizens, regardless of the fact that Germany was not a party to the treaty creating the Nuremberg Tribunal. The ICC Statute similarly has no such limitation. An aggressive ICC Prosecutor could assert this jurisdiction over citizens of the United States, regardless of the potential innocence of the Americans accused and despite significant flaws in the ICC Statute.

\textsuperscript{54} There is no right of appeal from an international criminal trial to the courts of the United States. See Hirota v. MacArthur, 338 U.S. 197, 198 (1948) (per curiam) (discussing an attempted habeas corpus from the International Military Tribunal for the Far East).


\textsuperscript{56} See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 (1987); Judgment of International Military Tribunal at Nuremberg (Oct. 1, 1946), reprinted in 1 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, supra note 26, at 171, 223 (an individual “cannot claim immunity while acting in pursuance of the authority of the State if the State in authorizing action moves outside its competence under international law”). See generally Paust, supra note 55 (discussing the reach of the jurisdiction of the ICC and the implications of this jurisdiction for the United States).

\textsuperscript{57} See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 & cmt. a (defining the jurisdiction of States to punish certain offenses, including genocide).

\textsuperscript{58} This was done after World War II in Nuremberg and Tokyo and during the 1990s in the tribunal for the former Yugoslavia, but not in the tribunal for Rwanda, where the Rwandan government sanctioned the proceedings. See Paust, supra note 55, at 5.
B. Overview of the Flaws in the ICC Statute

In light of the monumental importance of the ICC and the authority that exists for it to exercise a wide jurisdiction, the court is not acceptable in its current status. The key to international compliance to a treaty is the fairness of international rules themselves, and a primary reason why sovereigns obey the dictates of international bodies is the legitimacy of the processes by which such bodies distribute justice. International law, however, outside of a theoretical vacuum, can easily be used as a device to serve as no more than "a basis for a rhetoric of recrimination." Any international institution that is not perceived as a fair administrator of substantive justice will fail to meet its goals. The ICC Statute, as it is currently written, creates substantial risks of unfair trial proceedings and politically motivated prosecutions.

Instead of standing by as the ICC deteriorates into complete irrelevance, nations with strong legal systems must lead the process to reform the statute. The parties to this process must be willing to substantially rewrite the statute, but the process itself should begin with an overview of some basic flaws. The ICC Statute allows the court to undermine the settled system of international governance and the United States' position in that system by infringing on the role of the United Nations Security Council ("U.N. Security Council"). The ICC Statute also allows the ICC Prosecutor to be chosen through an overly political procedure. The statute has unclear due process guarantees; it defines its own jurisdictional limits and asserts a jurisdiction above that of all nations' laws, including countries that have not agreed to be within the court's jurisdiction.

These flaws, when viewed from a broader perspective, show a statute that does not reconcile individual culpability and accountability, or individual rights, with the wider interactions of states, and their individual legal systems. If the world community is going to develop a more effective system for the implementation of a system of basic accountability out of the "patchwork" of international criminal law, it must recognize the limitations of the dichotomy between individuals and states. Any international legal system that does not

60 Id.
62 See generally FRANCK, supra note 59 (fairness in international governance).
63 See Michele Caianiello & Giulio Illuminati, From the International Criminal Tribunal for the Former Yugoslavia to the International Criminal Court, 26 N.C. J. INT'L L. & COM. REG. 407, 410 (2001) (describing fusion of statutory law, international treaties, customary law, and case law as a "complex patchwork composed of different pieces").
do so will fail. For this reason, most countries do not assent to international agreements unless it is their intent to meet the agreement's standards in their domestic proceedings. By the same token, a country should not agree to an international accord that requires the opposite: that it accept unreasonably lower standards in order to abide by the accord.

In order for the rule of law in world affairs to have any integrity, the most despicable war criminals must have a fair trial and the court of law must be free from political influences. The right to a fair trial has long been accepted as a basic human right. Nonetheless, a lead drafter of the ICC Statute has ignored glaring due process concerns in the statute, stating that procedural law is not of primary importance because "international human rights norms and standards on fairness have reached such a level that developing a common denominator of a sufficiently high standard to satisfy the requirements of most countries of the world is quite possible." However, this ideal has yet to occur at the International Criminal Tribunal for the Former Yugoslavia ("ICTY"), which has allowed extremely sloppy trial procedures. In one trial, Dusko Tadić, a Bosnian Serb, was convicted of eleven crimes. Absurdly enough, the tribunal included among these convictions a crime that was never charged in the indictment. As a result, the accused had no opportunity to even prepare a defense to this charge. The tribunal also allowed anonymous witnesses to testify to primary parts of the prosecution's case and did not provide adequate discovery or adequate security for defense witnesses.

and the individual in order to have greater accountability for human rights atrocities and the author's prescription for how to do so).


70 Id.


73 Mark S. Ellis, Achieving Justice Before the International War Crimes Tribunals: Chal-
As discussed in detail below, the ICC Statute permits the same and similar violations to those allowed at the ICTY. It is not reasonable to expect the United States to extradite its people to the jurisdiction of the ICC, where due process of law is not suitably guaranteed and where there is susceptibility to abuse and ineffectiveness. The ICC is a global tribunal with a voice of authority and prestige far greater than any domestic trial forum to which the United States would agree to an extradition. While the United States Constitution does permit extradition to international tribunals with foreign rules, this certainly does not mean that this country must agree, or should agree, to do so. Rather than to submit to this institution, the United States and other stable democracies with strong judicial systems, checks and balances on the use of power, and histories of solid due process guarantees, should lead the world community in the development of a tribunal that has the necessary legal structure to meet its great mandate and that does not force strong countries to derogate from centuries of judicial integrity.

The judicial stability and responsibility in the United States has allowed for significant advances in areas of great need but is certainly not the only basis for creation of an international criminal court. Strong democracies such as Sweden and the United Kingdom developed over centuries of scholarship, experience, and stability, and maintained their high standards throughout the twentieth century. As a whole, however, there is no such precedent in most of the world. An effective ICC Statute must not reject the due process guarantees at

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74 See Lynn Sellers Bickley, U.S. Resistance to the International Criminal Court: Is the Sword Mightier than the Law?, 14 EMORY INT’L L. REV. 213, 247-50 (2000) (arguing that the substantive rights of Americans will be met at the ICC because it meets international minimal due process standards and because the United States allows extradition to countries with legal systems not as “well developed” or “well-defined” as U.S. law).


76 See, e.g., TEX. FAM. CODE ANN. §§ 54.01-.11 (Vernon 2002 & Supp. 2003) (setting forth procedures for the defense and prosecution of minors in the Texas Juvenile Justice System, which might have the most extensive due process guarantees in the world, based on the guarantees of the United States and Texas Constitutions, and additional statutory guarantees designed to rehabilitate and to maintain order and dignity in an accused person’s life).

77 See, e.g., HUGO TIBERG ET AL., SWEDISH LAW: A SURVEY (James Hurst trans., 1994).

the basis of strong common law and civil law legal structures that have been developed over centuries of history. Otherwise, it will have little hope of successfully being a responsible entity with the capability to maintain the credibility and relevance necessary to punish the most serious crimes of concern to the international community and to help prevent future war crimes.79

The most basic issues that will secure the ICC’s success and legitimacy are due process guarantees. Beyond due process concerns are portions of the statute that fail to protect against the effect of political forces on this unestablished legal institution. The following is an analysis of problems in the ICC Statute with a focus on the most critical deficiencies.

C. Political Influence Over a Fledgling Legal Institution

There are four major political problems in the ICC Statute.80 First, the statute places considerable authority in the role of the ICC Prosecutor but does not insulate the Office of the Prosecutor from the politics of the Assembly of States Parties. In addition, the statute provides the court with political power that infringes on the U.N. Security Council’s capacity to effectively fulfill its duties. Furthermore, the statute does not allow for exceptions to jurisdiction for foreign troops from non-signatory countries invited by signatory countries into their jurisdictions. Finally, the statute’s jurisdiction is not truly complimentary to sovereign countries.

1. Prevention of Political Pressure on the Office of the Prosecutor

The ICC Prosecutor serves for a period of nine years81 and is elected by an absolute majority of the Assembly of States Parties to the treaty.82 The deputy prosecutors are elected in the same manner and for the same term from a list provided to the Assembly of States Parties by the ICC Prosecutor.83 An absolute majority of the Assembly of States Parties can remove the Prosecutor for

79 See ICC Statute, supra note 17, pmbl. (stating the purposes of the ICC).
80 Many commentators have already addressed all of these problems. In this Article, I attempt to take a fresh look at them and to provide feasible alternatives to the statute.
81 ICC Statute, supra note 17, art. 42, § 4.
82 Id.
83 Id.
"serious misconduct" or a "serious breach" of duties. Deputy prosecutors cannot be removed without action by the Assembly.

This statutory scheme places extensive power over legal actors in the Assembly of Member States, which is a political body. This oversight is not a check on the justices and the Prosecutor, but rather a precarious infusion of politics into the legal system. The position of the ICC as an alternative to the use of politics or force places the court's Prosecutor into a unique balancing act. It must serve as a legal operative in pursuit of justice and must serve as a legal operative with no law enforcement personnel to rely upon. It must serve in this capacity while tightly constrained by the Assembly of Member States.

The ICC Prosecutor fits into several more structural constraints. The ICC will never have an army, deputies, or substantial coercive power. This separates the Prosecutor from the primary historical precedent in the Nuremberg Tribunal. This tribunal was uniquely positioned to establish international law because there were few political restraints upon it. The Allied armies had conquered Germany, captured war criminals, had complete access to the records of the Axis Powers, and had a mandate as a victor's tribunal. The ICC, other than a relatively weak requirement for state assistance, is in no such position. In order for the ICC Prosecutor to be effective, the ICC Statute must therefore be reformed to create extensive checks and balances to compensate for the court's lack of a military mandate in most areas where it will attempt to assert jurisdiction and to prevent the abuse of power within the mandate it has.

The statute states that the Office of the Prosecutor has the right to act "independently as a separate organ of the Court." In an attempt to isolate the office from international politics (or at least the world's most powerful states), the statute does not even permit the Prosecutor to be overseen by the U.N. Security Council. The statute provides for a powerful prosecutor that can instigate investigations and present them to an institution similar to a grand jury called the Pre-Trial Chamber. The Pre-Trial Chamber is a body of judges that provides a weak check on the Prosecutor. It may question an investigation or reject the filing of an indictment. Despite the decision of the Pre-Trial Chamber, it may not completely prevent the Prosecutor from pursuing a charge because the

84 Id. art. 46, §§ 1(a), 2(b).
85 Id. art. 46, § (2)(c).
86 See id. art. 93.
87 Id. art. 42, § 1.
88 Id. art. 15. The ICC Statute establishes three situations that set into motion the exercise of its jurisdiction: a state party referral of a situation to the Prosecutor for investigation, referral by the United Nations Security Council, and independent initiation of an investigation by the Prosecutor. Id. art. 13(a)-(c).
89 Id. art. 15(4).
90 Id. arts. 53, 58.
Prosecutor may continue to use its weight to further investigate a claim or related claim, even if the Pre-Trial Chamber rejects it.91

Ideally, the integrity of a prosecutor should keep him or her from being handicapped by extra-legal politics. However, no matter how mindful a prosecutor at the ICC is, the process for selection and removal of the prosecutor virtually guarantees that the Prosecutor will not be able to complete his or her responsibilities. The Assembly of Member States select and replace the individual who holds this office,92 and have too much power over this person.

The mere potential for the Assembly of Member States to make good decisions is not a reasonable rationale for leaving its power unchecked. This body should nonetheless be commended for its choice of the first ICC Prosecutor. The Assembly selected Luis Moreno Ocampo of Argentina to be the inaugural ICC Prosecutor.93 Ocampo has experience prosecuting individuals within the military dictatorship of Argentina for severe human rights abuses;94 he has campaigned against governmental and corporate corruption95 and has reviewed abuses within sham military trials following the Falkland Islands War.96 In addition, Ocampo has served as a visiting professor at Harvard Law School, is widely respected both domestically and internationally,97 and has been a thoughtful voice of pragmatism at the foundation of human rights law scholarship.98 Nonetheless, the ICC Statute wedges Ocampo between weakness and manipulation, leaving his wits restrained and his experience and integrity hampered by perverse constraints. Even if Ocampo can be a John Marshall figure and bring a legitimate rule of law under trying circumstances, the statute provides neither the support nor the checks and balances necessary for there to be a lasting rule of law untarnished by nefarious and foolish political agendas.

Some of the legal systems of members of the Assembly of States Parties are little more than "tools of repression."99 The legal systems of approximately

91 Id. art. 15(5).
92 Id. arts. 42, 46, § (2)(b).
94 Id.
96 See Roth, supra note 93.
97 Id.
half of the Assembly of States Parties have been implicated in extreme human rights abuses, including extra-judicial killings and torture. This body is likely to be a similar body to the General Assembly of the United Nations, a body of career diplomats, many of whom represent non-democratic nations with political agendas that have little to do with the ideals at the basis of the United Nations or the ICC. The United Nations General Assembly is an institution where political horse-trading, nationalist agendas, and corrupted ideals have allowed ironically disgusting appointments. This cynicism includes the appointment of Iraq as the head of the United Nations Commission on Disarmament and Libya as the head of the United Nations Commission on Human Rights. Beyond irresponsible horse-trading, it is a legitimate possibility that political mudslinging will dilute the integrity of the Prosecutor at the ICC. There are already concerns that member states have not followed the statute’s mandated judicial nomination procedures in order to nominate less qualified, but politically preferable nominees.

World politics should be one of many checks, not the end-all authority over the Prosecutor. The potential for mismanagement is magnified because citizens in most constituent countries are not directly affected by the crimes prosecuted at the ICC. This lack of attention by a citizenry affected by crime leaves the Prosecutor disproportionately open to lobbying by interest groups unchecked by the raw democratic scrutiny that faces prosecutors in domestic systems, and directly impairs the rule of law. A workable statute demands more safety measures to prevent states in the Assembly of States Parties with weak national judicial systems, or states with manipulative or irresponsible diplomats, from bringing misplaced expectations and improper political authority over the role of the Prosecutor. The mere possibility that the statute allows the Office of the Prosecutor to be abused, destroys the credibility of the court.

soc.org/Intllaw&%20AmerSov/CaseyHRR.pdf (last visited Nov. 13, 2003).

100  Id.


103  Civil Society Expresses Concern About Nomination Process of Judges to the ICC, at http://www.globalpolicy.org/ngos/int/other/2002/1202icc.htm (discussing that The Coalition for an International Criminal Court, a private organization that managed drafting convention’s lobbyist coalition, now has concern that Statute approved is not being followed).

104  See THE FEDERALIST NO. 48, at 345 (James Madison) (Benjamin Fletcher Wright ed., 1961) ("‘The concentration [of power] in the same hands, is precisely the definition of despotic government. It will be no alleviation, that these powers will be exercised by a plurality of hands, and not by a single one. One hundred and seventy-three despots would surely be as oppressive as one.") (quoting THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 195 (1801)).
ICC activist and former Nuremberg Prosecutor Benjamin Ferencz asserts, "The truth is that no other Prosecutor in human history has been subjected to as many controls as exist in the ICC Statute . . . ."105 A brief look at the criminal justice system in the United States shows this statement to be inaccurate. In the United States, there is a long history of prosecutorial autonomy despite intense political pressures.106 Prosecutors' decisions are regularly challenged, but there is no movement to vest prosecutorial authority elsewhere107 or even a desire for such a movement. This is largely due to extensive structural controls that check and balance the power of autonomous prosecutors and prevent the abuse of power within this system. United States prosecutors have considerable power108 that is held in check by a strong federal constitution, additional state laws,109 normative models for systematic examination and reexamination of the law,110 consistent judicial enforcement of standards that are usually

107 But see Richard S. Frase, Comparative Criminal Justice as a Guide to American Law Reform: How Do the French Do It, How Can We Find Out, and Why Should We Care?, 78 CAL. L. REV. 542, 553-665 (1990) (arguing that certain features of the French criminal justice system could reform the United States system, including restrictions on the power of the prosecutor and a narrower scope of the field of criminal law); James Voreenberg, Decent Restraint on Prosecutorial Discretion, 94 HARV. L. REV. 1521, 1523 (1981) (calling for limitations on prosecutorial power).
108 See Newman v. United States, 382 F.2d 479, 480 (D.C. Cir. 1967) ("Few subjects are less adapted to judicial review than the exercise by the Executive of his discretion in deciding when and whether to institute criminal proceedings, or what precise charge shall be made, or whether to dismiss a proceeding once brought."); see also United States v. Cox, 342 F.2d. 167 (5th Cir. 1965); Peter Krug, Prosecutorial Discretion and Its Limits, 50 AM. J. COMP. L. (Supp.) 643, 645-64 (2002) (discussing the broad prosecutorial discretion in charging function).
very clear, consistent attempts at expansion of constitutional norms by an autonomous defense,¹¹¹ the absolute right of a defendant to the first level of appeal in a multi-layered system of appellate review,¹¹² professional organizations with high standards,¹¹³ the accountability of a local electorate,¹¹⁴ close scrutiny by police unions and victims' rights lobbies, and open media coverage.¹¹⁵ Each check on prosecutorial power has developed at least one legal doctrine designed to prevent the abuse of power. Such checks on prosecutorial power include prohibitions against discriminatory or selective prosecutions¹¹⁶ and checks on vindictive prosecution.¹¹⁷

reform in dozens of state codes and thousands of appellate opinions and call for radical change to model code to encourage further checks on State power).


¹¹³ E.g., American Bar Association (www.abanet.org); Texas District and County Attorneys' Association (www.tdcaa.com); Texas Criminal Defense Lawyers' Association (www.tcdla.com); National Judicial College (www.judges.org).

¹¹⁴ Almost every state of the United States has locally elected prosecutors. See William T. Pizzi, Understanding Prosecutorial Discretion in the United States: The Limits of Comparative Criminal Procedure as an Instrument of Reform, 54 OHIO ST. L.J. 1325, 1338-40 (1993) (arguing that elected local prosecutors have greater political accountability than unelected officials in the legal system).

¹¹⁵ Fred C. Zacharias, The Professional Discipline of Prosecutors, 79 N.C. L. REV. 721, 765 (2001) (discussing the roles of the media and public on checking prosecutorial conduct); see, e.g., Michelle Mittelstadt, Tulia to Get House Review at Request of Black Caucus, Congress to Investigate Drug Arrests, DALLAS MORNING NEWS, May 8, 2003, 2003 WL 71205044 (probing into Texas scandal regarding prosecution and imprisonment, for long periods of time, on weak evidence, with accusations of racist targeting of innocent defendants, and further investigation into similar problems in other parts of the United States).

¹¹⁶ Compare United States v. Armstrong, 517 U.S. 456 (1996) (discussing discovery standards and burden in selective prosecution claim); Oyler v. Boles, 368 U.S. 448 (1962) (decision whether to prosecute may not be based on “an unjustifiable standard such as race, religion, or other arbitrary classification”); Yick Wo v. Hopkins, 118 U.S. 356 (1886) (discrimination based on race and nationality); United States v. Greene, 697 F.2d 1229 (5th Cir. 1983) (discrimination based on union membership); United States v. Alleyne, 454 F. Supp. 1164 (S.D.N.Y. 1978) (racial discrimination); State v. McCollum, 464 N.W.2d 44 (Wis. 1990) (gender discrimination), with ICC STATUTE, supra note 17, art. 21, § 3 (permitting no prosecution based on “age, race, col[or], language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status”); id. art. 42, §§ 5, 7 (prohibiting prosecutorial engagement “in any activity which is likely to interfere with his or her prosecutorial functions or to affect confidence in his or her independence” or participation “in any matter in which their impartiality might reasonably be doubted on any ground”).

The Office of the Prosecutor would better maintain its autonomy with a longer term of office and complete control over the hiring and firing of deputy prosecutors. A longer term of office would help prevent unnecessary interference with its role. Also, the terms "serious misconduct" and "serious breach of duties" must be meticulously defined to prevent the providing of credibility in attempts at the removal of the ICC Prosecutor based on more subjective grounds. On a larger scale, there are simply not enough checks and balances in the ICC; it must be more difficult to remove the Prosecutor.

A less political method for removal of the Prosecutor could simply follow the same procedures that are used to remove a judge. Under the ICC Statute, justices of the court may only be removed by the other justices. A justice can be removed by a two-thirds majority of the Assembly of States Parties upon a recommendation adopted by a two-thirds majority of the other justices. The removal process for the Prosecutor should be more like the judicial removal process because the judicial removal process is less likely to be prone to violations by international politics.

Nonetheless, the judicial chambers may not be the most appropriate place to instigate the removal of the Prosecutor because the Prosecutor is a party to the proceedings in the court. The statute could instead be amended to permit petition by the Assembly of States Parties to a special removal committee made up of the justices of the court. This would keep the preliminary steps of the process and open debate about the reasons for removal within the powers of the Assembly of States Parties, but would spread this responsibility to more than one branch of the institution.

A removal committee would only be organized if the Assembly filed a petition. A petition for removal would be filed upon a vote to file approved by an absolute majority of the member states. The removal committee would have to be large enough to have a diversity of voices amongst the justices. A minimum of nine of the eighteen justices on the court, chosen at random, could receive the petition and any other documentation any member state wishes to present. A simple majority vote of the justices on the committee would remove the

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118 ICC Statute, supra note 17, art. 46, §§ 1(a), 2(b).
119 See The Federalist No. 51, at 356 (James Madison) (Benjamin Fletcher Wright ed., 1961) (arguing that it is a "reflection upon human nature" that "auxiliary precautions" are necessary within a public entity, in order that "the members of each department should be as little dependent as possible on those of the others, for the emoluments annexed to their offices" in order to prevent the concentration of power in one part of a legal structure or another where it would be more subject to abuse).
120 ICC Statute, supra note 17, art. 46, § 2(a).
121 Id. art. 46, § 2(b).
122 See The Federalist No. 63, at 416 (James Madison) (Benjamin Fletcher Wright ed., 1961) ("The people can never willfully betray their own interests; but they may possibly be betrayed by the representatives of the people; and the danger will be evidently greater where the whole legislative trust is lodged in the hands of one body . . . ").
Prosecutor. The justices of the removal committee would write opinions describing their reasons for removal or non-removal and announce their decision in open court.

This set of procedures would force a reasoned legal process. This process would permit the removal of a Prosecutor only if necessary. At the same time, it would force states, improperly attempting to manipulate the role of Prosecutor, into the public eye and into a dignified forum for complaints against the Office of the Prosecutor. It would also create a system of checks and balances that establishes a real autonomy for the Office of the Prosecutor, while keeping it accountable and not taking away the Assembly of Member States' role in the removal process.

Finally, no matter how high the integrity of the ICC Prosecutor, in the chaotic world of mass terrorism and rogue states with weapons of mass destruction, the Office of the Prosecutor will face political questions that are beyond the role of a prosecuting attorney. The independence of this office has the power to indict anyone in the world. The U.N. Security Council, despite its political failures that have allowed war criminals to thrive in Kosovo, Rwanda, Iraq, and other genocidal hotspots across the world, is the only international institution capable of being a stabilizing check on the power of the ICC Prosecutor. The ICC Statute far from respects this need and has dangerously isolated the U.N. Security Council from the ICC by placing the power of the U.N. Security Council into the Assembly of Member States, which, as discussed above, is not an institution with any established credibility.

2. The Statute's Infringement on the Role of the United Nations Security Council

The most blatant problem with the ICC Statute is the power it gives to unelected, unaccountable international justices. The statute allows justices of the court to infringe upon the role of the U.N. Security Council by not having express provisions within it that prevent them from making rulings that define a wider scope of the court's authority than is permitted under the United Nations Charter ("U.N. Charter"). The statute must contain limitations to the justices' authority to expand the court's power under the color of law. Article 16 of the statute provides for a limited process by which the U.N. Security Council may defer an investigation or prosecution by requiring that,

No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after

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Some observers argue that there is far too much independence in the Office of the Prosecutor. See, e.g., Kristafer Ailslieger, Note, Why the United States Should Be Wary of the International Criminal Court: Concerns Over Sovereignty and Constitutional Guarantees, 39 WASHBURN L.J. 80, 90 (1999) (arguing that the prosecutor's power to initiate investigations on its own gives the office "the potential to become a grand inquisitor of unprecedented dimensions").
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.\textsuperscript{124}

This provision does not provide a sufficient check because it does not guard against activist judges and overly aggressive prosecutors by expressly limiting the authority of a justice to overrule treaty-based law.

Article 16 of the ICC Statute is unreasonably and unnecessarily close to a violation of the U.N. Charter because it does not affirmatively prohibit the court’s justices from asserting authority equal to or superior to the United Nations. Article 103 of the U.N. Charter places the treaty creating the United Nations superior to all other treaties.\textsuperscript{125} Furthermore, Article 39 of the U.N. Charter expressly articulates that it is the role of the U.N. Security Council to determine what measures should be taken “to maintain or restore international peace and security.”\textsuperscript{126} Additionally, Articles 25 and 48 of the U.N. Charter require that member states of the United Nations “agree to accept and carry out the decisions of the Security Council” made in accordance with the Charter of the United Nations.\textsuperscript{127}

Since every signatory to the ICC Statute is also a signatory to the U.N. Charter, every signatory to the statute is placing itself in the position of permitting a justice to make a ruling that violates the U.N. Charter. The Assembly of States Parties of the International Criminal Court has drafted a document to define its relationship with the United Nations.\textsuperscript{128} However, nowhere in this document does the Assembly of States Parties affirmatively recognize its members’ responsibilities under Articles 25, 39, or 103 of the U.N. Charter; nor does this document in any way seek to address this critical conflict.\textsuperscript{129}

Despite this basic problem, Article 16 of the ICC Statute still has a wider problem. The requirement in this article for there to be an affirmative vote by the U.N. Security Council in order to stop an investigation or a prosecution — in light of the U.N. Security Council’s historic incapacity to take affirmative actions in the Balkans, Rwanda, Iraq and elsewhere — marginalizes

\textsuperscript{124} ICC Statute, supra note 17, art. 16.


\textsuperscript{126} U.N. Charter art. 39.

\textsuperscript{127} Id. arts. 25, 48.


\textsuperscript{129} See id.
the one body that has the capability to stop the court from acting imprudently. This is significant because it allows the court to proceed when one permanent U.N. Security Council member objects to a resolution requesting deferral, and requires that deferral be sought by means of a formal resolution.  

This requirement of an affirmative act of the U.N. Security Council, under these circumstances, is essentially acting as a de facto amendment to the U.N. Charter that improperly restrains the U.N. Security Council by creating a legal mechanism not contemplated by the drafters of the Charter. These circumstances are unique; the ICC is neither an independent state nor a private entity. The ICC is a unique public international body, worldwide in its authority, created outside of the United Nations, and designed such that it can assert powers that rival those of the U.N. Security Council. The ICC is so unique that it is the only entity in the world that defines its own relationship with the U.N. Security Council under the color of international law. The ICC Statute's choice of definition for this relationship is an attempt to assert power in a way that fundamentally changes the dynamics of the United Nations without amending the U.N. Charter.

Adjustments of the authority of the U.N. Security Council must come through amendments to the U.N. Charter, not through other treaty making procedures. Any other attempt at change to the power of the U.N. Security Council is a destabilizing conflict with Article 49 of the United Nations Charter, which requires member states to "join in affording mutual assistance in carrying out the measures decided upon by the U.N. Security Council." This destabilization hinders the U.N. Security Council's potential to maintain or restore international peace and security pursuant to its mandate under Article 39 of the U.N. Charter by permitting an overly-aggressive Prosecutor, or activist collection of justices, to regulate problems that require a political or military solution.

This is an unnecessary and dangerous break with established international law that takes legitimacy from the ICC. The United Nations was created based on the recognition that the chaotic nature of international relations requires an international organization to secure peaceful dispute resolution and international cooperation. Unlike the ICC, the U.N. Security Council is designed to be the political entity to prevent breaches of the peace and security of the world. Circumvention of the U.N. Security Council is dangerous because the Security Council is the only universally legitimate international entity capable of acting with a united voice and the only multilateral authority remotely capable of effectively acting to address a crisis anywhere in the world.


131 U.N. CHARTER art. 49.

132 Id. pmbl.

133 See id. ch. V.
The ICC is an instrument designed to administer fair trials for alleged war criminals. But this circumvention permits the court to address political questions, rather than questions of law, in a backdoor change to the framework of the United Nations. If a need for reform or radical change to the U.N. Charter exists, an international tribunal is not the appropriate venue for such a debate. In this respect, the ICC Statute appears more concerned with politics than achieving its goal of making the world a safer place with predictable international standards of justice.

Some basic clarifications in the statute would alleviate this problem. The statute must contain language that expressly prohibits judicial activism and affirmatively recognizes the role of the U.N. Security Council. The statute must also contain language that defines the limits of the court’s authority. This must be a clear limitation and would be best drafted in the form of an international political question doctrine.

The Political Question Doctrine, in the United States, is a recognition of the checks and balances expressly set out in the Constitution. A court generally cannot address a political question. In invoking the political question doctrine, a court acknowledges the possibility that an issue may not be judicially enforceable but does not assert that there is no possible remedy to the issue. Without the principles of a clear international political question doctrine between the United Nations and the ICC, the parameters of Article 16 of the ICC Statute will not be properly defined, and there will be unnecessary tension in the relationship between the ICC and the United Nations.

3. The Statute’s Exposure of American Soldiers to Unwarranted Prosecution

The jurisdiction claimed by the ICC Statute is not congruent with the stabilizing force that maintains the geopolitical balance that allows the court to exist. This stability is an especially durable reality for the United States because it involves thousands of its citizens in uniform. Article 12 of the statute asserts


135 A political question is an issue that requires analysis in an area in which there is a textually demonstrable commitment of the issue to another authority and a lack of judicially discoverable and manageable standards for resolving it. See, e.g., Nixon v. United States, 506 U.S. 224, 226-38 (1993) (issues surrounding the impeachment of federal judges solely in the legislative branch of government and a check on the power of the judicial branch of government); Pac. States Tel. & Tel. Co. v. Oregon, 223 U.S. 118, 133-51 (1912) (holding challenge to initiative and referendum provisions of state constitution political questions); cf. United States v. Sioux Nation of Indians, 448 U.S. 371, 413 (1980) (stating Congress’s plenary power over Indian Tribes, particularly in regard to issues of past ethnic cleansing, not a political question).

136 See Nixon, 506 U.S. at 224.

jurisdiction over all people in countries that sign the treaty that created the ICC.\footnote{ICC STATUTE, supra note 17, art. 12.} Thus, if a country that chooses to host foreign troops is a signatory to the ICC Statute, these troops can now be brought before the ICC. This claim of jurisdiction includes countries such as: Columbia or the Philippines, where American troops are invited to assist with domestic security threats that directly affect United States security and world stability; Germany and South Korea, where American troops’ presence create the stability that free markets and democracy need to exist; or any other states where American troops are stationed. This leaves United States troops with far greater legal exposure to politically motivated charges at the ICC than any other state.

Certain provisions of the statute even act as double standards that put the United States in far greater jeopardy of abusive action within the court’s jurisdiction than any other state. Article 124 allows a country to sign the statute but to defer the application of jurisdiction upon it for a seven-year period.\footnote{Id. art. 124.} Additionally, Article 12 allows as well for non-signatories to present cases to the court while not being bound by the statute for prosecution of its own citizens.\footnote{Id. art. 12, §§ 2, 3.} Nonetheless, scholarly discussion of the court’s jurisdiction runs the risk of ignoring fundamental political realities at the basis of these provisions.

A major argument in defense of a wide application of jurisdiction is that such application is indistinguishable from a situation in which another country tries a United States citizen who breaks that country's laws while within that country’s territory.\footnote{See, e.g., Alison M. McIntire, Be Careful What You Wish for Because You Just Might Get It: The United States and the International Criminal Court, 25 SUFFOLK TRANSNAT’L L. REV. 249, 262-65 (2001).} This argument ignores the political realities and security threats that require American troops to remain abroad and ignores the wide shadow that international politics cast over the super-national authority claimed by the ICC. One professor goes so far as to argue that any American exception to the jurisdiction of the court “is rationally indefensible and morally corrupt.”\footnote{van der Vyver, supra note 75, at 819.} Such rhetoric is unproductive because, like the argument above, it fails to account for the unique predicaments faced by the United States. If the United States withdraws its troops from signatory countries where they are invited, world security will be dramatically weakened and more war crimes may take place.\footnote{Compare Grant McLoone, Book Note, The Trial of Henry Kissinger, 11 USAFA J. LEGAL STUD. 161, 164-65 (2002) (arguing that book’s thesis that Americans should be prosecuted for international crimes committed during the Cold War ignores the fact that many allegedly criminal acts were done to prevent world dominance by Soviet totalitarianism and the greater crimes such as...} Both judicial and appropriate military action bring peace, and neither should be permitted diminish the effectiveness of the other.\footnote{Id. § 124.}
Therefore, Article 12 must be amended to adjust the ICC Statute to the political realities that keep American troops overseas. These realities are based on the fact that to prevent massive crimes against humanity such as those that occurred in Kosovo or Baghdad, and defend against huge terrorist strikes, the United States may have to lead unilaterally and bear the brunt of most international deterrence. This places the United States at a uniquely high risk of unwarranted and politically motivated attacks at the court. As a result, the United States must be able to enter into bilateral agreements with allied countries where its troops are stationed that allow a waiver of enforcement of the ICC Statute (unless the United States agrees to an amended form of the statute).

This need for an American exception is less justifiable from a European point of view which rejected militarism while under the United States’ protection during the Cold War and from the developing world’s point of view which, unless working closely with American troops, may view the American troops’ presence as imperialist. From the American point of view, the assertion of jurisdiction in Article 12 is no more than a slight of hand, written such that it that removes the protections of the United States Constitution from thousands of service men and women and discourages American participation in peacekeeping and humanitarian operations. The United States has offered generous compromises to opposing parties that shield American soldiers from little more than foreign arrest, but these attempts to bridge this gap have fallen on deaf ears or faced “reflexive opposition” by active ICC proponents. If the United States’ allies on the court do not recognize the challenges faced by the United States, then this country will never be able to legitimately recognize the jurisdiction of the court. As a result, the ICC will be far less relevant to the workings of international affairs and perhaps a complete failure.

4. Complementarity

Article 17 of the statute states that the ICC does not have jurisdiction to hear cases that are being investigated or prosecuted by a state with jurisdiction, unless the state is unwilling or unable genuinely to impartially or independently

dominance would bring), with Jan Knippers Black, Bush’s Withdrawal from International Court Undermines Justice, PROGRESSIVE MEDIA PROJECT, May 16, 2002 (approving of use of the ICC as a mechanism that could “tie the hands of the U.S. Military” and “give pause to future powerbrokers who would blithely toy with the fates of peoples around the world”), at http://www.progressive.org.


145 Id. at 178.


147 See, e.g., Ronald Bailey, Should Libertarianism Stop at the Water’s Edge?, REASON, Aug. 2003, at 47 (calling for modified “Reagan Doctrine” to win the conflict against Al-Qaeda and similar direct threats to the United States, liberal democracy and the rule of law).
carry out the investigation or prosecution in a manner designed to serve justice. 148 This mechanism, while it exposes the weakness of the ICC because it would be very difficult to enforce an order under this article, 149 effectively places no guarantees that the enforcement of exceptions to this complementarity will be interpreted narrowly. Therefore, Article 17 essentially acts as a blank check that leaves it up to international judges to determine their own jurisdiction.

To keep this discretion from being abused, the statute must spell out clear, objective, and well-defined standards upon which a justice of the court can base such a decision. These standards must mandate: (1) a detailed explanation of the applicable law in the national jurisdiction; (2) a detailed explanation of why the law was not properly administered; (3) a detailed explanation of what is lacking in the applicable law or legal system; (4) a statement of exactly whom or what is preventing the independence of the investigation or prosecution; and (5) a detailed explanation of how any individual or institutional obstacle listed is preventing investigation or prosecution. The statute must also explicitly respect the rulings of military justice systems, unless: (1) the court is purely within an executive branch of government; (2) there is a showing that there is no procedure for independent appellate review or habeas corpus in the judicial branch of a government; or (3) the court is not legislatively created or reviewable.

Finally, the statute must be amended with a limited right of appeal to the U.N. Security Council to determine if the justices have abused their discretion in asserting jurisdiction where a national judicial system has exercised its authority. Most scholarly discussion of this section of the statute works solely within the paradigm that states must either accept an international criminal court with limitless jurisdiction or a court circumscribed solely by complementary jurisdiction. 150 This perspective is a false dichotomy. In order to depoliticize the court, the jurisdiction mandated in the statute must be circumscribed by a limited outside check on the court’s power.

The risk of a veto by the U.N. Security Council based on raw politics would be particularly limited if the right to appeal to the Security Council is limited with an abuse of discretion standard of review. Under this standard of review, the reviewing authority must view the case in the light most favorable to the prior authority’s ruling, indulge every presumption in favor of that ruling,

148 ICC STATUTE, supra note 17, art. 17.
149 See Mark A. Summers, A Fresh Look at the Jurisdictional Provisions of the Statute of the International Criminal Court: The Case for Scrapping the Treaty, 20 WIS. INT’L L.J. 57, 82-86 (2001) (discussing difficulties in enforcing this mechanism with analogy to Libya’s attempt to try the alleged perpetrators of the Pan Am Flight 103 bombing over Lockerbie, Scotland in contravention of Security Council Resolutions to the contrary within wider argument that the complementarity provision of the ICC Statute compromises the authority of the ICC).
and reverse that decision only if the decision is made "arbitrarily, unreasonably or without reference to any guiding principles."\(^{151}\) This is the most deferential standard of review and it prohibits the reviewing authority from simply substituting its judgment for that of the prior ruling authority’s decision.\(^{152}\)

The need for this limited outside check is particularly critical because, if there is any challenge to the actions it chooses to take, the ICC will be powerless without the support of the U.N. Security Council to fulfill its mandate. This check on the power of the ICC would be extremely limited because the abuse of discretion legal standard is precise and limited.\(^{153}\) The court, with this limited check on its power, will then be more likely to be impartial, reliable, and depoliticized.\(^{154}\)

D. Due Process of Law: The ICC Statute’s Failings

Winston Churchill advocated summary execution as the appropriate way to deal with high-level war criminals.\(^{155}\) The greatest precedent to come from the Nuremberg Tribunal is the spotlight of due process guarantees.\(^{156}\) This


\(^{152}\) United States v. Garner, 767 F.2d 104, 116 (5th Cir. 1985).

\(^{153}\) See Jennifer C. Root, The Commissioner’s Clear Reflection of Income Power Under § 446(B) and the Abuse of Discretion Standard of Review: Where Has the Rule of Law Gone, and Can We Get It Back?, 15 Akron Tax J. 69, 97-101 (2000) (discussing the extent to which the abuse of discretion standard of review limits a reviewing authority in the context of argument that the abuse of discretion standard of review essentially keeps cases within the executive branch and out of the Article III courts).

\(^{154}\) Cf. Brown, supra note 150, at 388-89 (calling for balance between Security Council and ICC that allows for a court that is “impartial, reliable, and depoliticized” in its “process for identifying the most important cases of international concern, evaluating the action of national justice systems with regard to those cases, and triggering the jurisdiction of the ICC when it is truly necessary”).

\(^{155}\) Gary Jonathan Bass, War Crimes and the Limits of Legalism, 97 Mich. L. Rev. 2103, 2109 (1999) (noting that Stalin wanted to execute approximately 100,000 Germans, and Churchill vigorously disagreed with Stalin and only advocated summary execution of fifty or one hundred Axis leaders).

\(^{156}\) In the words of Justice Jackson, former Chief Justice of the United States Supreme Court and Chief Council for the Prosecution at the Nuremberg,

We must never forget that the record on which we judge these defendants today is the record on which history will judge us tomorrow. To pass these defendants a poisoned chalice is to put it to our own lips as well. We must summon such detachment and intellectual integrity to our task that this Trial will commend itself to posterity as fulfilling humanity’s aspirations to do justice.

Second Day, in 2 Trial of the Major War Criminals Before the International Military Tribunal, supra note 26, at 95, 99 (giving the opening statement for the prosecution in the Nuremberg Trials on November 20, 1945).
light is dependent on expectations of high standards of due process of law, even for the most despicable human beings, and knowledge that the world community can subdue its passions and improve itself in legal procedures with high standards to develop the law.

Critical reviews of the due process standards at the ICC are generally too tepid. In the United States, there exists a strong history of carefully guarding the rights of people accused of horrendous crimes while maintaining efficient law enforcement, and carefully limiting the powers of parties that wield power. The ICC Statute places very few limits on the parties it governs and does not adequately provide the tools necessary for the ICC justices to make delicate legal decisions. These inadequacies are particularly problematic because international criminal law is extremely undeveloped, and because the ICC will not be responsible to any judicial organization to hear the appeals of its decisions.

Most of the diplomats who worked on the statute "lacked expertise in international criminal law, comparative criminal law, or comparative criminal procedure[,]" and "had no criminal practice experience of any kind." Many came from developed countries where the basic procedures in the domestic legal systems regularly fall far below even the basic norms of universal due process guarantees deemed acceptable by international law academia. One leading academic advocating immediate subordination to the court nonetheless asserts, "Prosecution of [crimes within the jurisdiction of the ICC] is indeed subject to universal norms of due process, which are specified in great detail in the ICC Statute and which do not fall one inch short of the principles of criminal justice recognized in the United States." As the following detailed comparative analysis will show, this professor's statement is clearly incorrect since it is read-

157 See, e.g., Stapleton, supra note 71, at 608-09.

158 An example of this balance in a case as reprehensible as anything that will ever come before the ICC is articulated in an opinion by Justice Brown, formerly of the Fifth Circuit Court of Appeals:

This case presents in dramatic terms the tensions between promoting thorough and efficient enforcement of the laws and ensuring that the rights of the accused are scrupulously guarded. We have on the one hand a murder [that] could hardly have been more reprehensible; the violent, senseless slaying of a young girl. On the other hand, we have a decision by a panel of this Court throwing out [the defendant]'s two written confessions on the grounds of voluntariness, making it very unlikely that [the defendant] could again be convicted on retrial.


159 M. Cherif Bassiouni, Negotiating the Treaty of Rome on the Establishment of an International Criminal Court, 32 CORNELL INT'L L.J. 443, 460 (1999). For a discussion of the result of these deficiencies, see infra Part V.

160 van der Vyver, supra note 75, at 809.
ily apparent that United States has far higher due process standards than the International Criminal Court.

The ICC Statute is silent about numerous basic guarantees that are taken for granted in the United States’ criminal justice system. There is no reference to the concept of a right to privacy. There is no protection from witness tampering. There is no hearsay rule. The discovery guarantees are vague. There is no reference to the concept of chain of custody necessary for evidence collected. There is no right to review of allegations of prosecutorial misconduct. There is no definition of effective counsel. There is no requirement

161 But see George E. Edwards, International Human Rights Law Challenges to the New International Criminal Court: The Search and Seizure Right to Privacy, 26 YALE J. INT’L L. 323 (2001) (arguing that, although the Statute does not expressly reference rights to privacy, the right survives because it is implicit in the statute, as an “‘internationally recognized human right’ under the Rome [ICC] Statute’s article 21(3)” and because “[i]t falls within the Court’s enumerated sources of applicable law”). Article 21(3) of the ICC Statute states, “The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights . . . .” ICC STATUTE, supra note 17, art. 21(3). Article 14 of the International Covenant on Civil and Political Rights contains a very basic set of due process guarantees that also could be applicable under this theory. See International Covenant on Civil and Political Rights, came into force Mar. 23, 1976, at 14, 999 U.N.T.S. 171. A workable statute, however, does not require vague cross-references to protect basic rights.

162 See, e.g., N.Y. PENAL LAW § 215.13 (Consol. 2003); 14 V.I. CODE ANN. § 1510 (2003). This was a very significant issue at the International Criminal Court for Rwanda. See, e.g., Prosecutor v. Kajelijeli, Case No. ICTR-98-44A-T, Decision on Juvenal Kajelijelis Motion for Protective Measures for Defense Witnesses ¶3 (ICTR Trial Chamber II Apr. 3, 2001) (defense claim that defense witnesses were “killed mysteriously or beaten to death”), at http://www.ictr.org (last visited Jan. 21, 2004).


164 Compare ICC STATUTE, supra note 17, art. 67, § 1(e), with CAL. PENAL CODE § 1054.5 (Deering 2003); Taylor v. Illinois, 484 U.S. 400 (1988) (excluding witness presented in violation of discovery request). The ICC Statute requires that the Prosecutor provide evidence at the basis of the prosecution to the Pre-Trial Chamber where the defendant and his attorney may be present, but there are no clear affirmative rights of the defendant to make discovery requests. See ICC STATUTE, supra note 17, art. 61, § 3(b).


167 See Strickland v. Washington, 466 U.S. 668, 693-94 (1984). There is a growing criticism that, as international criminal law becomes more institutionalized, criminal defense remains ad hoc and less developed. See Developments in the Law – International Criminal Law, 114 HARV. L. REV. 1943, 1994-2002 (2001) (arguing that tribunal-wide structural flaws in the ICC, such as ineffective defense counsel, and not procedural innovations, are the most pressing threats to defendants at ICCs) [hereinafter Developments].
that a conviction be based on more than a co-actor's testimony. There is no basis for determining whether a confession was properly obtained. There is no requirement of evidence to corroborate a confession. There is no concept of offense nullification.

Despite the extreme gaps in the ICC Statute, there are some significant due process guarantees. The burden of proof is on the prosecutor, utilizing the general criminal law standard of beyond a reasonable doubt. The statute proscribe the following rights: the right to be tried without undue delay; the right to be present at trial; the right to a public trial; the right to conduct a defense; the right to counsel, free of charge if necessary; a limited right of cross examination; the right to have the assistance of an interpreter; the right to a written statement of charges; the right to bail; a limited right to compulsory process for obtaining witnesses; the right not to make a statement of any kind and not have that silence used as evidence; a prohibition of ex post facto prosecutions; freedom from warrantless arrest and search; a lim-

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168 See, e.g., State v. Haugen, 448 N.W.2d 191, 194 (N.D. 1989) ("The purpose of corroborating evidence is to show that accomplices are reliable witnesses and worthy of credit."); Fleming v. State, 760 P.2d 208, 209-10 (Okla. Crim. App. 1988) ("The purpose behind the requirement of corroboration is to protect an accused from being falsely implicated by another criminal in the hope of clemency, a desire for revenge, or for any other reason.").

169 Cf. ICC Statute, supra note 17, § 1(g) (right to remain silent).

170 See, e.g., Smith v. United States, 348 U.S. 147, 153 (1954) ("[S]ound law enforcement requires police investigations which extend beyond the words of the accused.").

171 See generally Clay S. Conrad, Jury Nullification as a Defense Strategy, 2 Tex. F. On C.L. & C.R. 1 (1995) (discussing element to the democratic system of justice in the United States that a finder of fact may come to conclusions that are contrary to the evidence presented if a prosecutor brings forth a case that should not be prosecuted).

172 ICC Statute, supra note 17, arts. 66, 67.

173 Id. art. 67, § 1(c).

174 Id. art. 63.

175 Id. art. 64, § 7.

176 Id. art. 67, § 1(d).

177 Id. art. 55, § 2(c).

178 Id. art. 67, § 1(e).

179 Id. art. 55, § 1(c).

180 Id. art. 61, § 3(a).

181 Id. art. 60, § 2.

182 Id. art. 67, § 1(e).

183 Id. art. 55, § 2(b).

184 Id. art. 22.
ited right to exclusion of illegally obtained evidence;\footnote{186} limited double jeopardy rights;\footnote{187} and basic 
\textit{Brady} rights to evidence in the possession of the prosecutor that "shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused . . . ."\footnote{188}

Some of the rights guaranteed in the statute are clear. The presumption of innocence, the guarantees of a public trial, to be present at trial, to court appointed counsel, to an interpreter, and the right to remain silent are satisfactorily stated and do not need clarification. Other rights listed are not clear or, on the face of the statute, are not adequately guaranteed. The Assembly of States Parties has promulgated rules of evidence that create some discovery standards and some predictability to the proceedings.\footnote{189} However, these rules are not statutory guarantees created by the international treaty-making process. They are relegated to the status of mere instruments approved by a simple majority of the Assembly of Member States. This process is an inadequate method for drafting the cornerstones of due process at a major international judicial institution. Any law that comes from the Assembly of Member States, or from the justices of the court, may too easily be changed and takes the treaty-making power away from sovereign countries and gives it to an unchecked international body. The ICC Statute must be reformed to include a firm bill of rights to set minimum restrictions on the use of power that includes far more than the sketch in the current statute. The most crucial rights that clearly need protection are discussed below.

1. Notice Requirements and Discovery Rules

The ICC Statute is unclear about how much notice of charges pending against an accused person is necessary.\footnote{190} It would be easy to quash an ICC charging instrument in the United States if the charging instrument met no more than the minimum requirements in the statute. The statute must be reformed to insure there are firm guarantees of ample time to respond to allegations and to know with reasonable specificity the details of the allegations. If the statute allows the Prosecutor to rearrange its pleadings without adequate notice to the defense, it runs the risk of making it effectively impossible to defend even the

\footnotesize{\begin{itemize}
\item \textit{Id.} arts. 55, § 1(d), 57-59.
\item \textit{Id.} art. 69.
\item \textit{Id.} art. 20.
\item \textit{Id.} art. 67, § 2.
\item \textit{Cf.} ALA. CONST. art. I, § 6; S.D. CONST. art. VI, § 7.
\end{itemize}}
most basic of charges.\textsuperscript{191} The statute must clearly state fair discovery rights to be exercised after receiving proper notice. The clarification of discovery procedures in separate promulgations by the Assembly of Member States is necessary, but without a clear statement of fair discovery rights in the ICC Statute, all authority to the contrary is strengthened, and the fairness and legitimacy of the court is unnecessarily jeopardized.

2. Illegally Obtained Evidence

The standard for an exclusionary rule for improperly obtained evidence in the ICC Statute is particularly disturbing because it is unnecessarily vague and not centered upon the rights of the accused.\textsuperscript{192} The ICC Statute does not permit investigation into how a state collects evidence brought before the court or require the prosecution to establish a chain of custody of the evidence.\textsuperscript{193} The statute merely states that evidence should be excluded if obtained in violation of the statute or internationally recognized human rights standards if: "(a) The violation casts substantial doubt on the reliability of the evidence; or (b) The admission of such evidence would be antithetical to and would seriously damage the integrity of the proceedings."\textsuperscript{194} This standard is not a sufficient basis for a fruit-of-the-poisonous-tree doctrine because it merely makes reference to ethics and the integrity of the ICC, rather than being couched in terms of the rights of the accused.

While foreign evidence obtained in violation of the United States Constitution can be admissible in United States Courts,\textsuperscript{195} such a situation is so rare that it is an exception that proves a general rule. Every year, thousands of cases are reversed or thrown out of court in the United States on the basis of a suppression of improperly obtained evidence because of the strict evidentiary requirements mandated by the United States Constitution.\textsuperscript{196} This evidence may be extremely reliable, and the integrity of a court may not be affected by an illegal search or seizure; however, the evidence is still excluded to protect the rights


\textsuperscript{193} See ICC STATUTE, supra note 17, art. 69, § 8.

\textsuperscript{194} Id. art. 69, § 7.


\textsuperscript{196} See, e.g., Benanti v. United States, 355 U.S. 96 (1957); United States v. Portillo-Aguirre, 311 F.3d 647 (5th Cir. 2002).
of society as a whole from overbearing or overzealous public authorities, or from individuals separate from the court who misuse the power given to them by law. For example, a law officer acting dishonestly may place an entire court’s integrity in question with falsified or perjured evidence, without a judge or prosecutor ever knowing that its proceedings were dreadfully damaged.  

Or, at the other extreme, a law officer acting righteously and honestly acting on no more than an anonymous tip, may catch a criminal or be an instrument of harassment to an innocent person. Without a shift in priorities from catching the most horrible offenders to protecting the rights of the innocent, no matter how guilty and despicable most — or all — of the accused are, the ideal of the rule of law, with all of its symbolism and potential to do good, is sacrificed to political expediency.

3. Balancing the Right to Cross-Examination with Witness Rights to Safety and Security

The ICC Statute provides an admirable mandate to prosecute war crimes, and more specifically, gender-based crimes. However, without an adequately balanced rule of law that effectively balances basic due process guarantees and the rights of crime survivors, this mandate is weak. The ICC Statute permits the court to take “appropriate measures” to protect victims and witnesses as long as the measures are not “prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.” The statute also states:

Where the disclosure of evidence or information pursuant to this Statute may lead to the grave endangerment of the security of a witness or his or her family, the Prosecutor may, for the purposes of any proceedings conducted prior to the com-

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197 See, e.g., Thomas Korosec, The DA Speaks: Bill Hill Opens Up — A Bit — About Fake-Drug Scandal and Dallas Police Problems, DALLAS OBSERVER, Mar. 20, 2003 (reporting on Dallas County, Texas Prosecutors’ scramble to release innocent defendants from criminal justice system after courts accepted falsified Dallas Police Department investigations sworn to by rogue police officers and designed to frame innocent people), at http://www.dallasobserver.com/issues/2003-03-20/news.html/1/index.html. In the United States, of course, police departments and prosecutors are separate from each other, as well as from the courts, and provide checks on one another’s power.

198 See Florida v. J.L., 529 U.S. 266, 268 (2000) (holding anonymous tip that a person is carrying a gun, without any corroboration, insufficient cause to justify a police officer’s stop and frisk of that person).


200 ICC STATUTE, supra note 17, art. 68, § 1.
mencement of the trial, withhold such evidence or information and instead submit a summary thereof.\textsuperscript{201}

The statute also allows for the possibility that witness statements may be admitted into evidence without the opportunity for the defense to cross-examine the witnesses making the statements.\textsuperscript{202}

This language is far from an express guarantee to the defense to know the identities of the witnesses that provide evidence to the court or to be able to question his or her accusers. To the contrary, this provision acts as an unfair advantage for the prosecution. A firm guarantee of the right of cross-examination is necessary to ensure the rule of law and legitimate prosecution of all crimes. More appropriate guarantees to protect the rights of uniquely positioned war crime victims are suggested and discussed in this section.

The precedent available to the court from the ICTY allows for testimony via affidavit\textsuperscript{203} in what is at best a very weak cross-examination guarantee for the accused.\textsuperscript{204} In the first trial of the ICTY, Prosecutor v. Tadić,\textsuperscript{205} the court firmly ruled that witness identities may be withheld from the defense in order to protect the witnesses and to create conditions where the possibility of receiving testimony from witnesses would be more promising.\textsuperscript{206} This is an unbalanced standard, and not a significant due process guarantee.

The root of this insufficiency is due to a conflict between the two major legal systems of the world.\textsuperscript{207} This conflict has led to significant differences. The common law is chaotic compared to the order and predictability of most civil law regimes. The processes of most civil law regimes look at evidence through a different legal history and through different thought paradigms, lenses that do not include the same limitations as most common law jurisdictions.\textsuperscript{208}

\textsuperscript{201} Id. art. 68, § 5.

\textsuperscript{202} Id. art 69, § 2 (allowing the court to permit the use of oral, recorded, and written transcripts as evidence).


\textsuperscript{204} See Leigh, supra note 72, at 236 (arguing that ICTY cross-examination guarantees deny a defendant the right to a fair trial).

\textsuperscript{205} 105 I.L.R. 420 (ICTY Trial Chamber 1995).

\textsuperscript{206} Id. at 621.


\textsuperscript{208} Some civil law regimes have adapted common law practices, creating interesting hybrids. See, e.g., Caianiello & Illuminati, supra note 63, at 409-10 (describing movement in Italy from
The common law is generally based upon judging every case individually according to the rights and unique equities of every situation. On the other hand, civil law is a more stable system designed to provide a structure in which every situation may be fairly organized. The typical civil law system does not permit trial lawyers the art of cross-examination. Civil law is therefore, in this regard, more adaptable to prosecution, particularly prosecution of sexual crimes because sex war crimes are virtually impossible to enforce without firm procedural mechanisms that protect the survivors of these crimes.

Sometimes the most vulnerable of crime survivors are empowered by the experience of testifying, but more often they are retraumatized. This trauma is commonly expressed by fears for their safety and the safety of their family or other members of a wider community of which the witness is a member. The possibility of retaliation is also a significant fear for witnesses in criminal trials in the United States as it is around the world. The law of the typical jurisdiction in the United States has protections for child witnesses in some types of cases, and for crime victims, and has law enforcement to further protect victims of crime. Unlike traditional Westphalian jurisdictions,

inquisitorial model of criminal procedure to more of an adversarial system); Stephen C. Thaman, Spain Returns to Trial by Jury, 21 HASTINGS INT’L & COMP. L. REV. 241 (1998) (trial by jury in criminal cases in Spain).

209 See Developments, supra note 167, at 2000 n.13 (explaining how Dutch trial attorney at the ICTY after a one week crash course in cross-examination hires his British instructor as co-counsel).

210 See Fionnuala Ni Aolain, Radical Rules: The Effects of Evidential and Procedural Rules on the Regulation of Sexual Violence in War, 60 ALB. L. REV. 883, 885 (1997). Having personally worked only within the a common law system, but having prosecuted sexual assault and pedophilia cases, and other cases where a powerful person can retaliate against a weaker crime survivor, this author knows firsthand what the effect of such trials can be, and why people do not want to testify. For a discussion of the effects of trials on child victims, see generally Jessica Liebergott Hamblen & Murray Levine, The Legal Implications and Emotional Consequences of Sexually Abused Children Testifying as Victim-Witnesses, 21 LAW & PSYCHOL. REV. 139 (1997).

211 See Liebergott Hamblen & Levine, supra note 210, at 158 (psychological effects of testifying on crime survivors who are children).

212 Id.


214 Compare TEX. CODE CRIM. PROC. § 38.071 (Vernon Supp. 2003) (modifications to formal courtroom procedures for certain child witnesses, including testifying via pre-recorded video and closed-circuit television); Marx v. State, 987 S.W.2d 577, 582 (Tex. Crim. App. 1999) (holding that courtroom procedure not enumerated under statute which limited right of confrontation not a statutory or constitutional violation), with ICC STATUTE, supra note 17, art. 68, § 2 (establishing a vague standard).

215 See TEX. CODE CRIM. PROC. § 42.037(i) (Vernon Supp. 2003) (creating crime victim compensation fund, funded by convicted criminals).
the ICC does not have the capability to protect witnesses. Nonetheless, any concessions necessary to permit prosecution under these circumstances must respect the right of an accused person to cross-examine his or her accusers.216

Limited concessions in this area are possible because the right to cross-examine witnesses is not absolute,217 even in the United States. The United States Supreme Court has allowed limitations of this right when certain exigen-
cies require it. For instance, the Supreme Court has decided that there is no right of cross-examination upon a confidential informant.218 The rationale for this ruling is that an informant's identity is not relevant or helpful to the defense, and therefore not essential to a fair determination of a cause.219 However, if an American judge doubts the credibility of an informant, he or she may require that the informant be identified or even produced.220 An informant could clearly have considerable cause to fear retaliation by the defendant. These rationales are also relevant internationally; any witness at the ICC who is not essential to a fair determination of a cause should not be automatically identified for the defense. However, when a witness' identity is relevant or helpful to the defense, his or her identity must be disclosed, or a case in the United States will be summarily dismissed.221

Despite this mandate, limited concessions, with a little creativity, can protect the right of cross-examination while protecting oppressed, isolated and violated peoples. In Maryland, at least one court has satisfied the Sixth Amendment cross-examination guarantee by permitting defense counsel access to a witness while ordering counsel not to disclose the identity of the witness to his client, his client's relatives, or his client's acquaintances.222 This requires council to know a defendant's experience as well as a defendant. This is a high standard but one that should be expected of any defense counsel at the ICC.

Another significant domestic restriction on the right to cross-
examination places limitations on the right to question children who are crime victims. The United States Supreme Court has ruled that the "[s]tate's interest in the physical and psychological well-being of child abuse victims may be suffi-
ciently important to outweigh, at least in some cases, a defendant's right to face  

216 See U.S. Const. amend. VI.


219 See id. at 305-10.

220 See id. at 307-08.

221 See id. at 310.

222 See Demleitner, supra note 213, at 646.
his or her accusers in court."²²³ This ruling was based, after extensive debate among American lawyers,²²⁴ in part upon the observation that "a significant majority of States have enacted statutes to protect child witnesses from the trauma of giving testimony in child abuse cases . . . ."²²⁵ In Texas, for example, children who are victims of certain crimes do not have to directly testify if the presiding court determines that they are "unavailable" to testify.²²⁶ A child qualifies as "unavailable" when they are physically not there, or when psychologically or emotionally there would be an inappropriate effect on the child if he or she were to testify.²²⁷ A separate procedure is then required in this situation. When charges are not yet filed, a specially trained forensic interviewer may meet with the child in a safe, child-friendly environment and discuss the situation, on videotape, with the child using objective, non-leading questions.²²⁸ The defense is then permitted to submit questions for the same forensic interviewer to ask the child, on videotape.²²⁹ The tape is then shown at trial to the finder of fact.²³⁰

A similar procedure could also be implemented at the ICC. A witness could be videotaped in a safe environment by a specially trained interviewer. The defense could be provided with a transcript of the video, redacted as necessary to protect the witness but without taking substantial contextual elements from the event, and then be provided with the right to submit questions to same interviewer to ask the witness in the same safe environment. These questions could be screened by a judge for appropriateness, and then submitted for a second interview. The prosecution and the justices would have full access to the tapes, the transcripts, and the witnesses. The justices would know the limitations placed upon the defense, and could also have the opportunity to question the witnesses quasi-in-camera through the same process.

Any of these procedures, or a hybrid between them, and a clear rape shield to prevent any irrelevant analysis of a crime survivor's prior sexual history,²³¹ could more effectively protect witnesses without unacceptably removing the right of an accused to cross-examine his or her accusers. The ICC Statute, as it is currently written, is but a vague assurance and not a

²²⁵ Craig, 497 U.S. at 853 (citing numerous states' laws).
²²⁷ Id.
²²⁸ Id.
²²⁹ Id.
²³⁰ Id.
²³¹ See, e.g., TEX. R. EVID. 412(a) (Texas rape shield law).

https://researchrepository.wvu.edu/wvlr/vol106/iss2/4
guarantee suitable for a court of law. Reform to this section of the law simply requires more attention to basic procedure by the statute's drafters.

4. Vagueness and Undefined Terms: The Statute's Definitions of Crimes

The most controversial offense contemplated in the ICC Statute is "aggression" because of its widely varying interpretation and because the drafters could not agree on a definition of this term. This term deals with the inappropriate use of military force by one actor against another. The statute grants the court with prospective jurisdiction over "aggression" pending further agreement as to the definition of aggression and the extent of the court's jurisdiction over that crime.232 Defining "aggression" is a daunting task because it is very difficult to create an effective definition of aggression without questioning the legitimate use of military power that stands at the basis of foreign policies of almost all of the countries of the world.

The Nuremberg Court had a relatively easy time producing convictions for this crime because the guilty parties provided the prosecution with a very clear case to prove. In the time since the vague definition permitted for the fact scenario prosecuted at Nuremberg, the closest the world has come to creating a universally acceptable definition of this term was in 1974, when the United Nations created a definition.233 However, this definition was not acceptable to the diplomats who drafted the ICC Statute. In order for there to be an international rule of law in which a criminal breach can be alleged, there must a consensus as to the definitions of offenses.234 It is unclear how any authoritative, enforceable, or reasonable definition of this term can be created, except in the context of the prosecution of the leaders to an uncompromising state pacified by military force.

In general, there are significant problems defining international law offenses, even in the United States.235 In the ICC Statute, aside from the definition of genocide,236 which is clear, there are many possible interpretations of the words chosen to define the other crimes and several possible interpretations of appropriate mens reas applicable to them.237 The statute permits the justices of

232 ICC Statute, supra note 17, arts. 5, 121,123.
236 ICC Statute, supra note 17, art. 6.
237 It is beyond the scope of this Article to look more deeply into the definitions provided in the statute. However, the fact that these crimes are left open to widely varied interpretations is disconcerting because, despite the cautionary terms of the statute, see id. art. 22, § 2, these definitions
the court to fill in the undefined gaps in the law, including definitions of the crimes.\textsuperscript{238} It has been almost two hundred years since the United States rejected judicially defined crimes as a part of its canon.\textsuperscript{239} If a crime is judicially defined, the rule of law has regressed from firm agreements, enforceable by sovereigns who are held accountable for their actions, to a Platonian oligarchy\textsuperscript{240} of foreign justices who are not held accountable for their decisions.\textsuperscript{241} This system is too far from the jury system in the United States that enforces clearly defined statutory offenses to stand as a basis for the rule of law.

5. Trial by Jury

Another primary criticism of the ICC Statute is the fact that it conflicts with the Sixth Amendment right to a jury trial. Trial by Jury is an important check on power because it places power within both a judge and a jury, as checks and balances against one another, to prevent the integrity of a court’s decision from being lost.\textsuperscript{242} A complete requirement of the Sixth Amendment provides for “an impartial jury of the State or District wherein the crime was committed.”\textsuperscript{243} However, the United States Constitution does not apply to foreign crimes committed in foreign jurisdictions. Therefore, unlike a situation involving an extradition to a foreign country, this conflict only is a problem in the unlikely event of international prosecution for acts alleged to have taken place by civilians on United States soil. Unlike the other due process concerns discussed here, this is a far-fetched possibility. However, this conflict probably cannot be resolved without either a radical amendment to the United States Constitution or a change in the ICC Statute. The determination of the guilt or innocence of a party accused of a crime by a lay jury is one of the most fundamental

\textsuperscript{238} ICC STATUTE, supra note 17, art. 21, § 1(b).

\textsuperscript{239} See United States v. Coolidge, 14 U.S. (1 Wheat.) 415 (1816) (refusal of executive to prosecute common law crimes in order to keep unelected judiciary from defining elements to crimes); Rubin, supra note 49, at 141 (placing Coolidge in perspective of civil law regimentation of legal definitions and virtual abandonment of citation to a crime at common law in British legal system).

\textsuperscript{240} See generally Plato, The Republic (Francis MacDonald Cornford trans., Oxford Univ. Press 1973) (360 B.C.E).

\textsuperscript{241} See Rubin, supra note 49, at 140-41.


tenants of the American justice system.\textsuperscript{244} Whether or not a constitutional argument can be made that the right to trial by jury exists before the ICC, this right cannot be sacrificed domestically to meet foreign ideals in a foreign context.\textsuperscript{245}

6. Double Jeopardy

Article 20 of the ICC Statute provides that the court may not try any person for conduct that the person has already been convicted or acquitted by the ICC, or by another court.\textsuperscript{246} However, this same provision creates an exception for situations in which the Prosecutor determines that the prior court proceedings were "for the purpose of shielding the person concerned from criminal responsibility," or were "not conducted independently and impartially."\textsuperscript{247} Without more definitively adequate checks and balances within the court and beyond the court, the ICC may try an individual that has been fairly tried and acquitted by national courts.\textsuperscript{248}

The ICC Statute also violates double jeopardy guarantees by allowing the Prosecutor to appeal its case if the defendant is acquitted at trial.\textsuperscript{249} Any prosecution of a specific case should only receive one bite at the apple.\textsuperscript{250} The

\textsuperscript{244} See Duncan, 391 U.S. at 157-58 (discussing importance of trial by jury and tracing the practice through American and British history). See generally Ex parte Milligan, 71 U.S. (4 Wall.) 2 (1866) (invoking habeas corpus rejecting martial law suspension of trial by jury for charges that included war crimes, and releasing petitioner).

\textsuperscript{245} See The Federalist No. 5, at 108 (John Jay) (Benjamin Fletcher Wright ed., 1961) stating:

[Let us not forget how much more easy it is to receive foreign fleets into our ports, and foreign armies into our country, than it is to persuade or compel them to depart. How many conquests did the Romans and others make in the characters of allies, and what innovations did they under the same character introduce into the governments of those whom they pretended to protect.]

\textsuperscript{246} ICC Statute, supra note 17, art. 20.

\textsuperscript{247} Id.

\textsuperscript{248} While a federal court can (and does, on rare occasions) retry a case that was tried in a state court in the United States, this is one country, acting without international involvement, where the Constitution has been amended to permit checks and balances on judicial power that runs counter to the Constitution's federalist basis. As a representative democracy, there is accountability in this respect that does not exist at the ICC. But see Chris Crowe, Getting Away With Murder: The True Story of the Emmett Till Case (2003) (symbolic beginning of Civil Rights Movement; refusal of federal government to re-prosecute after sham trial of murderers of teenager who was brutally murdered in famous hate crime). This case is one of the last cases of a very different era. The entire United States has radically changed since this time. If there is ever anything this outrageous again in the United States, the claims of legitimacy and sovereignty asserted in this Article will be seriously undermined.

\textsuperscript{249} ICC Statute, supra note 17, art. 81, § 1.

\textsuperscript{250} See, e.g., State v. Hogg, 385 A.2d 844, 847 (N.H. 1978) (ruling on state constitutional grounds that prosecutor may not proceed in state court under theory that exact same offense for
right of the prosecutor to appeal a final conviction is an abrogation of this principle that blatantly violates the most basic aspects of the Fifth Amendment to the United States Constitution.²⁵¹

IV. DUE PROCESS OF LAW: THE NEED FOR EXPRESS GUARANTEES AND LIMITS ON JUDICIAL POWER

The ICC statute leaves virtually all due process issues²⁵² up to the justices in the Pre-trial Chamber to rule upon when an accused person may not even have an attorney appointed to argue on his or her behalf.²⁵³ While possible that the justices of the court could, on their own motions, expand these rights, or that a defense counsel could appear before the Pre-trial Chamber to present motions, mere possibilities are not due process guarantees. Moreover, by leaving basic due process questions unanswered, the statute leaves it up to the discretion of the justices and the prosecutor to determine the power of the court and the power of their own roles.

This reliance upon actors in a legal structure to restrict their own power runs contrary to the concept of having checks and balances in a legal system and contrary to basic concepts of limited government. The lead drafter of the statute nonetheless writes, "the concerns of the United States are overstated and that the interests of the United States in having [an ICC] far outweigh the marginal and far-fetched concerns that have been articulated by political opponents of the ICC."²⁵⁴ Due process of law is neither a far-fetched concern nor a political issue for a country with extensive international responsibilities, numerous actors who would like nothing more than to attack it at the ICC, and a constitution with extremely high due process requirements.

On a constitutional level, due process issues must be negotiated within an international treaty-making process or the United States may not agree to the treaty. The United States Constitution does not permit international treaties to abrogate rights guaranteed under the Constitution for actions that fall within United States jurisdiction.²⁵⁵ Any failure of the United States to carry out an

which defendant was acquitted in federal court was actually a separate offense under concept of dual sovereignty); see also Green v. United States, 355 U.S. 184 (1957).

²⁵¹ See U.S. CONST. amend. V.

²⁵² ICC STATUTE, supra note 17, arts. 66, 67 (presumption of innocence and rights actually mentioned in the Statute, listed above).

²⁵³ Id. art. 56.


²⁵⁵ See Reid v. Covert, 354 U.S. 1, 14 (1957) (holding that international agreement must be within the restraints of the Constitution); Asakura v. City of Seattle, 265 U.S. 332, 341 (1924) (holding that treaty may not authorize unconstitutional action); Geofroy v. Riggs, 133 U.S. 258, https://researchrepository.wvu.edu/wvlr/vol106/iss2/4
obligation on constitutional grounds does not relieve the United States of responsibility under international law. Therefore, constitutional issues must be addressed in the drafting process.

Even if the scheme arranged under the statute were constitutional, no matter how high the integrity of the justices or the prosecutor, a formative statute cannot rely on a holder of power to restrain itself. This is a basic principle in the American system; there must not be mere confidence that power will not be abused if left unchecked. In order to be viable not just for Americans, but for everyone, the statute must have a detailed bill of rights that will expressly maintain minimum due process guarantees and place limits on the roles of the parties governed by the statute. Any international criminal court statute without a detailed bill of rights is, on its face, unacceptable.

A written, detailed bill of rights is extremely important in light of the ICC’s ability to expand its jurisdiction beyond genocide, war crimes and crimes against humanity. The ICC Statute does not inherently base its jurisdiction under a concept of universal jurisdiction. However, the Assembly of Member States could easily influence the court and pressure it to use this doctrine to expand the court’s jurisdiction. The ICTY unnecessarily widened its jurisdiction on its own, without treaty-based or United Nations Security Council author-

267 (1890) (holding that treaty making power may not permit what is otherwise unconstitutional); The Cherokee Tobacco, 78 U.S. (11 Wall.) 616, 620 (1870) (holding that treaty may not change the Constitution or violate the Constitution); see also RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 cmt. a (1987) (“[R]ules of international law and provisions of international agreements of the United States are subject to the Bill of Rights and other prohibitions, restrictions, and requirements of the Constitution, and cannot be given effect in violation of them.”). But see Boos v. Barry, 485 U.S. 312, 324 (1988) (holding that international obligation did not abrogate the First Amendment, but leaving open possibility that a future international obligation could abrogate the Constitution).

256 See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 115 cmt. b. (“[T]he United States remains bound internationally when a principle of international law or a provision in an agreement of the United States is not given effect because it is inconsistent with the Constitution . . . . A state cannot adduce its constitution or its laws as a defense for failure to carry out its international obligation.”); see also id. § 311(3) (“A state may not invoke a violation of its internal law to vitiate its consent to be bound unless the violation was manifest and concerned a rule of fundamental importance.”).

257 See THE FEDERALIST No. 83, at 531 (Alexander Hamilton) (Benjamin Fletcher Wright ed., 1961) (“[A]buses of power have generally originated with the men who endeavor to persuade the people they are the warmest defenders of popular liberty, but who have rarely suffered constitutional obstacles to arrest them in a favorite career.”).

258 See id. No. 84, at 535 (arguing that a bill of rights is dangerous because it would not be a constitutional minimum, but rather would limit the powers vested by the Constitution in the people). This argument is not applicable in the context of the ICC because there are no constitutional guarantees to vest authority in the people in international criminal law, and there exists very limited precedent for the protection of basic rights within international tribunals.

259 ICC STATUTE, supra note 17, art. 12.
ity. The International Court of Justice has taken similar action. Whether or not the policy behind the courts' decisions was good policy or not is irrelevant. The issue is whether or not activist international judges may assert authority by these courts where no legislation, treaty, or clear outside written authority permits it.

Similar claims of authority could be made under the ICC Statute because the statute's terms may easily be expansively interpreted to give the court jurisdiction over acts not contemplated by the statute. The interpretation and application of all terms in the statute are left to the discretion of the prosecutor and the justices, without the checks and balances of a national legislative system. This discretion is wide authority to make legal assertions based on untested or imprudent theories into binding decisions that may run counter to world security and that would not be accepted by reasonable sovereign actors in a treaty-making proceeding. The ICC could even rule that it has the right to check the authority of the United Nations.

The court also could look to an unknown, unestablished, or non-existent custom to support a judgment under an expansive theory of customary international law. Customary international law is a loose, non-static, organization of the general needs of the world. It is supposed to represent basic internationally accepted norms. At the close of the Cold War, one scholar described customary international law as having "a claim to being the most democratic form of international law, . . . uncircumscribed by a minority of elites" and, on the same page of the text, also spoke of opportunities in academia for "refinement and change of normative content" of the same body of principles from the academy. This statement, although tempered by a call for the restraint of the "mere projection of personal needs and insecurities" over perceptions of the wider "needs, interests, expectations, and forms of participation and interaffectation" exposes customary international law's raw potential for abuse. Custom-

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260 See Prosecutor v. Tadić, 105 I.L.R. 420, 441 (ICTY Trial Chamber 1995), stating:

The Trial Chamber agrees that in [circumstances of serious breaches of international humanitarian law], the sovereign rights of States cannot and should not take precedence over the right of the international community to act appropriately as they affect the whole of mankind and shock the conscience of all nations of the world. There can therefore be no objections to an international tribunal properly constituted trying these crimes on behalf of the international community.


262 See generally Paust, Customary International Law, supra note 53 (explanation of foundations of customary international law).

263 Id. at 62-63.

264 Id. at 62 n.9.

265 Id.

266 Id.
ary international law, within the limited scope of its presence within international criminal law, has radically evolved since the end of the Cold War. Outside of private relationships where market forces are more resistant to raw manipulations, customary international law runs the risk of derogating into a loose body of assertions by commentators and politically unaccountable institutions.

Customary international law, in its development from early concepts of natural law, to positivist norms, into the current movement within international criminal law towards "custom" by proclamation, has evolved into a loose body of ideas that can be abused at international criminal proceedings. At its worst, it resembles little more than a process in which a lawyer or judge selectively gathers scattered examples of behavior or merely scattered statements about behavior, with little comment or challenge, sometimes made only to provide a strategic advantage and not to recognize a policy. The lawyer or judge then draws links between what he or she has gathered and the policy he or she argues is proper. This argument is then called the law, at least until another lawyer or judge draws another set of links to assert another "law." This development is inconsistent with the American rule of law developed through representative democracy, separation of powers, federalism, and common law principles.

Numerous delicate checks and balances intrinsic to the United States judiciary would be non-existent in a court with tunnel vision and an activist agenda. Sources of law that the court will look to for authority to base an opinion could be no more than a public decree by some professor or international body. This is unnerving because the ICC Statute paves the way for this action by leaving even basic questions of jurisdiction unanswered. Activist judges in preemptive power grabs could use concepts that may have little relevance to American law.

Arguments that attempt to repudiate challenges to the ICC's broad claims of authority are couched in assertions that massive cessions of sovereignty and domestic jurisdiction are the inevitable consequence of increased international cooperation and the incontrovertible effect of the ICC Statute. An argument based on a mere assertion that a radical shift is incontrovertible or inevitable is not a strong defense to a fundamental alteration to the most basic constitutional guarantees of a well-designed, stable legal system that has survived for centuries.

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V. THE DRAFTING PROCESS

The most striking failure of the ICC is the process by which its underlying statute was drafted. This process is the most substantial reason why the problems previously discussed are so extreme. Professor Cherif Bassiouni, one of the primary leaders at the drafting convention, has written, “Commentators on the Rome Statute will surely find much to criticize in the method and technique (or lack thereof) of the drafters.”\(^{270}\) This is a poignantly broad understatement. There was an over-influence of non-state parties in the drafting process. Also, before the conference, when the political and diplomatic leadership of the United States and the American media could have brought a lot of positive attention to the challenges of drafting a workable statute, the United States did not seek a leadership role appropriate for a strong country grounded in a legal system marked by stability and integrity.

According to Professor Bassiouni, the Delegates to the convention were unprepared and unacquainted with disputed legal issues,\(^{271}\) and the entire convention was designed under a strategy meant to “accelerate the drafting process.”\(^{272}\) Professor Bassiouni writes that conference organizers curtailed speech-making, proposed undebated drafts before negotiations began, and hastily created numerous small working groups for specific parts of the treaty in over one hundred locations.\(^{273}\) According to Professor Bassiouni, these locations were frequently arranged on an ad hoc basis and often changed at the last minute, without translators for many non-English speakers. Moreover, these locations were spread out and sometimes difficult to locate, prohibiting delegations from participating in the debate about many provisions of the statute.\(^{274}\) In the words of Professor Bassiouni, “[T]he informal working groups accelerated the process, even though only a few of the 2000 delegates grasped the overall progress of the work.”\(^{275}\) Professor Bassiouni adds that there was a “disparity in languages, legal approaches, and drafting techniques” that complicated the drafting process and that the “piecemeal transmission process” also caused “significant difficulties in maintaining a consistent form and style, in ensuring the uniform usage of terms, and in providing cross-references to other related articles.”\(^{276}\)

As a result, this process was extremely improper, especially for the creation of a document that could be a significant landmark for generations to come. A simple contract could not have been drafted under these conditions.

\(^{270}\) Bassiouni, supra note 159, at 466.

\(^{271}\) Id. at 446-48.

\(^{272}\) Id. at 448.

\(^{273}\) Id. at 447-51.

\(^{274}\) Id.

\(^{275}\) Id. at 450.

\(^{276}\) Id. at 452.
much less a complex international statute meant to both affect the most basic
due process rights of people accused of horrendous crimes and to stand as one of
the most significant treaties in world history.277 The convention rushed without
prudent deliberation; it dismissed basic questions of due process of law as pro-
cedural details by leaving them out of the statute entirely, and it ignored treaty-
making proceedings sanctioned by international law. Given these incredible
flaws, it is amazing and commendable that the diplomats at the convention
could come up with a document of any workability. Despite these incredible
flaws, the delegation from the United States and other like-minded delegations
from around the world attempted to work within the structure provided by the
leadership entities at the drafting convention. Nonetheless, judging from the
statute created, the drafters, at best, failed to effectively synthesize the diverse
legal systems of the world, and, at worst, discarded the interests of the United
States and its legal system.

When the United States did not effectively seek a leadership position in
the process of drafting the statute, non-governmental organizations took the
lead. Non-governmental organizations ("NGOs") are institutions that advocate
international policy agendas and monitor state compliance with international
legal rules. NGOs, sanctioned by the U.N. Charter, have an important official
role in international affairs to lobby at the United Nations regarding social and
economic powers; however, they are prohibited from lobbying at the General
Assembly or the Security Council.278 There are no standards to regulate their
conduct, and they are afforded no special rights under international law.279
When invited to sit in at a treaty-making convention, an NGO is no more than a
lobbyist.280 They are usually focused, single-issue organizations, which take on

277 Unfortunately, some well-meaning professionals view the ICC Statue drafting process as a
model for future treaty negotiations. See, e.g., Philippe Kirsch & John T. Holmes, The Rome
(1999).

278 U.N. CHARTER art. 71 ("The Economic and Social Council may make suitable arrangements
for consultation with non-governmental organizations which are concerned with matters within its
competence. Such arrangements may be made with international organizations and, where appro-
piate, with national organizations after consultation with the Member of the United Nations con-
cerned."). There are currently over two thousand NGOs registered with the Economic and Social
Council to lobby at the United Nations. See NGOs in Consultative Status with ECOSOC (Aug. 5,
the general NGO vision of their more limited role at the United Nations, NGO Global Network, at

279 See generally Karsten Nowrot, Legal Consequences of Globalization: The Status of Non-
Governmental Organizations Under International Law, 6 IND. J. GLOBAL LEGAL STUD. 579
(1999) (calling for formal recognition of roles and responsibilities of NGOs their integration into
system of international regulation).

280 The International Committee of the Red Cross (www.icrc.org) is one of many examples of
stable NGOs that speaks clearly about issues of worldwide importance and takes on challenging
operations to improve the world. Such sanctity, of course, does not give a mere interest group the
right to draft an international treaty any more than it gives a Washington lobbyist the right to draft
the role of communicating with leaders and mobilizing the public. While it is important for private institutions to bring attention to issues of worldwide significance, nableness of cause has no bearing on the fact that when attending a treaty-drafting assembly, an NGO is essentially no more than a political interest group without any sovereign democratic accountability.

The United States cannot sit back while non-state actors take the lead in the creation of international institutions. Hundreds of NGOs, such as "No Peace Without Justice," the "World Federalist Movement" and the "Transnational Radical Party" were active leaders at the conference. The "Coalition for the International Criminal Court," an umbrella organization for over one thousand NGOs, did a lot more than lobby. It essentially ran the convention, successfully coordinating an extremely well organized effort to push its political agendas into the draft. Such a structure, being without accountability
domestic legislation. NGOs, as lobbyists, often have political agendas that run counter to established legal precedents, such as the abolition of the death penalty or the abolition of gun ownership rights.

For example, in writing this Article, I have relied on research conducted by Amnesty International and Human Rights Watch, both NGOs with political agendas that color their reports, but also establishments with reputations for accurate reporting about policy issues.


Bassiouni, supra note 159, at 455-56.


The Coalition for the International Criminal Court stated its role as follows:

In order to follow the complex and concurrent negotiations taking place at the ICC diplomatic conference, thirteen NGO teams have been established. Each team consists of team leader(s), deputies and interested NGOs. The responsibilities of the Teams include organizing meetings with government delegations and the international CICC and reporting on developments with regards to articles included in their part of the statute. The teams will also work closely with the international coalition to recommend actions or strategies to be adopted on articles included in their part.

Governments interested in holding meetings with a particular team should contact the team leaders or deputies . . . .

Coalition for the Int'l Criminal Court, ROME TREATY CONF. MONITOR ON-LINE, June 15, 1998 (periodically specifically published to coordinate non-governmental organization activities related to the ICC), at http://www.iccnow.org/rome/html/rome_monitor/mon_index.htm. Since the drafting of the treaty, this institution has advocated its worldwide ratification.
to anyone and without the accountability of a domestic legal system, can take extreme positions and bring adversarial elements and heated rhetoric alien to the normal character of legal negotiations. This places such institutions in uneven bargaining positions with states that have extensive domestic and international responsibilities.

This organizational structure and uneven negotiation process was possible because the lead drafters allowed the NGOs’ leadership unfettered access to a drafting process in which it was very difficult, except in the central drafting committee, to determine the statute’s precise language. There were frequent private meetings between the NGOs and key diplomats throughout the convention, with each viewing the other as indispensable to the promotion of many of the agendas that have created basic problems in the statute.289 The United States and like-minded delegations and organizations were frozen out of these closed-door sessions of politically savvy diplomats and NGO representatives.290 Unlike the overall drafting process, these meetings were well organized and primarily receptive to small delegations from developing countries.291 United States’ delegates were isolated from primary decision-making processes because they were not permitted to attend these meetings.292 These meetings included strategy sessions between NGO leaders, the chair of the conference, and other leaders293 that appear, at best, to have ignored the concerns discussed in this article. This overtly political drafting atmosphere would be impossible at the United Nations, where the basic rules strictly limit such behavior.294

Professor Bassiouni hails the “strong professional bonds” of “the delegates of certain active governments and some NGO representatives” as “a significant driving force behind the statute.”295 Law professor and former Nuremberg Prosecutor Henry King, who joined in this effort, most aptly describes the situation. In his words, the NGOs “stemmed the tide of U.S. influence and created the strongest bulwark against the pressure and alleged threats tendered by the U.S. delegation and the Pentagon.”296 King continues, “Without this influ-

290 Id.
291 Bassiouni, supra note 159, at 455.
293 Id.
294 Id. at 372-73.
295 Bassiouni, supra note 159, at 455; see Washburn, supra note 292, at 367 (lauding the NGO participation at the drafting conference for “profoundly influenc[ing] every aspect of the Conference and deserv[ing] much of the credit for its success”).
ence, it is not at all clear that the delegations at Rome would have reached a sufficient level of consensus to produce a treaty which would have any force.”

King draws the conclusion that, “The best testimony to the work done by the NGOs and the individuals in favor of the court at Rome was their ability to withstand the final efforts of the United States to influence the outcome of the conference.”

This “bulwark” of political pressure isolated the United States’ basic concerns by stifling debate and by rushing one vote on the entire statute with universal jurisdiction and unchecked power subversive to the structure of the United Nations. Professor Bassiouni candidly explains the skewed balancing act that permitted this to happen, stating that in the name of efficiency and the success of the conference, on the last day of the conference “all of the political issues,” which he lists as “the definition of crimes, the Court’s jurisdiction and triggering mechanisms, complementarity, the roles of the Prosecutor and the U.N. Security Council, and the prospective application of the Statute’s substantive provisions,” were presented to be voted on together as a package, without debate.

When a vote was called on the ICC Statute, the conference appeared more like a circus or a late-night infomercial than a body of diplomats from around the world drafting an important treaty. The appropriate committees never even reviewed the statute, and the final proposal was not distributed until the early morning hours of the final day of the convention. Before the convention began, the lead drafters did not provide proposed drafts of the treaty to the countries of the world until shortly before the drafting convention. The chair of the convention purposefully withheld from circulation the draft of the most sensitive parts of the statute, much of which is dissected in this article, until it was too late to debate its contents. The United States had no time for an interagency review or to consult with its allies. Many countries’ delegates, under unreasonable time pressures, supported the statute not even knowing the language of the final draft or the political ramifications of this language.

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297 Id.
298 Id. at 97.
299 Bassiouni, supra note 159, at 457-58.
300 U.S. Department of State representative to the drafting conference James Rubin was more diplomatic, describing it as having the atmosphere of a “festival.” U.S. DEP’T OF STATE, DAILY PRESS BRIEFING (July 20, 1998), http://secretary.state.gov/www/briefings/9807/980720db.html.
301 Davenport, supra note 289.
302 Bassiouni, supra note 159, at 444-45.
303 Id. at 458.
304 Wedgwood, supra note 146, at 200.
305 Davenport, supra note 289; see, e.g., John Bolton, Courting Danger: What’s Wrong With the International Criminal Court, NAT’L INT’L, Winter 1998/99, at 60, 64 n.8 (arguing that lan-
Delegations cast their votes often after having little opportunity to pay attention to even general issues regarding the treaty, much less after being able to debate or scrutinize the text among themselves.\textsuperscript{306}

The consensus-based process of building international law was further hijacked beyond the requirement that states accept all of the statute or none of it with the undemocratic requirement that a mere sixty of the world’s 189 countries would activate the statute.\textsuperscript{307} This is less than a third of the total membership of the United Nations.\textsuperscript{308} Besides being a radical break from established international law, this voting process was undemocratic because it ignored the tiny populations of some countries signing the treaty\textsuperscript{309} and it imprudently ignored all strategic considerations.

The entire ICC Statute drafting process was a significant break with centuries of customary international law and a momentous rejection of the underlying principles of understanding and intellectual precision at the basis of the Vienna Convention on the Law of Treaties.\textsuperscript{310} Diplomatic negotiations should be non-adversarial, and not rushed. This permits the law to evolve according to the expectations of nations and prevents inflexible political agendas from taking the color of internationally recognized law.

Despite the political agendas of non-state entities and countries allied with them, currently no evidence of a conspiracy to write a flawed statute exists. There was only disarray and confusion, created by well meaning but poorly organized leadership. The effect of these failings, however, is a two-part fiasco. The first effect of these failings is a subversive and unrealistic statute, a procedural and linguistic coup d’etat, supported by weak and marginalized entities able for the first time to speak with loud voices but still with no political responsibility. The second effect is the political isolation of the United States, its power, and strong legal system. If there is any desire to thwart the influence of the United Nations or to attack the legitimacy of international treaty-making

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\textsuperscript{306} Bassiouni, \textit{supra} note 159, at 445.


\textsuperscript{308} \textit{Id.} at 268-69 (dubbing the term “Half-World Criminal Court” to describe the approval procedures of the court).

\textsuperscript{309} For example, small nations such as Andorra (population 66,000), Liechtenstein (population 32,000), San Marino (population 26,000), Nauru (population 11,000), the Marshall Islands (population 62,000), Dominica (population 71,000), and Antigua and Barbuda (population 67,000) were among the first 60 countries to join the court. See COALITION FOR THE INT’L CRIMINAL COURT, \textit{STATE SIGNATURES AND RATIFICATIONS CHART}, at http://www.iccnow.org/countryinfo/worldsigs-andratifications.html (list of signatories in chronological order); see also NAT’L GEOGRAPHIC, NATIONAL GEOGRAPHIC ATLAS OF THE WORLD 35-36, 70-72, 120 (7th ed. 1999).

standards, this political agenda should not be brought forward in the form of an international criminal court. The result of this process is a delegitimized discoloration of the law and a weakened court. The drafters over-legislated crimes, under-legislated processes and procedures, and did not provide a clear enough definition of the ICC’s jurisdiction. In doing so, they superficially reorganized customary international norms by dislocating them from the international treaty-making process, from the due process guarantees of the world’s strongest democracies, and from the brutal realities of international affairs.

Outside of the unique history of the European Continent, the over-legislation of international tribunals has lead to their rejection by sovereign states, including liberal democracies, and their ultimate irrelevance. For example, in the late 1990s, three Commonwealth Caribbean governments denounced human rights treaties they had agreed to, including treaties that placed their courts under the jurisdiction of international human rights tribunals. These steps came after a series of rulings by an international body prohibiting the application of the death penalty on convicted defendants who had used up their domestic appeals, but who had filed petitions abroad. This rejection of international criminal law in foreign tribunals occurred for many reasons, but key among these reasons are: over-legalization of the subject matter of the international tribunal, conflicting concepts of proper public policy, and the broad scope of authority within the international tribunal. Such rejection has happened already in the relationship between the United States and the International Criminal Court, and, although the court will have less of a direct influence on most of its member states than the Caribbean court did on the former members of its treaty regime, there could be further severances if there is not reform to the statute.

VI. Conclusions

Even with appropriate amendments to the ICC Statute, prosecutions by the ICC must be chosen very carefully lest the court overreach and lose what limited legitimacy it holds. Potential laboratories where the ICC can develop legitimacy include Liberia, Chad, Sierra Leone, Indonesia, Colum-


312 Id. at 1885-94.

313 Id.

314 Charles Taylor, former president of Liberia, has been indicted for war crimes, crimes against humanity and other violations of international humanitarian law including the use of child soldiers in a tribunal in Sierra Leone that, although not created by a treaty, asserts jurisdiction. See West Africa: Taylor Indictment Advances Justice: Liberian President Must Be Arrested, HUMAN RIGHTS WATCH, June 4, 2003, http://hrw.org/press/2003/06/westafrica060403.htm.

315 See Reed Brody, Universal Jurisdiction: Myths, Realities, and Prospects: The Prosecution
Bia\textsuperscript{318} and Myanmar (Burma),\textsuperscript{319} or the prosecution of Osama bin Ladin.\textsuperscript{320} While a prosecution of each of these actors for past violations in each of these situations would be ex post facto violations,\textsuperscript{321} none of them appear to be improving, and future violations may be likely.

Whichever cases the ICC Prosecutor selects for prosecution, the ideals at the court’s basis do not guarantee effective prosecution or deterrence, or even the potential for the court to have a positive effect on the world. Until the statute adequately protects the rights of the accused and prevents the ideals at its basis from being sacrificed to world politics, effective prosecution will escape the ICC. It is troubling that many American commentators who write intelligent defenses of the statute do not question the lack of limits on the power of the


\textsuperscript{317} See \textsc{Press Release, Amnesty Int’l, Indonesia: East Timor Trials Deliver Neither Truth Nor Justice} (Aug. 15, 2002), \textit{http://www.amnestyusa.org/news/2002/indonesia08152002.html} (alleging that prosecutors filed sloppy documents, ignored relevant evidence, failed to protect witnesses and presented cases which deliberately failed to prove the widespread and systematic nature of the war crimes that occurred in East Timor).


\textsuperscript{320} The treaty creating the ICC Statute would have to be amended to make large acts of international terrorism criminal offenses. However, bin Ladin could be prosecuted for genocide under the theory that he sought to kill Americans on the basis of their nationality. The primary problem with allowing the ICC to prosecute Osama bin Ladin is that the ICC does not permit the death penalty. \textit{See ICC Statute, supra} note 17, art. 77 (listing penalties). There is no such burden in the United States. \textit{See Gregg v. Georgia, 428 U.S. 153 (1976) (constitutionality of the death penalty)}; Jamison v. Collins, 100 F. Supp. 2d 647, 766-67 (S.D. Ohio 2000) (unsuccessful challenge to death penalty under the principles of international law).

\textsuperscript{321} This assumes that all of these acts occurred before the ICC Statute came into effect over the parties accused.
court, or the limits to the rights of the Americans, and anyone else, who could be brought before it.

Professor Benjamin Ferencz, a former Nuremberg Prosecutor from the United States, has written of the ICC’s positive potential, stating “possibilities for corruption, venality and inefficiency can be found in courts everywhere, but to suggest that because abuses are imaginable courts should not exist is to doubt the rule of law itself.” Nonetheless, it is equally true that, as James Madison has written, “Tyranny has perhaps oftener grown out of the assumptions of power, called for, on pressing exigencies, by a defective constitution, than out of the full exercise of . . . authorit[y].” In this country, the most expansive constitutional amendments that create judicial power were initially designed to protect the local bases of civil authority and have since been shaped to limit governmental authority. The ICC Statute, while speaking for humanity’s most oppressed, does the opposite for individual rights and local authority. If the United States submits to this statute as it currently is designed, this country will risk surrendering the authoritative peacemaking potential it has earned from the consistent application of the libertarian principles at the core of its constitution.

Professor Bassiouni laments that at the drafting convention, “Many delegations were dismayed by [the American] display of diplomatic inflexibility, which was widely interpreted as another sign of U.S. intransigence and as a weakness in the U.S. negotiating approach.” He follows this statement with the observation that “it must be noted that the United States had some valid concerns that were not sufficiently and clearly articulated, and that these were not addressed in an imaginative fashion.” This second observation, as it applies to the ultimate draft of the statue, is a massive understatement. The United States has a history of flexibility in its creation of strong legal documents.


324 The Federalist No. 20, at 184 (James Madison) (Benjamin Fletcher Wright ed., 1961).


327 Bassiouni, supra note 159, at 457.

328 Id.

However, in this situation, it must persistently insist upon reform because the ICC Statute does not adequately support the principles of limited government and individual rights.

The reform necessary to keep politics out of the courtroom and to protect due process of law must be made in the form of treaty-based law that has express limitations on the power the court may claim and must allow for political alternatives to prosecution. The statute instead has an over-centralized governing authority in the Assembly of Member States without limitations on the power of the court. Any reform that comes from the Assembly of Member States or from the judges of the court is too easily reversed, gives credibility to the sections of the statute that are not reformed, and takes the treaty-making power away from sovereign countries and gives it to an unaccountable international body.

Furthermore, the statute appears to be based on the premise that prosecution within an undeveloped area of the law is always the ultimate end of peace and reconciliation. International prosecution neither guarantees justice nor necessarily solves problems. In some desperate regions, where populations need to rebuild after war, the tearing of internal wounds prevents this process, or a population merely needs peace after years of unspeakable horrors or simply the existence of a basic civilized order more than even a symbol of justice.

A strong statute must look beyond the good intentions of most of the current statute's supporters. The statute as it is currently written hurts the long-term international stability it seeks by placing inadequate checks and balances on the power it claims. This inadequacy attacks the accountability that comes from sovereignty and decentralized government and replaces it with standards based in mere rhetoric and undefined passages of law that risk making the court irrelevant to world affairs. Even if there were stronger checks and

Mary's L.J. 93 (1988) (discussing the fusion of Jacksonian democracy, Spanish civil law, the American Revolution, constitutions of different states of the United States, English common law and the rejection of the lack of basic due process guarantees allowed under prior dictatorial rule into the Texas Constitution and the formation of the Republic of Texas).

330 See generally Martha Minow, Between Vengeance and Forgiveness (1998) (discussing thesis that war crime tribunals provide little more than a symbol of justice after incalculable horrors).

331 See W. Michael Reisman, Institutions and Practices for Restoring and Maintaining Public Order, 6 Duke J. Comp. & Int'l L. 175, 175 (1995) (arguing that we not "fall victim to a judicial romanticism in which we imagine that merely by creating entities we call 'courts' we have solved major problems"); see also Michael P. Scharf, The Case for a Permanent International Truth Commission, 7 Duke J. Comp. & Int'l L. 375, 398 (1997) (arguing that the ICC needs reform because it provides no discretion for truth commissions and other methods of reconciliation that may be more appropriate than criminal prosecution in individual circumstances).

332 See Wise, supra note 307, at 268-72 (supplying an interesting analysis of the ICC Statute that cautions that the ICC faces many paradoxes and dangers within the well-meaning efforts to establish a universal system of justice).

333 See generally Abraham D. Sofaer, International Law and Kosovo, 36 Stan. J Int'l L. 1
balances within the statute, the court's undefined jurisdiction and its expectation that written words alone will deter the skewed values of the terrorists and other lawless butchers of the world, both risk placing fear of prosecution only into states trying to bring peace and security to the world.  

Lest the twenty-first century be bloodier than the twentieth, an appropriate symbol of the rule of law and model legal system must be a workable reality. Like the United States Constitution, the ICC Statute must be meticulously designed to protect individual rights and to protect the reasonable use of preventative force. The statute, in its current form, reads like a European vision of a world without American power, without American constitutional guarantees, and without a basis in the lessons learned from victories in the Cold War and the second World War. This statute is a unilateral rejection of the American backbone to world security and a tool to promote an over-centralized global order. The ICC must instead be a fully worldwide body with clearly enumerated powers if it is to secure a strong and positive role in world affairs.

The possibilities for secure peace and meaningful justice today require international institutions to speak with authority and fairness. These possibilities remain as they did before September 11, as they did in 1945, 1648, 1776 and 1989. They continue to demand international cooperation and open dialogue. Cooperation and open dialogue will be difficult if the ICC is subversive to the United Nations' attempts to maintain political stability, or to the many responsibilities the United States has around the world. In order to reach the goals and ideals of this institution, including a successful international fight against terrorism, the signatory countries to the ICC Statute must be willing to enter into dialogue about reform to the statute, and the United States must be a role model and an active participant in this process.

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(2000) (detailing failings of legal assertions to prevent moral action in international affairs).

334 Issues relating to the relationship of American military force and the power claimed by the ICC go far beyond the scope of this Article. See generally Smidt, supra note 49 (discussing the relationship between the use of judicial authority to punish parties who commit atrocities and the use of military force to prevent atrocities).

335 See generally James W. Caesar, A Genealogy of Anti-Americanism, PUB. INT., Summer 2003 (arguing that contemporary European thinkers must seek common ground with American thought, and must reject lazy, amorphous anti-American arguments, while Americans must be more open to outside criticism and must not reject legitimate criticism as raw anti-Americanism, presented as thesis within article that traces history of Anti-Americanism in European thought and its effect on the world).