

A FRESH LOOK AT THE JURISDICTIONAL PROVISIONS OF THE STATUTE OF THE INTERNATIONAL CRIMINAL COURT: THE CASE FOR SCRAPPING THE TREATY

MARK A. SUMMERS*

I. INTRODUCTION

Since the end of the Nuremberg trials, many in the international community dreamt of a permanent tribunal with the power to bring international malefactors to justice.¹ As the century came to a close, the world community witnessed, in Bosnia-Herzegovina and Rwanda, repetitions of the kinds of atrocities committed during World War II. The graphic depictions broadcast to our living rooms made these crimes impossible to ignore.² A United Nations Commission and numerous other non-governmental organizations were on the ground interviewing the victims and compiling a detailed record upon which war crimes prosecutions could be based.³

All of this brought home the urgent need for a court, not only as an instrument of international justice, but also as an essential component in the international community's efforts to maintain peace and security.⁴ The United Nations Security Council responded by creating the ad hoc International Criminal Tribunals for the Former Yugoslavia (ICTY) and Rwanda (ICTR).⁵ Not surprisingly, there was an almost simultaneous move to create a permanent tribunal via a comprehensive multi-lateral treaty. Such a tribunal, it was believed, would have greater legitimacy than either the ICTY or the ICTR because it would not be beholden for its existence and powers on the highly politicized Security Council.⁶

The International Law Commission's draft statute for an international criminal court was resurrected as the basis for a new international criminal court.⁷ By 1998, a draft treaty was ready for finalization at an international conference in Rome.⁸ While there were many specific and detailed issues facing the delegates, the question that loomed

* Associate Professor of Law, Florida Coastal School of Law; B.A., Washington and Jefferson College, *cum laude*; J.D., West Virginia University College of Law; L.L.M., University of Cambridge (international law). The author twice served as an adjunct to the Office of the Prosecutor at the International Criminal Tribunal for the Former Yugoslavia, and also advised the judges of the Tribunal regarding changes in its rules of procedure and evidence.

¹ MICHAEL P. SCHARF, *BALKAN JUSTICE* 13-17 (1997).

² GARY JONATHAN BASS, *STAY THE HAND OF VENGEANCE* 210 (2000).

³ *Id.* at 211; SCHARF, *supra* note 1, at 47-49.

⁴ See SCHARF, *supra* note 1, at 51.

⁵ Statute of the ICTY, U.N. Doc. S/25704, Annex, reprinted in 32 I.L.M. 1192 (1993); Statute of the ICTR, S.C. Res. 955, Annex, Nov. 8, 1994, reprinted in 33 I.L.M. 1602 (1994).

⁶ See David A. Nill, *National Sovereignty: Must It Be Sacrificed to the International Criminal Court?*, 14 B.Y.U. J. PUB. L. 119, 123-28 (1999).

⁷ Rome Statute of the International Criminal Court, *Overview*, available at <http://www.un.org/law/icc/general/overview.htm> (last visited July 14, 2000).

⁸ *Id.*

large over the conference was whether it was possible to create an effective court, independent of state or Security Council domination, that, at the same time, did not unacceptably erode the prerogatives of state sovereignty.⁹

The United States was the key to answering this question in the negative. In more than one recent instance, it walked away from treaties proposing comprehensive solutions to vexing international problems, even though it actively participated in the treaty negotiating process and even though substantial concessions were made to assuage its concerns.¹⁰ This pattern would repeat itself in Rome.

In this article, I argue that U.S.-influenced compromises in the final treaty produced a fatally-flawed international criminal court that will function less well than the patchwork approach to international crimes characterizing the existing system. Equally unfortunate is the fact the treaty in its present form is one the United States will be unlikely ever to ratify, and, without U.S. participation, any international criminal court is doomed to fail.

Part II of the article will depict the treaty negotiation process and the U.S. role in it. Part III will describe how the jurisdictional rules in the treaty, those provisions that were most directly affected by the U.S. efforts to dilute the Court's power, will function. Part IV will examine the flaws in Article 12, the "jurisdictional" provision in the treaty. Part V will explore in detail how the admissibility provisions will create difficult, perhaps even intractable, problems for the Court and potentially put it in conflict with the Security Council. Part VI will apply these rules in a case study of the Lockerbie bombing, and Part VII will set forth my conclusions.

II. BACKGROUND

A. THE PROBLEMS FACED BY THE UNITED STATES DELEGATION TO THE ROME CONFERENCE¹¹

From June 15 to July 17, 1998, delegates from 160 nations met in Rome, Italy, to finalize the text of a treaty that would create the first permanent international criminal court.¹² The draft statute¹³ under

⁹ Nill, *supra* note 6, at 128.

¹⁰ Jody Williams, *U.S. Dampens Success of Land-Mine Treaty*, TORONTO STAR, Dec. 3, 1998, available at LEXIS, News Library, Major Newspapers File; Curtis Clifton, *Sign The Sea-Law Treaty*, N.Y. TIMES, Feb. 21, 1983, available at LEXIS, News Library, Major Newspapers File.

¹¹ The United Nations Conference of Plenipotentiaries on the Establishment of an International Criminal Court (ICC) held in Rome, Italy, from June 15 to July 17, 1998 (Rome Conference).

¹² *Id.*

¹³ U.N. Doc. A/CONF.183/2/Add.1 (1998).

consideration in Rome contained "some fourteen hundred ... points of disagreement," both as to substance and form, on which the conferees would have to agree in order to produce a treaty.¹⁴ At the end of the conference, the delegates voted on and adopted the text of the treaty that is now open for signature and ultimately ratification by the states.¹⁵ As of this writing, that process is moving inexorably towards the sixty ratifications required before the treaty takes effect.¹⁶

The United States delegation to the Rome Conference, led by David J. Scheffer, the Ambassador-at-Large for War Crimes, faced a daunting task. Even before the conference, Senator Jesse Helms, the chairman of the Senate Foreign Relations Committee, notified Secretary of State Madeleine Albright that any treaty creating an international court before which American servicemen could be tried would be "dead on arrival" in his committee.¹⁷ High ranking military leaders in the Pentagon expressed similar sentiments.¹⁸ This opposition is based on their fear (though it has not been expressed in exactly these words¹⁹) that Americans serving as peacekeepers or peacemakers in one

¹⁴ Phillippe Kirsch & John T. Holmes, *The Rome Conference on an International Criminal Court: The Negotiating Process*, 93 AM. J. INT'L L. 2, 3 (1999).

¹⁵ Mahnouch H. Arsanjani, *The Rome Statute of the International Criminal Court*, 93 AM. J. INT'L L. 22 (1999).

¹⁶ Rome Statute of the International Criminal Court, *Ratification Status* (Feb. 12, 2001), available at <http://www.un.org/law/icc/statute/status.htm> (last visited Mar. 29, 2001).

¹⁷ Helms Declares U.N. Criminal Court "Dead-On-Arrival" in Senate without United States Veto, GOV'T PRESS RELEASES, Mar. 26, 1998, available at 1998 WL 7322525.

¹⁸ Betsy Pisik, *Global Court Is No Done Deal. Conferees on Criminal Tribunal Confront "Difficult Issues."* WASH. TIMES, June 15, 1998, at A15.

On one side, Sen. Jesse Helms ... has said that if any chance exists for an American to be tried before the court, the treaty will be 'dead on arrival' when it comes before his committee for ratification.

The Pentagon, which routinely schools officers in the laws of war, holds a position similar to the senators' and has conducted informal briefings about the court with foreign military representatives.

The State Department appears willing to accept a slightly higher element of risk to United States soldiers overseas. The Justice Department is closer to State than Defense on the question of the Court.

Id.

¹⁹ See, e.g., David J. Scheffer, Press Conference before the National Press Club, July 31, 1998, available at 1998 WL 431804.

We have to see a document that provides us with the assurance that this court will not be a politically motivated court – will not be one that can be used by a rogue state against the United States, and yet create the bizarre consequence that our soldiers in multinational peacekeeping operations on the soil of a rogue state could be prosecuted. But the perpetrator of the mass crimes on the territory of that rogue state himself could not be prosecuted because of the way the treaty is structured.

of the world's hotspots could be arrested on trumped up charges by a vindictive, anti-American despot and brought before the international criminal tribunal where they would be swiftly convicted by a kangaroo court composed of equally vindictive, anti-American, foreign judges.²⁰ Moreover, the treaty's opponents were not satisfied that language in the treaty, which limited the court's jurisdiction over crimes against humanity²¹ and war crimes²² to those offenses committed as "part of a widespread or systematic

Id.

²⁰ Of course the possibility always exists that just such a scenario could play itself out in the local criminal justice system of a country like Bosnia or Haiti where Americans have served as peacekeepers. If that ever happens, the critics of the International Criminal Court might well pray for an international tribunal with the power to divest the local authorities of jurisdiction. For example, had diplomatic efforts failed to gain the release of three American soldiers captured by the Serbs in Macedonia during the Kosovo crisis, an ICC would have been a welcome refuge from the courts in Slobodan Milosevic's Yugoslavia. See Dana Priest, *Army Details Capture, Beatings of 3 Soldiers; Yugoslavs Ambushed Vehicle in Macedonia*, WASH. POST, May 8, 1999, at A1. In a more recent incident, Milosevic's army arrested two British and two Canadian citizens working with the U.N./O.S.C.E. (Organization for Security and Cooperation in Europe) Kosovo reconstruction mission and charged them with terrorism. They were held incommunicado in a military prison in Montenegro prior to being transferred to Belgrade for trial. *Four Arrested Westerners Transferred to Belgrade*, AGENCE FRANCE-PRESSE, Aug. 8, 2000, available at LEXIS, News File, Wire Service Stories. It is far more likely, however, that ICC or not, American GI's will continue to be prosecuted for crimes committed during overseas operations, as they always have been, by United States military tribunals. See, e.g., George Boehmer, *Ohio GI Gets Life Sentence for Killing Ethnic Albanian Girl in Kosovo*, A.P., Aug. 2, 2000, available at LEXIS, News File, News Group File, Most Recent Two Years.

²¹ Article 7(1), Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, U.N. Doc.A/CONF.183/9, reprinted in 37 I.L.M. 999 (1998) [hereinafter ICC Statute], defines "crimes against humanity" as:

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

²² *The Principles of International Law Recognized in The Charter of The Nuremberg Tribunal and in the Judgment of the Tribunal*, [1950] 2 Y.B. Int'l L. Comm'n 374, U.N.Doc.A/1316. A generally accepted definition of "war crimes" is found in paragraph 118(b):

b. War crimes:

Violations of the laws or customs of war which include, but are not limited to, murder, ill-treatment or deportation to slave-labour or for any other purpose of civilian population or in occupied territory, murder or ill-treatment of prisoners of war, or persons on the

attack directed against any civilian population, with knowledge of the attack" (crimes against humanity)²³ or those "in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes" (war crimes),²⁴ afforded sufficient protection against vindictive, baseless prosecutions.²⁵

B. THE U.S. NEGOTIATING STRATEGY

The American delegation at the Rome Conference therefore pursued several strategies intended sufficiently to circumscribe the jurisdiction of the international criminal court so that a watered-down version of the treaty might pass muster in Senator Helms' committee.²⁶ Claiming an outright exemption in the treaty for United States military personnel would have been legally untenable and politically impossible. Thus, the United States based its strategy on incorporating other provisions into the treaty intended to achieve the same result. Its principal negotiating positions were: first, states should be able to divest the international court of jurisdiction (the principle of "complementarity");²⁷ second, the Security Council should control which

seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns, or villages, or devastation not justified by military necessity.

Article 8 of the ICC Statute adds substantially to this list. ICC Statute, *supra* note 21, art. 8.

²³ *Id.* art. 7(1).

²⁴ *Id.* art. 8(1).

²⁵ See *Hearing on the United Nations International Criminal Court Before the S. Foreign Rel. Comm.* (1998) (statement of Sen. Jesse Helms, Member, Sen. Foreign Rel. Comm.), available at 1998 WL 422427.

²⁶ See Scheffer, *supra* note 19.

I think it's incumbent upon us to always keep the Senate's views very much in the forefront of our minds, because after all for us to be a credible negotiating party in these treaty negotiations, we have -- we know that we have a certain procedure in the United States for negotiating, signing, and ratifying treaties. And the United States Senate is a key part of the third leg of that endeavor, the ratification part.

We cannot credibly go in and negotiate treaties if we are certain that if we negotiate a particular outcome and support a particular outcome, the Senate then is vigorously opposed to that outcome even before we've presented the treaty to them. I think we have to be very cognizant of what those views are.

Id.

²⁷ David J. Scheffer, *Developments in International Criminal Law: The U.S. and the International Criminal Court*, 93 AM. J. INT'L L. 12, 13 (1999). This is the principle known as "complementarity." It is set forth in paragraph 10 of the Preamble and Article 1 of the ICC Statute, *supra* note 21 ("[T]he International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions.").

Mahnoush H. Arsanjani, Senior Legal Officer, Office of Legal Affairs, United Nations, and Secretary of the Committee of the Whole of the Rome Conference, described "complementarity" in these terms:

cases are referred to the Court;²⁸ third, states should be able to avoid the jurisdiction of the ICC altogether by "opting out" of war crimes and crimes against humanity, leaving the court with jurisdiction only over the crime of genocide;²⁹ fourth, "the mandatory consent of the state of the accused" must be a prerequisite to the Court's exercise of jurisdiction.³⁰ Although focused on different elements of the proposed ICC's statute, each of these strategies had the same purpose: maximizing U.S., and minimizing ICC, control over cases involving Americans.

C. THE RESULT: A WEAKENED TREATY THAT THE UNITED STATES STILL COULD NOT SIGN

Principally as a result of U.S. negotiating efforts, many of the U.S.-backed provisions, or variations thereof, found their way into the final treaty.³¹ These provisions included *bona fide* state prosecutions having priority;³² the Security Council being able to refer cases to the court³³ and being able to defer ICC investigations or prosecutions for twelve months by adopting a resolution under Chapter VII of the UN Charter.³⁴ But, the Japanese

"Three principles underlie the statute. The first, the principle of complementarity, establishes that the court may assume jurisdiction only when national legal systems are unable or unwilling to exercise jurisdiction. Thus, in cases of concurrent jurisdiction between national courts and the international criminal court, the former, in principle, have priority [footnote omitted]."

Arsanjani, *supra* note 15, at 24.

²⁸ Scheffer, *supra* note 27, at 13.

²⁹ *Id.* The United States supported "opt out" provisions for war crimes and crimes against humanity; however, it did not take that position with regard to genocide. Arsanjani, *supra* note 15, at 26 ("A few states, including the U.S., wanted automatic jurisdiction only for genocide. For other crimes, they preferred some form of a consent regime: either opting in or opting out, or consent on individual cases.").

³⁰ Kirsch & Holmes, *supra* note 14, at 4; Arsanjani, *supra* note 15, at 26 ("The requirement of consent by the accused's state of nationality was strongly supported by the U.S. as a key condition for the court's jurisdiction.").

³¹ Scheffer, *supra* note 19 ("We achieved, actually, many of our objectives in the statute of the court and we worked very hard at that. ...I think the treaty is stronger because of United States participation in the negotiations."); Theodor Meron, *The Court We Want*, WASH. POST, Oct. 13, 1998, available at 1998 WL 16561889 ("The United States imprint is, in fact all over the statute: in ensuring due process in trials, in the priority given to national courts, in the checks and balances on the powers of the prosecutor.").

³² ICC Statute, *supra* note 21, arts. 17(1)(a) & (b).

³³ *Id.* art. 13(b).

³⁴ *Id.* art. 16 (the 12 month period is renewable). While these provisions give the Security Council substantial control over ICC prosecutions, it is less than the role of "preliminary reviewer" of all cases that the United States had urged, Scheffer, *supra* note 27, at 13, since the Statute also permits states to refer cases (art. 13(a), and the prosecutor to initiate investigations *proprio motu* (art. 3(c), without prior Security Council approval.

proposal,³⁵ favored by the United States, to include in the statute an "opt out" clause for ten years for war crimes and crimes against humanity was rejected at the conference.³⁶ It was replaced by a compromise proposal allowing a state, for seven years after becoming a party to the treaty, to "not accept the jurisdiction of the Court with respect to [war crimes] when a crime is alleged to have been committed by its nationals or on its territory."³⁷

Because the U.S. negotiators were not entirely successful in Rome and because there is a claimed loophole³⁸ in the final statute that might result in American soldiers appearing before the ICC without U.S. consent,³⁹ the United States was one of seven countries (of the 160 participating in the Rome conference) voting against the final draft of the ICC Statute.⁴⁰

The goal of all those at Rome, as stated by Ambassador Scheffer, was to create "an international court [that] should be able to prosecute tyrants who commit mass murder, mass rape or mass torture against their own

³⁵ Kirsch & Holmes, *supra* note 14, at 9.

³⁶ Scheffer, *supra* note 19.

³⁷ ICC Statute, *supra* note 21, art. 124. Part of the U.S. objection to this compromise is that it gives only state parties to the treaty the choice to opt out, but is unavailable to non-parties that have signed the treaty during the period between signature and ratification. The United States feared that, in its case, the time period between signature and ratification could be substantial and that during it, U.S. citizens could be exposed to greater liability than nationals of state parties.

³⁸ This alleged loophole is in Article 12 of the ICC Statute, which gives the Court jurisdiction if either the state on whose territory the crime is committed, or of which the accused is a national, is a party to the statute and consents to the jurisdiction of the court. According to the United States,

Article 12 is inconsistent with treaty practice, for it would enable the court to exercise jurisdiction over a national of a non-state party if the state where the crime was committed had consented to the court's jurisdiction. Hence, the statute purports to establish an arrangement whereby United States armed forces operating overseas could conceivably be prosecuted by the ICC even if the U.S. had not agreed to be bound by the treaty. The U.S. took the position that such overreaching by the ICC could inhibit the U.S. from using its military to meet alliance obligations and to participate in multinational operations, including humanitarian interventions to save civilian lives.

Arsanjani, *supra* note 15, at 26 (emphasis added). Philippe Kirsch, Chair of the Committee of the Whole at the Rome Conference, concluded that, "[i]t is on this issue that the differences proved irreconcilable and consensus eventually broke down, leading to a vote at the end of the conference." Kirsch & Holmes, *supra* note 14, at 4; see also Bartram S. Brown, *United States Objections to the Statute of the International Criminal Court: A Brief Response*, 31 N.Y.U. J. INT'L L. & POL. 855, 868-70 (1999); Young Sok Kim, *The Preconditions to the Exercise of the Jurisdiction of the International Criminal Court: With Focus on Article 12 of the Rome Statute*, 8 MSU-DCL J. INT'L L. 47, 79-80 (1999).

³⁹ Even Article 98(2) of the ICC Statute, which requires the consent of the state of nationality of "guest forces" before a host state can release them to the ICC for prosecution, did not satisfy U. S. concerns. ICC Statute, *supra* note 21, art. 98(2).

⁴⁰ Arsanjani, *supra* note 15, at 22. More recently, the United States has continued to push for an amendment to the treaty that would exclude nationals of countries that have not ratified the treaty from the court's jurisdiction. Barbara Crossette, *United States Keeps Up Pressure Over Criminal Tribunal*, INT'L HERALD. TRIB., June 13, 2000, at 2.

citizens, while at the same time not inhibiting States from contributing to efforts to help protect international peace and security."⁴¹ The United States insisted that this means the permanent international criminal court cannot sit in judgment of U.S. citizens since that would hinder its ability, as the world's remaining superpower, "to protect international peace and security."⁴² Simply put, these two positions – an effective international criminal court with no jurisdiction over U.S. nationals – are irreconcilable and unachievable.⁴³

Nevertheless, even after the Rome Conference, Ambassador Scheffer wrote that:

The U.S. has had and will continue to have a compelling interest in the establishment of a permanent international criminal court (ICC). Such an international court, so long contemplated and so relevant in a world burdened with mass murderers, can both deter and punish those who might escape justice in national courts. Since 1995, the question for the Clinton administration has never been whether there should be an international criminal court, but rather what kind of court it should be in order to operate efficiently, effectively and appropriately within a global system that also requires our constant vigilance to protect international peace and security.⁴⁴

D. AFTERMATH

Despite the compromised document emerging from the Rome Conference, one commentator argued the United States should ratify the ICC Statute in order to create a "judicial 'safety net' in place for those rare cases where no national court system is willing and able to investigate serious international crimes."⁴⁵ Another commentator has suggested that only with the establishment of an international criminal court can international law

⁴¹ David J. Scheffer, Statement in the Sixth Committee of the General Assembly on the International Criminal Court, Oct. 21, 1998, USUN Press Release # 179 (98), available at http://www.un.int/usa/98_179.htm (last visited Aug. 2, 2000).

⁴² *Id.*

⁴³ See Christopher Keith Hall, *The Sixth Session of the U.N. Preparatory Committee on the Establishment of an International Criminal Court*, 92 AM. J. INT'L L. 548, 556 (1998).

Alternatively, President Clinton could decide that no Statute could satisfy Senator Helms and still be effective. He could then undertake a comprehensive reexamination of the U.S. position with a view to supporting a truly effective court and then ... take the case for an effective Court to the American people with the goal of ratification by a post-Helms Senate.

⁴⁴ *Id.*

⁴⁵ Scheffer, *supra* note 27, at 12.

⁴⁶ Brown, *supra* note 38, at 878 (describing the "judicial safety net" as the "Statute's modest goal").

enforcement escape the criticisms of unevenness (some crimes go unprosecuted), inequality ("victor's justice") and politicization (high level wrongdoers escape prosecution) that have been leveled at the ad hoc tribunals created to prosecute war crimes since World War II.⁴⁶

The reasons the United States advanced for refusing to sign the treaty may be summarized as: 1) the "overly broad scope of the crimes covered"; 2) "the refusal to permit reservations" to the treaty; 3) an overly powerful prosecutor; 4) the defeat of the United States sponsored ten year "opt out" provision; and 5) the extension of jurisdiction to nationals of non-party states.⁴⁷ In a stunning reversal of what had been the Clinton administration's "principled" opposition to the treaty in its current form, President Clinton signed the treaty in December 2000, just before he left office.⁴⁸ The signing will do little to change the dynamics of the debate over ratification. The treaty is not expected to see the light of day any time soon in the Senate Foreign Relations Committee, nor is the Bush administration expected to push for its ratification.⁴⁹

III. THE JURISDICTION AND ADMISSIBILITY PROVISIONS OF THE TREATY: HOW THEY WILL WORK

A. INITIATING A CASE: JURISDICTIONAL REVIEW BY THE PROSECUTOR; THE PRETRIAL CHAMBER AND THE COURT

The ICC treaty creates a court structure consisting of four principal organs: 1) the Presidency; 2) the Court, divided into pretrial, trial and appellate chambers; 3) the Prosecutor; and 4) the Registry, which is the administrative arm of the Court.⁵⁰ In addition, the states-parties to the ICC treaty comprise the Assembly of States Parties, which, *inter alia*, has the power to appoint judges and the prosecutor, to amend the treaty, and to adopt rules of procedure and evidence.⁵¹

⁴⁶ Marcella David, *Grotius Repudiated: The American Objections to the International Criminal Court and the Commitment to International Law*, 20 MICH. J. INT'L L. 337, 349-51 (1999).

⁴⁷ *Id.* at 354-55.

⁴⁸ Robin Wright, *The Confirmation Hearings*, L.A. TIMES, Jan. 18, 2001, available at 2001 WL 2453311.

⁴⁹ *Id.*

⁵⁰ ICC Statute, *supra* note 21, art. 34.

⁵¹ *Id.* art. 112.

All cases coming before the Court are first reviewed by the Office of the Prosecutor to determine whether there is a "reasonable basis" to continue the investigation.⁵² Cases may be referred to the prosecutor by the UN Security Council,⁵³ in the exercise of its Chapter VII power to "decide what measures shall be taken ... to maintain or restore international peace and security."⁵⁴ Cases may also be referred by a state party to the ICC Treaty.⁵⁵ And, finally, the prosecutor may initiate an investigation at her own discretion (or in the language of the Statute, *proprio motu*) "on the basis of information on crimes within the jurisdiction of the Court."⁵⁶

In addition to determining whether there is an adequate factual basis upon which to proceed, the prosecutor also makes a preliminary determination on whether the Court will have "jurisdiction" over the crime⁵⁷ and whether the case is admissible.⁵⁸ The ICC Statute sets forth jurisdictional requirements⁵⁹ that differ depending upon how the investigation was initiated. In general, the "jurisdictional" provisions that apply to state- or prosecutor-initiated cases are based on concepts that are well accepted in international criminal law,⁶⁰ *i.e.*, state consent, the territorial principle, and the nationality principle.⁶¹ The "admissibility" provisions, on the other hand, are manifestations of the concept of complementarity; that is, the ICC must defer its investigation or prosecution if a state with jurisdiction over the offense is "genuinely" proceeding with its own investigation or prosecution.⁶² Because

⁵² *Id.* art. 51(1).

⁵³ *Id.* art. 13(b).

⁵⁴ U.N. Charter art. 39.

⁵⁵ ICC Statute, *supra* note 21, art. 13(a).

⁵⁶ *Id.* art. 15(1). The prosecutor may investigate the "information" she receives regarding crimes within the Court's jurisdiction by soliciting additional information from States, organs of the U.N., inter-and non-governmental agencies, or "other reliable sources that he or she deems appropriate...." *Id.* art. 15(2).

⁵⁷ The broad categories of offenses in Article 5 are war crimes, crimes against humanity and genocide. The crime of "aggression" awaits definition after the treaty goes into force. While the United States has expressed objections to the inclusion of some the crimes covered by the treaty, especially the crime of aggression, this article will not consider those objections, since it focuses on the jurisdictional aspects of the ICC Statute. See David, *supra* note 46.

⁵⁸ ICC Statute, *supra* note 21, arts. 53(1)(a) & (b).

⁵⁹ *Id.* art. 12.

⁶⁰ See I. BROWNIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 300-303 (4th ed. 1990). I do not mean by this that the way these principles are applied in the ICC statute is non-controversial. Indeed, the United States has strenuously protested that the state consent provisions are contrary to accepted principles of international law, since they only require consent by either the state where the offense was committed, or that of which the accused is a national and thus improperly extend the Court's jurisdictional reach to non-party states. See Scheffer, *supra* note 27, at 13-15.

⁶¹ ICC Statute, *supra* note 21, art. 12.

⁶² ICC Statute, *supra* note 21, arts. 17(a) & (b) and arts. 18(1) & (2). Complementarity is an innovation of the ICC Statute. The jurisdiction of the ICTY and the ICTR, the *ad hoc* tribunals created by the U.N. Security Council (U.N. S.C. Res. 827 (1993) and U.N. S.C. Res. 955 (1994), respectively), is based on the principle of "primacy"; that is, in cases of jurisdictional conflicts

the jurisdiction and admissibility rules are interrelated, the result is a two-tiered test which every case, except those referred by the Security Council, must pass.⁶³

In addition, reflecting the concern that there might someday be a runaway prosecutor,⁶⁴ still another jurisdictional hurdle is imposed only in those cases initiated *proprio motu*. As soon as the prosecutor determines that there is "a reasonable basis to proceed with an investigation," she must submit the case to the Pre-Trial Chamber of the Court for authorization to commence the investigation.⁶⁵ If the Pre-Trial Chamber is satisfied, "that there is a reasonable basis to proceed with an investigation, and that the case appears to fall within the jurisdiction of the Court, it shall authorize the commencement of the investigation, without prejudice to subsequent determinations by the Court with regard to the jurisdiction and admissibility of a case [emphasis added]."⁶⁶

Prior to trial, in all cases (including those referred by the Security Council), the Court must satisfy itself that it has jurisdiction and it may *sua sponte* determine issues of admissibility.⁶⁷ In addition, challenges based on lack of admissibility and/or jurisdiction may also be made by the accused, or a state investigating or prosecuting a case, even if that state is not a party to the treaty, or non-party states accepting the jurisdiction of the Court under Article 12(3).⁶⁸ Because these jurisdiction/admissibility rules are intended to implement the core principle of complementarity⁶⁹ – state prosecutions have

between the international and a national tribunal, the international tribunal prevails. Article 9(2), Statute of the ICTY, U.N.Doc.S/25704, Annex, reprinted in 32 I.L.M. 1192 (1993); Art 8(2), Statute of the ICTR, S.C.Res.955, Annex (1994), reprinted in 33 I.L.M. 1602 (1994); Bartram S. Brown, *Primacy or Complementarity: Reconciling the Jurisdiction of National Courts and International Criminal Tribunals*, 23 YALE J. INT'L L. 383, 385 (1998).

⁶³ This statement cannot be made without qualification. As will be discussed in greater detail below, pp. 76-78 *infra*, Professor Bartram Brown does not believe that Security Council referred cases must be admissible, Brown, *supra* note 38, at 881-82, while Mahnouch Arsanjani, the Secretary of the Committee of the Whole of the Rome Conference, concludes that the Statute requires that all cases be admissible. Arsanjani, *supra* note 15, at 28.

⁶⁴ *Hearing on the United Nations International Criminal Court Before the Senate Comm. on Foreign Relations*, 105th Cong. (1998)(statement by Michael P. Scharf, professor) ("[A]n international Ken Starr," is how Professor Michael Scharf, quoting an unnamed Clinton administration official, described him in testimony before the Senate Foreign Relations Committee.).

⁶⁵ ICC Statute, *supra* note 21, art. 15(3); Arsanjani, *supra* note 15, at 27 ("The prosecutor may also initiate an investigation *proprio motu* subject to authorization by the pretrial chamber [citation omitted].")

⁶⁶ ICC Statute, *supra* note 21, art. 15(4).

⁶⁷ *Id.* art. 19(1).

⁶⁸ *Id.* art. 19(2)(a) – (c). Article 12(3) permits a non-party state to accept the jurisdiction of the Court in order to refer the investigation of a crime committed on its territory, or by its nationals, to the prosecutor.

⁶⁹ See *supra* note 27.

priority – their application should reduce the number of cases the tribunal will actually be able to investigate or prosecute. Moreover, since deciding jurisdiction/admissibility issues is a preliminary matter, resolving disputed claims could substantially prolong the time it takes to reach a determination on the merits.⁷⁰

B. ARTICLE 12 (JURISDICTION)

The design of the Statute's jurisdictional requirements is to ensure a nexus between a state consenting to be bound by the treaty and the offense being prosecuted.⁷¹ Thus, in cases where the prosecutor initiates the investigation or the matter is referred to her by a state party, the Court does not have jurisdiction unless either the state in which the crime was committed (the "territorial state") or the state of which the accused is a national (the "nationality state") is a party to the Statute or has specifically accepted the jurisdiction of the Court with regard to the crime in question.⁷² This

⁷⁰ Indeed, by my count, the jurisdiction/admissibility question may be raised in at least ten different ways: (1) the prosecutor may ask the Pre-Trial Chamber to authorize an investigation to which a state has requested deferral (Article 18(2)); (2) a state may appeal an adverse ruling by the Pre-Trial Chamber (Article 18(4)); (3) a state that has challenged and lost on the issue of admissibility before the Pre-Trial Chamber may raise the issue again before the Trial Chamber if there are "additional significant facts or significant change of circumstances" (Article 18(7)); (4) the Trial Chamber must satisfy itself that it has jurisdiction and may, on its own motion, decide questions of admissibility (Article 19(1)); (5) the accused may raise both issues before the Trial Chamber (Article 19(2)(a)); (6) a state investigating or prosecuting the case that has not previously raised the issues in the Pre-Trial Chamber may do so in the Trial Chamber; (7) a state that must specially accept the Court's jurisdiction under Article 12(3) may raise the issues in the Trial Chamber; (8) the prosecutor may seek a ruling on the issues in the Trial Chamber; (9) the Trial Chamber may permit additional challenges, before or after the trial has started, based on "exceptional circumstances," except that after the trial begins, such challenges must be based on *ne bis in idem* (double jeopardy) (Article 19(5)); and (10) the prosecutor can request a rehearing of a finding of inadmissibility based on new facts (Article 19(10)). Additionally, any adverse decision by the Trial Chamber may be appealed (Article 19(6)). In fairness, however, it should be noted that the "jurisdictional phase" is a feature of international litigation, see, e.g., Rules 72A (i) and 116A *bis*, ICTY Rules of Procedure and Evidence, and may not be any more cumbersome or time consuming in the ICC than it is in other international fora.

⁷¹ Kim, *supra* note 38, at 63-66.

⁷² ICC Statute, *supra* note 21. Art. 12 reads:

1. A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5.
2. In the case of article 13 (a) or (c), the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3:
 - (a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;
 - (b) The State of which the person accused of the crime is a national.

jurisdictional prerequisite does not apply if the matter is referred to the prosecutor by the Security Council.⁷³ Such action by the Council, however, must be pursuant to its Chapter VII powers⁷⁴, thus allowing for a veto by the United States or any other permanent member.⁷⁵

C. ARTICLES 17 AND 18 (ADMISSIBILITY)

The statutory scheme of the ICC presumes admissibility. Thus, if the Court has jurisdiction, the case is admissible unless no state (including non-party states)⁷⁶ with jurisdiction over the matter⁷⁷ is investigating or prosecuting or has determined not to prosecute,⁷⁸ and only then, if that state requests that

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

Id.

⁷³ Arsanjani, *supra* note 15, at 26.

⁷⁴ U.N. Charter arts. 39 – 42 empower the Security Council to take whatever measures it deems necessary to “maintain or restore international peace and security” if it determines that there has been a “threat to the peace, breach of the peace or act of aggression....” Such measures can include severance of diplomatic relations, economic sanctions and the use of armed force.

⁷⁵ Consent to be bound by the ICC Statute is unnecessary in Security Council referred cases because states that are U.N. members are thereby bound by Chapter VII Resolutions. U.N. Charter art. 25. Moreover, the U.N. Charter arguably makes Security Council Resolutions binding even on non-member states in cases involving international peace and security. *See id.* art. 2(6).

⁷⁶ ICC Statute, *supra* note 21, arts. 17(1)(a) & (b), which is not limited to state parties to the Statute, reads in pertinent part:

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

- (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;
- (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute....”

⁷⁷ In any international armed conflict, the potential number of states with jurisdiction under the ICC Statute will at least equal the number of combatant states, since, by definition, the conflict will either be fought on their territories, by their nationals, or both. That number could increase dramatically, even in the case of an internal conflict, if international organizations, or regular military, paramilitary, or mercenary forces of diverse nationalities participate in the conflict, as has recently been the case in several African conflicts, such as the one in the Republic of Congo.

⁷⁸ A case is also inadmissible if the “person concerned has already been tried for the conduct which is the subject of the complaint...,” *Id.* art. 17(1)(c), or the “case is not of sufficient gravity to justify further action by the Court.” *Id.* art. 17(1)(d). Because this article focuses on those situations where states either decide to, or not to, investigate or prosecute, these grounds for inadmissibility will not be considered in detail though their implementation may raise similar questions. *See id.* art. 18(2).

the ICC defer its investigation.⁷⁹ Through this mechanism, the Statute implements the principle of complementarity by allowing states to divest the ICC of jurisdiction over a case.⁸⁰

IV. THE FLAWS IN ARTICLE 12

A. THE U.S. OPPOSITION

The U.S. opposition to the ICC Statute solidified around its objections to Article 12 and specifically its interpretation of Article 12 as binding on states that are not parties to the treaty. According to the United States, a prosecution of one of its nationals without its consent, based on the fact that he or she was accused of committing an Article 5 crime on the territory of one of the states parties to the treaty, is tantamount to holding the United States to an obligation in a treaty that it has neither signed nor ratified.⁸¹ This, so the U.S. argument goes, violates one of the central tenets of international law: "A treaty does not create either obligations or rights for a third State without its consent."⁸²

The fallacy in this argument is, of course, that prosecuting a state's nationals in an international tribunal does not "create ... obligations" for the state under the treaty that established the tribunal.⁸³ Moreover, the United

⁷⁹ *Id.* In the spring of 1998, shortly before the Rome Conference was scheduled to convene in June, at the sixth and final session of the Preparatory Committee on the Establishment of an ICC, the United States proposed the rules by which a state could request the ICC to defer its investigation. A comparison of the text of the ICC Statute with Christopher Hall's description of the proposal the United States made at the Preparatory Committee session reveals that the U.S. proposal was largely included in the final draft of the treaty. See Hall, *supra* note 43, at 552; see also *infra* note 80.

⁸⁰ The prosecutor must notify all states that have jurisdiction (territorial or nationality) over the offense when "there is a reasonable basis to commence an investigation." ICC Statute, *supra* note 21, art. 18(1). A state so notified then has one month to advise the prosecutor that it is conducting an investigation or prosecution of the same offense and request that the Court defer its investigation. In this event, the prosecutor "shall defer to the state's investigation ... unless the Pre-Trial Chamber, on application of the prosecutor, decides to authorize the investigation." *Supra* note 38.

⁸² The Vienna Convention on the Law of Treaties, 1969, art. 34, U.N. Doc. A/CONF. 39/27, 1155 U.N.T.S. 331 [hereinafter Vienna Convention].

⁸³ Professor Bartram Brown has persuasively argued this point:

One of the basic aspects of the law of treaties is the rule that "[a] treaty does not create either obligations or rights for a third State without its consent." The United States government claims that the Statute violates this rule because, in some cases, it could allow the ICC to try individuals for serious international crimes without the consent of their national governments. The theory apparently is that if the ICC tries an individual for a crime, that individual's home State in some extended sense is being subjected to obligations under the Statute. This is a novel theory.

States and its courts have long recognized the principle of universal jurisdiction for certain offenses that are so grave that they may be prosecuted wherever the perpetrator or, in the case of a civil action, his property are found.⁸⁴ Indeed, a federal court in New York recently returned a verdict against Radovan Karadzic, the President of the Bosnian Serbs, in a civil action based on crimes against humanity, including killings, rapes and torture, committed during the war in Bosnia-Herzegovina from 1992-95.⁸⁵ Thus, the United States' poorly reasoned opposition to the jurisdictional provisions in Article 12 is not a valid basis for its refusal to sign or ratify the ICC Statute.

B. THE REAL PROBLEM WITH ARTICLE 12: OBSTRUCTING JUSTICE OR AVOIDING IT

Regardless of the arguments raised by the U.S., there are other more persuasive reasons to question whether the jurisdictional rules in Article 12 might actually so hamper the effort to prosecute future war criminals that states should refuse to ratify the ICC Statute. For example, the option to consent to the Court's jurisdiction in a specific case could be abused.⁸⁶ Had the ICC existed during the Kosovo conflict, the Federal Republic of

Equating ICC jurisdiction over individuals with the idea that States are being inappropriately 'bound' is a clever rhetorical device, but as legal reasoning it is completely untenable. Like any treaty, the Statute creates obligations for States Parties: these include the obligations to comply with requests for the surrender and transfer of suspects to the Court, to provide requested evidence, to give effect to fines or forfeitures ordered by the Court, and to pay assessments for the regular budget of the Court. None of these obligations applies to any non-party State, nor does the exercise of criminal jurisdiction against an accused individual bind that individual's home State.

Brown, *supra* note 38, at 868-70 (footnotes omitted).

⁸⁴ See, e.g., *Filartiga v. Pena-Irala*, 630 F.2d 876, 878 (2d Cir. 1980) ("[W]e hold that deliberate torture perpetrated under color of official authority violates universally accepted norms of the international law of human rights, regardless of the nationality of the parties. Thus, whenever an alleged torturer is found and served with process by an alien within our borders [28 U.S.C.] § 1350 provides federal jurisdiction."). Young Sok Kim, a member of the Korean delegation to the Rome Conference, contends that since universal jurisdiction to prosecute the core crimes covered by the ICC Statute is a well established principle of customary international law, U.S. nationals can currently be prosecuted for such crimes by any nation and that all nations have an obligation to do so. Thus, in this regard, Article 12 of the ICC Statute is merely reflective of customary international law and represents no enlargement of international jurisdiction. Kim, *supra* note 38, at 79-80.

⁸⁵ Bill Miller & Christine Haughney, *War Crimes Trials Find a United States Home*, WASH. POST, Aug. 9, 2000, at A1. The authors of this article also point out that "[w]ith increasing frequency in courtrooms across the United States, judges have awarded millions of dollars in damages to victims of abuses in such places as Guatemala, Haiti, Ethiopia, Rwanda, Indonesia and the Philippines."

⁸⁶ See Meron, *supra* note 31.

Yugoslavia (FRY)⁸⁷ might have consented to its jurisdiction just to try to thwart NATO's humanitarian military intervention intended to end Serb atrocities directed at the Kosovar Albanians.

In fact, the FRY tried a similar tactic when it attempted to invoke the jurisdiction of the International Court of Justice (ICJ) to obtain an injunction of the NATO bombings of Serbia.⁸⁸ In order to do so, however, the FRY, which had not previously accepted the jurisdiction of the ICJ, filed a declaration under the "optional clause" of the ICJ Statute⁸⁹ on April 25, 1999, accepting the Court's jurisdiction regarding "disputes arising or which may arise after the signature of the present Declaration."⁹⁰ The FRY contended that the NATO bombings on April 28, May 1, May 7 and May 8, 1999, each gave rise to a separate violation of international law and thus constituted a separate "disagreement on a point of law or fact."⁹¹ However, the ICJ ruled that the legal dispute between the parties arose well before April 25, 1999, and therefore Yugoslavia's optional clause declaration did not give the Court jurisdiction because "each individual air attack could not have given rise to a separate subsequent dispute...."⁹² This ruling was critical because the FRY had limited its optional clause declaration to cover only legal disputes arising after April 25th, the date it was made, in order to plead its case in such a way that would minimize the FRY's own responsibility for starting the crisis that occasioned the bombings in the first place. Fortunately, the ploy backfired because it allowed the Court to find that it did not have jurisdiction over the dispute, which actually arose before the FRY's optional clause declaration. The Court was thus able to avoid thrusting itself into the middle of the Kosovo crisis.

There will be no such escape route for the ICC. Its statute contemplates acceptance of the Court's jurisdiction by non-party states

⁸⁷ The Federal Republic of Yugoslavia consists of Serbia and Montenegro, the two states that remained after the breakup of the former Yugoslavia, which also included Slovenia, Croatia, Bosnia-Herzegovina, and Macedonia.

⁸⁸ Case Concerning Legality of the Use of Force (Yugo. v. U.K.), 1999 I.C.J. 1 (June 2) (request for indication of provisional measures).

⁸⁹ 59 ICJ Stat. 1055, art. 36(2) (1915) ("The states parties to the present Statute [all U.N. members] may at any time declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court...."). By allowing a declaration accepting the Court's jurisdiction to be made "at any time," the optional clause is the functional equivalent of ICC Statute, which permits a non-party state where the crime was committed or whose national committed it to file a declaration with the Registrar of the Court "accept[ing] the exercise of jurisdiction by the Court with respect to the crime in question." ICC Statute, *supra* note 21, art. 12(3).

⁹⁰ Yugo. v. U.K., 1999 I.C.J. 1.

⁹¹ *Id.*

⁹² *Id.*

for crimes that have already been committed. Additionally it allows such acceptance "with regard to the crime in question," apparently permitting a state to invoke the Court's jurisdiction with regard to some crimes and not others.⁹³ Thus, in the Kosovo example, the FRY could have accepted the ICC's jurisdiction, alleging that the bombings of Serbia were war crimes committed by NATO's commanders and even President Clinton, without raising the issue of its leaders' criminal responsibility for the ethnic cleansing (a form of genocide) and crimes against humanity, in order to derail the NATO bombing campaign.⁹⁴

Both world peace and international law would have suffered as a result. A ruling in favor of the FRY granting an injunction of the

⁹³ But see Cherif M. Bassiouni, *Negotiating the Treaty of Rome on the Establishment of an International Criminal Court*, 32 CORNELL INT'L L. J. 443, 453-54 (1999). Professor Bassiouni, Chairman of the Drafting Committee at the Rome Conference, acknowledges that this is a plausible reading of the Statute as adopted. However, he maintains that the use of the term "crime" in Article 12(3) resulted from a glitch in the drafting process and that the "intended meaning of Article 12(3) is that the Court should exercise its jurisdiction with respect to any crime referred to in Article 5 arising out of a 'situation' which is referred to it." Be that as it may, under the generally accepted treaty interpretation rules found in the Vienna Convention, which will be applicable in the ICC, ICC Statute, *supra* note 21, art. 21(b), recourse even to this informal "travaux préparatoires" is permissible only if the plain meaning of the text is ambiguous. Vienna Convention, *supra* note 82, art. 32.

⁹⁴ In a statement he made before the General Assembly in October, 1998, Ambassador Scheffer expressed this fear -- that an international criminal court could be misused by states (even those not party to the treaty) to interfere with legitimate uses of force by the United States in the course of an humanitarian intervention to save the lives of minorities being persecuted by their own governments. David, J. Scheffer, Statement in the Sixth Committee of the General Assembly on the International Criminal Court, Oct. 21, 1998, USUN. Press Release # 179 (98), available at <http://www.un.int/usa/98/179.htm> (last visited Aug. 2, 2000).

Consider the following. A State not a party to the treaty launches a campaign of terror against a dissident minority inside its territory. Thousands of innocent civilians are killed. International peace and security is imperiled. The United States participates in a coalition to use military force to intervene and stop the killing. Unfortunately, in so doing, bombs intended for military targets go astray. A hospital is hit. An apartment building is demolished. Some civilians being used as human shields are mistakenly shot by U.S. troops.

The State responsible for the atrocities demands that U.S. officials and commanders be prosecuted by the international criminal court. The demand is supported by a small group of other states. Under the terms of the Rome treaty, absent a Security Council referral, the court could not investigate those responsible for killing thousands, yet our senior officials, commanders and soldiers could face an international investigation and even prosecution.

Id.

Several states (including Russia) and international organizations did demand that the prosecutor at the ICTY investigate NATO's conduct, and particularly the bombing of civilian targets. After an eleven month inquiry, the ICTY prosecutor cleared NATO and its leaders of any wrongdoing. Charles Truehart, *U.N. Tribunal Rejects Calls for Probe of NATO; No Kosovo War Crimes Found*, WASH. POST, June 3, 2000, available at LEXIS, News Library, News Group File.

NATO bombings would surely have been ignored by NATO. This would have fueled the attacks by NATO's critics that the bombings were an unlawful use of force⁹⁵ and it would have added to already substantial skepticism regarding the effectiveness of the international court. The other alternative would have been equally problematic, since the Court could only sanction the bombings if it found that there existed a principle of customary international law allowing the use of force for humanitarian purposes without prior Security Council authorization, a legal proposition that is dubious at best.⁹⁶

Another, quite different, concern with the consent provisions in Article 12 of the ICC Statute is that they potentially weaken the Court by allowing rogue states that commit atrocities on their own territories directed against their own nationals to circumvent the ICC's jurisdiction simply by remaining non-parties.⁹⁷ The Statute insists on consent by either the state where the crime was committed or whose nationals committed it as a prerequisite to its jurisdiction. In the case of atrocities committed by governments against their own people, these two states are one in the same. And since by definition they are "rogue" states, they are unlikely to have either ratified the treaty or consented to the jurisdiction of the Court.⁹⁸ Accordingly, the wrongdoers (the leaders of the "rogue" state) cannot be brought to justice,⁹⁹ unless the matter is referred to the ICC by the Security Council.

⁹⁵ Bruno Simma, *NATO, the UN and the Use of Force: Legal Aspects*, 1999 E.J.I.L. 1, 5; See also Truehart, *supra* note 94.

⁹⁶ Simma, *supra* note 95, at 5.

⁹⁷ See, e.g., Meron, *supra* note 31.

By providing that the court is to have jurisdiction only when it is accepted by the state where the crimes have been committed or by the national state of the accused, the treaty effectively lets off future Saddam Husseins or Pol Pots, who kill their own people on their own territory. This provision [Article 12] makes the court largely ineffective in dealing with rogue regimes, except when the Security Council exercises its Chapter VII authority....

⁹⁸ In addition to the United States, India and Israel, several of the other states believed to have voted against the ICC Statute in Rome are regimes known to engage in large scale human rights violations directed against their own nationals. There is some uncertainty about who voted how because the votes were not recorded. Nonetheless, observers have listed China, Iraq, Iran, Libya, Yemen and Qatar among those nations believed to have voted against the Statute. Compare Kim, *supra* note 38, at 48, with Bassiouni, *supra* note 93, n.69. In addition, twenty-one other states abstained.

⁹⁹ For example, Augusto Pinochet, the former military strongman dictator in Chile, who has been accused of torturing over 3,000 Chilean nationals during his regime, was not brought to justice during his own reign. Nor at the time could he ever have been indicted in Chile, because upon leaving office he made himself a senator for life, a position which carried with it immunity from prosecution. Were it not for the "universal jurisdiction" provisions in the Torture Convention and the fortuitous circumstance that Pinochet left Chile, allowing an intrepid Spanish judge to request his extradition from Great Britain, his crimes would have gone unprosecuted. Thus, even though

Thus, especially when dealing with internal conflicts, the ICC's ability to prosecute despots will depend on exactly the same political equation that today determines whether a war criminal will be brought to justice – the consensus, or lack thereof, among the permanent members that determines whether the Security Council will exercise its Chapter VII powers. And, despite the Council's creation of the ICTY and ICTR, and more recently tribunals to prosecute war crimes in Cambodia¹⁰⁰ and Sierra Leone,¹⁰¹ some have argued that it is unlikely that the Security Council will continue to set up future *ad hoc* courts,¹⁰² especially after a permanent court is established. On the other hand, it is also unlikely that the Security Council will vote to refer cases to the ICC, especially when two of its permanent members – China and the United States – oppose the Court as currently structured. Under this hypothesis – no more *ad hoc* tribunals and no Security Council referrals to the ICC – the number of war crimes cases prosecuted would go down.¹⁰³

V. COMPLEMENTARITY: AN ASSESSMENT OF THE PROBLEMS POSED BY THE ADMISSIBILITY RULES

A. TO DEFER OR NOT TO DEFER, THAT IS THE QUESTION

A jurisdictional structure that required the ICC to defer to a state any time the latter asserted jurisdiction over an international crime covered by the treaty could be easily implemented. However, such an automatic deferral system would be ripe with the potential for abuse.

he was not extradited to Spain to face the charges because of his age and ill health, now, in part because of the international attention the case received, Chile's Supreme Court stripped Pinochet of his immunity, clearing the way for him to be prosecuted there. See Eduardo Gallardo, *Pinochet Stripped of Immunity, but it might be years before trial*, A.P., Aug. 8, 2000, available at WL Wires File.

¹⁰⁰ Barbara Crossette, *U.N. Allows Cambodians to Take Part in Trial of Khmer Rouge*, N.Y. TIMES ABSTRACTS, May 25, 2000, available at 2000 WL 21821307.

¹⁰¹ Barbara Crossette, *War Crimes Court for Sierra Leone Gets Conditional U.N. OK*, SAN DIEGO UNION TRIBUNE, Aug. 15, 2000, available at 2000 WL 13980414.

¹⁰² See David, *supra* note 46, at 351-52 n.49. This is sometimes referred to as "tribunal fatigue."

¹⁰³ Of course, there may be cases in which neither the United States nor China will exercise its veto in the U.N. Security Council because none of its nationals would be at risk of prosecution by the ICC. Unfortunately however, this will likely occur because the mere existence of the ICC will cause the United States to forgo future peacekeeping missions, precisely so that its troops will not be at risk. See, e.g., *Hearing on the "American Servicemen's Protection Act" Before Sen. Foreign Relations Comm.* (2000) (statement by Sen. Jesse Helms, Member, Sen. Foreign Relations Comm.), available at 2000 WL 819133. The act "requires that U.S. personnel be immunized from the ICC's jurisdiction before the U.S. can participate in any U.N. peacekeeping operation."

States could effectively "immunize" their nationals from prosecution simply by declaring that they were investigating or prosecuting the matter. This would be the international legal equivalent of "putting the fox in charge of the henhouse," since in many instances, *e.g.*, Milosevic before being ousted in Yugoslavia, the war criminals head the government conducting the prosecution. To avoid this obvious problem, the ICC Statute requires that the Court make a qualitative assessment of the *bona fides* of the state prosecution before deferring to it. This qualitative judgment is whether the state investigation or prosecution is "genuine."¹⁰⁴

Assessing the "genuineness" of a state's investigation or prosecution or its decision not to prosecute will pose an extremely difficult issue of fact, and the ICC's reputation and its chances for success may well be riding on how well it handles this issue. A decision to divest a state of jurisdiction will require a finding that the state has acted in bad faith by initiating an investigation for the purpose of shielding its nationals from prosecution¹⁰⁵ or that its national judicial system is in a state of total or substantial collapse.¹⁰⁶ Either determination by the ICC would be a slap in the face of any state that had requested that the Court defer to its national jurisdiction. Moreover, it is difficult to imagine that the Court could ever justifiably apply these standards to divest the court systems of the western industrialized democracies of jurisdiction. It seems far more likely that the Court will use these rules to take cases away from rogue states, states where there is internal conflict, or states whose legal systems differ dramatically from those in the industrialized west, *e.g.* Muslim states. Predictably, any such nation stripped of its jurisdiction will bitterly complain that only it is subjected to international justice, while others act with impunity.¹⁰⁷

¹⁰⁴ Article 17(a) bars international jurisdiction during the pendency of a state investigation or prosecution "unless the State is unwilling or unable *genuinely* to carry out the investigation or prosecution." ICC Statute, *supra* note 21, art. 17(a) (emphasis added). Under Article 17(b), the international court is likewise barred from proceeding if there is a state decision not to prosecute, "unless the decision resulted from the unwillingness or inability of the State *genuinely* to prosecute." *Id.* art. 17(b) (emphasis added).

¹⁰⁵ A state is "unwilling ... genuinely to carry out the investigation or prosecution" when it institutes a proceeding "for the purpose of shielding the person concerned," or engages in "unjustified delay ... inconsistent with an intent to bring the person concerned to justice," or when its proceedings are not conducted "independently or impartially and in a manner which, in the circumstances, is inconsistent with an intent to bring the person to justice." *Id.* arts. 17(2)(a)-(c) (emphasis added).

¹⁰⁶ A state is "unable genuinely to carry out the investigation or prosecution" when "due to a total or substantial collapse or unavailability of its national judicial system the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings." *Id.* art. 17(3).

¹⁰⁷ For example, eastern bloc countries, led by Russia, reacted to Slobodan Milosevic's indictment by the ICTY by holding a mock trial of NATO leaders who directed the bombings of Serbia during

The other alternative, deferring to a state prosecution, seems equally problematic. It will naturally be viewed with suspicion by states that perceive themselves as having an interest in the outcome.¹⁰⁸ And, since the initial decision to defer is not final (the prosecutor can review her decision to defer to the state at six month intervals or whenever "there has been a significant change of circumstances"¹⁰⁹), undue pressure may be brought to bear on the prosecutor by aggrieved states. It goes without saying that divesting a state of jurisdiction, after initially deferring to it, will surely raise cries of "foul." Thus, whether the decision is to divest or defer, the ICC will face the same charges of partiality and politicization that are leveled at the current system.¹¹⁰

These problems will be further exacerbated in admissibility disputes involving non-party states. A non-party state can assert the primacy of its courts' jurisdiction over the ICC¹¹¹ and it can do so without agreeing to abide by the ICC's decisions or implement its orders in the event that the Court rules against it. This loophole is both significant and curious. It is significant because it appears to create an incentive for a non-party state (especially one with custody of the accused) to commence an investigation in order to derail the ICC, litigate the admissibility issue in the Pre-Trial, Trial and Appellate Chambers to consume even more time, and then, if it ultimately loses, simply thumb its nose at the ICC's decision.¹¹² It is curious because the Statute imposes the duty to cooperate¹¹³ (including the obligation to arrest, surrender and transport suspects found on their territories¹¹⁴) on non-party states that specially accept the Court's jurisdiction for the purpose of referring a case to the prosecutor under Article 12(3). Why was the same duty to cooperate not

the Kosovo crisis. Philippa Fletcher, *War-crimes Tribunal Accuses NATO Leaders*, REUTERS, Mar. 30, 2000, available at 2000 WL 4824712.

¹⁰⁸ This may be true even in cases where the Court defers to one of the western industrialized legal systems. For example, the Italian government criticized the verdict of a U.S. military court that exonerated a pilot who flew into and severed a cable supporting a gondola car at an Italian ski resort, killing twenty passengers, even though the proceedings would have satisfied even the most rigorous due process standards and the facts appeared to support the court's verdict. David Williams & Sarah Delaney, *Italians Incensed By Verdict: Retribution Sought for Tragedy in Alps*, WASH. POST, Mar. 6, 1999, at A1.

¹⁰⁹ ICC Statute, *supra* note 21, art. 18(3).

¹¹⁰ See *supra* note 46 and sources cited therein.

¹¹¹ ICC Statute, *supra* note 21, arts. 17(1)(a) & (b), read together with art. 18(2), provide that a case is inadmissible if a state with jurisdiction over it is investigating or prosecuting the matter or has decided not to investigate or prosecute, if the state requests that the ICC defer to it.

¹¹² Cf. Hall, *supra* note 43, at 552 ("Some [states] argued the [state notification requirement] would alert state officials implicated in such crimes and result in lengthy delays before the ICC could act leading to the destruction of evidence or intimidation of witnesses....").

¹¹³ State parties and non-parties that accept the Court's jurisdiction under Article 12(3) must "cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court." ICC Statute, *supra* note 21, art. 86.

¹¹⁴ *Id.* arts. 89(1) & (3).

made a condition of raising an admissibility claim, especially since non-party states are those most likely to attempt to shield their nationals from prosecution by the ICC and those most likely to refuse voluntary surrender of their nationals to the international court?¹¹⁵

Of course, the Court may invite a non-party state to provide assistance on an *ad hoc* basis.¹¹⁶ It might even insist that a non-party state agree to surrender its nationals as a prerequisite to litigating an admissibility claim, though nothing in the Statute suggests that it has power to do so. However, even if a non-party state were to agree to cooperate with the Court in order to raise an admissibility claim, it could still refuse to comply with an adverse decision of the Court, because its only punishment would be that the Court "may so inform the Assembly of States Parties or, where the Security Council referred the matter to the Court, the Security Council."¹¹⁷ In other words, the Statute authorizes Security Council enforcement only in cases referred by it.¹¹⁸ In state- or prosecutor-initiated cases, enforcement measures are limited to referring the matter to the Assembly of States Parties for whatever action it deems appropriate. And that body does not have,¹¹⁹ nor can it have,¹²⁰ the power to impose any mandatory sanctions on a recalcitrant, non-party state.

B. DO THE ADMISSIBILITY RULES IN ARTICLES 17 AND 18 APPLY TO CASES REFERRED BY THE SECURITY COUNCIL?

Ambiguities in the drafting of the Statute have led to differing opinions as to whether the admissibility provisions in Articles 17 and 18 apply to Security Council referred cases. As noted above,¹²¹ Mahnouch

¹¹⁵ If among the non-parties are those states that voted against the Statute in Rome, this conclusion seems ineluctable. Defying the jurisdiction of the ICC is the espoused policy of the U.S. Senate Foreign Relations Committee that has considered legislation to block any U.S. cooperation with the Court. Hearing on the "American Servicemen's Protection Act," *Before Sen. Foreign Relations Comm.*, 2000 WL 819133. Similarly, it is impossible to imagine that China would willingly surrender its nationals to an international tribunal, and Israel, Iraq, Iran and Libya all have well-documented histories of stonewalling the international community.

¹¹⁶ ICC Statute, *supra* note 21, art. 87(5).

¹¹⁷ *Id.*

¹¹⁸ See Arsanjani, *supra* note 15, at 40.

¹¹⁹ ICC Statute, *supra* note 21, art. 112.

¹²⁰ See Vienna Convention, *supra* note 82, art. 34 ("A treaty does not create either obligations or rights for a third State without its consent."). Of course, it is possible that the Assembly of States Parties could vote to have its members individually suspend economic relations with, or impose other sanctions on, states that do not comply with the Court's orders. The effectiveness of any such measures would in turn depend upon how many and which states are parties to the treaty, and what state is the target of the sanctions.

¹²¹ *Supra* note 63.

Arsanjani, a Senior Legal Officer in the UN Office of Legal Affairs, who served as the Secretary of the Committee of the Whole at the Rome Conference, has concluded that Security Council referred cases must be admissible.¹²² On the other hand, Professor Bartram Brown, who has written perhaps the definitive article on complementarity,¹²³ disagrees with Arsanjani's conclusion: "An especially strict procedural regime, based on a United States proposal, ensures ICC deference to national investigations or prosecutions, but it does not apply to cases initiated by the Security Council."¹²⁴

Professor Brown apparently bases his conclusion on the language of Article 18, which does not require the prosecutor to notify states with jurisdiction when she concludes that there is a "reasonable basis to commence an investigation" if the case is referred by the Security Council.¹²⁵ This notification provision is for the purpose of allowing states to request the ICC to defer to a national investigation.¹²⁶ Accordingly, if no notification is required in Security Council referred cases, it follows that the principle of complementarity does not apply to those cases. It is also significant that, unlike states that refer matters to the Court or the prosecutor who commences an investigation *proprio motu*, the Security Council can neither challenge nor appeal an adverse court ruling on admissibility,¹²⁷ presumably because such challenges or appeals are unnecessary since the admissibility rules do not apply to cases referred by the Council.¹²⁸

On the other hand, there is no language in Article 17 itself limiting its applicability to state referred or prosecutor initiated cases: "Having regard to paragraph 10 of the Preamble and Article 1, the Court shall determine that a case is inadmissible where...." This reference in Article 17 to the Preamble and Article 1 is quite significant since there is

¹²² *Id.*

¹²³ Brown, *supra* note 62.

¹²⁴ Brown, *supra* note 38, at 881-82.

¹²⁵ See *id.* at n.101. Professor Brown also cites Professor Michael P. Scharf's testimony before the Senate Foreign Relations Committee that the Statute was designed to create two "tracks," one applying to Security Council referred cases and the other to state referred or prosecutor initiated cases. *Id.* at n.99 (citing *Hearing on the United Nations International Criminal Court Before the Sen. Foreign Relations Comm.*, 105th Cong. (1998) (statement of Michael P. Scharf, Professor), Legislation and Politics Library: United States Congress: Federal Document Clearing House Congressional Testimony).

¹²⁶ ICC Statute, *supra* note 21, art. 18(2).

¹²⁷ The Council may, however, ask the Pre-Trial Chamber to "review a decision of the Prosecutor ... not to proceed and may request the Prosecutor to reconsider that decision." ICC Statute, *supra* note 21, art. 53(3)(a).

¹²⁸ See *id.* arts. 18 & 19.

nothing in the language of either to suggest that the principle of complementarity does not apply to Security Council referred cases. Indeed, just the opposite is true. The Preamble states, "the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions." Article 1 provides that the "jurisdiction [of the Court] shall be complementary to national criminal jurisdictions." Moreover Article 19(1), which requires the Court to "satisfy itself that it has jurisdiction in any case brought before it" and "on its own motion, [to] determine the admissibility of a case in accordance with Article 17," is similarly not limited to state referred or prosecutor initiated cases. Finally, Article 53 (2) permits the prosecutor to decline a case, *inter alia*, if "[t]he case is inadmissible under article 17...." By reference this provision also applies to Security Council referred matters.¹²⁹

At minimum, these not inconsiderable ambiguities in the Statute could lead to years of legal wrangling¹³⁰ and put the Security Council at odds with states that assert their right to prosecute under the Statute. Ultimately, it will be up to the International Court of Justice to determine who has the better of this argument.¹³¹

· VI. A CASE STUDY: INADMISSIBILITY, ENFORCEMENT AND THE LOCKERBIE BOMBING CASE

A. WHEN IS AN OFFER TO PROSECUTE GENUINE? THE CLASH BETWEEN COMPETING STATES ASSERTING JURISDICTION

How will the limitations on the Court's jurisdiction and its lack of power to sanction states that do not comply with its orders affect its ability to function? These questions may be explored in the context of a case that involved states competing for jurisdiction to prosecute individuals charged with international crimes. The case is instructive because it demonstrates just how difficult it is to assess the *bona fides* of a state's offer to prosecute its

¹²⁹ *Id.* art. 53(3)(a) ("At the request ... of the Security Council ..., the Pre-Trial Chamber may review a decision of the Prosecutor *under paragraph 1 or 2* not to proceed and may request the Prosecutor to reconsider that decision.") (emphasis added).

¹³⁰ Nor does the process for amending the statute offer an alternative to litigation. No amendments to the Statute may be proposed until it has been in effect for seven years, and then adoption will require a two-thirds vote of the Assembly of States Parties. ICC Statute, *supra* note 21, arts. 121(1) & (3). See also Bassiouni, *supra* note 93, at 466 ("[T]he Rome text is not likely to be amended easily....").

¹³¹ See ICC Statute, *supra* note 21, art. 119(2). See also *infra* pp. 83-84.

own nationals and how, even with enforcement muscle of the of the Security Council, it took over eight years to bring the suspects to trial.

On December 21, 1988, a terrorist bomb destroyed Pan Am Flight 103 over Lockerbie, Scotland, killing all 270 persons aboard.¹³² In November 1991, a grand jury sitting in the United States District Court for the District of Columbia indicted two Libyan nationals for the crime.¹³³ The "nationality state" (Libya) had custody of the two suspects. The "territorial states" (the United States and the United Kingdom) demanded their surrender for trial.¹³⁴ Libya refused and, under Article 7 of the 1971 Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (the Montreal Convention), invoked its right (*aut dedere aut punire*) to try the defendants in its national courts in lieu of extradition.¹³⁵ In proceedings before the ICJ,¹³⁶ Libya represented to the Court that "after being apprised of the charge, Libya took such measures as were necessary to establish its jurisdiction over the offences charged...; that Libya also took measures to ensure the presence of the accused in Libya in order to enable criminal proceedings to be instituted, that it initiated a preliminary enquiry into the facts and that it submitted the case to its competent authorities for the purpose of prosecution..."¹³⁷

The United States and Great Britain responded in the Security Council, by seeking to force Libya to comply with the Council's earlier, non-binding Resolution.¹³⁸ Paragraph 2 of Security Council Resolution 731 "[s]trongly deplore[d] the fact that the Libyan Government has not yet responded to the above requests¹³⁹ to cooperate fully in establishing responsibility for the terrorist acts referred to above against Pan Am flight 103," and paragraph 3 "[u]rge[d] the Libyan Government immediately to provide a full and effective response to those requests..."¹⁴⁰ In Security

¹³² Intelligence Unit Limited, Apr. 1, 1999, 1999 WL 14364711; *Political Scene: A Lockerbie Deal Edges Closer*, Country Report Libya, ECONOMIST, 2d Quarter 1999.

¹³³ Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. U.S.), 1992 I.C.J. 114 (Apr. 14) [hereinafter "Lockerbie I"].

¹³⁴ *Id.* at 115-17.

¹³⁵ *Id.*

¹³⁶ "Lockerbie I" was filed on March 3, 1992. Libya requested that the Court grant provisional measures to: "(a) enjoin the United States from taking any action against Libya calculated to coerce or compel Libya to surrender the accused individuals to any jurisdiction outside of Libya; and (b) to ensure that no steps are taken that would prejudice in any way the rights of Libya with respect to the legal proceedings that are the subject of Libya's Application...." *Id.* at 119.

¹³⁷ *Id.* at 116.

¹³⁸ S.C. Res. 731, U.N. SCOR, 47th Sess., 3033rd mtg. at 51 (1992).

¹³⁹ On November 27, 1991, following the indictment, the United States and the United Kingdom demanded, *inter alia*, that Libya "surrender for trial all those charged with the crime...." *Id.*

¹⁴⁰ *Id.* at 51-52.

Council Resolution 748, which was adopted three days after the oral argument on Libya's application for provisional measures before the ICJ, the Council invoked its Chapter VII powers and "[d]etermin[ed] that the failure by the Libyan Government to demonstrate by concrete actions its renunciation of terrorism and in particular its continued failure to respond fully and effectively to the requests in resolution 731 (1992) constitute a threat to international peace and security."¹⁴¹ Since Libya's offer to try the suspects in its courts was made in the time between the adoptions of Resolutions 731 and 748, can Resolution 748 be read as anything other than a rejection of the "genuineness" of Libya's offer to prosecute? Otherwise, presumably Libya would have been in compliance with Resolution 731.

Following the passage of Resolution 748, the ICJ denied Libya's application for provisional measures because, "whatever the situation previous to the adoption of that resolution, the rights claimed by Libya under the Montreal Convention (including the right to prosecute in lieu of extradition) cannot now be regarded as appropriate for protection by the indication of provisional measures...."¹⁴² When thereafter Libya refused to comply with Resolution 748, the economic sanctions it provided for went into effect. In November 1993, in the face of Libya's continued refusal to surrender the defendants to the United States and the United Kingdom for trial, the Security Council imposed even more stringent sanctions.¹⁴³ Before Libya, the United States and the United Kingdom finally agreed to a trial in the Netherlands in 1999,¹⁴⁴ the UN sanctions were estimated to have cost the Libyan economy \$26.5 billion and may have caused as many as 10,000 deaths due to the unavailability of certain medicines.¹⁴⁵

Because Lockerbie involved an offer by a state to prosecute its own nationals, the parallel to a state's request for the ICC to defer prosecution under Article 18(2) of the ICC Statute is obvious. Moreover, the position of the United States and Great Britain was that any such prosecution would have been, in the language of Article 17(2)(a), "undertaken ... for the purpose of shielding the person concerned from criminal responsibility." Thus, the Lockerbie case poses just the sort of admissibility question that the ICC might

¹⁴¹ S.C. Res. 748, U.N. SCOR, 47th Sess., 3063d mtg., at 52 (1992).

¹⁴² Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. U.S.), 1992 I.C.J. 114. See also Vera Gowland-Debbas, *The Relationship Between the International Court of Justice and the Security Council in the Light of the Lockerbie Case*, 83 AM.J. INT'L L. 643, 647 (1992).

¹⁴³ S.C. Res. 883, U.N. SCOR, 48th Sess., 3312th mtg., at 2 (1993).

¹⁴⁴ *Political Scene: A Lockerbie Deal Edges Closer*, supra note 132.

¹⁴⁵ *Lockerbie Bombing Suspects Leave Libya for Trial in the Netherlands*, AGENCE FRANCE-PRESSE, Apr. 5, 1999, available at 1999 WL 2577599.