CHAPTER 9
THE POSITION OF INTERNATIONAL TRIBUNALS AND NATIONAL COURTS REGARDING THE DEFENCE OF SOVEREIGN IMMUNITY MADE BY VARIOUS HEADS OF STATES

9.1 INTRODUCTION

Professor Dinstein asserts that “[s]ince time immemorial, international law has allowed other States\textsuperscript{774} . . . to prosecute persons . . . for war crimes.”\textsuperscript{775} Of course this simple assertion raises two further questions: (1) What are “war crimes”? (2) Under what theory of jurisdiction may any State prosecute war criminals?\textsuperscript{776}

In response to the first question, Article 8(2) of the 1998 Rome Statute, establishing the International Criminal Court (ICC), “contains an extensive\textsuperscript{777} list of acts constituting war crimes over which the ICC has jurisdiction.”\textsuperscript{778} The list includes: eight “[g]rave breaches of the Geneva Conventions”\textsuperscript{779}; twenty-six “[o]ther serious violations of the laws and customs applicable in international armed conflict”\textsuperscript{780}; four “serious violations” of common article 3 for non-

\textsuperscript{774}This article uses the term "State" to refer to a country or nation-State.

\textsuperscript{775}YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 228 (Cambridge University Press 2004).

\textsuperscript{776}It is important to distinguish between “war criminals” (universal jurisdiction over which is the topic of this article) and “unlawful combatants” (which is beyond the scope of this article). \textit{Id.} at 233-37.

\textsuperscript{777}Professor Dinstein considers Article 8(2)’s list “[t]he most recent-and most detailed- definition of war crimes…..” \textit{Id.} at 230.


\textsuperscript{780}\textit{Id.} at Art. 8(2)(b).
international armed conflicts;\textsuperscript{781} and twelve “[o]ther serious violations of the laws and customs applicable in armed conflicts not of an international character.”\textsuperscript{782}

Regarding the jurisdictional basis for any State to prosecute war crimes, “[i]t is generally agreed that customary international law imposes limits on a nation’s prescriptive jurisdiction” to five principle jurisdictional bases\textsuperscript{783}: (1) territoriality;\textsuperscript{784} (2) nationality;\textsuperscript{785} (3) protective principle;\textsuperscript{786} (4) passive personality;\textsuperscript{787} and (5)

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\item\textsuperscript{781} \textit{Id.} at Art. 8(2)(c).
\item\textsuperscript{782} \textit{Id.} at Art. 8(2)(e). It is interesting to note that in the Rome Statute, Article 8 is by far the longest and most detailed article defining the crimes within the ICC’s jurisdiction. The other crimes currently within the jurisdiction of the ICC are genocide (Article 6), crimes against humanity (Article 7), and the crime of aggression, the latter of which is, as of yet, undefined. \textit{Id.} at Art. 5(2). The length and level of detail in Article 8 defining war crimes appears to be primarily due to the complexity and breadth of the modern Law of War (a.k.a. Law of Armed Conflict (LOAC), a.k.a. \textit{jus in bello}) as it has evolved via the entry into force of multilateral treaties and crystallization of customary international law, and less due to the intent of the Rome Conference to “single out” war crimes for special attention.
\item\textsuperscript{783} CURTIS A. BRADLEY & JACK L. GOLDSMITH, FOREIGN RELATIONS LAW, 534 (2003). \textit{See} United States v. Yunis, 681 F. Supp. 896, 899-903 (D.D.C. 1988) (describing the five traditional bases of jurisdiction over extraterritorial crimes). This very brief summary of jurisdictional bases necessarily conflates “prescriptive” jurisdiction with “enforcement” jurisdiction, which are, from a theoretical basis, quite distinct.

“Jurisdiction may describe a state's authority to make its law applicable to certain actors, events, or things (legislative [a.k.a. prescriptive] jurisdiction); a state's authority to subject certain actors or things to the processes of its judicial or administrative tribunals (adjudicatory jurisdiction); or a state's authority to compel certain actors to comply with its laws and to redress noncompliance (enforcement jurisdiction).”

\item\textsuperscript{784} Territorial jurisdiction can be further broken down into “objective” territorial jurisdiction, based on conduct occurring within a State’s territory, versus “subjective” territorial jurisdiction, based upon conduct occurring outside a State’s territory, but which has, or intends to have, a substantial effect within the State’s territory. David J. Anderson, Foreign Relations Law lecture at the George Washington University School of Law (Nov. 1, 2005).
\item\textsuperscript{785} A State may prescribe law with regard to the conduct of its own \textit{nationals}, both within and outside its territory. \textit{Id.} “Under customary international law, nations have almost unlimited authority to regulate the conduct of their own nationals around the world.” BRADLEY & GOLDSMITH, \textit{supra} note 10, at 535.
\item\textsuperscript{786} BRADLEY & GOLDSMITH, \textit{supra} note 10, at 534; David J. Anderson, Foreign Relations Law lecture at the George Washington University School of Law (Nov. 1, 2005).
\item\textsuperscript{787} BRADLEY & GOLDSMITH, \textit{supra} note 10, at 534; David J. Anderson, Foreign Relations Law lecture at the George Washington University School of Law (Nov. 1, 2005).

The most controversial category of prescriptive jurisdiction is the passive personality category, which would allow nations to assert jurisdiction over aliens who injure their nationals abroad. Historically the United States disputed the validity of this category of jurisdiction, but in recent
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The first four types of jurisdiction are subject to a nexus or "reasonableness" requirement, which is that the State’s exercise of jurisdiction must be "reasonable" vis-à-vis another State’s desire to exercise jurisdiction. However, the exercise of universal jurisdiction need not be "reasonable," (or at least need not show a nexus in order to be reasonable) because, “[u]niversal jurisdiction allows any nation to prosecute offenders for certain crimes even when the prosecuting nation lacks a traditional nexus with either the crime, the alleged offender, or the victim.” This is because “the universality principle assumes that every state has an interest in exercising jurisdiction to combat egregious

years, the United States and other countries have increasingly relied upon this category of jurisdiction as a basis for regulating terrorist attacks on their citizens.

BRADLEY & GOLDSMITH, supra note 10, at 535.

A State may prescribe law with regard to certain criminal acts recognized by the international community, such as piracy, slavery, genocide, aircraft hijacking, and possibly terrorism after the attacks on 11SEP2001. David J. Anderson, Foreign Relations Law lecture at the George Washington University School of Law (Nov. 1, 2005). See, e.g., In re Extradition of Demjanjuk, 612 F. Supp. 544, 558 (ND OH 1985), affirmed sub nom. Demjanjuk v. Petrovsky, 776 F.2d 571 (6th Cir. 1985), cert. denied, 475 U.S. 1016 (1986) (finding that Israel had properly asserted jurisdiction over “Ivan the Terrible” under the protective, passive personality, and universality principles).

Factors to be considered in assessing the reasonableness of a particular exercise of jurisdiction would include:

- the connection between the regulating state’s territory and the regulated activity, the connection between the regulating state and the person being regulated, the importance of the regulation to the regulating state, the importance of the regulation to the international political, legal or economic system, the extent to which the regulation is consistent with the traditions of the international law system, the extent to which another state may have an interest in regulating, and the likelihood of conflict with the regulations of another nation.

BRADLEY & GOLDSMITH, supra note 10, at 535. Although most States are circumspect in exercising jurisdiction over non-nationals under the theory of reciprocity, if a State was to assert a form of jurisdiction that was perceived to be unreasonable, other States could assert diplomatic protests or demarches in response.


Randall, supra note 10, at 785. See also BRADLEY & GOLDSMITH, supra note 10, at 536 (noting that “most U.S. criminal statutes expressly or implicitly require a connection to the United States or a U.S. national and thus do not assert universal jurisdiction.”); id. (noting that although a U.S. federal torture statute asserts universal jurisdiction by criminalizing “acts of official torture committed in foreign nations by foreign citizens . . . But there are no reported cases applying that statute.”).
offenses that states universally have condemned.” Thus, the sine qua non of exercising universal jurisdiction would seem to be the punishment of international crimes.

These raises the further question of which specific crimes may be considered international in scope, and therefore justify the application of universal jurisdiction by any State? Some commentators define the crimes that are subject to universal jurisdiction as “certain heinous and widely condemned offenses” or “the most atrocious offenses.” Of course, the mere fact that every State criminalizes certain conduct (e.g. rape and murder) is not a sufficient condition—the crime must threaten the international system as a whole if it were to go unpunished, or the prohibited acts must be of an international character and

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793 Sriram, supra note 17, at 316.
794 See, e.g., Rome Statute, supra note 6, at Preamble: “Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes.” See also, Randall, supra note 10, at 827-829; RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 404 reporter's note 1 (1987); Report of the International Law Commission on the work of its second session, 5 U.N. GAOR, Supp. 12, pt. 111, U.N. Doc. A/1316 (1950) (The “Nuremberg Principles” describe crimes against peace, war crimes, and crimes against humanity as "international crime[s]").
795 DUNOFF, RATNER & WIPPMAN, infra note 181, at 353.
798 Some writers argue that universal jurisdiction exists only over jus cogens (a.k.a. peremptory) norms. See, e.g., Chibundu, supra note 17, at 1131-33; Garland A. Kelley, Does Customary International Law Supersede A Federal Statute?, 37 COLUM. J. TRANSNAT'L L. 507, 517 (1999); Stephanie L. Williams, Your Honor, I Am Here Today Requesting The Court's Permission to Torture Mr. Doe": The Legality of Torture as a Means to an End v. The Illegality of Torture as a Violation of Jus Cogens Norms Under Customary International Law, 12 U. MIAMI INT'L & COMP. L. REV. 301, 324 (2004); Randall, supra note 10, at 829-831. However, this merely seems to be overstating the requirement that such crimes be of an international character, as does characterizing the perpetrator of such crimes as being hostis humani generis (i.e. an enemy to all of mankind). United States v. Brig Malek Adhel, 43 U.S. (2 How.) 210, 232 (1844); Filartiga v. Pena-Irala, 630 F.2d 876, 890 (2d Cir. 1980); In re Extradition of Demjanjuk, 612 F. Supp. at 556; Randall, supra note 10, at 832, 834. Nor does stating that the obligation to prosecute international criminals is erga omnes (i.e. “flowing to all”) seem particularly helpful. Id. at 829-31. But see
of serious concern to the international community as a whole. Although piracy and the slave trade may be the traditional exemplars, modern lists of such universal crimes would also include war crimes, genocide, torture, attacks on, sabotage of or hijacking aircraft, and perhaps even apartheid, terrorism and other human rights violations. The assertion of

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**Id. at 841** (“Universal crimes, obligations erga omnes, and peremptory norms [a.k.a. jus cogens] may be viewed as doctrinal siblings, sharing the common lineage of a modern world legal order concerned with global peace and human dignity.”).

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DUNOFF, RATNER & WIPPMAN, infra note 181, at 353. See also Chibundu, supra note 17, at 1132.

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In re Extradition of Demjanjuk, 612 F. Supp. at 556. However, the current definition of piracy “Requir[es] that piratical acts be committed for private ends, [under] both the 1958 Convention on the High Seas and the 1982 United Nations Convention on the Law of the Sea.” Randall, supra note 10, at 797-98. Thus, a crime committed on the high seas for other than private ends, such as the Achille Lauro hijacking where “the hijackers’ immediate objective was the release of certain Palestinian terrorists imprisoned in Israel,” would not fall within the modern definition of piracy, and thus would not be subject to universal jurisdiction unless the hijackers committed another universal crime. Id. This assumes, of course, that the modern treaty-based definition of piracy has supplanted the earlier and arguably broader customary international law definition. Cf. John Cerone, American Society of International Law, 100th Annual Meeting, Wash., DC [hereinafter ASIL 100th Mtg.], “The Status of the Individual in International Law,” Mar. 31, 2006 (arguing that although piracy was recognized as an international crime subject to universal jurisdiction, it was always criminalized by domestic statutes). See infra notes 408-11 (discussing the “universal jurisdiction plus” concept).

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DUNOFF, RATNER & WIPPMAN infra note 181, at 353. See, e.g., Randall, supra note 10, at 839; Sriram, supra note 17, at 305.

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DINSTEIN, supra note 2, at 236: “When charges are preferred against a war criminal, the overriding consideration in the matter of jurisdiction is that the crimes at issue are defined by international law itself. The governing principle is then universality: all States are empowered to try and punish war criminals.” Id.

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Randall, supra note 10, at 834-37. The Genocide and Apartheid treaties are the only two that declare violations to be international crimes per se, versus calling for States to criminalize the behavior domestically. ILC 1996 Draft Code, supra note 5, at Commentary para. 4 to Art. 8. Yet the Genocide and Torture Conventions did not foresee international prosecutions, calling instead for domestic prosecution or extradition. Dinah L. Shelton, International Law-Human Rights lecture at the George Washington University School of Law (Nov. 15, 2005).

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Randall, supra note 10, at 818, 826.

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In re Extradition of Demjanjuk, 612 F. Supp. at 556; Chibundu, supra note 17, at 1132; Randall, supra note 10, at 819.

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universal jurisdiction for many of these international crimes is based upon multilateral treaties that provide for “domestic jurisdiction over extraterritorial offenses regardless of the actors' nationalities,” and thus implicitly allow for universal jurisdiction, despite the fact that they lack “any reference to the universality principle.”

This article will focus on universal jurisdiction as it is applied to war crimes under the Law of War (a.k.a. *jus in bello*), versus peacetime atrocities. First, it will offer a brief history of the application of universal jurisdiction over war crimes, beginning with the International Military Tribunal (IMT) at Nuremberg and the International Military Tribunal for the Far East (IMTFE) at Tokyo, and then considering the two current *ad hoc* international tribunals for Yugoslavia and Rwanda. Next the article will provide a summary of the current status of universal jurisdiction over war crimes, which will necessarily include the ICC’s

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811 *Id.* at 819-20. Ironically, although these multilateral treaties (e.g. war crimes, hijacking, terrorism, and torture conventions) do not mention universal jurisdiction, their requirement to “prosecute or extradite” alleged offenders in their custody essentially transforms universal jurisdiction from a *permissive* basis of jurisdiction to a *mandatory* one for State parties. *Id.* at 820-21. However, nonparty States may be able to claim the “*jurisdictional right*” to prosecute or extradite under these multilateral treaties without being under a “*jurisdictional obligation*” to do so. *Id.* at 824, 826-27, 829-34, 837.

812 This article will occasionally reference the (as of yet) undefined crime of aggression, which is technically a matter of when States resort to the use of force, or *jus ad bellum*. Although the way in which governments decide to go to war (*jus ad bellum*) influences how the war is waged (*jus in bello*). Sir Franklin Berman, The George Wash. Univ. Law Sch. Symposium: Lawyers and Wars: A Symposium in Honor of Edward R. Cummings [hereinafter Cummings Symposium], Sep. 30, 2005. Moreover, the distinction between *jus ad bellum* and *jus in bello* may be dissolving. ASIL 100th Mtg., *supra* note 27, “The Relationship Between *Jus Ad Bellum* and *Jus In Bello*: Past, Present, Future,” Mar. 30, 2006.

813 Of course, “War crimes are not the only crimes against international law that can be committed in wartime. The war itself (if it is waged contrary to the *jus ad bellum*) may constitute a crime against peace, a.k.a. crime of aggression. In addition, acts committed in the course of the war may amount to crimes against humanity or to genocide. However these crimes – which can also be committed in peacetime – transcend the compass of LOIAC [Law of International Armed Conflict].” DINSTEIN, *supra* note 2, at 233. See also, Randall, *supra* note 10, at 834-35.


jurisdiction over State parties to the Rome Statute, but also universal jurisdiction as a matter of customary international law. Finally, the article will offer a few brief conclusions regarding universal jurisdiction over war crimes.

9.2 HISTORY OF UNIVERSAL JURISDICTION OVER WAR CRIMES

The Law of War can be traced back to ancient times. The Sumerians, Hammurabi King of Babylon, Cyrus I King of the Persians, and the Hittites all formulated rules or codes that were designed to regulate and provide structure to armed conflict. The idea that war should adhere to rules evolved throughout the subsequent centuries.

Despite the fact that the Law of War has an ancient lineage, Professor Dinstein cites no authority for his assertion that war crimes have been subject to prosecution by other States under international law “[s]ince time immemorial.” However, it is possible to find a few historical examples of (at least attempted) universal jurisdiction, broken down into the periods of Antiquity, World War I Era, and Post-World War II. More recently, various States have enacted domestic legislation providing for universal jurisdiction over war crimes, and international tribunals have been given universal jurisdiction over war crimes. Each of these time periods or topics will be considered in turn.

A. Antiquity

The soldier, be he friend or foe, is charged with the protection of the weak and unarmed. It is the very essence and reason for his being. When he violates this sacred trust, he not only profanes his entire cult but threatens the very fabric of

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816 This article will not discuss the other crimes currently within the ICC’s jurisdiction, namely genocide, or crimes against humanity, both of which may be “prosecuted even if they are committed outside an armed conflict.” ROBERTS & GUELFF, supra note 5, at 668.


818 DINSTEIN, supra note 2, at 228.
international society. The traditions of fighting men are long and honorable. They are based upon the noblest of human traits – sacrifice.819

Even before the medieval ages, there were “certain acts committed during war, including the deliberate murder of civilians” and perfidy that were widely regarded as morally wrongful, and as an affront to the professional character of an honorable soldier.820 “The medieval code of chivalry… further developed this martial code”821 of the law of arms or “jus armorum.”822

Violations of the medieval law of chivalry (a.k.a. “law of arms”)823 were punishable by having one’s knighthood stripped.824 Moreover, a knight who violated the laws of honor could be tried and punished by any court of honor.825 Arguably826 the first ‘international war crimes’ trial was in 1474 of Peter von

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821 Bradford, supra note 46, at 1275. Cf. Judge Theodor Meron, Cummings Symposium, supra note 39, Sep. 30, 2005 (noting that chivalry was the basis for international humanitarian law, and that honor and shame played a vital role).


824 Bradford, supra note 46, at 1275.

825 Burrus M. Carnahan, Law of War lecture at the George Washington University School of Law (Jan. 10, 2006). Contra Noone, supra note 44, at 181 (“These courts judged the accused knight on their manner with which they treated fellow knights, and not on any number of other ‘lowly’ combatants.”). Cf. id. at 185-86; Judge Theodor Meron, Cummings Symposium, supra note 39, Sep. 30, 2005 (noting that chivalry had a very narrow scope in that it only protected: (1) knights, not peasants; (2) Christian knights; and (3) rape of Christian women). Accord Meron, supra note 49, at 3; Chris af Jochnick and Roger Normand, The Legitimation of Violence: A Critical History of the Laws of War, 35 HARV. INT’L L.J. 49, 61 (1994). Of course, despite the limited protections of chivalry, it still was an early example of universal jurisdiction enforced by States that might bear no relation to the crime.

826 Some commentators would put the first recorded international war crimes trial as circa 1376, for the war crimes committed by the Duke of Lorraine during the invasion of Alsace. Dinah L. Shelton, International
Hagenbach for his violations of the law of war. Von Hagenbach was made governor of the city of Breisach by Charles the Bold, Duke of Burgundy, and he subsequently proceeded to rape, murder, confiscate private property, and illegally tax . . . its citizens. The court . . . [rejected] Von Hagenbach[’s] . . . ‘superior orders’ defense . . . and he was convicted. He was condemned to death, but first “deprived of his knighthood” and then executed.827

“By the Renaissance a set of norms, internalized by a transnational professional caste requiring, inter alia, minimization of civilian casualties consistent with military objectives as a matter of honor, had perfused warfare.”828 This martial code was based on the “conception of the foe as a fellow professional,” and thus “directed the honorable soldier to renounce treachery and criminality in combating him.”829 These martial norms were passed along via a “collective narrative developed to inform soldiers in the discharge of their duties; when in doubt, soldiers conformed to ‘stories about the great deeds of honorable soldiers’ drawn from the ‘collective narrative of [their] corps.’”830 This transnational martial code shared by the professional caste of soldiers was the primogenitor for twentieth century conceptions of universal jurisdiction over war crimes.

By the end of the Renaissance in the sixteenth century, the concept of universal jurisdiction over piracy was also starting to take hold.831 Shortly after the end of the Renaissance, the watershed Treaty of Westphalia,832 which ended the Thirty

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827 Noone, supra note 44, at 181-82 & n.25.
828 Bradford, supra note 46, at 1275.
829 Id. at 1276.
830 Id.
831 Randall, supra note 10, at 791-95, 839.
Years War in 1648, marked the formation of a community of sovereign States, and hence the foundations of modern public international law.\footnote{William C. Bradford, International Legal Regimes and the Incidence of Interstate War in the Twentieth Century: A Cursory Quantitative Assessment of the Associative Relationship, 16 AM. U. INT'L L. REV. 647, 652 n.12 (2001).} Hugo Grotius “considered the father of international law, had published his Law of War and Peace [*De Jure Belli Ac Pacis Libri Tres*]\footnote{Major Gerard J. Boyle, USMC, Humanity In Warfare, supra note 50.} in 1625 during the Thirty Years War, in response to the atrocities he witnessed.\footnote{Noone, supra note 44, at 187-88.} Grotius put forth general principles for the law of war (and hence war crimes, as violations of the law of war),\footnote{H. GROTIUS, RIGHTS OF WAR AND PEACE, 361-67 (A. Campbell trans. 1901).} that were gradually accepted as customary international law.\footnote{Major Gerard J. Boyle, USMC, Humanity In Warfare, supra note 50.} Grotius addressed the concept of universal jurisdiction as follows:

The fact must also be recognized that kings, and those who possess rights equal to those kings, have the right of demanding punishments not only on account of injuries committed against themselves or their subjects, but also on account of injuries which do not directly affect them but excessively violate the law of nature or of nations in regard to any persons whatsoever. . . . Truly it is more honourable to avenge the wrongs of others rather than one's own.\footnote{Theodor Meron, Common Rights of Mankind in Gentili, Grotius and Suarez, 85 AM. J. INT'L L. 110, 112 (1991).}

During the middle of the nineteenth century, the principles developed by Grotius were incorporated into various military manuals.\footnote{Major Gerard J. Boyle, USMC, Humanity In Warfare, supra note 50.} By the nineteenth century, universal jurisdiction over slave trading\footnote{Randall, supra note 10, at 796-800.} was also recognized. This ended what

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\footnote{Major Gerard J. Boyle, USMC, Humanity In Warfare, supra note 50.}
\footnote{Noone, supra note 44, at 187-88.}
\footnote{H. GROTIUS, RIGHTS OF WAR AND PEACE, 361-67 (A. Campbell trans. 1901).}
\footnote{Major Gerard J. Boyle, USMC, Humanity In Warfare, supra note 50.}
\footnote{Theodor Meron, Common Rights of Mankind in Gentili, Grotius and Suarez, 85 AM. J. INT'L L. 110, 112 (1991).}
\footnote{Major Gerard J. Boyle, USMC, Humanity In Warfare, supra note 50.}
\footnote{Randall, supra note 10, at 796-800.}
Professor Randall has coined the first of “three evolutionary stages” of universal jurisdiction.  

B. World War I Era

Although “no specific precedent existed prior to the Second World War for subjecting war crimes and crimes against humanity to the universality principle,” there had been repeated attempts to establish a competent tribunal of universal jurisdiction extending back to the nineteenth century. In 1872, the “President of what was to be later called the ICRC [International Committee of the Red Cross], proposed the establishment of an international criminal court to adjudicate violations of the 1864 Geneva Convention.” 

“At the ‘First Peace Conference’ in the Hague in 1899, [the] founder and President of the American Society of International Law . . . was a strong advocate for international tribunals.”

Even as late as the first third of the twentieth century, before the commencement of World War II, there had been repeated attempts at establishing a competent tribunal of universal jurisdiction. In 1915, Great Britain, France and Russia denounced Turkey’s massacre of its Armenian minority population as “crimes against humanity,” leading to President Woodrow Wilson’s proposal “to maintain peace via a League of Nations.” Because Turkey submitted to Allied demands and prosecuted two Turkish officials for the Armenian massacre, calls for an international court were stillborn.

\[841\] Id. at 839.

\[842\] Id. at 803 (emphasis added).

\[843\] ROBERTS & GUELFF, supra note 5, at 667.


\[845\] Id. at 241-42. See also Noone, supra note 44, at 201.

\[846\] Ferencz, supra note 71, at 241-42.

\[847\] Both Turkish officials were convicted, and one was sent to the gallows. Noone, supra note 44, at 201.
Legal experts appointed by the League [also] concluded that an international criminal court should be created to hold accountable those responsible for Germany’s aggressions and atrocities [during World War I].

In “1920, the Allied Powers presented a list of 854 individuals for [international] trial to the new German government . . . [but t]he German government . . . made a counterproposal ‘that those accused of war crimes be tried before the German Supreme Court in Leipzig’ [to which t]he Allied Powers ultimately agreed.”

Thus, calls for an international war crimes tribunal over alleged Turkish and German war criminals after World War I nevertheless gave precedence to national courts, foreshadowing the complementarity principle of the International Criminal Court (ICC).

As Professor Ferencz so succinctly summarized: “World War I inspired efforts to put the [German] Kaiser on trial for aggression and to hold German officers accountable for their atrocities. The efforts failed.”

The Kaiser was not indicted for specific war crimes committing during World War I, but for general violations of the law of nations, and dictates of the public conscience, which was a direct reference back to the Martens clause in the 1907 Hague Regulations.

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848 The two Turkish officials who were convicted were the only two held accountable for the Armenian massacre, and the other alleged perpetrators were granted amnesty in the 1923 Treaty of Lausanne. Noone, supra note 44, at 201.

849 Ferencz, supra note 71, at 242.

850 Noone, supra note 44, at 200.

851 See infra Parts II.E.4 and III.D.

852 Ferencz, supra note 71, at 243.


Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.

Id. at preamble para. 8.

However, in perhaps another foreshadowing of the ICC (this time of the United States’ objections thereto), “[i]n 1919, in Paris, it was the American delegates at the War Guilt Investigation Committee who opposed most strongly any legal sentence on the Kaiser for the very reason of the incompatibility of such a procedure with the sovereignty of the State.” Ultimately, the indictment of the Kaiser for war crimes committed during World War I failed, not because of any lack of support for an international tribunal to resolve the case, but because the Netherlands (to which the Kaiser escaped after the war) refused to extradite him. The Kaiser’s indictment for war crimes laid the groundwork for the Nuremberg trials after World War II, and yet the failure of the Kaiser’s indictment also foreshadowed the Article 98 agreements that the United States has championed in an attempt to thwart the potential jurisdiction of the ICC over American nationals.

Subsequent attempts after World War I to establish a permanent international criminal court also failed.

A French proposal to the League of Nations in 1934 for the creation of a permanent international criminal court was aimed at punishing acts of political terrorism [e.g. assassinations] rather than war crimes and, in [any] event, the two treaties defining the crimes and establishing the court adopted at a diplomatic conference in 1937 never entered into force.

“The United States, catering to strong isolationist sentiments, remained aloof.”

Unfortunately, America’s isolationism after World War I led to the rise of Adolf


\[857\] See infra Part II.E.4.

\[858\] ROBERTS & GUELFF, supra note 5, at 667. See also Ferencz, supra note 71, at 242.

\[859\] Ferencz, supra note 71, at 242.
Hitler in a disgruntled Germany. The failure to hold high-ranking criminals accountable [after World War I] was recalled years later by Adolf Hitler, who commented contemptuously when launching the Holocaust: ‘Who remembers the Armenians?’

C. Post-World War II

After World War II, Winston Churchill and Joseph Stalin recommended summarily executing the Nazi leaders as war criminals. But [U.S. Supreme Court Justice] Robert Jackson and U.S. Secretary of War Henry L. Stimson felt there was a better way – a legal way – to deal with the Nazi leaders for their crimes. They wanted fairness rather than vengeance to be the order of the day. Besides the initial war crimes tribunals in Nuremberg and Tokyo, subsequent trials were conducted years later as fugitive Nazi leaders were found and brought to justice. Jurisdiction in each of these trials was premised, at least in part, on universal jurisdiction.

1. Nuremberg

Justice Jackson was granted leave from the Supreme Court to serve as the lead U.S. prosecutor at the International Military Tribunal (IMT) in Nuremberg.

\[860\] Father Robert F. Drinan, 60th Nuremberg Anniversary, supra note 42, Nov. 11, 2005.

\[861\] Ferencz, supra note 71, at 242. Ferencz offers no source for this attribution, but it is commonly attributed to Hitler. The Committee for Open Debate on the Holocaust Web page contains a discussion of the alleged statement, describes circumstances surrounding it, and offers evidence that it may not have actually been made. http://forum.codoh.com/viewtopic.php?p=3709

\[862\] Sean D. Murphy, The George Wash. Univ. Law Sch.: “Should the U.S. Join the International Criminal Court?” A Moderated Panel Discussion [hereinafter ICC Panel], Feb. 13, 2006; Henry T. King, Jr., Remarks at 5, 60th Nuremberg Anniversary, supra note 42, Nov. 11, 2005; ABA President-Elect Karen Mathis, Id. Cf. In re Extradition of Demjanjuk, 612 F. Supp. at 558 (noting that “It is a historical verity that the victors in war have meted out punishment to the vanquished in the name of justice.”).

\[863\] Henry T. King, Jr., Remarks at 5, 60th Nuremberg Anniversary, supra note 42, Nov. 11, 2005.

\[864\] Randall, supra note 10, at 800. See also Demjanjuk v. Petrovsky, 776 F.2d at 582.

\[865\] Ferencz, supra note 71, at 225.
which was administered jointly by the four Allied powers.\footnote{United States, Great Britain, France, and Russia. Besides the four Allied powers, “[n]ineteen other states assented to the London Agreement” which established the IMT.” Randall, supra note 10, at 801.} The IMT was responsible for prosecuting the major German war criminals,\footnote{Id.} which included the “German leaders responsible for planning or perpetrating the aggressions, crimes against humanity and war crimes committed in flagrant violation of existing international laws.”\footnote{Ferencz, supra note 71, at 225.} Justice Jackson was careful to put together overwhelming proof of the alleged war criminals’ guilt, realizing that this was an historic endeavor: “We must never forget that the record on which we judge these defendants today is the record on which history will judge us tomorrow.”\footnote{Id. at 225-26}

Historically, the IMT is generally viewed as the commendable exercise of universal jurisdiction\footnote{Demjanjuk v. Petrovsky, 776 F.2d at 582. Cf. Randall, supra note 10, at 800, 805-06 (noting that the Allies could also have based jurisdiction on the territoriality, nationality, and passive personality principles, and that “while many sources view the IMT’s proceedings as being partly based on the universality principle, the IMT’s judgment and records actually evidence little or no explicit reliance on universal jurisdiction”). However, the perception that the IMT exercised universal jurisdiction grew out of its attempts to define crimes of universal condemnation, for which the international community could not rely on domestic courts to resolve.} over Nazi war criminals,\footnote{See Randall, supra note 10, at 803-04 (comparing the Axis offenses to piracy in order to justify the application of universal jurisdiction over the former). Cf. id. at 804 (recognizing that “the Allies’ partial reliance on the universality principle . . . represents a marked expansion of universal jurisdiction”).} and that “[a]t Nuremberg, the rule of law took a step forward.”\footnote{Ferencz, supra note 71, at 226.} “Hitler and his henchmen had been warned in 1942 that they would be held accountable for the atrocities being committed by Nazi Germany,”\footnote{Ferencz, supra note 71, at 225.} and so they were. All but three of the Nazi defendants were convicted after receiving putatively fair trials; seventy-one were hung, but many were imprisoned, and eventually released after having been pardoned.\footnote{Sean D. Murphy, ICC Panel, supra note 89, Feb. 13, 2006; ABA President-Elect Karen Mathis, 60th Nuremberg Anniversary, supra note 42, Nov. 11, 2005.}
“Nuremberg was designed to replace the ‘law of force’ with the ‘force of law,’” which it accomplished merely by providing judicial process instead of turning the “final solution” back against the Nazi leaders themselves, as the British and Russians proposed. Even the German people eventually came to regard the IMT prosecutions as a just result for the holocaust, although this took decades to come about.

Yet the IMT is today (and was then) not without its critics. Professor Wedgwood has pointed out that only the leaders and members of the Axis powers were prosecuted, and that neither the United States nor the other Allies were ever held accountable for potential war crimes, such as the firebombing of Dresden. Despite Justice Jackson’s role as chief U.S. prosecutor, the remainder of the justices on the U.S. Supreme Court considered the IMT to be “victors’ justice.” In fact, Chief Justice Harlan Stone called the IMT, “Jackson's high lynching expedition.” In addition, Justice “Jackson did not have support of much of the organized bar of the United States and Nuremberg [and] was excoriated by Senator Robert A. Taft . . . . But Jackson withstood the slings and arrows of his countrymen and held fast to his belief in the legitimacy of Nuremberg.”

The IMT “was a long time coming. But it was only a beginning.” After the IMT (generally known as “The Nuremberg Court”) tried the major Nazi officials, the Allies created “courts within the four occupation zones of post-war Germany which tried lesser Nazis,” again basing jurisdiction on universality. The

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875 Henry T. King, Jr., Remarks at 1, 60th Nuremberg Anniversary, supra note 42, Nov. 11, 2005.
876 Michael Scharf, 60th Nuremberg Anniversary, supra note 42, Nov. 11, 2005. Professor Scharf predicted that it may take equally long for the ICTR and ICTY to change people’s minds. Id.
879 Henry T. King, Jr., Remarks at 7, 60th Nuremberg Anniversary, supra note 42, Nov. 11, 2005.
880 Id.
881 Id.
882 Henry T. King, Jr., Remarks at 1, 60th Nuremberg Anniversary, supra note 42, Nov. 11, 2005.
883 Demjanjuk v. Petrovsky, 776 F.2d at 582; Randall, supra note 10, at 801.
United States conducted its twelve subsequent trials of lesser Nazis in the same court in Nuremberg that had housed the IMT. The International Military Tribunal for the Far East (IMTFE) conducted similar trials of Japanese war criminals in Tokyo, ultimately convicting twenty-eight of them for war crimes committed against Allied troops, and for offenses committed in various Japanese-occupied territories.

2. Eichmann

Years after the end of World War II, related war crimes trials were still being conducted under the rubric of universal jurisdiction as alleged war criminals were discovered hiding, often under assumed names, in foreign countries. The first prominent example of such a belated war crimes trial was Israel's prosecution of Adolph Eichmann in 1961, after having abducted him from Argentina. The Israeli government sent a note verbale to the Argentine Government, expressing its "hope that Argentina would overlook this violation of its sovereignty given 'the special significance' of bringing to trial the man responsible for the murder of

884 Randall, supra note 10, at 806-10 ("The proceedings of the zonal tribunals…contain more explicit references to the universality principle").

885 Henry T. King, Jr., Remarks at 1, 60th Nuremberg Anniversary, supra note 42, Nov. 11, 2005; Ferencz, supra note 71, at 225.

886 Ferencz, supra note 71, at 243; DINSTEIN, supra note 2, at 10; Sean D. Murphy, ICC Panel, supra note 89, Feb. 13, 2006.

887 Randall, supra note 10, at 802.

888 Id. For example, Adolph Eichmann was discovered in “Buenos Aires living under the alias of Ricardo Klement.” Biography of Simon Wiesenthal, available at http://www.jewishvirtuallibrary.org/jsource/biography/Wiesenthal.html (last visited Apr. 10, 2006).

889 Adolph Eichmann was the SS Lieutenant Colonel in charge of the Nazi Gestapo Jewish Section,” and thus responsible for supervising the “final solution of the Jewish Question.” Randall, supra note 10, at 810. See also Biography of Adolf Eichmann, available at http://www.jewishvirtuallibrary.org/jsource/Holocaust/eichmann.html (portraying Eichmann as more of a bureaucrat than an anti-Semitic ideologue; last visited Apr. 10, 2006); Doron Geller, The Capture of Adolf Eichmann, available at http://www.jewishvirtuallibrary.org/jsource/Holocaust/eichcap.html (“at all the Nuremberg trials of Nazi war criminals [Eichmann] was pointed to as the head butcher”; last visited Apr. 10, 2006).

Although obviously “the universality principle did not permit Israel to transgress Argentina's sovereignty,” and thus “[r]eturning Eichmann to Argentina might have been the proper remedy for the illegal abduction,” which Argentina initially demanded. Nevertheless, “Argentina eventually waived its right to protest Israel's jurisdiction over Eichmann,” thus paving the way for Israel to bring Eichmann to justice. “Israel based its jurisdiction under international law on the passive personality, protective, and universality principles.”

However, Eichmann's trial was not without its own hurdles. The first hurdle was Eichmann's claim that his irregular rendition from Argentina violated his rights and deprived the Jerusalem court of jurisdiction. Yet “under Israeli law, the 'irregularities' of Eichmann's apprehension did not entitle him to challenge the court's jurisdiction,” which is consistent with U.S. law as well.

The second hurdle at trial was the fact that the State of Israel did not exist when Eichmann committed his crimes during World War II. “Because Eichmann's victims were not Israelis when Eichmann acted and because Eichmann never threatened Israel's security, Israel's reliance on the passive personality and protective principles expanded those jurisdictional bases [considerably].” However,

the fact that Israel was not a state when Eichmann acted does not affect the legitimacy of Israel's jurisdiction under the universality principle. The basic premise of universal jurisdiction holds that every state has an

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891 Randall, supra note 10, at 812 & n. 171.

892 Id. at 813 & n. 174.

893 Id. at 813 & n. 175.

894 Id. at 811, 814.


896 Randall, supra note 10, at 814 & n. 177 (noting that the State of Israel was not proclaimed until May 14, 1948).

897 Id. at 814 & n. 178.
interest in bringing to justice the perpetrators of particular crimes of international concern. Logically, that sovereign interest is not limited to states that existed when the international crimes occurred... When any state captures and punishes a universal offender, all states benefit. In light of the universality principle’s purpose of redressing a special category of offenses, Israel's universal jurisdiction was valid despite Israel's lack of existence when Eichmann acted.898

Israel’s claim to universal jurisdiction was also bolstered by the enactment of “several significant multilateral treaties, including the [four] Geneva Conventions of 1949 and the [Genocide] Convention... [which] confirmed the global condemnation of crimes such as Eichmann’s, thus lending additional authority to Israel's use of universal jurisdiction.”899 Thus, Israel's jurisdiction over Eichmann was more firmly based on universal jurisdiction than the earlier Nuremberg trials.900

The third hurdle at Eichmann’s trial was more of a matter of comity between States than jurisdiction: the possibility of extradition back to Germany to stand trial.

The usual limitation is that the state which has apprehended the offender must first offer his extradition to the state in which the offense was committed. This limitation has no place in the circumstances of this case. This limitation was a practical one, based on availability of witnesses and evidence and therefore it becomes the forum conveniens for the conduct of the trial. Here the great number of witnesses and documentary evidence is in Israel.901

898 Id. at 814.
899 Randall, supra note 10, at 814-21.
Thus, the Israeli courts were not obligated to extradite Eichmann to Germany.\(^{902}\) After a thirteen-day trial, “[t]he District Court of Jerusalem convicted Eichmann and [subsequently] sentenced him to death, and the Supreme Court of Israel affirmed.”\(^{903}\) Eichmann’s conviction and execution put one more nail into the coffin of World War II atrocities, but it was not to be the final nail.

3. Demjanjuk

The second prominent (and more recent) example of a war crimes trial held decades after the end of World War II is the trial of John (Ivan) Demjanjuk (a.k.a. “Ivan the Terrible of Treblinka”), also held in Israel.\(^{904}\) Demjanjuk was a Ukrainian who was conscripted into the Soviet Red Army in 1940. He was captured by the Germans in 1942 and volunteered for service in the SS [Schutzstaffel].\(^{905}\) Demjanjuk allegedly served as an SS guard at various concentration/extermination camps, where he operated the gas chambers, “euthanizing” untold numbers of Jews.\(^{906}\) After World War II, Demjanjuk departed

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\(^{902}\) This is consistent with the general principle of “prosecute or extradite” that is found in most multilateral conventions. Prosecution and extradition are viewed as alternatives, not as steps to be followed seriatim, with extradition necessarily being of primary importance or consideration. See, e.g., Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 146, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV].


\(^{904}\) Randall, supra note 10, at 802.


\(^{906}\) At the Treblinka extermination camp where Demjanjuk allegedly operated the gas chambers, it is estimated that “700,000 Jews were killed [t]here by carbon monoxide” in a seventeen-month period between July 1942 and November 1943. Killing People Through Gas In Extermination and Concentration Camps, available at http://www.jewishvirtuallibrary.org/jsource/Holocaust/gascamp.html (last visited Apr. 10, 2006). This was the same time period that Demjanjuk allegedly operated the gas chambers at Treblinka. In re Extradition of Demjanjuk, 612 F. Supp. at 551.
Europe, and emigrated to the United States in 1952, where he became a naturalized citizen residing near Cleveland, Ohio.\textsuperscript{907}

In 1975, “there came into the possession of certain members of the U.S. Senate a list of Nazi war criminals living… in the U.S.”\textsuperscript{908} Demjanjuk’s name was on the list.\textsuperscript{909} After conducting an international investigation, the Immigration and Naturalization Service (INS) instituted denaturalization proceedings against Demjanjuk in 1977, although his trial was delayed until 1981.\textsuperscript{910} In 1983, while Demjanjuk’s appeals were pending, the State of Israel requested his extradition “to stand trial in Israel for murder and other offenses alleged under the Nazis and Nazi Collaborators (Punishment) Law.”\textsuperscript{911} The federal district court for the Northern District of Ohio found that Demjanjuk “had made material misrepresentations in his visa application by failing to disclose his service for the German SS at the Trawniki and Treblinka prison camps in 1942-43, [and] … ordered that [Demjanjuk]’s United States citizenship be revoked and his certificate of naturalization cancelled.”\textsuperscript{912} The federal district court also certified to the U.S. Secretary of State “that Demjanjuk was subject to extradition [to Israel]… on the charge of murder.”\textsuperscript{913}

On appeal, the Sixth Circuit Court of Appeals upheld the district court’s extradition certification, because all of the extradition requirements were met, including the fact that “the State of Israel has jurisdiction to punish for war crimes and crimes against humanity committed outside of its geographic boundaries”

\textsuperscript{907} In re Extradition of Demjanjuk, 612 F. Supp. at 546.


\textsuperscript{909} Id. “The information listed evidently emanated from material collated in the Soviet Union, consisting of authentic German documents captured by the Red Army when occupying territories under Nazi control in the summer of 1944.” Id.

\textsuperscript{910} Id.

\textsuperscript{911} Demjanjuk v. Petrovsky, 612 F. Supp. at 572.


\textsuperscript{913} In re Extradition of Demjanjuk, 612 F. Supp. at 571.
based on universal jurisdiction, which the U.S. also recognizes. Demjanjuk was finally extradited to Israel in 1986, where he was tried and convicted on all counts after a thirteen-month trial (versus Eichmann’s thirteen-day trial), and sentenced to death. “After spending five years on death row, the Israeli Supreme Court ruled [in 1993] there was reasonable doubt that he was Ivan [the Terrible of Treblinka] and ordered that he be released.” The Israeli Supreme Court held that although evidence of other crimes committed by Ivan Demjanjuk had been found, “a change in the basis of the extradition, more than seven years after the proceedings against [Demjanjuk] were opened, would be unreasonable.”

Demjanjuk returned to the U.S., where his U.S. citizenship was reinstated in 1998, but then stripped again in 2002, because although Demjanjuk apparently wasn’t “Ivan the Terrible of Treblinka,” he had been a guard at other Jewish concentration camps, and thus had still lied on his U.S. naturalization application. Demjanjuk (now eighty-five years old) recently was ordered deported to his native Ukraine on December 28, 2005. Demjanjuk plans to

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914 Demjanjuk v. Petrovsky, 776 F.2d at 583. See also Randall, supra note 10, at 790 & n.26.


916 Id.

917 Israeli prosecutors had obtained additional evidence from the former Soviet Union (which the Soviet Army had seized after World War II), including a number of written depositions that Ivan the Terrible of Treblinka was named Ivan Marchenko, not Ivan Demjanjuk. Asher Felix Landau, The Demjanjuk Appeal, July 29, 1993, available at http://www.jewishvirtuallibrary.org/jsource/Holocaust/Demjanuk3.html (last visited Apr. 10, 2006).


appeal the immigration judge’s order.\footnote{Appeal Possible for Alleged Nazi Guard, http://www.msnbc.msn.com/id/10630835/ (last visited Apr. 10, 2006).} The conclusion of Demjanjuk’s case may very well mark the end to Professor Randall’s second of “three evolutionary stages” of “universal jurisdiction over war crimes, crimes against humanity, and other Axis offenses following the Second World War.”\footnote{Randall, supra note 10, at 839.}

**D. Domestic Statutes**

The State of Israel based its jurisdiction over Demjanjuk’s trial on its domestic “Nazis and Nazi Collaborators (Punishment) Law.”\footnote{Demjanjuk v. Petrovsky, 612 F. Supp. at 572.} Although Israel’s domestic universal jurisdiction statute is, by definition, limited to Nazi offenders, other States’ have enacted domestic statutes that are more broadly defined, taking their cue from international treaties that purport to extend “universal jurisdiction over grave breaches of the Geneva Conventions, hijacking, hostage taking, crimes against internationally protected persons, apartheid, torture, genocide, and possibly other offenses.”\footnote{Randall, supra note 10, at 839. Cf. Bruno Simma & Andreas L. Paulus, 93 AM. J. INT’L L. 302, 214 (Apr. 1999) (noting that while universal jurisdiction for genocide and crimes against humanity seems almost universally accepted, universal jurisdiction for grave breaches of the Geneva Conventions is only “increasingly accepted,” and universal jurisdiction over human rights violations, such as torture or forced disappearances, is only provided for “in some instances”).} This is what Professor Randall calls the final of “three evolutionary stages” of universal jurisdiction.\footnote{Randall, supra note 10, at 839.}

Within this “general revival of the concept of universal jurisdiction,”\footnote{Burrus M. Carnahan, Law of War lecture at the George Washington University School of Law (Jan. 10, 2006).} is the specific notion that “any nation has the right to try and prosecute war criminals.”\footnote{Id.} The four Geneva Conventions of 1949 specifically provide for
universal jurisdiction under domestic statutes for “grave breaches” of the Geneva Convention:

The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing… any of the grave breaches of the present Convention… [and] to search for persons alleged to have committed… such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts.

It may also . . . hand such persons over for trial to another High Contracting Party concerned.\textsuperscript{930} Thus, many States have enacted domestic legislation providing for universal jurisdiction over war crimes, or at least those war crimes that represent “grave breaches”\textsuperscript{931} of the 1949 Geneva Conventions.\textsuperscript{932} As Professor Dinstein explains, “self-discipline by a belligerent Party is not enough,” and thus military and political leaders should anticipate that if they are unwilling to do so, other States will prosecute their nationals for war crimes, which they have done “since time immemorial.”\textsuperscript{933}


\textsuperscript{931} Article 147 of the Fourth Geneva Convention of 1949 contains the following list of “grave breaches”:

- wilful killing, torture or inhuman treatment … wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial …, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.


\textsuperscript{933} DINSTEIN, \emph{supra} note 2, at 228.
For example, Spain “requested extradition of General Pinochet [former President of Chile] from England to Spain for the murders of Spanish civilians in Chile in violation of the Convention Against Torture to which both England and Spain were signatories.” Spain asserted jurisdiction under both universal jurisdiction and the “passive personality” theory, because the victims were Spanish. The English House of Lords held that Pinochet could be extradited under universal jurisdiction under the Convention Against Torture. However, if each State decides for itself when another head-of-state’s act constitutes an international crime, that could disrupt diplomatic relations – this being one of the main justifications for creating the International Criminal Court (ICC).

“Belgium enacted a law allowing for [universal] jurisdiction over certain egregious violations of international law committed anywhere in the world, and convicted four Rwandan Hutus of committing genocide in Rwanda.” “A later [Belgian] decision held that a suspect had to be physically present in Belgium in order to be investigated and tried,” thereby negating the possibility of *in absentia* trials.

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936 Barrett, *supra* note 159, at 430 n. 6. Contra Sriram, *supra* note 17, at 323-25, 355-56 & n. 76-81, 225 (stating that universal jurisdiction was not “the central basis for the House of Lords’ willingness to extradite”).


938 BRADLEY & GOLDSMITH, *supra* note 10, at 536. See also Barrett, *supra* note 159, at 470 & n. 176; Dinah L. Shelton, International Law-Human Rights lecture at the George Washington University School of Law (Nov. 17, 2005) (noting that the four Rwandan Hutu defendants had been Belgian residents, and that Belgium had also been the colonial power in Rwanda, thus arguably supporting nationality jurisdiction as well).

939 BRADLEY & GOLDSMITH, *supra* note 10, at 537. Accord Belgium Bars Sharon War Crimes Trial, BBC News, June 26, 2002 (reporting a Belgium court's ruling that the case against Ariel Sharon could not be brought because he was not in Belgium), available at [http://news.bbc.co.uk/1/hi/world/europe/2066808.stm](http://news.bbc.co.uk/1/hi/world/europe/2066808.stm) (last visited Mar. 27, 2006). Requiring physical presence of the defendant before exercising universal jurisdiction could be seen as simply requiring personal (vs. subject matter) jurisdiction, rather than requiring some nexus to the State, such as that required for territorial jurisdiction (i.e. conduct occurring within the State, or having an effect therein). See also Dinah L. Shelton, International Law-Human Rights lecture at the George Washington University School of Law (Nov. 17, 2005) (noting that the Belgian law has been changed to now require a link to Belgium, and that individuals can no longer initiate investigations, but only a Belgian prosecutor can). Cf. Belgium Bars Sharon War Crimes Trial, BBC News, June 26, 2002 (noting that “[t]he cases have been an
Belgium also tried to establish universal jurisdiction over the Foreign Minister of the Democratic Republic of the Congo (DRC) for alleged genocide and crimes against humanity; the International Court of Justice (ICJ) dismissed the claim based on the Minister’s immunity, rather than addressing the universal jurisdiction issue.⁹⁴⁰

In an unrelated case, Republic of the Congo (ROC) vs. France, France sought to establish universal jurisdiction as a matter of customary international law⁹⁴¹ over the ROC President and other high-ranking ROC officials for alleged crimes against humanity and torture.⁹⁴² The ICJ again ducked the issue of universal jurisdiction by refusing to intercede at such a preliminary stage in France’s investigation.⁹⁴³ Spain, Belgium and France are not alone in seeking to exercise universal jurisdiction over war crimes and other international crimes:

Other states, including the Netherlands, Switzerland, Denmark, Australia, and Germany have recently used the Geneva Conventions to prosecute war criminals for acts committed by non-nationals against non-nationals living abroad. England has similarly adopted an act easing the procedure necessary to bring a case under the Geneva Conventions.⁹⁴⁴

Embarrassment for the Belgian Government, which has promised to make it harder for international claims to be launched in Belgian courts”), available at http://news.bbc.co.uk/1/hi/world/europe/2066808.stm (last visited Mar. 27, 2006). International comity would seem to limit in absentia trials, particularly with regard to sitting heads of State.

Dem. Rep. Congo v. Belg., 2002 I.C.J. at paras. 41, 42, 43 & 45. Accord Belgium Bars Sharon War Crimes Trial, BBC News, June 26, 2002 (reporting a Belgium court’s ruling that the case against Ariel Sharon could not be brought because he was not in Belgium), available at http://news.bbc.co.uk/1/hi/world/europe/2066808.stm (last visited Mar. 27, 2006). See also Barrett, supra note 159, at 470 & n. 176; Dinah L. Shelton, International Law-Human Rights lecture at the George Washington University School of Law (Nov. 17, 2005) (despite the fact that the parties requested that the ICJ not address the viability of universal jurisdiction, there appeared to be a fairly even split between the ICJ judges on the issue).

See Dinstein, supra note 2, at 228.


Id. at paras. 35, 37, 38 & 41.

Barrett, supra note 159, at 471-72. See also Steven R. Ratner & Anne-Marie Slaughter, Appraising the Methods of International Law: A Prospectus for Readers, 93 AM.J.INT’L L. 291, 297-98 (Apr. 1999). Cf. Sriram, supra note 17, at 317-31 (noting that Spain, Belgium, the United Kingdom, France, Switzerland,
By contrast, most U.S. criminal statutes either expressly or implicitly require a connection to the United States or to a U.S. national, and thus do not assert universal jurisdiction.\textsuperscript{945} Even the federal genocide statute requires that the offense occur in the United States or that the offender be a U.S. national.\textsuperscript{946} A federal torture statute does assert universal jurisdiction in that it criminalizes acts of official torture committed in foreign nations by foreign citizens, but there are no reported cases actually applying that statute.\textsuperscript{947} In terms of civil cases, a number of U.S. courts have asserted universal jurisdiction in the context of international human rights litigation.\textsuperscript{948} Thus, the United States does not appear as willing as European States to assert extraterritorial criminal jurisdiction under the rubric of universality, and yet appears more willing to assert extraterritorial civil jurisdiction.

E. International Tribunals

The IMT in Nuremberg after World War II was the first modern \textit{ad hoc} international tribunal for the prosecution of war crimes, crimes against humanity, and the crime of aggression. It was \textit{ad hoc} because it was created after the atrocities had been committed, and because it was not a permanent court – thus its jurisdiction was limited both geographically and temporally.\textsuperscript{949} It was \textit{international} because it was run by the four Allied powers, and because it was

\begin{footnotesize}
\textsuperscript{945} BRADLEY & GOLDSMITH, supra note 10, at 536.
\textsuperscript{946} Id.
\textsuperscript{947} Id.
\textsuperscript{948} Id. See, e.g., Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980); Sosa v. Alvarez-Machain, 542 U.S. 692 (2004).
\textsuperscript{949} Cf. supra note 104 and accompanying text (Professor Wedgwood’s criticism of the IMT for not considering the Allied war crimes). Perhaps this is more of a “victor/vanquished” limitation than a geographical limitation. Of course, the IMT was limited temporally to those atrocities committed during the hostilities of World War II, beginning in 1939 and ending in 1945.
\end{footnotesize}
supported by nineteen other signatories to the London Agreement. Therefore, it is perhaps not overly surprising that when the need next arose for international fora to adjudicate claims of genocide, crimes against humanity, and war crimes, the United Nations (UN), also a product of the Second World War, would fall back on the *ad hoc* Nuremberg model. Of course, no *permanent* International Criminal Court (ICC) yet existed, and arguably, perhaps, there was insufficient support for the establishment of a permanent ICC at the time.

Thus, the *ad hoc* international tribunals may be viewed as preliminary efforts at establishing a more permanent ICC, or as the UN ‘testing the waters.’

1. **ICTY**

The next occasion after the IMT when another international criminal tribunal was both necessary and feasible was when “[t]he mass rapes and genocidal acts in Yugoslavia induced the [UN] Security Council to set up a special [*ad hoc*] tribunal in 1993 to punish those responsible.” Before the UN Security Council (UNSC)

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950 Randall, *supra* note 10, at 801.

951 After coalition forces drove Saddam Hussein out of Kuwait in the First Gulf War in 1991, the lack of an international criminal court prevented any type of war crimes trial for atrocities committed by Saddam. Professor Ferenz has described this as a “political blunder,” where “[p]olitics prevailed over principle.” *Ferenz, supra* note 71, at 227. Instead, a civil compensation commission was created to provide civil remedies for people harmed in the war. Dinah L. Shelton, International Law-Human Rights lecture at the George Washington University School of Law (Nov. 15, 2005). However, war crimes proceedings were initiated in Belgium courts under the rubric of universal jurisdiction over Saddam Hussein, as well as Israeli Prime Minister Ariel Sharon, Palestinian leader Yasser Arafat, Cuban President Fidel Castro, and Ivory Coast President Laurent Gbagbo. Belgium Bars Sharon War Crimes Trial, BBC News, June 26, 2002, available at [http://news.bbc.co.uk/1/hi/world/europe/2066808.stm](http://news.bbc.co.uk/1/hi/world/europe/2066808.stm) (last visited Mar. 27, 2006).

952 An international tribunal was not feasible until the end of the Cold War stalemate on the United Nations Security Council. Sean D. Murphy, ICC Panel, *supra* note 89, Feb. 13, 2006; *Ferenz, supra* note 71, at 226: “The ideological war between the Soviet Union and the United States influenced every decision. United Nations committees operated on the principle of consensus; that meant, in effect, that every member could veto anything.” Another explanation for the resurrection of international fora was the sense that a climate of impunity” had developed, whereby despised dictators made amnesty for their offenses the price of their stepping down from power (e.g. Uruguay, Argentina, & Chile). Dinah L. Shelton, International Law-Human Rights lecture at the George Washington University School of Law (Nov. 16, 2005). “When domestic leaders exempt themselves from liability, all you can do is hold individuals accountable at the international level.” *Id.*

953 *Ferenz, supra* note 71, at 243. *See also* ROBERTS & GUELFF, *supra* note 5, at 565 (describing the series of wars associated with the breakup of the former Socialist Federal Republic of Yugoslavia as “consist[ing] as much of successive actions against civilians as of organized combat between armed forces,” and thus “necessarily involv[ing] violations of the laws of war”).
decided to establish the International Criminal Tribunal for the former Yugoslavia (ICTY) in The Hague, Netherlands, other options were considered, including the use of domestic criminal tribunals. These were judged to be of limited utility because of the destruction of the physical and human resources necessary for complex criminal trials, and due to divergent concerns that either hostile courts would afford too little due process to defendants, or that sympathetic governments would shield defendants from trial, perhaps by granting amnesty.954

Therefore it was recognized that an international criminal tribunal, such as the IMT at Nuremberg, needed to be established, with primacy over domestic courts.955 However, instead of pursuing this new international criminal tribunal through the customary, tedious treaty process (by which the IMT Charter had been created), interested governments and non-governmental organizations (NGOs) jump-started the process by convincing the UNSC to create the new international criminal tribunal pursuant to Chapter VII of the UN Charter.956

On May 25, 1993 the UNSC established the ICTY by fiat, prescribed its structure, defined its jurisdiction, and instructed all UN-member States to cooperate with the new court by turning over custody of suspects, evidence and witnesses.957 More specifically, the UNSC established the ICTY’s jurisdiction over grave breaches of the four 1949 Geneva Conventions, violations of the laws or customs of war, genocide, and crimes against humanity committed since January 1, 1991


956 DUNOFF, RATNER & WIPPMAN, supra note 181, at 600. Thus, the consent of States to support this new tribunal (e.g. by entering a multilateral treaty establishing the court) was deemed less important than establishing the ICTY efficiently and effectively. JAN KLABBERS, AN INTRODUCTION TO INTERNATIONAL INSTITUTIONAL LAW, 260 (2002).

957 DUNOFF, RATNER & WIPPMAN, supra note 181, at 601. See also ROBERTS & GUELFF, supra note 5, at 566.
in the territory of the former Socialist Federal Republic of Yugoslavia.\footnote{ICTY Statute, supra note 182, at Arts. 2–5, 8. The UNSC did not include the crime of aggression within the ICTY’s jurisdiction because the topic was too politically-charged. Sean D. Murphy, International Organizations lecture at the George Washington University School of Law (Oct. 31, 2005). The fact that the UNSC included grave breaches of the four 1949 Geneva Conventions within the ICTY’s jurisdiction supports the view that these rules had become rules of customary international law, because after the breakup of the former Yugoslavia, it was unclear that all of the new national entities had acceded to the four 1949 Geneva Conventions, and thus would not have been bound by their provisions as a matter of treaty law. Burrus M. Carnahan, Law of War lecture at the George Washington University School of Law (Feb. 21, 2006). It is also interesting to note the fact that the UNSC did not include violations of Additional Protocol I (AP I) to the Geneva Conventions within the ICTY’s jurisdiction, thus supporting the U.S. view that provisions of AP I have not risen to the level of customary international law. Id.} The second category of “violations of the laws or customs of war” was included to ensure that the ICTY could prosecute individuals for war crimes not rising to the level of \textit{grave breaches} of the four 1949 Geneva Conventions.\footnote{ICTY Statute, supra note 182, at Art. 3. This was particularly important for atrocities committed during those periods and locations of the Balkan conflict that were considered to be under civil war, because only common Article 3 of the four 1949 Geneva Conventions would apply to such a noninternational armed conflict. By including this category of “violations of the laws or customs of war,” the UNSC was forestalling the possible defense, raised at Nuremberg, of \textit{nullum crimen sine lege} (no crime without law). DUNOFF, RATNER & WIPPMAN, supra note 181, at 582-83. See also ROBERTS & GUELFF, supra note 5, at 566-67.} A former prosecutor at the Nuremberg war crimes trials opined that the ICTY “was a long-overdue building block on the edifice started at Nuremberg.”\footnote{Ferencz, supra note 71, at 228.}

The ICTY has carefully chosen which alleged crimes to investigate and to prosecute,\footnote{For example, the ICTY prosecutor elected not to investigate alleged excessive environmental damage (caused by the North Atlantic Treaty Organization (NATO) bombing of Kosovo) as a war crime, because of lack of specificity in defining this as a war crime. Burrus M. Carnahan, Law of War lecture at the George Washington University School of Law (Feb. 7, 2006); Final Report to the Prosecutor of the International Criminal Tribunal for the Former Yugoslavia by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, June 8, 2000.} both to maintain the court’s legitimacy, and to maintain the support of States upon which it relies to secure custody over criminal defendants, since the ICTY lacks its own international police force.\footnote{Dinah L. Shelton, International Law-Human Rights lecture at the George Washington University School of Law (Nov. 15, 2005).} The ICTY has successfully completed criminal proceedings against eighty-five defendants,\footnote{ICTY At a Glance, available at \url{http://www.un.org/icty/glance-e/index.htm} (last visited Apr. 10, 2006: Dinah L. Shelton, International Law-Human Rights lecture at the George Washington University School of Law (Nov. 16, 2005); DUNOFF, RATNER & WIPPMAN, supra note 181, at 380-382, 589-594; KLABBERS, supra note 183, at 183-85.} although its
highest profile defendant, former Yugoslav president Slobodan Milosevic, recently died in captivity on March 11, 2006 while his trial was ongoing.\footnote{Milosevic Found Dead in His Cell, available at \url{http://news.bbc.co.uk/2/hi/europe/4796470.stm} (last visited Apr. 10, 2006).}

2. ICTR

Only a year after the UNSC had established the ICTY to prosecute atrocities in the former Yugoslavia, atrocities in another war-torn country presented the need for the formation of a second international criminal tribunal:

In 1994, over half a million people were brutally butchered during ethnic conflicts and genocidal slaughter in Rwanda. The massacres could have been prevented but those with the power to halt the killings lacked the will, wisdom or political courage to take the military risks. Instead, in response to justified cries of universal indignation, the Security Council promptly created another ad hoc tribunal [nearly in Arusha, Tanzania] for crimes committed in Rwanda.\footnote{Ferencz, \textit{supra} note 71, at 228, 243. \textit{See also} ROBERTS & GUELFF, \textit{supra} note 5, at 615 (noting that “[d]uring the three-month period from April to July 1994 an estimated half million to one million people were killed in Rwanda in massacres widely viewed… as the clearest case of genocide since the Second World War.”); Justice Anthony Kennedy, ASIL 100th Mtg., \textit{supra} note 27, Plenary Address, Mar. 30, 2006 (“the world was warned, but waited, watched, and wept but little [regarding Rwanda]”).}

There are important similarities between the International Criminal Tribunal for Rwanda (ICTR) and its predecessor, the ICTY. On November 8, 1994, the UNSC established the ICTR again by \textit{fiat} acting under Chapter VII of the UN Charter, prescribing a similar structure,\footnote{Initially the ICTY and ICTR even shared the same prosecutor, and they continue to share the same appeals chamber. Statute of the International Criminal Tribunal for Rwanda [hereinafter ICTR Statute], S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg., Annex, U.N. Doc. S/RES/955, arts. 12 & 15 (1994).} defining similar primary jurisdiction over genocide and crimes against humanity, and similarly directing UN-member States to cooperate with the new court.\footnote{Id. at Arts. 2, 3 & 8; ROBERTS & GUELFF, \textit{supra} note 5, at 616. Although Rwanda, who happened to be serving on the UNSC at the time, was in favor of establishing an international tribunal, it cast the sole opposing vote for a number of reasons, including the fact that the ICTR lacked the death penalty and was based outside Rwanda. \textit{Id.}} Both courts lack the death penalty,
which is particularly ironic for the ICTR, since lesser cases of genocide were prosecuted in domestic Rwandan courts, leading to the execution of those convicted.  

Although the ICTR was patterned after the ICTY, there are also important differences. The ICTR has a more restrictive temporal limit on its jurisdiction (only covering offenses committed in 1994 versus offenses committed after January 1, 1991 for the ICTY), but a more relaxed geographical jurisdiction (territory of Rwanda plus Rwandan citizens committing genocide and other violations in the territory of neighboring States versus merely the territory of the former Yugoslavia for the ICTY). Many of the differences between the ICTR and ICTY arise from the fact that the conflict in Rwanda was almost exclusively an internal conflict, whereas the conflict in the former Yugoslavia was both an international and a non-international armed conflict. Therefore the ICTR Statute does not require a connection between crimes against humanity and armed conflict as does the ICTY Statute, and the ICTR refers to violations of Common Article 3 of the four 1949 Geneva Conventions and the 1977 Additional Protocol II to the Geneva Conventions (covering noninternational armed conflict) rather than to violations of the laws and customs of war as does the ICTY Statute. Although the focus in Rwanda (like the former Yugoslavia) was on criminal punishment, there was also a parallel process of “Truth and Reconciliation” in Rwanda to deal with the 100,000 criminal suspects in custody as well as creating an

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968 ROBERTS & GUELFF, supra note 5, at 616, 617.
969 ICTR Statute, supra note 193, at Preamble & Art. 7.
970 ROBERTS & GUELFF, supra note 5, at 616.
971 Compare ICTR Statute, supra note 193, at Art. 3 with ICTY Statute, supra note 182, at Art. 5. See also ROBERTS & GUELFF, supra note 5, at 616; Dinah L. Shelton, International Law-Human Rights lecture at the George Washington University School of Law (Nov. 15, 2005).
972 Compare ICTR Statute, supra note 193, at Art. 4 with ICTY Statute, supra note 182, at Art. 3. See also ROBERTS & GUELFF, supra note 5, at 616.
973 Dinah L. Shelton, International Law-Human Rights lecture at the George Washington University School of Law (Nov. 15, 2005). See also ROBERTS & GUELFF, supra note 5, at 617. Cf. Sriram, supra note 17, at 385 (noting that “[t]ruth commissions may be one tool to address the pain of the victims”).
acknowledged record of the atrocities. The ICTR has successfully completed criminal proceedings against twenty defendants.

3. Effectiveness of ICTY and ICTR

Reviews of the effectiveness of the two ad hoc international criminal tribunals have varied in their level of praise or criticism. On the one hand are commendatory claims that “[d]espite initial start-up problems, the ad hoc tribunals have been functioning reasonably well and have been creating important precedents to uphold and expand international humanitarian law,” and at least one claim that the number of internal armed conflicts has declined substantially since the formation of the ICTY and ICTR.

However, on the other hand are a variety of criticisms of the two ad hoc international criminal tribunals: whether the UNSC had the authority to create judicial sub-organs in the first place; whether ad hoc courts are effective as a deterrent, since many of the most serious atrocities occurred in the former Yugoslavia after the ICTY had been established; whether the two international criminal tribunals are too far removed from the citizenry and too inefficient,

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976 Ferencz, supra note 71, at 228.


978 DUNOFF, RATNER & WIPPMAN, supra note 181, at 601; Dinah L. Shelton, International Law-Human Rights lecture at the George Washington University School of Law (Nov. 15, 2005); KLABBERS, supra note 183, at 183-85.

979 ROBERTS & GUELFF, supra note 5, at 567.

980 Sriram, supra note 17, at 312-14 (concluding that “[p]ursuing such "globalitarian" concerns may come at the cost of local needs,” and that mixed tribunals may pursue international justice while still pursuing local needs). Accord Dinah L. Shelton, International Law-Human Rights lecture at the George Washington University School of Law (Nov. 16, 2005) (promoting “mixed tribunals,” like the one in Sierra Leone, which uphold international accountability as well as helping to remedy the defects in the domestic criminal
which has led for a push for them to complete their temporary mandates and be brought to an end;\textsuperscript{982} and even whether the two \textit{ad hoc} tribunals invade the province of military commanders if they engage in “micro-fact-finding” of operational law versus enforcing “massacre law.”\textsuperscript{983} Thus, the two \textit{ad hoc} international criminal tribunals would appear to be at most a partial success. However, the geographically and temporally limited jurisdiction of the \textit{ad hoc} tribunals, as well as their inefficiency,\textsuperscript{984} provided the incentive for finally establishing a permanent International Criminal Court,\textsuperscript{985} which would “obviate[e] the need to create such \textit{ad hoc} tribunals in the future.”\textsuperscript{986}

4. \textbf{ICC}

Although there is a long history of efforts to establish a permanent International Criminal Court (ICC),\textsuperscript{987} the lessons learned from the ICTY and ICTR provided the necessary impetus to finally bring the concept of an ICC into reality.\textsuperscript{988} Modern efforts to establish an ICC began with, and naturally followed from the

\textsuperscript{981} Dinah L. Shelton, International Law-Human Rights lecture at the George Washington University School of Law (Nov. 16, 2005) (promoting “mixed tribunals” as being more efficient than UN sponsored \textit{ad hoc} tribunals because of the voluntary contributions for mixed tribunals, which place a premium on efficiency). In the ten years since their creation, each of the \textit{ad hoc} tribunals has completed no more than half of their respective caseloads. Compare Key Figures of ICTY Cases, available at http://www.un.org/icty/glance-e/index.htm (last visited Apr. 10, 2006) (89 cases completed out of 161 indictments for the ICTY) with ICTR Status of Cases, available at http://65.18.216.88/ENGLISH/cases/status.htm (last visited Apr. 10, 2006) (20 cases completed out of 58 indictments for the ICTR).

\textsuperscript{982} DUNOFF, RATNER & WIPPMAN, supra note 181, Updates, Chapter 9, available a http://teaching.law.cornell.edu/faculty/drwcasebook/updates9.htm (last visited Apr. 10, 2006).

\textsuperscript{983} Ruth Wedgwood, Cummings Symposium, supra note 39, Sep. 30, 2005.

\textsuperscript{984} Ferencz, supra note 71, at 228; Barrett, supra note 159, at 470.

\textsuperscript{985} Sean D. Murphy, ICC Panel, supra note 89, Feb. 13, 2006; Dinah L. Shelton, International Law-Human Rights lecture at the George Washington University School of Law (Nov. 16, 2005).

\textsuperscript{986} ROBERTS & GUELFF, supra note 5, at 667.

\textsuperscript{987} See supra Part II.B.

\textsuperscript{988} Sean D. Murphy, ICC Panel, supra note 89, Feb. 13, 2006. Contra Ruth Wedgwood, id.
International Military Tribunals at Nuremberg and Tokyo. France proposed such a court in 1947, and when the UN General Assembly adopted the Genocide Convention in 1948, it asked the International Law Commission (ILC) to study the possibility of establishing an ICC for the punishment of genocide and other crimes.\footnote{ROBERTS & GUELFF, supra note 5, at 667.} The ILC submitted its report in 1950, concluding that the establishment of such a court was possible, but by then the Cold War had begun, and “consideration of the question proved to be complex and contentious.”\footnote{Id.; Sean D. Murphy, ICC Panel, supra note 89, Feb. 13, 2006.} Specifically, “[t]he absence of an agreed upon definition of aggression was the excuse given for lack of progress toward an international criminal court. Debates were interminable and inconclusive.”\footnote{Ferencz, supra note 71, at 226.}

Almost four decades later in 1989, Trinidad and Tobago revived the concept by making the relatively modest suggestion of establishing an ICC to only handle international drug trafficking cases – the UN General Assembly again passed the idea to the ILC for study.\footnote{DUNOFF, RATNER & WIPPMAN, supra note 181, at 606. Cf. ROBERTS & GUELFF, supra note 5, at 667 (noting that UN consideration of an ICC was within the framework of the ILC’s discussion of a draft Code of Offences Against the Peace and Security of Mankind, until the two issues were separated in 1992). The ILC forwarded its draft Code of Offences Against the Peace and Security of Mankind to the UN General Assembly in 1996, but by that time, preparatory work for the ICC was in full swing, and the draft Code was overcome by events. Randall, supra note 10, at 827-28.} The implosion of the former Soviet Union in 1990 had two repercussions vis-à-vis the ICC: first, the lack of US/USSR pressures led to outbreaks of violence (e.g. in Yugoslavia) and hence revealed the need for international fora; second, East-West tensions eased, thereby removing the major obstacle to the ICC.\footnote{Sean D. Murphy, ICC Panel, supra note 89, Feb. 13, 2006.} The UN Security Council primed the ICC pump by establishing the two \textit{ad hoc} international tribunals in 1993 and 1994.\footnote{Id. See supra Part II.E.1-2.} The ILC kept the process going by submitting its draft statute for the ICC to the UN
General Assembly in 1994. The next year, the UN General Assembly established a “Preparatory Committee on the Establishment of an International Criminal Court,” which met six times from 1996 to 1998 to prepare a draft convention “for consideration by an international conference in 1998, which would coincide with the fiftieth anniversary of the 1948 Genocide Convention.”

Thus the stage was set for the Rome Conference.

The Rome Conference was a “final frenetic month of negotiations,” culminating in the final vote on the Statute of the ICC:

On 15 June 1998, delegations from 160 states…(with thirty one intergovernmental organizations… and 135 non-governmental organizations attending as observers) met in Rome at the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court to finalize the Statute, which was adopted on 17 July 1998 with a vote of 120 in favour, seven against and twenty-one abstentions, and opened for signature on the same day.

The negative vote by the United States was a disappointment to the rest of the Rome Conference for two reasons: first, the United States had been a somewhat...

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995 Sean D. Murphy, ICC Panel, supra note 89, Feb. 13, 2006; DUNOFF, RATNER & WIPPMAN, supra note 181, at 606.
996 ROBERTS & GUELFF, supra note 5, at 667. See Ferencz, supra note 71, at 228; Sean D. Murphy, ICC Panel, supra note 89, Feb. 13, 2006; DUNOFF, RATNER & WIPPMAN, supra note 181, at 606.
997 DUNOFF, RATNER & WIPPMAN, supra note 181, at 606. Cf. Ferencz, supra note 71, at 229. Besides the desire to complete the ICC Treaty to coincide with the fiftieth anniversary of the 1948 Genocide Convention, there was also a push to “finish by the millennium,” and “gotta get it done in five weeks.” Ruth Wedgwood, ICC Panel, supra note 89, Feb. 13, 2006. Thus “the whole atmosphere in Rome was wrong,” and major States did not join (Russia, India, China, US). Id. Ambassador Scheffer, the lead U.S. representative at the Rome Conference, agrees that there was a “rush to judgment” in Rome and that the fair request by the United States for an extension of time should have been granted. Ambassador David Scheffer, ICC Panel, supra note 89, Feb. 13, 2006. He also noted that the “U.S. team had deep disappointment in the rush for gratification of concluding the treaty conference on time [when] often treaty conferences extend their deadline[s].” Id. The “rush to judgment” in Rome also led to the UN Secretary General, as the Depositary, needing to correct approximately seventy “technical errors” in the text of the Rome Statute. ROBERTS & GUELFF, supra note 5, at 668, 671.
998 ROBERTS & GUELFF, supra note 5, at 667. Cf. DUNOFF, RATNER & WIPPMAN, supra note 181, at 609 (noting that because the vote was not officially recorded, there is some uncertainty as to which States other than the United States voted no, but most lists include China, Iraq, Israel, Libya, Qatar & Yemen).
consistent supporter of the ICC over the years, and second, because many concessions had been made to satisfy U.S. concerns. The Rome Statute garnered another 19 signatures by the end of 2000, including that of Ambassador Scheffer of the United States. However, the United States subsequently expressed its intent not to ratify the treaty, and its belief that the United States was therefore under no legal obligations arising from Ambassador Scheffer’s signature. Nevertheless, the sixtieth State ratified the Rome

999 Compare Ferencz, supra note 71, at 243 (“For almost a century, the United States government was in the forefront of those advocating an international criminal jurisdiction.”) and ROBERTS & GUELFF, supra note 5, at 668 (U.S. opposition to ICC was ironic in having been an early and leading proponent of such a court and a continuing strong supporter of the ICTY and ICTR) and Ferencz, supra note 71, at 228 (“In 1997, President Clinton addressed the United Nations and called for the early establishment of a permanent International Criminal Court.”) with Ferencz, supra note 71, at 226 (U.S. support for the ICC vacillated during the Cold War) and Ruth Wedgwood, ICC Panel, supra note 89, Feb. 13, 2006 (US was for the ICC originally, but a modest ICC to include UNSC referrals only).

1000 Ferencz, supra note 71, at 229.

1001 Rome Statute, supra note 6, at Art. 125(1); Associate Dean Susan L. Karamanian, ICC Panel, supra note 89, Feb. 13, 2006.

1002 Sean D. Murphy, ICC Panel, supra note 89, Feb. 13, 2006; DUNOFF, RATNER & WIPPMAN, supra note 181, at 611-12. See also Ferencz, supra note 71, at 237-38:

After careful consideration in the White House, President Clinton instructed United States Ambassador David Scheffer to sign the Rome Statute just as the deadline was about to expire on December 31, 2000. Israel promptly followed suit. Signing was a reaffirmation of America's historical commitment to international accountability ever since Nuremberg. Knowing that there was no prospect of getting two-thirds of the Senators to consent, Clinton, seeking to mollify both right-wingers and human rights activists, said he would not recommend that it be submitted for ratification. He wanted the United States to stay engaged in order to help shape the Court and remain a key player.

1003 Press Statement, Richard Boucher, Spokesman, International Criminal Court: Letter to UN Secretary General Kofi Annan, available at http://www.state.gov/r/pa/prs/ps/2002/9968.htm (last visited Apr. 10, 2006). Accord Ferencz, supra note 71, at 238; DUNOFF, RATNER & WIPPMAN, supra note 181, at 612. Not too unsurprisingly, President Bush had the protégé of Senator Jesse Helms (a staunch opponent of the ICC) write the letter to the UN Secretary General. Press Statement, Richard Boucher, Spokesman, International Criminal Court: Letter to UN Secretary General Kofi Annan, available at http://www.state.gov/r/pa/prs/ps/2002/9968.htm (last visited Apr. 10, 2006). That protégé was, of course, John Bolton, who is now the U.S. Ambassador to the UN. Announcement of Nomination of John Bolton as U.S. Ambassador to the UN, available at http://www.state.gov/secretary/rm/2005/43062.htm (last visited Apr. 10, 2006). Ambassador Bolton apparently believes that “international law is not really law since it is not binding or enforceable” and “[h]e considered the Rome Statute too vague.” Ferencz, supra note 71, at 233-34. The purpose of “unsigning” the Rome Statute was in order not to be bound by the requirement not to defeat the object and purpose of the treaty, which is required by treaty signatories even before ratification, pursuant to Article 18 of the Vienna Convention of the Law of Treaties. Vienna Convention on the Law of Treaties art. 18, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT]. Sean D. Murphy, ICC Panel, supra note 89, Feb. 13, 2006. Although the United States is not a party to the VCLT, it considers the VCLT to represent customary international law. Sean D. Murphy, ICC Panel, supra note 89, Feb. 13, 2006. See infra note 314. This “unsigning” may have been in anticipation of a more active opposition to the ICC, such as entering Article 98 agreements with other States to circumvent the ICC’s jurisdiction. Ferencz,

Before discussing the U.S. objections to the ICC, it is important to note the five significant hurdles that must be overcome before a case can be brought before the ICC. First, temporally the ICC only has jurisdiction over war crimes and other offenses committed after the Rome Statute entered into force on July 1, 2002, or when a State subsequently signs the treaty, unless a State agrees to apply the Rome Statute retroactively. This period can be delayed by seven years specifically for war crimes, as France has so elected.

The second significant jurisdictional hurdle for the ICC is geographical: generally, the crime either has to have been committed within the territory of a State party, or committed by a national of a State party. The only two exceptions to this general geographical rule are if a non-party State enters into an ad hoc agreement to allow crimes committed within its territory or by its nationals to go to the ICC, or if the UN Security Council, acting under Chapter VII of the UN

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1005 Ferencz, supra note 71, at 238; DUNOFF, RATNER & WIPPMAN, supra note 181, at 612.


1008 Rome Statute, supra note 6, at Art. 12(2)(a); Sean D. Murphy, ICC Panel, supra note 89, Feb. 13, 2006.

1009 Rome Statute, supra note 6, at Art. 12(2)(b); Sean D. Murphy, ICC Panel, supra note 89, Feb. 13, 2006. Thus, technically the ICC itself does not rely upon the principle of universal jurisdiction, but on the more traditional jurisdictional bases asserted on behalf of its State parties.

1010 Rome Statute, supra note 6, at Art. 12(3). For example, the Democratic Republic of Congo (formerly Zaire) entered into such an ad hoc agreement in April 2004. Sean D. Murphy, ICC Panel, supra note 89, Feb. 13, 2006.
Charter, refers matters to the ICC, regardless of whether the State involved is a party to the treaty or not.\textsuperscript{1011}

The third important hurdle before a case can be brought before the ICC relates to subject matter jurisdiction: Article 5 of the Rome Statute provides that “[t]he jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole,” and then lists only four general crimes:

\begin{itemize}
  \item[(a)] The crime of genocide;
  \item[(b)] Crimes against humanity;
  \item[(c)] War crimes;
  \item[(d)] The crime of aggression.\textsuperscript{1012}
\end{itemize}

Only the first three crimes are defined with any more specificity.\textsuperscript{1013} The second paragraph of Article 5 notes that the crime of aggression is as of yet undefined the earliest this could happen would be in the year 2009, when State parties may first revise the Rome Statute, but the definition of the crime of aggression would not apply to State parties who do not ratify the amendment.\textsuperscript{1014}

The fourth major hurdle to ICC jurisdiction is the principle of complementarity: unlike the ICTY and ICTR, which have primacy over domestic courts,\textsuperscript{1015} the ICC

\textsuperscript{1011} Rome Statute, \textit{supra} note 6, at Art. 13(b). For example, in March 2005, the UN Security Council referred Sudan to the ICC. Sean D. Murphy, ICC Panel, \textit{supra} note 89, Feb. 13, 2006. The United States agreed that genocide was being committed in Darfur, and therefore it and the other three nonparties to the Rome Statute on the UN Security Council abstained from voting on the matter. Joan E. Donoghue, International Law lecture at the George Washington University School of Law (Nov. 17, 2005).

\textsuperscript{1012} Rome Statute, \textit{supra} note 6, at Art. 5(1) (emphasis added). \textit{See also id.} at Art. 17(1)(d) (noting that the ICC shall rule a case inadmissible if it “is not of sufficient gravity to justify further action by the Court”).

\textsuperscript{1013} Rome Statute, \textit{supra} note 6, at Arts. 6-8. \textit{See supra} note 9 and accompanying text.

\textsuperscript{1014} Rome Statute, \textit{supra} note 6, at Arts. 5(2), 121, 123; Henry T. King, Jr., Remarks at 3-4, 60\textsuperscript{th} Nuremberg Anniversary, \textit{supra} note 42, Nov. 11, 2005; ROBERTS & GUELFF, \textit{supra} note 5, at 670. Another irony of the ICC is that while Justice Jackson thought the crime of aggression was the most serious crime at the IMT in Nuremberg (Ferencz, \textit{supra} note 71, at 225; Henry T. King, Jr., Remarks at 3, 60th Nuremberg Anniversary, \textit{supra} note 42, Nov. 11, 2005), it was also the excuse given during the Cold War for lack of progress towards an ICC (\textit{see supra} note 220 and accompanying text), and yet the crime of aggression remains “inherently politicized” and is a “huge albatross around the ICC’s neck, which could kill it,” (Sir Franklin Berman, Cummings Symposium, \textit{supra} note 39, Sep. 30, 2005) and is one of the arguments the United States puts forth in opposition to the ICC (\textit{see infra} notes 311-16 and accompanying text).

\textsuperscript{1015} \textit{See supra} notes 184, 194 and accompanying text.
turns primacy on its head by giving precedence to domestic courts. The ICC will not assert jurisdiction over a case if:

(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;

[or]

(c) *The person concerned has already been tried* for conduct which is the subject of the complaint.

“Unwillingness” is defined as either shielding the person from criminal responsibility, or unjustifiably delaying or conducting the proceedings in a way “inconsistent with an intent to bring the person concerned to justice,” or not conducting the proceedings in an independent and impartial manner. “Inability” is defined as the “total or substantial collapse” of the domestic judicial system to the point where the State can either not gain custody over the accused, or the necessary evidence and testimony, or otherwise is unable to carry out its proceedings. A person who has “already been tried” is subject to similar requirements as the definition of unwillingness.

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1017 Rome Statute, *supra* note 6, at Art. 17(1) (emphasis added).

1018 *Id.* at Art. 17(2).

1019 *Id.* at Art. 17(3).

1020 *Id.* at Art. 20(3).
A fifth principal hurdle to ICC jurisdiction is that the ICC prosecutor may only take action on a case if referred by: (a) the UN Security Council acting under Chapter VII of the UN Charter, as already noted,1021 (b) one of the State parties to the Rome Statute,1022 or (c) the prosecutor acting proprio motu (on his own accord).1023 The ICC Prosecutor must “conclude[] that there is a reasonable basis to proceed with an investigation” before submitting an investigation authorization request to the Pre-Trial Chamber.1024 A majority of a panel of the Pre-Trial Chamber must determine “that there is a reasonable basis to proceed with an investigation, and that the case appears to fall within the jurisdiction of the Court” before authorizing the ICC Prosecutor to commence the investigation.1025 The ICC Prosecutor must then “notify all States Parties and those States which, taking into account the information available, would normally exercise jurisdiction over the crimes concerned.”1026 A State has thirty days to inform the ICC “that it is investigating or has investigated its nationals or others within its jurisdiction with respect to criminal acts which may constitute crimes [within the ICC’s

1021 *Id.* at Art. 13(b). See *supra* note 238 and accompanying text.

1022 *Rome Statute, supra* note 6, at Arts. 13(a) & 14.

1023 *Id.* at Arts. 13(c) & 15.

1024 *Id.* at Arts. 15(3) & 53(1). In fact, it appears that the Chief Prosecutor of the ICC, Mr. Luis Moreno-Ocampo, has carefully exercised his responsibilities to ensure an investigation is warranted. In response to over 240 communications regarding alleged war crimes committed in Iraq, Mr. Moreno-Ocampo wrote a ten-page, carefully considered letter explaining the limits of his and the ICC’s mandate, and concluding that “the available information did not provide a reasonable basis to believe that a crime within the jurisdiction of the Court had been committed” with regard to targeting of civilians or clearly excessive attacks. ICC Chief Prosecutor Luis Moreno-Ocampo, *Iraq Response letter* [hereinafter Iraq Response Letter] at 4-7, Feb. 9, 2006, available at [http://www.iccpi.int/library/organs/otp/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf](http://www.iccpi.int/library/organs/otp/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf) (last visited Apr. 10,2006). With regard to allegations of “wilful killing or inhuman treatment of civilians,” Mr. Moreno Ocampo “concluded that there was a reasonable basis to believe that crimes within the jurisdiction of the Court had been committed” for “four to twelve victims of wilful killing” and less than twenty victims of inhuman treatment. *Id.* at 7-8. Nevertheless, Mr. Moreno Ocampo concluded that the alleged wilful killing and inhuman treatment were not “committed as part of a plan or policy or as part of a large-scale commission of such crimes” as required by Article 8(1) of the Rome Statute before the ICC will exercise its jurisdiction over alleged war crimes. *Id.* at 8. Moreover, he found that the number of victims was of a much smaller magnitude than the three situations his office was investigating in Uganda, the Democratic Republic of Congo, and the Darfur region of Sudan, and thus “did not appear to meet the required threshold of the Statute.” *Id.* at 9. Without addressing complementarity, Mr. Moreno Ocampo noted that “national proceedings had been initiated with respect to each of the relevant incidents.” *Id.*

1025 *Rome Statute, supra* note 6, at Arts. 15(4) & 57(2)(a).

1026 *Rome Statute, supra* note 6, at Art. 18(1).
jurisdiction] and which relate to the information provided in the notification to States," and to request that the ICC Prosecutor defer his investigation.\footnote{Id. at Art. 18(2).} “[T]he Prosecutor shall defer to the State's investigation of those persons unless a majority of the seven judges on the Pre Trial Chamber, on the application of the Prosecutor, decides to [nevertheless] authorize the investigation," in which case the State concerned may appeal to the Appeals Chamber on an expedited basis.\footnote{Id. at Arts. 18(2), 18(4), 57(2)(a) & 82.} The State concerned may again subsequently challenge the admissibility of the case before the ICC will hear the case.\footnote{Id. at Arts. 19(2)(b) & 19(4).} Finally, the UN Security Council, acting under Chapter VII of the UN Charter, may defer the investigation or prosecution of any case for renewable twelve-month periods.\footnote{Id. at Art. 16.}

Despite these extensive controls on the ICC Prosecutor's discretion, the fear that he might conduct politicized investigations remains one of the U.S. concerns about the ICC.\footnote{Bureau of Political-Military Affairs, U.S. Department of State, Fact Sheet, The International Criminal Court [hereinafter ICC Fact Sheet], Aug. 2, 2002, available at http://www.state.gov/t/pm/rls/fs/2002/23426.htm (last visited Apr. 10, 2006). Professor Ferencz has noted that “no other Prosecutor in human history has been subjected to as many controls as exist in the ICC Statute.” Ferencz, supra note 71, at 231. See infra notes 301, 305-06 and accompanying text.}

### 5. U.S. Objections to the ICC

The United States has a number of objections to the ICC, which appear to fall into four broad categories: (a) contrary to U.S.-centric view; (b) criminal exposure of U.S. service members; (c) criminal exposure of U.S. civilian and military leaders; and (d) efficiency.\footnote{See generally Jennifer Elsea, U.S. Policy Regarding the International Criminal Court [hereinafter U.S. ICC Policy], September 3, 2002, available at http://fpc.state.gov/documents/organization/13389.pdf (last visited Apr. 10, 2006).} Each of these will be examined in turn.
a. Contrary to U.S.-Centric View

As one of the permanent five members\(^{1033}\) of the UN Security Council, the United States can remain above the international fray, knowing that it effectively possesses a unilateral veto\(^{1034}\) over any substantive actions taken by the UN Security Council, which has “primary responsibility for the maintenance of international peace and security.”\(^{1035}\) Thus, not too surprisingly, the United States initially proposed that the ICC only have jurisdiction over matters referred to it by the UN Security Council, essentially making the ICC a permanent version of the two *ad hoc* tribunals with their limited mandates.\(^{1036}\) Most other States and NGOs pressed for a court *independent* of the UN Security Council and the veto of the permanent members.\(^{1037}\) The U.S. argued in support of its proposal that an ICC prosecution may delay or complicate the peace process,\(^{1038}\) particularly if amnesty is the only means to achieve peace.\(^{1039}\) However, as previously noted, the UN Security Council may defer the investigation or prosecution of any case for renewable twelve-month periods,\(^{1040}\) which logically should allay U.S. concerns about interference with the UN Security Council’s control over the peace process.

A second U.S.-centric concern is the progressive development of international humanitarian law as interpreted by the ICC. The ICC’s interpretation of international humanitarian law might perhaps be at variance with the U.S. view,

\(^{1033}\) U.N. Charter art. 23(1). The permanent five (or P-5) members are: “The [People’s] Republic of China, France, the [former] Union of Soviet Socialist Republics [now Russia], the United Kingdom of Great Britain and Northern Ireland, and the United States of America.” *Id.*

\(^{1034}\) U.N. Charter art. 27(3). Technically, each of the permanent members does not possess a *veto* over substantive decisions made by the UN Security Council. However, their “concurring votes” are required for decisions on any non-procedural matters. *Id.*

\(^{1035}\) U.N. Charter art. 24(1).


\(^{1037}\) DUNOFF, RATNER & WIPPMAN, *supra* note 181, at 606.


\(^{1040}\) Rome Statute, *supra* note 6, at Art. 16. *See supra* note 257 and accompanying text.
particularly in areas of non-international armed conflict, the unsettled tension between human rights law and the law of war, or customary international law as it is developed by State practice.\textsuperscript{1041} Ambassador Scheffer's response is that the two \textit{ad hoc} tribunals have effectively dealt with the issue of the progressive development of the law,\textsuperscript{1042} and thus there is no reason to expect that the ICC would be any different.

A third U.S.-centric concern is that U.S. nationals would not receive a fair trial as guaranteed by the U.S. Constitution.\textsuperscript{1043} Yet the due process guarantees of the Rome Statute far exceed what would otherwise be available in domestic courts of foreign nations for war crimes committed abroad, and more closely mirror those guaranteed by the U.S. Bill of Rights than the rights guaranteed by other States.\textsuperscript{1044} An accused person is presumed innocent, and the ICC Prosecutor has the burden to prove guilt beyond a reasonable doubt.\textsuperscript{1045} In addition, the accused has the following rights:

1. In the determination of any charge, the accused shall be entitled to a public hearing . . . to a fair hearing conducted impartially, and to the following minimum guarantees, in full equality:

   (a) To be informed promptly and in detail of the nature, cause and content of the charge, in a language which the accused fully understands and speaks;


\textsuperscript{1042} Ambassador David Scheffer, ICC Panel, \textit{supra} note 89, Feb. 13, 2006.


\textsuperscript{1044} Ferencz, \textit{supra} note 71, at 231-32.

\textsuperscript{1045} Rome Statute, \textit{supra} note 6, at Art. 66.
(b) To have adequate time and facilities for the preparation of the defence and to communicate freely with counsel of the accused's choosing in confidence;

(c) To be tried without undue delay;

(d) ... to be present at the trial, to conduct the defence in person or through legal assistance of the accused's choosing, to be informed, if the accused does not have legal assistance, of this right and to have legal assistance assigned by the Court in any case where the interests of justice so require, and without payment if the accused lacks sufficient means to pay for it;

(e) To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her. The accused shall also be entitled to raise defences and to present other evidence admissible under this Statute;

(f) To have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness, if any of the proceedings of or documents presented to the Court are not in a language which the accused fully understands and speaks;

(g) Not to be compelled to testify or to confess guilt and to remain silent, without such silence being a consideration in the determination of guilt or innocence;

(h) To make an unsworn oral or written statement in his or her defence; and

(i) Not to have imposed on him or her any reversal of the burden of proof or any onus of rebuttal.
2. . . . the Prosecutor shall, as soon as practicable, disclose to the defence evidence in the Prosecutor’s possession or control which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence. In case of doubt as to the application of this paragraph, the Court shall decide.1046

Even with respect to admissions of guilt, the Rome Statute ensures that the admission was voluntarily made, is supported by the facts, and that the accused understands the nature and consequences of his admission.1047 The ICC has rules of evidence to ensure relevancy and admissibility of evidence, as well as rules of procedure.1048 There are also provisions for appeals of convictions.1049 The only two significant incidents of U.S. jurisprudence missing at the ICC are jury trials and the death penalty. Jury trials would likewise be missing in many foreign domestic criminal trials for war crimes committed abroad, to which the protections of the U.S. Constitution also would not apply.1050 Although the ICC lacks the death penalty,1051 the penalties imposed by the ICC do not “affect[] the application by States of penalties prescribed by their national law,” which would arguably include the imposition of the death penalty.1052 The absence of jury trials and the imposition of the death penalty do not otherwise detract from the fairness of ICC trials.

1046 Rome Statute, supra note 6, at Art. 67.
1047 Id. at Art. 65.
1048 Id. at Arts. 68-74, 76-78.
1049 Id. at Arts. 81-85.
1050 Ferencz, supra note 71, at 233.
1052 Rome Statute, supra note 6, at Art. 80; ROBERTS & GUELFF, supra note 5, at 670.
A fourth U.S.-centric concern is the possibility of domestic tribunals “dumping” their cases on the ICC rather than dealing with them directly. However, the ICC will find that a case is inadmissible if “[t]he case is not of sufficient gravity to justify further action by the Court.” Moreover, this would seem to be, at this point, merely a theoretical concern since the ICC currently has only had four situations referred to it. Should this problem present itself at some point in the future, it could be addressed at that time.

The fifth and final U.S.-centric concern is that the ICC judges are unqualified, or as Professor Wedgwood put it so succinctly: “can a panel of criminal law, human rights, and civil judges make the correct decisions?” This statement implies that the “correct” decisions are those that are in accordance with U.S. views. The eighteen judges currently serving on the ICC were required to either:

(i) Have established competence in criminal law and procedure, and the necessary relevant experience, whether as judge, prosecutor, advocate or in other similar capacity, in criminal proceedings; or

(ii) Have established competence in relevant areas of international law such as international humanitarian law and the law of human rights, and extensive experience in a professional legal capacity which is of relevance to the judicial work of the Court.

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1053 Ruth Wedgwood, ICC Panel, supra note 89, Feb. 13, 2006. Cf. Joan E. Donoghue, International Law lecture at the George Washington University School of Law (Nov. 17, 2005) (noting that the ICC will often have more available resources and targeted expertise than that found in most national governments, particularly those of developing countries, and thus successful prosecutions may be more likely under the ICC; therefore, governments now have an added tool to increase leverage on groups within their countries by initiating ICC proceedings).

1054 Rome Statute, supra note 6, at Art. 17(1)(d).

1055 ICC Situations and Cases, available at http://www.icc-cpi.int/cases.html (last visited Apr. 10, 2006) (noting that the Republic of Uganda, the Democratic Republic of Congo, and the Central African Republic have referred situations to the ICC, and that the UN Security Council has referred the situation in the Darfur region of the Sudan to the ICC).


1057 Rome Statute, supra note 6, at Art. 36(3)(b).
The ICC judges were nominated and elected by State parties to the Rome Statute,\textsuperscript{1058} and appear to have a wealth of experience in international humanitarian law, international human rights law, international criminal law and public international law.\textsuperscript{1059} Nine of the eighteen ICC judges have prior judicial experience (four on their country’s highest court and six on either the ICTY or the ICTR), nine are former law professors, three are former ministers of government, two are former attorneys general, one is a former national vice president, and one is a former law school dean.\textsuperscript{1060} The ICC judges appear to be at least as qualified as judges within the United States’ federal judicial branch, the vast majority (if not all) of whom are political appointees.

\textbf{b. Criminal Exposure of U.S. Service members}

Besides the U.S.-centric concerns, another major fear has been exposing U.S. military service members to potential criminal liability for military related activities committed abroad, such as the detainee abuse at Abu Ghraib prison.\textsuperscript{1061} More specifically, the fear is that the principle of complementarity may be insufficient to protect U.S. service members from ICC jurisdiction.\textsuperscript{1062} However, “[t]he duty not to commit the crimes is not new; only the mechanism for enforcement is being added via the ICC.”\textsuperscript{1063}

In addition to exposure for obvious war crimes, the United States is troubled by potential criminal liability where U.S. interpretations of the Law of War differ from

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\item Id. at Art. 36(4)-(7).
\item Id.
\item Ferencz, \textit{supra} note 71, at 233-234.
\end{enumerate}
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that of other countries. Although the general Law of War has fairly clear
principles, “applications of the Law of Armed Conflict are mixed questions of fact
and law, which are murky; for example, the 1999 NATO Intervention [in Kosovo,
specifically regarding] …choice of targets in an air war,” or shooting “technicals”
in Somalia on sight, or when conducting a freedom of navigation operation in the
Gulf of Sidra, firing back in response to being “painted with fire control radar.”

Under the U.S. Rules of Engagement (ROE), responding to being “painted” with
fire control radar is an act of self defense, whereas the British ROE require an
actual attack before you can respond in self-defense. Professor Wedgwood
suggests that perhaps the ICC would side with the United Kingdom’s view on
self-defense.

Ambassador Scheffer has two responses to this concern about the criminal
exposure of U.S. service members due to conflicting interpretations of the Law of
War: first, ad hoc tribunals have successfully dealt with the issue of conflicting
ROE, and there is no indication that the ICC would not follow their lead; second, Title 18, the Crimes and Criminal Procedure section of the United States
Code, “requires modernizing amendments to more accurately define prosecution
for crimes against humanity, genocide, and a fuller definition of war crimes,” as
well as “looking at the UCMJ [Uniform Code of Military Justice] regarding
exposure symmetry.” The United States is significantly behind other countries
in revising our law. If we take these steps, Ambassador Scheffer is confident
that “complementarity would work.” A third response might be that one

1065 Id.
1066 Id.
1067 Id.
1068 Id. See also Ferencz, supra note 71, at 233 (citing Chief Judge Everett on the Court of Appeals for the
Armed Forces as “suggest[ing] that Federal Statutes could be amended to completely cover all the crimes
under ICC jurisdiction”).
1069 Ambassador David Scheffer, ICC Panel, supra note 89, Feb. 13, 2006. Other States have begun to
revise their criminal laws, in order “to conform to their obligations as signatories to the … ICC[ ] Statute;
Belgium and Canada are among the nations that have already made such revisions.” Sriram, supra note 17,
at 310.

hundred States\textsuperscript{1071} have decided they are comfortable with the principle of complementarity, including many strong U.S. allies such as Australia, Canada, New Zealand, and the United Kingdom, which may indicate that the United States is “out of line” with the rest of the world on this issue.\textsuperscript{1072}

Besides differing interpretations of the Law of War, the United States is worried that its service members face greater potential criminal exposure for two reasons: first, “no other State regularly has 200,000 troops outside its borders”\textsuperscript{1073}, second, that U.S. service members may be subjected to politically motivated prosecutions, despite the United States not being a party to the Rome Statute.\textsuperscript{1074} In response to fears that U.S. troops engaged in UN peacekeeping efforts potentially would be subjected to ICC jurisdiction, the United States pressured\textsuperscript{1075} the UN Security Council “to request the ICC Prosecutor to defer for one year (with the possibility of renewal) any investigation into crimes by members of UN operations who are nationals of states not party to the Rome Statute.”\textsuperscript{1076}


\textsuperscript{1072} Joan E. Donoghue, International Law lecture at the George Washington University School of Law (Nov. 17, 2005).


\textsuperscript{1074} ROBERTS & GUELFF, supra note 5, at 669. Accord SECDEF ICC Statement, supra note 270; U.S. ICC Policy, supra note 259; Sean D. Murphy & Ruth Wedgwood, ICC Panel, supra note 89, Feb. 13, 2006; DUNOFF, RATNER & WIPPMAN, supra note 181, at 606, 610.

\textsuperscript{1075} The “pressure” was in the form of vetoing a resolution that “extend[ed] the mandate of United Nations peacekeeping operations in Bosnia.” Ferencz, supra note 71, at 239; DUNOFF, RATNER & WIPPMAN, supra note 181, at 612.

The greater exposure due to the sheer number of deployed U.S. service members could be mitigated by ensuring proper pre-deployment training on the Law of War, and enforcing the high moral standards of the U.S. military within the military justice system, which would then trigger the complementarity principle of the ICC. Moreover, as previously discussed, “no other Prosecutor in human history has been subjected to as many controls as exist in the ICC Statute.” In addition to those procedural controls previously discussed:

The ICC is under the complete control of the very many countries that form the Assembly of State Parties... They control the budget and can fire anyone who might be tempted to politicize the office... The ICC has no police force or other effective enforcement mechanism. The acceptance of its judgments depends upon the Court's reputation for integrity and competence. A frivolous Prosecutor could not remain in office. Politicization of the Court would amount to its suicide... It should be noted that early United States demands that only the Security Council could authorize prosecutions, were turned down by the others because they insisted upon an independent Prosecutor free of political influence.

Another way to phrase this particular concern is arguing that exposing U.S. service members to criminal liability at the ICC for alleged war crimes committed abroad detracts from U.S. sovereignty because the United States is not a party to the Rome Statute. However, in the absence of the Rome Statute, U.S. service

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1077 See notes 242-47 and accompanying text. Ambassador Scheffer argues that the United States “has to be willing to submit to some risk [of criminal exposure for its service members] to ensure the ICC reviews courts-martial of other States’ military justice systems, which may not be as well managed.” Ambassador David Scheffer, ICC Panel, supra note 89, Feb. 13, 2006.


1079 Ferencz, supra note 71, at 232. See also supra note 251 and accompanying text (summarizing the Chief Prosecutor to the ICC’s carefully considered response to over 240 communications regarding alleged war crimes in Iraq).

members would still be criminally liable in foreign domestic courts for alleged war crimes committed abroad, under either the territoriality or universality principles. ¹⁰⁸¹

Many treaties, such as hijacking or anti-terrorism conventions, provide for states other than state of nationality to exercise jurisdiction over persons accused of having committed serious crimes within their scope. These treaties, like the ICC treaty, do not require the state of nationality be a party to the treaty or consent to prosecution. The United States has in fact exercised jurisdiction over non-U.S. nationals in a number of cases on the basis of treaty provisions empowering it to do so. U.S. courts do not consider that the non-ratification of the relevant treaty by the suspect’s state of nationality might somehow render overreaching or otherwise questionable the exercise of U.S. jurisdiction. ¹⁰⁸²

Moreover, the lesson of the IMT at Nuremberg is that sovereignty cannot be used as a defense to war crimes. ¹⁰⁸³

The United States is also concerned about potential criminal exposure under newly defined crimes (such as the crime of aggression). ¹⁰⁸⁴ However, as previously noted, the earliest that definitions or elements of ICC crimes could be amended would be in the year 2009. ¹⁰⁸⁵ Moreover, the crimes, as amended, would not apply to State parties who do not ratify the amendment. ¹⁰⁸⁶ Thus, somewhat ironically, the United States would be more protected against any

¹⁰⁸¹ DUNOFF, RATNER & WIPPMAN, supra note 181, at 611. See supra notes 11-21 and accompanying text. Contra Ruth Wedgwood, ICC Panel, supra note 89, Feb. 13, 2006 (noting that the traditional architecture for Status of Forces Agreements (SOFAs) for NATO and UN Peacekeeping operations is that the sending State has responsibility for prosecuting war crimes, and the receiving State has responsibility for prosecuting off-duty crimes).

¹⁰⁸² DUNOFF, RATNER & WIPPMAN, supra note 181, at 611.

¹⁰⁸³ Henry T. King, Jr., Remarks at 1, 60th Nuremberg Anniversary, supra note 42, Nov. 11, 2005.

¹⁰⁸⁴ Ferencz, supra note 71, at 233-34. See supra notes 239-41 and accompanying text.

¹⁰⁸⁵ See supra note 241 and accompanying text.

¹⁰⁸⁶ Rome Statute, supra note 6, at Arts. 5(2), 121, 123. Accord ROBERTS & GUELFF, supra note 5, at 670; ICC Fact Sheet, supra note 258.
amendments to the definitions of ICC crimes if it were to ratify the Rome Statute before 2009, since after that date, it would appear to be bound by the amended treaty.\footnote{1087} To the extent that the United States is concerned that its service members would be exposed to criminal liability for newly defined crimes in States that do ratify the amendments, or for crimes committed in States that have ratified the treaty but delayed its jurisdiction for seven years,\footnote{1088} this is the same sovereignty argument as previously addressed.\footnote{1089}

c. Criminal Exposure of U.S. Civilian and Military Leaders

The United States’ unease about how the ICC might define the crime of aggression goes beyond concern for its service members, and extends to trepidation about the “command responsibility” of U.S. civilian and military leadership.\footnote{1090} As previously noted, the crime of aggression was the most serious charge at the IMT in Nuremberg,\footnote{1091} and if it is defined by the State parties to the Rome Statute,\footnote{1092} \textit{de facto} “State-to-State” complaints would be

\footnote{1087} The Rome Statute itself is silent on whether States that ratify the treaty after it has been amended are bound by the amendments. \textit{See generally} Rome Statute, \textit{supra} note 6, at Arts. 121-23, 125. However, the Vienna Convention on the Law of Treaties (VCLT) is fairly clear that “[a]ny State which becomes a party to the treaty after the entry into force of the amending agreement shall, failing an expression of a different intention by that State… be considered as a party to the treaty as amended.” VCLT, \textit{supra} note 230, at Art. 40(5). Since no reservations to the Rome Statute may be made (Art. 120), it would appear that the United States would be bound to accept any amendments to the Rome Statute if it ratified the treaty afterwards. Again, although the United States is not a party to the VCLT, it considers the VCLT to represent customary international law. Sean D. Murphy, ICC Panel, \textit{supra} note 89, Feb. 13, 2006. \textit{See supra} note 230.

\footnote{1088} \textit{See supra} note 234 and accompanying text.

\footnote{1089} ROBERTS & GUELFF, \textit{supra} note 5, at 670. \textit{See supra} notes 307-310 and accompanying text.

\footnote{1090} ICC Fact Sheet, \textit{supra} note 258. \textit{Accord} Ruth Wedgwood, ICC Panel, \textit{supra} note 89, Feb. 13, 2006; SECDEF ICC Statement, \textit{supra} note 270. \textit{See also} Benjamin B. Ferencz, 60\textsuperscript{th} Nuremberg Anniversary, \textit{supra} note 42, Nov. 11, 2005 (noting that “perhaps the U.S. has reason to worry about the ICC shining the ‘crime of aggression’ spotlight on the U.S. …. in Iraq II, the U.S. jumped the gun, which was the supreme crime of aggression”); ASIL 100th Mtg., \textit{supra} note 27, Resolution, Mar. 30, 2006 (stating seven foundational concepts of international law, including “[i]n some circumstances, commanders (both military and civilian) are personally responsible under international law for the acts of their subordinates). \textit{Cf.} Philippe Sands, \textit{“Lawless World”} Presentation, Oct. 25, 2005 (arguing that the U.S. removal of Saddam Hussein was “done in a bad way” [i.e. without UN Security Council approval], and that by March 2003, “there was no longer a good reason to get rid of Saddam”). Ironically, “Saddam’s trial will be the first prosecution for the crime of aggression since Nuremberg.” Michael Scharf, 60\textsuperscript{th} Nuremberg Anniversary, \textit{supra} note 42, Nov. 11, 2005. \textit{Accord} Henry T. King, Jr., Remarks at 3, \textit{Id}.

\footnote{1091} \textit{See supra} note 241 and accompanying text.

\footnote{1092} \textit{See supra} notes 241, 311 and accompanying text.
High-ranking civilian and military leaders would not be able to shield themselves from criminal liability beneath the banner of “head of State immunity,” because the Rome Statute, as the Statute of the IMT before it, considers official capacity to be irrelevant. 1094

Ambassador Scheffer agrees that:

The United States should be most worried about the definition of the crime of aggression and should want U.S. input regarding referral [of the crime of aggression] to the ICC, and how the crime of aggression is defined for individual criminal responsibility, instead of taking the position of total resistance to the ICC and having a policy of denial. 1095

Rather than continue in our “policy of fear,” Ambassador Scheffer argues that the United States should exercises its heretofore unexercised right to be present as an observer at the Assembly of States Parties to the Rome Statute. 1096

1093 Ruth Wedgwood, ICC Panel, supra note 89, Feb. 13, 2006. Although technically only individuals are subject to the ICC’s jurisdiction, a State party could refer another State’s Secretary of War or Head of State to the ICC Prosecutor for investigation based on the alleged crime of aggression. This would be a de facto State-to-State complaint.

1094 Rome Statute, supra note 6, at Art. 27. Official immunity and “merely following orders” were also rejected as defenses at the IMT in Nuremberg. See Report of Justice Jackson to President Truman, June 6, 1945, available at http://www.yale.edu/lawweb/avalon/imt/jackson/jack08.htm (last visited Mar. 26, 2006):

With the doctrine of immunity of a head of state usually is coupled another, that orders from an official superior protect one who obeys them. It will be noticed that the combination of these two doctrines means that nobody is responsible. Society as modernly organized cannot tolerate so broad an area of official irresponsibility.

Accord Sriram, supra note 17, at 316 (2003).


1096 Id.; Rome Statute, supra note 6, at Art. 112(1); U.S. ICC Policy, supra note 259. See also Philippe Sands, “Lawless World” Presentation, Oct. 25, 2005 (noting the “climate of fear” within the current U.S. administration); Judge Buergenthal, Mar. 28, 2006 (noting that both the ICC and the United States would benefit from U.S. participation). See supra note 230 and accompanying text.
d. Efficiency

The final U.S. objection to the ICC is also made about the two ad hoc tribunals: lack of efficiency.\textsuperscript{1097} With an estimated total annual budget of $150 million,\textsuperscript{1098} and approximately 475 staff members\textsuperscript{1099} in addition to the eighteen sitting judges,\textsuperscript{1100} the ICC has achieved the following progress in approximately three years of operations:\textsuperscript{1101} the initiation of three investigations into four situations,\textsuperscript{1102} and the recent indictment and arrest of the ICC’s first criminal defendant,\textsuperscript{1103} “Mr. Thomas Lubanga Dyilo, a Congolese national and alleged founder and leader of the Union des Patriotes Congolais (UPC),”\textsuperscript{1104} a militia that conscripted child soldiers in the Ituri region of the Democratic Republic of the Congo.\textsuperscript{1105} Of course, the depth and breadth of the ICC investigations is belied by these simple statistics.\textsuperscript{1106}

\textsuperscript{1097} Ruth Wedgwood, ICC Panel, supra note 89, Feb. 13, 2006. See supra note 211 and accompanying text.

\textsuperscript{1098} Dinah L. Shelton, International Law-Human Rights lecture at the George Washington University School of Law (Nov. 17, 2005).


\textsuperscript{1100} ICC, The Judges – Biographical Notes, supra note 286.


\textsuperscript{1103} The ICC had previously issued arrest warrants against five other defendants involved in the Uganda situation. D.R. Congo: ICC Arrest First Step to Justice, available at http://hrw.org/english/docs/2006/03/17/congo13026.htm (last visited Apr. 10, 2006) (noting that “On October 14, 2005, the court unsealed its first arrest warrants, for Joseph Kony, Vincent Otti and three other officers of the Lord’s Resistance Army (LRA) in Uganda. To date they have not been apprehended.”).


\textsuperscript{1106} Statement by ICC Chief Prosecutor Luis Moreno-Ocampo, supra note 332, at 2 (noting that “[s]ince the Court’s jurisdiction began in July 2002, 8,000 people were killed in the [Ituri] region, and 600,000 people displaced.”). Accord D.R. Congo: ICC Arrest First Step to Justice, available at
The U.S. concerns about the ICC appear related to its general distrust of international organizations, and international courts in particular. As Judge Buergenthal, the American judge on the International Court of Justice, recently remarked, the United States has very little experience dealing with international courts compared to European States, and thus is more critical of international courts. However, Ambassador Scheffer points out that:

the ICC was initially a force protection objective of the U.S., to hold militaries accountable to the Law of War. The dominant issue during the ICC negotiations was not the potential U.S. liability, but “atrocity lords” who seek to massacre people. We cannot be obsessed with U.S. concerns and overlook the fundamental purpose of the ICC, which was [addressing] war atrocities.

9.3. U.S. Opposition to the ICC

Besides raising a number of concerns, the United States has actively opposed the ICC in a variety of ways. As previously discussed, the United States “unsigned” the Rome Statute, and pressured the UN Security Council to request one year deferrals from the ICC Prosecutor before he investigates any crimes allegedly committed by members of UN peacekeeping operations who are nationals of States not party to the Rome Statute. The United States also cut off any funding or other support of the ICC, and introduced legislation “to prohibit and penalize any cooperation with the ICC.”


1109 See supra note 230 and accompanying text.

1110 See supra note 303 and accompanying text.

1111 Ferencz, supra note 71, at 236, 239.

1112 Id. at 236.
In addition, the United States launched “[a] worldwide campaign... to obtain bilateral agreements to block all assistance to the ICC and guarantee that no Americans would ever be handed over to the international court.”

Ambassador Bolton collected these bilateral agreements pursuant to Article 98 of the Rome Statute, which prevents the ICC from requesting a State party to surrender an accused if doing so would require it to act inconsistently with other international obligations it might have with regard to a third State. Under these “Article 98 agreements” as written, the U.S. President may waive their prohibition against cooperating with the ICC with respect to a particular named defendant for renewable one-year periods. To date, the United States has entered into one hundred Article 98 agreements with other States; thus there are now as many Article 98 agreements as there are State parties to the Rome Statute.

Article 98 agreements are offensive to other States, particularly to European States, for at least three reasons. First, they are written expansively in overbroad terms to include not only U.S. service members deployed overseas and engaged in official duties, but also “current or former officials, employees...

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1113 Id.


(including contractors), military personnel and all other U.S. nationals”\textsuperscript{1119} acting even in their private capacities.\textsuperscript{1120} Second, the Article 98 agreements serve as a kind of U.S.-created loophole or double standard because the United States appears to have one standard for foreigners, and a higher one for U.S. citizens.\textsuperscript{1121} The United States is willing to send suspected foreign war criminals to the \textit{ad hoc} and other international tribunals, including the ICC,\textsuperscript{1122} but not Americans.\textsuperscript{1123} This argument that Americans are somehow above international law is what Europeans find particularly offensive.\textsuperscript{1124} Third and finally, the fact that the United States has openly expressed its opposition to the ICC, and is willing to pull the levers of economic and military assistance to enforce its will, illustrates that the United States is using its clout to influence other States’ behavior.\textsuperscript{1125} The European Union grudgingly agreed on a set of “Guiding Principles” whereby its member-States could enter into these Article 98 agreements, so long as: (1) they only applied to nationals of non-parties to the Rome Statute, (2) they only applied to persons sent by the United States on official business, and (3) the United States agreed to conduct \textit{bona fide} investigations of crimes committed by Americans that would otherwise fall under ICC jurisdiction.\textsuperscript{1126}


\textsuperscript{1122} See supra note 238 and accompanying text.

\textsuperscript{1123} Philippe Sands, “\textit{Lawless World}” Presentation, Oct. 25, 2005.

\textsuperscript{1124} Id. ICJ President Judge Rosalyn Higgins, ASIL 100th Mtg., supra note 27, “A Conversation with Secretary of State Condoleezza Rice,” Mar. 29, 2006. Contra ICC FAQs, supra note 342.


\textsuperscript{1126} DUNOFF, RATNER & WIPPMAN, supra note 181, Updates, Chapter 9, available at http://teaching.law.cornell.edu/faculty/drwcasebook/updates9.htm (last visited Apr. 10, 2006).
The final significant move by the United States in opposition to the ICC was enacting the “American Service members Protection Act (ASPA) of 2002,” otherwise known as “The Hague Invasion Act.” The ASPA essentially serves as an umbrella framework for opposition to the ICC, combining:

1. cutting off all U.S. cooperation to the ICC (no funding, court assistance, assistance with investigations, etc.);

2. barring U.S. military assistance and economic support to ratifying States unless they are either
   a. a fellow NATO member;
   b. the President waives the prohibition; or
   c. if the State signs an Article 98 bilateral agreement not to surrender U.S. citizens

3. the United States refuses to provide UN peacekeepers unless there is an assurance of no potential liability for U.S. military

4. the President may use all means necessary to free any U.S. person detained by the ICC (hence the nickname “Hague Invasion Act”).

The ASPA was “meant to emphasize how serious the United States was… about no third party liability.”

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1128 See supra notes 340-53 and accompanying text.


Although U.S. opposition to the ICC was not unexpected after the numerous concerns it raised, “no one anticipated the vehemence of [U.S.] efforts to abort the court or cripple it in its cradle.” The irony of U.S. opposition to the ICC is readily apparent:

It is indeed ironic that the United States, which led the world in creating the Nuremberg principles, is now fighting so vehemently against the International Criminal Court which would institutionalize those principles, whereas Germany, whose leaders were the target of Nuremberg, is in the forefront of the fight to sustain the Nuremberg principles in today’s world.

Although Professor Dinstein argues that the “[p]rospects of [the ICC’s] success are still a matter of conjecture,” Ambassador Scheffer argues that it is time for the United States to accept the existence of the ICC and stop opposing it, because the ICC is “here to stay.” As he so succinctly put it, “the ICC is here to stay-get over it, get used to it, and get on with it.” Instead, Ambassador Scheffer argues that the United States needs to remain engaged in order to affect how the ICC is implemented, and to assist in managing the future cases and situations referred to it.

One final comment with regard to the ICC: it is important to remember the big picture, that the target of the ICC is not the United States, with its established domestic and military justice systems that are largely effective in punishing the occasional war criminal. Instead, the ICC is focused on the “‘atrocity lords’ who seek to massacre people [by the thousands]. We cannot be obsessed with U.S.

1131 Ferencz, supra note 71, at 229.
1132 Henry T. King, Jr., Remarks at 4, 60th Nuremberg Anniversary, supra note 42, Nov. 11, 2005. Accord id. at p. 5 (providing that the “Nuremberg principles… are good principles and they must guide our behavior by adherence to them – with no country exemptions (including the U.S.)”).
1133 DINSTEIN, supra note 2, at 229.
1135 Ambassador David Scheffer, 60th Nuremberg Anniversary, supra note 42, Nov. 11, 2005.
concerns and overlook the fundamental purpose of the ICC, which was war atrocities."1137

Since genocide, crimes against humanity and major war crimes are almost invariably committed with the connivance and support of a government, the absence of any international tribunal will almost surely mean that, unless the guilty regime is overthrown, the perpetrators will never be tried. The time has come for such impunity to end…. a country torn by civil strife will lack the political will or legal institutions needed to try wrongdoers. If tyrants are able to evade justice, their victims will seek vengeance and take the law into their own hands. Thus, there can be no justice without peace and no peace without justice.1138

9.4 CURRENT STATUS OF UNIVERSAL JURISDICTION OVER WAR CRIMES

In order to assess the current status of universal jurisdiction over war crimes, let us assume the following hypothetical1139: an uncooperative Afghan detainee is being held by U.S. personnel at the American military base in Bagram, Afghanistan in December 2005.1140 The American personnel strip the detainee of his clothing, strike him repeatedly with their rifle butts on his torso and legs, drag him around on the cold, damp floor of his cell, chain him to the concrete floor, and leave him there overnight in an unheated cell without any blankets—by the

1137 Ambassador David Scheffer, ICC Panel, supra note 89, Feb. 13, 2006. See also note 335 and accompanying text.

1138 Ferencz, supra note 71, at 230.


1140 It is important to note that Afghanistan acceded to the Rome Statute on February 10, 2003. ICC State Parties, supra note 298 (follow “Afghanistan” hyperlink).
next morning the Afghan detainee has died of hypothermia. Assuming the Geneva Conventions apply to U.S. forces present in Afghanistan in 2005, this would appear to be a relatively clear case of a “grave breach” of the “Geneva Convention Relative to the Treatment of Prisoners of War, of 12 August 1949” (Third Geneva Convention), and thus constitute a war crime. We will use this hypothetical to review the current status of universal jurisdiction vis-à-vis the other relevant traditional jurisdictional bases.

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Common Article 2 of the Geneva Conventions provides that the Convention applies in international armed conflict, and “to all cases of partial or total occupation.” See, e.g., Geneva Convention III, supra note 157, at Art. 2. Even if the continued U.S. involvement in Afghanistan does not rise to the level of “partial occupation,” Common Article 3 of the Geneva Conventions extends the following minimum level of protection to non-international armed conflicts:

> Persons taking no active part in the hostilities, including … those placed hors de combat by … detention … shall in all circumstances be treated humanely . . . . To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons: violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture.


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Article 130 of the Third Geneva Convention defines grave breaches to include “torture or inhuman treatment... wilfully causing great suffering or serious injury to body or health” to a “protected person.” Geneva Convention III, supra note 157, at Art. 130.

\[1143\]

A. Nationality Jurisdiction

Where “all States are empowered to try and punish war criminals,” the nationality of the perpetrator is a sufficient “linkage” to establish jurisdiction over the alleged war criminal.\textsuperscript{1144} This is true as a matter of “customary international law, [where] nations have almost unlimited authority to regulate the conduct of their own nationals around the world.”\textsuperscript{1145} Thus, in general terms, the United States would have jurisdiction to enforce its national laws against the American personnel who abused the detainee in the above hypothetical. Moreover, the U.S. jurisdiction arguably would be predominant or “[i]n the first instance.”\textsuperscript{1146} More specifically, the Geneva Conventions obligate “High Contracting Parties” to criminalize grave breaches of the Conventions.\textsuperscript{1147} Having ratified the four Geneva Conventions,\textsuperscript{1148} the United States fulfilled its commitment to criminalize “grave breaches” by enacting the War Crimes Act.\textsuperscript{1149} The War Crimes Act covers grave breaches of the four 1949 Geneva Conventions,\textsuperscript{1150} as well as violations of Common Article 3.\textsuperscript{1151} It would appear that the United States could charge any American \textit{civilians} involved in the detainee abuse hypothetical with having committed a war crime in violation of the War Crimes Act.

In addition, the United States could charge any American \textit{service members} involved in the detainee abuse hypothetical with having committed various

\textsuperscript{1144} \textit{Id.} at 236.

\textsuperscript{1145} BRADLEY \& GOLDSMITH, \textit{supra} note 10, at 535. \textit{See supra} note 12.

\textsuperscript{1146} \textit{ILC 1996 Draft Code, supra} note 5, at Commentary para. 1 to Art. 9.

\textsuperscript{1147} \textit{See, e.g.}, Geneva Convention III, \textit{supra} note 157, at Art. 129.

\textsuperscript{1148} The Unites States ratified all four Geneva Conventions on August 2, 1955. ROBERTS \& GUELFF, \textit{supra} note 5, at 361, 368.

\textsuperscript{1149} 18 USC § 2441 (2006).

\textsuperscript{1150} 18 USC § 2441(c)(1) (2006).

\textsuperscript{1151} 18 USC § 2441(c)(3) (2006).
crimes under the Uniform Code of Military Justice. Specifically, any American service members involved in the detainee abuse hypothetical above could be charged with conspiracy, failure to follow orders, dereliction of duty, cruelty and maltreatment, murder, manslaughter, assault, and “conduct of a nature to bring discredit upon the armed forces.” While these various crimes would not carry the moniker of “war crimes,” they would collectively carry a maximum punishment of life imprisonment, total forfeitures of all pay and allowances, and a Dishonorable Discharge from the military. Thus, the United States could effectively establish traditional nationality enforcement jurisdiction over any Americans involved with the detainee abuse hypothetical above, be they civilians or military service members.

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1152 10 USC §§ 801 et seq. (2006).
1153 Id. § 881.
1154 Id. §892(1).
1155 Id. §892(3).
1156 Id. at §893.
1157 Id. at § 918(3).
1158 Id. at §919(b).
1159 Id. at §928.
1160 Id. at §934.
1161 Appendix 12, MANUAL FOR COURTS-MARTIAL (2005). The charge of murder by being “engaged in an act that is inherently dangerous to another and evinces a wanton disregard of human life” alone may be punished by life imprisonment. 10 USC § 918(3) (2006); Uniform Code of Military Justice Art. 118(3), MANUAL FOR COURTS-MARTIAL (2005). Even without a conviction on the murder charge, the remaining charges carry a maximum punishment of over thirty years of confinement. Id.

1162 In addition to the War Crimes Act and the Uniform Code of Military Justice, the Military Extraterritorial Jurisdiction Act (MEJA) provides jurisdiction over anyone “employed by or accompanying the Armed Forces outside the United States,” or for members of the Armed Forces after they have left active duty for crimes committed abroad while they were on active duty. 18 USC §§ 3261 et seq. (2006). See generally Glenn R. Schmitt, Closing the Gap in Criminal Jurisdiction Over Civilians Accompanying the Armed Forces Abroad – A First Person Account of the Creation of the Military Extraterritorial Jurisdiction Act of 2000, 51 CATH. U.L. REV. 55 (2001).
B. Territoriality and Passive Personality Jurisdiction

Just as the nationality of the perpetrator is a sufficient "linkage" to establish jurisdiction over an alleged war criminal, so too is the fact that the war crime was committed within a State's territory. Territoriality is perhaps the most widely accepted basis for jurisdiction. Just as the United States has extended jurisdiction over crimes committed within its territory, so too may Afghanistan extend jurisdiction over crimes committed within its territory, such as the detainee abuse hypothetical.

Under the “passive personality” form of jurisdiction, the United States extends jurisdiction over war crimes committed against U.S. victims pursuant to the War Crimes Act. Afghanistan would likewise be legally justified in extending jurisdiction over perpetrators of war crimes against Afghan nationals. Nationality of the victim is therefore a sufficient linkage to establish jurisdiction. Thus, Afghanistan would be justified in extending its jurisdiction over the Americans involved with the detainee abuse hypothetical, under either the territoriality or passive personality principles.

One complicating factor for the exercise of either territoriality or passive personality jurisdiction by Afghanistan over the Americans involved with the detainee abuse hypothetical above, would be the presence of a Status of Forces Agreement (SOFA) between Afghanistan and the United States, whereby

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1163 See supra note 371 and accompanying text.

1164 DINSTEIN, supra note 2, at 236.

1165 See supra note 11 and accompanying text.


1167 See supra notes 366-70 and accompanying text.

1168 See supra note 14 and accompanying text.

1169 18 USC § 2441(b) (2006).

1170 DINSTEIN, supra note 2, at 236.
Afghanistan may have agreed to limit its otherwise legitimate jurisdiction over U.S. personnel.\textsuperscript{1171} As far as is publicly known, there is no SOFA between Afghanistan and the United States.\textsuperscript{1172} However, even in the absence of a SOFA, any Afghan attempt to exercise jurisdiction over the Americans involved with the hypothetical would depend on a number of factors, including: whether Afghanistan had physical custody over the Americans involved, existing diplomatic relations between Afghanistan and the United States, diplomatic pressures brought to bear between Afghanistan and the United States, and whether the United Nations Security Council decided to intervene.\textsuperscript{1173}

C. Universal Jurisdiction

Despite the proliferation of international tribunals, domestic prosecutions are still possible for certain universal crimes, including war crimes.\textsuperscript{1174} As mentioned earlier, a few States have either exercised, or sought to exercise, universal jurisdiction over crimes committed abroad, either as a matter of customary international law or pursuant to domestic statutes.\textsuperscript{1175} One commentator has categorized three distinct approaches taken by States with regard to universal jurisdiction: “pure universal jurisdiction,” “universal jurisdiction plus,” and “non-use.”\textsuperscript{1176}

\begin{thebibliography}{9}  
\bibitem{1171} There are apparently 110 permanent SOFAs between the United States and other nations. Joan E. Donoghue, International Law lecture at the George Washington University School of Law (Nov. 17, 2005).
\bibitem{1174} DUNOFF, RATNER & WIPPMAN, \textit{supra} note 181, at 611.
\bibitem{1175} \textit{See supra} notes 152-75 and accompanying text.
\bibitem{1176} Sriram, \textit{supra} note 17, at 358-67.
\end{thebibliography}
“Pure universal jurisdiction” is evidenced when a court does not feel the need to rely on any additional *domestic* legislation in order to establish jurisdiction over an international criminal, such as an alleged war criminal.\footnote{Sriram, *supra* note 17, at 310, 359-60.} The exercise of universal jurisdiction, even in its purest form, does not detract from other States’ sovereignty, since “recognition of universal jurisdiction in respect to a limited set of norms is consistent with principles of international comity.”\footnote{Sosa v. Alvarez-Machain, 542 U.S. 692, 762 (2004) (Breyer, J., concurring in part and concurring in the judgment).} The State exercising such pure universal jurisdiction over war crimes need not bear any relation to the conflict itself, and could even be a neutral State.\footnote{DINSTEIN, *supra* note 2, at 236.} Nevertheless, “[t]hese [pure] cases represent the boldest use of universal jurisdiction,” and thus, not too surprisingly, are relatively rare.\footnote{Id.}

The second approach, “universal jurisdiction plus,” links universal jurisdiction with more traditional bases of jurisdiction: “Judges in national courts have usually been more comfortable combining what is to them a novel basis for jurisdiction with more familiar bases like those linked to a state’s territory or interests.”\footnote{Sriram, *supra* note 17, at 310. See generally *id.* at 360-66. See also Barrett, *supra* note 159, at 470.} However, even Belgian law requires “that a suspect be physically present in Belgium in order to be investigated and tried.”\footnote{BRADLEY & GOLDSMITH, *supra* note 10, at 537. See *supra* note 166 and accompanying text.} So if a State like Belgium, which has domestic legislation supporting the exercise of universal jurisdiction, were to gain physical custody over any of the Americans involved with the detainee abuse hypothetical,\footnote{See *supra* notes 366-70 and accompanying text.} that State could exercise “universal jurisdiction plus” over the alleged grave breaches of the Geneva Conventions.\footnote{See *supra* notes 371-72 and accompanying text.}
The third and more common approach is the “non-use” of universal jurisdiction altogether, in the absence of domestic legislation supporting its exercise.\textsuperscript{1185} Thus, the courts in most States would rather rely on traditional bases for jurisdiction, such as nationality and passive personality,\textsuperscript{1186} than rely exclusively on universal jurisdiction.\textsuperscript{1187}

**D. ICC Complementarity**

Under the principle of “complementarity,”\textsuperscript{1188} the International Criminal Court (ICC) would first give “precedence to national courts”\textsuperscript{1189} exercising one of the five principle jurisdictional bases.\textsuperscript{1190} Thus, for the detainee abuse hypothetical\textsuperscript{1191}: the State of national\textit{ity} of the accused (United States), the State in whose territory the incident occurred (Afghanistan), the State of nationality of the victim, a.k.a. “passive personality” (Afghanistan), or some other State under the principle of universality (e.g. Belgium) would all have precedence before the ICC would consider prosecution.\textsuperscript{1192} Only if these States were “unwilling or unable genuinely to carry out the investigation or prosecution”\textsuperscript{1193} would the case be admissible before the ICC.\textsuperscript{1194}

\textsuperscript{1185} Sriram, \textit{supra} note 17, at 311.
\textsuperscript{1186} See \textit{supra} parts III.A & III.B.
\textsuperscript{1188} Rome Statute, \textit{supra} note 6, at Arts. 1, 17.
\textsuperscript{1189} ROBERTS & GUELFF, \textit{supra} note 5, at 669, 672.
\textsuperscript{1190} See \textit{supra} notes 10-21.
\textsuperscript{1191} See \textit{supra} notes 366-70 and accompanying text.
\textsuperscript{1192} The remaining jurisdictional basis, “protective principle,” would not seem to apply to this detainee abuse hypothetical, because the detainee abuse is neither directed against the security of the State, nor does it threaten the integrity of governmental functions. See \textit{supra} note 13.
\textsuperscript{1193} Rome Statute, \textit{supra} note 6, at Art. 17(1)(a).
\textsuperscript{1194} \textit{Id.} at Art. 17; ROBERTS & GUELFF, \textit{supra} note 5, at 669.
More specifically, the ICC Prosecutor:

is required to consider three factors. First, [he] must consider whether the available information provides a reasonable basis to believe that a crime within the jurisdiction of the [ICC] has been . . . committed. . . . [Second, he] must then consider admissibility before the [ICC], in light of the requirements relating to gravity and complementarity with national proceedings. Third, ... [he] must give consideration to the interests of justice. \(^{1195}\)

In the detainee abuse hypothetical, it would appear at first blush that the ICC Prosecutor should have little difficulty in determining that the first factor has been met, since the language of the 1998 Rome Statute defining “war crimes” mirrors that of the relevant Geneva Conventions.\(^{1196}\) However, the Rome Statute adds an additional requirement that the war crimes be “part of a plan or policy or as a part of a large-scale commission of such crimes.”\(^{1197}\) There was no evidence in the hypothetical that the detainee abuse met these requirements.\(^{1198}\) Thus, not even the first factor would be met, and the ICC could not assert jurisdiction over the Americans involved in the detainee abuse hypothetical.

The second factor of admissibility is the specific articulation of the principle of complementarity\(^ {1199}\) in terms of the ability and willingness of a State to genuinely investigate, and if warranted, prosecute the individuals involved.\(^{1200}\) If the United States military responded to the hypothetical detainee abuse similarly to other

\(^{1195}\) Iraq Response Letter, *supra* note 251, at 4-7.

\(^{1196}\) Rome Statute, *supra* note 6, at Art. 8.2(a) & (c). *See supra* notes 368-70 and accompanying text.


\(^{1198}\) Secretary of State Rice has stated that the vast majority of U.S. soldiers serve honorably, and that there are usually only a few people involved in detainee abuse. Secretary of State Condoleezza Rice, ASIL 100th Mtg., *supra* note 27, “A Conversation with Secretary of State Condoleezza Rice,” Mar. 29, 2006.

\(^{1199}\) *See supra* notes 242-47 and accompanying text.

\(^{1200}\) Rome Statute, *supra* note 6, at Art. 17.
allegations of detainee abuse, this would arguably demonstrate a genuine ability and willingness to investigate and prosecute, and would thus satisfy the ICC’s principle of complementarity. Thus, the second factor considered by the ICC Prosecutor would likewise fail to support ICC jurisdiction over the Americans involved in the hypothetical detainee abuse.

The third and final factor for the ICC Prosecutor to consider is: “[t]aking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.” The detainee abuse hypothetical is of even less gravity than the 240 actual communications received by the ICC Prosecutor concerning, inter alia, allegations of willful killing of four to twelve victims, and the inhuman treatment of less than twenty civilians in Iraq. The ICC Prosecutor found that even this more significant number of alleged victims “did not appear to meet the required threshold of the Statute,” and refused to seek authorization to initiate an investigation. Similarly, the third factor of “interests of justice” is not satisfied, under the broader rubric of complementarity. This does not even consider the moderating influence that Article 98 agreements and the “Hague Invasion Act” would have on the ICC’s decision to seek to impose jurisdiction over the Americans involved.

1201 See, e.g. Army Fact Sheet, supra note 366 (noting that of 109 cases with substantiated allegations of detainee abuse, 32 went to courts-martial, 56 were handled by non-judicial punishment, and there were 32 related administrative actions, totaling 120 actions). But see, e.g. Ambassador David Scheffer, ICC Panel, supra note 89, Feb. 13, 2006 (arguing that the United States did not properly investigate alleged detainee abuse in Afghanistan, and that the United States would have to submit to some risk in order to ensure that the ICC is able to review the courts-martial of other States).

1202 This deference to State investigations and prosecutions was supposed to reassure the United States, with its established military justice system. Sean D. Murphy, ICC Panel, supra note 89, Feb. 13, 2006.

1203 Rome Statute, supra note 6, at Art. 53(1)(c).

1204 Iraq Response Letter, supra note 251, at 7-8

1205 Id. at 9.

1206 See supra notes 340-53 and accompanying text.

1207 See supra notes 354-65 and accompanying text.
9.5 CONCLUSIONS

States have asserted universal jurisdiction over war crimes “[s]ince time immemorial,”\(^\text{1208}\) even without a *nexus* to “either the crime, the alleged offender, or the victim.”\(^\text{1209}\) The universal condemnation of war crimes justifies their prosecution\(^\text{1210}\) by any State in order to vindicate the international community’s interests in prosecuting these offenses.\(^\text{1211}\) Although authors may quibble on the margins, the core definition of war crimes would seem to be fairly well established, particularly in light of the general acceptance by one hundred State parties of the ICC’s definition.

Historical efforts at establishing an international tribunal to prosecute war crimes culminated in the International Military Tribunal (IMT) in Nuremberg following World War II. Recognizing the tribunal’s place in history, IMT chief prosecutor Justice Jackson ensured that the rule of law supplanted mere victors’ justice. However, the IMT’s jurisdiction was relatively short-lived, and States subsequently intent on prosecuting war criminals had to resort back to universal jurisdiction to do so. The fact that the State of Israel successfully prosecuted Adolph Eichmann for his war crimes during World War II, and yet ultimately failed to convict John (Ivan) Demjanjuk for his alleged involvement in Nazi extermination camps, reinforces the legitimacy of universal jurisdiction as having the rule of law as its foundation.

For a myriad of reasons, there has been a “general revival of the concept of universal jurisdiction.”\(^\text{1212}\) Many States enacted domestic legislation providing for universal jurisdiction over war crimes that represent “grave breaches” of the 1949

\(^{1208}\) DINSTEIN, *supra* note 2, at 228.

\(^{1209}\) Randall, *supra* note 10, at 785.


\(^{1211}\) Sriram, *supra* note 17, at 316.

\(^{1212}\) Burrus M. Carnahan, Law of War lecture at the George Washington University School of Law (Jan. 10, 2006).
Geneva Conventions. A handful of European States have gone further to authorize universal jurisdiction over lesser war crimes and other international crimes, even those committed by non-nationals against nonnationals in foreign territory. The United States is more restrictive in asserting extraterritorial criminal jurisdiction under the rubric of universality (requiring some nexus to the United States), and yet is more willing to assert extraterritorial jurisdiction in civil suits seeking monetary damages.

Ad hoc international tribunals served as preliminary efforts at establishing a more permanent ICC in 2002, which both supports and supplants the domestic exercise of universal jurisdiction over war crimes. The ICC supports the application of universal jurisdiction domestically by enforcing the primacy of domestic courts over the ICC via its complementarity principle, by only considering the most serious, systematic and factually supported allegations of war crimes, and by imposing a number of substantial hurdles before the ICC can assert its jurisdiction, including placing significant controls on the ICC Prosecutor. The ICC supplants the application of universal jurisdiction domestically for States that are either unable or unwilling to genuinely investigate or prosecute alleged war criminals found within their jurisdiction. Yet by supplanting a State’s inaction or inability to exercise universal jurisdiction over alleged war crimes, the ICC is in effect bolstering the application of universal jurisdiction by ensuring that the most heinous war criminals neither continue to commit atrocities with impunity, nor escape responsibility for their past war crimes.

The U.S. objections to the ICC do not seem particularly well-founded. U.S.-centric concerns have either been adequately addressed (e.g. noninterference with the UN Security Council’s control over the peace process), are unrealistic (e.g. the absence of jury trials and the death penalty when the ICC’s due process guarantees otherwise closely mirror those of the United States), or are patently wrong (e.g. inadequate qualifications of the ICC judges). The concern that U.S. military service members would be exposed to potential criminal liability at the ICC for military-related activities abroad ignores the fact that in the absence of the Rome Statute, U.S. service members already would be criminally liable in
foreign domestic courts for alleged war crimes committed abroad. Ironically, the concern about potential criminal exposure for U.S. civilian and military leaders for the as-of-yet undefined crime of aggression could be more effectively addressed if the United States were to ratify the Rome Statute before 2009 (when the State parties could first potentially amend the Rome Statute to define the crime of aggression), since after that date, the United States could be bound by the amended treaty. Perceived inefficiency may be a valid objection, but it would seem to be somewhat premature. Finally, the U.S. objections appear to be myopic, and ignore the fact that the ICC’s impetus was not to impose potential liability on Americans, but to deal with war crimes committed by “‘atrocity lords’ who seek to massacre people” on a wide scale.1213

Objections to the ICC have led to a campaign of active U.S. opposition, including using economic leverage to deny support to the ICC, domestic legislation to penalize cooperation with the ICC, and strong-arming allies into signing Article 98 “bilateral agreements to block all assistance to the ICC and guarantee that no Americans would ever be handed over to the international court.”1214 These Article 98 agreements are overbroad (protecting all Americans acting even in their private capacities (e.g. American tourists) versus merely U.S. service members engaged in official military duties), serve as a double standard (since the United States is willing to send suspected foreign war criminals to the ICTY, ICTR, and the ICC, but not Americans), and reveal that the United States is willing to use its economic and political clout as blunt instruments to influence other States’ behavior. The “American Service members Protection Act (ASPA) of 2002” (a.k.a. “The Hague Invasion Act”) merely ‘adds fuel to the fire.’ All of these opposition efforts are diplomatically offensive and bitterly ironic, given the United States’ nurturing support for the IMT at Nuremberg, and earlier efforts at establishing an ICC.

1214  Ferencz, supra note 71, at 236.
A simple detainee abuse hypothetical reveals why the United States should have little reason to fear the ICC (other than possibly defining the crime of aggression in 2009, for which U.S. interests would be better served by ratifying the Rome Statute before then as previously discussed). If the detainee abuse hypothetical had occurred before the advent of the ICC in 2002, both the United States would have jurisdiction (based on the nationality of the alleged American perpetrators), and Afghanistan would have jurisdiction (based on either the territoriality or passive personality principles). Neither the ICC nor the U.S. opposition measures (i.e. Article 98 agreements and “The Hague Invasion Act”) have affected the primacy of domestic jurisdiction over the alleged war crimes. In fact, the ICC principle of complementarity has reinforced the primacy of domestic jurisdiction.

Another State could also assert universal jurisdiction over the alleged American war criminals in the detainee abuse hypothetical, which has likewise not been affected by the ICC. Only if the United States, Afghanistan, and another State asserting universal jurisdiction (e.g. Belgium) were either unable or unwilling to genuinely investigate or prosecute the alleged war criminals found within their jurisdiction would the case be admissible before the ICC, and then only if the alleged war crime was sufficiently serious (i.e. part of a plan, policy, or large-scale commission of such crimes), and the alleged war crime could surpass the other hurdles to ICC jurisdiction. Thus, despite the U.S. concerns and active opposition, the ICC does not operate as a usurper of domestic jurisdiction, but rather as a safety net for when domestic jurisdiction fails.

1215 See supra notes 366-70 and accompanying text.
1216 See supra notes 239-41, 311-14, 317-22, and text preceding note 440.
1217 See supra notes 415-34 and accompanying text.
1218 For example, if Belgian authorities arrested the alleged American war criminals while they were transiting through Belgium en route to the United States, Belgium could assert universal jurisdiction over them. See supra notes 408-11 and accompanying text.
1219 Rome Statute at Art. 8(1).
1220 See supra notes 233-58 and accompanying text.
As Professor Dinstein so eloquently commented:

Absent effective mechanisms of supervision and dispute settlement, there is no way to guarantee that [the Law of International Armed Conflict, or LOIAC] is actually implemented….. There is a growing acknowledgement of the need to ensure individual penal accountability of war criminals for serious breaches of LOIAC, but the future of the International Criminal Court is still shrouded in doubt.\textsuperscript{1221}

The continued application of universal jurisdiction over war crimes by States’ domestic courts, and international tribunals such as the ICC, would appear to fill “the need to ensure individual penal accountability of war criminals for serious breaches”\textsuperscript{1222} of the Law of War.

\textsuperscript{1221} DINSTEIN, supra note 2, at 257.

\textsuperscript{1222} Id.