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THE INTERNATIONAL CRIMINAL COURT: AMERICAN CONCERNS ABOUT AN INTERNATIONAL PROSECUTOR

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> The establishment of the Court is…a gift of hope to future generations, and a giant step forward in the march towards universal human rights and the rule of law.
>
> Kofi Annan, Secretary-General of the United Nations
> 18 July 1998 at Campidoglio

INTRODUCTION

On 11 April 2002, ten countries ratified the Rome Statute of the International Criminal Court (ICC), bringing the total number of ratifications to more than 60 and triggering the entry into force of the Statute on 1 July 2002.(1) While Canada has been at the forefront of advocates of this historic international tribunal, the United States has long expressed reservations with respect to the Court. Despite having signed the treaty in 2000, the U.S. government officially renounced its legal obligations to the ICC in May 2002. Citing the concern that American military personnel and officials could potentially face politically motivated prosecutions abroad, the United States formally notified the United Nations that it would no longer be a party to the process envisaged by the Treaty of Rome.

This paper will provide a context for understanding the American objections to the jurisdiction of the ICC prosecutors, who have the power to initiate proceedings themselves – referred to as *proprio motu* authority. To begin, the paper provides an overview of the development of international criminal law by tracing the historical path to the 1998 Rome Conference. It then reviews the ICC Statute itself, particularly as it pertains to the office of the prosecutor and the proposed Pre-Trial Chamber process of judicial oversight. A limited examination of the role of the prosecutor in national legal systems follows, with Canada

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(1) The ten countries to deposit their instruments of ratification, thereby bringing the total number of ratifications to 66, were: Bosnia-Herzegovina, Bulgaria, Cambodia, the Democratic Republic of Congo, Ireland, Jordan, Mongolia, Niger, Romania and Slovakia.

receiving specific focus as a representative common law jurisdiction; the intention is that lessons relevant to the international context may be derived. The next section reviews the main criticisms of the powers of the ICC prosecutor's office, as well as other concerns about the Court, with an emphasis on the objections of the U.S. government. A response to the American critique follows, with a discussion of the necessity of U.S. participation in the ICC.

BACKGROUND AND ANALYSIS

A. Historical – How We Got to Rome

Perhaps more than any other period in history, the past decade has seen momentous progress in creating the means to bring to justice those responsible for humankind's most egregious crimes. Following the lead of the ad hoc tribunals for Rwanda and the former Yugoslavia, a permanent international criminal court is now taking concrete form. Prior to examining the proposed functioning of the ICC, it may be worthwhile to review the historical development of this area of law, now interchangeably referred to as international criminal law or international humanitarian law. Having progressed from a system of impunity to one of "justice" administered by victors over the vanquished, we are now witnessing the development of what many suggest will be an impartial system of international justice on a par with the national systems of the democratic world.

1. Pre-World War II

The concept of an international criminal court can be seen as early as the fifteenth century,[(2)] but it was not until the late nineteenth century that what we currently understand as international criminal law began to emerge in the form of rules governing military conflict – the area where the most serious and numerous human rights violations generally occur. The Brussels Protocol of 1874 was one of the earliest attempts at drafting a code regulating the conduct of armies in the field. While it made no reference to enforcement or any potential consequences of violations of the agreement, it resulted in a group known as the Institute of International Law drafting the "Manual on the Laws of War on Land" in 1880. This document

(2) Sandra L. Jamison, "A Permanent International Criminal Court: A Proposal that Overcomes Past Objections," *Denver Journal of International Law and Policy*, Vol. 23, 1995, p. 419, at p. 421.

was to become the model for the conventions adopted at the Hague Peace Conferences of 1899 and 1907.(3) These conventions represented major advances in international law. The Hague Convention IV, most importantly, for the first time made reference to liability for breaches of international law. While it did not establish personal criminal liability,(4) but simply state obligations, it was the first hint of the evolving enforcement of international norms which had always been trumped by the doctrine of state sovereignty, going back at least to the Treaty of Westphalia of 1648.(5)

During and following World War I, all combatant nations put members of enemy forces on trial for offences against the laws and customs of war. Of special note in the development of international criminal law was Article 227 of the Treaty of Versailles, which authorized the creation of a special tribunal to try Kaiser Wilhelm II.(6) While no trial ever took place, this represented a significant departure from the traditional view, still held by many today, that a head of state is immune from prosecution by any state other than his or her own. That said, all that occurred were some token national prosecutions in Germany, with the consent of the Allies. This suggests that – as may still be the case today – the political will of the world's major powers is essential for the enforcement of international humanitarian norms.(7)

2. Nuremberg and Tokyo

The next great impetus in the development of international humanitarian law was, of course, the global conflict that followed the "war to end all wars." The Nazi government of Germany, in launching an offensive military campaign and committing startling atrocities, led the Allied powers to "place among their principal war aims the punishment, through the channel

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(3) Leslie Green, "War Crimes, Crimes against Humanity, and Command Responsibility," *Naval War College Review*, Vol. L, No. 2, Spring 1997, p. 68.

(4) Green, *ibid.*, notes that Article 3 of the 1907 Convention seems to exclude any personal liability: "A belligerent party which violates the provisions of the said Regulations [annexed to the Convention] shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces."

(5) The Treaty of Westphalia marked the end of the Thirty Years' War and saw the central authority of the Holy Roman Empire replaced almost entirely by the sovereignty of about 300 princes.

(6) Article 227 reads in part: "The Allied and Associated Powers publicly arraign William II of Hohenzollern, formerly German Emperor, for a supreme offence against international morality and the sanctity of treaties. A special tribunal will be constituted to try the accused, thereby assuring him the guarantees to the right of defence."

(7) M. Cherif Bassiouni, "Historical Survey: 1919-1998," in Bassiouni, M. Cherif, ed., *The Statute of the International Criminal Court: A Documentary History*, Transnational Publishers, Ardsley, N.Y., 1998, p. 7.

of organized justice, of those guilty for these crimes, whether they have ordered them, perpetrated them, or participated in them."[8] In the aftermath of World War II, the International Military Tribunal sitting at Nuremberg (the IMT or "Nuremberg Tribunal") and the International Military Tribunal for the Far East sitting at Tokyo (the IMTFE or "Tokyo Tribunal") were established.

> That four great nations, flushed with victory and stung with injury stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of the law is one of the most significant tributes that Power has ever paid to Reason…We must never forget that the record on which we judge these defendants today is the record on which history will judge us tomorrow. To pass these defendants a poisoned chalice is to put it to our lips as well. We must summon such detachment and intellectual integrity to our task that this trial will commend itself to posterity as fulfilling humanity's aspirations to do justice.
>
> Robert M. Jackson
> U.S. Supreme Court Justice and
> U.S. Chief Representative at Nuremberg

At Nuremberg, each of the "Big Four" appointed a chief prosecutor.[9] As a team, they were responsible for investigating and prosecuting major war criminals responsible for "crimes against peace," "war crimes" and "crimes against humanity."[10] The Rules of Procedure for the IMT consisted of only eleven points, none of which specifically delineated the powers and obligations of the prosecutor.[11] Following the first trial of Goering et al., the partnership of prosecutors dissolved. Disagreements over joint subsequent trials led to a compromise under which each of the four Powers was able to carry on further prosecutions within its respective zone of occupation. The United States decided to conduct twelve further trials at the Nuremberg courthouse.[12]

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(8) Declaration of St. James, 13 January 1942, issued in London.

(9) *Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal*, 82 U.N.T.S. 280, entered into force 8 August 1945 (the "London Agreement"), Article 14.

(10) London Agreement, Article 6. Genocide was not yet a recognized offence.

(11) Nuremberg Trial Proceedings Rules of Procedure, adopted by the tribunal in accordance with Article 13 of the Tribunal Charter, 29 October 1945.

(12) Benjamin B. Ferencz, "International Criminal Courts: The Legacy of Nuremberg," *Pace International Law Review*, Vol. 10, 1997, p. 201, at p. 210.

Trials of Japanese ministers and military leaders began in Tokyo while the Nuremberg Court was still sitting. General MacArthur, as Supreme Commander in the Far East, appointed a tribunal of a similarly international character; that is, it was composed of representatives of nations – eleven in all – who had been at war with Japan. The Tokyo Charter was almost identical to that of Nuremberg, with a few variations.(13) The IMTFE trials lasted more than two years and all accused were found guilty. Seven were sentenced to death.(14)

Common to Nuremberg and Tokyo were the following: there was no code of conduct for the lawyers involved; there were no specific rules of evidence;(15) and the prosecutors were directly appointed by the victorious powers, whose political goals were hardly obscure. Professor Evan J. Wallach, in a review of the post-War tribunals procedures, determined that while the defendants were usually treated fairly, the malleability of the rules left open the possibility of abuse, which did occur.(16) One example he cites comes from the testimony of the chief prosecutor in a case involving the execution of American prisoners of war by the SS (the "Malmedy Massacre Case"). Appearing before the U.S. Senate, Lieutenant-Colonel Burton Ellis justified conducting mock trials with real defendants, some of whom were convinced that they had actually been convicted, in an attempt to elicit incriminating statements. This, suggests Wallach, demonstrates what can happen when there is pressure to produce and a lack of structural rules.(17)

Both Nuremberg and Tokyo have advanced the international rule of law(18) and are commonly regarded as the archetypes of modern international criminal law. While they have

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(13) For example, the definition of "crimes against peace" was altered to make it applicable to "declared or undeclared" war, as Japan had not made any formal declaration and the defendants could have argued that, technically, Japan was not at war.

(14) There were dissenting opinions from the judges. Judge Pal from India, for example, argued that none of the accused should have been convicted but that all nations should share responsibility for the war and its horrors. As well, he held that aggression had never been outlawed in international law, an argument rejected unanimously at Nuremberg.

(15) The London Charter for Nuremberg stated that the tribunal would not be bound by technical rules of evidence. With amazing candour, President Webb of the Tokyo Tribunal stated in respect of judicial decisions on the admissibility of evidence: "The decision of the Court will vary with its constitution from day to day." For a detailed review of the rules of procedure and evidence, or lack thereof, see Evan J. Wallach, "The Procedural and Evidentiary Rules of the Post-World War II War Crimes Trials: Did They Provide an Outline for International Legal Procedure?" *Columbia Journal of Transnational Law*, Vol. 37, 1999, p. 851.

(16) Wallach, *ibid.*, p. 868.

(17) Wallach, *ibid.*, p. 872.

(18) For example, the elimination of the defence of "obedience to superior orders" and the accountability of heads of state: Bassiouni, "Historical Survey: 1919-1998," *supra*, note 7, p. 9.

established a "moral legacy,"[19] one must recognize that, especially in respect of the "international" facet, they are imperfect examples.[20] Although the judges and prosecutors were drawn from more than one country and the tribunals invoked the notion of universal jurisdiction, they were in essence military courts created by the victors whose jurisdiction was founded on unconditional surrender.[21] Many Japanese, and indeed other observers, considered the Tokyo Tribunal more vengeance than justice. The use of the atomic bomb at Hiroshima and Nagasaki was seen as a manifestation of American inhumanity and hypocrisy.[22]

The rules of procedure and evidence were even less representative of the diversity of the world's legal systems. They were essentially devised by Americans and based on American law.[23] Despite the immense significance of the tribunals – many argue that they have stood the test of time as a fair articulation of evolving international law[24] – they were not ideal representations of what one would expect from an indifferent or unbiased tribunal. And as noted above in reference to the office of prosecutor, the lack of independence combined with unstructured rules can, and in some instances did, have a corrosive effect.[25]

3. The Cold War Stall

In 1948, the Genocide Convention[26] was adopted in response to Nazi atrocities and was among the first conventions of the United Nations to address humanitarian issues.[27] Article 1 provides that "the Contracting Parties confirm that genocide, whether committed in

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(19) Bassiouni, *supra*, note 7, p. 9.

(20) Lyal S. Sunga. *The Emerging System of International Criminal Law: Developments in Codification and Implementation*, Kluwer Law International, The Hague, Boston, 1997, p. 281.

(21) For example, with respect to the Nuremberg Court, the four occupying powers were granted "supreme authority with respect to Germany, including all the powers possessed by the German Government, the High Command, and any state, municipal, or local government or authority": Declaration concerning the defeat of Germany, *Department of State Bulletin*, Vol. 12, 10 June 1945, pp. 1051-1055. See Sunga, *supra*, p. 282.

(22) Ferencz, *supra*, note 12, p. 212.

(23) Wallach, *supra*, note 15, p. 853.

(24) Ferencz, *supra*, note 12, p. 207.

(25) Wallach, *supra*, note 15, p. 872.

(26) *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, 78 U.N.T.S. 277 (entered into force 12 January 1951).

(27) Marie-Claude Roberge, "Jurisdiction of the ad hoc Tribunals for the Former Yugoslavia and Rwanda over Crimes Against Humanity and Genocide," *International Review of the Red Cross*, No. 321, 1997, p. 651, par. 34.

time of peace or in time of war, is a crime under international law which they undertake to prevent and punish." This significant achievement, unfortunately, did not foreshadow further advances over the next four decades. Following Nuremberg and Tokyo, the UN General Assembly had given the International Law Commission (ILC) the assignment of examining the possibility of establishing a permanent international criminal court. Draft statutes were produced in the 1950s but the Cold War made any significant progress impossible.(28) There were some trials by national courts in the post-World War II period,(29) but a permanent international criminal court was considered a pipe dream by most.

The ILC's post-Nuremberg project was revived in 1989 via an unexpected route when Trinidad and Tobago approached the General Assembly with the suggestion of an international judicial forum for drug trafficking prosecutions. The Assembly held a special session on drugs in 1989, and in 1990 the ILC submitted a report that went beyond this limited issue. The report was well received and the ILC was encouraged, without a clear mandate, to continue its project. Thus, it was able to return to the task begun in the 1940s of preparing a draft statute for a comprehensive international criminal court.(30)

There appeared to be little hope for an ICC between 1989 and 1992, but Security Council Resolution 780,(31) establishing a Commission of Experts to investigate international humanitarian law violations in the former Yugoslavia, changed all this.(32) The breakdown of the bipolar world and the increased expectations of peace with the end of the Cold War sparked a strong international response to the humanitarian crisis in the Balkans, and allowed the major powers to find common ground.(33) The creation of the ad hoc tribunals for the former Yugoslavia (ICTY)(34) and Rwanda (ICTR)(35) followed the Commission's work and garnered worldwide recognition and credibility that gave support to the process for establishing the ICC.

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(28) See Bassiouni, "Historical Survey: 1919-1998," *supra*, note 7, pp. 10-15, for a review of this period.

(29) National court trials relating to the issue of command responsibility are canvassed by Green, *supra*, note 4, including the Canadian war crimes trial of Brigadeführer Kurt Meyer in 1945.

(30) Bassiouni, "Historical Survey: 1919-1998," *supra*, note 7, p. 17.

(31) Security Council Resolution 780, U.N. SCOR, 47th Session, U.N. Doc. S/RES/780 (1992).

(32) Bassiouni, "Historical Survey: 1919-1998," *supra*, note 7, p. 18.

(33) James O'Brien, "The International Tribunal for Violations of International Humanitarian Law in the Former Yugoslavia," *American Journal of International Law*, Vol. 87, 1993, p. 639, at pp. 639-640.

(34) Created pursuant to Security Council Resolution 827, U.N. SCOR, 48th Session, 3175th meeting, U.N. Doc. S/RES/827 (1993), the "ICTY Statute."

(35) Created pursuant to Security Council Resolution 955, U.N. SCOR, 49th Session, U.N. Doc. S/RES/995 (1994), the "ICTR Statute."

4. The International Criminal Tribunals for Yugoslavia and Rwanda

It has been suggested that the ICTY was born of the frustration of having exhausted all other measures to stop a brutal war, except the measures that took too much courage, and that the ICTR was born of the guilt of having stood by while half a million were slaughtered in one hundred days.(36) The cynicism surrounding the establishment of the ad hoc tribunals was exacerbated by the fact that Rwanda voted against Resolution 955 which created the ICTR, although it has agreed to co-operate with tribunal prosecutions.(37)

The ICTY was granted jurisdiction over grave breaches of the Geneva Conventions of 1949, violations of the law or customs of war, genocide and crimes against humanity. As the Rwandan crisis involved an internal conflict, although there were certainly international pressures and involvement, the ICTR's jurisdiction was established as including genocide, crimes against humanity and violations of Article 3 common to the 1949 Geneva Conventions and Additional Protocol II.(38)

Despite some initial cynicism and, with respect to the ICTY, significant difficulties in arresting those indicted, both tribunals have made historic progress in international humanitarian law. At the ICTY, for example, rape and enslavement have been recognized as crimes against humanity(39) and we have seen the indictment of a head of state while still in

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(36) Louise Arbour, "The Prosecution of International Crimes: Prospects and Pitfalls," *Washington University Journal of Law and Policy*, Vol. 1, 1999, p. 13, at p. 16.

(37) Rwanda's vote against the ICTR was based on, *inter alia*, the limitation of the tribunal's *ratione temporis* jurisdiction to acts committed in 1994, the fact that countries that had supported the genocidal regime would participate in the nomination of judges, and the exclusion of capital punishment from the penalties available: for a detailed review, see Olivier Dubois, "Rwanda's National Criminal Courts and the International Tribunal," *International Review of the Red Cross*, No. 321, 1997, p. 717.

(38) Article 3 of the Geneva Conventions and Protocols reads, in part: "In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions: 1. Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. 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: (a) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (b) Taking of hostages; (c) Outrages upon personal dignity, in particular humiliating and degrading treatment; (d) The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples. 2. The wounded and sick shall be collected and cared for."

(39) Kunarac, Kovac and Vukovic (the "Foca" case), No. IT-96-23 (Judgement of Trial Chamber II, 22 February 2001), available at http://www.un.org/icty.

office.(40) Recently, indictees have voluntarily surrendered to the Court, something that has shocked many observers.(41) In Rwanda, the former prime minister pleaded guilty to genocide and admitted his role in the murder of more than half a million people.(42) The 1998 Akeyesu decision of the ICTR was the first conviction by an international tribunal, including the Nuremberg Tribunal, for the crime of genocide.(43)

There was no precedent at the United Nations for establishing and administering an international prosecutor's office.(44) Unlike the prosecution team at Nuremberg, the prosecutors at the ICTY and the ICTR are not separate national teams of organized military lawyers with shared assumptions about legal and procedural matters.(45) The prosecution teams came, and continue to come, from diverse legal backgrounds and justice systems.

The ICTY and ICTR Statutes set out in much greater detail than any previous similar body the functions and duties of the prosecutor. The prosecutor of the ICTY was established as an independent entity and cannot seek or receive directions from national governments. The chief prosecutor is appointed by the UN Security Council for a term of four years.(46) The prosecutor's office is distinct from the tribunal itself, but any proposed indictment

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(40) Slobodan Milosovic was indicted for crimes against humanity and violations of the laws or customs of war in respect of the Kosovo conflict while President of Serbia (24 May 1999); see http://www.un.org/icty/indictment/english/mil-ii990524e.htm.

(41) For example, former Bosnian Serb President Biljana Plavsic voluntarily surrendered to the ICTY in January 2001; others have since followed.

(42) *Prosecutor* v. *Jean Kambanda*, No. ICTR-97-23-S (4 September 1998), available at http://www.ictr.org.

(43) *Prosecutor* v. *Akeyesu*, No. ICTR-96-4-T (2 September 1998), available at http://www.ictr.org.

(44) Minna Schrag, "The Yugoslav Crimes Tribunal: A Prosecutor's View," *Duke Journal of Comparative and International Law*, Vol. 6, 1995, p. 187, at p. 190.

(45) Schrag, *ibid.*, p. 190.

(46) Article 16 of the Statute of the International Tribunal (adopted 25 May 1993, as amended 13 May 1998) provides as follows:

1. The Prosecutor shall be responsible for the investigation and prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1 January 1991.
2. The Prosecutor shall act independently as a separate organ of the International Tribunal. He or she shall not seek or receive instructions from any Government or from any other source.
3. The Office of the Prosecutor shall be composed of a Prosecutor and such other qualified staff as may be required.
4. The Prosecutor shall be appointed by the Security Council on nomination by the Secretary-General. He or she shall be of high moral character and possess the highest level of competence and experience in the conduct of investigations and prosecutions of criminal cases. The Prosecutor shall serve for a four-year term and be eligible for reappointment. The terms and conditions of service of the Prosecutor shall be those of an Under-Secretary-General of the United Nations.
5. The staff of the Office of the Prosecutor shall be appointed by the Secretary-General on the recommendation of the Prosecutor.

must be submitted for approval by a judge of the ICTY.(47) Thus, the prosecutor's discretion as to whom the tribunal prosecutes is tempered by judicial oversight. The ICTR prosecutor is similarly an independent organ that does not "seek or receive instructions from government or from any other source."(48) The difference between the two tribunals relates to subject matter jurisdiction, as Rwanda was essentially an internal conflict.(49) The role of the prosecutor, however, is the same, and a chief prosecutor is responsible for both tribunals.

The ad hoc tribunals are significantly different from Nuremberg, which was a multilateral, not truly international, military court. It was composed of victorious allies as part of a political settlement, whereas the ICTY started functioning as conflict in the Balkans continued to rage. In Nuremberg, most defendants were in custody, and trial in absentia was permitted for those who were not. The Allies had a staff of prosecutors one hundred strong and only eleven simple rules of evidence. And there was no right of appeal at the IMT.(50) The situation for prosecutors also differs in respect of disclosure obligations, which are immense for the ICTY and ICTR.(51)

The creation of these tribunals demonstrates an evolution of the concept of an independent prosecutor. Although having greater political autonomy than their Nuremberg counterparts, the tribunals are still a creation of the Security Council and are beholden to it for funding and enforcement assistance. And there is, as mentioned, judicial oversight as prosecutions require authorization. As valuable a precedent as they are, they took two years of negotiation and preparation to establish – thereby confirming the necessity of a permanent ICC. Not only would a permanent Court avoid the time-consuming establishment process, but also it could address smaller-scale incidents that might not garner the political will to establish another ad hoc tribunal.(52)

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(47) *International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991: Rules of Procedure and Evidence*, U.N. Doc. IT/32 (1994), as amended, Part Five, Rule 47.

(48) Article 15(2) of the ICTR Statute, *supra*, note 35.

(49) See Payam Akhavan, "The International Criminal Tribunal for Rwanda: The Politics and Pragmatics of Punishment," *American Journal of International Law*, Vol. 90, 1996, p. 501.

(50) Arbour, "The Prosecution of International Crimes: Prospects and Pitfalls," *supra*, note 36, p. 21.

(51) Arbour, "The Prosecution of International Crimes: Prospects and Pitfalls," *ibid.*, p. 22.

(52) Melissa K. Marler, "The International Criminal Court: Assessing the Jurisdictional Loopholes in the Rome Statute," *Duke Law Journal*, Vol. 49, No. 3, 1999, p. 825, at p. 829.

In 1994, a draft statute for an international criminal court was submitted to the General Assembly;(53) and in 1996, the Preparatory Committee on the establishment of an International Criminal Court was established. An amended draft statute was submitted in April 1998, setting the stage for the five-week conference in Rome in June.

B. Rome 1998

> It is easy to say, "Never Again"; but much harder to make it so.
>
> President Bill Clinton
> 21 September 1999
> Address to the UN General Assembly

1. The Conference

President Clinton was probably not referring, in the quote above, to American roadblocks at the Rome Conference; but the United States was clearly the chief opponent of an independent Court. As the Conference got under way, three basic groupings of states emerged.(54) Led by Canada and Norway, the "like-minded group" was arguably the most influential(55) and advocated a potent and robust ICC. It consisted mostly of the middle powers and developing countries, who generally supported a *proprio motu* prosecutorial model. The second group consisted of the permanent members of the Security Council, or the "P-5," with the exception of Britain, which had joined the like-minded states just before the conference began. Not surprisingly, this group sought a more important role for the Security Council in the establishment and operation of the Court. The United States, in particular, expressed grave concerns about the possibility of a *proprio motu* prosecutor and argued for the limiting of the ICC's jurisdiction to Security Council referrals. A third non-aligned group was formed in opposition to the P-5's insistence on the exclusion of nuclear weapons from the statute. This group included states such as India, Mexico and Egypt. However, this group's position in respect of the independence and powers of the ICC was similar to that of the P-5.

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(53) ILC, *Draft Statute for an International Criminal Court*, UN GAOR, 49th Session, Supp No. 10, U.N. Doc. A/49/10 (1994).

(54) Philippe Kirsch and John T. Holmes, members of the Canadian delegation, describe the process in "The Rome Conference on an International Criminal Court: The Negotiating Process," *American Journal of International Law*, Vol. 93, 1999, p. 3.

(55) Michael Schmitt and Major Peter J. Richards, "Into Uncharted Waters: The International Criminal Court," *Naval War College Review*, Vol. LIII, No. 1, Winter 2000, p. 136, at p. 139.

Jurisdictional issues were the most complex and most sensitive, but the *proprio motu* prosecutor model did receive significant, although not general, support.(56) To address the concerns of opponents to the idea of an independent prosecutor, safeguards were discussed. As the conference was nearing its conclusion and no agreement was evident, the Bureau of the Committee of the Whole(57) decided to prepare a final package for possible adoption. The alternative of reporting that an agreement could not be reached and scheduling another conference was not attractive. Many feared that a second conference stood no better chance of success and would likely result in either a weakened ICC or no court at all for years to come. The Bureau, recognizing the need for broad political and financial support, developed solutions of its own to try to bridge the ideological divides. By a final vote of 120 in favour, 21 abstaining and 7 against, the Bureau's package was adopted.

The United States voted against the treaty in Rome – putting it in the company of China, Iraq, Israel, Libya, Qatar and Yemen – then signed on(58) and then, as previously noted, "unsigned." Its expressed concerns related to jurisdictional issues and, in particular, to what the American delegation saw as a lack of accountability in granting *proprio motu* power to an independent prosecutor. In American Senate hearings that coincided with the conference, Senator Rod Grams called the ICC "a monster that must be slain"(59) and Senator John Ashcroft similarly denounced the ICC as "a clear and continuing threat to the national interest of the United States."(60) Some commentators have suggested that Kenneth Starr's investigation of the Whitewater–Lewinsky affair gave rise to this sensitivity among American legislators to an independent prosecutor.(61)

The U.S. position at Rome was not, however, monolithic and there was likely some dissension within the U.S. ranks. Ultimately, Secretary of Defense William Cohen, a former Republican member of Congress who may have been influenced by outspoken ICC critic Senator Jesse Helms, won the delegation's support for his position. President Clinton, who was

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(56) See Kirsch and Holmes, *supra*, note 54, in their section "Jurisdictional Issues."

(57) Members of the Bureau included representatives of Canada, Argentina, Romania, Lesotho and Japan.

(58) The United States signed on 31 December 2000, the last day the Treaty was open for signature.

(59) Statement of Senator Rod Grams, Subcommittee on the Creation of the International Criminal Court, Hearing on the Creation of the International Criminal Court (23 July 1998).

(60) Statement of Senator John Ashcroft, Subcommittee on the Creation of the International Criminal Court, Hearing on the Creation of the International Criminal Court (23 July 1998).

(61) See, for example, Schmitt and Richards, *supra*, note 55, and Bartram S. Brown, "International Prosecutor, Independent Counsel," *Chicago Daily Law Bulletin*, Vol. 144, No. 177, 1998, p. 6.

perceived by some as weak on military issues but who had expressed tepid support for the ICC previously, had little to do with the Rome Conference. He spent this intense negotiation period immersed in his historic trip to China.(62)

2. The Rome Statute and the Office of the Prosecutor

Crimes within the jurisdiction of the ICC are limited by the Rome Statute to genocide, war crimes and crimes against humanity.(63) The Court will also have jurisdiction over the crime of "aggression" once a provision is adopted defining the crime and setting out the conditions under which the Court is to exercise jurisdiction in that regard.(64) Deferring the inclusion of aggression has generally been recognized as a concession made to entice broader (i.e., American) support of the Treaty.(65)

Jurisdiction is also limited *ratione temporis* to offences committed after the entry into force of the Statute.(66) Article 12 restricts the ICC's jurisdiction to crimes committed on the territory of a state party(67) or those committed by a national of a state party.(68) Noticeably absent is jurisdiction over an accused simply in the custody of a state party.(69) An ICC investigation may be commenced either by the Security Council, pursuant to Chapter VII of the UN Charter, by a state party or by the prosecutor acting under the *proprio motu* power.(70) The prosecutor's ability to initiate an investigation *ex officio* is set out in Article 15, but – as will become apparent – there are significant restrictions and oversight relating to the exercise of this purview.

To begin with, the *proprio motu* jurisdiction is limited by the principle of complementarity. The prosecutor must defer to a state with national jurisdiction over an offence

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(62) Michael P. Scharf, "The Politics Behind the U.S. Opposition to the International Criminal Court," *New England International and Comparative Law Annual*, Vol. 5, 1999, p. 5 (available at http://www.nesl.edu/annual/vol5/scharf.htm), par. 21.

(63) Rome Statute, Article 5(1).

(64) Rome Statute, Article 5(2).

(65) Kirsch and Holmes, *supra*, note 54, p. 10.

(66) Rome Statute, Article 11.

(67) Rome Statute, Article 12(2)(a).

(68) Rome Statute, Article 12(2)(b).

(69) Edward M. Wise, "The International Criminal Court: A Budget of Paradoxes," *Tulane Journal of International and Comparative Law*, Vol. 8, 2000, p. 261, at p. 270.

(70) Rome Statute, Article 13.

unless that state is unwilling or unable to investigate and prosecute.(71) Moreover, if desirous of initiating an investigation without a Security Council or state party referral, Article 15 provides that the prosecutor must first apply to the Pre-Trial Chamber for a ruling on admissibility.(72) Notification is required for any states that might normally have jurisdiction over the offence, regardless of whether or not they are party to the Treaty.(73) This provision had been proposed by the United States and was accepted by many signatory states with great reluctance as a compromise necessary to ensure the existence of the independent prosecutor.(74) Thus, the prosecutor must defer unless the Pre-Trial Chamber can be convinced that the state or states with national jurisdiction are not genuinely able or willing to carry out their own proceedings. The state or states concerned also have the right to appeal the Pre-Trial Chamber's decision.(75)

Further to address the concerns of the P-5, Article 16 provides for the deferral of investigations or prosecutions for a period of one year at the direction of the Security Council.(76) This deferral power is renewable and, theoretically, could result in an indefinite postponement of ICC proceedings. And as any prosecutor will attest, the passage of time usually diminishes the likelihood of conviction. Despite this oversight power lying in the hands of a small minority of the world's nations, some critics have suggested that Article 16 does not go far enough and in

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(71) The preamble of the Rome Statute states that "… the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions" and Article 17 provides, *inter alia*, that a case will be inadmissible when: (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution; (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute; (c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3; (d) The case is not of sufficient gravity to justify further action by the Court.

(72) Article 15(3) states: "If the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or she shall submit to the Pre-Trial Chamber a request for authorization of an investigation, together with any supporting material collected. Victims may make representations to the Pre-Trial Chamber, in accordance with the Rules of Procedure and Evidence."

(73) Rome Statute, Article 18.

(74) Mahnoush H. Arsanjani, "Developments in International Criminal Law: The Rome Statute of the International Criminal Court," *American Journal of International Law*, Vol. 93, 1999, p. 22, at p. 27.

(75) Rome Statute, Article 18(4).

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

fact undercuts the role of the P-5 by requiring an affirmative vote to stop the prosecutor.(77) The veto power in the Security Council, in effect, works only to allow an investigation or prosecution to continue, but not to stop one. Conversely, others have expressed fears that the Security Council deferral power could eviscerate the independence of the prosecutor and the Court.(78) What if, for example, a general understanding were to develop among the P-5 countries that it would not be in any one of their interests to allow an ICC investigation against P-5 nationals?

Finally, with respect to war crimes, the ICC is limited by the wording of the Statute to "grave breaches" of the Geneva Conventions,(79) "serious violations" of the listed laws and customs of international armed conflict(80) and a more limited list of offences for armed conflicts not of an international nature.(81) Moreover, Article 8 states that the Court will have jurisdiction over war crimes when "committed as part of a plan or policy or as part of a large-scale commission of such crimes."(82)

Professor Adam Roberts lists the following events and indicates whether they would, assuming temporal jurisdiction, fall within the purview of the ICC to demonstrate the extent of the constraints placed on the Court and to show that fears of a "rogue prosecutor" are misplaced:(83)

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(77) For example, the comments of John R. Bolton, former Assistant Secretary of State for International Organization Affairs, as quoted in Schmitt and Richards, *supra*, note 55: "This provision, of course, totally reverses the appropriate functioning of the Security Council. It seriously undercuts the role of the five permanent members of the Council, and radically dilutes their veto power….In requiring an affirmative vote of the Council to stop the Prosecutor and the Court, the Statute slants the balance of authority from the Council to the ICC. Moreover, a veto by a Permanent Member of such a restraining Council resolution leaves the ICC completely unsupervised. For the United States, faced with the possibility of an overzealous or politically motivated Prosecutor, the protection afforded by our veto has been eliminated. In effect, the UN charter has been implicitly amended without being approved pursuant to Chapter XVIII of the UN Charter." For the full text of the speech, see http://www.un.org/icc/speeches/617alm.htm.

(78) For instance, a Canadian non-government organization, The International Centre for Human Rights and Democratic Development, stated in a speech to the Conference: "If some States are able to use the ICC for their political motives, or if some individuals are beyond the reach of the ICC because of their position within a State, the Court will lose credibility, human rights will continue to be violated, and democratic development will be stifled. We understand that some States propose granting the Security Council sweeping powers to determine the docket of the Court. The granting of such powers to an essentially political body is incompatible with the establishment of an effective judicial body. The Court requires total independence in order to guarantee that the highest standards of international justice are respected." For the full text of the speech, see http://www.un.org/icc/speeches/617alm.htm.

(79) Rome Statute, Article 8(2)(a).

(80) Rome Statute, Article 8(2)(b).

(81) Rome Statute, Article 8(2)(c).

(82) Rome Statute, Article 8(1).

(83) Adam Roberts, "War Law: The International Criminal Court Will Not Be the Threat to the Armed Forces That Some of Its Critics Have Feared," *Manchester Guardian*, 4 April 2001.

Event		Admissible?
1968	My Lai massacre of Vietnamese villagers by U.S. troops	Maybe (only if killings were planned or if ICC dissatisfied with U.S. investigations)
1982	Royal Navy sinking of Argentine warship *Belgrano*	No (target was legitimate)
1991	U.S. bombing of Amariya bunker in Baghdad	No (civilian deaths not intended)
1991-to date	Rebel killings and amputations in Sierra Leone	Yes
1992-1999	Ethnic cleansing in Bosnia, Croatia and Kosovo	Yes
1994	Rwandan genocide	Yes
1999	Kosovans killed by NATO bombs	No (civilian deaths not intended)

In respect of Professor Roberts' determination relating to the My Lai massacre, it should also be noted that U.S. servicemen were tried domestically and that one conviction – Lieutenant William Calley – resulted.(84) As such, the principle of complementarity would likely have precluded ICC jurisdiction even in such an extreme case of abuse by the American military.

At least one further, albeit extraordinary, protection exists. A prosecutor can be removed from office or subjected to disciplinary measures if guilty of misconduct or a serious breach of duty.(85) Complaints may be made to the Presidency of the Court, which can also initiate proceedings on its own motion,(86) and punishable conduct will include anything that occurs within the course of official duties and is either incompatible with official functions or "is likely to cause serious harm to the proper administration of justice before the Court."(87) At least theoretically, a prosecutor who initiates politically motivated investigations that are consistently rejected by the Pre-Trial Chamber could be reined in by such a process.

It is worth noting as well, in respect of the independence of the office, that the prosecutor may refuse to pursue a state or Security Council referral if it is determined that there is no reasonable basis to proceed.(88) In such a case, the referring party may ask the Pre-Trial

(84) Tomas A. Kuehn, "Human 'Wrongs'?: The U.S. Takes an Unpopular Stance in Opposing a Strong International Criminal Court, Gaining Unlikely Allies in the Process," *Pepperdine Law Review*, Vol. 27, 2000, p. 299, at p. 319.

(85) Rome Statute, Article 46.

(86) *Finalized Draft Text of the Rules of Procedure and Evidence*, Preparatory Commission for the International Criminal Court, PCNICC/2000/1/Add.1, 2 November 2000, Rule 26(2).

(87) *Ibid.*, Rule 24 (1)(a).

(88) Rome Statute, Article 53.

Chamber to review the decision and the Court may request the prosecutor to reconsider the decision.(89) In most situations, there is no statutory authority for the Court to force an investigation if, after reconsideration, the prosecutor does not proceed. However, a different process exists if the prosecutor decides not to proceed on the basis that, "taking 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."(90) In such a case, the matter must be referred to the Pre-Trial Chamber and a majority must confirm the decision. If the decision not to proceed is rejected, the prosecutor must continue the investigation or prosecution.(91)

3. How Will the Pre-Trial Chamber Work?

The functioning of the Pre-Trial Chamber will obviously be important to the effectiveness and independence of the ICC prosecutor. The basic procedural steps for seeking authorization from the Pre-Trial Chamber to initiate an investigation *proprio motu* are outlined in the Draft Rules of Procedure and Evidence. Victims must first be informed, unless doing so would endanger them or threaten the integrity of the investigation, and notified victims may make representations in writing to the Pre-Trial Chamber.(92) The state with jurisdiction must also be notified, and such notification must contain specific information about the acts that may constitute crimes within ICC jurisdiction.(93) If the state requests that the prosecutor defer on the basis that it is conducting its own proceedings, the prosecutor can still request authorization to investigate if he or she is of the opinion that the state's actions are not genuinely intended to bring criminals to justice.(94) The prosecutor must give notice to the state and provide a summary of the basis of the application.(95) The Court may consider whether any of the following factors are applicable in deciding to authorize an investigation over the objections and request for deferral of a state:(96)

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(89) Rome Statute, Article 53(3).

(90) Rome Statute, Article 53, subparagraphs 1(c) and 2(c).

(91) *Finalized Draft Text of the Rules of Procedure and Evidence*, *supra*, note 86, Rule 110.

(92) *Ibid.*, Rule 50.

(93) *Ibid.*, Rule 52.

(94) Rome Statute, Article 18(2).

(95) *Finalized Draft Text of the Rules of Procedure and Evidence*, *supra*, note 86, Rule 54(2).

(96) Rome Statute, Article 17(2).

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

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

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

So that the Pre-Trial Chamber process itself does not become a tool for a state seeking to delay or deny justice, Article 18(6) permits the prosecutor to apply for permission to take investigative steps to preserve evidence, either pending a decision on the admissibility of a case by the Pre-Trial Chamber or during a period of official deferral to the state's national judicial system. This can be done on an *ex parte* and *in camera* basis.(97)

As noted by Bartram S. Brown, it is essential that an ICC based on the principle of complementarity have a reliable mechanism for evaluating national justice systems.(98) Otherwise, we will see the enforcement of international norms sacrificed to state sovereignty. The ICTY and ICTR have not had to deal with this issue specifically in the courtroom, but certainly we have seen the prosecutor taking an aggressive public stance vis-à-vis state claims of jurisdiction.(99) And it is to be noted that the standard of review in the Pre-Trial Chamber does not appear to be overly onerous for the prosecutor in initiating an investigation *proprio motu*. If there is a "reasonable basis to proceed with an investigation" and the case "appears to fall within the jurisdiction of the Court,"(100) a case is considered admissible.

In the event that a state claims to be investigating or prosecuting and on that basis asks for an Article 18(2) deferral, however, it is not entirely clear what the standard of review will be. According to the Draft Rules, the state requesting a deferral must begin by providing

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(97) *Finalized Draft Text of the Rules of Procedure and Evidence*, *supra*, note 86, Rule 57.

(98) Bartram S. Brown, "Primacy or Complementarity: Reconciling the Jurisdiction of National Courts and International Criminal Tribunals," *Yale Journal of International Law*, Vol. 23, No. 2, Summer 1998, p. 383, at p. 389.

(99) For example, Chief Prosecutor Carla Del Ponte continued to insist that Milosevic be tried in the Hague despite objections from the Government of Serbia, where he had been arrested on corruption charges.

(100) Rome Statute, Article 15(4).

information concerning its investigation to the Court.(101) The prosecutor may request additional information if need be.(102) The state may provide evidence that its courts meet internationally recognized norms and standards for the independent and impartial prosecution of similar conduct(103) and the Pre-Trial Chamber will then, using whatever procedure it deems appropriate,(104) consider the factors in Article 17 of the Rome Treaty.(105) Given the wording of Article 17(2), it appears as though the basis for a reliable mechanism to balance state sovereignty has been created.(106) It remains to be seen whether that mechanism will function in practice to assuage the concern of Bartram Brown and others that phony national investigations could subvert international justice.

As for those concerned that there may be only superficial control of the *proprio motu* prosecutor, the Djukic case(107) at the ICTY is instructive of the oversight role played by the Pre-Trial Chamber. In January 1996, General Djukic of the Bosnian Serb army was arrested after being indicted for war crimes and crimes against humanity. While in detention in the Hague, his health deteriorated so significantly that the prosecutor applied to withdraw the indictment on the basis that he was too sick to assist fully in his defence. Leave was denied by the Trial Chamber on the basis that nothing in the Tribunal Statute or Rules authorized the withdrawal of an indictment for health reasons.(108) While this case involves a prosecutor seeking to end a prosecution, it indicates that the ICTY process of judicial oversight is not simply a rubber stamp for the prosecutor's office, and may be a comforting precedent for those concerned about judicial oversight of indictments at the ICC.

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(101) *Finalized Draft Text of the Rules of Procedure and Evidence*, *supra*, note 86, Rule 53.

(102) *Ibid.*

(103) *Ibid.*, Rule 51.

(104) *Ibid.*, Rule 55(1).

(105) *Ibid.*, Rule 55(2).

(106) This judicial supervision procedure could also be superior in terms of fairness from the perspective of the defendant in relation to the procedures in most common law jurisdictions, where investigations are performed by the police and prosecutors with little or no oversight; see Kenneth Gallant, "The Role and Powers of Defense Counsel in the Rome Statute of the International Criminal Court," *International Lawyer*, Spring 2000, p. 21, at p. 40.

(107) *Prosecutor* v. *Djukic*, Case Numbers IT-96-19 and IT-96-20-T.

(108) The prosecutor filed an appeal but Djukic died before it could be heard.

C. The Role of the Prosecutor in National Systems

There is, of course, a myriad of prosecutorial systems in use globally, and one must keep in mind the unique nature of international criminal tribunals when making reference to national norms. Jurisprudence from the ICTY, for example, discourages a mechanical importation of notions from national law into international criminal proceedings.(109) However, examining the role of the prosecutor in national systems may provide some insight when assessing the office's functions at the ICC. As suggested by the ICTY Trial Chamber in the *Celebici* judgment, an international court does not exist in a vacuum; and while the importation of domestic jurisprudence can be problematic, reference to the systems upon which the Court's procedures are based is not improper:

> The Tribunal's Statute and Rules consist of a fusion and synthesis of two dominant legal traditions, these being the common law system, which has influenced the English-speaking countries, and the civil law system, which is characteristic of continental Europe and most countries which depend on the Code system. It has thus become necessary, and not merely expedient, for the interpretation of their provisions, to have regard to the different approaches of these legal traditions. It is conceded that a particular legal system's approach to statutory interpretation is shaped essentially by the particular history and traditions of that jurisdiction. However, since the essence of interpretation is to discover the true purpose and intent of the statute in question, invariably, the search of the judge interpreting a provision under whichever system, is necessarily the same.(110)

In a 1994 review, Kai Ambos compared and contrasted the common law systems, as represented by England and the United States, with the civil law systems, represented by France and Germany.(111) His commentary was somewhat impressionistic given the spatial constraints to which he was subjected,(112) but he concluded that the ILC-Draft follows the

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(109) Shabtai Rosenne, "Poor Drafting and Imperfect Organization: Flaws to Overcome in the Rome Statute," *Virginia Journal of International Law*, 2000, p. 164, at p. 181.

(110) *Prosecutor* v. *Delalic et al.*, 16 November 1998, Case No. IT-96-21-T, at par. 159 (available at http://www.un.org/icty/celebici/trialc2/judgement/index.htm).

(111) Kai Ambos, "The Role of the Prosecutor of an International Criminal Court from a Comparative Perspective," *International Commission of Jurists Review*, No. 58-59, December 1997, p. 45.

(112) Ambos, *ibid.*, p. 45.

adversarial common law model.(113) Since the foundations for that conclusion have not been altered in the Rome Statute, this paper will attempt to complement his review with a discussion of another common law jurisdiction: Canada.

Ambos posed a series of inquiries to fifteen countries(114) and attempted to answer three questions. Only his third question is specifically relevant to this examination of the independence of the prosecutor: Is there judicial supervision of prosecutorial investigation in the respective national systems and what is its scope?(115)

Ambos was writing before the Rome Statute was created and, as mentioned, his analysis is based on the ILC-Draft. In that document, if the prosecutor decided not to file an indictment, the Presidency could ask the prosecutor to reconsider the decision if so requested by the Security Council or a state party. Article 53 of the Rome Statute provides for a similar review process by the Pre-Trial Chamber. With respect to a decision to proceed with a prosecution, the ILC-Draft proposed that the Presidency examine the indictment and either confirm, not confirm or amend it.(116) Under the Rome Statute, there would automatically be a similar review by the Pre-Trial Chamber in the case of a *proprio motu* action. Thus, the ILC-Draft and the Rome Treaty are quite similar in terms of the oversight.

Ambos found that while national practices differ, judicial supervision of prosecutorial measures, including the indictment, is widely recognized.(117) Of particular note is

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(113) Ambos, *ibid.*, p. 56. Faiza Patel King and Anne-Marie La Rosa, in "The Jurisprudence of the Yugoslavia Tribunal: 1994-1996," *European Journal of International Law*, Vol. 8, 1997, p. 123, similarly confirm that the pre-trial process is based on common law adversarial systems, although they suggest that the trial stage demonstrates some elements derived from civil law jurisdictions. Page 124: "Since the Tribunal is an 'international' institution, its Rules attempt to combine the procedural traditions of the major systems of law prevalent in developed nations; that is, the civil and common law systems. For example, the initiation of prosecutions is modeled closely on the adversarial system and gives an independent prosecutor the authority and responsibility for investigating war crimes and issuing indictments. The role of the judges during proceedings, on the other hand, is more extensive than in common law countries and resembles the practice of civil law systems. Judges – unlike in common law systems – are explicitly authorized to question witnesses and may call for additional evidence or recall a witness."

(114) Argentina, England, France, Germany, Italy, Japan, Russia, Singapore, Scotland, Spain, Togo, the United States and Wales. The questions were also posed to an authority on Sharia law.

(115) The first question related to the role of the Security Council, which he hesitantly likened to a national executive, in initiating criminal proceedings. The second question involved the ability of the prosecutor to conduct on-site investigations, which now finds expression in Article 54 of the Rome Statute.

(116) Articles 27(2), 27(3) and 27(4) respectively.

(117) Ambos, *supra*, note 111, p. 56.

his finding that the ILC-Draft "resembles most the control of the indictment by the Grand Jury in U.S.-(federal) procedure."(118) Admissibility is decided without the participation of the accused and in an inquisitorial manner, although professional judges will provide the scrutiny at the ICC, not lay people. The inquisitorial systems are not very dissimilar in this respect, as most require strict judicial scrutiny of the indictment.(119)

This suggests that the ICC Pre-Trial Chamber should not be foreign to most legal professionals. As such, national standards of prosecutorial independence can be a useful source of reference. The UN has provided guidelines for prosecutors that may therefore be apropos,(120) even though they are directed at states and not international tribunals. For example, section 4 requires that:

> States shall ensure that prosecutors are able to perform their professional functions without intimidation, hindrance, harassment, improper interference or unjustified exposure to civil, penal or other liability.

And section 14:

> Prosecutors shall not initiate or continue prosecution, or shall make every effort to stay proceedings, when an impartial investigation shows the charge to be unfounded.

Unlike national prosecutors – who are part of a governmental system that, as noted above, usually provides some sort of political control – the ICC prosecutor has no direct overseer. As a result, the judicial branch, and in particular the Pre-Trial Chamber, has been given comparable supervisory and review powers.

D. Canada

The Canadian system provides no significant judicial oversight at the investigation stage. Although intrusive investigative procedures such as search warrants and

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(118) Ambos, *supra*, note 111, p. 52.

(119) Ambos, *supra*, note 111, p. 53.

(120) *Guidelines on the Role of Prosecutors, Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders*, Havana, 27 August to 7 September 1990, U.N. Doc. A/CONF.144/28/Rev.1 (1990), p. 189.

wiretaps require judicial authorization, the decision to investigate or prosecute does not. With respect to the pre-trial review of charges, this is limited to the "preliminary inquiry" wherein the Crown Prosecutor must demonstrate to the Court, in the case of an indictable offence, that there is sufficient evidence to put the accused on trial.(121) The defendant is involved in this adversarial process, which is often used by Defence Counsel as a discovery tool. However, with the consent of the Attorney-General, it is possible for the Crown Prosecutor to proceed with a direct indictment and put the accused on trial either without a preliminary hearing or following a preliminary hearing that has resulted in the discharge of the accused.(122) Thus, little can be gleaned in terms of judicial pre-trial review of the Crown Prosecutor's *ex officio* powers. However, the Canadian system may have guidance to offer the ICC in another respect; i.e., in relation to the independence of the prosecutor and how the functions of the office should be perceived. This guidance is not unique to Canada, as other systems share a similar understanding of the office; but a brief examination of the Canadian Crown Counsel should prove instructive nonetheless.

The historical roots of the Canadian Crown Counsel lie in the British common law system, where the notion of the prosecutor as a minister of justice has a long history.(123) In the 1838 case *R.* v. *Thursfield*,(124) the prosecutor opened his statement to the jury by setting out all the facts, including those that favoured the accused. The judge approved and expressed the view that the prosecutor is an "assistant to the Court in the furtherance of justice, and not…counsel for any particular party or person." This sentiment was echoed in 1899 in the influential paper "The Ethics of Advocacy," where S. Rogers stated that the Crown Counsel is not a mere advocate for a party, but an assistant to the Court whose duty is to help in ascertaining the truth. He went so far as to describe the office as a quasi-judicial position.(125)

This concept of the office of prosecutor has continued in Canada into the twentieth century, although it has now been modified, largely as a result of the adversarial

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(121) Criminal Code of Canada, R.S. 1985, c. C-46, s. 548(1).

(122) *Ibid.*, ss. 577-578.

(123) John Sutherland, "Role of the Prosecutor: A Brief History," *Ontario Criminal Lawyers' Association Newsletter*, Vol. 19, No. 2, 1998, p. 17.

(124) (1838) 173 E.R. 490.

(125) (1899) 15 L.Q.R. 259, as quoted in Sutherland, *supra*, note 123, p. 18.

process. A leading Supreme Court of Canada case in which the role of the Crown Prosecutor is explained is *R.* v. *Boucher*,[126] where Rand J. states, at 23:

> It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction, it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength but it must also be done fairly. The role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings.

While still considered an impartial participant in the process,[127] the prosecutor is required to press for a conviction. The role of the modern Canadian prosecutor is also fairly stated by the Commissioners of the Donald Marshall Inquiry: "The Crown prosecutor occupies a dual role, being obliged on the one hand to prosecute vigorously those accused of crime, and on the other hand to ensure that the power of the State is used only in the pursuit of impartial justice."[128]

In respect of the *proprio motu* issue, Canada's system offers a standard that should be emulated at the ICC. What we can take away from this brief review is that political interference with the office of the prosecutor is detrimental to its perceived legitimacy and subsequent effectiveness. This would only be amplified in the international arena.

E. Criticisms of the International Criminal Court

Much of the criticism aimed at the ICC has already surfaced in the previous sections of this commentary. This part, in some respects, summarizes the issues relating to the office of the prosecutor. It will also touch upon the other main challenges to the existence of the ICC, as all those challenges relate, directly or indirectly, to the prosecutor's functions.

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(126) [1955] S.C.R. 16.

(127) For example, J. Laidlaw of the Ontario Court of Appeal stated in the case *R.* v. *McDonald* (1958), 120 C.C.C. 209 at p. 212, that the Crown Counsel has no duty other than to fairly and justly place the evidence and facts before the jury.

(128) Report of the Royal Commission on the Donald Marshall Jr. Prosecution, Vol. 1, Halifax, 1989, p. 241.

1. The Politically Motivated Prosecutor

Clearly, what many ICC opponents fear most is a prosecutor who initiates proceedings *proprio motu* for purely political reasons. John R. Bolton, former American Assistant Secretary of State for International Organization Affairs, has suggested that the main concern for the United States should be "for the President, the Cabinet officers who comprise the National Security Council, and other senior civilian and military leaders responsible for our defense and foreign policy. They are the real potential targets of the politically unaccountable prosecutor."(129) This fear would be legitimate were it not for the safeguards in the Rome Treaty. The nature of international crime is inherently political and, in fact, there is a "political advisor to the prosecutor" position at the ICTY.(130) Anyone who assumes the prosecutorial role at the ICC will, of course, come with his or her own political perspective on the world and its conflicts, and external political pressure may be exerted in an effort to bring a complaint when it might not be justified or even helpful in a particular political context.(131) However, several factors – notably, a process of vigorous internal indictment review, such as that in place at the ICTY and ICTR; the requirement of confirmation by a judge; and the inevitable acquittal that would result from an unfounded prosecution – would likely prevent any abuse of power by a politically driven prosecutor.(132)

In fact, the ICC should serve to alleviate the adverse effect of political pressures in the realm of international justice. States have historically been reluctant to exercise universal jurisdiction in respect of grave crimes, due to political pressures from other states that wish to avoid exposure of their complicity. The ICC will serve to shift some of this risk from individual states and thereby overcome political obstacles to prosecution.(133)

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(129) "Is a U.N. International Criminal Court in the U.S. National Interest?" Hearing before the Subcommittee on International Operations of the Senate Committee on Foreign Relations, 105th Congress, (1998) ("ICC Hearing"), available at http://www.access.gpo.gov/congress/senate/senate11sh105.html, p. 48.

(130) The current holder of this position insists that the post is not actually political in nature and that he does not discuss politics but rather acts as a diplomatic advisor: e-mail correspondence from Jean-Jacques Joris to Mirko Klarin, 10 April 2001, as posted to International Justice Watch Discussion List.

(131) Arsanjani, *supra*, note 74, p. 27.

(132) Louise Arbour, "The Need for an Independent and Effective Prosecutor in the Permanent International Criminal Court," *Windsor Yearbook of Access to Justice*, Vol. 17, 1999, p. 207, at p. 212.

(133) Jonathan I. Charney, "Editorial Comment: Progress in International Criminal Law?" *American Journal of International Law*, Vol. 93, 1999, p. 452, at p. 456.

Some states also opposed the *proprio motu* power of the prosecutor on the ground that the office would be overwhelmed with frivolous complaints and would have to waste precious resources addressing them.(134) The real challenge, however, might actually lie in choosing from among meritorious complaints the appropriate ones for intervention, rather than weeding out the weaker ones. Experience at the ICTY and ICTR suggests that the prosecutor is able to dispose quickly of large quantities of unsubstantiated allegations.(135)

What may be the most significant concern with respect to the impartiality of not just the prosecutor, but the entire Court, relates to the matter of funding. Some have stated that ICTY impartiality is currently undermined by its dependence on the assistance of individual countries for providing its modest budget.(136) Like the ICTY, the inherent weakness of the ICC may be its reliance on the co-operation of national governments, and it will likely only succeed where international justice and power can be brought together.(137) From one perspective, it can be said that there are budgetary controls on the potential of a "rogue prosecutor." It is problematic, however, that such controls could be used by wealthier nations to restrict the ICC's effectiveness.

2. Soldiers Confused by the Laws of War

Another concern that finds expression in the debate is that the ICC will endanger soldiers who will not act when they should because of a fear of potential prosecution. If the prosecutor initiates proceedings without supervision by any national government – so the argument goes – cases could be pursued without understanding the dilemmas that are faced by soldiers in armed conflict. This could, for example, prevent a British warship from attacking a hostile warship until it was too late.(138) In response to this assertion, Adam Roberts suggests that

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(134) Arsanjani, *supra*, note 74, p. 27. Also note the testimony of former War Crimes Ambassador Scheffer, who suggests that the *proprio motu* power "will encourage overwhelming the court with complaints and risk diversion of its resources, as well as embroil the court in controversy, political decision-making, and confusion," ICC Hearing, *supra*, p. 14.

(135) Arbour, "The Need for an Independent and Effective Prosecutor in the Permanent International Criminal Court," *supra*, note 132, p. 212.

(136) For example, see Professor of History Charles Ingrao's op-ed piece, "Some Rules of the Road on Prosecuting War Crimes," *Los Angeles Times*, 3 April 2001.

(137) Michael P. Scharf, "The Tools for Enforcing International Criminal Justice in the New Millennium: Lessons from the Yugoslav Tribunal," *Depaul Law Review*, Vol. 49, 2000, p. 925, at pp. 978-979.

(138) This scenario was suggested to Professor Adam Roberts by a British "senior defence source": Roberts, "War Law: The International Criminal Court Will Not Be the Threat to the Armed Forces That Some of Its Critics Have Feared," *supra*, note 83.

most senior U.K. officers take a positive view of the laws of war. This is not an isolated perspective. In the 1991 Gulf War and in the 1999 Kosovo conflict, western forces found that the law actually assists in the professional and effective conduct of military operations.(139)

Article 8 of the Rome Statute would also limit the prosecution of soldiers for isolated incidents, regardless of whether they might be considered criminal acts. ICC jurisdiction is meant to apply to, in particular, war crimes that are committed as part of a plan or policy or part of a large-scale commission of such crimes.

3. A Barrier to Peace and Reconciliation

Sir Norman Lamont(140) expressed his "main worry" about the ICC as being that it would prove an obstacle to reconciliation and the resolution of conflicts.(141) He notes that in many countries, including South Africa, Chile and, to some extent, Great Britain in relation to Northern Ireland, governments have granted amnesties in order to end conflicts. As a result of the ICC, he suggests, wars will be fought longer and "to the last civilian." For who would relinquish power if facing indictment?

Conversely, many suggest that dictators do not leave power because they are offered amnesty. The reverse is true. They leave when they are weak and vulnerable and desperate to get whatever they can, not whatever they want.(142) Moreover, an indictment does not necessarily have a negative effect. For example, the arrest of Augusto Pinochet in London in 1998 did not destabilize Chile. Opinion polls at the time suggested that the arrest had no influence on voting intentions, that most were certain of his guilt and, although there was a preference that justice be meted out at home, most realized that this was a practical impossibility.(143) Similarly, while it cannot yet be said what effect the indictment of Milosevic had in his downfall, it arguably did not result in his clinging stubbornly to power.

During the preparatory phase and in Rome, the issue of how to address amnesties was never discussed, in part due to pressure from human rights groups.(144) However, Article 53

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(139) *Ibid.*

(140) Norman Lamont was Chancellor of the Exchequer in the U.K. government of John Major.

(141) Norman Lamont, "This International Court Isn't Simply Unjust, It Is a Threat to Peace," *The Times* [London], 24 March 2001.

(142) Vesselin Popovski, "International Criminal Court: Necessary Steps Towards Global Justice," *Security Dialogue*, Vol. 31, No. 4, 2000, p. 405, par. 10.

(143) *Ibid.*, par 5.

(144) Arsanjani, *supra*, note 74, p. 38.

of the Statute does allow for the prosecutor to refuse to proceed with an investigation or prosecution if it would not serve the interests of justice. As discussed earlier, this decision is subject to review by the Pre-Trial Chamber.

4. American Due Process

The anti-ICC forces in the United States claim that the Rome Statute denies American citizens the due process rights guaranteed in the U.S. Constitution. Indeed, the proposed legislation entitled the American Servicemembers' Protection Act of 2000 states among its "findings":

> Any American prosecuted by the International Criminal Court will, under the Rome Statute, be denied many of the procedural protections to which all Americans are entitled under the Bill of Rights to the United States Constitution, including, among others, the right to trial by jury, the right not to be compelled to provide self-incriminating testimony, and the right to confront and cross-examine all witnesses for the prosecution.(145)

Yale law professor Ruth Wedgwood does not concur.(146) To begin with, the United States has often agreed to accept international judicial procedures that do not conform to its internal processes; for example, NAFTA and the WTO. Second, it is clear that the ICC does not in fact offend the American ideas of due process as various safeguards are entrenched in the Treaty, including, *inter alia*, the presumption of innocence,(147) the privilege against self-incrimination,(148) the right to cross-examine adverse witnesses(149) and the prosecutor's burden to prove guilt beyond a reasonable doubt.(150) Third, while it is true that trial by jury would not be

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(145) H.R. 4654 in the House and S. 2726 in the Senate, section 2, para. 6. The Protection Act, sponsored by Senator Jesse Helms, would prohibit all U.S. federal and state government entities from co-operating with the ICC in any manner. It would also prohibit the U.S. President from sending troops to participate in UN peacekeeping operations on the territories of states that have ratified the Rome Statute.

(146) The results of Professor Wedgwood's study are summarized in Teresa Young Reeves, "A Global Court? U.S. Objections to the International Criminal Court and Obstacles to Ratification," *Human Rights Brief*, Vol. 8, 2000, p. 15, at pp. 18-19.

(147) Rome Statute, Article 66.

(148) Rome Statute, Article 55(1).

(149) Rome Statute, Article 67(1)(e).

(150) Rome Statute, Article 66(3).

available, the crimes within the ICC's jurisdiction are generally those that would be administered by the American military's courts martial system or through extradition of an American national to a foreign jurisdiction. In the case of a court martial, there is no right to a jury trial.(151) In non-military matters, the guarantee of a jury exists only in relation to the state or district where the offence occurred.(152) Thus, an American who commits a crime abroad risks extradition to the site of the offence and has no constitutional guarantee to a jury trial.

5. The ICC Purports to Exercise Jurisdiction Over Non-Party Nationals

One of the concerns expressed by the Senator who introduced the American Servicemembers' Protection Act of 2000(153) has been that the Rome Treaty purports to exert jurisdiction over U.S. servicemen even if the United States has not ratified. He contends that this is a violation of the principles of international law. Current international law, however, provides the principle of universal jurisdiction over the crimes currently defined in the Rome Statute. Thus, any state has the right to prosecute genocide, war crimes and crimes against humanity regardless of jurisdictional links such as nationality and territoriality.(154) Why should the ICC be less competent than an individual state to prosecute serious international crime? Even in the United States, recent court cases have indicated an increased reliance on the principle of universality.(155) Since its beginnings in the eighteenth century, the United States has recognized the power of its courts to prosecute individuals for the act of piracy; and by participating in the

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(151) In fact, requirement of a Grand Jury indictment for serious crimes does not apply to the military in times of conflict. The Fifth Amendment of the U.S. Constitution states: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger."

(152) The Sixth Amendment states that "the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed."

(153) *Supra*, note 145.

(154) See generally Lawyers Committee for Human Rights, "Exercise of ICC Jurisdiction: The Case for Universal Jurisdiction," *International Criminal Court Briefing Series*, Vol. 1, No. 8, 1998. Also, Melissa K. Marler, "The International Criminal Court: Assessing the Jurisdictional Loopholes in the Rome Statute" (*supra*, note 52), where it is asserted that the principle of universal jurisdiction allows any state, not just a belligerent, to prosecute any war criminal without regard to the geographic, temporal or national dimensions of the offence.

(155) Kenneth Randall, "Universal Jurisdiction Under International Law," *Texas Law Review*, 1988, p. 785, at p. 839. Randall, endnote 304, lists the following examples: *Tel-Oren* v. *Libyan Arab Republic*, 726 F.2d 774, 781, 788 (D.C. Cir. 1984), cert. Denied, 470 U.S. 1003 (1985); *Filartiga* v. *Pena-Irala*, 630 F.2d 876, 890 (2d Cir. 1980); *In re Demjanjuk*, 612 F. Supp. 544, 555 (N.D. Ohio), aff'd sub nom. *Demjanjuk* v. *Petrovsky*, 776 F.2d 571 (6th Cir. 1985), cert. Denied 475 U.S. 1016 (1986).

IMT and IMTFE it has clearly recognized universal jurisdiction with respect to war crimes and crimes against humanity.(156) The American Restatement of Law confirms this:

> A state has jurisdiction to define and prescribe punishment for certain offences recognized by the community of nations as of universal concern, such as piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism, even where none of the bases of jurisdiction…is present.(157)

WHERE IS THE UNITED STATES COMING FROM?

Official U.S. opposition to various aspects of the Rome Treaty must be examined with the perspective of the U.S. departments of State and Defense in mind. At the time that the ILC was given a renewed mandate in 1989, the American attitude was one of mistrust towards any international tribunals that could potentially call into question U.S. actions and policy. In part, this mistrust arose from the International Court of Justice decision in the *Nicaragua* case,(158) which led the United States to withdraw from the compulsory jurisdiction of the World Court, and from fears that American military leaders could face charges for other controversial actions like the 1989 invasion of Panama or the 1986 bombing of Tripoli.(159) Michael Scharf, who as a State Department official at the time was responsible for the ICC issue, confirms that his assignment was to make the proposal "go away."(160) If not for the situation in the Balkans and the creation of the Security Council-controlled ICTY and then ICTR in the early 1990s, Scharf suggests that the ILC might still be debating the issue today.

In fact, some would argue that the U.S. delegation got almost everything it wanted in Rome. Not only was the crime of aggression set aside for the time being, but for the remaining offences within the Court's jurisdiction, there exists a two-track system of jurisdiction.

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(156) Johan D. van der Vyver, "Personal and Territorial Jurisdiction of the International Criminal Court," *Emory International Law Review*, Vol. 14, No. 1, 2000, p. 43.

(157) Restatement (Third) of Foreign Relations Law of the United States, Vol. 404 (1986).

(158) *Nicaragua* v. *U.S.*, 1984 I.C.J. Rep. 392, where the I.C.J. held that the United States had violated international law by training and arming the contra forces, by mining the territorial waters of Nicaragua and by launching attacks against Nicaraguan territory.

(159) Michael P. Scharf, "The Politics Behind the U.S. Opposition to the International Criminal Court," *supra*, note 62.

(160) *Ibid.*, par. 8.

The first track, which was favoured by the United States, involves Security Council referrals that create binding obligations on all states to comply with orders under Chapter VII of the UN Charter. Obviously, this track will automatically have available Security Council enforcement mechanisms, such as embargoes and the authorization of the use of force. The second track, involving state party referrals and *proprio motu* prosecutions, has no built-in process of enforcement but relies on the co-operation of state parties. And as noted by former ICTY/ICTR prosecutor Louise Arbour, despite the significant advances of the past decade, international justice is particularly dependent on the goodwill of states in matters as basic as accessing evidence.(161) Even with the Security Council-sponsored ad hoc tribunals, the prosecutor's office has suffered from inadequate enforcement powers.(162) One can easily imagine the difficulties that will be apparent when an investigation or prosecution occurs that does not enjoy Security Council backing. Thus, the real power is in the first track.(163)

Even so, protective measures were incorporated into the ICC Statute that limit even further the Court's jurisdiction on this second track. As discussed previously, these include: the notion of complementarity and the provisions of Article 18; Article 8 and the restriction of jurisdiction to "serious" war crimes that represent a "policy or plan"; the Pre-Trial Chamber process of Article 15, including a right of appeal; and the deferral provision of Article 16, although this was less than the outright veto power sought by the American delegation.

So why does the United States oppose the Court? The arguments advanced by David Scheffer, U.S. Ambassador-at-Large for War Crimes Issues, are summarized by Johan van der Vyver as follows: "Almost all international 911 calls are channeled to Washington, D.C., because the United States has become the primary peace-keeping force of our times; and American troops engaged in peace-keeping efforts abroad do not want to run the risk of prosecutions in an international criminal tribunal for acts committed in the interest of international peace and security."(164)

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(161) Arbour, "The Prosecution of International Crimes: Prospects and Pitfalls," *supra*, note 36, p. 19.

(162) Arbour, "The Need for an Independent and Effective Prosecutor in the Permanent International Criminal Court," *supra*, note 132, p. 216.

(163) Scharf, *supra*, note 62, par. 15.

(164) Johan D. van der Vyver, "Personal and Territorial Jurisdiction of the International Criminal Court," *supra*, note 156, p. 25.

In response to this argument, Justice Richard Goldstone, former ICTY/ICTR prosecutor, suggests that the United States appears to be saying: "In order to be peacekeepers…we have to commit war crimes."(165) Many other countries have troops involved in peacekeeping missions. Certainly in terms of UN peacekeeping activities, the American commitment of troops and personnel is relatively small. As of 31 March 2002, for instance, the United States was contributing only 730 personnel, made up mainly of police.(166) In contrast, Australia had 1,491 personnel dedicated to UN peacekeeping missions, Bangladesh had 6,006, Ghana had 2,470, Jordan had 1,867 and the Ukraine had 1,544.(167) Granted, the United States has other forces in the field as part of KFOR, the NATO-led international security force in Kosovo; but even in Kosovo, the Americans account for only 7,000 of the 50,000 NATO and non-NATO troops.(168) The United States is hardly in a unique position with respect to its troops facing foreign assignment.

It is also interesting to note that opposition to Senator Helms and his supporters is evident within the United States, even in the American military. Retired Major-General William L. Nash, who commanded the multinational "Task Force Eagle" in Bosnia and was also a UN administrator in Kosovo, stated: "My experience from Vietnam to Desert Storm to Bosnia tells me that you behave within the laws of war. The treaty does not change that. It is an endorsement of what we believe in."(169)

IS U.S. SUPPORT NEEDED?

American support may not be needed for the ICC to function effectively, but active opposition could be detrimental to the Court. The ICTY became effective only after 1995 when the United States, and its allies were engaged on the ground in Bosnia(170) and, as indicated elsewhere, funding is a major issue. Thus, American support could be a huge boost towards an

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(165) "Goldstone: US Stance Contradictory," *Terra Viva*, No. 3, 17 June 1998, p. 7.

(166) UN Peacekeeping Operations, "Monthly Summary of Contributors," 31 March 2002, available at http://www.un.org/Depts/dpko/dpko/contributors/mar02.htm.

(167) *Ibid.*

(168) See the KFOR website: http://www.nato.int/kfor/welcome.html.

(169) James Carroll, "How Helms Is Sparking a Real Crisis," *The Boston Globe*, 5 December 2000.

(170) Adam Roberts, *supra*, note 83.

effective international system of criminal justice. Given the current political situation in the United States, where the anti-ICC forces apparently hold sway, this is not likely to occur in the short term.(171) What ICC proponents realistically hope for now is that the United States will act with what some have called "benign neglect":(172) essentially, staying out of the way and not attempting to scuttle the Court. Possibly, when the ICC is functioning, the United States will then gradually move towards greater engagement. Louise Arbour has suggested that as the ICC receives some of its mandate from the Security Council, this could be an indirect way of having interim U.S. involvement (and money) when the United States is interested in a particular situation. In this scenario, American non-ratification would not be fatal.(173) However, if the United States starts taking a proactive stance against the Court, the prognosis could be considerably different. Aggressively antagonistic or punitive measures, such as those contained in the proposed American Servicemembers' Protection Act, could cripple the ICC if states refused to co-operate out of fear of American sanctions.

PARLIAMENTARY ACTION IN CANADA

Bill C-19, the *Crimes Against Humanity and War Crimes Act*, received Royal Assent on 29 June 2000, enabling Canada to ratify the ICC Treaty soon thereafter, on 7 July 2000. The Act implements Canada's obligations under the Rome Statute and enhances Canada's ability to prosecute war crimes and crimes against humanity under the *Criminal Code*.(174)

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(171) Some suggest that the U.S. attitude to a permanent international court comes from a lack of willingness to adhere to the rule of law in international affairs: e.g., John F. Murphy, "The Quivering Gulliver: U.S. Views on a Permanent International Criminal Court," *The International Lawyer*, Vol. 34, No. 1, p. 45.

(172) E.g., Bill Pace, Convenor of the Coalition for an International Criminal Court, as quoted in *The Boston Globe*, "Clinton Makes History as US Gives Last-minute Assent to War Crimes Court," 1 January 2001.

(173) Justice Norman Dyson and Metta Spencer, "Prosecuting War Criminals: An Interview with Madam Justice Louise Arbour of Canada's Supreme Court," *Peace Magazine*, 16 April 2000, available at http://www.peacemagazine.org/0004/arbour.htm.

(174) For detailed information on Bill C-19, see David Goetz, *Bill C-19: Crimes Against Humanity and War Crimes Act*, Legislative Summary LS-360E, Parliamentary Research Branch, Library of Parliament, Ottawa, 15 June 2000.

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