

JUSTICE IN AN UNCOOPERATIVE WORLD: ICTY AND ICTR FORESHADOW ICC INEFFECTIVENESS

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“Until the day when the international community can demonstrate that those who ultimately bear the responsibility for violations of the most fundamental rules for the protection of human beings] are brought to justice, history will repeat itself.”¹

I. INTRODUCTION

In a time of unprecedented crime against humanity, the need for justice, retribution, and reconciliation is crucial. Humanity’s response to crimes such as genocide, aggression, and war crimes must be “swift and just” in order to ensure that such atrocities never reoccur.² The International Criminal Court (ICC), preceded by the ad hoc International Criminal Tribunal for the former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR), is the only permanent international court capable of trying individuals on charges of genocide, war crimes, and other crimes against humanity.³ It is the culmination of decades of desire to dispense criminal justice during a conflict, and thus, possibly prevent heinous crimes through international agreement. The ICTY and ICTR, although successful to an extent, have foreshadowed some of the problems with which the ICC continues to grapple. These issues include inadequate funding, procedural delays, insufficient witness protection, and most importantly, state noncooperation in apprehending local criminals and enforcing ICC decisions.⁴ Unless the ICC obtains greater international support, including that of the United States, its idealistic purpose could remain just that—an abstract idea incapable of concrete implementation.

1. Hans Corell, *Nuremberg and the Development of an International Criminal Court*, 149 MIL. L. REV. 87, 100 (1995).

2. Kofi Annan, former U.N. Sec’y-Gen., Remarks at the United Nations Conference of Plenipotentiaries on the Establishment of an Int’l Criminal Court (June 15, 1998) transcript available at http://www.un.org/News/ossg/sg/stories/statments_search_full.asp?statID=46.

3. Int’l Criminal Court, ICC—About the Court, <http://www.icc-cpi.int/Menus/ICC/About+the+Court> (last visited Sept. 2, 2010).

4. See René Blattmann & Kirsten Bowman, *Achievements and Problems of the International Criminal Court*, 6 J. INT’L CRIM. JUST. 711, 711 (2008).

This paper is divided into four parts, including this introduction. Part II discusses the background of the issue by examining the creation and purposes of the three courts, as well as their core achievements thus far. The successes of the courts allude to the problems they face. Part III analyzes those problems, especially in relation to the lack of state cooperation. It is divided into three major subsections: (1) the challenges experienced by the ICTY and ICTR, how the ICC has addressed those challenges, and the dilemmas that have followed; (2) the importance of state cooperation to ICC success, the U.S. policy regarding the ICC, and the recalcitrant status of other states regarding the ICC; and (3) proposed solutions to the lack of state participation. Finally, Part IV warns against reliance on a court that is only theoretically effective. In order to grant justice to countless victims worldwide, the abstract ideal of an international court must become an operational reality.

II. BACKGROUND

A. *Creation and Purpose*

1. *International Criminal Tribunal for the former Yugoslavia*

When the world could no longer ignore the blatant atrocities scarring the former Yugoslavia, the ICTY emerged as a beacon of hope for the protection of human rights. The U.N. Security Council established the tribunal to rectify the indescribable violations of humanitarian law occurring within former Yugoslavia, especially in the Republic of Bosnia.⁵ Acting under Chapter VII of the U.N. Charter,⁶ the Security Council passed Resolution 827 on May 25, 1993 and thus created an ad hoc subsidiary of the United Nations responsible for prosecuting

5. Rachel S. Taylor, *Tribunal Law Made Simple*, INST. FOR WAR & PEACE REPORTING, <http://www.globalpolicy.org/component/content/article/163/29333.html> (last visited Sept. 2, 2010). The Security Council based its decision on reports of “mass killings, massive, organized and systematic detention and rape of women, and the continuance of the practice of ‘ethnic cleansing[.]’ including for the acquisition and the holding of territory[.]” S.C. Res. 827, U.N. Doc. S/RES/827(May 25, 1993).

6. Chapter VII of the U.N. Charter allows the Security Council to take action to restore international peace and security. U.N. Charter art. 39.

crimes committed on the territory of former Yugoslavia since January 1, 1991.⁷

The ICTY, whose jurisdiction is binding on all U.N. Member States, may prosecute any individual who allegedly committed genocide, crimes against humanity, war crimes, or grave breaches of the Geneva Convention of 1949.⁸ The prosecutor, elected by the Security Council for a renewable four-year term, may initiate an investigation based on information received from any source.⁹ All states must cooperate with the tribunal with regard to an indictee's surrender, transfer, or detention.¹⁰ Upon conviction by a maximum of nine judges, a defendant may, at most, receive a sentence of life imprisonment.¹¹

2. *International Criminal Tribunal for Rwanda*

Building on the platform of the ICTY, the Security Council passed Resolution 955 on November 8, 1994 and created the ICTR.¹² In so doing, the Security Council expressed its condemnation for genocide and other serious violations of international humanitarian law that occurred in Rwanda in 1994.¹³ The express purpose of the resolution was not only the effectuation of justice, but also national reconciliation and the "maintenance of peace in the region."¹⁴

The ICTR, like the ICTY, is composed of three bodies: the Chambers and the Appeals Chamber, the Office of the Prosecutor, and the Registry, which provides administrative support to the other two branches.¹⁵ The prosecutor may initiate

7. Stojanka Mirceva, *Why the International Criminal Court is Different*, PEACE & CONFLICT MONITOR, Jan. 26, 2004, available at <http://www.globalpolicy.org/intljustice/icc/2004/0126different.htm>.

8. Taylor, *supra* note 5.

9. *Id.*

10. *Id.*

11. *Id.*

12. S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994).

13. Int'l Criminal Tribunal for Rwanda, General Information, <http://69.94.11.53/default.htm> (follow "About the Tribunal" hyperlink) (last visited Sept. 2, 2010).

14. *Id.*

15. *Id.*; see also Taylor, *supra* note 5 (describing the composition of the ICTY). Minute organizational differences exist between the two tribunals, such as the

investigation against an individual for acts of “genocide, crimes against humanity, [and] violations of Article 3 common to the Geneva Conventions and of Additional Protocol II”¹⁶ However, in order to be prosecutable, the crime must have occurred in the context of an armed conflict, and carried out for national, political, ethnic, racial, or religious reasons.¹⁷ State cooperation is invaluable for access to witnesses and material evidence, as well as for the enforcement of prison sentences.¹⁸

3. *International Criminal Court*

Within a war-torn atmosphere, it became necessary to create a permanent international court uninhibited by time and geographical restraints.¹⁹ On July 17, 1998, the adoption by 120 states of the Rome Statute²⁰ legitimized both the ICC and its jurisdiction over the “most serious crimes of international concern”²¹ Such offenses incorporate genocide, war crimes, and crimes against humanity (including those against U.N. and

procedural jurisdiction of each. Though ICTY proceedings take place only in The Hague, Netherlands, ICTR trials occur in both Tanzania and Rwanda. Int’l Criminal Tribunal for Rwanda, *The Tribunal at a Glance*, <http://69.94.11.53/ENGLISH/factsheets/1.htm> (last visited Sept. 2, 2010); Int’l Criminal Tribunal for the Former Yugo., *About the ICTY*, <http://www.icty.org/sections/AbouttheICTY> (last visited Sept. 2, 2010).

16. Int’l Criminal Tribunal for Rwanda, *supra* note 13.

17. Mirceva, *supra* note 7.

18. Int’l Criminal Tribunal for Rwanda, *International Co-operation with the Tribunal*, <http://69.94.11.53/ENGLISH/factsheets/6.htm> (last visited Sept. 2, 2010); *see also* Letter from Kenneth Roth, Executive Dir. of Human Rights Watch, to Members of the U.N. Security Council (Oct. 25, 2002), <http://www.hrw.org/en/news/2002/10/25/action-urged-regarding-non-cooperation-ictr-and-icty> (explaining the effects of Rwanda’s lack of cooperation in facilitating the travel of witnesses and providing access to documentary materials).

19. Int’l Criminal Court, *ICC—About the Court*, *supra* note 3.

20. *Id.*

21. Rome Statute of the International Criminal Court, art. 1, July 17, 1998, 2187 U.N.T.S. 3, *available at* <http://untreaty.un.org/cod/icc/statute/rome.htm> [hereinafter Rome Statute of the ICC].

associated personnel).²² The Rome Statute entered into force on July 1, 2002, after official ratification by sixty countries.²³

In stark contrast to the supremacy of the ICTY and ICTR over national courts, the ICC abides by the principle of complementarity to national criminal justice systems.²⁴ In essence, the court “is designed as a ‘court of last resort’ that backs up national jurisdictions rather than [overpowering] them.”²⁵ Additionally, the ICC is not considered a “foreign” court, but instead an independent judicial body composed of legal experts and governed by chosen procedures from Member States.²⁶

The ICC may initiate prosecution in three ways: 1) reference by State Parties; 2) request by the U.N. Security Council; and 3) self-initiation by the prosecutor.²⁷ The ICC seeks to effectively dispense justice during an ongoing conflict, and to date, it has investigated crimes committed in the Democratic Republic of Congo (DRC), northern Uganda, Darfur, the Central African Republic (CAR), and the Republic of Kenya.²⁸ Interestingly, the ICC has yet to conclude its first trial.²⁹

22. Int’l Criminal Court, Crimes within the Court’s Jurisdiction, <http://www.un.org/icc/crimes.htm> (last visited Sept. 2, 2010). There is also support for the inclusion of the crime of “aggression” in the court’s jurisdiction, but the crime has not been adequately defined. *Id.*

23. Int’l Criminal Court, ICC—About the Court, *supra* note 3.

24. Mirceva, *supra* note 7.

25. Nicholas Waddell & Phil Clark, *Introduction, in* COURTING CONFLICT? JUSTICE, PEACE AND THE ICC IN AFRICA 7, 8 (Nicholas Waddell and Phil Clark eds., 2008). For example, although the ICC’s Chief Prosecutor Luis Moreno Ocampo stated that he wants to move quickly against the perpetrators of Kenya’s 2007 post-election violence, a 2008 deal has allowed for a local tribunal to be set up to prosecute those behind the violence. *ICC Seeking Speedy Kenya Trials*, BBC NEWS, Nov. 7, 2009, <http://news.bbc.co.uk/2/hi/africa/8347999.stm>.

26. Chimène Keitner, *Crafting the International Criminal Court: Trials and Tribulations in Article 98(2)*, 6 UCLA J. INT’L L. & FOREIGN AFF. 215, 218 (2001).

27. Int’l Criminal Court, How the Court Works, <http://www.icc-cpi.int/Menus/ICC/About+the+Court/ICC+at+a+glance/How+the+Court+Works.htm> (last visited Sept. 2, 2010).

28. Waddell & Clark, *supra* note 25, at 7. *See also* Media Advisory, Coalition for the Int’l Criminal Court, ICC Opens Kenya Investigation (Mar. 31, 2010) (on file with author).

29. Nick Grono, *The International Criminal Court: Success or Failure?*, OPEN DEMOCRACY, June 9, 2008, <http://www.globalpolicy.org/intljustice/icc/2008/>

In theory, the ICC enforces customary international law and adheres to guarantees of due process and the right to a fair trial.³⁰ Although it may be an idealistic alternative to military intervention,³¹ the ICC “can never be stronger than the political commitment” of the treaty signatories.³² In fact, because it has no enforcement mechanism of its own,³³ the ICC’s success depends on the assistance of the countries in which it is operating.³⁴ The ICC is truly a product of its support system.

B. Core Achievements

1. International Criminal Tribunal for the former Yugoslavia

The ICTY represents an investment in the peace and future of the Balkans, and it has had notable success. The ICTY has spearheaded the shift from impunity to accountability by personalizing guilt, even within various heads of state.³⁵ Slobodan Milosevic, former President of Serbia, was the first former head of state to be tried in an international war crimes tribunal.³⁶ Also, former Bosnian Serb leader Radovan Karadzic was extradited to The Hague on July 31, 2008, and after thirteen years in hiding, he currently faces criminal prosecution.³⁷

As an added benefit, ICTY trials have allowed the emergence of a more complete historical record of the conflict in

0609success.htm.

30. CITIZENS FOR GLOBAL SOLUTIONS, WHAT IS THE INTERNATIONAL CRIMINAL COURT? (2005) 2, available at http://globalsolutions.org/files/general/what_20is_20icc.pdf.

31. *Id.* at 2.

32. Paul W. Kahn, *Why the United States is so Opposed*, CRIMES OF WAR PROJECT: THE MAG., Dec. 2003, http://www.crimesofwar.org/icc_magazine/icc-kahn.html.

33. Waddell & Clark, *supra* note 25, at 10.

34. Grono, *supra* note 29.

35. Int’l Criminal Tribunal for the Former Yugo., *Bringing Justice to the Former Yugoslavia: The Tribunal’s Five Core Achievements*, at 2 (2004), available at http://ulm.katholikentag.de/data/kt_aktuell/manuskripte/3732.doc [hereinafter *The Tribunal’s Core Achievements*].

36. Gary Bass, *Milosevic in the Hague*, FOREIGN AFF., May/June 2003, available at <http://www.foreignaffairs.org/20030501faessay11221/gary-j-bass/milosevic-in-the-hague.html>.

37. See *Radovan Karadzic Appears at Hague Hearing*, CNN.COM, Oct. 28, 2008, <http://www.cnn.com/2008/WORLD/europe/10/28/karadzic.hearing/index.html>.

the Balkans.³⁸ The reality and atrocious nature of the crimes can no longer be disputed.³⁹ The tribunal has also vindicated many victims and witnesses who have had an opportunity to testify.⁴⁰ Such witnesses have aided proceedings against 161 indicted individuals, sixty-two of whom have been formally sentenced.⁴¹

In its seventeen years of existence, the ICTY has made great advancements in the realm of international criminal law. As “the first truly international war crimes tribunal[,]” the ICTY created an independent system of law comprising of elements from various criminal procedure traditions.⁴² It set legal precedents by specifying crucial elements of the crime of genocide⁴³ and broadening the definitions of enslavement and persecution as parts of crimes against humanity.⁴⁴ The tribunal “identified . . . the modern doctrine of . . . command responsibility, clarifying that a formal superior-subordinate relationship is not [a prerequisite of such] responsibility.”⁴⁵ Also, the ICTY contributed to procedural law in the areas of confidentiality and disclosure of information relevant for national security of states, guilty pleas, and affirmative defenses available to the accused.⁴⁶

Although the ICTY has made formidable strides in altering “the way that the world looks at its leaders[,]”⁴⁷ it has only prosecuted a few top-level perpetrators.⁴⁸ Thus, even though the

38. The Tribunal’s Core Achievements, *supra* note 35, at 3.

39. *Id.*

40. *See id.* at 4.

41. UN ICTY, *Key Figures of ICTY Cases*, available at <http://www.icty.org/sections/TheCases/KeyFigures> (last visited Sept. 2, 2010).

42. *See* The Tribunal’s Core Achievements, *supra* note 35, at 5–6.

43. *Id.* at 5. Specifically, the ICTY expanded the definition of the target of such a crime “to refer to a group or part of a group of individuals.” *Id.*

44. *Id.*

45. *Id.*

46. *Id.* at 6.

47. Posting of Meredith Moore to The Big Picture, <http://hir.harvard.edu/blog/> (Mar. 20, 2006, 10:52 p.m.).

48. *Looking for Justice: The War Crimes Chamber in Bosnia and Herzegovina: Introduction*, 18 HUM. RTS. WATCH 1, 1 (2006).

ICTY touts an impressive list of accomplishments, the tribunal's shortcomings undermine its potential for success.

2. *International Criminal Tribunal for Rwanda*

The ICTR is the world's attempt to absorb the lessons of the Rwandan genocide and chisel away at a notorious culture of impunity prevalent in many African countries.⁴⁹ The tribunal symbolizes the hope of accountability on the continent.

Trials at the ICTR represent "the first time that high-ranking individuals have been called to account before an international court of law for massive violations of human rights in Africa."⁵⁰ Because the tribunal has focused its concentration "on the prosecution of those who bear the greatest responsibility for the tragic events [that have] occurred in Rwanda,"⁵¹ men such as Jean Kambanda, the former Prime Minister of Rwanda, have been convicted of the crime of genocide.⁵² Such high-profile cases have had notable effects on international law as well. For example, in making the crime of rape a part of former-mayor Jean-Paul Akayesu's conviction, the ICTR held that rape may constitute genocide if committed with intent to destroy a particular group.⁵³ The tribunal thus not only convicted and sentenced two prominent former government officials, it also left a lasting impression on international criminal law.⁵⁴

Throughout its existence, the ICTR has taken numerous steps to aid the Rwandan people. The tribunal established a Witness and Victims Support Section to "provid[e] impartial support and protection services to all witnesses and victims

49. Int'l Criminal Tribunal for Rwanda, *supra* note 15

50. *Id.*

51. *Id.*

52. *Id.* This case is notable because it represents the first time that a head of government was convicted of genocide. *Rwanda Genocide Appeal Fails*, BBC NEWS, Oct. 19, 2000, <http://news.bbc.co.uk/2/hi/africa/979279.stm>. It is also "the first time that an accused person acknowledged his guilt for the crime of genocide before an international criminal tribunal." Int'l Criminal Tribunal for Rwanda, *supra* note 13.

53. *When Rape Becomes Genocide*, NYTIMES.COM, Sept. 5, 1998, <http://www.nytimes.com/1998/09/05/opinion/when-rape-becomes-genocide.html>.

54. *See id.* (noting that Akeyasu's conviction advanced the world's legal treatment of rape and sexual violence).

called to testify.”⁵⁵ The ICTR has also worked to ensure that the Rwandan people have a clear understanding of its work product by embarking on an outreach program using various communication resources.⁵⁶ In the future, the tribunal hopes to extend its authority to provincial levels in order to promote human rights and foster the culture of accountability.⁵⁷

The backbone of any court is the state. In the case of international criminal law, the cooperation of states is indispensable to a tribunal’s success. The ICTR has had considerable and progressively greater success in obtaining multi-state cooperation in several respects.⁵⁸ U.N. Member States have assisted the ICTR “by arresting accused persons, providing prison facilities . . . , facilitating the transfer of witnesses . . . , and by making voluntary donations of financial and other material assistance.”⁵⁹ In part because of such support from African countries, the ICTR has, as of September 2010, handed down thirty-four judgments.⁶⁰ Twenty-one trials are currently in progress, with three additional suspects awaiting trial.⁶¹

Nevertheless, more stands to be accomplished. Specifically, the prosecutor suspended the inspection of the Rwanda Patriotic Army (RPA) because of Rwanda’s lack of cooperation in witness travel.⁶² Such severe threats to the prosecutor’s independence

55. Int’l Criminal Tribunal for Rwanda, *supra* note 13. As a collateral benefit, the program also provides “psychological counseling and access to medical care for witnesses . . . who are also victims of sexual assault.” *Id.*

56. *Id.* Such channels include the mass media, information seminars, and interpersonal communication toward a targeted audience. *Id.*

57. *Id.*

58. Int’l Criminal Tribunal for Rwanda, International Cooperation with the Tribunal, <http://69.94.11.53/ENGLISH/factsheets/6.htm> (last visited Sept. 2, 2010).

59. *Id.* The ICTR has received such support from “Tanzania, Cameroon, Kenya, Benin, Cote d’Ivoire, Namibia, Togo, Zambia, Burkina Faso, Mali, Democratic Republic of Congo, South Africa, Belgium, Switzerland, the Netherlands, and the United States.” *Id.*

60. Int’l Criminal Tribunal for Rwanda, Status of Cases, <http://www.unictl.org/Cases/tabid/204/Default.aspx> (last visited Sept. 2, 2010). The aforementioned thirty-four judgments do not include ten cases that are still pending on appeal and eight cases of acquittal. *Id.*

61. *Id.*

62. Letter from Kenneth Roth, *supra* note 18.

threaten the impartiality and effectiveness of any future investigations, and consequentially, of any future convictions.⁶³

3. *International Criminal Court*

Because the ICC has yet to conclude its first trial,⁶⁴ its achievements remain theoretical. Built upon the notion that “international criminal law is a branch of law that, more than any other, is based on human folly, human wickedness, [and] human aggressiveness[,]” the ICC represents the world’s response to such behavior.⁶⁵ The ICC was created to deal with crimes stemming from the dark side of human nature, and it was “intended to . . . bring to fruition the modern, Kantian model of the international community.”⁶⁶

First envisioned in 1872 by Gustave Moynier, one of the Swiss founders of the International Committee of the Red Cross, the ICC embodied the “idea of taking the power to judge certain crimes away from (warring) states, and putting it into the hands of an international tribunal.”⁶⁷ Although this initiative did not generate much support at the time, legal organizations and scholars allowed it to persist.⁶⁸ Global civil society involvement, especially that of the Coalition for an International Criminal Court (CICC), strengthened the involvement of people in negotiations for the establishment of the ICC.⁶⁹ Ethnic cleansing in Yugoslavia and the genocide in Rwanda triggered public outrage and the Security Council’s establishment of ad hoc

63. *Id.*

64. Grono, *supra* note 29.

65. Antonio Cassese, *A Big Step Forward for International Justice*, CRIMES OF WAR PROJECT: THE MAGAZINE, Dec. 2003, http://www.crimesofwar.org/icc_magazine/icc-cassese.html.

66. *Id.* Such a model is based on the notion that “whenever individuals resort to violence that is contrary to some fundamental legal standards of the world community, they must be held [account]able.” *Id.*

67. Marlies Glasius, *How Activists Shaped the Court*, CRIMES OF WAR PROJECT: THE MAGAZINE, Dec. 2003, http://www.crimesofwar.org/icc_magazine/icc-glasius.html.

68. *Id.* Such organizations included the International Law Association and the World Federalist Movement, as well as large humanitarian institutes like Amnesty International. *Id.*

69. *See id.*

tribunals for the two countries.⁷⁰ Not only did these tribunals pioneer the enforcement of international humanitarian law and the development of international criminal justice, they also opened the door for other forums to fight mass violations of human rights.⁷¹ “The success of these courts fed a growing sense among the international community that a more permanent forum to address the most egregious atrocities was needed.”⁷² After decades of contemplation, the ICC was born.

During this era of the most brutal violence in the history of mankind, the hope of a court that provides the right to compensation, restitution, and rehabilitation to victims is unprecedented.⁷³ In fact, the ICC is widely considered to be a victim-sensitive criminal tribunal because of its innovative endeavors to inform victims of relevant decisions, provide victims with legal aid, protection, support, and assistance, and allow for victim participation and reparation.⁷⁴ In practice, however, challenges exist in making such victim participation effective, including various security concerns, lack of legal aid during the application phase, and modalities of participation.⁷⁵

In utilizing the principle of complementarity,⁷⁶ “the ICC enables States to pool resources and cooperate in promoting . . .

70. *Id.*

71. Ban Ki-moon, U.N. Sec’y-Gen., Remarks at the Gen. Debate of the Sixth Assembly of State Parties to the Rome Statute of the Int’l Criminal Court (Dec. 3, 2007) transcript available at http://www.un.org/apps/news/infocus/sgspeeches/search_full.asp?statID=158. Primarily, “[t]he Special Court for Sierra Leone and the Extraordinary Chambers in the Courts of Cambodia followed the [example set by] the original tribunals [in bringing justice] and closure to the victims of unspeakable crimes.” *Id.*

72. *Id.*

73. Int’l Criminal Court, Bringing Justice to the Victims, (May 2008), <http://www.un.org/icc/justice.htm>. “Article 75 of the draft statute . . . provides for forfeiture of proceeds, property[,] and assets obtained by criminal conduct . . . [a]rticle 73 . . . addresses the issue of reparations to victims.” *Id.*

74. Mariana Goetz, *The International Criminal Court and its Relevance to Affected Communities*, in *COURTING CONFLICT? JUSTICE, PEACE AND THE ICC IN AFRICA* 65, 66 (2008).

75. *Id.* at 69–70.

76. See Keitner, *supra* note 26, at 221 (explaining that though ICC Member States have primary jurisdiction, if they are unwilling or unable to carry out their obligation to investigate and prosecute certain crimes, the ICC has complementary jurisdiction to do

international accountability”⁷⁷ If such a method proves ineffective, the ICC’s possession of universal jurisdiction (over signatories to the Rome Statute) allows for the theoretical exercise of universal condemnation of various atrocities.⁷⁸ On May 24, 2008, Jean-Pierre Bemba, the former vice-president of the DRC, was seized by Belgian police in Brussels under charges of war crimes and crimes against humanity resulting from acts conducted by his troops in the CAR.⁷⁹ His arrest illustrates the ICC’s denunciation of Bemba’s previous actions, as well as its quick capability to effectuate such disapproval.⁸⁰

The ICC’s core achievements thus far lie in the court’s ability to effectuate justice for violations of international law. Because there can be no peace without justice,⁸¹ the court’s purpose is ambitious. However, with the court’s first trial placed on hold⁸² and numerous warrants issued by the court still outstanding,⁸³ the ICC has yet to prove itself.

III. ANALYSIS

A. Problems Encountered by the Courts

1. Difficulties Obstructing the Success of the ICTY & the ICTR

The Security Council’s ad hoc tribunals have faced problems that have significantly interfered with their potential for realization of otherwise idealistic goals. Although each tribunal has its own array of problems, several common threads exist.

so in their stead).

77. *Id.* at 227.

78. *Id.*

79. Grono, *supra* note 29.

80. *See id.* Bemba was arrested for his role as a leader of a rebel group responsible for offenses in the CAR. *Id.*

81. Ki-moon, *supra* note 71.

82. Rachel Irwin, *Latest News: Two Lubanga Judges Will Preside Over Bemba trial*, Nov. 10, 2009, <http://www.lubangatrial.org/2009/11/10/latest-news-two-lubanga-judges-will-preside-over-bemba-trial/>. *See also* Coalition for the Int’l Criminal Court, Cases & Situations, available at <http://www.iccnw.org/?mod=bemba> (last visited Sept. 2, 2010).

83. Waddell & Clark, *supra* note 25, at 8.

The tribunals have primarily encountered problems in the realm of state cooperation—or, more specifically, its conspicuous absence. Both the ICTY and the ICTR require state assistance in order to substantiate allegations, obtain evidence, and locate, arrest, and try defendants.⁸⁴ Major issues arise with respect to defendants who are residing as citizens in countries that do not permit the extradition of nationals.⁸⁵ Such local rules, in combination with other questionable dealings,⁸⁶ prevent and delay the capture and trial of such criminal masterminds as Radovan Karadzic and Ratko Mladic.⁸⁷ Additionally, the former Yugoslav republics and Rwanda have exhibited a persistent unwillingness to provide their respective tribunals with access to documentary materials.⁸⁸ This lack of access is a great detriment to the cases made by the tribunals' prosecutors.⁸⁹ Such secrecy prevents the delivery of both "truth and restitution to the victims."⁹⁰

In addition to providing little to no aid to their respective tribunals, Rwanda and the former Yugoslav republics have not

84. See generally MacArthur Foundation, Remarks on the Status and Future of State Cooperation with the ICTR, OTP Presentation to the NPA Forum (Nov. 26–28, 2008), available at http://www.ictor.org/ENGLISH/international_cooperation/papers_presented/Future-of-State-Cooperation.pdf.

85. The ban on the extradition of nationals is entrenched in the respective constitutions of Croatia, Serbia, and Montenegro. Maja Jurišić, *Croatia Negotiating Over Jovic's Extradition*, Apr. 28, 2009, <http://dalje.com/en-croatia/croatia-negotiating-over-jovic-extradition/254246>.

86. Allegations exist that a secret deal signed by Radovan Karadzic and American negotiator Richard Holbrooke called for Karadzic's withdrawal from political and public life in exchange for immunity from ICTY prosecution. *Hague Probes Karadzic 'Deal' Claim*, BBC NEWS, Oct. 26, 2007, <http://news.bbc.co.uk/2/hi/europe/7062288.stm>.

87. See *id.*

88. Letter from Kenneth Roth, *supra* note 18; see also *Secrecy Still Shrouds Srebrenica*, BBC NEWS, Oct. 22, 2009, <http://news.bbc.co.uk/2/hi/programmes/newsnight/8321388.stm> ("All those interested in the topic need access to the best material and that's been denied them by Serbia in its calculated use of the Yugoslavian tribunals procedures to block production of documents, and then to avoid those documents being made available publicly." (quoting Sir Geoffrey Nice)).

89. Letter from Kenneth Roth, *supra* note 18. The materials document the "perpetrat[ion] of serious breaches of international humanitarian law and crimes against humanity." See *id.* (internal quotation marks omitted).

90. *Secrecy Still Shrouds Srebrenica*, *supra* note 88.

carried out effective domestic war crime trials.⁹¹ Specifically, the courts of former Yugoslavia are replete with “bias on the part of judges and prosecutors, poor case preparation[,] . . . inadequate cooperation from the police in the conduct of investigations, [and] poor cooperation between the states on judicial matters . . .”⁹² Furthermore, the lack of systematic and effective witness protection mechanisms have plagued trial success.⁹³ In Bosnia and Herzegovina, the domestic court’s “location in the country where the crimes occurred and the particular challenges associated with concealing a witness’s identity in a [relatively] small country” have impeded effective protection.⁹⁴ In Rwanda, the travel of witnesses to both domestic courts and the ICTR has been severely strained.⁹⁵ Such obstacles have not only detracted from the potential for domestic trial success, but they have also served as further burdens to emotionally depleted victims.

Additionally, the ad hoc tribunals have tackled continuing trial delays that have made success over war criminals and retribution for victims an apparently unattainable goal. In the ICTY, Slobodan Milosevic’s genocide trial “dragged” on before his death.⁹⁶ Judges fear that Radovan Karadzic’s trial will follow suit; his trial has been plagued by slow progress and has gone virtually nowhere since Karadzic was incarcerated.⁹⁷ Some

91. See Human Rights Watch, Summary, (Oct. 2004), <http://www.hrw.org/reports/2004/icty1004/2.htm>.

92. *Id.*

93. *Id.*

94. *Looking for Justice: The War Crimes Chamber in Bosnia and Herzegovina: Witness Protection and Support*, 18 HUM. RTS. WATCH 29, 29 (Feb. 2006).

95. Letter from Kenneth Roth, Executive Director, Human Rights Watch, to Justice Hassan B. Jallow, Prosecutor (May 26, 2009), available at <http://www.hrw.org/node/83536>. The Rwandan government has refused to allow witnesses to travel to courts in order to testify. ICTR Defence Conference, The Hague, Netherlands, Nov. 14–15, 2009, *ICTR Witness Protection?* (prepared by Allison Turner).

96. *Karadzic Warned to Get a Move on*, BBC NEWS, Oct. 28, 2008, <http://news.bbc.co.uk/2/hi/europe/7695026.stm>.

97. *Id.*; see also *Karadzic Boycotts Start of Trial*, BBC NEWS, Oct. 26, 2009, <http://news.bbc.co.uk/2/hi/europe/8325096.stm> (stating that Karadzic failed to appear at his trial because he believed he still needed “at least nine months to prepare his defense”); Letter from Radovan Karadzic to the Honorable O-Gon Kwon, Presiding Judge (Nov. 1, 2009) (stating, in Karadzic’s words, the reasoning behind his failure to appear at

claim that accusations such as genocide cannot be addressed in a few weeks, and that the court can do nothing to speed up the process.⁹⁸ Although that may be true to an extent, it is questionable whether justice can be effectively served decades after the perpetration of war crimes.

The ICTR, which has faced similar challenges regarding the pace of trial and pre-trial proceedings, may serve as an example of possible inroads that may be made to increase the speed of proceedings.⁹⁹ However, both tribunals remain infamous for the delays, and much more must be done to expedite the process and repair tribunal effectiveness.

Resource shortages have plagued the success of the tribunals as well.¹⁰⁰ In determining a suitable budget for the courts, the United Nations has sought to balance the need of the tribunals to “implement their proposed work programme but seek to impose suitable budgetary discipline.”¹⁰¹ Despite its lofty goals, the United Nations has, on several occasions, been unable to reach its target budget because of the lack of member contributions.¹⁰² That lack of donations has led to the courts hiring fewer prosecutors and constructing smaller courtrooms than necessary to ensure expeditious proceedings.¹⁰³

Although both courts have theoretically paved the way for the creation of the ICC and thus stand as examples of progress in the international criminal realm, much more remains to be

his trial), http://news.bbc.co.uk/2/shared/bsp/hi/pdfs/02_11_09_karadzic_letter.pdf.

98. Moore, *supra* note 47.

99. See Int'l Criminal Tribunal for Rwanda, *supra* note 13. Such inroads include deciding motions based on briefs alone, replacing judge panels with single judges, dealing with motions orally, using simultaneous interpretation, and the construction of additional courtrooms. *Id.*

100. See Gian Luigi Valenza, H.E. Ambassador, Statement on Behalf of the European Union to the Fifty-Eighth Session of the Gen. Assembly of the United Nations, Fifth Committee (Nov. 24, 2003) *transcript available at* http://www.europa-eu-un.org/articles/en/article_3040_en.htm.

101. *Id.*

102. *Id.* In 2003, “no fewer than 122 U.N. members failed to contribute anything for either tribunal.” *Id.*

103. *Looking for Justice: The War Crimes Chamber in Bosnia and Herzegovina: The Office of the Prosecutor*, 18 HUM. RTS. WATCH 8, 12 (Feb. 2006); see Int'l Criminal Tribunal for Rwanda, *supra* note 13 and accompanying text.

done in order for idealistic ideas to become concrete realities in the cases of former Yugoslavia and Rwanda.

2. ICC's Improvements on the ICTY and the ICTR

Although it is still a work in progress, the ICC has nevertheless made several advancements regarding the issues faced by its predecessor tribunals.

The “multilateral and treaty[-]based establishment of the ICC, to some extent, provides political independence in the prosecution of international crimes.”¹⁰⁴ This notion is exemplified by the prosecutor’s election—a secret ballot by an absolute majority of members—and the requirement that the prosecutor act as an impartial organ of Justice with a duty to investigate both sides of a case equally.¹⁰⁵ These requirements lessen the bias prevalent in ICTY and ICTR investigations.

Compared to its predecessors, the ICC has “all of the ingredients of a victim-sensitive criminal tribunal.”¹⁰⁶ The court has established a Victims and Witnesses Unit to provide legal advice, trauma counseling, and medical attention to victims and witnesses, with special attention granted to children.¹⁰⁷ The ICC’s mandate and its outreach program have informed victims about significant proceedings and engaged them in meaningful ways.¹⁰⁸ These novel provisions for victim involvement have given such persons “forms of moral and legal recognition [far] more valuable than [any] financial compensation” they could receive.¹⁰⁹

Moreover, the ICC is far more adept at budget management than are the ICTY and the ICTR. During the first five years of the ICC’s establishment, the budget process has been successful in providing the court with necessary resources that have

104. Mirceva, *supra* note 7.

105. *Id.*; see also Rome Statute of the ICC, *supra* note 21, art. 54 (stating that the ICC prosecutor shall investigate incriminating and exonerating circumstances equally).

106. Goetz, *supra* note 74.

107. Bringing Justice to the Victims, *supra* note 73.

108. Goetz, *supra* note 74, at 65.

109. *Id.* at 66 (summarizing NAOMI ROHT-ARRIAZA, *Reparations in the Aftermath of Repression and Mass Violence*, in STOVER & WEINSTEIN, *MY NEIGHBOR, MY ENEMY: JUSTICE AND COMMUNITY IN THE AFTERMATH OF MASS ATROCITY* 1, 126–27 (2004)).

enabled the court to conduct preliminary analyses, carry out investigations, and commence its first trial.¹¹⁰ Although concerns exist regarding some aspects of the budget preparation, it is important to note that “the budgets requested by the [ICC] have been overwhelmingly supported by state parties”¹¹¹

The Rome Statute departs from the ad hoc tribunal statutes in foundational aspects as well. The Rome Statute provides a detailed definition of the crimes against humanity, as well as enlarging the overall list of such crimes to include enforced disappearance of persons, apartheid, and forcible transfer of a population.¹¹² The Rome Statute has also advanced international law regarding sexual violence.¹¹³ In contrast to the ICTY and the ICTR, the ICC can assess and award damages to victims “be it restitution of property, medical assistance[,] or compensation for harm suffered.”¹¹⁴

Despite these advancements over its predecessors, the ICC continues to face its own problems, with lack of state cooperation at the top of the list.

3. *ICC Dilemmas*

Even at its young age, the ICC has encountered several major setbacks. Although much of humanity’s hope has been placed in this criminal court of last resort, elemental barriers must be conquered before the ICC is to reach its true potential.

The ICC’s legitimacy is most undermined by the absence of prosecutions of state actors.¹¹⁵ By necessity, the court hopes to avoid jeopardizing the relationships upon which it relies for its

110. Amnesty Int’l, *International Criminal Court Recommendations For Developing An Effective Budget Process*, Apr. 27, 2007, <http://asiapacific.amnesty.org/library/Index/ENGIOR400082007?open&of=ENG-385>.

111. *Id.*

112. Mirceva, *supra* note 7.

113. *Id.* The Rome Statute includes acts of sexual slavery, forced prostitution, forced pregnancy, forced sterilization, or any form of sexual violence of comparable gravity as crimes of sexual violence. *Id.*

114. See Goetz, *supra* note 74, at 66.

115. See Allison Martson Danner, *Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court*, *AM. J. INT’L. L.*, 518–34 (2003).

daily operations¹¹⁶ because the ICC only has power over those countries whose leaders have become signatories to the Rome Statute.¹¹⁷ Should the ICC prosecutor choose to investigate a country's leader, he may in turn alienate the country's very participation (and that of others) within the ICC's jurisdiction. This circular reasoning is being tested by the Darfur situation. On March 4, 2009, the ICC issued its first warrant against a sitting head of state when it demanded the arrest of Sudanese President Omar al-Bashir on charges of war crimes and crimes against humanity in Darfur.¹¹⁸ In doing so, however, the ICC enraged government supporters and alienated African and Arab ICC signatories that believe the ICC action will only increase tension in Sudan.¹¹⁹ The ICC warrant may indeed prove to be counterproductive, because Sudan reacted to the ICC indictment by expelling at least ten foreign aid agencies which, taken together, provide necessary sustenance to some 1.5 million displaced persons in Darfur.¹²⁰

The ICC has refrained from pursuing cases outside of Africa, and has thus further limited its own scope.¹²¹ Although this may be partially attributed to the comparatively larger extent of violence in Africa, grave atrocities have been, and continue to be, committed on other continents within the ICC's jurisdiction.¹²² Nevertheless, the prosecutor has dismissed all claims against the United States and the United Kingdom in Iraq,¹²³ thus illustrating the court's lack of presence beyond Africa.

116. *Id.* at 510-11.

117. Noah Novogrodsky, *Challenging Impunity*, NEW INTERNATIONALIST MAG., Dec. 2005, http://www.thirdworldtraveler.com/ICC/Challenging_Impunity_ICC.html.

118. *Warrant Issued for Sudan's Leader*, BBC NEWS, Mar. 4, 2009, <http://news.bbc.co.uk/2/hi/7923102.stm>.

119. *Id.*; see also *International Warrant Issued for Sudan President*, FOX NEWS, Mar. 4, 2009, <http://www.foxnews.com/story/0,2933,504426,00.html> (explaining the willingness of some African nations to withdraw from the ICC in retaliation for the issuance of the arrest warrant against Bashir).

120. *Bashir Vows to Defy Darfur Charge*, BBC NEWS, Mar. 5, 2009, <http://news.bbc.co.uk/2/hi/africa/7925445.stm>.

121. Grono, *supra* note 29.

122. *Id.*

123. WHAT IS THE INTERNATIONAL CRIMINAL COURT?, *supra* note 30, at 1. In

Although he may have limited his own power, the prosecutor is often said to be without many externally imposed checks and balances.¹²⁴ U.S. officials claim that the prosecutor responds to no superior executive power and as such, he is answerable only to the ICC.¹²⁵ Such officials state that true political accountability is almost totally absent from the ICC, though the court itself carries a great risk of politicization, especially in regard to the judicial nomination process.¹²⁶ As a court of potentially unlimited jurisdiction, the ICC may be dangerous if it is accountable to no one.

Although the ICC has been depicted as a victim-sensitive tribunal,¹²⁷ the victims have not yet been able to participate in the process in any meaningful way.¹²⁸ Generally, the victims have no direct contact with the ICC and are merely represented by lawyers in The Hague in what is surely a remote and foreign process to them.¹²⁹ Though the challenges to making victim participation successful include mainly practical concerns,¹³⁰ victim communities are heterogeneous—with fractured and fragmented stances—a fact that makes the integration of victim viewpoints nearly impossible.¹³¹ To ensure greater victim involvement in crimes that, by their very definition, implicate a vast number of victims, the ICC must extend legal aid to the application phase, further support intermediaries, simplify

dismissing such claims, the prosecutor has stated there is no evidence the United Kingdom is unable or unwilling to deal with the claims through its own courts. *Id.*

124. John R. Bolton, Under Sec'y for Arms Control & Int'l Security, Remarks to the Federalist Society (Nov. 14, 2002) *transcript available at* http://stage.amicc.org/docs/Bolton11_14_02.pdf.

125. *Id.*

126. *Id.*

127. Goetz, *supra* note 74, at 66.

128. *Id.* at 68.

129. *Id.*

130. *Id.* at 69. Such practical concerns with victim participation include victim insecurity in their safety, long and complicated application forms, lack of legal aid during the application phase, and the modalities of participation. *Id.* at 69–71.

131. Graeme Simpson, *One among Many: The ICC as a Tool of Justice during Transition*, in *COURTING CONFLICT? JUSTICE, PEACE AND THE ICC IN AFRICA* 73, 76 (Nicholas Waddell & Phil Clark eds., 2008).

forms, and streamline the process to bring it closer to the victims through any possible means.¹³²

Another dilemma plaguing the ICC's effectiveness involves the court's indecisiveness regarding the crime of aggression.¹³³ The inclusion of the crime within the court's jurisdiction is hotly debated, and both supporters and critics of the crime's inclusion focus the debate on two major issues.¹³⁴ First, pursuant to Article 39 of the U.N. Charter, the Security Council "shall determine" the existence of an "act of aggression."¹³⁵ Some claim that linking the work of the ICC to the Security Council may lead to politicization of the court.¹³⁶ Second, much of the debate has focused on finding an acceptable definition of the crime of aggression—one that would apply to a wide range of situations.¹³⁷ A draft statute contains two options concerning the definition of aggression: (1) "the specific acts for which an individual in a position of responsibility could be held accountable for aggression"¹³⁸; and (2) a second provision providing a list of acts constituting aggression.¹³⁹ Neither of these—nor any other version—has yet been adopted.¹⁴⁰

These dilemmas faced by the ICC are not without solution, and recognition and proactivity are the keys to reform. However,

132. Goetz, *supra* note 74, at 71. Crimes that by their nature implicate a sizable amount of victims include genocide, war crimes, and crimes against humanity. *Id.*

133. See Int'l Criminal Court, Crimes Within the Court's Jurisdiction (May 1998), <http://www.un.org/icc/crimes.htm>.

134. *Id.*

135. See *id.*; see also U.N. Charter art. 39.

136. Crimes within the Court's Jurisdiction, *supra* note 133.

137. *Id.*

138. *Id.* Under this definition, "the following acts would constitute the crime of aggression under this definition: planning, preparing, ordering, initiating, or carrying out an armed attack, or the use of force, or a war of aggression, or a war in violation of international treaties or agreements, by a State, against the territorial integrity of another State, against the provisions in the [U.N.] Charter." *Id.*

139. *Id.* The second possible definition includes invasion or attack by the armed forces, bombardment by armed forces, the blockade of ports, the use of armed forces in violation of the terms of an agreement, a State allowing its territory to be used for an act of aggression by another, or a State sending armed groups to carry out grave acts of armed forces. *Id.*

140. See Rome Statute of the ICC, *supra* note 21, at art. 5.

none of that will matter if the court does not obtain more effective global support.

B. Lack of State (U.S.) Support and Cooperation as Major Impediments to ICC Success

The establishment of the ICC was meant to ensure that the worst of crimes—crimes against humanity—were subject to international law, and that the world’s response to such crimes was just.¹⁴¹ The ICC sits alongside national mechanisms in a cumulative effort to tackle the impunity gap in societies emerging from massive violations.¹⁴² Thus, the ICC was created to operate as one mechanism among many for building accountability into peace-building, so that justice and peace may be better served.¹⁴³

1. Importance of State Cooperation

The single most important factor for success of any international tribunal, especially the ICC, is state cooperation.¹⁴⁴ Cooperation determines the effectiveness of such a court for several reasons. The arrest and surrender of indicted individuals can only be undertaken by states, even where peacekeeping operations have been deployed for assistance.¹⁴⁵ A court with no police force and enforcement mechanism of its own must also rely on the aid of others for funding, intelligence and

141. Annan, *supra* note 2.

142. Simpson, *supra* note 131, at 77. The notion of the impunity gap refers to war crimes that cannot be prosecuted at either the international or national levels because of various legislative obstacles, thus allowing criminals to roam freely. Press Release, U.N. Int’l Criminal Tribunal for the Former Yugo., Prosecutor at OSCE Permanent Council Urging End to War Crime Impunity Gap, AN/MOW/1106e (Sept. 7, 2006), <http://www.icty.org/sid/8708>.

143. Simpson, *supra* note 131, at 79.

144. Ki-moon, *supra* note 71. Such cooperation entails cooperation from states, the U.N. and other international organizations, civil society and the NGO community, victims, witnesses, and other individuals. *Id.* This cooperation results from financial support and political backing, and flows from expressions of support in public and behind closed doors. *Id.*

145. *Id.* For example, in the DRC, it was the Congolese authorities that arrested the first three people in ICC custody. Waddell & Clark, *supra* note 25, at 10.

evidence, and pressure on recalcitrant governments.¹⁴⁶ With the ICC in particular, the court's founding states must begin to provide true political support if the court is ever to end the impunity of those responsible for "conscience-shocking crimes."¹⁴⁷

Even though the significance of state cooperation in particular cannot be overstated in the equation of ICC success, many such states evade their humanitarian responsibilities.¹⁴⁸ "What makes a State a 'responsible' one under the ICC regime . . . is that State's willingness to become a Party to, and to cooperate with, the ICC."¹⁴⁹ Thus, the Rome Statute operates in merely one direction: only nationals of state parties or individuals who commit war crimes, genocide, or crimes against humanity on the territory of a state party are subject to the ICC's jurisdiction.¹⁵⁰ Because the ICC's power is so severely restricted, it is that much more important that a state both become a signatory of the Rome Statute and effectively abide by its terms.

2. U.S. Policy Regarding the ICC

At this point, 113 of the world's 195 countries¹⁵¹ have ratified the Rome Statute.¹⁵² However, despite its status as the "leader of the free world," the United States falls into a group of countries including Iran, Sudan, China, and Libya that have

146. Grono, *supra* note 29.

147. *Id.* For example, the West has stood by while Sudan has repeatedly defied ICC mandates. *Id.*

148. *See infra* notes 207–21 and accompanying text.

149. Keitner, *supra* note 26, at 244.

150. *Id.* However, all individuals remain susceptible to domestic laws prohibiting the aforementioned crimes and to relevant provisions enabling national courts to exercise universal jurisdiction. *Id.*

151. Matt Rosenberg, *The Number of Countries in the World*, Jul. 31, 2009, <http://geography.about.com/cs/countries/a/numbercountries.htm>.

152. Coalition for the Int'l Criminal Court, Ratification of the Rome Statute, available at <http://www.iccnw.org/?mod=romeratification> (last visited Sept. 2, 2010). Of those 113 countries, thirty-one are African states, fifteen are Asian states, seventeen are from Eastern Europe, twenty-five are from Latin America and the Caribbean, and twenty-five are from Western Europe and other states. *Id.*

vehemently refused to sign the Statute.¹⁵³ Why has the United States, despite continually affirming the need to create a fair and effective international criminal court,¹⁵⁴ compromised its moral leadership in international affairs by refusing to subject itself to the standards and enforcement mechanisms it imposes upon others?¹⁵⁵

Officially, several reasons exist for the United States' stance regarding the Rome Statute. Primarily, the U.S. government wants to ensure that its nationals are dealt with by utilizing the U.S. system of laws and due process.¹⁵⁶ Officials refuse to allow a court "which lacks necessary safeguards to ensure against politically motivated investigations" to try U.S. citizens.¹⁵⁷ Although ample provisions in the Rome Statute protect a democracy's capacity to engage in legal self-regulation and self-policing,¹⁵⁸ U.S. officials believe that the ICC is an organization whose precepts go against fundamental U.S. notions of sovereignty, checks and balances, and national independence.¹⁵⁹ U.S. officials have voiced their concern that U.S. Presidents and their advisors cannot be assured that they would be safe from charges of international criminal liability,¹⁶⁰ although the U.S. government is often quick to condemn foreign leaders for their criminal acts.¹⁶¹

153. WORLD SOCIAL FORUM, *Human Rights "Accountability" and in the WSF Global Day of Action and Mobilization and UDHR Commemorations*, at 4–5, <http://dgroups.org/file2.axd/3e9a383c-5664-4c87-a725-720a7eb535e1/draftaccountability.doc> (last visited Sept. 2, 2010). Although former President Clinton initially signed the Rome Statute on May 6, 2002, the United States, under the leadership of the Bush Administration, formally renounced its signature. Richard J. Goldstone, *U.S. Withdrawal from ICC Undermines Decades of American Leadership in International Justice*, INT'L CRIM. CT. MONITOR (2002), http://www.thirdworldtraveler.com/International_War_Crimes/USWithdrawal_ICC_Goldstone.html.

154. See Keitner, *supra* note 26, at 239.

155. *Id.* at 219.

156. BUREAU OF POLITICAL-MILITARY AFFAIRS, *Frequently Asked Questions About the U.S. Government's Policy Regarding the International Criminal Court (ICC)* (2003), <http://2001-2009.state.gov/t/pm/rls/fs/23428.htm>.

157. *Id.*

158. Kahn, *supra* note 32.

159. Bolton, *supra* note 124.

160. *Id.*

161. See Alisha Ryu, *North Korea Condemns Bush 'Axis of Evil' Remark*, Feb. 1,

The U.S. perspective views the invocation of international law as a contradiction of the idea that the United States is a self-determining political entity, and the United States will not subordinate its national will to the universal rule of reason.¹⁶² Doing so would threaten the American notion of popular sovereignty because it would suggest an end to the unique U.S. political project.¹⁶³ Thus, the U.S. rule of law is rule by the popular sovereign,¹⁶⁴ but only with respect to the United States itself. The notion makes no exception for other nations to abide by the same ideal.¹⁶⁵

Rather than becoming a party state to the Rome Statute, the United States has instead decided to negotiate bilateral agreements with the largest possible number of states, including nonparties to the agreement.¹⁶⁶ These so-called Article 98 Agreements provide American citizens with protection against the ICC's purported jurisdiction claims, yet they allow the United States to remain engaged internationally.¹⁶⁷ Currently, approximately one hundred countries have signed such agreements with the United States,¹⁶⁸ and each of them has promised that it would not waive diplomatic immunity or surrender citizens of the other signatory to the ICC unless both parties agree in advance to the alteration.¹⁶⁹ Article 98(2) thus

2002, <http://www.voanews.com/english/archive/2002-02/a-2002-02-01-29-North.cfm> (illustrating former President Bush's aggressive stance toward the leaders of North Korea, Iraq, and Iran).

162. Kahn, *supra* note 32.

163. *Id.*

164. *Id.*

165. *See id.*

166. Bolton, *supra* note 124.

167. *Id.*

168. Press Release, U.S. Dep't of State, U.S. Signs 100th Article 98 Agreement (May 3, 2005) available at <http://2001-2009.state.gov/r/pa/prs/ps/2005/45573.htm>.

169. CLAIRE M. RIBANDO, FOREIGN AFF., DEFENSE, AND TRADE DIVISION, ARTICLE 98 AGREEMENTS AND SANCTIONS ON U.S. FOREIGN AID TO LATIN AMERICA 1–2 (2006), available at <http://ciponline.org/facts/060410crs.pdf>. Article 98(2) states that “[t]he Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.” Rome Statute of the ICC, *supra* note 21, art. 98(2).

codifies a certain deference to state-to-state agreements¹⁷⁰ and benefits countries that wish to retain particular extradition-related relations with others without signing a multilateral treaty.

The United States has also negotiated various Status of Forces Agreements (SOFAs) with countries in which its troops are deployed.¹⁷¹ The purpose of a SOFA is to set forth rights and responsibilities between the United States and a host government on such matters as criminal and civil jurisdiction, the wearing of the uniform, the carrying of arms, tax and customs relief, entry and exit of personnel and property, and resolving damage claims.¹⁷² For example, the SOFA between the United States and NATO sets out provisions for jurisdiction over visiting forces.¹⁷³ Additionally, SOFAs are often included, along with other types of military agreements, as part of a comprehensive security arrangement with a particular country.¹⁷⁴

Due to its frequent use of Article 98 agreements and SOFAs, the U.S. government has felt it unnecessary to become a signatory to the Rome Statute.¹⁷⁵ It has thus carved out a blanket exemption for U.S. citizens from the ICC's jurisdiction¹⁷⁶ and has created both a "strategic question of credibility and legitimacy" and a "moral question of diplomatic honesty, integrity, and reciprocal good faith"¹⁷⁷ regarding its standards toward international crime. Because the effectiveness of an international rule or institution depends greatly on its voluntary and widespread acceptance by states,¹⁷⁸ the United

170. Keitner, *supra* note 26, at 234.

171. *Id.* at 241.

172. GlobalSecurity.Org, Military: Status-of-Force Agreement [SOFA], Apr. 26, 2005, <http://www.globalsecurity.org/military/facility/sofa.htm>.

173. Keitner, *supra* note 26, at 241. "The United States is currently a party to more than 100 agreements that may be considered SOFAs." R. CHUCK MASON, AMERICAN LAW DIVISION, STATUS OF FORCES AGREEMENT (SOFA): WHAT IS IT, AND HOW HAS IT BEEN UTILIZED? 1 (2009), available at <http://www.fas.org/sgp/crs/natsec/RL34531.pdf>.

174. Mason, *supra* note 173, at 7.

175. See Keitner, *supra* note 26, at 246–47.

176. See *id.* at 242–43, 256.

177. *Id.* at 257.

178. *Id.* at 262.

States, as a leader of democracy and freedom, cannot justifiably exempt its citizens from the internationally-recognized code of conduct embedded within the Rome Statute.¹⁷⁹ The United States cannot, and should not, use its unique position of power as a justification for immunity.¹⁸⁰ On the contrary, the United States must use its special status in the world to propel others to follow its lead in combating international crime through a greater, multicultural, and multilateral force: the ICC.

3. *United States: Missed Benefits and Chosen Alternatives*

Although the aforementioned responsibility follows from the unique and powerful position of the United States, other benefits exist favoring U.S. participation in the ICC. Primarily, participation in the ICC is essential to U.S. security, credibility, and leadership.¹⁸¹ Since Nuremberg, the United States has been instrumental in ensuring justice for genocide and crimes against humanity.¹⁸² By turning its back on the ICC now, the United States can be seen as betraying this legacy of leadership.¹⁸³ If it should re-sign the Rome Statute, the United States would show that “economic self-interest, nationalism and the unilateral formulation of one’s own interests . . . are no longer the defining characteristics of international dealings in the world community.”¹⁸⁴ “It is this step that scares so many States and makes them unwilling to ratify the statute[;]”¹⁸⁵ it is this step that would help restore U.S. leadership in the world.

An additional benefit to working alongside the ICC lies in the fact that the ICC is a viable alternative to military intervention,¹⁸⁶ and in cooperating with the ICC, the United States would illustrate its renewed faith in diplomacy as opposed to the unilateral militarism that marked the Bush

179. *Id.* at 263–64.

180. *Id.* at 264.

181. WHAT IS THE INTERNATIONAL CRIMINAL COURT?, *supra* note 30, at 2.

182. *Id.*

183. *Id.*

184. Cassase, *supra* note 65.

185. *Id.*

186. WHAT IS THE INTERNATIONAL CRIMINAL COURT?, *supra* note 30, at 2.

Administration.¹⁸⁷ The ICC brings to fruition the modern, Kantian model of the international community, and it sanctions the idea that the use of force must be curtailed as much as possible, both nationally and internationally.¹⁸⁸ In doing so, the ICC “actuat[es] the public and collective interest that exists in repressing major deviations from agreed standards of behaviour.”¹⁸⁹ Consequently, ICC “indictments de-legitimize rogue regimes, ostracizing them from other countries . . . and weakening them domestically.”¹⁹⁰ By participating in such multilateral, peaceful, and yet forceful efforts, the United States would demonstrate its willingness to set aside any urge to unilaterally and militarily intervene in a country’s politics in favor of a more global solution.

Nevertheless, the Bush Administration took several steps to undermine its support for the ICC. Most significantly, on August 3, 2002, former President Bush signed the American Service-Members’ Protection Act (ASPA),¹⁹¹ a directive dubbed as ‘The Hague Invasion Act’ by various European leaders.¹⁹² This act “prohibits the United States from providing military aid to countries that have ratified the Rome Statute”¹⁹³ On a

187. See Steven Martinovich, *How Neoconservatives are Ruining the World*, Apr. 12, 2004, http://www.enterstageright.com/archive/articles/0404/0404bushleague_diplomacy.htm (reviewing CRAIG R. EISENDRATH & MELVIN A. GOODMAN, *BUSH LEAGUE DIPLOMACY: HOW THE NEOCONSERVATIVES ARE PUTTING THE WORLD AT RISK* (2004)) (illustrating the Bush Administration’s abandonment of diplomacy in favor of military force when conducting foreign policy).

188. Cassese, *supra* note 65. The Kantian model depends on the idea that individuals are increasingly the focus of international relations and that there exists “a core of universal values . . . that all members of the international community must respect.” *Id.* This model stands in stark contrast to the Grotian model of international community, which is based on the notion that “States are the exclusive or almost exclusive actors on the international scene . . . that respect for State sovereignty is the pivotal element of all international relations.” *Id.*

189. *Id.*

190. WHAT IS THE INTERNATIONAL CRIMINAL COURT?, *supra* note 30, at 2. For example, the indictment of Slobodan Milosevic was credited by many in Serbia as critical to his domestic downfall. *Id.*

191. Anup Shah, *United States and the International Criminal Court*, Sept. 25, 2005, <http://www.globalissues.org/article/490/united-states-and-the-icc>.

192. Citizens for Global Solutions, *American Servicemember’s Protection Act*, Oct. 18, 2005, http://www.globalsolutions.org/issues/bia_resource_center/ASPA.

193. *Id.*

wider scale, “the ASPA limits U.S. cooperation with the [ICC], restricts U.S. participation in U.N. peacekeeping, prohibits military assistance to [many signatories of the] Rome Statute, and authorizes the President to use ‘all means necessary and appropriate’ to free any U.S. or allied personnel held by or on behalf of the ICC”¹⁹⁴ Although the Dodd Amendment to the ASPA allows the United States to assist international efforts to bring justice to those accused of genocide, war crimes, or crimes against humanity,¹⁹⁵ many view it as an indication that the United States is willing to bring others to justice, but not its own nationals.¹⁹⁶ Thus, the ASPA appears to be another effort by the United States to undermine various international agreements as well as to exempt itself from various humanitarian obligations.¹⁹⁷

Furthermore, in July 2002, the United States pressured the U.N. Security Council to agree to the terms of Resolution 1422, a decree that essentially exempts peacekeepers from prosecution.¹⁹⁸ Some, such as Amnesty International, believe that the resolution is unlawful because it is an attempt to undermine a treaty agreed between state parties, a power only given to the General Assembly of the U.N.¹⁹⁹ Interestingly, such a potentially illegal resolution was a result of stringent compromise. Initially, the U.S. government requested a

194. *Id.*; see 22 U.S.C. § 7427 (2006 & Supp. 2009) (“The President is authorized to use all means necessary and appropriate to bring about the release of any person described in subsection (b) who is being detained or imprisoned by, on behalf of, or at the request of the International Criminal Court.”).

195. Shah, *supra* note 191. “The Dodd Amendment reads: ‘Nothing in this title shall prohibit the United States from rendering assistance to international efforts to bring to justice Saddam Hussein, Slobodan Milosevic, Osama bin Laden, other members of Al Qaeda, leaders of Islamic Jihad, and other foreign nationals accused of genocide, war crimes or crimes against humanity.’” Citizens for Global Solutions, *supra* note 192.

196. Shah, *supra* note 191.

197. *Id.*

198. *Id.*; see also S.C. Res. 1422, ¶ 1, U.N. Doc. S/RES/1422 (July 12, 2002) (stating that the ICC shall not proceed with any investigations or prosecutions of any peacekeepers for a twelve-month period, unless the Security Council determines otherwise).

199. Shah, *supra* note 191; see also U.N. Charter art. 18, para. 2 (illustrating that, among other issues, the General Assembly shall decide matters of international peace and security).

complete and indefinite exemption from the ICC's jurisdiction for U.S. nationals.²⁰⁰

The United States has also taken several other steps to undermine the authority of the ICC. "In August 2002, the [United States] threatened to withdraw military aid for countries that would not guarantee U.S. immunity from prosecution by the ICC."²⁰¹ In December 2004, Congress adopted the Nethercutt Amendment to the Federal Appropriations Bill, which, on a more far-reaching level than the ASPA, authorized the loss of Economic Support Funds (ESF) to all countries which have ratified the Rome Statute but have not signed a bilateral immunity agreement with the United States.²⁰² Such countries lost millions of dollars in U.S. aid for projects to counter terrorism, build democratic institutions, promote peace and stability, and foster democratic growth.²⁰³ Although former President Bush "waived the funding restrictions . . . for 14 countries whose ESF had been previously cut . . . Ireland, Brazil, and Venezuela still have a total of approximately \$15 million in ESF aid threatened."²⁰⁴

The above tactics, combined with the U.S. propensity to sign Article 98 agreements with various countries, have all served to compromise state cooperation with the ICC. The United States has certainly been the most powerful leader of the opposition to the ICC, and numerous countries have "caved into [U.S.] pressure," with other states facing a substantial U.S. threat of aid withdrawal.²⁰⁵ Although the Obama Administration may offer greater hope for a re-signing of the Rome Statute, the current President certainly has some anxiety regarding the potential of politically motivated prosecutions of U.S. soldiers or

200. Shah, *supra* note 191.

201. *Id.*

202. Coalition for the Int'l Criminal Court, Nethercutt Amendment, <http://www.iccnw.org/?mod=nethercutt> (last visited Sept. 2, 2010).

203. Press Release, U.S. Threatens to Cut Aid to Countries That Support the ICC (Dec. 7, 2004), http://www.humanrightsfirst.org/media/2004_alerts/ij_1207_icc.htm.

204. Coalition for the Int'l Criminal Court, Nethercutt Amendment, *supra* note 202.

205. Shah, *supra* note 191.

officials.²⁰⁶ It is still unclear whether the Obama Administration's feelings toward the ICC, though less hostile in general, will alter the U.S. policy toward the ICC in any meaningful way.

4. *Recalcitrant Status of Other States*

Although the United States has been the most influential opponent of the ICC, other countries have stood in the way of the ICC's path to effectiveness. For example, China has chosen not to come under the ICC's jurisdiction for several reasons.²⁰⁷ China stands firmly opposed to the ICC idea of complementarity, and does not believe that war crimes in internal armed conflicts rightly fall under the ICC's jurisdiction.²⁰⁸ The Chinese government also deems the inclusion of the crime of aggression within the ICC's jurisdiction as a weakening of the U.N. Security Council's power.²⁰⁹ Finally, China feels that the power of the prosecutor may make the ICC open to political influence.²¹⁰ Although joining the ICC would not have a heavy impact on China because the country has few overseas military commitments,²¹¹ the Chinese bureaucracy has nevertheless been stringently opposed to giving up a portion of its power for the common good.

Additionally, Israel has not ratified the Rome Statute.²¹² Although the very concepts of genocide and crimes against humanity have their roots in the Holocaust, the notion of the ICC did not resonate with Israeli Jewish citizens because of one particular clause of the Rome Statute under which Israeli

206. William C. Mann, *US Policy on International Court Unlikely to Shift*, ASSOCIATED PRESS, Oct. 14, 2008, http://www.amicc.org/docs/AP_10_14_2008.pdf.

207. See Amnesty Int'l, Fact Sheet: China and the International Criminal Court, Jul. 19, 2007, <http://asiapacific.amnesty.org/library/Index/ENGASA170232007?open&of=ENG-2AS>.

208. Lu Jianping & Wang Zhixiang, *China's Attitude Towards the ICC*, 3 J. INT'L CRIM. JUST. 608, 608 (2005).

209. *Id.*

210. *Id.*

211. *Id.*

212. Mitchell Danow, *Israel Opposes Resolution to Create International Criminal Court*, JEWISH NEWS OF GREATER PHOENIX, July 24, 1998, <http://www.jewishaz.com/jewishnews/980724/court.shtml>.

settlement activity could be interpreted as a war crime.²¹³ Thus, taking a similar position as the U.S. government, the Israeli government appears afraid of ICC prosecution, especially if a national investigation is already under way.²¹⁴ For fear of subjecting itself to charges of international crime, Israel has effectively abstained from signing the Rome Statute.²¹⁵

India has also joined hands with the United States in opposing the ICC.²¹⁶ Although Indian officials claim the reasoning lies behind the court's exclusion of terrorism and the first use of nuclear weapons from the crimes under its jurisdiction, the true justification may remain elsewhere.²¹⁷ "[T]he real reason may have to do with the human rights violations of Indian security forces in Kashmir[, as well as] the impunity that it grants in practice to the perpetrators of hate crimes and communal violence of the kind that western Gujarat witnessed in 2002" ²¹⁸ Once again, a state that speaks strongly of the rule of law and the importance of multilateral institutions²¹⁹ has failed to do anything about the problem because the solution may implicate its own nationals.

213. *Id.* The relevant clause in the resolution that disturbs Israel refers to the "transfer, directly or indirectly, by an occupying power of parts of its civilian population into the territory it occupies, or the deportation or transfer of all or part of the population of the occupied territory within or outside this territory." *Id.*; see Rome Statute of the ICC, *supra* note 21, art. 8, ¶ 2 (b)(viii). The Rome Statute describes such an action as a violation of laws and customs applicable in international armed conflict. Rome Statute of the ICC, *supra* note 21, art. 8, ¶ 2 (b)

214. Richard D. Heideman & Daniel S. Mariaschin, *International Criminal Court? Not This Version*, ISRAEL INSIDER, May 10, 2002, available at <http://web.israelinsider.com/Views/617.htm>.

215. *Id.*

216. Praful Bidwai, *Saddam Hanging Boosts Case for Int'l Criminal Court*, GLOBAL POLY FORUM, Jan. 6, 2007, <http://www.globalpolicy.org/intljustice/tribunals/iraq/2007/0106iccboost.htm>. In doing so, India has signed bilateral Article 98 agreements with the United States. *Id.*

217. *Id.*

218. *Id.* The 2002 Gujarat violence has been deemed "India's worst state-sponsored program of an ethnic minority since independence[.]" claiming more than 2,000 lives and displacing 100,000 others. Praful Bidwai, *Indian Diplomacy at Dtake as Gujarat Burns*, DAWN, May 9, 2002, <http://www.dawn.com/2002/05/09/int12.htm>.

219. Bidwai, *supra* note 218.

Although the interim Iraqi government tentatively stated its intention to endorse the Rome Statute, the transitional administration quickly reversed its decision, presumably due to great pressure from the Bush Administration.²²⁰ Iraq's decision raised the possibility that U.S. officials would have to take their anti-ICC campaign to Baghdad, where the question of responsibility for war crimes is an ongoing issue and a charge under which the United States does not want to be liable.²²¹ It is likely that even if Iraq eventually becomes a signatory to the Rome Statute, the government will then be pressured to sign a bilateral agreement with the United States.²²² It is thus interesting to note that the opposition to the ICC, even across the globe from the United States, is nevertheless U.S.-led and U.S.-compelled.²²³

Lack of state cooperation, U.S. or otherwise, has served as the greatest impediment to potential ICC success.²²⁴ An institution with idealistic ambitions and humanistic goals can only be as triumphant as its subparts, and if some of the world's most populous states, such as the United States, China, and India, choose to be recalcitrant, the ideal of justice remains just that—an ideal. “Silence on justice is not cost-free[;] it only emboldens obstructionist regimes and reinforces their sense of impunity”²²⁵ More must be done. The need for justice is great, and the violence is seemingly never-ending.²²⁶

220. Haider Rizvi, *Groups Urge Iraq to Join International Criminal Court*, INTER PRESS SERVICE, Aug. 8, 2005, <http://www.commondreams.org/headlines05/0808-06.htm>.

221. *Id.*

222. *Id.*

223. *Id.*

224. Ki-moon, *supra* note 71.

225. Press Release, Richard Dicker, Dir., Human Rights Watch's Int'l Justice Programme, Press Conference by Human Rights Groups On International Criminal Court Meeting (Nov. 29, 2007) *available at* http://www.un.org/News/briefings/docs/2007/071129_ICC.doc.htm.

226. See Nicholas D. Kristof, *Genocide in Darfur Grows Worse, Spreads*, LEDGER, July 13, 2006, at A10, *available at* <http://news.google.com/newspapers?nid=1347&dat=20060713&id=WdYSAAAIBAJ&sjid=RP4DAAAIBAJ&pg=1738,668477> (explaining that the genocide in Darfur has gotten progressively worse).

C. Proposed Suggestions and Solutions

No simple “solution” will make the ICC a more effective and successful tribunal. However, several pathways exist that, if taken, would encourage greater state cooperation and lead to superior ICC acceptance and legitimacy in the world.

Primarily and perhaps most obviously, more of the world’s superpowers, especially the United States, must ratify the Rome Statute and accept the jurisdiction of the ICC. It is clear that the ICC depends on state cooperation, and in turn, that states can receive benefits from cooperation with the ICC. The bigger challenge lies in enticing such states to join forces with the ICC.

Two proposed “solutions” exist—one somewhat pragmatic, the other extremely idealistic. First, obstinate states could be persuaded, primarily through diplomatic means, to adopt a “wait and see” approach to ratifying the Rome Statute.²²⁷ Such states may be swayed by consistent jurisprudence and favorable outcomes for universally recognized crimes.²²⁸ In particular, the United States can become a good neighbor to the ICC even if it does not become a member, and in doing so, “[t]he [United States] can refer cases that it wants to see investigated and prosecuted to the ICC through the Security Council.”²²⁹ Such powerful support would certainly grant greater authority to certain cases before the court.²³⁰

Additionally, an amended reading of the Rome Statute would also allow such “neighbor” states to greatly contribute to the ICC without subjecting its nationals to the ICC’s jurisdiction. Primarily, Article 87 should be rewritten to allow the court the authority to make requests for cooperation to all states, not just State Parties.²³¹ In other words, there should not

227. WHAT IS THE INTERNATIONAL CRIMINAL COURT?, *supra* note 30, at 2.

228. Michael S. Rozeff, *To Back the International Criminal Court or Not?*, LEWROCKWELL.COM, Nov. 18, 2005, <http://www.lewrockwell.com/rozeff/rozeff43.html>.

229. WHAT IS THE INTERNATIONAL CRIMINAL COURT?, *supra* note 30, at 2.

230. *See* Ki-moon, *supra* note 71 (explaining that state cooperation is a determinant of a tribunal’s success).

231. *See* Rome Statute of the ICC, *supra* note 21, art. 87, ¶ 1, (a). In pertinent part, the Statute now reads: “The Court shall have the authority to make requests to State Parties for cooperation. The requests shall be transmitted through the diplomatic channel or any other appropriate channel as may be designated by each State Party

be a need for an ad hoc agreement as a condition precedent for cooperation of a non-signatory.²³² Expanding this requirement to include states not currently a party to the Rome Statute would place greater pressure on all states to participate and cooperate with the only permanent international criminal court that this world has ever known.

If it is unacceptable to re-write portions of the Rome Statute in the aforementioned manner, a committee of state and non-state parties may conceivably add several amendments or a protocol to the Statute with a similar effect.²³³ Even states not privy to the Rome Statute should be required to extradite accused foreign nationals known to be present on their soil, for doing so would illustrate such states' amenability while generally allowing greater justice to be served. However, the problem lies in the enforcement of such grandiloquent requests.²³⁴

The idealistic answer lies in the ICC's more significant ties to the United Nations, especially the Security Council. A more effective international tribunal would be one acting as an organ of the United Nations, with all consequent benefits of being such a subpart flowing from such membership.²³⁵ Although there exists an agreement of cooperation between the two bodies,²³⁶ it is certainly not great enough in scope to offer considerable enforcement advantages to the ICC. In order to effectuate an improved relationship between the two institutions, the U.N.

upon ratification, acceptance, approval or accession." *Id.*

232. *See id.* art. 87, ¶ 5.

233. *See* Rome Statute of the ICC, *supra* note 21, art. 121, ¶ 1 (allowing any State Party to propose an amendment to the Rome Statute beginning seven years after its entry into force).

234. *See* Waddell & Clark, *supra* note 25, at 10 (noting that the ICC has no enforcement mechanism of its own). How can a court that is already facing state cooperation problems hope to enforce a request of universal extradition of criminals?

235. *See* U.N. Charter art. 1 (illustrating that membership in the U.N. allows a nation to contribute to collective peace and security, friendly relations among nations, international cooperation in problem-solving, and the harmonization of actions of nations for the attainment of common goals).

236. *See* Negotiated Relationship Agreement between the International Criminal Court and the United Nations, U.N.-ICC, Apr. 10, 2004, ICC-ASP/3/25 (recognizing the mandates and independence of both institutions while outlining the conditions under which the United Nations and the ICC will cooperate).

should treat the ICC as it does the International Court of Justice (ICJ)—as a judicial organ.²³⁷ In such an instance, all U.N. members would automatically become parties to the court's statute, as they did in the case of the ICJ.²³⁸ Thus, effective state cooperation with the ICC would be forced upon individual states because U.N. membership would be inextricably tied to membership in the ICC. Although consent would be a necessary condition in bringing a case against a particular state, the lack of such consent could be overcome by a decision of the Security Council.²³⁹ All U.N. members would have a duty to comply with the decisions of the court,²⁴⁰ and in the case that they do not do so, the other party may have recourse to the Security Council, which may make recommendations or decide upon measures to be taken to give effect to the judgment.²⁴¹

Thus, like the ad hoc ICTY and ICTR, the ICC would have the power of the Security Council behind it.²⁴² Therefore, the ICC would be entitled to vast enforcement mechanisms "rang[ing] from economic and/or other sanctions not involving the use of armed force to international military action."²⁴³ Because the lack of operative enforcement mechanisms is one of the biggest obstacles of a court that completely depends on individual state cooperation, such a link to the Security Council

237. Int'l Court of Justice, The Court, <http://www.icj-cij.org/court/index.php?p1=1> (last visited Sept. 2, 2010).

238. U.N. Charter art. 93, para. 1 (granting all members of the United Nations automatic *ipso facto* party status to the ICJ).

239. See U.N. Charter art. 24, para. 1 (granting the Security Council primary responsibility for the maintenance of international peace and allowing it to act on behalf of all U.N. members in doing so).

240. See U.N. Charter art. 94, para. 1 (mandating each member of the U.N. to comply only with the decisions of the ICJ in any case in which it is a party).

241. See U.N. Charter art. 94, para. 2 (authorizing such a recourse in the case of the ICJ).

242. See Paul Magnarella, *Is US Cooperation with the UN Criminal Tribunal for Rwanda Unconstitutional?*, 1 AFR. STUD. Q. (1998), <http://web.africa.ufl.edu/asq/v1/4/6.htm>.

243. See U.N. Security Council Sanctions Committees, Security Council Sanctions Committees: An Overview, <http://www.un.org/sc/committees/index.shtml> (last visited Sept. 2, 2010). "[Th]is range of sanctions has included comprehensive economic and trade sanctions and/or more targeted measures such as arms embargoes, travel bans, financial or diplomatic restrictions." *Id.*

would make the ICC a greater reality to numerous currently refractory states. Although it should never have had to come to this solution—for all states should ideally seek justice, peace, and the equitable resolution of conflict—at times states must be gently coerced into participation. The ideals represented by the ICC are important enough to warrant a bit of coaxing, and perhaps even political or economic cajoling, in exchange for their efficient implementation.

IV. CONCLUSION

The past century witnessed unprecedented atrocities committed with impunity, which has only encouraged others to flout the laws of humanity.²⁴⁴ The mere existence of such widespread injustice and gross inhumanity has warranted the creation of the world's first permanent international criminal court, a tribunal which would ideally serve as hope to many and as a "step forward in the march towards universal human rights and the rule of law."²⁴⁵ Although its establishment was inundated by impressive ideals and dreams of a more just world, the ICC thus far has been marred by numerous issues, the greatest of which has been the lack of significant state cooperation, especially that of the United States.²⁴⁶ Even though the United States has historically led the effort to strengthen international accountability,²⁴⁷ its failure to participate in the ICC has not only greatly delegitimized the court, but it has also

244. Int'l Criminal Court, Frequently Asked Questions, <http://www.icc-cpi.int/Menus/ICC/About+the+Court/Frequently+asked+Questions/> (last visited Sept. 2, 2010).

245. Press Release, United Nations, Establishing International Criminal Court will be Fitting Way to Inaugurate New Millenium, Secretary-General Tells Court's Preparatory Commission (Feb. 16, 1999) *available at* <http://iccnw.org/documents/02.16.1999AnnanandICC.pdf>.

246. *See* Blattmann & Bowman, *supra* note 4, at 711 (discussing the difficulties facing the ICC).

247. BUREAU OF POLITICAL-MILITARY AFFAIRS, *supra* note 156 (listing past actions the United States has taken); *see also* JENNIFER K. ELSEA, U.S. POLICY REGARDING THE INTERNATIONAL CRIMINAL COURT, CRS REPORT FOR CONGRESS 3 (2006), *available at* <http://fpc.state.gov/documents/organization/73990.pdf>. The United States played a key role in the establishment of the ICTR, ICTY, and the Special Court in Sierra Leone. *See* BUREAU OF POLITICAL-MILITARY AFFAIRS, *supra* note 156.

somewhat justified the recalcitrant status of other strong powers in the world: China, Russia, and Israel, to name a few.

The solution to such an unfortunate lack of support is not simple. The court is in dire need of greater (U.S.) support and tougher and more effective enforcement mechanisms. The answer, as indicated by the U.S. Department of State, may lie in deeper connection to the Security Council, established within the framework of the U.N. Charter.²⁴⁸ As a subsidiary of the U.N., the ICC would function much like the ICJ and would thus have the much-needed support of the U.N. General Assembly and the U.N. Security Council. All non-compliant states would be ostracized by the world's largest assembly of states, while the day-to-day functions and composition of the ICC would remain virtually the same. Although the process of converting an independent institution into a U.N. organ could be lengthy and problematic—mainly for various procedural reasons—the end result would be a much more successful and respected tribunal.

The heart of global governance must be the prevention of destructive violence, and the ICC is an important step in that direction.²⁴⁹ However, for its ideal and abstract aspirations to be realized, they must be concretely effectuated with global support, strong leadership, and great lessons taken from the workings of previous ad hoc tribunals. States must effectively stand hand-in-hand against the global promulgation of genocide, war crimes, and crimes against humanity, or justice may not have hope in such a stark world. With the establishment of the international criminal court already completed, states, especially democratic leaders of justice and liberty, have run out of excuses.

248. *Id.*

249. CHRISTIAN P. SCHERRER, PREVENTING GENOCIDE: THE ROLE OF THE INTERNATIONAL COMMUNITY, ECOR-IRECOR GENOCIDE RESEARCH PROJECT (2000), <http://www.preventgenocide.org/prevent/scherrer.htm>.