

Unsigning the Rome Statute: Examining the Relationship Between the United States and the International Criminal Court

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ABSTRACT

Presently, 120 states are parties to the Rome Statute establishing the International Criminal Court (ICC). A state that one will not find on the list, however, would be the United States. This project examines the relationship between the International Criminal Court (ICC) and the United States. The United States took part in the negotiating process, signing the Rome Statute under President Bill Clinton, but was not fully satisfied with the agreement reached. Under President Bush, however, the Rome Statute was unsigned. Presently, the United States remains unsigned on the Rome Statute. The relationship between the Court and the United States is important in determining the future of the Court, in terms of effectiveness and legitimacy. I will begin with a brief historical background on the development of the ICC, its structure, and the extent of its jurisdiction. From there, I will detail several problems with the court from America's perspective. These include third-party jurisdiction and constitutional issues. I will also examine the relationship between the United States and the ICC under the three Presidents in office since the court's conception: Clinton, Bush, and Obama. Finally, I argue that the Court needs the support of the United States to survive, but that the problems with the Court from America's perspective will continue to stand in the way of American support for the court until U.S. interests are met.

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METHODOLOGY

To complete the project objective, I use qualitative data. Most of my research comes in the form of articles, books, and primary documents, such as the Rome Statute itself. I have viewed both the Rome Statute and the Constitution of the United States to see where the discrepancies might have come into play. I also utilized articles about the signing and unsigning of the statute and the connection between the U.S. and the court. I have researched articles written both before and after the unsigning of the Rome Statute.

To begin, I dove into the background of international law. I wanted to view the events leading up to the creation of the International Criminal Court. I examined the historical background, as well as the structure of the Court and the crimes over which the Court retains jurisdiction. From there I examined some of the main concerns of the United States to see why the country would not fully support the Court. These concerns include the threat of third party jurisdiction, anti-American sentiment, and constitutional objections. Following that, I examined how the three Presidents who have sat in office since the conception of the court—Presidents Clinton, Bush, and Obama—addressed the Court during their presidencies. I start with President Clinton’s signing of the Rome Statute, then President Bush’s unsigning of the treaty, and President Obama’s handling of the Court since the unsigning. Finally, I wanted to use the information gathered to develop my own opinion on the future of the Court in terms of its relationship with the United States. I argue that the Court needs the support of the United States in order to survive and develop, yet the United States has no incentive or interest to sign on to the Court presently.

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A BACKGROUND ON THE COURT

History of the Development of the International Criminal Court

The road to creating an international court spanned over a century. The first real origins of the International Criminal Court (ICC) can be identified as early as the 1870's when Gustave Moynier proposed a permanent international court following the Franco-Prussian War. His calls for a court were not seriously pursued by states due to the perceived threat on sovereignty—the ability of a nation to govern itself independently and make and enforce its own laws—but it planted the seed in the minds of many. Nearly 60 years later, the world saw the next serious push for an international court. Some framers of the 1919 Treaty of Versailles envisioned the creation of an ad hoc tribunal to try the German Kaiser and other German war criminals following World War I. British Prime Minister David Lloyd George proposed that the Allies should “hang the Kaiser.”ⁱ This call for a court never came to fruition, as it was opposed by both President Woodrow Wilson of the United States and King George V of the United Kingdom. Wilson strongly opposed the extradition of Kaiser Wilhelm II, and even though King George acknowledged that his cousin was “the greatest criminal in history”ⁱⁱ he still opposed the Prime Minister’s proposal. The main argument for opposing the measure was that it would destabilize the peace they had just won in the war.ⁱⁱⁱ Again, though, this call never became a reality, it planted the foundation for the trials that would follow World War II.

Following the second World War, the Allied forces created tribunals for German and Japanese war crimes, known as the Nuremberg and Tokyo tribunals, respectively. These courts were meant to try the top Axis war criminals following the close of the war. Though the court accomplished its goal of indicting and trying many of Germany’s top war criminals, many questioned the legitimacy of the tribunals. This doubt stemmed from the fact that the criminals were being tried for actions that were not defined as crimes until after the end of the war. This concept in domestic jurisdictions is known as *ex post facto* laws (laws made after the fact). These trials were also referred to as “victors’ justice,” as the victors (in this case,

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the Allied forces) only tried the “losers” of the war (the Germans). The most serious calls for an international court came in 1948 from the United Nations General Assembly (UN GA) who, after adopting the Convention on the Prevention and Punishment of the Crime of Genocide, called for international penal tribunals to try criminals. The UN GA called for the International Law Commission (ILC) to identify, “...the desirability and the possibility of establishing an international judicial organ for the trials of persons charged with genocide.”^{iv} The ILC began drafting this statute in the early 1950s. Simultaneously, the Cold War began, hindering the progress toward an international court. With two major superpowers at odds with each other, every issue became a political one and agreement to create an international court would never materialize. The UN GA abandoned the idea until the definition of “crime of aggression” and an international Code of Crimes could be agreed upon.

The next push for an international court came from an unlikely source. In June 1989, Trinidad and Tobago resurrected the notion of a court in response to the prevalence of drug trafficking. It resurrected the pre-existing proposal for the establishment of the court, and the UN GA responded by continuing its working on the statute it had started and then abandoned.

Soon after, in the early 1990s, the UN Security Council established two separate ad hoc tribunals, prompted by the conflicts in the former Yugoslavia (in Bosnia-Herzegovina and Kosovo), as well as Rwanda. These tribunals were created after the mass commission of crimes against humanity, war crimes, and genocide to hold individuals accountable for these crimes in these two conflicts. These two major ad hoc tribunals further emphasized the need for a permanent international criminal court. In the case of Rwanda, the jurisdiction of the UN tribunal was so limited and the case so unclear, that many of the minor cases were handed back to the Rwandan people to be dealt with in small, communal trials known as Gacaca courts. In these trials, the community gathers to hear both the side of the victims and the side of the accused. Then, as a community, they decide the fate of the accused, whether it be acquittal, community service, or imprisonment. This method has been criticized for not protecting the rights of the victims as well as the accused, arguing that the trials are unfair due

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to false accusations and the lack of lawyers. Had there been a permanent court, it can be argued that the process would have been far quicker and fairer for both sides.

The ILC presented the final draft of its statute to the UN GA in 1994. It also recommended the creation of a conference of plenipotentiaries, which would convene to negotiate a treaty and enact the statute that had just been drafted. In response to this recommendation, the UN GA established the Ad Hoc Committee on the Establishment of an International Criminal Court. This committee would convene twice in 1995 to discuss major substantive issues in the draft statute. The committee then submitted a report to the UN GA following its meetings.

The UN GA considered the committee's report, and created the Preparatory Committee on the Establishment of the ICC to prepare a consolidated draft text. Between 1996 and 1998, the Preparatory Committee convened for six sessions at the UN headquarters in New York. Contributing input to the discussion were many non-governmental organizations (NGOs). They attended the meetings under the umbrella of the NGO Coalition for an ICC (NICC). They submitted hundreds of documents to the Preparatory Committee for consideration during the six sessions.

In January 1998, the Bureau and the coordinators of the Preparatory Committee convened in the Netherlands for an Inter-Sessional meeting to consolidate and edit the draft articles into a draft. The draft, known as the Zutphen draft and consisted of 99 articles, showed a clear lack of agreement, as it was heavily bracketed. The draft compiled at the Inter-Sessional meeting was submitted to the Preparatory Committee at their March-April 1998 session. The draft submitted here was the basis of the draft to be considered at the Rome Conference. Based on this draft, the UN GA held a convention at the United Nations Conference of Plenipotentiaries on the Establishment of an ICC to "finalize and adopt a convention on the establishment"^v of an international criminal court.

Between June 15 and July 17, 1998, delegations from 160 countries convened in Rome, Italy for the Rome Conference. The NGO Coalition was also in attendance, monitoring the

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discussions and negotiations, distributing information worldwide, and facilitating the participation of more than 200 NGOs. By the end of the conference, 5 weeks later, 120 nations voted favorably for the adoption of the Rome Statute. Only 7 nations voted unfavorably for the Rome Statute: China, Israel, Iraq, Qatar, Libya, Yemen, and the United States of America. The biggest reasons the United States had for voting unfavorably towards the ICC was that it would violate state sovereignty, that citizens would be subject to laws created after an act had already been committed, and that the principle of complementarity, though seeming to allow states to retain domestic jurisdiction over its own citizens, allows the court to judge a nation's domestic court system in its decision whether to intervene. 21 states abstained from voting. The Preparatory Commission was given the task of finalizing the establishment of the court. It was always charged with overseeing the smooth function of the court by negotiating more documents, such as the Rules and Procedure of Evidence, the Financial Regulations, and the Agreement on the Privileges and Immunities of the court. July 17th is now known as International Justice Day, to commemorate the anniversary of the adoption of the Rome Statute.

The 60th ratification that was necessary to finalize the court was deposited by several states on April 11, 2002. The Assembly of State Parties, which was outlined in the Rome Statute as "each State Party shall have one representative in the Assembly who may be accompanied by alternates and advisers" and who are given the tasks of consideration and adoption of recommendations of the Preparatory Committee as well as providing oversight to the President, Prosecutor, and Registrar, met for the first time in September 2002.

In short, throughout history proposals for an international court have faced criticism. *Ad hoc* tribunals seemed to be the best course of action for a long time because they allowed more powerful nations to try other individuals of other nations, whether those that had lost a war (as was the case with Germany's war criminals post World War II) or those that were simply weaker that had committed international crimes (as were the cases of the former Yugoslavia and Rwanda). Yet even the *ad hoc* tribunals faced numerous criticisms about their legitimacy: the legitimacy of the powerful nations trying the weaker ones; the legitimacy of

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the process in indicting, trying, and sentencing defendants; and the legitimacy of the tribunals' ability to hand down and enforce judgments. Though initially proposed at the end of the 19th century, calls for a permanent court were not seriously considered until the beginning of the 20th century. Themes that would carry into the future negotiations on the development of an international court began to emerge almost instantly. The concept of sovereignty has always been a customary argument against the creation of a court. Allowing an outside, international party to have jurisdiction over a nation's citizens was not an appealing idea to most nations. Even once complementarity had been taken into account, it was still viewed as a way for the ICC to be allowed to judge a nation's legal system. Many of these questions and criticisms posed both during the period of *ad hoc* tribunals and the period during and following the creation of the ICC are still relevant and are being discussed presently as reasons for not signing the Rome Statute, though the United States showed support and played a major role in the Nuremberg and Tokyo tribunals, the ICTY, and the ICTR.

Structure of the Court

The Court is governed by the Assembly of State Parties, and consists of four judicial organs: the judges (Judicial Division), the Presidency, the Prosecutors, and the Registry.

The Assembly of State Parties acts as the legislative body of the court. It consists of one representative from each state party, each of which has one vote. It operates using the "every effort" method to reach decisions by consensus. The "every effort" method requires State parties to work together to determine the total consensus in the Assembly and in the Bureau. If they cannot reach a consensus through collaboration, a two-thirds majority of the present voting parties is needed to approve a decision on matters of substance, and a simple majority vote is needed for procedural issues.

The Assembly elects a president and two vice-presidents to preside, each of whom serves a three-year term. The Assembly typically meets once a year, either in New York or in Hague, though it may convene in special cases when circumstances call for it. All of its sessions are open to NGOs and observer states. Duties of the Assembly include electing judges and

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prosecutors, deciding on the budget of the Court, acting in a legislative manner to adopt texts for the Court, providing management oversight to the other bodies of the court, and removing judges or prosecutors from office in cases of serious misconduct. It cannot, however, interfere with any of the judicial functions of the court.

The Judicial Division consists of 18 judges divided amongst the three branches of the Judicial Division: the Pre-Trial Division, the Trial Division, and the Appeals Division. Judges are elected members of the ICC. All judges must be nationals of a state party to the Rome Statute, though they can be nominated by any member state, not just their own. Once elected into their divisions, judges sit in Chambers responsible for their various proceedings. The assignments to divisions is determined based on the nature of the division; the qualifications and backgrounds of the judges determine which division they are best suited for. This ensures that each judge in each division has the proper balance of both criminal and international law expertise. The first bench was elected in February 2003 and they were sworn in on March 11 of the same year. The second bench of judges was elected in January 2006 and also sworn in on March 11 of the same year. On November and December of 2007, three judges were elected to replace judges who had resigned. The most recent election occurred in 2011.

The office of the Presidency is composed of the President, First Vice-President, and Second Vice President. All three of these offices are elected by an absolute majority of the judges. They serve three year renewable terms. Duties of the President include judicial/legal functions, such as assigning cases to Chambers, conducting judicial reviews of decisions of the Registry, and finalizing cooperation with member states. The President is also responsible for carrying out the proper administration of the Court. The President must also oversee the work of the Office of the Registry and maintain relations with states, NGOs, and other entities to promote awareness of the Court's works as well as provide information and understanding of the Court.

Article 42 of the Rome Statute deals with the third organ of the court is the Office of the Prosecutor (OTP). The office is sectioned into three divisions: Prosecutions Division,

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Investigations Division, and Jurisdiction, Complementarity, and Cooperation Division. The OTP is currently involved in investigations in several countries: Northern Uganda; the Democratic Republic of Congo; Darfur, Sudan; the Central African Republic; Kenya; and Libya. Within each of these countries, many individuals are being pursued by the OTP. The office is also involved in preliminary investigations in several countries including Afghanistan, Georgia, Guinea, Cote d'Ivoire, Colombia, Palestine, Honduras, Korea, and Nigeria.

The Office of the Prosecutor is headed by the Prosecutor. Duties of the person in this position include management of the OTP, staff, and facilities of the office. The Prosecutor may be assisted by several Deputy Prosecutors, who must be of different nationalities than the Prosecutor. There is one major criticism about the power of the Prosecutor, however. According to the Rome Statute, the Prosecutor “may initiate investigations *proprio motu* on the basis of information on crimes within jurisdiction of the Court.”^{vi} In essence, the Prosecutor can initiate investigations at his discretion. If the Prosecutor believes a crime has been committed that falls within the jurisdiction of the International Criminal Court, he may decide to begin an investigation into the incident. This gives the Prosecutor a large amount of power, and it creates a controversy in which some question whether the Prosecutor has too much independence.

The final organ of the ICC, found in Article 43 of the Rome Statute, is the Office of the Registry. This office is responsible for much of the non-judicial servicing of the court. The Office of the Registry is presided over by the Registrar. The Registrar is the primary administrative officer of the Court and functions under the President. The person holding the position of Registrar must meet certain qualifications. The Registrar must be a person of high moral character, with fluency in at least one of the working languages of the Court.

Jurisdiction of the Court

International criminal law can be split into two main categories: international and transnational. Crimes in the international category are offenses against the global community

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including human rights violations, war crimes, and genocide. Crimes in the transnational category are offenses against one or several nations. These crimes can include drug trafficking, counterfeiting, terrorism, and willful damage to the environment. Many of these crimes are already covered by UN treaties and charters with the International Court of Justice (ICJ) serving as the UN's main judicial structure. The International Court of Justice primarily serves as an advisor on legal questions and will settle disputes between states (International).

Confusing the International Court of Justice (ICJ) with the International Criminal Court (ICC) can be a common mistake. They are two separate entities, however. The International Court of Justice differs from the International Criminal Court in several ways. The International Criminal Court is set up to prosecute individuals for egregious crimes while the International Court of Justice will settle disputes between different states. In the ICJ, "Only states may apply to and appear before the court" (International), meaning only nations can submit cases for resolution. All members of the UN are automatically members of the ICJ, but they must ratify the ICC on their own. International Court of Justice rulings are also subject to the enforcement of the UN Security Council which maintains the power to veto any enforcement of the rulings.

The ICC, is legally and functionally independent of the United Nations, yet the Rome Statute does grant certain powers to the UN Security Council. Under Article 13, cases that would not normally be considered within the Court's jurisdiction can be referred to the ICC by the Security Council. The Security Council used this power to refer the cases of Libya and Darfur to the Court; these cases would not have normally been considered because neither Sudan nor Libya are state parties to the Rome Statute. The Security Council can also require the Court to defer from investigating a case for a period of up to 12 months under Article 16. This deferral may be renewed indefinitely by the Security Council, which can be both a positive and a negative for the Court.

This arrangement allows the Court to utilize some of the enforcement powers of the Security Council, but it also carries the risk of tainting the Court with the political disagreements and

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controversies that are prevalent among the members of the Security Council. The Security Council is composed of 5 permanent members and 10 rotating members, each of whom serves a two-year term. China, France, Russian Federation, the United Kingdom, and the United States comprise the 5 permanent members of the Security Council. Each of the 5 permanent members also has the power to cast a veto to block actions of the other permanent members of the Security Council. These countries are arguably the most powerful in the world, and they also conflict with each other frequently. Relational and political problems can arise when countries such as Russia and China veto actions by the United Kingdom, France, and the United States, and the Court can feel the effects of this strain through continued renewals of a case deferment.

The International Criminal Court has jurisdiction over the crimes of genocide, crimes against humanity, war crimes, and crimes of aggression committed by individuals in a member state or committed on member state territory after the ratification of the Rome Statute in July 2002. As defined by the Rome Statute, genocide is "...any of the [following] acts committed with intent to destroy, in whole or in part, a national, ethnical, racial, or religious group."^{vii} It is important to note, when speaking about genocide, that the parameters for defining genocide do not include acts committed against a political group. Under this definition, it is acceptable to initiate mass violence against an opposing political group, in theory, because it is not enumerated as a protected group. In the past, acts of genocide were tried by ad hoc tribunals, such as the Nuremberg Trials and those for Rwanda and the former Yugoslavia. Crimes against humanity are defined as "...any of the [following] acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack."^{viii} Prior to any semblance of international law and rules of warfare, it was perfectly acceptable to target civilians and combatants alike during wartime. Since the development of international law, civilians have become a more protected class, who are to be free of direct and intentional attacks by enemy combatants. If large groups of civilians were to be targeted specifically during a time of war, it would be deemed as crimes against humanity. War crimes, "in particular when committed as part of a plan or policy or as part of

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a large-scale commission of such crimes,”^{ix} include torture, grave mistreatment of prisoners of war (POWs), the taking of hostages, purposefully causing great suffering to the body, and the willful destruction of property not justified as an act of military necessity.

Throughout most of world history, to the victor went the spoils. It was commonplace for the winning country to take property—land, gold, and other material objects—from not only combatants, but also from civilians, of the losing side. It was also common for the winning side to punish the entire country of the losing side, not just those who were actually fighting in the war. For example, at the conclusion of World War I, the entirety of Germany was forced to pay reparations to the allied forces. The entire country was being punished for the actions of the government and the military. The creation of ad hoc tribunals at the end of World War II marked the beginning of a different era in international law. Now, the allied forces could punish those directly responsible, rather than punishing the entire population for the actions of a few. It is the same principle in the International Criminal Court. The Court puts individuals on trial for their crimes, though finding where to draw the line of responsibility can be difficult. Generally, the Court only tries the highest ranking officials responsible for the committed crimes. For example, the ICC is currently investigating the situation concerning the Lord’s Resistance Army (LRA) in northern Uganda. Currently, arrest warrants have only been issued to 5 senior officials: leader Joseph Kony; Kony’s deputy, Vincent Otti; Army Commander of the LRA, Okot Odiambo; LRA commander, Raska Lukwiya; and LRA commander, Dominic Ongwen. Though thousands of others are involved in this particular situation, the ICC is only interested in trying the top officials, as there are far too many people to try individually and the trials would take too long.

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PROBLEMS WITH THE COURT FROM AMERICA'S PERSPECTIVE

The Threat of Third Party Jurisdiction and Anti-American Sentiment

One of the primary concerns raised by America when writing the Rome Statute and then signing it was the idea of third-party jurisdiction. Particularly in the United States, where sovereignty and freedom are prized above all other concepts, the idea of a third-party having jurisdiction over the way in which leaders and militaries acts was a harrowing thought. The United States is a powerful country with military presence throughout the world. It is also a powerful country with many enemies in this world. One of the major fears of American leaders was that American troops overseas, particularly those acting in “peace-enforcement, peacekeeping, rescue of nationals, freedom of navigation, and anti-terrorism,”^x could be subject to this jurisdiction if a vengeful state chose to act in an ill-manner and refer the United States to the Court. According to former Yale University Professor of Law, Ruth Wedgwood, “The worry of the United States is that in an unpopular conflict, there is a real chance that an adversary or critic will choose to misuse the ICC to make its point.”^{xi} Particularly with an powerful, elected Prosecutor, it is possible that states that are not on friendly terms with the United States would band together to elect Prosecutor with anti-American leanings.

There were, however, solutions proposed to this problem of third-party jurisdiction. One of the proposed solutions was to “suspend third-party jurisdiction where the state is willing to assume responsibility for the conduct as official acts,”^{xii} a concept known as complementarity. Essentially, if criminal acts were committed, complementarity allows the nation state in question to have the opportunity to try the case first. Complementarity would allow the United States to try its own citizens, or perpetrators who committed illegal acts on American soil, in the American judicial system first. This would afford the accused all of the rights and protections of the Constitution and allow the United States to retain jurisdiction over American crimes. If the United States took advantage of this privilege, the case need never be heard in front of the ICC. If the state acted to try the individuals responsible, they would not be subject to the jurisdiction of the ICC. The ICC would only step if the United

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States did not try the accused or if the trial appeared fraudulent or fixed in any way. This plan of action would not exempt government personnel from the justice system, but would rather protect the nation state from forfeiting its right to try its own people to an international body.

The other solution for the United States to protect itself from the jurisdiction of the Court would be to use its power of being on the Security Council. As mentioned, the Security Council has the power to defer the Court's investigation for a period of up to 12 months. Furthermore, the Security Council can vote for this deferral for an indefinite number of renewals. The United States can use its position to indefinitely defer any investigations into its own affairs. This would give the United States time to fully investigate the issue, decide the best course of action, and, if deemed necessary, try the issue without worrying about ICC interference. Admittedly, the U.S. would need the support of other Security Council Members; America would surely block a nation's desire to refer an investigation of U.S. actions, while other Security Council members would likewise be able to block deferments of investigations against the U.S. This could turn this into a point of U.S. contention with Court.

It could be argued that this power could also be dangerous if the United States were to abuse it in any way, such as utilizing it as a preventative action to keep its troops from ever facing the Court. That being said, the United States has a reputation that it needs to uphold, and the likelihood of the United States abusing this power seems small given the international backlash it would face if it were to do so. These kinds of actions could taint the United States' image, particularly to those whom the United States chose not to defer ICC investigations, whether ally or non-ally. For allies, it could negatively impact the positive relationship forged between the two countries; for non-allies, it could be used as a rallying point for anti-American sentiment. It is more likely that the United States would utilize this power to prepare a trial for its own citizens, given the lengthy trial process in the United States.

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The Problem of Constitutionality

Constitutional arguments have been made against the signing of the Rome Statute. It is unclear whether the Constitution allows the U.S. government to delegate judicial authority to an outside third party—in other words, to delegate jurisdiction over Americans or acts committed on American soil to an international body. A precedent seems to have been set in the case *Ex parte Milligan*^{xiii}. In this case, the Supreme Court struck down the conviction of a civilian by a military tribunal that was not established under Article III of the Constitution. The only way, it would seem, to bypass this issue would require at minimum that judges be appointed by the President, approved by the Senate, and serve for life. Even still, many other Constitutional problems would arise that would prevent the United States from accepting the jurisdiction of the ICC over American citizens as legitimate.

Procedurally, according to Lee A. Casey and David B. Rivkin, Jr., the ICC would fail to provide Americans the rights they are guaranteed under the Constitution. These would include rights guaranteed by the 4th Amendment, 5th Amendment, 6th Amendment, and the 8th Amendment in particular. In *De Geofroy v. Riggs* (1890), the Supreme Court ruled that Constitutional rights of Americans cannot be abridged by the federal government's power to conclude treaties. To quote, they claimed, “[W]e do not make the laws of war but we respect them so far as they do not conflict with the commands of Congress or the Constitution.”^{xiv} Clearly, then, one can see the difficulty in approving a court that goes against many of the ideals of the American way of life set forth by the Constitution. Though provided some protections under the Rome Statute, Americans on trial would not have the protections and rights guaranteed under the Bill of Rights, including protection from double jeopardy, the right to confront the accuser, and the right to a trial by jury. Furthermore, though the trials in the ICC are supposed to be public, the proceedings are often private. Exceptions to the public trial have never been enumerated in detail, however. It could be argued that this is a denial of a public trial that Americans would enjoy under the Constitution.

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Some rights are granted to those on trial in the ICC, though not necessarily the same rights enumerated in the American Constitution. The Rome Statute's Article 24 "Non-retroactivity *ratione personae*,"^{xv} criminal acts committed before the enactment of the treaty are not subject to ICC investigation. This protects people from punishment by *ex post facto* laws. Also under this article, if a law were to be changed before a final judgment was handed down, the law that is more favorable to the person on trial will be applied. This protects the accused from having a harsher punishment handed down as a result of a law change undertaken during the course of the trial. Under Article 26 of the Rome Statute, no person under the age of 18 at the time the crime was committed shall be subject to the Court's jurisdiction. Article 31 directly enumerates protection of those who suffer from mental diseases that prevent them from understanding their actions and the corresponding consequences. This same article allows people to act in self-defense—either through physical defending or the taking of property that is essential to survival—from "imminent and unlawful use of force in a manner proportionate to the degree of danger to the person or the other person or property protected"^{xvi} without punishment from the Court. Article 31 also protects those whose actions were the result of duress under threat of imminent death or bodily harm against that person or another person. Though the Court does offer these protections, it still does not offer the same standard of protection American citizens have come to enjoy under the American Constitution.^{xvii}

Article III of the Constitution also states, "The trial of all crimes, except in cases of impeachment, shall be by jury and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the Congress may by law have directed"^{xviii} As mentioned when discussing the structure of the court, all trials in the ICC would be heard in front of a bench of judges; there is no jury in the ICC. Should the United States fail to try the case within its own borders, any American tried before the ICC would, by default, forfeit his Constitutional right to a trial by jury. Further, the trial would not be held within the state the crime has been committed, but rather at the ICC headquarters in the Netherlands.

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The United States' initial signing of the treaty allowed the United States to play a significant role in the shaping of the court and its guiding principles. It gave the United States power in determining the direction of the court. During the preliminary discussions and the creation of the Rome Statute, the United States was always very mindful about the potential Constitutional impact. U.S. delegates questioned each portion of the Rome Statute in terms of how it fit with the U.S. Constitution. Though the Rome Statute was initially deemed to have met the criteria of the Constitutional test in terms of the rights of the accused according David Scheffer, head of the U.S. delegation to the Rome Conference (incidentally, he ended up voting against the adoption of the treaty), the United State proceeded to unsign the statute under President Bush.

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RELATIONSHIP BETWEEN THE U.S. AND THE COURT

Clinton Administration

Though hesitant and filled with concerns, President Bill Clinton signed the Rome Statute on December 31, 2000. President Clinton signed the statute in order to, "...reaffirm our strong support for international accountability and for bringing to justice perpetrators of genocide, war crimes, and crimes against humanity"^{xi}. Clinton also wanted to, "...remain engaged in making the ICC an instrument of impartial and effective justice in the years to come"^{xx}.

Clinton signed the Rome Statute with the hope of being involved in the process of creating the court and influencing its growth. It is important to note that signing the statute was not the same as ratifying it, however. Though he had signed the statute, the document still had to be reviewed and ratified by Congress before the United States could become a full state party to the Rome Statute. Clinton signed the document, but he did not submit it to Congress before his final term was complete.

Clinton did not believe that the Court should retain jurisdiction in states that had not ratified the Rome Statute. He believed "Court jurisdiction over U.S. personnel should come only with U.S. ratification of the treaty"^{xxi}. Clinton only wanted to be part to the continued creation of the court, not to the actual jurisdiction of the court. Furthermore, he did not want U.S. peacekeepers and soldiers in nations signed on to the Court to be subject to the Court's jurisdiction, particularly if the Rome Statute had not gone through the ratification process in the U.S. Congress. During this point in time, the United States had begun taking a stronger interest in humanitarian efforts across the world, potentially subjecting the United States to the jurisdiction of the Court.

Clinton even went so far as to suggest that his successor—President George W. Bush—should not submit the treaty for ratification until all American concerns had been addressed. Clinton held the view that signing the Rome Statute would allow the United States to be involved in shaping the Court, without actually being subject to the Court's jurisdiction. America was concerned that the ICC would interfere with domestic judicial systems and that the Prosecutor

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only be allowed to take action against an alleged criminal if the country of nationality is unwilling to investigate and try the crimes. The United States was also concerned that the Court would not only take jurisdiction over states that have signed the statute, but also those that had not. He acknowledged, however, that if the United States did not sign the treaty, it would not have the ability to influence the development of the Court.

Under the Rome Statute, the United States would be protected in various ways that countered President Clinton's hesitance. The Statute focused more on broad war crimes and crimes against humanity and would likely ignore smaller issues created by individual soldiers.^{xxii} The United States, as a Security Council member, would have also been able to stop the ICC from investigating and trying their soldiers involved in U.N. Peacekeeping Missions^{xxiii} by using the power to defer investigations. The idea of complementarity would also allow the United States to try their own citizens in their courts first before they would ever appear before the ICC.^{xxiv} The Rome Statute did allow some protections for the United States which eventually led to President Clinton's initial signing of the treaty at the end of the year 2000.

Overall, there appears to be a general trend for Clinton's reasons to sign the Rome Statute. Despite some reservations regarding provisions within the Rome Statute Clinton decided to sign and commit the United States. The decision allowed the United States to become a part of the creation of the court without having to commit to its jurisdiction. Clinton wanted to position the United States as helping the international community in setting up the court but also gave the United States the flexibility to back out if they believed the court was not in their best interests. Clinton never put the United States into the Court completely, but rather entered into the Rome Statute with reservations that he expected his successor to discuss and negotiate before the ratification of the Statute.

Bush Administration

The United States' approach to the International Criminal Court took a very different turn under Clinton's successor, President George W. Bush. President Bush sought to limit the International Criminal Court's influence over the United States and sought to limit its

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jurisdiction. President Bush even removed the United States' signature from the Rome Statute, eliminating their adherence to the treaty. Under the Bush administration the United States took aggressive measures in order to minimize the presence of the ICC.

The timing of Clinton's signature on the Rome Statute was one of the major issues the Bush administration had with the treaty. President Clinton signed the Rome Statute on December 31, 2000, less than one month before President Bush was to be inaugurated and take office. Clinton made recommendations to President Bush in his statement on the Rome Statute but failed consult him.^{xxv} President Bush's attitude towards the Rome Statute was that the United States should not be a part of the International Criminal Court.^{xxvi} Participation in the Statute was minimal and was not a priority of the Bush Administration until the 60th nation ratified the ICC on April 11, 2002. This event signaled that the ICC would, in fact, have enough support to become an operating institution.^{xxvii} Less than a month later, the Bush Administration sent notice to the United Nations that, "the United States has no legal obligations arising from its signature on December 31, 2000."^{xxviii}

The administration's actions towards the International Criminal Court became more focused on limiting the Court's power over Americans. The United States exercised its Security Council veto over peacekeeping missions in Bosnia until the other Security Council members passed, "...a resolution limiting the ICC's power to prosecute U.S. peacekeepers."^{xxix} In this case, U.S. peacekeepers were stationed in Bosnia and the U.S. threatened to veto the extension of peacekeeping missions in Security Council until the Council passed a resolution to shield US Peacekeepers from ICC prosecution. In addition, there were other bilateral agreements set up by the United States. This sought to prevent the extradition of American citizens to the ICC using the threat of revocation of aid as incentive.^{xxx} This was done to protect American citizens on the basis of Article 98 of the Rome Statute. This article allowed nations to cooperate with treaties in place in regards to diplomatic immunity of a third party instead of their responsibilities under the Rome Statute.^{xxxi}

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Bush also signed into law the American Servicemembers' Protection Act (ASPA) in 2002. This act sought to protect the United States' military and government officials from ICC prosecution.^{xxxii} This act required the Security Council to exempt United States armed forces from ICC jurisdiction in any United Nations peacekeeping missions. That act also authorized the President to, "...use all means necessary and appropriate to bring about the release of any person...who is being detained or imprisoned by, on behalf of, or at the request of the International Criminal Court."^{xxxiii} The American Servicemembers' Protection Act allowed the United States to take any means necessary to stop United States citizens from ICC prosecution.

The Bush Administration's strong anti-ICC actions were critical in the United States' unsigning of the treaty. The United States took aggressive actions to not only free themselves of their commitment to the Rome Statute, but to limit the ICC's influence and jurisdiction over Americans. According to John R. Bolton, the Bush administration was fearful that top military officials, government leaders, United States' U.N. peacekeepers, and civilians would become, "...the real potential targets of the ICC's politically unaccountable Prosecutor."^{xxxiv} The Bush administration feared an unaccountable International Criminal Court that would be free to prosecute whomever it deemed criminal. The Clinton Administration's actions of signing the Rome Statute without consulting the new administration only exacerbated President Bush's distaste towards the International Criminal Court. This culminated with the unsigning of the treaty and aggressive anti-ICC policies by the United States. Later in his presidency, Bush softened a little about enforcing these laws. In 2005, the United States abstained from the UN Security Council recommendation to investigate Sudan. Though America did not directly support the measure, the fact that it did not veto the recommendation was viewed as some measure of support for the concept of the ICC.

Obama Administration

President Barack Obama has closely followed some of his policies towards the international Criminal Court as President Bush did before him. While not as aggressively cutting all ties with the ICC the Obama Administration has still felt the need to maintain distance between

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the ICC and Americans. It is worth acknowledging, however, that President Obama is viewed as much more supportive of the Court in part because he is less unilateral than President Bush was while he was in office.

The Obama Administration closely followed the Bush Administration's previous policies with the referral of Mummur el-Qaddafi to the ICC. In 2005, the Bush Administration demanded a paragraph in the referral of Sudanese President Omar al-Bashir to the ICC exempting United States personnel from investigation (Hirsh). The Obama Administration demanded the same exemption in Qaddafi's referral before it would allow the referral to pass the UN Security Council. The clause "...declares that the United States will retain 'exclusive jurisdiction' over its own personnel" (Hirsh). However, in 2011, the United States voted in favor of UN Security Council Resolution 1970 which was concerned with the situation in with Qaddafi in Libya. This marked the first time in which a UN referral to the ICC had been unanimously decided upon.^{xxxv} This yes vote to recommend Sudan contrasted with President Bush's Administration who abstained on the previous vote. The Obama Administration has also supported the ICC in other ways most notably through the supplying of intelligence on Darfur.^{xxxvi}

So far over the course of Obama's Presidency, he has softened the United States' stance against the ICC. Despite maintaining the ICC lacks jurisdiction over United States citizens he has sought to aid it through the supply of information in order to stop war criminals. Obama appears to support the idea of an international body to try and convict the most heinous of war criminals, but still wants to put Americans above the ICC. Obama's actions have only continued to distance the United States from ICC jurisdiction. Obama has been more amicable towards the ICC but the fear remains that Americans will be unfairly targeted by the ICC. Obama's attempt to shield Americans from ICC jurisdiction exemplifies this.

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ANALYSIS OF THE RELATIONSHIP BETWEEN THE U.S. AND THE COURT

The relationship between the United States and the International Criminal Court is an important one in determining the future of the Court. The United States is among the most powerful countries in the world given its resources and its UN Security Council position. The Court needs the United States to volunteer these assets as well as its support in order to be viewed as legitimate in the eyes of the international community. Without support from the United States, the Court will fail or, at the very least, cease to be effective in fulfilling its purpose.

The Court faces a problem in being able to capture those it has brought indictments against. It has no police force or military force to bring these people into the Court, and it does not have the power to try people *in absentia*, or without the accused physically in the courtroom. It relies on countries using their own military and police forces to capture the criminals and hand them over to the court. The United States has the most powerful military in the world to accomplish this task, either as a member of the UN or on its own. Furthermore, the United States can utilize its connection to NATO to accomplish tasks that it may not have been able to through the UN due to vetoes by other Security Council members. It also can use its influence as a superpower to get countries to turn over accused criminals to the ICC.

Currently, no country signed on to the Rome Statute seems to have the capability or the will to offer what the United States could offer in way of either capturing accused criminals or influencing nations to hand them over. Without this kind of cooperation, the Court will hardly ever hear cases, as there will be few defendants present for trials. The Court will, therefore, fail in its goal of trying those potentially responsible for some of the world's most heinous crimes. If the Court has no cases to try because it has no way to bring people to their trials, it becomes an ineffective legal structure with no legitimacy and no purpose.

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The United States can also offer its position on the UN Security Council to bring legitimacy and effectiveness to the Court. The United States can use its position to refer important cases to the Court. Cases such as those of Sudan and Libya would not have made it to the ICC without UN referral. The United States could also work to prevent indefinite deferrals of important cases. Possessing such a powerful voice on the Security Council, U.S. influence would help bring legitimacy to the Court. Furthermore, U.S. influence on the UN Security Council could help solve the problem of capturing criminals and enforcing decisions, through direct intervention, influencing other countries to get involved, and influencing the home country to extradite its criminals.

The Court also needs funding in order to operate. It currently operates on the contributions of member states, and the amount that each member state pays corresponds with that country's income, similar to how the UN is funded. The Court can also get funding through the UN if it is approved by the General Assembly and is to be used in relation to a case referred to the Court by the Security Council. The United States is among the wealthiest countries in the world with the most resources. America provides approximately 22% of the entire UN budget. With funding from America, the Court could develop further and it would have the resources to work towards capturing criminals. The amount of funding America could provide could potentially make the Court a much higher functioning institution. Further, by contributing money to the Court, the United States will play a pivotal role in the development and furthering of the Court; though there are many things the United States does not particularly like about the Court, it cannot change the Court if it decides to stay away from the Court. It is a generally accepted concept that nations with the most resources to contribute are those who have the most influence in shaping an institution. This could be the case with the United States if it were to not only sign on to the Court, but also begin to fund the Court.

Most importantly, the influence of the United States on the international stage can either make or break the Court. If the United States continues to not only not support the Court, but also campaign against it, the Court will fail. If the United States, the most powerful nation in the world, does not want to sign on to the Court, other nations will question why they should.

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Others may also follow suit, withdrawing from the Court and unsigning the Rome Statute, particularly if lack of U.S. support impacts the ability of the ICC to function effectively. Lack of effective functioning may discourage members, who may unsign the treaty due to lack of progress. If no nations are member parties to the Court, the Court will have no jurisdiction and will thus be an ineffective court with no power and no reason for existing. The Court will be dismantled if the United States uses its influence to persuade others away from the Court.

However, as the ICC exists now, it is not in U.S. interests to join. Though many of the United States' European allies signed on to the measure, the United States itself is not as willing to forfeit some of its sovereignty and submit itself to third-party jurisdiction. One could make the argument that the United States gave up some sovereignty when it decided to join international governmental organizations such as the UN, but I would disagree. In bodies such as the UN, the United States was placed in a powerful position. It has a great deal of sway and influence in UN matters as a member of the Security Council, rather than simply being a General Assembly member. It has powers that most other countries do not. If the United States were to join the Court, it would not be placed in that powerful and advantageous position. Rather, it would be just as vulnerable and subject to investigation as other states signed on to the Court. In this way, the United States does not want to forfeit its sovereignty because there would be no opportunity to really gain anything in terms of power or influence in signing on. Instead, the United States would be placed on the same playing field as all of the other members, unless the Prosecutor somehow managed to always be from the United States, which would be a highly unlikely scenario given the number of countries signed on to the Statute. The United States wants the ability to be in control of every situation or international body, but there is little opportunity for that to occur in the Court.

Furthermore, the potential infringement on constitutionally guaranteed rights far outweighs the benefits of an International Criminal Court in the minds of many American politicians. I would also contend that the United States would end up bearing most of the burden of capturing and extraditing alleged criminals to the ICC, which would involve significant American funding coming out of the American taxpayers' pocket. The number of countries

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possessing anti-American sentiment is also high right now, creating even more objection to subjecting the U.S. to the Court's jurisdiction.

Using this logic, however, I would argue that the United States would never sign on to any kind of international court of which it could be subjected to outside jurisdiction. It partially has to do with the way in which the Court is set up with the elected judges and Prosecutor, but it also stems from the tradition of American emphasis on individual rights and freedoms, as well as a need to be in control of every situation. The United States wants to be involved in shaping and developing the court, as well as prosecuting criminals, yet it does not want to be on the receiving end of the court's jurisdiction, similar to the American role in the Nuremberg trials. Should this ideal ever become a reality, the court would never be viewed as illegitimate internationally anyway since only certain people would be subject to its jurisdiction. Perhaps, then, the United States will never sign on to any international court unless there is a drastic change in the court's structure and American ideals.

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