

THE INTERNATIONAL CRIMINAL COURT: FORMER PRESIDENT GEORGE W. BUSH AND WORLD OPINION

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I. INTRODUCTION

The International Criminal Court (Court or ICC) came into force on July 1, 2002.¹ It had 139 signatories and 89 parties² through the later part

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1. Chronology of the International Criminal Court [*hereinafter* Multilateral Treaties], available at <http://www2.icc-cpi.int/Menus/ICC/About+the+Court/ICC+at+a+glance/Chronology+of+the+ICC.htm> (last visited October 8, 2009). See also Press Release, In First Meeting, Assembly of

of the Bush Administration.³ In an effort to make this one of the most open treaties to come into force, as Pellet notes, States not a signatory as of December 31, 2000, are free to join at any time without objection by Member States.⁴ After more than a half century of work to bring this Court into existence,⁵ the ratification of the treaty took place after the General Assembly convened from June 15 to July 17 of 1998, at the United Nations Diplomatic Conference of Plenipotentiaries “to finalize and adopt a convention on the establishment of an international criminal court.”⁶ As the ICC website notes,

One of the primary objectives of the United Nations is securing universal respect for human rights and fundamental freedoms of individuals throughout the world. In this connection, few topics are of greater importance than the fight against impunity and the struggle for peace and justice and human rights in conflict situations in today’s world.⁷

The establishment of the Court reflects a need to bring to justice those who would otherwise go unpunished, as has happened in the past; in theory, the Court’s existence means this will no longer be the case in the future.

Further, the goal is to have the power to bring a citizen of *any* nation, including those who are non-signatories, before the Court for the crime of genocide, crimes against humanity, and war crimes.⁸ The ICC was

States Parties to Rome Statute of Internal Criminal Court Approves Financial, Administrative Arrangements (March 9, 2009).

2. Multilateral Treaties, *supra* note 1. The 139 signatories signed the statute, a preliminary step that had to be taken by December 31, 2000, by those states that intended to later ratify it and thereby become parties to it. According to Schabas, “Significant delays between signature and ratification were to be expected, because most States needed to undertake significant legislative changes in order to comply with the obligations imposed by the Statute, and it was normal for them to want to resolve these issues before formal ratification.” WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 20 (2nd ed., Cambridge University Press 2004).

3. See Multilateral Treaties, *supra* note 1.

4. Alain Pellet, Entry Into Force and Amendment of the Statute, in *The Rome Statute of the International Criminal Court: A Commentary*, in Volume I, 145, 153 (Antonio Cassese, et al. eds., Oxford University Press 2002).

5. Establishment of an International Criminal Court—Overview, available at <http://untreaty.un.org/cod/icc/general/overview.htm> (last visited October 8, 2009).

6. U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, June 15–July 17, 1998, ¶ 96, U.N.Doc A/CONF.183/SR.8 [hereinafter, U.N. Diplomatic Conference].

7. See Establishment of an International Criminal Court—Overview, *supra* note 5.

8. U.N. Diplomatic Conference, *supra* note 6, at 11, 14, 25.

established with the understanding that, “[n]ations agree that criminals should normally be brought to justice by national institutions. But in times of conflict, whether internal or international, such national institutions are often either unwilling or unable to act”⁹ Therefore, the first issue is whether the Court’s authority and even existence have been strengthened or weakened since Clinton¹⁰ first signed onto the ICC just before he left office.¹¹ The Bush Administration subsequently refused to participate in the Court¹² the following year.¹³ In a post-September 11 world, as will be demonstrated later, this departure from the Court has been dramatic; indeed, former President Bush’s action was due in part to the possibility of American soldiers or personnel involved in the war on terrorism being brought before the ICC.¹⁴ President Bush¹⁵ has said,

9. See Establishment of an International Criminal Court—Overview, *supra* note 5.

10. President Clinton noted his reason for supporting the ICC:

The United States is today signing the 1998 Rome Treaty on the International Criminal Court. In taking this action, we join more than 130 other countries that have signed by the December 31, 2000, deadline established in the treaty. We do so to reaffirm our strong support for international accountability and for bringing to justice perpetrators of genocide, war crimes, and crimes against humanity. We do so as well because we wish to remain engaged in making the ICC an instrument of impartial and effective justice in the years to come.

Bill Clinton, *Clinton's Words: 'The Right Action'* N.Y. TIMES, Jan. 1, 2001, at A6, available at <http://www.nytimes.com/2001/01/01/world/clinton-s-words-the-right-action.html> (October 8, 2009).

11. Orentlicher notes that the United States was supportive of a permanent international criminal court under President Clinton. Diane F. Orentlicher, *Unilateral Multilateralism: United States Policy Toward the International Criminal Court*, 36 CORNELL INT’L L.J. 415, 415–416 (2004).

12. In a communication received on 6 May 2002, the Government of the United States of America informed the Secretary-General of the following:

This is to inform you, in connection with the Rome Statute of the International Criminal Court adopted on July 17, 1998, that the United States does not intend to become a party to the treaty. Accordingly, the United States has no legal obligations arising from its signature on December 31, 2000. The United States request that its intention not to become a party, as expressed in this letter, be reflected in the depositary’s status lists relating to this treaty.

Letter from John Bolton, U.S. Undersecretary of State for Arms Control, to Kofi Annan, U.N. Secretary General (May 6, 2002).

13. See John R. Worth, Globalization and the Myth of Absolute National Sovereignty: Reconsidering the “Un-signing” of the Rome Statute and the Legacy of Senator Bricker, 79 IND. L.J. 245, 245 (2004).

14. Everett argues that American servicemembers are protected under the ICC because,

[T]he ICC Statute does make available to the United States a means for insisting that U.S. authorities—not the ICC—have the opportunity to investigate and to prosecute alleged crimes by servicemembers against the ‘Law of Nations.’

I strongly reject the ICC. I'm not going to accept an ICC. I'm not going to put ourselves in a position where our soldiers and diplomats get hauled into a Court over which we have got— [with] the prosecutors whom we don't know, the judges—I mean, we're not going to allow ourselves to do that. And our friends shouldn't want us to be put in that position.¹⁶

Is the former President right? Since his remarks on September 30, 2002, George W. Bush has continued to argue that the United States should not participate in the Court. Specifically, the White House continued to push a different agenda: U.S.-run tribunals in the wake of Afghanistan and the stabilization of Iraq through the use of both U.S. and international forces under its command.

The following three areas will be addressed in this paper: 1) The International Criminal Court: Its History and the Evolution of its Articles; 2) former President Bush and the International Criminal Court; and 3) The Bush Administration and World Opinion. Together, these will constitute the basic structure of the argument that the President Barack H. Obama and his Administration may be forced to deal with the ICC due to events throughout the world and the international response to the U.S. role in those events.

II. THE INTERNATIONAL CRIMINAL COURT: ITS HISTORY AND THE EVOLUTION OF ITS ARTICLES

The ICC has been in development for over fifty years. The process was started in Nuremberg and continued through recent tribunals in Yugoslavia. The ICC Statute (Rome Statute) that was finally presented in draft form in 1998 was the culmination of this history and the crystallization of a whole body of law. The challenges faced by the Nuremberg Tribunal following the Second World War, such as the need to create a unified court for the prosecution of one set of war criminals, called for the establishment of a court whose function was to deal with some of

Perhaps, therefore, the threat to American servicemembers posed by the Statute may be less ominous than many have supposed.

Robinson O. Everett, *American Servicemembers and the ICC in The United States and the International Criminal Court* 137, 147 (Sarah B. Sewall & Carl Kaysen eds., Rowman & Littlefield Publishers, Inc. 2000).

15. Unless noted otherwise, "Bush" will refer to the former President, George W. Bush, and not his father, former President George H.W. Bush.

16. George Bush, Remarks Prior to Discussions with President Alvaro Uribe of Colombia and an Exchange With Reporters, 38 WEEKLY COMP. PRES. DOCS. 39 (Sept. 30, 2002) [hereinafter Remarks with President Alvaro Uribe].

the worst crimes confronting humankind. The Rome Statute was designed to address problematic parts of international law that in the past have been dealt with via *ad hoc* criminal tribunals.¹⁷ The next section will review the specific history of the ICC. This will be followed by a review of the Rome Statute itself.

A. *History of the International Criminal Court*

According to Cassese, the ICC's history can be conceptualized in terms of four distinct phases:

- 1) [A]bortive early attempts (1919–1945);
- 2) [C]riminal prosecution in the aftermath of World War II: the Nuremberg and Tokyo Tribunals (1945–1946);
- 3) [P]reparation for the future ICC: the work of the International Law Commission (ILC) (1950–1954, 1990–1994); and
- 4) [P]ost-Cold War “new world order”: the development of the two *ad hoc* tribunals and the emergence of the ICC Statute (1991–1998).¹⁸

The first attempts at creating an international criminal court were designed to deal with the crimes against humanity committed during the First World War. In the wake of the horrors witnessed in this conflict, the international community sought a court with jurisdiction over these crimes. This effort failed, however, because the Allies allowed Germany to try its own citizens.¹⁹ In the end, of the 901 accused war criminals whose names were submitted by the Allies, only 13 were convicted, and all received light sentences.²⁰

The aftermath of the Second World War brought the beginnings of what might now be considered an international court. The crimes against humanity in connection with the Nazi genocide of Jews led to the establishment of the Nuremberg and Tokyo Tribunals.²¹ It was at these trials that the first semblance of what would later become the ICC took shape. The German leaders were tried for acts committed against their own

17. Antonio Cassese, *From Nuremberg to Rome: International Military Tribunals to the International Criminal Court*, in Volume I, *THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY* 3–4 (Antonio Cassese et al. eds., Oxford University Press 2002).

18. *Id.* at 4.

19. Paul D. Marquardt, *Law Without Borders: The Constitutionality of an International Criminal Court*, 33 *COLUM. J. TRANSNAT'L L.* 79–80 (1995).

20. *Id.*

21. See Cassese, *supra* note 17, at 5.

citizens under the principle that individuals and states alike are responsible under international law.²² These tribunals set forth many of the principles that would later be central to the evolution of the ICC, notably, the idea that people can be tried for crimes against humanity, even when those crimes are committed in an official capacity.

The need to prosecute Nazi war criminals at the Nuremberg Tribunal added to the difficulty of establishing a court to deal with some of the worst crimes confronting humankind. Following the Second World War, however, the ILC was created²³ with the intended purpose of addressing some of the problems encountered by both the Nuremberg and Tokyo tribunals.²⁴

Roughly around the next thirty years was a period in which the ILC attempted, but ultimately failed, to establish an international criminal court.²⁵ However, it was also during this period that the first laws comprising the basis for the ICC were prepared in the Draft Code of Crimes. Subsequently, however, the Draft Code's successor, the Draft Statute of the Court, was tabled by the United Nations in 1953.²⁶

One of the major obstacles to the creation of an international court such as the ICC during this period was the Cold War.²⁷ The problem, as Marquardt points out, was that the Soviets would only accept review by a court where they either had veto power, or the option not to participate in, or be subject to, the court;²⁸ neither condition was acceptable to the other participants. While the Cold War and the unresolved disagreements between Russia and other nations both complicated and delayed the process, the fall of the Berlin Wall, however, suddenly changed all of that.²⁹ The idea of the court had languished until the fall of the Soviet Union in 1989; within a few short years of that event, however, the ILC was again called upon to create a draft for the Rome Statute.

Starting in 1992, the ILC began on a draft that would take a decade to complete, which the international society and the world legal community would use as a foundation for the ICC. The ILC again took up the task of drafting the statutes for the Court in 1993 and adopted this document in

22. See Marquardt, *supra* note 19, at 82.

23. See Cassese, *supra* note 17, at 9.

24. *Id.* at 9–10.

25. *Id.* at 9.

26. *Id.* at 9.

27. See *id.* at 10; see also Marquardt, *supra* note 19, at 85–86.

28. See Marquardt, *supra* note 19, at 86.

29. See Cassese, *supra* note 17, at 11.

1994.³⁰ With the ILC convening regularly, in 1994, 1995, and 1996, the draft underwent many revisions. Throughout these years, the ILC sought to find a middle ground that would allow the maximum number of nations to sign on, while still retaining many of the most important features regarding such issues as jurisdiction and enforcement.

It was also during this period that there came to be a greater global awareness of the need for a permanent court to deal with war crimes, following the events in the former Yugoslavia and Rwanda.³¹ The experience of the military tribunals that were created to prosecute crimes in both of these countries could be drawn upon in order to create an effective international criminal court, one that would promise justice for those who could seek redress nowhere else. The Draft Statute and Draft Final Act were submitted to the Diplomatic Conference at Rome from June 15 to July 17 of 1998.³² The eventual establishment of the Court in 2002, ushered in a new period in international law marked by the existence of a permanent court, which in theory is able to bring to justice those who commit crimes against humanity.³³

On July 1, 2002, the Court was finally formally established.³⁴ Since former President George W. Bush took office, however, the United States government has opposed it, reversing the policy of the previous Bill Clinton Administration.³⁵ As will be explained, the Bush Administration's opposition has been both condemned and praised. For now, this paper will turn next to the issue of how the ICC articles have been transformed over time.

30. *Id.* at 10.

31. See Mark A. Drumbl, *Rule of Law Amid Lawlessness: Counseling the Accused in Rwanda's Domestic Genocide Trials*, 29 COLUM. HUM. RTS. L. REV. 545, 548 (1998); Evo Popoff, Note, *Inconsistency and Impunity in International Human Rights Law: Can the International Criminal Court Solve the Problems Raised by the Rwanda and Augusto Pinochet Cases*, 33 GEO. WASH. INT'L L. REV. 363, 378-79 (2001); Celina Schocken, *The Special Court for Sierra Leone: Overview and Recommendations*, 20 BERKELEY J. INT'L L. 436, 456 (2002).

32. See Cassese, *supra* note 17, at 17.

33. *Id.* at 18.

34. See *Multilateral Treaties*, *supra* note 1. There has been an official ICC website in existence after the United Nations' one stopped being updated as of December 31, 2003. www.icc-cpi.int. According to the ICC, "The seat of the Court is The Hague in The Netherlands. The Court will be temporarily housed at 'de Arc' on the outskirts of The Hague before moving to its permanent premises at the Alexanderkazerne. It is envisaged that the permanent premises will be ready for occupation between 2007 and 2009." *What is the ICC*, available at www.ciaonet.org/casestudy/media/mur01_a.html (last visited July 16, 2009).

35. Fiona McKay, *U.S. Unilateralism and International Crimes: The International Criminal Court and Terrorism*, 36 CORNELL INT'L L.J. 455, 463-65 (2004).

B. *The Transformation of the International Criminal Court's Articles*

In 1992, the ILC started working on the draft of the laws governing the ICC. The resulting articles of the Rome Statute were to be focused on international treaties of the many nation-states, especially with regard to crimes against humanity. At its 46th session, in 1994, after taking into account comments from participating nation-states and a number of other bodies, a Draft Statute for the ICC was finally adopted.³⁶ The only crimes that were not clearly defined in the Rome Statute were crimes of aggression by nation-states.³⁷

1. Finalizing the Rome Statute

In 1994, the ILC adopted the Draft Statute of the ICC; this statute consisted of sixty articles with commentaries.³⁸ The next two years would see this initial draft go through a number of revisions, taking into account commentaries from any number of sources. Most of the changes took place on the ILC draft in Working Groups³⁹ and focused on such issues as jurisdiction and the role of the U.N. Security Council. Many of these changes were in place by 1998. In June of that year, representatives from all over the world met in Rome in order to determine the shape of the final draft.

While many of those at the Rome meeting agreed on including crimes against humanity, there was strong opposition to this from four of the five permanent Security Council members,⁴⁰ the United Kingdom was the one exception, in part because it had already decided to join the Court.⁴¹ Fearing that its soldiers or other representatives would be brought before

36. James Crawford, *The Work of the International Law Commission*, in Volume I, THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 23, 28–29 (Antonio Cassese, et al. eds., Oxford University Press 2002).

37. Giorgio Gaja, *The Long Journey towards Repressing Aggression*, in Volume I, THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 427, 430–32 (Antonio Cassese, et al. eds., Oxford University Press 2002).

38. Adriaan Bos, *From the International Law Commission to the Rome Conference (1994–1998)*, in Volume I, THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 35, 36 (Antonio Cassese, et al. eds., Oxford University Press 2002).

39. *Id.* at 64.

40. The five permanent Security Council members include: Republic of China, France, the Union of Soviet Socialist Republics, United Kingdom of Great Britain and Northern Island, and the United States of America. U.N. Charter art. 23, para. 1.

41. Philippe Kirsch & Darryl Robinson, *Reaching Agreement at the Rome Conference*, in Volume I, THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 67, 71 (Antonio Cassese, et al. eds., Oxford University Press 2002).

the Court, representatives of the United States, including the executive and members of Congress, attempted to further limit the jurisdiction of the Court.⁴² The other participants, however, would not approve the “compromise” proposal presented by the United States on this point. Instead, on the final day, the Rome Statute was adopted without the U.S. proposal, with 120 votes in favor, 7 against, and 21 abstentions.⁴³ The Court was created with an international community in mind and with the goal of having the power to enforce penalties on those who violate its laws.

The transformation of the laws of the ICC occurred over time. Following the finalization of the Rome Statute, the Preparatory Commission was created to deal with remaining issues, such as the rules of procedure and elements of crimes.⁴⁴ It was this commission’s work that set the stage for the Court to officially come into being on July 1, 2002. The next sections will review areas of the Rome Statute that continued to be of importance to the Bush Administration.

2. Crimes Against Humanity

In addressing international law, the Rome Statute lays out a number of crimes for which individuals may be brought before the Court. Under Article 20 of the Draft Statute,⁴⁵ four crimes were listed under general international law:

- 1) Genocide;
- 2) Aggression;
- 3) Serious violations of the law and customs applicable in armed conflict; and
- 4) Crimes against humanity.⁴⁶

Article 7—Crimes Against Humanity—specifically lays out the laws for which an individual may be brought before the ICC⁴⁷ for this category

42. *Id.* at 77. The former Bush Administration had since made a sustained effort to make functional jurisdiction over U.S. citizens impossible. Jean Galbraith, Note, *The Bush Administration’s Response to the International Criminal Court*, 21 BERKELEY J. INT’L L. 683, 683 (2003); see also Allison M. Danner, *Navigating Law and Politics: The Prosecutor of the International Criminal Court and the Independent Counsel*, 55 STAN. L. REV. 1633, 1633–34 (2003); McKay, *supra* note 35, at 464.

43. Kirsch & Robinson, *supra* note 41, at 71.

44. Philippe Kirsch & Valarie Oosterveld, *The Post-Rome Conference Preparatory Commission*, in Volume I, THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 93, 93–104 (Antonio Cassese, et al. eds., Oxford University Press 2002).

45. Throughout this paper, “Article” refers to those Articles found in the Rome Statute.

46. Crawford, *supra* note 36, at 32.

of crimes. Article 7 lists those crimes. For the purpose of this Statute, “crime against humanity” means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

- (a) Murder;
- (b) Extermination;
- (c) Enslavement;
- (d) Deportation or forcible transfer of population;
- (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- (f) Torture;
- (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
- (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
- (i) Enforced disappearance of persons;
- (j) The crime of apartheid;
- (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.⁴⁸

Of the crimes listed above, the crime of torture⁴⁹ is of particular interest to the United States.⁵⁰ Under the Rome Statute’s provisions, there

47. See Mohamed E. Badar, From the Nuremberg Charter to the Rome Statute: Defining the Elements of Crimes Against Humanity, 5 SAN DIEGO INT’L L. J. 73, 90–91 (2004).

48. Rome Statute of the International Criminal Court art. 7, U.N. Doc. A/Conf. 183/9 (July 17, 1998) [hereinafter *Rome Statute*].

49. According to the definition under Article 7(2)(e), “‘Torture’ means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions.” *Id.* at 4.

50. According to an article by Shukovsky, recent developments regarding the abuse by U.S. jailors at Guantanamo Bay Naval Base in Cuba constitutes “torture” and (if proven true) are violations of the U.N. Convention Against Torture. Paul Shukovsky, *Terror Suspect’s Suit Tells of U.S. Abuse: Documents in Guantanamo Case Describe Extreme Isolation*, SEATTLE POST-INTELLIGENCER, Aug. 6, 2004, at A1; see generally Diane M. Amann, *Guantanamo*, 42 COLUM. J. TRANSNAT’L L. 263 (2004).

must be a clear *mens rea*⁵¹ that must include awareness by superior officers that the particular criminal act is both widespread and systematic against a civilian population.⁵² This may be satisfied if in the course of a particular crime, the attacker intended to pursue such an attack on a civilian population.⁵³

The section on torture is broader than under customary international law, as an international crime *per se*.⁵⁴ The Court may punish a single act of torture, even if the public authorities had no idea that the event was taking place.⁵⁵ The issue of torture is important for the United States because it is this category that could be used to bring one of its citizens before the ICC, on account of U.S. government or military actions in Afghanistan, the Guantanamo Bay Naval Base in Cuba,⁵⁶ or in connection with some future military involvement.

As one example, this article could be used against the United States as a result of the calls for justice for the Afghan-war “detainees” at Guantanamo Bay Naval Base.⁵⁷ In contrast, there are limited chances that the civilian U.S. legal system will prosecute any violations regarding the extraction of information through questionable methods if such acts are committed abroad.⁵⁸ However, it is possible for soldiers to be court

51. Antonio Cassese, *Crimes against Humanity*, in Volume I, THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 353, 363–65 (Antonio Cassese, et al. eds., Oxford University Press 2002).

52. *Id.* at 373.

53. *Id.* at 354.

54. *Id.* at 374.

55. *Id.*

56. Katharine Q. Seelye, *A Nation Challenged: Prisoners*, N.Y. TIMES, Apr. 16, 2002, at A12; Shukovsky, *supra* note 50.

57. See Seelye, *supra* note 56; Paisley Dodds, *Four freed from Guantánamo sue U.S., alleging abuse*, THE SEATTLE TIMES, Oct. 28, 2004, at A5. The article describes the pain that four detainees suffered at the U.S. military base at Guantanamo Bay Naval Base on Cuba. It also goes on to state the reasons for the \$40 million suit (\$10 million for each plaintiff). As the article notes:

The lawsuit alleges the four were chained to the floor while strobe lights and loud music were played in a room chilled by air conditioning set at maximum levels. The men say they were subjected to the conditions for up to 14 hours a day. They say they were stripped naked and forced to watch videotapes of other prisoners who had allegedly been ordered to sodomize each other

Id.

58. See Tim Golden, *In U.S. Report, Brutal Details Of 2 Afghan Inmates' Deaths*, N.Y. TIMES, May 20, 2005, at A1, available at <http://www.nytimes.com> (last visited July 20, 2009); see also Katharine Q. Seelye, *Threats and Responses: The Detainees*, N.Y. TIMES, Sept. 16, 2002, at A12.

marshalled for severe violations.⁵⁹ It has been argued that the United States has violated international laws in its treatment of those captured and held at the base through the use of torture.⁶⁰ Thus, it is not outside the realm of possibility that an American soldier stationed at Guantanamo Bay Naval Base could be brought before the ICC on the grounds of torture under Article 7, if the military chooses not to prosecute that soldier.

In addition, the Supreme Court has held in *Rasul v. United States* “that federal courts have jurisdiction to consider challenges to the legality of the detention of foreign nationals held at the Guantanamo Bay Naval Base.”⁶¹ The question remains whether the Obama Administration will allow challenges by the detainees to go forward in federal courts. It would seem that absent any legal recourse in the U.S. justice system, ICC jurisdiction might be invoked on the detainees’ behalf.

As a practical matter, however, for this to occur, the Court would have to gain jurisdiction over the soldier, which is highly unlikely. Nonetheless, at the very least, court proceedings might be initiated, and the United States could be faced with the difficult choice of either defending the soldier in a court it has yet to recognize or simply ignoring the proceedings and hoping that the soldier is never caught in an ICC member country. Furthermore, in such an eventuality, the United States could be expected to use whatever means necessary—including military force—in order to bring that soldier back to the United States.⁶²

3. Jurisdiction

As the Guantanamo Bay Naval Base example demonstrates, the issue of jurisdiction will be central for the Obama Administration should a U.S.

59. The U.S. soldiers being charged in a military court for crimes of torture of prisoners at the Guantanamo Bay Naval Base, Cuba is one example. See Kate Zernike, *At Abuse Hearing, No Testimony That G.I.'s Acted on Orders*, N.Y. TIMES, Aug. 7, 2004, at A7.

60. See Seelye, *supra* note 56, at A1; Shukovsky, *supra* note 50.

61. *Rasul v. United States*, 542 U.S. 466, 486 (2004) (quoting Kennedy, J., concurring); see also Linda Greenhouse, *Justices Affirm Legal Rights of 'Enemy Combatants'*, N.Y. TIMES, June 29, 2004, at A1.

62. See The American Servicemembers Protection Act, 22 U.S.C. § 7421 (2003). This act specifically addresses U.S. Servicemembers who might be brought before the ICC. Section (8) states:

Members of the Armed Forces of the United States should be free from the risk of prosecution by the International Criminal Court, especially when they are stationed or deployed around the world to protect the vital national interests of the United States. *The United States Government has an obligation to protect the members of its Armed Forces, to the maximum extent possible, against criminal prosecutions carried out by the International Criminal Court.*

Id. (italics added); see also McKay, *supra* note 35, at 464.

citizen ever face the ICC. It is only after jurisdiction is acquired and the ICC has the accused in its custody that the prosecution of that individual may actually begin. As Crawford points out, a major change made during the process of revising the Rome Statute was the deletion of the reference to existing international criminal law treaties that would have allowed greater access to the accused. He further notes, “[i]t is remarkable that a text which began its life eschewing any reliance upon customary international law as a basis for defining crimes . . . should end up by excluding any reference to the other treaties at all.”⁶³

By taking a closer look at the issue of ICC jurisdiction, a fuller understanding of the difficulties that may arise for the U.S. government may be gained. This section will now turn to the articles themselves in order to better understand how, specifically, the ICC might gain jurisdiction over a U.S. citizen.

To begin, when President Bush effectively annulled Clinton’s signature, the Court’s jurisdiction over U.S. citizens became far more limited. This is because, according to Article 11, the Court can have automatic jurisdiction only over those who are signatories of the Court. Article 12 notes this very limitation and lays out the preconditions to the exercise of jurisdiction:

- 1.A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5.
- 2.In the case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3:
 - (a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;
 - (b) The State of which the person accused of the crime is a national.
- 3.If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the

63. Crawford, *supra* note 36, at 33.

Court without any delay or exception in accordance with Part 9.⁶⁴

There are thus two basic ways that jurisdiction can be gained: first, according to Article 12(2)(b), if the accused is a citizen of an ICC signatory country;⁶⁵ and second, if the crime was committed within the territory of a country that is a State Party to the Rome Statute, regardless of the nationality of the perpetrator.⁶⁶ In effect, therefore, the United States managed to limit but not to completely eliminate ICC jurisdiction over its citizens when it unsigned the Statute. Frulli gives a solid summary of this issue:

[O]nly individuals who are nationals of State Parties who have accepted the jurisdiction of the Court, may be tried irrespective of the circumstances in which the crime was allegedly committed, whereas nationals of States who did not accept it [e.g., the United States] can be prosecuted only if charged with the commission of crimes in the territory of a State who accepts the ICC jurisdiction or in a situation which has been deferred to the Court by the Security Council under Article 13.⁶⁷

Thus, U.S. citizens can clearly be brought before the ICC under Article 12(2)(a) if they are accused of crimes committed on the territory of a signatory to the Court. As Frulli's summary notes, the only other condition under which a U.S. citizen could theoretically be brought before the ICC is with a U.N. Security Council recommendation via Article 13, which reads,

The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if:

- (a) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14;
- (b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; or

64. *Rome Statute*, *supra* note 48, at art. 12.

65. Micaela Frulli, *Jurisdiction Ratione Personae*, in Volume I, *THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY* 527, 535 (Antonio Cassese, et al. eds., Oxford University Press 2002).

66. *Id.*

67. *Id.*

- (c) The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15.⁶⁸

In other words, Article 13(b) would allow the U.N. Security Council to recommend that a U.S. citizen be brought before the Court regardless of where a crime had been committed. As a practical matter, however, it is highly doubtful that the United States would ever turn one of its citizens over to this Court, even if that person has clearly committed a crime.⁶⁹ It can be assumed, however, that the United States—particularly under the Bush Administration—would have used its veto power rather than allow the U.N. Security Council to recommend the prosecution of a U.S. national.

Furthermore, even if a U.S. citizen commits a crime on the soil of a signatory to the Court, that country will not likely be allowed to bring the U.S. citizen before the ICC. To begin, the United States is party to a number of extradition treaties with countries throughout the world.⁷⁰ Extradition enables the United States to transfer persons from its soil to the country in which they are wanted, to stand trial there for criminal acts, and vice versa.⁷¹ Therefore, if a country has a valid reason for wishing to prosecute a U.S. citizen for a criminal act that the Administration recognizes, it is much more likely that the United States would hand the person over to the jurisdiction of a country that had agreed not to turn the accused over to the ICC—although even then extradition would move along at the same glacial pace it had in modern times.

The difficulty comes, however, should the United States refuse to comply with an extradition request, as might be the case when the citizen that is being requested by the Court serves in the Armed Forces of the United States or is working for the U.S. government. If the crime is torture, the U.S. government may be particularly unwilling to hand that individual

68. *Rome Statute*, *supra* note 48, at art. 13.

69. *See* 22 U.S.C. § 7421, *supra* note 62.

70. Specifically, the United States has used its threat to cut off foreign aid—especially military aid—to any country that does not agree to immunize United States' citizens from prosecution via the ICC through bilateral agreements. *See* Alisha D. Telci, Note, *The International Criminal Court: Is the United States Overlooking an Easier Way to Hold Saddam Hussein and Osama Bin Laden Accountable for their Actions?*, 38 NEW ENG. L. REV. 451, 451–54 (2004). *See also* Paul J. Toner, *Competing Concepts of Immunity: The (R)evolution of the Head of State Immunity Defense*, 108 PENN ST. L. REV. 899 (2004). Toner states, “Pierre-Richard Prosper, the United States War Crimes Envoy, continually warns nations that they risk losing foreign aid if they do not grant United States citizens, officials, and military personnel immunity from the ICC.” *Id.* at 900 (summarizing Peter Slevin, *War Crimes Envoy Gets Face-to-Face To Make His Case; State Dept. Office Sets Sights on Iraqis*, THE WASHINGTON POST, Oct. 30, 2002, at A21).

71. *See United States v. Puentes*, 50 F.3d 1567 (11th Cir. 1995), *cited in* JORDAN J. PAUST ET AL., INTERNATIONAL LAW AND LITIGATION IN THE U.S. 501 (West Group 2000).

over for extradition. If the U.S. justice system then fails to prosecute that person in a U.S. court, the ICC can hold that the legal system in the United States has failed to function properly and that the person can therefore be brought before the ICC.⁷² Under Article 90(7), a request for extradition by a State Party (an ICC signatory nation) shall be given priority over extradition requests from non-signatories. In other words, for instance, should one country ask for extradition of a criminal currently held by another country, the ICC request would take priority. Article 90 states,

Where a State Party which receives a request from the Court for the surrender of a person also receives a request from any State for the extradition of the same person for conduct other than that which constitutes the crime for which the Court seeks the person's surrender:

- (a) The requested State shall, if it is not under an existing international obligation to extradite the person to the requesting State, give priority to the request from the Court;
- (b) The requested State shall, if it is under an existing international obligation to extradite the person to the requesting State, determine whether to surrender the person to the Court or to extradite the person to the requesting State. In making its decision, the requested State shall consider all the relevant factors, including but not limited to those set out in paragraph 6, but shall give special consideration to the relative nature and gravity of the conduct in question.⁷³

Thus, under Article 90(7), if a U.S. citizen wanted by a State Party is captured and arrested in a country that is a signatory to the ICC, then that Member State is obligated to turn the person over to the ICC to face trial for crimes as listed by the Rome Statute.

It is possible, though unlikely, that the Bush Administration would accept the ICC's jurisdiction, which is provided for under Article 12(3).⁷⁴ The non-Party State, in this case the United States, is then expected to cooperate with the Court. In this situation, however, the rights of the accused would almost certainly be an issue for the Administration.

72. Gennady M. Danilenko, *ICC Statute and Third States*, in Volume II, THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 1871, 1888 (Antonio Cassese, et al. eds., Oxford University Press 2002).

73. *Rome Statute*, *supra* note 48, at art. 90.

74. *See* Danilenko, *supra* note 72, at 1889–90.

4. Rights of the Defendant

Given that in the future a U.S. citizen may be brought before the Court, the question here is whether an accused can receive a fair trial. Kay notes that the ICC only mentions defense council in passing, and only then on the assumption that the defendant *chooses* not to represent him or herself.⁷⁵ As they also point out, a weak defense council going up against a very strong prosecution—a situation that would tip the balance toward the prosecution even before the trial begins—will undercut the credibility of the Rome Statute in the eyes of the international community.⁷⁶ Article 67(1)(d) outlines the rights of the accused to legal assistance and related guarantees:

Subject to article 63, paragraph 2, to be present at the trial, to conduct the defense in person or through legal assistance of the accused's choosing, to be informed, if the accused does not have legal assistance, of this right and to have legal assistance assigned by the Court in any case where the interests of justice so require, and without payment if the accused lacks sufficient means to pay for it.⁷⁷

In practice, however, the defense may be subjected at the very least to ridicule, or worse, violence for assisting people who are accused of committing some of the worst crimes imaginable against humanity. There will be problems when the defense goes into the country where the crimes were supposed to have taken place in order to gather information.⁷⁸ In the face of public or institutional hostility in the place where the crime was alleged to have occurred, the defense's ability to gather the evidence necessary to clear an accused person may be hampered.

In sum, the defense is marginalized as compared to the prosecution.⁷⁹ For this reason, the Bush Administration may have been justified in questioning whether the Court may provide a fair trial, especially if it brings a U.S. citizen before it for alleged crimes of torture. Assuming that a trial actually takes place, what could an accused expect in terms of procedures?

75. Steven Kay, *The Role of the Defence*, in Volume II, THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY, 1421, 1421 (Antonio Cassese, et al. eds., Oxford University Press 2002).

76. *See id.* at 1422–23.

77. *Rome Statute*, *supra* note 48, at art. 67.

78. Kay, *supra* note 75, at 1424–25.

79. *Id.* at 1430.

5. Trial

The trial is conducted in the presence of three judges and without a jury.⁸⁰ Therefore, there is a noted difference, between the U.S. legal system and that of the Court's. The U.S. Constitution Article III, Section 2, Clause 3, guarantees that trial of crimes *shall* be by jury. The defendant in an ICC trial does, however, have certain other rights. First, Article 66 states that there is a presumption of innocence:

- 1) Everyone shall be presumed innocent until proved guilty before the Court in accordance with the applicable law.
- 2) The onus is on the Prosecutor to prove the guilt of the accused.
- 3) In order to convict the accused, the Court must be convinced of the guilt of the accused beyond reasonable doubt.⁸¹

Then the prosecution must convince two of the three judges that the accused is guilty beyond a reasonable doubt. Zappala adds that this right has become part of customary international law concerning the administration of criminal justice.⁸² An accused shall be found innocent if the prosecution cannot prove guilt of the crimes of which he or she has been accused beyond a *reasonable* doubt.⁸³ What is considered *reasonable*, however, remains up to the three judges to decide. Furthermore, as discussed above, the problem here under the Court rules is that the prosecution has a major advantage as compared to the defense.⁸⁴ The advantages of the prosecution may bias the judges against the accused. The judges may also be biased against a defendant who chooses to remain silent at trial, although the right not to testify is guaranteed. According to Article 67(g), the accused has the right "[n]ot to be compelled to testify or to confess guilt and to remain silent, without such silence being a consideration in the determination of guilt or innocence."⁸⁵ As a practical

80. Frank Terrier, *Powers of the Trial Chamber*, in Volume II, THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY, 1259, 1260 (Antonio Cassese, et al. eds., Oxford University Press 2002) (interpreting *Rome Statute*, *supra* note 48, at art. 39).

81. *Rome Statute*, *supra* note 48, at art. 66.

82. Salvatore Zappala, *The Rights of the Accused*, in Volume II, THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY, 1319, 1341 (Antonio Cassese, et al. eds., Oxford University Press 2002).

83. *Rome Statute*, *supra* note 48, at art. 66; Zappala, *supra* note 82.

84. Kay, *supra* note 75, at 1430.

85. *Rome Statute*, *supra* note 48, at art. 67.

matter, however, here as in U.S. courts, the judges may be prejudiced against an accused who refuses to testify.

Other rights of the defendant include the right to be informed by the prosecution and the court's obligation to ensure that the accused understands the charges against him or her,⁸⁶ as listed under Articles 67(1)(a) to (i), respectively.⁸⁷ Certainly, the rights of the accused are strengthened under the Rome Statute, as compared to the *ad hoc* military tribunals of the recent past, especially as it relates to the assumption of innocence.⁸⁸ Yet, as Zappala points out, there is no way to sanction violations of the rights of the accused.⁸⁹ This is one area that could be strengthened within the Rome Statute.⁹⁰

There is in fact the general assurance of a "fair trial" under Article 67(1), which states, "In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this

86. Zappala, *supra* note 82, at 1349.

87. Articles 67(1)(a) to (i) of the Rome Statute state that an accused has the right:

(a) To be informed promptly and in detail of the nature, cause and content of the charge, in a language which the accused fully understands and speaks; (b) To have adequate time and facilities for the preparation of the defence and to communicate freely with counsel of the accused's choosing in confidence; (c) To be tried without undue delay; (d) Subject to article 63, paragraph 2, to be present at the trial, to conduct the defence in person or through legal assistance of the accused's choosing, to be informed, if the accused does not have legal assistance, of this right and to have legal assistance assigned by the Court in any case where the interests of justice so require, and without payment if the accused lacks sufficient means to pay for it; (e) To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her. The accused shall also be entitled to raise defences and to present other evidence admissible under this Statute; (f) To have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness, if any of the proceedings or documents presented to the Court are not in a language which the accused fully understands and speaks; (g) Not to be compelled to testify or to confess guilt and to remain silent, without such silence being a consideration in the determination of guilt or innocence; (h) To make an unsworn oral or written statement in his or her defence; and (i) Not to have imposed on him or her any reversal of the burden of proof or any onus of rebuttal.

Rome Statute, supra note 48, at art. 66–67.

88. Zappala, *supra* note 82, at 1353.

89. *Id.* at 1353–54.

90. *Id.*

Statute, to a fair hearing conducted impartially”⁹¹ Yet as Zappala points out, such fairness is not assured.⁹²

In conclusion, the rights of the accused are in many ways similar to those found in the U.S. courts, including in areas of evidence, witnesses, and the right to gather information from the prosecution. The major difference is the lack of a jury, which by itself may cause U.S. citizens and politicians to question whether the ICC trial offers a truly authentic process. In the event that a U.S. citizen has been tried and been found guilty, the next question is the type of sentence he or she might receive from the ICC.

6. Sentencing of the Accused

The sentence shall be read out to the accused and made public.⁹³ All deliberations of the Court regarding the accused, including those regarding sentences are, however, carried out in secret. In addition, the articles allow for a simple majority to be reached, *i.e.*, two of the three judges,⁹⁴ for a sentence to be given.⁹⁵ The rules are laid out in Article 74, which states,

1. All the judges of the Trial Chamber shall be present at each stage of the trial and throughout their deliberations. The Presidency [of the Court] may, on a case-by-case basis, designate, as available, one or more alternate judges to be present at each stage of the trial and to replace a member of the Trial Chamber if that member is unable to continue attending.
2. The Trial Chamber’s decision shall be based on its evaluation of the evidence and the entire proceedings. The decision shall not exceed the facts and circumstances described in the charges and any amendments to the charges. The Court may base its decision only on evidence submitted and discussed before it at the trial.
3. The judges shall attempt to achieve unanimity in their decision, failing which the decision shall be taken by a majority of the judges.
4. The deliberations of the Trial Chamber shall remain secret.

91. *Rome Statute*, *supra* note 48, at art. 67.

92. *Zappala*, *supra* note 82, at 1348.

93. Article 76(4) states, “The sentence shall be pronounced in public and, whenever possible, in the presence of the accused.” *Rome Statute*, *supra* note 48, at art. 76.

94. *See Rome Statute*, *supra* note 48, at art. 39(2)(b)(ii), art. 74(3)

95. Frank Terrier, *The Procedure before the Trial Chamber*, in Volume II, *THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY*, 1277, 1314 (Antonio Cassese, et al. eds., Oxford University Press 2002).

5. The decision shall be in writing and shall contain a full and reasoned statement of the Trial Chamber's findings on the evidence and conclusions. The Trial Chamber shall issue one decision. When there is no unanimity, the Trial Chamber's decision shall contain the views of the majority and the minority. The decision or a summary thereof shall be delivered in open court.⁹⁶

Although the secrecy of the deliberations is consistent with many courts of law in the United States, again, for a person to be convicted in a criminal trial in the United States, typically the *jury* must rule on the guilty verdict by a unanimous vote. In contrast, because all it takes is two people to mete out sentences that may be substantial, the "fairness" of the trial may be questioned by those accustomed to the U.S. judicial system.

Furthermore, as Terrier points out, the judges may hold the person guilty and sentence the accused in one sitting.⁹⁷ In this way, a simple majority of two can in effect act as both "judge and jury." The U.S. courts may grant this power in cases involving minor criminal infractions, but never for major crimes, including those egregious crimes against persons such as murder. This particular weakness of ICC procedures could become an issue if the one dissenting judge offers a severe criticism of either the verdict or the sentence in private and that opinion is somehow made public. In fact the minority judge's opinion would as a matter of course be published.⁹⁸

Possible sentences imposed by ICC judges can be very hard, as illustrated by Article 77:

1. Subject to article 110, the Court may impose one of the following penalties on a person convicted of a crime referred to in article 5 of this Statute:
 - (a) Imprisonment for a specified number of years, which may not exceed a maximum of 30 years; or
 - (b) A term of life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person.
2. In addition to imprisonment, the Court may order:
 - (a) A fine under the criteria provided for in the Rules of Procedure and Evidence;

96. *Rome Statute*, *supra* note 48, at art. 74.

97. Terrier, *supra* note 95, at 1317.

98. *Rome Statute*, *supra* note 48, at art. 74. Article 74(5) states, in part, "When there is no unanimity, the Trial Chamber's decision shall contain the views of the majority and the *minority*. The decision or a summary thereof shall be delivered in open court." *Id.* (italics added).

- (b) A forfeiture of proceeds, property and assets derived directly or indirectly from that crime, without prejudice to the rights of bona fide third parties.⁹⁹

To sentence a person to life, impose a substantial fine, and then take away their property is admittedly an extreme case, but it is not out of the realm of possibility. Arguably, such a sentence may be appropriate for those whose crimes deserve such severe punishment. In any case, it is hard to predict how the U.S. public or the current Obama Administration will react to a severe punishment meted by the Court to an American defendant. The final issue that this section will address is appeals.

7. Appeals

Following sentencing by the ICC, a U.S. citizen would be allowed to appeal. The appeal, however, is not *de novo* to the Appeals Chamber under Article 81(1), though the Court may hear additional evidence.¹⁰⁰ This process is similar to U.S. courts of appeal that may or may not review cases *de novo*, depending upon the issue at hand. Article 81(1) states in part,

- (b) The convicted person, or the Prosecutor on that person's behalf, may make an appeal on any of the following grounds:
 - (i) Procedural error,
 - (ii) Error of fact,
 - (iii) Error of law, or
 - (iv) Any other ground that affects the fairness or reliability of the proceedings or decision.¹⁰¹

The convicted individual's rights to appeal are therefore similar to those in U.S. courts. The decision may be affirmed, reversed, or amended.¹⁰² Indeed, the accused once sentenced, as well the prosecutor, has broad discretion to make an appeal. However, in contrast to the many levels of U.S. courts, the defendant convicted in an ICC proceeding has only one additional level to appeal to, the Appeals Chamber, whose decision becomes final.

99. *Id.* at art. 77.

100. Alphons Orié, *Accusatorial v. Inquisitorial Approach in International Criminal Proceedings Prior to the Establishment of the ICC and in the Proceedings Before the ICC*, in Volume II, *THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY*, 1439, 1491 (Antonio Cassese, et al. eds., Oxford University Press 2002).

101. *Rome Statute*, *supra* note 48, at art. 81.

102. Orié, *supra* note 100, at 1491.

Another potentially controversial issue resides in the fact that the Appeals Chamber is also part of the same legal structure; accordingly, it may be questioned whether it would be at all likely to reverse a decision by their fellow ICC judges. As Orie states, though the right to appeal is very broad, the Appeals Chamber might look more like a “common-law” appellate court,¹⁰³ where few reversals might be expected. Thus, despite the generally broad discretion to appeal, there appears to be a smaller likelihood that a conviction will be overturned in the ICC than in the U.S. criminal justice system.

In summary, while the Rome Statute offers many advantages for the accused, it may significantly also disadvantage those who are prosecuted under it. This section has reviewed the process by which a U.S. citizen might be convicted and tried before the ICC. It has been shown that a basic argument could be made for the bringing of a U.S. citizen before the Court for the purpose of charging him or her for the crime of torture under Article 7(1)(f)¹⁰⁴ of the Rome Statute for alleged crimes at the Guantanamo Bay Naval Base, in Iraq, in Afghanistan, or in some other country. For this to occur, however, the Court would first have to gain jurisdiction over that person, which may be all but impossible if he or she is residing in the United States or is under the protection of either the United States or one of its allies. However, if the accused is apprehended in a country that is a signatory to the ICC, then under Article 90(7)¹⁰⁵ that person could, in theory, be brought before the ICC. Of course, whether the Obama Administration would allow this to occur is an unanswered question.

III. FORMER PRESIDENT BUSH AND THE INTERNATIONAL CRIMINAL COURT

Few events have changed an Administration’s perspective more than did the attacks of September 11, 2001. In their aftermath, the focus has shifted from domestic issues to fighting terrorism around the globe. In the process, the former Bush Administration put itself squarely in the international arena, thereby opening itself to examination and even condemnation.

The previous Administration’s continued aggressiveness toward the lingering Iraqi resistance caused by “insurgents” and its “war on terrorism,”¹⁰⁶ has resulted in increased negative feelings toward the United States, and President Bush in particular, around the world due to its

103. *Id.*

104. *Rome Statute, supra* note 48, at art. 7.

105. *Id.* at art. 90.

106. See Robert M. Entman, *Projections of Power: Framing News, Public Opinion, and Foreign Policy 1–3* (The University of Chicago Press 2004).

preemptive doctrine and “aggressive unilateralism.”¹⁰⁷ Simultaneously, the Bush Administration continued its fight against the existence of the ICC.¹⁰⁸ With these combined actions, the possibility of U.S. citizens being brought before the ICC has increased, as populations of various countries have called on their leaders to oppose the former Bush Administration. This anti-U.S. sentiment has only increased with the treatment of prisoners in Afghanistan and at Guantanamo Bay Naval Base,¹⁰⁹ and because of continuing civilian casualties caused by the U.S. military and other U.S. operatives, e.g., the CIA in Iraq and elsewhere.

A. Foreign Policy

The Bush Administration came into power with a clear wish to reshape the United States. Part of that change was due to an event that forever changed the lives of so many. September 11 had a major impact on President Bush; although he started the day in a typical if not casual manner,¹¹⁰ the day’s events, according to Bruni, hit President Bush like nothing before in his presidency.¹¹¹ Nine days after the attack, President Bush told Congress and the American people:

On September 11th, the enemies of freedom committed an act of war against our country. Americans have known wars—but for the past 136 years, they have been wars on foreign soil, except for one Sunday in 1941. Americans have known the casualties of war—but not at the center of a great city on a peaceful morning. Americans have known surprise attacks—but never before on thousands of civilians. All of this was brought upon us in a single day—and night fell on a different world, a world where freedom is under attack.¹¹²

107. Seyom Brown, *The Illusion of Control: Force and Foreign Policy in the Twenty-First Century* 43 (Brookings Institute Press 2003).

108. See John Lumpkin, *U.S. threatened by international legal challenges as well as terrorism, Pentagon says*, ASSOCIATED PRESS, Mar. 18, 2005. The article notes that the Bush Administration “vehemently” opposes the ICC.

109. Douglas Jehl, *U.S. Rules on Prisoners Seen as a Back and Forth of Mixed Messages to G.I.’s*, N.Y. TIMES, June 22, 2004, at A7.

110. Frank Bruni, *Ambling into History, The Unlikely Odyssey of George W. Bush 1, 2* (HarperCollins 2002).

111. See *id.* at 247.

112. George W. Bush, *Enemies of Freedom Committed an Act of War Against America, in The Attack on America: September 11, 2001* 10 (William Dudley ed., Greenhaven Press 2002).

In the new, post-September 11 world, President Bush would seek a broad coalition to root out “terrorism,”¹¹³ as his focus shifted to international affairs,¹¹⁴ though more recently, the shift had once-again gone back to such domestic issues as social security reform and making his tax cuts permanent. The Administration’s change of direction both at home and abroad, while supported by many Americans, forced the international community to come to grips with a more “hands-on” President determined to see the United States lead the world and willing to intervene abroad. As an editorial by the *Harvard Law Review* notes:

In terms of foreign policy, then, September 11 has changed the American approach to terrorism from one of multilateral negotiation, recourse to international institutions, and recognition of equality among sister states to one of unilateral development and enunciation of policy to be executed jointly—by military force if necessary—by the United States and its allies.¹¹⁵

President Bush’s foreign-policy response to the attacks has been described as “masterful.”¹¹⁶ Indeed, September 11 galvanized the support of the American public in ways formerly seen in more traditional wars.¹¹⁷ With the passing of time, however, that support has been eroded as casualties caused by U.S. personnel have mounted, the rise of insurgent attacks causing more death in Iraq, and with abuse of prisoners by U.S. soldiers. Hostility¹¹⁸ towards American actions at home and abroad, even before U.S.-led forces attacked Iraq in March 1993, made the international environment even more troublesome for the Bush Administration, in the sense that fewer nations have been willing to go along with the wishes of the current superpower.

To summarize, the Bush Administration had chosen to focus on the global war on terrorism. In the process, it had increased the military budget

113. Henry H. Perritt, Jr., *Lessons from the Balkans for American Foreign Policy: Building Civil Society within a Multilateral Framework*, 3 *CHI. J. INT’L L.* 229, 229 (2002).

114. Stanley A. Renshon, *The World According to George W. Bush: Good Judgment or Cowboy Politics?*, in *GOOD JUDGMENT IN FOREIGN POLICY: THEORY AND APPLICATION* 271, 278 (Stanley A. Renshon & Deborah W. Larson eds., Rowman & Littlefield Publishers 2003).

115. Note, *Responding to Terrorism: Crime, Punishment, and War*, 115 *HARV. L. REV.* 1217, 1228 (2002).

116. See Renshon, *supra* note 114, at 301.

117. ENTMAN, *supra* note 106, at 1–4.

118. Edieth Y. Wu, *Saddam Hussein as Hostess Humani Generis? Should the U.S. Intervene?*, 26 *SYRACUSE J. INT’L L. & COM.* 55 (1998). Wu argues that hostility toward U.S. actions is being expressed on many fronts throughout the world community. *Id.* at 86.

and had chosen to take a more aggressive strategy in its attempt to eradicate the terrorists who operate both on U.S. soil and abroad. Furthermore, it used that goal as an argument in Iraq. In so doing, the Bush Administration may have been crossing the limits of what much of the world consider acceptable levels of intervention by the reigning world superpower;¹¹⁹ not to mention that it is widely believed to be using terrorism as an excuse for military adventures, *e.g.*, the restructuring of the Iraqi regime.

B. The International Criminal Court

Former President Bush had clearly stated his distrust of the ICC,¹²⁰ and his Administration was squarely in the camp of the opposition to the Court.¹²¹ Since the beginning of his presidency, President Bush has consistently opposed the ICC. On July 2, 2002, President Bush said,

The International Criminal Court is troubling to the United States. It's troubling to the Administration and obviously trouble with the United States Senate as well.

President Clinton signed this treaty, but when he signed it, he said it should not be submitted to the Senate. It therefore never has been, and I don't intend to submit it either, because it—you know, as the United States works to bring peace around the world, our diplomats and our soldiers could be drug into this Court, and that's a very troubling—very troubling to me.

And we'll try to work out the impasse at the United Nations. But one thing we're not going to do is sign on to the International Criminal Court.¹²²

On July 19, 2002, the President told the 10th Mountain Division at Fort Drum, New York,

You might have heard about a treaty that would place American troops under the jurisdiction of something called the International Criminal Court. The United States cooperates with many other nations to keep the peace, but we will not submit American

119. Michael Hirsh, *At War with Ourselves: Why America is Squandering Its Change to Build a Better World* 175–76 (Oxford University Press 2003).

120. George W. Bush's Exchange With Reporters in Milwaukee, Wis., 1 PUB. PAPERS 1161 (July 8, 2002) (hereinafter *Milwaukee*).

121. See Worth, *supra* note 13, at 245–46.

122. *Milwaukee*, *supra* note 120.

troops to prosecutors and judges whose jurisdiction we do not accept.¹²³

President Bush said on October 8, 2004, in his first presidential debate with Senator John Kerry (D-Massachusetts),

I made a decision not to join the International Criminal Court in The Hague, which is where our troops could be brought to—brought in front of a judge, an unaccounted judge.

I don't think we ought to join that. That was unpopular.

And so, what I'm telling you is, is that sometimes in this world you make unpopular decisions because you think they're right.

We'll continue to reach out.

Listen, there is 30 nations involved in Iraq, some 40 nations involved in Afghanistan.

People love America. Sometimes they don't like the decisions made by America, but I don't think you want a president who tries to become popular and does the wrong thing.

You don't want to join the International Criminal Court just because it's popular in certain capitals in Europe.¹²⁴

Thus, former President Bush had continued his opposition to the ICC, even if that means going against world opinion in favor of the Court. His position is shared by many current and former members of the White House, notably Henry Kissinger, who in a recent book questions the power given to ICC prosecutors as well as their ability to use unbiased discretion in bringing Americans before the Court.¹²⁵

Indeed, the involvement of nations who might be likely to bring U.S. citizens or agents before the Court continued to be a primary reason that the former Bush Administration resisted the Court's power to prosecute without

123. George W. Bush's Remarks to the Tenth Mountain Division at Fort Drum, N.Y. 2 PUB. PAPERS 1270 (July 22, 2002).

124. Transcript Part I: Candidates tackle Iraq, CNN, available at <http://edition.cnn.com/2004/ALLPOLITICS/10/08/debate.transcript/index.html> (last visited on October 8, 2009) [hereinafter Transcript Part I].

125. HENRY KISSINGER, DOES AMERICA NEED A FOREIGN POLICY? TOWARD A DIPLOMACY FOR THE 21ST CENTURY 281–82 (Simon & Schuster 2001). See also Cassandra Jeu, *A Successful, Permanent International Criminal Court. "Isn't it Pretty to Think so?"*, 26 HOUS. J. INT'L L. 411, 438–39 (2004).

U.N. Security Council's authorization. The basic argument is that military tribunals in which the United States has historically had a major influence are a far better route.¹²⁶

This profound distrust of the ICC will determine how this Obama Administration proceeds once the Court begins to bring individuals, especially U.S. citizens, before it for prosecution for war crimes. The question is how far the Administration will go in order to protect not only members of the Armed Forces of the United States and U.S. citizens,¹²⁷ but those of its allies as well. It is also unclear how the Obama Administration might react if, in the context of a war, it finds itself in the position where a U.S. citizen has committed an act that could in theory be prosecuted by the ICC. Even with support from Britain and a permanent seat on the U.N. Security Council, the stakes have been raised within the world community, which has increasingly taken a more anti-American view as a direct result of the former Bush Administration's handling of U.S. foreign affairs.¹²⁸ As will be argued in the next section, this negative viewpoint will increase the likelihood that a U.S. citizen will be brought before the ICC.

IV. THE FORMER BUSH ADMINISTRATION AND WORLD OPINION

Two contrasting views will be explored within this section. The first is the view of the world according to former President Bush, and the second is the world's view of former President Bush. The image of the world (and in particular Iraq) projected by President Bush in his statements to the media exerted a powerful influence on domestic politics.¹²⁹ This image in turn was picked up by public-opinion polls that attempt to gauge the effect of the President's message.¹³⁰ The message that the President received back through these polls may then have affected the direction taken by the Administration. Thus, the first challenge for the Bush Administration was to get the "right" message out to the American public, that is, the one conveying the Administration's view of the world. This is especially important regarding the ICC, and the former Administration's opposition to its status as a world court.

126. Kenneth Anderson, *What to do with Bin Laden and AL Quad Terrorists?: A Qualified Defense of Military Commissions and United States Policy on Detainees at Guantanamo Bay Naval Base*, 25 HARV. J.L. & PUB. POL'Y 591, 600-603 (2002).

127. *See* 22 U.S.C. § 7421.

128. Richard Morin, *World Image of U.S. Declines*, WASHINGTON POST, Dec. 5, 2002, at A26.

129. *See* Entman, *supra* note 106, at 1-3.

130. Crespi notes that one of the major criticisms of public opinion polls is that they in turn affect the political life of those involved, e.g., the politicians. IRVING CRESPI, PUBLIC OPINION POLLS, AND DEMOCRACY 2 (Westview Press 1989).

A. President Bush's View

Former President Bush has tended to use the term *world opinion* to mean the common viewpoint of United States and the rest of the world. When, however, the President wishes to get across the United States' resolve to "go it alone," he has made it a point in his speeches to project the Administration's position on such subjects as the war with Iraq. In this case, the use of the collective pronouns "we," "our," and "us" refers only to the United States. This tactic conveys that the United States speaks with one voice in foreign policy, and that this voice belongs to the President.¹³¹ In this way, President Bush was both projecting his own image as the nation's leader, speaking for its foreign policies, and implicitly asserting that the rest of the world should follow.¹³²

The President through the media can influence the U.S. public through such media as *The N.Y. Times* and *CNN*; furthermore, he may also even be able to more indirectly influence public opinion abroad. In addition, his strategic use of the media to convey his worldview can ensure that Congress will award foreign aid to selected countries and thereby influence those nations. As Gaddis argues, "President George W. Bush's national security strategy could represent the most sweeping shift in U.S. grand strategy since the beginning of the Cold War. But its success depends on the willingness of the rest of the world to welcome U.S. power with open arms."¹³³ He adds that President Bush planned to maintain the United States as the world hegemon at *any* cost.¹³⁴ The position of the United States as the undisputed world leader in terms of military strength, and to a lesser extent political leadership, might seem to allow him to push the views

131. Cleveland argues that such a voice is a myth, stating, however, that "the requirement of a unified voice in foreign relations has emerged from two related lines of doctrine: the principle that states are excluded from international relations, and the assumption that the President speaks as a soloist for the United States." Sarah H. Cleveland, *Crosby and the "One Voice" Myth in U.S. Foreign Relations*, 46 VILL. L. REV. 975, 982 (2001). Cleveland notes that the Supreme Court has upheld this "one-voice" belief. *Id.* at 975.

132. The thesis of Foyle's book is that:

[A] decision-maker's reaction to public opinion is based on the interaction between the person's beliefs about the proper role of public opinion in formulating foreign policy and the prevailing decision context. My findings suggest that some individuals' beliefs make them relatively open to decisions responding to public opinion, whereas others' beliefs cause them to ignore the public's view when contemplating foreign policy choices.

Douglas C. Foyle, *Counting the Public In: Presidents, Public Opinion, and Foreign Policy 2* (Columbia University Press, 1999).

133. John L. Gaddis, *A Grand Strategy*, FOREIGN AFFAIRS; Nov/Dec. 2002, at 50.

134. *See id.* at 52-53.

of his Administration onto the rest of the world. Indeed, the position of the United States as the world's hegemon is especially important to the issue of the ICC¹³⁵ versus military tribunals because many nations may openly support the U.S. position, even if they do not necessarily agree with it.

President Bush—as the world leader—had continued to push for tribunals as an alternative to the ICC.¹³⁶ He did so with the clear goal of influencing world opinion. The question is whether the rest of the world was getting his message. A message given when there is an increasingly negative world opinion directed at the United States due to the failure to find weapons of mass destruction in Iraq, the treatment of prisoners in Afghanistan and at the Guantanamo Bay Naval Base, and the continued civilian casualties caused by the U.S. military and civilian operatives in Iraq and elsewhere. The next section of this paper will attempt to answer this question by looking at how the rest of the world views the United States and specifically the former Bush Administration.

B. World Opinion

International public opinion changes with time and with the flow of world events.¹³⁷ Individuals such as former President Bush garner “global reputations,” whether fair or unfair, as representatives of the United States.¹³⁸ As discussed above, the prestige of the United States has declined since President Bush entered office. This is due in part to the treatment of prisoners at the hands of U.S. soldiers¹³⁹ as well as to the continued strife of the Israeli-Palestinian conflict.¹⁴⁰ This decline is seen in the data contained

135. See Hirsh, *supra* note 119, at 176.

136. See George W. Bush's Exchange With Reporters in Alexandria, Va., 1 PUB. PAPERS 458 (March 25, 2002).

137. Frank L. Rusciano, *World Opinion and the Emerging International Order* 159, 165 (Frank L. Rusciano ed., Praeger 1998).

138. See *id.* at 167.

139. Eric Schmitt & Kate Zernike, *U.S. Charges an Australian with Fighting for Taliban*, N.Y. TIMES, June 10, 2004, at A12.

140. Edith Y. Wu, *Global Responses and Recourses to Terrorism*, 25 WHITTIER L. REV. 521, 555–56 (2004). See also Transcript Part I, *supra* note 124. President Bush acknowledged during the debate with Senator Kerry:

You know, I've made some decisions on Israel that's unpopular. I wouldn't deal with Arafat, because I felt like he had let the former president down, and I don't think he's the kind of person that can lead toward a Palestinian state. And people in Europe didn't like that decision. And that was unpopular, but it was the right thing to do.

in surveys conducted by *The Pew Research Center for the People & the Press* (Pew).¹⁴¹ These show the extent to which the U.S. image abroad has slipped during President Bush's early tenure. This decline continued, according to a report released on June 6, 2003, by Pew: "[F]avorable opinions of the U.S. have slipped in nearly every country for which trend measures are available."¹⁴² According to a poll by Pew from March 16, 2004, this trend has only gotten worse: "A year after the war in Iraq, discontent with America and its policies has intensified rather than diminish."¹⁴³ President Bush's reelection disappointed many within the international community.¹⁴⁴ This trend should be a serious concern to both President Obama and those in Congress, for it is negative world opinion toward the United States and its policies that may ultimately lead to a U.S. citizen being brought before the ICC.

These findings indicate that the image of the United States abroad continues to slip. This includes, as Pew points out, "the predominantly Muslim countries surveyed, [where] anger toward the United States remains pervasive, although the level of hatred has eased somewhat and support for the war on terrorism has inched up."¹⁴⁵ Pew's analysis has implications for the current Obama Administration that will affect not just the court of world opinion, but ultimately perhaps the current members of the ICC; large majorities in every country, except for the U.S., hold an unfavorable opinion of President Bush.¹⁴⁶ An important factor in the world's perception of the United States, as noted by the Pew survey, "is the perception that the U.S. acts internationally without taking account of the interests of other nations. Large majorities in every nation surveyed, except the United States, believe that America pays little or no attention to their country's interests in making its foreign policy decisions."¹⁴⁷ This goes against the image believed by U.S. policymakers that the United States is a

141. The Pew Research Center for the People & the Press, *What the World Thinks in 2002* 4 (The Pew Research Center for the People & the Press 2002).

142. The Pew Research Center for the People & the Press, *Views of a Changing World*, June 2003 1 (The Pew Research Center for the People & the Press 2003).

143. The Pew Research Center for the People & the Press, *A Year After Iraq War: Mistrust of America in Europe ever Higher, Muslim Anger Persists* 6 (The Pew Research Center for the People & the Press 2004) [hereinafter *A Year After Iraq War*].

144. *Foreign Reaction to Vote Restrained: Bush's Re-election Disappoints Many*, THE SEATTLE TIMES, Nov. 4, 2004, at A13.

145. *A Year After Iraq War*, *supra* note 143, at 1.

146. See The Pew Research Center for the People & the Press, *America's Image Further Erodes, Europeans Want Weaker Ties: But Post-War Iraq Will Be Better Off, Most Say* 1 (The Pew Research Center for the People & the Press 2003).

147. *A Year After Iraq War*, *supra* note 143, at 6.

“benevolent” hegemon whose “soft power” immunizes it against a backlash from other countries’ negative perception.¹⁴⁸ It is, however, this negative view of the United States that has and will continue to affect the Obama Administration’s policies regarding the ICC.¹⁴⁹

V. CONCLUSION

The transformation in U.S. foreign policy, and world opinion directed toward the Bush Administration, can be traced to world events since September 11, 2001. This event affected President Bush in unforeseen ways.¹⁵⁰ The President’s focus shifted from domestic to international policy, with a clear focus on hunting down terrorists.¹⁵¹ In the process, he became more willing to use American troops to hunt down al-Qaeda in Afghanistan and elsewhere, and in the war against Iraq. In addition, the events involving prisoner abuse by U.S. soldiers at the Guantanamo Bay Naval Base has continued to cause negative world opinion toward the former Bush Administration to grow. This and other events have opened American soldiers,¹⁵² U.S. citizens,¹⁵³ and theoretically the former President himself¹⁵⁴ to the possibility of prosecution before the Court, which came into force on July 1, 2002. It is perhaps with this in mind that former President Bush has consistently opposed this Court in his public statements.¹⁵⁵

Thus, a central question is how the Obama Administration plans to address the vulnerability of members of the Armed Forces of the United States and U.S. civilians to the ICC’s universal jurisdiction, in the current, problematic context of changing world opinion directed against the U.S.

148. Christopher Layne, *Offshore Balancing Revisited*, in *What Does the World Want from America?*, International Perspectives on U.S. Foreign Policy 172, 179 (Alexander T.J. Lennon ed., The MIT Press 2002).

149. See Hirsh, *supra* note 119, at 175–76.

150. See Bruni, *supra* note 110, at 247.

151. See Renshon, *supra* note 114, at 278.

152. See Lee A. Casey, *Assessments of the United States Position: The Case Against the International Criminal Court*, 25 FORDHAM INT’L L.J. 840, 852–53 (2002).

153. See Michael E. Guillory, *Civilianizing the Force: Is the United States Crossing the Rubicon?*, 51 A.F.L. REV. 111, 132 (2001).

154. See Darryl Robinson, *The Rome Statute and its Impact on National Law*, in Volume II, THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY, 1849, 1855 (Antonio Cassese, et al. eds., Oxford University Press 2002); Danilenko, *supra* note 72, at 1875.

155. Remarks with President Alvaro Uribe, *supra* note 16; see also Transcript Part I: Candidates tackle Iraq, CNN, *supra* note 124.

foreign policies.¹⁵⁶ This opinion in recent years has become dramatically more negative, especially in Middle Eastern countries.¹⁵⁷ Given this continued negative change, President Obama will likely be challenged both to gain international support for his foreign-policy goals and to prevent countries from bringing U.S. nationals before the Court as the Administration pursues those goals militarily. Hoge notes, “[t]he United States bowed . . . to broad opposition on the [U.N.] Security Council and announced it was dropping its effort to gain immunity for its troops from prosecution by the International Criminal Court.”¹⁵⁸ Thus, there remains an increased possibility that a U.S. citizen can be brought before the ICC. That possibility has only increased as more reports detail abuses to prisoners by U.S. troops and their superiors and as others call for actions to be taken against those who commit those abuses. As Schulz, Executive Director of Amnesty International USA, states in his annual report,

If the US government continues to shirk its responsibility, Amnesty International calls on foreign governments to uphold their obligations under international law by investigating all senior US officials involved in the torture scandal. And if those investigations support prosecution, the governments should arrest any official who enters their territory and begin legal proceedings against them. The apparent high-level architects of torture should think twice before planning their next vacation to places like Acapulco or the French Riviera because they may find themselves under arrest as Augusto Pinochet famously did in London in 1998.¹⁵⁹

Thus, as calls such as this continue, it is perhaps only a matter of time before those seeking justice request the Court’s assistance to prosecute a U.S. citizen for crimes committed abroad. This paper has looked at the possible procedure through the Court that a U.S. citizen could go through in case such an event occurred.

In conclusion, the future of this Obama Administration’s policies toward the ICC will continue to change due to the evolving world opinion with regards to U.S. foreign intervention. The Obama Administration’s

156. See *A Year After Iraq War*, *supra* note 143, at 6.

157. See *A Year After Iraq War*, *supra* note 143, at 1.

158. Warren Hoge, *U.S. Drops Plan to Exempt G.I.’s from U.N. Court*, N.Y. TIMES, June 24, 2004, at A1.

159. Statement Of Dr. William F. Schulz Executive Director, *available at* <http://www.amnestyusa.org/annualreport/statement.html> (last visited July 27, 2009).

direction must include a greater respect for world opinion through acts intended to bring about this change for the betterment of *all those involved*.