

**TO KEEP YOU IS NO GAIN, TO KILL YOU IS NO LOSS* –
SECURING JUSTICE THROUGH
THE INTERNATIONAL CRIMINAL COURT**

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I. INTRODUCTION

“We who have witnessed in the twentieth century, the worst crimes against humanity, have an opportunity to bequeath to the new century a powerful instrument of justice. So let us rise to this challenge.”¹

An incomprehensible number of people have died as a result of war crimes, genocide, and crimes against humanity in the last century. After World War II and the Holocaust, nations and their citizenry proclaimed that never again would something so horrendous happen. “We must make sure that their deaths have posthumous meaning. We must make sure that from now until the end of days all humankind stares this evil in the face . . . and only then can we be sure it will never arise again.”² Despite this vow, from 1950 to 1990, there were seventeen genocides, with two that resulted in the death of over a million people.³ In 1994, 800,000 Tutsis died during a three-month genocide in Rwanda.⁴ Genocide, war crimes, and crimes against humanity are not only something that occurred in the distant past; sadly, they remain a vivid reality. If there is ever hope to end such crimes, they must be addressed by the law on an international scale. “We stand poised at the edge of invention: a rare occasion to build a new institution to serve a global need. An International Criminal Court is within our

* This phrase is identified as the motto of the Khmer Rouge regime who murdered in excess of two million Cambodians during their three year reign. SAMANTHA POWER, “A PROBLEM FROM HELL”: AMERICA AND THE AGE OF GENOCIDE 33-35 (2002).

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1. Kofi Annan, UN Security-General at http://209.217.98.79/english/00_index_e.htm (last visited Mar. 24, 2003).

2. Ronald Reagan, 40th President of the United States, *Remarks at the Site of the Future United States Holocaust Memorial Museum*, available at <http://www.state.sd.us/military/VetAffairs/sdwwiimemorial/subpages/testimonies/notes-quotes.htm> (Oct. 5, 1988).

3. *Teaching the Nazi Genocide, When Humanity Hit Bottom*, RECORD, Jan. 3, 1994, at A17, available at LEXIS, News Library, Record File.

4. Maggie O’Kane, *Former Rwanda PM Loses Appeal*, GUARDIAN, Oct. 20, 2000, at 16, available at 2000 WL 28347114.

grasp.”⁵

On March 28, 2002, Pierre-Richard Prosper, Ambassador At-Large for War Crimes Issues, stated at a press conference that the United States “[w]ill use all efforts at [its] disposal to end these abuses as they occur and hold perpetrators accountable [T]here must be accountability for war crimes in a credible, appropriate judicial mechanism.”⁶ On February 28, 2002, Prosper asserted that “the international practice should be to support sovereign states seeking justice domestically when it is feasible and would be credible.”⁷ The Bush administration purports that the United States is dedicated to trying perpetrators of genocide, war crimes, and crimes against humanity, however only in the domestic judicial system where such crimes occur.⁸ While in theory this proposal sounds reasonable, real world events have revealed that often it is neither “feasible” nor “credible” to try such crimes in the domestic judicial systems where they occur.⁹

In July of 1998, 120 nations signed the Rome Statute of the International Criminal Court – the basis for the creation of the International Criminal Court (ICC).¹⁰ The Rome Statute provides the ICC with jurisdiction over four categories of crimes: genocide, crimes against humanity, war crimes, and crimes of aggression.¹¹ Unlike many domestic courts, the ICC will have the capacity to try the above listed crimes in the “feasible” and “credible” manner called for by Prosper.

This Note enumerates the existence of genocide, crimes against humanity, and war crimes in recent history and argues that both victims and perpetrators deserve impartial, independent, and prompt trials. Part II briefly summarizes the Rome Statute and the U.S. objections to the ICC. This section will include a discussion of what prompted the creation of the ICC, its major facets, and the practical existence of the ICC. It also briefly examines various United States’ prompted protections, including the Servicemembers’ Protection

5. Hon. Lloyd Axworthy, Canadian Minister of Foreign Affairs at http://209.217.98.79/english/00_index_e.htm (last visited Mar. 24, 2003) (on file with author).

6. Judy Aita, Public Affairs Section of the United States Embassy, Japan, *Amb. Prosper: U.S. Committed to Combating War Crimes*, at <http://usembassy.state.gov/japan/wwwhse1263.html> (last visited June 17, 2003).

7. Press Release, Pierre-Richard Prosper, Ambassador At-Large for War Crimes Issues, U.S. Dept. of State, Before the Committee on International Relations, U.S. H.R., available at <http://usemb-belgrade.rpo.at/press/020301a.html> (Feb. 28, 2002) [hereinafter Prosper].

8. *Id.*

9. *See* Part III.

10. Rome Statute of the International Criminal Court, July 17, 1998, U.N. Doc. A/CONF. 183/9, [hereinafter Rome Statute].

11. Crimes of aggression are not defined in the Rome Statute and will remain undefined until June 1, 2009, when they will be defined consistent with the relevant provisions of the United Nations Charter. *Id.* art. 5(2).

Act¹² and impunity agreements, and the response of ICC proponents to the United States' fears. Part III will discuss the need for capable courts and then examine the practical realities of creating domestic courts capable of trying such crimes. This section will examine East Timor and Cambodia as examples of such attempts to establish domestic courts capable of trying perpetrators of these crimes and the consequences. Part IV argues that often it is neither "feasible" nor "credible" to try such crimes in domestic courts and therefore, if the United States is truly committed to prosecuting such criminals, the ICC is the only functional forum. This final section also speculates about the ICC's relevance to the War in Iraq and how it further illustrates the necessity of the ICC.

II. THE MAJOR FACETS OF THE INTERNATIONAL CRIMINAL COURT AND THE U.S. OBJECTIONS TO THE ICC

A. The Creation and Components of the ICC

The Rome Statute of the International Criminal Court establishing the first International Criminal Court entered into force on July 1, 2002.¹³ On August 23, 2003, there were 139 signatories and 91 parties to the Rome Statute.¹⁴ The establishment of the ICC is a direct response to the failure to redress the atrocities that have occurred in areas such as Cambodia, East Timor, Rwanda, Yugoslavia, Argentina, Uganda, Afghanistan, Chile, Iraq, and Sierra Leone during the twentieth century.¹⁵ The Preamble of the Rome Statute states, "mindful that

12. The American Service-Members' Protection Act attempts to preclude American servicemembers from the ICC's jurisdiction by prohibiting cooperation with the ICC.

13. Coalition for the International Criminal Court, *July 1 Marks Birth of International Criminal Court*, at <http://www.iccnw.org/pressroom/factsheets.html> (last visited June 17, 2003).

14. *Afghanistan Joins Global Criminal Court*, SAN DIEGO UNION-TRIB., Feb. 11, 2003, at A10, available at 2003 WL 6565597. Afghanistan was the eighty-ninth nation to join the ICC with its ratification of the treaty becoming effective on May 1, 2003. This ratification of the treaty makes warlords in Afghanistan susceptible for prosecution before the ICC if they carry out war crimes or other such covered offenses. *Id.* Lithuania was the ninetieth country to ratify the treaty on May 12, 2003. Coalition for the International Criminal Court, *Lithuania Becomes 90th State Party to the Rome Statute of the International Criminal Court*, at <http://www.iccnw.org/countryinfo/worldsignsandratifications.html> (last visited June 11, 2003). Guinea was the ninety-first country to ratify the treaty on July 14, 2003. Coalition for the International Criminal Court, *State Signatures and Ratifications Chart*, at <http://www.iccnw.org/countryinfo/worldsignsandratifications.html> (last visited Aug. 23, 2003) [hereinafter *State Signatures*].

15. B.A. Robinson, *Mass Crimes Against Humanity and Genocides: A List of Atrocities 1450 CE to the Present*, Ontario Consultants on Religious Tolerance, at <http://www.religoustolerance.org/genocide2.htm> (last modified July 27, 2003) (on file with author); see generally SAMANTHA POWER, "A PROBLEM FROM HELL": AMERICA AND THE

during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity.”¹⁶ After realizing the inadequacies of any existing systems, 139 nations, developed and undeveloped, came together to support the creation of an international criminal court imbued with the authority to try and punish those who commit the most heinous crimes.¹⁷

In 1945, at the close of World War II, the notion for the formation of the ICC began to germinate.¹⁸ The seed was originally planted on October 20, 1943, when the Allied Powers established the United Nations War Crimes Commission (UN War Crimes Commission) to gather evidence of war crimes committed by the Nazis.¹⁹ By August 8, 1945, the Nuremberg Tribunal was given jurisdiction over crimes against peace, war crimes, and crimes against humanity. Twenty-two Nazis were tried under the Court’s jurisdiction.²⁰ The growth continued, and on December 12, 1950, the General Assembly appointed experts to draft a statute for an international criminal court; however, by 1954, the group faltered, unable to define “aggression.”²¹ The idea of an international court lay dormant. It was not until 1989, at the end of the Cold War, that the creation of an international criminal court was back on the agenda of the UN General Assembly.²² The notion began to flourish and between 1993 and 1994, in Yugoslavia and Rwanda, two international criminal tribunals were formed to try perpetrators of genocide, crimes against humanity, and grave breaches of the Geneva Convention of 1949.²³ Then, on July 17, 1998, the Rome Statute for the Creation of the ICC was adopted.²⁴ Finally, on July 1, 2002, fifty-seven years after the seed was planted, the idea of the ICC blossomed.²⁵

The ICC has jurisdiction over the crimes of genocide, crimes against humanity, war crimes, and crimes of aggression.²⁶ The Rome Statute defines “genocide” as “any of the following acts committed with the intent to destroy, in whole or in part, a national, ethnic, racial, or religious group.”²⁷ Such acts include the killing of members of a group, causing serious bodily or mental harm to

AGE OF GENOCIDE (2002).

16. Rome Statute, *supra* note 10, pmbl.

17. *See id.*

18. Canada Dept. of Foreign Aff. and Int’l Trade, *Canada and the International Criminal Court: History*, at http://www.dfait-maeci.gc.ca/foreign_policy/icc/history-en.asp (last modified Apr. 29, 2003).

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. Canada Dept. of Foreign Aff. and Int’l Trade, *supra* note 18.

24. *Id.*

25. Coalition for the International Criminal Court, *supra* note 13.

26. Rome Statute, *supra* note 10, art. 5(1)(a)-(d).

27. *Id.* art. 6.

members of a group, deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part, imposing measures intended to prevent births within the group, and forcibly transferring children to another group.²⁸ “Crimes against humanity,” under the Rome Statute, include acts of murder, extermination, deportation, imprisonment or other severe deprivation of physical liberty, torture, rape, apartheid, and inhumane acts causing great suffering when committed as part of a widespread or systematic attack directed against any civilian population.²⁹ Under the Rome Statute, “war crimes” are any “grave breaches of the Geneva Conventions of 12 August 1949.”³⁰ These include such crimes as torture, willfully causing great suffering, attacking civilian populations, and other crimes associated specifically with war.³¹ “Crimes of aggression,” due to an inability to agree on what this crime entails, have not yet been defined under the Rome Statute and will not be defined until July 1, 2009.³² In the spectrum of crimes, the above list demonstrates that the jurisdiction of the ICC is actually quite limited; the ICC can only try perpetrators of the most horrendous crimes. The ICC’s jurisdiction, more descriptively, is limited to those crimes that require one to search the grave recesses of her imagination to actually grasp and comprehend.

In 1942, Jan Karski, a twenty-eight year old Polish diplomat who had been within the Warsaw ghetto and Poland during the period of exportation and murder, met with U.S. Supreme Court Justice Felix Frankfurter and vividly described the horror that was occurring there.³³ Once Karski finished his tale, Frankfurter responded, “I don’t believe you.”³⁴ As Karski began to protest that all he had said was true, Frankfurter interrupted saying, “I do not mean that you are lying. I simply said I cannot believe you.”³⁵ The unfathomable was occurring and even though there were descriptions of the ghastly, Frankfurter could not comprehend the unimaginable.³⁶ It is the reality of the unimaginable that has prompted the creation of the ICC and it is only over such crimes that that ICC has jurisdiction.³⁷

The ICC has jurisdictional authority over all parties to the Rome Statute and may exert this jurisdiction over individuals in multiple ways.³⁸ Without a Security Council referral, the ICC can exercise jurisdiction over a citizen of a State Party or over an individual who participated in the alleged crime in the

28. *Id.*

29. Rome Statute, *supra* note 10, art. 7.

30. *Id.* art. 8.

31. *Id.*

32. *Id.* art. 123.

33. POWER, *supra* note 15, at 32-34.

34. *Id.*

35. *Id.*

36. *Id.*

37. Rome Statute, *supra*, note 10.

38. *Id.* art. 12.

territory of a State Party.³⁹ A nonparty may also agree to ICC jurisdiction over a specific crime.⁴⁰ However, the ICC only has jurisdiction over crimes that occurred after the Rome Statute entered into force on July 1, 2002.⁴¹ Thus, the ICC is incapable of hearing cases regarding the atrocities that have recently occurred in locations such as Rwanda, East Timor, Yugoslavia, pre-July 1, 2002 Iraq, and Sierra Leone.

There are only three methods for bringing a case before the ICC: (1) a State Party may refer a case to the Prosecutor;⁴² (2) the UN Security Council may refer a case to the Prosecutor; or (3) the Prosecutor may initiate an investigation of an alleged crime.⁴³

The Rome Statute is international law and consequently provides the ICC with jurisdiction over many of the world's states. The American Law Institute's Restatement of Foreign Relations Law defines international law as consisting of "rules and principles of general application dealing with the conduct of states and of international organizations and with their relations inter se, as well as with some of their relations with persons, whether natural or juridical."⁴⁴ International agreements create binding international law for the state signatories, and can become customary international law when said agreements are intended for general adherence by all states and when they are widely accepted.⁴⁵ Thus, states have the capacity to make international law generally through international agreements.⁴⁶ The Rome Statute is an international agreement binding all parties to the jurisdiction of the ICC.⁴⁷ International law also permits any state to apply its laws to punish certain offenses even where the state has no links of territory with the offense or possesses a different nationality than the victim or offender.⁴⁸ This universal jurisdiction arises out of universal condemnation for certain crimes and an interest in suppressing them.⁴⁹ These offenses include piracy, slave trade, genocide,⁵⁰ war crimes, and other related crimes.⁵¹ Universal jurisdiction for

39. *Id.*

40. *Id.*

41. *Id.* art. 11.

42. *See infra* Part II.B. The Office of the Prosecutor is headed by a Chief Prosecutor who is elected by the Assembly of State Parties to the Rome Statute. The Chief Prosecutor is Mr. Luis Moreno Ocampo who took office on June 16, 2003. The Prosecutorial Office conducts investigations and prosecutions of crimes of genocide, crimes against humanity, and war crimes. International Criminal Court, *The Office of the Prosecutor At a Glance*, available at <http://www.icc-cpi.int/otp/ataglance.php> (last visited Aug. 23, 2003).

43. Rome Statute, *supra* note 10, art. 13.

44. BARRY E. CARTER & PHILIP R. TRIMBLE, INTERNATIONAL LAW 3 (3d ed. 1999).

45. *Id.*

46. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW pt. II, introductory n. (1987) [hereinafter RESTATEMENT].

47. Rome Statute, *supra* note 10, art. 12.

48. RESTATEMENT, *supra* note 46, § 404.

49. *Id.*

50. Genocide and war crimes became subject to universal jurisdiction after World

crimes not included here is provided by international agreements. Thus, any state desiring to prosecute a war crime, genocide, or most crimes against humanity, already has jurisdiction under universal jurisdiction through international law. The Rome Statute simply broadens this jurisdiction to the ICC. A state may exercise jurisdiction through its courts to enforce its criminal laws that punish universal crimes.⁵² The Rome Statute takes this principle and extends it so that the ICC may exercise jurisdiction to enforce the Rome Statute provisions and punish its defined crimes. The international Military Tribunal at Nuremberg stated that international law “is not static, but by continual adaptation follows the needs of a changing world.”⁵³ The world currently needs a judicial mechanism capable of trying those that commit unspeakable crimes worldwide, and the ICC is the new international legal body to do so.

B. The U.S. Objections to the ICC and the Response by ICC Proponents

The United States adamantly opposes the ICC.⁵⁴ In 1998, the United States, along with China, Iraq, Libya, Yemen, Qatar, and Israel, were the only seven nations to vote against the Rome Statute.⁵⁵ Former president Bill Clinton signed the Rome Treaty during his administration, but he stated that the treaty should not be ratified,⁵⁶ and President George W. Bush formally renounced U.S. obligations under the treaty.⁵⁷ “[T]he one thing [the United States is] not going to do is sign on.”⁵⁸ The United States cites three primary reasons for its opposition to

War II. *See id.* § 404 reprints’ notes.

51. *Id.* § 404.

52. *Id.* § 423.

53. *Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991*, U.N. GAOR, 49th Sess., Agenda Item 152, ¶ 47, U.N. Doc. A/49/342 (1994) [hereinafter General Assembly].

54. *See Prosper, supra note 7; see also Letter from Jim Kolbe, Arizona Congressman, to Talitha Gray, Author of this Note, (Oct. 11, 2002) (on file with author) [hereinafter Kolbe].*

55. Human Rights Watch, *The United States and the International Criminal Court*, at <http://www.hrw.org/campaigns/icc/us.htm> (last visited June 17, 2003). One should consider with whom the United States is associating itself through its nay vote. To begin with, the United States is placing the same vote as Communist China. Secondly, very recently, the United States was at war with Iraq because it disagrees with Iraq’s position on biological and nuclear weapons testing, but here the United States is placing the same vote as Iraq. The so-called “war on terrorism” also often cites Iraq and Libya as countries that house anti-U.S. terrorist cells. Yet, here the United States, through its voting, is associating itself with these countries and opposing the remaining democratic nations.

56. Kolbe, *supra* note 54.

57. *Id.*

58. Ron Fournier, *Bush Restates U.S. Request for Court Exemption*, THE LEXINGTON HERALD LEADER, July 3, 2002, available at 2002 WL 19705649.

the ICC: (1) potential vulnerability of American military and government members to the ICC; (2) the Prosecutor's independence; and (3) the inclusion of the undefined "crimes of aggression."⁵⁹ The greatest of these reasons is the fear that the ICC could try American military members and government officials. On September 7, 2002, the spokesman for the National Security Council, Sean McCormack, stated "[O]ur concern is politicized prosecutions of everyone – our servicemen and women and government officials."⁶⁰ The Rome Statute provides the ICC with jurisdiction, in certain instances, over U.S. officials and servicepeople who engage in war crimes, crimes against humanity, genocide, and crimes of aggression when arrested in the country where the act occurred.⁶¹ On July 23, 1998, David Scheffer, the Ambassador At-Large for War Crimes Issues during the Clinton administration, asserted that it is illogical for the United States to expose its military, the largest deployed military across the world, to the jurisdiction of a criminal court that is not recognized by U.S. law.⁶² The current Ambassador At-Large for War Crimes Issues and the Bush administration share this belief.⁶³

In response, the United States has taken two dramatic steps: the creation of Impunity Agreements and the Servicemembers' Protection Act. Impunity Agreements, also called Article 98 Agreements, are bilateral agreements between the United States and a second country that prohibit the latter country from extraditing U.S. citizens to the Hague to be tried by the ICC.⁶⁴ Arizona Congressman Jim Kolbe has stated that the United States is "willing to act unilaterally to protect its own interests," and these agreements reflect this mentality.⁶⁵ Article 98 of the Rome Statute states that the Court may not proceed with a request for surrender that would require the requested state to act inconsistently with its obligations under international law.⁶⁶ Thus, when a bilateral agreement has been signed that promises not to send U.S. military or government personnel to the ICC, the ICC cannot ask that country to extradite U.S. personnel to the Hague for trial. Between August 1, 2002 and October 14,

59. Gerald E. O'Connor, Note, *The Pursuit of Justice and Accountability: Why the United States Should Support the Establishment of an International Criminal Court*, 27 HOFSTRA L. REV. 927, 949-56 (1999).

60. Elizabeth Barker, *On World Court, US Focus Shifts to Shielding Officers*, N.Y. TIMES, Sept. 7, 2002, reproduced at <http://www.globalpolicy.org/intljustice/icc/crisis/0907official.htm>.

61. See Rome Statute, *supra* note 10, art. 12, 13.

62. *Is a U.N. International Criminal Court in the U.S. National Interest?: Hearing Before Subcomm. on International Operations of the Senate Comm. on Foreign Relations*, 105th Cong. 72 (1998) (statement of David Scheffer, Ambassador At-Large for War Crimes Issues) [hereinafter Senate Subcommittee Hearings].

63. See Prosper, *supra* note 7.

64. *US bilateral "non-surrender" agreements regarding the International Criminal Court*, M2 PRESSWIRE, Oct. 1, 2002, available at 2002 WL 26803083.

65. Kolbe, *supra* note 54.

66. Rome Statute, *supra* note 10, art. 98.

2003, the United States has signed sixty Immunity Agreements with Party States and non-Party States.⁶⁷ Some of these agreements are with India, Romania, Cambodia, Tajikistan, Dominican Republic, East Timor, Israel, Rwanda, Sri Lanka, and Afghanistan.⁶⁸ Also, on September 30, 2002, fifteen nations of the European Union agreed to exempt U.S. soldiers and government officials from the prosecution of war crimes by the ICC.⁶⁹ This agreement mandates that these states will not extradite U.S. servicepeople to the Hague for trial as long as the U.S. government guarantees that such a suspect would be tried in a U.S. court.⁷⁰ Although the United States sees this as an immunity, it actually subscribes to the ideology of the Rome Statute. The Rome Statute enumerates that the ICC will only try perpetrators of war crimes, crimes against humanity, and genocide if the state where the crime occurs fails to try such persons.⁷¹ Thus, the immunity agreements actually subscribe to the goals of the Rome Statute and the ICC. Currently, the legality of such agreements is debated,⁷² but for now, they serve, in the eyes of the United States, as a barrier of protection for American servicepeople deployed throughout the world.⁷³

On August 3, 2002, Congress enacted the American Service-Members' Protection Act (ASPA).⁷⁴ This Act attempts to preclude American servicemembers from the ICC's jurisdiction.⁷⁵ This is accomplished by prohibiting cooperation with the ICC in the following ways: (1) No agency or entity of any State or local government: a) may cooperate with the ICC in response to a request by the ICC for cooperation pursuant to the Rome Statute; b) may support any extradition or transportation of U.S. citizens to the ICC; c) may provide support for the ICC; (2) No funds appropriated under any provision of law

67. Coalition for the International Criminal Court, *Signatures/Ratifications of US Bilateral Immunity Agreements (BIAs) or "So-called Article 98 Agreements,"* at <http://www.iccnw.org/documents/otherissues/impunityart98/BIASignatories14Oct03.pdf> (last modified Oct. 14, 2003).

68. *Id.*

69. Paul Meller, *EU Agrees to Exempt U.S. Soldiers from Court*, SAN DIEGO UNION – TRIB., Oct. 1, 2002, at A10:7.

70. *Id.*

71. *See* Rome Statute, *supra* note 10, art. 17.

72. Amnesty International published a study on the U.S. impunity agreements that concluded that such agreements violate the Rome Statute and international law by permitting impunity for "the worst crimes known to humanity." Amnesty International, *International Criminal Court: The Need For The European Union To Take More Effective Steps To Prevent Members From Signing US Impunity Agreements* (Oct. 2002), available at <http://www.iccnw.org/documents/otherissues/impunityart98>.

73. *See* Amnesty International, *International Criminal Court: The Unlawful Attempt by the Security Council to Give U.S. Citizens Permanent Impunity From International Justice* (May 2003), at <http://www.iccnw.org/documents/otherissues.html>.

74. American Service-Members' Protection Act of 2002, H.R. 4775, 107th Cong. (2002).

75. *See id.* § 2002(8).

may be used to assist in the investigation, arrest, detention, extradition, or prosecution of any U.S. citizen or resident alien by the ICC; (3) No members of the ICC may conduct investigative activity relating to ICC proceedings in the United States; (4) Members of the Armed Forces may not participate in any peacekeeping operation under the charter of the United Nations, unless the President has submitted to the appropriate congressional committees; (5) After July 1, 2003, no U.S. military assistance may be provided to the government of a country that is a party to the Rome Statute, unless the President waives this; and (6) The President is authorized to use all means necessary for the release of U.S. citizens being detained or imprisoned by the ICC.⁷⁶

Through the Immunity Agreements and the ASPA, the United States has attempted to protect its citizens from the possibility of prosecution by the ICC. Supporters of the ICC argue that these measures are unnecessary and that, in reality, a U.S. citizen will never be tried by the ICC. Supporters of the ICC point to the Preamble and Article 17 of the Rome Statute as providing a mechanism to ensure that a U.S. citizen would never be unfairly or unjustly tried before the ICC.⁷⁷ The Preamble emphasizes that it is the duty of every State to exercise its own jurisdiction over perpetrators of the covered crimes.⁷⁸ Article 17 states that a case is inadmissible if it is being investigated or prosecuted by a State with jurisdiction to do so.⁷⁹ In order for a U.S. citizen to be tried by the ICC, those individuals would have to be perpetrators of genocide, war crimes, crimes against humanity, or crimes of aggression, and the United States would have to refuse to try these individuals in its own courts or hold a mock or sham trial.⁸⁰ Even if U.S. soldiers ignored all training and massacred civilians, as they did at My Lai in Vietnam,⁸¹ those officers would not be hailed before the ICC pursuant to the Rome Statute as long as the United States conducted a proper investigation and trial, even if it decided not to sentence those individuals.⁸²

In addition to the above safeguards, on July 12, 2002, the U.N. Security Council agreed to grant former and current personnel from non-ICC supporting countries participating in UN sanctioned peacekeeping activities a year-long

76. *Id.* §§ 2004–2008. Thus, theoretically, the President can require the U.S. military to attack The Hague to free any service-members detained there for trial.

77. *See infra* notes 78–80.

78. American Service-Members' Protection Act of 2002, H.R. 4775, pmb1.

79. *Id.* art. 17.

80. *Id.*

81. *See* Alexander Cockburn, *The Shame of My Lai Survive: Only One Soldier Was Convicted In The 1968 Massacre Of 500 Vietnamese Civilians*, L.A. TIMES, Mar. 12, 1998, at B9. On March 16, 1968, several hundred American soldiers and several officers entered My Lai, Vietnam, and shot in excess of five hundred men, women, and children civilians. The United States solely tried and convicted Lt. William L. Calley, Jr. *Id.*

82. O'Connor, *supra* note 59, at 964. If the United States held a sham trial, that is, they did not hold a fair trial of the perpetrators, then the ICC would have the ability to try them.

exemption from possible prosecution by the ICC.⁸³ This exemption can be renewed every year by a Security Council vote,⁸⁴ and indeed it was renewed for another year on June 12, 2003.⁸⁵ The resolution included a clause that would allow any seven members of the fifteen-member Security Council or five veto-wielding members to allow the court to pursue a case.⁸⁶

Secondly, the United States adamantly opposes the fact that the prosecutor is relatively free from close supervision by the UN Security Council.⁸⁷ Article 15(1) provides that the prosecutor may initiate investigations "proprio motu," meaning by self-initiation.⁸⁸ The United States fears that the Prosecutor may make politically motivated prosecutions against U.S. peacekeepers and officials.⁸⁹

In response to U.S. objections, proponents of the ICC argue that the Prosecutor, Moreno Ocampo,⁹⁰ is not able to undertake politically motivated prosecutions because of the judicial restrictions placed on the Prosecutor by the Rome Statute.⁹¹ For instance, before the Prosecutor may begin an investigation, a three-judge panel must first authorize the investigation, named the Pre-Trial Chamber.⁹² This procedural step is the first of several checks that limit and control the power of the Prosecutor. If the investigation is approved, the Prosecutor, under Article 18, must first notify all State Parties that would normally have jurisdiction over the involved crimes.⁹³ A State may then begin investigating

83. Edith M. Lederer, *Both Sides Bruised After US Deal Over War Crimes Court*, Global Policy Forum, at <http://www.globalpolicy.org/security/peacekpg/us/2002/0714sol.htm> (July 14, 2002).

84. *Id.*

85. Evelyn Leopold, *UN Exempts U.S. Soldiers From Prosecution for Year* (June 12, 2003), at <http://www.news.yahoo.com>.

86. Lederer, *supra* note 83.

87. O'Connor, *supra* note 59, at 954.

88. Rome Statute, *supra* note 10, art. 15(1). This means that the Prosecutor is capable of deciding that a matter needs to be investigated and is able to bring it before the Pre-Trial Chamber for approval, something that the Prosecutor is not capable of doing in the United States.

89. O'Connor, *supra* note 59, at 954.

90. Ocampo played a crucial role in the trials of the Argentine military that convicted five army chiefs, including two former presidents. Interestingly, he was a visiting professor at Harvard, which lends itself to suggest that he will not become the "rogue" prosecutor that the United States irrationally fears. Tomas Catan and Nikki Tait, *Argentine Likely to Fill Prosecutor Role in International Criminal Court*, FINANCIAL TIMES, Mar. 25, 2003, at P11, available at 2003 WL 16396657.

91. O'Connor, *supra* note 59, at 967-68. On March 25, 2003, Mr. Moreno Ocampo, an Argentine lawyer, was selected as the first Prosecutor. Christine Legrand, *Argentinean Lawyer Chosen to Head UN Criminal Court*, GUARDIAN, Apr. 3, 2003, at P29, available at 2003 WL 17733420.

92. Rome Statute, *supra* note 10, art. 15(3).

93. *Id.* art. 18.

the crime, making it inadmissible before the ICC.⁹⁴ If the applicable State Parties do not take action, and the investigation is completed, the Prosecutor must then convince the Pre-Trial Chamber that reasonable grounds exist to believe that a suspect committed a crime and that said crime is within the ICC's jurisdiction.⁹⁵ Once the individual is before the Court, the Pre-Trial Chamber holds a third hearing to confirm the charges that the Prosecutor intends to seek at trial.⁹⁶ The final safeguard is the ability of the UN Security Council to, at any time, direct the ICC to defer an investigation or prosecution for up to twelve months with the possibility for renewal.⁹⁷ Thus, the Prosecutor does not possess the unbridled power that the United States fears.

Interestingly, the judges that comprise the ICC are nationals of the various party States and no single nation has more than one national on the court.⁹⁸ The eighteen judges were elected in February of 2003 and are nationals of Ireland, Mali, United Kingdom, Trinidad and Tobago, France, Costa Rica, Cyprus, Samoa, Republic of Korea, Brazil, Bolivia, Germany, Canada, Finland, Ghana, South Africa, Italy, and Latvia.⁹⁹ The judicial body is comprised of seven women and eleven men.¹⁰⁰ William Pace, convener of the global Non-Governmental Organization (NGO) Coalition for the ICC, stated that "highly qualified, independent judges have been elected and regional, gender and legal system balance has been achieved."¹⁰¹ If the United States were a member of the ICC, one of its citizens would most likely be a member of this judicial body and be capable of influencing decisions that will impact the entire world.

The inclusion of the undefined "crime of aggression" is another reason the United States cites for not supporting the ICC. The Rome Statute leaves the term undefined until June 1, 2009, but establishes that when it is defined, it will be consistent with the relevant provisions of the UN Charter.¹⁰² Ambassador Scheffer stated that the United States wanted a provision to the effect that "there must be a direct linkage between a prior [UN] Security Council decision that a state has committed aggression and the conduct of an individual of that state."¹⁰³ ICC proponents emphasize that crimes of aggression will only be prosecuted once a definition has been adopted and that the UN Charter requires a prior determination by the Security Council as to what constitutes an act of

94. *See id.* art. 17.

95. *See id.* art. 58(1).

96. *See id.* art. 61(1).

97. Rome Statute, *supra* note 10, art. 16.

98. United Nations, *Nominations for judges of the International Criminal Court*, http://www.un.org/law/icc/elections/results/judges_results.htm (Feb. 12, 2003).

99. *Id.*

100. *Id.*

101. *Complete Bench of 18 Judges Elected to New International Criminal Court*, AGENCE FR. PRESSE, Feb. 8, 2003, available at 2003 WL 2720733.

102. Rome Statute, *supra* note 10, art. 5(2).

103. O'Connor, *supra* note 59, at 956.

aggression.¹⁰⁴

Essentially, the U.S. objections to the ICC are based upon the potential prosecution by the ICC of U.S. servicepeople deployed throughout the world, the Prosecutor's independence, and the undefined "crime of aggression."¹⁰⁵ As established above, the Rome Statute took ample steps to quell its fears,¹⁰⁶ but the United States continues to refuse to join the ICC and has taken its own steps to protect U.S. servicepeople from potential ICC prosecution. Although the United States so adamantly opposes the ICC, Prosper continues to state that the United States will continue to lead the fight to end impunity for genocide, crimes against humanity, and war crimes.¹⁰⁷ He proposes to do this via domestic courts, rather than through an international judicial mechanism.¹⁰⁸

An article examining the ICC must put forth the proposition that perhaps the United States actually fears just prosecution of its citizens – although such a position has not been openly suggested by the Bush administration or ICC proponents. In the past, the United States has taken actions that could be considered crimes against humanity. For instance, in the My Lai massacre in 1968, there were several officers, including a colonel and a captain of the U.S. army, that were seen participating in the murder of over five hundred civilian men, women, and children.¹⁰⁹ The massacre lasted over four hours and involved more than one hundred soldiers.¹¹⁰ A second company left My Lai and marched three miles to My Khe 5 and murdered more than ninety civilians.¹¹¹ Such action is not a deviation from orders, it is an organized, methodical military operation.¹¹² Unfortunately, the United States tried this matter as if it were a mere deviation, with Lt. William L. Calley, Jr. as the sole lunatic murdering hundreds.¹¹³ However, the court record indicates that the majority of those who testified believe Captain Medina ordered the troops to "kill every living thing in the village, and this included men, women, and children."¹¹⁴ The record also indicates that he participated in the shootings.¹¹⁵ Yet, he was not tried or sentenced.¹¹⁶ Instead, Calley was convicted of the premeditated murder of twenty-two infants, children, women, and old men and of assault with intent to murder a two-year old

104. *Id.* at 972.

105. *See id.* at 949–56.

106. The above-defined safeguards placed on the Prosecutor were added to the Rome Statute in response to the U.S. objections during the formation of the Rome Statute.

107. *See Aita, supra* note 6.

108. *Id.*

109. Cockburn, *supra* note 81.

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. Calley v. Callaway, 382 F. Supp. 650, 655 (M.D. Ga. 1974).

115. *Id.*

116. *See id.*

boy.¹¹⁷ Thus, those who murdered the remaining 490 civilian men, women, and children were never tried and the deceased never had their murderers hailed into court. Is this justice? Murder of this magnitude is the type of activity that should be tried by a domestic court, but if a domestic court fails to adequately try the perpetrators of such a crime, the ICC should then try it. In this respect, the ICC can be seen as a court of last resort. That is, when a crime of such horrendous magnitude is committed and there is no court to fairly try the matter, then the ICC shall try it.¹¹⁸ Perhaps the United States fears being held accountable for its actions when it fails to prosecute those U.S. servicepeople that orchestrate a massacre. “The U.S. should ratify the ICC Treaty out of concern for human rights worldwide The government’s message is that while others can be held responsible for human rights violations, the same rules need not apply to the U.S.”¹¹⁹

III. THE NECESSITY FOR THE ICC EXEMPLIFIED IN THE ASSESSMENT OF TWO DOMESTIC COURTS CURRENTLY TRYING GENOCIDE AND CRIMES AGAINST HUMANITY

A. Brief Examination of the Existence of Genocide, War Crimes, and Crimes Against Humanity in Yugoslavia, Rwanda, East Timor, and Cambodia

It is difficult to fathom that the atrocities that have occurred in Yugoslavia, Rwanda, Cambodia, and East Timor are only a few of the numerous horrific crimes committed in very recent history.¹²⁰ Yet, it is a truth that must be recognized and dealt with through the advent of an international law regime. After the Holocaust, it was proclaimed that such a thing would never occur again. “[O]ut of our memory . . . of the Holocaust we must forge an unshakeable oath with all civilized people that never again will the world stand silent, never again will the world . . . fail to act in time to prevent this terrible crime of genocide . . . we must . . . stamp out oppression wherever it exists.”¹²¹

The following discussion illustrates that despite its promise, the world has remained silent and failed to take action in the face of subsequent genocides. From 1975 to 1979, between 1.7 and 2 million Cambodians, over twenty-percent

117. *Id.*

118. *See id.*

119. Press Release, East Timor Action Network, Human Rights Activists Welcome Ratification of International Criminal Court, But East Timor Needs Own Tribunal, at <http://www.etan.org/news/2002a/04icc.htm> (Apr. 11, 2002).

120. *See* Rome Statute, *supra* note 10, pmb1.

121. Jimmy Carter, 39th President of the United States, *Remarks at the Presentation of the Final Report of the President's Commission on the Holocaust*, at <http://www.state.sd.us/military/VetAffairs/sdwiiimemorial/subpages/testimonies/notes-quotes.htm> (Sept. 27, 1979).

of the population, died at the hands of the Khmer Rouge.¹²² In 1975, the Indonesian army invaded the Portuguese colony of East Timor and between 1975 and 1999, murdered 200,000 East Timorese,¹²³ while forcing them under Indonesian rule.¹²⁴ Brutal tactics such as forced migration, rape, forced sterilization, torture, and murder were utilized.¹²⁵ In Rwanda in 1994, during an ethnic conflict between the majority Hutu and the minority Tutsi, an estimated 800,000 Tutsi were systematically murdered in 100 days.¹²⁶ Other research indicates that more than one million people, which is approximately one-seventh of Rwanda's population, were murdered.¹²⁷ "The victims were hacked to death with commonplace agricultural implements, beaten to death, thrown into pit latrines, drowned, raped, burned, and starved to death."¹²⁸ In the former Yugoslavia, tens of thousands were murdered—the largest massacre on European soil since the Holocaust — and in excess of two million people were displaced from their homes.¹²⁹ In the early 1990s, masses of men, women, and children were forced into makeshift prisons—concentration camps—and brutally, often sadistically, beaten, starved, tortured, raped, and murdered.¹³⁰ Rape was a weapon of war and a strategy for "ethnic cleansing."¹³¹ After being seized by Serbian fighters and told to undress, a fifteen-year-old Muslim girl reported the following:

We refused, then they beat us and tore off our clothes. They pushed us on the floor. Two of the men held me down while two others raped me. I shouted at them and tried to fight back but it was no use. As they raped me, they said they'd make sure I gave birth to a Serbian baby, and they kept repeating that during the rest of the time that they kept me there.¹³²

122. *Mass Crimes Against Humanity and Genocides: A List of Atrocities 1450 CE to the Present*, *supra* note 15. In a collective kitchen, a Khmer Rouge cadre accused a mother of two of stealing rice and when she denied it, he killed her by cutting open her stomach; her stomach was empty. *Small Cost for Justice in Cambodia*, THE WASH. TIMES, Mar. 3, 2002, at B05, available at 2002 WL 2905858.

123. Robinson, *supra* note 15.

124. *Id.*

125. *Id.*

126. *Id.*

127. *Government Report Says 1.07 Million People Killed in Rwandan Genocide*, CANADIAN PRESS, Feb. 14, 2002, available at 2002 WL 13838594.

128. *Id.*

129. ELIZABETH NEUFFER, THE KEY TO MY NEIGHBOR'S HOUSE: SEEKING JUSTICE IN BOSNIA AND RWANDA 33, 159, 166 (2001).

130. *Id.* at 36-48.

131. *Id.* at 276.

132. Michael Sells, *Torture of Prisoners*, at <http://www.haverford.edu/re/g/sells/reports/3rdB.html> (last modified Oct. 18, 2003).

These are just a few examples of the horrific crimes that have been committed in recent history and will reoccur without enforceable legal consequences. It is clear that being horrified by such inhumanity will not make it cease, as all of the above crimes occurred after the world was outraged by the Holocaust. Disgust is not enough, justice must be sought to deter future mass murderers. Much of the world believes that only an International Criminal Court will have the capability of trying perpetrators of such crimes, while the United States believes that domestic courts can try such perpetrators.¹³³ However, both hope that legal ramifications for the perpetration of these crimes will stop the execution of such crimes in the future.¹³⁴

B. The Costs in Time and Resources to Create a Domestic Court Capable of Trying War Crimes, Crimes Against Humanity, and Genocide

Pierre-Richard Prosper, the Ambassador At-Large for War Crimes Issues, stated on February 28, 2002, that “the international practice should be to support sovereign states seeking justice domestically.”¹³⁵ He further suggested that international tribunals should only be a last means of redress.¹³⁶ At first examination, domestic courts may appear to be the solution, but a closer look reveals that they are riddled with problems. Even the United States concedes that domestic courts may not always be effective and as a result international tribunals may be necessary.¹³⁷ Unfortunately, establishing domestic courts or international tribunals capable of trying perpetrators of war crimes, crimes against humanity, and genocide imposes tremendous financial and administrative burdens on uninvolved nations solely because they are capable of bearing the cost.¹³⁸ Many of the states where such atrocities have occurred are war-torn and politically and socially divided to such an extent that they lack the legal infrastructure required to orchestrate the necessary investigations and trials.¹³⁹ An examination of the International Criminal Tribunal for Yugoslavia (ICTY) reveals several of the problems associated with generating an international tribunal capable of trying such perpetrators in a state without the necessary legal mechanisms.

No judicial mechanisms existed in the former war-torn Yugoslavia capable of trying serious violators of international law.¹⁴⁰ Therefore, in 1991, the UN Security Council created an international criminal tribunal to try persons responsible for serious violations of international humanitarian law in the territory

133. See Rome Statute, *supra* note 10, pmbl; see Prosper, *supra* note 7.

134. See Prosper, *supra* note 7; see generally Rome Statute, *supra* note 10.

135. Prosper, *supra* note 7.

136. See *id.*

137. See *id.*

138. See General Assembly, *supra* note 53, ¶¶ 133-138.

139. See generally NEUFFER, *supra* note 129; see generally POWER, *supra* note 15.

140. See General Assembly, *supra* note 53, at 7.

of the former Yugoslavia.¹⁴¹ However, there were significant practical, financial, and structural problems in setting up the ICTY.¹⁴² Imagine taking a thirty-five-page report and creating an active international prosecutorial and judicial body in a war-torn country.¹⁴³ Judges, a prosecutor, a registrar, investigative and support staff, an interpretation and translation system, a legal aid structure, buildings, equipment, courtrooms, detention facilities, and necessary funding needed to be found or created.¹⁴⁴ Rules of procedure and evidence needed to be established.¹⁴⁵ However, emerging from a long period of war, the former Yugoslavia was incapable of providing these necessities.¹⁴⁶ Thus, beginning in 1993 and continuing today, the remainder of the world grudgingly provided all of the necessities.¹⁴⁷

In 1993, many countries began supporting the ICTY in its prosecution of perpetrators of crimes that fall into the categories of genocide, crimes against humanity, and war crimes.¹⁴⁸ Twelve countries pledged a total of \$5,146,042.77 to the support of the Tribunal.¹⁴⁹ The United Kingdom contributed computer equipment valued at 20,000 pounds.¹⁵⁰ The United States contributed a computer system valued at \$3 million and twenty-two staff members for a two-year term to the Office of the Prosecutor.¹⁵¹ Sweden also provided two investigators to the Office of the Prosecutor.¹⁵² Yet, all of these contributions were only enough to get the tribunal started.¹⁵³

From 1996 to 1999, the General Assembly of the U.N. Security Council appropriated over \$200 million dollars to the Special Account for the ICTY.¹⁵⁴ In 1999, the General Assembly approved 848 staff posts and \$95,942,600 to the Tribunal for the period of January 1, 2000 to December of 2000.¹⁵⁵ These figures reveal the magnitude of the cost associated with creating a court capable of trying those responsible for the most heinous crimes. They also illustrate the great number of personnel required to facilitate the investigations and trials. It should

141. *See id.* ¶ 1.

142. *See id.* ¶ 29.

143. *See* NEUFFER, *supra* note 129, at 134-36.

144. *See* General Assembly, *supra* note 53, ¶ 30.

145. *See id.* ¶ 39.

146. *See generally* NEUFFER, *supra* note 129.

147. *See* General Assembly, *supra* note 53, ¶ 172.

148. *See id.*

149. *See id.* ¶¶ 184-85.

150. This translates to approximately \$32, 666 (U.S.). *See id.* ¶ 187.

151. *See id.* ¶ 186.

152. *See* General Assembly, *supra* note 53, ¶ 188.

153. *See generally id.* ¶¶ 183-188, 192.

154. *Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991*, U.N. GAOR, 55th Sess., Agenda Item 152, ¶¶ 235-41, U.N. Doc. A/55/273 (2000).

155. *See id.* ¶ 242.

also become apparent from the above facts that only the wealthiest nations will be able to afford and furnish the funding and personnel necessary for the creation of a legal mechanism capable of trying responsible parties. Generally, the countries that have been party to the conflict are not capable of providing the expenses or personnel.¹⁵⁶

Aside from the staggering monetary costs, the above figures provide a glimpse into the immense difficulty of setting up such a court, but the following illustrations should illuminate the complexity of such a task. It took eighteen months for the UN Security Council to agree upon a Chief Prosecutor and that individual, although ultimately remarkable, had never been a prosecutor before and had never organized a prosecution office or staff.¹⁵⁷ When gathering evidence in Bosnia, the lawyers and investigators found themselves without telephones and without cars, much less armored cars, as are necessary in a war zone.¹⁵⁸ One prosecutor recalls sharing a helicopter ride with a dead Norwegian UN peacekeeper out of necessity.¹⁵⁹ In the first few years, the prosecution found themselves with only twenty investigators, the amount usually allotted for a murder case, not genocide.¹⁶⁰

Despite the logistical and financial obstacles, as of August 23, 2003, ninety-one accused had appeared in proceedings before the tribunal.¹⁶¹ Twenty of the accused had received their final sentences, thirty-eight accused had been tried, twelve were in the appeals process, five had been found not guilty, eight accused awaited Trial Chamber judgment or sentencing, four accused were in trial, and thirty-one accused were in the pre-trial stage.¹⁶² The ICTY illustrates that such ad hoc courts are capable of justice once instituted.¹⁶³ But why should the world be forced to spend substantial amounts of money, time, and personnel to create a capable court to try these crimes when the ICC exists? The reality is that crimes of genocide, crimes against humanity, and war crimes generally only occur in war-torn and economically unstable regions, such as East Timor, Cambodia, and the former Yugoslavia. Thus, the options are: (1) require the economically stable countries to spend substantial time, money, and personnel resources to create a capable domestic court or international tribunal in every locale where such crimes have been committed; or (2) have an international criminal court in place so that when such crimes occur, the only new expense accrued is the actual investigation and trial expense.

Extradition has been and remains a looming problem facing the ICTY

156. *See id.*

157. NEUFFER, *supra* note 129, at 135.

158. *Id.* at 136.

159. *Id.*

160. *Id.* at 137.

161 United Nations, International Criminal Tribunal of Yugoslavia, *Indictments and Proceedings*, at <http://un.org/icty/glance/index.htm> (last visited Aug. 23, 2003).

162. *Id.*

163. *Id.*

and is also an issue domestic courts face when trying perpetrators of genocide and crimes against humanity.¹⁶⁴ Extradition is the process by which a person is charged with a crime under the law of one state, arrested in a second state, and then returned to the first state for prosecution.¹⁶⁵ Extradition of persons charged or convicted of crimes in a second state is not necessary under customary international law, unless required by treaty provisions.¹⁶⁶ While the requirements for extradition vary greatly according to treaty provisions, the Restatement recognizes the following requirements that must be fulfilled in order for a person to be extradited: (1) there must be cause for holding the person for trial for the offense charged; (2) the offense must be extraditable under the treaty; (3) the offense must be a crime in both states; (4) the offense must be committed within the jurisdiction of the requesting state; and (5) extradition must not violate applicable principles of double jeopardy.¹⁶⁷

As of March of 2003, ten years after instituting investigations, ICTY efforts to bring criminal suspects to trial remain stymied by vexing extradition issues.¹⁶⁸ Absent a treaty that requires extradition of the criminal suspects, the ICTY must rely on voluntary surrender to the tribunal or on the cooperation of the Serbian government to extradite the suspects. Given the turbulent political and social environment in the former Yugoslavia, the ICTY has relied heavily on voluntary surrender.¹⁶⁹

On September 3, 2001, the Serbian government refused to extradite the Serbian Republic's president, Milan Milutinovic.¹⁷⁰ Prime Minister Zoran Djindjic asserted that Milutinovic enjoyed international immunity by virtue of the Serbian Constitution.¹⁷¹ Such an argument cannot be made by any signatory of the ICC, because being Party to the Rome Statute means that suspects of genocide must be sent to The Hague for trial if so requested.¹⁷² Nevertheless, in April of 2002, Yugoslavian authorities, under pressure from the United Nations, ordered the arrest of war crime suspects that did not voluntarily surrender to the tribunal.¹⁷³ In her farewell address, ICTY Judge McDonald¹⁷⁴ poignantly noted that the

164. See *Serbia Refuses to Transfer More Suspects to The Hague*, XINHUA NEWS AGENCY, Sept. 4, 2001, available at 2001 WL 26921554.

165. RESTATEMENT, *supra* note 46, pt. IV, ch. 7(B), introductory n.

166. *Id.*

167. *Id.*

168. *Belgrade to Order Arrest of War Crime Suspect as Deadline Expires*, AGENCE FR. PRESSE, Apr. 23, 2002, available at 2002 WL 2392470.

169. *See id.*

170. *Serbia Refuses to Transfer More Suspects to the Hague*, *supra* note 164.

171. *Id.*

172. Rome Statute, *supra* note 10, art. 27.

173. *Belgrade to Order Arrest of War Crime Suspect as Deadline Expires*, *supra* note 168.

174. Judge Gabrielle Kirk McDonald was a judge for the International Criminal Tribunal of Yugoslavia.

absence of extradition treaties undermines the very existence of international tribunals and that without such treaties requiring extradition, the ability of indicted criminals to avoid prosecution is a vivid reality.¹⁷⁵ “Make no mistake about it: if the international community does not ensure the orders of the court are enforced, it is bound to go the way of the League of Nations.”¹⁷⁶

Slobodan Milosevic, indicted in May of 1999, for crimes against humanity and violation of the laws and customs of war, was finally extradited to the Hague on June 29, 2001.¹⁷⁷ Milosevic is believed to have orchestrated the forced expulsion of the majority of ethnic Albanians from Kosovo, which resulted in the death of over 10,000.¹⁷⁸ Current President Kostunica only extradited Milosevic after Colin Powell threatened to boycott the international donors conference for Yugoslavia scheduled to take place on June 29, 2001, unless Milosevic was extradited to the Hague for trial.¹⁷⁹ After this threat, a divided federal cabinet adopted a draft law “acceding to international pressure for war crimes suspects to be handed over to the” ICTY on June 14, 2001.¹⁸⁰ Judge McDonald’s warning appears to have rung true here.¹⁸¹ Without the United States’ threat, it is unlikely that extradition legislation would have been adopted.

The ICC will not encounter the extradition issues with which the ICTY and domestic courts struggle. Extradition, as generally understood, requires that a state party to an extradition treaty is obligated to comply with the request of another State Party to that treaty to arrest and deliver a person duly sought by that state for trial on a charge of committing a crime under the treaty within the jurisdiction of the requesting state.¹⁸² Thus, any state that is party to the Rome Statute must extradite any person to The Hague for trial before the ICC if there is cause to believe he perpetrated genocide, a crime against humanity, or a war crime.¹⁸³

If the United States truly desires to try such perpetrators, it must realize that without the actual obtainment and production of the perpetrators, there cannot be trials. As with the former Yugoslavia, the acquisition of accused may be nearly impossible in many instances without the extradition capacity embodied in the Rome Statute.

175. NEUFFER, *supra* note 129, at 362.

176. *Id.*

177. PRS Group, *International Country Risk Guide: Yugoslavia: Politics*, at <http://www.prsgroup.com> (Jul. 1, 2001).

178. *Id.*

179. *Id.*

180. *Id.*

181. NEUFFER, *supra* note 129, at 363.

182. RESTATEMENT, *supra* note 46, at § 475.

183. *See* Rome Statute, *supra* note 10, art. 13.

C. East Timor¹⁸⁴ – Insight into the Unjust Reality of Domestic Courts Trying War Crimes, Crimes Against Humanity, and Genocide

The following is a brief historical overview of the events that led to the brutal crimes in East Timor. Because East Timor was administered by Portugal in 1960, it was added to the UN General Assembly list of Non-Self Governing Territories.¹⁸⁵ In 1974, Portugal tried to establish a provisional government, but civil war broke out and Portugal withdrew.¹⁸⁶ Indonesia then intervened militarily and integrated East Timor as its province. However, the United Nations did not recognize this integration and called for Indonesia's withdrawal from East Timor.¹⁸⁷ Throughout the course of this twenty-four year invasion, 200,000 East Timorese died through famine and murder.¹⁸⁸ In June of 1998, Indonesia proposed a limited autonomy for East Timor within Indonesia, and as a result, the Security General conducted a popular consultation to ascertain whether special autonomy would be accepted or rejected by the East Timorese.¹⁸⁹ To carry out the consultation, the Security Council authorized the establishment of the United Nations Mission for East Timor (UNAMET), to oversee the transition period pending the implementation of the decision made through the consultation by the East Timorese.¹⁹⁰ UNAMET registered 451,792 potential voters among the 800,000 population and of the registered voters, ninety-eight percent voted—over seventy-eight percent of the voters rejected the proposed autonomy in favor of a transition process toward independence.¹⁹¹

After the results were announced, pro-integration militias, with the support of elements of the Indonesian security forces, launched a campaign of

184. East Timor is located in “Southeastern Asia, northwest of Australia in the Lesser Sunda Islands at the eastern end of the Indonesian archipelago.” See Index Mundi, *East Timor Location*, at http://www.indexmundi.com/east_timor/location.html (last modified Jan. 1, 2002). On May 20, 2002, East Timor became an independent country renaming itself Timor-Leste. United Nations, *United Nations Mission of Support in East Timor*, at <http://www.un.org/Depts/dpko/missions/unmiset/index.html> (Aug. 24, 2003). However, as this paper discusses events prior to the independence and all utilized sources refer to East Timor, rather than Timor-Leste, this paper will also refer to East Timor for consistency and clarity.

185. Peace and Security Section of the Department of Public Information in Cooperation with the Department of Peacekeeping Operations at the United Nations, *East Timor- UNTAET Background*, 2001, at <http://www.un.org/peace/etimor/UntaetB.htm> (May 2002) [hereinafter Peace and Security].

186. *Id.*

187. *Id.*

188. Karen Polglaze, *East Timor to Join International Criminal Court*, AAP NEWS, June 17, 2002, available at 2002 WL 21145419.

189. Peace and Security, *supra* note 185.

190. *Id.*

191. *Id.*

violence, looting, and arson throughout East Timor.¹⁹² Nearly 1,000 East Timorese were murdered¹⁹³ and 500,000 were displaced from their homes. Half of those displaced left the territory, in some instances by force.¹⁹⁴ Experts estimate that eighty percent of East Timor was destroyed during the campaign.¹⁹⁵ Following the violence, Indonesian Armed Forces and police eventually withdrew from the territory, and the United Nations began aiding the country in its path to independent rule.¹⁹⁶

In January of 2000, a UN commission called for an international human rights tribunal to hold Indonesian military and government officials accountable for the crimes perpetrated in 1999 in direct opposition to the UN mission.¹⁹⁷ “Without justice, there can be no rule of law, no redress for victims, no deterrent for potential offenders.”¹⁹⁸ Yet, the Indonesian government promised the United Nations that it would establish its own human rights court to try the crimes associated with the violence and destruction that occurred in 1999 in East Timor, thus obviating the need for international trials.¹⁹⁹ Indonesian president Abdurrahman Wahid persuaded the United Nations that creating a human rights court to try the crimes committed in East Timor would allow Indonesia to put its business in order.²⁰⁰ On January 31, 2002, Indonesia inaugurated its first human rights court.²⁰¹ Leandro Despouy, president of the UN Human Rights Commission stated that the Indonesian court *should* meet international standards.²⁰² The word “should” is crucial, because it reveals that as early as January of 2002, the United Nations had become skeptical of the Indonesian court’s ability to provide justice for the victims and perpetrators through a fair and just trial.

As was foreshadowed at the beginning by Despouy’s word choice, “should,” the following discussion will illustrate that the Indonesian domestic court is not capable of providing just and credible trials that meet international standards. There is a general consensus that the Indonesian court has not and will not deliver justice.²⁰³ The government faltered in its initial steps by allowing

192. *Id.*

193. *East Timor Trial Verdicts Expected; Will Justice Be Done?*, JOYO INDONESIA NEWS, Aug. 11, 2002, at <http://www.etan.org/et2002c/august/01-10/11etverd.htm>.

194. Peace and Security, *supra* note 185.

195. *East Timor Trial Verdicts Expected; Will Justice Be Done?*, *supra* note 193.

196. *See* Peace and Security, *supra* note 185.

197. Diane Farsetta, *U.S. Must Lead E. Timor Reformation*, WIS. ST. J., Feb. 19, 2002, at A6, available at 2002 WL 6331079.

198. *Id.*

199. *Id.*

200. Tom Fawthrop, *Trying the War Criminals – East Timor’s Victims Unlikely to Find Justice*, BANGKOK POST, May 30, 2002, at P0, available at 2002 WL 18166776.

201. *Indonesia Inaugurates Rights Court for East Timor Offenders and Others*, AGENCE FR. PRESSE, Jan. 31, 2002, available at 2002 WL 2329204.

202. *Id.*

203. Farsetta, *supra* note 197.

delay in commencement of trials.²⁰⁴ The Indonesian human rights court was not inaugurated until January 31, 2002 - three years after the crimes in East Timor were committed.²⁰⁵ This time delay would not occur if there was a capable international judicial mechanism in existence. Crimes against humanity, genocide, and war crimes historically occur in war-torn countries that lack the legal infrastructure to adequately try such crimes immediately following the conflicts that fostered the crimes.²⁰⁶ It is therefore imperative that an external, international legal mechanism be established to try such crimes.²⁰⁷ The grave reality remains that destruction of political and legal systems is an unfortunate consequence of war: "Timor has land, a nation, but still does not have a high government."²⁰⁸

Even after the court's inauguration, at trial, the defense attorneys began by arguing that the Human Rights Law, which was passed to allow the Indonesian courts to try the crimes perpetrated in East Timor, was unconstitutional under the principle of retroactivity,²⁰⁹ which is similar to the U.S. constitutional ban on ex post facto prosecutions.²¹⁰ The court rejected the defense's argument²¹¹ stating, "Crimes against humanity are extraordinary crimes and punishment for the perpetrators should not be limited by time and space."²¹² Regardless of the court's appropriate conclusion, this argument resulted in continuous delay.

Judicial and prosecutorial inexperience regarding human rights abuses poses an additional threat to justice.²¹³ Some of the judges have little or no trial experience coming from academia²¹⁴ to the courtroom.²¹⁵ The inexperience of the

204. International Crisis Group, *Indonesia: The Implications of the Timor Trials* 1, at http://www.crisisweb.org/projects/asia/indonesia/reports//A400643_08052002.pdf (May 8, 2002).

205. *Indonesia Inaugurates Rights Court for East Timor Offenders and Others*, *supra* note 201.

206. *See generally* NEUFFER, *supra* note 129.

207. Alessandra Mello, *Brazil: Judge To Collaborate on UNTAET War Crimes Tribunal in Timor*, WORLD NEWS CONNECTION, MAR. 5, 2001, available at 2001 WL 15744745.

208. *Id.*

209. Bhimanto Suwastoyo, *East Timor Rights Trial Illegal, Defense Lawyers Claim*, AGENCE FR. PRESSE, Mar. 21, 2002, available at 2002 WL 2367351.

210. *See* U.S. CONST. art. I, § 10, cl. 1 (stating "No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, *ex post facto* Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility") (emphasis added); *see also* *Smith v. Doe*, 123 S. Ct. 1140 (2003) (discussing the U.S. ex post facto law).

211. Suwastoyo, *supra* note 209.

212. "Mission Impossible" for Indonesian Troops in Timor, AGENCE FR. PRESSE, Apr. 4, 2002, available at 2002 WL 2377653.

213. *See* International Crisis Group, *supra* note 204.

214. Seventeen of the eighteen judges appointed by President Megawati Sukarnoputri

prosecutors is evident in the carelessly written court documents and ineffective statements and cross-examinations.²¹⁶ Several judges also have close ties to the Indonesian military that allegedly perpetrated the crimes in East Timor, which creates a conflict of interest.²¹⁷ Additionally, the judges are intimidated by powerful military figures that are looming in the courtroom solely for this purpose.²¹⁸

The prosecutors' limited indictments and portrayal of the 1999 events as a civil conflict between two violent East Timorese factions (pro-independence and anti-independence) reinforces the defense position that the Indonesian military forces acted as bystanders caught in the conflict.²¹⁹ The prosecution has been ineffective in establishing that the Indonesian military's use of militia forces contributed to the human rights violations in East Timor.²²⁰ The prosecution has also failed to disclose ties between pro-integration militias, the Indonesian army, and the Indonesian government, even though they were closely linked.²²¹ Indonesia insisted that it maintain security during the ballot in East Timor, implying Indonesia's responsibility for the safety and well-being of the East Timorese during the ballot.²²² The Indonesian security forces then failed to maintain security, and beyond this, some forces participated in the campaign.²²³ The militias that participated in the violence were militias armed and trained by the Indonesian army and often acted as a proxy of the Indonesian military's interest in East Timor.²²⁴ Also, the burning and destruction of East Timor by the militias followed the "scorched earth" concept employed by the Indonesian military.²²⁵ If the prosecution laid the above framework and then added the actions of the individual officers, the court would have a basis for finding the police and military leaders guilty of crimes against humanity. However, such a framework has not been established and the prosecution has made a weak case

were academics coming from different universities to work alongside twelve career judges in the human rights court. *Indonesia Inaugurates Rights Court for East Timor Offenders and Others*, *supra* note 201.

215. See East Timor Action Network, *supra* note 119.

216. East Timor Action Network, *Indonesian Ad Hoc Human Rights Court Proven Not Able To Fulfill International Demands*, available at <http://www.etan.org/news/2002a/08etgroups.htm> (2002).

217. Farsetta, *supra* note 197, at A6.

218. *Id.*

219. *Research Group Says Timor Trials Cover Up Military's Role in Bloodshed*, AGENCE FR. PRESSE, May 9, 2002, available at 2002 WL 2403392.

220. *Id.*

221. *Activists Call for Int'l Human Rights Tribunal in East Timor*, JAKARTA POST, Aug. 20, 2002, at P2, available at 2002 WL 22939946.

222. *The Face of Our Justice*, JAKARTA POST, Aug. 28, 2002, at P6, available at 2002 WL 22940282.

223. *Id.*

224. *Id.*

225. *Id.*

against the Indonesian military leaders who developed the infrastructure for the death and destruction that occurred in 1999.

The limited jurisdiction of the court exacerbates the court's ineffectiveness. The Indonesian human rights court only has jurisdiction over the period from April 1999 to September 1999 and only over three of the thirteen districts in East Timor.²²⁶ As a result, numerous crimes committed in East Timor will never be tried.²²⁷ As noted above, in excess of 200,000 East Timorese were murdered by Indonesian forces after its invasion in 1975.²²⁸ Thousands of East Timorese were raped, murdered, or forced from their homes,²²⁹ and yet these crimes do not fall under the jurisdiction of the court. If this occurred post-ICC and involved a signatory nation, all of the above crimes and locales would be within the jurisdiction of the ICC.²³⁰

There are several societal and judicial factors that impact the effectiveness of the court as well. First, Indonesian courts are considered to be corrupt and susceptible to political pressure, according to the U.S. State Department.²³¹ A report by the State Department on Human Rights Practices described Indonesia's judiciary as riddled with "pervasive corruption" and "subordinated to the executive."²³² These judicial attributes may explain why the attorney general dropped all charges against General Wiranto, who headed the Indonesian Military during the violence in East Timor prior to the establishment of the tribunal.²³³ The Indonesian military also remains extremely powerful and operates with impunity.²³⁴ Numerous military members accused of crimes against humanity and other crimes in East Timor continue to hold prominent positions and receive promotions, while only a few token low-ranking officers are tried in order to pacify the United States and the United Nations and to promote these relationships.²³⁵

The miniscule number of East Timorese witnesses who have been able to testify also speaks to the inadequacy of the Indonesian court. As of August 2002, only four of the thirty-four witnesses called to testify were East Timorese and only one linked the defendants to any crime.²³⁶ One defense witness, General Wiranto,

226. East Timor Action Network, *supra* note 216.

227. *Id.*

228. Robinson, *supra* note 15.

229. East Timor Action Network, *supra* note 119.

230. Rome Statute, *supra* note 10, art. 5.

231. Press Release, East Timor Action Network, 10 Reasons Why Indonesian Courts Will Not Bring Justice to E. Timor, at <http://www.etan.org/news/2002a/03ten.htm> (Mar. 14, 2002).

232. *Id.*

233. *Activists Call for Int'l Human Rights Tribunal in East Timor*, *supra* note 221.

234. Chris Brummitt, *Judges for E. Timor Trials Picked*, ASSOCIATED PRESS, Jan. 31, 2002, available at 2002 WL 11686059.

235. East Timor Action Network, *supra* note 231.

236. *East Timor Trial Verdicts Expected; Will Justice Be Done?*, *supra* note 193.

praised Indonesian troops for their efforts in controlling the potential outbreak of a major war after the independence vote.²³⁷ However, human rights officials argue that Wiranto should be a defendant, not a witness for the defense.²³⁸ This conflict of belief alludes to the depth of the witness problems permeating these trials. The violent history between East Timor and Indonesia has left most East Timorese fearful to testify in Indonesian courts.²³⁹ The East Timorese have been traumatized by decades of Indonesian occupancy and given the military and police refusal to ensure security during the UN ballot period, the East Timorese are distrustful of the Indonesian government and military.²⁴⁰ In several instances, the victims and eyewitnesses did not receive sufficient protection, and as a result, they refused to testify.²⁴¹ In September 2002, six East Timorese opted not to appear before the court in Jakarta, citing the effective denial of their request for international accompaniment as the basis for this refusal.²⁴² The request for international accompaniment indicates the immense fear the East Timorese possess in relation to the Indonesians. Their refusal connotes that the East Timorese do not believe they are safe in Indonesia, even when entering Indonesia at the request of the court. However, this should not be surprising in light of the numerous pro-Jakartan protests that have occurred outside the courthouse during the trials.²⁴³ Protesters carry signs stating “Serious war crime? It’s crazy, Mr. Annan.”²⁴⁴ Thirteen witnesses called to testify told UN officials that they were too frightened to go to Jakarta to testify.²⁴⁵ One witness, Dominggas dos Santos Mouzinho told the press that she had been denied the use of a translator and that Indonesian soldiers had heckled her during her testimony.²⁴⁶ Amelio Barreto stated that he “felt like [he] was on trial, not the suspects,” and that Eurico Guterres, defendant and militia leader, had threatened him upon his arrival to testify.²⁴⁷ As the International Tribunals of Yugoslavia and Rwanda indicate, an international criminal court would not face such witness problems because of its neutral location and impartial judicial body.²⁴⁸

The discrepancy between the known events and crimes committed in 1999 in East Timor and the accusations and indictments that the prosecutor has

237. “Mission Impossible” for Indonesian Troops in Timor, *supra* note 212.

238. *Id.*

239. East Timor Action Network, *supra* note 231.

240. *Id.*

241. East Timor Action Network, *supra* note 216.

242. *Six E. Timorese Witnesses Fail to Appear at Rights Trial*, ANTARA INDON. NAT’L NEWS AGENCY, Sept. 2, 2002, available at 2002 WL 7165271.

243. Suwastoyo, *supra* note 209.

244. *Id.* “Mr. Annan” refers to Kofi Annan the Secretary General of the United Nations.

245. *East Timor Trial Verdicts Expected; Will Justice Be Done?*, *supra* note 193.

246. *Id.*

247. *Id.*

248. See Rome Statute, *supra* note 10, art. 3, 36.

presented reveals another glaring violation of justice by the Indonesian human rights court. The primary evidence of the direct involvement of the Indonesian military in the serious crimes that occurred in 1999 in East Timor has not been presented in the trials.²⁴⁹ Human rights experts have chided that the prosecutors ignored key evidence that was established by Indonesia's own Commission of Inquiry on Human Rights Violations in East Timor and by the UN International Commission of Inquiry.²⁵⁰

A look at those who have been indicted and tried to date by the Indonesian Court also exemplifies the ineptitude of the court. Abilio Soares was indicted on February 20, 2002, with two cumulative charges of crimes against humanity.²⁵¹ The first charge was murder as a crime against humanity and the second charge was assault and persecution as a crime against humanity.²⁵² This criminal responsibility is based on Article 42(2) of Law 26/2000, which provides that "[b]oth civil and police leaders are held responsible for gross violations of human rights perpetrated by subordinates under their effective command and control resulting from a failure on the part of the leader to properly and effectively control [his] subordinates."²⁵³ Soares, an East Timorese governor who identifies his nationality as Indonesian²⁵⁴ and who was appointed by Jakarta,²⁵⁵ was charged for the actions of two civilian officials²⁵⁶ and the deputy commander of the Pro-Integration Fighters militia, Eurico Guterres.²⁵⁷ These three individuals are accused of leading or allowing pro-integration forces to: (1) kill twenty-two²⁵⁸ and injure twenty-one pro-independence refugees at a church in Suai in East Timor; (2) kill twelve and injure four at the home of Manuel Carrascalao a pro-independence figure; (3) kill forty-six refugees in a diocese in Dili; (4) kill ten and injure one at the Dili home of Bishop Carlos Ximenes Belo; and (5) kill twenty-five refugees at Suai's Ave Maria church in East Timor.²⁵⁹ According to

249. East Timor Action Network, *supra* note 216.

250. Jane Perlez, *Indonesian Rights Tribunal Clears 6 in Church Massacre; Verdict Doesn't Please Bush Administration*, S. FLA. SUN-SENTINEL, Aug. 16, 2002, at A27, available at 2002 WL 22133192.

251. The East Timor Trial Observation Project, Indonesia, *Case Status Abilio Soares*, available at <http://www.jsmp.minihub.org/Indonesia/caseupdates/UpdSoares.pdf> (Aug. 15, 2002) [hereinafter *Case Status Abilio Soares*].

252. *Id.*

253. *Id.*

254. Bhimanto Suwastoyo, *Ex-Governor Accused of Ignoring Timor Massacre as Landmark Trials Start*, AGENCE FR. PRESSE, Mar. 14, 2002, available at 2002 WL 2359406.

255. Jakarta is the capital of Indonesia.

256. These were the civilian heads of Liquicia and Covalima districts in East Timor, Leonardo Martins and Herman Sedyono respectively.

257. Suwastoyo, *supra* note 254.

258. These numbers vary depending on which indictment one reads, underlining the carelessness of the prosecutors.

259. Suwastoyo, *supra* note 254.

Prosecutor Silalahi, these murders and injuries were committed with firearms, home-assembled firearms, machetes, samurai swords, arrows, and blunt objects.²⁶⁰

On August 14, 2002, Soares was found guilty of crimes against humanity and sentenced to a three-year prison term.²⁶¹ However, the statute requires a minimum sentence of ten years in prison and a maximum sentence of death.²⁶² The prosecutor had requested a sentence of ten years and six months.²⁶³ Critics purport that such a verdict is the result of the prosecution's failure to submit available evidence portraying the human rights violations as part of a widespread and systematic pattern of violence backed by Indonesia.²⁶⁴ Moreover, one cannot ignore the judges' failure to implement the requisite sentence, although they recognized that crimes against humanity had been committed. Regardless, Soares was found guilty of crimes against humanity and was only sentenced to three years in prison, a blatant violation of Indonesia's minimum ten-year sentence statute.²⁶⁵

Soares' sentence is the equivalent sentence given to a defendant found guilty of possession of marijuana in California.²⁶⁶ In Mississippi, section 97-3-79 of the Mississippi Code requires a minimum sentence of three years in a state penitentiary for robbery with a deadly weapon and a maximum sentence of life in prison.²⁶⁷ Neither of these crimes involve physical harm to another individual and yet each is the same sentence given to Soares, a man found guilty of crimes against humanity.

Prosecutors indicted former police chief Timbul Silaen under the same cumulative charges as Soares, but he was acquitted.²⁶⁸ As of December 2, 2002, ten Indonesian military officers, police officers, and civilians have been adjudicated not guilty of involvement in the 1999 violence.²⁶⁹ These acquittals are particularly disturbing in light of an eyewitness testimony that included positive identification of Indonesian soldiers as the perpetrators of several of the attacks listed in the indictments for Soares and Silaen.²⁷⁰ Alfredo Sanches was one of

260. Bhimanto Suwastoyo, *Indonesian Soldiers, Police Joined 1999 East Timor Church Massacre*, AGENCE FR. PRESSE, Jun. 19, 2002, available at 2002 WL 2434272.

261. *Case Status Abilio Soares*, *supra* note 251.

262. Thalif Deen, *Rights: U.N. Faults Indonesia on Sentence for East Timor Crimes*, INTER PRESS SERVICE, Aug. 15, 2002, available at 2002 WL 4915098.

263. *Id.*

264. *Id.*

265. *See* The East Timor Trial Observation Project, *supra* note 251.

266. *See* *Duran v. Castro*, 227 F.Supp.2d 1121, 1130 (2002).

267. MISS. CODE ANN. § 97-3-79 (2002).

268. The East Timor Trial Observation Project, Indonesia, *supra* note 251; *see also* The East Timor Trial Observation Project, Indonesia, *Case Study Timbul Silaen*, available at <http://www.jsmp.minihub.org/Indonesia/caseupdates/UpdSilaen.pdf> (June 20, 2002) [hereinafter *Case Study Timbul Silaen*].

269. *Court Acquits Four of Violence in East Timor*, ASIAN WALL STREET J., Dec. 2, 2002, at A5, available at 2002 WL-WSJA 23021774.

270. *Soldiers Led 1999 Attack on Refugee-Packed House in Dili: Witness*, AGENCE FR.

hundreds of refugees sheltered in the Carrascalao compound when pro-Indonesian militiamen attacked the compound on April 17, 1999.²⁷¹ Sanches, who was injured in the attack, testified that at least six native East Timorese serving in the Indonesian army attacked the compound and were followed by pro-Indonesian militias.²⁷² Sanches testified that he was certain the Indonesian armed forces launched the attack on a refugee-packed compound in Dili because he recognized several of the attackers as members of the Indonesian armed forces from the sub-district of Maubara in East Timor.²⁷³ When prompted by the court, Sanches named six of the Indonesian soldiers involved in the attack.²⁷⁴ He testified that the soldiers burst into the compound and attacked the refugees killing or wounding many East Timorese.²⁷⁵ This explanation of events was offered to demonstrate that the 1999 events were not a clash of two East Timorese groups, but rather an unprovoked attack by pro-Indonesian militias backed by the Indonesian military against pro-independence East Timorese.²⁷⁶ Nonetheless, only a few individuals have been found guilty of the systematic murder of over 1,000 East Timorese and the slash and burn destruction of eighty percent of East Timor post-ballot in 1999.²⁷⁷

Eurico Guterres, Deputy Commander of two militia groups, was found guilty of: (1) murder as a crime against humanity, and (2) assault as a crime against humanity.²⁷⁸ Both of these charges refer to Art. 42(2), citing his military command responsibility to control his subordinates or to correct inappropriate behavior by his subordinates.²⁷⁹ These were the same charges for which Silaen was acquitted and Soares received a sentence of less than the statutory minimum.²⁸⁰ However, here the evidence against Guterres was overwhelming.²⁸¹ The prosecution submitted videotape evidence showing Guterres directing a pro-Jakarta group to attack the home of Manuel Carrascalao where twelve East Timorese were murdered.²⁸²

PRESSE, Oct. 9, 2002, available at 2002 WL 23620412 [hereinafter *Soldiers Led 1999 Attack*].

271. *Id.*

272. *Id.*

273. *Id.*

274. *Id.*

275. *Soldiers Led 1999 Attack*, *supra* note 270.

276. *See id.*

277. *See Court Acquits Four of Violence in East Timor*, *supra* note 269; *see also East Timor Trial Verdicts Expected; Will Justice Be Done?*, *supra* note 193.

278. The East Timor Trial Observation Project, Indonesia, *Case Status Eurico Guterres*, at <http://www.jsmp.minihub.org/Indonesia/caseupdates/UpdEurico.pdf> (last modified Jul. 5, 2002) [hereinafter *Case Status Eurico Guterres*].

279. *Id.*

280. *Case Status Abilio Soares*, *supra* note 251; *Case Study Timbul Silaen*, *supra* note 268.

281. *Case Status Eurico Guterres*, *supra* note 278.

282. *No Justice in Jakarta*, S. CHINA MORNING POST, Nov. 29, 2002, at 17, available

On April 17, 1999, at a ceremony in front of Soares' Governor's Office, numerous military, government, and police leaders, including Soares, gathered, armed with weapons such as spears, guns, and machetes.²⁸³ At the ceremony, Guterres gave a speech where he called for the death of Manuel Viegas Carrascalao, his family, and pro-independence supporters.²⁸⁴ Shortly thereafter, Carrascalao's home was attacked, twelve people were murdered, others were injured, and Carrascalao's home was severely damaged.²⁸⁵ At trial, Guterres stated that he neither felt sorry nor guilty and that his actions were lawful because the Indonesian Constitution requires every citizen to defend the State.²⁸⁶ Such statements correlate the murders in East Timor after the ballot to the Indonesian government and yet only a few perpetrators have been found guilty of the mass and systematic murders and destruction that occurred. Guterres was only sentenced to ten years in prison.²⁸⁷ Indonesian law requires a minimum sentence of ten years in prison and a maximum sentence of death or life in prison.²⁸⁸ The Indonesian court handed down the lightest sentence possible under Indonesian law, although the evidence of guilt was tremendous and Guterres failed to indicate any remorse.

Human rights activists, such as Silvero Batista Pino, believe that the Indonesian court is not administrating justice.²⁸⁹ The organizers of mass destruction and murder are being acquitted or, if the evidence overwhelmingly indicates guilt, they are given lenient sentences.²⁹⁰ It hardly seems rational, much less just, that a judge can find a defendant guilty of grave human rights violations and crimes against humanity and then impose a sentence of only ten years in jail.²⁹¹ It is equally perplexing that given the evidence linking Indonesian militia and government leaders to the mass and systematic murders, only four officials have been found guilty as of February of 2003.²⁹² Moreover, many of the accused

at 2002 WL 103692641.

283. *Case Status Eurico Guterres*, *supra* note 278.

284. *Id.*

285. *Id.*

286. *Ex-Militia Leader Says No Regrets Over Action in East Timor*, AGENCE FR. PRESSE, Oct. 24, 2002, available at 2002 WL 23632983.

287. *Court Gives Guterres 10 Years*, ASIAN WALL STREET J., Nov. 28, 2002, at A4, available at 2002 WL-WSJA 23021624.

288. *Case Status Eurico Guterres*, *supra* note 278.

289. *Court Gives Guterres 10 Years*, *supra* note 287.

290. *Id.*

291. Lely T. Djuhari, *Indonesia Militia Leader Sentenced to Ten Years*, SCOTSMAN, Nov. 28, 2002, at P13, available at 2002 WL 103736810.

292. Lt. Col. Soejarwo, a Dili Military District Commander, was convicted in December of 2002. He was sentenced to five years in jail. *10-Year Jail Term Sought for General Over E. Timor Violence*, ASIAN POLITICAL NEWS, Feb. 10, 2003, available at 2003 WL 8842774. Indonesian Colonel Gultom was found guilty of crimes against humanity in Jan. 20, 2003. He was only sentenced to three years in prison. *Indonesia/E. Timor Sentencing*, VOICE OF AMERICA PRESS RELEASES AND DOCUMENTS, Jan. 20, 2003.

remain free.²⁹³ Asmara Nababan, a former member of the Commission into Human Rights Violations in East Timor, stated that “the fact that the convicts are not yet behind bars is a strong indication that the government has no intention of punishing the human rights violators.”²⁹⁴ Systematic murder and destruction requires organization and thus organizers. It is quite unlikely that Soares and Guterres solely orchestrated such terror and yet the prosecution has failed to indict and charge remaining perpetrators.

1. Special Panel for Serious Crimes: East Timor’s Response to the Spurious Indonesian Court

As Indonesia created its Human Rights Court, East Timor also instituted a UN-backed three-judge Special Panel for Serious Crimes that operates in the Dili District Court.²⁹⁵ The Dili court has faced substantial resistance from Indonesia, as Indonesia refuses to extradite Indonesian defendants to Dili for trial.²⁹⁶ The Dili court has charged two Indonesian army officials, Major Jacob Sarosa and Lieutenant Camilo dos Santos, with seventeen counts of crimes against humanity for their participation in the murders that occurred post-ballot in East Timor.²⁹⁷ Given Indonesia’s general refusal to extradite its citizens to East Timor for trial,²⁹⁸ the Dili court has issued arrest warrants for the indictees and forwarded them to Interpol.²⁹⁹ Also, on February 4, 2003, the UN Court indicted another thirty-two people, including fifteen Indonesian soldiers, on charges of crimes against humanity.³⁰⁰ As of March of 2003, nearly 150 East Timorese and Indonesians have been charged with genocide and crimes against humanity by the UN-backed court.³⁰¹ One indictment, against Indonesian Commander Joao Tavares, charged Tavares with issuing an explicit order to kill certain East Timorese.³⁰² Although the prosecution in East Timor does not expect Indonesia to respond cooperatively to the warrants, the warrants would allow other countries to

293. M. Taufiqurrahman, *Human Rights Tribunal Fails to Uphold Justice*, JAKARTA POST, Jan. 29, 2003, at P4, available at 2003 WL 4361780.

294. *Id.*

295. Bronwyn Curran, *Los Palos Killers Jailed for up to 33 Years for Crimes Against Humanity*, AGENCE FR. PRESSE, Dec. 11, 2001, available at 2001 WL 25083472. Dili is the capital of East Timor.

296. *See Annan Urges Jakarta to Press Ahead with Timor Rights Trial*, AGENCE FR. PRESSE, May 18, 2002, available at 2002 WL 2408994.

297. *Prosecutor Doubts Jakarta Will Return War Crimes Soldiers*, AGENCE FR. PRESSE, Nov. 7, 2002, available at 2002 WL 23643900.

298. *Annan Urges Jakarta to Press Ahead with Timor Rights Trial*, *supra* note 296.

299. *Prosecutor Doubts Jakarta Will Return War Crimes Soldiers*, *supra* note 297.

300. Michael Casey, *U.N. Indicts Thirty-Two in East Timor War Crimes*, ASSOCIATED PRESS, Feb. 4, 2003.

301. *Id.*

302. *Id.*

arrest and extradite the indictees upon entrance into that country.³⁰³ Indonesia's refusal to extradite its citizens to the East Timor court is yet another indication that Indonesia is not sincerely interested in prosecuting those that organized the violence and destruction in East Timor.

A comparison of the sentences and verdicts of the Dili court to those of the Indonesian court suggests that the Indonesian court is not administering justice. In January of 2002, the Dili court convicted ten militiamen of crimes against humanity, while the Indonesian court had only convicted two people as of December 1, 2002.³⁰⁴ The Dili court also found that the violence and destruction was widespread and systematic and that it was primarily directed and supported by Indonesian authorities.³⁰⁵ In December of 2001, the Dili court found ten individuals guilty of crimes against humanity for the murder of two nuns, three priests, an Indonesian journalist, and a number of other murders.³⁰⁶ The defendants were given varying jail terms ranging up to thirty-three years in prison.³⁰⁷ Compare this to the three-year and ten-year sentences the Indonesian court imposed on officials convicted of crimes against humanity. Such a sentence is substantially longer than any sentence provided by the Indonesian court. This seems to indicate a bias by the Indonesian court for its Indonesian defendants, particularly provided that the Indonesian court has consistently failed to apply the statutory minimum of ten years.

2. East Timor's Support for the ICC

The call for an international criminal court rings loud and clear in East Timor, where the inadequacies of domestic court prosecutions are on display. Indonesia, to do justice, must act against its own military and police,³⁰⁸ something it has yet to do. East Timor has attempted to compensate for Indonesia's ineffectiveness by creating its own special court, but it is a great burden for East Timor to carry, in light of its desperate financial status³⁰⁹ and Indonesia's general refusals to comply with extradition requests.³¹⁰ East Timorese lawyer Aderito de Jesus Soares stated, "We know what it is like to live under a regime that systematically tortures, rapes, and murders," and has also stated that he considers

303. *Prosecutor Doubts Jakarta Will Return War Crimes Soldiers*, *supra* note 297.

304. *Indonesian General Ready to Face Trial on Timor Abuses*, AGENCE FR. PRESSE, Jan. 2, 2002, available at 2002 WL 2307593; see also *supra* part III.C (discussing the convictions in the Indonesian court).

305. *Id.*

306. Curran, *supra* note 295.

307. *Id.*

308. Polglaze, *supra* note 188.

309. *Id.*

310. Murry Hiebert, *Role in East Timor Rampage Has U.S. Hesitant on Indonesia*, WALL ST. J. EUR., Mar. 6, 2002, at A3, available at 2002 WL-WSJE 3356198.

the Indonesian ad-hoc court to be “a sham.”³¹¹ He argues that “[T]his is exactly the kind of national failure that the ICC is meant to redress” and reiterates East Timor’s support for the ICC.³¹² East Timor ratified the Rome Statute for the creation of the ICC on September 6, 2002.³¹³

In light of East Timor’s recent experience with domestic court trials to address crimes of mass violence, the fact that East Timor supports the ICC seems particularly relevant.³¹⁴ Who better to decide whether the International Criminal Court is necessary than a country that has just suffered the impact of crimes against humanity and has had the perpetrators inadequately tried by a domestic court? The East Timorese understand from their own experience that domestic courts are often incapable of providing justice for such matters. Thus, their enthusiastic support for the ICC should have particular impact on the United States, which calls for trials of such matters to be handled by domestic courts.

D. Cambodia – A Second Example Demonstrating That Domestic Courts Cannot Provide Just Trials

Even as the United States pressed its case that domestic courts, or as a last resort, international tribunals, try perpetrators of genocide and crimes against humanity, the United Nations unequivocally proclaimed that a Cambodian domestic court is incapable of trying the leaders of the Khmer Rouge.³¹⁵ The Party of Democratic Kampuchea, more commonly referred to as the Khmer Rouge, seized power, thereby ending the civil war in April of 1975.³¹⁶ The regime envisioned a new, revolutionary agrarian society.³¹⁷ In furtherance of this society, within a few days of entering the capital of Cambodia, Phnom Penh, two million people were removed from their homes at gunpoint, taken to the countryside, and forced to labor in the fields from 4 a.m. to 10 a.m., 1 p.m. to 5 p.m., and 7 p.m. to 10 p.m.³¹⁸ Clocks, radios, televisions, hospitals, Western medicine, books, private business, and professions such as medicine, teaching, and dancing were forbidden.³¹⁹ Memories of the past life, that is, life before the Khmer Rouge, were banned.³²⁰ Praying was forbidden.³²¹ All property and money were abolished and

311. East Timor Action Network, *supra* note 119.

312. *Id.*

313. *State Signatures*, *supra* note 14.

314. *See id.*

315. *See* Marwaan Macan-Marker, *Politics-Cambodia: Leader’s Quest for Legitimacy Suffers Setback*, INTER PRESS SERVICE, Feb. 12, 2002, available at 2002 WL 4912843.

316. Mann Bunyanuda, Note, *The Khmer Rouge On Trial: Whither the Defense?*, 74 S. CAL. L. REV. 1581, 1581 (2001).

317. *Id.* at 1581-82.

318. POWER, *supra* note 15, at 117–18; Bunyanuda, *supra* note 316, at 1582.

319. Vivienne Walt, *Facing Cambodia’s Atrocities/Country Coming Under Increasing Pressure to Bring War Crimes Trials*, NEWSDAY, Jan. 7, 2001, at A17.

320. POWER, *supra* note 15, at 117-18.

no contact with the outside world was permitted.³²²

Along with the revolution, the regime instituted systematic killing, which was considered necessary to establish the new society.³²³ During the Khmer Rouge's three-year reign, at least 1.7 million people died of starvation or were systematically murdered.³²⁴ An independent U.S. scholar, Craig Etcheson, estimates that the death toll is actually between 2.2 and 2.5 million.³²⁵ These figures amount to genocide at a rate unprecedented in world history. Not only were certain racial and ethnic groups annihilated, but the educated were a targeted class – anyone who had completed the seventh grade was deemed educated and served a death sentence as soon as the regime became privy to such knowledge.³²⁶ The entire Vietnamese minority was murdered. Three hundred thousand of the 500,000 Muslim Cham living in Cambodia were murdered within three years, as were all but 1,000 of the 60,000 Buddhist monks who had lived in Cambodia at the beginning of the regime.³²⁷ The regime's ideology was "To keep you is no gain, to kill you is no loss."³²⁸

Those not executed were dressed in black pajamas and forced to perform agricultural labor in open fields, a situation that resulted in death for much of the population.³²⁹ Field laborers were given a minimal food ration of thin rice soup.³³⁰ In most areas, the regime only provided each worker with one tin or less of rice per day.³³¹ Others, particularly educated or urban individuals were quickly

321. *Id.*

322. *Id.*

323. See Seth Mydans, *Paper Trail For a System of Terror: But the Cambodian Government Has Never Prosecuted Any Khmer Rouge*, NAT'L POST, Sept. 21, 2002, at B08, available at 2002 WL 26205481.

324. *Id.*

325. *Id.* Such numbers are reminiscent of the Holocaust. From March 22, 1933, with the opening of the first concentration camp, until May 7, 1945, the date of the signing of the German surrender, approximately six million Jews were murdered and several million gypsies, homosexuals, Poles, and mentally ill were also murdered. This is a time span in excess of twelve years. In only three years, over two million Cambodians were murdered. To correlate this with the Holocaust, per year, more people were murdered by the Khmer Rouge than by the Nazi regime. Yet, the Nuremberg Military Tribunal was formed in the same year that the surrender was signed, but, as of July 2003, no tribunal has been established to try those that perpetrated the genocide in Cambodia. *The History Place: Holocaust Timeline*, at <http://www.historyplace.com/worldwar2/holocaust/timeline.html> (last visited Aug. 23, 2003).

326. POWER, *supra* note 15, at 119.

327. *Id.* at 143.

328. *Id.* at 119.

329. See *id.*; see also Mydans, *supra* note 323.

330. *The History Place: Holocaust Timeline*, *supra* note 325. This forced labor is reminiscent of what occurred in the Holocaust concentration camps.

331. POWER, *supra* note 15, at 117.

executed along with those thought to be disloyal.³³² There were defined rules and the consequence of disobedience was death.³³³ One former Khmer Rouge cadre, Bong Rim, recalls a young couple that was killed for committing the crime of unauthorized love, because the regime tolerated only government-approved arranged marriages.³³⁴ After interrogation and torture, these murders were generally perpetrated either in killing fields³³⁵ or schoolhouses³³⁶ transformed into prisons.³³⁷ However, these were not the only execution locales.³³⁸ People who fell behind in their work were also taken to salt mines after arrest to be tortured and often murdered.³³⁹ Bullets were too precious to waste on the executions; instead adults were killed with axes, knives, and bamboo sticks.³⁴⁰ Children, being smaller in size, were battered against trees.³⁴¹ As of March 3, 2002, the Documentation Center of Cambodia had documented 19,440 mass graves and 167 extermination prisons.³⁴² The Center had also collected in excess of 600,000

332. *The History Place: Holocaust Timeline*, *supra* note 325.

333. *Id.*

334. *Id.*

335. There are numerous “killing fields” in Cambodia. The commonly termed “killing fields” are the locales where the Khmer Rouge often murdered and/or disposed of the millions of murdered bodies. One killing field, Choeung Ek, nine miles from the capital of Phnom Penh, is the size of a soccer field and is surrounded by farmland. Estimates suggest approximately 20,000 Cambodians, most of whom were tortured and then murdered, are in the mass graves. The surrounding trees once held nooses for hangings. See Zoltan Istvan, “Killing Fields” Lure Tourists in Cambodia, NAT’L GEOGRAPHIC NEWS, available at http://www.nationalgeographic.com/news/2003/01/0110_030110_tvcaqmbodia.html (Jan. 10, 2003).

336. The Tuol Sleng Museum of Genocide in Phnom Penh was once a high school transformed into a torture camp, prison, and execution center. From the outside it looks like a typical school and yet inside are weapons of torture, skulls, bloodstains, and pictures of the thousands of people that were murdered within its walls. *See id.*

337. Mydans, *supra* note 323.

338. *See id.*

339. *See id.*

340. Istvan, *supra* note 335.

341. *Id.*

342. Youk Chhang, *Small Cost for Justice in Cambodia*, WASH. TIMES, Mar. 3, 2002, at B05, available at 2002 WL 2905858. Bou Meng was one of only seven people to survive Tuol Sleng. It is estimated that 30,000 Cambodians passed through the prison on their way to their death in the killing fields. His life was spared because he was able to draw pictures of Pol Pot that met his satisfaction. He desires to share his story with the world and testify at a trial of the living leaders of the violent regime. He and his family were taken to Tuol Sleng in 1977. They were questioned, handcuffed, and then blindfolded. They were bound and photographed. This is the last time that he saw his wife and children. Bou Meng was then beaten and the same can only be assumed of his family. In 2003, he possesses scars across his body created in 1977 by beatings with bamboo rods and electrical wire. Today he has only two teeth as the remainder were smashed out of his face and permanent hearing loss from the numerous blows to his skull. A week after being

pages of Khmer Rouge documents, because the regime, like the Nazis, meticulously recorded every detail.³⁴³ For instance, all persons brought to Tuol Sleng, one of the extermination centers, were numbered, photographed, and forced to sign a confession admitting to be a traitor, before they were murdered.³⁴⁴ There were interrogation manuals encouraging the use of torture.³⁴⁵ One manual blatantly stated, “We must hurt them, so they respond quickly,” but cautioned the tormentors to use care so as not to kill them too rapidly.³⁴⁶

In light of the extensive evidence of genocide and crimes against humanity at the hands of the Khmer Rouge, human rights activists and Cambodians have been calling for justice through the trial of the Khmer Rouge’s high-ranking leaders.³⁴⁷ Yet, although the regime lost power in January of 1979,³⁴⁸ as of January 6, 2003, there have not been any trials for the murder of several million people during the regime’s reign.³⁴⁹ In 1997, UN Security General Kofi Annan received a letter from the First Prime Minister of Cambodia, Norodom Ranariddh, requesting the United Nations’ help in prosecuting the Khmer Rouge leadership.³⁵⁰ This request was followed by a second letter from the Second Prime Minister Hun Sen.³⁵¹ Thereafter, a three-member panel was convened to: (1) determine the nature of the crimes committed; (2) determine the feasibility of bringing the perpetrators to justice; and (3) examine whether a domestic or international forum would be best.³⁵² The panel recommended that the United Nations establish an ad hoc international tribunal to try Khmer Rouge officials for crimes against humanity and genocide committed from April 17, 1975 to January 7, 1979.³⁵³ They also suggested the appointment of an independent

brought to the prison, there was a request for painters among the prisoners and Bou Meng stepped forward. He was selected and threatened with death if his picture did not perfectly match a photograph of Pol Pot. Because he was able to paint such replicas, he survived while thousands of others were tortured and murdered. He recalls hearing prisoners’ screams and cries for help. He saw guards carrying prisoners like pigs to the torture room; their swollen bodies tied to long sticks at the wrists. Patrick Falby, *Portrait of the Artist as Cambodian Survivor*, GLOBE AND MAIL (Toronto), Feb. 14, 2003, at A3; see also Alan Sipress, *For Torture Camp Survivor, Time is Scarce; Chance to Bear Witness Against the Khmer Rouge Hinges on Stalled Tribunal*, WASH. POST, Feb. 18, 2003, at A20, available at 2003 WL 13332997.

343. POWER, *supra* note 15, at 143, 145; Chang, *supra* note 342.

344. POWER, *supra* note 15, at 144.

345. *Id.* at 145.

346. *Id.*

347. See Bunyanuda, *supra* note 316, at 1583.

348. See *id.* at 1582.

349. Kim Gamel, *U.N. Resumes Talks on Cambodian Tribunal*, ASSOCIATED PRESS, Jan. 6, 2003, available at 2003 WL 2924346.

350. Bunyanuda, *supra* note 316, at 1614.

351. *Id.*

352. *Id.*

353. Craig Etcheson, *Accountability Beckons During a Year of Worries for the Khmer*

prosecutor and the establishment of an ad hoc court in a state in the Asia-Pacific Region, but not in Cambodia.³⁵⁴ However, Cambodia rejected the suggestions of the panel in 1998 and decided to establish its own court to try the Khmer Rouge.³⁵⁵ Displeased with this response, the United Nations negotiated with Cambodia on the terms and, after much effort, both the United Nations and Cambodia agreed to establish a mixed tribunal that would be established under Cambodian domestic law, but dominated by international personnel.³⁵⁶ Shortly thereafter, Cambodia and the United Nations each presented a draft charter for a Khmer Rouge tribunal, but the two charters were substantially different and often diametrically opposed.³⁵⁷ Cambodia, in response, proposed a domestic tribunal that would allow foreign judges to participate in the proceedings.³⁵⁸ However, UN Secretary General Kofi Annan responded to the Cambodian proposal by citing four remaining issues that needed to be addressed before the United Nations would participate in the trial.³⁵⁹ These issues were: (1) the status of the foreign prosecutor; (2) the apprehension of suspects; (3) amnesty for certain Khmer Rouge leaders; and (4) the number of foreign judges.³⁶⁰ The United Nations also indicated concern over the existence of adequate standards of justice, fairness, and due process of law in the Cambodian courts. If these concerns were not addressed, the United Nations would not support the Cambodian trials.³⁶¹ After further negotiations, in 2001, the tribunal was established and Cambodia signed the new legislation into law.³⁶² The newly enacted legislation sufficiently deviated from the negotiations, and as such, the United Nations' requested changes and clarifications, but Cambodia dismissed the requests and failed to amend the law.³⁶³ In February of 2002, Annan sent Prime Minister Hun Sen a letter stating that the Cambodian court Hun Sen desired to establish would not guarantee independence, impartiality, and objectivity.³⁶⁴ Therefore, the United Nations would not participate in the Cambodia trials.³⁶⁵ To this, Hun Sen stated that Cambodia would continue without the support of the United Nations.³⁶⁶

Several of the factors that led to the United Nations' refusal to support

Rouge Leadership, 6 ILSA J. INT'L & COMP. L. 507, 508 (2000).

354. *Id.*

355. *Id.* at 510.

356. *Id.*

357. *Id.* at 512.

358. Bunyanuda, *supra* note 316, at 1615.

359. *Id.*

360. *Id.*

361. *Id.*

362. *Id.* at 1616.

363. Bunyanuda, *supra* note 316, at 1616.

364. Macan-Marker, *supra* note 315.

365. *Id.*

366. *UN Not Needed for Khmer Rouge Tribunal, Says Cambodia's Prime Minister*, CANADIAN PRESS, May 14, 2002, available at 2002 WL 21293642.

the Cambodian domestic court's trials reveals why an international mechanism is necessary to justly try perpetrators of genocide and crimes against humanity and reiterates that domestic courts cannot effectively try such perpetrators in their own forum. The Cambodian legislation fails to define the impact of the law on previously issued pardons.³⁶⁷ For instance, Ieng Sary received a royal pardon in 1996.³⁶⁸ Sary, known as Brother Number Three within the regime, is generally believed to be the architect of the killing fields, but he received a royal pardon because he led the first large defection from the Khmer Rouge that essentially led to its collapse.³⁶⁹ Such immunity is an impenetrable barrier to justice and would never exist in an ICC trial.

In a similar vein, Hun Sen also believes that he can dictate who will and who will not be called before the domestic court.³⁷⁰ Selective prosecution completely undermines the power and independence of the court. Hun Sen has stated that he will not allow charges to be brought against Sary, although substantial evidence exists supporting charges of genocide and crimes against humanity.³⁷¹ Hun Sen has also assured the Cambodian public that low-ranking members of the Khmer Rouge will not be subject to trial.³⁷² This assurance may be prompted by the fact that Hun Sen himself is a former Khmer Rouge cadre who eventually defected and returned with the Vietnamese forces³⁷³ and he fears that if all officials of the Khmer Rouge are subject to trial, he may be called before the court. Regardless, the fact that Hun Sen is capable of dictating who will be called before the court clearly defies the basis of impartiality that is a cornerstone of the judiciary.

As in Indonesia, Cambodian judges also have a poor reputation for independence; they are often viewed as little more than puppets of the executive's will.³⁷⁴ Human rights groups have argued that without international control, the Cambodian courts will be unable to provide justice because the judiciary has a history of corruption and acting as an additional hand of the government.³⁷⁵ Sok Sam Oeun, a lawyer and coordinator of the Cambodian Human Rights Action

367. Bunyanuda, *supra* note 316, at 1620.

368. Anne Penketh, *Cambodia Clears the Way for 'Killing Fields' Trials*, THE INDEPENDENT (London), Aug. 8, 2001, at 10, available at 2001 WL 23543986.

369. Kathy Marks, *How Brother Number Three, Architect of the Killing Fields, Lives a Life of Luxury in New Cambodia*, THE INDEPENDENT (London), Dec. 7, 2002, at P15, available at 2002 WL 103791315; Julio A. Jeldres, *Trying Cambodia's Khmer Rouge: Guerrilla Genocide Trial is Beset With Obstacles*, BANGKOK POST, Jan. 5, 2001, at 14, available at 2001 WL 3319188.

370. Jeldres, *supra* note 369, at 14.

371. *Id.*

372. Men Kimseng, *Hun Sen Says Khmer Rouge Genocide Trials Could Start This Year*, AGENCE FR. PRESSE, Jan. 10, 2001, available at 2001 WL 2318182.

373. *Id.*

374. Bunyanuda, *supra* note 316, at 1619.

375. *Cambodia Gives OK to Genocide Tribunal*, HOUSTON CHRON., Aug. 11, 2002, available at 2001 WL 23620733.

Committee, considers the criminal justice system in Cambodia to be a failure, because the judges are little more than pawns of the government.³⁷⁶ Thus, a second pillar of the judiciary, its independence, is nonexistent in domestic Cambodian courts.

These factors, among others, have led the United Nations to the conclusion that the Cambodian court does not meet international standards of justice because it is void of independence, impartiality, and objectivity.³⁷⁷ But, without international aid, the Cambodian domestic court cannot even begin to effectively try the perpetrators.³⁷⁸ In June of 2002, Hun Sen admitted that a successful trial would require money from overseas.³⁷⁹ This need for assistance became evident after heavy pressure from Cambodia led the United Nations to agree to resume negotiations for a joint international and Cambodian tribunal in January of 2003.³⁸⁰

Finally, in June of 2003, the United Nations and Cambodia reached a tentative agreement for the creation of a hybrid court – that is, a combination of a Cambodian court and an international tribunal.³⁸¹ The court is referred to as the Extraordinary Chambers and is comprised of one trial court and one supreme court.³⁸² The judiciary will be comprised of a combination of international and Cambodian justices.³⁸³ However, the court faces several major hurdles even before the agreement can evolve into a functional court system.³⁸⁴ First, the agreement must be ratified by the Cambodian National Assembly.³⁸⁵ Second, at least \$19,000,000 must be raised to finance the court.³⁸⁶ Beyond these obstacles, the foregoing issues remain a potential problem that may halt the court at this stage indefinitely.³⁸⁷

The extraordinary delay in establishing a trial for the perpetrators of the genocide in Cambodia illustrates another reason why it is so imperative that the ICC be established immediately for all future crimes. The evidence is

376. Macan-Marker, *supra* note 315.

377. *Id.*

378. *Aid Needed for Trial of Cambodia's Khmer Rouge*, SAIGON TIMES DAILY, June 21, 2002, available at 2002 WL 21701488.

379. *Id.*

380. Gamel, *supra* note 349, at 35.

381. Paul Knox, *Khmer Rouge to Face Justice for Atrocities: Deal Paves Way for Special Court to Probe '70s Genocide in Cambodia's Killing Field*, GLOBE AND MAIL (Toronto), June 7, 2003, at A26, available at WESTLAW, Globemail File.

382. United Nations, *Cambodia Signs Agreement to Prosecute Former Khmer Rouge Leader*, at <http://www.un.org/apps/new/story.asp?newsID=7334&Cr=cambodia&Cr1=#> (last visited Jun. 6, 2003).

383. *Id.*

384. *Id.*; see also Knox, *supra* note 381.

385. United Nations, *Cambodia Signs Agreement to Prosecute Former Khmer Rouge Leader*, *supra* note 382.

386. Knox, *supra* note 381.

387. *Id.*

documented and available in Cambodia and yet it is more likely than not that the highest-ranking officials of the Khmer Rouge will die before that evidence is ever presented at a trial against them.³⁸⁸ Pol Pot, the leader of the Khmer Rouge and architect of the killing fields, died in 1998,³⁸⁹ and on February 15, 2002, Commander Ke Pauk passed away.³⁹⁰ Academics believe that this commander would have been indicted for crimes against humanity and genocide had there been a trial before his death.³⁹¹ The leaders that remain are generally in their seventies and many are already in poor health.³⁹² Nonetheless, these murderers will live out their days in comfort. Thus, if trials are not commenced immediately, there will be no defendants once the Cambodian court is ready to prosecute them and the hope for justice will vanish.

IV. THE ICC IS THE ONLY FORUM THAT CAN TRY CRIMES AGAINST HUMANITY, CRIMES OF GENOCIDE, AND WAR CRIMES IN A FEASIBLE, EFFECTIVE, AND CREDIBLE MANNER, PROVIDING JUSTICE FOR BOTH THE PERPETRATORS AND THE VICTIMS

A. Iraq: Yet Another Example Demonstrating the Necessity of the ICC

This section solely examines how the genocide against the Kurdish population in Iraq further demonstrates the necessity of the ICC. During the genocidal Anfal Campaign of 1983-88, the United States acknowledged that Sadaam Hussein's regime murdered in excess of 30,000 citizens, primarily Kurds, through the use of poisonous nerve and mustard gasses.³⁹³ The Kurdish leadership

388. See *Candidate for Khmer Rouge Trial Found Dead*, AGENCE FR. PRESSE, Feb. 15, 2002, available at 2002 WL 2341228.

389. Anne Penketh, *Cambodia Clears the Way for 'Killing Fields' Trials*, INDEPENDENT (London), Aug. 8, 2001, at 10, available at 2001 WL 23543986.

390. *Candidate for Khmer Rouge Trial Found Dead*, supra note 388.

391. *Id.*

392. Chris Decherd, *Khmer Rouge Leaders Evading Justice*, ASSOCIATED PRESS, Dec. 17, 2002, available at 2002 WL 104356710. As stated above, Brother Number One, Pol Pot, died in 1998. Brother Number Two, Nuon Chea, is seventy-five and currently lives in his mansion with his grandchildren in Pailin. Brother Number Three, Ieng Sary, is seventy-three and lives in his large white villa behind the Russian Embassy. He has heart problems and travels to Bangkok in his luxury car with his bodyguards for treatment. Ta Mok and Kang Kek Ieu remain in prison. Sister Number One, Khieu Ponnary, the first wife of Pol Pot, is currently experiencing signs of dementia and will likely never face trial or be capable of testifying as a result. Pascale Trouillaud, *Commanders of Cambodia's Killing Fields: Aged and Infirm, but Free*, AGENCE FR.-PRESSE, Feb. 9, 2003, available at 2003 WL 2721060.

393. U.S. Department of State: Bureau of Democracy, Human Rights, and Labor, *Iraq: A Population Silenced*, available at <http://www.state.gov/g/drl/rls/15996pf.htm> (Dec. 2002).

alternatively claims that 182,000 Kurds were systematically murdered during this campaign.³⁹⁴ However, Hassan Ali al-Majid, Commander of Operation Anfal, was enraged at this suggestion by the Kurdish leadership and retorted that not more than 100,000 Kurds could have been murdered.³⁹⁵ When the Anfal campaign came to an end in 1989, ninety percent of the Kurdish villages had been obliterated and reinhabited with 15,000,000 landmines and 1,500,000 Kurds had been forced into crude refugee camps.³⁹⁶

When he[, an Iraqi Kurd,] saw Iraqi planes bombing he sprinted back down to the village in order to help. But when he reached his home, where he had prepared a makeshift chemical attack shelter, no one was inside. He remembered: I became really afraid – convinced that nobody survived. I climbed up from the shelter to a cave nearby thinking they might have taken refuge there. There was nobody there, either. But when I went to the small stream near our house, I found my mother. She had fallen by the river; her mouth was biting into the mud bank I turned my mother over; she was dead. I wanted to kiss her but I knew that if I did, the chemicals would be passed on. Even now I deeply regret not kissing my beloved mother. He searched desperately for his wife and children: I continued along the river. I found the body of my nine-year-old daughter hugging her cousin, who had also choked to death in the water Then I went around the house. In the space of 200-300 square meters I saw the bodies of dozens of people from my family. Among them were my children, my brothers, my father, and my nieces and nephews. Some of them were still alive, but I couldn't tell one from another. I was trying to see if the children were dead. At that point I lost my feelings. I didn't know who to cry for anymore and I didn't know who to go to first. *I was all alone at night.*³⁹⁷

Today it is undisputed by the United States that the Hussein regime committed genocide against Iraq's rural Kurdish population,³⁹⁸ however not a

394. POWER, *supra* note 15, at 244.

395. *Id.*

396. Harry Hayes, *Genocide in Iraq: Further Reasons for a Criminal Tribunal*, *International Review*, at <http://www.geocities.com/Paris/Rue/4637/terr35a.html> (Jan. 14, 2003) (on file with author).

397. POWER, *supra* note 15, at 189-190 (emphasis added). During this Iraqi chemical attack against the Iraqi Kurds on May 3, 1988, twenty-five of Abdel-Qadir al-Askari's family members were murdered with chemical weapons. *Id.*

398. *Id.* at 245.

single political leader or soldier in this genocidal campaign has ever faced trial for these murders.³⁹⁹ Should a powerful, violent dictator be allowed to annihilate any specific group until he is removed from power? Once removed from power, should any murders or any genocide committed pursuant to his authority be forgotten and those responsible never held accountable?

If one answers “No” to the above questions and also believes in justice for all, then a judicial process must transpire. However, now that Sadaam Hussein has been removed from power, who will prosecute those who orchestrated the genocidal campaign against the Kurdish population in Iraq? If justice is to be served, an impartial and independent judiciary must try such individuals. The identifiable options are domestic courts, international tribunals, and the ICC. However, a fourth option arises under the circumstances in Iraq: the United States could formulate a court and try such parties. This practice, often referred to as the establishment of a “victor’s court,” also fails to offer the independence and impartiality that are the cornerstones of American and international justice. Does the United States allow the police officer that captures the thief to dictate the guilt of the individual? Does the U.S. Constitution allow the grieving mother of her murdered son to decide if a suspect is guilty of the crime? Such questions appear ridiculous as the U.S. legal system is based upon the premise that the judiciary is an independent and impartial governing body. Similarly, allowing the United States, which has had its soldiers murdered, expended significant resources liberating Iraq, and is visibly immersed politically, economically, and socially in the existence of Iraq, to try such individuals is equally in opposition to the foundations of justice set forth in the U.S. judiciary.

Therefore, who shall try the perpetrators of genocide in Iraq? Shall they be forgotten and allowed to exist as though they were not involved in the destruction of a population — as has occurred in Cambodia? Shall they be tried by domestic courts that fail to sincerely try the perpetrators — as in East Timor? Shall an international tribunal be established, costing the world incredible sums of money — as in the former Yugoslavia and Rwanda?

What shall be the answer now and when, sadly, such horrendous acts occur again in the future? The answer is the ICC. It is the only option that provides for an independent and impartial judicial body capable of trying such perpetrators without overwhelming expense and delay. Had the ICC existed in 1989, the leaders within Sadaam Hussein’s regime could be hailed before the ICC and justly tried in a manner consistent with U.S. and international law. The ICC is the solution to the question of how to justly try those that commit the most horrific crimes — genocide, crimes against humanity, and war crimes — and provide justice and closure to those that have suffered pursuant to such horror.

399. *Id.*

B. The ICC is the Only Credible and Feasible Forum to Consistently Try Genocide, Crimes Against Humanity, and War Crimes

As the United States has recently demonstrated with its attack on Iraq, “large countries can defend themselves by arms; small countries need the protection of the law.”⁴⁰⁰ Justice can only be accomplished for all people if there is a judicial mechanism in existence with the ability to provide justice for all people who have suffered grave wrongs. There are essentially three current forums available for redress: (1) international tribunals created by the United Nations; (2) domestic judicial systems in the location of the crime; and (3) the International Criminal Court. International criminal tribunals, such as the International Criminal Tribunal of Yugoslavia, have been quite successful in implementing fair trials for the crimes of genocide and crimes against humanity.⁴⁰¹ However, they are extremely costly, as explained above, as far as the extensive time required to implement the court, the staff involved, and the costs incurred while formulating and running the court. The United Nations also appears unwilling to institute international tribunals in every instance of genocide or crimes against humanity, as is evidenced by the fact that Cambodia and East Timor do not have international tribunals trying the crimes that occurred there.⁴⁰²

Domestic courts, as exemplified in Cambodia and East Timor, are grossly incapable of providing impartiality, due process, or justice. Crimes of genocide, war crimes, and crimes against humanity generally occur in war-ridden nations whose weakened legal infrastructures are not capable of trying these crimes.⁴⁰³ Implementing new domestic courts to try those that orchestrated the crimes often results in grave time delays.⁴⁰⁴ Additionally, there exist vexing problems related to witness protection, judicial impartiality, and judicial independence.⁴⁰⁵ Judicial impartiality and judicial independence are basic foundations of the legal system and without them there can be no justice. Sadly, as illustrated above, these legal pillars are often absent in the domestic courts of nations that have experienced such crimes.⁴⁰⁶

President George W. Bush claims that the United States will defend justice,⁴⁰⁷ and Pierre-Richard Prosper believes that supporting sovereign states

400. POWER, *supra* note 15, at 53.

401. *See generally* UN International Criminal Tribunal of Yugoslavia, *The ICTY at a Glance: General Information*, at <http://www.un.org/icty/glance/index.html> (last modified Sept. 26, 2003).

402. *See* Polgraze, *supra* note 188; *see also* Knox, *supra* note 381.

403. *See generally* POWER, *supra* note 15.

404. *See* Polgraze, *supra* note 188; *see also* Knox, *supra* note 381.

405. *See id.*

406. *See id.*

407. Jack Ray, *International Criminal Court*, SALT LAKE TRIB., Sept. 7, 2002, at A8, available at 2002 WL 4268732.

seeking justice domestically when it is “feasible” and “credible” can do this.⁴⁰⁸ However, as described above, it is often neither “feasible” nor “credible” for domestic courts to try perpetrators of crimes against humanity, genocide, and war crimes. If the United States seriously believes that everyone deserves justice, then such matters must be tried in another forum. The remaining “feasible” and “credible” forums are international tribunals and the ICC. However, the United Nations is not willing to create international tribunals in every instance of genocide, crimes against humanity, or war crimes.⁴⁰⁹ Thus, the only consistent remaining forum for the prosecution of such future crimes is the ICC. Ben Ferencz, an American veteran and leading lawyer for the Nuremberg prosecutorial team, observed, “remaining aloof and sulking, or trying to sabotage the court, can only be counterproductive and demean [the United States’] stature as world leader supporting the rule of law.”⁴¹⁰



408. Prosper, *supra* note 7.

409. See Polgraze, *supra* note 188; see also Knox, *supra* note 381.

410. John Hagan, *Perspective: Worldwide Justice When It's Convenient*, CHICAGO TRIBUNE, Feb. 16, 2003, available at 2003 WL 13237686.