# THE INTERNATIONAL CRIMINAL COURT AND THE TRIGGERING OF PROSECUTORIAL ACTION

BY ANDREW AMIGO

THE INTERNATIONAL HUMAN RIGHTS & HUMANITARIAN LAW PROJECT

SUFFOLK UNIVERSITY SCHOOL OF LAW

# THE INTERNATIONAL CRIMINAL COURT AND THE TRIGGERING OF PROSECUTORIAL ACTION

a Paper of the
International Human Rights/Humanitarian Law Project of Suffolk University Law School
(IHRHLP)
and Andrew J. Amigo, Research Associate

The creation of an International Criminal Court (hereinafter ICC) represents a critical step toward eliminating impunity and improving protection for victims of conflict. A permanent Court will avoid the necessity of creating tribunals on an ad hoc basis. The momentum toward the creation of an International Criminal Court will culminate in a conference of plenipotentiaries in June 1998. However, several key issues lie in the path of the success of the conference. In particular, the debate surrounding Security Council control over the "trigger" mechanism is preeminent. Trigger mechanisms are those procedures whereby an ICC proceeding is initiated. As currently fashioned, the Draft Statute of the ICC permits the United Nations Security Council to block the Court from undertaking prosecutorial action in cases which are included within situations on the agenda of the Security Council. While this provision is endorsed by four of the five permanent members of the Security Council,[1](hereinafter P5) it is otherwise widely criticized as undermining the independence and impartiality of the proposed Court. The present paper is addressed to this issue.

## I. Background: The United Nations Process Toward an ICC.

In 1992 the United Nations General Assembly directed the International Law Commission (hereinafter ILC) to elaborate a draft statute for an International Criminal Court.[2] Subsequently, the Security Council's establishment of the International Criminal Tribunal for the Former Yugoslavia[3] (hereinafter ICTY) and the International Criminal Tribunal for Rwanda[4] (hereinafter ICTR) further ignited public interest in creating a permanent International Criminal Court. Momentum toward an acceptable statute for an ICC has reached the point where no State stands in opposition to the formation of an ICC; negotiations now center upon the specific

---

[1]United Kingdom recently shifted its position as the making it the sole member of the P5 to support the Singapore Proposal. See infra. Section IV C. John M. Goshko, *Britain Differs on U.N. Court*, Washington Post , December 12, 1997, at A51.

[2]Report of the International Law Commission, 46th Sess., 2 May-22 July 1994, 49 U.N. G.A.O.R, Supp. No. 10, U.N. Doc. A/49/10 (1994).

[3]U.N. S.C. Res. 808 (1993).

[4]U.N. S.C. Res. 955 (1994).

aspects of the Court's intended powers and jurisdictional authority.[5]

The ILC issued a draft statute for an ICC in 1994 which represents the foundation for the current negotiations (hereinafter ILC Draft Statute).[6] The ILC Draft Statute contains sixty articles as well as extensive commentary by the ILC, outlining the proposed structure, staffing, jurisdictional authority and operation of the proposed ICC. Based upon the ILC Draft Statute and as currently envisioned, the ICC will be a permanent court with the power to investigate and prosecute individuals who commit the most serious crimes of concern to the international community -- genocide, war crimes and crimes against humanity (hereinafter "core crimes" ).[7] The core crimes are widely recognized as crimes under international customary law, most are also the subject of treaties and therefore are capable of consistent definition and application.[8]

In December 1994 the General Assembly established an Ad Hoc Committee open to all Member States (or members of specialized agencies) to review the major substantive and administrative issues arising out of the ILC Draft Statute.[9] The following year the General Assembly established the Preparatory Committee on the Establishment of an ICC (hereinafter PrepComm), with the mandate to draft a widely acceptable consolidated text of a convention for an international criminal court based on the ILC Draft Statute.[10] In 1996 the General Assembly reaffirmed the mandate of the PrepComm, delineating four sessions for meetings to complete drafting of a widely acceptable consolidated text of a convention to be submitted to a diplomatic conference of plenipotentiaries.[11] A diplomatic conference is slated for June, 1998, whereby a convention on the establishment of an ICC will be finalized and adopted.[12]

## II. ILC Draft Statute Article 23: Action by the Security Council.

Article 23 of the ILC Draft Statute codifies the role of the Security Council in the triggering of prosecutorial action. Article 23 provides as follows:

---

[5]Human Rights Watch, *Commentary for the December 1997 Preparatory Committee Meeting on the Establishment of an International Criminal Court*, p. 1 (1997).
[6]Report of the International Law Commission on the Work of its Forty-Sixth Session, 49 U.N. G.A.O.R., 49th Sess., Supp. No. 10, UN Doc A/49/19 (1994).
[7]The Committee on International Law; The Committee on International Human Rights of the Association of the Bar of the City of New York, *Report on the International Criminal Court*, at 23 (Jan. 1997).
[8]Id. at 23 n. 122.
[9]49 U.N. G.A.O.R., U.N. Doc., A/ 49/53 (1994).
[10] 50 U.N. G.A.O.R., U.N. Doc., A/50/46 (1995).
[11]U.N. Res. A/51/207 (12/17/96).
[12]U.N. Res. A/51/205, (12/17/96); see also A/C.6/52/L.16 (11/14/97). Cf. Address by David J. Scheffer, Ambassador at Large for War Crimes Issues, *Challenges Confronting International Justice*, New England School of Law, January 14, 1998; Ambassador Scheffer indicated that the actual signing may be delayed until the completion of drafting of rules of procedure, rules of evidence and elements of offenses, likely to culminate by the end of 1998.

*1. Notwithstanding article 21, the Court has jurisdiction in accordance with this Statute with respect to crimes referred to in article 20 as a consequence of the referral of a matter to the Court by the Security Council acting under Chapter VII of the Charter of the United Nations.*

*2. A complaint of or directly related to an act of aggression may not be brought under this Statute unless the Security Council has first determined that a State has committed the act of aggression which is the subject of the complaint.*

*3. No prosecution may be commenced under this Statute arising from a situation which is being dealt with by the Security Council as a threat to or breach of the peace or an act of aggression under Chapter VII of the Charter, unless the Security Council otherwise decides.*

For many States, Security Council control is seen as a crucial element in the creation of a new and global judicial body. Certain States, including the United States, France, China and the Russian Federation, support the present draft of Article 23 because of their permanent status in the Security Council which endows upon them a veto.[13] The drafters of the United Nations Charter chose to give the permanent members of the Security Council a veto over substantive decisions to protect their interests while dealing with international peace and security issues.[14] The majority of States--including that group designated the "like minded"[15]--contend, however, that the credibility of an ICC depends upon its freedom from the political machinations inherent in the Security Council ' s processes.[16]

---

[13]U.N. Charter art. 27, para. 3. The U.S. and France have affirmatively endorsed Article 23(3), while China and the Russian Federation have yet to advocate position in opposition.

[14]Frederic L. Kirgis, Jr., *The United Nations at Fifty: The Security Council's First Fifty Years*, 89 A.J.I.L. 506 (1995).

[15]The NGO Coalition for International Criminal Court, *The International Criminal Court Monitor, Sixth Committee Voices Strong Support for the Court,* Special. Ed. at 1 (12/97). The like-minded are a minority group of States who share positions on many key areas during the negotiations at the Preparatory Committee sessions. The like-minded States support the aims of the "Singapore proposal" (see infra. Part VI) and the establishment of an ICC that maintains its independence from the Security Council. At the 52nd Session of the U.N. General Assembly in October, 1997, States were permitted to address the Sixth Committee on various aspects relative to the establishment of an ICC. [Agenda Item 150]. The German delegation, in its intervention at this time, made reference to 41 like-minded States.

[16]Dr. Klaus Kinkel, Neue Juristische Wochenzeitschrift, 43 ed. (1997) ( quoted in European Law Students Association, Working Group on International Justice, *For A Just and Independent International Criminal Court* (Dec. 1997)). Dr. Kinkel, Minister of Foreign Affairs of the Republic of Germany, " The Court's independence needs to be protected against political influence by the countries or by the UN Security Council ..." See id. Statement of the Ghana delegation: "While it is possible for the Security Council to refer cases to the Court, we believe that the effect of Article 23(3) which vests the Security Council with the power to stop prosecution by the International Criminal Court, in situations where the matter is being dealt with by the Security Council, might compromise the

During the fourth session of the PrepComm, held at the United Nations in August 1997, several States including France, Republic of Korea, Portugal and Singapore, proffered alternative language for Article 23 in an attempt to craft compromise language.[17] In particular, the Singapore proposal relative to Article 23(3) and Security Council control of the trigger mechanism gained strong support from a majority of the delegations. In December 1997, at the fifth PrepComm, the United Kingdom gave its support for the Singapore proposal.[18] The remaining P4 have yet to modify their support of Article 23(3).[19] This divergence in position is based upon the desire of the P4 to retain control over the Court's docket and the perception of the like-minded States that the Court should not be controlled by the Security Council. Despite the efforts at the August and December PrepComms, no consensus relative to Article 23 has been reached.[20] The process of State ratification depends upon the reconciliation of these opposing views.

## III. Summary of Present Recommendations.

The IHRHLP supports the creation of an International Criminal Court which operates at the highest standards of justice. The credibility of the Court requires its freedom from political intervention. To be independent the Court cannot operate as a subsidiary body of the Security Council. The Court's impartiality depends upon its authority to prosecute, within its mandate, violations of international humanitarian law wherever they occur. The Court's effectiveness requires support from the major powers of the world. Without the United States and the other permanent members of the Security Council as ratifying States, the ICC will not have the financial support to function nor will it wield the influence to enforce its decisions. The objective, therefore, is to find common ground which will facilitate the negotiation process while maintaining high standards for the Court.

To assist in the task the present paper seeks to analyze United States policy in an effort to articulate a proposal which meets U.S. objectives and concerns. First, the paper will examine the debate at the August 1997 Preparatory Committee relative to trigger mechanisms. Second, the paper will consider the current position of the United States regarding trigger mechanisms and the role of the Security Council. Next, in an effort to fashion present recommendations based upon past lessons, the paper will evaluate the United States posture toward the International Court of Justice (hereinafter ICJ). Further, the paper will address the constitutional authorities of the ICJ and Security Council. Finally, the paper will recommend compromise language to

---

principle of judicial independence ... The political influences of the Security Council must not be allowed to seep into, and possibly taint structures established with the objective of dispensing justice. It is of absolute importance that the credibility and independence of the Court be maintained in all situations".

[17] See infra, notes 23, 24, 28.

[18] John M. Goshko, *Britain Differs on U.N. Court*, Washington Post, December 12, 1997, at A51. Moreover, Britain expressed a willingness to grant the Prosecutor of the ICC considerably more power and discretion. This announcement signaled a breach in the otherwise unyielding position of the P5 that has maintained Security Council prominence in the initiation of Court action.

[19] Id.

[20] The issue of Trigger Mechanisms was contained within the agenda of the August PrepComm; it was not formally addressed in December.

facilitate the negotiations.

## IV. The Debate Surrounding Article 23 of the ILC Draft Statute.

### A. Article 23(1): Security Council Referral.

The Security Council exercise of its Chapter VII authority in creating the ICTY and the ICTR demonstrates the power the Security Council can have in the judicial resolution of international conflict.[21] Clearly, the Charter envisions a preeminent role for the Security Council in matters of international peace and security.[22] For this reason, few if any of the delegations to the August PrepComm voiced concern over Article 23(1) and its provision for Security Council referral of matters to the Court. The French[23] and the Korean[24] delegations proposed minor modifications to Article 23(1).

### B. Article 23(2): Security Council Determination of Aggression.

Article 23(2) requires a Security Council finding of State-sponsored aggression before a complaint on aggression can be brought before the Court. Whether aggression will be included as a core crime within the jurisdiction of the Court is a hotly contested issue.[25] The issue of aggression has been divisive from the early attempts to create an international criminal court. The 1953 International Law Draft Statute for an international criminal court could not be ratified because of disagreement over the definition of aggression.[26] Only in 1974 did the General Assembly adopt, by resolution, a definition of aggression.[27] Provided an agreement to include the crime of aggression within the Court's jurisdictional mandate, the majority of States appear agreeable to the inclusion of paragraph two.[28]

---

[21]U.N. Charter art. 24, para 1: "[Security Council] has primary responsibility for the maintenance of international peace and security..." See U.N. Charter Chapter VII and art. 29.

[22]Id.

[23]The French delegation proposed the following additions to Article 23(1):

Notwithstanding article 21 [and 22] , the Court has jurisdiction in accordance with this statute with respect to crimes referred to in article 20 as a consequence of the referral of a matter [situation] to the Court by the Security Council acting under Chapter VII of the Charter of the United Nations.

[Notification of the Security Council decision to the prosecutor of the Court shall be accompanied by all supporting material available to the Security Council.]

[24]The Republic of Korea proposed the following modification to Article 23(1):

Notwithstanding article 21, the Court has jurisdiction in accordance with this Statute with respect to crimes referred to in Article 20, if the Security Council acting under Chapter VII of the Charter of the United Nations, decides to refer to the Court a matter [a situation] in which one or more crimes appear to have been committed.

[25]See U.N. Press Release GA/L/3047 (10/23/97).

[26]Ferencz Benjamin, An International Criminal Court: A Step Towards Peace, at 49 -51(Vol. 2 Oceana Publications Inc. 1980).

[27]Id. at 75.

[28]The French delegation included the following proposed additions to paragraph 2:

A complaint of or directly related to an act [crime] of aggression [,referred to in article 20,] may not be brought under this statute unless the Security Council has first determined that a state has committed the act of aggression which is the subject of the complaint [in accordance with Chapter VII of the Charter of the United Nations].

C. Article 23(3): Security Council Control.

The issue of trigger mechanisms becomes paramount in paragraph 3 of Article 23. Paragraph 3, as written, would restrict the ability of the Prosecutor to initiate an investigation/prosecution subsumed in any situation of which the Security Council is seized. The Security Council, could prevent the prosecution of individuals in any cases related to an item on the Security Council agenda. Any act arising out of the whole of a situation would be barred. Moreover, no limitations, temporally or contextually, restrict the Security Council in its ability to block the initiation of prosecutorial action. This has led to charges of politicization of the Court and the inherent ineffectiveness of a prosecutorial system lacking independence.[29]

The Singapore delegation proposed changes to paragraph 3 as follows:

*No investigation or prosecution may be commenced or proceeded with under this statute where the Security Council has, acting under Chapter VII of Charter of the United Nations, given a direction to that effect.*

Canada voiced its support of the Singapore Proposal and added a temporal limitation:

*No investigation or prosecution may be commenced or proceeded with under this statute for a period of twelve months where the Security Council has, acting under Chapter VII of the Charter of the United Nations, notified the Court to that effect. Notification that the Security Council is continuing to act may be renewed at twelve month intervals.*

The Singapore Proposal gained widespread support at the August PrepComm. In addition to the support of the UK, the Singapore Proposal now represents the compromise position of the like-minded States. The Proposal will be evaluated in more detail in section VI infra. Currently, the remaining four members of the P5 support the existing language of Article 23(3). However, it is possible that the Singapore Proposal will remain under consideration. At a recent address, U.S. Ambassador Scheffer stated the recognition that the Proposal has certain merits.[30]

---

[The determination by the Security Council shall not be interpreted as in any way affecting the independence of the Court in its determination of the criminal responsibility (sic) of the given person].

The Portugese delegation offered the following revised language to Article 23 (2):

The Court may proceed with all cases related to individual criminal responsibility for an act of aggression unless the Security Council prevents it from doing so because it considers that the State action which is the subject of the complaint is not an act of aggression.

The Delegation of Denmark proposed the following modification to Article 23(2):

A complaint of or directly related to an act of aggression brought under this Statute and the findings of the Court in such cases is without prejudice to the powers of the Security Council under Chapter VII of the Charter.

[29]See supra. note 16.

[30]Address by David J. Scheffer, Ambassador at Large for War Crime Issues, *Challenges Confronting International Justice*, New England School of Law, January 14, 1998.

## V. Evaluation of Article 23(3) as Presently Drafted.

A critical distinction must be drawn between the Security Council ' s referral to the Court of a situation and a complaint of individual acts for prosecution. The present articulation of Article 23 provides for the Security Council to refer a matter or situation to the Court, such as the conflict in the Former Yugoslavia. Once the situation is given to the Court, the Prosecutor is free to investigate any and all persons and events that are involved in the situation. Conversely, when a situation is withheld from the Court, the Prosecutor is fully constrained in addressing individual cases which fall within that situation. Moreover, as presently drafted, the ILC Draft Statute permits the initiation of cases only when (1) a State Party has referred a case to the Court or (2) the case is subsumed within a situation referred by the Security Council; the Prosecutor has no power to initiate an action upon his/her own initiative.

Moreover, as Article 23 (3) is currently framed, the actual import of the interconnection between Security Council action and the operation of the Court is highly ambiguous. The language of 23(3), "BEING DEALT WITH BY THE SECURITY COUNCIL", potentially permits the Security Council to block any prosecution or investigation of a case falling within any situation that is on the agenda of the Council.[31] Invariably, any existing or emerging crisis on the face of the globe is included within the Security Council's Seizures List. In 1997, for example, the Security Council retained on its active list matters in at least twenty-five countries or regions.[32]

## VI. Evaluation of the Singapore Proposal.

The Singapore Proposal effectively would shift the power of the trigger mechanism from the Security Council to the Court, while simultaneously allowing the Security Council to take affirmative steps to prevent an investigation. The Singapore Proposal emerged from the August Preparatory Committee with support from many delegates. The United States, apparently in the minority, opposes the proposal.

Ambassador David J. Scheffer, the United States Ambassador at Large for War Crime Issues, has evaluated the Singapore Proposal in this manner. First, he refers to the two methodologies as: the Right of Approval, whereby the Security Council decides which matters may come before the Court (the United States position) and the Right to Object, whereby the Security Council decides which matters to block. Under the Right of Approval, the ICC in effect must ask permission of the Security Council to undertake an investigation in a case which is subsumed within a situation on the agenda of the Security Council. Conversely, the Singapore Proposal permits the Court to begin investigations and the Security Council, should it wish to do so, must act affirmatively to halt that investigation. Presumably, a decision to halt prosecutorial

---

[31]The Committees on International Law and International Human Rights of the Association of the Bar of the City of New York, *Report on the International Criminal Court, at 33.* (Jan. 1997).
[32]List of Matters Considered/Actions Taken by the Security Council in 1997, Dag Hammarskjorld Library, found at UN web site <www. un.org/Depts/dhl/resguide/scact.htm> (Jan. 1998).

action is not reviewable and is made in accordance with standard operating practice at the Security Council. Nevertheless, the power of the veto would be shifted to an emphasis on negative action. According to the United States, the Singapore Proposal undermines inherent privileges of the P5, privileges that grant the authority to dominate decision-making in matters involving international peace and security.

## VII. The United States Position.

The United States endorses the creation of an international criminal court. President Clinton, in his recent address to the United Nations General Assembly, called for the establishment of a permanent ICC by the end of the century.[33] Ambassador Bill Richardson, the United States Representative to the United Nations, stated in October 1997 that individuals -- of whatever rank in society -- who participate in serious and widespread violations of international humanitarian law must no longer act with impunity. The time has come to create an international criminal court that is fair, efficient, and effective, and that serves as a deterrent and a mechanism of accountability in the years to come.[34]

Nevertheless, as political support for an ICC increases in the United States, so too does the desire of policymakers to fashion a Court which will be subject to ever more U.S. control. In fact, if the United States ultimately fails in its bid to retain Security Council control over Court initiative, it likely will expect stronger protections under the State consent mechanisms.

Recently, Ambassador Scheffer articulated the position of the United States on the role of the Security Council in the triggering of action before the Court and the reasons therefore. First, the United States would advocate for the Security Council and for States Parties to have the ability to refer situations to the Court (differing from the present ILC Draft Statute, which provides for States Parties to refer individual cases). When a State Party refers a situation to the Court which is on the agenda of the Security Council, the Security Council must approve the referral of the situation to the Court. Thus, where a permanent member exercises its veto, the approval will be blocked.[35]. Second, according to Ambassador Scheffer, the power of the Security Council to block a referral to the Court would affect the timing of the Court's intervention in the matter; that is, the Security Council would not permanently deny the referral.

---

[33]Remarks of the President of the United States to the 52nd Session of the United Nations General Assembly, Sept. 22, 1997, reprinted by The White House Office of the Press Secretary (Sept. 1997) found at <http://www.whitehouse.gov/WH/New/html/19970922-20823.html>.

[34]Statement by U.S. Ambassador Bill Richardson, on Agenda Item no. 150, the Establishment of an International Criminal Court, in the Sixth Committee, 10/23/97; U.S.U.N. Press Release no. 188 (10/97) cited in Report of American Bar Association at p. 7 n. 20 (11/17/97).

[35]Carter Center Conference, "The U.S. and the Establishment of a Permanent ICC", Nov. 13, 1997.

Further elaborating on the reasons for the United States position, Ambassador Scheffer has stated:

> *"It has to be a court that recognizes political realities. It has to be a court that does not contradict, contravene, or override the authority of the Security Council to deal with conflict situations. ....[O]nce an entire issue is received by the prosecutor to investigate, then the prosecutor should be independent to investigate and bring charges against individuals responsible for crimes in that situation. We want to make sure that a situation referred to a prosecutor, if it is one that is being dealt with by the Security Council, receives the approval of the Security Council for such a wide-sweeping investigation."*[36]

Ambassador Scheffer recently cited the situation of Chorrillo, Panama, as an example of potential abuse of the U.S. in the ICC.[37] The December 1989 invasion, "Operation Restore Hope," was a Bush Administration effort to capture Manuel Noriega. In the context of Operation Restore Hope, the Panamanian barrio of Chorrillo was destroyed. Chorrillo abuts the former Panama Defense Headquarters of Noriega.[38] Initial reports charged that U.S. attack helicopters had destroyed the barrio, killing innocent civilians. Repeated news reports, including the CBS News program 60 Minutes, reported the civilian casualties as high as 4,000.[39] Widespread editorials called for an investigation, charging that the scandal could potentially be as large as Watergate.[40] Eventually it was revealed that members of Noriega's own Dignity Battalions had set fire to the barrio, which resulted in the burning of 12 blocks and the displacement of approximately 25,000 residents.[41] The total number of dead Panamanians was estimated at around 700, with less than half of those civilians[42].

For the United States, the spectre of an American soldier haled before an ICC is insupportable. The U.S. government will be vigilant in its protection of its soldiers who, while engaged in military conflict, inadvertently kill civilians. Moreover, the indiscriminate nature of war is revealed by the occurrence of "friendly fire" killings, or collateral damage to civilian targets.

History, however, has witnessed instances where U.S. servicemen commit war crimes. In particular, the My Lai massacre that took place during the Vietnam War. The horrific events

---

[36]19th Annual United Nations Parliamentary Forum, Parliamentarians for Global Action, "Crafting Lasting Peace", Oct. 9, 1997.
[37]Address by David J. Scheffer, Ambassador at Large for War Crime Issues, *Challenges Confronting International Justice*, New England School of Law, January 14, 1998.
[38]Lee Hockstader, *Homes Destroyed by Noriega's Men, Residents Say; Burning of Chorrillo Slum May Be Remembered as Strongman's Last Act of Violence Against His People*, Washington Post, December 29, 1989 at 1, available in *Lexis* News Library.
[39]Mark A. Uhlig, *The World; In Panama, Counting the Invasion Dead Is A Matter of Dispute*, N.Y. Times, October 28, 1990 at 1, available in *Lexis*, News Library.
[40]Id.
[41]See supra. note 38.
[42]See supra. note 39.

of March 16, 1968 unfolded when U.S. servicemen laid siege to an unarmed civilian population in the village of My Lai, Vietnam.[43] Initially the events were reported as a U.S. victory; however, stories of individual and sporadic instances of rape and murder surfaced.[44] Eventually it was revealed that much of the killing was organized and traceable to one man, Lieutenant William Calley. Calley was eventually charged with the killing of 102 civilians.[45] In 1971 he was convicted by a U.S. military court of twenty-two acts of murder and received a life sentence.[46] Calley's conviction was first reduced to twenty-five years then to ten years in prison. Calley was released on bond and served three years under house arrest. He was paroled in 1975.[47]

The vast deployment of U.S. forces worldwide exacerbates the fear of exposure to an international tribunal. U.S. defense agencies seem anxious to protect against the possibility of politically-motivated complaints against U.S. troops.[48] As currently envisioned, the Security Council retains the ability to block the full scope of situations from coming before the ICC. Thus, where the Council is seized of a situation in which the United States is called to task, the U.S. could exercise its veto power and prevent an ICC investigation. This ability to prevent the ICC from investigating misconduct of a United States individual, it is argued, is essential to permit the United States to expand its engagement abroad. The importance of U.S. engagement was and is exemplified by the efforts in the Former Yugoslavia[49] and is articulated by the Report of the Quadrennial Defense Review, "[I]t is important to note that this projection of the security environment rests on two fundamental assumptions: that the United States will remain politically and militarily engaged in the world over the next 15 to 20 years, and that it will maintain military superiority over current and potential rivals."[50] Moreover, the world community has indicated the need for U.S. involvement in its expansion of peace enforcement operations.[51] The need for

---

[43]Herbert C. Kelman, V. Lee Hamilton, Crimes of Obedience, pp. 5-12 (Yale University Press 1989).

[44]Id. at 5.

[45]Id.

[46]Id.

[47]Id. at 12. The minimal sentence raises the issue of what constitutes an effective state prosecution and how a determination of ineffective prosecution would impact on the national court's primacy.

[48]*Peace Keeping Atrocities: UN Soldiers Accused of Torture, Murder, Sexual Exploitation of Children*, Village Voice (June 24, 1997). See supra. note 93.

[49]See, e.g., The Economist Newspaper Ltd., U.S. Edition, October 25, 1997; at 25. "Next June, NATO is due to withdraw the 35,000 soldiers who are keeping the peace in Bosnia. Anyone with a smidgen of knowledge of that benighted land knows that, without NATO's calming presence, war will probably start again. The Europeans say they will not keep their soldiers in Bosnia beyond June unless America stays too."

[50]Report of the Quadrennial Defense Review, § 2, p. 4 (May 1997).

[51]Barton Gellman, *Wider U.N. Police Role Supported; Foreigners Could Lead US Troops*, The Washington Post, August 5, 1993, final edition at 1, available in *Lexis* News Library. The Clinton Administration announced that it would support the expansion of the UN peacekeeping missions however, the U.S. offered less support and troops than the UN wanted.

the U.S. military in peacekeeping actions puts pressure on the U.S. to become the world's policeman, something the U.S. has rejected.[52]

No other government has such a large role in maintaining international peace and security as the U.S. As such, the U.S. has particular interest in protecting military and civilian personnel from unjustified exposure to criminal legal proceedings. Nevertheless, other mechanisms already exist within the ICC framework for devising such protective schemes.[53] Under the principle of complementarity articulated in the Statute's Preamble, the United States would retain primacy in its ability to act in advance of the ICC. The ICC will act only where an effective State system is unavailable. Further, should the ICC precipitate an action against a U.S. citizen, the U.S. could challenge admissibility as an interested State pursuant to Article 35. This assumes that a U.S. citizen is extradited to the Court by a third-party State. Moreover, the indictment process offers many layers of review, including the office of the Prosecutor and the President of the Court. Finally, in the extreme case where a third-party State refuses to hand over a U.S. citizen to U.S. authorities for prosecution, the U.S. may in fact welcome the intercession of the ICC.

## IX. Historical Analysis.

### A. The Tribunals of World War II.

The first modern use of an international Tribunal to prosecute atrocities committed during the course of an armed conflict was at the International Military Tribunal (IMT) and its counterpart the International Military Tribunal for the Far East (IMTFE).[54] These tribunals obtained their authority and jurisdiction by virtue of an agreement of unconditional surrender of the Axis powers to the Allied alliance.[55] A state of martial law had been imposed upon the citizenry of Germany, giving the IMT prosecutors the authority to find and apprehend those accountable.[56]

---

[52]Report of the Quadrennial Defense Review, § 2, p, 1:
" In between these competing visions of isolationism and world policeman lies a security strategy that is consistent with our global interest - a national security strategy of engagement."
[53]Justice Louis Arbour Address to the V Preparatory Committee on the Establishment of an International Criminal Court, Dec. 8 1997.
[54]Ferencz Benjamin, An International Criminal Court: A Step Towards Peace, at 90 (Vol.2 Oceana Publications Inc. 1980).
[55] Id. at 488. Allied Control Council Law No. 10, 20 December 1945, *Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity*. Law No. 10 gave effect to the terms of the Moscow Declaration of 30 October 1943 and the London Agreement of 8 August 1945. Moreover, Law No. 10 established a uniform basis for the prosecution of war criminals throughout the zones of the occupied territory subsequent to the IMT's completion. Id. at 488.
[56]Nuremberg Trials Final Report Appendix C: Directive on the Identification and Apprehension of Persons Suspected of War Crimes or Other Offenses and Trial of Certain Offenders, copy no. 26, J.C.S. 1023/10, July 8, 1945 p. 61-77 incl. [original copy]: Enclosure "C" Draft Directive to

The IMT and IMTFE handed down judgments based upon theories of culpability not previously recognized.[57] Moreover the tribunals were established by the victors to prosecute the vanquished.[58] In many respects the tribunals were an alternative solution to the popular and prevalent exaction of retribution: execution without a trial.[59]

Thus, the oft-stated premise that the World War II tribunals rendered victor's justice arises out of the respective bargaining positions of the parties.[60] In the imposition of jurisdiction and the restricted scope of the Tribunal's mandates, the IMT and IMTFE are more closely analogized to the current ad hoc Tribunals (ICTY and ICTR).[61]

B. The Ad Hoc Tribunals.

The end of the Cold War brought cooperation among the permanent members of the Security Council which facilitated the creation of the ICTY and the ICTR. The two ad hoc tribunals were established by virtue of a Security Council resolution taken pursuant to Chapter VII of the United Nations Charter.[62] As such, member States are required to give full force and effect to the constitutive statutes and decisions of the Tribunals.[63] The jurisdictional authority of each of the ad hoc Tribunals is limited both temporally and contextually.[64]

---

the US, UK USSR Commander in Chief, Apprehension of and Detention of War Criminals, Enclosure C, 2.

[57]Ferencz Benjamin, An International Criminal Court A Step Towards Peace at 88 - 90 (Vol.1 Oceana Publications 1980). The principle that high-ranking officials could be culpable for acts of aggression had not previously been recognized. Judge Pal of India noted that the rules of war only applied circumstantially and did not believe that the waging of war was previously a crime.

[58] Id.

[59] Id. at 88

[60]See supra. notes 55 and 56.

[61]*Compare:* 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, established by Security Council resolution 827 of 25 May 1993 *and* Charter for the International Military Tribunal, *Constitution of the International Military Tribunal*, Art. 1. In pursuance of the Agreement signed on the 8 August 1945 by the Government of the United States of America, the Provisional Government of the French Republic, the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Union of the Soviet Socialist Republics, there shall be established an International Military Tribunal for the just and prompt trial and punishment of the major war criminals of the European Axis. *Compare also.* Charter of the International Military Tribunal for the Far East, *Constitution of Tribunal*, Art. 1 and Art. 5 *and* Statute of the International Tribunal for Rwanda, created by Security Council resolution 955 (1994).

[62]See supra. note 3.

[63]U.N. Charter art. 25, " The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter."

[64]See supra. note 61.

C. The International Court of Justice.

Unlike the ad hoc Tribunals which came before it, the proposed International Criminal Court will be created through a consensual treaty process. Jurisdictional authority will be derived from the consent of States Parties who ratify the constitutive treaty. In respect of the consensual nature of the jurisdictional process, the proposed ICC is similar to the International Court of Justice (hereinafter ICJ).[65] The ICJ is the judicial organ of the United Nations and is empowered to decide contentious cases between States.[66] A historical analysis of the treaty process of the ICJ yields insight to the current discourse.

1. Creation of the ICJ.

The compromise that we now seek has its origins at the negotiations table in Dumbarton Oaks, in the Fall of 1944. There, the four surviving world powers after World War II -- China, United Kingdom, USSR and USA -- laid the foundation to a system of world governance to replace the order that lay in ruins.

In 1945 the four powers and France convened a conference in San Francisco, inviting fifty other nations to debate the Dunbarton Oaks draft statute for the creation of the United Nations.[67] The basic design of the United Nations comprises six primary organs, including the Security Council.[68] The Security Council is comprised of five permanent members, the five remaining military powers after World War II: the governments of the United States of America, the United Kingdom of Great Britain and Northern Ireland, the Union of the Soviet Socialist Republics (the Russian Federation succeeding to the seat of the former U.S.S.R.), the Republic of China and the Provisional Government of the French Republic (the government of France succeeding the Provisional Government).[69] Each of the P5 maintains veto power over substantive decisions; in other words, no substantive action of the Security Council may be taken

---

[65]Ratification of the UN Charter was optional to the delegates at the San Francisco Conference. Moreover, acceptance of the compulsory jurisdiction of the ICJ was optional under Article 36 of the ICJ statute. See infra. The Historical Analysis C. 2 "The Jurisdictional Authority of the ICJ".

[66] U.N. Charter art. 93, para. 1. " All Members of the United Nations are *ipso facto* parties to the Statute of the International Court of Justice."

See U.N. Charter art. 94:

1. Each Member of the united Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party.

2. If any party to a case fails to perform the obligations incumbent upon it under a judgement rendered by the Court, the other party may have recourse in the Security Council, which may, ir it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgement.

[67]Ferencz Benjamin, An International Criminal Court A Step Towards Peace at 2 -3 (Vol. 2 Oceana Publications Inc. 1980).

[68]U.N. Charter art. 7, para 1. " There are established as the principle organs of the United Nations: a General Assembly, a Security Council, an Economic and Social Council, a Trusteeship Council, an International Court of Justice, and a Secretariat."

[69]U.N. Charter art. 23.

without the concurring vote of the whole of the P5[70]. Other States rotate to fill the remaining ten seats on the Council.[71] The Security Council is charged with the primary responsibility for maintaining international peace and security. [72]

2. Jurisdictional Authority of the ICJ.

At the San Francisco Conference, the issue of compulsory jurisdiction was a source of heated debate. Many delegates maintained that compulsory jurisdiction of the new international court would represent a great advance toward the supremacy of law in international relations.[73] However many states, including the United States and the Soviet Union, opposed relinquishing sovereignty to an independent organ of the UN.[74] As a result, a modified version of the Statute of the Permanent International Court of Justice was adopted.[75] Negotiating States agreed upon the language now found at Article 36 of the Statute of the International Court of Justice, which clearly is rooted in compromise.[76] Article 36 grants full discretion to States as to whether to accede to the jurisdictional authority of the ICJ. Article 36 states in pertinent part:

> *(2) The states parties to the present Statute may at any time declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the court in all legal disputes concerning:*
>
> *(a) the interpretation of a treaty;*
> *(b) any question of international law;*
> *(c) the existence of any fact which, if established, would constitute a breach of an international obligation;*
> *(d) the nature or extent of the reparation to be made for the breach of an international obligation.*

---

[70]U.N. Charter art. 27. The use of innovative interpretation has allowed for voluntary abstention from a vote by a permanent member of the Council as a "concurring " vote, satisfying the requirement of article 27. See Benjamin B. Ferencz, Introduction Louis B. Sohn, New Legal Foundations for Global Survival: Security Through the Security Council, at i, (Paperback Ed. 1996).

[71]U.N. Charter art. 23. The original text of the Charter called for 11 members of the Security Council.

[72]U.N. Charter art. 24.

[73]Ferencz Benjamin, An International Criminal Court A Step Towards Peace at 2 -3 (Vol.2, Oceana Publications Inc. 1980), citing Professor Manley O. Hudson, " The most vital question as to the future of the Court relates to the extent of its compulsory jurisdiction over legal disputes. If such jurisdiction could be made universal, a great advance would be registered toward the supremacy of law in international relations."

[74]Id. at 3.

[75]Id.

[76]Id.

*(3) The declarations referred to above may be made unconditionally or on condition of reciprocity on the part of several or certain states, or for a certain time.*

3. United States and the ICJ.

On August 2, 1946, the United States issued the Truman Declaration, pursuant to Article 36(2) of the ICJ Statute, declaring U.S. accession to the compulsory jurisdiction of the ICJ.[77] In ratifying the Declaration, the U.S. Senate had overruled its own Committee on Foreign Relations and adopted an Amendment to the Truman Declaration penned by Senator Tom Connally.[78] The so-called Connally Reservation sought to circumscribe the authority of the Court to intervene upon matters deemed to fall within U.S. domestic jurisdiction.[79] "The United States does not accept compulsory jurisdiction over any disputes with regard to matters which are essentially within the domestic jurisdiction of the United States of America, as determined by the United States of America."[80] The Connally Reservation not only preempts action before the ICJ on matters within U.S. domestic jurisdiction, but leaves the ultimate determination of jurisdiction within the subjective determination of U.S. policymakers. The U.S. made a non-binding pledge not to use the Connally Reservation in bad faith, but the reality was that the U.S. could escape jurisdiction of the ICJ at will.[81]

4. U.S. Withdrawal from ICJ.

The United State's acceptance of compulsory jurisdiction of the ICJ was terminated by President Reagan on October 7, 1985, with effect six months from that date. The termination was linked to the decision of the ICJ in November 1984 in the case brought by Nicaragua versus the United States for its alleged military and paramilitary activities in Nicaragua.[82] In April, 1984 the government of Nicaragua brought an action at the ICJ against the United States, alleging the U.S. had been using military force against Nicaragua; intervening in Nicaragua's

---

[77]Thomas M. Franck & Jerome M. Lehrman, *Messianism and Chauvinism in America's Commitment to Peace Though Law*, published in, Lori F. Damrosch ed. International Court of Justice at a Crossroads, pp. 16 - 17 (American Society of International Law 1987).
[78]Ferencz Benjamin, An International Criminal Court A Step Towards Peace at 2 -3 (Vol. 2, Oceana Publications Inc. 1980).
[79]Id. (quoting Text of Declaration dated Aug. 14, 1946, in Dept. of State Bull. Vol. 15, Sept. 1, 1946, pp. 452-453).
[80]State Department at a Hearing before the Subcommittee On Human Rights and International Organizations of the Committee on Foreign Affairs House of Representatives, first session 99th Congress, October 30, 1985.

[81]Thomas M. Franck & Jerome M. Lehrman, *Messianism and Chauvinism in America's Commitment to Peace Though Law*, published in, Lori F. Damrosch ed. International Court of Justice at a Crossroads, pp. 16 - 17 (American Society of International Law 1987).
[82]Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America) , 1984 ICJ Rep. 392.

internal affairs, and violating Nicaragua's sovereignty[83]. The U.S. responded by diplomatic letter stating that the allegations involved a complex set of political, social, economic and security matters, and that the diplomatic process underway was the appropriate course of action. [84] The State Department argued against the Court's jurisdiction by asserting that the U.S. -- along with El Salvador, Honduras and Costa Rica -- were involved in a collective defense against Nicaragua. The U.S. contended that under Article 51 of the U.N. Charter, self-defense and collective defense is exempt from the purview of the Court.[85] The ICJ, over the protests of the U.S., found itself to have competent jurisdiction.[86] The U.S. withdrew from the compulsory jurisdiction of the Court. In 1986 a trial on the merits was held in absentia, and the U.S. was found to have violated customary law by its actions in Nicaragua.[87] The U.S. thereafter declared the decision a nullity.

In explaining the motives for the decision to terminate acceptance of ICJ compulsory jurisdiction, the Legal Advisor of the State Department, Abraham Sofaer, observed that the United States had never successfully brought another State before the Court under compulsory jurisdiction -- although it had tried several times to do so.[88] For example, in 1956 the U.S. instituted action before the ICJ against Bulgaria for allegedly shooting down a commercial airliner which had strayed into Bulgarian airspace.[89] The plane was carrying American civilians and property. Bulgaria asserted reciprocal application of the Connally Reservation, pursuant to

---

[83]Id. at 394. In April of 1984 the Ambassador for the Republic of Nicaragua to the Netherlands filed in the Registry of the ICJ an application beginning proceedings against the United States of America for breaches of customary international law. The United States objected to jurisdiction and the ICJ heard arguments on the issue of jurisdiction beginning in November of 1984. After determining that the ICJ had proper jurisdiction to hear the case in 1984, a trial on the merits was held in 1986. See Case Concerning Military and Paramilitary Activities in and Against Nicaragua, 1986 ICJ Rep. 14.

[84]Military and Paramilitary Activities (Nicar. V. U.S.), 1984 I.C.J. 70 (May 10) p.18. The U.S. responded to the Nicaraguan allegations by diplomatic letter, "The United States notes that the allegations of the Government of Nicaragua comprise but one facet of a complex of interrelated political, social, economic and security matters that confront the Central American region. Those matters are the subject of a regional diplomatic effort, known as the 'Contadora Process', which has been endorsed by the Organization of American States, and in which the Government of Nicaragua participates. This process is strongly supported by the United States as the most appropriate means of resolving this complex of issues, consistent with the United Nations Charter and the Charter of the Organization of American States, in order to achieve a durable peace in the region. The concern of the United States is that bilateral judicial proceedings initiated by Nicaragua would impede this ongoing multilateral diplomatic process".

[85]Military and Paramilitary Activities (Nicar. V. U.S.), 1984 I.C.J. 70 (May 10) p.17.

[86]Id.

[87]Cases Concerning Military and Paramilitary Activities in and Against Nicaragua, 1986 ICJ 14.

[88]U.S. State Department at a Hearing before the Subcommittee On Human Rights and International Organizations of the Committee on Foreign Affairs House of Representatives, first session 99th Congress, October 30,1985. Prepared Statement of Hon. Abraham D. Sofaer, Legal Advisor, Department of State, p.24 para. 3.

[89]Id. at 23.

Article 36(2) of the Court's Statute.[90] The principle of reciprocity permitted Bulgaria to invoke the Connally Reservation, arguing that the matter fell within Bulgarian domestic law -- in Bulgaria's subjective determination -- and therefore the ICJ had no jurisdiction to hear the case.[91]

Many States have expressed concern over the abuse of an international criminal court for political purposes. The Nicaragua case involved these elements. The United States in 1984 had a Republican White House and a Democratic Congress. This situation was ripe for exploitation by Nicaragua.[92] Similarly, the proposed ICC will have to address the possibility of political abuse of the Court. This possibility was addressed by Louise Arbour, referencing the ad hoc tribunals,

> "Our experience to date suggests that we can dispose quickly of even large quantities of unsubstantiated allegations. In any event, an appropriate process of vigorous internal indictment review, .... confirmation by a competent judge, and the inevitable acquittal that would result from an unfounded or overzealous prosecution, should alleviate any fear that an overzealous or politically driven Prosecutor could abuse his/her power."[93]

A fundamental difference between the ICC and ICJ is the jurisdiction of the tribunals. The ICJ is limited to the potentially more political jurisdiction of matters between States, whereas the ICC as proposed would hear cases involving individual culpability.

Nicaragua and its aftermath shed light on the overriding and fundamental perspective of the United States military establishment toward judicial intervention in military decision-making. According to Abraham Sofaer, the U.S. has reserved the power to make decisions involving national security interest which would not be subject to review in the ICJ.[94] This position is

---

[90]Edith Brown Weiss, *Reciprocity and the Option Clause,* published in, Lori F. Damrosch ed. International Court of Justice at a Crossroads, at 16 - 17 (American Society of International Law 1987). "The Court has consistently interpreted the condition of reciprocity contained in the Optional Clause as requiring jurisdictional equality of states before the Court with respect to disputes."

[91]Id. at 24.

[92]Terry D. Gill, Litigation Strategy At The International Court, A Case Study of the Nicaraguan v. United States Dispute, p. 134 (1989). Mr. Gill 's asserts that Nicaragua petitioned the ICJ to:

1. -to gain support from world public opinion by portraying Nicaragua as a victim of superpower intervention,
2. -to influence U.S. public opinion and especially Congressional opinion to oppose further funding of the contra guerillas,
3. -to influence U.S. and especially Congressional opinion to end authorization of covert CIA activities against Nicaragua -in particular the mining of its harbors, attacks upon shipping by speedboats and light aircraft, and sabotage of its oil depots and storage facilities etc.,
4. -to isolate the U.S. diplomacy from both its regional Latin American neighbors and allies and its Western partners in its opposition to Nicaragua,
5. -to improve Nicaragua's negotiating position in any subsequent bilateral or regional negotiations

[93]Statement by Justice Louise Arbour to the Preparatory Committee on the Establishment of an International Criminal Court, p. 8 ( December, 8 1997).

[94]See supra note 89 at 33.

bolstered by the evolving U.S. foreign policy of "engagement," which encompasses a growth in deployment of U.S. troops abroad.[95] The argument for protection of the "national interest" is one raised during the Nicaragua conflict and which persists today.[96]

The national interest position is not without its detractors, however, one of whom -- Leonard C. Meeker, former legal advisor to the Department of State -- persuasively argued in 1985 the following before the Subcommittee on Human Rights and International Organizations of the Committee on Foreign Affairs, House of Representatives, in 1985:

> *It has been urged that the United States should not submit to an international court cases raising questions about the use of armed force, or involving important political issues. The argument runs that national defense and national sovereignty are too important to allow cases involving such issues to be decided by a court. This is an old argument, which denies the possibility of progress toward a more lawful world and instead prefers to rest national policy in international affairs on the right of the strongest. The argument is not supported by either the Charter of the United Nations or the Statute of the International Court of Justice. The Charter confers on the Security Council primary not exclusive, responsibility for the maintenance of international peace and security. Nowhere in the Court's Statute is an exclusion provided for cases involving national defense or other important political issues.*[97]

Mr. Meeker finished his comments by offering his support for the ICJ and calling upon the U.S. to resubmit acceptance to the Court's compulsory jurisdiction.

---

[95]Report of the Quadrennial Defense Review, § 3, p. 16 (May 1997), "In sum, in order to protect and promote its national interests in the current and projected security environment, the United States must remain engaged as a global leader and harness the unmatched capabilities of its armed forces to do three things: *shape* the international security environment in favorable ways, *respond* to the full spectrum of crises when it is in our interests to do so, and *prepare now* to meet the challenges of an uncertain future by transforming U.S. combat capabilities and support structures to be able to shape and respond effectively well into the 21st century."

[96]The Nicaragua case made clear that U.S. involvement in the ICJ had become a liability to the Reagan Administration's foreign policy. The trump card of a Security Council veto that was negotiated in 1946 had been circumvented. The ICJ provided the Sandinistas with a forum in which to confront the U.S. on the world stage. Unlike the diplomatic bargaining table, where superpower status may garner an advantage, the Court presupposes equality. A close look at the reality of trial tactics reveals that the Nicaraguan government had access to detailed Congressional spending proposals, authorizations, hearings and debate over the U.S. action in Nicaragua. The U.S. did not have the same advantage. See Terry D. Gill, Litigation Strategy At The International Court, A Case Study of the Nicaraguan v. United States Dispute, p. 134 (1989).

[97]Leonard C. Meeker (former legal advisor to the U.S. Department of State), Hearing before the Subcommittee On Human Rights and International Organizations of the Committee on Foreign Affairs House of Representatives, first session 99th Congress, October 30, 1985.

The notion proffered by Mr. Meeker is one of concurrent jurisdiction of the Court and the Security Council. This model can be used to reach common ground in the current negotiations on the ICC. Permitting the Court to proceed unfettered by the Security Council veto is not the equivalent of abrogating Security Council authority in matters of security. Theoretically, neither the Court's actions nor those of the Security Council *necessitate* the postponement of the other's action. One forum is inherently political and focuses upon broad situations; the other is entirely judicial and deals with cases of individuals. However, in practice the work of the ICC will have extensive political implications.

## X. Concurrent Constitutional Powers and Authorities: Security Council and ICJ.

When a crisis or contentious situation arises between two states, a State party to the United Nations Charter can choose to petition the Security Council or the International Court of Justice, or both.[98] The framers of the U.N. Charter had purposefully elevated the ICJ to the position of primary organ and made all members of the U.N. ipso facto members of the Court.[99] Each organ will, in the first place, determine its own jurisdiction. Certain Expenses of the United Nations, 1962 UN 151, 168 (7/20/62). "While Article 12 of the UN Charter expressly forbids the General Assembly to make any recommendations with regard to a dispute or situation while the Security Council is exercising its functions in respect of that dispute or situation, no such restriction is placed on the functioning of the Court [ICJ] by any provision of either the Charter or the Statute of the Court."[100] Moreover, States Parties are bound in parallel fashion to comply with decision of each primary organ: decisions of the Security Council pursuant Article 25 and 48; decisions of the ICJ, where the State is a party before it, pursuant to Article 94(1).

Over the course of its history the ICJ has heard cases involving situations of which the Security Council is seized,[101] including the United States Diplomatic and Consular Staff in Tehran (*United States v. Iran*), 1980 ICJ Rep. 3, where the United States petitioned the ICJ after the Council was seized of the situation. Security Council Resolution 461 (1979) held the continued detention of the hostages as "contrary to its resolution 457 (1979) *and* the Order of the

---

[98]Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America), 1986 ICJ Rep. 14, p.22, para. 25. "Various elements of the present dispute have been brought before the United Nations Security Council by Nicaragua ..."

[99]U.N. Charter art. 92, art. 93.

[100]Takane Sugihara, *The Judicial Function of the International Court of Justice with Respect to Disputes Involving Highly Political Issues*, quoting United States Diplomatic and Consular Staff in Tehran (United States v. Iran), 1980 ICJ rep. 3 at 22; published in, A.S. Muller, D. Raic`, J.M. Thuraszky, The International Court of Justice; It Future Role After Fifty Years. (Kluwer Law International 1997).

[101]Shabtai Rosenne, The World Court; What It Is and How It Works, at 211 (5th Ed. Martin Nijhoff Publishers 1995). referencing the Aegean Sea Continental Shelf Delimitation incident between Greece and Turkey as the first situation to be simultaneously submitted to the Security Council and the ICJ.

International Court of Justice of December 15, 1978.[102] Moreover, the Court has maintained its competency to address situations where the Security Council has already taken Chapter VII action.[103]

However, as exemplified in the Lockerbie decision, the extent of the Court's jurisdiction over Chapter VII situations is circumscribed. The ICJ decision in Lockerbie stems from the Libyan Government's petition to the ICJ requesting provisional measures against the United States and the United Kingdom. The petition alleged breaches of the Montreal Convention of 1971.[104] The ICJ declined the request on the grounds that Libya was obliged, pursuant to Article 25 and Article 103 of the U.N. Charter, to carry out the decisions of the Security Council[105] and specifically Security Council Resolution 748. This invoked Chapter VII sanctions against Libya for failing to extradite two Libyan nationals suspected of bombing Pan Am flight 103 over Lockerbie, Scotland.[106] Although the ICJ denied the provisional measures requested by Libya, the Court decided the parties could contest the issue on the merits.[107] The Court refused to become a political alternative to Security Council resolutions while maintaining its independence from the Security Council to adjudicate contentious issues between States.[108]

---

[102]Shabtai Rosenne, The World Court: What It Is and How It Works, at 251 (5th Ed. Martin Nijhoff Publishers 1995).

[103]Takane Sugihara, *The Judicial Function of the International Court of Justice with Respect to Disputes Involving Highly Political Issues*, published in, A.S. Muller, D. Raic`, J.M. Thuraszky, The International Court of Justice, It Future Role After Fifty Years, at 125 (Kluwer Law International 1997). See Application of the Convention on the Prevention Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro)) Provisional measures Order, 1993 ICJ Rep. 4. See also Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America) (Jurisdiction and Admissibility), 1984 ICJ Rep. 392 at 437 - 438.

[104]Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom) (Provisional Measures), Order, 1992 ICJ Rep. 3; and Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie ( Libyan Arab Jamahiriya v. United States of America) ( Provisional Measures), Order, 1992 ICJ Rep. 114.

[105]Vera Gowland-Debbas, *The Relationship Between the International Court of Justice in the Light of the Lockerbie Case*, 88 A.J.I.L. 643 (1994).

[106]Id. at 646.

[107]Id. at 669. See, e.g.,Takane Sugihara, *The Judicial Function of the International Court of Justice with Respect to Disputes Involving Highly Political Issues*, published in, A.S. Muller, D. Raic, J.M. Thuraszky, The International Court of Justice, It Future Role After Fifty Years, at 125 (Kluwer Law International 1997).

[108]See supra, note 105.

## VI. RECOMMENDATION

If the Singapore Proposal fails to gain the needed support, an alternative solution will be needed. Compromise can be reached by maintaining Article 23(3) as written, altering only the phrase "BEING DEALT WITH". Theoretically the ILC Draft of Article 23(3) allows any Chapter VII situation to prevent ICC action. No distinction exists between situations that are merely placed upon the Council's agenda and situations that involve the use of force. A clear definition or restriction of the term "BEING DEALT WITH" is necessary before an agreement on Article 23(3) can be reached. Therefore the objective is to define the level of Security Council engagement in a situation sufficient to prevent ICC involvement. The IHRHLP proposes the following modification to Article 23(3):

> No prosecution may be commenced under this Statute arising from a situation which A SECURITY COUNCIL RESOLUTION HAS DETERMINED TO BE a threat to or breach of the peace or an act of aggression under Chapter VII of the Charter, unless the Security Council otherwise decides.

The proposed language maintains the primacy of the Security Council consistent with members' obligations pursuant to Article 25 and granted by Article 103 of the U.N. Charter.[109] However, the unbridled ability of the Security Council to indiscriminately block ICC prosecutions is restricted to situations the Council affirmatively undertakes by Resolution. The redefining of "BEING DEALT WITH" represents the middle ground between the Singapore and the ILC versions of Article 23(3). Unlike Singapore, the IHRHLP proposal does not require the Council to specifically prevent ICC action. However, it does require the minimum threshold of a formal Resolution before a situation can be withheld from the purview of the ICC.

## XII. Conclusion.

The debate over Article 23(3) has yet to be resolved. Seemingly wedded to the ILC version of Article 23(3), the United States may be willing to entertain proposals limiting the broad reaching language "BEING DEALT WITH"contained in Article 23(3). The middle ground between the Singapore and the ILC versions of Article 23(3) is the re-defining of the language "BEING DEALT WITH" in a manner that simultaneously limits the ability of the Security Council to prevent an ICC prosecution and goes even further than the Singapore Proposal in maintaining the U.N. Charter's grant of primacy to the Security Council over international peace and security issues.

---

[109]U.N. Charter art. 103;
"In the event of a conflict between the obligation of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."
U.N. Charter art 25,
"The members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter."