

CLOSING THE GAPS IN UNITED STATES LAW AND IMPLEMENTING THE ROME STATUTE: A COMPARATIVE APPROACH

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I. THE COMPARATIVE APPROACH

A. Introduction

This paper provides a comparative framework to analyze the extent to which five major democracies Canada, United Kingdom, Australia, Germany, and France—incorporated the subject matter jurisdiction Articles of the Rome Statute of the International Criminal Court (“Rome Statute”) through their domestic legislative processes while ratifying the Rome Statute, and what, if anything, the United States can interpret from the five distinct approaches. By examining what deviations the states made from the wording in the Rome Statute, how variant the deviations are, and what the rationale for such variations are, a picture will emerge which could provide guidance to the United States, were it to aspire to incorporate the Rome Statute crimes into the federal criminal code, amend Title 18 of the United States Code, and thus assure United States primacy over the International Criminal Court (“ICC”) complementarity jurisdiction. Through the use of comparative analysis, it is plausible to reason whether it would be feasible for the United States to build off the examples, close the gaps in the United States Code,¹ and ultimately ratify the Rome Statute. There appears to be a balancing act inherent in the ratification of the Rome Statute.² On one hand, there is the Rome Statute itself which details the requirements for incorporation into the ICC regime, the meaning and purpose of which must be included in the domestic code of the ratifying states in order to obtain jurisdiction over the ICC crimes.³ While, at the same time, there are political and legal considerations all of which require the governments to modify the wording of the Rome Statute’s Articles to conform to the states’ individual circumstances.⁴ However, too great a deviation from the meaning

1. See Douglass Cassel, *Empowering United States Courts to Hear Crimes within the Jurisdiction of the International Criminal Court*, 35 NEW ENG. L. REV. 421 (2001) (discussing the gaps in the federal criminal code as they pertain to federal jurisdiction over Genocide, Crimes Against Humanity, and War Crimes).

2. See Rome Statute of the International Criminal Court, United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, July 17, 1998, U.N. Doc. A/CONF. 183/9 (1998), 2187 U.N.T.S. 90 (1998) [hereinafter Rome Statute]; see also Jennifer Schense & Donald K. Piragoff, *Commonalities and Differences in the Implementation of the Rome Statute*, in NATIONAL LEGISLATION INCORPORATING INTERNATIONAL CRIMES 245 (Matthias Neuner ed., 2003) (discussing the differences of each state’s approach depending on unique legal, constitutional and due process criteria).

3. Rome Statute, *supra* note 2, arts. 5–8 (covering the crimes of “Genocide,” “War Crimes,” and “Crimes Against Humanity”).

4. *Id.* The Rome Statute is therefore somewhat analogous to a model treaty in that the Articles do not have to be incorporated verbatim into the domestic legal code of the ratifying state. The practical impossibility of the exercise, due to the vastness of criminal codes worldwide, requires that some flexibility be expected. The interesting question is how much flexibility will be allowed before the domestic statute falls outside the meaning and purpose of the Rome Statute. It should prove very interesting to observe how the

and purpose of the Rome Statute's Articles could produce a situation whereby the applicability of the treaty would be called into question. The balancing act between the intended purpose and meaning of the Rome Statute and the unique domestic requirements could presumably be too great for some countries, and subsequent ICC and domestic court decisions will analyze these instances as they arise and the ICC jurisprudence matures. It would be reasonable to assume that the ICC would take the unique circumstances of each country into consideration when called upon to interpret the implementing legislation, in essence, passing judgment over whether the state in question has the legal capability to genuinely carry out an investigation or prosecution pursuant to Articles 17 and 18 of the Rome Statute.

The international community assembled through the auspices of the United Nations in December of 1989⁵ to voice its concern about worldwide impunity for *hostis humani generis*,⁶ and began to conceptualize a permanent judicial organ focused on the most heinous crimes that exist.⁷ Instead of fashioning *ad hoc* tribunals for different instances of grave crimes that focus on specific regions or conflicts, as was done in Rwanda, the Balkans, the Special Court for Sierra Leone, or even a hybrid court, and as we are currently witnessing in

young court handles the instances where certain countries have strayed too far outside the boundaries of the Rome Statute. This scenario gives rise to many complex questions beginning with whether the state actually ratified the treaty.

5. ANTONIO CASSESE, *INTERNATIONAL CRIMINAL LAW*, 340–44 (2003); see also KRISTINA MISKOWIAK, *THE INTERNATIONAL CRIMINAL COURT: CONSENT, COMPLEMENTARITY AND COOPERATION* 13 (2000).

6. *Filartiga v. Pena-Irala*, 630 F.2d 876, 890 (2d Cir. 1980).

7. Patrick Zahnd, *How the International Criminal Court Should Help Implement International Humanitarian Law*, in *INTERNATIONAL CRIMES, PEACE, AND HUMAN RIGHTS: THE ROLE OF THE INTERNATIONAL CRIMINAL COURT* 43 (Dinah Shelton ed., 2000); see M. Cherif Bassiouni, *The International Criminal Court In Historical Context*, 99 ST. LOUIS-WARSAW TRANSATLANTIC L.J. 55; The preamble of the Rome Statute states:

Recognizing that such grave crimes threaten the peace, security, and well-being of the world, Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation, Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes. . . .

. . . .
 Determined to these ends and for the sake of present and future generations, to establish an independent permanent International Criminal Court in relationship with the United Nations system, with jurisdiction over the most serious crimes of concern to the international community as a whole. . . .

Rome Statute, *supra* note 2, pmbl.

Cambodia, a more permanent solution was conceived, one which ultimately became the constitutive agreement for the ICC known as the Rome Statute.⁸

In June and July of 1998, plenipotentiaries from around the globe met in Rome for five weeks with the single purpose of formulating a multilateral agreement that would end impunity for the perpetrators of the most heinous crimes, bringing the hope of justice to those who suffered and those who continue to suffer, from the most wretched acts of humankind.⁹ To make the multilateral treaty-drafting exercise even more difficult, it was ultimately decided that no reservations were allowed to be lodged.¹⁰ The disparate ideologies that many states have had in the past to multilateral agreements were generally quelled by their ability to register their disagreements with reservations which are included in the treaty document. The Rome Statute was to be different, however, and debates occurred regarding a state's ability to lodge formal reservations,¹¹ as is permitted by the Vienna Convention on the Law of Treaties.¹² In the end, the states were left with lodging merely understandings.¹³ The Rome Statute entered into force on July 1, 2002, with the

8. Rome Statute, *supra* note 2, pmb1.

9. Bassiouni, *supra* note 7, at 55.

10. David J. Scheffer et al., *Panel: The Foreign Affairs Consequences of America's Absence*, 8 UCLA J. INT'L L. & FOREIGN AFF. 17, 39 (2003) (stating that "one of our great defeats in Rome, was the fact that we failed to get a reservations clause into the treaty."); David J. Scheffer, *Staying the Course with the International Criminal Court*, 35 CORNELL L. REV. 47, 84 (2002) (stating "[T]he United States opposed such a prohibition prior to and during the Rome Conference."); see also Rome Statute, *supra* note 2, art. 120 (stating plainly that no reservations are to be allowed; similar to the debate regarding treaties of this nature, *i.e.*, Convention against Torture, etc., the argument is posited that, how could anyone have a reservation about the "clear illegality" of such acts.).

11. As a rule, no reservations may be made to the Rome Statute. Rome Statute, *supra* note 2, art. 120. However, a state may declare that, for a period of seven years after the entry into force of this Statute for the State concerned, it does not accept the jurisdiction of the Court with respect to the category of crimes referred to in Article 8 (War Crimes) when a crime is alleged to have been committed by its nationals or on its territory. *Id.* art. 124 (Transitional Provision). This provision is a compromise achieved by the Rome Conference at the expense of ensuring that one state supported the Rome Statute. See generally HUMAN RIGHTS WATCH, WORLD REPORT: INTERNATIONAL CRIMINAL COURT (1999). This compromise is justified by the fact that the "group of like-minded states" succeeded in obtaining support in prohibiting the possibility of making reservations to the Statute. *Id.* This compromise, being a result of very hot debates, is one of the most important principles of the Statute. *Id.*; see also MERAB TURAVA, OPEN SOCIETY—GEORGIA FOUNDATION, ANALYSIS OF COMPATIBILITY OF THE GEORGIAN LEGISLATION WITH THE STATUTE OF THE INTERNATIONAL CRIMINAL COURT (2001), available at <http://www.osgf.ge/interlaw/ICC -00.htm> (last visited Oct. 7, 2005).

12. Vienna Convention on the Law of Treaties, arts. 19–21, May 23, 1969, 1155 U.N.T.S. 331, 336–7 [hereinafter Vienna Convention].

13. The importance of noting the distinctions between the two is crucial. A reservation binds the reserving states' obligations of a treaty with regard to all signatory states. BARRY E. CARTER ET AL., INTERNATIONAL LAW 114–120 (4th ed., 2003). An understanding merely creates legal obligations for the

sixtieth ratifier at a seemingly unprecedented pace.¹⁴ Currently, there are ninety-eight countries that have ratified the Rome Statute.¹⁵

The Rome Statute was indeed an amalgam of the states' disparate ideologies with a single purpose, to constitute a permanent forum for the international community to bring the worst of criminals to justice. The ICC was going to be a place to end impunity for only the most heinous crimes. Many states prior to ratifying the Rome Statute, including the United States, did not have the domestic legal framework in place to either exercise jurisdiction at the national court level, or their criminal codes were silent or incomplete with regard to the underlying criminal offences. The necessity for legislation, entitling states' domestic jurisdiction, so that their courts could be an appropriate forum was made evident in Rome. Germany had expressed the possibility that the ICC may promote the beginning of a harmonization process of international criminal law amongst states.¹⁶ These gaps in jurisdiction have allowed for the imperfect administration of justice and, in certain situations, have not created mandatory activation of jurisdiction or prosecutorial authority. The Rome Statute was supposed to propose a cure for this inequality and be the world's court for war crimes, crimes against humanity, genocide, and aggression.

Each state's ICC implementing legislation is ripe with political, legal, and distinctive domestic concerns. By distinguishing the states' final legislative products, the United States can begin to conceptualize not only what sections of the Rome Statute have been modified through states' domestic legislation, seeing what issues are generally in play, but also to see whether the United States can replicate the dual successes of other democracies, protecting individual national interests and becoming a member of the ICC regime.

Passing legislation which would incorporate Articles 5 through 8 of the Rome Statute into the United States' federal criminal law would not mandate United States cooperation with the ICC. Congress can propose atrocity crime legislation which does not mention the Rome Statute or the ICC. The Rome Statute is not a self-executing treaty and, therefore, would still require the

reserving state to its own treaty obligations. *Id.* Had the United States been able to lodge a reservation to the Rome Statute, that accordingly did not defeat the object or purpose of the statute itself, ratification of the Rome Statute might have already occurred. *Id.*

14. See Rome Statute, *supra* note 2; see also COALITION FOR THE INTERNATIONAL CRIMINAL COURT, STATE SIGNATURES AND RATIFICATIONS CHART (2005), <http://www.iccnw.org/countryinfo/worldsignsandratifications.html> (last visited Sept. 23, 2005) (containing the most up to date tally of ratified states) [hereinafter SIGNATURES & RATIFICATIONS].

15. SIGNATURES & RATIFICATIONS, *supra* note 14 (The Dominican Republic ratified the Rome Statute on May 13, 2005, bringing the total number of States that are parties to the Statute to 99; 139 States are signatories).

16. Schense & Piragoff, *supra* note 2, at 249.

advice and consent of the United States Senate and a presidential signature before the United States would belong to the group of ratifying member states and be subject to the demands of the court.¹⁷

Only by passing criminal laws that would guarantee United States federal courts jurisdiction over ICC crimes does the United States effectively protect its national interests because, pursuant to Articles 17 and 18 of the Rome Statute, the United States would be willing and able to genuinely carry out the investigation or prosecution.¹⁸ This would effectively make the case initially inadmissible to the ICC. Currently the United States is not technically capable in all circumstances to supplant the ICC's jurisdiction and take full advantage of complementarity.

Section II examines the domestic legislative attempts by five western democracies to implement the Rome Statute. By focusing strictly on the divergences from the text of the Rome Statute and any possible constitutional impediments to implementation, certain reoccurring themes make themselves evident. The United States can benefit from such an examination because the issues that other democracies struggled with can be recognized as either unique to the state in question or inherent to all constitutional democracies. As a result, the dilemmas can be either avoided as unique to the state in question or the solution can be approached in a similar fashion as the other successfully implementing states.

Section III discusses United States' interests in and fears of the ICC regime. Were the ICC to become, as the plenipotentiaries in Rome envisioned, the world's court for atrocity crimes, there are succinct benefits to United States participation. For example, the future administration of the court will not be influenced directly by the United States, nor will the United States be able to contribute to state parties' proposals for additional ICC subject matter jurisdiction.

Section IV comparatively examines the approaches of the other states and applies their individual experiences to the current state of United States law. It is plausible to assume that many of the issues that arose during the implementation processes of the various states would translate in some form or other into issues which might arise, were the United States to attempt to implement the Rome Statute.

Lastly, Section V examines the differing approaches of implementing legislation of four states side-by-side with the Rome Statute. The annexes in this section were collected by the author as an aid to the reader and is the

17. Malvina Halberstam, *International Human Rights and Domestic Law Focusing on U.S. Law, with some Reference to Israeli Law*, 8 *CARDOZO J. INT'L & COMP.L.* 225, 234 (2000).

18. Rome Statute, *supra* note 2, arts. 17–18.

author's own effort at correlating the various national statutes with the Rome Statute.

II. FIVE STATES' APPROACHES TO RATIFYING THE ROME STATUTE

A. Canada

Canada has the unique distinction of being the first country to adopt comprehensive domestic legislation effectively ratifying the Rome Statute.¹⁹ The Canadian Parliament passed the Crimes Against Humanity and War Crimes Act ("CAHWCA") on June 29, 2000,²⁰ and ratified the Rome Statute on July 7, 2000.²¹ Subsequently, the CAHWCA entered into force on October 23, 2000.²² Dissimilar to the United States process of treaty ratification, the Canadian constitution mandates that any treaty obligation, in which Canada would like to enter, must first be entirely legislated through the parliamentary process before the treaty can be signed.²³ It is for this reason that Canada did not sign the Rome Statute before its parliament had the opportunity to fully legislate the contents of the treaty.²⁴

All of the ICC crimes were incorporated into Canadian domestic law under the CAHWCA.²⁵ Canada did more than merely incorporate the ICC crimes by reference to the Rome Statute into its criminal code,²⁶ which was done for a couple of reasons that will be discussed. Canada went further and made the CAHWCA more extensive by including, for example, retrospective jurisdiction²⁷ and the crime of using chemical weapons,²⁸ a crime which was absent

19. EUR. CONSULT. ASS., *Progress Report by Canada and Appendix*, Doc. No. 11 (2001) [hereinafter *Progress Report by Canada*]; Darryl Robinson, *Implementing International Crimes in National Law: The Canadian Approach*, in NATIONAL LEGISLATION INCORPORATING INTERNATIONAL CRIMES 45–54 (Matthias Neuner ed., 2003).

20. Crimes Against Humanity and War Crimes Act, 2000 S.C., ch. 24 (Can.) [hereinafter CAHWCA]; Robinson, *supra* note 19, at 45.

21. See Rome Statute, *supra* note 2; SIGNATURES & RATIFICATIONS, *supra* note 14.

22. HUMAN RIGHTS WATCH, TABLE 1: IMPLEMENTING THE ROME STATUTE (2002), <http://hrw.org/campaigns/icc/docs/chart1.pdf>.

23. Constitution Act, 1867, 30 & 31 Vict. Ch. 3 (U.K.), as reprinted in R.S.C., No. 5 (Appendix 1985); see also Robinson, *supra* note 19, at 46.

24. SIGNATURES & RATIFICATIONS, *supra* note 14.

25. Rome Statute, *supra* note 2, arts. 5–8; CAHWCA, *supra* note 20, § 4.

26. CAHWCA, *supra* note 20, § 4.

27. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982, ch. 11, § 11(g) (Eng.) [hereinafter Canadian Charter].

28. See Philippe Kirsch & John T. Holmes, *The Rome Conference on an International Criminal Court: The Negotiating Process*, 93 AM. J. INT'L L. 2 (1999).

from the Rome Statute.²⁹ A state can take full advantage of the complementarity jurisdiction and be in compliance with Articles 5 through 8 of the Rome Statute, regarding the crimes of genocide, war crimes, and crimes against humanity, by simply making reference to the Rome Statute Articles 5 through 8 in its implementing legislation.³⁰ Incorporating the Rome Statute's crimes by reference, as the convention declares, does not impede the continued development of customary international law.³¹

Canada had previously focused its legislative competence on war crimes and crimes against humanity.³² In 1987, the Canadian Parliament promulgated domestic law to enable the state to prosecute war crimes and crimes against humanity whether or not they occurred within Canadian territory.³³ Previously, Canadian jurisdiction was mostly based on territoriality.³⁴ The extraterritoriality of the 1987 law could extend globally with regard to the criminal acts, as long as the alleged criminal was on Canadian territory and subject to Canadian law and apprehension regardless of his/her nationality.³⁵ The reality of prosecuting an individual based on the Canadian war crimes statute proved to be insufficient and required additional legal framework to be incorporated for legitimacy purposes. The Canadian Supreme Court in *Regina v. Finta* held that prosecuting an individual in accordance with the 1987 law, for such a serious crime and for one which contained such a grave stigma in the international community, required that the prosecutor incorporate the international as well as the domestic

29. Elaina I. Kalivretakis, *Are Nuclear Weapons Above the Law? A Look at the International Criminal Court and the Prohibited Weapons Category*, 15 EMORY INT'L L. REV. 683, 686–87 (2001). The crime of using chemical weapons covered by the Chemical Weapons Convention was in Article 8 of the Rome Statute until the final week of the Rome Conference when it was decided to drop the provision in order to end the negotiation standstill which had occurred between the Arab/developing countries, who wanted to include the use of nuclear weapons in the Rome Statute, and those countries, of which the United States and Canada were included, who wanted to include the use of chemical weapons. The negotiated compromise was to drop all modern references to weapons based on treaty law. Therefore, it is not surprising that Canada went ahead and included the provision in their implementing legislation.

30. Rome Statute, *supra* note 2, arts. 5–8 (The Rome Statute is arguably referencing established customary international legal principles; those states that had not codified those crimes could do so by making reference to the appropriate Articles in the Rome Statute).

31. *Id.* art. 10.

32. Criminal Code, R.S.C., ch. C-46, §§ 7 (3.71)–(3.77) (1985) (§§ (3.76) and (3.77) repealed 2000) (Can.) [hereinafter Canadian Criminal Code].

33. *Id.*

34. William Schabas, *Canadian Implementing Legislation for the Rome Statute: Jurisdiction and Defences*, in NATIONAL LEGISLATION INCORPORATING INTERNATIONAL CRIMES 35–44 (Matthias Neuner ed., 2003); see also Canadian Criminal Code, *supra* note 32, § 6(2) (providing exceptions to the territorial jurisdictional rule for extraordinary cases).

35. See Canadian Criminal Code, note 32; Schabas, *supra* note 34, at 35–44.

elements of the crime.³⁶ The bar which the Canadian Supreme Court set was accordingly high, one which is plausibly too high for a prosecutor to prove beyond a reasonable doubt.³⁷

With the *Finta* holding as a marker, Canada looked to its inclusion in the ICC regime as not only a means to amend its criminal code but as an opportunity to integrate the lessons learned from *Finta* and include retrospective jurisdiction.³⁸ While Canada did not have to amend its constitution to incorporate the ICC crimes,³⁹ it did decide to broaden the domestic reach of its courts by utilizing the tool of retrospectivity which allows the Canadian courts to prosecute an individual if the commission of the alleged crime was recognized by customary international law at the time it was committed.⁴⁰ In contrast, Canada decided not to make the ICC crimes retroactive, as some provisions of the Rome Statute are manifestations of the recent developments of customary international law,⁴¹ possibly in an attempt to assure constitutional protections and safeguards.

The CAHWCA provides its own definitions of the ICC crimes.⁴² These definitions are, however, largely consistent with the Rome Statute. Compare the two:

CAHWCA §4(3)

[G]enocide means an act or omission committed with intent to destroy, in whole or in part, an identifiable group of persons, as such, that, at the time and in the place of its commission, constitutes genocide according to customary international law or conventional international law or by virtue of its being criminal according to the general principles of law recognized by the community of nations, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission.⁴³

36. Regina v. Finta [1994] 1 S.C.R. 701 (Eng.).

37. *Id.*; Robinson, *supra* note 19, at 47.

38. *Finta*, 1 S.C.R. at 701.

39. CAHWCA, *supra* note 20, § 4(3) & 6(3); Rome Statute, *supra* note 2, arts. 5–8.

40. *See id.* § 6 & 7(5); Section 6(1) states “Every person who, either before or after the coming into force of this section, commits outside Canada. . .” and Section 7(5) states “Where an act or omission constituting an offense under this section occurred before the coming into force of this section. . .” *Id.*; Rome Statute, *supra* note 2, arts. 11, 24.

41. Robinson, *supra* note 19, at 49.

42. CAHWCA, *supra* note 20, §§ 4(3), 6(3); Rome Statute, *supra* note 2, arts. 5–8.

43. *Id.* § 4(3).

ROME STATUTE ARTICLE 6

For the purpose of this Statute, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnic, racial, or religious group, such as:

- a) Killing members of the group;
- b) Causing serious bodily or mental harm to members of the group;
- c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- d) Imposing measures intended to prevent births within the group; and
- e) Forcibly transferring children of the group to another group.⁴⁴

Due to Canada's decision to mandate the prosecution of crimes retrospectively, simple reference to the Rome Statute would not suffice. A temporal element had to be included in the definition of the crimes to incorporate the law and make it applicable to the time of the commission of the crime.⁴⁵ Also, the CAHWCA references the Rome Statute's inability to encumber the development of customary international law.⁴⁶ This added element synchronizes the Canadian approach with its treaty obligations, intending to give its courts jurisdiction retrospectively while not stopping the development of customary international law.

Canada did have a substantial constitutional hurdle to negotiate in its legislative process to incorporate Article 28, "Command Responsibility," of the Rome Statute.⁴⁷ It is insightful to further examine the mechanism Canada utilized to mold the intention of Article 28 with its constitutional jurisprudence and the drafting of the CAHWCA due to the possibility that the United States could encounter a similar dilemma in the incorporation of Article 28, or other Articles of the Rome Statute, though most likely not in a constitutional context.

The crime of "Command Responsibility" as delineated in the Rome Statute contains a disjunctive *mens rea* test, allowing for either an objective or subjective test for mental culpability (emphasis added).⁴⁸ The Canadian

44. Rome Statute, *supra* note 2, art. 6.

45. CAHWCA, *supra* note 20, §§ 4, 6.

46. *Id.* § 4(4) (For greater certainty, crimes described in Articles 6 and 7 and paragraph 2 of Article 8 of the Rome Statute are, as of July 17, 1998, crimes according to customary international law. This does not limit or prejudice in any way the application of existing or developing rules of international law).

47. Rome Statute, *supra* note 2, art. 28.

48. *Id.* ("That military commander or person either knew or, owing to the circumstances at the time,

constitutional practice (Charter of Rights and Freedoms)⁴⁹ requires strict subjectivity for a crime that would reflect the “high degree of moral stigma society subscribes to those convicted of such crimes.”⁵⁰ Therefore, the test of “either knew or, owing to the circumstances at the time, should have known” as contained in the Rome Statute Article 28(a)(i) had to be amended.⁵¹

In *Regina v. Vaillancourt*, the Canadian Supreme Court outlawed vicarious criminal liability for such serious crimes as murder, when the *mens rea* requirement is merely subjective.⁵² In response to this quandary, the Canadian Parliament fashioned a new crime, “Breach of Responsibility by a Superior,” which pertains to both military and civilian commanders, as required by the Rome Statute, Article 28(a) and (b).⁵³ A person found guilty of the Canadian crime of “Breach of Responsibility by a Superior” can possibly receive the same sentence as someone who has been found guilty for direct commission of an Article 5 crime.⁵⁴ This assures the required Article 28 result.⁵⁵

Canada was able to secure the inclusion of Article 28 of the Rome Statute by utilizing its Supreme Court’s constitutional jurisprudence as a guide, and securing the adherence to the Canadian Constitution (Charter of Rights and Freedoms) but not diverge too greatly from the purpose and meaning of Article 28 of the Rome Statute.

Under the CAHWCA, a military commander or superior would be guilty of an Article 5 crime if a military commander either “failed to exercise proper control over a subordinate” and, as a result, an Article 5 offence was committed⁵⁶ or “knew, or was criminally negligent in failing to know” that a subordinate is “about to or is committing” an Article 5 offence,⁵⁷ including consciously disregarding evidence that clearly indicated that an Article 5 offence was being committed or was about to commit such an offence and “failed to take, as soon as practicable, all necessary and reasonable measures to

should have known. . . .”); *Progress Report by Canada*, *supra* note 19, at 3.

49. Canadian Charter, *supra* note 27.

50. *Finta*, 1 S.C.R. at 701.

51. Rome Statute, *supra* note 2, art. 28(a)(i).

52. *Regina v. Vaillancourt* [1987] S.C.R. 636 (Eng.); Robinson, *supra* note 19, at 52.

53. Rome Statute, *supra* note 2, art. 28 (including explicitly both a military, under Article 28(a), and a civilian under Article 28(b), component regarding Command Responsibility); *see also* CAHWCA, *supra* note 20, § 5.

54. CAHWCA, *supra* note 20, § 5(3) (“Every person who commits an offence under subsection (1), (2) or (2.1) is liable to imprisonment for life”).

55. Rome Statute, *supra* note 2, art. 77-1(b) (“A term of life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person. . . .”).

56. CAHWCA, *supra* note 20, §§ 5(1)(a)(i), 7 (for offences occurring outside of Canada).

57. *Id.* §§ 5(1)(b), 7 (for offences occurring outside of Canada).

prevent or repress the commission of the offence or of further offences," or submit the matter to competent authorities for investigation and prosecution.⁵⁸ Military commanders and others would be liable also for having attempted to, committed, conspired, counseled, or been an accessory to any Article 5 crimes outside of Canada.⁵⁹

The CAHWCA was able to solve the constitutional dilemma by circumventing the disjunctive *mens rea* test in Article 28 of the Rome Statute and creating a new law which gave equal effect of Article 28 but fit within the established constitutional confines delineated in *Regina v. Vaillancourt* and *Regina v. Finta*. Also, the punishment for the crime of breach of "Command Responsibility" can be life imprisonment, identical to that of the Article 28 of the Rome Statute, adding credence to Canada's adherence to the Rome Statute in general.

The ICC has complementary jurisdiction with the Canadian legal system.⁶⁰ The ICC can obtain jurisdiction only if Canada were to have jurisdiction over the offence (or suspect) and were unwilling or unable to investigate or prosecute an alleged crime or suspect.⁶¹ The Canadian jurisdiction is, however, subject to both a presence requirement and a consent requirement.⁶² There cannot be a trial in absentia; however, an investigation can occur without the detention of a suspect of the alleged crime.⁶³ The Attorney General's written consent is required before a prosecution can proceed.⁶⁴ Also, the CAHWCA prescribes a

58. *Id.*

59. *Id.* § 6(1.1).

60. Rome Statute, *supra* note 2, art. 1 ("[the International Criminal Court] shall be complementary to national criminal jurisdictions").

61. *Id.* art. 18(3) ("The Prosecutor's deferral to a State's investigation shall be open to review by the Prosecutor six months after the date of deferral or at any time when there has been a significant change of circumstances based on the State's unwillingness or inability genuinely to carry out the investigation." Article 17(1)(a), states that, "[t]he case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution. . . .").

62. CAHWCA, *supra* note 20, §§ 9(2)-(4).

63. *Id.* § 9(2) ("For greater certainty, in a proceeding commenced in any territorial division under subsection (1), the provisions of the Criminal Code relating to requirements that an accused appear at and be present during proceedings and any exceptions to those requirements apply").

64. *Id.* §§ 9(3),(4) (Procedures and Defences section) (No proceedings for an offence under any of sections 4 to 7 of this Act, or under section 354 or subsection 462.31(1) of the Criminal Code in relation to property or proceeds obtained or derived directly or indirectly as a result of the commission of an offence under this Act, may be commenced without the personal consent in writing of the Attorney General or Deputy Attorney General of Canada, and those proceedings may be conducted only by the Attorney General of Canada or counsel acting on their behalf. . . .No proceedings for an offence under section 18 may be commenced without the consent of the Attorney General of Canada).

mandatory sentence of life imprisonment for the intentional commission of an ICC crime and a maximum sentence of life imprisonment in any other case.⁶⁵

Finally, as prescribed in the Rome Statute, there are no immunities⁶⁶ and no applicable statutes of limitation⁶⁷ for the Rome Statute Article 5 crimes⁶⁸ in the CAHWCA. Canada can, as the United States continues to do, enter into bilateral "Article 98 Agreements," even though the enforceability and requisite verbiage is still open for judicial interpretation.⁶⁹

In sum, Canada had, prior to the Rome Statute, domestically legislated crimes against humanity and war crimes into their criminal code.⁷⁰ The subsequent difficulty Canada had with effectively prosecuting individuals under the new laws allowed for Canada to take advantage of the Rome Statute to build upon the experience and revamp their criminal code. Furthermore, Canada decided to broaden its jurisdiction of ICC crimes through the use of retrospection and, as a result of that decision, incorporating the ICC crimes by reference to the Rome Statute was not possible. A temporal element had to be included which reflected the decision to utilize retrospectivity. The crime of using chemical weapons was incorporated in the CAHWCA. This crime was absent from the final version of the Rome Statute and is evidence of the highly politicized and heavily negotiated nature of the Rome Statute.

As some of the Rome Statute is reflective of more recent developments of customary international law, Canada prudently decided to forgo the use of retroactivity, allowing for past acts to be judged by the customary law that governed at the time of the commission of the crime. Lastly, Canada negotiated through the Rome Statute's requirements of "Command Responsibility" using its constitutional jurisprudence as the guide. The Canadian Supreme Court had found vicarious criminal liability for serious crimes, like murder, unconstitutional and required subjective *mens rea* requirements for adjudication.

65. *Id.* §§ 4(2)(a), 4(2)(b), 5(3), 6(a), 6(b), 7(4), 15(1)(a)–(d), 15(1.1), 15(2), 15(3), 15(5).

66. Rome Statute, *supra* note 2, art. 27; CAHWCA, *supra* note 20, § 3.

67. Rome Statute, *supra* note 2, art. 29; *see generally* CAHWCA, *supra* note 20.

68. Rome Statute, *supra* note 2, art. 5.

69. COALITION FOR THE INTERNATIONAL CRIMINAL COURT, US BILATERAL IMMUNITY OR SO-CALLED "ARTICLE 98" AGREEMENTS (2003), *available at* <http://www.globalpolicy.org/intljustice/icc/2003/0606usbilaterals.htm> (Among other rationale, some legal scholars and those involved in the Rome Conference negotiations have declared that the United States Article 98 agreements are contrary to the language of Article 98 itself. The proposed agreements attempt to amend the terms of the Rome Statute by ostensibly canceling out the concept of 'sending state' from Article 98(2). 'Sending state' indicates that the language of Article 98(2) is intended to cover only SOFAs, SOMAs and other similar agreements. SOFAs and SOMAs reflect a division of responsibility for a limited class of persons deliberately sent from one country to another and carefully addresses how any crimes they may commit should be addressed) [hereinafter Article 98 Agreements].

70. *See* Canadian Criminal Code, *supra* note 32.

Therefore, Canada fashioned a new crime with subjective criteria to assure that the stigma that a conviction for such a heinous crime would carry has sufficient due process.

B. Australia

On January 9, 2002, Australia's legislation which domestically implemented the Rome Statute came into effect without requiring amendments to the Australian constitution.⁷¹ The International Criminal Court Act of 2002 ("ICC Act") and the International Criminal Court ("Consequential Amendments") Act of 2002 ("ICCCA") were passed by parliament on June 27, 2002.⁷² Australia then ratified the Rome Statute on July 1, 2002, becoming the seventy-fifth state to ratify.⁷³ The ICC Act is mainly focused on the procedural elements, such as cooperation, arrest, and extradition between Australia and the ICC, and is therefore less important for the purposes of this discussion.⁷⁴

The more pertinent act is the ICCCA which not only codified the elements of each crime in painstaking detail and the corresponding maximum sentences, but also, *inter alia*, made the necessary modifications to the Australian Criminal Code.⁷⁵ The ICCCA contains all the major crimes in Articles 5 through 8 of the Rome Statute except Article 8(2)(b)(xx).⁷⁶ The subsection makes reference to

71. See Rome Statute, *supra* note 2; See International Criminal Court Act, 2002, No. 41 (Austl.) [hereinafter Australia ICC Act]; Hon. Darryl Williams, Commonwealth Attorney General, Speech to International Society for the Reform of Criminal Law regarding the International Criminal Court: The Australian Experience (Aug. 30, 2001), http://www.ag.gov.au/agd/WWW/attorneygeneralHome.nsf/Page/Speeches_2001_Speeches_The_International_Criminal_Court:_The_Australian_Experience (in a speech by the former Australian Attorney-General, Darryl Williams (1996-2003), he stated "The constitutionality of the proposed legislation giving effect to the ICC is one of the issues raised by some critics of Australian ratification. The Government has satisfied itself that ratification of the Statute and enactment of the necessary legislation will not be inconsistent with any provision of the Constitution").

72. See Australia ICC Act, *supra* note 71; International Criminal Court (Consequential Amendments) Act, 2002, No. 42, at 2 (Austl.) [hereinafter Australia ICCCA Act] (an act to amend the Criminal Code Act 1995 and certain other acts in consequence of the enactment of the International Criminal Court Act 2002, and for other purposes).

73. See Rome Statute, *supra* note 2; See COALITION FOR THE ICC, AUSTRALIA (2005) <http://www.iccnw.org/countryinfo/oceania/australia.html> (last visited Sept. 12, 2005).

74. See Australia ICC Act, *supra* note 71.

75. See Australia ICCCA Act, *supra* note 72.

76. *Id.*; Rome Statute, *supra* note 2, art. 8(2)(b)(xx) ("Employing weapons, projectiles and materials and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of international law of armed conflict, provided that such weapons, projectiles and materials and methods of warfare are the subject of a comprehensive prohibition and are included in an annex to this Statute, by an amendment in accordance with the relevant provisions set forth in Articles 121 and 123. . . .").

an annex to the Rome Statute which was not included in the final version of the Rome Statute and was supposed to delineate certain “weapons, projectiles and materials, and methods of warfare” in accordance with Article 8(2)(b)(xx).⁷⁷ The first substantive provision of the ICCCA, subdivision B, begins with the crime of genocide, Article 6 of the Rome Statute.⁷⁸ This marks the first time that the crime of genocide is established in Australian law, although there had been previous legislative attempts to do so by the Australian Parliament.⁷⁹ There are five offences of the crime of genocide as it appears in the Rome Statute, and the ICCCA mirrors both the elements and the offences.⁸⁰

However, the ICCCA does not require that the genocidal conduct take place in a “manifest pattern of similar conduct,” as is required in the Elements of Crimes.⁸¹ Intent alone suffices for prosecution.⁸² The lack of this element should ease the burden of the prosecution to convict an alleged perpetrator. Also, it solidifies the fact that complementarity jurisdiction can not only be invoked by Australia, making conviction easier for Australian courts than for the ICC, but that any prosecution would be upheld by the ICC in accordance with Article 19(2)(b) of the Rome Statute.

Subdivision C of the ICCCA creates the criminal offence of crimes against humanity and follows Article 7 of the Rome Statute.⁸³ The detailed subsections, beginning with 268.8, flesh out the elements of each crime.⁸⁴ The only deviation from the Rome Statute appears with the unique approach that Australia took regarding the crime against humanity of the “forced disappearances of persons” by dividing it into two parts thus broadening the reach of the crime beyond that of the Rome Statute.⁸⁵ The two sections differ with regards to the person who refuses to acknowledge the criminal act of “forced disappearance.”⁸⁶ Section 268.21(1)(e) places the judicial focus on the government or organization responsible for the forced disappearance, while section 268.21(2)(h) focuses on

77. Rome Statute, *supra* note 2, art. 8(2)(b)(xx).

78. Australia ICCCA Act, *supra* note 72, §§ B; Rome Statute, *supra* note 2, art. 6.

79. Timothy L.H. McCormack, *Australia's Legislation for the Implementation of the Rome Statute*, in NATIONAL LEGISLATION INCORPORATING INTERNATIONAL CRIMES 70, 71 (Matthias Neuner ed., 2003).

80. Rome Statute, *supra* note 2, art. 6; *See* Australia ICCCA, *supra* note 72.

81. INTERNATIONAL CRIMINAL COURT, ASSEMBLY OF STATES PARTIES, ELEMENTS OF CRIMES, ICC-ASP/1/3 (2002) [hereinafter ELEMENTS OF CRIMES].

82. *Id.*

83. Rome Statute, *supra* note 2, art. 7(1)(a)–(k); *see also* Australia ICCCA Act, *supra* note 72, §§ C 268.8–268.23 (Rome Statute art. 7(1)(a)–(k) corresponds to §§ C 268.8–268.23 of the Australia ICCCA Act).

84. Australia ICCCA Act, *supra* note 72, §§ C 268.8–268.23.

85. Rome Statute, *supra* note 2, art. 7-1(i); Australia ICCCA Act, *supra* note 72, §§ C 268.21; McCormack, *supra* note 79, at 71.

86. Australia ICCCA Act, *supra* note 72, §§ 268.21(1),(2).

the ‘perpetrator’ of the forced disappearance who refuses to acknowledge the forced disappearance.⁸⁷ By bifurcating Article 7(2)(i) of the Rome Statute, it assures that the crime will not go unpunished by simply denying either actual complicity in the criminal act or the official condoning of such acts by a representative group.⁸⁸ This complies with the general tenor of ending impunity in the Rome Statute.

Australian history, similar to that of the United States, evidences episodes of unjust dealings with the indigenous population of that continent.⁸⁹ This may explain in part the motivation of the Australian Parliament to not make the crime of genocide retrospective in its application, as Canada decided to do, but rather apply the new law going forward as of July 1, 2002. Article 6(e) of the Rome Statute criminalizes the forced transferring of children of one group to that of another group.⁹⁰ The Australian government has in the past taken children of aboriginal Australians and placed them elsewhere in an attempt to acculturate the indigenous Australians.⁹¹

Australia had attempted to employ the tool of universal jurisdiction as it pertained to criminal prosecutions of non-Australian citizens for crimes perpetrated against non-Australian citizens, specifically Nazi war criminals who had taken residence in Australia after the Second World War.⁹² Australia went so far as to grant universal jurisdiction over the crimes in the Rome Statute to the Australian courts.⁹³ Again, this may have been done to assure primacy over any case in which the ICC may have an interest. The Australian Attorney General is required to give his written consent before a prosecution can proceed, however, investigation *in absentia* may occur.⁹⁴

In sum, Australia first codified the crime of genocide in the ICCCA by duplicating the offences in the Rome Statute, but the ICCCA does not require that the genocidal conduct take place in a “manifest pattern of similar conduct,” as is required in the Elements of Crimes.⁹⁵ The crime of forced disappearances

87. *Id.*

88. *Id.*; Rome Statute, *supra* note 2, art. 7(2)(i).

89. See generally Michael Legg, *Indigenous Australians and International Law: Racial Discrimination, Genocide and Reparations*, 20 BERKELEY J. INT'L. L. 387 (2002) (discussing history of indigenous Australians).

90. Rome Statute, *supra* note 2, art. 6(e).

91. See Legg, *supra* note 89, at 389.

92. Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537 n.91 (1991).

93. See generally Australia ICCCA Act, *supra* note 72.

94. *Id.* pt. 3 (allows for a suspect to be arrested, charged, remanded to custody or released on bail before the AG's consent is obtained).

95. ELEMENTS OF CRIMES, *supra* note 81.

was divided into two crimes, with each focusing on the *mens rea* of distinct suspects, either governmental perpetrators or individual (non-governmental) perpetrators.⁹⁶ Finally, universal jurisdiction was granted for all crimes in the Rome Statute, however, there is no retrospectivity jurisdiction for the crime of genocide. It would appear that the deviations from the Rome Statute were to assure the Australian courts jurisdiction over crimes in which the ICC could have an interest and to possibly ease prosecutors' burdens for prosecution.

C. United Kingdom

The United Kingdom government had proclaimed its intention to be one of the first sixty states to ratify the Rome Statute.⁹⁷ Making good on this pledge, the United Kingdom signed the Rome Statute on November 30, 1998, then subsequently ratified it on October 4, 2001, becoming the forty-second state to do so.⁹⁸ As with dualist nations, until necessary domestic legislation is passed, a foreign treaty cannot be ratified. Further, the United Kingdom legal system does not allow self-executing treaties. Therefore, the United Kingdom ratification process does not allow for any international treaty obligations of the sovereign to be ratified until domestic legislation codifying the treaty obligations is passed through the parliamentary process.⁹⁹

The United Kingdom had an arguably more simplified legislative route to maneuver in order to ratify the Rome Statute due to its lack of any formal constitution. There were no insurmountable hurdles which would require modifying the fundamental source of domestic law. This does not mean, however, that the United Kingdom legal system is amenable to any and all proposed legislation. The United Kingdom common law has defined the boundaries of its society for centuries.

The United Kingdom passed the International Criminal Court Act ("ICC Act") in 2001,¹⁰⁰ which applies predominantly to England, Wales, and Northern Ireland,¹⁰¹ paving the way for ratification. Scotland adopted its own ICC Act the same year¹⁰² due to the fact that the Scottish Parliament has autonomy over the drafting and inclusion of criminal statutes for its territory. The

96. *Id.*

97. EUR. CONSULT. ASS., *Progress Report by the United Kingdom*, Doc. No. 31 (2001) [hereinafter Progress Report by U.K.].

98. See Rome Statute, *supra* note 2; see SIGNATURES & RATIFICATIONS, *supra* note 14.

99. Schense & Piragoff, *supra* note 2, at 248.

100. See International Criminal Court Act, 2001, c. 17 (U.K.) [hereinafter U.K. ICC Act]; John A. Gilbert, *The United Kingdom's Approach to Implementation of the Rome Statute*, in NATIONAL LEGISLATION INCORPORATING INTERNATIONAL CRIMES 55 (Matthias Neuner ed., 2003).

101. See Progress Report by the U.K., *supra* note 97.

102. International Criminal Court (Scot.) Bill, 2001, (S.P. Bill 27A).

parliamentary process comprises debates in both houses, the Commons and the Lords, approval by both houses, and royal consent.

The United Kingdom took a pragmatic approach to ratifying the Rome Statute. According to John A. Gilbert, a Grade 7 in the Home Office's Criminal Policy Group, the United Kingdom's "aim has been to assure that the offences under the Rome Statute can be effectively and successfully prosecuted in our domestic courts."¹⁰³

The United Kingdom incorporated the ICC crimes, in large part, by simple reference to the Rome Statute Articles 6 through 8 crimes,¹⁰⁴ and included the possibility of the crime of aggression in Article 9.¹⁰⁵ The ICC Act does not define any of the crimes in detail, but refers judges to the ICC Elements of Crimes.¹⁰⁶ Many of the crimes, however, had already been codified by the United Kingdom Parliament, and the concern was whether the incorporation of those crimes, pursuant to the wording of the Rome Statute, would suffice for ratification purposes.¹⁰⁷ The United Kingdom was apparently cognizant while drafting the law for fear of not implementing the Rome Statute in its entirety and thus included the mention of Article 9 in its implementing legislation.

The United Kingdom broadened its extradition law through the ICC Act 2001 by empowering its judicial system to extradite a suspect who has been accused of the crime of genocide, war crimes, or crimes against humanity, to a third-party state who has universal jurisdiction over the alleged crime even though the United Kingdom may not have jurisdiction.¹⁰⁸ The United Kingdom did this by adding to section 51(2)(b). This eliminated the criterion of dual criminality, which attaches a criminal specter to any person who is either a United Kingdom citizen, resident, or is somehow subject to United Kingdom

103. Gilbert, *supra* note 100, at 57.

104. U.K. ICC Act, *supra* note 100, §§ 50, 51.

105. (1) In this Part- "genocide" means an act of genocide as defined in Article 6, "crime against humanity" means a crime against humanity as defined in Article 7, and "war crime" means a war crime as defined in Article 8.2.

...

(2)(a) any relevant Elements of Crimes adopted in accordance with Article 9. . . .

U.K. ICC Act, *supra* note 100, § 50 (the crime of aggression is referred to in subpart (2)(a)).

106. (2) In interpreting and applying the provisions of those Articles the court shall take into account—

(a) any relevant Elements of Crimes adopted with Article 9, and

(b) until such time as Elements of Crimes are adopted under that Article, any relevant Elements of Crimes contained in the report of the Preparatory Commission for the ICC adopted on 30th June 2000.

UK ICC Act, *supra* note 100, § 50(2).

107. See Progress Report by the U.K., *supra* note 97.

108. See U.K. ICC Act, *supra* note 100, §§ 71–73 (these sections deal with extradition); GILBERT, *supra* note 100, at 61.

service of process jurisdiction,¹⁰⁹ and has allegedly committed any of the ICC crimes outside the United Kingdom, but is considered a crime.

Also, sections 52 and 59 of the ICC Act give United Kingdom courts the ability to extradite indicted suspects for crimes ancillary to genocide, war crimes, and crimes against humanity.¹¹⁰ Ancillary crimes are defined in sections 55 and 62 of the ICC Act as:

- 1) Aiding and abetting;
- 2) Counseling or procuring the commission of an offence;
- 3) Inciting a person to commit an offence;
- 4) Attempt or conspiring to commit an offence;
- 5) Assisting an offender; and
- 6) Concealing an offence.¹¹¹

Section 72 of the ICC Act, which closes the door on harboring international criminals for good, is an innovative approach to assure rule of law worldwide.¹¹² The ICC Act also removes the dual-criminality extradition rule so that states which have a broader criminal jurisdiction can extradite a suspect from the United Kingdom.¹¹³

The consent of the Attorney General is required before any prosecution can commence.¹¹⁴ Interestingly, the United Kingdom did not incorporate the general principles of law, like defenses, because there is very little divergence between the United Kingdom criminal provisions and those in the Rome Statute which correspond.¹¹⁵ However, Article 28 of the Rome Statute, "Command Responsibility," is replicated.¹¹⁶

D. Germany

For historical reasons, Germany had a moral obligation to not take a passive role in implementing the Rome Statute. The Rome Statute and the ICC are the direct progeny of the Nuremberg Tribunal which was convened as a result of the Nazi war of aggression and the perpetration of atrocities during the

109. U.K. ICC Act, *supra* note 100, § 51(2)(b).

110. *Id.* §§ 52, 59.

111. *Id.* §§ 55, 62.

112. *Id.* § 72.

113. *See Regina v. Bartle and the Commissioner of Police for the Metropolis and Others EX Parte Pinochet Regina v. Evans and Another and the Commissioner of Police for the Metropolis and Others EX Parte Pinochet*, [1999] A.C. (appeal taken from Q.B.) (discussing the dual criminality rule).

114. U.K. ICC Act, *supra* note 100, §§ 53(3), 60(3).

115. U.K. ICC Act, *supra* note 100, pt. 3, 4 (enumerating the rights of the accused suspect during the investigative stage); GILBERT, *supra* note 100, at 59.

116. U.K. ICC Act, *supra* note 100, § 65; Rome Statute, *supra* note 2, art. 28.

Second World War.¹¹⁷ Germany should be commended for its ICC implementing legislation, as it generally broadens the scope of German jurisdiction for both its courts, and with regard to specific criminal acts. It has, since the Berlin Conference, manifestly supported the implementation of the Rome Statute, evidenced by the subsequent amendment to its constitution allowing for the extradition of its nationals to other competent judicial *fora*.¹¹⁸ Germany also declared that the ICC may promote the beginning of a harmonization process of international criminal law amongst states.¹¹⁹ With its implementing legislation, Germany not only recognizes its international treaty obligations by incorporating language from the Geneva Convention and the Optional Protocols into the code, but has made a concerted effort to legislate a modern and functional legal framework to assure that the types of crimes that had been committed by past German governments never occur again or at least do not go unpunished.¹²⁰

Germany ratified the Rome Statute on December 11, 2000, becoming the twenty-fifth ratifying state.¹²¹ The legislature in Berlin passed the new German Code of Crimes Against International Law (“CCAIL”), called in German, *Völkerstrafgesetzbuch*, which entered into force on June 30, 2002.¹²² Prior to the enactment of the CCAIL, Germany had not codified such crimes as crimes against humanity and war crimes as such. However, Germany had previously codified the crime of genocide in 1955 when Germany ratified the Genocide Convention.¹²³ The only change made in the 1955 Genocide Convention was to update the antiquated terminology so as to bring the CCAIL into line with the Rome Statute, more common usage of terms, and move the crime into the part of the criminal code dealing with crimes against international law.¹²⁴

German lawmakers decided to utilize the CCAIL drafting exercise to codify only those crimes and principles of international criminal law that were

117. DINAH L. SHELTON, *INTERNATIONAL CRIMES, PEACE, AND HUMAN RIGHTS: THE ROLE OF THE INTERNATIONAL CRIMINAL COURT*, ix–xi (Dinah Shelton ed., 2000).

118. Schense & Piragoff, *supra* note 2, at 249; GRUNDGESETZ [GG] [Constitution] (F.R.G.).

119. Schense & Piragoff, *supra* note 2, at 254.

120. *Id.*

121. Rome Statute, *supra* note 2; see SIGNATURES & RATIFICATIONS, *supra* note 14.

122. See Act to Introduce the Code of Crimes against International Law, 2002, (Germany) [hereinafter German CCAIL Act]; see COALITION FOR THE ICC, GERMANY (2005) <http://www.iccnw.org/countryinfo/europecis/germany.html> (last visited Sept. 12, 2005).

123. Convention on the Prevention and Punishment of the Crime of Genocide, Jan. 12, 1951, 78 U.N.T.S. 277 (Germany’s accession occurred on Nov. 24, 1954) 119 [hereinafter Genocide Convention].

124. *Id.*; see also Andreas Zimmermann, *Main Features of the new German Code of Crimes against International Law*, in NATIONAL LEGISLATION INCORPORATING INTERNATIONAL CRIMES 140 (Matthias Neuner ed., 2003) (updating such terminology in the crime of genocide by switching *durch ihr Volkstum bestimmt*, a group determined by their nationality, with *ethnische Gruppe*, an ethnic group).

novel to the German Code, not completely revamp the criminal code.¹²⁵ Some of the deviations from the Rome Statute which were incorporated into the CCAIL broaden the scope of German jurisdiction. For example, section 6(1) of the CCAIL mandates that the killing of a single member of a protected group can constitute genocide if the perpetrator acted with the requisite *mens rea*.¹²⁶ The Rome Statute, on the other hand, in Article 6(a), clearly states that there must be multiple killings for it to be considered genocide, as it says, “[K]illing members of the group. . . .”¹²⁷ By lowering the *actus reus* threshold for genocide and correctly focusing on the *mens rea* of the perpetrator, additional indignity, violence, and inhumanity is not required to be visited upon more than one person before an ICC crime is committed.

Germany availed itself of universal jurisdiction prior to the incorporation of the CCAIL.¹²⁸ However, with the inclusion of the CCAIL into German law, the principle of universal jurisdiction would apply to all criminal offences against international law included in the CCAIL even if there is no linkage between Germany and the crime.¹²⁹ This specification, as Germany had proposed at the ICC Preparatory Committee negotiations in 1998,¹³⁰ is commendable and truly an example of universal jurisdiction. The prosecutors are given wide discretion whether to investigate an ICC crime due to the fear that German courts would be continuously congested with extraterritorial claims in search of a credible judicial forum.¹³¹ Germany supercedes not only its fellow ICC brethren-states, but the Rome Statute itself¹³² with regard to the reach of German jurisdiction as it pertains to the ICC crimes.

125. See German CCAIL Act, *supra* note 122; Matthais Neuner, *General Principles of International Criminal Law in Germany*, in NATIONAL LEGISLATION INCORPORATING INTERNATIONAL CRIMES 105 (Matthias Neuner ed., 2003).

126. German CCAIL Act, *supra* note 122, § 6(1).

127. Rome Statute, *supra* note 2, art. 6(a) (emphasis added).

128. The four Geneva Conventions include: Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 (Germany had already availed itself of universal jurisdiction for the crime of genocide and for the crime of murder against “protected persons” as defined in the Geneva Convention.) [hereinafter Geneva Conventions].

129. German CCAIL Act, *supra* note 122, § 1.

130. See generally Johan D. Van der Vyver, Personal Territorial Jurisdiction of the International Criminal Court, 14 EMORY INT’L L. REV. 1 (2000).

131. Neuner, *supra* note 125, at 107.

132. See generally Rome Statute, *supra* note 2 (There is no specific requirement of universal jurisdiction for signatory or domestic ratification purposes).

Many of the German deviations from the Rome Statute are due to considerations focusing specifically on the preference of using language that had been previously utilized in the German criminal law and therefore can successfully prosecute those suspected of committing ICC crimes.¹³³ This may be accomplished because it requires less judicial interpretation and may reflect administrative ease for prosecutors and defense counsel. As new terminology is incorporated, judicial interpretation is, at times, required to parse out the meaning as it is applied to a specific circumstance. With no ICC interpretations currently available and no jurisprudence to build upon, the German courts would rely on German usage as well as international judicial usage. The uncertainty of definitional meanings may cause some to question the judicial findings and ultimately the due process rights granted suspects. Therefore, balancing the use of well-established terminology in domestic jurisprudence and the inclusion of novel legal principles is crucial in the domestic debate regarding domestic legislation incorporating the Rome Statute.

Other language diverges from the Rome Statute as a result of German law makers questioning the developmental stage of certain customary legal principles.¹³⁴ As the Rome Statute evidences intense negotiation, it may not reflect the current state of customary international law. Germany apparently decided to forgo any negotiated regression and to bring its criminal code up to date with customary international law, understanding presumptively, that codifying the current state of customary law, it would not prejudice or hinder the continuing development of customary international law for domestic prosecution purposes.¹³⁵

Finally, deviations from the Rome Statute apparently were calculated to encompass those international legal obligations, embodied in the Genocide Convention and Geneva Convention and Optional Protocols, which were not incorporated into the Rome Statute.¹³⁶ One can assume that in some parts of the CCAIL, treaty language was chosen over the Rome Statute language because Germany wanted to broaden, not narrow, the scope of the CCAIL.¹³⁷ This does not only assure Germany's capability to benefit from complementarity over any ICC case, but it stands as an indicator to the international community of

133. Neuner, *supra* note 125, at 136.

134. Zimmerman, *supra* note 124, at 139 (discussing that the German CCAIL brings Germany's criminal code up to date with customary international law).

135. Rome Statute, *supra* note 2, art. 10.

136. Rome Statute, *supra* note 2; Zimmerman, *supra* note 124, at 138; *See also* Geneva Conventions, *supra* note 128; Genocide Convention, *supra* note 123.

137. *See generally* Rome Statute, *supra* note 2 (The Rome Statute was heavily negotiated and therefore certain provisions may reflect more of a political compromise than the current status of customary international law.).

Germany's commitment to the rule of law and ending impunity for those who choose to ignore it.

E. France

French ratification of the Rome Statute experienced a major obstacle which could have derailed French involvement in the ICC, and had it not been for the stalwart desire and will of the French to link themselves to the concept of the ICC, this hurdle may have proven insurmountable. Although most treaty obligations in civil law states become part of the national law when ratified, France holds its constitution above any international legal obligation and requires a constitutional amendment for any conflicting treaty obligation.¹³⁸ France, which is a civil law state, may submit any possibly conflicting treaty obligation to the constitutional court for interpretation.¹³⁹

France signed the Rome Statute on July 18, 1998, and due to the constitutional dilemmas which subsequently arose, almost two years transpired before France was able to ratify the statute, which ultimately occurred on June 9, 2000.¹⁴⁰ Subsequent to the official expression of the French government of its intention to ratify the Rome Statute and its initial signature in 1998 at the Rome Conference, both the French President and the Prime Minister requested on December 24, 1998, that the French Constitutional Court issue a ruling on the constitutionality of the Rome Statute.¹⁴¹

The constitutional court held that not only was Article 27¹⁴² of the Rome Statute in direct contradiction to the protections provided for by Articles 26,¹⁴³

138. Schense & Piragoff, *supra* note 2, at 238.

139. *Id.* at 248.

140. See Rome Statute, *supra* note 2; SIGNATURES & RATIFICATIONS, *supra* note 14 (showing when France ratified the Rome Statute).

141. CC decision no. 98-408DC, Jan. 22, 1999, J.O., available at <http://www.conseil-constitutionnel.fr/langues/anglais/a98408dc.pdf> (the Constitutional Court's Decision regarding the incompatibility of Article 27 of the Rome Statute and the French Constitution) [hereinafter Const. Council].

142. Irrelevance of official capacity:

1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.

2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.

Rome Statute, *supra* note 2, art. 27.

143. La Constitution du 4 Octobre 1958 CONST. art. 26 (Fr.) (No Member of Parliament shall be prosecuted, investigated, arrested, detained or tried in respect of opinions expressed or votes cast in the

68,¹⁴⁴ and 68-1 of the French Constitution for officials and heads of state in the official capacity,¹⁴⁵ but that Articles 17 and 20 together,¹⁴⁶ and Article 99(4)¹⁴⁷ of the Rome Statute had to be addressed by the French legislature due to conflicts between French constitutional principles and the authority of the ICC as granted by the Rome Statute.

The French Constitutional Court found that the constitution, which strictly forbade any judicial organ other than the French High Court of Justice to indict the President of the Republic, had to be amended prior to ratification.¹⁴⁸ The President of the Republic enjoyed an absolute immunity which the Rome Statute would not recognize.¹⁴⁹ The constitutional spotlight also fell upon the members of the French Parliament.¹⁵⁰ The constitutional court, focusing on the immunities enjoyed by French Parliamentarians with respect to the opinions they espouse and the votes which they cast, held that Article 27 of the Rome

exercise of his duties. No Member of Parliament shall be arrested for a serious crime or other major offence, nor shall he be subjected to any other custodial or semi-custodial measure, without the authorization of the Bureau of the assembly of which he is a member. Such authorization shall not be required in the case of a serious crime or other major offence committed *flagrante delicto* or a final sentence. The detention, subsection to custodial or semi-custodial measures, or prosecution of a Member of Parliament shall be suspended for the duration of the session if the assembly of which he is a member so requires. The assembly concerned shall convene as of right for additional sittings in order to permit the preceding paragraph to be applied should circumstances so require.) [hereinafter France Const.].

144. France Const., *supra* note 143, art. 68 (“The President of the Republic shall not be held liable for acts performed in the exercise of his duties except in the case of high treason. He may be indicted only by the two assemblies ruling by identical vote in open ballots and by an absolute majority of their members. He shall be tried by the High Court of Justice.”).

145. France Const., *supra* note 143, art. 68(1) (Members of the Government shall be criminally liable for acts performed in the exercise of their duties and classified as serious crimes or other major offences at the time they were committed. They shall be tried by the Court of Justice of the Republic. The Court of Justice of the Republic shall be bound by such definition of serious crimes and other major offences and such determination of penalties as are laid down by statute.).

146. Rome Statute, *supra* note 2, art. 17, 20; Articles 17 and 20 taken together of the Rome Statute, according to the French Constitutional Court, would allow the ICC to:

[L]egitimately take jurisdiction based on a single application of a law of pardon or of domestic rules regarding prescriptions. In such cases, France apart from any unwillingness or inability of the State, could be forced to arrest and hand over a person to the Court for the sole reason that the acts are covered, according to French law, by pardon or prescription.

Olivier Barrat, CSIL Beijing Symposium on the Comparative Study of the International Criminal Law and the Rome Statute, Ratification and Adoption: The French Perspective 2 (2003).

147. Rome Statute, *supra* note 2, art. 99(4).

148. See Const. Council, *supra* note 141.

149. See *id.* ¶ 15.

150. *Id.*

Statute violated this constitutional safeguard.¹⁵¹ The court held that Article 26 of the French Constitution did not allow for members of parliament to be arrested for a serious crime, “nor be subjected to any other custodial or semi-custodial measure without the authorization of the bureau of the assembly of which they are a member,” and that, “such authorization is not required in the case of a serious crime or other major offence committed *flagrante delicto*.”¹⁵²

Regarding the concept and function with which “complementarity” would play in the administration of jurisdiction between the ICC and France, the constitutional court held that restrictions to the principle of “complementarity” were defined and based in the rule *pacta sunt servanda*, a concept which is “clear and well-defined.”¹⁵³

The constitutional court also found that the powers of the ICC Prosecutor, as prescribed by the Rome Statute, were usurping the fringes of national sovereignty; specifically that the ICC Prosecutor is empowered to act on French territory without oversight of the national authorities.¹⁵⁴ To some pundits, the infringements on the French Constitution were quasi-ethereal, for example, the attack on the constitutional principle of “the essential conditions of the exercise of national sovereignty” due to the ICC Prosecutor’s unconstrained powers.¹⁵⁵

Ultimately, France chose a legislative path which circumvented the constitutional obstacles it faced. By an overwhelming vote of 858 to six, France amended its Constitution, inserting a new Article, Article 53–2, which states, “[t]he Republic recognizes the jurisdiction of the ICC according to the conditions articulated by the treaty signed on July 18, 1998.”¹⁵⁶ The French approach is apparently stated so as to thwart the necessity of creating an exception to specific constitutional Articles.¹⁵⁷

Arguably, there remains a fundamental hurdle still to negotiate regarding the approach which the French took to incorporate the obligations contained within the Rome Statute. It seems that there has been no conclusive judicial determination regarding whether the French amendment will ultimately create constitutional inconsistencies, but one can reasonably assume that as the

151. See *id.* ¶ 5.

152. *Id.* ¶ 16.

153. See Const. Council, *supra* note 141; Int’l Comm. of the Red Cross, *Issues Raised with Regard to the Rome Statute of the International Criminal Court by National Constitutional Courts, Supreme Courts and Councils of State*, at 1 (Jan. 2003).

154. See Const. Council, *supra* note 141.

155. See France Const., *supra* note 143; Barrat, *supra* note 146, at 2.

156. France Const., *supra* note 143, art. 53(2); Helen Duffy, *National Constitutional Compatibility and the International Criminal Court*, 11 DUKE J. COMP. & INT’L L. 5, 9 (2001).

157. Venice Commission, *Report on Constitutional Issues Raised by the Ratification of the Rome Statute of the International Criminal Court*, CDL/2000/104 (Jan. 15, 2001).

circumstances arise, the French courts will sort out the hierarchy and procedures for meeting the obligations contained within the Rome Statute.

Appending the constitution by simply inserting language which "recognizes the jurisdiction of the ICC according to the Rome Statute" may signify that conditions contained within the Rome Statute have been elevated to those with constitutional primacy. Accordingly, all obligations under the Rome Statute would have the full weight of the constitution behind them. This may create inherent contradictions and inconsistencies within the French constitutional practice.

According to French law, the French Constitution reigns as supreme law on French territory, but mandated inaction in accordance with constitutional tenets may require action under the Rome Statute.¹⁵⁸ For example, since the French constitution has higher standing than international treaties, those who enjoy immunity as prescribed under the constitution and cannot be prosecuted in French courts may have to be extradited to the ICC upon its exercise of jurisdiction over the individual for alleged criminal acts.¹⁵⁹ Thus, what was an absolute immunity guaranteed by the constitution is now merely an abdication to the ICC of custody and, in effect, is no immunity at all. The constitutional inconsistency is, however, in accordance with the obligation to strip immunity of persons suspected of committing an ICC crime.

Although the approach the French utilized suffices to ratify the Rome Statute, subsequent French and ICC jurisprudence will detail the adequacy of the approach taken by the French government.

III. THE UNITED STATES' PERSPECTIVE

A. Discussion of United States' Interests

The approaches that the five countries took in legislating their unique versions of the Rome Statute are paradigmatic of a multilateral non-self-executing treaty which does not allow for any reservations, and certain legal obligations can supersede historically established constitutional tenets. Each state had to create an amalgam of domestic criminal law, due process and procedure, and merge it with an internationally negotiated treaty full of political compromise and customary international law.

The United States can assume that many of the issues that arose during the legislative implementation processes of the various states would translate in some form or other into issues which might arise, were the United States to attempt to implement the Rome Statute. Ancillary to this exercise is the

158. See France Const., *supra* note 143.

159. Barrat, *supra* note 146, at 4.

knowledge of what issues have raised concern amongst the states about the Rome Statute and their inclusion in the ICC regime. Gleaning this insight is both beneficial and time-saving for Congress. The major issues, with which all or most of the states had to grapple, were:

- 1) Whether to use previously legislated attempts of ICC crimes or to utilize the language provided by the Rome Statute due to the possibility of not fully implementing the Rome Statute;
- 2) How to reconcile a state's granting of immunity for the leading political decision makers and Article 27 of the Rome Statute, Irrelevance of Official Capacity;
- 3) Whether to implement retrospective jurisdiction to the ICC crimes;
- 4) Whether to apply universal jurisdiction to the ICC crimes; and
- 5) The extent to which the domestic courts of each country would be able to effectively and successfully prosecute those accused of ICC crimes.

What all states had in common was a cognizance of not fully implementing the Rome Statute resulting in their inability to take advantage of complementarity jurisdiction and thus exposing themselves unnecessarily to ICC jurisdiction. Articles 17(1) and 18 of the Rome Statute are the jurisdictional linchpins of the Rome Statute and, accordingly, they should also be the main focus for the United States, regardless of whether the United States decides to ratify the statute and become a signatory member state.¹⁶⁰

Article 18 is the general roadmap for admissibility and complementarity.¹⁶¹ Article 18 defines the steps that are required for both the prosecutor and the state when a situation has been deemed reasonable to investigate.¹⁶² Article 17(1) lays out a test for which, if met, states can guarantee primacy on a case by case basis within the ICC jurisdiction.¹⁶³ In effect, the two Articles make the ICC a court of last resort. Only if a state is shown to be unwilling or unable to genuinely investigate or prosecute a case can the ICC acquire primary jurisdiction.

To assure primacy of United States jurisdiction over ICC crimes and effectively eliminate the ICC's ability to prosecute persons from the United States, the United States would have to create legislation to close the gaps in

160. Rome Statute, *supra* note 2, art. 17(1), 18.

161. *Id.* art. 18.

162. Rome Statute, *supra* note 2, art. 18(1) (The meaning of "state" here is meant as the state that would normally exercise jurisdiction over the crimes concerned, as it is used in Article 18(1) of the Rome Statute.).

163. *Id.* art. 17(1).

title 18 of the United States Code. This would presumably protect United States' interests by securing its ability to prosecute all persons including United States' nationals who have allegedly committed certain ICC crimes overseas where United States federal jurisdiction is currently absent.¹⁶⁴

In accordance with Article 18 procedures, were the prosecutor to decide to continue with an investigation or prosecution after having deferred to the state, the prosecutor would have to bring the issue before the pre-trial chambers of the ICC to remove the case from the state's jurisdiction.¹⁶⁵ By closing the jurisdictional gaps in the United States criminal code, and if the ICC Prosecutor were motivated by anti-American propagandizing, as the United States has argued is a possibility, it is reasonable to suppose that the pre-trial chamber would be unsympathetic to the prosecutor's concerns were the United States to have in place domestic legislation that left no room for doubt.

The purpose of the ICC is not to try individual and isolated crimes, as discussed above, but as the preamble to the Rome Statute states, its focus is on the adjudication of such grave criminal acts that threaten the peace, security, and well-being of the world, and to end the impunity for the perpetrators of grave crimes.¹⁶⁶ As the United States continues with the "war on terror," the ICC is poised to focus the global spotlight of truth and justice on the perpetrators of human calamity.

Regardless of whether the ICC will prove to be the premier venue for the prosecution of terrorists worldwide, the incorporation of the ICC crimes into United States law would be an adept tool for the prosecution of terror suspects in United States courts. The ability to reach globally, to all nationalities, to extradite according to law, would serve as a moral victory for the United States and the rule of law. The termination of global impunity for terrorists that escape justice by hiding behind the protections of state-sponsors of terrorism is one of the rationales put forward by the current United States Administration for the invasion of Iraq.

The systematic attacks perpetrated against the United States on September 11, 2001, would have been within the ICC's jurisdiction, had the ICC existed at the time. Difficulties in obtaining personal jurisdiction of suspected terrorists have proven on occasion to be an insurmountable hurdle for the international administration of justice, as evidenced by the Lockerbie suspects.¹⁶⁷ Since it

164. CASSEL, *supra* note 1, at 436–38. (discussing the United States' difficulty in prosecuting international perpetrators of genocide, such as Pol Pot and Saddam Hussein's Lieutenants in federal court due to the lack of federal jurisdiction for the crimes they had allegedly committed).

165. Rome Statute, *supra* note 2, art. 18.

166. *Id.* pmb1.

167. See generally Omer Y. Elagab, *The Hague as the Seat of the Lockerbie Trial: Some Constraints*, INTERNATIONAL LAWYER (2000).

appears as if the “war on terror” will continue for the foreseeable future, empowering the United States to advantageously utilize the rule of law to bring suspects to justice should be given serious consideration. It may even revitalize the international perception of current United States foreign policy.

Although the United States during the Clinton Administration may have touted the necessity and desire to establish a permanent international criminal court,¹⁶⁸ it would appear that the United States is the single largest impediment to the legitimacy of the ICC.¹⁶⁹ Even though the United States actively participated and even took a leading role in the negotiation of the Rome Statute, the United States stands almost alone in its rejection of the ICC.¹⁷⁰ Since the Rome Statute was finalized at the end of the 1998 conference, the United States has attempted to redress issues which Ambassador David Scheffer, the United States lead negotiator at Rome, called “fundamental flaws in the Rome Treaty.”¹⁷¹ The United States has also legislated policy to undermine the ICC.¹⁷² Presently, there are no prospects that the United States will sign, re-sign, or ratify the existing text in the future.¹⁷³ Reflective of the current administration’s policy on the ICC, Congressman Vito Fossella (R-NY, 13th District) warned that the establishment of the ICC to prosecute war crimes could be used by

168. HOWARD BALL, PROSECUTING WAR CRIMES AND GENOCIDE, THE TWENTIETH CENTURY EXPERIENCE 188 (1999); David Scheffer, *The United States and the ICC*, in INTERNATIONAL CRIMES, PEACE, AND HUMAN RIGHTS: THE ROLE OF THE INTERNATIONAL CRIMINAL COURT 203 (Dinah Shelton ed., 2000); see also President’s Remarks Honoring Genocide Survivors in Kigali, Rwanda, 34 WEEKLY COMP. PRES. DOC. 13 (Mar. 30, 1998); see also STERLING JOHNSON, PEACE WITHOUT JUSTICE: HEGEMONIC INSTABILITY OR INTERNATIONAL CRIMINAL LAW? 1 (2003).

169. Bassiouni, *supra* note 7 (stating that the greatest source of uncertainty for the ICC is the current United States position); BALL, *supra* note 168, at 188.

170. See Rome Statute, *supra* note 2; see SIGNATURES & RATIFICATIONS, *supra* note 14 (There are 98 countries that have currently ratified the Rome Statute.); other countries that voted to reject the Rome Statute were Israel, Iraq, Qatar, China, Libya, and Yemen. Human Rights Watch, *The United States and the International Criminal Court*, <http://www.hrw.org/campaigns/icc/us.htm> (last visited Oct. 3, 2005).

171. See USUN Press Release, David J. Scheffer, Statement on “The International Criminal Court” (Oct. 21, 1998), available at http://www.un.int/usa/98_179.htm.

172. See Article 98 Agreements, *supra* note 69 (legislation undermining the ICC); see ‘American Servicemembers’ Protection Act of 2001, 107th Cong. § 857 (2001) [hereinafter ASPA]; *U.S. Threatens to Cut Aid to Countries That Support the ICC*, HUMAN RIGHTS FIRST, Dec. 7, 2004, http://www.humanrightsfirst.org/media/2004_alerts/ij_1207_icc.htm (threats to withhold financial payments to countries who support the ICC).

173. David J. Scheffer, *The United States and the International Criminal Court*, 93 AM. J. INT’L L. 12, 121 (1999) (“Having considered the matter with great care, the United States will not sign the treaty in its present form.”).

terrorist nations and enemies of the United States to thwart the war on terrorism.¹⁷⁴

The importance of United States participation in the process is exemplified by the leading role it had during the Preparatory Commission.¹⁷⁵ Subsequent review conferences will remain the places where the United States can participate and influence the future development of the court. By making the political decision to not participate in the ICC, the United States voluntarily relinquishes its ability to directly influence the court as it matures. The United States, for example, will not be able to participate in the important decisions regarding proposing judicial candidates, the ICC Prosecutor, or general court staffing.¹⁷⁶

Also, the United States may not have a presence as an observer in the Assembly of State Parties in 2009, when, supposedly, the signatory states are to attempt a working definition of the crime of aggression.¹⁷⁷ However, as an original signatory state, the United States has the right to attend.¹⁷⁸ Since the Bush Administration took office in 2001, it has sent two delegations to the Preparatory Commission Sessions.¹⁷⁹ Even though the Bush Administration's delegations declared that the United States did not support the ICC and did not participate in the plenary sessions, they did participate in the working groups on financing of the ICC and the definition of the crime of aggression.¹⁸⁰ There is simply too much at stake.

Specifically, the United States would not be able to voice its concern regarding the definition of the crime in which the United States might find itself most exposed and little, if any, influence would have been exercised in its formation. Although some, with greater insight, feel that the crime of aggression will not be defined in the foreseeable future.¹⁸¹ The foregoing of any significant influence over the eventual definition of the crime of aggression may prove to be ultimately rather unfortunate as it could either create an unbridgeable chasm between the United States and the ICC or it quite possibly could spell the eventual demise of the ICC.

174. Congressman Vito J. Fossella, *Fossella Warns Int'l Criminal Court Could Hinder America's War on Terrorism*, July 12, 2002, <http://www.house.gov/fossella/Press/pr020712.htm>.

175. See Scheffer, *supra* note 10, at 98.

176. John Washburn, *The International Criminal Court Arrives—The U.S. Position: Status and Prospects*, 25 *FORDHAM INT'L L.J.* 873, 880 (2002).

177. Rome Statute, *supra* note 2, art. 112 (describing the makeup and role of the Assembly of State Parties within the International Criminal Court).

178. *Id.*

179. *Id.*

180. *Id.*

181. See Bassiouni, *supra* note 7.

Were the United States to reverse its current disengagement from the ICC, there appears to be no internationally recognized requirement or procedure to repudiate the Bolton letter of May 6, 2002, from the United Nations (U.N.).¹⁸² According to the U.N. Under-Secretary for Legal Affairs, never before has a state unsigned a U.N. treaty.¹⁸³ Consequently, the procedures for withdrawal of the document, if even necessary, are equally unexplored, specifically regarding the legal significance of such a repudiation.

The Bolton letter was merely to notify the U.N. Secretary-General of the United States intent to not become a party to the Rome Statute, a requirement under the Vienna Convention on the Law of Treaties.¹⁸⁴ Per Article 18 of the Vienna Convention on the Law of Treaties, once a state has signed a treaty it is barred from acts which would defeat the object and purpose of the treaty.¹⁸⁵ The United States passed the American Servicemembers' Protection Act (ASPA) two months later, in late July, 2002.¹⁸⁶

Simply renouncing the Bolton letter by diplomatic communiqué to the Secretary General, total disengagement by the United States would ostensibly terminate. Communicating United States intent to the U.N. is important because, without doing so, any United States legislation closing the gaps in title

182. Letter from John R. Bolton, Under Secretary of State for Arms Control, to General Kofi Annan, U.N. Secretary-General (May 6, 2002), available at <http://www.amicc.org/docs/bolton.pdf> (This letter was the official communication from the United States government which informed the Secretary General of the U.N. that the United States did not intend to become a party to the Rome Statute, and stated that the United States has no legal obligations arising from President Clinton's signature on December 31, 2000.) [hereinafter Bolton Letter].

183. Press Release, World Federalist Association, Bush Official Hints at "Unsigned" of Rome Statute (Mar. 28, 2002) (quoting U.N. Under-Secretary for Legal Affairs).

184. This is to inform you, in connection with the Rome Statute of the International Criminal Court adopted on July 17, 1998, that the United States does not intend to become a party to the treaty. Accordingly, the United States has no legal obligations arising from its signature on December 31, 2000. The United States requests that its intention not to become a party, as expressed in this letter, be reflected in the depositary's status lists relating to this treaty.
Bolton Letter, *supra* note 182.

185. Article 18. Obligation not to defeat the object and purpose of a treaty prior to its entry into force
A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when:

- (a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or
- (b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.

Vienna Convention, *supra* note 12, art. 18.

186. See ASPA, *supra* note 172; see *Chronology of ICC-Related Legislation*, WASHINGTON WORKING GROUP ON THE ICC (May, 2001), available at <http://www.iccnw.org/documents/otherissues/aspa/presswiccaspa200208.doc>.

18 would not allow the United States to be “willing” to genuinely investigate or prosecute, now that the United States was “able” to do so. Also, by renouncing the Bolton letter, the ICC pre-trial chambers would be less sympathetic to *proprio motu* requests by the prosecutor to remove the case from United States jurisdiction.

B. United States’ Fears

The trepidation that the United States has expressed regarding the ICC was best articulated by the United States contingent at Rome,¹⁸⁷ then rehashed by the Bush Administration sometime subsequent. It appears to center around the fear of the United States losing its sovereign decision-making power¹⁸⁸ over its citizenry and national interests,¹⁸⁹ even when acting strictly within the U.N. authorized confines of a peacekeeping mission.¹⁹⁰ While the United States currently maintains that it does not recognize any obligations under the Rome Statute,¹⁹¹ remarkably, the United States is questionably more exposed as a non-signatory state than a state who has signed the treaty.¹⁹² Additionally, questions concerning sovereign integrity of non-party states to the Rome Statute arose with U.N. Security Council Resolution 1593 of March 31, 2005, granting the ICC Prosecutor “Chapter VII” authority to begin an investigation of the alleged atrocities perpetrated in Sudan.¹⁹³

These are powerful and valid arguments and are not to be easily discarded by those who merely disagree with the United States foreign policy or its negotiating strategy in Rome. The validity of these arguments must not only be discussed by the international community. They must be met with a political response that re-engages the United States into the ICC fold and the international community as a whole. Without dialogue and a resolution, the ICC will marginally exist at its own peril. Even if the United States Administration continues its current policy of actively working to isolate itself from the ICC, the United States should nonetheless prepare its federal criminal code in an attempt to minimize, if not fully eliminate, its exposure and create the requisite political and legal environment to protect its national interests and assure United

187. BALL, *supra* note 168, at 191.

188. Scheffer, *supra* note 173, at 15; BALL, *supra* note 168, at 201.

189. BALL, *supra* note 168, at 191; Thomas Omestad, *The Brief for a World Court: a Permanent War-Crimes Tribunal Is Coming, but Will it Have Teeth?*, U.S. NEWS & WORLD REPORT, Oct. 6, 1997, at 52.

190. BALL, *supra* note 168, at 192.

191. Bolton Letter, *supra* note 182 (The United States has no legal obligations arising from President Clinton’s signature on December 31, 2000.).

192. William K. Lietzau, *International Criminal Law after Rome: Concerns from a United States Military Perspective*, 64 LAW & CONTEMP. PROBS. 119, 131 (2001).

193. S.C. Res. 1593, U.N. Doc. S/RES/1593 (March 31, 2005).

States primacy over all potential ICC actions involving those United States interests.

A possible scenario could develop as follows: the United States President gives the approval to bomb what intelligence sources have indicated is a building housing belligerents, when in fact it is later proven to have been a hospital and innocent civilians are killed. An NGO, or the state where the bombing took place, or a state of nationality of a victim (if they are members of the ICC regime) informs the ICC Prosecutor of the incident. Before the ICC Prosecutor can initiate an investigation, he must inform all relevant parties of the incident. By calling on the states concerned, complementarity mandates that the United States have the option to take control of the investigation in accordance with Articles 17 and 18 of the Rome Statute.

For the United States to comply with Articles 17 and 18 of the Rome Statute¹⁹⁴ and assume primacy over the investigation and possible adjudication of American citizens accused of an ICC crime, the United States would have to be able to both investigate and prosecute the alleged crime. Currently, the United States does not have the legal framework in place to strictly comply with all the demands of Articles 17 and 18 of the Rome Statute, as gaps exist in the United States criminal code regarding certain ICC crimes.¹⁹⁵ The United States would have to initiate a *bona fide* investigation within six months and prove to the ICC Prosecutor that the investigation, if needed, was able to trace up the line of command, possibly up to the Chief Executive level.¹⁹⁶ The Rome Statute does not recognize immunity for heads of state from prosecution.¹⁹⁷ The fear of an international judicial organ mandating an investigation and the mere possibility of prosecuting the President of the United States for decisions made in his official capacity is real. It may prove to be one of the political hurdles that the United States is incapable of clearing.

The United States could argue that having to initiate an investigation of the President at the behest of an international body is a loss of sovereignty. Were the ICC Prosecutor not satisfied with the United States capability to prosecute a suspect, the ICC Prosecutor could forward a request to the pre-trial chambers of the ICC and ask for the judge's approval to handle both the investigation and

194. Rome Statute, *supra* note 2, arts. 17, 18.

195. *Id.*; Crimes and Criminal Procedure, 18 U.S.C. §§ 1091, 2441, 1111 (2000); CASSEL, *supra* note 1, at 436.

196. CASSEL, *supra* note 1, at 436.

197. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.

Rome Statute, *supra* note 2, art. 27(1).

possible subsequent prosecution of United States personnel involved in the bombing of the hospital.

Failing in the Article 18 arguments, the prosecutor may then look to Article 17(1) for jurisdiction, which is a case by case jurisdictional test. Article 17(1) of the Rome Statute states, “the court shall determine that a case is inadmissible where the case is being investigated or prosecuted by a state which has jurisdiction over it, unless the state is *unwilling or unable* genuinely to carry out the investigation or prosecution. . . .”¹⁹⁸ If the United States does not have the requisite criminal statutes to satisfy Article 17(1), then in fact the United States is *ipso facto* “unable” to prosecute.¹⁹⁹ Were the United States to have the requisite laws on the books, then the only question would be whether the United States is “unwilling” to investigate or prosecute. This is a fundamentally different question since every state must face this test, regardless of the breadth of their implementing legislation.

Another major reservation that the United States seems to have with the ICC is the fear that United States civilian and military persons would be prosecuted for Article 5 crimes by rogue and politically motivated states, the ICC Prosecutor, or the ICC Judges due to the possibility of anti-American propagandizing.²⁰⁰ There is also very little in the Rome Statute that recognizes the unique circumstances of the United States military such that the United States has “reluctantly had to conclude that the treaty, in its present form, contains flaws that render it unacceptable.”²⁰¹ The ICC only focuses on the extremely heinous crimes, as they are defined in Articles 5 through 8, that are crimes in which the United States government arguably does not engage.²⁰² The United States has been a world leader in establishing *ad hoc* tribunals and bringing the need for adjudication of international criminals to the forefront in war stricken parts of the world like Rwanda, Sierra Leone, the Balkans,²⁰³ and most recently in Cambodia, where direct legislative attention is focused on ending impunity for the surviving Khmer Rouge officials.²⁰⁴

198. *Id.* art. 17(1) (emphasis added).

199. *Id.*

200. BRUCE BROOMHALL, *INTERNATIONAL JUSTICE AND THE INTERNATIONAL CRIMINAL COURT: BETWEEN SOVEREIGNTY AND THE RULE OF LAW* 165 (2003).

201. Rome Statute, *supra* note 2; BALL, *supra* note 168, at 201 (quoting Ambassador David J. Scheffer who said, “On the practical side, no other nation matches the extent of the United States overseas military commitments through alliances and special missions such as current peacekeeping commitments. . . .”).

202. Rome Statute, *supra* note 2, arts. 5–8.

203. David J. Scheffer, *P-I Focus: U. S. Sabotages International Court at Its Own Peril*, THE SEATTLE POST-INTELLIGENCER, Feb. 1, 2004, http://seattlepi.nwsourc.com/opinion/158282_focus01.html.

204. See Ker Munthit, *Khmer Rouge Bosses Could Face Trials Soon*, THE GLOBE AND MAIL (Can.), Oct. 6, 2004.

Accompanying the United States Administration's disassociation from the ICC, the United States Congress took a significant step to codify the political disengagement, the purposes of which can be viewed as a precursor to continued negotiations regarding United States involvement in the ICC regime. The ASPA was signed into law in August, 2002, by President Bush in order "to protect United States military personnel and other elected and appointed officials of the United States Government against criminal prosecution by an international criminal court to which the United States is not a party."²⁰⁵ But for the Dodd Amendment inserted into the bill which eventually became Public Law 107-206, as a second degree amendment, the disassociation would have been a complete rupture.²⁰⁶

The United States has legislated attempts to not only insulate itself from the reach of the ICC, but also to penalize those states who do ratify the Rome Statute as evidenced in the recent international debate regarding the "Article 98 Agreements" which grants a waiver and allows states to disregard their obligation to cooperate with the ICC regarding the surrender of persons wanted by the ICC if it were to require the states to act inconsistently with their obligations under international law and agreements.²⁰⁷

IV. COMPARISON

A. *What the United States Can Learn From the Different Approaches*

As discussed briefly above, the United States had legislated some of the ICC crimes prior to the existence of the ICC.²⁰⁸ It would not be advisable, however, for the United States to consider those statutes as substitutes for the Rome Statute Articles 5 through 8 for a few reasons. First and most significantly, current federal jurisdiction regarding war crimes and genocide has significant jurisdictional gaps which do not allow for their prosecution in certain cases.

Other democracies wrestled with the possibility of using preexisting legislation as substitutes for the Rome Statute language, in part, due to the familiarity that their courts and lawyers had with the former legislation. Ultimately, the states came to the realization that to fully assure ratification of the Rome Statute, their codes had to be updated. It was in their best interests to do so.

205. See ASPA, *supra* note 172.

206. Supplemental Appropriations Act for Further Recovery from and Response to Terrorist Attacks on the United States, Pub. L. No. 107-206, 116 Stat. 820 (2002).

207. Rome Statute, *supra* note 2, art. 98.

208. 18 U.S.C. §§ 1091, 2441 (these sections are respectively the United States federal crimes of genocide and war crimes).

Germany, for example, wrestled with using new language and ultimately decided to not only update the old terminology with language from the Rome Statute, but to broaden the scope of the implementing legislation by including language from its international treaty obligations, which were not included in the Rome Statute, arising from the Geneva Convention and Optional Protocols. While the German technique is first-rate, there was no technical reason to include the Optional Protocols to the Geneva Convention. The legal obligations arising from ratified international treaties are binding nonetheless.

The United States will have to address Article 27 of the Rome Statute, “Irrelevance of Official Capacity,” in the near future regardless of whether the United States wishes to ratify the Rome Statute.²⁰⁹ The fact that tests in Articles 17 and 18 require a state to be *able and willing* to genuinely investigate may require an investigation of governmental officials (emphasis added).²¹⁰ This apparently cannot be avoided for state parties to the Rome Statute. The United States can rely on the state of customary international law were the United States to remain a non-state party to the ICC, as the ICJ in *Congo v Belgium* drew a road map for head of state immunity.²¹¹ All state parties to the Rome Statute have acquiesced to the abrogation of immunity for ICC crimes. A government official may retain his or her immunity for domestic criminal proceedings, but the domestic immunity will be ignored for ICC purposes. The French example is on point. The French added a phrase to their constitution recognizing the jurisdiction of the ICC according to the Rome Statute. The constitutional amendment continues to provide domestic immunity for French politicians acting in their official capacity from domestic criminal prosecutions but does not shield the same persons from the ICC’s jurisdiction. However, non-state parties to the Rome Statute must rely on customary international law.

With regard to non-state parties to the Rome Statute, under customary international law, the ICJ held in *Congo v Belgium* that there are four exceptions to an incumbent head of state’s absolute immunity:

- 1) A head of state is not immune from process in his or her home country;
- 2) The home country has the option to waive the head of state immunity in foreign jurisdictions;
- 3) There is no immunity for acts committed either before or after the period that the head of state is in office, and there is no immunity for international crimes committed while in office which are committed in his or her private capacity; and

209. Rome Statute, *supra* note 2, art. 27.

210. *Id.* arts. 17, 18.

211. Democratic Republic of the Congo v. Belgium, Feb. 14, 2002, 41 I.L.M. 536, 551–52.

- 4) No immunity exists when an international court has proper jurisdiction.²¹²

The Rome Statute emboldens the argument that incumbent head of state immunity was eroding under customary international law.²¹³ Falling squarely into the fourth exception to head of state immunity, the ICC relies on the state party's proper abrogation of head of state immunity under the Rome Statute for jurisdiction. However, heads of states of both state parties and non-state parties to the Rome Statute apparently must conform their actions committed in their private capacity as there is no immunity under customary international law for atrocity crimes. There is no defensible rationale for granting impunity for incumbent heads of state from atrocity crimes because the heinous nature of such crimes cannot fall within the justifiable requirements of the office. Generally, it appears that actions not committed in a private capacity by a non-state party's incumbent head of state retains immunity under customary international law while a state party's incumbent head of state does not in accordance with Article 27 of the Rome Statute.

The United States will have to examine at a later date whether to include retrospective and universal jurisdictions to any legislation that Congress would propose to close the gaps in title 18 of the United States Code. The purpose, as stated above, would be to assure United States jurisdictional primacy and meet the tests in Articles 17 and 18 of the Rome Statute. The broader the scope of any proposed legislation would be to provide more weight to the United States argument of having initially met the jurisdictional tests (a good faith investigation or prosecution would subsequently have to occur). If the United States were to apply retrospection, an examination of past United States policies may have to occur prior to any enactment of retrospective jurisdiction. Australia, for example, decided not to utilize the tool of retrospection due to its government's historical policies of dealing unjustly with the indigenous populations.

True universal jurisdiction, on the other hand, may not serve the best interests of the United States. Even though universal jurisdiction for a crime does not mean that it can be prosecuted in any court in all circumstances,²¹⁴ and ICC jurisdiction is based on the consent of the state parties where the crime occurred or the nationality of the accused,²¹⁵ the United States should fashion

212. *Id.*; see also Michael A. Tunks, *Diplomats or Defendants? Defining the Future of Head-of-State Immunity*, 52 DUKE L. J. 651, 665 (2002).

213. Rome Statute, *supra* note 2; Tunks, *supra* note 212, at 660.

214. David J. Scheffer, *Symposium: Universal Jurisdiction: Myths, Realities, and Prospects*, 35 NEW ENG. L. REV. 233, 233 (2001).

215. *Id.* at 238.

its jurisdictional boundaries for ICC crimes in any proposed legislation within these limiting parameters. By mirroring the ICC's own outer limits to its jurisdiction, the United States does not have to open itself up to be the world's court for ICC crimes. The United States would be protecting its sovereign interests by meticulously crafting its jurisdiction over ICC crimes to enable the United States to assure primacy over any case that the ICC could have an interest as it pertained to United States nationals, property, and interests.²¹⁶

By defining the United States jurisdiction as that equaling the ICC's jurisdiction over any case in which the United States may have an interest, it would allay doubt regarding the United States' capability to prosecute the suspect. Germany decided on very broad universal jurisdiction for the crime of genocide and, as a result, had to counterbalance the universality for the crime of genocide with broad prosecutorial discretion in order to assuage the fear of having the German courts clogged with suits from around the world in search of a judicial forum. The United Kingdom applied jurisdiction to any United Kingdom national, resident, or person who is subject to United Kingdom service of process. The United Kingdom, Australia, and Canada all require a signature from the Attorney General to move forward. Broadening the jurisdiction of the United States federal courts to be able to prosecute all the ICC crimes is a powerful tool for the United States regardless of whether the United States ratifies the Rome Statute.

B. United States' Gaps

Title 18 of the United States Code, for example, does not codify crimes against humanity as such.²¹⁷ A domestic federal charge of murder may theoretically be analogous to the crime against humanity of murder, but may not technically suffice to assure United States primacy over an ICC indictment. The elements of the two crimes, Article 7(1)(a) of the Rome Statute and domestic murder, 18 U.S.C. 1111(a), are arguably too divergent to satisfy the ICC's complementarity jurisdiction.²¹⁸ Furthermore, domestic murder does not express the gravity of the alleged crime.²¹⁹

216. *Id.* Incorporating the four kinds of jurisdiction possible:

- 1) territorial,
- 2) nationality or personality,
- 3) passive personality, and
- 4) protective or effects.

217. See 18 U.S.C. §§ 1091, 2441, 1111.

218. Rome Statute, *supra* note 2, § 7(1)(a); 18 U.S.C. § 1111(a).

219. Rome Statute, *supra* note 2, pmb1. (the high threshold of an ICC crime, as the Preamble of the Rome Statute notes, *inter alia*, that such grave crimes threaten the peace, security and well-being of the world).

Article 7(1)(a) of the Rome Statute deems murder to be a crime against humanity if certain circumstances are met.²²⁰ The Elements of Crimes further defines the crime against humanity of murder to contain an element of a “widespread or systematic” attack as part of the killing of a human being, and the perpetrator had to have knowledge that the conduct was part of, or intended the conduct to be part of, a “widespread or systematic” attack against a civilian population.²²¹ A simple murder does not constitute a crime against humanity.

The federal murder statute, 18 U.S.C. 1111(a), states that, “murder is the unlawful killing of a human being with malice aforethought.”²²² The federal charge allows for there to be multiple charges of murder, if applicable.²²³ Yet, there is no inference or requirement of a “systematic or widespread” attack in the federal charge.²²⁴ To put it simply, the only commonality between the two charges is the word murder. The federal charge would technically apply to a perpetrator of the crime against humanity of murder, but there still remain three crucial questions which require debate. Those are: 1) whether the federal charge of murder would suffice to fulfill Articles 17 and 18 of the Rome Statute and give the United States primacy over ICC jurisdiction; 2) would federal courts have jurisdiction over the perpetrator, federal courts currently have jurisdiction only over crimes against humanity committed overseas if they involve torture, attempted torture, or certain types of international terrorism;²²⁵ and 3) whether the federal charge of murder demonstrates, with sufficient magnitude, the heinous nature of the crime to the international community so that it rises to the high threshold which the Rome Statute requires.

This is but one example of a single crime in the Rome Statute. There are many that require a similar examination. With the current United States Administration’s aspiration to disassociate from the ICC in any fashion, whether the federal charge of murder is sufficient to guarantee primacy over an ICC

220. Rome Statute, *supra* note 2, art. 7(1)(a).

221. See ELEMENTS OF CRIMES, *supra* note 81.

222. There can be little doubt that murder in the second degree would not rise to the level of a crime against humanity because:

Murder is the unlawful killing of a human being with malice aforethought. Every murder perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious, and premeditated killing; or committed in the perpetration of, or attempt to perpetrate, any arson, escape, murder, kidnapping, treason, espionage, sabotage, aggravated sexual abuse or sexual abuse, burglary, or robbery; or perpetrated from a premeditated design unlawfully and maliciously to effect the death of any human being other than him who is killed, is murder in the first degree.

18 U.S.C. § 1111(a).

223. *Id.*

224. *Id.*

225. CASSEL, *supra* note 1, at 429.

indictment should ring alarm bells on Capitol Hill. The fundamental question of whether the federal courts even have jurisdiction over such heinous crimes should also be the cause of a certain amount of apprehension in Congress. Regardless of whether the current United States Administration is politically inclined to participate in the ICC regime or subsequent decisions prove the current federal law to be (or not to be) sufficient, incorporating analogues to the Rome Statute Articles 5 through 8 into federal law would have a single and profound effect. It would assure primacy of United States jurisdiction over any crime in which the ICC could have an interest. Even passing legislation that mirrors Articles 5 through 8 of the Rome Statute would not technically incorporate the United States into the ICC regime. It would simply protect against the fears currently propagated by the United States.

The current federal genocide statute allows the federal courts to have jurisdiction only when the crime is committed in the United States or by a United States national.²²⁶ For war crimes, United States federal jurisdiction is also not without its gaps. Only when the victim or the perpetrator is a United States national or member of the United States military do United States courts have jurisdiction.²²⁷ Other states parties to the Rome Statute dealt with the jurisdictional gaps of their own by expanding the reach of their domestic jurisdiction. The expansiveness depended on the established legal norms and what the law would permit.

Whether the federal murder statute properly reflects the heinous nature of the crime against humanity of murder is debatable. There are persuasive arguments that the penalties for murder are similar in their gravity, if not more so, in the United States since the United States can impose the death penalty. Therefore, if the criminal justice system's punishment is retributive in nature, there is parity. Since the federal murder statute can be used to charge multiple murders, a suspected criminal can be dealt with accordingly.

More persuasive, however, are the arguments that the federal murder statute does not properly reflect the magnitude of the crime against humanity of murder since the *mens rea* elements are distinct. In the federal statute:

“Malice aforethought” is the characteristic mark of all murder, as distinguished from the lesser crime of manslaughter which lacks it. It does not mean simply hatred or particular ill-will, but extends to and embraces generally the state of mind with which one commits a wrongful act. It may be discoverable in a specific deliberate intent to kill. It is not synonymous with premeditation, however, but may also be inferred from circumstances that show a wanton and depraved

226. 18 U.S.C. § 1091; CASSEL, *supra* note 1, at 429–30.

227. 18 U.S.C. § 2441.

spirit, a mind bent on evil mischief without regard to its consequences.²²⁸

Article 7(1)(a) of the Elements of Crimes states that the *mens rea* element is a subjective one and cannot be inferred as the federal statute allows.²²⁹ The perpetrator must *know* that the killing of a person was part of a widespread or systematic attack directed against a civilian population and, therefore, the knowledge requirement is premeditated murder as part of a grand scheme.²³⁰ One cannot know that he/she is going to kill a person as part of a widespread or systematic attack if one does not already know that he/she is going to kill.²³¹ The knowledge and preparation of killing as part of a widespread or systematic attack is arguably premeditation.²³² Not knowing exactly who it is that you are going to kill is irrelevant.²³³ Malice aforethought is not synonymous with premeditation, however, even if the killing were premeditated, because under the federal statute there is no requirement of a grand scheme of a widespread or systematic attack.²³⁴

There are three requirements for the crime against humanity of murder.²³⁵ They are 1) killing; 2) with knowledge (premeditation); and 3) as a part of a widespread or systematic attack on the civilian population.²³⁶ The federal murder statute has only two criteria: a killing, with malice aforethought.²³⁷ The heinous nature of the ICC crime is manifested in the widespread or systematic attack on the civilian population. For the reasons stated above, the federal statute does not arguably rise to the level of “such grave crimes [that] threaten the peace, security, and well-being of the world”²³⁸ without there being a reference to a widespread or systematic plan to kill civilians.

Also, if the purpose of the imprisonment for a crime is rehabilitative in nature, then the implementation of the death penalty by the United States for premeditated murder (and the United States argument that the federal murder statute reflects the heinous nature of the crime against humanity of murder)

228. *Gov. of the Virgin Islands v. Lake*, 362 F.2d 770, 774 (1966) (defining malice aforethought).

229. *ELEMENTS OF CRIMES*, *supra* note 81, art. 7(1)(a).

230. *Id.*

231. *Id.*

232. *Id.*

233. *Id.*

234. *ELEMENTS OF CRIMES*, *supra* note 81, art. 7(1)(a).

235. *Rome Statute*, *supra* note 2, art. 7(1).

236. *Id.*

237. 18 U.S.C. § 1111(a).

238. *Rome Statute*, *supra* note 2, pmbl.

arguably falls short, as no rehabilitation can occur when the convicted person's sentence is consummated.

Proposed legislation to close the United States' gaps should address these essential concerns. Below are the beginnings of proposed legislation that would close the gaps in title 18. The difficulties in providing a launching pad for proposed legislation is considering the political desire to officially recognize the ICC. It would be simple and effective to codify the ICC crimes by reference to Articles 5 through 8 of the Rome Statute and provide for United States federal jurisdiction accordingly, as many states did in their implementing legislation. The United States scenario is distinct due to political concerns. Therefore, in the proposed additions to the current analogues, no reference to the Rome Statute is made. A reference to the ICC is used to broaden federal personal jurisdiction with a consent requirement of the Attorney-General.

There is no codified federal analogue for Article 7, "Crimes Against Humanity."²³⁹ Two solutions are possible, however. The first solution is where there is a federal crime similar to those included in Article 7 of the Rome Statute, elements must be included to encompass the requirements of a "widespread or systematic attack directed against any civilian population," the jurisdictional elements of each crime must be broadened to the extent that the ICC may have jurisdiction, and any additional elements of the crime itself should be comparatively examined with the ICC Elements of Crimes requirements. Where there is no federal analogue, for example, the crime of apartheid, a new crime must be fashioned. The second solution is to draft proposed legislation that mirrors the crimes in both the Rome Statute and the ICC Elements of Crimes for crimes against humanity.

1. Genocide

With regard to the jurisdictional limitations of federal courts and the crime of genocide, a broadening of the federal genocide statute, 18 U.S.C. §1091, must occur. Additional elements should be added to subsection (d) of §1091, which aligns federal jurisdiction with that of the ICC and the definitional section, §1093. This can be accomplished by simply adding the Attorney General's consent to additional jurisdictional concerns.

- (d) REQUIRED CIRCUMSTANCE FOR OFFENCES.—
The circumstance referred to in subsections (a)
and (c) is that—
- 1) the offence is committed within the United States; or

239. *Id.* art. 7.

- 2) the alleged offender is a national of the United States (as defined in section 101 of the Immigration and Nationality Act (8 U.S.C. 1101)); or
- Additional section → 3) at the specific direction of the Attorney-General where the offence is committed outside the United States by any person; and
- Additional section → 4) jurisdiction over the offence by the International Criminal Court may occur.

Additionally, 18 USC §1093, the definitional section of the federal genocide statute should be amended to include a definition of the ICC.

(9) The term “International Criminal Court” means the court constituted by the Rome Statute of 1998.

2. Crimes Against Humanity

There is no federal statute codifying crimes against humanity as such. The United States has codified various crimes which may (or may not) suffice for securing United States complementarity jurisdiction, for example, the federal murder statute (18 U.S.C. §1111), discussed above, the federal torture statute (18 U.S.C. §2340A), kidnapping (18 U.S.C. §1201), hostage taking (18 U.S.C. §1203), sexual abuse (18 USC 2241-2245), etc.

A vastly more encompassing statute may be required, as is proposed below.

18 U.S.C. §X001—Crimes Against Humanity

(a) Offences.—

- (1) In General.—notwithstanding any other section of this title, it shall be an offence if anyone commits a crime against humanity if—
- (A) as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack, and
- (B) the Attorney-General expressly approves; and
- (C) jurisdiction over the offence by the International Criminal Court, as defined in 18 U.S.C. 093(9), may occur; and
- (D) commits an offence in (c).

- (b) Jurisdiction.—There is jurisdiction over the offences in subsection (a) if—
- (1) the offence takes place in the United States and—
 - (A) the Attorney-General expressly approves; and
 - (B) jurisdiction over the offence by the International Criminal Court, as defined in 18 U.S.C. 093(9), may occur.
 - (2) the offence takes place outside the United States and—
 - (A) the Attorney-General expressly approves; and
 - (B) jurisdiction over the offence by the International Criminal Court, as defined in 18 U.S.C. 093(9), may occur.
- (c) Definitions.—As used in this section, the term—“crime against humanity” means—murder, extermination, enslavement, deportation, imprisonment, torture, sexual violence, persecution or any other inhumane act or omission that is committed against any civilian population or any identifiable group and that, at the time and in the place of its commission, constitutes a crime against humanity according to customary international law or conventional international law or by virtue of its being criminal according to the general principles of law recognized by the community of nations, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission.

3. War Crimes

With regard to the jurisdictional limitations of federal courts and the federal war crimes statute (18 U.S.C. §2441), recognition of other persons (both suspects and victims) is required as well as a broadening of the subject matter jurisdiction. Currently, only when the victim or the perpetrator is a United States national or member of the United States military do United States courts have jurisdiction.

- (a) Offence. however, whether inside or outside the United States, commits a war crime, in any of the circumstances described in subsection (b), shall be fined under this title or imprisoned for life or any term of years, or both, and if death results to the victim, shall also be subject to the penalty of death.
- (b) Circumstances. he circumstances referred to in subsection (a) are that the person committing such war crime or the victim of such war crime is:

- New numbering → (1) a member of the Armed Forces of the United States; or
- New numbering → (2) a national of the United States (as defined in section 101 of the Immigration and Nationality Act); or
- Additional section → (3) at the specific direction of the Attorney-General, any person.
- (c) Definition. s used in this section the term ar crime means any conduct
- (1) defined as a grave breach in any of the international convention signed at Geneva 12 August 1949, or any protocol to such convention to which the United States is a party;
- (2) prohibited by Article 23, 25, 27, or 28 of the Annex to the Hague Convention IV, Respecting the Laws and Customs of War on Land, signed 18 October 1907;
- (3) which constitutes a violation of common Article 3 of the international convention signed at Geneva, 12 August 1949, or any protocol to such convention to which the United Kingdom is a party and which deals with non-international armed conflict;
- (4) of a person who, in relation to an armed conflict and contrary to the provisions of the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended at Geneva on 3 May 1996 (Protocol II as amended on 3 May 1996), when the United States is a party to such Protocol, willfully kills or causes serious injury to civilians; or
- Additional section → (5) over which the International Criminal Court, as defined in 18 USC 093(9), may have jurisdiction.

C. Conclusion

The United States has codified a patchwork of international crimes, some of which are contained in the Rome Statute. However, the patchwork is insufficient to confer jurisdiction to United States courts for the full range of

ICC crimes. The purpose of the United States in legislating crimes analogous to Articles 5 through 8 of the Rome Statute would be to satisfy Article 17 and 18 of the Rome Statute and supplant ICC jurisdiction, thus assuring United States primacy over all ICC investigations and prosecutions of persons accused of an ICC crime regardless of the nationality of the suspect or victim.

As this paper has examined, many states prior to ratification of the Rome Statute were in ostensibly the same situation as the United States currently finds itself. No state had established the legal framework sufficient to guarantee primacy over an ICC investigation or prosecution. Australia for the first time codified the crime of genocide during the ICC ratification process and Germany first legislated war crimes and crimes against humanity during the ICC ratification process. Canada used the ICC ratification process to revamp its criminal code which had previously codified war crimes and crimes against humanity but the Canadian courts found them too difficult to domestically prosecute. While the United States has the crime of genocide on the books, the jurisdictional limitations of the current law do not allow for prosecution of non-United States citizens who have allegedly committed genocide overseas and who may be in the United States, or if the alleged perpetrator is an American citizen.

Germany chose to legislate universal jurisdiction with few if any limitations imposed, relying on prosecutorial discretion to not overburden the courts with suits from around the world. Canada ultimately decided on universal jurisdiction but added a presence requirement, made the application of the crimes retrospective, and required the Attorney General's signature.²⁴⁰ This assures that the Canadian jurisprudential principles and constitutional limits of due process are protected. Australia also decided to apply universal jurisdiction to ICC crimes to assure its courts of jurisdiction, but decided against making the crime of genocide retrospective due to past Australian governmental policies of mistreatment of indigenous Australians. The United Kingdom broadened its extradition law so that it could extradite to a third-party state a suspect who has been accused of the crime of genocide, war crimes, or crimes against humanity.²⁴¹ The suspect can be either a United Kingdom citizen, resident, or somehow subject to United Kingdom service of process jurisdiction, and has allegedly committed any of the ICC crimes either inside or outside of the United Kingdom.²⁴²

However, many of the ICC crimes had already been codified by the United Kingdom Parliament, and the concern in London was whether the incorporation of those previously legislated crimes would suffice for ratification purposes of

240. See CAHWCA, *supra* note 20 (Canada's ratification of the ICC and its domestic legislation).

241. U.K. ICC Act, *supra* note 100, § 51(2)(b).

242. *Id.*

the Rome Statute.²⁴³ The United Kingdom decided not to assume that they would suffice, and incorporated the ICC crimes in the most efficient and unquestionable manner by referencing the Rome Statute directly.

Each state has uniquely implemented the Rome Statute. Due to the fear of historical governmental actions, constitutional hurdles, established jurisprudential norms, and political maneuvering, the Rome Statute has proven flexible enough to incorporate individual state's concerns yet still implement the most comprehensive codification of international criminal statutes to exist.

The United States can utilize the full array of approaches that the other ratifying states took to construct legislation that will close the gaps in title 18, thus protecting United States' interests without the necessity of ratifying the Rome Statute. When the political motivation emerges to do so, the ratification process would then entail few, if any, modifications of domestic law, thus expediting United States involvement in the future administration of the ICC. Even if the United States were to adamantly decide to never ratify the Rome Statute, by closing the gaps in title 18, the United States can assure primacy over any ICC investigation and prosecution, thus protecting its sovereign interests.

All the states that have ratified the Rome Statute, even those with seemingly insurmountable constitutional jurisprudence have apparently been satisfied with the principle of complementarity to resolve doubts and fears regarding violations of sovereignty. As the American perspective on the ICC becomes more and more isolationist based on fears which other western democracies have overcome, the United States will find itself more in the focus of the ICC as a non-member.

Finally, if the ICC were to promulgate judicial activism or deprive litigants of well-reasoned justice, the other state parties and democracies would cease to adhere to the ICC findings and the ICC would quickly become irrelevant and a footnote in a textbook detailing its failed attempt to administer international criminal justice. The ICC is dependent on the voluntary association of the member states. In the meantime, the United States can protect its national interests and its sovereignty by legislating the crimes contained in the Rome Statute and still remain an outsider to the ICC.

V. ANNEXES

The annexes below have been compiled for the ease of the reader to examine the various approaches the different states took to implementing the Rome Statute. The annexes below are the author's own effort at correlating the various national statutes with the Rome Statute. The German statute below of

243. See Progress Report by the U.K., *supra* note 97.

the implementing legislation is a translation and not considered an official version. Articles 6 through 8 of the Rome Statute are not reproduced in every case, as they are extensive. A simple reference to the Article in question is provided in its stead.

ANNEX 1 – CANADA

<p>Crimes Against Humanity War Crimes Act</p> <p>Section 3</p> <p>This Act is binding on Her Majesty in right of Canada or a province.</p>	<p>Rome Statute</p> <p>Article 27 Irrelevance of official capacity</p> <p>1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.</p> <p>2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.</p>
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<p>Crimes Against Humanity War Crimes Act</p> <p>Section 4(1)</p> <p>4. (1) Every person is guilty of an indictable offence who commits</p> <p>(a) genocide;</p> <p>(b) a crime against humanity;</p> <p>or</p> <p>(c) a war crime.</p>	<p>Rome Statute</p> <p>Article 5</p> <p>1. The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes:</p> <p>(a) The crime of genocide;</p> <p>(b) Crimes against humanity;</p> <p>(c) War crimes;</p> <p>(d) The crime of aggression.</p>
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<p>Crimes Against Humanity War Crimes Act</p> <p>Section 4(3)</p> <p>“crime against humanity” means murder, extermination, enslavement, deportation, imprisonment, torture, sexual violence, persecution or any other inhumane act or omission that is committed against any civilian population or any identifiable group and that, at the time and in the place of its commission, constitutes a crime against humanity according to customary international law or conventional international law or by virtue of its being criminal according to the general principles of law recognized by the community of nations, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission.</p> <p>Section 4(3)</p> <p>“genocide means an act or omission committed with intent to destroy, in whole or in part, an identifiable group of persons, as such, that, at the time and in the place of its commission, constitutes genocide according to customary international law or conventional international law or by virtue of its being criminal according to the general principles of law recognized by the community of nations, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission.</p>	<p>Rome Statute</p> <p>Article 7 Crimes against humanity</p> <p>1. For the purpose of this Statute, “crime against humanity” means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: (a) Murder; (b) Extermination; (c) Enslavement; (d) Deportation or forcible transfer of population; (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; (f) Torture; (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court; (i) Enforced disappearance of persons; (j) The crime of apartheid; (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.</p> <p>Article 6 Genocide</p> <p>For the purpose of this Statute, “genocide” means any of the</p>
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Section 4(3)

“war crime” means an act or omission committed during an armed conflict that, at the time and in the place of its commission, constitutes a war crime according to customary international law or conventional international law applicable to armed conflicts, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission.

following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group.

Article 8 War crimes

2. For the purpose of this Statute, “war crimes” means: (a) Grave breaches of the Geneva Convention of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention: (i) Willful killing; (ii) Torture or inhuman treatment, including biological experiments; (iii) Willfully causing great suffering, or serious injury to body or health; (iv) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly; (v) Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power; (vi) Willfully depriving a prisoner of war or other protected person of the rights of fair and regular trial; (vii) Unlawful deportation or transfer or unlawful confinement; (viii) Taking of hostages.

	(b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts: (i) . . .
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<p>Crimes Against Humanity War Crimes Act</p> <p>Section 4(4)</p> <p>For greater certainty, crimes described in Articles 6 and 7 and paragraph 2 of Article 8 of the Rome Statute are, as of July 17, 1998, crimes according to customary international law. This does not limit or prejudice in any way the application of existing or developing rules of international law.</p>	<p>Rome Statute</p> <p>Article 10</p> <p>Nothing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute.</p>
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<p>Crimes Against Humanity War Crimes Act</p> <p>Section 5(1)</p> <p>A military commander commits an indictable offence if</p> <p>(a) the military commander</p> <p>(i) fails to exercise control properly over a person under their effective command and control or effective authority and control, and as a result the person commits an offence under section 4, or</p> <p>(ii) fails, after the coming into force of this section, to exercise control properly over a person under their effective command and control or</p>	<p>Rome Statute</p> <p>Article 28</p> <p>In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court:</p> <p>(a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to</p>
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effective authority and control, and as a result the person commits an offence under section 6;

(b) the military commander knows, or is criminally negligent in failing to know, that the person is about to commit or is committing such an offence; and

(c) the military commander subsequently

(i) fails to take, as soon as practicable, all necessary and reasonable measures within their power to prevent or repress the commission of the offence, or the further commission of offences under section 4 or 6, or

(ii) fails to take, as soon as practicable, all necessary and reasonable measures within their power to submit the matter to the competent authorities for investigation and prosecution.

(2) A superior commits an indictable offence if

(a) the superior

(i) fails to exercise control properly over a person under their effective authority and control, and as a result the person commits an offence under section 4, or(ii) fails, after the coming into force of this section, to exercise control properly over a person under their effective authority and control, and as a result the person commits an offence under section 6;(b) the superior knows that the person is about to commit or is committing such an offence, or consciously disregards information that clearly indicates that such an offence is about to be committed or

exercise control properly over such forces, where: (i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and (ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

(b) With respect to superior and subordinate relationships not described in paragraph (a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:

(i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes; (ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and (iii) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

<p>is being committed by the person;</p> <p>(c) the offence relates to activities for which the superior has effective authority and control; and</p> <p>(d) the superior subsequently</p> <p>(i) fails to take, as soon as practicable, all necessary and reasonable measures within their power to prevent or repress the commission of the offence, or the further commission of offences under section 4 or 6, or</p> <p>(ii) fails to take, as soon as practicable, all necessary and reasonable measures within their power to submit the matter to the competent authorities for investigation and prosecution.</p>	
<p>Crimes Against Humanity War Crimes Act</p> <p>Section 8</p> <p>A person who is alleged to have committed an offence under section 6 or 7 may be prosecuted for that offence if</p> <p>(a) at the time the offence is alleged to have been committed,</p> <p>(i) the person was a Canadian citizen or was employed by Canada in a civilian or military capacity,</p> <p>(ii) the person was a citizen of a state that was engaged in an armed conflict against Canada, or was employed in a civilian or military capacity by such a state,</p> <p>(iii) the victim of the alleged offence was a Canadian citizen, or</p> <p>(iv) the victim of the alleged offence was a citizen of a state that was allied</p>	<p>Rome Statute</p> <p>Article 11 Jurisdiction <i>ratione temporis</i></p> <p>1. The Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute.</p> <p>2. If a State becomes a Party to this Statute after its entry into force, the Court may exercise its jurisdiction only with respect to crimes committed after the entry into force of this Statute for that State, unless that State has made a declaration under Article 12, paragraph 3.</p>

<p>with Canada in an armed conflict; or (b) after the time the offence is alleged to have been committed, the person is present in Canada.</p> <p>Section 9 (1) Proceedings for an offence under this Act alleged to have been committed outside Canada for which a person may be prosecuted under this Act may, whether or not the person is in Canada, be commenced in any territorial division in Canada and the person may be tried and punished in respect of that offence in the same manner as if the offence had been committed in that territorial division.</p>	
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Annex 2 – Australia

ICCCA	Rome Statute
<p>268.3 Genocide by killing (1) A person (the <i>perpetrator</i>) commits an offence if: (a) the perpetrator causes the death of one or more persons; and (b) the person or persons belong to a particular national, ethnical, racial or religious group; and (c) the perpetrator intends to destroy, in whole or in part, that national, ethnical, racial or religious group, as such.</p> <p>268.4 Genocide by causing serious bodily or mental harm (1) A person (the <i>perpetrator</i>) commits an offence if: (a) the perpetrator causes serious bodily or mental harm to one or more person;</p>	<p>Article 6 Genocide For the purpose of this Statute, “genocide” means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group.</p>

and (b) the person or persons belong to a particular national, ethnical, racial or religious group; and (c) the perpetrator intends to destroy, in whole or in part, that national, ethnical, racial or religious group, as such.

268.5 Genocide by deliberately inflicting conditions of life calculated to bring about physical destruction

(1) A person (the *perpetrator*) commits an offence if: (a) the perpetrator inflict certain conditions of life upon one or more persons; and (b) the person or persons belong to a particular national, ethnical, racial or religious group; and (c) the perpetrator intends to destroy, in whole or in part, that national, ethnical, racial or religious group, as such; and (d) the conditions of life are intended to bring about the physical destruction of that group, in whole or in part.

268.6 Genocide by imposing measures intended to prevent births

(1) A person (the *perpetrator*) commits an offence if: (a) the perpetrator imposes certain measures upon one or more persons; and (b) the person or persons belong to a particular national, ethnical, racial or religious group; and (c) the perpetrator intends to destroy, in whole or in part, that national, ethnical, racial or religious group, as such; and (d) the measures imposed are intended to prevent births within that group.

<p>268.7 Genocide by forcibly transferring children</p> <p>(1) A person (the <i>perpetrator</i>) commits an offence if: (a) the perpetrator forcibly transfers one or more persons; and (b) the person or persons belong to a particular national, ethnical, racial or religious group; and (c) the perpetrator intends to destroy, in whole or in part, that national, ethnical, racial or religious group, as such; and (d) the transfer is from one group to another national, ethnical, racial or religious group; and (e) the person or persons are under the age of 18 years; and (f) the perpetrator knows that, or is reckless as to whether, the person or persons are under that age.</p>	
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Annex 3 – United Kingdom

<p>ICC Act 2001—Part 5</p> <p>50—Meaning of “genocide”, “crime against humanity” and “war crime”</p> <p>(1) In this Part- “genocide” means an act of genocide as defined in Article 6,</p> <p>“crime against humanity” means a crime against humanity as defined in Article 7, and</p> <p>“war crime” means a war crime as defined in Article 8.2.</p>	<p>Rome Statute</p> <p>Articles 5, 6 and 7 of Rome Statute and corresponding Articles of the Elements of Crimes.</p>
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<p>(2) In interpreting and applying the provisions of those Articles the court shall take into account-</p> <p>(a) any relevant Elements of Crimes adopted in accordance with Article 9, and</p> <p>(b) until such time as Elements of Crimes are adopted under that Article, any relevant Elements of Crimes contained in the report of the Preparatory Commission for the International Criminal Court adopted on 30th June 2000.</p>	
<p>ICC Act 2001—Part 5</p> <p>51—Genocide, crime against humanity and war crimes</p> <p>(1) It is an offence against the law of England and Wales for a person to commit genocide, a crime against humanity or a war crime.</p> <p>(2) This section applies to acts committed-</p> <p>(a) in England or Wales, or</p> <p>(b) outside the United Kingdom by a United Kingdom national, a United Kingdom resident or a person subject to UK service jurisdiction.</p>	<p>Rome Statute</p> <p>No corresponding Article</p>
<p>ICC Act 2001</p> <p>72 extradition: exception to dual criminality rule under the 1989 Act</p> <p>(1) Section 2 of the Extradition Act 1989 (meaning of extradition crime is amended as follows.</p> <p>(2) In subsection (1)(b) (extra-territorial offences), after subparagraph (ii) add or</p>	<p>Rome Statute</p> <p>No corresponding Article</p>

<p>(iii) the condition specified in subsection (3A) below. (3) After subsection (3) insert-</p> <p>(3A) The condition mentioned in subsection (1)(b)(iii) above is that the conduct constituting the offence constitutes or, if committed in the United Kingdom would constitute-</p> <p>(a) an offence under section 51 or 58 of the International Criminal Court Act 2001 (genocide, crimes against humanity and war crimes),</p> <p>(b) an offence under section 52 or 59 of that Act (conduct ancillary to genocide etc. committed outside the jurisdiction), or</p> <p>(c) an ancillary offence, as defined in section 55 or 62 of that Act, in relation to any such offence.</p>	
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Annex 4 – Germany

<p>Code of Crimes against International Law</p> <p>Section 6- Genocide</p> <p>(1) Whoever with the intent of destroying as such, in whole or in part, a national, racial, religious or ethnic group</p> <ol style="list-style-type: none"> 1. kills a member of the group 2. causes serious bodily or mental harm to a member of the group, especially of the kind referred to in section 226 of the criminal code, 3. inflicts on the group conditions of life calculated to bring about their physical destruction in whole or in part, 4. imposes measures intended to 	<p>Rome Statute</p> <p>Article 6—Genocide</p> <p>For the purpose of this Statute, “genocide” means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:</p> <ol style="list-style-type: none"> (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group;
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prevent births within the group,
5. forcibly transfers a child of the group to another group shall be punished with imprisonment for life.

Code of Crimes against International Law

Section 7 Crimes against Humanity

(1) Whoever, as part of a widespread or systematic attack directed against any civilian population,

1. kills a person,
2. inflicts, with the intent of destroying a population in whole or in part, conditions of life on that population or on parts thereof, being conditions calculated to bring about its physical destruction on whole or in part,
3. traffics in persons, particularly in women or children, or whoever enslaves a person in another way and in doing so arrogates to himself a right of ownership over that person,
4. deports or forcibly transfers, by expulsion or other coercive acts, a person lawfully present in an area to another State or another area in contravention of a general rule of international law,
5. tortures a person in his or her custody or otherwise under his or her control by causing that person substantial physical or mental harm or suffering where such harm or suffering does not arise only from sanctions that are compatible with international law,
6. sexually coerces, rapes, forces into prostitution or deprives a person of his or her reproductive capacity, or confines a woman forcibly made

(e) Forcibly transferring children of the group to another group.

Rome Statute

Article 7 Crimes against humanity

1. For the purpose of this Statute, crime against humanity means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

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

pregnant with the intent of affecting the ethnic composition of any population,

7. causes a person enforced disappearance, with the intention of removing him or her from the protection of the law for a prolonged period of time,

(a) by abducting that person on behalf of or with the approval of a State or a political organization, or by otherwise severely depriving such person of his or her physical liberty, followed by a failure immediately to give truthful information, upon inquiry, on that person fate or whereabouts, or

(b) by refusing, on behalf of a State or of a political organization or in contravention of a legal duty, to give information immediately on the fate and whereabouts of the person deprived of his or her physical liberty under the circumstances referred to under letter (a) above, or by giving false information thereon,

8. causes another person severe physical or mental harm, especially of the kind referred to in section 226 of the Criminal Code,

9. Severely deprives, in contravention of a general rule of international law, a person of his or her physical liberty, or

10. persecutes an identifiable group or collectivity by depriving such group or collectivity of fundamental human rights, or by substantially restricting the same, on political, racial, national, ethnic, cultural or religious, gender or other grounds that are recognized as impermissible

(k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

Rome Statute

Article 8—War crimes

1. The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.

2. For the purpose of this Statute, “war crimes” means:

(a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

(i) Willful killing;

(ii) Torture or inhuman treatment, including biological experiments;

(iii) Willfully causing great suffering, or serious injury to body or health;

(iv) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;

(v) Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;

(vi) Willfully depriving a prisoner of

under general rules of international law. . .

Code of Crimes against International Law

Section 8- War crimes against persons

(1) Whoever in connection with an international armed conflict or with an armed conflict not of an international character

1. kills a person who is to be protected under international humanitarian law,
2. takes hostage a person who is to be protected under international humanitarian law,
3. treats a person who is to be protected under international humanitarian law cruelly or inhumanly by causing him or her substantial physical or mental harm or suffering, especially by torturing or mutilating that person,
4. sexually coerces, rapes, forces into prostitution or deprives a person who is to be protected under international humanitarian law of his or her reproductive capacity, or confines a woman forcibly made pregnant with the intent of affecting the ethnic composition of any population,
5. conscripts children under the age of fifteen years into the armed forces, or enlists them in the armed forces or in armed groups, or uses them to participate actively in hostilities,
6. deports or forcibly transfers, by expulsion or other coercive acts, a person who is to be protected under international humanitarian law and

war or other protected person of the rights of fair and regular trial;

(vii) Unlawful deportation or transfer or unlawful confinement;

(viii) Taking of hostages.

(b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:

(i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;

(ii) Intentionally directing attacks against civilian objects, that is, objects which are not military objectives

(iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;

(iv) Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;

(v) Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are

lawfully present in an area to another State or another area in contravention of a general rule of international law, 7. imposes on, or executes a substantial sentence in respect of a person who is to be protected under international humanitarian law, in particular the death penalty or imprisonment, without that person having been sentenced in a fair and regular trial affording the legal guarantees required by international law,

8. exposes a person who is to be protected under international humanitarian law to the risk of death or of serious injury to health

(a) by carrying out experiments on such a person, being a person who has not previously given his or her voluntary and express consent, or where the experiments concerned are neither medically necessary nor carried out in his or her interest,

(b) by taking body tissue or organs from such a person for transplantation purposes so far as it does not constitute removal of blood or skin for therapeutic purposes in conformity with generally recognized medical principles and the person concerned has previously not given his or her voluntary and express consent, or

(c) by using treatment methods that are not medically recognized on such person, without this being necessary from a medical point of view and without the person concerned having previously given his or her voluntary and express consent, or

9. treats a person who is to be

undefended and which are not military objectives;

(vi) Killing or wounding a combatant who, having laid down his arms or having no longer means of defense, has surrendered at discretion;

(vii) Making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury;

(viii) The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory;

(ix) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;

(x) Subjecting persons who are in the power of an adverse party to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;

(xi) Killing or wounding treacherously individuals belonging

protected under international humanitarian law in a gravely humiliating or degrading manner shall be punished, in the cases referred to under number 1, with imprisonment for life, in the cases referred to under number 2, with imprisonment for not less than five years, in the cases referred to under numbers 3 to 5, with imprisonment for not less than three years, in the cases referred to under numbers 6 to 8, with imprisonment for not less than two years, and, in the cases referred to under number 9, with imprisonment for not less than one year.

(2) Whoever in connection with an international armed conflict or with an armed conflict not of an international character, wounds a member of the adverse armed forces or a combatant of the adverse party after the latter has surrendered unconditionally or is otherwise placed hors de combat shall be punished with imprisonment for not less than three years.

(3) Whoever in connection with an international armed conflict

1. unlawfully holds as a prisoner or unjustifiably delays the return home of a protected person within the meaning of subsection (6), number 1,

2. transfers, as a member of an Occupying Power, parts of its own civilian population into the occupied territory,

3. compels a protected person within the meaning of subsection (6), number 1, by force or threat of appreciable harm to serve in the

to the hostile nation or army;

(xii) Declaring that no quarter will be given;

(xiii) Destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war;

(xiv) Declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party;

(xv) Compelling the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war;

(xvi) Pillaging a town or place, even when taken by assault;

(xvii) Employing poison or poisoned weapons;

(xviii) Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;

(xix) Employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions;

(xx) Employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict, provided that such weapons, projectiles and material and methods of warfare are the subject of a

forces of a hostile Power or
4. compels a national of the adverse party by force or threat of appreciable harm to take part in the operations of war directed against his or her own country shall be punished with imprisonment for not less than two years.

(4) Where the perpetrator causes the death of the victim through an offence pursuant to subsection (1), numbers 2 to 6, the punishment shall, in the cases referred to under subsection (1), number 2, be imprisonment for life or imprisonment for not less than ten years, in the cases referred to under subsection (1), numbers 3 to 5, imprisonment for not less than five years, and, in the cases referred to under subsection (1), number 6, imprisonment for not less than three years. Where an act referred to under subsection (1), number 8, causes death or serious harm to health, the punishment shall be imprisonment for not less than three years.

(5) In less serious cases referred to under subsection (1), number 2, the punishment shall be imprisonment for not less than two years, in less serious cases referred to under subsection (1), numbers 3 and 4, and under subsection (2) the punishment shall be imprisonment for not less than one year, in less serious cases referred to under subsection (1), number 6, and under subsection (3), number 1, the punishment shall be imprisonment from six months to five years.

comprehensive prohibition and are included in an annex to this Statute, by an amendment in accordance with the relevant provisions set forth in Articles 121 and 123;

(xxi) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;

(xxii) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in Article 7, paragraph 2 (f), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions;

(xxiii) Utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations;

(xxiv) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Convention in conformity with international law;

(xxv) Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including willfully impeding relief supplies as provided for under the Geneva Convention;

(xxvi) Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities

(6) Persons who are to be protected under international humanitarian law shall be

1. in an international armed conflict: persons protected for the purposes of the Geneva Convention and of the Protocol Additional to the Geneva Convention (Protocol I) (annexed to this Act), namely the wounded, the sick, the shipwrecked, prisoners of war and civilians;

2. in an armed conflict not of an international character: the wounded, the sick, the shipwrecked as well as persons taking no active part in the hostilities who are in the power of the adverse party;

3. in an international armed conflict and in an armed conflict not of an international character: members of armed forces and combatants of the adverse party, both of whom have laid down their arms or have no other means of defense.

Section 9—War crimes against property and other rights

(1) Whoever in connection with an international armed conflict or with an armed conflict not of an international character pillages or, unless this is imperatively demanded by the necessities of the armed conflict, otherwise extensively destroys, appropriates or seizes property of the adverse party contrary to international law, such property being in the power of the perpetrator's party, shall be punished with imprisonment from one to ten years.

(2) Whoever in connection with an international armed conflict and contrary to international law declares the rights and actions of all, or of a substantial proportion of, the nationals of the hostile party abolished, suspended or inadmissible in a court of law shall be punished with imprisonment from one to ten years.

Section 10—War crimes against humanitarian operations and emblems

(1) Whoever in connection with an international armed conflict or with an armed conflict not of an international character

1. directs an attack against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under international humanitarian law, or

2. directs an attack against personnel, buildings, material, medical units and transport, using the distinctive emblems of the Geneva Convention in conformity with international humanitarian law shall be punished with imprisonment for not less than three years. In less serious cases, particularly where the attack does not take place by military means, the punishment shall be imprisonment for not less than one year.

(2) Whoever in connection with an international armed conflict or with an armed conflict not of an international character makes improper use of the distinctive emblems of the

Geneva Convention, of the flag of truce, of the flag or of the military insignia or of the uniform of the enemy or of the United Nations, thereby causing a person's death or serious personal injury (section 226 of the Criminal Code) shall be punished with imprisonment for not less than five years.

Section 11—War crimes consisting in the use of prohibited methods of warfare

(1) Whoever in connection with an international armed conflict or with an armed conflict not of an international character

1. directs an attack by military means against the civilian population as such or against individual civilians not taking direct part in hostilities,

2. directs an attack by military means against civilian objects, so long as these objects are protected as such by international humanitarian law, namely buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, or against undefended towns, villages, dwellings or buildings, or against demilitarized zones, or against works and installations containing dangerous forces,

3. carries out an attack by military means and definitely anticipates that the attack will cause death or injury to civilians or damage to civilian objects on a scale out of proportion to the concrete and direct overall military advantage anticipated,

4. uses a person who is to be pro-

tected under international humanitarian law as a shield to restrain a hostile party from undertaking operations of war against certain targets,

5. uses starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival or impedes relief supplies in contravention of international humanitarian law,

6. orders or threatens, as a commander, that no quarter will be given, or

7. treacherously kills or wounds a member of the hostile armed forces or a combatant of the adverse party shall be punished with imprisonment for not less than three years. In less serious cases under number 2 the punishment shall be imprisonment for not less than one year.

(2) Where the perpetrator causes the death or serious injury of a civilian (section 226 of the Criminal Code) or of a person who is to be protected under international humanitarian law through an offence pursuant to subsection (1), numbers 1 to 6, he shall be punished with imprisonment for not less than five years. Where the perpetrator intentionally causes death, the punishment shall be imprisonment for life or for not less than ten years.

(3) Whoever in connection with an international armed conflict carries out an attack by military means and definitely anticipates that the attack will cause widespread, long-term and severe damage to the natural environment on a scale out of proportion to the concrete and direct overall

military advantage anticipated shall be punished with imprisonment for not less than three years.	
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