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Jibran Shermohammed April 20th, 2011

A Pragmatic Analysis of American Membership in the International Criminal Court

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Abstract

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By Jibran Salim Shermohammed

Since the end of World War II, the United States has demonstrated support for the construction of international humanitarian law. However, the United States has refused to join the International Criminal Court, a permanent court created to uphold such internationl law. In this paper, I will argue that Classical American Pragmatic Philosophy supports memberhip in the ICC and approaching the question of membership through the lense of an American Pragmatist helps mitigate many problems posed by membership in the court.

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Introduction

A 12-year-old boy, named Ishmael, and his friends have just discovered hip-hop music. Ishmael and his group of friends begin taking advantage of every opportunity to listen to the acclaimed Biggie Smalls, Tupac Shakur and Coolio and do everything they can to emulate their favorite rappers. Ishmael learns that a town, a few miles away, is having a talent show in a couple of weeks and convinces his friend that they should do a rap performance at the show together. The two begin practicing for the show, learn every word to a few of their favorite songs, and prepare an entire performance. They are convinced that they will take the crowd by storm and will win the competition. They even begin speaking like their hip-hop role models and begin all their sentences with "yo" and end conversations with "peaceout."

Since the next town is so close, on the day of the performance, they decide that they will walk over to the town early to prepare for the show and leave a few hours before their performance. After the two boys have traveled about 15 miles, Ishmael's and his friend's entire lives are destroyed. They learn that militant soldiers have just attacked their town and are destroying their homes. Ishmael and his friend run back to their home to see their parents and friends murdered, beaten, raped and tortured in front of their eyes. Ishmael, a boy who idolizes his father, like any other boy, witnesses his father being tortured and crying at the hands of a heavily armed man, whose aims are completely unclear. After their families told them to run, Ishmael and his friend immediately sprint back to the town where they had planned to perform. Here, they learn that their town had fallen victim to a rebellious army attempting to overthrow the government and that the town in which they presently were could no longer could take care of them. Ishmael and

his friend are forced to leave this town and wander from village to village scouring for food and shelter.

After months of living as a vagabond, Ishmael, hungry and tired, comes across a seemingly pleasant town being protected by men with guns. He sees children playing soccer in the village and feels safe for the first time since his home was destroyed. He is welcomed into the town by soldiers with open arms and is fed and taken good care of for the next few weeks. However, all this soon changes when one of the commanding officials approaches him and tells him that now he must either join the army or leave. His friend, who decides he wants to leave and begins attempting to do so, is shot immediately in front of Ishmael's eyes. Ishmael knows what he has to do.

Ishmael, along with other boys who are also between the ages of 9 and 16 are given weapons and ammunition and shown violent movies like Rambo. They are then forced to inhale lines of cocaine mixed with gunpowder and smoke marijuana. After these children are sufficiently desensitized and intoxicated, they are taken to nearby towns and told to shoot at any and everything that comes within their line of sight. This is how children were forced to become soldiers in countries like Sierra Leon, Rwanda, and Sudan, to name a few.

The above story of Ishamel Beah[i], a child soldier who was forced to fight in the conflict in Sierra Leon, is one of thousands that describe the lives of children in war torn countries in underdeveloped regions of the world. Children in these countries are abducted every day, desensitized, militarized and sent to massacre villages in these regions. However, the aforementioned nations, among others facing such conflict, are incapable of prosecuting criminals for violations of such crimes for various reasons and

thus, these crimes have gone unpunished for decades. Additionally, the use of children soldiers is far from the only violations of humanitarian law that are currently occurring in the world. Cambodia, the former Yugoslavia, Sierra Leon, and Rwanda are all places in which acts of genocide, torture, and mass enslavement have taken place or are still taking place today. All such crimes are violations of the Articles and Protocols of the Geneva Conventions, a series of treaties signed and ratified by 194 countries, including the United States, after World War II. Generally referred to as the Geneva Conventions, this treaty was created to limit the barbarity of war and protect the civilians, and non-combatants, who live in nations struck by war and conflict.[ii] The treaty serves as the cornerstone of International Humanitarian Law and upholding it is the objective of the International Criminal Court. Its goal is to enforce international laws created by the Geneva Convention by holding individuals accountable for heinous violations of humanitarian law, deter such violations from taking place in the future and provide justice for victims of such crimes. As demonstrated by the above scenarios, there is an obvious need for such a court in order to protect those individuals in the world who are helplessly living an existence full of fear. Militant leaders around the world are enslaving, torturing, and killing people at a whim or for political expediency, and these actions have been going unchecked by the international community because of the lack of such a court.

However, now that the ICC has been created, although 114 nations are members of the court, it is facing significant challenges from nations across the world.[iii] Surprisingly, one of the strongest opponents of the ICC's authority has been the United States of America. Over the last century, the United States has led the movement to

spread respect for humanitarian law and human rights around the world so its inconsistent behavior of impeding the progress of the ICC comes at a shock. There can be many justifications for why human rights and humanitarian law must exist. Some are grounded in natural law, others in utilitarianism and yet still others choose to appeal to religious authority or innate human dignity. However, in this paper I will not concern myself with why laws protecting such rights are just. Alternatively, I will strive to address the puzzling issue of the United States' inconsistent actions in regards to humanitarian law since the late 20th century. Through this essay, I will take on the project of evaluating why the United States of America is not a member of the International Criminal Court and build an argument based on Classical American Pragmatic Philosophy for why it should become a member.

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[i] "A Former Child Soldier Tells His Story - CBS Sunday Morning - CBS News."*Breaking News Headlines: Business, Entertainment & World News - CBS News*. CBS News, 3 June 2007. Web. 02 Apr. 2011. <http://www.cbsnews.com/stories/2007/06/03/sunday/main2878715.shtml?tag=contentMain;contentBody>

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[iii] United Nations. "Rome Statute of The International Criminal Court." *United Nations Treaty Collection*. United Naitons, 2010. Web. 1 Apr. 2011. <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&lang=en>

Chapter 1

"If we cannot end now our differences, at least we can help make the world safe for diversity."

-John F. Kennedy

The above remarks by the 53rd President of the United States summarize the prevailing trends in American foreign policy about international law and human rights. America's commitment to international justice has been proven time and time again through actions such as leadership in the creation of the Universal Declaration of Human Rights, co-written by Eleanor Roosevelt, and leadership in the war trials after World War II. However, even with such a great history of participation in this dialogue, the United States has a blemish on its record of human rights: its lack of involvement in the International Criminal Court (ICC). Through the study of events leading up to the ICC, it can be seen that the impetus for creating the ICC was partially the result of actions taken by the United States, which causes the US's lack of involvement in the ICC to be puzzling.

Lets first study some of the United States history of involvement in the realm of international justice to gain insight into this puzzle. The first call for international humanitarian law is generally traced back to the end of World War II and the Holocaust. Shortly after WWII ended, an International Military Tribunals (IMT) were set up in Nuremburg, Germany and Tokyo, Japan to bring justice for the heinous crimes of the Holocaust and treatment of civilians in East Asia. Due to the massive size of the genocide committed by the Nazis during the Holocaust and the increasing accessibility of information in the middle of the 20th century, the Holocaust was the first time in history

that crimes committed during war received so much global attention. Consequently, there was a global outcry for justice and accountability. This justice came in the form of the Nuremburg Trials, composed of the International Military (IMT) and the Nuremburg Military Tribunals (NMT). Although many ideas for holding the Nazis accountable had been proposed by the members of the allied powers, the concept of trials for the violation international laws, proposed by US Secretary of War, Henry Stimson, was implemented. These are often cited as the first steps in creation of international law because they were the first trial that ever prosecuted individuals for violations of laws that they claimed to be international in scope. They were also the first courts that held individuals, as opposed to governments, accountable for violations of these laws.

Often criticized as only having a façade of justice, the Nuremburg trials, by some, were seen as nothing more than imposing victor's justice. Werner Maser, a leading Hitler Scholar and German Historian, posits that the vast majority of defendants were assumed guilty before trials even started, that the judges were all shamelessly biased members of the Allied Forces, and that defendants were unable to present any evidence in their defense.[i] Maser's criticisms of the trial, although well-grounded in factual evidence, do not take into account the change in direction of international law caused by these trials, which are still impacting us in the 21st century. The Nuremberg Trials set the first precedent for international humanitarian law[ii] and made the statement that, regardless of their actions, every person deserved a trial before prosecution. Although they may have imposed victor's justice through an imperfect system of ad hoc courts, they planted the seed that grew into the International Criminal Court, a more consistent form of less biased international justice.

Hennery L. Stemson, a man who served as the Governor General of the Philippines, Secretary of State to President Hoover, and Secretary of War for both Presidents Taft and Franklin Roosevelt, is responsible for the conception of the Nuremberg Trials. Between the years of 1920 and 1945, Stimson defined American foreign policy and militaristic actions. Not surprisingly, he is considered the most influential man in American Foreign Policy of the 20th century after Presidents Theodore Roosevelt, Franklin Roosevelt, and Wilson.[iii] Stimson believed that after World War II, "the world…needed American leadership, ideals and trade," which led him to pursue the "denazification" of Germany and Japan and establishment of democracies,[iv] two goals of the Nuremberg and Tokyo trials.[v] Although initially Truman was inclined to take the advice of Treasury Secretary Henry Morgenthau's plan, which called for a Carthage like destruction of Germany, he ultimately agreed with Stemson's plan of reconstruction and war tribunals, which Stemson proposed at a meeting of the Big Three allied powers at Yalta. Originally, the USSR and Great Britain favored a summary execution plan for the Nazi party, which involved public executions and summary judgments for the leaders. However, by 1943, the allied powers eventually agreed on the establishment of the Nuremberg Criminal Tribunals for crimes committed by members of the Nazi party.[vi] Established in 1945 at the Palace of Justice, the IMT and NMT courts in Nuremburg, Germany were the first of their kind and set the first precedents for international humanitarian law. Following these, and the Tokyo Trials, 194 countries came together at Geneva in 1948 and established the Geneva Conventions. This treaty, also the first of its kind, established the parameters of international humanitarian law and called for an international court that would enforce these protocols. Ultimately, at the end of WWII the

Allied Powers were charting new territory in international law and the United States was a full participant of this movement.[vii]

The next steps towards international justice were taken almost 50 years later, in 1993 and 1994 through the creation of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the creation of the International Criminal Tribunal for Rwanda (ICTR), respectively. These courts were the first criminal tribunals created by the international community for regional conflicts in which war crimes were committed. In accordance with the United States' pattern of behavior, the American government also supported these courts through their participation in the United Nations Security Council. For example, the ICTY has had two presidents who were American, one of which has become a permanent judge of the court, and the ICTR has an American judge in its appeals chamber. Additionally, the United States' government showed its support for both the ICTY and ICTR when, as a member of the UN Security Council, its delegation voted in favor of the creation of both the ICTY and ICTR in Resolutions 827 and 977, respectively. Both tribunals' goals are to end impunity in the wake of their respective conflicts and both courts only try individuals who are alleged of committing war crimes, crimes against humanity, and genocide . Since their inception, they have reaffirmed the loosely bound principles of international law and have set the strongest precedents for international humanitarian law since the Nuremberg Trials.

Eventually, the sporadic creation of such courts culminated in the creation of the International Criminal Court (ICC) in 1998. The ICC is an independent international court formed under the auspices of the United Nations by the signing of Rome Statute on July 17, 1998. Although 93 countries originally signed the treaty in the first year, the

court officially began operations 60 days after the 60th signatory member ratified the treaty in 2002.[viii]

The ICC has a strict mandate of complementary jurisdiction and is considered the court of "last resort" by the international community. Although often referred to as a court of "universal jurisdiction," the ICC does not have original jurisdiction in any nation and can never be the first court to which a domestic crime is referred. Alternatively, the ICC is the court of last resort for nations in which crimes it may prosecute have been committed. Additionally, the ICC has strict restrictions on crimes that it may try. The International Criminal Court can only try cases involving war crimes, crimes against humanity, and/or genocide. The Rome Statute restricts the ICC so that it functions only to reach its goals of trying individuals who have gone unprosecuted for committing heinous acts of violence against large groups of people, providing reconciliation for the victims, and helping prevent such crimes from taking place in the future. An individual can be tried at the ICC if the nation in which he has committed the aforementioned crimes is one of the 110 party states and the state in which the crime is committed is either unable or unwilling to try him, or if a case is referred to the ICC by the United Nations Security Council. Consequently, the ICC does not have the ability to enter any country of its choosing and try any individual suspected to be a militant without the oversight of judges. Although the chief prosecutor has the ability to investigate cases in countries he finds appropriate, he must have the consent of a trial chamber composed of multiple judges before he can open an official investigation and declare the state of affairs in a country an investigated "situation." Essentially, the court has very little power to actively seek out cases for trial and relies heavily on the Security Council for referrals.

Since its establishment in 2002, the ICC has tried, or is in the process of trying, a total of 8 cases and has issued only 13 warrants of arrest.

The United States' historical support in the movement for international justice seems to be a predictor of how it would respond to the Rome Statute. However, the United States has opposed the ICC since its inception. I grant that the United States has been apprehensive of membership in treaties that could lead to holding its own soldiers accountable for their actions, but the United States actions and rhetoric broadly seem to demonstrate a support for such a court. Not only did the United States lead the movement for the post-WWII courts, but the United States has also been involved in the Geneva Conventions, the ICTY, the ICTR, and has claimed that militant leaders like Saddam Hussein, the Mujahideen, and Mu'ammar Quadafi must be deposed. Therefore, its actions broadly point to an inclination to support a court such as the ICC and its lack of membership is puzzling.

Although the US initially signed the Rome Statute in late 2000, the Senate never ratified the treaty and thus, according to the American Constitution, the Rome Statute never went into effect in the United States. Subsequently, in 2002, President George W. Bush stated that the US was no longer a signatory member of the Rome Statute and withdrew the American signature. Although President Bush stated that the United States supports human rights, by rescinding the American signature on the Rome Statute, he withdrew all American support for the court. Thus, in summation, the United States supported, and sometimes even led, the movement towards international justice since the Nuremberg trials, but failed to become a member of permanent institution that upheld the same values. Judge Goldstone of the ICC stated, "The US have really isolated themselves

and are putting themselves into bed with the likes of China, Yemen, and other undemocratic countries," countries which the United States has repeatedly condemned for their poor records on human rights.[ix]

In addition to the internationally unpopular move of dropping out of the ICC treaty, the United States also passed into law the American Service Members Protection Act (ASPA), a law stating that the US would use military force to recover any American held by the ICC and would assist its allies with the same goal. Although such a statement is not direct aggression against the ICC, it is clearly an aggressive stance against the court. It states that the United Sates is ready to engage in military action to recover any American Citizen, or citizen of an allied nation, from trial at the court, and states that membership in the court will result in halt of financial and military aid. Consequently, such a statement serves as a direct threat to nations who support the International Criminal Court.

Additionally, the ASPA law states that the US will withdraw all peacekeeping troops from any nation that becomes a signatory member of the ICC. Beyond directly threatening the court itself, through the ASPA law, the United States directly threatened the United States' allies who were relying on its aid. Instead of making a passive statement of its dissent, by something to the effect of offering more aid to an underdeveloped nation for not joining the ICC, the United States directly threatened its allies who did join, whereby actively hindering the progress of the ICC. Finally, the ASPA law states that the US will not participate in any UN peacekeeping initiatives unless it stays immune to prosecution by the ICC (essentially asserting that it wants a bilateral immunity treaty). This means that the USA, a country with one of the biggest

armies in the world and the world's largest economy, is ready to refuse aid to all nations if its citizens were not immune to the ICC. Essentially, through the ASPA law, the largest supplier of aid in the world states that it will halt all aid due to the International Criminal Court. By passing the ASPA, the United States not only withdrew from the ICC but also attempted to ensure that the ICC never had jurisdiction in the United States or its allies. Ultimately, in addition to disagreeing with the ICC, the US was doing what it could to hinder the ICC's progress in the early 2000s. Although the ASPA act has not been enforced since it became law in 2002 and the president has stated that he will interpret it as he sees fit with his foreign policy goals, the ASPA was never repealed and still exists.[x]

Finally, in addition to passing the APSA law and withdrawing from the ICC, the United States also pushed for the creation and signing of UN Security Council Resolution 1422 to exempt peacekeepers from prosecution in the ICC. This treaty, eventually passed into international law, is seen by various human rights NGOs as directly undermining the International Criminal Court. It grants limited immunity to individuals who are considered to be peacekeepers in any conflict stricken nation. However, there is an inherent theoretical contradiction in this law. If there are military officials from other states, stationed in a war-torn nation in order to keep peace then they should have no need to be protected from the ICC because the court can only prosecute for war crimes, crimes against humanity and genocide. Since such military officials would be specifically commissioned to keep peace, they should not commit such crimes. However, if a soldier did defect from his original mission and began committing one of the crimes within the jurisdiction of the ICC then he should be prosecuted for the crimes he commits if they violate the Geneva Conventions. The US really has no argument for why such individuals

should not be prosecuted because the United States even prosecutes its own soldiers who violate humanitarian law. All that SC resolution 1422 does is place "peacekeeping" nations and their military personnel on a higher moral ground than the nation in which they are stationed by claiming that the laws that apply to the belligerents do not apply to them. Most importantly, it weakens the ICC because it puts further limitations on its jurisdictions and creates more loopholes for criminals.

In addition to pushing this law through the Security Council, the United States also petitioned to get permanent immunity for itself from the ICC. Jim Lobe, Washington Bureau Chief of Inter Pres Services stated that the United States even attempted to pass a bilateral immunity agreement (BIA) with the ICC in which the US would have been granted permanent immunity from the International Criminal Court. Although this petition did not pass, the US was formally granted immunity for a one-year period from the court, further weakening the court on a global stage. Ultimately, since the ICC has become a reality, the United States did everything it could in the early 2000s to make sure that the court was unsuccessful.

Although the US has acted more amicably towards the court in recent years, especially since President Obama's election, the question of why, after historically demonstrating support for international humanitarian law, the United States has fought so hard against the International Criminal Court still remains. Tom Delay, the United States House of Representative majority leader between 2003 and 2005 and leader of the movement to uphold legislation against the ICC, stated in 2004 that, "The ICC presents a clear and present danger to the war on terror and to Americans who are fighting it all over the world," and attacked the courts legitimacy by describing it as "Kofi Annan's

Kangaroo Court."[xi] Delay's attack on the court, which is essentially only an *ad hominum* attack, tells us very little except that the Republican leadership opposed the court during the middle 2000s. Although they managed to secure legislation that supported their cause, and rally their political base, their rhetoric against the court does little to justify why the US is not a member of the ICC.

Alternatively, I will turn to decision makers and intellectuals who provide reasoning for their opposition to the ICC based on American interest. Reasons for opposing the International Criminal Court range from refusal to grant an international court any jurisdiction to opposition on the grounds that the ICC is too weak and limited in jurisdiction. The opposition to the court that claims that it does not go far enough to establish an international system of law will not be addressed in this paper because they are the polar opposite in reasoning from that of those in the United States government who vehemently oppose the court because of its effects on American interests. Since this paper's purpose is to deal specifically with the disconnect between America's history of supporting human rights with its contemporary actions of hindering the ICC, the arguments made by those on the far left are irrelevant. Opposition to the ICC on the other end of the spectrum, those made by the conservatives, generally deal with questions of relinquishing sovereignty to an international body that could become politicized and unfairly prosecute Americans. Most of these arguments hinge on whether international jurisdiction, like that of the ICC, could lead to political prosecutions and assert that enabling a body such as the ICC be harmful to American interests by limiting national sovereignty. Henry Kissinger, a former decision maker and current academic who opposes the ICC, presents strong arguments for why the United States should not be a

member of the ICC from the perspective of a moderately conservative thinker. Analysis of his opposition to the ICC will force us to raise questions that must be answered for the American government to justify membership into the court. In this paper, I will use his argument to structure the opposition to American membership in the court.[xii]

Henry Kissinger, a Nobel laureate, former Secretary of State and National Security advisor for both Presidents Nixon and Ford, published a paper in the Journal of Foreign Affairs in 2001 in which he outlines his stance against universal jurisdiction[xiii] in general and the International Criminal Court in specific. As the architect of American détente and the US Secretary of State during the Vietnam War and Cambodian Conflict, Kissinger has come to define American Foreign policy of the late 20th century. Kissinger, a supporter of Realpolitik Foreign Policy, serves as a source for criticism of the International Criminal Court whose theoretically and empirically supported dissent will serve as well-founded hurdles that must be overcome in order to justify support for the ICC.

His argument basically rests on three ideas: first that universal jurisdiction in domestic courts leads to a lack of due process of law and thus unjust prosecutions, second that such universal jurisdiction will lead to political prosecutions, and finally that an international court is so contrary to American ideology that it is unconstitutional and too revolutionary a move to be made without serious reflections on American culture.[xiv] In this paper, I will use Classical American Philosophy to reconstruct this debate to demonstrate how Kissinger's approach to the first two problems is both unconstructive and contrary to American goals. His last point, that the membership in the ICC will be

unconstitutional, will be addressed by analyzing the practical implications of membership in the ICC and demonstrating how it would in fact be in line with the US Constitution.

In his paper, "The Pitfalls of Universal Jurisdiction," Kissinger bases his argument on negative effects of universal jurisdiction that would result if it were structured in the manner that he presents it. He begins by citing the case of Chilean Dictator and coup d'états leader Augusto Pinochet. In 1998, the British government detained General Pinochet due to an extradition request submitted by a Spanish judge under a claim of what he calls universal jurisdiction (see end note xiv). The judge submitted that Pinochet had violated the human rights of 12 Spaniards in Chile and that as a result the Spanish government had the right to prosecute him in Spain. Although Pinochet was eventually returned to Chile, Kissinger argues that if he had been extradited to Spain, Pinochet would have been tried in a court with which he had no familiarity. He argues that Pinochet would have been unaware of the rules of evidence for the court, the documents governing the proceedings of the court, the methods of defense permitted, and would have had to have all of his witnesses brought to Spain from Chile for a fair trial. Ultimately, in a worst case scenario, this form of universal jurisdiction led by domestic courts and instituted through a loose coalition of third party states would lead to a complete lack of due process of law, according to Kissinger. Additionally, this form of universal jurisdiction directly violates the sovereignty of the nation in which the alleged crime has occurred because it usurps the power given to the judges of that state by disregarding their decision to not prosecute. In the first part of his paper, Kissinger states,

> "The unprecedented and sweeping interpretation of international law in *ex Pinochet* would arm any magistrate anywhere in the world with the power to demand extradition, substituting the magistrates' own judgment for the reconciliation procedures of even incontestably democratic societies where

> alleged violations of human rights may have occurred. It would also subject the accused to the criminal procedures of the magistrate's country, with a legal system that may be unfamiliar to the defendant and that would force the defendant to bring evidence and witnesses from long distances"
>
> - Kissinger, "The Pitfalls of Universal Jurisdiction" July 2001[xv]

If these points were the case and if international jurisdiction were implemented in this way than there would be clear issues with universal jurisdiction. This, however, is not the case with the International Criminal Court. In fact, the International Criminal Court directly mitigates such issues. First, the ICC, by nature of being an international court created by a coalition of governments, mitigates the issue of a lack of due process of law resulting from foreign courts by making one standard procedure of a court of universal jurisdiction. By framing universal jurisdiction through the Pinochet issue, issues of multiple inconsistent procedures of courts and laws arise because any court in any country would be able to cite this precedent and demand to try any person for virtually any crime. The Rome Statute, however, creates one body with limited scope and jurisdiction that tries all individuals according to the same procedures and laws. This consistency ensures that all defendants are allotted the same due process of law and are tried according to the same standards. Additionally, the ICC's strict policy of complementary jurisdiction ensures that it does not try any individual if the country in which the individual resides is capable and willing to try the accused, thus respecting the sovereignty of all nations. The ICC's creation ameliorates Kissinger's first concern regarding universal jurisdiction because it directly places limits on who can enforce it and how it can be enforced. It creates a precedent that directly contradicts the Pinochet case by establishing strict limitations on universal jurisdiction so that it cannot be evoked by any nation hoping to settle a political score.

However, such a response to Kissinger's questions of due process of law does nothing more than submit a theoretical rebuttal based on a formal argument. The question of whether, in practice, an individual's rights would be violated by the ICC still remains. Although I do not submit that application of Pragmatic Philosophy will provide any answers to whether the court will in fact violate any individual's rights, it does provide a justification for membership that is consistent with American tradition. Using the above argument to mitigate Kissinger's formal concerns only addresses half of the problem raised by the question of due process of law. The question of whether individuals are being prosecuted by an authority to which they may not have consented is still troublesome to those who believe in the democratic way of life. However, by demonstrating how the court actually deals with a completely new jurisdiction and how membership will in fact be the most democratic option in this case, I will argue that due process of law is actually upheld by membership in the ICC.

This brings us to Kissinger's second argument; that universal jurisdiction will lead to political prosecutions and will result in a loss of sovereignty. Kissinger's point in this regard is also unarguable if universal jurisdiction were framed through the Pinochet case. To make this point, Kissinger argues that if any country had the right to claim universal jurisdiction over cases in which crimes against their citizens were committed in foreign states then nations would use the guise of justice to engage in political prosecutions. He states

> "The Pinochet Proceedings, if applied literally, would permit the two sides in the Arab-Israeli conflict, or those in any other passionate international controversy, to project their battles into various national courts by pursuing adversaries with extradition requests. When discretion on what crimes are subject to universal jurisdiction and whom to prosecute is left to national prosecutors, the scope for arbitrariness is widened indeed."

- Kissinger, "The Pitfalls of Universal jurisdiction" July 2001[xvi]

However, again as is the case with Kissinger's first point against universal jurisdiction, the formal creation of the ICC mitigates these issues. Although the court was created through a treaty signed in the United Nations and conceived by a subcommittee of the United Nations, it is not a UN chartered institution and exists independent of any state. Thus, it has a limited political will of its own, especially in comparison to the type of universal jurisdiction claimed by Spain in the Pinochet Case. This disconnect from politics allows the ICC to be significantly less biased than independent state actors attempting to enforce universal jurisdiction and mitigates hazard of political prosecutions. I grant that various countries fund the court and the members of the Security Council can ask the prosecutor to investigate specific cases, or delay the investigation of others, which could lead to political prosecutions. Nonetheless, since no one country can independently exercise its political will through the court, as Great Britain and Spain did with the Pinochet Case, the court does more to relieve this concern with universal jurisdiction than the status quo. This addresses Kissinger's concern about universal jurisdiction becoming a tool for political prosecutions.

However, again this is only a formal solution to Kissinger's concerns. Kissinger's question of whether the US would be the victim of a political prosecution has the underlying concern of loosing sovereignty[xvii] to the ICC. One can only believe that the ICC will victimize him if he believes that the court will have some power over him and his actions. Therefore, Kissinger's question of political prosecutions is clearly underpinned by the concern for losing sovereignty. However, by reframing our understanding of sovereignty through the use of pragmatic principles, I will demonstrate

how membership in the court could actually strengthen individual sovereignty. I will apply certain pragmatic principles and show how membership in the ICC reaffirms our commitment to the notions of leadership through a social contract and that loss of national sovereignty does not have to be the same as lessening individual sovereignty.

Finally, we arrive at Kissinger's point of joining the ICC as being unconstitutional and contrary to the will of the American people. Kissinger states,

> "Such a momentous revolution should not come about by tacit acquiescence in the decision of the (British) house of Lords or by dealing with the ICC issue through a strategy of improving specific clauses rather than as a fundamental issue of principle."
>
> - Kissinger, "The Pitfalls of Universal jurisdiction" July 2001[xviii]

Article III of the United States' Constitution, which explicitly addresses the powers of the judicial branch, explicitly states "the judicial power of the United States shall be vested in one Supreme Court;" however, nowhere does it deal with laws regarding actors in the international realm. Kissinger's argument in this point is two fold; first that "assigning ultimate dilemmas of international politics to unelected jurists" is unconstitutional, and second that international justice in this form would be such a revolution of thought in American culture that it necessitates extensive discourse on the matter. The fact of the matter, however, is that national American jurists are not elected. When a case is taken to the Court of Appeals, which is essentially a court of "complementary jurisdiction" in the American judicial system, it is decided by a judge who is appointed by the president, not elected by popular vote. Similarly, state parties to the court elect judges in the ICC. Thus, by becoming a member of the ICC, the US president, along with the presidents of other member nations, has a direct say in who becomes a judge. Therefore, if the US were a state party to the court, the judges of the ICC, an international court with "complementary jurisdiction," would be appointed with

the consent of the president of the United States. Therefore, Kissinger's point, that trial by judges of the ICC would be unconstitutional, is debatable because of the justice selection process.

In this argument, Kissinger does bring up a valid point that necessitates further evaluation: does the ICC guarantee all of the rights that the United States Constitution guarantees to defendants? This is relevant because, if an American citizen were committing a crime, overseen by the ICC, to another person and he went unprosecuted by the American government, our democratic system of government would still be inclined to demand that the rights guaranteed to him by the American Constitution still be provided. However, this is impossible because, ultimately, the ICC does not guarantee every right that the American Bill of Rights guarantees, and specifically it does not provide an opportunity to a trial by jury. Additionally, the question of constitutionality forces us to evaluate weather the ICC usurps any powers that are expressly guaranteed to the Supreme Court of the United States. This question of constitutionality will be addressed in the third chapter by dealing with the practical implications of membership in the ICC and looking beyond the formal structures of the American Constitution and the Rome Statute.

Kissinger asserts that American membership in the International Criminal Court constitutes a fundamental change in the American character and necessitates a national debate. In this paper, I will posit that, quite contrary to Kissinger's claim, American character, as demonstrated through the American Philosophy of Pragmatism, is complementary to the values of the International Criminal Court and promotes membership in the ICC.

[i]Maser, Werner. *Nuremberg: a Nation on Trial*. New York: Scribner, 1979. Print.

[ii]Smith, Bradley F. *The Road to Nuremberg*. New York: Basic, 1981. Print.
Page 4. From here on, will be referred to as "Smith"

[iii]Schmitz, David F. *Henry L. Stimson the First Wise Man*. Wilmington, DE: Scholarly Resources, 2001. Print. From here on, will be referred to as "Schmitz"

[iv]Schmitz 166

[v]Schmitz 167

[vi]Smith 176, 10

[vii] Since the establishment of the Geneva Convention and its Protocols, international humanitarian law has become a major component of international law. Humanitarian law deals specifically with states engaged in war, however, the Geneva Convention defines war/conflict so broadly that it incorporates militaristic actions that a government takes against its own people. Since the establishment of these conventions, the US has also been a part of the creation of the United Nations Declaration of Human Rights, which asserts that, in addition to other right, protection from crimes outlined in the Geneva Conventions are basic human rights states must guarantee. Consequently, although these terms may have different meanings in different contexts, I will use the terms human rights law, international law and humanitarian law interchangeably through out this essay.

[viii] Article 126 of the Rome Statute
United Nations. "Rome Statute of The International Criminal Court." *United Nations Treaty Collection*. United Naitons, 2010. Web. 1 Apr. 2011. <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&lang=en>

[ix]"BBC News | AMERICAS | US Renounces World Court Treaty." *BBC News - Home*. Web. 16 Mar. 2011. <http://news.bbc.co.uk/2/hi/1970312.stm>

[x] "Congressional Update & ASPA." *AMICC*. The American Non-Governmental Organizationals Coalition for the International Criminal Court. Web. 01 Apr. 2011. <http://www.amicc.org/usinfo/congressional.html>.

[xi]Lobe, Jim. "House Republicans Take Initiative Against International Criminal Court by Jim Lobe." *LewRockwell.com*. 20 July 2004. Web. 16 Mar. 2011. <http://www.lewrockwell.com/ips/lobe108.html>

[xii] I submit that some decision makers, like Hilary Clinton, are at the center of this spectrum and are apprehensive of supporting an institution that could limit international power of the United States because it could restrict American actions in the international realm. However, this is the predicament that any leader will find him or herself in when faced with the decision of signing an international treaty. By demonstrating how the values championed by the ICC are in line with American Philosophy, I will illustrate how this concern is only cold feat that any responsible leader would have when entering an international treaty. Although such concerns are legitimate, they do not assert that the ICC is definitely harmful to the United States; they only raise the concern of the ICC potentially

limiting American actions. As a result they are not at the forefront of the argument against American membership in the ICC and will not be central to the discussion presented in this paper.

[xiii] According to Alejandro Chathman of University College London, distinctions between Universal Jurisdiction, Citizenship Jurisdiction and Territorial Jurisdiction exist. Citizenship Jurisdiction refers to the ability of a nation to claim jurisdiction over crimes committed to its national in foreign countries, like that Spain claimed in the Pinochet case. Territorial jurisdiction is the claim that a nation's court's jurisdiction ends with the boundaries of the state and universal jurisdiction refers to the claim that a court can try any criminal for any crime committed in any country to any individual. In his article, Kissinger uses the term universal jurisdiction to deal with citizenship jurisdiction. For the case of this paper, I will take universal jurisdiction to mean any jurisdiction dealing with crimes that are committed outside of the boarders of nation. Essentially, I will use universal jurisdiction to mean any jurisdiction other then territorial jurisdiction.
Chehtman, Alejandro. "ARTICLE: CITIZENSHIP V. TERRITORY: EXPLAINING THE SCOPE OF THE CRIMINAL LAW." *2010 Regents of University of California New Criminal Law Review* 13 (2010): 428-48. *LexisNexis Academic*. Web. 2 Apr. 2011. <http://www.lexisnexis.com.proxy.library.emory.edu/hottopics/lnacademic/?>.

[xiv]Kissinger, Henry A. "The Pitfalls of Universal Jurisdiction." *JSTOR*. Foreign Affairs, July 2001. Web. 16 Mar. 2011. <http://www.jstor.org/stable/20050228>.
From here on, will be refereed to as "Kissinger"

[xv]Kissinger 90

[xvi]Kissinger 92

[xvii] Until I redefine it specifically in the second chapter, I will assume sovereignty to mean any states ability to govern it self without external influence.

[xviii]Kissinger 93

Chapter 2

As Dr. John Stuhr, the Chairman of Emory University's Philosophy Department, states in the beginning of his book *Pragmatism and Classical American Philosophy*,

> "Classical American Philosophy offers no formula for salvation independent of human endeavor in time and nature; no method for infallibility, exactitude, or finality; no claim to truth or account of reality void of intrinsic historical and cultural connection; and no imperative to overcome the finite, unfinished, local, transient, pluralistic character of experience."
>
> -John Stuhr, *Pragmatism and Classical American Philosophy pg. 2* [i]

I do not expect that by applying the principles of Pragmatic Philosophy, we will be able to predict the result of our membership in the International Criminal Court or resolve the issue of impunity around the world. Alternatively, it is possible that American membership in the ICC may result in the collapse of the court as a whole because of the internal conflict that may ensue. However, Pragmatic Philosophy does provide the justification that the United States is looking for in order to become a member of the court and its presence in the fibers of the American character indicates that, contrary to opposition, membership in the ICC actually complements the American character.

In this chapter, I will outline questions surrounding membership in the ICC and explain how principles of American Philosophy serve to ameliorate the concerns raised by those questions. The strongest critics of the ICC base their opposition on two primary concerns: first that membership will result in a loss of American sovereignty and second that the ICC will result in unfair prosecution because it will not provide the due processes of law necessary for just trials. The

concerns surrounding a loss of American sovereignty can be separated into two categories: those raising theoretical concerns and those raising practical concerns. In this chapter, I will elaborate on both types of concerns dealing with sovereignty and apply American Pragmatic Philosophy to address both of them. The second concern surrounding membership in the ICC involves a misunderstanding of the due process of law that courts must guarantee in the international realm and this chapter will also elaborate on these concerns and address them by applying principles of Pragmatic American Philosophy. Finally, I will illustrate why applying such a philosophy to deal with the concerns of the ICC is not unrealistic or radical by discussing how its founders had such application of the philosophy in mind when forming it.

Like other schools of philosophy, American Philosophy has central tenants through which contemporary problems are to be analyzed. However, different from most schools of philosophy, American Philosophy encourages the reconstruction of its application so that its principles are applicable to modern contexts and problems. This is because a central tenant of American Philosophy is the notion of reconstructing seemingly archaic schools of thought for contemporary application. John Dewey, a central figure in Pragmatic American Philosophy, exemplifies this in his book, *Liberalism and Social Action*. In this book, he works to reconstruct Liberalism, a seemingly outdated school of thought, so that it can help alleviate the hardships brought on by the Great Depression. Ultimately, he asserts that there must be a distinction between the principles championed by a school of thought and the rules derived from those principles.[ii] He demonstrates that, while rules, like

laissez faire economics, derived from principles may be inappropriate for certain eras, the principles from which they are derived, such as that of individuality, never become obsolete. He encourages us to reapply these principles to our contemporary contexts so that the rules we derive from them do not become inappropriate and lead to detrimental actions. Similarly, the question, when applying Pragmatic American Philosophy, should not be what the original pragmatic philosophers would have said but what the principles of that philosophy suggest today.

Stuhr, in his book, *Pragmatism and Classical American Philosophy,* summarizes American Pragmatic Philosophy as adherence to seven principles: The rejection of modern philosophy and a dualistic approach to problems, a conviction to the belief that human beings are fallible, a commitment to pluralism, a belief in radical empiricism, a commitment to experimental methods, a strong support of pragmatism and meliorism, and a belief in development through a social existence.[iii] Adherence to these principles gives rise to a philosophy determined by experience and experiment that engenders a dedication to democracy and civic engagement, while acknowledging the importance of individuality. Its approach to problem solving first begins with making sure that we are asking the right question for the problems that we seek to solve. Such an approach forces us to first establish common definitions for the terms to be used in the discussion, resulting in the avoidance of insurmountable metaphysical disagreements. Additionally, due to its roots in Liberalism, Classical American Philosophy also has a commitment to individuality and self-realization. It encourages the pursuit of endeavors that one feels passionate about and emphasizes the importance of constantly working

towards progress and avoiding complacency. Approaching the question of whether the United States should join the ICC with Classical American Philosophy will help answer both concerns of practicality and cultural permissibility.

The first question that I will address is whether membership in the ICC results in violation of American sovereignty. As stated in the first chapter, Kissinger, and other conservative theorists, assert that American membership in the ICC will result in a loss of sovereignty because membership will arm magistrates in a court, not appointed by the United States, with the power to demand that individuals be tried for any crime it deems within its jurisdiction. Such free reign seems to be a grievous violation of national sovereignty. Although the reactionary response to this concern is to push for the protection of sovereignty, we must first evaluate whether such a violation actually takes place and, if it does, whether it is actually a bad thing. To do this, we will look at both theoretical and practical arguments presented by decision makers who oppose American membership in the ICC and cite the protection of sovereignty as their justification.

Senator Jesse Helms, the chairman of the Senate Foreign Relations committee in 2000 and opponent of the ICC on theoretical grounds, takes issue with the ICC because he believes that it "claims sovereign authority over American citizens without their consent".[iv] He argues that when the United States signs international treaties, those treaties become domestic law and thus are held on equal footing with other domestic laws. This leads to an issue with the ICC, because, according to the Rome Statute, if a member state is unable or *unwilling* to try a criminal that the ICC investigates, then the ICC has full rights to enter a state and investigate the criminal

and even prosecute him. Therefore, according to Senator Helms, because the Rome Statute becomes domestic law after it is ratified, the ICC has the ability to contradict actions by a United States court and is seen on the same footing as American courts. This results in encroachment on American sovereignty because it could in an international court overstepping the boundaries of our domestic courts. Helms' main issue is that such disregard for sovereignty will result in unrestricted power distributed among a few prosecutors and international organizational leaders, who will then attempt to influence both foreign and domestic policies of (semi-) autonomous democracies through the ICC.

Senator Helms brings up a valid point: If United States is to sign on to the ICC treaty than the US would have to accept the authority of the court which seems like a violation of national sovereignty. However, with the rise of powerful Intergovernmental Organizations (IGOs), like the European Union, International Court of Justice (ICJ), European Court of Justice (ECJ), and NATO, it is becoming more and more difficult to claim complete sovereignty in the manner first established by the Westphalean state system created in 1648. We have to first evaluate if the United States ever even had the level of sovereignty that Helms is claiming that it had.

Classical American Philosophy's approach to the social and individual helps address this question. George Herbert Mead, a Classical American philosopher and psychologist, emphasizes the social because he believes individuals are composed of their social interactions. He asserts that in order to be an individual, one must individuate from a community and thus no individual exists without

acknowledgment of the social. In his essay "The 'I' and the 'me,'" he states, "the 'I' is the response of the organism to the attitudes of the others; the 'me' is the organized set of attitudes of others which one himself assumes."[v] In this statement, he is asserting that although a person's reaction to others may be the result of his individual attitude and personality, the "me," or an individuals identity, is actually composed of ones experiences with, and perceptions of, others. By applying such an understanding of individuality to our understanding of sovereignty, we see that the US actually never had the complete sovereignty that Senator Helms would have us believe it did. Helms is taking sovereignty to mean complete autonomous rule without any external influence. However, by existing in a world with vibrant global culture and constant international interactions, it is impossible to lead an existence void of any external influence. Everything from economics and national security to entertainment and leisure are impacted by our relationships with other nations in the world. Consequently, our decisions as a nation regarding these issues are influenced by the actions of other nations. Thus we are never able to make decisions that are completely autonomous. In response to this, some may argue that we set the trends and patterns that are followed by other nations and thus, even if we are responding to other nations' markets, it is because we are responding to actions we caused other nations to take, which ultimately makes the United States sovereign. Although we may believe that we set the trends in all of the aforementioned areas, we can only be trendsetters if there are people wiling to follow the trend we set; a product cannot be sold on a market without the presence of the market itself. Therefore, the assumption that the US was ever completely sovereign is a false

premise. At best, the US has the most sovereignty relative to other nations in the world.

However, in order to attribute the best possible argument to our adversary lets assume that, by calling the US sovereign, Senator Helms means most sovereign and not absolutely sovereign. Assuming the, by sovereign, Helms means most sovereign, results in no longer percieving sovereignty as a dualistic theory evaluated on a zero sum scale. Alternatively, sovereignty is now assumed to be evaluated on a gradient scale, the ends of which can never be achieved, with attributes that can be met and foregone for positioning on the scale. Therefore, Senator Helms, when promoting a policy to make the US the most sovereign, is promoting the isolationist and anarchic attributes of sovereignty. Principles of Classical American Philosophy, however, bring us to a different outcome.

As stated earlier, Classic American Philosophy rejects Modern Philosophy. This rejection stems from the assertion that Modern Philosophy asks the wrong questions because it assumes that the world is naturally organized into categories. Classical American philosophers reject the existence of such natural categories and assert that these categories are only necessary to make distinction for the purpose of discussion. The rejection of such philosophies leads American philosophers to reject wholesale the notion of dualism, forcing us to approach sovereignty as a term of degree and not dichotomy. It is not the case that we must distinguish between two options: sovereigns and subordinate. Alternatively, we must approach the problem of loosing our sovereignty by acknowledging degrees of autonomy. Therefore, in order to deal with the possibility of moving up and down this scale, we

must ask ourselves, what the importance of sovereignty is and then evaluate how to maintain those aspects of this highly regarded principle while forsaking the aspects of it that give rise to conflict. The Westphalian State System, which views states as discrete autonomous nations and promotes minimal interference and interaction, gives rise to a somewhat international anarchy with little focus on the needs of individuals. The concern with such a system is that it does not ensure that all individuals in all countries are guaranteed individual rights, completely disrespecting personal sovereignty, something that social contract theorists, like Rousseau, argue is what gives rise to national sovereignty in the first place. In a world of complete international anarchy, every regime in the world would be able to treat its people in any way it deemed fit. Such regimes would not respect individual rights but instead make policies that guaranteed posterity of the regime. The history of international relations since the beginning of the 20th century, however, does not completely support the Westphalian System. Since the turn of the 20th century, the world has worked to limit national sovereignty so that governments across the globe protect individual rights through treaties such as the Geneva Conventions and the Universal Declaration of Human Rights. In following this trend, by joining the International Criminal Court, the United States would not be forsaking national sovereignty to empower a global court, but alternatively would be shifting the focus from strengthening state sovereignty to strengthening individual sovereignty, something that members of Senator Helms political party seem to regard highly. Therefore, the question is not weather the ICC encroaches on American sovereignty but whether it forces us to relocate on the scale of sovereignty and if so how much.

By providing more rights to the citizens of our nation, especially against the government, the ICC does move national sovereignty away from complete autonomy but does so for the sake of individual autonomy and personal sovereignty. This makes us, as individuals, more sovereign than we would have been before, because it empowers us to act against our leaders when they violate our rights.

The next concern of sovereignty is that of the practical implications associated with lessening it and whether this is the best policy for the goals the ICC pursues. Kissinger, in his article in Foreign Affairs Magazine, attacks universal jurisdiction from this angle by claiming that by violating the sovereignty of a nation, a court with universal jurisdiction would both hinder the reconstruction of the country it is attempting to help and create conflict due to extradition issues.[vi] The issue of reconstruction is one that is associated with the ICC and universal jurisdiction in general because of the nature of criminals who get brought before international courts. All crimes that lie within the jurisdiction of the International Criminal Court, and most any criminal court with international jurisdiction, involve impunity for crimes that members of an oppressive regime commit against their own people. Once the regime is ousted, through either international force or internal struggle, the nation faces a period of reconstruction. Kissinger asserts that the goal for such a system of justice is for national reconciliation and that by taking away the power to try a criminal in domestic courts, we hinder that very process. He asserts that, for reconciliation to take place, the people of a nation must themselves try the individual(s) who violated their rights; that striping a nation of this

opportunity takes away the opportunity for a nation to band around one common enemy and strengthen its unity.[vii]

The issue with Kissinger's argument, however, is that it does not take into account the form of the Rome Statute. That the Rome Statute explicitly mandates that the ICC can only try criminals if a nation is *unable* or unwilling to try them.[viii] Unwillingness to try a criminal is not a concern here because Kissinger's argument is that the ICC strips a nation of its opportunity to try a criminal when it would like to do so, thus we are only dealing with nations that are willing to try alleged war criminals. According to the Statute, if a recently liberated nation is capable of trying a war criminal, and willing to do so, then the ICC cannot, and will not, interfere. A nation must express the concern that it is unable to try the criminal in order for the court to take this task from it. Additionally, by trying a criminal at the ICC, a nation is able to focus more on the daunting task of trying to rebuild after war while still being able to band around the trial of the criminal, albeit by satellite. Although the criminal may not be tried on the soil of a nation, he will still be held responsible for his actions and the nation will nonetheless be able to feel a sense of collective justice after his trial. Thus, it is not the case that the ICC takes the opportunity to try a war criminal forcibly, but instead it provides an additional resource during a period of reconciliation so that nations are better able to decide their own approach to rebuilding.

Finally, Kissinger's last concern about the practicality of lessening American sovereignty involves extradition. He asserts that by allowing for universal jurisdiction, the international community will set a precedent that allows any nation

to claim jurisdiction over a criminal action and demand the extradition of an individual for any alleged crimes.[ix] This issue concerns sovereignty because if it were the case than it would involve the complete disregard of national boundaries in pursuit of criminal prosecutions. Essentially, it would give credibility to the claim that any nation could try a citizen of any country, irrespective of where he currently lives, on any grounds that a nation deemed fit. This would obviously be a concern if it were the result of international jurisdiction because it could clearly lead to international conflict. However, the ICC protects against this exact problem. By creation of a central court for heinous international crimes, we are able to deal with criminals who may necessitate extradition through a central body to which all member nations have consented. Thus, no nation can claim universal jurisdiction and only the crimes outlined by the ICC are considered crimes for which a court outside the domestic boundaries of a specific nation can have jurisdiction. The ICC not only avoids the problems associated with extradition and universal jurisdiction, but also successfully anticipates certain concerns that may arise regarding it.

Now that we have dealt with the problem of loosing sovereignty on both theoretical and practical grounds, lets turn our attention to next issue raised with the ICC and international jurisdiction: that it does not provide sufficient due process of law. Many argue that by instituting an international court with the ability to try criminals in a justice system that may not mirror the domestic system of the individuals on trial, individuals will be refused their due process of law. Kissinger, for example, asserts that trial in a foreign court would "subject the accused to the criminal procedures of the magistrate's country, with a legal system that may be

unfamiliar to the defendant".[x] As explained in the first chapter, the presence of a central international court with one set of legal procedures mitigates those formal concerns that Kissinger brings up here. If there is one set of legal procedures for prosecuting the crimes that can be tried in the ICC, then the criminals are not being subject to foreign unfamiliar procedures because the procedures are uniform for all cases and made public to all individuals. However, the underlying concern, which is not addressed simply by the creation of a central international court, is that of subjecting individuals to procedures to which they have not personally consented. When an individual is tried in domestic courts for alleged crimes, he not only is able to anticipate the punishments and procedures that await him but also has, at least in democratic countries, consented to, or implicitly consented to, the procedures and punishments for crimes for which he is charged. Alternatively, in the case of an international court, an individual charged with a crime has to deal with the procedures of a court that were not created by his elected officials and are not completely subjected to the authority of his elected officials. Therefore, trial in an international court can violate an individual's due process of law because the individual on trial may never have been given the opportunity to consent, or descent, to such trials and procedures. Such lack of consent is troublesome because it means that even the most democratic countries, by joining the ICC, are subjecting their populations to undemocratic forms of prosecution.

The problem of prosecution without consent, however, cannot be solved immediately because we are still unfamiliar with international justice. We give consent to our domestic justice system and empower our courts with the ability to

try us for violating the law, however, we are only able to do so because we are familiar with how we desire justice to be served to our neighbors. Domestic courts deal with violations of local, provincial, and even national laws, by the individual. Domestic courts do not have to deal with some new form of globally communal existence with which we have no experience; they only formalize what we have learned through existing in communities since the agrarian revolution. Consequently, we can consent to them based on the experiences of our ancestors. However, international courts are new to us. International courts deal with violations of law in the international realm, a realm in which the unit of action is an entire nation not just the individual. A fully accessible global community, like the one in which we live today, has never existed before and establishing justice and law within it is equally new. We do not have the precedents of our ancestors to look towards in order to establish the rules of international engagement in such a localized global community. Therefore, we must first attain knowledge regarding international justice before we can consent to it or attempt to influence how it functions. To get such knowledge we apply another two principles of Classical American Philosophy: radical empiricism and fallibilism.

Radical empiricism, first promoted by William James, emphasizes the individuality of knowledge and asserts that the universal is only an abstraction from the collective knowledge of individuals. James describes it as a "mosaic philosophy," that gives special prominence to the "directly experienced" and does not allow into the consciousness anything that is not.[xi] Instead of promoting Universal Truths, radical empiricism supports the notion that every individual is capable of obtaining

true knowledge of the world through direct experiences. James believes that people are able to get true insights into the world as it exists through their subjective understandings because truth, according to James, lies in the synthesis of every individual's thought and experience. James states "neither the whole of the truth nor the whole of good is revealed to any single observer," asserting that no one person can know the complete absolute truth, while allowing for the possibility that it can be known by an aggregation of truths from various observers.[xii] He follows this statement by writing that "each observer gains a partial superiority of insight from the peculiar position in which he stands," positing that every individual is capable of developing unique insight into different things because every person has a unique perception of the world.[xiii] Thus, truth is obtained through experience and can vary for every individual.

However, this does not mean that James believes truth to be absolutely relative. On the contrary, he is asserting that, although people's evaluations of things are the result of the feelings that those things arouse in them, these evaluations are reinforced by people's experiences and this leads to similar perceptions of the same things. For example an individual may think that antifreeze looks delicious and smells sweet, and so he may believe that it is a good thing to drink. However, his experience with drinking it may land him in the hospital and lead him to change his belief about consuming antifreeze. Such experiences, like something being harmful, lead people to develop similar conclusions about things and leads to overlapping individual truths, making them not relative. However, we must remember that, although experiencing certain things leads to people developing similar perceptions

of those things, everyones' knowledge is still subject to their experiences with life as a whole and thus truth is nonetheless dependant on subjectivity. Radical empiricism, however, leaves us to question how we can ever know anything if subjectivity is always skewing, or enhancing, our perceptions of it. In order to address this concern, we must understand radical empiricism in conjunction with the Pragmatic principles of fallibilism and the scientific method.

In Classical American Philosophy, fallibilism is a commitment to the notion that all knowledge is falsifiable. It asserts that one cannot be completely certain about anything because of the subjective nature of our knowledge, and since one cannot obtain knowledge without learning it subjectively, nothing can be objectively known. Therefore, nothing can be known with complete certainty. This notion is deeply tied to radical empiricism, which posits that all knowledge is learned through our senses and mediated by our subjective understanding of it, a claim that pragmatic philosophers use to ground their belief that all knowledge is fallible. In order to compensate for the fallible nature of human knowledge, Charles Sanders Peirce, a founding father of Classical American Philosophy, posits that in order " to satisfy our doubts, therefore, it is necessary that a method should be found by which our beliefs may be caused by nothing human, but by some external permanency."[xiv] At first glance, this seems to contradict the notion of radical empiricism because it seems to be asserting that external experiences need to help human beings formulate their understanding of some universal truth. Such a notion of truth and experience would contradict a belief in radical empiricism, which asserts that that absolute universal truths do not exist and even if they did, they would be

unattainable due to the subjective nature of experience. Peirce anticipates this question when he states that our beliefs should be influenced by the way that our experiences with the world affect us and that, "though these affections are necessarily as various as are individual conditions, yet the method must be such that the ultimate conclusion of every man shall be the same, or would be the same if inquiry were sufficiently persisted in".[xv] Therefore he is not championing the discovery of universal truths but of overlapping experiences that help reinforce our own truths. In the aforementioned quote, the method he is referring to is the scientific method. His point is that, regardless of weather our lived experiences are different, if an experiment were developed to test a reality in the world, that if repeated in an identical fashion many times would yield similar results, then it would help us develop some belief (although not with complete certainty) upon which we could build other beliefs and guide our ways of life. He is able to compensate for human fallibility by relying on the scientific method of experimentation. Here again we can reference the aforementioned antifreeze case for an example. Through experimentation, one learns that antifreeze is not good for him and, through others conducting the same experiment with similar harmful effects, we, as a species, learn that antifreeze is harmful to human beings if consumed.

The reasoning used above can be applied to the question of the International Criminal Court. In the international sphere, the individual actors are the nations themselves. Similar to how communities are composed of people, the world is composed of different nations. The fundamental unit of action in the world is the

human being, but ultimately the avenue through which action is taken in the international realm is the nation. In our current state system, the actors in the international realm are nations and because nations are ultimately controlled by groups of people, the nature of knowledge for a nation is the same as it is for an individual. Therefore, states gain knowledge empirically and are subject to fallibility, like all individuals. This does not mean that nations are doomed to find some external way to account for their fallibility when making domestic decisions because they are similar to cases of domestic governance, In which the plane of action is within the nation and the accountability for fallibility also comes from within the nation. Democracy is an example of such an occurrence: in a democracy, theory is posited in the form of legislation, if it passes, individuals experience it and if it is unsuccessful then it is repealed. However, such internal accountability for fallibility is not enough in the global realm because the plane of interaction in this realm is global and the individual actors in the case are individual states. The results of international actions impact countries as a whole and their results are felt by entire nations. Therefore, in order to account for the fallibility of nations in the international sphere there must exist something external to the nations themselves through which international actors can learn about principles of international relations, which they can then use to establish rules for international engagement. The International Criminal Court exists as one of these external institutions through which nations can develop a workable notion of justice.

International justice, like any other principle, cannot be formulated by our reasoning alone. However, an experience with domestic courts is not sufficient

either. As explained by Peirce, in order to gain knowledge of something, we must rely on external experiences and experimentation with it. Experiences with domestic courts are insufficient because these experiences will only serve to reinforce our preexisting notions of justice. Although we do learn about central tenants of a fair justice system, like due process of law and burden of proof, our experiences with domestic courts teach us nothing new about international justice or how justice for crimes against humanity, war crimes, and genocide should be served. This is because, first of all, if these crimes are able to take place then the system of justice in the nation in which these crimes are taking place is already defunct. Consequently, no surviving domestic court systems have any experience dealing with crimes like those dealt with by the ICC effectively. Next, experience with domestic courts is insufficient because their jurisdiction generally ends with the boarders of the nation in which they reside. Therefore, domestic courts are unable to set precedents about international law globally because they lack authority. Consequently, experimentation and experience with such courts in pursuit of knowledge relating to the aforementioned international crimes is futile. As a result, we must turn to an external international court in order to discover principles of international humanitarian law and create a system of international justice consistent with such principles. The International Criminal Court is the first completely international court that explores the nature of international justice and if we are to play a role in how international justice is defined in the future, or influence the way in which it develops today, we must become members of the ICC. Additionally, if we hope to knowledgably give consent or descent to any form of

international justice that may arise in the future, we must become members of the ICC.

Finally, after reading this chapter, one may wonder whether a school of philosophy, a subject often considered to be of the kind best studied while sitting in a couch next to the fire place in the living room, can have such far reaching implications. Although the notion of applying a school of philosophy, which is other than merely political, to a real-world problem with real-world implications may seem unrealistic or radical, American Philosophy has served exactly that function since its inception. Peirce, James, and Dewey, three individuals considered to be the founders of American Pragmatism, all intended their philosophies to be used for problem solving in both the world of practice and the world of thought. Consequently, application of these philosophies to the problem of American membership in the ICC does not require a stretch of the imagination.

Charles Saunders Peirce, often considered the father of American Pragmatism, was a committed supporter of the scientific method. As seen by his emphasis on inquiry, Peirce believed that only knowledge reinforced by experience deserves to be considered fact.[xvi] This commitment, along with his belief in fallibilism, proves that Peirce did not intend his philosophy to be applied only to problems of identity, cosmology, or metaphysics. He asserts that, "a *conception*…lies exclusively in its conceivable bearing upon the conduct of life," asserting that theories should be evaluated by their impact on people's conduct in the world.[xvii] Therefore, for Peirce's philosophy to serve the purpose for which it was intended, it must be applied to solve problems like that of American membership in the ICC.

William James asserts that, American Pragmatism is "interpret[ing] each notion [of an argument] by tracing its representative practical consequences." [xviii] Consequently, Pragmatic solutions to problems cannot be the conclusion of "armchair" philosophy. One must evaluate the consequences of different suggestions and decide if the practical implications of those solutions are the ones he is pursuing. For James, "conduct is for us its (a thought's) sole significance," demonstrating that he is not creating merely a different schema through which to view the world, but is championing a philosophy that encourages application so that actual worldwide problems can be addressed through it.[xix]

Finally, John Dewey, the youngest of the three American Pragmatists, demonstrates his commitment to real world application in *The Public and its Problems.* In this book, he works to prove that an opinionated public actually does exist and function as a unit, for purposes other than that of empowering the elite. He asserts that for true democracy to exist, it must permeate every facet of one's life and only fully comes to fruition when "free and social inquiry is indissolubly wedded to the art of full and moving communication."[xx] Ultimately, he believes that democracy is more than just a government elected by the people; he asserts that it requires a democratic mindset that impacts all the decisions of ones life. He strives to create a philosophy that impacts an individual's daily life by forcing him to think of the impact of his actions on other people, in addition to himself. Such a philosophy, focused on outcome and impact is ideal for application to problems like that of the US and the ICC because it pushes people to think about the outcome of their actions and alliances.

Classical American Pragmatic Philosophy has come to define the American outlook and its principles have become deeply woven into the fabric of the American character over the last 200 years. Principles of this philosophy encourage us to analyze the problems of American membership in the International Criminal Court from a perspective that looks deeper than the superficial ones that may arise from membership. By understanding the American tradition of rejecting the traditional philosophical commitment to dualisms, we learn that membership in the ICC does not necessarily equate to a loss of sovereignty. We see that sovereignty, as it actually relates to our position in the world system, is not a zero-sum phenomenon in which one has to pick between two poles. Analyzing sovereignty from this new perspective reveals that no nation is actually sovereign to the extent that it can make completely unilateral decisions without being, at least, influenced by the expected impact on other nations. In fact, ceding some sovereignty in a formal sense, as may be the case with the ICC, may result in more clout in international politics, which in turn would increase our global influence and arguably increase our ability to make unchallenged decisions. Consequently, the loss of sovereignty, *per se,* is a superficial argument for opposing the ICC and it need not be an insurmountable challenge to membership.

Similarly, understanding the notions of radical empiricism and fallibilism, along with a commitment to the scientific method demonstrate the shortcomings of the due process of law argument for declining membership in the ICC. The realm of international justice, one that has gone unexplored in the past, is of more pertinence as the digital revolution progresses. Our accessibility to individuals from all over the

world today is unparalleled and our ability to affect, and be affected by, people from other parts of the world has never been so great. However, this shortening of the distance between corners of the world also means that heinous crimes can be committed with more expediency. Thus, we must find a way to deal with them. However, abstaining from involvement in a global court system, merely because it does not mirror a justice system we have developed for domestic courts is counter productive for building a global notion for the due process of law. We must work with the nations of the world to develop a form of justice that all of us can agree upon. Although we may not find a perfect court with which every nation is completely happy, membership in the ICC will give us a seat at the table of discussion so that we can promote our notions of justice. Our commitment to experimentation, radical empiricism, fallibilism and pluralism obligate us to share our view in this international dialogue and engage in this global experiment to find the best form of international justice.

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[i]Stuhr, John J. *Pragmatism and Classical American Philosophy: Essential Readings and Interpretive Essays*. New York: Oxford UP, 2000. Print. From here on "Stuhr PCAP"

[ii]Dewey, John. *Liberalism and Social Action,*. New York: G.P. Putnam, 1935. Print.

[iii]Stuhr PCAP Introduction

[iv]Helms, Jesse. "Address by Senator Jesse Helms." *Sovereignty International Index*. Sovereignty International, Incorporated, 20 Jan. 2000. Web. 1 Mar. 2011. <http://www.sovereignty.net/center/helms.htm>.

[v]Mead, George H. *Mind Self and Society*. Toronto ON: University of Toronto, 1967. Print. Page 192

[vi]Kissinger, Henry A. "The Pitfalls of Universal Jurisdiction." *JSTOR*. Foreign Affairs, July 2001. Web. 16 Mar. 2011. <http://www.jstor.org/stable/20050228>. Page 90 From here on, will be refereed to as "Kissinger"

[vii]Kissinger 90-91

[viii]"The Rome Statute." *Rome Statute of The International Criminal Court*. United Nations, 10 Nov. 1998. Web. 15 Sept. 2010. <http://untreaty.un.org/cod/icc/statute/romefra.htm>. Article 17 Section 1a and 1b

[ix]Kissinger 90-91

[x]Kissinger 90

[xi]Stuhr PCAP 182, William James

[xii]James, William. "On Certain Blindness." *On Some of Life's Ideals: On a Certain Blindness in Human Beings. What Makes a Life Significant.* [Folcroft, Pa.]: Folcroft Library Editions, 1974. 285. Print. From here on "James On Blindness"

[xiii]James On Blindness Page 285

[xiv]Stuhr PCAP 74, Peirce

[xv]Stuhr PCAP 74, Peirce

[xvi]Stuhr PCAP 48, Peirce

[xvii]Stuhr PCAP 106, Peirce

[xviii]Stuhr PCAP 194, James

[xix]Stuhr PCAP 194, James

[xx]Dewey, John. *The Public and Its Problems*. Athens: Swallow Pr. [u.a.], [20]. Print. Page 184

Chapter 3

Having dealt with two major concerns about American membership in the International Criminal Court, in this chapter I will address a concern that is so central to the argument against joining the ICC that it requires its own chapter. The question of constitutionality must be asked of every law created by congress and every treaty signed by the President. The American Constitution is the "supreme law" of our country and impunity for violating it would weaken our very system of government. Consequently, The Rome Statute, a treaty that would put limits on American action in the international realm, must be scrutinized to evaluate if it violates the constitution before we sign it.

Any research will reveal that many opponents of American membership in the International Criminal Court argue that it would be unconstitutional for the United States to sign the Rome Statute. This question, briefly touched on by Henry Kissinger in his "Pitfalls of Universal Jurisdiction" article in *Foreign Affairs* magazine, has been one that opponents of the ICC have cited since the Early 2000s.[i] The importance of assessing the constitutionality of the Rome Statute is evident, however upon strict scrutiny of the American Constitution, The Rome Statute, and current American practice, we will realize that membership in the ICC would not be unconstitutional in either form or practice.

In this chapter I will first work to counter arguments made by opponents of the International Criminal Court on constitutional grounds, than I will discuss why membership would actually be beneficial to the United States. For the first part of this chapter I will assume the burden to be on those individuals who claim the ICC is

unconstitutional, as is the case with anyone claiming anything is unconstitutional in the US, and approach the question of constitutionality by discussing why the arguments claiming membership is unconstitutional are flawed.

Opponents of membership in the ICC claim that the ICC is unconstitutional based on three arguments. First, some claim that membership in the International Criminal Court would be unconstitutional because it would require ceding power, given to domestic courts by the American Constitution, to an international body. This seems to be a concern because the constitution, in Article III clearly outlines the power of the courts within the United States and states whether officials in other branches of government can redistribute those powers and under what circumstances this can be done. If the ICC were to usurp this power than it would be problematic for the Constitution. The next argument claims that there is no way to ensure that the ICC guarantees the same freedoms and due processes of law to defendants who the American Constitution does. This argument asserts that subjecting a criminal to such a court would be unconstitutional and that membership in such a court would be consenting to such behavior. Finally, the last and strongest argument claims that the Rome Statute directly violates Article III of the American Constitution because it gives an external court the power to try ministers of the US, a power that is explicitly reserved for The American Supreme Court. All three of these concerns are supported by prominent decision makers and collectively build a strong case for not signing the Rome Statute. However, by assessing the practical implications of the court, we will see that these concerns are ill founded and moot. In this chapter, to address the aforementioned concerns, I will

outline three scenarios in which all of the above concerns are manifested. Such an approach will help us avoid only discussing theoretical arguments and understand how the actual practice of the court would not violate the Constitution.

Kissinger, in *Foreign Affairs* Magazine, asserts that there would need to be a constitutional amendment allowing membership in the ICC because it would require ceding judicial power to a foreign body, which results in a violations of the Constitution as it stands.[ii] He argues that membership in the ICC would result in supreme judicial power being signed over to the international court. He states that the ICC's "present form of assigning the ultimate dilemmas of international politics to unelected jurists" represents a fundamental change to US constitutional practice. Similarly, Senator Helms, a former chairman of the Senate Committee on Foreign Relations and Republican Senator from North Carolina, led the opposition in 1993, when the rest of congress was in favor of the creation of an international criminal court. During a committee hearing on such a court, at a meeting of the 103d Congress, Senator Helms, along with six other senators, assert that membership in any international court empowered with the ability to deal with criminals would be unconstitutional.[iii] These two individuals compose the most influential voices opposing the international court and their arguments make up the strongest ones for opposition.[iv] Consequently, I will look to them for arguments claiming that the ICC is unconstitutional through out this chapter.

To argue that the practical implication of membership in the ICC is not the cession of judicial powers to an international body, but the recognition of the jurisdiction of a foreign court, we must understand why practical implications really

matter. As stated in Chapter 2, a central tenant of Classical American Philosophy is practicality. William James, in "Lecture II" of *What Pragmatism Means*, states "you must bring out of each word its practical cash-value, [and] set it at work within the stream of your experience."[v] He states this in reference to metaphysical theories in an effort to describe how such theories should affect an individual's life. His point is that discovery of a theory or way of life is not sufficient, an individual must apply the theory or live the way of life and realize the implication that the newly discovered thought process has on his or her lived experience. Then evaluate if that theory leads to a life he desires. Similarly, the presence of an international court with the ability to try criminals cannot be understood as some comprehensive theoretical court with the power to supersede all domestic courts of member nations. It must be understood within the contexts that make it applicable in the United States and whether it is practical for the ends we desire as a nation.

Due to the limitations imposed on the ICC by the Rome Statute, the "cash-value," or practical effects, of the ICC for the United States can only be one of three things: Either the a citizen of the United States has committed a crime overseen by the ICC in a foreign territory and is indicted by the court, an American leader has been indicted for committing a crime overseen by the ICC on American soil, or an American official is blamed for actions committed by an American official in a foreign country. Therefore, instead of dealing with the theoretical constitutionality of the International Criminal Court, we will deal with aforementioned three scenarios and evaluate whether the results of the scenarios would be constitutional or if there would be a formal contradiction of the constitution.

Based on Article 17 of the Rome Statute, which deals with the admissibility of the court, the International Criminal Court should be seen as a foreign court rather than a comprehensive global court with supreme judicial power. This article emphasizes the fact that this court is limited to only complementary jurisdiction and is restricted from asserting original jurisdiction over any cases. As outlined by Justice Douglas in the Hirota vs. Douglas MacArthur case of 1948, the US Supreme Court only has original jurisdiction over cases involving US Ambassadors, Ministers (or members of the Cabinet as they are called today), and/or States.[vi] The Supreme Court's jurisdiction is clearly outlined in Article III of The Constitution. It asserts that the US Supreme Court only has original jurisdiction over cases involving Ministers, Ambassadors, and cases between states. However, any case in which an American is being tried in another nation for violating a foreign law, the Supreme Court has no jurisdiction, nor does any other court within the United States. Consequently, in a scenario in which an American citizen commits genocide, a war crime, or a Crime Against Humanity in a foreign nation and the ICC indicts that individual, the question of jurisdiction is irrelevant because US courts have no jurisdiction outlined in the constitution. The only options in such a scenario is either to have the ICC try the individual or the courts of a foreign nation try the individual. By joining the ICC, if such a scenario were to arise, at least the US would have some say regarding the courts in which its own citizens were tried and would have been involved in the creation of the courts. Without membership, the US would be forced to remain complacent while its citizens were being tried in foreign courts to which it does not subscribe.

This scenario also includes the concern about American soldiers being indicted by the court. As an international superpower, arguably a hegemon, the United States is often solicited for help in international conflicts. In this capacity, The United States often either sends troops to a foreign nation or engages in some military operation to support a belligerent involved in the conflict. This raises the concern that, by becoming members in the ICC, the United States is consenting to the possibility of having its troops tried by an International Court for involvement in international conflicts. Some see this as increasing the exposure of our troops to international persecution, making them more vulnerable. Such a concern is valid if membership in the ICC would increase exposure to international prosecution. This is because if American soldiers had a greater possibility of being prosecuted in international, or even foreign courts, they would not only be putting their lives on the line for other people but would face the possibility of being demonized for risking their lives for our safety. This may lead to less US involvement in international conflicts, which could lead to a more chaotic global environment and threaten the stability of our global system. However such a scenario is not different than the status quo.

As stated earlier, American courts have no jurisdiction over what takes place on international soil, unless a criminal is extradited to the US. If, for example, a general in Afghanistan were to command his troops to commit some heinous crime against an ethnic group, lets say the pashtuns, tomorrow, than although he may suffer dishonorable discharge or a military commission court, the Constitution would not obligate the American government to try him in some court domestic to

the United States. Even if the Afghanistan government attempted to prosecute him, the US would most likely use its clout to have him extradited to the United States, or an American military base, where he would be tried in American military courts. Nothing would change if the US were a member of the ICC. Similar to the status quo today, the Afghan government would have the opportunity to try this general for his actions against the pashtuns, as outlined in Article 17 in the Rome Statute, and the US would be able to influence the Afghan government to take advantage of this opportunity and extradite this individual to the US for trial in a military court. The only scenario where this general would be tried in the ICC would be if the country, in which the crime was committed, decided it was unwilling to extradite him to the United States and wanted the ICC to intervene. In such a situation, whether the ICC existed or not, the United States would not be able to intervene in the prosecution of its military official because trying him in the ICC would be comparable to trying him in Afghan courts. Consequently, the cash-out value of membership in the court and of non-membership in such a situation would be the same. Additionally, neither would result in a violation of the Constitution.

Consent to the ICC, however, leads to another concern regarding the due process of law for American Citizens. This concern attempts to respond to my practical implications argument by positing that the ICC does not ensure a jury trial or the due process of law as outlined by the constitution and thus consent to such a trial for our citizens would be illegal. This concern stems from the notion that by signing the Rome Statute, we are granting implicit consent to all of the procedures of the court, and because the ICC does not provide the option of a jury trial, we would

be exposing our citizens to unconstitutional trials. Such a concern would be troublesome if all American citizens would be subject to the court by membership in the ICC. However, this is not the case and this concern mischaracterizes the problem by blurring jurisdictions. If the US were to join the ICC, at no point would it be obligatory to try domestic cases in the court. the ICC has no jurisdiction over any domestic cases and cannot overturn any rulings by domestic courts. The only scenario in which the ICC has any jurisdiction is when a nation is unable or unwilling to try an individual who has allegedly committed a crime covered by the ICC. If such a crimes is alleged to have occurred in a nation and the national court demonstrates that it investigated the allegation thoroughly and nonetheless decided not to try the individual, then according to Article 17 section 1b of the Rome Statute, the ICC cannot indict or investigate the alleged criminal.[vii] Consequently, whether the ICC guarantees the processes of law that the American Constitution mandates is irrelevant because its jurisdiction does not overlap with that of the American Constitution and it does not have jurisdiction over domestic crimes.

Now that we have address the problems of Americans on foreign soil, the next two possible scenarios in which the ICC could pursue in American citizen involve indicting American officials for actions they take while in office. These situations are different from the former scenario of an American citizen in foreign territory because an indictment of an individual holding national office can be seen as an indictment of a nation as a whole. This can cause a nation to become militaristic and can have severe ramifications. The first situation is one in which an individual, while in national office, commits genocide, war crimes, or Crimes Against

Humanity against the people of his own nation. For example, in 2011, “Colonel” Mu’ammer Qaddafi, the leader of Libya, quelled protestors within his nation by hiring militiamen from neighboring African states and unleashing a wave of violence. His actions are a clear example of a Crime Against Humanity as outlined by Article VII section 1 of the Rome Statute because he murdered a large group of people purely for political reasons. However his actions have also been accompanied with mass lawlessness in Libya and have dragged the nation to the brink of a civil war. If such an instance, as unforeseeable as it may seem, were to take place in the United States, then whether the individual committing the crimes against humanity was going to be tried in international courts or national courts would not be a concern for anybody. In fact during such a circumstance, the Constitution of The United States would no longer be applicable because we would be living under a tyranny, the vary thing that the Constitution was instituted to protect against. However, once the tyrant was overthrown and apprehended, if our nation were still capable of doing so, we would have the ability to try him in domestic courts. If, however, we were not able to try him in domestic courts, we would not violate the Constitution by sending him to an international court for trial because he would no longer be considered a minister, or an individual over whom the Supreme Court has original jurisdiction. It would be similar to extraditing an individual to another nation for a crime he committed in the United States. Although such a circumstance seems far-fetched, the tumultuous nature of international affairs necessitates addressing it.

The last issue is the most salient for opponents of American Membership in the International Criminal Court. This issue hinges on Article III, Section 2 of the American Constitution. Article III deals with the Judicial Branch and its limitations, section 2 states, "In all cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make." The part of this clause that proves troublesome when supporting membership in the ICC is the first sentence that explicitly states that cases involving Ambassadors and Ministers (or members of cabinet) must be dealt with by the Supreme Court of the United States. This is troublesome because, based on the precedent set in the Omar Al Bashir case, the ICC has the power to indict a sitting head, or minister, of state if it finds that he has committed a crime within its jurisdiction. Omar Al Bashir, the sitting head of Sudan, what is now North Sudan, has a warrant out for his arrest issued by Pre-Trial Chamber I of the ICC. The Office of the Prosecutor applied for a warrant for his arrest in 2008 on the grounds of war crimes, crimes against humanity and genocide and, after a thorough investigation, was issued two warrants on five counts of crimes against humanity, two counts of war crimes, and three counts of genocide.[viii] Based on the Rome Statute, if Al Bashir steps foot in any country that is a party to the ICC he must be arrested and sent to The Hague for trial at the International Criminal Court.

The ability to indict a sitting head of state is troublesome because if the US were a party to the ICC than it would mean that if a chamber of the ICC indicted an American head of state or minister then the US would have to allow the ICC to try that minister. Such an action would be a direct violation of Article III section 2 of the Constitution, which states that the US Supreme Court must be the trier of such cases. Although, whether this article includes the US president as a minister is up for debate, for the sake of this argument we will assume it does. This is because this chapter is working to counter the argument that membership in the Rome Statute would be unconstitutional, and if this article of the constitution were interpreted to not include the president than there would be no constitutional conflict regarding the president. So, in order to build the best argument for our opponents we will assume that Article III of the American Constitution assumes that the President is considered a minister and falls within the categories of people who are governed originally by the Supreme Court, via the Constitution. Therefore, based on the Al Bashir precedent, the ICC and the American Constitution seem to conflict because they both claim jurisdiction over American ministers, Ambassadors and the President.

The concern of an American minister being indicted by a foreign court is not new for the United States because any court in the world could potentially indict a sitting American minister. Because such a thing has never happened before I will use a hypothetical scenario for an example. Lets say that after the Abu Ghraib incident in Iraq, the courts of Iraq decided that Secretary of Defense, Donald Rumsfeld, sent the command to commit the heinous beheading and thus was

responsible instead of the soldiers who did it. They could put out a warrant for his arrest and attempt to prosecute him in their courts but, realistically, this would simply not be possible. First of all, Iraq, along with most nations of the world, does not have the political clout necessary to bring a sitting minister in the United States, or in any leading world nation, to trial in their domestic courts. In order to do this they would have to first be willing to give up all of the aid they are receiving form the US, then either convince their allies to agree to arrest the official they have indicted and extradite him to Iraq or convince the US to arrest Rumsfeld and extradite him to Iraq. Ultimately, indicting a minster of the United States and attempting to try him in any nation outside of the US would prove almost impossible. Their other option, however, is to come to the US and press charges against him within our boarders. As outlined in the Constitution, any trials dealing with ambassadors or ministers must be dealt with by the Supreme Court; therefore the party attempting to press charges could try the minister in the Supreme Court of the United States. If this were to happen the Supreme Court would first evaluate whether it had jurisdiction over such a case, then investigate the facts of the case and either dismiss it or allow it to be tried. Irrespective of what the Supreme Court decides in such a case, the procedures for holding national office holders accountable for their actions already exists within the United States. This exact procedure, in conjunction with Article 17 of the Rome Statute, is what keeps membership in the ICC from being unconstitutional.

Article 17, section 1, of the Rome Statute states that the ICC cannot try a case when “a) The case is being investigated or prosecuted by a State which has

jurisdiction over it… [or] b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned." This means that the ICC will not and cannot try a minister of the United States if the Supreme Court of the US has investigated the case thoroughly. I concede that membership in the ICC would be unconstitutional if the Rome Statute were to claim that the ICC must try all cases involving federal officials, or were to state that it had jurisdiction over all cases that a nation is unwilling to try. However, it states clearly in part 1b of Article 17 that if a nation has jurisdiction over a case and the courts of that nation earnestly investigate that case than the ICC is inadmissible. This means that the Rome Statute explicitly defers to the authority of the American Constitution when it has jurisdiction and thus does not violate it.

However, this solution seems only to address the formal concern of joining the ICC. It still leaves the concern that the prosecutor may have political motivations against the US and choose to rule American investigations of cases brought against head officials as insufficient. Such a concern, however, is one that any contract, agreement, or treaty brings about. It is a question of interpretation and if mal-intentioned individuals are allowed to interpret governing documents than malevolent actions will result. As demonstrated above, the formal structure of ICC is set up to defeat these challenges but there is no doubt that everyone will not agree on every outcome. However by becoming members we can influence the precedents set by the ICC so that we can at least guide how the future of international law is formed and play a role in who runs the court. All of the judges and the Prosecutor of the ICC are elected by a super majority and only member nations are permitted to

vote. Consequently, membership in the court gives an avenue through which to guide the policies of the ICC and ensure that none of our fears of membership ever manifest themselves.

As demonstrated in Chapter 1, the United States has always been in support of the movement to establish a standard of international humanitarian rights. The International Criminal Court provides us with a tool to enforce these standards and to ensure that all individuals of the world are at least ensured some protection from tyrannical despots. Often through out the history of the world, we have witnessed the rise of individuals like Charles Taylor, Omar Al Bashir, Mu'ammar Qaddafi, and of course Adolf Hitler. Such repulsive individuals should not be able to commit the heinous crimes they have and live without fear of prosecution. Institutions like the International Criminal Court set the standard for behavior of leaders across the world and it is important that the leaders of all nations take such an institution seriously. American membership would ensure that this court was respected universally and help dissuade individuals from creating conflict in which numerous lives are needlessly wasted. In all reality, the ICC is still in its infantile stages and the United States would not be obligated by any means even if it were a member of the court. American membership would both allow the court to gain more influence over the world and provide the US another avenue through which to guide international policy so that it was in line with American standards.

The US has such a strong emphasis on the rule of law and has such a well structured court system that membership in the ICC does very little, if anything, to affect it domestically. The International Criminal Court was not created to replace

the court systems of nations such as the United States or even to supplant the courts of developing nations. As seen in the Rome Statute, the International Criminal Court is only meant to help nations, struggling for survival or ruled by corrupt leaders, hold militant oppressors accountable. The court does not violate the American Constitution, but instead bolsters it by deferring to it in all cases over which the Constitution has jurisdiction. The complementary jurisdiction of the ICC make it so that the court has no jurisdiction over cases that can be settled domestically and makes the court's purview weaker than the courts of most constitutional democracies. As a result, the practical implications of American membership in the ICC does not prove to be unconstitutional.

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[i] Amann, Diane M., and M.N.S. Sellers. "AMERICAN LAW IN A TIME OF GLOBAL INTERDEPENDENCE: U.S. NATIONAL REPORTS TO THE XVITH INTERNATIONAL CONGRESS OF COMPARATIVE LAW: SECTION IV The United States of America and the International Criminal Court." *The American Journal of Comparative Law* 50 (2002): 381-404. *LexisNexis*. The American Society of Comparative Law, Inc. Web. 29 Mar. 2011. <http://www.lexisnexis.com.proxy.library.emory.edu/hottopics/lnacademic/?>

[ii] Kissinger, Henry A. "The Pitfalls of Universal Jurisdiction." *JSTOR*. Foreign Affairs, July 2001. Web. 16 Mar. 2011. <http://www.jstor.org/stable/20050228>. Page 93.
Ultimately, Kissinger argues that membership in the ICC would be such a drastic change to our current practice that it would necessitate a formal amendment. His main point is that the Constitution bars ceding the power given to a judge to any external actor and doing so would be a violation. However, Kissinger fails to take two tings into account. First that membership in the ICC would not result in ceding power that currently resides with American judges to a foreign judge. Granted, membership would empower a foreign judge and if the US was a part of the Court than we would implicitly be agreeing with all of the decisions of the court, but the power that would be given to the court would not be taken from American jurists. Although the court would be empowered if we were to join, its power would be that of granting a foreign court legitimacy. This argument is further developed in the rest of this chapter. The second problem with Kissinger's analysis is that it is over formal in terms of its interpretation of the constitution. I concede that Membership in the ICC would be drastically different than some of our current policies, however membership would not require that we amend the Constitution. The American Constitution is an elastic document that evolves with society and amending it every time we undertake a new policy, which is not directly addressed by the constitution, would be unrealistic. If Kissinger's logic were followed, then Reconstruction would have never been possible because there was no method of including the votes of citizens of the states that

seceded. Ultimately, the Constitution imposes certain important restriction on the US government, but amending it every time a drastic policy change (which does not contradict the constitution in the first place) is undertaken is both unrealistic and overly formal, and such constant amendment weakens the Constitutions as the Supreme Law.

[iii] Congressional Information Service, Inc., comp. *103d Congress Senate Rept. 103-71 103 S. Rpt. 71*. Proc. of Senate Committee on Foreign Relations Reports, Washington DC. *Lexis Nexis Congressional*. Web. 29 Mar. 2011

[iv] Marquardt, Paul D. "Law Without Borders: The Constitutionality of an International Criminal Court." *Columbia Journal of Transnational Law* 33.73 (1995): 73-148. *Lexis Nexis*. Web. 29 Mar. 2011. <http://www.lexisnexis.com.proxy.library.emory.edu/hottopics/lnacademic/?> Marquardt discuss the same issue I am addressing here but does not frame it within the contexts of pragmatic philosophy. His article works to find the best argument for why the ICC is unconstitutional and focuses on the arguments of Senator Helms. I have added Hennery Kissinger because his arguments are more recent than Helms and are more comprehensive.

[v] James, William. "James' What Pragmatism Means." *Marxists Internet Archive*. Mar. 2005. Web. 29 Mar. 2011. <http://www.marxists.org/reference/subject/philosophy/works/us/james.htm>

[vi] Hirota vs. Douglas MacArthur. US Supreme Court. 27 June 1949. *Justia.com*. Web. 29 Mar. 2011. <http://supreme.justia.com/us/338/197/case.html>.

[vii] "The Rome Statute." *Rome Statute of The International Criminal Court*. United Nations, 10 Nov. 1998. Web. 15 Sept. 2010. <http://untreaty.un.org/cod/icc/statute/romefra.htm>.

[viii] "Darfur, Sudan." *ICC*. 05 Feb. 2009. Web. 29 Mar. 2011. <http://www.icc-cpi.int/menus/icc/situations and cases/situations/situation icc 0205/related cases/icc02050109/icc02050109>.

Conclusion

The United States' opposition to the International Criminal Court proves to be troublesome because it is in part the actions of the United States that have given rise the establishment of the court. Since the end of World War II, the United States has worked to provide retribution and reconciliation to those nations that have had been hijacked by militants who have oppressed their citizens. The United States' work has set standards for how international courts and tribunals should be held and without the United States' support in the UN Security Council, courts like the ICTY and ICTR would not have even been established. The likes of Henry Stemson, Woodrow Wilson, and Eleanor Roosevelt laid the groundwork for American involvement in the realm of peaceful international relations and their precedents were followed until the late 20th century. However, since the presidency of Bill Clinton the US has been contradicting its historical actions and working against the progress of the International Criminal Court.

Not only has the United States never ratified the Rome Statute, but the US has passed laws, like the American Service Members Protection Act, that actively work to counter the ICC's progress. In comparison to its prior actions, by taking these actions, the United States is not only contradicting historical precedents but also undermining the values it promotes today. For example, liberating Iraq, Afghanistan, and (potentially) Libya all lead to the question of what to do with the corrupt oppressive leaders once they are apprehended. We claim that the democratic actions in such cases would be to try these individuals and prosecute them based on facts proven in court but we then oppose such a court when it is established. Such

inconsistent actions leave one wondering what reasons the US may have for opposing the ICC so vehemently.[i]

Through the course of this essay I have attempted to deconstruct the most salient arguments for why the United States should not join the International Criminal Court by applying Classical American Pragmatic Philosophy. I have attempted to provide a narrative of the arguments that opponents provide in conjunction to how those points would be seen through the lens of Pragmatic Philosophy. For this project, I divided the arguments for why the US should not join the ICC into three categories: questions of sovereignty, concerns about due process of law, and concerns of unconstitutionality. Each one of these concerns is important to address when evaluating whether to join the ICC and by evaluating them through the lens of Classical American Pragmatic Philosophy, I have demonstrated how each of them can be resolved to a degree that results in concluding that membership in the ICC is a prudent decision. Below, I will deal with these arguments again, providing a summary of how they were resolved with Classical American Pragmatic Philosophy.

Sovereignty

The arguments based on sovereignty for why the United States should not join the ICC can be split into the categories of theory and practice. Theoretical opponents of the ICC claim that membership in the court would result in the US loosing its national sovereignty in the global realm, which would decrease the United States' international power. However, by taking sovereignty to mean

complete autonomous rule, we render the argument of loosing sovereignty moot because assuming complete autonomy would require disregarding all societal and global influences, which is absolutely impossible in any modern society. Alternatively, if we assume the strongest argument for opposition based on sovereignty, than we find that we must perceive sovereignty on a gradient scale instead of as a dichotomy opposing subordination. When we perceive sovereignty in this manner, we see that by loosing the little national sovereignty we do lose by signing the Rome Statute, we gain a significant amount of individual sovereignty, a foundational principle of our democratic system of government. Consequently, we are able to remove the stigma associated with "losing sovereignty" by joining the ICC and see the court for what it really aims to do: empower individuals.

The practical concerns associated with loosing sovereignty focus on whether membership in the ICC is actually the most practical, or effective, way of achieving the goals that the ICC pursues. This argument asserts that the ICC usurps the right that every country has to rebuild itself after a time of conflict. It claims that by creating the ICC, the global community is striping conflict-ridden nations of their ability to find retribution and reconciliation after conflict, while imposing forms of justice that may be external to the war torn nations. Such a concern, however, has already been resolved by the structure of the International Criminal Court. In the Rome Statute, in Article 17, it clearly states that the ICC only has jurisdiction if a nation is unable or unwilling to try a case itself. If a war-torn nation is able, and willing, to try an individual than the ICC would not even get involved in the first place. When an opponent of membership in the ICC is arguing that it strips nations

of the opportunity to try their own criminals, the question of willingness is irrelevant. The only concern in this situation is ability, and if a nation is truly unable to try criminals in their own country than the ICC provides the only form of retribution and reconciliation that a nation may ever have.

Finally, opponents of the ICC arguing that it is impractical for American interest to forego sovereignty raise the concern that recognition of the ICC's jurisdiction would set a global precedent of extradition that could cause chaos in the international realm. Alternatively, I posit that consenting to the ICC anticipates such a concern and ameliorates them by creating a standard court for the crimes that it covers. It anticipates the problems of extradition that may arise by recognizing universal jurisdiction because although it is an extremely limited form of universal jurisdiction that, if recognized, it would provide a venue in which nations could bring cases against individuals and avoid issues of extradition and domestic jurisdiction altogether.

Therefore, based on perceiving sovereignty as it is upheld today and recognizing it as existing on a scale or degree, we are able to realize that membership in the ICC does not result in loosing sovereignty, but gaining it for the individual. In addition to empowering individuals, the ICC is structured in such a way that it empowers nations struggling after war so that they may seek its assistance when they find it necessary. Ultimately, the ICC is one of the first steps in organizing the anarchic chaos that currently exists in the international realm, which should be seen as empowering the individual instead of as lessening the power of the state.

Due Process of Law

The first argument, dealing with the due process of law, that an opponent of American membership in the ICC makes, is grounded in the form of the court. It asserts that simply by nature of being tried in a foreign court, an individual is not being afforded his due process of law because he is being tried according to foreign procedures and being held accountable for foreign laws. This argument asserts that simply because the individual is unfamiliar with the foreign court, he is not afforded his due process of law. Such an argument points to the logistical hurdles that must be overcome when an individual is tried in a foreign court, like transporting witnesses and evidence to the court and ensuring that the defendant has competent council.

The concern, however, is ameliorated by the creation of the International Criminal Court because the ICC creates an international standard, which becomes uniform for such trials. By creating the ICC, we outline what crimes may be tried in international courts, how they must all be tried and stipulate requirements for proceedings. Consequently, by consenting to the ICC, we consent to an international standard for trial and restrict the ability of nations to arbitrarily claim jurisdiction over cases dealing with citizens of other nations and trying them under procedures that may be foreign to them.

Nonetheless, a larger problem does exist with the due process of law that seems troublesome. This problem is that of consent. Due to the fact that the ICC is established by nations acting as sovereign bodies, it does not seat judges based on

democratic elections, and thus leads to the question of whether courts like these are actually democratic in nature.

By understanding the unique and new nature of the ICC we realize that we will never develop a democratic form of international law without engaging with things like the International Criminal Court. The ICC is the first court of its kind that works to establish a coherent system of international humanitarian law. Since, such a court has never existed in the past, the most democratic methods of granting it authority are yet to be determined, however such uncertainty is no reason for dismissal. Simply because we do not have precedents to look towards for a completely international court does not mean that we need not engage in a court for fear that it violates our due process of law. Our commitment to pluralism and radical empiricism obligate us to join a court like the ICC to ensure that it takes into account the nature of the American experience and its future manifestations are able to uphold American values. Alternatively, not joining the court is actually the violation of our due process of law because by not joining, we relinquish our input in the direction of the court and in the future of international law.

Constitutionality

The issues raised by those arguing that membership in the ICC would be unconstitutional are resolved by both comparing the written word of the constitution with the written word of the Rome Statute, and understanding the practical implications of membership in the court. First, the argument can be made

that, technically, the ICC would never even hear a case over which any American court has jurisdiction. This is because Article 17 of the Rome Statute clearly states that the ICC may only try cases that a nation with original jurisdiction is either unwilling or unable to try. Consequently, regardless if whether a nation convicts an alleged criminal, as long as the nation has thoroughly investigated the case, the ICC has no jurisdiction. Although this article leaves room for interpretation for the term investigation, it is relatively narrow in regards to the cases that the ICC may try. Therefore, the ICC does not impede on any courts that are established by the United States as long as the US upholds its deep-rooted respect for justice and law.

Additionally, by analyzing the practical implications of the court, we learn that there are a limited amount of scenarios in which the ICC may actually try American nationals. In all of these cases, if the ICC is understood as a foreign court, membership in the ICC leaves the status quo almost unchanged. As the current international system of anarchy stands, any court may claim jurisdiction over Americans committing crimes in their courts because American jurisdiction does not always extend beyond its boarders. However, with membership in the ICC, we are able to extend our influence more directly over trials involving Americans who otherwise would have taken place in completely foreign countries. Ultimately, membership in the ICC best serves American interest because it extends our influence in the realm of international law and also allows us to directly influence how our own nationals are tried in situations that would otherwise be completely out of our control.

Since the Obama Administration has taken office, the United States has worked more actively to change its stance towards the International Criminal Court and to create a less antagonistic relationship with it. In March of 2010, the president judge of the ICC, Judge Sang-Hyun Song gave a speech to the British House of Lords, in which he discussed his recent meeting with White House officials and President Obama.[ii] He stated that the Washington's attitude towards the ICC was changing and that after his meetings, he became optimistic that the United States would some day become a member of the court. In fact the United States has even encouraged Omar Al Bashir to appear before the ICC for his actions in Darfur.[iii] Such actions demonstrate that the possibility of the United States becoming a member of the court is becoming more likely as time progresses. However, with a divided congress, and democratic president who is losing popularity, the likeliness that the US will become a member in the near future seems unlikely. Republican senators, supported by a staunchly conservative base, seem to be committed to the notion that some how joining the ICC is "un-American," and detrimental to our future. I implore these decision makers to think pragmatically.

I do not claim that membership will solve all of the problems we face in the international realm, nor do I claim that by approaching the issue of membership in the ICC with Pragmatism, we will find solutions to all of our concerns. However, I do submit that by applying Classical American Pragmatic Philosophy when debating membership in the court, we find persuasive arguments for why the United States should become a member. Pragmatic Philosophy forces us to think of the benefits that come from joining the court and realize that a new horizon of international

justice will begin to develop once we become members. It also helps us address the main concerns that arise from membership. Although I grant that there will still be questions that must be answered before we enter the court, like whether there are sufficient American judges sitting on the court, what the chief prosecutor thinks of the United States, how much we will have to contribute to the court as the largest members and, most importantly, whether we can come to an agreement on what a "thorough investigation" means for the ICC, none of these questions are so insurmountable that we must dismiss the court completely. Therefore, by thinking Pragmatically, we find that membership in the International Criminal Court is actually beneficial for the United States and that dismissal of the court is contradictory to American Philosophy.

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[i] Of course this questions is with respect to nonpolitical concerns. The question of how politics have affected American membership in the ICC necessitates another paper of its own and has not been dealt with extensively here. I have only worked to address earnest concerns dealing with implications for the US as a whole if it were to join the court. Unlike such implications, political concerns only deal with certain segments of the population and thus have not been a central focus of this project.

[ii] "Bashir Will Eventually Face Trial - ICC President - AlertNet." *Thomson Reuters Foundation Homepage - Trust.org*. 04 Mar. 2010. Web. 02 Apr. 2011. <http://www.trust.org/alertnet/news/bashir-will-eventually-face-trial-icc-president>.

[iii] Biar, Zechariah Manyok. "Qatar's Former Justice Minister Calls on Bashir to Accept ICC Trial in Sudan." *Sudan Tribune: Plural News and Views on Sudan*. 3 Jan. 2011. Web. 02 Apr. 2011. <http://www.sudantribune.com/Qatar-s-former-justice-minister,37470>