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STRATEGIC IMPLICATIONS OF U.S. NON-SUPPORT FOR THE INTERNATIONAL CRIMINAL COURT

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Strategic Implications of U.S. Non-Support for the International Criminal Court

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ABSTRACT

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This paper examines the strategic implications affecting United States interests assuming the proposed International Criminal Court (ICC) will begin operation.

The U.S. objected to several Court provisions. Of primary concern is the limited UN Security Council role in deciding appropriate prosecutions. Second, the Court Prosecutor has virtually independent power. Third, the Crime of Aggression remains undefined. Fourth, the jurisdictional framework subjects troops of non-signatory nations, like the U.S., to prosecution in certain circumstances.

The U.S. will continue to take action to protect its vital and important interests regardless of the Court's existence. However, it may hesitate to participate in humanitarian or peacekeeping operations because of potential exposure for its troops to unwarranted prosecutions. Unfortunately, without strong U.S. and UN Security Council backing, the Court will not be the potent international force sought by the many countries and humanitarian organizations advocating its creation.

The U.S. will continue to support the rule of law and trial of human rights violators. It will also continue to protect its most important concerns and those of its closest allies. It may, however, weigh the potential for politically motivated prosecutions as too steep a price to pay for involvement in certain humanitarian type activities.

TABLE OF CONTENTS

ABSTRACT iiii

TITLE 1

SECTION I. BACKGROUND 1

SECTION II. KEY STATUTE PROVISIONS 3

SECTION III. U.S. POLICY OBJECTIONS 10

SECTION IV. IMPACT ON U.S. FUTURE ACTIONS 14

SECTION V. RECOMMENDATIONS AND CONCLUSIONS 30

ENDNOTES 35

BIBLIOGRAPHY 44

STRATEGIC IMPLICATIONS OF U.S. NON-SUPPORT FOR THE INTERNATIONAL CRIMINAL COURT

I. BACKGROUND

At the end of World War II many nations sought to create a standing international criminal court.[1] The Nuremberg and Tokyo War Crimes Tribunals were looked to as models for a permanent court whose existence would deter the types of atrocities that occurred in earlier wars and which could punish guilty actors should deterrence fail.[2] The Cold War effectively prevented any forward movement for the next fifty years.[3] In 1989 Trinidad and Tobago reintroduced the idea of a permanent War Crimes Court in the United Nations General Assembly and work on a draft statute began in earnest in 1995.[4] Slightly earlier the Security Council had created temporary War Crimes Tribunals to try individuals for crimes in the former Yugoslavia and Rwanda.[5]

For the next three years U.S. officials frequently made public statements in support of the proposed International Criminal Court (ICC).[6] However, at the Rome Final Drafting Conference in June and July 1998 the U.S. found itself unable to shape a Court consistent with U.S. policy or acceptable to Congressional concerns.[7] Accordingly, the vote taken at the end

of the negotiating session on July 17, 1998 had 120 countries in favor of the Rome Statute, including Britain, Germany, Canada, Russia, and France, while the U.S. found itself among the seven opposed.[8]

Sixty countries are required to ratify or accept the ICC Statute for it to enter into force and commence operations.[9] Given the number of nation signatories, entry into force will likely occur well before the expiration date of December 31, 2000.[10] The Rome Statute contains a review provision that will permit amendments to the basic statute after the Court has existed for seven years.[11] U.S. officials do not want a Court with the current jurisdictional set-up and have stated they intend to continue to work at crafting a modified statute acceptable to signatory nations yet addressing U.S. concerns.[12] The lack of similar success in Rome suggests a somewhat bleak outlook. What will happen if the Rome Statute, as it currently stands, forms the basis for an ICC that comes into existence in the next few years?

This paper examines the strategic implications potentially affecting United States interests, policies, and military forces in the likely event the ICC Statute is signed and accepted by the required number of nations and begins functioning. What are the Court's key points and the U.S. objections? What are the international legal implications of the ICC? Will it alter

existing International Law? Given that the U.S. did not sign the document, what are the implications for U.S. policy? Will the U.S. approach to international issues requiring the use of military forces, such as peacekeeping, need to be altered? Will the ICC hinder the U.S. ability to conduct unilateral or multilateral actions? What are the implications for U.S. troops assigned to UN or multinational operations? Should the U.S. ever agree to such a Court? Finally, what conclusions and recommendations should be made with respect to American policy toward the ICC? This paper will analyze possible answers to these questions and review the ramifications they may have for U.S. strategic policy.

II. KEY PROVISIONS OF THE ROME STATUTE

The Rome Statute contains 128 Articles, covering everything from naming the seat of the Court (The Hague, Netherlands) to definitions of cognizable crimes, jurisdiction, organization and roles of Court bodies, provisions for investigation, indictment, arrest, trial, and punishments.[13] Also covered are appeal procedures, financial provisions, the rules for ratifying and amending the basic statute, and establishing a governing body (the Assembly of State Parties).[14]

Five critical provisions engendering the greatest debate are summarized below.

A. Definition of the "Serious Crimes" Covered in the Court's Jurisdiction.

"Serious Crimes" include Genocide,[15] Crimes against Humanity,[16] War Crimes,[17] and the Crime of Aggression.[18] While Genocide, Crimes against Humanity, and War Crimes have generally accepted definitions under current International Law (e.g., from the Genocide Convention, the Hague and Geneva War Conventions, etc.) the Crime of Aggression has no internationally accepted definition.[19] Consequently, the statute leaves the crime undefined pending agreement and acceptance by signatory nations over the seven-year review period.[20] Some nations also wanted to include other offenses, particularly terrorism and international drug trafficking,[21] within the ICC jurisdiction, but the Rome Statute left those offenses to the future review process.[22] There is also criticism that the number and construction of the numerous offenses incorporated into the Crimes against Humanity Article and War Crimes Article have greatly expanded these crimes beyond current customary International Law.[23] Other commentators applaud the expansive enumerated listing for these crimes. Simultaneously, they deplore the Crimes against Humanity definition which construes "attacks against any civilian population" to require "a course of conduct … pursuant

to or in furtherance of a State or organizational policy" as too restrictive.[24] Some commentators also object to the qualifier that limits ICC jurisdiction over War Crimes to those crimes "committed as part of a plan or policy, or as part of a large-scale commission of such crimes" as being unnecessarily restrictive of ICC authority.[25]

B. The "Triggering Mechanism" or Procedure and Method for Referring Cases to the Court.

There are three ways a case may be referred to the Court for action.[26] State Parties to the treaty may refer a situation to the Prosecutor for investigation, the UN Security Council may refer a situation to the Prosecutor, and lastly, the Prosecutor has the independent authority to initiate investigations subject to a review by the Pre-Trial Chamber.[27] Many nations and human rights organizations felt the Court needed to be independent from the political restrictions and "Permanent-Five" veto potentially imposed by Security Council activities.[28] Others were concerned about the possible political motivations of State Parties or the Prosecutor and wanted a Court that could only take cases referred to it by the Security Council.[29] The Rome Statute reflects a compromise with the Security Council retaining authority to require the Prosecutor to defer an investigation or prosecution for renewable twelve-month periods.[30]

C. Universal and Automatic Jurisdiction over Serious Crimes.

Many nations and international organizations believed the ICC should have universal jurisdiction over all enumerated crimes.[31] Universal jurisdiction is the authority to investigate and prosecute any suspected Serious Crime, regardless of place of occurrence or nationality of the perpetrator. Despite strong urging from many nations and human rights groups, universal jurisdiction was not included in the Rome Statute. The ICC will have a type of limited jurisdiction discussed below.

With respect to automatic jurisdiction, State Parties are bound to accept the Court's jurisdiction once they ratify the treaty.[32] One proposal was that signatory nations should have the opportunity to assess the effectiveness and impartiality of the Court before consenting to automatic jurisdiction, except for the Crime of Genocide.[33] During a ten-year transitional period, State Parties could "opt-out" of jurisdiction for Crimes against Humanity and War Crimes, at the end of which the State had the option to accept full jurisdiction or withdraw from the treaty.[34] However, under the Rome Statute, State Parties are able to "opt out" of the War Crimes jurisdiction of the Court for an initial period of seven years when the alleged crime was committed within its own territory or by one of its nationals.[35]

In a related jurisdiction issue, the ICC only has jurisdiction in cases submitted by a State Party, or initiated

by the Prosecutor, when the country where the crime was committed is a State Party or the offender is a national of a State Party, or in the case of a non-State Party, when that State has consented to jurisdiction on an *ad hoc* basis.[36] In effect, unless a case is referred by the Security Council, States must agree to ICC jurisdiction over their nationals or events that occur within their territory.

D. "Complementary" Jurisdiction.

ICC proponents argued the Court was designed to complement, not supersede or replace, national criminal justice systems.[37] Article 1 states the complementary concept and Article 17 implements it by restricting ICC jurisdiction when a nation has taken action with respect to a case, unless the action is determined to be a subterfuge, results in an unjustified delay, or is inconsistent with bringing an accused to justice.[38] The Court itself, under Article 19, and through its Pre-Trial, Trial, and Appellate Chambers, will rule on any challenges to the exercise of its jurisdiction.[39] Opponents argued this power permits the ICC to review the actions of national justice systems and overrule their decisions.[40]

E. Enforceability of Court Actions.

As a creature of the nations agreeing to bring the Court into existence, the Court must rely on State Party cooperation to assist it in conducting investigations and in enforcing its decisions.[41] In one view, without UN, and particularly U.S. backing, the ICC has limited ability to apprehend and punish war criminals.[42] Despite these limitations others believe the overwhelming support from so many signatory nations and numerous world organizations will compel adherence to Court rulings and provide it the necessary assistance and legitimacy to be successful.[43]

F. Other Debated Provisions.

Other portions of the Statute subject to debate and negotiation will have an impact on the character and eventual functioning of the Court. An awareness of the following provisions is necessary to understand the Court's long term impact and operation.

Aspects of the Court that may affect a nation's decision to conduct military operations include the following. The ICC will enforce Individual Responsibility for criminal acts just as the International Criminal Tribunal for Former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR) are doing. This is different from the existing International Court of Justice (also known as the World Court), which only hears

disputes between sovereign nations who have agreed to its jurisdiction.[44] The ICC will be able to prosecute War Crimes committed in internal armed conflict, an area often considered beyond the reach of International Law.[45] The Rome Statute codified the Nuremberg Tribunal principles that crimes committed in an Official Capacity are not exempt from jurisdiction[46] and Superior Orders are no defense to crimes unless the accused had a duty to obey, did not know the order was unlawful, and the order was not manifestly unlawful.[47] The Statute also employs the softened "Yamashita Principle"[48] of command responsibility, as codified in Article 86, Protocol I to the Geneva Conventions of 1949,[49] that commanders may be held criminally responsible for crimes their troops commit if they "knew, or should have known" of the crimes and "failed to take all necessary and reasonable measures to prevent or repress" the crimes.[50]

Additionally, the Court's rules of procedure, rules of evidence, and specified elements for enumerated crimes were not agreed upon and are left for agreement by a two-thirds majority of members of the Assembly of State Parties, the Court's governing body, for eventual resolution and adoption.[51] These "legal" provisions will have greater impact once the Court assumes jurisdiction in a particular case. By themselves they will probably not affect foreign policy decisions, but their

indeterminate aspects at present serve to highlight the speculative nature of the Court's eventual character.

III. U.S. POLICY OBJECTIONS

Ambassador David Scheffer, U.S. Ambassador-at-Large for War Crimes Issues, headed the U.S. delegation to the UN Diplomatic Conference in Rome for the establishment of the ICC. He and other U.S. spokesmen have made several statements expressing the U.S. position concerning the adopted Rome Statute.[52] These statements outline U.S. objections and concerns and generally relate to the key provisions discussed in Section II.

With respect to the definition of Serious Crimes, the U.S. position is that the Crime of Aggression must be necessarily tied to a formal determination by the UN Security Council that a state had committed aggression.[53] Current ICC provisions leave the Crime of Aggression for future definition with no guaranteed linkage to a prior Security Council decision.[54] Given the unknown definition of aggression, the U.S. believes only the Security Council should have the authority to refer such a case to the Court. Existing procedures in the Rome Statute treat it no differently than the other listed crimes.

Another area of concern is the attempt to include the crimes of terrorism and international drug trafficking in the ICC

jurisdiction.[55] There is no accepted definition for these offenses and with limited ICC resources Court activity could actually undermine ongoing national and transnational investigative efforts.[56] Regardless, the Rome Conference added a recommendation to expand ICC jurisdiction to include these offenses at the earliest opportunity.[57]

The triggering mechanism, or crime referral system, was alluded to earlier in the discussion concerning the Crime of Aggression. The U.S. position is that the Court would have to enjoy the backing of the United Nations and its member states through the system previously established in the UN Charter, that is, by Security Council action.[58] The Security Council's key role in maintaining international peace and security should be the source of case referrals.[59] Without UN and State Party backing, the Court will have limited capability to enforce its decisions or insulate itself from frivolous calls for action.[60] Having a system of case referrals based on Security Council decisions or requests from member states who are parties to the Statute, and thus amenable to the Court's jurisdiction, insures appropriate international backing and consistency in the actions of the Court.

The Rome Statute which permits non-Party States to request ICC action and has "opt-out" provisions for State Parties could produce a jurisdictional anomaly for non-Party States deploying

forces to restore international peace and security.[61] For example, U.S. forces conducting humanitarian actions to halt genocide in a foreign country could be subject to ICC prosecution on the call of a non-party government (e.g., Iraq) where an alleged incident occurred. However, an "opt-out" state, such as France, also providing military forces, would not be subject to ICC action, and Iraq, who committed the acts of genocide the U.S. was trying to halt, would not be amenable to prosecution unless the Security Council referred the case to the ICC.[62]

The U.S. views this as an unacceptable scenario because of unique American responsibilities for leading the world in maintaining international peace and security.[63] It would subject U.S. decisions to use military force to meet alliance obligations or to participate in multinational operations to ICC jurisdiction, even without Security Council referral.[64] The U.S. argues the only method for imposing ICC jurisdiction on a non-Party State is through Security Council action.[65] The action of a sovereign nation ratifying the treaty and subjecting itself to the Court's jurisdiction is a meaningless exercise and contrary to current international principles as codified in the UN Charter if other countries of the world could create a court purporting to exercise power over non-Party States.[66]

Opponents of the U.S. view believe the Complementary Jurisdiction portions of the ICC Statute would effectively negate U.S. concerns about unwarranted prosecution of U.S. leaders or forces involved in international humanitarian activities.[67] The U.S. concern is that, regardless of its own investigative and prosecutorial procedure, if the U.S. determines prosecution is unwarranted, that decision is still subject to Court review and may ultimately lead to ICC prosecution.[68] The U.S. acknowledges that the Rome Statute contains some safeguards that defer to national investigation and prosecution decisions, but still desires greater protections.[69]

Two inter-connected concepts the U.S. opposed were the Independent Prosecutor and lack of a required Security Council referral before the Court could initiate action with respect to a case.[70] The U.S. concluded that a completely Independent Prosecutor risked "turning the Court or its Prosecutor into a human rights ombudsman open to, and responsible for ... any and all complaints from any source. Flooding the Court with every imaginable complaint, hindering its investigation into the most serious crimes and undermining its scope and relevance."[71] The U.S. did support giving the Prosecutor maximum independence and discretion to investigate a situation within the context of the

overall referral after the Security Council or a State Party referred a case to the Court.[72]

These official U.S. objections and concerns do not address some other objections noted by U.S. commentators. In particular, there are concerns about Americans potentially being hauled in front of an international Court that does not have the same constitutional guarantees afforded defendants in U.S. courts, such as trial by jury and rights to confront witnesses.[73] A possible "Double Jeopardy" issue exists if the ICC decides a U.S. prosecution was a sham, and the Court's limited ability to compel states to produce witnesses and evidence essential for an accused's defense are other noted constitutional concerns.[74]

Aware of U.S. objections, and given it is unlikely the U.S. will be successful in persuading State Parties to change the ICC Statute before it is ratified by a sufficient number of nations to bring it into force, what are the effects on U.S. strategic policy and the impact for U.S. forces in the years ahead?

IV. IMPACT ON U.S. FUTURE ACTIONS

A. What are the International Law Implications of the ICC?

The U.S. has an abiding interest in insuring the rule of International Law remains consistent and is adhered to by all

nations in the international community.[75] Nations that continually operate outside the norms of International Law are viewed as 'rogue states' and marginialized in the global arena. Accordingly, the U.S. is concerned about how International Law, the rules for governing relations among sovereign states, is affected by a widely subscribed treaty seeking to establish or alter international norms. With respect to the ICC this concern has several sub-parts.

1. How Does the Rome Statute Compare to Current International Law?

Historically, War Crimes, and to a lesser extent, Crimes against Humanity and Genocide, have been dealt with in either of two accepted ways. First, because the Law of War rests primarily on expectations of self-enforcement, allegations of criminal acts were pursued by the sovereign to whom the actor belonged.[76] Second, the victorious nation whose people or property were affected by the alleged crimes might convene a military tribunal to try allegations, especially if the offender was under their control.[77] The self-enforcement method has been the preferred international norm because it usually prevented outside nations from interfering in the internal activities of another nation. It was consistent with the accepted international regime that state-actors, not individuals, have pre-eminence in international affairs so that individual

transgressions or complaints can be resolved within the national framework and not the international arena. It also permits the responsible nation to take action; thereby demonstrating to the world that it is in fact concerned with concepts of justice, right conduct, human rights, and how it is perceived as a member in the family of nations.

Trial by the victors, or the opposing state, was understood as far back as the 1863 Lieber Code (U.S. Army General Order 100).[78] However, when the World War I Allies sought to establish an international military tribunal to try approximately eight hundred German suspected war criminals, the procedure ground to a halt because Germany refused to cooperate and would not turn the named suspects over for trial.[79]

Since the defeat of Nazi Germany and Imperial Japan, a gradual shift has occurred in the international arena. There is a greater focus on individual rights and a universal interest to call nations and individuals to account for crimes, even when those offenses were committed against that nation's own people.[80] World War II gave rise to the first of the temporary international tribunals established solely for the prosecution of the most horrific crimes, War Crimes, Crimes against Humanity, Waging Wars of Aggression, and Genocide.[81] These *ad hoc* tribunals tried individuals as representatives of their

nations and punished them for their individual and collective national offenses.

A UN sponsored temporary tribunal mechanism has existed since then to address allegations of War Crimes in the numerous conflicts after WW II. However, the political realties of the polarized Cold War world and the greater emphasis the UN placed on rapid conflict termination and regional stabilization militated against any permanent tribunal until after the Cold War. The problem with temporary tribunals has been primarily one of enforcement.[82] For the WW II tribunals, enforcement was not difficult because Germany and Japan were defeated and the Allied Powers were in control of the country, the defendants, and the evidence.[83]

The UN sponsored tribunals for Yugoslavia (ICTY) and Rwanda (ICTR) are somewhat different. While moving forward on redressing various crimes these temporary tribunals have been roundly criticized for their inability to gain custody and control of the primary defendants, secure the evidence, and ensure prompt justice.[84] The Government of Rwanda has tried hundreds more individuals responsible for the 1994 genocide than the ICTR.[85] The ICTY, on the other hand, has limited ability to enter and control the territories where the alleged atrocities occurred. Without strong international backing and military

power to bring perpetrators to justice, temporary tribunals have limited effectiveness.

The international community sought to address this concern by establishing the ICC as a standing tribunal empowered to enforce international norms with respect to the core offenses, the named Serious Crimes which have the greatest impact on human life and rights and endanger the global or regional community.[86] By its terms it would not replace national actions to suppress or prosecute Serious Crimes. However, it appears the Independent Prosecutor and review provisions could make the ICC take action at the behest of State Parties against individuals regardless of nationality or site of the alleged offenses.[87] To the many nations who signed the ICC statute and the host of human rights groups backing the ICC, this is clearly viewed as a major step forward in the international human rights arena.[88] There can be no doubt that the Court will change existing International Law.

A sitting tribunal with the authority to intervene, and more importantly, if it actually plays out this way, the power to enforce its decisions through the actions by the State Parties, is a major change in the international order of protected sovereignty. That protected sovereignty is supposedly the reason the UN exists; to keep nations out of the internal affairs of other nations and to maintain international peace and

security.[89] A greater willingness to intervene in internal activities is already manifest in the UN and throughout the world.[90] This retreat from respect for absolute sovereignty is for many a long awaited development, first envisioned when the UN was created after WWII, but only renewed in earnest since the end of the Cold War. Accordingly, the existence of the ICC is a continuation of this shift away from an international community focused on national sovereign rights and towards one more concerned with individual rights and protections, regardless of nationality or presence.[91]

2. Will this Legal Change Affect the U.S.?

As the nation with the most power to maintain peace and security and to assist in humanitarian disasters the U.S. will find itself more frequently called on to intervene in international activities to support and enforce ICC rulings. At the same time, because its leaders and military forces are conducting the activities necessary to support world security and assist in humanitarian endeavors they will become more susceptible to allegations of wrongdoing.[92] A damned if you do, damned if you don't proposition.

3. How Does the ICC Compare to the ICTY, ICTR, and Other Tribunals?

The temporary nature of all current and previous War Crimes Tribunals is the defining difference between them and the ICC.

Their scope has been necessarily limited in time and place to the wrongs they were created to redress.[93] However, the enforcement capability of the ICC is likely to be similar to that of the ICTY and ICTR. Regardless of the ICC's moral standing, it will require international backing from nations with the power to enforce its rulings. It needs a policeman, so to speak. The ICTY and ICTR have required a policeman as well. Normally, the policeman has been the power of the Security Council through its enforcement powers. As seen from the slow progress at the ICTY and ICTR, Security Council power is limited to the power it derives from member states.[94] No matter how much the human rights groups hope the mere existence of an ICC will force nations and individuals to comply with international humanitarian norms, a policeman is still needed. Yet, without the requirement for Security Council referral, where is that power to come from? From State Parties to the treaty, the preferred solution? Or from the United States, a non-member to the ICC Statute?

4. Will the ICC Statute become Customary International Law and Therefore Binding on the U.S.?

First, general rules of construction of International Law hold that a treaty it does not sign or ratify cannot bind a nation.[95] An exception, however, might exist in the area of International Law with respect to the rules of armed conflict.

Second, in so far as the practices of nations over a period of time tend to become the customary rule of law binding on all nation-states, if the actions of the ICC were to become the customary practices of nations, then it may eventually become International Law binding on the U.S.[96] The corollary is, that in order to become customary law, the nations of the world need to observe and comply with those practices. Therefore, without the adherence and support of the U.S., the major actor in international affairs, how can such a treaty replace existing customary law? It is unlikely to so, especially because without China and India, major international actors and also not signatories, the treaty lacks the backing of the three most populous nations on earth.[97]

5. If not Customary Law, and if the U.S. Does Not Sign, Can the ICC Still Affect U.S. Troops?

It may be possible to do so in at least two ways. First, U.S. troops deployed overseas may be putatively subject to ICC jurisdiction in the scenario posited in Section III, above. That is, a flier conducting operations over Serbian Kosovo could be captured by the opposing nation. If the airman was alleged to have participated in bombing protected targets, a possible war crime, Serbia could request the ICC assume jurisdiction over the incident and the airman even though Serbia did not sign the ICC Statute. Normally, of course the U.S. would conduct its own

investigation and prosecution for an alleged offense committed by an American service member. What if the U.S. soldier, sailor, airman, or marine was not in U.S. custody? Might another country or organization transfer custody to the ICC? Or, suppose allegations were made and dismissed at the time of an incident, to wit; Iraqi complaints of terrorism in the December 1998 bombings in Iraq. Later, a U.S. leader responsible for carrying out those campaigns, whether military or civilian, travels in a State Party territory and finds himself/herself in custody and facing extradition to the jurisdiction of the ICC?[98] Proponents of the Court would argue this is no different from when there was no ICC. For example, North Vietnam continually threatened to put captured U.S. fliers on trial for War Crimes. Certainly the U.S. would rather have our POWs turned over to the ICC.

In the second instance, War Crimes (like piracy and later airplane hijacking) have always been crimes of universal jurisdiction.[99] That means that because War Crimes are such an affront to the international peace and security, any nation finding itself with custody of an alleged war criminal has jurisdiction to try the perpetrator for his acts. If that is the case, then logically a suspect may also be delivered to an international body established for the purpose of investigating and trying War Crimes.

But the question is asked, what has prevented independent nations from trying suspected war criminals in the past? In the case of the most notorious criminals from World War II we still see instances of nations trying individuals found in their jurisdiction.[100] However, in most Twentieth Century wars of limited scope and duration nations have been hesitant to take it upon themselves to judge individuals from other nations involved in a conflict that did not involve them. Many reasons exist, but the most obvious one is that countries have little natural interest in the truth or falsity of allegations made by one party or the other, and do not have the ability or resources to determine the veracity of the complaints. A second reason is the risk to their own interests should they choose to place a national of another country on trial for events occurring in a third country. For instance, during the Vietnam War, the U.S. could have and should have exerted certain diplomatic and military pressures on a country that chose to try a captured U.S. pilot. Would this diplomacy be applicable if a country could escape their own accountability by delivering the accused airman to an international tribunal?

Perhaps not. The rejoinder is that, "Hey, we don't know the facts, but X country says he's a criminal. You say he's not. Let's leave it to the ICC to judge." The resulting specter of numerous actions taken against U.S. forces or leaders

for U.S. efforts at international activities to maintain peace and security is troubling. The unusual role international and national humanitarian organizations played in ICC development and the pressure they exerted on governmental delegations gives credence to the idea that some nations are backing the ICC to appear as if they are 'doing something,' yet have no accountability to go after and try the Pol Pots of the world.[101] Supporting a separate and independent body such as the ICC gives them the appearance of acting collectively against War Crimes, Genocide, etc., without having to step forward and take individual action.

6. What is the Impact on Existing Status of Forces Agreements (SOFA)?

A key component of a SOFA is criminal jurisdiction. Will we need to re-negotiate those documents to ensure the Receiving State, or Host Nation, where U.S. forces are stationed cannot turn service members over to the ICC for trial? This point has supposedly been discussed with NATO allies by the Secretary of Defense.[102] Without getting into too detailed a discussion, it appears clear any War Crime would at the least be a crime of "concurrent" jurisdiction. Under existing schemes the Host Nation generally has primary right to try the individual in concurrent cases. It seems logical to infer that once in the Receiving State's custody, U.S. troops would be at their mercy.

Certain diplomatic pressures exist to be sure, but if a nation were willing to maintain custody and turn jurisdiction over to the ICC, it is likely they would have expected those pressures, considered them, and decided to proceed anyway. On a practical note, SOFAs are notoriously difficult to negotiate for numerous reasons. A series of these negotiations would be extremely difficult, especially if the U.S. found itself faced with the opposition of nearly all of its NATO partners. Would the U.S. allow this point to destroy NATO?

B. Given the United States Did Not Sign the ICC Statute, What are the Implications for Long Range U.S. Policy?

Post Cold War events have shown the U.S. is expected to lead in world affairs. The U.S. lead coalition response to Iraq's invasion of Kuwait in 1990 and NATO's entry into the Balkans in 1995 are just two instances demonstrating the essential requirement for U.S. leadership in maintaining world security. Assuming the U.S. will be called upon to continue this role, what are the likely impacts of the ICC on U.S. policy decisions?

1. ICC Impact on Current Criminal Tribunals and the Hunt for War Criminals.

The U.S. supports the apprehension and trial of suspected war criminals throughout the world and particularly in the former Yugoslavia.[103] How will ICC existence affect the U.S.

stance with respect to named criminals in the ICTY, the ICTR, and from other conflicts? The ICTY and ICTR have specific mandates from the UN Security Council to bring suspected war criminals, or for the ICTR, those suspected of Genocide, to justice. Should these temporary tribunals end their duties and refer remaining cases to the ICC? The U.S. will not seek the end of the temporary tribunals because the ICC has prospective jurisdiction only, limiting its authority only to those crimes committed after it comes into existence.[104] Conceivably the Security Council could create other temporary tribunals for the trial of cases arising from past conflicts, Cambodia, for example.[105] That may be unlikely, but it is significant that Security Council tribunals, just like the Nuremberg and Tokyo Tribunals are usually retrospective in that they are established to try cases that occurred prior to their formation. Clearly the Security Council with U.S. backing can create specific courts to address future and past offenses.

Should the U.S. continue to support overt or covert efforts to apprehend war criminals? This policy question applies primarily to the ICTY, but has generic application for the future. The U.S. should continue support for apprehension of ICTY war criminals. As already noted, the ICC is several years away from existence and cannot address past crimes. Another aspect of this issue relates to the policy decision to continue

using U.S. military forces in small-scale contingencies and will be addressed below.

2. ICC Impact on U.S. Participation in Peacekeeping Operations, Humanitarian Assistance Operations, and Other Small Scale Contingencies.

It seems almost unrealistic to suggest that the U.S. should redefine its national strategy out of concern that U.S. forces may be subject to some future ICC jurisdiction. Nevertheless, such a concern is real. Already discussed were situations when the U.S. may find its troops or leaders at least arguably being prosecuted by the ICC. This could occur either because they are in the hands of an adversary eager to have Americans tried for alleged offenses, or because a State Party feels pressured to allow the ICC to rule on the legality of an American operation. If the ICC attains the respected international status sought by member countries, it is clear it will eventually become a forum for definitive statements on the war crimes status of most international military activities. Will this inhibit the U.S. from accepting calls from the world community to assist in various peacekeeping or humanitarian situations? It probably will if every time U.S. troops rush to the aid of the world community they tend to find themselves called to account before the ICC by an Independent Prosecutor or a State Party.

3. ICC Impact on the Perceived Legitimacy of U.S. Actions During UN-Sanctioned, Multilateral, or Unilateral Operations. The U.S. routinely attempts to develop international consensus before participating in international military operations. The preferred basis is under the auspices of the UN. On certain occasions the U.S. may act in concert with its regional allies or may seek multinational coalition support. In limited circumstances the U.S. must take unilateral action to protect its vital interests. In each situation U.S. leaders will make decisions and U.S. troops will conduct operations which may give rise to allegations of offenses under the Court's jurisdiction. U.S. actions taken under UN or regional organization mandated operations will have greater legitimacy and thus, will be less likely tried by the ICC for violations. In coalition or unilateral actions, however, the U.S. may find its activities enjoying less international support. Opposition nations or groups will be more apt to call for Prosecutor review of U.S. leader and troop actions to underscore their view that U.S. or coalition actions are "illegitimate." Troop activities may be subject to ICC jurisdiction regardless of the source of the operation.

The U.S. does not fear international scrutiny of its troop actions because U.S. troops are the best trained and some of the most disciplined forces in the world. Frequently though, U.S.

forces have been the recipients of adversary nations' atrocious treatment out of animosity toward U.S. policies regardless of the actual merit of the individual soldier actions.[106] The U.S. would prefer to act on those few instances of indiscipline within its own judicial framework and prevent U.S. forces from being put on international display for politically motivated charges. Claims that the U.S. has failed to police itself in the past for alleged offenses are misplaced. The U.S. has done as much or more than any other nation to ensure adherence to the law of armed conflict.[107]

4. Implications for Individual U.S. Troops Assigned to UN or Multinational Operations.

The U.S. sometimes assigns individual officer and enlisted members to perform duty with UN or multinational headquarters. Will the U.S. be less likely to provide such individuals once the ICC is established? Although at first appearance it may seem such individuals would be more susceptible to ICC action, in reality the possibility is probably very low. In most cases the detailed individuals are on high level staffs and quite distanced from the fighting or points of confrontation where alleged atrocities most often occur. Further, just as the umbrella of working for a UN or regional organization gives greater legitimacy to U.S. actions, the same applies to U.S. forces assigned to these headquarters, making it less likely a

detailed officer or NCO would be susceptible to frivolous claims before the ICC.

Given these policy and legal implications what should the U.S. do with respect to the establishment of the ICC?

V. RECOMMENDATIONS AND CONCLUSIONS

Will the U.S. ever agree to subject its citizens to the jurisdiction of such a Court? As Ambassador Scheffer told the 6th Committee of the General Assembly, it is unlikely the U.S. will agree to any International Criminal Court within the existing statutory construction.[108] However, the U.S. would prefer to work within a reasonable ICC system, and accordingly it will continue to seek amendments to the Statute to make it acceptable for U.S. participation.[109] In his Report to the Senate Foreign Relations Committee, Ambassador Scheffer outlined the objectionable ICC provisions (discussed in Section III above) preventing U.S. signature.[110] They are the official U.S. arguments, which even if satisfactorily addressed may not convert Congressional and other opponents to U.S. support for the treaty.[111] U.S. voluntary participation in the ICC looks a long way off. In the meantime, over 67 countries have signed

the document and submitted the Statute to their national ratification processes.[112]

Regardless of whether the ICC comes into existence, the U.S. will still take action to bring war criminals to justice before tribunals created consistent with UN Security Council mandates.[113] The international community will continue to look to the U.S. for leadership in resolving world crises, even when they disagree with certain aspects of U.S. policy or actions.[114] U.S. troops will continue to deploy to protect U.S. interests and contribute to international peace and security. The U.S. military will remain subject to the highest standards of behavior consistent with International Law, monitored by professional leaders, and enforced though the Uniform Code of Military Justice (UCMJ).

Will the U.S. hesitate to sign up for humanitarian or peacekeeping operations? Probably so, especially when circumstances within the locale of the prospective operation give indications the ICC will be pressured to assert jurisdiction over actions of Americans in order to thwart U.S. participation. In reality, however, the U.S. may be more hesitant to commit forces for <u>other</u> overriding policy concerns. As always, the issue of U.S. action will be determined based on whether the matter is one of vital, important, or some peripheral national interest. In cases of vital interest, and

for certain important national interests, the U.S. will be willing to act unilaterally despite some international opprobrium. Concern for the existence of an ICC with an independent and possibly anti-U.S. prosecutor will not, and should not, deter U.S. action. On the other hand, in instances of peripheral U.S. interest, primarily those of a humanitarian nature, the U.S. could well decide, that along with all the other factors militating against U.S. intervention or participation, the risks posed to U.S. troops by such an ICC simply does not justify U.S. participation. The ironic result is that the international push to form an ICC despite serious U.S. objection to certain provisions will actually have the opposite effect hoped for by the many nations and the unprecedented number of human rights organizations participating in the Rome Conference. They will have created an organization of limited and weak authority, when acting without the backing of the Security Council or the U.S., whose existence actually works against the very thing they want most - more U.S. participation in humanitarian and peace operations to alleviate suffering and deter human rights violators around the world.

In short, the world will proceed much as before, with an ICC, but without the international authority and power necessary to deter or punish the most egregious evildoers of the world.

And, by its very existence, it will help inhibit the only nation that can make a real difference in preventing such atrocities.

Should the U.S. continue to pursue amending the ICC Statute in order to help shape its final form? In so far as the U.S. can influence any changes to the Court, it should do so to make its existence more palatable to eventual U.S. membership. However, a realistic view sees the major changes necessary to obtain U.S. concurrence as highly unlikely. Accordingly, the U.S. should continue to formulate its strategic plan mindful of the implications of the ICC, but not alter its policy in the expectation that ICC existence will fundamentally change the international approach to its very object - deterring and punishing Crimes of Genocide, Crimes against Humanity, and War Crimes. In essence, an ICC without U.S. participation appears to be a Court with much ado but with little practical effect.

Word Count:

6913

ENDNOTES

[1] Benjamin B. Ferencz, An International Criminal Court, a Step Toward World Peace: A Documentary History and Analysis, Vol. II (Dobbs Ferry, NY: Oceana Publications, 1980), 32.

[2] Ibid., 99.

[3] Elizabeth Neuffer, "A Worldwide Tribunal on Crime Eyed," Boston Globe, 15 June 1998, p. 1.

[4] Ibid.

[5] United Nations Security Council. UNSCR 808, 3 May 1993 & UNSCR 827, 25 May 1993, UNSCOR 25704(1993)/32 I.L.M. 1159 (1993) for International Criminal Tribunal for the Former Yugoslavia (ICTY). UNSCR 955, 8 November 1994/33 I.L.M. 1598 (1994) for International Criminal Tribunal for Rwanda (ICTR).

[6] James P. Rubin, U.S. Department of State, Office of the Spokesman, "U.S. Position on International Criminal Court," 23 June 1998; available from http://www.usembassy.hr/Rubin622.html; Internet; accessed 20 October 1998. *See also* David J. Scheffer, U.S. Ambassador-at-Large for War Crimes Issues, statements on 13 November 1997, 14 January 1998 and 24 February 1998; reported respectively in U.S. Department of State Dispatch, December 1997, Vol.8, Issue 10, p.20; January/February 1998, Vol. 9, Issue 1, p. 19; and March 1998, Vol. 9, Issue 2, p. 19. Numerous other public statements in support of an International Criminal Court were made by the President, Secretary of State, and other Administration officials; available from the United States Information Agency; http://www.usia.gov/topical/pol; Internet; accessed frequently.

[7] Alessandra Stanley, "U.S. Dissents, but Accord is Reached on War-Crime Court," New York Times, 18 July 1998, sec. A, p. 3.

[8] Ibid.

[9] ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, Articles 125 (Signature, ratification, acceptance, approval or accession) & 126 (Entry into force), Adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 17 July 1998. *Hereinafter* ICC Statute or Rome Statute.

[10] Ibid., Art. 125.

[11] Ibid., Arts. 121 & 123.

[12] David J. Scheffer, "Remarks before the 6th Committee of the 53rd General Assembly," United Nations, New York, October 21, 1998, pp. 2-3; available from <http://www.state.gov/www/policy remarks/1998/981021 scheffer icc.html>; Internet; accessed 23 October 1998. *Hereinafter* Remarks before the 6th Committee.

[13] ICC Statute, Preamble and Parts 1 through 13 (Arts. 1-128).
[14] Ibid.
[15] Ibid., Arts. 5 & 6.
[16] Ibid., Arts. 5 & 7.
[17] Ibid., Arts. 5 & 8.
[18] Ibid., Art. 5.
[19] Adrian Karatnycky, "Don't Worry War Criminals - The New Court Won't Work," Wall Street Journal, 27 July 1998, p. A15.
[20] ICC Statute, Art. 5.
[21] Benjamin B. Ferencz, "Make Law Not War," World Today, 54 (June 1998): 152.
[22] Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, Italy, July 17, 1998, Annex I, Para E.
[23] Gary T. Dempsey, "Reasonable Doubt, The Case against the Proposed International Criminal Court," The Cato Institute, Washington, D.C., 16 July 1998, pp. 5-6; available from <http://www.cato.org/pubs/pas/pa-311.html>; Internet; accessed 30 October 1998. *Hereinafter* Reasonable Doubt.
[24] Lawyers Committee For Human Rights, International Criminal Court Briefing Series, Vol. 2, No. 1, August 1998, pp. 1-2; available from <http://www.lchr.org/icc/papv2n1.htm>; Internet; accessed 20 October 1998. *Hereinafter* Lawyers Committee Brief.
[25] Ibid.
[26] ICC Statute, Article 13.
[27] Ibid., Arts. 13-15.
[28] Lawyers Committee Brief, 4-5.
[29] Alessandra Stanley, "U.S. Argues Against Strongly Independent War Crimes Prosecutor," New York Times, 18 June 1998, sec. A, p.7.
[30] ICC Statute, Article 16.
[31] Lawyers Committee Brief, 3.
[32] Ibid., 2-5.
[33] David Scheffer, "Report to the Senate Foreign Relations Committee on Why the U.S. Opposed the International Criminal Court," Washington, D.C., 23 July 1998, p.3; available from <http://www.usembassy.hr/Scheffer.htm>; Internet; accessed 20 October 1998. *Hereinafter* Foreign Relations Committee Report.
[34] Ibid., 4.
[35] Ibid., and ICC Statute, Art. 124.
[36] ICC Statute, Art. 12 and Lawyers Committee Brief, 3.
[37] Dempsey, Reasonable Doubt, 3-4.
[38] ICC Statute, Arts. 1 & 17.
[39] Ibid., Article 19.

[40] Dempsey, Reasonable Doubt, 4.

[41] ICC Statute, Arts. 86-111.

[42] George Melloan, "In Rome, U.S. Realism Trumps Illusions," Wall Street Journal, 28 July 1998, p. A19.

[43] "Judging Tyrants and Torturers," Christian Science Monitor, Editorial, 22 July 1998, p. 16.

[44] ICC Statute, Article 25 and UN Charter, Article 92 establishing the International Court of Justice (ICJ) with its annexed Statute, based on the Statute of the Permanent Court of International Justice, an arm of the League of Nations.

[45] ICC Statute, Article 8, Section 2(e). *See also* Lawyers Committee Brief, 1.

[46] ICC Statute, Art. 27.

[47] Ibid., Article 33. Note Article 33 also specifically states that orders to commit Genocide or Crimes against Humanity are manifestly unlawful, thereby eliminating the possibility of the defense of Superior Orders for those crimes.

[48] In re Yamashita, 327 U.S. 1, (U.S. Supreme Court, 1946). *See also* Richard L. Lael, The Yamashita Precedent: War Crimes and Command Responsibility (Wilmington, DE: Scholarly Resources, 1982), especially Chapter 6, for the proposition that the Yamashita Case established a Commanders 'strict liability' standard for actions of their troops and the progression of Command Responsibility since then. *But Cf.* Wm. Hays Parks, "Command Responsibility for War Crimes," Military Law Review 64 (Summer 1973): 1, for the argument that General Yamashita knew about and personally ordered numerous executions, and thus the Yamashita case has been erroneously interpreted. *See also* Bruce D. Landrum, "The Yamashita War Crimes Trial: Command Responsibility Then and Now," Military Law Review 149 (Summer 1995): 293, for an excellent short discussion on the views of Command Responsibility.

[49] Department of the Army, Protocols to the Geneva Conventions of 1949, DA Pamphlet 27-1-1 (Washington, D.C.: U.S. Department of the Army, 1979), 65.

[50] ICC Statute, Article 48.

[51] ICC Statute, Article 9 for Elements of Crimes; Article 112, for Rules of Evidence and Procedure.

[52] Scheffer, Foreign Relations Committee Report, 3-4. *See also* David J. Scheffer, "America's Stake in Peace, Security, and Justice," 31 August 1998; available from <http://www.state.gov/www/policy remarks/1998/>; Internet; accessed 20 October 1998. *Hereinafter* America's Stake. *See also* Scheffer, Remarks before the 6th Committee.

[53] Scheffer, Foreign Relations Committee Report, 4.

[54] Ibid.

[55] Ibid.

[56] Ibid.

[57] Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 17 July 1998, Annex I, Para E.

[58] James Rubin, U.S. Department of State Spokesman, "Statement on Establishing an International Criminal Court," 2 April 1998, p.1; available from <http://www.usia.gov/topical/pol/usandun/rubin2.htm>; Internet; accessed 20 October 1998.

[59] Ibid.

[60] James P. Rubin, "U.S. Position on Self-Initiating Prosecutor at the Rome Conference on Establishment of International Criminal Court," 22 June 1998, p. 2; available from <http://www.usembassy.hr/Rubin622.html>; Internet; accessed 20 October 1998.

[61] David J. Scheffer, "Address on the 50th Anniversary of the Universal Declaration of Human Rights," Ramapo College, Mahwah, NJ, 16 September 1998, pp. 3-4; available from <http://www.state.gov/www/policy remarks/1998/>; Internet; accessed 20 October 1998.

[62] Ibid.

[63] David J. Scheffer, "Human Rights and International Justice," Dartmouth College, Dartmouth, NH, 23 October 1998, p. 7; available from <http://www.state.gov/www/policy remarks/1998/981023 scheffer dartmouth.html>; Internet; accessed 23 October 1998.

[64] Scheffer, Foreign Relations Committee Report, 3.

[65] Ibid.

[66] Ibid.

[67] Norman Dorsen, "The United States and the War Crimes Court: A Glass Half Full," Lakeville Journal, 30 July 1998, p. 2; available from <http://www.lchr.org/icc/rome/lakeville.htm>; Internet; accessed 20 October 1998. *Hereinafter* A Glass Half Full.

[68] Fred Hiatt, "The Trouble with the War Crimes Court," Washington Post, 26 July, 1998, sec. C, p. 7.

[69] Scheffer, Foreign Relations Committee Report, 2.

[70] Alessandra Stanley, "U.S. Argues Against Strongly Independent War Crimes Prosecutor," New York Times, 18 June 1998, sec. A, p. 7. *See also* Bill Richardson, U.S. Ambassador to the United Nations, "Statement at the UN Plenipotentiaries Conference on the Establishment of an International Criminal Court," Rome, 17 June 1998, p.2; available from

<http://www.undp.org/missions/usa/98 108.htm>; Internet; accessed 28 October 1998. *Hereinafter* Opening Remarks.

[71] Richardson, Opening Remarks.

[72] Ibid., pp. 2-3.

[73] Brett D. Schaefer, "The International Criminal Court: Threatening U.S. Sovereignty and Security," The Heritage Foundation, Washington, D.C., 2 July 1998, p.2; available from <http://www.heritage.org/library/execmemo/em537.html>; Internet; accessed 20 October 1998.

[74] Dempsey, Reasonable Doubt, 11-12. *See also* Lee A. Casey & David B. Rivkin, "Against an International Criminal Court," Commentary 105 (May 1998): 56-58.

[75] Scheffer, America's Stake.

[76] Georg Schwarzenberger, International Law as applied by International Courts and Tribunals, Vol. II, Law of Armed Conflict, (New York: Stevenson & Sons, 1968), 452-453.

[77] Schwarzenberger, 454. *See* Parks, "Command Responsibility for War Crimes," 12. *See also* Department of the Army, International Law, Vol. II, DA Pamphlet 27-62-1 (Washington, D.C.: U.S. Department of the Army, 1979), 221-222. *Note also* that although the historical precedent is that the victors try nationals of the losing side for offenses, in theory the losing side could, under international law, try those nationals of the victorious side who were in its custody for alleged offenses.

[78] Department of the Army, General Order 100, 24 April 1863, Art. 59, permitting trial of enemy war criminals. *Reprinted* in Law of War: A Documentary History, Vol. I, ed. Leon Friedman, (New York: Random House, 1972).

[79] Parks, "Command Responsibility for War Crimes," 13.

[80] Ibid.

[81] The International Military Tribunal (IMET) held at Nuremberg was established by the London Agreement of August 8, 1945. The International Military Tribunal for the Far East (IMTFE) held at Tokyo was established by proclamation of General Douglas MacArthur on behalf of the Allied Powers, January 1946. Reprinted in Law of War: A Documentary History, Vol. II, ed., Leon Friedman, (New York: Random House, 1972), 883 and 894, respectively.

[82] "At Last, a Court that War Criminals Must Take Seriously," Economist, 31 January 1998, 51. *See also* "Courting Disaster," New Republic, 13 July 1998, 7-8.

[83] Dempsey, Reasonable Doubt, 2. *See also* John R. Bolton, "Why an International Criminal Court Won't Work," Wall Street Journal, 30 March 1998, p. A19.

[84] "Courting Disaster," Economist, 51.

[85] David J. Scheffer, "US Policy on International Criminal Tribunals," Washington College of Law, American University, Washington, D.C. 31 March 1998; available from <http://www.state.gov/www/policy remarks/1998/980331 scheffer tr ibs.html>; Internet; accessed 3 February 1999. As of 31 March 1998 the ICTR had indicted 32 persons and prosecuted four in three trials, whereas Rwanda had prosecuted around 330 persons for crimes related to the genocide activities in 1994. *See also* UN Secretary General, "Report on the ICTY by the Secretary General to the 50th session of the United Nations," UN Documents S/1995/728, p. 6. This second report from the ICTY stated the ICTY had held no trials in its first three years of existence.

[86] Ferencz, "Make Law not War," 152.

[87] Casey & Rivkin, "Against an International Criminal Court," 56-57.

[88] Dorsen, A Glass Half Full, 2. *See also* Anthony Lewis, "A Turn in the Road," New York Times, 20 July 1998, sec. A, p. 15.

[89] Charter of the United Nations, 26 June 1945, Art. 1, sec. 1, and Art. 2, sec. A.

[90] Brinkley, "Democratic Enlargement: The Clinton Doctrine, " Foreign Policy Magazine 106 (Spring 1997): 2-3.

[91] Rick Panganiban, "The NGO Coalition for an International Criminal Court," UN Chronicle, 34, no. 4 (1997): 36.

[92] "Courting Disaster" Economist, 8.

[93] *See* UNSCRs establishing the ICTY, Art. 2, and ICTR, Art. 1, *supra* note 5.

[94] Melloan, "In Rome, U.S. Realism Trumps Illusions," A19.

[95] Vienna Convention on the Law of Treaties, Art. 34, 23 May 1969.

[96] Department of the Army, The Law of War, Field Manual 27-10 (Washington, D.C.: U.S. Department of the Army, 1956, w/ change 1), Paragraph 6, p. 6.

[97] "Judging Tyrants and Torturers" Christian Science Monitor Editorial, 22 July 1998, p. 16.

[98] A current example is the attempt by Spain to extradite former Chilean General and Head-of-State Augusto Pinochet from his hospital stay in Great Britain. United Kingdom courts have initially appeared sympathetic to this request despite long standing international norms to the contrary. *See* Steve Forbes, "Like It or Not" Forbes Magazine, 25 January 1999, p. 32: ProQuest Online Full Text; accessed 25 January 1999, for commentary on how this could apply to U.S. officials in the future.

[99] Department of the Army, The Law of Peace, Vol. I, DA Pamphlet 27-161-1 (Washington, D.C.: September 1979), Chapter 4,

Section I, Paragraph 4-9c, p. 4-20. *See also* Kenneth Roth, "The Court the U.S. Doesn't Want," New York Review of Books 45 (19 November 1998): 6-7: ProQuest Online Full Text; accessed 25 January 1999.

[100] *See* "Court Orders New Trial in 1944 Rome Massacre," New York Times, 16 October 1996, sec. A, p.4. The Italian High Court granted the government appeal and ordered former SS Captain Erich Priebke retried for his role in the massacre. Priebke's court-martial conviction in the summer of 1996 was overturned by a judge for violating the statute of limitations.

[101] *See* Schaefer, Heritage Foundation, 1-3. *See also* Paul Lewis, "Not Just Governments Make War or Peace," New York Times, 28 November 1998, p. 9: ProQuest Online Full Text; accessed 25 January 1999 and Barbara Crossette, "The World Expected Peace. It Found a New Brutality." New York Times, 24 January 1999, p. 1: ProQuest Online Full Text; accessed 25 January 1999. *See also* Roth, "The Court the U.S. Doesn't Want," 5; pointing out that individual governments are extremely hesitant to formally accuse another government for war crime type activities.

[102] Roth, "The Court the U.S. Doesn't Want," 8.

[103] Nancy Soderberg, U.S. Ambassador Representative for Special Political Affairs, "Statement in the Security Council in Explanation of Vote on Expansion of the International Criminal Tribunal for Rwanda," 30 April 1998; available from <http://wwww.undp.org/missions/usa/98 84.htm>; Internet; accessed 23 January 1999. *See also* Scheffer, America's Stake, 1.

[104] ICC Statute, Article 11.

[105] With Pol Pot's death in April 1998 it now appears Cambodia is ready to bring his accomplices to trial before an international tribunal. *See* "Sihanouk favors trial for Khmer Rouge leaders," Harrisburg Patriot-News, 31 December 1998, sec. A, p.11. *See also* Thomas W. Lippman, "U.S. Adds Cambodians to Disparate List of War Criminals to Pursue," Washington Post, 24 January 1999, p. A02: ProQuest Online Full Text; accessed 25 January 1999.

[106] One need only look to the violations of the Geneva Convention visited upon coalition forces during the Persian Gulf and other wars for evidence of this phenomena. *See* Margaret Tutwiler, U.S. Department of State Dispatch, 28 January 1991, Vol. 2, Iss. 4, p. 56, and numerous other publications going back to the Korean War for the propensity of U.S. adversaries to ignore minimum standards of expected treatment for US and Allied POWs in their effort to discredit official U.S. government actions.

[107] US v. Calley, 46 CMR 1131 (U.S.C.M.A., 1973). Although Lt. Calley did not serve his entire sentence (Life in Prison, reduced by the Convening Authority to twenty years, and later released by the President after 22 months) doesn't mean the Uniform Code of Military Justice (UCMJ) or the U.S. military justice system was ineffective. [*See* comment of noted historian Stephen Ambrose that the U.S. Army is one of the few armies of the world that would have publicly investigated and tried this case, Americans at War (Jackson, MS: University Press of Mississippi, 1997), 202]. No more than O.J. Simpson's acquittal meant that all California or American courts are ineffective, or the trial of Paul Touvier, henchman to Klaus Barbie and the only French citizen convicted of crimes against humanity, meant that France's actions against war criminals was lenient. The U.S. and other western nations are the few who publicly try suspected offenders for law of war violations. Canada's Princess Anne's Airborne Regiment was disbanded and several soldiers court-martialed for actions in Somalia; *see* Craig Turner, "Canadian Peacekeeping is under the Gun," Los Angeles Times, 1 August 1996, p. 10. *Note also* the investigations into alleged war crimes during the Grenada Operation and the court-martial of 1SG Bryant for allegedly shooting a prisoner during Operation Just Cause. This is all in addition to the extensive preventive measures, training, schooling and practice, done by U.S. forces at all levels and in most military exercises.

[108] Scheffer, Remarks before the 6th Committee.

[109] Scheffer, America's Stake, 2.

[110] *See* Scheffer, Remarks before the 6th Committee. The six specific U.S objections preventing signature are:

1) ICC jurisdiction over non-party states without UN Security Council referral. The U.S. continues to seek an active Security Council role in enforcing jurisdiction over non-party states and in instances of internal armed conflict.

2) The automatic jurisdiction set-up, with its seven-year "opt-out" provision for signatories for War Crimes committed by their citizens. The U.S. recommends a jurisdictional scheme whereby all countries must accept ICC automatic jurisdiction for the crime of Genocide, but would permit a ten-year transition period during which State-Parties could assess the court's effectiveness and impartiality before accepting automatic jurisdiction for Crimes against Humanity and War Crimes. At the end of the transition period states could a) accept ICC jurisdiction over all core crimes, b) cease to be a party, or c) seek a treaty amendment extending the transition period.

3) The prosecutor having power to self-refer cases to the court without a Security Council mandate or a State Party

request. The U.S. recommends the authority of the prosecutor be tied to Security Council action to ensure international agreement and backing for court activities.

4) The undefined Crime of Aggression. The U.S. position is this crime must be defined and linked to a Security Council finding that a state had committed the crime before conduct by an individual of the identified state would be subject to court action.

5) The proposal to include drug trafficking and terrorism within the court's jurisdiction. U.S. concern is that court focus and resources will be diverted from ICC priority interests by investigating complicated and sophisticated organizations better left to coordinated national and international efforts.

6) The no-reservations provision to the treaty. Such a clause prevents any signature for states concerned that their domestic constitutional or national judicial policies could conflict with ICC activities. A reservations procedure permits states a reasonable opportunity to become parties but maintain internal judicial consistency without undermining the ICC intent or purpose.

[111] Diane Orentlicher, "U.S. Cheats Justice in Opposing World Court," Los Angeles Times, 30 August 1998, sec. M, p. 2.

[112] "Rome Statute Signature and Ratification Chart," Non-Governmental Organization Coalition for an International Criminal Court (CICC), 3 February 1999; available from <http://www.igc.org/icc/rome/html/ratify.html>; Internet; accessed 3 February 1999.

[113] Scheffer, Report before the 6th Committee, 5. *See also* Theodor Meron, "The Court We Want," Washington Post 13 October 1998, p. A15.

[114] Adrian Karatnycky, "Human Rights Depend on American Power," Wall Street Journal, 10 December 1998, p. A22.

BIBLIOGRAPHY

"At Last, a Court that War Criminals Must Take Seriously." Economist, 31 January 1998, 51-52.

"Court Orders New Trial in 1944 Rome Massacre." New York Times. 16 October 1996, sec. A, p.4.

"Courting Disaster." New Republic 129 (13 July 1998): 7-8.

"Judging Tyrants and Torturers." Christian Science Monitor. Editorial, 22 July 1998.

"Rome Statute Signature and Ratification Chart." Non-Governmental Organization Coalition for an International Criminal Court (CICC). 3 February 1999. Available from <http://www.igc.org/icc/rome/html/ratify.html>. Internet. Accessed 3 February 1999.

"Sihanouk favors trial for Khmer Rouge leaders." Harrisburg Patriot-News, 31 December 1998, sec. A, p.11.

Ambrose, Stephen. Americans at War. Jackson, MS: University Press of Mississippi, 1997.

Bolton, John R. "Why an International Criminal Court Won't Work." Wall Street Journal, 30 March 1998, p. A19.

Brinkley, Douglas. "Democratic Enlargement: The Clinton Doctrine." Foreign Policy Magazine 106 (Spring 1997): 1-23.

Casey, Lee A. & David B. Rivkin. "Against an International Criminal Court." Commentary 105 (May 1998): 56-58.

Crossette, Barbara. "The World Expected Peace. It Found a New Brutality." New York Times, 24 January 1999, sec. A, pp. 1-2.

Dempsey, Gary T. "Reasonable Doubt, The Case against the Proposed International Criminal Court." The Cato Institute, Wash. DC, 16 July 1998, 1-18. Available from <http://www.cato.org/pubs/pas/pa-311.html>. Internet. Accessed 30 October 1998.

Dorsen, Norman. "The United States and the War Crimes Court: A Glass Half Full." Lakeville Journal, 30 July 1998. Available from

<http://www.lchr.org/icc/rome/lakeville.htm>. Internet. Accessed 20 October 1998.

Ferencz, Benjamin B. An International Criminal Court, a Step Toward World Peace: A Documentary History and Analysis, Vol. II. Dobbs Ferry, NY: Oceana Publications, 1980.

_____. "Make Law Not War." The World Today 54 (June 1998): 152-153.

Forbes, Steve. "Like It or Not." Forbes Magazine, January 25, 1999.

Friedman, Leon, ed. Law of War: A Documentary History, Vols. I & II. New York: Random House, 1972.

Hiatt, Fred. "The Trouble with the War Crimes Court." Washington Post, 26 July 1998, sec. C, p. 7.

Karatnycky, Adrian. "Don't Worry War Criminals - The New Court Won't Work." Wall Street Journal, 27 July 1998, p. A15.

_____. "Human Rights Depend on American Power." Wall Street Journal, 10 December 1998, p. A22.

Lael, Richard L. The Yamashita Precedent: War Crimes and Command Responsibility. Wilmington, DE: Scholarly Resources, 1982.

Landrum, Bruce D. "The Yamashita War Crimes Trial: Command Responsibility Then and Now," Military Law Review 149 (Summer 1995): 293-301.

Lawyers Committee For Human Rights, International Criminal Court briefing Series, 2 (August 1998): 1-6. Available from <http:// www.lchr.org/icc/v2n1prin.htm>. Internet. Accessed 20 October 1998.

Lewis, Anthony. "A Turn in the Road." New York Times, 20 July 1998, sec. A, p. 15.

Lewis, Paul. "Not Just Governments Make War or Peace." New York Times, 28 November 1998, p. 9.

Lippman, Thomas W. "U.S. Adds Cambodians to Disparate List of War Criminals to Pursue." Washington Post, 24 Jan 1999, p. A02.

Melloan, George. "In Rome, U.S. Realism Trumps Illusions." Wall Street Journal, 28 July 1998, p. A19.

Meron, Theodor. "The Court We Want." Washington Post, 13 October 1998, p. A15.

Neuffer, Elizabeth. "A Worldwide Tribunal on Crime Eyed." Boston Globe. 15 June 1998, p. 1.

Orentlicher, Diane. "U.S. Cheats Justice in Opposing World Court." Los Angeles Times, 30 August 1998, sec. M, p. 2.

Panganiban, Rick. "The NGO Coalition for an International Criminal Court." UN Chronicle 34, no. 4 (1997): 36.

Parks, William H. "Command Responsibility for War Crimes," Military Law Review, 64 (Summer 1973): 1-48.

Richardson, Bill. U.S. Ambassador to the United Nations. "Statement at the UN Plenipotentiaries Conference on the Establishment of an International Criminal Court." Rome, 17 June 1998. Available from <http://www.undp.org/missions/usa/98 108.htm>. Internet. Accessed 28 October 1998.

ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT. Adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 17 July 1998.

_____. Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court. Rome, 17 July 1998.

Roth, Kenneth. "The Court the U.S. Doesn't Want." New York Review of Books 45 (19 November 1998): 1-11: ProQuest Online Full Text; accessed 25 January 1999.

Rubin, James P. Spokesman, U.S. Department of State. "U.S. Position on International Criminal Court." 23 June 1998. Available from http://www.usembassy.hr/Rubin622.html. Internet. Accessed 20 October 1998.

_____. "U.S. Position on Self-Initiating Prosecutor at the Rome Conference on Establishment of International Criminal Court." Washington, D.C. 22 June 1998. Available from

<http://www.usembassy.hr/Rubin622.html>. Internet. Accessed 20 October 1998.

_____. "Statement on Establishing an International Criminal Court." Washington, D.C., 2 April 1998. Available from <http://www.usia.gov/topical/pol/usandun/rubin2.htm>. Internet. Accessed 20 October 1998.

Schaefer, Brett D. "The International Criminal Court: Threatening U.S. Sovereignty and Security." The Heritage Foundation, Washington, D.C., 2 July 1998. Available from >http://www.heritage.org/library/execmemo/em537.html>. Internet. Accessed 20 October 1998.

Scheffer, David J. U.S. Ambassador-at-Large for War Crimes Issues. "U.S. Policy and the Proposed Permanent International Criminal Court." U.S. Department of State Dispatch 8 (December 1997): 20-22.

_____. "Report to the Senate Foreign Relations Committee on Why the U.S. Opposed the International Criminal Court." Washington, D.C., 23 July 1998. Available from <http://www.usembassy.hr/Scheffer.htm>. Internet. Accessed 20 October 1998.

_____. "The Clear and Present Danger of War Crimes." U.S. Department of State Dispatch 9 (March 1998): 19-22.

_____. "Address on the 50th Anniversary of the Universal Declaration of Human Rights." Ramapo College, Mahwah, NJ, 16 September 1998. Available from <http://www.state.gov/www/policy remarks/1998/>. Internet. Accessed 20 October 1998.

_____. "America's Stake in Peace, Security, and Justice." Washington, D.C., 31 August 1998. Available from <http://www.state.gov/www/policy remarks/1998/>. Internet. Accessed 20 October 1998.

_____. "Challenges Confronting International Justice." U.S. Department of State Dispatch 9 (January/February 1998): 19-22.

_____. "Human Rights and International Justice." Dartmouth College, Dartmouth, NH, 23 October 1998. Available from <http://

www.state.gov/www/policy remarks/1998/981023 scheffer dartmouth.html>. Internet. Accessed 23 October 1998.

_____. "U.S. Policy on International Criminal Tribunals." Washington College of Law, American University, Washington, D.C. 31 March 1998. Available from <http://www.state.gov/www/policy remarks/1998/980331 scheffer tribs.html>. Internet. Accessed 3 February 1999.

_____."Remarks before the 6th Committee of the 53rd General Assembly." United Nations, New York, 21 October 1998. Available from http://www.state.gov/www/policy remarks/1998/981021 scheffer icc.html. Internet. Accessed 23 October 1998.

Schwarzenberger, Georg. International Law as applied by International Courts and Tribunals, Vol. II, Law of Armed Conflict. New York: Stevenson & Sons, 1968.

Soderberg, Nancy, U.S. Ambassador Representative for Special Political Affairs. "Statement in the Security Council in Explanation of Vote on Expansion of the International Criminal Tribunal for Rwanda." 30 April 1998. Available from <http://wwww.undp.org/missions/usa/98 84.htm>. Internet. Accessed 23 January 1999.

Stanley, Alessandra. "U.S. Dissents, but Accord is Reached on War-Crime Court." New York Times, 18 July 1998, sec. A, p. 3.

_____. "U.S. Argues Against Strongly Independent War Crimes Prosecutor." New York Times, 18 June 1998, sec. A, p. 7.

Turner, Craig. "Canadian Peacekeeping is under the Gun." Los Angeles Times, 1 August 1996, p.10

Tutwiler, Margaret. U.S. Department of State Dispatch 2 (January 1991): 56.

U.S. Department of the Army. International Law. DA Pamphlet 27-62-1, Vol. II. Washington, D.C.: U.S. Department of the Army, 1979.

_____. The Law of Peace, Vol. I. DA Pamphlet 27-161-1. Washington, D.C.: U.S. Department of the Army, September 1979.

_____. Protocols to the Geneva Conventions of 1949. DA Pamphlet 27-1-1. Washington, D.C.: U.S. Department of the Army, 1979.

_____. The Law of War. Field Manual 27-10, w/ change 1. Washington, D.C.: U.S. Department of the Army, 1956.

_____. General Order 100. Washington, D.C.: U.S. Department of the Army, 24 April 1863.

United Nations Charter. Charter of the United Nations. 26 June 1945.

_____. Statute of the International Court of Justice.

United Nations Secretary General. "Report on the ICTY to the 50th session of the United Nations." UN Documents S/1995/728, p. 6.

United Nations Security Council. International Criminal Tribunal for the Former Yugoslavia (ICTY), UNSCR 808, 3 May 1993 & UNSCR 827, 25 May 1993, UNSCOR 25704(1993)/32 I.L.M. 1159 (1993).

_____. International Criminal Tribunal for Rwanda (ICTR), UNSCR 955, 8 November 1994/33 I.L.M. 1598 (1994).

United States Court of Military Appeals. U.S. v. Calley, 46 CMR 1131 (U.S.C.M.A., 1973).

United States Information Agency. Available at http://www.usia.gov/topical/pol.htm. Internet. Accessed 20, 23, and 31 October 1998, 11, 16, and 23 November 1998, 18, 19, 20, 21, 22, 23, 24, 27, 28, 29, and 31 December 1998, 8, 11, 12, 15, 27, 30 and 31 January 1999, and 2, 3, and 4 February 1999.

United States Supreme Court. In re Yamashita, 327 U.S. 1, (1946).

Vienna Convention on the Law of Treaties. 23 May 1969. Vol. III, I.L.M. 679.