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The Debate over the Permanent International Criminal Court

Michael P. Scharf, *The Case for Supporting the International Criminal Court*, Washington University School of Law, Whitney R. Harris Institute for Global Legal Studies, Washington University in St. Louis, International Debate Series, No. 1 (2002).

Background: The Road to Rome

With the creation of the Yugoslavia and Rwanda Tribunals in the early 1990s, there was hope among U.S. policy makers that Security Council-controlled ad hoc tribunals would be set up for crimes against humanity elsewhere in the world. Even America's most ardent opponents of a permanent international criminal court had come to see the ad hoc tribunals as a useful foreign policy tool. The experience with the former Yugoslavia and Rwanda Tribunals proved that an international indictment and arrest warrant could serve to isolate offending leaders diplomatically, strengthen the hand of domestic rivals, and fortify international political will to impose economic sanctions and take more aggressive actions if necessary. Unlike a permanent international criminal court, there was no perceived risk of American personnel being prosecuted before the ad hoc tribunals since their subject matter, territorial and temporal jurisdiction were determined by the Security Council, which the United States could control with its veto.

But then something known in government circles as "Tribunal Fatigue" set in. The process of reaching agreement on the tribunal's statute; electing judges; selecting a prosecutor; hiring staff; negotiating headquarters agreements and judicial assistance pacts; erecting courtrooms, offices, and prisons; and appropriating funds turned out to be too time consuming and exhausting for the members of the Security Council to undertake on a repeated basis. China and other Permanent Members of the Security Council let it be known that Rwanda would be the last of the Security Council-established ad hoc tribunals.

Consequently, the establishment of a permanent international criminal court began to be seen by many members of the United Nations (as well as some within the U.S. government) as the solution to the impediments preventing a continuation of the ad hoc approach. Having successfully tackled most of the same complex legal and practical issues that U.S. diplomats had earlier identified as obstacles to a permanent international criminal court, the United States Government was left with little basis to justify continued foot-dragging with regard to the ICC. In 1994, the U.N. International Law Commission produced a draft Statute for an ICC which was largely based on the Statutes and Rules of the popular ad hoc tribunals. The International Law Commission's draft was subsequently refined through a series of Preparatory Conferences in which the United States played an active role.

During this time, the establishment of a permanent international criminal court began to receive near unanimous support in the United Nations. The only countries that were willing to go on record

as opposing the establishment of an ICC were the few states that the United States had labeled "persistent human rights violators" or "terrorist supporting states."

Thus, on the eve of the Rome Diplomatic Conference in the summer of 1998, both the U.S. Congress and the Clinton Administration indicated that they were in favor of an ICC if the right protections were built into its statute. As David Scheffer, then U.S. Ambassador-at-Large for War Crimes Issues, reminded the Senate Foreign Relations Committee on July 23, 1998: "Our experience with the establishment and operation of the International Criminal Tribunals for the former Yugoslavia and Rwanda had convinced us of the merit of creating a permanent court that could be more quickly available for investigations and prosecutions and more cost-efficient in its operation."

The Politics of Rome

The Rome Diplomatic Conference represented a tension between the United States, which sought a Security Council-controlled Court, and most of the other countries of the world which felt no country's citizens who are accused of serious war crimes or genocide should be exempt from the jurisdiction of a permanent international criminal court. These countries were concerned, moreover, about the possibility that the Security Council would once again slide into the state of paralysis that characterized the Cold War years, rendering a Security-Council controlled court a nullity. The justification for the American position was that, as the world's greatest military and economic power, more than any other country the United States is expected to intervene to halt humanitarian catastrophes around the world. The United States' unique position renders U.S. personnel uniquely vulnerable to the potential jurisdiction of an international criminal court. In sum, the U.S. Administration feared that an independent ICC Prosecutor would turn out to be (in the words of one U.S. official) an "international Ken Starr" who would bedevil U.S. military personnel and officials, and frustrate U.S. foreign policy.

Many of the countries at Rome were in fact sympathetic to the United States' concerns. Thus, what emerged from Rome was a Court with a two-track system of jurisdiction. Track one would constitute situations referred to the Court by the Security Council. This track would create binding obligations on all states to comply with orders for evidence or the surrender of indicted persons under Chapter VII of the U.N. Charter. This track would be enforced by Security Council imposed embargoes, the freezing of assets of leaders and their supporters, and/or by authorizing the use of force. It is this track that the United States favored, and would be likely to utilize in the event of a future Bosnia or Rwanda. The second track would constitute situations referred to the Court by individual countries or the ICC Prosecutor. This track would have no built in process for enforcement, but rather would rely on the good-faith cooperation of the Parties to the Court's statute.

Most of the delegates in Rome recognized that the real power was in the first track. But the United States still demanded protection from the second track of the Court's jurisdiction. In order to mollify U.S. concerns, the following protective mechanisms were incorporated into the Court's Statute at the urging of the United States:

First, the Court's jurisdiction under the second track would be based on a concept known as "complementarity" which was defined as meaning the court would be a last resort which comes into play only when domestic authorities are unable or unwilling to prosecute. At the insistence of the United States, the delegates at Rome added teeth to the concept of complementarity by providing in Article 18 of the Court's Statute that the Prosecutor has to notify states with a prosecutive interest in a case of his/her intention to commence an investigation. If, within one month of notification, such a state informs the Court that it is investigating the matter, the Prosecutor must defer to the State's

investigation, unless it can convince the Pre-Trial Chamber that the investigation is a sham. The decision of the Pre-Trial Chamber is subject to interlocutory appeal to the Appeals Chamber.

Second, Article 8 of the Court's Statute specifies that the Court would have jurisdiction only over "serious" war crimes that represent a "policy or plan." Thus, random acts of U.S. personnel involved in a foreign peacekeeping operation would not be subject to the Court's jurisdiction. Neither would one-time incidents such as the July 3, 1988 accidental downing of the Iran airbus by the *USS Vincennes* or the August 20, 1998 U.S. attack on the Al Shiffa suspected chemical weapons facility in Sudan that turned out to be a pharmaceutical plant.

Third, Article 15 of the Court's Statute guards against spurious complaints by the ICC prosecutor by requiring the approval of a three-judge pre-trial chamber before the prosecution can launch an investigation. Further, the decision of the chamber is subject to interlocutory appeal to the Appeals Chamber.

Fourth, Article 16 of the Statute allows the Security Council to affirmatively vote to postpone an investigation or case for up to twelve months, on a renewable basis. While this does not amount to the individual veto the United States had sought, this does give the United States and the other members of the Security Council a collective veto over the Court.

The United States Delegation played hard ball in Rome and got just about everything it wanted, substantially weakening the ICC in the process. As Ambassador Scheffer told the Senate Foreign Relations Committee: "The U.S. delegation certainly reduced exposure to unwarranted prosecutions by the international court through our successful efforts to build into the treaty a range of safeguards that will benefit not only us but also our friends and allies." These protections proved sufficient for other major powers including the United Kingdom, France and Russia, which joined 117 other countries in voting in favor of the Rome Treaty. But without what would amount to an iron-clad veto of jurisdiction over U.S. personnel and officials, the United States felt compelled to join China, Libya, Iraq, Israel, Qatar and Yemen as the only seven countries voting in opposition to the Rome Treaty.

It is an open secret that there was substantial dissension within the U.S. Delegation (especially among Department of State and Department of Justice representatives) about whether to oppose the ICC and that the position of the Secretary of Defense ultimately carried the day. As a former Republican member of Congress, there has been conjecture that Secretary of Defense William Cohen was influenced by Senator Jesse Helms (R-NC), a vocal opponent of the ICC. President Clinton, for his part, had proven to be uniquely vulnerable on issues affecting the military due to his record as a Vietnam "draft dodger" and his unpopular stand on gays in the military. Thus, rather than focus his attention on the negotiations in Rome as they came to a head, Clinton immersed himself in a historic trip to China during the Rome Conference. And in the midst of several breaking White House scandals in the summer of 1998, there was to be no last minute rescue of the Rome Treaty by Vice President Al Gore as had been the case with the Kyoto Climate Accord a year earlier.

The Question of ICC Jurisdiction over the Nationals of Non-Party States

Once it decided that it would not sign the Court's Statute, the primary goal of the United States government (still bowing to the concerns of the Pentagon) was to prevent the ICC from being able to exercise jurisdiction over U.S. personnel and officials. As Ambassador Scheffer explained to the Senate Foreign Relations Committee: "We sought an amendment to the text that would have required ... the consent of the state of nationality of the perpetrator be obtained before the court could exercise jurisdiction. We asked for a vote on our proposal, but a motion to take no action was

overwhelmingly carried by the vote of participating governments in the conference." Had the U.S. amendment been adopted, the United States could have declined to sign the Rome Statute, thereby ensuring its immunity from the second track of the court's jurisdiction, but at the same time permitting the United States to take advantage of the first track of the Court's jurisdiction (Security Council referrals) when it was in America's interest to do so.

Having lost that vote, the U.S. Administration began to argue that international law prohibits an ICC from exercising jurisdiction over the nationals of non-parties. Thus, Ambassador Scheffer told the Senate Foreign Relations Committee that "the treaty purports to establish an arrangement whereby U.S. armed forces operating overseas could be conceivably prosecuted by the international court even if the United States has not agreed to be bound by the treaty. ... This is contrary to the most fundamental principles of treaty law" as set forth in the Vienna Convention on the Law of Treaties. Based on the U.S. objection to the ICC's exercise of jurisdiction over nationals of non-party states, Ambassador Scheffer expressed the "hope that on reflection governments that have signed, or are planning to sign, the Rome treaty will begin to recognize the proper limits to Article 12 and how its misuse would do great damage to international law and be very disruptive to the international political system." Senator Helms later quoted this "Vienna Convention" argument in the preamble of his anti-ICC legislation, which is discussed below.

Diplomats and scholars have been quick to point out the flaws in Scheffer's argument. First, it is a distortion to say that the Rome Statute purports to impose obligations on non-party States. Under the terms of the Rome Treaty, the Parties are obligated to provide funding to the ICC, to extradite indicted persons to the ICC, to provide evidence to the ICC, and to provide other forms of cooperation to the Court. Those are the only obligations the Rome Treaty establishes on States, and they apply only to State Parties. Thus, Ambassador Scheffer's objection is not really that the Rome Treaty imposes obligations on the United States as a non-party, but that it affects the sovereignty interests of the United States -- an altogether different matter which does not come within the Vienna Convention's proscription. Moreover, although States have a sovereignty interest in their nationals, especially state officials and employees, sovereignty does not provide a basis for exclusive jurisdiction over crimes committed by a State's nationals in a foreign country. Nor does a foreign indictment of a State's nationals for acts committed in the foreign country constitute an impermissible intervention in the State's internal affairs.

Second, the exercise of the ICC's jurisdiction over nationals of non-party states who commit crimes in the territory of a State parties is well grounded in both the universality principle and the territoriality principle of jurisdiction under international law. The core crimes within the ICC's jurisdiction -- genocide, crimes against humanity, and war crimes -- are crimes of universal jurisdiction. The negotiating record of the Rome Treaty indicates that the consent regime was layered upon the ICC's inherent universal jurisdiction over these crimes, such that with the consent of the State in whose territory the offense was committed, the Court has the authority to issue indictments over the nationals of non-party States. The Nuremberg Tribunal and the ad hoc Tribunal for the former Yugoslavia provide precedent for the collective delegation of universal jurisdiction to an international criminal court without the consent of the State of the nationality of the accused.

In addition, international law recognizes the authority of the state where a crime occurs to delegate its territorial-based jurisdiction to a third State or international Tribunal. Careful analysis of the European Convention on the Transfer of Proceedings indicates that the consent of the State of the nationality of the accused is not a prerequisite for the delegation of territorial jurisdiction under the Convention, and therefore that it provides a precedent for the ICC's jurisdictional regime. There are no compelling policy reasons why territorial jurisdiction cannot be delegated to an international

court and the Nuremberg Tribunal provides the precedent for the collective exercise of territorial as well as universal jurisdiction.

Third, Scheffer's argument is inconsistent with past U.S. exercise of universal jurisdiction granted by anti-terrorism, anti-narcotic trafficking, torture, and war crimes treaties over the nationals of states which are not party to these treaties. In light of the past U.S. practice, the claim that a treaty cannot lawfully provide the basis of criminal jurisdiction over the nationals of non-party states, while directed against the ICC, has the potential of negatively effecting existing U.S. law enforcement authority with respect to terrorists, narco-traffickers, torturers, and war criminals.

An Effort to Modify the Rome Treaty

During hearings before the Senate Foreign Relations Committee on June 23, 1998, Senator Jesse Helms (R-N.C.) urged the Administration to take the following steps in opposition to the establishment of an international criminal court: First, that it announce that it would withdraw U.S. troops from any country that ratified the International Criminal Court Treaty. Second, that it veto any attempt by the Security Council to refer a matter to the Court's jurisdiction. Third, that it block any international organization in which it is a member from providing any funding to the International Criminal Court. Fourth, that it renegotiate its Status of Forces Agreements and Extradition Treaties to prohibit its treaty partners from surrendering U.S. nationals to the International Criminal Court. Finally, that it provide no U.S. soldiers to any regional or international peacekeeping operation where there is any possibility that they will come under the jurisdiction of the International Criminal Court. According to Senator Helms, these measures would ensure that the Rome Treaty will be "dead on arrival."

Ambassador Scheffer was non-committal as to the adoption of Senator Helms' proposals, saying only that "the Administration hopes that in the years ahead other governments will recognize the benefits of potential American participation in the Rome treaty and correct the flawed provisions in the treaty." In the meantime, he added, "more ad hoc judicial mechanisms will need to be considered." Ambassador Scheffer's testimony suggested that the U.S. response to the International Criminal Court might parallel its efforts to reform the 1982 Law of the Sea Convention. The United States refused to sign that treaty until amendments were adopted concerning its seabed mining regime. In 1994, the signatories to the Law of the Sea Convention adopted an Agreement containing the revisions sought by the United States and the United States signed the treaty, which still awaits Senate advice and consent to ratification.

In the following months, the United States tried to secure international backing for a clause to be included in the agreement that was being prepared to govern the relations between the United Nations and the ICC. Without actually amending the ICC Statute, the U.S. proposal would prevent the ICC from taking custody of official personnel of non-party states where the state has acknowledged responsibility for the act in question. This was a major walk back from its earlier position, as this proposal would not prevent the ICC from indicting nationals of non-party states, only prosecuting them. That the Clinton Administration was willing to float this proposal indicated that it was no longer promoting Ambassador Scheffer's questionable reading of the Vienna Convention.

Prior to the Rome Diplomatic Conference, many countries felt that the success of a permanent international criminal court would be in question without U.S. support. But as it became increasingly obvious that the United States was not going to sign the Rome Treaty, the willingness to compromise began to evaporate, culminating in the overwhelming vote against the U.S.

amendment requiring the consent of the state of nationality at the Rome Diplomatic Conference. The United States soon discovered that it would have no more luck with the issue through a series of bilateral negotiations than it did in the frenzied atmosphere that characterized the final days of the Rome Conference.

"If You Can't Beat 'em, Join 'em"

By late 2000, the Clinton Administration had come to realize that the ICC would ultimately enter into force with or without U.S. support. By December 2000, a growing number of countries had ratified the Rome Treaty, and over 120 countries had signed it, indicating their intention to ratify. Sixty ratifications are necessary to bring it into force. The Signatories included every other NATO State except for Turkey, three of the Permanent Members of the Security Council (France, Russia, and the United Kingdom), and both of the United States' closest neighbors (Mexico and Canada). Even Israel, which had been the only Western country to join the United States in voting against the ICC Treaty in Rome in 1998, later changed its position and announced that it would sign the treaty. Israel's change of position was made possible when the ICC Prep Con promulgated definitions of the crimes over which the ICC has jurisdiction, which clarified that the provision in the ICC Statute making altering the demographics of an occupied territory a war crime would be interpreted no more expansively than the existing law contained in the Geneva Conventions.

In the waning days of his presidency, William J. Clinton authorized the U.S. signature of the Rome Treaty, making the United States the 138th country to sign the treaty by the December 31st deadline. According to the ICC Statute, after December 31, 2000, States must accede to the Treaty, which requires full ratification -- something that was not likely for the United States in the near term given the current level of Senate opposition to the Treaty. While signature is not the equivalent of ratification, it set the stage for U.S. support of Security Council referrals to the International Criminal Court, as well as other forms of U.S. cooperation with the Court. In addition, it put the United States in a better position to continue to seek additional provisions to protect American personnel from the court's jurisdiction.

Hostile Outsider or Influential Insider?

Clinton's last minute action drew immediate ire from Senator Jesse Helms, then Chairman of the U.S. Senate Foreign Relations Committee, who has been one of the treaty's greatest opponents. In a Press Release, Helms stated:

"Today's action is a blatant attempt by a lame-duck President to tie the hands of his successor. Well, I have a message for the outgoing President. This decision will not stand. I will make reversing this decision, and protecting America's fighting men and women from the jurisdiction of this international kangaroo court, one of my highest priorities in the new Congress."

Helms responded by pushing for passage of the "Servicemembers Protection Act," Senate Bill 2726, which would prohibit any U.S. Government cooperation with the ICC, and cut off U.S. military assistance to any country that has ratified the ICC Treaty (with the exception of major U.S. allies), as long as the United States has not ratified the Rome Treaty. Further, the proposed legislation provides that U.S. military personnel must be immunized from ICC jurisdiction before the U.S. participates in any U.N. peacekeeping operation. The proposed legislation also authorizes

the President to use all means necessary to release any U.S. or allied personnel detained on behalf of the Court.

The essence of this debate, then, is whether the national security and foreign policy interests of the United States are better served by playing the role of a hostile outsider (as embodied in Senator Helms' and Lee Casey's "American Servicemembers Protection Act"), or by playing the role of an influential insider (as it has done, for example, with the Yugoslavia Tribunal). In deciding this issue, one must carefully and objectively examine the consequences that would flow from the hostile approach.

First, the hostile approach would transform American exceptionalism into unilateralism and/or isolationism by preventing the United States from participating in U.N. peacekeeping operations and cutting off aid to many countries vital to U.S. national security. This would be especially foolhardy at this moment in history when the United States is working hard to expand and hold together an international coalition against the terrorist organizations and their state supporters that were involved in the terrorist attacks of September 11, 2001.

Further, overt opposition to the ICC would erode the moral legitimacy of the United States, which has historically been as important to achieving U.S. foreign policy goals as military and economic might. A concrete example of this was the recent U.S. loss of its seat in the U.N. Commission of Human Rights, where several western countries cited current U.S. opposition to the ICC as warranting their vote against the United States.

Perversely, the approach embodied in Senator Helms' legislation could even turn the United States into a safe haven for international war criminals, since the U.S. would be prevented from surrendering them directly to the ICC or indirectly to another country which would surrender them to the ICC. And the idea that the President should use all means necessary to release any U.S. or allied personnel detained on behalf of the Court is the height of folly, as reflected in headlines describing the legislation as the "Hague Invasion Act."

Second, under the hostile approach, the United States would be prevented from being able to take advantage of the very real benefits of an ICC. The experience with the Yugoslavia Tribunal has shown that, even absent arrests, an international indictment has the effect of isolating rogue leaders, strengthening domestic opposition, and increasing international support for sanctions and even use of force. The United States has recognized these benefits in pushing for the subsequent creation of the ad hoc tribunals for the Rwanda, Sierra Leone, and Cambodia, as well as proposing the establishment of a tribunal for Iraq. But the establishment of the ICC will signal the end of the era of Security Council-created tribunals, since even our friends and allies at the U.N. will insist that situations involving genocide, crimes against humanity, and war crimes be referred to the existing ICC rather than additional ad hoc tribunals. Thus, when the next Rwanda occurs, the United States will not be able to employ the very useful tool of international criminal justice unless it works through the ICC.

To bring home this point, consider that if the ICC had been in existence on September 11, 2001, the United States and the other members of the Security Council could have referred the case of Osama bin Laden and the other masterminds of the attacks on the World Trade Center and Pentagon to the ICC, rather than creating U.S.-led military tribunals which have been subject to harsh criticism in the United States and abroad. An ICC indictment of these terrorists for their "crimes against humanity" would have strengthened foreign support for the American intervention into Afghanistan and would have deflected bin Laden's attempt to characterize the military action as an American attack against Islam. And if any of the perpetrators fell into any country's custody, an ICC would present a neutral fora for their prosecution that would have enjoyed the support of the Islamic world.

Opponents of the ICC have suggested that without U.S. support, the ICC is destined to be impotent and irrelevant because it will lack the power of the Security Council to enforce its arrest orders. But as the experience of the ad hoc Tribunals for Rwanda, Sierra Leone, and most recently Yugoslavia (with the surrender of Milosevic) has proven, in most cases where an ICC is needed, the perpetrators are no longer in power and are in the custody of a new government or of nearby states which are perfectly willing to hand them over to an international tribunal absent Security Council action. Moreover, the Security Council has been prevented (largely by Russian veto threats) from taking any action to impose sanctions on States that have not cooperated with the Yugoslavia Tribunal despite repeated pleas from the Tribunal's Prosecutor and Judges that it do so. Indeed, in the Yugoslavia context, where the perpetrators were still in power when the Tribunal was established, it was not action by the Security Council, but rather the threatened withholding of foreign aid and IMF loans that have induced Croatia and Serbia to hand over indictees. This indicates that, unlike the League of Nations (which United States officials have frequently referred to in this context), the ICC is likely to be a thriving institution even without United States participation. In other words, the United States may actually need the ICC more than the ICC needs the United States.

Third, the United States achieves no real protection from the ICC by remaining outside the ICC regime. This is because, as explained above, Article 12 of the Rome Statute empowers the ICC to exercise jurisdiction over nationals of non-party States who commit crimes in the territory of State Parties. Further, in its Pollyanna-ish refusal to recognize the legitimacy of the ICC's exercise of jurisdiction over the nationals of non-party states, opponents of the ICC have resorted to a questionable legal interpretation which is not only unlikely to sway the ICC or its founding members, but also has the potential of undermining important U.S. law enforcement interests.

If U.S. officials can be indicted by the ICC whether or not the U.S. is a party to the Rome Treaty, than the United States preserves very little by remaining outside the treaty regime, and could protect itself better by signing the treaty. This has been proven to be the case with the Yugoslavia Tribunal, which the U.S. has supported with contributions exceeding \$15 million annually, the loan of top-ranking investigators and lawyers from the federal government, the support of troops to permit the safe exhumation of mass graves, and even the provision of U-2 surveillance photographs to locate the places where Serb authorities had tried to hide the evidence of its wrongdoing. This policy bore fruit when the International Prosecutor opened an investigation into allegations of war crimes committed by NATO during the 1999 Kosovo intervention. Despite the briefs and reports of reputable human rights organizations arguing that NATO had committed breaches of international humanitarian law, on June 8, 2000, the International Prosecutor issued a report concluding that charges against NATO personnel were not warranted. This is not to suggest that the United States coopted the Yugoslavia Tribunal; but when dealing with close calls regarding application of international humanitarian law it is obviously better to have a sympathetic Prosecutor and Court than a hostile one.

Opponents of the ICC like to raise the specter of politicized indictments against American or Israeli officials drafted by prosecutors and confirmed by judges from countries that oppose our policies. A close examination of the list of the countries that have so far ratified the ICC, however, reveals that the ICC will be dominated not by our diplomatic opponents, but instead by our closest friends and allies. Of these 46 ratifying countries, nineteen are NATO or Western European allies, nine are Latin American and Caribbean countries with which the U.S. enjoys close relations, and four are U.S.-friendly Pacific island countries such as New Zealand and the Marshall Islands. With the possible exception of the Central African Republic, no country on the list would give a U.S.

foreign policy-maker any cause for concern. On the other hand, the countries that most frequently oppose the United States in the United Nations (Asian and middle-eastern countries such as China, Cuba, Iraq, Libya, North Korea, Syria, and the Sudan) are the countries least likely to ratify the ICC Statute, so they will not be able to participate in the ICC Assembly of Parties or nominate judges for the ICC's bench or select the Court's Prosecutor. Consequently, even if the U.S. does not ratify the Rome Treaty, the reality is that the ICC is going to be a very U.S.-friendly tribunal, unless, that is, the United States figuratively (and literally) wages war against the institution as suggested in Senator Helms' legislation.

Rebutting the Constitutional Arguments Against the ICC

Much of argument against the ICC concerns the constitutionality of U.S. participation in the Court. But, as Yale Law School constitutional Law professor Ruth Wedgwood has written, there are three reasons why we must conclude there "is no forbidding constitutional obstacle to U.S. participation in the Rome Treaty."

First, the ICC includes procedural protections negotiated by the U.S. Department of Justice representatives at Rome that closely follow the guarantees and safeguards of the American Bill of Rights. These including a Miranda-type warning, the right to defense counsel, reciprocal discovery, the right to exculpatory evidence, the right to speedy and public trial, the right to confront witnesses, and a prohibition on double jeopardy.

The only significant departures from U.S. law are that the ICC employs a bench trial before three judges rather than a jury, and it permits the Prosecutor to appeal an acquittal (but not to retry a defendant after the appeals have been decided). There were good reasons for these departures: For grave international crimes, qualified judges who issue detailed written opinions should be preferred over lay persons who issue unwritten verdicts. And if the trial judges misinterpret the applicable international law, whether in favor or to the detriment of the accused, an appeal is important to foster uniform interpretation of international criminal law.

Second, the United States has used its treaty power in the past to participate in other international tribunals that have had jurisdiction over U.S. nationals, such as the Yugoslavia Tribunal which was established by the Security Council pursuant to a treaty -- the U.N. Charter. Like the ICC, the Yugoslavia Tribunal employs judges rather than a jury, and permits the Prosecutor to appeal acquittals. Moreover, the U.S. Congress has approved legislation authorizing U.S. courts to extradite indicted persons (including those of U.S. nationality) to the Yugoslavia Tribunal where there exists an order for their arrest and surrender. And this legislation has been upheld in a recent federal court case.

Third, the offenses within the ICC's jurisdiction would ordinarily be handled through military courts-martial, which do not permit jury trial, or through extradition of offenders to foreign nations, which often utilize bench trials and do not employ American notions of due process. It should be noted that U.S. federal courts have upheld the extradition of Americans to such foreign jurisdictions for actions that took place on U.S. soil but had an effect abroad.

At the conclusion of the Senate Foreign Relations Committee's hearings on the ICC in July 1998, the Committee submitted several questions about the Constitutionality of U.S. participation in the ICC for the Department of Justice to answer for the record. The answers were prepared by Lee Casey's former colleagues in the Department's Office of Legal Counsel. This part of the Committee's published report should be required reading for anyone who has serious concerns about the Constitutionality of the ICC. The Department of Justice specifically found that U.S. ratification

of the Rome Treaty and surrender of persons including U.S. nationals to the ICC would not violate Article III, section 2 of the Constitution nor any of the provisions of the Bill of Rights.

Conclusion

Opponents of the ICC base their arguments on the assumption that it is not too late for America to prevent the ICC from coming into existence or to marginalize the Court so that it exists as a non-entity. But the spate of ratifications and the numerous powerful countries that are supporting the ICC (including virtually every other member of NATO) indicate that the ICC is a serious international institution that the United States is very soon going to have to learn to live with.

The risks to U.S. service members as well as the potential constitutional problems presented by the ICC have been greatly exaggerated by American opponents of the ICC, while both the practical usefulness of the ICC and the safeguards contained in the ICC Statute have been significantly undervalued. To the extent that American fears of politicized prosecutions are valid, U.S. opposition to the ICC will only increase the likelihood that the ICC will be more hostile than sympathetic to U.S. positions. And, by opposing the Court, the United States may actually engender more international hostility toward U.S. foreign policy than would have resulted from an indictment by the Court. Thus, whether or not the U.S. is able to achieve additional safeguards to prevent the ICC from exercising jurisdiction over U.S. personnel, it will be in the interests of U.S. national security and foreign policy to support, rather than oppose, the ICC.

It is important to recognize that supporting the ICC does not require immediate U.S. ratification of the Rome Treaty. Perhaps it would be prudent for the United States to let the Court prove itself over a period of years before sending the treaty to the Senate. But in the meantime, when the next Rwanda-like situation comes along, the United States will find value in having the option of Security Council referral to the ICC in its arsenal of foreign policy responses -- something the United States can do even if it does not ratify the Rome Treaty so long as it does not enact a version of Senator Helms' and Lee Casey's anti-ICC legislation.

Lee A. Casey, *The Case Against Supporting the International Criminal Court*, Washington University School of Law, Whitney R. Harris Institute for Global Legal Studies, Washington University in St. Louis, International Debate Series, No. 1 (2002).

The United States should not ratify the ICC Treaty. There are two fundamental objections to American participation in the ICC regime. First, U.S. participation would violate our Constitution by subjecting Americans to trial in an international court for offenses otherwise within the judicial power of the United States, and without the guarantees of the Bill of Rights. Second, our ratification of the Rome Treaty would constitute a profound surrender of American sovereignty, undercutting our right of self-government - the first human right, without which all others are simply words on paper, held by grace and favor, and no rights at all.

With respect to the Constitutional objections, by joining the ICC Treaty, the United States would subject American citizens to prosecution and trial in a court that was not established under Article III of the Constitution for criminal offenses otherwise subject to the judicial power of the United States. This, it cannot do. As the Supreme Court explained in the landmark Civil War case of *Ex parte Milligan* (1866), reversing a civilian's conviction by a military tribunal, "[e]very trial involves the exercise of judicial power," and courts not properly established under Article III can exercise "no part of the judicial power of the country."

This rationale is equally, and emphatically, applicable to the ICC, a court where neither the prosecutors nor the judges would have been appointed by the President, by and with the advice and consent of the Senate, and which would not be bound by the fundamental guarantees of the Bill of Rights. In fact, individuals brought before the ICC would only nominally enjoy the rights we in the United States take for granted.

For example, the ICC Treaty guarantees defendants the right "to be tried without undue delay." In the International Criminal Tribunal for the Former Yugoslavia (an institution widely understood to be a model for the permanent ICC), and which also guarantees this "right," defendants often wait more than a year in prison before their trial begins, and many years before a judgment actually is rendered. The Hague prosecutors actually have argued that up to five years would not be too long to wait IN PRISON for a trial, citing case law from the European Court of Human Rights supporting their position.

Such practices, admittedly, have a long pedigree, but they mock the presumption of innocence. Under U.S. law, the federal government must bring a criminal defendant to trial within three months, or let him go.

By the same token, the right of confrontation, guaranteed by the Sixth Amendment, includes the right to know the identity of hostile witnesses, and to exclude most "hearsay" evidence. In the Yugoslavia Tribunal, both anonymous witnesses and virtually unlimited hearsay evidence have been allowed at criminal trials, *large portions of which are conducted in secret*. Again, this is the model for the ICC.

Similarly, under the Constitution's guarantee against double jeopardy a judgment of acquittal cannot be appealed. Under the ICC statute, acquittals are freely appealable by the prosecution, as in the Yugoslav Tribunal, where the Prosecutor has appealed every judgment of acquittal.

In addition, the ICC would not preserve the right to a jury trial. The importance of this right cannot be overstated. Alone among the Constitution's guarantees, the right to a jury trial was stated twice, in Article III (sec. 2) and in the Sixth Amendment. It is not merely a means of determining facts in a judicial proceeding. It is a fundamental check on the abuse of power. As Justice Joseph Story explained: "The great object of a trial by jury in criminal cases is to guard against a spirit of oppression and tyranny on the part of rulers, and against a spirit of violence and vindictiveness on the part of the people." It is "part of that admirable common law, which had fenced round, and interposed barriers on every side against the approaches of arbitrary power." That said, the exclusion of jury trials from the ICC is not surprising, for that Court invites the exercise of arbitrary power by its very design.

The ICC will act as policeman, prosecutor, judge, jury, and jailor - all of these functions will be performed by its personnel, with nothing but bureaucratic divisions of authority, and no division of interest. There would be no appeal from its judgments. If the ICC abuses its power, there will be no recourse. From first to last, the ICC will be the judge in its own case. It will be more absolute than any dictator. As an institution, the ICC is fundamentally inconsistent with the political, philosophical, and legal traditions of the United States.

ICC supporters suggest that U.S. participation in this Court would not violate the Constitution because it would not be "a court of the United States," to which Article III and the Bill of Rights apply. They often point to cases in which the Supreme Court has allowed the extradition of citizens to face charges overseas. There are, however, fundamental differences between United States participation in the ICC Treaty Regime and extradition cases, where Americans are sought for crimes committed abroad. If the U.S. joined the ICC Treaty, the Court could try Americans who never have left the United States, for actions taken entirely within our borders.

A hypothetical, stripped of the emotional overlay inherent in "war crimes" issues, can best illustrate the constitutional point here: The Bill of Rights undoubtedly impedes efficient enforcement of the drug laws - also a subject of international concern. Could the federal government enter a treaty with Mexico and Canada, establishing an offshore "Special Drug Control Court," which would prosecute and try all drug offenses committed anywhere in North America, without the Bill of Rights guarantees? Could the federal government, through the device of a treaty, establish a special overseas court to try sedition cases - thus circumventing the guarantees of the First Amendment.

Fortunately, the Supreme Court has never faced such a case. However, in the 1998 case of *United States v. Balsys*, the Court suggested that, where a prosecution by a foreign court is, at least in part, undertaken on behalf of the United States, for example, where "the United States and its allies had enacted substantially similar criminal codes aimed at prosecuting offenses of international character . . ." then an argument can be made that the Bill of Rights would apply "*simply because that prosecution [would not be] fairly characterized as distinctly 'foreign'* The point would be that *the prosecution was as much on behalf of the United States as of the prosecuting nation...* "

This would, of course, be exactly the case with the ICC. If the United States became a "State Party" to the ICC Treaty, any prosecutions undertaken by the Court would be "as much on behalf of the United States as of any other State party. Since the full and undiluted guarantees of the Bill of Rights would not be available in the ICC, the United States cannot, constitutionally, sign and ratify the ICC treaty.

ICC supporters also have argued that the U.S. should sign and ratify the Rome Treaty because the Court would be directed against people like Saddam Hussein and Slobodan Milosevic, and not against the United States. Here, as pretty much everywhere, the past is the best predictor of the future. We already have seen this particular drama staged at the Yugoslav Tribunal. Even though that Tribunal was established to investigate crimes committed during 1991-1995 Yugoslav conflict, and even though NATO's air war against Serbia was fought on entirely humanitarian grounds, and even though it was conducted with the highest level of technical proficiency in history, the Hague prosecutors nevertheless undertook a *politically motivated* investigation - motivated by *international humanitarian rights activists along with Russia and China* - of NATO's actions based upon the civilian deaths that resulted.

At the end of this investigation, the prosecutors gave NATO a pass not because, in their view, there were no violations, but because "[i]n all cases, either the law is not sufficiently clear or investigations are unlikely to result in the acquisition of sufficient evidence to substantiate charges against high level accused or against lower accused for particularly heinous offenses."

Significantly, in their report the prosecutors openly acknowledged the very elastic nature of the legal standards in this area, further highlighting the danger that the United States will be the subject of such politically motivated prosecutions in the future: "[t]he answers to these question [regarding allegedly excessive civilian casualties] are not simple. It may be necessary to resolve them on a case-by-case basis, *and the answers may differ depending on the background and values of the decision-maker*. It is unlikely that a human rights lawyer and an experienced combat commander would assign the same relative values to military advantage and to injury to noncombatants. Further, it is unlikely that military commanders with different doctrinal backgrounds and differing degrees of combat experience or national military histories would always agree in close cases."

These are, in fact, "will-build-to-suit" crimes. Whether prosecutions are brought against American officials will depend entirely upon the motivations and political agenda of the ICC.

In response, ICC supporters claim that we can depend upon the professionalism and good will of the Court's personnel. One of the ICC's strongest advocates, former Yugoslav Tribunal Prosecutor Louise Arbour has argued for a powerful Prosecutor and Court, suggesting that "an institution should not be constructed on the assumption that it will be run by incompetent people, acting in bad faith from improper purposes."

The Framers of our Constitution understood the fallacy of this argument probably better than any other group in history. If there is one particular American contribution to the art of statecraft, it is the principle - incorporated into the very fabric of our Constitution - that *the security of our rights cannot be trusted to the good intentions of our leaders*. By its nature, power is capable of abuse and people are, by nature, flawed. As James Madison wrote "the great difficulty lies in this: you must first enable the government to control the governed; and in the next place *oblige it to control itself*." The ICC would not be obliged to control itself.

It is also often asserted that the principle of "complementarity," found in Article 17 of the Rome Treaty, will check the Court's ability to undertake prosecution of Americans. This is the principle that prohibits the ICC from taking up a case if the appropriate national authorities investigate and prosecute the matter. In fact, this limit on the ICC's power is, in the case of the United States, entirely illusory.

First, as with all other matters under the Rome Treaty, it will be solely within the discretion of the ICC to interpret and apply this provision.

Second, under Article 17, the Court can pursue a case wherever it determines that the responsible State was "unwilling or unable to carry out the investigation or prosecution." In determining whether a State was "unwilling" the Court will consider whether the national proceedings were conducted "independently or impartially." The United States can never meet that test as an institutional matter. Under the Constitution, the President is both the Chief Executive, i.e., the chief law enforcement officer, and the Commander-in-Chief of the armed forces. In any particular case, both the individuals investigating and prosecuting, and the individuals being investigated and prosecuted, work for the same man. Moreover, under command responsibility theories, the President is always a potential - indeed, a likely, target of any investigation. The ICC will simply note that an individual cannot "impartially" investigate himself, and it will be full steam ahead. As a check on the ICC, complementarity is meaningless.

Finally, it's important to understand exactly what is at stake here. Today, the officials of the United States are ultimately accountable for their actions to the American electorate. If the United States were to ratify the ICC Treaty this ultimate accountability would be transferred from the American people to the ICC in a very real and immediate way - through the threat of criminal prosecution and punishment. The policies implemented and actions taken by our national leaders, whether at home or abroad, could be scrutinized by the ICC and punished if, *in its opinion*, criminal violations had occurred. As Alexis de Tocqueville wrote, "[h]e who punishes the criminal is . . . the real master of society." Ratification of the ICC Treaty would, in short, constitute a profound surrender of American sovereignty - our right of self-government - the first human right. Without self-government, the rest are words on paper, held by grace and favor, and not rights at all.

That surrender would be to an institution that does not share our interests or values. There is no universally recognized and accepted legal system on the international level, particularly in the area of due process, as the Rome Treaty itself recognizes in requiring that, in the selection of judges, "the principal legal systems of the world," should be represented. Moreover, although a number of Western states have signed this treaty, so have states such as Algeria, Iran, Nigeria, Sudan, Syria and Yemen. According to the U.S. State Department, each of these states has been implicated in the use

of torture or extra judicial killings, or both. Yet, each of them would have as great a voice as the United States in selecting the ICC's Prosecutor and Judges and in the Assembly of State Parties.

This is especially troubling because, as the ICTY Prosecutor conceded, who is and who is not a war criminal is very much a matter of your point of view. And I'd like to give you a fairly poignant example that I learned of, actually, while practicing before the ICTY.

In this case there was a young officer, 20 or 21 years old, who commanded a detachment of regular soldiers, along with a group of irregulars. Irregulars are, of course, always a problem. I think everyone pretty much agrees that, for example, the worst atrocities in Bosnia were committed by irregulars. At any rate, these irregulars were clearly under the officer's command when they all ran into a body of enemy troops.

There was a short, sharp firefight. A number of the enemy were killed or wounded, and the rest threw down their arms and surrendered. At that point, the officer entirely lost control of the situation. His irregulars began to kill the wounded and then the rest of the prisoners -- with knives and axes actually.

After a good deal of confusion, the officer managed to form up his regulars around the remaining prisoners, but about a dozen were killed. Now, under our system of military justice, the perpetrators would be prosecuted, but the officer would very likely not be. He gave no order for the killings, and took some action to stop it.

However, under the command responsibility and "knowing presence" theories now current at the ICTY, the ICC's model, this officer is guilty of a war crime. The fact that he did make some attempt to prevent the killing would certainly be taken into account, but very likely as a matter of mitigation at sentencing.

At any rate, this is a real case. It didn't, however, happen in Central Bosnia, or Kosovo, or Eastern Slavonia, and the individuals involved were not Serbs, Croats, or Muslims. As a matter of fact, it happened in Western Pennsylvania. The soldiers were English subjects, at the time, and the irregulars were Iroquois Indians; their victims were French. The young officer was, as a matter of fact, from the county in which I live -- Fairfax, Virginia. And, for those of you who are students here at the University, his name -- Washington -- will grace each of your diplomas.

War is, inherently, a violent affair and the discretion whether to prosecute any particular case in which Americans are involved should be kept firmly in the hands of our institutions, to be made by individuals who are accountable to us for their actions. The ICC is inconsistent with our Constitution and inimical to our national interests. It is an institution of which we should have no part.