

USAWC STRATEGY RESEARCH PROJECT

**THE INTERNATIONAL CRIMINAL COURT:
IS IT IN THE UNITED STATES' STRATEGIC
INTERESTS TO REMAIN A NON-MEMBER?**

by

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ABSTRACT

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This paper examines the strategic advantages for the United States to sign the Rome Statute for International Criminal Court or to remain a non-signatory nation. It begins with the history of the Court's development, the current U.S. position, then examines some of the difficulties encountered when a war criminal like Saddam Hussein is captured. The advantages and disadvantages of the U.S. position are then compared, an intermediate solution is offered and concludes with a recommendation to join the Court but invoke Article 124—which allows the United States not to be subject to the Court's jurisdiction for a period of seven years.

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THE INTERNATIONAL CRIMINAL COURT: IS IT IN THE UNITED STATES' STRATEGIC INTERESTS TO REMAIN A NON-MEMBER?

After initially supporting efforts through the 1990s to help develop the International Criminal Court (ICC), the United States notified the United Nations it would not become a member of the ICC and would have no legal obligations stemming from the U.S. signature on the preliminary founding documents of December 2000. This paper will evaluate whether the United States would accomplish more strategically by joining the ICC or by remaining external to it and pursuing its own course against crimes against humanity. This paper will look at the history of the ICC development, the current U.S. position, and analyze whether we are better off strategically as a member or non-member.

HISTORY

The International Criminal Court traces its history back to the International Military Tribunals of Germany (Nuremberg, 1945) and the Far East (Tokyo, 1946), tribunals convened to deal with Nazi and Japanese war criminals. In 1946, as a result of the atrocities committed during World War II, the United Nations Convention on the Prevention and Punishment of the Crime of Genocide was approved. A year later, the UN invited the International Law Commission (ILC) to investigate the possibility of and the potential need for an international judicial organization to prosecute those accused of that crime. Over the next five years, the ILC developed several proposals but could not assemble a consensus on the need for a permanent court to prosecute violators. Nothing was done for 35 years until, in 1989, Trinidad and Tobago asked the UN General Assembly to resurrect the idea with a specific eye to prosecuting crimes arising from international drug trafficking.¹ It is interesting to note that the reason that re-launched the ICC, international drug trafficking, is not one of the crimes that now subject to its jurisdiction.

In the early 1990s, greater impetus may have been gained for the formation of a full time court as a direct result of the need for ad hoc tribunals to deal with the ethnic cleansing in the Former Republic of Yugoslavia (1993) and the atrocities committed in Rwanda (1994). Completed in 1994, the ILC submitted its draft Statute for the International Criminal Court that led the General Assembly to convene the Ad Hoc Committee on the Establishment of an International Criminal Court. This committee led to the Preparatory Committee on the Establishment of an International Criminal Court, which drafted the Statute of the International Criminal Court. It was adopted at the United Nations Conference of Plenipotentiaries in Rome in July 1998. It became effective on July 1st, 2002, by design, 60 days after the 60th instrument

of ratification was submitted to the United Nations². Currently, 92 countries have ratified or acceded to the Statute of Rome, including many U.S. allies and all but three members of the North Atlantic Treaty Organization (United States, Turkey, and the Czech Republic). It should also be noted this is NOT a United Nations controlled organization, but a totally independent entity that has no oversight body. Support funding is to be supplied by member States Parties nations in the same share that they contribute to the United Nations.

During negotiations on how best to implement the ICC, the United States tried vigorously to include several ideas that would have provided extensive safeguards against the abuse of the Court's power as well as enhance its credibility. The suggestions were significantly overridden by other nations. Initially, the United States tried to make it a requirement to seek the approval of any state where an investigation was to occur. Most nations saw this as a loophole that may allow transgressors to hide where they still had friends in power, because those in power wouldn't allow an investigation into the misdeeds. Then, citing the United Nations Charter, the United States attempted to make it a requirement to get UN Security Council approval prior to all investigations since the UNSC has primary responsibility for international peace and security according to the UN Charter. This change was soundly defeated by participating nations, who viewed it as a blatant attempt to use the U.S. position as one of the Permanent 5 to veto any investigation into American citizens or U.S. allies. The only concession the United States could get approved was an allowance for a one-year delay of any potential investigation based on a request from the UN Security Council.³

U.S. POSITION

Based on a variety of concerns, the United States announced its withdrawal of support for the ICC on May 6th, 2002. Although this withdrawal occurred under the Bush Administration, it is consistent with the position of the Clinton Administration that there were numerous significant flaws with the final version of the Court and the Treaty should not be submitted to the Senate for ratification⁴. The U.S. position is that the Rome Statute of the International Criminal Court cannot be supported for the following six reasons: it subjugates American sovereignty to an international treaty (U.S. law doesn't allow international treaties to supercede U.S. Laws); it doesn't adequately protect the rights of American military members and civilians as provided for in the Bill of Rights of the U.S. Constitution; it includes no safeguards from over-zealous prosecutions; it lacks oversight by an impartial higher authority; it contains far too much ill-defined language; and it sets no limits to what "wrongs" the court may attempt to redress in the future. However, according to Pierre-Richard Prosper, U.S. Ambassador for War Crimes

Issues, the United States fully and energetically supports countries seeking accountability for transgressions, but that it must be done by the post-conflict states exercising primary jurisdiction. This permits those states to develop the necessary appreciation for rule of law that should preclude exactly these types of misanthropic behaviors in the future.⁵ This coincides with our National Security Strategy, which emphasizes our encouragement of democracies whenever the opportunity presents itself and to “build the infrastructure of democracy”⁶. It is also clearly stated in the National Security Strategy, dated September 2002, that

“We will take the actions necessary to ensure that our efforts to meet our global security commitments and protect Americans are not impaired by the potential for investigations, inquiry or prosecution by the International Criminal Court (ICC), whose jurisdiction does not extend to Americans and which we do not accept. We will work together with other nations to avoid complications in our military operations and cooperation, through such mechanisms, as multilateral and bilateral agreements with will protect U.S. nationals from the ICC. We will implement fully the American Servicemembers Protection Act, whose provisions are intended to ensure and enhance the protection of U.S. personnel and officials.”⁷

In an effort to protect deployed U.S. military members from the anticipated threats by the establishment of the ICC, the Congress passed and the President signed the American Servicemembers Protection Act (ASPA) in 2001. Generally, it precludes U.S. military aid after July 1st, 2003 to countries that have signed the Rome Statute, unless they have also signed a bilateral agreement to exempt U.S. personnel while deployed to their country. The President also has the power to grant a waiver to certain nations by means specified in ASPA—if they are a U.S. national security interest, NATO member, or one of nine of our staunchest allies⁸. Passage of ASPA raised a furor from proponents of the ICC for a number of reasons: they claim it is a violation of the Rome Statute, Article 98(2) for ICC members to sign such agreements; such agreements exempt all American citizens not just the military; it is unnecessary since U.S. forces are already exempted under Article 98(2) of the Rome Statute; U.S. forces are almost always protected by a Status of Forces Agreement (SOFA) prior to their deployment for peacekeeping; the United States strong-armed the 68 ICC countries that have signed them; and finally, that the United States is punishing ICC members because the United States doesn't support the ICC.⁹

Another serious concern for the United States is unequal application of the justice meted out by the ICC. As the world's only super or hyper-power, the United States fears exposure to trumped up charges from rogue nations like Libya or Non-Governmental Organizations that don't agree with actions taken in our national security interests. During the 1998 negotiations, Libya was adamant that seizure or freezing of assets, like they experienced as an inducement

to resolve culpability for the Lockerbie, Scotland, airplane terrorism incident, should be included in the crimes punishable by the ICC. Obviously, the majority of nations categorically rejected such outlandish demands.

The U.S. concern is somewhat borne out by the NGO's publicly demonstrating during the final conference in Rome, demanding George H.W. Bush be held accountable for the blood bath of the Gulf War in 1991 and that William J. Clinton be charged with "genocide" based on deaths resulting from the sanctions against Iraq during his administration. The demonstrators may have gained more credibility had they also demanded justice be meted out for the Chinese Politburo members who ordered the shootings in Tiananmen Square in 1989 instead of focusing solely on alleged U.S. transgressions. But, from the U.S. perspective, due to its pre-eminence in the world, it is the one that will be singled out if, and when, the jurisdiction of the court is expanded, a real possibility since there is no oversight body to restrict expansion of the judicial "mandate".

COMPLICATIONS WITH A CAPTURED WAR CRIMINAL

The issue of the proper resolution once you've caught a war criminal subsumed the media headlines on December 13, 2003, with the capture of Saddam Hussein. The news was abuzz with speculation on how he should and would be dealt with. Early on, it was pointed out that the newly established ICC would be an ideal solution, except that most of his crimes occurred before the creation of the court, which only has jurisdiction on events that happened after its formation on 1 July 2002.

The United States, based on its policies spelled out in the National Security Strategy, would prefer to have him tried by an Iraqi court or tribunal since many of the atrocities were committed against his own people—systematic murder, rape, torture, and the use of chemical weapons against the Kurds in 1988. While this would serve well as a necessary step towards reconciliation within Iraq, there are several flaws with this idea. First is the concern that anyone selected to judge Saddam would be looking for revenge, not justice. This is a common issue in most countries where atrocities have occurred—how do you guarantee impartiality in a court where the victims have become the judges? Secondly, Iraq has no recent history of an impartial courts system either to return to or build upon. It would be as if the trial of the century would be gaveled to order on the first day the court is in session. For this trial to have the mandatory international credibility, the jurists should have stature within that community or experience in war crimes tribunals. Unfortunately, no one in Iraq has an adequate background. It would be necessary to import jurists from other countries, who may not share the same view of justice for

Saddam as native Iraqis who've suffered at his hands and give an aire of external domination to any proceedings.

Another alternative advanced by Michael Byers, of Oxford University, points to a possible solution in the recently established War Crimes Tribunal created by the Iraqi Governing Council (IGC)¹⁰. It would be an Iraqi tribunal established to deal with an Iraqi problem. It surely would have U.S. support, first, because the United States selected the members of the IGC who, in turn, established the WCT. Secondly, prior to Saddam's capture, Marc Grossman, Under Secretary for Political Affairs, said to an assembly at the Center for Strategic and International Studies

“While we oppose the ICC we share a common goal with its supporters—the promotion of the rule of law. Our differences are in approach and philosophy. In order for the rule of law to have the true meaning, societies must accept their responsibilities and be able to direct their future and come to terms with their past.”¹¹

The United States believes that countries gain much more by confronting their own horrific demons, using the errors of the past to help in the formulation of an effective government to guide them into the future, a cornerstone of which must be a viable judicial system to address transgressions. The issue with using the WCT is that the Iraqi Governing Council was appointed by the coalition that defeated Iraq, not the Iraqi people themselves through an elective process. That could give rise to issues of the legitimacy of any actions taken by the WCT.

There is always the option to request a United Nations Security Council Resolution (UNSCR) to establish an International War Crimes Tribunal, based on the models of those created for the Former Republic of Yugoslavia or Rwanda. It was previously pointed out as a criticism of UN organizations in general that there are serious concerns about the efficiency and fiscal responsibility of such organizations. The Carr Center for Human Rights, supportive of the United States joining the ICC, shares that view—

“... any country-specific court set up under the Security Council auspices would be vulnerable to political and budgetary pressures and debilitating start-up delays.”¹²

Ruth Wedgewood, of Johns Hopkins University, also points to the anticipated delays with this route, possibly amounting to more than two years.¹³ Additionally, since this would then be under the UN auspices, the death penalty, permitted in most Muslim countries as well as demanded by many vocal Iraqi demonstrators, is eliminated as a possible punishment option—a condition that would be unpalatable to many Iraqi citizens. From the U.S. perspective, this may

present another opportunity for those countries that opposed the war to advance or protect their interests, possibly at the expense of justice.

ADVANTAGES OF THE U.S. POSITION

What are the advantages to be gained from the current U.S. position as a non-member to the International Criminal Court? The current administration gains by keeping a consistent policy during an election year. If the Bush Administration were to reverse its position prior to November 2004, the media and the Democrats would have a field day attacking the President for being inconsistent at best, and at worst, being incompetent in foreign policy issues. The references would be back to President Clinton and how he supported the formation of the ICC and how President Bush made a mistake by not signing the Statute of Rome and presenting it to the Senate for ratification. Revisionists who oppose President Bush's re-election are already re-writing history that President Clinton was in favor of the court when in reality, he knew there were serious shortcomings but hoped they could be overcome and garner U.S. support.

U.S. military members gain by not being subject to the Court's jurisdiction while they experience the highest deployment rate since the Vietnam War. The Service Members know any wrongdoing would be dealt with swiftly through the Uniform Code Of Military Justice, providing them the protections they are most familiar with. Since it is not a States Party member, the United States is freer to pursue its aims militarily when diplomacy fails like it did in leading up to Operations ENDURING FREEDOM and IRAQI FREEDOM.

By being a non-States Party member, the United States is free to pursue nation building within the aggrieved states. The United States strongly supports the nations where atrocities have occurred to be able to try the criminals themselves. This builds confidence in the governmental agencies, establishes strong traditions of personal responsibility, and provides the populace greater hope for their future.

The ICC only has one solution to aberrant behavior—a court trial. Those nations external to the ICC have more options for resolution. The rebuilding nation can resolve the issue

“Through formal trials, through truth commissions combined with amnesty, through political process, or in exceptional cases through special tribunals.”¹⁴

In South Africa after the end of apartheid, rather than continue the divisiveness through criminal proceedings, the populace opted for reconciliation through truth commissions to heal the nations wounds more quickly. It appears to have been successful.

Another advantage to the U.S. position is that it requires an international consensus to be established, usually through the UN Security Council, before tribunals can be instigated.

Conversely, the ICC only needs a single prosecutor to convince two members of a three-judge panel to begin investigations and proceedings. The threshold for prosecution by the ICC is too low and may be easily influenced by external factors.

The final advantage to the U.S. position is economic. Since State Party members contribute in the same share as they contribute to the UN itself, the United States would be projected to cover 25% of the costs of the International Criminal Court. Current estimates for operating costs of the court range to 600 million dollars annually. While 150 million is not significant in terms of the U.S. budget, the United States has better things to do with it than fund an institution that may be diametrically opposed to U.S. foreign policy actions.

DISADVANTAGES TO THE U.S. POSITION

If the United States continues to remain a non-member of the International Criminal Court, what will be the impact to our strategic interests? The United States views its withdrawal from the ICC as a refusal to participate in an organization that does not meet our national objectives and therefore, we simply will not be a party to it. Non-participation sends a very chilling message to the developing nations that look to the United States as a world leader. Of the 191 United Nations members¹⁵, only 92 have joined the ICC.¹⁶ That leaves more than half of the nations in the world who are not yet members of the ICC that could be potentially influenced by our decision. Admittedly, it won't have much impact on China, Cuba, Iran, or Libya, who are also among those nations who have not joined. But looking to the dozens of nations from all continents that habitually turn to the United States for leadership--they may very well decide if it is not in the U.S.'s interests, it is probably not in theirs either. In many cases, this may not necessarily be true. Unlike many of the developing nations, the United States has a strong and vibrant judicial system to hold individuals accountable for their actions with a long history stretching back to our colonial days. Any military members committing crimes possibly subject to ICC jurisdiction would first be liable for prosecution under the Uniform Code of Military Justice (UCMJ) and may face a harsher punishment since the death penalty is an option under the UCMJ but not the ICC. In many of the developing countries that may follow in the U.S. footsteps, the judicial system is corrupt or non-existent and they would have no effective internal mechanisms to deal with transgressors without turning to an external organization like the International Criminal Court. This is specifically why the ICC was brought into fruition but these nations may lose out on the opportunity if they follow the U.S. lead and do not sign onto the Treaty of Rome.

And what of our typical allies who have signed the Treaty of Rome—all of the North Atlantic Treaty Organization (NATO) nations except the Czech Republic and Turkey, all of the seven nations with pending membership to NATO (Bulgaria, Estonia, Latvia, Lithuania, Romania, Slovakia, and Slovenia), and our perennial ally, Australia. How are they to view the United States, not only as an ally, but also as the world leader? Many of our Allies feel they have stepped out, relinquishing some of their sovereignty, to help build an institution that is in the long term interests of the entire world. After its strong leadership during the 1990s to lay the foundation of the ICC, they don't understand why the United States doesn't now join them to that end. To blunt ASPA's impact on our allies, it was written with Presidential waiver authority. Additionally, the U.S. is actively pursuing bi-lateral agreements¹⁷ to exempt U.S. service members, as well as relying on pre-existing SOFA with allies. From their national viewpoint, they must wonder about the necessity of special waivers or of a bi-lateral agreement with their ally just because they acted in their national interests and signed on with the ICC.

Turning to our usual opponents who have not yet joined the ICC—China, Iran, Libya, and North Korea, we've provided them a windfall for their rhetoric machines. The U.S. opposition to the ICC could be portrayed as 'because we are only interested in protecting our mercenary forces from prosecution for their war crimes' or 'even the U.S. recognizes that the ICC is so flawed that it is has no credibility and should have no standing to prosecute war criminals in any country'. Speculation? Certainly, but still a credible scenario of their potential United States and ICC bashing. In the first case, they could use our retreat from the ICC as further grounds to easily criticize any of our worldwide military efforts, from the invasion of Iraq to the humanitarian effort in Iran after the most recent earthquake. They could claim the United States won't join because it needs to protect the U.S. "mercenary" troops who would be subject to prosecution by the ICC for the atrocities they inflict upon the populace wherever they go. In the second example, it would play well if the ICC were to press a case against any member of those nations. The United States should never change its position because we end up on the same side of the issue as our usual opponents, but it should generate some serious questions about the path we're on and the reasons we've chosen it.

In the recent past, when U.S foreign policy was guided solely by security and economic national interests, the United States has usually regretted it in hindsight. Take for example, the Former Republic of Yugoslavia in the early 1990's or the situation in Rwanda between the Hutus and the Tutsis a couple of years later. Some estimates of the carnage in the Former Republic of Yugoslavia from the ethnic cleansing exceed 300,000 people. The United States delayed action in the Former Republic of Yugoslavia until late 1995, promising to be engaged with U.S.

troops for only one year. Over eight years later, the United States still has troops on the ground there. Some may even posit that an earlier U.S. intervention in the Balkans may have precluded the need for the air war over Kosovo, Operation ALLIED FORCE.

The United States refused to intervene in Rwanda while as many as 600,000 people may have been slaughtered there. The justification used for not intervening was that there was no direct U.S. national interest. Many would claim that, by virtue of its position as the world leader and the world's only super-power, the United States should have intervened in spite of having no clearly defined national interests at stake. Those critics presume the United States could have saved a large percentage of those slaughtered just by starting to prepare for an intervention and rallying other nations to the cause. Relying on national interests as a yardstick to judge the need for U.S. intervention turned a blind eye to the problem and may have conveyed a tacit message that, while not acceptable, the slaughter was not going to be stopped by U.S. military force. In these two cases, the United States lost leadership capital in areas of the world where it can afford it the least, in the Muslim nations and the developing countries of Africa.

The situation with the International Criminal Court is similar to our actions before the United States coalition invaded Iraq—the United States tried to engage with the United Nations Security Council but the political back-stabbing precluded achieving the desired outcome. In the early phases of the ICC development, the United States was fully engaged trying to guide it to be an equitable place to seek justice without the ICC becoming a place to redress all grievances, real or perceived. When the U.S. attempts to correct the perceived flaws were soundly defeated by the other nations, the U.S. realized the ICC was not going to measure up to all that it could have been, and withdrew its support. Other nations perceived it as the United States just being the U.S.—when things don't conform to the U.S. viewpoint, even if it is an 80% solution like the ICC, the United States simply withdraws support.

To exacerbate the issue further, the United States appears to be actively campaigning against the ICC by demanding Article 98 Bilateral Agreements to keep U.S. military aid dollars flowing. Those countries that declined to sign one were cut off starting in July of 2003. The United States clearly states in the National Security Strategy that

“We will take the actions necessary to ensure that our efforts to ... protect Americans are not impaired by the potential for investigations, inquiry, or prosecution by the International Criminal Court (ICC), whose jurisdiction does not extend to Americans and which we do not accept.”¹⁸

This seems inconsistent with what Ambassador Prosper stated on the day the United States announced its withdrawal from the Statute of Rome—

“The president has also made it clear that we respect the right of other states to be part of the ICC, but we ask them in return to respect our right not to be a part of the ICC process”¹⁹

It appears to many that the United States is communicating from two positions—respect the U.S.’s right not to join and to continue getting military aid, but you must act incongruent with your previous actions in support of the ICC.

To make matters worse, the U.S. projects the appearance of an antagonistic attitude toward the Court, and to some degree, those that are a member of it. Congress enacted and the President signed, the American Service-Members Protection Act (ASPA) in 2002. To quote Section 2004 (b),

“no United States Court, and no agency or entity of any State or local government, including any court, may cooperate with the International Criminal Court in response to a request for cooperation submitted by the International Criminal Court pursuant to the Rome Statute.”²⁰

The U.S. antagonistic behavior toward the International Criminal Court through the Article 98 Bi-lateral Agreements, the passage in the National Security Strategy, and ASPA Section 2004, leave little doubt that the United States is hurting itself in the international arena. As the Carr Center for Human Rights stated—

“...recognizing that the high diplomatic costs of outright opposition to the ICC would significantly damage the U.S. national interest.”²¹

Our non-support did not preclude the ICC from coming into existence, since almost one-third of its membership joined after the United States announced it was withdrawing its support from the organization. It also appears that our antagonism of the ICC is not impeding its full development in the early stages of formation. The real question now is how long the United States will continue this short-sighted policy?

Could the ICC be used to thwart U.S. unilateral military action and our foreign policy objectives? It is entirely within the realm of possibility. According to Brigadier General Charles Dunlap, U.S. Air Force, Staff Judge Advocate to Air Combat Command,

“There is an undeniable element of anti-Americanism in international law as it is developing today. Rivkin and Casey argue quite persuasively that “the impetus in international law today stems from both our allies and our adversaries, who have chosen to use it as a means to check, or at least harness, American power.”²²

A possible scenario could be a perceived U.S. need to intervene militarily in a nation suspected of developing weapons of mass destruction (WMD). Based on the U.S. stated policy of pre-emption for threats to our security, the United States would then act. Any nation that

opposed our actions could bring charges before the ICC of war crimes, which could be loosely interpreted under Article 8 of the Rome Statute as:

“iii—Willful causing of great suffering or serious injury to body or health.

iv—extensive destruction and appropriation of property not justified by military necessity and carried out unlawfully and wantonly.”²³

It would not require much imagination at all to see a nation opposed to our recent intervention in Iraq use these vague clauses to haul the U.S. leadership before the ICC. With the “Coalition of the Willing” placing so much emphasis on the WMD threat when they presented the justification for invading Iraq to the UN and, to date, having found none, the argument that our actions were unlawful could have credence with some nations in the world. Certainly, the United States would, and did, argue that under UN Security Council Resolution 1441, Saddam Hussein had ample time to validate that he had properly disposed of his WMD, was making no more, and was in full compliance with the UN mandate. His failure to do so provided the legal basis for our invasion and subsequent toppling of his regime. However, with a subjective interpretation of the wording in the Statute of Rome, it is anybody’s guess as to how loosely the Court would construe “war crimes”. Recall that vague wording was one of the reasons the United States gave for withdrawing their support from the ICC.

This hypothetical scenario brings to the fore another major issue the United States has with the International Criminal Court—the lack of any external oversight body to which a charged party could appeal. The only mechanism of appeal available in the ICC is upon conviction and then it is to the Appeals Court within the ICC’s own structure. This type of appeal would not be credible in the U.S. justice system. There is no body external to the International Criminal Court organization that could exert corrective influence if the ICC overstepped its bounds.

AN ALTERNATIVE SOLUTION: HOW TO MINIMIZE U.S. EXPOSURE

The overall tone of this paper has been that it is in the U.S. national interests to become a member of the ICC yet to try to avoid some of the detracting factors. The ideal solution would provide the United States with a way to have the benefits of being a States Party to the Court for diplomatic reasons with none of the potential headaches of being subject to its jurisdiction. But the United States does have such an intermediate alternative that would allow it to join the ICC without being immediately subject to the ICC’s jurisdiction. The United States, like France, can join and then invoke Article 124 of the Rome Statute of the International Criminal Court, which states

“... a State, on becoming a party to this Statute, may declare that, for a period of seven years after the entry into force of this Statute for the State concerned, it does not accept the jurisdiction of the Court with respect to the category of crimes referred to in Article 8 when a crime is alleged to have been committed by its nationals or on its territory. A declaration under this article may be withdrawn at any time. The provisions of this article shall be reviewed at the Review Conference convened in accordance with Article 123, paragraph 1.”²⁴

The United States would then be a member State, with all rights and privileges accorded, without exposing any of our military members to the Court's jurisdiction. Our experienced jurists could be involved in the formative years of the Court, guiding the establishment of rules that will carry on for years. As a member of the Assembly of States Parties, the United States will have inputs during the Article 123 directed Review Conference which should be conducted in mid 2009, at the direction of the United Nations Secretary General. This may be the last opportunity to seriously influence the direction of the Court, and to impact the exclusion of the nebulous crime of “aggression” that some nations want to include in the Rome Statute.

Then, in 2010 after six years have expired, if the United States isn't satisfied with the form, style, substance, application or evolution of the ICC, it can announce its withdrawal. Pursuant to Article 127 of the Rome Statute, a withdrawal from the Treaty goes into effect one year from notification of the United Nations Secretary General.²⁵ The United States would then have had the full seven years of engagement in an effort to impact the Court's policies and procedures without ever having been subject to the ICC's jurisdiction. This would provide the United States with the maximum flexibility while still allowing the U.S. diplomats and jurists to try to influence the formation of the Court.

According to the Independent Student Coalition for the International Criminal Court website,

“The United States was instrumental in the Rome conference that drafted the original Rome Statute in 1998. As a leading voice for the ICC at Rome, the American delegation pushed through extensive protections for its sovereignty, its servicemen based abroad, and its citizens. The US led the debate on the inclusion of strict rules of procedure and evidence for the Court.”²⁶

One of the main reasons the Court is structured in its present form is due specifically to the U.S. efforts during the ICC development conferences in the 1990s. Not only as a world leader, but as a nation with a long tradition of a fair and effective judicial proceedings, U.S. involvement during these first formative years of the Court and its first Review Conference in 2009 is an imperative. Choosing this path may gain back some of the leadership capital we've wasted by distancing ourselves from and being antagonistic to the ICC. But more importantly, it would also show the United States is serious about supporting the development of an

international legal system to address atrocious behaviors and a method to enforce those laws so developed.

CONCLUSION AND RECOMMENDATION

Is the United States further ahead strategically as a non-member of the ICC? The clear answer is no. It seems the concerns voiced by the United States are based on speculation of what might happen, rather than on hard evidence. Will the ICC, like the UN, be another venue for those countries antagonistic to U.S. policies to find a forum and a mechanism to criticize or attempt to thwart U.S. international efforts? Absolutely, but that is not sufficient justification to exclude ourselves from one of the most important developments in international law in world history.

After studying the history of the development of the International Criminal Court, examining how the United States was thoroughly engaged throughout the 1990s, and the evolution of the ICC since it came into existence, it seems evident the path that must be followed is clear, even if somewhat unpalatable to the current administration. The United States cannot pick and choose the occasions to exercise its world leadership. To try to be selective on when and where to step to the front of the international community undermines all the long-term interests of America. The United States must lead on this issue as well, to grant the imprimatur of the state with one of the most developed judicial systems in history and which has always seen the development of international law as the cornerstone of a peaceful and secure world. The conclusion of this paper comports with the Carr Center for Human Rights recommended in their position paper of 2000--

“We encourage a future U.S. administration to see the advantage in supporting the Court, if only as a matter of raw political calculus. Opposition to a functioning Court would undermine faith in a world based on justice and the rule of law and shake one of the foundations on which the legitimacy of the U.S. global leadership has rested since World War Two.”²⁷

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ENDNOTES

¹ Gary T. Dempsey, "Reasonable Doubt—The Case Against the Proposed International Criminal Court", 16 July 1998, Cato Institute, Policy Analysis No. 311, available from <http://cato.org/pubs/pas/pa-311.html>, Internet, accessed 30 September 2003 .

² Chronology of the International Criminal Court, International Criminal Court website, available from: <http://www.icc-cpi.int/php/whatistheicc/chronology.php>, Internet, accessed 30 September 2003.

³ Henry Lamb, "The International Criminal Court Summary Analysis", available from <http://www.sovereignty.net/p/gov/iccreview.htm>, Internet, accessed 30 September 2003.

⁴ Douglas A. Davidson, Charges d'Affaires, *U.S. Mission to OSCE Statement on the International Criminal Court*, 16 May 2002. Available from <http://www.usosce.rpo.at/archive/2002/05/16icc.htm> Internet, accessed 1 March 2004.

⁵ Pierre-Richard Prosper, "Issues Update: U.S. Has No Legal Obligation to the International Criminal Court" Foreign Press Center Briefing, 6 May 2002, available from <http://www.wfa.org/issues/wicc/unsigned/prosperunsigned.html>, Internet, accessed 30 September 2003.

⁶ George W. Bush, *The National Security Strategy of the United States of America* (Washington, D.C.: The White House, September 2002), Section VII, 21.

⁷ *ibid*, Section IX, 31.

⁸ "U.S. Impunity Agreements: A Summary", Washington Working Group on the International Criminal Court website, available at <http://www.wfa.org/issues/wicc/article98/art98factsheet.html>, Internet, accessed 30 September 2003. The nine countries are Argentina, Australia, Egypt, Israel, Jordan, Japan, New Zealand, Republic of Korea, Taiwan (Section 2007 of the American Service-Members' Protection Act).

⁹ "The American Servicemembers' Protection Act of 2002 Section-by-Section Summary", Washington Working Group on the International Criminal Court website, available at <http://www.wfa.org/issues/wicc/aspafinal/aspasection.html>, Internet, accessed 30 September 2003.

¹⁰ Brian Stewart hosts "*Who's Justice*" a discussion panel, Canadian Broadcast Corporation, 14 December 2003, viewed on the Public Broadcasting System 14 December 2003.

¹¹ Marc Grossman, *American Foreign Policy and the International Criminal Court*, Posture Statement to the Center for Strategic and International Studies, Washington, D.C. May 6, 2002. Available from [Http://www.state.gov/p/9949pf.htm](http://www.state.gov/p/9949pf.htm). Internet, accessed 18 February 2004.

¹² "*The International Criminal Court*", Carr Center for Human Right Policy Working Paper T-00-02, 3.

¹³ Brian Stewart hosts "*Who's Justice*" a discussion panel, Canadian Broadcast Corporation, 14 December 2003, viewed on the Public Broadcasting System 14 December 2003.

¹⁴ Colin Powell, Demarche on the U.S. Government Policy on the International Criminal Court, 6 May 2002, available from http://amicc.org/docs/Demarche_US.pdf Internet, accessed on 1 March 2004.

¹⁵ The United Nations website, Overview, List of Member States, available from <http://www.un.org/Overview/unmember.html> Internet, accessed on 9 December 2003.

¹⁶ The International Criminal Court website, States Parties, available from <http://www.icc-cpi.int/php/statesparties/allregions.php> Internet, accessed on 9 December 2003.

¹⁷ *Article 98, Rome Statute of the International Criminal Court, (1998)*. Available from [http://www.icc-cpi.int/library/basicdocuments/rome_statute\(e\).html](http://www.icc-cpi.int/library/basicdocuments/rome_statute(e).html), Internet, accessed 30 January 2004. Commonly referred to as Article 98 Bilateral Agreements referring to the Rome Statute Article 98 that deals with surrendering accused personnel to the ICC for prosecution. The Article 98 Agreements referred to guarantee any such American would be surrendered to the United States, not to the International Criminal Court.

¹⁸ George W. Bush, *The National Security Strategy of the United States of America* (Washington, D.C.: The White House, September 2002), Section IX, 31.

¹⁹ Pierre-Richard Prosper, "Issues Update: U.S. Has No Legal Obligation to the International Criminal Court" Foreign Press Center Briefing, 6 May 2002, available from <http://www.wfa.org/issues/wicc/unsigned/prosperunsigned.html>, Internet, accessed 30 September 2003.

²⁰ H.R. 4775, American Service-Members' Protection Act. Section 2004 (b).

²¹ "*The International Criminal Court*", Carr Center for Human Right Policy Working Paper T-00-02, 20.

²² Colonel Charles J. Dunlap, Jr., "*Law and Military Interventions: Preserving Humanitarian Values in 21st Century Conflicts*", available at <http://www.ksg.harvard.edu/cchrp/Web Working Papers/Use of Force/Dunlap2001.pdf>, Internet, accessed 1 March 2004. In his article, Col Dunlap sites David B. Rivkin, Jr. & Lee A Casey, "The Rocky Shoals of International Law," *The National Interest*, Winter 2000/01, 35.

²³ *Article 8, Rome Statute of the International Criminal Court, (1998)*. Available from [http://www.icc-cpi.int/library/basicdocuments/rome_statute\(e\).html](http://www.icc-cpi.int/library/basicdocuments/rome_statute(e).html), Internet, accessed 30 January 2004.

²⁴ *Article 124, Rome Statute of the International Criminal Court, (1998)*. Available from [http://www.icc-cpi.int/library/basicdocuments/rome_statute\(e\).html](http://www.icc-cpi.int/library/basicdocuments/rome_statute(e).html), Internet, accessed 30 January 2004.

²⁵ Statute of Rome, Article 127 (1).

²⁶ Background on the ICC, The Independent Student Coalition for the International Criminal Court website, available at <http://www.isc-icc.org/> Internet, accessed 29 January 2004.

²⁷ *"The International Criminal Court"*, Carr Center for Human Right Policy Working Paper T-00-02, 20-21.

BIBLIOGRAPHY

- Bush, George W., *The National Security Strategy of the United States of America* (Washington, D.C.: The White House, September 2002).
- Carr Center for Human Rights Policy, *The International Criminal Court*, Policy Working Paper T-00-02 (Cambridge, MA, John F. Kennedy School of Government).
- Davidson, Douglas A, Charges d'Affaires, *U.S. Mission to OSCE Statement on the International Criminal Court*, 16 May 2002. Available at <http://amicc.org/docs/OSCE.pdf> Internet. Accessed 1 March 2004.
- Dempsey, Gary T. "Reasonable Doubt—The Case Against the Proposed International Criminal Court", 16 July 1998, Cato Institute, Policy Analysis No. 311. Available from <http://cato.org/pubs/pas/pa-311.html>, Internet. Accessed 30 September 2003 .
- Dunlap, Charles J., Jr., Colonel, USAF, "*Law and Military Interventions: Preserving Humanitarian Values in 21st Century Conflicts*", available at [http://www.ksg.harvard.edu/cchrp/Web Working Papers/Use of Force/Dunlap2001.pdf](http://www.ksg.harvard.edu/cchrp/Web%20Working%20Papers/Use%20of%20Force/Dunlap2001.pdf), Internet. Accessed 1 March 2004. In his article, Col Dunlap sites David B. Rivkin, Jr. & Lee A Casey, "The Rocky Shoals of International Law," *The National Interest*, Winter 2000/01, 35.
- Grossman, Marc, *American Foreign Policy and the International Criminal Court*, Posture Statement to the Center for Strategic and International Studies, Washington, D.C. May 6, 2002. Available from <Http://www.state.gov/p/9949pf.htm>. Internet. Accessed 18 February 2004.
- H.R. 4775, Title III, American Service-Members' Protection Act. Section 2004 (b).
- Independent Student Coalition for the International Criminal Court website, Background on the ICC, Available at <http://www.isc-icc.org/> Internet. Accessed 29 January 2004.
- International Criminal Court website, Chronology of the International Criminal Court. Available from <http://www.icc-cpi.int/php/whatistheicc/chronology.php>, Internet. Accessed 30 September 2003.
- International Criminal Court website, States Parties, available from <http://www.icc-cpi.int/php/statesparties/allregions.php> Internet. Accessed on 9 December 2003.
- Lamb, Henry. "The International Criminal Court Summary Analysis". Available from <http://www.sovereignty.net/p/gov/iccreview.htm>, Internet. Accessed 30 September 2003.
- Negroponete, John D., Address to the UN Security Council: Exempting UN Peacekeepers from the International Criminal Court, 12 July 2002, available from <http://www.freerepublic.com/focus/news/717622/posts> Internet. Accessed 8 March 2004.
- Powell, Colin, Demarche on the U.S. Government Policy on the International Criminal Court, 6 May 2002, available from http://amicc.org/docs/Demarche_US.pdf Internet. Accessed on 1 March 2004.

Prosper, Pierre-Richard, "Issues Update: U.S. Has No Legal Obligation to the International Criminal Court" Foreign Press Center Briefing, 6 May 2002. Available from <http://www.wfa.org/issues/wicc/unsigned/prosperunsigned.html>, Internet. Accessed 30 September 2003.

Rome Statute of the International Criminal Court, (1998). Available from [http://www.icc-cpi.int/library/basicdocuments/rome_statute\(e\).html](http://www.icc-cpi.int/library/basicdocuments/rome_statute(e).html), Internet. Accessed 30 January 2004. Articles 8, 123, 124, 127.

Stewart, Brian, host, "*Who's Justice*" a discussion panel, Canadian Broadcast Corporation, Public Broadcasting System 14 December 2003.

The United Nations website, Overview, List of Member States, available from <http://www.un.org/Overview/unmember.html> Internet. Accessed on 9 December 2003.

Washington Working Group on the International Criminal Court, "*The American Servicemembers' Protection Act of 2002 Section-by-Section Summary*", Available at <http://www.wfa.org/issues/wicc/aspafinal/aspasection.html>, Internet. Accessed 30 September 2003.

Washington Working Group on the International Criminal Court, "*U.S. Impunity Agreements: A Summary*", Available at <http://www.wfa.org/issues/wicc/article98/art98factsheet.html>, Internet. Accessed 30 September 2003.