STRATEGY RESEARCH PROJECT

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THE UNITED STATES' VIEWS TOWARD THE INTERNATIONAL CRIMINAL COURT

BY

JEANNA M. TENDALL
United States Army Materiel Command

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Jeanna M. Tendall
U.S. Army Materiel Command

COL Thomas McShane
Project Advisor

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U.S. Army War College
CARLISLE BARRACKS, PENNSYLVANIA 17013

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ABSTRACT

AUTHOR: Jeanna M. Tendall, Department of Army Civilian, Army Materiel Command

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This paper analyzes the United States' views toward the International Criminal Court. The Court will be a permanent judicial institution to investigate, charge, and prosecute individuals who commit the most egregious crimes; war crimes, crimes against humanity, and genocide. The history of the Court's genesis, its principles, procedures, and structure will be reviewed, and the United States' reservations about the Court will be analyzed. This paper will demonstrate that, while not perfect, the Court has a solid foundation to execute its mandate and warrants strong support from the United States.

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THE UNITED STATES' VIEWS TOWARD THE INTERNATIONAL CRIMINAL COURT

The Statute of the International Criminal Court resulting from the July 1998 United Nations Rome Conference, might be considered the most significant development in international law in the twentieth century. The Statute, otherwise known as the Rome Treaty, came about in the same year as the fiftieth anniversary of two other hallmarks, the Universal Declaration of Human Rights and the Convention on the Prevention and Punishment of the Crime of Genocide. These documents along with the human rights provisions of the United Nations Charter and the 1949 Geneva Conventions brought the concern for treatment of individuals during war and peace to the forefront of the international stage.[1]

The International Criminal Court when it comes into force will provide the world a permanent judicial institution in which to investigate, charge, and prosecute individuals who commit the most egregious crimes; war crimes, crimes against humanity, and genocide. It will not be a perfect institution, none is, yet it will be the best there can be having been nurtured by great minds from a multitude of nations around the world, the United States chief among them, who are extremely committed to its principles and ideals whose time has long come.[2] These nations recognize that too many lives are at stake at the hands of tyrants and dictators across the globe who over the last several decades have demonstrated little more respect for human life than for cattle.

Yet establishment of the Court comes with risks. The United States, whose contributions toward the court since its genesis after World War I and through the Rome Conference were overwhelmingly influential in developing the Statute as it appears today, has serious reservations about the Treaty. Its primary concerns stem from the Court's universal jurisdiction over states not party to the Treaty, lack of external checks and balances for the Court, and its doubt about the Court's respect, in practice, for national jurisdiction.[3]

This paper will explore and analyze the position of the United States toward the Rome Treaty and specifically its reservations about the Court's coming into force. It will do so through a review and analysis of the over 80 year struggle to establish the Court, which in and of itself brings the need for the Court into clear focus, and an explanation and analysis of the principles, policies, procedures, and structure under which it will operate.

HISTORY OF THE INTERNATIONAL CRIMINAL COURT:

Since the end of World War I, the world community has sought to establish a permanent international criminal court. The attainment of that goal has been slow and painstaking. In the last 50 years, as the world's major political powers saw fit, four ad hoc tribunals and five investigatory commissions were established to deal with war crimes and other atrocities. After World War I, the Treaty of Versailles provided for international tribunals to prosecute individuals who committed acts in violation of the law and customs of war, but no international tribunals actually came into existence. Instead, with the consent of the Allies who included the provisions in the treaty, only token national prosecutions took place in Germany. That compromise demonstrated the overarching influence of the political will of the world's major powers regarding development of the International Criminal Court.[4]

In the aftermath of the heinous crimes committed during World War II, the International Military Tribunals sitting at Nuremberg and Tokyo prosecuted individuals for crimes against peace, war crimes, and crimes against humanity. These tribunals and subsequent prosecutions by the Allies were significant precedents in the efforts to establish an effective system of international criminal justice. As a result of these tribunals new legal norms and standards of responsibility were developed that advanced the international rule of law including accountability of heads of state and elimination of the defense of obedience to superior orders. [5]

While the efforts to establish a permanent International Criminal Court actually started with the League of Nations and were continued by the United Nations, the United Nations' goals were more encompassing than that of the League of Nations since they were aimed at establishing a permanent international criminal court. In 1949 the International Law Commission of the United Nations began to formulate the principles recognized in the Charter of the Nuremberg Tribunal and prepare a draft code of offenses against the peace and security of mankind.[6]

Although believing that an international criminal court was desirable in theory, at the time certain governments were skeptical about the success of such a court due to lack of consensus for it among the world's primary powers. The Soviet Union believed its sovereignty would be affected by the establishment of the tribunal; the United States would not accept establishment of a court at the height of the Cold War; France was supportive of the establishment of an international criminal court but did not strongly pursue it; and the United Kingdom felt the idea of a court was politically immature.[7] Even so, a Special Committee of the General Assembly was established in 1950 for the purpose of drafting a convention for the establishment of a court. A

draft statute was submitted to the General Assembly in 1951 but was revised in 1953 as a result of political pressure to add provisions, which limited jurisdiction and allowed state parties to retain more control. The 1953 revised draft statute was then tabled since the International Law Commission's work on the draft code of offenses was not yet complete.[8]

Since there were different UN bodies working separately at different times and different venues, Geneva and New York, and producing different texts effecting an international criminal court, it was easy for the General Assembly to table each text successively because one or the other was not yet ready. This went on for a period of 26 years. This lack of synchronization was the result of a political will on the part of world powers to delay the establishment of an international criminal court since at the time the world was sharply divided ideologically and frequently at risk of war.[9]

However, in 1989 the question of an international criminal court was again raised with the United Nations but by an unexpected route. The General Assembly held a special session on the problem of drug trafficking, and Trinidad and Tobago suggested that a specialized international court be established. The General Assembly requested that the International Law Commission prepare a report on the establishment of an international criminal court for the prosecution of persons engaged in drug trafficking. In 1990 the commission submitted its report, which went beyond the drug trafficking question, and when favorably received by the General Assembly, proceeded to prepare a draft comprehensive statute for an international criminal court even though it had no clear and specific mandate to do so. The commission submitted a draft text for a statute in 1994 and the General Assembly created the Ad Hoc Committee for the Establishment of an International Criminal Court to review and discuss the proposed draft.[10]

In late 1995 the Ad Hoc committee submitted its report, which became the basis for the General Assembly's establishment of the 1996 Preparatory Committee on the Establishment of an International Criminal Court (PrepCom). The PrepCom's mandate was to produce a consolidated text of a convention and statute in time for the convening of a diplomatic conference planned for 15 June-17 July 1998 in Rome to adopt a Convention on the Establishment of an International Criminal Court. It was believed that an international criminal court's time had come as many countries had changed their positions on the establishment of a permanent international criminal court during the period between 1994 and 1997. This change had come about as a result of the ad hoc international tribunals that were conducted to prosecute persons responsible for the serious violations of international humanitarian law committed in Rwanda and the former Yugoslavia. While there was mixed reaction regarding the

success of these tribunals, they did have the overall effect of creating a new international climate compelling governments to support the establishment of a permanent court. During this timeframe the change in the political climate and in the attitude by governments toward an international criminal court was extraordinary. Many governments were no longer willing to tolerate perpetrators of major international crimes going unpunished. It was believed that a permanent international criminal court would help put an end to impunity for international crimes and serious violations of fundamental human rights.[11]

The PrepCom on the establishment of an International Criminal Court had its work cut out for it; proponents of the international criminal court had to face many difficulties that prevented the process from moving forward. The process was slow due to the unfamiliarity of some delegates with the technical issues involved, and the desire of some delegates to mold a court, which would be most responsive to the political concerns of their governments. In addition the large number of proposals made by states at the PrepCom made it difficult to deal with them efficiently in the time available before the Rome diplomatic conference. To assist in dealing with these problems the PrepCom conducted its work through working groups on the following subjects: procedural matters, composition and administration of the court, establishment of the court and relationship with the United Nations, applicable law, jurisdictional issues, and enforcement. On 3 April 1998 the PrepCom completed its work with a consolidated text of 173 pages, containing 163 articles, which became the working text for the five week Rome Diplomatic Conference. However, 1300 unresolved issues remaining from the PrepCom had to be dealt with at the conference. [12]

The driving force behind the International Criminal Court's momentum was the group of delegations that came to be known as the "like-minded states". This group continued to grow in numbers as the PrepCom conducted its work and by April 1998 consisted of the countries of Australia, Austria, Argentina, Belgium, Canada, Chile, Croatia, Denmark, Egypt, Finland, Germany, Greece, Guatemala, Hungary, Ireland, Italy, Lesotho, Netherlands, New Zealand, Norway, Portugal, Samoa, Slovakia, South Africa, Sweden, Switzerland, Trinidad and Tobago, Uruguay, and Venezuela. The contributions of these countries were most effective and constructive in developing the PreCom's draft statute and had overwhelming influence during the Rome Conference.[13]

With the PrepCom having completed its work the Rome Diplomatic Conference for the establishment of the International Criminal Court convened 15 June through 17 July 1998. The structure of the conference consisted of the Committee of the Whole, the Working Groups, and the Drafting Committee. The PrepCom working group coordinators were subsequently

reappointed as the coordinators for the Rome Conference working groups, which contributed greatly to the overall leadership, continuity, and expertise of the conference. The first two weeks of the conference were very tenuous since many of the delegates of the 160 nations represented at the conference had no previous experience in the Ad Hoc or PrepCom sessions. This made for a steep learning curve and posed a grim outlook for the delegates actually concluding their work in the five short weeks planned for the conference.[14]

To speed the conference process the working groups were broken down further into informal working groups. Although this breakdown did move the process along faster, it proved to be disadvantageous in that only a few delegates actually had a grasp of the entire picture regarding the Statute. Most delegates did not understand and were uncertain of the overall progress in developing the language of the final statute as the conference moved along in time.[15]

In addition the Drafting Committee had great difficulty in integrating all the pieces and parts of articles of the statute submitted to it by the informal working groups and insuring that word meaning and consistency was maintained throughout all the articles. But by Wednesday, 15 July 1998, two days prior to the end of the conference, the Drafting Committee had completed all articles of the statute with the exception of the articles dealing with the very politically sticky issues of the role of the prosecutor, the role of the Security Council, the definition of crimes, jurisdiction, and Court triggering mechanisms. The Drafting Committee envisioned these issues to be settled through last moment political compromise. However, fearing that these issues, if left to the last minute, would cause collapse of the conference, the Chairman of the Committee of the Whole and the other conference leaders produced a text to address these issues. This text was then integrated into the parts of the Statute that had already been completed by the Drafting Committee. It was put to vote in the final hours of the conference with very little open forum discussion. This was both a tactical political move by the Chairman and also a gamble since the delegations could have opposed the approach and blocked it procedurally in the few remaining hours causing collapse of the conference. Both India and the United States wanted to introduce amendments in those final hours, but other delegations passed a "no action" vote on these amendments and a final vote on the overall statute was taken. The final vote was 120 for adoption of the statute, while seven voted against, and 21 abstained. One day later on 18 July 1998, 26 governments had already signed the treaty; the treaty remained open for signature until 31 December 2000.[16] President Clinton did not authorize signature of the treaty until 31 December 2000. The United States' reluctance to sign the treaty resulted from certain particularities of the statute as adopted, not an objection to

the Court's existence. [17] The concerns of the United States about the statute are discussed in succeeding sections of this paper.

As a final act of the Rome Conference, direction was given for the establishment of a follow-on PrepCom. The PrepCom was to prepare the way for the court to function without delay upon ratification by the required number of states (60). The PrepCom was charged with drafting texts on rules and procedures and evidence, elements of crimes, the relationship agreement between the Court and the UN, basic principles governing a headquarters agreement between the court and the host country, financial rules and regulations, privileges and immunities of the Court, a budget for the first financial year, and the rules procedures of the Assembly of States Parties.[18]

HOW THE COURT WILL WORK

Upon coming into force the International Criminal Court will be a permanent judicial institution, independent from the United Nations, that will be seated in The Hague in the Netherlands. The Court will have the power to exercise jurisdiction over persons for the most serious crimes of international concern, those being the crimes of genocide, crimes against humanity, and war crimes. [19] While the statute contains the crime of aggression as a core crime, the court will not have jurisdiction over this crime until a provision is adopted defining the crime and setting out the conditions under which the Court will exercise jurisdiction. This cannot occur until after the court has been in force for seven years and the United Nations convenes a Review Conference of states party to the treaty to consider amendments to the statute.[20]

The Court will consist of four organs: the Presidency; an Appeals, Trial, and Pre-trial Division; the Office of the Prosecutor; and the Registry. The president, along with a first and second vice president, will be responsible for judicial administration of the Court, with the exception of the Prosecutor's office. The Office of the Prosecutor is independent and will receive referrals regarding possible offenses, perform examinations, conduct investigations, and try cases. The Registry will handle all nonjudicial aspects of the Court's administration.[21]

There will be eighteen judges on the Court, each serving for a single period of nine years. The Statute provides that at least nine judges must have a criminal law background and at least five must have experience in international law. They will be elected by a two-thirds vote of the states that are party to the statute and can be removed by two-thirds vote. Judges may not be from the same state, and consideration must be given in judge selection to equitable geographic representation, gender, and the nature of legal systems from which they come. The

party states will select the Chief Prosecutor on a majority vote, and the judges will elect the President, Vice Presidents, and Registrar.[22]

The court's jurisdiction can be triggered through three avenues: by party states, the UN Security Council, or by the prosecutor on his/her own initiative. The court will not supplant national jurisdiction, but instead, will abide by the principle of complementarity, meaning that the International Criminal Court must defer to national courts' jurisdiction unless national courts are either unwilling or unable genuinely to investigate or prosecute alleged war criminals.[23] The statute construes the term unwillingness in three ways: attempts to shield a person involved in a core crime from criminal responsibility, unjustified delay in prosecution, or an overall lack of independence or impartiality in the national judicial system that would reflect a true intent to do justice. The Court would be the final authority in judging the effectiveness and integrity of national criminal judicial processes.[24] Regarding a state's inability to prosecute, the Court must consider situations such as collapse or unavailability of a national judicial system, or whether a state is unable to obtain the accused or the necessary evidence and testimony to proceed with prosecution.[25]

There are several preconditions listed in the Rome Statute for exercise of the Court's jurisdiction. In becoming a party state to the statute, states are deemed to have accepted the jurisdiction of the Court. In cases other than those referred to the Court by the UN Security Council, jurisdiction is exercised whenever the crime occurred on the territory of a party state or the accused is a national of a party state. A state that is not party to the Treaty may "accept" the exercise of jurisdiction of the Court if the crime is committed on its territory or by its citizens.[26]

Regarding procedures for investigations and prosecution the Prosecutor must first make three determinations: whether the information available provides a reasonable basis to believe that a crime over which the International Criminal Court has jurisdiction has been committed; whether the Court must defer to a national judicial system under the complemetarity principle; and whether the offense is sufficiently grave to be heard before the Court. The Pre-Trial Division under the Court must hold a hearing to confirm the charges on which the prosecutor intends to try the accused. If a decision is made to proceed with prosecution, the accused are afforded the rights not to incriminate themselves, not to be coerced, and to be free from arbitrary arrest or detention.[27]

The Rome Statute also outlines the procedures for international cooperation and judicial assistance to the International Criminal Court. It requires that party states must comply with a request by the Court to provide information as to the identification and whereabouts of

individuals or information and deliver individuals, evidence, or documents into the custody of the Court. It also calls for party states to execute searches and seizures and to protect victims and witnesses. The Court will have no independent enforcement powers. The task of apprehending suspects will fall to states, which already have the authority to apprehend suspects within their borders. The UN Security Council could decide to take enforcement action, but would be subject to a U.S. veto or veto by any other of the permanent members.[28]

The statute does compel the Court to respect international agreements between states regarding surrender of individuals to the Court, such as status-of-forces agreements, unless it can first obtain the cooperation and consent of the state.[29]

U.S. SIGNATURE OF THE ROME TREATY AND CURRENT ADMINISTRATION POLICY

Despite significant reservations over what the U.S. considered to be flaws in the statute, on 31 December 2000 President Clinton approved the signing of the Rome Treaty to establish the International Criminal Court. He indicated that there were two overriding reasons for signing the treaty: to reaffirm strong U.S. support for international accountability and for bringing to justice perpetrators of genocide, war crimes, and crimes against humanity; and to remain engaged in making the ICC an instrument of impartial and effective justice in the years to come. He stated the U.S. was not abandoning its concerns about significant flaws in the treaty, but that with signature, the U.S. will be in a position to influence the evolution of the court. President Clinton recommended treaty ratification action not be taken until U.S. concerns were satisfied and that time for observation and assessment of the functioning of the court could occur.[30]

The current Bush Administration has publicly declared its strong commitment to promoting accountability for genocide, war crimes, and crimes against humanity, but has not committed to support the Rome Statute. Although an overall policy review of the International Criminal Court is being conducted, the current position of the Administration is that there are fundamental concerns about the Treaty, particularly its "purported" jurisdiction over the nationals of non-state parties. Elliott Abrams, Special Assistant to the President and Senior Director for Democracy, Human Rights and International Operations, in a letter of response to the UN Security Council's inquiry on the U.S. position toward the Court, stated that the U.S. has concerns over the Statute and reminded the Council that the United States, more than any other country, would likely be subject to politically motivated charges before the International Criminal Court.[31] In addition Secretary of State, Colin Powell, stated that the Bush Administration would not support the creation of the new court. Reporters quoted him during a visit to the UN

headquarters in February 2001 saying, "President Clinton signed the Treaty, but we have no plans to send it forward to our Senate for ratification."[32]

Currently there are 139 treaty signatories[33], and 47 nations of the 60 required have ratified.[34] Israel, all members of the European Union, and most countries in Latin America and Africa have signed or ratified the treaty. It is expected that by the end of 2002, 60 countries will have ratified the treaty and the International Criminal Court will come into force.[35]

KEY PROVISIONS OF THE STATUTE AND U.S. CONCERNS:

The United States was deeply involved and engaged from the very beginning in promoting the establishment of a permanent International Criminal Court. The United States advanced the idea, was involved in all the discussions, and sought ways to structure the Statute so that it would have broad support not only of the U.S. government but of other governments as well. During the Rome Conference the U.S. delegation worked closely with allies and representatives of governments that would not be classified as allies to achieve a statute that reflected the overall goals of holding accountable the worst international criminals and eliminating impunity. In the give-and-take negotiations the U.S. delegation fought provision by provision to ensure the results of the conference achieved these goals. United States negotiators worked diligently and effectively to shape the Court's contours, and other nations, eager to have U.S. support, went out of their way to accommodate many U.S. proposals. In the end American legal practices and sensibilities had a tremendous influence on the Court's rules, procedures, and substance.[36]

David Scheffer, former U.S. Ambassador-at-Large for War Crimes Issues and Head of the U.S. Delegation at the Rome Conference, concluded that many critical U.S. objectives were achieved at the conference. These critical objectives included:

--an improved regime of complementarity that provided significant protection although not as much as the U.S. had sought;

--a role preserved for the UN Security Council including the affirmation of the Security Council's power to intervene to halt the Court's work;

--sovereign protection of national security information;

--broad recognition of national judicial procedures as a predicate for cooperation with the Court;

--coverage of internal conflicts which comprise the vast majority of armed conflicts today;

-- important due process protections for defendants and suspects;

--viable definitions of war crimes and crimes against humanity;

--recognition of gender issues; rigorous qualification for judges;

--an Assembly of States Parties to oversee the management of the Court;
--reasonable amendment procedures; and a sufficient number of ratifying states before the treaty can enter into force, namely 60 governments must ratify the Treaty.[37]

However, at the conclusion of the Rome Conference fundamental U.S. concerns over the statute remained, as they do today. The three overriding concerns are enumerated below including an explanation of the statute's safeguards negotiated at the Rome Conference that were designed to address these concerns:

CONCERN # 1: INTERNATIONAL CRIMINAL COURT JURISDICTION OVER NON-PARTY STATES:

One overriding concern of the United States dealt with the jurisdiction of the International Criminal Court over non-party states.[38]The U.S. position is that the Rome Statute provisions allowing the Court to reach citizens of non-party states violates the fundamental principle of international treaty law which provides that only states party to a treaty are bound by its terms.[39] Article 12 of the Rome Statute effectively extends the jurisdiction of the International Criminal Court to nationals of all states. The Treaty specifies that as a precondition to the jurisdiction of the Court over a crime, either the state of territory where the crime was committed or the state of nationality of the perpetrator of the crime must be party to the treaty or have granted its voluntary consent to the Court's jurisdiction.[40] U.S. negotiators feared that Americans taking part in multinational peacekeeping or other humanitarian operations in a country that has joined the treaty could be exposed to the Court's jurisdiction even though the U.S. has not joined the treaty.[41] To reduce this type of exposure the U.S. proposed that, as a minimum, consent of the state of nationality of the perpetrator be obtained before the Court could exercise jurisdiction. However, as a result of a "no-action" vote at the Rome Conference, the U.S. proposal was not considered.[42]

Proponents for the Court indicate that precedents for universal jurisdiction without consent of the state of nationality already exist in cases involving genocide, certain crimes against humanity, and war crimes. These cases are covered under the principle of customary international law.[43] However, as David Scheffer points out, "The crimes within the International Criminal Court's jurisdiction...go beyond those arguably covered by universal jurisdiction, and Court decisions or future amendments could effectively create new and unacceptable crimes."[44] He also states that in the Statute's attempt to subject Americans to the jurisdiction of the International Criminal Court, the party states are attempting to act as an international legislature,

a power it does not have, and a power that is fundamentally at odds with the guarantee of the sovereign equality of states memorialized in the UN charter.[45]

In its bottom line, the U.S. declared its position to be that a non-party state should not be subject to the Court's jurisdiction if that country does not join the treaty, except by means of UN Security Council action under the UN Charter. The U.S. has long supported the right of the Security Council to refer situations to the Court with mandatory effect, meaning that any rogue state could not deny the Court's jurisdiction under any circumstances. The U.S. believes that this is the only way, under international law and the UN Charter, to impose the Court's jurisdiction on a non-party state.[46]

Statute Safeguards Regarding Jurisdiction:

Proponents of the Statute argue that including provisions to allow consent of the state whose national is accused as a perpetrator of core crimes before coming under jurisdiction of the Court runs contrary to the Court's central purpose, which is to hold all individuals accountable for massive international crimes. They believe provisions within the Statute exist that provide adequate safeguards and minimize exposure of American citizens to jurisdiction by the Court, especially in cases such as peacekeeping and humanitarian operations.[47]

First, any crime committed by an American would have to constitute a core crime under the International Criminal Court and would have to meet strict preconditions for investigation and prosecution. In all three core crimes prosecutors would have to demonstrate that a plan, policy, or strategy existed to commit the crimes, and that the crimes were committed as part of a pattern of such crimes. As an example, atrocities committed by rouge military units such as the My Lai Massacre in Viet Nam, would not come under the Court's jurisdiction since they do not fall into the categories of crimes committed as part of an overall strategy or pattern. [48]

Second, under the principle of complementarity the International Criminal Court may not proceed with any case that is genuinely being investigated or prosecuted by a state that has jurisdiction. The Court must defer to any state's investigations, including military courts-martial actions in a nonparty/non-ratifying state. In addition the Court may not proceed in a case that has already been investigated by a state, which has jurisdiction and the state decided not to prosecute, or the accused has already been tried for the same offense. [49] A case can be brought by the International Criminal Court only when a national justice system is unwilling or unable to proceed with a good faith disposition of an alleged crime. If the Court's prosecutor decides to proceed with an investigation, he/she is obligated to notify national authorities, and the national justice system is allowed to take priority over the case unless it is acting in bad

faith. The prosecutor's decision to go forward with an investigation is subject to challenge in a Pretrial Chamber of the Court and to an additional appeal.[50]

CONCERN #2: LACK OF CHECKS AND BALANCES FOR THE INTERNATIONAL CRIMINAL COURT

One of the basic objections the United States had to the Rome Statute was that it provides for no external mechanism of restraint, no constitutional framework of checks and balances to limit the power of the Court and its prosecutor. In Article 119 of the Statute it directs that "any dispute concerning the judicial functions of the Court shall be settled by the decision of the Court."[51] In the eyes of the United States, the Court is its own referee, which raises serious concerns as to the direction that a fully empowered permanent Court could eventually take.[52] The egalitarian structure of the Rome Statute's decision-making process, such as the process for electing judges, is seen as a structural flaw. From a U.S. perspective a system in which the U.S. would have only one vote as a party state does not account adequately for U.S. power and influence or the greater burden it would bear in establishing and supporting the court.[53]

In addition, the treaty creates a self-initiating prosecutor who, on his or her own authority with the consent of two judges, can initiate investigations and prosecution of situations without referral to the court by a government that is party to the treaty or by the Security Council.[54] The U.S. sees the Office of the Prosecutor as the judicial branch of a world government that lacks an effective, functioning, democratically chosen legislature or executive branch to check and oversee the Prosecutor.[55] During the Rome Conference negotiations the United States favored a provision in the Statute that allowed the Court to take cases specifically referred to it by the UN Security Council where the U.S. has a veto along with other permanent members of the Council. The other permanent members of the Council favored this same type of provision for their own political reasons, but other influential governments did not hold the same opinion. They felt strongly that Security Council control over the Court's investigative and judicial authority would endanger the Court's independence and give immunity to citizens of the permanent members of the Council. In addition they cited atrocities committed by Pol Pot, Idi Amin, and Saddam Hussein, which the Security Council had considered but not taken action against, as evidence of Security Council paralysis in the highly politically charged UN environment. These governments felt strongly that the Court must have the freedom to act on its own to deal with international criminals without referral by the Security Council if necessary.[56]

Statute Safeguards Regarding Checks and Balances:

Proponents for the Court felt that adequate safeguards against an unrestrained Prosecutor and politically motivated judges lay in the Statute's provisions in Article 46 allowing removal of judges by a two-thirds majority vote by the Assembly of States Parties and in the case of the Prosecutor, a majority vote of the Assembly. The Assembly of States Parties is seen as the entity overseeing the functioning of the Court and ensuring that judges and prosecutors who commit serious misconduct or breach of duties are removed from the Court.[57] In addition a fundamental check on the overall power of the International Criminal Court is its jurisdictional limitation to only the most serious crimes of concern to the international community as a whole. The "most serious crimes of concern" threshold is an up-front restriction on the reach of the International Criminal Court that preserves the latitude of sovereign criminal systems.[58]

CONCERN # 3: THE PRINCIPLE OF COMPLEMENTARITY

"The principle of complementarity is the linchpin for assessing whether the last major international institution established in the 20th century will become a functioning reality or an international absurdity."[59] It will be the decisive factor in either preventing or enhancing the concept of a permanent international judicial body that coexists with state sovereignty in the interests of international peace and security.[60]

The underlying issue for the United States is whether the International Criminal Court, in every case, would respect U.S. handling of an allegation, even if the U.S. decided not to prosecute a case. As mentioned previously the Statute specifies that the Court is intended only to complement national judicial systems and act only in cases when national judicial systems are unwilling or unable genuinely to prosecute criminals. The U.S. concern is whether the Court in practice will live up to its promise to respect national judicial systems. Because of its superpower status and broad international commitments around the world, the U.S. sees itself as a vulnerable target for political manipulation by states intent on undermining its power.[61]

Other U.S. allies including Germany, France, and the U.K. had the same concerns. They, like the U.S., consider themselves to have global responsibilities. They also deploy forces around the world for various peace operations and other types of interventions including the use of force and see themselves open to political campaigns designed to thwart their actions. They worked diligently with the U.S. to insert additional safeguards and clarifications regarding the Court's procedures that offered protections against "politicized" charges from

other states. Unlike the U.S. however, the allies became satisfied with the tradeoffs inherent in joining the Court and concluded that the Court's larger value outweighed any residual risks it might pose to their nationals and foreign policy.[62]

Statute Safeguards Regarding the Complementarity Principle:

Article 17 of the Rome Statute regarding admissibility represents the most direct mechanism for allocating responsibility for certain prosecutions between the International Criminal Court and one or more domestic sovereigns that may have jurisdictional authority. The admissibility criteria establish the critical foundations for protecting the power of sovereign states to prosecute cases in their national courts as opposed to relying on the International Criminal Court. It mandates admissibility through definition of cases that are inadmissible. Cases are inadmissible under the International Criminal Court in four circumstances: a case that is being investigated or prosecuted by a state which has jurisdiction over it unless the state is unwilling or unable genuinely to carry out the investigation or prosecution; the case has been investigated by a state which has jurisdiction and the state has decided not to prosecute the person concerned; the person concerned has already been tried for conduct which is the subject of the complaint; or the case is not of sufficient gravity to justify further action by the Court.[63]

In addition the complementarity principle is preserved through a detailed procedure for states to challenge admissibility. Under Article 19, challenges regarding admissibility can be brought before the court by an accused person, or one for whom a warrant of arrest or a summons to appear has been issued; by a state which has jurisdiction over a case on the ground that it is in the process or has already investigated or prosecuted the case; or by a state from which acceptance of jurisdiction is required.[64] Article 20, which protects perpetrators from repetitive trials, also strengthens the complementarity principle.[65]

States that have not ratified the treaty, but who may want to bring politically motivated charges against the U.S., may accept the jurisdiction of the Court by "declaration". However, jurisdiction by declaration would expose their state's conduct to the full scrutiny of the International Criminal Court. For those countries such as China, Libya, Iraq, North Korea, and others who have refused to sign the treaty, exposure of their own actions most likely would lead to prosecution by the ICC. Thus jurisdiction by declaration would not be in their states' interests.[66]

As a check on the power of states, and a limit to complementarity, Article 13 allows the Security Council to refer a case to the International Criminal Court prosecutor acting under its

Chapter VII authority to exercise responsibility for the maintenance of international peace and security. A Security Council referral, therefore, has the practical effect of creating jurisdictional primacy for the International Criminal Court.[67] Given its veto power in the Council, the U.S. would be able to thwart any politicized actions that other states may attempt to pursue through a Security Council referral.

ANALYSIS OF U.S. CONCERNS:

In former Ambassador Scheffer's testimony before the Senate Foreign Relations Committee on 23 July 1998, just days after the Rome Conference ended, he succinctly summarized the extreme difficulty in developing a statute that would impose international justice on war criminals,

> "But we always knew how complex the exercise was, the risks that would have to be overcome, and the patience that we and others would have to demonstrate to get the document right. We were, after all, confronted with the task of fusing the diverse criminal law systems of nations and the laws of war into one functioning courtroom in which we and others had confidence criminal justice would be rendered fairly and effectively. We also were drafting a treaty-based court in which sovereign governments would agree to be bound by its jurisdiction in accordance with the terms of its statute. How so many governments would agree with precision on the content of those provisions would prove to be a daunting challenge. When some other governments wanted to rush to conclude this monumental task even as early as the end of 1995, the United States pressed successfully for a more methodical and considered procedure for the drafting and examination of texts."[68]

Although the United States has fundamental concerns over universal jurisdiction of the court, lack of sufficient external checks and balances, and the promise of respect for the principle of complementarity, when examined in its entirety, the Rome Statute is a marvelous work that exceeds all expectations and provides adequate protections to alleviate most U.S. fears about a renegade world criminal court. So many of the objectives regarding provisions in the Statute, which the United States sought to include, were achieved including: adoption of provisions to protect U.S. sovereignty through the principle of complementarity; provisions to protect national security information; ability of the UN Security Council to intervene and halt the Court's work if necessary; viable definitions of war crimes and crimes against humanity; rigorous

qualification of judges; due process protections; an opt-out period to allow for evaluation prior to acceptance of the Court's jurisdiction; and a whole host of other important provisions.[69]

While there is much more detailed work to be done in follow-on PrepComs to the Rome Conference, the U.S., as a signatory to the treaty, can play a substantial role in that work. As a non-signatory this would not have been possible. Extremely important details on rules, procedures, and evidence, elements of crimes, as well as the International Criminal Court's relationship to the UN and definitions of any additional crimes, which may be added to the Statute through the amendment process, remain to be defined. Just as in the development of the Statute itself, substantial U.S. involvement increases the chances of influencing these operational matters to U.S. satisfaction.[70]

In a broad based analysis of the fears the U.S. harbors regarding the Court, one must weigh the overall benefits that the Court will provide against its drawbacks. One must also consider the probability of these fears being realized, as well as the probability that protections in place in the statute would fail to alleviate U.S. vulnerability. The most common fear cited is that U.S. civilian and military leaders and possibly even individual soldiers would be charged with war crimes in the exercise of military operations abroad such as peace enforcement, peacekeeping, or humanitarian operations.[71] In this case analysis of the Statute's provisions appear to provide adequate protections. First, the probability of actual charges being brought against the United States by the Court seem remote since the purported crime must meet the definitions of the crimes within the scope of the Court's jurisdiction, and it must be proven that these crimes were committed as part of an overall strategy or plan versus committed as an isolated incident.[72] Second, if it were found that crimes had been committed, the principle of complementarity provides for the U.S. to initiate its own investigations and conduct prosecutions within its own judicial system, which effectively eliminates the International Criminal Court's involvement unless, that is, the Court does not believe the U.S. acted in good faith in its investigations and/or prosecutions and decides to launch its own investigation.[73] Given the principles and sophisticated rule of law upon which the U.S. stands, the likelihood of its judicial system, including its military courts-martial system, being completely compromised is hardly within the realm of possibility.[74] Even in the remote possibility that the prosecutors and judges of the Court become politicized or corrupted and specifically target the U.S. foreign policy and military decisions, the UN Security Council has the authority to step in and halt the Court's proceedings thus providing another layer of protection.[75]

In addition to the above protections, the Court must recognize Status of Forces Agreements since these essentially are international agreements among countries. These

agreements most often dictate that U.S. forces in the conduct of their official duties are subject exclusively to national jurisdiction, and therefore the Court could not demand that a state surrender a U.S. individual over to the Court. Such a demand would constitute the Court coercing a state to break its obligations under an international agreement.[76]

As with any other new international institution a period of "settling in" to its mission, policies, operations, and procedures will occur. During this "settling in" period the world will evaluate the effectiveness of the institution. The Statute provides for state parties to "opt-out" of the Court's jurisdiction for a period of 7 years, giving states time to evaluate the Court's performance.[77] If the U.S. were to ratify the treaty, it could exercise the 7 year "opt-out" provision, which also coincides with the timeframe for initiation of the Statute's amendment process. By exercising this option, the U.S. could avoid jurisdiction during the most vulnerable period of the Court's existence yet, have ample opportunity to take part in all the forums to shape, mold, and evaluate the Court and propose amendments to correct serious flaws.[78]

The other most common fear expressed by the U.S. concerning the International Criminal Court is that without external checks and balances the Court will become politicized or corrupted and that with each member state having only one vote in the Assembly of States, the U.S. will not be able to exert adequate influence to prevent or overcome these problems. Again as in the concerns above, one must weigh the probability of such circumstances actually coming to pass against the safeguards built into the court's structure to avoid politicization or corruption as well as the power of the UN to intervene and halt the Court's proceedings.[79] With the rigorous standards for judges and prosecutors demanded by the Statute, the provisions for the Assembly of States to remove judges and prosecutors who do not meet these standards, and the external "hammer" of the UN Security Council to bring the Court under control through imposed delay, one can be reasonably assured that widespread, prolonged politicization or corruption of the Court would be extremely unlikely.[80]

CONCLUSIONS AND RECOMMENDATIONS:

In the words of former Ambassador Scheffer to the Senate Foreign Relations Committee on 23 July 1998,

> "...no one can survey events of this decade without profound concern about worldwide respect for internationally recognized human rights. We live in a world where entire populations can still be terrorized and slaughtered by nationalistic butchers and undisciplined armies. We have witnessed this in Iraq, in the

Balkans, and in central Africa. Internal conflicts dominate the landscape of armed struggle today, and impunity too often shields the perpetrators of the most heinous crimes against their own people and others. As the most powerful nation committed to the rule of law, we have a responsibility to confront these assaults on humankind. One response mechanism is accountability, namely to help bring the perpetrators of genocide, crimes against humanity, and war crimes to justice. If we allow them to act with impunity, then we will only be inviting a perpetuation of these crimes far into the next millennium. Our legacy must demonstrate an unyielding commitment to the pursuit of justice."[81]

One thing is certain. The International Criminal Court will come into force very soon with or without the United States' ratification. President Clinton on 31 December 2000 took a bold step in authorizing the signature of the Rome Treaty but was soundly criticized by many in the United States Congress for doing so.[82] Although nowhere close to perfect, he recognized that the Treaty represents a huge step forward in the history of human society and the monumental role the United States played in bringing the Treaty to its present state. He also recognized that if there were to be any hope of the United States continuing to influence the development of the Court and the permanent enforcement of international laws against individuals who commit the worst crimes against their fellow man, the United States must become and remain a signatory to the Treaty.[83]

When one strips away the emotion surrounding the possible, yet remote, circumstances, which could bring U.S. citizens wrongfully before the Court, and looks to the extremely well crafted articles of the Statute designed to prevent those circumstances from occurring, the logical conclusion is one of strong support for the Treaty under the caveat of continuing to work to eliminate its shortcomings and ensure the best possible implementation of the Court. The benefits to be gained from the existence of the Court far outweigh the risks involved with its shortcomings. Yet, the current Administration, while supporting accountability for genocide, war crimes, and crimes against humanity, appears unwilling to support the International Criminal Court and has not participated fully in the forums for treaty signatories to continue work to improve the Court's procedures.[84] U.S. allies who, like we, have global commitments and responsibilities, have come to grips with the notion that although the Court is not perfect, it is far better than the ad hoc tribunals and commissions established over the decades to deal with international war criminals and genocide perpetrators. Arguments for continuing to use ad hoc tribunals and commissions to deal with perpetrators of these crimes are worn out. The ordeal to

reestablish ad hoc tribunals and commissions each time crimes are committed is so torturous in terms of time and national treasures that nations cannot depend on them being available when needed, and as a result crimes will go unpunished.[85]

Until there is something better, which is not likely to occur in this or the next generation given the long time the world has taken to get to this point, the Rome Treaty for Establishment of the International Criminal Court is the world's best chance to provide a permanent vehicle for prosecuting perpetrators of the worst kinds of crime; genocide, war crimes, and crimes against humanity. The September 11 terrorist attacks in New York and Washington, D.C., reinforce the dire need for enhanced cooperation between the U.S. and the international community in outlawing, investigating, and prosecuting these most serious crimes. The U.S. needs the support of its allies and friends around the globe now more than ever to wage war on terrorists and bring them to justice. It is in the national interests of the U.S. to support the Court especially at this time in its history. Any effort to work against the establishment of the Court will send a distinctly wrong message at the very worst time. Therefore, it is recommended that the Administration pursue a policy of strong support for the Treaty; actively participate in UN forums to further mold and shape the Court's policies and procedures to alleviate remaining United States' concerns; and finally, work diligently with members of Congress to lay the groundwork for eventual Treaty ratification.

WORD COUNT: 8194

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