

USAWC STRATEGY RESEARCH PROJECT

**THE UNITED STATES: A ROME STATUTE OF THE
INTERNATIONAL CRIMINAL COURT NON-PARTICIPANT**

by

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ABSTRACT

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Many have been prosecuted for war crimes since ancient times but the most heinous crimes against humanity in modern history occurred during this century with no one held accountable. As of 1 July 2002, the Rome Statute of the International Criminal Court is a reality. It will try individuals such as the Khmer Rouge, Slobodan Milosevic, and General Juvenal Habyarimana for crimes against humanity, genocide, and war crimes. The establishment of an International Criminal Court (ICC) was long over due and took longer than hoped by States, Human Rights Organizations, and Non-Governmental Organizations. The United States (U.S.), one of its strongest supporters since its beginning, voted against the adoption of the statute along with six other countries. The U.S. expressed its concerns on three major issues in different forums, but it was unable to find a middle ground. Prior to the ratification of the ICC, the U.S. informed the United Nations that it would not become a party to the ICC, therefore canceling the signature originally submitted by former President Clinton.

This paper will identify three possible options the U.S. may consider as a non-participant to the Rome Statute of the International Criminal Court and make a recommendation on whether it should continue to support the ICC, and if so, in what capacity. It will do so by discussing the background that led to the inception of the ICC; the concerns and reasons the U.S. did not sign the treaty; mechanisms emplaced by the U.S. to protect its citizens; and concessions offered by the United States, but rejected.

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THE UNITED STATES: A ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT NON-PARTICIPANT

The United Nations' (UN) past ad hoc tribunals to trying persons or criminal organizations for genocide are no longer practicable. Although they have made a significant contribution, the tribunals lack the speed and effectiveness to respond to crimes against humanity. Additionally, the process to organize from the beginning newly established tribunals with a competent legal staff is difficult. There is greater need for a permanent international court system that will prosecute individuals for massive human rights violations against humanity – an International Criminal Court (ICC).

For nearly half a century – almost as long as the United Nations has been in existence – the General Assembly has recognized the need to establish such a court to prosecute and punish persons responsible for crimes such as genocide. Many thought...that the horrors of the Second World War – the camps, the cruelty, the exterminations, the Holocaust – could never happen again. And yet they have. In Cambodia, in Bosnia and Herzegovina, in Rwanda. Our time – this decade even – has shown us that man's capacity for evil knows no limits. Genocide...is now a word of our time, too, a heinous reality that calls for a historic response.¹

For many years, nations have realized the need for global recognition of a judicial system that will prosecute individuals who commit genocide, crimes against humanity, and war crimes. Millions have died in wars and various conflicts with no one held accountable for the needless loss of lives. In December 1948, the General Assembly requested that the International Law Commission (body in charge of codifying international law) "...study the desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide."² Fifty-five years later, the Rome Statute of the International Criminal Court is a reality. However, it is a reality without one of its founders and strongest supporter – the United States (U.S.). The Rome Statute's final version has serious flaws. In spite of this, it could be the most important institutional innovation since the founding of the United Nations.³

Prior to the 1998 Rome negotiations, the U.S. consistently supported the establishment of an ICC; however, the U.S. cited on numerous occasions its concerns over the draft treaty text. "Among them, the lack of adequate checks and balances on powers of the ICC prosecutors and judges, the dilution of the U.N. Security Council's authority over international criminal prosecutions, and the lack of an effective mechanism to prevent politicized prosecutions of American servicemembers and officials."⁴ Under President Clinton's administration, the U.S. was unable to negotiate a compromise through the Rome negotiations and subsequent signing

of the treaty. The signing of the treaty was directed on the last possible day to allow the U.S. to continue working towards a resolution. The treaty originally signed in December 2000 was never sent to the Senate for ratification. Subsequent negotiations under the Bush Administration were not fruitful which resulted in the U.S. filing a letter withdrawing its signature from the treaty thus obviating any legal obligation and U.S. involvement in the Court.⁵ This response was brought upon concerns that the ICC "...might infringe on the rights of U.S. citizens and federal employees abroad, including members of the armed forces."⁶ The U.S. has been consistent with its support for a permanent ICC. Its reluctance to sign the treaty stems from particularities that may put the lives of all American citizens within the judicial reach of the ICC and not to the existence of an international court.⁷

This paper will identify three possible options the U.S. may consider as a non-participant to the Rome Statute of the International Criminal Court and makes a recommendation. It will do so by discussing the background that led to the inception of the ICC; the concerns and reasons the U.S. did not sign the treaty; mechanisms employed by the U.S. to protect its citizens; and concessions offered by the U.S., but rejected.

BACKGROUND

The United Nations General Assembly assigned a committee to establish an international court based on the International Law Commissions findings that an establishment of an international court to try persons charged with genocide was feasible. A draft statute was prepared in 1951 and revised in 1953.⁸ Consideration of the draft statute was deferred until a clear definition of aggression was established. The General Assembly did not act again towards an international court until 1989 when it requested that the International Law Commission resume work on establishing an International Court. The International Law Commission submitted a draft statute to the General Assembly in 1994. As a result, the General Assembly established the Ad Hoc Committee on the Establishment of an International Criminal Court to research the issues recognized in the draft statute. Based on the Committee's report, the General Assembly created the Preparatory Commission on the Establishment of an International Criminal Court to prepare an acceptable consolidated draft text for review and ultimately submit to a diplomatic conference.⁹ From 15 June to 17 July 1998, during the fifty-second session, the General Assembly decided to convene the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an ICC to finalize and adopt a convention on the establishment of an international criminal court.¹⁰ On 1 July 2002, the Rome Statute of the International Criminal court came into existence.

However, the bar for approval of the Rome Statute was set remarkably low, with the court to be approved upon ratification of only 60 nations out of 189 in the United Nations. For a court that purports to have worldwide jurisdiction, even over citizens of countries that do not sign the treaty, this is a narrow base of approval. Further, such a process takes no account of geographic representation, population base, or strategic considerations, but simply relies upon a one-nation-one-vote approach. The International Court went into effect on July 1 with fewer than half the nations of the world ratifying it, representing considerably less than half the population of the world.¹¹

Twenty-one nations abstained from voting and only seven nations were opposed to the statute, which included the United States, China, Israel, and India. Noteworthy to mention is that the governments that elected not to participate in the ratification of the treaty represent a massive concentration of people and of power.¹² The ICC is a judicial institution independent from the United Nations and is based in The Hague in The Netherlands. The court prosecutes individuals for genocide, crimes against humanity, and war crimes. The judicial arm of the ICC has jurisdiction over individuals if the national states are unable or unwilling to prosecute against alleged war crimes.¹³ The U.S. concern is that after its own investigative and prosecutorial efforts, if it is determined that prosecution is unfounded; the decision is still subject to ICC review, which may lead to prosecution regardless of its findings.¹⁴ "The United States argues that the possible investigation and prosecution of its nationals without its consent is tantamount to the imposition of treaty obligations on a third state ? something expressly disallowed by the Vienna Convention on the Law of Treaties."¹⁵ Unlike the international ad hoc war crimes tribunals preceding the ICC, it will try individuals for acts that occurred after coming into force.¹⁶ "In the end, the Rome Statute gives the Court jurisdiction either by remit from the Security Council acting under Chapter VII of the UN Charter, or by consent of the state of which the defendant is a national or in which the crime was committed."¹⁷

CONCERNS

It is the hope of the United Nations that the establishment of the ICC will end war crimes and genocide. It will serve as a tool of deterrence to demonstrate that individuals, along with states, will answer to an ICC for atrocities committed against humanity. However, the U.S. has its concerns and sees the ICC as potentially threatening American interests. The notion of a civilian court evaluating what is considered a professional military judgment is contrary to the essence of the U.S. military system.¹⁸ "The intent behind the creation of the ICC is a very noble one, however, the future of the ICC and the unresolved issues and implications surrounding it may, without change, cause its organizational demise."¹⁹ The U.S. has wholeheartedly

supported the creation of an international court since the international tribunals post World War II and as a key player in creating the ad-hoc tribunals for the former Yugoslavia and Rwanda. "More than any other state, the U.S. has supplied the political impetus, the funding, the intelligence information, and on occasion the military muscle needed by the tribunals (especially the Yugoslavia tribunal) for their existence and day-to-day functioning."²⁰

The U.S. has three major concerns for not ratifying the ICC treaty. First, there is concern that the ICC will infringe upon the sovereignty of the U.S. The Rome treaty has broken the norms of international law by extending the ICC's jurisdiction to the citizens of countries that did not sign and ratify the treaty.²¹

...the provisions that allow the court to reach citizens of nonsignatory states collectively represent a radical development in the law of treaties. It is a fundamental principle of international treaty law that only states parties to a treaty are bound by its terms; Article 12 of the Rome Statute effectively extends the jurisdiction of the International Criminal Court to nationals of all states.²²

In effect, the ICC will have the authority to judge the acts of service members and U.S. officials while performing their duties in foreign countries.²³

The second concern is that the ICC does not provide provisions to protect U.S. citizens and service members from politically motivated prosecution. "The ICC represents a serious threat to U.S. national interests because like all international bodies it could be used by critics of American foreign policy as a tool to prosecute United States servicemen, military officials, statesmen, and even presidents for alleged crimes against humanity."²⁴ The U.S. is unique in its role as a lone superpower. "Today, the U.S. military finds itself involved in a complex mixture of peacekeeping activities, humanitarian and disaster assistance missions, and counter-terrorism and counter-proliferation missions, each unique and often carrying significant political "baggage" in an increasingly fractious world."²⁵ Because of these missions, the U.S. requested exception or special provisions be incorporated into the treaty to ensure the safety of U.S. citizens and service members. The response from the ICC was less than favorable leaving no room for compromise.

U.S. leaders imply that because the United States is exceptional in international affairs today - assuming a unique responsibility for promoting international security - it deserves some exception from rules applied to other states. This assumption of exceptionalism colors U.S. attitudes toward multilateral institutions generally—even those such as the U.N. Security Council, which grants special rights to more powerful states. The ICC vexes the United States because all individuals (and, by extension, states) stand before it as equals.²⁶

Third, the court does not have enough checks and balances to be an effective international court. "The United States objects to the ability of the prosecutor to launch investigations and prosecutions independently, without authorizations by the Security Council or national governments."²⁷ There seems to be no constraints on the Court's powers. Additionally, judges may be elected from countries that do not have a democratic elected government or a functioning judicial system to sit in judgment of U.S. citizens.²⁸ "In addition, the Rome Statute also raises, but does not satisfactorily answer, the due process concerns. These include issues of multiple jeopardy, definitions of crimes, and problems of evidence and testimony when the Court has to harmonize various legal systems and languages."²⁹ The possibility of double jeopardy is of great concern especially when the ICC has the authority to prosecute service members and U.S. officials under their purview when the U.S. has ruled against prosecution. The limited ability to compel states to produce witnesses and evidence that is critical for an accuser's defense are both worth noting as constitutional concerns as well.³⁰ The aforementioned concerns leave the U.S. open to possible politically motivated charges for its military actions in Iraq and Kosovo without the proper checks and balances.

If current examples are any guide, we can learn much from the International Court of Justice. Three of the twenty-three cases on the court's docket are directed against the United States. Two of the cases have been brought by Libya and Iran for U.S. military operations, and one has been brought by Germany to influence U.S. domestic law regarding the death penalty. It would be naïve to think similar cases would not be attempted against Americans in an international criminal tribunal. In Libya, for example, there are indictments against President Reagan, his senior foreign policy and military advisers, and the servicemen who flew the planes that bombed Tripoli. In addition, in the wake of the war of Kosovo, many NGOs were calling for the Yugoslav War Tribunal to investigate the United States and NATO allies for their bombing campaigns. Even Milosevic brought a formal complaint that the NATO bombing constituted genocide.³¹

The U.S. proposed that the U. N. Security Council approve all investigations, thereby possibly invoking its veto power to block prosecutions against American citizens and its allies.³² The proposition was disapproved. As a result, the U.S. has no mechanism to protect Americans in foreign countries from arrests and investigations for crimes within the jurisdiction of the ICC. Although, current Status-of-Forces Agreements with other countries define the means by which the Department of Defense carries out its policy directive "to protect, to the maximum extent possible, the rights of the United States personnel who may be subject to criminal trial by foreign courts and imprisonment in foreign prisons,"³³ it does not sufficiently protect service members under the jurisdiction of the ICC. The U.S. position was to require the Security

Council's consent prior to proceeding with judicial action, which would ensure support and cooperation from governments and eventually facilitate the court's activities. "The International Criminal Court attempts to take this decision-making authority away from governments and instill it more directly to a limited number of bureaucrats."³⁴ The U.S. cannot support an ICC that does not protect the basic rights of Americans under the Bill of Rights to the U.S. Constitution. "The absence of these safeguards is all more disturbing because the Supreme Court stated plainly in an 1890 case, *De Geofroy v. Riggs*, that the constitutional rights of Americans cannot be abridged by the federal government's power to conclude treaties. That power, stated the Court, does not enable the government to "authorize what the Constitution forbids".³⁵ The ICC was always envisioned to complement current judicial systems already in place in sovereign nations, not nullify them.³⁶ Additionally, its existence was not supposed to "...become a vehicle for interfering with responsibilities of states, especially those with the demonstrated ability to investigate and discipline their citizens and service members who are alleged to have violated the law of armed conflict."³⁷

A concern outside of the U.S. is that many of the signatories believe that without the participation of the U.S., the ICC has a long road ahead. One of the obstacles is the ICC is funded by the states that ratify the treaty therefore the U.S. will not contribute to the operating expense of the ICC.³⁸ "The court expressly accepts gifts and contributions from any nation, organization, corporation, or individual – a practice that is strictly forbidden by the UN Charter".³⁹ The cost of the court is uncertain, but a 1997 DePaul University study estimated the cost of the court at \$60 million to \$115 million annually.⁴⁰ In addition to financial support, the ICC is dependent on the cooperation and assistance from national governments, but

Of more concern for the Court may be the apparent determination of the U.S. not to provide any help to the prosecutor with regard to information, documentations, or testimony. According to Pierre-Richard Prosper, Ambassador for War Crimes Issues: 'If the prosecutor for the ICC seeks to build a case against an individual, the prosecutor should build the case on his or her own effort and not be dependent or reliant upon U.S. information or cooperation. We have detached ourselves from the process and do not intend to contribute in that regard.'⁴¹

Equally important to know is that the ICC cannot protect its witnesses after they testify and leave the court because it has no police force.⁴² "No matter how much the human right groups hope the mere existence of an ICC will force nations and individuals to comply with international humanitarian norms, a policeman is still needed."⁴³ The only protection for the witnesses is from the local authorities in the country in which the witness lives. All these factors will make it difficult to prosecute crimes where the only evidence is the testimony of victims and

eyewitnesses.⁴⁴ The ICC must also be able to send investigators as needed to any country to investigate, collect evidence, and have available the local police to assist with protecting and securing evidence. If the ICC orders a government to arrest a local national or provide documents in support of an investigation that is unwilling to comply, there must be sanctions imposed by able countries that can force compliance.⁴⁵

This is a new situation, which requires states to cooperate not only voluntarily but also against their will. When they fail to do so, an entirely new approach to international enforcement will be needed, perhaps through the development of “smart” compulsion measures that can be applied by states bilaterally or multilaterally for specific and targeted purposes.⁴⁶

The effectiveness of the ICC is solely dependent on the extensive ratification of the treaty and all signatories complying with all aspects of the treaty.⁴⁷ The ICC, without the U.S., will have no direct means of enforcing its will. Enforcement remains the Court’s weakness; it must ultimately rely on state power. Consequently, the U.S. has less to fear and more to offer the Court.⁴⁸ The underlying issue is that nations will be reluctant to give up their sovereignty to an International Criminal Court. Therefore, “the United States’ participation is not only needed for practical reasons, but also to bolster the court’s moral authority, and eventually its universal acceptance.”⁴⁹

MECHANISMS TO PROTECT U.S. CITIZENS AND SERVICE MEMBERS

The U.S. and the ICC can both benefit by the U.S. signing the Rome Statute of the International Criminal Court. However, the ICC and its current signatories have more to lose than the U.S. if the U.S. does not sign. Since the court can also claim jurisdiction over personnel of states that did not ratify the treaty, the U.S. has responded to ensure mechanisms are in place to protect U.S. political officials and service members. The U.S. recognizes that the treaty contains some safeguards that defer ICC investigations and prosecution, but requires greater protection for its service members.⁵⁰

The U.S. informed the UN Security Council that “...without a Security Council resolution establishing immunity for personnel contributing to Security-Council-authorized peacekeeping missions, the U.S. would veto the resolution to renew the U.N. peacekeeping mission in Bosnia-Herzegovina.”⁵¹ The U.S. bases its claim under Article 16 of the ICC Statute that states that no investigation or prosecution may proceed under this Statute for a period of 12 months.⁵²

After intense negotiations, the U.N. adopted a resolution that prohibits the ICC for a year from investigating or bringing charges against personnel that participate in U.N. peacekeeping

operations and are not party to the Rome Statute treaty.⁵³ The Security Council intends to renew the resolution as needed for an indefinite period.

Additionally, "...the United States announced that it would seek separate bilateral agreements with states worldwide, committing them not to extradite U.S. nationals to the ICC."⁵⁴ The administration cited Article 98 of the Rome Statute that provides a basis for negotiating bilateral treaties with other countries.⁵⁵ Accordingly, "without undermining the Court's basic mission, these agreements will allow us the necessary protections in a manner that is legally permissible and consistent with the letter and spirit of the Rome Statute."⁵⁶ The U.S. scored a big victory when the European Union allowed their member states within certain guidelines, to negotiate an agreement with the U.S.⁵⁷ Ultimately, the U.S. plans to sign on every state that will agree not to extradite U.S. service personnel if the ICC charges them with crimes, regardless if they ratified the treaty. "As of the summer of 2003, thirty-six bilateral immunity agreements have been signed but not necessarily ratified by those nations; fifteen of them are ICC participants and twenty-one are non-ICC participants."⁵⁸

Finally, the U.S. passed legislation known as "The American Servicemembers' Protection Act (ASPA) of 2001" that prohibits the U.S. from cooperating with the ICC as long as the U.S. does not ratify the Rome Treaty.

Under the legislation, U.S. military personnel must be immunized from ICC jurisdiction before the U.S. participates in any U.N. peacekeeping operations; no direct or indirect transfer of classified national security information can be made available to the ICC; and no U.S. military assistance could be extended to any country that has ratified the treaty with the exception of major U.S. allies. The legislation also authorizes the President to use all means necessary to release any U.S. or allied personnel detained against their will or on behalf of the Court.⁵⁹

It is important to note that on August 2, 2002, President Bush signed the Supplemental Defense Appropriations Act of 2002 into law. Included was a modified ASPA from the originally introduced version. The final version stipulates that no part of the bill may interfere with the President's constitutional authority to make foreign policy. Additionally, a deliberate decision was made not to modify the amendment that prohibits any portion of the bill from interfering with US efforts to bring to justice individuals accused of atrocious crimes.⁶⁰ The modification to the ASPA was to ensure that the President is not hindered by legislation when he determines that it makes sense for the U.S. to cooperate with any international body, including the ICC, to protect American interests. U.S. cooperation includes various forms of assistance to prosecute foreign nationals accused of egregious crimes.⁶¹ The full text to the ASPA of 2002 reads: "Nothing in this title shall prohibit the United States from rendering assistance to international efforts to bring to justice Saddam Hussein, Slobodan Milosevic, Osama bin Laden, other members of Al

Queda, leaders of Islamic Jihad, and other foreign nationals accused of genocide, war crimes, or crimes against humanity.”⁶² This U.S. unilateral move to protect service members from unfair prosecution by the ICC has attracted the most criticisms. Especially, since Section 2008 of the ASPA authorizes the President to use, “all means necessary and appropriate” to free U.S. citizens and allied personnel detained or imprisoned at the request of the ICC.⁶³ European leaders call this provision “The Hague Invasion Act”.⁶⁴ Opponents to the ASPA maintain that the new legislation does not provide additional protection to U.S. service members.⁶⁵

U.S. OPTIONS

“U.S. policy choices toward the ICC involve tradeoffs. The incontestably sound, assuredly effective, risk-free option does not exist.”⁶⁶ Regardless of the option chosen, the U.S. and the ICC community will need to make concessions. There are three basic options for the U.S. in relation to the ICC.

First, the U.S. can retain the status quo by opposing the ICC and can continue to prosecute rogue states by way of UN tribunals. It would not serve our national interests by endorsing a judicial system beyond the U.S. Constitution's reach that is capable of prosecuting our political and military leaders by way of political motivation. In addition, the ICC prosecutor is authorized to reach beyond U.S. prosecutor's empowerment and crimes of aggression are not clearly defined.⁶⁷

The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.⁶⁸

The U.S. objects to this provision stating that crimes of aggression should remain within the scope of the UN Security Council when dealing with crimes of aggression.⁶⁹ Retaining the status quo will eliminate an international commitment to a statute that is in conflict with the U.S. Constitution. It ... “helps allay concerns that U.S. servicemen and women and leaders may be subject to prosecution, particularly if U.S. opposition prevents the court from functioning effectively. Reducing the alleged threat to U.S. military personnel would also reduce Pentagon objections to foreign deployments considered necessary by the administration.”⁷⁰

As an alternative to the ICC, the U.S., through the UN Security Council, can choose to prosecute individuals and states with crimes against humanity by establishing tribunals similar to the ones established for the former Yugoslavia and Rwanda. The U.N. tribunals did not function without complications, but for the most part were successes. “The most significant is

the acceptance today that an international court is able to dispense justice - that a fair trial before such a tribunal is possible.”⁷¹ In addition, the United Nations tribunals have been a judicial arena where advancements in international humanitarian law and international procedural law have been made. It is a natural product of the law turned to practical effect.⁷²

Nonetheless, retaining status quo comes with a price. It will isolate the U.S. from key allies at a time when we are persuading more countries to share the burden in our post-war operations in Iraq. It will prevent the use of the ICC to prosecute individuals for crimes under the courts charter and will weaken the U.S. position on human rights and humanitarian issues.⁷³ Although the tribunals were successes, they do have their disadvantages. The tribunals disadvantage is that they function distances away from the site of the crimes they will prosecute and the U.S. funds twenty-five percent of the operating costs for the two tribunals.⁷⁴

Second, the U.S. can sign the statute. The ICC is a mechanism for addressing horrendous crimes against humanity, other forms of war crimes, aggression (once defined), and genocide. It can possibly serve as an international judicial mechanism that can deter crimes more easily committed without the ICC. This will require less expense and energy from the U.S. for establishing ad hoc tribunals to investigate crimes. Signing the statute will strengthen relations with U.S. allies and reestablish the commitment to prosecute war criminals. It will ensure that the U.S. has full voting rights for appointing prosecutors and judges to the ICC.⁷⁵ On the other hand, it will not alleviate U.S. concerns of insufficient protection for service members and politicians from an international court that does not guarantee basic rights under the U.S. Constitution. The ICC treaty lacks constitutional safeguards such as the right to confront one's accusers, due process, trial by an impartial jury and double jeopardy. Moreover, without safeguard mechanisms for all U.S. citizens, ratification of the treaty will not have the advice and consent from the Senate.⁷⁶

Finally, the U.S. can sign the Rome Statute of the International Criminal Court, continue to work with the Commission in adding amendments to the treaty, and then ratify it. The ICC has made tremendous progress with establishing an international criminal system for egregious crimes, however; it does not adequately address the means to protect the U.S. military while conducting its military operations throughout the world. “Nevertheless, the ICC's mandate over genocide, war crimes, and crimes against humanity serves the broad U.S. interest of promoting the rule of law and global justice.”⁷⁷ Therefore, continuing dialogue with the ICC community will enhance the chances of inserting U.S. recommendations and assist with clarifying the legal text within the Statute articles. To further the process, “the Preparatory Commission should provide clear, binding interpretations that the ICC will respect military judgments unless they are

'manifestly unlawful' and will never require the presentation of classified information to justify controversial targeting decisions."⁷⁸ The U.S. can strengthen its commitment to shaping the ICC so that it can become an efficient international judicial organ and at the same time preserve its autonomy from the ICC. While the ICC proves itself by its selection of judges, prosecutors, effective investigations and indictments, the U.S. can stimulate support from the Department of Defense, Congress, and the American populace.⁷⁹ Additionally, it can convince the other countries that signed the treaty that it is also in their best interest to strengthen the checks and balances within the ICC. By participating as a signatory and working with the Preparatory Commission, the U.S. will express unanimity with key allies.⁸⁰ Seemingly, cooperating with the Court can advance American interests rather than hinder them. In this course of action, the U.S. can ensure that it continues to make significant contributions in shaping an effective judicial institution without commitments.

The negative side is, if the U.S. propositions are rejected, the American people and Congress may lose heart in the process, which may make it difficult to ratify the treaty in the future. On the other hand, by not ratifying the treaty, the U.S. will lose its vote with respect to decisions and direction concerning the ICC and forfeits its voice by way of voting for judges and prosecutors.⁸¹ "Ultimately, however, the U.S. should be prepared to lead, with a clear agenda and strong networks of support. Many of the worthwhile and legitimate issues at stake, most especially concerning human rights and safety, can be achieved by working through governments and nations than by countenancing a new system that stands outside the state structure."⁸²

Whatever option the U.S. selects, Mark Grossman, Under Secretary for Political Affairs, on May 6, 2002, made the following commitment during his remarks to the Center for Strategic and International Studies, Washington, DC: The existence of a functioning ICC will not cause the United States to retreat from its leadership role in the promotion of international justice and the rule of law. The United States will:

- Work together with countries to avoid any disruptions caused by the Treaty, particularly those implications in United States military cooperation with friends and allies that are parties to the treaty.
- Continue our longstanding role as an advocate for the principle that there must be accountability for war crimes and other serious violations of international humanitarian law.
- Continue to play a leadership role to right these wrongs.
- The armed forces of the United States will obey the law of war, while our international policies are (and will remain) completely consistent with these norms.

- Continue to discipline our own when appropriate.
- We will remain committed to promoting the rule of law and helping to bring violators of humanitarian law to justice, wherever the violations may occur.
- We will support creative ad-hoc mechanisms such as the hybrid process in Sierra Leone – where there is a division of labor between the sovereign state and the international community, as well as, alternative justice mechanisms such as the truth and reconciliation commissions.
- We will work with Congress to obtain necessary resources to support this global effort.
- We will mobilize the private sector to see how and where they can contribute.
- We will seek to create a pool of experienced judges and prosecutors who would be willing to work on these projects on short-notice.
- We will take steps to ensure that gaps in United States' law do not allow persons wanted or indicted for genocide, war crimes, or crimes against humanity to seek safe haven on our soil in hopes of evading justice.⁸³

RECOMMENDATION AND CONCLUSION

The best option is to cooperate as a signatory until U.S. approved modifications to the Rome Statute of the International Criminal Court are incorporated, ratified by the other state parties to the ICC, and ultimately ratified by the U.S. The Department of Defense and Congress may support this option as long as there are clear stipulations that guarantee the exemption of international prosecution for American troops participating in various military and humanitarian missions in other countries.⁸⁴ This route will also engender the good will of Human Rights groups and other Non-Governmental Organizations, which may be willing to support U.S. proposals to the Rome Statute. “The Rome Conference was remarkable for the intensity and detail of the lobbying campaigns mounted by NGOs, led by Amnesty and Human Rights Watch.”⁸⁵ These human rights crusaders also played a significant role in the creation of the ICC. “The unusual role the international and national humanitarian organizations played in ICC development and the pressure they exerted on governmental delegations gives credence to the idea that some nations are backing the ICC to appear as they are ‘doing something’....”⁸⁶ Nonetheless, to have their support would be a considerable victory for the U.S.

The U.S. has exercised hegemonic approaches to ensure protection of its military service members, political officials, and allies from the unrestrictive jurisdictional reach of the ICC. Therefore, unless the ICC can provide guarantees through its statute, that U.S. political officials and military personnel working in military and humanitarian operations are exempt from

prosecution by the ICC, it is highly unlikely that the U.S. government will sign the Rome Statute of the International Criminal Court.

As a result, the nation with the most power to maintain peace and security and to assist in humanitarian disasters, the U.S., will find itself more frequently called on to intervene in international activities to support and enforce ICC rulings. At the same time, because its leaders and military forces are conducting the activities necessary to support world security and assist in humanitarian endeavors they will become more susceptible to allegations of wrongdoing. A damned if you do, damned if you don't proposition.⁸⁷

The U.S. is the lone "Superpower" and as such, is looked upon for leadership, financial, diplomatic and, more importantly, military assistance in resolving crisis within countries. The U.S. is involved in various parts of the world assisting countries that are unable to prevent aggression against humanity and genocide from within their borders or from other countries. It is because of its military involvement throughout the world that the U.S. supported and assisted in the creation of an International Criminal Court. The U.S. "provided funds, attorneys, investigators, and other staff, including military and intelligence assistance for their [ICC] operations."⁸⁸

The U.S. is in concert with the countries that signed the Rome Statute treaty that want to bring individuals such as Slobodan Milosevic and Saddam Hussein to justice as a world community for horrendous human rights violations. The U.S. cannot continue to play "Big Brother" to the world without an international judicial system lifting some of the burden.

Conversely, it cannot support an ICC that is capable of prosecuting U.S. citizens in their support of a U.N. mission or a U.S. unilateral action in support of its national interest without mechanisms that prevent politically motivated charges against the U.S. in the ICC. U.S. government officials, military service members, and allies that assist the U.S. in accomplishing their missions must be able to carry out their duties without the threat of possible prosecution.⁸⁹

Many countries shoulder the burden of international security. The United States participates with other governments in military alliances and in the United Nations or other multi-national peacekeeping operations. Soldiers deployed far from home need to do their jobs without exposure to politicized proceedings. More generally, we are not here to create a court that exists to sit in judgment on national systems, to second-guess each action and to intervene if it disagrees.⁹⁰

All should be equal in a judicial system, however, the U.S. is unique in its role as the lone superpower, and special consideration should be allowed for this role. Compromises from both sides must be met or it will be a "silent Cold War" between the U.S. and the International Criminal Court. Marc Grossman, Under Secretary for Political Affairs, stated, "We believe that

there is a common ground, and ask those nations who have decided to join the Rome Treaty to meet us there."⁹¹ Time will tell which way the international judicial scales will tilt as the U.S. continues to find the elusive common ground.

WORD COUNT= 6000

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