

The International Criminal Court

Why We Need It, How We Got It,
Our Concern About It

Donald A. MacCuish, EdD



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DONALD A. MACCUISH, EdD

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Muir S. Fairchild (1894-1950), the first commander of
Air University and the university's conceptual father.
General Fairchild was part visionary, part keen taskmaster,
and "Air Force to the core." His legacy is one of confidence
about the future of the Air Force and the central
role of Air University in that future.

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Preface

I have been following the establishment of the permanent International Criminal Court (ICC) as called for in the Treaty of Rome since I first began teaching an elective, *Morality and War: Implications for the War Fighter*, here at the Air Command and Staff College (ACSC) in January 2000. I have found the process to be quite interesting. Almost from the beginning, my thoughts harkened back to what I believe Winston Churchill was warning us about the future. As I remember it, his words were something like, “Be ever mindful of the ghost of Nuremberg coming back to haunt us.” This notion haunts us today.

According to author Bradley Smith, it was at America’s insistence that the victorious Allies conducted the trials at Nuremberg and in the Pacific as well. Stalin, who realized the value of “show” courts, was enthusiastic. Churchill was less so, fearing the implications, and Charles de Gaulle, well de Gaulle was de Gaulle. The Germans never accepted the results as legitimate.

Since the conclusion of those trials over 50 years ago, the United States has been at the forefront, leading the fight for a permanent criminal tribunal, only to end up opposed to one when the details were penned to paper. It always is in the details, isn’t it?

The Plenipotentiaries convened in Rome from 15 June until 17 July 1998 to negotiate and draft what became the Treaty of Rome, establishing the permanent ICC. The participants included 160 states, 33 intergovernmental organizations, and 236 nongovernmental organizations. When all was said and done, there were 120 states voting in favor of the treaty, seven against it, and 21 abstentions. There is no record about the 22 other states in attendance. Interestingly, the United States, which had been pushing for a permanent court, and which was instrumental in establishing the Criminal Tribunals for Yugoslavia and Rwanda, voted against the treaty. However, America’s allies—the French, British, and Russians—voted for the treaty on the last day of the conference.

One of Pres. William “Bill” Clinton’s final official acts before leaving office was to sign the Treaty of Rome on behalf of the

United States. But affixing his signature to the treaty only tended to add fuel to those who criticized his administration. However, in this instance, he did the right thing because if he had not signed the treaty, the United States would not have been allowed to participate in the rest of the formulation process—the details, if you will, of how the court functions. On 6 May 2002, Pres. George W. Bush announced that the United States withdrew its signatory status to the Treaty of Rome. Maj Steven D. Dubriske's paper explains the nuances of the treaty quite well. This paper won the 2003 ACSC Commandant's Award for Research Excellence.

For quite some time now, Lt Col Tomislav Ruby and I have had some serious reservations about the ICC. We noted early on that many of the legal rights, we, as Americans, enjoy would be swept away by the court. For example, once selected, the prosecutor is not accountable to anyone. Also, if a defendant is found not guilty, the prosecutor can appeal the not guilty verdict. Finally, even though the defendant's country has the right of first refusal, if the prosecutor does not like the verdict, he or she can haul the person before the ICC under the guise that the national court proceedings were a dodge. We were further concerned because we thought it not only possible, but quite likely, that an American would be brought before the court for political reasons. Although, later withdrawn, a complaint to try Gen Tommy Franks before a Belgian court for war crimes in Iraq was filed. Even so, the incident does, in my opinion, validate our concerns. In the future, if a similar complaint were filed with the ICC would it also be withdrawn? Hmmm.

Thus, on our way home from a conference at the Army War College in April 2002, we began putting our thoughts down on paper. The third essay is the result of that discussion. Admittedly, the genre we selected was fiction all save a couple of the specific examples that actually occurred during Operation Allied Force. That essay is a well-researched and appropriately documented academic article. This article was recently adopted by the Georgetown University Institute for the Study of Diplomacy (GUISD) as a case study for graduate students studying

International Relations and Diplomacy and for law students specializing in International and Human Rights Law.

During the month of June 2002, I began developing my research topics for the Resident Program here at ACSC. I wrote one research topic focusing on the Treaty of Rome and the ICC. During the research open season, I had two students who showed an interest in the topic. Their essays constitute the first two in this anthology. Maj David Hater's approach was to look at the history of war crimes that led up to the Treaty of Rome. As I mentioned previously, Major Dubriske discusses the specifics of the treaty as it stands today.

There is a strong argument to be made for establishing a permanent criminal court to bring to justice individuals responsible for specific, well-defined violations of the rules and customs of war—genocide, crimes against humanity, war crimes (violation of the Hague and Geneva Conventions, etc.). Prof. Rudi Rummel, in his book, *Death by Government*, states that in the twentieth century over 170 million civilians have been victims of the aforementioned crimes. This should be appalling to everyone, and there ought to be an international forum of accountability for the perpetrators of such crimes. In my opinion, the ICC, as currently constituted, is not that forum for all the reasons cited.

I want to take this opportunity to acknowledge several people who have made this anthology possible. I want to thank Dr. Shirley Laseter, director of Air University Library and Air University Press, for her kind assistance in the publication of this anthology. I also owe a special debt of gratitude to Mr. Darrell Phillips, chief, International and Operations Law Division, and Capt Shelly Schools, instructor, Military Justice Division, both of whom serve at the Air Force Judge Advocate General School, Maxwell Air Force Base, Alabama. They guided me in tying the loose ends together. Several international law specialists had reviewed the third essay and criticized those parts that were not precise. Mr. Phillips and Captain Schools helped me correct those legal imprecisions, and for that I am truly grateful.

It is my hope that these three essays provide the reader with a better and more comprehensive understanding of the ICC,

its development, and the reasons all Americans should be concerned. For the non-American reader, I hope that these essays provide a well-articulated explanation of our concerns about the ICC.

A handwritten signature in black ink, appearing to read 'Don MacCuish', with a stylized, flowing script.

DONALD A. MACCUISH, EdD
July 2005

A History of War Crimes and Their Consequences

David A. Hater
Major, US Army

War crimes have plagued mankind for centuries. While there is disagreement over exactly what constitutes a war crime and what a war crime is, the fact remains that military forces have committed atrocities throughout recorded history.

The way of prosecuting war criminals or punishing them through nonjudicial, political mechanisms has also changed over time. Options range from take no prisoners or summary executions of prisoners, at the one extreme, to judicial trials and sentencing, at the other extreme. The problem with judicial proceedings is that they can have a hint of victor's justice, especially if the jurisdiction, legitimacy, and authority of the court are not established in advance. The International Criminal Court (ICC) was established on 17 July 1998 in part to address these concerns.

However, the United States (US) has not ratified the Rome Treaty of 17 July 1998 and has specifically stated it will not be bound by the treaty. Nonetheless, the international community implemented the treaty, and the ICC became a reality on 1 July 2002 after the 60th nation ratified the treaty. What exactly does ratification mean for members of the United States Armed Forces?

This essay explores the implications for military members in four parts. It traces the historical development of war crimes and looks at what types of issues the ICC might have jurisdiction over. Then, it focuses on international criminal courts in general and examines the predecessors of the ICC: Nuremberg/Tokyo, the ICC for the former Yugoslavia, and the ICC for Rwanda. The essay then details the inner workings of the ICC. Finally, it looks at the question of whether members of the United States Armed Forces are subject to ICC jurisdiction. This answer will be based on a legal, political, and moral analytical framework.

The history of war crimes is nearly as old as recorded history. When many people think of war crimes, their thoughts normally turn to the twentieth century and the Nuremberg tribunals. The history, though, is far older. As far back as 400 BC, the Greeks were writing about the Battle of Melos. Similarly, in 149–46 BC at the Battle of Carthage, there were disturbing abuses by the conquering Romans.

It is true that, at the time, these were not considered war crimes, nor were there any tribunals. However, by any objective standard of morality, these atrocities qualify as war crimes. Many ancient Greeks, Carthaginians, and even many relatively modern soldiers would say that the term *war crime* itself is an oxymoron. According to this school of thought, there is no morality in war. Similarly, because during those times (and some would argue even today), there was no world court, international sovereign, United Nations, or codified international law of war, it follows that there were no judicial constraints on military action.

In Thucydides' *History of the Peloponnesian War*, the Athenian generals Cleomedes and Tsias defend realism saying, "For this is what war is really like: 'they that have odds of power exact as much as they can, and the weak yield to such conditions as they can get.'"¹ For the Athenians, war was not a moral or a legal condition; it was a natural condition that Thomas Hobbes would later call a "state of nature." Under this doctrine, "If they do not conquer when they can, they only reveal weakness and invite attack; and so, 'by a necessity of nature' . . . they conquer when they can."²

This is the nature of the security dilemma: conquer or be conquered, kill or be killed. For this reason, when the Romans conquered Carthage, they felt it necessary to kill all the Carthaginians to prevent future conflicts and to provide increased security for the Roman Empire. The Romans did not view killing all Carthaginians (including women and children) as a war crime.

In that age, victor's justice was not a concern. The stronger side completely conquered the weaker side. There was no need to try soldiers of the enemy. They were killed in battle or summarily executed. In the custom of the day, this total war realism

doctrine was the norm. However, even in that day, there were signs of some dissent. In his writing about the ring of Gyges, Plato discusses morality and writes about what morality demands even when nobody is looking. If a ring of Gyges made a man invisible so that he could “get away with any action,” what would morality demand? Plato rejects the Darwinian survival of the fittest theory. Similarly, Plato’s mentor Socrates also rejected the common notion of realism and total war. Socrates writes,

They will not, being Greeks, ravage Greek territory nor burn habitations, and they will not admit that in any city all the population are enemies, men, women, and children, but they will say that only a few at any time are their foes, those, namely, who are to blame for the quarrel. And on all these considerations they will not be willing to lay waste the soil, since the majority are their friends, nor to destroy the houses, but will carry the conflict only to the point of compelling the guilty to do justice by the pressure of the suffering of the innocent.³

War crimes were not only restricted to ancient Greece. The United States has also had its fair share of dubious behavior in combat. One of the more infamous examples is Sherman’s march to the sea during the American Civil War. Gen William T. Sherman advanced through the Confederacy burning entire towns along the way. He justified his tactics using the defense of military necessity. Sherman felt that by breaking the will of the people, he could win the war quickly. Winning the war quickly in Sherman’s mind was justified because a shorter war saves lives, even if innocent civilians needed to be sacrificed. Sherman’s view of war was that war is ugly and cannot be refined. He clearly believed that the ends justify the means. Under this reasoning, anything that furthers the goal of victory is justified.⁴ Had the South won the Civil War, Sherman most certainly would have been tried as a war criminal and likely would have been executed. Perhaps this is nothing more than victor’s justice, but clearly generals such as Sherman do need to be held accountable for their actions.

Within the twentieth century, the United States also has engaged in some acts that many people would categorize as war crimes. In World War II, the United States engaged in carpet-bombing of Germany, and to a lesser extent, Japanese cities. The final US mission of bombing Hiroshima and Nagasaki re-

mains controversial to this day. Perhaps the bombing of Hiroshima and Nagasaki can be justified in a court of law dedicated to adjudicating the Law of Armed Conflict (LOAC). However, anytime civilian population centers are deliberately targeted, it seems that there is at least probable cause (if not definitive proof) to initiate war crimes proceedings. Gen Curtis E. LeMay seemed to agree when he stated, "Killing Japanese didn't bother me very much at that time . . . I suppose if I had lost the war, I would have been tried as a war criminal. . . . Every soldier thinks something of the moral aspects of what he is doing. But all war is immoral and if you let it bother you, you're not a good soldier."⁵

One of the most famous cases of a war crime is obviously the case of Lt William Calley. The Vietnam War frustrated US soldiers because the Vietcong used asymmetric warfare (some would say terrorism) to maximize their advantages. It was often difficult to distinguish between combatants and noncombatants because women and small children were often soldiers. In addition, they did not always wear uniforms or carry arms openly. The enemy would attack US forces and then quickly disappear into the countryside. Frustrated by mounting losses and an inability to find the enemy, morale in Calley's company suffered greatly. Soldiers in Calley's platoon were desperate to inflict losses on the enemy to avenge friendly deaths. In this type of environment, discipline slips and the environment becomes ripe for war crimes. In the village of My Lai in 1968, soldiers of Calley's platoon lined up nearly every woman and child in the village and summarily executed them and then burned the village to the ground. Calley's justification was that he was acting pursuant to superior orders. Even though superior orders were rejected as a defense at Nuremberg, soldiers were still using it as a defense to alleged war crimes, and some are still using it today.⁶ Another justification Calley offered is that leveling entire villages was the only way to prosecute the war against asymmetric tactics used by the Vietcong and that the entire village was made up of Vietcong sympathizers who should be considered combatants.⁷

The full extent of the war crimes were not made public until several years after the fact when a soldier from Calley's pla-

toon came forward to the Department of Defense and his congressman. The fact that there was no immediate investigation by the Army seems to suggest that those who may have been aware of what happened at My Lai at least tacitly condoned the behavior. After the atrocities became known, the public outcry became so great that the US military was forced to investigate. Calley was tried for murder and, at a general court-martial, was convicted and given a life sentence. Pres. Richard M. Nixon later pardoned Calley. Nixon felt that Calley was made a scapegoat.

The scapegoat evidence is somewhat mixed. Capt Ernest Medina, Calley's company commander, was acquitted at a later court-martial. The prosecution was never able to prove that Medina had any direct knowledge of the My Lai massacres or that he gave an order to commit war crimes. He was also found not guilty of command responsibility for Calley's actions. The findings in the Medina case were contradictory to the findings of the case of Gen Tomoyuki Yamashita, who was tried, convicted, and executed on 28 February 1946 based on command responsibility for the actions of Japanese warriors in World War II. Compared to Medina and Calley, Yamashita was many more levels removed from the Japanese warriors.⁸ The trial records also conclusively demonstrate that Yamashita had no direct knowledge of the Japanese war crimes. Many historians argue that there was a double standard between Yamashita and Medina.⁹

We do not need to go back to Vietnam to find examples of alleged US violations of the LOAC. In recent peacekeeping operations, there have been several examples that, while far short of Calley's actions, may constitute violations of LOAC. Lt John Serafini was charged with assault for the way he interrogated a Kosovar detainee.¹⁰ Serafini pointed an empty 9 millimeter at the head of a prisoner and threatened to kill him. Serafini and his soldiers also physically assaulted the detainee. Again, the justification was military necessity: it was the only (or most expedient) way to gather the information and to accomplish the mission.

Throughout history, there have been many examples of war crimes. My premise here is to show that there have been ques-

tionable acts and outright war crimes committed by US soldiers. The record of prosecuting these alleged war crimes is a mixed bag. Sometimes the United States prosecuted its own soldiers, while in other instances, no charges were filed. Because the United States has always been on the winning side, and because there has never been an international war crimes tribunal, if the United States decided not to prosecute its own service members, then alleged US war criminals were never prosecuted.

History of Military Tribunals

War crimes have been dealt with in a number of ways throughout history. Often, what we currently consider war crimes were not considered war crimes either by the offending party or by the victims. War was a matter conducted between states. The winners merely exacted whatever they could from the losers.¹¹ It follows from this that war crimes committed by the winning side were rarely, if ever, prosecuted. The winning side often punished the losing side for war crimes committed against the victors. Sometimes, this was done after a trial; other times summary executions were the rule. If a trial were held, there were varying degrees of respect for the rule of law. Often, military tribunals conducted the trials where the rules of evidence and criminal procedure were quite different from a typical civilian judicial proceeding.

One of the earliest examples of military tribunal use in the United States was immediately after the Civil War. Perhaps the most famous example during this period was the use of military tribunals to try those accused in the Lincoln assassination. The use of military tribunals remains controversial even to this day. The descendants of Dr. Samuel Mudd, the doctor who treated John Wilkes Booth after the assassination and who was convicted of this offense, continue to try to clear Dr. Mudd's name. Dr. Mudd's descendants had some success in clearing his name in 1992, when the Army Board for Correction of Military Records recommended that his conviction be overturned because he was not tried in a civilian court. But, no action has been taken on this recommendation. In November 2002, the case was brought to the Circuit Court of Appeals for the District of Columbia on

grounds that a military tribunal did not have jurisdiction because civilians were available. The case was dismissed.¹² Thus, the basic issue concerning military tribunals and civilians remains unclear. There are numerous cases dealing with terrorist suspects and detainees at Camp Delta, Guantanamo Bay, Cuba, that are working their way through the court system that some clarity to this issue might emerge.

This is not merely an academic point or one restricted to clearing the name of one person. President Bush has authorized the use of military tribunals to try suspects in the war on terrorism. Military tribunals have not been used yet, but many civil libertarians decry even the proposed use.

The United States is not the only country that uses military tribunals. Secret military trials are a preferred tactic of third world dictators and unstable governments. One recent example of the use of military tribunals was in combating terrorists in Peru. The Peruvian government used military tribunals as an effective way to protect the judicial system from reprisals and witness intimidation and to dispense justice efficiently and protect national security. It is ironic that these are many of the same reasons given for military tribunals by the current administration. The Peruvian government had much success using military tribunals. Terrorism was brought under control and many criminals were brought to justice. However, the cost was high. Human rights groups allege that there were many abuses. Even if the abuses were the minority of cases, Peru's international reputation suffered. To this day, ex-president Alberto Fujimori remains under indictment in self-exile, while his enforcer former spy chief, Vladimiro Montesinos, is held in a Peruvian prison.

Because of the problems associated with military tribunals, particularly victor's justice, lack of due process, ad hoc organizations, and ex post facto laws, the world searched for a better way to deal with suspected war criminals. Within the modern era (before the creation of the ICC), three examples of courts were established to deal with war crimes: Nuremberg, former Yugoslavia, and Rwanda.

Leading up to the end of World War II, there was general agreement among the Allied forces that something must be

done about alleged German war criminals. Beyond this very general agreement, there was considerable disagreement over the mechanism for dealing with the Germans and what sorts of crimes should be prosecuted. The problem for the Allies is that international law was, for the most part, not well developed in either of these two areas. International law is not well codified, and there was no international criminal court.¹³

The first major area of disagreement concerned the mechanism for dealing with the Germans. Since there was no international court, a vehicle would have to be created to adjudicate and punish German war criminals. The options ranged from a political solution (closely resembling victor's justice) to various judicial solutions. The political solution was favored by the British and, at the extreme end, consisted of summary executions of Germans judged by the Allied governments to have committed war crimes. It is ironic that the originators of the Magna Carta were pushing for summary executions while Marshal Josef Stalin favored at least some limited trial mechanism. The British political solution is a throwback to the Napoleonic days and did not find favor with the remaining Allied powers.¹⁴

It may seem that if a political solution is rejected that there is only one option: judicial. However, this judicial option is exceedingly complicated. By what authority would the court be established? Some parties favored a treaty to establish a court, but this has significant issues. Approving a treaty (especially in the United States) is a time-consuming task. The Allied powers wanted a speedy resolution to the war crimes issue. Another problem was that the treaty was *ex post facto* and by what authority were the accused Germans subject to the jurisdiction since they had not ratified the treaty and the treaty did not exist prior to the beginning of the war. These two issues of *ex post facto* and authority over a nonsignatory would remain as issues.

Establishing a court by treaty was eventually rejected. The accepted alternative was to establish a court by executive agreement among the Allied powers. This still had the problems of *ex post facto* law and jurisdiction over Germans, but it met the Allied goal of being speedy. The Allies tried to give the executive agreement mechanism added legitimacy by establishing

the United Nations (UN) and establishing executive agreement among numerous nation states.

The German crimes were another area of considerable controversy. What exactly constituted a war crime? The issues can be divided into several broad areas: "(1) crimes by and against those who never left Germany, (2) crimes committed prior to 1939, (3) atrocities by and against unidentified persons, (4) crimes committed by, and criminal liability of, superiors of the persons actually committing the offenses and (5) the disposition of the major war criminals."¹⁵

The first two categories were problematic under international law. Sovereignty seemed to dictate that actions committed entirely within Germany or before World War II are domestic rather than international problems. These two categories of offenses largely relate to the treatment of Jews in Germany. While these are certainly atrocities, they seem to fall outside the scope of war crimes. Common law recognized a broad category of crimes against humanity, but it was certainly not well codified.

The third category of atrocities may be the easiest to deal with from an international law perspective. There may be a practical problem of identifying perpetrators, but, once identified, these individuals could be charged with violations of customary international law. In some cases, this international law was codified in various treaties or in a country's domestic law.

The fourth category of offense dealt with individuals operating pursuant to superior orders. There are several issues here. One issue is command responsibility either based on giving the order or negligence in failing to control one's armed forces. Command responsibility when an explicit order is given is readily resolved as a criminal offense. The Nuremberg and Tokyo tribunals also established the principle of a commander being responsible for everything under his command. General Yamashita of Japan was executed under the theory of failing to control one's troops. One international law principle that Nuremberg did establish was that of superior orders. Superior order was not a viable defense of a subordinate. The superior and the subordinate were jointly criminally liable.

Another issue of superior responsibility concerned membership in criminal organizations (i.e., the SS [or *Schutzstaffel*] and the Gestapo). One plan suggested that the initial trials of the commanders of these organizations establish the criminality of the organization and by extension all members of the organization. This plan envisioned trials for lower-ranking individuals only having to prove membership in the organization to establish guilt. Judicial notice would be taken that persons belonging to these organizations would be classified as a war criminal merely by their membership.¹⁶

The last category concerned the top leaders of Germany. While it is clear that these individuals prosecuted a war of atrocities, what would be the exact charge? Often, they did not carry out the atrocities, and it may be difficult to establish, beyond a reasonable doubt (in the absence of a smoking gun) that they gave the order. There was some sentiment for charging the leaders of the crime for starting an aggressive war. One problem with this approach is that international law is not codified, so aggressive war is not a crime. The proponents of this aggressive war theory tried to get around this problem by showing that Germany violated the Kellogg Briand treaty when it violated the sovereignty of numerous countries.¹⁷

The issues raised at Nuremberg and Tokyo would remain in the international community for decades. Some would argue that many of the lessons of Nuremberg were not learned by the international community because when it came time to deal with war crimes in Rwanda and the former Yugoslavia, the international framework was only slightly better than after World War II. The major problems in the Yugoslavia and Rwanda war crimes tribunals were related to jurisdictional, *ex post facto*, and domestic versus international war crimes.

The International Criminal Tribunal for the former Yugoslavia was formed as an *ad hoc* organization in 1993 and held the first international war crimes trial since Nuremberg.¹⁸ It was given authority over acts committed in the former Yugoslavia after 1 January 1991 and is expected to be disestablished by 2007.¹⁹

One problem for this tribunal is that it was created under UN Resolution 827 citing chapter 7 of the UN charter.²⁰ The

tribunal was created after the fact, and the government of the former Yugoslavia had not agreed to be bound by this resolution. Additionally, the list of offenses that the tribunal has jurisdiction over is general rather than specific. Finally, the war was a civil war involving Yugoslavia, Bosnia, and Serbia. Arguably, the courts of these nations should be the first to prosecute the offenders.

The International Criminal Tribunal for Rwanda has the same problems. The tribunal was established after the alleged crimes under UN authority and covers actions in a civil war. The civil war in this case involved the Hutus and the Tutsis. One reason the International Criminal Trial for Rwanda may have some additional legitimacy is that one alleged charge is genocide.

The history of war crimes tribunals is filled with examples of arguments over jurisdiction, ex post facto issues, domestic versus international authority, and supremacy of the international system to national courts. These were the issues at Nuremberg; they continued through the former Yugoslavia and Rwanda and remain contentious issues. In this environment, the ICC was envisioned to solve many of the most contentious issues.

1998 Rome Treaty

Because of the difficulties experienced in dealing with past war crimes, a movement surfaced in the international community to establish a permanent international criminal court. This movement is attributable to several factors: the aforementioned problems in prosecuting war crimes caused sentiment for a permanent solution to linger for quite some time, the commission of atrocities in Rwanda and the former Yugoslavia gave strength to the movement, and the end of the cold war changed international politics, which created a political climate favorable to the creation of a permanent international criminal court. This changed political climate consisted of the lessening of the influence of the former Soviet Union and a democratic president in the person of Bill Clinton, who supported the creation of the court as the leader of the world's only remaining superpower.

The statute establishing the ICC was adopted at the Rome conference on 17 July 1998. Article 126 of the treaty calls for adoption when 60 countries sign the treaty, which occurred on 1 July 2002 with the signing by the 60th country.²¹ As of April 2004, 89 countries had signed the treaty.²² However, the United States is not one of the countries, and the United States has explicitly rejected the treaty and has informed the international community that the treaty in its present form will not bind the United States.²³

The journey to the establishment of the ICC has been a protracted one, full of contentious debate. Delegates started working on the treaty in 1994, and it was four years before the treaty was presented to the UN for approval. An additional four years passed before the required 60 countries ratified the process.²⁴

Part of the reason for these lengthy delays is directly attributable to the United States' trying to influence the process. The United States was one of the first countries to support the creation of the ICC. However, the drafted statute failed to include several procedural safeguards that the United States felt were important to protect its soldiers.²⁵

The United States wanted a greater role for the Security Council (where the United States has a veto). The problem from the United States' perspective is that every country in the world that ratifies the treaty (including potential enemies of the United States) is eligible to nominate judges and prosecutors to the court. The United States would have one voice among many and would not enjoy as much influence as it does in the Security Council. A cynical view of the United States' position is that it wants an ICC, but demands a veto over any of its actions. A more favorable view is that the United States is the lone remaining world superpower, that it provides significant funding to the United Nations, and that it provides the majority of troops for peacekeeping operations and thus should enjoy more of a voice in the process. The United States' position is that policy and court decisions should not be driven primarily by small nations who do not provide troops for peacekeeping operations and are thus, as a practical matter, not subject to the ICC provisions.²⁶

Another concern of the United States is that the court fails to respect national sovereignty. The United States' view is that the court should operate only when a country fails to police its own soldiers. The statute does not operate this way. The ICC can exert jurisdiction virtually anywhere that the court (the independent prosecutor) itself thinks it has jurisdiction. Further, the ICC can exert jurisdiction even when a national court has acquitted an individual.

The last significant concern for the United States is what constitutes a war crime under the ICC. The United States' very narrow view consisted of crimes against humanity, genocide, and traditional war crimes covered under The Hague and Geneva Conventions and other appropriate authorities. However, the statute also includes wars of aggression and, at one time, in the process considered adopting a very broad range of crimes for illegal activity. To make matters worse, the court itself largely defines the crimes over which the court has jurisdiction. This makes it a challenge to predict in advance how the court might rule in a given case.

Notwithstanding the United States' objections, how does the court function? The treaty itself has 128 articles divided into 13 parts covering such areas as establishment of the court, jurisdiction, admissibility, and applicable law; general principles of criminal law; compositions and administration of the court; investigation and prosecution; trial, penalties, appeal and revision; international cooperation and judicial assistance; enforcement; assembly of states parties; financing; and final clauses.²⁷

The court is set up in three chambers that includes a pre-trial branch, trial branch, and appeals division. In addition, the ICC has an Office of the Presidency, Office of the Prosecutor, and Registry Division. The treaty specifies that there be 18 judges. Three judges (president, first vice president, and second vice president) serve in the Office of the Presidency.²⁸

The appeals division consists of the president and four other judges. The judges serve their entire terms of office in the appeals division. The trial and pretrial divisions have a minimum of six judges each. Teams of three judges then hear cases. Judges in the trial and pretrial divisions serve for three years. If their term has not yet expired, they move to another cham-

ber. However, they do not move to the appeals division, and they cannot participate in the same case as it moves through the various divisions.²⁹

The countries that are signatories to the treaty also nominate judges who are pulled from two broad categories. The first category mandates that the judge must “have established competence in criminal law and procedure, and the necessary relevant experience whether as judge, prosecutor, advocate, or in other similar capacity, in criminal proceedings.” The second category requires that the judge “have established competence in relevant areas of international law such as international humanitarian law and the law of human rights, and extensive experience in a professional legal capacity which is of relevance to the court.”³⁰

The first category is made up largely of criminal lawyers. Members of the second category do not have to be lawyers or judges. They could acquire experience as members of a human rights organization. The only stipulation is that the pretrial and trial chamber must be made up predominantly of judges with criminal trial experience, that not fewer than nine of the 18 judges must come from the first category, that not fewer than five judges must come from the second category, and that not more than two judges may come from the same country. Judges are elected by secret ballot by members who are signatories to the treaty. The 18 candidates with the most votes are elected if they received at least two-thirds of the votes of the members present. If there are not 18 candidates with a two-thirds majority elected on the first ballot, subsequent votes are held until all 18 positions are filled. Judges serve for three-, six-, or nine-year terms. The term of the initial judges is determined by lot, therefore, one-third of the judges serve in each term. Judges who serve a three-year term are eligible for reelection. Judges who serve six- or nine-year terms are not eligible for reelection. The president of the ICC determines which judges serve on a full-time basis and which judges serve on a part-time basis.³¹

The election of prosecutors is similar. Each state that is a party to the treaty may nominate one candidate. The prosecutor is the candidate who receives the most votes, provided that

candidate receives a two-thirds majority. The prosecutor may be assisted by one or more deputy prosecutors. For each deputy prosecutor position, the prosecutor nominates three candidates. The candidate with the most votes is elected, provided that candidate receives a two-thirds majority. Again, no two prosecutors may be of the same nationality. Prosecutors serve on a full-time basis for nine-year terms. They are not eligible for reelection.³²

Implication for the War Fighter

This paper started with the question of whether US military members could or would likely to be subject to the jurisdiction of the ICC. The answer can be complex and defies a clear-cut explanation, but there are some guiding principles. In part, the answer depends on the framework of analysis. Looking at the question from legal, political, and normative perspectives can yield differing results.

Before engaging in this analysis, it is worth reviewing United States' practices that were raised earlier in this paper. The modern way of waging war differs somewhat from several of the earlier examples. Today, the United States is much more sensitive to noncombatant casualties. The bombings of Hiroshima and Nagasaki are not likely to be repeated in the near future. Additionally, the US military now routinely trains and gives greater emphasis to the LOAC. Atrocities such as those committed by Lieutenant Calley are not in the near future. If such atrocities do occur, they likely will be isolated incidents and be handled by the Uniform Code of Military Justice (UCMJ). Thus, the United States probably will not engage in the worst abuses that the ICC was established to deal with.

If US forces are vulnerable to prosecution, it will likely occur for lesser war crimes or gray areas or for the actions of isolated soldiers. The other way that US military personnel or political leaders might be vulnerable to prosecution is for aggressive war. Some scholars have argued that any war fought without explicit UN backing is an aggressive war. They then argue that Operation Allied Force and Operation Iraqi Freedom were aggressive wars.

Assuming Operation Allied Force represents a typical US operation, is the United States legally liable to the ICC? The first consideration is jurisdictional. The United States signed the Rome Treaty on 31 December 2000, but on 6 May 2002, the United States said to the UN,

This is to inform you, in connection with the Rome Statute of the International Criminal Court adopted on 17 July 1998, that the United States does not intend to become a party to the treaty. Accordingly, the United States has no legal obligations arising from its signature on 31 December 2000. The United States requests that its intention not to become a party, as expressed in this letter, be reflected in the depositary's status relating to this treaty.³³

However, two things may give the ICC jurisdiction over US forces. The first is very clear. Operations that take place in countries that have ratified the treaty are subject to ICC jurisdiction. If US forces engage in operations in foreign countries that have ratified the treaty, like Afghanistan or Bosnia, then they are subject to ICC jurisdiction. The second way that the ICC could likely obtain jurisdiction is murkier. Once the treaty is accepted by enough nations, it could be afforded the status of customary international law. Exactly when a practice becomes customary international law is open to debate, but the more countries that ratify the Rome Treaty, the more likely it becomes that the ICC will be customary international law. The problem from the US perspective is that whether or not something is customary international law would have to be litigated in an international court. The only international court with jurisdiction is the ICC; therefore, the ICC would have to rule on its own legality. The World Court in The Hague is an international court, but its jurisdiction is limited to disputes between states rather than war crimes issues.

There is a third way that a nonsignatory country can become subject to ICC jurisdiction, but it only merits a passing comment: a nonsignatory country can agree to ICC jurisdiction for a particular case.³⁴ There may be at least one other way a person from a state that is not a party to the treaty could become subject to the jurisdiction of the court. Under Article 15, the prosecutor, with concurrence by the retrial chamber may initiate investigations *proprio motu* or on his own initiative. If the prosecutor having initiated such an investigation deter-

mines that a crime that is within the jurisdiction of the court has been committed, he or she can then present it to the court for resolution. In short, the jurisdiction of the court is yet to be determined.

The US government is well aware of the jurisdictional problems imposed by the Rome Treaty.³⁵ Because of these concerns, the United States sought and received a 12-month exemption from ICC jurisdiction for all peacekeepers engaged under UN authority. This exemption meant that for the period 1 July 2002 to 1 July 2003, the United States was not legally liable to the ICC if it acted under UN resolutions.³⁶ Thus, for most operations, the United States is temporarily not subject to ICC jurisdiction. Once the exemption expires, the United States will be liable to ICC jurisdiction if the operation occurs in a signatory country or the ICC becomes customary international law. While the exemption is in place, the United States is legally subject to ICC jurisdiction when it fails to receive UN backing, such as in Operation Allied Force or Operation Iraqi Freedom.

In addition to obtaining exemption from the ICC for all peacekeepers engaged under UN authority, the United States has decided to seek bilateral agreements with countries under paragraph two of Article 98, "Cooperation with respect to waiver of immunity and consent to surrender," of the Rome Treaty.³⁷ Essentially, this article prohibits the ICC from asking for assistance in the court's business that would require the requested state to act inconsistently with its obligations under international law or agreements unless the court first obtains permission from the state affected. As part of these Article 98 agreements with the United States, countries also pledged not to refer crimes covered by the treaty to the ICC without permission from the United States.

The United States was obviously aware of the ICC implications for Operation Iraqi Freedom when it chose to engage in the operation even though neither it nor Iraq was a party to the Rome Treaty. There are two reasons for this. First, the United States felt confident that none of its forces would commit war crimes, and, second, if an isolated event did occur, the United States would handle it under the UCMJ.

Regardless, there is significant difference regarding the theoretical and legal question of jurisdiction and the practical matter of enforcing that decision. Simply put, the ICC lacks formal enforcement mechanisms. The ICC can only enforce its decisions with the consent of the international community (perhaps the Security Council). Since the United States has veto authority in the Security Council and is the largest, perhaps only, remaining superpower, it is only bound by the ICC if it agrees to be bound. The political answer then is that the United States is not subject to ICC jurisdiction. The legal answer is open to debate.

Political decisions do have consequences. The United States can thumb its nose at the ICC, but the price to be paid is world influence and world resentment. It is much harder to form coalitions when other countries perceive the United States as being above the law. Resentment occurs, and this could lead to increased terrorist attacks as anti-US rhetoric and propaganda value of non-US acceptance of the ICC becomes an issue.

This leads to the last part of the analysis: normative. Should the United States become subject to ICC jurisdiction? In one sense, this is an easy question to answer. A system of laws is only effective if all parties are treated equally. On this level, every country, including the United States, should be bound by the ICC.

This is easier said than done. As always, the devil is in the details. The United States fears ICC jurisdiction because of practical problems in implementing the treaty. Any signatory country, including those engaging in an aggressive war can refer charges to the ICC. Political prosecutions are a legitimate concern. It would not be ethically defensible for the United States to liberate a country and then be subject to prosecution from the defeated enemy. On the other hand, is victor's justice under the guise of international law defensible?

Another problem with the ICC is the lack of established checks and balances. In essence, the ICC answers only to itself, and there is no way to ensure that judges are truly objective. While it is true that all human beings have biases and nobody is ever truly objective, at least in the domestic court analogy, the biases are more controllable.

Having said this, not all of the US objections are ethically defensible. One of the objections is that the United States pays more for peacekeeping operations and engages in them more frequently and thus should have a greater say in prosecution implementation. This turns objectivity on its head! The United States is rightly concerned that it could be the victim of nonobjective judges. How then can we justify having a greater say? The only way that political jurisdiction is ethically defensible is if equality before the law is more than just a phrase. The United States does not deserve a greater say. What it deserves is a fair hearing from objective judges. Just because these objective judges come from smaller countries that do not take part in peacekeeping operations does not necessarily diminish their objectivity.

What does all this mean for the war fighter? Legally, whether the United States is subject to ICC jurisdiction depends on the circumstances. Politically, the United States does not fear the ICC because we can defy it if we so choose. Ethically, we should be subject to ICC jurisdiction but only once objectivity concerns are solved. The bottom line for the war fighter is that as long as the US government supports the actions of the war fighter, he or she does not need to fear prosecution. When the United States does not support the war-fighter's conduct, the military member is far more likely to be prosecuted in a US military court.

Conclusion

The objective of this project was to determine whether members of the United States Armed Forces would be subject to prosecution by the ICC. By examining past history, we see that United States Armed Forces' members have committed atrocities that may fall under ICC jurisdiction. The fact remains though that the United States has not ratified the statute and claims not to be bound by the ICC, and this has created several problems with a number of America's allies, especially many in Europe.

The answer to the problem is legal, political, and moral. From a legal perspective, the answer is that when the conditions of the statute are met, the United States is subject to ju-

risdiction. This is precisely why the United States has worked so hard for the UN to grant peacekeepers an exemption to the ICC. This exemption gives the US refusal an air of legitimacy. The political answer is that the political realist perspective means that the United States as a superpower can refuse to be bound. The ICC lacks any type of effective enforcement mechanism except consent of the states. Notwithstanding, the legal and political issues, should the United States, as a sovereign nation, submit itself to the judgment of the world community? Here the issue is more complicated. Clearly, the United States does not see itself as above the law or able to act unilaterally in all cases. The simple answer is that the United States should submit itself to judgment by the world community. In the realist perspective, this happens every day through the instruments of national power. The only ethical justification that can be given for refusal is that the system is so flawed that it lacks due process and justice. This is exactly the argument that the United States makes. However, in many cases, due process and justice are in the eye of the beholder.

The bottom line for the US war fighter is that the United States has the political strength to avoid ICC jurisdiction. The United States does not want to rely on power and politics, so it makes ethical arguments on why it should not be bound and obtains Article 98 agreements (e.g., exemptions to ICC jurisdiction) or refuses to place its military members in peacekeeping operations where such exemptions are not in place. While not everybody accepts the US ethical argument in favor of these agreements, the fact is that they do exist. For the foreseeable future, and especially as long as the exemptions are renewed by the UN Security Council, the United States will only be bound by the ICC when it wants to be bound. The likelihood is this will never occur because the United States prefers to prosecute its own people in its own courts. The US position will always be that justice was done in the United States. The ICC only has a role when sovereign countries refuse to prosecute their own nationals or the chief prosecutor determines, with no appeal, that the country failed to adequately address the offense.

Notes

1. Michael Walzer, *Just and Unjust Wars*, 3d ed. (New York: Basic Books, 2000), 5.
2. *Ibid.*
3. Quoted in Plato, "The Republic" in Paul Christopher, *The Ethics of War and Peace* (Upper Saddle River, N.J.: Prentice Hall, 1994), 10.
4. Walzer, 33–34.
5. Paul Fussell, *Wartime: Understanding and Behavior in the Second World War* (New York: Oxford University Press, 1989), 152.
6. Walzer, 312.
7. *Ibid.*, 311.
8. Christopher, 146–49.
9. Justice Murphy wrote a stinging dissent of the Yamashita death sentence. See "The Yamashita Case" in Leon Friedman, *The Law of War: A Documentary History* (New York: Random House, 1972).
10. James Harder, "Military Morale Sinks to a New Low," *Insight on the News*, 27 November 2000, <http://www.insightmag.com/news/2000/11/27/Nation/Armed.Services.Military.Morale.Sinks.To.New.Low-208650.html>.
11. Walzer, 4–6.
12. For additional information, see Andrew Ferguson, "The Last Battle of the Civil War," *The Weekly Standard* 8, no. 16 (30 December 2002).
13. Bradley F. Smith, *The Road to Nuremberg: How the Allies Finally Agreed to Try the Nazi Leaders Rather Than Summarily Shoot Them* (New York: Basic Books, 1981), 4.
14. *Ibid.*, 45.
15. *Ibid.*, 179.
16. *Ibid.*, 51.
17. *Ibid.*, 70.
18. James G. Apple, "Former U.S. Judge Presides at First International War Crimes Tribunal Since Nuremberg; McDonald Heads Three-Judge Panel in The Hague," *International Judicial Observer*, 3 September 1996, 1.
19. *Ibid.*
20. *Ibid.*
21. Rome Statute of the (ICC), 60, <http://www.un.org/law/icc>.
22. Web site of the ICC, <http://www.un.org/law/icc>. See appendix.
23. "International Criminal Court," 27 January 2003, <http://www.globalissues.org>.
24. James Crawford, "ILC Adopts a Statute for an International Criminal Court," *American Journal of International Law*, 99, no. 2 (April 1995): 404.
25. Capt Andrew S. Williams, "The Proposed International Criminal Court: An Imminent Danger?" *The Reporter Air Force Recurring Periodical* 51-1, 27, no. 2 (June 2000): 4–5.
26. *Ibid.*, 5–6.
27. Rome Statute of the International Criminal Court, 17.
28. *Ibid.*
29. *Ibid.*, 17–19.

30. Ibid., 18.

31. Ibid., 19.

32. Ibid., 21-22.

33. Web site of the ICC, <http://www.un.org/law/icc>.

34. Rome Statute of the ICC, 2, from <http://www.un.org/law/icc>.

35. For an in-depth discussion on this matter, see D. J. Scheffer, "The United States and the International Criminal Court," *The American Journal of International Law* 93 (1999): 12-22.

36. The United Nations has extended this exemption.

37. As of the end of July 2003, more than 50 countries had signed US impunity agreements (Article 98 agreements) with the United States. The coalition for the ICC in an article dated 18 April 2003, entitled "US Bilateral Immunity of So-called 'Article 98' agreements," reported that "many governmental, legal and non-governmental experts" believe that the Article 98 agreements are contrary to international law and the Statute of Rome itself, 3 February 2004, <http://www.globalpolicy.org/intljustice/icc/2003/0606usbilaterals.htm>.

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The International Criminal Court: A Case of the United States Having Its Cake and Eating It Too?

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We live in a golden age of impunity in which a person stands a better chance of being prosecuted for killing one person than for killing 100,000 or a million people.

—Michael P. Scharf

On 1 July 2002, the long-standing dream of many in the UN to create a permanent international tribunal to address atrocities against mankind became a reality when the ICC opened for business. ICC supporters have hailed the court as the missing link in the international legal system as it provides a permanent mechanism to hold individuals—not nation-states—responsible for acts of genocide and egregious violations of human rights.¹ By having a permanent mechanism to address individual culpability, ICC supporters reason that future barbarians in the image of Pol Pot or Slobodan Milosevic will be deterred from committing atrocities out of fear of ICC prosecution. Provided deterrence fails, ICC supporters believe the permanent tribunal will finally ensure that all individuals who commit these unthinkable acts against mankind will be brought to justice swiftly and efficiently.

Although a long-time supporter of a permanent international tribunal to address human rights atrocities, the United States was one of only a handful of countries to oppose the creation of the ICC in its current form. While the United States lodged a number of procedural objections and due process concerns regarding the creation of the ICC, its foremost complaint stemmed from a fear that the ICC would be used as a political weapon to unfairly target US political leaders and military personnel for actions taken in the interest of national security.

This research paper examines the legal framework of the ICC to determine whether the tribunal does put policy makers and military personnel at risk for politically motivated prosecution as claimed by the United States. Additionally, this paper briefly examines the potential foreign policy impact caused by US rejection of such international bodies as the ICC. The second part of this paper provides a brief historical examination of the ICC leading to its creation in July 2002. The third part then examines the in-depth involvement of the United States in formulating many of the substantive provisions of the current ICC. The fourth part addresses the question of whether US policy makers and military personnel are actually at risk for politically motivated prosecution because of the current ICC process. This examination includes a discussion of some of the specific provisions that led to the United States' withdrawing its initial support of the ICC. The next part looks at the current position of the United States to examine whether modifications to the current treaty language will lead to US support for the tribunal. The last part looks at the possible foreign policy implications caused by the rejection of the ICC. As the United States continues its attempt to employ international coalitions to address global diplomatic, economic, and security problems, the perception of other countries that the United States "will only play when the rules are in its favor" may very well have an adverse impact on its future standing in the international community.

History of the ICC

On 9 December 1948, after the completion of the Nuremberg and Tokyo War crimes tribunals, the UN recognized the need for a permanent international tribunal to prosecute such war atrocities as genocide.² Because of the involvement of the International Law Commission and many United Nations member states including the United States, a permanent international court to address war atrocities was very close to becoming a reality in the early 1950s.³ However, the Cold War and its related political consequences caused the international criminal tribunal to be placed on the UN's back burner.

In December 1989, at the request of Trinidad and Tobago, the UN resurrected the idea of a permanent international criminal tribunal.⁴ As had been done in the early 1950s, the International Law Commission was tasked by the UN to submit a draft statute to establish an international criminal tribunal.⁵ While the International Law Commission was working on a draft statute, the atrocities in the Balkans (former Yugoslavia) and Rwanda provided an additional incentive to create a permanent court to address human rights atrocities. The International Law Commission responded to the tasking in 1994 when it adopted a draft statute at its 46th session and recommended that an international conference of plenipotentiaries be convened to paper the draft statute and to conclude a convention on the establishment of an ICC.⁶

In light of the draft statute from the International Law Commission, the UN General Assembly established an ad hoc committee of UN member states to examine the substantive and administrative issues with the International Law Commission's proposal.⁷ After the ad hoc committee filed a report favorable to the creation of an ICC, the General Assembly created a Preparatory Committee to further refine the draft statute submitted by the International Law Commission.⁸ Specifically, the General Assembly charged the Preparatory Committee to

discuss further the major substantive and administrative issues arising out of the draft statute prepared by the International Law Commission and, taking into account the different views expressed during the meetings, to draft texts, with a view to preparing a widely acceptable consolidated text of a convention for an ICC as a next step towards consideration by a conference of plenipotentiaries, and also decided that the work of the Preparatory Committee should be based on the draft statute prepared by the International Law Commission and should take into account the report of the ad hoc committee and the written comments submitted by States. . . .⁹

On 3 April 1998, after a number of conferences, the Preparatory Committee completed a draft convention on the establishment of an ICC.¹⁰ Thereafter, the UN Diplomatic Conference of Plenipotentiaries on the establishment of an ICC held meetings from 15 June until 17 July 1998 in Rome, Italy. The conference was attended by 160 nation-states, including the United States. In addition to UN member states, observers from other

international bodies and nongovernmental organizations were also invited to participate in the Rome Conference.

The stated purpose of the diplomatic conference was to approve a convention for the establishment of an ICC.¹¹ This conference goal easily could be viewed as a lofty goal considering the conference was attempting to incorporate the individual political interests of approximately 160 nation-states. Surprisingly, however, a draft statute¹² did emerge during the early morning hours of 17 July 1998, the last day of the diplomatic conference.¹³ The statute set out the ICC's jurisdiction and judicial structure, as well as the basic elements of most offenses. This statute, hastily finalized by a small number of conference representatives, was presented to the conference delegates as a final draft statute.

Because the United States, in particular, objected to numerous provisions in the last-minute draft statute, the US delegation worked on the last day of the conference to gain support for modifications to the final draft that may have allowed the United States to support the final document produced by the Rome Conference.¹⁴ When it was readily apparent that further modifications to the final statute would not be considered before the end of the conference, the United States requested a plenary session vote on the statute. Contrary to the hopes of the United States, the Rome Statute of the ICC (also referred to as the Treaty of Rome) was adopted by a vote of 120 countries in favor, seven against, and 21 abstaining.¹⁵ Although a vote was not recorded, observers noted that the United States voted against the Rome Statute along with China, Israel, Iraq, Libya, Qatar, and Yemen.¹⁶

Pursuant to the terms of the Rome Statute as adopted, the ICC would become effective on the first day of the month, 60 days after the date that the 60th country to the Rome Statute ratified or accepted the document.¹⁷ In preparation for the ICC becoming operational, the Rome Statute provided that a Preparatory Commission for the ICC would be established to prepare proposals that addressed the working details of the ICC.¹⁸ These working details consisted of a number of substantive issues such as rules of evidence and procedure, elements of crimes, rules of procedure for the Assembly of State

Parties,¹⁹ and financial regulations.²⁰ The commission was also charged with developing proposals for the crime of aggression, including crafting a definition of the crime and developing its elements.²¹

The Preparatory Commission began its meetings on 16 February 1999.²² During its fifth session on 30 June 2000, the commission submitted a final draft text for the rules of procedure and evidence, and the draft elements of crimes in accordance with the compliance date set by the Rome Statute.²³ The commission submitted its final report after completion of its 10th session on 12 July 2002, noting that it had completed its mandate as directed by the Rome Statute.²⁴

On 11 April 2002, as the Preparatory Commission continued to finalize the substantive and procedural issues for the ICC, the Rome Statute was ratified by its 60th signatory.²⁵ Thus, on 1 July 2002, the ICC came into existence a half-century after the initial United Nations proposal. Pursuant to the terms of the Rome Statute, the ICC was given jurisdiction over such crimes of concerns to the international community as genocide, crimes against humanity, war crimes, and crimes of aggression.

Although the requisite number of treaty ratifications allowed the ICC to stand up on 1 July 2002, the lack of rules and procedures, facilities, and personnel ensured that the ICC would remain a work in progress for some time. With that said, however, the ICC has taken great strides in moving towards a functional court. For example, the Assembly of State Parties to the Rome Statute of the ICC²⁶ (hereafter Assembly) held its first session 3–10 September 2002 to approve the draft rules of procedure, rules of evidence, and elements of crimes as previously submitted by the Preparatory Commission.²⁷ Subsequently, during its sessions in February 2003, the assembly successfully elected 18 sitting judges for the ICC. The ICC has also secured temporary facilities and broken ground on its own facility at The Hague, Netherlands, in accordance with the Rome Statute. The assembly hopes that this new facility will be completed and ready for occupancy between 2007 and 2009.²⁸

Because of the progress made in establishing a working tribunal, an inaugural ceremony for the ICC occurred on 11

March 2003 at The Hague.²⁹ The purpose of the ceremony was to allow the previously elected judges to take their oaths of office. With these key personnel in place, the Assembly believed the remaining principal officers of the ICC, the registrar and the prosecutor, would be elected soon. Provided these key officers were elected as planned, the assembly envisioned that the ICC would be a functional tribunal by the end of 2003.³⁰

Involvement of the United States

There can be no question that the United States has long supported using the rule of law to address such human rights atrocities as genocide and crimes against humanity. At the Nuremberg and Tokyo tribunals after World War II, the United States was instrumental in ensuring that adequate legal process—and not revenge—was the guiding principle of justice.³¹ The United States' chief prosecutor to the Nuremberg tribunal, Supreme Court Justice Robert H. Jackson, eloquently discussed this notion of justice when he provided his opening statement:

The privilege of opening the first trial in history for crimes against the peace of the world imposes a grave responsibility. The wrongs, which we seek to condemn and punish have been so calculated, so malignant and so devastating, that civilization cannot tolerate their being ignored because it cannot survive their being repeated. That four great nations, flushed with the victory and stung with the injury stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of the law is one of the most significant tributes that Power ever has paid to Reason.³²

Because of its support for the rule of law, the United States was a primary supporter of the UN proposal after World War II for a permanent international criminal tribunal. While the cold war prevented the UN from following through on its initial proposal, this delay did not reduce US support for a permanent tribunal to address human rights atrocities committed during conflict. Thus, in the early 1990s when the UN again raised this issue, the government of the United States actively supported the establishment of a permanent international court to address human rights atrocities.³³

The support for a permanent international tribunal emanated from both the legislative and executive branches of the US government.³⁴ In addition to the significant political, administrative, and financial support provided to the ad hoc tribunals in the former Yugoslavia and Rwanda, the US Congress publicly supported a permanent tribunal. For example, in 1993, the US Senate published findings that the establishment of an ICC with jurisdiction over crimes of an international character would greatly strengthen the international rule of law and serve the interests of the United States and the world community.³⁵ This support from the US Senate culminated with the passage of Senate Joint Resolution 32, which called for the United States to support efforts of the UN to establish an ICC.³⁶

The House of Representatives, likewise, provided support to the call for a permanent international court. In July 1997, various members of the House of Representatives introduced a joint resolution calling for the United States to support and fully participate in the negotiations at the United Nations to establish a permanent ICC.³⁷ One of the sponsors of the resolution, Cong. Patrick Kennedy, noted that the resolution had also garnered the support of the Clinton administration, the Department of Defense, and the Department of State.³⁸

Similar to the legislative branch, the Executive Branch of the United States (US) government was vocal in its support for a permanent criminal tribunal. In fact, President Clinton made six public statements prior to the Rome Conference in 1998 in support of a permanent international court.³⁹ Because of this support, the Clinton administration began in early 1993 to review the proposal for a permanent international court that had been under consideration by the International Law Commission at the request of the United Nations. In fact, the United States was actively involved in shaping the International Law Commission's draft statute for a permanent tribunal.⁴⁰ Although the draft statute was not identical to the position proposed by the Clinton administration, it was the administration's belief that continued negotiations eventually would advance the majority of US concerns.⁴¹

With this hope, the Clinton administration began its interaction with the Preparatory Committee that had been established by the UN prior to the Rome Conference. As was done with the International Law Commission, the US delegation engaged the Preparatory Committee on a number of issues that were of critical importance to the United States. In particular, the United States strongly believed that the United Nations Security Council (UNSC) should retain some significant control over the referral of cases to the new tribunal.⁴² The United States also believed that it was important for the Preparatory Committee to define precisely the types of crimes that would be subjected to the new tribunal's jurisdiction.⁴³

As early as 1995, however, it became clear that the Clinton administration had some serious concerns with the proposed structure of the ICC. In a 15 October 1995 speech at the University of Connecticut, President Clinton first hinted that the support of the United States for the proposed international tribunal was not unconditional.

By successfully prosecuting war criminals in the former Yugoslavia and Rwanda, we can send a strong signal to those who would use the cover of war to commit terrible atrocities that they cannot escape the consequences of such actions. And a signal will come across even more loudly and clearly if nations all around the world who value freedom and tolerance establish a permanent international court to prosecute, with the support of the UNSC, serious violations of humanitarian law. This, it seems to me, would be the ultimate tribute to the people who did such important work at Nuremberg, a permanent international court to prosecute such violations. And we are working today at the United Nations to see whether it can be done.⁴⁴

As the Preparatory Committee closed in preparation for the Rome Conference in July 1998, a number of unresolved issues still faced the United States on how the proposed ICC would function. The inability to obtain widespread support for a significant referral role of the Security Council was especially troubling for the United States delegation. Amb. David J. Scheffer highlighted this specific concern during an address at The Hague on 19 September 1997. In referencing the referral process for cases to the tribunal prosecutor, Ambassador Scheffer provided the following warning:

We are, however, at a crossroads in the UN talks. Governments must make maximum efforts over the next eight months to reach agreement

on as many as possible of the remaining issues. Otherwise, we risk going to Rome in June of next year for a diplomatic conference with a deeply flawed document, weighed down with brackets that a single session, even if it is six weeks long, simply will not overcome.⁴⁵

On the eve of the Rome Conference, however, the US delegation believed it could still develop an ICC that would meet its requirements. However, the United States made it clear to the attendees of the Rome Conference that the United States would not sacrifice its national interest in pursuit of an international tribunal. In a press release three days before the Rome Conference, the State Department publicly stated the US position on the establishment of a permanent ICC.

From 15 June through 17 July, governments will gather in Rome for the United Nations Diplomatic Conference on the establishment of an ICC (ICC). The United States supports the creation of a properly-constituted ICC that will promote justice and deter those who would commit genocide, war crimes, and crimes against humanity.

But creation of the court will not take place in a vacuum. We must distinguish carefully between the ideal of an ICC and the reality of the world today. Negotiating the court's establishment should not ignore existing institutions that can support the court's goals or vexing problems that could cause its politicalization. The treaty requires a balanced and realistic approach that will permit both the pursuit of justice and the pursuit of international security. We must be careful to guard against the creation of an ICC that politically-motivated states could manipulate to challenge the actions of responsible governments by targeting their military and civilian personnel for criminal investigation and prosecution.

The Clinton administration supports the creation of a strong, effective, and properly constituted court. However, our desire to support the process does not dilute our determination to design a document that reflects a variety of US concerns, including the role of the UN Security Council, deferral of capable national legal systems, jurisdiction, elements of offenses, rules of evidence, and criminal procedure. We remain hopeful that governments will resolve their remaining differences and that the conference will produce a statute for the court that the international community, including the United States, can embrace.⁴⁶

Thus, while the US support for a permanent ICC appeared to some to be "strong and resolute,"⁴⁷ the unresolved issues clearly posed significant obstacles for the US delegation at the Rome Conference.⁴⁸

The US delegation successfully remedied many of the concerns it brought to the Rome Conference. For example, the

delegation ensured that the crimes subject to the court's jurisdiction were appropriately defined in accordance with customary international law.⁴⁹ The United States also negotiated the provisions in the final treaty that ensured specific crimes against women (e.g., rape, forced pregnancy) were included as crimes against humanity.⁵⁰ Moreover, the Rome Conference also accepted the US proposal that the elements of proof and rules of evidence and procedure should be approved by the Assembly of State Parties, rather than the tribunal judges.⁵¹

The US delegation also was able to ensure that the court's jurisdiction covered atrocities occurring during internal conflict.⁵² The ad hoc tribunals in the former Yugoslavia and Rwanda had shown that internal conflicts also generate the types of atrocities subject to the court's jurisdiction. The delegation was also successful in ensuring a number of general criminal law principles associated with war crimes prosecutions were included in the Rome Statute. These principles, including command responsibility, superior orders defense, and defense of mission-essential property, helped to ensure the draft treaty arose to the level of justice generally expected in United States courts.⁵³

In addition to these provisions, US negotiators ensured that defendants before the court were provided with almost all of the due process rights afforded by the US Constitution.⁵⁴ For example, defendants before the ICC were provided with a presumption of innocence,⁵⁵ privilege against self-incrimination,⁵⁶ right to counsel,⁵⁷ right to a speedy trial,⁵⁸ and right to confront witnesses.⁵⁹ Additionally, the delegation successfully negotiated provisions in the final treaty that ensured the protection of national security information brought before the court.⁶⁰ This issue had been a key concern for the US delegation to resolve at Rome.⁶¹

While these accomplishments were significant, the final treaty submitted at the end of the Rome Conference failed to gain US support. While the US delegation levied a number of specific objections to the statute, the primary objections appeared to stem from sovereignty and national security concerns.⁶² The lead negotiator, Ambassador Scheffer, later noted these concerns when he stated:

The US delegation was not prepared at any time during the Rome Conference to accept a treaty text that represented a political compromise on fundamental issues of international criminal law and international peace and security. We could not negotiate as if certain risks could be easily dismissed or certain procedures of the permanent court would be infallible. We could not bargain away our security or our faith in basic principles of international law even if our closest allies reached their own level of satisfaction with the final treaty text. The United States made compromises throughout the Rome process, but we always emphasized that the issue of jurisdiction had to be resolved satisfactorily or else the entire treaty and the integrity of the court would be imperiled.⁶³

However, even after the Rome Statute was approved, the United States continued to work with the Preparatory Commission in hopes of developing a fair and realistic international court.⁶⁴ This hope was discussed in a 1999 article written by Ambassador Scheffer:

While we firmly believe that the true intent of national governments cannot be that which now appears reflected in a few key provisions of the Rome treaty, the political will remains within the Clinton administration to support a treaty that is fairly and realistically constituted. On December 8, 1998, the United States joined a consensus in the UN General Assembly to adopt a resolution that authorizes the work of the Preparatory Commission in 1999. The next step for the United States will be to discuss with other governments our fundamental concerns about the Rome treaty, many of which have been identified in this report. We believe that these and other problems concerning the Rome treaty are solvable. The United States remains strongly committed to the achievement of international justice. We hope developments will unfold in the future so that the considerable support that the United States could bring to a properly constituted international criminal court can be realized.⁶⁵

On 31 December 2001, the date the Rome Statute closed for signatures,⁶⁶ the US delegation had yet to remedy the concerns raised at the Rome Conference. Faced with the deadline for signature, President Clinton signed the Rome Statute on behalf of the United States on that date. While some believed this action was nothing more than a cheap parting shot at the incoming Bush administration,⁶⁷ President Clinton noted that his signature was only given to ensure the United States could continue to work with the other signatories to the Rome Statute to develop a permanent international court that the United States could support.⁶⁸ President Clinton made it very

clear, however, that his signature in no way invalidated the US concerns that the Rome Statute contained significant flaws.⁶⁹

On 11 April 2002, the Rome Statute was ratified by its 60th signatory. While the United States had made some improvements to the Rome Statute during the Preparatory Commission meetings, the primary objections developed during the Rome Conference remained when the Rome Statute entered into force. Faced with the fact that the ICC would become effective on 1 July 2002, the Bush administration provided the secretary general of the United Nations with written notice on 6 May 2002 that the United States was withdrawing its signature from the Rome Statute.⁷⁰ In taking this action, the Bush administration wanted to remove any unwarranted expectations that the United States would be actively involved with the ICC once it became effective.⁷¹

Validity of United States Position

The United States, throughout the ICC negotiations, raised a number of relevant and credible objections to the terms of the Rome Statute. Some of these objections, such as providing ICC defendants with due process protections, appear to have been worked out to the general satisfaction of the United States during the negotiations leading up to the ICC becoming a functioning international body.⁷² Many other objections, however, remain unresolved. For example, the Rome Statute restricts nation-states from attaching reservations to the underlying treaty.⁷³ This restriction arguably violates the US Constitution as the Senate is given the power to attach reservations to all treaties joined by the United States.⁷⁴

While all of the objections raised by the US government are important to consider, one primary objection has continued to be raised throughout the ICC negotiations. Specifically, the United States believes that the Rome Statute creates a process that will subject US civilian leaders and military personnel to politically motivated prosecutions for actions taken to protect US interests and its national security.⁷⁵ The United States holds this belief because the process set up by the Rome Statute generally fails to make the ICC prosecutor accountable

to the UN or its member states for official actions taken in the name of the ICC.

This reasoning for rejecting the ICC has been labeled by at least one commentator as “prudence, paranoia, or extreme miscalculation.”⁷⁶ Based on an analysis of the terms of the Rome Statute and a review of recent history, US concern on this issue should be labeled as prudence. While it is unlikely that US personnel will actually be prosecuted by the ICC due to the inherent protections built into the Rome Statute, there is a substantial risk that politically motivated charges will result in unnecessary investigations by the ICC prosecutor against US political leaders and military personnel. These investigations, although doubtful to ever result in a trial, will run a significant risk of negatively impacting the international standing of the United States. Moreover, although prosecution is unlikely, even proponents of the ICC cannot state with certainty that the tribunal will not become a forum to remedy a foreign policy vendetta.⁷⁷ Only time will tell.⁷⁸

US concern on this issue stems from the creation of a *proprio motu* or self-initiating prosecutor.⁷⁹ The prosecutor, pursuant to the terms of the Rome Statute, can initiate investigations without a referral from either a state party to the Rome Statute or the UNSC.⁸⁰ Instead, the prosecutor can begin an investigation on his or her own volition. Additionally, the prosecutor can act upon complaints or information tendered by nonparties to the Rome Statute, including nongovernmental organizations, intergovernmental bodies, or even individual citizens.⁸¹

Because of the freedom inherent in the Rome Statute, the ICC prosecutor remains largely unaccountable to either the assembly of state parties or the UN General Assembly for his or her actions.⁸² The United States objected to this unconstrained power as it lacked the checks and balances found within the democratic system of the United States.⁸³ Unlike US judicial systems that hold the prosecutor accountable for his or her actions to another political branch of state or federal government, the *proprio motu* prosecutor is in reality answerable to no other state or institution other than the ICC itself.⁸⁴

In rejecting the Rome Statute on this basis, the United States argued that an unconstrained prosecutor would result in prosecutions being based on political agendas, not on evidence and neutral prosecutorial judgment.⁸⁵ In his testimony before the US Senate, Ambassador Scheffer explained his concerns about the potential politicalization of the ICC process.

The prosecutor undoubtedly is going to have to become not only the receiver of an enormous amount of information in this capacity, he will have to decide, and he will have to make judgments as to what he pursues and what he does not pursue for investigative purposes. In the end, those kinds of judgments by the prosecutor will inevitably be political judgments because he is going to have to say no to a lot of complaints, a lot of individuals, a lot of organizations that believe very strongly that crimes have been committed, but he is going to have to say no to them. When he says no to them and yes to others and he is deluged with these, he may find that he ends up making some political decisions.⁸⁶

The United States was concerned with potential politicalization of the ICC because of its unique position in the foreign policy arena. The United States is engaged in various foreign policy missions (e.g., peacekeeping or humanitarian) in almost 100 countries around the world at any given time.⁸⁷ Because of the United States' political, economic, and military strength, and its willingness to deploy personnel around the world in support of its foreign policy goals, it is often difficult for organizations or other nation-states to directly influence US policy. However, the ICC, with its unconstrained prosecutor, provides an organization or nation-state with a mechanism to attack or frustrate US foreign policy by holding at risk those policy makers and military personnel who are used to implement that policy.⁸⁸

The ICC will especially provide opponents of US foreign policy with the ability to influence employment of the US military forces. Because the power of the US military is markedly superior to other countries, the ability to influence US employment of its military forces is virtually nonexistent. However, the ICC provides such a mechanism. As one commentator noted,

When frustrated by an ability to influence US foreign policy directly, some may be inclined to impact it indirectly by targeting those who make and implement that policy. The military missions of our current

era are markedly unlike the “traditional” cold-war scenarios of the past. Today, the US military finds itself involved in a complex mixture of peacekeeping activities, humanitarian and disaster assistance missions, counterterrorism and counterproliferation missions. Each is unique and often carries significant political “baggage” in an increasingly fractious world and witnesses the situations in Kosovo and Iraq, and the conflicts raging in Africa. In these circumstances, the military is often the instrument of first resort for policy makers. An ill-constituted ICC with the authority to make the final determination as to which cases will be investigated or come before it invites the use of the court for political mischief. Those who would deny the possibility—even likelihood—of such ill-intended referrals overlook the natural trajectory of emotions stirred by the use of armed force.⁸⁹

In response to its concerns about politicalized prosecutions, the United States unsuccessfully proposed prior to the Rome Conference that the UNSC or a state party to the treaty must first refer an overall situation to the office of the prosecutor before a case is opened by the ICC.⁹⁰ Once a general situation had been referred, for example, the Rwandan massacres, the prosecutor would be free to investigate and prosecute the allegations without any external interference.⁹¹ As noted by Ambassador Scheffer during testimony before the US Senate, the United States believed this referral process removed any risk of political prosecutions as the UNSC, unlike the *proprio motu* prosecutor, was accountable to its members.

The value of having a government to refer it or for the Security Council to refer it is that they are accountable to somebody. They are accountable either to their people, their populace, for doing so, or the Security Council is accountable to the UN system. We believe that the fundamental principle of accountability should be at the core of referrals to this court.⁹²

Proponents of the Rome Statute, however, argued the United States’ proposal to tie the Security Council to the referral process did more to politicalize the ICC than did the *proprio motu* prosecutor. They argue that the Security Council is nothing more than a political body that would interject political questions into the referral process.⁹³ The *proprio motu* prosecutor system, on the other hand, would be less susceptible to political pressure from individual countries as it would operate outside of a domestic political setting and would be staffed by international personnel from a variety of countries and judicial systems.⁹⁴ These protections, proponents argue, will ensure that irrespon-

sible states will not be able to misuse the prosecutorial process for political purposes.⁹⁵

Moreover, proponents of the ICC believe that other protections in the Rome Statute will ensure that political prosecutions do not result from the ICC process. For example, ICC supporters argue that the requirement for the prosecutor to gain investigatory approval from the Pretrial Chamber of the ICC will ensure that rogue prosecutors, nongovernmental organizations, or nation-states will not use the ICC for political retribution. While the prosecutor can initiate an investigation, Article 15 of the Rome Statute requires the prosecutor to seek authorization from the Pretrial Chamber when the prosecutor believes there exists a reasonable basis to continue the investigation.⁹⁶ It is only after two of three judges of the Pretrial Chamber approve the prosecutor's request that the investigation can continue.⁹⁷ ICC supporters argue this second level of review by the judicial branch will ensure that the ICC is not used for political prosecutions.

This review process, although important, does little to minimize the risk that the ICC will be used to investigate or prosecute spurious allegations. Instead of having one individual to win over, organizations and nation-states that are intent to misuse the ICC will only have to sway two additional individuals to invoke the wrath of the ICC. These three individuals, although elected by the assembly of state parties to the Rome Statute, are all subject to little direct oversight. In fact, it could be argued that the only control by the ICC member states is the authority to remove a prosecutor or judge.⁹⁸ This ability is limited, however, to only those cases in which there is a finding of serious misconduct or serious breach of duties.⁹⁹ Because it will be difficult to prove political motives for an investigation absent a public admission from the prosecutor or judge, this oversight by the assembly of state parties provides little protection to US policy makers and military personnel.

ICC supporters also point towards the principle of complementarity as evidence dispelling the US concerns. The principle of complementarity recognizes that ICC jurisdiction should be secondary or complementary to the national criminal jurisdiction of nation states.¹⁰⁰ Thus, the ICC will only act as an al-

ternative forum to address atrocities when independent and effective judicial systems are not available or fail.¹⁰¹ Provided a national criminal jurisdiction is functioning effectively and handling a complaint also before the ICC, the ICC will defer its investigation in lieu of the national criminal judicial system.¹⁰²

This protection also does little to ensure that US policy makers and military personnel are insulated from political attack. First, the principle will unnecessarily cause the United States to investigate the legality or appropriateness of a military action that it has already deemed to be valid.¹⁰³ For example, provided a complaint was filed with the ICC, the United States would have to investigate and justify every decision regarding military necessity or proportionality in combat.

Second, similar to the discussion regarding the review by the Pretrial Chamber, the finding that a national criminal justice system is investigating an allegation before the ICC is subject to being overturned by two judges in the Pretrial Chamber. Thus, if two judges believe that the United States' handling of a complaint was not sufficient to meet the standards set out in the Rome Statute, the prosecutor can proceed with his investigation and prosecution.¹⁰⁴ As the standard for case admissibility¹⁰⁵ is left to the interpretation of the judges hearing the case, the principle of complementarity alone fails to provide sufficient protection to US policy makers and military personnel.

Proponents of the ICC also hold out the limited nature of the offenses within the jurisdiction of the court as a solution to the US concerns. They believe that the crimes defined by the statute—genocide, crimes against humanity, and war crimes—require such a high threshold for violations that the isolated act by a policy maker or military member will not give rise to the jurisdiction of the ICC.¹⁰⁶ For example, a violation of crimes against humanity requires the person commit the act as part of a widespread or systematic attack against a civilian population.¹⁰⁷ As an isolated act by a US representative will not meet this element of the crime, prosecution by the ICC, proponents argue, could not follow.

With regard to the core crimes within the ICC's jurisdiction, the argument above is supportable. Because of the early work by members of the US delegation to the Preparatory Commission

and Rome Conference, the crimes defined by the Rome Statute ensure that isolated criminal acts are not subjected to the ICC process.¹⁰⁸ These well-defined crimes undoubtedly took the appropriate steps in remedying US concerns.

However, the Rome Statute also allows the ICC to gain jurisdiction over the crime of aggression.¹⁰⁹ This crime was not defined during the Rome Conference. Instead, the decision was deferred to allow the assembly of state parties to craft an appropriate definition for the crime.¹¹⁰ Once the crime of aggression is defined, the ICC's jurisdiction will be extended pursuant to the terms of the Rome Statute.¹¹¹

This open-ended arrangement was a concern that the United States had voiced early during the Preparatory Commission meetings.¹¹² The United States and other countries had long argued that the crime of aggression for individuals had not been defined under customary international law.¹¹³ The United States also had advocated that any determination of aggression had to be linked to the UNSC, as the Security Council is responsible for peace and security under Article VII of the United Nations Charter.¹¹⁴ Because a definition was not developed during the Rome Conference, the final definition of aggression could be unlimited, broadly covering any use of military force or economic sanctions.¹¹⁵ As the definition eventually developed by the Assembly of State Parties will become effective once seven-eighths of the member states complete ratification, the United States could likely be at the mercy of the other countries that fail to share the US foreign policy and national security interests.¹¹⁶

The potential for a politically motivated definition of aggression is significant. For example, one of the definitions proposed by the Preparatory Committee would find a person commits a crime of aggression when, "being in a position effectively to exercise control over or to direct the political or military action of a State, that person intentionally and knowingly orders or participates actively in the planning, preparation, initiation or execution of an act of aggression which, by its character, gravity and scale, constitutes a flagrant violation of the Charter of the United Nations."¹¹⁷ As previous definitions of aggression by the UN General Assembly have defined the term as the use of

armed force by a state against the sovereignty, territorial integrity, or political independence of another state, or in any other manner inconsistent with the charter of the UN, it is arguable that any use of armed forces to protect national security interests could result in political or military leaders being in violation of the Rome Statute.¹¹⁸ Although some of the discussion by the Assembly of State Parties has centered on the need to involve the UNSC in the initial determination of whether the use of force amounts to aggression, there are no guarantees that a restricted definition will find its way into the ICC structure.¹¹⁹

The recent conflict within the UN over the disarming of Iraq provides a cogent example of the possible dangers facing the United States if a broad definition of aggression is added to the ICC's jurisdiction in the future.¹²⁰ The United States has opined that previous UNSC resolutions provide the United States with the necessary authority to forcibly disarm Iraq.¹²¹ As the United States has now employed military force against Iraq, a member of the ICC (e.g., France) opposed to the action could claim the United States engaged in the crime of aggression by using military force without specific UN authorization. Based on the confrontational diplomacy that occurred within the UN over the disarmament of Iraq and the meaning of previous resolutions, the hypothetical outcome discussed above is not beyond the realm of possibility.¹²²

US concerns over the definition of aggression is reinforced by at least one definition in the Rome Statute that reflects political motivations. Specifically, the definition of war crimes within the Rome Statute includes the crime of occupation of territory.¹²³ There is little question that proponents of this crime offered the definition in response to actions by the government of Israel.¹²⁴

The United States argued that the crime of occupation similar to the crime of aggression was not sufficiently recognized by customary international law to be included in the Rome Statute.¹²⁵ With this position known, however, 120 countries still voted to approve a treaty that included the crime of occupation that immediately and directly threatened one nation-state—Israel. As noted by one commentator, the inclusion of

the crime of occupation provides “an excellent example of the politicalization of what is masquerading as a purely legal and judicial process. It is the kind of effort to gain political advantage out of the manipulation of the Statute, the Court and the Prosecutor that we can expect to see no end of.”¹²⁶

Thus, contrary to the arguments from proponents of the ICC, the risk that the crime of aggression could be politicalized in the future is a real concern. Libya, for example, has long argued that aggression should be defined to include the confiscation of property.¹²⁷ Clearly, this definition is politically motivated and based solely on the United States’ actions to freeze Libyan assets. Provided a definition is accepted that fails to consider the right of a nation-state to defend itself and its foreign policy with the use of force, United States’ political and military leaders could find themselves before the ICC for protecting US national security concerns.

Finally, ICC supporters cite the ability of the UNSC to defer investigations as a mechanism that should alleviate the United States’ fear of politically motivated prosecutions.¹²⁸ While Article 16 of the Rome Statute does allow the UNSC to intervene into ICC matters, this check of the prosecutor’s power is blatantly hollow for a number of reasons. First, the UNSC can only defer—not preclude—an investigation or prosecution by the ICC. It only provides temporary protection against politically motivated prosecutions. Thus, if the UNSC fails to renew a situation identified by the ICC as a possible war crime, the prosecutor can reinstate the prosecution. Second, the decision by the UNSC is subject to the veto power of the five permanent members to the UNSC. As such, this mechanism provides little guaranteed protection against the raw power placed in the Office of the Prosecutor.

Interestingly, the United States has seen firsthand how the assembly of state parties will view the UNSC deferral process in the future. On 12 July 2002, the UNSC unanimously adopted Security Council Resolution 1422 that requested the ICC defer prosecution of UN peacekeeping personnel whose countries were not part of the Rome Statute.¹²⁹ This request, made pursuant to Article 16 of the Rome Statute, provided protection to peace-

keeping personnel for actions taken between 1 July 2002 and 30 June 2003.¹³⁰

This resolution was a by-product of the US plan to withdraw its military personnel from peacekeeping operations sponsored by the UN. Because the ICC became functional on 1 July 2002, the United States felt it was necessary to remove its troops from United Nations' missions to protect them from the jurisdiction of the ICC.¹³¹ Faced with the prospect of losing US support for peacekeeping operations, the members of the UNSC exercised their authority under Article 16 and, in effect, deferred any prosecution of Americans by the ICC.

Although not surprising, the United States came under intense criticism for securing the Article 16 protection from the UNSC.¹³² Thus, while some proponents had highlighted Article 16 as a reason for the United States to sign the Rome Statute, others now castigated the UNSC's deferral action as improperly usurping the terms of the Rome Statute.¹³³ As the United States faced significant criticism for deferring crimes that had yet to occur, one can only imagine the uproar that will occur if the UNSC ever defers an actual case against a US political leader or military member accused of human rights atrocities.

Proponents of the ICC believe these provisions discussed above, taken together, provide sufficient safeguards to alleviate concerns raised by the United States. However, even proponents of the ICC cannot provide the United States with assurances that misuse of the ICC will not compromise the expansive foreign policy agenda of the United States.¹³⁴ On the contrary, they can only opine that the chances of politically motivated prosecution are unlikely.

If the rules on complementarity are well crafted, it will be very unlikely that the prosecutor can exceed his or her authority. Concerns about a "rogue" prosecutor are groundless. Thus, it is reasonable to assume that, if war crimes are well defined, complementarity is followed, and the role of the prosecutor is subject to judicial safeguards, *the risk of abuses are practically nil*. My conclusion is that the concerns of the United States are overstated and that the interests of the United States in having an ICC far outweigh the marginal and

far-fetched concerns that have been articulated by political opponents to the ICC.¹³⁵

Based on its foreign policy agenda and its commitment of military forces around the world, the United States decided wisely not to gamble on the hopes of the vocal ICC supporters. Instead, the United States proposed a compromise regarding the referral process that would have eliminated its concerns, while continuing to ensure the ICC prosecutor had the independence to pursue particular cases without undue political interference.

Specifically, the United States proposed provisions to allow nation-states to opt out of ICC jurisdiction for crimes against humanity and war crimes.¹³⁶ This proposal, which had initially been proposed by the International Law Commission in 1994, would have allowed the United States to accept the ICC's jurisdiction over genocide alone. The opt out provision would have then allowed the United States and other treaty parties to examine the functioning of the ICC before submitting its jurisdiction for the other core crimes in the Rome Statute.¹³⁷ This modification to the jurisdiction of the ICC may have allowed the United States to support the Rome Statute. Unfortunately, however, all jurisdictionally related amendments submitted by the United States were rejected.¹³⁸

Faced with the uncertainty surrounding the operational functioning of the ICC, the United States took the prudent course of action in rejecting the ICC. While the US position has been castigated by ICC proponents as unfounded or groundless, a review of recent history supports the concerns of the United States regarding the potentially political nature of the ICC.¹³⁹ Proponents of the ICC, on the other hand, can only offer hope, speculation, and innuendo in their attack of the US position.¹⁴⁰

US concerns regarding the ICC were highlighted by politically motivated allegations filed against NATO over the NATO-led bombing campaign in Kosovo to stop the ethnic cleansing by Bosnian military forces.¹⁴¹ In response to complaints from journalists, nongovernmental organizations, and various law professors, the International Criminal Tribunal for the former Yugoslavia (ICTY) launched a four-month investigation to deter-

mine whether North Atlantic Treaty Organization (NATO) commanders and United States pilots engaged in war crimes by indiscriminately bombing civilian targets during the campaign.¹⁴² The complaints surrounded the targeting of power plants and a television station, as well as three instances in which civilians were inadvertently or mistakenly killed.¹⁴³

Putting aside the fact that the ICC has little expertise to address questions of military necessity, allegations supporting the complaints did not rise to the high thresholds set for crimes against humanity and war crimes.¹⁴⁴ On the contrary, the alleged crimes committed by NATO showed absolutely no pattern of improper or criminal action. Still, however, the ICTY prosecutor felt her obligation and responsibility to examine all complaints brought before the tribunal.¹⁴⁵

The ICTY prosecutor made it clear during the investigation that she was prepared to seek indictments against NATO personnel if the evidence was incriminating.¹⁴⁶ Fortunately, however, the ICTY declined to pursue charges against NATO for its bombing campaign in Kosovo.¹⁴⁷ While proponents of the ICC may suggest that the prosecutor's declination to prosecute is evidence that the ICC system will work, they ignore the detrimental political impact that results from the unsupported allegation being filed in the first place, along with the resulting investigation. Thus, the prevention of the political impact from specious allegations alone provides a sufficient basis for the United States to reject the current structure of the ICC.

Moreover, certain domestic groups or nongovernmental organizations may use the threat of ICC prosecution to gain influence over foreign policy or national security decisions of the United States.¹⁴⁸ As noted above, previous tribunal prosecutors have noted the obligation and responsibility to review all claims filed with the ICC regardless of the apparent merit of the claim. Because of this open-door policy, there will be no negative consequences for groups filing unsupported allegations before the court. The individuals and nation-states subjected to these spurious claims, however, will be paraded around on the international stage and subjected to ridicule and scorn from allegations alone.

These concerns, similar to the concerns over politically motivated prosecutions, are more than a hypothetical problem. There already have been cases in which domestic groups or nongovernmental organizations have threatened the use of the ICC to achieve their goals. For example, an Israeli pacifist group has previously threatened Israeli army officers with ICC prosecution for official actions undertaken pursuant to their official duties.¹⁴⁹ Additionally, persons opposed to the policies of the government of Israel have sought to use the ICC as a tool to force change.¹⁵⁰ These examples provide sufficient additional support for the United States to assume a defensive position regarding the ICC.

United States Position on the ICC Today

There has been no evidence since the United States withdrew its signature from the Rome Statute that its position on the ICC has changed. In fact, it appears its opposition has only grown more determined. This opposition was unambiguously stated last summer by the US ambassador to the UN, Amb. John Negroponte, when he informed the UNSC that the United States “never will be” a member of the ICC.¹⁵¹ This statement, along with others from the Bush administration, makes it readily apparent that the ICC is effectively dead in the eyes of the executive branch of the US government.

The legislative actions from Congress likewise support the administration’s position that the United States will never recognize the jurisdiction of the ICC over US policy makers and military personnel. In response to the Rome Statute, Congress passed the American Servicemembers’ Protection Act (ASPA).¹⁵² The ASPA, dubbed the “Hague Invasion Act” by some, authorizes the use of force to free US personnel held for trial by the ICC.¹⁵³ The ASPA also allows the United States to withdraw military assistance from countries that have ratified the Rome treaty.

Furthermore, the rhetoric from Congress has shown there is little support for the United States’ joining the ICC. Sen. Jesse Helms, one of the staunchest opponents of the ICC, has publicly stated that the United States never will ratify the Rome Statute if he has anything to do with it.¹⁵⁴ Senator Helms is not alone in

his criticisms of the ICC. In fact, many in Congress have voiced their opposition to the United States' participating in the ICC.¹⁵⁵

Considering the current positions of the Bush administration and the US Congress, it is doubtful that the United States will ever become a party to the Rome Statute. The only solution for the United States would be for the UNSC to gain control over the referral of cases to the ICC. Based on the overwhelming defeat of the previous US proposal for Security Council control, however, it is doubtful the key factor for US support will ever find its way into the Rome Statute.

Despite some of the rhetoric that accompanied the ASPA, however, it does not appear to be the intent of the United States to destroy the ICC. On the contrary, representatives from the Bush administration have made it clear that the United States does not want to undermine the ICC.¹⁵⁶ In return, the United States has only asked that nation-states that are a party to the ICC respect the US decision not to join the international tribunal.¹⁵⁷

Implications to United States Foreign Policy

While there have been numerous discussions on substantive and procedural aspects of the ICC that prevent the United States from ratifying the Rome Statute, the root of US concerns can be captured with one word—sovereignty. The United States, in its role as the world's most formidable military power, has assumed a more realist position regarding the protection of its national security, especially after the terrorist attacks of 11 September 2001. Because of this position that focuses on the security interest of the nation-state over international institutions, the executive and legislative branches of the US government could not accept an international body such as the ICC that could frustrate the ability of the United States to actively respond to national security threats through the use of its diplomatic, economic, and military instruments of power.¹⁵⁸

This realist position by the United States is not a new or novel concept. On the contrary, the United States has tended to believe that the power of the nation-state is necessary to advance American ideals throughout the world.¹⁵⁹ Likewise, the European countries that currently criticize the United States

have also taken the position in the past that the interests of the nation-state are paramount over those of international institutions. One commentator aptly summarized this position when he stated that “You hear Europeans say [President] Bush is a cowboy from Texas. But when the Europeans were at the top of the international heap, they were hard-bitten realists about using power, and it was the United States that was trying to outlaw war.”¹⁶⁰

With this realist position in mind, the United States believes the ICC could frustrate its foreign policy agenda by causing any use of force to potentially fall under the jurisdiction of the court. For example, some have argued that the United States could be found guilty of the crime of aggression if it takes military action to protect its interests without the express approval of the UN.¹⁶¹ As previously discussed, the current military action by the United States and its Coalition partners in Iraq may very well test the validity of US concerns.

Proponents of the ICC reject this realist position and, instead, accept a more liberalist view of international relations. Specifically, supporters of international institutions such as the ICC believe that carefully designed international institutions that facilitate international cooperation can overcome the requirement for conflict in the anarchic system of realism.¹⁶² By engaging in international institutions, nation-states realize political gains from cooperation that allow them to forgo short-term needs for long-term objectives.¹⁶³ Proponents of the ICC argue that for true global peace to exist, the nations of the world must adhere to a binding and universal code of legal behavior that trumps the basic sovereignty rights of nation-states.¹⁶⁴ The ICC, according to these supporters, provides this requisite universal code.

Supporters of the liberalist view have criticized the United States for its realist position on various foreign policy matters. In addition to the ICC, it has been noted that the United States has failed to support global treaties addressing biological weapons, antipersonnel land mines, biological diversity, and nuclear weapon testing.¹⁶⁵ Although the United States will not support the creation of these international norms, liberalists note that the United States is quick to judge the actions of

others who violate these norms.¹⁶⁶ This lack of support has led many in the world to believe that the United States will only participate within the international community if it is allowed to play under a different set of rules. Those countries critical of the United States vehemently argue that the United States cannot have it both ways. The United States either plays by the rules, or it doesn't play. With regard to the ICC, the United States has decided not to play.

Provided the United States would accept the ICC's jurisdiction, ICC supporters believe the United States would actually improve its ability to implement its foreign policy goals of promoting peace and security. They argue that by accepting the ICC, the United States would show by its actions that it is willing to commit to forging a better world based on the rule of law.¹⁶⁷ In other words, the United States can walk the walk and give credence to its claims of leadership within the international community.

Furthermore, supporters of the ICC believe the US acceptance of international institutions will serve its foreign policy interests by developing cooperative relationships with other countries that support the ICC.¹⁶⁸ In the wake of globalization, it is argued that the United States cannot effectively act unilaterally in all aspects of international relations. Some have questioned the timing of the US decision to reject the ICC at the same time it is requesting the assistance of other countries for the problems in the Middle East and the war on terrorism.¹⁶⁹ By doing so, the United States may impair its ability to build coalitions in the future.¹⁷⁰

There is no question that it will be difficult for the United States to go it alone when it comes to protecting its national security. This is especially true for future military interventions that need multilateral cooperation for both cost-sharing (both financial and human resources) and political legitimacy.¹⁷¹ The war on terrorism and the current conflict in Iraq already have shown the need to maintain multilateral cooperation. While a realist could argue that the cooperating countries possess their own national security interests that justify their intervention in the current conflicts, there is no doubt that multilateral action is value added.

There is little empirical evidence, however, that the US rejection of the ICC has hampered its ability to protect its foreign policy interests.¹⁷² While many countries and nongovernmental organizations criticize the United States for its position on the ICC, these same bodies depend on American power for their security and prosperity.¹⁷³ In this light, it is not surprising that US rejection of the ICC has not been highlighted as a reason for failing to support the foreign policy agenda of the United States. It could be argued that the recent friction within the UNSC regarding the disarming of Iraq is related to the realist position of the United States on issues such as the ICC. However, one could likewise argue that the economic and diplomatic interests of the major countries opposing the military intervention provide a plausible alternative basis for their positions. Thus, the jury is still out on whether the US position on the ICC will have long-term consequences to its foreign policy.

It is interesting, however, that many commentators examining the US position argue that the United States is at odds with the rest of the world on the idea of permanent international criminal tribunal. As noted by one commentator, "In the aftermath of the [Rome] Statute's adoption, the United States stands alone as the one great power unwilling to contribute to the institutionalization of international criminal law through an independent ICC."¹⁷⁴ While it is, in fact, true that the United States has taken a position opposite to many countries of the world, it is far-fetched to state that the United States is standing alone in its opposition of the ICC. One commentator noted that the first 66 countries that ratified the Rome Statute made up less than one-sixth of the world's population.¹⁷⁵ Furthermore, although 120 countries voted to approve the Rome Statute, fewer than 90 have actually ratified the treaty to date.

Moreover, those critical of the United States fail to mention the other regional powers that have failed to ratify (or even sign) the Rome Statute. Russia, China, and Japan are three countries with significant economic, diplomatic, or military power that have refused to submit their governments to the jurisdiction of the ICC. Additionally, a review of the United Nations' ratification database¹⁷⁶ shows that few Arab countries have ratified the

Rome Statute. Although many other states have taken positions similar to that of the United States, it is extremely difficult to find commentators who will condemn these states for their opposition to the ICC. While the focused criticism may be appropriate considering the US claim as a supporter and protector of human rights, the specific attacks on one country lends credence to the US concerns that it, more than any other country, will be singled out for disparate treatment by the jurisdictional mechanism of the ICC.

Conclusion

We are a super power. We are a country whose great good fortune and our strength and our resources require us to bear certain responsibilities. We cannot bear those responsibilities if we are going to have the people who are carrying out these very difficult and dangerous duties for us be subject to prosecution by anyone who does not particularly care for American foreign policy or anyone who does not particularly care for America. And there are quite a few people like that in the world. . . .

—The Honorable Caspar W. Weinberger

There is no question that throughout history, the United States has supported applying the rule of law to violations of basic human rights. There is also no doubt that the United States will continue to maintain this stance when the next human rights atrocities are committed within the international community. The United States shared the long-standing dream of many in the UN to create a permanent international tribunal to handle the most egregious human rights atrocities. In this light, it was the hope of the United States that the ICC would become that long-awaited court.

With regard to the idea of a permanent international tribunal, it is clear now that the United States will not be able to “have its cake and eat it too.” The so-called international community at the Rome Conference developed the permanent international legal mechanism in the form of the ICC. There appears little hope that the countries that support the current ICC regime will ever support the treaty protections long advo-

cated by the United States. Thus, similar to the draft treaty that was submitted at the end of the Rome Conference, the United States basically has been offered a take it or leave it proposition by those countries and nongovernmental organizations that supported the creation of the ICC.

The decision by the current administration of President Bush to leave it is a wise one based on the relatively unconstrained power of the ICC, the historical politicalization of crimes under the ICC's jurisdiction, and the unique position of the United States in the realm of international relations. Whether or not the United States is an indispensable nation as noted by former Secretary of State Madeline Albright, let there be no debate that the United States is saddled with unique national security concerns and obligations based on its standing as the world's strongest military power.

It is because of these unique obligations that the jurisdictional regime of the ICC, while providing a mechanism to adjudicate abuses of human rights, poses unique risks to US policy makers and military personnel serving around the world. The ICC, as created by the Rome Statute, fails to provide sufficient protections to ensure the legal process is not used as a political tool to frustrate or disrupt the foreign policy agenda of the United States. One commentator highlighted this risk during Senate testimony when he stated: "The danger that the ICC might be used as a political tool against the United States is neither fanciful nor alarmist. The United States has interests and responsibilities around the world and the possibility that a prosecutor and bench staffed by individuals hostile to the United States and its interests is quite real. The Cold War is over, but the United States still has enemies and competitors. Indeed, as the world's only superpower, it is viewed with suspicion by many states, and with outright hostility by more than a few."¹⁷⁷

Proponents of the ICC point to the various protections inherent in the Rome Statute that will prevent a United States official or military officer from ever being brought before the ICC. As discussed within this article, however, these protections are clearly in the eye of the beholder. Furthermore, proponents of the ICC fail to appreciate the political damage to

the United States that will occur by a zealous prosecutor simply launching a criminal investigation.¹⁷⁸ As noted by one commentator, "Truth does not matter; false charges are effective propaganda even if the American accused is eventually cleared."¹⁷⁹ It is for these reasons that the US rejection of the current ICC regime is warranted.

US rejection of the ICC, however, does not come without some risk. By rejecting international institutions such as the ICC now, the United States is gambling on a future dominated by the theory of *realpolitik*, where the security interests of nation-states remain paramount.¹⁸⁰ Provided the world as we know it is now moving towards a more liberalist view where international institutions will rule the day, the resentment caused by the current stance of the United States may create some long-term costs for its foreign policy agenda. Only time will tell.

Notes

1. *Overview of the ICC*, United Nations Document, <http://www.un.org/law/icc/general/overview.htm>.
2. United Nations General Assembly Resolution 260, *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948.
3. Established in 1947, the International Law Commission is an organ of the United Nations. The stated mission of the International Law Commission is to promote the progressive development of international law and its codification. Background on the International Law Commission can be found at <http://www.un.org/law/ilc/ilcintro.htm>.
4. The specific request from Trinidad and Tobago concerned the need for an international tribunal for drug trafficking.
5. United Nations General Assembly Resolution 47/33, 25 November 1992, <http://www.un.org/documents/ga/res/47/a47r033.htm>.
6. The international conference of plenipotentiaries generally incorporates the draft statute of the International Law Commission into a convention or treaty in which nation-states are then able to join as parties.
7. United Nations General Assembly Resolution 49/53, 17 February 1995, <http://www.un.org/documents/ga/res/49/a49r053.htm>.
8. United Nations General Assembly Resolution 51/207, 16 January 1997.
9. *Ibid.*
10. United Nations Document A/CONF.183/10, *Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an ICC* (17 July 1998).
11. United Nations General Assembly Resolution 52/160, 28 January 1998.

12. Although the draft document is actually a treaty, not a statute, the term *statute* will be used throughout this paper in line with the language used by the Rome Conference.

13. David J. Scheffer, "Developments in International Criminal Law: The United States and the ICC," *American Journal of International Law* 93 (January 1999): 20.

14. Some of the United States' objections will be discussed in section 4. Other objections, such as the principle of universal jurisdiction, are beyond the scope of this research paper.

15. William K. Lietzau, "International Criminal Law After Rome: Concerns From A U.S. Military Perspective," *Law and Contemporary Problems* 119 (Winter 2001): 119.

16. *Ibid.*, 121, note 4.

17. Rome Statute, Article 126(1).

18. *Ibid.*, Resolution F.

19. The Assembly of State Parties is the governing body of the ICC. It is made up of one member from each state party to the Rome Statute who is given an equal vote on issues before the assembly. The assembly is tasked to provide management oversight to the Offices of the Presidency, Prosecutor, and Registrar. It is also the body that can adopt recommendations of the Preparatory Committee on issues such as rules of evidence and procedure. See Rome Statute, Article 112.

20. *Ibid.*

21. *Ibid.*

22. United Nations Document PCNICC/2002/2, *Report of the Preparatory Commission for the ICC*, 24 July 2002, 3.

23. United Nations Document PCNICC/2001/1, *Report of the Preparatory Commission for the ICC*, 2 November 2000, 3; and Rome Statute, Resolution F; United Nations General Assembly Resolution 53/105, 26 January 1999.

24. United Nations Document PCNICC/2002/L.4/Rev. 1, *Proceedings of the Preparatory Commission at its Tenth Session*, 22 July 2002, 3; and United Nations Document PCNICC/2002/2, *Report of the Preparatory Commission for the ICC*, 24 July 2002.

25. Ten nations simultaneously ratified the Rome Statute on this date bringing the total number of ratifications to 66 nation-states. See Appendix.

26. The assembly is tasked to provide management oversight to the Offices of the Presidency (judges), Prosecutor, and Registrar. See Rome Statute, Article 112. This tasking includes the sole authority to both elect and remove the judges and chief prosecutor of the ICC. See Articles 36(6)(a) and 42(4) (election); and Article 46 (removal).

27. ICC Document ICC-ASP/1/3, *Assembly of States Parties to the Rome Statute of the ICC*, 3–10 September 2002.

28. See generally, "Overview of The Assembly of State Parties," ICC document, found at http://www.icc.int/en/assembly_of_states_parties.html.

29. Keith B. Richburg, "International War Crimes Court is Inaugurated, But Without U.S.," *Washington Post*, 12 March 2003, 18 (reviewed at ebird.dtic.mil/Mar2003/e20030312151454.html).

30. *Ibid.*

31. Joe J. Heydecker, Joe J. and Johannes Leeb, *The Nuremberg Trial* (Cleveland, Ohio: The World Publishing Company, 1958), 76–82 (summary of negotiations leading to the Nuremberg tribunal); and William J. Bosch, *Judgment on Nuremberg* (Chapel Hill: The University of North Carolina Press, 1970), 9–11.

32. Jay W. Baird, ed., *From Nuremberg to My Lai* (Lexington, Mass.: D.C. Heath and Co., 1972), 20 (reprint of Justice Jackson's opening statement).

33. Public Law 101-513, sec. 599E, 104 stat. 2066, 5 November 1990 (re-requesting the United States explore the need for an ICC).

34. This support was not unanimous by any means. See US Senate Report 103-71, 103d Cong., 1st sess. (1993) (statement of Sen. Jesse Helms).

35. Public Law 103-236, sec. 517(b), 108 stat. 469; and Harry T. King and Theodore C. Theofrastous, "From Nuremberg to Rome: A Step Backward for U.S. Foreign Policy," *Case Western Journal of International Law* 31 (Winter 1999): 47, 70–73 (discussion of legislative actions taken in support of an ICC).

36. US Senate, 139th Cong. Rec. S 889, 930–32, 28 January 1993.

37. US House of Representatives, Joint Resolution 89, 143d Cong. Rec. H. 6405, 31 July 1993.

38. US House of Representatives, 143d Cong. Rec. E. 1567, 30 July 1997 (statement of Rep. Edward Kennedy).

39. David J. Scheffer, "Developments in International Criminal Law: The United States and the ICC," *American Journal of International Law* 93 (January 1999): 13; and King, *supra* note 5, at 74, and note 108 (summary of President Clinton's speeches).

40. Scheffer, *supra* note 9, at 12–13.

41. *Ibid.*, 13.

42. *Ibid.*, 13–14.

43. *Ibid.*

44. William J. Clinton, *Remarks at the University of Connecticut in Storrs*, 31 Weekly Comp. Pres. Doc. 1840, 15 October 1995 (emphasis added); and William J. Clinton, "A Commitment to Human Dignity, Democracy, and Peace," *USIA Electronic Journal Issues of Democracy* 1, no. 3 (May 1996) (article adapted from a previous speech given at the University of Connecticut) found at <http://usinfo.state.gov/journals/itdhr/0596/ijde/Clinton.htm>.

45. David J. Scheffer, *The Future of International Justice*, address at the Peace Palace, The Hague, Netherlands, 19 September 1997, at http://www.state.gov/www/global/narcotics_law/970919_scheffer.html.

46. James B. Foley, *US Participation in the Rome Conference on the Establishment of an ICC*, Department of State Press Statement, 12 June 1998, secretary.state.gov/www/briefings/statements/1998/ps980612a.html.

47. King, *supra* note 5, at 77.

48. Ambassador Scheffer later noted that the United States delegation approached the Rome Conference with “cautious optimism” because a number of fundamental issues to the United States were not addressed during the Preparatory Committee meetings. See Scheffer, *supra* note 9, 14.

49. Lietzau, 124.

50. Scheffer, *supra* note 9, at 16–17.

51. Lietzau, *supra* note 19, at 124.

52. US Senate, *Is a U.N. ICC in the U.S. National Interest?: Hearing before the Subcommittee on International Operations of the Committee on Foreign Relations*, 105th Cong., 2d sess., 23 July 1998, 12 (statement of Ambassador Scheffer).

53. Lietzau, *supra* note 19, at 124.

54. Scheffer, *supra* note 9, at 17; and “The ICC and the US Constitution.” *USA for the ICC* (reviewed 9 January 2003), http://www.usaforicc.org/facts_America-icc.html (chart comparing ICC protections to the United States Constitution).

55. Rome Statute, Article 66.

56. *Ibid.*, Article 67(1)(g).

57. *Ibid.*, Article 67(1)(b).

58. *Ibid.*, Article 67(1)(c).

59. *Ibid.*, Article 67(1)(e).

60. US Senate, *supra* note 22, at 12 (statement of Ambassador Scheffer).

61. Scheffer, *supra* note 9, at 15–16.

62. US Senate, *supra* note 22, at 12–16 (Ambassador Scheffer listing specific objections by US delegation).

63. Scheffer, *supra* note 9, at 17.

64. David J. Scheffer, “The ICC,” Statement Before the Sixth Committee of the 53d General Assembly, USUN Press Release #179, 21 October 1998, www.un.int/usa/98_179.htm.

65. Scheffer, *supra* note 9, at 21–22.

66. Rome Statute, Article 125(1).

67. Diane Sabom, “ICC Fails Tests of American Justice,” *Insight on the News* 18, issue 19, 27 May 2002.

68. William J. Clinton, *Statement on the Rome Treaty on the ICC*, Public Papers of the President, 31 December 2000.

69. *Ibid.*

70. The letter to the secretary general provided the following statement:

This is to inform you, in connection with the Rome Statute of the International Criminal Court adopted on July 17, 1998, that the United States does not intend to become a party to the treaty. Accordingly, the United States has no legal obligations arising from its signature on December 31, 2000. The United States requests that its intention not to become a party, as expressed in this letter, be reflected in the depository’s status lists relating to this treaty.

See Appendix, note 6.

71. Marc Grossman, "American Foreign Policy and the ICC," Remarks to the Center for Strategic and International Studies, Washington, D.C., 6 May 2002, <http://www.state.gov/p/9949pf.htm>.

72. US Senate, *Is a U.N. ICC in the U.S. National Interest?* However, it appears the United States is still citing due process concerns for its continued rejection of the ICC. See Nicholas Rostow, "Statement of the Fifty-Seventh Session of the United Nations General Assembly," United States Mission to United Nations, 14 October 2002, http://www.un.int/usa/02_153.htm. This paper does not address these continued concerns, as they appear to be secondary to the primary argument put forth by the United States.

73. See Rome Statute, Article 120.

74. Article II, sec. 2, clause 2, requires that the Senate give its advice and consent to all treaties provided two-thirds of those present concur. Thus, the Senate has the power to add reservations, amendments, etc., to treaties. See also US Senate, *Is a U.N. ICC in the U.S. National Interest?: Hearing before the Subcommittee on International Operations of the Committee on Foreign Relations*, 105th Cong., 2d sess., 59, 23 July 1998 (statement of John R. Bolton). Because the discussion of treaty law and its constitutional implications provide sufficient information for another research paper, this article will not address these legal issues.

75. *Ibid.*, 12 (statement of ambassador Scheffer).

76. John Washburn, "The ICC Arrives—The U.S. Position: Status and Prospects," *Fordham International Law Journal* 25 (March 2002): 877.

77. *Ibid.*

78. The United States delegation at the Rome Conference proposed an opt out concept for war crimes and crimes against humanity. This opt out procedure would have allowed parties to the Rome Statute to evaluate over time whether the ICC was becoming a tool for politically motivated prosecutions. This proposal was rejected at the Rome Conference. See David J. Scheffer, "Developments in International Criminal Law: The United States and the ICC," *American Journal of International Law* 93 (January 1999): 19.

79. This is Latin for one's own initiative.

80. Rome Statute, Article 15.

81. *Ibid.*

82. John R. Bolton, "The United States and the ICC," Remarks at the Aspen Institute, Berlin, Germany, 16 September 2002, <http://www.state.gov/t/us/rm/13538pf.htm>.

83. As noted by one State Department official when discussing the US position, "Unchecked power, our founders understood, is open to abuse, even with good intentions of those who establish it." See Marc Grossman, "American Foreign Policy and the ICC," Remarks to the Center for Strategic and International Studies, Washington, D.C., 6 May 2002, <http://www.state.gov/p/9949pf.htm>.

84. *Ibid.*

85. See Rostow.

86. United States Senate, *supra* note 1, at 23 (statement of Ambassador Scheffer). It is interesting, however, that Ambassador Scheffer has now apparently changed his position regarding the politicalization of the ICC. See David J. Scheffer, "A Treaty Bush Shouldn't 'Unsign,'" *New York Times*, 6 April 2002, A15.

87. Bolton, *supra* note 11.

88. Lietzau, 136.

89. *Ibid.*, 126-27.

90. Washburn, *supra* note 5, at 878.

91. The United States made its position clear that only the prosecutor should control the investigation, including referring specific cases against individual defendants. The referral mechanism would only refer situations to the prosecutor, not individual cases. See "Statement of the United States Delegation Expressing Concerns Regarding the Proposal for a Proprio Motu Prosecutor," 22 June 2002 (cited in US Senate, 147-48).

92. US Senate, *supra* note 1, at 23 (statement of Ambassador Scheffer).

93. Peggy A. Rancilio, "From Nuremberg to Rome: Establishing an ICC and the Need for U.S. Participation," *University of Detroit Mercy Law Review* 78 (Winter 2001): 328.

94. See "U.S. Role: Engagement or Opposition, Lawyers Committee for Human Rights," http://www.lchr.org/ijp/icc_usa.htm.

95. *Ibid.*

96. Rome Statute, Article 15(3).

97. *Ibid.*, Article 15(3); and Article 57(2)(a).

98. *Ibid.*, Article 46.

99. *Ibid.*, Article 46(1)(a). In the case of a judge, a two-thirds' majority of the Assembly of State Parties must find sufficient cause for removal. See Article 46(2)(a). The removal of the prosecutor requires an absolute majority of the Assembly of State Parties. See *Ibid.*, Article 46(2)(b).

100. *Ibid.*, Article 1.

101. See Lietzau, *supra* note 17, at 136; and Cheryl K. Moralez, "Establishing an ICC Will it Work?" *DePaul International Law Journal* 4 (Winter 2000): 152.

102. Rome Statute, Article 17.

103. Scheffer, *supra* note 7, at 19.

104. For example, one commentator has questioned whether the immunity procedures set up by South Africa's Truth and Reconciliation Commission would be viewed as an inadequate investigation by the ICC. See US Senate, *supra* note 1, at 147-48 (statement of John R. Bolton).

105. The standard is whether the nation-state is unwilling or unable to genuinely carry out the investigation or prosecution of the case. See Rome Statute, Article 17(1)(a).

106. Rancilio, *supra* note 22, at 326.

107. Rome Statute, Article 7(1).

108. Scheffer, *supra* note 7, at 16.

109. Rome Statute, Article 5.

110. *Ibid.*, Article 5(2).
111. As of the last meeting of the Assembly of State Parties in February 2003, the crime of aggression has yet to be defined. See Summary of the First Session of the Assembly of State Parties, <http://www.un.org/law/icc/asp/aspfra.htm>.
112. Scheffer, *supra* note 7, at 14.
113. United States Senate, *supra* note 1, at 14 (testimony of Ambassador Scheffer).
114. Scheffer, *supra* note 7, at 21.
115. *Ibid.*
116. See Rome Statute, Article 121(4).
117. United Nations Document PCNICC 2002/2/Add. 2, *Report of the Preparatory Commission for the ICC, Part II, Proposals for a Provision on the Crime of Aggression*, 24 July 2002, 3
118. See United Nations General Assembly Resolution 3314 (29) (re-viewed at <http://jurist.law.pitt.edu/3314.htm>).
119. There is clearly no consensus between nation-states on how to handle the crime of aggression under the ICC. See United Nations Press Release L/2765, 27 March 1996 (discussion of the varied positions put forth by Preparatory Committee members on the crime of aggression); see also United Nations General Assembly Press Release GA/L/3047, 23 October 1997 (delegates differing on whether crime of aggression should be included in the ICC's jurisdiction).
120. Brett D. Schaefer, *The ICC: Threatening U.S. Sovereignty and Security*, The Heritage Foundation Executive Memorandum, No. 537, 2, 2 July 1998 (discussing consequence to the United States' not obtaining additional UNSC authority prior to using force against Iraq).
121. See United Nations Security Council Resolutions 1141 (2001) and 687 (1991).
122. Interestingly, when asked if the United States would violate international law by invading Iraq, the secretary-general of the United Nations, Kofi Annan, responded that the Security Council would eventually have to address that issue. See United Nations Press Statement, 17 March 2003, www.un.org/apps/sg/printoffthecuff.asp?nid=398.
123. Rome Statute, Article 8(2)(b)(viii).
124. See US Senate, *The ICC: Protecting American Servicemen and Officials from the Threat of International Prosecution: Hearing before the Committee on Foreign Relations*, 106th Cong., 2d sess., 14 June 2000, 15 (response by Dr. Jeremy Rabkin).
125. US Senate, *supra* note 1, 24-25 (statement of Ambassador Scheffer).
126. *Ibid.*, 61, note 25 (statement of John Bolton).
127. Marjorie Cohn, "The Crime of Aggression: What Is It and Why Doesn't the United States Want the ICC to Punish It?" *The Jurist*, 22 March 2001, <http://www.jurist.law.pitt.edu/forum/forumnew18.htm>. See generally, US Senate, *Is a U.N. ICC in the U.S. National Interest?*, 61 (statement of John R. Bolton).

128. King and Theofrastous, 87–88.
129. See United Nations Security Council Press Release SC/7450, *Security Council Requests ICC Not to Bring Cases Against Peacekeeping Personnel from States Not Party to Statute*, 12 July 2002, <http://www.un.org/News/Press/docs/2002/sc7450.doc.htm>.
130. Resolution 1422 also expresses the intention of the United Nations Security Council that the Article 16 request will be renewed for additional 12-month periods as long as necessary.
131. John D. Negroponte, “Statement to the United Nations Security Council,” United States Mission to the United Nations, 10 July 2002, http://www.un.int/usa/02print_095.htm.
132. “US Criticized on Immunity Demand,” *The Associated Press*, 10 July 2002, <http://www.globalpolicy.org/intljustice/icc/crisis/0710.htm>.
133. See United Nations Security Council, *supra* note 58.
134. For example, one commentator stated that the question of safeguards within the Rome Statute is “more nearly a matter of judgment.” See Washburn, *supra* note 5, at 876.
135. See Morales, “Establishing an ICC: Will it Work?,” 152 (citing statements of M. Cherif Bassiouni) (emphasis added).
136. Scheffer, *supra* note 7, 19.
137. Ambassador Scheffer noted that 22 delegations expressed support for this opt out proposal. See Scheffer, *supra* note 7, at 19.
138. *Ibid.*, 20.
139. See United Nations Document PCNICC/2002/INF 7, *Statement of the European Union on the Position of the United States of America Towards the ICC*, 20 May 2002, <http://ods-dds-ny.un.org/doc/UNDOC/GEN/N02/392/92/PDF/N0239292.pdf?OpenElement>. In this statement, it is curious that the European Union criticized the United States for withdrawing its signature “without the benefit of actual experience of the Court’s activities.” However, the United States proposal for opting out of jurisdiction for specific crimes was rejected during the Rome Conference.
140. *Ibid.*
141. Because of the United States involvement in the bombing campaign, it was also suggested that President Clinton and military leaders should also face prosecution for war crimes. See Jeffrey K. Kuhner, “U.S., Clinton Accused of War Atrocities,” *Washington Times*, 22 April 2002, <http://www.caausa.org/articles/clintoaccused.htm>.
142. John T. Correll, “UN Tribunal Drops Investigation of NATO for War Crimes,” *Air Force Magazine* 83, Issue 2, February 2000; and Charles Truheart, “War Crimes Court is Looking at NATO,” *Washington Post*, 29 December 1999.
143. Barbara Crossette, “U.N. War Crimes Prosecutor Declines to Investigate NATO,” *New York Times*, 3 June 2000, n.p.
144. For instance, customary international law has generally required a crime against humanity be committed as part of a widespread or systematic attack directed against the civilian population. See Rome Statute, Article 7(1).

145. Crossette, *supra* note 72.
146. Correll, *supra* note 71.
147. Crossette, *supra* note 72.
148. Peter Grier, "Disorder in the Court," *Air Force Magazine* 85, no. 10 (October 2002): 39.
149. *Ibid.*
150. Specifically, a special interest group has engaged in a petition campaign to the United Nations secretary general requesting various members of the Israeli government be indicted as war criminals for their part in creating the Jenin refugee camp. See "Jenin War Crimes Petition," <http://www.petitiononline.com/SSF001>.
151. John D. Negroponte, "Statement to the United Nations Security Council, United States Mission to the United Nations" (emphasis added), 12 July 2002, www.un.int/usa/02print_098.htm.
152. Public Law 107-206, 2 August 2002 (codified at 22 U.S.C. §§, 7421-7433).
153. See Grier, 39.
154. US Senate, *The ICC: Protecting American Servicemen and Officials from the Threat of International Prosecution: Hearing before the Committee on Foreign Relations*, 106th Cong., 2d sess., 2, 14 June 2000.
155. See US Senate, 148th Cong. Rec. S 7844, 1 August 2002 (statement of Senator Bennett); and US House of Representatives, 148th Cong. Rec. E. 1291, 18 July 2002 (statement of Representative Bereuter).
156. Rostow.
157. *Ibid.*
158. See Christopher Rudolph, "Constructing an Atrocities Regime: The Politics of War Crimes," *International Organizations* 55, issue 3 (Summer 2001): 655.
159. See James Dao, "One Nation Plays the Great Game Alone," *New York Times*, 7 July 2002.
160. *Ibid.*
161. US Senate, *Is a U.N. ICC in the U.S. National Interest?* (statement of Senator Helms).
162. Rudolph, *supra* note 1.
163. *Ibid.*, *supra* note 1.
164. King and Theofrastous, 104.
165. See "Unilateralism is U.S.," *Time Magazine* 158, no. 5 (6 August 2001): 15.
166. See Johan D. van der Vyver, "International Human Rights: American Exceptionalism: Human Rights, International Criminal Justice, and National Self-Righteousness," *Emory Law Journal* 50 (Summer 2001): 775, 827.
167. See Rancilio, 337.
168. *Ibid.*, *supra* note 10, 337-38.
169. See Barbara Slavin and Andrea Stone, "U.S. Refuses to be Subject to World Body," *USA Today*, 3 July 2002, A4.

170. US House of Representatives, 148th Cong. Rec. E. 1630, 19 September 2002 (statement of Representative Leach).

171. Rudolph, *supra* note 1.

172. In fact, critics of the US position on the ICC can only contend that the current stance will harm US foreign policy in the future. See Dao, *supra* note 2, at 5.

173. *Ibid.*

174. See King and Theofrastous, *supra* note 7, 98.

175. See Sabom, 22.

176. See appendix.

177. US Senate, *Is a U.N. ICC in the U.S. National Interest?* (statement of Lee A. Casey).

178. *Ibid.*, 60 (statement of John R. Bolton).

179. Kurt A. Schlichter, "International Court Ripe For Takeover By Those Who Would Frame U.S. Troops," *Army Times* 63, Issue 3 (12 August 2002): 50.

180. See James Graff, "America Is Not Pleased," *Time Atlantic* 160 (8 July 2002): 36.

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Dateline Washington

General Watson to the ICC? The President Must Decide Soon!

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The following is a fictional account of what many leaders in today's military fear is in store for officers and politicians in the United States. The year is 2007, and the United States has concluded a short military campaign to protect a minority population facing a humanitarian disaster in the Eastern Mediterranean. The North Atlantic Treaty Organization (NATO) strongly condemned the atrocities being committed and sought to stem the flow of refugees into their countries, which they feared might be a conduit for terrorists to enter Western Europe under the guise of fleeing oppression. Under a United Nations (UN) resolution, a US Air Force lieutenant general led a Coalition force of aircraft attacking the terrorist infrastructure and paramilitary forces to stop the humanitarian disaster. In the course of the conflict, discipline issues raised by the American forces became legal issues for the International Criminal Court (ICC), which came into existence 60 days after the Treaty of Rome was ratified by the 60th country on 11 April 2002. The treaty came into force on 1 July 2002. It ultimately became a serious political debate in capitals throughout the world.

This fictional account is merely one hypothetical scenario and is not a prediction of future political and legal dilemmas. Given the ongoing war on terrorism and the ratification of the Rome Treaty establishing an ICC, the authors followed one logical train.

The Oval Office

The president sat in the Oval Office behind his great desk. On the couches and chairs opposite him sat the vice president, the secretary of state, the attorney general, the secretary of defense, the White House counsel, the speaker of the House, the House minority leader, and the Senate majority and minority leaders. The atmosphere was serious, though without tension. The day before, the realization had hit most of these leaders that the United States, while remaining the lone superpower, was being challenged. This challenge came not on a battlefield but through an international court that the United States had strongly opposed. Beyond the actual case being presented against a US Air Force general who had been retired for more than a year before this meeting, America's allies were calling for the United States to do something it vowed never to do—hand over a US citizen to the ICC for trial on a charge of war crimes.

Lt Gen Keith Watson had led a coalition of states in the bombing of radical Islamist terrorist forces that had taken control of the Lebanese government and were driving out the Maronite Christian population from Beirut.¹ As the senior Coalition commander responsible for the conduct of air operations, General Watson approved the target list on a daily basis and signed the air tasking order (ATO), the legal military order setting out the entire plan of operations for the next cycle of the air portion of the conflict. He had devised a brilliant plan to utilize precision air attacks in conjunction with Coalition special operations forces to seek out and destroy terrorist leadership cells and their infrastructure.² At the end of the war, he retired with distinction. Then came the accusations by independent observers and even within the US military that the general was negligent in his command, failing to protect innocent civilians. As the joint force commander, General Watson was personally responsible for approving all targets and therefore was personally accountable. On numerous occasions during the conflict, targets of dubious military value had been attacked resulting in the loss of innocent civilian lives. Of these, one case in particular captured the attention of the ICC.

Today, the president of the United States must decide not merely the general's future, but the military and international future of the United States as well.

Morality and Warfare: Implications for the War Fighter

Nineteen months earlier, four pilots gathered in their wing's mission-planning cell the afternoon before their next combat mission over Beirut. The flight lead, Capt Jimmy Boscomb, known to his fellow flyers by his call sign, "Maple," picked up the folder for his mission and gathered his pilots around the mission-planning table. They laid out the mission orders and pictures of the target taken the day before by an unmanned aerial vehicle,³ a former police station that paramilitary guerilla units had used as a local headquarters when terrorizing the local minority population. They checked the threat maps to see where the enemy surface-to-air missiles (SAM) were located and to determine the best route through the threats to the target. When their intelligence officer, Lt Sandy Mason, walked in for their premission planning briefing, the pilots turned and gave her their attention.

Lieutenant Mason went through her checklist, briefing the most current developments in the conflict, the disposition of forces, the target significance, and threats to the mission. Newly included in the briefing format were collateral damage considerations.⁴ Boscomb asked the intelligence officer to go over the target significance one more time. She said that the target, a police station, which was attacked and damaged three days prior, was a key command post for terrorist forces attacking the local population. Boscomb's orders were to lead his flight of four F-16s to drop a pair of 2,000-pound laser-guided smart bombs on the police station. The target, which was seriously damaged in the previous attack, still had part of the roof and two walls standing. From the imagery, it was clear that the building was unusable, but perhaps it could be cleaned out at some point in the future. The real issue, however, was the collateral damage consideration. The police building was adjacent to a hospital complex that included a "sanatorium," the

regional name for a retirement home.⁵ The one wall of the sanatorium closest to the police station was destroyed, but the target photos of the police station showed the sanatorium had sheets of plastic or some other covering over the exposed wall, indicating that the sanatorium was still occupied.

Captain Boscomb gathered his pilots around him and looked more closely at the pictures. Together with the intelligence officer and her targets specialists, they agreed that the retirement home was not abandoned after the first attack. Furthermore, after checking additional sources, the intelligence officer found that higher headquarters saw no activity at the police station over the last three days.

Boscomb looked hard at Lieutenant Mason. He asked her to call her counterparts at the Combined Air Operations Center (CAOC), the headquarters of the air war, and find out why this target was still on the list given its damage and its proximity to the retirement home. When the intelligence officer made the call, the targets officer at the CAOC said that although there was no observed activity at the police station, there may have been activity that was unobserved and until the building was completely destroyed, there was no way to ensure it would not be used to command paramilitaries.

Boscomb once again canvassed his flight. None of the pilots felt strongly about the need to hit this target, but they were very uncomfortable with questioning orders for what to attack. There was a staff member at the CAOC who was responsible for target selection. The commander of the air campaign and the commander of Coalition forces were responsible for making the determination of what is moral and what is the appropriate level of use of force when noncombatants are involved. But, these were old people next to a target already heavily damaged. Therefore, the flight lead took his concerns to the squadron and wing commanders, Lt Col "Mack" Shell and Col "Billy" Jack.

Maple told his commanders he was concerned with being sought by the ICC for war crimes if they attacked that target. They mentioned the apartment block that had been hit by a flight earlier in the week. It had targeted a printing press and publishing house, resulting in the loss of numerous civilian

lives.⁶ The squadron and wing commanders were not overly concerned with the collateral damage implications but decided to call the CAOC to ask the question.

When the wing commander called and talked to the CAOC director, the answer that he delivered from General Watson was that this was an air tasking *order*, not a request.⁷ The wing commander could hardly disagree and told Captain Boscomb to complete his planning and fly the mission as ordered. The pilots and their intelligence personnel finished the planning, and the fliers went back to their trailers for the mandatory crew rest.

The next day, after flying the mission, the four pilots walked into the operations building for their debriefing by intelligence. They said they made it to the target area, but threat reactions to enemy SAMs and poor visibility precluded them from dropping their bombs on the intended target. Instead, they destroyed their back-up target, a depot out in the countryside away from any villages.

After reviewing the video from the jets for information that could be of intelligence value, the intelligence officer saw that the intended target looked visible and not obscured by weather. She called the squadron commander in to see the tapes, after which the commander called the four pilots into his office and grounded them. The four explained that they decided before flying the mission that they could not bring themselves to attack a target that was already hit, since that would have resulted in numerous old people being killed or wounded.

Lieutenant Colonel Shell went to talk to Colonel Jack, who was irate at the thought of his officers disobeying orders during the conduct of combat operations. The wing commander called General Watson, commander of the Coalition forces of Operation Restore Dignity and senior US Air Force commander in the operation. Colonel Jack informed General Watson of the incident that morning and recommended he, General Watson, give each of the pilots an Article 15 under the Uniform Code of Military Justice (UCMJ).⁸ General Watson agreed that would be the best course of action. He told Colonel Jack he would not make the penalty so stiff as to cause a backlash among the fliers.

General Watson, after conferring with his staff judge advocate (SJA) about his options, decided to offer each officer an Article 15 and ground them from flying pending a board of inquiry after the war to determine whether they should ever fly again in the Air Force. He called the four pilots in together and told them he intended to impose nonjudicial punishment under Article 15. He recommended that before they made any decision on this matter that they first visit the area defense counsel's office and talk the matter over with the area defense counsel. Then, the four fliers did something nobody expected. They all refused the nonjudicial punishment in favor of a trial by court-martial.⁹ General Watson was barely able to control himself as he explained how much more trouble they faced in a trial by jury of their peers. They all said they understood and were willing to take their chances.

General Watson then called to inform Colonel Jack of the pilots' decision. Colonel Jack was stunned at the decision of the pilots and asked the general what he planned to do now. General Watson said he was going to exercise his right to hold a trial at his level of command and later convened a general court-martial at his headquarters.¹⁰ The court members consisted of Air Force officers selected from the theater of operations equal to or higher in rank than the accused. The area defense counsel and his team performed admirably in defense of the pilots, but the prosecution mounted a vigorous case against the pilots for refusing orders.¹¹ The CAOC, after all, has a large staff to determine target importance, and the commanders of the operation, not their subordinates, are responsible for the decisions of what is an acceptable level of noncombatant casualties weighed against target necessity. The court members deliberated only 90 minutes before returning four guilty verdicts. The pilots were dismissed from the service. Since the officers were sentenced to dismissal from the service, an appeal to the Air Force Court of Criminal Appeals was automatic. That court affirmed the findings and sentences imposed on the pilots.

The message that went from that trial to the forces was clearly received. For the most part, the pilots flying combat missions agreed with the verdict. They had things like getting

to the target and returning home alive to worry about without doing someone else's job for them. But, the four pilots did not accept the verdict. They obtained civilian counsel¹² and petitioned the US Court of Appeals for the Armed Forces in Washington, D.C., to hear their appeal.¹³ The court agreed, as the operation in Lebanon continued.

On appeal, the defense argued that the laws of war, specifically The Hague Convention IV of 1907 and the Geneva Conventions of 1949 as well as the annual Law of Armed Conflict (LOAC) training that all US military pilots receive, forbid disproportionate noncombatant loss of life.¹⁴ The fliers' counsel argued that the Geneva Conventions as well as precedent set at Nuremberg forbid officers from carrying out unlawful orders.¹⁵ They argued that the order to attack that police station was unlawful given the high likelihood of deaths to retirees in the sanatorium when the objective against the target was achieved on a previous bombing mission.¹⁶

The defense counsel then turned its attention to *United States v. New*.¹⁷ Counsel reminded the court that in the *New* case, the court cited *United States v. Trani* and noted the long-standing principle of military law that the command of a superior officer is clothed with presumption of legality and that the burden of establishing the converse devolves upon the defense.¹⁸ Counsel then noted that at least as early as 1917, the manuals for courts-martial reinforced the notion that a military member could disobey the order of a superior provided the order would cause injury to a third party, was a breach of law and a crime, and could correct an injury or crime.¹⁹ Counsel also observed that if the defendants had carried out the attack on the abandoned police station, then the likelihood existed that a large number of noncombatants would be injured or killed as a result of bombing a target whose value was, at best, highly questionable.

Counsel then reminded the court that Articles 90, 91, and 92 of the UCMJ not only recognize the right, but the obligation, of service members to obey lawful orders. Thus, individuals have an equal responsibility and obligation to disobey illegal orders. Counsel asked: "How do service members determine the lawfulness of an order?" "What is the standard?" "Where do we find

this standard?" and "Where do we find the answers to all these questions?" The answers are ubiquitous.

Defense then informed the court that there was a political side to this matter as well and asked the court to reaffirm the principle that the courts should decline to review political questions.

The Air Force appellate counsel responded that there were no political issues here and defense's argument was spurious. The Air Force then went on to argue that if subordinates down the ranks questioned every order made by senior officers, military order and discipline would surely collapse. While agreeing that officers were forbidden from carrying out illegal orders, the prosecution stated that good order and discipline would collapse, and no operations could be carried out if officers questioned every order they were given. The court deliberated.

In its decision to overturn the conviction of the pilots and order their reinstatement by the Air Force with no future repercussions against the officers for their actions, the court emphasized two points. First, the court agreed with the Air Force that the notion that both executive and legislative branches by funding and mandating programs that stressed military ethics, character, and moral decision making was too much of a stretch for any court to entertain. However, the court did agree with defense's position that not only did each of the services expect all their members to disobey illegal orders but provided them with the tools to base such decisions in their respective training and education programs. This is especially true, noted the court, with regards to the officer corps. Why else, the court reasoned, would each of the service academies have departments and centers dedicated to character development or military ethics? The Department of Defense, the court added, has sponsored the Joint Services Conference on Professional Ethics (JSCOPE) since 1995.²⁰ The conference stresses issues relating to morality and war. In addition, the professional development publications of each of the services routinely include discussions of moral decision making. Officer professional military education institutions, particularly those of the Air Force, noted the court, include courses and research

projects focusing on the notion of just war.²¹ The case made by the defense was compelling.

The appellate judges went on to state that the officers did exercise due diligence in this case. They declared that, given the previous convictions of foreign military officers in international courts, it was entirely reasonable for these pilots to question the legality of this order to attack a seriously damaged police station that only “might” be used at some undetermined time in the future when considering the proximity of the retirement home.

The judges agreed that, having ratified The Hague and Geneva Conventions, the United States vowed to uphold the treaty requirements. Furthermore, they agreed that, although there is a large staff specifically assigned to turn political decisions into military strategies for any operation, the pilots made the right decision to question the target’s significance. Given the facts, the senior leadership at the CAOC should have reconsidered the target based on a stricter interpretation of the just war doctrine of double effect. Referring to learning materials used at Air Command and Staff College, the judges wrote that double effect requires that four criteria be satisfied. First, the act itself must be a legitimate act of war. Second, the direct outcome of the act must satisfy the standard of moral acceptability. Third, the intended outcome must be in and of itself good. And, fourth, the good effect far outweighs the destructive consequences. The judges then noted that there is a significant difference between foreseeable and unfortunate consequences, and positive effect is proportionally greater than any potential evil effect. In other words, they stated the action could not be a backdoor means to injure or punish the innocent for an act of their government or actions of others.²²

Aftermath and Consequences

What ensued from this decision, closely monitored by military officers, foreign governments, and nongovernmental organizations, was a political bombshell that shook capitals worldwide. The NATO countries that had opposed bombing in populated areas away from the region of ethnic cleansing felt

vindicated. The commanders and political leaders who had to make the decisions about what is a proportional number of acceptable noncombatant casualties against the necessity of a target or objective realized how much more difficult their jobs became. The president and secretary of defense decided to approve targets themselves to forego another trial.²³ Human rights organizations were ecstatic over the appellate court's decision and made the most serious overtures towards criminalizing military behavior. In addition, there were large demonstrations in Paris, Berlin, Frankfurt, Amsterdam, and several other European cities supporting the decision.

Within four months of the end of combat operations, a coalition of human rights organizations, as well as several present members of the UN Security Council that ratified the Rome Treaty, petitioned the chief prosecutor of the ICC to investigate the incident and take action under the auspices of the Rome Treaty to prosecute war criminals.²⁴ The petitioners pointed out that the US military appeals court, although stopping short of calling the order to bomb the police station illegal, found cause for the pilots to question the order. If the order were unlawful, should the person responsible for the order be held accountable? argued the human rights groups. After all, *Sky News* had reported that, after that target was questioned by the four pilots and the ensuing court-martial, 17 additional targets were removed from the master target file for lack of military necessity.

The prosecutor decided to broadly interpret her powers, as this would constitute a precedent-setting case. She sought approval from the pretrial chamber to conduct a full investigation of the allegations of General Watson's conduct.²⁵ Although the prosecutor acknowledged that the United States was not a party to the treaty establishing the ICC, she successfully argued for the full investigation on the following points:

1. A party to the convention had initiated the request.
2. Since one or more of the aged civilians involved in the situation were citizens of a party to the Treaty of Rome, the court should have jurisdiction in the case.
3. Since the United States was a party to both The Hague and Geneva Conventions and a signatory to Protocol 1 relating

to the Protection of Victims of International Armed Conflicts, the court could and ought to exercise jurisdiction if the United States did not act on its own.²⁶

4. Given the number of nations that have signed the treaty and the growing support for the investigation by the world community, it is obvious that the Treaty of Rome is considered Customary International Law.²⁷

5. Since the victorious Allied Powers at Nuremberg upheld the principle of command responsibility, and since the General Assembly of the UN affirmed the principles of international law addressed by the Nuremberg Tribunals, which were further validated by the subsequent trials of Gen Tomoyuki Yamashita and Capt Ernest Medina, General Watson as the Air Component commander must be held accountable for the actions of Coalition Air Forces in Lebanon.²⁸

The pretrial chamber readily agreed with the arguments set forth by the prosecutor.²⁹ The investigation continued. Shortly thereafter, the prosecutor presented her findings to the pretrial chamber, which after a close consideration of the prosecutor's information, found reasonable grounds for a case against General Watson and issued a summons to appear.³⁰

The president at first ignored the request, but as the request was made public in European capitals and their newspapers, the administration was increasingly asked to respond to the request by friendly governments.³¹ Of course, as a nonparty to the Rome Treaty, the president declined to dignify the request, which would only further lend credence to a process that the United States has always believed would be used against it politically. And, now it appeared that was just the case.

The secretary of defense, in consultation with the president, decided not to prosecute General Watson, because no one was actually harmed in the planned reattack on the police station, as the pilots actually dropped their bombs on an alternate target away from noncombatants. Besides, the general has since retired, and nobody in the administration felt this was the right course of action. At that point, the pretrial chamber, acting on the request of the chief prosecutor, asked the United States to surrender General Watson to the jurisdiction of the court for trial.

Thus, the general effectively could not leave the United States because all countries that are parties to the ICC are obligated to hand over to the court those who have been summoned by the court.³² He retired to his family's farm in Wisconsin to tend his dairy cows and await his fate.

The first phone call the president received came from the prime minister (PM) of Great Britain. The PM urged his old friend to open a case against the general and find, as they surely would, that no laws had been broken.³³ That way the ICC would be satisfied, and the United States could preserve its public opposition to the treaty. Furthermore, it would set an example for other countries to see that the United States practices what it preaches. The president thanked his old friend before hanging up. He then convened a meeting of key decision makers and advisors in the Oval Office.

Back in the Oval Office

The secretary of defense took the opportunity to speak first. "Mr. President, if we turn Watson over to this court, it will be a sham. I don't know of any general that will ever want to command an operation knowing that he can be put on trial in The Hague for his decisions. We could face a mass resignation of our senior leadership. And with the potential flare ups in this terror war, we need our most experienced senior leaders commanding forces, not younger officers promoted to fill the holes."³⁴

Answered the secretary of state, "We all clearly understand that point. But there are at least two issues on my mind here. First, how do we continue to ensure our own safety in the world with these terrorist cells still active and planning on hitting us all over the world if we don't have access to basing? We have been receiving messages in most of our embassies that our access will immediately disappear if we shield General Watson. Of course, there are a few who are on our side, but that doesn't leave us with many options. Second, we are about to lose our UN Human Rights seat again, and this time we're unlikely to get it back. The international implications of not turning the general over are far greater than most people, even in this room, I'd dare be so bold as to suggest, have envisioned.

Everything from international sports to preferential trade agreements will suffer.”³⁵

The vice president looked over to the attorney general and said, “Countries are screaming that the law does not change based on the rank of the officer implicated. We say the same thing here, but damn it, we didn’t take his rank into account when we decided in this room that he was not guilty of a war crime. This is a political farce! Doesn’t anyone remember . . . we didn’t bomb that building! . . . There was no attack!”

“I raised that very point, sir, when I talked with the chief prosecutor before driving over here,” said the attorney general. “Her reply to me is that I missed the second point she originally made before the pretrial chamber.”

“And exactly what was that?” asked an irritated vice president. “Well, when the Appeals Court overturned the verdict and sentences, that simply opened the door. She reminded me that the ‘abandoned,’ her words, not mine, police station was in fact previously attacked and civilians died. She went on to mention that she thought it disturbing that right after the court martial, 17 targets were suddenly reevaluated and removed from the target list. She reasoned that if we just happened to notice that such a large number of targets lacked military necessity after the trial, there is sufficient reason to believe that there were at least as many such targets before the pilots did their duty.”

“That line of reasoning is nonsense!” said the vice president. “They’re trying to get to us through this court to undermine our military capability in a way they could not ever hope to do on a battlefield.”

“That may be,” the attorney general answered, for “whatever the military implications, our laws conflict on this issue. Although we have not tried the general here in the United States, I am confident he would never be convicted under the UCMJ. Yet, although we never ratified the ICC,³⁶ we have a long history of supporting war crimes tribunals.³⁷ Legally we can make a strong case against the prosecutor and the pretrial chamber on the notion that we made a bona fide examination of the alleged war crime.³⁸ Of course, the prosecutor will argue that we did not. This is a political decision, not a legal one. I believe

there is sufficient cause under present law to either turn Watson over to the ICC, or to never turn him over. But also understand that, while we did not ratify the treaty, and even though the conflict took place in a country that did not ratify the treaty, because some of the dead were from countries that are a party to the Treaty, within the bounds of the treaty the ICC had justification to indict the general.”³⁹

After a few moments of silence in which everyone chewed over the attorney general’s words, the president looked over to the speaker and nodded. Then the speaker of the House added, “Mr. President, both houses of Congress are nearly unified. The sense among the electorate is that the rest of the world can take a hike, as long as we can defend ourselves. With a few exceptions, members from both sides of the aisle in both houses strongly oppose extradition. If the General were ordered extradited by the administration, both houses would feel compelled to issue a joint resolution condemning the extradition. We’re trying to keep the members in line as best we can, but many, not only on the other side of the aisle, would see a cut in many of the administration’s highest nondefense priorities a logical form of protest.”

“That’s beautiful,” said the president. “Just beautiful.”

“The problem,” said the secretary of defense, “is that state is right. We’re having trouble defending ourselves as it is even after targeting the terrorist cells abroad. If we do not have access to basing around the world and have our former allies on board with us, then no Western country will ever be able to prevent these people from forming, training, planning, and carrying out their terror against us from rogue states or states they take over. The world is not as simple as it was at the beginning of the last century when armies lined up like football teams to see who was stronger. We got to this point because the world has changed while our political will and military strategy have not caught up.”

“I can’t believe all this hassle over one reversal by the Court of Appeals for the Armed Forces,” said the president.

“As I said earlier, Mr. President, that was only the catalyst,” the attorney general interjected. “The issue is the civilian casualties, however large or small, that are reinforced by four pilots

who refused to obey what they believed was an illegal order. If there was one, how many more were there? If four pilots had the gumption to say no, why not the others?"

"Okay! Okay!" responded the frustrated president, catching his breath. "What are my options and what are the consequences of those options?" he asked. Then looking over to his counsel, he said, "Tony, take notes for me."

The vice president spoke first. "I see three options. We can formally investigate the conduct of decision making in the headquarters and, if warranted, try the general in a court-martial. We can turn him over to the ICC. Alternatively, we can ignore the request from the ICC. Of course each of these comes with consequences, both domestically and internationally." All present nodded in agreement.

"OK, what about the option to try the general here at home?"

"First off, from a military standpoint," answered the secretary of defense, "we'd face the possibility of mass resignations by the senior military and civilian leadership. On the other hand, my staff believes that there would be a greater percentage of officers, especially in the field grade and lower general officer ranks that would be in favor of an open investigation and trial, in the hopes that Watson would be cleared, perhaps, but justice served, at the very least. It would undoubtedly put some very serious strain on the personnel system and our decisions for command positions in the future conduct of any war or, for that matter, any UN-sponsored action."

"If we tried General Watson by court-martial and he was acquitted, would the ICC let it rest, or would they come after him?" asked the president.

The secretary of state answered flatly, "They'd better let it rest. Under the treaty, the ICC must accept a national court decision unless there is cause to believe it was a contrived trial. They'll respect any decision we make."⁴⁰

The president spoke up. "If we do try the General, and I'm not saying he should be or shouldn't be tried, but if we tried him, wouldn't we look like we were forced to do it? Wouldn't that be the same as handing him over? I mean, if we do this openly, he may well be convicted, and that would be something we'd have to be prepared to answer. We said no to the

initial investigation, but now are considering allowing him to be tried. If we do this, we may never be able to prevent such a scenario again.”

“Mr. President, is that necessarily a bad thing?” asked the attorney general. “We need not remind other countries about laws unless we are willing to comply with our own, let alone international laws.”

“Its the long-term military consequences I’m concerned about,” noted the graved-faced president. The secretary of defense was agitated, but still spoke quietly. He had an entire military to think about and all that went with it. “We are swimming in bad waters here. We have no idea what will result from our decisions. My counsel tells me the domestic law here is very unclear. There is no clear-cut rule for determining proportionality. That is what command means, making that decision in each case. For goodness sake, it is a war. If we tried him and he was found guilty, that might make some governments and some activists happy, but it would scare military leaders around the world to death, even those who are in favor of a trial. I’d bet 10 dollars on that.”

“The future international consequences of a guilty verdict would be the same as an acquittal.” The secretary of state was thinking deeply as he spoke. “The problem is that if we try him, regardless the outcome, pressure will mount from all quarters in all future wars for a strict legal checklist to be followed, rather than the creativity that has won wars in the past.⁴¹ Our adversaries have already tried to use our own laws against us and any trial would embolden them even more in the future.”⁴²

“OK.” The president looked around the room and stood up to go get some coffee at the side table. He talked as he poured his coffee. “Trying him here is looking like a tough option. What else can we do?”

“The next option,” said the vice president, “is extraditing General Watson to The Hague to stand trial before the ICC. Not something we would have thought to discuss two years ago. Let’s hear what you all think the consequences of this course of action would be.”

The attorney general spoke first. “Mr. President, I am most uncomfortable with this option because we clearly have laws

on the books that this case could be tried under, namely the UCMJ. We have a judicial system here that is far less political than most assume the ICC to be, true or not. If we send the General to The Hague, there is no telling what would happen. If he is, in fact guilty of a crime, we should find that out here in our own judicial system."

All looked towards the secretary of state who said, "I think there would be a near split in the international community. Many would hail an extradition as the consummation of global international law. They would then have the precedent necessary to request and receive the extraditions of hundreds of indictees worldwide. They would say that the United States has finally put its money where its mouth is when urging other states to extradite their accused war criminals. From an international relations standpoint, that one aspect would be good. On the other hand, there would be many other states that would, at best, grudgingly accept this extradition and criticize the United States for not taking care of its own problem, especially given the tradition of jurisprudence the attorney general just cited. It would mean as much as domestic turmoil for them as it would for us."

Turning to the speaker, the president asked, "What about Congress?"

"Mr. President," said the speaker, "there would be a grueling debate on the issue. I can speak for the House, and I am sure the Senate would be equally concerned." Both Senate leaders nodded. "Many of the very members who opposed the treaty in the first place would argue that we cannot let our national security interests be decided in foreign capitals or by human rights organizations. Others, however, would gladly accept the extradition to show we are not trying to be unilateralists. It would be a fierce debate, but I'm afraid both chambers would oppose extradition with a joint resolution."

The vice president said, "Mr. President, no matter what your decision, there are going to be some Americans praising you for it and others who will rake you over the coals." Then, he dropped the bombshell, "The American Civil Liberties Union has made it perfectly clear that they will defend the General

and bring a suit in the District Court here in D.C. to block any extradition.”

A startled attorney general looked at the vice president and asked, “Do we know why?”

“They agree that the general’s right to a fair trial by his peers would be jeopardized by sending him overseas for an action not found to be criminal under US law.”

Then the president asked, “What if he was acquitted in The Hague?”

The secretary of state answered, “There would, of course, be those who claim the court is merely a tool of American hegemony, but they would not carry the day. Far more likely, everyone would breathe a sigh of relief that it was all over and hope that something like this never happens again.”

“*Would* he be acquitted at the ICC?” the president asked to nobody in particular.

The attorney general answered, “From what I know of this case, he’d be acquitted here and very likely also in The Hague. There is very little black and white here. The main ICC case is built upon the ruling of the Court of Appeals for the Armed Forces, who never actually said the general committed a crime, only that there was cause for the officers to believe the order may have been unlawful. One more thing, Mr. President, even if the general was acquitted, the prosecutor can appeal the acquittal.⁴³ So, an acquittal does not necessarily mean an acquittal, at least as we know it.”

Then the vice president wondered aloud, “What if he were convicted at The Hague?”

“The only possible action we could take, Mr. President,” said the secretary of state, trying to find something positive in such a scenario, “would be to stand up and say that, even as a non-signatory, the United States does not shield people from their crimes, and set it as an example for the world to follow.”

“What would be the future implications of that?” asked the president.

“Well, I think it would be hard to find people who desired to achieve command rank in the military,” said the secretary of state “and don’t think this is only a problem for us. You think about which country’s officers would want to command a

coalition or go into uncertain operations of the kind we have fought in the last decade. This may be the worst thing to happen to those that need the most protection. By trying to protect everyone from harm, military officers worldwide will fear to go into certain areas or follow certain strategies for fear of hurting noncombatants. All the while bad guys will cleanse entire areas while military leaders wait for orders from civilians who have not had to make those decisions in the past.”

“That sounds like an even tougher option,” said the president. “What’s left?”

The vice president continued. “Domestically, I’m not confident that the citizenry would be comfortable in merely ignoring the indictment. There is strong concern these days with equality of treatment, and frankly, it might indeed look like we have something to hide.”

The secretary of state spoke up next. “If we chose to ignore the indictment, there would be essentially two responses internationally. The first is that the international community would have their bluff called, and they would go quietly. There might be some minor demonstrations in certain capitals, but governments might not see this as an issue to push us on. If that were the case, we could ride out the storm within a few months.”

“On the other hand, and I think more likely, there would be strong condemnation in the UN and within NATO. There might be very vocal and very public cries for resolutions pressuring us to turn Watson over.”

“NATO has already pushed for a restructuring of the command relationships to put non-US officers in the command billets of Allied Forces Southern Europe,”⁴⁴ said the secretary of defense. “This would be the reason and we’d likely lose the vote big.”

“Furthermore, we would have to face the possibility that in any future conflicts, or even continuations of our war on terrorism, countries may not join the coalition under US leadership if we protect Watson,” said the secretary of state.

“That’s balderdash, and we all know it,” replied an angry secretary of defense. “We’re the only ones able to lead any combat coalition anywhere in the world. Unless these countries all decided not to fight, which would be fine by many within my

department, they'd need our logistics capability to support and sustain them in any operations."

"How likely is it that they'd all either demand alternative coalition leadership, or stay at home in future fights?" asked the vice president.

"Well, you all know how hard they've been pressing me both in my visits abroad and on the phone," answered the president. "Most of the leaders understand the position we're in, although they disagree with us. It is their parliaments that are pushing them, and they will likely follow their popular sentiment."

"Mr. President, if I may?" It was the House speaker seeking the attention of the president, saying, "The Armed Services Committee staffers have been hearing rumblings from within the uniformed services for an airing about this. Sort of a desire to seek accountability and either clear the guy or clean up the image, which the leadership just below the top levels says needs to be repaired."

The secretary of defense spoke in calm, but measured words. "This is true, but I don't want mention of it outside private deliberations. We can't have staffers on the Hill talking to the media about problems within the ranks, especially in this time of high operations tempo. The fact is, Mr. President, that many of our lower-ranking generals and colonels think that ignoring the issue would make their jobs all the more difficult if the situation isn't dealt with openly. This is in contrast to many of the senior generals who want to see no investigation at all. This is at least as important an issue as the international considerations, in my mind."

"Anything else that can happen under the Ignore option?" asked the vice president.

"Well, Mr. President," said the secretary of state, "it is possible that there would be intense diplomatic and military to military pressure below the level of media attention. Other countries might put pressure on American business interests. We might see some disengagement of talks at certain diplomatic levels, and may see many of our military exercise opportunities abroad reduced. While not openly vocal, this may be, in fact, more damaging in a real sense."

The vice president summed it up. "The unknown ramifications of how to determine future actions based on past silence will weigh on both government and military leaders. How will we deal, in this very room, with future decisions if we remain silent on this issue? This is probably the most uncomfortable option for all with the greatest long-term implications. Silence may set a precedent that nobody will want, but that nobody may be able to avoid."

The room was filled with silence as the president's advisors sat back and looked to the president for a decision.

Then the secretary of state spoke once again, "Excuse me Mr. President. There is one more thing I failed to mention. The United States has always taken the lead in issues of this sort. We were the ones to push for war crimes tribunals at the end of the World War II. We are the ones who pushed for the affirmation of the tribunals at the UN in 1946. We did the same for Rwanda and Yugoslavia. We got a black eye for failing to ratify the Rome Treaty. And, we've caught hell around the world with our Article 98 Agreements.⁴⁵ I really do not have any idea what the fallout will be if we say no again. I'm sorry, Mr. President, but I just had to . . ." as his chin slowly dropped onto his chest and his voice drifted off into mumbled silence.

"Alright, my head's starting to hurt," said the president, indicating that the meeting had come to an end. "I'm going to think about this. We'll get back together, maybe tomorrow or at the latest the day after."

Notes

1. Intelligence reports noted that al-Qaida was attempting to regroup in Lebanon. Numerous other news outlets, to include the *London Times* and *Wall Street Journal*, reported similar stories. See "UPI Hears . . .," *Washington Times*, 25 March 2002.

2. The strategy executed by the US Central Command and the coalition against terrorism in Afghanistan broke conventional expectations by relying not on massive airpower alone, nor massive ground attacks, but precision attacks against specific terrorist objectives through a synergy of special operations forces working in concert with air power dropping precision munitions.

3. See The Federation of American Scientists at <http://www.fas.org/irp/program/collect/predator.htm> for details on the capabilities of the Predator

uninhibited aerial vehicle and discussion of its role both in the Kosovo war as well as in Afghanistan.

4. The standard intelligence premission briefing format has expanded in some wings to include collateral damage estimates and implications for the planners to consider.

5. Several hospitals (Nis, Dragisa Misovi, and Surdulica) and an old age home (Surdulica) were damaged or destroyed during attacks. See "NATO/Federal Republic of Yugoslavia 'Collateral Damage' or Unlawful Killings? Violations of the Laws of War by NATO during Operation Allied Force," a report written by Amnesty International, <http://web.amnesty.org/library/print/ENGEUR700182000>. See also Jeffrey L. Gingras and Tomislav Z. Ruby, "Morality in Modern Aerial Warfare," unpublished manuscript, Montgomery, Ala.: Air Command and Staff College, 2000, <http://research.maxwell.af.mil/papers/student/ay2000/acsc/html/00-205.pdf>. In Operation Allied Force, the NATO air war over Serbia, NATO forces targeted and attacked in the town of Surdulica, a Serbian police station used by paramilitaries who were ethnically cleansing the Albanian population from the area. The police station shared a perimeter with a retirement home and was hit on more than one occasion. Human Rights Watch questioned NATO regarding the importance of the target. In an official memorandum to Human Rights Watch, NATO explained that the police station was a legitimate target, but the organization did not mention any scale of proportionality of noncombatant casualties against the necessity of that target. In just war theory, the notion of proportionality is the second of two key elements of *jus in bello*, or the just conduct in war. Proportionality is essentially a cost benefits analysis of a specific operation or act in war. The destruction caused must not be greater than the justified military outcome or end.

6. During the air war over Serbia, NATO spokesman Jamie Shea acknowledged that 11 people were killed and more than 20 injured when one of 20 bombs targeted on a publishing house in the town of Novi Pazar, Serbia, went long and hit an apartment building across the street. See "NATO's Bombing Blunders," *BBC News*, on-line, 1 June 1999, 7.

7. The same response was given by a general officer to a wing commander in Desert Storm after questioning the wisdom of sending unprotected strikers into a heavily defended part of Iraq.

8. An Article 15 is the highest level of nonjudicial punishment offered under the Uniform Code of Military Justice and must be included in officers' official service records. For officers to receive Article 15s on their records virtually means never being promoted beyond their present rank. There have, of course, been a few exceptions.

9. Under the UCMJ, military personnel are not obligated to accept an Article 15, nonjudicial punishment. They have the right to request trial by court-martial wherein they may be exonerated, found guilty, or receive an even harsher punishment. Even if an individual is exonerated, the individual might still face an administrative discharge.

10. Before a general court-martial is convened, the military will first conduct an Article 32 investigation. This is the military equivalent to a civilian grand jury. For reasons of brevity, this article assumes that an Article 32 investigation has been conducted and the investigating officer recommended that this case go to trial.

11. There is no firm rule on joinder of related cases. Depending on the facts and circumstances, individuals could be tried together or separately. In this particular case, trying the officers together was a logical approach based on all the facts and circumstances surrounding it.

12. Military counsel is provided free of charge to all military personnel tried in a military court. Free counsel continues throughout the appeals process. The service member always has the option of personally hiring civilian counsel, which the pilots chose to do in this case.

13. See the court Web site, <http://www.armfor.uscourts.gov/>.

14. Article 22 of Hague IV (1907) states that “the rights of belligerents to adopt means of injuring the enemy is not unlimited.” Article 27 states that “as far as possible,” charitable buildings, hospitals, etc., are to be spared. All four of the Geneva Conventions of 1949 note that noncombatants are protected persons. The United States is not a party to Protocol I (1977) of the Geneva Conventions of 1949. Article 51, paragraph 1, states that the civilian population shall not be the object of attack. Paragraph 5 (b) identifies an indiscriminate attack as an attack that may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and directed military advantage anticipated. *Air Force Instruction 51-401* governs LOAC training program. At a minimum, this *Air Force Instruction* requires that every member of the Air Force undergo annual training on the laws and customs of war as stipulated by The Hague and Geneva Conventions. In addition, a member of the Air Force who believes that a possible violation of LOAC has occurred *must* immediately report the incident to his or her commanding officer. Any commander who has received a report of noncompliance with or a breach of LOAC *must* immediately report all facts to the appropriate staff judge advocate (emphasis in original).

15. In discussing LOAC and Nuremberg, one cannot fail to mention the incident at My Lai, Viet Nam in January 1968, and the killing of several hundred noncombatants (men, women, and children) by US forces. Of the 25 officers and enlisted personnel originally charged, three were court-martialed—two were acquitted, and the third, Lt William Calley, was convicted. None of the three was charged for violations of either international law or LOAC. All were charged under the UCMJ. Calley was convicted for violation of Article 118, murder. Nonetheless, the courts validated several convention and LOAC provisions. First, the obligation to disobey illegal orders was affirmed. Second, the concept that a commander is responsible for the actions of subordinates (superior accountability) and must take all reasonable steps to insure compliance with LOAC was validated.

16. Anthony Cordesman argued that every officer has the moral responsibility for every other officer's decisions. This standard would support the fliers' questioning of proportionality in this scenario. See Anthony Cordesman, "The Moral and Ethical Challenges of Modern War" (paper presented to the US Army War College's 21st Annual Strategy Conference, 9 April 2002).

17. See *United States v. New*, 55M.J. 95 (2001), decided on 13 June 2001. In this case, Army Spec. Michael G. New appealed his conviction for disobeying a lawful order.

18. In addition to *United States v. New*, see also *United States v. Trani*, 1952 CMA LEXIS 826, 1 U.S.C.M.A. 293, 3 C.M.R. 27 (1952).

19. In addition to *United States v. New*, see also paragraph 415, Manual for Courts-Martial, United States, 1917, at 210, which sets a high standard for disobeying an order.

20. For additional information about JSCOPE, see <http://www.usafa.af.mil/jscope/>. Many of the papers presented at the JSCOPE Conferences are readily available online at this web address.

21. Maj Jerry Swift, one of our ACSC students, researched and submitted his findings in "The Teaching of Morality in Warfighting in Today's Officer Corps" in partial fulfillment of our Morality and War elective requirement in 2001. His paper is available at <https://research.maxwell.af.mil/papers/ay2001/acsc/01-208.pdf>.

22. See Michael Walzer, *Just and Unjust Wars* (New York: Basic Books, 1977), 151–60, and Michael Carlino, "The Moral Limits of Strategic Attack," *Parameters* 32, no. 1 (Spring 2002): 15–29, for a discussion of the doctrine of double effect and the strict scale of proportionality allowable within warfare.

23. Beginning with the air war over Serbia, target graphics were designed for briefing at the White House for presidential approval. The graphics included pictures of the target, the significance of the target, and an estimate of noncombatant casualties given the type of weapons recommended.

24. See the International Criminal Tribunal for Yugoslavia Weekly Press Briefing, 5 May 1999, <http://www.un.org/icty/briefing/PB050599.htm>. A spokesman stated that the Office of the Prosecutor "was satisfied that it had jurisdiction over the 19 NATO members."

25. Under Article 14 of the Treaty of Rome, "a state party may refer to the prosecutor a situation in which one or more crimes within the jurisdiction of the Court appear to have been committed. . . ." Article 15, paragraph 1, of the treaty authorizes the prosecutor to initiate an investigation. Paragraph 3 of the same article requires that the prosecutor to seek approval from the pretrial chamber to proceed with an investigation provided there is a reasonable basis to conduct an investigation.

26. "Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977," <http://www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e636b/f6c8b9fee14a77fdc125641e0052b079?OpenDocument>. Article 51, paragraph 4, prohibits indiscriminate attacks on the civilian population. Paragraph 5 defines the types of attacks that are considered indis-

criminate. Subparagraph 5(b) states “an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.”

27. Article 38 of section 4 states that “Treaties and Third States of the United Nations Convention on the Law of Treaties” (dated 23 May 1969), which entered into force on 27 January 1980, become binding on a third state when that treaty becomes recognized as a customary rule of international law. The criteria determining when something becomes customary is open to speculation.

28. At the end of World War I, the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties established the principle of command responsibility (superior accountability). Col Kenneth Howard, the military judge, validated superior accountability during the trial of Gen Tomoyuki Yamashita in 1946 and as previously documented in note 15 above during the trial of Captain Medina (My Lai). For an in-depth review of this issue, see Leslie C. Green, “War Crimes, Crimes against Humanity, and Command Responsibility,” <http://www.nwc.navy.mil/press/Review/1997/spring/art2sp97.htm>.

29. Article 34 of the Rome Statute addresses the organization of the court: Presidency, Appeals Division, Trial Division, Pre-Trial Division, and Office of the Prosecutor and the Registry. The pretrial chamber is comprised of three judges from the Pre-Trial Division. The rules of procedure and evidence discuss the duties and responsibilities of the members of the court. The pretrial chamber handles all of the pre-trial matters of the court. See <http://www.iccnw.org/buildingthecourt.html>.

30. Article 58 of the Rome Statute states that the pretrial chamber may issue a warrant of arrest or a summons to appear before the ICC on the application of the prosecutor upon being satisfied that there are reasonable grounds to believe that a crime within the jurisdiction of the court has been committed.

31. See Robert W. Tucker, “The International Criminal Court Controversy,” *World Policy Journal* 18, no. 2 (Summer 2001). The ICC may only take jurisdiction if a state is unwilling or unable to investigate and prosecute.

32. Under the provisions of part 9 to the statute, the court has the authority to ask all other “States parties” for cooperation. Countries that are a party to the statute are then obligated to assist in the apprehension of persons sought by the court.

33. See Jonathan I. Charney, “International Criminal Law and the Role of Domestic Courts,” *The American Journal of International Law* 95, no. 1 (January 2001): 120–24, for a discussion of the pressure which can be applied to countries to conduct bona fide examinations, or turn the indicted over.

34. In his testimony before the Senate Foreign Relations Committee on 23 July 1998, David Scheffer, US ambassador at large for war crimes issues, stated that the establishment of the court could “inhibit the ability of the United States to use its military to meet alliance obligations and participate

in multilateral operations, including humanitarian interventions to save civilian lives.” See http://www.state.gov/www/policy_remarks/1998/980723_scheffer_icc.html.

35. The United States was voted off the 53-nation Human Rights Commission on 3 May 2001. According to the Reuters News Service, which interviewed Joanna Weschler, the UN representative of Human Rights Watch, “Many voters resented the poor US voting record on issues like land mines and availability of AIDS drugs.” See http://news.bbc.co.uk/hi/english/world/americas/newsid_1311000/1311468.stm, *BBC News*, 3 May 2001. According to the *BBC News*, the United States regained a seat on the Human Rights Commission in a secret ballot. See http://news.bbc.co.uk/hi/english/world/americas/newsid_1958000/1958406.stm, 29 April 2002.

36. On 31 December 2000, Pres. Bill Clinton signed the Treaty of Rome to leave open the option for the United States to offer future changes in the treaty. Had he not signed the treaty, the United States would have no voice in determining any of the rules or procedures governing the operation of the court. On 6 May 2002, the United States notified the secretary-general of the United Nations that the United States had not intended to ratify the Treaty of Rome and was therefore not bound by its provisions. For additional details, see <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty10.asp>.

37. The United States was instrumental in establishing the Nuremberg War Crimes Trials as well as the War Crimes Trials in the Pacific after World War II. The United States was also a key player for the International Criminal Tribunals for Rwanda and the Former Yugoslavia.

38. The ICC Statute, Article 17, states that a case is not admissible to the ICC if a bona fide examination of the alleged crime was undertaken and disposed of by the state. However, there is no precedent as to what constitutes a “bona fide examination” or disposition by the state.

39. See Tucker, “The International Criminal Court Controversy,” *World Policy Journal*, Summer 2001, 71–81. Tucker argues that “Indeed the United States extradites and surrenders its own citizens all the time to be tried by foreign courts that are not subject to the US Constitution or its Bill of Rights.”

40. According to Article 20 of the Rome Statute, a person tried by another court cannot be tried by the ICC unless the court believes “the proceedings of the other court: (a) were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the court; or (b) Otherwise (*sic*) were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.”

41. For a detailed discussion of “lawfare” in future conflicts, see Col Charles Dunlap, *Law and Military Interventions: Preserving Humanitarian Values in 21st Century Conflicts* (paper presented at the Humanitarian Challenges Military Intervention Conference, Washington, D.C., 29 November 2001).

42. Mary Anastasia O'Grady reported that it is not uncommon for insurgents to either bribe or force peasants to file false charges against competent military commanders to force them from their positions. All the while, they themselves are committing atrocities and other human rights violations. See Mary Anastasia O'Grady, "What About Colombia's Terrorists?" *Wall Street Journal*, 5 October 2001.

43. Rule 111 of the rules of procedure and evidence allow the prosecutor to appeal the trial chamber's acquittal of a suspect if certain conditions are satisfied.

44. Since 1997, France has made numerous public statements about wanting a European commander in NATO's southern headquarters in Naples, Italy. Presently, the overall commander, as well as the air and naval commanders for NATO's southern region are Americans. See the Center For Defense Information, *Weekly Defense Monitor*, No. 2 (24 July 1997), <http://www.cdi.org/weekly/1997/Issue2/#2>, and "A New Dialogue Between Equals," *Time* 194, no. 4 (27 January 1997), http://www.time.com/time/magazine/1997/int/970127/europe.a_new.html for more details.

45. Under the Treaty of Rome, Article 98(2), agreements allow a country to enter into jurisdictional-routing agreements that take precedent over the Treaty of Rome. Many of America's allies and nongovernment organizations contend that these so-called agreements not only violate the intent but the letter of Article 98 as well.

Appendix

Signatories and Ratifications to the Rome Statute of the ICC*

State	Signature	Ratification, Accession (a)	State Party Number
Afghanistan		10 Feb 2003 (a)	89
Albania	18 Jul 2002	31 Jan 2003	88
Algeria	28 Dec 2000		
Andorra	18 Jul 1998	30 Apr 2001	30
Angola	7 Oct 1998		
Antigua and Barbuda	23 Oct 1998	18 Jun 2001	34
Argentina	8 Jan 1999	8 Feb 2001	28
Armenia	1 Oct 1999		
Australia	9 Dec 1998	1 Jul 2002	75
Austria	7 Oct 1998	28 Dec 2000	26
Bahamas	29 Dec 2000		
Bahrain	11 Dec 2000		
Bangladesh	16 Sep 1999		
Barbados	8 Sep 2000	10 Dec 2002	87
Belgium	10 Sep 1998	28 Jun 2000	13
Belize	5 Apr 2000	5 Apr 2000	8

*This list is current as of 19 May 2005.

**Ten countries deposited their instrument of ratification simultaneously at a special UN ceremony on 11 April 2002, crossing the threshold of 60 ratifications needed for the Rome Statute to enter into force. Due to their concerted efforts, each country was designated the 60th State Parties member.

State	Signature	Ratification, Accession (a)	State Party Number
Benin	24 Sep 1999	22 Jan 2002	49
Bolivia	17 Jul 1998	27 Jun 2002	71
Bosnia and Herzegovina	17 Jul 2000	11 Apr 2002	60**
Botswana	8 Sep 2000	8 Sep 2000	18
Brazil	7 Feb 2000	20 Jun 2002	69
Bulgaria	11 Feb 1999	11 Apr 2002	60**
Burkina Faso	30 Nov 1998	16 Apr 2004	93
Burundi	13 Jan 1999	21 Sep 2004	95
Cambodia	23 Oct 2000	11 Apr 2002	60**
Cameroon	17 Jul 1998		
Canada	18 Dec 1998	7 Jul 2000	14
Cape Verde	28 Dec 2000		
Central African Republic	7 Dec 1999	3 Oct 2001	41
Chad	20 Oct 1999		
Chile	11 Sep 1998		
Colombia	10 Dec 1998	5 Aug 2002	77
Comoros	22 Sep 2000		
Congo	17 Jul 1998	3 May 2004	94
Costa Rica	7 Oct 1998	7 Jun 2001	33

State	Signature	Ratification, Accession (a)	State Party Number
Côte d'Ivoire	30 Nov 1998		
Croatia	12 Oct 1998	21 May 2001	32
Cyprus	15 Oct 1998	7 Mar 2002	55
Czech Republic	13 Apr 1999		
Democratic Republic of Congo	8 Sep 2000	11 Apr 2002	60**
Denmark	25 Sep 1998	21 Jun 2001	35
Djibouti	7 Oct 1998	5 Nov 2002	82
Dominica		12 Feb 2001 a	29
Dominican Republic	8 Sep 2000	13 May 2005	99
Timor Leste		6 Sep 2002 a	79
Ecuador	7 Oct 1998	5 Feb 2002	52
Egypt	26 Dec 2000		
Eritrea	7 Oct 1998		
Estonia	27 Dec 1999	30 Jan 2002	50
Fiji	29 Nov 1999	29 Nov 1999	5
Finland	7 Oct 1998	29 Dec 2000	27
France	18 Jul 1998	9 Jun 2000	12
Gabon	22 Dec 1998	20 Sep 2000	21
Gambia	4 Dec 1998	28 Jun 2002	73

State	Signature	Ratification, Accession (a)	State Party Number
Georgia	18 Jul 1998	5 Sep 2003	92
Germany	10 Dec 1998	11 Dec 2000	25
Ghana	18 Jul 1998	20 Dec 1999	6
Greece	18 Jul 1998	15 May 2002	67
Guinea	7 Sep 2000	14 Jul 2003	91
Guinea-Bissau	12 Sep 2000		
Guyana	28 Dec 2000	24 Sep 2004	97
Haiti	26 Feb 1999		
Honduras	7 Oct 1998	1 Jul 2002	76
Hungary	15 Jan 1999	30 Nov 2001	47
Iceland	26 Aug 1998	25 May 2000	10
Iran (Islamic Republic of)	31 Dec 2000		
Ireland	7 Oct 1998	11 Apr 2002	60**
Israel	31 Dec 2000		
Italy	18 Jul 1998	26 Jul 1999	4
Jamaica	8 Sep 2000		
Jordan	7 Oct 1998	11 Apr 2002	60**
Kenya	11 Aug 1999	15 Mar 2005	98
Kuwait	8 Sep 2000		

State	Signature	Ratification, Accession (a)	State Party Number
Kyrgyzstan	8 Dec 1998		
Latvia	22 Apr 1999	28 Jun 2002	74
Lesotho	30 Nov 1998	6 Sep 2000	16
Liberia	17 Jul 1998	22 Sep 2004	96
Liechtenstein	18 Jul 1998	2 Oct 2001	40
Lithuania	10 Dec 1998	12 May 2003	90
Luxembourg	13 Oct 1998	8 Sep 2000	19
Macedonia (F.Y.R)	7 Oct 1998	6 Mar 2002	54
Madagascar	18 Jul 1998		
Malawi	2 Mar 1999	19 Sep 2002	81
Mali	17 Jul 1998	16 Aug 2000	15
Malta	17 Jul 1998	29 Nov 2002	85
Marshall Islands	6 Sep 2000	7 Dec 2000	24
Mauritius	11 Nov 1998	5 Mar 2002	53
Mexico	7 Sep 2000		
Monaco	18 Jul 1998		
Mongolia	29 Dec 2000	11 Apr 2002	60**
Morocco	8 Sep 2000		
Mozambique	28 Dec 2000		

State	Signature	Ratification, Accession (a)	State Party Number
Namibia	27 Oct 1998	25 Jun 2002	70
Nauru	13 Dec 2000	12 Nov 2001	45
Netherlands	18 Jul 1998	17 Jul 2001	37
New Zealand	7 Oct 1998	7 Sep 2000	17
Niger	17 Jul 1998	11 Apr 2002	60**
Nigeria	1 Jun 2000	27 Sep 2001	39
Norway	28 Aug 1998	16 Feb 2000	7
Oman	20 Dec 2000		
Panama	18 Jul 1998	21 Mar 2002	56
Paraguay	7 Oct 1998	14 May 2001	31
Peru	7 Dec 2000	10 Nov 2001	44
Philippines	28 Dec 2000		
Poland	9 Apr 1999	12 Nov 2001	46
Portugal	7 Oct 1998	5 Feb 2002	51
Republic of Korea	8 Mar 2000	13 Nov 2002	83
Republic of Moldova	8 Sep 2000		
Romania	7 Jul 1999	11 Apr 2002	60**
Russian Federation	13 Sep 2000		
Saint Lucia	27 Aug 1999		

State	Signature	Ratification, Accession (a)	State Party Number
Saint Vincent and the Grenadines		3 Dec 2002 a	86
Samoa	17 Jul 1998	16 Sep 2002	80
San Marino	18 Jul 1998	13 May 1999	3
Sao Tome and Principe	28 Dec 2000		
Senegal	18 Jul 1998	2 Feb 1999	1
Serbia and Montenegro	19 Dec 2000	6 Sep 2001	38
Seychelles	28 Dec 2000		
Sierra Leone	17 Oct 1998	15 Sep 2000	20
Slovakia	23 Dec 1998	11 Apr 2002	60**
Slovenia	7 Oct 1998	31 Dec 2001	48
Solomon Islands	3 Dec 1998		
South Africa	17 Jul 1998	27 Nov 2000	23
Spain	18 Jul 1998	24 Oct 2000	22
Sudan	8 Sep 2000		
Sweden	7 Oct 1998	28 Jun 2001	36
Switzerland	18 Jul 1998	12 Oct 2001	43
Syrian Arab Republic	29 Nov 2000		
Tajikistan	30 Nov 1998	5 May 2000	9
Tanzania (United Rep.)	29 Dec 2000	20 Aug 2002	78

State	Signature	Ratification, Accession (a)	State Party Number
Thailand	2 Oct 2000		
Trinidad and Tobago	23 Mar 1999	6 Apr 1999	2
Uganda	17 Mar 1999	14 Jun 2002	68
Ukraine	20 Jan 2000		
United Arab Emirates	27 Nov 2000		
United Kingdom	30 Nov 1998	4 Oct 2001	42
United States of America	31 Dec 2000		
Uruguay	19 Dec 2000	28 Jun 2002	72
Uzbekistan	29 Dec 2000		
Venezuela	14 Oct 1998	7 Jun 2000	11
Yemen	28 Dec 2000		
Zambia	17 Jul 1998	13 Nov 2002	84
Zimbabwe	17 Jul 1998		