

USAWC STRATEGY RESEARCH PROJECT

**U.S. POLICY ON THE INTERNATIONAL CRIMINAL COURT (ICC): LEAD, FOLLOW
OR GET OUT OF THE WAY**

by

Colonel Diana A. Raynor
United States Army

Colonel George Teague
Project Advisor

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U.S. Army War College, Carlisle Barracks, Pennsylvania 17013

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ABSTRACT

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This paper reviews the history, structure, role and responsibilities of the ICC, and then discusses US policy and the main objections the United States has to the ICC. It outlines and discusses three possible courses of action for the United States in regards to the ICC. The paper concludes with a recommended course of action for the United States to take that is in concert with its position as the world's remaining super power.

U.S. POLICY ON THE INTERNATIONAL CRIMINAL COURT (ICC): LEAD, FOLLOW OR GET OUT OF THE WAY

On 6 May 2002, the United States, in a letter to the United Nations Secretary General Kofi Annan, stated the United States will not be a party to the Rome Treaty and therefore has no legal obligations to the International Criminal Court (ICC).¹ President George W. Bush has stated that the United States will not sign on to the ICC and has never submitted the Rome Treaty to the Senate. The President stated, according to Mr. Ari Fleisher, that "the ICC is fundamentally flawed because it puts American servicemen and women at fundamental risk of being tried by an entity that is beyond America's reach, beyond America's laws and can subject American civilian and military to arbitrary standards of justice."² The United States (US) policy on the ICC, therefore, is one of non-participation. In fact, the United States is promoting a global campaign of opposition to the ICC.³ In addition to discouraging ratification of the treaty by other countries, the United States has developed bi-lateral agreements, permitted by Article 98 of the Rome Treaty, with several countries that are obligated to support the ICC. These agreements ensure our military personnel operating in those countries are not held accountable to the ICC in return for our continued military support and, in some cases, financial aid. To further solidify our non-participation in the ICC, President Bush signed into law the American Servicemembers' Protection Act (ASPS) to restrict government cooperation with the ICC.⁴

However, the ICC appears to be here to stay. Therefore, US policymakers must be concerned with the impact it may have on the United States and the American people. There is a strong possibility that the ICC could have grave consequences to the American military and civilians that participated initially in Operations Enduring Freedom and Iraqi Freedom, as well as those that continue to serve in Iraq and Afghanistan.

This paper reviews the history, structure, role and responsibilities of the ICC, and then discusses US policy and the main objections the United States has to the ICC. It will outline and discuss three possible courses of action for the United States in regards to the ICC. The paper will conclude with a recommended course of action for the United States to take that is in concert with its position as the world's remaining super power.

The History and Evolution of the ICC.

To understand and effectively review U.S. policy concerning the ICC, one must first understand what the ICC is, why it exists, what its roles and responsibilities are, and how it is structured. The ICC is located in The Hague, the Netherlands, and is independent of the United Nations (UN).⁵ It was brought into existence because the international community felt there was

a need to have a permanent court established for the trial of war crimes instead of standing up ad hoc courts after an incident has occurred. Therefore, this court is charged with ensuring the most serious crimes concerning the international community do not go unpunished. Those crimes include acts of genocide, crimes against humanity, war crimes and crimes of aggression.⁶

The ICC is based on two historical trends: the development of international laws to protect individual human rights, and the creation of international institutions to enhance, govern or advance these objectives by likeminded nations.⁷ International humanitarian law has been coming for a long time. There have been and are many laws and customs designed by various countries to protect human rights, particularly during the conduct of war. However, these laws have often been ignored. The Nuremberg Tribunal, held after World War II, is an example of likeminded nations (United States and its allies) coming together to enforce international humanitarian law at the individual level under the belief that "...one who has committed a criminal act may not take refuge in superior orders nor in the doctrine that his crimes were acts of state."⁸ This gave renewed interest to creating a permanent criminal court that would not be realized until after the end of the Cold War when the United Nations, at the urging of the United States, created two new international tribunals to address criminal actions in Yugoslavia and Rwanda⁹. These two tribunals opened the door and paved the way to the creation of a standing institution to hold international criminals accountable for their actions. Trinidad and Tobago initiated the request to the United Nations to form a permanent international court believing the court would better serve the international community and serve as a deterrent, as well as allow for the swift prosecution of offenders.¹⁰ This was backed by the Coalition for the International Criminal Court (CICC) in 1995. The CICC is a global network of over 2,000 non-governmental organizations (NGOs) advocating for a fair, effective and independent International Criminal Court.¹¹

At the United Nations conference in Rome, 17 July 1998, a treaty was established to create the first permanent international tribunal for the trial of war crimes and other serious breaches of humanitarian law. This treaty is commonly referred to as the Rome Treaty or Statute. The treaty required all parties to sign the treaty by 31 December 2000 if they wanted to be part of the international process of designing the court and refining the judicial terms and procedures of the court. President Clinton signed the treaty on 31 December with grave concerns that the Treaty had serious flaws. His intent was to stay engaged in order to influence the development of the Treaty into a document the United States could fully support. He stated he could not forward the treaty to the Senate for ratification in its current state and would

recommend to the Bush administration that they not forward it to the Senate as well. Despite the United States' objection and later un-signing of the Treaty by President George W. Bush, the Treaty was ratified on 11 April 2002 and went into force on 1 July 2002.

For decades, the United States has been a major player in advocating for enforcement of international law in dealing with heinous criminals as well as supporting human rights. Yet today, the United States stands against the ICC along with a handful of other opponents, to include China, Iraq, India, Pakistan, Indonesia, and Turkey. Even without the support and participation of these countries, the International Criminal Court has been created and is beginning to operate.

Structure, Roles and Responsibilities of the ICC.

The ICC has four basic components: the Presidency, the Judiciary Chambers, the Office of the Prosecutor and the Registry. There are eighteen judges that serve for three, six or nine-year renewable terms. The original judges were elected by secret ballot from the eighty-eight nations that participated in an election that took place in The Hague on 11 March 2003. These judges were from Bolivia, Brazil, Canada, Costa Rica, Cyprus, Finland, France, Germany, Ghana, Ireland, Italy, Latvia, Mali, Samoa, South Africa, South Korea, Trinidad and Tobago, and the United Kingdom.¹² On 26 January 2006, elections for judges were again held by the Assembly of States Parties where eighteen judges were elected from the same countries with one exception; the Samoa judge was replaced by a judge from Bulgaria.¹³ Several of these judges gained experience during the International Criminal Tribunals for Rwanda and the former Yugoslavia.¹⁴ All of the judges of the ICC have distinguished careers with extensive experience and professional staffs. Among the eighteen judges are seven females. However, of note, there is not a judge from the United States.

The Presidency consists of the President and the First and Second Vice Presidents. Each office is elected by an absolute majority of the eighteen judges. They each serve for a three-year renewable term. The office of the Presidency is responsible for the administration of the Court, excluding the Office of the Prosecutor.¹⁵ The President of the ICC is Judge Philippe Kirsch from Canada. He was elected for a six-year period from the Western European and others Group of States (WEOG) and assigned to the Appeals Division. Judge Mrs. Akua Kuenyehia from Ghana is the First Vice President. She was elected for a three-year period from the African States Group and is assigned to the Pre-Trial Division. The Second Vice President is Judge René Blattmann from Bolivia. He was elected for a six-year term from the Latin American and Caribbean Group of the States (GRULAC) and is assigned to the Trial Division.

The Judiciary Chambers has three divisions: the Pre-Trial Division, the Trial Division and the Appeals Division. The Pre-Trial Division is responsible for reviewing the initial findings to ensure there is enough criminal evidence to refer a case to trial. The Trial Division actually tries the case to determine guilt or innocence. Finally, if a trial's ruling is appealed by either party for any reason, the Appeals Division makes the final decision; it is the final appellate authority.¹⁶ Each court varies in composition. The Pre-Trial and Trial Divisions consist of at least six judges each. The Appeals Division consists of the President and four additional judges not serving in either of the other Divisions.¹⁷

Should the Court convict an individual, it cannot impose the death penalty. The Court, however, may impose a 30 year imprisonment or a life sentence.¹⁸ In addition, the court may order a fine and/or forfeiture of proceeds, property or assets derived from the committed crime. The sentence of imprisonment shall be served in a State designated by the Court from a list of States which have indicated a willingness to accept sentenced persons.¹⁹

The Office of the Prosecutor is the body of the Court responsible for investigating alleged crimes and for prosecuting those that fall within the purview of the ICC once it determines the allegations are credible. In accordance with Chapter VII of the statute, criminal allegations may be submitted by various individuals, countries or states, or by the United Nations Security Council.²⁰

Finally, the Registry is responsible for all non-judicial aspects of the administration and servicing of the Court. The Registrar is the principle administrative officer of the Court and is elected by a majority of judges meeting in plenary session for a renewable term of five years. The duties of the Registrar are performed under the authority of the President of the Court.²¹ This is not a judicial position.

The Jurisdiction of the ICC.

The determination of what territorial and personal jurisdiction the ICC has on the world is one of the most controversial aspects of the Court. Territorial jurisdiction is jurisdiction a court holds over a given geographical area, while personal jurisdiction is jurisdiction over crimes an individual commits that the Court is responsible for prosecuting.²² An example of a court with both territorial and personal jurisdiction in a case is the International Criminal Tribunal for Rwanda. This court had jurisdiction over crimes committed in Rwanda as well as crimes committed by Rwandans in neighboring countries.²³ The ICC was created with the consent of signatory nations to have both territorial and personal jurisdiction over those crimes committed in their countries and by their citizens. In general terms, the jurisdiction of the ICC extends to

those states that are a party to the Rome Treaty or accept the jurisdiction of the Court on an ad hoc basis.²⁴ Some would say the Court attempts to have jurisdiction over non-signatories to the treaty. The Court could claim jurisdiction under Article 12 to detain and try citizens of non-signatory states for crimes committed on the soil of a treaty signatory if referred by a State Party or by the UN Security Council and not vetoed by one of five permanent members (United States, China, Russia, France, Great Britain), and if the investigation concludes there is enough information to warrant a trial.²⁵ However, the ICC will only step in to investigate or prosecute when the alleged criminal's nation state refuses or is unwilling or unable to try the individual.²⁶ This is called admissibility and relates to whether the court should litigate the case.²⁷ The Court may determine unwillingness as follows: 1) The proceedings were undertaken or a decision was made solely to shield the person from criminal responsibility for crimes within the jurisdiction of the Court; 2) The proceedings were unjustifiably delayed inconsistent with bringing the person to justice; and 3) The procedures were not conducted independently or impartially consistent with bringing the person to justice.²⁸ The Court determines inability by whether there is a collapse or unavailability of a national judicial system, or due to circumstances the judicial system is unable to carry out its proceedings.²⁹ This narrows the scope of those cases the ICC has the responsibility to prosecute. To date, 139 countries have signed the treaty and 100 countries are party to the treaty, meaning they have ratified or acceded to the ICC statute.³⁰ As a result, the ICC has jurisdiction over the citizens of, and in the territories of, nearly three-fourths of the countries of the world.

Investigations and Prosecution of Cases Brought Before the ICC.

The ICC only investigates those cases referred to the court and then only after they satisfy that they have jurisdiction and admissibility over the case. To date, there have been only four cases referred to the Office of the Prosecutor. Three cases were referred by nation states and one by the UN. The cases are: The Democratic Republic of the Congo; The Republic of Uganda, The Darfur, Sudan; and The Central African Republic.³¹ All but The Central African Republic have been accepted. The case of The Darfur, Sudan was referred by the UN Security Council. A review of these cases illustrates not only the types of cases the ICC will prosecute, but also the process by which these decision are made.

The Democratic Republic of Congo (DRC). The first case referred to the ICC was to investigate crimes allegedly committed in The Democratic Republic of Congo (DRC) since 1 July 2002. The Prosecutor of the ICC received a letter signed by the President of the DRC requesting an investigation into crimes based on the situation in the DRC to determine if one or

more persons should be charged.³² The Chief Prosecutor, Luis Moreno-Ocampo, decided to open an investigation, stating "...investigation of grave crimes in the DRC will be in the interest of justice and of the victims."³³ The charges are violations of international humanitarian law and human rights law based on reports of thousands of deaths by mass murder and summary execution since 2002, with an alleged pattern of rape, torture, forced displacement and the illegal use of child soldiers.³⁴ The court is only investigating those crimes committed since the ICC was officially stood up. This case is now in Pre-Trial phase and still ongoing. However, on 10 February 2006, the ICC issued an arrest warrant for the leader of a political and military movement, the Union Congolese Patriots (UPC), Thomas Lubanga Dyilo. Mr. Lubanga had been in custody in Makala, Kinshasa, since his arrest on 19 March 2005. Through the cooperation of national authorities, the French government, and the UN mission in DR Congo (MONUM), Mr. Lubanga was transferred to The Hague and appeared before the court on 17 March 2006.³⁵ This is the first arrest by the ICC.³⁶

The Republic of Uganda. An Internal conflict in Uganda has been ongoing for over seventeen years. After Yoweri Museveni became president in 1986, a rebel group called the Lord's Resistance Army (LRA) was formed.³⁷ Reports given to the Office of the Prosecutor for the ICC suggest that the LRA has committed many serious human rights abuses against civilians in Northern Uganda. The alleged crimes include summary executions, torture and mutilation, recruitment of child soldiers, child sexual abuse, rape, forcible displacement and looting and destruction of civilian property.³⁸ In December of 2003, President Museveni referred the situation concerning the LRA to the ICC. The Prosecutor of the ICC determined there was sufficient basis to start an investigation.³⁹ The President of Uganda and the ICC met and determined that a key issue would be locating and arresting the LRA leadership. However, Uganda would like to reintegrate LRA members into the Ugandan society to secure the future stability of Northern Uganda and therefore has enacted an amnesty law. The amnesty law excludes the LRA leadership in order to ensure those most responsible for the crimes against humanity are brought to justice.⁴⁰ After thorough analysis into the allegations, on 29 July 2004, the Chief Prosecutor to the ICC determined the situation in Uganda merits an investigation.⁴¹

The Prosecutor then filed an application for warrants to arrest for crimes against humanity and war crimes. Warrants were issued against five senior commanders of the LRA. The warrants are for Joseph Kony, Vincent Otti, Raska Lukwiya, Okat Odhiambo and Dominic Ongwen.⁴² To date, none of the five commanders have been arrested. This is still an ongoing investigation; however, it is the furthest along and will more than likely result in prosecution.

The Darfur, Sudan. On 18 September 2004, the UN Security Council established an international commission of inquiry to investigate reports of violations of international humanitarian law and human rights law in Darfur. The commission was to determine if acts of genocide occurred and, if so, who the perpetrators were to ensure those responsible are held accountable. The commission submitted a report with its findings to the UN Secretary-General on 25 January 2005, stating the Government of Sudan and the Janjaweed, an armed militia group in Darfur, Western Sudan, comprised of fighters of Arab background, are responsible for conducting indiscriminate attacks, including the killing of civilians, torture, enforced disappearances, destruction of villages, rape and other forms of sexual violence, pillaging and forced displacement throughout Darfur.⁴³ However, the Government of Sudan stated any attacks carried out by the government armed forces were for counter-insurgency purposes.⁴⁴ The commission determined that the perpetrators include Sudanese government officials, members of militia forces and rebel groups, and foreign army officers acting in their personal capacity. The commission also stated senior government officials and military commanders may be responsible as well because they knowingly failed to prevent or repress the crimes being committed by those under their command.⁴⁵ The commission recommended that the Security Council refer the situation to the ICC for further investigation and possible prosecution. The commission concluded that the Sudanese justice system is unable and unwilling to address the situation in Darfur.⁴⁶ The measures the Sudanese government had taken were inadequate and ineffective. The Sudanese are not confident that justice will occur and that reprisal may be sought against those who bring the charges against Sudanese government officials and others. On 31 March 2005, the UN Security Council referred the situation in Darfur to the Prosecutor of the ICC.⁴⁷ In February, 2005, Secretary of State Condoleezza Rice proposed two alternate solutions to referring this case to the ICC: 1) the creation of a new ad hoc criminal tribunal in Sudan, and 2) the referral of the Darfur case to a new chamber within the International Criminal Tribunal for Rwanda (ICTR) in Tanzania.⁴⁸ Neither proposal was accepted since many countries felt the ICC has the wherewithal to investigate and prosecute this case. On 31 March 2005, the United States abstained on Security Council Resolution 1593, referring the situation in Darfur to the ICC, and the resolution passed (11-0-4) with Algeria, Brazil and China also abstaining.⁴⁹

On 6 June 2005, the Prosecutor of the ICC opened an investigation into the situation in Darfur. The Prosecutor stated that the statutory requirements for initiating the investigation had been satisfied. However, the Sudanese Government subsequently established a Special Tribunal to address the individuals considered responsible for committing these crimes;

therefore, the ICC will monitor the proceedings of the tribunal to determine if the Sudanese Government does in fact investigate and prosecute the crimes in a sincere fashion.⁵⁰ This case is still open.

The Central African Republic. The Central African Republic referred itself to the Court on 6 January 2005. The Prosecutor of the International Criminal Court, Luis Moreno-Ocampo, received a letter sent on behalf of the government of the Central African Republic referring crimes within the jurisdiction of the Court committed anywhere on the territory of the Central African Republic since 1 July 2002, the date of entry into force of the Rome Statute.⁵¹ On 19 January 2005, the Presidency assigned this case to Pre-Trial Chambers III.⁵²

Additionally, on 14 April 2006, a Central African Republic court referred former President Ange Felix Patasse and Congo's Vice-President Jean Pierre Bemba to the ICC on war crimes charges that Patasse's security forces, backed by Bemba's then rebel movement fighters and mercenaries from Chad, executed and raped civilians as they defeated a coup attempt in October 2002. The appeals court in the Central African Republic declared itself incompetent to handle the war crimes, crimes against humanity and genocide charges brought against Patasse.⁵³

Review of Charges Levied Against U.S.

There are no actual charges levied against the United States at this time. However, the International Criminal Court has received approximately 240 communications concerning the war in Iraq⁵⁴ and 16 specifically alleged crimes committed by US troops in Iraq.⁵⁵ The concerns listed range from the actual launching of military operations (crime of aggression) to allegations regarding genocide, crimes against humanity, and war crimes. According to a letter of reply from Chief Prosecutor Luis Moreno-Ocampo, the ICC has determined that the requirements under article 15(6) of the Rome Statute to initiate an investigation have not been met at this time.⁵⁶ Why is this?

According to the letter, the ICC concluded it does not have jurisdiction over Iraq where the alleged offenses took place because Iraq is a non-State Party (article 12(2)(b)).⁵⁷ Additionally, the ICC cannot rule on whether the decision to engage in armed conflict with Iraq was legal because the court has not adopted a definition for crime of aggression that sets conditions for the Court to exercise jurisdiction. This requires an amendment that cannot be made until 2009.⁵⁸ The allegations of the war crime of targeting civilians or clearly excessive attacks were not substantiated. Under international humanitarian law and the Rome Statute, the death of civilians during a war does not by itself constitute a war crime. There is insufficient proof that

the targets or methods used were intended to cause large civilian deaths, therefore the allegations did not clearly meet the jurisdiction of the Court regarding excessive attacks. There were also allegations concerning the willful killing or inhuman treatment of civilians, particularly the mistreatment of detainees. The analysis showed there had been some willful killing and victims that received inhuman treatment; however, since the number of victims was extremely low, four to twenty victims, it did not meet the gravity threshold of the Court for admissibility and therefore the Court found it unnecessary to investigate further. In the case of the detainees, it is unlikely that the Court will take any further action since the United States investigated and took action against those individuals found guilty.

However, in its conclusion the Court stated, "This conclusion can be reconsidered in the light of new facts or evidence."⁵⁹ This may lead one to conclude that the ICC will continue to watch the situation in Iraq and these allegations may arise again in the future. The mark on the wall may be 2009 when the Court reviews and makes a decision on the definition of the crime of aggression.

US Objections

The ICC seems like a noble, credible, and necessary institution for the International Community. If that is so, then why is the United States so opposed to the ICC, especially since the United States has always been involved in, if not leading, the effort to bring to justice those who commit war crimes and/or crimes against humanity? This was true in the Nuremburg trials and is true today in its active role in the formation of an Iraqi-led Special Tribunal to prosecute the human rights abuses perpetrated under Saddam Hussein.⁶⁰

The United States has several objections to the Rome Statute. First and foremost, as seen in most written word regarding this subject, is the interference with the sovereignty of the state. This is articulated by Nick Green, a staff writer for the Harvard International Review, in this quote, "...the United States argued that the establishment of a permanent court with international jurisdiction conflicts with the principle of national sovereignty, which grants each state absolute power of jurisdiction within its territory."⁶¹ Under Article 12, the ICC retains jurisdiction over not only signatory states, but non-signatory states as well under certain circumstances.⁶² For instance, the ICC has the prerogative to try a case as long as any one party has ratified the Statute and the act falls within the predetermined classification of international crimes.⁶³ It also states in Article 13(b) that the ICC allows the court to exercise jurisdiction if the offense occurred on territory of a state-party or the accused is a national of a

state-party. A state that is not a party may accept the exercise of jurisdiction of the court in regards to a crime committed on its territory or by its citizens.⁶⁴

Article 12 of the Rome Treaty is a departure from international law that states, under the principle of "primacy of national jurisdiction," it is the right and obligation of states concerned to investigate and prosecute crimes falling within their jurisdiction.⁶⁵ It also seems to be a violation of the Vienna Convention of the Law of Treaties which requires that only a state party to a treaty be bound by its terms.⁶⁶ Allowing the ICC to subject nations not signatories to this treaty implies that signatory states are giving the ICC international legislature powers that they currently do not have and goes against the UN Charter on sovereign equality of states.⁶⁷ The sovereignty of states is also protected under international law by the right of states to try cases as they pertain to their citizens.

A second US objection is that the ICC's process does not provide adequate guarantees of due process,⁶⁸ thus violating the constitutional rights of US citizens to trial by their peers and a proper appellate process.⁶⁹ Our constitution guarantees that there are checks and balances to ensure there are no abuses of power by the institution exercising that power. The ICC answers to no one. In fact, there is not a higher independent authority, such as the UN Security Council, to appeal the Court's decisions. The structure, governing laws, and processes for investigation and prosecution of crimes and for appeals were all established by the ICC and voted upon by the limited body of signatories from the international community. However, those personnel that make up the ICC have exempted themselves from punishment by the very laws they established and swore to uphold.⁷⁰ Therefore, on 7 December 2001, the US Senate passed the American Service Members' Protection Act (ASPA), a measure prohibiting any United States cooperation with the ICC.⁷¹ This ensures the United States does not cooperate or share information with, support with funds, nor extradite anyone to the ICC.⁷² This position is backed by the US President as conveyed in his answer to a question during the Presidential debate televised 30 September 2004. President Bush stated, "...I wouldn't join the International Criminal Court. It's a body based in The Hague where unaccountable judges and prosecutors can pull our troops or diplomats up for trial...But it's the right move not to join a foreign court that could --where our people could be prosecuted."⁷³

A third US objection to the ICC is the challenge to our right as a nation to self defense in the form of preemptive strikes against another nation. This concern is fueled by the lack of a clear and specific definition of the term "crime of aggression". Our National Security Strategy states, "While the United States will constantly strive to enlist the support of the international community, we will not hesitate to act alone, if necessary, to exercise our right of self-defense

by acting preemptively against such terrorists, to prevent them from doing harm against our people and our country;...”⁷⁴ Without a clear definition and understanding of what crimes of aggression are, the United States could be subject to prosecution by this court for attacking a country without the UN's sanction and support. According to the UN Charter, the UN has the sole prerogative to define and punish the crime of aggression.

A fourth objection to the Rome Treaty is the possibility of politicized prosecution. The United States fears the ICC may be used by other countries or NGOs to falsely accuse US citizens of crimes against humanity strictly based on political motivation. US citizens could possibly be targeted more often or be more vulnerable to politically motivated attacks due to the prominent, and often unpopular, role of the United States in world affairs.⁷⁵ There are countries that often view US policies and decisions as criminal or unfair and therefore may use the ICC as a forum to have these grievances investigated and possibly prosecuted. This particular concern is also held by the Philippines, Russia and China.⁷⁶

The final US objection is that the Prosecutor of the ICC is not controlled by any separate political authority and therefore has unchecked discretion to initiate cases. This is tied to the previous objection because it could lead then to prosecution based on a politicized agenda.

These objections are not just held by the United States. In fact, there are several countries that have some of the same concerns. This was evident by the fact that six other countries (Israel, China, Libya, Iraq, Qatar and Yemen) voted against the original treaty.⁷⁷ However, Israel has since signed the treaty. Further, several countries in Southeast Asia have reservations that range from politically motivated accusations and upholding national sovereignty to concerns of pressure to reject the statute by the United States or other groups.⁷⁸

Implications for US National Security Decision-Making and Foreign Policy

There are pros and cons concerning the ICC and the effect or impact it may have on US interests and foreign policy. It can be seen as a threat to the US armed services and civilian policy makers due to ICC jurisdiction over nationals of Non-Party States. Many of our citizens are involved in various diplomatic and advisory roles throughout the world, causing them to be more visible and therefore more susceptible to prosecution whether warranted or not. This concerns senior members of our government since there could be a possible threat of prosecution based on individual conduct that may be the result of a policy decision under the prevue of US foreign policy. Therefore, the threat of prosecution from the ICC could possibly inhibit US officials in implementing certain US foreign policies. Many countries that are unfriendly to the US or its policies often characterize US policies and decisions as criminal and

may therefore use the ICC as a forum to have these incidents or policies investigated with a goal of eventual prosecution. Opponents argue this is how the ICC could infringe on US sovereignty.⁷⁹

Another aspect of foreign policy concerns the US role as a world leader, especially as it relates to human rights. One could view the ICC as a foreign policy tool for defining and deterring crimes against humanity and therefore preventing the perpetrators of the most egregious crimes from going unpunished.⁸⁰ US objection to the ICC, therefore, could be seen as inconsistent with our policies concerning protection of human rights.

The ICC relies heavily on state parties to provide the resources necessary to execute the roles and responsibilities of the Court. This can range from providing information and documents to arresting accused individuals and incarcerating convicted persons. One could surmise that the absence of US participation and support may seriously limit or impair the ICC's ability to execute its roles and responsibilities, thereby limiting its ability to influence or shape international law of war as well as to prosecute and convict those that commit crimes against humanity and human rights.

As noted earlier, the US armed services operate around the world in various roles. Under the ASPA, the United States has stipulated that military assistance would be withheld from member states of the ICC. This may be seen as a means to coerce and thereby prevent other countries from ratifying the Rome Statute or to force them to sign an Article 98 (bilateral) agreement, all of which could be seen as undermining the ICC's authority.⁸¹

As of 1 January 2005, according to a guide by Georgetown University Law Library, the United States has 100 Article 98 agreements.⁸² Although one might criticize this tactic as referenced in the previous paragraph, these types of agreements are not new or unusual. We have status of forces agreements (SOFA) with Korea and Germany and have had them for years. Another example is the International Security Assistance Force (ISAF), a UN joint force that provided assistance to the interim government of Afghanistan. This force had a clause in the agreement for immunity of participating military personnel. Since this is a UN-sanctioned agreement, it is consistent with Article 98 of the Rome Agreement.⁸³

Some would say since Article 98 agreements are consistent with the Rome Treaty, they do not undermine the ICC. However, there are several government, non-government, and legal experts that would disagree. Some argue that these bilateral agreements are contrary to the intent of the statute in that Article 98 was not intended for new agreements, but rather to prevent legal conflicts which might arise due to existing agreements.⁸⁴ Countries that do sign these agreements could possibly find themselves breaching Articles 27, 86, 87, 89 and 90 of the

Statute which require states to cooperate with and provide assistance to the Court, and Article 18 of the Vienna Convention on the Law of Treaties which obligates them to refrain from acts that would defeat the object and purpose of the Statute.⁸⁵

As of 18 October 2005, forty-nine countries that have signed the Rome Treaty have not signed Article 98 agreements with the United States, stating that doing so would breach their legal obligations under the treaty.⁸⁶ In accordance with the ASPA, military assistance was suspended on 1 July 2003 from those countries that chose not to sign agreements with the United States. This assistance included: International Military Education and Training (IMET), Foreign Military Financing (FMF), Excess Defense Articles (EDA), and non-drug Emergency Drawdown Authority funds.⁸⁷ Countries exempt under ASPA include all NATO countries in addition to Argentina, Australia, Bahrain, Egypt, Israel, Japan, Jordan, Kuwait, Morocco, New Zealand, Pakistan, Philippines, the Republic of Korea, Taiwan and Thailand.⁸⁸ The Nethercutt Amendment passed in the Fiscal Year 2005 appropriations bill adds the Economic Aid Program and Economic Support Funds to the suspended list as well.⁸⁹ The same countries, with the exceptions of Bahrain, Kuwait, Morocco, Pakistan, Philippines, Taiwan and Thailand, are exempt from the Nethercutt Amendment. However, aid to anti-drug programs can still be delivered and the President still has the authority to waive the application of this law if he deems it is in the United States' national interest.⁹⁰ So far, Article 98 agreements have not been challenged by the ICC.

Therefore, one could surmise that the absence of US participation and support may seriously limit or impair the ICC's ability to carry out its functions and responsibilities. Countries around the world may also perceive that the United States has lost the moral high ground, causing a loss of influence around the world and a reduced ability to influence or shape international law of war as well as crimes against humanity and human rights.⁹¹

Implications for the U.S. Military in the Prosecution of the War on Terrorism.

The United States is being seen as more and more aggressive as it continues its unilateral approach to dealing with world affairs. Some may even perceive the United States as seeing itself as above international law.⁹² This could have serious consequences for coalition-building and international support for the War on Terrorism,⁹³ particularly in the war with Iraq.

In Iraq, in order to maintain legitimacy and popular support for the war, the United States sought to build a coalition of forces to prosecute the war. States such as France, Russia and China used the war in Iraq as a means to challenge the United States' dominance or super power status by making it more costly for the United States to use military power. These states

were not able to deter or prevent the United States from going to war, but by blocking a second Security Council resolution, they were able to make it more expensive.⁹⁴ Without UN backing, the United States was denied land and air bases and other support from allies that previously had provided these services. Two examples are Turkey's refusal to allow transport of ground troops and Saudi Arabia's reluctance to allow American use of air bases.⁹⁵ It has also been more expensive for the United States to conduct reconstruction efforts. Without UN backing, the United States has invested more than \$100 billion in the reconstruction effort. Americans have also have had to shoulder the cost of building a coalition for peacekeeping in Iraq. It is estimated that the United States spent approximately \$250 million to underwrite countries like Poland, Ukraine, Nicaragua, El Salvador, Honduras and others for their participation, a cost normally covered by the UN.⁹⁶

The United States continues to seek Article 98 agreements with countries in which it operates that include language stating the signatory agrees not to surrender US citizens to other signatories to the ICC, unless both parties consent in advance to the surrender.⁹⁷ However, Kenneth Roth, Executive Director of Human Rights Watch, in a letter dated 9 December 2003 to then Secretary Powell states, "But Washington is sending the message that it is an ally only so long as it is able to force strict compliance with its agenda. When national interests diverge, the United States does not respect other states' policies."⁹⁸ Further, the World Federalist Association, in a December 2003 document, stated that sanctions to our allies are harming our national security interests and the building of cooperation in the war on terror; citing the aid suspended to countries in Africa and Latin America as hindering US ability to gain their cooperation to fight against terrorism within their own borders.⁹⁹

Discussion of Three Possible Alternatives to the Current Policy

The objections outlined in this paper are serious concerns. It is the duty of the United States, as the only world super power and leader of the free world, to seriously consider its policy and develop a strategy to deal with the issue of the ICC. Therefore, this paper puts forth the following three possible courses of action that the United States could take on this important global forum: Lead, Follow or Get Out of the Way.

Lead. The United States could try to take a leadership role in the ICC. In a positive light, across the globe, nations of the world still look to the United States for leadership. There are very few, if any, decisions made in the UN, NATO or other multinational organizations that the United States does not either participate in or get consulted about. During the war in Bosnia, for example, Europe heaved a collective sigh of relief when the United States briefed its end game

strategy as the way to end this conflict.¹⁰⁰ When the United States takes the lead, other nations normally follow. If this is the case, then it would make good political sense for the United States to be a signatory to this treaty. As the lead nation with substantial power, diplomatically, financially and militarily, the United States would be in the position to help develop this treaty into an acceptable document with a court process modeled after its own. The United States would be able to help define the term "Crimes of Aggression" in a manner that it could accept, therefore addressing the right of self-defense. This proposal would also improve US standing in the world's eyes by showing not only the willingness to participate in, but to be subjugated to, the ICC. It would send the message that the United States is not above the rest of the world, but rather a partner in it.

However, there are some negative aspects in leading the ICC process. First, the United States would have to re-sign the Rome Treaty. There is the potential that the US request to resign the Treaty could be rejected. Should this happen, it could be very embarrassing and may cause the United States to lose international standing. Further, even if allowed to resign the treaty, it is unclear what the US status would be. The United States may not have the same rights as the original signatories to the treaty. Should the United States not receive full rights, it would almost certainly be less effective in leading the process. Second, the United States would bring the country under the authority of the court. According to the Treaty, the Court may exercise its jurisdiction only with respect to crimes committed after the entry into force of this Statute for that State.¹⁰¹ In the wake of Abu Garib and the fact that over 100 complaints have been filed before the court against Americans, the United States could be involved in several investigations and possible court proceedings.¹⁰² However, the likelihood of a US citizen being brought before the court is minimal. The United States has an excellent system of justice and believes in bringing those who break the law to justice. US courts would try the cases and uphold the law to ensure its citizens receives due process. Once tried by the state, unless the trial was seen as a sham, the individual would not be tried again by the ICC.

Follow. To follow the progression of the ICC and not openly participate in the process is a second alternative position for United States. In this course of action, the United States would let the world know that it does not agree with the treaty. This alternative could allow the United States to approach this policy from a different direction. Here the United States could use its considerable soft power, through diplomatic, informational and economic means, to not only shape the treaty and the Court, but also to educate other nations on how to improve the ICC and its procedures. This could be done by influencing other nations that are signatories to the Treaty to voice US concessions, objections, and improvements to further develop the treaty and

process of the court to standards it could accept. After all, the United States has a huge interest in maintaining international order.

There are several positive aspects of this approach. Dealing with the ICC in this manner allows the United States to abide by the ASPA and therefore uphold our constitution and, as non-signatories, the United States could continue to advocate that it is not subject to the court. This also allows the United States to maintain the moral high ground. Through the use of US soft power with allies and coalition partners, those countries that are signatories would know that the United States is willing to reconsider its position and possibly sign the treaty at some future date once concessions are made to address US grievances.

One might say this is the current state of play; however, research shows that this is not the case. The United States is very engaged in participating in the process, but it is using what might be considered strong arm tactics with other nations to try and shape the outcome. The United States has made statements to the UN and other nations concerning what our disagreements are with no results. However, this may be because many US statements to date have been in a forceful or threatening manner as demonstrated by this statement from an anonymous Australian, "the US move could raise concern that Washington, which does not recognize the UN-mandated court, might follow through its threat to shut down or stop participating in UN-authorized peacekeeping operations."¹⁰³ This approach could be seen as less than honorable and as undermining the legal process. In addition, threats often do not convey the right message and may serve to have just the opposite effect. Former Secretary of Defense Robert McNamara states, "If we can't persuade nations with comparable values of merit of our cause, we'd better re-examine our reasoning".¹⁰⁴ Finally, when working through a proxy, one is never sure that one's ideas or concerns are represented accurately.

Get out of the Way. This is the final course of action to consider. Under this proposal the United States would not participate at all. Instead, the United States would conduct business in the world as if this treaty has no impact on or meaning for the United States. This would allow the UN and those who agree with the Rome Treaty to develop the process and operate the court as they see fit. Not only would the United States not participate, but it would also refrain from any actions to improve or undermine the system. The United States would only engage the UN on this Treaty if a time came that it required US attention. For example, the United States actively engaged in the Darfur, Sudan case because the case represents one of its key objections to the ICC. Ambassador Patterson, acting as the US representative to the UN, put it this way, "The United States continues to fundamentally object to the view that the ICC should be able to exercise jurisdiction over the nationals, including government officials, of states not

party to the Rome Statute. This strikes at the essence of the nature of sovereignty. Because of our concerns we do not agree to a [UN Security Council] referral of the situation in Darfur to the ICC and have abstained on this resolution".¹⁰⁵ Although the United States objected to the UN referral of this case, it did not use its veto power to prevent its referral.

What is to be gained with this choice of action? The United States retains its sovereignty; continues to reserve the right to process American personnel under the US judicial system; and continues to negotiate bi-lateral agreements with those countries in which the United States operates. Currently, the United States has successfully negotiated bi-lateral agreements with over 90 countries.¹⁰⁶ Finally, the United States is also able to defend the position to the right of self-defense.

When this option is scrutinized, there are some real concerns that we must consider. Since becoming a super power, the United States has never taken a back seat on the world front. Doing so is against this nation's principles and not what the international community expects from the United States. In essence, the United States gives up its lead nation status. The United States would also leave a very important treaty that defines a judicial system and criminal prosecution for the International Community without the US stamp on it. Under this option, the United States delays the resolution of concerns with the ICC to some point in the future when forced to confront them. For example, due to the controversy over the abuse of prisoners in Abu Garib, the United States withdrew its bid for immunity through the renewal of Resolution 1487.¹⁰⁷ In the Darfur case, the United States abstained on the resolution after Great Britain brokered a compromise to resolution that stated, "...states not party to the ICC have exclusive jurisdiction over any of their nationals accused of crimes related to their presence in the Sudan pursuant to UN - or African Union – authorized peacekeeping of humanitarian operations. And confirms that all cost of the ICC referral will be paid by the ICC parties, not by the United Nations".¹⁰⁸ Finally, it diminishes the United States' ability to use soft power in an effective way. Certainly, it paints the United States in a bad light as stated by Gen Aleksandr Vladimirov, a Russian, "America, will not do anything what does not profit it and will destroy all mechanisms that may exert influence on it"¹⁰⁹

Summary and Recommendation

It has now been approximately five years since the ICC came into force. Although it has flaws and there continues to be opposition to the Court, it does not appear to be going away. On the contrary, with the recent endorsement from the UN Security Council regarding Darfur, Sudan, one may conclude it is gaining support.

Most would agree that the establishment of the ICC was for all the right reasons. The intent was to have a permanent court to investigate and prosecute individuals that commit the most heinous crimes against humanity. Therefore, the ICC would ensure that the atrocities of the world do not go unpunished. The Court offers yet another way to strengthen the international rules and serve as a deterrent to future unchecked violence. The United States has always been at the forefront of human rights, and from the beginning was engaged in the process to ensure the success of the Court. It was with reluctance that the United States withdrew from the Treaty when solutions to serious concerns could not be found.

The United States enjoys a position of dominance that no other country can match and has ability to project power anywhere in the world, whenever the United States chooses.¹¹⁰ More often than not, the United States engages militarily in the world for moral or humanitarian reasons and, therefore, it is imperative that the United States continue to shape the political and legal environment in which the military operates.¹¹¹ This is often easier when the international community legitimizes the operation, particularly in regards to coalition building.

In most instances military engagement is only the first step in any operation. However, to secure peace and stability requires world wide engagement in diplomacy and economic assistance which require the assistance of nations as well as private organizations. The United States, with its superpower status, has the ability to lead the world militarily, politically, and economically and to have an effect that determines the future of not only the United States, but the world.¹¹²

To date the United States has been in the "Follow" and "Get Out the Way" modes. Neither position is a position of strength. This has caused the United States to spend many hours in diplomatic engagement with nations across the globe to gain Article 98 agreements. Occasionally, the United States has had to give waivers to policies to gain support of a nation such as Argentina.¹¹³ In terms of financial obligations, it has cost the United States billions of dollars in reconstruction efforts in Iraq and to gain coalition partners. Therefore, clearly the United States should take the "Lead" position in regards to the US policy on the ICC.

The United States can do more to advance national interests by signing the treaty than opposing it. This course of action is in the country's best interest and that of the world. Therefore, the United States should immediately engage the UN in an effort to re-sign the Rome Treaty, requesting full rights according to the original agreement. Once accepted, the United States should actively seek to lead the process that shapes and molds the ICC to standards not only acceptable to the United States, but to the international community. By becoming a part of the process the United States can ensure the effectiveness and impact the court will have on

the world. In this manner, the United States could unite the world and ensure the ICC is equipped with the authority and legitimacy to deter, and if necessary, to prosecute the world's most dangerous criminals.¹¹⁴ After all, the United States is leading the fight on the global war on terrorism, and the ICC could be the mechanism to bring these terrorists and criminals to justice. With US financial backing and military might, the ICC would ensure no atrocities go unpunished, thus making the world a more secure place to live.

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