STRATEGY RESEARCH PROJECT

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INTERNATIONAL CRIMINAL COURT: A WATERSHED IN INTERNATIONAL RELATIONS

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International Criminal Court: A Watershed in International Relations

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ABSTRACT

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The July 1, 2002 ratification of the International Criminal Court (ICC) is a significant and far-reaching accomplishment in the changing architecture of the international legal system. The Statute gives the "permanent" court the power to prosecute individuals for the most serious crimes of concern to the international community. Although the United States played a major role in the court's development, the U.S. "officially" withdrew from the ICC in July 2002 citing jurisdiction and treaty law concerns and unacceptable risk to U.S. military personnel. The U.S. is negotiating bilateral agreements with individual countries and using its weight in the UN Security Council to influence the ICC in order to protect military personnel and high-ranking government officials from prosecution by the court. Both of these actions undermine the spirit of the ICC. The American decision not to support the court is an important watershed in international relations. This paper will address the origins of the International Criminal Court, discuss how the ICC works, highlight U.S. objections to the statute, and analyze U.S. objections.

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INTERNATIONAL CRIMINAL COURT

> After nearly four years of intense negotiations among some 120 countries, the effort to set up the world criminal court has run smack into the ambivalence that has always been felt by the world's biggest powers about international law: they are keen to have it apply to others in the name of world order, but loath to submit to restrictions on their own sovereignty.
>
> — Economist, 1998[1]

During the 20th Century, millions of people perished throughout the world because of genocide, crimes against humanity and other serious crimes under international law. Unfortunately, the perpetrators deserving of prosecution were rarely held accountable. To stop this cycle of aggression and promote justice, a body of international and customary law has evolved, particularly since World War I, consisting of rules and principles that govern the relations and dealings of nations with each other. Today, this body of law continues to move forward with the 1 July 2002 ratification of the Rome Statute of the International Criminal Court (ICC). The Statute is the first global permanent international court with jurisdiction to prosecute individuals for "the most serious crimes" of concern to the international community.[2] The United Nations (UN), many human rights organizations, and most democratic nations support the court. The United States does not.

The American decision not to support the court is an important watershed in international relations. While the United States has certainly been an advocate in promoting the international rule of law to help maintain basic standards of human decency, its absence from this important multilateral institution may well determine the success or failure of the court. This paper will address the origins of the International Criminal Court, discuss how the ICC works, highlight U.S. objections to the statute, and analyze the pros and cons of U.S. objections.

THE COURT

The ICC is a permanent institution located in the Hague, the Netherlands. Although Article 16 of the Statute gives the United Nations the ability to stop or defer a case, the Court is independent of the UN. The aim of the International Criminal Court is to prosecute significant criminal activity during wartime but leave to national jurisdiction the job of disciplining the isolated war crimes committed by errant soldiers. The Rome Statute consists of 128 articles and grants the court the power to exercise jurisdiction over persons, regardless of state citizenship, who have been involved in what are termed genocide, crimes against humanity and war crimes. The core crime of aggression is included in the Statute; but the court will not be able to take

action on acts of aggression until party states clearly define the crime and set conditions under which the court can exercise jurisdiction. Drug trafficking and terrorism were considered for inclusion in the court, but were omitted because of the difficulty of investigating these types of crimes.[3] Terrorism, drug trafficking and aggression will be addressed at the ICC's 2009 conference review.

ORIGIN OF THE COURT

Humanitarian concerns about the conduct of war go back many centuries, although international codification only started in the 19th and 20th centuries. As World War I came to a close, public pressure mounted in the victorious nations for criminal prosecution of those generally considered responsible for the war.[4] The creation of the League of Nations following World War I was a revolutionary event in international relations and laws. The League's charter was to provide collective security to its member states, great and small alike, by offering mutual guarantees of political independence and territorial integrity. The institution failed to preserve the peace, however, because of the refusal of the United States to join and because of the unwillingness of other member nations to use the power of the League to curb violations of international law by rogue nations. Nevertheless, the League of Nations established the basis of the post-World War II war crimes trials at Nuremberg and Tokyo.

As law of war concerns arose again in the wake of the Nuremberg and Tokyo tribunals, the United Nations General Assembly directed its International Law Commission (ILC) to examine the possibility of establishing a permanent court. The objective was to postulate new legal norms and standards of responsibility that would advance the international rule of law. All of the post-war great powers accepted in principle the desirability of an international criminal court. But the Soviet Union believed the establishment of the tribunal would adversely affect its sovereignty, and the United States, France and the United Kingdom were wary of such an organization as the Cold War developed. Consequently, although the ILC prepared two draft Statutes for consideration, the great powers suspended action on the Statutes.[5]

The idea of a permanent International Criminal Court resurfaced in 1989 when the UN delegation from Trinidad and Tobago proposed an international mechanism to address criminal activities associated with drug trafficking.[6] The ILC convened to discuss the issue and in 1990 delivered a comprehensive and far-reaching report to the General Assembly. Because of the committee's work, the General Assembly formed in 1995 the "ad hoc" Preparatory Committee (PrepCom) for the Establishment of an International Criminal Court.[7] Its mandate was to produce a consolidated statute for the June 1998 United Nations Diplomatic Conference of

Plenipotentiaries on the Establishment of an International Criminal Court. With the participation of approximately 90 nations and numerous nongovernmental organizations, the PrepCom met periodically over two years to prepare the Statute, submitting its report to the General Assembly on April 3, 1998.[8] While the PrepCom was drafting the ICC Statute, world events required the creation of two International Criminal Courts on an ad hoc basis to address the crimes committed in the former Yugoslavia and Rwanda. These ad hoc tribunals provided a useful and encouraging model of what an international criminal court might look like and helped to set legal precedent to guide PrepCom drafters. Furthermore, the implementation of these tribunals highlighted the potential efficiencies that could be gained from a permanent standing institution that would not require constantly reinventing the same wheel, while demonstrating the international political will to deal with these serious problems with an international institution.[9]

In July 1998, over 160 countries gathered in Italy for the Rome Conference to complete the Statute. This proved to be a difficult task because many of the delegates present had no previous experience either in the ad hoc or PrepCom sessions.[10] Additionally, conference procedures allowed for a handful of states or even one state to hold up the process with a negative vote. Differences between delegations were worked out one by one and adopted by general agreements in working groups. After a month of deliberations and continued adjustments, 120 states voted to adopt the Statute, 21 abstained, and seven--China, Iraq, Israel, Libya, Qatar, and the United States--voted against.[11] The United States' reluctance to sign the treaty resulted from perceived flaws in the Statute, not from an objection to the court's existence.

On 31 December 2000, the U.S. signed the Statute—the last day to do so. President Clinton believed that signing the Statute afforded the U.S. more time to negotiate differences before expected Statute ratification.[12] When U.S. efforts to resolve concerns were again unsuccessful, Clinton decided not to forward the document to the U.S. Senate for ratification. He then suggested that President-elect Bush take a similar course of action. Despite U.S. dissent, the Statute was ratified on July 1, 2002 by the minimum 60 states. Currently, 189 countries are signatories to the Rome Statute establishing the court and 89 countries are ratified members. The most recent country to ratify the Statute is Afghanistan, a move strongly opposed by the United States.[13]

MECHANICS OF THE COURT

The court is composed of two independent parts. The first part is the Judiciary, consisting of the judges and their administrative support personnel who serve under the President. The

Prosecutorial arm of the court includes investigators and an independent Prosecutor. All of this structure, in turn, falls under the supervision of the Assembly of States Parties. The eighteen judges, each serving for a single period of nine years, are selected by a vote of the Assembly of States Parties from two lists of nominees, one containing candidates with criminal law background and the other containing candidates with international law background.[14] To prevent having the entire judiciary change over at the same time and to maintain continuity in the court, judges are subject to a phase-in period in which one-third of the judges will have terms expiring every three years.[15] Lastly, judges may not be from the same state, and consideration must be given in judge selection to equitable geographic representation, gender, and nature of legal systems from which they come. Each of these measures helps to mitigate court bias to assure the appropriate expertise in the handling of cases, and to guarantee that each party state is appropriately represented either by vote or by holding a leadership position in the court.[16] The Assembly of States Parties, in which each state has one member, is responsible for administrative matters such as overseeing general ICC guidelines, managing the budget, implementing changes to key positions, and adopting amendments to the Statute.

The allegation that a crime has been committed may be referred by a State Party, by the Security Council, or by the Prosecutor. The jurisdiction of the court is specifically limited to the crime of genocide, crimes against humanity and war crimes. Before initiating an investigation, however, the Prosecutor must determine if the ICC has jurisdiction over the alleged crime, if the case should be deferred to a national judicial system and if the offense is sufficiently grave to be heard before the court.[17] If the Prosecutor determines the existence of a reasonable basis to investigate, he must first notify the state that would normally exercise jurisdiction over the crime alleged. The notified state has one month to respond, within which time the state may request the Prosecutor defer to the state's investigation. The Prosecutor must next obtain authorization from the Pre-Trial Division of the Court to initiate the investigation. Upon receiving a state referral request and completion of the hearing by the Pre-Trial Division, the case is deferred to the state for action unless the Pre-Trial Division authorizes the Prosecutor to proceed despite the deferral request.[18] Regardless of the means of initiation, the court does not usurp national legal systems. Rather, it abides by the principle of complementarity, which means that the ICC must defer to the jurisdiction of national courts unless those courts are either unwilling or unable genuinely to investigate or prosecute alleged war criminals.

The Court's procedures for international cooperation and judicial assistance to the ICC are another key aspect of the Statute. Under these procedures, party states are required to comply with requests by the Court to provide information on the identity and whereabouts of individuals

as well as to deliver persons, evidence, or documents into the custody of the court. This is important because the court has no independent enforcement powers. Therefore, the task of apprehending suspects falls to states, which already have the authority to apprehend suspects within their borders.[19]

THE U.S. OBJECTIONS

In May 2002, the United States notified the United Nations that it was opposed to the Statute and renounced any U.S. obligations under it. "The United States cooperates with many other nations to keep the peace," President Bush informed the United Nations, "but we will not submit American troops to prosecutors and judges whose jurisdiction we do not accept. Every person who serves under the American flag will answer to his or her own superiors and to military law, not to the rulings of an unaccountable International Criminal Court."[20] The President affirmed this position in his *2002 National Security Strategy*, noting the U.S. would take the "actions necessary to meet its global security commitments while at the same time ensuring Americans are not impaired by the potential for investigations or prosecution by the ICC." At the same time, the document emphasized, "the U.S. continues to share the goal of ICC supporters—promotion of the rule of law—and does not intend to take any action to undermine the court."[21]

From the American perspective, four articles pose the greatest impediments to participation in the court. Article 12 states that the ICC retains jurisdiction over not only party states, but "non-party" states under certain circumstances. This is viewed by American officials as being a major departure from long-standing international treaty law since it violates national sovereignty.[22] Article 27 and Article 28 address immunity for government officials and command responsibility. In particular, Article 27 stipulates that citizens acting in an official capacity as a head of state or government, a member of a government or parliament, an elected representative or a government official are "not" immune from prosecution. Article 28 adds that a military commander or superior can be held criminally responsible for crimes "committed by forces under his or her effective command and control...as a result of his or her failure to exercise control properly over such forces." For the United States, both of these Articles bring in to question the fundamental rights contained in existing customary and international law and thereby place American leaders at risk.

JURISDICTION OVER NON-PARTY STATES

The primary United States objection to the Statute is embodied in Article 12 in which citizens of non-party states can be investigated and prosecuted by the court provided either the

non-party state consents to ICC jurisdiction of the state where the crime occurred or state of nationality of the perpetrator is already party to the Statute. More importantly, the court asserts jurisdiction over non-party nationals without the authority of the Security Council, a power that had previously been granted exclusively to the Security Council.[23] In the eyes of the United States, a provision that allows for the court to prosecute citizens of non-signatory states violates a fundamental principle of the Vienna Convention on the Law of Treaties which requires that only a state party to a treaty be bound by its terms.[24] In the "post-Westphalian" international system, nation-states obligated themselves with respect to other states by means of treaties. If nation-states are held accountable to treaties that they never signed, the U.S. argues, then the state-centric, treaty-based international system will be undetermined.[25] "Fundamental principles of treaty law still mater today and we are loath to ignore them with respect to any state's obligations vis-à-vis a treaty regime," the chief U.S. delegate at the Rome Conference pointed out. "The establishment of, and a state's participation in, an international criminal court are not derived from custom, but rather, from the requirements of treaty law"[26]

At the heart of the American objection is the belief that the court challenges U.S. sovereignty in its pronouncement of jurisdiction over military members charged with "war crimes" resulting from legitimate uses of force, and its assertion of jurisdiction over other American officials charged for conduct related to foreign policy initiatives. In attempting in this manner to subject Americans under the jurisdiction of the ICC, states are acting as an international legislature, a power they do not have and a power that is fundamentally at odds with the U.S. Constitution, and with the guarantee of the sovereign equality of states in the United Nations Charter.[27] This is of particular concern since Americans taking part in multinational peacekeeping or other humanitarian operations in a country that is a party to the treaty could be exposed to the court's jurisdiction.

The issue of command responsibility and non exemption of heads of state from prosecution is also a significant problem. Holding superiors potentially liable for crimes committed against forces is contrary to long-standing customary law and protections provided to high-ranking government officials. The U.S. attempted to resolve these issues by creating a mandatory role for the United Nations Security Council in deciding when the ICC should assert jurisdiction. But the majority of member states refused to adopt such a rule on the grounds that it would mirror the uneven prosecution of war crimes and crimes against humanity under the present system of ad hoc tribunals.[28] Although, the U.S. can use its power as a permanent member of the UN to veto ICC jurisdiction, the Statue as currently written poses an unacceptable risk to U.S. military personnel and America's ability to deploy forces worldwide to

protect U.S. and global interests.[29] Thus, the American argument concludes, the non-party jurisdiction provision violates the UN Charter, which requires that non-party states that commit international law crimes should be addressed under the purview of that institution's Security Council, not the International Criminal Court.

Counterarguments to the U.S. position usually focus on the American argument that Article 12 binds non-party states to its jurisdiction, and thus unfairly holds the U.S. accountable to a treaty it did not sign, thereby violating international treaty law. It is clearly recognized that Article 12 has emerged as a paradox. On the one hand, the Statute does not directly bind non-party states to the courts jurisdiction.[30] Yet if an alleged crime occurs in a state that is a member of the Statute, a non-party state citizen could be prosecuted. The paradox notwithstanding, the strength of the Statute is based on the notion that all states want the perpetrators of crimes to be held accountable and therefore will cooperate with one another when crimes are committed. This spirit of cooperation between party members as well as the possibility to hold non-party states accountable if they commit crimes against party states, allow the ICC to place pressure on non-party states to comply with international law. Otherwise, so called "rogue regimes" could insulate themselves as non-party states beyond the reach of the ICC simply by not ratifying the Statute. Lastly, there are precedents for jurisdiction over nations without their consent. For instance, the concept of universal jurisdiction over genocide is an established principle of customary international law.[31] Therefore, the court's approach to non-party states is nothing new or drastically out of line and actually encourages nations to be a party to the Statute.[32] The U.S. needs to accept this aspect of the Statute and join the 189 countries that agree with the ICC.

In any event, the ICC advocates point out, the Statute addresses only individual crimes, not those of a nation. As a result, crimes covered by the Statute are already prohibited under international law either by treaty or under the concept of universal jurisdiction, which pertains to certain crimes that are so harmful to international interests that states are entitled--and even obligated--to bring proceedings against the perpetrator regardless of location of the crime or the nationality of the perpetrator or the victim.[33] In other words, all nations already have universal jurisdiction to try persons for these crimes. What the ICC is merely doing, that institution's supporters argue, is exercising the collective jurisdiction of its members, any of which could independently assert jurisdiction over the accused persons under this theory of universality.[34]

Advocates for the court, conclude that the Statute provides more than adequate safeguards for American troops and leaders from frivolous prosecution.[35] Under the principle of complementarity, for example, the ICC may not proceed with any case that is genuinely being

investigated or prosecuted by a state that has jurisdiction. The prevailing thought is that a properly structured court will prosecute significant criminal activity during wartime, but will leave to national jurisdiction the job of disciplining the isolated war crimes committed by errant soldiers.

POLITICIZED PROSECUTION & UNCHECKED CHECKS & BALANCES

The second concern is the potential for the court to be used as a political instrument in the hands of nations that wish to undermine the United States. Because of America's superpower status and broad international commitments around the world, the United States sees itself as a vulnerable target for political manipulation by states intent on undermining its power.[36] Smaller nation states have little to fear from ICC politicization in comparison to a nation burdened with international commitments. Also, embedded in this issue is the United States' discontent with the treatment of the United Nations Security Council. The U.S. believes that requiring the court to channel all referrals through the Security Council allows the American veto authority as a permanent member of that UN institution to act as an insurance policy against politicization and activism in the ICC. Without this ability to veto, the U.S. is concerned that its citizens, and in particular military personnel on official assignments, may be exposed to malicious or frivolous international prosecution.

In this regard, the United States also disagrees with the unchecked powers of the Prosecutor and the ability of that official to bring alleged criminals to trial. According to the procedures of the court, the Prosecutor is not controlled by any separate political authority and therefore has unchecked discretion to initiate cases that could lead to "politicized" prosecutions. Basically, this Prosecutor, with the consent of two judges, can initiate investigations and prosecution in situations without referral to the court by a government that is party to the treaty or by the Security Council.[37] Lastly, the Statute stipulates that any dispute concerning the judicial functions of the court will be settled by the decision of the court. This means the court is the only check on itself and could technically overrule the results of a U.S. investigation. In the eyes of the U.S., each of these actions allows the court to be its own referee—another reason why the U.S. wants a role for the U.N. Security Council, particularly because the integrity of the court depends in large part on the integrity of the people charged with implementing and enforcing the rules. The only way to guarantee the integrity of the ICC system is to establish a solid framework of checks and balances to ensure that no official is ever operating without independent oversight. Doing so will mitigate "overzealous" prosecutors and prevent politicized prosecutions.[38]

Proponents of the Statute, on the other hand, believe the ICC provides a number of safeguards to protect party-states against an unrestrained prosecutor and politically motivated judges. First, prosecutors can be removed from their office and subjected to disciplinary measures if found to have committed serious misconduct or a serious breach of duties under the Statute.[39] Second, the right of a state to initiate its own investigation under the principle of "complimentarity" ensures that the ICC can only act when a state is unwilling or unable genuinely to investigate the allegations itself. Third, the UN Security Council has the authority to step in at any time and halt the court's proceedings under Article 16, United Nations Deferral Option, if it believes prosecutor actions are unscrupulous, thus giving the Security Council a collective veto over the court. Fourth, the International Criminal Court is obligated to honor existing state bilateral and multilateral agreements and treaties as described in the Statute. Each of these mechanisms clearly dissuades any prosecutor from acting in a political and biased manner toward the United States. Additional checks, these ICC proponents argue, require prosecutors to meet the litmus test of determining whether or not the case should be handled by the court in the first place followed by a Pre-Trial Division review to verify appropriateness of the case for prosecution. In addition, actions can be challenged by any judge of an interested state before a case can go forward. Lastly, the rights and protections of the accused are extensive and on par with the U.S. Constitution and human rights treaties such as the 1966 International Covenant on Civil and Political Rights.[40] Many of the rules of evidence included in the Statute also closely resemble rules applied in U.S. courts. The Statute provides for a well-developed system to protect victims and witnesses, and to respect their rights to participate in the proceedings. While it is true the ICC is the final authority in judging the effectiveness and integrity of national judicial systems, the likelihood of the ICC overturning a U.S. decision is low.

Added to all this, ICC proponents take exception to the notion that Americans are more likely to be targeted for prosecution. Many other countries participating in peacekeeping operations are just as likely to be targeted and are willing, nonetheless, to subject their soldiers and officials to the jurisdiction of the ICC. Moreover, they argue, if the Court is to accumulate the respect and authority it needs to establish itself as an institution of abiding international importance, it will resist any temptation to take political sides, especially against the United States. More importantly, the safeguards already built into the Court's Statute as well as new ones likely to evolve in the Rules of Procedure and Evidence and Elements of Crimes, should help ease fears. In any event, the likelihood of an American's being "politically" prosecuted for alleged crimes by the Court is extremely low. Finally, party-states are confident in the Court's

resolve to dismiss unfounded and politically motivated charges and assert, contrary to U.S. fears, that in order to make the Court work, an independent Prosecutor is vital to ensure just results, free from political control.

ANALYSIS

The United States has long enjoyed a reputation for leadership in the struggle for universal human rights and the rule of law. Although the United States has fundamental differences with the ICC Statue as currently written, these differences are not so great that they cannot be overcome. The world is at a point in international law where the ICC makes sense and offers enormous promise. But the court needs U.S. backing. "As the most powerful nation committed to the rule of law," the U.S. Ambassador to the 1998 Rome Conference pointed out to the United States Senate in this regard, "we have a responsibility to confront assaults on humankind. One response mechanism is accountability, namely to help bring the perpetrators of genocide, crimes against humanity, and war crimes to justice. If we allow them to act with impunity, then we will only be inviting a perpetuation of these crimes far into the next millennium. Our legacy must demonstrate an unyielding commitment to the pursuit of justice."[41]

The argument "for" or "against" the United States joining the ICC in some cases is a matter of perception. Is the United States willing to operate in a multilateral framework of equality under international law? Is the United States willing to be subjected to the judgment of an international body that it cannot control? United States' actions thusfar indicate that it is not. For example, immediately following the ratification of the Court, the United States announced it would withdraw its forces from international peacekeeping missions such as those in the Balkans if Americans were not exempt from prosecution. Congress quickly followed suit by invoking the American Service Members Protection Act of 2002 baring any U.S. cooperation with the ICC so long as the United States has not ratified the Statute. The Act also blocks U.S. military aid to certain countries that are a party to the Court. This type of initiative weakens any legitimate U.S. claim to be a leader in advancing international law. As a result of U.S. efforts, the UN Security Council voted unanimously to adopt a resolution exempting members of UN peacekeeping missions from prosecution by the ICC for a period of one year. This immunity resolution will expire in July 2004, and if not reinstated, the U.S. will have to make a difficult decision about continued American involvement in peacekeeping operations. The U.S. has repeatedly stated that it is committed to international accountability for war crimes, genocide, and crimes against humanity. But, if the jurisdictional guidelines described in the Statute are going to be a defining issue, then U.S. participation in future peace operations is at risk.

The major strength of the ICC is that it has been agreed to by the majority of states in the world and reflects the experience garnered from two existing war crime tribunals. Based on this experience, the ICC avoids direct infringement on national sovereignty with the principle of complementarity, in which national legal systems maintain primacy for prosecution of criminals. As a result of the earlier ad hoc tribunals, many provisions and concerns were built into the ICC Statute. In this regard, the U.S. should not lose sight of the protections provided to states that ratify the Statute. For example, Article 124 allows for party states to "opt out" of ICC jurisdiction and any exposure whatsoever to war crime charges for an initial seven years. This gives states more time to evaluate the competency and fairness of the court. Article 16 enables the UN Security Council to immediately suspend prosecution of a case if the court or judge is not carrying out his or her duties fairly and appropriately. Article 98 permits states to create bilateral agreements with other countries if it so desires in order to further protect its citizens. All of these actions are meant to gain cooperation between states and ensure punishment of the worst individual violators of international human rights.

On the other hand, there are immediate consequences for the United States in terms of its stance on the ICC. Upon ratification of the Statute, the Assembly of States Parties assumed control as the governing body to oversee the implementation and possible amendment of the Statute. Because the United States is a non-party to the treaty, it is relegated to an observer role only. Moreover, it has lost several rights afforded only to members of the court, specifically, to cast a vote in elections for judges or the prosecutor, to nominate U.S. nationals to serve in key positions, or to suggest items for the ICC agenda. Additionally, the United States has no input into the further development of the Rules of Evidence and Procedure or to vote on the definition of crime of aggression and its inclusion in the jurisdiction of the ICC when the matter is considered during the review. Lastly, as a non-party state, the U.S. cannot refer cases to the Prosecutor for investigation.

To mitigate the loss of these rights, the U.S. is aggressively negotiating bilateral agreements with individual states, including non-parties states, under the provisions of Article 98 of the Statute. These agreements provide Americans with essential immunity against the court's jurisdiction claims, and allow the U.S. to remain engaged internationally with its friends and allies. To date, 21 countries have signed Article 98 Agreements. Rwanda will be the 22nd country to sign the Article 98 agreement with the U.S. later this year. Most importantly, the U.S. is continuing to use its weight as a permanent member of the Security Council in its attempts to obtain permanent immunity for Americans.[42] In any event, that membership will ensure that the U.S. will be involved in Security Council requests to the Prosecutor to defer investigations or

prosecutions and to the Pre-Trial Chamber to review a decision of the Prosecutor not to prosecute or investigate.[43] But the fact remains that the American efforts could be more effective if the U.S. acted as a member of the ICC. In that capacity, American representatives could use the structure of the Court Statute to lobby for changes in procedure that might eventually mandate a role for the UN Security Council in deciding when the ICC should assert jurisdiction. This realistic extension of the great power veto provision from the realm of geopolitics to that of international law would provide from the U.S. perception the checks and balances over the ICC necessary to prevent potential abuses.

Absent these types of efforts from within the organization, it will be very difficult for the U.S. to dismiss the ICC and then seek to create future ad hoc tribunals. The ICC enjoys enhanced legitimacy by virtue of its widespread political support. The UN members will not look favorably on creating additional new courts that duplicate the function of the ICC. The ICC also avoids the recurring need to expend energy and political capital to establish ad hoc tribunals to investigate crimes. In the future, the option of punishing individuals responsible for mass atrocities will be either national courts or the ICC. The Court serves as a permanent mechanism the deterrent effect of which makes it a relevant institution.

Although U.S. concerns in all this is understandable, the American withdrawal from the ICC has potentially undesirable long-term consequences on multilateral treaty making and the rule of law in international relations. To begin with, that action sets a precedence that could encourage other nations to remove their signatures from treaties that are vital to U.S. interests. In addition, the spirit of the Court is being undermined by the United States pursuit of bilateral agreements with individual countries accompanied by threats to withdraw from peacekeeping missions if Americans are not exempt from prosecution. This behavior is drawing extreme criticism concerning the American commitment to justice from U.S. Allies. Moreover, American actions further perpetuate an adverse global perception of U.S. elitism and lack of proper consideration for the interests of other countries, and for the need to address world problems.[44] This emerging pattern of reluctance to join such international institutions as the Landmine Treaty, Kyoto Treaty and now the International Criminal Court makes it difficult for the U.S. to maintain its credibility while trying to achieve the national security strategy goal of respect for human dignity. If not careful, the U.S. will become isolated and maligned—an outsider in the type of multilateral negotiations necessary to maintain it status as a superpower.

CONCLUSION

America's national security strategy is guided by the conviction that no country alone can build a safer, better world alone and that alliances and multilateral institutions can multiply the strength of freedom-loving nations.[45] The International Criminal Court offers one way in which the U.S. can better realize its goal of promoting human dignity and global interests. The United States has always been a world leader in promoting the rule of law. The ICC is a useful tool in promoting human rights and holding the perpetrators of the worst violations accountable before the world. Despite U.S. concerns and perceived ICC flaws, the International Criminal Court will proceed with or without the United States. But it will be a better institution with the United States.

As with any international treaty, there is some risk associated with joining a new regime; but the benefit of being a signatory of the Statute and the opportunity to continue to shape the future of the court outweigh the risk. The International Court is a bold step in the direction of global institutions designed to promote global interests. Speaking to delegates at the Rome Conference the UN Secretary General commented, "There can be no global justice unless the worst of crimes—crimes against humanity—are subject to the law. In this age more than ever we recognize that the crime of genocide against one people truly is an assault on us all—a crime against humanity. The establishment of an ICC will ensure that humanity's response will be swift and will be just."[46]

In a larger sense, the result is paradoxical. America's concern as the world's only superpower with threats from international institutions to its unique global leadership capabilities could in the long run reduce those very capabilities. For the U.S., not to join a regime that so largely bears the American imprint just because it does not agree with every American position, is inappropriate. The U.S. had the opportunity to be at the forefront of change in international law. Instead, by withdrawing from the ICC, America is relegated to an observer role. In that capacity, the U.S. has lost its power to directly influence the court, to select ICC judges, and to set the agenda for future ICC sessions. What the U.S. wanted from the ICC was a guarantee that no Americans would be prosecuted by the court. That is not possible. On 10 March 2003 under the watchful eyes of Kofi Annan, 18 International Criminal Court judges were sworn in as the most important human rights institution the world has seen in half a century was inaugurated. Additionally, Canadian diplomat Phillippe Kirsch was elected the first president of the ICC. Noticeably absent from the inauguration ceremony was the Untied States. As a result, the United States has surrendered a great deal of the moral high ground concerned with international law, the ultimate hallmark of a great power.

Word count = 6,045

ENDNOTES

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