

Pace International Law Review

Volume 15
Issue 1 *Spring 2003*

Article 7

April 2003

Misguided Fears about the International Criminal Court

Benjamin B. Ferencz

Follow this and additional works at: <http://digitalcommons.pace.edu/pilr>

Recommended Citation

Benjamin B. Ferencz, *Misguided Fears about the International Criminal Court*, 15 Pace Int'l L. Rev. 223 (2003)

Available at: <http://digitalcommons.pace.edu/pilr/vol15/iss1/7>

This Article is brought to you for free and open access by the School of Law at DigitalCommons@Pace. It has been accepted for inclusion in Pace International Law Review by an authorized administrator of DigitalCommons@Pace. For more information, please contact cpittson@law.pace.edu.

ESSAY

MISGUIDED FEARS ABOUT THE INTERNATIONAL CRIMINAL COURT

Benjamin B. Ferencz*

I.	Introduction	224
II.	Visions of World Peace Through Law	224
	A. The United Nations	224
	B. Nuremberg Trials and the Rule of Law	225
III.	What Happened to the Dream?	226
	A. Chilling Effects of the Cold War	226
	B. The Security Council Asserts Its Authority	227
IV.	Permanent International Criminal Court (ICC) ...	228
	A. The Challenge	228
	B. The Rome Statute	229
V.	United States Objections to the Court	230
	A. Fear of an Unrestrained Prosecutor	231
	B. Protecting United States Constitutional Rights	232
	C. United States Sovereignty's Impaired	233
	D. Other Objections	235
VI.	Coercion as Persuasion	236
	A. United States Legislation to Thwart the ICC ..	236
	B. Revoking a Prior President's Signature	237
	C. Prohibiting United States Funds for the ICC ..	239

* The author is a graduate of the Harvard Law School (1943). He served in the United States Army as a war crimes investigator during World War II. He became Chief Prosecutor in the Nuremberg trial against Nazi extermination squads (Einsatzgruppen) that had murdered more than a million innocent people. He remained in Germany to set up the programs to compensate victims of persecution and returned to New York where he practiced law with Telford Taylor, who had been his Chief at Nuremberg. He has been an Adjunct Professor at Pace Law School and has lectured widely on world peace issues. His books and articles can be found on his website: <http://www.benferencz.org>.

D.	No United States Peacekeepers Without Immunity.....	239
E.	Bilateral Agreements to Block Extradition.....	240
VII.	Where Do We Go From Here?	240
A.	Historical Indicators	241
B.	Philosophical Differences	243
C.	Political Realities	244
D.	Long Range Prospects	245

I. INTRODUCTION

The temple of the law has been built one stone upon the other. Unfortunately, the edifice upon which the peace and tranquility of humankind rests is far from complete. Every civilized society is based on at least three pillars: 1) a code of laws that define clearly what is permissible or prohibited; 2) courts to resolve differences; and 3) a system of effective enforcement to deter future transgressions. Code, courts and enforcement form a synergistic tripod for an integrated and balanced regime designed to curb international violence by the rule of law.

Unfortunately, our interdependent world still lacks many of the vital components needed for stability. Consequently, individuals, groups and nations commit massive crimes against humanity with impunity and resort to illegal military might to settle differences that seem intractable. The world has not yet grasped the reality that law is better than war.

II. VISIONS OF WORLD PEACE THROUGH LAW

A. *The United Nations*

After some forty million people were killed during World War II, world leaders led by the United States devised what it hoped would be a more peaceful world order. Collective security was to be safeguarded by a new United Nations Organization governed by rules of international law that would "save succeeding generations from the scourge of war." Social goals and principles of humanitarian behavior were prescribed in the United Nations Charter adopted in 1945. Member States were expected to disarm, forego the use of force and rely on international military contingents to carry out Security Council mandates for the maintenance of peace.

In order to gain widespread acceptance, many Charter provisions were couched in language that was amenable to different interpretations. The United Nations Charter Preamble spoke of "equal rights of nations large and small" but some were more equal than others. The victorious allied powers, United States, United Kingdom, Russia, France and China, retained the exclusive right to veto any enforcement action by the Security Council. Without that inequitable privilege it would have been politically impossible to muster the needed consent of two-thirds of the United States Senate that the United States Constitution mandated before any treaty could be ratified. It should have been obvious that without unanimity among the five powers, the United Nations would be unable to achieve its lofty humanitarian goals. When idealistic principles are surrendered to realistic politics, humanity becomes the victim.

B. *Nuremberg Trials and the Rule of Law*

In addition to the frail United Nations Charter, the post-war vision of world peace was buttressed by a reaffirmation of the rule of law. Hitler and his henchmen had been warned in 1942 that they would be held accountable for the atrocities being committed by Nazi Germany. Under American leadership, an International Military Tribunal (IMT), that included eminent British, French and Soviet jurists, was convened in Nuremberg in 1945 to hold accountable those German leaders responsible for planning or perpetrating the aggressions, crimes against humanity and war crimes committed in flagrant violation of existing international laws. Twelve subsequent trials, conducted in Nuremberg by the United States, laid bare the criminality of the hierarchy that supported the Nazi terrors.

Aggressive war was held to be "the supreme international crime." Crimes against humanity that shocked the conscience of mankind, as well as massive violations of traditional rules of war were also punishable regardless of the rank or station of the perpetrator. Vengeance or retribution against the German people was rejected as a policy. Those leaders found guilty, after a fair trial, were sentenced to death or imprisonment. Justice Robert Jackson, on leave from the United States Supreme Court to serve as American Chief Prosecutor at the IMT trials, proclaimed: "We must never forget that the record on which we

judge these defendants today is the record on which history will judge us tomorrow." His successor for the dozen subsequent Nuremberg trials, General Telford Taylor (later a Professor at Columbia University) reaffirmed the fundamental principle that law must apply equally to everyone. At Nuremberg, the rule of law took a step forward.

The Nuremberg Principles were unanimously affirmed by the first General Assembly of the United Nations. Committees were appointed to draft a Code of Crimes Against the Peace and Security of Mankind as a foundation for a permanent international criminal court. A United Nations Convention was adopted to punish the crime of genocide, but nations were not yet ready to accept any international tribunal to punish even that horrendous crime. Because of opposition of a small minority in the United States Senate, forty years would pass before the President could ratify the Genocide Convention and then only with crippling reservations. With no court to try the perpetrators, genocide continued to be committed with impunity in various parts of the world.

III. WHAT HAPPENED TO THE DREAM?

A. *Chilling Effects of the Cold War*

The ideological war between the Soviet Union and the United States influenced every decision. United Nations committees operated on the principle of consensus; that meant, in effect, that every member could veto anything. The absence of an agreed upon definition of aggression was the excuse given for lack of progress toward an international criminal court. Debates were interminable and inconclusive. United States support for the court vacillated. By 1954, several drafts had been considered, however the time for the law to take another step forward was "not yet ripe." In 1974, after decades of futile wrangling, by consensus the crime of aggression was defined. The definition listed many examples of prohibited acts but the ultimate decision whether aggression by a State had been committed required the concurrence of all five Permanent Council Members. The agreed upon definition provided new impetus to the United Nations, but it needed new acts of aggression, genocide and overwhelming inhumanity to shake the diplomats out of their lethargy.

B. *The Security Council Asserts Its Authority*

In August 1990, Iraq invaded Kuwait, a friendly and neighboring Arab state. It was a case of flagrant aggression accompanied by a host of war crimes and crimes against humanity. The United States, with major oil interests in the area, took the lead in obtaining Security Council Resolution 678 authorizing States to use "all necessary means to repel the aggression and restore peace in the area." The assertion of Council authority was the type of response the United Nations Charter had envisioned, but for which political will was usually lacking. In a stunning military victory, led by United States forces, Iraq was driven out of Kuwait in a hundred hours. It was sadly ironic that the victors could not muster the will to bring the perpetrators of the international crimes committed by Iraq before a court of justice as they had promised. Unfortunately, there was still no competent international court in existence.

Nuremberg had taught that only those leaders responsible for international crimes should be tried and punished. Instead, the people of Iraq, many of whom may have opposed the brutal policies of their dictator Saddam Hussein, were subjected to United States-led bombardment and international economic sanctions. The individual generally regarded as primarily responsible for the harm was allowed to remain free. Political realists expected Hussein to be toppled and they feared that the next tyrant, possibly from Iran, might be worse for the United States. Politics prevailed over principle. It was a political blunder that would cost the world dearly.

Beginning around 1991, rival ethnic groups in Yugoslavia declared their independence as sovereign States. War erupted, accompanied by campaigns of mass rapes and "ethnic cleansing" bordering on genocide. Having suffered a humiliating defeat in Somalia a few years earlier, when United States Rangers were ambushed while on a humanitarian mission, the United States was unwilling to risk its troops to stop the killings. Instead, the Security Council, encouraged by the US, turned to the rule of law. In Resolution 808, which was passed in 1993, the Council decided to establish a tribunal "for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991." Within a matter of weeks, an ad hoc

International Criminal Tribunal was created. It was a long-overdue building block on the edifice started at Nuremberg.

In 1994, over half a million people were brutally butchered during ethnic conflicts and genocidal slaughter in Rwanda. The massacres could have been prevented but those with the power to halt the killings lacked the will, wisdom or political courage to take the military risks. Instead, in response to justified cries of universal indignation, the Security Council promptly created another ad hoc tribunal for crimes committed in Rwanda. Both of these new criminal tribunals received significant support from the United States. Despite initial start-up problems, the ad hoc tribunals have been functioning reasonably well and have been creating important precedents to uphold and expand international humanitarian law. With unrestrained violence continuing in other parts of Africa and the world, it became increasingly apparent that a proliferation of special ad hoc tribunals created by the Security Council after the harm had been done, and covering only crimes committed in a limited area during a specific time, was hardly a fair or efficient way to deter international criminality. The improvised ad hoc courts of the Security Council were important new stones added to the international legal edifice but much more was needed to establish universal justice. As the Nuremberg trials had made abundantly clear: to be worthy of its name, law must apply equally to everyone, everywhere.

IV. A PERMANENT INTERNATIONAL CRIMINAL COURT (ICC)

A. *The Challenge*

In 1995, President Clinton, addressing a large audience honoring the memory of Tom Dodd, one of the leading United States Prosecutors at Nuremberg, reaffirmed America's commitment to uphold the Nuremberg principles. By the end of that year, the General Assembly decided to establish a special Preparatory Committee to consider drafts prepared after decades of deliberation by experts on the International Law Commission. None of the states opposed the drafts. In 1997, President Clinton addressed the United Nations and called for the early establishment of a permanent International Criminal Court. United Nations committees, representing 185 nations with different legal and social systems, were charged with cre-

ating a fair, efficient and effective new judicial regime to try leading perpetrators of massive international crimes. It was a daunting challenge.

B. *The Rome Statute*

Following several years of intense deliberations in countless meetings, the competent and determined United Nations jurists and diplomats were approaching possible compromises on differences of substance, procedure and wording. After five weeks of hectic negotiations that took place in Rome, a final agreement was reached on July 21, 1998. According to the terms of the court statute, the ICC would be incorporated into a treaty that nations could sign and ratify as provided in their own constitutions. One hundred twenty nations voted for the Court. Seven voted against it and twenty-one abstained. The hall burst into wild and sustained applause. Young people from all over the world led the cheers as part of a coalition of almost 1000 civic groups.

Committee Chairman Philippe Kirsch of Canada spoke of "humanity's finest hour." United States Ambassador, David Scheffer, surrounded by representatives from the Senate and Pentagon, sat glumly silent. The United States vote against the treaty was joined by such strange bedfellows as Libya, Yemen, Qatar and Algeria, that many considered "Rogue States." Israel reluctantly followed in the footsteps of the United States. Since many concessions had been made to satisfy America's concerns, the failure of the United States to vote for the Court was a big disappointment to the overwhelming majority.

United Nations Secretary-General Kofi Annan, who flew to Rome for the ceremony, hailed the International Criminal Court as "The hope of future generations." The Rome Statute was a prototype for a new institution that many considered the missing link in the world's legal order. It was obvious to all that the newborn babe would have to be nurtured and helped to realize its full potential. According to its terms, at least 60 nations would have to ratify the treaty before it would become binding on all. However, no one anticipated the vehemence of US efforts to abort the court or cripple it in its cradle.

V. UNITED STATES OBJECTIONS TO THE COURT

It is inevitable in every great democracy that there are differences of opinion on most important subjects. The establishment of new international courts with binding authority has always been contentious. Therefore, it is perfectly understandable that some voices in the United States should oppose the idea of a new international criminal court with compulsory jurisdiction over United States nationals. The most determined and outspoken opponent of any such tribunal has been Senator Jesse Helms of North Carolina. Similar views are held by other conservatives in the Congress, the administration and the country. Those who, in good faith, oppose the ICC for valid reasons are entitled to have their opinions considered and respected. Their arguments should be evaluated to determine whether they are well founded and whether or not they serve the best interests of the nation and the world.

Those who favor the ICC are entitled to the same consideration. They see an international criminal court as an essential link in a more humane and peaceful world order that will benefit everyone. Since genocide, crimes against humanity and major war crimes are almost invariably committed with the connivance and support of a government, the absence of any international tribunal will almost surely mean that, unless the guilty regime is overthrown, the perpetrators will never be tried. Supporters of the court feel strongly that the time has come for such impunity to end. They argue that a country torn by civil strife will lack the political will or legal institutions needed to try wrongdoers. If tyrants are able to evade justice, their victims will seek vengeance and take the law into their own hands. Thus, there can be no justice without peace and no peace without justice.

Supporters of the Court admit that the Rome Statute is far from perfect. It is a product of negotiated compromise by very many nations with different views and legal systems. To wait for perfection may mean to wait forever. Shabtai Rosenne, retired Ambassador of Israel and a renowned legal scholar, concluded that the ICC, despite current defects that could be repaired, was a major legal creation that "will shine on the record of the twentieth century." (41 Va. J. Int'l L.164, Fall 2000.)

Those who oppose the ICC insist upon absolute guarantees in advance that no United States nationals will ever come under its jurisdiction. Let us consider the three main objections voiced by opponents of the Court:

A. *Fear of an Unrestrained Prosecutor*

It has been argued that the Statute does not contain adequate restraints on the Prosecutor, thereby risking the danger that Americans may be subjected to political prosecutions that would inhibit United States military interventions for humanitarian or national security reasons. No other country has raised this objection. The truth is that no other Prosecutor in human history has been subjected to as many controls as exist in the ICC Statute:

*The national State has priority over the International Court. Only leaders responsible for planning and perpetrating the crimes are the intended targets, and only if their own State is unable or unwilling to give them a fair trial that is not a sham. The US will always be given priority to try its own nationals.

*Only crimes committed after July 1, 2002, can be considered. There is no retroactivity.

*The Prosecutor cannot start an investigation without prior authorization from a three-judge panel, subject to appeals to five other judges.

*Eighteen highly qualified international judges, male and female, sworn to uphold the law and justice, will decide by majority vote whether the accused is guilty. There is no death penalty.

*The Prosecutor can only investigate crimes that meet strictly defined definitions as crimes against humanity, genocide or major war crimes "of concern to the international community as a whole." United States negotiators agreed to the definitions that bind the Prosecutor.

*The Prosecutor must prove that the defendant knew that the act was criminal and intended the unlawful consequences. Proof of guilty knowledge and intent must be established beyond reasonable doubt.

*The Security Council can direct the ICC to cease any prosecutions that might interfere with peace negotiations. Suspensions can be renewed indefinitely.

*The ICC is under the complete control of the very many countries that form the Assembly of State Parties - including the entire European Community, England, France, Germany, Canada, Australia and many other faithful friends of the United States. They control the budget and can fire anyone who might be tempted to politicize the office.

*Proceedings must be open to public view. Unjustified prosecutions for political reasons would soon be blocked by public outrage.

*The ICC has no police force or other effective enforcement mechanism. The acceptance of its judgments depends upon the Court's reputation for integrity and competence. A frivolous Prosecutor could not remain in office. Politization of the Court would amount to its suicide.

*It should be noted that early United States demands that only the Security Council could authorize prosecutions, were turned down by the others because they insisted upon an independent Prosecutor free of political influence.

B. *Protecting United States Constitutional Rights*

It has been argued that the ICC Statute would deprive United States nationals of the right to fair trial as guaranteed by the United States Constitution. The truth is that trials by the ICC offer far more protection to US nationals than they would receive if the ICC did not exist. The Statute guarantees "due process" as provided in the United States Bill of Rights as follows:

- *Presumption of innocence.
- *Speedy and public trial.
- *Assistance of counsel.
- *Right to remain silent.
- *Privilege against self-incrimination.
- *Right to written statement of charges.
- *Right to examine witnesses.
- *No ex post facto prosecutions.
- *Protection against double jeopardy.
- *No arrest warrants without probable cause.
- *Right to be present at trial.
- *Exclusion of illegally obtained evidence.
- *No trials in absentia.

It is true that the ICC Statute does not provide for trial by jury, a right originally intended to protect against secret star-chamber proceedings by the English King. Those who make this argument seem to forget that the Sixth Amendment to the Bill of Rights calls for “an impartial jury of the State or District wherein the crime was committed.” A foreign venue is not likely to be more protective than the international court. No crimes committed abroad are covered by the United States Constitution. Members of the military have never been entitled to a trial by jury but are subject to Courts Martial in a military trial. Juries are often unreliable and not used in most countries. It is not unreasonable, unfair or a violation of “due process” for the ICC to accept a compromise that includes such an impressive list of human rights protections for the accused.

Professor Robinson O. Everett, Chief Judge of the Court of Military Appeals, has suggested that Federal Statutes could be amended to completely cover all the crimes under ICC jurisdiction. The ICC, being required by its Statute to yield primary jurisdiction to the United States for the fair trial of its nationals, would thereby divest the ICC of any authority over American citizens. The risk that United States proceedings would be held to be a sham that would be ignored by the ICC is conceivable but, in fact, is so far-fetched as not to constitute a plausible objection.

The rights contained in the ICC Statute reinforced the conclusion of the American Bar Association in February 2001 that: “The security interests of the United States and of its service members and officials are as fully protected as reasonably could be provided for by an international treaty. Indeed, these national and individual interests are better protected if the United States joins the ICC than if we reject it.” It is sadly ironic that those who oppose the ICC as a “kangaroo court,” raise no objection to United States detaining suspected terrorists under conditions that deny them rights that would exist for any American tried by the ICC.

C. *United States Sovereignty is Impaired*

Critics of the ICC argue that the Court infringes on United States sovereignty. The truth is that medieval notions of absolute state sovereignty, where by Divine right the monarch and

his male heirs were above the law, went out with Magna Carta in 1215 and were repudiated by the United States Declaration of Independence. In democratic States, sovereignty resides not in the reigning Monarch, or President, but in the people. The world could not function for one day without the thousands of laws, rules, regulations and agreements that bind all nations to certain commonly accepted standards of behavior. Every treaty, by creating mutually accepted obligations, infringes on the national "sovereignty" of the signatories. But even if there is no treaty, or it is not signed, certain universal prohibitions must be respected to protect the interests of people everywhere.

Rules, written and unwritten, governing permissible warfare have been in existence since man first went into battle. International law, like domestic law, does not advance solely by statute; it grows by practice, custom and binding legal decisions to meet the needs of a constantly changing society. International "rules of the road," enable this interconnected global society to function more efficiently. Piracy has always been treated as punishable wherever the pirates are captured. The widely accepted codifications by the International Committee of the Red Cross are now binding on everyone – whether or not they are ratified. Genocide, grave breaches of the rules of war and other crimes against humanity are now in the same category. The Rome Statute does not impose any novel obligations since all nations are already bound to respect its restraints. The duty not to commit the crimes is not new; only the mechanism for enforcement is being added via the ICC. Brandishing a tattered banner of absolute State sovereignty is hardly a persuasive argument against the need to bring perpetrators of massive criminality before the bar of justice.

It was the United States that led the world at Nuremberg in establishing the universally binding prohibitions that no person and no nation had a sovereign right to commit genocide and crimes against humanity with impunity. The implied promise was that "never again" would the perpetrators escape judgment. It is to uphold those legal principles and to curb the worst abuses of State power that the ICC was created. Human rights are not diminished but enhanced by the ICC. Jingoistic slogans may be politically appealing but are never an acceptable substitute for reason and the rule of law.

D. *Other objections*

Undersecretary of State John Bolton, a leading spokesman for Senator Helms, argued that international law is not really law since it is not binding or enforceable. He considered the Rome Statute too vague – despite its detailed definitions worked out with consent of United States negotiators. He did not believe that the ICC could deter the crimes under its jurisdiction and denounced human rights advocates like Aryeh Neier of The Open Society Institute for their “utopian zeal.” He also expressed grave concern that the US might be accused of aggression – despite the fact that the ICC has no authority to consider such a charge until some time after 2009 and only if there is complete agreement on a new definition that recognizes the role of the Security Council. The innocent need never fear the rule of law. Those who seek to exclude aggression from scrutiny are bound to make their weaker and law-abiding neighbors rather nervous.

A more moderate position is taken by Professor Ruth Wedgwood of Yale, an Advisor to the Pentagon who has written extensively and skeptically about the new Court. She notes that the law of armed conflict is indeterminate and new technologies may require actions against unconventional adversaries that some might interpret as legal violations. Giving the United States priority to try United States nationals for war crimes won't guarantee justice since the United States is not likely to try its own soldiers who are carrying out official instructions and the ICC might then seek to intervene. She argues that United States humanitarian intervention or preemptive strikes against weapons of mass destruction may be necessary and should not give rise to criminal indictments – “despite the disapproval of academics.” She refers to “the moral responsibility of sovereign States.” Little thought seems to have been given to the possibility that other nations would assert the same rights to ignore existing law and what the consequences might be for world order. She concludes that it would be wise for the Administration to see how the ICC progresses before deciding whether it is in the United States interest to support the Court.

VI. COERCION AS PERSUASION

When it began to appear that the arguments advanced by opponents of the ICC would not be persuasive to most nations, a more belligerent tactic was adopted by Senator Helms and his Conservative friends. If persuasion wouldn't work, they reasoned, try coercion. With Pentagon support, the assault against the Court advanced on several fronts: a) Legislation was introduced to prohibit and penalize any cooperation with the ICC; b) The Court would be further undermined by repudiating the United States government's signature on the Rome Treaty; c) All United States funds that might aid the Court would be cut off; d) The United States threatened to withdraw its forces from United Nations peacekeeping missions unless they were given absolute legal immunity from foreign prosecution; and e) A worldwide campaign was launched to obtain bilateral agreements to block all assistance to the ICC and guarantee that no Americans would ever be handed over to the international court.

A. *United States Legislation to Thwart the ICC*

Jesse Helms, throughout his long career in the Senate, had always opposed foreign intervention in America's affairs. In 2000, he introduced legislation intended to scuttle the ICC. It threatened economic and military sanctions against States that cooperated with the Court. It also authorized the President to "use all means necessary and appropriate" to free any United States personnel arrested on behalf of the Court. Critics mocked it as "The Hague Invasion Act." The Dutch were not amused. Despite its appealing but misleading title, the American Service members' Protection Act (ASPA) endangered the military more than it protected them. Without an international court to protect their rights, captured United States soldiers would be completely at the mercy of their captors.

In support of the ASPA, Helms succeeded in procuring the signatures of a dozen former Republicans, including ex-Secretary of State Henry Kissinger, Defense Secretary Donald Rumsfeld and other distinguished public servants, who supported his initiative that contained the same canards about an unrestrained prosecutor, infringement on United States sovereignty, constitutional rights and the country's ability to pursue ter-

rorists and protect its interests. A very distinguished legal expert, Monroe Leigh, who had been Advisor to both the State and Defense Departments and President of the American Society of International Law, assembled ten former Presidents of the Society to support his conclusion that arguments against the Court were unfounded and unjustified.

A few courageous voices were raised in Congress to support the Court. Senator Patrick Leahy, Democrat of Vermont, rebutted the false arguments and hailed the Court as an institution that would uphold America's national interests. He characterized the Pentagon's demands for a guarantee that no United States soldiers would ever come before the ICC as "a totally untenable position." (Dec. 15, 2000). Senator Christopher Dodd of Connecticut, whose father had been a leading prosecutor at the Nuremberg trials, expressed the same sentiments. In the House of Representatives Congressmen Tom Lantos and Patrick Kennedy pleaded for the Court and against going down the road to isolationism and injustice. On May 9, 2001, Nobel Laureate Elie Wiesel warned the House Committee against "US acceptance of impunity for the world's worst atrocities."

After persistent maneuvering, the Helm's proposal was attached to a supplementary appropriations bill and was pushed through Congress. Relatively minor amendments gave the President discretion in enforcing the legislation. It was signed into law by President Bush on August 2, 2002 as Public Law 107-206. The right-wing argument, that the ICC was a threat to America's military personnel and security interests at a time when America was at war against terrorists, had great public and political appeal. Once again, politics prevailed over reason.

B. *Revoking a Prior President's Signature*

After careful consideration in the White House, President Clinton instructed United States Ambassador David Scheffer to sign the Rome Statute just as the deadline was about to expire on December 31, 2000. Israel promptly followed suit. Signing was a reaffirmation of America's historical commitment to international accountability ever since Nuremberg. Knowing that there was no prospect of getting two-thirds of the Senators to consent, Clinton, seeking to mollify both right-wingers and human rights activists, said he would not recommend that it be

submitted for ratification. He wanted the United States to stay engaged in order to help shape the Court and remain a key player. As might have been expected, Senator Helms was livid. The next day, the *Chicago Tribune* quoted Helms saying: "I will make reversing this decision. . .one of my highest priorities in the new Congress, this decision will not stand." It was as if the Senator, backed by the Pentagon, was declaring war on the ICC.

Under the terms of the Rome Statute, the Treaty would not go into effect until it was ratified by at least sixty nations. Despite the fact that some countries would have to amend their national Constitutions in order to be able to accept the jurisdiction of an international court, ratifications came in much faster than expected. On April 11, 2002, the minimum number needed to put the treaty into effect was exceeded. Now retired, ex-United States Ambassador Scheffer hailed it as "an extremely significant moment in world history." There was a joyous celebration at the United Nations but the United Nations seat reserved for the United States was empty. Scheffer's successor, Ambassador Pierre Prosper, said: "There was no need to attend." On April 17, the *Atlanta Constitution* commented on United States intransigence and petulance saying: "The Bush Administration wants to abandon our historic commitment to the international rule of law." The Rome Treaty came into force on July 1, 2002 - without the United States.

Senator Helms had warned that if the Treaty were sent to the Senate for confirmation it would be "dead on arrival." The Conservatives were now in control. On May 6, 2002, Helms' protégé, John Bolton, now Assistant Secretary for Arms Control and International Security, sent a one-paragraph letter to the United Nations: ". . . the United States does not intend to become a party to the treaty. Accordingly, the United States has no legal obligations arising from its signature of December 31, 2000." This unprecedented and unlimited repudiation of a solemn Presidential commitment gave rise to an enormous outcry from all over the world. The European Community was stunned. Former United States Ambassador William Luers, President of UNA-USA, said the world's first nation to disavow its own signature served no worthy purpose, undermined United States leadership and damaged relations with our allies.

Amnesty International called it “a new nadir of isolationism and exceptionalism.”

C. *Prohibiting US Funds for the ICC*

An Appropriations Act providing funding for the Commerce, Justice and State Departments was amended on June 18, 2001, to prohibit any United States funds being expended to assist the ICC in any way.(H.R.2500, Title VI, Sec. 623). The reasons given for such drastic action were the usual ones voiced in opposition to the Court. There was practically no debate. The party in power controlled the purse and he who controlled the purse called the tune.

D. *No US Peacekeepers Without Immunity*

As more nations ratified the ICC Treaty, and agreements were reached on the rules to govern the Court, the fury of right-wing United States opposition seemed to increase. On June 30, one day before the Treaty was to go into effect, the United States bellowed its defiance in a way that shocked everyone.

Standing alone against all fourteen other Security Council members, the United States, as it had warned, cast a veto scuttling a resolution extending the mandate of United Nations peacekeeping operations in Bosnia. It indicated that unless all of its troops were guaranteed complete immunity by Security Council resolution it would withdraw from all United Nations peacekeeping. It was a frontal assault on the existing international order. All the nations that had accepted the ICC joined in strong protest against the United States action. Richard Dicker of Human Rights Watch had called the United States threat “an ideological jihad against international justice.” William Pace, coordinator of a vast coalition of non-governmental organizations, said: “The message that they’re delivering is that it’s more important to them to torpedo the ICC than to preserve peacekeeping at the United Nations and around the world.” After much diplomatic skirmishing, a last-minute compromise was reached that enabled the Bosnia mission to continue. But the United States insisted that it would continue to raise the issue with all other peacekeeping missions.

E. *Bilateral agreements to Block Extradition*

The Pentagon instructed its attaches in foreign ministries to seek special agreements that would defeat any ICC attempt to bring Americans to trial. Bolton, described as "Bush's hatchet-man in the State Department," while denying any intention to oust the ICC, embarked on a worldwide tour to do just that. The United States frequently entered into Status of Forces Agreements (SOFA) that required American soldiers arrested for crimes committed on foreign soil to be surrendered to the United States for trial rather than being tried under the local national laws. On United States initiative, a rather cumbersome provision was written into the Rome Statute, Article 98, to respect such pre-existing treaty obligations. Someone figured out that if new surrender of forces agreements could be concluded along the same lines it might be possible to completely divest the ICC of jurisdiction. The fact that such an interpretation would clearly distort the intended meaning of Article 98, and would violate the Rome Treaty obligation of all parties to assist the court, did not disturb Mr. Bolton.

Ambassador Scheffer, who negotiated the Article 98 text on behalf of the United States, wrote in *The Wall Street Journal* on September 20, 2002 that the Bush administration overreached by trying to use that article to immunize all United States nationals. That did not stop Bolton's campaign of misinterpretation backed up by threats of United States sanctions. The European Community was incensed at the brazenness of the United States assault and insulted by the notion that they would have accepted a clause that would allow all signatories to undermine the essential purpose of the Treaty. Several States, believing that a situation where they would want to send an American to the ICC would probably never arise, reluctantly concluded that it would be in their political and economic interest to sign on temporarily to the unreasonable American demand. The image of the United States as a bully could not be avoided. America's reputation for integrity and respect for law was surely not enhanced.

VII. WHERE DO WE GO FROM HERE?

The most predictable thing about the future is that it is usually unpredictable. Nevertheless, there are certain historical

movements that are detectable and, once perceived, can be influenced by human effort. So it is with the development of the rule of law. There can be no doubt that there has been an evolutionary movement toward the legal control of human behavior in many fields. Pollution of the environment, regulations governing seas, space and the protection of fundamental human rights are among the many areas brought under international controls during recent years. It seems inevitable that the prohibition of massive violence against innocent people should also be prohibited and deterred by law.

A. *Historical Indicators*

The problem of creating international courts with binding authority has engaged the government of the United States for over a century. At the "First Peace Conference" in the Hague in 1899, Elihu Root, founder and President of the American Society of International Law and a former Senator and Secretary of State, was a strong advocate for international tribunals. When Great Britain was on the brink of conflict over seizures of neutral vessels as a prize of war, she welcomed the idea of creating a new international court. Proposals for the International Prize Court were on the verge of general acceptance in 1907. President Theodore Roosevelt, in his message to Congress, hailed "the great advance which the world is making toward the substitution of the rule of reason and justice for simple force." Before all necessary ratifications could be completed, disagreements arose regarding some of the rules that would govern the tribunal. Britannia ruled the waves and insisted on waiving the rules. When no agreement on details could be reached, the widely acclaimed court was torpedoed. The world just missed the boat.

In a speech on December 17, 1910, President Howard Taft called for an international court as "a better method of settling controversies than war." The need for a criminal court should have become obvious in 1914 when Archduke Ferdinand of Austria was assassinated by Serbian nationalists. Instead of legal trial, nations turned to trial by battle. Amidst the bloodshed of World War One, France, Great Britain and Russia denounced Turkey's 1915 massacre of its Armenian minority as "crimes against humanity." Diplomatic protests were ignored. There

was no international court to try or deter the criminals. After countless millions perished, United States President Woodrow Wilson proposed a treaty to maintain peace via a League of Nations. A conservative minority in the United States Senate foiled his attempt to get two-thirds of the Senators to consent to ratification of the Treaty. Legal experts appointed by the League concluded that an international criminal court should be created to hold accountable those responsible for Germany's aggressions and atrocities. Their recommendations were quietly pushed aside by the diplomats in charge.

In 1934, King Alexander of Yugoslavia was assassinated by a Croatian nationalist. It was reminiscent of the murder of Archduke Ferdinand in 1914 that had ignited the First World War. To calm the international hubbub, France proposed that an international penal code be drafted to condemn assassinations and that an international court be created to punish terrorists. Two Conventions were drafted by 1935 and revised by 1937, after passions had cooled. Only India ratified the Terrorism Convention and not a single State ratified the one calling for an International Criminal Court. Neither Convention ever went into force. The United States, catering to strong isolationist sentiments, remained aloof. Diplomats trained to think first and foremost of the interests of their own country were unwilling or unable to change their way of thinking. They would soon pay dearly for their indecision.

The failure to hold high-ranking criminals accountable was recalled years later by Adolf Hitler, who commented contemptuously when launching the Holocaust: "Who remembers the Armenians?" The horrors of World War II need not be described here. We will never know how many wars could have been avoided or how many deaths could have been prevented if international courts had been created when proposed. The Permanent Court of International Justice set up in The Hague by the League of Nations could only deal with civil disputes submitted by consenting States. It had no criminal jurisdiction whatsoever. The unconditional surrender of Nazi Germany in 1945 paved the way for the assumption of governmental powers by the victors and the legal creation of the International Military Tribunal at Nuremberg. It was a long time coming. But it was only a beginning.

Our scan of history reveals that fortuitous events and changes in political climate can have a decisive influence on the speed and direction of change. World War I inspired efforts to put the Kaiser on trial for aggression and to hold German officers accountable for their atrocities. The efforts failed. World War II produced the Nuremberg trials, followed by similar war crimes trials in Tokyo and elsewhere. The mass rapes and genocidal acts in Yugoslavia induced the Security Council to set up a special tribunal in 1993 to punish those responsible. The shameful genocide in Rwanda gave rise to another ad hoc criminal tribunal.

Continuing atrocities elsewhere generated talk of more international trials and the beginning of movements in that direction. For almost a century, the United States government was in the forefront of those advocating an international criminal jurisdiction. In upholding principles of justice and law, it earned the appreciation and respect of embattled people everywhere. Just as a permanent International Criminal Court was about to come into existence, the Bush Administration became the leader in trying to destroy it.

B. *Philosophical Differences*

The reasons stated to justify opposition to the ICC are not persuasive. Basic philosophical differences may help explain the dissent. "Realists" note that the United Nations Charter has not saved succeeding generations from war; nor has it prevented massive atrocities. Its terms are too vague and its controls too political to be effective in a world divided by enormous political, religious and social differences. As a result, powerful States may deem it necessary to intervene militarily for humanitarian or national reasons that other States might regard as aggression.

To avoid the risk of being accused of illegal conduct, "Realists" in the Defense Department, and Conservatives in the government, prefer a free hand without judicial interference. It has been argued that United States interventions without prior Security Council approval is lawful, as shown by the absence of Council resolutions condemning what has become a fairly common practice. There is some merit in those arguments, but not much. The fact that a law cannot be enforced because the police

are impotent does not render the violation lawful. Opposition to the ICC is a negation of the rule of law.

C. *Political Realities*

New legal institutions cannot be created in a vacuum. George W. Bush of Texas was chosen as President of the United States in November 2000 by the narrowest of margins. He could hardly afford to antagonize Conservatives whose support had won him the election. His cabinet appointments signaled a new wind blowing in Washington. Before a year had passed, the occurrence of unforeseeable events would have a profound influence on how the Administration would view the rule of law and the ICC.

On September 11, 2001, hijacked American passenger planes were used as bombs to crash into the Pentagon and the World Trade Center in New York, 19 Arab "suicide bombers" perished along with some 3000 innocent people. Americans were horrified, outraged and traumatized. The President declared "war" on Al-Qaeda, a militant Muslim organization believed to be behind the attacks. The country was mobilized and reorganized to fight terrorism by every available means. United States forces attacked Afghanistan in search for terrorist hiding places. Conservatives threatened to use military and economic sanctions against any nation that failed to assist the United States.

No one in the government suggested that an International Criminal Court might be a correct forum for the trial of those responsible for this outrageous crime against humanity. On the contrary, the campaign against the ICC was intensified. Judge Richard Goldstone, a prominent South African human rights advocate who served with distinction as Chief Prosecutor for the International Criminal Court for Yugoslavia, said United States opposition to the ICC "borders nearly on the irrational."

The Bush Administration did little to conceal its scorn for the United Nations and international law. Suspected terrorists were seized in various parts of the world, transported to a United States naval base in Cuba to be held incommunicado for an indefinite period. The President announced that he would get rid of the regime of Saddam Hussein in Iraq, even if the Security Council did not approve. That was modified somewhat

in the face of strong public protest and the United States turned to the Council for a resolution requiring United Nations inspectors to detect whether Iraq still possessed weapons of mass destruction. The American public, frightened by threats of uncontrollable terrorism and the possibility of a new war, rallied behind the flag and the Commander-in-Chief. Europeans were getting even more concerned about what they perceived as a new unilateralism and belligerence by the United States.

D. *Long Range Prospects*

The ICC Treaty has gone into effect and the Court will start functioning soon – without the United States. A nation that sits sulking on the sidelines cannot remain a leader for very long. The majority of the American people do not agree with the position on the ICC taken by the Bush Administration. The Financial Times of London reported on September 25, 2002 that a survey by the Chicago Council on Foreign Relations concluded that 83% of United States nationals supported the use of the ICC to try suspected terrorists and 65% favored the Court even if it might bring a President to trial on trumped up charges. There is no doubt that even some members of the cabinet and other high-ranking officials do not share the negativism and exceptionalism of those in the Defense Department and Conservatives in the Congress who have set their hand and mind against the new Court. When the political climate changes, as hopefully it will, a democratic society will reflect the will of the majority of the people and the noble traditions of the nation.

No one should denigrate the courage or loyalty of patriotic young people who serve in the military. There is no doubt that the planners in the Pentagon make a serious effort to avoid violating the rules of war and the unintentional killing of civilians that is euphemistically labeled “collateral damage.” Despite great admiration for America’s past aspirations and accomplishments, no other nation in the world is prepared to accept the proposition that international law to prevent massive crimes applies to everyone else but not to the United States.

The trashcans of history are filled with the ashes of great empires that once were the superpowers of their day. The tide of history will not be turned back. In time, when the ICC has proved itself as a fair and workable tribunal, the United States

Government will recognize that insisting on blanket immunity for United States nationals is not a tenable position. The best way to assure that human rights will prevail over human wrongs is to clarify and enforce international law for the protection of all. The best way to protect the United States military is by preventing war-making itself. The best way to prevent war is by learning why some young patriots are willing to kill or be killed for their own particular cause. Teaching tolerance and compassion and trying to ameliorate the ills or injustices that give rise to the discontents that spawn recurrent bouts of destructive violence will do more to protect courageous people in uniform than fighting against the ICC. The rule of law remains the best hope for the protection of humankind.

SELECTED BIBLIOGRAPHY

1. BENJAMIN B. FERENCZ, *AN INTERNATIONAL CRIMINAL COURT, A STEP TOWARD WORLD PEACE: A DOCUMENTARY HISTORY AND ANALYSIS*, (1980)
2. *THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE – ISSUES, NEGOTIATIONS, RESULTS* (Roy S. Lee and Project on Int'l. Courts and Tribunals eds., 1999).
3. *THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT: NATIONAL SECURITY AND INTERNATIONAL LAW* (Sarah B Sewall and Carl Kaysen eds., 2000).
4. M.CHERIF BASSIOUNI, *THE STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A DOCUMENTARY HISTORY* (1998).
5. LEILA NADYA SADAT, *THE INTERNATIONAL CRIMINAL COURT AND THE TRANSFORMATION OF INTERNATIONAL LAW: JUSTICE FOR THE NEW MILLENIUM* (2002).
6. *The Coalition for an International Criminal Court (CICC)* (contains comprehensive references to the subject), at <http://www.iccnw.org>.