

THE INTERNATIONAL CRIMINAL COURT, NATIONAL SECURITY, AND COMPLIANCE WITH INTERNATIONAL LAW

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Thank you, Mark, for your kind introduction.

The question before the panel today is whether the United States, actions regarding national security over the last year or so are in harmony with international law, or, in the alternative, are the United States, policies on a collision course with international law. The panel introduction mentioned several issues that can be examined in this light in the wake of 9-11, including the United States military and intelligence activities in the global war on terror, indefinite detention of suspected foreign terrorists and the renunciation of the International Criminal Court ("ICC"). These remarks focus on the latter issue—United States involvement with the ICC, and we will examine why the United States, actions toward the ICC have been in compliance with international law. First, we will begin with a brief background of the history of the ICC, then we'll identify and discuss the major flaws of the treaty, and then examine the United States, efforts to deal with the existence of the treaty and its entry into force.

The ICC was created through the Rome Treaty on July 17th, 1998, and it entered into force on July 1st of 2002. To date, the treaty has 139 signatories and 81 state parties. The court is located in the Hague, The Netherlands. Jurisdiction of the court began on July 1st, 2002, and jurisdiction is not retroactive. The court is now being constituted and should be operational in the spring of 2003.

The ICC claims jurisdiction to try war crimes, genocide and crimes against humanity. The court also claims jurisdiction to try the "crime of aggression," which the treaty has not yet defined. In this regard, one may view the ICC as related to the "Uniting for Peace" resolution of the General Assembly, and as an effort by the General Assembly to seize a more active role in dealing with threats to peace and security.

The United States signed the ICC on December 31st, 2000. At the time, President Clinton said the treaty was "fundamentally flawed," and the President

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would not forward the treaty to the Senate for ratification. President Clinton also recommended that his successor not do so as well. President G. W. Bush has acknowledged the same flaws that President Clinton identified, and he also has not forwarded the treaty to the Senate for advice and consent. On May 6th, 2002, the United States notified the United Nations, and virtually every nation on the planet by demarche that the United States did not intend to be bound by the treaty. This “unsigned” of the treaty was consistent with United States obligations under Article 18 of the Vienna Convention on the Law of Treaties, which states that a state is obliged to refrain from acts that would defeat the object and purpose of the treaty “until it shall have made its intentions clear not to become a party to the treaty.”

Why did President Clinton announce the treaty was “fundamentally flawed?” We will introduce some of the major provisions of the treaty that serve to highlight flaws in the convention.

First, the treaty is a threat to the sovereignty of states. The treaty claims jurisdiction over nationals of non-parties without their state’s consent. This leads to the problem that Ambassador David Scheffer identified with jurisdiction of the court. Jurisdiction of the court is both too broad and too narrow. In testimony before the Senate Foreign Relations Committee on 23 July 1998, Ambassador David Scheffer set forth one of the United States’ fundamental disagreements with the parameters of the ICC’s jurisdiction. Article 12 of the Statute establishes jurisdiction, absent a Security Council referral, when either the state on whose territory the crime was committed is a party or when the accused person’s state of nationality is a party. This jurisdiction is both too broad and too narrow. The jurisdiction is far too narrow because under Article 12 construction a state could simply stay a non-party and remain outside the reach of the ICC. Thus, the ICC fails to capture perhaps the leading cause of genocide and mass murder in modern history—governments killing their own citizens. On this subject, it is useful to make reference to the work of Professor Rudy Rummel at the University of Hawaii. His research, which was funded by the United States Institute of Peace, indicates that the greatest numbers of mass murders in the modern era have been committed by governments against their own people. His findings indicate that 170 million people have been murdered by their own governments, aside from war, in recent memory. Because the ICC purportedly does not apply to non-parties, it potentially cannot establish jurisdiction over governments that reject the treaty—potentially leaving the mass human rights crimes of the world’s more heinous leaders untouched by the jurisdiction of the court.

While ICC jurisdiction is too narrow, failing to be able to assert jurisdiction over the worse genocide and human rights offenders, the jurisdiction is also overly broad. A non-party, e.g., the United States, participating in a peacekeeping operation in a state party’s territory, could be

subject to ICC jurisdiction. Moreover, because a non-party cannot opt out of war crimes jurisdiction for the permitted seven years, its exposure may be even greater than that of state parties.

Second, serious defects in the treaty threaten United States freedom of action and expose United States civilian and military leaders, as well as military servicemen and women, to politically motivated prosecution. The ICC prosecutors are self-initiating and largely unaccountable. The ICC establishes an independent prosecutor that has the power to initiate investigations either referral from either a state party or the United Nations Security Council. There are inadequate checks and balances on powers of prosecutors and judges to the ICC. The judges and prosecutors are not responsible to the UN or elected officials, and a consensus of 2 out of 3 judges can decide to go forward on a case.

Related to the issue of inadequate checks and balances on the ICC is that it does not provide the extensive criminal procedure rights and protections guaranteed in the United States Constitution, such as the right to a trial by jury and high standards of evidence. As a result, the ICC might fail to recognize a United States prosecution that ends in an acquittal because of a constitutional technicality or the requirement that all elements be proved "beyond a reasonable doubt." The ICC prosecutor is self-initiating, tantamount to a global version of the domestic independent prosecutor, which has been charged by both Republicans and Democrats as operating from a politically motivated bias. Without internal checks and balances on the prosecutor, there is no protection against politicized prosecutions.

This makes the relationship between the ICC and national judicial processes uncertain. Under the Rome Statute, the ICC claims the authority to second guess the actions taken and the results reached by sovereign states with respect to the investigation and prosecution of crimes. Even in cases in which the United States has appropriately exercised its responsibilities to investigate and/or prosecute in a particular case, the ICC prosecutor, with the approval from a three-judge panel, could still decide to initiate an ICC investigation or prosecution. Such a decision by the ICC prosecutor is not inconceivable. Many of the features of the United States common law system diverge from the European continental approach and other legal systems throughout the world. An ICC prosecutor may not understand, or may disagree with the operation of the common law system, including the jury system, constitutional protections for criminal defendants, and rights of appeal, that are fundamental aspects of the American system. Reservations to the statute might have been able to address these issues, but the treaty prohibits state reservations to the treaty. Lacking important reservations, the treaty is inconsistent with United States law and establishes a dangerous precedent. Thus, the court's claimed jurisdiction over nonparties encroaches on United States constitutional safeguards.

This leads to the fourth problem with the ICC, which is that it dilutes the role of the United Nations Security Council (“UNSC”), as set forth in the United Nations Charter. Text excludes a proper and adequate role for the UNSC—degree of UNSC control over prosecutions. In contrast to the ad hoc tribunals for Rwanda and Yugoslavia which worked in conjunction with and under the authorization of the UNSC, the ICC is independent of the UNSC. As an independent body, it usurps the authority of the Security Council. I would add that the United States has been a major proponent of these proper international tribunals. Slobodan Milosevic is on trial for his crimes because a coalition of nations led by the United States, gave political support and funding to the International Tribunal for the former Yugoslavia. The United States has also provided practical cooperation and assistance to the new leadership in Belgrade in this regard. The United States also supported the International Criminal Tribunal in Rwanda, and the American government recently announced a “Rewards for Justice” program on Central Africa with the goal of bringing to Arusha the authors of the Rwandan genocide who are still at large.

The vague and ambiguous definitions of crimes are especially susceptible to abuse. In particular, the undefined “crime of aggression” could extend to some United States troop deployments, and the alleged crime of “settlement in an occupied territory”, arguably implicates Israeli leaders for activities in the West Bank and Gaza strip. Traditionally, a crime of aggression is what the Security Council determines it to be. The current text usurps the UNSC’s authority to define aggression, but paradoxically, the court establishes ICC jurisdiction over crimes of aggression—all while leaving the definition of aggression to subsequent amendment.

The current system—based upon the UNSC—delivers accountability. The global community is best served by relying on national judicial systems and international tribunals established where appropriate by the Security Council within the framework of the United Nations Charter. If someone disagrees with this arrangement and the involvement of the UNSC, then the solution is not to create a new mechanism that is at odds with the existing security architecture, as the ICC is, but to amend the present United Nations Charter.

The United States approach to the ICC has been to seek agreements with other nations that exempt United States nationals from the jurisdiction of the treaty. These agreements, authorized by Article 98 of the Rome Treaty, are fully consistent with and contemplated by the treaty framework. In fact, during the UNSC debate on protection for peacekeepers from the ICC, countries that are leading proponents for the court urged the United States to make use of Article 98 agreements as a means of addressing American concerns about the court. It is, then, a bit disingenuous; to now argue that proposing Article 98 agreements somehow undermines the treaty. One more note with regard specifically to the military. Some proponents of the treaty maintain that the

existence of bilateral or regional Status of Forces Agreements (“SOFAs”) already provide protection for United States service men and women, and should be sufficient to address United States concerns. SOFAs typically govern the status of military forces in a particular partner nation. While criminal jurisdiction issues within the context of the host nation’s laws are dealt with in SOFAs, there is no inherent conflict in signing an Article 98 agreement. Moreover, the Article 98 agreements sought by the United States are not limited to protecting only military and civilian employees of the Department of Defense, as most SOFAs are, but will protect all United States nationals.

In these few minutes, I have set forth why President Clinton termed the Rome Treaty “fundamentally flawed,” as well as the major reasons why the United States and other nations have departed from cooperation with the court. By utilizing the United Nations Charter framework, which has taken fifty years to evolve and gain acceptance as a mechanism for stabilizing global order, the United States is preserving national security while strengthening international legal regimes.