The International Criminal Court:

By JAMES P. TERRY

In this issue of *JFQ*, Commander Brian Hoyt, USN, presents a thoughtful argument that U.S. policy on the International Criminal Court (ICC), established in 2002, should be changed. He maintains that since the attacks on the World Trade Center and Pentagon on September 11, 2001, U.S. national security policy requires a more integrated approach with the Nation's strategic partners, including judicial cooperation, to ensure success in managing the war on terror and to guarantee that our principles and national interests are not in conflict. He further urges that our current stance with respect to the ICC will have the strategic consequence of fostering the decline of U.S. image and influence in the world community.

I respectfully disagree. Just as in 1937,[1] when discussions focused on similar development of an international tribunal, the concern today relates to guaranteed constitutional rights of American citizens and military personnel and whether those rights can be recognized under international law—in this case, the Rome Statute—*independent* of U.S. domestic law and constitutional guarantees. Despite these differences, the U.S. Government shares the commitment of parties to the Rome Statute to bring to justice those who perpetrate genocide, war crimes, and crimes against humanity. While the United States and other nations may have honest differences over how accountability is best achieved, this nation has always worked closely with other states to make sure that perpetrators of these atrocities are held accountable for their actions.

This discussion focuses not only on the legal requirements and policy reasons for our separate approach but also on our respect for the rights of other nations to become parties to the Rome Statute.

The Rome Statute

When the representatives of more than 130 nations gathered in Rome in 1998 for negotiations to create a permanent International Criminal Court, the U.S. representatives arrived with the firm belief that those who perpetrate genocide, crimes against humanity, and war crimes must be held accountable. In fact, the United States has traditionally been the world leader in promoting the rule of law and ensuring the effective prosecution of these offenses. Following World War II, it was American leadership that responded to the worst tyranny on record and supported, through funding and personnel, the tribunals at Nuremberg and in the Far East. More recently, it was U.S. support that ensured the success of the International Criminal Tribunals in the former Yugoslavia and Rwanda.

Without question, it has been the United States that has been in the forefront of promoting human rights, ensuring international justice, and demanding accountability of the world's worst criminal offenders. But as worthy as the precepts underlying the Rome negotiations are, the statute that emerged establishing the ICC, which began functioning on July 1, 2002, did not effectively advance them with respect to the constitutional protections guaranteed to American Servicemembers and citizens.

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Fifth plenary meeting of ICC Assembly of States Parties elects judges in 2006

ICC–CPI

A Concept Whose Time Has *Not* Come

After 5 years, we do not find that our posture on the ICC has precluded the effectiveness of our relations with other national states in any meaningful way. We do, however, continue to believe that without significant changes in the ICC and Rome Statute, we can never become full partners in the court's operation. The problems identified by U.S. negotiators from 1998 onward are well known and much publicized, but are nevertheless worth reciting here so the debate can be joined.

U.S. concerns with the Rome Statute fall into three main categories. The first is that subjecting American Servicemembers to trial before the International Criminal Court for offenses within the judicial authority of the United States would violate the exclusive rights of our citizens.[2] The second is that our ratification of the Rome Statute would constitute a partial surrender of American sovereignty for those U.S. forces serving in United Nations (UN)–monitored military conflicts. The third concern relates to the corrosive impact that the ICC, as presently structured, could have on the effectiveness of other UN institutions.

The first category relates to the fact that ICC prosecutors and judges are not bound by the Constitution; are not appointed by the President, as are all Federal prosecutors and judges and all military officers; are not confirmed with the advice and consent of the Senate; and are not required to guarantee for defendants the application of protections within the first 10 Amendments to the Constitution. In fact, U.S. citizens brought before the ICC would only generally enjoy the rights we hold so dear in this country.

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For example, under U.S. law, a military prosecutor must bring a defendant to trial within 90 days or release him.[3] Under the Rome Statute, ICC prosecutors must only ensure defendants "the right to be tried without undue delay." Under the International Criminal Tribunal for the Former Yugoslavia (ICTFY), which contains the same speedy trial language in its charter and serves as the model for the ICC, criminal defendants can often wait more than a year in confinement prior to trial. In fact, ICTFY prosecutors have argued at The Hague that a far longer period of confinement, up to 5 years, would not violate the defendant's fundamental rights.

Equally significant, the right of confrontation, guaranteed by the Sixth Amendment to the Constitution, is largely diluted under ICC practice. The ICTFY practice, upon which the ICC is based, allows virtually unlimited hearsay evidence and anonymous witnesses to testify in trials, large portions of which have been conducted in secret. Such practices do violence to the presumption of innocence.

In a similar way, the ICC statute permits a judgment of acquittal to be appealed to an appellate body. This directly conflicts with the Constitution's protection against double jeopardy, but again, it parallels the ICTFY statute. In the Yugoslav Tribunal to date, the prosecutors have appealed every judgment of acquittal.

Defendants in post–World War II Nuremberg trials

DOD

Likewise of great concern is the failure of the ICC to afford the right to a jury trial, guaranteed to U.S. citizens in both the Sixth Amendment and in Article III, section 2, of the Constitution. While Commander Hoyt argues that this right is more than offset by the wisdom represented by three experienced jurists, this procedure permits the ICC to perform all functions of the judicial process—investigator, prosecutor, court, and jury—an approach fundamentally at odds with the legal tradition of the United States.

Those supportive of ratifying the Rome Statute argue that because the ICC (if the United States were to accede) would not be a court of the United States, the provisions of the Bill of Rights and Article III, section 2, would not apply. They further argue that in our extradition treaties with myriad nations, we provide reciprocal rights to foreign governments, with different legal systems, to try Americans for crimes committed abroad. The difference is that the ICC statute would permit the court to try Americans who have never left the United States, for actions taken within the borders of this country, without providing these constitutional protections.

While there has been no case precisely on point, in a 1998 case, *United States v. Balsys*, the Supreme Court stated that where a prosecution by a foreign court is, at least in part, undertaken on behalf of the United States, and where "the United States and its allies had enacted substantially similar criminal codes aimed at prosecuting offenses of international character," then an argument can be made that the first 10 Amendments to the Constitution would apply "simply because that prosecution [would not be] fairly characterized as distinctly 'foreign[.]' The point would be that the prosecution was acting as much on behalf of the United States as of the prosecuting nation."[4] This is arguably the case with the International Criminal Court.

Proponents of ratification have also urged that it is highly unlikely that ICC jurisdiction would ever be directed to U.S. Servicemembers or citizens, and thus the import of our constitutional arguments should be minimized. Unfortunately, it is hard to imagine that the divisions among nations should ICC jurisdiction be applied in a conflict in which the United States is involved would be any different than our experience in Bosnia from 1991 to 1995, where Russia and China objected to our actions. Under their pressure and with the support of international human rights activists, ICTFY investigators in The Hague targeted actions of the North Atlantic Treaty Organization based on civilian deaths resulting from the air bombardment. This occurred despite the precise targeting involved and the fact that our actions were designed to preclude a humanitarian disaster.

It is also asserted by Commander Hoyt and other proponents of ratification that the principle of "complementarity" will ensure that only the United States can prosecute its own citizens. This principle, addressed in Article 17 of the Rome Statute, prohibits the ICC from exercising jurisdiction if the appropriate national authorities investigate and prosecute the matter.

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Serbian Representative addresses ICC's Fifth Session of Assembly of the States Parties in November 2006

ICC

The reasons this purported check on ICC power is illusory are threefold. First, it is the ICC, *not* the participant nation, that decides how this provision shall be interpreted and applied. This is similarly true of all provisions within the statute. Second, Article 17 provides the ICC an exception to a ratifying state's exercise of jurisdiction in any case in which the court determines the national proceedings were not conducted "independently or impartially." In a governmental system such as the United States, where the President is both the chief executive with coordinate law enforcement authority and Commander in Chief of all military forces, it is not hard to imagine unfriendly member states, however absurdly, claiming lack of independence and partiality in a U.S. decision that there is no basis to prosecute.

Finally, by placing within the ICC the sole jurisdiction of ultimately determining whether, for example, national leaders committed criminal violations by ordering certain military actions, the sovereign will of the citizens of the United States is both circumscribed and diminished. While sovereign nations have the authority to try noncitizens who have committed crimes against their citizens or on their territory, the United States has never recognized the right of an international organization to do so absent consent or a UN Security Council mandate. This court, however, claims the power to detain and try American citizens, even though our democratically elected representatives have not agreed to be bound by the statute.

With ratification, the ultimate accountability of national leaders to the citizenry would literally be transferred, at least with respect to matters before the body, to the ICC. Fundamentally, this transfer of sovereignty would be to an institution with values and interests greatly divergent from our own. When one considers that the ICC member states include Syria, Iran, Yemen, and Nigeria, all accused of directing extrajudicial killings abroad, ratification of the Rome Statute could constitute a significant surrender of American sovereignty.

Erosion of Authority

Under the UN Charter, the Security Council has primary responsibility for maintaining international peace and security. But

the Rome Statute removes this existing system of checks and balances and places enormous unchecked power and authority in the hands of ICC prosecutors and judges. The Rome Statute has created a self-initiating prosecutor, answerable to no state or institution other than the court itself.

During the negotiations in Rome, U.S. representatives opined that placing this kind of unchecked power in the hands of prosecutors would lead both to controversy and politicized prosecutions.[5] As an alternative, we urged that the Security Council should maintain its responsibility to check any possible excesses of the ICC prosecutor. This request was denied.

Equally significant, the statute creates a yet to be defined crime of "aggression" and authorizes the court to decide when and if it has occurred and permits its prosecutors to investigate and prosecute this undefined crime. This provision was approved over U.S. objection despite the fact that the UN Charter empowers only the Security Council to decide when a state has committed an act of aggression.

From an American perspective, the inherent right of self-defense, memorialized in Article 51 of the Charter, could also be diminished by the current court structure absent the checks and balances of Security Council oversight. With ICC prosecutors and judges presuming to sit in judgment of actions of nonmember states, the court could have a chilling effect on the willingness of states to project power in defense of their moral and security interests. As observed in Kosovo, Afghanistan, and Iraq, the principled projection of force by the world's democracies is critical to protecting human rights, stopping genocide, and changing regimes. By placing U.S. officials, and our men and women in uniform, at risk of politicized prosecutions, the ICC could complicate U.S. military cooperation with friends and allies[6] who now have a treaty obligation to hand over American nationals to the court, even over U.S. objections, unless an Article 98 agreement is in place.

Addressing and Countering Flaws

Despite voting against the Rome Statute (Treaty) in 1998, for the reasons outlined above, the United States remained committed and engaged and continued to work to shape the court and to seek the necessary safeguards that would permit ratification. U.S. officials from the Departments of State and Defense urged, without success, changes to ensure effective oversight and prevent politicization. Despite this frustration, U.S. experts participated in the preparatory conferences and took a leadership role in drafting the elements of offenses and the procedures necessary for court operation.

On December 2000, over the objections of many,[7] President Bill Clinton signed the Rome Treaty on the International Criminal Court. The President nevertheless made clear that the United States was not abandoning its concerns about the treaty:

In particular, we are concerned that when the Court comes into existence, it will not only exercise authority over personnel of states that have ratified the Treaty, but also claim jurisdiction over personnel of states that have not. With signature, however, we will be in a position to influence the evolution of the Court. Without signature, we will not.[8]

Unfortunately, the United States was not able to further influence the evolution of the court. On April 11, 2002, the ICC was ratified by a sufficient number of countries (60) to bring it into force on July 1, 2002.

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U.S. Army Criminal Investigation Command Special Agents collect evidence of war crimes from mass grave near Mosul, Iraq, July 2003

U.S. Air Force (Robert R. Hargreaves, Jr.)

Sudan Liberation Army rebels meet with UN Special Envoys, February 2007

UN (Tim McKulkal)

On May 6, 2002, President George W. Bush directed that the following diplomatic note be sent by John R. Bolton, Under Secretary of State for Arms Control and International Security, to the Secretary-General of the United Nations, Kofi Annan:

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

The dilemma posed for the UN in 2002 was the need for the continued leadership of the United States in the peace enforcement operations in Bosnia, a presence that America was prepared to abandon unless its forces were protected from the unfettered jurisdiction of the ICC. The United States is the only nation that can combine those elements of power required to sustain such large-scale operations: overhead intelligence-gathering, lift, logistic support, communications, planning, operational coordination, and close air support. In a compromise to prevent U.S. withdrawal, the Security Council, in July 2002, granted American troops conducting peace enforcement operations in Bosnia a renewable 1-year immunity from the jurisdiction of the ICC.

On August 3, 2002, President Bush signed into law the U.S. Service-members' Protection Act (ASPA).[9] This law, the final version of which was proposed by Henry Hyde (R–IL), is designed to protect American Servicemembers from the reach of the ICC. It provides for the withdrawal of U.S. military assistance from countries ratifying the ICC treaty and restricts U.S. participation in UN peacekeeping and peace enforcement operations unless the United States obtains immunity from prosecution before the court. These provisions can be, and have been, waived by the President on "national interest" grounds. In addition, the law allows the United States to assist international efforts to bring to justice those accused of war crimes, crimes against humanity, or genocide.[10] More importantly, the provisions precluding assistance to those nations that have ratified the ICC treaty do not apply if the ratifying nation has negotiated an Article 98 Agreement with the United States. At present, 104 nations have concluded agreements, with 97 currently in force.

At the same time, the United States initiated negotiations to secure Article 98[11] Agreements with all nations for whom it provided foreign assistance as a condition for that assistance to continue. These bilateral agreements likewise provide assurance that U.S. forces will not be subjected to ICC jurisdiction when the United States is operating with forces from these nations in UN peacekeeping or peace enforcement operations. These agreements have largely permitted Washington to continue its support for UN operations and its unique role and responsibility in helping to preserve international peace and security. It is important to remember that at any given time, U.S. forces are located in roughly 100 nations assisting in peacekeeping and humanitarian operations.

Reflections

The ICC represents a step forward in the evolution of a justice process addressing more than national interests and prerogatives. But a great deal more remains to be done before the United States should ratify the Rome Statute. Court jurisdiction over U.S. personnel should be permitted only after U.S. ratification of the treaty. The United States should continue to press for changes to the court's statute authorizing a trial by one's peers, a limit on the evidence allowed to direct evidence and not hearsay, the strict adherence to a non–double jeopardy standard, and a willingness to consider an oversight mechanism in the Security Council to preclude politicized prosecutions (as occurred in Bosnia when NATO leaders were charged in the ICTFY).

Despite the ICC's limitations, the United States has optimized its benefits among other participants in UN peacekeeping and peace enforcement operations through the careful management of foreign assistance as directed in the ASPA legislation. Through negotiation of Article 98 Agreements with all those states desiring to continue such aid and/or the continued participation of the United States in UN-sponsored operations, the Nation has ensured that its Soldiers and Sailors serving abroad will enjoy the same legal protections as those serving in garrison at Fort Bragg or Camp Lejeune.

There is no question that a properly constituted and structured International Criminal Court would make a profound contribution in deterring egregious human rights abuses worldwide. Unfortunately, the current structure represented by the ICC is in direct conflict with certain of the constitutional protections guaranteed to our military personnel and civilians serving at the behest of our nation on foreign soil or directing activities on foreign territory from the United States. While American interests are not served by ratification at this time, this nation remains committed to promoting the rule of law and assisting in the successful prosecution of violators of humanitarian law. **JFQ**

NOTES

[1] See generally Roger S. Clark and Madeleine Sann, eds., *The Prosecution of International War Crimes: A Critical Study of the International Tribunal for the Former Yugoslavia* (Piscataway, NJ: Transaction Publishers, 1996).

[2] See *Ex Parte Milligan*, 71 U.S. (4 Wall.) 2 (1866), for the premise that courts not properly established under the Constitution "can exercise no part of the judicial power of the country."

[3] See, for example, *United States v. Pascasco*, 37 M.J. 1012, rev. den. 45 M.J. 6 (1993). Under U.S.C. 3161, a Federal prosecutor must indict within 30 days of arrest and bring the defendant to trial within 70 days of indictment.

[4] 524 U.S. 666 (1998).

[5] The NATO experience in Bosnia under a similar court structure reflects the requirement for such oversight.

[6] There are 105 states that have ratified the Rome Statute, including most NATO nations.

[7] Most notably Senator Jesse Helms (R–NC) of the Senate Foreign Relations Committee and Chairman Henry Hyde (R–IL) of the House International Relations Committee.

[8] Statement of President Bill Clinton, "Signature of the International Criminal Court Treaty," The White House (Camp David), December 31, 2000.

[9] Public Law 107–206 (2006); 22 U.S.C. 7401–7433 (2003). (The earlier version was named the American Service-members' Protection Act, hence ASPA.)

[10] The author served as Deputy Assistant Secretary of State for Regional, Global, and Functional Affairs in the Bureau of Legislative Affairs during this period and shepherded this legislation through the Congress.

[11] Article 98 of the Rome Statute provides for bilateral agreements in which protections between participating nations for their individual forces in United Nations operations, to include immunity from referral to the International Criminal Court, can be previously negotiated.