Executive Summary

By HARVEY RISHIKOF

Juridical Warfare

The Neglected Legal Instrument

Joint Force Quarterly should be commended for recognizing the vital relationship between law and national security.[1] For too long, the law has not been understood as a critical instrument of foreign policy. Under the traditional paradigm of DIME (diplomacy, intelligence, military, and economics) as the instruments of power, *L* or *law* has had no place. As an acronym, *LEDIM* or *DIMEL* or *LIMED* just did not have the same catchy ring. Theorists have posited a new formulation, *MIDLIFE* (military, information, diplomacy, law enforcement, intelligence, finance, and economics). It is argued that with the skillful orchestration of these MIDLIFE instruments, or soft and hard power, we will ultimately achieve *smart* power.

The law, indeed, is a complicated intellectual mistress. Like economics, law is both a context for the application of power and at the same time an instrument of power. Rule of law, though, has an ideological force unto itself and is both a domestic and international *legitimizer* of action. Moreover, law enforcement operations have nudged their way into the foreign policy arena, and this, too, has created analytical problems for those who believe in military operations other than war as an exclusively military issue.

The traditional view of the instruments of national power is to separate them into various boxes and study their essential characteristics to illustrate how unique each is. But such an analytical approach does a disservice to the relationship of one instrument to another and how each instrument can affect the operational efficacy of another if one is abused or misused. Air Force theorists, in particular, have been sensitive to this problem, given the nature of airpower. Major General Charles Dunlap, deputy judge advocate general, has focused on the modern emergence of "lawfare" within warfare:

It is clear that lawfare has become a key aspect of modern war. The abuses at Abu Ghraib and elsewhere produced effects more damaging than any imposed by our enemies by force of arms. What makes it especially maddening is that these are self-inflicted wounds, wholly preventable incidents where adherence to the rule of law would have avoided the disastrous consequences that still plague America's war-fighting effort.[2]

Lawfare for Dunlap occurs when the enemy exploits real, perceived, or even orchestrated incidents of law of war violations as an unconventional means of confronting American military power. The goal of lawfare for the enemy is to make it appear that the United States is fighting in an illegal or immoral way. The damage inflicted by the legal debate on the public support required in a democracy to wage war can contribute to the defeat of American goals. As an example, Dunlap notes that an Air Force policy of "zero tolerance" for noncombatant casualties, although not required by international law, may have the unintended consequence of undermining the ability to use airpower and encourage the enemy to collocate with noncombatants to exploit the new high moral ground being asserted by U.S. policy.

Since World War II, the ethical and legal dimensions of strategic bombing have filled volumes of commentary.[3] In the words of Colonel Peter Faber, USAF, a National War College core course director, although "the moral/legal ambiguities of World War II are long gone, military options are under assault through moral/legal means, and the only way we can arrest this development is by educating 'combatants' for ethical and legal war."[4]

For Dunlap, "international law is the friend of civilized societies and the military forces they field. However, if we impose restraints as a matter of policy in a misguided attempt to 'improve' on it, we play into the hands of those who would use it to wage lawfare against us."[5] Lawfare can be a powerful ideological instrument indeed for a superpower, or it can be a powerful inhibitor.

For the traditionalists in the law of armed conflict, the lawfare debate raises the categories of *jus ad bellum*, *jus in bello*, and *jus post bellum*. But the Just War paradigm carries historic baggage that often does not assist in debates over nuclear war, terrorism, and when to intervene in failing states. Domestic law and international law in the "age of modern terrorism" have collided as debates rage over how best to categorize and use force against "terrorists." These policies have proven to be controversial issues in our polity, and the Just

Professor Harvey Rishikof is former Chair of the Department of National Security Strategy at the National War College.

War categories have demonstrated analytical limitations in the face of the new realities.

The executive branch has clashed with both Congress and the Supreme Court in its view of executive power when creating new policy on a war footing. Is a terrorist action a criminal violation or a political act? Should terrorism be prosecuted under the laws of armed conflict or the criminal justice system? Is terrorism primarily a domestic or foreign issue? When projecting force against the threat of terrorism, should we use law enforcement shooting criteria or military rules of engagement? Which international conventions govern the confinement and interrogation of terrorists and how? Does it make a difference if the victims of terrorism are combatants or noncombatants? Under what laws should "private contractors" be governed—military, criminal, or local? If gathering intelligence is the center of gravity to prevent terrorist acts, should this process be governed by law enforcement restrictions or foreign intelligence criteria? How should the executive branch conduct its terrorist policies with respect to Congress and the Federal courts?

Based on the range of these questions and the constitutional issues involved, the characterization *juridical warfare* appears to be a more appropriate term than *lawfare* when thinking about the law more broadly, both as an ideological concept and as a tool, within the context of national security. The essays that follow in this Forum on habeas corpus, rendition, targeted killing, and the International Criminal Court eloquently contribute to the exploration of some of the critical issues involved in juridical warfare.

James Terry's essay, "Habeas Corpus and the Detention of Enemy Combatants in the War on Terror," explores the evolution of detainee confinement over the last 5 years and the role that habeas corpus should play during an armed conflict. The essay squarely addresses the proper role of the courts in shaping detainee issues through its interpretation of the writ of habeas corpus. Mr. Terry contends that in the war on terror, there must be some limitations on "judicial adventurism." He reasons that the "expansion" of the writ of habeas corpus for alien/enemy combatants will encourage forum shopping and that we need to remove domestic courts from military affairs. Relying on the precedent of *Johnson v. Eisentrager*, Terry traces the limits on habeas for aliens held in foreign territories through the four times the writ has been suspended under Article I of the U.S. Constitution due to "rebellion or invasion" in our history: the Civil War post-facto under President Abraham Lincoln (for General Winfield Scott to secure safe passage between Washington and Philadelphia); the Ku Klux Klan Act (post–Civil War) under President Ulysses Grant; the Philippines insurrection (post–Spanish-American War) under President William McKinley; and, most recently, post–Pearl Harbor in the Hawaiian Islands under President Franklin Roosevelt.

Terry then summarizes the key detainee cases *Rasul v. Bush*, *Padilla v. Rumsfeld*, and *Hamdi v. Rumsfeld* in which the administration's interpretation of executive power and no Federal jurisdiction was rejected by the Supreme Court, which laid out the basic requirement of "due process." Congress's responses to these cases, the Detainee Treatment Act of 2005 and the Military Commission Act (MCA) of 2006, are discussed in the Court's further rejection of "jurisdiction stripping" in *Hamdan v. Rumsfeld*.

The analysis of the issue ends with the *Boumediene v. Bush* case, which, along with *Odah v. Bush*, has just been granted certiorari before the Supreme Court to determine if the MCA afforded the plaintiffs appropriate "due process" rights and whether historically the writ applied to those held outside of the sovereign's territory. Congress is also threatening to revisit the issue of habeas corpus and amend the MCA to enforce the right for the detainees. Some international juridical warfare aspects of the case are joined specifically in the Odah case, where the International Law Scholars (ILS) have filed an *amici curiae* brief on behalf of one defendant, Omar Khadr, a minor under the age of 18. It is the ILS position that the MCA, by denying habeas, is violating customary international law for minors. Moreover, the ILS argues that customary international law prohibits the prosecution of children in general, and in the exceptional cases where it is lawful, children must be treated with special protections for rehabilitation and reintegration, all which are being denied under the current MCA procedures. The issue of minors and prosecution in the war on terror brings into stark relief the problem of using new frameworks that generate international juridical warfare controversy.

Colonel Peter Cullen, USA, in his essay "The Role of Targeted Killing in the Campaign against Terror," analyzes what some have contended is an indispensable tool for the war on terror: *targeted killing*, or the "intentional slaying of a specific individual or group of individuals undertaken with explicit government approval." For Cullen, a circumscribed policy for targeted killings can be legal, moral, and effective, and he proposes specific procedures to that effect. For critics, these killings are extrajudicial and prohibited by international law. Cullen states several reasons by which both international and domestic law justify targeted killing:

- The United States has an inherent right of self-defense under Article 2(4) of the United Nations (UN) Charter and *jus ad bellum*.
- Under Additional Protocol II and Article 13(2) of the UN Charter, since the United States is in an armed conflict with al Qaeda and associated movements (AQAM), members and operatives are combatants and may be lawfully targeted at will under *jus in bello*.
- Proper designation of AQAM targets will turn on intelligence, proportionality, and a cost/benefit analysis.
- Domestic law such as Executive Order 12333 does not apply in war to the military, and the authorization of the use of military force by the Congress granted legal authority for the practice.
- The National Security Act of 1947 contemplates findings for killing operations.

As for moral considerations, in Cullen's view this tool complies with Just War theory as long as all efforts are taken to minimize noncombatant casualties, ensure the accuracy of the intelligence, and use the tool sparingly. As for its efficacy, for Cullen targeted killing has contributed to our safety, despite the critics who argue that it is counterproductive since it produces martyrs, undermines the battle of ideas and rule of law arguments, reduces the possibility for more intelligence, and is prone to misidentification. Cullen's guidelines establish whom to target, what circumstances authorize an operation, who should approve an operation, who should conduct the operation, and how an operation should be conducted.

Cullen concludes that the success of targeted killing will turn on two factors: obtaining actionable intelligence and persuading domestic and international communities that this tool is legal, moral, and effective. In other

words, the United States must win the juridical warfare debate and not be perceived as conducting extrajudicial killings and assassinations. This will require transparency, minimizing collateral damage, checks and balances to ensure proper targets, and accurate intelligence. When targeted killing is used as a tool, however, mistakes will be international juridical warfare *causes célèbres*.

The essay, "Rendition: The Beast and the Man," by Colonel Kevin Cieply, USA, reviews another controversial technique of the war on terror: the capturing of suspected terrorists and their transportation to undisclosed locations. Cieply defines *rendition* as "the practice of capture and transfer of an individual from one nation to another for the purpose of subjecting the individual to interrogation without following the normal process of extradition or removal." The purest defense of the practice is the Machiavellian rationale that the "end justifies the means." Rendition is the form of Machiavellian combat that does not follow laws but rather force. This philosophy of results is contrasted with the more idealist position of George Kennan, the preeminent international relations theoretician of the Cold War, who opposed techniques of rendition on principle since they conflicted with American traditional standards and compromised our diplomacy in other areas.

But what is one to do with Khalid Sheikh Mohammed, Abu Zubaydah, or Ramzi Yousef when traditional law enforcement methodologies are unsuccessful? It must be underscored that Khalid Sheikh Mohammed did not receive any form of due process for 4 years from capture to his first administrative hearing. Yet what of the cases of Kahled El-Masri and Abu Omar, men captured and then released and not charged? How do such practices square with world moral leadership and rule of law? Cieply argues for a middle ground, a rendition policy with transparency and some type of due process. Time will tell if such middle ground is possible and acceptable to world opinion.

The last set of essays by Commander Brian Hoyt, USN, "Rethinking the U.S. Policy on the International Criminal Court" and James Terry, "The International Criminal Court: A Concept Whose Time Has Not Come," debate the U.S. decision not to ratify the Treaty of Rome's International Criminal Court (ICC). As pointed out by the authors, 104 countries, including two of our staunchest allies, Canada and Great Britain, have ratified the ICC. Hoyt makes a strong case for the court, refuting the traditional objections to it concerning its overbreadth on jurisdiction, infringement on U.S. sovereignty, the weak procedural protections for defendants compared to the U.S. criminal code, and the ICC's susceptibility to political manipulation by overzealous prosecutors. Hoyt is critical of the Bilateral Immunity Agreements (Article 98 Agreements) that the United States has entered into with individual countries, which some have seen as highly pressured exertions of American power on our allies and friends to undercut the strength of the treaty.

Terry takes the exact opposite view of the ICC, highlighting the risks to U.S. Servicemembers serving in UN-monitored military conflicts. Under the ICC, Servicemembers forego American guaranteed constitutional rights involving evidence production, hearsay, and double jeopardy protections. Terry is also concerned about the corrosive effect the court could have on other UN institutions, particularly the Security Council. His essay highlights Congress's role in passing the American Service-members' Protection Act of 2002 requiring immunity from ICC prosecution before the United States can participate in UN peacekeeping and peace enforcement operations.

In essence, the ICC debate acts as a foil to the general juridical warfare dilemma confronting the United States as a world power. Although the Nation is a historic leader in international law, there are some who believe that Washington views the creation or emergence of these new international institutions, such as the ICC, Kyoto environmental agreements, new Law of the Sea convention, and Ottawa anti-landmine convention, as attacks on national sovereignty and restrictions on U.S. ability to maneuver in the international arena. Often these conventions are viewed as mechanisms to skirt the authority of the Security Council and the "Big Power" veto that helped legitimize the original United Nations. Ironically, the United States, the preeminent rule of law society, is made to look as the "anti" rule of law rogue, pursuing its self-interest at the expense of world norms based on its rejections of these conventions. The mistrust of the United States is evident in official pronouncements that highlight the fear of international political manipulation or persecution and of projected attempts to publicly discredit U.S. policy.

Often the American position exemplifies the fact that the 1950s international legal framework was based on a Cold War balance of power and set of norms that are no longer efficacious in the post–Cold War world. Failing states, emerging new powers, terrorism, and globalism are calling the status quo into question. As the world struggles for new norms and frameworks for justice, there is much suspicion and lack of international trust. In a world where the old is increasingly obsolete, the new reflects shifting and emerging balances of power, and the current is amenable to plays of unfettered power projections of the strong, it is no wonder that juridical warfare is on the rise and resented as a tool of the weak.

These essays raise important questions about juridical warfare. In particular, how does law or the rule of law interact with the war on terror? How does the United States participate in the ideological debate over international justice and world opinion? As a result, all the essays share the fundamental issues of what the appropriate legal authority to prosecute war crimes is, how far habeas corpus should be extended when prosecuting terrorism, and when targeted killings and renditions are appropriate. For these authors, these issues are primarily military-political executive functions. But under the juridical warfare paradigm, what role should law and the courts—both international and domestic—play? Perhaps this is a question for another issue of *JFQ*. May the compelling and timely discussions raised on lawfare and juridical warfare continue in these pages in the future. **JFQ**

NOTES

[1] The author would like to give Trudi Rishikof special thanks for her assistance with this article.

[2] Major General Charles J. Dunlap, Jr., USAF, "Lawfare Amid Warfare," op-ed, *The Washington Times*, August 3, 2007.

[3] See Peter Faber, "The Ethical-Legal Dimensions of Strategic Bombing During WWII: An Admonition to Current Ethicists," a paper prepared for the Joint Services Conference on Professional Ethics XVII, Washington, DC, January 25–26, 1996, available at <www.usafa.af.mil/jscope/JSCOPE96/faber96.html>.

[4] Ibid.

[5] Dunlap.

administration formally renounced any U.S. obligations arising from the 2000 signature (some have called this "unsigning" the treaty).[6] The treaty has yet to be ratified by the Senate.

The ICC is an independent, permanent court that tries persons accused of the most serious crimes of international concern, namely genocide, crimes against humanity, and war crimes. Aggression is also mentioned in the statute but is not currently defined, and the court claims no jurisdiction over this crime. This topic is due to be discussed at the ICC's 2009 Review Conference, and it could be adopted into the Rome Statute at that time.

The ICC is a court of last resort. It will not act if a case is investigated or prosecuted by a national judicial system unless the national proceedings are not genuine (for example, if formal proceedings were undertaken solely to shield a person from criminal responsibility). This notion, called *complementarity*, means the ICC complements, rather than competes with, national judicial systems.[7] In addition, the court has jurisdiction over war crimes only when they are committed as part of a plan or policy or as a part of a large-scale commission of such crimes. Thus, individual or isolated incidents of war crimes do not fall under the jurisdiction of the ICC. The nation of the individual involved is responsible for investigating those cases.

ASPA and the Nethercutt Amendment

Though the United States is not a party to the ICC, Congress felt that the court still posed a risk to American citizens (military and civilian) serving overseas. In particular, if a member of the U.S. military were involved in a peacekeeping operation in a country that was a party to the ICC, that nation could conceivably detain and turn him over to the court if he was accused of violating a provision of the Rome Statute. Additionally, senior civilian officials of the U.S. Government could be charged with crimes. Because of this, the United States subsequently passed the American Service-members' Protection Act, which is designed to induce ICC member nations to sign Bilateral Immunity Agreements (BIAs) with the United States. A BIA is an agreement in which the member nation agrees that it will not arrest, detain, prosecute, or imprison any U.S. citizen (civilian or military) on behalf of the ICC without Washington's consent. This correlates to Article 98 of the Rome Statute, which acknowledges that a nation may have other international treaty obligations that override its obligations to the ICC.[8] Thus, BIAs are also known as Article 98 agreements.

ASPA prohibits U.S. military assistance to countries that are parties to the ICC but have not signed a BIA with the United States. For the purpose of ASPA, military assistance includes foreign military financing (including transfer of excess defense articles) and international military education and training. Foreign military financing provides grants to foreign nations to purchase U.S. defense equipment, services, and training. International military education and training provides education and training to students from allied and friendly nations. The fiscal year 2007 Defense Authorization Act removed the ASPA restrictions on international military education and training.

U.S. concerns about the International Criminal Court have not materialized in the 5 years the court has been in existence

ASPA also prohibits any agency or entity of a U.S. Federal, state, or local government (including any court) from cooperating with the ICC. This includes providing support to the ICC, extraditing or transferring any U.S. citizen or resident alien to the court, or providing it legal assistance. Finally, ASPA prohibits any agent of the court from conducting investigative activity in the United States or on territory where the Nation has jurisdiction.[9]

A related law, known as the Nethercutt Amendment, also placed economic restrictions on states that have not signed BIAs.[10] Those states are restricted from receiving Economic Support Funds, which are designed to promote economic and political stability in regions where the United States has special security interests.

Exceptions to ASPA and the Nethercutt Amendment exist for major U.S. allies, including North Atlantic Treaty Organization (NATO) member nations, major non-NATO allies,[11] and Taiwan. States receiving assistance under the provisions of the Millennium Challenge Act[12] are not subject to the restrictions of the Nethercutt Amendment. ASPA also contains provisions for a Presidential waiver of its restrictions if the President certifies that it is in the national interest. Waivers have been approved for both ASPA and Nethercutt restrictions.

U.S. Policy

The official U.S. position on the ICC has not changed since the court's inception in 2002. The Department of State views the court as an unaccountable international body that could target American citizens overseas based on its political motives. Washington's objections fall into four general categories, discussed below. Much of the angst about the ICC is based on an incomplete or inaccurate understanding of the Rome Statute, so the discussion also attempts to correct some common misperceptions surrounding the court.

First, the United States asserts that according to the Vienna Convention on the Law of Treaties, the Rome Statute is not binding on the United States and the ICC has no jurisdiction over states that are not party to the treaty.[13] The court claims jurisdiction over all persons whether or not their parent nation is a signatory. Second (and the fundamental concern of most U.S. military members) is that the court could claim jurisdiction over charges of war crimes by U.S. Servicemembers resulting from legitimate use of force or by senior civilian leaders resulting from foreign policy initiatives that are not viewed as legitimate by the ICC.[14] Of concern to senior military and civilian policymakers, the threat of prosecution could influence military and foreign policy decisions, thus infringing on U.S. sovereignty. Third, Washington's position also cites a lack of legal procedural protections (such as right to a trial by jury) that are rights of U.S. citizens under the Constitution. Fourth, the United States raises concerns about accountability of the court—a lack of checks and balances—to prevent political manipulation by member nations or the court itself.

Objection 1: Jurisdiction of the Court. The Rome Statute states that the court has jurisdiction "on the territory of any State Party and, by special arrangement, on the territory of any other State."[15] This means that U.S. forces serving in a country that is party to the Rome Statute are subject to ICC jurisdiction.[16] Although the United States, as a nonparty to the treaty, is not bound by the Rome Statute, the ICC claims jurisdiction over all states under certain circumstances. Washington objects to this claim. Furthermore, in 2002 the United States "unsigned" the treaty with a letter to the United Nations that expressed its intent not to become a party.

However, this objection is only a distraction from the fundamental objections outlined below and is really not central to the question of whether the United States should ratify the

ICC. This is only an issue when the Nation is not a signatory to the Rome Statute.[17] If America ratifies the Rome Statute, it obviously subjects U.S. nationals to the jurisdiction of the International Criminal Court.

Objection 2: Infringement on U.S. Sovereignty. It is accepted in the United States that actual war crimes will be punished by the American judicial system, whether by civilian or military courts. In the case of the ICC, the U.S. concern rests on who gets to decide whether charges of war crimes are legitimate, leading to potentially different interpretations of what constitutes a war crime. Differences between U.S. law and that of the International Criminal Court could cause the ICC prosecutor to view a case that was investigated or prosecuted in the United States as inadequate and could prompt prosecution by the ICC. There are indeed differences between U.S. law (including the Uniform Code of Military Justice) and the Rome Statute. These gaps could place a U.S. national in a gray area according to U.S. domestic law, but in direct violation of the Rome Statute. Thus, the concept of complementarity could be abrogated if the ICC determined that the U.S. judicial system was unable to sufficiently investigate or prosecute a crime as defined in the Rome Statute.

These gaps should be closed so that American citizens will be fully covered by the U.S. judicial system. The Rome Statute acknowledged that this situation might exist and included a provision that allows a nation to opt out of the ICC's jurisdiction over war crimes for 7 years after it ratifies the Rome Statute, allowing a period to amend domestic code to close the legal gaps between the Rome Statute and domestic laws.[18] While this is fundamentally an argument for strengthening the provision of complementarity, there are a few gaps that might not be easily closed.

One such case is exemplified by allegations of torture and abuse in the Abu Ghraib, Guantanamo Bay, and overseas Central Intelligence Agency (CIA) detention facilities. It is important to distinguish among these cases. In Abu Ghraib, the United States maintains that incidents of torture and abuse, though not isolated to one occurrence, were not part of a U.S. plan or policy. They would therefore not fall under the Rome Statute's definition of war crimes. In any case, the United States did investigate and prosecute the individuals involved, which would preclude the ICC prosecutor from initiating an investigation.

The Guantanamo Bay and overseas CIA detention facilities cases are more complicated. In both instances, the alleged crimes center around "enforced disappearance of persons," a crime against humanity according to the Rome Statute, and torture (waterboarding, sleep deprivation, and other controversial interrogation techniques), also a war crime. Because these alleged crimes were originally carried out as part of a U.S. plan or policy,[19] they could form the basis for an ICC case if a state party to the ICC, UN Security Council, or ICC prosecutor chose to refer the case to the court.

In the case of Guantanamo Bay, Cuba is not a member state, and the alleged crimes involve U.S. personnel, so U.S. nationals could only be subjected to ICC jurisdiction if the Security Council passed a resolution referring the case to the court, or if the United States or Cuba agreed to accept the court's jurisdiction. The first two scenarios are highly unlikely, but if the ICC prosecutor chose to refer a case to the court and Cuba chose to accept ICC jurisdiction, the case could be prosecuted under the Rome Statute. In the case of the overseas CIA detention facilities, it is possible that U.S. personnel could be subject to jurisdiction, but two conditions would be required: the CIA detention facilities were located in an ICC member state, and the member state did not sign a BIA with the United States. The location of these detention facilities has not been officially disclosed by the United States, so whether these conditions have been met is currently unclear. However, if both conditions were met, the member state or the ICC prosecutor could refer a case to the International Criminal Court. If these conditions were not met, it is again possible—but unlikely—that a case could be investigated by the ICC if the UN Security Council passed a resolution or the United States or country in which the facility was located accepted ICC jurisdiction.

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A second category of common concern is exemplified by supplementary U.S. rules of engagement (ROE) that have come to be called the *Mogadishu rules*, designed for the type of irregular warfare encountered in Somalia 1993. In this scenario, the combatants did not adhere to internationally recognized standards of warfare such as openly carrying their weapons, wearing distinctive clothing that identified them as combatants, and not shielding themselves behind civilians. The supplementary ROE issued for these situations, which are approved by the Secretary of Defense, have occasionally been mischaracterized as not meeting the standards prescribed in the Law of Armed Conflict. In accordance with Department of Defense policy, however, all supplemental ROE are examined by Judge Advocates General with specific knowledge of operational law and approved by the chain of command up to and including the Secretary of Defense. It is implausible that supplementary ROE would be approved that put U.S. forces outside the protection of recognized international law.

Another concern is the ICC's currently undefined *crime of aggression*. Among U.S. military members, one of the commonly cited reasons for opposition to the ICC is the hypothetical case in which U.S. Servicemembers are part of a unilateral American action that does not have broad worldwide support. If the ICC adopts the crime of aggression article during the 2009 Review Conference, the court could interpret this hypothetical case as a crime of aggression, subjecting U.S. troops, military leadership, or civilian leadership to ICC prosecution. While this is a legitimate concern for the future, the United States as a party to the Rome Statute would be in a much stronger position to shape the definition of aggression. ICC working groups are currently meeting to

Released Abu Ghraib prison detainees board buses to transport them home

define aggression, but the United States is not officially represented and will not have a vote when and if the Rome Statute is amended.

Objection 3: Procedural Protections. The Department of State objects to the investigation or prosecution of American citizens by the ICC, stating that U.S. nationals should be dealt with by the American system of laws and due process. Accordingly, U.S. policy is "to encourage states to pursue credible justice within their own institutions, consistent with their responsibilities as sovereign states."[20] This statement is not at odds with the basic goal of the ICC; indeed, it is a fundamental precept of the court and the foundation of the concept of complementarity that nations have jurisdiction over their own citizens. The ICC was created, however, to address the situation where the sovereign state is unable or unwilling to administer justice when a serious crime has been committed. This is not the case in American society. The United States has consistently shown the commitment to investigate and prosecute Americans who have committed war crimes, as evidenced by the prosecutions of Servicemembers in the Haditha, Fallujah, Ramadi, and Mahmoudiya rape and murder cases,[21] as well as the Abu Ghraib prisoner abuse cases. Furthermore, the ICC has jurisdiction over war crimes only "when committed as part of a plan or policy or as part of a large-scale commission of such crimes."[22]

In the case of crimes that are not associated with armed conflict, such as an assault or rape committed by a U.S. Servicemember or diplomat in a peacetime overseas environment, existing Status of Forces or Status of Mission agreements continue to prevail.[23] In the case of a crime committed by a U.S. civilian overseas, existing procedures prevail, namely the laws of the nation in which the crime was committed. These procedures are internationally recognized and accepted by the United States.

Objection 4: Political Manipulation. Those who favor current policy on the ICC and ASPA state that the Rome Statute could leave American nationals open to prosecution by a court system that does not share all of the same protections as the U.S. judicial system. According to the State Department, the ICC lacks necessary safeguards to ensure against politically motivated investigations and prosecutions. The Department maintains that ICC authority under the Rome Statute is too broad and that even if the United States were to appropriately exercise its responsibilities to investigate or prosecute in a particular case, the ICC prosecutor could still decide to initiate an investigation or prosecution with concurrence of two judges from a three-judge panel, and the United States would have no recourse to appeal to a higher body.[24] There does exist a system of checks and balances within the court, including an appeals process. That process, however, does not include an appeal to a body above the ICC, such as the United Nations.[25,26] The Rome Statute also requires that biased judges be excused and places restrictions on the prosecutor's ability to initiate investigations. According to some legal experts, "since the ICC Prosecutor arguably has less authority than a United States district attorney or county prosecutor, the claim that the ICC will pursue politically motivated prosecution appears quite weak."[27]

4th Combat Camera Squadron (Roy Santana)

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Early predictions that the court prosecutor would investigate or prosecute politically motivated cases have not materialized. In fact, the opposite has happened: the court has resisted political pressure to prosecute certain alleged crimes. In an illuminating 2006 letter from the ICC prosecutor, the International Criminal Court acknowledged that it had received over 240 communications from citizens and organizations alleging crimes committed in Iraq.[28] This is an interesting case because Iraq and the United States are not parties to the ICC, but other coalition nations (including the United Kingdom) are. Under the Rome Statute, this excludes the United States from ICC jurisdiction but includes the United Kingdom, which fully cooperated with the court, providing substantial documentation of the alleged crimes. The Prosecutor's Office reviewed each of the communications and produced a crime analysis from all available information. The majority of alleged crimes were war crimes (as opposed to genocide or crimes against humanity). Many allegations related to the crime of aggression—the legality of the conflict.

The court reiterated that it has no jurisdiction over aggression and found that there was no evidence of genocide, crimes against humanity, or war crimes that fell under its jurisdiction. According to the court, there were isolated criminal acts but no plan or policy to commit those acts by the nations involved. Additionally, the court reviewed the use of cluster munitions. While antipersonnel mines are prohibited by the Ottawa Treaty (to which the United Kingdom is a signatory and the United States is not), they are not specifically prohibited by the Rome Statute; thus, their use did not violate any specific restrictions. Going one step further, the ICC also looked at the use of cluster munitions from the broader perspective of a war crime ("targeting civilians" or "clearly excessive attacks"). The court found that in all cases, cluster munitions were used in a manner consistent with the international law of armed conflict, so there was no reasonable basis to conclude that their use could constitute a war crime.

In the instances of isolated criminal acts, the court noted that national criminal proceedings had been undertaken by the countries involved. The court reiterated that in any case, it did not have jurisdiction for war crimes unless they were committed as part of a plan or policy or as part of a large-scale commission of war crimes. No evidence of such a plan or policy was found.

The ICC passed a crucial U.S. test in Iraq: that it works as designed, free of politically motivated investigations or prosecutions. In doing so, it established legal precedent that will guide future cases.

Additional Considerations

From a strategic view, U.S. policy on the ICC has a negative impact on how most other nations view the United States. Washington is among the world champions for human rights and rule of law and is vocal in pointing out what it considers to be other governments' violations. Yet the U.S. stance that Americans should be exempt from the jurisdiction of an international court that may not always find in their favor leads others to believe that the values and principles that Americans frequently proclaim others should adopt do not appear to match U.S. policies. This contributes to the world view of U.S. policy as arrogant and hypocritical.

Beyond the points outlined earlier, there are additional considerations regarding Washington's policy on the ICC that many U.S. nongovernmental organizations espouse. The first is ideological. American values are closely aligned with those advocated by the ICC, namely accountability, equality, and justice. If the ICC is even partially successful in its goal of deterring crimes against humanity, genocide, and war crimes, it could ultimately serve to reduce human suffering. Second, and on a more practical level, an effective and impartial ICC is in the best interests of the United States. If the court deters these crimes, it may reduce requirements for worldwide crisis intervention (primarily humanitarian assistance and peacekeeping operations). This could translate to reduced requirements for the U.S. military.

The Department of State has obtained over 100 BIAs, but it appears that the point of diminishing returns has been reached. Those nations that have not yet signed a BIA are unlikely to. The paradox is that many of the remaining nations are those with which the United States needs to improve relations, and ASPA sanctions are making these strained relationships even worse. Particularly enlightening are recent comments from Latin American leaders who, as Adam Isacson said in Senate testimony, are "wearing their refusal to sign Article 98 agreements as a badge of honor."[29] The U.S. policy of ASPA sanctions has not worked with many Latin American nations.[30] Instead of bringing these countries into the fold, sanctions have amplified tensions in a region already hostile to Washington, contributed to the perception of the United States as a bully, and helped U.S. competitors (particularly China and Venezuela) make inroads.

Negative Impacts

Ratifying the Rome Statute and repealing the associated ASPA and Nethercutt legislation would not be without political and financial costs. Domestically, there is not a wide awareness of these issues. Where there is awareness, it appears to be superficial and often subject to xenophobic influences.

Changing these policies without also changing American perceptions of the ICC could be politically damaging to U.S. policymakers and legislators. The appearance of "softening" is not appealing to Congress, especially while U.S. troops are engaged in Iraq and Afghanistan. While the Bush administration, State Department, and Defense Department continue to oppose changes to current policy, shooting silver bullets in a perceived steep uphill battle is another congressional concern.

Internationally, there may be some impact on relationships with those nations that have already signed BIAs. Many of these nations' leaders expended valuable political capital getting their national legislatures to ratify the agreements, and the United States should acknowledge this by extending some benefit to these countries if sanctions are lifted for all nations without BIAs.

There will be relatively minor impact on the U.S. budget if these programs are restored. The annual cost of affected programs would need to be considered. Finally, there will be some danger to U.S. citizens. The "gaps" in U.S. law, including the Uniform Code of Military Justice, need to be closed to maximize the application of the concept of complementarity. The Rome Statute acknowledges that requirement and allows 7 years for a new party to make those changes. If those alterations are not completed within this time, U.S. citizens may be at risk.

The Armed Forces are planning and executing the strategic guidance as directed in national policy documents. The policy guidance from these documents that emphasizes building and maintaining relationships with partner nations is carried forward in State, Defense, and Service policy documents and is shaping the way the Services organize, train, and equip forces. However, national policy on the International Criminal Court, including the American Service-members' Protection Act of 2002 and its Article 98 requirements, is impeding execution of this guidance. It has also had numerous unintended negative effects. Until this policy is aligned with national strategic guidance, ASPA restrictions will hamper efforts to build and maintain relationships with emerging and existing partner nations.

Much of the opposition to the International Criminal Court is based on limited or incorrect understanding of the authority, operation, and limits of the court. The debate on the court needs to be reopened, and the debaters need to have the facts. They also need to approach the debate from a strategic perspective that acknowledges that compromise on tactical issues is often required to attain strategic victory.

Retired Ambassador to Saudi Arabia Chas Freeman recently addressed the new Members of Congress about national security policy. His remarks echo those of a host of former and current diplomats but could have been made by anyone who has ever been part of a successful team: "To lead as a team, you must know how to be a team player. To inspire people or nations to follow you, you must have a reputation for moral uprightness, wisdom, and veracity. To hold other people or nations to rules, you must show that you are prepared to follow them too. We all know these things. Why don't we act accordingly?"[31] While Ambassador Freeman was talking about U.S. policy coordination in general, his remarks are applicable to the specific issue of policy toward the International Criminal Court. It is time to reexamine U.S. policy on the court, and it should be done through a strategic lens. **JFQ**

NOTES

[1] The President's 2008 budget submission to Congress includes approximately $1.5 billion in the State and International Programs budget for "promoting democratic transitions" and $1.5 billion for "broad outreach to developing and oppressed countries around the world through international broadcasting, exchanges, and public diplomacy."

[2] See The Pew Global Attitudes Project at <www.pewglobal.org>.

[3] John L. Esposito, "It's the Policy, Stupid: Political Islam and U.S. Foreign Policy," *Harvard International Review*, November 2, 2006, available at <http://hir.harvard.edu/articles/1453/>.

[4] For an excellent study of the International Criminal Court and U.S. military, see Victoria K. Holt and Elisabeth W. Dallas, *On Trial: The U.S. Military and the International Criminal Court* (Washington, DC: The Henry L. Stimson Center, March 2006), available at <www.stimson.org/fopo/pdf/US_Military_and_the_ICC_FINAL_website.pdf>.

[5] Algeria, China, Israel, Libya, Qatar, the United States, and Yemen.

[6] In a May 6, 2002, letter to UN Secretary-General Kofi Annan, Under Secretary of State for

Arms Control and International Security John R. Bolton wrote 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." This removed any obligations the United States had as a *signatory* of the treaty (versus a party that had *ratified* the treaty) in accordance with Articles 12 and 18 of the Vienna Convention on the Law of Treaties.

[7] Rome Statute of the International Criminal Court, Article 1, available at <www.un.org/law/icc/statute/english/rome_statute(e).pdf>.

[8] Ibid., Article 98.

[9] American Service-Members' Protection Act of 2002, Public Law 107–206.

[10] The Nethercutt Amendment does place limitations on Economic Support Fund (ESF) assistance for certain foreign governments that are parties to the ICC, *but goes on to say* that ESF will not be made available to a country if they are a party to the ICC *and have not entered into an agreement with the United States pursuant to Article 98* of the Rome Statute. See Public Law 109–102, Title 5, Section 547, para. a.

[11] Designated U.S. major non-NATO allies are Argentina, Australia, Bahrain, Egypt, Israel, Japan, Jordan, Kuwait, Morocco, New Zealand, Pakistan, the Philippines, South Korea, and Thailand.

[12] The Millennium Challenge Account is a U.S.-funded development fund.

[13] Article 34 of the 1969 Vienna Convention on the Law of Treaties states that a treaty does not create either obligations or rights for a third state without its consent. However, Article 38 states that rules in a treaty become binding on third states through international custom. The rules of the Rome Statute could become international customary law through common use over time. The Vienna Convention on the Law of Treaties entered into force in 1980.

[14] Holt and Dallas.

[15] Rome Statute of the International Criminal Court, Article 4.

[16] Ibid., Article 12.

[17] The United States, like most nations, accepts the principle of customary international law (as distinct from treaty law). Washington accepts the binding nature of customary international law in this case. A particular category of customary international law, *jus cogens*, refers to a principle of international law so fundamental that no state may opt out by way of treaty or otherwise. Examples of this are genocide and crimes against humanity. See a short description of customary international law at <www.ll.georgetown.edu/intl/imc/imcothersourcesguide.html>.

[18] Rome Statute of the International Criminal Court, Article 124.

[19] The United States classified the detainees in these facilities as "unlawful combatants" as opposed to prisoners of war (POWs), affording them different rights than POWs (POW status provides internationally recognized protections under the Geneva Conventions). The U.S. Supreme Court recently determined that Common Article 3 to the Geneva Conventions of 1949 applies as a matter of law to the conflict with al Qaeda, prompting changes to the U.S. policies under discussion. Common Article 3 of the Geneva Conventions of 1949 requires the humane treatment of any personnel detained, whether they are ultimately determined to be prisoners of war, unlawful enemy combatants, retained persons, or civilian internees.

[20] U.S. Department of State, "Fact Sheet: Frequently Asked Questions about the U.S. Government's Policy Regarding the International Criminal Court (ICC)," July 30, 2003, available at <www.state.gov/t/pm/rls/fs/23428.htm>.

[21] Ryan Lenz, "GIs May Have Planned Iraq Rape, Slayings," *The Washington Post*, July 1, 2006.

[22] Rome Statute of the International Criminal Court, Article 8.

[23] These scenarios apply to crimes not associated with armed conflict (and therefore generally outside the stated jurisdiction of the ICC, which considers war crimes, genocides, and crimes against humanity).

[24] U.S. Department of State.

[25] Though the UN Security Council can refer cases to the ICC, the UN has no direct authority over the ICC. The UN consciously separated itself from the ICC to avoid perceptions of political influence on the court. John Bolton, in his July 1998 testimony to the Senate Foreign Relations Committee, objected to this separation, stating that the UN was being marginalized. The UN Security Council, per Article 24 of its charter, is charged with "primary responsibility for the maintenance of international peace and security."

[26] The UN Security Council does have the ability to delay investigation or prosecution of a case for a year by passage of a resolution. There are no restrictions on how many times such a resolution may be passed.

[27] Lilian V. Faulhaber, "American Servicemembers' Protection Act of 2002," *Harvard Journal on Legislation* 40, no. 2 (Summer 2003).

[28] For the text of this letter, see <www.icc-cpi.int/library/organs/otp/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf>.

[29] See testimony of Adam Isacson, Director of Programs, Center for International Policy, before the Western Hemisphere, Peace Corps, and Narcotics Affairs Subcommittee, Committee on Foreign Relations, U.S. Senate, "The Impact on Latin America of the Servicemembers' Protection Act," March 8, 2006, available at <www.senate.gov/~foreign/testimony/2006/IsacsonTestimony060308.pdf>.

[30] Latin American signatories include Antigua and Barbuda, Belize, Colombia, Dominica, Dominican Republic, Grenada, Guyana, Haiti, Honduras, Nicaragua, Panama, and Saint Kitts and Nevis.

[31] Chas W. Freeman, Jr., "National Security in the Age of Terrorism," remarks to new Members of Congress in Williamsburg, Virginia, January 6, 2007, available at <www.saudi-us-relations.org/articles/2007/ioi/070111p-freeman-security.html>.

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.

Colonel James P. Terry, USMC (Ret.), is the Chairman of the Board of Veterans Appeals in the Department of Veterans Affairs. He previously served as Principal Deputy Assistant Secretary and Deputy Assistant Secretary in the Department of State and as Legal Counsel to the Chairman of the Joint Chiefs of Staff.

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.

the United States has traditionally been the world leader in promoting the rule of law and ensuring the effective prosecution of offenses

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.

the ICC statute would permit the court to try Americans who have never left the United States

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.

from an American perspective, the inherent right of self-defense could be diminished by the current court structure absent Security Council oversight

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.