



CASE WESTERN RESERVE
UNIVERSITY
SCHOOL OF LAW

INTRODUCTION TO INTERNATIONAL CRIMINAL LAW

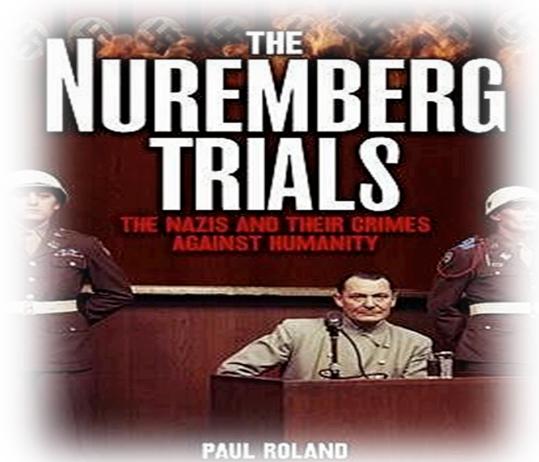
**MOOC taught by Professor
Michael P. Scharf**

Module #1:

From Nuremberg to The Hague

International Criminal Law Professor Michael Scharf

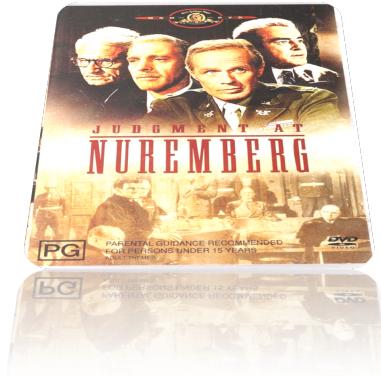
Readings for Module #1: “From Nuremberg to the Hague”



I. Introduction

The first class session focuses on the post World War II Nuremberg Trials, which launched the field of International Criminal Law. It then examines the creation of the International Criminal Court.

After the end of World War II, the world gradually became aware of the full extent of the atrocities perpetrated by Nazi Germany. After the conclusion of the Nuremberg trial, a series of trials were held in Nuremberg, Germany, by an international tribunal, headed by American legal and military officials, with the intent of bringing to justice those guilty of crimes against humanity. Director Stanley Kramer's Academy Award winning movie, "Judgment at Nuremberg," was based on one of those trials, the real-life case of *U.S. v. Joseph Alstoetter*. Clips from the movie will be shown during the first on-line class session. The entire movie is available on YouTube at: <http://m.youtube.com/watch?hl=en&gl=US&client=mv-google&v=J62XvzlHelk>



In the movie, Judge Dan Haywood (Spencer Tracy) is overseeing the trial of Dr. Ernst Yannig (Burt Lancaster) and Emil Hahn (Werner Klemperer) — Nazi judges accused of participating in a court system which disregarded human rights and due process and made possible sterilizations and executions on racial, religious and political grounds. Maximilian Schell (winner of the Best Actor Oscar) plays the defense counsel who argues that his client was no more responsible than the German people and the leaders of the rest of the world for standing by while Hitler committed atrocities. “The judges do not make the law, they merely carry them out.” Richard Widmark plays the Prosecutor, U.S. Col. Tad Lawson. The move also features notable supporting performances by Judy Garland and Montgomery Clift, both of whom play witnesses at the trial. William Shatner plays the Clerk of Court.

ONLINE SIMULATIONS

In order to complete the optional on-line simulations for this course, students must go to the Navigation Bar on the left panel. Under the Exercises section, you will find a button for “on-line simulations.” The simulations for each session are available under this button. Written work can be submitted directly or through file upload. Students who post five or more on-line submissions of over 200 words in length during the course (simulations and discussions) will be awarded a Statement of Accomplishment with Distinction for the course.

On-line Simulation #1:

Your participation in the on-line simulations and debates is optional but highly encouraged as it will help bring the course to life! For this (and subsequent simulations), those enrolled in this course will be divided up into two groups, by first letter of your last name. Last names beginning with the letters A through H will be in **Group A**; letters I through Z will be in **Group B**. This will ensure that a roughly equal number of students participate on each side of an issue throughout the course.

Based on the reading materials herein, members of Group A are invited to submit a short written opening argument on behalf of the Prosecution of Nazi Minister of Justice Schlegelberger (the defendant upon which Spencer Tracy's character was modeled) in the Alstoetter Case, which is described in the readings below. Your argument should cover the justification for prosecuting the German judges, the law that applies to their crimes, and responses to the defense argument that prosecuting them would be unfair.

Members in Group B will represent the Defense. You are invited to submit a short written opening argument that argues that the judges on trial committed no crime, they just applied the law; and that prosecution of them before the military tribunal is unfair.

On-line simulation #2:

In addition or in the alternative to submitting a closing argument in the *Alstoetter Case*, members of **Group B** are invited to submit written argument in favor of prosecuting former DOJ attorney, John Yoo, who wrote the "White House Torture Memo" under the precedent of the *Alstoetter Case*. Members of **Group A** are invited to submit a written argument on behalf of John Yoo.

On-line simulation #3:

In addition or in the alternative to the above simulations, members of **Group A** are invited to submit a written argument in favor of the United States becoming a party to the International Criminal Court. **Members of Group B** are invited to submit a written argument against the United States doing so.

II. READINGS

A. *Establishment of the Nuremberg Tribunal*

Virginia Morris and Michael P. Scharf, THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA, 2-7 (Transnational Publishers, Inc. 1998) (footnotes omitted).



The possibility of establishing an international criminal court with jurisdiction over war crimes and crimes against humanity was seriously considered for the first time in relation to the atrocities committed during the First World War. At the end of the war, the Allied Powers established the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties to investigate and recommend action on war crimes committed by the personnel of the defeated Central Powers. The Commission documented thirty categories of offenses against the laws and customs of war ranging from the deliberate bombardment of undefended places and attacks against hospital ships by the Germans to the massacre of over a million Armenians by Turkish authorities and by the Turkish populace supported by the public policy of the State.

After the war, the Treaty of Sevres and the Treaty of Versailles, respectively, provided for the prosecution of Turkish and German war criminals (including Kaiser Wilhelm II) before international tribunals. However, no international tribunals were ever established for this purpose. Instead, Kaiser Wilhelm was given sanctuary in the Netherlands and the Allied Powers consented to the trial of accused Germans before the German Supreme Court sitting at Leipzig. Of the 896 Germans accused of war crimes by the Allied Powers, only twelve were tried and of those only six were convicted (and given token sentences). The Turks fared even better by receiving amnesty for their crimes in the Treaty of Lausanne, which replaced the Treaty of Sevres.

Despite the unsatisfactory experience with the attempt to conduct international war crimes trials after the First World War, the Allies were determined to conduct such trials at the end of the Second World War. In the midst of this worldwide conflagration, the Allies took a number of decisive measures in order to ensure that the persons who were responsible for the outbreak of the war and the atrocities that followed would be brought to justice. In 1943, the Allies set up the United Nations War Crimes Commission to collect evidence with a view to conducting trials at the end of the war. Furthermore, the Allies solemnly declared and gave full warning of their unequivocal intention to bring to justice the German political and military leaders who were responsible for the atrocities committed during the war. In 1945, the victorious Allied Governments of the United States, France, the United Kingdom and the Soviet Union concluded the London Agreement providing for the establishment of the International Military Tribunal at Nuremberg (Nuremberg Tribunal) to try the most notorious of the

Germans accused of crimes against peace, war crimes and crimes against humanity. The Charter of the International Military Tribunal (Nuremberg Charter) was annexed to the London Agreement.

The Nuremberg Charter was the constitutive instrument of the Nuremberg Tribunal. Thus, the Nuremberg Charter established the structure and governed the functions of the Nuremberg Tribunal. Each State Party to the Nuremberg Charter was to appoint one of the four judges and one of their alternates. The members of the Nuremberg Tribunal were to select from among themselves a President for the first trial, with the presidency rotating among the members in successive trials. A conviction and a sentence could be imposed only by an affirmative vote of at least three members of the Nuremberg Tribunal. All other questions would be decided by majority vote, with the President having the decisive vote in the event of a tie. Each State Party was also to appoint one of the four Chief Prosecutors. The Chief Prosecutors were to act as a committee in designating the major war criminals to be tried by the Nuremberg Tribunal and in preparing the indictments. The Chief Prosecutors were also responsible for drafting the rules of procedure for the Nuremberg Tribunal, which were subject to the approval of the judges. The Nuremberg Tribunal was not bound by technical rules of evidence and was at liberty to admit any evidence which it deemed to have probative value. Moreover, the Nuremberg Tribunal was given the power to compel the presence of witnesses, to interrogate defendants, to compel the production of documents and other evidence, to administer oaths, and to appoint officers to take evidence on commission. The Nuremberg Tribunal was also authorized, upon conviction of a defendant, to impose any punishment it considered just, including the death penalty. The Nuremberg Tribunal judgments were not subject to review.

As regards jurisdiction and applicable law, the Nuremberg Charter determined the subject matter jurisdiction of the Nuremberg Tribunal and provided the definitions of the three categories of crimes with which the defendants were charged:

Crimes Against Peace: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a Common Plan or Conspiracy for the accomplishment of any of the foregoing;

War Crimes: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave-labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by necessity;

Crimes Against Humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial, or religious grounds, in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of domestic law of the country where perpetrated.

.... As regards due process, the Nuremberg Charter guaranteed certain fundamental rights of the accused in order to ensure that every accused received a fair trial, namely: (1) the right to be furnished with the indictment in a language which the accused understands at a reasonable time before trial; (2) the right to give any explanation relevant to the charges against the accused; (3) the right to translation of proceedings before the Nuremberg Tribunal in a language which the accused understands; (4) the right to have the assistance of counsel; and (5) the right to present evidence and to cross-examine any witness called by the prosecution. At the same time, the Nuremberg Charter provided for trials *in absentia*, authorized the Nuremberg Tribunal to interrogate the accused, limited the defenses available to the accused by excluding the act of State defense and the defense of superior orders; and precluded any challenges to the jurisdiction or the composition of the Nuremberg Tribunal.

.... In terms of procedure, the Nuremberg Charter and Rules of Procedure provided an innovative blend and balance of various elements of the Continental European inquisitorial system and the Anglo-American adversarial system in order to create a tailor-made international criminal procedure which would be generally acceptable to the States Parties representing both systems. ... The Nuremberg Tribunal was governed by simplified evidentiary rules which constituted another unique feature of the Nuremberg Charter. The technical rules of evidence developed under the common law system of jury trials to prevent the jury from being influenced by improper evidence were considered to be unnecessary for trials conducted in the absence of a jury. Accordingly, the Nuremberg Charter provided that the Nuremberg Tribunal was not bound by technical rules of evidence and could admit any evidence which it deemed to have probative value. Consequently, the Nuremberg Tribunal allowed the prosecutors to introduce *ex parte* affidavits against the accused over the objections of their attorneys.

B. The Rationale for Creating the Nuremberg Tribunal

Michael P. Scharf and William A. Schabas, Slobodan Milosevic on Trial: A Companion, 39-43 (Continuum, 2002).

The events that prompted the formation of the Nuremberg Tribunal in 1945 are probably more familiar to most than those which led to the creation of the Yugoslavia War Crimes Tribunal a half century later. Between 1933 and 1940, the Nazi regime established concentration camps where Jews, Communists and opponents of the regime were incarcerated without trial; it progressively prohibited Jews from engaging in employment and participating in various areas of public life, stripped them of citizenship, and made marriage or sexual intimacy between Jews and German citizens a criminal offense; it forcibly annexed Austria and Czechoslovakia; invaded and occupied Poland, Denmark, Norway, Luxembourg, Holland, Belgium, and France; and then it set in motion "the final solution to the Jewish problem" by establishing death camps such as Auschwitz and Treblinka, where six million Jews were exterminated.

As Allied forces pressed into Germany and an end to the fighting in Europe came into sight, the Allied powers faced the challenge of deciding what to do with the

surviving Nazi leaders who were responsible for these atrocities. Holding an international trial, however, was not their first preference. The British Government opposed trying the Nazi leaders on the ground that their "guilt was so black" that it was "beyond the scope of judicial process." British Prime Minister Winston Churchill, therefore, proposed the summary execution of the Nazi leaders. Soviet leader Joseph Stalin, however, urged that Nazi leaders be tried, much as he had done with dissidents in his own country during the purges of the 1930s. United States President Franklin D. Roosevelt initially appeared willing to go along with Churchill's proposal. But upon Roosevelt's death in April 1945, President Harry Truman made it clear that he opposed summary execution. Instead, at the urging of U.S. Secretary of War, Henry Stimson, Truman pushed for the establishment of an international tribunal to try the Nazi leaders.



The arguments for a judicial approach were compelling, and soon won the day. First, judicial proceedings would avert future hostilities which would likely result from the execution, absent a trial, of German leaders. Legal proceedings, moreover, would bring German atrocities to the attention of all the world, thereby legitimizing Allied conduct during and after the war. They would individualize guilt by identifying specific perpetrators instead of leaving Germany with a sense of collective guilt. Finally, such a trial would permit the Allied powers, and the world, to exact a penalty from the Nazi leadership rather than from Germany's civilian population.

C. The Legacy of the Nuremberg Tribunal

1. Virginia Morris and Michael P. Scharf, THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA, 7-17 (Transnational Publishers, Inc. 1998) (footnotes omitted).

After a trial that lasted 284 days, the Nuremberg Tribunal convicted nineteen of the twenty-two German officials and sentenced twelve of the major war criminals to death by hanging. In the course of the lengthy trial, the Nuremberg Tribunal documented the Nazi atrocities "with such authenticity and in such detail that there can be no responsible denial of these crimes in the future and no tradition of martyrdom of the Nazi leaders can arise among informed people." The judgment of the Nuremberg Tribunal

also paved the way for the trial of over a thousand other German political and military officers, businessmen, doctors, and jurists under Control Council Law No. 10 by military tribunals in occupied zones in Germany and in the liberated or Allied Nations. Moreover, the Charter and the Judgment of the Nuremberg Tribunal established the fundamental principles of individual responsibility for crimes under international law which provide the cornerstones of the legal foundation for all subsequent international criminal proceedings.

A year after the Nuremberg trial, the major Japanese war criminals were tried before the International Military Tribunal for the Far East (Tokyo Tribunal). The Charter of the International Military Tribunal for the Far East (Tokyo Charter) was based largely on the Nuremberg Charter. Nonetheless, the Charter and the Judgment of the Tokyo Tribunal are generally considered to be less authoritative than those of the Nuremberg Tribunal. Whereas the Nuremberg Charter was adopted as part of an international agreement after extensive multilateral negotiations, the Tokyo Charter was promulgated as an executive order by the Supreme Allied Commander for Japan following the war, General Douglas MacArthur, without the prior approval of the other Allied Powers.

Furthermore, in contrast to the Nuremberg Tribunal whose judges and prosecutors were selected by four different countries, the prosecutor and the judges of the Tokyo Tribunal were personally selected by General MacArthur. In his dissenting opinion, the French judge of the Tokyo Tribunal, Henri Bernard, expressed the view that "so many principles of justice were violated during the trial that the Court's judgment certainly would be nullified on legal grounds in most civilized countries." Thus, the United Nations General Assembly expressly affirmed the principles of international law recognized in the Charter and the Judgment of the Nuremberg Tribunal and merely took note of the Charter and the Judgment of the Tokyo Tribunal.

Although the Nuremberg Tribunal has been hailed as one of the most important developments in international law in this century, it has also been subject to three major criticisms. While these criticisms are not entirely justified, they deserve consideration because they are also not entirely without some foundation. It is important to consider the shortcomings of the Nuremberg precedent in order to avoid them in the future. At the same time, it is important to judge the Nuremberg precedent--not by contemporary standards--but by the standards of its time.

First, the Nuremberg Tribunal has been criticized as a victor's tribunal before which only the vanquished were called to account for violations of international humanitarian law committed during the war. The victorious States created the Nuremberg Tribunal and appointed their nationals to serve as its judges. The ability of the judges to objectively perform their judicial functions was questioned due to their nationality and the various roles which they performed. In particular, two of the Nuremberg judges had earlier served on the committee of prosecutors that negotiated the Nuremberg Charter, selected the defendants for trial, and drafted the indictments against these defendants. In addition, during the Nuremberg trial the defense counsel argued that the judges were not qualified to pass judgment on the accused because the States which tried the Nuremberg defendants were guilty of many of the same crimes for which their representatives on the bench would judge their former adversaries.

The first criticism of the Nuremberg Tribunal as victor's justice is without any foundation in terms of the existing international law at the time and ignores the fact that

the only other alternative that was seriously considered was far less desirable, namely, victor's vengeance. At the conclusion of the Second World War, the victorious parties to the armed conflict were fully competent as a matter of international law to try the members of the vanquished armed forces for violations of the laws and customs of war. The history of war has sadly demonstrated that vengeance often prevails on the battlefield during the war and impunity often prevails at the negotiating table after the war. It was an extraordinary triumph of justice and the rule of law that the major German war criminals were brought to trial before a court of law, rather than being summarily executed (as proposed by Winston Churchill and Joseph Stalin at the Yalta Conference in 1945) or being allowed to go unpunished (as after the First World War).

As the Chief Prosecutor for the United States at Nuremberg, Supreme Court Justice Robert H. Jackson, observed in his opening remarks for the prosecution: "That four great nations, flushed with victory and stung with injury, stay the hands of vengeance and voluntarily submit their captive enemies to the judgment of the law, is one of the most significant tributes that Power has ever paid to Reason." Clearly, it would have been preferable to bring the major German war criminals before a permanent international criminal court which had been established previously by the international community and whose judiciary excluded nationals of the parties to the armed conflict. This ideal solution was quite simply not an option at the end of the Second World War. Yet few, if any, have suggested that the characteristics of the Nuremberg Tribunal as a "victor's tribunal" resulted in the conviction of a single innocent man. The documentary evidence alone was overwhelming.

The second criticism of the Nuremberg Tribunal was that the defendants were prosecuted and punished for crimes expressly defined as such for the first time in an instrument adopted by the victors at the conclusion of the war. In particular, the Nuremberg Tribunal was perceived by some as applying *ex post facto* law because it held individuals responsible for waging a war of aggression for the first time in history. Senator Robert Taft of Ohio was one of the first to voice this criticism in 1946. His views became part of the public legacy of Nuremberg when his speech was included by John F. Kennedy in his 1956 Pulitzer Prize winning book *Profiles in Courage*. To this day, articles appear in the popular press deriding Nuremberg as "a retroactive jurisprudence that would surely be unconstitutional in an American court."

This second criticism of the Nuremberg Tribunal minimizes the existing law at the time. The war crimes for which the defendants were tried and punished were violations of well established rules of law governing the conduct of war. The crimes against humanity for which the defendants were tried and punished were contrary to the national law of every civilized nation. No reasonable individual could possibly doubt the serious criminal nature of such crimes which were clearly *malum in se*. The crimes against peace for which the defendants were tried and punished were contrary to a panoply of legal instruments that prohibited aggressive warfare at the time. Nazi Germany initiated an aggressive war--not because it believed that this was permitted under international law--but because it believed that it could do so with impunity. The fact that a law has not been enforced in the past is no guarantee that it will not be enforced in the future. In this regard, there were specific warnings of individual responsibility for violations of international law at the end of the First World War and during the Second World War, as discussed previously. Furthermore, the defendants had

the opportunity to raise this legal challenge which was considered and rejected by the Nuremberg Tribunal.

The third criticism of the Nuremberg Tribunal was that it functioned on the basis of limited procedural rules which did not provide sufficient protection of the rights of the accused. More specifically, the Nuremberg Charter is criticized for providing insufficient due process guarantees for the accused which were circumscribed by several rulings of the Nuremberg Tribunal in favor of the prosecution. In particular, the Nuremberg Tribunal allowed the prosecutors to introduce the *ex parte* affidavits of persons who were available to testify at trial as evidence against the defendants. As one of the Nuremberg prosecutors, Telford Taylor, wrote: "Total reliance on...untested depositions by unseen witnesses is certainly not the most reliable road to factual accuracy....Considering the number of deponents and the play of emotional factors, not only faulty observation but deliberate exaggeration must have warped many of the reports." The procedural rulings in favor of the prosecution were considered to be particularly troubling since the Nuremberg Charter did not provide for a right of appeal. It has further been argued that the defendants who were acquitted by the Nuremberg Tribunal did not fare much better than those who were convicted since the Nuremberg Charter failed to provide any guarantee of the *non bis in idem* principle (known in the United States as the prohibition of double jeopardy). Consequently, the defendants Schacht, von Papen and Fritzsche were acquitted by the Nuremberg Tribunal only to be subsequently tried and convicted by German national courts for similar crimes.

The third criticism of the limited procedural guarantees provided by the Nuremberg Charter ignores the fact that this was the first attempt to establish an international standard of due process and fair trial. Notwithstanding the absence of any internationally recognized standard of fair trial, the Nuremberg Charter endeavored to guarantee the minimum rights of the accused which were considered to be essential for a fair trial based on general principles of procedural fairness and due process recognized in various national criminal justice systems at the time. It is generally recognized that the defendants who were tried by the Nuremberg Tribunal were entitled to the essential procedural guarantees required for a fair trial even if there were some procedural imperfections.

The Nuremberg Tribunal was unquestionably a significant achievement for its time notwithstanding its shortcomings. Telford Taylor recognized that the Nuremberg Tribunal was not free from what he referred to as its "political warts." Even Justice Jackson acknowledged at the conclusion of the Nuremberg trial that "many mistakes have been made and many inadequacies must be confessed." But he went on to say that he was "consoled by the fact that in proceedings of this novelty, errors and missteps may also be instructive to the future." In this regard, the Nuremberg precedent provides an important benchmark for evaluating the subsequent international criminal tribunals.

Despite its shortcomings, the Nuremberg precedent has had an enduring impact on the development of international criminal law and jurisdiction. The principles of international law recognized in the Charter and the Judgment of the Nuremberg Tribunal constitute the fundamental principles of international criminal law today.

The Nuremberg precedent also contributed to the further development of international criminal law after the Second World War. In 1948, the Nuremberg precedent with respect to persecution as a crime against humanity led to the adoption of

the Convention on the Prevention and Punishment of the Crime of Genocide. In 1949, the Nuremberg precedent with respect to war crimes was codified and further developed in the Geneva Conventions for the protection of war victims. In terms of international criminal jurisdiction, the Nuremberg Tribunal demonstrated for the first time the feasibility of establishing an international criminal tribunal to replace the historical tradition of impunity and vengeance by a new world order based on justice and the rule of law. In doing so, the Nuremberg Tribunal laid the foundation for all subsequent international criminal jurisdictions.

2. Principles of the Nuremberg Charter and Judgment Formulated by the International Law Commission pursuant to G.A. Res. 177(11)(a), 5 U.N. GAOR, Supp. No. 12, at 11-14, para. 99, U.N. Doc. A/1316 (1946).

- I. Any person who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment.
- II. The fact that internal law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law.
- III. The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible Government official does not relieve him from responsibility under international law.
- IV. The fact that a person acted pursuant to order of his Government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him.
- V. Any person charged with a crime under international law has the right to a fair trial on the facts and law.
- VI. The crimes hereinafter set out are punishable as crimes under international law: (a) Crimes against peace, (b) War crimes, (c) Crimes against humanity....
- VII. Complicity in the commission of a crime against peace, a war crime, or a crime against humanity as set forth in Principle VI is a crime under international law.

D. Judgment at Nuremberg: The Real Story Behind the Movie

1. A Commentary on the Justice Case by Doug Linder, 2000



No one contends, of course, that German judges and prosecutors destroyed as many lives as did the SS, Gestapo, or other agencies of the Nazi machine. Their victims number in the thousands, not the millions. A judge who knowingly sentenced even one innocent Jew or Pole to death was, however, guilty in the eyes of the prosecutors and judges at the Justice Trial in Nuremberg. There would be no "only a couple of atrocities" defense.

Ingo Muller, in Hitler's Justice: The Courts of the Third Reich, provides a penetrating picture of the workings of the criminal justice system in Nazi Germany. Muller's analysis of the evidence suggests that most German judges--contrary to common opinion--were ultraconservative nationalists who were largely sympathetic to Nazi goals. The "Nazification" of German law occurred with the willing and enthusiastic help of judges, rather than over their principled objections.

Many judges appointed before the Nazi rise to power--because of the economic and social circles that judges were drawn from--had views that were quite compatible with the Nazi party. A few Jewish judges sat on the bench when the Nazis assumed power--but only a very few. A 1933 law removed those few Jewish judges from office.

Only a handful of the non-Jewish judges demonstrated real courage in the face of Nazi persecution and violations of civil liberties. One who did was Lothar Kressig, a county court judge who issued injunctions against sending hospital patients to extermination camps. When ordered to withdraw his injunctions, Kreyssig refused. He also attempted to initiate a prosecution of Nazis for their role in the program. Kreyssig, under pressure, eventually resigned.

In the Justice trial, American prosecutors sought to demonstrate a pattern of judicial and prosecutorial support for Nazi programs of persecution, sterilization, extermination, and other gross violations of human rights. In order to prove an individual defendant guilty, prosecutors had to show that the defendant consciously furthered these human rights abuses.

The violations of human rights progressively worsened as the Nazis solidified power and began their wars of aggression. In 1938, laws were adopted that imposed different levels of punishment for the same crime--a tougher punishment for Jews, a lighter one for other Germans. By 1940, sterilization programs were underway. By 1942, the "Final Solution," the wholesale extermination of Jews and other persons deemed undesirable, was in full swing.

Two features of German law combined to facilitate the Nazi's evil schemes. The first was that German law, unlike the law of the United States and many other nations, lacked "higher law" (constitutional or ethical standards) that might be resorted to by judges to avoid the harsh effects of discriminatory laws adopted by the Nazi regime. The second difficulty was that there was no separation of powers between the executive and judicial branches of government. Hitler declared, and the Reichstag agreed, had the power "to intervene in any case." This was done, legally, through what was called "an extraordinary appeal for nullification of sentence." The nullification invariably resulted in a sentence the Nazis thought was too light being replaced by a more severe sentence, often death. If these features of German law weren't enough, the Nazis also assigned a member of the Security Service to each judge to funnel secret information about the judges back to Hitler and his henchmen.

The excerpt from the decision of the tribunal (omitted) includes the judgments for two of the Justice trial defendants, Franz Schlegelberger and Oswald Rothaug. In the movie Judgment at Nuremberg, Burt Lancaster played the role of a German judge (Ernst Janning) that was based loosely on the prosecution of Schlegelberger.

Schlegelberger is the more sympathetic of the two defendants. He served in the Ministry of Justice from 1931-1942. For the last seventeen months of his service, Schlegelberger was Director of the Ministry of Justice. He wrote several books on the law and was called at the time of his retirement, "the last of the German jurists." Schlegelberger argued in his defense that he was bound to follow the orders of Hitler, the "Supreme Judge" of Germany, but that he did so only reluctantly. Schlegelberger pointed out that he did not join the Nazis until 1938, and then only because he was ordered to do so by Hitler. Schlegelberger claimed to have harbored no ill-will toward the Jews. His personal physician, in fact, was Jewish. In his defense, he also stresses that he resisted the proposal that sent "half Jews" to concentration camps. Schlegelberger suggested giving "half Jews" a choice between sterilization and evacuation. He also argued that he continued to serve as long as he did because "if I had resigned, a worse man would have taken my place." Indeed, once Schlegelberger did resign, brutality increased.

In its decision, the Justice Trial tribunal considered what it called Schlegelberger's "hesitant injustices." The tribunal concluded that Schlegelberger "loathed the evil that he did" and that his real love was for the "life of the intellect, the work of the scholar." In the end he resigned because "the cruelties of the system were too much for him." Despite its obvious sympathy with Schlegelberger's plight, the tribunal finds him guilty. It pointed out that the decision of a man of his stature to remain in office lent credibility to the Nazi regime. Moreover, Schegelberger did sign his name to orders that, in the tribunal's judgment, constituted crimes. One case described in the decision involved the prosecution in 1941 of a Jew (Luftgas) accused of "hoarding eggs." Schlegelberger gave Luftgas a two-and-a-half-year sentence, but then Hitler indicated that he wanted the convicted man executed. Although Schlegelberger may well have protested, he signed his name to the order that led to the execution of Luftgas. Another case cited by the tribunal concerned a remission-of-sentence order signed by Schlegelberger. Scheleberger explained in his decision that the sentence imposed against a police officer who was convicted of beating a Jewish milking hand would have been bad for the morale of officers. Although Sclegelberger received a life sentence in Nuremberg, he was released from prison in 1951 and received a generous monthly pension until his death.

The tribunal found "no mitigating circumstances" in the case of Oswald Rothaug. In its decision, the tribunal calls Rothaug "a sadistic and evil man." Rothaug, unlike Schlegelberger, had no reservations about enthusiastically supporting the Nazi pattern of human rights abuses. One case used by the tribunal to illustrate Rothaug's guilt involved a sixty-eight-year-old Leo Katzenberger, head of the Nuremberg Jewish community. Katzenberger stood accused of violating Article 2 of the Law for the Protection of German Blood. The law forbid sexual intercourse between Jews and other German nationals. Katzenberger was accused of having sexual intercourse with a nineteen-year-old German photographer, Seillor.

Both Katzenberger and Seillor denied the charge. Katzenberger described the relationship between the two of them as "fatherly." The most incriminating evidence the

prosecution produced was that Seiler was seen sitting on Katzenberger's lap. That, in Rothaug's view, was enough: "It is sufficient for me that the swine said that a German girl sat upon his lap!" Rothaug arranged to have Katzenberger's trial transferred to a special court. In the special court, high-ranking Nazi officials--in uniform--took the stand to express their opinions that Katzenberger was guilty. Rothaug's real trick, however, was getting Katzenberger's punishment increased from life in prison (the normal punishment for violations of Article 2) to death. This he did by a creative construction of a law that prescribed death for breaking certain laws "to take advantage of the war effort." Rothaug argued that death was the appropriate punishment for Katzenberger because he exploited the lights-out situation provided by air raid precautions to develop his "romance" with Seiler.

2. Michael P. Scharf, "Judgment at Nuremberg Revisited," from "Grotian Moment: Saddam Hussein Trial Blog" (2006), available at: <http://law.case.edu/grotian-moment-blog/>



The defendant who sits immediately to the right of Saddam Hussein in the Iraqi High Tribunal courtroom every day is Awwad Al-Bandar, the former Chief Judge of Saddam's Revolutionary Court. The placement is no coincidence, as next to Saddam, Al-Bandar is the most important man on trial. He is charged with crimes against humanity in connection with ordering the execution of 148 Dujail townspeople after an unfair trial. He is the first judge since the Nuremberg-era Alstoetter case, which was made into the Academy Award-winning Movie "Judgment at Nuremberg," to be tried for using his court as a political weapon.

On March 13, 2006, Al-Bandar took the stand to testify on his own behalf. Al-Bandar acknowledged that he presided over the 1984 Dujail trial, and that he sentenced all 148 defendants in that case to death after a trial that lasted only two weeks. "They attacked the president of the Republic and they confessed," he told the IHT. He said that their confessions were verified by the intelligence department's investigative judge, and added that the Dujail defendants also admitted their responsibility on radio and television. Moreover, Al-Bandar said that the case file had established that weapons and incriminating documents, proving the Dujail defendants' affiliation with the Iran-allied Al-Da'wah Party, were found in their hideouts in the Dujail orchards. He said that the Dujail defendants were represented by court-appointed counsel, and that his court issued the ruling in accordance with the law and without the interference or influence of any side. He admitted that the trial was a short one given the number of defendants, but said

that due to the war with Iran and the defendants' confessions the trial could not be delayed, stressing that "these were extraordinary events, as the president was targeted."

When confronted with documents showing that 46 of the 148 Dujail defendants had actually died during interrogation before the 1984 trial, Al-Bandar replied: "Is it so strange for someone to die during interrogation," asserting that five of his fellow former Ba'ath party leaders have died in U.S. custody since 2003. Al-Bandar then read from a prepared statement, saying "according to the law, a judge cannot be arrested or tried unless he carries out a proven crime." He added that at the time of the Dujail trial, Iraqi law stated that any member of the Al-Da'wah Party was to be executed, and also required the death sentence for any person who attempts to kill the head of state. "Therefore, the court had no choice but to sentence the Dujail defendants to death."

Al-Bandar's testimony raises difficult moral and legal questions: should a judge be held criminally liable for presiding over an unfair trial if it comported with the domestic law then in effect? And should departures from normal fair trial norms be permissible with respect to alleged insurgents or terrorists in times of war? In considering these questions, it may be helpful to consider a few of the most memorable passages from the movie "Judgment at Nuremberg."

Prosecutor's Opening Statement: "Your Honor, the case is unusual in that the defendants are charged with crimes committed in the name of the law. These men are the embodiment of what passed for justice in the Third Reich. As judges on the bench you will be sitting in judgment of judges in the dock. This is how it should be. For only a judge knows how much more a court is than a courtroom. It is a process and a spirit. It is the House of Law. The defendants knew this too. They knew courtrooms well. They sat in their black robes. And they distorted and they perverted and they destroyed justice in Germany. They are, perhaps more than others, guilty of complicity in murders, tortures, atrocities—the most cruel and devastating this world has ever seen. Here they will receive the justice they denied others."

Defense's Opening Statement: "If the defendant is to be found guilty, certain implications must arise. A judge does not make the law. He carries out the laws of his country, be it a democracy or a dictatorship. The statement, 'My country right or wrong,' was expressed by a great American patriot. It is no less true for a German patriot. Should the defendant have carried out the laws of his country? Or should he have refused to carry them out and become a traitor?"

Judgment: "This trial has shown that under a national crisis, ordinary, even able and extraordinary men can delude themselves into the commission of crimes against humanity. How easily it can happen. There are those in our own country too that today speak of the protection of country, of survival. A decision must be made in the life of every nation, at the very moment when the grasp of the enemy is at its throat; then it seems that the only way to survive is to use the means of the enemy, to wrest survival on what is expedient, to look the other way. Only the answer to that is... survival as what? A country isn't a rock; it's not an extension of one's self. It's what it stands for. It's what it stands for when standing for something is the most difficult. Before the people of the world, here in our decision, this is what we stand for – justice, truth, and the value of a single human being."

Like its Hollywood counterpart, the real-life Nuremberg Tribunal found the Nazi judges guilty of crimes against humanity, concluding that "the dagger of the assassin was

concealed beneath the robe of the jurist.” The Tribunal rejected both the necessity defense and the notion that the judges should be absolved because they did not make the law, they only carried it out – the very arguments Al-Abandar has made before the IHT. For sixty years, the Alstoetter judgment has served as a warning to judges and other government officials. A conviction in the Al-Abandar case would reaffirm the continuing vitality of this precedent, and send an important message not just to those in the new Iraqi government, but also to those in governments around the world (including the United States) who might be tempted to argue that in time of war the law must be silent.

**3. ASIL Insight, Scott Lyons, “German Criminal Complaint Against Donald Rumsfeld and Others,” Dec. 14, 2006, available at:
<http://www.asil.org/insights/2006/12/insights061214.html>**



On November 14, 2006, a criminal complaint was filed in a German court against senior U.S. officials, including former Secretary of Defense Donald Rumsfeld, former CIA Director George Tenet, high ranking military officers, and several former government lawyers alleging torture and war crimes at Abu Ghraib prison in Iraq and the Guantanamo Bay Prison Camp. The new complaint renews debates surrounding the international law of universal jurisdiction, which contemplates that certain heinous offenses may be prosecuted wherever the alleged offender is found, even if he or she is not a national of the prosecuting country. Further, the new complaint raises questions concerning the impact of the Military Commissions Act of 2006 (MCA) on Germany’s interest in respecting principles of comity and “complementarity” and the culpability of lawyers for the actions of a government.

The Complaint

The complaint is an updated attempt to indict U.S. officials in a German court after a previous German Federal Prosecutor failed to prosecute many of the same defendants two years ago. Under German criminal procedure, prosecutors have discretion whether to pursue universal jurisdiction cases, and the 2004 complaint was dismissed with the prosecutor stating: “there are no indications that the authorities and courts of the United States of America are refraining, or would refrain, from penal measures as regards

the violations described in the complaint.” At the time, the prosecutor cited investigations and proceedings in the U.S. that indicated that the judicial process should best be reserved for U.S. jurisdiction. The dismissal also followed political pressure from the U.S. government.

The new complaint is filed on behalf of eleven Iraqi citizens held at Abu Ghraib and a Saudi held at Guatanamo Bay. The complaint is filed under Germany’s Code of Crimes Against International Law (CCAIL), which has been in effect since July 2002. The law was enacted in response to the formation of the International Criminal Court, to which Germany is a party. CCAIL enables German courts to exercise jurisdiction over specified crimes against international law and is applicable to acts committed regardless of location of the alleged crimes or the nationality of the persons involved in those actions.

The new complaint differs from the 2004 complaint because it follows Mr. Rumsfeld’s resignation, thus removing possible immunities from universal jurisdiction attached to certain government offices, and the passage of the MCA. The new complaint also names U.S. Attorney General Alberto Gonzales, former Assistant Attorney General Jay Bybee, former Deputy Assistant Attorney General John Yoo, former Counsel to the Vice-President and current chief of staff David S. Addington, and General Counsel of the Department of Defense William J. Haynes, II. The complaint alleges that the government lawyers facilitated, aided and abetted torture by drafting legal opinions, which were clearly erroneous, but enabled the torture to occur under the guise of legal justification. Torture is one of the offenses generally recognized as being subject to universal jurisdiction.

Issues of Immunity

Personal immunity offers protection to heads of State and certain high-ranking State officers from foreign prosecution while that person is in office. This immunity prevents States from prosecuting officials of another sovereign State without consent and ensures that high-ranking government officials can travel freely to represent their State in order to carry out foreign relations without threat of criminal action. Personal immunity has been found to attach to the offices of head of State and minister for foreign affairs, in addition to foreign diplomats. Whether personal immunity would attach to the equivalent offices of Minister of Defense or Director of Intelligence or their high-ranking employees is uncertain, but viable arguments have been made that high-level defense and intelligence officers must similarly travel abroad so that they can represent their State and carry out the necessary functions related to international alliances and defense pacts. Donald Rumsfeld’s and George Tenet’s resignations remove this possible limitation to the exercise of universal jurisdiction. However, the question still remains whether some of the named U.S. officials still in office (e.g. Under-Secretary of Defense for Intelligence Stephen A. Cambone) are accorded personal immunity.

Impact of the MCA

As noted in the first complaint dismissal, the purpose of universal jurisdiction prosecution is to “close gaps in punishability” and ensure criminal accountability. However, a State’s interest in combating impunity must be balanced against the fundamental principle of non-interference in the affairs of foreign States. Germany’s universal jurisdiction provisions are derived from the Statute creating the International

Criminal Court, and the German prosecutor cited complementarity for the deferral to U.S. jurisdiction. Complementarity denotes that States with direct nexus to the perpetrators, perpetrated acts, or victims have the first right and obligation to prosecute international crimes, and because third-state universal jurisdiction is complementary to these courts, German jurisdiction can only be invoked if those States, or a competent international tribunal, are unwilling or unable to prosecute.

The first case was dismissed when the U.S., the State with primary jurisdiction, was shown to be conducting investigations and U.S. authorities had no actual or legal obstacles to prosecution. The new complaint alleges that the recent passage of the MCA immunizes U.S. officials from criminal liability for events at Abu Ghraib and Guantanamo Bay. The MCA protects certain U.S. government personnel by retroactively narrowing the grounds for criminal liability under the War Crimes Act and creating a defense that the detention and interrogation techniques were either lawful or the person responsible, acting with ordinary sense and understanding, did not know the practices were unlawful. The complaint argues that these provisions effectively grant immunity from prosecution in the United States, leaving only foreign venues as avenues for redress. (Lawyers representing Mr. Rumsfeld, Lt. Gen. Ricardo Sanchez and Col. Thomas M. Pappas have already cited the MCA for purposes of immunity from an unrelated civil claim filed in a U.S. District Court on behalf of detainees in Iraq and Afghanistan. With the newly created immunity, the U.S. not being a party to the International Criminal Court, and Iraqi courts having no jurisdiction to prosecute Americans, the complaint contends that foreign courts are the last resort. The U.S. government is likely to argue that the MCA does not prevent legal accountability, but instead clarifies criminal conduct that would constitute torture and prevents *ex post facto* prosecution. Further, the U.S. likely will contend that the State did not abdicate responsibility because the Department of Defense conducted twelve substantial reviews of the events and detention operations and prosecuted those most directly responsible for criminal activity at Abu Ghraib.

The MCA may also impact named military officers stationed in Germany. The NATO Status of Forces Agreement says that the authorities of the receiving State (in this case, Germany) have exclusive jurisdiction over members of the sending State's military forces with respect to offences punishable by its law, but not by the law of the sending State. The Agreement also specifies that, in cases of concurrent jurisdiction, the U.S. military authorities shall have the primary (but not exclusive) right to exercise jurisdiction over its officers in relation to offences committed in the performance of official duty. The right to exercise primary jurisdiction can be waived. Consequently, in situations where the MCA provides military officers stationed in Germany with a defense to prosecution in the United States, an obstacle may be cleared for the exercise of German jurisdiction either because the offence is not punishable by U.S. law or because the MCA might be regarded as a waiver of U.S. jurisdiction.

Culpability of Lawyers

The new complaint includes the lawyers who advised on, and possibly enabled, the legal framework governing prisoner policies in Iraq and Guantanamo Bay. While it is very rare for war crimes allegations to be issued against legal advisors, it is not without precedent. Twelve trials were held in Nuremberg, Germany under the provisions of the Control Council Law No. 10, following the U.S. defeat of Nazi Germany. One of these

trials, the United States versus Joseph Altstoetter, et. al (also known as “the Justice Case”) indicted nine officials of the Reich Ministry of Justice for participating in the drafting and enacting of unlawful orders and facilitating the violation of the laws of war and of humanity, by allowing war crimes to be perpetrated under the impression of law authorized by the Ministry of Justice. The Ministry of Justice lawyers had decreed that the relevant Hague Law and Geneva Convention on the Prisoners of War of 1929 did not apply to German actions because of the legal status of the occupied territories and that the insurgencies did not subscribe to the treaties. While the allegations stemming from Iraq and Guantanamo Bay are in no way comparable to those relating to events in World War II, the Justice Case forms an instructive nonbinding precedent in U.S. and German-related jurisprudence for criminal responsibility for lawyers who provide legal justification for the commission of war crimes.

Conclusion

While it is uncertain whether the German prosecutor will initiate an investigation due to political considerations and the barriers that make extradition for purposes of trial unlikely, the new claim raises legal questions that were absent during the dismissal of the first claim.

II. THE INTERNATIONAL CRIMINAL COURT



The ICC Statute is available at: <http://untreaty.un.org/cod/icc/statute/romefra.htm>

- A. Michael P. Scharf, *The Case for Supporting the International Criminal Court*, Washington University School of Law, Whitney R. Harris Institute for Global Legal Studies, Washington University in St. Louis, International Debate Series, No. 1 (2002).

Background: The Road to Rome

With the creation of the Yugoslavia and Rwanda Tribunals in the early 1990s, there was hope among U.S. policy makers that Security Council-controlled ad hoc tribunals

would be set up for crimes against humanity elsewhere in the world. Even America's most ardent opponents of a permanent international criminal court had come to see the ad hoc tribunals as a useful foreign policy tool. The experience with the former Yugoslavia and Rwanda Tribunals proved that an international indictment and arrest warrant could serve to isolate offending leaders diplomatically, strengthen the hand of domestic rivals, and fortify international political will to impose economic sanctions and take more aggressive actions if necessary. Unlike a permanent international criminal court, there was no perceived risk of American personnel being prosecuted before the ad hoc tribunals since their subject matter, territorial and temporal jurisdiction were determined by the Security Council, which the United States could control with its veto.

But then something known in government circles as "Tribunal Fatigue" set in. The process of reaching agreement on the tribunal's statute; electing judges; selecting a prosecutor; hiring staff; negotiating headquarters agreements and judicial assistance pacts; erecting courtrooms, offices, and prisons; and appropriating funds turned out to be too time consuming and exhausting for the members of the Security Council to undertake on a repeated basis. China and other Permanent Members of the Security Council let it be known that Rwanda would be the last of the Security Council-established ad hoc tribunals.

Consequently, the establishment of a permanent international criminal court began to be seen by many members of the United Nations (as well as some within the U.S. government) as the solution to the impediments preventing a continuation of the ad hoc approach. Having successfully tackled most of the same complex legal and practical issues that U.S. diplomats had earlier identified as obstacles to a permanent international criminal court, the United States Government was left with little basis to justify continued foot-dragging with regard to the ICC. In 1994, the U.N. International Law Commission produced a draft Statute for an ICC which was largely based on the Statutes and Rules of the popular ad hoc tribunals. The International Law Commission's draft was subsequently refined through a series of Preparatory Conferences in which the United States played an active role. During this time, the establishment of a permanent international criminal court began to receive near unanimous support in the United Nations. The only countries that were willing to go on record as opposing the establishment of an ICC were the few states that the United States had labeled "persistent human rights violators" or "terrorist supporting states."

Thus, on the eve of the Rome Diplomatic Conference in the summer of 1998, both the U.S. Congress and the Clinton Administration indicated that they were in favor of an ICC if the right protections were built into its statute. As David Scheffer, then U.S. Ambassador-at-Large for War Crimes Issues, reminded the Senate Foreign Relations Committee on July 23, 1998: "Our experience with the establishment and operation of the International Criminal Tribunals for the former Yugoslavia and Rwanda had convinced us of the merit of creating a permanent court that could be more quickly available for investigations and prosecutions and more cost-efficient in its operation."

The Politics of Rome

The Rome Diplomatic Conference represented a tension between the United States, which sought a Security Council-controlled Court, and most of the other countries of the

world which felt no country's citizens who are accused of serious war crimes or genocide should be exempt from the jurisdiction of a permanent international criminal court. These countries were concerned, moreover, about the possibility that the Security Council would once again slide into the state of paralysis that characterized the Cold War years, rendering a Security-Council controlled court a nullity. The justification for the American position was that, as the world's greatest military and economic power, more than any other country the United States is expected to intervene to halt humanitarian catastrophes around the world. The United States' unique position renders U.S. personnel uniquely vulnerable to the potential jurisdiction of an international criminal court. In sum, the U.S. Administration feared that an independent ICC Prosecutor would turn out to be (in the words of one U.S. official) an "international Ken Starr" who would bedevil U.S. military personnel and officials, and frustrate U.S. foreign policy.

Many of the countries at Rome were in fact sympathetic to the United States' concerns. Thus, what emerged from Rome was a Court with a two-track system of jurisdiction. Track one would constitute situations referred to the Court by the Security Council. This track would create binding obligations on all states to comply with orders for evidence or the surrender of indicted persons under Chapter VII of the U.N. Charter. This track would be enforced by Security Council imposed embargoes, the freezing of assets of leaders and their supporters, and/or by authorizing the use of force. It is this track that the United States favored, and would be likely to utilize in the event of a future Bosnia or Rwanda. The second track would constitute situations referred to the Court by individual countries or the ICC Prosecutor. This track would have no built in process for enforcement, but rather would rely on the good-faith cooperation of the Parties to the Court's statute. Most of the delegates in Rome recognized that the real power was in the first track. But the United States still demanded protection from the second track of the Court's jurisdiction. In order to mollify U.S. concerns, the following protective mechanisms were incorporated into the Court's Statute at the urging of the United States:

First, the Court's jurisdiction under the second track would be based on a concept known as "complementarity" which was defined as meaning the court would be a last resort which comes into play only when domestic authorities are unable or unwilling to prosecute. At the insistence of the United States, the delegates at Rome added teeth to the concept of complementarity by providing in Article 18 of the Court's Statute that the Prosecutor has to notify states with a prosecutive interest in a case of his/her intention to commence an investigation. If, within one month of notification, such a state informs the Court that it is investigating the matter, the Prosecutor must defer to the State's investigation, unless it can convince the Pre-Trial Chamber that the investigation is a sham. The decision of the Pre-Trial Chamber is subject to interlocutory appeal to the Appeals Chamber.

Second, Article 8 of the Court's Statute specifies that the Court would have jurisdiction only over "serious" war crimes that represent a "policy or plan." Thus, random acts of U.S. personnel involved in a foreign peacekeeping operation would not be subject to the Court's jurisdiction. Neither would one-time incidents such as the July 3, 1988 accidental downing of the Iran airbus by the *USS Vincennes* or the August 20, 1998 U.S. attack on the Al Shiffa suspected chemical weapons facility in Sudan that turned out to be a pharmaceutical plant.

Third, Article 15 of the Court's Statute guards against spurious complaints by the ICC prosecutor by requiring the approval of a three-judge pre-trial chamber before the prosecution can launch an investigation. Further, the decision of the chamber is subject to interlocutory appeal to the Appeals Chamber.

Fourth, Article 16 of the Statute allows the Security Council to affirmatively vote to postpone an investigation or case for up to twelve months, on a renewable basis. While this does not amount to the individual veto the United States had sought, this does give the United States and the other members of the Security Council a collective veto over the Court.

The United States Delegation played hard ball in Rome and got just about everything it wanted, substantially weakening the ICC in the process. As Ambassador Scheffer told the Senate Foreign Relations Committee: "The U.S. delegation certainly reduced exposure to unwarranted prosecutions by the international court through our successful efforts to build into the treaty a range of safeguards that will benefit not only us but also our friends and allies." These protections proved sufficient for other major powers including the United Kingdom, France and Russia, which joined 117 other countries in voting in favor of the Rome Treaty. But without what would amount to an iron-clad veto of jurisdiction over U.S. personnel and officials, the United States felt compelled to join China, Libya, Iraq, Israel, Qatar and Yemen as the only seven countries voting in opposition to the Rome Treaty.

It is an open secret that there was substantial dissension within the U.S. Delegation (especially among Department of State and Department of Justice representatives) about whether to oppose the ICC and that the position of the Secretary of Defense ultimately carried the day. As a former Republican member of Congress, there has been conjecture that Secretary of Defense William Cohen was influenced by Senator Jesse Helms (R-NC), a vocal opponent of the ICC. President Clinton, for his part, had proven to be uniquely vulnerable on issues affecting the military due to his record as a Vietnam "draft dodger" and his unpopular stand on gays in the military. Thus, rather than focus his attention on the negotiations in Rome as they came to a head, Clinton immersed himself in a historic trip to China during the Rome Conference. And in the midst of several breaking White House scandals in the summer of 1998, there was to be no last minute rescue of the Rome Treaty by Vice President Al Gore as had been the case with the Kyoto Climate Accord a year earlier.

The Question of ICC Jurisdiction over the Nationals of Non-Party States

Once it decided that it would not sign the Court's Statute, the primary goal of the United States government (still bowing to the concerns of the Pentagon) was to prevent the ICC from being able to exercise jurisdiction over U.S. personnel and officials. As Ambassador Scheffer explained to the Senate Foreign Relations Committee: "We sought an amendment to the text that would have required ... the consent of the state of nationality of the perpetrator be obtained before the court could exercise jurisdiction. We asked for a vote on our proposal, but a motion to take no action was overwhelmingly carried by the vote of participating governments in the conference." Had the U.S. amendment been adopted, the United States could have declined to sign the Rome Statute, thereby ensuring its immunity from the second track of the court's jurisdiction,

but at the same time permitting the United States to take advantage of the first track of the Court's jurisdiction (Security Council referrals) when it was in America's interest to do so.

Having lost that vote, the U.S. Administration began to argue that international law prohibits an ICC from exercising jurisdiction over the nationals of non-parties. Thus, Ambassador Scheffer told the Senate Foreign Relations Committee that "the treaty purports to establish an arrangement whereby U.S. armed forces operating overseas could be conceivably prosecuted by the international court even if the United States has not agreed to be bound by the treaty. ... This is contrary to the most fundamental principles of treaty law" as set forth in the Vienna Convention on the Law of Treaties. Based on the U.S. objection to the ICC's exercise of jurisdiction over nationals of non-party states, Ambassador Scheffer expressed the "hope that on reflection governments that have signed, or are planning to sign, the Rome treaty will begin to recognize the proper limits to Article 12 and how its misuse would do great damage to international law and be very disruptive to the international political system." Senator Helms later quoted this "Vienna Convention" argument in the preamble of his anti-ICC legislation, which is discussed below.

Diplomats and scholars have been quick to point out the flaws in Scheffer's argument. First, it is a distortion to say that the Rome Statute purports to impose obligations on non-party States. Under the terms of the Rome Treaty, the Parties are obligated to provide funding to the ICC, to extradite indicted persons to the ICC, to provide evidence to the ICC, and to provide other forms of cooperation to the Court. Those are the only obligations the Rome Treaty establishes on States, and they apply only to State Parties. Thus, Ambassador Scheffer's objection is not really that the Rome Treaty imposes obligations on the United States as a non-party, but that it affects the sovereignty interests of the United States -- an altogether different matter which does not come within the Vienna Convention's proscription. Moreover, although States have a sovereignty interest in their nationals, especially state officials and employees, sovereignty does not provide a basis for exclusive jurisdiction over crimes committed by a State's nationals in a foreign country. Nor does a foreign indictment of a State's nationals for acts committed in the foreign country constitute an impermissible intervention in the State's internal affairs.

Second, the exercise of the ICC's jurisdiction over nationals of non-party states who commit crimes in the territory of a State parties is well grounded in both the universality principle and the territoriality principle of jurisdiction under international law. The core crimes within the ICC's jurisdiction -- genocide, crimes against humanity, and war crimes -- are crimes of universal jurisdiction. The negotiating record of the Rome Treaty indicates that the consent regime was layered upon the ICC's inherent universal jurisdiction over these crimes, such that with the consent of the State in whose territory the offense was committed, the Court has the authority to issue indictments over the nationals of non-party States. The Nuremberg Tribunal and the ad hoc Tribunal for the former Yugoslavia provide precedent for the collective delegation of universal jurisdiction to an international criminal court without the consent of the State of the nationality of the accused.

In addition, international law recognizes the authority of the state where a crime occurs to delegate its territorial-based jurisdiction to a third State or international Tribunal. Careful analysis of the European Convention on the Transfer of Proceedings

indicates that the consent of the State of the nationality of the accused is not a prerequisite for the delegation of territorial jurisdiction under the Convention, and therefore that it provides a precedent for the ICC's jurisdictional regime. There are no compelling policy reasons why territorial jurisdiction cannot be delegated to an international court and the Nuremberg Tribunal provides the precedent for the collective exercise of territorial as well as universal jurisdiction.

Third, Scheffer's argument is inconsistent with past U.S. exercise of universal jurisdiction granted by anti-terrorism, anti-narcotic trafficking, torture, and war crimes treaties over the nationals of states which are not party to these treaties. In light of the past U.S. practice, the claim that a treaty cannot lawfully provide the basis of criminal jurisdiction over the nationals of non-party states, while directed against the ICC, has the potential of negatively effecting existing U.S. law enforcement authority with respect to terrorists, narco-traffickers, torturers, and war criminals.

An Effort to Modify the Rome Treaty

During hearings before the Senate Foreign Relations Committee on June 23, 1998, Senator Jesse Helms (R-N.C.) urged the Administration to take the following steps in opposition to the establishment of an international criminal court: First, that it announce that it would withdraw U.S. troops from any country that ratified the International Criminal Court Treaty. Second, that it veto any attempt by the Security Council to refer a matter to the Court's jurisdiction. Third, that it block any international organization in which it is a member from providing any funding to the International Criminal Court. Fourth, that it renegotiate its Status of Forces Agreements and Extradition Treaties to prohibit its treaty partners from surrendering U.S. nationals to the International Criminal Court. Finally, that it provide no U.S. soldiers to any regional or international peacekeeping operation where there is any possibility that they will come under the jurisdiction of the International Criminal Court. According to Senator Helms, these measures would ensure that the Rome Treaty will be "dead on arrival."

Ambassador Scheffer was non-committal as to the adoption of Senator Helms' proposals, saying only that "the Administration hopes that in the years ahead other governments will recognize the benefits of potential American participation in the Rome treaty and correct the flawed provisions in the treaty." In the meantime, he added, "more ad hoc judicial mechanisms will need to be considered." Ambassador Scheffer's testimony suggested that the U.S. response to the International Criminal Court might parallel its efforts to reform the 1982 Law of the Sea Convention. The United States refused to sign that treaty until amendments were adopted concerning its seabed mining regime. In 1994, the signatories to the Law of the Sea Convention adopted an Agreement containing the revisions sought by the United States and the United States signed the treaty, which still awaits Senate advice and consent to ratification.

In the following months, the United States tried to secure international backing for a clause to be included in the agreement that was being prepared to govern the relations between the United Nations and the ICC. Without actually amending the ICC Statute, the U.S. proposal would prevent the ICC from taking custody of official personnel of non-party states where the state has acknowledged responsibility for the act in question. This was a major walk back from its earlier position, as this proposal would not prevent the

ICC from indicting nationals of non-party states, only prosecuting them. That the Clinton Administration was willing to float this proposal indicated that it was no longer promoting Ambassador Scheffer's questionable reading of the Vienna Convention.

Prior to the Rome Diplomatic Conference, many countries felt that the success of a permanent international criminal court would be in question without U.S. support. But as it became increasingly obvious that the United States was not going to sign the Rome Treaty, the willingness to compromise began to evaporate, culminating in the overwhelming vote against the U.S. amendment requiring the consent of the state of nationality at the Rome Diplomatic Conference. The United States soon discovered that it would have no more luck with the issue through a series of bilateral negotiations than it did in the frenzied atmosphere that characterized the final days of the Rome Conference.

"If You Can't Beat 'em, Join 'em"

By late 2000, the Clinton Administration had come to realize that the ICC would ultimately enter into force with or without U.S. support. By December 2000, a growing number of countries had ratified the Rome Treaty, and over 120 countries had signed it, indicating their intention to ratify. Sixty ratifications are necessary to bring it into force. The Signatories included every other NATO State except for Turkey, three of the Permanent Members of the Security Council (France, Russia, and the United Kingdom), and both of the United States' closest neighbors (Mexico and Canada). Even Israel, which had been the only Western country to join the United States in voting against the ICC Treaty in Rome in 1998, later changed its position and announced that it would sign the treaty. Israel's change of position was made possible when the ICC Prep Con promulgated definitions of the crimes over which the ICC has jurisdiction, which clarified that the provision in the ICC Statute making altering the demographics of an occupied territory a war crime would be interpreted no more expansively than the existing law contained in the Geneva Conventions.

In the waning days of his presidency, William J. Clinton authorized the U.S. signature of the Rome Treaty, making the United States the 138th country to sign the treaty by the December 31st deadline. According to the ICC Statute, after December 31, 2000, States must accede to the Treaty, which requires full ratification -- something that was not likely for the United States in the near term given the current level of Senate opposition to the Treaty. While signature is not the equivalent of ratification, it set the stage for U.S. support of Security Council referrals to the International Criminal Court, as well as other forms of U.S. cooperation with the Court. In addition, it put the United States in a better position to continue to seek additional provisions to protect American personnel from the court's jurisdiction.

Hostile Outsider or Influential Insider?

Clinton's last minute action drew immediate ire from Senator Jesse Helms, then Chairman of the U.S. Senate Foreign Relations Committee, who has been one of the treaty's greatest opponents. In a Press Release, Helms stated: "Today's action is a blatant attempt by a lame-duck President to tie the hands of his successor. Well, I have a message for the outgoing President. This decision will not stand. I will make reversing

this decision, and protecting America's fighting men and women from the jurisdiction of this international kangaroo court, one of my highest priorities in the new Congress."

Helms responded by pushing for passage of the "Servicemembers Protection Act," Senate Bill 2726, which would prohibit any U.S. Government cooperation with the ICC, and cut off U.S. military assistance to any country that has ratified the ICC Treaty (with the exception of major U.S. allies), as long as the United States has not ratified the Rome Treaty. Further, the proposed legislation provides that U.S. military personnel must be immunized from ICC jurisdiction before the U.S. participates in any U.N. peacekeeping operation. The proposed legislation also authorizes the President to use all means necessary to release any U.S. or allied personnel detained on behalf of the Court.

The essence of this debate, then, is whether the national security and foreign policy interests of the United States are better served by playing the role of a hostile outsider (as embodied in Senator Helms' and Lee Casey's "American Servicemembers Protection Act"), or by playing the role of an influential insider (as it has done, for example, with the Yugoslavia Tribunal). In deciding this issue, one must carefully and objectively examine the consequences that would flow from the hostile approach.

First, the hostile approach would transform American exceptionalism into unilateralism and/or isolationism by preventing the United States from participating in U.N. peacekeeping operations and cutting off aid to many countries vital to U.S. national security. This would be especially foolhardy at this moment in history when the United States is working hard to expand and hold together an international coalition against the terrorist organizations and their state supporters that were involved in the terrorist attacks of September 11, 2001.

Further, overt opposition to the ICC would erode the moral legitimacy of the United States, which has historically been as important to achieving U.S. foreign policy goals as military and economic might. A concrete example of this was the recent U.S. loss of its seat in the U.N. Commission of Human Rights, where several western countries cited current U.S. opposition to the ICC as warranting their vote against the United States.

Perversely, the approach embodied in Senator Helms' legislation could even turn the United States into a safe haven for international war criminals, since the U.S. would be prevented from surrendering them directly to the ICC or indirectly to another country which would surrender them to the ICC. And the idea that the President should use all means necessary to release any U.S. or allied personnel detained on behalf of the Court is the height of folly, as reflected in headlines describing the legislation as the "Hague Invasion Act."

Second, under the hostile approach, the United States would be prevented from being able to take advantage of the very real benefits of an ICC. The experience with the Yugoslavia Tribunal has shown that, even absent arrests, an international indictment has the effect of isolating rogue leaders, strengthening domestic opposition, and increasing international support for sanctions and even use of force. The United States has recognized these benefits in pushing for the subsequent creation of the ad hoc tribunals for the Rwanda, Sierra Leone, and Cambodia, as well as proposing the establishment of a tribunal for Iraq. But the establishment of the ICC will signal the end of the era of Security Council-created tribunals, since even our friends and allies at the U.N. will insist that situations involving genocide, crimes against humanity, and war crimes be referred to the existing ICC rather than additional ad hoc tribunals. Thus, when the next Rwanda

occurs, the United States will not be able to employ the very useful tool of international criminal justice unless it works through the ICC.

To bring home this point, consider that if the ICC had been in existence on September 11, 2001, the United States and the other members of the Security Council could have referred the case of Osama bin Laden and the other masterminds of the attacks on the World Trade Center and Pentagon to the ICC, rather than creating U.S.-led military tribunals which have been subject to harsh criticism in the United States and abroad. An ICC indictment of these terrorists for their "crimes against humanity" would have strengthened foreign support for the American intervention into Afghanistan and would have deflected bin Laden's attempt to characterize the military action as an American attack against Islam. And if any of the perpetrators fell into any country's custody, an ICC would present a neutral fora for their prosecution that would have enjoyed the support of the Islamic world.

Opponents of the ICC have suggested that without U.S. support, the ICC is destined to be impotent and irrelevant because it will lack the power of the Security Council to enforce its arrest orders. But as the experience of the ad hoc Tribunals for Rwanda, Sierra Leone, and most recently Yugoslavia (with the surrender of Milosevic) has proven, in most cases where an ICC is needed, the perpetrators are no longer in power and are in the custody of a new government or of nearby states which are perfectly willing to hand them over to an international tribunal absent Security Council action. Moreover, the Security Council has been prevented (largely by Russian veto threats) from taking any action to impose sanctions on States that have not cooperated with the Yugoslavia Tribunal despite repeated pleas from the Tribunal's Prosecutor and Judges that it do so. Indeed, in the Yugoslavia context, where the perpetrators were still in power when the Tribunal was established, it was not action by the Security Council, but rather the threatened withholding of foreign aid and IMF loans that have induced Croatia and Serbia to hand over indictees. This indicates that, unlike the League of Nations (which United States officials have frequently referred to in this context), the ICC is likely to be a thriving institution even without United States participation. In other words, the United States may actually need the ICC more than the ICC needs the United States.

Third, the United States achieves no real protection from the ICC by remaining outside the ICC regime. This is because, as explained above, Article 12 of the Rome Statute empowers the ICC to exercise jurisdiction over nationals of non-party States who commit crimes in the territory of State Parties. Further, in its Pollyanna-ish refusal to recognize the legitimacy of the ICC's exercise of jurisdiction over the nationals of non-party states, opponents of the ICC have resorted to a questionable legal interpretation which is not only unlikely to sway the ICC or its founding members, but also has the potential of undermining important U.S. law enforcement interests.

If U.S. officials can be indicted by the ICC whether or not the U.S. is a party to the Rome Treaty, than the United States preserves very little by remaining outside the treaty regime, and could protect itself better by signing the treaty. This has been proven to be the case with the Yugoslavia Tribunal, which the U.S. has supported with contributions exceeding \$15 million annually, the loan of top-ranking investigators and lawyers from the federal government, the support of troops to permit the safe exhumation of mass graves, and even the provision of U-2 surveillance photographs to locate the places where Serb authorities had tried to hide the evidence of its wrongdoing. This policy bore fruit

when the International Prosecutor opened an investigation into allegations of war crimes committed by NATO during the 1999 Kosovo intervention. Despite the briefs and reports of reputable human rights organizations arguing that NATO had committed breaches of international humanitarian law, on June 8, 2000, the International Prosecutor issued a report concluding that charges against NATO personnel were not warranted. This is not to suggest that the United States coopted the Yugoslavia Tribunal; but when dealing with close calls regarding application of international humanitarian law it is obviously better to have a sympathetic Prosecutor and Court than a hostile one.

Opponents of the ICC like to raise the specter of politicized indictments against American or Israeli officials drafted by prosecutors and confirmed by judges from countries that oppose our policies. A close examination of the list of the countries that have so far ratified the ICC, however, reveals that the ICC will be dominated not by our diplomatic opponents, but instead by our closest friends and allies. Of these 46 ratifying countries, nineteen are NATO or Western European allies, nine are Latin American and Caribbean countries with which the U.S. enjoys close relations, and four are U.S.-friendly Pacific island countries such as New Zealand and the Marshall Islands. With the possible exception of the Central African Republic, no country on the list would give a U.S. foreign policy-maker any cause for concern. On the other hand, the countries that most frequently oppose the United States in the United Nations (Asian and middle-eastern countries such as China, Cuba, Iraq, Libya, North Korea, Syria, and the Sudan) are the countries least likely to ratify the ICC Statute, so they will not be able to participate in the ICC Assembly of Parties or nominate judges for the ICC's bench or select the Court's Prosecutor. Consequently, even if the U.S. does not ratify the Rome Treaty, the reality is that the ICC is going to be a very U.S.-friendly tribunal, unless, that is, the United States figuratively (and literally) wages war against the institution as suggested in Senator Helms' legislation.

Rebutting the Constitutional Arguments Against the ICC

Much of argument against the ICC concerns the constitutionality of U.S. participation in the Court. But, as Yale Law School constitutional Law professor Ruth Wedgwood has written, there are three reasons why we must conclude there "is no forbidding constitutional obstacle to U.S. participation in the Rome Treaty."

First, the ICC includes procedural protections negotiated by the U.S. Department of Justice representatives at Rome that closely follow the guarantees and safeguards of the American Bill of Rights. These including a Miranda-type warning, the right to defense counsel, reciprocal discovery, the right to exculpatory evidence, the right to speedy and public trial, the right to confront witnesses, and a prohibition on double jeopardy.

The only significant departures from U.S. law are that the ICC employs a bench trial before three judges rather than a jury, and it permits the Prosecutor to appeal an acquittal (but not to retry a defendant after the appeals have been decided). There were good reasons for these departures: For grave international crimes, qualified judges who issue detailed written opinions should be preferred over lay persons who issue unwritten verdicts. And if the trial judges misinterpret the applicable international law, whether in favor or to the detriment of the accused, an appeal is important to foster uniform interpretation of international criminal law.

Second, the United States has used its treaty power in the past to participate in other international tribunals that have had jurisdiction over U.S. nationals, such as the Yugoslavia Tribunal which was established by the Security Council pursuant to a treaty - - the U.N. Charter. Like the ICC, the Yugoslavia Tribunal employs judges rather than a jury, and permits the Prosecutor to appeal acquittals. Moreover, the U.S. Congress has approved legislation authorizing U.S. courts to extradite indicted persons (including those of U.S. nationality) to the Yugoslavia Tribunal where there exists an order for their arrest and surrender. And this legislation has been upheld in a recent federal court case.

Third, the offenses within the ICC's jurisdiction would ordinarily be handled through military courts-martial, which do not permit jury trial, or through extradition of offenders to foreign nations, which often utilize bench trials and do not employ American notions of due process. It should be noted that U.S. federal courts have upheld the extradition of Americans to such foreign jurisdictions for actions that took place on U.S. soil but had an effect abroad.

At the conclusion of the Senate Foreign Relations Committee's hearings on the ICC in July 1998, the Committee submitted several questions about the Constitutionality of U.S. participation in the ICC for the Department of Justice to answer for the record. The answers were prepared by Lee Casey's former colleagues in the Department's Office of Legal Counsel. This part of the Committee's published report should be required reading for anyone who has serious concerns about the Constitutionality of the ICC. The Department of Justice specifically found that U.S. ratification of the Rome Treaty and surrender of persons including U.S. nationals to the ICC would not violate Article III, section 2 of the Constitution nor any of the provisions of the Bill of Rights.

Conclusion

Opponents of the ICC base their arguments on the assumption that it is not too late for America to prevent the ICC from coming into existence or to marginalize the Court so that it exists as a non-entity. But the spate of ratifications and the numerous powerful countries that are supporting the ICC (including virtually every other member of NATO) indicate that the ICC is a serious international institution that the United States is very soon going to have to learn to live with.

The risks to U.S. service members as well as the potential constitutional problems presented by the ICC have been greatly exaggerated by American opponents of the ICC, while both the practical usefulness of the ICC and the safeguards contained in the ICC Statute have been significantly undervalued. To the extent that American fears of politicized prosecutions are valid, U.S. opposition to the ICC will only increase the likelihood that the ICC will be more hostile than sympathetic to U.S. positions. And, by opposing the Court, the United States may actually engender more international hostility toward U.S. foreign policy than would have resulted from an indictment by the Court. Thus, whether or not the U.S. is able to achieve additional safeguards to prevent the ICC from exercising jurisdiction over U.S. personnel, it will be in the interests of U.S. national security and foreign policy to support, rather than oppose, the ICC.

It is important to recognize that supporting the ICC does not require immediate U.S. ratification of the Rome Treaty. Perhaps it would be prudent for the United States to let the Court prove itself over a period of years before sending the treaty to the Senate. But

in the meantime, when the next Rwanda-like situation comes along, the United States will find value in having the option of Security Council referral to the ICC in its arsenal of foreign policy responses -- something the United States can do even if it does not ratify the Rome Treaty so long as it does not enact a version of Senator Helms' and Lee Casey's anti-ICC legislation.

B. Lee A. Casey, *The Case Against Supporting the International Criminal Court*, Washington University School of Law, Whitney R. Harris Institute for Global Legal Studies, Washington University in St. Louis, International Debate Series, No. 1 (2002).

The United States should not ratify the ICC Treaty. There are two fundamental objections to American participation in the ICC regime. First, U.S. participation would violate our Constitution by subjecting Americans to trial in an international court for offenses otherwise within the judicial power of the United States, and without the guarantees of the Bill of Rights. Second, our ratification of the Rome Treaty would constitute a profound surrender of American sovereignty, undercutting our right of self-government - the first human right, without which all others are simply words on paper, held by grace and favor, and no rights at all.

With respect to the Constitutional objections, by joining the ICC Treaty, the United States would subject American citizens to prosecution and trial in a court that was not established under Article III of the Constitution for criminal offenses otherwise subject to the judicial power of the United States. This, it cannot do. As the Supreme Court explained in the landmark Civil War case of *Ex parte Milligan* (1866), reversing a civilian's conviction by a military tribunal, "[e]very trial involves the exercise of judicial power," and courts not properly established under Article III can exercise "no part of the judicial power of the country."

This rationale is equally, and emphatically, applicable to the ICC, a court where neither the prosecutors nor the judges would have been appointed by the President, by and with the advice and consent of the Senate, and which would not be bound by the fundamental guarantees of the Bill of Rights. In fact, individuals brought before the ICC would only nominally enjoy the rights we in the United States take for granted.

For example, the ICC Treaty guarantees defendants the right "to be tried without undue delay." In the International Criminal Tribunal for the Former Yugoslavia (an institution widely understood to be a model for the permanent ICC), and which also guarantees this "right," defendants often wait more than a year in prison before their trial begins, and many years before a judgment actually is rendered. The Hague prosecutors actually have argued that up to five years would not be too long to wait IN PRISON for a trial, citing case law from the European Court of Human Rights supporting their position.

Such practices, admittedly, have a long pedigree, but they mock the presumption of innocence. Under U.S. law, the federal government must bring a criminal defendant to trial within three months, or let him go.

By the same token, the right of confrontation, guaranteed by the Sixth Amendment, includes the right to know the identity of hostile witnesses, and to exclude most "hearsay" evidence. In the Yugoslavia Tribunal, both anonymous witnesses and

virtually unlimited hearsay evidence have been allowed at criminal trials, *large portions of which are conducted in secret*. Again, this is the model for the ICC.

Similarly, under the Constitution's guarantee against double jeopardy a judgment of acquittal cannot be appealed. Under the ICC statute, acquittals are freely appealable by the prosecution, as in the Yugoslav Tribunal, where the Prosecutor has appealed every judgment of acquittal.

In addition, the ICC would not preserve the right to a jury trial. The importance of this right cannot be overstated. Alone among the Constitution's guarantees, the right to a jury trial was stated twice, in Article III (sec. 2) and in the Sixth Amendment. It is not merely a means of determining facts in a judicial proceeding. It is a fundamental check on the abuse of power. As Justice Joseph Story explained: "The great object of a trial by jury in criminal cases is to guard against a spirit of oppression and tyranny on the part of rulers, and against a spirit of violence and vindictiveness on the part of the people.⁶ It is "part of that admirable common law, which had fenced round, and interposed barriers on every side against the approaches of arbitrary power." That said, the exclusion of jury trials from the ICC is not surprising, for that Court invites the exercise of arbitrary power by its very design.

The ICC will act as policeman, prosecutor, judge, jury, and jailor - all of these functions will be performed by its personnel, with nothing but bureaucratic divisions of authority, and no division of interest. There would be no appeal from its judgments. If the ICC abuses its power, there will be no recourse. From first to last, the ICC will be the judge in its own case. It will be more absolute than any dictator. As an institution, the ICC is fundamentally inconsistent with the political, philosophical, and legal traditions of the United States.

ICC supporters suggest that U.S. participation in this Court would not violate the Constitution because it would not be "a court of the United States," to which Article III and the Bill of Rights apply. They often point to cases in which the Supreme Court has allowed the extradition of citizens to face charges overseas. There are, however, fundamental differences between United States participation in the ICC Treaty Regime and extradition cases, where Americans are sought for crimes committed abroad. If the U.S. joined the ICC Treaty, the Court could try Americans who never have left the United States, for actions taken entirely within our borders.

A hypothetical, stripped of the emotional overlay inherent in "war crimes" issues, can best illustrate the constitutional point here: The Bill of Rights undoubtedly impedes efficient enforcement of the drug laws - also a subject of international concern. Could the federal government enter a treaty with Mexico and Canada, establishing an offshore "Special Drug Control Court," which would prosecute and try all drug offenses committed anywhere in North America, without the Bill of Rights guarantees? Could the federal government, through the device of a treaty, establish a special overseas court to try sedition cases - thus circumventing the guarantees of the First Amendment.

Fortunately, the Supreme Court has never faced such a case. However, in the 1998 case of *United States v. Balsys*, the Court suggested that, where a prosecution by a foreign court is, at least in part, undertaken on behalf of the United States, for example, 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 Bill of Rights would apply "*simply because that prosecution [would not*

be] fairly characterized as distinctly >foreign' The point would be that the prosecution was as much on behalf of the United States as of the prosecuting nation... "

This would, of course, be exactly the case with the ICC. If the United States became a "State Party" to the ICC Treaty, any prosecutions undertaken by the Court would be "as much on behalf of the United States as of any other State party. Since the full and undiluted guarantees of the Bill of Rights would not be available in the ICC, the United States cannot, constitutionally, sign and ratify the ICC treaty.

ICC supporters also have argued that the U.S. should sign and ratify the Rome Treaty because the Court would be directed against people like Saddam Hussein and Slobodan Milosevic, and not against the United States. Here, as pretty much everywhere, the past is the best predictor of the future. We already have seen this particular drama staged at the Yugoslav Tribunal. Even though that Tribunal was established to investigate crimes committed during 1991-1995 Yugoslav conflict, and even though NATO's air war against Serbia was fought on entirely humanitarian grounds, and even though it was conducted with the highest level of technical proficiency in history, the Hague prosecutors nevertheless undertook a *politically motivated investigation - motivated by international humanitarian rights activists along with Russia and China - of NATO's actions based upon the civilian deaths that resulted.*

At the end of this investigation, the prosecutors gave NATO a pass not because, in their view, there were no violations, but because "[i]n all cases, either the law is not sufficiently clear or investigations are unlikely to result in the acquisition of sufficient evidence to substantiate charges against high level accused or against lower accused for particularly heinous offenses."

Significantly, in their report the prosecutors openly acknowledged the very elastic nature of the legal standards in this area, further highlighting the danger that the United States will be the subject of such politically motivated prosecutions in the future: "[t]he answers to these question [regarding allegedly excessive civilian casualties] are not simple. It may be necessary to resolve them on a case-by-case basis, *and the answers may differ depending on the background and values of the decision-maker.* It is unlikely that a human rights lawyer and an experienced combat commander would assign the same relative values to military advantage and to injury to noncombatants. Further, it is unlikely that military commanders with different doctrinal backgrounds and differing degrees of combat experience or national military histories would always agree in close cases."

These are, in fact, "will-build-to-suit" crimes. Whether prosecutions are brought against American officials will depend entirely upon the motivations and political agenda of the ICC.

In response, ICC supporters claim that we can depend upon the professionalism and good will of the Court's personnel. One of the ICC=s strongest advocates, former Yugoslav Tribunal Prosecutor Louise Arbour has argued for a powerful Prosecutor and Court, suggesting that "an institution should not be constructed on the assumption that it will be run by incompetent people, acting in bad faith from improper purposes."

The Framers of our Constitution understood the fallacy of this argument probably better than any other group in history. If there is one particular American contribution to the art of statecraft, it is the principle - incorporated into the very fabric of our Constitution - that *the security of our rights cannot be trusted to the good intentions of*

our leaders. By its nature, power is capable of abuse and people are, by nature, flawed. As James Madison wrote "the great difficulty lies in this: you must first enable the government to control the governed; and in the next place *oblige it to control itself.* A The ICC would not be obliged to control itself.

It is also often asserted that the principle of "complementarity," found in Article 17 of the Rome Treaty, will check the Court's ability to undertake prosecution of Americans. This is the principle that prohibits the ICC from taking up a case if the appropriate national authorities investigate and prosecute the matter. In fact, this limit on the ICC=s power is, in the case of the United States, entirely illusory.

First, as with all other matters under the Rome Treaty, it will be solely within the discretion of the ICC to interpret and apply this provision. Second, under Article 17, the Court can pursue a case wherever it determines that the responsible State was "unwilling or unable to carry out the investigation or prosecution." In determining whether a State was "unwilling" the Court will consider whether the national proceedings were conducted "independently or impartially." The United States can never meet that test as an institutional matter. Under the Constitution, the President is both the Chief Executive, i.e., the chief law enforcement officer, and the Commander-in-Chief of the armed forces. In any particular case, both the individuals investigating and prosecuting, and the individuals being investigated and prosecuted, work for the same man. Moreover, under command responsibility theories, the President is always a potential - indeed, a likely, target of any investigation. The ICC will simply note that an individual cannot "impartially" investigate himself, and it will be full steam ahead. As a check on the ICC, complementarity is meaningless.

Finally, it's important to understand exactly what is at stake here. Today, the officials of the United States are ultimately accountable for their actions to the American electorate. If the United States were to ratify the ICC Treaty this ultimate accountability would be transferred from the American people to the ICC in a very real and immediate way - through the threat of criminal prosecution and punishment. The policies implemented and actions taken by our national leaders, whether at home or abroad, could be scrutinized by the ICC and punished if, *in its opinion*, criminal violations had occurred. As Alexis de Tocqueville wrote, "[h]e who punishes the criminal is . . . the real master of society." Ratification of the ICC Treaty would, in short, constitute a profound surrender of American sovereignty - our right of self-government -the first human right. Without self-government, the rest are words on paper, held by grace and favor, and not rights at all.

That surrender would be to an institution that does not share our interests or values. There is no universally recognized and accepted legal system on the international level, particularly in the area of due process, as the Rome Treaty itself recognizes in requiring that, in the selection of judges, "the principal legal systems of the world," should be represented. Moreover, although a number of Western states have signed this treaty, so have states such as Algeria, Iran, Nigeria, Sudan, Syria and Yemen. According to the U.S. State Department, each of these states has been implicated in the use of torture or extra judicial killings, or both. Yet, each of them would have as great a voice as the United States in selecting the ICC=s Prosecutor and Judges and in the Assembly of State Parties.

This is especially troubling because, as the ICTY Prosecutor conceded, who is and who is not a war criminal is very much a matter of your point of view. And I'd like to give you a fairly poignant example that I learned of, actually, while practicing before the ICTY.

In this case there was a young officer, 20 or 21 years old, who commanded a detachment of regular soldiers, along with a group of irregulars. Irregulars are, of course, always a problem. I think everyone pretty much agrees that, for example, the worst atrocities in Bosnia were committed by irregulars. At any rate, these irregulars were clearly under the officer's command when they all ran into a body of enemy troops.

There was a short, sharp firefight. A number of the enemy were killed or wounded, and the rest threw down their arms and surrendered. At that point, the officer entirely lost control of the situation. His irregulars began to kill the wounded and then the rest of the prisoners -- with knives and axes actually.

After a good deal of confusion, the officer managed to form up his regulars around the remaining prisoners, but about a dozen were killed. Now, under our system of military justice, the perpetrators would be prosecuted, but the officer would very likely not be. He gave no order for the killings, and took some action to stop it.

However, under the command responsibility and "knowing presence" theories now current at the ICTY, the ICC's model, this officer is guilty of a war crime. The fact that he did make some attempt to prevent the killing would certainly be taken into account, but very likely as a matter of mitigation at sentencing.

At any rate, this is a real case. It didn't, however, happen in Central Bosnia, or Kosovo, or Eastern Slavonia, and the individuals involved were not Serbs, Croats, or Muslims. As a matter of fact, it happened in Western Pennsylvania. The soldiers were English subjects, at the time, and the irregulars were Iroquois Indians; their victims were French. The young officer was, as a matter of fact, from the county in which I live -- Fairfax, Virginia. And, for those of you who are students here at the University, his name -- Washington -- will grace each of your diplomas.

War is, inherently, a violent affair and the discretion whether to prosecute any particular case in which Americans are involved should be kept firmly in the hands of our institutions, to be made by individuals who are accountable to us for their actions. The ICC is inconsistent with our Constitution and inimical to our national interests. It is an institution of which we should have no part.

C. Fatou Bensouda: the woman who could redeem the international criminal court, *The Guardian*, June 14, 2012.



Times are hard for the International Criminal Court. It is nine years since it was established with notions of ending impunity for "unimaginable atrocities that deeply shock the conscience of humanity". The arrest in Libya last week of four members of the court's defence team, who were visiting Muammar Gaddafi's son, Saif al-Islam, marked a new low in the court's history.

But with only one conviction in its history, an exclusively African caseload, and relations with other African states also at breaking point, the court's reputation leaves much to be desired.

Into the fray steps Fatou Bensouda, the Gambian who on Friday becomes chief prosecutor – the second in the court's history and the first African woman.

Her most immediate task will be to resolve the standoff with Libya, amid concern for the welfare of the ICC envoys after the Libyan government said they had been placed in "preventive detention" in prison for 45 days during investigations into alleged threats to Libya's national security.

Alexander Khodakov, of Russia, Esteban Peralta Losilla, of Spain, Lebanese Helene Assaf and Australian Melinda Taylor were arrested after meeting Gaddafi, who is in detention and has been indicted by the ICC. They were held at an unknown location before being moved to a prison.

Human rights groups have strongly condemned the move by Libya, which they say violates international law and the immunity given to ICC staff, and claim that they have not had access to legal advice. "The detention of the four staff members of the international criminal court is unacceptable," said Mark Ellis, executive director of the International Bar Association. "Defence rights are essential for any meaningful judicial proceedings at the national and international levels and should be adhered to in the proceedings of Saif al-Islam Gaddafi's trial."

The detention comes after months of tension between the court and the Libyan government over where the toppled dictator's son and former spy chief, Abdullah al-Senussi should stand trial.

On the surface, it is hard to see how Bensouda, a public prosecutor and former attorney general of the Gambia, could be equipped to turn around the fortunes of the ICC, which is based in The Hague. Her country – with a population of only 1.7 million – is notorious as one of west Africa's last dictatorships, with opposition to President Yahya Jammeh's 18-year regime suppressed.

Yet among those who follow – and frequently criticise – the ICC, there is a surprising degree of faith in Bensouda's leadership, and a view that she has remained unscathed despite her professional relationships with Jammeh and the deeply unpopular outgoing chief prosecutor, the Argentinian Luis Moreno-Ocampo.

"I feel positive about Fatou's tenure as chief prosecutor," said Chidi Odinkalu, chairman of the Nigerian National Human Rights Commission. "Will she wave a magic wand and cure all the difficulties that exist at the ICC at the moment? No. Can she bring positive disposition over time to transforming the polluted atmosphere in which the institution has been operating in Africa? Absolutely."

Controversy surrounding the ICC has centred on its relationship with Africa. It is currently prosecuting suspects in seven "situations" – the Democratic Republic of the Congo, the Central African Republic, Uganda, Sudan, Kenya, Ivory Coast, and Libya.

The first three of these countries self-referred to the court. Even that was controversial: Moreno-Ocampo was accused of going soft on co-operative rulers by not prosecuting government forces.

But it is the remaining cases that have drawn the most withering criticism of "LMO", as he is affectionately known in the African legal community.

Moreno-Ocampo's exclusive focus on Africa – at a time when two other international courts, the International Criminal Tribunal for Rwanda and the Special Court for Sierra Leone, were also prosecuting Africans for crimes against humanity – has drawn extensive criticism. Opportunities to investigate abuses in Afghanistan, Colombia, Georgia, and Iraq have largely been passed up, prompting a widespread belief within Africa that the court is an imperialist organ of western governments.

A full-blown crisis in relations between the courts and the African Union was triggered by the decision to issue an arrest warrant for the Sudanese president Omar al-Bashir in 2009 for genocide, crimes against humanity and war crimes for his role in the situation in Darfur. After Moreno-Ocampo ignored an AU warning that attempting to arrest al-Bashir could undermine peace talks in Sudan, African member states retaliated by flouting the warrant, and welcoming al-Bashir into their jurisdictions.

Bensouda's popularity stems in no small part from the fact that she is not Moreno-Ocampo. "Fatou brings a different set of skills and temperament from her predecessor, and that is a positive thing" said Odinkalu. "She has a pretty difficult job given the state of relations between the ICC and African states – things are quite honestly abysmal."

Despite her close professional relationship with Moreno-Ocampo, she remains a popular choice. "A lot of people have said that Fatou has been a yes man – someone that just followed or went along with LMO's policies, but she has made it clear that while it is important to consolidate the gains made over the past nine years, there are things that could be improved," said Alpha Sesay, a Sierra Leonean lawyer based in The Hague for

the Open Society Justice Initiative. "I do really accept that things will be different under her."

"Fatou is someone who is ready to listen and provide answers. You can sense that this is a different regime from the past, that she wants to listen, and to have a dialogue," Sesay added.

Bensouda is also – crucially – African. "She qualified here in Nigeria but really made her name in the Gambia," said Odinkalu. "She did have a reputation as a principled but also sensitive and sensible leader of the bar and chief law officer of the country. She even came out of serving her stint at the justice ministry with her reputation intact ... in fact she is one of the very few who has."

"There is no question that the AU [African Union] is warming up to Fatou. How much further things go is going to depend a lot on her diplomatic skills," said Sesay. "And in that, she is going to be completely different from Moreno-Ocampo."

Many challenges remain. The first is to get Arab countries to sign up to the Rome Statute, which established the ICC – Tunisia stands alone as the only Arab nation to belong to the court. Libya, where acts committed by pro-Gaddafi forces during last year's uprising are before the court, has acted with aggressive defiance of its investigations, refusing to surrender Gaddafi.

Fatou inherits two cases instigated by Moreno-Ocampo at his own discretion – violations by forces loyal to former president Laurent Gbagbo in Ivory Coast, and the prosecution of six prominent figures for post-election violence in Kenya in 2007-9. Both are proceeding slowly and continue to attract controversy for their political ramifications.

Perhaps the most important task for Bensouda, international lawyers say, will be to change the court's approach towards victims. "People have the mistaken impression that it is just heads of state, motivated by their own self interest, who have criticised the ICC – it's not," said Odinkalu. "The first alarm bells were sounded by victims' communities – they have a sense of being used, abused, dumped and not cared for."

"Fatou's accession gives ICC an opportunity to redeem relationships with victims' communities, show them that it is capable of caring – she inherits a situation in which the ability to be deeply nuanced is needed and if she has those skills, which she seems to, that will be an asset," said Odinkalu.

Bensouda insists that for her, helping victims is at the centre of what international criminal justice is really about. "That's where I get my inspiration and my pride," she said.