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A Global Court? U.S. Objections to the International Criminal Court and Obstacles to Ratification

by Teresa Young Reeves*

On July 17, 1998, 120 nations voted to adopt the Rome Statute of the International Criminal Court (Rome Statute), establishing the world's first permanent tribunal for the crime of genocide, crimes against humanity, and war crimes. The adoption of the Rome Statute marked the end of a four-year, multinational negotiating marathon. It also signaled the end of the contentious, five-week "United Nations Diplomatic Conference of Plenipotentiaries" (Rome Conference) at which 21 nations abstained from voting, and seven nations, including the United States, Israel, and China, opposed adoption of the Rome Statute. The United States opposed the Rome Statute because of its concern that it might one day have to surrender a citizen, particularly a member of its government or armed forces, to the jurisdiction of the International Criminal Court (ICC). The United States also feared, and continues to fear, that the ICC will deny U.S. citizens the procedural due process rights guaranteed to them in the U.S. Constitution. Under the Rome Statute, it is possible that the ICC could subject a U.S. citizen to its jurisdiction. In reality, however, the narrow definition of the crimes, coupled with the Court's fundamental principle of deferring to national judicial systems, virtually negate that possibility. If, however, the remote possibility of a U.S. citizen being indicted by the Court were to arise, it is important for the United States to note the congruency of the Rome Statute with the U.S. Constitution.

The International Criminal Court

Pursuant to the Rome Statute, the ICC will be an independent and permanent criminal tribunal, headquartered in The Hague, The Netherlands (Article 3(1)). The Court will officially come into existence once 60 nations have ratified the treaty (Article 126). The nations that ratify the treaty constitute the Assembly of States Parties (Assembly) (Article 112). After the Court is created, the Assembly will elect, by a two-thirds majority vote, 18 judges to nine-year nonrenewable terms (Articles 36(6), (9)). The Assembly also will elect, by an absolute majority vote, one prosecutor and one or more deputy prosecutors to nine-year non-renewable terms (Article 42(4)). As of November 2000, 115 states have signed the Rome Statute and 22 nations have ratified it. Observers of the ICC expect the Court will come into existence as early as 2002.

Once established, the Court will have jurisdiction over the crime of genocide, crimes against humanity, and war crimes (Article 5). While ad hoc tribunals are formed only after the commission of such crimes, the ICC aims to prevent these crimes from occurring in the first place. Unlike the United Nations International Court of Justice, which deals only with disputes among states, the ICC will have jurisdiction over individuals, including heads of state and other government representatives. The ICC thus embodies the principle of individual accountability that the justices at Nuremberg defined more than half a century ago: "crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced." The ICC's strength thus lies in its capacity to hold individuals responsible for committing the most serious crimes of international concern. Yet it is the ram-

ifications of this principle of individual accountability that have fueled the United States' opposition to the Rome Statute.

Genocide, Crimes Against Humanity and War Crimes

The Rome Statute provides the Court with jurisdiction over genocide, which occurs when a perpetrator intends "to destroy, in whole or in part, a national, ethnical, racial or religious group" (Article 6). The U.S. delegation to the Rome Conference, led by David Scheffer, former U.S. ambassador-at-large for war crimes, was not concerned that one of its citizens acting in an official capacity as a soldier or government representative would commit the crime of genocide. Rather, the team was concerned that, under the language of the Rome Statute, the ICC could misconstrue a peacekeeping, pre-emptive defense, or other military action by a U.S. citizen as a commission by that citizen of either a crime against humanity or a war crime.

Under the Rome Statute, a crime against humanity includes, *inter alia*, murder, enslavement, torture, apartheid, rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of

comparable gravity (Article 7). Further, the individual must commit the act as "part of a widespread or systematic attack directed against any civilian population . . . pursuant to or in furtherance of a State or organizational policy to commit such an attack" (Articles 7(1), (2)(a)). A war crime is defined under the Rome Statute as a crime committed during an international or internal conflict "as part of a plan or policy or as part of a large-scale commission of such crimes" (Articles 8(1), (2)(b), (2)(c)). Thus, in order for the ICC to charge an individual with a crime against humanity or a war crime, the individual also must be found guilty of having a policy or plan to intentionally kill civilians. Therefore, under the language of the Rome Statute, unintentional civilian casualties would not constitute either the commission of a crime against humanity or a war crime. Assuming, however, that the ICC considers indicting a U.S. citizen for a crime against humanity or a war crime, the ICC's principle of complementarity to national judicial systems further safeguards any such U.S. citizen from coming under a direct investigation or prosecution by the Court.

The Principle of Complementarity

One of the founding principles of the ICC is its creation as a court that will act to complement, rather than to substitute, national judicial systems (Preamble). The ICC's function is not to displace the criminal jurisdiction of any state, but rather to serve as an alternative judicial forum for states that are either "unwilling or unable genuinely" to prosecute a suspect on its own accord (Article 17). A determination by a panel of ICC judges that a state is "unable" to carry out an investigation or prosecution requires either a literal inability by the state to prosecute the perpetrator, or "a total or substantial collapse or unavailability of [the state's] national judicial system" (Article 17(3)). It is unlikely the United States would not be able to conduct a sufficient judicial proceeding to satisfy the requirements of the Rome Statute. Moreover, the likelihood of the U.S. judicial

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system suffering a total collapse at any time in the foreseeable future is remote. Thus, the U.S. concern for its citizens appears to turn on the definition of “unwillingness.”

Under the Rome Statute, a panel of ICC judges is empowered to determine that a state is unwilling to investigate or prosecute a perpetrator only in three circumstances: when it appears the proceedings are designed to shield the perpetrator from criminal responsibility; when the proceedings have been unjustifiably delayed so as not to bring the perpetrator to justice; or when the proceedings lack independence and impartiality or are being conducted in a manner inconsistent with the state’s intent to bring the perpetrator to justice (Article 17(2)). Therefore, the ICC would directly prosecute a U.S. citizen only if it ruled that the U.S. judicial process was so biased that it was unwilling to carry out a valid investigation and prosecution of an individual suspected of committing a crime of genocide, a crime against humanity, or a war crime.

Congressional Opposition to the Rome Statute

During the Rome Conference, Senator Jesse Helms (R-NC), chair of the Senate Foreign Relations Committee, declared that the Rome Statute would be “dead on arrival” in Congress unless the ICC incorporated a provision exempting all U.S. citizens from its jurisdiction. Further, on June 14, 2000, the senator introduced a bill that would threaten the effect of the ICC. Senate bill S. 2726, the American Servicemembers’ Protection Act of 2000 (Protection Act), grants U.S. military personnel, and many categories of elected and appointed officials of the U.S. government, protection from investigation or prosecution by the ICC. Also on June 14, Representative Tom DeLay (R-TX) introduced a similar bill, H.R. 4654, in the House.

The Protection Act prohibits all U.S. federal and state government entities, agencies, and courts from cooperating with the ICC. Under the Protection Act, cooperation includes any type of assistance relating to the investigation, arrest, extradition, or transit of suspects. In addition, the Protection Act prohibits the U.S. president from sending U.S. troops to participate in select UN peacekeeping operations occurring on territories of states that have ratified the Rome Statute. The Protection Act

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prohibits such U.S. military assistance because of the danger that a U.S. servicemember could be found by the ICC to have engaged in an activity that might render him or her accountable before the ICC. Further, the Protection Act explicitly states that, under the Rome Statute, U.S. citizens will “be denied many of the procedural protections to which all U.S. citizens are entitled under the Bill of Rights to the United States Constitution, including, among others, the right to trial by jury, the right not to be compelled to provide self-incriminating testimony, and the right to confront and cross-examine all witnesses for the prosecution.” This statement, however, is not wholly accurate. Contrary to the Protection Act’s assertion, the Rome Statute is consistent with the U.S. Constitution.

Constitutionality of the Rome Statute

The Rome Statute does not deny U.S. citizens their rights under the U.S. Constitution. According to Yale Law School

Professor Ruth Wedgwood’s extensive study, there “is no forbidding constitutional obstacle to U.S. participation in the treaty.” Wedgwood cites five reasons for this conclusion, three of which will be addressed here. First, historically the United States has signed treaties allowing U.S. participation in international tribunals that could affect the lives and property of U.S. citizens. For example, the North American Free Trade Agreement and the World Trade Organization subject U.S. businesses to judicial processes that do not mirror those found in an American courtroom, i.e., fact-finding by a panel of judges rather than by a jury.

Even before the U.S. delegation team headed to Rome during the summer of 1998, the U.S. State Department issued a statement signaling an impending U.S. opposition to the ICC.

Second, the ICC does not offend U.S. constitutional notions of due process because the Rome Statute, as carefully negotiated by Scheffer and his team at the Rome Conference, comports with the procedural protections and safeguards provided to U.S. citizens under the U.S. Constitution. Wedgwood and Monroe Leigh, a member of the American Bar Association, have compiled lists citing articles of the Rome Statute that both address and guarantee due process rights. Their lists include, *inter alia*, the right of the suspect: to have timely notice of charges filed against him (Article 60(1)); to a presumption of innocence (Articles 66(1), (2)); to the privilege against self-incrimination (Articles 55(1)(a), (1)(b), 67(1)(g)); to the assistance of counsel (Articles 55(2)(c), 67(1)(b), (1)(d)); to a speedy trial (Article 67(1)(c)); to cross-examine adverse witnesses (Article 67(1)(e)); to innocence unless the prosecutor has proved guilt “beyond reasonable doubt” (Article 66(3)); and to be present at the trial (Article 63).

Third, the crimes within the ICC’s jurisdiction under which a U.S. citizen could be indicted are generally those that would ordinarily be administered through the U.S. military court-martial system or through extradition of the U.S. suspect to the foreign nation where the criminal violation occurred. Specifically in response to H.R. 4654, on July 25, 2000, Leigh submitted a statement to the House Committee on International Relations in which he asserted the constitutionality of any potential criminal proceedings by the ICC against a U.S. citizen. Leigh’s statement emphasizes that members of the U.S. armed forces are precluded the right to jury trials under the Fifth Amendment of the Constitution, which states: “No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger.” Moreover, the language of the Sixth Amendment, which concerns criminal trials, extends the guarantee of a jury trial only to the state and district where the crime was committed: “In all criminal proceedings, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed. . . .” Therefore, a person who commits a crime in a foreign country risks extradition to that foreign country and, accordingly, has no constitutional guarantee of a jury trial.

In arguing that the Rome Statute does not offend U.S. constitutional notions of due process, Wedgwood cites three

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commutation from the Jamaican Privy Council violated their right to apply for amnesty, pardon, or commutation of their sentence under Article 4(6) of the American Convention. The Jamaican Privy Council may pardon or commute a death sentence under Articles 90 and 91 of the Constitution of Jamaica, but prisoners have no procedural guarantees.

Decision: On April 13, 2000, the Commission ruled Jamaica had violated Articles 4(1), 5(1), 5(2), 8(1), and 4(6) of the Con-

The Commission criticized the Peruvian Intelligence Service's (SIN) use of wiretapping, espionage, and physical surveillance to harass and intimidate opposition presidential candidates.

vention by disallowing the petitioners to present mitigating evidence at an individualized sentencing hearing before imposing the death penalty. The Commission found the Jamaican Privy Council's power to grant a pardon or commute a death sentence does not serve as a form of judicial review because under Jamaican law the petitioners have no effective right to apply for this form of discretionary relief. The Commission recommended the State commute the death sentences and offer the petitioners compensation. Additionally, the Commission recommended Jamaica adopt domestic legislation requiring the death penalty be imposed only in accordance with the American Convention and pass legislation allowing criminal defendants to apply for amnesty, pardon, or commutation of the death penalty.

The "Second Report on the Situation of Human Rights in Peru"

On June 2, 2000, the Commission issued the "Second Report on the Situation of Human Rights in Peru" (Report), following

an on-site visit in November 1998. The Report described measures implemented by the executive, legislative and judicial branches of government, restricting the right of political participation of its citizens, as guaranteed by Article 23 of the Convention. The Commission criticized the Peruvian Intelligence Service's (SIN) use of wiretapping, espionage and physical surveillance to harass and intimidate opposition presidential candidates. In documenting the State's interference in citizens' participation in the political process, the Commission referred to contentious cases from Peru currently under review, previously decided, or already submitted to the Inter-American Court of Human Rights. These included the *Case of Mariela Barreto Riofano*, the *Case of Susana Higuchi Miyagawa*, and the *Case of Baruch Iocher Bronstein*.

The Commission also reviewed reports by the Organization of American States Electoral Observation Mission, the Commission's Rapporteur for Freedom of Expression, the Peruvian Human Rights Ombudsman, and non-governmental organizations within Peru that observed the April 9, 2000, presidential and legislative elections. These reports documented serious abnormalities and persistent inequities in the voting process, including the tallying of the votes. Consequently, the Electoral Observation Mission and other election monitoring organizations decided against observing the second round of elections on May 28, 2000, which ultimately declared Fujimori the winner of the presidency. The Commission concluded the 2000 elections were not free and fair in light of international standards enshrining the right of political participation. The Commission further held that Peru should hold another election, guaranteed to be free and fair, within a reasonable time period, to uphold the rule of law and guarantee the right of political participation. As of November 27, 2000, Fujimori has resigned the presidency and been replaced by former congressman Valentin Paniagua. ☹

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procedural provisions of the Rome Statute that distinguish the ICC from U.S. common law procedures. First, the Rome Statute provides for the use of a fact-finding panel of judges rather than a jury (Articles 34, 39(2)(b)(ii), 74). As discussed above, historic U.S. treaty participation already subjects U.S. citizens to this procedure. Second, verdicts rendered by the ICC are by a vote of at least two judges (Article 74(3)). Finally, the ICC prosecutor may file an appeal based on errors of fact, law, and procedure (Article 81(1)(a)). Because U.S. citizens who commit crimes abroad are generally subject to the rules either of foreign courts or of the U.S. military courts-martial system, it is safe to assume that a U.S. citizen could encounter these same rules of procedure in a foreign country. In addition, U.S. courts-martial rules similarly stipulate that verdicts, in cases of acts resulting in unintentional civilian casualties or other unintentional harms, need not be rendered by a unanimous vote: "a finding of guilty results only if at least two-thirds of the members present vote for a finding of guilty" (R.C.M.921(c)(2)(B)).

Further, the United States has the capacity to ensure the constitutionality of the ICC's Rules of Procedure and Evidence (Rules) before committing itself to the provisions of the Rome Statute. At the signing of the Rome Statute, the Rome Conference adopted Resolution F, mandating the establishment of a Preparatory Commission (PrepCom) to complete draft texts

Ratifications of the ICC Statute as of November 2000.

COUNTRY	DATE OF RATIFICATION
Senegal	February 2, 1999
Trinidad and Tobago	April 6, 1999
San Marino	May 13, 1999
Italy	July 26, 1999
Fiji	November 29, 1999
Ghana	December 20, 1999
Norway	February 16, 2000
Belize	April 5, 2000
Tajikistan	May 5, 2000
Iceland	May 25, 2000
Venezuela	June 7, 2000
France	June 9, 2000
Belgium	June 28, 2000
Canada	July 7, 2000
Mali	August 16, 2000
Lesotho	September 6, 2000
New Zealand	September 7, 2000
Botswana	September 8, 2000
Luxembourg	September 8, 2000
Sierra Leone	September 15, 2000
Gabon	September 21, 2000
Spain	October 25, 2000

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person alone cannot make a difference, stating, “if you feel that you’re too small to do anything, then you’ve never been in bed with a mosquito.”

In response to a directed question from Professor Tigar, Guillaume Ngefa Atondoko described the role of international actors in exacerbating African wars. He derided the United States for claiming to support the rule of law in Africa while ignoring the suffering of more than 400 million people throughout the continent and warned that U.S. taxpayer dollars are used to support murderous policies abroad. As a response to this type of insidious foreign involvement, Mr. Ngefa’s organization is exploring how to link traditional war crimes and crimes against humanity with the nascent concept of economic war crimes.

Professor Martin next asked a question eliciting the advocates’ opinions regarding the international community’s efforts to address human rights issues. Harry Wu expressed his concern that the Western world, and in particular the United States, seems willing to dismiss human rights violations in China as cultural traditions. He noted the mutability of traditions, describing how France, a country once best known for the invention of the guillotine, now bans the death penalty. Mr. Wu expressed his hope that in the future, Western policy makers will not use the concept of tradition as an excuse to refrain from holding China accountable for its human rights violations. Digna Ochoa focused on the positive impact of international solidarity, explaining that it helps protect human rights defenders from governmental retribution for their work. Moreover, she noted that publicizing Mexican human rights violations abroad discourages the government from committing such abuses because of its fears of losing international economic investment as a result.

In closing, Ariel Dorfman, Walter Hines Page Research Professor of Literature and Latin American Studies at Duke University, playwright, and author of a theatrical presentation based on the defenders’ lives, reiterated how the defenders use the power of truth to challenge the status quo. Unwilling to turn away from the ugly and the horrific, these activists threaten not only state perpetrators of human rights violations, but also the complacency shared by many of the privileged around the world. As Ms. Kennedy-Cuomo states in the introduction to her book, “[t]heir determination, valor, and commitment in the face of overwhelming danger challenge each of us to take up the torch for a more decent society. Today we are blessed by the presence of these people. They are teachers, who show us not how to be saints, but how to be fully human.”

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Crimes of War provides an informative overview of war crimes and the laws designed to limit them. Consistent with the book’s educational mission, the reader obtains a useful foundation for evaluating current and future events. Although the book’s alphabetical organization, numerous contributors, and wide range of subject matter make for a somewhat uneven read, on the whole, it is an invaluable reference.

In addition to Professor Anderson’s contribution as legal editor, WCL Professor Diane Orentlicher provided the essay, “Genocide,” and WCL Professor Robert Goldman, assisted by

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defining the Rules and the Elements of the Crimes (Elements) on or before June 30, 2000. Although the United States is not a signatory to the Rome Statute, it has nonetheless taken an active role in drafting both the Rules and the Elements to be used by the Court once it officially comes into existence. In addition, the PrepCom agreed in June 2000 to extend considerations to exempt U.S. citizens from the jurisdiction of the Court until the PrepCom’s next meeting in November and December of this year. Because the Rome Statute is open for signature at the United Nations Headquarters in New York until December 31, 2000, the United States still has the opportunity to adopt the Rome Statute (Article 125). Therefore, should the United States choose to endorse the creation of the ICC, it will have a chance to review the final texts of the Rules prior to signing the treaty.

Conclusion

Although prior to the Rome Conference the Clinton administration advocated a world criminal court, the efforts of the U.S. delegation team at the Rome Conference do not reflect such a desire. Rather, their efforts reveal an American attempt to shape a court that would not pose a threat to U.S. citizens. Even before the U.S. delegation team headed to Rome during the summer of 1998, the U.S. State Department issued a statement signaling an impending U.S. opposition to the ICC: “The American armed forces have a unique peacekeeping role, posted to hot spots around the world. Representing the world’s sole remaining superpower, American soldiers on such missions stand to be uniquely subject to frivolous, nuisance accusations by parties of all sorts. And [the United States] simply cannot be expected to expose [its] people to those sorts of risks.” Accordingly, some might argue the United States sought the creation of a global court only insofar as the term “global” would exclude the United States.

Aside from U.S. opposition to the Rome Statute, the accomplishments of the Rome Conference mark an historic and important step toward ending the traditional impunity of those who commit the most offensive crimes. Perhaps the most remarkable aspect of the Rome Conference is the overwhelming international support for the creation of a permanent world criminal court. The consensus achieved in the ICC’s creation is testament to the international community’s unified position of intolerance toward crimes against humanity and other egregious crimes.

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then-WCL L.L.M. candidate Ewen Allison, provided seven entries, including “Belligerent Status,” “Civil Patrols,” and “Illegal or Prohibited Acts.” Royalties from the book support the Crimes of War Project, a non-profit organization based at American University that seeks to raise awareness about international humanitarian law.

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