

## America, Human Rights and the International Criminal Court

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In July 2002, the United States government threatened to use its considerable international power to shut down all UN peacekeeping operations. If its American troops were not guaranteed immunity from prosecution from the newly ratified International Criminal Court (ICC), the United States government warned it would begin withdrawing its peacekeeping troops from Bosnia.<sup>1</sup>

The United States was met with fierce opposition from its closest allies: the European Union, Canada, and Mexico. The international community refused to submit to the American government's demands, insisting that to provide the US with blanket immunity would strike a blow to the credibility of international law and the deterrent effect of the International Criminal Court.

By mid-month the United States agreed to a compromise, voting with the UN Security Council, to invoke article 16 of the Rome Statute to place a 12-month moratorium on potential prosecutions against participants in UN peacekeeping operations.<sup>2</sup> Angered and disappointed at what he considered to be an intolerable compromise, John Negroponte, the American ambassador to the United Nations, threatened, 'Should the I.C.C. eventually seek to detain any American, the United States would regard this as illegitimate, and it would have serious consequences . . . . No nation should underestimate our commitment to protect our citizens'.<sup>3</sup>

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<sup>1</sup> C. Lynch, 'Dispute Threatens U.N. Role In Bosnia: U.S. Wields Veto In Clash Over War Crimes Court', *The Washington Post*, 1 July 2002, available at <<http://www.washingtonpost.com/ac2/wp-dyn/A5514-2002Jun30?language=printer>> .

<sup>2</sup> Rome Statute of the International Criminal Court, 17 July 1998, Art. 16, effective as of 1 July 2002, available at <<http://www.un.org/law/icc/statute/romefra.htm>> (Rome Statute).

<sup>3</sup> S. Schmemmann, 'U.S. Peacekeepers Given Year's Immunity From New Court', *The New York Times*, 13 July 2002, available at <<http://www.nytimes.com/2002/07/13/international/13NATI.html?pagewanted=print&position=top>> .

The American president and his conservative supporters are resolute in their opposition to the International Criminal Court.<sup>4</sup> Their arguments, addressed to an apprehensive American audience, deserve careful review.

**Argument:**<sup>5</sup> The International Criminal Court could prosecute a soldier for a single murder or rape of a civilian.

**Response: The Court has jurisdiction over only the most heinous and wide-spread international crimes.**

The offenses subject to the jurisdiction of the International Criminal Court are of the ilk of the atrocious crimes such as those committed by Adolf Hitler, Slobodan Milosevic, Cambodia's Pol Pot and Uganda's Idi Amin.

The Court at this time has jurisdiction over three primary categories of crimes: genocide, crimes against humanity and war crimes.

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<sup>4</sup> This resistance of the United States to the ICC is one of a succession of signs that the present administration stands in opposition to prior US administration's commitment to international tribunals. In February 2002, President Bush's Ambassador-at-Large for War Crimes, Pierre-Richard Prosper, announced that the United States questions the effectiveness and efficiency of the Yugoslav and Rwanda *ad hoc* tribunals, and the government is considering terminating US financial support for the tribunals at the end of 2004. According to Prosper, 'We want to bring ownership of the process back to the people, because that is the only way the rule of law will become truly ingrained in a society. [The Tribunals have] been too removed from everyday experiences of the people and the victims.' See J. Bravin, 'Bush Looks to Rein in U.N. Courts, Citing Mismanagement by Tribunals', *The Wall Street Journal*, 28 February 2002, available at <<http://www.iccnw.org/html/presswsj20020228.pdf>>. This statement by Prosper has been viewed by European diplomats as an inappropriate challenge to the ICTY, just as the Milosevic trial was beginning in The Hague in February. In a similar sign of resistance to international tribunals, President Bush has locked horns with the prosecutor of the International Criminal Tribunal of Yugoslavia (ICTY). The Prosecutor, Carla de Ponte, has called Richard Holbrooke to testify against Yugoslavia's former president, Slobodan Milosevic. This testimony is considered central to the case, and perhaps vital to Milosevic's conviction. Holbrooke, President Clinton's former Ambassador to the UN, was instrumental in the success of the Dayton Accord that ended the Bosnian conflict. He is an important witness who may be able to testify regarding Milosevic's knowledge and ordering of the crimes in Bosnia. However, the US government insists that any testimony given by sitting or former American officials, including Holbrooke, must be given *in camera*. The prosecutor, finding insufficient reason for shielding the witness, has stated, however, that because of the importance of transparent hearings, such a demand cannot be fulfilled. It would be tragic if Milosevic, the first standing leader brought to trial for war crimes and crimes against humanity, should be set free because the U.S. refuses to cooperate. See Ian Black, 'Secrecy May Rule Out Star Witness', *The Guardian*, 13 June 2002 available at <<http://www.guardian.co.uk/yugo/article/0,2763,736385,00.html>>.

<sup>5</sup> The arguments quoted in this article can be found in an article by John Dean, former White House counsel to US President Richard Nixon, J. Dean, 'The World Court Dispute: Why The Administration's Objections To Joining, And Its Moves To Protect U.S. Peacekeeping Troops, Are Entirely Justified' (July 5, 2002) FINDLAW's Writ: Legal Commentary, available at <<http://writ.news.findlaw.com/dean/20020705.html>>.

Genocide: In order for an individual to be prosecuted in the ICC for genocide, it must be proven that the act of genocide was committed ‘with intent to destroy, in whole or in part, a national, ethnical, racial or religious group’.<sup>6</sup> The issue of *mens rea* (i.e., criminal intent) in the commission of genocide is an area of international law that has been carefully examined by the three previous international criminal tribunals (Nuremberg, Yugoslavia, and Rwanda) and has been scrutinized in scholarly writings.

Crimes against Humanity: Crimes against humanity must be part of a ‘widespread or systematic attack directed against a civilian population’.<sup>7</sup> This requirement sets a very high standard of proof before a crime qualifies for the Court’s jurisdiction. This distinguishes certain acts of violence that might be committed, even by soldiers or UN police, but which are isolated or random in nature. These lesser crimes are specifically placed outside the jurisdiction of this international court.

War Crimes: ‘War’ – The concept itself is burdened with images of death and destruction. Concomitant with acts of war are feelings of fear and hatred, and the excessive upheaval of civilian populations. The ICC provides a permanent forum for trying war crime cases. Contrary to American claims, no soldier could be subject to the Court’s jurisdiction, even for the most monstrous of crimes of murder or rape, unless it could be proven that such a crime ‘when committed [was] part of a plan or policy or as part of a large-scale commission of such crimes’.<sup>8</sup>

**Argument:** ‘[T]he crimes for which [the ICC] may prosecute treaty signatories are not well defined, and the potentials for misusing – and, especially, politicizing – the ICC are substantial.’

**Response:** **The ICC’s definitions of crimes and the elements of those crimes have been carefully drafted and are supplemented by international law.**

The definition of crimes over which the ICC has jurisdiction is set forth in the Rome Statute. The elements of those crimes, including conditions, contexts, and *mens rea*, are catalogued in 48 pages of the Court’s, soon to be implemented, *Elements of Crimes*. The law on the accountability of individuals for international crimes has been further developed through customary international law, scholarly writings and by a growing body of case-law from the three previously established *ad hoc* international criminal tribunals (Nuremberg, Yugoslavia, and Rwanda).<sup>9</sup>

The American argument against the ICC fails to take into consideration that the Court is no mere domestic court of some small developing nation, but is a highly

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<sup>6</sup> Rome Statute, *supra*, note 2, Art. 6.

<sup>7</sup> Rome Statute, *supra*, note 2, Art. 7.

<sup>8</sup> Rome Statute, *supra*, note 2, Art. 8.

<sup>9</sup> For an excellent examination of accountability in international human rights law, see S.R. Ratner & J.S. Abrams, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy* (Oxford Clarendon Press 2001, 2nd ed.).

prestigious, competent court with a carefully chosen prosecutor. This court and its prosecutor's office will be staffed by the finest legal minds from England, France, Germany and the rest of the world. If the prosecutor and the ICC judges do not conform to the highest standards of justice, they will be replaced.<sup>10</sup>

**Argument:** '[T]he treaty creating the ICC does not afford Americans the protections of the Bill of Rights.'<sup>11</sup>

**Response:** **The primary sources of law establishing and regulating the ICC guarantee fundamental due process rights.**

The Rome Statute, the ICC's *Rules of Procedure and Evidence*<sup>12</sup> and the *Elements of Crimes*<sup>13</sup> provide substantially the same due process rights as those guaranteed to American citizens in the United States Constitution and in American case law.<sup>14</sup> The United States government was involved in the drafting of both the Rome Statute and the *Rules of Procedure and Evidence*.

Former US State Department legal advisor to Henry Kissinger, Monroe Leigh has written: 'The list of due process rights guaranteed by the Rome Statute are, if anything, more detailed and comprehensive than those in the American Bill of Rights . . . I can think of no right guaranteed to military personnel by the U.S. Constitution that is not also guaranteed in the Treaty of Rome.'<sup>15</sup>

In addition to the well-established due process rights protected by American law, the Rome Statute insures that juvenile offenders,<sup>16</sup> the mentally ill and the

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<sup>10</sup> See Rome Statute, *supra*, note 2, Art. 36 for the process of selecting judges; see Rome Statute, *supra*, note 2, Art. 41 for excusing and disqualifying a judge. See Rome Statute, *supra*, note 2, Art. 42 for the selection and removal of the prosecutor.

<sup>11</sup> The 'Bill of Rights' is the nomenclature given to the first fourteen amendments to the United States Constitution.

<sup>12</sup> Finalized draft text of the Rules of Procedure and Evidence, adopted by the Preparatory Commission for the International Criminal Court, available in English at <[http://www.un.org/law/icc/statute/rules/english/l\\_add1e.pdf](http://www.un.org/law/icc/statute/rules/english/l_add1e.pdf)> (30 June 2000).

<sup>13</sup> Finalized draft text of the Elements of Crimes, 30 June 2000, adopted by the Preparatory Commission for the International Criminal Court, available in English at <[http://www.un.org/law/icc/statute/elements/english/l\\_add2e.pdf#pagemode=bookmarks](http://www.un.org/law/icc/statute/elements/english/l_add2e.pdf#pagemode=bookmarks)>.

<sup>14</sup> The Rome Statute does not provide for trial by jury. The jury trial system is not universally utilized in Europe. Even Britain, where the jury trial concept was developed, has substantially cut back on jury trials. In the case of the ICC, jury trials would be impractical where cases are expected to be protracted, the pertinent law would be difficult to understand and establishing a panel of peers of the accused would be very difficult. The court of first instance for the ICC, the Trial Chamber, is made up of a panel of three judges. See Rome Statute, *supra*, note 2, Art. 39.

<sup>15</sup> Quoted in 'Myths and Facts about the International Criminal Court', Human Rights Watch: International Justice, accessed at <<http://www.hrw.org/campaigns/icc/facts.htm>> (July 24, 2002).

<sup>16</sup> Rome Statute, *supra*, note 2, Art. 26.

developmentally challenged are protected from prosecution.<sup>17</sup> A penalty of death, for even the worst of crimes, may not be imposed by the Court.<sup>18</sup>

Regrettably, President Bush and Ambassador Negro Ponte present their argument in a manner that characterizes the United States as being the only country with a legal system advanced enough to fairly prosecute and try its American citizens. This position is an insult to other great legal systems, such as those of the English and French, who produced the fathers of the Enlightenment and developed those systems of justice which the Americans gratefully copied in the 18th century.<sup>19</sup>

**Argument:** '[T]he Rome [Statute] did not include cultural genocide. But there is serious concern it might be added. [T]he United States could be found guilty of cultural genocide . . . [based on its] historical treatment of Native Americans and African Americans.'

**Response:** **Adding additional crimes to the jurisdiction of the ICC is carefully controlled. The ICC has no jurisdiction to prosecute crimes based on the historical treatment of any peoples.**

The Rome Statute does not include a crime of 'cultural genocide', and no amendments may be made to the Statute for the next seven years.<sup>20</sup> If, in fact, the United States were a participant in the ICC, it would have the right to make a reservation against added jurisdictions of the Court.<sup>21</sup>

Concern about the potential authority of the Court is not a logical reason to prevent the United States from participating in this important institution. The best way to prevent the ICC from becoming something the United States would abhor is for the United States to be a part of the process. By refusing to take part in the International Criminal Court, Americans lose the opportunity to be part of the evolution of international law and the development of the Court.

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<sup>17</sup> Rome Statute, *supra*, note 2, Art. 31.

<sup>18</sup> Rome Statute, *supra*, note 2, Art. 24.

<sup>19</sup> The American criminal justice system is not viewed by the rest of the world to be as superior as American political conservatives like to believe it is. The American system is seen by many as a system that tolerates the execution of the convicted, including children and the developmentally challenged. The United States is one of the few developed countries to support the death penalty. Russia and Ukraine have abolished the death penalty. European courts refuse to extradite suspected terrorists to US shores if the death penalty is a possibility, because to do so would be in violation of Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950 (Convention). See *Soering v. UK*, 11 ECtHR 439 (1989), where the Court made a remarkable decision, holding that Britain would be found to be in violation of Article 3 of the Convention if it extradited a suspect to the United States, not because the article prohibited the death penalty, but because the prospect of numerous years on death row would be 'inhuman or degrading treatment or punishment.' Art. 1 of Protocol 6 of the Convention, signed on 28 April 1983, abolishes the death penalty in peacetime.

<sup>20</sup> Rome Statute, *supra*, note 2, Art. 121.

<sup>21</sup> *Ibid.*

The ICC has no retroactive jurisdiction over crimes and, thus, has no jurisdiction over crimes committed before 1 July 2002.<sup>22</sup> No American could ever be subject to prosecution for past crimes committed against African Americans or Native Americans. No crime, including crimes against the Vietnamese or Nicaraguans, no matter how monstrous, can be tried by the Court, if committed before 1 July 2002.

**Argument:** '[T]he ICC would become a super-court with judicial power over Americans . . . even if those crimes have been committed within the United States.'

**Response:** **The United States would always have the right to select its national courts as the court of first instance.**

If and when the United States ratifies the Rome Statute, any crime committed in the U.S. would first be subject to prosecution by US courts. The International Criminal Court's jurisdiction is 'complementary' to that of national courts.<sup>23</sup> This means that American citizens will not be subject to prosecution in the International Criminal Court unless American prosecutors and courts refuse to investigate those crimes.<sup>24</sup>

The ICC will prosecute only when a nation is unable or unwilling to investigate and/or prosecute a crime within the ICC's jurisdiction.<sup>25</sup> In fact, it is highly unlikely that peacekeeping soldiers will ever be prosecuted in the ICC without the tacit approval of their government. For this reason, the British government, who also expressed initial concerns about the ICC's jurisdiction, has signed and ratified the Rome Statute.

If all domestic courts were willing to aggressively pursue human rights crimes, there would be no need for a court at the international level. One of the difficulties in prosecuting a leader who commits crimes against a disenfranchised people is that he/she controls the criminal justice system. In the case of deposed leaders, subsequent administrations are often unable or unwilling to prosecute past leaders.

**Argument:** '[T]here is no exemption in the treaty for high government officials.'

**Response:** **This is true.**<sup>26</sup>

Where international crimes are concerned, international law has long been

<sup>22</sup> Rome Statute, *supra*, note 2, Art. 11.

<sup>23</sup> Rome Statute, *supra*, note 2, Art. 17.

<sup>24</sup> Philippe Kirsch of Canada, Chairman of the preparatory panel for the International Criminal Court, stated that in the United States, 'a great democracy with a judicial system that functions perfectly well, it is extremely difficult to imagine that if American peacekeepers were to commit crimes of that nature – we're not talking about shoplifting here, we're talking about crimes against humanity, genocide, very serious war crimes – that the American system would not deal with it.' 'International Criminal Court safeguards against politicization, key negotiator says', *UN News Center*, 12 July 2002, available at <<http://www.un.org/apps/news/story.asp?NewsID=4179&Cr=icc&Cr1=#>>.

<sup>25</sup> *Ibid.*

<sup>26</sup> Rome Statute, *supra*, note 2, Art. 27.

moving toward the rule that international criminal tribunals will have jurisdiction even over persons claiming official capacity.<sup>27</sup> No individual, whether a minister of foreign affairs, the chancellor of Germany or the dictator of Chile may be absolved for commission of crimes of genocide, torture, and mass murder.<sup>28</sup> The United States supported this historic change in international law at the Nuremberg trials,<sup>29</sup> and more recently at the Milosevic trial.<sup>30</sup> Sovereign or diplomatic immunity does not shield leaders prosecuted on the international level.<sup>31</sup>

**Argument:** ‘The proponents of the Rome [Statute] have taken a hard line from the outset, and refused to address America’s reservations.’

**Response:** **The concerns of the American government were thoughtfully considered throughout the drafting of the Rome Statute. It was as a result of the United States’ support for the idea of a permanent international court that efforts were begun in the early 1990s to establish the ICC.**

In response to the United States government’s concerns, a complex set of compromises were made to complete the final draft.

Despite the enormous influence the United States had on the formation of the Rome Statute, in the end the United States refused to ratify that Statute. A change of political leadership clouded the horizon. In July 2002, President Bush directed the unprecedented act of ‘unsigned’ the Rome Statute which was signed by his predecessor, President Bill Clinton.<sup>32</sup> This refusal to participate in the ICC stems

<sup>27</sup> See Charter of the International Military Tribunal of Nuremberg, Art. 7, 8 August 1945, [hereinafter IMT]; Charter of the International Military Tribunal for the Far East, Art. 6, 19 January 1946; Statute of the International Criminal Tribunal for the former Yugoslavia, 25 May 1993, 7, ¶ 2; Statute of the International Criminal Tribunal for Rwanda, Art. 6, ¶ 2, 8 November 1994.

<sup>28</sup> Immunity may still exist on the domestic level. See the February 2002 decision of the International Court of Justice, where the Court held that although the international community has eliminated immunity for high officials in international criminal tribunals, State practice has not yet recognized this exception for national courts. *Arrest Warrant of 11 April 2000: Democratic Republic of the Congo v. Belgium* (14 February 2002). Summary of the judgment available at <[http://www.icj-cij.org/icjwww/ipresscom/ipress2002/ipress2002-04bis\\_cobe\\_20020214.htm](http://www.icj-cij.org/icjwww/ipresscom/ipress2002/ipress2002-04bis_cobe_20020214.htm)>.

<sup>29</sup> See IMT, *supra*, note 27; see also Affirmation of the Principles of International Law, United Nations General Assembly (11 December 1946).

<sup>30</sup> See IMT, *supra*, note 27.

<sup>31</sup> For a review of the law see the *Pinochet* case decision by Lord Browne-Wilkinson, [1999] 2 All E.R. 97, at 111–15, available at <<http://www.trentu.ca/~mneumann/pino2.txt>>.

<sup>32</sup> Judge Richard Goldstone, a South African jurist who was the first chief prosecutor of the International Criminal Tribunal of the former Yugoslavia bluntly said of the administration’s ‘unsigned’ of the Rome Statute: ‘I think it is a very backwards step. It is unprecedented which I think to an extent smacks of pettiness in the sense that it is not going to affect in any way the establishment of the international criminal court.’ ‘US renounces world court treaty’, BBC News, 6 May 2002, available at <<http://news.bbc.co.uk/2/hi/world/americas/1970312.stm>>.

from the fact that the American conservative right, with whom the President aligns and finds support, is traditionally suspicious of international involvement.<sup>33</sup> Hiding behind theories of state's rights and support of the military, the right wing of the Republican Party regularly takes a unilateralist approach to international affairs. Suspicious of the United Nations and treaties that may rob the country of sovereign control, the sitting president has, in his 18 months of rule, reversed American commitment to the Kyoto Protocol,<sup>34</sup> the Protocol to the Torture Convention,<sup>35</sup> the ABM Treaty,<sup>36</sup> and this Rome Statute.

In the dispute over the International Criminal Court, President Bush was disappointed that he was unable to convince UN members to grant the UN Security Council unlimited power to veto any ICC prosecution. Given the American veto power in the Security Council, this would have given the US power to grant its citizens immunity from prosecution. The American administration claimed that reserving this veto power to the Security Council was needed to prevent a misuse of power in the hands of the ICC prosecutor.<sup>37</sup>

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<sup>33</sup> Jesse Helms, an ultra-conservative Republican senator from North Carolina, and the senior Republican on the Senate Foreign Relations Committee and its former chairman, has spent his 30-year political career acting as a guardian of American sovereignty. He so opposes the International Criminal Court that he has sponsored legislation, the American Servicemembers' Protection Act (ASPA), labeled by its opponents as the 'Hague Invasion Act'. The legislation, signed by President Bush on 3 August 2002, will, *inter alia*, prohibit the US government from sharing with the Court any classified national security information. No military assistance will be extended to any countries that have ratified the Rome Statute. NATO nations and other designated allies, including Israel, Egypt, Australia, Japan and South Korea are exempt. Bizarrely, the legislation authorizes the President of the US to use all means necessary to release any US personnel detained by the Court against their will – this power was the source of the derisive term, 'Hague Invasion Act'. For a copy of the bill and a discussion of the legislation, see 'The American Servicemembers' Protection Act of 2001: Implications for U.S. Cooperation with the ICC', available at <http://www.unausa.org/dc/advocacy/iccfact.htm> (accessed on 10 November 2001). The law was passed by an ultra-nationalistic Congress dealing with the emotions of the aftermath of the 9/11 attacks on New York and the Pentagon. This bill was ingeniously hidden within the '2002 Supplemental Appropriations Act for Further Recovery from and Response to Terrorist Attacks on the United States', see "'Hague Invasion Act' Becomes Law August 3, 2002: White House "Stops at Nothing" in Campaign Against War Crimes Court', Human Rights Watch, available at <<http://www.hrw.org/press/2002/08/aspa080302.htm>> (3 August 2002); see also Elizabeth Becker, 'U.S. Ties Military Aid to Peacekeepers' Immunity', available at <<http://nytimes.com/2002/08/10/international/10COUR.html?pagewanted=print&position=top>> (10 August 2002).

<sup>34</sup> J. Graff, Why Bush Bailed on Global Warming Pact, *TIME.com*, available at <<http://www.time.com/time/europe/eu/magazine/0,9868,104674,00.html>> (9 April 2001).

<sup>35</sup> I. Arieff, 'U.S. Defeated in Bid to Block UN Anti-Torture Pact', Reuters, <[http://story.news.yahoo.com/news?tmpl=story2&cid=574&u=/nm/20020725/wl\\_nm/rights\\_un\\_usa\\_dc\\_3&printer=1](http://story.news.yahoo.com/news?tmpl=story2&cid=574&u=/nm/20020725/wl_nm/rights_un_usa_dc_3&printer=1)> (24 July 2002).

<sup>36</sup> 'Bush Calls for Replacing ABM Treaty', Reuters, available at <<http://www.european-internet.com/russia/news.php3?id=397966&brief=text>> (2 May 2001).

<sup>37</sup> See The International Criminal Court, US Department of State – Office of War Crimes Issues: Fact Sheet, available at <<http://www.state.gov/s/wci/rls/fs/2002/9978.htm>> (6 May 2002).



**Argument:** ‘The wording of the treaty permits the ICC to prosecute even nationals of countries that have not ratified the treaty. [This] universal jurisdiction is contrary to existing international law.’

**Response:** **The concept of universal jurisdiction is an established part of international law.**

**Domestic courts:** Generally, a nation’s domestic courts rely on the territorial principle or effects doctrine, which states that their courts have jurisdiction over crimes committed on their own territory. Thus, regardless of the existence of the ICC, Americans working abroad, including American servicemen and volunteers, are currently subject to the laws of the nation in which they commit a crime. An American soldier who commits a crime in East Timor will be prosecuted, tried and sentenced under East Timor laws.

Some nations have also passed laws giving their national courts universal jurisdiction over crimes of genocide, crimes against humanity and war crimes. This universal jurisdiction means that a domestic court may claim jurisdiction over an individual who has committed a serious human rights crime, even if he or she is not a citizen of that nation, and even if the crime was not committed on its territory.

Thus, according to established international law, an American who commits war crimes, torture or crimes against humanity may be subject to prosecution in any nation where he or she committed those crimes; he or she may also be brought to trial in those States claiming universal jurisdiction.

**International Courts/Tribunals:** American peacekeeping troops in the former Yugoslavia are at present subject to international criminal prosecution in the International Criminal Tribunal of the former Yugoslavia (ICTY).<sup>38</sup> US troops in Bosnia and Kosovo, as well as the pilots bombing Kosovo under the direction of NATO, are subject to the jurisdiction of the ICTY. Carla de Ponte, prosecutor to the ICTY, reviewed complaints against the NATO operations and found no criminal responsibility (12 June 2000). The United States government spearheaded and supported the rules implementing that important *ad hoc* tribunal.

The International Criminal Court, though not providing immunity to UN troops from ICC prosecution, does give considerably more shelter from international prosecution than is available in foreign domestic laws or in the ICTY.

The Rome Statute provides safeguards that would, in all likelihood, prevent prosecutions against American UN troops abroad. In the unlikely event that an American soldier should commit a crime subject to the jurisdiction of the ICC, the ICC Prosecutor may begin an investigation only after receiving permission from the ICC Pre-Trial Chamber of Judges. These judges must defer to American prosecutors for at least six months, giving the Americans time to complete an investigation. After

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<sup>38</sup> Statute of the International Tribunal, 25 May 1993, Art. 1, available at <<http://www.un.org/icty/basic/statut/stat2000.htm#25>>.

the investigation, the ICC judges could authorize the Prosecutor to investigate only if the ICC judges held that the US judicial system was willingly obstructing justice.<sup>39</sup>

## **The American long-standing commitment to human rights**

There are no serious legal or moral arguments to give the United States reason to refuse to participate in the International Criminal Court. The Court will act only when it is found that national jurisdictions cannot or will not proceed.

The establishment of the International Criminal Court is THE most significant achievement of the international community since the prohibition of the use of armed force by the UN Charter in 1945. The Court is the most important international human rights institution in history. The alternative to supporting this permanent court is a continued proliferation of unspeakable attacks on the dignity of individuals. This Court is an attempt to place a tourniquet on the bleeding sores of humanity.

At the time of writing, the world watches in shock as 500,000 Angolans suffer starvation as a result of 20 years of brutal destruction and war-imposed famine. President Mugabe of Zimbabwe directs a campaign to annihilate populations of blacks and whites in opposition to his dictatorship.

The United States, which historically has campaigned to place justice above war, genocide and dictatorship, should have difficulty walking away and saying, 'I've changed my mind'. It will be a lost opportunity if the United States does not continue its role in shaping the work of the world's first permanent international criminal court. The ICC and international justice need the military power, the information systems and the moral support that the United States can provide.

The creation of the International Criminal Court is the culmination of a long arduous journey embarked on at the closure of World War II. It will be a great loss to America and international justice if the American president continues his campaign to block efforts to bring an end to impunity for war crimes and crimes against humanity.<sup>40</sup>

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<sup>39</sup> Rome Statute, *supra*, note 2, Art. 17.

<sup>40</sup> For an excellent thorough commentary, see Antonio Cassese, Paolo Gaeta and John R. W. D. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press, 2002).