

**THE INTERNATIONAL CRIMINAL COURT:  
PROTECTING AMERICAN SERVICEMEN AND  
OFFICIALS FROM THE THREAT OF  
INTERNATIONAL PROSECUTION**

---

---

**HEARING**

BEFORE THE

**COMMITTEE ON FOREIGN RELATIONS**

**UNITED STATES SENATE**

**ONE HUNDRED SIXTH CONGRESS**

**SECOND SESSION**

—————  
**JUNE 14, 2000**  
—————

Printed for the use of the Committee on Foreign Relations



Available via the World Wide Web: <http://www.access.gpo.gov/congress/senate>

U.S. GOVERNMENT PRINTING OFFICE

67-980 CC

WASHINGTON : 2000

COMMITTEE ON FOREIGN RELATIONS

JESSE HELMS, North Carolina, *Chairman*

RICHARD G. LUGAR, Indiana

CHUCK HAGEL, Nebraska

GORDON H. SMITH, Oregon

ROD GRAMS, Minnesota

SAM BROWNBACK, Kansas

CRAIG THOMAS, Wyoming

JOHN ASHCROFT, Missouri

BILL FRIST, Tennessee

LINCOLN D. CHAFEE, Rhode Island

JOSEPH R. BIDEN, JR., Delaware

PAUL S. SARBANES, Maryland

CHRISTOPHER J. DODD, Connecticut

JOHN F. KERRY, Massachusetts

RUSSELL D. FEINGOLD, Wisconsin

PAUL D. WELLSTONE, Minnesota

BARBARA BOXER, California

ROBERT G. TORRICELLI, New Jersey

STEPHEN E. BIEGUN, *Staff Director*

EDWIN K. HALL, *Minority Staff Director*

## CONTENTS

---

	Page
Lawyers Committee for Human Rights, Elisa Massimino, director, Washington, DC, prepared statement submitted for the record .....	38
Rabkin, Dr. Jeremy, professor, Department of Government, Cornell University, Ithaca, NY .....	8
Prepared statement .....	16
Responses to additional questions for the record from Senator Jesse Helms .....	13
Wedgwood, Ruth, professor of law, Yale University, New Haven, CT; and senior fellow and director, Project on International Organizations and Law, Council on Foreign Relations. ....	21
Prepared statement .....	24
Weinberger, Hon. Caspar W., former Secretary of Defense; and chief executive officer, Forbes, Inc., Washington, DC .....	4
Responses to additional questions for the record from Senator Jesse Helms .....	7



**THE INTERNATIONAL CRIMINAL COURT: PROTECTING AMERICAN SERVICEMEN AND OFFICIALS FROM THE THREAT OF INTERNATIONAL PROSECUTION**

**WEDNESDAY, JUNE 14, 2000**

U.S. SENATE,  
COMMITTEE ON FOREIGN RELATIONS,  
*Washington, DC.*

The committee met, pursuant to notice, at 3:35 p.m., in room SD-419, Dirksen Senate Office Building, the Hon. Jesse Helms (chairman of the committee) presiding.

Present: Senators Helms and Grams.

The CHAIRMAN. The meeting will come to order. We have a most interesting and impressive agenda here this afternoon.

Cap Weinberger—I am going to say the Honorable Caspar W. Weinberger—whom I have known ever since I have been in the Senate, former Secretary of Defense and chief executive officer of Forbes, Inc., in Washington; and Dr. Jeremy Rabkin, professor in the Department of Government, Cornell University in Ithaca, New York; and last, but certainly not least, is Ruth Wedgwood, professor of law, Yale University in New Haven, Connecticut and senior fellow and director of the Project of International Organizations and Law at the Council on Foreign Relations.

Now then, with the establishment of a prominent International Criminal Court [ICC] drawing nearer and nearer, the fact that American servicemen and officials may one day be seized, extradited and prosecuted for war crimes is growing. And indeed, that day may already have arrived.

In a little-noticed article, the New York Times recently reported that following General Pinochet's detention—and I am quoting the Times—"The FBI has warned several former U.S. officials not to travel to some countries, including some in Europe, where there is a risk of extradition to other nations interested in prosecuting them," end of quote from the Times article.

Moreover, this year for the first time we have seen an international criminal tribunal investigate allegations that NATO committed war crimes during the Kosovo campaign. And a month ago, in May, NATO Secretary General Lord Robertson submitted to a degrading, written interrogation by a woman named Carla Del Ponte, the chief prosecutor of the Yugoslav War Crimes Tribunal.

And after examining Lord Robertson's answers, Ms. Del Ponte decided to wrap up her 11-month investigation of NATO without bringing any charges against President Clinton, NATO com-

manders, or allied servicemen. But the damage was already done, you see. Simply by cooperating with the investigation, Lord Robertson mistakenly acknowledged that the Yugoslav tribunal had jurisdiction over NATO and its member states, and thereby had authority to judge NATO actions.

Now this extremely dangerous precedent will come back to haunt the United States. NATO commanders and officials may have avoided the indictment this time, but mark my words, the day is not far off when American servicemen and officials will face indictment by an International Criminal Court. And this committee is convened today because of that, because I and other Senators felt the need to assess the threat to United States servicemen and officials posed by this dangerous evolution of so-called international law and to consider a legislative remedy.

And this morning, or a little later than that, this afternoon, I have introduced, with Majority Leader Trent Lott and Senators Warner, Grams—Mr. Grams is here—Hatch, Shelby and others, the American Service Members Protection Act of 2000.

The American Service Members Protection Act will bar any U.S. cooperation with the ICC so long as the United States has not signed and ratified the Rome Treaty. It requires that United States personnel be immunized from the ICC's jurisdiction before the United States can participate in any United Nations peacekeeping operation. And it prevents the transfer of classified national security information to the court.

And it bans U.S. military assistance to any country that has ratified the Rome Treaty, with a waiver for U.S. allies who have agreements that protect Americans from extradition.

Furthermore, it authorizes the President to use all means necessary and appropriate to bring home any United States or allied personnel detained against their will by or on behalf of the court.

Now this legislation does not, does not, prevent the United States from cooperating with current or future ad hoc tribunals created through the Security Council. And it will not prevent the prosecution of future Pol Pots and Saddam Husseins. What it will do is make certain that the United States does not acknowledge the legitimacy of the ICC's bogus claim of jurisdiction over American citizens.

Now then, why is such legislation necessary? Because the International Criminal Court insists that American citizens will be under its jurisdiction, notwithstanding the fact that the United States has neither signed nor ratified the Rome Treaty. And if I have anything to do with it, the United States never will.

Yet despite this, Secretary Albright has declared that the United States intends to pursue a "good neighbor" policy with the ICC. Now then, I want to know how can we be a good neighbor to a court that insists on its so-called right to prosecute American servicemen and officials, even though the United States has refused to join the court. If other nations are going to insist on placing Americans under the ICC's jurisdiction against their will, then Congress has a right and responsibility to place a cost on their obstinacy, and to ensure that our men and women in uniform are protected.

And that is why we are so pleased today to welcome the Honorable Caspar Weinberger, who will share his perspective as a former

U.S. Secretary of Defense on why the prospect of international prosecutions of American servicemen and officials would have a chilling effect on U.S. national security decisions.

We also, as I said earlier, welcome Professor Rabkin and Professor Wedgwood.

Senator Grams, would you have some comments?

Senator GRAMS. Thank you very much, Mr. Chairman. I do just have a brief statement.

The CHAIRMAN. Please.

Senator GRAMS. But I want to thank you for holding this hearing. And I am also very pleased to be an original cosponsor of the legislation to protect our military personnel from the International Criminal Court prosecution and to restrict our Government from cooperating with this court until the Senate ratification occurs.

Now last year, two of my ICC initiatives were signed into law; one prohibiting U.S. funds from going to the ICC, and the other prohibiting extradition of U.S. citizens to the court. The American Service Members Protection Act of 2000 will build upon those efforts.

It is needed, because I believe the greatest force for peace on this Earth is not an international court; it is the United States military. Ironically, the very nations that have created a court which inhibits our ability to project force have repeatedly called on the United States to be the global enforcer. They should recognize that a treaty which hinders our military is not only bad for America, but it is also bad for the international community.

Now supporters of this treaty are banking on the fact that the United States will allow the ICC to flourish and to gain legitimacy over time. There are calls for a policy of benign neglect. And we cannot let that happen.

Even if it is weak at its inception, the ICC's scope and power can, and it will, grow. The court will be an international institution without checks, without balances, accountable to no state or institution for its sanctions or its actions. There will be no way to appeal its decisions, except through the court itself. And the rules of the court will be developed over time by the court itself through custom and precedent.

So we must affirm that the United States will fight any institution which claims to have power to override the U.S. legal system and to pass judgment on our foreign policy actions. We must refuse to let our soldiers and government officials be exposed to trial for promoting the national security interests of the United States.

Should this court come into existence, Mr. Chairman, we should have a firm policy of total non-cooperation, no funding, no acceptance of its jurisdiction, no acknowledgment of its rulings, and absolutely no referral of cases by the Security Council.

Thank you very much, Mr. Chairman. I have to leave for another meeting, but I will read with interest the testimony of our witnesses today, and also their responses to your questions. But I thank you very much. This is an important hearing. Thank you.

The CHAIRMAN. Rod, thank you very much. And we will see you later.

Let me mention the cosponsors of my bill. I mentioned, Senator Lott and myself. But in addition to those two, John Warner, Chair-

man of the Senate Armed Services Committee is a cosponsor; Rod Grams, from whom you just heard; Orrin Hatch, who is the Chairman of the Senate Judiciary Committee; and Richard Shelby, who is Chairman of the Intelligence Committee of the Senate; and over in the House Tom DeLay, Floyd Spence, Dick Armey, Porter Goss, Ben Gilman, Henry Hyde, J.C. Watts, Chris Smith and others are cosponsoring it on that side.

Mr. Secretary, we are glad to see you again. We will proceed with you, if you will.

**STATEMENT OF HON. CASPAR W. WEINBERGER, FORMER SECRETARY OF DEFENSE; CHIEF EXECUTIVE OFFICER, FORBES, INC., WASHINGTON, DC**

Secretary WEINBERGER. Thank you very much, Mr. Chairman. It is a great honor to be asked to testify before this committee. And I am delighted to be able to do so, particularly on a matter as important as this.

And I particularly would like to commend you and the committee for holding the hearings and also for preparing the bill, which has been generally described, and which I think is an essential act to prevent any problems that could come up with the fact that this court will undoubtedly attempt to assert its jurisdiction over American citizens and American servicemen, even though we would not be a party to the treaty. It seems a little hard for a lot of people to grasp, but that can happen.

But literally all we have to do is refer to the Pinochet case and see what can happen even without the treaty and without any of its provisions being in effect, because in effect, the British House of Lords, to my considerable surprise and astonishment, ruled that he could be extradited to Spain, even though there was no connection between Britain and Spain or between Spain and Pinochet, except as they were willing to assert it.

So I think it is essential to have this kind of an act that you are proposing along with a very distinguished group of cosponsors, as long as this treaty is about to come into force. I gather that will happen when 60 nations have ratified it. Some 97 have signed it as of February, I guess.

The ratifications have come in slowly. But yesterday or the day before, France signed it and ratified. And as a member of the NATO Security Council, I find that not only very disquieting but an indication of the way in which the trend will go.

And so I think it is fair to say that the treaty will probably be formally declared in effect probably within the year, year and a half. And it certainly is well to be as prepared as we can.

I would suspect that the passage of the bill you are proposing, Mr. Chairman, would have a rather chilling effect on some countries as to whether they would really want to exchange membership and support for the kind of cooperation and friendship and military support and all the rest that the United States have been offering, but will be unable to offer, or cooperation in the peacekeeping forces, which we will be unable to proceed with if this treaty should be formally ratified by the 60 nations.

Assuming that it is, I think it is well to look at precisely what it would do, particularly to our servicemen or to any officials who



might be brought before it by the court's own direction. The court will be pretty much freestanding. There are indications that the Security Council could overrule or possibly change some of its actions, but that is pretty fuzzy. And the Security Council itself is known to have made some decisions that are, we feel, certainly in many cases, have not been in the best interest of the United States.

The whole concept really tests whether the idea of sovereignty exists any longer. And it is a very major step along the road toward wiping out individual national sovereignty. And I do not think very many of our people realize that that essentially is what it is and that we have already given up a fair amount of sovereignty. And the question really is, do we want to do it anymore in this very critically important kind of situation.

When you realize that this treaty would set up a court that would not in any sense be able to, nor required to, offer defendants the right of trial by jury, protection against self-incrimination, the right to confront and cross-examine prosecution witnesses, none of those rights that we take for granted and that have been part of the fabric of our country since its foundation, and before that part of the fabric of the whole English common law, then we should ask do we really want to allow American citizens to be brought before a court that would operate in this kind of a—under a different set of rules and without the principles that we have always felt were essential.

I would think that there is not sufficient understanding yet among the people of the country that this is essentially what could happen.

We have been told that we would not be able to bring international criminals to trial or to court unless we sign this treaty.

I would suggest, Mr. Chairman, we have a very good example of an international criminal who has been brought to justice. Mr. Noriega is in jail. He was taken as a result of a military action. He will be tried according to American rules. He will have his own counsel. He will have all these rights that I mentioned. But he will be tried. And that can happen.

I would also suggest that the United Nations' record is not all that good in apprehending or dealing with people whom they designate as international criminals. There have been a couple of Yugoslavian generals who were identified as people who were responsible for a great many of the atrocities that were committed in Bosnia and in Kosovo.

It is reported that they cannot be found. Yet they attend and speak to public meetings. And they appear in public, and they do not seem to have much fear of being apprehended by the United Nations.

So I think we might want to contrast these various ways of dealing with international criminals. And bear in mind that a court of this kind will be freestanding in a sense, will have its own rules, will make its own definitions, they are the ones who will define and interpret the rather vague language of the treaty of Rome that created it, defining what is an atrocity, what is terrorism, what is abuse of human rights and so on. And until they do, no one really knows precisely who could be a defendant.

I think the administration is to be commended. You may be surprised to hear me say that, but I think they are to be commended for not signing this treaty thus far. I think there is some evidence, however, of what I would call backsliding, because our negotiators have been meeting all this week, trying to get a few concessions and changes in the treaty that might make it slightly more palatable, such things as, first of all, trying to bring about a situation in which we could try some of these people in our own courts. It is said that we could do that now. But not under American jurisprudence rules, but under the rules that would be established by this court.

It was also said that we could veto any individual, American citizen, brought before the court and deny that by a vote of the Security Council. But we do not always prevail in the Security Council. And in order to pacify some people who objected to our having this exception, our negotiator has agreed that that clause could be removed. So that is no longer a provision that would mitigate the effects of the treaty.

These matters are all settled at the moment by what are called status of forces agreements. Wherever we have American troops stationed in a foreign country, we at the same time establish a bilateral status of forces agreement that covers such matters as jurisdiction and whether the servicemen who might commit crimes can be tried in American courts or in the domestic courts.

We have had those rules that are worked out bilaterally, to which we consent and to which we are part of the negotiations and which we agree to.

All of those status of forces agreements would essentially be overridden, if this treaty were adopted and we were a part of it. And they would be even subject to challenge, even though we are not part of the treaty. And that again is the difference between bilateral resolution of complex matters and leaving it up to a group that would be in a sense representative of some 180, 190 nations, some of whom occasionally vote with us, but not very often.

So I think all of these are factors that we have to keep in mind when we think about whether or not we would want to be part of it. We have decided thus far that we are not going to be part of it. And I am glad of that. I hope there is not going to be any backsliding.

I feel somewhat confident that there would be, because one of the perhaps unintended consequences of this treaty would be that Iran, for example, might bring a charge against President Clinton.

He would then be tried by this court and could be punished by that court for his actions in trying to secure international inspections of Iranian weaponsites. The fact that that might happen might very well prevent any further backsliding. And I hope that it will prevent that.

But that is an example, perhaps an extreme one, of the kinds of things that could happen, if we do not take the action to immunize American forces and American people from the actions of the court to which we thus far have decided we do not want to belong to.

These would all be reasons why I think it is essential that we consider very carefully whether or not an action of this kind is not necessary. My own feeling is that it is necessary. Our status in the

world requires that we participate in a number of activities in different parts of the world.

We are a super power. We are a country whose great good fortune and our strength and our resources requires us to bear certain responsibilities. We cannot bear those responsibilities if we are going to have the people who are carrying out these very difficult and dangerous duties for us are subject to prosecution by anyone who does not particularly care for American foreign policy or anyone who does not particularly care for America. And there are quite a few people like that in the world, as you know.

So for all those reasons and for many, many more, I would strongly urge the adoption of this bill that you have introduced and secured the co-sponsorship of many distinguished Senators, and that it is going to be introduced in the House. I think it is essential that those be adopted and that they be adopted early.

It may very well have, as I said, a rather chilling effect on some countries that are considering whether they want to formally ratify this treaty and bring this kind of court into existence. If it does not, so be it. It does not seem to me to be a particularly difficult burden to bear, if America stands outside of this kind of an arrangement and indeed prevents our people from being penalized by it.

I think that that may be, with the way in which the world is going and with the number of countries that are there, with the foreign policies that they have that are so vastly different than ours, it may be that that will be a regular occurrence regularly from now on. I hope not. I wish we could be able to secure the kind of united support that we used to have and that I think we need.

But in the absence of getting it, the very least we could do is protect the service people that we call upon to carry out these difficult and dangerous duties and our other officials, all of whom would be subject to the action of a court to which we not only do not belong but which we have specifically refused to join.

Those are the reasons why I think it is very important that your bill pass, sir.

The CHAIRMAN. Thank you, sir.

[Responses of Mr. Weinberger to additional questions for the record follow:]

RESPONSES OF HON. CASPAR W. WEINBERGER TO ADDITIONAL QUESTIONS FOR THE RECORD SUBMITTED BY SENATOR JESSE HELMS

TERRORISM

*Question 1.* The Report of the National Commission on Terrorism was released earlier this month, and placed emphasis on the "imperative to find terrorists and prevent their attacks [using] all the legal authorities and instruments available."

- In your view, would an operating ICC be an ally, a bystander or an obstacle to the U.S. struggle against terrorism?
- Will an active, aggressive ICC prosecutorial authority "chill" international activity by U.S. intelligence agencies that could, quite conceivably, protect American citizens from enormous peril?
- If non-state actors have no international juridical personality, how will the ICC respond to terrorism by irregular armed groups, some of which are working to obtain weapons of mass destruction?

Answer. I am afraid the International Criminal Court (ICC) would be an obstacle to our attempts to deal with terrorism at home and abroad. With so many members from various Third World countries, some of them hosts to terrorism, I would suspect that the ICC would be used as a method of blocking any attempts by us that might be reasonably effective in dealing with terrorism.

## UNIFORM CODE OF MILITARY JUSTICE

*Question 2.* Could the Uniform Code of Military Justice and U.S. statutes and guidelines on combat engagement coexist with the ICC's claim to international war crimes prosecutorial authority?

- What will this do to our command structure and traditions, even if we are not a Rome Statute party?

Answer. I do not believe the UCMJ could coexist with the ICC's very broad prosecutorial authority. In any event, many situations would probably involve lengthy and non-productive lawyers' arguments about whether our law or the ICC would prevail, which would in itself impair our efforts.

## AMERICAN SERVICEMEN'S PROTECTION ACT

*Question 3.* Given the transnational prosecutorial revolution we see developing:

- Should the United States insist that the U.N. Security Council explicitly immunize our troops from future prosecution before deploying them on peacekeeping missions?
- Should the United States insist on explicit agreement from governments of nations on whose soil we deploy troops that they will not hand over those troops to the International Criminal Court?

I'd like you to comment on the "American Servicemen's Protection Act of 2000" which I introduced with Senators Warner, Lott, and others, today.

- Do you think it provides appropriate protections for the situation in which the International Criminal Court exists but the United States has not ratified it? What is your opinion of the legislation?

Answer. In case there are further suggestions that we join the ICC, I think it increasingly essential the American Servicemen's Protection Act be adopted. I think that legislation is extremely important, but I believe it would be even more important for us not by ever adopting the ICC, to put ourselves in a position where we would have to rely on promises from so many countries, and in addition rely on the assumption that all of those promises would be kept. The legislation is certainly our very best safeguard next to not joining the ICC at all, but it might give some the impression that adoption of this Act would cause us to lessen our strong objection to signing the ICC agreement later.

## IMPACT ON ISRAEL

*Question 4.* What kinds of threats do you anticipate Israel will face from the International Criminal Court?

- Do you imagine that Israeli policies in the so-called "occupied territories" will be the subject of proceedings initiated by Arab and other Third World states?

Answer. Again in view of the large number of nations involved and the known hostility of at least some toward Israel, it is likely that these nations would try to make every use of the ICC as part of their continuing opposition to Israeli policies.

The CHAIRMAN. Professor Rabkin.

**STATEMENT OF DR. JEREMY RABKIN, PROFESSOR, DEPARTMENT OF GOVERNMENT, CORNELL UNIVERSITY, ITHACA, NY**

Dr. RABKIN. Thank you. Well, I also think the bill is a very good idea. And I think so for the same reasons that you indicated at the beginning, Senator Helms. It is rather important to try to stop this thing.

And as Senator Grams said, if it gets started, it will gain momentum. And it is better to try to nip it in the bud, or at least to make very clear to the world that we do not accept its legitimacy.

I want to start by saying that I think the way this has been described by the Clinton administration seems to me quite wrong. They keep saying this is a very good idea, it is very worthy, it just has a few technical glitches. And I think that is totally the wrong way of looking at this. It is not a very worthy idea. It is actually a quite bizarre idea. Nothing like this has ever been attempted.

Nothing like this has ever been proposed in the whole history of the world.

And you have to wonder why is that, since all kinds of crackpot schemes have been proposed previously. But nobody previously said: "Let us have a criminal court for the whole world." I give you just one example of just how extreme this is.

If you look at the European Union, they have now a common flag, they have common passports, they have a common parliament, they have all these common institutions. One institution which they do not have is a common criminal court, because the countries of Europe, which are willing to share a lot of power, are not willing to share that.

So we are supposed to believe that something which the Europeans are not willing to do in Europe, the whole world is willing to do on a global basis. That's very hard to take seriously, I think.

And it is a bad idea. It is not just bizarre. I mean, the basic premise here is that the core responsibility of a sovereign state, which is enforcing criminal justice in its territory, that this core responsibility should be delegated to some international authority to take care of for you. But what this implies is that somehow outsiders will be better able to take care of your territory than you are in this most fundamental thing.

Now it is true the ICC does not cover all criminal justice. It just covers the most sensitive criminal cases that any country will have to deal with. We all think that perpetrators of terrible crimes should be punished. But the fact is there are circumstances in which countries, including our own, have decided, well, maybe we cannot, because there are other considerations than simply doing justice.

To give one famous example, which we do not talk about very much anymore, but maybe we ought to remember it, after our own Civil War, there was a general amnesty for all the rebels. And that included people who had committed atrocities. There were people in the Confederate Army who went around shooting black troops, because they said, "we do not recognize these people as troops." And they just executed them in cold blood. These were terrible crimes.

We threatened during the war that perpetrators of such atrocities would be punished with execution. But afterwards we just said, "Let us wipe the slate clean and move on."

I do not know whether that was the right decision or not. But surely, that is a decision which a country should be able to make for itself and not have made for it by some international authority. Yet that is the core concept of this tribunal, that you have an independent prosecutor, a global Ken Starr, and if you do not punish the people who should be punished, the global Ken Starr will step in and do it for you.

What that is saying is that the decision about whether to prosecute should be made by someone who is not responsible for governing the territory. Advocates for the ICC tell us there is a tradition of this, but the supposed precedents are not at all the same thing, if you go back to Nuremberg or the Tokyo war crimes tribunals.

In those cases, we did not just step in to help other countries with trials of their war criminals. We were in control of those territories. We were, as a matter of fact, and we said so, exercising the sovereignty of Germany at the time. There was no other German government except the authority of the allied occupying powers. There was no other Japanese government, except General MacArthur's.

And we took responsibility for who to prosecute and who not. Sometimes we were more lenient maybe than we should have been, but the United States and its allies were responsible for governing the territory and worrying about what would happen there afterwards.

The ICC advocates are now saying "No, let this international bureaucrat take care of it for you." I think it is a very bizarre idea. And the point that I want to make is, it is so bizarre that you cannot take it seriously, that this tribunal by itself will enforce international norms of justice. It cannot do that. It does not have an army. It does not have a police force. It does not even have a real subpoena power.

Basically, all it can do is, if people are willing to cooperate, then it can have a trial. There are not likely to be very many of them. The ones which do actually result will be ones where interested powers wanted it to happen, not necessarily because it is their citizen, but more likely because it is someone else's citizen in the dock.

This is something which is a recipe for show trials. I think it is fair to say it has no other purpose really than to set up a platform for show trials. Is that really something we want to let loose in the world?

The second point I want to make is, we should not just focus on the ICC. We should see this in a larger context. Secretary Weinberger mentioned the Pinochet case, and he was right to mention that.

It has the following relevance: Two months after the Rome conference, Britain decided on its own that it was going to arrest Pinochet. He had no warning and he had actually been there visiting many times before without incident. He came on a diplomatic passport, with no reason at all to think he would be in trouble. And suddenly they arrested him and said: "We are going to extradite you to Spain where they want to put you on trial. They want to put you on trial for genocide."

It took the British courts a year-and-a-half to sort this out. And they said, "Well, no, it is not exactly genocide that you did, but we think that you could be tried under the torture convention." The torture convention defines torture as "any act by which severe pain and suffering, whether physical or mental, is intentionally inflicted."

That is such an elastic definition that I think there cannot be a single government in the world which is not in some cases responsible for something which falls under that definition of torture.

The British on their own said Pinochet could be tried for what he did to Chileans in Chilean territory while he was the head of state of Chile. They on their own say: "We think that international law has now reached a point where any country that wants to can

go out there and do justice on third parties because it just wants to.” Now that is loose in the world.

The relevance to the ICC is the following: People are saying, “Well, if that bothers you, 180 countries going out there seizing whoever they can get hold of and putting them on trial and having their own show trial, the answer is the ICC, because we will say do not have all these countries doing it on their own, ‘Do not do it yourself, hand it over to the experts in The Hague, the ICC.’”

But if you look at the statute, the Rome Statute, it does not prohibit these kind of do-it-yourself exercises in international justice. So far from prohibiting them, it actually encourages them, because what it says in the preamble is, among this list of things that are supposed to get you in the mood for the statute, it says at the beginning, “it is the duty of every state to exercise its criminal jurisdiction over those responsible for international crimes.”

It does not say exercise your jurisdiction over your own criminals. It says exercise your state jurisdiction over those, all of those, “responsible for international crimes.”

The people who put this together think the Pinochet case—I mean they did it before the Pinochet case, but they are looking ahead to that. They are saying, “Yes, you should be able to reach out into the world. And anyone you can grab, if you want to do justice, do it good, do it.”

Now, what that means is, if the ICC gets up and going, even though a lot of its jurisdiction will not apply to us, if we do not ratify it, there can be these do-it-yourself efforts of justice by third countries, who happen to get hold of some American official and want to put him on trial. The ICC not only does not prevent that, it encourages it, because if this thing gets going at all, the ICC, you are going to have a number of show trials. You are going to have interpretations. You are going to have precedents. You are going to buildup a case law.

And that will make it easier for—take your pick of which country is most likely to do this. But countries that want to have their own fun show trial at the expense of an American will have a chance to do it and rely on this case law. So I think this is a very combustible mix which we have now.

The last point I want to make briefly is this: People say, “Well, do not worry that this will be turned against the United States, because, you know, basically this is a European proposal, and basically it will be restrained by reasonable people who will be there in The Hague.” I do not believe that at all. And I think it would be foolish for us to rely on that. And again, I commend you, Senator Helms, for saying: “No, we have to stop this.”

If you look at the text of the Rome Statute itself, it makes no distinction between democracies and dictatorships. And in that it is like all these human rights conventions. They all say in effect, “it doesn’t matter if you happen to be a democracy, because we have these international human rights that we are going to impose on you, and we know better.”

We are not aiming for anything in the statute to rescue people who are under despotic governments. We are just out to do good, to rescue anyone and everyone, including people who live under democracies, including people like the Chileans, who have this issue

about what to do with somebody who was a dictator and then voluntarily gave up power. And they decided to leave it at that, as most countries have when they have made a transition.

Really, do you want to have this international prosecutor decide for you? I think what is going to happen is, this international court, because it has no police, because it has no army, because it has no real power, is going to have to play to the gallery. It is going to have to play to the crowd.

It is going to have to have non-governmental advocacy groups mobilize on its behalf. That is what happens in international programs. That is what happens in all these environmental conferences. You have to get Green Peace and Friends of the Earth and all these environmental groups to agitate for you, because otherwise you do not have anything there.

So these groups, I think, will be setting an agenda. That is exactly what happened with Britain. How come they picked on Pinochet? There are a lot of dictators in the world. There are a lot of people who have much bloodier hands than he does. Well, the answer is international advocacy groups were agitating about Pinochet. But they are not only agitating about Pinochet.

And concluding, I just want to call your attention to a few other things they agitate about. One, of course, is a lot of them agitate about Israel. At the conference, the Rome conference itself, one of the disputes there was whether the definition of war crimes should include doing injury to property and houses. And the Israeli Ambassador said: "You cannot do this, because that is one of our tactics of retaliation against terrorists. This is just aimed at us."

And the Arabs said: "Yes, it is aimed at you. And yes, we are going to put you on trial for war crimes for blowing up people's houses." And the Israeli Ambassador said: "Please do not do this." The delegates at the Rome conference did not give him the time of day.

We hear all the time about the United States now being in the small group of countries that have not signed the Rome Statute. Every newspaper article I have seen in the last week says China, we are in the company of China, we are in the company of Iraq, we are in the company of, you know, bad countries.

And they never mention Israel. How come we are in Israel's company? Well, because Israel is a country that really has to worry about international authority being used against it. Israel is constantly condemned at the U.N. Come to think of it, we used to be condemned a lot at the U.N.

And I think the people who agitate these things will want to agitate a case against the United States. If you look at Amnesty International, they said the United States was guilty of war crimes in Kosovo. You mentioned that before.

It was Amnesty International that really cranked that up and said that the Yugoslav tribunal had to look at the United States. Amnesty International publishes more attacks, they publish more studies, more accusations against the United States than they do against any Communist country.

There are a lot of reasons for that, but I think the ultimate reason is they are more interested in attacking the United States, because their audience, the people who give them money and read



their publications, are more interested in attacking the United States, because that is what they are interested in.

I think there is every likelihood that if this thing gets going, it will be used against the United States. And I think the ultimate problem here is not that some individual serviceman will be held captive. I mean, servicemen, by definition, they have volunteered to risk their lives. I think the ultimate threat here is that there will be a kind of propaganda circus aimed at us. It will be disorienting and demoralizing to us.

And I hope this will not happen, but I fear that it may even be somewhat effective. And people think, "Oh, gosh, we are violating international law. We have to change our laws." And that is, of course, the purpose of this institution. It is to set up some higher authority to tell us what to do in this country.

And I think you are absolutely right, Mr. Chairman, in saying: "No, we do not want any part of it." And we do not want anyone else to take part in it either. And if we can do anything to discourage them, we are going to do it now. Do not do this thing, that's what we should now say to the world.

Thank you.

The CHAIRMAN. Thank you, Dr. Rabkin.

[Responses of Dr. Rabkin to additional questions for the record follow:]

RESPONSES OF DR. JEREMY RABKIN TO ADDITIONAL QUESTIONS FOR THE RECORD  
SUBMITTED BY SENATOR JESSE HELMS

*Question 1.* What kind of legitimacy does an International Criminal Court have when numerous parties to it do not respect democracy and the rule of law at home?

Answer. Proponents of the Rome Statute might argue that the legitimacy of the ICC does not turn on the internal characteristics of signatory states but on the performance of the court, itself. But the Court will not have police of its own to make arrests. It will depend for its effectiveness on the cooperation of signatory states. And states with dictatorial governments, having no regard for the rule of law at home, are not likely to be reliable partners in international justice.

*Question 2.* If judges from Communist China and other dictatorships serve as judges on that Court, does it have any legitimacy?

Answer. It may be that "legitimacy" is in the eye of the beholder. Few people today question the "legitimacy" of the International Tribunal at Nuremberg, which tried and sentenced the top Nazi leaders after World War II—even though one quarter of its judges were appointed by the murderous totalitarian government of Josef Stalin. The Rome Statute requires that ICC judges be chosen in such a way as to assure both "equitable geographical representation" and "representation of the principal legal systems of the world." [Art. 36(8)(a)] So there is certainly a good chance that some of the judges will be appointed from countries which have repressive dictatorships at home. This is a disturbing prospect.

But I regard the backgrounds of the individual judges as a secondary concern. The ICC would still be a very questionable venture even if we could somehow be assured that all the judges would come from democratic nations with fully independent court systems. As I mentioned in my testimony, it is telling that even the bona fide democracies of the European Union have thus far been unwilling to establish a common criminal justice system, even on the European level. There are many reasons to worry about the notion of an independent international criminal justice system; the influence of undemocratic participants is only one source of concern.

*Question 3.* Are ad hoc war crimes tribunals—such as those for the former Yugoslavia and Rwanda—a better instrument for justice than a standing global war crimes court?

Answer. The only ad hoc war crimes tribunals that have been established since Nuremberg—that is, the one for the former Yugoslavia and the one for Rwanda—were both established by resolutions of the Security Council. The obvious advantage in this approach is that, if it depends on the Security Council to approve the juris-

diction of the tribunal, then the United States can block any proposed jurisdiction that seems overly broad. (That is so, of course, because the U.S., as a permanent member of the Security Council, can veto any Council resolution by its own unilateral vote.)

But I still think the practice is worrisome. First, the U.N. Charter does not anywhere grant the Security Council the authority to impose such a tribunal. In Rwanda, the tribunal was established with the consent and cooperation of the new Tutsi government and there was, unquestionably, an urgent moral claim to punish the organizers of genocide in the previous (Hutu) government. But I am troubled at the precedent here, which implies that the Security Council has the authority to establish a court, simply by its own resolution, even for judging crimes that took place entirely within the borders of one country and involved only the nationals of that one country. In the former Yugoslavia, the Security Council imposed a tribunal over the strong objections of the sovereign state of Serbia and in the face of clear indications from Croatia that it would not extradite its own criminals to the court. I find it particularly hard to accept that the Security Council can impose a criminal court on a country that does not want to accept it.

Beyond these concerns, there is a larger point for the United States. It may be true that the United States retains the right to veto Security Council resolutions. But it does not always exercise that right. In the case of the Yugoslav tribunal, the Clinton administration approved a resolution which, in fact, did give the tribunal jurisdiction over American troops serving in the region. More than that, the resolution establishing the tribunal made it the duty of the prosecutor to investigate allegations received from whatever source. So the prosecutor for that tribunal did feel obliged to make preliminary inquiries about charges that NATO forces had committed war crimes during the Kosovo air campaign. But the prosecution staff was doing its job. The indignation might more properly have been directed against the American government for agreeing to assign that job to the prosecutors. Suppose things had gone a few stages beyond this or go beyond this in the next round of charges: Suppose the prosecutors actually indict American squad leader whose men kill civilians in Kosovo after a confusing firefight with concealed snipers—a Balkan version of the NYPD's Diallo case. Suppose prosecutors in the Hague demand that the U.S. government turn over an American soldier for trial in the Hague. I am not sure what the Clinton administration would do in such a case but I do not want to find out. I think it is a mistake to support these tribunals on the complacent assumption that the U.S. government can simultaneously pretend to cooperate in full but always pull away and refuse to turn over an American suspect if the court indicts an American. It would be far better, I believe, to insist that every country should try its own criminals and leave it at that.

*Question 4.* Does it worry you that the United States will face politicized prosecutors and that U.S. officials and servicemen will just as likely be targets of ICC proceedings as dictators?

Answer. I am certainly worried about the possibility that U.S. officials and servicemen may be targets of ICC proceedings. But I think the question is slightly misdirected. I don't think the main risk is that the prosecutors will be "politicized"—if by that you mean, starting off with a deep-seated bias against the United States. Even if the prosecutor has no particular bias, I think the circumstances of the court will introduce a bias. The United States is a relatively open society where it is easy to obtain information and where an international prosecutor can count on receiving at least sizable support from American-based advocacy groups. For this reason, it will seem easier to make charges against Americans than against officials or soldiers of a closed and repressive government. Besides, the United States is the world's last remaining superpower, so the ICC will have strong incentives to go after an American to prove that it is not intimidated by American power.

But even if we are lucky and the prosecutor is not actually influenced by such improper considerations, the question remains whether the American people can feel full confidence in leaving prosecutorial decisions in the hands of an unaccountable foreign official. Independent Counsel Ken Starr was a former federal judge and a man with an impeccable reputation before he took on the job of Independent Counsel. By the time he left, almost everyone—including Starr, himself—acknowledged that an independent prosecutor, effectively accountable to no one, is an official who just won't be trusted by the American people. If we can't trust our own independent counsel, how can we possibly trust the U.N. counterpart in the Hague?

*Question 5.* Should the United States insist that the U.N. Security Council explicitly immunize our troops from future prosecutions before deploying them on peacekeeping missions?

Answer. I don't think the Rome Statute authorizes the Security Council to offer such immunization. The Security Council is authorized to impose a 12 month "deferral" on any particular investigation or prosecution (Art. 16). But if it does not re-authorize that deferral, the prosecutor is free to proceed as he thinks best. Meanwhile, any one of the permanent members of the Security Council (which include China and Russia, as well as France) may block the re-authorization. So we might get an initial resolution, that seemed to hold back the prosecutors, and then find that it had run out and couldn't be restored and American peace-keepers would, after all, find themselves vulnerable to prosecution. If the ICC does come into existence, the Security Council cannot provide the United States with reliable protection from ICC prosecution.

*Question 6.* Should the United States insist on explicit agreement from governments of nations whose soil we deploy troops that they will not hand over those troops to the International Criminal Court?

Answer. Here again, I do not think this precaution can be relied upon. A government may make this promise to us—and then renege on it. Moreover, the host government may make this promise and the ICC itself may hold that the promise was improper and therefore invalid under international law. The Rome Statute does say that no signatory may make any reservations to the obligations of the treaty (Art. 120). It really does seem inconsistent with the treaty scheme to promise full cooperation with the Court, when signing, and then make a separate agreement that excludes this or that potential suspect from the Court's reach. In the course of pursuing a particular case, the ICC may rule that such an agreement is invalid and therefore no bar to ICC prosecution. If the Court does issue such a ruling, the host country for U.S. troops may feel that it has no choice—or at least, that it has a very good excuse—to hand over accused American to the ICC, despite its earlier promise not to do so.

*Question 7.* Do you think [the American Servicemen's Protection Act of 2000] provides appropriate protections for the situation in which the ICC exists but the United States has not ratified it? What is your opinion of the legislation?

Answer. I am strongly in favor of this legislation. My hope is that it may deter enough countries from ratifying the Rome Statute so the ICC never comes into existence. Or, if the legislation is not that successful, it may at least hold down the number of ratifying parties so that the ICC has less prestige and authority than its proponents seek for it. Even if the legislation does not succeed in these respects, it can still, I think, make a valuable contribution because it may deter participating countries from actually arresting or holding American citizens for the ICC. When Secretary of State Albright says we will be a "good neighbor" to the ICC, the implication might seem to be that we won't feel too bad if other countries arrest Americans. This legislation makes it unmistakably clear that we will regard such an arrest as a hostile action—for which we feel entitled to retaliate with force.

*Question 8.* What kinds of threats do you anticipate Israel will face from the International Criminal Court?

Answer. I anticipate that Israeli officials will be among the first suspects investigated by the ICC and among the first actually indicted. Israel faces ongoing terrorist attacks which requires it to take defensive measures and retaliatory actions that can easily be portrayed as abusive. At the same time, Israel has implacable enemies who have already shown themselves quite determined to use every international forum they can to score propaganda points against it. But Israel is a small country with few natural resources and therefore its ostensible friends in Europe do not stir themselves to defend Israel. This was proven at the Rome conference, itself, when the Israeli delegate pleaded with the other delegations not to endorse Arab efforts to include the destruction of buildings as a "war crime"—when the Arabs made clear they would use this clause to charge Israel with war crimes for its retaliation policies in the disputed territories of the West Bank. No European country bothered to come to Israel's defense. I assume no European country would come to Israel's defense if an Israeli were held for trial at the Hague. Finally, as Israel is a democracy with a free press and a vigorous opposition, it will be much easier to document alleged abuses by Israeli officials. So I fear the ICC will have many incentives and many opportunities to target an Israeli soldier or official to prove that "international justice" is a force to be reckoned with—at least when dealing with small countries that have few reliable friends.

*Question 9.* Do you imagine that Israeli policies in the so-called "occupied territories" will be the subject of proceedings initiated by Arab and other Third World states?

Answer. I wouldn't simply say that I can "imagine" this sort of intervention. If the ICC does come into existence, I would *predict* that it will quickly be turned against Israel. We have seen this pattern again and again in other international forums. In the 1980s, Arab states even used the World Heritage Convention to condemn Israel for alleged neglect of historic sites in Jerusalem—under a treaty to which Israel was not a signatory. UNESCO has a long history of Israel-bashing. So does the ILO. So does the General Assembly. Last year, Arab states tried to summon a general conference of signatories of the 1949 Geneva Conventions (the first ever, since the drafting conference in 1949) to condemn Israel for alleged "war crimes." All of western Europe was quite prepared to appease Arab dictatorships with new condemnations of Israel in this forum and the conference was only put off when Yasser Arafat requested that it be "postponed."

Perhaps the ICC will take a somewhat more responsible stance, because its prosecutorial force does not have to answer to direct votes by the states which ratify the Rome treaty. On the other hand, the United States has been able to shield Israel from Arab enmity and European cowardice in many other forums, but it will not have any opportunity to exercise a veto on ICC proceedings. There are good reasons why Israel has so far refused to sign this treaty. Unfortunately, the ICC may claim that it has jurisdiction over Israelis, even without Israel's adherence to the Rome treaty, if "Palestine" does adhere or some other Arab state do. We should take it for granted that Arab states will do their best to turn the ICC, like so many other international forums, against Israel and we should take it for granted that few countries will come to Israel's defense. I hope the United States remains an exception. I do not see that it will be any better at defending Israel by ratifying the Rome Statute or trying to cooperate with the ICC. In the end, my guess is that Israel's defense will require armed force. That will be all the easier to exercise if we do not subscribe to the Rome Statute.

[The prepared statement of Dr. Rabkin follows:]

PREPARED STATEMENT OF DR. JEREMY RABKIN

Thank you for inviting me to testify on the American Servicemen's Protection Act." It is, I believe, a very important and timely response to some very disturbing trends in international politics.

The official title of this measure calls attention to one specific concern—the threat that individual American military personnel will be placed on trial before the proposed International Court of Justice (ICC). I believe this concern is well-warranted. But I also believe this immediate concern needs to be seen in a wider context. What we should worry about is not simply a physical threat to our servicemen but a wider threat to our national sovereignty. In what follows, I will try to sketch the most worrisome aspects of what is now emerging as a broad trend in international law.

I will emphasize three main points: First, the ICC represents a dramatic departure from traditional principles of national sovereignty. Second, it comes at a time when principles of national sovereignty have already been dangerously eroded and the ICC will only reinforce this trend. Third, this trend will very likely serve to undermine the authority of democratic governments—and the United States will be a particularly tempting target.

I. INTERNATIONAL PROSECUTIONS THREATEN NATIONAL SOVEREIGNTY

International law has been developing for many centuries. Major legal treatises have been published on the subject since the early 17th century. Yet no one, until quite recently, has envisioned a reliable system of criminal justice that would be truly international.

Why not? Because criminal law is inherently coercive—often quite intensively so. Contract disputes typically involve business firms that have some interest in demonstrating their trustworthiness. So many contract disputes are now submitted, quite voluntarily, to private arbitration. For centuries, merchants doing business across national borders have agreed to trust national courts to settle international contract disputes.

But criminals are, by definition, prepared to defy the law. So you cannot enforce criminal law without force or the credible threat of force. Who provides that force? The traditional answer was that every sovereign state must be responsible for enforcing law and order within its own territory. This ultimate authority to use force was understood as one of the distinctive attributes of a sovereign state.

The historic priority of international law was to reduce occasions for conflict among sovereign states. For the most part, it tried to do this by getting them to respect the sovereign rights of other states within their own territory. A state could

enforce its criminal law on foreign citizens entering its own territory but it could not try to enforce its law on foreign citizens in some other territory. Here, for example, is how a leading American treatise summarized the accepted international law doctrine at the end of World War II: "States are agreed that within the national domain, the will of the territorial sovereign is supreme. That will must, therefore, be exclusive. . . ." Accordingly, "a State cannot determine the lawfulness of occurrences in places outside of . . . its control." (C.C. Hyde, *International Law, Chiefly as Interpreted and Applied by the United States*, 2d. ed., 1945, pp. 640, 726)

It is true that in the decades since then, many countries—including the United States—have claimed extra-territorial criminal jurisdiction for crimes committed against their own citizens or against their own fundamental security concerns. But such jurisdiction is hard to enforce and has not often been exercised because, among other things, it requires cooperation of other states or risks affronting other states when done unilaterally.

It is a big leap beyond such limited self-protective measures to the sort of jurisdiction envisaged for the ICC. Among other things, the Rome Statute would give the ICC the authority to prosecute government officials who violate the human rights of their own citizens. And the ICC would have the authority to do this, for signatory states, in any case where its independent prosecutor thinks justice has not been done—even if the home state has conducted its own trial or issued its own pardons.

Every country vests a pardon power in executive officials, which is an acknowledgment that legal justice must sometimes be tempered by other considerations. We ended our own Civil War with a general amnesty for the rebels, even those responsible for murdering black soldiers in cold blood. Every country that has made a transition to democracy in the past decade—a considerable list of states from South Africa to Latin America and Eastern Europe—has issued broad amnesties for past abuses in order to conciliate previous opponents of democracy.

By contrast, the premise of the Rome Statute is that sovereign states can no longer be trusted to decide for themselves when and how to prosecute perpetrators of serious human rights violations in their own territories. Instead, the ultimate responsibility for such prosecutions will be vested in an international authority—with no responsibility for the ultimate political consequences of its actions.

Nothing like this has been attempted before. The few exceptions that are commonly cited as precedents for this venture are exceptions that prove the rule. Germany and Japan did not consent to transfer jurisdiction over their war criminals to international tribunals. They had both surrendered unconditionally and it was the Allied victors who determined to impose these trials. The Allied powers, as the acting governmental authorities in Germany and Japan, did not surrender prosecutorial authority to some international bureaucrat. Allied governments made their own decisions about which criminals to prosecute and justice was not their only concern. So, to conciliate Japanese opinion, American authorities decided that the Emperor of Japan should not be tried as a war criminal. A few years after the first Nuremberg trials, American authorities also decided to cut back on planned prosecutions of lower level Nazis in Germany, as the advent of Cold War tensions made it seem more important to conciliate public opinion in western Germany. Meanwhile, the Allies were quite scrupulous in excluding themselves from the jurisdiction of the tribunals they imposed on their defeated enemies.

In Rwanda and the former Yugoslavia, the U.N. Security Council did impose war crimes tribunals for limited purposes—but on territories that were so mired in chaos and civil war that they were not in much of a position to assert their own sovereignty. And in both cases, the Security Council (or the countries represented on it) did little to stop ongoing atrocities when they were occurring and then did little to help catch the perpetrators. These courts are little more than gestures and rather cheap gestures, at that.

Meanwhile, the European Union—which has its own parliament and its own flag and a whole series of common institutions—has not yet attempted to establish a European Criminal Court. Even countries that are unique in the world for their willingness to share sovereign powers with a regional authority have not been willing to share their criminal enforcement power. So we are to imagine that what has not been attempted in western Europe, even after decades of effort toward economic and political integration, can now be effectively implemented over the whole world!

We are told that most countries in the world now support the Rome Statute and the requisite majority will soon ratify it. But countries have voted for all sorts of treaty measures without seriously intending to change their conduct. The ICC will have no army, no police, no real coercive force. It will depend on voluntary cooperation. Most signatories may assume their own nationals will never be prosecuted or that they can always refuse to turn them over to the ICC if a prosecution is attempted.

The ICC is certainly not going to impose its will on the most abusive governments—any more than the International War Crimes Tribunal for the Former Yugoslavia has deterred Serbian President Milosevic from committing atrocities. At best, the ICC will be able to conduct a few symbolic prosecutions. Due process of some sort will be observed, but in the most literal sense these will be show trials—to make a political point, in the absence of real authority to enforce a meaningful international standard.

And the ICC will not be the only forum for show trials.

## II. LARGER CONTEXT: PINOCHET WON'T BE THE LAST VICTIM OF AD HOC ACTION

Human rights conventions have for decades asserted that countries are bound by international law in their treatment of their own citizens. But most human rights conventions have no serious enforcement power. A few criminal trials will not, by themselves, give force to international human rights standards. But they will certainly rivet international attention and give credibility to the idea that these standards are really “law.”

Before the Pinochet case, however, such criminal prosecutions by outside countries were only taken seriously in the academic writings of a subset of international law scholars. These academics began to assert in the 1980s that there was an evolving customary law of human rights, which had established a “universal jurisdiction” for prosecution of human rights abuses. According to this theory, any country might try perpetrators of human rights abuses in other countries. Until the Pinochet case, this was a theory and not even a very plausible theory—since it asserted a customary law based on almost no actual practice by governments.

The fact is that governments had been quite reluctant to prosecute top officials of other states. International law had previously been supposed to place top government officials in a separate category, because they were seen as the bearers of a special sovereign immunity or because their decisions, as sovereign acts, could not be questioned in the courts of other countries. The legal doctrines have exceptions and technical complexities. But the fact is that no country had dared to attempt the prosecution, in its own national courts, of a high official of another state for his official acts in his home state. The exceptions (such as Israel's trial of Nazi killer Adolf Eichmann or the U.S. trial of Panama's Manuel Noriega) took place in cases where the home country of the defendant did not object.

Pinochet was seized by British authorities in the summer of 1998, weeks after he entered the country on a diplomatic passport as part of a Chilean arms buying mission. The aim was to extradite Pinochet to Spain, where a magistrate sought to try him for “genocide” against Chilean leftists (some 3,000 of whom were killed in the aftermath of the military coup that brought Pinochet to power). After more than a year of legal wrangling, a panel of judges in Britain's House of Lords, its highest court, held that Britain did have the authority to extradite Pinochet, because Spain did have the authority to put him on trial—for abuses of his government against Chilean citizens in the territory of Chile.

As the Law Lords saw the case, Spain could assert jurisdiction for such a trial under the U.N. Convention Against Torture. The Convention says nothing about waiving immunity for top officials but the majority of the British judges held that the waiver could be read into the text, given larger trends in international law. The Torture Convention defines torture as “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted. . . .” By that very vague standard almost every government in the world has probably committed some acts of “torture” and the convention does not limit its reach to dictatorships or to especially violent regimes.

Even in the Pinochet case, the House of Lords insisted, with curious legal fastidiousness, that Pinochet could only be tried for offenses committed in the last months of his rule (after Britain and Chile had ratified the torture convention) and in that brief period there were only a handful of documented abuses. It was, according to British judges, of no relevance that Pinochet submitted to a democratic referendum on his continued rule and voluntarily submitted to a peaceful transition to democratic rule in 1990. It was of no relevance that in almost a decade thereafter, the freely elected government of Chile had declined to question an amnesty protecting Pinochet from prosecution there. The standard for international prosecutions, according to British judges, applies to democratic governments as to dictatorships. The British judges declined even to recognize an international exemption for sitting heads of state (though agreeing that *British* law would not allow their arrest).

If the Pinochet ruling is good law, it would seem that almost any country in the world now can seek to impose criminal liability on officials from almost any other country in the world, so long as the prosecuting state can get its hands on the offi-

cially it wants to try. And it is up to all other countries to decide whether they want to make an arrest on a hapless official visitor and extradite him, without warning, to a state that wants to mount such a trial. The United States has, in fact, ratified the torture convention, which can now be cited (on the Pinochet precedent) as consent to have American state governors, for example, arrested in foreign countries which wish to try them for abuses in their state prison systems. What British courts have read into the torture convention, others may read into other human rights standards. Or it can be argued that we are bound by emerging standards of customary international law, even when derived from conventions we have not ratified or ratified with reservations and other countries may try to enforce these standards with their own prosecutions of any American suspect they get hold of. At the least, there is no longer any clear international understanding that such prosecutions will violate international law.

Advocates for the ICC say the threat of such unilateral actions by national prosecutors in 150 countries is a strong reason to establish a centralized international authority to control such prosecutions. But the fact is that the Rome Statute does not assert exclusive jurisdiction for the ICC. It says nothing at all about the propriety of unilateral prosecutions by countries that just want to do justice on their own—to some other country's officials. To the contrary, the Statute says that the ICC will only prosecute if other countries have failed to take action. And advocates of the ICC insist that it will not have to take action very often because the normal recourse will be trial by national courts. Why not the national courts of outside states, as in the Pinochet case?

If the ICC does become established, it will lend even more weight to ad hoc, unilateral prosecutions by other countries. At least, it has the potential to do so. It may give the highest international authority to the claim that some disputed practice is actually a "war crime" or a "crime against humanity" or a "crime of aggression" or even "genocide."

By its terms, the ICC will only have jurisdiction over nationals of countries that ratify the Rome Statute—except for those who commit "war crimes" against a signatory state. So if the United States does not ratify the Rome Statute, U.S. officials could not be prosecuted before the ICC, itself, for human rights abuses against Americans. But a serious danger is that the ICC, in prosecuting nationals of other countries, will lend credibility and legal authority to similar prosecutions by individual countries, operating through their own national courts—and these can be turned against Americans. Putting the Pinochet precedent together with an established ICC may prove a rather potent force for expanding the reach of international criminal law.

### III. INTERNATIONAL JUSTICE WILL BE HOSTILE TO AMERICAN DEMOCRACY

Would international prosecutions really be turned against Americans or against our friends? There are reasons to think so.

To begin with, international human rights advocacy has always displayed a compulsive eagerness to find fault with democracies in order to balance criticism of more repressive governments. Amnesty International, for example, took the lead in mobilizing public opinion in Britain (and elsewhere) for the prosecution of Pinochet—despite the fact that the democratic government of Chile urged Britain to release Pinochet. AI also urged the Yugoslav War Crimes Tribunal to prosecute NATO officials for what it characterized as "war crimes" in the Kosovo bombing campaign. These were hardly anomalous stances. AI's 1999 Annual Report offers twice as much criticism of human rights practices in Australia as in North Korea, four times as much criticism of the U.S.A. as of communist Cuba, seven times as much criticism of Israel as of Syria. (See *IPA Review*, Melbourne, Australia, Sept. 1999 for a more detailed analysis.)

One reason for this sort of imbalance is that human rights advocates strive to demonstrate impartiality by finding fault on all sides. Another reason is that they have readier access to information about democratic governments than they have about dictatorships. But it is also true that the primary audience for human rights campaigners is in western countries. It is in those countries where they derive their financial support and their primary media attention. And they cater to constituencies eager to use the rhetoric of human rights to attack their own governments on policy matters they disagree with. So we have had the European Court of Human Rights solemnly informing Ireland that it must change its laws on abortion and recently telling the United Kingdom that it must drop its ban on homosexuals in its armed forces. Meanwhile, the U.N. Human Rights Committee has declared that American capital punishment statutes violate international human rights stand-

ards—even though the United States made an explicit reservation regarding capital punishment when it ratified the Covenant on Civil and Political Rights.

The International Criminal Court will have no real power to compel countries to cooperate with it. It will therefore have to rely on the mobilizing efforts of human rights advocacy groups. It will, in all likelihood, pay close attention to the priorities and concerns of these groups just as U.N. environmental programs attend closely to the concerns of environmental NGOs, which mobilize public opinion for their efforts.

Even some western governments may want to see the United States threatened—if only a bit—by international prosecutions. At the Rome conference, American delegates repeatedly expressed willingness to support an international criminal court if its prosecutions were made subject to Security Council approval. This would have exempted the U.S. from any danger that its servicemen would be subject to international prosecutions for alleged abuses committed in peacekeeping operations. This proposal seems to have won almost no support. Opponents insisted it would send an unacceptable signal to provide exemptions for the great powers. But won't it send an even better signal to launch a prosecution against an American official?

Finally, we should not take very seriously the idea that an international prosecutor will be restrained by the moderating influences of the western countries. At the Rome conference, itself, Arab countries maneuvered to include, among the definitions of “crimes against humanity” the willful destruction of houses—because this is a common Israeli form of retaliation for terrorist attacks. The Israeli ambassador to the conference pleaded with the delegates not to do this. He was, himself, as he told them, a survivor of the Nazi genocide that actually launched the concept of “crimes against humanity.” Surely, he protested, it was indecent to compare Israeli security policy with the Nazi genocide. His pleas fell on deaf ears. If it is convenient for European governments to conciliate Arab opinion in setting up the tribunal, will it be less convenient to conciliate Arab opinion with a few dramatic prosecutions by the ICC?

#### IV. CONCLUSION: A PRUDENT WARNING

Some people will say that the “American Servicemen’s Protection Act” is merely a petulant gesture. The ICC may yet be improved. It may never prosecute an American. Why not wait until an American is actually threatened, before deciding how to respond?

I would give two answers. First, the establishment of the ICC will itself add momentum to a larger trend. It is in our interest to reverse that larger trend. We should try to stop the ICC from coming into existence or at least make clear that it is not an important authority for shaping international law. Whether the ICC does come into existence, and with what level of support and credibility, is still somewhat uncertain. If we can discourage other countries from ratifying the Rome Statute, by proclaiming our refusal to cooperate with it, we will have achieved something quite worthwhile.

Second, we should remember that these prosecutions are likely to operate in a twilight zone of bluff and dodge. In the end, Britain allowed Pinochet to return to Chile with the excuse that he was too sick to stand trial. Human rights groups, though expressing frustration at the immediate result, still insisted that an important point had been made. The prosecutors in the Yugoslav tribunal did not dare to charge war crimes against NATO but they went through the motions of investigating to make a formal point.

It is very easy to imagine this sort of game played out against Americans or Israelis or other American friends who happen to be in disfavor with “international opinion.” Those who set out on such a prosecution may even think it worthwhile to test whether public opinion in the United States can be roused to restrain the American government from reacting too forcefully to the arrest of some particular American servicemen or official. The U.S. might feel a bit intimidated by “world opinion” or “international law”—or at least, other countries might hope so, when arresting an American.

In this setting, it is much to our interest to dispel ambiguity in advance. We should tell the world quite openly that we will not stand for the arrest of an American—or a counterpart from one of our allies—simply because the arrest is justified with the encompassing rhetoric of international human rights protection. Other countries may want to share their sovereignty with an international criminal court. We should make it clear in advance that we would regard such action as an extremely hostile act against the sovereign rights of the United States. We should make it clear that we will defend our own sovereignty, whatever other countries may do.



The CHAIRMAN. Professor Wedgwood.

**STATEMENT OF MS. RUTH WEDGWOOD, PROFESSOR OF LAW,  
YALE UNIVERSITY, NEW HAVEN, CT; AND SENIOR FELLOW  
AND DIRECTOR OF THE PROJECT ON INTERNATIONAL OR-  
GANIZATIONS AND LAW, COUNCIL ON FOREIGN RELATIONS**

Ms. WEDGWOOD. Thank you very much, Chairman Helms. Thank you for allowing me to appear before you. It is a great honor, and I am pleased to be here.

I may, however, fall into the middle ground here, I think. I have had some of my most interesting and pleasurable experiences in the last 5 years talking to and with the people of the American military.

I had a lovely year a year ago at the U.S. Naval War College, as a Stockton Professor of Law up there. I had classes filled with majors and colonels, who would tell me their concerns about ROE's and worries about border patrol duty when they are trained for war and combat.

And I have also spent a long time looking at peacekeeping, its problems, its policies in Haiti, in Bosnia and Georgia. And I am about to go out to East Timor to look at the U.N. operation there.

So it has been fun. It has been uplifting. It has really brought me, for a Vietnam generation, into contact with very gallant people, whose concerns I take most seriously.

But at the same time, while I feel a real collegueship with my friends in the military, I wanted to make a couple of points.

First is that we all, of course, do not want U.S. GI's, sailors, marines, airmen, to ever be subject to unfair prosecution. They give loyal and legal service. And the American security role abroad is unique and necessary to the stability of Asia and the Middle East and Europe. And I would never want there to be a legal Somalia, in which an American GI was penalized for doing his duty.

At the same time, though, there is a military interest in having effective enforcement of the law of war. We depend on that. When our three GI's got nabbed by Belgrade at the beginning of the Kosovo conflict, there was a little confab interagency about what to do about them. And ultimately, it was decided that we had to rely upon the Geneva Conventions to give them special protection as prisoners of war.

And Geneva, the venerable treaty from 1949 does establish some of the things that Professor Rabkin thinks are newfangled, like the ability of any country to enforce its provisions. But for the protection of American soldiers, a law of armed conflict that has some teeth is important.

How do we get to this point of the ICC? The United States has tried a couple of times in the Security Council to set up ad hoc tribunals for Rwanda and for the former Yugoslavia. There has, to be honest, come to be a political resistance in the Security Council to using its powers repeatedly with quite that latitude.

Many countries thought it would be more deferential to national sovereignty to have a court be treaty based or not at all. And that is how the ICC idea got started in the early nineties, when the United States signed on to the idea.

The concern about protecting American GI's, I think any of us can make the distinction between the kind of atrocities that Foday Sankoh commits in Sierra Leone—when he goes lopping off people's forearms and their legs, including little girls and women and civilians of all stripe—the kind of atrocities Foday Sankoh commits as quite a different thing from the sometimes contentious and close cases about military doctrine.

Some of the Europeans from time to time have not liked our policy of targeting electrical grids. We feel we have to, because those support anti-aircraft systems, and we have to protect our pilots. Or taking out the television broadcast station in Belgrade. We felt we had to do because the morale that Slobodan Milosevic was trying to whip up among his people in wartime was one of the obstacles to getting Belgrade to cave in.

On those kinds of questions, close questions of doctrine, a criminal court has no business. Maybe it is too much the lawyer in me—and I am also kind of a Hans Morgenthau realist—but there may be some ways that a combination of lawyering and moxie can substantially protect U.S. interests. If I may quote Robert Frost, "Good fences make good neighbors."

And what Dave Scheffer is trying to do up in New York at the moment is to push through the U.N. preparatory conference an agreement that would state that Americans could never be subject to the court's jurisdiction, so long as the United States stays outside the treaty. And I suspect that will be as long as Chairman Helms certainly presides over this committee. But it would be an actual guarantee of no third-party jurisdiction. It is a very delicate moment diplomatically. And my plaint to you would be the following: Good cop/bad cop is our favorite script from Hollywood. The United States may need to have something to offer its allies as a positive incentive, as well as negative incentives, if it is going to be able to win the day. It is late in the process, unfortunately, from some people's point of view, for us to be entering this fray. This has been percolating since 1994.

There are European countries that are going to sign it and ratify it. It may well be the European court that Jeremy Rabkin thinks cannot ever come to pass. I think at this point, we do not want the court to disrupt our NATO relationships or our other important military relationships.

We do not want the tail wagging the dog. And it may require a combination of positive, as well as negative, incentives to persuade countries to respect American immunity as a non-party to this treaty.

So I would urge the committee to consider leaving their bill simmering on the back burner. It is out there. Everybody sees it. Everybody knows what it means. But the timing of this is such in New York that one cannot work this guarantee of third-party immunity through the diplomatic process at that criminal court conference until the end of December 2000. And I think, therefore, this might be one of those bills that can be allowed to marinate with great attention and great respect, but in the fullness of time.

Let me just mention a few other little things, if you might permit me, just to clarify a few things. One is that we all share concerns about sovereignty. I like being a democratically ruled person. I do

not want somebody else telling me what to do. But the ICC, the International Criminal Court, cannot look at the internal practices of third-party countries.

Second, I also share the concern about due process. It was too hard won to give up lightly. And there are some differences between this court and traditional American trial procedures. There is no jury, although there is no jury in American court martials either. There is, however, a clearly stated right against self-incrimination in Article 55(1).

Equally importantly, the treaty would not override the protection of status of forces agreements, the so-called SOFA's. I think we have belt and suspenders here. If Ambassador Sheffer can get his third party immunity agreement by working this through, culminating in December 2000, and we have our status of forces agreements in good order, the ICC treaty itself must respect those under Article 98(2).

The reason why this treaty, if you look at it closely, has some surprising protections in it is in part because we have military folks up there working it.

My superb former student, who was a lieutenant colonel in the Marine Corps and Deputy Legal Counsel of the Joint Chiefs of Staff, Bill Lietzau, has been up there in the clinch, you know, cajoling, taking to coffee, making friends, but also letting them know who the United States is, trying to make sure that the wording of war crimes fits our doctrine, that the procedural protections are what we want them to be. I think this may be the kind of double-hatted role that one needs to play.

On amnesties, which even human rights people take seriously—because look at South Africa, look at Salvador, look at Guatemala, look at Central Europe, Spain and Portugal, Spain especially, shades of Pinochet, the way they got from dictatorship to democracy was with amnesties.

There is a lot in the human rights community that cannot be talked about from time to time. And one of the things they are coming around to understand is that this criminal court has to respect amnesties. It is a grudging concession that they are making, but ultimately, under the definition of what is a permissible, admissible case, a respect for locally and democratically chosen amnesties has come to be the consensus position.

And finally on the point about democracies, does the court's treaty overtly distinguish between dictatorships and democracies? Not overtly. But the fact of the matter is that democracies do not commit systematic war crimes. Our folks train under humanitarian law. We have Judge Advocates General deployed in the field to answer any questions commanders have.

We live by the code of Geneva and The Hague. The law of war is something that every honorable and professional military man I have ever met takes seriously for his own protection and because we are a moral and a religious people.

Does the treaty text type out the word democracy? No; but the fact of the matter is, democracies do not commit this kind of shenanigan. So I would just urge the committee to have patience and to publicize your bill for sure, but think about the possibility that a certain reticence may help to cajole our European friends, who

increasingly, in the post-cold war world, seem to have their own independent sense of what they are about.

It is a very interesting time in security politics, because with the diminishing of the Russian threat, the Europeans are all of a sudden all kind of independent and do not pay as much court to us as they once did. But still, ultimately I think they are aware, as they must be, that we are responsible for security in South Korea, in the South Pacific, South Asia, the Middle East, not them.

Europe has not yet risen to a broader responsibility for global security. It is way behind the mark on that. And I think ultimately they will respect our military needs.

Thank you.

The CHAIRMAN. Thank you, ma'am.

[The prepared statement of Ms. Wedgwood follows:]

PREPARED STATEMENT OF PROFESSOR RUTH WEDGWOOD

THE INTERNATIONAL CRIMINAL COURT AND THE PROTECTION OF AMERICAN  
SERVICEMEN AND OFFICIALS

Thank you for the chance to discuss with the committee the crucial question of how to protect American service personnel and American citizens in the international arena. I share the committee's concern that we should do nothing in the international arena that would ever penalize American soldiers, sailors, airmen, or marines for their loyal and lawful service on behalf of their country. This concern has been strengthened by my own close contact with American military operations. I have visited the American peacekeeping operations in Bosnia and Haiti. In 1995, I cochaired a seminar series on Capitol Hill for the Congressional staff on "Lessons Learned in Peacekeeping," which looked critically at our experiences in Somalia, Haiti, Bosnia, and elsewhere. As a professor of law at Yale University, I have written about the law of armed conflict, including the ambiguities in international law about the nature of self-defense and humanitarian intervention. In 1998-99, I had the pleasure of serving at the U.S. Naval War College in Newport, Rhode Island, on sabbatical leave from Yale, as the Charles Stockton Professor of International Law. At Newport, I served as a senior civilian player in the College's war games, and spent much of my time talking to the officers in my classes about the problems they encountered in their own operational responsibilities.

The American military has a direct interest in the effective enforcement of humanitarian law. The law of war is designed to protect the dignity and safety of men in conflict who may have the misfortune of falling into the hands of the enemy as prisoners of war. It is designed to protect civilians against deliberate mistreatment in occupied areas. And it is designed to prevent terror tactics that abuse the innocent civilians for whom our military fights. The American military trains and fights according to the standards of international humanitarian law. The Pentagon deploys judge-advocates-general into the field, in peace and in war, to give advice to our military commanders on any questions that may arise on the requirements of the law of war. It is the outlaws of the international community—men of the ilk of Saddam Hussein, Slobodan Milosevic, and most recently, Foday Sankoh of Sierra Leone—who have frequently and deliberately cast aside all standards of decency in mistreating civilian populations through ethnic cleansing and atrocities against innocent civilians.

In 1993, the United States worked to create an international *ad hoc* tribunal to prosecute the war crimes and atrocities arising out of the conflicts in the former Yugoslavia, including Bosnia. This international court was created through the power of the United Nations Security Council, and has been supported by the United States with personnel on loan, intelligence information, and the assistance of the U.S. military in arresting defendants and providing area security to court personnel who must investigate facts on the ground. The jurisdiction of this court has been broad enough to indict Slobodan Milosevic for his crimes in Kosovo as well. The past president of the *ad hoc* tribunal was Judge Gabrielle Kirk McDonald, a former U.S. District Court judge from Houston, Texas. An American judge currently serves on the *ad hoc* tribunal, Judge Patricia Wald, who was formerly the chief judge of the U.S. Court of Appeals for the District of Columbia Circuit. The United States has also supported the creation and operation of an *ad hoc* tribunal to try

the criminals who organized the 1994 genocide in Rwanda, in the Great Lakes region of Africa.

The *ad hoc* model has its limitations. There has been concern that other permanent members of the Security Council may veto the creation of future *ad hoc* tribunals. There has also been resistance to taxing the Council's power and political authority beyond its sustainable limits. Since 1994, the United States has been part of a negotiating process to attempt to create a standing structure that could try international rogues who commit crimes in the future.

The negotiating process has been a difficult one for the United States. The Rome conference in 1998 coincided with a moment when the members of the European Union were reexamining their security role. The influence of non-governmental organizations was more evident than ever before. And the rushed five-week diplomatic conference was not an ideal setting for airing our concerns.

As Americans, we do have unique concerns. The United States has global security obligations that no other country will undertake—in our steadfast commitments in Europe, the Middle East, and Asia. We have over 200,000 troops stationed abroad. We spend more money on international security than Germany, France, the United Kingdom, Italy, Spain, Belgium, the Netherlands, Canada, Australia, Japan, and South Korea combined. We pull the heavy load in peace enforcement and anti-terrorist actions, as well as participating in peacekeeping and freedom of navigation exercises. Each time the United Nations has called for nation states to use force against an aggressor, the United States has been at the center of the coalition. We are the only nation capable of sustained transcontinental operations, able to make unique contributions in airlift, logistics, and intelligence. The deterrent power of American military force provided the backbone of the free world during the Cold War, and is still the spine of post-Cold-War security. But the unique nature of American power, and its long reliability, means that at times, even our friends take us for granted.

The concern of the United States in the ongoing negotiations concerning the permanent international court is to make sure that the court knows how to exercise its power wisely. The record of the *ad hoc* Yugoslav tribunal shows that an international court can handle only a limited number of matters and must prioritize its workload. The permanent court is designed to target the atrocities of the bloody civil conflicts of our age, not to interfere with the legitimate exercise of military power for the protection of our common interests. Even a schoolboy can distinguish between the atrocities committed by rogue actors, and the legitimate military operations that sustain our security.

Uniformed officers of the United States military have been front and center in the U.S. negotiating team on the criminal court, to make sure that the court's articulation of the law of war fits our own conception. We have been working carefully through the court's statute, to pin down the elements of offenses in any grey areas, to assure that no American service personnel could ever be caught inadvertently in the traces of an international court.

In addition, the American team has worked hard to guarantee that the court will have to defer to the reliable processes of American military justice. The lawyers' idea of "complementarity" means that the international court has a role to play only in countries where the system of justice has broken down.

At the same time, as realists, we must be aware that there are adversaries and adventurists who may try to misuse the court to frustrate American security interests. Even our closest allies may have differing views on the details of how military operations should be conducted.

There are principles of the law of war that are clear in theory, but hard to apply in practice. This includes the principle of "proportionality" which says that the damage to civilians in a military operation should be reasonable in relation to the military advantage. This also includes the rule against targeting so-called "civilian objects"—and the difficult question of how these objects are defined. In war, the United States may need to shut down an adversary's electrical grid that supports his anti-aircraft system, or to shut down the broadcast station with which he sustains his war effort. We need to protect our ability to call the shots as we see them, in the legitimate exercise of the law of war.

There is every reason to believe that the International Criminal Court will wish to work hand-in-glove with NATO and the United States. This has been the story for the *ad hoc* tribunal for the former Yugoslavia.

At the same time, a permanent court is a new concept, and the role of foreign judges, who are not members of the American political community, needs to be settled in practice. We need to be sure that they will read the law reasonably, and will exercise good judgment to avoid any chance that the court could become a political plaything.

My recommendations would be two-fold.

First, the United States should take steps to make sure that the members of the International Criminal Court are educated in the nature and demands of modern military operations. According to the Rome treaty, the judges of the court must have professional experience either in criminal law or international law. What is sorely wanting as a third prerequisite is experience in and knowledge of military operations. The International Criminal Court—even if the United States never chooses to join it as a party—will be a more productive institution if we help to provide the necessary expertise to support wise judgments. This could include a roster of expert military witnesses, or a military advisory council, or informal contacts through conferences and educational institutions. As every American President knows, military men have a distinct expertise and knowledge, and one ignores this wisdom at one's hazard.

Second, the United States must work to assure that its military and political personnel are not subjected to the jurisdiction of the international court for authorized operations, under the guise of "third party" jurisdiction. A surprising number of countries have argued that because the Geneva Conventions of 1949 allow the exercise of national court jurisdiction over accused defendants who fall into the hands of the enemy in an international war, this national jurisdiction can also be delegated to a treaty-based court—even where the accused's state has remained outside the treaty. The United States has firmly opposed this view.

It will take time if the United States is ever to consider joining the court. In the meantime—and how long that is, is up to the Senate and the President in their judgment—we must be sure that our personnel are not subject to the court's powers of arrest for authorized operations.

We are at a delicate diplomatic moment in New York at the preparatory conference. The countries that have signed the Rome treaty and wish to join the court have every reason to want a "good neighbor" policy with the United States. Our negotiators, including expert military members of the U.S. delegation who have worked throughout the process, are in a close order battle, seeking the most effective means to persuade our friends and allies that they should support the United States in this concern. This is a matter too important for mere lawyers and technicians—it involves a profound judgment as to how the International Criminal Court can best function as a responsible institution and how to maintain the amity and working strength of NATO and other allied relationships.

The timing and atmosphere of these negotiations is crucial, and for this reason, as a modest observer, I would recommend that the appellate not be upset by any draconian measures. The State Department is engaged in high level capital-to-capital discussions about the importance of this issue, and is urging its allies to make a mature judgment about their long term interest in a responsible and effective court.

While it is too late to amend the text of the Rome treaty, the United States has proposed a rule under Article 98 of the treaty that would make clear that the court must observe all applicable international agreements in the exercise of its powers of arrest or acceptance of surrenders. This rule is on the agenda of the current "prepcom" in New York, which adjourns on June 30.

At the same time, we are discussing with our allies the content of a key international agreement—the so-called "relationship agreement" between the court and the United Nations. This agreement could bar third-party arrests or surrenders of the nationals of non-parties. The United States is working with its allies to frame this agreement in a way that might permit the court to reach the leaders of rogue states that have committed the most extraordinary outrages, while protecting the personnel of responsible militaries that engage in peace enforcement and the maintenance of international security. This agreement is likely to be on the agenda for the prepcom in December 2000, and the United States must gain the support of its allies in the intervening period.

My own advice is meant to be agnostic. Whatever one's views of the merits of the International Criminal Court—pro or con—it is crucial that the United States and the court not start down a road of mutual acrimony. Our NATO allies and many other countries apparently intend to join the court. Some of them have concluded that the United States will only be a spoiler and should be marginalized in the negotiations. But others of our friends have become more cognizant of the unique operational role of the American military and the legitimate reasons why we may be wary of an untried and untested institution. The strategy that may best serve American interests is to show our allies that their desire for a responsible court to meet the atrocities of a Foday Sankoh is consistent with the exercise of America's unique security role in the world.

The CHAIRMAN. Let me say that the absence of Senators is not meaningful in terms of interest. They are tied up on conference committees and all the rest of their commitments. And I know all three of you understand that. And I was cautioned by two or three Senators, or more than that, at the Senate Republican Policy Luncheon today that they could not attend.

They said, "Now I want to submit a question or two" and so forth. So you will be getting some mail from the U.S. Senate. And I hope you will be responsive to the questions.

Cap, you served as Secretary of Defense for, what was it, 7 years?

Secretary WEINBERGER. Seven years, yes, sir.

The CHAIRMAN. I know a little bit about the Pinochet case. I went down there to Chile a couple of times, as well as to other countries. And what I saw and what I heard from the people is very much different from what is being published and was being published at that time in some of the media.

Now, are you concerned about the effect of the Pinochet case and the nearing establishment of an International Criminal Court on U.S. national security decisionmaking?

Secretary WEINBERGER. Yes, sir. I think that if you have a court of this kind and we do not get—when we either do not join it or we finally work around and get them to give us some concessions so that we would be a member of it, either way, there would be a very considerable additional reluctance on the part of the regular military and the Pentagon, and I would hope among the civilian leadership of the Pentagon, to commit forces into countries and situations where we have not worked out a status of forces agreement that covers the kind of rights and protections that we think are necessary, and they differ in each country, for the protection of the troops.

It may be that some people will argue, as we have just heard, to the effect that the treaty for the International Criminal Court would not override status of forces agreements. That may be what the Statute of Rome says that created it. But bear in mind, sir, that this court is going to make its own interpretation. And they will be the sole judges of what they think it means.

And if they feel that a status of forces agreement is inconsistent with, or incompatible with, something that they want to do, they would not hesitate, I am sure, to reach the conclusion they wanted to and, in effect, override the status of forces agreement, regardless of what the treaty itself says.

So I think there should be a very cautionary note induced into every situation as to whether we thought we should put American forces into any country to achieve a result that we think is essential for our own national security, our own national policy, if we thought that the troops were going to be subjected to this kind of potential prosecution by a court over which we have basically no control, and in many years perhaps not even membership on the court itself, assuming we joined the treaty. And the court would attempt to assume jurisdiction, even though we had not joined it.

So all of those would be—they would certainly lead me to be very cautious about deploying American troops in the absence of specific protections of the kind that are covered in your bill or that would

be worked out in an agreement with the host country. And so I think it could very well affect our whole foreign policy in ways that are quite adverse to it.

The CHAIRMAN. I think you are exactly right. Let me follow up with a question that is sort of personal. Back in March, I think the tail end of March, maybe the 26, 27, along in there, the New York Times reported that the FBI had warned several former government officials to take care in traveling to certain countries, including some European countries, in the wake of the detainment of Pinochet.

Did you receive any such warning?

Secretary WEINBERGER. Did I?

The CHAIRMAN. Yes, sir.

Secretary WEINBERGER. No, sir. I am too "former." I do not think that there would be any particular interest in me. But theoretically, it would not be impossible for Libya to claim that we did not treat them nicely when we conducted the raid, which was essential to punish them for harboring terrorists and all the rest. But I did not receive any such warning, no. I think they have forgotten me.

The CHAIRMAN. Oh, I think you were up to date in Kansas City. I do not think you are a former former, and we are glad to have you here.

Dr. Rabkin, a good friend of mine, and perhaps a friend of yours, is the Secretary of State Madeleine Albright. I talked to her last night, but she did not mention it: She has characterized a good neighbor policy toward the International Criminal Court; that is, that we should cooperate with the court without being a formal party to the court.

And I want to ask you: Would that lend legitimacy notwithstanding to an institution I consider to be undeserving of American support of any kind? How do you feel about that?

Dr. RABKIN. She is a friend of yours. She is not a friend of mine, actually. And—

The CHAIRMAN. She is a pretty nice lady.

Dr. RABKIN [continuing]. I think it is a terrible idea. I mean, this thing is a menace. And we should be trying to snuff it out. We should not be trying to get on with it in a neighborly way.

And if I could just use this occasion to respond to one thing that is very pertinent—could I?—that Ruth Wedgwood said, which was, well, we do have an interest in having some authority out there which will prosecute violators of the Geneva Conventions. And I just want to say, that is wrong. We do not have that interest.

Any country that has custody of somebody who has attacked American troops in a way that is contrary to the Geneva Conventions, any country that has custody of that war criminal, can just as well hand him over to us as to The Hague.

We have no particular stake in saying, "Oh, please, we would like to have them tried in The Hague." Why try them in The Hague? We can try them ourselves. We have done it before. We know how to do it. I do not think we have any interest in having this thing go forward, none.

The CHAIRMAN. I searched in my book here for a biographical sketch. How many years did you spend in the classroom?

Dr. RABKIN. Do you mean teaching?



The CHAIRMAN. Yes, sir.

Dr. RABKIN. Twenty now.

The CHAIRMAN. Twenty?

Dr. RABKIN. Yes.

The CHAIRMAN. Well, you are a good teacher. I enjoyed—

Dr. RABKIN. Thank you.

The CHAIRMAN. I enjoyed very much your presentation, because you reminded me of a professor I had in school years ago.

Dr. RABKIN. Thank you.

The CHAIRMAN. There is one question I particularly wanted to ask. And that was of you, Professor Wedgwood.

By associating itself with the International Criminal Court, which is modeled on the European prosecutorial model, would not the United States be accepting a system which lacks constitutional safeguards, such as the presumption of innocence or right to cross-examination, or right to confrontation, or trial by jury?

That was posed to me as a question, and I pass it along to you.

Ms. WEDGWOOD. Yes, sir. Well, I do think if debates on the International Criminal Court ever got along farther in this country, you would have a very interesting conversation, where folks who are concerned about American military power might well have close allies in the American Trial Lawyers Association, who would be concerned about constitutional protections.

There is, however, kind of a civil war going on in the Yugoslav War Crimes Tribunal, the civil lawyers against the common law lawyers. And basically the common law lawyers have won. The Yugoslav tribunal's procedure looks a whole lot like an American courtroom. And frankly, so does the ICC. There is a right against self-incrimination and the presumption of innocence and a right to cross-examination.

There are a few issues that do concern me. There is a right of appeal by the prosecutor, which you never have in this country, a right of appeal from an acquittal. And there is no jury trial, which is a central tenet of American jurisprudence, the right to be judged by your peers.

And those are going to be difficult debates, because yes, it is true that in court martials GI's do not get juries either. But on the other hand, this is not strictly a military court.

If I might just say one last thing, on the problem of errant countries, Libya, of course, has already indicted our fighter pilots for bombing them in Tripoli in 1986. And Yugoslavia has purported to indict us. I am not concerned about fractious rogues who try to strike back at us. We are big enough and tough enough and strong enough. And to be honest, I would think that a responsible American Cabinet Member is never really going to be deterred by that kind of shenanigan.

On the court, I do think we can kill them with kindness. And there I disagree with my two colleagues on the panel here. I do think that the way that we transformed the peacekeeping operations department at the U.N. was by kind of moving in and setting right their operations. And to some degree, we are going to have to, I think for our protection, do the same thing with this court and educate them about modern military operations.

The CHAIRMAN. Now you said, right of appeal?

Ms. WEDGWOOD. Yes, sir.

The CHAIRMAN. Let us take a corporal from Chinquapin, North Carolina, who is over there somewhere, and he gets charged with whatever.

Ms. WEDGWOOD. Yes, sir.

The CHAIRMAN. Now to whom would he appeal upon conviction, to the same court that convicted him?

Ms. WEDGWOOD. If a—it is hard for me to imagine that an American soldier ever would be before this court, because we take care of our own military justice problems here just fine, thank you.

But in the very hypothetical that an American GI could somehow be before this court, he would appeal to the appellate chamber of the court, which is staffed by judges who were chosen by the treaty party members.

Dr. RABKIN. It is the same court, in other words, Senator. He would appeal to another division of the same court, created in the same manner, and staffed in the same way, and without any required input by us.

The CHAIRMAN. I do not think I want to be tried by that court.

Dr. RABKIN. I would not care to argue before such a court, either.

The CHAIRMAN. Cap, our troops will be law abiding when we are deployed over there in nations abroad.

Secretary WEINBERGER. Yes.

The CHAIRMAN. Professor, you are good.

All three of you are.

Do you think that the Framers of the Constitution ever, ever contemplated a surrender of sovereignty by the United States on a scale which would be represented by the United States' accession to the Statute of Rome?

Dr. RABKIN. Absolutely not.

The CHAIRMAN. Absolutely not. Is that your final answer?

It is a good one. You are right.

Dr. RABKIN. I mean, I think they would just be appalled by this. They would just be appalled by this, because, you know, they went to a lot of trouble to set up a constitutional system here—

The CHAIRMAN. Exactly.

Dr. RABKIN [continuing]. In which we have constitutionally accountable officers who govern us. And here we would say, "Oh, yes, but now we are going to, by treaty, set up something which sits on top of that constitutional system and has authority over it." I think they would regard that as just unbelievable, that we would even be thinking about it. And yet we are thinking about it.

I mean, let us go back to that. The Clinton administration helped to get this thing going. The Clinton administration is, if not the father of this treaty, at least, you know, godfather of this treaty. Right? And now they are saying, "Well, OK, it did not turn out quite exactly right—well, maybe it could be fixed a little bit."

But it is not a question of fixing it. What were they thinking in the first place? They have launched this forth as something that we could actually join. How could we possibly join a thing like this?

The CHAIRMAN. Cap, I am trying to think of something to be illustrative in the range of possibilities. Imagine that the United States hands over some documents or some classified information, or perhaps some suspect of war crimes. Under that set of cir-

cumstances, can such cooperation endanger American interests, even as a non-party, by legitimizing the court and its claim of jurisdiction over Americans?

Secretary WEINBERGER. Oh, it is perfectly conceivable, Senator, yes. You have all kinds of documents that might be giving instruction to the troops, rules of engagement for them, things that they should do in certain contingencies. There would be an enormous amount of potentially classifiable material that should not be turned over to anyone, let alone a court that would not have any experience in dealing with the use of classified material in the course of a trial.

We have provisions for turning over classified documents to our own courts, in which case they strike out anything that is indicated to be classified or anything that should not be used. And whether or not the whole document can be used is governed by the rule of law and all the rest.

This court would not be governed by any of those precedents. It would not have any to start with. And it would not be governed by any of the rules that we consider essential to preserving our own security. And they would be able to demand the production and the transmission of these various documents.

Some people can say, well, we would not have to comply. Well, that leaves us in the situation then of headlines all over the world saying we are defying an international court. And we should not be in that kind of position.

You may have noticed, Senator, that just last week we were required, under a torture agreement we were a party to many years ago, to turn in a report of whether we had committed any acts of torture with respect to prisoners or others in the American judicial system, American criminal court system. And we said we did not think we had, but yes, it was true we had done a few things that were rather brutal.

Immediately various nongovernmental organizations, Amnesty International and others, picked that up and said that we had been guilty of all kinds of atrocities and brutalities. And all this plays out on the world stage before this group, because we are required to turn in this kind of a report. We have to try to justify the actions of a number of different jurisdictions all over the country, Federal, state and local.

And these are the kinds of things that we have to, in a sense, answer to these world bodies for. This is a non-related agreement, of course. But it is the kind of thing that can happen, when you get into these internationally controlled organizations.

And they then will say that the practice is used to transport extremely dangerous criminals from one jail to another or from jail to court, that those tactics are not fair, that you should not put on handcuffs or you should not put on so-called stun belts that are designed to keep these extremely dangerous criminals, who have been on Alcatraz and so on, from hurting anybody in the court or in the sheriffs' groups or whatever transporting them.

We have to try to say that this is why we do it. And we have to, in a sense, defend ourselves and try to excuse what some other critical organization might say about it. And there is no shortage

of organizations that are eager to find something that we do wrong, some of them at home.

The CHAIRMAN. Ms. Wedgwood, nearly all countries refuse to extradite their citizens to the United States. That is my understanding. I am not a lawyer, but they just refuse to extradite them for crimes they commit in the United States.

And the question came to my mind, why should the United States involve itself with an international court composed almost entirely of states that do not cooperate fully with the United States bilaterally. Do you have any opinion about that?

Ms. WEDGWOOD. Well, it is an insightful question, Senator. There are some countries that do extradite their citizens and some countries that do not. The Scandinavian countries, Latin countries tend not to extradite their nationals to the United States. Mexico can waive that bar. Some countries have a constitutional requirement that they cannot send us defendants.

To sign up to the ICC, they are going to have to agree to turn over their nationals in cases where their own national justice systems have broken down. Extradition has always been built on reciprocity.

We have negotiated a host of bilateral extradition agreements—I used to work in the Department of Justice back in the late seventies, and I prosecuted in the eighties and had a Bulgarian spy and a couple other good national security cases. And basically, you have to rely on reciprocity and cooperation. The British will extradite to us. The Canadians will. Other countries will not. We try to negotiate effective bilateral extradition treaties that protect our interests.

Could I also just possibly bend your kindness with a footnote on the issue of classified information?

The CHAIRMAN. Sure.

Ms. WEDGWOOD. I take that very seriously. Back in the late seventies we were worried about the problem of so-called gray mail, where certain kinds of cases could not be properly tried without prejudicing American national security information.

And we devised a series of procedures that were later passed by the Senate and House in the Classified Information Procedures Act to think about ways that you could put on a trial that was reasonably fair and still protect vital information.

The one absolutely solar plexis blow that we did not permit the ICC treaty to do is we have protected our national security information. The court cannot require the turnover of classified information. That was a line in the sand for the U.S. delegation. And I think that has been met forthrightly in the treaty text.

Thank you.

The CHAIRMAN. All right. One final question, I guess; I want to throw it open to any one of the three of you. I think you know that the International Criminal Tribunal for the Former Yugoslavia recently completed an 11-month investigation of alleged NATO “war crimes” in Kosovo. Now the court wisely did not proceed with indictments against NATO, but it did declare its authority to judge NATO actions.

Now most Americans are probably unaware that one of the judges sitting on that court is from what I call Red China, you see.

And my question is: Should Americans be alarmed by the fact that a judge from a Communist country—and I say that as a matter of fact, because that is what the Government of Beijing is—is sitting on a court which claims the power to indict and try American officials and service members.

You, you, or you tackle it. Go ahead.

Dr. RABKIN. You know, this was not something that the court, by a kind of Warren court judicial activism, reached out for. That is not what is going on here. The Clinton administration, which set up this court, agreed in the charter of this court to say that it had jurisdiction over all participants in military action in the former Yugoslavia. It was perfectly obvious at the time that this jurisdiction could include us.

After the Kosovo war—or whatever we are calling it now, bombing campaign, air campaign—the Security Council passed a resolution, which presumably we were very involved in drafting, which said, “Now there will be this and this and this in Kosovo. And everybody is urged to cooperate with this war crimes tribunal.” And it made no exception at all for NATO forces.

They do have jurisdiction over this. I think the moral of that story is when Secretary Cohen—I just saw him. I mean, I saw his statement this week saying, “It was an outrage, it was an outrage, that the Yugoslav tribunal challenged us.” Listen, if you sign on to a thing like this, you have to expect that they will call you on it sometime.

I think the moral of this story is that you should not play around with these things, because—you should not rely on what we seem to have been relying on, which is “Oh, they would not dare, they would not dare.”

And I do not think the prosecutors there were happy to do this. I really do not think the prosecutors went out of their way to do this. I think it was the other way around. These advocacy groups came to them and said, “What about this? What about this? What about this? What about this?” And the prosecutors thought they would look weak or partisan. They thought it would be discreditable to them, if they did not look into these charges.

And you cannot really look into it unless you do some interviews. And so you call in high-level NATO officers and interrogate them. We have to expect that this will happen if we put ourselves under an international tribunal.

The CHAIRMAN. Since you just talked, you go first, Cap, and then back to you, Professor Wedgwood.

Secretary WEINBERGER. Well, Senator, I think part of this stems from the fact that few people seem to have any idea what combat is all about. Combat is a very messy business. It is not tidy in any way. And you cannot play it by a certain predetermined rule. You have to do what occurs to you at the point.

If you have to take evasive action, if you have been assigned a bombing target, and you have to let your bombs go on a secondary target, you may very well do some injury. There is no question about it. That is why we try our best to do anything we can to avoid war.

But if you are going to have a situation in which somebody can be sued in a foreign court to which we are not a party and charged

or perhaps punished for actions of that kind, the recruitment is going to be far lower than it is now. And it is something that I think we just have to realize would completely nullify our capability to defend ourselves or to take actions in other countries that we think are compatible with our foreign interest.

And there is no question at all, and I agree very much with the professor, that the administration has had a record of preferring to have all kinds of matters settled by international bodies rather than by our own individual unilateral or bilateral actions.

And that is why I worry about the status of these agreements that we have with a number of countries that have been worked out very carefully as to how we can protect our troops going over on missions which frequently they have requested us to perform.

So I think that the seeds of a great deal of very unhappy results are in this treaty and in our continued attempts to change it. Just last week, this week, we have been urging them to make a few changes. And in the course of doing that, it always happens in negotiations, we agreed to take out one provision that we thought was reasonably helpful.

And that was that the Security Council itself could determine whether or not a particular person who is summoned to be tried could be excluded. And the reason we thought that was helpful was because we have a veto power on the Security Council. Because of that, it was objected to. And our negotiator agreed to take it out.

So this is the kind of thing, as was just said, of playing around and trying to improve things that are extremely bad ideas from the start.

The CHAIRMAN. Professor Wedgwood.

Ms. WEDGWOOD. Carla Del Ponte was a tough-minded Swiss prosecutor before she went to The Hague Tribunal for Yugoslavia. Her decision not to open a full investigation of NATO was well founded in fact and law. I think she felt obliged, because the statute was indeed worded in terms of the territory of Yugoslavia, to show that she could look at it in a fair-minded way, sauce for the goose, sauce for the gander.

The dilemma of American policy is really that it is very hard to devise a jurisdictional scheme that will catch the Foday Sankohs of Sierra Leone, the Slobodan Milosevics and the Saddam Husseins, that does not have a broad compass that can in theory trouble other people.

But I do have faith in the law-abiding nature of our military. I think we should think about letting this court—see how it turns out. It is not benign neglect; it is educational involvement. Teach them about armies. Teach them about the demands of modern military operations.

One of my concerns, Senator, if I may just say very briefly, is that in peacekeeping operations, to protect our troops, we have felt the need to do things that were innovative. Like our bubble exclusion zone in the tanker war in the Iran-Iraq war, when we were escorting Kuwaiti oil tankers and told other vessels to stay away, even though it is not provided for in the Law of the Sea Convention. And in Mogadishu where we said that truck-mounted automatic weapons—so-called “technical” vehicles—were going to be

considered presumptively hostile, as necessary ROE's to protect our folks.

They may be innovative, but they should not be mistaken for crimes. What I think one might do is hang back with a threat of the Sword of Damocles dangling over the court and see if people of prudence and judgment are the ones who exercise their offices there. And if they are in fact behaving irresponsibly, the obvious consequence follows.

The CHAIRMAN. I have kept you here longer than I had intended to do. Let me say this: I am glad that the rest of the Senators have other commitments because I have enjoyed having this all to myself. I get to ask all the questions I want.

I never make a speech, Cap, that while I am driving home, I do not say, "Gee, why did I not say such and such? I forgot about that."

I do not know whether you folks have the same situation. But let us take a minute or two for each of you. And if you have such a windup statement, I would appreciate it.

Cap, do you have one? Do you have anything you want to say in addition to what you have said?

Secretary WEINBERGER. No. I think that covered it pretty well, Senator. I will say just one closing point, and that is that there is a tremendous double standard here. I mentioned it in the course of the presentation.

And that is when you have a complete brutal assassin like General Ratko Mladic of Yugoslavia, whom everybody says should be tried and all the rest of it, and they report they cannot find him, when he is up making speeches every half-hour. It seems to me that they have made a conclusion or decided that this is somebody that they really do not dare want to do this to.

But it is that kind of a double standard that I think could be applied here, that would make an additional reason why this should be something we should not think about. And because of the fact that it could be made to apply to us, it makes the passage of your act all the more necessary.

The CHAIRMAN. Professor Wedgwood.

Ms. WEDGWOOD. Sir, if the ICC is going to ever breathe any breath out of the grave, it is going to need the United States for intelligence, for perimeter security, if it wants to exhume a mass grave in Yugoslavia or some other place, for witness relocation, for diplomacy and support. I did an amicus brief in front of the Yugoslav tribunal, trying to protect classified information from turnover, and yet to allow us to demand of Croatia what we needed to pin one of their generals, who had engaged in ethnic cleansing, brutal ethnic cleansing. U.S. diplomatic support was crucial.

It is hard. But basically, the proposed International Criminal Court is going to need U.S. assistance, if it is going to amount to anything. So I think the "kill them with kindness" strategy can work. And I do think, also, just like we are all scared of ever going to court—just as the worst headache in the world is to have a lawsuit, to have a judge who knows little about your industry or your product—one does need to educate judges of all stripes about the particular demands of occupations, including the honorable occupation of arms.

And finally, just to tease my friend Jeremy Rabkin in closing, the Founding Fathers actually did take international law a good deal more seriously than we do.

If you read James Wilson's lectures in 1790, or Alexander Hamilton who was as hard-headed as they come, they both think you have to have some structure of international law to protect American interests. We were, after all, a trading nation. We wanted rights of neutrality.

The problem is to get it right, the right kind of balance between local self-governance and international involvement. And my hope is that if Ambassador Scheffer succeeds in his attempt to get this third-party immunity for American GPs, until and unless we ever join the treaty, that this will allow some kind of productive cohabitation with the ICC.

The CHAIRMAN. Very well.

Last but not least, Dr. Rabkin.

Dr. RABKIN. Thank you. Let me make three quick points. The first one is just in response to Ruth Wedgwood. I was not saying that the American Founders were disdainful of international law. I quite agree with you that they did respect international law. The Declaration of Independence starts with an appeal to the rights of nations under international law.

But what I was asked was, how would the Founders feel about the International Criminal Court. And on that I think it is very clear they would be appalled. And one of the authorities I would appeal to is this article that you wrote a long time ago, in which you developed this point that they even had great concerns about extraditing an American at all, even to Britain, let alone to The Hague.

Let me make two other substantive points. First—and I do not mean this as tit for tat. But I think that what Ms. Wedgwood is saying here is what defenders of this generically say, which is, "Let us not throw out the baby with the bath water. You know, this is really important." And she gave the example of Sierra Leone. "We want a court that can deal with that," she says.

But I say what those people need is not a court. What those people need is an army. I think we have this completely backward to keep pretending that because there are horrible atrocities taking place in the world—and there are, I agree, some very horrible ones—the solution is to send in a squad of lawyers.

What happened in Rwanda was a horror and it was a disgrace that the United States stood by, that the U.N. stood by. But we are not fixing it by saying, "OK, let us have some trials afterwards." I mean, if you want to deal with atrocities like that, you have to think about military responses. Maybe we are not up to it. Maybe nobody is. But that is what we should be thinking about, not playing around with trials and lawyers. That is the very least of the problem, if you're worried about atrocities.

And the last point I want to make is again in response to what Ruth is saying. She says, and defenders of the ICC in general say, "Well, we can fine tune it, you know. It may not be perfect now, but it will not be that bad. We will tinker with it, and then it will not actually threaten any American."



And I want to say there really is a point of principle here. Even if you could assure me by some back channel insider connection that the ICC will not go after an American, at least not for the next 10 years, I still would think this was very wrong in principle. That's because I think one of the reasons why so many people want this institution to be established is they want to establish in principle that there is an international authority which rightly sits above sovereign states and judges them.

And I say in principle that is wrong. And since I mentioned the Declaration of Independence, let me end by appealing to the Declaration of Independence, which in the opening sentence, refers to the United States taking a "separate and equal station among the powers of the Earth." That has it right. It invokes the "separate and equal station among the powers of the Earth to which the laws of nature and nature's God entitle" us.

As a sovereign state, there is no other state, there is no other power on Earth, which is above us. God is above us, as above all other states. And that is very important. To set up an international authority that is higher than our own Government really is, I think, and surely the Founding generation would have said, that is almost blasphemous.

It is putting international authority in the place of God. The international tribunal will be the judge of the rectitude of nations. I say, no. That is not the Earth that we live on. And it is not the Earth that we should want to live on.

There should not be anything higher than the United States, even if you could assure us that, really, it has all been fixed, and it will not do anything to harm us. The principle is a bad one. And I am sure it will have bad consequences, because it promotes a certain way of thinking, which is, to use an old-fashioned term, subversive. It is literally subversive of our constitutional order.

It is saying our Constitution is just sort of provisional. And if we want to, we are free, without amending the Constitution, to place something on top of the Constitution that has higher authority. And I think the answer to that has to be no, no, a thousand times no. And I think that is what your bill is trying to say, and good luck to you in sending this answer to the rest of the world.

The CHAIRMAN. Thank you.

I feel like clapping, too.

I have presided over literally hundreds of committee meetings. And, Cap, I am going to be honest: I think this is the most interesting one I have ever presided over.

And I am so grateful to all three of you. Just do me a favor, when you get questions from Senators who are not here, please respond to them, because I want to generate as much interest and as much conversation as we can on this subject.

Thank you for coming, and thank you for being delightful witnesses. And if there be no further business to come before the committee, we stand in recess.

[Whereupon, at 4:55 p.m., the hearing was concluded.]

---

## ADDITIONAL STATEMENT SUBMITTED FOR THE RECORD

### PREPARED STATEMENT OF THE LAWYERS COMMITTEE FOR HUMAN RIGHTS

#### I. A STRONG AND INDEPENDENT INTERNATIONAL CRIMINAL COURT SERVES IMPORTANT NATIONAL INTERESTS OF THE UNITED STATES

At the end of World War II, with much of Europe in ashes, some allied leaders urged that the leaders of the defeated Third Reich be summarily executed. The United States disagreed. U.S. leaders insisted that a larger and more valuable contribution to the peace could be made if the Nazis were individually charged and tried for violations of international law. The International Criminal Court is an expression, in institutional form, of an aspiration for justice with which the United States had been deeply identified ever since World War II. It was created to advance objectives that are totally consistent with the long-term U.S. national interest in a peaceful, stable, democratic and integrated global system. And the Rome Treaty, in its final form, promised to advance that interest in the following ways:

- *First*, the treaty embodies deeply held American values. The establishment of the Court responds to the moral imperative of halting crimes that are an offense to our common humanity. The ICC promises to promote respect for human rights; advance the rule of law around the world, both domestically and internationally; reinforce the independence and effectiveness of national courts; and uphold the principle of equal accountability to international norms.
- *Second*, the ICC will help to deter future gross violations. It will not halt them completely, of course. But over time, its proceedings will cause prospective violators to think twice about the likelihood that they will face prosecution. This deterrent effect is already apparent in the former Yugoslavia. Even though leading architects of ethnic cleansing, such as Radovan Karadzic and Ratko Mladic, have not been brought to trial, their indictment has limited their ability to act and has allowed more moderate political forces to emerge, reducing the risk to U.S. and other international peacekeepers still in Bosnia.
- *Third*, through this deterrent effect the ICC will contribute to a more stable and peaceful international order, and thus directly advance U.S. security interests. This is already true of the Yugoslav Tribunal, but it will be much more true of the ICC, because of its broader jurisdiction, its ability to respond to Security Council referrals, and the perception of its impartiality. The Court will promote the U.S. interest in the preventing regional conflicts that sap diplomatic energies and drain resources in the form of humanitarian relief and peacekeeping operations. Massive human rights violations almost always have larger ramifications in terms of international security and stability. These include widening armed conflict, refugee flows, international arms and drug trafficking, and other forms of organized crime, all of which involve both direct and indirect costs for the United States.
- *Fourth*, the ICC will reaffirm the importance of international law, including those laws that protect Americans overseas. For many people in the United States, "international law" is seen either as a utopian abstraction, or an unwelcome intrusion into our sovereign affairs. But as Abram Chayes, former Department of State Legal Adviser, remarked shortly before his death earlier this year, there is nothing utopian about international law in today's world. On the contrary, it is a matter of "hard-headed realism." Many nations who voted for the Rome Treaty had similar misgivings about its potential impact on their sovereignty. But they recognized that this kind of trade-off is the necessary price of securing a rule-based international order in the 21st century. France, for example, which participates extensively in international peacekeeping operations, made this calculation, joined the consensus in Rome and last week ratified the treaty. The United States, likewise, should see the ICC as an integral part of an expanding international legal framework that also includes rules to stimulate and regulate the global economy, protect the environment, control the proliferation of weapons of mass destruction, and curb international criminal activity. The United States has long been a leading exponent, and will be a prime beneficiary, of this growing international system of cooperation.

#### II. THE RISKS POSED BY THE ICC TO U.S. SERVICEMEN AND OFFICIALS ARE NEGLIGIBLE IN COMPARISON TO THE BENEFITS OF THE COURT TO UNITED STATES' INTERESTS

In assessing the U.S. government's concerns, it is important to bear in mind some basic threshold considerations about the ICC. Most fundamentally, it will be a court of last resort. It will have a narrow jurisdiction, and is intended to deal with only

the most heinous crimes. The ICC will step in only where states are unwilling or unable to dispense justice. Indeed, that is its entire purpose: to ensure that the worst criminals do not go free to create further havoc just because their country of origin does not have a functioning legal system. The Court was designed with situations like Rwanda and Cambodia and Sierra Leone in mind, not to supplant sophisticated legal systems like those of the United States. Furthermore, there are strict guidelines for the selection of ICC judges and prosecutors, as well as a set of internal checks and balances, that meet or exceed the highest existing international standards. The legal professionals who staff the Court will not waste their time in the pursuit of frivolous cases.

Second, the Court will only deal with genocide, war crimes and crimes against humanity, all of which are subject to a jurisdiction narrower than that available to domestic courts under international law. It will not be concerned with allegations of isolated atrocities, but only with the most egregious, planned and large-scale crimes.

Could a member of the U.S. armed forces face credible allegations of crimes of this magnitude? Genocide would seem to be out of the question. War crimes and crimes against humanity are more conceivable. The My Lai massacre in Vietnam revealed the bitter truth that evil knows no nationality: American soldiers can sometimes be capable of serious crimes. If such a crime were committed today, it would appear self-evident that the U.S. military justice system would investigate and prosecute the perpetrators, as it did at My Lai, whether or not an ICC existed. And if it were an isolated act, not committed in pursuit of a systematic plan or policy, it would not meet the threshold for ICC concern in any case.

Benign support by the United States for the ICC as a non-party to the Treaty would reaffirm the standing U.S. commitment to uphold the laws of war and could be offered in the knowledge that the Court would defer to the U.S. military justice system to carry out a good faith investigation in the unlikely event that an alleged crime by an American was brought to its attention. The marginal risk that is involved could then simply be treated as part of the ordinary calculus of conducting military operations, on a par with the risk of incurring casualties or the restraints imposed by the laws of war. The preparation and conduct of military action is all about risk assessment, and the marginal risk of exposure to ICC jurisdiction is far outweighed by the benefits of the Court for U.S. foreign policy.

### III. THE ICC PROVIDES AN OPPORTUNITY FOR THE UNITED STATES TO REAFFIRM ITS LEADERSHIP ON THE ISSUE OF INTERNATIONAL JUSTICE, WHICH FOR SO LONG HAS BEEN A CENTRAL GOAL OF U.S. POLICY

We urge the United States to develop a long-term view of the benefits of the ICC. Such an approach would open the door to cooperation with the Court as a non-state party, and eventually to full U.S. participation. This policy shift should be based on the following five premises:

- *The creation of new international institutions requires concessions from all the participants.* As an international agreement, the Rome Statute bears the marks of many concessions to sovereign states—not least the United States. As such, the ICC will have a twofold virtue: it will be imbued with the flexibility of an international institution as well as with the rigor of a domestic criminal court. The risks involved in supporting the present ICC Treaty are more than outweighed by the expansion of an international legal framework that is congenial to U.S. interests and values.
- *The risks of U.S. exposure to ICC jurisdiction are in fact extremely limited, as a result of the extensive safeguards that are built into the Rome Treaty.* Those safeguards are there in large part because the United States insisted on their inclusion. The modest risks that remain can never be fully eliminated without compromising the core principles established at Nuremberg and undermining the basic effectiveness of an institution that can do much to advance U.S. interests. The best way to minimize any residual risk is to remain engaged with others in helping to shape the Court. The risks, in fact, will only be aggravated if the United States decides to withdraw from the ICC process. Joining the ICC, on the other hand, would allow the United States to help nominate, select and dismiss its judges and prosecutors, and so ensure that it operates to the highest standards of professional integrity. More broadly, the ICC's Assembly of States Parties would provide an ideal setting for the United States to demonstrate its leadership in the fight against impunity for the worst criminals.
- *The Pentagon's views, while important, should be balanced among other U.S. policy interests in reference to the ICC.* The U.S. military has an institutional interest in retaining the maximum degree of flexibility in its operational decisions. But this must be put in proper perspective by civilian authorities as they

weigh the pros and cons of the ICC. Legislators and others who have so far remained on the sidelines of the ICC debate will have an important part to play in helping the Administration develop a broader approach to the ICC, one that puts long-term stewardship of the national interest into its proper perspective.

- *U.S. leadership requires working in close cooperation with our allies around the world.* It is tempting to believe that U.S. economic and military supremacy is now so absolute that the United States can go it alone and impose its will on the rest of the world. But the evolution of the ICC is a reminder that this kind of unilateralism is not possible in today's more complex world. The United States has tried to impose its will on the ICC negotiations, and it has failed. In its repeated efforts to find a "fix," the United States has succeeded only in painting itself into a corner. Worse, it has disregarded one of the cardinal rules of diplomacy, which is never to commit all your resources to an outcome that is unattainable. Unable to offer credible carrots, decisive sticks, or viable legal arguments, the United States finds itself on what one scholar has called a "lonely legal ledge," able neither to advance nor to retreat. Asking for concessions it cannot win, in a process it can neither leave nor realistically oppose, the United States has so far resisted coming to terms with the limits of its ability to control the ICC process.
- *The costs of opposition to the Court are too high and would significantly damage the U.S. national interest.* Once the ICC is up and running, it seems highly unlikely that the United States would refuse to support the principle of accountability for the worst international crimes simply because the Court was the only viable means of upholding that principle. It is far more likely that a future U.S. administration will see the advantage in supporting the Court, if only as a matter of raw political calculus. Opposition to a functioning Court would undermine faith in a world based on justice and the rule of law and would shake one of the foundation stones on which the legitimacy of U.S. global leadership has rested since World War II.

For the last half century, U.S. foreign policy has sought to balance military strength with the nurturing of an international system of cooperation based on democracy and the rule of law. It would be a serious mistake to imagine that victory in the Cold War means that the institutional part of this equation can now be abandoned, and that ad hoc applications of force should prevail over the consistent application of law.

#### LAWYERS COMMITTEE FOR HUMAN RIGHTS

##### INTERNATIONAL CRIMINAL COURT SERIES

- Pre-Trial Rights in the Rules of Procedure and Evidence (February 1999)
- Frequently Asked Questions about the International Criminal Court (ICC) (December 1998)
- The International Criminal Court: The Case for U.S. Support (Vol. 2, No. 2) (December 1998)
- Exercise of ICC Jurisdiction: The Case for Universal Jurisdiction (May 1998)
- Pre-Trial Establishing an International Criminal Court: Major Unresolved Issues in the Draft Statute (May 1998)
- Exercise of ICC Jurisdiction—The Case for Universal Jurisdiction (May 1998)
- Establishing and Financing the International Criminal Court (March 1998)
- The Accountability of an Ex Officio Prosecutor (February 1998)
- Compliance with ICC Decisions (December 1997)
- The International Criminal Court Trigger Mechanism and the Need for an Independent Prosecutor (July 1997)
- Crimes Within the ICC's Jurisdiction and Essential Elements of Their Definitions (February 1997)
- Fairness to Defendants at the International Criminal Court: Proposals to Strengthen the Draft (August 1996)

Additional materials are available at [www.lchr.org](http://www.lchr.org)

