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THE INTERNATIONAL CRIMINAL COURT

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THE INTERNATIONAL CRIMINAL COURT: PART 1—A THREAT TO AMERICAN MILITARY PERSONNEL?

TUESDAY, JULY 25, 2000

HOUSE OF REPRESENTATIVES,
COMMITTEE ON INTERNATIONAL RELATIONS,
Washington, DC.

The Committee met, pursuant to notice, at 10:16 a.m., in room 2172, Rayburn House Office Building, Hon. Doug Bereuter presiding.

Mr. BEREUTER. The Committee will be in order. We will reconvene and proceed with the hearing scheduled for today. Today we hold the first of two hearings on the International Criminal Court. Tomorrow we will hear from two witnesses from the Clinton Administration, but today we are privileged to have before us two very distinguished former Executive Branch officials.

Former Secretary of State Lawrence Eagleburger and former Assistant Secretary of State for International Organization Affairs John Bolton bring with them a wealth of experience relevant to the International Criminal Court. They are well-known to all Members of the Committee and require no substantial introduction.

The subject of the International Criminal Court probably is new to many Members, however, so I will exercise the prerogative of the Chair to offer a few opening comments, primarily prepared by Mr. Gilman, who unexpectedly could not be here this morning.

There are many strongly held opinions about the International Criminal Court, and many passionate disagreements. The one thing that virtually everyone agrees on, however, is that the way this issue has evolved over the last few years has been nothing short of disastrous from the point of view of the national interest of the United States. This is a very important issue that we have before us today. Today we are well on the way to establishment of an U.N.-led criminal court which will claim the jurisdiction to prosecute and imprison many people, including, most important to us, of course, American servicemembers and other officials of our government in certain instances, irrespective of whether the United States ever becomes a party to the Court.

No one likes what has happened in this country with regard to this issue, least of all the Clinton Administration itself. Tomorrow the Administration's representative will tell us how they are trying to undo the damage that seems to be underway. They will tell us, I am sure, that they are working hard not to bring the United

States into the Court, which is not their view, but rather to make it safe for the United States to remain outside the Court.

Supporters of the International Criminal Court claim that the Administration should have overlooked the flaws in the Rome Statute creating the Court. The Administration's mistake, in their view, was its decision in 1998 to walk away from the Court at the last minute after having done so much to help launch the project. I am not associating myself with those particular criticisms.

Today they urge us to disregard the Court's shortcomings and formally submit our nation and its officials to the court's jurisdiction by becoming party to the Rome Statute. Another group of critics, including the sponsors of the American Servicemembers' Protection Act of 2000, believe that the Clinton Administration's mistake was in launching this project in the first place, given the likelihood that it might spin out of control, as indeed it seems to have done.

They doubt that the Clinton Administration will ever be able to reverse the diplomatic defeats it sustained in the Rome negotiations, and they view the Court as a long-term threat to our sovereignty and the legal supremacy of the United States Constitution. We hope that our witnesses will be able to help us sort through these issues today as we proceed toward the hearing tomorrow, and clarify for us what can be done at this date to protect our national interests.

Before introducing the panel very briefly, I would next turn to recognize our distinguished Ranking Democratic Member, Mr. Gejdenson, for any opening comments that he might wish to offer at this point. Mr. Gejdenson.

[The prepared statement of Mr. Gilman appears in the appendix.]

Mr. GEJDENSON. Thank you, Mr. Chairman. Let me say that I am very happy to have both gentlemen before us but particularly Mr. Eagleburger, who has served this country so well and had such a distinguished career through the years. Even though on rare occasions we had some differences with him on policy, he is someone who does bring before the Committee and before the Congress a wealth of knowledge and has really served this country in an outstanding way, and I really appreciate both these gentlemen but note in particular a long association with Mr. Eagleburger.

Really I think every Member on this Committee who has dealt with him through the years has the greatest respect for him even where again there may be some disagreements. Thank you, Mr. Chairman.

Mr. BEREUTER. Thank you, Mr. Gejdenson. Mr. Secretary, I have already said that you require no introduction so now I hesitate to introduce you but I will simply say that since leaving your very distinguished career with the Department of State, which culminated in your appointment as Secretary of State in 1992, you have worked, as the audience should know, as senior foreign policy advisor to the law firm of Baker, Donelson, Bearman and Caldwell, where you work with among others our former colleague from the Senate, the Majority leader, Howard Baker.

I understand that you would like your colleague at the table, John Bolton, to testify first. I am sure this comes as no surprise

to John because you worked together for 4 years during the Bush Administration, and he worked, of course, as the Assistant Secretary of State for International Operation Organization Affairs where among other things he was responsible for our relations with the United Nations.

Mr. Bolton previously had a very distinguished career as a lawyer in Washington and is now the Senior Vice President of the American Enterprise Institute. Among other things he has written extensively about the International Criminal Court. I think Members have some of his articles in the packets before them. Mr. Bolton, Members have your prepared remarks as well. They will without objection be made a part of the record, and therefore I invite you to summarize them for us and emphasize the key points. Mr. Bolton, you are recognized.

STATEMENT OF HON. JOHN R. BOLTON, ESQUIRE, SENIOR VICE PRESIDENT, AMERICAN ENTERPRISE INSTITUTE

Mr. BOLTON. Thank you, Mr. Chairman. It is a pleasure to be here again to testify on the American Servicemembers' Protection Act of 2000. I appreciate the opportunity to be here today and to voice my support for that legislation, and I will, as you request, summarize the statement. I have written on this subject extensively. What I would like to do today that I think might be helpful to the Committee is touch on a few of the important reasons why the International Criminal Court itself is objectionable, and some things that have happened in the past few years that I think help demonstrate that and demonstrate why the proposed legislation will be helpful.

Support for the International Criminal Court concept is based largely on emotional appeals to an abstract ideal of an international judicial system, unsupported by any meaningful evidence, and running contrary to sound principles of international crisis resolution. Moreover, for some, faith in the ICC rests largely on an unstated agenda of creating ever-more comprehensive international structures to bind nation states in general, and one nation state in particular.

Regrettably, the Clinton Administration's naive support for the concept of an ICC has left the United States in a worse position internationally than if we had simply declared our principled opposition in the first place. I think there are three broad reasons why the ICC is objectionable. First, is that all the available empirical evidence we have demonstrates that the Court and its prosecutor—and I want to come to this important role of the prosecutor in more detail later in the testimony. I think we all gloss over talking about "the Court" this and "the Court" that when the real element of concern here is as much the prosecutor as the Court—will not achieve the stated purpose of these institutions, deterrence of war crimes and crimes against humanity. This is not likely to happen for the simple reason that the Court will not and should not have the authority it needs to be an effective deterrent.

Indeed, there is not a shred of evidence that advocates of the ICC have presented to support their deterrence theories. One advocate said at the drafting of the Rome Statute that "the certainty of punishment can be a powerful deterrent." I think that statement is cor-

rect. Unfortunately, it doesn't have anything to do with the International Criminal Court. In many respects, the ICC's advocates fundamentally confuse the appropriate roles of political and economic power, diplomatic efforts, military force, and legal procedures.

No one disputes that the barbarous actions under discussion are unacceptable to civilized peoples. The real issue is how and when to deal with these acts, and this is not simply or even primarily a legal exercise. The ICC's advocates make a fundamental error by trying to transform matters of international power into matters of law. Misunderstanding the appropriate roles of force, diplomacy and power in the world is not just bad analysis, but bad and potentially dangerous policy for the United States.

Recent history is ripe with examples where strong military force or the threat of force failed to deter aggression or gross abuses of human rights. Why should we believe that bewigged judges in the Hague will be able to prevent what cold steel has failed to prevent? Deterrence ultimately rests on effectiveness and the ICC is unlikely to be that.

We have one excellent example that has just taken place in the course of the air campaign over Yugoslavia where the Milosevic regime already faced an existing ad hoc tribunal dealing with former Yugoslavia. And even in the face of an existing tribunal and indeed even with precision guided weapons falling on the regime's head in Belgrade it still stepped up ethnic cleansing in Kosovo. Even viewed in the light most favorable to the Court, I don't think that its supporters have adduced any evidence that the hard men of history like Pol Pot and Saddam Hussein are going to be deterred by this Court. Holding out the prospect of ICC deterrence to those who are already weak and vulnerable is simply fanciful.

Now, Mr. Chairman, in my testimony I go through at some length a recent report about the Rwanda and Yugoslav tribunal showing many of the defects that they already have. These two tribunals I think are at least some indication of the difficulties a permanent ICC would have. And if you were to look at a military analogy, using these two courts as kind of prototypes of a new weapon system that, to be frank about it, had some problems, I think most reasonable people would say "let us order a couple more prototypes before we make a final decision."

Creating the ICC based on the Rwanda and Yugoslav tribunals is a little bit like saying, "Well, there are some problems with these prototypes but why don't we order 1,000 copies of them?" The Ackerman Report also points out that these are not inexpensive vehicles. The Yugoslav Tribunal's budget last year was $94 million and the Rwanda Tribunal's budget was $68.5 million, which are not small sums even for the United States.

Second, Mr. Chairman, another broad problem with the International Criminal Court approach is the idea that the international search for justice is always and everywhere consistent with the attainable political resolution of serious political and military disputes, whether between states or within states. In the real world, as opposed to theory, justice and reconciliation may be consistent or they may not be and the idea of prosecution uberalles [ph] is something that I think we undertake with great reservation.

I think the example of the South African Truth and Reconciliation Commission is an alternative way to look at past abuses by prior governments. It is something that is important, and here we have examples in the real world where we have seen the potential adverse effects of the prosecutorial approach embodied in the International Criminal Court.

I discuss at some length in the testimony the Pinochet matter in Chile. And let me just take that very quickly as an example. I have no defense whatever for the allegations made against General Pinochet, but I think it is critical to understand that in a country like Chile that is today indisputably a democracy, the resolution of the Pinochet matter is for the Chilean people. It is for their elected government. It is an issue that still causes great passion in Chile in political debate, and it is exactly the wrong thing to do as happened over the past few years for a loose cannon Spanish magistrate to attempt a judicial kidnapping of Pinochet in the United Kingdom on the grounds that somehow this matter should be resolved in Spain rather than in Chile.

The example of the Spanish magistrate and his uncontrolled, indeed unaccountable exercise of power, should bring to mind exactly the concerns that many of us have about the prosecutor in the proposed International Criminal Court. But, third, Mr. Chairman, and I think most importantly, and this is where the proposed legislation I think is especially important, there are tangible American interests at risk here. I think that the ICC's most likely future will be weak and ineffective and eventually ignored, but there is another possibility: That the Court and the prosecutor will be strong and effective.

In that case, the United States may face a much more serious danger to our interests, if not immediately then in the long run, and this is where the power of the prosecutor becomes so important.

But there are other aspects to the treaty that are objectionable as well. For example, article 120 of the Rome Statute says that there can be no reservations to the treaty. Mr. Chairman, if there were nothing else objectionable about this treaty, that alone would be a reason to reject it. The notion that the Senate in its consideration can't make appropriate reservations is an unacceptable precedent for the United States.

Second, and even more serious, this treaty purports to cover the nationals of non-signatories. If a country like the United States doesn't sign the treaty, citizens of the United States may nonetheless be subject to the jurisdiction of the Court if they commit prohibited behavior on the territory of a country that is a signatory.

Now I think it is unacceptable; unacceptable, not compromisable; unacceptable, for the United States to be bound by a treaty that it is not a party to. The Administration, and I am sure you will hear this tomorrow, has a number of fixes they are going to try and make to the provisions of the rules of the Court and the relationship agreement that needs to be negotiated between the United Nations and the ICC itself that are not really going to address that fundamental problem. There are small fixes that may or may not be made to the problem created by article 98 of the Rome Statute, but nothing addresses—nothing can address—the fundamental and

to me dispositive philosophical objection that this treaty purports to bind the United States even if it is not a signatory.

Now let us be clear here. Our main concern under the Rome Statute should not be that the prosecutor will indict the occasional American soldier who contrary to his or her training and doctrine allegedly commits a war crime. Our main concern should be for the President, the Cabinet officers, and the National Security Council and other senior leaders responsible for our defense and foreign policy. They are the real potential targets of the ICC's politically unaccountable prosecutor. This statute is incredibly vague, and I give some examples in the testimony, of language that has a general moral proposition we could probably all agree with, but which has never been applied in a criminal context and which if it were attempted to be written into American criminal law, I have every confidence the Supreme Court would declare void for vagueness.

The pattern of discussions we have had over the last 2 years about these vague provisions and about a range of objections to the Court typically are answered by advocates of the Court saying, "Well, that is not going to happen, that is not going to happen. It is not a concern." These are concerns. These are things that have already begun to take place. And I want to give a couple of examples but I think one other thing to keep in mind: Whether I am right or wrong the ultimate decision about the Court's authority is by the Court itself. Article 119 of the Rome Statute provides any dispute concerning the judicial functions of the Court shall be settled by the decision of the Court, and that means that once they have decided it is effectively out of our hands.

Now let me just take two quick examples and then I want to conclude, Mr. Chairman. One of the things that is still under discussion is the definition for the crime of aggression. This is something of particular interest and particular risk to us. Very recently the Secretary General of the United Nations, Kofi Annan, expressed this view during the bombing campaign over former Yugoslavia. He said, "Unless the Security Council is restored to its pre-eminent position as the sole source of legitimacy on the use of force, we are on a dangerous path to anarchy." Let me just repeat the key phrase there. The Security Council as "the sole source of legitimacy on the use of force."

That is to say that if NATO in the case of Yugoslavia, or the United States unilaterally, undertook the use of force without Security Council authorization, under his view it would be illegal and therefore would potentially subject the United States and its top leaders to prosecution by the prosecutor. This is not hypothetical. We have already seen it happen in the case of the international criminal tribunal for Yugoslavia where a complaint was filed against top NATO leaders by, what else, a group of law professors arguing that several aspects of the NATO air campaign constituted war crimes.

Now the prosecutor, Mrs. Del Ponte, rejected the assertion that NATO's actions amounted to war crimes, but by taking under advisement a complaint about NATO's leadership and by ruling it insufficient for lack of intent, which is clearly one of the hardest elements to prove, she made it pretty clear that she thought she had jurisdiction. So I think a lot of Members of Congress were quite

surprised that the tribunal that was supposedly set up to try Balkan war criminals had actually been investigating NATO. The conclusion that Mrs. Del Ponte made didn't go to the overall question of the air war's legality, because she wasn't presented with it.

There is another example that has also occurred recently that brings the future very close to home. A group of families of Argentine sailors killed in the Falklands conflict in the early 1980's in the British sinking of the Argentine warship *General Belgrano* filed a suit for damages in the European Court of Human Rights, arguing that the British sinking of the *Belgrano* outside of the self-declared 200-mile exclusion zone around the Falklands violated the Hague Convention of 1907.

To begin with but it is important that the European Court of Human Rights has effectively taken jurisdiction of the case. They have remanded it for certain proceedings, but as I understand the press reports they have concluded that they do have jurisdiction. This is an argument that an act of war, not against civilians at all, against a warship amounted to a war crime by the British government. And while this is a civil suit for damages, it is only a very short step for somebody to conclude that the attack on the *Belgrano* was the fit subject for the prosecutor of something like the International Criminal Court.

These risks of prosecution to top government decisionmakers in critical periods are far from hypothetical, Mr. Chairman. It is the reality we face. And that is the real risk of the prosecutor. He is not political accountable. He is not subject to adequate oversight. We in this country have had recent and very painful experience with the concept of an independent counsel. And just in the past few years on a bipartisan basis the independent counsel has been laid to its well-deserved rest.

It just boggles the mind that after we have gone through and experienced what an unaccountable prosecutor can do, we are about to, or at least some suggest, wreaking this concept on the rest of the world. In conclusion, Mr. Speaker, I believe that our American policy toward the International Criminal Court should be a policy of "three noes:" No financial support, directly or indirectly, no collaboration, and no further negotiation with other governments to try and improve it.

This institution is objectionable on principal. We should oppose it on principal, and I think the American Servicemembers' Protection Act of 2000 is a well-crafted instrument to help in our diplomatic efforts. Thank you very much, Mr. Chairman.

[The prepared statement of Mr. Bolton appears in the appendix.]

Mr. BEREUTER. Mr. Bolton, thank you very much. Secretary Eagleburger, again welcome. You may proceed as you wish.

STATEMENT OF HON. LAWRENCE S. EAGLEBURGER, SENIOR FOREIGN POLICY ADVISOR, BAKER, DONELSON, BEARMAN AND CALDWELL

Mr. EAGLEBURGER. Thank you, Mr. Chairman. It is a pleasure to be here. Congressman Gejdenson's remarks this morning brought tears to my eyes. I came close to weeping. It is the first time since we have been associated for so many years where he said anything

nice about me and I want you to know that I will take that and treasure it forever, Congressman.

Mr. GEJDENSON. If the staff has time, I am sure we can find some other nice things I have said, and I will have them go back and look at the record.

Mr. EAGLEBURGER. It is also good to be here and to see two people in the art work here that I have worked with and have great respect for. That is Dottie Fasell and Clem Zablocky, who were great chairmen and good friends and we miss them both, I am sure. I can, I hope, be brief. First of all, I would like to associate myself with Mr. Bolton's testimony but I want to go on to a couple of other items that he didn't really touch, I think.

First of all, I spent a fair amount of time reading over the position of the Administration on this particular bill and it occurred to me very quickly that under normal circumstances those were letters I would have signed myself when I was in the State Department except I don't think so in this case and I want to try to explain why. There is a fundamental here that really bothers me and that is that I have no argument whatsoever with the United Nations and its efficacy and the need to establish international organizations that can deal with difficult problems.

I, however, have a very serious problem if we go very far in conceding that the United Nations should be making international law. This isn't a democracy, the United Nations These are a number of sovereign states, some of whom the governments were elected by democratic means and a great many more who think other than democratic and whose concerns about human rights in terms of the way they demonstrate their own activities is substantially different from the mouthings they now put forward in the United Nations about human rights and so forth.

So I think we have to be very, very careful when we are prepared to concede to that international institution without a great deal of caution the right to make international law and, for example, and Mr. Bolton referred to it, until we return the Security Council to its sole responsibility, I don't know that the Security Council ever was solely responsible for the use of force.

It is certainly hopefully something that we can continue to turn to but I would suggest to you that if there may well be times where in the security interests of the United States there is a need to act whether the United Nations as such is going to be willing to agree to it or not. Most of the time I would hope that is not the case but I can assure you that if we are not careful we will bind our own ability to make decisions on when we should be acting in our security interests in ways that we, I think, unwisely will learn later that we should not have done.

My point, gentlemen, ladies, is that I agree with Mr. Bolton's three noes. I do not see how it is possible to reform this institution through negotiations on the part of the United States, who with the best will in the world may be trying to remove the differences and the difficulties but the fact of the matter is the fundamental difficulty won't be done away with. That Court is in my judgment a creation that is both illegitimate and illogical.

I know that is going to upset most of my more liberal friends but the fact of the matter is that particular Court, particularly since

the United States has said it will not participate, that particular Court in my judgment should bear no real authority whatsoever and we have to make it clear that that is our view of it. Now why do I say that aside from the fact I think that we have dangerously over time slipped into this concept of making international law by global consensus, if you will, and it is a consensus that is in part made by countries that have no interest in the very things that we are most interested in trying to protect.

And I am worried that the very things that we agree through a Court like this should be—international law will some day come back and bite us where we shouldn't be bitten. And my point here really to summarize, and I have said this both in speeches and in articles for the last 2 or 3 years, I think we Americans need to understand that we are going into a very uncertain century and anyone who thinks that because the Cold War is over the 21st century is going to be a relaxed period of time, I think is fooling himself.

The Bosnias of this world, the problems in what used to be the Soviet Union, I could go through around the world and suggest to you any number of potential areas of instability, my point being I think those instabilities are likely to increase rather than decrease. And I would say to you that the next step, whether we Americans like it or not, unless the United States is prepared in the next decades to be seriously interested in trying to maintain global stability where it should be maintained that we are going to find ourselves by the middle of the century having repeated too many of the mistakes we made in the 20th century.

What does that mean? That means hopefully that the United States with wisdom and intelligence will be prepared to be involved in trying to maintain or correct—maintain global stability or correct injustices where they occur, not that we are the world's policemen but when an issue becomes so important to the United States that we will be prepared to act whether others will or not.

And Congressman Lantos, for example, will remember just to try to give you an example, that in the days when I was in the State Department we used to argue fairly strenuously about whether the United States should or should not do anything in Yugoslavia with me taking the position and the Administration taking the position no. But quite rightly Congressman Lantos and others felt very strongly that we should be acting.

My point here is that it is precisely a question for the United States to decide, not necessarily with the consensus of everybody else. Now in the end when we went into Yugoslavia, yes, we had an agreement, but I would suggest to Congressman Lantos that his feeling as it was expressed to me at least in those years would have been if necessary we had—this is such a crucial issue that we should act on our own if we have to.

I am not trying to put words in your mouth, Congressman, but I am saying the discussions we had very clearly led me to believe that you felt that this was such a humanitarian disgrace that something had to be done. I felt it was a humanitarian disgrace. I did not feel the United States was in a position to act. That is where the argument came. My point being we were arguing this issue on the basis of what was in U.S. interests.

And I think we must continue to remind the rest of the world that we are going to continue to make our decisions on the basis of our best interests and that if, for example, we decide we want to act in a certain area, we should not have our GIs subject to the jurisdiction of this Court if somebody wants to make a point against the United States and its actions. And I would suggest to you, and then I will close, I would suggest to you that one of the problems we are going to have in these coming years is that in fact we are going to find more and more of the rest of the world that resents the fact that we are what we are, resents the fact that we are prepared to do what we can to defend human rights interests and act against war crimes and are going to find ways, if they can, to bring against us the same judgments that we are supposedly making against others.

And we will, before this is over, before this century is out, and long before this century is out if we continue along this path, we will find ourselves being charged with war crimes by those who have no business in the business of charging war crimes because they themselves may well be war criminals or they will be neutrals who resent the power and influence of the United States and will be prepared to act against us if they can.

We are walking into, in my judgment, by even doing anything more with this treaty, we are walking into a potential real mess. I hate to say it because the United States should not always stand against these kinds of issues. But, for example, in the mining treaty we had a serious responsibility to our troops in Korea and the Administration did the right thing by saying, no, we will not join the treaty. We have responsibilities as the United States that are not faced by other countries and as a consequence of that we have to act with all respect to the rest of the world. We on occasion have to act like we recognize that we are different, that our responsibilities are greater, and that the decisions we take are more immediately influential in terms of whether global stability is maintained or not.

I don't like to dwell on it so much because the rest of the world is more and more, I think, resentful of the fact that we are what we are but without us and an ability to act when we feel we need to, the world is going to be a poorer place, not a better place. Thank you, Mr. Chairman.

Mr. BEREUTER. Thank you, Mr. Secretary. Without objection, all Members' opening statements, if any, with extraneous material will be made a part of the record. Hearing no objection, that will be the order. We will now proceed under the 5-minute rule, and I will recognize Members in order as they were here at the start of the hearing.

Gentlemen, you make some very compelling points in varying details and degrees of specificity about the problems inherent in the Rome Statute creating the International Criminal Court. Does it follow from what you said that any International Criminal Court would pose very serious problems to the United States or is it just this International Criminal Court created under this treaty that would create those problems?

To put it another way, would it be possible to have a permanent international tribunal or tribunals capable of pursuing serious war criminals that the United States could enthusiastically support?

Mr. EAGLEBURGER. Mr. Chairman, Mr. Bolton is the expert, the lawyer, on this. I would simply say to you certainly this treaty ought to be junked, ignored, whatever the point is. I suppose carefully drawn you could establish a treaty that would—and it would have some limitations, would have to have some limitations to it but that could at least move in the direction of being able to deal with war crimes.

I think we would have to be very careful to make sure that it didn't limit our ability to act if we felt it necessary to act but I can conceive in general of such treaty. It seems to me Mr. Bolton is much more likely to be able to give you a useful answer.

Mr. BOLTON. Let me take a shot at it, Mr. Chairman. I thought about this a good deal and I don't think there is a way to create an International Criminal Court designed to do what this is doing consistent with our Constitution. And the basic problem is that the Court and the prosecutor, and I want to stress again that what we have got here is not simply a bunch of people in black robes dispensing impartial justice. In the institution of the prosecutor the Rome Statute creates a very powerful source of executive authority and takes it and just sort of puts it out there in the international context.

Under our constitutional system, we are willing to accept prosecutors having the enormous authority they do because ultimately they are politically accountable. The Supreme Court has said, for example, that the Attorney General is the hand of the President in fulfilling the President's constitutional obligation to take care that the laws be faithfully executed and the authority of the President that flows from being elected by the citizens goes through the Attorney General down to U.S. Attorneys down to the lowest Assistant U.S. Attorney in any office around the country.

That is a kind of accountability that we find important and in our system we have another kind of accountability. I just speak here as an alumnus of the Justice Department having testified before other committees in this House and on the other side. Congress exercises very intense scrutiny over the policies and practices of prosecutors at the Federal level. That is the kind of accountability and democratic legitimacy within our system that in the main we accept. But the prosecutor of the International Criminal Court doesn't report to any elected executive authority. He is not supervised by anybody except the Court itself.

Now people say in Europe they do that all the time, and my response is that is one reason they are Europeans and we are not. We formulated a doctrine of separation of powers that said we are going to split the executive power, the power of prosecution, from the judicial power from the courts. That is fundamentally mixed together in this system. So, in effect, what the Rome Statute does is create centers of power out there in the international environment not subject to acceptable, at least in my view, constitutional or democratic limitations and gives them authority without accountability or oversight.

I just find that unacceptable and for free people to find law being made in ways by other people are not subject to their ability to elect them or throw them out of office. Now, you know, Mr. Chairman, other governments have recognized this point and some governments are actually amending their constitutions to make sure that their constitutions are consistent with the Rome Statute.

And I think because they correctly recognize that if the Court actually came into being effectively it would have authority over and above their constitution. I find that unacceptable for the United States as well. We have an acceptable democratic procedure here to amend our Constitution. People may like the results, may disagree on substance, but we got a system that works. And I think subordinating it to an ill-defined, unaccountable system larger than that is a risk that we should not take.

Mr. BEREUTER. Thank you, Mr. Bolton. My time is almost up. I would advise Members we are probably going to have time for a second round so I will now call on the gentleman from Connecticut, Mr. Gejdenson, for his 5 minutes.

Mr. GEJDENSON. Thank you, Mr. Chairman. I think we clearly agree that this generation of political leaders shouldn't be amending the Constitution. They probably wouldn't improve on what Jefferson and the others did originally. But it seems to me you put before us the choice, it is either war or law, and I think there has got to be something between there. And I guess, Mr. Bolton, you come down that we should deal with this as the United States dealt with Mr. Noriega and Israel dealt with Mr. Eichman, that we kind of go in and grab the people that we think should be put on trial and then we put together a system here and try them.

Mr. BOLTON. I think there are a variety of different ways in which this can be handled, and I can give you some specific example concretely today. In the case, for example, of Indonesia, there is a real question what to do with Indonesian military officers who are alleged to have committed war crimes in East Timor before, during and after the U.N. referendum. Now there is one proposal that says let us create another ad hoc tribunal, which would be necessary because the ICC doesn't exist yet.

Let us create another international tribunal to try these allegations against the Indonesian military. The other alternative though is to have the Indonesian government try the Indonesian officers but I think this is——

Mr. GEJDENSON. I only have 5 minutes until I have to run up to another meeting. My problem is that the legislation goes beyond just concerns which we all have about this and I think there are reasonable concerns out here. But it prevents us from providing information in the case of a prosecution. The Court gets set up with or without us. These countries go and they get to whatever the magic number is, 60. They have 14 already. The Court is in operation.

We have evidence that would put Milosevic away. What this legislation says is we can't give it to them. An American is prosecuted in the Court. It exists with or without us. We have evidence that is exculpatory. This legislation says you can't hand that evidence over. And for God's sake, if the Court is going to happen with or without us doesn't it make sense for the Administration to engage

in at least a continuing dialogue, where let us assume it is going to be far from perfect.

Let us even assume it is going to be bad. Isn't it a little mindless to say we can't let those people over in the Administration even talk about improving it. I think it undermines us internationally. It undermines us in practice because you will end up with something that is worse without our input. At the end of the day I may end up in the same place that you are, Mr. Eagleburger, and say, no, this doesn't work because of our singular role in the world. We need to not accept this at the moment.

But how can you tell the Administration don't try to make it better, don't try to help prosecute a criminal, and don't try to defend an American who is being falsely accused. Mr. Eagleburger, I know you can answer this in a minute and 50 seconds.

Mr. EAGLEBURGER. I can answer it in 10 seconds, Mr. Gejdenson. First of all, let me make the point with regard to Noriega and Panama and so forth. The ultimate choice for this democracy, the ultimate answer to the question of whether we do that or don't do it and how we answer for it rests in the hands of you people right here and the American people. When we do the Panama sort of thing it seems to me that is—because we are what we are and we are different than 99 percent of the rest of the world our political leadership is answerable to you and to the American people.

That is to me a critical difference here. But, second, and the point that you asked about, why can't we continue to try to make this thing better or at least not so bad, and my only answer to you, Sam, excuse me, Mr. Chairman—Mr. Congressman, Mr. Gejdenson, whatever the proper term is—I haven't got you Chairman yet, not for a while.

Mr. GEJDENSON. It is hopefully prophetic but go ahead.

Mr. EAGLEBURGER. But anyway on that last point the issue it seems to me now is so clear that no matter what we do to try to make that treaty less bad in the end it is going to be so bad anyway that we are probably far better off right now to say we want nothing more to do with this and fellows, you better understand we are not going to accept its applicability to anyone that is a United States citizen.

I admit to you, you can play around with it and try to change it if you can. Like, for example, trying to give information about whomever when some Court asks for it, and I don't mind that issue being dealt with if you can but I would say that it is still in my judgment far better. It says here I must stop and I will in 10 seconds. It is far better that we just simply say we wash our hands of this. There is no way it is going to turn out well under any circumstances and not playing around with it at all implies that we are prepared to deal with it.

Mr. BEREUTER. Thank you. The time of the gentleman has expired. Here in order at the beginning of the hearing, and then we will alternate across the aisle, Mr. Lantos, Mr. Hastings, Mr. Delahunt. The gentleman from California, Mr. Lantos, is recognized.

Mr. LANTOS. Thank you very much, Mr. Chairman. Let me say at the risk of embarrassing Secretary Eagleburger that in my 20 years in this body I have never learned as much from anybody as

I have learned from you nor have I respected anybody more than I have respected you. And since we are making these public concessions at least on my part, let me say I have never had more affection for anybody than you.

Mr. EAGLEBURGER. Mr. Chairman, could I ask if I could leave now? It can't get any better.

Mr. LANTOS. It is going to get better.

Mr. BEREUTER. Sorry, Mr. Eagleburger.

Mr. LANTOS. Let me say I am very pleased to see Mr. Bolton. I appreciate his testimony. I would like to take a different tact from my two friends thus far and I would like to ask the question, the basic question, of why we are dealing with this legislation, which is entitled the American Servicemembers' Protection Act. I tell you we are dealing with the legislation for very simple political reasons. In a few months we will be voting and our colleagues on the other side of the aisle would like some of us to vote against protecting American servicemen.

This is a wonderful campaign commercial. It has great appeal. The only other thing that I could think would have greater appeal would be the American Mothers' Protection Act, and knowing the creativity on the other side within a week I expect the Majority Whip or somebody introducing that legislation. We will have hearings on it. It will be an atrocious piece of legislation and some of us will be compelled to vote against it.

I am always interested, Mr. Chairman, in dealing with the agenda but I am also interested in dealing with the hidden agenda, and I am anxious at the outset to bring out the hidden agenda. The hidden agenda is to make those of us who in general have some sympathy for an International Criminal Court recognizing all of the reservations that our two guests have raised very properly to have us get on the record that we are against protecting American servicemen. That is the purpose of this legislation.

Now let me deal with some of the issues you gentlemen have raised. Secretary Eagleburger, I fully agree with you that you and I are in total agreement on the issue that occasionally when necessary the United States must go it alone. This is in all national interests and it is in the global national interest and with respect to Yugoslavia while my preference was early action by NATO, I would have preferred early action by us to no action whatsoever. You are correct.

Now this particular proposal does have some flaws but since you have highlighted some which are present let me, if I may, point to cases where with all due respect you may have contradicted yourselves. On November 16 appearing on Night Line, Secretary Eagleburger, this is what you said.

> I am not particularly clear on all of the arguments as to why we haven't joined International Criminal Court. My personal view is that those kinds of questions ought to be handled and that we should certainly enter into this Court precisely to begin to get at the kinds of problems in an orderly way that the Pinochet case demonstrates with regard to the need to do something about it but it certainly is disorderly at this point.

I am not suggesting that there is anything wrong in changing your position. I have changed my position on many issues over the years as I have become wiser and more knowledgeable, and this is

true of others. But I think it is important to realize that just 2 years ago your general position was that we ought to join the International Criminal Court, and you probably said that, Mr. Secretary, because while your point is very well taken that the majority of the members of the United Nations are dictatorial countries and how can we have those people serve on the criminal court when the leadership was not elected as ours was.

May I remind all of us that at Nuremberg Stalin's representative participated as a full-fledged member of the Nuremberg trials. I welcomed Stalin's representative because certainly the Soviet Union earned the right to participate in a trial that dealt with Nazi criminals. This is not an ideal state of affairs and all of us, both you and all of us on the panel would like to see a world made up of only democratic countries but clearly that is not the case.

And the fact that occasionally non-democratic countries may play a role and in the case of the Nuremberg trials played a very pivotal role, a very pivotal role, is in the nature of this very imperfect world we live in. Now I do believe—my time is up. May I just make one more point, Mr. Chairman. It is a self-serving point. I have legislation pending calling for the United States to rejoin UNESCO. Some years back properly we left UNESCO because we had some very severe reservations about UNESCO. I shared those reservations and I support the government's decision to pull out of UNESCO.

Most of the problems, the most serious ones with UNESCO, have now been reasonably solved. There is still no willingness on the part of this Congress to rejoin UNESCO for reasons that escape me, and I think that there is a danger as we exclude ourselves from participating in international organizations which are admittedly flawed and imperfect and subject to improvement that we will create sort of a new kind of isolationism that rejects United States participation in legitimate international ventures which given the nature of the world are admittedly flawed. I would be grateful if both of you would react.

Mr. BEREUTER. The time of the gentleman has expired. Secretary Eagleburger, do you specifically have a question?

Mr. EAGLEBURGER. Yes, and I will be quick. Congressman Lantos, you are quite right on the television comment that this was focused then on specifically the Pinochet case 2 years ago. I feel so strongly and have all along that it was an absolute corruption of proper international law to have acted against Pinochet the way they did. And my point then was this is a disorderly system and what we are seeing now with regard to General Pinochet continue if we are not careful and perhaps with this Court we can regularize these things.

Now 2 years later I am going to tell you I don't think—you know, I don't think the Court can do that. I do think that the Pinochet case does demonstrate the need for trying to find some way to regularize some way to incorporate into international law what I would consider to be appropriate means of dealing with the Pinochet problem and my basic point would be the Pinochet problem should have rested with the Chilean government and not much of anybody else.

So I agree I said what I said. I think it was under different circumstances. Let me simply conclude again, Mr. Lantos, I agree with you the United States should not exclude itself under almost any circumstances. We are the world's leader and we better act like leaders. I don't deny that at all.

I will, however, say that in this specific case as you look at the consequences and more important, frankly, sir, as you look at the process that has led to this kind of a decision to create this Court, which I find it so anti-democratic in its own way, maybe that is the wrong term, but at least I find it so much threatening in the last analysis, the very things that we hold dearest within the Constitution and the dangers that those will over time slide away that I just don't think this is a particular case for continuing to participate, but under normal circumstances I agree with you completely.

Mr. BEREUTER. I thank the gentleman.

Mr. BOLTON. Could I just make one very brief comment?

Mr. BEREUTER. Mr. Bolton.

Mr. BOLTON. I think it goes beyond the inappropriateness of nondemocracies participating. You know, other defects of this Court include the absence of jury trial, the absence of a right of confrontation of cross-examination and at least in the minds of some real limitation on the protection against self-incrimination. And debating with law professors over the past couple of years about that, I have pointed those things out and the response of many have been, "Well, but in European systems of justice, various European systems, they don't have these provisions, and, you know, you got to have some European provisions and some American provisions."

I would have to say, Mr. Lantos, I don't accept that. I view this as so flawed in so many respects, the idea that a jury trial is not guaranteed or that a defendant doesn't have a right of confrontation of witnesses who are testifying against him, that violates fundamental precepts of our own justice system. I just think that it may be acceptable to Europeans, but it should not be acceptable to us.

Mr. BEREUTER. The gentleman from Massachusetts, Mr. Delahunt, is recognized.

Mr. DELAHUNT. Thank you, Mr. Chairman. You would concede, however, Mr. Bolton, that the European system, while it isn't our system, at least thrives in a democratic society.

Mr. BOLTON. Sure. And the question is whether using aspects of their system that we have rejected for our own domestic purposes should be acceptable in the context of an International Criminal Court. And I think the absence of a separation of powers is——

Mr. DELAHUNT. I share that concern. I find disturbing aspects of the European system but I don't think we just simply want to discredit European democracies and leave the impression that the legal system is undemocratic. Clearly, it is not. I mean you are right about a trial by jury and right of cross-examination, etc., but I think Secretary Eagleburger—I think it maybe was you, Mr. Bolton, that just made the statement that we should act like leaders.

I understand your concerns about this particular treaty but to get back to the legislation that has been submitted by the Majority Whip. I mean to insist that we do not prohibit us from collabo-

rating in an investigation which would lead to justice as we could define it. OK. I conclude that you believe that the treaty itself, the ICC, is so flawed that we should just kill it.

Am I wrong to infer that you see the legislation as a means to accomplish that because there are so many aspects to the legislation itself that are truly absurd such as lack of collaboration in an effort to bring Milosevic or someone to—particularly if we possess information that can accomplish that particular goal, which we could agree to. I mean aren't there other ways to kill it rather than to do something that is hostile to what I think would be overwhelming, unanimous agreement about a particular pattern of heinous conduct?

Mr. BOLTON. Mr. Delahunt, let me address both the general and the specific, if I may. First, I think the legislation could be extremely useful to either this Administration or a subsequent Administration in convincing other governments not to ratify the ICC itself.

Mr. DELAHUNT. Then you have answered my question. I think what you are saying is this is a message. We will take such an extreme stand that we want to kill it. What I think is, what I would suggest is I think a more honest and for us a more correct position in terms of what we stand for, OK, is to accomplish that goal through other means.

Mr. BOLTON. May I just continue because I think it is important. There are other aspects of this, whether the Court comes into existence or not, that in this legislation that gives even the Clinton Administration leverage in its negotiations with other governments on such things as status of forces agreements. You know, I am a creature of the executive branch; in a perfect world, I would have hoped that we wouldn't be in the fix we are in right now to begin with if the Administration had not led us into this swamp.

But in the absence of that, I think it does help and does send a clear signal to other governments that really think the Administration is still trying to find a way to sign the Rome Statute, that this statement by Congress——

Mr. DELAHUNT. I think I understand the position. In terms of deterrence, I think you indicated that there is no data in terms of deterrence. I served 20 years as an elected prosecutor myself up in the Boston area. I have always had a problem with the concept of general deterrence. We always hear about sending the message of deterrence. Sometimes there is no one listening to the message.

This is simply going to happen no matter how draconian a particular sanction might be because there is nobody listening but—my experience always led me to conclude that the more sophisticated and the more educated do listen.

Mr. BOLTON. I didn't mean to say I don't believe in deterrence. What I am saying is this Court will not fulfill this function in much the same way that the International Court of Justice, which handles disputes between states, has fallen into such——

Mr. DELAHUNT. Right, but I guess we have a disagreement there because it is difficult to survey what transpires in individual minds and how people reach decisions. But over an extended period of time, and I am not referring specifically to this Court, but if there

were consistency decisions that were made might not well have been made if there were a deterrent. Secretary Eagleburger.

Mr. EAGLEBURGER. Basically, I am going to agree with you on the issue of deterrence. I think it does make a difference. I would only suggest to you that what I hope will deter the next Milosevic is not some Court but the fact that he is still cleaning up Belgrade and rebuilding bridges and so forth.

Mr. DELAHUNT. Could I disagree with you. Let me tell you something. My experience has been that people like Milosevic are not necessarily concerned about cleaning up Belgrade. They are concerned about their own back.

Mr. EAGLEBURGER. No, you are quite right about Milosevic. All I am saying is the next time around, the next potential Milosevic, the fact that he caught a good bit of hell afterward, may be something of a deterrent——

Mr. DELAHUNT. Let me again respectfully disagree. I have to tell you that my experience dealing with very sophisticated criminals is that they are only concerned about themselves.

Mr. EAGLEBURGER. I am not arguing that. I guess if I pin it quite so directly to Milosevic I can't make the argument. I am saying, however, that there are these pipsqueak leaders out here that if they see their country about to be very badly damaged may decide not to do something. However, whether that is an argument or not, I think we need to keep one thing very clearly in mind. Deterrent or not, when it comes to dealing with war crimes and trying to punish people for them, this will work perhaps with the little countries, but let me tell you, do you conceive possibly of bringing President Putin to the international court because of what he is doing in Chechnya, for example? Of course not.

One of the things we need to keep in mind here is on the little wars the little countries maybe this makes a difference. It doesn't make a difference at all with the bigger ones because we will never get them to a Court.

Mr. BEREUTER. The time of the gentleman has expired. The gentleman asked for 30 additional seconds. Unanimous consent for 30 additional seconds.

Mr. DELAHUNT. I thank the Chairman because I won't be here for a second round but I really do wonder if the Chilean government would have acted but for that out of control Spanish magistrate that you referred to.

Mr. BOLTON. You know, we just had an election in Chile and the new president who has come in had a different view of what to do with Pinochet and other military figures. This is something that has been the subject of ongoing discussion, not just in Chile but in Argentina and Uruguay, and a number of countries. And the point that I would make, and the point I wanted to make to Mr. Gejdenson about Indonesia, is that the Chileans may not do what you would do or what I would do. The Indonesians may not conduct the kind of trial you would conduct or I would conduct. But there is an element of national maturation and assuming democratic responsibility that they ought to be allowed to——

Mr. DELAHUNT. I don't disagree with that but the treaty itself does provide for the retention of jurisdiction.

Mr. BOLTON. Well, hypothetically it provides what is called the doctrine of complementarity, which was made up for this Court. We don't know sitting here today in fact whether the resort to national courts will be permitted or not, even for the United States.

Mr. DELAHUNT. But let us make it that way.

Mr. BEREUTER. The time of the gentleman has expired again. I will get into the matter of complementarity in the next round. The gentleman from American Samoa, Mr. Faleomavaega, is recognized.

Mr. FALEOMAVAEGA. Thank you, Mr. Chairman. I certainly want to compliment and thank both gentleman for their testimony this morning surely with tremendous eminence and history in terms of the important positions that they held with the previous administrations. I do have a couple of questions. It seems like what we are looking at on several fronts is that our national sovereignty seems to be in question concerning the proposed Rome Statute.

Our Constitution allows us to conduct foreign relations with other countries, treaties and of the sort, which is why, for example, we are members of the United Nations. We live in the reality of a world where there seems to be a desire for one consistency, and perhaps that is the reason why so many nations of the world are motivated to establish an International Criminal Court.

You can talk about Pol Pot and extermination of 2 million Cambodians. Nothing is done about that. You can talk about Stalin's extermination of 60 million Russians, if I am correct on my history on that. You can talk about—you mentioned Indonesia, Mr. Bolton. You can talk about the extermination of 300,000, 200,000 East Timorees and 100,000 West Paupunig [ph] Indians by both Sukarno and Suharto and their dictatorship. You can talk about Rwanda. You can talk about Milosevic exterminating 250,000 Yugoslavians before we got involved in Bosnia.

So if you are looking from that perspective, we haven't done anything as a world community. I took notice also in your statement, Mr. Bolton, where you said that Pinochet should have been handled by the Chileans. Why did we not allow Noriega to be handled by the Panamanians. We went over there and just got him out. It was in our national interest. I know that. I do agree with Secretary Eagleburger's statement everything and anything should always be our national interest and ought to be in terms of establishing a world court or being a member of the United Nations or whatever. It should always be in our national interest.

But my question is what would the world have been like if we did not join as a founding member of the League of Nations, the United Nations, a member of the Security Council, and if you felt that we have compromised our national interest by not being members of these important organizations.

Mr. BOLTON. Well, I am a supporter of United States membership in the United Nations, and I have never been otherwise. The question with respect to the International Criminal Court is not the broad question of involvement in international affairs. The question is whether this is both a useful and a workable instrument to accomplish the goals that you are talking about. And for the reasons that I have stated before, and I won't repeat, I don't think it is.

So it raises the question in the case of the International Criminal Court, as in the case of the International Court of Justice formed in 1945, which is simply not a player in international affairs today. The United States has withdrawn from the mandatory jurisdiction of the ICJ, and it simply has no impact because it has been politicized. The judges vote purely along political grounds, and I think it has next to no respect and certainly very little following in this country.

What is striking about the ICC is that the argument that its proponents make are exactly the same arguments that were made in 1945 about the ICJ, and yet there is no new evidence that is adduced to show that this Court will be any more successful than the International Court of Justice.

Mr. FALEOMAVAEGA. If I am correct, I think, and of course we have our constitutional procedures to follow, with the advice and consent of the Senate it so happens that this Administration accepts the ICC and what it purports to do at least to help. Are we jumping the gun perhaps that we ought to let the Senate follow its procedures and advice and consent and know exactly the specifics in terms of whether or not the Rome Statute should be applied to our own country.

Mr. BOLTON. I don't think so in this sense; other countries are considering at the moment whether or not to ratify, and only 14 have. You know, it has been 2 years since the Rome Statute was signed, so having 14 ratifications is not exactly moving with lightning speed. And I think that vigorous leadership by the United States could have an impact on the decisionmaking of other countries, so I hope Congress would go ahead.

Mr. FALEOMAVAEGA. Well, one thing that I know for certain that our national sovereignty certainly I do not believe has been compromised in any way. This is the reason why we have not accepted the Law of the Sea Treaty. We have not accepted the Kyoto Treaties in terms of the global warming issues, the land mines as Secretary Eagleburger had stated earlier, much to the chagrin and protestations of many nations of the world about land mines.

So I don't see where we are compromising our efforts by this Administration's efforts to see that our sovereignty is not compromised by the provisions of the Rome Statute. This is where I am having a little problem in trying to agree with you gentlemen and your concerns.

Mr. BOLTON. Secretary Eagleburger wanted to get in if he could.

Mr. BEREUTER. The gentleman may respond.

Mr. EAGLEBURGER. I just want to come back to one thing you said, sir, which is you mentioned the Noriega thing and we went and got him. This is in a sense precisely the distinction I was trying to make. You can argue whether we should have gone to get Noriega or not but the fact was he was in charge of a country. Pinochet had already been removed. We believed that Noriega was enough of a problem for us and for most Panamanians that we in fact needed to act unilaterally to get rid of him to get him out of there.

All I am saying here is it is precisely that kind of action on the part of the United States, whether you agree with a specific act or not, that we must be careful to be able to preserve our ability to

do. That is all I really was saying. And I think this treaty tends to act against our ability.

Mr. FALEOMAVAEGA. So we should have done the same for Saddam Hussein?

Mr. EAGLEBURGER. No. Well, we don't want to get into that now, do we, really?

Mr. BOLTON. If we had him in custody.

Mr. BEREUTER. Many of us would feel more comfortable with unilateral action if in fact the President would seek the advice of Congress in a very formal fashion as they did in the Gulf War but that was not done in Bosnia. It was not done in Kosovo. And basically you have a decision ultimately made by one man as to whether or not the United States is going to defy international pressure and concern.

Mr. EAGLEBURGER. Mr. Chairman, that is absolutely correct. The ability of an administration to do what it should do with regard to consulting with the Congress is a different issue. I will say to you I think that with regard to the Kuwait war we worked very hard in fact to do the consultation before we acted.

Mr. BEREUTER. Well, indeed it happened and we had the longest debate in the history of the House of Representatives on that issue. Ultimately the Congress approved the President's decision to gather a multi-national force. The gentleman from New Jersey, Mr. Payne, is recognized.

Mr. PAYNE. Thank you very much, Mr. Chairman. I certainly have a different opinion regarding this legislation. Actually I really have to admit that I did not read it carefully before I came here but just listening to the testimony, and that is why these hearings are so important, that I certainly am more awakened about how devastating this thing is in my opinion. I certainly am not a diplomat and have a lot of respect for Secretary Eagleburger and what his whole career has been.

But I think we do have to be careful when we just say that, you know, there is no other people in the whole world like us. I mean if I were a Canadian, I would be a little upset, I guess, if my cousin lived in New York and I lived in Toronto or even some strong British friend that lives in London that has been supportive of U.S. policy and we had been partners.

I would just feel a little uncomfortable, of course, even living in Lagos in Nigeria. But I think that one of the problems that we do have is that we do have to be the strongest nation in the world. We do have to preserve. We are the world power. There is nothing that we can do about that. And it is great and that God did shed his light on us and we got the purple mountains majesty from sea to sea.

But there is the world and there are other people whose blood is red and eyes are blue and the rest. I think when we continually talk about only us outside—I think we are going down the wrong track when we just figure that we can build these missile defenses that come like 300 miles from the target and that we can stand alone, put another billion in and maybe you will get 200 miles from the target.

We can't stand alone in this world and the quicker we understand, I think the better. That does not mean that we are weak.

I mean this bill talks about cutoff aid to anybody who joins the treaty like the rest of the world, IMED or talking about any kind of assistance. This is one of the most ridiculous pieces of legislation I think I have seen. If you are talking about the United States with our 270 million people standing against the other 8 billion people in the world, you know, our grandchildren are going to have a very, very isolated life.

And, you know, to be against everything, land mines, I still don't understand why we are against land mines. Who is going to walk down from North Korea to South Korea so you have land mines that—I guess land mines keep people from walking down. So I guess they are going to walk down from North Korea to take over Seoul. It makes no sense at all. It is a poor excuse. It is not even an excuse.

We are even against—let me ask Mr. Bolton, are you in favor of the Decertification Treaty? That is the one that says the desert is coming down from the world and the world is drying up and that we ought to do stuff to prevent it from happening. The Senate has not ratified. Let me just ask. I want to ask. I know where you stand on ICC and Chow soldiers and land mines and all the other things. What about the Decertification Treaty? Have you looked at that one?

Mr. BOLTON. I have to confess I am not an expert on the Decertification Treaty.

Mr. PAYNE. OK. We are against that too. We are against the desert coming down, taking—I mean it is amazing that the U.S. Senate—believe me, we are not supposed to speak about the other House, thank God, but this is just amazing. Now let me just ask one quick question since my time has probably almost expired. But, like I said, I didn't read this thing carefully. I don't want to say it too much. One of my opponents will take it off the record.

But let me just ask this question. I just want to be clear about it. Now either one of you can answer this. Maybe Secretary Eagleburger will mention it. You believe the real risk of the Court is a politicized prosecutor or Court would, what do you call it, indict a high U.S. Government official ultimately responsible for alleged war crimes but not U.S. soldiers.

There was this question about soldiers being given—that the one that said that soldiers should go somewhere, he would be indicted and not the ground troops.

Mr. BOLTON. Sure. If you read the provisions of the Rome Statute dealing with who is liable for alleged war crimes or crimes against humanity, it clearly permits the responsibility be taken up the chain of command, and that those who ordered the activity in question or in some circumstances those who knew about the activity or should have known about the activity can be liable as well. So this is far from a hypothetical. I think it is a very real intent of those who drafted the Rome Statute.

Mr. EAGLEBURGER. May I make——

Mr. PAYNE. Yes.

Mr. EAGLEBURGER. I would make one point here, which is again I basically agree with most of what you said. I have to make a distinction between—let me reverse myself there. There is no question that one of the problems we will face as we go into this next cen-

tury is a neo-isolationist attitude in this country and we have to be very careful of it and that means most of the time we have to participate. I am not arguing any of that. In fact, I think it is a big danger that we may in fact try to isolate ourselves.

However, it is in this specific case and only this case that I would argue otherwise, and I argue it not simply on the basis of the examples that you and Mr. Bolton have talked about, namely, an unruly prosecutor or whatever. I have made the point and I will just make it one more time and then I will shut up, but my point is in my judgment there is a critical factor here that we are all ignoring, which is this the way to make legitimate international law where a group of countries get together and without the responsibilities the United States has and will have to have whether we like it or not draw up this treaty which will, if nothing else, make it more difficult for the United States to do what it feels it has to do internationally to maintain stability in the future.

And I worry, I don't want to get the United States as the world's policeman but on the other hand I don't want to lock our hands any more than we have to in terms of our ability to act when we feel we must in the coming decades. And one thing this country has that not an awful lot of other countries have is that when decisions are made by the executive in the end there is the check of the Congress and the check of the American people, and they vote, and that to me makes a great distinction between us and an awful lot of the rest of the world.

Mr. BOLTON. Mr. Chairman, could I just make one more point very quickly in response to Mr. Payne? Mr. Payne, I am sure you remember the tragic case of Colonel Higgins, who was a U.S. officer assigned to the U.N. Troop Supervisory Organization headquartered in Jerusalem who was captured by terrorists in Lebanon when he was serving there. And he was brutally tortured and killed in the late 1980's, 1989. Colonel Higgins was selected out of the 30-plus governments represented in UNTSO by military officers, selected quite clearly because he was an American. There is no doubt about it.

And that is why, for example, the provision in this bill section 5 on restricting American participation in peacekeeping, unless the Americans involved were protected against the jurisdiction of the International Criminal Court I think is a real and important point, and goes to the question of why we are treated differently than the Canadians. Thank you, Mr. Chairman.

Mr. PAYNE. Yeah, just in response to that. There is no question that we always are going to be treated differently. You all made that case, which I agree. We are a super power, the only one. But I do think that to the extent of what this legislation talks about about restricting, for example, IMED, or other kinds of—any kind of assistance to any country that becomes a party to this, we are really, I think, treacherously going down the wrong path.

Mr. BEREUTER. I thank the gentleman. I would recognize myself now for an opportunity to, with my colleagues and their opportunity forthcoming, wind up with a few questions to you that I think ought to be asked. I have two with a third comment. The Clinton Administration is trying to get the ICC to forego criminal

jurisdiction over Americans and persons of other countries that are not signatories to the Rome Statute.

First, how do you assess their prospects for success, and if they do succeed do you think that American servicemen and other governmental officials will in fact be safe from prosecution by the ICC? Second, we have had the subject of complementarity come up. It is imbedded in the Rome Statute. How does complementarity work, Mr. Bolton? I think that might be best addressed to you. Describe for us how it might protect an American president or a Secretary of State or a Member of Congress against prosecution by the ICC.

Third, I would just observe if you have any comment on the observation that Israel did not sign the Rome Statute. Now you would expect that a country with direct experience and its people with genocide would feel compelled to stay outside an institution that is ostensibly designed to punish and prevent genocide and other war crimes. Do you have any insight about that? And I call on each of you to respond to that part that you feel most comfortable in addressing.

Mr. BOLTON. Mr. Chairman, perhaps I could go first. On the subject of the Court's jurisdiction over Americans the Clinton Administration negotiated very hard in Rome to try and carve out exemptions from the Court's jurisdiction so that states that did not sign the Rome Statute could not have their personnel subjected to the jurisdiction of the International Criminal Court. It was an issue that was explicitly raised. It was explicitly rejected.

Now I have followed the Administration's work in the various U.N. preparatory commissions as they tried a variety of different ways to get out from under that problem, and specifically the latest thing they had been negotiating under article 98 of the Rome Statute having to do with not simply jurisdiction but the physical act of surrendering a defendant to the authority of the Court. I think the chances of their negotiating successfully to get the kind of exemption that they are trying to get are close to zero; the reason is that to get the exemption that they were denied expressly in Rome, you would have to assume that the other states party to the treaty had either gone to sleep, or had given up their objection.

I don't see any possibility that that is going to happen. I think this is an exercise that is doomed to failure. What they have achieved so far, at best, can be described as ambiguous, and it is because people know that the next stage is potentially dispositive. But even if they got something like what they have achieved already, bearing in mind that the ultimate decisionmaking authority over rules of evidence and elements of crimes for the Court is the Court itself, I think it is very, very unlikely that the Court is going to rule against a basic decision taken at Rome over the Administration's objections. So I think this entire effort, quite frankly, is a waste of time.

Mr. BEREUTER. Mr. Bolton, just to set the context here again for the second question. Some supporters of the ICC say that the concept of Americans being prosecuted is overblown and they point to complementarity imbedded in the Rome Statute as the reason for their comments so now can you take on what complementarity does, how it is supposed to work?

Mr. BOLTON. Mr. Chairman, the theory of complementarity, and I stress the theory of complementarity, is that in the first instance the Court would defer to the national judicial systems of countries of defendants alleged to have committed war crimes. In theory, it is only when that system fails to function or functions inadequately that the prosecutor would step in. First, Mr. Chairman, we have absolutely no experience with this doctrine in practice. This is nothing but a prediction based on hope, not on experience.

And, second, if you actually read the provisions of the Rome Statute that embodied the principle of complementarity, I think you can see the ambiguity. And I will just very quickly, if I may, read one where it says the Court will not take jurisdiction over a case where a state has investigated an alleged war crime, and now I am quoting from the Rome Statute, "and where the state has decided not to prosecute the person concerned unless the decision resulted from the unwillingness or inability of the state genuinely to prosecute."

So let us say that a prosecutor, a military prosecutor in this country, looked at a particular circumstance and made a decision for lack of sufficient evidence or whatever that the prosecutor was not going to proceed against a particular American serviceman. It is up to the International Criminal Court to say whether they accept that or not whether the state genuinely decided not to prosecute or whether it was just unwilling to.

What that means is that the theory of complementarity is ultimately dictated in reality by the decisions of the International Criminal Court and that is a cession of authority and sovereignty to an as yet unestablished, untested Court that I find excessively risky, and not just in the case, Mr. Chairman, of a GI, but in the case of our top national decisionmakers. That is what I am really worried about.

Mr. BEREUTER. Thank you. Mr. Eagleburger, Secretary, do you wish to address any of those or do either of you wish to address or speculate why Israel did not sign the Rome Statute?

Mr. BOLTON. Could I maybe take a shot at Israel and then let Larry handle the rest of it. The particular provision that Israel was concerned about was in the statement of offenses contained in the Rome Statute for war crimes. There is language, and I won't get into detail here, but language that basically changed the applicable language from the fourth Geneva Convention in a way that made it much more likely that Israel could be, and its practices in the occupied territories of Gaza and the West Bank, could be subject to prosecution.

Now this sounds like it is just a technical kind of dispute over the movement of persons by an occupying power into occupied territories, which is what the U.S. position about Gaza and the West Bank has been consistently since 1967. But really, Mr. Chairman, this shows exactly the risk of politicization inherent in the International Criminal Court. To me it is only a question whether the first complaints filed by the prosecutor are going to be against Israel or the United States. It will be a real race to the courthouse door.

And the states that wanted this changed provision in the definition of war crimes were exactly Israel's political opponents. And

what will happen, and one of the reasons Israel was concerned about it, and I think quite properly, is that it was just a setup way for score settling, not a true search for justice in any meaningful sense of the word, but a way to carry on military and political conflict through ostensibly legal means.

Mr. BEREUTER. Thank you. Mr. Secretary, do you wish to comment?

Mr. EAGLEBURGER. No.

Mr. BEREUTER. The gentleman from Massachusetts is recognized for 5 minutes if he has further questions.

Mr. DELAHUNT. I won't take my whole 5 minutes but thank you, Mr. Chairman. I agree with you, Secretary Eagleburger, in terms of the concern about the return of isolation. I think we are at the point where the global economy is not going to allow it anyhow. You keep referring to making international law. By that I presume you are talking about procedural law because I don't see—I mean of course as decisions would come presuming that the Court ever came into existence, it would establish a certain level of precedent and *stari decisis,* if you will.

But what I see it more is establishing an infrastructure. I don't think that is making international law per se. At least I want to be more clear in terms of where you are coming from on that.

Mr. EAGLEBURGER. You are correct, sir, in the sense that it is at this stage procedural but let me try to make my point this way. I understand, for example, that with regard to the mining treaty, for example, that there are now people who including the lady here in the United States whose name I can't remember, who are arguing that once that treaty was established even though the United States did not sign it, it is now international law.

Now, OK, you can argue that that is stretching the point and that she won't make her point. My worry is that in fact she will over time. If you take a look at what has happened, I think in terms of thinking about war crimes and how we deal with issues like the mining treaty, there is a growing tendency on the part of those who are advocates of that kind of approach to argue that once it is done then 5 countries agree with it or 15, it is now either international law or close to it.

And if we go ahead with this criminal court, it seems to me that, yes, it is procedural in what we are debating now but I think there is a real worry that it becomes much more than that as it begins to, I would say, build decisions which will lead to differences in itself.

Mr. DELAHUNT. With due respect, I think that would happen anyhow even in terms of the ad hoc tribunals that are in existence now. What I suggest is that is going to happen whether the ICC comes into existence or whether the ad hoc tribunals, whether they deal with Rwanda or the Yugoslavian one. I think we are building up a body of international law. But let me go to Mr. Bolton for a minute.

You made reference to the European court on human rights and some suit that appeared to be frivolous that was brought against Britain. I mean in any system, any legal system of justice, I think we are going to always have to anticipate frivolous assertions and allegations. I mean we never are going to design the perfect sys-

tem. I guess what we are looking for is less than perfect, as much imperfection as we can deal with.

I think that you, Mr. Bolton, point out the most legitimate concern, and that is the issue of prosecutorial accountability. But don't we have the capacity to design a system that deals with that particular issue, the concerns I think that you justifiably raise because I am sure in your experience and in mine, we have both observed prosecutors who abuse that awesome power, the power to deprive individuals of their liberty.

But whether it be some sort of oversight mechanism, whether it be length of term, whether it be the appointing authority, I mean what I suggest is that, you know, within the wealth and the abundance of our experience there are ways to deal with the issue of prosecutorial accountability.

Mr. BOLTON. That is entirely correct. In this country we call it democracy. The legitimacy that prosecutors have flows from the fact that they are ultimately politically accountable to elected officials. That is not the case for the prosecutor in this Court. He is ultimately accountable first to the Court itself, which is a system of allocating power that we have found unacceptable in this country since the framing of the Constitution, and, second, ultimately to 140 or more states party to the agreement.

That is like saying the General Assembly of the United Nations is responsible for the prosecutor. I don't think anybody could argue that is going to work.

Mr. DELAHUNT. OK. I mean, again, just to take that, I mean whether it is the Security Council that has authority over the Court at some point in time, unanimity, if you will, would be required.

Mr. BOLTON. But, Mr. Delahunt, I mean that is a very important point. The original position of the Administration was that the prosecutor of the ICC could only be triggered by a resolution, by an affirmative decision of the Security Council, and that was rejected. Had that provision been in the treaty, I still wouldn't support it but a lot of other people would have because——

Mr. DELAHUNT. All right.

Mr. BOLTON. Now could I just make one other real quick point?

Mr. DELAHUNT. Of course.

Mr. BOLTON. On the question of frivolous charges, the subject of Kofi Annan's remark is not frivolous. The man is the Secretary General of the United Nations and whether you agree or disagree with him when he speaks about the authority of the Council you have to take it as seriously reflecting some people's views. He wasn't the only U.N. official to speak about the legality of NATO's air campaign over Yugoslavia.

And I want to say I opposed that campaign as a matter of policy. But the U.N. High Commissioner for Human Rights, Mary Robinson, said with respect to the NATO bombing that it was unacceptable that NATO "remains the sole judge of what is or is not acceptable to bomb." And she went on to say "It surely must be right for the Security Council of the United Nations to have a say in whether a prolonged bombing campaign in which the bomber choose their targets at will is consistent with the principle of legality under the

charter of the United Nations." She is a former president of Ireland and she was saying those things so——

Mr. DELAHUNT. I take with great credibility any statements by former presidents of Ireland.

Mr. BOLTON. I am sure you do.

Mr. DELAHUNT. I want you to know that, Mr. Bolton.

Mr. EAGLEBURGER. I wish she hadn't made the point.

Mr. DELAHUNT. That is right.

Mr. BOLTON. But that is why the *Belgrano* litigation is not frivolous and I don't think Mrs. Thatcher and her government take it as frivolous.

Mr. DELAHUNT. I think Mrs. Thatcher has left the government——

Mr. BOLTON. Former government.

Mr. BEREUTER. The time of the gentleman has expired. Let us avoid Irish politics here, if we can. The gentleman from New Jersey, Mr. Payne. Do you have any further questions or comments?

Mr. PAYNE. Just a brief comment. I know the gentleman and I agree with him on the statements from Irish former presidents. The question though about the fact, and I hope too that isolation won't come about, and he said that because of global economy it will. He feels that we don't have to worry about that isolation business. You have to recall that it was in the 1930's when there was a big depression in Germany that Hitler decided he needed to do something to divert attention so if we ever get back to a down turn, you know, in economies then that makes it even more dangerous as we stand alone and build this big wall around the United States

As a matter of fact, as you may recall, there has been legislation put in the bill—you know, a fence in Texas to keep Mexicans out. I mean just build a fence on the whole border. That way we won't have illegal immigrants. So we get to the point where sometimes we really have to question it. That has nothing to do with this but let me just ask this question and maybe it has been answered, Mr. Bolton.

What situations in the recent past, you just mentioned the NATO business, do you think that this International Court of Justice would have prosecuted the President of the United States or some high official?

Mr. BOLTON. Well, let me take the example of the NATO air campaign over Yugoslavia, which was not approved by a resolution of the Security Council and in fact I think the Administration correctly judged that if they had taken it to a vote in the Security Council it might well have been vetoed by both Russia and China. The question of both the general legality of the campaign and the subject of the specific bombing targeting decisions and actions by NATO were considered by the prosecutor for the Yugoslav tribunal and in effect, although she declined to prosecute, she concluded that she had jurisdiction at least over the operational aspects of the matter.

And I think that is the kind of thing that we should have considerable pause on. If mistakes were made by NATO officials, by American officials in the conduct of that air campaign, we have, and quite properly so, mechanisms in the military justice system in this country to deal with that and to allow our senior officials

to be exposed to second guessing after the fact and possible prosecution for that seems to me to be unacceptable.

Let me give you another example. There has recently been controversy over an engagement that took place at the end of the Persian Gulf War when General Barry McCaffrey and his forces destroyed an Iraqi tank and armored personnel column. And there has been a lot of discussion about whether he acted in violation of the cease-fire or not. I remember that from the last days of the war where I saw the cable at the time about that engagement, but I could easily see a prosecutor saying, well, I would like to look into that and I think McCaffrey may be subject to indictment for having violated the terms of the cease-fire and therefore having committed a war crime under the Rome Statute.

McCaffrey, under the statute as presently drafted would be subject to the jurisdiction of the Court. Now I don't think McCaffrey did anything wrong at least based on what I know but what I do know is that the United States has a fully functioning military justice system that can deal with it if he did.

Mr. PAYNE. Just finally the question about extradition. By us not being a part of the worldwide system, for example, you may recall that one of the perpetrators [genocidaires (ph)] in the Rwanda genocide where, between 500,000 and 1,000,000 people were killed and that was it was planned, and of course as you may recall no one in the world wanted to act.

One of the genocidaires came to the United States and was in Texas for a year, year and a half, but because of this ICC potential and the fact that we did not feel that we could extradite him because it would set a precedent, you know, we could become the haven, I guess, of people that want to slip into the country, we were bound then to harbor a person like this who is responsible for the deaths of thousands and thousands of people. He sat in Houston, TX, or somewhere and may still be there. How do we prevent that kind of business from happening?

Mr. BOLTON. Well, I think the question of that particular extradition proceeding had to do with the question whether the applicable treaty provisions really governed an institution like the ad hoc tribunal, but I think the purpose of the legislation, as I understand it, by precluding agencies of the government at all levels, Federal, state and local, from cooperating is to demonstrate the seriousness of American opposition and I think that is a very important point to make.

And we are not alone in having concerns about extradition, particularly of citizens of countries to something like the International Criminal Court. One of the reasons for Latin American countries in particular why ratification has been so slow in coming is that those countries in many cases have constitutional provisions that prohibit their citizens from being extradited for trial in another country and they are facing now looking at the provisions for surrender to the International Criminal Court whether they actually have to amend their constitution. So this is not a problem that is peculiar to the United States.

Mr. BEREUTER. The time of the gentleman has expired. I have a few concluding comments as I adjourn but before we do that, I

want to recognize the gentleman from California, Mr. Berman, for the 5-minute rule, if he has any comments or questions.

Mr. BERMAN. Thank you, Mr. Chairman, and it is good to see you, Mr. Secretary, Mr. Bolton, and I apologize for not being here for your testimony and the earlier questions. Mr. Bolton, you just said in response to a question by Mr. Payne under the statute McCaffrey might be subject to prosecution for war crimes. What statute?

Mr. BOLTON. The Rome Statute, the substantive provisions, not retroactively. I am using that as an example prospectively of conduct during the course of warfare that would be subject to possible oversight by the prosecutor.

Mr. BERMAN. And who passed this statute, this Rome Statute?

Mr. BOLTON. The Rome Statute was signed by over 100 countries in Rome. It has been ratified so far only by 14.

Mr. BERMAN. And the United States did not sign?

Mr. BOLTON. That is correct.

Mr. BERMAN. And how many ratifications are needed before——

Mr. BOLTON. Sixty.

Mr. BERMAN. Sixty. Let us assume 60 parliaments around the world ratify. Now we have an International Criminal Court to pursue into this statute. This bill goes beyond prohibiting the United States from signing the treaty, as I understand it, or convention. Is that——

Mr. BOLTON. It is called the Rome Statute. It is a treaty.

Mr. BERMAN. But it also seeks to prohibit our cooperation with the International Criminal Court.

Mr. BOLTON. Right.

Mr. BERMAN. Let us assume it is ratified and Milosevic, for example, is apprehended and brought to trial for different kinds of war crimes and the United States has evidence that would be useful in that prosecution. Why would we beforehand want to say that no matter what the situation, no matter what the circumstances, no matter whom we are talking about, if this is the place where he is being brought to justice, we are not going to assist in the prosecution of him?

Mr. BOLTON. Well, I think there are three reasons for that. The first deals with the question whether or not the evidence is classified or not. Now let us assume for purposes of this discussion that it is unclassified. The reason not to cooperate even in the case of Milosevic is to demonstrate beyond any question to any other state party to the treaty that we do not accept the legitimacy of the Court.

We don't accept legitimacy for all the reasons we have been discussing here for the past couple of hours which I won't repeat but that is to emphasize and underline the strength of the United States view. That is point one. Point two, if we have evidence, other people might have evidence as well. It is not like it is, at least on an unclassified basis, that we are saying the Court can't get any evidence at all.

We are simply saying for our perspective we are unilaterally not cooperating with the Court, but I think the more difficult circumstance—and the proposed legislation also covers this—which really would trouble me is where we had classified information.

And I don't have any trouble at all in that circumstance saying, "Of course we are not going to turn over classified information to a Court like that; that could compromise sources and methods that we couldn't permit to be used in the prosecution of Milosevic without compromising our own intelligence efforts."

Just as you are very familiar with, I am sure, in this country where we have evidence against terrorist activity in this country that is obtained that we can't use in a prosecution in Court.

Mr. BERMAN. No one is talking about a statute that compels cooperation with this International Criminal Court.

Mr. BOLTON. No, but it is to prevent the cooperation from an Administration that has demonstrated by its every action that it wants to do exactly what would be prohibited by this legislation.

Mr. BERMAN. I think that is quite a statement. You are saying that this Administration apparently would want to compromise sources and methods——

Mr. BOLTON. No, no, no. Come on, Congressman Berman.

Mr. BERMAN. That is what you said.

Mr. BOLTON. What I said was that the Administration has demonstrated repeatedly it would love to sign the Rome Statute if it could figure out how to do it and it wants to cooperate——

Mr. BERMAN. I don't understand what you mean. Do you mean——

Mr. BOLTON. It is testified publicly that it would seek to cooperate with the Court in every occasion that was possible and I think that is one of the reasons it has given rise——

Mr. BERMAN. Well, if it would love to sign the Rome Statute, why doesn't it?

Mr. BOLTON. Because it recognizes, No. 1, there is opposition in the Pentagon, and, No. 2, it would be dead on arrival in the Senate.

Mr. BERMAN. As opposed to the Comprehensive Test Ban Treaty or any of the other treaties that have not been ratified by the Senate?

Mr. BOLTON. I am not aware of a single Senator who has endorsed the Rome Statute as currently written. Perhaps you are.

Mr. BERMAN. I would like to know of—I am not saying we should sign the Rome Statute. I would like to understand why we should have a provision that prohibits any Administration, not just this Administration, any Court—you can talk about a deposition at a trial where you need the original transcript of that deposition to impeach a witness there and, as I understand it, this prohibits any state or local government and presumably any branch of any state or local government or Federal court from providing upon request certified copies of transcripts of testimony given in a Court to the Criminal Court for the purposes of aiding in the prosecution of someone that there is a consensus we feel has engaged in war crimes activity.

It seems like in order to limit your fears about what might happen, you are tying the hands in allowing things that could happen in a form that we would prefer didn't exist but does exist. It has legitimacy in that a certain number of nations have signed it and have given it that legitimacy. We don't have to accept it or make our folks subject to it or participate in it to say that, you know, under the principle that even a stopped clock is right twice a day.

There may be some situations where we want the flexibility to let the only possible way in which somebody could be brought to the bar of justice for that to be a successful operation. It just seems like an overage here.

Mr. BEREUTER. The time of the gentleman has expired.

Mr. SMITH. Mr. Chairman.

Mr. BEREUTER. The question has been asked several times and it may well be a question that the legislative body will have to address when we take up this matter.

Mr. SMITH. Mr. Chairman.

Mr. BEREUTER. Yes. I did say I would conclude the hearing, but I do recognize the gentleman from New Jersey.

Mr. SMITH. Thank you very much, Mr. Chairman. Two bills that were on the floor, one Veterans and one dealing with the issue of capital punishment precluded my being here so I missed what I am sure was very eloquent testimony from two good friends, Secretary Eagleburger and Secretary John Bolton. Let me just ask unanimous consent that my full statement be made a part of the record, Mr. Chairman, and just make a couple of observations.

I was at the and led the delegation, was head of the delegation at the OSCE parliamentary assembly in Bucharest just a couple of weeks ago and there was an issue dealing with the International Criminal Court and there was a resolution to try to get states to ratify it, to accelerate ratification. Our delegation took the view of either abstaining or voting against it. I spoke very vigorously against the resolution and did so not because I am not for international criminal tribunals.

As a matter of fact, our Subcommittee on International Operations and Human Rights took a back seat to no one nor did the Helsinki Commission when we were talking about the creation of the Balkans war crimes tribunal. As a matter of fact, I offered amendments to increase the amount of money donation from the U.S. Government to try to accelerate that very specific war crimes tribunal and did likewise for the tribunal dealing with Rwanda and the genocide that took place there.

The problem with the Rome treaty, as I see it, is a lack of definition. The fact that the article 5, the crime of aggression, isn't even defined yet and yet it is included and countries are being asked to ratify and the fact that there is immense elasticity with definitions in other areas means that this is ripe for political manipulation. The fact that the prosecutor's office can accept the work of NGO's, and again I take a back seat like the Chairman and like others, NGO's play a very fine role.

But the independence of a prosecutor should be just that. He or she should have the ability and the capability in terms of assets to very vigorously go after a real bona fide war crime. But again we are dealing with language that is very, very imprecise and I think that we need to look at this very carefully. Finally, Mr. Chairman, I am concerned about the impact this might have on peace keeping and peace making.

I think any Commander-in-Chief would be loathe to send our men and women into harm's way believing that there could be a very frivolous but very mischief-making assertion of war crimes being asserted against our men and women if they take out a TV

tower, for example, and that is construed not to be a military assess even though it is putting out propaganda and calling people to a war-like footing in that country as did Milosevic, and yet some people might say, oh, that should be off limits.

This is a very, very problematic area. We need to go slow and where there are war crimes, like I said, there needs to be at least ad hoc tribunals convened, but there is some very real reason for pause with regards to this. And again I would ask that my full statement be made part of the record and thank our good friends for being here today.

Mr. BEREUTER. Without objection, that will be the case. I thank the gentleman for his excellent statement. I am in agreement with what he said. As we conclude these hearings, I want to thank first of all the witnesses for the time that they spent with us and for the way they have addressed our questions. I am very concerned about the statement made by the Secretary General that is a quote in your statement, Mr. Bolton.

I have known this gentleman for a long time before he was Secretary General. I have great respect for him. But I think there is something that is happening gradually and it is very insidious with respect to our sovereignty. We have heard such a great amount of warped rhetoric about loss of sovereignty that sometimes we may not recognize it when it is happening. And I would say that there is no way that the United States should accept the legitimacy of the ICC if it is established.

Since I spend a lot of time with European institutions, I have found over the last few years that what has happened with European nations that are members of the European Union, for example, is that they have gradually given parts of their sovereignty to the commission, and it has become the accepted norm. We have seen, as one of you pointed out, with respect to Yugoslavia how action probably could not have been taken with a U.N. resolution in the case of intervening in Kosovo.

Now I, too, disagree with what happened there as a matter of policy, but I do believe that we would find ourselves in a stalemate. Increasingly, in the NATO Parliamentary Assembly, we have votes now which makes it clear that the Europeans by and large today—NATO members of Europe and EU members—think of the United Nations as a super-national body to which should be given or in some cases assenting to the gift of elements of our sovereignty. That is something that is very serious.

Mr. Lantos raised questions as to whether or not this legislation which is in part the subject of this hearing, certainly prompted it, is offered for partisan reasons or for partially partisan reasons. That is a legitimate question to be asked. But we had a number of questions also raised as to whether or not we should attempt to amend the legislation to address it so that proper consultation and assistance might be offered and whether or not if we refine relief so that non-signatory citizens would not be subject to the jurisdiction of the international court this would be acceptable.

On the other hand, we have presented to you the suggestion that this is a way of saying that the United States is so much and so fundamentally opposed to the ICC that this would be a way of demonstrating on the part of Congress that the Administration has no

further mandate if they had one at all from the Congress to proceed with attempting to fix the problems that we see within the ICC.

Gentlemen, you have been helpful to us in sorting through some of these issues. We are prepared to hold a hearing on this same subject when we hear from the Administration tomorrow, and we are looking forward to that as well. And in closing I ask unanimous consent to include in the record statements submitted on behalf of the American Bar Association and the Lawyers Committee for Human Rights. The Committee is adjourned.

[The aboved-mentioned statements appear in the appendix.]

[Whereupon, at 12:13 p.m., the Committee was adjourned.]

THE INTERNATIONAL CRIMINAL COURT: PART 2—RECENT DEVELOPMENTS

WEDNESDAY, JULY 26, 2000

HOUSE OF REPRESENTATIVES,
COMMITTEE ON INTERNATIONAL RELATIONS,
Washington, DC.

The Committee met, pursuant to notice, at 10:30 a.m., in room 2172, Rayburn House Office Building, Hon. Doug Bereuter presiding.

Mr. BEREUTER. The Committee will be in order.

Today we hold the second of two hearings on the International Criminal Court. Yesterday we heard from two very distinguished former executive branch officials, former Secretary of State Lawrence Eagleburger and the former Assistant Secretary of State for International Organizations John Bolton. They both testified about the very serious dangers to our national interest arising from the International Criminal Court in their judgment, and they urged Congress to begin to remedy this situation by approving H.R. 4654, the American Servicemembers' Protection Act of 2000.

As I noted at the outset of yesterday's hearing, there are many strongly held opinions about the International Criminal Court and many passionate disagreements.

The one thing that virtually everyone agrees on, however, is that the way this issue has evolved over the last few years has been nothing short of disastrous from the point of view of the national interest of the United States.

Today we are well on the way, it appears, to the establishment of a U.N.-led criminal court, which will claim the jurisdiction to prosecute and imprison American servicemembers and other officials of our Government in certain instances, irrespective of whether the United States every becomes a party to the Court.

I know from the prepared testimony of today's witnesses that they intend to devote themselves to criticizing legislation that is before the Committee, the American Servicemembers' Protection Act, and we want your criticism of legislation and your own view.

Clearly the Administration is not supportive of the legislation, but we should all reflect for a moment on why the legislation was introduced, as I understand it.

To my mind, the legislation is about accountability. It was introduced because there has been a failure in the conduct of our nation's diplomacy with respect to the International Criminal Court.

The Administration set in motion a process that led to the Rome Treaty. It seems to me that it lost control of the process while dealing with European Union members in particular those with a very

different attitude about international organizations than does the United States and its citizens.

A treaty emerged that is prejudicial to our national interest, so prejudicial, in fact, that the Administration decided it could not sign the treaty; I commend them for that judgment.

Since that time, the Administration has devoted itself to trying to deal with the problem that presents itself to us. Apparently, the Administration is no longer trying to bring the United States into membership of the Court. Rather it now seems to be focused on trying to make it safe for the United States to remain outside the Court.

Secretary Eagleburger and Secretary Bolton yesterday predicted that the Administration is unlikely to succeed in its efforts to win back what it lost in negotiations in Rome. I hope their judgment is incorrect, but that is commonly thought to be the case. They further argued that even if the Administration gets the technical fixes it is seeking, no American servicemember or Government official can have real confidence that he or she is safe from ICC prosecution, so I hope our witnesses today will not focus exclusively on the legislation and their criticism of it, although we want that. I hope you also tell us how our nation can avoid these kind of problems in the future, because I happen to think, in light of my contact with the legislators and government officials of the European Union nations, for example, that this is the beginning of a long-term problem for the United States.

They are willing to give up elements of their sovereignty, it is quite clear, and we are not, and should not be.

Before recognizing our panel, I want to first recognize the Ranking Democratic Member, Mr. Gejdenson, for opening comments he may have, and then I will introduce our witnesses. Mr. Gejdenson.

Mr. GEJDENSON. Thank you, Mr. Chairman.

I am not sure whether the impetus for this legislation was the crowd that constantly worries about black helicopters and blue helmets taking over the country or simply a partisan attempt to gain advantage for the November elections, but it really just stuns me, and I was frankly disappointed by my old friend Secretary Eagleburger's responses yesterday.

If you read the legislation, it says the United States should not help prosecute a known war criminal, it should not help defend an American who is being prosecuted. It creates an America attempting to isolate itself without even having a conversation about where the Court is going.

I think there is no doubt here that we have grave reservations about the formation of the Court, its operation. But to argue that an Administration ought to be precluded from trying to improve an institution that is being created, a Court that is being created internationally is absolutely stunning to me.

I think we all agree that at the end of the day it is highly unlikely that the Administration or the Congress would be supportive of this Court, but to argue that the Administration should not try to improve an institution that will be created, to make sure that America's interests aren't heard is particularly troubling to me—to argue that somehow it is not in America's best interest to have con-

versations with its closest allies in Europe and just simply walk away and not have any conversations is unacceptable to me.

I want to ask the witnesses to address their concerns about the Court, because I think that is important, but also to argue and articulate why it is important for the Administration to continue discussions with our European friends and partners. I particularly want to welcome Under Secretary Slocombe and hope that he can make a statement at the end of Ambassador's Scheffer's remarks so we can get the Defense Department's views on record.

All of us understand the difference between Liechtenstein and the United States as far as our exposure and our responsibilities worldwide, but I do not think we want the future of the world left to ad hoc courts and kidnappings as the only way to deal with international terrorists and criminals. If Brazil decided tomorrow that it had authority to go into every Latin American country and just grab whoever they wanted, the United States and I think most of the world would be offended. This Court may have the wrong definition, the wrong process, the wrong players, everything about it might be wrong, but we still ought to be in that discussion.

Mr. BEREUTER. I thank you, Mr. Gejdenson.

It is my pleasure now to call on the gentleman from New Jersey, who is the Chairman of the Subcommittee responsible for oversight of Americans' involvement in international organizations, the gentleman from New Jersey, Mr. Smith.

Mr. SMITH. Thank you very much, Mr. Chairman.

Mr. Chairman, the concept of a permanent International Criminal Court charged with prosecuting the gravest of crimes against humanity is not a new one. The idea was proposed and dismissed after the conclusion of the Nuremberg and Tokyo War Crime Tribunals that followed World War II.

In recent years the idea has gained new momentum, driven largely by memories of the horrific crimes committed in Rwanda and the former Yugoslavia. I share the ideals of many ICC supporters. If we could construct an entity that would impartially prosecute only genocidal tyrants and war criminals I would support it without hesitation, but we do not inhabit an ideal world. The difficulty is in devising a system that will prosecute Pol Pot but not President Clinton, that will indict Ratko Mladic but not Norman Schwartzkopf.

I am concerned that the Rome Statute of the International Criminal Court fails to accomplish that goal and that it is susceptible to serious abuse and manipulation.

As it took form, the draft statute ballooned from an instrument focused on well-established war crimes into an encyclopedia of still-emerging human rights law. The resulting statute is a 30,000 word document that covers 77 pages. It contains sweeping language that leaves many elements of vaguely defined crimes up to the imagination of international lawyers.

For example, according to article VI the crime of genocide includes, "causing serious mental harm" to members of a, "national, ethnic, racial or religious group."

It is true that similar language is contained in the Convention against Genocide, but the United States took a reservation to the jurisdiction of the World Court over the definition of genocide. This

is not because we intend to commit genocide, but because the United States was unwilling to surrender its sovereignty to a body that might be manipulated by hostile parties using the vague language of the convention as an ideological hobbyhorse.

Similarly, article V asserts ICC jurisdiction over the, "crime of aggression"—an offense that is not defined in international law or even in the Rome Statute itself, a point that I made repeatedly at the OSCE parliamentary assembly in Bucharest earlier this month. In the context of domestic law, such vagueness would be problematic. In the more combative context of international law it is dangerous.

In addition to the problems posed by its vague definitions, the statute also claims a jurisdictional reach that is without precedent. Once 60 countries have ratified it, the statute claims ICC jurisdiction over any defendant who may have committed a crime in a signatory state regardless of whether the defendant's own state had ratified the treaty. By claiming to bind the subjects of non-signatory states, this self-executing, potentially universal jurisdiction directly challenges traditional concepts of national sovereignty.

Finally, the Rome Statute gives the ICC prosecutor a vast amount of personal power with a minimum amount of oversight. The statute drafters rejected a U.S. proposal that the prosecutor only be allowed to proceed on cases referred either by a sovereign state or by the U.N. Security Council. Instead, the ICC prosecutor may initiate investigations and prosecutions on his own authority without control or oversight by any national or international party.

Under article 44, the prosecutor may also accept any offer of, "gratis personnel offered by nongovernmental organizations to assist with the work of any of the organs of the Court."

I have long been a supporter of the important work undertaken by International NGO's, particularly relating to the protection of human rights and the provision of humanitarian relief, but it is also true that there exist hundreds of highly ideological NGO's who look to international bodies to promote agendas that go far beyond the domestic political consensus in their home countries. The combination of the independent prosecutor's extreme discretion with staff provided by well-funded extremist NGO's could lead to serious problems and partisanship by the ICC. These are but a few of the problems that I have with the present form of the Rome Statute.

I readily acknowledge that many, probably most, ICC supporters do not intend for the Court to be used as a club for U.S.-bashing or as an engine or radical social engineering, but once the ICC is established it will take on a life of its own. Its activities will be restricted by the language of the Rome Statute itself rather than by the best intentions of its most responsible supporters, and I just would say finally, Mr. Chairman, as you know, I take a back seat to no one in promoting—in the past and present—both the Rwanda War Crimes Tribunal and the International War Crimes Tribunal for the Balkans.

When we were holding early hearings in our subcommittee as well as on the Helsinki Commission I offered language and amendments to boost the U.S. donation to those important tribunals and so I take a back seat to no one, but this I think has some very real problems that need to be addressed. I yield back.

Mr. BEREUTER. Thank you very much, Mr. Smith.

Now our first witness today is Ambassador David Scheffer, the Ambassador-at-Large for War Crimes Issues at the Department of State.

He has held that office since 1997. He previously served as Senior Advisor and Counsel to our then-Ambassador to the United Nations, Madeline Albright.

Before working in the Clinton Administration, Ambassador Scheffer held a variety of positions including Adjunct Professor of Law at Georgetown University and Columbia University, Senior Associate at the Carnegie Endowment for International Peace, and a stint as a consultant to an organization called the House Committee on Foreign Affairs.

Ambassador Scheffer is joined by the Honorable Walter Slocombe, the Under Secretary of Defense for Policy. Secretary Slocombe has held this position since 1994. Before joining the Administration, he was partner in the D.C. law firm of Kaplan & Drysdale and also held positions in the Department of Defense during the Carter Administration and is a frequent witness before this Committee and our subcommittees.

Gentlemen, we welcome you. Ambassador Scheffer, we have your prepared statement, so we welcome a summary of your testimony. Your entire statement will be made a part of the record and you may proceed as you wish.

STATEMENT OF THE HONORABLE DAVID SCHEFFER, AMBASSADOR-AT-LARGE FOR WAR CRIMES ISSUES, U.S. DEPARTMENT OF STATE

Ambassador SCHEFFER. Thank you very much, Mr. Chairman, and thank you also, Congressman Smith, and to the ranking Member Congressman Gejdenson.

I will in fact shorten my statement considerably and look forward to the full statement being filed in the record.

I appreciate the opportunity to testify this afternoon on H.R. 4654, the American Servicemembers' Protection Act of 2000. We all share the same minimum objective, namely to ensure that members of the U.S. Armed Forces and U.S. Government officials are not prosecuted before the International Criminal Court when it is established.

However, as the Chief Negotiator for the United States on the ICC Treaty of July 17, 1998, and its supplemental agreements still being negotiated at the ICC Prep. Comm., I believe that this legislation will cripple our ability to achieve our common objective. This legislation will not change a single word of the ICC Treaty of any of its supplemental documents. Indeed, H.R. 4654 will worsen our negotiating position at the very moment when we stand the best chance of securing agreement with other governments to protect our soldiers and Government officials and to continue our support for international justice.

The Administration opposes this legislation. H.R. 4654 infringes on the President's Constitutional authority as Commander-in-Chief and to conduct foreign relations. It is counter-productive not only because of its direct impact on critical negotiations relating to the ICC, but also because H.R. 4654 would seriously damage U.S. na-

tional policy objectives. It would hold national security and foreign policy interests hostage to the fate of our relationship with Governments that support the ICC and to the willingness of other members of the Security Council to immunize our Armed Forces personnel from ICC jurisdiction.

As the Department has explained in letters to Chairman Gilman and Representative Gejdenson dated June 30, 2000, current law prohibits the use of Federal funds to support the International Criminal Court, but this bill is more sweeping and harmful to particular Defense and foreign affairs programs. It would prohibit military aid to any country that has ratified the ICC treaty with exceptions only for NATO and major non-NATO allies.

Moreover, by requiring that the U.N. Security Council grant immunity to U.S. personnel to participate in U.N.-authorized military activity, the legislation could effectively prevent U.S. military engagement on issues of critical national security concern.

The bill would have these detrimental consequences without providing the Administration with any new authority or any increased ability to protect U.S. servicemembers from prosecution. Rather, it would tie the hands of the President as Commander-in-Chief, and risk harming important U.S. interests by its inflexibility.

The Administration is actively pursuing the international protection objectives that are critical to the executive branch as well as to many Members of Congress. In particular, at the ICC Prep. Comm. meetings in New York where supplementary treaty documents are being considered, we are proposing a measure that in general terms would ensure that servicemembers and civilian officials of countries such as the United States that have not ratified the Treaty are not brought before the Court without the consent of their governments.

We have made clear that without a favorable result the United States would be compelled to reconsider U.S. military participation in certain contingencies.

The latest round of ICC meetings ended on June 30. We made important progress at those meetings, but we have a very tough struggle ahead as we advance toward the next session in late November. We are deeply concerned that in addition to imposing unnecessary and dangerous restrictions on national security decision-making the legislation prejudges the outcome of ongoing negotiations on the protection objectives we are seeking to achieve.

For this reason it would undermine the efforts of the U.S. negotiators and diminish the likelihood of obtaining those additional protections for U.S. servicemembers.

Before I comment on particular provisions of the bill I want to emphasize that the ICC Treaty is designed to bring to justice those most responsible for the most serious crimes of concern to the international community, namely genocide, crimes against humanity, and war crimes. Since 1993, we have been deeply engaged in every phase of the ICC treaty. We have supported the creation of an effective and appropriate International Criminal Court because there is a clear need for one in the wake of continued atrocities.

Nonetheless, a fundamental flaw remains in the ICC Treaty regarding the Court's purported ability to prosecute under certain circumstances the nationals of nonparty states, even those acting

officially for responsible nations like the United States. Therefore, the possibility of our own exposure under the ICC Treaty remains, and that is why we are seeking further protection in the ICC talks.

In my prepared remarks there is considerable attention paid to the Department of Justice's advice regarding the Constitutional infirmities of this legislation. I will not repeat those points in my oral remarks but I strongly recommend them to you for your attention.

I also believe that the paper submitted by Monroe Lee on behalf of the American Bar Association, which also discusses the Constitutional issues relating to this legislation, is extremely good reading, and I commend it to the Committee.

Section IV of H.R. 4654 would prohibit specific forms of cooperation with the Court until the United States ratifies the ICC Treaty. The President already has that authority, but we anticipate there will be instances in which it will be the national interest to respond to requests for cooperation even if the United States is not a party to the ICC Treaty. We may decide that an international investigation and prosecution of a Pol Pot or Saddam Hussein and Idi Amin, a Foday Sankoh or some other rogue leader who has committed or is committing heinous crimes that no civilized government or people could possibly condone or acquiesce in would be in the national interest of the United States to support.

In the ICC negotiations the U.S. Government has pressed other governments hard to accommodate our need to protect U.S. personnel from being surrendered to the ICC to stand trial while the United States is not a party to the Treaty. I must be able to offer in exchange for the protection that we are seeking the ultimate cooperation of the United States with the ICC when it serves our national interests while our country is a nonparty to the ICC Treaty.

Section V can severely impede national interests and needlessly hold them hostage to the ICC Treaty. Under the Constitution the President already has the authority to do all that is required in Section V of the bill but Section V ignores the President's responsibility to national security considerations in deciding when and how to deploy U.S. military personnel under a wide and often unpredictable range of contingencies. The bill ties the President's hands in a way that can severely undermine this nation's ability and will to protect our national interests.

Section VI is unnecessary. As we have already ensured in articles 72 and 73 of the ICC Treaty that we will have complete control as a nonparty or as a party to the ICC Treaty over the transfer of classified national security information to the ICC.

Under Section VII of H.R. 4654 U.S. military assistance globally would be held hostage to the ICC Treaty regardless of U.S. national interests, regardless of whether our servicemembers are protected through some means other than an article 98 agreement and regardless of what circumstances will arise in the future. This provision can only undermine our national interests. The President already has this authority if he chooses to use it to advance national security objectives. The legislation requires the use of that authority in a way that is most likely to undermine relevant national policies.

Section VIII would authorize the President to use all means necessary and appropriate to free U.S. personnel being detained or im-

prisoned by or on behalf of the ICC. We would note that the ICC will be located in The Hague, the Netherlands, so in a curious way Section VIII contemplates an armed attack on the Netherlands, a close NATO ally of the United States. It is, to put it bluntly, an alarmist provision that only complicates our ability to negotiate our common objective of protection from prosecution.

Under the Constitution the President already has the authority to protect U.S. personnel wherever they are located in the world.

Section IX of the H.R. 4654 requires a report evaluating the degree to which each existing status of forces agreement or other similar international agreement protects U.S. personnel from extradition to the ICC under article 98 of the ICC Treaty. Although we could provide such an assessment, the major issue lies in reopening SOFAS to negotiation in order to seek full protection from extradition through a SOFA provision.

Section IX requires the President to transmit to Congress a plan for amending existing SOFAs or negotiating new international agreements in order to achieve the maximum protection available under article 98. Reopening SOFAs could encourage host countries to insist on renegotiating other existing provisions.

Section X requires a report with respect to military alliances to which the United States is a party. This provision needlessly subjects our alliance command arrangements to factors pertaining to the ICC Treaty and thus suggests that once again our national security interests will be held hostage to the ICC Treaty.

In conclusion, many of the provisions of H.R. 4654 achieve exactly the opposite of the result intended and would seriously harm our own national security and foreign policy interests. The legislation would cripple our negotiating leverage to achieve the common objective of protection of American servicemembers from surrender to the ICC. Section V could make it impossible for the United States to engage in critical multinational operations. Section VII could weaken essential military alliances.

The bill raises fundamental Constitutional issues and would seriously impair any future Administration's ability to pursue national security objectives.

As a negotiator who has faithfully worked and will continue to work to protect U.S. national interests and U.S. servicemembers in the ICC Treaty regime, I respectfully ask you to withdraw this legislation so that I have a fighting chance to achieve additional protections for U.S. servicemembers.

Thank you, Mr. Chairman and Congressman Smith.

[The prepared statement of Ambassador Scheffer appears in the appendix.]

Mr. BEREUTER. Thank you, Ambassador Scheffer. Do you have any kind of statement or remarks that you would like to offer at this point? If not, the Under Secretary is recognized.

STATEMENT OF THE HONORABLE WALTER SLOCOMBE, UNDER SECRETARY OF DEFENSE FOR POLICY, U.S. DEPARTMENT OF DEFENSE

Mr. SLOCOMBE. Thank you, Mr. Chairman.

First of all, I associate myself with and the Department of Defense with the detailed points made by Ambassador Scheffer in his statement.

Let me say a few words, first of all, about why the Department of Defense and the Administration are opposed to the United States being a party to the Rome Statute, and, indeed, opposed to particular provisions of the Rome Statute, the issues which Congressman Smith addressed in his statement, in particular.

And then I will explain why, in spite of that position, we are concerned about this bill and oppose it in its present form.

The Department of Defense is committed to the vigorous prosecution of violations of human rights law and of the Law of War. We have, indeed, prosecuted American Servicemen where there have been credible allegations of such violations on their part.

We have supported the international criminal tribunals for Rwanda and for Yugoslavia, and we regard the establishment of a body of international law relating to crimes against humanity, genocide and so on, as valuable and important. Indeed, we place a high priority in conducting our own military operations on compliance with the relevant provisions of the Law of War. I commend to the Committee's attention the very important opinion issued by the Prosecutor for the ICTY, rejecting all of the allegations against NATO activity in Kosovo.

So it is not a question of fidelity to international law or recognizing its importance. Indeed, the United States supported—would have supported—the establishment of an appropriate international criminal court. However, we have a fundamental problem with the treaty as it emerged from the Rome meetings, because of its inadequate jurisdictional safeguards, particularly as applied to nationals of states that have not ratified the treaty.

As it currently stands, the Rome Treaty could expose servicemembers and government officials of non-party states to criminal liability. This possibility is particularly serious in the case of the United States, because we believe there is a real potential for groundless, politically motivated charges to be brought by other states that object to the international policies of any non-party states, but specifically the United States.

That exposure would inhibit responsible international military efforts in support of humanitarian and peacekeeping objectives.

However, the fact is that this treaty is likely to come into effect when 60 states ratify it. For that reason we attach very high importance to making an attempt, which is now in progress, to ensure that nationals of non-party states acting pursuant to official instructions, acting on behalf of their countries, cannot be prosecuted.

If those efforts fail, we will have to take a hard look at our overall approach to the Court. A negative result could have a major impact on our decisions about whether to participate in certain types of military contingencies.

We would be facing the significant risk that the United States would be unable to support the ICC or recognize its legitimacy, particularly over personnel engaged in military operations.

So just as there is, I think, no question that the Department of Defense recognizes international law and the requirements that that imposes on our operations, there is no question that the Administration, very largely for the reasons that Congressman Smith has identified, regards the treaty in its present form as unsatisfactory.

All that said, the Department of Defense joins in the opposition to this bill for two basic reasons.

First, and perhaps of the greatest immediate importance, Ambassador Scheffer, leading an interagency delegation, is now engaged in very difficult negotiations to secure protection for U.S. military personnel in the situation which is going to exist anyway, that is, that the treaty comes into effect with the United States as a non-party.

We believe that the legislation will interfere with those efforts to fix the problem.

Second, there are serious objections to details in the legislation which have been broadly outlined by Ambassador Scheffer, quite apart from its immediate impact on the on-going negotiations.

The bill does not give the President any power he doesn't already have.

It seriously limits U.S. flexibility, for example, by cutting off aid to a large number of countries in the world with whom we have, for very good reasons, with the support of the Congress, substantial military-to-military links.

It would complicate the already sufficiently complicated problem of keeping our Status of Forces Agreements [SOFAs] in a form which will protect American military personnel overseas from a whole set of other problems.

It would block U.S. cooperation, even in cases of prosecutions which we strongly supported, and in a sense, it is legislative overkill.

This issue—of the ICC—is an important one, but it is not the only concern we have, and by imposing a set of rigid rules, we'd make it far more difficult, I believe, both to carry out our objectives with respect to the Rome Statute, but also with respect to carrying out our national security policies in the future.

I thank the Committee for your attention, and I look forward to answering questions.

Mr. BEREUTER. Thank you very much, Secretary Slocombe. The House has a series of two votes that occur in 15 minutes, which is only 5 minutes away, and then a 5-minute vote, so we will recess the Committee until approximately 10:50 a.m.

Thank you very much.

[Recess.]

Mr. BEREUTER [presiding]. The Committee will be in order. We'll now proceed under the 5-minute rules for the questioning of our witnesses.

Ambassador Scheffer, could you clarify for me and for the Committee, the policy of the Administration regarding the Rome Treaty and the creation of the ICC?

Are you trying, in effect, to fix the Rome Statute so that eventually the United States can sign it, can ratify the treaty to create the ICC? Or, are you trying to fix it so that our nation can remain a permanent non-party to the treaty without fear that our servicemembers and other government officials will become targets for prosecution by the ICC?

Ambassador SCHEFFER. Thank you, Mr. Chairman. It's actually neither, but it's mostly the latter that you have just described.

In other words, we are not in a posture at this point of trying to, shall we say, fix the treaty in contemplation of signing and ratifying it; rather, we are seeking to fix what I very accurately describe as the treaty regime, because it simply is not plausible at this stage to consider actually amending the text of the treaty.

The first opportunity to amend the text of the treaty only arises 7 years after the treaty enters into force with 60 ratifications.

So in our own interest, that's not exactly where we should be directing our energies at this point; but, rather, we are looking at the supplemental documents that are associated with this treaty to determine how we might best protect our most important interests in those documents.

And, of course, our most important fundamental interest is the protection of U.S. personnel from surrender to this Court while we are a non-party. That is our objective.

It is not tied to any plan for signature, and certainly none for ratification.

The only reason I said it's not quite the latter point that you described is that you said for our permanent non-party status under the treaty.

I don't want to prejudge that for future Administrations whatsoever. All we want to do at this time is to get this squared away so that the United States can be comfortable with this treaty and be able to facilitate its objectives when it is in our national interest to do so.

Mr. BEREUTER. So, Ambassador, you're saying that the word that I used, "permanent," makes it not an accurate description. So, in fact, you're trying to assure that as a non-party to the treaty, our personnel, military and otherwise will not be subject to prosecution in the ICC? Is that correct?

Ambassador SCHEFFER. Precisely.

Mr. BEREUTER. And if, in fact, there are no opportunities to amend the treaty until approximately 7 years, I think you said——

Ambassador SCHEFFER. Yes.

Mr. BEREUTER. And at that time, it would only be members of the ICC, those that have signed the treaty, ratified it, that would have an opportunity to amend it?

Ambassador SCHEFFER. That's correct.

Mr. BEREUTER. In fact, as a non-party, we would not be part of those discussions for amendment?

Ambassador SCHEFFER. Yes.

Mr. BEREUTER. Ambassador Scheffer, could you explain to me, how people came together to draft the Rome Statute? I want to understand the legitimacy of the people that gathered to make decisions like that.

Ambassador SCHEFFER. It began in 1989 with a proposal by Trinidad and Tobago to create a permanent court for drug trafficking prosecutions. But it grew from that in the International Law Commission of the United Nations to focus instead on a permanent court that would prosecute genocide, war crimes, and crimes against humanity.

And in the early 1990's, up through 1994, the International Law Commission prepared a draft statute for such a permanent court. That was then sent to the General Assembly of the United Nations, and the General Assembly decided in late 1994 to create a committee of the whole body of the United Nations to examine the statute prepared by the International Law Commission.

Those meetings began in early 1995, and they continued through to the Rome Conference of July 1998.

Mr. BEREUTER. And who were participants in that?

Ambassador SCHEFFER. The participants were representatives of, I would say, a majority of the governments which are member states of the United Nations. Each session saw a few more governments, you know, participate from the earlier sessions.

But it has always been one of the frustrations that we had as a U.S. delegation, that the membership of so many delegations of governments consisted primarily of lawyers, sometime academic lawyers, even though we're both lawyers.

But the point is that they were not necessarily there with the full corpus of the political context of their own — of the entire process in mind. It became very much at times a technician's exercise. And we tried to keep bringing people back to the reality that this Court must balance the requirements of international peace and security — and many of us have those responsibilities—with our common interest in preserving international justice.

And in the process, we won a lot of our debates. We won a lot of our points in this treaty, but on some of them, we did not prevail.

Mr. BEREUTER. Mr. Smith, I'm going to extend myself another minute or two, and then we'll be generous with you as well.

Ambassador, the term "statute" confuses me, because as I understand what happened there, this is not consistent with the way we use the term in the Congress or in making legislation or crafting within the United States.

Why the term "statute" when we are, in fact, proposing a treaty?

Ambassador SCHEFFER. Let me explain the difference, if I may, Mr. Chairman. When one speaks of creating a court on an international level, it has to have some governing document for the functioning of that court. And as with the Yugoslav Tribunal and the Rwanda Tribunal, the Security Council adopted statutes or a statute for each tribunal, which is its constitution, basically, the court's own constitution, the basic principles by which the court must function.

It is simply a term of art that has arisen in the international sphere, and during the talks for the ICC, it is that basic constitutional document of the court itself which is described as the statute.

The treaty itself, when ratified, embodies that statute, and I guess the best I can say is that it's simply, in U.N. practice, once

you have ratified the treaty, per se, you are also, of course, adopting as part of that ratification package, the statute of the court itself.

Mr. BEREUTER. Thank you very much. I have further questions, but we'll turn now to Mr. Smith under the 5-minute rule, and I will extend it to seven.

Mr. SMITH. Thank you very much. Ambassador Scheffer, let me just ask you a question with regard to the delegations.

It's my understanding that many of the delegations really were represented by NGO's. I wonder if you could provide us with a roster of who the participants were? You know, who was in the room, who was actually leading the effort for the language that ultimately resulted? I think it would be very, very enlightening to get that.

Ambassador SCHEFFER. I can do that, Mr. Congressman. In fact, it's very easy, because at each session, the United Nations compiled the official list, so we can provide you with that.

Mr. SMITH. I ask that that be part of the record. I think that would be important.

Mr. BEREUTER. Without objection.

[The information requested was not provided.]

Mr. SMITH. Let me ask you, Mr. Ambassador, your view as to why Israel was unable to sign the Rome Statute? It struck many of us as strange that a nation whose people have had such a direct experience with genocide would feel compelled to stay outside an institution that is ostensibly designed to punish and prevent genocide and other war crimes?

Ambassador SCHEFFER. Sir, some of the reasons—and I don't want to speak for the government of Israel, but since I worked closely with their delegation, I think they will have confidence in my saying this, that certainly some of their objections were related to the very same reasons that we had, particularly the exposure of non-party nationals, because they may find themselves in that position as well, so they have that concern.

But they also had a very dominant concern that was not necessarily relevant to the United States and the territory of the United States, but since we have a very close relationship with Israel, of course it's relevant to us. And that is the particular war crimes set forth in article VIII–2(b)(8), which refers to the transfer of civilian population into an occupied territory.

The manner in which that crime was agreed upon in Rome was contrary to what we wanted. We felt it was an overreach of existing international law. It consumed an enormous amount of debate and time in the negotiations, and Israel clearly could not accept the way it came out.

We always had a standing principle in our negotiations on the crimes, which is the crime must reflect existing customary international law, and there must be nothing that contradicts that.

So we knew that we had a very tough road ahead of us after Rome in the document called The Elements of Crimes. This is where each crime is further fleshed out in terms of its definitions and how a persecutor would prosecute the crime or defense counsel would defend against it.

Over almost a year of intensive discussion, we finally were able to draft the Elements of Crimes for that particular crime in a way that was satisfactory to the Government of Israel, and also achieved consensus with other governments. Everything we do has to achieve consensus in these deliberations.

At the end of that, we were able in the Elements of Crimes to accommodate the concerns of Israel, to have a footnote inserted in the Elements of Crimes that would make it clear that international humanitarian law has to be the guiding principle for the application of that particular crime, meaning existing international humanitarian law.

Israel was prepared to say we'll interpret it the way we believe it should be interpreted, and we'll fight it on that ground. After we achieved that fix in the Elements of Crimes, Israel expressed its appreciation to us, and Israel joined in the consensus on the Elements of Crimes, including that particular crime.

Mr. SMITH. Just going back, if you could provide the Committee with a list of each area where we had a disagreement, I think it would be very helpful.

But did we, pursuant to consensus, finally accede to the Elements of Crimes and all the other provisions that are in that?

Ambassador SCHEFFER. Yes, we joined consensus on the Elements of Crimes and on the Rules of Procedure and Evidence. That was on June 30, last month.

Mr. SMITH. So the only remaining area of difference is what?

Ambassador SCHEFFER. Well, we still have a difficulty with the underlying statute of the Court, which is this issue of the possibility that nationals of non-party states——

Mr. SMITH. If I could interrupt, I thought that was a concern. But have we agreed to everything in the body of the Rome Statute by way of consensus—or haven't we?

Ambassador SCHEFFER. No. We did not join consensus in Rome on the statute itself.

Mr. SMITH. We were unable to block it, so consensus really didn't prevail?

Ambassador SCHEFFER. No. Just to clarify, everything we've been doing in the Preparatory Commission after Rome has been by consensus. At Rome, we called for a vote to state our objection to the actual stature.

Mr. SMITH. Secretary Slocombe, I noted that the Ambassador criticized Section VIII of the American Servicemembers Protection Act, which authorizes the President to use whatever means are necessary to free any American servicemembers who are held captive by or on behalf of the Court.

The testimony, as he presented it, said that this provision implicitly threatens the Netherlands where the ICC will be headquartered, with an armed attack by the United States. The testimony then goes on to assert that the President already has all the authority he needs to protect American servicemembers anywhere in the world.

The juxtaposition of these two assertions leads me to ask what the policy of the Administration is if an American servicemember were imprisoned by the ICC in the Netherlands or elsewhere? If all other diplomatic efforts to bring about the release of that

servicemember failed, would the Administration be prepared to use force to free him, or would it let him remain a prisoner of an international tribunal whose legitimacy we have rejected?

Mr. SLOCOMBE. Certainly making sure that American service personnel who are being improperly held are freed, would be a very high priority. What the mechanics of doing it are, and what would be workable and in our interest in any particular circumstance would have to be decided at the time.

Mr. SMITH. What do you believe, hypothetically, would be ruled in, and would be ruled out? One of the reasons why this legislation is proposed is to give clear notice as to U.S. intent.

Mr. SLOCOMBE. I think there is no question that the President would have the authority to do what he thought was appropriate, so the legislation doesn't add to the authority.

And, to be fair, the legislation doesn't say to go bomb The Hague at the first time you have a dispute about it. I think it's an example of the legislation, which is basically, I agree, well-intentioned and, indeed, supports something the Administration agrees with.

It just goes overboard, and, in fact, doesn't add any power that don't already exist.

Mr. BEREUTER. The time of the gentleman has expired. I was going to recognize Mr. Berman, but I wonder if the gentleman would have an opportunity to take the chair so that I could go participate on the debate on the Vietnam waiver. Thank you.

The Chair recognizes the gentleman from California for 7 minutes.

Mr. BERMAN. Gentlemen, it is good to have you here and I apologize for missing your testimony.

There are a couple of things I want to pursue. The United States has decided it does not want to sign and submit to the Administration, to sign and submit for ratification the loan statute. Is that——

Ambassador SCHEFFER. There is no plan to do either.

Mr. BERMAN. Right. At the same time the legislation prohibits you from what kinds of activities dealing with this International Criminal Court and the statute?

Ambassador SCHEFFER. It would shut down, if this legislation were adopted, it would shut down any ability of any governmental unit of the United States at the Federal, state or local level, to respond to any request for cooperation or even to allow any investigator of the Court to enter U.S. territory for any purpose that is before the Court.

Now, the difficulty with that proposition is that it could well be the case, 10, 20, 25, 30 years from now, that the Court which will come into existence would have before it a rather odious individual from somewhere else in the world that truly should stand before a court of law and be prosecuted for genocide, crimes against humanity, or war crimes. This legislation prevents us from even voluntarily cooperating with the Court to ensure the prosecution of that individual.

Unfortunately, it sort of has the flip side potential of being a War Criminal Protection Act, because, in a sense, it would deprive the Court of evidence or other information that we might be very willing to provide in order to actually prosecute the individual. It also

would set up the United States in a rather curious way as a potential safe haven for these individuals, who know that if they arrived in the United States, there would be no cooperation with the ICC.

Mr. BERMAN. Although just on that point, do our courts have jurisdiction and do we have the ability to prosecute under U.S. laws people who engage in international criminal conduct?

Ambassador SCHEFFER. Congressman, in some cases we do and in others we don't. You know, we are quite familiar with what the limitations of our own Federal law are at this time, and I think one of the challenges that we have before us in the coming years is to take a good hard look at the Federal law and at the Code of Military Justice and determine, are we fully capable of prosecuting individuals on our soil with respect to these crimes?

I think in some cases you will find we are. In others, there are statutes of limitations that make it very difficult if suddenly the individual arrives 5 years after the commission of the crime. So we do have a lot of work ahead of us to ensure that we are capable of prosecuting these individuals in the United States.

Mr. BERMAN. Yesterday I caught just a brief part of the hearing Secretary Eagleburger and former Assistant Secretary Bolton testified at. And I asked them—I raised the issue, forget 25 or 30 years from now, let's assume 60 countries sign and ratify this—how many have already signed it?

Ambassador SCHEFFER. Ninety-seven have signed it, 15 have ratified it.

Mr. BERMAN. And 60 is the——

Ambassador SCHEFFER. Is the benchmark.

Mr. BERMAN. And you stated it as it if were as much of a certainty as one can state in this world that 60 will ratify it.

Ambassador SCHEFFER. I think it is the only responsible presumption for our government to have, that it will, in fact, reach 60 ratifications. To assume otherwise would be extremely dangerous, I think.

Mr. BERMAN. Well, I raised one of the—it was they apprehended, under some set of circumstances, and decided to prosecute Milosevic for criminal conduct under the Rome Statute. And there was information held by the United States or one of its agencies, or witnesses that were here, and notwithstanding our desire not to participate in the Court, we thought that this served general world interests and U.S. interests to help provide evidence to the prosecutor of this case.

And they, Mr. Bolton, in particular, acknowledged that this would prohibit that kind of cooperation, but he thought that was good because this Administration in particular would undoubtedly provide classified information to that Court which would reveal sources and methods to the detriment of people who had befriended us and provided certain information to us, and that we had to have this statute to protect our country from our Administration.

I am just curious about your reaction to that line.

Ambassador SCHEFFER. Well, we share neither Mr. Bolton's vision of this Administration, nor his vision of the future. As for this Administration, I think we have established a very firm record with respect to our relationship with the Yugoslav War Crimes Tribunal and the Rwanda War Crimes Tribunal on the provision of in-

formation to those tribunals. We have a very rigorous procedure, it is one that is dominated by interagency checks and balances and I can assure you, being in the trenches of it, that I can state with great confidence that we are doing our job extremely well with those two tribunals on this issue.

As for the future, it is somewhat astonishing to conclude at this juncture that under any circumstances whatsoever in the future, we might not view it in our national interest to facilitate such a prosecution. I will remind the Committee that articles 72 and 73 of the ICC Treaty, which we negotiated very intensely in Rome, and we prevailed on, give us complete authority over what information is provided of a national security character to the ICC. We have complete discretion.

Mr. BERMAN. May I ask one more question, Mr. Chairman? I do see my time is up.

I think in response to the gentleman from New Jersey's question, you spoke about the situation with Israel. I take it you construe this bill to prohibit you from participating in those kinds of negotiations in the future?

Ambassador SCHEFFER. I'm sorry, Congressman.

Mr. BERMAN. With respect to the definition of one of the crimes dealing with transfer of populations Mr. Smith asked you asked, you told the story of sort of the U.S. role in changing the term of reference and getting a footnote, and, as a result of that, Israel withdrew its concerns with that language. My question is, do you view this bill as prohibiting you in the future from doing that kind of activity that you did there?

Ambassador SCHEFFER. Thank you very much. I am sorry I didn't catch on. First of all, those negotiations on that particular crime have now come to a close, and we satisfactorily resolved the issue with that crime.

Mr. BERMAN. Right.

Ambassador SCHEFFER. But with respect to this bill, I must say that I think the very last government in the world that would want this bill adopted would be the State of Israel. Why? Because they look to us in these negotiations to pursue the objectives of this government, which are clearly of great interest and importance to the government of Israel as well. And therefore, if this bill were to be adopted, and there were no capability whatsoever to cooperate with the Court once it is established, we would have no influence with the Court on any matter that might pertain to the State of Israel. Why not have that influence?

I cannot conceive of the State of Israel wanting to support this bill, it would be totally counter-intuitive to their interest to do so.

Mr. BERMAN. Well, but the negotiations you described, as you pointed out, are already concluded. So maybe it was good that this was not the law then.

Ambassador SCHEFFER. Exactly.

Mr. BERMAN. But what about now? What more negotiations are there?

Ambassador SCHEFFER. Exactly. I mean if this bill——

Mr. BERMAN. Are there any more negotiations?

Ambassador SCHEFFER. There are more negotiations in the Preparatory Commission ahead of us, very important ones.

Mr. BERMAN. On what kinds of issues?

Ambassador SCHEFFER. On the relationship between the Court and the United Nations, on the financing of the Court, on the rules for the assembly of states parties, once the Court is established, and how the states parties interact with each other, on the privileges and immunities for Court staff, and on the——

Mr. BERMAN. What about the role of forces and peacekeeping operations, is that part of negotiation?

Ambassador SCHEFFER. Well, nothing is ruled out for future discussion in the Preparatory Commission. And the Preparatory Commission will continue until the treaty actually enters into force. So there is a period of time here where it is going to continue to operate and there are going to continue to be meetings. In fact, there will be many issues of direct concern to the United States where we should be there discussing those issues, particularly the financing of the Court.

The problem with this legislation is that if it were to be adopted at this time, it sends an extremely destructive message to other governments. Why should they listen to the United States in this negotiating realm? Shut it down is what they would do. It would be totally counterproductive.

Mr. BERMAN. All right. So it isn't that the bill would prohibit you from participating in those discussions, it is that once you have indicated that in no fashion will you ever cooperate with anything they do, no matter it is, and by law you are precluded from cooperating, they are not going to give you the time of day?

Ambassador SCHEFFER. That's right. As I read the bill, and maybe I am misreading it, but I don't think this bill, on its face, precludes us from participating in further Preparatory Commission meetings prior to establishment of the Court, but it establishes such a burden on our shoulders going into those negotiations, that in no circumstances do I foresee this bill enabling, or facilitating, or strengthening our ability as negotiators on a whole range of technical issues where we actually have very important interests at stake.

Mr. BERMAN. Thank you, Mr. Chairman.

Mr. SMITH [presiding]. Thank you very much, Mr. Berman.

Let me ask a few questions and then I will yield to my friend, Mr. Berman, if he has any further questions.

You mentioned checks and balances that exist within the Yugoslavian War Crimes Tribunal. Do those same checks and balances also exist in the Rome Statute?

Ambassador SCHEFFER. Congressman, there are many more checks and balances in the ICC statute, and I can go into some of those. But the power of the prosecutor is much more qualified within the ICC statute. The principle of complementarity, which is nowhere found in the Yugoslav or Rwanda Tribunal statutes is a central feature of this particular Court.

And, furthermore, this Court, the ICC, depends upon the states parties to the Court to actually make very important decisions relating to the Court, whereas, the Yugoslav and Rwanda Tribunals look to no governments whatsoever for their decisionmaking.

Mr. SMITH. Let me ask you what kind of checks and balances there are. In terms of elected officials, our Founding Fathers, I

think, were right in vesting only limited power in each of the three branches, being so distrustful, as they were, of any single entity being given so much power. Power corrupts, and absolute power corrupts absolutely.

What happens if a prosecutor and/or judges were to run amok and to engage in an ideological crusade against certain individuals? I think we already have a shot across the bow when lawyers brought action against NATO for alleged war crimes, that our planes were flying too high, putting additional civilians at risk, the choice of targets, which they seem to disagree with. A war crime then potentially could be in the eye of the beholder. Because, again, I do think there is some true elasticity to these terms.

Yes, Mrs. Del Ponte did not accept and did not proceed on those charges, but some other prosecutor may not be so favorably inclined. You might want to comment on that. Looking back, if the Rome Statute were in effect during World War II, for example, and we dropped the bomb on Hiroshima and Nagasaki, and we did the firebombing of Dresden and the other German cities with a huge number of civilian casualties, would that be construed as a war crime under the plain meaning of the Rome Statute?

Ambassador SCHEFFER. Well, Congressman, it is far too speculative to try to get into that. Remember that during World War II, the question is, were those actions violations of codified or customary international law at that time?

Mr. SMITH. That is not the question I am asking.

Ambassador SCHEFFER. No, I know.

Mr. SMITH. Fast-forward those military actions that this country undertook with our Alliance.

Ambassador SCHEFFER. It is entirely speculative to say we would use exactly the same military tactics today as we did during World War II. I would not speculate in that direction, not at all. We are far more precise——

Mr. SMITH. But there is no doubt a reasonable man or woman could use the Rome Statute in cases analogous to matters of historical fact, where military decisions were made which resulted in huge casualties. Thankfully, at least, the consequence of Hiroshima and Nagasaki was the ending of the war. But there is an argument that has been made ever since as to the advisability of those actions.

I think it is a fair question. Past is prologue. We may be faced with this in the future. We all know that NATO, in terms of its war doctrine, would rely on superiority, at least during the Soviet days, rather than quantity. Quality was what we would rely on. There is the potential that a United States President, or a French President, or a British Prime Minister may have to make a decision some day to use nuclear weapons. It is not beyond the realm of possibility and it is not highly speculative. Those things have to be thought through.

Since we have the historical record, I think it needs to be plugged in to see whether or not this would have triggered a war crimes prosecution.

Ambassador SCHEFFER. Well, we were careful in the drafting of the statute, as well as the elements of crimes, to establish very high barriers to actually launching investigations and prosecuting

the crimes. Not isolated incidents, there has to be systematic widespread events. There have to be plans and policies to directly assault civilian populations. If military necessity dominates the reasoning behind the use of any particular military force, then that is in conformity with international law and it is in conformity with the statute.

But if you are asking me, speculate as to whether or not it can conceivably be drawn that the United States takes a particular type of military action without describing what the intent was behind it, the plan or the policy behind it, I can't answer questions like that because you have to go through every step of the analysis before you can answer whether or not this statute would actually apply to that particular use of military force.

Mr. SMITH. Well, one of the more perverse outcomes would be that our military strategists would be faced with factoring in not just what is in the best interests of the United States and our allies, and how are we more likely to achieve a military end to a conflict. They would also have to factor in whether or not such an action would violate the Rome Statute.

Let me also say, our nuclear doctrine rests on deterrence, and if the Russians were to attack us or to launch, we would destroy Russian cities. How would that fit into a Rome Statute world?

Ambassador SCHEFFER. Congressman, this statute, as I said, specifically provides very high barriers that have to be met.

Mr. SMITH. But crimes of aggression aren't even defined yet.

Ambassador SCHEFFER. And it is contrary to U.S. Federal law as well as the Uniform Code of Military Justice to violate the laws of war. So I would assume the plan or policy of the United States would not be to violate the laws of war. If it were the plan or policy to violate the laws of war, then we have a lot to answer for. But if it is not the policy to violate the laws of war, there should be symmetry between our actions and what has been set forth in the statute, which we agree with.

We agree that the crimes set forth in the statute are crimes under customary international law which we must adhere to. We are not disagreeing with what is in the statute in terms of the list of crimes, we agree with them. They must be complied with.

Mr. SMITH. And again, signing a document that still has not defined crimes of aggression——

Ambassador SCHEFFER. And by the way, I noticed that in your opening statement. I did want to get back to you on that. The whole process in the Preparatory Commission now is to try to determine, can there be a definition for aggression? The crime of aggression is not actionable under the statute unless there has been an agreement among the states parties to the statute at the 7-year review conference as to what is the definition of that crime. So you can't—there is no way to prosecute that crime until such a definition has been arrived at. And we have a very significant coalition of governments in total agreement with us as to how to proceed in those talks to define the crime of aggression.

Interestingly enough, under the statute, if one is a state party to the statute, you have every right, if a new crime is added to the statute, to completely exclude yourself from the coverage of that crime.

Mr. SMITH. Mr. Slocombe, Secretary Slocombe, if you could respond to the hypothetical posed earlier about not just our deterrence strategy, which is based on the obliteration of cities, unless something has changed there that I don't know about, but also the bombing of Hiroshima, Nagasaki, and the firebombing that took place in Germany. If the Rome Statute were in effect, would that have precluded those actions?

Mr. SLOCOMBE. Mr. Smith, I think the way I would answer that would be to say that, in our view, if the Rome Statute were properly applied, American military personnel or the political officers, the President and, I guess in those cases, the Secretary of War, the Secretary of the Navy who ordered operations could not properly be prosecuted under them because they were legitimate. In the case of Hiroshima and Nagasaki, and, indeed, in general, with respect to the strategic bombing campaign against both Japan and Germany with conventional weapons, I would maintain that, judged by the context in which they occurred, they were not violations of the law of war under any circumstances.

So that, as a lawyer, the way I would answer the question would be that the United States would have a good defense if such cases were, in your case, hypothetically tried.

What I am concerned about, what the United States is concerned about, is that there could be a politically motivated prosecution based on what would, in our view, be a misinterpretation of the law of war, and, therefore, a misinterpretation of the Rome Statute. And once one is in a court, once you concede the principle of jurisdiction, there are no guarantees as to the result.

Mr. SMITH. So it would be possible that a Hiroshima, Nagasaki type action or the firebombing in Japan and in Germany could be prosecuted in the future if such a thing were——

Mr. SLOCOMBE. As we have said repeatedly, our concern in respect of this statute, in respect of the Court, is precisely the concern about politically motivated, in effect, bad faith prosecutions. Exactly.

Mr. SMITH. But what about a good faith prosecution, by someone who honestly believed that Hiroshima was a war crime? I mean it is possible that it could happen?

Mr. SLOCOMBE. Well, there is no question that on its face, the Court has jurisdiction over actual "war crimes". That is what the statute says, that is what is intended. Our concern, the United States military, through the United States military justice system, prosecutes and prosecutes vigorously well-founded allegations that American military personnel have violated the law of war.

We do not need the International Criminal Court to deal with that problem. So that is a non-problem. Our concern is not that there would be valid prosecutions of American military personnel. Our concern, rather, is, as I said, and as we had said repeatedly, our concern is with politically motivated prosecutions based not really on serious allegations of war crimes, but on disagreement with U.S. or other alliance policies, of which I think the rejected allegations with respect to Kosovo are a good example.

Mr. SMITH. Could I ask, and ask you to provide it for the record, that the Pentagon undertake an analysis as to whether or not Rome would apply to World War II actions like I mentioned before?

Ambassador Scheffer, I think if these other issues were ironed out, you probably would like to see us sign this. But we have got to know what we are heading toward, and we need to look back before we look forward. Such an analysis, if it hasn't been done, really should be done.

Mr. SLOCOMBE. It has been done, that is the reason we opposed the treaty.

Mr. SMITH. What has been done, a look back at past conflicts?

Mr. SLOCOMBE. Well, I don't know that anyone did it in the mind of saying Dresden could have been prosecuted, I think they did it in the mind of saying you don't have to go back to World War II or to the Vietnam War to say that there is a very real danger that there could be politically motivated prosecutions through the International Criminal Court, and that is precisely the reason that not just the Department of Defense, but the Administration voted against the text and have refused to sign the treaty.

Mr. SMITH. And Ambassador Scheffer, you agree with that, there could be politically motivated prosecutions?

Ambassador SCHEFFER. Precisely.

Mr. SMITH. I'm sorry?

Ambassador SCHEFFER. Yes. Yes.

Mr. SMITH. Do you, Ambassador Scheffer, personally think that President Clinton made a mistake when he decided against signing the treaty in 1998?

Your mike is not on.

Ambassador SCHEFFER. I'm sorry, Congressman. My answer to your other question was yes.

Mr. SMITH. OK. Thank you.

Ambassador SCHEFFER. No, there was no mistake whatsoever. In fact, the issue of signing was simply not the issue. In Rome it was, do we agree with other governments to release the text of the statute out of the Rome Conference in the form that existed at the end of the conference? That was the only issue there.

It truly is a more responsible course to take not to consider even the issue of signing until one sees the totality of this treaty regime.

Mr. SLOCOMBE. If I could, Mr. Chairman, could I read a sentence from a letter which Secretary Cohen, with the concurrence of his colleagues in the senior levels of the Administration, sent in support of Ambassador Scheffer's effort, which responds exactly to your point? It reads, "As it currently stands, the Rome Treaty could expose servicemembers and Government officials of nonparty states to criminal liability based on politically motivated charges brought by other states that object to the nonparty states' international policies." That is our position and that, in a sentence, is the reason for our concerns.

Mr. SMITH. Let me ask a final question or two. Ambassador Scheffer, how likely do you really think it is that you will succeed in your efforts to get the ICC to forego criminal jurisdiction over Americans and persons from other countries that are not a party to the Rome Statute? And what happens if you fail? Obviously there are a different set of diplomats and parliamentarians that I was meeting with, but at the Bucharest Conference we were all alone in our opposition. I was amazed in speaking one-on-one during the course of the week in Bucharest at the OSCE Parliamen-

tary Assembly at how Pollyanna-ish some of the views were of members who did not have a clue what was contained in the statute but just said "We want an ICC and that is it." The British were probably more emphatic than anyone, although they seem to have been informed and knew the contents of the statute. They were vigorously pushing for rapid ratification, which is what the operative language was that they were offering.

The Germans offered it. We tried to weaken it with an amendment and it was not acceptable, regrettably. It seems as if, as Mr. Bereuter pointed out earlier, in terms of a willingness to just cede sovereignty, the Europeans have no problem with that, it seems. But obviously we do.

What is the next step if they do not include us—or exclude us, I should say—from jurisdiction? What would be the next step?

Ambassador SCHEFFER. Well, I think there will be some—let me just describe it as serious results if we cannot prevail with a provision or a document that is satisfactory to us in the Preparatory Commission talks.

I think as Under Secretary Slocombe said earlier we are going to have to take a very serious reassessment of this. I think there is going to be a clearer assessment as to what we can consider in terms of military contingencies for this Government, but at the same time I would hope that that assessment could, the fact that there would be such an assessment would encourage a good number of governments, particularly our allies, that they have far more to gain from this process from the United States being a cooperative partner in this Treaty, even as a nonparty, than they do to isolate us by not taking into consideration the very specific requirements that we have in the international community, so all I can say is I hope I can succeed.

I don't want to pretend to say that I have got an easy job ahead of me. Right now the deck is stacked against me, but we have to try. This is a step-by-step process. We have had to exercise some patience in getting there, but every time we have pursued our objectives since Rome to actually accomplish what we need to accomplish, we have accomplished it, so I want to go that final mile and see if we can accomplish this objective.

Mr. SMITH. Again, what is the likelihood of doing it? I mean Secretary Bolton and——

Ambassador SCHEFFER. It could be 50–50 at this stage.

Mr. SMITH. Secretary Bolton and Eagleburger, former Secretary of State, have made it clear that they thought we lost the fight 2 years ago.

Ambassador SCHEFFER. Well, as I said, we simply do not share their vision of either having lost or waging this campaign. I think you have to be in the trenches of it to recognize that other governments truly do not want, at least many other governments, truly do not want to see the United States walk out of this process. They know how valuable we can be in the long-run for this Court and therefore I would hope that we could persuade them that a reasonable accommodation within the Treaty regime of U.S. interests is going to be to the betterment of the entire process and to the Court itself.

Mr. SMITH. I would respectfully suggest that we did lose it 2 years ago. We are trying to fix it now, and I obviously wish you success. We all would wish you success on that, but, you know, you mentioned serious repercussions or serious consequences. I think we are more likely to avoid that if we are very specific in saying this or that happens. Predictability I think is your friend now. Can you elaborate on some of the consequences if we lose?

Ambassador SCHEFFER. Well, as we have already stated to our colleagues in other governments in letters that the Secretary of Defense has sent to his counterparts, we would have to re-evaluate our ability to participate in military contingencies if we cannot prevail on that, and I think that is a fairly powerful consequence.

In addition to that, I think governments truly are having to gauge what is the consequence if the United States cannot be a good neighbor to this treaty. It will severely cripple the operation of this Court if we cannot be a player in it.

Mr. SMITH. How would it affect peacekeeping in your view, and Mr. Slocombe, you might want to add your views on peacemaking as well?

Ambassador SCHEFFER. I think it could have a very severe impact on that. Walt?

Mr. SLOCOMBE. What the Secretary of Defense said in his letter was unfortunately a negative result—that is, a negative result with respect to the article 98 effort—could have a major impact on our decision whether to participate in certain types of military contingencies.

That is what he said. I would not see that as an absolute judgment that we will never send American troops overseas in any situation, but it would have to be a factor we would have to take into account.

Mr. SMITH. Just getting back to the legislation, and I know in its current form you have made it clear you don't support it, but can you not at least admit there is some value in again broadcasting to the world that we are very serious and that the Congress is very serious about there being very negative consequences if this thing proceeds and we are included, having not been made a party to it, having not ceded or signed it?

Ambassador SCHEFFER. Well, I think there is some value to it and the mere existence of the legislation I think has sent that signal very loudly and clearly.

What I am saying is that actual adoption of this legislation would then have the reverse effect on our ability to actually negotiate our common objective.

Mr. SMITH. Let me just take that one step further. I mean the President obviously would have the capability of vetoing the bill if he thought it was not the right vehicle.

But let me point out that the Congress also has prerogatives, and we do fund peacekeeping. We obviously provide the necessary and requisite moneys for our military. It seems to me that we need to be very much a part of this because the outcome could be a disaster going forward for the world and for U.S. men and women in uniform who may be deployed overseas.

As I have read this, and I have read just about everything I can get my hands on, I have grave concerns. I said at the outset that

no one has been more favorably inclined toward ad hoc tribunals than I am. When we had the first hearings in the Helsinki Commission on what became the Yugoslavian Tribunal we were being told by its leader, the man that was charged by the United Nations to take on the responsibility, that it was designed to fail, that he had been given insufficient resources, that it was nothing but fluff in order to placate certain individuals in countries, but it really was not a serious effort.

Now if we go in the other extreme and all of a sudden pass or enact something that potentially could prosecute the President or our Secretary of State or Defense or Supreme NATO Allied Commander, I think we have erred significantly as well, and I don't think there has been enough vetting of this issue.

I think a very small group of people have decided this. As I mentioned earlier, you know, I really want to take a look at who the actual participants were. We have heard that NGO's were filling the seats and taking on the responsibility of negotiating rather than the respective governments, who were kind of like brushed aside and the designated hitters were making decisions. That is serious if that indeed turns out to be the case. So I think there has been far less scrutiny brought to this, and hopefully these hearings are the beginning of even more focus by the Congress, but I thank you for your testimony.

Mr. Tancredo is here. Do you have any comments?

Mr. TANCREDO. No.

Mr. SMITH. I do thank you for your comments. We look forward to working with you in the future.

Ambassador SCHEFFER. Thank you, Mr. Chairman.

Mr. SLOCOMBE. Thank you, Mr. Chairman.

[Whereupon, at 11:51 a.m., the Committee was adjourned.]

A P P E N D I X

JULY 25 and 26, 2000

JULY 25, 2000

STATEMENT OF CHAIRMAN BENJAMIN A. GILMAN
HEARING ON INTERNATIONAL CRIMINAL COURT
July 25, 2000

Today we hold the first of two hearings on the International Criminal Court. Tomorrow we will hear from two witnesses from the Clinton Administration, but today we are privileged to have before us two very distinguished former Executive branch officials.

Former Secretary of State Lawrence Eagleburger, and former Assistant Secretary of State for International Organization Affairs John Bolton, bring with them a wealth of experience relevant to the International Criminal Court. They are well-known to all members of the Committee and require no introduction.

The subject of the International Criminal Court probably is new to many members, however, so I will exercise the prerogative of the Chair to offer a few opening comments.

There are many strongly held opinions about the International Criminal Court, and many passionate disagreements. The one thing that virtually everyone can agree on, however, is that the way this issue has evolved over the last few years has been nothing short of disastrous from the point of view of the national interest of the United States.

Today we are well on the way to the establishment of a U.N.-led criminal court, which will claim the jurisdiction to prosecute and imprison American servicemembers and other officials of our government in certain instances, irrespective of whether the United States ever becomes party to the Court.

No one likes where the Clinton Administration's polices have led us, least of all the Clinton Administration itself. Tomorrow the Administration's representatives will tell us how they are trying to undo the damage that has been done. They will tell us they are working hard, not to bring the United States into the Court, it would appear, but rather to make it safe for the United States to remain outside the Court.

Supporters of the International Criminal Court claim that the Administration should have overlooked the flaws in the Rome Statute creating the Court. The Administration's mistake, in their view, was its decision in 1998 to walk away from the Court at the last minute after having done so much to help launch the project. Today they urge us to disregard the Court's shortcomings and formally submit our nation and its officials to the court's jurisdiction by becoming party to the Rome Statute.

Another group of critics, including the sponsors of the American Servicemembers' Protection Act of 2000, believe that the Clinton Administration's mistake was in launching this project in the first place, given the likelihood that it would spin out of control, as indeed it did.

They doubt that the Clinton Administration will ever be able to reverse the diplomatic defeats it sustained in the Rome negotiations, and they view the Court as a long-term threat to our sovereignty and the legal supremacy of the United States Constitution.

We hope that our witnesses will be able to help us sort through these issues, and clarify for us what can be done at this late date to protect our national interest.

Before recognizing our panel, I will first recognize our Ranking Democratic Member, Mr. Gejdenson, for any opening comments he may have. Mr. Gejdenson?

Secretary Eagleburger, I have already said that you require no introduction, so I now hesitate to introduce you. I will simply say that, since leaving your very distinguished career at the Department of State which culminated in your appointment as Secretary of State in 1992, you have worked as the Senior Foreign Policy Advisor to the law firm of Baker, Donelson, Bearman and Caldwell, where you work with, among others, our former colleague, Senator Howard Baker.

I understand that you would like your colleague, John Bolton, to testify first. That way, not only will you get the last word, but you can also correct his mistakes. I am sure this comes as no surprise to Mr. Bolton, because he had the privilege of working with you for four (4) years during the Bush Administration as the Assistant Secretary of State for International Organization Affairs, where, among other things, he was responsible for our relations with the United Nations. He previously had a very distinguished career as a lawyer here in Washington, and he is now the Senior Vice President of the American Enterprise Institute.

Mr. Bolton, the members have before them the text of your prepared remarks. I invite you to summarize them for us, and emphasize the key points.

PREPARED STATEMENT OF JOHN R. BOLTON, SENIOR VICE PRESIDENT, AMERICAN ENTERPRISE INSTITUTE, ON THE AMERICAN SERVICEMEMBERS' PROTECTION ACT OF 2000

JULY 25, 2000

Thank you, Mr. Chairman, for the opportunity to appear today before the Committee to testify about the proposed "American Servicemembers' Protection Act of 2000," and recent developments concerning the International Criminal Court ("ICC") created by the Rome Statute in 1998. I strongly support the proposed legislation, and I hope that Congress will be able to move swiftly toward its enactment. I have a prepared statement that I will summarize, and that I ask be included in the record, and I would be pleased to answer any questions Members of the Committee might have.

Unfortunately, support for the ICC concept is based largely on emotional appeals to an abstract ideal of an international judicial system, unsupported by any meaningful evidence, and running contrary to sound principles of international crisis resolution.[1] Moreover, for some, faith in the ICC rests largely on an unstated agenda of creating ever-more-comprehensive international structures to bind nation states in general, and one nation state in particular. Regrettably, the Clinton Administration's naïve support for the concept of an ICC has left the U.S. in a worse position internationally than if we had simply declared our principled opposition in the first place.

Many people have been led astray by analogizing the ICC to the Nuremberg trials, and the mistaken notion that the ICC traces its intellectual lineage from those efforts. However, examining what actually happened at Nuremberg easily disproves this analysis, and demonstrates why the ICC as presently conceived can never perform effectively in the real world. Nuremberg occurred after complete and unambiguous military victories by allies who shared juridical and political norms, and a common vision for reconstructing the defeated Axis powers as democracies. The trials were intended as part of an overall process, at the conclusion of which the defeated states would acknowledge that the trials were prerequisites for their readmission to civilized circles. They were not just political "score settling," or continuing the war by other means. Moreover, the Nuremberg trials were effectively and honorably conducted. Just stating these circumstances shows how different was Nuremberg from so many contemporary circumstances, where not only is the military result ambiguous, but so is the political, and where war crimes trials are seen simply as extensions of the military and political struggles under judicial cover.

Many ICC supporters believe simply that if you abhor genocide, war crimes and crimes against humanity, you should support the ICC. This logic is flatly wrong for three compelling reasons.

First, all available historical evidence demonstrates that the Court and the Prosecutor will not achieve their central goal -- the deterrence of heinous crimes -- because they do not (and should not) have sufficient authority in the real world. Beneath

[1] I have previously examined the ICC's deficiencies in "Courting Danger: What's Wrong with the International Criminal Court," *The National Interest*, Number 54, Winter 1989/99, at 60, and in testimony before the Senate Foreign Relations Committee on July 23, 1998. *See also* Bolton, "The Global Prosecutors: Hunting War Criminals in the Name of Utopia," 78 *Foreign Affairs* 157, January-February, 1999.

the optimistic rhetoric of the ICC's proponents, there is not a shred of evidence to support their deterrence theories. Instead, it is simply a near-religious article of faith. Rarely, if ever, has so sweeping a proposal for restructuring international life had so little empirical evidence to support it. One ICC advocate said in Rome that: "the certainty of punishment can be a powerful deterrent." I think that statement is correct, but, unfortunately, it has little or nothing to do with the ICC.

In many respects, the ICC's advocates fundamentally confuse the appropriate role of political and economic power; diplomatic efforts; military force and legal procedures. No one disputes that the barbarous actions under discussion are unacceptable to civilized peoples. The real issue is how and when to deal with these acts, and this is not simply, or even primarily, a legal exercise. The ICC's advocates make a fundamental error by trying to transform matters of international power and force into matters of law. Misunderstanding the appropriate roles of force, diplomacy and power in the world is not just bad analysis, but bad and potentially dangerous policy for the United States.

Recent history is unfortunately rife with cases where strong military force or the threat of force failed to deter aggression or gross abuses of human rights. Why we should believe that bewigged judges in The Hague will prevent what cold steel has failed to prevent remains entirely unexplained. Deterrence ultimately depends on perceived effectiveness, and the ICC is most unlikely to be that. In cases like Rwanda, where the West declined to intervene as crimes against humanity were occurring, why would the mere possibility of distant legal action deter a potential perpetrator?

Indeed, it may well be that NATO was more inhibited by "international law" in the recent NATO air campaign against former Yugoslavia than was the Milosevic regime in Belgrade, thus proving that those who don't really need to be deterred will be, and those that should be the principle targets of international "justice" will simply ignore it. Serbs (and others) were already facing charges for crimes and crimes against humanity allegedly committed in Bosnia before the Kosovo air war began. If ever there were a case where the prospect of prosecution and sentencing should have been palpable to senior political and military leaders, those in Belgrade should have understood best of all. Nonetheless, the Yugoslav leadership proceeded with its campaigns against civilians in Kosovo as if the International Criminal Tribunal for Yugoslavia ("ICTY") did not exist. Even more important, the Milosevic regime not only ignored the threat of NATO military action, it dramatically stepped up ethnic cleansing in Kosovo after the NATO bombing actually began. It defies credulity to believe that a regime not deterred by precision-guided bombs and missiles literally falling on its head will somehow be deterred by the threat of war-crimes prosecutions at some distant, hazy point down the road.

Even viewed in the light most favorable to the ICC, this debate is almost solely about predictions. Without more, predictions alone (and blind faith is a more accurate description) are insufficient to support radical change in the international order. Needless to say, I do not view the argument in this favorable light. Existing empirical evidence in the military sphere argues convincingly that a weak and distant legal body will have no deterrent effect on the hard men like Pol Pot and Saddam Hussein most likely to commit

crimes against humanity. Holding out the prospect of ICC deterrence to those who are already weak and vulnerable is simply fanciful.

Moreover, the actual operations of the existing Yugoslav and Rwanda ("ICTR") tribunals have not been free from criticism, criticism that foretells in significant ways how an ICC might actually operate. A UN experts' study (known as the "Ackerman Report," after its chairman) noted considerable room for improvement in the work of the tribunals.[2] The Report notes that, in 1999, ICTY's annual budget was $ 94,103,800, covering a total of 838 assessed-budget personnel, and that ICTR's budget amounted to $ 68,531,900, with 779 assessed-budget personnel. While these figures are not well known in Congress or in other UN member governments, they most certainly show that neither court is starved for funding. Even with these large expenditures and personnel, however, the pace of the Tribunals' work has been slow. The Ackerman Report states that "[i]deally, the trial of an accused should commence and be concluded expeditiously following an indictment. But that has not generally been the case in ICTY or ICTR."

Moreover, ICC opponents have warned that it will be subjected to intense political pressures by parties to disputes seeking to use the tribunal to achieve their own non-judicial objectives, such as score-settling and gaining advantage in subsequent phases of the conflict. The Ackerman Report, in discussing the ICTY's quandary about whether to pursue "leadership" cases or low-level suspects, points out precisely how such political pressures work, and their consequences: "[u]navoidable early political pressures on the Office of the Prosecutor to act against perpetrators of war crimes . . . led to the first trials beginning in 1995 against relatively minor figures. And while important developments . . . have resulted from these cases, the cost has been high. Years have elapsed and not all of the cases have been completed." In short, political pressures on the Tribunals, to which they respond, are not phantom threats, but real.

Indeed, one important result of the Prosecutor's focus on leadership cases, in her own view, has been "to further worsen the difficulties in obtaining state cooperation, particularly in the ICTY region." This finding underscores the central problem of inserting criminal-law institutions into still-unresolved political/military contexts, while believing naively that such tribunals can function impartially, like a municipal traffic court. The Ackerman Report makes clear that, in such unsettled contexts, the leadership defendants "are viewed by many, however mistakenly, as heroic rather than criminal figures warranting prosecution. Local politicians see cooperation with the ICTY in such cases as political suicide." The experts go on to identify another central reality that ICC advocates too often, and too naively, ignore: "If there is insufficient political resolve in the region and elsewhere to implement the mandate of the Security Council, the Prosecutor's policy of focusing on top leadership may, paradoxically, be self-defeating."

The Ackerman Report explores many other aspects of the ICTY/ICTR experience that have direct applicability to the ICC, notably the integration of the Prosecutor and the Chambers: "Unlike the prevailing situation in national jurisdictions, the Prosecutor,

[2] The panel's chairman was an American citizen, Jerome Ackerman, a former member and chairman of the UN Administrative Tribunal.

while independent in many respects, is an organ of the Tribunals, and to a degree is integrated into their rules. . .." Moreover, the Registry (which essentially comprises the support structures for the Tribunals, including incarceration), because of its "unusual dual role, is occasionally faced with seeming conflicts in discharging its responsibilities." These are serious matters, too often dismissed simply as minor administrative concerns.

Many of the Ackerman Report's findings thus reflect the inherent difficulties of the multilateral versus national prosecution of alleged war criminals. It says, for example that creation of the ICTY and ICTR "almost inevitably presented issues either unforeseen or not fully appreciated, issues that would unfold only through the often costly process of trial and error." This cautionary language is, of course, directly applicable to American consideration of the ICC. Although ICC proponents predict almost nothing but smooth sailing, the actual experience of the ICTY and the ICTR proves that much of what lies ahead for so unparalleled an institution is simply unforeseeable, and that the level of risk is accordingly quite high.

Second, the ICC's advocates mistakenly believe that the international search for "justice" is everywhere and always consistent with the attainable political resolution of serious political and military disputes, whether between or within states, and the reconciliation of hostile neighbors. In the real world, as opposed to theory, justice and reconciliation may be consistent -- or they may not be. Our recent experiences in situations as diverse as Bosnia, Rwanda, South Africa, Cambodia and Iraq argue in favor of a case-by-case approach rather than the artificially imposed uniformity of the ICC.

For example, an important alternative is South Africa's Truth and Reconciliation Commission. After apartheid, the new government faced the difficulty of establishing truly democratic institutions, and dealing with earlier crimes. One option was certainly widespread prosecutions against those who committed human rights abuses. Instead, the new government decided to establish the Commission to deal with prior unlawful acts. Those who had committed human rights abuses may come before the Commission and confess their past misdeeds, and if fully truthful, can in, effect, receive pardons from prosecution.

I do not argue that the South African approach should be followed everywhere, or even necessarily that is it is the correct solution for South Africa. But it is certainly radical different approach from the regime envisioned by the ICC. For example, the post-Communist governments in Eastern Europe have largely chosen the path of amnesty, because the insidious nature of the totalitarian police states in which they lived for over four decades made it almost impossible to sort out the past fairly, and because they felt that it was better for their societies to look forward rather than backward

Two other recent examples, since the adoption of the Rome Statute, although not arising in the context of the as-yet unformed ICC, nonetheless illustrate this point graphically. Efforts to minimize or override the nation state through "international law" have found further expression in the expansive elaboration of the doctrine of "universal jurisdiction." Until recently an obscure, theoretical creature in the academic domain, the

doctrine gained enormous public exposure (although very little scrutiny) during the efforts to extradite General Augusto Pinochet of Chile from the United Kingdom.

Even defining "universal jurisdiction" is not easy because the idea is evolving so rapidly. For example, the sixth edition of *Black's Law* Dictionary, published in 1990, does not even contain an entry for the term. The idea was first associated with pirates, who were said to be *hostes humani generis* ("enemies of the human race"), and, indeed, the 1990 *Black's Law Dictionary*, following its definition of the Latin phrase, continues "i.e., pirates," signifying that they alone are covered. Because pirates were beyond the control of any state and thus not subject to any existing criminal justice system, the idea developed that it was legitimate for any aggrieved party to deal with them. Such "jurisdiction" could be said to be "universal" because the crime of piracy was of concern to everyone, and because such jurisdiction did not comport with more traditional jurisdictional bases, such as territoriality or nationality. In a sense, the state that prosecuted pirates could be seen as vindicating the common interest of all states. (Slave trading is also frequently considered to be the subject of universal jurisdiction, following similar reasoning.)

A key element in the criminal characterization of piracy is that, by definition, pirates operate on the high seas, beyond state boundaries. As the Italian Alberico Gentili wrote in the late 16th century, the sea "is by nature open to all men and its use is common to all, like that of the air." Referring to ancient history, Gentili argued:

> "Romans justly took up arms against [pirates] even though those people had touched nothing belonging to the Romans, to their allies, or to any one connected with them; for they had violated the common law of nations. . . . Piracy is contrary to the law of nations and the league of human society. Therefore war should be made against pirates by all men."

In short, this is not "jurisdiction" in a legal process sense, but instead is a justification for the legitimate use of force. It is a far cry from what "human rights " activists, NGOs, and academics, who repeatedly confuse the roles of force and law, have in mind today. From a very narrow foundation, theorists have enlarged the concept of universal jurisdiction to cover far more activities, with far less historical or legal support, than arose earlier in the context of piracy. At the same time, they have omitted reference to the use of force, and substituted their preferred criminal prosecution. The proscribed roster of offenses now typically includes genocide, torture, war crimes and crimes against humanity, which are said to vest prosecutorial jurisdiction in all states.

Announcing his decision in the November 25, 1998 decision of *Ex parte Pinochet*, Lord Nicholls described the crimes of which the General stood accused by saying, "International law has made it plain that certain types of conduct . . . are not acceptable conduct on the part of anyone." Although that decision (overturned and set for rehearing because of lapses in judicial ethics by one of the majority judges, but subsequently readopted in substance) did not actually rest on universal jurisdiction, Lord Nicholls in fact stated the doctrine's essential foundation.

The worst problem with universal jurisdiction is not its diaphanous legal footings but its fundamental inappropriateness in the realm of foreign policy. In effect (and in intention), the NGOs and theoreticians advocating the concept are misapplying legal forms in political or military contexts. What constitutes "crimes against humanity" and whether they should be prosecuted or otherwise handled -- and by whom -- are not questions to be left to lawyers and judges. To deal with them as such is, ironically, so bloodless as to divorce these crimes from reality. It is not merely naïve, but potentially dangerous, as Pinochet's case demonstrates.

Morally and politically, what Pinochet's regime did or did not do is primarily a question for Chile to resolve. Most assuredly, Pinochet is not, unlike a pirate or a slave trader, beyond the control of any state. Although many people around the world intensely dislike the solution that Chile adopted in order to restore constitutional and democratic rule in 1990, especially the various provisions for amnesty, the terms and implementation of that deal should be left to the Chileans themselves. They (and their democratically elected government) may continue to honor the deal, or they may choose to bring their own judicial proceedings against Pinochet. One may accept or reject the wisdom or morality of either course (and I would argue that they should uphold the deal), but it should be indisputable that the decision is principally theirs to make. The idea that Spain or any other country that subsequently filed extradition requests in the United Kingdom has an interest superior to that of Chile -- and can thus effectively overturn the Chilean deal -- is untenable. And yet, if the British had ultimately extradited Pinochet to Spain, that is exactly what would have happened. A Spanish magistrate operating completely outside the Chilean system will effectively have imposed his will on the Chilean people. One is sorely tempted to ask: Who elected him? If that is what "universal jurisdiction" means in practice (as opposed to the theoretical world of law reviews), it is hopelessly flawed.

Spain *does* have a legitimate interest in justice on behalf of Spanish citizens who may have been held hostage, tortured, or murdered by the Pinochet regime. And the Spanish government may take whatever steps it ultimately considers to be in the best interest of Spanish citizens, but its recourse lies with the government of Chile, and certainly not with that of the United Kingdom. If the government of Spain -- as opposed to a loose cannon magistrate -- were truly serious, it would have approached the government of Chile directly. Whether Spain proceeded by a judicial action or through diplomatic channels (or both, or through military means) would, of course, have been up to Spain; in turn, Chile could have responded as it chose. But in this proper bilateral context, the Pinochet question would have been primarily a political matter. In actuality, the attempt to extradite Pinochet while he was in London was thus not the exercise of law; it was political theater.

Much the same could be said about the debate over whether allegations of war crimes by members of Indonesia's armed forces in East Timor should be tried by Indonesia, or in a special tribunal to be created by the United Nations. This, too, is a question that is not simply a matter of legal process, but one that reaches the heart both of

democratic theory and practice, and of national sovereignty. A UN panel of experts, formed to investigate the violence in East Timor, recommended to the Secretary General that the Security Council establish an international court along the lines of those established for Yugoslavia and Rwanda. By contrast, a human rights commission appointed by the Indonesian government recommended to the country's Attorney General that top military leaders be tried in Indonesian courts. There is no dispute that atrocities took place (although the specifics remain subject to further investigation), and there is no dispute that someone should be held accountable. But the remaining questions -- who should do the accounting, and how -- pose a critical philosophical debate for which Indonesia's answer could set an important precedent.

As in Chile, they key issue in Indonesia is whether nations, especially emerging democracies, are to be afforded the chance to confront the realities of their own histories. They should set the moral, political and legal standards by which they wish to be judged, implement those standards in viable judicial codes and institutions, and then live with the consequences of those decisions. This is one critical way in which fledgling democracies mature. To take critical decisions, such as those facing Indonesia, out of their hands is to deny them the chance for historical responsibility. To be sure, the decisions they make may not be those that the self-assured higher moralists might make, but that is inherent in the concept of popular sovereignty and autonomy. Facing up to their own past, reckoning how to deal with it themselves, and then consciously taking responsibility for their decisions are central to moral choice, and living with the consequences. Anyone is free to offer Indonesia advice, but it is precisely the democratic responsibility to make its own decisions that would be at risk if the decisions were internationalized. To abort Indonesia's assumption of responsibility for its citizens' actions is not just elitist and paternalistic, but fundamentally violates the assumptions of democratic government. Unlike unfortunate Chile, Indonesia should be given the breathing space it needs to confront what happened in East Timor, and neither spared the pain of so doing, nor the lesson of living with whatever it decides.

Because of the substantial publicity surrounding the Pinochet matter, we can expect copycat efforts covering a range of other "crimes against humanity" in the near future. But adding purported crimes (shocking though they may be) to the list of what triggers universal jurisdiction does not make the concept any more real. Nor does a flurry of law review articles (and there has been far more than a flurry) make concrete an abstract speculation. In fact, "universal jurisdiction" is conceptually circular: universal jurisdiction covers the most dastardly offenses; accordingly, if the offense is dastardly, there must be universal jurisdiction to prosecute it. Precisely because of this circularity, there is absolutely no limit to what creative imaginations can enlarge it to cover, and we can be sure that they are already hard at work.

Any concept that can expand so dramatically so quickly -- from piracy to genocide -- is unlikely to slow down soon. Although one area of expansion will almost certainly be the official conduct of foreign policy, the realm of business and commercial activity will not be overlooked. Typically, the existing "universal jurisdiction" crimes require an element of illicit governmental action, but not all do. For the creative activist,

glossing over a "state action" requirement should prove no hurdle at all in proscribing what, in Lord Nicholls words, is "not acceptable conduct on the part of anyone." Consider just three examples: (i) major environmental disasters, particularly those with international implications like an oil spill at sea, could easily be envisaged as "crimes against humanity," and therefore subject to prosecution universally. An analogy to maritime piracy would be strained, to say the least, but not beyond either the ability or inclination of NGOs and academic theorists; (ii) unsatisfactory wages, hours or other conditions of employment at multinational corporations are already targets of union and human rights activists, who would not need much encouragement to liken such practices to slavery; and (iii) mining or manufacturing near sites of cultural or historical interest -- what UNESCO devotees like to call the "common heritage of mankind" -- could quite readily become the subject of universal jurisdiction, especially since the states where such activities occur might be classified as too weak to vindicate their own interests.

Thus, an oil company whose tanker broke up on the high seas could be brought to trial in an environmentally conscious state. A law-wage transnational could be prosecuted by a righteous Social Democratic government. A "culturally insensitive" company could be indicted almost anywhere cultural sensitivity is an issue. In each case, senior corporate executives could be arrested, detained and ultimately extradited for trial in countries far removed from any traditional nexus to the alleged offenses. Surely, no one will object, for they are, after all, *hostes humani generis*, are they not? We are not yet at this point, but the warning signs are clear. Consigning "universal jurisdiction" to the isolated debates of legal academics is seriously ill-advised from both foreign and economic policy perspectives, and more dispassionate analysis of the concept is sorely needed. Here is a clear case where law is too important to be left to law professors.

These examples make clear that the questions whether, how, and under what circumstances, to initiate prosecutions for "crimes against humanity" are not susceptible to uniform, one-size-fits-all approaches. Experience therefore counsels strongly against locking in a permanent ICC and Prosecutor absent more compelling experience.

Third, tangible American interests are at risk. I believe that the ICC's most likely future is that is will be weak and ineffective, and eventually ignored, because naively conceived and executed. There is, of course, another possibility: that the Court and the Prosecutor (either as established now, or as potentially enhanced) will be strong and effective. In that case, the US may face a much more serious danger to our interests, if not immediately, then in the long run.

Although everyone commonly refers to the "Court" created at the 1998 Rome Conference, what the Conference actually did was to create not just a Court, but also a powerful and unaccountable piece of an "executive" branch: the Prosecutor. Let there be no mistake: our main concern from the US perspective is not that the Prosecutor will indict the occasional US soldier who violates our own laws and values, and his or her military training and doctrine, by allegedly committing a war crime. Our main concern should be for the President, the Cabinet officers on the National Security Council, and

other senior leaders responsible for our defense and foreign policy. They are the real potential targets of the ICC's politically unaccountable Prosecutor.

One problem is the crisis of legitimacy we face now in international organizations dealing with human rights and legal norms. Their record is, to say the least, not encouraging. The International Court of Justice and the UN Human Rights Commission are held in very low esteem, and not just in the US. ICC supporters deliberately chose to establish it independently of the ICJ to avoid its baggage.

Next is the overwhelming repudiation by the Rome Conference of the American position supporting even a minimal role for the Security Council. Alone among UN governing bodies, the Security Council does enjoy a significant level of legitimacy in America. And yet it was precisely the Council where the US found the greatest resistance to its position. The Council has primacy in the UN for "international peace and security," in all their manifestations, and it is now passing strange that the Council and the ICC are to operate virtually independently of one another. The implicit weakening of the Security Council is a fundamental *new* problem created by the ICC, and an important reason why the ICC should be rejected. The Council now risks both having the ICC interfering in its ongoing work, and even more confusion among the appropriate roles of law, politics and power in settling international disputes.

The ICC has its own problems of legitimacy. Its components do not fit into a coherent international structure that clearly delineates how laws are made, adjudicated and enforced, subject to popular accountability, and structured to protect liberty. Just being "out there" in the international system is unacceptable, and, indeed, almost irrational unless one understands the hidden agenda of many NGOs supporting the ICC. There is real vagueness over the ICC's substantive jurisdiction, although one thing is emphatically clear: this is not a court of limited jurisdiction. We should take a "systems analysis" approach to the ICC, judging not only what we see before us now, but look forward to what might be added in the long run. Only if we are willing to travel the entire path should we take the first step. Otherwise, we should prevent the consequences by denying the assumptions, and not even indirectly endorse the ICC's work.

Examples of vagueness in key elements of the Statute's text include:

- "Genocide," as defined by the Rome Conference is inconsistent with the Senate reservations attached to the underlying Genocide Convention, and the Rome Statute is not subject to reservations.

- "War crimes" have enormous definitional problems concerning civilian targets. Would the United States, for example, have been guilty of "war crimes" for its WWII bombing campaigns, and use of atomic weapons, under the Rome Statute?

- What does the Statute we mean by phrases like "knowledge" of "incidental loss of life or injury to civilians"? "long-term and severe damage to the natural environment"? "clearly excessive" damage?

Apart from problems with existing provisions, and the uncertain development of customary international law, there are many other "crimes" on the waiting list: aggression, terrorism, embargoes (courtesy of Cuba), drug trafficking, etc. The Court's potential jurisdiction is enormous. Article 119 provides: "any dispute concerning the judicial functions of the Court shall be settled by the decision of the Court."

Consider one recent example of the use of force, the NATO air campaign over former Yugoslavia. Although most Americans did not question the international "legality" of NATO's actions, that view was not uniformly held elsewhere. During the NATO air war, Secretary General Kofi Annan expressed the predominant view that "unless the Security Council is restored to its pre-eminent position as the sole source of legitimacy on the use of force, we are on a dangerous path to anarchy."[3] Shortly thereafter, in a report to the UN membership, Annan repeated his argument, stating that military actions (such as the NATO air campaign) amounted to threats to the "very core of the international security system. . . . Only the Charter provides a universally legal basis for the use of force."[4]

Implicitly, therefore, in Annan's view, NATO's failure to obtain Council authorization made its actions illegitimate, which is what those pursuing the hidden agenda want to hear: while one cannot stop the United States from using force because it is so big and powerful, one can ensure that it is illegitimate absent Security Council authorization, ***and thus a possible target of action by the ICC Prosecutor***. UN High Commissioner for Human Rights Mary Robinson was even more pointed, announcing that: "civilian casualties are human rights victims." She asked: "if it is not possible to ascertain whether civilian buses are on bridges, should those bridges be blown?" Her basic objection, however, was not to civilian casualties, but to the bombing itself. During the war, she said "NATO remains the sole judge of what is or is not acceptable to bomb," and she did not mean it as a compliment. Even more basically, she, like Annan, asserted that NATO's lack of Security Council authorization violated international law:

> "It surely must be right for the Security Council of the United Nations to have a say in whether a prolonged bombing campaign in which the bombers choose their target at will is consistent with the principle of legality under the Charter of the United Nations."[5]

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[3] Quoted in "Annan Visits Macedonia To Discuss Refugees," *International Herald Tribune*, Thursday, May 20, 1999, p. 4, col. 6. (Hong Kong ed.)

[4] Michael Littlejohns, "'Significant' Rise in Wars, Disasters," *Earth Times*, 16-30 September 1999, p. 22, col. 1.

[5] Report on the Human Rights Situation Involving Kosovo, submitted by Mary Robinson to the Commission on Human Rights, Geneva, April 30, 1999, OHCHR/99/04/30/A.

Mrs. Robinson's peripheral position in international affairs did not expose her to the full measure of criticism that one might have expected, but her elaboration of Annan's basic position further evidences the direction the Secretary General was traveling.

Now, in fact, both Annan and Robinson are badly mistaken, their analysis being unsupported either by the UN Charter or fifty-five years of UN practice. Most of the "legal" criticism of the NATO bombing campaign came from the academic left, and, in fact, in the summer of 1999, European and Canadian law professors filed a "complaint" with Louise Arbour, then the Prosecutor of the International Criminal Tribunal for Yugoslavia ("ICTY"), alleging that NATO's use of force was an illegal act of aggression, and that several actions during the aerial campaign specifically amounted to war crimes or crimes against humanity.[6] Arbour ordered an internal staff review of these allegations, resulting in the preparation of a staff report. Although Arbour's successor, Carla Del Ponte, in response to news reports, subsequently denied that she was conducting a "formal inquiry" into NATO's actions, her carefully-worded statement only raised more questions about what she actually was doing.

Even Del Ponte's subsequent declination to indict NATO officials does not finally resolve the matter. She stated explicitly that she was not opining on the basic "legality" of the NATO campaign, which was "not our task and is not part of our brief, just as we cannot decide on general responsibilities of countries or international organizations. It is our task to pinpoint possible individual responsibilities." Tribunal officials were also reported saying "privately that they hoped their report would cause NATO countries to change their rules of engagement in order to lessen the chances of civilian casualties." Moreover, Del Ponte qualified her declination by saying "some mistakes were made by NATO," thus basing her conclusion on the absence of intent, perhaps the easiest of the elements of any criminal offense for a prosecutor to consider subjectively.

Moreover, by actively considering the complaints, and by effectively rejecting their substantive allegations, the Prosecutor nonetheless implicitly concluded that she had jurisdiction over the incidents alleged. In short, she was asserting that, had there been sufficient evidence or credible allegations of war crimes by NATO personnel, she would have had the requisite authority to launch prosecutions against them. While it may comfort some in the short term that no NATO officials were prosecuted this time, the longer-term repercussions are far more troubling. Many will be surprised to find that the ICTY, created in 1993 at the behest of the Clinton Administration, has jurisdiction over more than Balkan war criminals. The idea that the Security Council can create tribunals of limited scope and authority, and exercise authority over the tribunals once created, is this already a casualty of Del Ponte's "vindication" of NATO's bombing campaign.

Many hope to change Pentagon behavior as much as the international "rules" themselves, through the threat of prosecution. They seek to constrain military options, and thus lower the potential effectiveness of such actions, or raise the costs to successively more unacceptable levels by increasing the legal risks and liabilities

[6] Yugoslav President Slobodan Milosevic had also proclaimed that NATO's bombing was illegal, and Yugoslavia filed a complaint against the "aggressor" nations before the International Court of Justice.

perceived by top American and allied civilian and military planners undertaking military action. Indeed, the ICTY Prosecutor's review of the allegations against NATO is a virtual road map to the future role of NGOs in pressuring and cajoling the ICC Prosecutor into adopting their worldview, thus providing yet another reason to reject the ICC.

Amnesty International and Human Rights Watch, for example, were quite willing to make the judgments Mrs. Del Ponte had avoided, following the path blazed by Mary Robinson. Amnesty asserted less than a week after Del Ponte's announcement that "NATO forces violated the laws of war leading to cases of unlawful killing of civilians." The NGO complained loudly about NATO attacks on a "civilian" television transmitter in Belgrade, even though it served the Milosevic regime's propaganda purposes. Similarly, Human Rights Watch had earlier concluded that NATO violated international law, but stopped short of labeling its actions as "war crimes." In another recent report, this NGO announced its opposition to the sale of American air-to-ground missiles to Israel because of the Israeli "war crime" of attacking Lebanese electrical power stations. Of course, much the same could also be said about American air attacks during the Persian Gulf War, aimed at destroying critical communications and transportation infrastructure inside Iraq, in order to deny it to Saddam's military. If these targets are now "off limits," the American military will be far weaker than it would otherwise be.

This is precisely the agenda of many in the "human rights" movement. The events leading to the internal ICTY staff report are a virtual road map to the future role of NGOs in pressuring and cajoling future national and international prosecutors. It is unacceptable to begin with that a small group of academic ideologues could have moved the ICTY Prosecutor even to the extent they have. Emerging ICC procedures, for example, already contemplate an even larger role for NGOs, which will inevitably provide the dominant ideological compass for the Prosecutor. Law Professor Diane F. Orentlicher in effect gave the game away when she crowed: "the future the United States government feared is here sooner than it expected."

The future arrived for the United Kingdom shortly thereafter when it was sued in the European Court of Human Rights in Strasbourg by families of Argentine sailors who died in the 1982 sinking of the Argentine battleship *General Belgrano* during the Falklands War.[7] The plaintiffs argue that torpedoing the warship violated the 1907 Hague Convention because it was sunk outside of a 200-mile "exclusion zone" around the Falklands (known as the Malvinas in Argentina), unilaterally declared by the United Kingdom, and thus not in a legitimate theater of operations. Although is merely a "human rights" lawsuit that seeks monetary damages on behalf of the deceased Argentines, the *Belgrano* litigation is an entirely predictable adjunct to recent efforts to criminalize the use of force in international affairs. Nonetheless, this case raises several new, unacceptable precedents, such as second-guessing a military decision eighteen years after it was made in the heat of combat. No civilians or civilian targets were even arguably involved. Complaining now today sailors on the *Belgrano* dies as a result is a

[7] Robert Shrimsley and Ken Warn, "Britain faces legal action over sinking of Belgrano," *Financial Times*, June 30, 2000, p. 2, col. 1; Andy McSmith, "Belgrano families to sue Britain," *Daily Telegraph*, June 30, 2000, p. 2, col. 1.

direct challenge not to one particular military decision, but to the very fact of the war itself, which is not a "legal" complaint, but a political one.

Moreover, the belligerent governments, both now indisputably democracies, have already resolved both their general differences over the Falklands and their specific differences over the sinking of the *General Belgrano*. Diplomatic relations between the combatants were restored in 1990, and in 1994 Argentina agreed that the incident was "a legal act of war." The *Belgrano*'s captain himself has said: "I realized from the outset that the 200-mile limit did not exclude danger or risks. It was the same in or out." One might question the wisdom of the outcome, but what is not legitimate is for such public policy questions to be removed from the political field and assigned to judges, especially international ones. This is not simply a technical, legal question, but a basic issue of the allocation of power and responsibility between the political and judicial branches of government, with the notable point that the judicial "branch" involved here is not part of any recognized government. One can predict with confidence that the *Belgrano* case will not be the last of its kind filed in Strasbourg, or considered by the ICC.

These and many other troubling substantive problems are overshadowed by the governance structures of the Court and the Prosecutor. One of the Executive Branch's strongest powers is law enforcement. In the US, we accept this enormous power because we separate it from the adjudicative power, and because we render it politically accountable through Presidential elections and Congressional oversight. Indeed, it was the lack of political accountability that ultimately -- and quite justifiably -- consigned the Independent Counsel statute to the ash heap of history. Europeans may feel comfortable with the ICC's structure -- no political accountability and no separation of powers -- but that is a major reason why they are Europeans and we are not.

* * * * * *

What to do next is obviously the critical question. Whether the ICC survives and flourishes depends in large measure on the United States. We should not allow this act of sentimentality masquerading as policy to achieve indirectly what was rejected in Rome. We should oppose any suggestion that we cooperate, help fund, and generally support the work of the Court and Prosecutor. We should isolate and ignore the ICC.

Specifically, I have long proposed for the United States a policy of "Three Noes" toward the ICC: (1) no financial support, directly or indirectly; (2) no collaboration; and (3) no further negotiations with other governments to "improve" the Statute. I am therefore very pleased Mr. Chairman that the American Servicemembers' Protection Act of 2000 is well-crafted and well-designed to achieve these objectives. This approach is likely to maximize the chances that the ICC will wither and collapse, which should be our objective. The ICC is a fundamentally bad idea. It cannot be improved by technical fixes as the years pass, such as those being suggested by the Clinton Administration, and in fact it is more likely than not to worsen. We have alternative approaches and methods consistent with American national interests, as I have previously outlined, and we should follow them.

JULY 26, 2000

STATEMENT OF CHAIRMAN BENJAMIN A. GILMAN
HEARING ON INTERNATIONAL CRIMINAL COURT
July 26, 2000

Today we hold the second of two hearings on the International Criminal Court. Yesterday we heard from two very distinguished former Executive branch officials, former Secretary of State Lawrence Eagleburger and former Assistant Secretary of State for International Organization Affairs John Bolton. They both testified about the very serious dangers to our national interest arising from the International Criminal Court, and they urged Congress to begin to remedy this situation by approving H.R. 4654, the American Servicemembers' Protection Act of 2000.

As I noted at the outset of yesterday's hearing, there are many strongly held opinions about the International Criminal Court, and many passionate disagreements. The one thing that virtually everyone agrees on, however, is that the way this issue has evolved over the last few years has been nothing short of disastrous from the point of view of the national interest of the United States.

Today we are well on the way to the establishment of a U.N.-led criminal court, which will claim the jurisdiction to prosecute and imprison American servicemembers and other officials of our government in certain instances, irrespective of whether the United States ever becomes party to the Court.

I know from the prepared testimony of today's witnesses that they intend to devote themselves to criticizing the legislation that is before the Committee, the American Servicemembers' Protection Act. Clearly the Administration is unhappy with the legislation, but I think we should all reflect for a moment on why this legislation was introduced.

To my mind, the legislation is about accountability. It was introduced because there has been a colossal failure in the conduct of our nation's diplomacy with respect to the International Criminal Court. The Administration set in motion the process that led to the Rome Treaty, it lost control of that process, and a treaty emerged that is highly prejudicial to our national interests. So prejudicial, in fact, that the Administration decided it could not sign the treaty.

Since that time, the Administration has devoted itself to trying to undo the damage that has been done. Apparently the Administration is no longer trying to bring the United States into the Court. Rather, it now seems to be focused only on trying to make it safe for the United States to remain outside the Court.

Secretary Eagleburger and Secretary Bolton yesterday predicted that the Administration is unlikely to succeed in its efforts to win back what it lost in the negotiations in Rome, and I thought they made a pretty good case. They further argued that even if the Administration gets the technical fixes it is seeking, no American servicemember or goverment official can have real confidence that he or she is safe from ICC prosecution.

So I hope our witnesses today will not confine themselves to attacking they American Servicemembers' Protection Act. I hope they will also tell us how our nation got into this mess, and why our witnesses yesterday were wrong when they told us the Administration has no credible plan for getting us out of the mess.

To put it another way, if the Administration wants to avoid the legislation, it needs to address the desire for accountability that I believe has given rise to the legislation.

Before recognizing our panel, I will first recognize our Ranking Democratic Member, Mr. Gejdenson, for any opening comments he may have. Mr. Gejdenson?

Statement of Rep. Chris Smith
Chairman, Subcommittee on International
Operations and Human Rights
July 26, 2000

The concept of a permanent International Criminal Court charged with prosecuting the gravest of crimes against humanity is not a new one. The idea was proposed (and dismissed) after the conclusion of the Nuremberg and Tokyo War Crime Tribunals that followed World War II. In recent years, the idea has gained new momentum, driven largely by memories of the horrific crimes committed in Rwanda and the former Yugoslavia.

I share the ideals of many ICC supporters. If we could construct an entity that would impartially prosecute only genocidal tyrants and war criminals, I would support it without hesitation. But we do not inhabit an ideal world. The difficulty is in devising a system that will prosecute Pol Pot but not President Clinton, that will indict Ratko Mladic but not Norman Schwartzkopf. I am concerned that the Rome Statute fails to accomplish that goal, and that it is susceptible to serious abuse and manipulation.

As it took form, the draft statute ballooned from an instrument focused on well-established war crimes into an encyclopedia of still-emerging human rights

law. The resulting Rome Statute of the International Criminal Court is a 30,000-word document that covers 77 pages. It contains sweeping language that leaves many elements of vaguely defined crimes up to the imagination of international lawyers. For example, according to Article 6, the crime of genocide includes "causing serious...mental harm" to members of "a national, ethnical, racial or religious group." It is true that similar language is contained in the Convention Against Genocide. But the United States took a reservation to the jurisdiction of the World Court over the definition of genocide. This is not because we intend to commit genocide, but because hostile parties might attempt to use the vague language to accuse us of "genocide."

Similarly, Article 5 asserts ICC jurisdiction over "the crime of aggression" — an offense that is not defined in international law or even in the Rome Statute itself (a point that I raised at the OSCE Parliamentary Assembly in Bucharest earlier this month). In the context of domestic law, such vagueness would be problematic. In the more combative context of international law, it is dangerous.

The Rome Statute also identifies "forced pregnancy" as a crime against humanity and as a war crime. The term "forced pregnancy" is an epithet

sometimes used to characterize the results of pro-life legislative efforts to discourage abortion-on-demand. Although the statute also includes language apparently meant to dispel fears that it might be used to assert an international right to abortion, the continued use of the term "forced pregnancy" remains problematic. As I urged Administration officials prior to the conclusion of the Rome Statute negotiations, that phrase should have been replaced with the more precise term "forced impregnation." "Forced impregnation" clearly refers to the results of the crime of rape — and especially to cases in which pregnancy is an intended rather than an incidental effect of the rape — without leaving itself open to the interpretation that countries whose laws prohibit abortion might thereby violate international law.

In addition to the problems posed by its vague definitions, the statute also claims a jurisdictional reach that is without precedent. Once 60 countries have ratified it, the statute claims ICC jurisdiction over <u>any</u> defendant who may have committed a "crime" in a signatory state, regardless of whether the defendant's own state has ratified the treaty. By claiming to bind the subjects of non-signatory states, this self-executing, potentially universal jurisdiction directly challenges traditional concepts of national sovereignty.

Finally, the Rome Statute grants the ICC prosecutor a vast amount of personal power with a minimum of oversight. The statute drafters rejected a U.S. proposal that the prosecutor only be allowed to proceed on cases referred either by a sovereign state or by the UN Security Council. Instead, the ICC prosecutor may initiate investigations and prosecutions on his own authority, without control or oversight by any national or international party. Under Article 44, the prosecutor may also accept any offer of "gratis personnel offered by. . .non-governmental organizations to assist with the work of any of the organs of the Court." I have long been a supporter of the significant work undertaken by international NGOs, particularly relating to the protection of human rights and the provision of humanitarian relief. But it is also true that there exist hundreds of highly ideological NGOs who look to international bodies to promote agendas that go far beyond the domestic political consensus in their home countries. The combination of the independent prosecutor's extreme discretion with staff provided by well-funded, highly ideological NGOs could lead to serious problems and partisanship by the ICC.

These are but a few of the problems I have with the present form of the Rome Statute. I readily acknowledge that many — if not most — ICC supporters

do not intend for the Court to be used as a club for U.S.-bashing or as an engine for radical social engineering. But once the International Criminal Court is established, it will take on a life of its own. Its activities will be restricted by the language of the Rome Statute itself, rather than by the best intentions of its most responsible supporters. That language leaves a lot of room for concern.

I look forward to hearing the testimony of our distinguished witnesses this morning.

March 31, 1998

The Honorable Princeton Lyman
Assistant Secretary of State for
International Organization Affairs
2201 C Street, N.W.
Washington, D.C. 20520

Dear Ambassador Lyman:

I am writing in connection with the Preparatory Committee on the Establishment of an International Criminal Court that is currently meeting at United Nations headquarters in New York.

It has been brought to my attention that the current draft of the document being assembled by the Preparatory Committee contains references to "forced pregnancy" as a crime. As you may be aware, the term "forced pregnancy" is an epithet sometimes used to characterize the results of pro-life legislative efforts to discourage abortion-on-demand. I am asking that you direct United States representatives to the Preparatory Committee to make every effort to replace textual references to "forced pregnancy" with the term "forced impregnation." This term clearly refers to the results of the crime of rape -- and especially to cases in which pregnancy is an intended rather than an incidental effect of the rape -- without leaving itself open to the interpretation that countries whose laws prohibit abortion might thereby violate international law. If the final document were to include references to "forced pregnancy," I and other pro-life Members of Congress would have to oppose it.

Thank you for your consideration. Do not hesitate to call me or my Subcommittee staff with any questions you may have on this subject.

Sincerely,

CHRISTOPHER H. SMITH
Chairman, Subcommittee on International
Operations and Human Rights

Statement of David J. Scheffer
Ambassador-at-Large for War Crimes Issues and
Head of the U.S. Delegation to the United Nations Preparatory Commission
for the International Criminal Court
before the
House International Relations Committee
July 26, 2000

Thank you, Mr. Chairman.

I appreciate the opportunity to testify this afternoon on H.R. 4654, the "American Servicemembers' Protection Act of 2000." We all share the same minimum objective, namely, to ensure that members of the U.S. Armed Forces and U.S. Government officials are not prosecuted before the International Criminal Court (ICC) when it is established. However, as the chief negotiator for the United States on the ICC Treaty of July 17, 1998, and its supplemental agreements still being negotiated in the ICC Preparatory Commission, I believe that this legislation will cripple our ability to achieve our common objective. Indeed, H.R. 4654 will worsen our negotiating position at the very moment when we stand the best chance of securing agreement with other governments to protect our soldiers and government officials and continue our support for international justice.

The Administration opposes this legislation. H.R. 4654 infringes on the President's constitutional authority as Commander-in-Chief and to conduct foreign relations. It is counter productive not only because of its direct impact on critical negotiations relating to the International Criminal Court, but also because H.R. 4654 would seriously damage U.S. national policy objectives. It would hold national security and foreign policy interests hostage to the fate of our relationship with governments that support the ICC and to the willingness of other members of the Security Council to immunize our armed forces personnel from ICC jurisdiction.

As the Department has explained in letters to Chairman Gilman and Representative Gejdenson dated June 30, 2000, current law prohibits use of federal funds to "support" the International Criminal Court. But this bill is more sweeping and harmful to particular defense and foreign affairs programs. It would prohibit military aid to any country that has ratified the ICC Treaty, with exceptions only for NATO and major non-NATO allies. Moreover, by requiring that the UN Security Council grant immunity to U.S. personnel to participate in UN-authorized military activity, the legislation could effectively prevent U.S. military engagement on issues of critical national security concern.

The bill would have these detrimental consequences without providing the Administration with any new authority or any increased ability to protect U.S. service members from prosecution. Rather, it would tie the hands of the President as Commander in Chief, and risk harming important U.S. interests by its inflexibility.

The Administration is actively pursuing the international protection objectives that are critical to the Executive Branch as well as to many members of Congress. In particular, at the ICC Preparatory Commission meetings in New York, where supplementary treaty documents are being considered, we are proposing a measure that would ensure that service members and civilian officials of countries, such as the United States, that have not ratified the Treaty are not brought before the Court without the consent of their governments. We have made clear that, without a favorable result, the United States would be compelled to reconsider U.S. military participation in certain contingencies.

The latest round of ICC meetings ended on June 30. We made important progress at those meetings. But we have a very tough struggle ahead as we advance towards the next session in late November. We are deeply concerned that, in addition to imposing unnecessary and dangerous restrictions on national security decision-making, the legislation prejudges the outcome of ongoing negotiations on the protection objectives we are seeking to achieve. For this reason it would undermine the efforts of the U.S. negotiators and diminish the likelihood of obtaining those additional protections for U.S. service members.

Before I comment on particular provisions of the bill, I want to emphasize that the ICC Treaty is designed to bring to justice those most responsible for the most serious crimes of concern to the international community, namely, genocide, crimes against humanity, and war crimes. Since 1993 we have been deeply engaged in every phase of the ICC Treaty. We have supported the creation of an effective and appropriate international criminal court because there is a clear need for one in the wake of continued atrocities. Nonetheless, a fundamental flaw remains in the ICC Treaty regarding the Court's purported ability to prosecute under certain circumstances the nationals of non-party States, even those acting officially for responsible nations like the United States. Therefore, the possibility of our own exposure under the ICC Treaty remains and that is why we are seeking further protection in the ICC talks.

Section 4 of H.R. 4654 would prohibit specific forms of cooperation with the Court until the United States ratifies the ICC Treaty. The President already has that authority. But we anticipate there will be instances in which it will be in the national interest to respond to requests for cooperation even if the United States is not a party to the ICC Treaty. We may decide that an international investigation and prosecution of a Pol Pot, a Saddam Hussein, an Idi Amin, a Foday Sankoh, or some other rogue leader who has committed or is committing heinous crimes that no civilized government or people could possibly condone or acquiesce in, would be in the national interest of the United States to support.

Further, the Department of Justice advises that these restrictions on the United States' ability to participate in cooperative international activities, such as providing United States military or law enforcement personnel, advice, or equipment to assist in

bringing prisoners before the court, or in executing the court's orders, may impair the President's powers as Commander-in-Chief, especially if such actions are deemed by the President to be necessary to further operations in which the United States armed forces are authorized to take part.

The Department of Justice further advises that insofar as such a court can be considered to be a type of international forum, the provision would seem to bar the President from communicating with that forum, whether by filing court papers or submitting the views of the United States, or otherwise, if such conduct were considered "cooperation" with the forum. If so construed, it would present an unconstitutional intrusion into the President's plenary and exclusive authority over diplomatic communications.

In the ICC negotiations, the U.S. government has pressed other governments hard to accommodate our need to protect U.S. personnel from being surrendered to the ICC to stand trial while the United States is not a party to the Treaty. We made the progress we needed to in the June talks to pursue our equities in the next round of talks in late November. It is absolutely essential, however, that the U.S. not expand current limitations on cooperation with the ICC. To do so would ensure that we are unable to obtain additional protection within the ICC Treaty regime. I must be able to offer, in exchange for the protection that we are seeking, the ultimate cooperation of the United States with the ICC when it serves our national interests while our country is a non-party to the ICC Treaty. As I have often said, Section 4 is counter productive.

Section 5 of H.R. 4654 states that the President should use the voice and vote of the United States in the UN Security Council to ensure that the Council permanently exempts U.S. military personnel from criminal prosecution before the ICC in connection with UN peacekeeping operations. Section 5 further prohibits U.S. military participation in UN peacekeeping operations unless the President certifies that the Security Council has permanently exempted U.S. military personnel from ICC prosecution, or that each country in which U.S. personnel are present in a peacekeeping operation either is not a party to the ICC Treaty or has entered into an Article 98 agreement preventing the ICC from proceeding against U.S. personnel present in that country, or the President has taken other appropriate steps to guarantee that U.S. personnel will not be prosecuted by the ICC.

The Department of Justice believes that Section 5 could unconstitutionally intrude upon the President's authority as Commander in Chief. In its application, this provision could be construed to prevent the President from participating in United Nations peacekeeping efforts even where he determines that such participation is necessary for the safety of United States forces or the national security, for example, responding to a sudden attack to rescue U.S. forces in danger. Further, Section 5 can severely impede national interests and needlessly hold them hostage to the ICC Treaty. Under the Constitution, the President already has the authority to do all that is required in Section 5. But Section 5 ignores the President's responsibility to weigh national security considerations in deciding when and how to deploy U.S. military personnel under a wide

and often unpredictable range of contingencies. The bill ties the President's hands in a way that can severely undermine this nation's ability and will to protect our national interests.

Section 6 is unnecessary, as we have already ensured in Articles 72 and 73 of the ICC Treaty that we will have complete control as a non-party or as a party to the ICC Treaty over the transfer of classified national security information to the ICC. The President already has the authority and is exercising the responsibility to ensure that appropriate procedures are in place.

Section 7 would prohibit providing U.S. military assistance to the government of a country that is a party to the ICC Treaty, unless the government has entered into an Article 98 agreement or is a NATO or major non-NATO ally. Thus, U.S. military assistance globally would be held hostage to the ICC Treaty regardless of U.S. national interests, regardless of whether our service members are protected through some means other than an Article 98 agreement, and regardless of what circumstances will arise in the future. This provision can only undermine our national interests. Again, the President already has this authority if he chooses to use it to advance national security objectives. The legislation requires the use of that authority in a way that is most likely to undermine relevant national policies.

The Department of Justice advises that in some circumstances this provision could be unconstitutional. If it were construed, for example, to prevent the United States from providing necessary military assistance that a friendly nation not exempted by Section 7(d) would use in operations supporting U.S. forces subjected to a sudden attack. The waiver provision in Section 7(b) is insufficient to cure this constitutional problem as it may not be practical in an emergency situation to complete the necessary reporting requirements.

Section 8 would authorize the President to use all means necessary and appropriate to free U.S. personnel being detained or imprisoned by or on behalf of the ICC. We would note that the ICC will be located in The Hague, The Netherlands. So, in a curious way, Section 8 contemplates an armed attack on The Netherlands, a close NATO ally of the United States. It is, to put it bluntly, an alarmist provision that only complicates our ability to negotiate our common objective of protection from prosecution. Under the Constitution, the President already has the authority to protect U.S. personnel wherever they are located in the world.

Section 9 of H.R. 4654 requires a report evaluating the degree to which each existing status of forces agreement or other similar international agreement protects U.S. personnel from extradition to the ICC under Article 98 of the ICC Treaty. Although we could provide such an assessment, the major issue lies in re-opening SOFAs to negotiation in order to seek full protection from extradition through a SOFA provision. Section 9 requires the President to transmit to Congress a plan for amending existing SOFAs or negotiating new international agreements, in order to achieve the maximum protection

available under Article 98. Re-opening SOFAs could encourage host countries to insist on renegotiating other existing provisions.

Section 10 requires a report with respect to military alliances to which the United States is a party. This provision needlessly subjects our alliance command arrangements to factors pertaining to the ICC Treaty and thus suggests that, once again, our national security interests will be held hostage to the ICC Treaty. U.S. service members under operational control of foreign military officers are still under U.S. command and the administrative control of the United States. More importantly, the risks facing U.S. service persons are the same once they are in the territory of a state party to the ICC, regardless of the command or operational relationship they have with foreign military officers who are nationals of countries that are parties to the ICC. The degree of risk may vary based upon any existing status of forces agreement or other similar international agreement, as was discussed under Section 9.

The Department of Justice advises that both Sections 9(b) and 10(b) would impermissibly intrude on the President's constitutional powers over the nation's diplomatic relations and his authority as Commander-in-Chief. Because the Constitution vests authority over the nation's diplomatic negotiations in the President, the President and his subordinates must have discretion to decide whether to enter into negotiations with foreign governments and to control the content of those negotiations. The requirement in these provisions that the President submit to Congress plans for amending certain agreements with foreign nations implies a Congressional mandate that the President negotiate such changes; so construed, they impermissibly infringe on the President's exclusive responsibility under the Constitution to determine the form and manner in which the United States will maintain relations with foreign nations.

In conclusion, many of the provisions of H.R. 4654 achieve exactly the opposite of the result intended, and would seriously harm our own national security and foreign policy interests. The legislation would cripple our negotiating leverage to achieve the common objective of protection of American service members from surrender to the ICC. Section 5 could make it impossible for the United States to engage in critical multinational operations. Section 7 could weaken essential military alliances. The bill raises fundamental constitutional issues and would seriously impair any future Administration's ability to pursue national security objectives.

As a negotiator who has faithfully worked and will continue to work to protect U.S. national interests and U.S. service members in the ICC Treaty regime, I respectfully ask you to withdraw this legislation so that I have a fighting chance to achieve additional protections for U.S. service members.

Thank you, Mr. Chairman.

STATEMENT OF MONROE LEIGH, ON BEHALF OF THE AMERICAN BAR ASSOCIATION, ON THE AMERICAN SERVICEMEMBERS' PROTECTION ACT OF 2000

JULY 25, 2000

Mr. Chairman and Members of the Committee:

My name is Monroe Leigh. I am filing this statement on behalf of the American Bar Association. I thank the Committee and the Chairman for this opportunity to comment on H.R. 4654, American Servicemembers' Protection Act of 2000 sponsored by Representative Tom DeLay which is identical in text to S. 2726 which has been introduced in the Senate by Senator Jesse Helms. My written comments are in support of deferral of this measure until after the next meeting of the Preparatory Commission which will take place in November and December of this year.

The American Bar Association which numbers more than 400,000 attorneys throughout the country and abroad has long advocated the creation of an international criminal court to punish offenses against the Genocide Convention, crimes against humanity, and war crimes. The most recent statement of position is found in the Resolution of February 2, 1998, adopted in Nashville by the ABA House of Delegates, which is the governing body of the Association. That resolution (the text of which is attached at Tab 1 along with the supporting report) reiterated with great specificity the elements which the Association thought desirable in the statute creating such a court. This resolution was adopted shortly before the convening of the Rome diplomatic conference which promulgated in July 1998 the text of the Convention which would create the permanent International Criminal Court. It will come into effect when the 60th ratification is deposited.

On August 2, 1998, the ABA Section of International Law and Practice adopted at its Toronto meeting a resolution confirming that the text of the Rome Statute conformed to the specific requirements of the prior House of Delegates resolution of February 3, 1998. (A copy of the Toronto resolution and supporting report is attached at Tab 2.)

It should be noted that the Nashville and Toronto resolutions are only the latest expressions of the position of the American Bar Association. Earlier resolutions were adopted by the House of Delegates in 1972, 1992, and 1994. All supported in principle the creation of a permanent

international criminal court. In 1976, the Association also supported U.S. adherence to the genocide convention, which was ratified by the United States in 1989 and which outlaws the crime of genocide, one of the core crimes within the jurisdiction of the court to be created by the Rome Treaty. Article VI of that Convention contemplates the possible creation of an international criminal court.

As is well known, the United States voted against the text of the Statute as promulgated at Rome in July 1998 and was one of seven participating nations to do so. Since that date the U.S. has sought to secure changes in the proposed court, either by changes in the text of the statute or by interpretation of that text by specific provisions in the Rules of Procedure and Evidence or by further defining the Elements of the Crimes within the jurisdiction of the Court. So far it has not succeeded but will have another opportunity at the next meeting of the Preparatory Committee, which will take place later this year in November and December.

The present bill, H.R. 4654, is obviously drafted on the assumption that the United States will not become a party to the Rome treaty. And obviously the sponsors of the bill do not wish the United States to become a party. However, the Executive Branch and the President are still negotiating. So long as the President is negotiating, it is in my judgment unwise for the Legislative Branch to pass a bill such as this which prejudges, and quite possibly prejudices the outcome of these negotiations. And if enacted the bill would prohibit cooperation between the U.S. and the proposed new court so long as the U.S. has not ratified the treaty. I strongly urge that this measure be deferred.

If the Congress concludes that it must express an opinion on the merits of the Treaty of Rome prior to the conclusion of the negotiations, which traditionally are the prerogative of the President under the Constitution, I urge that that action be in the form of a non-binding, sense of congress resolution, rather than in the form of H.R. 4654.

In this connection, I should note that the Congress in years past, has adopted sense of Congress resolutions urging the creation of a permanent international criminal court.

The proposed bill, in its present form, is radically inconsistent with the position which the ABA has favored for so many years. Quite apart from the merits of the Rome Treaty, the bill trespasses on the constitutional prerogatives of the President as Commander in Chief and as the principal "organ for the conduct" of foreign affairs. No doubt the Executive Branch will in due course express its views on these fundamental issues.

For the present, I would like to make a few observations about the specific criticisms of the Rome Treaty as expressed in section 2 of the bill which I think are misconceived. They relate to the due process provisions of the Treaty of Rome. For example, subsection 2(6) of H.R. 4654 criticizes the Treaty of Rome because

> Any American prosecuted by the International Criminal Court will, under the Rome Statute, be denied many of the procedural protections to which all Americans are entitled under the Bill of Rights to the United States Constitution, including, among others, the right to trial by jury, the right not to be compelled to provide self-incriminating testimony, and the right to confront and cross-examine all witnesses for the prosecution.

None of these three criticisms is in my opinion justified.

(1) Jury trial is by the terms of the Constitution not applicable to trial of servicemen and women abroad. Thus, such personnel are specifically excluded from the guarantee of grand jury presentment in the Fifth Amendment. Under the Sixth Amendment, which is applicable to criminal trials, jury trial is guaranteed only "in the State and district wherein the offense shall have been committed." By its terms it has no extraterritorial effect in foreign countries. The Seventh Amendment by its terms applies only to civil or non-criminal cases, and is therefore not relevant to this issue.

(2) The second specific criticism is that the Treaty of Rome does not provide for the right of confrontation and cross-examination. This is demonstrably untrue. Article 67(1)(e) of the Treaty specifically guarantees this right.

(3) The third specific criticism of the Treaty of Rome is that there is no guarantee against compulsory self-incrimination. This is also untrue. Article 67(1)(g) is a specific prohibition against self-incrimination.

The one theme which has been consistently emphasized in the ABA resolutions is that whatever treaty is approved for establishing an international criminal court, it must contain provisions for guaranteeing due process to defendants. Accordingly, I consider it necessary and proper to list the due process protections of the Treaty of Rome. They are:

Presumption of innocence (Art. 66);

Assistance of counsel (Arts. 67(1)(b), (d));

Right to remain silent (Art. 67(1)(g));

Privilege against self incrimination (Arts. 54(1)(a), 67(1)(g)):

Right to written statement of charges (Art. 61(3));

Right to examine adverse witnesses (Art. 67(1)(e));

Right to have compulsory process to obtain witnesses (Art. 67(1)(e));

Prohibition against ex post facto crimes (Art. 22);

Protection against double jeopardy (Art. 20));

Freedom from warrantless arrest and search (Arts. 57 bis(3), 58);

Right to be present at the trial (Art. 63);

Exclusion of illegally obtained evidence (Art. 69(7)); and

Prohibition against trials in absentia. (Art. 67(1), 67(1)(c).

Finally, to emphasize the point just made I have prepared parallel tables showing in the left column the specific textual due process protections in the Treaty of Rome and in the right hand column the specific textual protections in the American Constitution. See attachment at Tab 3.

The list of protections in the Rome Treaty should not be viewed with suspicion, rather with pride because it embodies rights which were first constitutionalized in the United States Constitution. Indeed, it may be said that these ideas are our most important intellectual export. I do not say that the Rome list is better than our Bill of Rights because it is longer or more detailed. Not at all. Our Bill of Rights is reinforced by a powerful constitutional tradition of due process which has been flexible enough to accommodate judicial expansion of the basic textual protections set forth in the Constitution and the Bill of Rights. Nevertheless, it cannot be denied that the Treaty of Rome contains the most comprehensive list of due process protections which has so far been promulgated.

Finally, it is necessary I think to comment on another misconception reflected in H.R. 4654. The draftsman of the bill assumes that if the United States rejects the Treaty of Rome, our military personnel will be better protected against unjustified prosecution for offenses occurring outside the United States. This is a really serious misconception -- a fatal misconception -- as I will undertake to show in the remaining paragraphs of this statement.

It is axiomatic that international law recognizes a territorial basis for jurisdiction as well as a nationality basis for jurisdiction. Inevitably there will be cases in which the two bases conflict or run in parallel. In those cases it is nearly always the territorial jurisdiction which prevails over the nationality jurisdiction unless there is some governing international agreement to the contrary.

Thus, if the United States is to retain and be permitted to exercise its nationality jurisdiction over its nationals for offenses committed abroad, it must have the agreement of the territorial sovereign. When American tourists travel abroad they naturally come under the jurisdiction of the territorial sovereign. The same is true when non-Americans come to the United States. They become subject to United States territorial jurisdiction for offenses committed in U.S. territory.

If the U.S. were to reject the Treaty of Rome for an International Criminal Court, the effect would be that Americans, whether military or civilians, would be subject to the jurisdiction of the territorial sovereign for offenses committed in that territory. Thus, some kind of an international agreement is necessary.

This principle is firmly established in international law and no less firmly established in U.S. constitutional law. In 1812 in the famous *Schooner Exchange* case, Chief Justice Marshall wrote

> The jurisdiction of the nation within its own territory is necessarily exclusive and absolute; it is susceptible to no limitation not imposed by itself (7 Cranch 116 at page 135).

In 1957 when the NATO Status of Forces Agreement was subjected to a rigorous constitutional reexamination, the Supreme Court unanimously came to the same conclusion. It stated:

> A sovereign nation has exclusive jurisdiction to punish offenses against its laws committed within its borders, unless it expressly or impliedly consents to surrender jurisdiction. (Girard v. Wilson 354 U.S. 524 at page 529).

As is well known, the Treaty of Rome provides that the state of nationality of the accused shall have primary jurisdiction -- *i.e.*, the first right to investigate and try its nationals -- wherever the alleged offense occurs. Only if the state of nationality is "unable or unwilling" to exercise its jurisdiction will the

ICC have the right to exercise jurisdiction under the Treaty of Rome. I do not expect the United States ever to be genuinely "unable or unwilling" to exercise its primary jurisdiction. If the U.S. exercise of jurisdiction is not genuine -- in other words, a sham trial -- the U.S. will deserve to forfeit its primary jurisdiction.

If a genuine exercise of U.S. primary jurisdiction is improperly challenged by the ICC prosecutor for ulterior political reasons, the U.S. will have a right of interlocutory appeal to the three judges of the pre-trial chamber or if that fails to the five judge appellate chamber. And if such abuse of the treaty persists, the U.S. should give the appropriate notice and withdraw from the Court.

It is the provisions of the Rome Treaty which secure these primary jurisdictional rights to the United States. Otherwise, the territorial sovereign will have the prevailing claim to the exercise of jurisdiction. Thus, some international agreement is indispensable to protect our military abroad. As you can see, I think the Treaty of Rome is that agreement and merits your support.

I will conclude by reiterating my conviction that the best available protection for the protection for our men and women in the military services when serving abroad is afforded by the terms of the Treaty of Rome.

Treaty of Rome	U.S. Constitution
Presumption of Innocence "Everyone shall be presumed to be innocent until proven guilty before the Court..." (Art. 66)	"The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law." *Coffin v. United States*, 156 U.S. 432, 453 (1895)
Speedy & Public Trial "...the accused shall be entitled to a public hearing..." "the accused shall be entitled...to be tried without undue delay;..." (Arts. 67(1), 67(1)(c)	"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial,..." (Amendment IV)
Assistance of Counsel "...the accused shall be entitled...to communicate freely with counsel of accused's choosing..." "...the accused shall be entitled...to have legal assistance assigned by the Court where the interests of justice so require, and without payment if the accused lacks sufficient means to pay for it;..." (Arts. 67(1)(b), (d))	"In all criminal prosecutions, the accused shall enjoy the right...to have the Assistance of Counsel for his defence." (Amendment VI)
Right to Remain Silent "...the accused shall be entitled...not to be compelled to testify or to confess guilt and to remain silent, without such silence being a consideration in the determination of guilt or innocence;..." (Art. 67(1)(g))	"No person...shall be compelled in any criminal case to be a witness against himself..." (Amendment V)
Privilege Against Self-Incrimination "...the accused shall be entitled...not to be compelled to testify or to confess guilt..." (Arts. 54(1)(a), 67(1)(g))	"No person...shall be compelled in any criminal case to be a witness against himself..." (Amendment V)
Right to Written Statement of Charges "...the person shall be provided with a copy of the...charges..." (Art. 61(3))	In all criminal prosecutions, the accused shall enjoy the right...to be informed of the nature and cause of the accusation;..." (Amendment VI)
Right to Examine or to Have Examined Adverse Witnesses "...the accused shall be entitled...to examine, or to have examined...the witnesses against him or her..." (Art. 67(1)(e))	In all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him;..." (Amendment VI)

Treaty of Rome	U.S. Constitution
Right to Compulsory Process to Obtain Witnesses "...the accused shall be entitled...to obtain the attendance and examination of witnesses on his or her behalf..." (Art. 67(1)(e))	In all criminal prosecutions, the accused shall enjoy the right...to have compulsory process for obtaining witnesses in his favor,..." (Amendment VI)
Prohibition against Ex Post Facto Crimes "A person shall not be criminally responsible...unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court." (Art. 22)	"No Bill of Attaninder or ex post facto Law shall be passed." (Art. I, sec. 9, cl. 3)
Protection against Double Jeopardy "No person who has been tried by another court...shall be tried by the Court with respect to the same conduct..." (Art. 20)	"...nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb;..." (Amendment V)
Freedom from Warrantless Arrest & Searches "...the Pre-Trial Chamber may...issue...warrants as may be required..." "...if it [the Pre-Trial Chamber] is satisfied that there are reasonable grounds to believe that the person has committed a crime...and the arrest of the person appears necessary..." (Arts. 57 bis (3), 58))	"[N]o Warrants shall issue, but upon probable cause..." (Amendment IV)
Right to be Present at Trial "The accused shall be present during the trial." (Art. 63)	"One of the most basic of the rights guaranteed by the Confrontation Clause is the accused's right to be present in the courtroom at every stage of his trial." *Illinois v. Allen*, 397 U.S. 337, 338 (1970) (*Citing Lewis v. United States*, 146 U.S. 370 (1892))

Treaty of Rome	U.S. Constitution
Exclusion of Illegally Obtained Evidence "Evidence obtained by means of a violation of this Statute or internationally recognized human rights shall not be admissible..." (Art. 69(7))	When evidence is obtained in violation of the Fourth Amendment, the judicially developed exclusionary rule usually precludes its use in a criminal proceeding against the victim of the illegal search and seizure. *Illinois v. Krull*, 480 U.S. 340, 347 (1987) (*Citing Weeks v. United States*, 232 U.S. 383 (1914); *Mapp v. Ohio*, 367 U.S. 643 (1961)).[1]
Prohibition against Trials *in absentia* "The accused shall be present during the trial." (Art. 63)	When defendant knowingly absents himself from court during trial, court may "proceed with trial in like manner and with like effect as if he were present." *Diaz v. United States*, 223 U.S. 442, 455 (1912)[2] The language, history, and logic of Rule 43 support a straightforward interpretation that prohibits the trial in absentia of a defendant who is not present at the beginning of trial. *Crosby v. United States*, 506 U.S. 255, 262 (1993)

[1] The exclusionary rule is a judicially created means of deterring illegal searches and seizures. *United States v. Calandra*, 414 U.S. 338, 348 (1974). As such, the rule does not "proscribe the introduction of illegally seized evidence in all proceedings or against all persons," *Stone v. Powell*, 428 U.S. 465, 486 (1976), but applies only in contexts "where its remedial objectives are thought most efficaciously served," *Calandra*, 414 U.S. at 348; See also *United States v. Janis*, 428 U.S. 433, 454 (1976) ("If ... the exclusionary rule does not result in appreciable deterrence, then, clearly, its use in the instant situation is unwarranted"). Because the rule is prudential rather than constitutionally mandated, the Court has held it to be applicable only where its deterrence benefits outweigh its "substantial social costs." *United States v. Leon*, 468 U.S. 897, 907 (1984).

[2] *Diaz* was cited by the Advisory Committee that drafted Federal Rule of Criminal Procedure Rule 43. The Committee explained: "The second sentence of the rule is a restatement of existing law that, except in capital cases, the defendant may not defeat the proceedings by voluntarily absenting himself after the trial has been commenced in his presence." Advisory Committee's Notes on Fed.Rule Crim.Proc. 43, 18 U.S.C.App., p. 821. There is no reason to believe that the drafters intended the Rule to go further. Commenting on a preliminary version of the Rule, Judge John B. Sanborn, a member of the Committee, stated: "I think it would be inadvisable to conduct criminal trials in the absence of the defendant. That has never been the practice, and, whether the defendant wants to attend the trial or not, I think he should be compelled to be present. If, during the trial, he disappears, there is, of course, no reason why the trial should not proceed without him." 2 M. Wilken & N. Triffin, Drafting History 261 of the Federal Rules of Criminal Procedure 236 (1991).

STATEMENT OF THE LAWYERS COMMITTEE FOR HUMAN RIGHTS, FOR THE HEARING ON "THE INTERNATIONAL CRIMINAL COURT: A THREAT TO AMERICAN MILITARY PERSONNEL?"

JULY 25, 2000

The United States has compelling reasons to remain open to eventual cooperation with the International Criminal Court (ICC). United States interests may dictate such cooperation, even while the US remains a non-party to the Rome Statute. The 'American Service Members Protection Act' (H.R. 4654) would seriously endanger such cooperation, and thereby damage the U.S. national interest. The following paper describes the U.S. interest in supporting the ICC.

I. A strong and independent International Criminal Court serves important national interests of the United States.

At the end of World War Two, 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 Two. 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 Two.

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.