

**THE INTERNATIONAL CRIMINAL COURT: PANACEA OR EXERCISE IN
FUTILITY?**

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GOVERNMENT**

28 MAY 2002

PREFACE

With the collapse of the Soviet Union in the late 1980's, a feeling of euphoria gripped the world. No longer applicable was the Cold War paradigm emphasizing a bipolar world. The ideological struggle between democratic and communist societies that had dominated global politics, economic systems, and military competition for the previous half century had been decided. The world had made its choice – democracy had won. Francis Fukuyama advanced his “end of history” thesis: “We may be witnessing the end of history as such, that is, the end point of mankind’s ideological evolution and universalization of Western liberal democracy as the final form of human government.” (Fukuyama, p. 4) He wasn’t alone. This belief was widely held and people eagerly anticipated a new world order based on harmony and a system of shared values.

It soon became apparent that this was an illusion. The 1990s were not a decade of harmony and peace. The collapse of the Soviet Union was, in fact, destabilizing. The West may not have a dragon as an enemy anymore, but as one government official noted, it now had a thousand snakes. The previously held view that the world had only two choices – democracy or communism – and the collapse of one meant the acceptance by default of the other was wishful thinking. Additionally, the global community became increasingly familiar with concepts and words – some old, some new, all troubling – that violently defined the world’s progression from the twentieth to the twenty first century: ‘multi-cultural disintegration’, ‘ethnic cleansing’, ‘transnational terrorism’, ‘genocide’, ‘jihad’, and even ‘concentration camps’. Instead of a new world order, a new world disorder was closer to the truth.

This new world disorder was exemplified by human rights violations in the former Yugoslavia and Rwanda. Attempts to deal with these abuses resulted in the establishment of international criminal tribunals (International Criminal Tribunal Rwanda or ICTR and International Criminal Tribunal Yugoslavia or ICTY), which were widely seen as test cases for future international justice systems. The ICTY was established in May 1993, based in the Hague, and was meant to do what the Yugoslavian domestic courts could not: prosecute those accused of severe violations of humanitarian law on the territory of the former Yugoslavia since 1991. The violations included breaches of the 1949 Geneva Conventions, war crimes, genocide, and crimes against humanity. In November 1994, the Rwanda tribunal was created and entrusted to prosecute those responsible for the 1994 slaughter of 800,000 people – mainly minority Tutsis and moderate Hutus – in and around that African state.

Both these tribunals have their proponents and detractors. Proponents point to the conviction by the ICTR in September 1998 of Jean-Paul Akayesu for crimes against humanity, genocide, and other violations. He received a life sentence, marking the first international sentence for genocide, as well as the first conviction of a former head of government by an international tribunal. They also laud the arrest and detention of former Yugoslav President Slobodan Milosevic for crimes in Kosovo in 1999. However, detractors claim that the tribunals were created primarily out of global frustration that little was done while the events were unfolding, that the pace of the proceedings has been glacial, that there is a Western bias, and that the price has been too high (\$595 million collectively, according to Daisy Sindelar in a September 2001 article for Radio Free Europe) for relatively few convictions.

Frustration with the present systems of international justice has resulted in the attempt to develop an International Criminal Court (ICC). Accordingly, the ICC was established by the 1998 Rome Statute and would be a permanent international court for trying the crime of genocide, crimes against humanity, war crimes, and the crime of aggression. Unlike the international war crimes tribunals, which employ specially appointed legal officials to rule on specific regional crimes, the ICC would hear cases on humanitarian crimes committed in any of the countries that have ratified the statute. Legal experts around the world have hailed the ICC as the product of a truly multicultural effort to create an impartial and rigorous forum for prosecuting future human rights abusers.

Three years later the number of ratifying states continues to grow. According to Statute, the ICC will enter into force on the first day of the month after the 60th day following the deposit of the 60th instrument of ratification. Following entry into force, the framework of the court will be put into place and the court's senior officials elected during an approximate 12 month time period. As of 11 April 2002, the Rome Statute of the ICC has the required ratifications.

It is becoming more apparent, however, that the Statute of Rome is flawed in its structure, its lack of true universal acceptance, and in its enforcement. Its primary focal point is human rights, and human rights (as they are interpreted today) are inherently adversarial to states' sovereignty in that the rights of the individual take precedence over the rights of the state (Michael Ignatieff, Harvard author and lecturer, makes this point in his class on Human Rights). The ceding of sovereignty to a 'court of last resort' is a

significant obstacle to universal acceptance, especially from powerful nations that have everything to lose and very little to gain.

Additionally, the perceived Western bias of its architecture, adherent's disclaimers notwithstanding, presents another stumbling block that is not likely to be overcome anytime soon. Questions soon arise regarding this treaty – Which countries are not signing the treaty, and why not? Will the treaty be truly international in scope? Will it in fact be at best a regional agreement between the countries least likely to violate it, or a scrap of paper demonstrating once again a global inability to reach a consensus on self-restraint? And, more importantly, who will ensure compliance with its adjudications, especially if military force is required?

This paper will explore the questions raised by examining two countries (the United States and China), their opposition to the treaty, and the ramifications of their actions on the universality of the ICC and its enforcement. Islamic countries dominated will also be examined. The United States' opposition to the Rome Statute will be examined based on issues of sovereignty, China's on the basis of sovereignty and differing values (Confucian ideology), and Islamic countries on the basis of values and rejection of Western ideals.

Why these three in particular? The United States was chosen because it is the leader of the West, the last superpower, and withholding its signature from the treaty would deprive the ICC of important moral and legal support, its enforcement capability, and much of its financial base. China was chosen because of its increasing prominence on the world stage, at the present time being a regionally dominant entity, but destined to become a truly global political, economic, and military power.

Islamic countries were chosen for a variety of reasons. It is conceded that Islam is not a country and therefore not a signatory to the Rome Treaty. However, the fact remains that it represents a quarter of the world's population, a large portion of the Earth's landmass with its corresponding natural resources and strategic locations, and is a force to be reckoned with. Furthermore, its adherents have a transnational or even tribal allegiance to Islam as opposed to allegiance to a traditional state. Recent events illustrate its increasing importance on global dynamics, and based on its influence in a large number of countries it cannot be ignored. It is highly unlikely that a country with a significant Muslim population will ever sign the Statute of Rome (At the time of this paper, Jordan has been the only *Arabic* country to ratify).

An examination of the issues stated above and explored in the following pages should lead the reader to the following conclusions: several countries that could give the ICC additional moral credibility, enforcement capability, and a firm financial foundation will never sign; the Statute of Rome has a perceived, distinctly Western bias; and finally, the ICC will not be an effective mechanism for universal jurisprudence, because its requirements for credible force and political will to ensure deterrence, compliance, and punishment are non-existent.

THE UNITED STATES

Before a discussion can be undertaken with regard to the United States opposition to the Treaty of Rome, it would be beneficial to develop the underlying rationale for this opposition and why it exists not merely in the decision-making apparatus of government, but in the cultural makeup of the average American. To begin with, the United States is inherently isolationist in its outlook. This viewpoint can be traced back at least as far as George Washington's Farewell address:

The great role of conduct for us, in regard to foreign nations, is in extending our commercial relations to have with them as little political connection as possible...Europe has a set of primary interests, which to us have none, or a very remote relation. Hence she must be engaged in frequent controversies, the causes of which are essentially foreign to our concerns...'Tis our true policy to steer clear of permanent alliances, with any portion of the foreign world...'Tis folly for one nation to look for disinterested favors from another...There can be no greater error than to expect, or calculate upon real favors from nation to nation. 'Tis an illusion which experience must cure, which a just pride ought to discard. (Ellis, p.152)

Two world wars and an untold number of crises underscore the wisdom of this advice given over 200 years ago. The globalization effort with all its implications notwithstanding, when left to his own devices, the average American would just as soon stay out of other countries' business and wishes to have the same courtesy extended to him. Suspicion of international obligations (foreign entanglements) runs deep within the psyche of Americans, even though no country is more involved politically, economically, or militarily on the international front. Elected government officials understand this paradox reflexively, and those that don't ignore it at the peril of their professional lives. In short, treaty obligations that cede American sovereignty to a foreign judicial body would in all likelihood result in an administration's political suicide.

In line with this thought is the fact that as Americans, we are different. We are not Europeans. As Chris Matthews puts it,

...that word freedom isn't just in our documents; it's in our cowboy souls. We are the most freedom-loving people in the world. We'd rather have guns than live under a government powerful enough to collect them all. We regularly say 'no' to a British-style national health system, fearing it means a regime of long lines to see strange doctors. Many people with grave concerns about abortion would rather see women decide the matter rather than live under a government repressive enough to deny them the freedom to decide. (Matthews, p.34)

This attitude also illustrates the American belief in limitations on governmental power, properly defined by constitutional checks and balances.

The American concept of separation of powers reflects the belief that liberty is best protected when, to the maximum extent possible, the various authorities legitimately exercised by government are placed in separate branches. The founding fathers believed so structuring the national government would prevent the excessive accumulation of power in a limited number of hands, thus providing the greatest protection for individual liberty. Continental European constitutional structures do not, by and large, reflect a similar set of beliefs: they do not so thoroughly separate judicial from executive powers, just as their parliamentary systems do not so thoroughly separate executive from legislative powers. While that is certainly their prerogative, it goes a long way toward explaining why they appear to be more comfortable with the ICC structure, which closely melds prosecutorial and judicial functions in the European fashion.

In addition, the United States Constitution provides that the discharge of executive authority will be rendered accountable to the citizenry in two ways. First, the law enforcement power is exercised only through an elected president. The president is constitutionally charged with the responsibility to "take care that the laws be faithfully

executed”, and the constitutional authority of the actual law enforcers stems directly from the president, who is the only elected executive official. Second, Congress, all of whose members are elected, exercises significant influence and oversight both through its statute-making authority and through the appropriations process. When necessary, the congressional impeachment power serves as the ultimate safeguard. (Paraphrased, Bolton, p. 43-44)

In European parliamentary systems, these sorts of political checks are either greatly attenuated or entirely absent, just as with the ICC’s central structures, the court and prosecutor. They are accountable to no one. The prosecutor will answer to no superior executive power, elected or unelected. Nor is there any legislature anywhere in sight, elected or unelected, in the Statute of Rome. The prosecutor and his future investigatory, arresting, and detaining apparatus are answerable only to the court, and then only partially. Europeans in particular have come to accept increasing limitations on their sovereign rights, to the point of permitting significant elements of their foreign and domestic policies to be formulated by the European Union’s bureaucracy in Brussels, rather than by their own elected national legislatures. (Rivkin and Casey, p. 42) This unchecked, unaccountable power, however, is diametrically opposed to American constitutional precepts. The Europeans may be comfortable with such a system, but Americans by and large are not.

The sovereignty issue is indeed the key to the U.S. reluctance to sign the treaty. The countries that have signed the treaty thus far also acknowledge this fact. Of the 66 countries that have ratified the treaty on the ICC, most say they willingly accept the possible surrender of sovereignty in exchange for the court’s role in protecting human

rights. Croatia's ambassador to the United Nations, Ivan Simonovic, says that ratifying the Rome statute was relatively easy for his country. He stated, "What Croatia wanted to show with the ratification of the Rome statute is *that we are willing to reduce our own sovereignty* for the sake of international protection of the most basic human rights if other countries choose to do the same. Croatia has already begun to make changes to its judicial system so that it can process some of the serious crimes envisaged by the ICC." Simonovic goes on to state that he understands the reluctance of the United States, as the world's superpower, to hand over part of its sovereignty to an international court: "*I think that it's something that is frightening that we are willingly restraining a part of our sovereignty*. Perhaps it's even more challenging for a superpower like the United States." (Radio Free Europe web site, 11 Sep 2001, italics mine)

Another aspect of the creation of a body of universal jurisprudence was the prominence of non-governmental organizations (NGOs), which have been a leading force in the process of promoting and adopting international treaties and conventions. NGOs have been arguing that they are able to represent public aspirations at both the national and global levels better than any government. While it is obvious such claims are patently false, that NGOs themselves are not elected, are not accountable to any body politic, and are not any better than other special interest group, such groups have had considerable success in shaping new international law. (Rivkin and Casey, p. 37)

Amnesty International is one such NGO, and is well known for its diatribes against alleged U.S. human rights violations. The following is an illustration:

"There is a persistent and widespread pattern of human rights abuses in the USA... Systematic brutality by police has been uncovered by inquiries into some of the country's largest urban police departments...Across the USA, people have been beaten kicked, punched, choked and shot by police officers, even when they posed

no threat...In another denial of the rights to life and freedom from cruel treatment, more than 350 prisoners have been executed since 1990. A further 3,300 people await their deaths hands of the U.S authorities. Fuelled by politicians making inflammatory and false claims about the death penalty, the rate of executions and the number of crimes punishable by death has relentlessly increased. International human rights standards aim to restrict the death penalty; they forbid its use against juvenile defenders, see it as unacceptable punishment for the mentally impaired, and demand the strictest legal safeguards in capital trials. In the USA, the death penalty is applied in an arbitrary and unfair manner and is prone to bias on the grounds of race or economic status. In all these areas – the conduct of police, the treatment of prisoners and asylum seekers, and the death penalty – Amnesty International calls on the USA to bring its laws and practices into line with international standards. (Amnesty International USA, p. 3)

In another paper dealing with supposed U.S. double standards and international human rights protection, Amnesty International states – “The USA’s resistance to international human rights commitments is demonstrated by its delays in ratifying human rights treaties and its use of reservations to undermine a treaty’s full protection.” (Amnesty International, p. 128) But the stipulated delays and reservations are an inherent part of our constitutional process. For instance, our Senate cannot accept the Statute of Rome’s definition of genocide unless it is prepared to reverse the position it took in February 1986 in approving the Genocide Convention of 1948. At that time, the Senate attached two reservations, five understandings, and one declaration. By contrast, Article 120 of the Statute of Rome provides explicitly and without any exceptions that “no reservations may be made to this Statute.”

Thus, confronted with the statute’s definition of “genocide” that ignores existing American reservations to the underlying Genocide Convention, the Senate would not have the option of attaching those reservations (or any others) to any possible ratification of the Rome statute. Unable to make reservations to the statute, the United States would risk interpretations by a politically motivated court. It also appears that the “no

reservations” clause is directed primarily against the United States and its Senate. It is a treaty provision no American president should ever agree to. (Bolton, p. 39)

It should also be noted that under the United States Constitution, any Congress may, by law, amend an earlier act of Congress, *including treaties*, thus freeing the United States unilaterally of any obligation. This can best be illustrated by the Chae Chan Ping case of 1889, in which the Supreme Court stated:

“A treaty is in its nature a contract between nations, and is often merely promissory in its character, requiring legislation to carry its stipulations into effect. Such legislation will be open to future repeal or amendment. If the treaty operates by its own force, it can be deemed in that particular only the equivalent of a legislative act, to be modified or repealed at the pleasure of Congress. *In either case the last expression of sovereign will must control.* (Italics mine)

If the proponents of the ICC have their way, this process will be subverted.

Another troubling aspect of the Rome Treaty is that the court claims to exercise “universal jurisdiction”, which will theoretically allow it to prosecute American citizens when their actions, or the effects of their actions, take place on the territory of a state that has signed the ICC treaty. The danger here is not limited to the potential actions of the ICC. Based on the “universal jurisdiction” theory – which suggests that any state can prosecute international humanitarian violations wherever they occur, whether or not that state’s own citizens are involved – any state, or even a low-level foreign magistrate, can begin a prosecution against American or civilian officials. This was the case with the former Chilean dictator Augusto Pinochet, who traveled to England for medical treatment in 1998. Pinochet was widely held responsible for the torture and deaths of thousands of Chileans during his 17 years of rule. Never tried at home, he was detained after his arrival in England and held for 16 months at the request of a Spanish judge seeking to try the former military leader for crimes committed in Chile against Spaniards. Both Britain’s

Law Lords and Spain's highest criminal court upheld the move. Although Pinochet was eventually released and sent home for health reasons, his landmark detention gave universal jurisprudence a new global importance.

Another example occurred in Belgium, which recently began a criminal investigation against Israeli Prime Minister Ariel Sharon for a 1982 massacre of Palestinians in Lebanese refugee camps. The possibility that Belgium could eventually indict the sitting head of an outside government for alleged crimes committed outside Belgium underscores the premise that an ICC employing the concept of "universal jurisdiction" could engage in what Henry Kissinger calls "judicial tyranny". (Kissinger, p. 27) Belgium is the only country that allows its courts to prosecute anyone in the world for war crimes, wherever they were committed, and there are a number of cases 'in the pipeline', with complaints lodged against Iraq's President Saddam Hussein, Iran's former President Ali Akbar Rafsanjani, and the presidents of Chad, Guatemala and the Ivory Coast. *Some government officials say they believe it is only a matter of time before the law is used to lodge complaints against senior U.S. and European politicians.* This exemplifies everything that is wrong with a universal judicial body

Additionally, two offenses addressed in the Rome statute – war crimes and crimes against humanity – are couched in vague language that an activist court and prosecutor could essentially interpret without limit. A fair reading of the treaty leads one to conclude that the United States could be found guilty of war crimes for its bombing campaigns over Germany and Japan in World War II. How will these types of phrases be interpreted? Who will advise that a U.S. president is unequivocally safe from retroactive imposition of criminal liability? These questions have not been adequately answered, and

indeed further investigation concerning the use of military force would also place American servicemen in danger of prosecution. As the world's pre-eminent military power, with global interests and responsibilities, the United States should be very concerned about any effort to create international judicial institutions capable of prosecuting individual soldiers, officers, and elected officials in the chain of command.

This prospect takes on a new reality with the events of September 11th and the United States subsequent campaign in Afghanistan. America's adversaries will surely argue that the attack is illegal and that the United States is guilty of crimes against humanity. Regardless of American claims of self-defense – possibly citing Article 51 of the U.N. charter, which permits states to defend themselves – victims of the U.S. attacks would almost certainly make counterclaims.

There is precedent. For instance, some Serbian families have filed cases in the European Court of Human Rights alleging that the U.S. bombing campaign deprived their relatives of their “right to life” enshrined in the European Convention on Human Rights. The case is still pending. (Kaminski and Hofheinz, Sep 18, 2001) A U.N. tribunal on Yugoslavia said NATO leaders or officers shouldn't face war crimes charges, but the court questioned NATO's targeting of Serbia's national television headquarters and the use of cluster bombs. In its Final Report to the Prosecutor reviewing these charges, the crux of the issue was highlighted: “It is unlikely that a human rights lawyer and an experienced combat commander would assign the same relative values to military advantage and to injury to noncombatants. Further, it is unlikely that military commanders with different doctrinal backgrounds and differing degrees of combat

experience or national military histories would always agree in close cases.” (Final Report, para. 50)

The key issue here, of course, is that injuries to noncombatants and their property (collateral damage) are an inherent and unavoidable consequence of combat. One of the “war crimes” prosecutable in the ICC is defined as – “intentionally launching an attack in the knowledge that such an attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.” This is subject to interpretation – regardless of whether the force commander is rigidly adhering to guidelines of proportionality – and seems to suggest that zero civilian casualties and no collateral damage are not only attainable outcomes in modern combat, but that these should be the norm. As one who has actually participated in combat and experienced what Clausewitz would call “friction” – unforeseen and unplanned events that occur with the dynamics of a combat situation – I can assure the reader that ensuring full compliance with this precept would be virtually impossible.

Another crime punishable by the ICC is the crime of “aggression”, which, although included in the Rome Statute, was not defined. Although frequently easy to identify, aggression can at times be in the eye of the beholder. As John Bolton notes:

Israel justifiably feared during the negotiations in Rome that its preemptive strike in the Six Day War almost certainly would have provoked a proceeding against top Israeli officials. Moreover, there is no doubt that Israel will be the target of a complaint in the ICC concerning conditions and practices by the Israeli military in the West Bank and Gaza. The United States, with continuous bipartisan support for many years, has attempted to minimize the disruptive role that the United Nations has too often played in the Middle East peace process. We do not now need the

ICC interjecting itself into extremely delicate matters at inappropriate times. That is why Israel voted with the U.S. against the statute. (Bolton, p. 40)

The potential for abuse of power in the enforcement of an ill-defined and subjective term such as “aggression” is readily apparent.

Proponents of an ICC also make the claim that it will have a substantial deterrent effect against the perpetration of grievous crimes against humanity. This claim is made with virtually no evidence to support it, and quite a bit to refute it. Recent history is replete with examples where even strong military force or the threat of its use failed to deter gross human rights violations such as ethnic cleansing. It is hard to conceive of a situation of a court dissuading someone from an aggressive act when a 2000-pound laser guided bomb does not. Not only that, but what proponents fail to realize is that many of these hatreds run deep, with ethnic and cultural conflicts that can trace their history back in many cases hundreds of years (Or more – the Israeli/Arab conflict can be traced back to Isaac and Ishmael, sons of Abraham). The terrorist attack of September 11th is another illustration of the inadequacy of this position. The prospect of certain death did not deter the terrorists in any way, shape, or fashion. There are undoubtedly many more like them. Would a standing ICC have deterred these men, or Hamas suicide bombers, and would it be likely to do so in the future? It is highly unlikely.

But what is likely, if one considers the deterrence aspect from all angles, is that the ones most likely to be deterred from action are the ones that should be empowered to act. With the prospects of legal action being taken against those responding militarily to a perceived “war crime”, “crime against humanity”, “human rights violations”, or “aggression” – no matter how well supported internationally – it becomes less and less likely that appropriate military action will ever be taken, and certainly not in a timely

fashion. Perpetrators of these heinous crimes know this, know that time is on their side, and that by the time the international community gets its act together, they will then be facing a fait accompli. Winston Churchill pointed this out years ago, noting that “Virtuous motives, trammled by inertia and timidity, are no match for armed and resolute wickedness.” (Churchill, p. 87) He might also have added that those who do not pay attention to history are doomed to repeat it.

The last aspect of deterrence concerns the punishment that will be enacted by the court, since punishment – swift and sure – is, in fact, a cornerstone of the deterrence proposition. But the death penalty cannot be invoked, so the worst punishment that can be proscribed is some period of incarceration in a facility where the detainees will be assured that all their human rights are diligently adhered to. Therefore, an individual guilty of the most heinous crimes, possibly the wholesale slaughtering of thousands if not millions of innocent people, will therefore be faced with, at most, a sentence of lifetime imprisonment. Proponents would submit that a lifetime of imprisonment is enough punishment, worse than the death penalty, while detractors would submit that detention in an EU facility with guaranteed human rights observations would be inadequate. Another interesting point is that even a lifetime imprisonment is not a sure bet, and even if it is enacted, may be commuted later. This is not justice and it is not deterrence, its an invitation to commit mass murder with little prospect of prosecution and less of punishment.

Another concept that we will examine regarding United States objections is with respect to the human rights issue. As we have mentioned previously, NGOs like Amnesty International have a laundry list of alleged human rights violations that the United States

has perpetrated. Ratifying the Treaty of Rome will not only lead to increasing litigation in our own judicial system – with every Ruby Ridge, every Waco, every Elian Gonzalez decision, etc. having to be defended ad infinitum, with government officials at all levels being held criminally liable in domestic and international courts – it could lead to the indictment of a standing president of the United States and his possible incarceration. This is an issue that proponents of the ICC do not wish to discuss, but their attempts to dismiss it as not viable do not make the possibility any less real or the danger less potent.

Aligned with the concept of human rights violations and the fact that nebulous definitions invite abuse, is the realization that any non-elected prosecutorial body is likely to be highly political in both complement and adjudication. The existing record of adjudication is not encouraging. Few observers argue that the International Court of Justice (ICJ) – the so-called World Court – has garnered the legitimacy sought by its founders in 1945. This is highly ironic when one considers that much of what was said then about the ICJ anticipates recent claims by ICC supporters. These touching sentiments were not borne out in practice for the ICJ, which has been largely ineffective when invoked and more often ignored in significant international disputes.

Among the several reasons why the ICJ is held in such low repute, and what is candidly admitted privately in international circles, is the highly politicized nature of its decisions. Although ICJ judges supposedly function independently of their governments, their election by the U.N. General Assembly is thoroughly political, involving horse-trading among and within the United Nations' several political groupings. Once elected, the judges vote along highly predictable national lines except in the most innocuous of cases. We do not need a repetition of this hypocrisy. (Bolton, p. 46-7)

If the above United States reservations with the associated rationale concerning the ICC are taken into account – historical reluctance of Americans to engage in international agreements; constitutional safeguards; differences in the European and American systems of government; the subjectiveness of the language used in the treaty and its potential for abuse; and the fallacious argument with respect to deterrence, all of which revolve around the cession of sovereignty to a non-elected, non-accountable body empowered with universal jurisdiction – the reader will likely come to the same conclusion as the author: it is highly unlikely that the United States will ever ratify the treaty of Rome.

CHINA

China's aversion to the Statute of Rome, as stated in the preface, is based on her increasing economic, political, and military might and the implied threat of an ICC to her sovereignty. Additionally, China's value system, primarily Confucian based and somewhat suppressed until a recent resurgence, resents the imposition of what are perceived as Western ideals on an emerging regional power. The following pages will be devoted to exploring these issues and their impact on the ratification of the Rome Statute.

China is a country with one of the largest homogenous cultures, with a population of over 1.3 billion covering a territory of approximately 4 million square miles. For two millennia China was the dominant force in East Asia. However, in 1842, the British imposed the Treaty of Nanking on China by the British and initiated a century of perceived humiliation and subordination to the West. China's dynastic and imperial order collapsed and foreign powers imposed extraterritorial and colonial rights. From the mid-nineteenth to the mid-twentieth century, China experienced foreign occupation and war, massive and bloody civil wars and insurrections, violent ideological struggles and revolutionary ferment, threats of nuclear attack, and, according to the Chinese view, unresolved national partition in the form of Taiwan's continued political separation from the mainland. (Gill, p.3-4) A range of competing philosophies and concepts emerged – from democracy to communism – and vied for control. Soviet-imported communism won the day and China was re-formed as a socialist country.

However, Communism failed to produce economic development, and with its total collapse in the late 1980s the Chinese leadership was faced with the issue of whether

to turn Westward or inward. Many intellectuals and some others advocated adoption of Western or democratic ideals, but Tiananmen Square and the repression that followed illustrated the fact that this Western orientation never really enjoyed widespread support from either the masses or the ruling elite. The leadership instead chose an amalgamation – capitalism and involvement in the world economy, on the one hand, combined with political authoritarianism and recommitment to traditional Chinese culture, on the other. (Adapted from Huntington, p. 105)

This economic reform actually started even earlier – in 1979. Prior to 1979, China maintained a centrally planned, or command, economy, in which a large share of the country's economic output was directed and controlled by the state, which set production goals, controlled prices, and allocated resources throughout most of the economy. During the 1950s, all of China's individual household farms were collectivized into large communes. To support rapid industrialization, the central government during the 1960s and 1970s undertook large-scale investments in physical and human capital. As a result, by 1978 nearly three-fourths of industrial production was produced by centrally controlled state-owned enterprises (SOEs) according to centrally planned output targets. A central goal of the government was to make China's economy relatively self-sufficient. Foreign trade was generally limited to obtaining only those goods that could not be made or obtained in China. (Congressional Research Service, p. 1)

China launched several economic reforms beginning in 1979. New and more complex features of a decentralized system have replaced most of the features associated with the traditional and centralized planning system. The economic decision-making system has been greatly decentralized from the center to the localities, which now have

substantial power in areas such as revenue collection, government expenditure, credit allocation, investment project approval, price and wage control, foreign trade management, and industrial policy formation. Inefficiency due to the rigidity of a central planning system is no longer a significant issue. (Ma, p. 4)

Since the introduction of economic reforms, China's economy has grown substantially faster than the pre-reform period. Chinese statistics show real GDP from 1979-2000 growing at an average annual rate of 9.5%, making China one of the world's fastest growing economies. According to the World Bank, China's economic reforms have raised nearly 200 million people out of extreme poverty. (Congressional Research Service p. 2. These figures have recently been disputed, however, and the true figures may be closer to 4%.) Other Asian economies – Japan, Indonesia, and South Korea – were influenced both directly and indirectly, even though in some cases their economies were already flourishing. (Mahbubani, p. 100-103)

While the long-term outlook for the Chinese economy remains mixed - China was able to weather the effects of the 1998-1999 Asian financial crisis at the cost of delaying needed economic reforms to the SOEs and the banking system – projections indicate that China will continue to enjoy relatively healthy economic growth in the future. Indeed, China's recent acceptance into the WTO reflects a broad recognition within the Chinese political apparatus that the program of limited market-oriented reforms two decades ago had stagnated. Hai Wen, an economist at Beijing University, argues that joining the WTO was necessary to ensure that China “will take the market economy road and can't turn back.” (Chandler and Pan, November 13, 2001) Additionally, China and 10 Southeast Asian countries have agreed to create a free trade area (FTA) within 10 years, developing

a vast market of over 1.7 billion people. Even if Asian economic growth levels off sooner and more precipitously than expected, the consequences of the growth that has already occurred for Asia and the world are still enormous. (Huntington, p. 103)

Most economists predict that China will continue to enjoy relatively healthy economic growth in the future. Standard and Poor's DRI, a private international forecasting firm, projects China's real GDP will grow by 7.7% in 2001. In the near term (2002-2005), it predicts China's real GDP will rise at an annual rate of 6.8%. Over the long term (2006-2020), it also projects annual real GDP growth at 6.8%. These projections, if accurate, indicate China will likely double the size of its economy every 11 years. On the flip side of the coin, since China's economy is heavily dependent on trade and foreign investment, a major economic slowdown in the United States or European Union could significantly slow China's economy. (Congressional Research Service, p. 14) Nevertheless, if China continues to make the necessary reforms and there are no major external shocks to the world economy, these projections could remain valid.

China's military capability has also improved, both quantitatively and qualitatively, as opposed to much of the rest of the world. After the end of the Cold War, budget allocations for defense in both Russia and Western militaries significantly declined. Soviet Union military forces basically ceased to exist, with only the Ukraine inheriting any significant military capability. Russian forces were greatly reduced in size and were withdrawn from Central Europe and the Baltic states. At the same time, under the plans of the Bush and Clinton administrations, U.S. military spending dropped by 35 per cent, from \$342.3 billion in 1990 to \$222.3 in 1998. The force structure that year was half to two-thirds what it was at the end of the Cold War. Total military personnel also

fell from 2.1 million to 1.4 million and many major weapons programs have been and are being cancelled. Between 1985 and 1995 annual purchases of major weapons went down from 29 to 6 ships, 943 to 127 aircraft, 720 to 0 tanks, and 48 to 18 strategic missiles. Beginning in the late 1980s, Britain, Germany, and, to a lesser degree, France went through similar reductions in spending and military capabilities. In the mid-1990s, the German armed forces declined from 370,000 to 320,000; the French army dropped strength from 290,000 in 1990 to 225,000 in 1997. British military personnel went down from 377,100 in 1985 to 274,800 in 1993. (Huntington, p. 89)

Trends in China, and indeed all of East Asia differed significantly from those in Russia and the West. Increased military spending and force improvements were manifest with China leading the way. Stimulated by both their increasing economic wealth and the Chinese buildup, other East Asian countries are modernizing and expanding their military forces. While NATO defense expenditures declined by about 10% between 1985 and 1993, expenditures in East Asia rose by 50% in the same period. (Huntington, p. 90)

Most prominently, there is a recognizable and ongoing, intensifying effort by the Chinese military to improve its military capabilities in preparation for a Taiwan contingency in the future. China's missile buildup opposite Taiwan is the most high-profile manifestation of this effort. (Gill, p. 11-12) And while China is not at present time in position to sustain a direct military confrontation with the U.S. or Taiwan, the widely held perception – based in reality – is that China's power regionally is on the ascent and Western power is declining (This is not something that is happening overnight. Some analysts project possibly 20-25 years before parity is achieved).

The result of this expanded economic wealth and military capability is an erosion of Western culture as other beliefs and institutions reassert themselves. Expanding upon this concept, Joseph Nye points out the relationship between “hard power” and “soft power”. Hard power is the power to command resting on economic and military strength, while soft power is the ability of a state to get other countries to want what it wants through the appeal of its culture and ideology. If a state’s culture and ideology are attractive, others will be willing to follow its leadership; hence soft power is just as important as hard command power. (Nye, p. 181-182)

Huntington points out, however, that soft power is power only when it rests on a foundation of hard power. Increases in hard economic and military power produce enhanced self-confidence, arrogance, and belief in the superiority of one’s own culture or soft power compared to those of other peoples and greatly increases its attractiveness to other peoples. *As non-Western societies enhance their economic, military and political capacity, they increasingly trumpet the virtues of their own values, institutions, and culture.* (Italics mine, Huntington, p. 92) The expansion of Western universalistic tendencies and associated values has inspired Chinese renewed efforts to resist these influences and insist on progress based on “Chinese characteristics” (See Lee Kwan Yew’s observations below). (Paraphrased, Gill, p. 3) Correspondingly, as their power declines, the ability of the West to impose Western concepts of human rights, liberalism, and democracy on non-Western societies also declines and so does the attractiveness of those values to other societies.

Nothing illustrates this better than the example of Harry Lee, formerly known as the “best bloody Englishman east of the Suez”, but now better known as Lee Kwan Yew,

the Senior Minister and former ruler of Singapore. He has managed a rather miraculous transformation in Singapore's economy while maintaining tight political control over the country. Even though recently 'retired', he still commands enormous influence and power in the country as Senior Minister, and now travels throughout East Asia dispensing advice on how to achieve economic growth while retaining political stability and control. His stipulation is that the Western system of political and economic development will not work in Asia. And while he doesn't go so far as to admit the existence of an 'Asian Model', he states:

...Asian societies are unlike Western ones. The fundamental differences between Western concepts of society and government and East Asian concepts – when I say East Asians, I mean Korea, Japan, China, Vietnam, as distinct from Southeast Asia, which is a mix between the Sinic and the Indian, though Indian culture also emphasizes similar values – is that Eastern societies believe that the individual exist in the context of his family. He is not pristine and separate. The family is part of the extended family, and then friends and the wider society. The ruler or the government does not try to provide for a person what the family best provides. We have used the family to push economic growth, factoring the ambitions of a person and his family into planning... and we have been able to create economic growth because we facilitated certain changes while we moved from an agricultural society to an industrial society”, and concerning the authoritarian government in China “...the regime in Beijing is more stable than any alternative government that can be formed in China. If the students had carried the day at Tiananmen Square had carried the day, the resulting government would be worse than the Soviet Union. China is a vast, disparate country; there is no alternative to strong central power.” (Zakaria, p. 109-126)

Lee's conclusions are obvious – there are alternatives to Western principles, and these are legitimate, and in fact, superior to the Western ideal. When attempted in an Asian culture, democratic-based ideology will fail.

He is not alone. Observing the differences in Chinese and democratic philosophies, Chinese economist Gao Leyong of Nanjing University noted that:

...the very functioning of democracy depends upon the existence of strong cultural beliefs that are often rooted in the teachings of certain religions. Because of these

strongly held beliefs, people in stable democracies by and large obey the law voluntarily...the religious institutions that lie at the root of their cultures taught people that they should voluntarily be honest; respect the life and property of others; and follow through on contracts and commitments...if you look at those countries where Americans have essentially snapped their fingers and insisted, 'We want democracy here, and we want it now,' the result has been chaos, rather than peace and progress, when a strong cultural foundation grounded in such religious beliefs has not been present. (Christensen and Stevenson, p. 7)

It is increasingly apparent that East Asians in general and the Chinese specifically attribute their economic success to their adherence to their own culture, not to the importation of Western ideals. They seem to be saying that they are succeeding not because of the West, but in spite of it. With this economic success and increased military capability come confidence and a sense of power; there are 'alternatives to the dominant global political, social, and economic arrangements.' *The West is also losing its ability to make Asian societies conform to Western standards concerning human rights and other values.* (Italics mine, Huntington, p. 107)

Therein lies the crux of the issue. China's human rights stance is well known and constantly attacked by virtually all human rights organizations, but threats by various U.S. policy-makers – for instance, the Clinton administration in 1993 and 1994 – to revoke China's Most Favored Nation trading status if dramatic societal changes were not forthcoming, came to naught. In a dramatic reversal, in 1994 President Clinton reneged on a campaign pledge to stop "coddling" China's leaders and declared his intention to form a "strategic partnership" by seeking out areas of cooperation. Engagement replaced multilateral censure and bilateral economic pressure as the preferred foreign policy for addressing China's human rights violations. China itself believes that Western criticism of its human rights record is part of an effort to contain China and prevent it from assuming its rightful place as a world power. (Santoro, p. 74-77)

This all ties in directly with China's views on sovereignty. Although a latecomer to Westphalian nation-state diplomacy, Chinese leaders have anchored their security and diplomatic practice for the past five decades in what has been termed "hyper-sovereignty values". China's stance on sovereignty has remained rigid in rhetoric and almost always inflexible in practice and its leaders argue that concern for human rights, even genocide, can never override inviolable principles of sovereignty. (Feigenbaum, p. 33-34)

Unilateral actions by the U.S. and also in conjunction with its NATO allies (i.e. Kosovo) are viewed with alarm and suspicion and are seen as a direct challenge to China's conceptualization of sovereignty. Ambassador Qin Huasun of China had this to say regarding Kosovo: "The question of Kosovo as an internal matter of the Federal Republic of Yugoslavia, should be resolved among the parties concerned in the Federal Republic... We oppose interference in the internal affairs of other States, under whatever pretext or whatever form." (Franck, p.18) Additionally, the Western propensity to engage in a complex system of international institutions – for example the European Union, NATO, Western European Union, Council of Europe, Organization for Security and Cooperation in Europe, and others – find no equal in East Asia.

The formation of an ICC, where an international tribunal can impose its will on a country, is repugnant to the Chinese, and viewed as a direct challenge to Chinese concepts of sovereignty. Moreover, it is seen as another manifestation of Western arrogance, an attempt to force its concepts of human rights, liberalism, and democracy on other civilizations, supporter's stipulations to the contrary notwithstanding. Bruce Broomhal, one of the more vocal and active advocates for an ICC, is the director of the International Justice Program for the U.S.-based Lawyers Committee for Human Rights.

He states that the Rome Statute is: "... the product of a truly multicultural effort by legal experts around the world to create an impartial and rigorous forum for prosecuting the Saddam Husseins, Pol Pots, and Idi Amins of the future, and that it was negotiated by hundreds of legal experts with input from advocates and human rights activists from around the world, from legal systems in sub-Saharan Africa, Latin America, Europe, North America and Asia". These representatives may have attended, but their input was negligible – otherwise, there would not be the widespread and significant opposition from non-Western countries regarding the Statute of Rome's perceived Western bias.

We have illustrated in some detail - necessarily so, to give the reader a foundation on the Chinese rationale - how China has become an economic, military, and political force that is destined to dominate the Asian sphere for the foreseeable future. This has been accomplished largely with a rejection of the Western ideals and an embracing of those concepts that China has traditionally cherished; its success indicates to the Chinese the moral superiority of their values to the West. It may not be a clash of civilizations, but it most certainly is a clash of ideologies. The fact that China abstained from signing the Statute of Rome – a challenge to their sovereignty and their values – much less ratify it should come as no surprise.

THE ISLAMIC CULTURE

September 11, 2001, may not have changed the world, but it certainly changed America's – and the West's – perception of it. Suddenly, the Western world was confronted with the Islamic culture and its adherence to a system of beliefs and values that appeared to be diametrically opposed to the Western ideal; an extremist religion that promoted civil wars, terrorism, authoritarian rule, and the suppression of basic human rights. The concept of 'jihad' was introduced to a shocked and unbelieving world on a scale that was previously unimaginable. It is well beyond the scope of this paper to delve into the complexities of the Islamic faith. What we can do is provide a thumbnail sketch: look at the historical roots of Islam to determine its value system, and then use that information as a foundation to determine whether or not it is likely that many, if any, Islam dominated countries will ever acquiesce to the Statute of Rome.

Islam is Arabic for "submission to, or having peace with, God", and an adherent of Islam is a Muslim, or "one who submits". It traces its roots to 622 A.D., when Muhammad, accepted by Muslims as the last and greatest prophet, founded it in Saudi Arabia. It is the youngest of the three great monotheistic world religions (the others being Judaism and Christianity) and is the dominant religion throughout large portions of Asia and Africa, especially North Africa, the Middle East, Central Asia, Pakistan, Bangladesh, Malaysia, and Indonesia (the world's largest Muslim country). There are over 935 million Muslims worldwide, less than one-fifth of whom are Arabic.

The salient feature of Islam is its devotion to the Koran, or Qur'an, a book believed to be the revelation of God to Muhammad. Since the Koran is in Arabic, this

language is used in Islam all over the world and therefore the custom of referring to God as Allah, His name in Arabic. The ethos of Islam is its attitude toward God: to Him Muslims submit; Him they praise and glorify; and in Him alone they hope. The ordinary pious Muslim does not distinguish faith from works, as both are indispensable and mutually supplementary. Every Muslim has five duties: to make the profession of faith (“There is no God but Allah, and Muhammad is the messenger of God”), to pray five times a day, to give a regular portion of goods to charity, to fast during the month of Ramadan, and to make at least one pilgrimage (hajj) to Mecca if possible. Alcohol and pork are prohibited and there are injunctions against gambling, usury, fraud, slander, and the making of images. The Sunna, the way or example of the Prophet, supplements the Koran. It consists of the collected sayings and anecdotes of Muhammad. The Ijma, or the agreement of Islam, is expressed in Muhammad’s saying, “My community will never agree in an error”, and is the principle that has enabled Islam to resolve apparent contradictions and maintain both flexibility and unity with the past.

The Koran, the Sunna, and the Ijma are the three foundations of Islam. The fundamental division of Islam into Sunni and Shiites dates from disputes over the succession to the caliphate in the first centuries of the Muslim era. The Shiites believe in twelve Imams, perfect teachers, who still guide the faithful from paradise. Shiite practice tends toward the ecstatic, while the Sunni is staid and simple; the Shiites affirm human free will while the Sunni are deterministic. Additionally, the mystic tradition in Islam is Sufism. A Sufi adept is someone who believes he has acquired a special inner knowledge direct from Allah. The Shiites, by contrast, have fathered countless sects, including the Assassins (more about these later), Druze, Fatimids, Ismailis, and Karmathians. In

Muslim thought, philosophy has never been distinct from theology; theoretically, the state and religious community are one, administered by a caliph. (The above perspective was provided by the 1996 Encyclopedia Britannica.)

Now that a brief historical framework has been established, we can proceed from there into twentieth century applicability. In the 1980s and 1990s there has been an overall trend in Islam in an anti-Western direction. Conflicts between the West and Islam focus less on territory than on broader issues such as weapons proliferation, *human rights and democracy*, control of oil, migration, Islamic terrorism, and *Western intervention*.

Huntington points out several factors to account for this increasing conflict between Islam and the West: 1) Muslim population growth has generated large numbers of unemployed and disaffected young people who become recruits to Islamic causes, exert pressure on neighboring societies, and migrate to the West, 2) the 'Islamic Resurgence' has given Muslims renewed confidence in the distinctive character and worth of their civilization compared to those of the West, 3) the West's simultaneous efforts to universalize its values and institutions, to maintain its military and economic superiority, and to intervene in conflicts in the Muslim world generate intense resentment among Muslims, 4) the collapse of communism removed a common enemy of the West and Islam and left each the major perceived threat of the other, and 5) the increasing contact between and intermingling of Muslims and Westerners stimulate in each a new sense of their own identity and how it differs from that of the other. (Huntington, p. 211)

It is also apparent that while this conflict between Islam and the West may have been on the increase in the past twenty years or so, it is merely a current manifestation of a well-documented rivalry that has been going on since the Crusades. For instance, the

French philosopher Denis Diderot noted in 1774 that, “There is not a Musselman alive who would not imagine he was performing an action pleasing to God and his Holy Prophet by exterminating every Christian on earth, while the Christians are scarcely more tolerant on their side”. (Diderot, Selected Writings) Malcolm X, putting his own particular American slant on Islam, observed in the 1960s that, “There is nothing in our book, the Koran, that teaches us to suffer peacefully. Our religion teaches us to be intelligent. Be peaceful, be courteous, obey the law, respect everyone; but if someone puts his hand on you, send him to the cemetery. That’s a good religion”. (Malcolm X, ch.1)

Jeffrey Goldberg reinforces this thought in an article for the New Yorker in October of 2001. While in Cairo, a well-known professor from Cairo University named Ahmed Youseff gave Mr. Goldberg his interpretation of the differing outlooks of Christianity and Islam, “In Islam, if I slap your cheek, you should slap my other cheek. But in Christianity, Jesus says turn the other cheek”. (Goldberg, p. 48) The implication, in view of the terrorist attacks September 11, is that not only should America refrain from responding, it should offer up other cities as targets. (Jesus also said, “I came not to send peace, but a sword.” I guess professor Youseff skipped over that verse. It is interesting that people throughout history have used selected sacred writings to justify whatever programs of annihilation they are administering to a defenseless and/or unsuspecting population.)

Additionally, one needs look no further than the word “assassin” and its origins. Assassins were members of a secret Islamic order originating in the eleventh century to harass and murder their enemies. The most important members of the order were those

who actually did the killing. Having been promised paradise in return for dying in action, the killers, it is said, were made to yearn for paradise by being given a life of pleasure that included the use of hashish. Hence, the name for the secret order as a whole, *hassasin*, “hashish users”. The application to recent terrorist attacks is real and has an historical basis – some things never change.

With this historical rivalry in values, a comparable amount of territory under their political control compared to the West (West – 24%, Islam – 21%), with a population of adherents that is significantly higher than the West and on the increase (West – 10%, Islam – 19%), and with Islamic practitioners becoming healthier, more urban, more literate and better educated, it is no wonder that countries that are dominated by Muslims feel under no compunction to accept a Western style agreement such as the Statute of Rome. (Huntington, p. 84-85) It is perceived as a forum that will do little more than serve Western political agendas, with small and weak countries being subjected to Western political bias.

Ramesh Thakur is the vice rector of the Peace and Governance program at United Nations University in Tokyo. He says that, to date, universal jurisprudence has betrayed a strong sense of Western bias, with proceedings that resemble nothing more than “judicial colonialism”:

That is what I think the Europeans who tend to assume that their processes and their systems of justice are automatically superior to everyone else, which was a similar belief underlying the historical period of colonialism, that their civilization and values were preferable and so much superior that they should and could be imposed on the rest of the world, and hence colonization. And that’s why I use the phrase judicial colonialism. (Sindelar, p. 4)

This becomes even more apparent when one looks at which countries have ratified the treaty – over one-third are European. And while almost all of Europe has

ratified the Rome Statute, very few Islamic countries have at this point, and indeed, quite a few of them abstained from signing, as did China. But unlike China, it is not really a question of sovereignty per se, since there is not really an Islamic core state. With Islam, it is a rejection of a competing value system, a value system perceived as decadent, corrupt, and immoral.

ENFORCEMENT

At the very crux of any discussion concerning the viability of an International Criminal court lays its ability to enforce its judicial edicts. As stated previously, proponents of an ICC idealize this court as the only effective means of dealing with the “Sadaam Husseins, Pol Pots, and Idi Amins of the future”, having both an effective deterrent and enforcement component. If this is so, and if the primary reasons of establishing an ICC are to bring war criminals to justice or deter them from committing these crimes in the first place, both a credible military force and the willingness to use this force are essential. (United Nations support is implied and is, in fact, essential to execute ICC indictments.) Many of the worst perpetrators of war crimes and crimes against humanity have (or will have) armies of varying sizes and capabilities, and it is not likely that they will surrender of their own volition. The final section of this paper will be devoted to exploring valid issues raised by the above suppositions.

The world has changed fundamentally since the collapse of the Soviet Union and many of today’s conflicts are intrastate rather than between states. According to the General Assembly Security Council’s “Supplement to an Agenda For Peace” in 1995:

With the end of the cold war, the constraints that had inhibited conflict in the former Soviet Union and elsewhere have been removed. As a result, there have been a rash of wars within newly independent states, often of a religious or ethnic character and often involving unusual violence and cruelty. The end of the cold war seems also to have contributed to an outbreak of such wars in Africa. In addition, some of the proxy wars fuelled by the cold war within states remain unresolved. Interstate wars, by contrast, have become infrequent. Of the five peacekeeping operations that existed in early 1988, four related to interstate wars and only one (20 per cent of the total) to an intrastate conflict. Of the 21 operations established since then, only 8 have been related to interstate wars, whereas 13 (62 per cent) have related to intrastate conflicts, though some of them, especially those in the former Yugoslavia, have some interstate dimensions also. Of the 11 operations established since January 1992, all but 2 (82 per cent) relate to intrastate conflicts. (General Assembly, p. 3)

The United Nations is facing significant threats to world peace or international order, and it is not particularly suited in structure or function to deal with these threats. Secretary General Kofi Annan noted in his “We the Peoples” address in 2000:

How far we have moved from a strictly international world is evidenced by the changed nature of threats to peace and security faced by the world’s people today. The provisions of the Charter presupposed that external aggression, an attack by one state against another, would constitute the most serious threat; but in recent decades, far more people have been killed in civil wars, ethnic cleansing and acts of genocide, fueled by weapons widely available in the global arms bazaar. Technologies of mass destruction circulate in a netherworld of illicit markets, and terrorism casts shadows on stable rule. We have not yet adapted our institutions to this new reality. (Annan, p.11)

The United Nations has repeatedly failed to meet the challenges presented by the “new reality”. One of the primary reasons for this failure has been highlighted by the Brahimi Report of 21 August 2001. The Executive Summary states:

For preventive initiatives to succeed in reducing tension and averting conflict, the Secretary-General needs *clear, strong and sustained political support from member states*. Furthermore, as the United Nations has bitterly and repeatedly discovered over the last decade, *no amount of good intentions can substitute for the ability to project credible force* if complex peacekeeping, in particular, is to succeed. But force alone cannot create peace; it can only create the space in which peace may be built. Moreover, the changes the panel recommends will have no lasting impact unless Member States *summon the political will* to support the United Nations politically, financially and operationally to enable the United Nations to be truly credible as a force for peace. (Italics mine, Brahimi Report, p. viii.)

But member states have increasingly expressed an unwillingness to become involved in crises. Boutros-Ghali addressed this in 1992, stating that: “The indifference of the international community to a problem, or the marginalization of it, can thwart the

possibilities of solution”. (Boutros-Ghali, p. 20) Things have not improved since 1992.

The Brahimi report of 2000 also notes that:

The absence of detailed statistics on responses notwithstanding, many member states are saying “no” to deploying formed military units to United Nations-led peacekeeping operations, far more often than they are saying “yes”. In contrast to the long tradition of developed countries providing the bulk of the troops for United Nations peacekeeping operations during the first 50 years, in the last few years 77 per cent of the troops in formed military units deployed in United Nations peacekeeping operations, as of June 2000, were contributed by developing countries. (Brahimi, p.17)

There are a number of reasons for this reluctance, including a lack of defined national interests regarding a particular crisis, a corresponding unwillingness to accept casualties, and a lack of resources due to downsizing. Frustration regarding this lack of response from the international community has led to some calls for the UN to have its own highly trained international volunteer force, willing, proponents argue, to fight hard to break the cycle of violence at an early stage in low-level but dangerous conflicts. Boutros-Ghali addressed this issue in his report An Agenda for Peace, calling for armed forces to be made available to the Security Council on a permanent basis. Brian Urquhart further articulates this concept in the article “For a UN Volunteer Military Force”, in which he states, “...a timely intervention by a relatively small but highly trained force, willing and authorized to take combat risks and representing the will of the international community, could make a decisive difference in the early stages of a crisis”. He goes on to say, “An international force would be under the exclusive authority of the Security Council and under the day-to-day direction of the Secretary-General. To function effectively, it would need the full support of members of the United Nations. Such support should include, if necessary, air, naval, and other kinds of military action. The

volunteer force would be trained in the techniques of peacekeeping and negotiation as well as the more bloody business of fighting”. (Urquhart, p. 3)

There are a number of problems with this concept. For one, formation of a supranational armed force is viewed with justifiable concern, if not outright suspicion, by member states. Secondly, and this is alluded to in the Urquhart article, there is still a significant requirement for support. Troops do not deploy in a vacuum, and there is still a requirement for logistics, naval, air, armor and a host of other types of support. There is a need for real time intelligence using advanced sensor technologies, including unmanned aerial vehicles, thermal imaging systems, and night vision devices. (Adelphi paper 281, p. 18) Satellite communications, state of the art navigation systems, a comprehensive command and control structure, an advanced capability in the field of information warfare, and the ability to convey a complete tactical picture for situational awareness is instrumental. There are very few countries that can provide any of these, and only the United States can supply them all.

Thirdly, from where are the volunteers recruited, trained, funded and equipped? And to whom do they owe their allegiance? Would a paid, professional cadre of soldiers be no more than mercenaries? Urquhart attempts to defuse this issue by saying that, “...outstanding leadership, high standards of recruitment, training, and performance, and dedication to the principles and objectives of the UN should help address such concerns”; that, “...a five-thousand strong light infantry force would cost about \$380 million a year to maintain and equip, if surplus equipment could be obtained below cost from governments”; and finally, such concerns [that], “...there would be more than enough volunteers from around the world for an elite peace force of this kind. The problem

would be to select, organize and train the best of them, develop a command and support structure, and form them into suitable operational units”.

I will not argue the fact that volunteers would be available – an ad in Soldier of Fortune magazine would probably suffice for a veritable bonanza. But a paid, professional soldier with allegiance to nebulous concepts of world peace as opposed to defense of a country fits most people’s concept of a mercenary. The price tag is also debatable, the ‘surplus, below cost equipment’ provided notwithstanding. This would provide an absolute baseline – an infantry with little, if any, of the essentials delineated above. Additionally, the whole concept of a UN volunteer force comes uncomfortably close to alleviating member states of their individual responsibility concerning the preservation of international order – paying someone else to do their dirty work because they are unwilling to become involved.

Unfortunately, recent crises seem to indicate that the forces that are used are either ad hoc coalitions that only respond after much of the damage has already been done (genocide in Rwanda and ethnic cleansing in the Balkans, for instance), or else unilateral campaigns initiated by the United States when perceived national interests are at stake. The reluctance of the international community to become involved, especially with regard to bringing a firmly entrenched dictator to justice, will not go away with the formation of an ICC. In fact, it will only get worse, and one need look no further than the present campaign in Afghanistan for proof.

The targeting process that took place during the air campaign in Afghanistan was done almost entirely by the United States. The British participated on a very limited scale, delivering only certain types of munitions against very select targets. They were

forbidden to use some types of munitions – such as cluster bombs – or to allow the United States to use these types of munitions if using a British base or a British territorial base. The reason given to those involved in the targeting process is that they were very concerned about being held liable in an international judicial venue. It is worthwhile to note that the British have ratified the Rome Statute while the United States has not. If the United States had ratified it, it is unlikely that the Afghanistan operation would have taken place, and if it had, would be proceeding at such a glacial pace as to render it ineffective and, in fact, counterproductive. (I am not going to get into an extensive discussion over the use of cluster or any other type of munitions or their effectiveness. I will only point out that there are times and places for certain types of ordnance, and to refrain from their use results in a conflict being protracted to the detriment of all concerned.)

And so, we are introduced to an interesting paradox. The institution that is created with the intention of both deterring crimes against humanity and punishing those that engage in them will instead provoke these types of activities. Lacking political will, credible force, or both, the international community has already demonstrated a reluctance to become involved with crises, especially ones that may require casualties. And so the very countries that should be involved in the enforcement of an ICC's edicts will be loathe to commit to such action, having demonstrated so in the past, and if present operations are any indication, will continue to do so in the future. Dictators know this and will respond accordingly. Ironically, the country that is most capable of presenting both a credible military force and the will to use it has not, and will not, ratify the Statute.

CONCLUSIONS

We have used the past few pages to explore a concept – that the Statute of Rome and its attempt at universal jurisprudence will fail to be truly international in scope, with countries like the United States and China and very few of those with an Islamic culture unlikely ever to ratify the treaty. It was necessary in establishing the premise, in the three cases examined, to provide an historical framework for the reader to appreciate how the conclusions were drawn. And while it was beyond the scope of this paper to examine Russia's reluctance to ratify the Statute of Rome, many of the reasons annotated with regard to sovereignty issues and value systems are pertinent – translation: it is unlikely that one will see President Putin put on trial for crimes against humanity committed in Chechnya.

As far as the United States is concerned, the issue of sovereignty formed the basis of the conclusions that were developed, but it is actually more complicated than that. The United States is part of the West (as in the West vs. the rest) but there are important differences with countries in Europe, not the least of which is the U.S. political system and way of administering justice, as discussed in the previous pages. But the Statute of Rome is also seen as an attempt to subvert U.S. standing as a superpower and to rein it in with legal maneuvering.

China's resistance was examined with respect to sovereignty issues and a difference in values, the collision between Confucian and Western philosophy. It was necessary to go into some of the historical perspectives, but also a somewhat lengthy discourse on the economic turnaround that China has been able to achieve. Whether

China can maintain this economic development, which is the source of its military and political clout, remains to be seen. Furthermore, Chinese officials see acceptance into the WTO as a mixed blessing. Chinese Prime Minister Zhu Rongji, the reform-minded technocrat who ranks second in China's communist hierarchy and who has worked tirelessly for admission into the global trade body, stated after China's acceptance, "Everyone is very happy about the WTO except me". (Chandler and Pan, p. A27) He understands that the prospect of more global competition for China's inefficient farms and businesses is a gamble. There will be long-term benefits, if successful, but there will also be undeniable short-term hardship. Nevertheless, whatever the outcome, it is highly unlikely that the Chinese government will ever change its rigid views on sovereignty and will continue to consider treaties such as that creating an ICC as a challenge to that concept.

Islamic adherents continue to struggle with their place in the global community. As illustrated beforehand, Islam has a long tradition of opposition to other value systems, Christian or otherwise. Indeed, the present ideological collision is perceived as not so much as a struggle against Christianity but a struggle against the decadence of the West. There is an increased perception that Islam offers another way of doing things, one that is seen as morally superior to the West. The problem that remains, however, is whether Islam can embrace modernity without also embracing Western values. The answer seems to be a qualified yes, with Muslims living in the United States apparently indicating that Muslims can have their cake and eat it, too. Whether this message can be successfully conveyed to the world of Islam is unclear. What is clear is that few countries with a

significant Muslim population, with an opposing set of values, are unlikely to ratify the Statute of Rome.

The future of an ICC with universal jurisdiction is uncertain, and there is not much room for optimism. In light of recent events, it seems worthwhile to make some observations. Certain commentators are calling for Osama bin Laden, should he be taken alive, to be tried before an international tribunal of justices, including a Muslim judge. Such a court, it is argued, would appear more legitimate to the world community, and in particular to Muslims who oppose the use of force in Afghanistan, than a trial in a U.S. court. There are problems with this and Jack Goldsmith and Bernard Meltzer, law professors at the University of Chicago, highlight the fallaciousness of this reasoning.

It is unlikely that this tribunal would make any difference to those who believe U.S. actions to be unjust. The nations that would establish the tribunal have already condemned bin Laden and al-Qaeda for September 11, and it would be viewed as another biased tool of Western power. (It is interesting to note that, according to recent polls conducted, a significant percentage of Muslims do not believe Osama bin Laden had anything to do with September 11.) Such a trial would only enhance bin Laden's reputation and give him a platform to attack U.S. culture, motives and policies – an attack that would reverberate throughout the Muslim world. Furthermore, any dissent from a guilty verdict would weaken the judgment's legitimacy and further increase the terrorists' power and prestige. Additionally, the media frenzy that would accompany any trial would be of epic proportions. There is also the very real possibility of Western hostages being taken and executed on a daily basis as a tool to intimidate the tribunal. And finally, the terrorist act of September 11th was mass murder performed on American soil, a crime

punishable by our judicial system. Attempts to circumvent this system are both misguided and dangerous. When one takes the above into consideration – along with the very real prospect of acquittal due to inadmissibility of evidence based on classified sources – President Bush’s decision to use Military Tribunals is understood.

Furthermore, the campaign in Afghanistan illustrates the problems that are encountered when too much attention is given to the restraining legal aspects of conducting warfare. There are complex Rules of Engagement that require an inordinate weighting to avoidance of civilian casualties (collateral damage). This results in lawyers being heavily involved in the targeting process, at different levels, and a corresponding increase in response time for targets of opportunity – in other words, the ability to respond to a threat in a fluid combat situation is reduced significantly. Ironically, this can result in the conflict taking longer to resolve and in all likelihood an increase in the types of casualties that everyone is trying to avoid. With a standing ICC and its ability to prosecute on selective violations, this will only get worse.

In the final analysis, the Statute of Rome is fatally flawed. The creation of an ICC is another concept that superficially sounds good but does not stand up to examination. Punishing crimes against humanity, war crimes, and aggression are noble pursuits but the terms themselves are not well defined and are inherently subjective. There are virtually no incentives for a powerful country to ratify the Statute of Rome. While small, weak countries would ratify the treaty, they are losing nothing and would probably be using it as a self-defense mechanism to deter its neighbors.

Adherents claim that it is the best method for punishing violators of international laws and norms, that there is presently no mechanism in place to do this, that the

existence of an ICC will deter aggressive acts, and that somehow countries are morally obligated to ratify the Rome Statute – this is all they have to offer. These are nebulous claims at best, obviously intangible, and for these a country is supposed to willingly sacrifice its sovereignty and in some cases its constitutional framework for the ‘global community’? It is not likely to happen, which makes the implementation of an ICC an exercise in futility. And claims regarding the universality of the ICC are optimistic, to say the least, when reality suggests that one superpower (United States), two regional powers with significant populations, resources, and arsenals, (China and Russia) and those countries with a predominantly Islamic influence, are unlikely to ratify the Statute of Rome.

So what is the alternative? Should the International Community throw up its collective hands and walk away from any possibility of bringing the perpetrators of heinous crimes to justice? No. We have mechanisms in place to deal with this – such as ad hoc tribunals convened as necessary – but what is lacking is the political will to follow through when necessary, even if substantial military force is required. A current case in point is the situation in Iraq. Saddam Hussein is a veritable poster child for war crimes, crimes against humanity, human rights violations, and crimes of aggression. The facts that he has demonstrated a willingness to use weapons of mass destruction on his own people, is engaged in further development of these weapons and their delivery mechanisms, and will use them at the first opportunity, are undeniable. And yet there is little, if any, international condemnation, and when the United States even broaches the subject of his removal from power, it finds itself the subject of universal outrage. An ICC will not alleviate any of this, and until the above points are understood, no amount of

treaties, agreements, or memos of understanding will result in justice being served. They are mere pieces of paper.

So what does the future hold? The necessary number of countries needed for the Statute of Rome to be enacted has been achieved. What the final number will be that will *submit to its jurisdiction* remains to be seen, but what is virtually certain is that an International Criminal Court will never be truly universal in scope, and the most serious perpetrators of crimes against humanity will remain unpunished, possibly being indicted but never brought to justice. It will instead hold perpetrators of lesser crimes accountable, interpreting the language of the statute in any manner it sees fit – particularly with regard to what constitutes a human rights violation – and will become increasingly involved in jurisprudence issues best left to individual countries. It will do this because that is what it will be capable of doing. In the final analysis, it will not be what an ICC *should* do that will pose significant problems, but what it *could* do, and eventually the world could find itself facing the same dilemma the ancient Romans addressed: “Who will guard the guardians themselves?”

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