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THE INTERNATIONAL CRIMINAL COURT: THREATENING U.S. SOVEREIGNTY AND SECURITY

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Diplomats from over 150 countries began negotiations in Rome on June 15 to finalize the language and adopt a convention to establish an International Criminal Court (ICC). Supporters of this court, including the American Bar Association and various human rights groups, claim that it is necessary to bring despots and criminals to justice for crimes that are beyond the jurisdiction of any one nation-state.

The ICC would be empowered to investigate, try, and punish certain crimes, such as war crimes and crimes against humanity. Currently, nation-states have primary responsibility for prosecuting these crimes. In exceptional cases, they have been addressed through ad hoc tribunals set up by the United Nations (U.N.) Security Council. Ad hoc tribunals are set up for specific crimes and given prescribed authority, which prevents them from expanding their original mandate. The ICC, by contrast, would have greater autonomy and powers to investigate and prosecute suspected crimes. This unprecedented power could affect profoundly the rights guaranteed every American by the U.S. Constitution and threaten the ability of the United States to engage in military action to protect its national security interests. Because the ICC offers the United States no tangible benefits to outweigh these egregious threats, Congress and the Clinton Administration should strongly oppose it.

CONSTITUTIONAL AND LEGAL CONCERNS

The extremely complex, 167-page ICC draft statute contains over 1,500 disputed provisions.

Many of these have serious implications for national sovereignty, individual rights, and security. Vital issues, such as which crimes will fall within the jurisdiction of the ICC, the court's relationship with national judicial systems, and how alleged crimes will be referred to the ICC, have not been resolved. For example, the Clinton Administration thus far has insisted that all ICC cases be referred to the court by the U.N. Security Council, a position most countries oppose. This would make it less likely that the court could prosecute Americans because of the U.S. veto in the Security Council. Even this protection is insufficient, however: Once a matter is referred to the ICC from the Security Council, the United States would be unable to protect its citizens from prosecution.

Even the undisputed text in the draft convention contains many problems. For example, the current draft creates an independent international court whose agents and judges would be empowered to investigate crimes, prosecute, pass judgments, sentence, and even hear the appeals of its decisions on

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an array of crimes from genocide to war crimes to terrorism. This judicial omnipotence is fundamentally inconsistent with American legal traditions, in which the functions of investigation, prosecution, trial, and appeal are clearly separated to ensure that the accused receives a fair trial and that corruption and politicization are avoided.

The United States also faces unique problems with the very nature of an ICC. It is questionable, for example, whether the U.S. Constitution allows the U.S. government to permit U.S. citizens to be tried for alleged crimes committed on U.S. soil by a body that is not a court of the United States. For example, if the United States agreed to grant jurisdiction over international drug trafficking to the ICC, this court legitimately could demand extradition of an accused U.S. citizen who never set foot outside the United States. Another problem is that the ICC most likely would not provide many of the basic legal rights of Americans, such as a trial by jury, forbidding trials *in absentia*, and the right of the accused to confront his accuser.

GRAVE NATIONAL SECURITY CONCERNS

The ICC also presents important policy concerns on U.S. national security and the use of the U.S. military. For example, many countries support placing the “crime of aggression” under the jurisdiction of an ICC. Several definitions of “crime of aggression” are being debated; all are variations of the phrasing known as Option 1, which states that any individual in a position of “exercising control or capable of directing, planning, preparing, ordering, initiating, or carrying out an armed attack” against another state, when this attack is in contravention of the U.N. Charter, is subject to investigation, trial, conviction, and punishment by the ICC. In effect, this would require the United States to receive prior U.N. Security Council approval and ICC confirmation of the legality of a proposed military action. If it does not do so, every U.S. official involved in the operation, up to and including the President, could be charged, tried, convicted, and sentenced merely for protecting U.S. interests.

Former Justice Department lawyers Lee A. Casey and David B. Rivkin provide an example of the possible impact of the ICC on U.S. national security in the May 1998 issue of *Commentary*. The Clinton Administration asserts that past U.N. Security Council decisions legally justify U.S. military action against Iraq if that country obstructs U.N. weapons inspectors. If the United States did attack, however, it could be challenged before the ICC. The reason: Other nation-states (including China, France, and Russia) claim that any new strikes against Iraq would require further Security Council approval, and that any attack without that approval would violate international law.

AD HOC TRIBUNALS

Supporters of the ICC point to despots like Pol Pot who have escaped punishment for their crimes because of politics. There is no question that such heinous crimes should be investigated and punished. But the answer is not a supranational court that could violate the constitutional rights of Americans and entangle legitimate U.S. military operations in U.N. legal disputes; instead, the answer is that ad hoc tribunals be applied with greater impartiality and, perhaps, frequency. The flaws in the ad hoc system are correctable and are not sufficient reason to abrogate U.S. sovereignty or to forfeit the ability of the United States to protect its national security.

CONCLUSION

The proposed International Criminal Court poses serious threats to U.S. sovereignty and security. Congress and the Administration should declare unequivocally that the United States will not participate in an ICC that does not guarantee, at a minimum, the rights and privileges contained in the U.S. Constitution and the American judicial system—including trial by jury. Nor will the United States participate in any international body that hinders the ability of the United States to protect its national security.

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