Backgrounder

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The ICC Review Conference: A Threat to U.S. Interests

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Abstract: *Since the approval of the Rome Statute in 1998, U.S. policy toward the International Criminal Court has been clear and consistent: The U.S. has refused to join the ICC because it lacks prudent safeguards against political manipulation, possesses sweeping authority without accountability to the U.N. Security Council, and violates national sovereignty by claiming jurisdiction over the nationals and military personnel of non-party states in some circumstances. In a key shift in U.S. policy, the Obama Administration decided to expand U.S. engagement with the ICC and sent a delegation to the 8th session of the Assembly of States Parties. It will also send a delegation to the upcoming ICC review conference. The three amendments to be considered at the upcoming ICC review conference, especially the amendment defining the crime of aggression, will only increase the threat to U.S. national interests. The U.S. delegation to the conference should seek to persuade ICC member states to reject these amendments or at least minimize the damage.*

The Assembly of States Parties (ASP) to the Rome Statute of the International Criminal Court (ICC) will hold its first review conference from May 31 to June 11 in Kampala, Uganda, to consider amendments to the Rome Statute and to assess the court's activities to date. In a key shift in U.S. policy, the Obama Administration decided to expand U.S. engagement with the ICC and sent a delegation to the 8th session of the Assembly of States Parties.[1] It will also send a delegation to the review conference. The Administration has been conducting a lengthy review of U.S. policy toward the ICC

Talking Points

- The Bush and Clinton Administrations refused to join the International Criminal Court because it lacks prudent safeguards against political manipulation, possesses sweeping authority without accountability to the U.N. Security Council, and violates national sovereignty by claiming jurisdiction over the nationals and military personnel of non-party states in some circumstances.
- In a key shift in U.S. policy, the Obama Administration decided to expand U.S. engagement with the ICC and send a delegation to the upcoming ICC review conference.
- The three amendments to the Rome Statute to be considered at the Review Conference, especially the amendment defining the crime of aggression, will only increase the threat to U.S. national security interests.
- The ICC poses a serious threat to U.S. national security and steps taken by the U.S. to protect its military personnel, officials, and nationals from ICC claims of jurisdiction are appropriate and should be maintained.

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and has explained that it is attending ICC meetings to gain "a better understanding of the issues being considered here and the workings of the Court."[2]

Based on statements by members of the Obama Administration, the Administration clearly wishes to increase U.S. cooperation with and support of the ICC. However, the Administration has also expressed concerns about the ICC and noted the need to ensure that U.S. military personnel receive "maximum protection" from illegitimate actions by the court.[3] U.S. Ambassador-at-Large for War Crimes Stephen Rapp has also stated that the "review as to our involvement in the future in the International Criminal Court…will not result in a decision by the administration to submit the ICC Treaty for ratification."[4] Whether this statement evinces an intent never to submit the Rome Statute to the Senate is unclear.

A clear motivation behind both the Administration's caution about joining the ICC and its decision to participate in the ASP sessions and to attend the review conference is concern that the states parties could adopt a definition of the "crime of aggression" that would damage U.S. interests. As Ambassador Rapp stated:

> The United States has well-known views on the crime of aggression, which reflect the specific role and responsibilities entrusted to the Security Council by the UN Charter in responding to aggression or its threat, as well as concerns about the way the draft definition itself has been framed. Our view has been and remains that, should the Rome Statute be amended to include a defined crime of aggression, jurisdiction should follow a Security Council determination that aggression has occurred.[5]

The three proposed amendments to the Rome Statute, particularly the proposed definition of the crime of aggression, should greatly concern the U.S. The court technically already has jurisdiction over the crime of aggression, but it remains dormant because the states parties were unable to agree on a definition of aggression during the 1998 negotiations on the Rome Statute. The states parties will consider an amendment at the upcoming review conference that would define the crime of aggression and codify the circumstances under which the ICC could investigate and prosecute such crimes. A broad definition of aggression combined with empowering the ICC to exercise jurisdiction without specific authorization from the U.N. Security Council would seriously threaten U.S. efforts to defend its interests and those of its allies.

A broad definition of aggression combined with empowering the ICC to exercise jurisdiction without specific authorization from the U.N. Security Council would seriously threaten U.S. efforts to defend its interests and those of its allies.

Therefore, the U.S. delegation to the review conference should seek to defeat all of the proposed amendments, but particularly the proposed amendment on the crime of aggression. Eliminating the ICC's jurisdiction over the crime of aggression on the grounds that it infringes on the Security Council's purview would be even better. Short of that, the U.S. should seek to narrow the definition to prevent politicization of this crime and to require an explicit referral by the Security Council to trigger an investigation of an alleged crime of aggression.

1. The first part of the 8th Session was held on November 18–26, 2009. It resumed and concluded on March 22–25, 2010.
2. Stephen J. Rapp, "Address to Assembly of States Parties," The Hague, November 19, 2009, at *http://www.state.gov/s/wci/us_releases/remarks/133316.htm* (May 20, 2010).
3. Hillary Rodham Clinton, quoted in John Kerry, "Questions for the Record: Nomination of Hillary Rodham Clinton," p. 66, at *http://www.foreignpolicy.com/files/KerryClintonQFRs.pdf* (May 20, 2010).
4. U.S. Mission to the United Nations and Other International Organizations in Geneva, "Press Briefing with Stephen J. Rapp Ambassador-at-Large for War Crimes Issues," Geneva, January 22, 2010, at *http://geneva.usmission.gov/2010/01/22/stephen-rapp* (May 20, 2010).
5. Rapp, "Address to Assembly of States Parties."

The U.S. and the ICC

The United States has long championed human rights and supported the ideal that those who commit serious human rights violations should be held accountable. Over Soviet objections, the U.S. insisted on including promoting basic human rights and fundamental freedoms among the purposes of the United Nations, and the U.S. played a lead role in drafting the Universal Declaration of Human Rights. With the Allies, the U.S. established the Nuremberg and Tokyo tribunals to prosecute atrocities committed during World War II and was a key supporter of establishing the ad hoc International Criminal Tribunal for the former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR), which were both approved by the Security Council.

Continuing its long support for these efforts, the U.S. initially was an eager participant in creating the International Criminal Court in the 1990s. However, once negotiations began on the final version of the Rome Statute, America's support waned because many of its concerns were ignored or opposed outright during the five-week U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court held in Rome in June 1998.[6]

Since the approval of the Rome Statute in 1998, U.S. policy toward the ICC has been clear and consistent: The U.S. has refused to join the ICC because it lacks prudent safeguards against political manipulation, possesses sweeping authority without accountability to the U.N. Security Council, and violates national sovereignty by claiming jurisdiction over the nationals and military personnel of non-party states in some circumstances.[7]

Although his Administration signed the Rome Statute, President Bill Clinton urged President George W. Bush not to submit the Rome Statute to the Senate for the advice and consent necessary for ratification based on these concerns.[8] After extensive efforts to change the statute to address key U.S. concerns failed, President Bush felt it necessary to "un-sign" the Rome Statute by formally notifying the U.N. Secretary-General that the U.S. did not intend to ratify the treaty and was no longer bound under international law to avoid actions that would run counter to the treaty's object and purpose.

Other major nations—including China, Russia, and India—have refused to ratify the Rome Statute out of concern that it unduly infringes on their foreign and security policy prerogatives.

Subsequently, the U.S. took several steps to protect its military personnel, officials, and nationals from ICC claims of jurisdiction. For instance, Congress passed the American Service-Members' Protection Act of 2002, which restricts U.S. interaction with and support for the ICC, and the Bush Administration negotiated Article 98 agreements with other nations to preclude them from surrendering, extraditing, or transferring U.S. persons to the ICC or third countries for that purpose without U.S. consent.

The United States is not alone in its concerns about the ICC. As of March 24, 2010, only 111 of the 192 U.N. member states had ratified the Rome Statute.[9] Other major nations—including China, Russia, and India—have refused to ratify the Rome

6. According to David J. Scheffer, chief U.S. negotiator at the 1998 Rome conference, "In Rome, we indicated our willingness to be flexible.... Unfortunately, a small group of countries, meeting behind closed doors in the final days of the Rome conference, produced a seriously flawed take-it-or-leave-it text, one that provides a recipe for politicization of the court and risks deterring responsible international action to promote peace and security." David J. Scheffer, "America's Stake in Peace, Security, and Justice," U.S. Department of State, August 31, 1998, at *http://www.state.gov/www/policy_remarks/1998/980831_scheffer_icc.html* (May 20, 2010).
7. For a more detailed discussion of U.S. policy toward the ICC, see Brett D. Schaefer and Steven Groves, "The U.S. Should Not Join the International Criminal Court," Heritage Foundation *Backgrounder* No. 2307, August 18, 2009, at *http://www.heritage.org/research/reports/2009/08/the-us-should-not-join-the-international-criminal-court*.
8. Bill Clinton, "Statement on the Rome Treaty on the International Criminal Court," December 31, 2000, at *http://findarticles.com/p/articles/mi_m2889/is_1_37/ai_71360100* (May 20, 2010).
9. International Criminal Court, "The States Parties to the Rome Statute," at *http://www.icc-cpi.int/Menus/ASP/states+parties* (May 20, 2010).

Statute out of concern that it unduly infringes on their foreign and security policy prerogatives, which are issues reserved to sovereign governments over which the ICC should not claim authority.

The Obama Administration has indicated that it views U.S. policy toward the ICC as too hostile. In numerous statements, Administration officials expressed the intent to increase U.S. cooperation with and support for the court. For example, during her confirmation hearing as U.S. Secretary of State, Hillary Clinton stated that President Obama believes:

> [The U.S.] should support the ICC's investigations.... Whether we work toward joining or not, we will end hostility towards the ICC, and look for opportunities to encourage effective ICC action in ways that promote U.S. interests by bringing war criminals to justice.[10]

In March 2010, the principal U.S. interlocutor with the ICC, Ambassador Rapp, reaffirmed, "The United States is prepared to listen and to work with the ICC."[11]

The ICC Review Conference

Although the U.S. is not a party to the Rome Statute and therefore will not possess a vote at the review conference, the U.S. has the right to attend and voice its opinions because it participated in the 1998 conference. A number of issues on the agenda will bear heavily on the ICC's future and affect U.S. cooperation with the court. Because the Obama Administration is clearly intent on expanding U.S. cooperation with ICC, it is obligated to defend U.S. interests and to dissuade decisions that could damage U.S. interests. Two major topics are on the agenda at the review conference in Uganda: a stocktaking exercise to assess the ICC's record since 2002 and consideration of three amendments to the Rome Statute.

Stocktaking. The states parties will dedicate several days to discussing the impact of the Rome Statute system on victims and affected communities, how the principle of complementarity (the instruction for the ICC to function secondary to national jurisdiction and act only on evidence that a country is unable or unwilling to investigate a crime) has worked in practice, how states have cooperated with the ICC, how to codify the authority of the ICC in national laws, and whether the ICC has bolstered or undermined efforts to advance peace and justice.

Performance. Although the court's proponents claim that the ICC has achieved significant success in its first eight years, scant evidence supports this claim. An honest stocktaking would conclude that the ICC as an institution has performed little, if any, better than the ad hoc tribunals that it was created to replace. Like the Rwandan and Yugoslavian tribunals, the ICC is slow to act. The ICC prosecutor took six months to open an investigation in Uganda (referred to the ICC by the Ugandan government in 2004), two months in the Democratic Republic of the Congo (referred by the Congolese government in 2004), over a year in Darfur (referred by the Security Council in 2005), and nearly two years in the Central African Republic (referred by the national government in 2005). The ICC prosecutor began a preliminary examination in early 2008 of alleged crimes committed in Kenya. The prosecutor opened an official investigation in March 2010. The ICC has issued 14 warrants related to these cases, but it has yet to conclude a full trial cycle nearly eight years after being created. This is notable because one argument for establishing the ICC was that it would be faster and more effective than ad hoc tribunals, such as the tribunals for Yugoslavia and Rwanda.

Deterrence. Moreover, like the ad hoc tribunals, the ICC can investigate and prosecute crimes only after the fact. The alleged deterrent effect of a standing international criminal court has not ended atrocities in the Democratic Republic of the Congo or Darfur, where cases are ongoing. Fear of ICC prosecution has not deterred despotic regimes from committing crimes against their own peoples. The ICC did not deter Russia from its 2008 invasion of

10. Kerry, "Questions for the Record."
11. George Lerner, "Ambassador: U.S. Moving to Support International Court," CNN, March 24, 2010, at *http://www.cnn.com/2010/US/03/24/us.global.justice/index.html* (May 20, 2010).

Georgia, an ICC party. Nor has ICC party Venezuela stopped supporting leftist guerillas in Colombia.

Peace and Justice. The ICC's contributions to peace and justice are also very much in question. ICC decisions to pursue investigations and indictments can, and arguably already have, upset delicate diplomatic situations. For instance, the ICC decision to indict and issue an arrest warrant for Sudanese President Omar al-Bashir[12] for his involvement in crimes committed in Darfur arguably has only further entrenched his determination to punish those opposed to his regime in Darfur on the basis that he has little to lose. The desire to see Bashir face justice for his complicity in the crimes committed in Darfur is understandable and should not be abandoned. However, the ICC's efforts to bring Bashir to justice prior to resolving the ongoing conflict may be counterproductive, ultimately leading to more suffering.

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Enforcement. A related issue is the ICC's inability to enforce its own rulings. It entirely depends on the cooperation of governments to arrest and transfer perpetrators to the court. This flaw was also present with the ICTY and the ICTR, although they could at least rely on a Security Council resolution mandating international cooperation in enforcing their arrest warrants. In contrast, the Nuremburg and Tokyo tribunals could rely on Allied occupation forces to search out, arrest, and detain the accused. This "jurisdiction without enforcement" flaw lies at the heart of the Rome Statute and cannot be cured by an amendment. No change to the Rome Statute would give the ICC enforcement power, which requires the ability and willingness to use force. Even if the court could be invested with such power—a dubious prospect—governments would likely wisely refuse to give a largely unaccountable judicial body the power and resources to enforce its decisions.

An objective stocktaking exercise would raise cautions about the consequences and implications of having an international court unbound by political considerations. The U.S. could contribute greatly to the stocktaking exercise by posing tough questions about when and where the ICC should act, the wisdom of allowing a largely unaccountable international legal body to insert itself into situations involving international peace and security, and why the ICC has been so slow in carrying out its proceedings.

Proposed Amendments to the Rome Statute. The most important topic on the agenda is the proposed amendments to the Rome Statute. The three amendments under consideration would delete Article 124 of the Rome Statute, classify the use of additional weapons as war crimes, and adopt a definition of the crime of aggression.[13]

Amendment 1. Article 124 allows a state upon ratifying or acceding to the treaty to "declare that, for a period of seven years after the entry into force of this Statute for the State concerned, it does not accept the jurisdiction of the Court with respect to [war crimes] when a crime is alleged to have been committed by its nationals or on its territory."[14] It was included in the treaty to broaden its appeal to states involved in conflicts at the time. Only France and Colombia exercised their option under Article 124, but neither option remains in effect.[15] Critics of this article argue that it is inconsistent with the treaty's object and purpose: punishing war crimes. Although the Obama Administration maintains that it is not contemplating ratification of the Rome Statute, it should nonetheless support retaining Article 124 to maximize the treaty's few provisions that recognize the

12. Press release, "ICC Issues a Warrant of Arrest for Omar Al Bashir, President of Sudan," International Criminal Court, March 4, 2009.
13. International Criminal Court, "Rome Statute Amendment Proposals," at *http://www.icc-cpi.int/Menus/ASP/ReviewConference/Rome+Statute+amendment+proposals.htm* (May 20, 2010).
14. Rome Statute of the International Criminal Court, July 17, 1998, at *http://www.icc-cpi.int/NR/rdonlyres/EA9AEFF7-5752-4F84-BE94-0A655EB30E16/0/Rome_Statute_English.pdf* (May 20, 2010).
15. France withdrew its declaration in 2008, and Colombia's declaration expired in November 2009.

difficult and complex political circumstances inherent in decisions by states to use force and serve to protect individuals from ICC jurisdiction.

Amendment 2. The second proposed amendment would criminalize the use of three categories of weapons in noninternational armed conflicts:

1. "Employing poison or poisoned weapons";
2. "Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices"; and
3. "Employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions."[16]

The effort to criminalize the use of conventional weapons has a long history dating back to the Third Declaration at the Hague Convention of 1899 in the case of bullets that flatten easily in the body and to the Second Declaration of 1899 in the case of asphyxiating gases. Even though the U.S. is not a party to the Hague Convention, the U.S. recognizes the use of weapons that cause "unnecessary suffering" or "superfluous injury" as criminal under customary international law. However, making such a determination is difficult. In the past, the U.S. has evaluated various types of weapons on whether their use is justified by military necessity to achieve a legitimate objective.[17] However, this determination is subjective, and other parties, including the ICC prosecutor, could reach contradictory conclusions.

As a result, the U.S. should take issue with this amendment and any subsequent effort to use the Rome Statute to expand the list of criminalized weapons. The text of the amendment[18] is broad and could be interpreted to include weapons that are or could be used by U.S. police and armed forces in certain circumstances, such as riot control agents in various situations,[19] including noninternational armed conflict.[20] It could also be interpreted to

16. International Criminal Court, "Rome Statute Amendment Proposals."
17. For an overview of international efforts to regulate or ban conventional weapons, see W. Hays Parks, "Conventional Weapons and Weapons Reviews," *Yearbook of International Humanitarian Law*, Vol. 8 (December 2005), pp. 55–142.
18. The Rome Statue lists "[o]ther serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law" that constitute war crimes. Rome Statute of the International Criminal Court, Art. 8, para. 2(c). The proposed amendment would add "poison or poisoned weapons"; "asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices"; and "bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions." International Criminal Court, "Rome Statute Amendment Proposals."
19. For instance, the liberal Arms Control Association observes, "The United States signed the [Chemical Weapons Convention] in January 1993, and it entered into force in April 1997. The treaty bans the possession and use of chemical weapons but allows the use of 'toxic chemicals and their precursors' in 'law enforcement including domestic riot control purposes,' provided that 'the types and quantities are consistent with such purposes.' In addition, the CWC allows states-parties to possess 'riot control agents,' defined as chemicals that 'can produce rapidly in humans sensory irritation or disabling physical effects which disappear within a short time following termination of exposure.' The CWC, however, bans the use of riot control agents 'as a method of warfare.' The gray area between using riot control agents for domestic law enforcement and for warfare remains undefined. Some proponents of using riot control agents overseas argue that law enforcement allows for military missions such as peacekeeping and counterterrorism. Some opponents argue that using riot control agents beyond domestic law enforcement would certainly undermine the CWC and might also violate U.S. obligations under the treaty." Kerry Boyd, "Rumsfeld Wants to Use Riot Control Agents in Combat," Arms Control Association, March 2003, at *http://www.armscontrol.org/act/2003_03/nonlethal_mar03* (May 20, 2010).
20. A recent report by the Council on Foreign Relations noted, "In preparing for Kampala the U.S. government should determine whether it has national security concerns about expanding the criminal prohibition of the use of various weapons to noninternational armed conflict. The United States is currently engaged in a noninternational armed conflict with al-Qaeda. Extending any criminal prohibition from international to noninternational armed conflict must be assessed in light of current and anticipated military practices and existing treaty commitments on weapons use." Vijay Padmanabhan, "From Rome to Kampala: The U.S. Approach to the 2010 International Criminal Court Review Conference," Council on Foreign Relations *Special Report* No. 55, April 2010, at *http://www.cfr.org/content/publications/attachments/CSR55_ICC.pdf* (May 20, 2010).

include specialized ammunition used by snipers for increased accuracy[21] or hollow-point ammunition that is or could be used by police in heavily populated urban settings or by police or soldiers in hostage situations where jacketed ammunition could penetrate walls or the bodies of targeted individuals, putting innocents at risk. Moreover, the U.S. should be wary of establishing a precedent for expanding the list of weapons the use of which is deemed a war crime, especially considering ongoing international efforts to outlaw antipersonnel landmines, cluster munitions, and other weapons.[22]

Amendment 3. By far the most controversial item on the agenda is the proposed amendment to define the crime of aggression (See Text Box: Proposed Definition of "Crime of Aggression")[23] and the circumstances under which the court could investigate and prosecute a crime of aggression. (See Text Box: "Proposal for Exercise of Jurisdiction over the Crime of Aggression.") The effort to define the crime of aggression and to empower the ICC to investigate and try individuals for acts of aggression inappropriately infringes on the authority of the U.N. Security Council, will greatly complicate future U.S.

Proposed Definition of "Crime of Aggression"

1. For the purpose of this Statute, "crime of aggression" means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.
2. For the purpose of paragraph 1, "act of aggression" means the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations. Any of the following acts, regardless of a declaration of war, shall, in accordance with United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974, qualify as an act of aggression:
   a. The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;
   b. Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;
   c. The blockade of the ports or coasts of a State by the armed forces of another State;
   d. An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;
   e. The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;
   f. The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;
   g. The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.

Source: Coalition for the International Criminal Court, "Special Working Group's Proposal on the Crime of Aggression," at *http://www.iccnow.org/?mod=swgca-proposal* (May 24, 2010).

decisions on the use of force to protect its interests, and inserts the ICC into an inherently political realm that will likely undermine its legitimacy.

First, the proposal to grant the ICC authority to investigate, prosecute, and punish individuals for the crime of aggression is a direct assault on the prerogatives of the U.N. Security Council. The Security Council is not the sole authority in this realm, nor even the final authority. The final authority for decisions on the use of force and related decisions to respond to aggression are vested under international law based on centuries of tradition and state practice in sovereign governments and affirmed in the U.N. Charter—most expressly under Article 51.[24] Among international institutions, however, the Security Council is vested with clear authority in matters related to international peace and security, including questions regarding the existence of an act of aggression on the part of a state. Specifically, the U.N. Charter gives the Security Council "primary responsibility for the maintenance of international peace and security" and states that the Security Council shall "determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken."[25] Yet the proposed definition of the crime of aggression could empower the ICC prosecutor to investigate and the ICC to penalize individuals for alleged crimes of aggression without any Security Council oversight. The Rome Statute, especially considering the non-universal ratification status of the treaty, inappropriately intrudes on the Security Council's jurisdiction.

Second, except for the 1991 Iraq War and the 2002 invasion of Afghanistan, which were expressly authorized by the Security Council, virtually every U.S. military action in recent decades could easily have been deemed an act of aggression if the ICC had existed and possessed the authority to investigate and prosecute the "crime of aggression." As one legal scholar has noted, "had the proposed crime [of aggression] existed over recent decades, every U.S. president since John F. Kennedy and hundreds of political and military leaders from other countries would have been subject to potential indictment, arrest and prosecution."[26]

Regardless of whether the U.S. deemed them acts of defense, retaliatory acts, or acts of preemptive defense, many of the U.S. military activities in the recent past would likely have been referred to the ICC prosecutor by other nations as crimes of aggression or investigated as such by the prosecutor based on communications from individuals or nongovernmental organizations.

For instance, former U.N. Secretary-General Kofi Annan famously stated that Operation Iraqi Freedom in 2003 was "illegal" because "it was not in conformity with the U.N. charter."[27] It is nearly

21. For the U.S. legal justification for the use of open-tipped ammunition by snipers, see Colonel W. Hays Parks, "Sniper Use of Open-Tip Ammunition," U.S. Army Special Operations Command, October 12, 1990, at *http://www.thegunzone.com/opentip-ammo.html* (May 20, 2010).
22. For example, see Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, and the Convention on Cluster Munitions, September 18, 1997. For a discussion, see Parks, "Conventional Weapons and Weapons Reviews."
23. International Criminal Court, "Liechtenstein: Proposals for a Provision on Aggression," at *http://www.icc-cpi.int/iccdocs/asp_docs/RC2010/ICC-ASP-8-Res.6-AnxII-ENG.pdf* (May 20, 2010).
24. Charter of the United Nations, Article 51, states, "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security."
25. Charter of the United Nations, Art. 24 and Art. 39.
26. Michael J. Glennon, "The Vague New Crime of 'Aggression,'" *The New York Times*, April 6, 2010, at *http://www.nytimes.com/2010/04/06/opinion/06iht-edglennon.html* (May 20, 2010).
27. BBC, "Iraq War Illegal, Says Annan," September 16, 2004, at *http://news.bbc.co.uk/2/hi/3661134.stm* (May 20, 2010).

certain that this operation would have been referred to the ICC by nongovernmental organizations or even some governments. A far from exhaustive list of other possible acts of "aggression" could include the 2009 air strikes against militants in Yemen, the 2008 air strikes against al-Shabaab forces in Somalia, the 1998 cruise missile strikes in Afghanistan and Sudan under President Clinton, the 1983 U.S. invasion of Grenada to restore democratic government under President Ronald Reagan, and President Jimmy Carter's effort to rescue U.S. hostages from Iran in 1979. Even ongoing actions

Proposal for Exercise of Jurisdiction over the Crime of Aggression

1. The Court may exercise jurisdiction over the crime of aggression in accordance with article 13, subject to the provisions of this article.
2. Where the Prosecutor concludes that there is a reasonable basis to proceed with an investigation in respect of a crime of aggression, he or she shall first ascertain whether the Security Council has made a determination of an act of aggression committed by the State concerned. The Prosecutor shall notify the Secretary-General of the United Nations of the situation before the Court, including any relevant information and documents.
3. Where the Security Council has made such a determination, the Prosecutor may proceed with the investigation in respect of a crime of aggression.

Alternative 1

3. In the absence of such a determination, the Prosecutor may not proceed with the investigation in respect of a crime of aggression,

   Option 1—end the paragraph here.

   Option 2—add: unless the Security Council has, in a resolution adopted under Chapter VII of the Charter of the United Nations, requested the Prosecutor to proceed with the investigation in respect of a crime of aggression.

Alternative 2

3. Where no such determination is made within [6] months after the date of notification, the Prosecutor may proceed with the investigation in respect of a crime of aggression,

   Option 1—end the paragraph here.

   Option 2—add: provided that the Pre-Trial Chamber has authorized the commencement of the investigation in respect of a crime of aggression in accordance with the procedure contained in article 15;

   Option 3—add: provided that the General Assembly has determined that an act of aggression has been committed by the State referred to in article 8 bis;

   Option 4—add: provided that the International Court of Justice has determined that an act of aggression has been committed by the State referred to in article 8 bis.

4. A determination of an act of aggression by an organ outside the Court shall be without prejudice to the Court's own findings under this Statute.
5. This article is without prejudice to the provisions relating to the exercise of jurisdiction with respect to other crimes referred to in article 5.

Source: Coalition for the International Criminal Court, "Special Working Group's Proposal on the Crime of Aggression," at *http://www.iccnow.org/?mod=swgca-proposal* (May 24, 2010).

taken to advance missions approved by the Security Council, such as U.S. unmanned aerial vehicle strikes against Taliban targets in Pakistan, could be deemed crimes of aggression because they are not specifically authorized by the Security Council or explicitly sanctioned by all relevant parties.

Moreover, missions undertaken for ostensibly humanitarian purposes would not necessarily be immune. For example, in 1999, the U.S. and NATO conducted a bombing campaign against the Federal Republic of Yugoslavia to end ethnic cleansing in Kosovo, but the bombings were never "authorized" by the Security Council. Thus, a case could be made that the bombing campaign was "inconsistent with the Charter of the United Nations" and therefore constituted aggression.

The possibility of ICC investigations and prosecutions will inevitably introduce strong new tensions into relations between the U.S. and its allies who are parties to the ICC. In recent decades, the U.S. has conducted military operations in Panama, Bosnia, and Serbia. It is currently engaged in military operations in Afghanistan. All are ICC parties. The U.S. will inevitably at some future time conduct military operations in the territory of an ICC party. If in the future the ICC issues warrants for U.S. officials or service members for the "crime of aggression," how will U.S. allies who have ratified the Rome Statute react?

As international law professor Michael Glennon observed:

> The proposed new crime will…force hundreds of political and military leaders who act in good faith to guess when and where they will be arrested in their international travels. It will strain relations among allies and exacerbate tensions among adversaries. It will bollix an international equilibrium that already is precarious enough.[28]

At best, adopting this definition for the crime of aggression would greatly complicate the U.S. decision-making process on using force any place where the ICC could exercise jurisdiction, likely to the point of reducing the ability of the United States to defend itself and its allies. Specifically, it would expose decisions to use force preemptively or preventively to address threats to U.S. interests to charges of aggression.

In addition to the current difficult process of determining whether and to what extent to use military force and conduct the subsequent operation in accordance with U.S. law and principles, U.S. policymakers would need to consider the possibility of ICC prosecution of service members and officials for those actions. Indeed, for many, the point of granting the ICC jurisdiction over the crime of aggression may be to hamstring the U.S. military by outlawing any military action taken without explicit Security Council authorization, regardless of Article 51 of the U.N. Charter which explicitly states that nothing in the "Charter shall impair the inherent right of individual or collective self-defence." The U.S. has asserted that acts in self-defense include actions taken to forestall or prevent an attack.[29]

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Third, in addition to infringing on the purview of the Security Council and hopelessly complicating international relations, the proposed definition of the crime of aggression is expansive and vague, and it would insert the court into an inherently political environment. The definition assigns criminal culpability to anyone involved in the "planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations." At what level of authority does a person "exercise control" over an act of aggression? What constitutes a "manifest violation" of the U.N. Charter?

28. *Ibid.*

In virtually every one of the hundreds of wars since 1945, each side could argue and provide evidence (sometimes convincingly, sometimes less so) that it acted lawfully. Deciding conclusively which side is the aggressor can be more difficult than is immediately apparent. Moreover, the political circumstances surrounding these actions and the ramifications of assigning culpability can be daunting. For instance, if the Security Council concludes that an act of aggression has occurred, it will be expected to respond. Unsurprisingly, the Security Council has authorized military action to counter aggression in only two instances: the North Korean invasion of South Korea in 1950 and the Iraqi invasion of Kuwait in 1990.

Interestingly, former Assistant Secretary of State Stephen Rademaker argues that forcing the ICC to determine whether an act of aggression has occurred could cripple the court:

> While empowering the ICC to prosecute aggression would be bad for the United States, it would be worse for the court itself.
>
> The ICC is manifestly incapable of exercising the responsibility and making the judgments that would come with jurisdiction over aggression. If Russia were to attack Georgia again, would the ICC really indict Vladimir Putin and Dmitry Medvedev? Or would it concoct a reason to look the other way? Which would be worse for the court's credibility and prospects for long-term success?
>
> Similarly, is the court really capable of sorting out through a judicial process who hit whom first in the festering conflicts of the Middle East? Could it afford politically to exonerate Israel of charges of aggression? Or would it bow to overwhelming pressure to blame Israel first, as routinely happens at the United Nations? Again, which course of action would be more politically damaging?
>
> Giving the ICC jurisdiction over aggression would probably prove fatal to the court. Exercising such jurisdiction would almost immediately entangle it in international controversies that defy judicial resolution, quickly discrediting the institution.[30]

The danger posed by granting the ICC jurisdiction over the crime of aggression as defined could be exacerbated by the various proposed jurisdictional "triggers" of the crime, which range from very restrictive to legal *laissez faire*. The most restrictive trigger would empower the ICC to investigate an alleged crime of aggression only after the Security Council determines that a crime of aggression has occurred. The least restrictive trigger would permit the ICC prosecutor to proceed with an investigation on his own authority six months after notifying the Security Council that he believes that there is a reasonable basis to investigate. The proposal offers several other possible triggers:

- A request from the Security Council under Chapter VII,

29. For instance, the 2006 National Security Strategy states: "To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act preemptively in exercising our inherent right of self-defense. The United States will not resort to force in all cases to preempt emerging threats. Our preference is that nonmilitary actions succeed. And no country should ever use preemption as a pretext for aggression." The White House, *The National Security Strategy of the United States of America*, March 2006, at *http://georgewbush-whitehouse.archives.gov/nsc/nss/2006/nss2006.pdf* (May 20, 2010). The 2010 *National Security Strategy*, authored by the Obama Administration, does not specifically affirm the U.S. policy of acting preemptively, but it also does not preclude it. Specifically, it states, "While the use of force is sometimes necessary, we will exhaust other options before war whenever we can, and carefully weigh the costs and risks of action against the costs and risks of inaction. When force is necessary, we will continue to do so in a way that reflects our values and strengthens our legitimacy, and we will seek broad international support, working with such institutions as NATO and the U.N. Security Council. The United States must reserve the right to act unilaterally if necessary to defend our nation and our interests, yet we will also seek to adhere to standards that govern the use of force." The White House, *The National Security Strategy*, May 2010, p. 22, at *http://www.whitehouse.gov/sites/default/files/rss_viewer/national_security_strategy.pdf* (May 27, 2010).

30. Stephen G. Rademaker, "International Criminal Court Doesn't Need Power over 'Aggression,'" *The Washington Post*, April 2, 2010, p. A17, at *http://www.washingtonpost.com/wp-dyn/content/article/2010/04/01/AR2010040102802.html* (May 20, 2010).

- Authorization by the ICC Pre-Trial Chamber,
- A U.N. General Assembly determination that an act of aggression has been committed, and
- A determination by the International Court of Justice that an act of aggression has occurred.

The lower the threshold for initiating an ICC investigation, the greater is the probability that U.S. military actions will be targeted. Clearly, the U.S. should seek to minimize the possibility of an ICC investigation of its officials and service members.

Recommendations

The ICC poses a serious threat to U.S. national security interests. If the U.S. were ever to become a party to the Rome Statute, every U.S. decision to use force, every civilian death resulting from U.S. military action, and every allegedly abused detainee would become grounds for America's enemies to file charges against U.S. soldiers and officials. Moreover, any U.S. "failure" to investigate or prosecute a high-ranking U.S. official in such instances could precipitate a cause of action at the ICC.

For example, the principle of complementarity will not prevent a politicized prosecutor from bringing charges against a sitting U.S. President or Secretary of Defense. While the U.S. Department of Justice is unlikely to file criminal charges against such officials for their decisions involving the use of military force, that decision would be a prerequisite for the ICC taking up the case. At best, the U.S. would find itself defending its military and civilian officials against frivolous and politically motivated charges submitted to the ICC prosecutor. At worst, international political pressure could compel the ICC prosecutor to file charges against current or former U.S. officials.

Even standing outside the ICC and refusing to join is no guarantee of protection because many U.S. military actions could occur on the territory of an ICC member state, potentially exposing U.S. officials and military to ICC investigation and prosecution. For instance, the ICC prosecutor announced in 2009 that he was conducting a preliminary investigation into war crimes and crimes against humanity allegedly committed in Afghanistan. The prosecutor's office has indicated that the investigation could include crimes allegedly committed by U.S. and NATO forces. The investigation is not complete, and the prosecutor has not determined whether to seek warrants against U.S. officials or servicemen, and Afghanistan is constrained from turning over U.S. persons to the ICC under existing "status of forces" and Article 98 agreements. The potential legal confrontation, however, justifies past U.S. policy and emphasizes the need to maintain and expand legal protections for U.S. persons against ICC claims of jurisdiction.[31]

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The ICC Review Conference could further exacerbate the problems that the court is already causing in U.S. efforts to defend its interests and those of its allies. By choosing to attend the conference, the Administration assumed the responsibility of defending U.S. interests in Kampala. Specifically, the U.S. delegation should use its influence to:

- **Prevent adoption of a definition of a crime of aggression.** To avoid the problems posed by an ICC empowered to try individuals for alleged crimes of aggression, the U.S. should urge the ICC member states to reject the proposed definition of the crime of aggression, thereby continuing to block the court from investigating alleged crimes of aggression. If that effort falls short, the U.S. should urge the member states to empower the ICC to investigate alleged crimes of aggression only after the Security Council determines that an act of aggression has occurred. This

31. Brett D. Schaefer and Steven Groves, "The ICC Investigation in Afghanistan Vindicates U.S. Policy Toward the ICC," Heritage Foundation *WebMemo* No. 2611, September 14, 2009, at *http://www.heritage.org/Research/Reports/2009/09/The-ICC-Investigation-in-Afghanistan-Vindicates-US-Policy-Toward-the-ICC*.

would reaffirm the position of the Security Council among international institutions in matters of international peace and security as established by the U.N. Charter and protect the U.S. from spurious, politically motivated legal attacks on its legitimate efforts to protect its interests.

- **Support Article 124 of the Rome Statute.** Article 124 allows a state, upon ratifying or acceding to the treaty, to exempt its nationals from ICC jurisdiction for war crimes for seven years after ratification of the Rome Statute. Although the Obama Administration maintains that it is not contemplating ratification of the Rome Statute, it should nonetheless on principle argue for maintaining Article 124 as due recognition of the complex nature of decisions by governments to use force and to provide maximum protection for individuals from ICC jurisdiction.
- **Resist expansion of the list of war crimes.** The U.S. should oppose the proposal to expand the list of criminalized weapons whose use would constitute war crimes. The amendment could be interpreted to include weapons that are or could be used by U.S. police and armed forces in certain circumstances for legitimate reasons. Moreover, the U.S. should be wary of establishing a precedent for expanding the list of criminalized weapons considering current international efforts to outlaw weapons, such as antipersonnel landmines, cluster munitions, and depleted uranium bullets.

Conclusion

Although the Obama Administration clearly wishes to increase U.S. cooperation and support for the International Criminal Court, the Administration is sufficiently concerned about the ICC that it has decided not to seek ratification of the Rome Statute in the foreseeable future. The Administration is right to be concerned.

However, the Administration's decision not to seek ratification of the Rome Statute at present will not prevent the upcoming ICC Review Conference from making decisions that would threaten U.S. interests. The proposed amendments to the Rome Statute run counter to U.S. national security interests. Successfully convincing the member states to reject these amendments would be a significant victory for the Administration. Failure to scuttle these amendments would only reinforce longstanding U.S. concerns about the ICC.

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