

# THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT

*The Rome Treaty to establish an International Criminal Court will give the world a permanent mechanism for punishing those responsible for the gravest of human rights violations, of the sort that have been committed in Rwanda, Bosnia and Kosovo. The Treaty, which enjoys broad international support, was carefully negotiated to ensure that the Court will focus on atrocities such as these, and operate according to the highest standards of professionalism and integrity.*

At the end of World War Two, with much of Europe in ashes, some allied leaders argued that the leaders of the defeated Third Reich be summarily executed. The United States disagreed. U.S. leaders insisted that a larger and more valuable contribution to the peace could be made if the Nazis were individually charged and tried for violations of international law. This would establish two cardinal principles: first, that the rule of law should take precedence over the rule of force; and second, that it is individuals, not states, who commit crimes. Individual accountability was the key, and claiming that a criminal action was an "act of state" would be no defense.

The chief prosecutor at Nuremberg, U.S. Supreme Court Justice Robert Jackson, declared in his opening statement, "that four great nations, flushed with victory and stung with injury, stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of the law is one of the most significant tributes that Power has ever paid to Reason."<sup>1</sup> Emphasizing that the Nazi leaders embodied "sinister influences that will lurk in the world long after their bodies have returned to dust," Justice Jackson went on: "The [Nuremberg] charter recognizes that one who has committed a criminal act may not take refuge in superior orders nor in the doctrine that his crimes were acts of state."

The principles enunciated by Justice Jackson took root, giving rise to an impressive body of international law. In 1948, the UN Genocide Convention affirmed genocide as an international crime for which individuals could be held responsible, either before national

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courts or a contemplated international tribunal. The four Geneva Conventions of 1949 codified many of the laws of war and established individual responsibility for grave breaches of them. In 1950, the International Law Commission (ILC), a body of legal experts acting at the direction of the UN, distilled the "Principles of the Nuremberg Tribunal." The first of these was that "[a]ny person who commits an act which constitutes a crime under international law is responsible therefore and liable to punishment."

But if the Nuremberg Principles live on more than half a century later, so do the "sinister influences" of which Justice Jackson warned, shocking the conscience and disturbing the stability of the world. Their handiwork is visible in the genocides in Rwanda and Cambodia; the widespread use of chemical weapons against the Kurds of Iraq; ethnic cleansing in Kosovo and the slaughter of thousands of Muslims at Srebrenica; the gruesome images of women and children whose limbs have been hacked off by rebel forces in Sierra Leone. In all of these modern conflicts, it is civilians, not combatants, who are the principal victims.

In the half century since Nuremberg, those who have perpetrated the worst crimes have too often escaped justice. In large part this is because there have been no courts willing or able to judge them. National judicial systems are often hopelessly compromised, if not completely destroyed, by the governments responsible for the crimes in question. And for as long as the Cold War dragged on, superpower rivalries and Security Council vetoes doomed any proposal to establish an international court.

But then the Cold War ended, and in its wake came the ethnically motivated atrocities in Rwanda and the former Yugoslavia. These led to a new determination to ensure that those responsible for the most egregious crimes would be held accountable. Reclaiming the leadership it had displayed after World War Two, the United States worked to have the UN Security Council create two special criminal tribunals, the first to deal with

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crimes committed in the former Yugoslavia, and the second to try those responsible for the Rwandan genocide. In 1994, the Clinton Administration declared that support for a *permanent* international court would be an important element of a foreign policy designed to deter future outbursts of ethnic violence.

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They arrived at this view as they observed both the strengths and the weaknesses of the "ad hocs" – strengths, because their professionalism and fairness offered a preview of how a permanent international court would operate; and weaknesses, because it became clear that any country-specific court set up under Security Council auspices would be vulnerable to political and budgetary pressures and debilitating start-up delays.

At the same time as these limitations became apparent, there was also growing state interest in the assertion of "universal jurisdiction," a term that expresses the idea that certain crimes are so heinous that they constitute crimes against the entire international community, wherever they are committed. As such, humanity as a whole—that is to say, *any* state—has the right, and sometimes the obligation, to bring the perpetrators to trial. But that is more easily said than done.

Both the promise and the pitfalls of universal jurisdiction were dramatized in 1998, when the United Kingdom, acting on charges of torture filed by a Spanish prosecutor, detained the former Chilean military leader, Gen. Augusto Pinochet. The Pinochet affair was in many respects a pathbreaking assertion of universal jurisdiction, but the diplomatic controversies it aroused also showed the difficulties involved in the application of that legal principle. The exercise of universal jurisdiction is at a very early stage, and will evolve over time as additional cases arise. But while it promises to be a useful adjunct to the ICC, it will

never have the same capacity or consistency as a permanent court, and may lack the perceived legitimacy that a treaty-based entity will enjoy.

By successfully prosecuting war criminals in the former Yugoslavia and Rwanda, we can send a strong signal to those who would use the cover of war to commit terrible atrocities that they cannot escape the consequences of such actions. And a signal will come across even more loudly and clearly if nations all around the world who value freedom and tolerance establish a permanent international court to prosecute, with the support of the United Nations Security Council, serious violations of humanitarian law.

This, it seems to me, would be the ultimate tribute to the people who did such important work at Nuremberg — a permanent international court to prosecute such violations.

—President Clinton, October 15, 1995

## A COURT THAT SERVES THE NATIONAL INTEREST

On July 17, 1998, just a few months before Pinochet's arrest, 120 countries agreed to the text of a treaty establishing the ICC. Those in favor included all of our NATO allies, with the exception of Turkey. Supporters of the Court saw the treaty, with all of the compromises that were adopted in order to make it a reality, as a necessary extension of national jurisdiction in those extreme cases where local justice is unavailable to deal with the most serious crimes. Seven countries voted against the treaty, including the United States. For the United States' closest allies, U.S. opposition to the treaty was deeply disappointing.

The ICC Treaty embodies deeply held American values. The establishment of the court responds to the moral imperative of halting crimes that are an offense to our common humanity. The ICC promises to promote respect for human rights; advance the rule of law around the world, both domestically and internationally; reinforce the independence and effectiveness of national courts; and uphold and strengthen international norms. Ever since World War Two, the United States has been a leader in expressing these aspirations for justice.

With these values as its foundation, the ICC was created to advance objectives that are quite consistent with the long-term U.S. national interest in a peaceful, democratic and integrated global system. The Rome Treaty, in its final form, promises to advance U.S. interests in three important ways.

- *First*, the ICC will help to deter future gross violations. It will not halt them completely, of course. But over time, its proceedings are likely to cause

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prospective violators to consider the likelihood that they will face prosecution for their actions. The international tribunals for the Former Yugoslavia and Rwanda, backed in recent months by more vigorous enforcement actions and the active cooperation of other states, now have custody of dozens of former senior government officials, high-ranking officers, death squad leaders and detention camp commanders.

Even in cases where indicted war criminals have eluded capture, the tribunals' effect in curbing atrocities is already apparent in the former Yugoslavia. Leading architects of ethnic cleansing, such as Radovan Karadzic and Ratko Mladic, have

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not yet been brought to trial, but their indictment has limited their ability to act. Driven underground, they have lost local credibility and support. This has allowed more moderate political forces to emerge, and reduced the risk to US and other international peacekeepers in Bosnia. And by reaffirming the notion of individual rather than collective criminal responsibility, the Yugoslav Tribunal has already begun to help short-circuit cycles of counterviolence and retribution, and show victimized groups that justice can be achieved without violence.

- *Second*, by contributing in this way to a more stable and peaceful international order, the ICC can help promote US security interests. What is already true of the Yugoslav Tribunal will be much more true of the ICC, because of its broader jurisdiction, its ability to respond to Security Council referrals, and the perception of its impartiality. The Court will promote the U.S. interest in preventing regional conflicts that sap diplomatic energies and drain resources in the form of humanitarian relief and peacekeeping operations. Massive human

rights violations almost always have larger ramifications in terms of international security and stability. These include widening armed conflict, refugee flows, international arms and drug trafficking, and other forms of organized crime, all of which involve both direct and indirect costs for the United States.

- *Third*, the ICC will reaffirm the view that international law matters, including those laws that protect Americans overseas. For many people in the United States, "international law" is seen either as an abstraction or an unwelcome intrusion into our sovereign affairs. But as Abram Chayes, former Department of State Legal Adviser, wrote shortly before his death in early 2000, "The United States has traditionally maintained the importance for its own national security of an international system governed by the rule of law. Skeptics have often dismissed this invocation of an international rule of law as the utopian rhetoric of a few internationalists. In the post-Cold War world, however, it is hardheaded realism. An increasingly interdependent world is bound together by law. Much of what the United States can and must do to enhance its own prosperity and well-being depends on reliably functioning legal frameworks."<sup>1</sup>

The ICC should be seen as an integral part of the current globalizing tendency in which nations seek to exercise their sovereignty not unilaterally but through cooperative arrangements and rules. This also includes rules to stimulate and regulate the global economy, protect the environment, control the proliferation of weapons of mass destruction, and curb international criminal activity. The United States has long been a leading exponent, and will be a prime beneficiary, of this growing international framework of cooperation.

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<sup>1</sup> Abram Chayes and Anne-Marie Slaughter, "The International Criminal Court and the Future of the Global Legal System," in Sarah B. Sewall and Carl Kaysen, eds., *The United States and the International Criminal Court: National Security and International Law*, Rowman & Littlefield, September 2000. In preparing this paper, the authors have drawn upon a number of arguments presented in this volume.





## THE REASONS FOR U.S. OPPOSITION

In light of these clear benefits, why did the U.S. government oppose the Rome Treaty? Part of the explanation is the widespread suspicion in Congress of multilateral institutions in general, and the way they are perceived to encroach on U.S. sovereign prerogatives. But more fundamentally, the ICC highlights the tension that exists among U.S. policymakers between the desire for a cooperative international system based on the rule of law, and the wish to assert the right to use unilateral force in pursuit of policy goals.

Because of its size, strength and influence, the U.S. military has played the preponderant role in multilateral military operations in such hot spots as Iraq and Kosovo. U.S. military capabilities and political influence increase the exposure of U.S. forces deployed internationally. It is tempting for U.S. leaders to see international norms and institutions as checks on their freedom of action, rather than as the essential bricks and mortar of a global order that is congenial to U.S. interests.

It was largely as a result of these concerns that U.S. policymakers sought to modify the Rome Treaty and, in the last two years, to seek by other procedural means guarantees against the prosecution of U.S. citizens. While it made significant contributions to the content of the Treaty, and thus to the eventual character of the Court, the U.S. delegation appeared to see the Rome conference less as an opportunity to be maximized than as a threat to be contained. An important element of this

We anticipate there will be instances in which it will be in the national interest to respond to requests for cooperation even if the United States is not a party to the ICC Treaty. We may decide that an international investigation and prosecution of a Pol Pot, a Saddam Hussein, an Idi Amin, a Foday Sankoh, or some other rogue leader who has committed or is committing heinous crimes that no civilized government or people could possibly condone or acquiesce in, would be in the national interest of the United States to support.

—David J. Scheffer, U.S. Ambassador-at-Large for War Crimes Issues, July 26, 2000

was the concern that the Court might become a venue for second-guessing controversial U.S. military command decisions.

With the aim of exempting Americans from the jurisdiction of the ICC, the United States has repeatedly tried to curtail the Court's potential jurisdiction over the nationals of states that are not parties to the ICC Treaty. Yet the Court's jurisdiction over non-party nationals is exceedingly narrow. It would arise only where an alleged crime was committed on the territory of a State Party, and where no state (including the state of nationality) is willing or able to conduct a genuine investigation.

The U.S. demand for special treatment proved hard for other delegations to understand. The other major Western governments, and the leaders of the so-called "Like-Minded" group of states supporting the ICC, were well aware of how much the Court would benefit from U.S. expertise and leadership. Indeed, many of these governments had their own reservations about the Statute; those who were active participants in international peacekeeping operations, such as Britain and France, made much the same calculus as the United States about the risk of exposure of their forces to ICC jurisdiction. Some nations, such as France, knew that accepting the Treaty would even oblige them to amend their Constitutions. But ultimately they concluded that the risks involved in creating such a treaty were clearly outweighed by its benefits. Both Britain and France will be present when the first Assembly of States Parties convenes.

The International Criminal Court will act only where national courts have failed to offer a remedy. Therefore I think the concern about U.S. servicemen is misplaced. There is a strong judicial system in the United States. It can take action itself if there were to be breaches of international humanitarian law by U.S. servicemen . . . in those circumstances the International Criminal Court does not apply.

We in Britain would not be exposing our servicemen to vexatious prosecution. We have signed up to the International Criminal Court because we are confident there is no risk of that.

— British Foreign Secretary Robin Cook, August 2000

The leading proponents of the Treaty went to considerable lengths to accommodate U.S. concerns. By the end of the Rome Conference, many important elements of the Statute had been reshaped to allay U.S. fears. The final document incorporated most of the key safeguards on which the United States had insisted, and in some ways these helped create a treaty which more states are now likely to sign.

*By the end of the  
Rome Conference,*

But as the post-Rome debates over the Court's procedures drew to an end, the United States stuck to its core objection: that there was still a risk, no matter how small, that a U.S. soldier might at some future date be brought before the Court. While the United States abandoned its effort to alter the text of the Treaty itself, it pressed for the same result through some form of procedural side agreement that would give absolute guarantees that no American could ever be prosecuted.

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However, such an endeavor presents some very real problems. Would a loophole for Sergeant Jones – or General Jones – also provide a loophole for a future Saddam Hussein or Pol Pot? The United States has been urging other states to accept an exemption for the "official acts" of non-party nationals, in order to satisfy its own desire for immunity, while minimizing the risk that this would offer an escape route for others. However, no matter how imaginatively framed, the principle of exemption for "official acts" for the nationals of any state cannot be reconciled with the core principles laid down at Nuremberg.

## RISKS AND BENEFITS

The risks posed by the ICC appear negligible in relation to the benefits it would bring. In assessing the U.S. government's concerns, it is important to bear in mind some basic threshold considerations about the ICC. Most fundamentally, it will be a court of last resort, stepping in only where states are unwilling or unable to dispense justice. Indeed, that is its entire purpose: to ensure that the worst criminals do not go free to create further havoc just because their country of origin does not have a functioning legal system. The Court was designed with situations like Rwanda and Cambodia and Sierra Leone in mind, not to supplant sophisticated legal systems like those of the United States. Furthermore, strict guidelines for the selection of ICC judges and prosecutors should ensure that the legal professionals who staff the Court, like those who have staffed the ad hoc tribunals, will not waste their time in the pursuit of frivolous cases.

Second, the Court will only deal with genocide, war crimes and crimes against humanity, which are in general subject to a more restrictive jurisdiction than that available to domestic courts under international law. The ICC Statute makes it clear that the Court will be concerned above all with the most serious, planned and large-scale crimes, rather than with allegations of isolated atrocities.

Could a member of the U.S. armed forces face credible allegations of crimes of this magnitude? Genocide would seem to be out of the question, although charges of war crimes and crimes against humanity are more conceivable. These might arise as a result of humanitarian military interventions such as the spring 1999 bombing of Kosovo.

If the Court sought to investigate an American in such a case, it would have to inform the United States of its intent, and give the United States a month to declare its own intention to investigate. The My Lai massacre in Vietnam revealed the bitter truth that American soldiers can sometimes be capable of heinous crimes. If such a crime were committed today, it is logical to suppose that the U.S. military justice system would

investigate and prosecute the perpetrators, as it did at My Lai, whether or not an ICC existed. Also, since the ICC will be primarily concerned with acts committed in pursuit of a systematic plan or policy, an isolated crime would generally not meet this threshold.

If the United States decided *not* to proceed with a domestic prosecution, the ICC prosecutor would be obliged to respect that decision and defer to U.S. assurances. In theory, the ICC's Pre-Trial Chamber could still overrule the United States' claim, but only if a majority of judges—serious, eminent international law experts, elected through a rigorous process—decided that the United States was “unwilling or unable genuinely to carry out the investigation or prosecution.” Obviously, in view of the capacity of the U.S. military justice system, there could be no realistic finding of inability. So that leaves unwillingness—in other words, a manifest lack of judicial independence and impartiality, a desire to shield the guilty party from criminal responsibility, or obvious bad faith in the conduct of the proceedings.

But assume for the sake of argument that worse comes to worst, and an American faces indictment by the International Criminal Court. For this to happen, there would have to be reasonable grounds for suspecting that the person had committed war crimes, genocide or other crimes against humanity on the territory of a state that had accepted ICC jurisdiction. It would also require that no state, including the territorial state and the United States itself, was able or willing to conduct a genuine investigation. While such a chain of events is highly unlikely, it is possible, *in theory*, under the Rome Statute.

If the United States resorted to political means to evade the Court's jurisdiction, this of course would have diplomatic costs of its own. It would be an embarrassment and it would undermine the credibility that is the foundation of U.S. global leadership. Yet

[The ICC] is no longer something that's going away; in fact it's probably something that's coming quicker than most people would anticipate. It's now taking form, shape and movement, plus some energy. That is itself should be a message. Our strategy is to keep the U.S. engaged...Let's continue to work and massage and accommodate. But there has to be flexibility on the U.S. side. They have to adjust their sights now too and recognize that they are not going to get an exemption from this court. That's pretty clear. They've been told that.

— Hon. Lloyd A. Axworthy, Foreign Minister of Canada

ironically, these are precisely the kind of costs that the United States has already begun to incur as a result of its pursuit of exemption. The current levels of disquiet among NATO allies about U.S. unilateralism would only increase if the United States were to move into a posture of open opposition to the ICC. Worse, this kind of antagonism might well produce the very outcome that critics of the ICC fear – namely a Court with a more unfriendly attitude toward the United States.

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On the other hand, continued engagement with the ICC process, as a non-party to the Treaty, would reaffirm the standing U.S. commitment to uphold international humanitarian law. The United States could adopt such a posture secure in the knowledge that, in the unlikely event that an alleged crime by an American was brought to the Court's attention, the ICC Statute would obligate it to defer to the U.S. military justice system to carry out a good faith investigation. The marginal risk that is involved could then simply be treated as part of the ordinary calculus of conducting military operations, on a par with the risk of incurring casualties or the restraints imposed by the laws of war. The preparation and conduct of military action is all about risk assessment, and the marginal risk of exposure to ICC jurisdiction is far outweighed by the benefits of the Court for U.S. foreign policy.

THE IMMINENT REALITY OF THE COURT

These arguments become more compelling as the tangible reality of the Court draws nearer. The ICC may come into existence as early as 2002 or 2003. The Treaty will come into force when 60 countries have ratified it. As of this writing, 98 states have signed the Rome Statute. Fifteen have already ratified. By the end of the year 2000, a majority of the 15 member states of the European Union are expected to have done so.

As the number of ratifications moves closer to the required 60, there will be fewer incentives for other governments to go any further to accommodate U.S. demands. Support for the basic architecture of the Rome Statute runs strong and deep. Whatever their initial

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misgivings, the signatories to the treaty, including those that regularly commit troops abroad, have decided that it offers enough safeguards to meet their concerns, and that it is necessary to temper their demands for absolute autonomy if institutions like the ICC are to be developed.

A functioning ICC will close off other paths to international justice. Once the Court is in place, there will be a strong desire to avoid duplicating its work by creating additional ad hoc criminal tribunals for particular countries.

Where national justice fails, the ICC will be the alternative. The Court will be the only realistic means of securing the principles of international justice to which the United States has for so long declared its commitment. Open opposition to the Court, therefore, would risk being interpreted as disdain for international justice as a whole.

The political and financial strength of the ICC in its early days will come from leading European governments and other close U.S. allies, with its moral credibility secured by its African and Latin American supporters. While they would strongly prefer active U.S. participation and support for the process, they have not wanted or needed it enough to

compromise the basic integrity of the Court. For that reason, they have been reluctant to accept any amendments to the ICC's Statute or procedural rules that would give the nationals of any state, even the United States, a blanket exemption from prosecution.

Those who will carry the main financial burden of the Court in its start-up phase have calculated that it can be viable even without Washington's support. They also recognize, and are likely to work hard to convince the United States, that it will eventually get beyond its frustration with the current impasse, and appreciate, as its allies have, that the benefits of the Court are greater than its drawbacks. Time and patience are the keys here – time for the Court to demonstrate in practice that it is the fair, professional and effective institution that its advocates claim it will be, and patience on the part of the current and incoming U.S. administrations not to walk away from the process but to remain benignly engaged, even as a non-party, so that the United States can retain the greatest possible degree of flexibility in defining its future relationship to the ICC.

#### HOW THE COURT WILL WORK

The ICC Statute promises to create a Court that is independent, effective and fair, providing a framework for international justice for future generations.

Cases will be brought before the court by States Parties, the UN Security Council, and the ICC Prosecutor acting on his or her own motion. The independence of the Prosecutor is an especially vital guarantee of the Court's future strength and credibility.

The Security Council will, under specified circumstances, also have the right to defer ICC investigations or prosecutions.

The ICC will be a permanent judicial body headquartered in The Hague, with 18 judges divided among pre-trial, trial and appeals divisions. Its chief prosecutor and one or more deputy prosecutors will be elected every nine years to nonrenewable terms by an absolute majority of nations that have ratified the ICC Treaty.

The ICC is not intended to replace functioning domestic judicial systems. Instead, it will provide an alternative to impunity when national court cannot, or will not, investigate and prosecute the most serious crimes.



TIME FOR A NEW APPROACH

**D**espite past U.S. hostility to the court, the next administration will have a fresh opportunity to display leadership on the issue of international justice, which for so long has been a central goal of U.S. policy. More broadly, this will help the United States to reaffirm its authority to exercise global leadership, which will depend on the continued trust, confidence and cooperation of other nations.

A reassessment of U.S. policy toward the ICC should be based on four assumptions, each of which has been validated in the course of past U.S. efforts to shape the court.

- 1. The ICC is an integral part of an expanding international framework, based on the rule of law, that is congenial to U.S. interests and values.** Ever since World War Two, many other international organizations have benefited from U.S. engagement and support, and this in turn has strengthened U.S. influence within them. The development of international law and institutions often involves putting long-term interests ahead of short-term ones; intensive engagement in the shaping of a new institution like the ICC is a key way of maximizing its effect in serving the national interest in the long term.
- 2. The creation of new international treaties or legal institutions requires a willingness by all participants to make concessions.** As an international agreement, the Rome Statute bears the marks of many concessions to sovereign states – not least the United States. The United States should recognize that this kind of give and take is not only unavoidable but can be positively beneficial. As a result of the extensive negotiations that have led to its creation, the ICC will have a twofold virtue: it will balance the deference to sovereignty concerns of an international institution with the rigor of a domestic criminal court. Accepting the

way in which the Rome Statute balances these diverse interests would do nothing to preclude the United States, through engagement with the Court, from continuing to shape the institution in accordance with its interests. It would, however, relieve the United States from its current uncomfortable situation of seeking concessions it cannot win in a process it can neither leave nor realistically oppose, and would offer a real opportunity to show leadership in the effort to bring the worst criminals to justice.

- 3. The risks of U.S. exposure to ICC jurisdiction are in fact very limited, as a result of the extensive safeguards that are built into the Rome Treaty.** Those safeguards are there in large part because the United States insisted on their inclusion. The modest risks that remain can never be fully eliminated without compromising the core principles established at Nuremberg, and undermining the basic effectiveness of an institution that can do much to advance U.S. interests. The best way to minimize the risks that exist is to remain engaged with others in shaping the Court. The risks can only be aggravated if the United States decides to oppose the Court. Remaining engaged in the ICC process, even as a non-State Party, would allow the United States to have a hand in the nomination, selection and dismissal of its judges and prosecutors, and so help ensure that it operates to the highest standards of professional integrity. More broadly, the ICC's Assembly of States Parties would provide an ideal setting for the United States to demonstrate its leadership in the fight against impunity for the worst international criminals.
- 4. U.S. leadership requires working in close cooperation with our allies around the world.** The evolution of the ICC demonstrates that old tools of leadership must be updated to meet the demands of today's more complex world. Although the progress toward establishment of the ICC bears many marks of U.S. moral leadership, the negotiations over the Court have made it clear that economic and military supremacy cannot substitute for the kind of cooperation with our allies that

is grounded in an appreciation of common strategic interests. Reluctance to recognize this is likely to produce a growing estrangement from states and institutions that are important to U.S. security.

## RECOMMENDATIONS

**A** new U.S. administration will be faced with three possible choices in defining its future policies toward the ICC:

- Outright opposition, in the form of withdrawal from the ICC diplomatic process and the threat of linkages between future U.S. military and economic assistance and diplomatic support and other nations' ratification of the ICC Treaty;
- A neutral or "hands-off" posture, without diplomatic or other forms of pressure against states that choose to ratify the ICC Treaty;
- Benign cooperation with the court as a non-state party, remaining engaged in the diplomatic process, attending the Assembly of States Parties as an observer, showing a good-faith interest in the development and strengthening of the Court, and a readiness to provide diplomatic, financial and other forms of support where this would serve U.S. interests.

We urge the next administration to choose the third of these options, recognizing that the high diplomatic costs of outright opposition to the ICC would significantly damage the U.S. national interest. Once the ICC is up and running, it seems highly unlikely that the United States would refuse to support the principle of accountability for the worst international crimes simply because the Court was the only viable means of upholding that principle. We encourage a future U.S. administration to see the advantage in supporting the Court, if only as a matter of raw political calculus. Opposition to a functioning Court would undermine faith in a world based on justice and the rule of law and shake one of the

foundations on which the legitimacy of U.S. global leadership has rested since World War Two.

We therefore make the following recommendations:

1. The present administration should recognize that, while it may gain time to observe the development of the ICC as a non-signatory to the Treaty, a U.S. exemption from the court's jurisdiction will not be possible. It should accordingly avoid an "all or nothing" approach to such an exemption, and avoid strategies that would further isolate the United States and limit the options available to future administrations.
2. The next administration should conduct a comprehensive and public review of U.S. policy toward the ICC, based on an assessment of the long-term benefits that the court can offer. Such a review should include an analysis of the ICC Statute, as well as the Court's Rules of Procedure and Evidence and Elements of Crimes, noting the extent to which these documents are compatible with U.S. interests, and recognizing the extent to which the U.S. delegation to the ICC was able to shape their content.
3. For as long as it remains a non-state party to the ICC Treaty, the United States should pursue a policy of benign cooperation with the Court, with a readiness to provide diplomatic, financial and other forms of support, subject to review in the event that the Court acts in a manner that is inconsistent with its purposes as defined in the Statute.