Far from Nuremberg

The United States, War Crimes, and the International Criminal Court

by Mark M. Hull

Commitment to the rule of law, the idea that both persons and nations are responsible for their conduct, is generally seen as the dividing line between civilized behavior and barbarism. Flowing from the mass atrocities that occurred during World War II, the United Nations—led by the United States—championed an international forum intended to define crimes and enforce justice in an effort to insure that there would never again be a situation where the guilty could escape punishment for crimes that offend the most basic concepts of humanity. Despite the proven success of that approach since 1945, various domestic political agendas and nationalistic concepts have cast the U.S. in the role of a country that actively seeks to evade the same application of international justice.

Concepts of international criminal law have an uneven history. Largely originating in the middle of the nineteenth century, the earliest efforts (e.g. St. Petersburg Declaration in 1868) were treaties aimed at mitigating unnecessary suffering and later expanded to cover the minimum acceptable conduct of belligerents in areas such as naval war, the protection of civilian populations, treatment of prisoners of war, and limitations on the use of unnecessarily destructive ordnance. The Hague Convention (1899) and the Geneva Convention (1929) hammered out the essential prohibitions but failed to agree on an enforcement mechanism. Perhaps naively, the parties believed that a common spirit of basic humanity would suffice and that a treaty signed in good faith was binding in and of itself. Honest self-regulation would obviate the need for an external international arbiter.

A factor, too, was the new-found sense of nationalism which was more powerful than the nascent idea that justice is a problem best confronted by nations acting in concert. Citizens were first responsible to their own systems of law and order, and the idea that—for example—a Frenchman

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could be fairly judged by a panel consisting of Italians, Germans, and English would have seemed patently absurd. The horrific nature of World War I started to change this attitude. Articles 227-230 of the Versailles Treaty provided for war crimes trials of the defeated Central Powers--certainly with an element of victor's justice--by ill-defined Allied tribunals. A separate commission charged to study the matter recommended that a "High Tribunal" be created, with judges appointed by the Allied governments. This tribunal could determine its own procedures and apply "the principles of the law of nations as they result from the usages established among civilized peoples, from the laws of humanity and from the dictates of public conscience." Punishments could be imposed in accordance with what is customary "in any country represented on the tribunal or in the country of the convicted person."

The drafters of the Versailles Treaty rejected this recommendation. Along with the Japanese, the Americans were uncomfortable with the idea of international enforcement, for which "a precedent is lacking, and which appears to be unknown in the practice of nations."[1]

They were likewise lukewarm on the idea of trying a head of state and the precedent that might set. Accordingly, after intense wrangling with the Weimar government (the Allies initially presented a list of 900 war crimes suspects) the Allies decided to allow German courts to try German citizens for violations of international law. A series of such trials were held in Leipzig in 1921[2] and the results were unimpressive: of 45 named individuals, only twelve were brought to trial. Of these, six were judged guilty, with the longest sentence being four years imprisonment. Two of the convicted soon escaped from custody under suspicious circumstances and were later pardoned.[3] Clearly, despite the best intentions by some--and the worst intentions by others--the Allies could not bring forward a binding sense of international justice. Resolution of this point would have to wait for another twenty years and crimes so shocking that neither the Allies nor Germans in 1921 could have possibly envisioned them.

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The brief window of optimism in the 1920s expressed itself in the Kellogg-Briand Pact, which outlawed war as an instrument of national policy. A tiger without teeth, this well-intentioned attempt at international peace and cooperation also lacked any means of enforcement, although fifteen nations (including the United States, Britain, France, Germany and Japan) ratified it. While subsequent events demonstrated that Kellogg-Briand did not in any way dissuade nations from going to war to further their individual national interests, the violation of this agreement provided an important legal basis for what came next. It also shows the willingness, at least for this moment in time, of the U.S. to act in concert with other nations in the realm of international accords.

It is unnecessary at this point to review the specifics of mass murder, deportation, slave labor, and other atrocities that characterized World War II—these are well known and beyond the need of additional evidence. As early as 1941, Roosevelt and Churchill issued warnings of "fearful retribution" to be visited upon Nazi leaders for the murders in Eastern Europe known to have been committed at that stage. The Soviet Union joined this chorus a month later. The first meaningful steps toward fulfilling this promise originated from the St.

James Palace Declaration in January 1942, where the representatives of nine occupied nations jointly stated that postwar criminal trials would take place, based upon violations of the Hague and Geneva Conventions. Later that same year, Roosevelt and Churchill directed the creation of a United Nations War Crimes Commission to investigate German (and Japanese) atrocities. Joseph Stalin joined the other two Allied leaders in November 1943 in Moscow, calling for international criminal trials for those Nazi leaders who committed crimes which went beyond the borders of any one nation.[4] The intent, though still vague on specifics, was to avoid a repetition of the Leipzig Trials where the accused were subject to the variable justice of their own country. Crimes of this magnitude were a matter for the community of nations.

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However, this realization was not as natural and immediate as it might seem. In fact, until the spring of 1945, "justice" in an Allied sense meant the capture and execution, without trial, of the Nazis considered responsible for war crimes. Ironically, the Soviets—no strangers to war crimes themselves—pushed hardest for an international judicial forum. Britain's view was more draconian:

> His Majesty's Government is deeply impressed with the dangers and difficulties of this course [judicial proceedings], and they think that execution without trial is the preferable course. [A trial] would be exceedingly long and elaborate, many of the Nazis' deeds are not war crimes in the ordinary sense, nor is it at all clear that they can properly be described as crimes under international law.[5]

Perhaps the most significant yet least well-known individual in the development of international law was a U.S. Army lawyer named Murray Bernays. Almost single-handedly, he charted the course that led to the creation of the International Military Tribunals in Nuremberg and Tokyo, and by extension, to the Rome Statute and International Criminal Court of today. Despite the preference of his superiors for "executive action," Bernays made the compelling argument that it was possible to navigate around the functional gaps in contemporary international criminal law and still achieve a measure of justice for victims of crimes that were not clearly defined. His solution paved the way for what is perhaps the most distinct difference between the methods of the Allies and the Axis: international justice done in concert with other nations. An imperfect process, to be sure, and one which opens up charges of the victorious merely punishing the vanquished, but it recognized that the nature of Axis crimes—the Holocaust chief among them—were of an altogether different character, of a special class of evil. The only means of achieving practical justice was an international trial; open to the world, with the defendant's permitted to deny the charges and present evidence on their own behalf.

Roosevelt accepted these arguments, presented in a memorandum to him from his war cabinet in January 1945, that "While [executive action] has the advantage of sure and swift disposition, it would be violative of the most fundamental principles of justice, common to all the United Nations."[6] These principles, enshrined in both the London

Cabinets filled with human skulls of victims of the Khmer Rouge, disinterred from the grounds of the prison on display at Tuol Sleng Genocide Museum in Phnom Penh, Cambodia.

photo by Adam Carr

Declaration in June 1945 and the indictments of the Nuremberg defendants, consisted of four separate, yet related points: planning and conspiring to wage aggressive war (in violation of the Kellogg-Briand Pact); waging aggressive war; war crimes; and crimes against humanity.[7] These remain the bedrock of international criminal law as expressed in the Rome Statute. There was likewise a specific rejection of two earlier objections—the head of state defense and acting under order of a government or superior. Any person, chief of state or army private, was equally culpable if the evidence so indicated.

These same principles were translated into permanent international law in August 1946 when the United Nations General Assembly adopted the "Nuremberg Principles." Principle VI carried forward the categories of criminal conduct from the International Military Tribunal: Crimes Against Peace; War Crimes (violations of the laws and customs of war, including murder, ill-treatment, or deportation to slave labor of the civilian population, murder or ill-treatment of prisoners of war, and wanton destruction of towns not justified by military necessity); and Crimes Against Humanity (murder, extermination, enslavement, deportation, or persecution based on political, racial, or religious grounds). Related parts of the Nuremberg Principles took the concept a step further: individual responsibility for war crimes, individual responsibility in international law regardless of whether domestic law prohibits the conduct, rejection of the head of state defense, rejection of the superior orders defense, right to a fair trial for those accused, and complicity/conspiracy as a separate criminal offense punishable by the international community. The U.S. voted in favor of adopting these principles.

Unfortunately for the cause of international criminal law, this expression of intent was not soon translated into meaningful action. Despite many instances of war crimes in the decades after 1945, the first international tribunal under UN auspices was not created until 1993 (International Criminal Tribunal for the former Yugoslavia), followed soon thereafter by the International Criminal Tribunal for Rwanda, in response to the overwhelmingly brutal genocide in that country.

The creation of a UN criminal court to punish those responsible for the Cambodian genocide serves as a useful example. The United Nations adopted the Genocide Convention in 1948, which both defined the crime and mandated international efforts to stop it once identified as such. Despite abundant evidence to the murder of 2 million people and the forced deportation under slave labor conditions of millions more carried out at the direction of Pol Pot and his

Khmer Rouge between 1975 and 1979, the promised international justice was slow to come. Despite being at the forefront of the effort to quantify and define genocide, it took us forty years to ratify the treaty which aimed to punish the crime. President Harry Truman first sent the treaty to the Senate in 1949; Ronald Reagan deposited the ratified document (with reservations) at the UN in 1988.[8]

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The principal reason for the four decades' long delay was domestic American conservative opposition to some of the key principles in international enforcement: that the Genocide Convention would subordinate U.S. domestic law with international concepts, causing a constitutional crisis. The U.S., they argued, would forfeit sovereignty if American citizens were subject to foreign entities and foreign laws without specific U.S. consent. This same line of argument continues today in connection with U.S. ratification of the Rome Statute and participation in the International Criminal Court. It is worth noting that Americans citizens are routinely tried, convicted, and sentenced in foreign courts, without prior U.S. consent, just as foreign citizens are prosecuted and convicted in the American judicial system.

Finally, in 1994, almost twenty years after the Khmer Rouge murders began, the U.S. Congress passed the Cambodian Genocide Justice Act, which stated, in part:

> Consistent with international law, it is the policy of the United States to support efforts to bring to justice members of the Khmer Rouge for their crimes against humanity committed in Cambodia between April 17, 1975 and January 7, 1979.[9]

It was not a general endorsement of international criminal law principles, and the nature of the crime (Cambodian nationals murdering other Cambodian nationals) precluded touching upon the thorny issue of an international tribunal trying Americans for crimes committed elsewhere.

U.S. support for global endeavors has a checkered history. Although instrumental in the creation of the idea of international justice, American international priorities are often determined with a home audience in mind. The unfortunate results of U.S. intervention in Somalia in 1993—nineteen U.S. servicemen killed in the capital city of Mogadishu during the course of this humanitarian relief mission—destroyed domestic support for international intervention. In the wake of Mogadishu, moves to create a permanent UN rapid reaction force were effectively killed by a Clinton administration under public pressure. When, following the genocidal tragedies in the Balkans, Cambodia, and Rwanda, the UN gathered enough momentum to pursue the idea of an International Court, the U.S. balked.

U.S. military opposition to an International Criminal Court (ICC) was both predictable and influential. Both President Clinton and his Secretary of State Madeleine Albright championed the idea of the ICC well into 1998, perhaps most poignantly during a visit to Rwanda, sight of the humanitarian tragedy where the U.S. and the rest of the civilized world did nothing to intervene. The Pentagon's fears were grounded on the possibility of "frivolous prosecutions of commanders and ordinary soldiers that are politically motivated by opposition to U.S. military actions."[10] The Pentagon had powerful friends in the U.S.

Senate, where any negotiated treaty must be submitted for advice and consent. In a *New York Times* article, journalist Eric Schmitt offered that:

> The Pentagon has a key ally in the Senate, which must approve United States membership in the court. Senator Jesse Helms, the North Carolina Republican who heads the Senate Foreign Relations Committee, vowed last month that any international criminal court would be 'dead on arrival' in the Senate unless Washington had veto power over it.[11]

Helms spokesman clarified his master's intent: that the U.S. Senate Foreign Relations Committee (specifically the Subcommittee on International Operations) "considers the ICC to be the most dangerous threat to national sovereignty since the League of Nations."[12] Other comments were even more direct. One U.S. senator was reported as saying, "this court [the ICC] is a monster, and it is a monster that must be slain."[13]

Despite ominous rumblings from the U.S., representatives from 161 UN member states attended the June-July 1998 conference in Rome with the aim of establishing the ICC. U.S. representatives attended but remained firm on certain positions, such as the insistence on the veto power of the five permanent members of the UN Security Council as to any prosecution by the ICC. More of an impediment was the clear message that the American government would not likely surrender Americans to face an ICC tribunal; U.S. military and civilians "will always remain beyond the conceivable reach of such an [international criminal] court."[14] U.S. delegates likewise demanded that before an investigation could proceed, the ICC must obtain the consent of any state that had an interest in the case, thereby effectively insuring that Americans could never be prosecuted unless the American government pointedly agreed. This same line of reasoning would also protect U.S. allies and interests—of whatever nature—from any adverse judgments by the tribunals.

American concerns were not entirely specious. The U.S. provided the bulk of the funding (and often essential military support) for UN-sanctioned peacekeeping around the globe. These same missions were often politically contentious and it was reasonable to have some system of protecting soldiers and leaders from arrest and trial for merely carrying out their assigned tasks. "It is in our collective interest that the personnel of our militaries and civilian commands be able to fulfill their many legitimate responsibilities without unjustified exposure to criminal legal proceedings."[15]

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However, the key issue was (and remains) one of national sovereignty. Is not the very nature of the ICC one where the U.S. laws would be superseded by international laws? If that happens, how can the U.S. hope to maintain the constitutional guarantees afforded to all American citizens? Isn't it likely that some prosecutions could be politically motivated by individuals, groups, or states which are ideologically opposed to the U.S.? The alternative—and one which no one wanted to consider—was that the move toward the ICC without such protections would result in the U.S. withdrawing from its peacekeeping role in an effort to reduce potential criminal liability.

Ambassador William Richardson spoke to the drafting group:

[The ICC] will not act in a political vacuum. Experience teaches U.S. that we must carefully distinguish between what looks good on paper and what works in the real world…the U.S. believes that the Security Council must play an important role in the work of a permanent court…the ICC must work in coordination, not in conflict, with other states. The Court must complement national jurisdiction and encourage national state action wherever possible….We must not turn the ICC—or its Prosecutor—into a human rights ombudsman, open to, and responsible for responding to, any and all complaints from any source.[16]

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American fears about both trampled national sovereignty and a rogue prosecutor created an impasse. These were lines beyond which the U.S. would not go. "If the Prosecutor has sole discretion to initiate investigations and file complaints—as some delegates have sought—the results could be more idiosyncratic and possibly even more political, than the decisions of the Security Council." [17] In short, unless the U.S. had the right to veto any prosecution, particularly those involving U.S. citizens or interests, it would not be a signatory to an International Criminal Court, not feel itself bound by ICC decisions, and certainly not surrender Americans to ICC jurisdiction. In what is perhaps a telling event, Muammar Qaddafi's Libya, Saddam Hussein's Iraq, and China supported the American position.

The final version of the Rome Statute contained a number of compromises, which the assembly of delegates hoped would be sufficiently moderate to generate American support, despite clear indications of an all-or-nothing approach from the U.S. Article 124 provided that a nation could "opt out" of ICC jurisdiction for a period of seven years following the entry into force of the statute for the party concerned. However, Article 12 (2) stipulated that the ICC can take up a case when submitted to it by the Security Council or a state party or initiated by the prosecutor when either the state on whose territory the crime was committed or the state of the defendant's nationality is a state party or has accepted the ICC's jurisdiction over the crime on an ad hoc basis. The obvious problem for the Americans is that their citizens could still face trial if the nation where the crimes took place had ratified the Rome Statute and could not or would not prosecute themselves.[18]

The Americans fared less well when it came to the issue of an independent prosecutor. Article 15 allows the Prosecutor to investigate and initiate prosecutions, in addition to cases referred from the Security Council or state party to the treaty under Article 13. By way of balance, the Security Council can defer a case brought by any entity for one year. The Americans argued for ICC jurisdiction only over the crime of genocide; the majority of other delegates voted to include—as exemplified by the earlier Nuremburg Principles to which the U.S. approved—the additional crimes of aggression, war crimes, and crimes against humanity.

U.S. opposition notwithstanding, when the sixtieth nation ratified the Rome Statute in 2002, it became international law. In the first of a series of contradictory actions, the U.S. voted against the Rome Statute in the UN general assembly

but President Clinton nevertheless signed it in 2000…and then announced he would not submit it to the Senate for advice and consent until the U.S. had observed the functioning of the court and "until our fundamental concerns are satisfied." Clinton continued:

> Nonetheless, signature is the right action to take at this point. I believe that a properly constituted and structured International Criminal Court would make a profound contribution in deterring egregious human rights abuses worldwide, and that signature increases the chances for productive discussions with other governments to advance those goals in the months and years ahead.[19]

The presidency of George W. Bush served only to highlight the dysfunctional relationship between the U.S. and the ICC, as well as to politicize the already polarizing issues to a significant degree. On May 6, 2002, Bush sent a formal note to the UN Secretary General, "suspending" Clinton's signature on the still un-ratified treaty—an unprecedented act in international relations—and stated that the U.S. recognized no formal obligation to the Rome Statute. Bush's point, apparently, was that he considered the signature—while not binding—to be symbolic that the U.S. was in the process of even considering ratifying the Statute, and in fact, under the Vienna Convention (1969) states which have signed international treaties but not yet ratified them are still obligated to do nothing in contravention. Bush was unwilling to accept this.

The Bush administration went still further. In what could be seen as a logical follow-on to an entrenched them-versus-us mentality, Bush actively sought to weaken what he viewed as an anti-American movement (establishment of the ICC)—a somewhat perverse point of view, considering the American role in the IMT and Nuremburg Principles. In 2002, the administration introduced legislation—the American Servicemembers' Protection Act (ASPA)—which prohibited U.S. cooperation with the ICC unless/until the U.S. ratifies the Rome Statute, something Bush never wished to do. Section 2008 of the ASPA authorized the President to use "all means necessary and appropriate" to free any U.S. military personnel held by any nation on behalf of the ICC (there has been no instance of this ever happening), and to make the punitive point crystal clear the specific language of the ASPA forbade the U.S. from providing military aid to any country which ratified the Rome Statute.

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Exceptions were made for NATO members, non-NATO allies of the U.S., and countries which entered what were called "Article 98 Agreements," as articulated in the Rome Statute. The ASPA reflected the hawkish mood of not just the President in a post-9/11 world, but the Congress and segments of the population, as well. International cooperation with anything outside the "coalition of the willing" in Iraq and Afghanistan was seen as undesirable, and possibly hazardous.[20] Bush and the Congress later reduced or effectively neutralized many of the anti-ICC provisions in the ASPA, starting in 2006.

The Article 98 Agreements, or Bilateral Immunity Agreements (BIA), are problematic. Interpreting the language of Article 98 of the

Rome Statute which prohibits the ICC from requesting the surrender of a defendant if to do so would force the state to "act inconsistently" in its agreements with other states, the U.S. embarked on an ambitious program to avoid ICC jurisdiction. The American position is quite clear: a state which has signed a BIA with the U.S. cannot surrender a U.S. citizen to the ICC—and vice versa. Governments refusing the BIA were punished—with some exceptions—by having U.S. military support and Economic Support Fund assistance suspended.[21] Between 2002 and 2005, over a hundred such agreements were negotiated and signed between the U.S. and nations which are signatory to the Rome Statute. It also put the U.S. in the position of engaging in active measures to shield accused war criminals for fear of having American nationals face international justice. The last BIA was signed in 2005, and most punitive enforcement provisions have since been removed.

Although the Obama administration has significantly improved cooperation with the ICC—participating in the 2010 Kampala Conference, for example—and promising to end what Secretary of State Hillary Clinton called a history of hostility to the Court, there are no immediate signs that the U.S. is ready to consider re-signing the Rome Statute and submitting it for Senate ratification. As a Congressional study phrased it:

> Perspectives differ on the impact of the ICC on U.S. interests, as it begins to operate. Some see the ICC as a fundamental threat to the U.S. armed forces, civilian policy makers, and U.S. defense and foreign policy. Others see it as a valuable foreign policy tool for defining and deterring crimes against humanity, a step forward in the decades-long U.S. effort to end impunity for egregious mass crimes. Debate over the ICC has brought out a tension between enhancing the international legal justice system and encroaching on what some countries perceive as their legitimate use of force.[22]

Americans agree, at least in the abstract, that deterring war crimes and punishing the offenders is worthwhile, but there is a singular lack of urgency when it comes to putting that into practice. Concepts of international law do not resonate with the domestic electorate, particularly in an increasingly polarized political climate. Even suggesting that fellow Americans could become answerable to a "foreign" court is an almost unacceptable political position and it is unlikely that any administration can afford the losing battle which would result from supporting ratification of the Rome Statute. Until such time as effectively prosecuting war criminals in concert with the world community again becomes a priority, there is almost no chance of the United States resuming the leadership role it embraced at Nuremberg—a role it has relinquished in the decades since. ***IAJ***

Notes

1 *Treaty of Peace with Germany: Hearings Before the Committee on Foreign Relations, United States Senate*, Government Printing Office, 1919, p. 372.

2 The Allies' principal villain, Kaiser Wilhelm II, was in exile in the Netherlands, and the Dutch rebuffed requests for his extradition. The Weimar government likewise refused to surrender German nationals; an Allied desire for justice on this point was insufficient to overcome their reluctance to return to war.

3 James Willis, *Prologue to Nuremburg: The Politics and Diplomacy of Punishing War Criminals of the First World War*, Greenwood Press, Westport, CN, 1982, p. 138ff.

4 Howard Ball, *Prosecuting War Crimes and Genocide*, University of Kansas Press, 1999, p. 43.

5 Richard H. Minear, *Victor's Justice: The Tokyo War Crimes Trial*, Princeton University Press, 1971, pp. 8-9.

6 Memorandum for the President, 22 January 1945, http://avalon.law.yale.edu/imt/jack01.asp, accessed March 5, 2012.

7 This was slightly modified in the Nuremberg indictments to Crimes Against Peace, War Crimes, and Crimes Against Humanity.

8 The Reagan administration had an idiosyncratic relationship with the Pol Pot dictatorship. They engaged in covert efforts against it, while voting to allow the Khmer Rouge representative to hold the Cambodian seat in the UN for many years after the fall of Pol Pot and rebuffing efforts to label the mass murders as Genocide. http://www.yale.edu/cgp/KiernanCambodia30thAnniversaryEssay.doc.

9 Cambodian Genocide Justice Act, 22 U.S.C. 2656, Part D, Section 572.a., April 30, 1994, http://www.cybercambodia.com/dachs/cgja.html#sec572, accessed March 5, 2012.

10 "The Brief for a World Court," *U.S. News and World Report*, September 28, 1997.

11 "Pentagon Battle Plans for International War Crimes Tribunal," *New York Times*, April 14, 1998, p. A7,

12 "Creating a World Criminal Court Is Like Making Sausage–Except it Takes Longer," *Texas Observer*, June 30, 1998, pp. 7-8.

13 James Podgers, "War Crimes Court under Fire," *American Bar Association Journal,* September 1998.

14 Joe Stork, "International Criminal Court" *Foreign Policy in Focus*, Washington, DC, April 1, 1998, p. 1.

15 Peter Hay and Tibor Várady, eds, *Resolving International Conflicts*, Central European University Press, Budapest, p. 291.

16 N. Douglas Lewis, *Global Governance and the Quest for Justice: Human Rights*, Hart Publishing, Oxford,UK, 2004, p. 148.

17 Erik K. Leonard, *The Onset of Global Governance: International Relations Theory and the International Criminal Court*, Ashgate Publishing, Farnham, UK, 2005, p. 55.

18 This is an important point: the Rome Statute specifically states that it intends jurisdiction ONLY in those cases where the host nation is unable or unwilling to prosecute (Rome Statute, Art. 17). Likewise, jurisdiction is only exercised over persons, not nations (Art. 25).

19 Rebecca Joyce Frey, *Global Issues: Genocide and International Justice*, Infobase Publishing, NY, July 1, 2009, p. 144.

20 In a related move, On June 30, 2002, the U.S. vetoed a draft U.N. resolution to extend the peacekeeping mission in Bosnia because the members of the Security Council refused to add a guarantee of full immunity for U.S. personnel from the jurisdiction of the ICC.

21 Among other things, the ESF provides funds for counternarcotic efforts, counterterrorism, and HIV/AIDS education.

22 Jennifer Elsea, *U.S. Policy Regarding the International Criminal Court*, Report for Congress, Congressional Research Service, Library of Congress, August 29. 2006, p. CRS-21.