Withdrawal/Redaction Sheet
Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. email	Carlos Pascual to Steven Black. Subject: RE: Strobe-Stepashin Meeting. (5 pages)	05/24/1999	P1/b(1)
002. email	Jack Segal to Carlos Pascual and Steven Black. Subject: RE: Strobe-Stepashin Meeting. (7 pages)	05/24/1999	P1/b(1)
003. email	Steven Black to Richard Saunders. Subject: Proposed Memo / TP to Strobe with my edits. (4 pages)	05/25/1999	P1/b(1)
004. email	Steven Black to Richard Saunders. Subject: Draft Memo to SRB. (6 pages)	05/27/1999	P1/b(1)
005. email	Steven Black to Michael Roberts. Subject: Please Turn in a Hardcopy Memo for Leon. (3 pages)	05/27/1999	P1/b(1)
006. email	Carlos Pascual to June Bartlett, Kevin Cosgriff, Glyn Davies et al. Subject: Commerical Space Launch and Nonproliferation. (7 pages)	05/31/1999	P1/b(1)
007. email	Steven Black to Carlos Pascual, Gary Samore, and John Caravelli. Subject: Edits on Recent Papers. (10 pages)	06/01/1999	P1/b(1)
008. email	Carlos Pascual to Betsy Pimentel. Subject:FW: Commercial Space Launch and Nonproliferation. (7 pages)	06/03/1999	P1/b(1)

COLLECTION:

Clinton Presidential Records
NSC Emails
Exchange-Record (Sept 97-Jan 01) ([Senator Helms])
OA/Box Number: 620000

FOLDER TITLE:

[05/20/1999-06/17/1999]

2006-1363-F
vz5668

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Exchange Mail

DATE-TIME	5/20/99 10:10:25 AM
FROM	Caravelli, John M.
CLASSIFICATION	~~CONFIDENTIAL~~
CLASSIFICATIONREASON	1.5(d)
DATECLASSIFIEDON	05/20/1999
DECLASSIFYON	05/20/2009
SUBJECT	RE: Notification Obligation ~~[CONFIDENTIAL]~~
TO	Pascual, Carlos E. Black, Steven K.
CARBON_COPY	Samore, Gary S. Segal, Jack D.

DECLASSIFIED
E.O. 13526 5/16/2017
White House Guidelines, ~~September 11, 2006~~
By VZ NARA, Date 2/7/2019
2006-1363-F (3)

TEXT_BODY

I think we have to be very careful here. Having been part of the talks with Marshall, I have every expectation that we would loudly be accused of bad faith if we were not to apprise them of our plans if the oportunity presents itself.. I agree with Carlos on the fine points/nuance, but I'm not sure that would buy us much on the Hill. I also say this in the context of a possible trip to Moscow next week. Should we have that trip and NOT tell the Hill in advance of at least our general approach, I think there will be trouble. That said, I think we also must consider actions Marshall might take if we do notify him this week. Damned if you do...

-----Original Message-----
From: Pascual, Carlos E.
Sent: Thursday, May 20, 1999 9:38 AM
To: Black, Steven K.
Cc: Samore, Gary S.; Caravelli, John M.; Segal, Jack D.
Subject: RE: Notification Obligation ~~[CONFIDENTIAL]~~

No,
I don't agree. The cable says that we would be prepared to consider an increase if there is a track record of implementation. We can and shuold tell the Hill that, but I do not consider this an offer to increase the quota. Just a more positive formulation of our position all along.

-----Original Message-----
From: Black, Steven K.

Sent: Thursday, May 20, 1999 9:20 AM
To: Pascual, Carlos E.
Subject: Notification
Obligation ~~[CONFIDENTIAL~~]

Gary, Jack and I were talking this morning about the cross-hatch and stumbled to the conclusion that if Leon signs it out as is (that is, with an offer to consider increasing the launch quota), then that would "trigger" our obligation to inform Senator Helms as we indicated in the last LKE notification letter to him. Do you agree? Steve

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Exchange Mail

DATE-TIME	5/25/99 3:00:33 PM
FROM	Krass, Caroline D.
CLASSIFICATION	UNCLASSIFIED
SUBJECT	FW: Convention on Nuclear Safety: Please substitute this version of the POTUS memo [UNCLASSIFIED]
TO	Silva, Mary Ann T.
CARBON_COPY	
TEXT_BODY	Wanted to make sure you got this version of the POTUS memo. Thanks.

-----Original
Message-----
From: Krass, Caroline D.
Sent: Tuesday, May 25, 1999
2:54 PM
To: Elkind, Jonathan H.
Cc: Kaufman, Stuart J.; @RUSSIA
- Russia/Ukraine; @LEGAL - Legal Advisor; Caravelli, John M.
Subject: Convention
on Nuclear Safety: Please substitute this version of the POTUS memo
[UNCLASSIFIED]

As discussed, I have added a sentence at the
end of the memo mentioning the constitutional point.

TRANSLATED_ATTACHMENT

nuke safety potus memo_.doc

ACTION

MEMORANDUM FOR THE PRESIDENT

THROUGH: THE EXECUTIVE CLERK

FROM: SAMUEL BERGER
ASSISTANT TO THE PRESIDENT FOR NATIONAL SECURITY AFFAIRS

SUBJECT: Certifications Required by Senate Ratification of the Convention on
Nuclear Safety

Purpose

To sign a letter to Senator Helms certifying that the United States will comply
with two conditions imposed by the Senate in ratifying the Convention on Nuclear
Safety (CNS).

Background

In April of this year you signed the Instrument of Ratification for the CNS,
along with a letter of certification. In ratifying the CNS, the Senate imposed
two additional certification requirements, each with a 45-day deadline. That
deadline is May 26, 1999.

The CNS was negotiated with strong U.S. support and leadership. It strengthens
nuclear safety around the world by having each country's civilian nuclear power
program held up for peer review every three years. Ratification of the CNS
allowed us to begin participating in the civilian nuclear program peer review
mechanism laid out in the CNS, thereby maintaining our ability to provide
international leadership in nuclear safety fora.

The conditions you will certify can be met without undue difficulty. The first
states that the U.S. will comment on reports submitted by the Parties receiving
nuclear safety assistance from the United States; the second states that the
Comptroller General of the United States will have access to certain information
in the possession of the United States relating to the operation of the

CNS, and
to information about any U.S. Government analysis undertaken pursuant to the
CNS.

To safeguard your constitutionally-based Presidential prerogatives, the letter
concludes by stating that you will implement the certifications consistent with
the allocation of authority and responsibility under the Constitution.

RECOMMENDATION

That you sign the letter of certification (Tab A).

Attachment
Tab A Certification letter

2

cc: Vice President
Chief of Staff

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Exchange Mail

DATE-TIME 6/7/99 9:08:46 AM

FROM Shapiro, Daniel B.

CLASSIFICATION UNCLASSIFIED

SUBJECT RE: Holbrooke -- FYI [UNCLASSIFIED]

TO Schulte, Gregory L.

CARBON_COPY

TEXT_BODY

More specifically, for you it means a hearing on the 24th that takes on our Balkans policy generally, and in which Helms tries specifically to smear Holbrooke for "coddling" war criminals.

-----Original Message-----
From: Schulte, Gregory L.
Sent: Friday, June 04, 1999 9:21 PM
To: Shapiro, Daniel B.
Subject: RE: Holbrooke -- FYI [UNCLASSIFIED]

Is it normal to have this many sessions? What does this mean?

-----Original Message-----
From: Shapiro, Daniel B.
Sent: Friday, June 04, 1999 7:31 PM
To: @MULTILAT - Multilateral and Humanitarian Affairs; @EUROPE - European Affairs; @LEGAL - Legal Advisor; @KOSOVO; @RUDMAN; @CEE - Central/Eastern Europe
Cc: @LEGISLAT - Legislative Affairs
Subject: Holbrooke -- FYI [UNCLASSIFIED]

Sen. Helms has announced a hearing schedule for the Holbrooke nomination:

June 17 -- Ethics Issues (closed)
June 17 -- Ethics Issues (open)
June 22 -- U.N.Reform/Arrears

June 24 -- U.S. Policy in the Balkans

Will
keep you posted as this drama unfolds.

Exchange Mail

DATE-TIME 6/7/99 9:39:46 AM

FROM Schulte, Gregory L.

CLASSIFICATION UNCLASSIFIED

SUBJECT RE: Holbrooke -- FYI [UNCLASSIFIED]

TO Shapiro, Daniel B.

CARBON_COPY

TEXT_BODY

hmmm. suspected so much. thanks.

-----Original Message-----
From: Shapiro,
Daniel B.
Sent: Monday, June 07, 1999 9:07 AM
To: Schulte, Gregory
L.
Subject: RE: Holbrooke -- FYI [UNCLASSIFIED]

Completely abnormal.
It means Helms is trying to kill this nomination by bleeding it
to death slowly, looking for ways to embarrass Holbrooke/the Administration
on one issue or another. Should he fail to stop it, he will be hoping
to "send a message" to Holbrooke not to mess with him.

-----Original
Message-----
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Sent: Friday, June 04,
1999 9:21 PM
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Subject: RE: Holbrooke -- FYI
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keep you posted as this drama unfolds.

Exchange Mail

DATE-TIME	6/11/99 6:19:28 PM
FROM	Wippman, David
CLASSIFICATION	UNCLASSIFIED
SUBJECT	book chapter [UNCLASSIFIED]
TO	Schwartz, Eric P.
CARBON_COPY	
TEXT_BODY	OK, OK, it was a rush job.
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CAN AN INTERNATIONAL CRIMINAL COURT PREVENT AND PUNISH GENOCIDE?

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INTRODUCTION

For more than seventy years, states have worked fitfully towards the creation of
a permanent international criminal court. Efforts to create a court in the immediate aftermath of World War II foundered on Cold War disagreements, but the
movement gained new life with the collapse of the Soviet Union and the outbreak
of large-scale inter-communal violence in the former Yugoslavia and Rwanda. The
effort moved closer to fruition this past summer when more than 160 states and
numerous non-governmental organizations gathered in Rome to concluc a treaty
creating the first permanent international criminal court ever.
From the beginning, the drive to create such a court rested in substantial part
on the need to prevent and punish the crime of genocide. In the aftermat of
World War II, states joined together to transform the motto "never agair into a

binding international legal obligation. The result was the 1948 Convention on
the Prevention and Punishment of the Crime of Genocide.1 The Genoci Convention
declared that genocide was a crime under international law, and the parties to
the Convention undertook, individually and collectively, to "prevent anc punish"
that crime in the future.
Now as then, the twin goals of prevention and punishment seem unassailable.
But the extent to which international courts and conventions can contribute to
these two goals in a still decentralized international legal system remain open
to question. Although the Genocide Convention was adopted 50 years ago, the
first international criminal tribunals since Nuremberg were not established until
the 1990s, and their first verdict in a genocide case was rendered only ir 1998.
As the two existing international criminal tribunals (one for Rwanda, th other
for former Yugoslavia) work through their dockets, more genocide verdicts in
individual cases can be expected. But the numbers are certain to remain small.
Moreover, the mandate of each tribunal is limited to a particular place a time,
and their impact is therefore necessarily circumscribed.
Advocates of a permanent international criminal court hoped to build or the two
existing ad hoc tribunals, and to surmount some of their limitations. In t

months leading up to the Rome conference, expectations ran high in ma quarters.
Proponents of the new court routinely described the Rome negotiations an
"historic opportunity to put an end to the impunity granted to those who
perpetrate the heinous crimes of genocide, war crimes, and crimes again

humanity".2 The accompanying assumption was that ending impunity would deter the
commission of such crimes in the first place.
Such claims may be overstated. Even the best treaty that might fairly ha been
anticipated to emerge from the Rome negotiations could not, in the reasonably
foreseeable future, have accomplished what court boosters hoped to achieve.

International courts and prosecutors can contribute to deterring genocid‹ and related crimes and to punishing those who commit them. But ending impunity and eliminating such crimes ultimately requires nothing less than the re-shaping of political cultures across the globe, so that politicians cannot see political gain in the turning of one ethnic or religious group against another, and individuals cannot be induced to heed calls for violence against others who differ in race, religion, or nationality.

Of course, if an international court can help even slightly to lessen the frequency or extent of genocidal conflicts, that in itself would be a wort

objective. But the obstacles to even this modest goal should not be underestimated.

First, there are technical problems inherent in the conception and definition of genocide as a crime. By design, the Genocide Convention does not appl to all cases of mass killings; for example, the massacre of Cambodians by Pol Pot and the Khmer Rouge arguably did not constitute genocide because the kille and the victims did not differ along ethnic or other lines deemed relevant under the Convention.3 Moreover, the specific intent required to establish genocic is often surprisingly difficult to prove.

Second, and more important, the enforcement and compliance issues associated with international law generally are particularly acute in the contexts in which contemporary genocidal violence tends to occur. When the government responsible for genocide remains in power, national prosecutions rarely occur, and international tribunals find it extremely difficult to exact meaningful cooperation in the arrest and prosecution of culpable individuals. On occasion, third states may be able to place enough pressure on a recalcitrant government to force modest cooperation, but only rarely will third states have sufficien incentive to bear the diplomatic and other costs entailed in exerting sucl pressures, and even then, third state efforts will likely be modest and sporadic.

Prospects for meaningful prosecutions are plainly enhanced when the government that is responsible for genocide in a particular case is overthrown, but in such cases, other problems are likely to arise. The newly established

government may
have its own reasons for resisting a significant role for an international tribunal, or the tribunal may lack the resources or intergovernmental support it
needs to do an effective job.
Third, even when an international tribunal is operational and reasonably effective, as is the International Criminal Tribunal for the former Yugoslavia
(ICTY), its capacity to deter further offenses, and its ability to prosecute those responsible for offenses that have already occurred, is limited. Although
the ICTY began its work while the war in Bosnia was still ongoing, it is hard to
demonstrate whether and to what extent its existence worked to deter further
crimes, which continued with depressing frequency until NATO forced the parties
to accept a negotiated settlement. Similarly, it is uncertain whether and t what extent the tribunal's expressed intention to prosecute those guilty o international criminal offenses committed during the conflict in Kosovo has
served or will serve to deter further such crimes. In practice, an uncertai risk of future prosecution is simply one factor in the political and persor

calculus that surrounds a decision to participate in genocide, crimes against
humanity, or war crimes. For these reasons, even the best treaty that might have
emerged from the Rome negotiations would not likely have had as mucl of an impact
on the incidence of genocide as advocates have suggested, though it cou have
reinforced applicable norms and created an institution better suited to th prosecution of genocide and related crimes than any existing internation

institution.
Unfortunately, the treaty that emerged from Rome was not the best of treaties.
The treaty reflects a political compromise crafted to garner the maximur number
of votes. From one standpoint, this strategy was successful; the treaty te was
adopted by a vote of 120-7, with 21 abstentions. But the cost was heavy As a
concession to governments concerned with state sovereignty issues, the treaty's
jurisdictional provisions permit future Pol Pots and Saddam Husseins, leaders
willing to commit genocide against their own people, to escape the Court's

scrutiny simply by not joining the treaty, so long as those leaders remair in power and confine their atrocities to their own territory.4 Thus, absent a Security Council referral, there can be no ICC prosecution of some of th world's worst offenders.

At the same time, the treaty's drafters failed to satisfy some of the key concerns of the United States, which has refused to sign the treaty. Whatever one thinks of the positions adopted by the United States during the Rom negotiations, the failure to obtain U.S. support for the Court is a greater blow to the Court's prospects than many realize. Rhetoric aside, the United States has provided the lion's share of the political, financial, diplomatic, and even military support for the two existing international criminal tribunals.5 It remains to be seen whether other states, individually or collectively, wil fill the gap created by the refusal of the U.S. to join the treaty.

It would be a mistake to conclude that the International Criminal Court envisioned in the Rome treaty cannot serve cannot contribute significan to the prevention and punishment of genocide, crimes against humanity, and war crimes.

But the work necessary to enable the proposed Court to play that role ha only just begun.

CREATING AN INTERNATIONAL CRIMINAL COURT

The creation of the first modern international criminal tribunals, established at Nuremberg and Tokyo after World War II, is commonly celebrated as defining moment in international law. The Nuremberg tribunal in particular established two fundamental, and in some respects revolutionary, principles: first, that individuals owe a duty to the international community that supersedes a competing obligation to state or group; and second, that those who commit genocide, war crimes, and crimes against humanity can be held individually accountable for their crimes, whether or not they were acting in the service of their governments. In the aftermath of World War II, the United Nations moved to solidify the still somewhat tenuous legal and institutional bases for international criminal prosecutions. In 1948, the General Assembly promulgated the Genocide Convention, which declared genocide an international crir and envisioned its prosecution in some future international penal tribunal as well as in national courts.6 In addition, the General Assembly asked the International Law Commission "to study the desirability and possibility of establishin an international judicial organ for the trial of persons charged with genocid or other crimes over which jurisdiction will be conferred upon that organ b international conventions."7 The ILC also began work on a Draft Code Offenses Against the Peace and Security of Mankind, which was intended to serv as the equivalent of a domestic criminal statute that an international penal tribunal might apply.

On the recommendation of the International Law Commission, the General Assembly in 1950 established a Committee on International Criminal Jurisdiction and directed it to prepare a draft statute for an international criminal court.8 The Committee submitted an initial draft in 1951, which was revised by second Committee in 1953. The attempt to create a Court then entered the legal equivalent of suspended animation. Efforts to complete the Draft Code Crimes, once thought vital to the work of a permanent international criminal cou ran aground on the rock of aggression. States could not agree on a definitio and even though the General Assembly finally adopted a definition in 1947, the controversy effectively derailed efforts to create a court.9 Thereafter, th forward momentum generated by revulsion at the Holocaust began to dissipate, and Cold War tensions blocked any further progress for more than thirty-fiv years.

In 1989, as the Cold War came to a close, interest in a permanent international criminal court revived. Trinidad and Tobago, heading up a group of sixteen Caribbean and Latin American states seeking a mechanism to address their own difficulties in prosecuting narcotics traffickers, resuscitated the issue in the

General Assembly.10 At their request, the General Assembly instructed the ILC to resume its work on an international criminal court.

The ILC's efforts acquired greater urgency with the outbreak of war and "ethnic cleansing" in the former Yugoslavia. In 1993, the UN Security Council voted to establish an ad hoc international criminal tribunal to prosecute genocide crimes against humanity and war crimes arising out of that conflict.11 That tribunal provided a helpful model for, and a strong impetus to, the continuing work of the ILC. Most important, the creation of the Yugoslavia tribunal demonstrated that the legal and political obstacles long standing in the way of an international penal tribunal could be satisfactorily overcome.12 In 1994, the ILC submitted a draft statute for a permanent court to the General Assembly, and recommended that an international conference be convened to adopt the statute by treaty.1: The General Assembly established an Ad Hoc Committee on the Establishment of an International Criminal Court to consider the ILC's draft statute, and ther

Preparatory Committee to incorporate comments from states and other interested parties into a consolidated draft text. The Preparatory Committee completed a draft consolidated text in April 1998, paving the way for a United Natio

Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, held in Rome from June 15 to July 17, 1998. At the end of a frenetic five weeks, and following vigorous debate, the Ron

conference adopted a statute for an international criminal in a celebrator atmosphere.

The Need for an International Criminal Court

By the commencement of the Rome conference, there was a fairly broac consensus among states, non-governmental organizations (NGOs), and academics the need for a permanent international criminal court. By 1998, the two existing international criminal tribunals had demonstrated both the feasibility of

contemporary international criminal prosecutions and the limits of ad hc tribunals created for particular situations. Prior to the creation of the Yugoslavia tribunal, many commentators doubted the efficacy of an international
tribunal that lacked the obvious situational advantages enjoyed by the Nuremberg
and Tokyo tribunals. Both the latter tribunals were established in the wake of
the defeat and occupation of enemy states, and had the luxury of access the
evidence and suspects under the control of the occupying powers, the states most
interested in pursuing prosecutions for war crimes and crimes against humanity.
By contrast, the warring parties responsible for genocide and other crim in the
course of the conflict in Bosnia did not suffer complete military defeat and
occupation by forces committed to prosecuting the principal offenders. Although
NATO forces deployed to Bosnia in support of the Dayton accord occasionally
arrest indicted suspects, their presence is hardly comparable to the occupation
of Germany and Japan at the close of World War II. Accordingly, it has been
apparent from the outset that the Yugoslavia tribunal would have to rely to a
large extent on the cooperation of a number of states and non-state entities with
varying degrees of interest in criminal prosecutions.
Nonetheless, the ICTY has had considerable success in indicting and trying
individuals accused of committing war crimes and other atrocities in the former
Yugoslavia. Of course, many of the most senior officials sought by the Tribunal
remain at large, including Radovan Karadzic and Ratko Mladic. But the risk of
prosecution has forced both men to surrender most of the political powe they
wielded in Bosnia, and each lives under the fear of eventual arrest and surrender
to the tribunal.14 Moreover, although the total number of individuals actually
indicted by the ICTY remains small in relation to the number of individuals who
participated in the commission of atrocities, public prosecution of even ; representative sampling can reinforce the applicable international norms advance

the rule of law, and perhaps even help promote reconciliation in the affected
states.
The International Criminal Tribunal for Rwanda ("ICTR") has had a mc difficult
life, even though the forces principally responsible for atrocities in that country were routed on the battlefield. Among other things, the tribunal' own
internal administrative difficulties have seriously impeded its work. Nonetheless, the ICTR has made considerable progress in recent month: and in
September 1998, with the conviction of Jean Paul Akayesu, a prominen former
Rwandan government official, the ICTR became the first international tribunal
ever to render a verdict in a genocide case.
Thus, the operation of the two existing tribunals demonstrated the feasibility
of contemporary international criminal prosecutions, even for crimes committed in
predominantly internal conflicts. At the same time, the establishment an day-to-day operations of the two tribunals highlighted the problems of a hoc
criminal courts. Creating, staffing, and funding an international criminal court
is a complex and difficult endeavor. In each case, the Security Council had to
reach consensus on the need for a Court, agree on its mandate, find judges,
prosecutors, investigators and staff with suitable experience, locate or construct appropriate facilities, reach agreements with host states, and confront
numerous other obstacles. The process is lengthy, difficult, and expensive.
A permanent international criminal court could obviate many of these problems.
As a standing body, it would not be necessary to recreate the human anc material
infrastructure necessary for international criminal trials every time different
conflicts come under scrutiny. The Court would be available to handle cases
involving genocide and related crimes whether referred to it by the Security
Council or in accordance with alternate referral procedures set out in the treaty
establishing the Court.
Theoretically, a permanent court could also be set up in a way that eliminates
or at least substantially reduces the problem of selectivity many see as

inherent
in the establishment of ad hoc tribunals. While it is easy to offer politica
explanations for establishing tribunals for Rwanda and Yugoslavia, but
not, for
example, for Sudan or Afghanistan, it is hard to conceive of legal or
philosophical justifications. In practice, however, selectivity turns out tc
be
difficult to avoid, and, for reasons discussed below, was not avoided in
the Rome
treaty.
Nonetheless, most if not all of the 160 states gathered in Rome believed
the
institutional continuity, and the symbolism, of a permanent court justifi
the
work and expense required to establish it. In addition, a standing court
may
obviate the problem of "tribunal fatigue."15 The cost of ad hoc tribunals
both
financial and political, makes it problematic to continually resort to the
Security Council to seek the creation of new tribunals for each conflict
warranting the prosecution of genocide and other crimes. It is easier to
refer
situations to a standing tribunal than to create a new one from scratch.
Perhaps the strongest argument in favor of a permanent international
criminal
court is that it may help deter the commission of future atrocities. The
unfortunate historical fact is that most perpetrators of genocide and othe
heinous crimes have gone unpunished. The military tribunals establishe
in the
aftermath of World War II prosecuted only a small fraction of those
responsible
for genocidal acts, and many of the worst offenders were never brought

justice. Similarly, only a tiny fraction of those responsible for crimes
against
humanity and war crimes in Bosnia and Rwanda will likely ever be
indicted by an
international tribunal, and fewer still will be brought to trial. As
unfortunate as this relative impunity is, the situation in other cases has
been
even worse. In Cambodia, for example, Pol Pot and the Khmer Rouge
wiped out as
many as two million people, but there have been no criminal prosecutio
for
genocide or related offenses.16 Regrettably, impunity in contemporary
(and
past) conflicts is not the exception, but the rule. Hundreds of thousands

non-combatants have been murdered under the most horrifying
circumstances in

recent conflicts, from Afghanistan to Chechnya to the Sudan, but prosecutions are rare. One reason for the dearth of prosecutions is that in the absence of any international penal tribunal with jurisdiction over such crimes, the only alternative is to rely on national courts. Unfortunately, such courts are often under the control or influence of the governments or military forces responsible for precisely the kinds of offenses that should be prosecuted.

The establishment of an ad hoc international criminal tribunal may remedy this problem in part. But by the time it becomes sufficiently apparent that su a tribunal is needed, and the political consensus necessary for the Securit} Council to act is generated, many of the atrocities one might hope to det

through the threat of prosecution may already have taken place. Sadly, this was the case in both Rwanda and former Yugoslavia.17 Moreover, the delay attendant on the creation of an ad hoc tribunal may allow suspects time to go into hiding, and may lead to the disappearance of witnesses and the deterioration or destruction of physical evidence. Advocates of a permanent internationa criminal court have long contended that such a court may help deter genocidal ar other atrocities before a conflict even begins, in addition to facilitating the prosecution of offenders after a genocidal conflict starts. As Hans Corel United Nations Under Secretary-General for Legal Affairs optimisticall' observed, "[f]rom now on, all potential warlords must know that, depending on ho a conflict develops, there might be established an international tribunal before which those will be brought who violate the laws of war and humanitari law."18

VISIONS OF A PERMANENT INTERNATIONAL CRIMINAL COURT

The concept of an international criminal court evolved dramatically in tl years leading up to the adoption of the Rome treaty. In 1992, a Working Grou of the International Law Commission suggested that the Court should be a par time "flexible and supplementary facility" that would give states parties an

alternative to trying offenders in national courts or extraditing them to another
state.19 Over the next two years, the Working Group prepared and refin a draft
statute that expanded the powers of the Court but retained a focus on creating an
institution that would try cases when national court jurisdiction might b
unavailable or ineffective. For the court to exercise jurisdiction over crimes
against humanity or war crimes, the draft statute required either a referr by
the Security Council or the joint consent of the state on the territory of which
the crime was committed and the state with custody over the accused. T

statute contained a more liberal jurisdictional provision for genocide. Under
the ILC's proposal, the Court could exercise its "inherent jurisdiction" o the
basis of a referral by any state party that was also a party to the Genocid
Convention, on the theory that the Convention expressly contemplates referral of
genocide cases to an international penal tribunal.

As the negotiations in Rome began, sharp differences emerged among delegations
concerning the scope of the Court's jurisdiction and the "trigger mechanism" for
the exercise of that jurisdiction (that is, the means by which crimes with the
Court's jurisdiction would be referred to it for prosecution). Most
participating non-governmental organizations (NGOs), who were represented in
force in Rome and who played a leading role in the negotiations (some NGO
representatives even appeared on and effectively led the delegations fro certain
smaller states), wanted to maximize the scope of the Court's jurisdiction and
minimize the obstacles to invocation of that jurisdiction. In particular, most
NGOs favored automatic jurisdiction over the "core crimes" of genocid crimes
against humanity and war crimes, so that all treaty parties would be subject to
the Court's jurisdiction over those crimes without any need for further state
consent. Similarly, NGOs supported "universal jurisdiction" over the co

crimes, to permit the Court to prosecute such crimes no matter where th might

have been committed. NGOs strongly opposed any provision that woulc require
either UN Security Council approval for prosecutions or the consent of particular
states, such as the state of nationality of the accused. Further, NGOs vigorously supported an independent, self-initiating prosecutor able to commence
prosecutions on his or her own authority (including on the basis of information
supplied by NGOs), without having to rely on referrals by individual states or by
the Security Council.

A broad group of predominantly western states, including Canada, the United
Kingdom, and most of western Europe, supported most of the NGO positions, though
with varying degrees of qualification. This so-called "Like-Minded Group" formed
the core of international political support for what proponents viewed as

strong treaty.

The views of the non-aligned states are harder to characterize, and varie widely depending on the specific issue under discussion. Many non-aligned states
had reason to be concerned about a Court with an inherent jurisdiction broad
enough to encompass the investigation and prosecution of crimes that occur within
a state's own territory in the course of an internal conflict. A significant number, led by India, wanted to include the threat or use of nuclear weapons as a
war crime. Many Arab states wanted the definition of war crimes to include
language concerning the treatment of populations in occupied territory that would
permit them to characterize Israeli settlement policies and other actions the
occupied territories as criminal. Although some of the positions advocated by
non-aligned states were anathema to the like-minded governments (and NGOs),
the differences were ultimately resolved through some fairly direct bargaining
that resulted in a statute both groupings could support.

In one of the great ironies of the Rome process, the bargaining between like-minded and some non-aligned states was driven to a considerable extent by
opposition to positions advanced by the United States. The United State came to
Rome with an agenda different in significant respects from many of its

closest
allies. Initially, the United States saw the Court primarily as a standing body
that would reduce the time and expense required to set up ad hoc tribuna with
every additional Bosnia or Rwanda, but which in other respects would operate much
as the two existing tribunals have done. In particular, the U.S. argued th the
Security Council should be the body to refer situations to the court for prosecution.20 In addition, the U.S. strongly opposed universal jurisdiction,
arguing that the effort to give the court jurisdiction over the nationals of non-party states for official acts amounted to an attempt to bind states tc treaty provisions to which they had not consented, in violation of the mc

fundamental rules of treaty law.21
Although the U.S. position on referral of cases to the Court resembled a prior
ILC proposal in many respects, by the time of the Rome Conference fev other
states were prepared to accept a Security Council veto over the Court's ability
to exercise its jurisdiction. Like-minded governments and NGOs saw th U.S.
position as an unwarranted interference with the independence of the Court and
its prosecutor. They feared that individual permanent members of the Council
would use the veto to block prosecution of their own nationals and the nationals
of their allies. Many non-aligned states strongly opposed any role for th Security Council, viewing it as a western-dominated forum in which the exercised
little or no influence. Moreover, many states strongly supported univers jurisdiction or some variation that would permit the court to exercise jurisdiction over the nationals of non-party states, for the simple reason that
states might otherwise escape the Court's jurisdiction by the simple expedient of
refusing to ratify the treaty.
As the conference wore on, the U.S. modified its position on the Securit Council by signaling its willingness to accept the so-called "Singapore option",
which gave the Security Council the right to suspend prosecutions whicl might
interfere with on-going Council efforts to manage particular situations. The
U.S. also indicated its willingness to accept automatic jurisdiction over genocide, but pressed for the right to opt-out of the Court's jurisdiction

over
crimes against humanity and war crimes for a period of ten years. The U.S.
continued to oppose universal jurisdiction, but suggested consideration ‹ a
provision that would preclude the Court from prosecuting nationals of non-parties
for crimes committed in the course of official duties acknowledged as such by the
state. 22

STRIKING A BARGAIN

The shifts in the U.S. position proved to be too little, too late. In a frenz of last-minute deal making, much of it conducted behind closed doors b the small group of states primarily responsible for the coordination and productio of the final draft text, a proposed statute was produced with only a matter of hours left before the final vote was scheduled to take place. The statute that emerged, if ratified by the requisite 60 states, would lead to the establishment of a permanent Court with automatic jurisdiction over genocide, crimes against humanity and war crimes.23 Prosecutions could be initiated on referral from states parties, the Security Council, or the prosecutor acting on his or he own initiative, provided that either the state on whose territory the alleged crime was committed or the state of nationality of the accused consented to th court's jurisdiction. The Security Council is authorized to suspend a prosecutio for a period of 12 months. Nationals of non-party states are subject to prosecution, provided that the jurisdictional requirements noted above are satisfied. As last-ditch efforts to amend the text were voted down at the closing plenary, many delegates to the conference clapped and cheered. Even the most optimistic recognized that much work remained to be done. Critical issues relating to funding, the definition of aggression, and the specification of the eleme of particular crimes were left for future resolution. But for the celebrants, t

long struggle to create an international criminal court had finally come t

a
successful conclusion.
It is too soon, however, to declare the effort to create an international criminal court a success. There is a large difference between a strong treaty
and a strong court, and, as discussed below, it is doubtful in any event tl the
treaty as adopted can be fairly characterized as strong.

DEFINITIONAL HURDLES

To avoid a divisive debate over the definition and elements of the crime of
genocide, the drafters of the ICC treaty adopted verbatim the definition contained in the 1948 Genocide Convention. That definition contains at least two
inherent weaknesses.24 First, the Convention deliberately excludes fron its reach
attempts to destroy political or social groups. Under the Convention, genocide
entails any of a series of harmful acts, but only if committed with "inten to
destroy, in whole or in part, a national, ethnical, racial or religious grouן as
such."25 Some of the most egregious cases of mass slaughter in recent memory
might not qualify as genocide under that definition. For example, Pol Pc and
the Khmer Rouge's murderous assault on their fellow Cambodians, because it did
not focus on any particular national, ethnic, racial or religious group, arguably
falls outside the definition of genocide. Moreover, determining whether particular group constitutes a national, ethnic, racial or religious group poses,
at least in theory, contentious issues of group identification and definitic
Second, the Convention definition requires proof of an intent to destroy the
group as such, whether in whole or in part. Thus, in addition to demonstrating
that an accused intended to commit one of the Convention's predicate acts, such
as killing or otherwise causing serious harm to members of the group, prosecutors
must also show that the accused was aware of and intended to further a larger
policy of genocide, or, at a minimum, that the accused was aware of the larger
political context in which his or her predicate act might have been

facilitated
by or might have furthered a policy or practice of genocide. Proving the requisite intent is difficult. As Cherif Bassiouni points out, "[w]hile this type of intent is more readily identifiable in leaders or decision-makers, is
not always easily demonstrated with respect to the different layers or levels of
executors of the policy."26 Intent can be inferred from contextual evidence,
including factors such as "the general context of the perpetration of othe culpable acts systematically directed against" a targeted group, "the scal of
atrocities committed, their general nature . . . [or] the fact of deliberatel) and systematically targeting victims on account of their membership of particular group, while excluding the members of other groups. . . ."27 Nonetheless, the difficulty of proving specific intent is great enough tha prosecutors often shy away from pursuing charges of genocide in favor more
easily demonstrable charges of crimes against humanity and war crimes Thus, the
Office of the Prosecutor for the Yugoslavia tribunal has only occasional

included genocide among the charges brought against the perpetrators o atrocities in the Yugoslav conflicts, and the tribunal has yet to render a single
genocide verdict. Similarly, as of December 1998, the Rwanda tribunal had
rendered only one verdict of genocide, despite multiple prosecutions foı crimes
associated with the 1994 mass slaughter of Tutsis and other targeted Rwandans.

In some respects, it might be counted as a victory for international humanitarian law that the definition of genocide in the ICC statute is exactly
the same as that found in the 1948 Convention. By contrast, the drafters of the
statute consciously adopted definitions of crimes against humanity and war crimes
more restrictive than those found in other international law instruments. Something similar might easily have happened to the definition of genocide.

Still, retaining the 1948 definition perpetuates all the definitional and evidentiary hurdles associated with that definition, thus limiting from th outset the ICC's capacity to prevent and punish genocide.

FLAWS IN THE ICC STATUTE

More serious constraints on the effectiveness of the court lie in some of its

more controversial provisions, especially those relating to the Court's jurisdiction, and the reactions of individual states, particularly the Unite States, to those provisions. These constraints may be exacerbated - or ameliorated -- by the ultimate resolution of issues that proved too complex or
too contentious to decide in Rome, but which will be addressed by a Preparatory
Committee established pursuant to a November 1998 resolution of the UN's Sixth
Committee.

Problems with the Court's Jurisdiction

As noted earlier, last-minute deal-making produced a jurisdictional regime that
fell short of the universal jurisdiction supported by NGOs and some of t

"like-minded" states, but that went too far for the United States to support. In
some respects, the outcome is the worst of all worlds.
On the one hand, the jurisdictional reach of the court is too narrow. Because
jurisdiction requires the consent of both the state on whose territory the alleged crime is committed and the state of nationality of the accused, a sitting
government can frustrate the Court's exercise of its inherent jurisdiction by
the simple expedient of refusing to join the treaty or to consent ad hoc t(the
prosecution of its nationals for crimes committed on that state's territory In
other words, as the United States has often pointed out, a future Saddam Hussein
or Pol Pot, whose crimes are confined to the territory of their home state can
easily escape prosecution in the absence of a Security Council referral. This
problem of underinclusion is a serious one, since the vast majority of contemporary cases of genocide, crimes against humanity, and war crim take
place in internal conflicts, and since the governments most likely to ord(or to
tolerate such crimes are precisely the governments least likely to consen to the
Court's jurisdiction.
On occasion, the problem might be overcome by Security Council actio pursuant
to article 13 of the treaty. But Russian and Chinese support for referral (situations to the Court some years hence is uncertain at best. And

ironically,
U.S. support is also uncertain. Although it is impossible to predict with confidence the posture the U.S. will adopt towards the Court in future administrations, it is certainly possible, for reasons elaborated more full below, that the U.S. might, in a given situation, block Security Council action.

In some cases, replacement of the regime in power at the time the offenses are
committed may permit the state involved to consent to the Court's jurisdiction.
The government that assumed power in Rwanda following the 1994 massacres has
cooperated with the ICTR, notwithstanding significant concerns about tl slow
pace of the tribunal's proceedings and its inability to mete out the death penalty (a penalty applied to Rwandans convicted of genocide and othe crimes in
national courts). In other cases, a change of regime is no guarantee that state will cooperate with the Court. In Cambodia, for example, the fall c the
Pol Pot regime has yet to lead to any genocide prosecutions, internation or
domestic, notwithstanding the current Cambodian government's stated willingness
to support such prosecutions. In other countries, such as El Salvador, regime
changes have been accompanied by amnesties and truth commissions rather than
criminal prosecutions. For these reasons, the treaty will not reach some the
worst violators of international humanitarian law.
On the other hand, the treaty's reach is in some respects too broad. The treaty
permits the Court to assert jurisdiction over nationals of non-party state if
they commit covered crimes in another state and that state consents to tl court's jurisdiction. Although it is a basic principle of treaty law that treaties do not bind non-parties, the legal justification for this approach i that the treaty does not confer jurisdiction over non-party states, but ratl

over their nationals, and under circumstances that would permit the territorial
state to exercise jurisdiction itself. Because the state on whose territory the
crime at issue has been committed could itself prosecute the offender, tl state
arguably has the power to delegate the authority to prosecute to the tribunal,
either ad hoc or by virtue of joining the treaty. The validity of this

delegation theory is uncertain. The Nuremberg tribunal was established by virtue of a treaty between the four victorious powers at the close of World Wa II, but the legal justification for the exercise of authority over German national rested in significant part on the fact that the creators of the tribunal were also the occupying powers in Germany, and therefore in a position to claim the right to administer courts of justice in lieu of national courts.

It could be argued that application of the treaty to nationals of a non-par state amounts to the application of the treaty to the state itself, at least insofar as the acts under consideration reflect the policy of the state, and therefore violates the principle that treaties do not bind non-parties. Whether or not one accepts this argument, the problem posed by application of th treaty to non-party nationals for countries such as the United States is clear. While it is highly unlikely that U.S. military action abroad might bring charges of genocide, it is not at all improbable that such action might generate charges of crimes against humanity or war crimes or (depending on the outcome of continuing negotiations) aggression. As a practical matter, a decision by an international criminal court to prosecute such charges, or even to investigate them, would be highly problematic from a U.S. foreign policy standpoint. The United States has international security interests and responsibilities that require it to depl troops abroad in a wider range of situations and for a broader variety of purposes than any other country. It is therefore difficult for the U.S., practically and politically, to accept the constraints on deployment of forces that might stem from the possibility of an international criminal prosecution for official government actions.

During the negotiations on the ICC treaty, the U.S. attempted to secure provisions in the treaty that would preclude such prosecutions. Other states refused to accept such provisions, arguing that any protections afforded the United States would necessarily also insulate the nationals of other state from prosecution, including the egregious offenders that all delegates to the conference agreed should be the focus of the Court. In addition, other states argued that the treaty's complementarity provisions would afford adequa

protection from any unwarranted international prosecution. Article __ o the treaty, which is based on the principle of complementarity, requires the Court to defer to national prosecutions of individuals accused of treaty crimes, provided that the state conducting the prosecution is genuinely able and willing to do so and is not engaged in a sham proceeding for the purposes of protecting the offender. Thus, if a U.S. soldier was accused of committing a crime covered by the ICC treaty, the U.S. could forestall an international prosecution by trying that soldier in a U.S. court. While this is an important protection against politicized prosecutions, the U.S. viewed it as inadequate for at least tw reasons. First, the Court retains the final authority to determine whether the prosecution at issue is in fact genuine. Second, and more troubling, complementarity does not protect a state that engages in a particular action (e.g., a military strike against a particular target) that the state reasonabl believes is legitimate under international humanitarian law but that the Court or the Prosecutor believes is not legitimate.

Any conflict of significant magnitude is likely to generate instances in which observers after the fact disagree on the propriety of a particular target, tl necessity of a particular use of force, the legal status of a particular weapon, or the proportionality of a particular action. While prosecutors might be expected to avoid close cases when there is an abundance of obvious humanitarian law violations to pursue, a prosecutor seeking "balance" in the work of the Court might well choose to prosecute close cases involving the United States.

Other states, including some of the United States' closest allies, worked hard to persuade the United States that the risk of such prosecutions was minimal, and that it was an unavoidable feature of a court that needed the authority to prosecute nationals of non-consenting states in order to be more than ju a standing court for cases referred by the Security Council. The United States, concerned about the possible implications of international criminal prosecutions for official actions whether undertaken in peacekeeping, peace

enforcement, or
other conflict situations, disagreed.
The net result, from the U.S. perspective, was doubly unfortunate.
Hypothetically, at least, a future Saddam Hussein could escape prosecution for
genocide committed on his own territory, while conferring jurisdiction (the ICC
to prosecute U.S. peacekeepers sent in to end that same genocide.

Problems with Amendments

Under the amendment procedures stipulated in the treaty, parties to the treaty
may add new crimes to the Court's jurisdiction. In what has been justifie post
hoc as an incentive for treaty ratification, the treaty permits parties to exempt
their nationals from the Court's jurisdiction over new crimes, even thou no
such exemption is available for nationals of non-parties.28 The result is
difficult to defend on any principled basis, since there is no substantive reason
why nationals of a state that is party to the treaty should be exempt from the
Court's jurisdiction for a crime for which nationals of a state that is not party
to the treaty would be prosecuted. The incentive argument borders on diplomatic
blackmail. States that do not wish to have their nationals subject to the
Court's jurisdiction at all are told that they must join the treaty in order t
minimize its application to their nationals. (The provision permitting parties
-- but not non-parties -- to opt out of the Court's jurisdiction over war crimes
works in much the same way.)
The ability of states parties to exempt their nationals from the effects of an
amendment dilutes an important constraint on what amounts to an international
legislative power. Ordinarily, states through treaties "legislate" only for
themselves and are constrained in their actions by the reciprocal effects any
treaty. The ICC treaty allows party states to create new crimes that will apply
to conduct by nationals of non-party states, and to do so through a votin
process in which dissenting party states need not worry that newly legislated
crimes will apply to them. Thus, for example, two thirds of the member of the

Assembly of States Parties might choose to outlaw the use of anti-personnel mines or nuclear weapons, leading to a prosecution of nationals of the United States for violations for which nationals of at least some treaty parties could nc themselves be held liable. In this scenario, treaty parties which could ordinarily be expected to oppose vigorously any effort to outlaw such weapons would have a much weaker incentive to do so, given their ability to exempt themselves from the new provision's application.

All of this has no direct bearing on the crime of genocide, since that is already one of the core crimes of the treaty and not likely, in its essentia

to be the subject of an amendment in the foreseeable future. But the amendment process constitutes another feature of the treaty likely to provoke the opposition of states whose cooperation or at least acquiescence is vital t the effective operation of the Court, whether now or in the future. Certainly the United States has identified the amendment provision as one of the principal flaws of the treaty.

THE EFFECT OF U.S. NON-PARTICIPATION

Whether or not U.S. concerns are exaggerated, as many critics have argued, is almost beside the point. The U.S. has made clear that there is no prospe that it will sign the treaty in its present form. Even if a future Administration chose to sign the treaty, the chances that the Senate would ratify it in the foreseeable future are negligible at best. Senator Helms, Chairman of th influential Senate Foreign Relations Committee, has taken various opportunities to announce his implacable opposition to the treaty, and has suggested a number of coercive measures the United States could take in opposition to the treaty.

More surprising, there is little support for the treaty even among Democrats in Congress.

Unfortunately, past experience suggests that the capacity of the propose Court to serve as an effective vehicle for the prevention and punishment of genocide rests in significant part on the cooperation and support of the United States.

The U.S. took the lead role in the initiation, organization, and operation the
two existing international criminal tribunals. More than any other state, the
United States has supplied the political impetus, the funding, the intelligence
information, and on occasion the military muscle needed by the tribunal
especially the Yugoslavia tribunal, for their existence and day-to-day functioning.
Where will the ICC find comparable support? It is possible that the European
states who have championed the present ICC statute will step up to the plate in
the absence of the United States and provide the political and financial support
needed for an effective tribunal. But there is considerable room for dout
Funding for the Court is particularly problematic. Many treaty signatori
favor UN funding, at least for the large start-up costs associated with creating
a permanent institution of this magnitude. The U.S., faced with legislati

prohibiting support for treaty bodies created under treaties to which the U.S. is
not a party, strongly opposes funding from the regular UN budget, and i likely
to reduce its payments to the UN by any amount assessed for the Court (except
perhaps for amounts associated with situations referred to the Court by the
Security Council). If the Court is to live up to the aspirations of its
supporters, it will cost far more than either of the existing international
tribunals, which have mandates limited to specific conflicts. Whether other
states will fund the Court at levels adequate for effective performance o its
functions remains to be seen.
Political support for the Court is equally vital. Its ability to obtain
cooperation, even from treaty parties, in acquiring evidence and custody of
suspects requires active assistance from the countries directly involved i
particular cases. In many instances, the countries most involved are also the
most reluctant to cooperate. Chile's vigorous objections to the arrest of
General Pinochet suggest that a proposition attractive to many states in the
abstract - that all accused of genocide and crimes against humanity shou be
brought to trial even if their home country objects - may, for at least son

countries, lose some of its luster in the context of actual cases. In such cases, only broad international support for the Court is likely to be able

overcome a state's reluctance to cooperate.
In turn, the Court's ability to shape international humanitarian law, and, more
important, to act as a deterrent to the commission of crimes within the Court's
jurisdiction, depend on adequate financing and political support. If the Court
can prosecute only the occasional case, the deterrent value of the threat

prosecution obviously diminishes. Moreover, sporadic decisions by a Court
without broad international support can have only limited effect on the future
direction of international humanitarian law.

FUTURE PROSPECTS

The danger that emerges from the inability to achieve a consensus in Rome that
included major states such as the United States, China, and India is that the
Court will lack both the broad international legitimacy and the political,
financial and logistical support the Court needs to be truly effective. If t

Court is to realize its potential, it will need to convince the skeptics that
can operate effectively and (within reason) apolitically. Supporters anticipate
that actual operation of the Court will alleviate many of the doubts expressed by
the United States and others. They note that the overwhelming majority voted in
favor of the Court's statute in Rome, and predict that ratification by the
requisite sixty states will come within a few years.
While the Rome treaty may indeed come into force in the next few year; it is
less apparent that in the short term it will command the support of the states
most important to its success. While most European and other western democratic
states are likely to ratify the treaty in the relatively near future, these are
not the states in which the covered crimes are most likely to occur. Moreover,
while a significant number of states with shabby human rights records a among
the signatories of the Court's statute, it is as yet unclear whether such states

will actually ratify the Rome treaty, or cooperate with the Court even if they do
ratify.
Of course, to say that the Court will not be all that it could be is not to s:

that its creation is not an important step in the effort to prevent and puni

genocide and related crimes. At a minimum, creation of the Court may help
constrain future genocidaires and war criminals in their foreign travels, lest
they be arrested and extradited to stand trial before the Court. Moreover when
those responsible for the statute's core crimes lose power in their home states,
new governments in those states may turn to the Court for assistance in prosecutions. In other situations, the Security Council may choose to rei

matters to the Court, as an alternative to creating new ad hoc tribunals. Perhaps most important, countries in transition, that is, countries seekin; to
leave behind a history of violent political conflict and egregious human rights
abuses by adoption of democratic political institutions and norms, may find that
ratification of the statute helps protect their gains by sending a message

some of the worst elements in their societies that certain kinds of crimes will
not be tolerated in the future.
Still, it is hard not to conclude that the Rome negotiations fell substantially
short of what might have been achieved. How far short time alone will tell.
Much depends on whether the concerns of the United States and other k countries
can ultimately be satisfied.
1 78 U.N.T.S. 277, entered into force, Dec. 9, 1948.
2 Statement by the International Commission of Jurists at the Plenary Session
of the Rome conference, quoted in 4 The Rome Treaty Conference Monitor (available
at http://www.igc.apc.org/icc/rome/html/rome_monitor/4/rmon4.htm).
3 See Steven R. Ratner and Jason S. Abrams, Accountability for Humar Rights
Atrocities in International Law: Beyond Nuremberg 243-53 (1997).
4 See David J. Scheffer, America's Stake in Peace, Security and Justice, ASIL
Newsletter (September-October 1998).
5 David J. Scheffer, U.S. Policy on International Criminal Tribunals, 13

Am. U.
J. Int'l L. 1383 (1998).
6 Genocide Convention, supra note 1, article VI ("Persons charged with genocide
or any of the other acts enumerated in article III shall be tried by a competent
tribunal of the State in the territory of which the act was committed, or t such
international penal tribunal as may have jurisdiction with respect to thos
Contracting Parties which shall have accepted its jurisdiction").
7 G.A. Res. 260 (1948).
8 G.A. Res. 489(V) (1950).
9 See Jordan Paust, M. Cherif Bassiouni, Sharon Williams, Michael Scharf, Jimmy
Gurule, & Bruce Zagaris, International Criminal Law: Cases and Materials 845
(1996).
10 See Leila Sadat Wexler, The Proposed International Criminal Court: An
Appraisal, 29 Cornell Int'l L.J. 665, 683 n. 112 (1996).
11 S.C. Res. (1993).
12 See Jordan Paust, et al., supra note 9, at 847.
13 Report of the International Law Commission, U.N. GAOR, 49th Ses: Supp. No.
10, U.N. Doc. A/49/10 (1994).
14 U.S. Department of State Press Briefing, April 9, 1998 (available at
http://secretary.state.gov/www/briefings).
15 Coalition for an International Criminal Court, Overview (available at
http://www.un.org/icc/overview.htm).
16 See Seth Mydans, Cambodian Leader Resists Punishing Top Khmer Rouge, N.Y.
Times, A1 (December 29, 1998).
17 See David J. Scheffer, Genocide and Crimes Against Humanity: Earl Warning
and Prevention, Address at the Holocaust Museum, December 10, 1998 (available at
www.state.gov/www/policy_remarks).
18 Quoted in Background and Information,
http://www.un.org/icc/overview.htm.
19 Report of the Working Group on the question of an international criminal
jurisdiction, Report of the International Law Commission, 44th Session, 74 U.N.
G.A.O.R., Supp. No. 10, annex, at 162, U.N. Doc. A/47/10.
20 David J. Scheffer, Address before the Carter Center, November 13, 1997
(available at
http://www.state.gov/www/policy_remarks/971113_scheffer_tribunal.h l).
21 Statement of David J. Scheffer before the Committee on Foreign

Relations of
the U.S. Senate, July 23, 1998.
22 See id.; see also Theodor Meron, The Court We Want, The Washington Post,
A15, October 13, 1998.
23 Rome Statute of the International Criminal Court, A/CONF.183/9 (July 17,
1998).
24 See generally Lori F. Damrosch, Genocide and Ethnic Conflict, in International Law and Ethnic Conflict 256 (1998).
25 Genocide Convention, article II (emphasis added).
26 Cherif Bassiouni, Crimes Against Humanity in International Crimina Law
(1992).
27 Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4-T, 6.3.2 (September 2,
1998).
28 Under article 124 of the Court's statute, a two-thirds majority of the parties to the statute may amend the statute to provide for jurisdiction over
additional crimes beyond those now contained in the Court's statute. Parties may
choose to opt out of the Court's jurisdiction over those additional crimes but
that choice is not available to non-parties.
1

Exchange Mail

DATE-TIME	6/15/99 1:58:36 PM
FROM	Elkind, Jonathan H.
CLASSIFICATION	UNCLASSIFIED
SUBJECT	RE: second confirmation hearing [UNCLASSIFIED]
TO	Sandalow, David B. Shapiro, Daniel B. Burrell, Christina L. Lackey, Miles M. Shapiro, Daniel B. Tavlarides, Mark J.
CARBON_COPY	Orfini, Michael H.

TEXT_BODY

yuck

did the EPA letter get out? seems to me that this would
answer the mail...

-----Original Message-----
From: Sandalow,
David B.
Sent: Tuesday, June 15, 1999 12:39 PM
To: Shapiro, Daniel
B.; @LEGISLAT - Legislative Affairs
Cc: Elkind, Jonathan H.; Orfini,
Michael H.
Subject: RE: second confirmation hearing [UNCLASSIFIED]

Issue
involves discussions about a possible pilot emissions trading program
with the Russians. Committee is concerned these discussions may
have violated the restriction (set forth in EPA's FY99 appropriations
bill) against any "rule, order or decree" that would "implement the
Kyoto Protocol." They didn't; hope we can quickly reassure Committee
of the same.

-----Original Message-----
From: Shapiro, Daniel
B.
Sent: Tuesday, June 15, 1999 12:06 PM
To: Sandalow, David B.;

@LEGISLAT - Legislative Affairs
Subject: RE: second confirmation
hearing [UNCLASSIFIED]

Aaackthpt. Not exactly an invitation you can turn down, huh? What was the issue?

-----Original Message-----
From: Sandalow,
David B.
Sent: Tuesday, June 15, 1999 12:03 PM
To: @LEGISLAT -
Legislative Affairs
Subject: second confirmation hearing [UNCLASSIFIED]

Alas,
I have a letter from Senator Helms complaining about certain administration activities on climate change, and inviting me to a second confirmation hearing next Wednesday, June 23. More details if you like. David

Exchange Mail

DATE-TIME	6/17/99 5:26:55 PM
FROM	Rice, Edward A.
CLASSIFICATION	UNCLASSIFIED
SUBJECT	Leg Update [UNCLASSIFIED]
TO	Kerrick, Donald L.
CARBON_COPY	
TEXT_BODY	
TRANSLATED_ATTACHMENT	Doc12.doc

Legislative Update
June 16, 1999

Highlights from Thursday

* The "Commend the President" resolution in the Senate is still kicking around
between the Democrats and the Republicans. Both sides are being petty -- the two
sides are very close -- but it is still not clear whether this will be worked our
or whether be a problem. [Since this note was drafted, a final agreement was
reached -- assuming both sides sign off, this will go away without controversy].

* The Foreign Operations bill will marked-up in about 15 minutes -- with very few
amendments. All of the Kosovo provisions remained in the bill, despite our veto
threat. The report language on the police funding issue says: "The Committee
has provided support for reestablishing an autonomous government and associated
security force in Kosovo. The Committee understands that the Administration's
planning reflects a requirement to fund similar activities such as police
training". That's not as bad as last night, but still a cause for concern.
None of the other serious problems were fixed in the bill either. This will be a
long-term problem (floor and conference).

* SFRC held the first round of Dick Holbrooke's nomination hearing Thursday -- on ethics matters. Sen. Helms appeared to soften his tone and approach noticeably when Holbrooke acknowledged that he had not been as careful as he should have been in his record keeping, which led to the apparent conflict of interest, now resolved. Helms canceled the afternoon session (closed hearing on ethics matters). The hearings continue next week with sessions on U.N. reform and Balkans policy.

* Walpole, Kartman from State and a DOD rep. briefed House members and staff on status of Kumchang-ni underground site in North Korea. Four Members (Bereuter, Gilman, Cooksey and Knollenberg) and 20 staff attended. Members wanted assurances that site could not be used to construct underground nuclear facility in the future and wanted to know why we had originally thought it might have been such a facility.

Friday's Highlights:

* The Senate will begin consideration of the State Department Authorization bill on Friday. The SAP will express general support for the bill's passage, but says senior advisers will not recommend the bill be signed until a number of key provisions are resolved.

* The bill provides the Administration's request for State Department operations, programs, and building and maintenance. It provides advance appropriations of $3 billion for embassy security, per our request. Authorizations for annual assessed contributions to International Organizations and International

Peacekeeping Activities are $23 million and $20 million below our request, respectively. Included is an updated version of the original Helms-Biden U.N.

Reform/Arrears package -- authorizing $926 million for U.N. arrears over three
years, tied to specific U.N. reforms. Also included are a number of foreign
policy provisions on China, Jerusalem, and the PLO office.

* Some of the objectionable provisions include: micromanaging State Department
reorganization by creating an Assistant Secretary for Verification and
Compliance; micromanaging staffing of the Office of Children's Issues; reducing
flexibility on implementation of embassy security construction requirements;
onerous reporting requirements relating to ongoing nonproliferation negotiations;
requiring verification procedures on export licenses to Hong Kong; denying visas
to foreign officials involved in forced abortion or sterilization; placing the
Consulate General in Jerusalem under Embassy Tel Aviv, and requiring U.S.
government documents to list Jerusalem as the capital of Israel; adding a
condition to the waiver authority for operation of the PLO office in Washington
-- that there has been no declaration of an independent Palestinian state; and
requiring the President to vest and liquidate blocked Libyan assets to pay for
Pan Am 103 families to attend the trial in the Hague.

* By unanimous consent, only 50 amendments are in order, 40 of these by
Democrats. Helms and Lott each of place holders. We have seen content on very
few of these amendments. The only ones we are familiar with and concerned about
are two Ashcroft amendments -- a sense of the Senate on U.S. citizens killed in
Palestinian terrorist attacks, and a lengthy reporting requirement on the same
subject We do not believe these are likely to be challenged on the floor, but we
are working with State to provide off-line suggestions for negotiated fixes to
Daschle. Sen. Feingold may offer an amendment to strip funding for the National
Endowment for Democracy.

* We expect the Jerusalem Embassy act waiver and letter to Sen.

Moynihan Friday
morning. Sen. Levin raised a concern about it coming up while the State bill is
on the floor. However, given the finite list of amendments (Kyl is boxed out)
and AIPAC's stated desire to avoid a legislative clash before the Barak visit, we
believe this is manageable. Additional delay would likely put the waiver into
next week when the House may consider the same bill, when CJS may be on the
Senate floor, etc. In short, waiting beyond Friday provides us with no discernible benefit.

Next Week Issue

* The FY00 Commerce, Justice, State Appropriations bill contains a general
provision which states "Notwithstanding any other provision of law, none of the
funds appropriated or otherwise made available by this Act may be provided for or
used by the NSC or personnel working for or detailed to the Council". The CJS
bill is scheduled for Senate floor consideration next week. Mara recalls that a
similar measure was included in last year's bill and eventually dropped. State
Department strongly opposes provision (prohibition applies to other agencies
funded by the bill as well). Draft SAP also states that the Administration
strongly opposes the provision. We will work closely with State to make certain
that this section is eventually dropped.