

MEMORANDUM TO CONGRESS ON THE ICC
FROM CURRENT AND PAST PRESIDENTS OF THE ASIL

Late last year, in a letter to Congressman Tom DeLay, majority whip of the House of Representatives, twelve former high government officials expressed their support for a bill introduced by Senator Jesse Helms in June 2000, entitled "American Servicemembers' Protection Act."¹ The bill, if enacted, would prohibit any agency of the U.S. government from cooperating with the international criminal court (ICC), and proscribe U.S. military assistance to any nation that becomes a party to the treaty of Rome,² with the exception of NATO members and certain other allied countries.

The twelve former government officials included four former secretaries of state (James A. Baker III, Lawrence S. Eagleburger, Henry A. Kissinger, George P. Shultz), two former secretaries of defense (Donald H. Rumsfeld, Caspar W. Weinberger), three former national security advisors to the president (Richard V. Allen, Zbigniew Brzezinski, Brent Scowcroft), two former directors of central intelligence (Robert M. Gates, R. James Woolsey), and one former ambassador to the United Nations (Jeane J. Kirkpatrick).³

These officials referred to the ICC as a "threat to American sovereignty and international freedom of action."⁴ They said that despite the refusal of the United States to become a party to the treaty, the ICC would claim jurisdiction to prosecute and imprison American service members and other officials of the U.S. government. "Moreover," they wrote, "any American prosecuted by the ICC will be denied basic constitutional rights guaranteed them under our Bill of Rights."⁵ They asserted that it was

equally important that the President, cabinet officers, and other national security decision-makers not have to fear international criminal prosecution as they go about their work. The risk of international criminal prosecution will certainly chill decision-making within our government, and could limit the willingness of our national leadership to respond forcefully to acts of terrorism, aggression, and other threats to American interests.⁶

In addition, they warned that "the last thing America's leaders need is an additional reason not to respond when our nation's interests are threatened."⁷

On February 21, 2001, eight former presidents of the American Society of International Law (Thomas M. Franck, Louis Henkin, Monroe Leigh, William D. Rogers, Oscar Schachter, Louis B. Sohn, Peter D. Trooboff, and Edith Brown Weiss), the honorary president (Stephen M. Schwebel), and the undersigned, the current ASIL president (Arthur W. Rovine), sent a memorandum (for insertion into the hearing record) to Congressman Henry Hyde, chairman of the House Committee on International Relations.⁸ The presidents' memoran

¹ American Servicemembers' Protection Act of 2000, H.R. 4654, 106th Cong. (2000).

² Rome Statute of the International Criminal Court, July 17, 1998, UN Doc. A/CONF.183/9*, 37 ILM 999 (1998), *corrected through July 1999* by UN Doc. PCNICC/1999/INF/3*, at <<http://www.un.org/law/icc>>.

³ Letter from Lawrence S. Eagleburger, Former Secretary of State, et al., to Tom DeLay, Majority Whip, U.S. House of Representatives (Nov. 29, 2000) (on file with author).

⁴ *Id.*, para. 2 (cited by paragraph for convenience; the paragraphs in the letter are not formally numbered).

⁵ *Id.*

⁶ *Id.*, para. 4.

⁷ *Id.*

⁸ Letter from Monroe Leigh, Partner, Steptoe & Johnson, to Henry Hyde, Chairman, House Committee on International Relations (Feb. 21, 2001), attaching memorandum entitled "Misconceptions About the Proposed International Criminal Court" by current and former presidents of the American Society of International Law Oscar Schachter, Hamilton Fish Professor of International Law and Diplomacy Emeritus & Special Lecturer, Columbia University School of Law; William D. Rogers, Partner, Arnold & Porter; Monroe Leigh, Partner, Steptoe & Johnson; Louis B. Sohn, Distinguished Research Professor and Director, Research and Studies, George Washington University Law School; Peter D. Trooboff, Partner, Covington & Burling; Louis Henkin, University

dum stated that the letter of the twelve former government officials suffered from “a fatal misconception as to fundamental principles of international law.”⁹ The presidents explained that the false assumption was that if the opponents of the ICC succeeded in preventing the court from coming into existence, or in preventing the United States from becoming a party, they would save American servicemen and women from trial in a foreign court if charged with one of the crimes within the limited jurisdiction of the proposed new court, that is, genocide, war crimes, and crimes against humanity.

The presidents’ memorandum pointed out that without some international agreement to the contrary, American airmen shot down, for example, while carrying out a bombing mission over enemy territory would be subject, under customary international law, to the territorial jurisdiction of the target state. Chief Justice John Marshall held in 1812 that the “jurisdiction of the nation within its own territory is necessarily exclusive and absolute; it is susceptible of no limitation not imposed by itself.”¹⁰ The presidents’ memorandum indicated that in 1957, when the NATO Status of Forces Agreement was subjected to a constitutional reexamination, the United States Supreme Court came to the same conclusion.¹¹

The presidents’ memorandum then stated that the current rule, as it has been in the past and will be in the future, is that when an American official, whether military or civilian, enters the territory of a foreign sovereign, the official is subject to that sovereign’s jurisdiction if the official commits an offense against its laws.

The memorandum pointed out that the only escape from this fundamental principle of customary international law is an agreement between the state of nationality of the accused and the territorial sovereign. This is the route taken by NATO in the Status of Forces Agreement in 1951 and accepted by the Senate in 1953.¹² Since the NATO status of forces and similar treaties are not worldwide in coverage, “they are not binding on every nation, least of all, on certain rogue states who will be free to exercise territorial jurisdiction over any American military person who allegedly commits an offense in their territory and is brought into their custody. This is the reality of the situation.”¹³

The presidents then urged that “the Treaty of Rome be given a fair hearing on its merits.”¹⁴ They stated that the U.S. negotiators had done an outstanding job in negotiating a treaty that protects the national security interests of the United States, as well as the individual rights of American nationals, including those in military service abroad. “We dissent only from the continuing attempts of the U.S. negotiators to obtain agreement for the exemption of nationals of the United States and of other non-parties from the jurisdiction of the proposed court,” the letter went on to say.¹⁵

The presidents pointed out that the Rome statute will create a treaty-based alternative to the unrestricted jurisdiction that customary international law accords to the territorial sovereign. It will create primacy of jurisdiction in the state of nationality of the accused, and only if the United States were “unwilling or unable genuinely” to exercise its primary juris-

Professor Emeritus and Special Service Professor, Columbia University School of Law; Edith Brown Weiss, Georgetown University Law Center; Thomas M. Franck, Murray and Ida Becker Professor and Director, Center for International Studies, New York University School of Law; Arthur W. Rovine, Partner, Baker & McKenzie; Stephen M. Schwebel, former Judge, International Court of Justice (Feb. 13, 2001) (on file with author) [hereinafter ASIL Presidents’ Memorandum].

⁹ *Id.*, para. 4 (the paragraphs, though unnumbered, are cited here by number for convenience).

¹⁰ *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 136 (1812).

¹¹ *Wilson v. Girard*, 354 U.S. 524, 530 (1957).

¹² Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces, June 19, 1951, 4 UST 1792, 199 UNTS 67.

¹³ ASIL Presidents’ Memorandum, *supra* note 8, para. 9.

¹⁴ *Id.*, para. 10.

¹⁵ *Id.*, para. 11.

diction would the new court be able under the treaty to exercise its contingent jurisdiction, which the letter writers believed would be “an extremely rare and remote possibility.”¹⁶ The memorandum noted that if and when the new court exercises its jurisdiction, it must do so subject to a list of due process protections for the accused that are “at least as comprehensive as the American Bill of Rights—in certain cases even more detailed and specific.”¹⁷ The writers urged that the United States accept the treaty without any changes in the text.

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¹⁶ *Id.*, para. 13.

¹⁷ *Id.*, para. 15.

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