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**INDEPENDENT STUDENT COALITION FOR THE INTERNATIONAL CRIMINAL COURT**  
**(ISC-ICC)**

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**EYES ON THE ICC:**  
**WHAT AMERICANS WANT TO KNOW ABOUT THE NEW INTERNATIONAL CRIMINAL COURT**

UNIVERSITY OF MAINE SCHOOL OF LAW  
PORTLAND, MAINE, USA  
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**PREPARED BY ANNA N. ASTVATSATUROVA**  
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(Notes provided by the co-sponsor, co-organizer and a host organization, the International Law Society, University of  
Maine School of Law)

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**FORMAT OF THE CONFERENCE**

- I. HEARING (12:30 PM – 3:30 PM)**
    - A. PRESENTATIONS BY EXPERT PANELISTS:** JOHN WASHBURN, NICHOLAS ROSTOW, AND JANE ROCAMORA. MODERATED BY JOHN SHATTUCK
    - B. STUDENT QUESTIONS**
    - C. GENERAL DISCUSSION AND AUDIENCE QUESTIONS**
  
  - II. WORKSHOPS (3:45 PM – 5:30 PM)**
    - A. WORKSHOP A: ICC'S MOST FASCINATING LEGAL DETAILS**
      - 1. PRESENTATION BY JOHN WASHBURN
      - 2. GENERAL DISCUSSION AND AUDIENCE QUESTIONS
    - B. WORKSHOP B/D (COMBINED): AD HOC TRIBUNALS/WOMEN AND THE ICC**
      - 1. PRESENTATION BY JANE ROCAMORA
      - 2. GENERAL DISCUSSION AND AUDIENCE QUESTIONS
    - C. WORKSHOP C: UNIVERSAL JURISDICTION**
      - 1. PRESENTATION BY ALLEN SPRINGER
      - 2. GENERAL DISCUSSION (INCORPORATED IN PRESENTATION)
    - D. WORKSHOP E: JUSTICE AND PEACEMAKING**
      - 1. PRESENTATION BY KEN RODMAN
      - 2. GENERAL DISCUSSION AND AUDIENCE QUESTIONS
  
  - III. CLOSING REMARKS (5:30 PM – 6:00 PM)**
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## HEARING

**OPENING PANEL:** **MODERATOR, JOHN SHATTUCK**, CEO Kennedy Library Foundation; former Assistant Secretary of State

**JOHN WASHBURN**, Convener, American NGO Coalition for the ICC

**NICHOLAS ROSTOW**, General Counsel, US Mission to the United Nations

**JANE ROCAMORA**, International Criminal Defense Attorneys Association

**STUDENT QUESTIONERS:** **KELCI GREENACRE**, Hampden Academy  
(in order of appearance) **AMY MATUEWEZSKI**, University of Southern Maine  
**WILLIAM T. BLY**, University of Maine School of Law

The Conference started with a brief welcome by **DAVID P. CLUCHEY**, an Associate Dean of the University of Maine School of Law. Mr. Cluchey, who has been appointed by Governor of Maine, Angus King, to be the 2002 UN Day Chair for Maine, welcomed the distinguished guests and in honor of United Nations Day (October 24, 2002) read the Proclamation issued by Governor King. (*applause*)

**ANNA N. ASTVATSATUROVA**, a third year law student, President of the International Law Society of University of Maine School of Law, and the Director of Education Programs of ISC-ICC, introduced the guests. (*applause*)

**MR. JOHN SHATTUCK** started the Hearing by welcoming the panelists. The time and setting of this conference are extraordinary, said Mr. Shattuck. He was pleased it was set at the University of Maine School of Law, “but also that it is set at a time when issues of international justice are at the forefront of international agenda, just as issues of international terrorism and the crisis that faces the world as it addresses the issues of terrorism which also have a great bearing on what we will be discussing today.”

Each panelist made a brief, 10-15 minute presentation. In order of appearance:

**JOHN WASHBURN:**

Mr. Washburn thanked the organizers and the co-sponsoring organizations, “an all-star line up for Maine.” He said that he just came back from series of speaking tours for AMICC, in Kansas, Missouri and Utah. In his travels around the heartland of the United States, Mr. Washburn noted that one question that was frequently asked about the ICC was - “Is ICC is going to be a real court?” Mr. Washburn stressed that yes, it will be a real court, and “it already has a building in The Hague. You will be able to see it on Court TV.” There will be judges, a Prosecutor. “The Court will have its own detention facilities for pre-trial and its own prisons for after. It’s not an exotic construction, not something that never existed before in our experience.” It will be a Court comfortably close to the courts we have in United States but with a major exception - it tries a narrow range of crimes.

“When does it happen?” was another frequently asked question. Mr. Washburn answered by saying that “it has happened.” The Court is real. The Court’s jurisdiction began on 3<sup>rd</sup> of July, and the Rome Statute came into effect on April 11, 2002. There is no retroactive jurisdiction. Court’s governing body met for the first

time in 3-10 September, 2002 in New York at the UN. The function and role of United Nations in creating this Court and the function and Role of General Assembly came to an end and the Court came into an existence as an independent, international institution responsible for its own funding and its own management - no longer a part of the UN.

Mr. Washburn discussed the nomination of judges, the building at The Hague that the government of Netherlands have provided for the Court and also the ceremony that will take place in March of 2003 at The Hague when the swearing in of the judges will take place

Complaints and information about cases have already been coming in to the Advance Team, which is already at The Hague, said Mr. Washburn. The Court will be processing cases in June or July of 2003 and it is expected that the Prosecutor's office will be handling investigations of the first cases toward the end of 2003.

Its coming into existence has changed both the national discourse in this country and an international approach attitudes, said Mr. Washburn. It has had effects on US government actions toward the Court. Mr. Washburn noted that the physical existence of the Court has a significant effect on how it is being perceived. Since the US has not participated in the Assembly of States Parties, a number of members of Congress are uncomfortable with the idea that US will not participate in this process.

"How did it happen, what was the process by which it came about?" he is asked regularly. Mr. Washburn described the long and intense process of the Rome Conference where thousands of experts, lawyers, scholars and diplomats participated in creating of the Rome Statute and also the Preparatory Commissions of the Court. The Rome Statute and the accompanying documents of the Elements of Crimes and Rules of Procedure and Evidence are the results of detailed, prolonged, and careful work of the extraordinarily high quality drafted through 10 meetings of the Preparatory Commission of the ICC, said Mr. Washburn. He stressed that this is a serious business, no lighthearted undertaking, taken on by very serious and qualified people. Mr. Washburn noted that the United States delegation played a large role in creation of the Statute. US has not attended the first Assembly of States Parties. But, he stressed, we have good reason to be very proud of the contribution of the American delegation to this process. (*applause*)

At the conclusion of Mr. Washburn's presentation, the moderator, **MR. SHATTUCK** clarified to the audience that the United States has been very active in this field. US has been deeply involved in the creation of the two criminal tribunals, which were forerunners of the ICC. The Congress has demonstrated a strong bipartisan effort and showed strong support for the International Criminal Tribunals of Rwanda and former Yugoslavia, as does the current administration, said Mr. Shattuck. Bush administration continues to support these two tribunals. After stating the above, he welcomed Mr. Rostow to start his presentation.

#### **NICHOLAS ROSTOW:**

Mr. Rostow wanted to start by saying that he expected to be "a skunk at a garden party" but said it isn't a right metaphor. Because he is a law professor and this was a law school, he wanted "to raise questions that might lead one to have reasonable doubt so that one might have some substantial issues about the institution [ICC] to keep an eye on."

He clarified by saying that he isn't here to defend human rights violations, nor genocide in his critical assessment of the Rome Statute. "No US government should be accused or thought to tolerate such things." United States does not support nor tolerate genocide, but the ICC is not an instrument of the rule of law as

Dean Cluchey suggested in his introduction or in the way Mr. Washburn “painted a rosy picture of the Rome Statute.”

Administration’s position shared by Congress’s majority and shared by the Junior Senator of New York, said Mr. Rostow. According to him, there are **four principle legal flaws** in the Rome Statute and the ICC, with a fifth overriding problem:

1. Accountability
2. Jurisdiction
3. Due Process
4. Relationship to the United Nations

The problem with **accountability** is in two or three different dimensions, Rostow explained. The Court houses judges, prosecutors, prison officials and administrators. “As in experience of the Rwanda and Yugoslav tribunals over the last decade, these are not that easy to separate. . . . What these institutions don’t have, is rootedness of a democratic political process that provides both the separation of prosecutorial and judicial functions and the Court administrative functions, and also a democratic accountability so that there is a check on the behavior of the institution.”

Mr. Rostow also found an issue of **due process** troubling. He cited to an article by Judge Patricia Wald (?), one of the early judges at ICTY, which noted that there are difficulties when there is an attempt “to merge different legal systems and different legal cultures with respect to handling of evidence, witnesses and the problems of translation and so forth. These difficulties really do affect due process the defendant gets,” and the Rome Statute does not work those out fully and adequately, said Mr. Rostow.

Secondly, he stated, there is a problem with a fundamental principle of **double jeopardy**. The Court proponents argue that the ICC is an institution with a safety net, if the national jurisdiction fails to prosecute in good faith. This is a case of creating an institution with a second guess. There is a question of whether any of the absolutely normal processes of the US justice, for example, would be respected. Mr. Rostow said, no. There is no guarantee that ICC judges and prosecutors would respect it. “There are real risks of multiple jeopardy.”

**Relationship of ICC and the UN Charter** was another troubling issue for Mr. Rostow. “ICC is not a UN organization and not accountable to the UN body, certainly not to the Security Council.” Its parties are trying to spend a good deal of time over the next coming months, years, if not decades trying to define aggression as a crime. Aggression is a serious offense. “It is a loaded political term that the Security Council has never used.” There is a real issue about the diffusion of the function of the ICC and the Security Council, and the proponents of the Court say that’s the whole point.

**Politicization** issue is the most fundamental risk, Rostow stressed. Every time the US has used force in Mr. Rostow’s lifetime, every one from the President to the soldiers have been accused of war crimes. It is a very serious charge, he explained. US armed forces keep peace all over the world, and are, therefore, very vulnerable. It is not a frivolous concern, he stressed. Secretary Colin Powell’s view, said Rostow, is that the ICC is not a part of the great bargain that is made. The US military personnel serve in the armed forces, he explained; they accept the risk and discipline of that responsibility; they are sent where their commander in chief sends them, and if they are in trouble they will not receive the same justice as they will at home, because the ICC will not provide that.

ICC is unique among tribunals because it will have jurisdiction over citizens of countries whether or not the country ratified the Rome Statute, Rostow noted. “We don’t have a world government, but yet here we are creating the world international criminal court.” In closing he said that the administration’s policy is that the US will not become the party to the Rome Statute and will not do anything to undermine the Court. *(applause)*

**MR. SHATTUCK** was interested in hearing about the differences between the ad hoc tribunals and the ICC. **MR. ROSTOW** responded, saying that he will take on that question later on in the afternoon.

**JANE ROCAMORA:**

She began by saying that she applauds the organizers of this Conference. She thanked Mr. Rostow for coming because through such a dialogue the progress is made. The organizers asked Ms. Rocamora to speak about defense. It is a real court, she said, because there is real defense. Development of defense at these international criminal tribunals is important because without the strong and independent defense there is no court, she said. The process through which the tribunal went through demonstrates this is a real court that can dispense a measure of high level of justice. This process lead up to the adoption of the Statute and the companion documents and has ultimately left us in awe; the collaboration with different cultural, judicial and gender concerns enriched the outcome. The ICC is not perfect but does promise to be an effective institution. We should all look forward in watching it operating, said Ms. Rocamora.

Ms. Rocamora explained that by 1996 the process of drafting the statute has begun. The Coalition [CICC] has been operating by then in moving the drafting of the Statute along. Having been in Rwanda and seeing what the genocide has created there, Ms. Rocamora went to Arusha’s criminal court and was shocked when she saw the defense in 1996 as it was being practiced there. She investigated it; there was no institutional support for the provision of the defense. Her observations were not very well received at one of the Conferences for ICTR. ICDA was therefore created by the like-minded people and became a member of the International Coalition for the ICC (CICC) “In 1996 and 1997, NGOs working with the Court were very hands off about us.” They weren’t sure they wanted to work with people who try to establish adequate defense for perpetrators of such heinous crimes, she explained.

ICDA’s first allies were Governments – Canadians, Australians and “hats off to the Dutch,” said Ms. Rocamora. “It took ICDA a while to do the educational work with government representatives as well as the NGO forum about the need of this issue to be supported and be out in the open.” The process was political, and defense was not something delegates wanted to discuss in public. “Governments are supportive of the defense, but because it is a political process - it is hard to be supportive of defense in public. Governments don’t want to be seen as supporting some of these worst human rights abusers that the world has ever seen” as we have observed even here at this Conference in a disclaimer form. It has been a difficult and rocky road. “I can say that ultimately we have been successful.”

There are **2 entities** and institutions that has come about from this process that Ms. Rocamora thought are going to assure an independent and effective defense:

- 1. International Criminal Bar.** “What we’ve learned from ICTY and ICTR is that there are issues associated with qualifications, issues associated with codes of ethics, which are nowhere addressed within the structures and procedures of the two ad hocs.” The ICDA convened last year in Paris with the help of the Paris Bar and the Dutch government and invited all the heads of Bars, from

major legal systems around the world. Around 62 Bars attended. At that meeting there was a consensus to establish the ICB to take care of these issues. It has been established with a steering committee. Now this Bar is in the process of developing its own rules of operation and regulation.

2. Second thing missing in the two ad hocs is an institution that has a power and capacity to **implement defense rights**. How does a defendant know to choose among the possible defense attorneys, which is best for him or her? Registrar, Prosecutor and Judges cannot address these issues. Through this PrepCom process we came to a conclusion that **Defense Counsel Unit** should be established. And it was indeed established in September of 2002 at the First Assembly of States Parties and was given very good funding in the First Year Budget adopted by the Assembly of States Parties.

“Why are we concerned about an effective defense?” asked Rocamora. We want a court that adheres to principle of due process. “A court that fails to provide an effective and independent defense fails due process. We are going to see that the defense of these crimes brought before the ICC is going to look different than defense looks in our own domestic courts. There are lots of reasons why that is true. However, my belief is that if we provide this defense, I think we might learn more about why are these people doing these horrible things and wouldn’t that be a good thing to know?” (*applause*)

*(During this section of the Conference, Moderator John Shattuck called on three students selected to ask the panelists a question from their respective groups and organizations.)*

## QUESTIONS

(ASKED BY STUDENT QUESTIONERS)

**QUESTION (GREENACRE): Double Jeopardy, terrorist hypothetical and Article 20 of the Rome Statute: Can the Court take over the case where a domestic court convicted the terrorist and sentenced him to death?**

**ROSTOW:** To state the question is to answer it. Article 20 is a good example of impenetrability of the Rome Statute.

**ROCAMORA:** There are gate-keeping measures that prevent the Court from taking over the case. With ICC there is an issue of whether the crimes committed by the terrorist fall under certain categories. Issues of **Complementarity** – only where a state is unable or unwilling to criminally prosecute a person who has committed a crime within the jurisdiction of the Court, the Court will *consider* not take over. Would I like to see the Court take over a case like that? Absolutely. Can it? Absolutely not.

**SHATTUCK:** ICC does not and will not take a case if the justice system of the state is functioning properly. There are only two instances in which that would not be the case. 1. No state – failed state with incompetent judicial system. 2. Where a state is unwilling to investigate and fully consider the case. Issue of willingness is covered in the statute.

**QUESTION (MATUEWEZSKI): Will US opposition and non-involvement weaken the Court and how will it or will it not?**

**WASHBURN:** Background – 1. Reaction to the Court was formally announced May 6, 2002, US was detached and disengaging from the Court. 2. July of 2002 – extensive and very difficult negotiation at the Security Council took place. US wanted an exemption from the Rome Statute. Result was a Security Council resolution, which provided for such exemption for one year. 3. US did not participate in the Assembly of States Parties. 4. US seeks bilateral agreements with countries, which is to obtain an agreement from another nation. If a US citizen was an object of interest of the ICC, the US would have the right under this agreement to have this person to be returned, and the other party has to honor that right. There has been a substantial negative reaction by many countries toward these bilateral agreements. European Union has issued guidelines for this matter - if you feel you must negotiate, it can only cover persons on your territory over people on official business (Article 98(2) only refers to persons on official business).

If US is successful in obtaining these agreements of majority of the 81 ratifying countries, then it will have a significant influence on the operation of the Court. It will be a disadvantage to the Court not to have the cooperation of the US in matters of evidence and information, expertise and experience - things will be missed. It is difficult to calibrate the exact degree of such disadvantage. “Court will have to travel further down the runway, but in the end it will become airborne and will fly effectively.”

**ROSTOW:** Administration’s position on the Rome Statute is related to the position of the previous administration. Although President Clinton authorized signature the Rome Statute “President Clinton advised the successor not to do it.” The Rome Statute may not be amended for seven years.

Mr. Washburn left out a fact of small significance and that is - why the Resolution 1422 of Security Council is a one-year resolution? “And that is that our nearest and dearest allies and friends, and the most enthusiastic partisans of the Court said ‘don’t seek to solve your concerns through the Security Council; negotiate bilateral agreements with other countries.’ I’m not going to list the countries from whom we got this advice, but a number of them are members of the European Union, a number of them are parties to the Rome Statute, and others not in Europe but are also enthusiastic supporters of the Court. And so the Secretary of State instructed the delegation in New York – ‘get me a year so I can get my Article 98 agreements.’ Well, time is fleeting and we don’t have many in the books yet, but we are working hard on them.”

The fact that we want to cover former officials as well as current officials, civilians as well as military officers is because the ICC jurisdiction covers not foot soldiers so much as politicians and commanders. Administration’s policy does not want to subject former Presidents and Secretary of States to the jurisdiction of the ICC.

**ROCAMORA:** The administration is looking at defending from the ICC; it is not looking at what it is going to be missing in not being able to participate in the process. The focus is on the defense from the ICC, rather than looking at using the ICC in achieving the human rights protections.

**ROSTOW:** The administration instead prefers the ad hoc tribunals. The chief judge and chief prosecutor gives a report on how they are doing...management of money is investigated. Corruption is present there. It has never dawned on me that judges and prosecutors and defense counsel each have a finger in the funds. Fee splitting is happening there. I am told it is happening in The Hague too, but not as much as in the Rwandan tribunal. “I am terribly encouraged by what my colleague in the panel said [Rocamora],” very much being a supporter of code of ethics and professional responsibility.

**SHATTUCK:** being able to influence the course of the developments of these ad hoc tribunals is very important. Being actively involved is the same true for the ICC.

**QUESTION (BLY):** What are mechanisms in place currently for bring individuals to justice? How does the Court deal with potential problems of bringing an uncooperative head of state to justice? If Security Council is involved - how can you keep it from becoming a highly politicized event, as opposed to a judicial event?

**ROCAMORA:** It is a logistics problem with international law. Statute allows for several mechanisms, none of which involve invading a country. One of the mechanisms is resort to UN Security Council pressure, and I would say as a lawyer that using the Security Council to accomplish a logistic task is not corrupting a judicial process with politics.

**(BLY cont.)** It is tiptoeing around the issue. In regards to the Iraqi problem – how do you put pressure on Mr. Hussein through Security Council? A sheriff in Iraq is not going to approach Saddam and say “Come with me, I am taking you to The Hague.”

**WASHBURN:** Here we face an important issue - how do you tell people to obey? It is an inherent problem of all international organizations. To deal with uncooperative head of state problem, Mr. Washburn stated: if the head of state is not ratifying the statute – he is safe, if he stays at home. And in the case of Mr. Saddam Hussein, he is not interested in international travel. If the head of state is of a state party, then they have a constitutional conflict. In that situation also the head of state have problems with travel.

You learn quickly in law school and quicker in practice that courts are political bodies, created through a political process. The UN Security Council is a political body that will do things with political overtones. But there are two things in Rome Statute: Security Council may refer cases to the Court, and if it is a head of state case - these kinds of cases are most likely to be referred by the Security Council. How do you deal with a problem of difficulty of getting people in front of the Court? There are cases of international community pressure (example of 1.3 billion dollars in aid to Bosnia to produce Mr. Milosovic.) Other cases, it is convenient for a country to get someone off of their territory. Some countries want the ICC to try their own citizens (example Congo).

*(The floor was open to the audience members to ask questions; the Moderator gave each panelist an opportunity to respond)*

**DISCUSSION AND GENERAL QUESTIONS**  
(QUESTIONS FROM THE AUDIENCE; NOT IN ENTIRETY)

**QUESTION:** Who appoints/replaces judges, prosecutors?

**ROCAMORA:** Assembly of States Parties addressed these problems. The Court is accountable to the Assembly of States Parties, despite what Mr. Rostow is saying.

**QUESTION:** Concerning the Principle of Complementarity - What happens if the prosecuting authorities of the particular country, which is a party nation determine that the alleged war crime doesn't rise to the level of a war crime and does not prosecute. Is that considered “unwillingness” to prosecute or a legitimate determination? How do you draw that distinction under the Rome Statute?

**ROSTOW:** You asked a question that United States government asked and decided not to become a party to the Rome Statute. It is not automatic that a country, which prosecutes a soldier for war crimes, sentenced a soldier to a number of years and ICC will take it as an adequate decision.

**WASHBURN:** Every court has to determine boundaries of that court's jurisdiction. You are not a proper court if someone from outside determines it for you. You put your finger on the power, which a court needs to be a legitimate court.

**ROSTOW:** If I may respond, I have a fundamental disagreement with what Mr. Washburn describes as a legitimate court. No court in the US determines its own jurisdiction. Even in the case of the Supreme Court: there is a process to amend Constitution, to determine the jurisdiction of the US Supreme Court. It is a very difficult process, but it is available. This is not the case with ICC.

**ROCAMORA:** This Court is not determining its own jurisdiction; the Rome Statute does that through its adoption by the Assembly of States Parties.

**QUESTION: Does not the US have a degree of responsibility to conform itself to international law?**

**ROSTOW:** I have always taken the view that US has obligation to obey international law. Charter of UN is a treaty and Article 6 of the Constitution says treaty is the supreme law of the land. The fine point of the argument is whether or not the treaty of that sort is binding that it rises a cause of action in the US Court and that is a different kind of a question.

**QUESTION: Why don't we [United States] ratify the Rome Statute and have the ability to amend what we need, rather than have absolutely no power?**

**ROSTOW:** The US experience with persuading the partisans of the Rome Statute was not particularly satisfactory. Because of the way the Statute is constructed, so that no amendment is possible for 7 years, the administration determined that there is no really useful purpose to sit in on the Assembly of States Parties as an observer since we could not influence what was going on.

**QUESTION: Even the Supreme Court of the United States makes stupid mistakes; in fact it made one recently. I cannot understand how those risks can be so significant that they can possibly affect the United States? (applause)**

**SHATTUCK (CONCLUDING THE HEARING):** And this will be our last question. Risk analysis is what this is about. The current administration reached the conclusion that it is not in the interests of the US not to sign and participate in the ICC process. There are real risks, the questions is whether they are larger than benefits. Participating allows to correct some of the flaws. We can see the nature of the principle concern - unfair or political judgment of international justice system. The area of ICC activity will be quite focused on the crimes that the ICC has jurisdiction over. If, however unlikely, US citizen will fall under jurisdiction of the ICC, US will be contacted immediately and the investigation will take place by the US. If US is unwilling to carry out the investigation, the case will be taken with the ICC. "Unwilling" is defined in the Statute. US will have to demonstrate intent to shield a person from *prima facie* criminal responsibility. Even differences of the result of the investigation would not be of a sufficient basis in taking over of the case.

There may well be risks in that situation. “In my view it’s relatively small. US would have to be so biased from standpoint of the ICC that the case should be taken from the ICC away from the American justice system.”

It is my personal opinion, it is not sufficient to outweigh the enormous benefits that are brought to bear by developing the system of justice, building on the work that has been done by the two tribunals and taking all the flaws and imperfections by trying to change them by working effectively from within. “We are risking more to our own national security and our own principles as we project them around the world, by standing aside and doing the kinds of things, in good faith, and I don’t challenge the good faith of this administration in doing this, but I think it is significantly undermining our ability in projecting our influence over human rights around the world.” *(applause)*

**WASHBURN:** I call us to our responsibility to respond to what Mr. Rostow said. Supporters, do not take our reactions out in indignation. We need to do what we can to make sure that this Court functions as it should that it makes the demonstration to US government, that in fact that these concerns can fully be set aside.

**ROSTOW:** “I fully agree with what Mr. Washburn said, I wish more people took it to heart. I’ve rarely been through such an intemperate period as in June and July in NYC on First Avenue.” US has very serious concerns about the misuse of this institution. The administration’s concern is substantive and not dismissive of the whole idea of the ICC. Most important element is that in the case of WWI and WWII, soldiers delivered justice to the war criminals. It was Vietnamese army who stopped atrocities in Cambodia. It was Rwandan army that ended genocide in Rwanda. It was NATO who brought Milosovic to justice. Proponents of the Court think it is a new instrumentality “and I don’t think we have gotten there yet.”

**ROCAMORA:** Those of us who support the Court, contact your representatives. They are afraid of the Court and they shouldn’t be.

*(applause)*

*(The Hearing section of the Conference ended and the audience split up into the four listed workshops)*

**WORKSHOP A: ICC’S MOST FASCINATING LEGAL DETAILS**  
**PRESENTER: JOHN WASHBURN**

*(The Workshop opened with the presentation by Mr. Washburn)*

**I. Basic**

- The ICC is a real court.
- The Rome Statute was a result of long negotiations. It was not a casual undertaking.

**II. Strengths/Weakness/Challenges of Negotiations**

- Clarity and familiarity of what the Court is
- Fundamental agreement on what the Court depends on:
- Countries had raw historical memories (Sierra Leone, S. Africa, S. America, Holocaust)
- Repugnant quality to these crimes.

- Foundation that Statute can be built on what was already there, which is most unusual in negotiations.
- Challenges
  - (1) The room for compromise is more limited than what normally would be. (The US left for this reason; failure to get exemption for jurisdiction; effected US position creating much bitterness.)
  - (2) Reconciling different legal systems
    - Terminology problems (ex. “due process”)
    - Some compromises (ex. role of a judge more intrusive than in US system but less intrusive than in civil law system.)
  - (3) Complexity of document

Technical problem that all matter be covered properly and in proper order:

- Jurisprudence of the Court
- Jurisdiction of the Court
- Governance
- Finance and Management Operation
- Trial Process

(4) Political and Social Issues

- Dividing jurisdiction
- Make sure the definitions of crimes make it into the Statute:
  - “enforced pregnancy”
  - “rape”

### **III. Highpoints of Negotiations**

(1) Special Areas of Interest

- a. Gender Crimes - No longer a subset of another crime;
- b. Recognize crimes of an atrocious nature - do not have to arise in concept of conventional war or conflict altogether. This was insisted on by the US and without the court would have been desperately limited.

(2) Unusual and desirable

- a. Facility for defense counsel (lacking in Rwanda and Yugoslavia)
- b. Structure of provisions for witnesses, victims, and survivors
  - civil law procedures largely adopted
  - deals and aids victims better
  - victim has standing
  - Victim Representation and Reparation Units
    - represent by legal counsel
    - collect funds for reparations, fines, and seized property to be distributed to victims
    - victims trust fund
    - counseling

(3) Very little political fighting during negotiations (very unusual). There was peer-pressure to avoid these conflicts.

## QUESTIONS AND RESPONSE

*(Questions posed by the audience with Mr. Washburn responses)*

**Q: What will the true test for the Court be? When a major state cedes authority to Court?**

**R:** Remember the Court has jurisdiction over individuals not governments, nor companies. The real target is a person who can induce mob mentality to get people in his/her society to commit atrocities, which they otherwise would not commit. These people will now be bound to person because it is the only way to relieve their guilt. The legitimacy of the Court is bound to this purpose. (ex. Hitler, Stalin)

**Q: What about strategic bombing? Could US officials be tried for it?**

**R:** It has to be a crime of shocking, atrocious, mass destruction, and intentional for the Court to step in.

**Q: World Trade Center?**

**R:** Yes, that meets all the criteria.

**Q: Isn't the ICC a victor's court?**

**R:** NO! Nuremberg was a victor's court. It worked with a body of law, which was established after the fact. This Court is not retroactive.

**Q: Can you explain the Assembly of States Parties?**

**R:** Accountability. It is the governing body of the Court. Every ratifying state is entitled to be a member. Non-ratifying countries have a right to be an observer. The Assembly is responsible for the budget, appoints and elects judges, broad oversight over the Court, and has ability to fire and discipline.

**Q: How much of a blessing would it be if the US joined the Court?**

**R:** The US has a lot to bring to the Court. US has a lot of resources that would be beneficial to the Court. There will be cases that the US will want to be seen by the Court. The first goal is to get the US to exercise its observer status. This goal is obtainable.

**Q: Can the ICC injure or intrude with the Truth and Reconciling process?**

**R:** First, the Court will be able to try only senior people involved with an atrocity. Second, South Africa is looking back at it and thinks it was a mistake to offer Truth and Reconciling to senior officials. It was to the victims. However, they believed that a trial in South Africa would have been too disruptive to putting the country back together again. South Africa would have preferred the Court possibly to step in.

**Q: What are the chances of the ICC looking into other international crimes that are not listed in the Statute?**

**R:** Unlikely in our lifetime. The Statute would have to be amended. It is not impossible but it is a difficult process. There could be other judicial bodies to look at other areas.

**Q: What about universal jurisdiction?**

**R:** ICC - no universal jurisdiction. It has a highly defined jurisdiction, as much definition and can be achieved. However, the Court can be the gold standard for courts with universal jurisdiction.

## WORKSHOP B/D : AD HOC TRIBUNALS/WOMEN AND THE ICC

PRESENTER: JANE ROCAMORA, ICDA

*(Audience questions carried over from the Hearing, answered by Ms. Rocamora)*

### **Why does the US Government refuse to participate in the ICC, and why does the Bush administration see it as wrong for America?**

**ROCAMORA:** The US problem with this Court is that US hegemony practiced at the Security Council is gone if this Court goes on line. If the Court only had jurisdiction over cases referred to it by the Security Council the US would back it 100%, but the Court can take jurisdiction over an individual who has committed a crime on the territory of a state, which has ratified the ICC and is a member. The US claims that the Court is inherently political, but so are Security Council decisions. The US government is supportive of *ad hoc* tribunals as a way of dealing with atrocities recognized by the UN. The two presently in operation are the ICTR (Rwanda) and the ICTY (Yugoslavia). These are non-permanent courts with extremely limited jurisdiction and subject matter. The problem is that the cost of an ad hoc tribunal is prohibitive and members of the Security Council will often not support convening one because of the cost. They must be forced to convene one, as in the case of Rwanda, where they were threatened with accusations of racism.

### **What triggers an ICC investigation into a charge? Who has standing to bring charges to the ICC?**

**ROCAMORA:** There are three triggering mechanisms: 1) the Registrar invites NGO's, State Departments, reporters and others with firsthand knowledge to submit cases which they believe are under the jurisdiction of the Court. The Court then determines whether or not to investigate. The Court next puts together pleading, which goes to the Pre-trial chambers (a three judge panel) to determine whether a formal investigation is warranted. Next, the government of the state in question is notified of the Court's intent to proceed. At this time the state has the opportunity to go before the pretrial chambers and deny the allegations. If there is enough evidence, the Court proceeds to prosecute. 2) The UN Security Council reports a situation for investigation to the ICC, and 3) A state party to the ICC decides to refer a situation to the Court.

### **Where does the ICC get its jurisprudence?**

**ROCAMORA:** The ICC gets its jurisprudence from both common law and civil law traditions. Civil law countries are more numerous than common law countries. Jurisprudence is defined by Statute — the same law as used by the ICJ — it will develop over time.

### **What is the difference between the ICC and the ICJ?**

**ROCAMORA:** The ICJ was created within the charter of the UN and any member of the UN is subject to its jurisdiction. The US prefers to decide whether it will submit to ICJ jurisdiction on a case-by-case basis. The ICJ only has jurisdiction over disputes between states, and only over member states by consent to its jurisdiction. The ICC has jurisdiction over individuals: the only consent is whether to be a state party. Once a state has done this the ICC has automatic jurisdiction over an action.

### **What is the US concern over plea-bargaining at the ICC?**

**ROCAMORA:** The US is afraid that in international trials state secrets could be revealed if plea-bargaining is not allowed. The ICC does not exclude the possibility of plea-bargaining for this purpose. The US is also

concerned that if the US brings an individual before the ICC and there is a plea bargain it could be alleged that no prosecution occurred. Another US concern is that commanders could be prosecuted for the actions of their subordinates, but the Statute provides for determination of when who gets prosecuted.

### **What about corruption ?**

**ROCAMORA:** It is closely aligned to the competence of personnel. The failure to recruit adequately for positions and do complete background checks has precipitated corruption in the two ad hocs. There was too much power vested in the Registrars. They controlled the money for both the chambers and the prosecutors. The UN set them up as they would any UN deployment anywhere in the world to monitor human rights issues. This was a mistake. Changes: the Presidency (head judge) for each tribunal is responsible to the Assembly of States Parties and has control over the registrar. The Prosecution is now separate from the chambers.

### **Where does the ICC get its funding?**

Funding for the ICC comes from the Assembly of States Parties (the states who have ratified the Rome Statute and became members of the ICC).

### **Why has the US not withdrawn from other human rights treaties?**

Before 1984 Jesse Helms blocked ratification of treaties re: genocide. Since 1984 the US has determined that it is in the best interest of the US to be in the controlling bodies for implementation of these treaties. The US has not ratified the ICC. Clinton signed it but did not submit it to the Senate for ratification because he wanted the US to engage with the process. Bush sent a note to the UN saying that the US will not ratify. The Rome Statute allows the Court to be in operation for seven years before changes can be made. It is hoped that this will give the process time to figure out what works and what does not and how to amend if necessary. Within these seven years states can ratify but be exempted from the jurisdiction of the ICC for that time. No one has yet chosen to invoke this option. If put to a vote in the Senate right now the ICC would be overwhelmingly defeated.

## **GENDER ISSUES**

### **How difficult was it to get minimal defense into the Statutes because the crimes over which the ICC has jurisdiction are so heinous?**

**ROCAMORA:** CICC - a coalition of all NGO's responsible for hashing out ICC PrepCom. The Gender Caucus, which is a member of the CICC is a multicultural, multinational powerhouse, which made substantial gains during the planning process in reflecting the experience of women and children in war. Rape will be subsumed under genocide, crimes against humanity and war crimes. Rape is a feature of every conflict and bringing it in under war crimes will allow a much lower standard of proof than in crimes against humanity, which must be shown to be of systemic and widespread proportions.

The substantive crimes have been expanded and far more indictments will include gender crimes. Every crime in Rwanda should have had an element of gender in the indictment but I can think of only two that actually did. This statute includes a more sophisticated approach to witness protection assistance to victims — the ICC has a structure to protect female witnesses when they are witnesses for the defense —it has

taken a much closer look at gender issues in relation to defense witnesses. Finally, the Gender Caucus is pushing hard to get women into positions at every stage of the process

### **Do you have any reservations about the ICC?**

**ROCAMORA:** The two ad hocs should have been much, much better. They did not suffer for lack of money. I think/hope that the ICC was structured to avoid the pitfalls we encountered in Rwanda and Yugoslavia. The other alternative — which I really like a lot — is mixed tribunals. Examples: Sierra Leone, East Timor, Cambodia, and Kosovo — these are not chapter 7 institutions created by the UN Security Council (like Rwanda and Yugoslavia). The Secretary General negotiated with local governments to set up tribunals consisting of local and international fact finders. In this way the local governments get buckets of international aid to set up their judicial systems. Each agreement is different. They help the local government to set up the capacity to prosecute its own criminals rather than having outsiders swooping down and taking over and then leaving in seven years.

### **WORKSHOP C: UNIVERSAL JURISDICTION**

**PRESENTER: ALLEN SPRINGER, PROFESSOR OF LEGAL STUDIES, BOWDOIN COLLEGE**

*(Presentation by Mr. Allen Springer)*

### **Workshop Questions:**

- What is universal jurisdiction?
- What are its limitations and potential?
- What was learned in the Pinochet case?
- What cases have been decided already?
- Who is next?

### **I. What is Universal Jurisdiction?**

Definition – quoted from Princeton University Program in Law and Public Affairs, “The Princeton Principles on Universal Jurisdiction,” 28 (2001):

“For the purposes of these Principles, universal jurisdiction is based solely on the nature of the crime, without regard to where the crime was committed, the nationality of the alleged or convicted perpetrator, the nationality of the victim, or any other connection to the state exercising jurisdiction.”

Normally, we define jurisdiction as being:

- territorial
- based on nationality (subject to laws on one’s state
- based on passive nationality
- Protective principle – state may claim the right to regulate people abroad b/c what they are doing may endanger a governmental interest of the United States

\* There is a nexus between the country prosecuting and the subject in question. Universality, however, states that jurisdiction is exclusively based on the nature of the crime. Universal Jurisdiction may arise when countries are a party to certain treaties (Geneva Convention, Torture Convention, Hostage Convention etc.).

\* We need to raise questions and be skeptical of universal jurisdiction. UJ has already been asserted – Amnesty Int’l has attempted to make the case that UJ exists as a matter of deep historical practice (it’s a well-founded basis of jurisdiction).

\* How does this relate to the ICC? The Rome Statute primarily avoids the question of universal jurisdiction – these UJ questions only come up when a Security Council referral is involved.

\* Is Universal jurisdiction a better or weaker alternative to the ICC?

\* Pure universal jurisdiction may be an alternative method to the ICC. It looks like this: a national community, as an agent of the international community, prosecutes a war criminal on the basis of “universal jurisdiction.” That is, acting on behalf of the international community, that country prosecutes someone who is in violation of international law. Because universal jurisdiction is infrequently asserted by different countries, it makes it difficult to evaluate what the international community actually thinks about universal jurisdiction. We have to look very clearly at the context in which these claims have been made before assuming that there’s broad support for it. It is one thing for Israel to claim the universal jurisdiction; it is another for the rest of the world (others) to recognize and validate that Israel does, indeed, have that jurisdiction. Finally, should the ICC have universal jurisdiction (which it currently does not)?

\* U.S. has traditionally accepted the idea of universal jurisdiction, and claimed that it can prosecute people in our jurisdiction, however they got here, unless they were brutally treated by government agents or to do so would be in violation of a treaty.

\* **The ICC does not claim universal jurisdiction.** Universal jurisdiction could only be invoked if the UN Security Council essentially delegated responsibilities to the Court to try a case that the UN brings to the ICC through the universal jurisdiction of the U.N. Security Council. (During negotiations, German delegation wanted the ICC to have universal jurisdiction, but that was eliminated during negotiations)

## **A. Relevant Crimes**

American Law Institute, 1987 Restatement of Foreign Relations Law of the U.S., Section 404:

“A state has jurisdiction to define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern, such piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism . . .”

## **II. What cases have been decided already?**

### **A. Israel v. Eichman (Israel, Supreme Court, 1962):**

“It is the universal character of the crimes in question which vests in every State the authority to try and punish those who participated in their commission . . . regardless of the fact that the offense was committed outside its territory by a person who did not belong to it, provided he is in custody when brought to trial . . . It follows that the State which prosecutes and punishes a person for piracy acts merely as the organ and agent of the international community and metes out punishment to the offender for his breach of the prohibition imposed by the law of nations . . . That being the case, no importance attaches to the fact that the State of Israel did not exist when the offense were committed.”

### **B. Demjanjuk v. Petrovsky (U.S., Court of Appeals, Sixth Circuit, 1985):**

(Petrovsky was believed to be “Ivan the Terrible” (turned out to be untrue later). He “showed up” in the

U.S. Israel asked for his extradition. The U.S. insisted, despite protests from Petrovsky's lawyers, that Israel did have jurisdiction because it was a matter of international concern.

“International law recognizes a ‘universal jurisdiction’ over certain offenses . . . based on the assumption that some crimes are so universally condemned that the perpetrators are the enemies of all people. Therefore, any nation which has custody of the perpetrators may punish them according to its laws applicable to such offenses . . . This being so, Israel or any other nation, regardless of its status in 1942 or 1943, may undertake to vindicate the interest of all nations by seeking to punish the perpetrators of such crimes.”

### **III. What was learned in the Pinochet Case?**

#### **A. Legal Issues:**

- Does General Pinochet have any immunity from UK jurisdiction, particularly given status as former head of state?
- Were his actions while in power “acts of state” not reviewable by other national courts?
- Does UK extradition law require/permit extradition in this instance given the basis of jurisdiction claimed by Spain and the nature of the alleged crimes?

#### **B. Regina v. Bartle and the Commissioner of Police for the Metropolis and Others v. Ex Parte Pinochet (United Kingdom, House of Lords, 1999):**

“The jurisdiction being established by the Torture Convention and the Hostages Convention is one where existing domestic courts of all the countries are being authorized and required to take jurisdiction internationally. The question is whether, in this new type of jurisdiction, the only possible view is that those made subject to the jurisdiction of the state courts of the world in relation to torture are not entitled to claim immunity . . . [I]f the implementation of the torture regime is to be treated as official business sufficient to found an immunity for the former head of state, it must also be official business sufficient to justify immunity for his inferiors who also did the torture. Under the Convention the international crime of torture can only be committed by an individual or someone in an official capacity . . . Therefore the whole elaborate structure of universal jurisdiction over torture committed by officials is rendered abortive and one of the main objectives of the Torture Convention—to provide a system under which there is no safe haven for torture—will have been frustrated. In my judgment all these factors together demonstrate that the notion of continued immunity for ex-heads of state is inconsistent with the provisions of the Torture Convention.”

- This can be perceived as a very narrow decision involving U.K. extradition law; for that reason doesn't necessarily teach us anything about the scope of universal jurisdiction.
- This was perhaps more groundbreaking politically than legally (because it was a narrow decision).
- The political repercussions of this case triggered Kissinger's response to the idea of universal jurisdiction.
- Chileans felt it was a major usurpation of national sovereignty.

#### **C. Later Developments**

1. Senegal – Indictment of Hissene Habre (2000-01)
2. Belgium  
The Butare Four (2001)

International Court of Justice, *Arrest Warrant of 11 April 2000 (Congo v. Belgium)*  
(2002)  
Indictment of Ariel Sharon (2002)

3. United States – Tachiona v. Mugabe (2001)

#### IV. What are the limitations and potential of universal jurisdiction?

A. The Debate – Henry Kissinger, “The Pitfalls of Universal Jurisdiction” v. Kenneth Roth, “The Case for Universal Jurisdiction,” *Foreign Affairs*, 2001, Vol. 80, Nos. 4 and 5

##### Cons:

- unclear legal standards
- politicized prosecutions
- fairness of procedures
- accountability of national judges
- danger of undermining processes of national reconciliation

##### Pros:

- legal standards do exist in treaties (Genocide and Torture Convention) and being developed
- need to remove impunity to punish past violations
- deterrence of future violations
- affirmation of universal values
- reconciliation requires sense of “justice” which prosecution of major offenders can provide.

#### WORKSHOP E: JUSTICE AND PEACEMAKING

**PRESENTER: KEN RODMAN, WILLIAM R. COTTER DISTINGUISHED PROFESSOR OF GOVERNMENT, COLBY COLLEGE, WATERVILLE, MAINE**

*(20-minute presentation by Mr. Rodman to raise issues and then the floor was open for discussion)*

**RODMAN: What are the potential conflicts between the requirements of justice and the exigencies of diplomacy/peacemaking? How might they be resolved?**

Issue today is somewhat different—the potential conflict between law and diplomacy:

- Considerations of justice in considerations of peacemaking
- Might not justice reinforce peace?
- Peacemaking requires justice — way of individualizing rather than collecting

Justice requires impartiality in

- real legal meaning to the law established after Nuremberg
- legalism— more just legal order
- diplomacy—quote from Harold Nicholson “worst kind are diplomatic are missionaries fanatics and lawyers...best kind are humanitarians”

- political criteria rather than legal ones
  - whether you need participation for outcome
  - amnesty was exchanged for truth

Compromises legitimize behaviors that should be criminalized

- assumption that compromises allow criminalists to avoid accountability
- difference between ?
- in most cases, adversaries that behaviors are stigmatized ...
- at least two examples (Cambodia & Sierre Leone) were trying to introduce peace
- political as well as legal criteria

Key question is the degree of political accountability

South Africa and Bosnia cases

Truth and Reconciliation Commission - process where amnesty was granted in exchange for truth whenever dealing with political negotiations you have to be willing...truth enabled people to move on (in contrast to not knowing what happened to people)

- had to acknowledge involvements to be effective

What if ICC involved in 94?

Could use article 17? (proceeding inconsistent argument)

- If ICC could have had jurisdiction could prosecutor override this?
- Answer was prosecutor would have right to investigate, but focused on truth for amnesty
- Even if there was basis to initiate investigation, article 53 allows for discretion if it “would not serve justice.”
- Couldn't prosecutor, (looking at families, false contrition of perpetrators of apartheid) say the prosecutions should go forward anyway
- Judges response is the prosecutor can't do this on his own...greater degree of accountability; 3 judge panel, appeal to another 3 judge panel to decide to go forward (as legal)
- Should not this be subject to political decision-making, not a legal one?

Bosnia example

Judge Goldstone prosecutor

-essay he wrote took issue with argument made by anonymous reporter “the quest for justice for yesterday's victims...tomorrow's dead.

- have to acknowledge what happened; marginalize, individualize to prevent collectivism
- encourage judicial proceedings for those most responsible
- no evidence indictments proceeded diplomacy
- memoirs noted....
- Assisted US from separating and being able to negotiate prosecution
- American diplomats use leverage to end war

Harder to make argument that indicting Milosovic helped end war

- partially persuasive argument – need to marginalize, strategy of indictment plays into diplomatic strategies
- but what if indicted Milosovic at earlier time? Response- no evidence at time, but question is when

negotiating with Milosovic to end war and had evidence – would you have indicted?

- I'm lawyer not diplomat...its not my responsibility to take into account political judgments
- If you want a lawyer, then that focus is on law; diplomat focus on diplomacy
- Where is the in between?
- Not comfortable with this no in between?

What kind of accountability is there when diplomacy and law collide?

Political accountability built into treaty

- UN Security Council can postpone for 12 months
- Can remove prosecutor
- Don't stop prosecutor in perpetuity, but is signal crossing a political line
  - Example: prosecutor who wants to use Article 17—a vote would most likely override the prosecutor
  - Similarly, peace process to which ICC was strongly committed, very likely would have support

There is a significant degree of political accountability

More important over Prosecutor ?

Theme of political science—need cooperation of states, acting independently weakens themselves as institutions

Back to example not having evidence of indicting Milosovic

- policies he was pursuing were having logical outcome
- at time mediation of end of Bosnia War was in process (had not reached agreement)
- if he tried to prosecute the main interlocutor in negotiations, what would that have done to the negotiations?
- Motions of investigation, pretty close to impossible that they would prosecute leaders...certain power realities that international institutions would be able to ignore.

Theory can more independently pursue ...

Still dependent on sovereign independent states

- for intelligence, production of evidence
- no police force no army
- likely to be most strongest and most effective when there is strong support from the major powers
- - ICC in practice will not stray too far (purely independent Court might try to separate political)
- more partial, more effective if drawing upon major powers supporting

US has more to contribute than to fear

- economic power
- prevent prosecutions that divorce justice from politics
- more likely to come from negotiations rather than no participation

#### QUESTIONS

*(General questions from the audience, answered both by Mr. Rodman and Mr. Nick Rostow, who was in the audience. All questions were answered by Mr. Rodman unless otherwise noted)*

South African example comment

- truth for revenge – likely to explode, if you came down hard legally would have exploded
- response, “these kind of arguments make for impunity” necessary compromise, should be very

skeptical...conflict between Israelis and Palestinians...

- often legalistic approach tends to criminalize parties
- sometimes when you can't use force, you need to negotiate and that requires compromise
- human rights, NGO communities

### **Will the Court enforce treaties that are broken?**

- this is not the court for world, it deals with specific issues
- given that United Nations has not defined, not likely to see that soon
- specific set of crimes under specific set of circumstances
- ICC is not the supreme court for the world

conceptual suggestion to consider

- legalistic approach, many forms of justice, judicial proceedings are not controllable, once packman of judicial proceedings are launched, then other sections take 2<sup>nd</sup> seat or worse...
- heightened irresponsibility to
- no indictment - no invasion; trapped US and no way to get out of box—quashed indictment can't use judicial system that way; suggesting way communicated was to use ICTY power as diplomatic gain, problem with ICC is that it is not controllable the way you suggest...ultimate authority in taking total-ity into account is President's not Prosecutors'
- Answer: I was agreeing with much—on one hand less threat to American soldiers
- ICC likely to be most effective when getting referrals....parameters of where justice takes place
- Sharon and Arafat have committed serious war crimes—leaders of their respective countries? Do you criminalize the leaders of the countries?

Indictment changes everything? If you don't force the issue what is going to happen?

If Sharon indicted Arabs say all fears justified, and incentives to work with that country to disappear; same thing for Arafat...not honest broker, trying to do a deal

- What should be the critical question—you committed a crime and we are going to prosecute you or look to have a deal, need to move away from a view—take responsibility for ensuring...

### **Is ideology driving this whole thing (conservative Christian life) (question to Mr. Rostow)**

**ROSTOW:** I don't know that any particular group is driving the policy; two or three strands leading to same result; the most important strand is professional soldier (Powell) – resonates all over the Pentagon

- don't have an answer to that question—does a soldier expect to be subject to law of a different country—not so easily defined
- 2<sup>nd</sup> strand is people who believe that proponents of court want to use it against Israel and America
- 3<sup>rd</sup> strand are people anxious to see if it gets abused or used properly, want to introduce into political moments
- one thing that feeds efforts is that countries try to muddle through coming to term with own past—might not seem most appropriate to others
- International Criminal Tribunal for Rwanda – no relevancy to anything - don't know what trial is, 100s of thousands in jails in Rwanda awaiting death – \$800 million spent on tribunal to only try 5 people

**RODMAN:** it is better to rebuild Rwanda

- resources in tribunal – limits to what resources the courts have; without political backing then you can't do as much

Tribunals, the amount of money is real, it comes out of UN and peacekeeping budget...US pays 22% of one part—25% of the other part...

- why prosecute ?
- if don't prosecute then people will continue to get away with it

Prosecution?

- Support ICTY
- Ultimately have to delegate
- Limits to what any tribunal could do

We are prosecuting the head of state

- most significant is on trial right now
- other heads of states are indicted, the issue is apprehending them
- NATO isn't engaging in apprehending

One argument made by Clinton's administration was that we are going to be there as peacekeepers and we're going to be cautious: fear of having casualties

Manpower and financial support to the UN more than other countries/ if we give that to ICC then what return would we get?

- question to ICC is to what extent does this represent progress ?

Would it just serve international interests/would it serve American interests?

- that's what the debate is about
- risk of prosecutions rigidify costs outweigh benefits

Issue of hypocrisy – if one goes down list of governments in the world...savory characters running countries...quickest way to bring ICC to ground would be to try to bring them to justice

For example Russian war barbaric...should we wage war against Russia

- at time of Geneva conference asked if Russia was member, should you have indicted Putin, and he said prosecutor should do that...
- if look at world divorced from politics...
- the countries can't conduct diplomacy...extension between world of justice and world of diplomacy...problem is that some reject that tension

World has held leaders responsible when go beyond pale and can be caught...Napoleon, victorious powers said this man is incompatible with Peace and sent him to Iraq...do what you can, no one talks about since the US has the only usable military capability – if you raise threshold too high people will not want to raise risk

- live in real political world—in practical terms even though not same as in Security Council...can make a difference...take case of Khmer Rouge...US did not stigmatize—Thailand and China were funneling money to those opposing...that was a shameful decision US made...having it pointed out would not be a bad thing
- when had peace agreement part of the agreement ended the war

Disagree with introduction of prosecutor because you lose the ability to make a deal...Cambodia is a bit schizophrenic...vengeance and not wanting vengeance. Along with no one having clean hands—did what you had to survive

ICC only deals with crimes that happen after it came into force – not retroactive;

### **How is ICC going to settle Palestinian/Israeli conflict?**

- legally not relevant because not dealing with...
- politically, need diplomacy...allow Palestinians to control lives, and in Palestine's best interest to hold persons accountable for suicide bombings...
- involves reconciliation of differences

It is really important to distinguish between judicial proceedings and political proceedings

#### **ROSTOW:**

- justice was meted out by beating, didn't care about being hanged—losing was the price they paid
- very concerned about the rigidifying impact at the wrong time
- problem with two existing tribunals – created in lieu of having a policy that makes sense
- set up ICTY because didn't have a policy in Bosnia that made sense
- people talk about it as a deterrent, it is not a deterrent...only deterrent around is US armed forces because everyone else is cheap...

### **What about the moral dimension we as a nation are advocating (question to Rostow) that has been around my whole life?**

#### **ROSTOW:**

- trying to deal with terrorism and that is the main order of day

**RODMAN:** I don't think primary cause lies in foreign arm sales, in Rwanda the worst atrocities happened with machetes

### **Protesting is one avenue, but not very effective, would rather see building of structures...our country developed system (stop at red lights and go on green lights—why can't we do that globally)—question to Rostow**

#### **ROSTOW:**

- that is the essence of UN Charter—problem in Iraq is that government in Iraq hasn't accepted the legally binding
- found Iraq to be in material breach nine times
- the capacity has to do with will and power of member states...acting collectively

**RODMAN** - sure we have confederation and constitution, why can't we do that globally, but it is not an all or nothing issue...people's nature continues

### **Why kind of rule of law—would have to change social constructs?**

UN forces do Ch 6 assignments most effectively—peacekeeping force in Rwanda

#### **ROSTOW:**

1948 and 1973 decisions are binding

242338 and 1397 set out framework to which all parties pay lip service to reaching agreement—the other

resolutions—occasional Security Council resolutions, very different...designed with specific intent...to get them out of Kuwait...to re-establish peace and order in the region ...when you lose 3,000 people in one hour your perspective changes...

**What about jurisdiction (binding decisions): how can you say that?**

- confusing Security Council resolutions?

**ROSTOW:**

- according to letter of Rome Statute, procedures that says no country can ask for an escape...that is an amendment to Rome Statute and you barred amendments to statutes for seven years...this gives me pause...
- it's not the US will be forced to be a party, it is that if you joined armed forces of US and did something court found was within jurisdiction and were not held accountable, then the court can hold you responsible (Mr. Rodman disagreed with this interpretation, focusing on Article 12)

Court only takes action if that country of person committing crime doesn't exercise justice, can we take comfort that individual countries will take action?

- in theory the Court is supposed to be a last resort court
- the question is whether the country recognized it as a crime (more likely to use article 17 if the crime is not recognized)
- war crimes, there were allegations...that the US didn't recognize—if dealing with something generally recognized as crime...you're dealing with your own prosecutions...in 2<sup>nd</sup> case the American soldier was turned over to the Japanese government ... status of forces agreement is different with Japan (where it is more absolute) and other countries (where it is limited to official duties)...after the determination was made that the Japanese trial would be fair, then the soldier was turned over

**ROSTOW:**

- the troops operating in Afghanistan...agreement British drafted provides exclusive jurisdiction to states and none of the forces would turn over to tribunal any soldier...

**CONCLUSION**

*(After the workshops came to an end,, the audience gathered in the main auditorium for final remarks)*

**What You Can Do:**

**MR. JOHN WASHBURN** answered the remaining questions posed by the audience and spoke about the American NGO Coalition for the ICC, AMICC

**MS. ANNA N. ASTVATSATUROVA** spoke about the Independent Student Coalition for the ICC (ISC-ICC), and thanked the panelists and the audience for attending Eyes on the ICC Conference.

[Videotaped comments from Judge Pillay and UN Secretary General Kofi Annan closed the program.]