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Speech

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San Francisco World Affairs Council

Remarks by William J. Haynes II, General Counsel of the Department of Defense, San Francisco, CA, May 30, 2002.

Thank you. I am happy to be here with you this afternoon.

Today, I want to discuss a common critique of the Bush Administration's approach to foreign policy and international security: that it is unilateralist and dismissive of the role of our allies and international institutions. It is a critique more often heard abroad than in America, and much less frequently heard after September 11—when America assembled the most diverse coalition in history to make war on terrorism, and mobilized all the institutions of the international community to undergird that effort.

Nevertheless it remains a subtext of a running commentary by critics of our foreign and defense policy, and deserves to be addressed head-on. Let me start with the so-called Rome Statute as the first case in point.

As all of you know, the 1998 Rome Statute was intended to create a permanent International Criminal Court, ostensibly building on the precedents of the Nuremberg and Far East Tribunals and the International Criminal Tribunals for the former Yugoslavia and for Rwanda. Some call it a Statute, but I prefer to call it a treaty – calling it a statute suggests that it is a kind of legislation that can bind even those countries not agreeing to it, but—we do not agree to it and it does not bind us) – the treaty was intended to realize the long-deferred objective of some to create a permanent international criminal tribunal.

The Clinton Administration shared this objective and participated fully in the negotiations. But the Rome treaty coming out of those discussions was so flawed that in the end even the Clinton Administration decided it had no choice but to vote against a court that it had itself sought to create. This is hardly surprising, given the process that led to it. At the time the UN General Assembly

convened the meeting of plenipotentiaries to complete and approve the Rome treaty, its Preparatory Committee had produced a 167-page draft with hundreds of highly contentious provisions. In just five weeks, 160 national delegations, 33 intergovernmental organizations, and a coalition of some 124 non-governmental organizations sought to resolve the disagreements. (1) Ambassador David Scheffer, the Clinton Administration's envoy at the negotiations, has described the final session that produced the Treaty as follows:

> [During] [t]he process launched in the final forty-eight hours of the Rome Conference . . . [t]he treaty text was subjected to a mysterious, closed-door and exclusionary process of revision by a small number of delegates, mostly from the like-minded group, who cut deals to attract certain wavering governments into supporting a text that was produced at 2:00 am on the final day of the conference, July 17. This . . . text . . . was not subjected to rigorous review . . . and was rushed to adoption hours later . . . without debate. (2)

The central U.S. concerns about the Treaty were ignored. As a result, the Clinton Administration voted against adoption of the final text in 1998. The Administration continued to work to fix the Treaty for two years, but got nowhere. President Clinton refrained from signing it until the last possible moment—December 31, 2000. Even then, he noted his continued objections to the "significant flaws in the treaty," and specifically urged that his successor not submit it to the Senate for its advice and consent to ratification.

President Bush also has fundamental reservations concerning the ICC. After considerable reflection, the President instructed our UN Mission on May 6 to inform the United Nations—the treaty depository—of the United States' intention not to become a party to it. This rare but not unprecedented (3) step has prompted continuing comment and criticism abroad and, to a much lesser extent, at home.

Let me address some of this criticism. One line of argument, mostly voiced abroad, cites our decision as yet another example of American unilateralism and disregard for the international community. It has even been argued that our decision reflects a downgrading of international law and human rights as priorities for this Administration. These criticisms are simply untrue.

No nation has done more to promote human rights, democracy, and the rule of law than the United States. The question is not whether international law is followed, but who stands in judgment. Domestically, the United States has the fairest, most impartial legal system in the world, and we choose to judge our own citizens.

Yet the ICC insists it has the power to judge our own citizens, even though the United States has not agreed to be bound by the Treaty.

On the global scale, when the international community decides to prosecute these crimes, the United Nations Security Council, which has primary responsibility for international peace and security, has the power to establish ad hoc tribunals.

The ICC overturns this system of checks and balances, as well, by taking the power of international criminal prosecution out of the hands of the Security Council and giving it to an ICC prosecutor answerable to no one. This is the Independent Counsel writ global.

This is both a recipe for politicized prosecutions and a flagrant departure from established principles of international law. This is why two Administrations have opposed the ICC, and bipartisan majorities in both houses of Congress have overwhelmingly voted for legislation that disassociates the United States from the ICC and precludes the use of appropriated funds to support its activities. The Bush Administration is in good company at home in its approach to the ICC.

The Rome treaty and the ICC are the product of genuine idealism and good intentions. But to paraphrase the late Senator Sam Ervin, we judge a law not by what a good man will do with it, but by what a bad man could do with it. The ICC represents a flawed and self-defeating version of internationalism. By removing checks and balances, it risks politicizing the complex issues of stability, security, and justice.

The ICC and its prosecutor are accountable neither to any democratically elected body nor to the United Nations Security Council. (4)

The Office of the ICC prosecutor, although created by a multilateral treaty, is an autonomous, largely unchecked, unilateral agency possessing virtually sweeping authority to prosecute offenses.

The ICC will claim authority to prosecute the as-yet undefined crime of "aggression," thus undermining a fundamental tenet of the UN Charter, which empowers the Security Council alone to make determinations that an act of aggression has occurred.

More broadly, the ICC could emerge as an entity that erodes the responsibility that the UN Charter assigns primarily to the Security Council: determining the measures necessary to maintain or restore international peace and security. (5) The United States urged throughout the negotiations that the Security Council’s oversight authority over the ICC be maintained. This argument was rejected. As a result, the ICC’s functions with respect to the undefined crime of "aggression" could lead to a direct challenge to the role of the Security Council, designed by the framers of the Charter to be the linchpin of our international order.

Moreover, the ICC purports to assert the authority to detain and try American citizens notwithstanding our decision not to be bound by the Rome treaty, and purports to impose on parties—who of course include many of our friends and allies—a treaty obligation to surrender U.S. nationals to the court.

Here again, the Rome treaty tramples on longstanding international law and bipartisan United States policy. The United States has never recognized the right of any entity to detain or try U.S. nationals without the United States’ consent or a UN Security Council authorization.

More importantly, besides trampling on the authority of sovereign states, the treaty creates a regime that facilitates the abdication of state responsibility. Since the Treaty of Westphalia, international law has thrived in an environment where nations are responsible to each other for the way they deal with matters that affect each other's citizens, including criminal behavior. No one questions France's ability to try a U.S. citizen accused of committing a crime in Paris, but France is responsible to the United States and others for the way it conducts the consequent trial. Under the ICC's jurisdictional regime, a country has the ability—even the obligation in some cases—to surrender jurisdictional authority, and concomitantly jurisdictional responsibility, to the ICC, and abdicate any further responsibility for the conduct of the investigation and trial. In that regard, the ICC can serve as a scapegoat for states that desire a particular political outcome without the attendant accountability.

Further, by putting current and former American servicemen and women and U.S. policymakers at risk of politicized prosecutions, the ICC could well create a powerful disincentive for U.S. military engagement in the world—a recipe for isolationism, and a striking irony as American military power is today being used to counter terrorism and to address and forestall genuine crimes against the international order and world peace.

In this regard, the ICC's vaunted principle of "complementarity," which provides that the ICC may intervene only when a nation is "unwilling or unable genuinely" to prosecute its own nationals, is small consolation.

Because the ICC reserves for itself the power to judge the "unwillingness" or "inability" of States to prosecute their nationals, no effective mechanism exists to check a politically motivated decision as to whether a domestic investigation or prosecution was adequate.

Imagine a scenario in which one of our pilots serving in Afghanistan bombs an approved target known to be an Al Qaeda headquarters. A local Taliban official claims the pilot deliberately targeted a protected cultural site. Our investigators investigate the incident and verify the target was an Al Qaeda headquarters. The pilot's chain of command (his or her superiors) determines the pilot acted appropriately. Now imagine the Taliban official's complaint is taken up by a country that is a party to the Rome Treaty and that is hostile to the United States. Finally, imagine the ICC prosecutor, for whatever reasons, including political ones, determines that the United States was unwilling or unable genuinely to carry out the investigation (under Article 17 of the Rome treaty), and initiates an investigation that leads to the issuance of a request for the pilot's surrender to the ICC for war crimes trial. Unfortunately, under the Rome treaty, this scenario could become a reality.

That request for the pilot's surrender arguably would have to be honored by any State party to the Rome treaty, regardless of where that pilot subsequently is assigned by the U.S. Government and regardless of whether the pilot leaves the U.S. Armed Forces, unless the United States has obtained necessary protections from all other ICC State parties.

The perversity of the Rome treaty's jurisdictional provisions was well described by Ambassador

Scheffer, who as the Clinton Administration's representative at the Rome Conference had a ringside seat at (though no effect on) the last-minute drafting:

> A country whose forces commit war crimes could join the treaty but escape prosecution of its nationals by "opting out" of the court's jurisdiction over war crimes for seven years. By contrast, a country that does not join the treaty but deploys its soldiers abroad to restore international peace and security could be vulnerable to assertions that the court has jurisdiction over acts of those soldiers.
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> Under the treaty, the court may exercise jurisdiction over a crime if either the country of nationality of the accused or the country where the alleged crime took place is a party to the treaty or consents. Thus, with only the consent of a Saddam Hussein, even if Iraq does not join the treaty, the treaty text purports to provide the court with jurisdiction over American or other troops involved in international humanitarian action in northern Iraq, but the court could not on its own prosecute Saddam for massacring his own people. (6)

Finally, the ICC may well undermine nascent transitions to democracy and the rule of law by preventing transitioning societies from making their own choices about how to face their past. In cases such as South Africa and Chile, the responsible government has chosen to limit the scope of prosecutions in the interest of national reconciliation and has used alternative mechanisms like truth and reconciliation commissions. Such a judgment, made by the parties who had themselves suffered most from the prior oppression, should not lightly be disturbed by an external judicial body.

Let me also address, more briefly, the weaker form of the critique of the President's decision, which acknowledges what President Clinton termed "the significant flaws in the treaty" but argues that the United States would retain more influence over the ICC as a non-ratifying signatory than otherwise.

President Bush took almost a year and a half to explore this option. In making his decision he could look back on some three and a half years of hard work, by both the Clinton and Bush Administrations, to convince countries of the need to address serious U.S. concerns. Despite our best efforts, the United States was ultimately unable to obtain the remedies necessary to overcome our fundamental concerns, most particularly limiting the jurisdiction of the court to nationals of States that are parties to the Treaty or to cases where the Security Council authorizes jurisdiction.

Indeed, the long litany of basic flaws and unintended consequences that I cited earlier surely answers the question whether the United States should remain a non-ratifying signatory of the treaty. In fact, the better question is why President Clinton chose at the last minute to sign a treaty that his own Administration voted against in Rome and that his own chief negotiator described as "put[ting] at risk the vital efforts of the United States and others to promote international peace and security, while the worst perpetrators of atrocities may go unpunished." (7)

Remaining a non-ratifying signatory could expose us to the worst of both worlds. On the one hand, the United States could be viewed as being obligated under international law (8) not to take actions that defeat the object and purpose of the treaty. That obligation might well undermine our ability to mitigate the worst effects of the Treaty on our cooperation with friends and allies who are parties to it. On the other hand, the United States would have failed to act straightforwardly on our often expressed, basic disagreements with the treaty. The President and his senior advisers have concluded that our relations with other countries will be better served by candidly acknowledging that we have irremediable objections to the Treaty than by remaining indefinitely in the limbo of non-ratifying signatories.

Military Commissions

Where do military commissions fit in this analysis? In our view, they are a valuable means of enforcing the laws of war against captured enemy combatants. In that regard, the commissions may be seen as both an alternative to the ICC and a response to its invitation to exercise national jurisdiction over trial and punishment of violations of international humanitarian law.

President Bush's Military Order last November creating a framework for military commissions set a process in motion to enforce the laws of war. This Order directed the Secretary of Defense to issue rules of procedure to ensure the conduct of "full and fair" trials. The public debate that followed issuance of that Order proved useful to those involved in developing these rules, as did our extensive consultation with prominent experts and human rights organizations. As a result, we have procedures in place that enjoy bipartisan support in Congress because they reflect an appropriate balance—one that recognizes the exigencies associated with evidence secured on the battlefield, yet one that faithfully adheres to the principles of fairness that characterize our criminal jurisprudence.

The procedures Secretary Rumsfeld issued this Spring to implement the President's Military Order on military commissions are designed to provide justice in the context of the war on terrorism. These procedures recognize the national security difficulties associated with wartime prosecutions (for example, it is hard to maintain a chain of custody on the battlefield), while at the same time affording any defendants important due process protections. These include the ability to confront witnesses, the presumption of innocence, the standard of proof beyond a reasonable doubt, and the requirement of a unanimous verdict for death sentences.

The commission procedures permit trials to be held in locations and at times that will maximize the security of the participants, and provide greater flexibility for the use and protection of classified and other sensitive information than is available in Federal court and courts-martial.

As for the conditions under which detainees are being held, the Administration quickly reached two conclusions concerning the status of these combatants under the Geneva Conventions. First, the 1949 Third Geneva Convention Relative to the Treatment of Prisoners of War was written for a different kind of conflict. The Geneva Conventions were meant to apply to armed conflicts between High

Contracting Parties to the Conventions. And Taliban or Al Qaeda belligerents do not appropriately fall into any of the six categories of persons who might be granted Prisoner of War status under the Conventions. We concluded that the Third Geneva Convention simply did not apply to our conflict with Al Qaeda. And, after much analysis and deliberation, it was determined that while the Third Geneva Convention applied to our conflict with the Taliban, the ad hoc militia that constituted Taliban forces did not qualify for POW status under any reasonable interpretation of the Third Geneva Convention.

The principles of the Geneva and Hague Conventions, however, have been the mainstay of the law of armed conflict for decades. We therefore recognized that, while the rules may not technically apply, the principles that serve as their foundation must continue to serve as the foundation for the future of the laws of war. Therefore, the United States decided to apply the principles of the Third Geneva Convention to the detainees under our control. Detainees are receiving protections consistent with the Third Geneva Convention and military necessity, including humane treatment at all times, adequate shelter, exceptional medical care, and nutritious, culturally appropriate meals.

Conclusion

To summarize: We believe that the ICC in its current form is itself a significant and unfortunate departure from international norms for addressing serious international offenses. It derogates from the role of the UN Security Council. Its prosecutor is tantamount to a supranational agency, not responsible either to any elected body or to the UN Security Council. The ICC could chill United States multilateral cooperation over a range of vital goals, including—ironically enough—prevention or punishment of serious international crimes.

By contrast, military commissions offer an effective, just, flexible means of enforcing the law of war in current circumstances—one with a long pedigree both in American and international law.

As I hope the foregoing discussion makes clear, the choice America faces today is not between isolationism or unilateralism and internationalism. It is between workable and unworkable internationalism. The ICC, unhappily, exemplifies the latter. Our policy of engagement with other countries and international bodies in pursuit of international

peace and security—exemplified by Operation Enduring Freedom, one of the greatest multilateral campaigns in our history—shows sustainable, workable internationalism in practice. And our military commissions represent in practice the policy preference ostensibly underlying the ICC itself—a preference for exercising national jurisdiction over violations of international humanitarian law.

The United States will therefore continue its leadership role in demanding and, where necessary, enforcing accountability for war crimes and other serious violations of the law of armed conflict. Our armed forces will continue to obey the law of armed conflict, and we will continue to discipline our forces when necessary. We will continue to promote the rule of law and help bring violators of the law

of armed conflict to justice, wherever the violations may occur. We will support post-conflict states that seek credibly to pursue domestic prosecution options in the context of national reconciliation. We will ensure that persons wanted or indicted for genocide, war crimes, or crimes against humanity are not allowed to go unpunished or to find safe haven on our soil.

Above all, however, we should always remember that the ultimate safeguard against such crimes is the spread of democracy and the rule of law. Democratic nations do not commit crimes against their own peoples or others. A world of free and democratic nations is our best hope for a world free of inhumanity and aggression.

1. See Guy Roberts, Assault on Sovereignty: The Clear and Present Danger of the New International Criminal Court, 17 Am. U.Int'l L. Rev. 35 (2001).
2. See David J. Scheffer, The United States and the International Criminal Court, 93 Am. J. Int'l L. 12, 20 (1999).
3. In 1986, the United States notified the Swiss Government that it did not intend to become a party to Protocol I of the Geneva Conventions.
4. The ICC's governing body is the Assembly of States Parties; its Prosecutor will be elected by secret ballot of ratifying States.
5. See, e.g., Art. 39 ("The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression, and shall . . . decide what measures shall be taken . . . to maintain or restore international peace and security.").
6. David J. Scheffer, Ambassador-at-Large for War Crimes Issues, U.S. Department of State, Statement on creating an international criminal court, Washington, DC, August 31, 1998. Article 124 creates a seven-year war crime "opt-out" for states parties. No such jurisdictional limitation is available to non-party nationals. Therefore, a state that becomes party to the treaty can opt out of war crimes and actually limit the court's jurisdiction over its own citizens while the nationals of non-party states are subject to the entirety of the court's subject matter jurisdiction. Non-party nationals are actually more vulnerable to the court's jurisdiction than nationals of states parties. Articles 11 and 121 are similarly perverse in their potential application. The temporal jurisdiction of the court, laid out in Article 11, limits jurisdiction to crimes committed after entry into force for that state. As with Article 124, the language of Article 11 is imprecisely drafted, but if the provision is interpreted as applying to individuals, then a state could theoretically shield an accused national by joining the treaty before trial, thus immunizing the individual for all conduct prior to the entry into force for that state. Non-party nationals do not enjoy such jurisdictional limitations. Finally, Article 121 presents the clearest example of a jurisdictional anomaly since its language is unambiguously oriented toward individuals as opposed to states. Under paragraph five of that article, amendments to the list of crimes within the subject matter jurisdiction of the court are not applicable against nationals of states parties that fail to ratify the amendment. Therefore, states that join the treaty have the ability to shield their citizens from jurisdiction over all crimes not currently in the treaty. There is no similar limitation, however, to the list of crimes that is potentially available for application against non-party nationals. Therefore, in theory, U.S. citizens could be made subject to the jurisdiction of the court for any number of currently unknown future offenses, even if the

United States were not party to the treaty, but states parties could effectively shield their nationals.

7. See Scheffer, id.
8. Customary international law, which article 18 of the Vienna Convention on the Law of Treaties reflects.

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