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THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT: A RECOMMENDATION FOR THE BUSH ADMINISTRATION

Michael P. Scharf

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I. INTRODUCTION

In the waning days of his presidency, William J. Clinton authorized the United States signature of the Rome Treaty establishing an International Criminal Court (ICC), making the United States the 138th country to sign the treaty by the December 30th deadline. According to the ICC Statute, after December 31, 2000, States must accede to the Treaty, which requires full ratification—something that was not likely for the United States in the near term given the current level of Senate opposition to the Treaty. While signature is not the equivalent of ratification, it sets the stage for United States support of Security Council referrals to the International Criminal Court, as well as other forms of United States cooperation with the Court. In addition, it enables the United States to continue to seek additional provisions to protect American personnel from the court’s jurisdiction.

Clinton’s action drew immediate reaction from Senator Jesse Helms, Chairman of the United States Senate Foreign Relations Committee, who has been one of the treaty’s greatest opponents. In a Press Release, Helms stated: “Today’s action is a blatant attempt by a lame-duck President to tie the hands of his successor. Well, I have a message for the outgoing President. This decision will not stand. I will make reversing this decision, and protecting America’s fighting men and women from the jurisdiction of this international kangaroo court, one of my highest priorities in the new Congress.”¹

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1. Press Release, Helms on Clinton ICC Signature: This Decision Will Not Stand (Dec. 31, 2000) (on file with author).

During the 107th Congress, Helms is likely to resurrect the "Servicemembers Protection Act," Senate Bill 2726, which he initially introduced in June 2000. The Act would prohibit any United States Government cooperation with the ICC, and cut off United States military assistance to any country that has ratified the ICC Treaty (with the exception of major United States allies), as long as the United States has not ratified the Rome Treaty. Further, the proposed legislation provides that United States military personnel must be immunized from ICC jurisdiction before the United States participates in any United Nations peacekeeping operation. The proposed legislation also authorizes the President to use all means necessary to release any United States or allied personnel detained on behalf of the Court.²

II. INFLUENTIAL INSIDER OR HOSTILE OUTSIDER?

The inescapable reality for the United States is that the ICC will soon enter into force with or without United States support. As this is being written, thirty countries have already ratified the treaty, and 139 have signed it indicating their intention to ratify.³ Sixty ratifications are necessary to bring it into force. The Signatories include every other North Atlantic Treaty Organization (NATO) State except for Turkey. Three of the Permanent Members of the Security Council (France, Russia, and the United Kingdom) have signed it. Both of the United States' closest neighbors (Mexico and Canada) have signed it. And even Israel, which had been the only Western country to join the United States in voting against the ICC Treaty in Rome in 1998, later changed its position and signed the Treaty.⁴

The question facing the Bush Administration, then, is whether its interests are better served by playing the role of a hostile outsider (as embodied in Jesse Helms' "American Servicemembers Protection Act") or by playing the role of an influential insider (as it has done for example with the Yugoslavia Tribunal). In deciding on a course of action, the Bush Administration must recognize the consequences that would flow from the hostile approach.

First, the hostile approach would transform American exceptionalism into unilateralism and/or isolationism by preventing the United States from participating in United Nations peacekeeping operations and cutting off aid to many countries vital to United States national security. Further, overt opposition to the ICC would erode the moral legitimacy of the United States, which has historically been as important to achieving United States foreign

2. See American Servicemembers' Protection Act of 2000, H.R. 4654, 106th Cong. §2(5) (1999).

3. *Rome ICC Treaty Conference: Rome Statute Signature and Ratification Chart*, at <http://www.igc.org/icc> (last visited Mar. 17, 2001).

4. Nomi Bar-Yaacov, *In Change of Heart, Israel Considers Signing War Crimes Treaty*, AGENCE FRANCE PRESSE, Aug. 20, 2000, at International News.

policy goals as military and economic might. Perversely, the hostile approach may even turn the United States into a safe haven for international war criminals, since the United States would be prevented from surrendering them directly to the ICC or indirectly to another country which would surrender them to the ICC.

Second, the United States would be prevented from being able to take advantage of the very real benefits of an ICC. The experience with the Yugoslavia Tribunal has shown that, even absent arrests, an international indictment has the effect of isolating rogue leaders, strengthening domestic opposition, and increasing international support for sanctions and even use of force. The United States has recognized these benefits in pushing for the subsequent creation of the *ad hoc* tribunals for Rwanda and Sierra Leone, as well as proposing the establishment of tribunals for Cambodia and Iraq. But the establishment of the ICC will signal the end of the era of *ad hoc* tribunals. Under the hostile approach, when the next Rwanda-like situation occurs, the United States will not be able to employ the very useful tool of international criminal justice.

The United States opponents of the ICC have suggested that without United States support, the ICC is destined to be impotent because it will lack the power of the Security Council to enforce its arrest orders. But as the *ad hoc* Tribunals for Rwanda and Sierra Leone indicate, in most cases where an ICC is needed, the perpetrators are no longer in power and are in the custody of a new government or nearby states which are perfectly willing to hand them over to an ICC absent Security Council action. Moreover, the Security Council has been prevented (by Russian veto threats) from taking any action to impose sanctions on States that have not cooperated with the Yugoslavia Tribunal despite repeated pleas from the Tribunal's Prosecutor and Judges that it do so. Indeed, in the Yugoslavia context, where the perpetrators were still in power when the Tribunal was established, it was not action by the Security Council, but rather the withholding of international loans that have induced Croatia and Serbia to hand over two dozen indictees. This indicates that, unlike the League of Nations (which United States opponents of the ICC have frequently referred to in this context), the ICC is likely to be a thriving institution even without United States participation. In other words, the United States may actually need the ICC more than the ICC needs the United States.

The third problem with the hostile approach is that the United States achieves no real protection from the ICC by remaining outside the ICC regime. This is because Article 12 of the Rome Statute empowers the ICC to exercise jurisdiction over nationals of non-party States who commit crimes in the territory of State Parties. Opponents of the ICC have attempted to negate this problem by arguing that international law prohibits the ICC from exercising

jurisdiction over the nationals of non-parties.⁵ In a lengthy article in *Law and Contemporary Problems*, I provide a detailed critique of this legal argument, pointing out that it is not supported by the historic record or guiding precedents.⁶ But far more important than what I have to say is the fact that the representatives at the ICC Prep. Con. have rejected the argument, indicating that the ICC Assembly of State Parties and the ICC itself are extremely unlikely to accept it.

If United States officials can be indicted by the ICC whether or not the United States is a party to the Rome Treaty, then the United States preserves very little by remaining outside the treaty regime, and could protect itself better by signing the treaty. This has been proven to be the case with the Yugoslavia Tribunal, which the United States has supported with contributions exceeding \$15 million annually, the loan of top-ranking investigators and lawyers from the federal government, the support of troops to permit the safe exhumation of mass graves, and even the provision of U-2 surveillance photographs to locate the places where Serb authorities had tried to hide the evidence of its wrongdoing.⁷

This policy bore fruit when the International Prosecutor opened an investigation into allegations of war crimes committed by NATO during the 1999 Kosovo intervention. Despite the briefs and reports of reputable human rights organizations arguing that NATO had committed breaches of international humanitarian law, on June 8, 2000 the International Prosecutor issued a report concluding that charges against NATO personnel were not warranted.⁸ I am not suggesting that the United States co-opted the Yugoslavia Tribunal, but when dealing with close calls regarding application of international humanitarian law it is obviously better to have a sympathetic Prosecutor and Court than a hostile one.

III. A RECOMMENDATION BASED ON REAL POLITICK CONSIDERATIONS

I served as Attorney-Adviser for Law Enforcement and Intelligence and Attorney-Adviser for United Nations Affairs at the State Department under the first President Bush. Unlike much of the commentary on both sides of this issue, which is clouded by emotionalism and idealism, I have sought here to

5. See American Servicemembers' Protection Act of 2000, H.R. 4654, 106th Cong. § 2(5), at pmbl. (1999).

6. Michael P. Scharf, *The ICC's Jurisdiction over the Nationals of Non-Party States: A Critique of the U.S. Position*, 63 LAW & CONTEMP. PROBS. (forthcoming 2000).

7. Ruth Wedgwood, *Improve the International Criminal Court*, at <http://www.foreignrelations.org/public/pubs/CriminalCourtCPI.html> (last visited Mar. 17, 2001).

8. Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia (2000) (on file with the author).

provide a detached risk-benefit analysis of the foreign policy and national security consequences of the question facing the new Administration.⁹

The risks to United States servicemembers presented by the ICC have been greatly exaggerated, while the safeguards contained in the ICC Treaty have been seriously underrated. But to the extent that such fears are valid, United States opposition to the ICC will only increase the likelihood that the ICC will be more hostile than sympathetic to United States positions. And, ironically, by opposing the Court, the United States would likely engender more international hostility toward United States foreign policy than could result from an indictment by the Court. Thus, whether or not the United States is able to achieve additional safeguards to prevent the ICC from exercising jurisdiction over United States personnel, it will be in the interests of United States national security and foreign policy to support, rather than oppose, the ICC. This does not require immediate ratification. Perhaps it is better to let the Court prove itself over a period of years before sending the treaty to the Senate. But when the next Rwanda-like situation comes along, the Bush Administration will find value in having the option of Security Council referral to the ICC in its arsenal of foreign policy responses.

9. For a more detailed analysis, see *THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT: NATIONAL SECURITY AND INTERNATIONAL LAW* (Sewall and Kaysen, eds., 2000) (A project of the American Academy of Arts and Sciences of which the author served as Co-Director).

