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IV. ASSESSMENTS OF THE UNITED STATES POSITION: THE INTERNATIONAL CRIMINAL COURT
ARRIVES - THE U.S. POSITION: STATUS AND PROSPECTS

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SUMMARY:

... A policy review of the ICC is said to be under way within the U.S. Government, which will conclude with an analysis of the circumstances and implications of entry into force. ... The Bush Administration has clearly ruled out ratification and its policy review is unlikely to change that. ... Moreover, the experiences of the U.S. delegations at these sessions may well be influential in the last stage of the Administration's policy review. ... A JCS conclusion that the protection of American servicemembers requires maximum U.S. involvement in the shaping of the ICC is possible, although not probable, and would have a powerful effect on the outcome of the Administration's policy review. ... Much more than can be covered in this brief Essay will be at play in determining whether the Administration will make a formal decision on its position toward the ICC after the Rome Statute enters into force, and the content of the decision if made. ...

TEXT:

[*873]

INTRODUCTION

The International Criminal Court ("ICC" or "Court") is about to begin. The sixtieth ratification needed to bring the ICC Statute ("Statute" or "Rome Statute") into force is expected as early as March or April 2002. n1 The United Nations is scheduling the first meeting of the Court's governing body, the Assembly of States Parties, for September 2002. n2

The United States has declared that it does not support the Court. On December 19, 2001, at an international conference in The Hague, Ambassador for War Crimes Pierre-Richard Prosper said in a final statement that:

As many of you know, the International Criminal Court has been a point of concern for the United States. This concern has not changed as a result of September 11th. While the United States has sought from the inception of the debate at the end of World War II a court that could be neutral, focused on the pursuit of efficient justice, and most of all immune from the poisonous taint of raw political power, the Bush administration, as with the previous administration, opposes the Rome Treaty. And despite the signature by President Clinton, we - like the previous administration - will not send it to the United States Senate for ratification.

We are steadfast in our concerns and committed to our beliefs that the United States cannot be part of a process that lacks the essential safeguards to avoid a politicization of the process. We also firmly believe that the ICC treaty is just

that - a treaty. Therefore it does not and should not have [*874] jurisdiction over a non-party state absent United Nations Security Council action. The United States has a unique role in the world in helping to defend freedom and advance the cause of humanity. We will continue to meet our responsibility but not at the price of our national security.
n3

This Essay first examines the current official U.S. position on the Court. The second section describes the development of the position as stated by Ambassador Prosper throughout the negotiations for the ICC from 1994 to the present. The final section reviews the prospects for changes in the U.S. position in the early years of the ICC's existence.

I. CURRENT POSITION

Ambassador Prosper's statement appears to be the Administration's current final word. Although U.S. representatives have recently on occasion added due process questions, some constitutional issues, and objections to the extent of the powers of the prosecutor to the list of complaints, these appear not to be central. n4 A policy review of the ICC is said to be under way within the U.S. Government, which will conclude with an analysis of the circumstances and implications of entry into force. n5 This has yet to produce, however, any public explanation or rationale for the two principal aspects of the Administration's bare statements of opposition to the ICC.

Both have nonetheless received extensive public comments. n6 On its face, the Administration's objection that the Rome Statute will give the Court jurisdiction over non-party States is refuted by the language of the Statute itself. The Rome [*875] Statute n7 in Article 1 is specific that the court "shall have the power to exercise its jurisdiction over persons" n8

Article 25 provides unequivocally in section 1 that "the Court shall have jurisdiction over natural persons pursuant to this Statute." n9 All references in the Statute to the object of the Court's jurisdiction are only to persons - such as the phrase "the person concerned" frequently appearing in Article 17. n10 Thus the Statute leaves no room for ICC jurisdiction over non-party States or governments as such. Such jurisdiction, if it existed, would of course violate the Vienna Convention on the Law of Treaties. n11

Occasionally, the United States and its officials have seemed to argue, especially in private discussions, that the elements of the Court's jurisdiction taken together give it a kind of de facto jurisdiction over States and governments. First, the Court has jurisdiction under Article 27, over "all persons without any distinction based on official capacity." n12 In particular, "official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute" n13 Section 2 of the article removes as bans to the Court's jurisdiction immunities or special procedures that domestic or international law might otherwise provide for officials.

Second, the definitions of crimes in the Statute, by referring to "intent to destroy" in the case of genocide, n14 "a state or organizational policy" for crimes against humanity, n15 and "part of a plan or policy or as part of a large-scale commission of such crimes" n16 for war crimes give the Court the right and obligation [*876] to examine State policy and decision making.

U.S. officials further argue that, taken together, these provisions give the Court an intimidating influence over responsible officials and their policy decisions that is tantamount to jurisdiction over the governments they serve. Proponents respond that the Court would be useless without jurisdiction over active officials - several Heads of State now in office are responsible for atrocities clearly within the jurisdiction of the ICC. Moreover, they argue, the Court's power to review the policies and decisions of governments is very restricted. It can determine only whether an act was in fact pursuant to a particular plan or policy. It may not examine or pronounce on any other aspect of that plan or policy. It may not make any order or comment about it to a government.

The question of safeguards is more nearly a matter of judgment. There are a number of these in various forms in the Statute. n17 The U.S. delegation took the lead in creating many of them during the ICC negotiations. However, from the beginning, the United States had pressed for either full exemption from the jurisdiction of the Court until U.S. ratification of the Rome Statute, or U.S. control over the submission of cases to the Court.

The safeguards now in the Statute include restrictions on the discretion and initiative of the prosecutor; the very limited nature of the cases the Court may take ("high thresholds"); the obligation of the Court to defer on request to national courts and legal processes unless these can be shown to be non-existent, sham, in bad faith, or suborned ("complementarity"); the oversight of the Assembly of States Parties; and the right of the Security Council to require the

Court, by annually renewable requests, to refrain from taking a case. Perhaps the most stringent safeguard is simply the very limited origination of cases: an eligible crime must come by Security Council referral, from a State Party on whose territory the crime occurred, or a State Party whose national is accused of committing it. A non-State party [*877] meeting the same criteria may also voluntarily submit a case if it is willing to have the Court address the entire situation of which the case is a part. n18

Supporters of the Court say that, taken together, this array of safeguards gives almost 100% protection against political abuse or harassment through the Court for the United States - the world's only superpower with a democratic government and highly developed, well established judicial and legal systems. The U.S. government responds by finding inadequacies in each safeguard viewed separately: complementarity and prosecutorial limitations are subject to evasion by biased judges; deferral requests by the Security Council can be stopped by vetoes; the limited origination of cases is still too broad because Americans and the American military are spread so widely around the world; the high profile, dramatic cases to which the Court is restricted are precisely those that enemies of the United States would like to see brought against it in the ICC. Finally, experience with other one nation-one vote international bodies makes the United States very uncertain of being able to protect its interests in the Assembly of States Parties. n19

Depending on the observer's perspective, this U.S. response may be prudence, paranoia, or extreme miscalculation. A brief review of the history of U.S. position shows that the last is the most likely to be correct.

II. DEVELOPMENT OF THE U.S. POSITION

Once the negotiations at the United Nations for the ICC were fairly launched by the General Assembly in 1995, the United States committed itself to this process and seemed also to support the concept of an international criminal court. n20 Over [*878] the years to the Rome diplomatic conference in 1998 and beyond, expert, hard-working, and thoughtful U.S. delegations greatly improved the emerging Statute, and thereafter the Elements of Crimes and Rules of Procedure and Evidence that elaborated on it. These included such essentials as the definitions of crimes, the inclusion of crimes committed in internal conflicts, full due process protections for defendants except for trial by jury, and the treatment of crimes against women on a par with and as part of the other crimes within the Court's jurisdiction.

At the same time, the United States consistently pushed for either control over which cases would reach the Court or exception at will from its jurisdiction. n21 The first approach was referral of all cases by the Security Council only, which the United States could block with its veto. By 1996, it was obvious to observers of the negotiations that this goal was impossible. The great majority of delegations was then clearly ready to accept a proposal by Singapore that the Security Council would only be able to require the Court to defer consideration of a case. n22

The United States then turned to finding a formula for exemption. Unfortunately, the negotiating style of the delegation (and perhaps its private hopes) resulted in giving other delegations the impression that with enough concessions restricting the powers and reach of the Court, the United States would conclude that it had achieved a kind of virtual exemption. n23 Accordingly, delegations gave such concession without demanding others from the United States. Some of these, such as abandoning the nationality of the victim as a basis for the Court's jurisdiction, came hard and with resentment. Nonetheless, these unilateral concessions continued into the Rome Conference. n24

[*879] The United States finally paid the price for this approach in the closing weeks of the Rome Conference. As U.S. demands for total exemption became ever more peremptory and were backed up by diplomatic demarches in capitals, a substantial majority of delegations and their governments decided that the search for a compromise with the United States had become futile. They were therefore ready to react sharply to the proposals for exemption that the United States introduced in the last four days of the Conference. n25 They rejected these proposals as both unacceptable on their face and as efforts to break up the emerging compromise agreement on a package text of the Statute. When the United States insisted on formal votes, majorities of about four-fifths voted against its proposal and for the package text. n26

The United States nonetheless continued its quest for exemption as well as its fundamental contributions to the Court into the sessions of the Preparatory Commission, which followed the Rome Conference. On June 30, 2000, it joined in the consensus adoption in the Commission of extensive documents on Elements of Crimes and Rules of Procedure and Evidence. The U.S. delegation had negotiated expertly and painstakingly over these texts and contributed invaluable to both. In particular, a military lawyer on the delegation had initiated the Rome Conference's authorization of the Commission's negotiations on the Elements and had been the leader of them. As a result, the detailed definitions of the crimes in the Statute achieved in this supplementary document were entirely acceptable to the U.S. Department of Defense.

Characteristically however, the U.S. delegation threatened to withdraw its participation in the consensus adoption of these texts unless the Commission agreed to a rule of procedure, which might open the way to a provision for exemption in the relationship agreements between the Court and the United Nations. Again, vigorous demarches backed up this demand. In their anxiety to have consensus for the Rules and the Elements, other governments agreed grudgingly and resentfully to the rule [*880] the United States wanted. n27 They refused however, to allow any mention of the United Nations-ICC relationship agreement in the rule or in the final report of this session of the Commission.

III. PROSPECTS

The United States now finds itself confronted with the launch in 2002 of the ICC as a court whose jurisprudence, structure, and purposes it accepts. It recognizes that the Court will be able to start and function (although quite possibly not as well without the support of the United States) because it will have the determined support of all of Western Europe and the participation of most countries of South America and Africa. n28 The Assembly of States Parties will be dominated at the beginning by democracies and other countries with which the United States has close relations. Finally, the United States will have to accept, if it does not already, that the arrival of the ICC means that the international community will no longer support temporary international criminal tribunals.

The Bush Administration has clearly ruled out ratification and its policy review is unlikely to change that. It will not be able to offer the prospect of ratification as an inducement to members of the Assembly of States Parties to accept American preferences in the initial organization of the Court and in the selection of its judges and senior officials. But will the Administration be willing to work within this and other limitations to nonetheless make the most of its observership in the Assembly? With the reality of the Court before it, will it decide to do its best to make the ICC suitable to American interests, or will it turn its back, absent itself, and resort to indifference or to distant observation?

There is one clue and two especially important factors for the American response. There have been two sessions of the Preparatory Commission since the Bush Administration took office and it has sent delegations. These have confined their participation to working groups on aggression and the financing of the ICC. Neither participated in substantive plenary sessions and both reiterated that the United States does not support the [*881] Court. However, the rank of the delegates and the vigor of their participation increased significantly with the second delegation.

U.S. participation in the final two Commission sessions scheduled for April and July of this year may offer important early indications of the Administration's response to the entry into force of the Rome Statute. Moreover, the experiences of the U.S. delegations at these sessions may well be influential in the last stage of the Administration's policy review.

The two particular important factors are the Congress and the American military. Unlike the straightforward and clear although not precisely defined position of the Administration, opposition to the ICC in Congress has attacked numerous aspects of the Court including elements of its jurisdiction. The sources of this opposition are varied and numerous: American exceptionalist, hegemonist, ideological, and unilateralist. Successful legislation in opposition has been aimed at preventing the United States from supporting or cooperating with the ICC. n29 Current leaders of the Congressional opposition include the Republican leadership in the House of Representatives, and Senators Helms, Hatch, and Craig. Support for the ICC in Congress is greatly outnumbered, but has been growing slowly. Neither side in general is well informed about the Court, a situation that may change as the early enactment of the Statute and the organization of the Court compel Congressional attention.

The Administration has been strongly affected by the opposition in Congress. It provides a powerful and convenient excuse for not taking hard decisions and for ignoring unwelcome truths and events. The Bush administration had also correctly seen it as expressing the views of its political base in the right wing of the Republican Party.

The ultimate source of the demand for exemption in the positions of both the Clinton and Bush administrations has been the Joint Chiefs of Staff ("JCS") in the Department of Defense. They have enjoyed the vigorous support of Secretaries Cohen and Rumsfeld. The JCS argument is that the United States as the sole superpower has unique global responsibilities and its armed forces are more widely deployed around the world than those of any other nation. This combination of responsibility and exposure should entitle the United States to special treatment [*882] by the ICC. Moreover, the possibility of ICC action should not influence the most urgent and important international relations decisions of very senior American officials. Finally, the JCS, to the extent that it has examined the safeguards in the Rome Statute, rejects these one by one in the manner already described.

The JCS objective has been to stop the creation of the Court unless complete exemption can be achieved. Its reaction to the reality that this is impossible will critically influence the future position of the Administration. A JCS conclusion that the protection of American servicemembers requires maximum U.S. involvement in the shaping of the ICC is possible, although not probable, and would have a powerful effect on the outcome of the Administration's policy review.

It is also possible that a combination of a strongly hostile reaction by the JCS, administration domestic political considerations, and the concern that countries with terrorists in custody might consider the ICC an alternative to delivering them to the United States would produce a stance of denunciation and defiance. One purpose of this would probably be to intimidate the Court and its supporters so as to reduce the possibility of prosecutions of Americans or of initiatives to encourage the surrender of terrorists to the ICC.

This approach would probably include steps to reverse the effect of President Clinton's signature of the Rome Statute, an announcement that the United States will not participate in any further meetings on the ICC, efforts to block United Nations support and financial contributions to the Court, and a round of diplomatic demarches in capitals to drive home the significance and serious intent of these actions.

Ambassador Prosper's speech suggests strongly that this strategy and others could well include an American campaign to reduce the use of international criminal tribunals sponsored by or created as worldwide organizations in favor of national or regional courts. n30

Much more than can be covered in this brief Essay will be at play in determining whether the Administration will make a formal decision on its position toward the ICC after the Rome Statute enters into force, and the content of the decision if made. It [*883] is quite possible that the Administration will observe without acting until forced to act. An example of such an action-forcing event might be a move in the Security Council to refer a case such as Sudan to the ICC, which the Administration might feel considerable pressure from its own supporters not to veto. Whatever the Administration does or avoids doing about the International Criminal Court, the debate behind its decisions and positions will be about national identity, power, and politics, not about the jurisprudence of the Court.

FOOTNOTES:

n1. For a full list of ratifications and much other information about the international campaign for ratifications, see the NGO Coalition for the International Criminal Court ("CICC") website, at <http://www.iccnw.org>.

n2. See *id.* (information provided by the CICC from United Nations sources).

n3. Pierre-Richard Prosper, U.S. Ambassador-at-Large for War Crimes Issues, Address at the Peace Palace, The Hague, the Netherlands (Dec. 19, 2001) (on file with author).

n4. Nicholas Rostow, Legal Adviser of the U.S. Mission to the United Nations, Remarks to the 27th session of the Sixth Committee of the U.N. General Assembly (Nov. 19, 2001), available at <http://www.un.org/News/Press/docs/2001/GAL3199.doc.htm>.

n5. See Letter from Elliott Abrams to Ambassador William Luers, President, the United Nations Association of the United States of America (July 3, 2001), available at <http://www.unausa.org>; Bill Keller, The Monster in the Dock, N.Y. Times, Feb. 9, 2002, at A19.

n6. See Bartram S. Brown, Unilateralism, Multilateralism & the International Criminal Court, in *Multilateralism and U.S. Foreign Policy* 323 (Stewart Patrick & Shepard Forman eds., 2002). See Part II, The

United States and the International Criminal Court, in *The United States and the International Criminal Court* 115 (Sarah B. Sewall & Carl Kaysen eds., 2000).

n7. Rome Statute of the International Criminal Court, A/CONF.183/9 (1998), art. 13, available at <http://www.un.org/law/icc/statute/romefra.htm> [hereinafter Rome Statute].

n8. Id. art. 1 (emphasis added).

n9. Id. art. 25.

n10. Id. art. 17.

n11. See Vienna Convention on the Law of Treaties, May 23, 1969, U.N. Doc. A/CONF.39/27.

n12. Rome Statute, *supra* note 7, art. 27.

n13. Id. art. 27(1).

n14. Id. art. 6.

n15. Id. art. 7(2).

n16. Id. art. 8.

n17. See Brown, *supra* note 6, at 328-29; David Scheffer, A Negotiator's Perspective on the International Criminal Court, *167 Mil. L. Rev. 1, 10-11 (2001)*. An excellent description and balancing of the overall risks and benefits the Court presents to the United States can be found in Sarah Sewall & Carl Kaysen, *The United States and The International Criminal Court: The Choices Ahead*, 1999, which is an occasional paper of the American Academy of Arts and Sciences, available at <http://www.amacad.org/projects/iccarticle.htm>.

n18. Rome Statute, *supra* note 7, art. 12(2)-(3); Finalized draft text of the Rules of Evidence and Procedure, U.N. Doc. PCNICC/2000/1/Add.1 (Nov. 2, 2000), rule 44, at 29.

n19. Discussions between members of the U.S. delegation and the author during the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, held in Rome, Italy, June 15-July 17, 1998. See Part II, *The United States and the ICC*, in *The United States and the International Criminal Court*, *supra* note 6.

n20. See William J. Clinton, A Commitment to Human Dignity, Democracy and Peace, *Issues of Democracy*, USIA Electronic Journal, Vol.1, No.3, May 1996, at <http://usinfo.state.gov/journals/itdhr/0596/ijde/clinton.htm>. This is the article form of a speech by President

Clinton on October 15, 1995, at the University of Connecticut at the inauguration of the Dodd Human Rights Center. See also Ad hoc Committee on the Establishment of an International Criminal Court, Comments Received Pursuant to Paragraph 4 of General Assembly Resolution 49/53 on the Establishment of an International Criminal Court, U.N. Doc. A/ac.244/1/Add.2 (Mar. 31, 1995), at 7, paras. 1, 2.

n21. See generally Lawrence Weschler, *Exceptional Cases in Rome: The United States and the Struggle for an ICC*, in *The United States and the International Criminal Court*, supra note 6, at 85.

n22. See Lionel Yee, *The International Criminal Court and the Security Council*, in *The International Criminal Court, The Making of the Rome Statute* 143 (Roy S. Lee ed., 1999).

n23. See Scheffer, supra note 17, at 8-9; David Scheffer, *Don't Forfeit the International Criminal Court*, *Def. News*, May 29, 2001, available at <http://www.wfa.org/issues/wicc/press2001.html>.

n24. See Fanny Benedetti & John L. Washburn, *Drafting the International Criminal Court Treaty: Two Years to Rome and an Afterword on the Rome Diplomatic Conference*, 5 *Global Governance*, no.1 (Jan.-Mar. 1999), at 26; Weschler, supra note 21.

n25. Benedetti & Washburn, supra note 24, at 26-27.

n26. Personal observation by the author at the meeting; Wechsler, supra note 21, at 106-09.

n27. Jennifer Schense & John L. Washburn, *The United States and the International Criminal Court*, 35 *Int'l L.*, no. 2, at 617-18 (Summer 2001).

n28. Statements to the author by officials of the State Department and the U.S. Mission to the United Nations, Nov. 1, 2000.

n29. *Id.*

n30. Prosper Address, supra note 3, at 2-4.