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SYMPOSIUM ISSUE: THE INTERNATIONAL CRIMINAL COURT: AMERICA'S STAKE IN PEACE,
SECURITY AND JUSTICE

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The United States has had and will continue to have a compelling interest in the establishment of a permanent International Criminal Court (ICC). Such an international court so long contemplated and so relevant in a world burdened with mass murderers, can both deter and punish those who might escape justice in national courts. As head of the United States delegation to the International Criminal Court talks, I can confirm that the United States has had an abiding interest in what kind of court the ICC would be in order to operate efficiently, effectively and appropriately within a global system that also requires our constant vigilance to protect international peace and security. Our refusal to support the final draft of the treaty in Rome last summer was grounded in law and in the reality of our international system.

Last December, we joined consensus in the United Nations General Assembly to adopt a resolution creating the Preparatory Commission on the ICC which met last month in New York under the expert leadership of Philippe Kirsch, the Legal Advisor of the Canadian Ministry of Foreign Affairs. I led the United States delegation in the critical work of the PrepCom to develop the elements of crimes and the rules of procedure and evidence of the court. The United States took the lead in the elements discussions. This summer the PrepCom will afford an opportunity for concerns we and others have had about the effectiveness and acceptance of the Court to be addressed. We believe the problems of the treaty which prevent us from signing it can be solved, and that it is in the interest of all the governments to address those problems now so we can all be active partners in the ICC. There is far more to lose in the effectiveness of the ICC if the United States is not a treaty partner, than there is to gain from its current dubious regime jurisdiction. As I said at the United Nations last October, we do not pretend to know all of the answers. We hope some creative thinking can be generated in the months ahead.

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Governments and nongovernmental organizations have often told me that their intention behind establishing an international criminal court is to prosecute the Pol Pots and Saddam Husseins of the world - those leaders of lawless regimes who bring death and terror upon their own people and citizens of neighboring states. Their intention, they say, is not to "go after" the United States or our armed forces. The United States, to a substantial extent, embraces that intention. In fact, we wish that everyone in Rome who was such a strong advocate for a permanent international criminal court for the future (and I do not include Canada in what I'm about to say) would show more resolve and commitment to helping us today bring to justice perpetrators of genocide and crimes against

humanity and serious war crimes in our own time. Lofty rhetoric about justice of the future lacks credibility if we are not prepared to establish, or to strengthen, credible institutions of international justice today.

At the Rome conference last summer, the United States delegation worked with other delegations, including Canada's, to achieve important objectives. One major objective was a strong complementarian regime, namely, deferral to national jurisdictions. A key purpose of the ICC should be to promote observance and enforcement of international humanitarian law by domestic legal systems. Therefore, we were pleased to see the adoption of Article 18, which is drawn originally from an American proposal, and its companion Articles 17 and 19. We consider it only logical that, when an investigation of an overall situation is initiated, relevant and capable national governments be given an opportunity under reasonable guidelines that respect the authority of the court to take the lead in investigating their own nationals or others within their jurisdiction.

Our negotiators struggled successfully to preserve appropriate sovereign decision making in connection with obligations to cooperate with the court. Some delegates were tempted to require unqualified cooperation by state parties with all court orders, notwithstanding national judicial procedures that would be involved in any event. Such obligations of unqualified cooperation were unrealistic and would have raised serious constitutional issues not only with the United States but in many other jurisdictions. Part 9 of the statute represents hard-fought battles in this respect. The requirement that the action of states parties be taken "in accordance with national procedural law" or similar [*3] language is pragmatic and legally essential to the successful operation of the court.

The United States experience with the Yugoslav War Crimes Tribunal has shown that some sensitive information collected by a government could be made available as lead evidence to the prosecutor provided that detailed procedures were strictly followed. We applied years of experience of the Yugoslav Tribunal to the challenge of similar cooperation with a permanent court. It was not easy. Some delegations argued that the court should have the final determination of the release of all national security information requested from a government. Our position prevailed in Article 72 - a national government must have the right of final refusal if the request pertains to its national security. In the case of a government's refusal, the court may seek a remedy from the Assembly of States Parties or the Security Council.

The United States helped lead the successful effort to ensure that the ICC's jurisdiction over crimes against humanity included acts in internal armed conflicts and acts in the absence of armed conflict. We also argued successfully that there has to be a reasonably high threshold for such crimes.

United States lawyers insisted that definitions of war crimes be drawn from customary international law and that they respect the requirements of military objectives for combat and the requisite intent. We had long sought a high threshold for the court's jurisdiction over war crimes, since individual soldiers often commit isolated war crimes that by themselves should not automatically trigger the massive machinery of the ICC. We believe the definition we have arrived at serves our purpose as well: "The court shall have jurisdiction in respect to war crimes in particular when committed as a part of a planned policy or as part of a large-scale commission of such crimes."

A major achievement of Article 8 of the treaty is its application to war crimes committed during internal armed conflicts. In order to widen the acceptance of the statute to war crimes committed during internal armed conflicts, the United States helped broker language that excludes situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence, and other acts of a similar nature.

One of the more difficult, but essential, issues to negotiate was the coverage of crimes against women, in particular either as a crime against humanity or war crime. The United States delegation worked hard to include explicit reference to crimes relating to sexual assault in the text [*4] of the statute. Rape, slavery, forced prostitution, forced pregnancy, enforced sterilization, and other forms of sexual violence of significant magnitude were included as crimes.

As I mentioned earlier, our emphasis on the elements of the crimes resulted in Article 9 of the treaty, which requires their preparation - a task the delegates are now undertaking. We also were instrumental in creating the acceptable definitions of command responsibility and the defense of superior orders.

These accomplishments and others in the Rome Treaty are significant. But the United States delegation was not prepared at any time during the Rome conference to accept a treaty text that represented a political compromise on fundamental issues of international criminal law and international peace and security. We could not negotiate, as if certain risks could be easily dismissed or certain procedures of the permanent court would be infallible. We could not bargain away unique security requirements or decline to uphold basic principles of international law, even if some of our closest allies reached their own level of satisfaction with the final treaty. The United States made compromises throughout the Rome process, but we always emphasized that the issue of jurisdiction had to be resolved satisfactorily or else the entire treaty and the integrity of the court would be imperiled.

The theory of universal jurisdiction for genocide, crimes against humanity and war crimes seized the imagination of many delegates negotiating the ICC treaty. They appeared to believe that the ICC should be empowered to do what some national governments have done unilaterally, namely, to enact laws that empower their courts to prosecute any individuals, including non-nationals, who commit these crimes. Some governments have enacted such laws, which theoretically, but only occasionally in practice, make their courts arenas for international prosecutions. Of course, the catch for any national government seeking to exercise universal jurisdiction is to exercise personal jurisdiction over the suspect. Without custody or the prospect of it through an extradition proceeding, a national court's claim of universal jurisdiction necessarily and rightly is limited.

The ICC is designed as a treaty-based court, not only with the unique power to prosecute and sentence individuals and deprive them of their liberty, but also to impose obligations of cooperation upon the contracting states. A fundamental principle of international treaty law is that only states that are party to a treaty should be bound by its terms. Yet [*5] Article 12 of the ICC treaty reduces the need for ratification of the treaty by national governments by providing the court with jurisdiction over nationals of non-party states. Under Article 12, the ICC may exercise such jurisdiction over anyone anywhere in the world, even in the absence of a referral by the Security Council, if found in a state or territory where the crime was committed or the state of

nationality of the accused consents. Ironically, the treaty exposes non-parties in ways that parties are not exposed.

Never mind that Article 11, paragraph 2, of the treaty requires the Court to exercise jurisdiction only with respect to crimes committed after entry into force of the statute for any particular State unless, as a non-party, the State has made a declaration under Article 12, paragraph 3. I wonder how Article 11, paragraph 2, makes sense in the context of an international criminal court, whose only targets of prosecution are individuals, if that provision does not apply to the nationals of the State in question.

Never mind that Article 24, paragraph 1, states, "No person shall be criminally responsible under this statute for conduct prior to the entry into force of the statute." It seems to me that this provision can only be consistent with Article 11, paragraph 2, if it means "entry into force of the Statute for the state of the nationality of such person" unless there is a Security Council referral under Chapter VII.

Never mind that Article 22, paragraph 1, which articulates the principle of *nullum crimen sine lege*, states that "A person shall not be criminally responsible under this statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court." It is puzzling how a national non-party state that has not accepted the jurisdiction of the ICC at the time the conduct takes place, could be criminally responsible before the ICC for conduct that does not in fact fall within the jurisdiction of the Court.

However, even if you believe that Articles 11, 22, and 24 have nothing to do with nationals of a non-party states and their rights, Article 12 runs counter to some serious norms of international law if it purports to empower the Court to exercise jurisdiction over non-party nationals. I want to acknowledge at this point the work of Professor Madeline Morris, Duke University School of Law, and Professor Ruth Wedgwood, Yale Law School, whose work I have had the benefit of seeing in draft form prior to publication. The following remarks are drawn, in part, from their work.

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Let me begin with the question of universal jurisdiction as a rationale for jurisdiction. As everyone agrees, Article 12 of the Rome Treaty rejects universal jurisdiction for the Court. Yet there is an argument that State Parties delegate to the ICC their right to prosecute domestically individuals of any nationality for certain international crimes of universal jurisdiction. But the foundations of that argument are paper thin. The ICC treaty itself relies explicitly not on universal jurisdiction but on the consent jurisdiction either by the act of becoming a state party or by special consent under Article 12, paragraph 3.

Professor Morris has argued that "reliance on universal jurisdiction would render nonsensical the jurisdictional provisions adopted" in Rome. She is right. First, the requirement of consent of the state whose territory the crime was committed would be unnecessary if the Court's basis for jurisdiction were universality.

Second, not all of the crimes within the subject matter jurisdiction of the Court in fact enjoy universal jurisdiction under customary international law. Those international treaties that do use universal jurisdiction as a means of

enforcement before domestic courts are well understood to apply to crimes of universal jurisdiction, such as torture, international terrorism and hostage taking. Professor Wedgwood at Yale pointed out that enforcement of these treaties has generally been among treaty parties and, I would stress, before national courts of those treaty parties. She also points to various war crimes (now embodied in the ICC statute) that stem from the Hague regulations or from the laws and customs of war, neither of which directly provides for universal jurisdiction.

Third, as a matter of law, is it true that universal jurisdiction over a crime that a state may seek to exercise itself can be delegated to a treaty-based collective international court? We believe the Vienna Convention on the Law of Treaties states rather clearly that treaties cannot bind non-party states, and we would add, particularly with respect to treaty-based international institutions. A state that recognizes universal jurisdiction for a political crime may not, even as a state party, wish to delegate such jurisdiction to an international court. By becoming a party to the treaty, a state makes a one-time delegation of such jurisdiction to the court. Such delegation thereby eliminates any possibility of bilateral negotiations with another state even if it is a non-party, on a case-by-case basis, unless there is an extradition treaty under Article 98 of the ICC statute or there is some other relevant bilateral agreement between the two states.

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In Rome the United States delegation offered various proposals to break the back of the jurisdiction problem. The other permanent members of the Security Council joined us in a compromise formula during the last week of the Rome conference. One of our proposals was to exempt from the court's jurisdiction conduct that arises from the official actions of a nonparty state acknowledged as such by that nonparty. This would require a non-party state to acknowledge responsibility for an atrocity in order to be exempted—an unlikely occurrence for those who usually commit genocide or other serious violation of international humanitarian law. Regrettably, our proposed amendments to Article 12 were rejected on the premise that the proposed take-it or leave-it draft of the treaty was so fragile that, if any part of it were reopened, the conference would fall apart.

The final text of the treaty includes the crime of aggression, albeit undefined until a Review Conference seven years after entry into force of the treaty when only the states who are parties to the treaty at that time determine the meaning of aggression. This political concession to the most persistent advocates of a crime of aggression without a consensus definition and without the linkage to a prior Security Council determination that an act of aggression has occurred, should concern all of us. The Preparatory Commission is addressing this issue, however, and we hope it will proceed responsibly in the years ahead. If handled poorly, this issue alone will fatally compromise the ICC's future credibility.

We firmly believe that the true intent of national governments cannot be that which now appears reflected in a few key provisions of the Rome treaty, as they are being interpreted. The political will remains within the Clinton administration to support a treaty that is fairly and realistically constituted. We hope developments will unfold in the future so that the considerable support that the United States could bring to a properly constituted international criminal court can be realized.

Finally, I recognize the irony of having to speak in such detail today about non-party status under the Rome treaty, but Article 12 is the key to resolving our most fundamental difficulty with the treaty. We look forward to the problem

of Article 12 being solved because by solving it, the interests of international law and justice that we all share will be served.