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The United States and the International Criminal Court (ICC)

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The United States and the International Criminal Court

The Rome Statute was the culmination of years of anticipation towards developing a permanent court to violators of international law. The treaty drawn up in Rome (hence the name) was established 17 July 1998 by 120 signatory nations. There are (as of 14 November 2005) 100 nations who are parties to the International Criminal Court (ICC Website – Assembly of State Parties, n.d.). The United States, while a leader in the development of the ICC (AMICC - US & ICC Info, n.d.; Republican Policy Committee, 2004) initially hoped to have the UN Security Council (of which the U.S. is one of the permanent 5 with veto power) control which cases the ICC is allowed to take. This was to attempt to maintain U.S. control over its personnel (specifically military and other officials).

President Clinton refused to allow the U.S. to sign on to the Rome Treaty until December 31, 2000, the deadline established in the Treaty, due to concerns over “significant flaws in the treaty” (Clinton, 2000). President Clinton stated “I will not, and do not recommend that my successor submit the treaty to the Senate for advice and consent until our fundamental concerns are satisfied” (Ibid). The major concern was that the ICC would invade sovereignty rights of nations and refuse to be encumbered by Article 17 (specifically subsections 1a, 1b) of the Treaty, that issues under the treaty are inadmissible “unless the State is unwilling or unable genuinely to carry out the investigation or prosecution” (Rome Statute of the ICC, 1998, p. 17).

President Bush, having concerns similar to President Clinton, has not submitted the Rome Treaty to the Senate to perform its “advise and consent” to the treaty. On May 6, 2002 President Bush notified the United Nations (UN) that the U.S. would not be a party to the ICC and renounced the commitment made on December 31, 2000 (Republican Policy Committee, 2004). Instead the US is working towards bilateral arrangements, under article 98, with nations party to

the Rome Treaty, to grant immunity to US personnel (Coalition for the ICC – USA Country Info website) and prevent US personnel from being brought before the ICC. Several countries are refusing to cooperate with US goals even after the threat of withdrawal of military and financial assistance. Also, under the American Servicemembers' Protections Act (ASPA) any entity of local, state or federal government is prohibited from cooperating with the ICC (no arrest, detention, extradition, seizures, mutual assistance, or permit any investigative activity authorized by the ICC (ASPA, 2002, Sec. 4). After failed votes in the UN Security Council to pass resolutions to grant UN personnel immunity, American troops were removed from several UN Peacekeeping missions and vetoed continuation of the entire UN Mission in Bosnia and Herzegovina (UNMIBH) (U.S. Mission to the European Union, 2002). ASPA also allows the President to use all means necessary to free certain US agents and officials from captivity of the ICC, including military force (see ASPA, section 8).

It is apparent that the U.S. is unreceptive to the idea of joining the ICC until substantive changes are made with regard to the treaty. Currently, the ICC's goal is to "promote the rule of law and ensure that the gravest international crimes do not go unpunished" (ICC website – About the Court, n.d.). Specifically, those "gravest" of crimes include "genocide", "crimes against humanity", "war crimes", and "crimes of aggression" (Rome Statute of the ICC, 1998, p. 8). This court secured jurisdiction under the Rome Treaty on July 1, 2002.

Whereas combating these evils is noble and right, definitions must be specific. The Rome Statute does continue and specifically define what each of those crimes entail in Articles 6, 7, and 8. Herein lays some potential problems. For example, Article 7 -1(k) defines an aspect of "crimes against humanity" as "Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health." Could the U.S., by

refusing to recognize an EU-recognized “right” to homosexual marriage, be interpreted one day by the ICC as being inhumane and intentionally causing great suffering to mental health (in violation of Article 5 – 1(b))? The U.S. would likely be “unwilling to carry out the investigation” of the alleged crime (by the government itself), and hence permit the ICC to take action. If United States’ legal interpretive history is any example, this certainly is a possibility. Similarly, Article 7- 2(g) defines persecution as “the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity”. The same example regarding homosexuality could apply here as well. There are many more examples that could be drawn out of the text of the Rome Statute, but this should suffice in illuminating part of the reason the Rome Statute has “significant flaws” (Clinton, 2000, p. 1).

U.S. Ambassador Stephen Minikes set forth four formally stated obstacles to the U.S. joining the ICC while addressing the Organization for Security and Cooperation in Europe (OSCE):

1. the ICC has assumed jurisdiction over nationals of countries not party to the Rome Treaty, to include government officials and military servicemen;
2. there is little accountability over the ICC and its prosecutors and it is feared that politically motivated attempts to investigate and prosecute U.S. servicemen will ensue;
3. the ICC can unilaterally decide whether an American investigation or prosecution was adequate;
4. the ICC undermines the role of the UN Security Council in determining if a state has committed an “act of aggression” (4 July 2002).

Jack Spencer, senior policy analyst at The Heritage Foundation adds that the ICC as it currently stands also is antithetical to the principles fought for in the American Revolution; namely, that the “American system of government is based on the consent of the governed, and Americans have the right to be tried in accordance with the laws enacted by their elected representatives, to be judged by their peers, and none other” (10 July 2003). Spencer continues by offering three additional reasons that the ICC immunity should be supported:

1. “Americans are not the problem”
2. “American criminals are successfully prosecuted by the American judicial system;”
3. “Americans cannot be expected to contribute to coalitions without ICC immunity” (10 July 2003).

Until there is willingness on the part of the Rome Treaty participants to understand the legal ramifications under the Constitution to the U.S. they will not understand the principled stand taken by both the current Republican administration and the previous Democrat administration. It seems unlikely that the U.S. will obtain the desired revisions to the treaty; its implementation may have progressed too far. The only real remaining option is to continue to pursue individual bi-lateral agreements with other nations to get their agreement not to assist the ICC in investigating or prosecuting American personnel under Article 98 of the Rome Treaty. There does still remain the possibility that an American might have to be freed from the grip of the court by force under the ASPA. It would seem likely that the ICC would not want to risk pressuring the U.S. into a situation of such proportion, so it seems unlikely, for the time being, that the status quo will remain. The U.S. will be extremely fastidious in deciding whether to send troops to the next peacekeeping mission. But even worse, it could potentially create problems for soldiers fighting in Afghanistan and Iraq.

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