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# The United States and the International Criminal Court: The Case for “Dexterous Multilateralism”

Eric P. Schwartz\*

## I. INTRODUCTION

On Sunday, December 31, 2000, the United States signed the Rome Statute of the International Criminal Court (“ICC”), and thus became one of the 139 nations that met the New Year’s Eve, 2000 deadline for signature established in the Treaty.<sup>1</sup> David Scheffer, who served as the Clinton Administration’s Ambassador-at-Large for War Crimes Issues, signed on the President’s behalf, after traveling to the United Nations on the Sunday morning at the direction of the National Security Advisor, Samuel R. “Sandy” Berger.

Scheffer’s last major diplomatic mission for the outgoing Administration came after an eleventh-hour Presidential decision that marked a major shift in US policy toward the ICC. The President’s decision was hailed by Court proponents, who have long advocated the establishment of a permanent international judicial tribunal with jurisdiction over genocide, crimes against humanity, and war crimes. But the decision was also roundly condemned by conservative commentators and members of Congress, who see the ICC as a threat to US sovereignty. John Bolton, now Undersecretary of State for Arms Control and International Security, writing in the *Washington Post*, accused the President of “a stealth approach to eroding our constitutionalism and undermining the independence and flexibility that our military forces need to

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<sup>1</sup> See Rome Statute of the International Criminal Court, UN Doc No A/CONF.183/9, reprinted in 37 ILM 999 (1998) (hereinafter Rome Statute).

defend our interests around the world.”<sup>2</sup> He urged the incoming Administration, of which he is now a part, to “unsign” the Treaty.

Despite highly charged criticism by ICC opponents, President Clinton’s signature was far from the unequivocal endorsement of the ICC that Court advocates would have most welcomed. In fact, the President’s signature statement complained about “significant flaws in the Treaty,” and indicated that US concerns should be effectively addressed before the Senate considered consent to ratification of the Rome Statute.<sup>3</sup> Signature offered neither unqualified support nor unbridled rejection of the Rome Statute. Rather, it represented an effort to manage effectively legitimate yet conflicting policy imperatives to reach an equilibrium that best addressed US interests. This effort at “dexterous multilateralism” is worth examining closely, as it relates to an issue of growing importance in US foreign policy: the tension between sovereign prerogatives and deference to multilateral institutions. It is this issue which increasingly bedevils US policymakers as they consider how to address the war on terrorism, the situation in Iraq, and related national security challenges.

## II. BACKGROUND TO SIGNATURE

In many respects, President Clinton’s decision to sign the Rome Statute grew out of his Administration’s forward-leaning approach toward multilateral engagement on international human rights issues. This included successful Administration efforts to establish the post of the United Nations High Commissioner for Human Rights; to secure Senate consent to ratification of the International Convention on the Elimination of All Forms of Racial Discrimination; to sign the Convention on the Rights of the Child; and to negotiate the International Labor Organization Convention on the Worst Forms of Child Labor, as well as UN protocols against trafficking in persons, exploitation of children, and use of child soldiers. The Clinton Administration combined its emphasis on promoting international human rights norms with an effort to encourage political accountability for human rights abuses—for example, through active US involvement in the UN Human Rights Commission. US officials also recognized that the United States could not easily urge upon others standards of behavior and accountability that the US government was unprepared to accept for itself, and the Administration spent a great deal of time and energy in preparing reports on human rights practices in the United States, which were submitted to UN bodies pursuant to treaties relating to civil and political rights, torture, and racial discrimination.

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<sup>2</sup> John R. Bolton, *Unsign That Treaty*, Wash Post A21 (Jan 4, 2001).

<sup>3</sup> Statement by the President, *Signature of the International Criminal Court Treaty* (Dec 31, 2000), available online at <<http://usinfo.state.gov/topical/pol/usandun/00123101.htm>> (visited Mar 30, 2003).

The Clinton Administration also embraced the concept of international criminal accountability for massive human rights violations and played a leading role in efforts to establish the International Criminal Tribunals for the Former Yugoslavia and Rwanda. In the case of the Balkans, in particular, the Administration viewed the Tribunal not only as a means to ensure justice for victims of grave abuses, but also as part of an international political effort to marginalize extremists and thereby encourage regional peace, stability, and reconciliation.

In 1995, on the strength of this general orientation toward human rights and accountability, several factors set the stage for a Clinton Administration commitment in principle to an International Criminal Court. These included sympathy within the Administration for a permanent structure which might obviate the need for ad hoc tribunals, and the completion of a draft statute on an International Criminal Court by the UN's International Law Commission—a draft that envisioned a “gatekeeper” role for the UN Security Council analogous in many ways to the role played by the Security Council in the Yugoslavia and Rwanda Tribunals.

Senior US officials saw an opportunity to advance the issue at an October 1995 event at the University of Connecticut. It was there that the President was to inaugurate a research center named for Senator Thomas J. Dodd, who had been a senior prosecutor at the International Military Tribunal at Nuremberg. At the event, the President affirmed the importance of successful prosecution of war criminals in the former Yugoslavia and Rwanda, and noted that the “signal will come across even more loudly and clearly if nations all around the world who value freedom and tolerance establish a permanent international court to prosecute, with the support of the United Nations Security Council, serious violations of humanitarian law.”<sup>4</sup>

### III. INITIAL US POSTURE TOWARD THE ICC

The President's endorsement of a “permanent international court” laid the groundwork for the next several years of US diplomacy on the ICC. To be sure, the President's reference to a role for the Security Council reflected a US desire to make certain that the United States, through its veto power in the Council, would have the ability to prevent Court action against US officials. But the reference, and the resulting diplomacy in support of US objectives, reflected a US desire to ensure that the ICC would not undermine the role of the UN Security Council in managing global peace and security issues. US officials were particularly concerned that a Court that was independent of—and therefore not accountable to—the Security Council risked “shoe-horning” into a judicial

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<sup>4</sup> William J. Clinton, *Remarks at the University of Connecticut in Storrs*, 2 Pub Papers 1595, 1597 (Oct 15, 1995).

framework controversies that are the appropriate province of politics and diplomacy. American officials thought this problem could play out in a number of ways.

First, the Administration argued that the absence of a requirement for Security Council endorsement of ICC action would risk inappropriate, and possibly dangerous, Court interference in international peace and security issues. If, for example, the Security Council were involved in sensitive negotiations to prevent war on the Korean peninsula, it might not be prudent for an institution not accountable to the Security Council to be filing charges against Kim Jong Il for massive violations of human rights. Similarly, the Court could run roughshod over a domestic political consensus that a South African-style truth and reconciliation model, rather than one focused on criminal accountability and punishment, would best serve the cause of political reconciliation in a particular country.

Second, with judges chosen by states parties, US officials feared the Court could become politicized and seek to target Americans. It is difficult to dismiss this concern out of hand. After all, the United States has worldwide responsibilities for international security and maintains more than two-hundred thousand American troops overseas during peacetime. While friends and allies welcome this US role, it is in many cases resented by America's adversaries. Why wouldn't they seek to use the Court to level the playing field—that is, strike out against the American government through judicial proceedings when other avenues of attack were unavailable? Proponents of a highly independent Court claimed that US officials would be protected by the Treaty's incorporation of *complementarity*, or deferral of cases to domestic courts unless it was determined that the state with jurisdiction was genuinely unable or unwilling to investigate (and prosecute if warranted).<sup>5</sup> But this did not quell official US concerns, as the complementarity provision under discussion (and ultimately adopted) left to judges of the Court the final decision on the adequacy of domestic judicial institutions.

It is also worth noting that for many opponents of a highly independent ICC, the integrity of Court judges was not necessarily the key issue. Rather, it was that an ICC not subservient to the UN Security Council would be insufficiently accountable to US political, legislative, and judicial processes. This concern was heightened by the existence of differing perspectives internationally regarding the specific requirements of international humanitarian law. In short, there could well be situations where the US interpreted the law to permit actions that other states (and ICC prosecutors and judges) believed to be prohibited.

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<sup>5</sup> See Rome Statute at art 17 (cited in note 1) (“A case is inadmissible where: ... (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution.”).

Finally, US officials expressed concerns regarding the impact of an independent ICC on the willingness of capable states to engage in international humanitarian actions. They argued that, in the absence of Security Council supervision, the United States and other militarily capable states might be deterred from deploying militaries to save lives if they feared that their soldiers might be put before the ICC for alleged human rights violations in the conduct of a humanitarian rescue operation.

In essence, advocates of a strong and independent Court not directly accountable to the UN Security Council argued that the United States had it backwards. The problem was not that a strong Court would seek to impose law where politics and diplomacy should govern. Rather, an ICC whose actions could be vetoed by the most powerful states in the international system (that is, the permanent members of the Security Council) would ensure the imposition of politics where law ought to prevail, and thereby sustain the prerogative of the United States and others to disregard human rights norms when compliance proved inconvenient. They argued that an international judicial institution of this nature needed to be accountable to a much broader constituency than the fifteen members of the Security Council.

Advocates of a more independent Court also noted that international law already sanctions trials of foreign nationals by sovereign states for crimes committed in their territories, and that governments ratifying an ICC Treaty would only be transferring that prerogative to an international institution. Thus, US concerns about the limited accountability of this institution to the US political and legal process were overblown. Finally, proponents of a strong Court contended that US fears of politicization were also exaggerated; the institution itself would be properly accountable to the states parties to the Treaty, which would choose judges and a prosecutor and otherwise influence the Court's growth and development.

In sum, the debate on the ICC reflects sharply divergent views about the constituencies to which an International Criminal Court should be accountable. This should not be surprising, as the two sides of the debate have widely differing beliefs about the nature of sovereign prerogatives, the role of existing international institutions designed to maintain international peace and security, and the potential integrity and capacity of new structures. The dilemma, of course, is that the position of each side is defensible. The risks that each has identified are real, and it is only in the practical evolution of the Court that we will discover how these issues will be managed.

But the fact remains that the US position on a gatekeeper role for the Security Council did not prevail. Instead, the US is left with a Rome Statute that will, in specified circumstances, enable the ICC to assert jurisdiction over US

citizens for alleged acts of genocide, crimes against humanity, and war crimes.<sup>6</sup> Moreover, the US refusal to ratify will not insulate Americans from the Court's claims of jurisdiction, though any such claims will be subject to the provisions of complementarity previously described. The US is also left with a Treaty that came into force with its sixtieth ratification in 2002 and is expected to begin operations in earnest this year.

So how should the United States manage this situation?

#### IV. DEXTEROUS MULTILATERALISM

It was in the context of this dilemma that President Clinton faced the decision on signature in late 2000. By December, it had become clear that US diplomatic efforts to obtain significant additional protections—efforts which had continued even after adoption of the Rome Statute—would not succeed. At the same time, the President had reviewed material describing the impending December 31 deadline for signature and asked National Security Advisor Sandy Berger about its status. As the principal White House Advisor on the ICC, I was tasked with drafting a response, and I concluded that the President's inquiry demanded more than a simple reiteration of US policy against the Rome Statute. In a memorandum to Berger, prepared in conjunction with other offices at the National Security Council ("NSC"), I recommended that NSC staff develop an options paper, laying out the cases for and against signature. Berger endorsed the exercise and ultimately sent a memorandum to the President presenting both sides of the issue, and reflecting a strong divergence of views not only within the NSC staff, but among Administration agencies.

It is worth noting that Berger insisted that the case against signature be made as robustly as possible; in fact, he returned an early memorandum I drafted and instructed me to strengthen the arguments behind the "no" option. I did not believe he was seeking to stack the deck against signature. Rather, I was convinced he believed the President was inclined toward signature and wanted the President to be well aware of the downsides before taking such action. Berger's posture was in keeping with his integrity, his excellent political instincts, and his loyalty to the President.

The case against signature was straightforward. In essence, signing could undermine US opposition to key elements of the Rome Statute by sending the confusing message that the US now endorsed a Treaty that it had opposed

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<sup>6</sup> The Rome Statute would permit the Court to assert jurisdiction over US citizens if the alleged crimes were committed in the territory of a state that was a party to the Treaty or in a state that accepted the Court's jurisdiction. In addition, US citizens could in theory be prosecuted as a result of UN Security Council referral of a situation to the ICC, although the US veto in the Council would enable the US Government to prevent such a referral. See Rome Statute at arts 12–13 (cited in note 1).

strongly only two years before, and accepted provisions that the Administration continued to believe conflicted with US interests. Moreover, signing might not even serve the ultimate objectives of Court proponents, as it could enhance momentum for efforts in the Congress and the incoming Administration to take action against the Treaty.

The argument for signing was more complicated. Of course, signing would send a powerful signal of United States support for the principle of international accountability for massive abuses of human rights. From the time of the Nuremberg Tribunal to the formation of the International Criminal Tribunals for the Former Yugoslavia and Rwanda, the United States has been at the forefront of efforts to ensure such accountability. And, like it or not, the ICC had become the most likely inheritor of the Nuremberg legacy. Signing also sent a signal to other governments of US engagement with the ICC, which might help to persuade them to consider seriously US concerns.

But could the United States sign and sustain its opposition to key elements of the Treaty? Administration legal experts agreed that the US government could do so: that signature would not prevent the United States from conditioning ratification on the satisfaction of its concerns (especially if those concerns could be addressed without altering the text of the Rome Statute—that is, in documents that supplemented the Treaty); and that signing would not preclude the government from rejecting Court efforts to assert jurisdiction over US officials.

As the end of the year approached, the issue was briefed to the President and, on Saturday night, December 30, the National Security Advisor informed me that the President had decided to sign. The President's statement upon signature expressed support for the principle of accountability, but also emphasized that the Administration retained its serious concerns about jurisdictional issues in the Rome Statute. In particular, the statement emphasized US opposition to the Court's assertion of jurisdiction over the nationals of nonparty states, with the President asserting that he would not submit the Treaty to the Senate for advice and consent to ratification, nor recommend that his successor do so, "until our fundamental concerns are satisfied."<sup>7</sup> Nonetheless, the statement argued that "signature is the right action to take at this point," as it would put the United States "in a position to influence the evolution of the Court."<sup>8</sup>

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<sup>7</sup> Statement by the President (cited in note 3).

<sup>8</sup> *Id.*

## V. ASSESSING THE CASE FOR SIGNATURE

While US signature was far from an unequivocal endorsement of the Rome Statute of the ICC, it did indeed suggest a willingness to be a “good neighbor” to the Court, and to avoid attacks on the institution as the United States sought to encourage modifications to address US concerns. Signing also implied a willingness to consider the functioning of the Court over time, and to be prepared to adjust US approaches accordingly.

Noting that the United States retained its fundamental concerns about the Court, critics of signature question why this good neighbor approach was more appropriate than one designed to thwart the functioning of the Court. They argue that the United States could have diminished the Treaty’s power and influence by refusing to sign it, even while recognizing the inevitability of the Treaty coming into force.

A good neighbor approach makes more sense for both tactical and philosophical reasons. On the tactical level, the United States has increasingly found itself outnumbered in multilateral treaty negotiations, where the principle of one nation, one vote often prevails. When confronted with the reality that a preferred US position does not command majority support, US officials must decide whether to remain engaged and offer (or accept) compromises that are far from ideal, or whether to stick to their guns, walk away from a process that the United States cannot dictate, and risk an outcome that is worse than compromises that could have been achieved.

The correct choice is not always self-evident. As a general matter, treaty provisions are not binding upon nonparties. Thus, rejecting a compromise about which US officials are not enthusiastic—even if it assures that other countries adopt a treaty that is unacceptable to the United States—is an option. But it can be an option with serious costs.

In some cases, the obligations agreed upon by others and formalized in a treaty to which the US is not party will, at a minimum, negatively impact US diplomacy and, in the more extreme cases, have implications for US freedom of action on important peace and security issues. Such was the case with the Ottawa process leading to the Convention on the Prohibition of Landmines. While the United States is not bound by the Ottawa Treaty provisions, many of its allies are, raising complicated questions about US use and deployment of landmines in combined operations.

In other cases, obligations agreed upon by others will inform the development of general international norms affecting US equities. That was certainly true with the Landmines Convention. It was also the case in negotiations on rules relating to the Rome Statute of the ICC, where, for example, Pentagon officials played a central role in establishing the definitions of crimes. But to play this sort of a role, the United States must remain engaged.

The experiences of the Clinton Administration in two negotiations involving human rights issues provide contrasting models of US engagement, and offer valuable insights into how the US might position itself on issues of this kind.

The first negotiation involved the ICC itself and, in particular, the US posture prior to the international conference that resulted in the Rome Statute in 1998. As indicated above, US support at the time for a “gatekeeper” role for the UN Security Council reflected an Administration consensus that the United States should not permit its nationals to be subject to the jurisdiction of the Court without some prior act of US consent. As we now well know, that position ran up against substantial sentiment among negotiating parties in favor of more expansive jurisdiction for the Court.

But before the final Rome negotiations began in earnest, US and foreign diplomats suggested that a deal was possible: in return for accepting ICC jurisdiction over the nationals of states that *ratified* the Treaty, the United States could secure protection from prosecution for officials from *nonratifying* states. Although this outcome would have ensured that the United States would not be an early ratifier of the Rome Statute, proponents of the deal, including senior officials in the Department of State, argued that nonaccession was worth the benefits of the protection accorded US officials and continued US engagement in the ICC process.<sup>9</sup>

However, the Administration could not reach an early consensus on whether to offer such a compromise. Thus, until the very end of the Rome Conference, the Administration insisted that Treaty parties—that is, governments that chose to ratify—be entitled to limit the ICC’s jurisdiction over their nationals through broad opt-out provisions in the Statute.

Proponents of this tougher US position, led by senior defense and military officials, argued that the Clinton Administration should not agree to a Treaty that it could not ratify in due course, and that, through more vigorous diplomatic efforts, the United States could achieve the more ambitious negotiating objective. Frankly, proponents of the tougher line may also have been concerned that, after accepting a compromise and obtaining an agreed text, the Clinton Administration or a successor might be tempted to seek ratification even if it meant ICC jurisdiction over US officials. In any event, the divergence of views within the government was not resolved prior to the Rome Conference, and the outcome was a Treaty which asserts Court jurisdiction over nationals of both parties and nonparties.

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<sup>9</sup> Had such a provision been included in the Rome Statute, it would not have necessarily barred all ICC action against officials of nonratifying states. This is because Security Council resolutions could have established jurisdiction over officials of nonratifying states in specific cases.

The irony of this situation is that the deal that the Administration might have achieved, but did not seek, in Rome quickly became the fix that the US sought in the post-Treaty negotiations. Some may question whether the Administration, even in Rome, could have achieved the compromise arrangement.<sup>10</sup> But there is no question that whatever opportunity there had been to do so had long passed once the Rome Statute had been adopted.

This diplomatic outcome contrasts with the result of a second negotiation, which ended in 2000 and involved a draft Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict.<sup>11</sup> For several years prior to 2000, there had been broad international consensus that the Convention's minimum age for recruitment into the armed forces and participation in hostilities—set at fifteen years of age—should be raised. Many US negotiating counterparts were urging the Administration to accept an eighteen-year-old minimum for both recruitment and participation in hostilities. The US position had long been that seventeen-year-olds, with permission of their parents, should be permitted to enter the armed forces and to participate in hostilities. The Administration believed, with great merit, that the real issue was not seventeen versus eighteen, but rather the question of much younger children conscripted into combat in many parts of the developing world. US Defense Department officials contended that US military readiness requirements, and the need to tap into the nationwide pool of potential candidates in high school, made it essential that the United States be able to recruit seventeen-year-olds. Moreover, US military leaders were hardly eager to place restrictions on the deployment of seventeen-year-olds once they were recruited.

In negotiations that took place during much of the 1990s, the US stood firm on a seventeen-year-old floor for both recruitment and participation in hostilities. However, it became apparent in 1999 that US unwillingness to bend on this across-the-board position could diminish incentives for compromise among US negotiating counterparts, and risk the hardening of a consensus among many other governments on behalf of an eighteen-year-old minimum for both recruitment and participation in hostilities.

Thus, with the ICC and Landmines experiences fresh in the minds of civilian and military leaders at the Pentagon, officials began to consider carefully what might be an acceptable, if not an ideal, arrangement. Upon review, the Department of Defense (“DOD”) determined that taking “all feasible measures” to withhold seventeen-year-olds from “direct participation” in hostilities would not have a discernible impact on readiness or on other national security interests.

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<sup>10</sup> Of course, many would argue that such a compromise would have rendered the Treaty fatally flawed.

<sup>11</sup> See Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, General Assembly Res No 54/263, UN Doc No A/Res/54/263 (2000) (hereinafter *Child Soldiers Protocol*).

Reversing a longstanding insistence on retaining the existing policy, DOD officials signaled their willingness to accept an eighteen-year-old standard for participation in hostilities, a position that the Administration adopted and presented to US negotiating partners. The US shift on this issue averted pressures for an eighteen-year-old standard for recruitment, and the result was a Protocol that garnered broad support within the international community.<sup>12</sup>

In the Child Soldiers Protocol negotiations, and for the first time in recent memory, the United States expressed a willingness to change a major US military practice solely to conform to the requirements of an international human rights treaty. In so doing, officials diminished the likelihood that future US administrations would face international pressures to alter US practices with respect to the recruitment and training of seventeen-year-olds. The action also made sense in terms of building US goodwill among a range of other governments and sustaining American engagement in the development of international human rights law.

US engagement on the Child Soldiers Protocol provides the right model for thinking about the US posture toward the ICC. Of course, the stakes in the case of the ICC are higher, and the US is probably without the ability to modify the text of the Rome Statute. At the same time, the ICC will soon be up and running in earnest, and the Court, as well as Treaty parties, will consider many issues impacting US interests. For example, the United States has a critical interest in influencing decisions on the general role of the UN Security Council in determining whether a crime of aggression has occurred. Similarly, with the proliferation of international legal actions against human rights violators in domestic courts from Chile to Belgium to the United Kingdom, some have suggested that the ICC might play a role in rationalizing decisions on difficult jurisdictional issues. As in the case of aggression, the US government would have a keen interest in influencing action that the ICC might take in this area. Also, with the advent of the ICC, the UN Security Council may be unlikely to adopt ad hoc tribunals for crimes committed after entry into force of the Rome Statute. Thus, in the context of a Security Council consensus to go after a future Slobodan Milosevic, the United States would not want to have foreclosed any possibility of US–ICC cooperation.

Finally, it is important to consider the US posture toward the ICC in terms of the historic commitment of the United States to international human rights, the rule of law, and accountability for grave abuses—commitments that hardly began with the Clinton Administration. In fact, it was not Madeleine Albright,

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<sup>12</sup> See *id.* at arts 1–4. The Clinton Administration signed, and the Bush Administration ultimately ratified this important measure. See US Dept of State, *Ratification of Optional Protocols to the Convention on the Rights of the Child* (Dec 23, 2002), available online at <<http://www.state.gov/r/pa/prs/ps/2002/16198.htm>> (visited Mar 30, 2003).

but rather Lawrence Eagleburger, President George H.W. Bush's last Secretary of State, who arguably set the United States on a course that ultimately fostered the adoption of the Treaty to establish an International Criminal Court. In December 1992, at the International Conference on the Former Yugoslavia in Geneva, Switzerland, the then-Secretary declared that it was "time for the international community to begin identifying individuals who may have to answer for having committed crimes against humanity."<sup>13</sup> He also endorsed the UN process to establish accountability, and urged the incoming Clinton Administration to carry forward the effort. Eagleburger's tough language was the logical extension of Bush Administration support, two months earlier, for the creation of a UN commission of experts to examine evidence of war crimes and to recommend further appropriate steps to address this issue.

## VI. THE BUSH ADMINISTRATION AND THE WAY AHEAD

As reflected by US efforts to ensure the delivery of Slobodan Milosevic to the Hague to face prosecution by the International Criminal Tribunal for the Former Yugoslavia, the second Bush Administration has sought to use the concept of international criminal accountability in the Balkans in much the same way as did the Clinton Administration: to marginalize extremists and thereby promote the process of democratization. To be sure, it is nowhere ordained that American support for the principles of universality and international accountability through an ad hoc international criminal tribunal compels the United States to embrace the ICC in its current form. But unequivocal opposition, reflected, for example, in efforts to force other governments to modify their commitments to the Court, cannot reasonably be reconciled with the United States' historic posture on the question of human rights and accountability.

Unfortunately, the Bush Administration's posture toward the ICC has tended toward this more extreme position. Shortly after formally renouncing US signature (and any obligations attendant to that act) in May 2002, the Administration sought Security Council endorsement of an indefinite exemption from ICC jurisdiction for all US officials engaged in peacekeeping operations anywhere in the world. Moreover, the US threatened not only to withdraw official US personnel from all UN operations if the US did not get its way, but also threatened to veto continuation of a UN law enforcement assistance mission in Bosnia and Herzegovina that was up for renewal in June 2002. The overwhelming majority of other governments opposed the US position, and while US allies sought some sort of compromise, they argued that the Rome Statute effectively authorized the Security Council to provide only one year, and

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<sup>13</sup> Lawrence Eagleburger, *The Need to Respond to War Crimes in the Former Yugoslavia*, 3 US Dept of State Dispatch 923, 923 (1992).

not indefinite, exemptions from prosecution.<sup>14</sup> Thus, even US friends and allies were loath to accept a US proposal that would force them to undermine the text of a Treaty they had only recently ratified. Nonetheless, the Administration held firm and, on July 1, 2002, vetoed extension of the UN mission in Bosnia. At the time, Administration critics, including this author, noted that the US is now depending on the leadership of other governments in peacekeeping missions in Afghanistan, the Balkans, and East Timor, and argued that US threats of disengagement sent the wrong message to allies whose support in the war on terrorism, Iraq, and other issues will be critical in the years ahead.<sup>15</sup> Although the Administration ultimately changed its approach and accepted a one-year exemption (which enabled continuation of the Bosnia mission), the compromise came after much of the diplomatic damage had already been done.<sup>16</sup>

As the Bush Administration confronts additional ICC-related issues in the months and years to come, a far more prudent course would be to restore the prior Administration's posture of dexterous multilateralism. In that posture, the Bush Administration could still emphasize that it is not prepared to support ratification or endorse Treaty provisions on Court jurisdiction over the nationals of nonparties. But the Administration could also make it clear that it is keeping its options open and avoiding actions that would undermine the Court and imperil a future US relationship with the institution.

In view of Administration statements and actions over the past two years, it is unrealistic to expect President Bush to embrace the ICC. At the same time, it is not unreasonable to expect the Administration to avoid a self-defeating and hostile approach toward the Court, which will serve only to antagonize valued allies and undermine US leadership around the world.

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<sup>14</sup> The relevant provision is Article 16 of the Rome Statute, which provides: "No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions." Rome Statute at art 16 (cited in note 1).

<sup>15</sup> For the author's views at the time, see Eric Schwartz, *The US Assault on World Criminal Court*, Boston Globe A11 (July 1, 2002).

<sup>16</sup> UNSC Resolution 1422, adopted on July 12, 2002, provides a one year exemption for "current or former officials or personnel from a contributing State not a Party to the Rome Statute over acts or omissions relating to a United Nations established or authorized operation." Security Council Res No 1422, UN Doc No S/RES/1422 (2002).



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