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Jean Galbraith
University of Pennsylvania Carey Law School

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The Bush Administration's Response to the International Criminal Court

By
Jean Galbraith*

I.
Preface

The Bush administration, with the backing of Congress, has made sustained international efforts to keep the International Criminal Court ("ICC") from attaining any functional jurisdiction over the United States or its citizens. It has taken unprecedented legal steps, wielded its veto power in the Security Council, and negotiated bilateral treaties limiting the extradition of U.S. citizens to the ICC. This aggressive diplomacy against the ICC's jurisdictional reach differs substantially from the more ambivalent approach adopted under President Clinton. While the Bush administration seeks the support of other nations in achieving its aims, these aims are themselves unilateral attempts to shield American citizens, policies, and sovereignty from international oversight.

Very little scholarship has looked systematically at the Bush administration's behavior with relation to the ICC.[1] This Article attempts to fill that gap. I first examine relevant events prior to President Bush's inauguration, then present a chronology of events during the first two years of his administration. Following this factual discussion, I analyze U.S. objectives related to the ICC and argue that the Bush administration has pursued these objectives with aggressive unilateralism. I consider what factors motivated the change in its approach from that of the Clinton administration. Finally, I evaluate the success of the administration's strategy in achieving U.S. objectives. I argue that while the Bush administration's aggressive unilateralism accomplishes U.S. objectives successfully in the short term, it is a difficult long-term strategy to sustain. The administration's approach surrenders U.S. influence over the ICC, thus requiring sustained brinkmanship to protect U.S. autonomy, and curtails U.S. ability to bring war criminals to justice in the future.

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* J.D. Candidate, 2004, School of Law, University of California at Berkeley (Boalt Hall). My thanks to all the participants in the international law writing seminar for their suggestions on this piece. Laura Altieri, my editor, deserves special thanks for her thoughtful suggestions.

1. For one recent exception focusing on how U.S. concerns with the universality of the Rome Statute have led to what the author calls its "campaign of political blackmail," see Marc Weller, *Undoing the Global Constitution: U.N. Security Council Action on the International Criminal Court*, 78 Int'l Aff. 693, 712 (2002).

II.
THE DEVELOPMENT OF THE ICC AND THE AMBIVALENT ENGAGEMENT OF THE CLINTON ADMINISTRATION

The 1990s saw the rise of international prosecution of serious human rights crimes, particularly at sites of genocide. The U.N. Security Council established international tribunals to judge individuals from Rwanda and the former Yugoslavia and considered similar plans for other troubled parts of the world. The General Assembly renewed its call, largely dormant since Nuremberg,[2] for consideration of an international criminal court.[3] In 1998, the ICC came closer to becoming a reality when the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court met in Rome. The terms of the resulting Rome Statute gave the ICC jurisdiction over war crimes, genocide, and crimes against humanity that occur after the court's establishment.[4]

While perhaps conducive to international human rights in the long term, the Rome Statute raised the specter of American soldiers and civilian leaders being tried without constitutional protections by an anti-American prosecutor in front of non-American judges. Led by its Ambassador at Large for War Crimes Issues, David Scheffer, the Clinton administration had worked actively to write many protections and procedural safeguards into the treaty and later into its supplemental agreements to limit this possibility.[5] These safeguards included some deference by the ICC to national jurisdiction,[6] numerous procedural protections for the accused,[7] yearly suspensions of prosecution at the vote of the Security Council,[8] and ICC respect for bilateral agreements limiting extraditions to the ICC.[9]

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2. *See* G.A. Res. 260, U.N. GAOR, 3d Sess., U.N. Doc A/810 (1948) (calling on the International Law Commission to "study the desirability and possibility of establishing an international judicial organ" to address crimes like genocide). Whether due to the difficulties of agreeing on terms—for example, the definition of the crime of aggression—or Cold War tensions, little action outside of committees occurred until the 1990s. For an outline of the interim period, see M. CHERIF BASSIOUNI, THE STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A DOCUMENTARY HISTORY 10-15 (1998).

3. G.A. Res. 47/33, U.N. GAOR, 47th Sess., U.N. Doc. A/RES/47/33 (1992), *available at* http://www.un.org/documents/ga/res/47/a47r033.htm. An earlier call in 1989 had focused on drug traffickers. G.A. Res. 44/39, U.N. GAOR, 44th Sess., U.N. Doc. A/RES/44/39 (1989), *available at* http://www.un.org/documents/ga/res/44/a44r039.htm (last visited Oct. 28, 2002).

4. *See* Rome Statute of the International Criminal Court, U.N. Doc. A/CONF/183/9, arts. 5(1), 11 (1998), *available at* http://www.un.org/law/icc/statute/romefra.htm. The ICC will also have jurisdiction over the crime of aggression once a provision gets adopted which defines this crime. *Id.* at art. 5(2). The court came into being on July 1, 2002, following its ratification by the sixtieth country in April 2002.

5. David Scheffer, *Staying the Course With the International Criminal Court*, 35 CORNELL INT'L L. J. 47, 68-87 (2002).

6. *Id.* at 73; Rome Statute, *supra* note 4, arts. 18, 20(3).

7. Scheffer, *supra* note 5, at 73. Rome Statute, *supra* note 4, art. 67 lists specific rights, including right to counsel; right to translation; and right to remain silent without such silence affecting determinations of guilt or innocence.

8. Rome Statute, *supra* note 4, art. 16; *see also* Scheffer, *supra* note 5, at 73.

9. Rome Statute, *supra* note 4, art. 98; *see also* Scheffer, *supra* note 5, at 74.

The Rome Statute remained open for signatures only until December 31, 2000.[10] In characteristic fashion, President Clinton waited until exactly that day to sign it. The statement he released in conjunction with the signing showed continued ambivalence: he sought to "reaffirm our strong support for international accountability," but without "abandoning our concerns about significant flaws in the treaty."[11] In particular, he was concerned that the treaty would claim jurisdiction over personnel of nations which had not ratified the treaty.[12] He recommended that his successor work to fix this problem and wait until satisfied that the ICC was a well-functioning body before submitting the treaty for ratification.[13]

Though willing to make recommendations to his successor, President Clinton did not seek to consult him. David Scheffer had instructions not to brief Congressional staffers or Bush administration transition team members during the last weeks of December.[14] Not surprisingly, both the incoming President and powerful members of Congress indicated concern with the decision to sign the treaty. Bush's spokesperson, Ari Fleischer, released a statement saying the incoming administration would not seek ratification in its current form.[15] Senator Jesse Helms's spokesperson suggested that the incoming President unsign the treaty.[16] John R. Bolton, soon to become Under Secretary of State for Arms Control and International Security in the Bush administration, wrote an op-ed piece in the Washington Post titled "Unsign That Treaty."[17]

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10. Rome Statute, *supra* note 4, art. 125(1). Thereafter, nations must accede to the Rome Statute in order to become parties. *Id.* at (3).

11. *Clinton's Words: "The Right Action,"* N.Y. TIMES, Jan. 1, 2001, at A6.

12. *Id.* The Rome Statute permits the ICC to exercise jurisdiction in any of the following cases: 1) The crime was committed on the territory of a nation which is a party to the treaty; 2) the crime was committed by a citizen of a party nation; 3) the Security Council refers a situation to the Prosecutor. Rome Statute, *supra* note 4, arts. 12-13. The first of these scenarios concerns the United States the most, since it can control the other two by not ratifying the treaty and exercising its Security Council veto. I use the term "functional jurisdiction" in this essay to refer to these three scenarios, since only through these scenarios does the Rome Statute permit the ICC to exercise its jurisdiction.

13. *Clinton's Words*, *supra* note 11. *The Economist* used the headline "Sign On, Opt Out" in covering this story in its Jan. 6, 2001 magazine. Clinton's statement recommending against the pursuit of ratification gets frequently cited by members of the Bush administration in justifying their own actions. Exchange with Reporters in Milwaukee, Wisconsin, 38 WEEKLY COMP. PRES. DOC. 1123 (June 2, 2002), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=2002_presidential_documents&docid=pd08jy02_txt-13 (last visited Mar. 30, 2003); Press Release, Office of Press Secretary, Press Briefing by Secretary of State Powell (May 28, 2002) *at* http://www.whitehouse.gov/news/releases/2002/05/20020528-5.html (last visited Mar. 19, 2003); Press Release, Office of Press Secretary, Press Briefing by Ari Fleischer (May 7, 2002), *at* http://www.white house.gov/news/releases/2002/05/20020507-6.html (last visited Mar. 19, 2003).

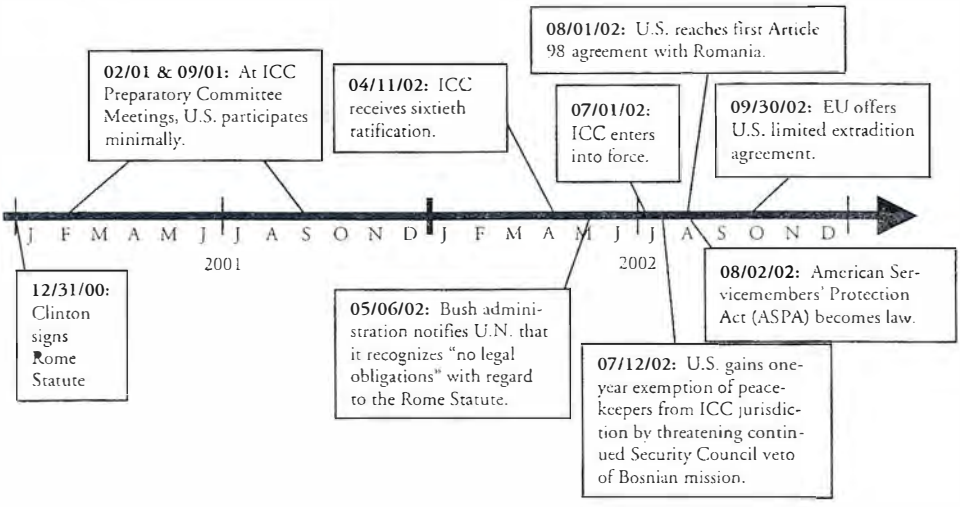
14. Scheffer, *supra* note 5, at 63, n. 5.

15. *Bush Aide Says Pact on Global Tribunal Faces New Review*, N.Y. TIMES, Jan. 3, 2001, at A4.

16. Betsy Pisik, *Conservatives Prepare to Contest Global Court; View Treaty as Threat to U.S. Military*, WASH. TIMES, Jan. 8, 2001, at A1. Representative Bob Barr has since called Clinton's decision to sign "one of the most questionable acts a President [sic] of the U.S. has ever done." Bob Barr, *Protecting National Sovereignty in an Era of International Meddling: An Increasingly Difficult Task*, 39 HARV. J. ON LEGIS. 299, 317 (2002).

17. John R. Bolton, *Unsign That Treaty*, WASH. POST, Jan. 4, 2001, at A21.

FIGURE 1



III.
OVERVIEW OF ICC DEVELOPMENTS DURING THE BUSH ADMINISTRATION

From January 2001 until May 2002, both the Bush administration and Congress indicated concern about the ICC but did not make the issue a policy priority. President Bush and his advisors expressed clearly and repeatedly that they did not think it in the U.S. interest to become a party to the treaty.[18] The administration participated only minimally at ICC Preparatory Sessions in February and September of 2001.[19] Congress passed provisions in several bills prohibiting the use of appropriated funds for the ICC.[20] September 11, 2001 caused very little demonstrable shift in the administration's focus, at most delaying the Bush administration's decision to announce that the United States had no legal obligations with regard to the Rome Statute.[21]

18. *E.g.*, Statement on Signing the Department of Defense and Emergency Supplemental Appropriations for Recovery from and Response to Terrorists Attacks on the United States Act, 2002, 38 WEEKLY COMP. PRES. DOC. 47-48 (Jan. 10, 2002), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=2002_presidential_documents&docid=pd14ja02_txt-17 (last visited Mar. 30, 2003); Statement on Signing the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 2002, 37 WEEKLY COMP. PRES. DOC. 1724 (Nov. 28, 2001), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=2001_presidential_documents&docid=pd03de01_txt-16 (last visited Mar. 30, 2003 [collectively hereinafter Press Releases]; Carol Giacomo, *Rice Says Rejecting Global Treaties Doesn't Equal Isolationism*, WASH. TIMES, July 30, 2001, at A11; Barbara Crossette, *Powell Pledges Strong Support for Wide Spectrum of U.N. Activities*, N.Y. TIMES, Feb. 15, 2001, at A15.

19. Scheffer, *supra* note 5, at 62 (a few "mid-level career lawyers" went to discussions on the crime of aggression and on financial matters); Bruce Zagaris, *Bush Administration Ponders Position Towards International Criminal Court*, 17 No. 6 INT'L ENFORCEMENT L. REP. 266 (2001).

20. *See* Press Releases, *supra* note 18.

21. Neil Lewis, *U.S. Is Set to Renounce Its Role in Pact for World Tribunal*, N.Y. TIMES, May 5, 2002, at A18. While perhaps the terrorist attacks demonstrated the need for international accountability, the administration recognized that its resulting foreign policy decisions might lead to conflict with the future ICC. Betsy Pisik, *U.N. Says Attacks Show Use For Court*, WASH. TIMES, Sept 20,

On April 11, 2002, the ICC received its sixtieth ratification,[22] ensuring that it would start operating (and having jurisdiction) from July 1 onward. As the accompanying timeline indicates (see Figure 1), efforts to extract the United States from any ICC entanglement picked up dramatically. On May 6, 2002, John R. Bolton, now Under Secretary of State for Arms Control and International Security, sent the following communication to the U.N. Secretary-General:

> This is to inform you, in connection with the Rome Statute of the International Criminal Court adopted on July 17, 1998, that the United States does not intend to become a party to the treaty. Accordingly, the United States has no legal obligations arising from its signature on December 31, 2000. The United States requests that its intention not to become a party, as expressed in this letter, be reflected in the depositary's status lists relating to this treaty.[23]

The media has referred to this as "unsigning" the treaty, a term which is convenient though not totally accurate. Whether the U.S. communication violates international law will not be explored further here.[24] What is clear is that this was an unprecedented move.

Congress similarly showed immediate antagonism to the ICC. The House Appropriations Committee, led by Republican Tom DeLay of Texas, voted thirty-eight to eighteen to bar arms aid to any nations ratifying the Rome Statute (with significant room for Presidential waivers) and to authorize the president to use force to rescue any American held by the ICC.[25] This formed the basis of the American Servicemembers' Protection Act discussed shortly.

As the ICC entered into force in July 2002, the Bush administration actively took international steps to limit its likely control over Americans. On June 30, the United States vetoed a routine Security Council extension of the U.N. peacekeeping mission in Bosnia,[26] essentially holding the Bosnia mission

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2001, at A15. This continued antagonism in the wake of September 11 provoked indignation from certain members of Congress. *See, e.g.*, Betsy Pisik, *White House Seeks ICC Protection. Bill Aims to Shield U.S. Forces From the World Court's Control*, WASH. TIMES, Sept. 28, 2001, at A1 (quoting Senator Christopher Dodd as saying "I cannot believe that . . . at the very moment we are asking the world to join in apprehending the thugs and criminals who claimed 6,000 lives . . . we would say we will have nothing to do with the establishment of an International Criminal Court.").

22. Tom Carter, *Global Tribunal Becomes Reality; U.S. Won't Back War-Crimes Court*, WASH. TIMES, April 11, 2002, at A14.

23. Press Statement, U.S. Department of State, Richard Boucher, Spokesman, International Criminal Court: Letter to UN Secretary General Kofi Annan (May 6, 2002), *at* http://www.state.gov/r/pa/prs/ps/2002/9968.htm (last visited Mar. 19, 2003).

24. The complexities involved put this issue beyond the scope of this paper. For an initial analysis from an international law scholar, see Curtis A. Bradley, *U.S. Announces Intent Not to Ratify International Criminal Court Treaty*, ASIL Insights, *at* http://www.asil.org/insights/insigh87.htm (last visited Apr. 15, 2003). See also David C. Scott, Comment, *Presidential Power to "Un-Sign" Treaties*, 69 U. CHI. L. REV. 1447 (2002) for a discussion of the relevant international laws.

25. Adam Clymer, *House Panel Approves Measure to Oppose New Global Court*, N.Y. TIMES, May 11, 2002, at A3. Several Democrats opposed this fiercely, with David Obey of Wisconsin asking if Mr. DeLay understood that "[w]e would be sending our troops to invade the Netherlands." *Id.*

26. Colum Lynch, *Dispute Threatens U.N. Role in Bosnia; U.S. Wields Veto in Clash over War Crimes Court*, WASH. POST, July 1, 2002, at A1.

hostage until it convinced the Security Council to pass a resolution limiting the ICC's power to prosecute U.S. peacekeepers.[27] This conduct drew strong statements from U.S. allies[28] and earned the term "brinkmanship" from at least one observer.[29]

Besides acting in the U.N., the Bush administration also sought, and continues to seek, bilateral agreements with nations to ensure that they would not extradite U.S. citizens to the ICC.[30] When the European Union (EU) initially urged its members not to consider such agreements, the Bush administration responded with hints that, if these members refused, NATO might not survive in its current state.[31] By the end of September, the EU supported a somewhat limited agreement.[32] In their private negotiations, Bush officials allegedly emphasized their concern that the ICC and its Prosecutor might target top civilian leaders as well as on-the-ground soldiers.[33]

Congress mirrored the Bush administration's actions by passing the American Servicemembers' Protection Act (ASPA).[34] This Act, which passed on August 2, 2002, as part of an appropriations bill, began with Congressional findings

27. U.N. SCOR, U.N. Doc. S/RES/1422 (2002). This resolution requires the ICC not to investigate any personnel belonging to a non-party nation with regard to acts arising from a "United Nations established or authorized operation" for a twelve-month period with the intent of continued renewals. *Id.* The United States had sought a similar resolution earlier with regard to East Timor, but had not then pushed the issue. Somini Sengupta, *U.S. Fails in U.N. to Exempt Peacekeepers From New Court*, N.Y. TIMES, May 18, 2002, at A4.

28. *E.g.*, Warren Hoge, *Bosnia Vote By the U.S. is Condemned by Britain*, N.Y. TIMES, July 2, 2002, at A8 (quoting statement of concern by British foreign minister Jack Straw and others).

29. *Id.* (quoting Carl Bildt of Sweden as calling the U.S. conduct "a very dangerous exercise in diplomatic brinkmanship with possible consequences that no one is fully aware of.").

30. Article 98 of the Rome Statute authorizes nations which are parties to the treaty to decline to extradite the nationals of other countries if they have agreements with these countries. Rome Statute, *supra* note 4, art. 98. The United States reached the first of these agreements with Romania on August 1. Weller, *supra* note 1, at 709. As of March 5, 2003, the United States had reached twenty-four Article 98 agreements with other nations, not all of which had signed and/or ratified the Rome Statute. These nations are: Afghanistan, Azerbaijan, Bahrain, Djibouti, the Dominican Republic, East Timor, El Salvador, The Gambia, Georgia, Honduras, India, Israel, the Marshall Islands, Mauritania, Micronesia, Nauru, Nepal, Palau, Romania, Rwanda, Sri Lanka, Tajikistan, Tuvalu, and Uzbekistan. *U.S., Rwanda Sign Pact Over Criminal Court*, SAN DIEGO UNION-TRIBUNE, Mar. 5, 2003, at A14.

31. Elizabeth Becker, *U.S. Issues Warning to Europeans in Dispute Over New Court*, N.Y. TIMES, Aug. 26, 2002, at A10. State Department Spokesman Richard Boucher asserted that the United States would not take the unwillingness of any NATO aspirant countries to enter into Article 98 agreements with the United States into account when voting on whether to offer these countries a place in NATO. Richard Boucher, Daily Press Briefing, U.S. Department of State (Aug. 26, 2002) *at* http://www.state.gov/r/pa/prs/dpb/2002/13051.htm (last visited Feb. 18, 2003).

32. Paul Meller, *Europeans to Exempt U.S. From World Court*, N.Y. TIMES, Oct. 1, 2002, at A6 (describing an EU proposal not to extradite American soldiers and officials to the ICC provided they received trial in American court). The Bush administration thought the EU's offer somewhat inadequate since it did not extend to all U.S. citizens. Press Release, Office of Press Secretary, Briefing by Ari Fleischer (Oct. 10, 2002), *at* http://www.whitehouse.gov/news/releases/2002/10/20021010-2.html#15 (last visited Mar. 19, 2003).

33. Elizabeth Becker, *On World Court, U.S. Focus Shifts to Shielding Officials*, N.Y. TIMES, Sept. 7, 2002, at A4.

34. Some members of Congress, like Senator Dodd of Connecticut, do support the ICC and have expressed regret at the administration's decision to turn away from it. *See* Christopher Marquis, *U.S. Is Seeking Pledges to Shield Its Peacekeepers From Tribunal*, N.Y. TIMES, Aug. 7, 2002, at A1.

that the armed forces and government officials should be free from the risk of ICC persecution.[35] Subject largely to waiver at the discretion of the president, the act does the following:

- Prohibits any government official from cooperating with the ICC.[36]
- Permits Armed Forces use in peacekeeping missions only if the relevant country is not an ICC party or has signed a bilateral agreement with the United States, unless the Security Council has exempted U.S. peacekeepers from ICC investigation.[37]
- Bans military assistance to ICC parties with the exception of NATO countries, major allies, and countries with whom the United States has suitable bilateral agreements.[38]
- Authorizes presidential use of "all means necessary and appropriate" to free U.S. government employees and certain other categories of individuals from ICC detainment.[39]

President Bush signed the ASPA into law, and his administration continues its antagonistic approach to the ICC. The current National Security Strategy of the United States reads: "We will take the actions necessary to ensure that our efforts to meet our global security commitments and protect Americans are not impaired by the potential for investigations, inquiry, or prosecution by the International Criminal Court (ICC), whose jurisdiction does not extend to Americans and which we do not accept."[40]

Concern for bringing international war criminals to justice has not changed this general antagonism towards the ICC. In an October press briefing, the White House suggested that while an international court might be appropriate for dealing with Saddam Hussein, it would support a special tribunal, not the ICC.[41] Similarly Pierre-Richard Prosper, the current Ambassador at Large for War Crimes Issues, has emphasized the need to look at other processes besides the ICC for bringing to justice the perpetrators of genocide, war crimes, and crimes against humanity.[42] John R. Bolton has spoken of structures like the Truth and Reconciliation Commission of South Africa as possible alternatives to the ICC.[43] While such remarks show that Bush administration officials are

35. American Servicemembers' Protection Act, 22 U.S.C. § 7421 *et seq.* (2002).

36. *Id.* at § 7423.

37. *Id.* at § 7424.

38. *Id.* at § 7426.

39. *Id.* at § 7427.

40. National Security Strategy of the United States, *available at* http://www.whitehouse.gov/nsc/nss9.html (last visited Mar. 19, 2003). This sentence suggests that not only does the Bush administration dislike the thought of the ICC's jurisdiction over Americans, it also "does not accept" the ICC more generally as an institution.

41. Press Release, Office of Press Secretary, Press Briefing by Ari Fleischer (Oct. 11, 2002), *at* http://www.whitehouse.gov/news/releases/2002/10/20021011-5.html (last visited Mar. 19, 2003). The ICC might not be a good vehicle to try the Iraqi regime because its jurisdiction began only on July 1, 2002. However, this was not the reason Fleischer gave for avoiding the ICC; instead, he spoke of the "controversy" over the ICC as a reason to steer clear of it. *Id.*

42. Press Conference, Pierre-Richard Prosper (Sept. 24, 2002), *at* http://www.usembassy.org.uk/forpo528.html (last visited Mar. 19, 2003) [hereinafter Prosper Press Conference].

43. John R. Bolton, The United States and the International Criminal Court, Remarks to the Federalist Society (Nov. 14, 2002) *at* http://www.state.gov/t/us/rm/15158.htm (last visited Feb. 18, 2003) [hereinafter Bolton, Federalist Society Remarks].

keeping U.S. involvement in war crimes prosecution in mind, no clear and concrete suggestions have emerged.

IV.
UNDERLYING OBJECTIVES AFFECTING THE U.S. APPROACH TO THE ICC

The U.S. stance towards the ICC has its roots in several compelling—and sometimes conflicting—objectives. This section sets forth three primary considerations raised by U.S. policy-makers: protection of U.S. autonomy; respect for constitutional constraints; and prosecution of international war criminals.[44] Subsequent sections will consider how and why the Bush administration seeks to achieve these objectives and evaluate its success.

A. Protection of U.S. Autonomy

Policy makers wish to shield U.S. personnel from external pressures. This concern stems from at least two causes: a strong urge to protect individuals who serve the country and an interest in keeping decision-making unhindered by fear of international prosecution. This goal can conflict with the ICC's jurisdiction, especially given the considerable discretion available to its Prosecutor.

President Clinton, President Bush, and Congress all have strongly expressed the importance of shielding U.S. personnel from the reach of the ICC.[45] In a speech to troops in July 2002, President Bush assured them that "[w]e will not submit American troops to prosecutors and judges whose jurisdiction we do not accept . . . Every person who serves under the American flag will answer to his or her own superiors and to military law, not to the rulings of an unaccountable international criminal court."[46] The ASPA demonstrates a similar Congressional emphasis that troops "should be free" from ICC prosecution and that the "United States Government has an obligation" to protect them.[47]

> While protection of U.S. control over the prosecution of its troops is an oft-mentioned objection to the ICC, it probably does not carry the same practical likelihood as the prosecution of top officials and civilian leaders. The ICC can only exercise its jurisdiction after local remedies have been exhausted.[48] Thus, an

44. There may be subsidiary objectives as well, such as a desire for international cooperation. Such objectives, however, are neither specific to the ICC nor necessarily shared by most policy-makers, and hence I will not examine them in this section.

45. President Clinton sought such shielding at least until it was clear that the ICC was functioning suitably. *See Clinton's Words*, *supra* note 11. For a discussion of the ceaseless negotiations David Scheffer engaged in during his largely successful efforts to limit ICC jurisdiction, see Hans-Peter Kaul, *The Continuing Struggle on the Jurisdiction of the International Criminal Court*, *in* INTERNATIONAL AND NATIONAL PROSECUTION OF CRIMES UNDER INTERNATIONAL LAW 21-37 (Horst Fischer et al. eds. 2001).

46. Remarks to the 10th Mountain Division at Fort Drum, New York, 38 WEEKLY COMP. PRES. DOC. 1231 (July 19, 2002), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=2002_presidential_documents&docid=pd22jy02_txt-22 (last visited Mar. 30, 2003).

47. 22 USCA § 7421 (2002).

48. Rome Statute, *supra* note 4, art. 20(3)(b). *See also* John T. Holmes, *The Principle of Complementarity*, *in* THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE 41-78 (Roy S. Lee ed., 1999).

> individual soldier who commits an egregious war crime would only face ICC jurisdiction if he or she did not get adequately tried before a U.S. court (military or otherwise) and then only if the ICC decided the case was important enough to warrant its resources. As John R. Bolton wrote in 2000:
>
> > [o]ur main concern should not be that the Prosecutor will target for indictment the isolated U.S. soldier. . . . Instead, our main concern should be for our country's top civilian and military leaders, those responsible for our defense and foreign policy. They are the real potential targets of the ICC's politically unaccountable Prosecutor.[49]

Such decision-makers have been international targets in the past.[50] In negotiating Article 98 agreements in Europe, the administration allegedly has emphasized its concern that civilian leaders might get targeted.[51] Congress expressed a similar concern in the ASPA.[52] Nonetheless, the extent to which the ICC's Prosecutor would go after U.S. officials in practice is hotly debated.[53] U.S. policy makers understandably have a strong—and indeed personal—interest in not being held accountable to the ICC. Should policy makers feel themselves individually subject to ICC jurisdiction, they might factor this into their policy decisions. While this concern is not emphasized by U.S. officials, it is nonetheless a consideration in weighing America's approach to the ICC.

B. Respect for Constitutional Constraints

Besides being influenced by the practical goals described above, policymakers have also sought to remain within the U.S. constitutional framework in their dealings with the ICC. The boundaries of this framework, however, remain the subject of constant debate. Some scholars and policy makers find the Rome Statute compatible with the U.S. constitutional structure; others think it undermines this structure.[54]

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49. John R. Bolton, *The Risks and Weaknesses of the International Criminal Court from America's Perspective*, 41 VA. J. INT'L L. 186, 194 (2000).

50. While former Secretary of State Henry Kissinger gets frequent mention in this context, even Clinton administration officials have proved potentially vulnerable. Over the summer of 2002, rumors suggested that the prosecutor of the International Criminal Tribunal for the former Yugoslavia was considering indicting President Clinton and several others for their role in a Croat offensive. Jeffrey Kuhner, *Balkans Tribunal Turns to Clinton; Considers Charges For Aiding Croatia*, WASH. TIMES, July 8, 2002, at A1.

51. *On World Court, U.S. Focus Shifts to Shielding Officials*, *supra* note 33.

52. 22 USCA § 7421 (2002).

53. *Compare* John R. Bolton, *supra* note 49, *with* Secretary-General Kofi Annan, Address to the Meeting of the Assembly of State Parties to the International Criminal Court (Sept. 10, 2002), U.N. Doc SG/SM/8372, *at* http://www.un.org/News/Press/docs/2002/sgsm8372.doc.htm (last visited Mar. 19, 2003) (saying "(t)he ICC is not—and must never become—an organ for political witch hunting."). The administration's belief that the United States plays a unique and widespread role in international affairs may increase its concerns. *See* Prosper Press Conference, *supra* note 42 ("We know the role that we play and we need to play in the world regarding helping to protect, ensure and preserve international peace and security. We're not going to walk away or shy away from that responsibility. We'll just make sure that we have a clear understanding with the rest of the international community as we move forward in accepting our responsibilities.").

54. *Compare* John R. Bolton, *supra* note 49, at 193-195 *with* Ruth Wedgewood, *The Constitution and the ICC*, *in* THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT 115-136 (Sarah B. Sewall and Carl Kaysen, eds., 2000).

This article will not attempt to evaluate the nature or extent of constitutional constraints.[55] However, it is worth noting that perception of these constraints can have a substantial impact on approaches to the ICC. For example, Congress expressed concern in ASPA that Americans before the ICC would "be denied procedural protections to which all Americans are entitled under the Bill of Rights," giving the ICC's lack of jury trials as an example.[56] This concern might lead Congress not merely to oppose ratification, but also to maintain antagonism towards the ICC as a body that could potentially exercise jurisdiction over Americans. To the extent that policy-makers have constitutional concerns about the ICC which create rather than justify their attitudes towards it, these concerns factor into underlying objectives.

C. Prosecution of International War Criminals

The United States has played—and continues to play—a substantial role in ad hoc tribunals such as the International Criminal Tribunals for Rwanda and the former Yugoslavia.[57] The Bush administration has expressed its decided interest in bringing war criminals to trial. Ari Fleischer declared that "the United States has done its part, and will continue to do its part in bringing war criminals to justice, no matter where they are."[58] Pierre-Richard Prosper has made the same point.[59] Speaking more specifically on Iraqi generals, President Bush recently remarked in a speech in Cincinnati that "they must understand that all war criminals will be pursued and punished."[60] Similarly, Congressmen who disapprove of the ICC nevertheless have emphasized the pursuit of war criminals in other contexts.[61]

Given that the ICC was created as a permanent forum for bringing war criminals to justice and has the backing of a substantial number of the world's nations,[62] the United States must consider how its approach to the ICC will affect its ability to play a major role in bringing future war criminals to justice. The collective effort in creating the ICC was enormous,[63] and the United States

55. This issue is a paper in itself (or several), and others have treated it in far more depth than I can do here. *See, e.g.*, Diane Marie Amann and M.N.S. Sellers, *American Law in a Time of Global Interdependence: U.S. National Reports to the XVIth International Congress of Comparative Law: Section IV The United States and the International Criminal Court*, 50 AM. J. COMP. L. 381, 392-404 (2002).

56. 22 U.S.C. § 7421(7) (2020).

57. *See* SAMANTHA POWER, "A PROBLEM FROM HELL": AMERICA AND THE AGE OF GENOCIDE 475-516 (2002).

58. Press Release, Office of Press Secretary, Press Briefing by Ari Fleischer (July 12, 2002), *at* http://www.whitehouse.gov/news/releases/2002/07/20020712-3.html.

59. Prosper Press Release, *supra* note 42.

60. Address to the Nation on Iraq From Cincinnati, Ohio, 38 WEEKLY COMP. PRES. DOC. 1719 (Oct. 7, 2002), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=2002_presidential_documents&docid=pd14oc02_txt-11 (last visited Mar. 30, 2003).

61. *See, e.g.*, POWER, *supra* note 57, at 493 (quoting a letter from Jesse Helms mocking the Clinton administration's ineffectiveness at catching war criminals from the former Yugoslavia).

62. The Rome Statute had 139 signatories (including the United States) and eighty-four parties as of Nov. 25, 2002. Information *available at* http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty10.asp (last visited Mar. 19, 2003).

63. *See* BASSIOUNI, *supra* note 2, at 15-35.

participated seriously in this effort.[64] It may now prove difficult to generate international support for the international prosecution of war criminals via other means. Besides the political difficulties of getting Security Council authorization for any such prosecution (authorization which would still be needed for certain ICC prosecutions), ICC party nations may not want to put funds and energy into other tribunals besides the ICC, thus perhaps making particularly challenging the U.S. goal of achieving the international prosecution of war criminals through other means.

Different means can accomplish the aforementioned objectives of U.S. policy. As discussed in an earlier section, the Clinton administration engaged in active multilateral negotiations to try to preserve U.S. autonomy (for example, by negotiating stringent limits to the exercise of jurisdiction) and remain within constitutional constraints (for example, by seeking to strengthen procedural protections) without sacrificing the aim of bringing war criminals to justice through the ICC. The next section discusses the quite different approach of the Bush administration.

V.
A Policy of Aggressive Unilateralism

The current approach of the Bush administration with regard to the ICC is one of wholesale aggressive unilateralism. It is aggressive because the threat of the ICC provokes the administration not to isolationist withdrawal but rather to active efforts on an international scale. It is unilateral because, while the administration is willing to use diplomatic processes to achieve its end, it is neither willing to alter this end in response to international pressure nor to limit its means to diplomatic ones. And, finally, it is wholesale because the administration appears willing to use every aspect of its arsenal and risk the corresponding consequences of such "brinkmanship." This section examines each of these characterizations in turn and also touches briefly on the similar approach of the Congressional majority as demonstrated in the ASPA.

A. Aggressive Efforts on an International Scale

Given the Bush administration's disapproval of the Rome Statute and its perception of a substantial risk that the ICC will seek to prosecute Americans, its resulting international efforts with regard to the ICC stem from compulsion rather than choice. Were the United States to ignore ICC issues altogether, the prospect of Americans falling under its jurisdiction would remain open, since the ICC exercises jurisdiction over crimes committed on the territory of any party nation regardless of the nationality of the perpetrator.

64. One State Department Senior Advisor recently observed that "when the ICC negotiations began . . . the ICC was originally a United States idea. The United States was very strongly supportive." Michael Newton, *Should the United States Join the International Criminal Court*, 9 U.C. Davis J. Int'l L. & Pol'y 35, 38 (2002).

While the Bush administration must act if it wishes to shape the ICC's likely control over Americans in the future, it has had options with regard to how it acts. The Clinton administration, while alert to the value of Article 98 agreements, also sought to shape the ICC's likely control over Americans by having as much influence as it could on ongoing ICC discussions.[65] The Bush administration has not followed this route. It has, however, used big stick diplomacy to reach bilateral agreements, exercised its Security Council veto, made creative assertions with regard to treaty obligations, and called for the prosecution of Iraqi war crimes by temporary tribunals. These aggressive efforts make its refusal to undertake substantive participation at the ICC Preparatory Sessions all the more notable. Congress has sanctioned the administration's approach consistently, refusing funding in several bills even before the ASPA.[66]

B. Unilateral Insistence Upon "Principle" Backed by Threat of Force

The administration has never shown any flexibility on the subject of the ICC. As stated earlier, it did not ever attempt to change the ICC from within, but instead asserted a "principle" precluding international cooperation.[67] By resting its concerns on an unshared and uncompromisable principle, the administration has *a priori* eliminated the possibility of multilateral negotiations that might result in its resolving its difficulties with the ICC.

More significantly, the administration has backed up its efforts to break loose from the ICC with the threat of force. It proved willing to hint coercively to European countries that NATO might be at risk without Article 98 agreements.[68] President Bush signed the ASPA into law, thus gaining for himself the authorization provided by Congress to use "all means necessary and appropriate" to release any American employees held by the ICC.[69] At a press conference in England, British reporters asked Ambassador Prosper whether the ASPA would permit the United States to invade Britain to rescue U.S. prisoners. Prosper responded by saying that it was one tool in the Presidential "toolbox," although "Article 98 is something that just takes away this issue of concern for us."[70]

Some members of the Bush administration have tried to downplay the unilateral nature of its approach. Speaking at a press conference in late May 2002, Secretary Powell said:

> I don't think one should view an issue like [the ICC] as an example of the United States essentially turning its back on its friends in Europe. Quite the contrary. We listened, we heard, we explained back to our European friends why we could

65. *See* Kaul, *supra* note 45.

66. Press Releases, *supra* note 18.

67. Powell Press Briefing, *supra* note 13 ("we believe that we have a principle we must hold dear to"); Prosper Press Conference, *supra* note 43 ("What we're doing is we're detaching ourselves from the process . . . We are taking a position of principle.").

68. Becker, *supra* note 31.

69. 22 U.S.C. § 7427 (2002).

70. Prosper Press Conference, *supra* note 42. Britain has not yet signed an Article 98 agreement.

> not move in that direction to go along with them on the ICC. And so where we believe we have a principle we must hold dear to, and so long as we are in discussions with our European friends, that should not be viewed as unilateralism or just going our way; we have a disagreement. And just because we are part of a great alliance and we are part of the Euro-Atlantic community does not mean that every issue we can join the consensus on.[71]

This statement attempts to portray the administration's approach as non-unilateral on the grounds that it is simply a discussed disagreement. Communication, however, does not negate unilateralism, particularly if—as in this case—there is no element of reconsideration involved in the discussion but instead an uncompromisable "principle." While willing to mention the principle, Powell's characterization of the disagreement as a conversation among friends leaves out the coercive pressure the United States proved willing to apply to resolve the disagreement in its favor.

C. The Wholesale Effort of the Bush Administration

The wholesale nature of the Bush administration's commitment to resisting the ICC is demonstrated by what it has put on the line. As discussed earlier, it has risked initiating an unsettling precedent with regard to treaties by repudiating the prior administration's signature. It has proved willing to abandon peacekeeping missions, bringing down an entire mission through a Security Council veto rather than simply withdrawing U.S. troops. It has suggested that the continued existence of NATO in its current form rests upon bilateral agreements limiting extradition. Finally, it has gained Congressional approval to get U.S. government employees out of ICC hands by any appropriate means—a veiled hint at force that would most likely go against traditional U.S. allies.

While the energy devoted by the Bush administration towards ICC concerns increased dramatically after the ICC entered into force, the administration's stance has been consistent throughout its tenure. At Ambassador Prosper's press conference in England, a reporter asked why the Bush administration had undertaken "the huge expenditure of political capital that was required by the United States to address potential cases which I think most people feel hypothetical in the extreme." Prosper replied that

> [w]ell we, in the beginning, did not think it was necessary. . . . but, for one reason or another, the issue was raised to a different level. . . . We do believe that it [sic] there is a real possibility that someone will use the International Criminal Court for political purposes, exploit the process, in order to use it as a weapon or a tool to attack the United States personnel and/or its policies. . . . And we're taking a stand on principle.[72]

This "real possibility" combined with the "principle" has led the United States to put a great deal on the line in its aggressive unilateralism with regard to the ICC.

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71. Powell Press Briefing, *supra* note 13.

72. Prosper Press Conference, *supra* note 42.

VI.
WHY THIS SHIFT IN APPROACH FROM THE CLINTON ADMINISTRATION TO THE BUSH ADMINISTRATION?

The Bush administration has not vacillated in its view towards the ICC. Instead, it continues to present consistent and persistent opposition, ever concerned that someday and somehow Americans might fall under the ICC's jurisdiction. No member of the administration is on the record as ambivalent about the ICC relation to the United States. Even Secretary Powell, often considered a moderate force in the Bush administration, expressed antagonism to the ICC as early as February 2001.[73] The aim behind this certainty is a simple one: to limit the ICC's functional jurisdiction over Americans.

This single-mindedness distinguishes the Bush administration from its predecessor. As Clinton's hesitant signature of the Rome Statute indicates, he, and his administration, felt torn by conflicting pressures. While wishing to minimize the ICC's exercise of jurisdiction over Americans, he also wanted to show his appreciation for the value of international accountability for all. His statement on signing the Rome Statute reflects a perhaps wistful expectation that two aims were best accomplished simultaneously.[74] His cautious multilateralism differs dramatically from the aggressive unilateralism of the subsequent Bush administration.

This section grapples with the underlying causes of this shift in objectives between the two administrations. I argue that the shift largely reflects the Bush administration's stronger interest in unhampered national sovereignty, and, to a far lesser extent, its distaste for ambiguities.

A. An Emphasis on Sovereignty Without Constraints

At a press conference in early July 2002, Ari Fleischer said in reference to the ICC that "I assure you that the President's [sic] determination to protect America's peacekeepers and America's diplomats from other nations that would impose their sovereignty over America is continuing. That will not change."[75] In this comment, President Bush's press secretary's objection to the ICC lies not in the substance of its potential charges against Americans but rather against its (or, as he somewhat misleadingly puts it, "other nations") sovereignty in the first place. This remark illustrates the fundamental difference between the Bush administration's concern and its predecessor's with regard to the ICC. As discussed earlier, both administrations worried that the ICC might provide a platform for politically-driven anti-American suits, curtail U.S. foreign policy, and fail to provide adequate constitutional protections for Americans. However, where the Clinton administration worked to limit the practical likelihood of

73. *See* Crossette, *supra* note 18.

74. *Clinton's Words*, *supra* note 11 ("Signature will enhance our ability to further protect U.S. officials from unfounded charges and to achieve the human rights and accountability objectives of the ICC.").

75. Press Release, Office of Press Secretary, Press Briefing by Ari Fleischer (July 12, 2002), *at* http://www.whitehouse.gov/news/releases/2002/07.20020712-3.html.

American prosecutions by shaping the structure of the ICC, the Bush administration has emphasized the "principle" at stake and has thus not tried to change the ICC from within.

This principle is sovereignty. John R. Bolton argued in an article shortly before President Bush took office that if "the American citadel can be breached, advocates of binding international law will be well on the way to the ultimate elimination of the 'nation state.' Thus it is important to understand why America and its Constitution would have to change fundamentally and irrevocably if we accepted the ICC."[76] Bolton's view of sovereignty as a "citadel" leaves no room for flexibility; one crack will bring down the entire American framework. This stark view results in the following position: "America's posture towards the ICC should be 'Three No's': no financial support, directly or indirectly; no cooperation; and no further negotiations with other governments to 'improve' the ICC. . . . The United States should raise our objections to the ICC on every appropriate occasion."[77]

Bolton's view does not support any U.S. cooperation with any system that asserts any bind upon the United States. This perspective may not represent the administration as a whole. Others such as Ambassador Prosper have emphasized that "the court is a noble idea but it's just flawed in it's [sic] implementation."[78] Prosper's approach indicates that while this particular ICC is not acceptable to the United States, some such institution might be. However, later in his press conference, Prosper went on to suggest that the acceptable model would be a standing institution that only could act on a vote of the Security Council.[79] Since the United States would always have a veto, Prosper's position is not so far removed from Bolton's.

At this same press conference, a reporter asked Ambassador Prosper whether the United States intended to undermine the Rome Statute.[80] While U.S. actions seem quite likely to undermine the ICC by reducing the reach of its jurisdiction and providing a precedent of national resistance to it,[81] it is not clear whether such undermining is a goal of the Bush administration's or simply a side effect. Prosper replied that the United States was not trying to undermine the treaty, but rather to avoid getting entangled in it.[82]

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76. Bolton, *supra* note 49, at 193.

77. *Id.* at 202. In a recent speech, Bolton again noted that "the United States decided that the ICC had unacceptable consequences for our national sovereignty." Bolton, Federalist Society Remarks, *supra* note 43.

78. Prosper Press Conference, *supra* note 42.

79. *Id.*

80. *Id.*

81. The headline of *The Economist*'s July 6, 2002 story on the ICC was *Not (Quite) Strangled at Birth.*

82. Prosper Press Conference, *supra* note 42 ("[W]e respect the rights of states to be a party to the court, we just ask that they respect our right NOT to be a party to the court and we decide to take this (inaudible) divorce and detach ourselves from the process so it's not a source of tension or conflict between the United States and the Court and the United States and its allies who are parties to the court.").

Similarly, John R. Bolton has recently asserted that the United States is not trying to undermine the ICC.[83] His publications before joining the administration, however, express a different sentiment. He suggested in an article that the ICC will have bad effects for all nations and that though other nations could try to live with it, the United States should not.[84] His hostility towards the ICC appears to reach beyond concern about its direct effect on the United States and U.S. citizens to worries about how its very existence could "marginalize" the U.N. Security Council and thus "have a tangible and highly detrimental impact on the conduct of U.S. foreign policy."[85] Such a concern implies that the United States would be better off if the ICC did not exist.

With the administration's emphasis on sovereignty necessarily follows a reduced interest in international accountability from a universal perspective. This not only reduces U.S. motivation to support the ICC but also leaves other nations without much effective leverage to challenge this stance. President Clinton's image of himself as a promoter of international accountability and human rights may have influenced his decision to sign the ICC. However, the U.S. loss of a seat on the U.N. Human Rights Commission, attributable by some to its stark stance on the ICC,[86] has not had much visible effect on the Bush administration's outlook.

B. Concern for Consistency

Beyond the difference in substantive values, the Bush and Clinton administrations also vary appreciably in their tolerance for ambiguities. President Clinton's expressed concern about "significant flaws" as he signed the Rome Statute is a notable example.[87] David Scheffer admitted the ambiguities suggested by this approach but called it "consistent with the rather complex and paradoxical point we had been making for years."[88]

Though President Clinton was simultaneously willing to sign the Rome Statute and recommend against its submission for ratification, Bush administration officials expressed distaste for such ambiguity. Condoleezza Rice called it "peculiar" and suggested that by contrast "[w]e're going to be honest with our allies about which treaties are in our interest; . . . and, those that are not, we're not prepared to be a party to."[89] Not only is the Bush administration perhaps more forthright, it also appears to have less internal dissent about how to ap-

83. Marquis, *supra* note 34.

84. Bolton, *supra* note 49, at 196, 202.

85. *Id.* at 198.

86. Colum Lynch, *U.S. Loses Seat on U.N. Rights Body; Defeat Laid to Irritation at White House Policies*, WASH. POST, May 4, 2001, at A1.

87. *Clinton's Words*, *supra* note 11.

88. Scheffer, *supra* note 5, at 65.

89. Giacomo, *supra* note 18.

proach the ICC.[90] Without such ambivalence, its approach stands squarely in line with the Congressional majority.

VII.
U.S. Success in Achieving Its Objectives Regarding the ICC

As discussed in the above sections, the Bush administration has taken a much more unilateralist approach to the ICC than did the Clinton administration. These differences appear largely attributable to tendencies of the Bush administration and its members to work in stark terms and see the nation-state as a citadel. Both administrations, however, sought to accomplish approximately the same objectives described in Section III. This section returns to those objectives by evaluating the success of the Bush administration in accomplishing them.

A. The Protection of U.S. Autonomy: Short-Term Success and Long-Term Concern

By pursuing its policy of aggressive unilateralism, the Bush administration has successfully limited the ICC's functional jurisdiction over Americans in the short run. It has negotiated bilateral agreements limiting the extradition of U.S. personnel to the ICC by many nations, with more undoubtedly on the way, and it has also gotten a year-long U.N. Security Council Resolution deferring any ICC investigation of U.N. authorized peacekeepers. The U.S. willingness to threaten the withdrawal of military aid from certain countries that fail to reach such Article 98 agreements and to wield its Security Council veto illustrate the forceful nature of this approach.

By active disengagement from the ICC, however, the United States limits its options with regard to it. The Bush administration's refusal to involve itself with ICC Preparatory Committee work and heavy-handed dealings thereafter may have lost it good will and a corresponding opportunity to actively influence the development of the ICC and thus reduce the risk of the prosecutions of Americans in the first place. Rather than being able to head off the prosecution of U.S. citizens through inside influence, the United States instead must rely on its Article 98 agreements backed by its threat of force. It will not be able to prevent indictments, but only to keep these indictees out of ICC hands. Such situations could generate extreme strain and antagonism within the world order. Had the United States continued a policy of cautious support for the ICC, it could potentially have headed off such problems earlier without surrendering its ability to take more forceful measures should preventative ones fail.

The Bush administration's current approach, however, requires continued effort to maintain. The United States will need to continue to assert its willingness to use coercive measures or force to keep U.S. citizens safe from ICC prosecution. The Article 98 agreements will not necessarily substitute for such

90. I have seen no evidence of conflict within the Bush administration over how to approach the ICC. Clinton's signatory statement, by contrast, represented a compromise between different factions. Scheffer, *supra* note 5, at 64.

threat of force. Not all nations have agreed to them, and several have indicated that they will not.[91] Furthermore, though the United States intends such agreements to be lasting,[92] it is not clear that other countries will go along with this. Bush administration officials have demonstrated a willingness to duck international obligations—such as any obligations stemming from President Clinton's signature of the Rome Statute—and some of its members have even less concern for the legal weight of international law.[93] Countries may take a leaf from the U.S. book on this issue or at the very least demand higher pay-offs if the agreements get called into practical use.

The insufficiency of Article 98 agreements will necessitate a continued threat of force on the U.S. part and require the continued high expenditure of international political capital. For the current U.S. wholesale aggressive unilateralism to succeed, it must be perpetually applied, and applied against our European allies who are the primary backers of the ICC.

All these speculations may appear far-fetched, resting as they do on the assumption that the ICC will one day try to indict Americans. However, this is the very premise that has sparked many of the Bush administration's concerns, and is therefore a reasonable one to use in evaluating its accomplishment of U.S. objectives.

B. The Difficulty of Evaluating the Accomplishment of Constitutional Considerations

The Bush administration has opposed the ICC at least in part based on a principle with Constitutional underpinnings.[94] As I discussed earlier, different understandings of the Constitution dictate—or justify—very different approaches to the ICC.[95] Some Clinton officials saw compatibility between the ICC and the Constitution; some Bush officials saw and continue to see the opposite.[96] All undoubtedly felt their approaches to the ICC were in keeping with their views of the Constitution. I cannot evaluate their actual success without beginning from a particular understanding of the Constitution. Such an endeavor is beyond the scope of this Article.

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91. Switzerland has said so firmly; Yugoslavia, Canada, and Norway have made similar assertions. *Yugoslavia Says No to Deal on World Court*, L.A. TIMES, Aug. 14, 2002, at A4. For the list of countries that have signed Article 98 agreements with the United States, see *supra* note 30.

92. Prosper Press Conference, *supra* note 42.

93. *See* Bolton, *supra* note 49, at 193. Bolton cites *Chae Chan Ping v. United States*, 130 U.S. 581 (1889) to support his argument that "treaties cannot legally 'bind' the U.S." and therefore "it need not detain us long to dismiss the notion that 'customary international law' has any binding legal effect either." *Id.*

94. Bolton, *supra* note 49, at 193.

95. *See supra* Part III(B).

96. *Compare* Scheffer, *supra* note 5, at 93-94 ("Critics who have focused on supposed U.S. constitutional defects in the ICC Treaty are either ill-informed about the treaty regime . . . or overlook international practices by the United States") *with* Bolton, *supra* note 49, at 189 ("The ICC's failing stems from its purported authority to operate outside of (and on a plane superior to) the U.S. Constitution, and thereby to inhibit the full constitutional autonomy of all three branches of the U.S. government, and indeed, of all state parties to the Statute."). *See also* Bolton, Federalist Society Remarks, *supra* note 43.

C. *Potential U.S. Marginalization From the Prosecution of Future War Criminals*

The Bush administration's aggressive unilateralism with regard to the ICC may leave the United States on the sidelines of the prosecution of future war criminals. Such concerns of marginalization in part prompted President Clinton's decision to sign the treaty.[97] So far, however, Bush administration officials have expressed little public concern that their decision not to cooperate with the ICC will affect their ability to play a major role in the prosecution of international war criminals.

Instead, the Bush administration has suggested that it will pursue other mechanisms for bringing war criminals to justice.[98] It has expressed support for an ad hoc tribunal similar to those in the former Yugoslavia and Rwanda for dealing with Iraqi war criminals.[99] This support is perhaps surprising given skepticism of administration officials about the merits of these existing tribunals.[100]

The Bush administration may manage to persuade the Security Council to set up an ad hoc tribunal for dealing with Saddam Hussein and his officials. For future war criminals, however, the United States may have a difficult time getting such tribunals through the Security Council. The ICC may appear a logical venue to other Security Council members for war criminals whose crimes (unlike those of Saddam Hussein) occurred primarily after the ICC's jurisdiction began on July 1, 2002. Furthermore, the ICC itself may initiate investigations of such war criminals if they come from party nations or committed their crimes on the territory of other party nations. Any attempt by the Security Council to set up a competing tribunal might cause complication, confusion, and gridlock.[101]

Finally, any permanent Security Council member can veto an ad hoc tribunal. The treaty negotiations leading to the Rome Statute recognized precisely this problem and thus sought to distance the ICC's Prosecutor from political pressures by enabling him or her to initiate investigations independently with regard to the territory or citizens of party nations. This prosecutorial autonomy concerns the United States greatly as a potential target. However, it is necessary not merely for efforts to target the United States, but also for efforts to target any other permanent Security Council member or a member's close allies. Without going through the ICC, the United States cannot have a role in the international prosecution of parties whom a permanent Security Council member does not wish to see prosecuted. By refusing to participate in the ICC and thus surrender-

97. *Clinton's Words*, *supra* note 11; *see also* Scheffer, *supra* note 5, at 58.

98. *See supra* notes 41-43 and accompanying text.

99. *See supra* note 41 and accompanying text.

100. *E.g.*, Ben Barber, *U.S. Calls U.N. Tribunals Wasteful, Wants Them Closed*, WASH. TIMES, Mar. 1, 2002, at A1.

101. Indeed, one can easily imagine a turf war that would leave war criminals from a nation not a party to the ICC unaccountable for their crimes. The United States might veto a Security Council resolution to put the matter before the ICC, and other permanent members might veto any alternative in order to try to preserve the viability of the ICC.

ing an effective say in how it operates, the United States limits its ability to participate in international efforts to bring war criminals to justice.

VIII.
Conclusion

Like the Clinton administration, the Bush administration has worked energetically to extract the United States from the reach of the ICC. Here the similarities end. The Clinton administration focused its efforts on multilateral engagement, seeking to achieve its objectives by influencing the shape of the ICC. By contrast, the Bush administration, with the support of Congress, has pursued a strategy very similar to the "Three No's" approach endorsed by John R. Bolton,[102] and it has backed its opposition with the threat of force.

This strategy of wholesale aggressive unilateralism may increase the risk that the ICC will target Americans, since the United States no longer can exert influence as an ICC supporter. Should the ICC target Americans, however, then the Bush administration's heavy-handed tactics and Article 98 agreements already in place may limit the likelihood that the ICC will ever manage to actually take or keep such Americans in custody. It is difficult to predict the merits of this trade-off, but it is clear that the Bush administration's approach has led to considerably more tension between the United States and both its traditional European allies and the U.N. than did the approach of the Clinton administration. Furthermore, the Bush administration's approach may push the United States to the sidelines of the international prosecution of war criminals in the future.

The willingness of the Bush administration to expend so much over the risk of ICC prosecution of Americans—a risk that many considered small—supports what administration officials have stated: that a principle is at stake. This principle is one of national sovereignty at all costs over any binding form of international accountability.

102. Bolton, *supra* note 49, at 202.