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United States policy towards the International Criminal Court. Selected legal issues

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Abstract: This paper presents selected legal issues affecting the United States' policy toward the International Criminal Court. The author presents a short introduction to the history of international prosecutions and the role the US has played in the system of supranational justice. The article investigates the US approach during negotiations and the rise of the US opposition towards the ICC. It focuses on the consistency of the Rome Statute with international law, legal effect of the US Signature and the 2002 Letter to the UN Secretary General, Article 98 Agreements and the American Service Members' Protection Act of 2002. The author concludes that despite the shift in the American policy towards the ICC, the US membership remains unlikely in the foreseeable future.

Polityka USA wobec Międzynarodowego Trybunału Karnego. Wybrane zagadnienia prawne

Abstrakt: Celem artykułu jest zaprezentowanie wybranych problemów prawnych mających wpływ na amerykańską politykę wobec Międzynarodowego Trybunału Karnego. Autor przedstawia krótką historię międzynarodowego sądownictwa karnego i rolę, jaką w jego rozwoju odegrały Stany Zjednoczone. W artykule zaprezentowano amerykańskie stanowisko w czasie negocjacji Statutu Rzymskiego i przyczyny opozycji wobec MTK. Analizie zostają poddane zagadnienia zgodności Statutu Rzymskiego z normami prawa międzynarodowego, skutki prawne podpisania Statutu przez Stany Zjednoczone i listu do Sekretarza Generalnego ONZ z 2002 r., a także porozumienia zawierane na mocy art. 98 Statutu Rzymskiego i ustawa o ochronie członków rządu, armii i innych oficjalnych urzędników, którzy mogliby zostać postawieni przed MTK. Konkluzja wskazuje na zmianę amerykańskiej polityki wobec MTK w ostatnich latach, ale nie przewiduje szybkiego przystąpienia USA do MTK.

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Introduction

The creation of a first permanent, treaty based, international criminal court with potentially global jurisdiction, established to help end impunity of the perpetrators of the most serious crimes of concern to the international community, has been one of the most important recent developments in international criminal law. The Statute of the International Criminal Court has not only established a new judicial institution to prosecute international offences, but also has set out a new code of international criminal law. The ICC is an independent international organization, and it is not part of the United Nations system.

International prosecutions

The international community has long aspired to the creation of a permanent tribunal, and, in the 20th century, it reached consensus of definitions of genocide, crimes against humanity and war crimes. The Nuremberg International Military Tribunal and its sibling, the International Military Tribunal for the Far East, set up in January 1946, addressed war crimes, crimes against peace, and crimes against humanity committed during the Second World War. Until the early 1990s, it seemed unlikely that the progeny of the international tribunals would appear soon. After the end of the Cold War, tribunals like the International Criminal Tribunal for the former Yugoslavia and for Rwanda were the result of consensus that impunity is unacceptable. In February 1993, the United Nations Security Council voted to establish a tribunal mandated to prosecute "persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991."[1] In November 1994, acting on a request from Rwanda, the Security Council decided upon the creation of a second ad hoc tribunal, charged with the prosecution of genocide and other serious violations of international humanitarian law committed in Rwanda and in neighbouring countries.[2] In 1994, the United Nations General Assembly decided to pursue work towards the establishment of an international criminal court, taking the International Law Commission's draft statute as a basis.[3] The draft statute, proposed by the International Law Commission gave the court a broader jurisdiction than the Rome Statute. The draft was, however, more protective of States' sovereignty.

[1] United Nations Security Council Resolution on the Establishment of the International Criminal Tribunal for the former Yugoslavia, *UN Doc. S/RES/827 (1993)*, http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/827%281993%29 (access: 14.05.2013).

[2] United Nations Security Council Resolution on the Establishment of the International Criminal Tribunal for Rwanda (ICTR) and adoption of the Statute of the Tribunal, *UN Doc. S/RES/955 (1994)*, http://www.un.org/en/sc/documents/resolutions/1994.shtml (access: 14.05.2013).

[3] United Nations General Assembly Resolution on the Situaton in Bosnia and Herzegovina, *UN Doc. A/49/10 (1994)*, http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/49/10&Lang=E (access: 14.05.2013).

On 17th July 1998, at the headquarters of the Food and Agriculture Organisation of the United Nations in Rome, 120 States voted to adopt the Rome Statute of the International Criminal Court.

The US approach

The United States, as part of its foreign policy, has long promoted international justice and the rule of law. Through its involvement in the creation of the International Military Tribunals at the Nuremburg and Tokyo, as well as the ad hoc Tribunals for Rwanda and former Yugoslavia, the US has been dedicated to prosecute international crimes at the international level.[4] During the negotiations to establish the permanent court, the US had made many constructive and helpful contributions. Nevertheless, the final result was not satisfactory for the Washington's policy making community. At the time the Statute was adopted, it became clear that the Court would not achieve its worldwide jurisdiction. While the US has not joined the Court as a Party to the treaty, its attitude toward the Court has evolved from initial skepticism and concern at the end of the Clinton administration, hostility during the Bush administration towards a recent recognition of an important work the ICC is doing in investigating and prosecuting the atrocities in Sudan, Uganda, the Democratic Republic of the Congo, and the Central African Republic.

On 31st December 2000, Ambassador David Scheffer, at the discretion of President Clinton, signed the treaty. Upon signature, Clinton stated that the US retained reservations about the Statute: "In signing, however, we are not abandoning our concerns about significant flaws in the Treaty. [...] Court jurisdiction over U.S. personnel should come only with U.S. ratification to the Treaty. […] I will not, and do not recommend that my successor, submit the Treaty to the Senate for advice and consent until our fundamental concerns are satisfied."[5]

Its signing may be attributed to the fact that the US at that time was not in principle opposed to the idea of creation of a permanent international court, and hoped to resolve some of the points of difficulty during the ongoing negotiations regarding the Rules of Procedure and Evidence and the Elements of Crimes.

Inconsistency with international law

The principle objection made against the Rome Statute was its inconsistency with international law. It was argued that under Article 12 it may exercise criminal jurisdiction over nationals of a State not a party to the Statute without that State's

[4] M. Grossman, *Remarks to the Center for Strategic and International Studies*, Washington DC, 6.05.2002, http://2001-2009.state.gov/p/us/rm/9949.htm (access: 14.05.2013).

[5] B. Clinton, *Statement on Signature of the International Criminal Court Treaty*, Washington DC, 31.12.2000, http://www.amicc.org/docs/Clinton_sign.pdf (access: 14.05.2013).

consent.[6] The ICC was accorded such jurisdiction on order to ensure that perpetrators of the most serious international crimes, which come under the jurisdiction of the Court, will be held accountable regardless of their nationality. The question has arisen as to whether such broad jurisdiction is consistent with international law or rather an unlawful intrusion on States sovereignty. The claim that this is contrary to international law is made by reference to the Vienna Convention on the Law of the Treaties, which in Article 34 provides that "a treaty does not create either obligations or rights for a third State without its consent."[7] It should be noted, however, that the Rome Statute does not create obligations for States not parties to it. As a technical matter, in establishing jurisdiction over nationals of non-Parties, it does not bind the non-Party State. The Rome Statute encompasses crimes already proscribed by international treaty or customary law and most of these can be prosecuted under applicable national law, on grounds such as territorial jurisdiction or treaty-based jurisdiction in any national court. In the exercise of its jurisdiction, the ICC does not rely on universal jurisdiction but the consent of either the State on whose territory the crime occurred or the State nationality of the accused, unless the situation is referred by the Security Council.[8] In the context of ordinary criminal law, States often exert jurisdiction over nationals of other States without the latter State's consent or authorization under the principles of territoriality, passive personality or protective jurisdiction. This does not require the consent of the State of nationality. The US is Party or Signatory to a number of international treaties containing provisions that do not require jurisdiction to be tied to the nationality of the offender.[9] While it undoubtedly affects a State's interests that the Court may have jurisdiction over its nationals, this is not a justifiable ground for claiming that the Statute is contrary to international law. It is, however, contended that exercise of jurisdiction by a national court or tribunal is different from delegation of jurisdiction over nationals of non-party States to an international institution. International law does not preclude States from acting collectively by delegating to international court the jurisdiction which they would be entitled to exercise themselves and there is no requirement for a positive rule of international law allowing States to exercise their jurisdiction collectively in

[6] Ibid.

[7] Vienna Convention on the Law of Treaties 1969, *Article 34*, http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf (access: 14.05.2013).

[8] Rome Statute of the International Criminal Court, *Article 12*, http://untreaty.un.org/cod/icc/statute/romefra.htm (access: 14.05.2013).

[9] See e.g. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984; Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents 1973; Convention on the Prevention and Punishment of the Crime of Genocide 1948.

this manner.[10] At Nuremberg, such international jurisdiction was accepted, recognizing that States: "[…] have done together what any one of them might have done singly; for it is not to be doubted that any nation has the right thus to set up special courts to administer law."[11] To address further doubts, it is important to underline that under the Rome Statute, the exercise of complementarity can be undertaken by any State whose nationals are being involved. Thus, if the national of the US were arrested abroad, the US could offer to investigate and prosecute the matter itself. Opponents of the Statute argue, however, that States with effective legal systems cannot be sure that the ICC will not take over the prosecutions over American citizens, because the Statute leaves it to the Court itself to decide, if national courts are "unable or unwilling genuinely to carry out the investigation or prosecution."[12] On this view, the principle of complementarity is not a reliable safeguard. The argument whether the ICC can or cannot be trusted to apply it, is less of law than of legitimacy and political biases.[13]

Legal effects of the US signature

Upon signature the US became eligible to consent to the Statute by ratification.[14] It imposed an obligation on the US under Article 18 of the Vienna Convention of the Law of Treaties which states that a signatory state "is obliged to refrain from acts which would defeat the object and purpose of a treaty" unless it has made clear its intention not to become a party to the treaty.[15] Serious questions remain over Article 18's scope, i.e. how to interpret a treaty's "object and purpose" and the acts that would "defeat" them. A wide range of views exist, from narrow readings that Article 18 bars a State only from acts making treaty performance impossible, to broader interpretations requiring the State to comply with core provisions of the treaty.[16]

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[10] R. Cryer et al., *An Introduction to International Criminal Law and Procedure*, New York 2010, pp. 172−173.

[11] 22 Trial of the Major War Criminals Before the International Military Tribunal 466 (1948).

[12] Rome Statute of the International Criminal Court, *Article 17(a)*.

[13] See e.g. M. Lohr, W. Lietzau, *One Road Away From Rome: Concerns Regarding the International Criminal Court*, "US Air Force Journal of Legal Studies" 1999, no. 9, p. 33.

[14] Rome Statute of the International Criminal Court, *Article 125(2)*.

[15] Vienna Convention on the Law of Treaties 1969, *Article 18*.

[16] See e.g. C.A. Bradley, *Unratified Treaties, Domestic Politics, and the US Constitution*, "Harvard International Law Journal" 2007, no. 48; J. Klabbers, *How to Defeat a Treaty's Object and Purpose Pending Entry into Force: Toward Manifest Intent*, "Vanderbilt Journal of Transnational Law" 2001, no. 34; P.V. McDade, *The Interim Obligation between Signature & Ratification of a Treaty*, "Netherlands International Law Review" 1985, no. 34, p. 5; M. Rogoff, *The International Law Obligations of Signatories to an Unratified Treaty*, "Maine Law Review" 1980, no. 32.

However, President Clinton, in his signing statement, expressed continuing concerns about the ICC and recommended that the Treaty should not be submitted for ratification until these issues are satisfied.[17] With the advent of Bush administration came fiercer opposition to the Court. In order to avoid the obligation under Article 18, the US made clear its intention not to ratify the Statute in a communication to the UN Secretariat on 6th May 2002.[18] This letter, often referred to as "unsigning," raised questions about the current state of US rights and obligations towards the Court, the Statute's objects and purpose and whether the US remains capable of joining the ICC through ratification. The letter relieved the US of its Signatory obligations arising from Article 18, but contrary to popular belief, it did not result in unsigning the Statute. Neither the Vienna Convention on the Law of Treaties nor international customary law provides any support for such a possibility. The United Nations Treaty Collection continues to list the US as a Signatory to the Rome Statute, although with a footnote reproducing the 2002 letter.[19]

Article 98 Agreements

The unsigning was only a precursor for more aggressive challenges to the ICC. Most of these took the form of measures aimed at protecting "US peacekeepers."[20] The US pressured a number of States to conclude bilateral agreements to protect American nationals from the ICC. These, often referred to as "Article 98 Agreements" were made pursuant to Article 98(2) of the Rome Statute. Article 98(2) prevents the ICC from proceeding with a request to surrender an accused if this would require the requested State "to act inconsistently with its obligations under international agreements made with another State."[21] This provision was intended to give a kind of immunity to foreign military forces based in another State, or to various international and non-governmental organisations.[22] Article 98 Agreements went much further as they apply to all US nationals within the State in question. Perhaps they were consistent with the technical interpretation of Article 98(2), although they were not at all what were meant when those provisions were adopted. Some States declared them *per se* contrary to the Statute and, thus, in-

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[17] B. Clinton, op. cit.

[18] U.S. Department of State, *Press Statement on International Criminal Court: Letter to UN Secretary General Kofi Annan*, http://2001−2009.state.gov/r/pa/prs/ps/2002/9968.htm (access: 14.05.2013).

[19] United Nations Treaty Collection, http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&lang=en#11 (access: 14.05.2013).

[20] S.D. Murphy, *Efforts to Obtain Immunity from ICC for US Peacekeepers*, "American Journal of International Law" 2002, no. 96.

[21] Rome Statute of the International Criminal Court, *Article 98(2)*.

[22] D. Scheffer, *Article 98(2) of the Rome Statute: America's Original Intent*, "Journal of International Justice" 2005, no 3.

consistent with State Parties' obligations under the Statute. Others have accepted them but only under limited conditions.[23]

American Service Members' Protection Act 2002

On 2nd August 2002, President Bush signed into law the American Service Members' Protection Act (ASPA). Referring to the Rome Statute, the preamble of the Act declares that: "[The Rome Statute] do not serve the cause of international justice and that not only is this contrary to the most fundamental principles of treaty law, it could inhibit the ability of the United States to use its military to meet alliance obligations and participate in multinational operations, including interventions to save civilian lives. […] contributors to peacekeeping operations will be similarly exposed."[24] ASPA places restrictions on the US cooperation with the ICC. It prohibits cooperation by any US court or agency — federal, state or local — with the Court.[25] Forms of prohibited cooperation include responding to requests of cooperation from the Court, provisions of support, extraditing any person from the US to the ICC or transferring any US national or permanent resident to the ICC, restrictions of funds to assist the Court, and permitting ICC investigations on US territory.[26] It also prohibits direct or indirect transfer of classified national security information and law enforcement information.[27] ASPA imposes restrictions on participation in UN peacekeeping activities, prohibits the US military assistance to States Parties to the Statute and authorizes the President to use "all means necessary and appropriate to" free its service members.[28] Section 2003(c) provides for the possibility of presidential waiver of these restrictions and prohibitions established under ASPA "to the degree such prohibitions and requirements would prevent United States cooperation with an investigation of prosecution of a named individual by the International Criminal Court."[29] It would appear that even with this waiver authority, the executive remains constrained by ASPA to go beyond case-specific cooperation with the ICC and develop systematic insti-

[23] On 25th September 2002, the European Parliament opposed to the agreement proposed by the US, saying that it was inconsistent with the Rome Statute. Also, the Parliamentary Assembly of the Council of Europe declared that these Agreements were not admissible under international law governing treaties. Guidelines were issued by the EU to its Member States on acceptable terms for Article 98 Agreements and set the parameters in order to preserve integrity of the Statute and ensure respect for the arising obligations.

[24] American Service Members' Protection Act, http://www.state.gov/t/pm/rls/othr/misc/23425.htm (access: 15.05.2013).

[25] Ibid., Sec. 2004.

[26] Ibid.

[27] Ibid., Sec. 2006.

[28] S.D. Murphy, *American Service Protection Act*, "American Journal of International" 2002, no. 96.

[29] Ibid., Sec. 2003.

tutional ties. Also, Section 2015, appears to grant leeway for cooperation to "bring to justice Saddam Hussein, Slobodan Milosevic, Osama bin Laden, other members of Al Queda, leaders of Islamic Jihad, and other foreign nationals accused of genocide, war crimes or crimes against humanity."[30] It is clear that the US could not become a State Party to the Rome Statute without significant amendment or repeal of ASPA, given the aim of the treaty and obligations to cooperate with and provide judicial assistance to the ICC.[31] Even if the US became party to the Rome Statute, ASPA restrictions would hinder it from fulfilling its obligations as State Party, particularly to "cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court."[32]

Conclusion

The Obama administration has indicated that it will pursue a more constructive policy towards the ICC. In November 2009, the US returned to the observer seat in the Court's Assembly of States Parties that it had left empty in 2002. It participated actively in the Review Conference in Kampala in June 2010. However, it is very unlikely that the US will ratify the Rome Statute in the foreseeable future. Even with the political will of the administration, the constitution sets a threshold of two-thirds of the Senate. Although not a State Party, the US can still contribute to the Court in many ways.

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[30] Ibid., Sec. 2015.

[31] Rome Statute of the International Criminal Court, op. cit., Part IX.

[32] Ibid., Article 86.

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United States policy towards the International Criminal Court. Selected legal issues

Summary

This article analyzes the United States policy towards the International Criminal Court while focusing on the selected legal issues. The author starts with an introduction to the history of international criminal prosecutions, in particular — the creation of the International Criminal Court. It discusses alleged inconsistencies of the Rome Statute with international law, legal effects of the US signature of the Statute, as well as domestic and international actions of the US regarding protection of its citizens and regulating the cooperation with the ICC. In conclusion the author argues that it is unlikely that the US will rectify the Rome Statute.