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Unratified and Unsigned Treaties Still Constrain U.S. Action

Executive Summary

- This paper illustrates why the United States must vigorously defend its position in international fora and negotiations directed at new treaties. It is insufficient for the United States simply to refuse to sign a treaty in the hopes of avoiding its adverse effects.
- Signing a treaty has consequences under international law. Specifically, a state (country) that has signed, but not ratified, a treaty is to refrain from acts that would defeat the object and purpose of a treaty until it shall have made its intention clear not to become a party to the treaty.
- A state may “unsign” a treaty to remove this obligation, as the United States did when it unsigned the Rome Statute creating the International Criminal Court (“ICC”).
 - President Clinton had signed the Statute on December 31, 2000.
 - On May 6, 2002, the Bush Administration removed its signature from the treaty.
 - This effectively returned the United States to a status of a non-signatory state.
- Treaties the United States has not signed still constrain U.S. action. For example, the ICC can exercise jurisdiction over non-parties, which may cause U.S. officials to act differently than they otherwise would in protecting U.S. interests.
- Similarly, some NGOs are calling upon parties to the Landmine Convention not to participate in joint operations with non-party states, stockpile mines of non-party states, or allow the transit of mines of non-party states.
 - The United States refused to sign the Landmine Convention.
 - All NATO Members but Poland, along with other geographically crucial allies, such as Australia and Japan, have ratified the Landmine Convention.

Introduction

International law is based on consent. There has been a veritable explosion in recent decades in the number and scope of international agreements, some of which promulgate principles of law that the United States does not accept. Signing a treaty has consequences under international law, and thus it is an act not to be taken lightly. Moreover, this paper will provide examples of how even treaties that the United States has not signed still constrain U.S. action. This finding illustrates why the United States must vigorously defend its position in international fora and negotiations directed at new treaties. It is insufficient for the United States simply to refuse to sign a treaty in the hopes of avoiding its adverse effects.

Treaty Background

International law is primarily concerned with the rights and obligations of states and their relations with each other. Historically, it has been much less directed at sub-state actors, such as individual persons.¹ International treaties and conventions are a primary source of international law;² and they are the most obvious manifestation of international law to the general public.

A traditional principle of international law is that it is based on the consent of states.³ In order for the rules of international law to be properly applied to states, those states must have accepted those rules. As such, states are not bound by treaties they do not sign.⁴

In recent decades, there has been an increase in the number of international agreements coming into existence, and an expansion in the topics they address.⁵ “[T]reaties have become the principal vehicle for making law for the international system.”⁶ The subject of treaties is also of note, as, traditionally, they were focused on relations between states, but they are now expanding to cover behavior of sub-state actors, including corporations and individuals. An individual person was historically not the “‘subject’ of international law,”⁷ and “it was thought to be

¹ Restatement (Third) of the Foreign Relations Law of the United States § 101 (1987) (defining international law as the “rules and principles of general application dealing with the conduct of states and of international organizations and with their relations *inter se*, as well as with some of their relations with persons, whether natural or juridical”).

² Statute of the International Court of Justice, Art. 38 (“ICJ Statute”). The Statute of the International Court of Justice is annexed to the Charter of the United Nations, and is reprinted at 59 Stat. 1031 (1945). Customary practices are another primary source of international law. ICJ Statute Art. 38(1)(b). In fact, “[u]ntil recently, international law was essentially customary law.” Restatement at Part I, Chapter I, Introductory Note.

³ Restatement at § 102, Reporters’ Notes ¶ 1 (noting the “traditional principle that international law essentially depends on the consent of states”).

⁴ Vienna Convention on the Law of Treaties, art. 34, 1155 U.N.T.S. 331, 8 I.L.M. 679 (opened for signature May 23, 1969, entered into force Jan. 27, 1980) (“A treaty does not create either obligations or rights for a third State without its consent.”). The United States is not a party to this treaty but essentially accepts the treaty as a declaratory restatement of customary international law default rules governing the topic of treaties in general. See Restatement at Part III, Introductory Note.

⁵ Richard B. Graves, III, *Globalization, Treaty Powers, and the Limits of the Intellectual Property Clause*, 50 J. Copyright Soc’y USA 199, 249 (2003) (“Both the number of treaties to which the United States is a party, and particularly the scope of those treaties, have sharply increased in recent decades.”); Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 Mich. L. Rev. 390, 396 (1998) (noting the “proliferation of treaties”).

⁶ Restatement at Part I, Chapter I, Introductory Note.

⁷ Restatement at Part VII, Introductory Note.

antithetical for there to be *international legal rights* that individuals could assert against states, especially against their own governments.”⁸ Now, as the Restatement (Third) of the Foreign Relations Law of the United States⁹ notes, how a state treats individual human beings, including its own citizens, is considered to be a matter of international concern, and a proper subject for regulation by international law.¹⁰

International agreements seem increasingly directed at creating legal measures to constrain the ability of states to act unilaterally, especially in the use of force¹¹—and particularly directed at the United States. It is part of a trend that Henry Kissinger describes as a movement “to submit international politics to judicial procedures.”¹² The United States itself has potentially exacerbated this trend. Several years ago, John Bolton, now the United States Ambassador to the United Nations, lamented the “legalism that has permeated American foreign policy during the twentieth century.”¹³ The Rome Statute creating the International Criminal Court and the Landmine Convention are examples of this trend. The United States, under the Clinton Administration, was intimately involved in the negotiations of both of these texts; but in the end, it did not sign the Landmine Convention, and only signed the Rome Statute on the last day it was open for signature as a last act before leaving office.¹⁴ The United States has since removed its signature from the Rome Statute. But, as discussed herein, both treaties continue to affect U.S. affairs.

Legal Effect of Signing a Treaty

Signing a treaty, even if that treaty is never ratified, has consequences for the signatory state under international law. When negotiations for a treaty or international convention are completed, that instrument generally is opened for signature, which differs from ratification. Ratification, under international law, “refer[s] to a conclusive act by which a state party communicates its consent to an international agreement to its treaty partners.”¹⁵ “Ratification is also used to refer to internal procedures (like those under Article II of the U.S. Constitution) that national law requires as a condition precedent for ratification in the international law sense.”¹⁶

⁸ Mark W. Janis, *An Introduction to International Law* 245 (2d ed. 1993) (emphasis added).

⁹ The Restatement is published by the American Law Institute, and is generally regarded as a persuasive declaration of the foreign affairs law of the United States. Though not binding authority, U.S. courts, including the Supreme Court, do cite to it in their official opinions. *E.g.*, *Medellin v. Dretke*, 544 U.S. 660, 670 (2005).

¹⁰ Restatement at Part VII, Introductory Note.

¹¹ John R. Bolton, *The Risks and Weaknesses of the International Criminal Court from America’s Perspective*, *Law & Contemp. Probs.* (Vol. 64, No. 1, Winter 2001), at 167, 167-68.

¹² Henry Kissinger, *The Pitfalls of Universal Jurisdiction*, *Foreign Aff* (July-Aug 2001), at 86, 86.

¹³ Bolton, *Law & Contemp. Probs.* (Vol. 64, No. 1, Winter 2001), at 168.

¹⁴ The United States was an initial supporter of both the creation of a permanent international criminal court and some type of ban on antipersonnel landmines. Once the negotiations of agreements directed towards these ends were hijacked by countries more interested in constraining great power action, particularly U.S. action, it was almost inevitable that the final texts would be irredeemably hostile to U.S. interests.

¹⁵ Edward T. Swaine, *Unsigning*, 55 *Stan. L. Rev.* 2061, 2066 n. 21 (2003).

¹⁶ Swaine, 55 *Stan. L. Rev.* at 2066 n. 21 (parenthesis in original). Under U.S. law, it is the Executive Branch that exchanges the instrument of ratification with foreign treaty partners, and officially commits the United States to a treaty under international law. This, of course, may only take place after at least two-thirds of the Senate has approved a resolution of ratification. *Treaties and Other International Agreements: The Role of the United States Senate*, pp. 147-49, S. Prt. 106-71, 106th Cong, 2d Sess (2001). The President cannot ratify a treaty without the consent of the Senate, although one can imagine an odd scenario in which the President chooses not to ratify a treaty

Signature, on the other hand, is generally the first step in the process by which a state makes an initial tangible commitment to the treaty.

It is crucial to note that a state literally “signs up” to some legal consequences under international law when it signs a treaty. Article 18 of the Vienna Convention on the Law of Treaties outlines the most important consequence under international law of *signing* a treaty. It provides that a state that has signed, but not ratified, a treaty is “to refrain from acts which would defeat the object and purpose of a treaty . . . until it shall have made its intention clear not to become a party to the treaty.”¹⁷ The Vienna Convention does not define “object and purpose,” and, as the Restatement notes, “[i]t is often unclear what [state] actions would have such effect”¹⁸ of defeating the object and purpose of a treaty. Moreover, the “Vienna Convention does not suggest any easily administered test for determining a treaty’s ‘object and purpose’ or, for that matter, assessing when a state’s actions would ‘defeat’ it.”¹⁹

The scope of this obligation is, therefore, unclear. Some commentators suggest that state behavior violates the interim obligation when the behavior violates the treaty’s provisions, particularly “major or indispensable provisions.”²⁰ This likely proves too much, however, because Article 18 of the Vienna Convention “clearly resists any attempt to break up the object and purpose of a treaty into the objects and purposes of smaller parts of the treaty.”²¹ Moreover, such a test would essentially equate signature with ratification,²² and completely conflate concepts that are treated separately under international law, and the Vienna Convention itself. A better approach to this interim obligation is a requirement that a signatory not engage in acts that would disable it from complying with the treaty if ratified.²³ Formulated slightly differently, a state must “not do anything which would affect its ability fully to comply with the treaty once it has entered into force.”²⁴

This obligation has important real-world impacts. The Restatement offered the following example with respect to the Second Strategic Arms Limitation Treaty, which was signed in 1979 but has never been ratified: “Testing a weapon in contravention of a clause prohibiting such a test might violate the purpose of the agreement, since the consequences of the test might be

after the Senate consents to it. *See Treaties and Other International Agreements*, pp. 152-53, S. Prt. 106-71. For example, the Senate could attach Reservations, Understandings, or Declarations that the President would find unacceptable.

¹⁷ Vienna Convention on the Law of Treaties, art. 18, 1155 U.N.T.S. 331, 8 I.L.M. 679 (opened for signature May 23, 1969, entered into force Jan. 27, 1980) (emphasis added). “Prior to the entry into force of an international agreement, a state that has signed the agreement or expressed its consent to be bound is obliged to refrain from acts that would defeat the object and purpose of the agreement.” Restatement at § 312(3). Other practical effects of signature are that “signature tends to fix the treaty’s substantive terms,” Swaine, 55 Stan. L. Rev. at 2067; and, in some instances, “may also invest the signatory with particular rights under the treaty.” Swaine, 55 Stan. L. Rev. at 2067 n.25.

¹⁸ Restatement at § 312, cmnt i.

¹⁹ Swaine, 55 Stan. L. Rev. at 2078.

²⁰ *See* arguments discussed in Swaine, 55 Stan. L. Rev. at 2078.

²¹ Jan Klabbers, *How to Defeat a Treaty’s Object and Purpose Pending Entry into Force: Toward Manifest Intent*, 34 Vand. J. Transnat’l L. 283, 293 (2001).

²² Klabbers, 34 Vand. J. Transnat’l L. at 293-94.

²³ Swaine, 55 Stan. L. Rev. at 2078.

²⁴ Anthony Aust, *Modern Treaty Law and Practice*, p. 94 (Cambridge 2000).

irreversible. Failing to dismantle a weapon scheduled to be dismantled under the treaty might not defeat its object, since the dismantling could be effected later.”²⁵ Similarly, as a signatory to the Comprehensive Test Ban Treaty,²⁶ for example, it would seem that the United States could maintain a posture where it could be in a position to conduct a nuclear test in a timely manner at some point in the future,²⁷ but not conduct an actual test. Because of these interim obligations, signing a treaty is not an act to be completed blithely. It is also possible to “unsign” a treaty, as the United States did with the Rome Statute creating the International Criminal Court.

The practical effect of “unsigning” a treaty is that a state removes itself from this burden to not frustrate the treaty’s object and purpose. Article 18, by its terms, contemplates that states can exit from under this interim obligation.²⁸ It is entirely appropriate that unsigning a treaty be “acknowledged as a legitimate and understandable course of action under the Vienna Convention.”²⁹

Moreover, even when the United States does not sign a treaty—or even if it “unsigns” a treaty previously signed but not ratified—those treaties can still affect the United States. The next section will illustrate, by reference to the International Criminal Court and the Landmine Treaty, how international law principles to which the United States *has not consented* still constrain U.S. action.

International Criminal Court

The Rome Statute,³⁰ establishing the International Criminal Court, has many flaws,³¹ but this paper will limit its critique to how the treaty constrains U.S. action even though the United

²⁵ Restatement at § 312, cmnt i.

²⁶ Comprehensive Test Ban Treaty, 35 I.L.M. 1439 (1996) (opened for signature Sept. 24, 1996). The United States remains a signatory to the CTBT, but has no intention of becoming a party to it. Condoleezza Rice, Response of the Secretary of State to a Question for the Record of Senator Biden (No. 12), Committee on Foreign Relations, Feb. 16, 2005, *reprinted at* 151 Cong. Rec. S8532 (daily ed. July 20, 2005) (noting that “the U.S. does not support the CTBT and will not become a party to it”). The ratification of the United States is required for the treaty to enter into force. CTBT, art. 14 and Annex II (listing the states whose ratification is required for the treaty to enter into force, which includes the United States).

²⁷ *Cf.* Conference Report attending FY06 Energy and Water Appropriations Act, Pub. L. No. 109-103, Conf. Rpt. 109-275, p. 159 (directing the Department of Energy to “maintain the current 24-month test readiness posture”). Being able to resume nuclear weapons testing requires the nuclear weapons and scientific communities to conduct various non-nuclear experiments.

²⁸ Swaine, 55 Stan. L. Rev. at 2082 (noting that Article 18 “does not require that the interim obligation be observed for all eternity, but instead only ‘until [the signatory] shall have made its intention clear not to become a party to the treaty’”) (brackets in original).

²⁹ Swaine, 55 Stan. L. Rev. at 2089.

³⁰ Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of the International Criminal Court, U.N. Doc. No. A/Conf.183/9, 37 I.L.M. 999 (1998) (opened for signature July 17, 1998, entered into force July 1, 2002) (“Rome Statute”). For a more detailed discussion on the historical development of the Rome Statute, see RPC Policy Paper, *Protecting U.S. Troops from the Reach of the U.N.’s International Criminal Court*, pp. 2-3 (Jan. 31, 2005), available at <http://rpc.senate.gov/files/Jan3105RevisedICCDF.pdf>.

³¹ For a more detailed discussion on the reasons the Bush Administration has rejected the Rome Statute, see RPC Policy Paper, *Protecting U.S. Troops from the Reach of the U.N.’s International Criminal Court*, pp. 3-4. For an in-depth discussion of the Treaty and its flaws, see Bolton; and Lee Casey, et al, *The United States and the International Criminal Court*, available at <http://www.fed-soc.org/Publications/Terrorism/ICC.pdf>. Of note to the

States is not a party to it. Particularly, the Rome Statute gives the Court the power to exercise jurisdiction over nationals of states that are not party to the Treaty. This includes Americans.

United States is not a Party

On July 17, 1998, after years of preparatory talks and negotiation, states of the world adopted the Rome Statute by a vote of 120 to 7 (including the United States), with 21 abstentions. The treaty was opened for signature that day, and remained open for signature until December 31, 2000,³² the day on which outgoing President Clinton signed the treaty for the United States, even though the United States voted against the adoption of the Statute at the conclusion of the Rome Conference. On May 6, 2002, the Bush Administration formally notified the United Nations that the United States did not intend to become a party to the treaty, i.e., it “unsigned” the treaty. Thus, in international law terms, the United States “simply reverted back to the status it might have retained all along—namely, that of a non-party.”³³ The treaty entered into force on July 1, 2002, after having received the ratification of 60 states. As of November 15, 2005, 100 states are party to the treaty.

Potential Jurisdiction over U.S. Nationals

The way the jurisdiction of the Court is constructed allows it to exercise authority over non-parties. First, Article 12 of the Statute provides that the Court shall have jurisdiction over conduct occurring on the territory of state-parties.³⁴ Next, the prosecutor is authorized to initiate investigations on his own motion;³⁵ and there are procedures by which the prosecutor may obtain warrants for arrest.³⁶ Thus, this jurisdictional authority can capture any situation in which a U.S. national is charged with committing acts within the jurisdiction of the court³⁷ on the territory of a state party, i.e., actions by an individual of a non-state party on the territory of a state party.

There is then a process by which the Court can bring before it officials against whom a warrant for arrest is issued. First, the Court does not acknowledge a defense of immunity for heads of state, for example. Article 27 of the Rome Statute specifically rejects the defense of immunity for officials serving in the capacity of head of state or government, or as an elected representative of that government. It also provides that such claims of immunity shall not bar the Court from exercising jurisdiction over such a person.³⁸ Thus, no U.S. official would be immune from the jurisdiction of the ICC.

Second, Article 28 of the Rome Statute provides that criminal liability lies with a military commander for crimes within the jurisdiction of the Court committed by forces under his

Senate, Article 120 of the Treaty prohibits reservations to the Treaty, which is contrary to long-standing practice, and would purport to eliminate a crucial role of the United States Senate.

³² Rome Statute, art. 125.

³³ Swaine, 55 Stan. L. Rev. at 2062.

³⁴ Rome Statute, art. 12(2)(a).

³⁵ Rome Statute, art. 15(1).

³⁶ Rome Statute, art. 58.

³⁷ Article 5 of the Statute restricts the jurisdiction of the Court to adjudicate the crimes of genocide, crimes against humanity, war crimes, and the crime of aggression.

³⁸ Rome Statute, art. 27 (irrelevance of official capacity).

command if that military commander *should have known* that the forces were committing such crimes, and that military commander failed to take measures to prevent their commission.³⁹ This is how the purview of criminal liability under the Court’s rules is expanded.

Finally, if warrants for arrest are issued against U.S. officials, and those officials travel to a state that is party to the treaty, that state party is obligated to arrest the U.S. officials and turn them over to the Court. Article 89(1) of the Statute provides that “[t]he Court may transmit a request for the arrest and surrender of a person . . . to any State *on the territory of which that person may be found* and . . . States Parties *shall* comply with requests for arrest and surrender.”⁴⁰

A simple hypothetical illustrates one of the numerous ways in which the ICC could bring politically motivated prosecutions against U.S. officials. The Rome Statute has jurisdiction over war crimes and the crime of aggression. It defines war crimes, in part, as “outrages upon personal dignity, in particular humiliating and degrading treatment.”⁴¹ Human rights organizations have made various pronouncements that senior Pentagon officials “should have known” about the “degrading treatment” of detainees under U.S. control.⁴² Thus, any U.S. official who is indicted by the ICC for such matters, and who is traveling to countries that are ICC parties, has the potential of being made subject to ICC jurisdiction. In this regard, the jurisdictional principles of the Statute directly contradict the principle of international law that a treaty does not create obligations for a state without its consent.⁴³

How ICC Jurisdiction Affects the United States

There are various ways that this potential exercise of jurisdiction can directly limit U.S. action or have an adverse effect on U.S. foreign policy decision-making. As a simple example, the freedom of movement of U.S. officials is potentially implicated. For example, all NATO members, except the Czech Republic and Turkey, have ratified the Treaty.

More importantly, the potential exercise of ICC jurisdiction may adversely affect how high-level decision-makers consider the use of force in protecting American interests. The very existence of the ICC and its potential exercise of jurisdiction may either openly or subtly affect policy debates. For example, commentators have noted,

America has a healthy respect for the rule of law, so when considering military action or foreign policy involving the use of force, our decision makers will ask not only the question “is this action legal?” but also the question “how will this action be perceived by the ICC and the Prosecutor?”⁴⁴

³⁹ Rome Statute, art. 28 (emphasis added).

⁴⁰ Rome Statute, art. 89(1) (emphasis added). *See also* Rome Statute, Part 9 (international cooperation and judicial assistance).

⁴¹ Rome Statute, art. 8(2)(b)(xxi).

⁴² *E.g.* Human Rights Watch, *Getting Away with Torture? Command Responsibility for the U.S. Abuse of Detainees*, Apr. 2005, available at <http://hrw.org/reports/2005/us0405/us0405.pdf>.

⁴³ *See* footnote 4 and accompanying text. Vienna Convention on the Law of Treaties, art. 34 (“A treaty does not create either obligations or rights for a third State without its consent.”).

⁴⁴ Lee Casey, et al, at p. 23.

This consideration is not frivolous, and the possibility that it affects policy debates cannot be discounted. Commentators have recounted how the prosecutor of the International Criminal Tribunal for the Former Yugoslavia—which the United Nations Security Council created to pursue persons responsible for ethnic cleansing—initiated an investigation into whether U.S. and NATO officials had committed “war crimes” during the campaign by their use of depleted uranium munitions. The committee of tribunal officials conducting the investigation voted, 3-2, to pursue an indictment, but the prosecutor chose not to move forward with it.⁴⁵ This fact pattern is analogous to a situation in which the United States as a non-party to the Rome Statute could take military action in the territory of a state party, which would place that action under ICC jurisdiction.

The scenarios outlined illustrate how a treaty to which the United States is not a party may cause U.S. policymakers to act more cautiously in protecting America’s interests in the Global War on Terror. The United States must always be in a position to assertively protect its interests—not cautiously, out of fear that the protection of its interests may agitate an ICC prosecutor who is aggressively (and, perhaps, politically) interpreting his mandate.

Landmine Convention

Why the United States is not a Party

The Rome Statute is not the only example of how a treaty the United States has not signed can hinder U.S. action. The United States is also not a party to the Ottawa Convention, the treaty banning landmines,⁴⁶ and it does not plan on joining this “Landmine Convention.”⁴⁷ In explaining why the United States did not sign the Convention at the time, President Clinton explained that the United States insisted on two provisions in the Convention, neither of which was included in the final text. The United States noted that it needed “an adequate transition period to phase out the antipersonnel mines we now use to protect our troops, . . . [and] to preserve the antitank mines we rely upon to slow down an enemy’s armor defensive in a battle situation.”⁴⁸ These are not just abstract considerations, as landmines are an integral part of the defense of South Korea, and antitank mines are needed to deter or stop an armed assault against troops.⁴⁹ Just like the Rome Statute, there is a potential that the Ottawa Convention can hinder U.S. military action even though the United States has refused to sign the Convention.

⁴⁵ Lee Casey, et al, at pp. 20-22.

⁴⁶ Convention on the Prohibition of the Use, Stockpiling, Production, and Transfer of Anti-Personnel Mines and on Their Destruction, 36 I.L.M. 1507 (completed on Sept. 18, 1997, entered into force March 1, 1999).

⁴⁷ See documents attending the announcement on February 27, 2004 of a new U.S. policy with respect to landmines, available at <http://www.state.gov/t/pm/wra/c11735.htm>.

⁴⁸ William J. Clinton, Remarks by the President on Land-Mines, 33 Weekly Comp. Pres. Doc. 1356 (Sept. 22, 1997).

⁴⁹ William J. Clinton. Again of note to the Senate, Article 19 of the Treaty prohibits reservations to the Treaty.

How the Landmine Convention Can Limit International Cooperation

For example, Article One of the Convention calls upon state parties not to assist anyone to engage in any activity prohibited under the Convention. Various states interpret this provision in various ways. Some NGOs, such as the International Campaign to Ban Landmines, believe that this prohibition should extend to participation in joint operations, foreign stockpiling of mines, and transiting of mines.⁵⁰ This is cause for concern for the United States. The United States has participated in a number of multi-national operations—such as both wars in Iraq, Somalia, the Balkans, and Afghanistan—with coalition partners who are signatories to the Ottawa Convention.

More importantly, pre-positioning military equipment is a necessary element of global power projection, and, hence, is a crucial element of United States national security strategy. Pre-positioning equipment is integral to rapid reaction and deployment to hostile areas, and can serve to deter would-be aggressors for that reason. Thus, a ban on pre-positioning landmines, particularly anti-tank mines, works against deterrence of potential state aggressors. Given these two considerations, it is important to note that every NATO Member but Poland, along with other geographically crucial allies, such as Australia and Japan, has ratified the Ottawa Convention. These crucial allies are most likely to be involved in, or otherwise support, joint operations with the United States.

Policy Responses

The United States formulated certain policy initiatives in response to the Rome Statute entering into force, namely the completion of Article 98 agreements. It is interesting to note how some major allies have not welcomed such policy initiatives.

Article 98 Agreements

Specifically, with respect to the ICC, the United States should continue to secure “Article 98” Agreements with as many states as possible. Simply put, an Article 98 Agreement is a bilateral non-surrender agreement concluded between the United States and another country, which prohibits that country from surrendering U.S. persons to the ICC without permission from the U.S. government. Article 98 of the Rome Statute provides that the ICC may not proceed with a request for surrender when that request would require the requested state to act inconsistently with such a bilateral agreement.⁵¹

⁵⁰ See International Campaign to Ban Landmines, *Landmine Monitor Report 2002*, available in relevant part at <http://www.icbl.org/lm/2002/intro/banning.html> (“The ICBL calls on States Parties to insist that any non-signatories do not use antipersonnel mines in joint operations, and to refuse to take part in joint operations that involve use of antipersonnel mines.”); International Campaign to Ban Landmines, *Landmine Monitor Report 2001*, available in relevant part at <http://www.icbl.org/lm/2001/intro/banning.html> (“The ICBL believes that it would violate the spirit of the treaty for States Parties to permit any government or entity to stockpile antipersonnel mines on their territory. . . . The ICBL believes that if a State Party willfully permits transit of antipersonnel mines which are destined for use in combat, that government is certainly violating the spirit of the Mine Ban Treaty, is likely violating the Article 1 ban on assistance to an act prohibited by the treaty, and possibly violating the Article 1 prohibition on transfer.”).

⁵¹ Rome Statute, art. 98.

American Servicemembers' Protection Act & the Nethercutt Amendment

Congress has already acted in this area. It has passed, and the President has signed into law, the American Servicemembers' Protection Act ("ASPA")⁵² and the Nethercutt amendment.⁵³ These provisions, respectively, prohibit disbursement of military assistance and of economic support funds to countries that are party to the Rome Statute. The three exceptions are for countries that specifically are exempted in the legislation, those that have entered into an Article 98 agreement with the United States, and those that have received a waiver from the President.⁵⁴

The United States has used these provisions as leverage in securing Article 98 agreements, as it has already concluded at least 100 of them,⁵⁵ and they are generally permanent. At the same time, major U.S. allies that are party to the ICC to which U.S. officials would travel on a regular basis have not concluded an Article 98 agreement with the United States, including all European Union members, Australia, and South Korea. The EU has been successful in influencing other countries not to complete such agreements with the United States by essentially making consideration for EU membership conditional on not signing an Article 98 agreement with the United States. For example, Romania has signed an Article 98 agreement, but has not ratified the agreement, as the EU predicated Romania's accession, in part, on not completing the agreement.

Some Administration officials have raised concerns about the enforcement of the sanction of ASPA and the Nethercutt amendment. For example, Army General Bantz Craddock has cautioned:

Eleven countries remain sanctioned under the American Servicemembers' Protection Act (ASPA) and are, therefore, barred from receiving IMET [International Military Education and Training] funds. . . . Providing opportunities for foreign military personnel to attend school with U.S. service members is essential to maintaining strong ties with our partner nations. Decreasing engagement opens the door for competing nations and outside political actors who may not share our democratic principles to increase interaction and influence within the region. It is well

⁵² American Servicemembers' Protection Act, codified as part of 2002 Supplemental Appropriations Act for Further Recovery From and Response to Terrorist Attacks on the United States § 2001 et seq, Pub. L. No. 107-206, 116 Stat. 820, 899 (Aug. 2, 2002) (codified at 22 U.S.C. 7421 et seq).

⁵³ FY05 Foreign Operations, Export Financing, and Related Programs Appropriations Act, 2005, § 574, codified as part of the Consolidated Appropriations Act of 2005, Pub. L. No. 108-447, 118 Stat. 2809, 3027 (Dec. 8, 2004).

⁵⁴ 22 U.S.C. § 7426, and FY05 Foreign Operations Appropriations § 574. The countries listed in the statutes are: NATO members, major non-NATO allies (including Australia, Egypt, Israel, Japan, Jordan, Argentina, the Republic of Korea, and New Zealand); or Taiwan. 22 U.S.C. 7426(d), and FY05 Foreign Operations Appropriations § 574(b).

⁵⁵ An unofficial compilation of Article 98 Agreements is available at http://www.ll.georgetown.edu/intl/guides/article_98.cfm.

known that the Peoples Republic of China (PRC) has a long-term goal of partnering with the countries of Latin America.⁵⁶

Congress has provided the President with the authority to waive the application of these sanctions when it is in the national interest do so.⁵⁷ When deciding whether to invoke the sanctions under ASPA and the Nethercutt Amendment, the Administration must balance the value of protecting U.S. personnel from the jurisdiction of the Court against the cost of lost cooperation with countries not signing Article 98 agreements.

No Support to the ICC

In addition to protecting Americans from possibly being subject to the jurisdiction of the ICC, the United States should continue to reject referrals of issues from the Security Council to the ICC so as not to confer legitimacy on the ICC. In its place, if certain circumstances demand an international tribunal, the United States should support the creation of tribunals on an ad hoc basis, like the International Criminal Tribunals for the Former Yugoslavia (“ICTY”) or Rwanda (“ICTR”). In conclusion, the U.S. policy towards the ICC should be the “‘Three Noes’: no financial support, directly or indirectly; no cooperation; and no further negotiations with other governments to ‘improve’ the ICC. . . . The United States should [also] raise our objections to the ICC [by voice and vote] on every appropriate occasion.”⁵⁸

Conclusion

The examples in this paper illustrate why the United States cannot simply refuse to sign a treaty in the hopes of avoiding its adverse effects. Moreover, since the mere act of signing a treaty has effect under international law, the United States cannot avoid such adverse effects by refusing to ratify a signed treaty. Thus, the United States must vigorously defend its position in international fora and negotiations directed at new treaties in order to protect its national interests.

⁵⁶ Army General Bantz Craddock, Testimony of the Commander, United States Southern Command, before the Senate Armed Services Committee hearing of the combatant commanders on their military strategy and operational requirements in review of the Defense Authorization request for Fiscal Year 2007 (March 14, 2006). *See also* Condoleezza Rice, Remarks of the Secretary of State during a Hearing of the House Appropriations Committee Subcommittee on Science, State, Justice, and Commerce regarding the FY07 State Department Appropriations Request (March 9, 2006) (expressing concern that the inability of a state to provide an Article 98 agreement, and the resultant sanction of removing certain assistance to that country, “puts us in the odd position of being unable to support a state that, for instance, wants to help us in Afghanistan or in Iraq”).

⁵⁷ It is unclear what effect such a waiver has upon the likelihood of securing an Article 98 agreement from the country for which sanctions were waived. Even if such sanctions were waived, there are likely many other options available to persuade recalcitrant countries to complete an Article 98 agreement.

⁵⁸ Bolton, *Law & Contemp. Probs.* (Vol. 64, No. 1, Winter 2001), at 180.