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ASIL Insights

U.S. Announces Intent Not to Ratify International Criminal Court Treaty

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On May 6, 2002, the Bush Administration announced that the United States does not intend to become a party to the Rome Statute of the International Criminal Court. John Bolton, the Under Secretary of State for Arms Control and International Security, sent a letter to Kofi Annan, the Secretary-General of the United Nations, stating that "the United States does not intend to become a party to the treaty," and that, "[a]ccordingly, the United States has no legal obligations arising from its signature on December 31, 2000."

[1] In a press briefing the same day, Defense Secretary Donald Rumsfeld explained that the Administration had "a number of serious objections to the [International Criminal Court] - among them, the lack of adequate checks and balances on powers of the [Court's] prosecutor and judges; the dilution of the U.N. Security Council's authority over international criminal prosecutions; and the lack of any effective mechanism to prevent politicized prosecutions of American service members and officials." [2] Marc Grossman, Under Secretary for Political Affairs, expressed additional concerns about the treaty in a speech to the Center for Strategic and International Studies. [3]

The Rome Statute, which calls for the establishment of a permanent international criminal court, was signed by 120 nations at a conference in Rome in July 1998. Although initially a supporter of the proposed Court, the Clinton Administration did not sign the treaty at the Rome conference because of a variety of concerns, including a concern that the treaty contained insufficient protection against politicized prosecutions. The Administration eventually did sign the treaty, however, near the end of President Clinton's term in office. President Clinton explained that the treaty had "significant flaws," but that "[w]ith signature . . . we will be in a position to influence the evolution of the court." [4] He also stated that he would not recommend that the next President submit the treaty to the Senate for its advice and consent "until our fundamental concerns are satisfied." [5] As discussed in last month's *ASIL Insights*, the Statute recently received sufficient ratifications to take effect and, pursuant to Article 126 of the treaty, will enter into force on July 1, 2002.

While the policy merits of the Bush Administration's announcement are of course open to debate, the announcement appears to be consistent with international law. There is nothing in international law that obligates a signatory to a treaty to become a party to the treaty, [6] and the Rome Statute itself (in Article 125) states that it is "subject to ratification, acceptance or approval by signatory States." In addition, Article 18 of the Vienna Convention on the Law of Treaties provides that, upon signing a treaty, a nation is "obliged to refrain from acts which would defeat the object and purpose" of the treaty "until it shall have made its intention clear not to become a party to the treaty." The Vienna Convention thus contemplates that nations may announce an intent not to ratify a treaty after signing it.

If the United States had not clearly announced its intent not to ratify the Rome Statute, it would have, according to the Vienna Convention, been "obliged to refrain from acts which would defeat the object and purpose" of the treaty. The Vienna Convention does not define "object and purpose," so it is unclear what this obligation entails, especially in the context of a treaty, like the Rome Statute, that creates and regulates a new international institution. Nor is it clear how long the object and purpose obligation lasts after a nation has signed a treaty. It could be argued that a long delay in ratifying a treaty would signal a clear intent not to become a party to the treaty. On the other hand, it is worth noting that the United States has sometimes ratified treaties long after signing them. A notable example is the Convention on the Prevention and Punishment of the Crime of Genocide, which the United States signed in 1948 but did not ratify until 1988.

Nevertheless, there may be at least two ways in which the Administration's announcement will have legal significance. First, Article 86 of the Rome Statute provides that parties to the treaty shall "cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court," and other articles in the treaty provide that the Court may formally request even nonparties to provide assistance to the Court and to surrender suspects to the Court. One possible effect of the Administration's announcement will be to preclude an argument that the United States would be violating its duty not to defeat the object and purpose of the treaty if, in some future case, it rejects a request for assistance by the Court. In fact, the same day that the Bush Administration made its announcement, Pierre-Richard Prosper, the State Department's ambassador for war crimes, stated that the Court should not expect assistance from the United States. Another possible effect of the Administration's announcement concerns the Court's jurisdiction. Article 12 of the treaty allows the Court to exercise jurisdiction over the nationals of non-party countries if the crime is committed in the territory of a party country. The Administration's announcement might remove any basis for parties to the treaty to argue that the United States, by signing the treaty, has waived objection to the trial of US citizens in this situation.

Contrary to some press reports, the Bush Administration, in announcing its intent not to ratify the Rome Statute, did not renounce the Vienna Convention on the Law of Treaties. Although the United States has not ratified the Vienna Convention, US officials have often indicated that they accept at least much of the Convention as reflecting binding customary international law. [7] Moreover, Mr. Bolton's contention that the Administration's announcement would mean that the United States "has no legal obligations arising from its signature" appears to have been an implicit reference to the object and purpose requirement in Article 18 of the Vienna Convention. Of course, it is open to question whether Mr. Bolton's statement reflected an acceptance of Article 18 or merely an abundance of caution on the part of the Administration. Under either interpretation, however, the statement was not a renunciation of the Vienna Convention. Finally, in Mr. Grossman's remarks to the Center for Strategic and International Studies, he stated that the Administration's actions were "consistent with the Vienna Convention on the Law of Treaties." As discussed above, this statement appears to be correct.

About the Author:

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[1] Press Statement, International Criminal Court: Letter to UN Secretary General Kofi Annan, at <http://www.state.gov/r/pa/prs/ps/2002/9968.htm>.

[2] News Release, Secretary Rumsfeld Statement on the ICC Treaty (May 6, 2002), at http://www.defenselink.mil/news/May2002/b05062002_bt233-02.html.

[3] Remarks to the Center for Strategic and International Studies, Washington., D.C. (May 6, 2002), at <http://www.state.gov/p/9949.htm>.

[4] Text of President Clinton's Remarks on Signature of ICC Treaty, at <http://www.wfa.org/issues/wicc/prestext.html>.

[5] *Id.*

[6] See Anthony Aust, *Modern Treaty Law and Practice* 83 (2000).

[7] As far as I am aware, however, the United States has not expressly accepted Article 18 of the Convention, and it is not clear whether that Article reflects customary international law. See Aust, *supra*, at 94; Lori F. Damrosch et al., *International Law: Cases and Materials* 476 (4th ed. 2001).

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