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A matter of trust -
The icc and the united states

master thesis
20 points

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International law

spring 2003

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Summary

Impunity from grave crimes such as genocide, war crimes, and crimes against humanity are one of our society's greatest problems. One step in the right direction towards holding people accountable for their gross criminal acts, and serving justice to victims, has been the establishment of the International Criminal Court, a treaty-based Court with jurisdiction to try perpetrators of these crimes. Why, then, is the United States doing all it can to thwart these international efforts? This thesis looks at the arguments brought forward by the US in order to find the underlying reason for this opposition.

Abbreviations

ASPA	American Servicemen Protection Act
ICC	International Criminal Court
IMT	International Military Tribunal
SOFA	Status of Forces Agreement
UCMJ	Uniform Code of Military Justice

1 Introduction

The International Criminal Court is the sum of the last sixty years' theories and hopes of a lasting resolution to war and strife in the world. Mankind has long struggled to create some form of legal boundaries for war, and has, at times, partially succeeded. Now, in the 21st century, the solution is at hand, in the form of the International Criminal Court.

The International Criminal Court (hereafter ICC) has been in creation since World War II, when atrocities committed, not only against enemy combatants, but against innocent civilians, were documented and commented by the population at large.

Many States prominent on the international scene have sought to, and succeeded in, influencing the movement of the international legal order in the last decades, especially in the areas of genocide, war crimes, and crimes against humanity. The United States has, especially since the World War II atrocities, been especially keen on regulating and adjudicating these crimes.

However, during the past few years we have seen a general change in attitude towards taking responsibility of atrocities committed. The United States, a long-time proponent of an International Criminal Court, has reversed its support and has committed itself to working against the proposed solution.

1.1 Purpose

The purpose of the thesis is to find the true reasons behind the United States' aversion toward the ICC. After so many years of propagating for a permanent international criminal court, why is the United States suddenly and so forcefully opposing it?

The United States has framed its rejection of the ICC in a series of reservations and doubts regarding the Statute itself. The main issues of concern to the United States are the role of the Security Council in relation to the Court, the accountability of the Independent Prosecutor, and the universality of the Court's jurisdiction. As will be shown, the ICC Statute contains both procedural and substantive safeguards to assuage the United States' concerns, but still the United States refuses to join the Court.

Not only does the United States not want to join the ICC, it has been working against the court at every single opportunity. As will be shown, US domestic policy decisions have been made at several occasions that are clearly and openly contrary to the aims of the ICC. Why has the schism between the US and the ICC become so wide?

My aim is to analyze the arguments brought forward by proponents and sceptics to the ICC and to find the underlying reason for the United States' position. The United States seems to be on a path towards isolationism, a process which

has been going on for a few years.¹ The United States apparently feels it is not receiving enough credit for its actions on the international scene. A rejection of the ICC may act as a reminder of the need the rest of the world has of a strong United States, both as an economic power and as the sole remaining military superpower.

1.2 Sources

In collecting information for this thesis, I have searched mainly for objective sources outlining the United States' point of view, the legal bases of the actualized points of law, and the background of the ICC Statute. The process has not been simple, most of my information coming from the Internet. I have relied on information from validated sources like the homepages of the United States Senate, the Department of Defense and the Department of State of the United States, as well as homepages of the United Nations, the ICC, and of internationally recognized non-governmental agencies like Human Rights Watch and the Coalition for an International Criminal Court.

Additionally, I have looked at official and unofficial statements made by members of the United States' Government, unaligned NGOs, and individual commentators, to form my own opinion of the current legal and political standpoint of the United States and the international legal community on the legality of an International Criminal Court.

1.3 Disposition

Since the United States' relationship with the ICC has evolved and changed character at very distinct points in time, the thesis is laid out in chronological order, beginning with a brief glance at historical developments, through the Rome Conference held in 1998, the US' signature of the ICC Statute in 2000, and its subsequent withdrawal. Finally, the most recent developments in the Security Council regarding the ICC are mentioned.

¹ I refer for example to the United States' refusal to ratify the Kyoto Protocol, its rejection of the Ottawa Convention on the prohibition of anti-personnel mines. Senate hearing, 106th Congress (II), p. 20.

2 The Path to Rome

2.1 Military Tribunals in Nuremberg and Tokyo

After World War II there was a call for justice to be done concerning the atrocities committed by Germany against its people and other peoples of Europe, and by Japan in the Far East. Consequently, Military Tribunals were set up, the Nuremberg Military Tribunal (by the London Agreement between the US, the UK, France, and the Soviet Union), and the Tokyo Military Tribunal (set up by the Allied forces).

The establishment of the Tokyo Tribunal was in keeping with the surrender agreement signed between the Japanese government and the Allies, whereby the Japanese Government expressly consented to Japanese officials, both civilian and military, being put to trial before the Tribunal for war crimes and crimes against humanity.²

The Nuremberg Tribunal was of a different character. Germany had surrendered unconditionally to the Allied forces, there being no German Government which could negotiate a surrender. The German territory was under effective Allied control, which meant the Allied forces were responsible for policing the territory, as well as prosecuting crimes. Pursuant to the London Agreement, the responsibility of prosecuting German war criminals was divided between the Allies, with the United States responsible for prosecuting the crime of conspiracy to commit war before the war started. The UK prosecuted crimes against peace, and the Soviet Union and France prosecuted war crimes and crimes against humanity. 22 individuals stood accused, and all but three were convicted. Eleven were sentenced to death and the rest to prison sentences of varying lengths (the Tokyo Tribunal charged 28 individuals, all of whom were found guilty; seven were sentenced to death).³

The legacy of the Nuremberg Tribunal can be summarized in seven points, the so-called Nuremberg Principles⁴:

1. Any person who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment
2. The fact that internal law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law
3. The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible governmental official does not relieve him from responsibility under international law

² M.P. Scharf in *The United States and the International Criminal Court: National Security and International Law*, p. 224.

³ J. Godkin, *Origin of the International Military Tribunal at Nuremberg*, Nuclearfiles.org

⁴ Nuclearfiles.org, The Nuremberg Principles.

4. The fact that a person acted pursuant to order of his Government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible for him
5. Any person charged with a crime under international law has the right to a fair trial on the facts and law
6. The crimes [crimes against peace, war crimes, crimes against humanity] are punishable as crimes under international law
7. Complicity in the commission of a crime against peace, a war crime, or a crime against humanity as set forth in [point 6] is a crime under international law.

These principles have since become an established part of international criminal law and have influenced the war crimes tribunals for Yugoslavia and Rwanda, as well as the ICC.

2.2 After Nuremberg

Any hopes that WWII would be the last war for a long time were soon shattered. During the 1950s and -60s, conflicts erupted around the world. Some conflicts concerned liberation from colonial rule (Africa), others resulted in military dictatorships taking control of the country (Latin America). However, the main conflict overshadowing all others was the Cold War. The main contenders, the United States and the Soviet Union, never actually came to blows, but they caused many smaller, peripheral conflicts to erupt. The invasion of the Bay of Pigs to depose Castro, the Soviet advancement into Central Europe, and the Vietnam War are all chilling examples of conflicts emanating from the Cold War.

At the same time, public awareness of world events was growing. Advances in the field of telecommunications made it possible for people to see and hear first-hand what was happening on the other side of the world. In this respect, the Vietnam War stood apart from other armed conflicts up to that time. It was the first conflict truly open to scrutiny by the world. Correspondents travelling with the armed forces reported on the atrocities they witnessed, making the entire world aware of the actions of all warring parties. Consequently, commanders suddenly had an even greater responsibility to punish violations of the laws of war than ever before.

Unfortunately, the United Nations Security Council, deadlocked by the Cold War, could do very little to resolve the ongoing conflicts. It was not until after the fall of the Berlin Wall at the end of the Cold War that the international community was represented by a strong organization with the will and power to fully take on its responsibilities according to the UN Charter.

2.3 War crimes Tribunals for Yugoslavia and Rwanda

In 1991, hostilities erupted in Yugoslavia. The conflict rapidly grew into a full-scale civil war, with countless atrocities committed by different factions against the civilian population of the territories of the former Yugoslavia.

Two years later, the United Nations Security Council issued a Resolution (827) calling for the creation of “international tribunal for the sole purpose of prosecuting persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia”.⁵ The jurisdiction of the ICTY was limited in time and geographical scope, but had precedence over national courts. The Rwanda Tribunal, created in 1994 by Security Council Resolution 955, is formed along the same lines. Both Tribunals are deeply influenced by the Nuremberg Principles.

The creation of these two Tribunals strengthened the hope that other ad hoc courts would be created in the same manner, when the need arose. However, it soon became obvious that it would be too expensive and time-consuming to establish a new court every time there was an international call for justice.⁶ The Security Council asked the International Law Committee to look into the possibility of a permanent International Criminal Court and to compile a first draft for a Tribunal Statute. After several rounds of Preparatory Committee meetings, where the details of the Statute were slowly crystallizing, the process culminated in the gathering in Rome in June 1998 for a Diplomatic Conference.

⁵ UNSC Res 827 (1993)

⁶ Senate hearing, 105th Congress, p. 73.

3 The Rome Conference

162 States⁷ arrived in Rome in the middle of June 1998, with expectations of tough negotiations and hopes of a successful outcome. During the four preceding years, negotiations had been held at Preparatory Committees to hammer out the basic outline of a Statute of an International Criminal Court. Here in Rome, the aim was to finalize the draft treaty and to adopt a final ICC Statute. However, the notion of a successful outcome varied greatly from country to country.

As the Conference progressed, it became possible to differentiate between several groups of States.⁸ The “Like-minded Group” (LMG) was constituted by most European States (excepting France but including the United Kingdom) and by States with experience in genocide and war crimes (i.e. almost all African and Latin American States). The second group consisted of the remaining four of the Permanent Five members of the Security Council. Other groups could also, from time to time and depending on the issue at stake, be identified.⁹

At Rome, discussions were held at many levels on several topics. It soon became apparent that there were four main areas where it would be very difficult to reach consensus.

3.1 Security Council control

The division between the Permanent Five and the LMG became most apparent in the question of the proposed role of the Security Council. While the Permanent Five wanted a court that could act only on Security Council initiative, most other States wanted exactly the opposite: a court completely free from the politics of the Security Council. These States feared for the independence of the court if the Security Council played too large a role. A fair amount of the LMG did not trust the impartiality of the Security Council in referring cases to the ICC. They feared that only criminals from certain areas of the world would be indicted, while others would remain at large, under the protection of powerful countries.

The Permanent Five, on the other hand, were concerned with the work of the Security Council being hampered by the ICC. The main goal of the Security Council is to maintain international peace and security in the world. Under certain circumstances, an ICC investigation could seriously endanger ongoing peace negotiations where the Security Council would be involved; the Security Council may have to negotiate with individuals who faced indictment by the ICC. Faced with such an indictment, such individuals might refuse to cooperate

⁷ B.S. Brown in *The United States and the International Criminal Court: National Security and International Law*, p. 63

⁸ These groups began to emerge already at the Preparatory stage.

⁹ The Asian countries stayed together, as did the conservative Arab states.

in the negotiations, or otherwise might obstruct a constructive solution to the negotiations.

This issue seemed for a long while to be impossible to solve in a manner acceptable to all parties, until the Singapore delegation suggested that the Security Council be given the power to halt an investigation for a renewable period of twelve months. This power would take the form of a majority vote; a veto from any of the Permanent Five would “stop” the interference and allow the Prosecutor to continue his investigation.¹⁰

The Singapore Proposal had one unprecedented result: the United Kingdom, up to this point a solid member of the Permanent Five group, bought into the idea of a court independent from the Security Council except as according to the Proposal, and joined the LMG in December 1997, six months before the Rome Conference.¹¹

3.2 The Independent Prosecutor

Close in hand with the issue of Security Council control was the question of the independent Prosecutor. The Conference delegates had earlier discussed the matter of allowing States Parties to refer cases to the ICC. The LMG wanted to go further and allow the Prosecutor to initiate cases on his own accord, based on information sent to him by NGOs and other organizations.

A number of States, the United States included, objected to this position.¹² In a statement on June 22, the United States delegation declared that this proposal “not only offers little by way of advancing the mandate of the Court and the principles of prosecutorial independence and effectiveness, but also will make much more difficult the Prosecutor’s central task of thoroughly and fairly investigating the most egregious of crimes”¹³.

The United States delegation was concerned with the legitimacy of the Court; they didn’t want this legitimacy undermined by a Prosecutor who didn’t strictly adhere to prosecuting core crimes, but who, for whatever reason, reached further and prosecuted crimes that were not, strictly speaking, under the ICC mandate. This would also be a strain on the ICC’s limited budget and time restrictions. Further, some States (including the United States) were concerned with the accountability of the Prosecutor. They were not sure to whom the Prosecutor was answerable or even if he was answerable to anyone.¹⁴

¹⁰ The head of the Singapore delegation noted: “After all, if a majority of the Security Council, including all five Permanent Five members, agreed on the peacekeeping necessity of temporarily blocking court action, there’d likely be something to it.” L. Wechsler in *The United States and the International Criminal Court: National Security and International Law*, p. 93.

¹¹ B.S. Brown in *The United States and the International Criminal Court: National Security and International Law*, p. 63.

¹² L. Sadat, *The ICC and the transformation of International Law*, p. 94.

¹³ Statement of the United States Delegation Expressing Concerns Regarding the Proposal for a Proprio Motu Prosecutor

¹⁴ L. Sadat, *The ICC and the transformation of International Law*, p. 94.

Proponents of an independent Prosecutor, on the other hand, felt that this authority was necessary to balance the potentially political referrals made by States Parties (and even by the Security Council). The LMG felt the need for a Prosecutor that was truly independent, who wouldn't be swayed by political concerns and who would adhere to the maxims of impartiality and independence.

During the Preparatory Committees and during the Rome Conference itself, procedural safeguards were implanted into the Statute, in order to ensure the impartiality and independence of the Prosecutor. The United States delegation played a leading role in this process.

The negotiations resulted in an agreement on a series of obstacles the Prosecutor will have to overcome in order to bring a case to the court. The first step requires the Prosecutor to make a preliminary determination of whether the information provided is reliable and whether there is a reasonable ground for proceeding with the investigation (Art 18.1). The case is then brought before a three-judge Pre-Trial Chamber. At the same time, the State(s) involved are informed of the Prosecutor's preliminary decision to initiate an investigation (Art 18.1). The involved State(s) is given one month to inform the court whether it has investigated or is currently investigating the case. If this is so, the Prosecutor shall defer the case to the State(s), unless the Pre-Trial Chamber decides that the Prosecutor shall continue with the investigation (Art 18.2). The decision of the Pre-Trial Chamber may be appealed both by the Prosecutor and by the State(s) concerned (Art 18.4). Further, it is clearly stated that the Prosecutor is accountable to an Appeals Chamber (Art 42.7-8) and may be removed from office by the Assembly of States Parties (Art 46.2).

These procedural safeguards were, unfortunately, not enough for the United States delegation, and contributed greatly to the US' decision to vote against the Treaty.

3.3 Jurisdiction

Another issue that seemed almost insurmountable was jurisdiction. When would a case be open to referral to the ICC? Some States favored the universal jurisdiction approach, arguing that the crimes enumerated in the Statute already were crimes of universal jurisdiction and thus self-evident that the Court would have jurisdiction to try anyone for any of the crimes. This approach was hotly contested. Some were not prepared to entrust so much power to the Court, but wanted limitations to its jurisdiction.

3.3.1 Jurisdiction *ratione temporis*

First, *ratione temporis*, the ICC can only investigate allegations of crimes committed after the Statute enters into force (Art 11.1). States who accede to the treaty after it has come into force can only be subject to investigation after they've acceded to it (Art 11.2). No State was interested in dredging up past violations or crimes which had not been addressed until then. The reasoning

was that, first of all, it was against the principle of non-retroactivity to investigate incidents that may not have been illegal at the time they occurred. Second, it would be almost impossible to find reliable evidence concerning an alleged crime committed fifty years ago, and most of the alleged violators would probably be ailing or dead.

3.3.2 Jurisdiction *ratione materiae*

When discussions on an international criminal court seriously began in the beginning of the 1990's, the aim for several countries was to have a court with jurisdiction to try drug-related crimes and terrorist crimes. Certain Caribbean countries were especially concerned with international drug trafficking and wanted a forum to deal with this issue.¹⁵ Other countries were concerned with the growing number of terrorist actions in the world and wished for a strong court in this area. However, it was argued, investigating terrorism requires long-term planning, infiltration, etc., which is better suited for the national rather than the international scene. There is also as yet no internationally accepted definition of terrorism that could be used.¹⁶

The proposed crimes of drug trafficking and terrorism are listed in a resolution adopted by the Rome Conference, with the recommendation that they be considered further at the review conference to be held in 2009.¹⁷

Eventually, the Rome Conference settled on four categories of crimes: genocide, crimes against humanity, war crimes, and aggression. Prima facie, it was not hard for States to unite behind these crimes, as many writers consider them *jus cogens*.¹⁸ The Statute defines these crimes as “the most serious crimes of concern to the international community as a whole” (Art 5.1). The debates were not over, however. New questions arose as to the definitions of the crimes, especially concerning war crimes and aggression.

There was considerable debate regarding what was to constitute a war crime. The basis of discussion was the Geneva Conventions of 1949 and the definitions therein. However, not all countries were prepared to admit the possibility of personal responsibility attached to certain of the enumerated crimes.¹⁹ Further, States wanted some form of pattern, i.e. that it would concern crimes “committed as part of a plan or policy or as a part of the large-scale commission of such crimes” (Art 8.1). This would accentuate the seri-

¹⁵ M.H. Arsanjani in *American Journal of International Law*, vol. 93, no. 1, p. 29.

¹⁶ *Ibid.*

¹⁷ *Ibid.*, p. 30.

¹⁸ L. Sadat, *The ICC and the transformation of International Law*, p. 108.

¹⁹ Ex. Israel was especially concerned with the action of transferring population into occupied territory, as it appears in Art 8.2.b.viii, which finally resulted in Israel voting against the ICC Statute. See Statement by Judge Eli Nathan, Head of the Delegation of Israel to the Rome Conference, July 17th, 1998.

ousness of the crime and would, at the same time, remove inadvertent civilian casualties caused by peacekeeping operations from ICC jurisdiction.²⁰

There were also long discussions on whether the ICC would have jurisdiction in international conflicts only, or if the jurisdiction would stretch to include internal conflicts as well. Most States felt that they could accept wording like that in Common Article 3 to the Geneva Conventions concerning internal conflict, and even go further in regulating internal conflicts.²¹ Some governments, however, adamantly refused to include internal conflicts, as they meant this was exclusively a matter of domestic jurisdiction. The issue was resolved by including internal conflicts in Art 8.2.c-f of the Statute, with the note that internal disturbances and tensions do not constitute armed conflict (Art 8.2.d). The United States played a leading role in including internal conflicts in the Statute.²²

As to aggression, the problem was also one of definition. There was, and still is, no concrete definition of aggression. In 1974 the UN General Assembly issued a resolution (GA Res 3314 (xxix)), containing a tentative definition of aggression in the form of a non-exhaustive list of crimes that may be considered as acts of aggression.²³ This resolution has never been used, and was not included in the Statutes of the Yugoslavia and Rwanda tribunals. It is up to the Security Council to determine whether a State has committed an act of aggression, i.e. made a unilateral aggressive move toward another State without Security Council approval.

The only real difference of opinion between the groupings at the Conference in this area concerned the competence of the Security Council to determine what constitutes an act of aggression. The Permanent Five wanted a clear recognition of the Security Council's role, while a number of other States wanted primary, but not exclusive, competence given to the Security Council.²⁴

In the end, aggression was included in the crime catalogue²⁵, but with the reservation that the court could not exercise jurisdiction on this basis until a review conference has reviewed the issue, defined aggression, and defined the role of the Security Council in this matter in relation to the ICC.²⁶

With the crimes defined, the question arose as to how universal the court's jurisdiction really is, that is, whether the court has automatic jurisdiction

²⁰ B.S. Brown in *The United States and the International Criminal Court: National Security and International Law*, p. 69.

²¹ P. Kirsch & J.T. Holmes, *American Journal of International Law*, vol. 93, no. 1, p.7.

²² D. Scheffer, *American Journal of International Law*, vol. 93, no. 1, p. 16.

²³ L. Sadat, *The ICC and the transformation of International Law*, p. 133

²⁴ M.H. Arsanjani in *American Journal of International Law*, vol. 93, no. 1, p. 29-30.

²⁵ It was agreed on the last day of the Rome Conference to include the crime of aggression. W.A. Schabas, *An introduction to the International Criminal Court*, p. 26

²⁶ M. Politi & G. Nesi, *The Rome Statute: a Challenge to Impunity*, p. 9. The review conference will take place in 2009.

over States Parties based solely on the Parties' ratification, or if a possibility exists for States to opt out or in of certain crimes.²⁷ A number of States wanted to be able to opt out of any of these crimes, i.e. to have a "smorgasbord" of crimes to pick and choose from.²⁸ This was completely unacceptable to other States, who felt that ratification meant complete and automatic acceptance of ICC jurisdiction over all crimes. The Permanent Five proposed introducing a ten-year period during which any State Party could opt out of ICC jurisdiction over crimes against humanity or war crimes.²⁹ This ten-year period might then be renewed if there was general consensus. The Proposal was rejected by the LMG.

The final result was a seven-year opt-out clause for war crimes only (Art 124). This opt-out clause means that a State may decide, upon ratification or accession, that it does not accept ICC jurisdiction over war crimes committed by the State itself or by its nationals.³⁰ The opt-out clause does not apply in case of referral by the Security Council and is non-renewable.

3.3.3 Jurisdiction *ratione loci*

The next question that arose was that of the geographical scope of the ICC's jurisdiction. Here, a distinction was made between Security Council referral on the one hand, and the Prosecutor's investigation, either *proprio motu* or following a State referral, on the other.

Regarding Security Council referral, it was concluded early on in the proceedings that jurisdiction would be universal and automatic, i.e. the Security Council has the power to refer a case concerning any State in the world, regardless of whether that State is a Party to the Statute or not (Art 12.1). This is in keeping with the Security Council's role as stated in the UN Charter.

Problems arose while discussing the Prosecutor's role. Some States wanted to give the Prosecutor the same power as the Security Council referral, i.e. universal jurisdiction. Germany³¹ reminded the Conference that the crimes in question, or at least war crimes and genocide, were crimes for which universal jurisdiction already existed, especially since almost all States in the world have ratified the Geneva Conventions. Germany also mentioned the Nuremberg IMT's universal jurisdiction over war crimes, genocide, and crimes of aggression. Consequently, there existed reasonable basis for assuming universal jurisdiction for the ICC.

²⁷ P. Kirsch & J.T. Holmes, *American Journal of International Law*, vol. 93, no. 1, p. 5.

²⁸ Among them, the United States. B.S. Brown in *The United States and the International Criminal Court: National Security and International Law*, p. 63.

²⁹ D. Scheffer, *American Journal of International Law*, vol. 93, no. 1, p. 19.

³⁰ M. Politì & G. Nesi, *The Rome Statute: a Challenge to Impunity*, p. 12. The only state so far to have made a declaration along Art 124 is France.

³¹ L. Wechsler in *The United States and the International Criminal Court: National Security and International Law*, p. 97.

A number of States did not at all agree with Germany, and instead wanted a strict rule regarding jurisdiction. Some States wanted the court to have jurisdiction only over nationals of State Parties, others allowed for custodial State jurisdiction (the State which has custody of the alleged criminal). Korea³² suggested that one of four States had to accept jurisdiction: the State where the crime took place, the State of nationality of the alleged criminal, the custodial State, or the State of nationality of the victim. This was still too wide for some countries.

At the very end of the Rome Conference, a proposal was forwarded that required either the acceptance of the State of nationality of the accused, or the State where the crime took place³³. Further, if one or more of these States were not a Party to the Statute, an option existed for that State to accept ICC jurisdiction in the particular case in question (Art 12.2-3).

This proposal was finally accepted, but not everyone was happy with it. Certain NGO's wanted the custodial State to be included, in order to eliminate the potential problem of war criminals seeking and finding refuge in non-Party States.³⁴ Some other States, on the other hand, felt the proposal went too far, as it would mean a non-Party State could become the subject of ICC jurisdiction despite not having agreed to be bound by the Statute. For example, if Germany were a Party and the United States weren't, an American committing a Statute crime in Germany could be subject to ICC jurisdiction, despite the United States not being a State Party. The United States proposed instead that both the State of nationality and the territorial State should have to approve ICC jurisdiction, so as to avoid this problem.³⁵ This proposal was rejected.

3.4 Complementarity

Unlike the two international criminal tribunals for Yugoslavia and Rwanda, which enjoy primacy over national courts³⁶, the ICC is merely complementary to national jurisdictions. That is, the ICC will only have jurisdiction if, for some reason, the State of nationality of the accused or the territorial State cannot or will not investigate or prosecute a case. The ICC was never intended to replace national courts, but is supposed to be an extra "safety net" to pick up those criminals who fall through the domestic systems.

When looking closer at complementarity, the principle seems very logical. States are better equipped than the international community to investigate, prosecute, and punish violators because they have better developed systems

³² P. Kirsch & J.T. Holmes, *American Journal of International Law*, vol. 93, no.1, p. 9.

³³ Ibid, p. 11, at 34.

³⁴ L. Sadat, *The ICC and the transformation of International Law*, p. 118.

³⁵ D. Scheffer, *American Journal of International Law*, vol.93, no.1, p. 20.

³⁶ Art 9 ICTY Statute, Art 8 ICTR Statute.

of criminal justice.³⁷ It is also easier for domestic courts and prosecutors to gather evidence, hear witnesses and form a more informed opinion of circumstances surrounding the alleged crime. The international community does not have an effective police with authority to operate anywhere in the world. Further, in dealing with crimes of the seriousness and magnitude stated in the Statute, gathering evidence will probably clash with certain States' national interests and/or security, making the process all the more difficult.³⁸

The delegates at the Rome Conference all agreed on the necessity of national courts having primary jurisdiction. The Yugoslav and Rwanda Tribunals were ad hoc courts with limited jurisdiction, but the ICC is a permanent court, and no State was willing to give up that much sovereignty as to allow this court to have primacy over domestic courts.

At the same time, it was becoming increasingly obvious that national judicial systems did not work in all cases. Pol Pot, Pinochet, and others were still at large and were not being held responsible for crimes committed against their people. Some system was needed to put such criminals on trial.

At the Conference, difficulties arose in deciding just when the principle of complementarity would come into play, that is, when the ICC could initiate an investigation. There are four situations where a case is inadmissible to the ICC. Two of these refer to the principle of complementarity. A case is inadmissible when it is being investigated by a State with jurisdiction, or the case has been investigated by a State with jurisdiction, which has decided not to prosecute.³⁹ The idea was that the ICC would only have jurisdiction when a State was unwilling or genuinely unable to investigate.⁴⁰

Looking first at a State's inability to investigate or prosecute, this issue was barely contested at the Conference. Inability basically entails total or near-total collapse of the State's judicial system (Art 17.3). It may be a State ravaged by civil war, where the infrastructure has collapsed; it may be a country going through a democratization process but not having had time to establish a functional system. The main criterion is that the State, despite a willingness to investigate, is genuinely unable to do so.

The other situation, unwillingness to prosecute or investigate, is more complex. It may be that the illegal action was sanctioned (officially or unofficially) by the State, or the State is under pressure from neighboring countries to shelter the alleged criminal. But it could also be that the State is

³⁷ L. Sadat, *The International Criminal Court and the Transformation of International Law: Justice for the New Millennium*, p. 114.

³⁸ L. Sadat, *The International Criminal Court and the Transformation of International Law: Justice for the New Millennium*, p. 121.

³⁹ Art 17. The other two situations are res judicata and situations where the case is of insufficient gravity to warrant pursuit.

⁴⁰ K. Miskowiak, *The International Criminal Court: Consent, Complementarity and Cooperation*, p. 40.

seeking a different approach in dealing with its past and future. One example is South Africa's Truth and Reconciliation Commission, where, the South African government sought a means less invasive and accusatory than a public trial to deal with past aggressors.⁴¹ Another example is the amnesty given General Pinochet in Chile. Instead of reviving old hatreds, Chile decided to let bygones be bygones and focus instead on the future of the country.

The problem became that of differentiating between "negative" unwillingness and "positive" unwillingness, that is, unwillingness stemming out of lack of respect toward international law and custom, and unwillingness stemming out of a wish to move forward and away from hard times.⁴² The Conference reached a solution to the problem by inserting four guidelines toward determining unwillingness. There is unwillingness when it is shown that the State is shielding the person concerned (Art 17.2.a), when there has been an unjustified delay in the proceedings (Art 17.2.b), a reflection on the principle of due process), or when the proceedings are not being conducted independently or impartially (Art 17.2.c).

The next question that arose regarded the determination of whether a State's investigation or prosecution was genuine or lacking according to Art 17. Most States embraced the principle of *kompetenz-kompetenz*, that is, that the court itself decides whether it has the competence to decide the case. This raised objections by some States, among them the United States, who was sceptical toward the whole idea, and wanted some outside control. They felt that there was a risk that the court might not take a genuine investigation by a State seriously and would want to try the case itself, which would entail a breach of State sovereignty. The United States did not entirely trust the safeguards put in place in the Statute.

3.5 The final vote

By July 17th, 1998, the last day of the Rome Conference, agreement had not yet been reached on several items of the Statute, so the Conference's executive Bureau felt it necessary to do something drastic. The Bureau compiled a draft Statute containing solutions reached and propositions for solutions, which it presented as a final package to the Conference delegates.⁴³ It was a take it or leave it-deal with compromise being the guiding word. Several States started to object, but in the end it was decided to put the package in its entirety to a vote.

⁴¹ M.P. Scharf in *The United States and the International Criminal Court: National Security and International Law*, p. 188.

⁴² K. Miskowiak, *The International Criminal Court: Consent, Complementarity and Cooperation*, p. 48.

⁴³ P. Kirsch & J.T. Holmes, *American Journal of International Law*, vol. 93, no.1, p. 10.

The end result was 120 votes for, 7 against, and 21 abstentions. The ICC Statute was thus overwhelmingly adopted, with only the United States, Israel, China, Libya, Yemen, Qatar, and Iraq deciding not to accept the deal.⁴⁴

⁴⁴ L. Wechsler in *The United States and the International Criminal Court: National Security and International Law*, p. 108.

4 The politics behind the United States' rejection of the Statute in Rome

With 120 nations of the world voting for an international criminal court,⁴⁵ it was very odd for many people that the United States decided not to participate, thereby joining a small group of countries which are not famous for their observation of human rights and international law. Many people asked themselves why the US would want to identify itself with these countries. It is safe to say that the United States doesn't share the political views of those countries (with the possible exception of Israel). So what happened? Why did the US vote against the ICC Statute?

The answer may to some extent be found in the Senate hearing held the week after the end of the Rome Conference. The subject of this hearing was "Is a UN international criminal court in the US national interest?" and its aim was to dissect the Rome proceedings and make sure the United States had made the right decision. Two other hearings were also held, in 2000, regarding the American Servicemen Protection Act and protection of American personnel.⁴⁶ In all these hearings, diplomatic niceties were substituted by political rhetoric.

The main points of discussion raised at the first Senate hearing were, unsurprisingly, the same as the ones held forth as troubling by the US delegation in Rome. The main issue of concern to the participants seemed to be the situation of American military and civilian personnel working abroad. The question was raised while discussing the independent prosecutor, the dilution of the Security Council's power, and the universal jurisdiction of the court. But these are not the only arguments put forth. Some argued that the ICC Statute is fundamentally at odds with the US Constitution, making it impossible for the US to join.

At the Senate hearings of 2000, focus was again on the protection of American servicemen. A bill was introduced, the "American Servicemembers' Protection Act" which proposed to stop any and all US cooperation with the ICC until the United States has acceded to the treaty. Further, it demands immunity of American servicemembers if the US is going to participate in any international peacekeeping efforts. The Act also proposes to stop all military aid to countries who have ratified the treaty, unless they are US allies who have signed agreements with the United States promising not to extradite Americans.⁴⁷

In the end, the US objections can be summarized into five statements, which will be subsequently analyzed and counter-argued.

⁴⁵ Among them France, UK, and Russia of the Permanent Five, the entire European Union, almost all of the Americas, and most of Africa.

⁴⁶ Senate hearings, 106th Congress, June 14, 2000; and July 25-26, 2000. They will be referenced as 106th Congress (I), and (II), respectively.

⁴⁷ Senate hearing, 106th Congress (I), p. 2.

1. The independent prosecutor will “run amok”, either because of pressure from NGOs, etc., or because of a personal agenda, an overzealousness to bring criminals to justice, regardless of reasons why the cases haven’t been tried domestically or been referred to the ICC by the Security Council or a State Party.

The official US position⁴⁸ in Rome was a concern with the potential workload of the Prosecutor. Faced with a bombardment of information from individuals, NGOs and other organisations, it would take all the Prosecutor’s time and effort to sift through this information in order to find cases with enough merit to warrant an investigation.⁴⁹

This argument was expanded in the Senate hearing, where there was a distrust of NGOs and their work. One participant saw international advocacy groups as the only way for the independent Prosecutor to receive any information at all.⁵⁰ He didn’t trust these groups because he thought they feel a need to press down hard on democracies in order to show their impartiality by finding fault everywhere.⁵¹ The United States would be at a great disadvantage here, since these groups need to show they are not afraid of the United States; a disproportionate amount of reports will reach the independent Prosecutor’s desk regarding the US.⁵²

The Prosecutor may have a political agenda of his own, perhaps an issue he finds very important, and thus uses his position to initiate investigations into these issues.⁵³ Merely initiating an investigation, conducting preliminary interviews, etc., can have a major political impact.⁵⁴

One Senator brought forth an example from the ICTY which he saw as very discouraging.⁵⁵ In 2000, Carla Del Ponte, the Head Prosecutor, initiated a preliminary investigation into the NATO bombing of Kosovo and interrogated (in writing) Lord Robertson, Secretary General of NATO. Mrs. Del Ponte did not pursue the investigation further. Still, the Senator saw this as very damaging to NATO and its member States, and felt that Lord Robertson had legitimized ICTY jurisdiction over NATO and its member States.

The action was also seen as a move to establish ICTY jurisdiction over NATO, something which apparently surprised some Members of Congress,⁵⁶ who had a hard time understanding why Mrs. Del Ponte had decided to initiate an investi-

⁴⁸ Statement of the United States Delegation Expressing Concerns Regarding the Proposal for a Proprio Motu Prosecutor, Senate hearing, 105th Congress, p. 147.

⁴⁹ Senate hearing, 105th Congress, p. 14.

⁵⁰ Senate hearing, 106th Congress (I), p. 12.

⁵¹ Senate hearing, 106th Congress(I), p. 19.

⁵² Senate hearing, 106th Congress(I), p. 14.

⁵³ J.R. Bolton, *Remarks at the Aspen Institute*, September 16, 2002.

⁵⁴ Senate hearing, 105th Congress, p. 60.

⁵⁵ Senate hearing, 106th Congress (I), p. 2.

⁵⁶ Senate hearing, 106th Congress (II), p. 6-7.

gation into NATO in the first place. The implication was that international action groups and the media had unduly influenced her to begin looking into the incident.

The counter-argument

NGOs form an integral part of the international community because they are present in areas and situations where government agencies might not be able or want to go. They have ways of gathering information and assessing situations which would be a considerable asset to an institution like the ICC and its Prosecutor.

The Prosecutor will have a possibility to look into cases highlighted by NGOs without as much potential political distortion as those brought him by referral from the Security Council or by States. This third way into the ICC must exist, to strengthen the independence and impartiality of the ICC.

The Independent Prosecutor is an important part of the International Court, because he may alert the world to problems and incidents which States may not care to deal with on their own initiative, and which the Security Council may not feel it wants to become involved in directly. The ICC is supposed to put pressure on governments around the world to deal with impunity, and therefore it is extremely necessary to have an impartial, independent Prosecutor free from political bias who can exert pressure where political bodies cannot.

Regarding the chance of the Prosecutor running amok, the risk is very slight. Just because the Prosecutor may initiate investigations on his own, does not automatically mean that the case will actually reach the Court. There are numerous safeguards in the ICC Statute to make sure only the most serious of cases are prosecuted.⁵⁷ These safeguards are in place to ensure proper handling of the case, that there is enough background information to warrant an investigation, and to make sure the Prosecutor doesn't overstep his competence.

With regard to the specific case of NATO in the ICTY, the situation is a bit unclear. It seems that Mrs. Del Ponte's goal was achieved. It is unlikely that she realistically held hopes of ever actually prosecuting NATO for its actions, but it brought the issue into the scrutinizing light of the media and public opinion. This is uncharted territory in international law, but bringing it up for public discussion may in the future clear the doubts as to the hierarchy of responsibility of NATO, the UN, and other international organizations.

2. The Court and the independent Prosecutor are unchecked and politically unaccountable to an outside body, contrary to basic principles of the US Constitution.

The doctrines of the separation of powers and of checks and balances were established in the Constitution by the Founding Fathers. The three branches of

⁵⁷ See *supra*, Ch. 3.2.

government, the Executive, Legislative, and Judicial, need to be separate from each other, in order for them to accurately control each other and to maintain the balance of power in the government. The ICC contains no such division of powers, but is highly influenced by the European Continental system, where the judicial, executive, and legislative bodies are more interdependent.⁵⁸

The judges of the Court are chosen from all around the world, representing different legal views and political opinions. There is a great risk that an American might come before a Court consisting of judges from non-democratic countries only. These judges might very well hold grudges against the United States, making their impartiality a matter of grave concern.⁵⁹ Further, they possibly lack knowledge and understanding about military society and customs, knowledge which is necessary in a Court of this type.⁶⁰

The independent Prosecutor of the ICC is accountable to no-one outside the Court, which leaves a lot of potential for mischief.⁶¹ He answers to no superior executive power or any legislation,⁶² something very foreign to the United States.

The American rejection of an independent Prosecutor may lie in the fear that this Prosecutor will become an “international Ken Starr”.⁶³ One of the more embarrassing points in American history was the impeachment of Bill Clinton in the Lewinsky-affair, and the conduct of Ken Starr, the independent prosecutor appointed to handle the case. Several question marks have been raised about how independent Mr. Starr really was, how he conducted his investigation, and how much he was influenced by politics. Starr, according to one participant to the Senate hearings, was a former judge with a very good reputation who, as it turned out, could not be trusted by the American people.⁶⁴ One Congressman has stated that “Starr is a rogue prosecutor with a single-minded attempt to bring the President down no matter what the cost to the nation”.⁶⁵ Congressman Kennedy mentions entrapment of the President, unauthorized methods of investigation, press leaks, and politicized and biased reports as the main reasons for investigation.

With this precedent still very clear in the minds of Americans, it is very hard to find enthusiasm, much less trust for the concept of an “international Ken Starr”. Neither the Prosecutor nor the Court is really accountable to anyone outside the Court itself, and has great leeway in deciding for itself when it has jurisdiction. This *kompetenz-kompetenz* may have very serious consequences, especially for the United States.⁶⁶

⁵⁸ Senate hearing, 105th Congress, p. 62.

⁵⁹ Senate hearing, 106th Congress (I), p. 12.

⁶⁰ R.O. Everett in *The United States and the International Criminal Court: National Security and International Law*, p. 141.

⁶¹ Senate hearing, 105th Congress, p. 68.

⁶² Senate hearing, 105th Congress, p. 62. See also J.R Bolton, *Remarks to the Aspen Institute*, September 16, 2002.

⁶³ Senate hearing, 105th Congress, p. 73.

⁶⁴ Senate hearing, 106th Congress(I), p. 14.

⁶⁵ Press Release, Congressman Patrick J. Kennedy (D-RI), October 8, 1998.

⁶⁶ Senate hearing, 105th Congress, p. 68.

The counter-argument

The Court and Prosecutor are not unchecked or unaccountable in the ICC. It is important to remember the nature of this Court. The ICC is a treaty body, not a governing body, which means it cannot have the same powers as a government or a national court. The Prosecutor is a creature of the ICC treaty, thus responsible to the parties to the treaty. In this case, the Prosecutor is responsible primarily to the Appeals Chamber of the court, and ultimately to the Assembly of States Parties. A Prosecutor may be disqualified from a case if he is deemed as not being able to uphold his impartiality in a specific case (Art 42.8). If the Prosecutor abuses his power or neglects to do his duty as required by the Statute, he may be removed from office by the Assembly of States Parties (Art 46).

Judges of the Court are similarly accountable to the Assembly of States Parties. Further, the process of appointing judges follows strict guidelines from the Statute. The judges shall be persons with high moral character, impartiality and integrity (Art 36.3.a). They shall be competent in international law, international humanitarian law and human rights law, and have experience in a professional legal capacity as well as established competence in criminal law and procedure (Art 36.3.b.i-ii). The Assembly of States Parties shall take account of equitable representation of the principle legal systems in the world and of geographical representation (Art 36.8.a.i-iii). The Assembly shall also take into account the need for specific legal expertise on certain issues (Art 36.8.b).

The argument that Americans might face judges with different political opinions than their own holds no bearing. It could be countered by saying that an individual in the United States on trial couldn't get a fair trial if the judge was appointed by a Republican governor and the individual voted for the Democrats in the last election. Further, as a case in point, the Nuremberg judges were not only American, French, and British; Russian judges from the Soviet Union also sat in trial, and no-one had any qualms about that.⁶⁷

The principle of *kompetenz-kompetenz* (Art 19.1) is well-established in many legal systems, and simply means it is up to the Court to satisfy itself that it has jurisdiction or that a case is admissible. There are rules as to how the Court is to make this decision (Art 13, 17), and the decision may be challenged (Art 19) and/or appealed (Art 82). The Court is by no ways an unchallenged organization running roughshod over established principles of law, but rather a well-organized, carefully planned, independent and impartial institution.

3. Complementarity is a completely new, theoretical, principle that has never been tested, which does not bode well for the future.⁶⁸ With no precedent to rely on, the Prosecutor and the Pre-Trial Chamber may well have free reins to decide for themselves if and when complementarity is applicable, giving the ICC jurisdiction.

⁶⁷ Senate hearing, 106th Congress (II), p. 15.

⁶⁸ Senate hearing, 105th Congress, p. 63.

One participant at the Senate hearings saw particular danger to the United States in the matter of complementarity. American law states that the Executive Branch is responsible for decisions to prosecute military and civilian personnel. Since the individuals the ICC is interested to prosecute would primarily be individuals of the Executive Branch, it is very likely that any US domestic investigation would be seen as biased and not independent, giving the Prosecutor the right to conduct his own investigation into the matter.⁶⁹ With the present vague and unchecked complementarity principle, both military and civilian officials could be second-guessed on the well-founded foreign policy decisions. This would be unacceptable.⁷⁰

Further, the ICC will with all probability disregard States' attempts at solving domestic problems with former officials who have arguably committed grave crimes, by resorting to methods other than judicial proceedings. Pinochet was granted amnesty,⁷¹ South Africa initiated a Truth and Reconciliation Commission.⁷² Even the United States resorted to amnesties after the Civil War, when rebels were not held accountable for crimes committed during the war.⁷³

The ICC cannot close its eyes to the fact that, sometimes there are alternatives to prosecution and trial that are more productive, especially for States transitioning from oppressive regime to democracy.⁷⁴ It might be a way for the new democratic regime to break away from the old. There is an obvious risk that these efforts will be undone by a Prosecutor who decides that amnesties and Truth Commissions are not serious or adequate substitutes for prosecution and trial.

The counter-argument

Complementarity ensures that States really do take responsibility for investigating and prosecuting serious allegations of war crimes, crimes against humanity, and genocide. It is only when States cannot or, because of dishonest reasons, will not investigate that the ICC's jurisdiction comes into play. Strict rules apply to this determination.

Primary jurisdiction still lies with the States concerned. The Preamble of the Statute reiterates "it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes" and firmly states that "the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions".

It is not the purpose of the ICC to second-guess the actions and policies of States who fulfil their international obligations to adhere to the human rights instruments they are Parties to and the laws they are bound to follow. States

⁶⁹ D. Scheffer, *American Journal of International Law*, vol. 93, no. 1, p. 19; Senate hearing, 105th Congress, p. 69.

⁷⁰ Senate hearing, 106th Congress(II), p. 28-29.

⁷¹ Senate hearing, 106th Congress(I), p. 19.

⁷² J.R. Bolton, *Remarks at the Aspen Institute*, September 16, 2002.

⁷³ Senate hearing, 106th Congress(I), p. 9.

⁷⁴ Senate hearing, 106th Congress(I), p. 17.

like the United States who act responsibly with regard to others have nothing to fear. The ICC has no jurisdictional basis, and obviously no need, to go after countries that openly display adherence to and respect for international law, especially with regard to the laws of war.

The United States, having been involved in many conflicts the last fifty years, has a very good record of punishing individuals who commit crimes against the laws of war. It is against US Federal law and the UCMJ to violate the laws of war, so these crimes will be punished by the US military. There are several examples of courts-martial involving war crimes, especially from the Vietnam War.⁷⁵

Although States cannot always prevent crimes like these from occurring, there is a big difference between States who take responsibility over what happened and punish those responsible, and those who do not. It is the countries that do not take responsibility who are the targets of the ICC. Even then it may be difficult for the ICC to decide if the State has fulfilled its obligations or not. The point remains, however, that the ICC is a necessary component in the international community for punishing those guilty of serious violations of international law.

As regards amnesties, it is not clear where these stand in relation to international law. It seems as if the Prosecutor should abstain from investigating in such cases, if he finds “substantial reasons to believe that an investigation would not serve the interests of justice” (Art 53.1.c)⁷⁶. This wording is vague, but still gives the impression that the Court should respect a country’s decision to refrain from judicial proceedings in favor of other methods that may better serve the country and the victims of crimes committed. Of course, the Court would have to look closely at the nature of and reason for the amnesty, as well as the nature of the crime before making a final decision on the status of the amnesty.

A further indication of the Court’s inclination towards acceptance of amnesties is that there is no explicit mention that the investigation into the crime should be a criminal investigation. A Truth Commission might in some cases be better suited than a full-scale criminal inquiry.

As stated, there is no clear answer yes or no whether amnesties will be recognized by the Court, but doctrine and an interpretation of the Statute are inclined to say yes.

4 There are several other issues in the ICC Statute that are incompatible with the Constitution.

⁷⁵ Ex. the My Lai massacre, US v. Griffen, US v. Duffy, etc. See R.A. Falk (ed), *The Vietnam War and International Law*, vols. 3 & 4, p. 350 (vol. 3), pp.161, 367 (vol. 4).

⁷⁶ M.P. Scharf in *The United States and the International Criminal Court: National Security and International Law*, p. 188.

First of all, the ICC does not contain any of the constitutional guarantees found in the Bill of Rights, such as the right to a trial by jury, the right to a speedy trial, the right to confront witnesses, and the right to be tried in the state and district where the crime was committed.⁷⁷

This last right stems directly from the Founding Fathers' despair over the British practice to send colonial criminals to Britain for trial, a country unknown to Americans and where the risk of a hostile court was obvious.⁷⁸ The ICC has the potential to become a similar court, where Americans would be tried by judges they haven't themselves chosen and who might very well be from a non-democratic country.

Further, there is no system of outside appeal from decisions of the ICC, another indication of a lack of accountability. It ought to be possible for the country of nationality of the convicted individual to appeal the ICC's decision.⁷⁹

The right to trial by jury does not exist. The ICC is based on the European inquisitorial system, whereby the case is decided by judges, not a jury. This goes deeply against fundamental principles in the United States.⁸⁰

The counter-argument

The section in the ICC Statute on the rights and duties of the accused was written under considerable influence from the United States. Everyone has the right to be presumed innocent until proven guilty (Art 66), to be tried without undue delay (Art 67.1.b), to examine witnesses against them (Art 67.1.e), to examine evidence against them (Art 67.2), etc. The Statute provides more than adequate safeguards not only for the accused, but also for witnesses, handling of evidence, and appeal.

Article 81 allows for appeal against a decision of acquittal or conviction or against sentence. The Appeals Chamber consists of judges who did not participate in the case itself (Art 39.1).

As regards sending Americans to the Hague for trial, this is nothing new in international law. American civilians who have committed crimes abroad will be tried by that State according to its own laws. There is no right for the accused to demand to be tried in his home country. The same applies for the ICC, which serves as a stand-in for the country that could not or would not try him.

⁷⁷ Casey & Rivkin, *The International Criminal Court vs. the American People*, February 5, 1999.

⁷⁸ Senate hearing, 105th Congress, p. 32.

⁷⁹ Casey & Rivkin, *The International Criminal Court vs. the American People*, February 5, 1999; Senate hearing, 105th Congress, p. 69.

⁸⁰ Senate hearing, 105th Congress, p. 66-67.

The ICC is based on the European Continental inquisitorial system, whereby judges decide the case, not a jury. As just mentioned, Americans tried in other States for crimes committed there are tried according to that State's procedures, which do not always include a jury. The United States has had no objections to this before and should not have any objections now.

Also, not all trials in the United States are by jury. Active duty members of the armed forces (i.e. those who would stand the greatest risk of being tried by the ICC) are not guaranteed jury trial by the Constitution.⁸¹

5. Nationals of non-Party States may still be subjected to ICC jurisdiction, a reflection of the universal character of this jurisdiction.

This problem has arisen because of the absence of the requirement of consent to ICC jurisdiction by the nationality State. As it stands now, a case may be referred to the court, or the Prosecutor may initiate an investigation, if either the State of territory where the act took place or the State of nationality of the accused is a Party to the Statute and thereby consents to jurisdiction. The United States wanted nationality State approval to be mandatory but was voted down in Rome.⁸²

One of the potential consequences of this regulation is that American officials no longer are safe travelling abroad.⁸³ An American official travelling to Afghanistan could be detained by Afghan authorities and brought to the ICC with allegations of crimes committed by the United States in Afghanistan, holding this individual personally responsible. It is unacceptable that officials carrying out their official duties might be detained with spurious allegations when what they have done is act according to US official foreign policy.⁸⁴ US foreign policy should not be put on trial. It is an act of State sovereignty. Equally, the United States is very sceptical to the risk of the President or members of his Cabinet being indicted before the Court despite immunities generally granted by international law to heads of state and other high officials.

This problem was actualized in the wake of the Pinochet extradition case in 1998, when the United Kingdom, having detained Pinochet, was considering whether to extradite him to Spain, where he was facing charges of genocide. The United States felt this was a grave breach of State sovereignty and the guarantee of amnesty granted Pinochet (he travelled to the UK on a diplomatic passport). "Shouldn't Chile be allowed to handle the case as it

⁸¹ Washington Working Group on the International Criminal Court, *The International Criminal Court and US National Security*.

⁸² Senate hearing, 105th Congress, p. 36.

⁸³ Senate hearing, 106th Congress (I), p. 27-28.

⁸⁴ L. Wechsler in *The United States and the International Criminal Court: National Security and International Law*, p. 110.

lomatic passport). “Shouldn’t Chile be allowed to handle the case as it deems fit?”, the argument went.⁸⁵

Another part of the universality of the ICC’s jurisdiction means that even crimes committed by Americans on American soil may be investigated and prosecuted by the ICC. This is a grave breach of State sovereignty which cannot be accepted.⁸⁶

There is a very strong opinion that American citizens (particularly, in the context of the ICC, US military) should be tried by US authorities, especially when acting on behalf of the United States. The ICC could seriously inhibit US activity abroad, unless there is adequate protection of American servicemembers.

One Senator⁸⁷ expressed an opinion that he was not sure the United States could continue participating in international peacekeeping operations, whether under the auspices of a UN force or otherwise, unless there was a guarantee that US personnel would not be subject to investigation or prosecution by the ICC.⁸⁸ Another argued that it was widely known that the United States is not universally loved, and the US might have to operate in nations that were not positively inclined toward the US and its actions.⁸⁹ If such a State were a party to the ICC, what would stop them from arresting US personnel and handing them over to the ICC along with a referral to the Court under the pretext of an alleged crime? This referral, according to him, would be politically motivated and not at all caused by a genuine concern over an illegal action.⁹⁰ The risks would simply be too big to warrant continued US interventions around the world.⁹¹

The United States is active in many countries around the world, and one of the mechanisms employed to ensure the safety of those Americans working abroad are Status of Forces Agreements (SOFAs) concluded between the United States and the countries hosting US personnel. These SOFAs regulate jurisdiction over acts committed by US personnel while on active duty in foreign countries, placing primary jurisdiction on the United States military (unless the crime was committed by off-duty personnel outside that jurisdiction, in which case jurisdiction would lie with the receiving State).⁹²

However, it is not clear whether the existing SOFAs will be enough to stop the ICC from exercising jurisdiction over American personnel, so the United States began renegotiating these agreements in the light of Article 98 of the Statute.

⁸⁵ Senate hearing, 106th Congress (I), p. 11.

⁸⁶ Senate hearing, 105th Congress, p. 68.

⁸⁷ Senate Hearing, 105th Congress, p. 7.

⁸⁸ See also, Senate hearing, 106th Congress (I), p. 6-7.

⁸⁹ Senate Hearing, 105th Congress, p. 70.

⁹⁰ Senate Hearing, 105th Congress, p. 70.

⁹¹ D. Scheffer, *American Journal of International Law*, vol. 93, no. 1, p. 19.

⁹² Casey & Rivkin, *The International Criminal Court vs. the American People*, February 5, 1999; R. Wedgwood in *The United States and the International Criminal Court: National Security and International Law*, p. 124.

Article 98 regulates the surrender of individuals to the ICC, and asserts that a State may not surrender an individual to the Court without the sending State's permission, if there is a bilateral agreement between the sending and the receiving States. The United States proposes to amend their SOFAs into "Article 98-agreements" stating that the receiving State may not surrender American individuals to the ICC. This would give US military and civilian personnel adequate protection from ICC prosecution while avoiding conflict with the spirit of the Statute.⁹³

The counter-argument

The requirement of nationality State consent would seriously hinder the work of the ICC and would effectively make the ICC useless. The most serious criminals are most often under the protection of their nationality State (ex. Pol Pot, Milosevic, Saddam Hussein) and are impossible to reach. The ICC has no possibility to act unilaterally to retrieve an accused from their home State, unlike the US action to retrieve Noriega from Panama in 1989.⁹⁴

The United States invaded Panama to take Noriega to trial for drug and racketeering charges. Noriega may well have been a threat to the United States, but that still leaves the question of what gave the United States the right to infringe on Panama's sovereignty in this way. Since there is no internationally recognized universal jurisdiction attached to these crimes, the legal legitimacy of this action seems highly questionable, to say the least.

As regards jurisdictional principles, the principle of territoriality is seen as the rule, and that of nationality as the exception.⁹⁵ Even the United States recognizes this, as it recognizes the universal jurisdiction over crimes of war, genocide, and certain other crimes.⁹⁶ The universal character of these crimes means that any State may exercise this jurisdiction over any individual in the world, regardless of existing treaties.

The ICC Statute is not the first treaty to confer jurisdiction over nationals of non-Parties, and the United States is Party to a number of them, among them the Geneva Conventions, the Convention Against Torture and the International Convention Against the Taking of Hostages.⁹⁷ All these treaties contain provisions for the principle of *aut dedere aut judicare*, either extradite or prosecute. Had there existed any Convention on drug trafficking containing corresponding regulations, the Noriega incidents might have been seen as more legitimate.

The United States is also concerned with the Pinochet case. This case is a good example of universal jurisdiction at work. Spain, a Party to the Convention Against Torture, has long accepted people fleeing from the repressive Pinochet regime in Chile. Based on information and testimonies provided by these peo-

⁹³ J.R. Bolton, *Remarks at the Aspen Institute* September 16, 2002.

⁹⁴ R. Jackson & M. Clary, *Noriega Convicted on 8 Drug and Racketeering Charges*, Los Angeles Times, April 10, 1992.

⁹⁵ HRW, *The ICC Jurisdictional Regime; Addressing US Arguments*, at 3.

⁹⁶ HRW, *The ICC Jurisdictional Regime; Addressing US Arguments*, at 4.

⁹⁷ HRW, *The ICC Jurisdictional Regime; Addressing US Arguments*, at 7.

ple, a Spanish court decided it had a case against Pinochet for torture amounting to genocide. Pinochet was at the time visiting the United Kingdom for medical treatment when he was arrested. He appealed the extradition decision, but the British court reached the conclusion that the UK had a right to extradite him to Spain, based on Spain's universal jurisdiction. There was no need to obtain the consent of Chile to try the case.⁹⁸

A distinction has to be made between general universal jurisdiction and the more qualified universal jurisdiction of the ICC. Pinochet cannot be brought before the ICC, because of the temporal jurisdiction (only crimes committed after the entry into force of the Statute are admissible), but suppose the events in Chile had happened now. Since this was an internal matter, that is, the territorial and nationality States are the same, the consent of Chile would be required for the case to be investigated by the ICC unless, of course, the Security Council referred the case.

The United States is afraid the same thing would happen to Americans traveling abroad, perhaps that a Texan governor travelling to Germany would be detained and referred to the ICC alleging crimes against humanity for allowing people to be executed in Texas prisons. As the alleged crime would have been committed by an American on American soil, the United States would have to consent to the ICC's jurisdiction, which would never happen. Security Council referral is also, obviously, out of the question, because of the US veto power.

Article 98 was developed because of a concern about the potential for conflict between the Statute, and existing fundamental obligations of international law (like the Vienna Convention on Diplomatic Relations) and obligations arising from SOFAs.

Article 98.1 states that a State may not hand over an individual from a third State (the sending State) enjoying diplomatic immunity,⁹⁹ unless the sending States waives the immunity. Thus, the decision to hand over such an individual remains completely with the sending State.

Article 98.2 deals with a similar situation, but here the jurisdictional responsibility for the individual stems from an existing¹⁰⁰ agreement between the sending and the receiving States (i.e. a SOFA). The purpose of the Article is to enable the ICC to continue its work without States having to violate previous international agreements. Traditionally, SOFAs cover military and civilian personnel from the sending State in their official capacities. Actions taking place outside this official capacity are generally under the jurisdiction of the receiving State, thus outside the scope of the SOFA, giving the receiving State the right to hand over an individual to the ICC without first obtaining permission from the sending State.

⁹⁸ Senate hearing, 106th Congress(I), p. 18-19. In the end, Pinochet was allowed to return to Chile because his health was too fragile to risk a trial.

⁹⁹ Arising from international law, such as the Vienna Convention on Diplomatic Relations

¹⁰⁰ i.e. Article 98.2 will not come into play for new agreements reached after the entry into force of the Statute, since states parties are bound to follow the Statute. CICC, *US so-called "Article 98" agreements*, March 4, 2003.

The US version of “Article 98.2-agreements” goes much further than this. Its focus is on the prevention of surrender to the ICC rather than an assertion of the return of individuals to the United States, and covers many more categories than allowed by Article 98.2. The Article allows for agreements concerning individuals on official active duty in another State. The US version includes individuals active and formerly active, as well as individuals employed by the United States, such as contractors, etc., who are nationals of the receiving States,¹⁰¹ and is thus inconsistent with the aim and purpose of the ICC Statute. Any State Party to the Statute consenting to sign such an agreement will be in violation of the Statute. Unfortunately, at least fourteen countries have signed “Article 98-agreements” with the United States.¹⁰²

¹⁰¹ CICC MEMO, *Bilateral Agreements Proposed by US Government*, August 23, 2002.

¹⁰² The American Non-Governmental Organizations Coalition for the International Criminal Court, *Fact Sheet: Chronology of the US Opposition to the International Criminal Court*.

5 Recent Developments

5.1 World events since the Rome Conference

Since the end of the Rome Conference on July 17, 1998, the world has seen many dramatic events. Unfortunately these events have not been healthy for the ICC's relationship with the United States.

Although the distance between the United States and the ICC seemed too large to bridge after the Rome Conference, President Clinton made an unprecedented move when he, on December 31, 2000 (his last day in office), signed the ICC Statute. In his press statement, Clinton reaffirmed the United States' respect and support for international accountability and his wish to help the development of the ICC in the future. But, at the same time, he reaffirmed that he saw the ICC Statute as it is as fundamentally flawed, and urged Congress not to ratify it until these flaws have been corrected.¹⁰³

The Bush Administration has been much harder in its criticism of the ICC and, on May 6, 2002, the United States sent a note to United Nations Secretary General Kofi Annan declaring that the United States would no longer consider itself bound by its signature to the Statute¹⁰⁴. This action, however politically questionable, is perfectly legal under Article 18.a in fine of the Vienna Convention on the Law of Treaties. This action provoked reactions around the world. The EU stated its respect for the United States' decision but made clear that this action had the potential of annulling all developments in the field of international accountability during recent years.¹⁰⁵ The EU has previously made clear its support of the creation of the ICC and encouraged the United States to cooperate with the Court.¹⁰⁶

5.1.1 Developments in the Security Council

A little more than a month after the nullification of its signature to the ICC Statute, the United States proposed a Security Council resolution that would exempt UN peacekeepers from ICC jurisdiction completely.¹⁰⁷ The proposal received no support, so the United States countered by vetoing the renewal of

¹⁰³ Statement by the President, *Signature of the International Criminal Court Treaty*, December 31, 2000.

¹⁰⁴ US Department of State, *International Criminal Court: Letter to UN Secretary General Kofi Annan*, May 6, 2002

¹⁰⁵ Declaration by the Presidency on behalf of the European Union on the position of the US towards the International Criminal Court, May 13, 2002.

¹⁰⁶ Council Common Position on the International Criminal Court, June 11, 2001.

¹⁰⁷ Human Rights Watch Statement, *US Proposals to Undermine the International Criminal Court Through a UN Security Council Resolution*, June 25, 2002.

the mandate of the UN peacekeeping force in Bosnia-Herzegovina.¹⁰⁸ The impasse was solved by the passing of Security Council Resolution 1422 which states that a case before the ICC which involves current or former peacekeeping personnel from a contributing State not Party to the ICC statute, shall automatically be deferred for a period of twelve months, unless the Security Council decides otherwise.¹⁰⁹ The resolution was renewed by the Security Council on June 12, 2003.¹¹⁰

5.1.2 The American Servicemembers' Protection Act

Directly following the Rome Conference, some Senators began work on a proposal for a law that would guarantee protection of US military and civilian personnel from the jurisdiction of the ICC. The work resulted in a bill, the American Servicemembers' Protection Act (ASPA), that was presented at a Hearing before the Committee on Foreign Relations of the United States Senate in the summer of 2000.

The idea behind the proposal was to stop any and all cooperation between the United States and the ICC as long as the US has not acceded to the Treaty. The United States would not send personnel to any UN peacekeeping force unless US troops were guaranteed immunity from ICC prosecution. Further, transfer of classified national security information to the ICC would not be allowed, and the US would not send military assistance to any ICC signatory State unless there are special provisions in SOFAs or "Article 98-agreements" providing for immunity of US personnel from extradition to the Court. Lastly, ASPA would empower the President to use all means necessary to bring home any individual detained against their will by the ICC.¹¹¹

This last provision prompted critics of ASPA to dub the proposal the "Hague Invasion Act", because it would effectively mean that the US could launch a "rescue operation" to retrieve Americans detained in the Hague, unquestionably an act of hostility towards the Netherlands.

ASPA was well received by some Members of Congress, but others had strong doubts as to the necessity of taking such harsh measures. On the point of the handing over of classified information and of not cooperating in any way with the Court, someone pointed out that this would mean the ICC potentially would have to acquit a future Pol Pot due to lack of evidence, because the US might have evidence pointing to his guilt but would not share it with the Court. Also, even though the US is not a Party to the Statute, an American could be brought before the ICC; the proposed legislation would not allow the US government to provide the Court with exonerating evidence.¹¹² Further, if you look at existing

¹⁰⁸ The American Non-Governmental Organizations Coalition for the International Criminal Court, *Fact Sheet: Chronology of the US Opposition to the International Criminal Court*.

¹⁰⁹ *Ibid.*

¹¹⁰ UNSC Resolution 1487 (2003).

¹¹¹ Senate hearing, 106th Congress(I), p. 2.

¹¹² Senate hearing, 106th Congress (II), p. 36.

legislation, the President already has the power to withhold classified national security information.¹¹³

The President also already has the authority to protect American personnel wherever they are, making the “invasion” clause unnecessary.¹¹⁴ This provision does nothing more than aggravate relations with the Netherlands, and is counter-productive to the aims of the United States and the ICC.

The proposal of making it illegal to send US troops to partake in UN peacekeeping operations was heavily refuted. This proposal would seriously hamper the United States’ ability to act quickly on issues of critical national security concerns, and would infringe on the President’s power as Commander-in-Chief.¹¹⁵

The ASPA proposal, as put forth in 2000, did not receive Senate support. However, several amendments were made, and the bill was introduced to Congress in the beginning of May, 2002, and signed into law on August 2, 2002. The American Servicemembers Protection Act bars any US participation in UN peacekeeping missions unless American forces are exempt from ICC jurisdiction. The President may waive this prohibition in case of national security interest. Further, ASPA stops military assistance to ICC member States, with the exception of NATO States and certain other US allies. US cooperation with the ICC is limited, but the President can, under his own authority, share classified information. The Dodd Amendment allows for the US to assist in bringing foreign nationals to justice. Finally, the “invasion” clause remains intact, giving the President authority to free Americans and allies held by the ICC.

¹¹³ Senate hearing, 106th Congress (II), p. 41-42.

¹¹⁴ Senate hearing, 106th Congress (II), p. 41-42.

¹¹⁵ Senate hearing, 106th Congress (II), p. 31

6 Conclusion – where do we go from here?

The International Criminal Court has been in the making ever since the last defendant was led from the courtroom in Nuremberg. It has been a long and arduous road, but the goal has been achieved: a criminal tribunal empowered to prosecute individuals from around the world for crimes against humanity, war crimes, and genocide. Due to the gravity of these crimes and the universality granted them by international customary law (as stated in the Nuremberg Principles), Heads of State are no longer immune to prosecution for these crimes. The international community has decided that anyone committing crimes on this scale and gravity should be punished for it.

Yet this is not a Court with absolute power. Fundamental rules of procedure and evidence ensure that the rights of the accused are safeguarded. The principle of complementarity gives States primary jurisdiction to try cases against their nationals or crimes committed on their territory, as has been customary. Under customary international law, States have an obligation to prosecute the crimes in question. Only if one or more of these States is unwilling or genuinely unable to exercise its jurisdiction does the ICC step in.

Why, then, is the United States so set against the ICC? As a democratic country with a working judicial system, and a military with deep knowledge in and respect for the laws of war, the United States has nothing to fear from the Court. Yet still the United States hesitates. Or, actually, it goes further than that: the United States is working actively to undermine the ICC, refusing to cooperate in any way, and convincing other States, both ICC Parties and not, that the ICC is a fundamentally bad idea, flawed at the core.

At the same time, it is interesting to note that the United States took a very active part in the forming of the Statute, and was a great asset to the Rome Conference and the Preparatory Committees that led up to the Conference. How come, then, that the US, after obtaining 95 % of what they wanted in the Treaty, did they walk away?

To some extent I think the answer lies in United States' position in international affairs. The United States is highly exposed economically, politically, ideologically, and in the sheer power of its military forces. This makes the US the single most powerful country in the world, but at the same time the most vulnerable to attack. The United States maintains that it must have some way of safeguarding its interests and its people from unwarranted attacks.

To the rest of the world, an International Criminal Court may seem as a wonderful idea, but for a country as powerful as the United States, the risks far outweigh the benefits. The United States means that it cannot join a court that would put its citizens, high and low, in a position vulnerable to foreign influence and attack.

The problem with the United States' arguments is that they don't stand up to closer scrutiny. As has been shown in this thesis, each argument the US has put forth can easily be refuted, simply by reading the Statute or referring to existing international law. There is simply no basis in fact to any of the arguments. The United States needs to have faith in the capability of others, needs to trust other States to hold up their end of the agreement, just like other States do with the United States.

Who, if not the most powerful country in the world, would want to make extra sure it follows international law and acts like a role model for other States to follow? Yet the United States does the opposite, it demands exceptions from the rules, precisely due to the fact that it is so strong. This sort of action creates jealousy and enmity, precisely what the United States does not want.

And here is where I believe the problem lies. The United States does not trust the international community. It shies away from cooperation, not only in the ICC, but on other issues as well, like the Kyoto Conference on Sustainable Development, the WTO Ministerial Conference in Doha, and the negotiations in Ottawa on the prohibition of anti-personnel mines. This trend is worrisome, and does not bode well for the US or for the international community as a whole.

Ironically, the fact that the US is so dead set against the ICC may prove to fulfil the purpose of the ICC. Since the US is so set against the ICC, it is improving its national legislation, both civil and military, to make it impossible for cases to be brought before the ICC. The US is in actuality creating a fail-proof system for punishing Americans who commit war crimes, crimes against humanity, genocide, and crimes of aggression, that the ICC will never come into play for Americans. This is precisely the aim of the ICC!

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