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Fiona McKay

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Introduction

In 2002, a new international institution arrived as the International Criminal Court (ICC) opened its doors in The Hague.¹ At the time of this writing there are ninety-two states parties, which have met on three occasions during 2003.² They elected the Court's first eighteen judges in February and its Chief Prosecutor in April. The Court itself has hit the ground running. The new Prosecutor has not begun any formal investigations but announced, in July, that he is closely following the situation in the Ituri province of the Democratic Republic of the Congo where, in recent months, brutal killings, torture and rape have taken place.³

The establishment of the ICC is the culmination of a process that began with the Nuremberg trials more than half a century ago, whereby

1. The Rome Statute of the ICC entered into force on July 1, 2002, two months after the 60th ratification according to Article 126 of the Statute. *Rome Statute of the International Criminal Court*, July 17, 1998, Annex 11, U.N. Doc. A/CONF.183/9 (1998), available at <http://www.un.org/law/icc/statute/roefra.htm>.

2. States Parties include many of the U.S.'s closest allies: all of the European Union, Colombia, Brazil, Argentina, South Africa, Canada and Australia. Russia has signed the Statute but not yet ratified. A total of 143 States have either signed or become party to the treaty. States that have remained outside the treaty so far include the U.S. and Israel (both of which signed but subsequently "unsigned" the treaty), North Korea, India and Pakistan. Japan is actively preparing to become a party and China has indicated that it is considering doing so. See Colum Lynch, *U.S. Presses U.N. to Extend War Crimes Court Exemption*, WASH. POST, June 7, 2003, at A16.

3. *Report of the Prosecutor of the ICC, Mr. Luis Moreno Ocampo to the Second Assembly of States Parties to the Rome Statute of the International Criminal Court*, (Sept. 8, 2003), at http://www.icc-cpi.int/otp/030909_prosecutor_speech.pdf.

governments have agreed to work together to ensure justice for the world's worst human rights abusers. The last generation of tyrants like Pol Pot, Idi Amin and Stalin went unpunished. Augusto Pinochet and Saddam Hussein have felt the heat. Slobadan Milosevic and the leaders of the Rwandan genocide have actually been brought before a court to answer for their crimes. International law developed during the twentieth century from a situation where what went on inside a state was no one else's business to a coherent framework and accepted set of norms intended to ensure that perpetrators of mass atrocities can be pursued wherever they go.

While half the world's states are working together to set up this global mechanism to punish and deter genocide, crimes against humanity and war crimes, the U.S. is absent from the table. Worse, since the start of the Bush presidency, U.S. representatives have been actively undermining the new Court. More recently, the administration's attack has gone beyond the ICC alone and has begun to pose a broader threat to cooperative efforts by national judiciaries to make sure that no safe haven exists for those who commit the worst of crimes. The implications of these actions are profound, both for the ICC and for international law. At the same time, the United States has been vigorously pursuing a global "war on terrorism," sparked largely by the attacks of September 11, 2001, for which it has been drumming up international support for some of the very principles of collective action it is undermining in its actions concerning the ICC. One result of this inconsistency is that due to its non-cooperation in tackling impunity for human rights crimes, the United States risks losing the international cooperation it seeks on other fronts, and is thus doing serious harm to its own interests.

I. The ICC and Terrorism

Would the ICC have been more acceptable to the United States if its jurisdiction included terrorism? Acts of terrorism, as such, are not included in the list of crimes within the ICC's jurisdiction. The Rome Statute includes genocide, crimes against humanity and war crimes, with the crime of aggression to be added if and when a definition can be agreed on at a future review conference. During the Rome Statute negotiations the possibility of including certain acts of terrorism, already prohibited in international treaties, was discussed, but a majority of states opposed inclusion, viewing these acts as crimes of a different character for which effective systems of international cooperation were already in place, and they were ultimately not included.⁴ There was also the problem of reaching agreement on a definition. But to acknowledge the strongly held views of some states, the Final Act of the Rome Conference included a recommendation that a future review conference consider adding the crimes of terrorism and drug crimes to the Court's jurisdiction.

4. THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE 81 (Roy Lee ed., 1999).

Many believe that major acts of terrorism such as the attacks on the World Trade Center and the Pentagon are of a sufficiently serious nature to meet the threshold required to qualify as a crime against humanity under Article 7 of the Rome Statute.⁵ In fact, this same point was made by the ICC's Chief Prosecutor, Luis Moreno Ocampo, who recently said the United States was passing up a potential weapon in the war against terrorism by refusing to cooperate with the ICC.⁶

Despite their absence from the Rome Statute, acts of terrorism have been condemned as criminal acts in several international treaties. Although there is as yet no comprehensive treaty on international terrorism, many international and regional treaties cover specific acts, including the Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation of 1971,⁷ the Convention against the Taking of Hostages of 1979,⁸ and the 1998 International Convention for the Suppression of Terrorist Bombings.⁹

Interestingly, there is a lot of convergence between the treaties dealing with the suppression of terrorism and those dealing with human rights, particularly in how they deal with the question of international cooperation in pursuing individuals accused of committing prohibited acts. Several of the terrorism treaties require states parties to criminalize specific acts and impose an obligation on states to either prosecute suspects or extradite them to stand trial elsewhere. This *aut dedere aut judicare* (extradite or prosecute) formula appears in very similar form in human rights treaties such as the U.N. Convention against Torture. Both sets of conventions demand that in appropriate circumstances states exercise extraterritorial jurisdiction—that is, jurisdiction over acts not committed within their territory, in order to pursue the common interest of ensuring that such persons do not escape justice.

II. U.S. Attitude Towards International Cooperation and Extraterritorial Reach to Combat Terrorism and Serious Human Rights Crimes

If one looks to see what approach the United States has taken domestically to apply these two sets of international provisions, one dealing with terrorism and the other with human rights atrocities, the picture begins to look rather more uneven. In both legislation and practice, the U.S. has gone further in relation to terrorism than in relation to genocide, crimes

5. See, e.g., David Scheffer, *Staying the Course with the International Criminal Court*, 35 CORNELL INT'L L.J. 47 (2001/2002). "The terrorist assaults of September 11, 2001 on the United States were crimes against humanity that probably would have fallen within the jurisdiction of the ICC had the Court existed on that date." *Id.* at 49.

6. James Podgers, *An Unused Weapon*, A.B.A. JOURNAL REPORT, (Sept. 19, 2003), at <http://www.abanet.org/journal/ereport/s19terror.html> (reporting on the Prosecutor's remarks during the International Bar Association meeting in San Francisco).

7. Sept. 23, 1971, 24 U.S.T. 564, T.I.A.S. No. 7570.

8. Dec. 17, 1979, 1316 U.N.T.S. 205, T.I.A.S. No. 11,081.

9. G.A. Res. 164, U.N. GAOR, 52d Sess., Supp. No. 37, U.N. Doc. A/52/653 (1998).

against humanity or war crimes. As regards terrorism, at least eight pieces of legislation have been introduced that establish criminal extraterritorial jurisdiction of U.S. courts for acts including aircraft hijacking, violence at international airports, hostage taking, transactions involving nuclear materials, murder of foreign officials, and violence against maritime navigation or platforms.¹⁰ These were largely enacted in order to implement international treaties that the United States ratified or in response to specific acts of terrorism. They have been invoked on a number of occasions, *inter alia* to prosecute a Lebanese national for hijacking a Jordanian plane in Beirut,¹¹ to prosecute one of the World Trade Center bombers for placing a bomb on a Philippines Airlines flight en route for Japan¹² and to prosecute a Palestinian for hijacking an Egyptian plane on a flight from Athens.¹³

Turning to human rights crimes, the U.S. record is less commendable in terms of its willingness to use domestic instruments in order to play a cooperative role in global efforts to suppress offences. Only in relation to torture has the United States legislated to establish broad extraterritorial jurisdiction. After becoming party to the U.N. Convention against Torture, Congress enacted legislation making it an offense to commit torture outside the United States, and conferring jurisdiction on U.S. courts, where the alleged offender is a U.S. national or is present in the United States.¹⁴ To date, no prosecutions have been brought under this provision. On war crimes, although a party to the Geneva Conventions of 1949, which require states parties to "search for persons alleged to have committed, or to have ordered to be committed . . . grave breaches, and . . . bring such persons, regardless of their nationality, before its own courts" if it does not extradite them,¹⁵ the War Crimes Act only allows U.S. courts to hear cases relating to offences committed outside the U.S. if the offence is committed by or against a member of the U.S. Armed Forces or a U.S. national.¹⁶ Similarly, the Genocide Act only applies to offenses committed within the United States, or when the alleged offender is a U.S. national.¹⁷

10. These are 18 U.S.C. § 32 (2000) (destruction of aircraft or aircraft facilities), 18 U.S.C. § 37 (2000) (violence at international airports), 18 U.S.C. § 831 (2000) (prohibited transactions involving nuclear materials), 18 U.S.C. § 1116 (2000) (murder or manslaughter of foreign officials, official guests or internationally protected persons), 18 U.S.C. § 1201 (2000) (kidnapping of internationally protected persons outside the U.S.), 18 U.S.C. § 1203 (2000) (hostage taking), 18 U.S.C. § 2280 (2000) (Violence against maritime navigation) and 18 U.S.C. § 2281 (2000) (violence against maritime fixed platforms).

11. *United States v. Yunis*, 924 F.2d 1086 (D.C. Cir. 1991).

12. *United States v. Yousef*, 327 F.3d 56 (2d Cir. 2003).

13. *United States v. Rezaq*, 134 F.3d 1121 (D.C. Cir. 1998).

14. 18 U.S.C. § 2340 (2000).

15. Geneva Convention Relative to the Treatment of Prisoners of War, art. 129, Aug. 12, 1949, 6 U.S.T. 3316, 74 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Person in Time of War, Aug. 12, 1949, art. 146, 6 U.S.T. 3516, 75 U.N.T.S. 287.

16. 18 U.S.C. § 2441 (2000).

17. 18 U.S.C. § 1091 (2000).

Despite this mixed record domestically, the United States has certainly not been opposed to all multilateral efforts to combat impunity. The U.S. was, of course, a leading player in the Nuremberg trials following the Second World War. More recently, it supported the establishment and operation of ad hoc international or hybrid criminal tribunals for the former Yugoslavia, Rwanda and Sierra Leone.

The United States has also, at least under previous administrations, cooperated somewhat in efforts by other national legal systems to implement the *aut dedere aut judicare* principle. When Chilean ex-dictator Augusto Pinochet was being investigated in Spain, the Clinton Administration was asked to open intelligence files and eventually did. Official eyebrows, however, were raised when Henry Kissinger was summoned to submit to questioning by Spanish and French investigating judges in relation to the Pinochet case. Kissinger refused.

The Bush Administration has raised serious objections to other countries exercising extraterritorial jurisdiction for serious human rights crimes only when U.S. citizens have been directly involved. But in such cases, the reaction has been extreme. When complaints were laid before a Belgian investigating judge in April 2003 asking for an investigation of Tommy Franks and George Bush for possible war crimes committed in Iraq, the resulting furor from Washington was so overwhelming that the Belgian government bowed to U.S. pressure and amended the law on which the complaint was based.¹⁸

It is interesting in considering the attitude of the Clinton Administration when the International Criminal Tribunal for the former Yugoslavia looked into the NATO bombings in Kosovo, in which U.S. forces played a major part, to speculate as to how the Bush Administration would have reacted to such scrutiny of the actions of U.S. forces by an international tribunal. Of course, Clinton would have rigorously defended any prosecu-

18. See *Belgium Moves to Limit War Crimes Law, Repair U.S. Ties*, L.A. TIMES, Aug. 2, 2003, at A6. In 1993, Belgium enacted a Law for the Suppression of Grave Violations of International Humanitarian Law, permitting prosecutions for genocide, serious war crimes and crimes against humanity in Belgian courts, wherever they were committed. Although many other countries have universal jurisdiction for certain crimes under international law, the Belgian legislation was among the widest in terms of the scope of crimes covered and the access for victims to file information with an investigating judge. However only one case was completed; four Rwandans were convicted for their role in the genocide of 1994. In April 2003, the government amended the law for the first time following the filing of cases against several foreign leaders including former President George Bush in relation to the Gulf War of 1991, introducing government discretion on whether to proceed in cases with no direct link to Belgium, in an attempt to filter out politically motivated complaints. But then, in June 2003, U.S. Defense Secretary Donald Rumsfeld threatened to withhold American funding for a new NATO headquarters in Belgium after complaints were filed with an investigating judge against George Bush, General Tommy Franks and others in relation to the war in Iraq. In July, the Belgian Parliament and Senate passed a second law restricting the jurisdiction of Belgian courts further, requiring a close link to Belgium. Although the Belgian Prime Minister denied that the changes were in direct response to U.S. pressure, officials had admitted that the changes would have been unlikely without that pressure.

tion had it ensued, but tolerated the review of the tribunal.¹⁹

The United States does have a unique jurisdiction allowing victims of violations of international law to sue perpetrators when they are physically present in the country, under the Alien Tort Claims Act and the Torture Victim Protection Act. These statutes enable U.S. courts to provide a forum for victims of universally condemned conduct that occurs anywhere in the world, when other avenues are not available.²⁰ Cases have been successfully brought for genocide, torture, extrajudicial murder, and other serious violations of human rights. Although cases of terrorism have not yet been successfully brought against individuals under these statutes, some believe it is only a matter of time, because international consensus probably exists to condemn certain acts of terrorism, such as hijacking and hostage taking.²¹ Since 1998, an amendment to the Foreign Sovereign Immunities Act has permitted civil actions against foreign states "for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act," but only if the foreign state is designated as a state sponsor of terrorism.²² Since then a number of cases have been filed against Libya, Iran and other states for both human rights violations and acts of terrorism.

III. The ICC and U.S. Opposition During the Negotiations

Under the Clinton Administration, the United States was actively engaged in negotiations for the establishment of the ICC. President Clinton said frequently that the world needs a permanent international criminal court. Under his presidency U.S. negotiators played a key role in shaping many aspects of the text of the Statute itself, as well as of two important supplemental documents, the Elements of Crimes and the Rules of Procedure and Evidence.

Nevertheless, throughout the negotiations, the U.S. team maintained serious differences of opinion with the majority of other states on funda-

19. The Prosecutor of the ICTY established a committee to review the several complaints made regarding NATO operations in Kosovo in 1999. The committee recommended, in 2000, that a formal investigation was not warranted. *Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991*, 55th Sess., Agenda item 52, at 6, U.N. Doc. A/55/273 (2000), available at <http://www.un.org/icty/rappannu-e/2000/AR00e.pdf>.

20. The Alien Tort Claims Act, 28 U.S.C. § 1350 (2000), provides that: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." Enacted in 1789, the Statute was originally intended to apply to acts of piracy, and was taken up in a line of cases beginning with *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), that deal with serious violations of human rights on which there is universal consensus in the international community. The Torture Victim Protection Act was enacted in 1992 and allows civil actions for torture or extrajudicial killing. 28 U.S.C. § 1350 (2000).

21. Harold Hongju Koh, *Civil Remedies for Uncivil Wrongs: Combating Terrorism Through Transnational Public Law Litigation*, 22 TEX. INT'L L.J. 169, 205 (1987).

22. 28 U.S.C. § 1605 (2000).

mental aspects. The question of what should be the basis of the Court's jurisdiction was the central bone of contention. The U.S. opposed the Court having jurisdiction over nationals of states that were not party to the Treaty, except in situations that would be referred to the Court by the Security Council. During the negotiations, the U.S. pressed continuously for a regime based on the principle of state consent, favoring an opt-in system for listed crimes (other than for genocide), rather than a system whereby the Court would automatically have jurisdiction when certain pre-conditions were met.²³

In the end the jurisdictional regime agreed to in the final package was a compromise: the Court would be able to exercise jurisdiction if either the territorial state or the state of nationality of the accused is a Party to the Statute (or has accepted its jurisdiction on an ad hoc basis). In addition, the Court would have jurisdiction over situations referred to it by the U.N. Security Council exercising its Chapter VII powers. This was reflected in Article 12 of the Rome Statute. The only exception was the optional opt-out for war crimes for a limited period located exclusively in Article 124. This outcome meant that in certain circumstances, nationals of non-State Parties could be "caught" by the court's jurisdiction. This could occur, for instance, if a national of a non-state party were to commit a crime within the territory of a State Party.

Despite remaining concerns, President Clinton eventually signed the Rome Statute on December 31, 2000, the last possible day for signature of the treaty.²⁴ Upon signing the Statute, Clinton issued a statement recognizing that there were "significant flaws" in the treaty and recommending that his successor not submit it to the Senate for ratification until the U.S.'s fundamental concerns were satisfied.²⁵ In fact it had long been thought that Congress would not ratify and that therefore the U.S. would not be in a position to become a party to the treaty for some time to come. Attention,

23. Several options were considered by states during the negotiations. Under the original International Law Commission's draft, the Court would have inherent or automatic jurisdiction if a complaint was brought by a state that was also party to the Genocide Convention; for other crimes the jurisdiction of the Court over the crime must have been accepted by the territorial state or the custodial state in an "opt-in" system (variations on an opt-in system were discussed during the negotiations). Others proposed universal jurisdiction, on the basis that since international law permits universal jurisdiction for the crimes under the Rome Statute, the Court should be in the same position to exercise jurisdiction as states were themselves, and that the Court should have jurisdiction over anyone regardless of whether or not any particular state was party to the Statute. A third option, which ultimately prevailed, was that the Court could exercise jurisdiction automatically, without the need for state consent, if certain states (options included the territorial state, the custodial state, the state of nationality of the accused or the state of which the victim is a national) were party.

24. After that date, according to Article 125(1) of the Rome Statute, a state would have to accede in order to become a party. See Scheffer, *supra* note 5, as the chief U.S. negotiator under Clinton, he explains the reasons why the President signed the Rome Statute.

25. See Thomas E. Ricks, *U.S. Signs Treaty on War Crimes Tribunal: Pentagon, Republicans Object to Clinton Move*, WASH. POST, Jan. 1, 2001, at A1 (quoting President Clinton).

early on, had therefore focused on the question of the status of non-State Parties. In signing, President Clinton restated the U.S. concern that the Court would claim jurisdiction over personnel of states that are not party to the treaty. However he said that as a signatory, the U.S. would be in a position to influence the evolution of the Court—whereas without signing, it would not.

First among U.S. concerns remains the fact that the Court has jurisdiction over nationals of non-parties. To others, the principle that states have jurisdiction over the crimes in the Statute was already well established under international law; states are entitled to do collectively what they are permitted to do individually, and may agree to confer the power onto a judicial body that they establish.

The ICC regime is entirely consistent with international law. Nationals of non-State Parties to international treaties that have the purpose of preventing and punishing crimes under international law have long been exposed to potential prosecution without the consent of their governments. The U.S. itself has accepted this by becoming party to treaties such as the Geneva Conventions and the U.N. Convention against Torture, and agreements relating to terrorism, which oblige parties to pursue those suspected of committing the relevant crimes regardless of whether they are a national of a state that is party to the treaty in question. Customary international law also permits states to cooperate in combating impunity for crimes under international law, including exercising criminal jurisdiction.²⁶ Official State Department policy supports this view.²⁷ The line of cases in U.S. courts brought under the Alien Tort Claims Act has involved U.S. courts in examining international norms in order to determine which acts have been generally recognized by states as of such seriousness that their prohibition and punishment by all meets with overwhelming approval. Although these are civil cases, in carrying out the exercise of identifying principles that are “universal, definable, and obligatory international norms”²⁸ governing the circumstances in which U.S. courts may assert jurisdiction in order to offer redress for victims of universally condemned acts, U.S. courts have drawn on the principles of international criminal law.²⁹

26. While there is disagreement as to precisely which crimes give rise to universal jurisdiction under customary international law, there is broad agreement that the duty to combat impunity for serious crimes of international concern exists.

27. The Third Restatement of the Foreign Relations Law of the United States, at § 404, provides that: “A State has jurisdiction to define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern, such as piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes and perhaps certain acts of terrorism, even where none of the bases of jurisdiction indicated in § 402 is present.” RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 (1987).

28. *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1540 (N.D. Cal. 1987).

29. The Third Restatement of the Foreign Relations Law of the United States, § 404, *supra* note 27, specifies that universal jurisdiction is not limited to criminal law and that international law does not preclude its application, for instance, by providing a remedy in tort.

It is puzzling why the U.S. would appear to accept—through its own adoption of universal jurisdiction for certain crimes and its recognition of the principle of universal jurisdiction—that exceptional extraterritorial jurisdiction could be exercised by the judiciary of one country over nationals of another state for crimes of international concern, but reject the idea that such jurisdiction could be conferred upon an international tribunal. Concerns about politically motivated prosecutions would seem to be far more justified in relation to the former, with the real possibility of sham prosecutions by rogue states. The ICC, with its plethora of safeguards and due process guarantees—many of which were put in place partly as a result of U.S. insistence—and dominated by U.S. allies, would appear to be a considerably safer option.³⁰

IV. U.S. Opposition to the ICC under the Bush Administration

In a presage of things to come, in July 1998, shortly following the adoption of the Rome Statute, John Bolton, then Senior Vice President of the American Enterprise Institute, appeared before a hearing of the Subcommittee on International Operations of the U.S. Senate and said: “we should oppose any suggestion that we cooperate, help fund or generally support the work of the prosecutor. We should isolate and ignore the ICC This approach is likely to maximize the chances that the ICC will wither and collapse, which should be our objective.”³¹ Under the Bush Administration, Bolton became Undersecretary of State for Arms Control and International Security, and was given the opportunity to implement this policy. As a first step, the U.S. completely disengaged from the ICC. On May 6, 2002, Bolton signed a letter to the U.N. Secretary General, informing him that “the United States does not intend to become a party to the treaty” and asserting that: “Accordingly, the United States has no legal obligations arising from its signature on December 31, 2000.”³² The U.S. has remained disengaged ever since, refusing to participate in inter-governmental discussions relating to the ICC despite constant invitations to do so.³³

30. While the U.S. disputed the assertion that states are entitled to delegate to an international court established by treaty the power they each have individually to prosecute crimes under international law, former lead U.S. negotiator David Scheffer makes it clear that at least as important in U.S. strategy under the Clinton Administration was the more pragmatic need to obtain protection as a non-State Party in order to build domestic support for eventually becoming party to the treaty. See Scheffer, *supra* note 5.

31. *Is A U.N. International Criminal Court in the U.S. National Interest?: Hearing Before the Subcomm. Pm International Operations of the Senate Comm. on Foreign Relations*, 105th Cong. 48-64 (1998) (statement of John Bolton, Senior V.P., American Enterprise Institute), available at http://www.amicc.org/docs/SIOC7_23_98.pdf.

32. See Lydia Adetunji & Carola Hoyos, *US to Draw Sharp Criticism for World Court Withdrawal*, FIN. TIMES, May, 7 2002, at P6 (quoting Under-Secretary John Bolton).

33. As a non-State Party, the U.S. would be entitled to attend meetings of the Assembly of States Parties as an observer. While allies have made many calls for the U.S. to engage, the European Union issued an official invitation to the U.S. to engage in dialogue on U.S. re-engagement in the ICC process, practical cooperation in specific cases and other matters. *Draft Council Conclusions on the ICC*, COUNCIL OF THE E.U., 12386/02

The Bush Administration took steps aimed at ensuring that the U.S. would not cooperate in any way with the ICC. Congress enacted the American Servicemembers Protection Act (ASPA), which was signed into law on August 2, 2002.³⁴ The ASPA prohibits U.S. cooperation with the ICC unless the President determines that cooperation would be in the national interest. The Act also grants authority to the President to “use all means necessary and appropriate to bring about the release” of nationals of the U.S. or its allies if they are detained by the ICC—a provision that has led to the ASPA being known in the Netherlands, the seat of the Court, as the “Hague Invasion Act.”

Next, the Administration began to aggressively pursue mechanisms for obtaining iron-clad protections for U.S. nationals from the ICC. The first major initiative, in that direction, came in July 2002, when the Bush Administration threatened to pull out of peacekeeping operations in Bosnia unless the Security Council adopted a resolution preventing the ICC from pursuing personnel from non-States Parties participating in such operations. Under heavy U.S. pressure, the Security Council eventually passed Resolution 1422, which provided that the Security Council, “Acting under Chapter VII of the UN Charter”:

Requests, consistent with the provisions of Article 16 of the RS, that the ICC, if a case arises involving current or former officials or personnel from a contributing state not a party to the RS over acts or omissions relating to a UN established or authorized operation, shall for a 12 month period starting 1 July 2002 not commence or proceed with investigation or prosecution of any such case, unless the S.C. decides otherwise.³⁵

Although through Resolution 1487, adopted on June 12, 2003, was renewed for a further year, the provision has by no means achieved broad acceptance.³⁶ Widespread unease about the lawfulness and implications of the resolution were voiced both in 2002 and in 2003. Concerns centered on the fact that the Council was, in effect, amending the Rome Statute, and that giving exemptions to some would weaken the ICC and impair its authority.³⁷ One of the fundamental principles underlying the Rome

COJUR 9 USA 35 PESC 369, (Sept. 30, 2002) (Brussels), available at <http://www.icnow.org/documents/declarationsresolutions/intergovbodies/EUConclusions30Sept02.pdf>.

34. Pub. L. No. 107-206, 116 Stat. 820 (American Service Members Act 22 U.S.C. § 7401 *et seq.* (2002)).

35. U.N. SCOR 57th Sess., 4572d mtg., U.N. Doc. S/Res/1422 (2002), available at <http://www.unhchr.ch/Huridocda/Huridoca.nsf/TestFrame/7a399ae94254b5e1c1256c8b003baf0a?Opendocument>.

36. U.N. SCOR 58th Sess., 4772d mtg., U.N. Doc. S/Res/1487 (2003), available at <http://www.unhchr.ch/Huridocda/Huridoca.nsf/TestFrame/2e33a298d7b1215fc1256d4700270d48?Opendocument>.

37. Canada stated that the Security Council has acted *ultra vires* through resolution 1422 since it is not allowed to “change the negotiated terms of any treaty it wished” Paul Heinbecker, Ambassador and permanent Representative of Canada to the United Nations at the tenth session of the Preparatory Commission for the ICC (July 3, 2002), at <http://www.iccnw.org>. According to Germany “Chapter VII of the United Nations Charter requires the existence of a threat to the peace, a breach of the peace or an act of aggression, none of which, in our view, is present in this case. The Security Council would thus be running the risk of undermining its own authority and credibility.” U.N.

Statute is that no one is immune from prosecution for ICC crimes, reinforcing the principles of the rule of law and of equality before the law. Many were also concerned that the Security Council was abusing its powers by adopting a resolution supposedly using its Chapter VII powers, but that could not be justified on the basis of any threat to international peace and security. Basing the resolution on Chapter VII powers was tantamount to saying that the ICC itself constituted a threat to international peace and security or an impediment to peacekeeping. In reality any threat that did exist had been entirely manufactured by the U.S. when it threatened to veto the Bosnia peacekeeping resolution. Another concern was that 1422 contradicted the carefully constructed relationship between the Security Council and the ICC carved out in the Rome Statute as mentioned above. Article 16 of the Statute, which allows the Council to request that the ICC defer consideration of a case for a period of one year, was intended to be used on a case by case basis and not as a general power conferring blanket exemptions on any class of persons, or permitting an indefinite or permanent immunity.³⁸ Nevertheless, the concern that the U.S. might withdraw from international peacekeeping missions ensured that Resolutions 1422 and 1487 were adopted.

Both when the original draft of Resolution 1422 was presented in 2002, and again when it was presented for renewal in 2003, states not on the Security Council were sufficiently troubled that they took the unusual step of requesting an open meeting at which non-members could express their views. On each occasion U.S. allies, and even many non-State Parties to the Rome Statute, presented strong concerns and objections, most stressing that the provision should not be regarded as permanent. In 2003, three states on the Security Council, France, Germany and Syria, felt unable to vote for the renewal of Resolution 1422 and abstained.

In July 2003, the U.S. introduced a resolution in the Security Council that went even further. This time it was a clause in a resolution authorizing the deployment of a peacekeeping force in Liberia. Operative paragraph 7 of Resolution 1497 reads as follows:

The Security Council, Acting under Chapter VII of the Charter of the United Nations . . .

7. Decides that current or former officials or personnel from a contributing State, which is not a party to the Rome Statute of the International Criminal Court, shall be subject to the exclusive jurisdiction of that contributing State for all alleged acts of omissions arising out of or related to the Multinational Force or United Nations stabilization force in Liberia, unless such exclusive jurisdiction has been expressly waived by that

SCOR 57th Sess., 4568th mtg., at 9, U.N. DOC. S/PV.4568 (2002) (Remarks of Schumacher).

38. U.N. Secretary-General Kofi Annan told members he believed Article 16 was intended to cover more specific requests relating to a particular situation. Press Release, In Statement to Security Council, Secretary-General Voices Concerns Over Extending UN Peacekeepers' Immunity From ICC Action, U.N. Press Release, SG/SM/8749, SC/7790 (Dec. 6, 2003).

contributing State. . . .³⁹

Paragraph 7 was intended not only to exempt personnel of the multinational force from the clutches of the ICC, but also to place them beyond the reach of *any* other jurisdiction other than its own courts. In other words, the U.S. was now taking on not only the ICC, but also the broader international norm that permits or requires states to pursue perpetrators of serious international crimes and ensure that they are brought to trial somewhere—the principle *aut dedere aut judicare*. Most national legal systems do include expressions of this principle for certain crimes of international concern, and many also reserve the right to pursue suspects on the basis of principles of jurisdiction long recognized by international law including active personality (the nationality of the accused), passive personality (the nationality of the victim) and the protective principle (the state's national interests). Paragraph 7 also seeks to override a state's own territorial jurisdiction, as it would require a host state to return an individual to his own state. Although states do frequently agree to allocate jurisdiction between themselves in situations where there might be concurrent jurisdiction, particularly where military personnel are sent to another country,⁴⁰ the purpose of such agreements (such as Status of Forces agreements) is to recognize the primary right—and indeed duty—of the sending State to prosecute persons under their control, and not to encourage impunity. Those regular agreements are consistent with international law, including the principle of complementarity that underlies the Rome Statute.

In relation to the Liberian resolution, U.S. representatives again took advantage of an emergency situation in order to push the resolution through. As the Security Council hesitated, balking at what the U.S. was trying to do, casualties were mounting in Liberia. Despite this, again three Security Council states felt unable to vote for the resolution and abstained.⁴¹ In explanation, the three stated that paragraph 7 created a dangerous precedent which contravened not only the International Criminal Court Statute but also states' domestic law and international law.⁴² Mexico said that this was a move towards the institutionalization of impunity. U.N. Secretary-General Kofi Annan said, "Frankly my sentiments are with those countries that abstained."

Obtaining temporary blanket exemptions for U.S. peacekeepers through the Security Council was apparently not thought by the Bush Administration to offer sufficient protection from the ICC, and soon after

39. U.N. SCOR, 58th Sess., 4803d mtg., U.N. Doc. S/Res/1497 (2003), available at <http://www.unhcr.ch/Huridocda/Huridoca.nsf/TestFrame/fa1d822a06484827c1256d9000291d5e?Opendocument>.

40. It is common for Status of Forces agreements and Status of Mission agreements to allocate who has jurisdiction and to oblige a state receiving military forces to return home nationals of a sending state when a crime has been committed on the receiving state's territory.

41. This time it was France, Germany, and Mexico that abstained.

42. U.N. Doc., Press Release CS/2534, August 1, 2003.

the “unsigning” of the Statute in 2002, officials started seeking other forms of guarantees. Emerging from the vote on Security Council Resolution 1422 on July 12, 2002, U.S. Ambassador to the U.N. John Negroponte announced that the resolution was just a first step in protecting U.S. citizens from the ICC, and that the U.S. would use the coming year to find additional protections, including “bilateral agreements expressly contemplated in Article 98 of the Rome Statute.”⁴³ During the months that followed, the Bush Administration set out to obtain—often to wrest—from states bilateral agreements that prohibit the surrender of U.S. nationals to the ICC.

Despite Ambassador Negroponte’s assertion, these agreements are incompatible with Article 98 of the Rome Statute, and directly contradict the very purpose of the Statute as well as other international norms. Article 98.2 of the Statute allows for narrow limitations on the duties of States Parties to cooperate with the ICC, specifying that the Court may not proceed with a request for surrender of a person where this would “require the requested state to act inconsistently with its obligations under international agreements” without the consent of that state. The provision was included to deal with situations where states’ existing obligations under international law—such as under Status of Forces agreements—might conflict with the obligations they are taking on by becoming party to the Rome Statute. Its use to obtain blanket exemptions for all nationals of a particular state was not contemplated, and the U.S. attempt to use the provision for that purpose is, like its purported reliance on Article 16, erroneous.

The European Union, in September 2002, issued guidelines for its member states to use “when considering the necessity and scope of possible agreements or arrangements in responding to the United States’ proposal.”⁴⁴ The guidelines state categorically that: “Entering into US agreements—as presently drafted—would be inconsistent with ICC States Parties’ obligations with regard to the ICC Statute and may be inconsistent with other international agreements to which ICC States Parties are Parties.”⁴⁵ Similarly, a Legal Opinion obtained by the Lawyers Committee for Human Rights from prominent international lawyers, including James

43. Press Release, Explanation of Vote and Remarks by Ambassador John D. Negroponte, U.S. Permanent Representative to the United Nations, following the vote on UN Security Council Resolution 1422 on the International Criminal Court at the Security Council Stake-Out, U.S. Mission to the U.N. Press Release no. 92(02) (July 12, 2002), available at http://www.un.int/usa/02print_098.htm.

44. *Draft Conclusions on the ICC*, *supra* note 31.

45. Criticism by the European Union, non-governmental organizations and others has focused in particular on the wide scope of persons that are covered by the agreements. Whereas Status of Forces Agreements cover currently serving military and related civilian personnel sent for a specific military purpose and address only crimes committed on the territory of the “receiving State,” the agreements sought by the U.S. are much wider, covering “current or former government officials, employees (including contractors), or military personnel or nationals” and without regard to where the crime occurred. A second major concern is that the agreements can result in persons alleged to have committed grave international crimes escaping justice, and will therefore lead to impunity.

Crawford, who is a member of the International Law Commission and drafted the first version of the Rome Statute, concludes that: "It is inconsistent with the object and purpose of the ICC Statute for a State Party to enter into or apply a bilateral non-surrender agreement if the purpose or effect of doing so would be to provide impunity to a person credibly suspected of having committed a crime within the jurisdiction of the ICC," and that similar considerations would apply to signatories.⁴⁶

The Bush Administration has gone to extraordinary lengths to pressure states into signing these impunity agreements. It has sustained a relentless diplomatic campaign directed at all capitals of the world that has included threats to cut economic aid and has exhausted considerable U.S. political capital. One stick used to beat refuseniks is the ASPA. As well as prohibiting the U.S. from cooperating with the ICC, the Act provides that states that are parties to the ICC Treaty and have not signed an agreement with the U.S. by July 1, 2003, may have their military assistance suspended. The Act itself provides exceptions for NATO members and major non-NATO allies and allows the President to issue waivers if in the national interest of the U.S.

The Act has been applied to the letter. The U.S. froze military aid to 35 countries after they failed to meet the July 1, 2003 signing deadline. As of September 2003, 32 states were being sanctioned, and a total of \$89.28 million in military assistance funds was set to be withheld in the financial year 2004.⁴⁷ The list of countries that have refused to sign agreements on principle includes many of the U.S.'s closest allies, but the wealthiest of those are protected by the automatic waiver for NATO members and other key allies. It is smaller and weaker states that are most vulnerable, and they face both political and economic pressure that has in some cases been simply impossible to resist. Former Canadian Foreign Affairs minister Lloyd Axworthy remarked: "It is the first time I have even seen political or economic sanctions imposed on countries that want to uphold the rule of law."⁴⁸

V. The Implications of U.S. Unilateralism

U.S. objections to the ICC have been countered time and time again by the Court's supporters. A leading U.S. concern—the ICC's jurisdiction over nationals of non-States Parties—is out of step with international law. Other claims the Administration makes include the lack of accountability of the Prosecutor, the usurpation of the role of the U.N. Security Council,

46. James Crawford et al., In the Matter of the Statute of the International Criminal Court And In the Matter of Bilateral Agreements Sought by the United States Under Article 98(2) of the Statute (June 5, 2003), available at http://www.lchr.org/international_justice/Art98_061403.pdf.

47. See World Federalist Association, What is at Stake? How Sanctions will Affect U.S. Allies, Sept. 2003, available at <http://www.iccnw.org/documents/otherissues/impunityart98/FS-WICC-BIAanecdotes.pdf>.

48. Kim Housego, *Columbia Armies Enlist Children*, A.P. Online, Sept. 18, 2003. More than 11,000 children fight in Colombia's armed conflict.

and the lack of due process guarantees.⁴⁹ All of these are unfounded. The Prosecutor cannot even begin an investigation without the approval of the Pre-Trial Chamber and is accountable both to the Court itself and to the Assembly of States Parties—now 92 States. Careful consideration was given during the negotiations to what should be an appropriate role for the Security Council, so as to ensure on the one hand that the ICC would not interfere with the Council's role in relation to threats to international peace and security while on the other, preserving the independence of the ICC. The balance struck was that the Security Council will be able to refer cases to the ICC so that the ICC will be one tool the Council can use when exercising its powers under Chapter VII of the U.N. Charter. On the other hand, in recognition of the fact that there may be circumstances in which independent action by the ICC to pursue cases during sensitive negotiation of peace treaties could derail a peace process, the Rome Statute allows the Security Council to defer ICC proceedings for a year. As regards the criticisms of due process guarantees, both participating states, including the U.S., and human rights organizations insisted that the Rome Statute include fundamental safeguards including the presumption of innocence, a speedy and public trial, counsel of one's choice, privilege against self-incrimination, the right to confront witnesses, and the exclusion of illegally-obtained evidence.

One of the most damaging aspects of the U.S. campaign against the ICC is the assertion of exceptionalism: because of the U.S.'s special role in the world, the argument goes, its military forces spread across the globe are uniquely exposed to politically motivated prosecutions. The U.S.'s closest allies have frequently expressed confusion and frustration that the U.S. claims a special place for itself and rejects a legal regime to which they themselves are prepared to submit themselves. They counter that the U.S. concerns are misplaced and that the way to deal with them is to create enough filters and safeguards to ensure that there is no possibility of politically motivated investigations or prosecutions. These were put in place during the negotiation of the Statute, and include the checks on the role of the Prosecutor by a Pre-Trial Chamber already mentioned and stringent admissibility requirements. Further, the court is able to target only the most serious crimes and can only act where states are themselves either unable or unwilling to do so. Any state with a strong legal system that investigates allegations in good faith is extremely unlikely to find itself the subject of scrutiny by the ICC's Prosecutor. The response of the Prosecutor to complaints submitted to the court relating to actions of members of the coalition forces in Iraq that are parties to the Rome Statute, such as the UK, illustrates that point. The Prosecutor's view was that these types of complaints should be investigated in the UK.⁵⁰

49. Jennifer Elsea, U.S. Policy Regarding the International Criminal Court, Report for Congress, Updated Sept. 3, 2002, Library of Congress, Report RL31495, available at <http://www.usembassy.it/pdf/other/RL31495.pdf>.

50. Press Release, ICC Prosecutor Luis Moreno Ocampo, Communications Received by the Office of the Prosecutor of the ICC (July 16, 2003) (The Hague).

Yet, the U.S. insistence on exceptionalism is extremely damaging. If one state can argue for special treatment, why can't others? The message that emerges is that justice is for some but not for all. This undermines the principles of the rule of law and of equality before the law that are essential. If a key purpose of the ICC is to make future tyrants think they cannot get away with it, why will they hold back if they see the international community divided over the principal enforcement mechanism? And if states are wavering over whether or not to become party to the ICC, seeing others asserting that they are above the law will only encourage a cynical attitude towards an institution that is founded on the assertion of equality before the law. While the ICC regime aims to uphold a single standard for all aimed at preventing and deterring the worst of crimes, the U.S. is working against it by seeking to create immunity for entire classes of persons. The U.S. campaign has therefore been extremely damaging to the ICC itself, as it seeks to establish itself as a major new international institution.

A second major aspect of the U.S. assault on the ICC is that it has caused the U.S. to work directly against the trend towards stronger international cooperation to combat impunity for atrocities. The U.S. is in danger of placing itself outside the global consensus that has emerged during the past half century through working together to ensure that there is no safe haven for those who commit the worst of crimes. This consensus rests not only on the International Criminal Court but also other important pillars such as the principle *aut dedere aut judicare*. The attempt as seen in the Security Council resolution on Liberia to oust these forms of jurisdiction is particularly troubling. A third concern is the damage done to the functioning of the international legal order by the abuse of the powers of the Security Council and attempts to override not only the Rome Statute but also other international law. In so doing, the U.S. has been ready to jeopardize crucial international peacekeeping efforts in order to get its way. In this regard the U.S. drive to achieve its objectives has been shortsighted and has come at considerable legal and political costs, both immediate and long term.

Finally, the U.S. campaign against the ICC has been conducted at enormous cost to the country. It has created considerable resentment among friends and foes alike. The U.S. is almost alone in its views on the ICC; states like China and Russia, though not yet themselves parties to the ICC Treaty, regularly speak out in support of the ICC in the face of U.S. assaults on the court.

Conclusion

Instead of supporting the development of this new global institution that was set up to ensure perpetrators of the worst atrocities do not escape justice, which would be consistent with what the U.S. stood for at Nuremberg, the Bush Administration has been putting its considerable muscle into efforts to make sure no U.S. citizen could ever come before the new ICC. The assault on the ICC is often given as an example of the Bush Administration disengaging from international institutions and increasing

unilateralism. But the approach to the ICC has gone beyond disengagement. The actions over the past two years demonstrate a concerted attempt to undermine and destroy the court, some of the implications of which have been explored above, with implications for the very foundations of international law and the international political system as well as for the ICC itself.

Meanwhile, as the new ICC Prosecutor begins his work, interesting parallels are already developing with international efforts to combat terrorism. In the field of terrorism, it is notable that whereas states have not even been able to agree on a definition of terrorism, they have concluded an International Convention for the Suppression of the Financing of Terrorism.⁵¹ In the very first case he is looking at, Moreno Ocampo is looking into international money flows as part of his strategy for dealing with crimes committed in the Democratic Republic of the Congo, looking in particular at businesses that trade weapons in exchange for gold and diamonds. In other words, he is aiming to cut off the financing that is fueling the crimes, just as has become the practice in relation to terrorism. A series of U.N. reports have exposed the fact that companies in 25 countries, including the U.S., have helped fund the crimes through the illegal export of natural resources and trade in arms. Ocampo has said the killing will only stop when this illegal business activity stops.

There are many other overlaps between the fight against serious human rights crimes and the fight against terrorism. In the post 9/11 world, the U.S. has taken a cavalier attitude towards extraterritorial reach in the name of combating terrorism. In doing so, many believe it has overstepped the boundaries of what is permissible under international law. But at the same time, the U.S. has failed to take the opportunity to play its full role in combating other sorts of crimes of international concern that mainly affect others. Ironically, there is also the very real possibility that the U.S. attacks on the ICC may have actually constrained its ability to fight terrorism. In angering its allies, and in suspending aid—as a sanction for refusing to sign impunity agreements relating to the ICC—even to countries that are partners in fighting terrorism, the U.S. has harmed its own interests.

While there may be disagreements over the precise definition of torture, or what is a legitimate target in war, few would disagree that it is everyone's concern if a state commits mass murder or torture against its own citizens or those of another country. The behavior of the Bush Administration towards the ICC should raise serious questions for U.S. citizens: is it more in the national interest for the government to work to ensure that fundamental principles of the rule of law and equality are upheld and gross violators of human rights are brought to justice, or for it to rail obsessively against U.S. nationals being treated just like anyone else?

51. G.A. 109, U.N. GAOR, 54th Sess., Annex 1, Agenda Item 160, U.N. Doc. A/Res/54/109 (Concluded in New York, 2000), available at <http://ods-dds-ny.un.org/doc/UNDOC/GEN/N00/251/28/PDF/N0025128.pdf?OpenElement>.

