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# *United States Hostility to the International Criminal Court: It's All About the Security Council*

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## **Abstract**

*The now abundant literature on the hostility of the United States towards the International Criminal Court speaks to the litany of criticisms invoked by Washington, from the vulnerability of American nationals to prosecution to such issues as the lack of trial by jury. But these so-called shortcomings are also features of the international tribunals to which the United States has accorded enthusiastic support, from Nuremberg and Tokyo to the more recent generation. Had the 1994 draft of the International Law Commission remained more or less intact, it is likely that today the United States would be a keen supporter of the Court. The distinctions between the 1994 draft and the final version of the Rome Statute unlock the mystery of United States opposition. At the heart of the changes during the four-year drafting process is the relationship between the Court and Security Council. The ILC had conceived of what was in effect a permanent ad hoc tribunal, perfectly subordinate to the Security Council and interlocked with the Charter of the United Nations. But the drafters adjusted this conception, with the result that the Court has significant independence from the Security Council, notably with respect to the triggering of prosecutions, the deferral of cases and the definition of aggression.*

Why does the United States hate the International Criminal Court so much? What exactly is it about the ICC that seems to twist the tail of the Department of State, the Pentagon, the National Security Council, various senators and congressmen and the host of other participants in Washington's complex policy-making community?

The current hostility manifests itself in a number of ways: Security Council resolutions that block anticipated prosecutions by the Court, adopted in response to threats to sabotage humanitarian missions by a perverse use of the veto;<sup>1</sup> bilateral

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<sup>1</sup> UN Doc. S/RES/1422 (2002); UN Doc. S/RES/1487 (2003).

treaties intended to shelter United States nationals and even some nationals of other countries from the threat of transfer to the Court;<sup>2</sup> and domestic legislation authorizing the President of the United States to use military force in order to obstruct the operations of the Court.<sup>3</sup> The prospect of Security Council referral of cases to the ICC, once lauded as the most viable and likely ‘trigger mechanism’ to bring cases before the Court, now seems unthinkable because of resistance from the United States.

Since international criminal justice first became truly operational, in 1945, it has had no greater friend or promoter than the United States. Besides playing a central role in the great post-war trials at Nuremberg and Tokyo, United States military tribunals also held a series of thematic trials that set precedents followed to this day. More recently, it has been the United States that has taken the initiative to promote the ad hoc tribunals for the former Yugoslavia, Rwanda and Sierra Leone, and that has used its financial muscle to make these projects a reality. The United States participated actively in the process leading to the establishment of the International Criminal Court, and made many productive and helpful contributions to the final product.

Clearly, the idea of accountability for serious violations of international humanitarian law lies very much at the heart of United States foreign policy doctrine. The United States is still the only country with a dedicated ambassador for war crimes. Two out of four presidents of the International Criminal Tribunal for the former Yugoslavia, Gabrielle Kirk Macdonald and Theodor Meron, hail from the United States. The Prosecutor of the Special Court for Sierra Leone, David Crane, served as a senior lawyer in the United States Department of Defense. Around the world, United States government bodies like the Agency for International Development and think tanks like the United States Institute of Peace can be found in the midst of transitional justice and accountability initiatives.

This essay attempts to understand and explain the United States position towards the International Criminal Court set against a backdrop of historic enthusiasm for similar initiatives. Much has already been written to describe and either defend or contest the attitude taken by the United States. Ambassador David Scheffer, who led the United States negotiating team prior to, during and after the Rome Conference, has provided several accounts, including a defence of the Clinton Administration’s decision to sign the Statute on 31 December 2000.<sup>4</sup> Some of the numerous academic

<sup>2</sup> On so-called ‘Article 98 agreements’, or ‘bilateral impunity agreements’, as they are called by non-governmental organizations, see: W. A. Schabas, *Introduction to the International Criminal Court* (2nd ed., 2004).

<sup>3</sup> American Service-members’ Protection Act of 2002, 22 U.S.C.A. § § 7401–7432 (2002).

<sup>4</sup> Scheffer, ‘U.S. Policy and the International Criminal Court’, 32 *Cornell Int’l L.J.* (1999) 529; Scheffer, ‘The United States and the International Criminal Court’, 93 *AJIL* (1999) 12. Ambassador Scheffer’s personal opinions are now rather more friendly to the Court than the official positions he defended while working for the Department of State under the Clinton Administration: Scheffer, ‘A Negotiator’s Perspective on the International Criminal Court’, 167 *Mil. L. Rev.* (2001) 1; Scheffer, ‘Staying the Course with the International Criminal Court’, 35 *Cornell Int’l L.J.* (2001–2002) 47. His article ‘Staying the Course...’ is dedicated to the late Monroe Leigh, ‘whose integrity and guidance on this issue served the interests of all Americans’. Monroe Leigh was probably the most articulate and prestigious commentator

articles on the subject, both critical of the United States position<sup>5</sup> and favourable to it,<sup>6</sup> have been authored by accomplished and respected international lawyers, many of them acknowledged specialists on the Court, while a near avalanche of others are the work of talented law students.<sup>7</sup> Some articles have attempted to reassure American

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to demolish the arguments invoked by the United States Government, and expressed by Ambassador Scheffer: Leigh, 'The United States and the Statute of Rome', 95 *AJIL* (2001) 124. On the views of United States negotiators, see also the work of William Lietzau, a Pentagon lawyer who was a member of the United States negotiating team: Lietzau, 'International Criminal Law after Rome: Concerns from a U.S. Military Perspective', 64 *Law & Contemp. Probs.* (2001) 119; Lohr and Lietzau, 'One Road Away from Rome: Concerns Regarding the International Criminal Court', 9 *U.S.A.F. J. Leg. Stud.* (1998/1999) 33.

<sup>5</sup> Leigh, *supra* note 4; Hafner *et al.*, 'A Response to the American View as Presented by Ruth Wedgwood', 10 *EJIL* (1999) 108; van der Vyver, 'International Human Rights: American Exceptionalism: Human Rights, International Criminal Justice and National Self-Righteousness', 50 *Emory L.J.* (2001) 775; King and Theofrastous, 'From Nuremberg to Rome: A Step Backward for U.S. Foreign Policy', 31 *Case W. Res. J. Int'l L.* (1999) 47; Ellis, 'The International Criminal Court and its Implication for Domestic Law and National Capacity Building', 15 *Fla. J. Int'l L.* (2002) 215; Gurule, 'United States Opposition to the 1998 Rome Statute Establishing an International Criminal Court: Is the Court's Jurisdiction Truly Complementary to National Criminal Jurisdictions?', 35 *Cornell Int'l L.J.* (2001–2002) 1; Sadat and Carden, 'The New International Criminal Court: An Uneasy Revolution', 88 *Geo. L.J.* (2000) 381; Cassel, 'The Rome Treaty for an International Criminal Court: A Flawed but Essential First Step', 6 *Brown J. World Aff.* (1999) 41; Scharf, 'The United States and the International Criminal Court: The ICC's Jurisdiction Over the Nationals of Non-Party States: A Critique of the U.S. Position', 64 *Law & Contemp. Probs.* (2001) 67; Scharf, 'The United States and the International Criminal Court: A Recommendation for the Bush Administration', 7 *ILSA J Int'l & Comp. L.* (2001) 385; Scharf, 'Application of Treaty-Based Universal Jurisdiction to Nationals of Non-Party States', 35 *New Eng. L. Rev.* (2001) 363; Brown, 'U.S. Objections to the Statute of the International Criminal Court: A Brief Response', 31 *NYU J. Int'l L. & Pol.* (1999) 855; Ferencz, 'Misguided Fears About the International Criminal Court', 15 *Pace Int'l L. Rev.* (2003) 223; Amann and Sellers, 'The United States of America and the International Criminal Court', 50 *Am. J. Comp. L.* (2002) 381; Murphy, 'The Quivering Gulliver: U.S. Views on a Permanent International Criminal Court', 34 *Int'l Law* (2000) 45; Gallarotti and Preis, 'Politics, International Justice, and the United States: Toward a Permanent International Criminal Court', 4 *UCLA J. Int'l L. & For. Aff.* (1999) 1; Chibueze, 'United States Objection to the International Criminal Court: A Paradox of "Operation Enduring Freedom"', 9 *Ann. Surv. Int'l & Comp. L.* (2003) 19; Joel F. England, 'The Response of the United States to the International Criminal Court: Rejection, Ratification or Something Else?', 18 *Ariz. J. Int'l & Comp. Law* (2001) 941; Latore, 'Escape Out the Back Door or Charge in the Front Door: U.S. Reactions to the International Criminal Court', 25 *B.C. Int'l & Comp. L. Rev.* (2002) 159; Van de Kieft, 'Uncertain Risk: The United States Military and the International Criminal Court', 23 *Cardozo L. Rev.* (2002) 2325.

<sup>6</sup> Wedgwood, 'The International Criminal Court: An American View', 10 *EJIL* (1999) 93; Wedgwood, 'The United States and the International Criminal Court: The Irresolution of Rome', 64 *Law & Contemp. Probs.* (2001) 193; Casey, 'The Case against the International Criminal Court', 25 *Fordham Int'l L.J.* (2002) 840; Casey and Rivkin, 'The Limits of Legitimacy: The Rome Statute's Unlawful Application to Non-State Parties', 44 *Va. J. Int'l L.* (2003) 63; Morris, 'High Crimes and Misconceptions: The ICC and Non-party States', 64 *Law & Contemp. Probs.* (2001) 13; Bolton, 'The Risks and Weaknesses of the International Criminal Court from America's Perspective', 64 *Law & Contemp. Probs.* (2001) 167; Bolton, 'The Risks and the Weaknesses of the International Criminal Court from America's Perspective', 41 *Va. J. Int'l L.* (2000) 186; Goldsmith, 'The Self-Defeating International Criminal Court', 70 *U. Chi. L. Rev.* (2003) 89; Ailslieger, 'Why the United States Should Be Wary of the International Criminal Court: Concerns over Sovereignty and Constitutional Guarantees', 39 *Washburn L.J.* (1999) 80.

<sup>7</sup> Seguin, 'Denouncing the International Criminal Court: An Examination of U.S. Objections to the Rome Statute', 18 *B.U. Int'l L.J.* (2000) 85; Rancilio, 'From Nuremberg to Rome: Establishing an International Criminal Court and the Need for U.S. Participation', 77 *U. Det. Mercy L. Rev.* (1999) 155; Taulbee, 'A Call to Arms Declined: The United States and the International Criminal Court', 14 *Emory Int'l L. Rev.* (2000)

policy-makers that they need not fear the Court, that the independent prosecutor will act responsibly, and that complementarity will ensure that American war criminals are adequately prosecuted by their own domestic tribunals thereby obviating any role for the ICC.<sup>8</sup>

By and large, this literature does not adequately explain the paradox of United States support for the ad hoc criminal tribunals and its opposition to the ICC. Indeed, many analysts express astonishment at what they see as an apparently contradictory situation. It is as if there is some fundamental inconsistency in the United States attitude towards the ICC that ought logically to be resolved once policy-makers in Washington come to their senses and recognize the inherent anomaly of their stance. Others attempt to dissect the litany of objections that have been invoked at one time or another, and show why they are not well-founded in law or in fact. The keenest opponents of the Court enumerate and develop arguments that never even figure in public pronouncements from the United States Government; while these often novel arguments may merit consideration, they certainly do not account for Washington's current policy.

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105; Bickley, 'U.S. Resistance to the International Criminal Court: Is the Sword Mightier Than the Law?', 14 *Emory Int'l L. Rev.* (2000) 213; Schwartz, 'The United States and the International Criminal Court: The Case for "Dexterous Multilateralism"', 4 *Chi. J. Int'l L.* (2003) 223; Horton, 'The Long Road to Hypocrisy: The United States and the International Criminal Court', 24 *Whittier L. Rev.* (2003) 1041; Ohl, 'U.S. Opposition to the International Criminal Court: Outside the Realm of Responsibility', 46 *Wayne L. Rev.* (2000) 2043; Barrett, 'Ratify or Reject: Examining the United States' Opposition to the International Criminal Court', 28 *Ga. J. Int'l & Comp. L.* (1999) 83; Supple, 'Global Responsibility and the United States: The Constitutionality of the International Criminal Court', 27 *Hastings Const. L.Q.* (1999) 181; Bevitz, 'Flawed Foreign Policy: Hypocritical U.S. Attitudes toward International Criminal Forums', 53 *Hastings L.J.* (2002) 931; Grant, 'The International Criminal Court: The Nations of the World Must not Give in to All of the United States Demands if the Court is to be a Strong, Independent, International Organ', 23 *Suffolk Transnat'l L. Rev.* (1999) 327; Sailer, 'The International Criminal Court: An Argument to Extend its Jurisdiction to Terrorism and a Dismissal of U.S. Objections', 13 *Temp. Int'l & Comp. L.J.* (1999) 311; Gallarotti and Preis, 'Politics, International Justice, and the United States: Toward a Permanent International Criminal Court', 4 *UCLA J. Int'l L. & For. Aff.* (1999) 1; O'Connor, 'The Pursuit of Justice and Accountability: Why the United States Should Support the Establishment of an International Criminal Court', 27 *Hofstra L. Rev.* (1999) 927; Andreasen, 'The International Criminal Court: Does the Constitution Preclude Its Ratification by the United States?', 85 *Iowa L. Rev.* (2000) 697; Delmont, 'The International Criminal Court: The United States Should Ratify the Rome Statute Despite Its Objections', 27 *J. Legis.* (2001) 335; Sinanyan, 'The International Criminal Court: Why the United States Should Sign the Statute (But Perhaps Wait to Ratify)', 73 *S. Cal. L. Rev.* (2000) 1171; Holcombe, 'The United States Becomes a Signatory to the Rome Treaty Establishing the International Criminal Court: Why Are So Many Concerned by this Action?', 62 *Mont. L. Rev.* (2001) 301; Mysak, 'Judging the Giant: An Examination of American Opposition to the Rome Statute of the International Criminal Court', 63 *Sask. L. Rev.* (2000) 275; McIntire, 'Be Careful What You Wish For Because You Just Might Get It: The United States and the International Criminal Court', 25 *Suffolk Transnat'l L. Rev.* (2001) 249; Arnaut, 'When in Rome . . . ? The International Criminal Court and Avenues for U.S. Participation', 43 *Va. J. Int'l L.* (2003) 525.

<sup>8</sup> See, for example, the remarks of Leila Sadat Waxler in 'Association of American Law Schools Panel on the International Criminal Court', 36 *Am. Crim. L. Rev.* (1999) 223, at 244; Monroe Leigh, *supra* note 4, at 128.

## 1 Historic Support for International Justice

There is, in fact, a rather odd prelude to what was to become a subsequent pattern of United States support for international justice initiatives. In 1919, the American members of the Commission on Responsibilities urged a cautious approach when their erstwhile allies sought to forge ahead with post-war prosecutions.<sup>9</sup> The Commission concluded that a 'high tribunal' should be established, to include representatives of the United States, charged with applying 'the principles of the laws of nations as they result from the usages established among civilised peoples, from the laws of humanity and the dictates of the public conscience'.<sup>10</sup> Moreover, 'all enemy persons alleged to have been guilty of offences against the laws and customs of war and the laws of humanity shall be excluded from any amnesty'.<sup>11</sup> But Robert Lansing and James Brown Scott, although prepared to accept the establishment of 'a tribunal of an international character ... formed by the union of existing national military tribunals',<sup>12</sup> objected '[t]o the unprecedented proposal of creating an international criminal tribunal'.<sup>13</sup> As for the basis of prosecution, while they could acknowledge the punishability of 'the laws and customs of war', they declared that reference to 'the laws and principles of humanity' was an unacceptable departure from law and a venture into morality.<sup>14</sup>

A quarter of a century later, when the issue of international prosecution resurfaced, after some initial reticence, the United States became a keen supporter of efforts to hold their vanquished enemies responsible not only for violations of the laws and customs of war, but also for the two concepts upon which they had hesitated in Paris, and which were now labelled 'crimes against humanity', and 'crimes against peace'. The United States was only one of four powers which shared responsibility for the great Nuremberg trial, but it was to a great extent *primus inter pares*. Its support for the process continued through the Tokyo trial, and the various successor trials of Nazi doctors, lawyers, military leaders, political leaders, the SS and businessmen.<sup>15</sup>

As it does today, it had its own particular concerns about the development of the law. The famous 'nexus', by which crimes against humanity could only be prosecuted to the extent that they were linked with aggressive war, was an American contribution. At the London Conference, which set the framework for the Nuremberg prosecution, Justice Robert Jackson said:

It has been a general principle of foreign policy of our Government from time immemorial that the internal affairs of another government are not ordinarily our business; that is to say, the

<sup>9</sup> 'Memorandum of Reservations Presented by the Representatives of the United States to the Report of the Commission on Responsibilities', 14 *AJIL* (1920) 127.

<sup>10</sup> 'Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties', 14 *AJIL* (1920) 95, at 122.

<sup>11</sup> *Ibid.*, at 123.

<sup>12</sup> 'Memorandum of Reservations', *supra* note 9, at 129.

<sup>13</sup> *Ibid.*

<sup>14</sup> *Ibid.*, at 135.

<sup>15</sup> T. Taylor, *The Anatomy of the Nuremberg Trials* (1992); F. M. Buscher, *The U.S. War Crimes Trial Program in Germany, 1946–1955* (1989).

way Germany treats its inhabitants, or any other country treats its inhabitants is not our affair any more than it is the affair of some other government to interpose itself in our problems. The reason that this program of extermination of Jews and destruction of the rights of minorities becomes an international concern is this: it was a part of a plan for making an illegal war. Unless we have a war connection as a basis for reaching them, I would think we have no basis for dealing with atrocities.<sup>16</sup>

Pure self-interest accounted for limiting the scope of crimes against humanity. As Jackson explained, '[w]e have some regrettable circumstances at times in our own country in which minorities are unfairly treated. We think it is justifiable that we interfere or attempt to bring retribution to individuals or to states only because the concentration camps and the deportations were in pursuance of a common plan or enterprise of making an unjust or illegal war in which we became involved.'<sup>17</sup>

The emergence of individual criminal responsibility in the post-World War II context also manifested itself in the adoption of the Convention on the Prevention and Punishment of the Crime of Genocide.<sup>18</sup> The United States actively participated in its adoption — in contrast, for example, with the reticent British.<sup>19</sup> The Member States who had originally put the subject of genocide on the agenda of the United Nations in 1946 sought, as one of their two principal objectives, the recognition of universal jurisdiction over genocide.<sup>20</sup> The United States was the first to dissent, insisting that prosecution for crimes committed outside the territory of a state could only be undertaken with the consent of the state upon whose territory the crime was committed.<sup>21</sup> According to the United States, '[t]he principle of universal punishment was one of the most dangerous and unacceptable of principles'.<sup>22</sup> The alternative, which was associated with an explicit rejection of the principle of universal jurisdiction, was the following provision: 'Genocide shall be punished by any competent tribunal of the State in the territory of which the crime is committed or by a competent international tribunal.'<sup>23</sup> This became the compromise that was finally adopted, and that is reflected, with minor changes, in Article 6 of the Convention.

President Truman signed the Convention within a day of its adoption by the General Assembly, although the belated ratification would remain one of the great

<sup>16</sup> 'Minutes of Conference Session of July 23, 1945', in *Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials* (1949) 328, at 331.

<sup>17</sup> *Ibid.*, at 333.

<sup>18</sup> 78 UNTS (1951) 277. On the Convention generally, see W. A. Schabas, *Genocide in International Law* (2000).

<sup>19</sup> Simpson, 'Great Britain and the Genocide Convention', 73 *BYBIL* (2002) 1.

<sup>20</sup> The first draft resolution on genocide, presented by India, Cuba and Panama. UN Doc. A/BUR/50, called for recognition of universal jurisdiction over genocide: 'Whereas the punishment of the very serious crime of genocide when committed in time of peace lies within the exclusive territorial jurisdiction of the judiciary of every State concerned, while crimes of a relatively lesser importance such as piracy, trade in women, children, drugs, obscene publications are declared as international crimes and have been made matters of international concern . . .' This preambular paragraph was dropped in the final version of the resolution: GA Res. 96(I).

<sup>21</sup> UN Doc. E/623, Art. V. Also UN Doc. E/AC.25/SR.8, at 11.

<sup>22</sup> *Ibid.* (Maktos, United States of America).

<sup>23</sup> UN Doc. E/AC.25/SR.18, at 10.

disgraces in United States human rights policy.<sup>24</sup> By the 1980s, the law on universal jurisdiction had evolved considerably, and courts in the United States were prepared to endorse the position that their government had bitterly opposed four decades earlier. In *Demjanjuk v Petrovsky*, a federal court in the United States said that ‘some crimes are so universally condemned that the perpetrators are the enemies of all people. Therefore, any nation which has custody of the perpetrators may punish them according to its law.’<sup>25</sup>

In 1990, George Bush and Margaret Thatcher, both invoking the precedent of the Nuremberg trials, broached the idea of an international tribunal with jurisdiction over such crimes as aggression and hostage-taking to deal with the Iraqi invasion of Kuwait.<sup>26</sup> There are reports that the idea originated in the United States Department of the Army.<sup>27</sup> Pentagon lawyers prepared a report documenting crimes allegedly committed by the Iraqi President for a possible trial. The matter was ‘quietly dropped after the American-led coalition won the Persian Gulf War without capturing Mr. Hussein’.<sup>28</sup> Some European powers temporarily revived the idea, but then it went no further.<sup>29</sup>

In mid-1992, proposals for international prosecution resurfaced following the outbreak of war in Bosnia and Herzegovina. The United States took the initiative on a Security Council resolution to establish a commission of inquiry into reports of widespread violations of international humanitarian law, including the practice of ‘ethnic cleansing’.<sup>30</sup> The United States wanted to call the body the ‘Commission on War Crimes’, modelled on the 1943 war crimes commission that laid the groundwork for the Nuremberg trials, but the resolution it proposed was watered down by the

<sup>24</sup> Korey, ‘America’s Shame: The Unratified Genocide Treaty’, in J. N. Porter, *Genocide and Human Rights, A Global Anthology* (1982) 280; Joyner, ‘The United States and the Genocide Convention’, 27 *Indian J. Int’l L.* (1987) 411; Rosenthal, ‘Legal and Political Considerations of the United States’ Ratification of the Genocide Convention’, 3 *Antioch L.J.* (1985) 117; L. J. Leblanc, *The United States and the Genocide Convention* (1991); Leblanc, ‘The ICJ, the Genocide Convention, and the United States’, 6 *Wisconsin Int’l L.J.* (1987) 43.

<sup>25</sup> *Demjanjuk v Petrovsky*, 776 F.2d 571 (6th Cir. 1985). Also *In the Matter of the Extradition of John Demjanjuk*, 612 F.Supp. 544 (D.C. Ohio 1985); *Beanal v Freeport-McMoRan*, 969 F.Supp. 362, 371 (E.D.La. 1997).

<sup>26</sup> For Thatcher, see her television interview of 1 September 1990: 61 *BYbLL* (1990). For Bush, see: ‘U.S. Department of State Dispatch’, 22 October 1990, Vol. I(8), at 205; ‘U.S. Department of State Dispatch’, 12 November 1990, Vol. I(11), at 260.

<sup>27</sup> ‘When Saddam is Brought to Court’, *The Times*, 3 September 1990.

<sup>28</sup> Sciolino, ‘U.S. Names Figures It Wants Charged with War Crimes’, *New York Times*, 17 December 1992, at 1.

<sup>29</sup> Letter by President-in-Office of the Council, Jacques Poos, to the Secretary-General of the United Nations, Perez de Cuellar, 16 April 1991, reproduced in International Criminal Tribunal for the former Yugoslavia, *The Path to The Hague* (2001), at 16–17. Genscher also formulated the proposal in a speech delivered at the University of Ottawa when he was awarded an honorary degree on 27 September 1991. Also: ‘Deutschlands Verantwortung in der Welt’, *Ostthüringer Zeitung*, 3 October 1991.

<sup>30</sup> UN Doc. S/RES/780 (1992).

United Kingdom, France and China, who feared that establishment of an international tribunal would be the next step, as it had been at Nuremberg.<sup>31</sup>

The full story of the United States involvement in the establishment of the International Criminal Tribunal for the former Yugoslavia goes beyond the scope of this paper. Its commitment to the enterprise, however, from the earliest days right through to the present day, stands as an example to other states. Two of the four presidents of the Tribunal have come from the United States. Secondments of lawyers and other professionals from the United States Government have ensured not only a high level of expertise at the Tribunal, but also an important and sometimes decisive influence in both its legal culture and its policies.<sup>32</sup> In the seminal *Tadic* case on jurisdiction,<sup>33</sup> the United States submitted an *amicus curiae* brief that was justified, it said, by 'its special interest and knowledge as a permanent member of the United Nations Security Council and its substantial involvement in the adoption of the statute of the Tribunal'.<sup>34</sup>

## 2 The United States and Drafting of the Rome Statute

The United States actively participated in the drafting process that led to the adoption of the Rome Statute of the International Criminal Court. At the final session of the Plenary Committee, late in the evening on 17 July 1998, it called for a vote, thereby ensuring the Statute would not be adopted by consensus. But it did not request a roll call vote, which might well have discouraged states from voting in favour, or even abstaining, and which could well have compromised the final result. Certainly, there was no shortage of opportunities to wreck the process, if that had been the intent of the United States. On many occasions during the drafting process, its initiatives were positive and helpful.

One example should suffice. The issue of capital punishment emerged as a deeply divisive matter, and one upon which the entire Rome Conference might have fatally stumbled. Proposals concerning the death penalty were submitted by a block of Arab and Islamic States, and the Commonwealth Caribbean States, together with a few other enthusiasts for the practice, such as Singapore. In all, they numbered perhaps

<sup>31</sup> Tran and Pick, 'UN to Set Up Commission to Investigate Atrocities in Former Yugoslavia: Europeans Dilute US Call for War Crimes Tribunal', *The Guardian*, 7 October 1992, at 8.

<sup>32</sup> For example, according to the first Annual Report of the Tribunal, the United States was responsible for the most substantial contribution of money and equipment, as well as the secondment of 22 professionals for a two-year period: 'Annual 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', UN Doc. A/49/342 — S/1994/1007, para. 186.

<sup>33</sup> *Prosecutor v Tadic* (Case no. IT-94-1-AR72), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995.

<sup>34</sup> 'Annual 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', UN Doc. A/50/365 — S/1995/728, para. 18.

20 states.<sup>35</sup> But in the dynamics of the Conference, a collection of small minorities on single issues could easily become magnified into an unhappy majority. Some might have expected the United States to join the death penalty states, given its notorious support for the practice in its own criminal justice system. But rather than exploit the possibilities of this 'deal breaker', the United States took the view that the death penalty should be excluded from the Rome Statute.

On the evening of 3 July 1998, as the death penalty debate began to hint at its potential to derail the entire conference, United States Ambassador David Scheffer took the floor at the formal, public session of the Working Group. It was a sincere effort to assist the chair in his search for a workable solution. Ambassador Scheffer focused on the concept of complementarity, noting that 'we know the death penalty very well in the United States, where it is imposed in many jurisdictions including by the federal system, and where it is supported by the executive'. Scheffer said that the International Criminal Court should encourage national judicial systems to prosecute and punish the crimes within its jurisdiction, 'and this will include the death penalty'. But, he continued, a second principle was the need to create a uniform penalty regime for the Court, failing which the operation of the Court would be diverse and unpredictable. 'The United States believes that the language proposed by the chair achieves the goal of just and severe punishment on an international level', he concluded.

In his testimony to Congress a few days after the conclusion of the Rome Conference, Ambassador Scheffer listed a number of other aspects of the Statute for which the United States could, at least partially, take the credit. Few would argue that some of these were positive contributions and improved the Court's ability to address impunity: extension of war crimes to deal with internal armed conflict, due process guarantees for defendants, recognition of gender issues, rigorous qualifications for judges. He did not mention, but might have, the insistence by the United States that the nexus between crimes against humanity and armed conflict be removed.<sup>36</sup> Several other items on the United States agenda were aimed at weakening the Court, and enhancing the checks on its operations by both states parties and the Security Council. But any suggestion that the United States was out to sabotage or defeat the Court is far too simplistic. If the United States had really meant to wreck the process, it passed up many opportunities to do so.

### 3 Arguments against the Rome Statute by the United States

Many assessments of the position of the United States often reduce it to the simple proposition that Washington wants to protect its own citizens from the jurisdiction of

<sup>35</sup> Schabas, 'Life, Death and the Crime of Crimes: Supreme Penalties and the ICC Statute', 2 *Punishment & Society* (2000) 263.

<sup>36</sup> See 'Statement, United States Delegation to the Preparatory Committee on the Establishment of an International Criminal Court', 23 March 1998. Ironically, it was also the United States that had put the *nexus* into crimes against humanity in the first place. See *supra* notes 16–17 and accompanying text.

the Court.<sup>37</sup> A distinct but related argument contests the legality of the Court's alleged jurisdiction over third states. When it 'unsigned' the Statute, on 6 May 2002,<sup>38</sup> Marc Grossman, who was Under Secretary for Political Affairs, stated that 'the United States respects the decision of those nations who have chosen to join the ICC; but they in turn must respect our decision not to join the ICC or place our citizens under the jurisdiction of the court'.<sup>39</sup> This is, of course, a perfectly logical response by Washington to a Court that it does not like. However, it fails to explain why Washington doesn't like the Court. It does not respond to the rather obvious observation that the United States sought to establish a Court that it would be able to support and that would, consequently, exercise jurisdiction over United States nationals. As Monroe Leigh has pointed out, '[o]nly very late in the negotiations did the United States introduce this objection as a fundamental obstacle to its acceptance of the treaty'.<sup>40</sup> The implication is that the point was not genuinely central to American concerns.

In any event, the Court does not exercise jurisdiction over or otherwise affect the rights of third states. Rather, it has jurisdiction over nationals of third states for crimes committed within the territory of states parties. Obviously, international law has never recognized a right of nationals of one state to commit genocide, crimes against humanity or war crimes in the territory of another state.

Exclusion of United States nationals from the jurisdiction of the Court was not a policy objective of the United States. If other states had been more conciliatory, and the Rome Statute had turned out in a form that was more or less satisfactory to the United States, then it would presumably have ratified the Statute, with the inevitable consequence that the Court would have had jurisdiction over American nationals. After all, the other international tribunals, for the former Yugoslavia, Rwanda and Sierra Leone, all have jurisdiction over nationals of the United States. In 1999, the Office of the Prosecutor of the International Criminal Tribunal for the former Yugoslavia published a report on its examination of allegations that American military and civilian officials might be responsible for serious violations of international humanitarian law during the Kosovo bombing campaign. Concerns about

<sup>37</sup> For example, Halberstam, in 'Association of American Law Schools Panel on the International Criminal Court', *supra* note 8, at 257.

<sup>38</sup> 'Press Statement, U.S. Department of State, Richard Boucher, Spokesman, International Criminal Court: Letter to UN Secretary General Kofi Annan', 6 May 2002, available at <http://www.state.gov/r/pa/prs/ps/2002/9968.htm>. One of the interesting by-products of the 'unsigned' is that it has generated much new research on the legal significance of signature and of a subsequent declaration of intent not to ratify. See, e.g., Hongju Koh, 'On American Exceptionalism', 55 *Stan. L. Rev.* (2003) 1479; Swaine, 'Unsigned', 55 *Stan. L. Rev.* (2003) 2061; Scott, 'Presidential Power to "Un-Sign" Treaties', 69 *U. Chi. L. Rev.* (2002) 1447. It also casts a new light on obligations imposed upon the United States with respect to treaties that it has signed but not yet unsigned, such as the American Convention on Human Rights, the International Covenant on Economic, Social and Cultural Rights, and the Convention on the Rights of the Child.

<sup>39</sup> 'U.S. Under Secretary of State for Political Affairs Marc Grossman. American Foreign Policy and the International Criminal Court, Remarks to the Center for Strategic and International Studies', 6 May 2002, available at <http://www.state.gov/p/9949pf.htm>.

<sup>40</sup> Monroe Leigh, *supra* note 4, at 127.

prosecution of American nationals, particularly American servicemen, should not be dismissed as a factor in Washington's opposition. But this does not satisfactorily account for its opposition to the Rome Statute in its current form.

Some of the other arguments invoked by the United States are so feeble that they cannot possibly lie at the core of any rational policy-making. For example, spokespersons for the United States administration have picked at some of the admittedly odd and exceptional provisions in the Statute, the inevitable result of such a negotiating process. Thus, because Article 124 allows states parties to 'opt out' of jurisdiction over war crimes, it has been alleged that this allows a state party 'to escape prosecution of its nationals', something that a non-party state cannot do.<sup>41</sup> The objection is insignificant, because only two states have invoked the provision, France and Colombia. In any event, it is misplaced, because nationals of France and Colombia can be prosecuted for war crimes committed on the territory of another state party, in the same way as American nationals can be prosecuted. There is no injustice or inequality here. As for the *ad hoc* jurisdictional regime in Article 12(3), which allows a state to give jurisdiction to the Court without itself actually joining the treaty, its scope has been subsequently narrowed by the Rules, largely the result of post-Rome participation of the United States in the follow-up work.<sup>42</sup>

Other complaints amount to little more than technical criticism. In some cases, they may well have some validity. But here again, they provide no insight into the opposition of the United States. For example, Ambassador Scheffer has noted that the prohibition of reservations in Article 120 of the Statute is excessive. Even had the United States administration tried to submit the Statute, Article 120 would have frustrated the Senate with its penchant for reservations, understandings, declarations and provisos, and made ratification improbable. At Rome, those who argued for an absolute prohibition on reservations claimed it would avoid the disputes that afflict interpretation and application of many human rights treaties. But this has not proven to be the case, and despite Article 120, many states have formulated complex 'declarations' that, in some cases at least, seem to amount to a 'unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State'.<sup>43</sup> In other words, a reservation.

<sup>41</sup> Scheffer, 'America's Stake in Peace, Security and Justice' (31 Aug. 1998), available at [http://www.state.gov/www/policy\\_remarks/1998/980831\\_scheffer\\_icc.html](http://www.state.gov/www/policy_remarks/1998/980831_scheffer_icc.html), cited in remarks of Halberstam, *supra* note 37.

<sup>42</sup> Rules of Procedure and Evidence, ICC-ASP/1/3, at 10–107, Rule 44.

<sup>43</sup> Vienna Convention on the Law of Treaties, Art. 2(1)(d). For example, see Denmark's 'declaration' of a 'territorial exclusion to the effect that "Until further notice, the Statute shall not apply to the Faroe Islands and Greenland"', available at <http://www.un.org/law/icc/statute/status.htm>. A similar declaration affecting the territorial scope of the European Court of Human Rights has been judged invalid: *Loizidou v Turkey (Preliminary Objections)*, 23 March 1995, Series A, No. 310. The legal effect of the Danish declaration is puzzling. Although inspired by an undoubtedly legitimate respect for the autonomy of the indigenous peoples of Greenland and the Faroe Islands, it does not in fact shelter these individuals from the jurisdiction of the Court because the declaration only addresses the territory itself:

Many of the arguments against the Court that are invoked in the literature have never been a significant part of the official policy.<sup>44</sup> For example, some commentators argue that allowing the ICC to prosecute United States nationals or to hold trials without juries violates the constitution.<sup>45</sup> The American Servicemembers' Protection Act cites the jury argument and similar ones, including the charge that the Rome Statute does not respect the right against self-incrimination, and the right of confrontation and cross-examination. Of course, the same can be said of the Yugoslavia, Rwanda and Sierra Leone tribunals, all of which enjoy the enthusiastic support of the United States, and all of which have jurisdiction over United States nationals. Senator Helms has also complained at the outrage that '[t]hese crimes and these cases would be tried before judges who could be from North Korea, Cuba, or other unfriendly places'.<sup>46</sup> But that threat too has always existed. Americans can be judged by the courts of North Korea or Cuba for crimes committed on the territory, and for crimes of universal jurisdiction, and they can be judged by judges from those two countries to the extent they are elected to an international tribunal.

In order to comprehend the logic behind the opposition of the United States towards the ICC, it is helpful to consider what the United States actually wanted. In 1994, when the International Law Commission presented its report on an international criminal court to the General Assembly,<sup>47</sup> the United States was well-disposed to the proposal.<sup>48</sup> In a general sense, the International Law Commission draft provided for an international criminal court that fit neatly within the Charter of the United Nations and that was, accordingly, subordinate to the Security Council. It might be described as a permanent version of the *ad hoc* tribunal established a year earlier by the Security Council. As David Scheffer has noted,

[t]he ILC's final draft statute for the ICC addressed many of the U.S. objectives and constituted, in our opinion, a good starting point for far more detailed and comprehensive discussions. Though not identical to U.S. positions, the ILC draft recognized that the Security Council should determine whether cases that pertain to its functions under Chapter VII of the UN

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as Danish nationals, indigenous peoples resident in Greenland and the Faroe Islands are nevertheless subject to the jurisdiction of the ICC for acts committed in Greenland and the Faroe Islands. It would seem that the declaration only excludes nationals of non-party states alleged to commit crimes within the jurisdiction of the Court on the territory of Greenland and the Faroe Islands, something that presumably will please the Americans.

<sup>44</sup> Some of them were publicly criticized by Ambassador David Scheffer: 'Statement before the Congressional Human Rights Caucus', 15 September 2000.

<sup>45</sup> Rodriguez, 'Slaying the Monster: Why the United States Should Not Support the Rome Treaty', 14 *Am. U. Int'l L. Rev.* (1999) 805, at 814; Baronoff, 'Unbalance of Powers: The International Criminal Court's Potential to Upset the Founders' Checks and Balances', 4 *U. Pa. J. Const. L.* (2002) 800; Everett, 'American Servicemembers and the ICC', in S. B. Sewall and Kaysen (eds), *The United States and the International Criminal Court* (2000), 137, at 137, 140–41; Levitine, 'Constitutional Aspects of an International Criminal Court', 9 *N.Y. Int'l L. Rev.* (1996) 27, at 37–38.

<sup>46</sup> 140 Congressional Record S96, 101 (daily edition, 26 January 1994).

<sup>47</sup> 'Report of the International Law Commission on the Work of its Forty-Sixth Session, 2 May–22 July 1994', UN Doc. A/49/10, Chapter II. See Crawford, 'The ILC Adopts a Statute for an International Criminal Court', 89 *AJIL* (1995) 404.

<sup>48</sup> UN Doc. A/CN.4/458/Add.7.

Charter should be considered by the ICC, that the Security Council must act before any alleged crime of aggression could be prosecuted against an individual, and that the prosecutor should act only in cases referred either by a state party to the treaty or by the Council.<sup>49</sup>

In 1995, President Clinton expressed support for the permanent war crimes court. Interestingly, his remarks focused on the relationship between the proposed tribunal and the Security Council: 'all nations around the world who value freedom and tolerance [should] establish a permanent international criminal court to prosecute, with the support of the United Nations Security Council, serious violations of humanitarian law'.<sup>50</sup>

The focus on the role of the Security Council appeared in other major policy declarations of United States officials in the course of the negotiations. In the Sixth Committee of the General Assembly, in 1995, the spokesperson for the United States delegation, Jamison Borek, reviewed several criticisms of the ongoing work. These were not so much differences of principle as constructive suggestions about how to move the process forward. Several ideas should be rejected, he said, not because they were fundamentally flawed but simply because they were incapable of achieving sufficient support from states, or because they raised insurmountable technical difficulties. On the Security Council, however, he was more insistent:

There is an important role for the Security Council to play in the work of the court. We have heard the role of the Security Council criticized as unduly tainting the independence of a judicial body. Ironically, allowing a State unfettered discretion to launch cases against another State, regardless of whether the resulting international prosecution would be necessary or effective, has even greater potential for political misuse. Under the current draft, the initiation of cases would be subject to whatever political agenda a particular State may have, rather than a collective decision by the Council that in fact would be less likely to reflect a political bias than that of an individual State. In any event, the reality of the hard core categories of crimes is that they are in almost all cases relevant to the matters of which the Security Council is likely to be seized, and which are part of the Council's mandate under the Charter of the United Nations to maintain and restore international peace and security. A primary purpose in establishing a permanent international criminal court is to avoid the necessity of the Security Council establishing ad hoc tribunals to deal with crimes arising under international humanitarian law.<sup>51</sup>

At the outset of the Rome Conference, on 17 June 1998, Bill Richardson, United States Ambassador to the United Nations, described the position of the United States:

A permanent Court cannot stand alone. It must be part of the international order, and supported by the international community. The United Nations Security Council remains a vital part of that world order. Because of the Security Council's legal responsibilities for maintaining international peace and security, the United States believes that the Council must play an important role in the work of the permanent Court, including the Court's trigger mechanism. The Council must be able to pursue the aims of peace. The Council must be able to refer critical situations to the Court for investigation, and must be able to instruct countries to

<sup>49</sup> Scheffler, 'The United States and the International Criminal Court', 93 *AJIL* (1999) 12, at 13.

<sup>50</sup> Clinton, 'Remarks at the University of Connecticut in Storrs', 15 October 1995, 2 *Pub Papers* 1595, 159.

<sup>51</sup> 'Statement by Jamison S. Borek, Deputy Legal Advisor', 1 November 1995.

cooperate with the Court if necessary and appropriate within its powers. The Council's mandatory Chapter VII powers will be absolutely essential to the workings of the Court — not only for enforcement but also to ensure the true universality of its jurisdiction and powers. From the point of view not only of law but of vital policy, the Court must operate in coordination — not in conflict — with the Security Council and its role and powers under the U.N. Charter.<sup>52</sup>

More recently, Lincoln P. Bloomfield Jr., Assistant Secretary for Political-Military Affairs, in a speech to the Consultative Assembly of Parliamentarians for Global Action, addressed the relationship between the Court and the Security Council as the first item of difficulty: 'Unlike other war crimes tribunals, such as for Rwanda and the former Yugoslavia, the ICC does not operate under the functional supervision of the U.N. Security Council, and is thus further removed from the will of sovereign states, to say nothing of democratic voters in sovereign states.'<sup>53</sup>

Thoughtful academic commentators who support the government's position also seem to grasp the centrality of the Security Council issue. In a recent article, Jack Goldsmith has condemned 'the ICC's unprecedented attempt to check the power of the Security Council'.<sup>54</sup> Similarly, Ruth Wedgwood has written:

Some countries have instead supposed that the ICC and its Assembly of State Parties are entitled to mimic Security Council authority, unilaterally impleading the nationals of states that have declined to join the Court. Washington sees this as a usurpation of the Security Council's established position in international law and in the architecture of the UN Charter. Under the Charter, the permanent members of the Security Council must concur in any UN enforcement decisions.<sup>55</sup>

#### 4 The Security Council: Gatekeeper or Spectator?

Tension between the Security Council and the International Criminal Court manifests itself in several parts of the Rome Statute. Not surprisingly, these issues figured prominently on the list of problems that the United States has with the Rome Statute. Article 16 of the Rome Statute allows the Security Council to 'defer' prosecutions. It states: 'No investigation or prosecution may be commenced or proceeded with under this Statute for a period of twelve months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.'<sup>56</sup> The ancestor of Article 16 in the 1994 International Law Commission

<sup>52</sup> Bill Richardson, 'Statement in the Plenary Session of the U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court', 19 June 1998, cited in van der Vyver, *supra* note 5, at 798–799.

<sup>53</sup> Lincoln P. Bloomfield Jr., Assistant Secretary for Political-Military Affairs, in a speech to the Consultative Assembly of Parliamentarians for Global Action, New York, 12 September 2003.

<sup>54</sup> Goldsmith, *supra* note 6, at 101.

<sup>55</sup> Wedgwood, 'The Irresolution of Rome', *supra* note 6, at 198–199 (reference omitted).

<sup>56</sup> Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9.

draft read: 'No prosecution may be commenced under this Statute arising from a situation which is being dealt with by the Security Council as a threat to or breach of the peace or an act of aggression under Chapter VII of the Charter, unless the Security Council otherwise decides.'<sup>57</sup> Because the list of items 'being dealt with . . . as a threat to or breach of the peace or an act of aggression under Chapter VII' on the agenda of the Security Council is more or less identical to the list of serious violations of international humanitarian law likely to attract the attention of an international prosecutor, the ILC provision would have had the effect of giving the Security Council a veto on all potential prosecutions. Essentially, the ILC had viewed the Security Council as the gatekeeper to the Court.

The relationship between the Security Council and the Court was a central issue in the negotiations leading up to Rome.<sup>58</sup> The 'like-minded caucus', which was a loose coalition of states, mainly 'middle powers' and developing countries, attacked the ILC draft provision as a serious encroachment upon judicial independence.<sup>59</sup> While the negotiations were ongoing, the wars in the former Yugoslavia provided an example of how difficulties in this area might arise. As international negotiators attempted to broker a peace with the warring parties in Bosnia and Herzegovina, Prosecutor Richard Goldstone issued an indictment against Bosnian Serb leaders Karadzic and Mladic, in effect ensuring they would not travel to Dayton for the late-1995 peace talks.<sup>60</sup> A more recent manifestation of the clash between international prosecution and pragmatic diplomacy took place in June 2003, when prosecutor David Crane of the Special Court for Sierra Leone demanded that Ghana arrest Liberian President Charles Taylor while the tyrant was visiting Accra for a peace conference. Taylor had been secretly indicted in March 2003, but Crane had waited for him to make a foreign trip before attempting to effect an arrest. The attempt to apprehend Taylor had the consequence of sabotaging a peace conference and, arguably, prolonging an armed conflict.<sup>61</sup>

As the pre-Rome negotiations unfolded, one of the members of the 'like-minded', Singapore, produced a compromise proposal that subsequently became, with a few

<sup>57</sup> 'Report of the International Law Commission on the Work of its Forty-Sixth Session', *supra* note 47, Art. 23(3).

<sup>58</sup> For the debates, see 'Report of the *Ad Hoc* Committee on the Establishment of an International Criminal Court', UN Doc. A/50/22, paras 124–125; 'Report of the Preparatory Committee on the Establishment of an International Criminal Court', UN Doc. A/51/22, paras 140–144.

<sup>59</sup> Kirsch and Holmes, 'The Rome Conference on an International Criminal Court, The Negotiating Process', 93 *AJIL* (1999) 2.

<sup>60</sup> In his memoirs, Richard Goldstone says that Secretary-General Boutros Boutros-Ghali expressed surprise that he had not been consulted on the decision to indict. See R. J. Goldstone, *For Humanity, Reflections of a War Crimes Investigator* (2000), at 91–92. According to Deputy Prosecutor Graham Blewitt, '[w]e wanted to make sure that we were going to be part of the Dayton solution', cited in G. Bass, *Stay the Hand of Vengeance* (2000), at 244. Also J. Hagen, *Justice in the Balkans, Prosecuting War Crimes in the Hague Tribunal* (2004), at 134–135.

<sup>61</sup> 'Statement of David M. Crane, Chief Prosecutor, Special Court for Sierra Leone', 4 June 2003.

minor changes, the final version of Article 16 of the ICC Statute.<sup>62</sup> It attempted to reconcile those who believed there was a legitimate role for some political interference in judicial proceedings, for example where delicate peace negotiations were being pursued, and those who saw this as unacceptable. The provision probably found an appropriate balance between political concerns and judicial independence, at least to the extent it is interpreted and applied in accordance with the intent of those who drafted it. According to Article 16, the Security Council is no longer the gatekeeper to the Court, as it had been in the ILC draft. Its approval is not a prerequisite for investigation and prosecution, although the Council can still intervene by means of a resolution in particular cases. The Charter's requirement of a nine-vote majority and the concurrence of the five permanent members seemed an adequate guarantee that this power to defer prosecutions could not be easily abused. At the time, the willingness of the United States to stoop to what amounted to blackmail so as to pervert the object and purpose of Article 16 had not been anticipated.<sup>63</sup>

Essentially all of the other major concerns of the United States with the Rome Statute flow from the issue of Security Council deferral. If a permanent member of the Security Council can effectively block prosecutions, then the United States is in control. It could do this effectively and almost automatically under the ILC draft; it can only do it with difficulty, and without legal certainty,<sup>64</sup> under the Statute as it now stands.

The United States has also frequently expressed its unhappiness with the independent or *proprio motu* prosecutor provided for under Article 15 of the Rome Statute. The original ILC draft did not allow for a prosecutor who would, at his or her discretion, have the authority to initiate prosecutions independently of any authorization from the Security Council or a state party. The *proprio motu* prosecutor was also a principal part of the platform of the 'like minded' caucus. The Rome Statute imposes a degree of control on prosecutorial discretion, but it is judicial, through the Pre-Trial Chamber, and not political. Ironically, American opponents of the Court cite their own country's experience with so-called special prosecutors, like the one who hounded President Clinton, as proof of the instability of such an institution.<sup>65</sup> But the

<sup>62</sup> See Yee, 'The International Criminal Court and the Security Council: Articles 13(b) and 16', in R. Lee (ed.), *The International Criminal Court, The Making of the Rome Statute, Issues, Negotiations, Results* (1999) 143, at 149–152.

<sup>63</sup> El Zeidy, 'The United States Dropped the Atomic Bomb of Article 16 of the ICC Statute: Security Council Power of Deferrals and Resolution 1422', 35 *Vand. J. Transnat'l L.* (2002) 1503.

<sup>64</sup> There is some intriguing speculation about the power of the ICC Pre-Trial Chamber to consider the legality of Security Council resolutions adopted to obstruct the exercise of the Court's jurisdiction. Some states, in their declarations to the Security Council, have argued that Resolutions 1422 and 1487 are *ultra vires*. The Parliamentary Assembly of the Council of Europe has also described the resolutions as *ultra vires*: Provisional Edition, Threats to the International Criminal Court, Resolution 1336 (2003)(1). Assembly debate on 25 June 2003 (20th Sitting) (see Doc. 9844, report of the Committee on Legal Affairs and Human Rights, rapporteur: M. Marty). Text adopted by the Assembly on 25 June 2003 (20th Sitting), available at <http://www.iccnw.org/documents/declarationsresolutions/intergovbodies/CoEResBIAs25june03Eng.doc>.

<sup>65</sup> Bolton, 'The Risks and Weaknesses of the International Criminal Court from America's Perspective', *supra* note 6, at 173.

oft-expressed fear of the United States that the *proprio motu* prosecutor might be politically motivated has a ring of hypocrisy. Actually, the United States doesn't really mind politically-motivated prosecutors as long as it can control them. It has never been shy about giving 'political' direction to the prosecutors of the ad hoc tribunals, or the prosecutor of the Special Court for Sierra Leone. In a recent declaration, United States Ambassador John D. Negroponte condemned former Yugoslav President Slobodan Milosevic and Sierra Leonean warlord Foday Sankoh, taking the lion's share of credit for their prosecutions and speaking of 'their crimes' as if they had already been tried and convicted.<sup>66</sup>

Finally, there is the daunting issue of aggression. During negotiations, the United States was less intransigent than on some other subjects, arguing for a cautious position, and warning of the difficulties. As early as 1995, in the Sixth Committee of the General Assembly, it said 'the inclusion of the crime of aggression [was] highly problematic on numerous grounds'.<sup>67</sup> In his testimony to the Senate Foreign Relations Committee following the Rome Conference, Ambassador Scheffer said the United States delegation was 'disappointed with the treatment of the crime of aggression'.<sup>68</sup> In contrast with the relatively restrained tone of the United States negotiators, Senator Jesse Helms was, predictably, rather shrill on the subject: 'I think I can anticipate what will constitute a crime of "aggression" in the eyes of this Court: it will be a crime when the United States of America takes any military action to defend its national interests, unless the U.S. first seeks and receives the permission of the United Nations.'<sup>69</sup>

The reference to aggression, in Article 5 of the Rome Statute, is little more than a place-holder. Ongoing discussions, first in the Preparatory Commission and later in the Assembly of States Parties, give no assurance that any consensus will be reached, and that the promise that the Court might actually exercise jurisdiction over the crime will come to pass. Again, the role of the Security Council is central to United States concerns here. Whatever may develop in the law of the Court itself, Article 39 of the Charter of the United Nations indicates that first and foremost it is for the Security Council to determine the existence of acts of aggression. The 1994 ILC draft, which gave the Court jurisdiction over the crime of aggression,<sup>70</sup> addressed this matter directly, and in a way that was satisfactory to the United States: 'A complaint of or directly related to an act of aggression may not be brought under this Statute unless the Security Council has first determined that a State has committed the act of

<sup>66</sup> Statement by Ambassador John D. Negroponte, United States Permanent Representative to the United Nations, on the Situation in Bosnia and Herzegovina, Security Council, 10 July 2002.

<sup>67</sup> 'Statement by Jamison S. Borek', *supra* note 51.

<sup>68</sup> 'Statement of David J. Scheffer, Ambassador-at-Large for War Crimes Issues, And Head of the U.S. Delegation to the U.N. Diplomatic Conference on the Establishment of a Permanent International Criminal Court Before the Committee on Foreign Relations of the United States Senate', 23 July 1998.

<sup>69</sup> 'Hearing on the Creation of an International Criminal Court Before the Subcommittee on International Operations of the Committee on Foreign Relations', 105th Cong. 60 (1998) (statement of Senator Helms).

<sup>70</sup> 'Report of the International Law Commission on the Work of its Forty-Sixth Session', *supra* note 47, Art. 20(b).

aggression which is the subject of the complaint.<sup>71</sup> That language does not appear in the Rome Statute, nor is it at all certain that any proposals for amendment, in accordance with Article 5(2), will insist upon such a preliminary Security Council determination.<sup>72</sup> This is, obviously, a great concern to the United States. Those who urged that the United States should remain ‘engaged’ in the Court, by means of signature, used the uncertain status of aggression and the fact that the matter will be debated within the structures of the Court as one of their arguments.<sup>73</sup>

Finally, another serious objection from the United States concerns the referral mechanism by a non-party state, allowed by Article 12(3) of the Statute. Although a similar provision appeared in the ILC draft,<sup>74</sup> the logic of its inclusion was different. The ILC draft required consent of both the state of nationality and the state of territory, and this provision was inserted to address cases where only one of these states was a party to the Statute. According to Article 12(3), a state which has not ratified the Statute can nevertheless give jurisdiction to the Court with respect to a crime committed on its territory, essentially on an ad hoc basis.<sup>75</sup> In his post-Rome testimony to the Senate, Ambassador Scheffer raised the spectre of Saddam Hussein experimenting with such a manoeuvre, thereby allowing the Court jurisdiction over the actions of American troops in northern Iraq.<sup>76</sup> As a result of efforts by the United States delegation, a provision was inserted into the Rules of Procedure and Evidence that tempers Article 12(3), requiring any non-party state that attempts a one-sided exercise of jurisdiction to expose itself to prosecution as well.<sup>77</sup> Saddam Hussein may no longer be around to make such mischief for the United States. But Fidel Castro

<sup>71</sup> *Ibid.*, Art. 23(2).

<sup>72</sup> See ‘Discussion Paper Proposed by the Coordinator’, UN Doc. PCNICC/2002/WGCA/RT.1/Rev.2. Also Sylvia Fernandez de Gurmendi, ‘The Working Group on Aggression at the Preparatory Commission for the International Criminal Court’, 25 *Fordham Int’l L.J.* (2002) 589; Pierce, ‘Which of the Preparatory Commission’s Latest Proposals for the Definition of the Crime of Aggression and the Exercise of Jurisdiction Should be Adopted into the Rome Statute of the International Criminal Court’, 15 *B.Y.U.J. Pub. L.* (2001) 281; Meron, ‘Defining Aggression for the International Criminal Court’, 15 *Suffolk Transnat’l L. Rev.* (2001) 1.

<sup>73</sup> Brown, *supra* note 5, at 868.

<sup>74</sup> ‘Report of the International Law Commission on the Work of its Forty-Sixth Session’, *supra* note 47, Art. 22(4).

<sup>75</sup> Cherif Bassiouni suggests that this was unintended: Bassiouni, ‘Negotiating the Treaty of Rome on the Establishment of an International Criminal Court’, 32 *Cornell Int’l L.J.* (1999) 443, at 454. A harsh critic of the United States position, Professor Bassiouni nevertheless concedes that its concerns with respect to Article 12(3) were ‘valid’: see at 459, n. 66. Also Sadat and Carden, *supra* note 5, at 413, note 192; Scharf, ‘The United States and the International Criminal Court: The ICC’s Jurisdiction Over the Nationals of Non-Party States: A Critique of the U.S. Position’, *supra* note 5, at 78, note 56; Wedgwood, ‘The United States and the International Criminal Court: Achieving a Wider Consensus through the “Ithaca Package”’, 32 *Corn. Int’l L.J.* (1999) 535, at 541. Jack Goldsmith argues that Rule 44 doesn’t really fix the problem: Goldsmith, *supra* note 6, at 91–92, 98.

<sup>76</sup> Scheffer, ‘America’s Stake in Peace, Security and Justice’ (31 August 1998), available at [http://www.state.gov/www/policy\\_remarks/1998/980831\\_scheffer\\_icc.html](http://www.state.gov/www/policy_remarks/1998/980831_scheffer_icc.html). Also Scheffer, ‘The United States and the International Criminal Court’, 93 *AJIL* (1999) 12, at 18–20.

<sup>77</sup> Wedgwood, ‘The Irresolution of Rome’, at 201; England, *supra* note 5, at 945–946.

might be tempted to use Article 12(3) so as to give the Court jurisdiction over Guantanamo Bay.

## 5 Conclusions

The muddle of arguments from the United States no doubt reflects some of the differences within Washington's policy-making community. Conservative Republicans, like John Bolton, present a litany of justifications for United States opposition that are in large part nothing more than a general hostility to multilateral diplomacy and international organizations. There is great disagreement in Washington about how to confront the Court, something reflected in the contradictory views of Democrat and Republican administrations on the question of signature of the Statute. However, this does not mean there is not a political centre of gravity reflecting some elements of a virtual consensus in Washington. It is shared by Democrats, as reflected in the writings of David Scheffer, and Republicans (see those of John Bolton), and points to a proper understanding of why the United States is so opposed to the Court, and why this opposition is largely indifferent to the political taint of the administration. It concerns the efforts of the Rome Statute to reduce the role and prerogatives of the Security Council.

John Bolton is right when he says 'never before has the United States been asked to place [the power of law enforcement] outside the complete control of our government without our consent'.<sup>78</sup> The vast majority of United Nations Member States cannot say this. The states of the former Yugoslavia and Rwanda know all about placing the power of law enforcement outside their complete control. They sacrificed their sovereignty when they joined the United Nations and accepted the authority of the Security Council to take binding decisions, including those encroaching upon their own criminal law jurisdiction. Rwanda, a member of the Security Council at the time, actually voted against the resolution establishing the International Criminal Tribunal for Rwanda.<sup>79</sup> As an elected member — unlike the United States — it had no power of veto.

When the United Nations was being created, at the close of the Second World War, President Roosevelt allegedly said that the real business would go on in the Security Council, while the General Assembly would provide a place for the majority of small states to 'let off steam'. The special position of the Security Council for the nearly 190 Member States who are not permanent members has always been a sore point. This may explain why it was the 'middle powers', like Germany and Canada, who reacted so strongly when the United States used the Security Council to stymie the Court, with Resolutions 1422 and 1487.

<sup>78</sup> 'The United States and the International Criminal Court', John R. Bolton, Under Secretary for Arms Control and International Security, Remarks at the Aspen Institute, Berlin, Germany, 16 September 2002, available at <http://www.state.gov/t/us/rm/13538.htm>.

<sup>79</sup> UN Doc. S/PV.3453 (1994).

The adoption of the Rome Statute of the International Criminal Court represents a singular defeat for American diplomacy. The world's only superpower found itself outmanoeuvred by a constellation of small and medium powers, including some of its closest friends and allies. Since adoption, the Statute has exceeded the expectations of even its most unconditional supporters and enthusiasts. Faced with an accelerated pace of ratification and entry into force, the United States took several aggressive measures directed against the Court. None have been particularly successful, and while both annoying and humiliating, none pose a serious threat to the success of the institution.

This article attempts to comprehend United States opposition to the Court, rather than to study and respond to its arguments against the Court. The complex discourse advanced by the United States is at times confusing. It is necessary to separate serious objections from more trivial ones, and to distinguish what are really no more than technical criticisms. Only concerns about the role of the Security Council satisfactorily explain the increasingly hostile attitude of the United States towards the Court.

That the earlier ad hoc experiments in international justice, the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda, were creatures of the Security Council shows just how closely involved international justice is in the maintenance of international peace and security. The experts at the International Law Commission conceived of a permanent court within this context. In a general sense, they proposed what amounted to a permanent ad hoc tribunal. The planned court's activities were to be seamlessly positioned within the framework of the Charter of the United Nations. Specifically, the International Law Commission addressed potential points of friction between the future court and the Security Council. For the United States, this was a court that made sense. To the extent that the final product promised to be along the lines projected by the ILC, the United States was willing to contribute to the effort.

But the dynamics of the post-Cold War world revealed an underlying malaise with the Security Council's monopoly on such matters. The result at Rome was a new international institution, distinct from the United Nations and yet exercising authority in a field that had previously been occupied, albeit on a piecemeal basis, by the Security Council. In a sense, the Rome Statute was an attempt to effect indirectly what could not be done directly, namely reform of the United Nations and amendment of the Charter. This unprecedented challenge to the Security Council accounts for the antagonism of the United States, as this article posits. But it also contributes to understanding and explaining the astonishing success of the Organization. It is precisely because of this bold and exciting challenge to the existing mechanisms of the United Nations that so many states have enthusiastically joined the new venture. Had the Rome Statute been more accommodating to the Security Council, and had it more closely resembled the 1994 draft of the International Criminal Court, the United States might be a state party. But this would have dampened the enthusiasm of other states. Overall, there might well have been considerably fewer states parties than there are today.