

American Disengagement with the International Criminal Court: Undermining International Justice and U.S. Foreign Policy Goals¹

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Part I

George Washington Williams, a black American who was the son of a freed slave, wrote an *Open Letter* on his experience in the Congo in which he stated that King Leopold of Belgium was guilty of “crimes against humanity.”² Possibly one of the first uses of the phrase that is now often associated with criminal tribunals, Williams wrote these words over a century ago in 1890 in a letter to Leopold and the American Secretary of State. Viewed by history as one of the first great dissenters on the nature of this colonial regime, this letter was drafted by a keen observer who, before embarking on his travels, had the seemingly idyllic notion of sending black Americans to work in the Congo state. His comments are unique because they were the first to highlight the egregious human rights violations carried out by the administration of terror in the Congo with King Leopold holding effective control without ever stepping foot in the territory. However, almost as important as this study and his choice of words is the fact that Williams actually charges a sitting head of state with responsibility for these crimes. His letter about his experiences sent to the two leaders recognizes the endless power possessed by this one man, and still declares that, based on careful investigation, the King’s reprobate behavior and engagement with the territory should be scrutinized by an “International Commission.”³

While no such commission existed at the time, Williams clearly had an authority in mind to which Leopold should be held accountable for his “crimes against humanity”. He understood that a strategy to systematically dominate the territory and control its precious resources was brutally being carried out as a policy emanating from the reaches of power in Belgium. At the point of a gun, the native population was given a choice: either provide rubber, ivory and labor or else see their houses and villages destroyed or meet death. Williams wrote about the tricks and deception that were used by Leopold’s agents to get the local chiefs to sign over their land. He also debunks any perception that Leopold is any type of anti-slavery crusader, a persona he often boasted of at the time, by flatly accusing him of engaging in the slave trade while the traders themselves took African women as prisoners to be repeatedly raped. The list goes on. Williams dreamed of a legal mechanism to practically address the situation in Congo; he wanted to invoke the responsibility that accompanies the “never again” that reminds us today of the plight of the Jews in the 1930’s and 40’s.

A little over a century later, there is a forum that might have fit the dreams of Williams. What was considered a utopian vision for many years has now become a reality in the form of the International Criminal Court (ICC) that officially came into existence in July of 2002. It attempts to address the war crimes, crimes against humanity, the crime of genocide, and the crime of

¹ Note: An abridged version of this article was previously published in the Fall 2004 “Law and War” issue of the *Peace Review: A Journal of Social Justice*.

² Adam Hochschild, *King Leopold’s Ghost: A Story of Greed Terror, and Heroism in Colonial Africa*, (New York: Mariner Books, 1998), pg 112.

³ *Ibid.* pg 109.

aggression⁴, and acts that are considered an offense against the international community as a whole. Knowing that there are important moments after large-scale devastation that cannot be squandered, it is no accident that the International Law Commission submitted the draft statute during the summer after the Rwandan genocide. The Commission understood that there are important moments that cannot be wasted.

Though not the result of the international community's first effort, the Court seeks to remedy the spectacular failures of national courts that often accompany weak states averse to carrying out investigation and prosecution of systematic abuse. The ICC is a tool to be used in times when domestic justice for grave breaches of customary international law is unattainable. As articulated in the Velasquez Rodriguez decision of the Inter-American Court of Human Rights, government has a responsibility to investigate whether an alleged crime may be attributed to government officials or civilians and to secure non-repetition of that crime.⁵ With methods built into the Court for determining when a state is unwilling or unable to prosecute or investigate a crime in good faith, no longer can a state shield an individual from criminal responsibility.⁶ In strengthening state responsibility, the court sets punishment as the norm when dealing with the worst crimes.

This is the institution that the Bush administration is so committed to destroy. American opposition is not simply in the form of non-engagement but rather is in the form of a policy to undermine the Court. The ultimate goal of the relentless campaign against the Court is to have its greatest champion one day question its utility. In May 2002 the Bush administration chose to "unsign" the statute, a practice that is foreign to the Vienna Convention on the Law of Treaties. Usually when a nation has signed a treaty and does not wish to go ahead with ratification, it simply lets it languish without ever depositing the instruments for ratification. Moreover, the Bush administration wanted to renounce its signature with a flourish so it sent a formal notification to Secretary General Kofi Annan stating that it has no intention to ever become a party to the treaty and that, "the United States has no legal obligations arising from its signature on December 31, 2000."⁷

It is necessary to point out that this attitude toward the Court did not begin with the Bush administration. After five weeks of playing an active role in creating the multilateral document at the Rome Conference in 1998, the United States snubbed the gathering as one of only seven countries that voted against the statute; its opposition was in the company of Iraq, Libya, Yemen and Qatar. President Clinton's vision for the Court was as a "permanent 'ad hoc' tribunal that the Security Council could be turned on and off like a faucet."⁸ From where does the US objection to the Court emanate? The American 'nay' vote at the Rome Conference was partly a result of the US realization that the court would neither be subject to the manipulation of the Security Council nor part of a system of justice that must bow to the consent of a state in order to proceed with the investigating of a national. But the main impetus against the Court was emanating from the

⁴See Article 5 on "Crimes within the jurisdiction of the Court", Rome Statute of the International Criminal Court. Note that the crime of aggression named in article 5 of the Rome Statute has yet to be defined. This crime was included only to be given meaning seven years after the Court is functioning per the procedure for amendments.

⁵ Velasquez Rodriguez Decision, Inter-American Court of Human Rights Judgment of July 29, 1988.

⁶ "Unable" to prosecute can also refer to legal impediments such as the granting of an amnesty by a head of state. See Barrios Altos Case of the Inter-American Court of Human Rights that addresses an amnesty that removed the criminal character of a government sponsored incident.

⁷ Letter to UN Secretary General Kofi Annan from Under Secretary of State for Arms Control and International Security John R. Bolton, May 6, 2002.

⁸ University Seminars Series, Columbia University: Richard Dicker, April 9, 2003.

Department of Defense. Explanations that pointed to the extent of US troop deployment around the world were given to qualify the resistance.⁹ However, these fears seem hollow when one examines the Uniformed Code of Military Justice, which is actually *stricter* than the ICC statute.¹⁰ If the code is actually applied, according to the current policy, the U.S. should not have to worry about its nationals being prosecuted by a court on foreign soil.

Misperceptions of the Court also stem from distrust of foreign judges trying U.S. nationals, in particular U.S. military who are serving their country. Suspicion of foreign judges trying U.S. nationals may also be considered unfounded as the U.S. has signed numerous extradition treaties; if an American citizen commits a crime on Spanish soil, for example, he would be tried in Spain for that crime. Benjamin Ferencz, a prosecutor at Nuremberg, dismisses the U.S. position and says, “ICC prosecutors are more restricted than in any other court.”¹¹ But yet “national security and our national interests” are continually cited in explanations of American opposition to the Court. Clinton decided to sign the treaty only at the last possible moment when it had 137 signatories three weeks before he was to leave office. Most observers believe he signed not with the intention to soon ratify but to secure a guarantee in the provisions of the statute that would exempt U.S. soldiers and government officials from its jurisdiction.¹² Though United States opposition to the Court is exemplary of U.S. exceptionalism, the United States has also stood out alone in its opposition to the 1997 Mine Ban Treaty, the Optional Protocol prohibiting the use or recruitment of Child Soldiers as well as the Kyoto Protocol addressing global warming.

This paper will argue not only that it is advantageous to the United States to support the ICC, but that it is in its national interest to do so. It is in the US interest to promote the freedom and dignity that are featured in the marquee of the current National Security Strategy released in August 2002; ignoring human rights would have a profoundly harmful effect on U.S. national interests including the “war on terror”. To achieve the goals stated in the strategy, U.S. policy should not have to be a choice between “multilateralism” and “unilateralism.” Instead U.S. policy should be described as “taking others’ interests into account in our own decision making.”¹³ This document is mandated by Congress to be released every year; in 2002, its contents were meant to be purposely provocative. What is most disturbing about current opposition to the International Criminal Court is its potential for damaging the ability of transitional democracies or fragile states emerging from conflict to bring domestic standards in conformity with those set out in the international legal standards of the Rome statute. If the International Criminal Court is not considered fair and is not recognized by superpowers, it will be of limited use to the society that wishes to send an abusive leader to this international forum. Only in an illusory political world can America react to its claims of “difference” by tempering its response to atrocities and grave human rights abuses.

Part II

One relevant theme of the International Criminal Court is that justice is best served domestically. A flowering of domestic prosecutions would surely not be a problematic

⁹ David J. Scheffer, “The United States and the International Criminal Court” *American Journal of International Law*, Vol. 93 January 1999.

¹⁰ University Seminars Series, Columbia University: Richard Dicker, April 9, 2003.

¹¹ “Genocide Expert Lauds War Crimes Court” Elizabeth Ganga, *Journal News* Sept. 28, 2002.

¹² David Stoelting, “Creating a Court for Crimes Against Humanity”, *New York Law Journal*, September 25, 2001.

¹³ William F. Schulz, “What Price Human Rights”, *The National Interest*, 1999 Summer.

consequence of the ICC. It must be noted that although the Rome Statute set up a supranational organization, it is not ostensibly a supranational court. The Court encourages national jurisdiction for war crimes and crimes against humanity as it is the duty of every state to “put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes.”¹⁴ The jurisdiction of the Court includes crimes that may give rise to universal jurisdiction under customary international law (even in the United States), however; the link is not transferred to the action but remains within the traditional conception of jurisdiction based on territory.

In addition to states just adapting laws to facilitate cooperation with the Court, states have also had to pass legislation that allow for the domestic prosecution of the crimes laid out in article 5 of the statute. Article 17 of the statute, which details the essence of the Court’s system of “complementarity”, has provoked efforts to make national criminal justice systems more effective. While some critics initially saw this principle as watering down the statute, it is now more commonly viewed as strengthening the object and purpose of the Court. Both national courts and the ICC will have jurisdiction over the same offenses; this relationship invigorates the reach of the international community over “the most serious crimes.” The ICC may also be effective as a deterrent in that “all nations, even major powers, will now more assertively monitor their own military operations, police, and penal institutions because of the possibility of the international embarrassment of an ICC investigation and trial.”¹⁵ A location of a court internal to the conflict would help to build a culture of rights by highlighting the international legal norms integrated into the domestic system. Regional observation of the punishment of violators may act as a deterrent to future perpetrators. Recalling the opinion of the Inter-American Court of Human Rights in the Barrios Altos Case, “the protection of human rights is the duty of every state towards the international community.”

Thus, the ICC is not universal jurisdiction but a system of universal justice with the Court actively behaving as a check on the functioning of domestic justice. If a case is referred to the Court either by the Security Council, another state, or the prosecutor, the state in question cannot delay proceedings, conduct sham trials, or use false proceedings to shield an individual from criminal prosecution. In fact some laws go beyond the minimum requirements set out in the Rome Statute by including universal jurisdiction provisions. But what is most central to this new doctrine of mandated prosecution in a competent court of what the statute refers to as “situations” is the acceptance of an extended gaze of the international community. A state’s national jurisdiction can swiftly be taken away if they fail to prosecute crimes that concern the international community as a whole. No longer can an egregious act committed by the government or other official actors be judged as legal or permissible under internal procedure. This building of an edifice of an emerging system of international justice, often times in places where such principles as equality under the law did not previously exist, is in essence an “intervention” of the Court. Just as Louis Henkin disdains discussions of sovereignty as only restricting rights, the ICC may have the potential be the kind intervention that has been articulated as an emerging norm of customary international law.¹⁶ With most violent conflicts now taking place inside a state’s borders, this emerging norm of intervention, though originally articulated as a justification for military intervention, accomplishes the same goal by emphatically signaling that states can no longer use the concept of sovereignty as a shield.

¹⁴ Preamble, Rome Statute of the International Criminal Court

¹⁵ James Griffin, “A Predictive Framework for the Effectiveness of International Criminal Tribunals”, *Vanderbilt Journal of Transitional Law*, Vol. 43, Number 2, March 2001.

¹⁶ Kofi Annan “‘We the Peoples’: The Role of the United Nations in the 21st Century,” *Millennium Report of the Secretary-General of the United Nations*, 2002.

Though some critics say that many international treaties and covenants are only worth the price of the paper upon which they are printed due to a lack of enforcement mechanisms, recent changes in domestic law as a result of the Rome Statute have produced more robust legal systems in such fragile states as the Democratic Republic of the Congo (DRC). The DRC is a state that has endured a protracted civil war that has killed more than 3.3 million people, through direct combat as well as “treatable diseases and malnutrition, linked to displacement and the collapse of much of the country’s health system and economy”.¹⁷ After a bloody decade of war and over three decades of a dictator that personified the classic example of a “failed state”, the DRC has expressed a commitment to justice by signing the Rome Statute. This commitment has the power to translate into a force that would permeate the political institutions of this society that has seen bloodier times than almost any other nation. Second only to halting any ongoing violence is the task of establishing a durable rights framework that would prevent atrocities from recurring.

The DRC has completed the draft legislation needed to properly investigate and prosecute the crimes under the jurisdiction of the Rome Statute and to guarantee its full cooperation with the International Criminal Court. The legislation proclaims the “irrelevance of the official capacity of the accused” for genocide, crimes against humanity and war crimes at the same time that these crimes have been integrated into the general legal system. Jurisdiction over these crimes has even been extended to ordinary criminal courts.¹⁸ The power of this denunciation of head of state immunity cannot be underestimated as leadership in the DRC has been limited to a monopoly on violence aimed at quickly and effectively quelling any expression of dissatisfaction. For many years the pillaging of the DRC has been systematic with the state apparatus as a facilitator of crimes that have killed significant numbers of the population. The Permanent Representative of the Democratic Republic of the Congo to the United Nations acknowledges the difficulty in enforcing current Security Council resolutions pertaining to the violence in his country by saying,

“Those responsible for these crimes have not been brought to justice, and have even scoffed at Security Council resolutions calling for a peaceful resolution to the conflict. This is evidence that impunity is one of the essential factors in the failure of peace and security in the region.”¹⁹

Such recognition of this state’s experiences has shown to have a direct impact on its decision to ratify. Ratification may be seen as a pledge to remove some of the legal impediments that stand in the way of responsible leadership. Ambassador Ileka goes on to signal a new chapter for the Congolese state:

“From our point of view, the ICC constitutes major progress in the fight against impunity. A hand extended to the victims who have lost all hope. A strong signal to all murderers, including those in the Great Lakes Region where the culture of impunity and bloody conflicts have caused the worst violation of human rights and humanitarian disasters.”²⁰

¹⁷ International Rescue Committee Report: *Conflict in Democratic Republic of Congo Deadliest Since World War II, Says The IRC*, April 8, 2003.

¹⁸ Lawyers Committee for Human Rights, “DRC Completes Draft Legislation for Implementing ICC Statute” and draft legislation at www.icc-cpi.int/.

¹⁹ Ambassador Atoki Ileka, Permanent Representative of the Democratic Republic of the Congo to the United Nations, *International Criminal Court Monitor*, Issue 21, June 2002.

²⁰ Ibid.

Congo's commitment to the authority and influence of international law is evidenced in the steps taken to implement the Rome Statute. Not only has Congo given its Attorney General power to hand over a suspect to the court but the process of writing new legislation, required for parties to the Court, has reached farther by provoking an assessment of basic criminal law and procedure; this self-analysis led to the codification of principles, many of which were only previously provided for by customary Congolese law. New domestic legislation, reflecting the ICC statute, has expanded on the discussion of torture as expressed in the Convention Against Torture. While the Convention describes torture as a crime when committed for specific purposes under the color of officialdom, the state of Congo in response to the definition laid out in the Rome Statute, has discarded these qualifications. Congo's new legislation does not require torture to be committed for a certain purpose nor does it require that the individual be connected to the concentration of power; torture simply must be part of a "generalized or systematic attack".²¹

Ratification of the Court has also forced the DRC to consult with Western non-governmental organization as well as African human rights groups on the best way to guarantee the rights of individuals in this country whose style of governing has for many years been labeled as the ultimate predator state. This collaboration hopes to deter any charges that the Court might be irrelevant to ordinary citizens. While it is imperative to determine specifically *who* committed atrocities, it is also necessary to redesign the institutions that were embedded with abusive practices. Most often criminal policy is not haphazard but occurs as part of a political project that has been going on for years.

In no instance can a Congolese judge now dismiss a case for lack of jurisdiction over the crimes set out in the statute. An example of the strength of the implementing legislation can be found in Article 16 which sets out the details of command responsibility by stating,

"All hierarchically superior military or civilian who fails to prevent his subordinate from committing an unlawful act by the present law or fails to restrain his subordinate who has committed a crime is punished as the author of the act committed by the subordinate."²²

The excuse of "just following orders" does not constitute a defense for criminal liability nor does the level of the official preclude culpability. With recognition of the past, the new legislation also integrates Optional Protocol 1 (1977) of the Geneva Conventions as domestic law. As this Protocol governs war crimes of internal armed conflicts, its relevance to the recent history of the DRC cannot be understated. Previously there was a requirement to prosecute international armed conflict and the crime of genocide, however "there was no obligation to prosecute crimes against humanity and internal armed conflict that occurred in places such as Chile, El Salvador, Guatemala, Haiti, Sierra Leone, South Africa, or Uruguay."²³

If the Democratic Republic of Congo cannot support the myriad of new judicial standards it has established, the International Criminal Court, with a full spectrum of due process protections, steps in to fill this gap. The Chief Prosecutor of the Court saw a need for this in June 2004 and ordered a special investigation into the grave crimes allegedly committed on the territory of the (DRC) since the advent of the Court. The Rome Statute required implementing legislation that would give the ICC prosecutor the

²¹ Lawyers Committee for Human Rights, "DRC Completes Draft Legislation for Implementing ICC Statute"

²² Draft implementation legislation of the Democratic Republic of the Congo, July 2002.

²³ Michael P. Scharf, "Justice versus Peace" in The United States and the International Criminal Court, Eds. Sarah B. Sewall and Carl Kaysen (Lanham: Rowman and Littlefield, 2000) pg. 189.

ability to conduct investigations inside the territory of all state parties and the Prosecutor's decision was made in coordination with the DRC itself, other nations and international organizations. The object and purpose of the Court acknowledges that sometimes the duty to prosecute, itself, is imposed upon those who have committed certain crimes.²⁴ With the extended gaze of the international community and a more universally applied criminal code, ratification of the Rome Statute and the subsequent changes in the nation's legal system may be considered a first step in a closer examination the elements that have fuelled the seemingly interminable conflict.

Though it is clear that the ICC may have a profound effect on transitional societies making them more responsible to international law, the Court should not be seen as an institution that is only important to these delicate states. Conflict often knows no borders and can spillover into neighboring states. The new standards can lessen the contagion of instability. Infectious violence resulting from perpetual impunity for serious crimes afflicted the West African states of Sierra Leone, Liberia, and Guinea-Bissau in the 1990's. This case highlights the powerful link between government, alliances and conflict in a corner of Africa that is not typically of interest to the outside world. When conflict spills over to small states that are not the focus of the world or even the region's hegemony, a system of law and order that would prevent unwieldy power and unnoticed abuse becomes important. Even though the ICC would not have jurisdiction over the atrocities orchestrated in Sierra Leone, looking ahead, the Ambassador to the United Nations commented:

“The negotiations for the Court's establishment created greater awareness in the international community with respect to the principles of international criminal justice and the significant role that accountability can play in the consolidation of peace and reconciliation.”²⁵

Currently all the states embroiled in that West African conflict, and those on the periphery of the conflict such as Senegal and Burkina Faso, have either signed or ratified the Rome Statute. Perhaps past atrocities will define the nature of future government behavior with the awareness created by the Criminal Court statute as a catalyst.

The power of example should not be underestimated. The hegemonic states of the world not only act, but act as precedent setters. Even as other nations raise their standards of justice, the United States, the principle architect of Nuremberg and the ad hoc tribunals of the 1990's, has ended up as “the only major nation in the world unwilling to contribute to the internationalization of the prosecution of offenses deemed crimes against humanity.”²⁶ The American refusal to examine the content of its own conduct does not go unnoticed. While playing a significant financial and policy role in the formation of these courts, the United States has still maintained that these mechanisms, as well as the international law that makes up their skeleton, are ultimately designed for other states.

²⁴José Zalaquett, “Balancing Ethical Imperatives and Political Constraints: The Dilemma of New Democracies Confronting Past Human Rights Violations” *Hastings Law Journal* vol. 43, pg. 1431.

²⁵Ambassador and Permanent Representative to the United Nations of Sierra Leone, Ibrahim M'baba Kamara, “Small States Recognize Critical Role of the Court” *International Criminal Court Monitor*, Issue 21, June 2002.

²⁶ Robert F. Drinan, *A World View of Human Rights: The Mobilization of Shame*, (New Haven: Yale University Press, 2001) pg. 79.

Unrealized Compatibility

The US Campaign against the ICC: An Assault on American Security Interests

The paradox of U.S. foreign policy is reflected in the fact that it possesses a superior military and judicial system while shrinking from fully engaging in international law. The U.S. is blind to the convergence of its interests with those of smaller or less powerful states. What has become known as “atrocities law” during the last decade has reached the character of customary international law and yet the White House pursues an antagonistic policy towards states that are trying to open a new chapter in their history, create a culture of rights, and gain legitimacy in the international community. The U.S. is effectively infringing on the obligation to prosecute that has been fortified by the Rome Statute. With the developments in international law codified by the Statute, the apparent American scaling-back will have profound effects on both human rights around the world as well as American interests.

Concern for failed states, articulated in the National Security Strategy (NSS) 2002, is also a chief issue addressed by the International Criminal Court. Threats to national security intensify when there are regimes or governments that function without accountability. The National Security Strategy discusses “failing states” instead of “conquering states” as the greatest challenges of the twenty-first century. With this in mind, one may say that President Bush’s “unsigning” actually represents an ironic assault on American interests. The Court’s principle of “complementarity”, which specifies that it will only take up cases where the state exhibits an unwillingness or inability to prosecute or investigate a crime in good faith, has been shown to have a tangible impact on domestic legal systems after the treaty has been in force for only 2 years. Earnest investigation and prosecution are intrinsic to a politically stable society that values justice and promotes human rights. The ICC statute acknowledges that this sometimes cannot occur, thus it is ironic that the U.S. Department of State lists as one of its “alternatives” to the Court a directive to “encourage states to pursue credible justice at home rather than abdicating responsibility to an international body.”²⁷ Under the heading, “Domestic Accountability” the U.S. government ignores the potential of the ICC to actually motivate national courts, particularly in weak or transitional states, to do what they are intended to do. As a participant in the Court, the U.S. could guarantee that the international community does *not* ignore these states. Though such domestic stability is often cited by the White House as a necessary part of the foundation for political order, the U.S. continues to reinforce its position as an outsider.

Even the cover letter of the National Security Strategy asserts that the U.S. position of “unparalleled military strength and great economic and political influence” can work to stand as a bulwark against “terrorists”, “tyrants”, “shadowy networks” “weak states” and “weak institutions”. Acknowledging that various combinations of the aforementioned actors create conditions conducive to terrorism, insecurity, and human rights abuses, the document pledges to pursue the development and fortification of open societies. However a premise underlying the multilateral institutions, specifically the International Criminal Court, that the White House often dismisses is that a state cannot survive without collaboration. According to the National Security Strategy, American power implies privileges and duties that do not fit in to the real logic of interdependence. Some degree of isolation is necessary to preserve this difference. Almost in anticipation of criticism, the letter states, “we do not use our strength for unilateral advantage” though the rest of the document supports the notion that the U.S. will defend its right and its duty to act unilaterally. American interests are highlighted as distinctive due to the moral and

²⁷ The International Criminal Court: A Fact Sheet, U.S. Department of State, Office of War Crimes Issues, May 6, 2002.

historical characteristics of the country. It follows that American hegemony exists as the prerequisite for the National Security Strategy.

The American Servicemembers' Protection Act: Protecting American "Difference"

Are U.S. interests served by playing the role of the hostile outsider to the ICC? Though one may think that U.S. hostility to the Court would have been tempered since the crime of terrorism on American soil shocked the world on September 11, 2001, the coalition-building efforts conducted after the event had no mollifying effect on the government's stance. Clinging as closely as ever to the right and duty to act alone without too many questions asked, the President signed into law the American Servicemembers Protection Act (ASPA), a virtual pledge of non-cooperation with the court in any shape or form, on August 2, 2002.²⁸

While this bill purports (even by its title) to protect American men and women in uniform, many observers have commented that its real purpose is to establish non-jurisdiction over any U.S. foreign policy action. In order to accomplish this, the current administration has exaggerated or even fabricated ridiculous scenarios of dutiful soldiers being prosecuted by judges who do not comprehend the American justice system. When these scenarios are read with the statute, they fall far outside the Court's subject matter jurisdiction, as the Court exists to prosecute crimes committed on a large-scale as part of a plan or policy. But the true intentions are not buried too deeply. In fact, one of Senator Jesse Helms (possibly the most outspoken leader of the campaign against the Court) four reasons why he viewed the Rome Statute as "irreparably flawed" was that the Court could engage in "second guessing U.S. foreign policy decisions."²⁹ Neither the checks and balances on the power of the prosecutor, the procedures on admissibility contained in article 17 of the statute, or the principle of "complementarity" could assuage U.S. defiance. Thus under the guise of removing anyone in the U.S. military from the jurisdiction of the ICC as they would be subject to the gaze of the Court when operating in the territory of a state party, the US fortifies its own sovereignty with the effect of tempering the potency of the ICC as a powerful human rights enforcement mechanism.

The lengths to which the U.S. government would go in order to protect its actions from being scrutinized by any supranational body can best be seen in the extended reach of the pledge of non-cooperation. The halls of the United Nations were not protected from the harmful effects of U.S. opposition to the Court: in May 2002 the United States forged Security Council Resolution 1422 in order to get immunity for *six* U.S. peacekeepers taking part in the mission in East Timor. At the same time, a routine vote came up to renew the peacekeeping mission in Bosnia where 46 unarmed Americans participated in a UN sponsored mission training local police forces.³⁰ After the great US effort in the crisis in the Balkans, the US held the Bosnian people hostage to the imperative of broadcasting to the world its virulent hostility to the ICC. Through the threat of repeated veto of any peacekeeping mission in which the US was involved, Resolution 1422 was passed giving US peacekeepers immunity from International Criminal Court jurisdiction. Only after pressure from other members of the Security Council and international non-governmental organizations in the wake of the allegations of Iraqi prisoner abuse at Abu-Ghraib did the US in

²⁸ Another part of the ASPA, often dubbed the "Hague Invasion Clause", allows the United States government, or specifically the military, to forcibly go into another country or the Court, itself, and extricate an American citizen held under the auspices of the ICC.

²⁹ Quoted in Colonel M. Tia Johnson, *The American Servicemembers' Protection Act: Protecting Whom?*, Virginia Journal of International Law (Winter 2003).

³⁰ University Seminars Series, Columbia University: Richard Dicker, April 9, 2003.

June 2004 withdraw its proposal to exempt peacekeepers from the jurisdiction of the ICC. While it was a small victory for the international community, it does not represent any US commitment to reassess its relationship with the Court. Although, for the time being, the US is refraining from using Chapter VII of the UN Charter and Security Council authority to usurp the object and purpose of a treaty it opposed, it still refuses to remove all obstacles to the strengthening of democratic tendencies among the people of fragile states.

The ASPA undermines the achievement of international law in having reached a point where it governs a state's treatment of its own citizens. The original draft of the Act did not allow any U.S. military assistance to be extended to any country that has ratified the treaty with the exception of major U.S. allies, specifically those who are members of the NATO alliance. Presented in Congress in May 2001 when the ICC had 30 ratifications, the bill was meant to thwart the other thirty ratifications needed for the treaty to enter into force. The practice of withholding aid for foreign policy objectives has largely been conducted with states that have records of severe human rights violations since the Carter administration; this practice as articulated in the ASPA, took a new turn as the nations that ratified the ICC and reaffirmed a commitment to responsible government were faced with the threat of denied financial assistance. Clearly good government and respect for the rule of law are central to U.S. foreign policy, though the practice that was conducted to enforce these goals went on a new trajectory with the movement to destroy support of the ICC.

With the subsequent entry into force of the Rome Statute, the central provision of the ASPA has been altered to take the form of what are now known as "Article 98 Agreements". Article 98 of the Rome Statute was originally meant to address, acknowledge and respect the *existing* status of forces based in other states. In no way was it intended to allow a suspect to be shipped to a state that was not a party to the ICC. However the US has manipulated the meaning of the article to forge agreements, conducted bilaterally, that require a signatory state to pledge not to surrender any U.S. government official, employee, or military personnel (including subcontractors) to the International Criminal Court. Though the U.S. continues to contend that, "It is a misconception that the United States wants to use these Article 98 agreements to undermine the ICC"³¹ its actions represent an inherent reservation to the embedding of certain crimes in customary international law.

Most of the states that have signed these bilateral treaties are small, fragile nations dependent on United States aid. The pressure applied by the US through the threat of withholding funds, when successful, effectively forces a state to contravene a treaty to which it has entered in good faith. In essence, the Rome Statute, a treaty that 94 states have ratified, has been improperly and unlawfully amended. Sierra Leone and the Democratic Republic of the Congo are two of the states that have recently signed these agreements with the United States. In essence, by engaging in these bi-lateral arrangements, these nations are giving up the right to try any American citizens if they have been suspected of committing genocide, war crimes, or crimes against humanity on their soil. Reciprocally, the U.S. would not be bound to send any Congolese or Sierra Leonean citizens to the court.

Moreover, the ASPA pledges that no office or bureau of the United States government will interact with the court; this includes the delivery of evidence or suspects sought by the Court for prosecution or investigation. These agreements open up the possibility that U.S. territory will become a safe haven for international war criminals or perpetrators of grave human rights abuses.

³¹ "The U.S. and the International Criminal Court" John R. Bolton, Under Secretary for Arms Control and International Security Remarks to the Federalist Society November 14, 2002.

The US has turned over individuals wanted by the ICTR and the ICTY found within American borders; however, with the pledge of non-cooperation as a major element of the ASPA, what will be the fate of the suspects found in the US that are wanted by the ICC in the investigation of specific situations relating to war crimes, crimes against humanity or genocide? Cooperation in the submission of evidence and arrest of one who has committed serious breaches of international law should know no borders, a guiding principal of the statute. On the one hand the Bush administration demands the application of the rule of law, equal justice, and limits on the power of the state³² and on the other hand it goes to great lengths to deflate the ICC's power to build up the domestic accountability of state behavior. Though the State Department suggests an alternative mechanism to the Court "domestic accountability", its actions tell a different story that lends no support to this professed goal of international justice. It is important for governments to know that the ICC is a permanent fixture of the international community of states able to contemplate any human rights violations that fall within the statute. As the crimes being examined by the court are offenses that shock the international community, it is the duty of the Court as a mechanism of nations, to prevent further abuse and punish the perpetrators. The International Criminal Court, through its complementarity framework, forces nations to foster a culture of prevention in its scrutiny of domestic justice. Nowhere in the alternatives laid out by the State Department is there concern for potential victims of human rights abuses while, in contrast with past tribunals; the ICC has more of a concentrated focus on the welfare of victims and potential victims. The Article 98 agreements only serve to reinforce the shield of sovereignty effectively subverting Secretary General Kofi Annan's "moral duty to act on behalf of the international community"³³ and the possibility that the ICC may function as a deterrent in that "all nations, even major powers, will now more assertively monitor their own military operations, police, and penal institutions because of the possibility of the international embarrassment of an ICC investigation and trial."³⁴

Thus U.S. behavior may be seen as thwarting the prosecution of the most serious crimes. Without an International Criminal Court, a leader or high ranking official who has committed grave atrocities would have to be apprehended to stand trial in a third country as fair and effective trials could not be conducted in his country of origin. Even though the nature of the crime might give rise to universal jurisdiction, the decision of where to take him would be rife with divisive politics and possible claims of "victor's justice" depending on the context; when an abusive official is taken to the ICC the event will only be marked by an elevation of the universality of the norms of international law backed up by all parties to the treaty. The independence of the Court rests on the cooperation of states that may have competing political interests. In some cases when the ICC may be needed, the perpetrators are no longer in power and are in the custody of a nearby state which is perfectly willing to hand them over to the ICC; international indictments by the Yugoslavia and Rwanda Tribunals, have shown to have the effect of isolating some rogue leaders.³⁵ On the whole, the international community takes arrest warrants seriously. In the case of Bosnia, the Legal Counsel of the Joint Chiefs of Staff clearly recognized the legal obligations that flow from these warrants considering both the United States and territory under its control as

³² National Security Strategy 2002 and State of the Union Address January 28, 2002. Also see Philip Zelikow, *The Transformation of National Security: Five Redefinitions*, 71 *The National Interest* (Spring 2003).

³³ Kofi Annan "'We the Peoples': The Role of the United Nations in the 21st Century," *Millennium Report of the Secretary-General of the United Nations*.

³⁴ James Griffin, "A Predictive Framework for the Effectiveness of International Criminal Tribunals", *Vanderbilt Journal of Transitional Law*, Vol. 43, Number 2, March 2001.

³⁵ Michael P. Scharf, *The United States and the International Criminal Court: A Recommendation for the Bush Administration*, *ILSA Journal of International and Comparative Law* (Spring 2001).

part of the jurisdiction covered by the order.³⁶ The U.S. declaration of non-cooperation can create a safe area for perpetrators of serious crimes. When war criminals or perpetrators of grave human rights violations remain “at large”, it is more difficult for the society that has endured these crimes to move on and place trust in its institutions. Otherwise the ICC, an independent Court though formed by a coalition of states, is an instrument that actually takes the politics out of prosecution.

Conclusion

As with most treaties, the International Criminal Court will require the political might of the states parties for its enforcement and ultimate success at fulfilling its object and purpose. The US declaration of a practical self-interest in its engagement with the court as a non-party threatens the norms that have evolved through the development over the last fifty years of international law. As the crimes examined by the court are offenses that shock the international community, it is the duty of the Court, as a mechanism of nations, to prevent further abuse and punish perpetrators. Though within the structure of the ICC, the emphasis is not solely on the perpetrator, but also is on the system that allows an individual to commit atrocities that provoke collective moral outrage.

Over one hundred years ago when George Washington Williams tried to provoke such outrage about the crisis in the Congo with his reports on “crimes against humanity” as the population of the territory during Leopold’s time was slashed roughly in half, he sought the judgment of an “international commission”. Though none was available then, the International Criminal Court, now still in its infancy, claims that no one is immune from the reach of an independent tribunal that advocates for the highest standards of justice.

The “human dignity” that is repeatedly mentioned in the National Security Strategy most always, when threatened, is due to the encroachment of state power. However, the US self-imposed isolation that works to preserve its difference effectively weakens the authority and influence of international legal standards that might act as part of the extended gaze of an international community of states committed to ending a norm of impunity and severe abuses of power. While the International Criminal Court is no panacea for states emerging from mass atrocity, human rights abuses or prolonged armed conflict, it may act as one source of pressure to provoke states to pursue a rights-based rule of law. The evangelical extension of U.S. foreign policy complete with implied infallibility reflects an acute inconsistency between its practice of foreign policy and its stated goals.

Just as the UN Charter represents a covenant among states to prevent “succeeding generations” from the scourge of war, the ICC represents an agreement to end the atrocities, like those that were committed during the 1990’s, and to bring the perpetrators to justice. Though the Rome Statute is an imperfect document negotiated by over 150 states, it has already had the effect of challenging impunity, a norm that was only rarely questioned from Nuremberg up through the Yugoslavia Tribunal. The International Criminal Court is too young for one to assert soaring judgments on its effectiveness, though one should look at the bigger picture within a future context. The litigation in London concerning the ex-Chilean dictator, Augusto Pinochet, had a catalytic and emboldening effect on the courts in Chile. This recent example underscores the potential for a positive spillover of this type of international litigation into domestic courts. With the internalization of the highest human rights standards into national law, the Court has proven

³⁶ Michael P. Scharf, *The Tools for Enforcing International Criminal Justice in the New Millennium: Lessons from the Yugoslavia Tribunal*, 49 De Paul Law Review (2000) 956.

to be more than simply a reactive mechanism as it addresses the question of why certain atrocities occur.

Though the true efficacy of the International Criminal Court may be unproven, the credibility and legitimacy of any court evolves over time. Perhaps a new administration occupying the White House in the not so distant future will be able to see the demonstrated professionalism of the Court and its ability to elevate domestic legal standards. This administration might decide that American support would be advantageous to both international justice and U.S. policy goals.

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