THE INTERNATIONAL CRIMINAL COURT WITHOUT THE UNITED STATES

THE INDEFENSIBLE POSITION OF AN INDISPENSABLE STATE

M Rafiqul Islam*

I. INTRODUCTION

Although the Nuremberg and Tokyo trials after World War II established individual responsibility and accountability for crimes against humanity and war crimes, these heinous crimes continued unabated. Their perpetrators remained impervious to justice in the absence of an international court with jurisdiction over them. In a bid to fill this gap, the United Nations initiated diplomatic negotiations to create a permanent international criminal court. This resulted in the United Nations Diplomatic Conference in Rome that adopted the Statute of the International Criminal Court (ICC) on 17 July 1998.[1] The Statute entered into force on 1 July 2002 following its ratification by states pursuant to Article 126.[2]

The United States was one of the strongest voices during the Rome Conference calling for the creation of this permanent international criminal court.[3] However, when the Statute for the ICC's creation was voted upon, it cast a negative vote even though the majority of states in the world, including its staunch allies, voted in favour. This breadth of support for the Statute reflected a remarkable international consensus

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* Associate Professor of Law, Macquarie University, Australia.

[1] The final text of the Statute is available at <www.un.org/law/icc/statute/final.htm> (visited December 2002).

[2] The Statute was signed by 139 states and ratified by almost 90 states to date. Two states that ratified recently were Zambia (on 13 November 2002) and Barbados (on 10 December 2002): see "Rome Statute of the International Criminal Court, Rome, 17 July 1998" at <www.untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty10.asp> (visited January 2003).

[3] President Bill Clinton demonstrated this support on at least six occasions: Scheffer, "The United States and the International Criminal Court" (1999) 93:1 American Journal of International Law 12; United States Congress, "Background on current United Nations efforts to develop a permanent ICC", Paper circulated to Congress members: see <gopher://gopher.igc.apc.org/00/orgs/icc/ngodocs/monitor/one/us-state-dept+> (visited December 2002).

for this initiative. On 31 December 2000 the United States changed its mind and signed the Statute rekindling the hope that it would ratify the Statute in due course. However, in another change of mind it wrote to the United Nations Secretary-General on 6 May 2002 stating that it "[did] not intend to become a party to the treaty" and that it "ha[d] no obligations arising from its signature."[4] As a consequence, the Statute ultimately came into force without its support.

This article will argue that the United States had no convincing reason for not joining the international consensus to create an effective ICC. Although it was understandable that a state would not normally wish its personnel to be subject to an external body's jurisdiction, there were enough safeguards in the Statute against its abusive and/or political use. In this sense, the concern was not reasonable or defensible. To eliminate any risk of its military personnel being prosecuted under the Statute, the United States isolated itself at a time when its engagement and leadership were crucial to the prevention of crimes that shocked the human conscience.[5] Its decision not to ratify the Statute was therefore ill conceived and could be seen as a bid to exist above the community of states or the rule of law in total disregard for the formidable consensus on this issue. It could find that this self-imposed isolation on such an important principle could be contrary to its best interest once the ICC became fully operational.

The ICC was conceptualised as an organisation that would benefit all states by strengthening the global justice system and widening its reach. The United States' demonstrated leadership when it helped to create the *ad hoc* international criminal tribunals for the former Yugoslavia and Rwanda and its initial public support for a permanent ICC evidenced its interest in, and support for, an effective international

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[4] Rome Statute of the International Criminal Court, Rome, 17 July 1998 at <http://un treaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty10.asp> (visited January 2002).

[5] In order to reinforce its determination that its peacekeepers were exempt from the ICC's jurisdiction, on 30 June 2002 the United States vetoed a Security Council resolution to renew United Nations peacekeeping operations in Bosnia. This position was intended to underline its sustained opposition to the ICC in its current form. Subsequently, the United States agreed to an extension: United Nations Press Release SC/7437, " Security Council reject draft proposing extension of United Nations Mission in Bosnia and Herzegovina" <www.un.org/News/Press/docs/2002/SC7437. doc.htm> (visited January 2003).

justice system. Unhappily, its later opposition to the Statute adversely affected the ICC and undermined the interest of all states.

II. THE UNITED STATES' POSITION

The United States sought to create an ICC "empowered by the United Nations Security Council to pursue those responsible for heinous crimes."[6] Its delegation to the Rome Conference played a pro-active role in drafting the Statute. Although this influence was reflected to a great extent in the Statute's final text, the United States ultimately found the text unacceptable[7] raising several issues during the Conference. To this end, it proposed several alternatives such as on jurisdiction and the meaning of aggression.[8]

(a) Jurisdiction over the Individual

The United States raised many concerns based on jurisdiction.[9] It argued that the ICC's sweeping jurisdiction contravened the basic principle of sovereign equality as found in Article 2(1) of the United Nations Charter (the Charter). It added that the ICC's assumption of jurisdiction over a state without its consent rendered the Statute's ratification process meaningless. It objected particularly to the ICC's broad and overriding jurisdiction concerning the nationals of non-party states. It disagreed with Article 12 of the Statute allowing the ICC to exercise jurisdiction over an accused individual who was the national of a party state or who had committed the designated crimes in a party state's territory. It was this jurisdiction that concerned the United States most because its armed forces on official duty overseas would become unduly exposed to the risk of politically motivated prosecutions in a

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[6] Scheffer "America's stake in peace, security and justice", Los Angeles Times, 31 August 1998, 6.

[7] Ambassador David Scheffer led the United States delegation to the 1998 Rome Conference. For his objectives and achievements see Scheffer, "The United States and the International Criminal Court" (1999) 93:1 American Journal of International Law 12.

[8] Ibid; see also Scheffer D, "ICC: the challenge of jurisdiction", Address given to the Annual Meeting of the American Society of International Law, Washington DC, 26 March 1999; Wedgegood, "Fiddling in Rome: America and the ICC" (November-December 1998) 77:6 Foreign Affairs 20-24; Scheffer, "America's stake in peace, security and justice", Los Angeles Times, 31 August 1998, 6.

[9] For the concerns and explanations see notes 7-8 above.

party state that could be hostile to or on bad terms with it. This possibility also threatened its many peacekeeping roles worldwide.

The Statute gave the ICC a reasonably independent jurisdiction, the result of a strong voice advocating the court's universal jurisdiction to prosecute international criminals. Although this reflected an emerging trend in recent multilateral treaties to prescribe universal jurisdiction for enforcement purposes as exemplified by the 1979 International Convention against Hostage Taking and the 1984 International Convention against Torture, the Statute's final text represented a more conservative approach. As a concession, the ICC was invested with jurisdiction that did not truly reflect universal jurisdiction because it was a compromise between consent-based and universal jurisdiction.

This concession was significant because most armed conflicts were internal in nature and crimes committed during such conflicts remained beyond the ICC's reach. Impunity for the most heinous of atrocities could continue and rogue States would be among the last to accept the ICC's jurisdiction. Assuming that the ICC existed in 1975 and Kampuchea (Cambodia) did not ratify the Statute, Pol Pot would be immune from the ICC's jurisdiction despite the "killing fields". Assuming that an Iraqi official gassed the Kurds again, the ICC would not have jurisdiction if the act were perpetrated against fellow Iraqis on Iraqi territory since Iraq was not a party to the Statute. Similarly, Russia and China as non-parties could commit atrocities in Chechnya and Tibet respectively without concern for the ICC and its jurisdiction.

Notwithstanding their numerical strength in the United Nations and an enhanced ability to participate in international affairs in the General Assembly, the values, traditions and expectations of the vast majority of developing states remained under-represented in that world system. The Security Council's permanent members with their right of veto[10] had both the power balance and financial power in the undemocratic Security Council. Also, the United States had made no secret of its intention to control the United Nations, an agenda Madeleine Albright referred to as "assertive multilateralism", designed to advance United States foreign policy goals and national interests globally.[11] Thus, the

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[10] See Article 23(1) of the Charter.

[11] United States Congress, House Committee on Foreign Affairs, Hearings before the

United States' argument based on the principle governing the sovereign equality of states would be hollow and self-defeating for two reasons. First, its permanent seat in the Security Council came with a right of veto. Secondly, its power domination and the culture it generated could possibly undermine this principle. In this respect, it could be deemed to be more equal than other states.

In the post cold war era, the so-called "new world" order seemed to be based on the hegemonic reality of international relations and undermined increasingly the sovereign equality of states. A hierarchy of states emerged where powerful states such as the United States enjoyed the self-perpetuating image of benevolent leader in international rule making and standard setting. They were able to implement rules and standards selectively to support their own strategic interests backed by their military and economic might. On the contrary, their supposedly equal counterparts not belonging to this club became subservient and less than equal sovereign states.

The ICC's jurisdiction based on a causal link between the crime and the place of commission was not novel but quite common in international conventions.[12] Lord Millet adopted an even more liberal approach in *ex PartePinochet (No 3)* observing that:[13]

> ...every state has jurisdiction under international customary law to exercise extra-territorial jurisdiction in respect of international crimes which satisfy the relevant criteria.

In practice, the United Nations preferred the consensus method in modern treaty making by relying on diplomatic conferences, collective negotiation and decision-making techniques.[14] Consensus based law

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Subcommittee on International Security, International Organisations and Human Rights, 103rd Congress, 2nd session, 24 June 1994, 3-21.

[12] For example, Article 2 of the 1978 United Nations Convention on the Carriage of Goods by Sea; United Nations, Report of the Preparatory Commission for the ICC: Finalised Draft Text of the Elements of Crimes, 6 July 2000: <www.un.org/law/icc/prepcomm/report/prepreportdocs.htm> (visited in January 2003).

[13] R v Bow Street, Metropolitan Stipendiary Magistrate, ex Parte Pinochet Ugarte (Amnesty International and Others intervening) [1999] 2 All English Reports 77, 177.

[14] For example, the United Nations used this process to conclude the 1961 Vienna Convention on Diplomatic Relations, 1969 Vienna Convention on the Law of Treaties and 1982 Convention on the Law of the Sea.

making, which did not require the consent of every State, seemed to replace consent based law making. The 1998 Rome Conference made use of this process when the United States was unwilling to shift its rigid opposition to the creation of a court that could exercise jurisdiction over its nationals without its authorisation.

The United States had also objected to the automatic trigger mechanism for initiating a prosecution that allowed the independent prosecutor to begin a prosecution without a referral from a party state or United Nations organ under Articles 13(c) and 15 of the Statute. It added that this allowed a self-initiating prosecutor to embroil the ICC in political decision-making. However, the argument was unsound and the Statute had pre-empted this concern as seen in the following examples:

(a) Article 1 specified that only "the most serious crimes of international concern" would be prosecuted.
(b) Under Article 17(1)(d) a case would be inadmissible even where there was clear evidence a crime had been committed but "sufficient gravity to justify further action" was lacking.
(c) The ICC Prosecutor could not initiate a proceeding until after the ICC's Pre-Trial Chamber had scrutinised the allegation and its merit. Therefore, even before an investigation started, the Prosecutor should convince the judges of the Pre-Trial Chamber under Article 15.4 that the investigation had "a reasonable basis" and the ICC had jurisdiction.
(d) Under Article 58, the Prosecutor could not obtain an arrest warrant unless the Pre-Trial Chamber was persuaded that there were reasonable grounds to believe that the accused violated the Statute.
(e) Article 61 provided that the prosecutor who might have custody of an alleged criminal could not proceed to trial without establishing a convincing case in a contested confirmation hearing of the allegation.

The above showed that the Prosecutor acted as a safeguard against the Security Council (a political body) potentially dominating the ICC (a judicial body), but this seemed lost on the United States. Further, the ICC's jurisdiction was complementary to and not a substitute for national jurisdiction under Article 17. This allowed a party state to assert the primacy of its national judicial system if the accused was a

national. In this respect, it addressed the United States' sovereignty concerns and ensured that the national system retained jurisdiction over its armed personnel serving overseas. Thus, not only could the United States' advanced criminal justice system investigate and prosecute to the ICC's exclusion, the Statute gave the ICC jurisdiction where the national machinery was unable or unwilling to act.

It was this very reason that prompted the United States to argue that *ad hoc* international criminal tribunals should be created for the former Yugoslavia and Rwanda when it became apparent that the Yugoslav authorities were unlikely to punish those responsible for the atrocities in Bosnia and Rwanda could not prosecute when its judicial system collapsed in spite of its political will. Thus, if the United States wished, it could invoke complementarity, a fundamental principle of the Statute, to avoid the ICC's jurisdiction under Articles 18 and 19. It could also appeal a decision of the Pre-Trial Chamber or Trial Chamber to the Appeals Chamber under Articles 81 and 82 and exercise its political clout in the Security Council by deferring an investigation and/or prosecution for twelve months. In fact, it should have found these possibilities comforting since they could be effective stalling tactics that could be renewed endlessly under Article 16.[15]

In sum, the checks and balances shown above limited the Prosecutor's ability to politicise the ICC and allayed concerns on the independence of this office. Frivolous or politically motivated prosecutions were not solely the concerns of the United States. Other states such as Australia that deployed military personnel abroad suffered similar misgivings about exposing their own to unwarranted external prosecutions. Yet, they were reasonably satisfied that the Statute's provisions were sufficiently stringent against misuses of authority. More importantly, one would expect peacekeepers, as enforcers of international law and order, to be not threatened by the ICC's jurisdiction since the highest of standards applied to them.

Another jurisdictional issue concerned the Security Council's role. The United States suggested that the safest and more politically sensible

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[15] This provision permitted the United States to use its veto to "compel" the Security Council and hence the ICC to postpone an investigation or prosecution by resolution under Chapter VII of the Charter.

basis for criminal proceedings was a Security Council referral. If accepted, it meant that this organ's permanent members (including the United States) would have a right to veto any referral thus turning the ICC into the Security Council's political arm and diluting its independence. On the other hand, it could be said that the United States had partially achieved its intention since the body that was created had to receive its greatest authority from the Security Council under Article 12 of the Statute. Thus, if the ICC acted without any Security Council mandate its jurisdictional competence would be limited severely to cases concerning the territory and/or nationals of party states only. This effectively meant that only those prosecutions in which Security Council members (especially the permanent five) had an interest would receive the nod to proceed. However, this would be quite antithetical to the Statute's objectives as the equivalent of selective justice.[16]

In the end, the final text of Article 12 did not give the ICC universal jurisdiction and the ICC did not become totally independent of the Security Council. This reflected the view of the overwhelming majority of states and NGOs[17] who felt that myriad safeguards existed already to address unjustified prosecutions. To them, any extra jurisdictional compromise or restriction would paralyse the ICC, threaten its effectiveness and encourage states with aggressive inclinations to reject the Statute. Also, it did not compromise the international law rule that a state had the sovereign right to deal with criminal acts committed on its own territory. Neither did it compromise the rule that a state could try an individual for international crimes even where they were not committed within its territory, as seen in General Augusto Pinochet's arrest and prosecution in England for crimes committed in Chile.[18] Thus, for all of the above reasons the United States' view that the ICC had no jurisdiction if a person committed a crime outside his or her own state should be rejected as untenable in international law.

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[16] These objectives were found in the Statute's Preamble. Indeed, one reason for a permanent criminal court was to avoid such selectivity or victor's justice associated with hoc tribunals for war crimes: "United Nations establishment of an ICC: Overview" at <www.un.org/law/icc/general/overview.htm> (visited December 2002).

[17] Almost 90% of participants supported a German and Korean proposal to this effect: Kirsch and anor, "The Rome Conference on an International Criminal Court: The negotiating process" (1998) 93:1 American Journal of International Law 8-9.

[18] R v Bow Street, Metropolitan Stipendiary Magistrate, ex Parte Pinochet Ugarte (Amnesty International and Others intervening) [1999] 2 All English Reports 77.

Appreciating the significance of United States support for the ICC, those wanting an effective ICC tried hard to break the deadlock. Despite their impressive numerical strength and the concessions made to entice the United States to join, the latter remained determined not to. As a result, they stopped the courting when they felt that further concessions would restrict the court making it dysfunctional.

(b) Individual Responsibility

The day before the Rome Conference ended on 16 July 1998, the United States tabled a final proposal on the individual's responsibility for international crimes. It argued that before the ICC could exercise jurisdiction the accused person's state of nationality should give its consent when the state claimed that the alleged crimes were committed "in the course of official duties".[19] This "official duties" or "official acts" approach drew an artificial distinction between officially sanctioned and other criminal conduct, the culpability of which was not distinguishable qualitatively. It created the stigma of official guilt to cover up individual guilt and accountability.

If this proposal was accepted it would have eviscerated the widely recognised and judicially endorsed principle of international criminal justice that individual perpetrators of atrocities could not be exonerated from responsibility by pleading that the act was committed in an official capacity or the result of official orders. On this point, the Nuremberg Tribunal had observed:[20]

> [C]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced...individuals have international duties which transcend the national obligations of obedience imposed by individual state[s].

In 1950, the International Law Commission synthesised Nuremberg Principle 1 stating that a person who committed an act constituting a crime under international law was responsible for it and liable to

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[19] Scheffer, "The United States and the International Criminal Court" (1999) 93:1 American Journal of International Law 12.

[20] Judgment of the Nuremburg International Military Tribunal [1947] 41 American Journal of International Law 172.

punishment.[21] Individual accountability for international crimes was also found in the 1948 Genocide Convention[22] and the four 1949 Geneva Conventions.[23] Consistent with this trend on attributing criminal responsibility to individuals perpetrating international crimes, Article 25 of the Statute made a person responsible for committing any crime found under Article 5 and liable to punishment under the ICC's jurisdiction. Thus, the possibility of immunity for individuals solely on the basis that their national state held a privileged status as a veto-yielding permanent member of the Security Council amounted to double standards at its best and blatant discrimination at its worst.

(c) Aggression

The United States had three main objections to aggression as a crime under the Statute. First, although the 1974 General Assembly Declaration on the Definition of Aggression had identified acts of aggression for the purposes of the Charter,[24] international law had not yet defined it in relation to the individual's criminal responsibility. Secondly, adversarial judicial methods were inappropriate to deal with aggression since it would concern politics warranting negotiation and mediation more than judicial reasoning. Thirdly, the Security Council had exclusive mandate over aggression under Chapter 7 of the Charter. As such, an alternative authoritative body such as the ICC with concurrent jurisdiction over aggression would undermine the Security Council's effective functioning regarding international peace and security.

The United States had previously brought disputes to the Security Council and the ICJ simultaneously. When considering the second

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[21] Report of the International Law Commission on the work of its second session, 5 June to 29 July 1950 (A/1316).

[22] Article 4 of the 1950 Convention on the Prevention and Punishment of the Crime of Genocide held persons individually accountable if they committed genocide or any other act enumerated in Article 3, irrespective of whether they were constitutionally responsible rulers, public officials or private individuals.

[23] 1949 Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; 1949 Convention for the Amelioration of the Condition of the Wounded and Sick and Shipwrecked Members of Armed Forces at Sea; 1949 Convention on the Treatment of Prisoners of War; 1949 Convention on the Protection of Civilian Persons in Time of War.

[24] General Assembly Resolution 3314, 29 GAOR Supp 31, United Nations Doc A/9890, 1994.

Security Council resolution in *United States Diplomatic and Consular Staff in Tehran,*[25] the ICJ stated:

> [The resolution] expressly took into account the Court's Order of December 15, 1979 indicating provisional measures; and it does not seem to have occurred to any member of the Council that there was or could be anything irregular in the simultaneous exercise of their respective functions by the Court and the Security Council. Nor is there in this any cause for surprise.

In *Military and Paramilitary Activities in and against Nicaragua,* the ICJ held:[26]

> [T]he fact that a matter is before the Security Council should not prevent it [from] being dealt with by the Court and that both proceedings could be pursued *pari passu.*

The Security Council was notorious for its functional paralysis due to the stultifying effects of the veto and selectivity. The list of acts of aggression where the Security Council could not or did not respond seemed endless. As a result, an alternative forum such as the ICC was needed. Constitutionally, there was no conflict of jurisdiction between the Security Council and the ICC over aggression because even though Article 12 of the Charter expressly prevented the General Assembly from making any recommendation on a matter the Security Council was considering at the same time, there was no such Charter restriction on the ICC. The United States' argument that the Security Council had exclusive competence to deal with acts of aggression under its mandate to maintain international peace and security was accordingly not justified especially when the Security Council was only given "primary responsibility" under Article 24 of the Charter, thereby implying that other bodies had secondary and residual responsibility.

The Security Council was the political body that dealt with acts of aggression. For example, it could use diplomatic mediation to arrive at a desirable, although not necessarily an ideal, solution. Like the ICJ,

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[25] United States Diplomatic and Consular Staff in Tehran [1980] International Court of Justice Reports 3, 21 para 40.
[26] (Jurisdiction) [1984] International Court of Justice Reports 392, 433-434 para 93.

the ICC could simultaneously deal with the same act of aggression albeit in the judicial sphere. *United States Diplomatic and Consular Staff in Tehran* and *Military and Paramilitary Activities in and against Nicaragua* were two precedents where the ICJ provided a judicial solution. Thus, while the Security Council aimed to end aggression by negotiation, the ICC was to exercise its judicial function to ascertain the extent of the individual's responsibility for committing aggression. However, if the United States' argument was accepted it could result in an individual's immunity from prosecution, at least in the *de facto* sense, since individuals had no *locus standi* in the Security Council.

At this stage, one should ask what was at stake for the United States given its determination to undermine the ICC's independent jurisdiction. An analysis of the recent controversy surrounding United States soldiers in Japan who were accused of committing multiple rapes could shed some light on the matter.[27] Another allegation involved its missile strikes on Sudan's major pharmaceutical plant on 20 August 1998 killing the civilians employed there without legitimate justification. The United States claimed that it was responding to the bombing of its embassies in Kenya and Tanzania on 7 August 1998 and the attacks were based on "convincing evidence" the factory was producing chemical weapons.[28] When Sudan challenged this claim and attempted to initiate a Security Council fact-finding investigation the United States blocked this move.[29] Under the Statute this incident would call into question the personal responsibility of the individuals who ordered the attacks. However, if the ICC were dependent on the Security Council for a referral, the United States' proposed consent-based jurisdiction could see them remain beyond the scope of international accountability and justice.

During the Preparatory Committee meeting on the Statute in August 1997, the United States proposed an amnesty clause to exonerate outgoing political leaders from prosecution especially if they came from states undergoing a transition to democracy. This was contrary to

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[27] The victims included schoolgirls and the perpetrators were prosecuted in Japan. This attracted widespread public protest in Japan and worldwide media reports: see generally BBC News, "US airman jailed for Okinawa rape" at <http://news.bbc.co.uk /2/hi/asia-pacific/1898004.stm> (visited February 2003).

[28] Los Angeles Times, 21 August 1998, A1.

[29] New York Times, 29 August 1998 at A1; ibid 3 September 1998, A6.

the ICC's objective to combat and not conceal impunity as provided in the Statute's Preamble in sub-paragraph 5. If such amnesty were allowed, not only would it be antithetical to international humanitarian law since the ICC's primary goal was to respond to serious international crimes but it would also confuse the ICC's legal role with a political one.

III. THE COST/BENEFIT OF NON-RATIFICATION

The Statute was not a perfect instrument as it was a compromise between the competing interests of 160 states, 33 international bodies, 236 NGOs and several other peripheral groups. In the circumstances, it was the best possible outcome for something so complex.

Similar to other participants in Rome the United States had pursued vigorously its national interests including the issue of abusive prosecutions. As shown above, the Conference had addressed this as reasonably as possible but the United States still declined to ratify the Statute notwithstanding its declared interest in an effective ICC and its influence on the process as seen in the Statute's final text. Admittedly, it would have been ideal if it ratified the Statute since its political, military, intelligence and financial support would be indispensable in relation to the successful indictment and prosecution of criminals worldwide. The importance of this support was brought home during the attempts to indict Slobodan Milosevic before the International Criminal Tribunal for Yugoslav. Until the United States agreed to provide crucial evidence obtained from intercepted communication between Belgrade and field forces in Bosnia, Milosevic could not be found and brought to trial before the Tribunal.[30]

This United States ambivalence towards international law was not new. It had shown repeatedly that its dogmatic adherence to self-interest outweighed its internationalism and relationship with allies. It seemed to relish fostering internationalism and exercising universal jurisdiction on others in the name of world order but loathed submitting itself to the same jurisdiction. It took 40 and 25 years respectively to ratify the 1948 Genocide Convention and 1966 International Covenant on Civil

[30] Leicht L, "Establishing an effective International Criminal Court: Current concerns", Statement by the Director of Human Rights Watch, Brussels at <www.sef-bonn.org/sef/sef/events/1998/icc/leicht.html> (visited January 2003).

and Political Rights,[31] which tendency was also reflected in its non-ratification of the Statute. This evidenced its adherence to a type of multi-polar governance of international justice caused seemingly by its desire to exercise unfettered hegemony over world affairs. As such, the international community should allow the United States more time to re-evaluate its position and appreciate the wisdom inherent in an independent ICC. On the other hand, if the United States did not change its mind, it would be better to have an ICC without the United States than a weak ICC with the United States.

A lesson could be learnt from past experience when the United States was granted too much concession in multilateral negotiations. For example, diplomatic negotiations under the 1947 General Agreement on Tariffs and Trade (GATT) for fair and free agricultural trade became inhibited when the United States insisted that the GATT rules on agricultural trade be permitted to suit its pre-existing domestic policies in pursuit of uncompetitive trading conditions so as to benefit its farm sector. When this happened, the United States should have been required to alter its policies to meet the needs of other agricultural producing states with comparative advantage.[32] Even after 50 years of institutionalised and structured trade liberalisation the international trading community and the World Trade Organisation (WTO) have yet to adopt a successful comprehensive approach to agricultural trade reform due mainly to the United States' persistent opposition.[33] Using this example, if the ICC was founded on the United States' proposals, the progressive development of a fair international justice system aimed at equal treatment for all party states and their nationals without any distinction whatsoever would be stultified.

By opposing the ICC, the United States had drifted apart from its allies and treated human rights and humanitarian issues as secondary to political expediency. This exposed the moral dimension of its policies (or lack thereof) and hurt potentially its standing as a world leader. Thus, it was unsurprising that in a secret ballot on 5 May 2002, it lost

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[31] Goddard, "The Globalisation of Criminal Justice: Will the ICC become a reality?" (2000) 7 Canterbury Law Review 462.

[32] Agriculture remains the most highly protected, subsidised and distorted sector under the WTO: WTO Secretariat Study, "Significant trade barriers remain after Uruguay Round", Press Release, 27 April 2001.

[33] Ibid.

its seat on the United Nations Human Rights Commission. Among many factors contributing to this outcome was its negative stance on global initiatives such as the treaty abolishing land mines,[34] the Kyoto Protocol reducing global warming[35] and AIDS drugs for everyone.[36]

Here, it is noteworthy that as a non-party to the Statute, it could not protect its interests during the ICC's crucial formative stage and in the Preparatory Commission. It could not participate in the on-going preparatory meetings in late 2002 to select the judges and prosecutors, formulate rules of evidence, procedure and legal elements of the designated crimes,[37] and facilitate the ICC's creation and operation. Above all, it was ineligible for an ICC seat. As a result, it would appear that the distant benefits of not embracing the Statute would not justify the cost of such self-imposed isolation. With international terrorism being introduced into its homeland on September 11, the United States should appreciate all the more that combating international crimes as sanctioned by the rule of law and justice under the Statute would be both beneficial and necessary for a stable and lasting world order.

However desirable, it would be difficult to restore peaceful order without justice. Neither could justice be administered in the absence of order. The ICC was designed to be an international forum to prosecute

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[34] The United States refused to be party to the 1997 Ottawa Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-personnel Mines adopted on 3 December 1997 and effective on 1 March 1999; see also Malanczuk, "The ICC and landmines: What are the consequences of leaving the US behind?" (2000) 11 European Journal of International Law 77.

[35] The United States declined to join the 1997 Kyoto Protocol to the United Nations Framework Convention on Climate Change. While the Clinton administration called for tangible evidence of active participation by developing states before it would ratify the Protocol, the present Bush administration felt that the protocol was unfair to the United States and it therefore renounced a campaign promising to impose carbon dioxide emission restrictions on power plants based on the fact that carbon dioxide was not a "pollutant" under the Federal Clean Air Act (1990).

[36] See Leopole, "US loses its seat on rights body", The Weekend Australian, 5 May, 2001, 15.

[37] Further clarification on the Preparatory Commission's definition on crimes was in response to the United States' concerns that imprecisely defined and broadly construed crimes would cause unnecessary investigations and prosecutions: Report of the Preparatory Commission for the International Criminal Court on the work of its tenth session, 1 July to 12 July 2002 (PCNICC/2002).

the most horrible of crimes. When the national system was unwilling or unable to act it could be used as the forum of last resort.[38] While United Nations peacekeepers maintained an exterior peace in unsettled situations the ICC could minimise the cycle of violence by offering justice as an alternative to revenge. Thus, the threat of prosecution and punishment would not be a panacea but used to deter the most gross and violent deprivation of human rights and human life. In this respect, it was intended that every indictment, arrest, conviction and sentence under the Statute would have a deterrent effect globally.

Although the threat of prosecution could be insufficient to deter recalcitrant genocidal tyrants such as Pol Pot, more cautious dictators such as Milosevic might find the credible threat of indictment under the Statute sufficient to tip the balance towards restraint. Further, an effective ICC could lessen the need for peacekeepers to be deployed. Even if deployment were needed, such operations would be facilitated by the mere existence of the ICC. For example, United States peacekeepers in Bosnia felt safer when leading war criminals were indicted, in hiding and/or in prison, since this prevented them from inciting their supporters to foment violence.

IV. CONCLUSION

The United States Congress and its inward-looking domestic policies played a major role in shaping the United States' negativity towards an international and independent criminal court.[39] President Bill Clinton signing the Statute on the very last day it was open for signature was no more than a token gesture by an outgoing president especially when ratification did not follow. Senator Helms, Chair of the Senate Foreign Relations Committee, reacted sharply to the signing, evidencing Congress' deep-rooted hostilities towards the ICC. He even vowed to work with the incoming Bush administration "to deal decisively with the threat posed by this court and to ensure once and for all that no

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[38] Panel, "Universal legal principles: Has the globalisation of justice superseded national legal system?" (2000) 81:2 The Parliamentarian 16-18.

[39] For an account of consistent congressional opposition to the ICC see Murphy, "Contemporary practice of the United States relating to international law: International Criminal Law" (1999) 93 American Journal of International Law 186; Scharf, "The politics of establishing an International Criminal Court" (1995) 6 Duke Journal of Competition and International Law 171.

American is ever tried by this global star-chamber."[40] Such dogmatic adherence to self-serving domestic policies prevented Congress from appreciating the fact that the United States was only one of seven states[41] voting against the Statute, which posture did not adhere to or reflect the international community's collective will.

Although states were obliged to enforce international obligations within their territory, acknowledged limitations on the enforcement of international law existed based on the state sovereignty principle. It was ironic that the worst atrocities often took place within the territory of a state where it could not or would not comply with its commitments. It would be a triumph for the international justice system and its advocates if states became self-reflective and complied with their obligations as members of the international community. Global justice could not exist unless the most heinous of crimes committed by states wearing the garb of sovereignty were subjected to the rule of law and independent judicial scrutiny.

The ICC's creation would challenge the persistent culture of impunity governing internationally recognised crimes. Acceptance of the ICC's jurisdiction would go a long way to redress gross injustices perpetrated in the name of sovereignty. In this sense, it would be more expedient if the United States were to view the ICC as part of the evolution of international law and not consider it a threat to its own sovereignty.

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[40] "United States signs Rome Treaty establishing ICC" at <www.unausa.org/dc/info/dc010301.htm> (visited December 2002).

[41] Since the voting was unrecorded only three of the seven states that voted against the ICC are known as they have publicly stated their reasons. They are China, Israel and the United States: "Rome Statute of the International Criminal Court: Questions and answers" at <www.un.org/law/icc/statute/iccq&a.htm> (visited January 2003).