

Rechtspolitisches Forum

Legal Policy Forum

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The International Criminal Court
- American Responses to the Rome Conference
and the Role of the European Union -

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The United States insisted that the International Criminal Court would not have jurisdiction to prosecute American nationals. It was to be a court for others, not for them. The Rome Conference insisted on upholding the principle of equal justice for all and consequently rejected American exceptionalism. The Clinton administration nevertheless signed the ICC Statute and remained involved in the post Rome proceedings of the Preparatory Commission for the International Criminal Court. However, when President Bush took office, his administration embarked on a world wide campaign to discredit the ICC. It cancelled the American signing of the ICC Statute, it enacted hostile legislation aimed at frustrating the functioning of the ICC, and it concluded agreements with approximately 50 States that place those States under an obligation not to surrender American nationals for trial in the ICC. The difference of opinion between the United States and the European Union cannot be resolved by diplomatic means since the United States administration is obligated by an American statute to discredit the ICC and to prevent it from operating according to its Statute. The European Union and its Member States will therefore have to embark on a policy of confrontation.

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This contribution originates from a lecture held by the author at the University of Trier on 28 July 2003. Only notes and references are added.

THE INTERNATIONAL CRIMINAL COURT
– AMERICAN RESPONSES TO THE ROME CONFERENCE
AND THE ROLE OF THE EUROPEAN UNION –

Johan D. van der Vyver

In 1994, when the International Law Commission submitted its Draft Statute for an International Criminal Court to the United Nations Organization, the United States Senate came out in full support of such a tribunal, stating that an international criminal court with jurisdiction over international crimes “would greatly strengthen the rule of law,” that such a court “would serve the interests of the United States and of the world community,” and that the United States delegation “should make every effort to advance this proposal at the United Nations.”¹

These sentiments were echoed on several occasions by President William Clinton. In his opening address at a conference on *Fifty Years after Nuremberg: Human Rights and the Rule of Law*, held at the University of Connecticut on October 15, 1995, the President of the United States said:

By successfully prosecuting war criminals in the former Yugoslavia and Rwanda, we can send a strong signal to those who would use the cover of war to commit terrible atrocities that they cannot escape the consequences of such actions. And a signal will come across even more loudly and clearly if nations all around the world who value freedom and tolerance establish a permanent international court to prosecute, with the support of the United Nations Security Council, serious violations of humanitarian law.²

On September 22, 1997, President Clinton in his address to the 52nd Session of the General Assembly of the United Nations reiterated these sentiments:

¹ *Foreign Relations Authorization Act, Fiscal Year 1994 and 1995*, § 517(b), HR 2333, 103rd Cong, 108 Stat 382, 469 (1994). The Senate did add that it would not ratify a treaty establishing the court “which permits representatives of any terrorist organization, including but not limited to the Palestine Liberation Organization, or citizens, nationals or residents of any country listed by the Secretary of State ... as having repeatedly provided support for acts of international terrorism, to sit in judgment on American citizens” (§ 518), or one that would not guarantee that the court would take no action infringing upon or diminishing the rights of American citizens under the First and Fourth Amendments to the Constitution of the United States, as interpreted by the United States (§ 519).

² 31.42 *Weekly Compilation of Presidential Documents* 1840, at 1843 (Oct. 23, 1995).

The United Nations must be prepared to respond [to the demands of people who do not enjoy universal human rights] not only by setting standards but by implementing them. ... To punish those responsible for crimes against humanity and to promote justice so that peace endures, we must maintain our strong support for the U.N.'s war crime tribunals and truth commissions. And before the century ends, we should establish a permanent international court to prosecute the most serious violations of humanitarian law.³

On 25 March 1998, while addressing the people of Rwanda at Kigali Airport and referring to the acts of genocide in that country, President Clinton said:

[W]e must make it clear to all those who would commit such acts in the future that they too must answer for their acts ... Internationally, as we meet here, talks are underway at the United Nations to establish a permanent international criminal court. Rwanda and the difficulties we have had with this special [international criminal] tribunal [for Rwanda] underscores the need for such a court. And the United States will work to see that it is created.⁴

However, it soon emerged that the United States would place considerations of national self-interest above everything else. Speaking at the Commonwealth Club in San Francisco, California, on 13 May 1998, Ambassador at Large for War Crimes Issues and leader of the American delegation in Rome, David Scheffer, said it quite bluntly: "The US delegation has been and will continue to be guided by our paramount duty: to protect and advance US interests."⁵ The American perception of its own national self-interest was encapsulated by Ambassador Scheffer in an interview with the *Washington Post*: "Any arrangement by which a UN-sponsored tribunal could assert jurisdiction to prosecute Americans would be political poison in Congress."⁶

Affording immunity for American nationals from prosecutions in the ICC was the primary concern of, and driving force behind, participation of the United States in the norm-creating proceedings for the establishment of a permanent

3 33.39 *Weekly Compilation of Presidential Documents* 1386, at 1389 (Sept. 29, 1997).

4 34.13 *Weekly Compilation of Presidential Documents* 495, at 497 (March 30, 1998).

5 DJ Scheffer 'Seeking Accountability for War Crimes: Past, Present and Future' <http://www.state.gov/www/policy_remarks/1998/980513_scheffer_war_crimes.html>; and see S Power 'The United States and the Genocide Law: A History of Ambivalence' *The United States and the International Criminal Court* (eds) Sarah B Sewall & Carl Kaysen (2000) 165, p. 172.

6 TW Lippman 'Ambassador to the Darkest Areas of Human Conflict' *Washington Post* (18 November 1997), p. A.19.

international criminal court. An advisor to the German delegation, reflecting on the Rome Conference, noted the “tragic role” of the United States in those proceedings.⁷ He particularly referred to the uncompromising disposition of the United States delegation and its insistence on a Court “that could take action against the small and poor States but would capitulate before the transgressions of the powerful ones.”⁸

Failure to achieve that goal prompted the Bush administration to embark on a malicious campaign that seeks to disable the effective functioning, and in fact to secure the destruction, of the ICC. John Bolton, Under Secretary of State for Arms Control and International Security in the (current) Bush administration, leaves one in no doubt as far as the true motives and intent of the American government is concerned. Writing in *The National Interest*, he proclaimed:

... whether the ICC survives and flourishes depends in a large measure on the United States. We should therefore ignore it in our official posture, and attempt to isolate it through our diplomacy, in order to prevent it from acquiring any further legitimacy or resources.⁹

It is perhaps worth noting that in spite of its negative stance on vital issues of equal justice for all and effective implementation of the ICC’s major objective, the United States delegation made valuable contributions – equalled by perhaps only one or two other single delegations – to the overall design of the ICC Statute.¹⁰ However, the basic instruction of the American delegation to

⁷ K Ambos 'Der neue Internationale Strafgerichtshof: Die schwierige Balance zwischen effizienter Strafverfolgung und Realpolitik' 39 *Entwicklung und Zusammenarbeit* (1998) 224, p. 225 col. 2-3.

⁸ *Ibid.* (“der sich gegen kleine und arme Staaten richtet und vor den Verbrechen mächtiger Staaten kapituliert”).

⁹ J Bolton 'Courting Danger, What's Wrong With the International Criminal Court' 54 *The National Interest* (Winter 1998/99) 60, p. 71.

¹⁰ In his report to the Senate, Ambassador David Scheffer recited an impressive list of special contributions of the United States. See S.H. 105-724, at 9-27 (23 July 1998), and see in general DJ Scheffer 'U.S. Policy and the International Criminal Court' 32 *Cornell Int'l L.J.* (1999) 529, pp. 530-31; DJ Scheffer 'The United States and the International Criminal Court' 93 *AJIL* (1999) 12, pp. 13-14; F Benedetti & JL Washburn 'Drafting the International Criminal Court Treaty: Two Years to Rome and an Afterword on the Rome Diplomatic Conference' 5 *Global Governance: A Review of Multinational and Int'l Organizations* (1999) 1, p. 32; R Wedgwood 'Improve the International Criminal Court' in *Toward an International Criminal Court?* (Project Director) Alton Frye (1999) 53, pp. 63-64; P Malanczuk 'The International Criminal Court and Landmines: What Are the Consequences of Leaving the US Behind?' 11 *EJIL* (2000) 77, p. 80; H-P Kaul 'The Continuing Struggle on the Jurisdiction of the International Criminal Court' in *International and National Prosecution of Crimes Under International Law: Current Developments* (eds) Horst Fisher, Claus Kreß & Sascha Rold Lüder (2001) 21, pp. 23-24; V Popovski 'International Criminal Court: A Necessary Step Towards Global Justice' 31.4 *Security Dialogue* (2000) 406, p. 416; JL Washburn 'The In-

secure immunity of American nationals from prosecution in the ICC was not to be.

Symptomatic, perhaps, of what was to be expected of the United States in response to insistence by the vast majority of delegations in Rome on the principle of equal justice for all was the fact that the Rome Conference and its outcome was almost entirely ignored by American politicians and in the American media.¹¹ There can be little doubt that the establishment of the ICC marks the greatest achievement in international relations since the founding of the United Nations Organization in 1945. When the President of the United States in January 1999 delivered his first State of the Union Address after the Rome Conference,¹² he dedicated a significant part of his speech to international affairs,¹³ but without even uttering one word about the ICC. History will judge the United States harshly for that!

Official responses in the United States as to where to go from here took a dramatic turn for the worst following the change in government when George W. Bush (Republican) became President of the United States in 2001. While the Clinton administration, through the agency of one or more of the several instruments that remained unfinished in Rome, sought to further pursue strategies that would promote American interests, the Bush administration after it took office reduced and finally terminated further involvement of the United States in matters that still had to be attended to by a post-Rome Preparatory Commission.¹⁴

This essay will highlight differences in the responses of the Clinton and the Bush administrations, respectively, to the outcome of the Rome Conference, emphasizing that the Bush administration is committed to reduce the significance of the ICC to the lowest possible level. This places a compelling obligation on countries supportive of the ICC, and in particular on Member States of the European Union (EU). Their transatlantic alliances with the United States place them in the most favourable position to broker a change in attitude on

international Criminal Court Arrives – The U.S. Position: Status and Prospects' 25 *Fordham Int'l L.J.* (2002) 873, pp. 876, 879.

11 See L Weschler 'Exceptional Cases in Rome: The United States and the Struggle for an ICC' in *The United States and the International Criminal Court* (2000) 85, pp. 109-10 (eds) Sarah B Sewell & Carl Kaysen. Lanham/Boulder/New York/Oxford: Rowman & Littlefield.

12 'Address Before a Joint Session of the Congress on the State of the Union' Jan. 19, 1999, in *1999 Publications of the Presidents: William J Clinton* (2000), vol. 1; also printed in 35.1 *Weekly Compilation of Presidential Documents* (1999), 78.

13 *Publications of the President*, pp. 67-69; *Weekly Compilation*, pp. 83-85.

14 See JL Washburn, *supra* note 10, pp. 880-81. Note that Washburn had hoped that the United States would increase its participation in the final sessions of the Preparatory Commission (which had not taken place at the time he wrote the article). The United States in fact did not send a delegation to those final sessions at all.

the part of the United States. Their commitment to the ICC might also in the end compel them to resort to confrontational action in order to prevent the American strategies for the destruction of the ICC to succeed.

1. *Attempts at Securing a “Procedural Fix”*

Inasmuch as the *Rules of Procedure and Evidence* were thought to be a viable tool for protecting American nationals from prosecution in the ICC,¹⁵ Secretary of State Madeleine Albright on one occasion referred to a “procedural fix” to overcome the United States’ “long-standing concern about the jurisdictional reach” of the ICC. She held out the promise that if the American demands were to be accommodated, the United States would be enabled “at a minimum to be a ‘good neighbor’ to the court.”¹⁶ Those efforts were not successful because it was not within the power of the Preparatory Commission to effect changes to the provisions of the Rome Statute.

In the final hours of 31 December 2000 – the closing date for this to be done – the Clinton administration nevertheless signed the ICC Statute, thereby keeping the door open for further participation of the United States in forging an international criminal justice regime after its own liking. Upon giving instructions for the ICC Statute to be signed, President Clinton stated:

We do so to reaffirm our strong support for international accountability and for bringing to justice perpetrators of genocide, war crimes, and crimes against humanity. We do so as well because we wish to remain engaged in making the ICC an instrument of impartial and effective justice in the years to come.¹⁷

The President reiterated, though, that the United States was not abandoning its concerns about “significant flaws” in the ICC Statute and that, given those concerns, he did not intend to submit the ICC Statute for ratification to the US Senate. He also would not recommend that his successor do so “until our fundamental concerns are satisfied.” The President’s insistence that American

¹⁵ Fears had also been expressed that the United States might utilize the Elements of Crimes to limit the scope of criminal conduct included in the definitions of crimes as approved in Rome. See K Ambos 'Der neue Internationale Strafgerichtshof: Funktion und vorläufige Bewertung' in *Jahrbuch Menschenrechte* (edited by Gabriela von Arnim et al) 2000 (1999) 122, p. 133.

¹⁶ 'U.S. Offers a “Procedural Fix” to Link With War-Crimes Court' in *The Desert News* (6 May 2000) p. A.04 (Salt Lake City, UT).

¹⁷ 'Statement on the Rome Treaty on the International Criminal Court' 37 *Weekly Compilation of Presidential Documents* (31 December 2000) 4; and see SD Murphy 'Contemporary Practice of the United States relating to International Law' 95 *AJIL* (2001) 387, pp. 397-400.

citizens ought to be permitted, at the discretion of the United States, to commit with impunity genocide, war crimes and crimes against humanity on foreign soil, stands in sharp contrast to his testimony of a commitment in the same statement to the principle of accountability.

2. *Attempts at Undermining the ICC's Effective Functioning*

Following the Rome Conference and even before President Bush took office, an influential lobby in Washington DC proposed a strategy of actually opposing the establishment of the ICC.¹⁸ Senator Jesse Helms (R-NC), at the time Chair of the Foreign Relations Committee of the US Senate, on one occasion depicted the ICC as “a threat to US national interests,” adding that “it is our responsibility to slay it before it grows to devour us.”¹⁹

Displeasure of the United States government with an international criminal justice system with jurisdiction over American nationals manifested itself in anti-ICC action on four fronts:

- avoiding its liability as a signatory State of the ICC Statute;
- enacting hostile legislation;
- entering into bilateral international agreements to exempt American service members and officials from ICC jurisdiction; and
- using its privileged status in the Security Council to blackmail the United Nations into giving in to its demands.

2.1 *“Unsigning” of the ICC Statute*

When President Clinton issued instructions for the ICC Statute to be signed by the United States, Senator Jesse Helms issued a press release, describing President Clinton’s decision to sign the ICC Statute as “outrageous as it is inexplicable”; and referring to the ICC as a “global Star Chamber,” he went on to say:

Today’s action is a blatant attempt by a lame-duck President to tie the hands of his successor. Well, I have a message for the outgoing President. This decision will not stand. I will make reversing this decision, and protecting America’s fighting men and women from the jurisdiction of this international

¹⁸ See K Ambos, *supra* note 7, p. 225, col. 3.

¹⁹ J Helms 'We Must Slay This Monster: Voting Against the International Criminal Court is Not Enough. The US Should Try to Bring It Down' *Financial Times* (31 July 1998), p. 18. As to the strong opposition of Jesse Helms to the ICC and his influence in devising and formulating US policy in regard to the ICC, see HT King & TC Theofrastous 'From Nuremberg to Rome: A Step Backward for U.S. Foreign Policy' 31 *Case Western J. Int'l L.* (1999) 47, pp. 79-81; L Weschler, *supra* note 11, p. 90.

kangaroo court, one of my highest priorities in the new Congress.²⁰

Following the accession to power of President George W. Bush, the United States considerably reduced its representation in the Preparatory Commission and eventually terminated it altogether. On 6 May 2002, it submitted the following note, signed by John Bolton as Under Secretary of State for Arms Control and Internal Security, to the Secretary-General of the United Nations:

This is to inform you, in connection with the Rome Statute of the International Criminal Court adopted on July 17, 1998, that the United States does not intend to become a party to the treaty. Accordingly, the United States has no legal obligations arising from its signature on December 31, 2000. The United States requests that its intention not to become a party, as expressed in this letter, be reflected in the depositary's status list relating to the treaty.

The "unsigned" of the ICC Statute occurred in conformity with Article 18 of the *Vienna Convention on the Law of Treaties*.²¹ Signing of a treaty places upon a signatory State the obligation to refrain from acts that would defeat the objects of the treaty. In terms of Article 18, this obligation lapses when the signatory State has made its intention clear not to become a Party to the treaty. However, this has never before been done, and one would assume that cancellation of a signature would only be justified if circumstances have changed since the signing of the treaty concerned. That was admittedly not the case in this instance.

The action taken by the Bush administration was therefore widely condemned. David Scheffer, chief American spokesperson at the Rome Conference, described it as "a bizarre and dangerous idea."²² The European Union issued the following statement in this regard:

1. The European Union takes note with disappointment and regret of the decision by the United States on May 6 2002 formally to announce that it does not intend to ratify the Rome Statute of the International Criminal Court (ICC) and that it considers itself released from any legal obligation arising from its signature of the Statute on 31 December 2000.

²⁰ F/k/a/ Federal Document Clearing House, Inc., 31 December 2000.

²¹ *Vienna Convention on the Law of Treaties*, 1969, art. 18, UN Doc. A/CONF. 39/27 (1969), 1155 UNTS 331, 8 ILM (1969) 679, 63 *AJIL* (1969) 875.

²² DJ Scheffer 'A Treaty Bush Shouldn't "Unsigned" ' *The New York Times* (April 6, 2002) p. A.15.

2. While respecting the sovereign rights of the United States, the European Union notes that this unilateral action may have undesirable consequences on multilateral treaty-making and generally on the rule of law in international relations.
3. The European Union restates its belief the anxieties expressed by the United States with regard to the future activities of the ICC are unfounded and that the Rome Statute provides all necessary safeguards against the misuse of the Court for politically motivated purposes. It is confident that this will become self-evident when the Court begins its work. The European Union is disappointed that the United States has felt obliged to act as it has without the benefit of actual experience of the Court's activities. It believes that such experience will show that the United States can associate itself fully with the Court.
4. The European Union is also concerned at the potentially negative effect that this particular action by the United States may have on the development and reinforcement of recent trends towards individual accountability for the most serious crimes of concern to the international community and to which the United States shows itself strongly committed.
5. For its part, the European Union reaffirms its determination to encourage the widest possible international support for the ICC through ratification or accession to the Rome Statute and its commitment to support the early establishment of the ICC as a valuable instrument of the world community to combat impunity for the most serious international crimes.
6. The European Union expresses the hope that the United States will continue to work together with friends and partners in developing effective and impartial international criminal justice and will not close the door to any kind of cooperation with the ICC which is going to be a reality in the near future. The European Union stands ready for such a dialogue.²³

2.2 Hostile legislation

The 2000-2001 *Foreign Relations Authorization Act* contains a provision which prohibits any US funds from being utilized by the United Nations for any ICC expenditures until such time as the Senate has given its advice and consent for ratification of the ICC Statute by the United States.²⁴

²³ *Statement of the European Union on the Position of the United States towards the International Criminal Court*, Brussels 8864/02 (Presse 144), P 64/02 (14 May 2002).

²⁴ Public Law 106-113, § 1000(a)(7), 113 Stat. 1501A-460.

On 2 August 2002, President George W. Bush signed into law the *American Servicemembers' Protection Act*,²⁵ tagged onto the *2002 Supplemental Appropriation Act for Further Recovery From and Response to Terrorist Attacks on the United States* as agreed to by both Houses of Congress.²⁶

The Bill "to protect United States military personnel and other elected and appointed officials of the United States Government against criminal prosecution by an international criminal court to which the United States is not a party" first surfaced in June 2000, while the Preparatory Commission was in session to consider the then pending proposals for a "procedural fix" that would satisfy American demands, and was introduced in the Senate by Senator Jesse Helms (R-NC)²⁷ and in the House of Representatives by Representative Tom DeLay (R-TX).²⁸ It strikes one that the Bill was founded on several misrepresentations, for example the allegation that "Americans prosecuted by the International Criminal Court will, under the Rome Statute, be denied many of the procedural protections to which all Americans are entitled under the Bill of Rights to the United States Constitution, including, among others, the right to trial by jury, the right not to be compelled to provide self-incriminating testimony, and the right to confront and cross-examine all witnesses for the prosecution."²⁹ The fact is that the US Constitution does not guarantee a right to jury trials to American citizens in all criminal cases, the ICC Statute expressly guarantees the right of every accused "[n]ot to be compelled to testify or to confess guilt and to remain silent, without such silence being a consideration in the determination of guilt or innocence";³⁰ and the ICC Statute also expressly guarantees the right of an accused to examine³¹ the witnesses against him or her.³² Reference to self-incriminating evidence and the right to confront and cross-examine witnesses were omitted from the congressional findings in the final draft that became law in the United States.³³

²⁵ *American Servicemembers' Protection Act* of 2002, P.L. 107-206, 116 Stat. 899, 22 USC 7401 (hereafter "ASPA").

²⁶ *2002 Supplemental Appropriation Act for Further Recovery From and Response to Terrorist Attacks on the United States*, P.L. 107-206, 116 Stat. (2 August 2002), 820.

²⁷ 1999 CONG. U.S. S. 2726; 106th Congress, 2d Session (14 June 2000).

²⁸ 1999 CONG. U.S. HR. 4654, 106th Congress, 2d Session (14 June 2000).

²⁹ U.S. S. 2726, para. (6); U.S. HR. 4654, para. (6).

³⁰ *Statute of the International Criminal Court*, art. 67(1)(g), UN Doc. A/CONF.183/9 (17 July 1998), 37 ILM (1998) 1002 (hereafter "ICC Statute").

³¹ The right to examine includes the right to cross-examine a witness.

³² *ICC Statute*, art. 67(1)(e), Measures inserted in the ICC Statute to protect victims and witnesses "shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial." *Id.*, art. 68 (1).

³³ See *ASPA*, *supra* note 25, § 2002 (7).

The American Servicemembers' Protection Act authorizes the President to use "all means necessary and appropriate" to bring about the release of any US citizen or the national of any NATO country, a "major non-NATO ally" (including Argentina, Australia, Egypt, Israel, Japan, Jordan, the Republic of Korea, and New Zealand), or Taiwan, who is detained or imprisoned by or on behalf of the ICC and provided the country concerned has not ratified the ICC Statute and wishes its nationals to be exempt from ICC jurisdiction.³⁴ Since those means may conceivably include military action, and since persons to be prosecuted in the ICC will be detained at the seat of the Court in The Netherlands, the Act came to be depicted as "The Hague Invasion Act".

The Act further prohibits any form of cooperation with the ICC, specified in great detail in the Act.³⁵ It prohibits the use of American funds for the purpose of assisting the investigation, arrest, detention, surrender, or prosecution of any US citizen or permanent resident alien by the ICC.³⁶ American officials are instructed to limit the use of international treaties or agreements for mutual assistance in criminal matters, or extradition treaties, with a view to preventing the surrender of persons to stand trial in the ICC.³⁷ No military assistance may be afforded by the United States to the Government of a State Party to the ICC Statute, except in the case of a NATO member country, a major non-NATO ally, or Taiwan, or unless the President has waived this prohibition in respect of any other country, either because he considers the waiver to be important to the national interest of the United States, or the United States has entered into an agreement with that country, pursuant to Article 98 of the ICC Statute (Article 98 agreement), "preventing the International Criminal Court from proceeding against United States personnel present in that country."³⁸

The President "should use" the voice and vote of the United States in the Security Council to ensure that each resolution authorizing any peacekeeping mission or enforcement operation designed to terminate a threat to the peace, a breach of the peace or an act of aggression "permanently exempts" members of the armed forces of the United States participating in such operations from criminal prosecution or other assertion of jurisdiction by the ICC for any actions undertaken in connection with the operation.³⁹ Members of the American armed forces may not participate in any peacekeeping or enforcement operations sanctioned by the Security Council unless the President can certify

³⁴ *Id.*, § 2008 (a)-(b), read with § 2013(3) and (4).

³⁵ *Id.*, §§ 2004 (b) and (d), (e), and (h), and 2006.

³⁶ *Id.*, § 2004 (f).

³⁷ *Id.*, § 2004 (g).

³⁸ *Id.*, § 2007.

³⁹ *Id.*, § 2005 (a).

that the Security Council has permanently exempted members of the American armed forces from criminal prosecution or other assertion of jurisdiction by the ICC for any actions undertaken in connection with the operation, each country in which members of the American armed forces will be present in connection with the operation is either not a State Party to the ICC Statute and has not agreed to the exercise of jurisdiction by the ICC, or has entered into an Article 98 agreement with the United States, or the national interests of the United States justify participation of members of the American armed forces in the operation.⁴⁰

The President of the United States may for fixed periods of one year waive the restrictions pertaining to military assistance to a State Party to the ICC Statute, or those pertaining to participation of members of the American armed forces in UN peacekeeping and enforcement operations, if a binding agreement exists that would exonerate US citizen, or the national of any NATO country, or any of the “major non-NATO allies” referred to above, or of Taiwan from the exercise of ICC jurisdiction *ratione personae* and such agreements have indeed been honoured during the preceding period of one year.⁴¹

The proscriptions mandating non-cooperation with the ICC may be waived in respect to a named perpetrator, provided an agreement is in place exonerating the above “covered” persons from the exercise of jurisdiction *ratione personae* by the ICC, there is reason to believe that the named perpetrator committed the crime being investigated or to be prosecuted, it is in the national interest of the United States for the ICC investigation or prosecution to proceed, and those proscriptions do not entail an investigation, arrest, detention, prosecution or imprisonment of any such “covered” person in respect of any action taken by him or her in an official capacity.⁴²

The so-called Dodd Amendment to the initial Draft Statute also authorizes US assistance to international efforts to bring to justice Saddam Hussein, Slobodan Milosovic, Osama Bin Laden and other members of Al Queda, leaders of Islamic Jihad, and other foreign nationals accused of genocide, war crimes or crimes against humanity.⁴³ Those “international efforts” will probably not include prosecution in the ICC.

The tremendous irony of the exemption provisions boggles the mind: the President of the United States is afforded the function of “Super Prosecutor” to decide whether or not an investigation or prosecution would be appropriate, and the Statute furthermore implies that it might be in the interest of the

40 *Id.*, § 2005 (b) and (c).

41 *Id.*, § 2003 (a) and (b), read with § 2013 (3) and (4).

42 *Id.*, § 2003 (c), read with § 2013 (3) and (4).

43 *Id.*, § 2015.

United States that the non-American perpetrator of an act of genocide, a crime against humanity, or a war crime of the kind within the jurisdiction of the ICC not be brought to trial. The Act nevertheless authorizes cooperation of the United States to prosecute all the crimes within its subject-matter jurisdiction, provided only that the accused is a foreign national.

The Act furthermore permits the President to take action on a case-by-case basis with respect to a specific matter involving the ICC pursuant to his constitutional office as Commander in Chief of the Armed Forces of the United States;⁴⁴ and, on a more positive note, permits the United States to provide legal assistance to American citizens and the nationals of NATO countries, non-NATO allied countries and Taiwan who do come to stand trial in the ICC.⁴⁵

On 17 June 2002, the Council of the European Union (General Affairs) recorded the Union's concerns regarding the American Servicemembers' Protection Act which would restrict US participation in UN peacekeeping operations, prohibit the transfer of information to the ICC, and prohibit US military assistance to States Parties of the ICC. The statement went on to proclaim:

The Council is particularly concerned about the current provision authorizing the President to use all means necessary and appropriate to bring about the release of any person who is being detained or imprisoned by, on behalf of, or at the bequest of the ICC, including on the territory of EU Member States.⁴⁶

2.3 *Bilateral agreements to undermine ICC jurisdiction*

The Bush administration embarked on an elaborate mission to conclude bilateral agreements with individual States that would preclude the surrender of American service members and state officials to stand trial in the ICC.⁴⁷ It professed to do so under authority of Article 98(2) of the ICC Statute, which provides:

⁴⁴ *Id.*, § 2011.

⁴⁵ *Id.*, § 2008 (c), read with § 2013 (3) and (4).

⁴⁶ *Council Conclusion on the International Criminal Court (ICC) and the Draft US American Servicemembers' Protection Act (ASPA)*, 2437th Council Meeting – General Affairs, Luxembourg (17 June 2002).

⁴⁷ US officials engaged in this world-wide mission include John Bolton, Patricia McNerney and Renick Smith from the Office of the Undersecretary for Arms Control and International Security, Joan Corbett and Marisa Lino from the Bureau of Political-Military Affairs, Stephen G. Rademaker from the Bureau of Arms Control, Colonel Albert Ringenberg and Jed Royal from the Department of Defence, Barbara Bodine from the Bureau of Near Eastern Affairs, and Elizabeth Jones from the Bureau of European and Eurasian Affairs.

The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.⁴⁸

The purpose of Article 98(2) was to honour *bona fide* status-of-forces agreements entered into by States that have deployed troops for peacekeeping purposes in another State. It was certainly not intended to promote the entering into bilateral international agreements with all and sundry for the purpose of undermining the exercise of jurisdiction by the ICC.

Status-of-forces agreements owe their origin, and probably their only justification, to the deployment of peacekeeping forces in a foreign country. It has become general practice for the United Nations to enter into status-of-forces agreements with countries where UN peacekeeping forces are deployed.⁴⁹ Those agreements, *inter alia*, protect the troops of a sending state from prosecution for criminal conduct in the courts of the receiving state where the crime was committed.⁵⁰

The United States seeks to entice countries into arrangements that would preclude those countries from surrendering American nationals to stand trial in the ICC. It does so by threatening to withhold military aid from countries refusing to enter into or abide by such arrangements. Those arrangements differ from status-of-forces agreements in several important respects:

- status-of-forces agreements are only entered into with governments of countries where troops and military personnel of a sending state are deployed, whereas the agreements currently being concluded by the United States are not confined to countries where members of the American armed forces are stationed;
- status-of-forces agreements apply only to members of the armed forces of the sending state, whereas the agreements currently being concluded by the United States seek to protect all American nationals from prosecution in the ICC;

⁴⁸ *ICC Statute*, art. 98 (2).

⁴⁹ M Bergsmo 'The Jurisdictional Régime of the International Criminal Court (Part II, Articles 11-19)' 6 *Eur. J. Crime, Cr. L. & Cr. Justice* (1998) 345, pp. 350-51.

⁵⁰ M Zwanenburg 'The Statute of the International Criminal Court and the United States: Peacekeeping Under Fire?' 10 *EJIL* (1999) 124, pp. 127-28.

- status-of-forces agreements apply only to members of the armed forces who have been accused of committing an offence on the territory of the receiving State, whereas the agreements currently being concluded by the United States apply irrespective of the locality of the crime under investigation;
- status-of-forces agreements implicate a duty of the sending State to actually prosecute the member of its armed forces for the offence committed on the territory of the receiving State, whereas the United States does not include that obligation in the agreements currently being concluded.

On 1 August 2002, the United States entered into an agreement with Romania in terms of which current or former Government officials, employees (including contractors), military personnel or nationals of either State shall not be surrendered or transferred to the ICC by the other State, or to any other entity or a third country for the purpose of being surrendered or transferred to stand trial in the ICC. Similar so-called Article 98 agreements have to date been signed by approximately 50 States, including Romania and Bosnia-Herzegovina. The Romanian parliament subsequently refused to ratify the agreement. Croatia, Lithuania, Norway, Slovenia, Switzerland, and all 15 EU Member States are among the countries who made it known that they would not enter into such agreements.

The so-called Article 98 agreements take on three forms:

- Where the non-US party to the agreement is not a party to the ICC Statute, both parties to the agreement undertake not to surrender each others nationals to stand trial in the ICC (for example, the Israel-US agreement);
- Where the non-US party to the agreement is a party to the ICC Statute, the agreement does not prohibit the United States from surrendering a citizen of the State Party to stand trial in the ICC (for example, the US-Romania and US-Tajikistan agreements);
- Where the non-US party to the agreement has not yet signed or ratified the ICC Statute, the agreement includes a commitment by the non-US party to the agreement not to cooperate with efforts of a third State to surrender persons to the ICC (for example, the US-East Timor agreement).

The EU has not taken kindly to any of its Member States entering into a so-called Article 98 agreement with the United States, because it sees the American campaign for what it really is: an attempt to undermine the exercise of jurisdiction by the ICC. On 30 September 2002, the General Affairs and External Relations Council of the EU drafted a set of guidelines for Member States to consider when entering into agreements setting conditions for the surrender

of suspects for prosecution in the ICC.⁵¹ Those guidelines were in turn incorporated into the Common Position of the Council of the EU on the International Criminal Court of 16 June 2003.⁵² In conformity with the ICC Statute, the guidelines uphold respect for the enforcement of existing status-of-forces agreements and extradition treaties but note that the US proposed agreements are inconsistent with the ICC Statute, that rendering impunity to persons who have committed crimes within the jurisdiction of the ICC is unacceptable, and (perhaps less fortunately) that any solution should only cover persons who are not nationals of a State Party to the ICC Statute.

2.4 *Abuse of power in the Security Council*

In terms of the *American Servicemembers' Protection Act*, the President of the United States "should use" its voice and vote in the Security Council to make participation of members of the American armed forces in peacekeeping and enforcement operations of the United Nations conditional upon a Security Council guarantee rendering them "permanently exempt" from prosecution in the ICC for acts of genocide, crimes against humanity or war crimes committed in connection with such operations.⁵³ Prior to the enactment of this provision, the United States demonstrated things to come.

In June 2002, the renewal of the Security Council mandate for peacekeeping operation in Bosnia-Herzegovina came onto the Council's agenda. The United States introduced a proposal in the Security Council proclaiming:

that persons from contributing States acting in connection with such operations shall enjoy in the territory of all Member States, other than the contributing States, immunity from arrest, detention and prosecution with respect to all acts arising out of the operation and that this immunity shall continue after the termination of their participation in the operation for all such acts.

At the same time, the United States introduced a further resolution to afford immunity from arrest, detention and prosecution in all Member States of the United Nations, save the one of their own nationality, to persons participating in all United Nations peacekeeping operations. This resolution was based on

⁵¹ Council of the European Union, *Draft Council Conclusions on the International Criminal Court*, EU Doc. 12488/1/02 Rev. 1 (30 September 2002) Annex.

⁵² Council Common Position 2003/444/CFSP of 16 June 2003 on the International Criminal Court, OJ L.150 (18 June 2003), p. 67 para. (11) and art. 5(2). The Common Position of 16 June 2003 replaced Common Position 2001/443/CFSP of 11 June 2001 on the International Criminal Court (OJ L. 155, 12.6.2001, p. 19), as amended by Common Position 2002/474/CFSP (OJ L. 164, 22.6.2002, p. 1).

⁵³ See *supra*, the text accompanying note 39.

the assumption “that it is in the interest of international peace and security to facilitate Member States’ ability to contribute to operations established or authorized by the UN Security Council” and was therefore to be a “decision” of the Security Council acting under Chapter VII of the Charter. According to the proposal, such immunity can be waived by the contributing State or the Security Council itself.

It might be noted in passing that during the pre-Rome negotiations of the Preparatory Committee, France actually proposed that persons who carried out acts ordered by, or in accordance with a mandate of, the Security Council cannot be held criminally liable for such acts in the ICC.⁵⁴ There was from the outset strong opposition to this proposal, because it implied that the Security Council could authorize conduct that constituted international crimes of the kind over which the ICC was to have jurisdiction.⁵⁵

On 21 June 2002, the Security Council adopted Resolution 1418 to extend the UN peacekeeping mission in Bosnia-Herzegovina until June 30th with a view to negotiate a settlement with the United States, following an announcement by US Ambassador John Negroponte that the United States will veto Security Council resolutions authorizing peacekeeping missions unless US citizens are excluded from the jurisdiction of the ICC.

No settlement was forthcoming for the simple reason that the US proposals would constitute an amendment of the ICC Statute, which in itself was not within the province of the Security Council. The US proposals were therefore defeated in the Security Council. For that reason, the United States on 30 June 2002 vetoed the Security Council resolution that would have extended the UN peacekeeping mission in Bosnia-Herzegovina (UNMIBH), including the International Police Task Force, for a period of twelve months. In a letter to both Houses of Congress, President Bush admitted that much:

... the United States vetoed the U.N. Security Council Resolution authorizing Member States to continue SFOR [the NATO-led Stabilization Force] for a period of 12 months be-

⁵⁴ See 'Decisions Taken by the Preparatory Committee at Its Meeting of 1 to 12 December 1997. Annex II: Report of the Working Group on General Principles of Criminal Law, ad art. M (2) (at 19)': “Persons who have carried out acts ordered by the Security Council in accordance with a mandate issued by it shall not be criminally responsible before the International Criminal Court.” This proposal is also reflected (in brackets) in the Draft Statute composed by the Zutphen inter-sessional meeting of January 1998. *Report of the Inter-Sessional Meeting from 19 to 30 January 1998 in Zutphen, The Netherlands*, art. 26[M] (2), UN Doc. A/AC.249/1998/L.13 (1998), reprinted in part in 29 *Colum. Hum. Rts. L. Rev.* (1998), pp. 330-54.

⁵⁵ A Zimmermann 'Die Schaffung eines ständigen Internationalen Strafgerichtshofes: Perspektiven und Probleme vor der Staatenkonferenz in Rom' 58 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (1998) 47, p. 84.

cause it did not provide protection for U.S. forces participating in SFOR from the purported jurisdiction of the International Criminal Court (ICC).⁵⁶

It is important to note that there are status-of-forces agreements in place that protect members of the peacekeeping forces from prosecution in Bosnia-Herzegovina,⁵⁷ and in terms of Article 98(2) of the ICC Statute prosecution in the sending State of members of the peacekeeping forces for crimes committed in the receiving State takes precedence over the exercise of jurisdiction for such crimes in the ICC. That was not good enough for the United States. The American veto, furthermore, had nothing to do with the need for peacekeeping in Bosnia-Herzegovina but was entirely motivated by the futile insistence of the United States to exclude American nationals from the jurisdiction of the ICC. William Pace, Chair of the International Coalition for an International Criminal Court described this, quite disgusting, act of the United States as “one of the most shameful lows in global U.S. leadership.”⁵⁸ Sir Lloyd Axworthy, Minister of Foreign Affairs of Canada in the period 1996 to 2000, spoke of “their tactic of holding hostage the renewal of a peacekeeping mission in the Balkans and subverting the role of the Security Council” and “the use of blackmail on peacekeeping to achieve the purely self-interested objective” of the United States.⁵⁹ A German columnist likewise referred to it as “an unworthy blackmail attempt.”⁶⁰

Never before in the history of the United Nations has a member of the Security Council stooped so low!

At the opening of the final session of the Preparatory Commission on 1 July 2002, Ambassador Ellen Margrethe Loj (Denmark), speaking on behalf of the European Union, said:

⁵⁶ 'Text of a Letter from the President to the Speaker of the House of Representatives and the President Pro Tempore of the Senate, dated July 22, 2002' 38.30 *Weekly Compilation of Presidential Documents* (29 July 29 2002), p. 1243.

⁵⁷ *General Framework Agreement for Peace in Bosnia and Herzegovina of November 20, 1995*, Appendix B to Annex I-A, art. 7 (the Dayton Accord), reprinted in 35 ILM (1996) 89, p. 102: “NATO military personnel under all circumstances and at all times shall be subject to the exclusive jurisdiction of their respective national elements in respect of any criminal and disciplinary offences which may be committed by them in the Republic of Bosnia and Herzegovina. NATO and the authorities of Bosnia and Herzegovina shall assist each other in the exercise of their respective jurisdictions.”

⁵⁸ Cited in Associated Press report under the heading: 'U.S. Ends U.N. Mission in Bosnia Over New Global Court' (30 June 2002).

⁵⁹ L Axworthy 'Stop the U.S. Foul Play' *The Toronto Globe and Mail* (17 July 2002), p. A.13 .

⁶⁰ A Kecke 'Strafgerichtshof: Schwerer Start' *Dresdner Neueste Nachrichten* (2 July 2002) (“ein unwürdiger Erpressungsversuch”).

The EU deeply regrets that the U.S. veto ... of a resolution extending the mandate of the UN mission in Bosnia-Herzegovina has placed the Security Council members in a difficult situation with regard to support for UN-peacekeeping and adherence to their commitment to the ICC statute. The EU hopes that members of the Security Council will adhere to the Secretary General's strong appeal within the coming days. The EU would accept any solution that respects the Statute and does not undermine the effective functioning of the Court.

On 10 July 2002, the Secretary-General convened a public meeting at the Security Council, open to all Member States, to discuss the US proposals to exclude participants of UN peacekeeping operations from the jurisdiction of the ICC (i) in the context of the UN mission in Bosnia-Herzegovina, and (ii) in connection with all UN peacekeeping operations. The United States on that occasion received the support of only one country, namely India. Opposition to the American position was mainly based on the truism that it was not within the power of the Security Council to amend the ICC Statute.

The Permanent Members of the Security Council eventually gave in to the American blackmail, albeit on the basis that the Security Council could not secure blanket immunity from prosecution in the ICC of participants in UN peacekeeping operations as initially insisted upon by the United States. With the United Kingdom playing a leading role in the negotiations, a compromise resolution was brokered founded on Article 16 of the ICC Statute. Article 16 authorizes the Security Council, acting under Chapter VII of the UN Charter, to request the ICC to suspend an investigation or prosecution for a period of twelve months, which request may be renewed after the lapse of twelve months under the same conditions.

On 12 July 2002 the Security Council, acting under Chapter VII of the UN Charter, unanimously adopted Resolution 1422,⁶¹ stating that "it is in the interest of international peace and security to facilitate Member States' ability to contribute to operations established or authorized by the United Nations" and requesting the ICC in terms of Article 16 of the ICC Statute not to proceed with an investigation or prosecution for a period of twelve months as from 1 July 2002 of any cases that might involve current or former officials or personnel from a contributing State not a Party to the ICC Statute in connection with acts or omissions relating to an operation established or authorized by the United Nations. The Resolution furthermore recorded the intention of the Security

⁶¹ SC Res. 1422 of 12 July 2002.

Council to renew the request under the same conditions on each first day of July “for further 12-months periods for as long as may be necessary.” Resolution 1423 of 12 July 2002 thereupon authorized Member States to continue with the peacekeeping mission in Bosnia-Herzegovina for a further twelve months period.⁶²

Following a public debate on the renewal of Resolution 1422 (requested by Canada, Jordan, Liechtenstein, New Zealand and Switzerland), the Resolution was renewed for a further period of 12 months on 12 June 2003.⁶³ But this time around, France, Germany and Syria abstained. Commenting on the Resolution, Prince Zeid Raad al-Hussein, the Jordanian Ambassador and Chair of the Assembly of States Parties of the ICC, bluntly proclaimed:

We are still concerned over how this resolution has attempted to elevate an entire category of people to a point above the law, a feeling sharpened still further when thought is given to the revolting nature of the crimes covered by the Court’s jurisdiction.⁶⁴

Secretary-General Kofi Annan was less than enthusiastic about the renewal of Resolution 1422, noting that if such renewals were to become an annual routine, they would “undermine not only the authority of the ICC but also the authority of this Council and the legitimacy of United Nations peacekeeping.”⁶⁵

Although Resolution 1422 is seemingly authorized by the wording of Article 16 of the ICC Statute, the legislative history of the latter provision will show that it was intended to be applied on a case-by-case basis:

- where an investigation by the ICC of a particular situation, or the prosecution of a particular person in the ICC, has commenced or is imminently pending;
- where the concrete situation from which the investigation or prosecution emerged has been proclaimed by the Security Council, acting under its Chapter VII powers, to constitute a threat to the peace, a breach of the peace or an act of aggression;
- where the investigation or prosecution, if it were to continue, would stifle attempts of the Security Council, while being seized with the matter from which the situation or alleged crime emerged, to maintain or to restore international peace and security.

62 SC Res. 1423 of 12 July 2002.

63 SC Res. 1487 of 12 June 2003.

64 Cited in F Barringer ‘U.N. Peacekeepers’ Exemption From Prosecution’ *The New York Times* (13 June 2003).

65 *Ibid.*

In terms of the *Vienna Convention on the Law of Treaties*, Article 16 of the ICC Statute, being a treaty provision, must be interpreted “in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”⁶⁶ Recourse may be had to “the preparatory work of a treaty and the circumstances of its conclusion” in order to confirm the meaning resulting from giving effect to the wording of a provision in the treaty in its proper context and in light of its object and purpose.⁶⁷

The Security Council clearly overstepped its mark. Facilitating UN Member States’ ability to contribute to operations established or authorized by the United Nations is scarcely the kind of crisis situation that would prompt mandatory action by the Security Council acting under its Chapter VII powers. There is also nothing in the wording of Resolution 1422 suggesting that the Resolution constitutes a “decision” of the Security Council as required by the ICC Statute and Chapter VII of the UN Charter.⁶⁸ Expressing its intention to renew the suspension of ICC investigations and prosecutions annually and for as long as it takes, is in clear defiance of the intent of making allowance for renewal of the request to suspend in view of circumstances that prevail at the time when the renewal decision is taken. It would be well within the power of the ICC to disregard Resolution 1422 because the “request” of the Security Council does not accord with Article 16. It would then be up to the Security Council to reconsider the matter on proper grounds.

For the United States, Resolution 1422 remains cold comfort: it does not provide immunity from prosecution to American citizens but only the suspension of investigations and prosecutions; it leaves the exercise of universal jurisdiction by individual States intact; and executing the stated intention to renew the suspension from year-to-year can, when the time comes, be vetoed by any of the Permanent Members of the Security Council.

3. *Basis of the American Opposition to the ICC*

The United States is essentially opposed to the ICC because, in very special circumstances, the ICC can exercise jurisdiction over American citizens without the consent of the American government. The arguments raised by the United States in support of what has come to be known as “American excep-

⁶⁶ *Vienna Convention on the Law of Treaties*, *supra* note 21, art. 31(1).

⁶⁷ *Id.*, art. 32.

⁶⁸ For Article 16 to be invoked, the ICC Statute requires “a resolution adopted under Chapter VII of the Charter.” In terms of the UN Charter, the Security Council, if its course of action is to be more than merely a recommendation, must “decide what measures shall be taken.” *Charter of the United Nations*, art. 39, 1976 YBUN 1043, 59 Stat. 1031; TS No. 993.

tionalism”⁶⁹ amount to the following: the United States, being the only remaining Super Power in the world, has become the major/only peace-keeping force of our times; and American troops engaged in peace-keeping efforts abroad do not want to run the risk of prosecutions in an international criminal tribunal for acts committed in the interest of peace and security on earth.⁷⁰

Justice Richard Goldstone, former Prosecutor in the International Criminal Tribunals for the Former Yugoslavia and International Tribunal for Rwanda, in a press interview at the Rome Conference gave short shrift to this reasoning: “I really have difficulty understanding that policy,” he said: “What the US is saying is, ‘In order to be peacekeepers ... we have to commit war crimes.’ That’s what the policy boils down to.”⁷¹ It is furthermore not a function of the United States to maintain international peace and security; that is the task of the United Nations Organization.

There is only one instance in which an American national can be brought to trial in the ICC without the permission of the United States: that is, if the American national were to commit the crime of genocide, a crime against humanity, or a war crime in a country other than the United States and that other State has either ratified the ICC Statute, or has agreed on an *ad hoc* basis to the exercise of jurisdiction by the ICC in that particular case.⁷² And even then,

⁶⁹ See JD van der Vyver ‘American Exceptionalism: Human Rights, International Criminal Justice, and National Self-Righteousness’ 50 *Emory L.J.* (2001) 775, pp. 792-827.

⁷⁰ DJ Scheffer ‘U.S. Policy on International Criminal Tribunals’ 13 *Am U. Int’l L. Rev.* (1998) 1389, p. 1399; DJ Scheffer ‘The United States and the International Criminal Court’, *supra* note 10, pp. 18-19; and see also R Wedgwood, *supra* note 10, p. 66; R Wedgwood ‘The International Criminal Court: An American View’ 10 *EJIL* (1999) 93, pp. 101-02; R Wedgwood ‘The United States and the International Criminal Court: Achieving a Wider Consensus through the “Ithaca Package”’ 32 *Cornell Int’l L.J.* (1999) 535, pp. 537-38; M Zwanenburg, *supra* note 50, pp. 126-27; M Zwanenburg ‘The Statute of the International Criminal Court and the United States: Peace Without Justice?’ 12 *Leiden J. Int’l L.* (1999) 1, p. 6; M David ‘Grotius Repudiated: The American Objections to the International Criminal Court and the Commitment to International Law’ 20 *Mich. J. Int’l L.* (1999) 337, p. 357; SA Williams ‘Preconditions to the Exercise of Jurisdiction’ in *Commentary on the Rome Statute of the International Criminal Court* (1999) 329, p. 336 (ed.) Otto Triffterer. Baden-Baden: Nomos Verlagsgesellschaft; L Weschler, *supra* note 11, at 91-92; P Melanczuk, *supra* note 10, pp. 80-81; M Bergsmo ‘Occasional Remarks on Certain State Concerns about the Jurisdictional Reach of the International Criminal Court and Their Possible Implications for the Relationship Between the Court and the Security Council’ 69 *Nordic J. Int’l L.* (2000) 87, pp. 102-03; L Washburn, *supra* note 10, pp. 876, 881-82; H-P Kaul ‘Preconditions to the Exercise of Jurisdiction’ 1 *The Rome Statute of the International Criminal Court: A Commentary* (2002) 583, p. 601 (eds.) Antonio Cassese, Paola Gaeta, John R.W.D. Jones. Oxford: Oxford Univ. Press.

⁷¹ ‘Goldstone: US Stance Contradictory’ 3 *Terra Viva* (June 17, 1998), p. 7; and see also M Zwanenburg, *supra* note 50, p. 142; M Zwanenburg ‘Peace Without Justice?’, *supra* note 70, p. 7; P Melanczuk, *supra* note 70, p. 82.

⁷² *ICC Statute*, art. 12.

if in the case of a war crime there is a status-of-forces agreement in place between the United States and the State where the crime was committed, effect must be given to the status-of-forces agreement in preference to surrendering the person concerned for prosecution in the ICC.⁷³ An American national can under no circumstances be prosecuted in the ICC for crimes committed in the United States without the consent of the United States. If the alleged crime was committed in a foreign country and that foreign country is a State Party to the ICC Statute or has agreed to the exercise of jurisdiction by the ICC in that particular case, the United States can still block the prosecution in the ICC merely by conducting a *bona fide* investigation into the crime allegedly committed by its national on foreign soil.⁷⁴ If following such an investigation the United States investigating authorities were to find that there is no probable cause for a prosecution, then so be it: the ICC is precluded from overruling that decision.⁷⁵

The chances of an American national ever being prosecuted in the ICC is therefore extremely remote. For the reasons mentioned above, the ICC Prosecutor Luis Moreno-Ocampo announced on July 17 that war crimes allegedly committed by American-led forces in the War against Iraq were inadmissible in the ICC.⁷⁶

In order to add further substance to their opposition to the ICC, apologists for the American position have therefore tried to uncover “serious flaws” in the ICC Statute. It is not worth pondering over the American reasoning, because it is based either on outrageous assumptions or on conspicuous misrepresentations. Recently, for example, following a resolution on “Promotion of the International Criminal Court” adopted by the General Assembly of the Organization of American States on 10 June 2003,⁷⁷ the American representative noted that the independence of the ICC is unacceptable to the United States. Others have singled out the independence of the Prosecutor as something essentially bad, forgetting that the principle of prosecutorial independence (from Security Council control) actually derived from a proposal of the United States and disregarding the fact that all major decisions of the Prosecutor are subject to judicial control.⁷⁸ Being squeamish because the ICC Statute “lacks an essential

⁷³ *Id.*, art. 98(2).

⁷⁴ *Id.*, art. 17(1).

⁷⁵ *Id.*, art. 17(1)(b).

⁷⁶ It might be noted that members of Australian and British forces may be prosecuted in the ICC for crimes committed in Iraq, because those countries have ratified the ICC Statute.

⁷⁷ AG/Res. 1929 (XXXIII-0/03) of June 10, 2003.

⁷⁸ See, for example, art. 15(4)-(5), 18(6), 53(1).

link with the American Bill of Rights”⁷⁹ disregards the fact that persons are to be prosecuted in the ICC under the norms of international law and not of American law, and that the ICC Statute upholds all the principles of criminal justice that have come to be accepted by a cross-section of the countries of the world as basic rules for the due process of law.

Let us look more closely at a ground of critique that seems to linger in the minds of American officials seeking to defend their country’s attacks on the ICC: the supposition that the ICC Statute, by affording to the ICC jurisdiction to prosecute nationals of non-party States, violates a basic principle of the law of treaties. David Scheffer thus proclaimed that this creates “a form of extra-territorial jurisdiction which would be quite unorthodox in treaty practice – to apply a treaty regime to a country without its consent.”⁸⁰

This line of reasoning fails to distinguish between the jurisdiction of the ICC to prosecute international crimes on the one hand, and the duty of States to cooperate with the Court in fulfilling that noble task on the other.⁸¹ It is true, of course, that jurisdiction and cooperation are intimately linked,⁸² but that inter-relationship does not undo the different functions of the two as distinct modalities of a criminal justice system. The ICC Statute provides a forum for the prosecution of *individuals* suspected of having committed acts of genocide, crimes against humanity, or war crimes; it does not place any obligations upon States not Parties to the ICC Statute, unless such States have consented to cooperate with the Court. By not ratifying the ICC Statute, a State cannot be compelled to cooperate with the Court, but that does not necessarily render nationals of that State immune from prosecution in the ICC under the rules of international criminal law,⁸³ or for that matter in the national courts of any State whose criminal justice system permits the exercise of universal jurisdiction.

⁷⁹ See, for example, CL Rodrigues ‘Slaying the Monster: Why the United States Should Not Support the Rome Treaty’ 14 *Am. U. Int’l L. Rev.* (1999) 805; LA Casey, ‘The Case Against the International Criminal Court’ 25 *Fordham Int’l L.J.* (2002) 840.

⁸⁰ See H-P Kaul, *supra* note 70, at 601.

⁸¹ See S A Williams, *supra* note 70, at 335 and 341.

⁸² See H-P Kaul & C Kreß ‘Jurisdiction and Cooperation in the Statute of the International Criminal Court: Principles and Compromises’ *Y.B. Humanitarian L.* (1999) 143, at 143-44, 174.

⁸³ See M David, *supra* note 70, at 369; MP Scharf ‘The ICC’s Jurisdiction over the Nationals of Non-Party States: A Critique of the U.S. Position’ 64 *L. & Contemp. Probs.* 67, at 213-14 and 220.

Conclusion

The United States-European Summit held in June 2003 “agreed to disagree” on the question of the ICC. However, the American attitude presents a challenge to the EU and its Member States that will require much more than merely diplomatic niceties. The United States administration is obligated by American legislation to oppose investigations by and prosecutions in the ICC of any of its nationals, and is furthermore required to use its veto in the Security Council to achieve its destructive objective.

The relentless resolve of the United States to discredit the ICC and, in the process, to deprive the Security Council of its legitimate role in international relations was again demonstrated only two weeks ago when a draft resolution aimed at increasing the protection of humanitarian aid workers in conflict zones of the world was doing the rounds. The draft resolution, prepared by Mexico in April 2003 during its presidency of the Security Council, described attacks against peacekeeping personnel as a war crime as defined in the ICC Statute. The United States threatened to veto the resolution unless reference to the ICC is removed from the text.⁸⁴ In virtue of that threat, reference to the ICC was omitted from the resolution adopted by the Security Council on 26 August 2003.⁸⁵

EU Member States are duty-bound to oppose immunity of those suspected of having committed any of the crimes within the jurisdiction of the ICC – Americans and non-Americans alike. Political confrontation on these issues seems inevitable.

The Council of the EU has already committed itself to draw the attention of non-EU Member States to the guidelines that discredit the American version of Article 98(2) agreements.⁸⁶ That initiative has provoked an angry response from US authorities, proclaiming in a demarche delivered to EU governments early in June 2003 that interference in US efforts to afford immunity from prosecution in the ICC of American nationals will be “very damaging” to transatlantic relations.⁸⁷

On 25 June 2003, the Parliamentary Assembly of the EU adopted a Resolution regretting the renewal of SC Resolution 1422, describing it as “a legally questionable and politically damaging interference with the functioning of the

⁸⁴ Reported in Mark Turner ‘US Threat over Protection Plan for UN Aid Staff: Security Council Resolution’ *Financial Times* (London) of 16 July 2003, p. 9.

⁸⁵ S.C. Res. 1502 of 26 August 2003.

⁸⁶ Council Common Position of 16 June 2003, *supra* note 52, art. 5(2).

⁸⁷ See ‘U.S. Confronts EU on War Crimes Court; Immunity Pact Issue Threatens Relations’ *The Washington Post* (10 June 2003) p. A.17.

International Criminal Court.”⁸⁸ The Assembly also regretted “the ongoing campaign by the United States” to convince States Parties to the Rome Statute to enter into immunity agreements, noting that such agreements violate the ICC Statute, and condemned pressures exercised by the United States on a number of Member States of the Council of Europe to enter into such agreements.⁸⁹

The final challenge to the will and determination of EU countries to make the ICC happen will emerge in June 2004, when SC Resolution 1244 will again come up for renewal. Every EU member of the Security Council will be duty bound to vote against the renewal, and France and the UK will simply have to use their veto to put an end to this comedy of errors. Should the United States respond by exercising its veto to block the peacekeeping mission in Bosnia-Herzegovina or any other similar humanitarian activity, let then the blood of those who will suffer in consequence of the attempted blackmail be on its hands.

⁸⁸ Parliamentary Assembly Res. 1336 (2003)[1] of 26 June 2003, para. 6-7.

⁸⁹ *Id.*, para. 8-10.

Impressum

Herausgeber

Prof. Dr. Bernd von Hoffmann, Prof. Dr. Gerhard Robbers

Unter Mitarbeit von

Angelika Günzel, Oliver Windgätter, Claudia Lehnen und
Sylvia Lutz

Redaktionelle Zuschriften

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ISSN 1616-8828