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U.S. Attitudes toward International Criminal Courts and Tribunals

*John P. Cerone**

1. Introduction

This chapter aims to provide a description of U.S. policy on the subject of international criminal courts and tribunals, both at present and historically, and how that policy has been, and continues to be, developed. It is not intended to provide a critique of that policy. The merits of policy positions are examined only in so far as they shed light on the origins of or motivations underlying those positions.

As an initial matter, it is essential to formulate a definition of the term “international criminal court” as it will be used in this study. The characterization of a court as “international” may be influenced by a range of factors.¹ In order to comprehend the full range of U.S. policy positions, it is important to include not only those characteristics that jurists would consider relevant, but also those that are relevant for policy-makers, whether legally relevant or not (and whether reasonable or not). Thus, relevant criteria could include whether the court is a creature of international law (i.e. whether the court has international legal personality, subjective or objective); whether its legal basis is an international legal instrument; the nature of the acts to be prosecuted (including their gravity, the implication of political - moral or material- interests of the international community, or their connection to international law); the composition or manner of selection of the staff or officials of the court; the source of funding; the

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¹ Feel free to include the encyclopedia cite you suggested.

mandate; whether the court is related to or forms part of a national legal system; the source of the court's jurisdiction; the scope of its jurisdiction; whether the court is labeled "international"; whether its creation or functioning is linked to the United Nations or another international organization; whether the court's operations are beyond the control of states (or beyond the control of a small number of states, or of any single state); and the law to be applied by the court.

The quintessential example of an international criminal court is the International Criminal Court (ICC), established by the 1998 Rome Statute.² An inquiry including any of the foregoing considerations would lead to the conclusion that the ICC is an international criminal court. A less central case of an international criminal court would be the Special Court for Sierra Leone, which although treaty-based, has a number of characteristics normally associated with a domestic court, including the inclusion of Sierra Leonean law within its subject matter jurisdiction and the inclusion of domestic personnel. Toward the periphery of this concept of an international criminal court would be an institution such as the Extraordinary Chambers in the Courts of Cambodia, which are a creature of domestic legislation, are located within the domestic judiciary, apply domestic law (which incorporates international norms), and are primarily staffed by Cambodian personnel. At the outer limit of this conception, or perhaps even beyond it, would be an institution such as the Iraqi High Tribunal, which is a national court without international legal personality, staffed by national personnel, prosecuting perpetrators under domestic law on ordinary bases of jurisdiction (territory and nationality), and without any connection to an international organization. The only factors giving this institution an international veneer are the nature of the acts prosecuted, the source of funding, and the possible appointment of foreign (or "international") officials or advisors.

Finally, it should be noted that there is no coherent U.S. policy on international criminal courts generally. This is in part due to the multifaceted nature of international criminal courts, and more generally to the fact that the U.S. perspective is an amalgamation of diverse views reduced in some cases to written form, which is itself subject to varying interpretations.

² Rome Statute of the International Criminal Court, July 17, 1998, 37 I.L.M. 999.

2. Early U.S. Attitudes Toward International Justice and the Possibility of International Criminal Courts (from the Nineteenth Century to 1945)

2.a. The Hague Peace Conferences (1899-1907)

The United States has been a strong supporter of the international regulation of armed conflict since at least the nineteenth century codifications of international humanitarian law. Indeed, the Lieber Code, drafted at the request of the U.S. government for the regulation of the conduct of the armed forces during the U.S. Civil War, had a tremendous impact on the elaboration of the rules of humanitarian law set forth in the Hague Conventions of 1899 and 1907.

While the U.S. has demonstrated consistent commitment to the promotion of international humanitarian law (subject to a recent weakening of support for international law generally), this is only tangentially related to the topic of the present study. The issue of whether international law should provide rules for the regulation of armed conflict is quite different from whether there should be an international mechanism with jurisdiction to prosecute individuals for violation of those rules. In addition, it must be noted that humanitarian law, or the *jus in bello*, is a distinct body of law from the *jus ad bellum* – the law which regulates the recourse to the use of armed force. While the U.S. supports the development of generally applicable rules for the regulation of armed conflict, it is more reluctant to submit the question of the legitimacy of the use of force by the U.S. to legal regulation.

While the Hague Peace Conferences did not deal with the issue of an international criminal court, they did consider the creation of an international court for resolving disputes between states. The Report of the United States delegation makes clear that although the U.S. government was deeply committed to the establishment of an international court, it was also, along with most of the participating Powers, unwilling to submit to compulsory jurisdiction matters that implicated strong national interests.³ Nonetheless, the U.S. welcomed the creation of the Permanent Court of Arbitration, with

³ Report of the U.S. delegation to the Hague Peace Conference, 1899.

its purely consent-based jurisdiction, in part because of the role it would play in developing an international jurisprudence.⁴

2.b. The Treaty of Versailles (1919)

Article 227 of the Treaty of Versailles provided that Kaiser Wilhelm II (the former German Emperor) was to be prosecuted by an international tribunal for “a supreme offence against international morality and the sanctity of treaties.”⁵ The tribunal was to consist of judges from the victorious powers: the United States, Great Britain, France, Italy and Japan.⁶

According to Telford Taylor, the U.S. was opposed to the idea of an international tribunal from the beginning. Accountability for war crimes did not rank high in President Woodrow Wilson’s list of priorities. He was far more concerned with a “moderate peace, a viable democratic government for Germany, and, most of all, a League of Nations to secure future peace.”⁷ The U.S. delegation was instructed to express serious reservations, rejecting the tribunal and opposing the trial of the Kaiser, who, in the meantime, had found refuge in the neutral Netherlands.⁸

The U.S. representatives to the 1919 Paris Peace Conference indeed made strenuous legal objections to the proposed tribunal and prosecution of the Kaiser, while at the same time expressing the desire of the U.S. government that “those responsible for violations of the laws and customs of war should be punished for their crimes, moral and legal.”⁹ The American members of the Commission on Responsibility of Authors of the War, appointed by the Conference, noted that the “differences which have arisen between them and their colleagues lie in the means of accomplishing this common desire.”¹⁰ In

⁴ *Id.*

⁵ Treaty of Versailles, Article 227.

⁶ Telford Taylor, *The Anatomy of the Nuremberg Trials: a personal memoir* 15 (Alfred A. Knopf, Inc. 1992).

⁷ *Id.*

⁸ *Id.*

⁹ Memorandum of Reservations at 127.

¹⁰ *Id.*

particular, they objected to the creation of an international tribunal, prosecution for violations of the laws of humanity, the prosecution of a Head of State, and the idea of “negative criminality” (i.e. prosecution for failure to prevent violations).¹¹

Finding no way “to harmonize the[ir] differences without an abandonment of principles which were fundamental,”¹² the U.S. delegation strongly expressed its refusal to endorse the creation of the proposed international criminal court. According to its official “Memorandum of Reservations”:

*“In view of their objections to the uncertain law to be applied, varying according to the conception of the members of the high court as to the laws and principles of humanity, and in view also of their objections to the extent of the proposed jurisdiction of that tribunal, the American representatives were constrained to decline to be a party to its creation. . . . They therefore refrained from taking further part either in the discussion of the constitution or of the procedure of the tribunal”.*¹³

Indeed, with regard to the “unprecedented”¹⁴ proposal to create an international tribunal, the U.S. representatives were:

*“....unable to agree, and their views differ so fundamentally and so radically from those of the Commission that they found themselves obliged to oppose the views of their colleagues in the Commission and to dissent from the statement of those views as recorded in the report”.*¹⁵

¹¹ *Id.* at 129.

¹² Commission on the Responsibility of the Authors of the War and on the Enforcement of Penalties, Report Presented to the Preliminary Peace Conference, March 29, 1919, Annex II: Memorandum of Reservations Presented by the Representatives of the United States to the Report of the Commission on Responsibilities, reprinted in 14 Am. J. Int’l L. 95 (1920).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* at 140.

They proposed instead that “acts affecting the persons or property of one of the Allied or Associated Governments should be tried by a military tribunal of that country.”¹⁶ As for acts affecting more than one country, they could be tried “by a tribunal either made up of the competent tribunals of the countries affected or of a commission thereof possessing their authority.”¹⁷ This tribunal “would be formed by the mere assemblage of the members, bringing with them the law to be applied, namely, the laws and customs of war, and the procedure, namely, the procedure of the national commissions or courts.”¹⁸

Such a mechanism would address the concerns of the U.S. delegation regarding what they perceived as the *ex post facto* nature of an international tribunal. The U.S. representatives believed that

*“... the nations should use the machinery at hand, which had been tried and found competent, with a law and procedure framed and therefore known in advance, rather than to create an international tribunal with a criminal jurisdiction for which there is no precedent, precept, practice, or procedure.”*¹⁹

By creating a joint, multinational tribunal or commission, “existing national tribunals or national commissions which could legally be called into being would be utilized, and not only the law and the penalty would be already declared, but the procedure would be settled.”²⁰ Only under these conditions and with these limitations might the U.S. participate in “a high tribunal, which they would have preferred to call, because of its composition, the Mixed or United Tribunal or Commission.”²¹

¹⁶ *Id.* at 146.

¹⁷ *Id.*

¹⁸ *Id.* at 142. This is essentially what is contemplated in Article 229 of the Versailles Treaty, the second paragraph of which provided, “Persons guilty of criminal acts against the nationals of more than one of the Allied and Associated Powers will be brought before military tribunals composed of members of the military tribunals of the Powers concerned...”

¹⁹ *Id.*

²⁰ *Id.* at 147.

²¹ *Id.*

Notwithstanding these objections, the U.S. grudgingly went along with the inclusion of Article 227 in the final draft of the Treaty of Versailles, but only after negotiating language that would reduce the prospects of it being implemented.²²

2.c.. The League of Nations (1919-1945)

Early in its existence, the Council of the League of Nations had before it a proposal to create an international criminal court. An Advisory Committee of Jurists, appointed by the Council in February 1920, recommended the creation of a “High Court of International Justice,” which would be competent to criminally prosecute individuals for violations of the “universal law of nations.”²³ This proposal was eventually rejected by the League. According to the Third Committee of the League Assembly, it was “best to entrust criminal cases to the ordinary tribunals as is at present the custom in international procedure.” While recognizing that “crimes of this kind” might “in future be brought within the scope of international penal law,” consideration of the issue was, “at the moment, premature.”²⁴

According to UN Special Rapporteur Richard Alfaró, this rejection “reflected the views of those who had opposed the establishment of an international jurisdiction for the trial of the First World War criminals, for certain legal reasons, to wit: that there was no defined notion of international crimes; that there was no international penal law, that the principle *nulla poena sine lege* would be disregarded; that the different proposals were not clear; and that inasmuch as only States were subjects of international law, individuals could only be punished in accordance with their national law.”²⁵ This closely parallels the position taken by the U.S. delegation to the Paris Commission on Responsibilities.

More than a decade later, under the auspices of the League of Nations, a treaty was elaborated which would have created an international criminal court to prosecute the

²² Taylor, *supra* n. 5, at 15.

²³ Report on the Question of International Criminal Jurisdiction by Richard J. Alfaró, Special Rapporteur, Yearbook of the International Law Commission, 1950, vol. II, A/CN.4/15, at para. 15.

²⁴ *Id.*, at para. 16.

²⁵ *Id.*, at para. 17.

crime of terrorism. This treaty failed to attract ratification, and consequently never entered into force.²⁶

Expressing contemporary views on the matter, Manley Hudson, U.S. jurist and former judge of the Permanent Court of International Justice, wrote in 1944:

*“Instead of attempting to create an international penal law and international agencies to administer it, perhaps attention may more usefully be given to promoting the cooperation of national agencies in such matters as extradition, judicial assistance, jurisdiction to punish for crime, and coordinated surveillance by national police. Whatever course of development may be imminent with reference to political organization, the time is hardly ripe for the extension of international law to include judicial process for condemning and punishing acts either of States or of individuals.”*²⁷

Hudson speculated that “[t]he local impact of anti-social acts inspires the desire of States to safeguard local condemnation and local punishment, and impingement on national prerogatives in this field will become possible only as the need for international action is clearly demonstrated.”²⁸ Arguably, the horrors of World War II provided the necessary demonstration.

3. U.S. Policy Toward International Criminal Courts since World War II

3.a. Nuremberg and Tokyo

The United States was strongly supportive of the establishment of the International Military Tribunals (IMTs) at Nuremberg and Tokyo after WWII. As one of the four victorious allies responsible for creating the Tribunals, the U.S. played a central role in shaping their design and operation.

²⁶ *Id.*, at para. 26. REF for the aborted treaty?

²⁷ Manley O. Hudson, *International Tribunals: Past and Future* 186 (Carnegie Endowment for International Peace and The Brookings Institution 1944).

²⁸ *Id.*

However, as recalled by Telford Taylor, the U.S. was initially unsupportive of the Russian proposal to establish an international tribunal for the trial of “major war criminals.”²⁹ Indeed, Roosevelt initially endorsed Churchill’s counter-proposal to summarily execute them.

Taylor primarily credits Secretary of War Henry L. Stimson with the reversal of this position. In negotiations within the U.S. government, the War Department emerged as the dominant entity.³⁰ Taylor also noted that Stimson had the support of the military:

*“Stimson’s ascendancy also foreclosed American support for the British summary-execution plan. In his insistence that the Nazi leaders stand trial, the Secretary had the strong support of both the Army Chief of Staff, General George C. Marshall, and the army’s principal lawyer, Judge Advocate General Myron C. Cramer”.*³¹

The U.S. government’s preference for a “judicial” solution to the problem of war criminals was ultimately made clear in the Yalta Memorandum, which had been prepared to guide U.S. President Roosevelt when he attended the Yalta conference.

*“We think that the just and effective solution lies in the use of the judicial method. Condemnation of these criminals after a trial, moreover, would command maximum public support in our own times and receive the respect of history. The use of the judicial method will, in addition, make available for all mankind to study in future years an authentic record of Nazi crimes and criminality”.*³²

This same Memorandum envisions the creation of an International Military Tribunal, to be established by Executive Agreement, and formed the groundwork of the

²⁹ Taylor, *supra* n. 5, at 34.

³⁰ *Id.*

³¹ *Id.* at 35.

³² Memorandum to President Roosevelt from the Secretaries of State and War and the Attorney General (“Yalta Memorandum”), January 22, 1945, at <http://www.yale.edu/lawweb/avalon/imt/jackson/jack01.htm>.

later drafts submitted by the United States for an international agreement. The Memorandum was initialed by Secretary Stimson, Secretary of State Edward R. Stettinius Jr., and Attorney General Francis Biddle.

Ultimately, support for the Tribunal came from the highest levels of the U.S. administration, including President Truman. Taylor notes that Truman, soon after taking office, made clear that he opposed summary execution and supported the establishment of a tribunal.³³

The IMT at Nuremberg was established on the basis of the London Agreement, a treaty concluded among the four allies, and the IMT for the Far East (Tokyo) was created by a special proclamation of General MacArthur, acting as Supreme Commander of the Allied Forces. Both Tribunals were given jurisdiction to prosecute crimes against peace, war crimes, and crimes against humanity. Thus, the Tribunals were charged with prosecuting not only violations of the *jus in bello*, but also violations of the *jus ad bellum*. Significantly for the purposes of this paper, their jurisdiction was limited to prosecuting those fighting on behalf of enemy states. According to Article 6 of the London Charter, the Tribunal had the power to prosecute only those who were “acting in the interests of the European Axis countries.” Thus, there was no possibility of prosecuting those fighting on behalf of the Allies.

While U.S. support for the creation of the IMTs may appear inconsistent with the position taken by the U.S. delegation to the 1919 Paris Conference, it is worth noting the similarities between the IMTs and the U.S. counter-proposal detailed in its 1919 Memorandum of Reservations. Echoing the U.S. vision of a joint, multinational military tribunal, the Nuremberg Tribunal pointed out:

*“The Signatory Powers created this Tribunal, defined the law it was to administer, and made regulations for the proper conduct of the Trial. In doing so, they have done together what any one of them might have done singly; for it is not to be doubted that any nation has the right thus to set up special courts to administer law”.*³⁴

³³ *Id.* at 32.

³⁴ Judgment of the Nuremberg Tribunal, 1946. In addition, the Yalta Memorandum cites an Aide Memoire from the British Embassy indicating the UK government’s willingness to cooperate in the

Nonetheless, a key difference remained. The accused were clearly prosecuted on the basis of international law, and not under the domestic law of the Signatory Powers. As noted by the Tribunal, the IMT Charter “is the expression of international law existing at the time of its creation.”³⁵

Some observers find U.S. support for the IMTs ultimately grounded in the confluence of internationalism and exceptionalism.³⁶ Although the Tribunals were in some respects international, they were also viewed as mechanisms of the occupying Powers and, in part, as arms of the U.S. military.³⁷ As international tribunals subject to a wide measure of U.S. control, their existence and operation were compatible with contemporary American tendencies toward internationalism while alleviating any concern about ceding power beyond U.S. reins. While the United States did not have exclusive control of the Tribunals, the government was assured that U.S. nationals would

establishment of “Mixed Military Tribunals to deal with cases which for one reason or another could not be tried in national courts.” Its reference to “Mixed Military Tribunals” bears a strong similarity to the term preferred by the U.S. delegation to the 1919 Commission on Responsibilities -- “Mixed or United Tribunal or Commission”.

³⁵ *Id.* It should be noted, however, that the U.S. discomfort with the notion of the “laws of humanity,” expressed repeatedly by the U.S. representatives to the 1919 Commission on Responsibilities, still existed in 1945. According to the Yalta Memorandum, Hitler’s pre-war atrocities were “neither ‘war crimes’ in the technical sense, nor offenses against international law.” Nevertheless, this would not stand in the way of the “declared policy of the United Nations” that these crimes would be punished. In early drafts of the London Charter prepared by the United States, there was no reference to Crimes Against Humanity. The analogous provision referred to “atrocities and offences” committed in violation of “any applicable provision of the *domestic law* of the country in which committed.” Formulation of the Nürnberg Principles – Report by J. Spiropoulos, Special Rapporteur, Yearbook of the International Law Commission, 1950, vol. II, A/CN.4/22, at para. 2. Ultimately, this lingering discomfort was reflected in the conservative approach taken to the codification of Crimes Against Humanity in the Nuremberg Charter. Crimes Against Humanity could only be prosecuted if committed in conjunction with another crime within the jurisdiction of the Tribunal.

³⁶ Interview with former State Department official (name withheld), December 13, 2005.

³⁷ The U.S. preference for a military tribunal was made clear in the Yalta memorandum. It stated, “We would prefer a court of military personnel, as being less likely to give undue weight to technical contentions and legalistic arguments.”

not be prosecuted, since the personal jurisdiction of the Tribunals was limited to those who were acting in the interests of enemy states.

3.b. Early UN Efforts to Create an International Criminal Court

The establishment of an international criminal court was on the UN's agenda from very early on in its existence. In 1946, acting on the initiative of the U.S. delegation,³⁸ the UN General Assembly affirmed the principles of international law recognized in the Charter and judgment of the Nuremberg Tribunal, and mandated the Committee on the codification of international law to:

*“treat as a matter of primary importance plans for the formation, in the context of a general codification of offences against the peace and security of mankind, or of an International Criminal Code, of the principles recognized in the Charter of the Nuremberg Tribunal and in the judgment of the Tribunal.”*³⁹

The following year saw the negotiation of the text of the Genocide Convention. An early draft prepared by the Secretariat included as appendices alternative proposals for a permanent and an ad hoc international criminal court to try and punish acts of genocide.⁴⁰ In its comments on the draft Convention the U.S. proposed that the issue of establishing an international criminal court be considered separately.⁴¹

While the U.S. supported the creation of ad hoc tribunals to prosecute genocide, it expressed concern that the attachment of a treaty creating a court to the draft genocide convention might jeopardize the successful conclusion of the latter.⁴² It also noted that the “problem of the institution of [an international penal] tribunal, competent to try

³⁸ Formulation of the Nürnberg Principles – Report by J. Spiropoulos, Special Rapporteur, Yearbook of the International Law Commission, 1950, vol. II, A/CN.4/22, at para. 29.

³⁹ G.A. Res. 1/95, 11 December 1946.

⁴⁰ Draft Convention on Genocide, Doc. A/362, 25 August 1947. The proposals for these courts drew heavily from the text of the 1937 Convention.

⁴¹ Communications Received by the Secretary-General, Doc. A/401, 27 September 1947.

⁴² *Id.*

international crimes generally, is of such a magnitude as to necessitate a separate project, having the most careful consideration, and inviting the largest number of States possible to become party thereto.”⁴³ It suggested instead that the Genocide Convention expressly include an obligation to work toward the establishment of a permanent international criminal court, and that, pending the establishment of such an institution, States Parties should create ad hoc tribunals as needed. It also proposed that the International Law Commission, the successor entity of the Committee on the codification of international law, be mandated to explore the possibility of creating a permanent court.⁴⁴

In subsequent debates in the Sixth Committee, the U.S. continued to voice strong support for retaining language in the Genocide Convention that would provide a foundation for the future development of an international criminal court.⁴⁵ The U.S. delegate noted that “[i]t was precisely because it had been felt that national courts might not be sufficiently effective in the punishment of genocide that States had realized the need for an international convention on the subject.” He also pointed out that such a court’s jurisdiction would be consent-based.

Subsequently, the General Assembly, in the same resolution adopting the text of the Genocide Convention, invited the ILC to “study the desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide or other crimes over which jurisdiction will be conferred upon that organ by international conventions”⁴⁶. The Commission turned to this task the following year.

⁴³ *Id.*

⁴⁴ *Id.* In its comments, the U.S. also objected to the inclusion of universal jurisdiction in the draft Convention. Among the reasons for its objection to this provision was “that it would apparently seek to establish a rule of law applicable to nationals of States which have not consented to it, namely, such States as may not ratify the convention.” *Id.*

⁴⁵ Consideration of the draft Convention on Genocide, 98th Meeting of the Sixth Committee, 10 November 1948.

⁴⁶ G. A. Res. 3/260, 9 December 1948. The adoption of the Genocide Convention was strongly condemned by the President of the American Bar Association, who specifically objected to the possibility that “public officials as well as private citizens are to be made amenable to international tribunals for a variety of ill-defined and ambiguous acts of ‘genocide’ – to the extent that the causing of ‘mental harm’ to a member of a group or complicity in so doing is an act of genocide.” F. Holman, “International Proposals Affecting So-Called Human Rights,” 14 *Law & Contemp. Probs.* 479 (1949). His views were subsequently

In 1950, the General Assembly designated a Committee consisting of 17 UN Member States, including the United States, for the “purpose of preparing one or more preliminary draft conventions and proposals relating to the establishment and the statute of an international criminal court.”⁴⁷ The U.S. delegate, George Morris, chaired the Committee, which met in Geneva in August 1951. When the Report of the Geneva Committee was considered by the Sixth Committee in the fall of 1952, Morris, then representing the U.S. on the Sixth Committee, seemed to voice modest support for the creation of an international criminal court, stating that the “United Nations was on the threshold of a potentially great idea.”⁴⁸ However, a week later he clarified that the U.S. “neither favored nor opposed the establishment of an international criminal court.”⁴⁹

In the face of a wide range of views on the subject, including strong opposition from the United Kingdom,⁵⁰ Morris played a conciliatory role. For example, he pointed out that many of the delegates’ objections to the creation of a court by a General Assembly resolution had been alleviated by a series of “agreements for the safeguarding of national interests.”⁵¹ In particular, he noted that the Geneva Committee had agreed that “no government should be bound to accept the court’s jurisdiction for its own nationals; recognition of the court’s jurisdiction could be the subject of a specific convention.”⁵² Thus, while the U.S. appeared to be amenable to the creation of an international criminal court, the court envisioned would have jurisdiction only over those individuals whose state of nationality had recognized the court’s jurisdiction by treaty.

endorsed in part by US Senator John Bricker. J. Bricker, “Making Treaties and Other International Agreements,” 289 *Annals Am. Acad. Pol. & Soc. Sci.* 134 (1953).

⁴⁷ G.A. Res. 5/489, 12 December 1950.

⁴⁸ Consideration of the Report on the Committee on International Criminal Jurisdiction, 322nd Meeting of the Sixth Committee, 8 November 1952, at para. 18.

⁴⁹ Consideration of the Report on the Committee on International Criminal Jurisdiction, 328th Meeting of the Sixth Committee, 17 November 1952, at para. 29.

⁵⁰ Consideration of the Report on the Committee on International Criminal Jurisdiction, 321st Meeting of the Sixth Committee, 7 November 1952, at para. 26 and following.

⁵¹ Consideration of the Report on the Committee on International Criminal Jurisdiction, 322nd Meeting of the Sixth Committee, 8 November 1952, at para. 17.

⁵² Consideration of the Report on the Committee on International Criminal Jurisdiction, 322nd Meeting of the Sixth Committee, 8 November 1952, at para. 16.

The UN continued its work on the draft statute for five more years, but differences among UN Member States, exacerbated by the nascent Cold War, led the UN to abandon its efforts on this project.⁵³ Among the more controversial aspects of the draft statute was the definition of the crime of aggression,⁵⁴

It was not until 1981 that the UN General Assembly would request that the ILC return to the task of elaborating an international criminal code,⁵⁵ and the creation of an international criminal court would not find a place on the UN agenda until 1989. There is likely a link between this renewed interest in the UN and a change of attitude towards the matter in Washington D.C. Indeed, in the U.S., support for an international criminal court resurfaced in the late 1980s. In 1988, the U.S. Congress passed legislation urging the President to “begin discussions with foreign governments to investigate the feasibility and advisability of establishing an international criminal court to expedite cases regarding the prosecution of persons accused of having engaged in international drug trafficking or having committed international crimes.”⁵⁶ However, this same piece of legislation was careful to preserve the possibility of an exemption for U.S. nationals. It stipulated, “Such discussions shall not include any commitment that such court shall have jurisdiction over the extradition of United States citizens...”⁵⁷

In 1989, Trinidad and Tobago placed the question of an ICC back on the agenda of the UN General Assembly, which requested the ILC to prepare a draft statute.⁵⁸

⁵³ Ferencz, *An International Criminal Court: A Step Toward World Peace*, vol. 2, 1980, pp. 36 – 38.

⁵⁴ Report of the Sixth Committee, Doc. A/3770, 6 December 1957, at para. 5 and following. See also G.A. Res. 12/1186, 11 December 1957. The U.S. has traditionally resisted efforts to define aggression. For example the U.S. opposed the inclusion of a definition of aggression in the UN Charter. 5 Whiteman, *Digest of International Law* 740 (1965). This controversy remains in the context of continuing negotiations over the definition for aggression as a crime within the subject matter jurisdiction of the International Criminal Court.

⁵⁵ G.A. Res. 36/106, 10 December 1981.

⁵⁶ PL 100-690, 102 Stat. 4267 (1988).

⁵⁷ *Id.*

⁵⁸ G.A. Res. 44/39, 4 December 1989.

3.c. The ICTY and ICTR

The United States was the driving force behind the establishment of the International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR), contributing the greatest share of political and financial muscle.

After the end of the Cold War, the U.S. became preeminent and gained a substantial degree of control, primarily through the Security Council, over UN mechanisms, providing an impetus to make greater use of them.⁵⁹ Thus, when faced with growing pressure to act in the face of widely publicized atrocities in the former Yugoslavia and Rwanda, the Clinton administration responded by promoting the creation of the ICTY and ICTR.⁶⁰

Both Tribunals have jurisdiction to prosecute war crimes, genocide, and crimes against humanity. Unlike the IMTs, violations of the *jus ad bellum* are not within their subject matter jurisdiction. As ad hoc Tribunals, they have limited territorial and temporal scope. While U.S. personnel are theoretically subject to prosecution by either Tribunal, the nature of the Tribunals' jurisdiction and the political framework within which the Tribunals operate make such an event unlikely, which reduced the likelihood of any U.S. opposition. Another factor bolstering U.S. support for the Tribunals is the ability of the U.S. to influence their operations. This influence, though limited, expresses itself through the staffing of the tribunals with a number of U.S. citizens, several of whom have been former government employees, and through the 'silent influence' of the U.S. – the mere fact that the staff of the tribunals are aware that without the support of the U.S., they would not exist.⁶¹

It is clear that without the support of the United States, the ICTs would never have come into being. The initial declarations of a number of Member States expressed

⁵⁹ Interview with David Scheffer, former U.S. Ambassador for War Crimes Issues, March 31, 2005; interview with former State Department official (name withheld), December 13, 2005; interview with former State Department official (name withheld), May 11, 2006.

⁶⁰ *Id.* But see D. Scheffer, "Three Memories from the Year of Origin: 1993," 2 J. Int'l Crim. Justice, No. 2, 353 (2004).

⁶¹ Interview with ICTY official (name withheld), April 3, 2005.

genuine skepticism at the idea of a Security Council-created international tribunal.⁶² The establishment of the ICTY was a U.S. idea, and it was the U.S. that pushed it through the Security Council.⁶³

Many observers credit then U.S. Ambassador to the UN Madeline Albright with the creation of the ICTY.⁶⁴ Her expressions of support rang of high ideals. Upon the establishment of the ICTY, she stated, “There is an echo in this chamber today. The Nuremberg principles have been reaffirmed. The lesson that we are all accountable to international law may finally have taken hold in our collective memory.”⁶⁵

U.S. President Clinton also expressed strong support for the ICTY and ICTR in a 1995 speech at the University of Connecticut:

*“With our purpose and with our position comes the responsibility to help shine the light of justice on those who would deny to others their most basic human rights. We have an obligation to carry forward the lessons of Nuremberg. That is why we strongly support the United Nations War Crimes Tribunals for the former Yugoslavia and for Rwanda”.*⁶⁶

Clinton reiterated his support in a 1997 address before the UN General Assembly, and also endorsed the creation of a permanent international criminal court, saying:

“[W]e must maintain our strong support for the United Nations war crime tribunals and truth commissions. And before the century ends, we should establish a

⁶² See Zacklin, “Bosnia and Beyond,” 34 Va. J. Int’l L. 277 (1994) (“In my twenty years of experience in the United Nations, I have never encountered as much skepticism as has surrounded the establishment of this Tribunal. Even now, though the Tribunal has actually been established, member states and United Nations organs continue to question whether this Tribunal will work.”)

⁶³ Interview with UN official (name withheld), March 27, 2005.

⁶⁴ *Id.*

⁶⁵ Madeleine K. Albright, *UN Security Council Adopts Resolution 808 on War Crimes Tribunal*, 4 U.S. Dept. of St. Dispatch No. 12, Art. 5 (March 22, 1993).

⁶⁶ William J. Clinton, *Remarks at the University of Connecticut in Storrs*, 31 Wkly. Comp. Pres. Docs. 1840, 1842 (Oct. 23, 1995).

*permanent international court to prosecute the most serious violations of humanitarian law...*⁶⁷

A number of official statements of support for the Tribunals have, of course, also been made by the former U.S. Ambassador at Large for War Crimes Issues Pierre Prosper, and his predecessor David Scheffer.⁶⁸

The ad hoc Tribunals, and the ICTY in particular, enjoy broad support in the U.S. Congress. Congressional support has been very important in putting pressure on the administration to act in support of the Tribunals.⁶⁹

U.S. support for the Tribunals has taken a variety of forms. In addition to the financial support that the U.S. provides as the largest contributing Member State of the United Nations,⁷⁰ the U.S. government has also provided significant additional direct support, including through in-kind contributions. The U.S. had also provided a large number of gratis personnel, until the Fifth Committee of the General Assembly put a stop to it.⁷¹

Its political support has been manifested in its continued advocacy for the Tribunals in UN fora, as well as through the creation of the Rewards for Justice Program⁷² and its continuing efforts to pressure states to cooperate with the Tribunals,

⁶⁷ William J. Clinton, *Remarks to the 52d Session of the United Nations General Assembly in New York City*, 33 Wkly. Comp. Pres. Docs. 1386, 1389 (Sept. 29, 1997).

⁶⁸ See various statements of support on the web-site of the US State Department Office of War Crimes Issues. (<http://www.state.gov/s/wci>)

⁶⁹ Interview with Nina Bang-Jensen, Executive Director of the Coalition for International Justice, June 16, 2005; interview with Richard Dicker, Human Rights Watch, March 9, 2005.

⁷⁰ By the end of 2006, U.S. financial support will total more than \$500 million. Statement of John Bellinger, May 11, 2006.

⁷¹ Interview with ICTY official (name withheld), April 3, 2005. Presumably, the Fifth Committee acted to ensure that the ICTY and ICTR could still be representative of the whole UN membership and that a handful of nations would not be over-represented in the staff

⁷² Through this program, the US government pays significant financial rewards in return for information leading to the apprehension of certain individuals indicted by the tribunals. See, e.g., Public Law 106-277 (October 2000).

including through conditionality. In addition, as noted above, a number of U.S. citizens are employed by the Tribunals, many in key and top-level positions.⁷³ As with many of these factors, this serves as an expression of U.S. support, as well as an influence in bolstering U.S. support.

Some advocates within the NGO community have perceived a cooling of U.S. support for the Tribunals in the era following the adoption of the Rome Statute creating the ICC, which they attribute to a cooling toward international justice generally.⁷⁴ Others, however, have perceived a shift of increasing support, which they attribute to the Bush administration's desire to demonstrate the value of ad hoc, Security Council controlled tribunals, and, in the case of the Rwanda Tribunal, the virtue of carrying out justice locally, in contrast to the ICC.⁷⁵ It seems more likely that both have occurred, and that they have resulted in a dynamic equilibrium of sorts that still equates with a generally supportive attitude.

Be that as it may, U.S. support of the ad hoc international criminal tribunals has been largely consistent. Official criticism has generally been limited to concerns about efficiency and accountability of staff members (particularly with respect to the ICTR),⁷⁶ which may be linked to a latent suspicion of international bureaucracies.

A possible exception to this otherwise consistent support would be situations in which the operations of the Tribunals have directly conflicted with U.S. foreign policy objectives. For example, the review of the NATO bombing of Serbia in 1999, undertaken by the Office of the Prosecutor (OTP) of the ICTY,⁷⁷ infuriated opponents of the ICC within the U.S. government.⁷⁸ Similarly, U.S. government officials were upset by the

⁷³ The US has always had a US-nominated judge on the ICTY, two of whom have been ICTY President. In addition, US nationals have occupied the largest number of senior positions in the OTP and Registry.

⁷⁴ *Id.*

⁷⁵ Interview with John Stompor, Human Rights First, March 8, 2005.

⁷⁶ See Opening Statement of Pierre-Richard Prosper Before the Committee on International Relations of the U.S. House of Representatives, February 28, 2002.

⁷⁷ See Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia (2000).

⁷⁸ Interview with former State Department official (name withheld), August 24, 2001.

indictment of Radovan Karadzic in the run-up to the Dayton Accords.⁷⁹ Some observers suggest that this attitude was also reflected in NATO's failure to arrest Karadzic and also Ratko Mladic -- two of the ICTY's most wanted.⁸⁰ Similar allegations have been made concerning US interference in the ICTR's efforts to prosecute members of the Rwandan Patriotic Front (RPF).⁸¹

3.d. The International Criminal Court

By the mid-1990s, it became apparent that the ad hoc approach was unsustainable; a phenomenon which some have dubbed 'tribunal fatigue'.⁸² From the U.S. perspective, this left two options – reverting to domestic systems or developing a permanent international criminal court.⁸³ At this time, the U.S. government appeared very supportive of the idea of establishing a permanent international criminal court.

In 1995, President Clinton expressed this support when he stated that “nations all around the world who value freedom and tolerance [should] establish a permanent international criminal court to prosecute, with the support of the United Nations Security Council, serious violations of humanitarian law.”⁸⁴ On July 30 1997, Congress expressed its support for the creation of an international criminal court in House Joint Resolution 89, reminding Clinton of his earlier expressions of support and calling on him “to

⁷⁹ *Id.*

⁸⁰ Interview with ICTY official (name withheld), March 27, 2005.

⁸¹ In her 2007 book, *Peace and Punishment*, former ICTY/R Spokeswoman Florence Hartmann claims that the US government pressured Carla del Ponte, former ICTR Prosecutor, to drop her investigations into alleged international crimes committed by members of the RPF. She asserts that the US acted at the request of Rwandan President Paul Kagame, former leader of the RPF, as a quid pro quo for Rwanda's consent to an Article 98 Agreement with the US. Hartmann also claims that del Ponte's refusal to halt the investigations is what led to the appointment of a new ICTR Prosecutor in September 2003. F. Hartmann, *Peace and Punishment* (2007). See also, S. Aulich, “Behind Curtains of International Justice,” interview with Florence Hartmann, *The European Courier*, October 11, 2007.

⁸² “Challenges Confronting International Justice Issues,” Address by David J. Scheffer at New England School of Law, Ambassador at Large for War Crimes Issues, January 14, 1998.

⁸³ Interview with David Scheffer, former U.S. Ambassador for War Crimes Issues, March 31, 2005.

⁸⁴ 31 Wkly. Comp. Pres. Docs. at 1843. At the same time, his reference to the “support of the Security Council” may indicate that he was envisioning a particular control mechanism for such a court.

continue to support and fully participate in negotiations at the United Nations to conclude an international agreement to establish an international criminal court.”⁸⁵

Nonetheless, there was a broad spectrum of views within the U.S. government, and each agency had its own concerns. While the State Department as a whole was in favor of establishing an international criminal court, there was resistance from the intelligence community and the Joint Chiefs of Staff.⁸⁶ Through inter-agency dialogue, some of the rough edges were smoothed, and inter-agency consensus in favor of establishing an international criminal court was ultimately achieved.⁸⁷

3.d.i. .The Rome Conference – June / July 1998

The U.S. delegation to the Rome Conference, led by then U.S. Ambassador at Large for War Crimes Issues David Scheffer, was the largest of any government. A number of U.S. agencies, including the Departments of Justice, State, Defense, Treasury, the Joint Chiefs of Staff, and the intelligence community, had all been involved in developing the U.S. position at Rome.⁸⁸

The U.S. delegation arrived in Rome with a number of concerns that it sought to be addressed during the conference. Broadly, they fell into three categories: the crimes that would fall within the subject matter jurisdiction of the court; the way in which cases would be triggered; and the exposure of U.S. personnel.⁸⁹ In general, the delegation engaged in what it considered to be a constructive approach – to influence the Conference to accede to U.S. demands in the hope of establishing a court acceptable to the United States.⁹⁰

⁸⁵ H.J. Res. 89, 105th Cong. (July 30, 1997).

⁸⁶ Interview with David Scheffer, former U.S. Ambassador for War Crimes Issues, March 31, 2005.

⁸⁷ *Id.*

⁸⁸ Sen. Subcomm. on Intl. Operations of the Comm. on For. Rel., *Is a U.N. International Criminal Court in the U.S. National Interest?*, 105th Cong. 11 (July 23, 1998).

⁸⁹ Interview with David Scheffer, former U.S. Ambassador for War Crimes Issues, March 31, 2005.

⁹⁰ *Id.*

To the NGO community, it was clear that the U.S. delegation wanted to limit the jurisdictional reach of the ICC.⁹¹ The delegation wanted either Security Council control or a clear exemption for nationals of non-states parties.⁹² The U.S. pushed particularly hard on three issues: bases of jurisdiction; *proprio motu* investigations by the prosecutor; and peacekeeper exemptions.⁹³ It resorted to particularly strong-arm tactics. According to NGO reports, U.S. officials were calling capitals threatening to cut off aid, going after the smaller, weaker states, especially in Africa.⁹⁴ Even if these states did not have much political weight, they had numerical significance.

While many of its concerns were addressed, a few key issues were not resolved to the satisfaction of the U.S. government. Thus, U.S. support cooled considerably following the adoption of the Rome Statute. Indeed, the U.S. was one of only a handful of states that voted against the adoption of the Rome Statute.

Shortly after the adoption of the Rome Statute, Scheffer testified before the Senate Foreign Relations Committee setting forth the reasons why the delegation voted against adoption. The U.S. objected to the breadth of the court's jurisdiction, in particular, its jurisdiction over nationals of non-states parties (absent a Security Council referral); the *proprio motu* power of the Prosecutor; the possibility of a definition for the crime of aggression that will not maintain the "vital linkage" with a prior decision by the Security Council; and the inclusion of a "no reservations" clause.⁹⁵

One of the other witnesses testifying at the Senate hearings on the International Criminal Court was John Bolton, introduced at the hearing as "Former Assistant Secretary of State for International Organization Affairs; Senior Vice President, American Enterprise Institute."⁹⁶ At the time of the 1998 hearing, Bolton had served in a prior administration but was then employed by the conservative think tank, American

⁹¹ Interview with diplomat (non-U.S.) involved in the Rome negotiations (name withheld), March 26, 2005.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.* at 12-15.

⁹⁶ *Id.* at 28.

Enterprise Institute (AEI). Bolton’s comments before the Committee demonstrate a very different attitude toward the idea of an international criminal court in general:

*“Unfortunately, support for the ICC concept is based largely on emotional appeals to an abstract ideal of an international judicial system, unsupported by any meaningful evidence, and running contrary to sound principles of international crisis resolution. Moreover, for some, faith in the ICC rests largely on an unstated agenda of creating ever more comprehensive international structures to bind nation states in general and one nation state in particular. Regrettably, the Clinton administration’s naive support for the ICC has left the U.S. in a worse position internationally than if we had simply declared our principled opposition in the first place”.*⁹⁷

He concluded that the U.S. “should oppose any suggestion that we cooperate, help, fund or generally support the work of the prosecutor. We should isolate and ignore the ICC.”⁹⁸ He described his policy proposal as the “Three Noes: no financial support, directly or indirectly; no collaboration; and no further negotiations with other governments to improve the statute.”⁹⁹ This approach was “likely to maximize the chances that the ICC will wither and collapse, which should be our objective.”¹⁰⁰

As articulated in a July 2002 CRS report, the U.S., and in particular the U.S. Congress, would have three options: “to withhold all cooperation from the ICC and its member states in order to prevent the ICC from becoming effective, to continue contributing to the development of the ICC in order to improve it, or to adopt a pragmatic approach based solely on U.S. interests.”¹⁰¹

3.d.ii. The Decision to Sign the Rome Statute

⁹⁷ *Id.*

⁹⁸ *Is a U.N. International Criminal Court in the U.S. National Interest?*, 105th Cong. at 31.

⁹⁹ *Id.* at 32.

¹⁰⁰ *Id.*

¹⁰¹ Jennifer Elsea, Congressional Research Service, *U.S. Policy Regarding the International Criminal Court* 3 (July 9, 2002).

The Rome Statute was open for signature until December 31, 2000. There was a split view within the U.S. government over whether or not to sign. The Department of Defense, and the Joint Chiefs of Staff in particular, did not want to sign; however, it should be noted that there was division even within the Pentagon.¹⁰²

On December 31, 2000, the last day that it was open for signature, and during the final days of the Clinton administration, the US signed the treaty. Upon signing, however, President Clinton made clear that the U.S. was not prepared to ratify the treaty in its present form, citing continuing concerns about “significant flaws” in the Statute. (This language was heavily negotiated in order to satisfy the Department of Defense.)¹⁰³ He remarked that despite the U.S. signature, “I will not, and do not recommend that my successor, submit the treaty to the Senate for advice and consent until our fundamental concerns are satisfied.”¹⁰⁴

Nonetheless, it appeared that the U.S. might ultimately be prepared to ratify the treaty if it was successful in obtaining certain concessions from the other signatory states, and it signed to maintain its seat at the discussion table.¹⁰⁵ The general attitude of the U.S. government at this time appeared to be that the ICC in principle was a good thing, but needed adjustments in order to be acceptable to the United States.¹⁰⁶

3.d.iii. The Bush Administration and Notification of Intent Not to Become a Party

Shortly after the Clinton administration signed the Rome Statute, George W. Bush was sworn in as the new U.S. President. Under his administration, the attitude of the U.S. government toward the ICC would shift from cautious support to outright opposition.

¹⁰² Interview former State Department official (name withheld).

¹⁰³ *Id.*

¹⁰⁴ William J. Clinton, *Statement on the Rome Treaty on the International Criminal Court*, 31 Wkly. Comp. Pres. Docs. 4 (Dec. 31, 2000).

¹⁰⁵ Interview with David Scheffer, former U.S. Ambassador for War Crimes Issues, March 31, 2005.

¹⁰⁶ *Id.*

Some observers believe that this shift was immediate, and that the position immediately became one of intense hostility. Others perceived a more gradual shift.

Those who perceived an immediate shift to intense hostility point to the greater wariness about international law and institutions on the part of Bush, Vice-President Dick Cheney, and a number of their appointees, including Donald Rumsfeld, Secretary of Defense,¹⁰⁷ and John Bolton, Under Secretary of State for Arms Control and International Security.¹⁰⁸ Further, Bolton, whose anti-ICC position was clearly set forth in the Senate hearings described above, had an influence greater than his title would ordinarily imply because he was perceived to have helped Bush win the 2000 presidential election.¹⁰⁹

This shift in the Executive must also be seen against the backdrop of prevailing skepticism on Capitol Hill. Most Democrats were at best tepid in their support for the ICC,¹¹⁰ and key Republican legislators, such as Tom DeLay and Jesse Helms, shared the Bush Administration's profound visceral hostility toward the ICC.

Some observers also attribute increasing opposition to the ICC to the perception that it is "too European" or "too human rights-based".¹¹¹ Certainly, Europe has become the dominant political supporter of the ICC. But there also seems to be a concern that the work of the ICC is more likely to be dominated by Continental European jurisprudence. The frequent references by the ICTY to jurisprudence of the European Court of Human Rights, for example, fuel this perception. Others have emphasized the central role of NGOs in the creation of the court, suggesting that NGOs 'hijacked' the Rome Conference and continue to influence developments from a position beyond the inter-state process. Still others cite the holding of the International Court of Justice in *Congo v. Belgium* that

¹⁰⁷ The Defense Department under Rumsfeld was firmly opposed to the ICC. See Rumsfeld's comments issued by the U.S. Department of Defense, May 6, 2002.

¹⁰⁸ Bolton was subsequently appointed U.S. Representative to the United Nations.

¹⁰⁹ Bolton was a key official in the Florida recount that secured Bush his election victory.

¹¹⁰ Very few Democrat legislators have gone on record as supporting U.S. adherence to the ICC Statute. Even Chris Dodd, who was the chief opponent of the anti-ICC provisions of the ASPA, described below, stated during the ASPA debates that he would not support U.S. ratification of the ICC Statute.

¹¹¹ Interview with Defense Department official (name withheld), March 29, 2005. Interview with State Department official (name withheld), March 31, 2005.

the customary law of Head of State immunity, while barring prosecution in foreign courts, may not bar prosecution before international criminal courts.¹¹²

In any event, a number of events that occurred after the change in administration seemed to reinforce, if not augment,¹¹³ the U.S. government's initial hostility toward the ICC. The most dramatic of these were the September 11, 2001 attacks on the Pentagon and World Trade Center. The War on Terror, launched in response to those attacks, led to a greater projection of U.S. armed force abroad. In this new context, the existence of the ICC, the subject matter jurisdiction of which potentially encompasses violations of the *jus ad bellum*, is seen as a possible restraint on that use of force. The 9/11 attacks also reinforced the U.S. notion of exceptionalism. The attacks seemed to confirm to the U.S. government that it was not similarly situated to other states.

The Rome Statute received its sixtieth ratification in April 2002. It thus became clear that the treaty would enter into force on July 1, 2002. The Bush administration had already indicated that it would not proceed with ratification. In a speech following the passage of the 2001 Commerce Budget Bill, Bush had this to say:

*“Section 630 prohibits the use of appropriated funds for cooperation with, or assistance or other support to, the [ICC]... [this] clearly reflects that Congress agrees with my Administration that it is not in the interests of the United States to become a party to the ICC treaty.”*¹¹⁴

On May 6, 2002, the Bush administration, through John Bolton, widely regarded as the chief opponent to the ICC within the US administration, sent a letter to the UN, as depository of the treaty, stating that “the United States does not intend to become a party

¹¹² Case Concerning the Arrest Warrant of 11 April 2000 (*Dem. Rep. Congo v. Belgium*), 2002 ICJ 3 (Feb. 14).

¹¹³ Some observers have indicated that U.S. opposition could not be more intense than it was from the inception of the Bush Administration. Interview with NGO official (name withheld), December 11, 2006.

¹¹⁴ George W. Bush, *Statement on Signing the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 2002*, Wkly. Comp. Pres. Docs. 1723, 1724 (Nov. 28, 2001).

to the [ICC] treaty. Accordingly, the United States has no legal obligations arising from its signature on December 31, 2000.”¹¹⁵ The purpose of this statement was presumably two-fold: to make clear U.S. opposition to ICC jurisdiction over U.S. nationals, and to relieve itself of any legal obligation it may have undertaken upon signing the treaty.¹¹⁶

On that same date, Marc Grossman, Under Secretary of State for Political Affairs, spoke at the Center for Strategic and International Studies about the U.S. and the International Criminal Court. In his speech, Grossman said that the U.S. decision to withdraw its signature from the treaty was not an easy decision to make, and “after years of working to fix this flawed statute, and having our constructive proposals rebuffed, it [was] our only alternative.”¹¹⁷ He stated that the principles that the U.S. stands for —such as “states, not international institutions are primarily responsible for ensuring justice in the international system . . . [and] the best way to combat these serious offenses is to build domestic judicial systems, strengthen political will and promote human freedom”¹¹⁸— are not consistent with the Rome Statute. Reflecting the U.S. concerns expressed at Rome, Grossman listed four critiques of the ICC saying that: it “undermines the role of the United Nations Security Council in maintaining international peace and security,”¹¹⁹ “[it] creates a prosecutorial system that is an unchecked power,”¹²⁰ “[it] asserts jurisdiction over citizens of states that have not ratified the treaty . . . [which] threatens U.S. sovereignty,”¹²¹ and “[it] is built on a flawed foundation . . . [and] these flaws leave it open for exploitation and politically motivated prosecutions.”¹²² He concluded by stating that “the United States respects the decision of those nations who

¹¹⁵ Press Release, John R. Bolton, Under Sec’y of State for Arms Control and Int’l Sec., *International Criminal Court: Letter to UN Secretary General Kofi Annan* (May 6, 2002), at <http://www.state.gov/r/pa/prs/ps/2002/9968.htm>.

¹¹⁶ Vienna Convention on the Law of Treaties, art. 18.

¹¹⁷ Press Release, Marc Grossman, Under Sec’y for Political Affairs, *American Foreign Policy and the International Criminal Court* (May 6, 2002), at <http://www.state.gov/p/9949.htm>.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

have chosen to join the ICC; but they in turn must respect our decision not to join the ICC or place our citizens under the jurisdiction of the court.”¹²³

Pierre Prosper, in his capacity as Ambassador for War Crimes Issues, held a press briefing the same day to state that “[t]he President has made clear that – what he wanted to do today was to make our intentions clear and to not take aggressive action or wage war, if you will, against the ICC or the supporters of the ICC.”¹²⁴ The remarks of Grossman and Prosper appeared to indicate that the U.S., while not supporting the ICC, would refrain from interfering in the ICC’s operations in relation to the States Parties to the Rome Statute. In sum, over the course of seventeen months, the U.S. attitude appeared to shift from cautious optimism to strict neutrality (non-supportive, non-interference).

3.d.iv. .Attempts to Exempt U.S. Nationals from ICC Prosecution

The desire to shield U.S. service members from prosecution before non-U.S. courts is one of the oldest elements of U.S. policy toward the ICC. For decades, the U.S. has been careful to include jurisdictional exemptions for its forces in Status of Forces Agreements. However, efforts to shield nationals from possible ICC prosecution have been undertaken with unusual breadth and fervor.

By the time of the withdrawal of signature, it had begun to pursue aggressively a strategy for limiting the exposure of all U.S. citizens to the jurisdiction of the ICC. According to the State Department fact sheet on the ICC, the U.S. would “work together with other nations to avoid any disruptions that might be caused by the treaty. The treaty itself provides for this, specifically in Article 98. We intend to pursue Article 98 agreements worldwide.”¹²⁵ By June 2005, the government, at times applying tremendous

¹²³ *Id.*

¹²⁴ Press Release, Pierre-Richard Prosper, U.S. Ambassador for War Crimes Issues, *Issues Update* (May 6, 2002), at <http://fpc.state.gov/9965.htm>.

¹²⁵ Fact Sheet, Bureau of Political-Military Affairs, *The International Criminal Court* (Aug. 2, 2002), at <http://www.state.gov/t/pm/rls/fs/2002/23426.htm>.

political and financial pressure, had persuaded 100 states to sign Article 98 agreements, whereby those states would undertake not to surrender U.S. citizens to the ICC.

The U.S. also worked through the Security Council to obtain an exemption for peacekeepers from non-States Parties. After intense pressure tactics by the U.S., including vetoing the renewal of a peacekeeping operation, the Security Council on July 12, 2002 adopted Resolution 1422, which requested that the ICC refrain from proceeding with investigation or prosecution of any case “involving current or former officials or personnel from a contributing State not a Party to the Rome Statute over acts or omissions relating to a United Nations established or authorized operation...”¹²⁶ Resolution 1422, which was adopted under Chapter VII of the UN Charter, also “decide[d] that Member States shall take no action inconsistent with”¹²⁷ this request. This Resolution was renewed by the Security Council the following July. However, in the wake of revelations about egregious detainee abuse by U.S. forces at Abu Ghraib, the U.S. was unable to secure a second renewal in 2004.

At the same time, the U.S. Congress was preparing legislation to support these efforts. In August 2002, Bush signed into law the American Servicemembers' Protection Act (ASPA).¹²⁸ This legislation, dubbed the "Hague Invasion Act" by human rights NGOs, contains provisions restricting U.S. cooperation with the ICC;¹²⁹ making U.S. support of peacekeeping missions largely contingent on achieving ICC exemption for all U.S. personnel;¹³⁰ cutting off military assistance to states that refuse to sign Article 98 agreements;¹³¹ and granting the President permission to use “all means necessary and

¹²⁶ S.C. Res. 1422 ¶ 1, U.N. Doc. S/RES/1422 (July 12, 2002).

¹²⁷ *Id.* at ¶ 3.

¹²⁸ According to some observers, proponents of the ASPA had introduced in the hope of preventing the ICC from coming into existence. Indeed, the ASPA would likely have been passed in the fall of 2001, before the ICC Statute attracted sufficient ratifications to enter into force, had it not been for a temporary change in Senate leadership that saw the Democrats gain control just long enough to drop the bill from that session’s legislative agenda. Thus, the ASPA could not be passed until August of the following year, by which time the ICC Statute had entered into force.

¹²⁹ 22 U.S.C.A. § 7423 (West 2002).

¹³⁰ *Id.* at § 7424.

¹³¹ *Id.* at § 7426.

appropriate”¹³² to free U.S. citizens and allies from ICC-ordered detention or imprisonment. The legislation, however, contains waivers that enable the President to avoid application of these measures where necessary.¹³³ The scope of such considerable measures was increased in December 2004 with the enactment of the so-called Nethercutt Amendment, as part of the U.S. Foreign Appropriations Bill. This legislation permits the termination of other forms of economic aid (not limited to military assistance). In introducing the legislation, Senator Jesse Helms stated:

*“[The purpose of the ASPA is] to protect [Americans] from a U.N. Kangaroo Court where the United States has no veto. ... Let me state for the record, to be absolutely certain there is no mistake made about it, (1) this amendment will prohibit U.S. cooperation with the court, including use of taxpayer funding or sharing of classified information; (2) it will restrict a U.S. role in peacekeeping missions unless the United Nations specifically exempts U.S. troops from prosecution by this international court; (3) it blocks U.S. aid to allies unless they too sign accords to shield U.S. troops on their soil from being turned over to the court; and (4) it authorizes the President to take any necessary action to rescue U.S. soldiers, any service man or woman, improperly handed over to that Court”.*¹³⁴

Helms also expressed doubts as to the impartiality of the ICC, stating that “these crimes and these cases would be tried before judges who could be from North Korea, Cuba or other unfriendly places.”¹³⁵

The U.S. administration has relied on this legislation to cut off aid to a number of U.S. allies,¹³⁶ at times to the detriment of other U.S. foreign policy objectives. For

¹³² *Id.* at § 7427.

¹³³ In addition, pursuant to a Senate amendment, Section 2015 of the law expressly permits the U.S. to render assistance to international efforts to bring to justice foreign nationals accused of genocide, war crimes, or crimes against humanity.

¹³⁴ Congressional Record – Senate, at s10042, October 2, 2001.

¹³⁵ 140 Cong. Rec. S96, 101 (Jan. 26, 1994).

¹³⁶ Washington has cut off military aid to Mexico, Costa Rica, Venezuela, Ecuador, Peru, Bolivia, Paraguay, Uruguay, Brazil, Barbados, St. Vincent & The Grenadines, Trinidad & Tobago, Croatia, Serbia,

example, the U.S. terminated military assistance to Trinidad and Tobago, which inhibits them from preventing illegal narcotics from getting into the United States.¹³⁷

3.d.v.. Increasing Expressions of Hostility Toward the ICC

By this time, the U.S. attitude toward the ICC had become one of outright opposition. In early 2005, ICC supporters within the NGO community described the U.S. attitude toward the ICC as “intensely hostile.”¹³⁸ One NGO official noted that he was “baffled by the degree to which the U.S. government has been willing to slap around long-term allies like Jordan and the Baltic states for their being Parties to the Rome Statute.”¹³⁹

Indeed, the rhetoric of U.S. government officials shifted increasingly toward the position outlined by Bolton in 1998. Bolton’s views had been aired in a 1999 speech drafted for consideration by then President Clinton, and for the purposes of analyzing possible foreign policy options. Bolton, then still a Senior Vice President for the AEI, wrote for Clinton’s use:

“I plan to say nothing more about the ICC during the remainder of my administration, I have, however, instructed the secretary of state to raise our objections to the ICC on every appropriate occasion, as part of our larger campaign to assert American interests against stifling, illegitimate, and unacceptable international agreements. The plain fact is that additional ‘fixes’ over time to the ICC will not alter it’s

Montenegro, Malta, Mali, Niger, Kenya, Tanzania, Lesotho, South African, and Namibia. Jess Bravin, “U.S. Warms to Hague Tribunal – New Stance Reflects Desire to Use Court to Prosecute Darfur Crimes,” *The Wall Street Journal*, June 14, 2006.

¹³⁷ Interview with Richard Dicker, Human Rights Watch, March 9, 2005. See also, statements of military officials, *infra*.

¹³⁸ *Id.*

¹³⁹ *Id.*

multiple inherent defects, and we will not advocate any such efforts. We will leave the ICC to the obscurity it so richly deserves”.¹⁴⁰

Although this policy was rejected by Clinton, it seems to have been given some life under the Bush administration. During his term, Bush has made a number of statements that demonstrate his administration’s opposition to the ICC. To troops preparing to deploy for Afghanistan, he proclaimed:

*“As we prepare our military for action, we will protect our military from international courts ... with agendas of their own. ... You might have heard about a treaty that would place American troops under the jurisdiction of something called the [ICC]. The United States cooperates with many other nations to keep the peace, but we will not submit American troops to prosecutors and judges whose jurisdiction we do not accept.”*¹⁴¹

In his campaign for re-election against Senator John Kerry, he reminded the public that he had “made a decision not to join the International Criminal Court in The Hague, which is where our troops could be brought to -- brought in front of a judge, an unaccounted judge. I don't think we ought to join that.”¹⁴²

As noted above, Members of Congress have also expressed deep opposition to the ICC. In June 2005, then House Majority Leader Tom DeLay remarked:

¹⁴⁰ John Bolton, *Speech Two: Reject and Oppose the International Criminal Court* 36, http://www.cfr.org/content/publications/attachments/International_Criminal_Court.pdf (1999).

¹⁴¹ George W. Bush, *Remarks to the 10th Mountain Division at Fort Drum, New York*, Wkly. Comp. Pres. Docs. 1189, 1231 (July 19, 2002).

¹⁴² George W. Bush, *Presidential Debate in St. Louis, Missouri*, Wkly. Comp. Pres. Docs. 2289, 2293 (Oct. 15, 2004). See also Jess Bravin, “U.S. Warms to Hague Tribunal – New Stance Reflects Desire to Use Court to Prosecute Darfur Crimes,” *The Wall Street Journal*, June 14, 2006 (quoting Bush during a 2004 presidential debate as stating that the ICC is a “body based in the Hague where unaccountable judges and prosecutors can pull our troops or diplomats up for trial”). The fact that Bush mentioned the ICC twice during the presidential debates indicates that his campaign regarded this as a winning issue.

*“The ICC is a threat not only to the sovereignty of the United States and the constitutional rights of American citizens; it is an overreaching distortion of the United Nations Charter and its mission. The ICC would, in effect, disregard not only Federal and State laws, but also the Uniform Code of Military Justice, thereby establishing a rogue court in which foreign judges can indict, try, and convict American troops for broadly defined and openly interpreted crimes, all without any of the fundamental legal rights guaranteed by the United States Constitution ... The United Nations' mission is to protect and promote human rights around the globe, to exhort with clarity and courage the principles of justice and liberty to those who would seek to oppress them. The ICC, on the contrary, could be an instrument of undemocratic score-settling, a shadowy kangaroo court in which despots and their diplomats can humiliate and even imprison the men and women who have the courage to do the work the U.N. refuses to do”.*¹⁴³

3.d.vi. Abu Ghraib

As noted above, a consistent theme in the U.S. attitude toward the ICC under both the Clinton and Bush administrations has been the desire to limit the exposure of U.S. personnel to prosecution by the ICC. However, this central concern seems to have broadened under the Bush administration. While the Clinton administration focused on the possibility of prosecution of U.S. troops, the Bush administration seemed to be concerned about prosecutions of leadership as well.¹⁴⁴ Arguably, the decision to invade Iraq in the face of a large international opposition and lacking explicit UN endorsement may have played a role in this shift.

From the perspective of the U.S. government, the calls for criminal prosecution of senior U.S. officials for the Abu Ghraib crimes highlight the problems with the ICC system of complementarity. There is serious concern within the U.S. government that if the ICC had jurisdiction in this case, it could conclude that there has been an

¹⁴³ Congressional Record, at H4634, June 16, 2005.

¹⁴⁴ Interview with former State Department official (name withheld); interview with State Department official (name withheld), November 3, 2005.

unwillingness on the part of the U.S. to prosecute senior officials under a theory of complicity or superior responsibility.¹⁴⁵ Admittedly, there are segments of the international community, both governmental and non-governmental, that would reach such a conclusion, whether pursuant to political motivations or otherwise. As the U.S. has little confidence in the ICC's ability to insulate itself from these perspectives and even fears that ICC officials may share them, its hostility toward the ICC increases.

Yet, after Abu Ghraib, it became increasingly difficult for the U.S. to publicly cite fear of politically motivated prosecutions as an objection to the ICC. It was forced to strengthen and emphasize its more principled objections.

3.d.vii. Strengthening Preference for Resolution at the National Level

U.S. hostility toward the ICC combined with other perennial national concerns, including shielding U.S. personnel from prosecution by foreign courts and fear of interference with national policy objectives, to create a new policy line – that an international criminal court is not a good thing, even in principle, and that prosecution of atrocities should be returned to the domestic sphere, or as close as possible to that sphere.

As stated by Prosper before the Senate Committee on the Judiciary:

“[T]he international practice should be to support sovereign states seeking justice domestically when it is feasible and would be credible ...¹⁴⁶ International tribunals are not and should not be the courts of first redress, but of last resort. When domestic justice is not possible for egregious war crimes due to a failed state or a dysfunctional judicial system, the international community may through the Security Council or by consent step in on an ad hoc basis as in Rwanda and Yugoslavia...”¹⁴⁷

¹⁴⁵ *Id.*

¹⁴⁶ Press Release, Pierre-Richard Prosper, U.S. Ambassador for War Crimes Issues, *War Crimes in the 21st Century* [¶ 31] (Oct. 26, 2004), at <http://www.state.gov/s/wci/rm/38309.htm>.

¹⁴⁷ Press Release, Pierre-Richard Prosper, U.S. Ambassador for War Crimes Issues, *Address at the Peace Palace in the Hague* [¶ 8] (Dec. 19, 2001), at <http://www.state.gov/s/wci/rm/8053.htm>.

He summarized the Bush administration's policy as "encourage[ing] states to pursue credible justice rather than abdicating the responsibility. Because justice and the administration of justice are a cornerstone of any democracy, pursuing accountability for war crimes while respecting the rule of law by a sovereign state must be encouraged at all times."¹⁴⁸

Where there is no possibility for credible justice at the national level, Prosper has indicated a U.S. preference for regional solutions. This policy-line was manifested in U.S. proposals to find a regional solution to the situation in Darfur.

3.d.viii. The Darfur Referral

In September 2004, then U.S. Secretary of State Colin Powell announced the view of the U.S. government that the killings in Sudan's Darfur region constitute genocide.¹⁴⁹ The U.S. led international condemnation of the atrocities and called on the United Nations to initiate a full investigation.¹⁵⁰

The following week, in Resolution 1654, the UN Security Council requested the Secretary-General to "rapidly establish an international commission of inquiry in order immediately to investigate reports of violations of international humanitarian law and human rights law in Darfur by all parties, to determine also whether or not acts of genocide have occurred, and to identify the perpetrators of such violations with a view to ensuring that those responsible are held accountable."¹⁵¹ Shortly thereafter, the International Commission of Inquiry on Darfur was established and began working.

¹⁴⁸ Press Release, Pierre-Richard Prosper, U.S. Ambassador for War Crimes Issues, *The Campaign Against Terrorism: Military Commissions and the Pursuit of Justice* [¶ 22] (Dec. 4, 2001), at <http://www.state.gov/s/wci/rm/8584.htm>.

¹⁴⁹ The U.S. House of Representatives had two months earlier similarly declared that genocide was occurring in Darfur.

¹⁵⁰ Secretary Colin L. Powell, Testimony Before the Senate Foreign Relations Committee Washington, DC, September 9, 2004.

¹⁵¹ REF?

In its January 2005 report to the Secretary-General, the Commission “strongly recommend[ed] that the Security Council immediately refer the situation of Darfur to the International Criminal Court, pursuant to article 13(b) of the ICC Statute.”¹⁵²

On March 31, 2005, after months of intense negotiations, the UN Security Council by its Resolution 1593 referred the situation in Darfur to the ICC.¹⁵³ In the negotiations leading up to the adoption of that resolution, the U.S. demonstrated strong resistance to the referral, leading some observers to conclude that U.S. opposition to the ICC had become overtly hostile to the point of compromising the ability of the UN to respond to the atrocities being committed.¹⁵⁴

However, the official position of the United States was simply that the ICC was not a suitable forum. The United States had instead proposed a "Sudan Tribunal" that would be “created and mandated by a U.N. Security Council resolution and administered by the U.N. in conjunction with the African Union (AU)...”. The proposed tribunal, U.S. officials said, “would allow the AU to continue its leadership role... [and] would contribute to the development of the African Union's overall judicial capacity on the continent.”¹⁵⁵ This approach fit in with the U.S. policy of delivering justice closer to the victim community and would avoid what U.S. officials described as the ‘colonial’ approach of Europeans judging Africans.¹⁵⁶

¹⁵² Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, January 25, 2005. As Sudan is not a party to the Rome Statute and would not otherwise consent to ICC jurisdiction over Darfur, a Security Council resolution was required to bring the situation within the Court’s competence.

¹⁵³ S.C. Res. 1593 ¶ 1, U.N. Doc. S/RES/1593 (March 31, 2005).

¹⁵⁴ Interview with diplomat (non-U.S.) involved in the negotiations (name withheld), March 26, 2005; interview with John Stompor, Human Rights First, March 8, 2005; “U.S. Thwarts Justice for Darfur,” Human Rights Watch, March 24, 2005.

¹⁵⁵ Press Release, Judy Alta, Washington File United Nations Correspondent, *African Union Tribunal Proposed for War Crimes in Darfur* [¶¶ 5-6] (Feb. 2005), at <http://usinfo.state.gov/af/Archive/2005/Feb/10-767752.html>.

¹⁵⁶ Interview with State Department official, March 31, 2005.

This proposal took a variety of forms.¹⁵⁷ Under one version, it was proposed that the “Sudan Tribunal” would eventually be folded into the emerging, but not yet established, African Court of Human and Peoples’ Rights. The U.S. was prepared to fully fund this Tribunal.¹⁵⁸

These proposals were seen by other members of the Security Council as an attempt by the U.S. to marginalize the ICC, belying an intention to prevent the ICC from becoming a credible institution.¹⁵⁹ This perception was reinforced when Prosper, explaining the U.S. position, bluntly stated, “We don’t want to be party to legitimizing the ICC.”¹⁶⁰

It is difficult to ascertain the true design of the U.S., as there seems to be no single, uniform intention. In all probability, the amalgamation of views included those who wanted to undermine the ICC, those who were convinced of the need to bolster the African Union and to conduct prosecutions on the regional level, and those who simply wanted to see the African Court of Human and Peoples’ Rights get off the ground.

Ultimately, the U.S. failed to garner support for its proposed “Sudan Tribunal,” and it allowed the referral to go through by abstaining. However, the U.S. achieved a substantial concession in exchange for agreeing to abstain. Security Council resolution 1593 provided far more than a mere exemption from ICC jurisdiction of nationals of states not parties to the treaty establishing the Court. In paragraph 6 of that resolution, the Council decided that

“nationals, current or former officials or personnel from a contributing State outside Sudan which is not a party to the Rome Statute of the International Criminal Court shall be subject to the exclusive jurisdiction of that contributing State for all

¹⁵⁷ “U.S. Proposes New Regional Court to Hear Charges Involving Darfur, Others Urge ICC,” 99 Am. J. Int’l L. 501 (2005); U.S. Department of State Daily Press Briefing, February 1, 2005.

¹⁵⁸ Remarks of Secretary of State Condoleezza Rice Before the Senate Foreign Relations Committee, February 16, 2005.

¹⁵⁹ Interview with diplomat (non-U.S.) involved in the negotiations (name withheld), March 26, 2005.

¹⁶⁰ Human Rights Watch, *Human Rights News, U.S. Fiddles Over ICC While Darfur Burns* [¶ 6], <http://hrw.org/english/docs/2005/01/31/usint10091.htm> (Jan. 31, 2005).

*alleged acts or omissions arising out of or related to operations in Sudan... unless such exclusive jurisdiction has been expressly waived by that contributing State...*¹⁶¹

In other words, rather than simply referring the case to the ICC, while exempting from its jurisdiction peacekeepers from states not parties to the ICC treaty, the Security Council at the behest of the United States government decided that *only* those states would have jurisdiction. In doing so, the Council not only purported to limit the jurisdiction of the ICC, but also to circumscribe the jurisdiction of all Member States of the United Nations. While the reservation of “exclusive jurisdiction” is commonly found in bilateral arrangements between troop contributing states and host states, the effect of such a provision is to deprive the host state of jurisdiction without affecting the jurisdiction of other states. Resolution 1593 purports to instantly multilateralize this obligation.¹⁶² This remarkable use of Security Council power to legislate for the entire international community effectively limits the rights of all countries to exercise jurisdiction over international crimes even where their national was the victim, absent an express waiver by the contributing state.

This provision was likely included in order to stave off attempts to bring cases in foreign domestic courts under a theory of universal jurisdiction. Thus, the breadth of this provision resonates beyond U.S. opposition to the ICC, and indicates broader concerns about exposure of U.S. personnel to prosecutions anywhere in the world.

However, in the months following this diplomatic defeat in the Security Council, the U.S. view of the Darfur referral seemed to shift slightly. Indeed, U.S. government officials at times seemed to express satisfaction with the referral. For example, addressing an international conference in September 2005, State Department Legal Adviser John Bellinger stated:

“Even on issues such as those involving the ICC, where the United States has voiced political concerns, we have undertaken to work with the international community through the Security Council to a satisfactory resolution. Thus, Secretary Rice worked

¹⁶¹ S.C. Res. 1593, *supra* note 49, ¶ 6.

¹⁶² *Id.*

*hard last spring to find an acceptable formula for a Security Council resolution to address the issue of accountability in Sudan. While the United States continues to maintain fundamental objections to the ICC, we did not veto UNSCR 1593, which referred the situation in Darfur to the ICC, because we recognized the need for the international community to work together to end the atrocities in Sudan and speak with one voice to bring to account the perpetrators of those crimes”.*¹⁶³

While such statements may have initially been attempts to save face following diplomatic defeat, they may also have fed back into the U.S. attitude perhaps contributing to yet another shift toward a more moderate stance toward the ICC.¹⁶⁴

In November 2005, the U.S. Assistant Secretary of State Jendayi Frazer indicated a willingness on the part of the U.S. to assist the ICC in Darfur prosecutions. On November 1, she told the House International Relations Committee "that if the ICC requires assistance, the United States stands ready to assist... we don't want to see impunity for any of these actors... we stand ready to assist."¹⁶⁵

By the spring of 2006, the U.S. government began to make other noises questioning the wisdom of its earlier approach to the ICC. With regard to aid cut-offs required by the ASPA, U.S. Secretary of State Condoleeza Rice acknowledged in March 2006 that the U.S. government may be “shooting ourselves in the foot,” expressly

¹⁶³ Press Release, John B. Bellinger, III, U.S. Dept. of State Legal Adviser, *United Nations Security Council Resolutions and the Application of International Humanitarian Law, Human Rights and Refugee Law* [¶10] (Sept. 9, 2005), at <http://www.usmission.ch/Press2005/0909BellingerIHLSanRemo-2.htm>.

¹⁶⁴ See also the Statement of the U.S. Representative during the 53rd Plenary Meeting of the General Assembly, A/60/PV.53, 23 November 2005 (“While our concerns about the Court have not changed, we would like to move beyond divisiveness on the issue. . . .While we have preferred a different mechanism [for Darfur], we believed that it was important for the international community to speak with one voice and to act decisively. Consequently, we accepted referral of the Darfur situation by the Security Council to the Court. Those events demonstrate that there can be common ground when both sides are willing to work constructively.”)

¹⁶⁵ H.R. Subcomm. on Africa, Global Human Rights, and Intl. Operations of the Comm. On Intl. Relations, *Sudan: Losing Ground on Peace?*, 109th Cong. 16, 29 (Nov. 1, 2005).

acknowledging that the ASPA requirements interfered with other U.S. foreign policy objectives:

*“[...] we do have certain statutory requirements concerning the ICC. I think you're probably aware of, as I testified yesterday, that we're looking at the issues concerning those situations in which we may have, in a sense, sort of the same as shooting ourselves in the foot, which is, I guess, what we mean. By having to put off aid to countries with which we have important counterterrorism or counterdrug or in some cases, in some of our allies, it's even been cooperation in places like Afghanistan and Iraq. And so I think we just have to look at it. And we're certainly reviewing it and we'll consult with Congress about it. But I think it's important from time that we take a look to make sure that we're not having a negative effect on the relationships that are really important to us from the point of view of getting our security environment -- improving the security environment”.*¹⁶⁶

In a recent interview, State Department Legal Advisor John Bellinger gave further support to the view that the ICC is no longer regarded as a “rogue court,” acknowledging that “it has a role to play in the overall system of international justice.”¹⁶⁷

3.d.ix The Call to Move the Taylor Prosecution to the Hague

On March 29, 2006, Former Liberian President Charles Taylor was arrested and surrendered to the Special Court for Sierra Leone Shortly after his arrest, amid concerns for regional stability prompted by his impending prosecution, the U.S. called for his trial to be moved to the Hague. Pursuant to this proposal, Taylor would still be prosecuted by the Special Court, but the trial would take place using the facilities of the ICC in the

¹⁶⁶ Press Release, Condoleezza Rice, Sec. of State, *Trip Briefing* (March 10, 2006), at <http://www.state.gov/secretary/rm/2006/63001.htm>.

¹⁶⁷ Jess Bravin, “U.S. Warm to Hague Tribunal – New Stance Reflects Desire to Use Court to Prosecute Darfur Crimes,” *The Wall Street Journal*, June 14, 2006.

Hague. Taylor was transferred to the ICC Detention Centre in the Hague on June 20, 2006. The U.S. government was heavily involved in facilitating the transfer.¹⁶⁸

The announcement of this proposal by the U.S. government stands in sharp contrast to its zealous attempts to prevent the Darfur referral, as well as its general pattern of attempts over the past few years to remove any reference to the ICC in, for instance, resolutions and other official documents of intergovernmental organizations. Previously, the U.S. objective of preventing official acts that could be perceived to legitimize the ICC in any way seemed to prevail above most other competing interests. It now appears that the importance of this objective may have diminished.

The transfer of the Taylor proceedings to The Hague may also provide a vehicle for improving relations between the U.S. government and the ICC. Already U.S. officials have held numerous discussions with ICC officials in order to facilitate the transfer.¹⁶⁹ These discussions have required the establishment of new contacts and have also served to strengthen existing relationships among officials, broadening the prospects for other forms of cooperation between the two entities.

3.d.x The Moderation of the U.S. Position

The Darfur referral and the transfer of the Taylor case signal a new phase in the U.S. relationship with the ICC. Moreover, other recent statements and actions by the U.S. Executive demonstrate increasing recognition of the value of the ICC.

In June 2006, U.S. Assistant Secretary of State for African Affairs Jendayi Frazer publicly acknowledged the constructive role of the ICC.¹⁷⁰ Speaking at a press conference in Uganda about the situation there, she noted that “the ICC indictment [of rebel Leader Joseph Kony] is extremely important and it is part of the process of accountability, and ending impunity...”¹⁷¹ She also cited the case of Charles Taylor as evidence that “you can achieve peace and accountability.” Later that year, the U.S.

¹⁶⁸ Interview with State Department official (name withheld), July 21, 2006.

¹⁶⁹ Interview with State Department official (name withheld), July 21, 2006.

¹⁷⁰ Presidential waiver, October 2, 2006.

¹⁷¹ Transcript of June 20, 2006 press conference, Entebbe, Uganda.

Ambassador to Uganda explained that the U.S. does not perceive the ICC arrest warrants to be obstacles to peace talks. “[I]nstead,” he remarked, “it is the reason why we have peace talks today.”¹⁷²

The U.S. Administration has also recently waived many of the ASPA and Nethercutt funding restrictions imposed on countries that have failed to become parties to bilateral non-surrender agreements.¹⁷³

An increasing openness toward the International Criminal Court can be found in Congress, too. In September 2006, Congress approved legislation eliminating some of the aid restrictions imposed by the ASPA on states parties to the ICC Statute. Individual members of Congress have also recently made statements in support of the ICC.¹⁷⁴

Moderation of the U.S. position is facilitated by a number of factors, including the transfer of the Taylor case and the need to retrospectively characterize the Darfur referral as a positive development. Another major factor has been the fact that all of the ICC cases to date dovetail with U.S. foreign policy interests. All of the situations before the Court – the Central African Republic, Uganda, the Congo, and Darfur – are situations where the U.S. supports external scrutiny. Further, three of the situations – the Central African Republic, the Congo, and Uganda -- were brought to the ICC by the governments of those states. As such, the Prosecutor is not intervening in a situation where the

¹⁷² “ICC-phobic U.S. offers court rare praise for Uganda rebel charges,” Agence France Presse quoting Ambassador Steven Browning, 16 November 2006.

¹⁷³ A number of countries have refused to become parties to these agreements. The U.S. military has been influential in securing waivers for these states. See Statements of General Brantz J. Craddock Before the Senate Armed Services Committee, March 14, 2006 & September 19, 2006, and House Armed Services Committee, March 7, 2005 & March 16, 2006. It encouraged the granting of waivers by pointing out that China has begun providing military assistance to these countries.

¹⁷⁴ See “A Shift in the Debate on International Court; Some U.S. Officials Seem to Ease Disfavor,” The Washington Post, November 7, 2006 (quoting Senator Patrick Leahy as stating, “The ICC has refuted its critics, who confidently and wrongly predicted that it would be politicized and manipulated by our enemies to prosecute U.S. soldiers.”); “Rescue Darfur Now,” Washington Post Op-Ed by Senator John McCain and former Senator Bob Dole (calling on the U.S. government to “publicly remind Khartoum that the International Criminal Court has jurisdiction to prosecute war crimes in Darfur...”).

government would prefer to handle the matter domestically.¹⁷⁵ The fourth situation, Darfur, was undertaken at the behest of the Security Council, which, from the U.S. perspective, has been the preferred mode of ICC operation.

This change of attitude has also coincided with personnel changes within the U.S. government. The neoconservatives have lost influence. Rumsfeld has resigned. Delay has left Congress. Helms has died. Bolton failed to win the Congressional support necessary to retain his appointment as U.S. Representative to the United Nations. The waning of their influence, and their ideological objection to the very idea of an international criminal court, has allowed room for pragmatists to assume a greater role.

In sum, since 1998, the U.S. has shifted through each of the options identified by the CRS and noted above -- from constructive engagement, to firm opposition, to pragmatic exploitation.

In the early 1990s, the U.S. was a supporter of the idea of a permanent international criminal court. After the Rome Conference, at which the United States was not completely successful in having its concerns addressed, U.S. support waned. Nonetheless, it remained engaged in the preparations for the establishment of the Court, and ultimately signed the Rome Statute to enable continued participation.

U.S. support lessened upon the election of George W. Bush, who brought with him an administration that was generally anti-internationalist. This sentiment was augmented following the attacks of September 11, 2001. By the spring of 2002, opposition was clear, while it maintained an official position of neutrality, as expressed by U.S. officials upon the withdrawal from the Rome Statute. This opposition became increasingly visible, manifesting itself in the passage of legislation and the adoption of diplomatic strategies that appeared to constitute frontal attacks against the ICC.

Recent developments, including the Darfur referral, the transfer of the Taylor trial to The Hague, and the waiver of ASPA restrictions, may indicate a lessening propensity

¹⁷⁵ Indeed, the Prosecutor has been criticized for being overly cautious in his approach. The Pre-Trial Chambers have resorted to holding hearings to pressure the Prosecutor to act. See, e.g., Decision Inviting Observations in Application of Rule 103 of the Rules of Procedure and Evidence, ICC-02/05-10, 24.07.2006.

for ideologically-rooted or visceral responses¹⁷⁶ and a recognition of the value of the ICC in the attainment of other foreign policy objectives. This has led the State Department Legal Adviser to characterize the present U.S. attitude as “pragmatic.”¹⁷⁷

3.e. Internationalized, Hybrid, and Related Criminal Tribunals

In general, the U.S. has adopted more favorable positions with respect to so-called hybrid or internationalized tribunals. There is little or no possibility of prosecution of U.S. personnel in these fora, and each has a closer connection to the national legal system where the atrocities occurred.

3.e.i. Sierra Leone

The Special Court for Sierra Leone is considered to be a hybrid court because of its synthesis of international and domestic elements. Unlike the ICTY and ICTR, which were established by the United Nations Security Council as UN subsidiary bodies, the legal basis for the SCSL is a treaty between the UN and Sierra Leone.¹⁷⁸ Thus, the SCSL is not a UN organ and the Sierra Leonean government was deeply involved in its creation. Oversight is carried out by a Management Committee, drawn from a Group of Interested States.¹⁷⁹ The substantive criminal law to be applied by the Court, codified in

¹⁷⁶ While the U.S. administration has continued its anti-ICC rhetoric to some degree, this may simply serve as a smokescreen to create the appearance that U.S. opposition remains firm.

¹⁷⁷ Statement of John Bellinger, U.S. Department of State Legal Adviser, 29th Roundtable on Current Problems of International Humanitarian Law, 8 September 2006. See also, Bellinger, in this book, chapter 1. See also “The United States and International Law,” Remarks of John Bellinger at The Hague, June 6, 2007 (The Darfur referral, the offer assistance of the OTP in Darfur, and the transfer of the Taylor proceedings “reflect our desire to find practical ways to work with ICC supporters to advance our shared goals of promoting international criminal justice.”).

¹⁷⁸ *Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone* preamble (Jan. 16, 2002), at <http://www.sc-sl.org/scsl-agreement.html>.

¹⁷⁹ *Id.* at art. 7.

the Statute of the SCSL, was derived from both international law and domestic law.¹⁸⁰ Finally, the personnel of the Court are also mixed, employing both international and national staff.

As with the ICTR and ICTY, the U.S. was the prime mover behind the creation of the Special Court for Sierra Leone.¹⁸¹ It was also strongly supported by the UK, though the U.S. and the UK divided over certain details, such as the scope of the court's temporal jurisdiction.¹⁸²

In the SCSL, the Bush Administration saw an opportunity to build an international justice mechanism that would conform more closely to the model espoused by the U.S. as preferable to the ICC.¹⁸³ The SCSL was created in cooperation with the Sierra Leonean authorities, it does not have the authority to bind other states or otherwise require their cooperation, it is funded primarily by voluntary contributions, and peacekeepers are exempt from its jurisdiction, subject to a Security Council override. Some claim that hostility within the UN's Office of Legal Affairs toward the establishment of the SCSL was a response to what they perceived as an attempt by the U.S. to undermine the ICC.¹⁸⁴

Whether this motivation to showcase the SCSL as an ICC-alternative was present from the beginning, or whether it evolved along with negotiations on the design of the court is unclear. In any event, the U.S. was strongly supportive from its inception. Indeed,

¹⁸⁰ *Id.* at art. 1.

¹⁸¹ Interview with diplomat (non-U.S.) involved in the negotiations (name withheld), March 26, 2005; interview with former SCSL official (name withheld), March 7, 2005. One NGO official viewed the US as only one of several significant promoters of the Court, including Canada, the Netherlands, and, of course, Sierra Leone. Interview with Alison Smith, No Peace Without Justice, March 24, 2005.

¹⁸² Interview with diplomat (non-U.S.) involved in the negotiations (name withheld), March 26, 2005.

¹⁸³ Interview with David Scheffer, March 31, 2005. The decision to create the Court had already been taken under the Clinton Administration. *Id.* Nonetheless, the continued support of the US under the Bush Administration was critical to the ultimate establishment of the Court in 2002.

¹⁸⁴ Interview with diplomat (non-U.S.) involved in the negotiations (name withheld), March 26, 2005; interview with former SCSL official (name withheld), March 7, 2005.

some assert that it was the U.S. government that initially approached the Sierra Leonean government, inviting it to request the United Nations to establish the SCSL.

While not unanimous, the U.S. Congress was extraordinarily and uncharacteristically supportive of the SCSL.¹⁸⁵ This support likely emerged from the confluence of three factors: it provided an opportunity to make the U.S. Congress seem pro-accountability, as well as an opportunity to criticize the UN, by, e.g., citing the failure of UNAMSIL; the sensationalism of the amputee issue appealed to the camera-chasing members of congress; and those harboring anti-Clinton sentiment saw this as an opportunity to publicize the failure of the Lomé Accords.¹⁸⁶

The Department of Defense, which had been a recent source of opposition to international criminal courts, did not express opposition to the creation of the SCSL and at times seemed affirmatively supportive.¹⁸⁷ Their support was largely due to the fact that David Crane, who had been employed at the Pentagon, was appointed as Prosecutor.

Again, U.S. support has taken a variety of forms. As noted above, the U.S. was the driving force behind the creation of the SCSL. Ambassador Richard Holbrooke as well as Scheffer and Prosper all helped to push the court along.¹⁸⁸ In addition, the U.S. has been the largest financial contributor to the operations of the court.¹⁸⁹

The U.S. was highly influential in the design of the court. A number of states, including the U.S., made it clear from the beginning that the SCSL would not have Chapter VII authority, despite the desire of the Sierra Leonean government for a Security

¹⁸⁵ Interview with former SCSL official (name withheld), March 7, 2005; interview with Nina Bang-Jensen, Coalition for International Justice, June 16, 2005.

¹⁸⁶ Interview with former SCSL official (name withheld), March 7, 2005.

¹⁸⁷ Interview with former SCSL official (name withheld), March 7, 2005; interview with former SCSL official (name withheld), April 15, 2006.

¹⁸⁸ Interview with diplomat (non-U.S.) involved in the negotiations (name withheld), March 26, 2005; interview with former SCSL official (name withheld), March 7, 2005; interview with David Scheffer, March 31, 2005.

¹⁸⁹ Fact Sheet, Office of the Press Secretary, *Fact Sheet: United States and G8 Renew Strong Commitment to Africa* (July 8, 2005), at <http://www.whitehouse.gov/news/releases/2005/07/20050708-3.html>.

Council resolution to that effect.¹⁹⁰ Thus, unlike the ICTY and ICTR, the Special Court was not given authority to compel cooperation from states. Possibly as a result of tribunal fatigue, the U.S. also wanted the SCSL to be outside of the UN structure and to be funded through voluntary contributions.¹⁹¹

The continuing political support of the U.S. was evident when the SCSL ran into financial difficulty in 2004. The U.S. Mission to the United Nations (USUN) asked the Secretary General to intervene on the funding issue. The Secretary General would have to go to the Security Council to ask for authorization to go to General Assembly to get authorization to make a subvention grant.¹⁹² The U.S. prompted the Secretary General to seek this authorization from the Security Council, and then pushed it through.¹⁹³ It then followed up by ensuring proper language was used in the General Assembly resolutions authorizing the subvention grant.¹⁹⁴ The SCSL then received a subvention grant for 2005, enabling it to continue operations.

Senior USUN officials have also intervened with the office of the UN Controller.¹⁹⁵ The Office of the Controller was dragging its heels in dispersing funds to the SCSL. Some have speculated that this was due to the fact that the SCSL was created as an institution outside of the UN framework or perhaps for reasons similar to those evoking hostility from OLA.¹⁹⁶ In any event, USUN intervened in order to secure cooperation from the Controller's office.

Another major factor bolstering U.S. support, and with respect to which the U.S. played a central role, is the limited personal jurisdiction of the SCSL.

¹⁹⁰ Interview with diplomat (non-U.S.) involved in the negotiations (name withheld), March 26, 2005.

¹⁹¹ Interview with former SCSL official (name withheld), March 7, 2005; interview with diplomat (non-U.S.) involved in the negotiations (name withheld), March 26, 2005.

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ Interview with diplomat (non-U.S.) involved in the negotiations (name withheld), March 26, 2005.

¹⁹⁶ Interview with former SCSL official (name withheld), March 7, 2005.

3.e.i.A. The Peacekeeper Exemption

The scope of personal jurisdiction of the SCSL was a matter of concern for a number of UN Member State delegations.¹⁹⁷ These delegations initially sought to limit the personal jurisdiction of the Court to Sierra Leonean nationals.¹⁹⁸ Indeed, this was stipulated in the original draft statute of the Court.¹⁹⁹ However, the finally agreed text did not include a nationality limitation. Instead, the Court's personal jurisdiction is limited to:

*"... persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996, including those leaders who, in committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone."*²⁰⁰

In the course of the negotiations, the nationality limitation was dropped in exchange for an exemption for peacekeepers.²⁰¹ Article 1 of the SCSL Statute excludes peacekeepers from the personal jurisdiction of the Court unless their sending state is unwilling or unable to prosecute. Even if it is established that the sending state is unwilling or unable to prosecute, the Security Council must still approve the prosecution before it can proceed.²⁰² Thus, not only does this establish a precedent for a peacekeeper exemption, it also enables the U.S., as one of the P-5, to prevent the prosecution of peacekeepers sent by its allies, e.g. from Nigeria, without Security Council approval. This is essentially the kind of exemption that the U.S. sought at the Rome Conference.

¹⁹⁷ Interview with diplomat (non-U.S.) involved in the negotiations (name withheld), March 26, 2005.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Statute of the Special Court for Sierra Leone* art. 1 (Jan. 16, 2002), at <http://www.sc-sl.org/scsl-statute.html>.

²⁰¹ Interview with diplomat (non-U.S.) involved in the negotiations (name withheld), March 26, 2005.

²⁰² *Statute of the Special Court for Sierra Leone* art. 1 (Jan. 16, 2002), at <http://www.sc-sl.org/scsl-statute.html>.

3.e.i.B. The Appointment of an American Prosecutor

Another major factor in U.S. support for the SCSL was the appointment of David Crane as prosecutor. The U.S. lobbied intensely to get him appointed. OLA was supporting another candidate – Ken Flemming.²⁰³ The UN Secretary General was undecided between Crane and Flemming, and expressed a desire to see other candidates. Several high administration officials and even members of Congress applied pressure to UN Secretary General Kofi Annan to get Crane appointed.²⁰⁴ This of course exacerbated the existing tensions with OLA.

Some observers would infer that the key issue for the U.S. is control of who could be indicted.²⁰⁵ In the case of the SCSL, the appointment of an American who was previously employed at the Pentagon reassured the U.S., and the Department of Defense in particular. Further, it may be that the appointment of a former member of the U.S. military, who brought with him a team of former military servicemembers, gave the SCSL more of a Nuremberg feel, further facilitating support for it.

Prosper's office supported Crane for a number of reasons. They wanted someone with management experience; Crane had been a senior executive at the Pentagon. They also liked the fact that he was a former Judge Advocate (having retired from the Army in 1996), again mirroring the IMT model. His Africa background was another factor. Crane was also a former teacher of Prosper's then deputy.²⁰⁶

Some have speculated, however, that the State Department as a whole was not as keen on the selection of Crane as Prosecutor.²⁰⁷ When Crane was initially deployed to

²⁰³ Interview with former SCSL official (name withheld), March 7, 2005; interview with NGO official involved in the negotiations, March 24, 2005.

²⁰⁴ Interview with former SCSL official (name withheld), March 7, 2005.

²⁰⁵ Interview with diplomat (non-U.S.) involved in the negotiations (name withheld), March 26, 2005; interview with John Stompor, Human Rights First, March 8, 2005; interview with ICTY official (name withheld), March 27, 2005; interview with former State Department official (name withheld), December 13, 2005.

²⁰⁶ Interview with former SCSL official (name withheld), April 15, 2006.

²⁰⁷ Interview with diplomat (non-U.S.) involved in the negotiations (name withheld), March 26, 2005; interview with former SCSL official (name withheld), March 7, 2005.

Sierra Leone, he and several of his handpicked senior staff had top secret clearance, thus providing them access to all of the cables between Washington and Freetown.²⁰⁸ This access was lost when he and his team started carrying out investigations in neighboring Liberia. Some have suggested that this loss of clearance was an expression of disapproval by the State Department.

Crane's relationship with the State Department, and as a result the relationship between the SCSL and the U.S. government, worsened considerably upon the unsealing of the Taylor indictment.²⁰⁹

3.e.i.C. The Unsealing of the Taylor Indictment

On June 4, 2003, the SCSL unsealed the indictment of Charles Taylor, then President of Liberia. On that date, Taylor was participating at a peace conference in Ghana. Although it was apparent to most observers that Crane was planning to indict Taylor, and given the SCSL's numbering of indictments it was clear that there had been a sealed indictment, the State Department apparently found major fault with Crane's timing.

The timing of the unsealing of the indictment was not coincidental. Indeed, the Prosecutor's strategy was to demonstrate the power of the rule of law by stripping Taylor of his political power in front of his peers.²¹⁰ Crane gave 24-hours notice to concerned parties, including the U.S. government, of his intent to unseal the indictment. State Department officials tried unsuccessfully to persuade him to refrain from doing so.²¹¹

Key State Department officials and members of the National Security Council were infuriated by Crane's decision.²¹² For months after the indictment was unsealed, the

²⁰⁸ Interview with former SCSL official (name withheld), March 7, 2005.

²⁰⁹ Interview with former SCSL official (name withheld), March 7, 2005; interview with former SCSL official (name withheld), April 15, 2006.

²¹⁰ Interview with former SCSL official (name withheld), April 15, 2006.

²¹¹ *Id.*

²¹² *Id.* Interview with former SCSL official (name withheld), April 15, 2006.

State Department cut off all communication with the OTP of the SCSL.²¹³ During this period, the U.S. Ambassador in Freetown refused access to all personnel.²¹⁴

Nonetheless, many observers credit the unsealing of the indictment with the hastening of Taylor's departure from Monrovia.²¹⁵ With the consent of the U.S. government, Taylor was subsequently granted refuge in Nigeria. After Taylor's arrival in Calabar, Nigeria, the U.S. Executive appeared reluctant to push Nigeria, a key ally, into surrendering Taylor to the SCSL. The U.S. Congress was divided as to how to handle Taylor.²¹⁶ In early 2004, the US government seemed to be equivocating on this issue.²¹⁷ But by late 2004, the new U.S. ambassador had re-opened dialogue, and began appealing to the Nigerian government (at least publicly) to surrender Taylor to the court.²¹⁸

By the spring of 2005, the political winds had shifted. There seemed to be a growing recognition within the U.S. government that the best solution to the Taylor problem was prosecution before the Special Court. In an overwhelming show of support for the SCSL, the U.S. Congress on May 10, 2005, adopted Congressional Resolution 127, urging Nigeria to "expeditiously transfer" Taylor to the Special Court.²¹⁹ The Resolution, which passed the House by a vote of 421 to 1 and was unanimously endorsed by the Senate, also noted that "the Special Court for Sierra Leone has contributed to developing the rule of law in Sierra Leone and is deserving of support..."²²⁰ and included statements by Crane on the threat posed to Liberia's stability by Taylor's continuing

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ Interview with John Stompor, Human Rights First, March 8, 2005; "Charles Taylor, Indicted," Washington Post, June 5, 2003, at A32; Ward, "Might v. Right: Charles Taylor and the Sierra Leone Special Court," 11 Hum. Rts. Br. 8, 8 (2003); Remarks of Alex Vines, Human Rights Watch, Before House International Relations Committee, October 3, 2003.

²¹⁶ Interview with former SCSL official (name withheld), March 7, 2005.

²¹⁷ Interview with John Stompor, Human Rights First, March 8, 2005.

²¹⁸ Remarks of Pierre-Richard Prosper Before the Africa Subcommittee of the House International Relations Committee, June 24, 2004.

²¹⁹ H.R. Con. Res. 127, 109th Cong. [¶ 14] (May 4, 2005); see also "Bring Charles Taylor Justice," New York Times Op-Ed by Congressman Ed Royce, May 5, 2005.

²²⁰ *Id.* at [¶ 10].

evasion of justice. The U.S. also played a leading role in getting the Security Council to pass a resolution allowing UN peacekeepers in Liberia to arrest Taylor.²²¹

Following the exertion of pressure on Nigeria and Liberia by both the Executive and Congress, Taylor was finally surrendered to the Court on March 29, 2006. Members of Congress had earlier made clear to the newly elected President of Liberia that U.S. aid was dependent upon Liberian cooperation with the transfer of Taylor to the Court.²²² On March 22, during a visit to the U.S., Liberian President Ellen Johnson-Sirleaf called for Taylor's swift surrender to face trial.²²³

On March 28, Taylor had disappeared from his home in Calabar, Nigeria. At the time of Taylor's disappearance, Nigerian President Obasanjo was en route to Washington, DC. Members of Congress publicly urged Bush to refuse to meet with Obasanjo unless Taylor was brought to justice.²²⁴ Upon arrival, Obasanjo was informed by senior State Department officials that unless Taylor was turned over to the Special Court, Bush would not meet with him.²²⁵ Within hours, Taylor was apprehended and turned over to the Special Court.

As noted above, the U.S. government, citing concern for West African regional stability, called for Taylor's trial to be conducted in The Hague, using the facilities of the ICC.²²⁶ Taylor would still be tried by the SCSL, but in an ICC courtroom. Taylor was

²²¹ UNSC Resolution 1638 (deciding "that the mandate of the United Nations Mission in Liberia (UNMIL) shall include the following additional element: to apprehend and detain former President Charles Taylor in the event of a return to Liberia and to transfer him or facilitate his transfer to Sierra Leone for prosecution before the Special Court for Sierra Leone.").

²²² Interview with former SCSL official (name withheld), March 7, 2005.

²²³ "Nigeria Pressed by UN Court to Arrest Liberia's Ex-leader," *The New York Times*, March 27, 2006.

²²⁴ Statement of U.S. Senator Barack Obama on Charles Taylor, March 28, 2006.

²²⁵ Interview with NGO official (name withheld), April 3, 2006; interview with SCSL official (name withheld), April 4, 2006.

²²⁶ "President Discusses Democracy in Iraq with Freedom House," Office of the Press Secretary, March 29, 2006; see also SC Res. 1688 (2006).

transferred to the ICC Detention Centre in the Hague on June 20, 2006. The U.S. government was heavily involved in the transfer negotiations.²²⁷

3.e.i.D .Increasing Internationalization of the SCSL

In many ways, the Special Court has evolved into an increasingly international court. The nature of its jurisdiction, its personnel, and even its subject matter jurisdiction have all gradually moved to the international end of the spectrum. The Court itself has held that it is an international court, and as such may prosecute even sitting Heads of State.²²⁸ The Deputy Prosecutor, initially envisioned by the treaty establishing the Court to be a Sierra Leonean, was an international/foreigner whose appointment was facilitated by an amendment to the treaty. Defendants have been tried only for violations of international law; no charges have been brought on the basis of the provisions of Sierra Leonean law included in the Statute (for a variety of reasons, including the Lomé Amnesty). Now, its most prominent trial, that of Charles Taylor, may be moved to the Netherlands. It appears that the hybrid nature of the Court is increasingly a formal matter. This transformation does not seem to have elicited opposition from the U.S. government, raising questions as to the strength of its desire for a more domestic-oriented tribunal.

3.e.ii .Cambodia

The Extraordinary Chambers in the Courts of Cambodia (ECCC) differ significantly from the Special Court for Sierra Leone in that they form part of Cambodia's domestic judiciary. They were created on the basis of domestic legislation, and their subject matter jurisdiction is circumscribed by this same domestic law. While Cambodia has entered into a treaty with the UN with regard to the work of the ECCC, this treaty merely regulates UN involvement and imposes certain obligations on

²²⁷ Interview with SCSL official (name withheld), April 4, 2006; interview with State Department official July 21, 2006.

²²⁸ *Prosecutor v. Taylor*, Decision of the Appeals Chamber on Immunity from Jurisdiction, [SCSL-03-01-I-059](#), 31 May 2004.

Cambodia and the UN with respect to the court's operations. It does not serve as the constitutive instrument of the ECCC.

The Chambers will be staffed by both Cambodian and foreign²²⁹ staff and officials. However, unlike the SCSL, the Cambodian officials will constitute the majority. In order to ensure that decisions will not be made through a purely Cambodian majority, decisions of the Chamber require a super-majority, including at least one foreign judge.

Initially, the U.S. supported the creation of an accountability mechanism for the Khmer Rouge atrocities. It had consistently funded documentation efforts and was heavily involved in the initial negotiations to establish the ECCC. Indeed, Scheffer has been credited with the idea of requiring a super-majority for judicial decisions, thus facilitating resolution of what had been a highly contentious issue during the negotiations.²³⁰ In 2001, Prosper stated that the U.S. had been “encouraging both the Royal Government of Cambodia and the United Nations to be flexible in their approaches and to expeditiously finalize an agreement to ensure credible justice is achieved in the establishment of the Extraordinary Chambers.”²³¹

In recent years, however, U.S. political support for the ECCC has been lukewarm. This is attributable in part to conflicting views within Congress and opposition to the Chambers on the part of a number of human rights NGOs. Congressional ambivalence results from the fact that different Cambodian diaspora groups, as constituencies of several members of Congress, have different views on the Chambers.²³² While all of

²²⁹ The Cambodian legislation establishing the ECCC refers to “foreign”, as opposed to “international”, judges and prosecutors. See, e.g., articles 9, 11, 16 & 18, Law on the Establishment of the Extraordinary Chambers, as amended on 27 October 2004 (NS/RKM/1004/006). Use of the term “foreign” underscores the fact that the Extraordinary Chambers are closer to the domestic end of the hybrid spectrum. It may also be used in order to affirm that the foreign officials are not hierarchically superior to the Cambodian officials, and possibly as a reminder that the former are operating within a foreign, rather than international, system.

²³⁰ Interview with NGO official involved in the negotiations (name withheld), DATE. U.S. Senator John Kerry was also involved in the negotiations. *Id.*

²³¹ Press Release, Pierre-Richard Prosper, U.S. Ambassador for War Crimes Issues, *Address at the Peace Palace in the Hague* [¶ 20] (Dec. 19, 2001), at <http://www.state.gov/s/wci/rm/8053.htm>.

²³² Interview with Nina Bang-Jensen, Coalition for International Justice, June 16, 2005.

these groups want to see an accountability process, they are divided as to whether the Extraordinary Chambers can provide credible justice. Human rights NGOs have similar concerns as to whether the Chambers will be able to act independently in light of the Cambodian government's track-record.²³³

The U.S. has not provided any funding to the Extraordinary Chambers. This has been in part attributable to the fact that, until recently, U.S. legislation specifically precluded²³⁴ the U.S. government from providing financial assistance to the central government of Cambodia, and, in particular, "to any tribunal established by the Government of Cambodia" unless the Secretary of State "determine[d] and reporte[d] to the Committee on Appropriations that: (1) Cambodia's judiciary is competent, independent, free from widespread corruption, and its decisions are free from interference by the executive branch; and (2) the proposed tribunal is capable of delivering justice, that meets internationally recognized standards, for crimes against humanity and genocide in an impartial and credible manner."²³⁵ This provision appeared in Appropriations legislation for several years.²³⁶

²³³ See, e.g., "[Kingdom of Cambodia: Amnesty International's position and concerns regarding the proposed "Khmer Rouge" tribunal](#)," April 25, 2003; "[Cambodia: Opposition MP Jailed After Sham Trial](#)," Human Rights Watch Report, August 9, 2005; [Extraordinary Chambers of the Courts of Cambodia, Letter from Human Rights Watch to the Secretariat of the Rules and Procedure Committee, November 17, 2006](#).

²³⁴ However, certain statutory exceptions were made, none of which are relevant to the present analysis.

²³⁵ Foreign Operations Appropriations Act, 2005. This provision was introduced by a member of Congress whose staffer had spent significant time in Cambodia and had reported a very poor human rights record. Several officials have indicated that it is highly unlikely that the Secretary of State could have made such a determination, particularly with respect to the first requirement.

²³⁶ According to the Congressional Research Service, "Restrictions on U.S. assistance largely reflect congressional disapproval of Prime Minister Hun Sen's seizure of power in 1997 and concerns about ongoing political violence. Since 1998, foreign operations appropriations legislation has barred U.S. assistance to the central government of Cambodia and to the Khmer Rouge tribunal and instructed U.S. representatives to international financial institutions to oppose loans to Cambodia, except those that meet basic human needs. U.S. assistance may be provided only to Cambodian and foreign NGOs and to local governments. Statutory exceptions allow for U.S. assistance to the central government of Cambodia for reproductive, maternal, and child health care, preventing and treating HIV/AIDS and other infectious diseases, basic education, combating human trafficking, rule-of-law programs, cultural and historic

In the Committee Report accompanying the 2005 Appropriations Act, the Committee noted:

“The Committee again restricts assistance to the Cambodian Government, with few exceptions, and notes that the budget request does not contain funding for a United States contribution to the Khmer Rouge tribunal. The Committee directs that no funds be made available for a contribution to the tribunal unless the Secretary of State reports to the Committee that the tribunal is capable of delivering justice that meets internationally recognized standards of justice for crimes against humanity and genocide in an impartial and credible manner”.

This tribunal-specific provision, however, was removed in the 2006 Appropriations Act, perhaps signaling a moderation of the U.S. position. Nonetheless, the blanket prohibition on aid to the central government still poses an obstacle to direct assistance to the Tribunal.²³⁷

Most observers agree that if it were not for this legislative obstacle, the U.S. would have been likely to support the Extraordinary Chambers financially for at least two reasons.²³⁸ First, as special chambers within the domestic Cambodian legal system, they conform more closely to the model that the present U.S. administration puts forth as the ideal. Second, the U.S. has already provided a significant amount of financial support to

preservation (Angkor Wat), counter-narcotics, and developing international adoptions procedures. For most of these activities, however, USAID collaborates with the central government of Cambodia but continues to provide funding only through NGOs.” Congressional Research Service, “Cambodia: Background and U.S. Relations,” July 8, 2005.

²³⁷ There may, however, be some room to maneuver around this funding prohibition in the 2006 Appropriations Act. The Act contains an exception making funds available for “activities to support democracy, the rule of law, and human rights...” Section 554(b), 2006 Foreign Operations Appropriations Act. The State Department must, however, consult with the Committee prior to “the obligation of assistance for the central Government of Cambodia.” Section 520; see also Committee Report accompanying the 2006 Appropriations Act.

²³⁸ Interview with Nina Bang-Jensen, Coalition for International Justice, June 16, 2005; interview with NGO official (name withheld), April 6, 2006.

the non-governmental Documentation Center for Cambodia, knowing that the records of this organization will play a crucial role in any prosecutions that occur before the Extraordinary Chambers.

Throughout the ECCC's first year of operation, the U.S. maintained a wait-and-see approach to the issue of whether to provide any form of direct support to the ECCC. Corruption allegations,²³⁹ as well as a perceived lack of progress at early plenary sessions of the ECCC,²⁴⁰ posed new impediments to U.S. support.

However, in early 2008, Cambodian officials reported that the U.S. expressed the possibility of directly supporting the ECCC. According to the Cambodian Foreign Ministry, U.S. diplomats had offered the possibility of financial support if the Cambodian government acceded to a U.S. request for an advisory role at the ECCC.²⁴¹

3.e.iii. Other Courts with an International Dimension

The U.S. has been largely supportive of other courts with an international dimension, including the internationalized Kosovo and East Timorese court systems, and the Bosnian War Crimes Chamber. The U.S. has provided political, financial, and other material support for these mechanisms.

For example, the U.S. provided personnel to assist in the work of each of these institutions. U.S. prosecutors and judges served in the internationalized courts of East Timor, Kosovo, and Bosnia. The U.S. also provided direct financial support to each of these institutions.

The U.S. has also been credited with the creation of the Bosnian War Crimes Chambers.²⁴² According to a number of sources, the Chambers would not have come into

²³⁹ OSJI Press Release, "Corruption Allegations at Khmer Rouge Court Must Be Investigated Thoroughly," February 14, 2007.

²⁴⁰ Interview with intergovernmental organization official (name withheld), February 7, 2007.

²⁴¹ "US seeks role in Cambodian KRouge trials: official," AFP, January 17, 2008.

²⁴² Interview with international official of the Bosnian War Crimes Chamber (name withheld), November 3, 2005.

existence without the exertion of U.S. political pressure, as well as the initial financial contribution of the U.S., which opened the door to funding by other states.²⁴³

U.S. support was again facilitated by the fact that each of these mechanisms is closer to the national end of the hybrid spectrum, bringing them within the U.S. preference for resolution at the national level. They each sat essentially as domestic courts staffed in part by foreign nationals and applying in part international law. The creation of each also dovetailed with other U.S. foreign policy objectives in the relevant regions. However, in some instances that support has been interrupted by the emergence of competing foreign policy considerations. This was seen most dramatically in relation to U.S. support for the Special Panels for Serious Crimes in East Timor. While the U.S. continued to support the Panels in their prosecution of East Timorese perpetrators, it was not supportive of East Timor's efforts to prosecute Indonesian officials. Indonesia is viewed by the U.S. as a key ally in the "war on terror" as well as having strategic value because of its location.

The most recent quasi-international criminal court to be supported by the U.S. is the Special Tribunal for Lebanon (STL), which was established to prosecute certain "terrorist attacks" occurring in Lebanon since October 2004.²⁴⁴ Similar to the hybrid mechanisms described above, the STL will be composed of a mix of international and Lebanese officials.

The jurisdiction of the Tribunal is very narrowly circumscribed. The STL's jurisdiction encompasses only the assassination of former Lebanese Prime Minister Rafiq Hariri and other related attacks between October 1, 2004 and December 12, 2005. The Tribunal can take jurisdiction over subsequent related attacks only with the consent of the Security Council. Thus, any Member of the Security Council may veto jurisdiction over acts committed after December 2005. Further, the STL's subject matter jurisdiction is limited to crimes under Lebanese law.²⁴⁵ A participant in the negotiations has indicated that these jurisdictional limitations were included at the behest of the U.S. to ensure that

²⁴³ Interview with international official of the Bosnian War Crimes Chamber (name withheld), November 3, 2005.

²⁴⁴ UN SC Resolution 1757 (2007).

²⁴⁵ *Id.* at Annex.

the Tribunal could not take jurisdiction over the conduct of Israeli forces during the 2006 conflict between Israel and Hezbollah & Lebanon.²⁴⁶

An institution at the farthest end of the hybrid spectrum (i.e. the least international in nature) would be the Iraqi High Tribunal, which has been robustly supported by the United States. Not only has the U.S. provided extensive political and financial support, but the institution itself was essentially a U.S. creation. Having a central role in the creation of the court, the U.S. was able to ensure that U.S. personnel would not be subject to its jurisdiction. Indeed, the initial Statute for the Tribunal expressly limited its jurisdiction to Iraqi nationals.

It must be born in mind that the IHT was created during a time in which the U.S. was still an occupying force in Iraq, and thus in possession of broad power over the creation of Iraqi institutions. This was also during the peak of U.S. hostility toward the ICC. Thus, the U.S. rejected a role for the ICC or even the creation of a hybrid along the lines of the Sierra Leone model. Instead, it saw the creation of the IHT as an opportunity to show that even trials of former Heads of State and other senior officials could be conducted at the national level.

In general, as hostility toward international institutions has increased, the U.S. has shown increasing support for hybrid institutions. However, as with other international criminal justice mechanisms, U.S. support for the hybrids has been strongly influenced by competing foreign policy objectives, as well as the possibility of prosecution of U.S. nationals, especially U.S. agents.

4. Conclusion

Essentially, the official position of the U.S. government may be summarized as:

- a. The U.S. is in principle committed to justice and accountability for all.

²⁴⁶ Interview with U.N. official involved in the negotiation over the Tribunal's jurisdiction (name withheld), March 22, 2007.

- b. It is best to prosecute crimes, including all international crimes, at the national level. Prosecution by any other court (including domestic courts of other countries)²⁴⁷ should be the absolute last resort.
- c. The Security Council should have the final word on prosecution by any other court.

4.a. Commitment to Accountability

The U.S. is in principle committed to accountability. Notwithstanding changes of administration, a strong ideological strain in favor of accountability permeates all branches of the U.S. government and public.

This does not mean, however, that the U.S. seeks accountability at any cost. Even in cases where the U.S. attitude toward international criminal courts is at its most favorable, these institutions are not viewed as ends in themselves. The U.S. approach is pragmatic – each institution is assessed in terms of its ability to advance U.S. interests, which include, but are not limited to, promoting accountability and the rule of law on the international level.

When accountability efforts at the domestic level fail, the U.S. resorts to a balancing of interests. When international accountability efforts conflict with strong national interests, those interests will prevail.

4.b. Strong Preference for Domestic Resolution; Other Courts as Last Resort

Despite its support for the ad hoc tribunals, there is a belief in the current administration that the ICTY in particular has not been successful in making changes for the affected people or the affected region. The U.S. insists that it is far better to have courts trying people locally, contributing to the sense of ownership by the affected communities.

²⁴⁷ There are of course strong parallels with the U.S. position on the exercise of universal jurisdiction.

The U.S. government is now pointing to the ICC as even further removed from the affected communities, emphasizing the fact that the first four situations before the Court are all in Africa. The U.S. continues to emphasize that African crimes should be prosecuted in Africa, distinguishing this from the ‘colonial’ approach of the ICC where Africans are ‘prosecuted by their former colonial masters in The Hague’.

4.c. .Security Council Control

The U.S. is strongly interested in maintaining the primacy of the Security Council in matters of peace and security. The U.S. regards the existence of the ICC as a threat to this primacy. Most observers assert that this position is a direct consequence of the status of the U.S. as a permanent member of the Council. Indeed, some would argue that the degree of U.S. support for a tribunal directly corresponds to its degree of control over the mechanism.

4.d. .Other / Underlying Factors

The U.S. attitude seems to be influenced by a range of factors, including such variables as ideological leanings of those in power and the strength of certain personalities (proponents or opponents). The impact of such variables tends to be moderated over time. Sentiments that appear to underlie present U.S. hostility toward international criminal courts include:

1. Belief in the superiority of the U.S. justice system, and U.S. governance generally;
2. Belief that the U.S., in light of its global preeminence, activities and responsibilities, is not similarly situated to other states, and that therefore its agents should not be subject to the same constraints and legal liabilities as those of other states;
3. Suspicion of international / multilateral institutions (perceived to have greater tendency toward inefficiency, bias, and corruption);

4. Perception of international criminal courts as being unrealistic, 'too European' or 'too human rights-based';
5. Fear of accountability mechanisms outside of any U.S. control, coupled with fear that 'everyone is out to get us'.

The relationship between the principles upon which the U.S. publicly grounds its policy and the other factors identified above is complex. The extent to which there are ideological objections and visceral responses by those in power corresponds to an increasing likelihood of a top-down approach to policy-making. As these objections and responses become moderated over time, the normal inter-agency process of policy formulation regains the space necessary to perform its function.

4.e. .Historical Analysis of Policy Formulation

The historical survey above reveals certain consistent themes underlying U.S. attitudes toward international criminal courts. One consistent element would appear to be the (un)likelihood of prosecution of U.S. nationals. The U.S. has tended to support international criminal courts where the U.S. government has (or is perceived by U.S. officials to have) a significant degree of control over the court, or where the possibility of prosecution of U.S. nationals is either expressly precluded or otherwise remote. This was certainly the case for the post-World War II military tribunals, as well as the Security Council ad hoc tribunals. U.S. support for the hybrid tribunals was similarly facilitated by the inclusion of jurisdictional limitations and other assurances of non-prosecution of U.S. nationals.

If the U.S. is assured that U.S. nationals will not be prosecuted (or, at least, not without its consent), it will engage in a balancing of interests to determine its level of support or opposition. Ideological leanings will of course color this balancing of interests and at times define some of those interests. To the extent an administration's ideological strain in favor of criminal accountability is stronger than its ideological strain opposed to the creation of international authority, the prospect of U.S. support of a given international criminal court seems to increase.

4.f. The Limits of Pragmatism

This balancing of interests approach corresponds with Bellinger’s description of the US approach as “pragmatic”. In a May 2006 statement to the Colloquium of authors of the present book, Bellinger stated:

*“In our view, such courts and tribunals should not be seen as an end in themselves but rather as potential tools to advance shared international interests in developing and promoting the rule of law, ensuring justice and accountability, and solving legal disputes. Consistent with this approach, we evaluate the contributions that proposed international courts and tribunals may make on a case-by-case basis, just as we consider the advantages and disadvantages of particular matters through international judicial mechanisms rather than diplomatic or other means.”*²⁴⁸

While Bellinger does not spell out the possible disadvantages in much detail, the practice of the US indicates that not all such considerations relate to the high-minded ideals cited in the preceding sentence. Of course, the US considers these high-minded ideals in its calculation of interests, but not to the exclusion of lower-minded considerations.

For some critics, a pragmatic approach that permits consideration of purely national self-interests, and perhaps even the interests of individual government officials, is inappropriate when it comes to judicial settlement of disputes. For them, the idea of selective use of courts creates an internal tension – that selective judicial enforcement is inconsistent with the very idea of a court. This tension is exacerbated considerably in the value-laden criminal realm, with its punitive dimension, and *a fortiori* when it comes to prosecution of individuals for such morally heinous crimes as those that typically spring to mind in the present context.

²⁴⁸ “International Court and Tribunals and the Rule of Law,” Statement by John Bellinger, Legal Advisor, at George Washington School of Law, Washington, DC, May 11, 2006. This instrumental use of international courts is clearly visible in the creation of the STL. The jurisdiction of the Tribunal is essentially limited to a single crime. While it may be appropriate for politics to play a role in shaping a court’s subject matter jurisdiction, even in relation to conduct that has already been committed, it may lead to a manipulation of jurisdiction to single out particular perpetrators for prosecution. It could also lead to a de-contextualization of, and thus misapprehension of, conduct.

This is perhaps the greatest challenge to the US position. The idea of a court comes with a lot of ideological baggage, some of which resounds in other value-laden areas of international law. Indeed, international law as a whole has been permeated by the development of human rights law, as well as older notions of equality before the law and other principles of natural justice. While this baggage may not be essential to a court's technical operation, it still serves an important purpose. Courts find their credibility and legitimacy in that baggage. Selectivity of use diminishes a court's legitimacy. A pragmatic approach that overlooks this factor may ultimately prove impractical.