
The International Criminal Court and Landmines: What Are the Consequences of Leaving the US Behind?

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Abstract

The paper examines the main reasons of the United States not joining the Rome Statute of the International Criminal Court and the Anti-Personnel Mines Treaty and discusses the consequences of this failure. It also makes some comparative observations on the 'unilateralism' of the United States vis à vis human rights treaties. It concludes that the objections of the United States, both with regard to the International Criminal Court Treaty as well as to the Anti-Personnel Mines treaty are primarily based upon its 'special global military responsibilities'. This is, in part, a hypocritical attitude. But the US also advances other differentiated arguments against the treaties that cannot be dismissed as being simply irrelevant to the subject matter of both conventions. It is also the sovereign right of the US not to accept international treaty obligations that it deems as being not in conformity with its national interest. As to the consequences, it is argued that there will be more difficulties in effectively implementing the conventions without American participation. Another consequence may be that the US will be viewed as continuing to set a bad example in the development of international law by claiming special privileges and immunities.

1 Introduction

The focus of this article is not on the vexed question of unilateral acts or declarations as a source of international law,¹ but on a 'negative act of lawmaking' in the sense of the non-participation (at least for the time being) of the United States in

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¹ See, for example, Fiedler, 'Unilateral Acts in International Law', in R. Bernhardt (ed.), 9 *Encyclopedia of Public International Law (EPIL)* (1984) 517–522; Zemanek, 'The Legal Foundations of the International Legal System', 266 *Recueil des Cours* (1997) 9–335, at 193 *et seq.*

two multilateral treaties. Considering that there is no obligation for a state to become party to a treaty it does not like, even if many or most other states do, and does not engage any state responsibility under international law for such abstention, it might be asked: what is the point of inquiring into this type of ‘unilateralism’ under international law?

One could, of course, in a sociological or political sense usefully examine the role of the United States in the negotiating process of these treaties. One could try to establish whether and to which extent the United States has positively or negatively contributed to the final normative outcome, even though it has refrained from becoming a party. But this is not what the organizers of the Symposium asked for. With regard to the treaties on the International Criminal Court (ICC) and on Landmines the specific question posed is ‘what are the consequences of leaving the US behind?’ I will consider each of these cases and then introduce, for comparative purposes, the illuminating issue of US ‘unilateralism’ towards international human rights treaties.

2 The Case of the International Criminal Court

The so-called Rome Statute of the International Criminal Court (ICC) was finally negotiated in a UN Diplomatic Conference of Plenipotentiaries from 15 June to 17 July 1998. The significance of the Yugoslavia and Rwanda Tribunals are not addressed here in this regard.² It must suffice to briefly outline the main results, without being able to enter into the details and a more comprehensive evaluation of the Rome Statute. In this connection, I would like to refer to the International Symposium on the ICC Statute held by the GLODIS-Institute and the Law Faculty of Erasmus University Rotterdam at the occasion of the award of an honorary doctorate to Judge Antonio Cassese, the first President of the Yugoslavia Tribunal, where I had the privilege to be the promoter.³

As a starting point, the following background information is indispensable. The draft text submitted to the Rome Conference by the Preparatory Committee (PrepCom) was riddled with about 1,400 square brackets, indicating controversial points with quite a number of alternative texts as to complete or partial provisions. Within the limited time available, it was therefore quite clear from the beginning that

² See, also for references to the literature, P. Malanczuk, *Akehurst's Modern Introduction to International Law*, 7th ed. (1997) 355 *et seq.*

³ The International Criminal Court: A Critical Review of the Results of the Rome Conference. Symposium in Honour of Judge Cassese at the Occasion of the Award of an Honorary Doctorate by the Erasmus University Rotterdam, held on 5 November 1998. For Judge Cassese's keynote presentation see: ‘The Statute of the International Criminal Court: Some Preliminary Reflections’, 10 *EJIL* (1999) 144 *et seq.* Other speakers included Adriaan Bos, Horst Fischer, Lars van Troost, Theo van Boven, William Fenrick and A.H.J. Swart. The panels were chaired by Judge Krzysztof J. Skubiszewski and Judge Shahabuddeen. See Laudation Doctorate Honoris Causa to Professor Dr A. Cassese delivered by Honorary Promotor Prof. Dr P. Malanczuk, Faculty of Law, in *8 November 1998 Dies Natalis — Foundation Day, Diesrede en laudatio's eredoctoraten, Vijfentachtigste dies natalis — Foundation day speech and laudations Doctores honoris causa eighty-fifth foundation day, Erasmus University Rotterdam 1998* (1998) 50–52. Dutch text: 27–30.

the outstanding issues could not have been possibly resolved in a systematic manner by the many participating actors.⁴ The thirteen parts of the Rome Statute⁵ involve complicated issues, such as (i) Establishment of the Court; (ii) Jurisdiction, Admissibility and Applicable Law; (iii) General Principles of Criminal Law; (iv) Composition and Administration of the Court; (v) Investigation and Prosecution; (vi) The Trial; (vii) Penalties; (viii) Appeal and Revision; (ix) International Cooperation and Judicial Assistance; (x) Enforcement; (xi) Assembly of State Parties; (xii) Financing; and (xiii) Final Clauses. The most controversial elements were in the second part, dealing with Jurisdiction, Admissibility and Applicable Law.⁶ This part includes the list and definition of crimes.

The participants at the Rome Conference included 160 states, 33 international organizations and a group of 236 non-governmental organizations (NGOs). In order to understand the political context of the position of the United States in this multifaceted conference in a proper perspective, it is necessary to say something on the various negotiation positions. Not unexpectedly, NGOs, although not a uniform group, generally tended to press for an effective court with automatic jurisdiction, an independent prosecutor, recognition of the importance of the protection of women and jurisdiction of the court over internal (not only international) conflicts.

As far as states are concerned, three main groupings may be distinguished. First, there was the group of so-called 'like-minded states' (mostly European and a number of developing countries) which, generally speaking, were in favour of a strong and independent court. Second, one needs to mention the P-5, the five permanent members of the Security Council. The P-5 were in full agreement that (a) the Council should be given a strong position towards the court; and (b) that the statute should not prohibit nuclear weapons. They also desired to see the jurisdiction of the court carefully limited, although the United Kingdom, in this respect, joined the group of 'like-minded states' shortly before the Rome Conference. The third group, including, for example, India, Mexico and Egypt, were also against a strong and independent court, but being suspicious of the great powers and the Security Council wished to see nuclear weapons to be included among those weapons addressed by the statute.

This is, of course, only a very crude picture of the diversity among states on many other issues, in particular, on which crimes should be included (i.e. aggression, terrorism, drug-trafficking, in addition to genocide, crimes against humanity and war crimes) and whether the jurisdiction of the court should extend to internal armed conflicts. The Rome Statute was adopted not by agreement, but by a non-recorded vote of 120 states in favour, 7 against and 21 abstentions. While France, the United Kingdom and Russia supported the statute, the United States declared publicly that it

⁴ See Kirsch and Holmes, 'The Rome Conference on an International Criminal Court: The Negotiating Process', 93 *AJIL* (1999) 3.

⁵ Adopted on 17 July 1998, text in 37 *ILM* (1998) 999.

⁶ For details of the various parts see Arsanjani, 'The Rome Statute of the International Criminal Court', 93 *AJIL* (1999) 22 *et seq.* For a short overview see also Sarooshi, 'The Statute of the International Criminal Court', 48 *International and Comparative Law Quarterly* (1999) 387–404.

opposed it.⁷ Although the United States was not the only state that opposed, or did not fully consent to, the statute, it is especially the US position that has come under fire from a European perspective. This can be seen, for example, from the dispute between Ruth Wedgwood and Gerhard Hafner and others in the latest issue of the *EJIL*.⁸

The question is therefore what are the objections of the United States to the Rome Statute and how are these objections to be evaluated as to their legal and political consequences. The analysis in this presentation will be limited to what appears to be the main objections.⁹

For these purposes, it is most prudent to rely upon the more or less official version of the matter given by David J. Scheffer, US Ambassador-at-Large for War Crimes Issues and head of the US delegation to the Rome Conference.¹⁰ For lack of time, I will not dwell upon the positive contributions quite rightly claimed by the United States to the process of establishing not only the Yugoslavia and Rwanda Tribunals, but also a permanent (not selective and ad hoc) international criminal court in the preparatory work since 1989 and during the Rome Conference.

The United States achieved some important parts of its negotiating goals to be secured in the statute, such as the principle of complementarity. Under this principle, the court is only to act in a role that is subsidiary to national courts which in effect weakens its independence. This is different from the Yugoslavia and Rwanda Tribunals which enjoy primacy in their jurisdiction vis à vis national courts. The United States also achieved its objective of curtailing the independent role of the prosecutor and in limiting the material scope of the crimes within the jurisdiction of the court. However, numerous other states had similar objectives.

Among the various reasons given why the United States could not accept the statute, the central consideration is clearly related to the assumed role of the United States, in the words of David Scheffer:

within a global system that also requires our constant vigilance to protect international peace and security. At the same time, the United States has special responsibilities and special exposure to political controversy over our actions. This factor cannot be taken lightly when issues of international peace and security are at stake. We are called upon to act, sometimes at great risk, far more than any other nation. This is a reality in the international system.¹¹

In more simple terms, this rather general claim boils down to the much more specific claim that a US soldier should not, and cannot, be submitted to the jurisdiction of the court. The US is particularly suspicious of the theory of universal jurisdiction for

⁷ *Ibid.* at 22 *et seq.*

⁸ 10 *EJIL* (1999) 93 *et seq.*

⁹ For a more complete and critical analysis see M. David, 'Grotius Repudiated: The American Objections to the International Criminal Court and the Commitment to International Law', 20 *Michigan Journal of International Law* (1999) 337–412. See also King and Theofrastous, 'From Nuremberg to Rome: A Step Backward for US Foreign Policy', 31 *Case Western Reserve Journal of International Law* (1999) 47–106; Zwanenburg, 'The Statute for an International Criminal Court and the United States: Peace Without Justice?', 12 *Leiden Journal of International Law* (1999) 1–7.

¹⁰ Scheffer, 'The United States and the Criminal Court', 93 *AJIL* (1999) 12–22.

¹¹ *Ibid.* at 12.

genocide, crimes against humanity and war crimes as it sees reflected in the statute.¹² It is interesting to note in this connection that the work of the International Law Association's Human Rights Committee, for example, is currently examining the usefulness of the greater extension of this theory as applied by national courts.¹³

The US considers it a dangerous flaw in the statute that the International Criminal Court may gradually come to extend the scope of the crimes under its jurisdiction, in particular in view of Article 12 of the statute which would provide the court with jurisdiction even over nationals of a non-party state under certain circumstances. The practical concern of the United States is expressed in the following terms:

It is simply and logically untenable to expose the largest deployed military force in the world, stationed across the globe to help maintain international peace and security and to defend US allies and friends, to the jurisdiction of a criminal court the US Government has not joined and whose authority over US citizens the United States does not yet recognize. No other country, even not our closest military allies, has anywhere near as many troops and military assets deployed globally as does the United States. The theory that an individual US soldier acting on foreign territory should be exposed to ICC jurisdiction if his alleged crime occurs on that territory, even if the United States is not party to the ICC Treaty and even if that foreign state is also not a party to the treaty but consents ad hoc to ICC jurisdiction, may appeal to those who believe in the blind application of territorial jurisdiction. But the terms of Article 12 could render nonsensical the actual functioning of the ICC.¹⁴

I find the main *legal* argument behind this position basically convincing. The argument is that international treaties generally do not bind third parties and cannot impose legal obligations against third parties without their consent.¹⁵ The jurisdiction of the court over nationals of non-parties is not simply a question of *erga omnes* obligations allegedly binding upon the international community as a whole.¹⁶ It also involves the institutional question of the obligatory submission without consent to a specific international forum of the prosecution of the alleged violation of such obligations. Indeed, this is not in accordance with international treaty law, at least as I understand it. On the other hand, the legal impact of Article 12 for the United States as a non-party should not be exaggerated. As Ruth Wedgwood has quite rightly pointed out in her article on the matter in *Foreign Affairs*, the 1949 Geneva Conventions already permit foreign courts to prosecute certain crimes committed in international armed conflicts.¹⁷ Moreover, US military stationed abroad could be protected by amending the 'status of forces' agreements accordingly.

¹² *Ibid.* at 17–18.

¹³ Committee on Human Rights Law and Practice, Report on the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offences, prepared by Menno Kamminga, *International Law Association, Report of the 68th Conference, Taipei, Taiwan, Republic of China* (1998), 563 *et seq.*

¹⁴ Scheffer, *supra* note 10, at 18.

¹⁵ See Malanczuk, *Akehurst's*, *supra* note 2, at 137, with references.

¹⁶ On *ius cogens*, peremptory norms, obligations *erga omnes* and the concept of 'international crimes' of states see Malanczuk, *Akehurst's*, *supra* note 2, at 57 *et seq.*

¹⁷ Wedgwood, 'Fiddling in Rome — America and the International Criminal Court', 77 *Foreign Affairs* (1999) 24.

On the other hand, I do not find convincing the further *political* proposition that Article 12 would pose ‘significant new legal and political risks’ to US armed intervention abroad ‘in order to save human lives or to restore international or regional peace and security’.¹⁸ With all respect to Ambassador Scheffer, I tend to believe that the history of US armed intervention in the Western hemisphere and beyond is revealing in a rather different direction. In most cases the United States has intervened militarily in other countries (whether sometimes authorized, as more recently, by the Security Council or not) not for purely altruistic reasons alone, but usually at least also in the national interest and/or for strategic reasons, including the protection of the interests of its allies.¹⁹ The case of Somalia, the results of which we all know, is perhaps one of the exceptions, if one disregards the strategic interest to contain Islamic fundamentalism in the Horn of Africa.²⁰

Be that as it may, I have no doubt that Article 12 will not be any real political or legal obstacle for the peaceful US deployment of troops abroad in general (also because this is part of the global strategy in the interest of the United States). I also do not think that this Article would prevent unilateral armed intervention if the US deems it necessary to protect what is called ‘vital interests’ in the history of international law and the great powers’ relationship to it.²¹

I am much more disturbed by the basic assumption that seems to underly this argument, beyond the particular issue of the application of Article 12, namely that if US soldiers commit war crimes abroad during their ‘global presence’, as a matter of principle, they should remain exempted from the jurisdiction of international tribunals and prosecuted only by US courts. Whether this is really an effective and objective remedy may sometimes be doubted, but this would lead, *inter alia*, into a complicated discussion, for example, of the Vietnam War, the *My Lai* case and the ‘*de minimis* punishment’ of US Army Lieutenant William Calley. Calley was overall implicated in the intentional killing of about 400 Vietnamese civilians and convicted in 1973 for the ‘premeditated murder of 22 infants, children, women and old men, and of assault with intent to murder a child of about 2 years of age’ in the My Lai massacre.²² It is reported that, as a result, the officer was in prison only for a short time before President Nixon commuted his sentence and that many of his associates were not charged with any crime at all, while others were acquitted by military courts.²³

Another major objection of the United States to the Rome Statute concerns the lack of the possibility of states to limit their so-called ‘exposure’ to the court in cases other

¹⁸ Scheffer, *supra* note 10, at 19.

¹⁹ See P. Malanczuk, *Humanitarian Intervention and the Legitimacy of the Use of Force* (1993); Malanczuk, ‘Monroe Doctrine [with Addendum]’, in R. Bernhardt (ed.), *Encyclopedia of Public International Law*, 3 (1997) 460–464.

²⁰ See Malanczuk, *Akehurst’s*, *supra* note 2, at 427.

²¹ See Partsch, ‘Vital Interests’, in R. Bernhardt (ed.), *Encyclopedia of Public International Law*, Instalment 10 (1987) 526–528; Randelzhofer, ‘Great Powers’, in R. Bernhardt (ed.), *Encyclopedia of Public International Law*, 2 (1995) 618–622.

²² *US v. Calley*, 46 CMR 1131 (1973).

²³ See King and Theofrastous, *supra* note 9, at 69, notes 88 and 89.

than those referred to it by the Security Council (where, of course, the P-5 can rely on the right of veto). The US delegation argued at the final stage of the conference, supported by the other permanent members, that only the crime of genocide should be made subject to the automatic jurisdiction of the court. With respect to crimes against humanity or war crimes, the P-5 favoured the acceptance of an opting-out privilege for any state party for a period of ten years. This further limitation on the power of the court was quite rightly rejected by the majority. Even France, the United Kingdom and Russia did not maintain this objection at the end.

Finally, I will only mention the US objection to the possible inclusion of the crime of aggression in the future, once it has been properly defined. Anyone who has some knowledge of the fruitless history in the United Nations to define 'aggression' will fully understand this objection, especially if there is no link to the authority of the Security Council to determine whether or not there has actually been an act of aggression.²⁴ In my view, by nature, this is a political decision, with which an international criminal court alone cannot be burdened in the present UN system. Therefore, I believe that this objection is quite a reasonable one.

Nevertheless, on the whole, it is difficult to avoid the impression that the basic attitude of the United States in this affair signifies its general reluctance to submit to any higher authority and its claim to exceptionalism in view of its great power status. Not only Europeans and many other countries probably see it this way. A recent critical analysis of the position of the United States vis à vis the International Criminal Court published by Marcella David in this Law School's distinguished *Michigan Journal of International Law* arrives at the following conclusion:

... Even if credible information suggests a crime has been committed, only the United States will be permitted to judge that conduct. One can easily imagine the only scenario in which the US will accede to a superior authority: the albeit unlikely circumstance when it loses the war. With this implicit rejection of universal application of the law, the United States does significant damage to the development of international law. Indeed the US repudiates the principle of Nuremberg by insisting that America (the state with the most political and military power) should be exempt from the law: *it really was victor's justice after all*.

The implications for the international community are troubling... It is already strained by American pronouncements of international law (which the US apparently feels, in many circumstances, no obligations to follow itself); by American use of its political and economic clout to ensure favourable outcomes in situations where its own interests are implicated; by stated lack of respect for the United Nations. To avoid further, perhaps irreparable fracture of the international community, it is time for the United States to embrace, and not repudiate, the ideals of Grotius.²⁵

²⁴ See Bross, 'The Definition of Aggression', 1 *RdC* 154 (1977), 299–400; T. Bruha, *Die Definition der Aggression* (1980); Bennet, 'A Linguistic Perspective of the Definition of Aggression', *German Yearbook of International Law* 31 (1988), 48–69; Y. Dinstein, *War, Aggression and Self-Defence* (1988).

²⁵ David, *supra* note 9, at 409. See also the comment by Prof. Wise at the AALS Panel on the International Criminal Court, 36 *American Criminal Law Review* 36 (1999), 259: '... whatever the Administration says, the essence of American objections emanating from the Senate, is rather that the United States alone among the countries of the world shouldn't be required to submit itself to enforceable international standards. That, it seems to me, is not a legitimate objection...' In the same Panel discussion, Prof.

There is truth in this observation. But it is also clear that the participation of the United States in the establishment of the International Criminal Court, quite rightly often described as a historic landmark in the development of international law, is necessary for securing the effectiveness and the financial basis of the operation of the court. Now, a year after the adoption of the Rome Statute, however, there seems more room for reconsideration of the matter. The work on technical details of the Rome Statute, such as the definition of crimes and the financial issues, has been making some progress and it appears possible that the negotiations may be completed by mid 2000. The entry into force of the Rome Statute requires sixty ratifications, so far four states have ratified it and more than eighty states have signed it. It seems that the United States has recognized that, in the end, it will not be able to prevent the establishment of the court (although this will certainly take some years). It seems to have amended its tactics of opposing the ICC in principle by engaging into bilateral discussions to seek acceptable conditions for its accession to the statute through an additional protocol, or a General Assembly resolution, or other formula.²⁶

3 The Case of the Anti-Personnel Mines Treaty

Professor Anderson has broadly addressed the Anti-Personnel Mines Treaty and I will therefore limit my part here to the following observations.

The UN Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and Their Destruction, the so-called Ottawa Treaty,²⁷ entered into force on 1 March this year.²⁸ This treaty has a very wide scope and aims at the complete ban of a particular type of weapon which kills or maims some 25,000 people every year. It goes far beyond the amended Protocol II of the Conventional Weapons Convention, which entered into force in December 1998,²⁹ and was accepted by the US.³⁰ Protocol II is considered to be flawed because it merely seeks to impose further restrictions on the use of anti-personnel landmines, rather than prohibiting them entirely. The Ottawa Treaty has been accepted not only by

Halberstam made the interesting observation that, prior to the Rome conference, US opposition to the ICC seemed to be primarily based in the Senate and the Congress: 'But it is the Executive, the Clinton Administration, which was in favor of an International Criminal Court, that is against this Statute', at 263.

²⁶ *Frankfurter Allgemeine Zeitung*, 16 August 1999, at 4.

²⁷ Adopted at Oslo, Norway on 18 September 1997; text in 36 *ILM* 36 (1997) 1507. For the history and negotiation of the 'Ottawa Treaty' see Maslen and Herby, 'An International Ban on Anti-Personnel Mines', *International Review of the Red Cross* 38 (1998) 693–713; Roberts, 'No Exceptions, No Reservations, No Loopholes: The Campaign for the 1997 Convention on the Prohibition of the Development, Production, Stockpiling, Transfer and Use of Anti-Personnel Mines and Their Destruction', *Colorado Journal of International Environmental Law* 9 (1998) 371–391.

²⁸ See Piotrowicz, 'Anti-personnel Mines — The Political Time Bomb under the Superpowers' Table', *Australian Law Journal* 73 (1999) 100–103.

²⁹ Text in 35 *ILM* (1996) 1206–1217.

³⁰ For the US position upon ratification see 91 *AJIL* (1997), 325 *et seq.*

states such as Andorra and Monaco, but also by the United Kingdom and France. The United States, China and Russia, however, have refused to join the Ottawa Treaty. Thus, although the treaty can be regarded as a major step forward, it does not (yet) effectively establish a universal regime outlawing this type of weapon.

While declaring that the United States would not join the 125 states signing the Ottawa Treaty, on 17 September 1997, President Clinton announced that the United States would ban all anti-personnel mines by 2003, except in Korea, where they would continue to be used until 2006. Still, critics have argued that over one million existing US anti-personnel mines would be exempted from this promised ban.³¹ What were the main objections of the United States, which generally claims to be in favour of a ban, but did not sign the treaty?

One central point is that the Ottawa Treaty admits no reservations to it in its Article 19, a provision which the United States tried, but failed, to have deleted.³² One other of the provisions of the Ottawa Treaty that was highly controversial was Article 3. It deals with exceptions. The United States suggested a specific exception that would have permitted it to continue to employ anti-personnel mines in Korea.³³ Only Japan supported this proposal and a few other countries showed some sympathy (Australia, Ecuador, Poland, Spain and Venezuela). The majority, however, opposed it and finally no exception was allowed to solve the United States' 'Korean problem' through a transitional period or other formula. The conviction prevailed that any exception to a treaty seeking to ban a certain weapon was a contradiction in terms and that if a geographic exception was granted to one country, other countries would also ask for their own exceptions.

Other provisions that met US opposition were Articles 17 and 18 dealing with the entry into force of the treaty. Although some delegations had sought to require only 20 ratifications as in the case of the 1980 Convention on Conventional Weapons,³⁴ the entry in force of the Ottawa Treaty was set at 40 ratifications. The United States had proposed that 60 ratifications should be necessary, including all of the Security Council's P-5 and 75 per cent of historic producers and users, a suggestion which may have left the entry into force of the treaty at the discretion of China and Russia. A further US proposal that was also rejected was that parties should have the right to sign the treaty while postponing entry into force of the core articles for a period of nine years.³⁵

A final major point of dispute concerned Article 20 on the duration of and withdrawal from the treaty. The text, as adopted, provides that the convention shall be of unlimited duration and that states may effectively withdraw from the treaty after six months of submitting the withdrawal notification. Originally, the draft treaty had envisaged a one-year notification period. The current text also states: 'If, however, on

³¹ See Roberts, *supra* note 27, 387, note 87.

³² *Ibid.* at 384.

³³ *Ibid.* at 385–386.

³⁴ Malanczuk, *Akehurst's, supra* note 2, at 344 *et seq.*

³⁵ Roberts, *supra* note 27, at 387–388.

the expiry of that six-month period, the withdrawing State Party is engaged in an armed conflict, the withdrawal shall not take effect before the end of the armed conflict.³⁶

Unhappy with this provision, the United States unsuccessfully proposed to reduce the withdrawal period from one year to ninety days and that parties should have the right to withdraw from the treaty during armed conflict.³⁷ It is clear that such an amendment would have effectively reduced the ban on anti-personnel mines to times of peace.

The overriding perspective of the United States as regards the Ottawa Treaty is still clearly a military one. But this is also so in the case of other states which have refrained from signing it, such as China and Russia. In this respect, the United States is not standing alone. Current US military doctrine still considers mines as a military necessity, although since 1992 a number of political steps have been taken to reduce their use.³⁸ One of the military considerations is that the Ottawa Treaty is over inclusive by also covering so-called ‘smart’ mines, mostly used by the US military, as distinct from ‘conventional’ or ‘dumb’ mines. Conventional or ‘dumb’ mines are classified as mines that once they are activated remain deadly until they detonate, decompose or are demined. ‘Smart’ mines, on the other hand, are described as having limited lives and containing mechanisms causing them ‘to either self-destruct, self-deactivate, or self-neutralize’ and it is said that the ‘technology behind these devices is both simple and fail-safe’ because they operate by battery with a fixed life.³⁹

Apparently, the United States nowadays uses such ‘smart mines’ everywhere, except in Korea in the Demilitarized Zone. It also seems that now all new US landmines are ‘smart’.⁴⁰ It is further argued that US landmines are usually laid en masse and in plain sight above ground and that they:

are programmed to self-neutralize, self-destruct, or self-deactivate within hours and they accurately perform that task over 99.99% of the time, making the advent of a hazardous dud extremely rare. If the rest of the world modelled their use of anti-personnel mines after the United States then mines would only claim one civilian casualty every three years. Obviously, the unmarked and invisible ‘killing fields’, responsible for the death of thousands of innocents, are not the result of this type of mining.⁴¹

It is important to note that the minefields laid by the United States usually combine anti-tank mines surrounded by anti-personnel mines to protect the anti-tank mines, considered as crucial in military terms on modern battlefields.⁴² One can, of course,

³⁶ Art. 20, para. 3, 2nd sentence.

³⁷ Roberts, *supra* note 27, at 388.

³⁸ For a discussion from a military point of view see Efaw, ‘The United States Refusal to Ban Landmines: The Intersection Between Tactics, Strategy, Policy and International Law’, 159 *Military Law Review* (1999) 98 *et seq.*

³⁹ *Ibid.* at 143.

⁴⁰ *Ibid.* at 146, note 374, stating that although 10% of the mines in the US inventory are ‘dumb’, these are only used in the Korean DMZ.

⁴¹ *Ibid.* at 144.

⁴² For details see *ibid.* at 149 *et seq.*

sympathize with US Senator Patrick Leahy who, in addressing Congress in September 1997, has noted:

... If the use of anti-personnel-mines near anti-tank mines is what prevents the US from signing the treaty, then solve it. . . If the Pentagon had spent the past three years since the President first called for a world wide ban really trying to solve that problem rather than to keep from having to solve it, the [United States] might have been able to show the leadership on this issue that the world needs.⁴³

But the legal and political consequences of 'leaving the US behind' in the case of the Ottawa Treaty are perhaps not as dramatic as they may appear at first sight. It has been more important to secure a treaty text that envisages a total ban on the use of landmines and permits no exceptions and reservations. One should also not forget that the United States has been the promoter of other important disarmament treaties, such as the Chemical Weapons Convention and the Nuclear Test Ban Treaty. Eventually, the United States may be expected to join, especially if Russia and China do so, and the technical conditions of the relevant weaponry are ripe from a defence point of view. After all, President Clinton has made the clear statement on 16 May 1996 that the United States is committed to the international goal of eliminating anti-personnel mines entirely and has reiterated on 7 January 1997, in the letter of transmittal to the Senate for ratification of Protocol II to the Conventional Weapons Convention, that:

a global ban on anti-personnel landmines . . . is one of my top arms control priorities. At the same time, the policy recognizes that the United States has international commitments and responsibilities that must be taken into account in any negotiations on a total ban.⁴⁴

But there is also another point to be made. I think one can generally agree with the proposition that the United States is a 'responsible user' of landmines and has not caused, and is not causing, the loss of the many civilian lives through buried and booby-trapped landmines in countries such as Afghanistan, Angola, Bosnia-Herzegovina, Cambodia, Iraq or Mozambique. Then the question arises whether a total ban on anti-personnel mines accepted by the United States in terms of the Ottawa Treaty would really make much difference immediately. For it is easy to produce anti-personnel mines which are not 'high technology' and production is cheap at an average cost of \$5 each.⁴⁵ Especially in internal conflicts, it is therefore likely that an international ban will not be easy to verify and implement in reality, whether the United States participates or not.

4 US 'Unilateralism' in International Human Rights Lawmaking

Finally, let me put the above remarks into a more general perspective. If the attitude of the United States in these two particular cases is to be analysed as a form of

⁴³ 143 CONG. REC. S9778-01, S9779 at S9780 (daily ed. 23 September 1997).

⁴⁴ 91 *AJIL* (1997), 326.

⁴⁵ Eflaw, *supra* note 38, at 148.

‘unilateralism’ in international lawmaking, then I suggest that we have much better examples in the field of international human rights treaties.

The United States is known as the foremost bearer of the ideology of human rights as an instrument of foreign policy, especially since President Carter.⁴⁶ The constitutional protection of (liberal) human rights and fundamental freedoms against the legislative, executive and judicial powers in this country are considered as leading in the world. On the international level, however, there is a marked reluctance to ratify human rights instruments. The United States did finally ratify the 1948 Genocide Convention in 1986, the 1966 Covenant on Civil and Political Rights in 1992, the 1984 Torture Convention in 1994 and the 1965 Racial Discrimination Convention in 1994. It still has not ratified (as one of two states—the other one is Somalia) the 1989 Rights of the Child Convention, the 1979 Discrimination against Women Convention, and does not intend to ratify the 1966 Covenant on Economic, Social and Cultural Rights.⁴⁷ Moreover, numerous reservations and declarations accompany the treaties that the United States did ratify. They boil down to the statement that the United States accepts only those international provisions that conform to existing American law and constitutional provisions. In a recent publication, the well-known American scholar Louis Henkin has given the following summary of the principles the United States applies when ratifying international human rights treaties:

1. The United States will not undertake any treaty obligation it will not be able to carry out because it is inconsistent with the United States Constitution.
2. United States’ adherence to an international human rights treaty should not effect, or promise, change in existing United States’ law or practice.
3. The United States will not submit to the jurisdiction of the International Court of Justice to decide disputes as to the interpretation or application of human rights conventions.
4. Every human rights treaty to which the United States adheres should be subject to a ‘federalism clause’ so that the United States could leave implementation of the convention largely to the states.
5. Every international human rights agreement should be ‘non-self-executing’.⁴⁸

A recent study of the matter, perhaps not surprisingly in view of the above, arrives at the conclusion that:

the American approach to international human rights is as much a manifestation of cultural relativism as any other sectional approach to international human rights founded on national or ethnic, cultural or religious peculiarities. American relativism, furthermore, also serves to

⁴⁶ See also H. Hannum and D.D. Fisher (eds), *United States Ratification of the International Covenants on Human Rights* (1993); Henkin, ‘US Ratification of Human Rights Conventions: The Ghost of Senator Bricker’, 89 *AJIL* (1995) 341–349.

⁴⁷ See J.D. van der Vyver, ‘Universality and Relativity of Human Rights: American Relativism’, 4 *Buffalo Human Rights Law Review* (1998) 65 *et seq.*

⁴⁸ Henkin, *supra* note 46, at 341.

obstruct the United Nations' resolve to promote *universal* respect for human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.⁴⁹

It is not the purpose of this paper to enter into the details of the argument concerning this particular problem regarding the attitude of the United States and its reasons. What solely matters here is the simple fact that the United States has not accepted all international human rights obligations in an unqualified sense, while it continues to criticize — rightly or wrongly — other states for not respecting internationally binding human rights norms. It has been correctly observed in this connection that what is good for the goose must be also good for the gander and there is no logical reason then to blame other parts of the world for having their own reservations.⁵⁰

5 Conclusion

If one compares the ICC case with the landmines case the common feature is that, in both cases, the United States has based its non-participation on the special global military responsibilities it claims, requiring exceptions for the United States. In both cases, the admission of such exceptions and privileges for the United States could have been equally claimed by other states and would have (further) watered down the normative regimes as a result. It must be also noted, however, that in both cases the United States is not the only major power that feels uncomfortable with the contents of the treaty.

It is the sovereign right of the United States not to sign an international treaty it does not like. It must be admitted that the US also has differentiated arguments that cannot be fully dismissed as being irrelevant to the subject matter of both conventions. Clearly, there is a need of US support for both treaties to be able to operate effectively. 'Leaving the US behind' means that in the short term there certainly will be more difficulties in the implementation of the treaties. In the longer term, however, the United States, as in the case of the international human rights treaties may decide to join, if it can secure its interests and the various interested local constituencies can be persuaded.

Nevertheless, in both cases the United States may be seen as continuing to set a bad example in the development of international law, as in the case in international human rights lawmaking, by claiming special privileges and immunities. It reinforces

⁴⁹ van der Vyver, *supra* note 47, at 77. See also Malanczuk, 'The Universality of Human Rights and Differences in Asian and European Values from the Perspective of International Law' (Keynote Speaker), *Second Informal Asian-European Meeting (ASEM) Human Rights Seminar, co-sponsored by China, Sweden, France, Indonesia and the Asian-European Foundation (AEF)*, Beijing, 28–29 June 1999 (forthcoming).

⁵⁰ See also Buergenthal, 'Entwicklungen in der Menschenrechtspolitik der USA', 16 *Europäische Grundrechtszeitschrift* (1989) 149–157, who noted ten years ago that (in sum) the attitude of the USA is harming the quest for a more human world, gives the impression of arrogance and hypocrisy on the part of one of the great democracies, and serves as a bad example (at 157).

the not uncommon view outside of the US that this country, in a hypocritical sense, refers to international law only when it serves its national interest in foreign policy. In the ICC and landmines cases, the larger part of the international community, including allies of the United States, has decided to go ahead without the US. I would conclude that the US has not been left behind, but rather has left itself behind, most clearly in the case of the International Criminal Court.