
Dynamic Equilibrium: The Evolution of US Attitudes toward International Criminal Courts and Tribunals

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Abstract

This article examines the seemingly dynamic relationship between the United States and international criminal courts. Its scope is limited to a description of the attitude of the US government toward international criminal courts and tribunals, both at present and historically, and how that attitude has evolved. The article surveys US attitudes toward all of the major international criminal courts created or proposed over the past century. The US attitude is 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. The survey also reveals certain consistent themes underlying US attitudes toward international criminal courts. One consistent element would appear to be the (un)likelihood of prosecution of US nationals. The US has tended to support international criminal courts where the US government has (or is perceived by US officials to have) a significant degree of control over the court, or where the possibility of prosecution of US nationals is either expressly precluded or otherwise remote. If the US is assured that US 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 colour this balancing of interests and at times define some of those interests. To the extent that an administration's ideological strain in favour of accountability is stronger than its ideological strain opposed to the creation of international authority, the prospect of US support of a given international criminal court increases.

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Finding no way ‘to harmonize the[ir] differences without an abandonment of principles which were fundamental’,¹ the US government 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.²

At first glance, these objections might seem to be those expressed by US representatives participating in the 1998 negotiation of the Statute of the International Criminal Court. In fact, they were expressed almost 80 years earlier.³

1 Introduction

The purpose of this article is to examine the seemingly dynamic relationship between the United States and international criminal courts. Its scope is limited to a description⁴ of the attitude of the US government⁵ toward international criminal courts and tribunals, both at present and historically, and how that attitude has evolved. Much of the research presented herein was gathered through interviews with officials of the US government, the United Nations, each of the international criminal courts surveyed, and non-governmental organizations (NGOs) working on international justice issues.

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. In order to comprehend the full range of US 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).

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);

¹ Commission on the Responsibility of the Authors of the War and on the Enforcement of Penalties, Report Presented to the Preliminary Peace Conference, 29 Mar. 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 *AJIL*. (1920) 95.

² *Ibid.*

³ See *infra*, sect. II.B.

⁴ This article is not intended to be a critique of US 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.

⁵ The NGO community has played a central role in contributing to the development of international criminal courts, as well as in shaping the attitude of the US government toward these courts. The attitude of the US government, of course, cannot be examined in complete isolation from that of civil society and the broader American public. However, the primary focus of this article is the attitude of the US government, and this article does not attempt to document the full scope of the role played by civil society in this process.

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 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 the court's jurisdiction; whether the court is labelled 'international'; whether the court's 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.⁶ 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 US policy on international criminal courts generally. This is in part due to the considerations noted above, and more generally to the fact that the US perspective is an amalgamation of diverse views reduced in some cases to written form, which is itself subject to varying interpretations.

2 Early US Attitudes toward International Justice and the Possibility of International Criminal Courts

A *The Hague Peace Conferences*

The United States has been a strong supporter of the international regulation of armed conflict since at least the 19th-century codifications of international humanitarian

⁶ Rome Statute of the International Criminal Court, 17 July 1998, 37 I.L.M. 999.

law. Indeed, the Lieber Code, drafted at the request of the US government for the regulation of the conduct of the armed forces during the US 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 US 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 recourse to the use of armed force. While the US 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 US to legal regulation.

While the Hague Peace Conferences did not deal with the issue of an international criminal court, they did of course consider the creation of an international court for resolving disputes between states. The Report of the United States delegation makes clear that although the US 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.⁷ Nonetheless, the US welcomed the creation of the Permanent Court of Arbitration, with its purely consent-based jurisdiction, in part because of the role it would play in developing an international jurisprudence.⁸

B *The Treaty of Versailles*

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’.⁹ The tribunal was to consist of judges from the United States, Great Britain, France, Italy and Japan.¹⁰

According to Telford Taylor, the US 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’.¹¹ The US delegation was instructed to express serious reservations, rejecting the tribunal and opposing the trial of the Kaiser.¹²

⁷ Peace Conference at the Hague 1899: General Report of the United States Commission to the International Conference at the Hague, 31 July 1899: www.yale.edu/lawweb/avalon/lawofwar/hague99/hag99-04.htm.

⁸ *Ibid.*

⁹ Treaty of Versailles, Art. 227.

¹⁰ T. Taylor, *The Anatomy of the Nuremberg Trials: A Personal Memoir* (1992), at 15.

¹¹ *Ibid.*

¹² *Ibid.*

The US 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 US government that 'those responsible for violations of the laws and customs of war should be punished for their crimes, moral and legal'.¹³ 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'.¹⁴ In 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).¹⁵

With regard to the 'unprecedented'¹⁶ proposal to create an international tribunal, the US 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.¹⁷

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'.¹⁸ 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'.¹⁹ 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'.²⁰

Such a mechanism would address the concerns of the US delegation regarding what they perceived as the *ex post facto* nature of an international tribunal. The US 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'.²¹ 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

¹³ Memorandum of Reservations, *supra* note 1, at 127.

¹⁴ *Ibid.*

¹⁵ *Ibid.*, at 129.

¹⁶ *Ibid.*

¹⁷ *Ibid.*, at 140.

¹⁸ *Ibid.*, at 146.

¹⁹ *Ibid.*

²⁰ *Ibid.*, at 142. This is essentially what is contemplated in Art. 229 of the Versailles Treaty, the second para. of which provided, '[p]ersons 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...'.²¹

²¹ *Ibid.*

be settled'.²² Only under these conditions and with these limitations might the US participate in 'a high tribunal, which they would have preferred to call, because of its composition, the Mixed or United Tribunal or Commission'.²³

Notwithstanding these objections, the US grudgingly went along with the inclusion of Article 227, but only after negotiating language that would reduce the prospects of it being implemented.²⁴

C *The League of Nations*

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'.²⁵ This proposal was 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'.²⁶

According to UN Special Rapporteur Richard Alfaro, 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.²⁷

This closely parallels the position taken by the US 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 crime of terrorism. This treaty failed to attract sufficient ratification, and consequently never entered into force.²⁸

Expressing contemporary views on the matter, US jurist Manley Hudson 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

²² *Ibid.*, at 147.

²³ *Ibid.*

²⁴ Taylor, *supra* note 5, at 15.

²⁵ Report on the Question of International Criminal Jurisdiction by Richard J. Alfaro, Special Rapporteur, [1950] Yearbook of the International Law Commission, ii, A/CN.4/15, at para. 15.

²⁶ *Ibid.*, at para. 16.

²⁷ *Ibid.*, at para. 17.

²⁸ *Ibid.*, at para. 26.

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.²⁹

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'.³⁰ Arguably, the horrors of World War II provided the necessary demonstration.

3 US Policy toward International Criminal Courts since World War II

A *Nuremberg and Tokyo*

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

However, as recalled by Telford Taylor, the US was initially unsupportive of the Russian proposal to establish an international tribunal for the trial of 'major war criminals'.³¹ Indeed, Roosevelt initially endorsed Churchill's counter-proposal to summarily execute them.

Taylor primarily credits Secretary of War Henry L. Stimson with the US reversal. In negotiations within the US government, the War Department emerged as the dominant entity.³² 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.³³

The US 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 US 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.³⁴

²⁹ M. O. Hudson, *International Tribunals: Past and Future* (1944), at 186.

³⁰ *Ibid.*

³¹ Taylor, *supra* note 5, at 34.

³² *Ibid.*

³³ *Ibid.*, at 35.

³⁴ Memorandum to President Roosevelt from the Secretaries of State and War and the Attorney General ('Yalta Memorandum'), 22 Jan. 1945, available at: www.yale.edu/lawweb/avalon/imt/jackson/jack01.htm.

This same Memorandum envisions the creation of an International Military Tribunal, to be established by Executive Agreement, and formed the groundwork of the later drafts submitted by the United States for an international agreement. The Memorandum was initialled 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 US 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.³⁵

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 US support for the creation of the IMTs may appear inconsistent with the position taken by the US delegation to the 1919 Paris Conference, it is worth noting the similarities between the IMTs and the US counter-proposal detailed in its 1919 Memorandum of Reservations. Echoing the US 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.³⁶

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’.³⁷

³⁵ *Ibid.*, at 32.

³⁶ Judgment of the Nuremberg Tribunal, 1946. In addition, the Yalta Memorandum cites an *Aide Mémoire* from the British Embassy indicating the UK government’s willingness to co-operate in the 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 US delegation to the 1919 Commission on Responsibilities—‘Mixed or United Tribunal or Commission’.

³⁷ *Ibid.* It should be noted, however, that the US discomfort with the notion of the ‘laws of humanity’, expressed repeatedly by the US 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

Some observers find US support for the IMTs ultimately grounded in the confluence of internationalism and exceptionalism.³⁸ 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 US military.³⁹ As international tribunals subject to a wide measure of US control, their existence and operation were compatible with contemporary US tendencies toward internationalism while alleviating any concern about ceding power beyond US reins. While the US did not have exclusive control of the Tribunals, the US government was assured that US forces would not be prosecuted, since the personal jurisdiction of the Tribunals was limited to those who were acting in the interests of enemy states.

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 US delegation,⁴⁰ 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 formulation, 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 Nürnberg Tribunal and in the judgment of the Tribunal'.⁴¹

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.⁴² In its comments on the draft Convention the US proposed that the issue of establishing an international criminal court be considered separately.⁴³

While the US supported the creation of ad hoc tribunals to prosecute genocide, it expressed concern that attaching to the draft Genocide Convention a treaty creating

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 [1950] Yearbook of the International Law Commission, 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.

³⁸ Interview with former State Department official (name withheld), 13 Dec. 2005.

³⁹ The US 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'.

⁴⁰ Spiropoulos Report, *supra* note 37, at para. 29.

⁴¹ GA Res. 1/95, 11 Dec. 1946.

⁴² Draft Convention on Genocide, Doc. A/362, 25 Aug. 1947. The proposals for these courts drew heavily from the text of the 1937 Convention.

⁴³ Communications Received by the Secretary-General, Doc. A/401, 27 Sept. 1947.

a court might jeopardize the successful conclusion of the former.⁴⁴ It also noted that the ‘problem of the institution of [an international penal] tribunal, competent to try 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’.⁴⁵ 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.⁴⁶

In subsequent debates in the Sixth Committee, the US 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.⁴⁷ The US 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’.⁴⁸ He also pointed out that such a court’s jurisdiction would be consent-based.⁴⁹

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’.⁵⁰ The Commission turned to this task the following year.

In 1950, the General Assembly designated a Committee consisting of 17 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’.⁵¹ The US 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 autumn of 1952, Morris, then representing the US 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’.⁵² However, a week later he clarified that

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*

⁴⁶ *Ibid.* In its comments, the US 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’: *ibid.*

⁴⁷ Consideration of the draft Convention on Genocide, 98th Meeting of the Sixth Committee, 10 Nov. 1948.

⁴⁸ *Ibid.*

⁴⁹ *Ibid.*

⁵⁰ GA Res. 3/260, 9 Dec. 1948.

⁵¹ GA Res. 5/489, 12 Dec. 1950.

⁵² Consideration of the Report on the Committee on International Criminal Jurisdiction, 322nd Meeting of the Sixth Committee, 8 Nov. 1952, at para. 18.

the US 'neither favored nor opposed the establishment of an international criminal court'.⁵³

In the face of a wide range of views on the subject, including strong opposition from the Representative of the United Kingdom,⁵⁴ 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'.⁵⁵ 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'.⁵⁶ Thus, while the US appeared to be amenable to the creation of an international criminal court, the envisioned court would have jurisdiction only over those individuals whose state of nationality had recognized the court's jurisdiction by treaty.

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.⁵⁷ Among the more controversial aspects of the draft statute was the definition of the crime of aggression.⁵⁸

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,⁵⁹ and the creation of an international criminal court would not find a place on the UN agenda until 1989.

In the US, support for an international criminal court resurfaced in the late 1980s. In 1988, the US 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'.⁶⁰ However, this same piece of legislation was careful to preserve the possibility of an exemption for US nationals. It stipulated, '[s]uch discussions shall not include any commitment that such court shall have jurisdiction over the extradition of United States citizens'.⁶¹

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.⁶²

⁵³ Consideration of the Report on the Committee on International Criminal Jurisdiction, 328th Meeting of the Sixth Committee, 17 Nov. 1952, at para. 29.

⁵⁴ Consideration of the Report on the Committee on International Criminal Jurisdiction, 321st Meeting of the Sixth Committee, 7 Nov. 1952, at para. 26 ff.

⁵⁵ Consideration of the Report on the Committee on International Criminal Jurisdiction, 322nd Meeting of the Sixth Committee, 8 Nov. 1952, at para. 17.

⁵⁶ *Ibid.*, at para. 16.

⁵⁷ B. Ferencz, *An International Criminal Court: A Step Toward World Peace* (1980), ii, at 36–38.

⁵⁸ Report of the Sixth Committee, Doc. A/3770, 6 Dec. 1957, at para. 5 ff. See also GA Res. 12/1186, 11 Dec. 1957. The US has traditionally resisted efforts to define aggression; e.g., the US opposed the inclusion of a definition of aggression in the UN Charter: Whiteman, 5 *Digest of International Law* (1965) 740.

⁵⁹ GA Res. 36/106, 10 Dec. 1981.

⁶⁰ PL 100-690, 102 Stat. 4267 (1988).

⁶¹ *Ibid.*

⁶² GA Res. 44/39, 4 Dec. 1989.

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 US became pre-eminent and gained a substantial degree of control, primarily through the Security Council, over UN mechanisms, providing an impetus to make greater use of such mechanisms.⁶³ 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 through the Security Council.⁶⁴

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 the subject matter jurisdiction of the ICTs. As ad hoc Tribunals, they have limited territorial and temporal scope. While US 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 US opposition. Another factor bolstering US support for the Tribunals is the ability of the US to influence their operations. This influence, though limited, expresses itself through the staffing of the tribunals with a number of US citizens, several of whom have been former government employees, and through the 'silent influence' of the US – the mere fact that the staff of the tribunals are aware that without the support of the US, they would not exist.⁶⁵

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 genuine scepticism at the idea of an international tribunal created by the Security Council.⁶⁶ The establishment of the ICTY was a US idea, and it was the US that pushed it through the Security Council.⁶⁷ Many observers credit then US Ambassador to the UN Madeline Albright with the creation of the ICTY.⁶⁸

Albright's expressions of support rang of high ideals. Upon the establishment of the ICTY, Albright 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'.⁶⁹

⁶³ Interview with David Scheffer, former US Ambassador for War Crimes Issues, 31 Mar. 2005; interview with former State Department official, *supra* note 38; interview with former State Department official (name withheld), 11 May 2006.

⁶⁴ *Ibid.* But see Scheffer, 'Three Memories from the Year of Origin: 1993', 2 *JICJ* (2004) 353.

⁶⁵ Interview with ICTY official (name withheld), 3 Apr. 2005.

⁶⁶ See Zacklin, 'Bosnia and Beyond', 34 *Va J Int'l L* (1994) 277 ('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').

⁶⁷ Interview with a UN official (name withheld), 27 Mar. 2005.

⁶⁸ *Ibid.*

⁶⁹ M. K. Albright, 'UN Security Council Adopts Resolution 808 on War Crimes Tribunal', 4 US Dept. of St. Dispatch No. 12, Art. 5 (22 Mar. 1993).

US 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.⁷⁰

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 permanent international court to prosecute the most serious violations of humanitarian law...⁷¹

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

The ad hoc Tribunals, and the ICTY in particular, have enjoyed broad, bipartisan support in the US Congress. Congressional support has been very important in putting pressure on both the Clinton and Bush administrations to match their rhetorical support of the Tribunals with action, particularly on the issue of conditioning economic infrastructure aid on the arrest and transfer of indicted suspects to the Tribunals.⁷²

US support for the Tribunals has taken a variety of forms. In addition to the financial support that the US provides as the largest contributing Member State of the United Nations,⁷³ the US government has also provided significant additional direct support, including through in-kind contributions. The US had also provided a large number of gratis personnel, until the Fifth Committee of the General Assembly put a stop to it.⁷⁴

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 Program and its continuing efforts to pressure states to cooperate with the Tribunals, including through conditionality. In addition, a number of US citizens are employed by the Tribunals. As with many of these factors, this serves as an expression of US support, as well as an influence in bolstering US support.

Some advocates within the NGO community have perceived a cooling of US support for the Tribunals in the post-Rome era, which they attribute to a cooling toward international justice generally.⁷⁵ Other advocates have perceived a shift of increasing support, which they attribute to the Bush administration's desire to demonstrate the

⁷⁰ W. J. Clinton, 'Remarks at the University of Connecticut in Storrs', 31 Wkly. Comp. Pres. Docs. 1840, 1842 (23 Oct. 1995).

⁷¹ W. J. Clinton, 'Remarks to the 52d Session of the United Nations General Assembly in New York City', 33 Wkly. Comp. Pres. Docs. 1386, 1389 (29 Sept. 1997).

⁷² Interview with Nina Bang-Jensen, Executive Director of the Coalition for International Justice, 16 June 2005; interview with Richard Dicker, Human Rights Watch, 9 Mar. 2005.

⁷³ By the end of 2006, US financial support will total more than \$500 million: Statement of John Bellinger, 11 May 2006.

⁷⁴ Interview with ICTY official, *supra* note 65.

⁷⁵ *Ibid.*

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.⁷⁶ 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.

Thus, US support has been largely consistent. Official criticism of the Tribunals has generally been limited to concerns about efficiency and accountability of staff members (particularly with respect to the ICTR),⁷⁷ 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 US foreign policy objectives. For example, the review of the NATO bombing of Serbia that was undertaken by the Office of the Prosecutor (OTP) of the ICTY⁷⁸ infuriated opponents of the ICC within the US government.⁷⁹ Similarly, US government officials were upset by the indictment of Karadzic in the run-up to the Dayton Accords.⁸⁰ Some observers suggest that this attitude was also reflected in NATO's failure to arrest Karadzic and Mladic – two of the ICTY's most wanted accused.⁸¹

D *The International Criminal Court*

The relationship between the US and the ICC has been far more dynamic. In the course of the development of the basic structure of this new institution, the US was to discover that its vision of what an international criminal court should be was not shared by the rest of the world.

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 US perspective, this left two options – reverting to domestic systems or developing a permanent international criminal court.⁸³ At this time, the US 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 30 July 1997, Congress expressed its support for the creation of an international criminal court in House

⁷⁶ Interview with John Stompopor, Human Rights First, 8 Mar. 2005.

⁷⁷ See Opening Statement of Pierre-Richard Prosper Before the Committee on International Relations of the US House of Representatives, 28 Feb. 2002.

⁷⁸ See Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia (2000).

⁷⁹ Interview with a former State Department official (name withheld), 24 Aug. 2001.

⁸⁰ *Ibid.*

⁸¹ Interview with an ICTY official (name withheld), 27 Mar. 2005.

⁸² 'Challenges Confronting International Justice Issues', Address by David J. Scheffer at New England School of Law, 14 Jan. 1998.

⁸³ Interview with David Scheffer, *supra* note 63, 31 Mar. 2005.

⁸⁴ *Supra* note 70, 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.

Joint Resolution 89, reminding Clinton of his earlier expressions of support and calling on him 'to 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 US government, and each agency had its own concerns. While the State Department as a whole was in favour 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 favour of establishing an international criminal court was ultimately achieved.⁸⁷

1 The Rome Conference – June/July 1998

The US delegation to the Rome Conference, led by then US Ambassador at Large for War Crimes Issues David Scheffer, was the largest of any government. A number of US 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 US position at Rome.⁸⁸

The US delegation arrived in Rome with a number of concerns that it sought to have addressed during the conference. Broadly these concerns 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 US personnel.⁸⁹ In general, the delegation engaged in what it considered to be a constructive approach – to influence the Conference to accede to US demands in the hope of establishing a court acceptable to the US.⁹⁰

To the NGO community, it was clear that the US 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 US pushed particularly hard on three issues: bases of jurisdiction, *proprio motu* investigations by the prosecutor, and peacekeeper exemptions.⁹³ According to NGO reports, US 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.

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

⁸⁶ Interview with David Scheffer, *supra* note 63.

⁸⁷ *Ibid.*

⁸⁸ Senior Subcommittee on International Operations of the Commission on Foreign Relations, 'Is a U.N. International Criminal Court in the U.S. National Interest?', 105th Cong. 11 (23 July 1998).

⁸⁹ Interview with David Scheffer, *supra* note 63.

⁹⁰ *Ibid.*

⁹¹ Interview with a diplomat (non-US) involved in the Rome negotiations (name withheld), 26 Mar. 2005.

⁹² *Ibid.*

⁹³ *Ibid.*

⁹⁴ *Ibid.*

While many of its concerns were addressed, a few key issues were not resolved to the satisfaction of the US government. Thus, US support cooled considerably following the adoption of the Rome Statute. Indeed, the US 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 US 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 was John Bolton.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 Enterprise Institute (AEI). Unlike Scheffer's comments, Bolton's comments before the Committee demonstrate a negative attitude toward the very idea of an international criminal court, irrespective of its particular design:

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 US '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 Congressional Research Service (CRS) report, the US, and in particular the US Congress, had 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

⁹⁵ Senior Subcommittee, *supra* note 88, at 12–15.

⁹⁶ *Ibid.*, at 28.

⁹⁷ *Ibid.*

⁹⁸ *Ibid.*, at 31.

⁹⁹ *Ibid.*, at 32.

¹⁰⁰ *Ibid.*

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

2 The Decision to Sign the Rome Statute

The Rome Statute was open for signature until 31 December 2000. There was a split view within the US government over whether or not to sign. The Department of Defense (DoD), 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 DoD.¹⁰²

On 31 December 2000, the last day that it was open for signature, the US, under the Clinton administration, signed the treaty. Upon signing the treaty, however, Clinton made clear that the US 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 DoD.)¹⁰³ He remarked that despite the US 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 US might ultimately be prepared to ratify the treaty if it was successful in obtaining certain concessions from the other signatory states, and it signed the treaty to maintain its seat at the discussion table.¹⁰⁵ The general attitude of the US government at this time appeared to be that the ICC in principle was a good thing.¹⁰⁶

3 The Bush Administration and Declining Support for the ICC

Shortly after the Clinton administration signed the Rome Statute, George W. Bush was sworn in as the new US President. Under his administration, the attitude of the US government toward the ICC was to shift from cautious support to outright opposition. 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 scepticism on Capitol Hill. Most Democrats were at best tepid in their support for the ICC,¹¹⁰

¹⁰² Interview with a former State Department official (name withheld).

¹⁰³ *Ibid.*

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

¹⁰⁵ Interview with David Scheffer, *supra* note 63.

¹⁰⁶ *Ibid.*

¹⁰⁷ The Defense Department under Rumsfeld was firmly opposed to the ICC: see Rumsfeld's comments issued by the US Department of Defense, 6 May 2002.

¹⁰⁸ Bolton was subsequently appointed US Representative to the UN.

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 US adherence to the ICC Statute. Even Chris Dodd, who was the chief opponent of the anti-ICC provisions of the ASPA, described *infra*, stated during the ASPA debates that he would not support US ratification of the ICC Statute.

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 the ICC 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 jurisprudence.¹¹² 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.¹¹³ Still others cite the holding of the International Court of Justice in *Congo v. Belgium*¹¹⁴ that the customary law of Head of State immunity, while barring prosecution in foreign courts, may not bar prosecution before international criminal courts.¹¹⁵

In any event, a number of events that occurred after the change in administration seemed to reinforce, if not augment,¹¹⁶ the US government's initial hostility toward the ICC. The most dramatic of these events were the 11 September 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 armed force by the US government. 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 US notion of exceptionalism. The attacks seemed to confirm to the US government that it was not similarly situated to other states.

4 Notification of Intent Not to Become a Party

The Rome Statute received its 60th ratification in April 2002. It thus became clear that the treaty would enter into force on 1 July 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.'¹¹⁷

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

¹¹² *Ibid.*

¹¹³ Interview with a former State Department official (name withheld), 27 June 2005.

¹¹⁴ Case Concerning the Arrest Warrant of 11 Apr. 2000 (*Dem. Rep. Congo v. Belgium*) [2002] ICJ Rep 3 (14 Feb.).

¹¹⁵ Interview with a former State Department official, *supra* note 113.

¹¹⁶ Some observers have indicated that US opposition could not be more intense than it was from the inception of the Bush Administration: Interview with an NGO official (name withheld), 11 Dec. 2006.

¹¹⁷ G. 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 (28 Nov. 2001).

On 6 May 2002, the Bush administration, through John Bolton, sent a letter to the UN, as depository of the treaty, stating that ‘the United States does not intend to become a party to the [ICC] treaty. Accordingly, the United States has no legal obligations arising from its signature on December 31, 2000’.¹¹⁸ The purpose of this statement was presumably twofold: to make clear US opposition to ICC jurisdiction over US nationals, and to relieve itself of any legal obligation it may have undertaken upon signing the treaty.¹¹⁹

On that same date, Marc Grossman, Under Secretary of State for Political Affairs spoke to the Center for Strategic and International Studies about the US and the International Criminal Court. In his speech, Grossman said that the US 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’.¹²⁰ He concluded by stating that ‘the United States respects the decision of those nations who 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’.¹²¹

Prosper 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’.¹²² The remarks of Grossman and Prosper appeared to indicate that the US, while not supporting the ICC, would refrain from interfering in the ICC’s operations in relation to the states parties to the Rome Statute. Thus, in the preceding 17 months, the US attitude appears to have shifted from cautious optimism to neutrality (non-supportive, non-interference).

5 Attempts to Exempt US Nationals from ICC Prosecution

The desire to shield US service members from prosecution before non-US courts is one of the oldest elements of US policy toward the ICC. For decades, the US has been careful

¹¹⁸ Press Release, John R. Bolton, Under Sec’y of State for Arms Control and Int’l Sec., ‘International Criminal Court: Letter to United Nations Secretary General Kofi Annan’ (6 May 2002), available at: www.state.gov/r/pa/prs/ps/2002/9968.htm.

¹¹⁹ Vienna Convention on the Law of Treaties, Art. 18.

¹²⁰ Press Release, Marc Grossman, Under Sec’y for Political Affairs, ‘American Foreign Policy and the International Criminal Court’ (6 May 2002), available at: www.state.gov/p/9949.htm. He stated that the principles that the US 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’—are not consistent with the Rome Statute. Reflecting the US concerns expressed at Rome, Grossman listed 4 critiques of the ICC saying that it ‘undermines the role of the United Nations Security Council in maintaining international peace and security’, ‘[it] creates a prosecutorial system that is an unchecked power’, ‘[it] asserts jurisdiction over citizens of states that have not ratified the treaty ... [which] threatens US sovereignty’, and ‘[it] is built on a flawed foundation ... [and] these flaws leave it open for exploitation and politically motivated prosecutions’: *ibid.*

¹²¹ *Ibid.*

¹²² Press Release, Pierre-Richard Prosper, US Ambassador for War Crimes Issues, *Issues Update* (6 May 2002), available at: <http://fpc.state.gov/9965.htm>.

to include jurisdictional exemptions for US forces in Status of Forces Agreements. However, its efforts to shield US nationals from possible ICC prosecution have been undertaken with unusual breadth and fervour.

By the time the US had withdrawn its signature, it had begun to pursue aggressively a strategy for limiting the exposure of all US citizens to the jurisdiction of the ICC. According to the State Department fact sheet on the ICC, the US 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’.¹²³ By June 2005, the US government, at times applying tremendous political and financial pressure, had persuaded 100 states to sign Article 98 agreements, whereby those states would undertake not to surrender US citizens to the ICC.

The US also worked through the Security Council to obtain an exemption for peacekeepers from non-states parties. After intense pressure tactics by the US, including vetoing the renewal of a peacekeeping operation, the Security Council on 12 July 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. . .’.¹²⁴ Resolution 1422, which was adopted under Chapter VII of the UN Charter, also ‘decide[d] that Member States shall take no action inconsistent with’¹²⁵ this request. This Resolution was renewed by the Security Council the following July. However, the US was unable to secure a second renewal in 2004. (This attempt failed in the wake of revelations about egregious detainee abuse by US forces at Abu Ghraib.)

At the same time, the US Congress was preparing legislation to support these efforts. In August 2002, Bush signed into law the American Service-members’ Protection Act (ASPA).¹²⁶ This legislation, dubbed the ‘Hague Invasion Act’ by human rights NGOs, contains provisions restricting US cooperation with the ICC;¹²⁷ making US support of peacekeeping missions largely contingent on achieving ICC exemption for all US personnel;¹²⁸ cutting off military assistance to states that refuse to sign Article 98 agreements;¹²⁹ and granting the President permission to use ‘all means necessary and appropriate’¹³⁰ to free US citizens and allies from ICC-ordered detention or imprisonment.

¹²³ Fact Sheet, Bureau of Political-Military Affairs, *The International Criminal Court* (2 Aug. 2002), available at www.state.gov/t/pm/rls/fs/2002/23426.htm.

¹²⁴ SC Res. 1422 para. 1, UN Doc. S/RES/1422 (12 July 2002).

¹²⁵ *Ibid.*, at para. 3.

¹²⁶ According to some observers, proponents of the ASPA had introduced the draft legislation 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 Aug. of the following year, by which time the ICC Statute had entered into force.

¹²⁷ 22 USCA § 7423 (West 2002).

¹²⁸ *Ibid.*, at § 7424.

¹²⁹ *Ibid.*, at § 7426.

¹³⁰ *Ibid.*, at § 7427.

The legislation, however, contains waivers that enable the President to avoid application of these measures where necessary.¹³¹ The scope of such measures was increased in December 2004 with the enactment of the Nethercutt Amendment, as part of the US 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'.¹³² He 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'.¹³³

The US administration has relied on this legislation to cut off aid to a number of US allies,¹³⁴ at times to the detriment of other US foreign policy objectives.¹³⁵

6 Hostility toward the ICC and a Strengthening Preference for Resolution at the National Level

It was now clear that the US attitude toward the ICC was one of outright opposition. By the beginning of 2005, ICC supporters within the NGO community described the US attitude toward the ICC as 'intensely hostile'.¹³⁶ One NGO official noted that he was 'baffled by the degree to which the US government has been willing to slap around long-term allies like Jordan and the Baltic states for their being States Parties to the Rome Statute'.¹³⁷

Indeed, the rhetoric of US government officials shifted increasingly toward the position outlined by Bolton in 1998.¹³⁸ During his term, Bush has made a number

¹³¹ In addition, pursuant to a Senate amendment, Sect. 2015 of the law expressly permits the US to render assistance to international efforts to bring to justice foreign nationals accused of genocide, war crimes, or crimes against humanity.

¹³² Congressional Record—Senate, at s. 10042, 2 Oct. 2001. He continued, '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'.

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

¹³⁴ Washington cut off military aid to Mexico, Costa Rica, Venezuela, Ecuador, Peru, Bolivia, Paraguay, Uruguay, Brazil, Barbados, St Vincent & The Grenadines, Trinidad & Tobago, Croatia, Serbia, Montenegro, Malta, Mali, Niger, Kenya, Tanzania, Lesotho, South African, and Namibia: Bravin, 'U.S. Warms to Hague Tribunal—New Stance Reflects Desire to Use Court to Prosecute Darfur Crimes', *The Wall Street Journal*, 14 June 2006.

¹³⁵ E.g., the US terminated military assistance to Trinidad and Tobago, which inhibits them from preventing illegal narcotics from getting into the US: Interview with Richard Dicker, *supra* note 76. See also statements of military officials, *infra*.

¹³⁶ *Ibid.*

¹³⁷ *Ibid.*

¹³⁸ Bolton's views had been aired in a 1999 speech drafted for consideration by then President Clinton, and for the purposes of analysing 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

of statements that demonstrate his administration's opposition to the ICC, including during the presidential debates.¹³⁹ As noted above, Members of Congress also expressed profound opposition to the ICC. In June 2005, then House Majority Leader Tom DeLay referred to the ICC as a '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'.¹⁴⁰

Following the events at Abu Ghraib,¹⁴¹ however, it became increasingly difficult for the US 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. Thus, its hostility toward the ICC combined with other perennial US concerns, including shielding US personnel from prosecution by non-US courts and fear of interference

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 its multiple inherent defects, and we will not advocate any such efforts. We will leave the ICC to the obscurity it so richly deserves': J. Bolton, *Speech Two: Reject and Oppose the International Criminal Court* (1999), at 36, available at: www.cfr.org/content/publications/attachments/International_Criminal_Court.pdf. Although this policy was rejected by Clinton, it seems to have been given some life under the Bush administration.

¹³⁹ 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': G. W. Bush, 'Remarks to the 10th Mountain Division at Fort Drum, New York', *Wkly. Comp. Pres. Docs.* 1189, 1231 (19 July 2002). 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': G. W. Bush, 'Presidential Debate in St. Louis, Missouri', *Wkly. Comp. Pres. Docs.* 2289, 2293 (15 Oct. 2004). See also Bravin, *supra* note 134 (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.

¹⁴⁰ Congressional Record, at H4634, 16 June 2005. He remarked, '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'.

¹⁴¹ As noted above, a consistent theme in the US attitude toward the ICC under both the Clinton and Bush administrations has been the desire to limit the exposure of US personnel to prosecution by the ICC. However, this central concern seems to have broadened under the Bush administration. While the Clinton administration was focused on the possibility of prosecution of US troops, the Bush administration seems to be concerned about prosecutions of leadership as well: Interview with a former State Department official (name withheld), 30 Mar. 2005; interview with a State Department official (name withheld), 3 Nov.

with US 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 . . .¹⁴²

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 . . .¹⁴³

He summarized the Bush administration's policy as

encourag[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.¹⁴⁴

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

7 *The Darfur Referral*

In September 2004, then US Secretary of State Colin Powell announced the view of the US government that the killings in Sudan's Darfur region constitute genocide.¹⁴⁵ The US led international condemnation of the atrocities and called on the United Nations to initiate a full investigation.¹⁴⁶

2005. From the perspective of the US government, the calls for criminal prosecution of senior US officials for the Abu Ghraib crimes highlight the problems with the ICC system of complementarity. There is serious concern within the US government that if the ICC had jurisdiction in this case, it could conclude that there has been an unwillingness on the part of the US to prosecute senior officials under a theory of complicity or superior responsibility. 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 US has little confidence in the ICC's ability to insulate itself from these perspectives, and even fears that ICC officials may share these perspectives, its hostility toward the ICC increases.

¹⁴² Press Release, Pierre-Richard Prosper, US Ambassador for War Crimes Issues, 'War Crimes in the 21st Century', at para. 31 (26 Oct. 2004), available at: www.state.gov/s/wci/rm/38309.htm.

¹⁴³ Press Release, Pierre-Richard Prosper, US Ambassador for War Crimes Issues, 'Address at the Peace Palace in the Hague', at para. 8 (19 Dec. 2001), available at: www.state.gov/s/wci/rm/8053.htm.

¹⁴⁴ Press Release, Pierre-Richard Prosper, US Ambassador for War Crimes Issues, 'The Campaign Against Terrorism: Military Commissions and the Pursuit of Justice', para. 22 (4 Dec. 2001), available at: www.state.gov/s/wci/rm/8584.htm.

¹⁴⁵ The US House of Representatives had two months earlier similarly declared that genocide was occurring in Darfur.

¹⁴⁶ Secretary Colin L. Powell, Testimony Before the Senate Foreign Relations Committee Washington, DC, 9 Sept. 2004.

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.

Shortly thereafter, the International Commission of Inquiry on Darfur was established and began working.

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’.¹⁴⁷

On 31 March 2005, after months of intense negotiations, the UN Security Council by its Resolution 1593 referred the situation in Darfur to the ICC.¹⁴⁸ In the negotiations leading up to the adoption of that resolution, the US demonstrated strong resistance to the referral, leading some observers to conclude that US 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.¹⁴⁹

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’.¹⁵⁰ This approach fitted in with the US policy of delivering justice closer to the victim community and would avoid what US officials described as the ‘colonial’ approach of Europeans judging Africans.¹⁵¹

These proposals were seen by other members of the Security Council as an attempt by the US to marginalize the ICC, belying an intention to prevent the ICC from becoming a credible institution.¹⁵² This perception was reinforced when Prosper, explaining the US position, bluntly stated, ‘We don’t want to be party to legitimizing the I.C.C.’¹⁵³

¹⁴⁷ Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, 25 Jan. 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.

¹⁴⁸ SC Res. 1593, para. 1, UN Doc. S/RES/1593 (31 Mar. 2005).

¹⁴⁹ Interview with a diplomat, *supra* note 91; interview with John Stompore, *supra* note 76; ‘US Thwarts Justice for Darfur’, Human Rights Watch, 24 Mar. 2005.

¹⁵⁰ Press Release, Judy Alta, Washington File United Nations Correspondent, ‘African Union Tribunal Proposed for War Crimes in Darfur’, paras 5–6 (Feb. 2005), available at: <http://usinfo.state.gov/af/Archive/2005/Feb/10-767752.html>. This proposal took a variety of forms. Under one version, it was proposed that the ‘Sudan Tribunal’ would eventually be converted into the African Court of Human and Peoples’ Rights. The US was prepared fully to fund this Tribunal: Remarks of Secretary of State Condoleezza Rice Before the Senate Foreign Relations Committee, 16 Feb. 2005. See also Crook, ‘US Proposes New Regional Court to Hear Charges Involving Darfur, Others Urge ICC’, 99 *AJIL* (2005) 501; US Department of State Daily Press Briefing, 1 Feb. 2005.

¹⁵¹ Interview with a State Department official (name withheld), 31 Mar. 2005.

¹⁵² Interview with a diplomat, *supra* note 91.

¹⁵³ Human Rights Watch, *Human Rights News, U.S. Fiddles Over ICC While Darfur Burns*, at para. 6 (31 Jan. 2005), available at: <http://hrw.org/english/docs/2005/01/31/usint10091.htm>.

It is difficult to ascertain the true 'intention' of the US, as there is no single, uniform intention. In all probability, the amalgamation of views included those who supported this proposal 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 US failed to garner support for its proposed 'Sudan Tribunal', and it allowed the referral to go through by abstaining. However, the US 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 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. . . .¹⁵⁴

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 US opposition to the ICC, and indicates broader concerns about exposure of US personnel to prosecutions anywhere in the world.

However, in the months following this diplomatic defeat in the Security Council, the US view of the Darfur referral seemed to shift slightly. Indeed, US 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, 'Secretary Rice worked hard last spring to find an acceptable formula for a Security Council resolution to address the issue of accountability in Sudan.'¹⁵⁵ He pointed out that '[w]hile the United States continues to maintain fundamental objections to the ICC, we did not veto [the referral] because we recognized the need for the international community to work together to end the atrocities in Sudan and speak

¹⁵⁴ SC Res. 1593, *supra* note 148, para. 6. 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 US 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 UN. 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 instantly to multilateralize this obligation. 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.

¹⁵⁵ Press Release, John B. Bellinger, III, US Dept. of State Legal Adviser, 'United Nations Security Council Resolutions and the Application of International Humanitarian Law, Human Rights and Refugee Law', para. 10 (9 Sept. 2005), available at: www.usmission.ch/Press2005/0909BellingerIHLSanRemo-2.htm.

with one voice to bring to account the perpetrators of those crimes'.¹⁵⁶ While such statements may have initially been attempts to save face following diplomatic defeat, these statements may also have fed back into the US attitude perhaps contributing to a shift toward a more moderate stance toward the ICC.¹⁵⁷

In November 2005, the US Assistant Secretary of State Jendayi Frazer indicated a willingness on the part of the US to assist the ICC in Darfur prosecutions. On 1 November, 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'.¹⁵⁸

By the spring of 2006, the US 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, US Secretary of State Condoleezza Rice stated in March 2006 that the US government may be 'shooting ourselves in the foot', expressly acknowledging that the ASPA requirements interfered with other US foreign policy objectives.¹⁵⁹

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'.¹⁶⁰

8 *The Call to Move the Taylor Prosecution to the Hague*

Former Liberian President Charles Taylor was arrested and surrendered to the Special Court for Sierra Leone on 29 March 2006. Shortly after his arrest, amid concerns for regional stability prompted by his impending prosecution, the US 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 Hague.

¹⁵⁶ *Ibid.*

¹⁵⁷ See also the Statement of the US Representative during the 53rd Plenary Meeting of the General Assembly, A/60/PV.53, 23 Nov. 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.')

¹⁵⁸ HR Subcommittee on Africa, Global Human Rights, and International Operations of the Committee on International Relations, *Sudan: Losing Ground on Peace?*, 109th Cong. 16, 29 (1 Nov. 2005).

¹⁵⁹ Press Release, Condoleezza Rice, Sec. of State, 'Trip Briefing' (10 Mar. 2006), available at: www.state.gov/secretary/rm/2006/63001.htm. Rice stated: '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'.

¹⁶⁰ Bravin, *supra* note 134.

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

The announcement of this proposal by the US 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 US 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 US government and the ICC. Already US officials have held numerous discussions with ICC officials in order to facilitate the transfer.¹⁶¹ 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.

9 Moderation of the US Position

The Darfur referral and the transfer of the Taylor case correspond to a moderation of the US position. Other recent statements and actions by the US Executive demonstrate increasing recognition of the value of the ICC.

In June 2006, US Assistant Secretary of State for African Affairs Jendayi Frazer publicly acknowledged the constructive role of the ICC.¹⁶² 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. . .'.¹⁶³ She also cited the case of Charles Taylor as evidence that 'you can achieve peace and accountability'. Later that year, the US Ambassador to Uganda explained that the US 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.'¹⁶⁴

In addition, the US administration has recently waived many of the ASPA and Nethercutt funding restrictions imposed on countries that have failed to become parties to bilateral non-surrender agreements.¹⁶⁵

The US Congress has also evinced an increasing openness toward the International Criminal Court. In September 2006, Congress approved legislation eliminating some

¹⁶¹ Interview with a State Department official (name withheld), 21 July 2006.

¹⁶² Presidential waiver, 2 Oct. 2006.

¹⁶³ Transcript of press conference, Entebbe, Uganda, 20 June 2006.

¹⁶⁴ 'ICC-phobic US offers court rare praise for Uganda rebel charges', *Agence France Presse*, 16 Nov. 2006, quoting Ambassador Steven Browning.

¹⁶⁵ A number of countries have refused to become parties to these agreements. The US military has been influential in securing waivers for these states: see Statements of General Brantz J. Craddock Before the Senate Armed Services Committee, 14 Mar. 2006 and 19 Sept. 2006, and House Armed Services Committee, 7 Mar. 2005 and 16 Mar. 2006. It encouraged the granting of waivers by pointing out that China has begun providing military assistance to these countries.

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.¹⁶⁶

Moderation of the US 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 US foreign policy interests. All of the situations before the Court – the Central African Republic, Uganda, the Congo, and Darfur – are situations where the US 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 government would prefer to handle the matter domestically.¹⁶⁷ The fourth situation, Darfur, was undertaken at the behest of the Security Council, which, from the US perspective, has been the preferred mode of ICC operation.

Not insignificantly, this moderation has also corresponded to personnel changes within the US 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 US Representative to the United Nations. The recession of their influence has allowed room for the pragmatists to assume a greater role.

Thus, since 1998, the US 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 US 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, US support waned. Nonetheless, the US remained engaged in the preparations for the establishment of the Court, and ultimately signed the Rome Statute to enable continued participation.

US 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 11 September 2001. By the spring of 2002, US opposition was clear, while it maintained an official position of neutrality, as expressed by US 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

¹⁶⁶ See 'A Shift in the Debate on International Court; Some US Officials Seem to Ease Disfavor', *Washington Post*, 7 Nov. 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 US soldiers"); 'Rescue Darfur Now', *Washington Post*, 10 Sept. 2006, Opinions–Editorials by Senator John McCain and former Senator Bob Dole (calling on the US government 'publicly [to] remind Khartoum that the International Criminal Court has jurisdiction to prosecute war crimes in Darfur. . .').

¹⁶⁷ 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 July 2006.

for ideologically-rooted or visceral responses¹⁶⁸ 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 US attitude as 'pragmatic'.¹⁶⁹

E *Internationalized/Hybrid Criminal Tribunals*

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

1 *Sierra Leone*

The Special Court for Sierra Leone (SCSL) is regarded as 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.¹⁷⁰ 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.¹⁷¹ The substantive criminal law to be applied by the Court, codified in the Statute of the SCSL, was derived from both international law and domestic law.¹⁷² Finally, the personnel of the Court are also mixed, employing both international and national staff.

As with the ICTR and ICTY, the US was the prime mover behind the creation of the Special Court for Sierra Leone.¹⁷³ It was also strongly supported by the UK, though the US and the UK divided over certain details, such as the scope of the Court's temporal jurisdiction.¹⁷⁴

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 US as preferable to the ICC.¹⁷⁵ 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.

¹⁶⁸ While the US administration has continued its anti-ICC rhetoric to some degree, this may simply serve as a smokescreen to create the appearance that US opposition remains firm.

¹⁶⁹ Statement of John Bellinger, US Department of State Legal Adviser, 29th Roundtable on Current Problems of International Humanitarian Law, 8 Sept. 2006.

¹⁷⁰ Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, preamble (16 Jan. 2002), available at: www.sc-sl.org/scsl-agreement.html.

¹⁷¹ *Ibid.* at art. 7.

¹⁷² *Ibid.* at art. 1.

¹⁷³ Interview with a diplomat, *supra* note 91; interview with a former SCSL official (name withheld), 7 Mar. 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, 24 Mar. 2005.

¹⁷⁴ Interview with a diplomat, *supra* note 91.

¹⁷⁵ Interview with David Scheffer, *supra* note 63. The decision to create the Court had already been taken under the Clinton administration, *Ibid.* Nonetheless, the continued support of the US under the Bush administration was critical to the ultimate establishment of the Court in 2002.

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 US to undermine the ICC.¹⁷⁶

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 US was strongly supportive from its inception. Indeed, some assert that it was the US government that initially approached the Sierra Leonean government, inviting the latter to request the United Nations to establish the SCSL.

While not unanimous, the US Congress was extraordinarily and uncharacteristically supportive of the SCSL.¹⁷⁷ This support likely emerged from the confluence of three factors: it provided an opportunity to make the US Congress seem pro-accountability, as well as presenting an opportunity to criticize the UN, by, for instance, citing the failure of UNAMSIL; the sensationalism of the amputee issue appealed to the camera-chasing members of Congress; and those harbouring anti-Clinton sentiment saw this as an opportunity to publicize the failure of the Lome Accords.¹⁷⁸

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.¹⁷⁹ Their support was largely due to the fact that David Crane, who had been employed at the Pentagon, was appointed as Prosecutor.

Again, US support has taken a variety of forms. As noted above, the US 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.¹⁸⁰ In addition, the US has been the largest financial contributor to the operations of the Court.¹⁸¹

The US was highly influential in the design of the Court. A number of states, including the US, 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 Council resolution to that effect.¹⁸² Thus, unlike the ICTY and ICTR, the Special Court was not given authority to compel cooperation from states. The US also wanted the SCSL, possibly as a result of tribunal fatigue, to be outside of the UN structure and to be funded through voluntary contributions.¹⁸³

The continuing political support of the US was evident when the SCSL ran into financial difficulty in 2004. The US Mission to the United Nations (USUN) asked the

¹⁷⁶ Interview with a diplomat, *supra* note 91; interview with a former SCSL official, *supra* note 173.

¹⁷⁷ Interview with a former SCSL official, *supra* note 173. Congress pushed the administration repeatedly on budget and arrest issues, particularly on the transfer of Charles Taylor from his exile in Nigeria. Interview with Nina Bang-Jensen, *supra* note 72.

¹⁷⁸ Interview with a former SCSL official, *supra* note 173.

¹⁷⁹ *Ibid.*; interview with a former SCSL official (name withheld), 15 Apr. 2006.

¹⁸⁰ Interview with a diplomat, *supra* note 91; interview with former SCSL official, *supra* note 173; interview with David Scheffer, *supra* note 63.

¹⁸¹ Fact Sheet, Office of the Press Secretary, *Fact Sheet: United States and G8 Renew Strong Commitment to Africa* (8 July 2005), available at: www.whitehouse.gov/news/releases/2005/07/20050708-3.html.

¹⁸² Interview with a diplomat, *supra* note 91.

¹⁸³ Interview with a former SCSL official, *supra* note 173; interview with a diplomat, *supra* note 91.

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 the General Assembly to get authorization to make a subvention grant.¹⁸⁴ The US prompted the Secretary-General to seek this authorization from the Security Council, and then pushed it through the Security Council.¹⁸⁵ It then followed up by ensuring proper language was used in the General Assembly resolutions authorizing the subvention grant.¹⁸⁶ The SCSL then received a subvention grant for 2005.

Senior USUN officials have also intervened with the office of the UN Controller.¹⁸⁷ 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.¹⁸⁸ In any event, USUN intervened in order to secure cooperation from the Controller's office.

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

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.¹⁸⁹ These delegations initially sought to limit the personal jurisdiction of the Court to Sierra Leonean nationals.¹⁹⁰ Indeed, this was stipulated in the original draft statute of the Court.¹⁹¹ 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'.¹⁹²

In the course of the negotiations, the nationality limitation was dropped in exchange for an exemption for peacekeepers.¹⁹³ 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.¹⁹⁴ Thus, not only does this establish a precedent for a

¹⁸⁴ *Ibid.*

¹⁸⁵ *Ibid.*

¹⁸⁶ *Ibid.*

¹⁸⁷ Interview with a diplomat, *supra* note 91.

¹⁸⁸ Interview with a former SCSL official, *supra* note 173.

¹⁸⁹ Interview with a diplomat, *supra* note 91.

¹⁹⁰ *Ibid.*

¹⁹¹ *Ibid.*

¹⁹² Statute of the Special Court for Sierra Leone, art. 1 (16 Jan. 2002), available at: www.sc-sl.org/scsl-statute.html.

¹⁹³ Interview with a diplomat, *supra* note 91.

¹⁹⁴ Statute of the Special Court for Sierra Leone, art. 1 (16 Jan. 2002), available at: www.sc-sl.org/scsl-statute.html.

peacekeeper exemption, it also enables the US, as one of the P-5, to prevent the prosecution of peacekeepers sent by its allies, for instance, from Nigeria, without Security Council approval. This is essentially the kind of exemption that the US sought at the Rome Conference.

b The appointment of an American prosecutor

Another major factor in US support for the SCSL was the appointment of Crane as prosecutor. The US lobbied intensely to get Crane appointed.

OLA was supporting another candidate – Ken Flemming.¹⁹⁵ 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.¹⁹⁶ This of course exacerbated the existing tensions with OLA.

Some observers would infer that the key issue for the US is control of who could be indicted.¹⁹⁷ In the case of the SCSL, the appointment of an American who was previously employed at the Pentagon reassured the US, and the DoD in particular. Further, it may be that the appointment of a former member of the US military, who brought with him a team of former military service-members, 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 within the DoD. 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.¹⁹⁸

Some have speculated, however, that the State Department as a whole was not as keen on the selection of Crane as Prosecutor.¹⁹⁹ When Crane was initially deployed to Sierra Leone, he and several of his hand-picked senior staff had top secret clearance, thus providing them access to all of the cables between Washington and Freetown.²⁰⁰ This access was lost when he and his team started carrying out investigations in neighbouring 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 US government, worsened considerably upon the unsealing of the Taylor indictment.²⁰¹

¹⁹⁵ Interview with a former SCSL official, *supra* note 173; interview with an NGO official involved in the negotiations, 24 Mar. 2005.

¹⁹⁶ Interview with a former SCSL official, *supra* note 173.

¹⁹⁷ Interview with a diplomat, *supra* note 91; interview with John Stompor, *supra* note 76; interview with an ICTY official, *supra* note 81; interview with former State Department official, *supra* note 38.

¹⁹⁸ Interview with a former SCSL official, *supra* note 179.

¹⁹⁹ Interview with a diplomat, *supra* note 91; interview with a former SCSL official, *supra* note 173.

²⁰⁰ *Ibid.*

²⁰¹ *Ibid.*; interview with a former SCSL official, *supra* note 179.

c The Taylor indictment

On 4 June 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.²⁰² Crane gave 24-hours notice to concerned parties, including the US government, of his intent to unseal the indictment. State Department officials tried unsuccessfully to persuade him to refrain from doing so.²⁰³

Key State Department officials and members of the National Security Council were infuriated by Crane's decision.²⁰⁴ For months after the indictment was unsealed, the State Department cut off all communication with the OTP of the SCSL.²⁰⁵ During this period, the US Ambassador in Freetown refused access to all personnel.²⁰⁶

Nonetheless, many observers credit the unsealing of the indictment with the hastening of Taylor's departure from Monrovia.²⁰⁷ With the consent of the US government, Taylor was subsequently granted refuge in Nigeria.

After Taylor's arrival in Calabar, the US Executive appeared reluctant to push Nigeria, a key ally, into surrendering Taylor to the SCSL. The US Congress had been divided as to how to handle Taylor.²⁰⁸ In early 2004, the US government was sending mixed messages on this issue.²⁰⁹ But by late 2004, the new US Ambassador had reopened dialogue with the Nigerian government, and began appealing to the Nigerian government (at least publicly) to surrender Taylor to the Court.²¹⁰

By the spring of 2005, the political winds had shifted. There seemed to be a growing recognition within the US 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 US Congress on 10 May 2005 adopted Congressional Resolution 127, urging Nigeria to 'expeditiously transfer' Taylor to the Special Court.²¹¹ The resolution,

²⁰² Resolution, *ibid.*

²⁰³ *Ibid.*

²⁰⁴ *Ibid.*; interview with former SCSL official, *supra* note 179.

²⁰⁵ *Ibid.*

²⁰⁶ *Ibid.*

²⁰⁷ Interview with John Stompor, *supra* note 76; 'Charles Taylor, Indicted', *Washington Post*, 5 June 2003, at A32; Ward, 'Might v. Right: Charles Taylor and the Sierra Leone Special Court', 11 *Human Rts Brief* (2003) 8, at 8; Remarks of Alex Vines, Human Rights Watch, Before House International Relations Committee, 3 Oct. 2003.

²⁰⁸ Interview with a former SCSL official, *supra* note 173.

²⁰⁹ Interview with John Stompor, *supra* note 76.

²¹⁰ Remarks of Pierre-Richard Prosper Before the Africa Subcommittee of the House International Relations Committee, 24 June 2004.

²¹¹ HR Cong. Res. 127, 109th Cong., para. 14 (4 May 2005); see also 'Bring Charles Taylor Justice', *New York Times*, Opinions-Editorials by Congressman Ed Royce, 5 May 2005.

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. . .’²¹² and included statements by Crane on the threat posed to Liberia’s stability by Taylor’s continuing evasion of justice. The US also played a leading role in getting the Security Council to pass a resolution allowing UN peacekeepers in Liberia to arrest Taylor.²¹³

Following the exertion of pressure on Nigeria and Liberia by both the Executive and Congress, Taylor was finally surrendered to the Court on 29 March 2006. Members of Congress had earlier made clear to the newly elected President of Liberia that US aid was dependent upon Liberian cooperation with the transfer of Taylor to the Court.²¹⁴ On 22 March, during a visit to the US, Liberian President Ellen Johnson-Sirleaf called for Taylor’s swift surrender to face trial.²¹⁵

On 28 March, Taylor had disappeared from his home in Calabar. At the time of Taylor’s disappearance, Nigerian President Obasanjo was en route to Washington, D.C. Members of Congress publicly urged Bush to refuse to meet with Obasanjo unless Taylor was brought to justice.²¹⁶ 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.²¹⁷ Within hours, Taylor was apprehended and turned over to the Special Court.

As noted above, the US 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.²¹⁸ Taylor would still be tried by the SCSL, but in an ICC courtroom. Taylor was transferred to the ICC Detention Centre in the Hague on 20 June 2006. The US government was heavily involved in the transfer negotiations.²¹⁹

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.²²⁰ The Deputy Prosecutor, initially envisioned by the treaty establishing the

²¹² *Ibid.*, at para. 10.

²¹³ UNSC Res. 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’).

²¹⁴ Interview with a former SCSL official, *supra* note 173.

²¹⁵ ‘Nigeria Pressed by UN Court to Arrest Liberia’s Ex-leader’, *New York Times*, 27 Mar. 2006.

²¹⁶ Statement of US Senator Barack Obama on Charles Taylor, 28 Mar. 2006.

²¹⁷ Interview with an NGO official (name withheld), 3 Apr. 2006; interview with an SCSL official (name withheld), 14 Apr. 2006.

²¹⁸ ‘President Discusses Democracy in Iraq with Freedom House’, Office of the Press Secretary, 29 Mar. 2006; see also SC Res. 1688 (2006).

²¹⁹ Interview with an SCSL official (name withheld), 4 Apr. 2006; interview with a State Department official, *supra* note 161.

²²⁰ *Prosecutor v. Taylor*, Decision of the Appeals Chamber on Immunity from Jurisdiction, SCSL-03-01-I-059, 31 May 2004.

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 Lome 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 US government, raising questions as to the strength of its desire for a more domestic-oriented tribunal.

2 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 Cambodia and the UN with respect to the Court's operations. It does not in any way serve as the constitutive instrument of the ECCC.

The Chambers will be staffed by both Cambodian and foreign²²¹ 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 US 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.²²² In 2001, Prosper stated that the US 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'.²²³

²²¹ The Cambodian legislation establishing the ECCC refers to 'foreign', as opposed to 'international', judges and prosecutors: see, e.g., Arts 9, 11, 16, and 18 of the Law on the Establishment of the Extraordinary Chambers, as amended on 27 Oct. 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.

²²² Interview with an NGO official involved in the negotiations (name withheld), 16 Mar. 2003. US Senator John Kerry was also involved in the negotiations: *ibid.*

²²³ Press Release, Pierre-Richard Prosper, *supra* note 143, para. 20 (19 Dec. 2001), available at: www.state.gov/s/wci/rm/8053.htm.

In recent years, however, US 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 concern of key staff members who have personally experienced what they deem to be Cambodian government brutality and corruption.²²⁴ In addition, Cambodian diaspora groups, as constituencies of several members of Congress, have different views on the Chambers. While all of these groups want to see an accountability process, they are divided as to whether the Extraordinary Chambers can provide credible justice.²²⁵ 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.²²⁶

The US has not provided any funding to the Extraordinary Chambers. This has been in part attributable to the fact that, until recently, US legislation specifically precluded²²⁷ the US 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.²²⁸

This provision appeared in Appropriations legislation for several years.²²⁹

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

²²⁴ Interview with Nina Bang-Jensen, *supra* note 72.

²²⁵ In particular, they differ in their view as to whether the Tribunal is worth undertaking if it must operate as part of the Cambodian judicial system. *Ibid.*

²²⁶ See, e.g., 'Kingdom of Cambodia: Amnesty International's position and concerns regarding the proposed 'Khmer Rouge' tribunal', 25 Apr. 2003; 'Cambodia: Opposition MP Jailed After Sham Trial', *Human Rights Watch Report*, 9 Aug. 2005; Extraordinary Chambers of the Courts of Cambodia, Letter from Human Rights Watch to the Secretariat of the Rules and Procedure Committee, 17 Nov. 2006.

²²⁷ However, certain statutory exceptions were made, none of which are relevant to the present analysis.

²²⁸ Foreign Operations Appropriations Act, 2005. This provision was introduced by a member of Congress whose staff member 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.

²²⁹ According to the Congressional Research Service, 'Restrictions on US 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 US assistance to the central government of Cambodia and to the Khmer Rouge tribunal and instructed US representatives to international financial institutions to oppose loans to Cambodia, except those that meet basic human needs. US assistance may be provided only to Cambodian and foreign NGOs and to local governments. Statutory exceptions allow for US assistance to the central government of Cambodia for reproductive, maternal, and

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 signalling a moderation of the US position. Nonetheless, the blanket prohibition on aid to the central government still poses an obstacle to direct assistance to the Tribunal.²³⁰

Most observers agree that if it were not for this legislative obstacle, the US would have been likely to support the Extraordinary Chambers financially for at least two reasons. First, as special chambers within the domestic Cambodian legal system, they conform more closely to the model that the present US administration puts forth as the ideal. Second, since 1997, the US Congress and both administrations have provided millions of dollars of financial support to the Cambodian NGO, Documentation Center of Cambodia (DC-CAM), which for years has been collecting documents, statements and other materials that may play a crucial role in any prosecutions that occur before the Extraordinary Chambers, as well as in other domestic accountability efforts.²³¹

However, as of February 2006, the US had adopted a wait-and-see approach to the issue of whether to provide any form of direct support to the ECCC. Corruption allegations,²³² as well as a perceived lack of progress at recent plenary sessions of the ECCC,²³³ have posed new impediments to US support.

4 Conclusion

Essentially, the official position of the US government may be summarized as:

- The US is in principle committed to justice and accountability for all.
- 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)²³⁴ should be the absolute last resort.
- The Security Council should have the final word on prosecution by any other court.

child health care, preventing and treating HIV/AIDS and other infectious diseases, basic education, combating human trafficking, rule-of-law programs, cultural and historic 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 US Relations', 8 July 2005.

²³⁰ There may, however, be some room to manoeuvre 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..': sect. 554(b) of the 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': sect. 520; see also Committee Report accompanying the 2006 Appropriations Act.

²³¹ Interview with Nina Bang-Jensen, *supra* note 72; interview with NGO official (name withheld), 6 April 2006.

²³² OSJI Press Release, 'Corruption Allegations at Khmer Rouge Court Must Be Investigated Thoroughly', 14 Feb. 2007.

²³³ Interview with an intergovernmental organization official (name withheld), 7 Feb. 2007.

²³⁴ There are of course strong parallels with the US position on the exercise of universal jurisdiction.

A Commitment to Accountability

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

This does not mean, however, that the US seeks accountability at any cost. Even in cases where the US attitude toward international criminal courts is at its most favourable, these institutions are not viewed as ends in themselves. The US approach is pragmatic – each institution is assessed in terms of its ability to advance US 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 US resorts to a balancing of interests. When international accountability efforts conflict with strong national interests, those interests will prevail.

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 US insists that it is far better to have courts trying people locally, contributing to the sense of ownership by the affected communities.

The US 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 US 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’.

C Security Council Control

The US is strongly interested in maintaining the primacy of the Security Council in matters of peace and security. The US 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 US as a permanent member of the Council. Indeed, some would argue that the degree of US support for a tribunal directly corresponds to its degree of control over the mechanism.

D Other/Underlying Factors

The US attitude is 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 US hostility toward international criminal courts include:

- belief in the superiority of the US justice system, and US governance generally;
- belief that the US, in light of its global pre-eminence, 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;

- suspicion of international/multilateral institutions (perceived to have a greater tendency toward inefficiency, bias and corruption);
- perception of international criminal courts as being unrealistic, ‘too European’ or ‘too human rights-based’;
- fear of accountability mechanisms outside of any US control, coupled with fear that ‘everyone is out to get us’.

The relationship between the principles upon which the US 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.

E Historical Analysis of Policy Formulation

The historical survey above reveals certain consistent themes underlying US attitudes toward international criminal courts. One consistent element would appear to be the (un)likelihood of prosecution of US nationals. The US has tended to support international criminal courts where the US government has (or is perceived by US officials to have) a significant degree of control over the court, or where the possibility of prosecution of US 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. US support for the hybrid tribunals was similarly facilitated by the inclusion of jurisdictional limitations and other assurances of non-prosecution of US nationals.

If the US is assured that US 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 colour this balancing of interests and at times define some of those interests. To the extent that an administration’s ideological strain in favour of accountability is stronger than its ideological strain opposed to the creation of international authority, the prospect of US support of a given international criminal court increases.²³⁵

²³⁵ Of course, these are merely two of countless variables that may affect the calculation of interests.