# AMERICAN POLICY TOWARD THE INTERNATIONAL CRIMINAL COURT (ICC): A STUDY OF THE AMERICAN CITIZENS IMMUNITY FROM (ICC) JURISDICTION

**By**

**Abeer Bassam Y. Ammari**

**Supervisor**

**Dr. Ibrahim Al-Jazy**

**This Thesis was Submitted in Partial Fulfillment of the Requirements for the Master's Degree of Diplomatic Studies**

**Faculty of Graduate Studies**

**The University of Jordan**

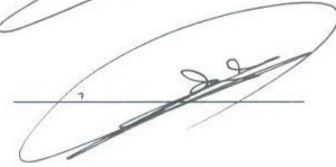
**Jan, 2007**

All Rights Reserved - Library of University of Jordan - Center of Thesis Deposit

المنارة للاستشارات

www.manaraa.com

**This Thesis (American Policy To Towards The International Court (ICC): A Study of the American Citizens Immunity from (ICC) jurisdiction) was successfully defended and approved on 7.1.2007.**

| **Examination Committee** | **Signature** |
| --- | --- |
| Dr. Ibrahim Al-Jazi, Chairman<br>Associate Prof. International Law | |
| Dr. Mohammad H. Masalhah<br>Associate Prof. Political Science | |
| Dr. Omar Hamdan Hadrami<br>Associate Prof. Political Science |  |
| Dr. Ahmad Majed Majali<br>Associate Prof. Political Science (Mu'tah University) | |

All Rights Reserved - Library of University of Jordan - Center of Thesis Deposit

ارات

# DEDICATION

**This thesis is dedicated to the ever-living memory**

**Of His Majesty King Hussein Bin Talal**

All Rights Reserved - Library of University of Jordan - Center of Thesis Deposit

المنارة للاستشارات

www.manaraa.com

**ACKNOWLEDGEMENT**

**My thanks are due to all my teachers, particularly Dr .Ibrahim Al-Jazy for supervising my dissertation and helping me with the topic. I would also like to thank my friends especially Hiba Al- Hassan , Ibrahim Ammari, Samir Taktak and Khawla Akasheh for their constant support all through my M.A .course.**

**I Am for ever indebted to my husband Mazen Akasheh , my parents ,my brothers and my three children for their endless support, and for making it possible for me to further my studies.**

All Rights Reserved - Library of University of Jordan - Center of Thesis Deposit

المنارة للاستشارات

www.manaraa.com

## List of Contents


| Subject | Page |
|---|---|
| **Committee Decision ……………………………………………………………** | **ii** |
| **Dedication…………………………………………………………………………** | **iii** |
| **Acknowledgement………………………………………………………………...** | **iv** |
| **List of contents………………………………………………………………….** | **v** |
| **Abstract ..………………………………………………………………………** | **vii** |
| **Introduction……………………………………………………………………** | **1** |
| The Problem of the Study and its Importance ……………………………..…. | **2** |
| Purpose of the Study……………………………………………………………... | **3** |
| Literature Review………………………………………………………………… | **4** |
| Methodology……………………………………………………………………… | **12** |
| **Chapter One: The Rome Statute and the Structure of the International Criminal Court…………………………………………………………………** | **13** |
| International Criminal System: Historical Background…………….……………… | **14** |
| Establishment of the International Criminal Court……….………………………… | **21** |
| Universal jurisdiction……………………………………………………………… | **23** |
| Composition and Administration of the Court…………………………………… | **24** |
| Crimes within the jurisdiction of the Court………..…………………………….. | **24** |
| How cases reach the ICC…………………………………………….…………… | **25** |
| The ICC and the Individual within the International Law ………………………….. | **26** |
| The Relationship between the ICC and the United Nations…………………... .... | **30** |
| Objections against ICC…………………………………………………………... | **32** |


All Rights Reserved - Library of University of Jordan - Center of Thesis Deposit

المنارة للاستشارات

www.manaraa.com

| Subject | Page |
|---|---|
| **Chapter Two: The United States stand from the International Criminal Court.** | **33** |
| The American Reasons to Oppose the International Criminal Court …………….. | **35** |
| **Chapter Three: The Politics behind the United States' Rejection of the Statute of Rome and the Search for Immunity……………………………………………..** | **48** |
| Differences between the Clinton and the Bush Administrations…………………… | **50** |
| The Search for Immunity ……………………………..……………………….. | **52** |
| The Attempt To Obtain Impunity For US Peace-Keepers……….………………..... | **55** |
| The United States and Bilateral Non-Surrender Agreements……………………… | **60** |
| The American Service members' Protection Act (ASPA) 2002…………………….. | **69** |
| **Chapter Four: The Future of the Relations between the US and the ICC in the light of American Rejection……………………………………………………** | **71** |
| American Experience in Supporting International Criminal Tribunals ……………... | **74** |
| American Alternatives to the ICC……………………………………………………. | **75** |
| Who Needs The Other? ……………………………………………………..……. | **78** |
| The Latest Developments ……………………………………………………… | **82** |
| **Conclusion……………………………………………………………………** | **87** |
| **References……………………………………………………………………** | **92** |
| **Abstract in Arabic language……………………………………………………..** | **102** |


All Rights Reserved - Library of University of Jordan - Center of Thesis Deposit

المنارة للاستشارات
www.manaraa.com

**AMERICAN POLICY TOWARD THE INTERNATIONAL CRIMINAL COURT (ICC): A STUDY OF THE AMERICAN CITIZENS IMMUNITY FROM (ICC) JURISDICTION**

**By**

**Abeer B. Ammari**

**Supervisor**

**Dr. Ibrahim Al-Jazy**

**ABSTRACT**

This dissertation will investigate the reasons behind the United States' opposition toward the ICC. It is based on the main assumption that the United States troops over the world have committed –and will commit- violations and crimes which will make them subject to the ICC Jurisdiction. This assumption led the United States to take several steps to undermine the court's authority that have made the United States the most visible and active opponent of the ICC.

The study through historical and analytical approaches, as well as the legal approach leads to the result that although the United States played a central role in the modern development of international humanitarian and human rights law; it has been the primary opponent to the ICC, at the same time the US approved the purposes of the ICC and chooses not to veto The UN Security Council that referred the cases of Darfur to the International Criminal Court (ICC). To some extent, the answer lies in the United States' position in international affairs. In a sense the national security is the innermost interest of any state, there is a special relation that binds national security to international conducts. Which proves that the US, s Foreign policy is directed by protecting its national interests abroad even if its policy violates human rights agreements.

The ICC will necessarily have difficulties in its early years, as do many institutions, but in this case even more, because of the opposition of the US's Bush Administration .The ICC ability to overcome political opposition and to effectively tackle its own inevitable problems will be the main factors that will ensure its success..

All Rights Reserved - Library of University of Jordan - Center of Thesis Deposit

المنارة للاستشارات

www.manaraa.com

# Introduction

After World War II unleashed its horrors, the world community promised that they will never again go back to war but many new atrocities took place. Since 1945, 250 conflicts have occurred on international and non-international level, which have produced estimable harmful consequences.

The promise that the world community will never again go back to war was never redeemed. Instead governments went about the pursuit of power and wealth. The devastating results have been the inability to prevent or control these terrible occurrences so there was need for accountability and justice.

The history of Civilization reveals that every polity has developed judicial institutions to impose, resolve and mediate settlements to conflicts that disrupted the social order. In the latter half of the twentieth century, we witnessed the emergence of a more globalize society, and the International Criminal Court is the newest judicial institution to address that reality. This point was addressed by her highness Princess Maria Theresa de Bourbon (a Professor of Political Sociology in University of Alicante/ Spain) in a special interview during which she stated that **unanimously all the cultures of the world melted in the ICC**[(*)].

What follows is a history of the international community's quest for the establishment of permanent criminal court, which began aftermath of World War I in 1919 and was concluded with the opening of signature on July 18, 1998, of the Treaty of Rome containing the statute for ICC.

(*)Princess Maria Theresa de Bourbon, (2006), Personal interview, 15 February 2006, Amman- Jordan

All Rights Reserved - Library of University of Jordan - Center of Thesis Deposit

المنارة للاستشارات
www.manaraa.com

This study will try to tackle the birth of the International Criminal Court and the obstacles it faced while making its way into existence. Unfortunately, although the establishment of the International Criminal Court met the approval of the vast majority of the international community, contemporaneously the United States has opposed the ICC.

The Court faced the resistance of the United States who tried to exempt its citizens / military personnel from the effects of the court. According to the US Department Reports as for August 22, 2006,101 bilateral immunity agreements have been concluded to prevent the surrender of its nationals to the jurisdiction of the ICC.

The stand of the United States is a complete and unexplainable paradox .In its foreign policy the observer finds the United States rallying countries and international troops to render justice to the people of the world, as it was seen in former Yugoslavia, Rwanda and Afghanistan. This dissertation will try to investigate this paradox, how close it is to reality and to what extent it is affected by the United States foreign policy.

## The Problem of the Study and its Importance

On July 17, 1998, the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court adopted the Rome Statute of the International Criminal Court (ICC)[(1)]. IN accordance with its Article 126, the Rome Statute entered into force on 1 July 2002, which was the first day of the month after the 60th day following the date that the 60th instrument of State Party ratification has been delivered to the United Nations[(2)].

(1)Weller, M., Undoing the global constitution: UN Security Council action on the International Criminal Court. **International Affairs**, Oct2002, Vol. 78 Issue 4, p694.

(2)Yang, Lijun,. On the Principle of Complementarity in the Rome Statute of the International Criminal Court, **Chinese Journal of International Law**; 2005, Vol. 4 Issue 1, p121.

All Rights Reserved - Library of University of Jordan - Center of Thesis Deposit

المنارة للاستشارات

www.manaraa.com

The U.S. played an important leading role in the creation of the ICC, especially in the drafting of the Rome's Statute. The Clinton administration worked through long discussions to resolve some remaining concerns it had with the Court's jurisdiction, but on December 31, 2000 (the last day the treaty was open for signature) President Clinton signed the Rome Statute . The Bush administration "invalids" the U.S. signature by sending a letter to U.N. Secretary General Kofi Annan on May 6, 2002, expressing its intention not to be obligated by the treaty[(1)].

It was somewhat of a surprise that the United States decided not to participate. The United States joined a small group of countries that are not famous for their observation of human rights and international law. Many people asked themselves why the US would want to identify itself with these countries [(2)].

## Purpose of the Study

The purpose of the study is to provide an inclusive assessment of the reasons behind the United States' position toward the ICC. After so many years of propagating for a permanent international criminal court, why is the United States suddenly and so forcefully opposing it?

The United States has framed its rejection of the ICC in a series of reservations and doubts regarding the Statute itself. The main issues of concern to the United States are the role of the Security Council in relation to the Court, the accountability of the Independent Prosecutor, and the universality of the Court's jurisdiction. As will be shown, the ICC

(1) Fact Sheet, (2005), U.S. Policy on the International Criminal Court, **global solutions**, available at: http://www.globalsolutions.org/programs/law_justice/icc/resources/uspolicy.html

(2)Mokhtar, Aly**,** (2003), The fine art of arm-twisting: The US, Resolution 1422 and Security Council deferral power under the Rome Statute**, International Criminal Law Review,** 2003, Vol. 3, p307.

All Rights Reserved - Library of University of Jordan - Center of Thesis Deposit

المنارة للاستشارات
www.manaraa.com

Statute contains both procedural and essential safeguards to ease the United States' concerns, but still the United States refuses to join the Court.

Not only did the United States refuse to join the ICC, but also worked against the court at every single opportunity. As will be shown, the US domestic policy decisions have been made at several occasions that are clearly and openly contrary to the aims of the ICC. Why has the schism between the US and the ICC become so wide?

The aim is to analyze the arguments brought forward by proponents and skeptics to the ICC and to find the underlying reason for the United States' position.

## Literature Review

In collecting information, this study searched mainly for objective sources outlining the United States' opposition to The International Criminal Court (ICC), the legal bases of the actualized points of law, and the background of the ICC Statute. The process has not been simple. The study relied on information from validated sources like the EBSCO research Database and the International law Periodicals, homepages of the United States Governments, as well as homepages of the United Nations, the ICC, and of internationally recognized non-governmental agencies like Human Rights Watch and the Coalition for an International Criminal Court. Additionally, Books concerned with the ICC and the United States' opposition to The International Criminal Court plus some interviews.

In the following, reviews for some previous related studies to this study:

All Rights Reserved - Library of University of Jordan - Center of Thesis Deposit

المنارة للاستشارات
www.manaraa.com

**- Zwanenburg, Marten,. The Statute for an International Criminal Court and the United States: Peacekeepers under Fire?, European Journal of International Law, 1999, Vol. 10, p 124-143**

In evaluating, the traditional practice of reserving criminal jurisdiction over members of peacekeeping operations, certain disadvantages has been marked. The drafting of the Statute for an International Criminal Court provided an opportunity to re-evaluate this practice. The Rome Statute has been criticized by the United Stated for allowing prosecution of its peacekeepers by the ICC. The United States worries that the Rome Statute may lead to politicized prosecutions. This article discusses what changes the Statute entails with regard to the prosecution of peacekeepers. It argues that the traditional practice largely remains unaffected because the Statute includes a number of safeguards, a principal one being the notion of complementarily. The article concludes that the content of the Statute does not justify US fears and that it does not address the problems connected with the traditional system of criminal jurisdiction over peacekeepers.

**- Sewall, Sarah B.; Editor: Kaysen, Carl, United States And The International Criminal Court: National Security And International Law, Rowman & Littlefield, October 2000.**

There was a growing international consensus supporting the idea of holding individuals responsible for the most outrageously violations of human rights such as genocide. This consensus lies behind the recent efforts to create an International Criminal Court .The United States has refused to support the ICC, citing concerns that the Court may pose a threat to national security. This study brings legal, historical, military, and political perspectives to an examination of U.S. concerns about the ICC. The contributors assess not

All Rights Reserved - Library of University of Jordan - Center of Thesis Deposit

المنارة للاستشارات
www.manaraa.com

only the potential national security risks that would be associated with a functioning ICC, but also the potential costs to U.S. security that may result from opposing the Court's creation.

**- Weller, M., Undoing the global constitution: UN Security Council action on the International Criminal Court. International Affairs, Oct2002, Vol. 78 Issue 4, p693-712.**

The adoption of the Rome Statute of the International Criminal Court adopted in 1998 marked the culmination of the international constitutional law–making of the twentieth century. The Statute reflects a vision of an advanced universal legal order, administered through a process of multilayered international governance. In this article, the author examines the key elements of this design, including the doctrine of universality of international criminal jurisdiction, the process of universal law making and international institution building. The author places these concepts, and the ICC itself, into the context of the emerging international constitutional order. He also considers the attempts of the United States government to undermine some of the key assumptions that underpin the concept of the ICC. In addition to analyzing the objections put by the US government, the author addresses the US campaign in the Security Council to exempt US service personnel and others from the reach of the court. He argues that this episode represents a very important factor in the possible development of two parallel international legal systems: one of universal application, and a special set of rules and exemptions that only apply to the one remaining superpower.

All Rights Reserved - Library of University of Jordan - Center of Thesis Deposit

المنارة للاستشارات

www.manaraa.com

**- Magliveras, Konstantinos, Rescinding the Signature of an International Treaty: The United States and the Rome Statute Establishing the International Criminal Court, Diplomacy & Statecraft; Dec2003, Vol. 14 Issue 4, p21-49.**

The international community's efforts to create a global permanent penal court culminated in the Rome Statute establishing the International Criminal Court of 1998. Although the United States of America initially signed it, it later withdrew the signature and strongly opposed the court. This article attempts:

- To examine and analyze the US opposition from the standpoint of international relations and diplomatic law.
- To determine its legality in the context of the law of treaties.

**- Mayerfeld, Jamie., Who Shall Be Judge?: The United States, the International Criminal Court, and the Global Enforcement of Human Rights. Human Rights Quarterly, Feb2003, Vol. 25 Issue 1, p93-129.**

The aim of the International Criminal Court is to prosecute individuals guilty of the worst human rights atrocities. The court faced firm resistance from the United States. this dispute is a clash between two different models for achieving the global enforcement of human rights: a collective enforcement model exemplified by the Court, and a unidirectional enforcement model favored by the US. Both models present difficulties, but those of the collective model are treated, while those of the unidirectional model are not. Since the ICC cures the most significant difficulties associated with the collective model, it deserves US support. This paper addresses several of the specific legal, moral, and political controversies that have appeared in debates over the ICC.

All Rights Reserved - Library of University of Jordan - Center of Thesis Deposit

المنارة للاستشارات

www.manaraa.com

**- For us or against us? Economist; 11/22/2003, Vol. 369 Issue 8351, p27-27, 1p, 1c**

This article focuses on the distrust of the United States toward the International Criminal Court. Jordan, one of the United States' few friends in the Middle East, was given a stark choice. Unless it agreed to sign a pact with the United States, prohibiting the surrender of American citizens to the International Criminal Court (ICC), it would forfeit the $100m in American aid earmarked for its help in training Iraqi policemen. Jordan refused to give in, and the Bush administration backed down. Others have not been so courageous. Some 70 countries, representing 40% of the world's population, have now signed bilateral agreements with the United States exempting American citizens--and often their own--from prosecution by the ICC. According to John Bolton, (America's under-secretary for international security/ 2001 - 2005), America's ultimate goal is to conclude such pacts with every country in the world. The ICC is the first permanent international body able to try individuals for war crimes, genocide and crimes against humanity. Yet America's arm-twisting of many of its own closest allies has at times been ferocious. Under the American Service members' Protection Act, passed last year, the administration threatened to cut all military aid to those countries which had ratified the Rome statute, but which were unwilling to sign bilateral impunity agreements with the United States. The United States says it fears that rogue nations and anti-American activists could use the court to bring spurious, politically motivated charges against its citizens. However, several safeguards already exist to prevent this. Despite these safeguards, the Bush administration remains fiercely opposed.

All Rights Reserved - Library of University of Jordan - Center of Thesis Deposit

المنارة للاستشارات
www.manaraa.com

**- Ralph, Jason, Between Cosmopolitan and American Democracy: Understanding US Opposition to the International Criminal Court, International Relations; Jun2003, Vol. 17 Issue 2, p195-p212.**

The International Criminal Court can be seen as a cosmopolitan response to the problems of global democracy. This article demonstrates how opponents of the Court use a concern for international order to disguise a policy motivated by a narrow conception of the national interest. US opposition reveals the extent to which it fears being held accountable for the way America uses the great power veto on the UN Security Council. America's opposition to the Court has also succeeded in bringing to the surface the extent to which American foreign policy is driven by communitarian conceptions of democracy. Despite promising to hold power accountable for egregious human rights violations, the Court is considered a threat to American sovereignty. The article argues that this communitarian understanding of democracy promotion will be increasingly problematic as the processes of globalization undermine the capacity of states to guarantee human rights.

**- Dovey, Kathryn, Keeping the peacekeepers away from the court: The United States of America, the International Criminal Court and UN Security Council Resolution 1422, McGill University (Canada), 2004.**

Diplomatic stalemate at the seat of the UN Security Council is by no means a recent problem. Nevertheless, it may be argued that American unilateralism reached its apex in July 2002, when the United States stood its ground and demanded immunity from prosecution before the International Criminal Court (ICC) for US peacekeepers. This request was accompanied by the heavy-handed and deadly serious threat to veto the renewal of the UN peacekeeping mission in Bosnia, a threat that was realized over the

All Rights Reserved - Library of University of Jordan - Center of Thesis Deposit

المنارة للاستشارات
www.manaraa.com

course of the debates. This political practice, which pitted the United States against friends and enemies alike, finally ended when the US agreed to accept a Security Council Resolution offering a twelve-month deferral of prosecution for peacekeepers before the ICC. It is the legality of this Resolution, which is the focus of this thesis. This thesis exposed the Resolution to the limits of international law and questioned the US tactics. It argued that in order to appease the recalcitrant superpower, the Security Council passed a Resolution contrary to both the Rome Statute of the ICC and the UN Charter. With the ICC still in its embryonic stage, this thesis suggested the responses available to the Court when faced with a Resolution of such dubious legality which affects its jurisdiction to try the most heinous crimes known to humanity.

**- Toon, Valeriane, International Criminal Court: Reservations of Non-State Parties in Southeast Asia. Contemporary Southeast Asia: A Journal of International & Strategic Affairs; Aug2004, Vol. 26 Issue 2, p218-232.**

Debates over the merits of supporting the International Criminal Court (ICC) continue with fervour at the United Nations Security Council and General Assembly, in spite of steadfast opposition by the United States towards the Rome Statute and its pro-active attempts to thwart the ICC's sphere of influence with bilateral immunity agreements. In assessing the dominant reservations withholding non-party Southeast Asian states from endorsing the ICC -- be it apprehension over politically motivated accusations, the desire to uphold the norm of national sovereignty over eirgaomnes, domestic considerations such as opposition from vested interest groups, or pressure from the US to reject the Statute altogether -- this article discerns a conspicuous trait spanning all countries, i.e. public opinion, even in

All Rights Reserved - Library of University of Jordan - Center of Thesis Deposit

المنارة للاستشارات
www.manaraa.com

democracies, is secondary to state elites' obsession with preservation of state sovereignty and regime sustenance.

**- Ralph, Jason, International society, the International Criminal Court and American foreign policy. Review of International Studies; Jan2005, Vol. 31 Issue 1, p27-44**

The discipline of International Relations has been slow to assess the ICC and American opposition to it. This article uses the English School approach to assess the impact of the ICC on international society. The Rome Statute's definition of core crimes and its provision of an independent prosecutor help to legally constitute world society which transcends the society of states. The U.S. opposes this development by arguing that international criminal justice should remain within the framework of the society of the state. This is because the society of states accommodates a strong exceptionalist discourse and furthers America's particular interests in a way world society does not.

**- Tan Jr., Chet J.,** The Proliferation Of Bilateral Non-Surrender Agreements Among Non-Ratifiers Of The Rome Statute Of The International Criminal Court. **American University International Law Review; 2004, Vol. 19 Issue 5, p1115-1180.**

This study Explores the proliferation of bilateral non-surrender agreements among non-ratifiers of the Statute of the International Criminal Court in Rome. Overview of the Statute; Provisions of the Philippines-U.S. bilateral non-surrender agreement; Ways to fulfill obligations under the Statute and a bilateral non-surrender agreement.

What is significant about this study is that it clarifies the changed position of United States toward the ICC in Darfur Case.

All Rights Reserved - Library of University of Jordan - Center of Thesis Deposit

المنارة للاستشارات
www.manaraa.com

## Methodology

Since the United States' relationship with the ICC has evolved and changed character at very distinct points in time, the study will lay out in chronological order, the beginning with a brief glance at the historical developments, through the Rome Conference held in 1998, the US' signature of the ICC Statute in 2000, and its subsequent withdrawal. Finally, the study will mention the most recent developments in the Security Council regarding the ICC. To achieve this goal, this study will rely on the historical and analytical approaches, as well on the legal approach which will be used to clarify the legal status of the United States' position toward the ICC.

## Hypothesis

The United States had participated actively in the Rome Conference, contributed most notably to the protections for due process and rights of the accused. However, it joined six others- including China, Iraq, and Sudan- in an attempt to defeat the establishment of the Court. These countries were a minority: 120 nations including a all of the US's leading allies, voted in favor of the Court**.**

Consequently, this study is based on the main assumption that the United States opposition to The International Criminal Court is resulting from the American perception that its troops over the world have committed – and will commit- violations and crimes will make them subjected to ICC Jurisdiction. What led US government to seek immunity for its citizens by signing bilateral agreements with countries members in Rome Statute of the ICC.

## Research tools

Because this paper is considered a theoretical research, the research tools were books , articles of periodicals , newspapers comments and interviews .

All Rights Reserved - Library of University of Jordan - Center of Thesis Deposit

المنارة للاستشارات
www.manaraa.com

# Chapter One

## The Rome Statute and the Structure of the International Criminal Court.

All Rights Reserved - Library of University of Jordan - Center of Thesis Deposit

المنارة للاستشارات
www.manaraa.com

## Introduction

It is necessary to have an international order that protects the unarmed individuals and the weak in the times of conflicts and wars. Those who have the authority, and can start war and destruction, should bear in mind that there are always limitations and restrictions to such practices.

The criminal liabilities of presidents or those who are in charge are not limited. Therefore, there were attempts to the enforcement and the execution of law, which prevents any violation of human rights. The principle of command responsibility may be the key to this study. There are two kinds of possibilities: The first includes the responsibility of a superior who orders a subordinate to commit an illegal act - for example a crime against peace. The second includes the situation where the subordinate claims absence of responsibility for an offence, because he acted in accordance with orders or what he presumed to be the wishes of his superior, such a defense being known as "compliance with superior orders" or "due obedience".

## International Criminal System: Historical Background

The evolution of an international criminal system could be said to have started after the Second World War. The Nuremberg and Tokyo tribunals were established by the Allied powers to prosecute those who were responsible for war crimes during the Second World War [(1)].

However when reviewing the Historical Evolution of International Criminal System, we find that the origin of the concept of responsibility of the person in command could be dated to at least 500 years BC when Sun Tzu referred to it in his work "The Art of War".

(1)Helena, Cobban,. (2006), International Courts**, Foreign Policy**; Issue 153, p22-23.

All Rights Reserved - Library of University of Jordan - Center of Thesis Deposit

المنارة للاستشارات
www.manaraa.com

The book contains several important remarks in its teachings on humanitarian treatment of captured warriors and of occupied territories or concerning the true aim of war, i.e. the achievement of the military aim and advantage instead of unjustified destruction[(1)].

It can also be found in theregulation of 1439 of Charles VII of France who held his captains and lieutenants responsible for any abuses committed by a soldier in their company. Also, Gustavus Adolphus of Sweden in 1621 introduced punitive laws holding liable any colonel or captain who ordered a soldier to commit or participate in an illegal act. In 1625 Grotius, considered the father of international law, recognized this principle in his book "De Jure Belli Ac Pacis Libri Tres" (On the Law of War and Peace) [(2)].Also, it was applied against Napoleon for violating his agreement to be sent into exile and for failing to respect humanitarian laws.

Moreover, the Americans themselves had similar legislations which were applied this "the Lieber Code" that governed the conduct of American soldiers during the Civil War. The Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties set up at the end of World War I, established criminal responsibility without distinction in rank (including heads of state) for those guilty of violations of humanitarian laws[(3)].

Due to the complaints against war crimes committed against civilians and soldiers the concept of war crimes evolved as customary law for millennia. Toward the end of the nineteenth century, several European states took the important step of codifying these

---

(1)Kovacs, Peter, (2004), Relativities in Unilateralism and Bilateralism of the International Law of Antiquity**,** **Journal of the History of International Law**, Vol. 6 Issue 2, p185.

(2) Nizkor**,** Equipo., **Statement on the War on Iraq: Acts of aggression and breaches of the peace in the Charter of the United Nations,** available at: ***http://www.russfound.org/Enet/nizkor-dec.htm***

(3) Ibid.

All Rights Reserved - Library of University of Jordan - Center of Thesis Deposit

المنارة للاستشارات
www.manaraa.com

norms. The "Law of the Hague", embodied in a series of treaties, governed the conduct of war, another set of treaties comprising the "law of Geneva" governed the treatment of the wounded and sick during war [(1)].

The Hague Convention was the first treaty to attribute responsibility to a person in command for violation of humanitarian laws in the context of military conflict (art.3). As in the case of Brigadier-General Jacob H Smith, in 1902, who had been removed from active service by President Roosevelt when it was determined that he had given illegal orders to his subordinates in the exercise of his command. This responsibility is also recognized when the Red Cross Convention of 1929 had clearly articulated in the Treaty of Versailles [(2)].

Despite their advances in articulating and refining norms on international conduct, European states had little success in enforcing them. The first efforts to establish an international war crimes tribunal may be traced after the First World War , when the victors proposed to prosecute Kaiser Wilhelm II, members of the German military accused of war crimes, and Turkish officials responsible for the Armenian genocide. But this first attempt to establish an international tribunal to prosecute international crimes proved unsuccessful [(3)].

Unfortunately only twelve officers and soldiers were eventually tried for war crimes; the majorities convicted were who received relatively mild sentences. This led to much criticism over the laxity of German national tribunals among the Allied States, particularly the French and the Belgians. This unsatisfactory episode proved the lack of commitment on

---

(1) International Criminal Law, (2001), **Harvard Law Review**; Vol. 114 Issue 7, p1949-1950.

(2) Nizkor, Statement on the War on Iraq: Acts of aggression and breaches of the peace in the Charter of the United Nations, Ibid.

(3) International Criminal Law, Op. cit, p1950 .

All Rights Reserved - Library of University of Jordan - Center of Thesis Deposit

المنارة للاستشارات
www.manaraa.com

the side of the Allied States with regard to the trial of the convicted before a unique multinational tribunal. Nonetheless, the trials at Leipzig are significant because they constituted the first step towards the setting up of an international war crimes tribunal [(1)].

After World War II, the four major European Allies signed the London Agreement, on August, 8, 1945, which established the International Military tribunal that subsequently sat in Nuremberg. These tribunals were the first genuine international criminal trials; the tribunal tried twenty- two German leaders and convicted nineteen of them of war crimes, crimes against peace, and crimes against humanity. Subsequent trials in Tokyo, the Philippines, and elsewhere in the pacific theater resulted in the convictions of Japanese war criminals. These national had been held accountable for many years to come [(2)].

Since the establishment of the Nuremberg and Tokyo Tribunals, The international community has upheld the importance of establishing individual criminal responsible for gross violations of human rights and humanitarian law. The most popular accountability mechanisms have included domestic judicial systems, permanent international tribunals, ad hoc tribunals, and hybrid courts [(3)].

International criminal law had witnessed many developments since the end of the Second World War; it expanded rapidly, especially in imposing limits on the conduct of states toward their own citizens. With the end of 1940[s], the international community adopted many Conventions in international criminal law, the Universal Declaration of Human Rights of 1948, the Convention on the Prevention and Punishment of the Crime of

---

(1) Sob, Pierre, (1998), The Dynamics of International Criminal Tribunals**, Nordic Journal of International Law**; Vol. 67 Issue 2, p140.

(2) International Criminal Law, Op. cit, p1951.

(3) Restructuring The ICC Framework To Advance Transitional Justice: A Search For A Permanent Solution In Sudan. **Columbia Law Review**; Jan2006, Vol. 106 Issue 1, p182.

All Rights Reserved - Library of University of Jordan - Center of Thesis Deposit

المنارة للاستشارات

www.manaraa.com

Genocide of 1948, and the Geneva Conventions of 1949. The evolution continues with the Convention against Torture of 1984, the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, of 1986 and many other Conventions[(1)].

In this connection Bernhard Graefrath in his article about "Universal Criminal Jurisdiction and an International Criminal Court" indicated that, in the years following the Nuremburg and Tokyo proceedings, there was an obvious desire to generalize the experience gained from the Ad Hoc jurisdiction of the international military tribunals, and the evidence is the UN General Assembly's statement that confirmed the principles of international law recognized by the Nuremburg Tribunal and in the judgment of the Tribunal. In fact, the UN General Assembly directed the UN Committee on Codification of International Law to treat the formulation of the Nuremburg principles - either in the form of a general codification of offences against the peace and security of mankind or in the form of an international criminal court - as a particularly urgent task [(2)].

If the Geneva Conventions of 1949 do not expressly set out the duties of commanders, the responsibility for the issue of illegal orders, or for failing to carry out one’s duty, it can be easily extracted from various articles on the subject. It is just as easy to commit a serious violation of the Conventions norms by failure to act, as it is to do so by means of a positive act. In 1977, the responsibility of a superior was formally codified and included in Protocol I additional to the Geneva Conventions. Articles 86 and 87 envisage the responsibility of a

---

(1) For more information about these Conventions, see:

Schindler, Dietrich, (2003), **International Humanitarian Law: Its Remarkable Development and its Persistent Violation,** Journal of the History of International Law; 2003, Vol. 5 Issue 2, p165-188.

(2)Graefrath, Bernhard,. (1990), Universal Criminal Jurisdiction and an International Criminal Court, **European Journal of International Law**, Vol.1, No1, p 67-68.

All Rights Reserved - Library of University of Jordan - Center of Thesis Deposit

للاستشارات المنارة
www.manaraa.com

person in command in those cases where he does not act or he fails to carry out a positive duty[(1)].

The doctrine of responsibility of a person in command was being developed both directly and indirectly at an international level, it was also being developed at a national level in the military codes of various states and in certain significant cases brought before national military tribunals. Today there is an ample body of opinion that the responsibility by omission of a person in command has the status of customary international law [(2)].

According to Al- Rashidi ,such order and system has firmly set up and promoted the principle of the Criminal Responsibility of individuals regardless of their official positions, and violations to human rights they committed[(3)].

As a matter of fact, the cold war era witnessed decline in considering human rights, until the Security Council issued the decision No.780 in 1991, and decided to send a special committee to run investigations about the violations to human rights in the former Yugoslavia. Following its report, an ad hoc tribunal to trying war criminals who committed horrible and inhuman violations to human rights was established. This court was established officially in La Haya (Hague), in 1993. The second serious attempt to enforce Human laws, in order to prevent violations to the human rights is clearly represented in the establishment of Ad hoc tribunals for trying the criminals who committed mass killing and genocides and other violations to human rights during the civilian war in Rwanda. This court was established in accordance with the Security Council decision No. 935 in 1994.

(1) Nizkor, Statement on the War on Iraq: Acts of aggression and breaches of the peace in the Charter of the United Nations, Ibid.

(2) Ibid.

(3) الرشيدي، أحمد، (2002). النظام الجنائي الدولي: من لجان التحقيق المؤقتة إلى المحكمة الجنائية الدولية، **مجلة السياسة الدولية**، العدد 150، ص8-13.

All Rights Reserved - Library of University of Jordan - Center of Thesis Deposit

المنارة للاستشارات
www.manaraa.com

The structure and jurisdictions of this court is similar to the aforementioned court in Yugoslavia. This court seat is in Arousha in Tanzania [(1)].

To summarize, the above mentioned attempts highlight the international community's high concern about the treatment of issues affecting human rights and dignity in both peace and war times. Nevertheless, such attempts, and the previous Nuremberg and Tokyo war criminals tribunals were only temporary and limited in their competences and served mostly political will. In fact, War crimes committed by the powerful went unchallenged. On the other hand, international crimes committed in the world's territories were frequently ignored by the outside world if the victims were not the citizens of powerful states. In addition, the Ad Hoc tribunals for the former Yugoslavia and Rwanda strengthen the mechanism of international criminal justice, but, because their jurisdiction was limited to the conflicts in these two areas, these courts offered no guarantee that future crimes would be punished.

Therefore, the need for a permanent tool, and for an international and an authorized institution, has emerged to observe, protect, and take legal actions against the individuals or the states that committed violations to human rights, for Ad Hoc tribunals are not sufficient measures. Such measures require universal accepted criminal norms that guarantee equal jurisdictions, apply on both the powerful and defeated countries. It becomes a challenge to any international body attempting to implement justice when the issues or violations to human rights involved powerful countries.

In fact, the ICC should prove itself judicious and determinant to the enforcement of justice. Further, it needs to create its permanent means and methods to pursue all violators worldwide. Therefore, the Rome Statute was the first step on the right track.

---

(1) Ibid, p12.

All Rights Reserved - Library of University of Jordan - Center of Thesis Deposit

المنارة للاستشارات
www.manaraa.com

## Establishment of the International Criminal Court

The idea of a multinational criminal court with the power to hold individuals responsible for war crimes, genocide, crimes against humanity, or other violations of international criminal law is an idea about how to change the organization and conduct of international politics. The Court's establishment represents a powerful change in the rules of state sovereignty because it creates a multinational judicial authority with the power to rule for those states that have agreed to ratify it[(1)].

Before discussing the steps, procedures, and conditions of the establishment of the International Criminal Court, we have to indicate that the idea of creating an international criminal court is by no means new. It was first mentioned in the 1919 Paris Peace Treaty, whose signatories envisaged trying the German Emperor for "a supreme offense against morality and the sanctity of treaties". The 1948 Genocide Convention provided that the perpetrators of this crime against humanity would be tried before an international penal tribunal, if and when one was set up. Draft Statutes for an ICC were prepared in 1951 and 1953 by the International Law Commission (ILC), a U.N. expert body, only to be laid to rest because of the advent of the Cold War[(2)].

With the tenth decade of the past century, the world had witnessed the almost total impunity for war crimes and grave human rights violations, be it in the former Yugoslavia or in states of less public interest like Columbia or Peru, Togo or Liberia - to mention only

---

(1) Struett, Michael, (2004, The meaning of the International Criminal Court**, Peace Review**; Vol. 16 Issue 3, p319.

(2) Pejic, Jelena, (1996), What is an International Criminal Court?, **Human Rights: Journal of the Section of Individual Rights & Responsibilities;** Vol. 23, Issue 4, p16-17.

All Rights Reserved - Library of University of Jordan - Center of Thesis Deposit

المنارة للاستشارات
www.manaraa.com

a few - led to calls for the further development of mechanisms of international criminal justice [(1)].

The International Law Commission successfully completed its work on the draft statute for an international criminal court and in 1994 submitted the draft statute to the General Assembly. To consider major substantive issues arising from that draft statute, the General Assembly established the Ad Hoc Committee on the Establishment of an International Criminal Court, which met twice in 1995. After the General Assembly had considered the Committee's report, it created the Preparatory Committee on the Establishment of an International Criminal Court to prepare a widely acceptable consolidated draft text for submission to a diplomatic conference. The Preparatory Committee, which met from 1996 to 1998, held its final sessions in March and April of 1998 and completed the drafting of the text [(2)]. The U.N. General Assembly called the "United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court" in Italy, where the Rome Statute of the International Criminal Court was adopted, at its fifty-second session [(3)].

The ICC became enforced and legally existed on 1 July 2002, and can only prosecute crimes that occurred after this date. As of August 22, 2006, 102 countries became parties to the statute.

The official seat of the ICC is in The Hague (Netherlands). However, the court is permitted to engage in proceedings anywhere, for it is provided in article 3 of the Statue that “The Court shall enter into a headquarters agreement with the host State, to be approved by the

(1) Ambos, Kai,. (1996), Establishing an International Criminal Court and International Criminal Code: Observations from an International Criminal Law Viewpoint, **European Journal of International Law**, Vol7, No4, p519.

(2) United Nations, International Criminal Court, **Establishment of an International Criminal Court - overview**, available at: ***www.un.org/law/icc/general/overview.htm***

(3) Ibid.

All Rights Reserved - Library of University of Jordan - Center of Thesis Deposit

المنارة للاستشارات
www.manaraa.com

Assembly of States Parties and thereafter concluded by the President of the Court on its behalf." And that "The court may sit elsewhere, whenever it considers it desirable, as provided in this Statute." [(1)].

After the appointment of a prosecutor and 18 judges, the ICC opened on 11 March 2003.

It is provided in Rome Statute on the definition of the court that it is "An International Criminal Court ("the Court") is hereby established. It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be complementary to national criminal jurisdictions. The jurisdiction and functioning of the Court shall be governed by the provisions of the Rome Statute according to Article 1 [(2)].

## Universal jurisdiction

Universal jurisdiction or universality principle is when states claim criminal jurisdiction over persons whose alleged crimes were committed outside the boundaries of the prosecuting states, regardless of: - Nationality, Country of residence , Any other relation with the prosecuting country. The state depend its claim on the base that committed crime is a crime against humanity ,so any state is authorized to punish . This concept received a great deal of importance with Belgium's 1993 "law of universal jurisdiction", but later in 2003 it was amended to reduce its scope. In 1962 Israel relied on this principal when the highest Israeli Court condemned the alleged Nazi "Heymann" for committing genocide and crimes against humanity during War World Two .This was also utilized when the British

---

(1) United Nations, International Criminal Court:
***http://www.un.org/law/icc/statute/romefra.htm.***

(2) United Nations, International Criminal Court:
***http://www.un.org/law/icc/statute/99_corr/cstatute.htm.***

All Rights Reserved - Library of University of Jordan - Center of Thesis Deposit

المنارة للاستشارات
www.manaraa.com

Authorities arrested the previous Chilean leader Pinocho during his presence for treatment in the U K[1] .

What concerns the study here is that the creation of the International Criminal Court (ICC) in 2002 reduced the perceived need to create universal jurisdiction laws. Critics of the ICC observed that its articles do not state this principle. With reference to professor Bassiouni,, the court does not represent the Universal Jurisdiction Principle except when the Security Council sends a case to the court[2].

If the articles did state this principle, then the latest criminal humanitarian acts by Israel during its recent offensive against Lebanon could have been tried before the International criminal court although both Israel and Lebanon are not parties to the statue.

## Composition and Administration of the Court

As in the article 34 (Organs of the Court) of Rome Statute of the International Criminal Court, The Court shall be composed of the following organs [3]:

(a) The Presidency;

(b) An Appeals Division, a Trial Division and a Pre-Trial Division;

(c) The Office of the Prosecutor;

(d) The Registry.

## Crimes within the jurisdiction of the Court

The article 5 of Rome Statute of the International Criminal Court stated that [4]:

(1) ماجد، عادل، (2001). **المحكمة الجنائية الدولية والسيادة الوطنية**، القاهرة: مركز الدراسات السياسية والإستراتيجية، ص24.

(2) بسيوني، محمود شريف، (2004). المحكمة الجنائية الدولية: مدخل لدراسة وآليات الإنقاذ الوطني للنظام الأساسي، القاهرة، دار الشروق، ص26.

(3) Article (34) of Rome Statute of the International Criminal Court.

(4) Article (5) of Rome Statute of the International Criminal Court.

All Rights Reserved - Library of University of Jordan - Center of Thesis Deposit

المنارة للاستشارات
www.manaraa.com

1. The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes:

(a) The crime of genocide;

(b) Crimes against humanity;

(c) War crimes;

(d) The crime of aggression.

2. The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.

## How cases reach the ICC?

ICC has jurisdictions over cases in one of the following cases [(1)]:

a- A country member of the Assembly of States Parties (ratified the Court's Statute) sends the case (Article 13B, 14).

b- A country that is not member and has chosen to accept the ICC's jurisdiction sends the case. (Article 12 (3).

c- The Security Council sends the case (subject to veto from the permanent five members). (Article 13B)

The three-judge panel authorizes a case initiated by the ICC Prosecutor. (Article 15)

---

(1) Encyclopedia of Political Information, **International Criminal Court,** available at: ***http://www.politicalinformation.net/encyclopedia/International_Criminal_Court.htm.***

All Rights Reserved - Library of University of Jordan - Center of Thesis Deposit

المنارة للاستشارات
www.manaraa.com

## The ICC and the Individual within the International Law

In view of the extra ordinarily high level of victimization that has occurred after World War II , and the fact that most of that victimization falls under the proscriptive norms of genocide, crimes against humanity and war crimes. As a result, the most perpetrators of these crimes, including decision makers and senior executors, have seldom been brought to account for their misdeeds, and instead benefit from impunity. Excerpted from Volume 1, The Legislative History of The International Criminal Court[(1)].

However, international civil society has finally reached the limits of its tolerance for impunity and as indicated by Michail Wladimiroff, the concept that individuals are just agents of a state changed by the time into the understanding, that individuals are responsible for their own behavior during an armed conflict. The ICC statute represents the present international consensus on criminal responsibility of individuals. It's an improvement to previous international instruments .Under the ICC the issue can be approached in two different ways [(2)]:

First: To consider the planners and the organisers as principal offenders. For example , as the Jerusalem Court did when it held Eichmann to be a principal offender in the same way as two or more other persons who collaborated in forging a document are all principle offenders[(3)] .

---

(1)Bassiouni, M. Cherif., (2006), Personal Communication, at the International Criminal Court & Arab National System*s* conference, 13 - 15 February 2006 Amman, Radisson SAS.

(2) Wladimiroff, Michail, (2004), The Individual within International Law, in Ramesh Chandra Thakur**, From sovereign impunity to international accountability the search for justice in a world of states**, New York: United Nations University Press, p103-115.

(3) For more information about Eichmann court, see: Kimura, Akio, Genocide and the modern mind: intention and structure, **Journal of Genocide Research**; Sep2003, Vol. 5 Issue 3, p409-p412.

All Rights Reserved - Library of University of Jordan - Center of Thesis Deposit

للاستشارات المنارة
www.manaraa.com

Second: To try accomplices, who aid or abet, if directly and substantially as planners and organisers, the principal offenders.

Another improvement is the issue of conspiracy, The ICC statute adopted a midway position: conspiracy requires the commission of some overt act, but imposing that no requirement that the crime itself is actually committed [(1)].

The criminal responsibility is concerned with international and knowing behaviour, guilty mind. Each crime in international humanitarian law has its own built - in mensrea, as genocide requires an intent to destroy the protected groups and crimes against humanity involve a widespread or systematic attack against a civilian population with knowledge of the attack .Many war crimes include the adjectives wilfully, wantonly or treacherously[(2)] .

## Military Responsibility

As an exception to the general standard as discussed before, the international doctrine has accepted functional responsibility of military commanders by drawing the line where the commander "should have known" of the unlawful activity, its based on negligence. The military commander has not only a duty to take all necessary and reasonable measures within his power to prevent the commission of an unlawful act by subordinates under his command, but he has also an obligation to take all the necessary and reasonable steps to keep himself sufficiently informed in order to be reasonably able to prevent unlawful act of his subordinates. The ICC take the matter further by including culpability when failing to take the necessary and reasonable measures to punish perpetrators or to submit the matter to the competent authorities for investigation and prosecution . In both cases –the

(1) Wladimiroff, The Individual within International Law, Op. Cit, p105.

(2) Ibid, p106.

All Rights Reserved - Library of University of Jordan - Center of Thesis Deposit

المنارة للاستشارات
www.manaraa.com

prevention and repression – a military commander is therefore under the obligation to exercise effective control over his subordinate [1].

Military standard are perhaps higher than their civilian counterparts for two reasons [2]:

1 – There is a need to preserve a higher standard of discipline in a military structure.

2 – There are differences in the effectiveness of deterrence in military and civilian life.

## Civilian Superior Responsibility.

Civilians can be held responsible for the behaviour of others when they are in a superior position to and able to control the behaviour of the subordinate. Such superiors can work in a state hierarchical structure, be politicians, or leaders of commercials enterprises as well. In this respect acceleration of the development of international law through Ad Hoc tribunals has affected the functional (criminal) responsibility doctrine with respect to civilians as well[3] .

Article 28 of the ICC Statute regulated the issue by separating both responsibilities in two different paragraphs .The military paragraph provides for an extra test of ‘ should – have – known’ and the civilian one without such test ,the civilian superior is responsible only when he has intention and knowledge .The superior also carry’s the criminal responsibility of superiors when consciously disregarding information which clearly indicated that subordinates were committing or about to commit crimes so he is responsible for negligence[4].

(1)Tan Jr., Chet J., (2004), The Proliferation Of Bilateral Non-Surrender Agreements Among Non-Ratifiers Of The Rome Statute Of The International Criminal Court. **American University International Law Review**; 2004, Vol. 19 Issue 5, p1133.

(2) Wladimiroff, The Individual within International Law, Op. cit, p107.

(3) Ibid, p109.

(4) United Nations, International Criminal Court:

***http://www.un.org/law/icc/statute/romefra.htm.***

All Rights Reserved - Library of University of Jordan - Center of Thesis Deposit

المنارة للاستشارات
www.manaraa.com

## Miscellaneous

The shift of focus from State responsibility to individual responsibility would become meaningless when individuals would hide away behind the sovereignty of the State .The trend in international law is to rule out all barriers that would allow any form of violations of humanitarian law.

Immunity of government leaders, ministers of Foreign Affairs and Heads of State on an international level is denied in the Nuremberg Charter ,Tokyo Charter and under the ICC Statute .The scope on criminal responsibility for violations of humanitarian law in international prosecutions is therefore almost absolute. The only exception to this responsibility may be the age of the accused: according to article 26 of the ICC Statute, the balance was defined at the age of eighteen. The principle is that heinous crimes ought not to go unpunished ,but that principle may conflict with the principle of non-retroactivity, so the ( ICC ) according to its Statute has competence only over crimes committed after its official start on 1 July 2002[(1)].

## The Relationship between the ICC and the United Nations

The first motives for the ICC establishment came from within the United Nations. Although it is legally a separate entity established by a separate treaty between states, and not the Security Council acting under the United Nations Charter, the UN has a clearly defined role towards the court.

The global presence and infrastructure of the U N make it potentially the most important partner of the ICC on various levels. The agreement between the two organizations, which entered into force on 4 October 2004, regulates the working relationship, and establishes

(1) Wladimiroff, The Individual within International Law, Op. cit, p109-112.

All Rights Reserved - Library of University of Jordan - Center of Thesis Deposit

المنارة للاستشارات
www.manaraa.com

the legal foundation for cooperation within their respective mandates and status. The relationship agreement covers two key categories of procedures:

First: it addresses procedures that are relatively standard and include the exchange of representatives, the exchange of information and documentation.

Second: The Relationship Agreement covers procedures unique to the court as an independent judicial institution focusing on international criminal law [(1)].

## The Relationship between the ICC and the Security Council

It's worth recalling the following [(2)]:

- That under article 24 of the UN Charter the Security Council has 'primary responsibility for the maintenance of international peace and security'.

- Article 39 of the Charter confers upon the Security Council the power to determine "the existence of any threat to the peace, breach of the peace, or act of aggression".

- Chapter VII of the Charter sets out the powers of the Security Council to take measures to maintain or restore international peace and security.

- Decisions of the Security Council adopted under Chapter VII are legally binding upon all Member States of the United Nations. By virtue of article 103 of the United Nations Charter any legally – binding decisions adopted under Chapter VII , prevail over all other obligations entered into by Members of the U N , in particular their other treaty obligations.

Its there for important politically, as well as legally necessary, that the ICC should act in a way which complements the primary responsibility of the Security Council for the

---

(1) بسيوني، المحكمة الجنائية الدولية: مدخل لدراسة وآليات الإنقاذ الوطني للنظام الأساسي، مرجع سابق، ص69–70.

(2) Roach, Steven C., (2005), Humanitarian Emergencies and the International Criminal Court (ICC): Toward a Cooperative Arrangement between the ICC and UN Security Council, **International Studies Perspectives**, Vol. 6 Issue 4, p431-446.

All Rights Reserved - Library of University of Jordan - Center of Thesis Deposit

المنارة للاستشارات
www.manaraa.com

maintenance of peace and security and does not obstruct it. It's important that the Security Council and the ICC should work in harmony.

- First: Under Article 13 (b) of the Rome Statute, when the Security Council, acting under Chapter VII, refers a situation to the Prosecutor, as in Darfur case.
- Second: Under the provision of Article 16 of the Rome Statute, the Security Council may request the Prosecutor to defer an investigation for a period of twelve months, through a resolution adopted under Chapter VII. The deferral also can be renewed [(1)].

Under such referrals the United States assists in payment for any prosecutions made under such a referral[(2)].

It's another area where the relationship between the Security Council and the Court needs to be complementary, the key point is that under Article 39 of the Charter it is for the Security Council to determine whether an act of aggression has taken place or not .

The state Parties must adopt an agreement setting up a definition of aggression and the conditions under which the Court could exercise its jurisdiction. A review conference will be held in 2009, seven years from the date that the Rome Statute entered into force, during which the matter will be discussed. Discussions are ongoing concerning the definition of aggression and the necessary amendments to the Rome Statute , it's a very tricky area and the relationship between the Court's exercise of jurisdiction over the crime of aggression and the Security council's exercise of its powers under Chapter VII will be crucial .It's in the interests of the international community as a whole and in particular the Arabic

(1) Ibid, p431-446.

(2) Landrum, Bruce D.,(2002), The Globalization of Justice : The Rome Statute of the ICC , **Army Lawyer**, Issue 356, p5.

All Rights Reserved - Library of University of Jordan - Center of Thesis Deposit

المنارة للاستشارات
www.manaraa.com

community that the two institutions should work together to deal with cases of aggression[(1)].

According to article 121, the jurisdiction of the court can include in the future other crimes such as trafficking narcotics, and terrorism [(2)].

## Objections against ICC

While 102 countries have ratified the Rome Statute, As of August 22, 2006[(3)].

The USA and other countries such as Israel have opposed the establishment of the ICC. Some claim that the ICC significantly reduces the authority of the top state officials.

Further, the USA tried to engage in bilateral agreement which protect the American citizens from being tried for crimes such as war crimes, by signing bilateral Immunity Agreement, which will be covered in the next chapters in details.

Nevertheless, the International Criminal Court (ICC) remains the first ever permanent, treaty based, international criminal court established to promote the rule of law and ensure that the gravest international crimes do not go unpunished. The ICC will be complementary to the national criminal jurisdictions. Further, it is supported by the majority of NGO, defending human rights and the International law.

(1) see: International Criminal Court: Frequently asked questions, available at: ***http://www.icc-cpi.int/***

- In an interview with Nasser Amin , Arab Colation for ICC ,Arab Center for the Independence of the Judiciary and the Legal Profession, Egypt . On the 15th of February, 2006 at the Radisson SAS Hotel Amman, Jordan. He mentioned that only two Arabic countries are party of the Rome Statute which will weaken their chances in the review conference that will be held in 2009.

(2) بسيوني، المحكمة الجنائية الدولية: مدخل لدراسة وآليات الإنقاذ الوطني للنظام الأساسي، مرجع سابق، ص40.

(3) See the table of these countries in Wikipedia Encyclopedia, available at: ***http://en.wikipedia.org/wiki/International_criminal_court*** in .

All Rights Reserved - Library of University of Jordan - Center of Thesis Deposit

المنارة للاستشارات
www.manaraa.com

# Chapter Two

## The United States stand from the International Criminal Court.

All Rights Reserved - Library of University of Jordan - Center of Thesis Deposit

المنارة للاستشارات

www.manaraa.com

## Introduction

The United States was a driving force behind the establishment of the Ad Hoc Criminal Tribunals for the former Yugoslavia and Rwanda (ICTY and ICTR), generally seen as important steps leading to the establishment of the ICC. It was similarly instrumental in the process which led to the Rome Conference. Observers who saw this as an indication of the potential role of the US during the negotiations concerning the Court's Statute

were bitterly disappointed when the United States nullified its signature to the Rome Statute. The US adopted a very conservative attitude on a number of issues, opposing a Court with broad powers [(1)].

The United States signed the Rome statute on December 31, 2000, the last day it was open for signature. On 6 May 2002, Under Secretary of State for Arms Control and International Security John R. Bolton (2001-2005), addressed a letter to the UN Secretary General informing him that the United States does not intend to become a contracting party to the Rome Statute and that, consequently, his country has no legal obligations arising from its signature. This move, which has been interpreted as nullifying the US signature on the Rome Statute, was the culmination of the United States' long-standing negative approach towards the establishment of the International Criminal Court[(2)].

This opposition of the United States to the International Criminal Court appears as either an embarrassment to many of the nation's traditional supporters or a puzzle. A puzzle, for it is not at all understandable why the United States should feel so threatened by this new court.

---

([1])Zwanenburg, Marten,(1999), The Statute for an International Criminal Court and the United States: Peacekeepers under Fire?, **European Journal of International Law**, Vol. 10, No.1, p125.

([2]) Magliveras, Konstantinos, Bourantonis, Dimitris, (2003), Rescinding the Signature of an International Treaty: The United States and the Rome Statute Establishing the International Criminal Court**, Diplomacy & Statecraft**; Vol. 14 Issue 4, p21.

All Rights Reserved - Library of University of Jordan - Center of Thesis Deposit

المنارة للاستشارات
www.manaraa.com

Supporters of the Court point out that there are sufficient provisions in the Rome Statute designed to protect all countries that have a mature democracy's capacity to engage in legal self-regulation and self-policing[(1)].

## The American Reasons to Oppose the International Criminal Court

The United States has wholly rejected the ICC; it has argued both that US Participation in the ICC would violate the US Constitution and that US hegemony in the unipolar world would subject the United States to politically motivated prosecutions in the ICC arising from US peacekeeping activities. The constitutional concerns surrounding the US participation in the ICC focus largely on jurisdictional considerations and on an unclear and vague language in the ICC Statute's definition of jurisdiction-conferring crimes[(2)].

Robert C. Johansen indicated that the U S worries from creating a permanent international criminal court arises from unwarranted fears that US officials might be wrongly prosecuted. The United States opposition also rests on a mistaken belief that legitimate national sovereignty can only be protected by rejecting international legal constraints on criminal abuses of sovereignty[(3)].

In general, the United States has framed its rejection of the ICC in a series of reservations and doubts regarding the Statute itself. In a statement before the Committee on Foreign Relations of the US Senate on July 23, 1998, just after the conclusion of the Rome

---

(1) Khan, Paul, M,. (2003), why the United States is so opposed, crimes of war projects, ICC Magazine, available at: ***http://www.crimesofwar.org/icc_magazine/index.html.***

([2]) Compounding the Countermajoritarian Difficulty Through "Plaintiff's Diplomacy": Can the International Criminal Court Provide a Solution? (2003), **Brigham Young University Law Review**; Vol. Issue 3, p1130.

([3]) Johansen, Robert C., (2001), **U.S. Opposition to the International Criminal Court: Unfounded Fears**. Policy Brief 7, The Joan B. Kroc Institute for International Peace Studies, University of Notre Dame, available at: ***http://www.nd.edu/~krocinst/polbriefs/pbrief7.shtml***

All Rights Reserved - Library of University of Jordan - Center of Thesis Deposit

المنارة للاستشارات
www.manaraa.com

Conference, Ambassador Scheffer listed the following objections to the International Criminal Court Statute negotiated and approved in Rome:

- Fundamental disagreement with the parameters of the ICC's jurisdiction: for article 12 of the Statute establishes jurisdiction when either the state on whose territory the crime was committed is a party or when the accused person's state of nationality is a party without any referrals from the Security Council.
- Desire for an "opt out" provision: Ambassador Scheffer indicated that the United States was unsuccessful in obtaining a broad ability for states to "opt out" of ICC jurisdiction for up to 10 years. So During these ten years states could evaluate the ICC and determine if it was operating effectively and impartially. This "opt out" if approved would have been similar to the "opt out" adopted under Article 124, the Statute does allow a seven year opt-out period for war crimes.
- Opposition to a self-initiating prosecutor: the United States objects to the establishment of a prosecutor with independent power to initiate investigations without either referral from a state party or the Security Council.
- Disappointment with the inclusion of an undefined "crime of aggression": Traditionally, a crime of aggression is what the Security Council determines it to be. And the current text adopted in the Rome Statute provides for ICC jurisdiction over crimes of aggression, but leaves the definition to later amendment.
- There was displeasure with the Statute's of "take it or leave it" approach: Against the requests of the United States, a provision was adopted which prohibits reservations to the Statute [(1)].

(1)Frye, Alton., (1999), **Toward an International Criminal Court: three options presented as presidential speeches,** New York**:** Council on Foreign Relations Press, p75-76.

All Rights Reserved - Library of University of Jordan - Center of Thesis Deposit

المنارة للاستشارات
www.manaraa.com

- The USA contradictory views, for example the longing for having "opting out", and the disappointment of not having "opt out" or" take it or leave it" approach can be interpreted as a way of delaying matters rather than genuine concern.

In Particular, we can confine the main issues of concern to the United States by the following: the role of the Security Council in relation to the Court, the accountability of the Independent Prosecutor, and the universality of the Court's jurisdiction.

**- Security Council Control**

The interrelationship between the Security Council and the ICC formed a critical and controversial part of the negotiations leading up to and at the Rome Conference. Many states believed that one of the central goals of establishing an ICC was to avert the need for the ad hoc approach taken by the Security Council. So the Security Council will refer the serious situations to the permanent court for investigation and prosecution, rather than pursing the difficult and costly process of establishing a new Ad Hoc tribunal. As the former ad hoc tribunal for Yugoslavia which was very costly. This logic held broad approval to many delegations at Rome (1). On asking professor Basyoni, about how authoritative forming Ad hoc tribunal after the establishment the ICC is, he replied, that according to UN charter the council has the right to do that as well as the right to use the ICC as ad hoc tribunal for it self. And therefore the council can refer a country that is not a party of the Rome statute to the ICC and vice versa (2).

(1)Kirsch, Philippe, and Holmes, John T. and Johnson, Mora,. (2004), **International Tribunals and Courts**, in: Malone, David M., UN Security Council: From the Cold War to the 21st Century, London:

(2)Bassiouni, M. Cherif., (2006), Personal Communication, at the International Criminal Court & Arab National Systems conference, 13 - 15 February 2006 Amman, Radisson SAS.

All Rights Reserved - Library of University of Jordan - Center of Thesis Deposit

المنارة للاستشارات
www.manaraa.com

The difficulties in the negotiations about the interrelationship between the Security Council and the ICC came from two sources: one legal and another political. From a legal standpoint, there were justifiable concerns for the need to achieve appropriate balance between the Council's primacy in addressing situations threatening international peace and security and the necessity of protecting the Court from inappropriate political influence by the Council. Politically, the debate on the role of the Security Council and the ICC became entangled in the endless debates in New York regarding Security Council reform and expansion, particularly the use of the veto. A few states face up the notion that the Security Council should have any role with respect to the ICC because of the veto possessed by the Permanent five [(1)].

One of the most opponents to the Security Council referral powers was India, which pointed out that the Security Council should have no role at all in the Court's operation. India explained its vote against the final treaty that "the Statute gives to the Security Council a role in terms that violate international law." Also India asserted that the Security Council according to Article (16) will have the power to defer investigations or prosecutions for renewable twelve month periods [(2)].

The United States sought after having a major influence and role to the United Nations Security Council to play on the workings of the court. The United States wanted a requirement of Security Council consent for every case brought to the ICC, Due to its responsibilities under Chapter 7 of the UN Charter. One objective of the US throughout the early drafting and negotiations processes was that there should be a significant role for the

(1)Kirsch, International Tribunals and Courts, Op. cit, p287.

(2) Fowler, The Rome Treaty for an International Criminal Court: A Framework of International Justice for Future Generations, Op. cit., p136.

All Rights Reserved - Library of University of Jordan - Center of Thesis Deposit

المنارة للاستشارات
www.manaraa.com

Security Council in determining whether or not a case should be referred to the Court. The key issue was the US unwillingness to yield the veto power, even on the subject of an international criminal Court. This point was made crystal clear when Mr. Helms (Chairman of the Senate Foreign Relations Committee/ 1995-2001), stated that, “without a clear US veto the UN Criminal Court will be dead-on-arrival at the Senate Foreign Relations Committee”. Accordingly, what is concluded is that the “non-veto” issues are the first and foremost concerns of the US, despite the other reasons given to explain their opposition [(1)].

As for Marc Grossman (Under Secretary for Political Affairs/ 2001-2005) in his article about (American Foreign Policy and the International Criminal Court), he saw that under the UN Charter, The UN Security Council has crucial responsibility for maintaining international security and peace . But the Rome Treaty removes this existing system of checks and balances, and put massive unchecked power in the hands of the ICC judges and prosecutor. He indicated that:” The treaty created a self-initiating prosecutor, answerable to no state or institution other than the Court itself. In Rome, the United States said that placing this kind of unchecked power in the hands of the prosecutor would lead to controversy, politicized prosecutions, and confusion. Instead, the US argued that the Security Council should maintain its responsibility to check any possible excesses of the ICC prosecutor. Our arguments were rejected; the role of the Security Council was usurp"[(2)].

In other words, the United States officials at first supported the proposed permanent court, when they was expecting that the new court would not be allowed to take any action until

---

(1)Mokhtar, Aly, (2003), The fine art of arm-twisting: The US, Resolution 1422 and Security Council deferral power under the Rome Statute**, International Criminal Law Review**, Vol. 3 Issue 4, p295-344,p297.

(2) Grossman, Marc., (2003), **American Foreign Policy and the International Criminal Court**, in: Driscoll, William J, Zompetti, Joseph P, and Zompetti, Suzette, (ed), The International Criminal Court: Global Politics and the Quest for Justice, New York: International Debate Education Association, p153.

All Rights Reserved - Library of University of Jordan - Center of Thesis Deposit

المنارة للاستشارات

www.manaraa.com

after a UN Security Council decision had referred a case to the court. Within the Security Council, Washington could use its veto power to prevent any investigation of itself or its friends. The United States wanted a court in which the prosecutor could never bring charges against anyone from the United States, although the United States could, through a Security Council decision, bring charges against others[1].

**- The Independent Prosecutor**

The Statute of Rome establishes substantive principles of international law and to adjudicate these principles it creates new institutions and procedures. The statute confers jurisdiction on the ICC over four crimes: genocide, crimes against humanity, war crimes, and the crime of aggression. The court's jurisdiction applies automatically to individuals accused of crimes under the statute whether or not their governments have ratified it. Particularly important here is the independent prosecutor, who is responsible for conducting investigations and prosecutions before the court., based on referrals by states who are parties to the agreement or on the basis of information that he or she otherwise obtains. While the Security Council is precluded from a meaningful role in the court's work [2].

The United States opposed giving the prosecutor propio motu powers for several reasons :

One of the reasons can be understood from (US Ambassador-at-Large for War Crimes Issues) David Scheffer's words, "it will encourage overwhelming the Court with complaints and risk diversion of its resources, as well as embroil the Court in controversy, political decision-making, and confusion." Although the Ambassador expresses a valid concern, one

(1) Johansen, U.S. Opposition to the International Criminal Court: Unfounded Fears, Op. cit.

(2)Frye, Toward an International Criminal Court: three options presented as presidential speeches, op. cit, p37-38.

All Rights Reserved - Library of University of Jordan - Center of Thesis Deposit

المنارة للاستشارات
www.manaraa.com

needs to question and understand whether it justifies opposing the entire treaty. Systems and procedures are developed for the fair and professional handling of unsolicited information. The fact that the Court's has narrow subject matter jurisdiction will provide an effective screen that will filter out the overwhelming majority of prosecutions, even if the prosecutor does receive a large volume of complaints. Moreover, the preconditions to exercise the Court's jurisdiction, will also work as a screening mechanism. As for the danger of "political decision-making," the surest way to avoid that is precisely the mechanism embodied in the treaty it self for the independent prosecutor is subject to judicial oversight applying crimes that are strictly defined and widely accepted [(1)].

A majority of states argued that the prosecutor's independence is needed in order to be efficient and free of political coercion, while Some other states including the US argued that this would lead to a work overload, which, accordingly would force the prosecutor to take political decisions [(2)].

Another reason as indicated by Leila Sadat in her book about (The International Criminal Court and the Transformation of International Law), That the United States delegation was worried about the legitimacy of the Court; they didn't want this legitimacy to be undermined by a Prosecutor who didn't strictly adhere to prosecuting core crimes, but reached further and prosecuted crimes that were notunder the ICC mandate. This would also be a strain on the ICC's limited budget and time restrictions.

---

(1) Fowler, Jerry., (2003), **The Rome Treaty for an International Criminal Court: A Framework of International Justice for Future Generations**, in: Driscoll, William J, Zompetti, Joseph P, and Zompetti, Suzette, (ed), The International Criminal Court: Global Politics and the Quest for Justice, New York: International Debate Education Association, p137.

(2) Weschler, Lawrence., (2000), **Exceptional Cases in Rome: The United States and the Struggle for an ICC**, in: Sewall, Sarah B. and Kaysen, Carl (ed): The United States and the International Criminal Court – National Security and International Law, Maryland: Rowman and Little Publishers, p94.

All Rights Reserved - Library of University of Jordan - Center of Thesis Deposit

المنارة للاستشارات

www.manaraa.com

Thirdly, some States (including the United States) were concerned with the accountability of the Prosecutor. They were not sure to whom the Prosecutor was answerable or even if he was answerable to anyone [(1)].On the other side, proponents of an independent Prosecutor, felt the need for a Prosecutor that was truly independent, who wouldn't be swayed by political concerns and who would adhere to the maxims of impartiality and independence , also they believed that this independence and authority was necessary needed to balance the potentially political referrals made by States Parties and even by the Security Council [(2)].

The national sovereignty issue formulates the United States opposition in face of the powers vested in the prosecutor, because it fears that the flexible powers placed in the hands of a prosecutor are antithetical to its national sovereignty. The US sees the ICC as an infringement of its sovereign rights as a Superpower to carry out humanitarian and international peace missions across the globe. The ICC will have the power to prosecute US citizens and soldiers, who are spread across the globe in pursuit of protecting US business and security interests. In order to prevent such a possibility, the US tried its best to differentiate between internal conflicts and international armed conflicts. So from the beginning the US rejected the notion of automatic jurisdiction for crimes except genocide and proposed an opt-out mechanism for war crimes and crimes against humanity [(3)].

That was also emphasized by Lizzie Rushing who indicated that the fact that a court of which they are not a party could have jurisdiction for crimes alleged against any US

---

(1) Sadat, Leila Nadya, (2002), **The International Criminal Court and the Transformation of International Law: justice for the New Millennium**, , New York: Transnational Publishers, p94.

(2) Lee, Roy S., (1999), **The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations and Results,** Boston: Kluwer Law International, p176.

(3)Corn, Geoffrey S., and Aldykiewicz, Jan E., (2002), New Options for Prosecuting War Criminals in Internal Armed Conflicts. **Parameters**. Vol. 32 Issue 1, p37-43.

All Rights Reserved - Library of University of Jordan - Center of Thesis Deposit

المنارة للاستشارات
www.manaraa.com

nationals seems to threaten their national security, as well as their interests as a military superpower in world politics for at any given time, there are thousands of US forces across the globe conducting peacekeeping operations [(1)].

Hence, as seen by Marc Grossman: "We must ensure that our soldiers and government officials are not exposed to the prospect of politicized prosecutions and investigations. Our President is committed to a robust American engagement in the world to defend freedom and defeat terror; we cannot permit the ICC to disrupt that vital mission"[(2)].

And that what made the American participation in ICC unlikely from the first steps, as mentioned by Bruce Broomhall who indicated that "what characterized US participation in the Prep Com process, however, was its continued search for protection against jurisdiction of Americans, as nationals of a Non-Party State. Thus, it did not seem like the United States would ever join the court"[(3)].

## - The Jurisdiction

Many researchers agreed that the primary reason that the United States gave for opposing the Rome Treaty was that the Court would be able to exercise jurisdiction over a conduct that occurs on the territory of a state that has not accepted the Court's jurisdiction. The US insisted that the Court can only be able to exercise jurisdiction if the state of the suspect's nationality has accepted jurisdiction. Ambassador Scheffer denounced the territorial basis

---

(1)Rushing, Lizzie., (2003), The International Criminal Court and American Exceptionalism, **International Studies, Organizations, and Social Justice, Geneva, Switzerland**, Independent Study Project, p11. available at:

***http://www.sit-edu-geneva.ch/international_criminal_court_and.htm#_ftnref38***

(2) Grossman, American Foreign Policy and the International Criminal Court, Op. cit., p154.

(3)Broomhall, Bruce, (2003), **International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law**. New York: Oxford University Press, p171.

All Rights Reserved - Library of University of Jordan - Center of Thesis Deposit

المنارة للاستشارات
www.manaraa.com

for the Court's jurisdiction as "a form of jurisdiction over non-party states." It was, he said, "contrary to the most fundamental principles of treaty law [(1)].

Secondly the US concern focuses on Article 12 of the Rome Statute, which allows the personnel of non-states parties to fall under the jurisdiction of the ICC if the acts in question were committed in the territory of a state party to the statute. The United States argued that treaties are binding only on those that consent to be bound and emphasizes that its objection to ratify the Rome Statute should shield American nationals from prosecution[(2)].

David Forsythe sees that US insistence of its position on this point meant that the US was prepared to gut the entire ICC project in order to exempt itself. It is no wonder that most other states that ratified the Rome Statute and their supporters in the NGO community reject the US position on Article 12[(3)].

Central importance in the Rome document is the establishes of the principle of "complementarily," which means that the court can take action only if the suspect's own country, through its regular judicial system, has failed to address accusations of misconduct. Also, the United Nations Security Council (of which the United States is a permanent member) can on its own authority prevent the ICC from taking action against the armed forces of any country involved in an officially approved U.N. peacekeeping

(1) Fowler, The Rome Treaty for an International Criminal Court: A Framework of International Justice for Future Generations, Op. cit., p139.

(2) Forsythe, David P., (2004), **International Criminal Justice and the United States: Law, Culture, Power**, in: Ramesh Thakur and Peter Malcontent (ed), From Sovereign Impunity to International Accountability: The Search for Justice in a World of States, New York: United Nations University Press, p68.

(3) Ibid, p68.

All Rights Reserved - Library of University of Jordan - Center of Thesis Deposit

المنارة للاستشارات
www.manaraa.com

mission [1].Thirdly-as indicated by Stephen Garrett- the Rome Treaty actually will not exercise jurisdiction in war crimes until a provision is adopted in accordance with articles 121 and 123 defining the crime . Moreover, Article 8 of the statute state that "war crimes" as actions "committed as a part of a plan or policy" or as part of a "widespread or systematic attack directed against any civilian population"[2]. This clearly means that isolated unauthorized individuals transgressions are unlikely to be part of the court's agenda. So there is no explanation, in any event, why the United States has much to fear from a prosecution being undertaken of its soldiers . Even though the US argues that the crime of aggression "had not been defined under customary international law for purposes of individual criminal responsibility". The US insisted that there had to be a direct linkage between a Security Council decision that a state had committed aggression, and the conduct of an individual of that state[3].

In this context, Lizzie Rushing indicated that the ICC, free from any oversight of the Council, "dilutes the authority of the UN Security Council and departs from the system that the framers of the UN Charter envisioned." A further analysis of the Rome Statute also reveals that the parties to the treaty will be able to amend these "crimes of aggression," as well as be able to opt out of the jurisdiction of these crimes once they are defined. A non-party, on the other hand, will not be given the opportunity to opt out, nor will they have any voice as to its definition. This is, according to the US Department of State, "unacceptable" [4].

---

(1)Garrett, Stephen A., (1999), The United States and The International Criminal Court. **America Magazine**, Vol. 181 Issue 5, p14.

(2) Article (8) of Rome Statute of the International Criminal Court.

(3)Mokhtar, The fine art of arm-twisting: The US, Resolution 1422 and Security Council deferral power under the Rome Statute**,** Op. cit.,p300-301.

(4)Rushing, The International Criminal Court and American Exceptionalism, Op. cit, p12.

All Rights Reserved - Library of University of Jordan - Center of Thesis Deposit

المنارة للاستشارات

www.manaraa.com

A long discussion were held on whether the ICC would have jurisdiction in international conflicts only, or if it would includes internal conflicts as well. Most States felt that they could accept to include internal conflict, and even go further in regulating internal conflicts [(1)]. Other States, however, refused to include internal conflicts, as they felt that this was exclusively a matter of domestic jurisdiction. The issue was resolved by including internal conflicts in Art 8.2.c-f of the Statute, with the note that internal disturbances and tensions do not constitute armed conflict (Art 8.2.d). [(2)].

The US was also adamantly opposed to Article 120 of the Rome Statute, which states in part, "no reservations may be made to this Statute" [(3)]. The argument against such a provision was that, especially within the states cooperating with the ICC, a reservation might be needed. The reasoning was that national constitutional requirements and judicial procedures might necessitate a reasonable opportunity for reservations that do not defeat the intent or the purpose of the treaty [(4)].

There is another objection based on a "democratic deficit". This argument stresses that the ICC, unlike say the US Supreme Court, is not embedded in a broader system of democratic policy making. So the argument runs, the ICC will make a number of very broad judgments, nor just narrow and technical ones. Since the ICC will in effect "legislate" on a variety of weighty issues, and since its prosecutor and judges will have the opportunity to

---

(1) Kirsch, Phillipe, Holmes, John T., (1999), The Rome conference on an international criminal court: The negotiating process, **American Journal of International Law**, Vol. 93, Issue 1, p7.

(2) Scheffer, David J., (1999 ), The United States and the international criminal court, **American Journal of International Law**, Vol. 93, Issue 1, p16.

(3) Article (35) of Rome Statute of the International Criminal Court.

(4)Mokhtar, The fine art of arm-twisting: The US, Resolution 1422 and Security Council deferral power under the Rome Statute**,** Op. cit.,p300.

All Rights Reserved - Library of University of Jordan - Center of Thesis Deposit

المنارة للاستشارات
www.manaraa.com

overturn policy established by national democracies, the court should be opposed. There is no political check on the ICC; the court does not answer to any political body [1].

That was a discussion of some reasons which the United States declared to oppose the International Criminal Court and its statute. These reasons were discussed from the legal and procedural views, the next chapter will discuss the American attitude towards ICC from the political dimension, and reviewing the political behavior of the United States' Rejection of the Statute in Rome and the efforts to obtain impunity for genocide, crimes against humanity and war crimes.

(1) Forsythe, International Criminal Justice and the United States: Law, Culture, Power, Op. cit, p70.

All Rights Reserved - Library of University of Jordan - Center of Thesis Deposit

المنارة للاستشارات
www.manaraa.com

# Chapter Three

## The Politics behind the United States' Rejection of the Statute of Rome and the Search for Immunity

All Rights Reserved - Library of University of Jordan - Center of Thesis Deposit

المنارة للاستشارات
www.manaraa.com

## Introduction

As of August 22, 2006,102 countries have ratified the Rome Statute, (Among them France, UK, and Russia of the Permanent Five, the entire European Union, almost all of the Americas, and most of Africa), it was very odd for many people that the United States decided not to participate, thereby joining a small group of countries which are not famous for their observations of human rights and international law. The American Bar Association, prominent human rights organizations, and many academics support the ICC, but this has had not the slightest effect on official Washington opinion.

Many people asked themselves why the US would want to identify itself with these countries. So what happened? Why did the US Rejected the ICC Statute? What the politics behind the United States' rejection??

As indicated by David P. Forsythe , the US legal arguments about international criminal justice, however, are set in cultural and power considerations far deeper than the particular legal arguments against the ICC that has been subjected to so much analysis by lawyers. The twin reality of American exceptionalism and US commitment to power politics remains crucial to the US orientation to the ICC and other forms of international criminal justice. Precise legal arguments are but the superstructure of this enduring fundamental reality [(1)]. The new era is therefore a cause for concern than celebration and what confirms this is the experience of previous multipolar systems, specially the era before both world wars. In the words of Mearshemier :"the stability of the last forty five years is unlikely to be repeated[(2)].

---

(1) Forsythe, International Criminal Justice and the United States: Law, Culture, Power, Op. cit, p1.

(2) Burchill, Scott (1996), **Liberal internationalism**, in Scott Burchill and Andrew Linklater (eds), Theories of International Relations, New York: St Martin's Press, , p34.

All Rights Reserved - Library of University of Jordan - Center of Thesis Deposit

المنارة للاستشارات

www.manaraa.com

This chapter will discuss the American attitude towards ICC from the political dimension specially the radical shift which the US position on the International Criminal Court , which took place after George W. Bush was elected President. The new administration ceased to participate in the work of the Preparatory Commission. It then gave a green light to continued efforts in the US Congress to enact the American Service Members Protection Act (ASPA), which entered into force on 2 August 2002 and bars cooperation with the International Criminal Court if it investigates or prosecutes US citizens. On 6 May 2002, in an unprecedented step for a treaty signatory, the USA nullified its signature of the Rome Statute. It indicated that the USA would strongly oppose any efforts by the International Criminal Court to exercise its jurisdiction over persons suspected of genocide, crimes against humanity or war crimes if they were US nationals involved in UN peace-keeping operations[1].

## Differences between the Clinton and the Bush Administrations

As evident from the above, US policy towards the ICC has been aimed at the same goals, and has been founded on the same fundamental issues under both the Bush and the Clinton administrations. The main issues that seems to have been raised by the Bush administration, and not the Clinton administration, is the issue of "due process" guarantees –the constitutional right to a jury trial - which the Bush administration believed is not satisfactory to be included in the ICC.

Also the difference in policy that can be found between the two administrations is the issue of hostility demonstrated by the Bush administration through their opposition to the court

(1) Amnesty International, (2003), **International Criminal Court: The unlawful attempt by the Security Council to give US citizens permanent impunity from international justice**, International Secretariat, 1 Easton Street, London Wc1x 0dw, United Kingdom, p8-9.

All Rights Reserved - Library of University of Jordan - Center of Thesis Deposit

المنارة للاستشارات
www.manaraa.com

following the notification of its intent not to ratify the statute. Clinton has stated that he disagrees with the Bush administration's decision to completely withdraw from the ICC . Additionally, the Clinton administration spoke against the option of adopting the Service Members Protection Act (ASPA) even though it did not have as many options for waivers as the final version signed by Bush administration. The Bush administration objectives were to remove the restraints by ASPA in order to pursue their own agenda relating to national security and foreign interests. Their argument was that any constraints would seriously damage US national policy objectives and foreign policy interests through restraining the actions of the US government [(1)]. The reasons behind the US's withdrawal it's signature was it's intentions to invade Iraq and Afghanistan. Moreover, the terrorist incidents what happened in 11 Sep 2001 in the United States is anther reason. And finally they withdraw because of the New American Strategy (2002).

Of course, with the court already coming into being at the time of the passing of the ASPA, there was no more room for maneuvering, and the possibility to achieve any more objectives in the negotiations did no longer exist. [(2)].

This means that under a different President, the United States would have acted slightly different towards the ICC. The United States may have participated more actively as an observer in the Assembly of States Parties and the ASPA may not have come into effect. A different president may have acted differently; however, the objectives of gaining exemption from prosecution for American citizens, and protecting Americans from jurisdiction of the ICC would have been the primary goals of both presidents.

(1) Scheffer, David J., (2000), **Statement before the House International Relations Committee**, available at: ***http://www.state.gov/www/policy_remarks/2000/000726_scheffer_service.html***.

(2) Clinton, William Jefferson, (2002), **Our Shared Future: Globalization in the 21st Century**. an address in Council on Foreign Relations, June 17, 2002. available at:
***http://www.amicc.org/docs/WJC_CFR.pdf 2004-05-16.***

All Rights Reserved - Library of University of Jordan - Center of Thesis Deposit

المنارة للاستشارات
www.manaraa.com

It is beyond the purpose of this thesis to analyze the different approaches of the Clinton administration and the Bush administration to human rights, or other issues. So we will concentrate on the main features of the US attitude towards ICC and how Bush administration uses its political abilities to ensure the American citizens immunity from ICC Jurisdiction.

## The Search for Immunity

In May 2002, when the UN Security Council was considering a resolution on the deployment of peacekeeping forces in East Timor, the US searched for assurances that all peacekeepers would be excluded from prosecution by the ICC. However, this provoked strong opposition from ICC supporters, and the US was not able to achieve its goal (1).

In June of 2002, the differences between the US and ICC supporters came to a head when, on June 30, the US vetoed a resolution on an extension of the Bosnia peacekeeping operation (UNMIBH). This came after the US again failed to exempt US peacekeeping forces from the jurisdiction of the ICC. During the time when a compromise was being negotiated, UNMIBH was given several very brief extensions (2).

On the 12th of July 2002, as the UN Security Council unanimously adopted Resolution 1422 on United Nations peacekeeping, for a deal was reached between the US and the Security Council which was necessary in order to counter the US threats to block the collective security system of the UN Charter .

Article 16 of the Rome Statute laid the decision in the hands of the security council., it stipulated that the ICC does not investigate or prosecute any case involving officials or

---

(1)Elsea, Jennifer, (2002), Legislative Attorney, American Law Division: U.S. Policy Regarding the International Criminal Court. Report for Congress, Received through the CRS Web. Congressional Research Service, Library of Congress 2002, p3, available at:

***http://fpc.state.gov/documents/organization/13389.pdf.***

(2) Zwanenburg, The Statute for an International Criminal Court and the United States: Peacekeepers under Fire?, Op. cit , p128.

All Rights Reserved - Library of University of Jordan - Center of Thesis Deposit

المنارة للاستشارات
www.manaraa.com

personnel from a contributing state that is not party to the Rome Statute, for one year from 1 July 2002 (the date of entry into force of the Rome Statute), unless the security council decision allows a prosecution to go ahead. This Article played into the US hands and provided the US with the ability to veto any decision it may not like. The UN Security Council also expressed the intent to renew the resolution for as long as may be necessary [(1)]. The resolution was renewed on 12 June 2003. This resolution has the same effect as the previous one, but for the period of 12 months starting July 1, 2003. It also states the intent to renew the request under the same conditions every July 1 "for as long as may be necessary" [(2)].

It is worth mentioning at this stage that Security Council members argue that the deal reached on 12 July 2002 was necessary in order to counter the US threats to block the collective security system of the Charter. While that threat was indeed troubling, the disturbing precedent set by SC Resolution 1422 (2002) is no less troubling.

The implementation of this resolution does not mean that the issue has been resolved. The compromised reached on the 12th July 2002 is only a first step in the continuing dispute over the immunity of prosecution for US servicemen by the ICC[(3)].

According to chapter 7 article 16 of the United Nations Charter the Security Council has the right to seize cases for twelve months should there has be genuine threat to the International peace and security. However the resolution 1422 of the Security Council passed its authority according to article 16:

---

(1)Mokhtar, The fine art of arm-twisting: The US, Resolution 1422 and Security Council deferral power under the Rome Statute**,** Op. cit, p295.

(2)Murphy, Sean D,. (2006), **United States Practice in International Law**, New York: Cambridge University Press, p315.

(3)Stahn, Carsten., (2003), The Ambiguities of Security Council Resolution 1422 (2002), **European Journal of International Law**, Vol. 14, No. 1 p2.

All Rights Reserved - Library of University of Jordan - Center of Thesis Deposit

المنارة للاستشارات
www.manaraa.com

***Firstly*** : when it gave complete immunity to peacekeeping members of non- state parties to Rome Statute in fifteen different area operating around the world .

***Secondly***: there was no threat to international peace and security.

***Finally***: Security Council should look into each case individually.

Also the US's approval of this resolution is proof that it approves of the ICC[(1)].

According to Aly Mokhtar, in examining Resolution 1422 in the context of Article 16, one should make a differentiation between the legal effect of the deferral request, as well as its aim and nature. The legal effect of the deferral is to stop an existing investigation or to block an investigation or prosecution from commencing. Therefore, the deferral does not affect the legal status of the case; it does not get rid of the ICC's jurisdiction, and it does not mean that the ICC has lost jurisdiction in dealing with a specific case. The aim of a deferral request is to maintain or restore international peace and security; it requires that the proceedings of the ICC in a certain case would be detrimental to the international peace and security. This thesis is interested in the nature of the deferral power provided for the Security Council; this is quite unprecedented, as this falls as part of the judicial function [(2)].

The exemption from the jurisdiction of the ICC provided for in these resolutions was neither permanent, nor absolute. This means that if the UN Security Council decides not to extend the life of Article 16, the ICC will have the ability to investigate and prosecute criminal acts that occurred after the Rome Statute's entry into force. Worth mentioning

---

(1)Bassiouni, Personal Communication, Op. cit.

(2)Mokhtar, The fine art of arm-twisting: The US, Resolution 1422 and Security Council deferral power under the Rome Statute**,** Op. cit, p310.

All Rights Reserved - Library of University of Jordan - Center of Thesis Deposit

المنارة للاستشارات
www.manaraa.com

here , that the exemption will only covers US personnel's operating under the UN operational umbrella [(1)].

In 2004, the US again put forward a proposal to extend the UN resolution. However, after hard criticisms from among others UN Secretary General Kofi Annan, and statements from several countries saying that they would abstain in the case of a vote in the Security Council, on June 23 the US withdrew its proposal. The US has since withdrawn American personnel from two UN peacekeeping missions [(2)].

The failure to extend the UN resolution and the caution of other countries about the intentions of the US government has made the US more isolated. They continued investigating other means such as the impunity for US peace-keepers in East Timor and Bosnia, and the Bilateral Non-Surrender Agreements in which US utilized all its powers and its foreign relations across the world.

### The Attempt To Obtain Impunity For US Peace-Keepers [(3)].

Genocide, crimes against humanity and war crimes are not usually associated with peacekeeping forces. However, sometimes you need to develop laws to protect the civilian populations against their guardians. What if it is the peacekeepers who commit the crimes and the ordinary civilians do need to be protected from their guardians? Peacekeeping doctrine has not yet developed a satisfactory answer to this question. There is no heterogeneous criminal justice system for members of a peacekeeping force. An International Criminal Court could possibly fill part of this lacuna by providing for a

(1)Elsea, Legislative Attorney, American Law Division: U.S. Policy Regarding the International Criminal Court. Op. cit, p25.

(2)United States to withdraw some peacekeepers, UN confirms. UN News Centre, available at:
***http://www.un.org/apps/news/story.asp?NewsID=11229&Cr=peacekeeping&Cr1=***

(3) Amnesty International, International Criminal Court: The unlawful attempt by the Security Council to give US citizens permanent impunity from international justice, Op. cit, p9-11.

All Rights Reserved - Library of University of Jordan - Center of Thesis Deposit

المنارة للاستشارات
www.manaraa.com

uniform international criminal law regime. Nevertheless, one of the arguments of the US for not signing the Statute concerned its implications for US peacekeepers [(1)].

In the International Criminal Court and Arab National Systems conference, Professor Bassiouni was asked; Where should UN peace keepers be tried, should their members violate laws?

Professor Bassiouni replied that this is a very important issue especially after it was agreed that these forces are liable to International Humanitarian laws. And he added that he is working now with a committee within the UN to study this issue and that there were many proposals: **1:** Creating a military court within the UN.

**2:** Each country conducts its own investigations.

**3:** The proposal to create an investigation unit within the UN to look into such violations with the resolution sent to the country to which the violator belongs, he added that it is financially and practically hard for many countries to conduct the investigations by themselves[(2)].

Some countries for instance, like England conducted their own investigations and had already sue some violators. Procedures followed in Switzerland as confirmed by Colonel Peter Hostettler (Law of Armed Conflict (LOAC) Expert) is that a special institute was created to follow up on these investigations because the best way to conduct such investigations is in accordance with national laws and regulations of Switzerland . When asked about the practicality of this procedure and the hard difficulties, he added that for them the best way is when national investigators operate according to national laws[(3)].

([1]) Zwanenburg, The Statute for an International Criminal Court and the United States: Peacekeepers under Fire?, Op. cit , p124.

(2)Bassiouni, Personal Communication, Op. cit.

(3)Hostettler, Peter., (2006), Personal Communication, at the International Criminal Court & Arab National System*s* conference, 13 - 15 February 2006 Amman, Radisson SAS.

All Rights Reserved - Library of University of Jordan - Center of Thesis Deposit

المنارة للاستشارات
www.manaraa.com

Professor Bassiouni personal opinion is that the ICC preserves the right to look into the violations of any individual weather working with his country, abroad or under the UN roof. In fact the above mentioned fact is what worries the USA and is behind the American opposition to the ICC and the reason behind issuing the Security Council resolution number 1422. Professor Bassiouni resumed that the justification of issuing this resolution was the implied promise that the concerned countries will try their soldiers. However, should those countries be committed to trying their soldiers and to International Law then this resolution is unnecessary. He emphasized that in order to encourage governments to send their soldiers there is an implied agreement which states that the law applied when trying individuals should be the national law of the individual concerned[(1)].

The concern that the US had relating to the Statute was that it could be used as a politically motivated tool to prosecute peacekeepers who will be operating in a potentially hostile and unforgiving environment. Traditional arrangements affirm that these peacekeepers may not be prosecuted. The head of the US delegation to the Rome Conference stated that: "we have to see a document that provides us with the assurance that this court will not be a politically motivated court — will not . . . create the bizarre consequence that our soldiers in multinational peacekeeping operations on the soil of a rogue state could be prosecuted"[(2)].

In this context we have to indicate that the Clinton administration explained its negative doubts on the ICC largely in terms of its fear that American military personnel serving overseas on peacekeeping missions might be dragged before the ICC on trumped up charges of war crimes presented by an ideologically biased prosecutor. As State Department spokesman James Rubin put it, the Rome statute was "a rush to judgment that

---

(1)Bassiouni, Personal Communication, Op. cit.

([2]) Ibid , p129.

All Rights Reserved - Library of University of Jordan - Center of Thesis Deposit

المنارة للاستشارات

www.manaraa.com

does not adequately reflect the important role that America and our armed forces play around the world". A quick review of the ICC's structure imply that the stated justifications for the US rejection of the document was largely a chimera, and that other, less admirable considerations determined the American position[1].

Accordingly, Unites States start a plan to obtain impunity for US peace-keepers across the world. The first attempt to obtain this impunity for US peace-keepers from arrest or surrender to the International Criminal Court came in May 2002 and involved its peace-keepers in the UN mission in East Timor (UNTAET), which consisted of three unarmed US military monitors and about 80 US police officers[2].

The USA sought to obtain impunity for these US nationals from East Timorese courts as well. However, this effort met with strong resistance from other members of the Security Council and the French Ambassador to the UN, Jean-David Levitte, declared that "the US amendment is a violation of the ICC treaty". On 17 May 2002, the Security Council refused to provide this immunity when it extended the mandate of the UN peace-keeping mission. The US Ambassador to the UN, John D. Negroponte, notify the Security Council that the US might withdraw these 83 US nationals from East Timor .Other US officials also threatened that the US might withdraw US nationals from all 15 UN peace-keeping missions [3].

(1)Garrett, The United States and The International Criminal Court, Op. cit, p14.

(2) Lynch, Colum, (2002), U.S. Seeks Court Immunity for E. Timor Peacekeepers, **Washington Post**, 16 May 2002.

(3) Lynch, Colum, (2002), U.S. Peacekeepers May Leave E. Timor - Immunity Sought from War Crimes Court**, Washington Post**, 18 May 2002.

All Rights Reserved - Library of University of Jordan - Center of Thesis Deposit

المنارة للاستشارات
www.manaraa.com

On 19 June 2002, 11 days before the United Nations Mission in Bosnia and Herzegovina (UNMIBH) was due to expire ( on 30 June 2002 ), the USA circulated two proposals for a Security Council resolution [(1)].

On June 30, 2002, the United States vetoed a resolution to extend for six months the mandate of the UN peacekeeping mission to Bosnia. In a statement explaining the veto, U.S .ambassador to the U.N. John Negroponte linked the participation in the peacekeeping mission with the ICC: "Contributing personnel to peacekeeping efforts demonstrates a commitment to international peace and security that … can involve hardship and danger to those involved in peacekeeping. Having accepted these risks, by exposing people to dangerous and difficult situations in the service of promoting peace and stability, we will not ask them to accept the additional risks of politicized prosecutions before a court whose jurisdiction over our people the Government of the United States does not accept[(2)].

This created a critical constitutional crisis for the United Nations. Following this situation the US government openly admitted that it was strongly in support of the continuation of the Bosnia operation but its decision to veto is connected with the battle about the reach and effectiveness of the ICC. Formerly, a similar attitude was done by the government of China, which had brought about the termination of the UN mission in Macedonia at an extremely critical point in the history of that country, which had been condemned by a large number of other states who looks after the interest of the international community [(3)].

---

(1) Amnesty International, International Criminal Court: The unlawful attempt by the Security Council to give US citizens permanent impunity from international justice, Op. cit, p10-11.

(2) Franck, Thomas M. And Yuhan, Stephen H., (2003), The United States And The International Criminal Court: Unilateralism Rampant, **International Law And Politics**, Vol. 35, p524-525.

(3)Weller, Marc., (2002), Undoing the global constitution**:** UN Security Council action on the International Criminal Court, **International Affairs**, Vol. 78 Issue 4, p706.

All Rights Reserved - Library of University of Jordan - Center of Thesis Deposit

المنارة للاستشارات
www.manaraa.com

## The United States and Bilateral Non-Surrender Agreements

As previously mentioned, the United States proclaimed immediately after the Rome Conference, that it would not sign or ratify, at present or in the future, the treaty in its current form. Further more, some US officials suggested that US policy has to go beyond mere non-participation to 'actively opposing' the ICC (1). Accordingly, the United States launched a diplomatic campaign to weaken the core concepts that underpin the ICC. This campaign ranged from the deployment of national legislation against the Court, to the obstruction of crucial decisions of the UN Security Council and to pressure directed against individual states to contract out of the ICC regime they had just joined. This program of action produced resistance and condemnation by a very large number of other states who are interested of the international community as a whole (2).

In addition, the United States turned to secure bilateral non-surrender agreements from states across the world. which are provided for under Article 98 of the Rome Statute, to ensure that US persons will not be surrendered to the International Criminal Court without the US permission(3). As of May 3, 2005, the US Government reported 100 such

(1)Mokhtar, The fine art of arm-twisting: The US, Resolution 1422 and Security Council deferral power under the Rome Statute**,** Op. cit, p296.

(2)Weller, Undoing the global constitution**:** UN Security Council action on the International Criminal Court, Op. cit, p694.

(3)Article 98 of Rome Statute dealt with the Cooperation with respect to waiver of immunity and consent to surrender, it stated that:

*1. The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.*

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

All Rights Reserved - Library of University of Jordan - Center of Thesis Deposit

المنارة للاستشارات
www.manaraa.com

agreements with 100 states in the world [(1)]. It is worth mentioning that some countries have secretly signed bilateral agreements with the USA. Quoting The Washington Times issue dated on the 10th September 2003 the countries that are referred to are Egypt, Kuwait, Morocco, Tunisia, Nigeria and Libya[(2)].

In the words of professor Bassiouni about the legal base of conducting the bilateral agreements with one hundred countries, he stated that these agreements are considered to be memories of memoranda they are not considered treaties and that the USA has not yet requested the ratification of any of these immunity agreements from the congress. Moreover, he added that the base of these agreements is the Vienna Convention when it stated that multilateral agreements do not bind non-party states. Since the USA is not a party of the Rome statute, countries therefore cannot condemn the USA individuals according to it. Also the Customary International Law asserts that if an individual commits a violation in a country that preserves the right to try and convict him, in addition if a country is asked to hand in a convicted person to a third country where he is claimed to have committed a violation, it is customary to hand the convicted person in. That is why the USA argues that the handing in of criminals should be done between states themselves and not between a state and an organization or entity such as ICC, where there is no diplomatic impunity [(3)].

---

(1)Boucher, Richard, (2005), **U.S. Signs 100th Article 98 Agreement**, Press Statement, Released on May 3, 2005, available at: ***http://www.amicc.org/usinfo/administration_policy_BIAs.html***.

(2) بسيوني، المحكمة الجنائية الدولية: مدخل لدراسة وآليات الإنقاذ الوطني للنظام الأساسي، مرجع سابق، ص147.

(3)Bassiouni, Personal Communication, Op. cit.

All Rights Reserved - Library of University of Jordan - Center of Thesis Deposit

المنارة للاستشارات
www.manaraa.com

**Article 98(2) Of the Rome Statute and Bilateral Non-Surrender Agreements**

One of the ways in which the ICC can acquire personal jurisdiction over indicted individuals is for the Court to request their surrender from the state in whose territory they may be found. Article 89 of the Rome Statute sets forth the authority whereby the ICC may make such a request:

***Article 89: "Surrender of persons to the Court***

**1.** The Court may transmit a request for the arrest and surrender of a person, together with the material supporting the request outlined in article 91, to any state on the territory of which that person may be found and shall request the cooperation of that state in the arrest and surrender of such a person. States Parties shall, in accordance with the provisions of this Part and the procedure under their national law, comply with requests for arrest and surrender "[1].

However, controversial limitations found in the Rome Statute counterbalance the ICC's power to make such a request. The controversial provision is Article 98(2), which states:

***Article 98: "Cooperation with respect to waiver of immunity and consent to surrender***

2. The Court may not proceed with a request for surrender which would require the requested state to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending state is required to surrender a person of that state to the Court, unless the Court can first obtain the cooperation of the sending state for the giving of consent for the surrender "[2].

In the personal interview with Nasser Amin, (Director General of the Arab Center for the Independence of the Judiciary and the Legal Profession), When asked, Is the ratification of the bilateral non surrender agreements a violation of the Rome Statute ? His answer was:

(1) Article (89) of Rome Statute of the International Criminal Court.

(2) Article (98) of Rome Statute of the International Criminal Court.

All Rights Reserved - Library of University of Jordan - Center of Thesis Deposit

المنارة للاستشارات

www.manaraa.com

"No, it is legal according to the article number 98 of the Rome Statute since the Americans naturally back up all their agreements with legal articles of the International Law".At the same time " The United States exceeded all international ethics when it ferociously passed the Protection Act, which threatened to stop all their aids for countries which were unwilling to sign bilateral impunity agreements"[(1)].

Before starting the discussion about Article 98 of the Statute as a source of legal groundwork of American Bilateral Non-Surrender Agreements, its helpful to point to what called Status of Forces Agreements (SOFAs). Its widely known that The United States is active in many countries around the world, and one of the mechanisms employed to ensure the safety of those Americans working abroad are Status of Forces Agreements (SOFAs) concluded between the United States and the countries hosting US personnel. These SOFAs regulate jurisdiction over acts committed by US personnel while on active duty in foreign countries, placing primary jurisdiction on the United States military (unless the crime was committed by off-duty personnel outside that jurisdiction, in which case jurisdiction would lie with the receiving State) [(2)] .

Under most of these SOFA's, an act by an American service-member that violates military law but not the law of the host country will face a US courts-martial. Vice versa, courts of the host country have exclusive jurisdiction to try acts prohibited by the law of that country but not prohibited by US military law. For acts that violate both, there is concurrent jurisdiction. However, the host country has an obligation to *"give sympathetic consideration to"* a request from the US for a waiver if it is of a particular importance to

(1)Amin, Nasser., (2006), Personal Communication, at the International Criminal Court & Arab National System*s* conference, 13 - 15 February 2006 Amman, Radisson SAS.

(2) Zwanenburg, The Statute for an International Criminal Court and the United States: Peacekeepers under Fire?, Op. cit , p127.

All Rights Reserved - Library of University of Jordan - Center of Thesis Deposit

المنارة للاستشارات

www.manaraa.com

the US Civilians to be tried in the courts of the host country [(1)]. An example of a national court incriminating an American citizen and executing him is in Saudi Arabia ,when an American killed a Saudis national the US failed to save him despite all the US efforts to save him.

Going back to the article 98, according to Marc Weller, the adoption of resolution 1422 release the US from ICC actions in relation to UN authorized operations. However, it does not cover operations undertaken by the US outside of a UN mandate as the so-called war on terror and other unilateral or coalition operations. The US sought to use or perhaps misuse another provision in the ICC Statute. According to Article 98 the court may not proceed with a request for surrender or assistance that would require the requested state to act inconsistently with its obligations under international law. The aim of this provision intend to ensure that a state is not subjected to two conflicting obligations, say one to surrender a suspect to the ICC and another to extradite an individual to his or her home state, however this article was misused by the Us [(2)].

as indicated by John R. Bolton (Under Secretary for Arms Control and International Security/ 2001 - 2005), Article 98 regulates the surrender of individuals to the ICC, and asserts that a State may not surrender an individual to the Court without the sending State's permission, if there is a bilateral agreement between the sending and the receiving States. The United States proposes to amend their SOFAs into "Article 98- agreements" stating that the receiving State may not surrender American individuals to the ICC. This would

---

(1) Everett, Robinson O., (2000), American Service members and the ICC, in: Sewall, and Kaysen (ed): The United States and the International Criminal Court – National Security and International Law, Op. cit, p138-139.

(2)Weller, Undoing the global constitution**:** UN Security Council action on the International Criminal Court, Op. cit, p708.

All Rights Reserved - Library of University of Jordan - Center of Thesis Deposit

المنارة للاستشارات

www.manaraa.com

give US military and civilian personnel adequate protection from ICC prosecution while avoiding conflict with the spirit of the Statute [(1)].

In summary and as stated by American President Bush, "every person who serves under the American flag will answer to his or her own superiors and to military law, not to the rulings of an unaccountable International Criminal Court". According to Bolton, the ultimate goal of the United States in regards to the Article 98 agreements is to conclude legally binding agreements with all countries in the world, regardless of whether or not they have signed or ratified the ICC, and he insists that these agreements are “consistent with the letter and spirit of the Rome Statute"[(2)].

Those opposed to the so-called “impunity agreements” emphasize that the Bush administration is employing the impunity agreements for the sole reason of undermining the Court. Their would be no need to undermine the court so long as each country tries its soldiers in accordance with the international laws as asserted by the implementary principle[(3)]. Furthermore as indicated by Bruce Broomhall- these bilateral agreements cannot achieve complete immunity from jurisdiction of the ICC. They only guarantee that the state that enters into the agreement will not extradite an American citizen present on its territory to the ICC at its request. According to Art 98 of the Rome Statute, the ICC has to respect this obligation. Nevertheless, the ICC can still start an investigation, or issue an indictment of the US national [(4)].

---

(1) Bolton, John R. (2002), **The United States and the International Criminal Court**: **Remarks at the Aspen Institute, Berlin, September 16, 2002**, available at: ***www.state.gov/t/us/rm/13538.htm***.

(2) Ibid.

(3)Bolton, John R. (2002), **The United States and the International Criminal Court: Remarks to the Federalist Society.** U.S. Department of State. Washington, DC (14 November 2002), available at ***http://www.state.gov/t/us/rm/15158.htm***.

(4)Broomhall, International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law, Op. cit., p180.

All Rights Reserved - Library of University of Jordan - Center of Thesis Deposit

المنارة للاستشارات

www.manaraa.com

Therefore, it would be in each country's best interests to try its own nationals even if that meant issuing military courts outside national territories. Further, there is no provision for accused persons or their states of nationality to challenge the jurisdiction of the ICC based on a violation of a bilateral agreement. The ICC can gain custody over the accused through other means, its jurisdiction would not be affected by a bilateral agreement [(1)].

Another opponent view indicated that the US version of "Article 98.2-agreements" goes much further than allowed by article 98.2. The Article allows for agreements concerning individuals on official active duty in another States while the US version includes individuals active and formerly active, as well as individuals employed by the United States, such as contractors, etc., who are nationals of the receiving States[(2)].

Also the US focus is on the prevention of surrender to the ICC rather than an emphasizing of the return of individuals to the United States.

**The Typical US Impunity Agreement**

The typical US impunity agreement - which has no resemblance whatsoever to a SOFA (Status of Forces Agreements) - comes in at least three forms. Each is designed to remove the other state's sovereign right to determine which courts will investigate and prosecute crimes committed on its territory or by persons found on its territory. The Impunity Agreements are designed to remove the state's sovereign right to determine which courts will investigate as well those of an international criminal court to which states have

---

(1)Elsea, Legislative Attorney, American Law Division: U.S. Policy Regarding the International Criminal Court, Op. cit. p25**.**

(2) Memo, Cicc., **Bilateral agreements proposed by US government**, August 23, 2002, ***http://www.iccnow.org/html/ciccart98membo20020823.pdf.***

All Rights Reserved - Library of University of Jordan - Center of Thesis Deposit

المنارة للاستشارات

www.manaraa.com

delegated its authority under a multilateral treaty. Each form will require states to renegotiate re-extradition provisions in all current extradition agreements [(1)].

The standard form of the US impunity agreement provides that both parties will not surrender a broad range of each other's nationals to the International Criminal Court without the consent of the other party. This form includes certain other associated nationals and persons that are not serving in a UN peace-keeping operation. The second form is similar except that it does not prohibit the USA from surrendering nationals (and certain other associated nationals) of the second state to the International Criminal Court. The third form, which is designed for states that have neither signed nor ratified the Rome Statute, and signed only by East Timor, which is not yet a UN member state, it includes a paragraph that requires those states not to cooperate with efforts of third states to surrender persons to the International Criminal Court[(2)].

On the 25th of September 2002 The European Parliament issued resolution number 1300 which objected the USA Impunity Agreements for they do not comply with the core aims of The Rome Statute. On the 30th of September 2002 the EU advised that certain broad principles should be adopted to control such bilateral Impunity Agreements. The point suggested was to give immunity to American military members and diplomats of the jurisdiction of the ICC provided that the USA commits to trying them . It is obvious however, that the USA is unwilling to do so despite the fact that the USA laws require its

All Rights Reserved - Library of University of Jordan - Center of Thesis Deposit

(1)The UN Commission on Human Rights, International Criminal Court:US efforts to obtain impunity for genocide, crimes against humanity and war crimes, Op. cit, p19.

(2) Ibid, p20.

المنارة للاستشارات
www.manaraa.com

government to try violators. The USA will thus be able to do it well and sign those immunity agreements [(1)].

We should emphasize that the main target and the extreme purpose of the ICC is to end impunity for the war crimes in the world depending on the principle of complementarity , which puts the primary responsibility of investigating and prosecuting of these crimes on states, but ensures that the International Criminal Court will be able to exercise jurisdiction when states fail to takeover these responsibilities. A fundamental principle underlying the Statute is that no one is above the law and immune for genocide, crimes against humanity or war crimes. Any possible exceptions in the Rome Statute to this principle must be strictly understood in a manner consistent with the object and purpose of the Statute. As the language and drafting history of Article 98 (2) reveals that it was established to ensure that existing agreements as Status of Forces Agreements (SOFAs) were not nullified by the later in time Rome Statute. It was not designed as a permit for impunity from the Court by letting states enter into later bilateral agreements undermining the entire statutory aim [(2)].

In the other words, any interpretation that Article 98 (2) did cover such agreements would lead to the obviously illogical and unreasonable result which will allow any non-state party to undermine the fundamental principle in the Rome Statute [(3)].

(1) بسيوني، المحكمة الجنائية الدولية: مدخل لدراسة وآليات الإنقاذ الوطني للنظام الأساسي، مرجع سابق، ص148.

(2) Ibid, p2.

(3)Article 86 of Rome Statute provides that: ***States Parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court***.

All Rights Reserved - Library of University of Jordan - Center of Thesis Deposit

المنارة للاستشارات
www.manaraa.com

## The American Service members' Protection Act (ASPA) 2002

We mentioned previously in this chapter, that the United States also enacted the American Service members' Protection Act (ASPA), as a mean to oppose the ICC.

This law basically prohibits the United States from cooperating with the ICC. This law also prohibits the United States from providing military assistance to a government that is a party to the ICC, unless that government is a NATO or a major non-NATO ally, or unless it enters into an agreement with the United States—a provision with supposed support in Article 98 of the Rome Statute(1).

Most controversially, the ASPA authorizes the President to use *"all means necessary and appropriate"* to bring about the release of covered US citizens or permanent residents, and citizens of allied countries upon request of their government who are being detained or imprisoned by or on behalf of the ICC. There is no definition of possible means it's a very wide illogical concept. the ASPA authorizes the President to direct any federal agency to provide all legal assistance, as well as exculpatory evidence on behalf of covered US or allied persons who are arrested, detained, investigated, prosecuted or imprisoned by, or on behalf of, the ICC(2).

President Bush at a signing ceremony of the ASPA legislation, issued a statement in were he assured that the ASPA legislation "must be applied consistent with his constitutional authority in the area of foreign affairs, which, among other things, will enable him to take actions to protect U.S. nationals from the purported jurisdiction of the Rome treaty "(3).

---

(1)Tan Jr., Chet J., The Proliferation Of Bilateral Non-Surrender Agreements Among Non-Ratifiers Of The Rome Statute Of The International Criminal Court. op. cit., p1122.

(2)Murphy, United States Practice in International Law, op. cit , p308 .

(3)International Federation of Human Rights, (2001), **The United States Wage War on the ICC**, 10 December 2001, Available at ***http://www.fidh.org/communiq/2001/ij1212a.htm***.

All Rights Reserved - Library of University of Jordan - Center of Thesis Deposit

المنارة للاستشارات
www.manaraa.com

This Act has received rough criticism from the international community. for example, in the European Parliament Resolution on the Draft American Service Members' Protection Act it was decided that "the ASPA goes well beyond the exercise of the U.S.'s sovereign right not to participate in the Court," For the Act contained provisions that could potentially block and undermine the Court, as well as it "threatens to penalize" countries which have chosen to participate in or support the Court [(1)].

The ASPA was strongly criticized by senior US legislators, and the European Parliament "welcomed the wide powers of waiver which were introduced by congressional opponents," calling on the U.S. Congress to reject the blatant unilateralism which is represented by the ASPA[(2)].

David J. Scheffer, the Ambassador at Large for War Crimes Issues, present before the House International Relations Committee his assessment that the ASPA would worsen the United States' negotiating position "at the very moment when the US stands the best chance of securing agreement with other governments" in order to protect American soldiers and government officials . Scheffer added very interesting point when he said that the ASPA would "tie the hands of the President as Commander in Chief and risk harming important U.S. interests by its inflexibility" rather than granting the President any new authority or ability to protect American nationals from prosecution by the ICC [(3)].

---

(1) Global Policy Forum, (2002), **European Parliament Resolution on the Draft American Service Members' Protection Act (ASPA)**. P5_TA-PROV(2002)0367: Consequences for Transatlantic Relations of Law on the Protection of U.S. Personnel, (4 July 2002). Available at ***http://www.globalpolicy.org/intljustice/icc/crisis/0704res.htm***.

(2) Ibid.

(3) Scheffer, David J., (2000), **Statement before the House International Relations Committee**, available at: ***http://www.state.gov/www/policy_remarks/2000/000726_scheffer_service.html***.

All Rights Reserved - Library of University of Jordan - Center of Thesis Deposit

المنارة للاستشارات
www.manaraa.com

# Chapter Four

## The Future of the Relations between the US and the ICC in the light of American Rejection

All Rights Reserved - Library of University of Jordan - Center of Thesis Deposit

المنارة للاستشارات
www.manaraa.com

## Introduction

The United States, one of the world's largest superpowers, has decided to do everything in its power to undermine the ICC. "The ICC can only be as effective as it is coercive, and it cannot be coercive without the assertive cooperation of the military and police forces operating in the vicinity of the jurisdiction it assumes" [(1)].

It was clear from the very beginning that the United States had no intention in cooperating with the ICC, on the contrary the US wish was to disable the Court, and in the world of Aryeh Neier:"It seems unlikely that the U.S. attitude toward the Court will change any time soon. The most that can be expected from the Clinton administration is that it might exercise some restraint over the Pentagon's efforts to sabotage it"[(2)].

In his article about the U.S. Reactions To The International Criminal Court, Roseann M. Latore holds the view that without the participation of the United States, the ICC will be **"maimed at birth"** [(3)], which is the opinion of most of the international community.

AT the end the international Criminal Court (ICC) may or may not be judged as a success. But the Rome Statute of 17 July 1998, establishing the Court, is already a success in two ways. First, it has come into force with the substantial backing from many countries and despite opposition of the United States. Secondly, it is a major step away from the culture of impunity which until the 1990s accompanied the elaboration of many international criminal law instruments [(4)].

---

(1)Naraghi, Bahman., **Does the ICC Need the USA?: Taking Over What the USA Started**, Civitatis International, p22, available at: www.civitatis.org/pdf/icc.pdf

(2)Neier, Aryeh., (1998), Waiting for justice**, World Policy Journal**; Fall98, Vol. 15 Issue 3, p35.

(3)Latore, Roseann M., (2002), Escape Out The Back Door Or Charge In The Front Door: U.S. Reactions To The International Criminal Court, **Boston College International & Comparative Law Review**, Vol 25, No1, p164.

(4) Crawford, James., (2003), **The Drafting of the Rome Statute**, in: Sands, Philippe (ed), From Nuremberg to The Hague, New York: Cambridge University Press, p109.

All Rights Reserved - Library of University of Jordan - Center of Thesis Deposit

المنارة للاستشارات
www.manaraa.com

And as seen by Douglass Cassel, the ICC is far from ideal. Its powers are constrained and its coverage is incomplete. Time will tell how effective the current legal design will be in practice. But it is very essential first step towards international justice in a world where national justice has failed. It merits support, and all governments should be pressed to [(1)].

The US rejection of the ICC has raised many questions about the future of the International Criminal Court as an effective, strong and independent institution capable of bringing the perpetrators of heinous crimes to justice. Especially with the United States position in the new world order as a dominating country in all international affairs, particularly in what relating with democratic and human rights issues in addition to the US experience in supporting international criminal tribunals.

The US point of view as many American officials indicated that in spite of the US objections to the International Criminal Court, the US continues to be a self-described advocate for the principle that there must be a strong system of accountability for genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law. The Bush administration emphasizes this view by arguing that since they have respected the decision of States Parties to join the ICC, these very same parties are thus bound by basic principles of sovereignty to respect the American decision not to be bound by "jurisdictional claims to which the US have not consented." [(2)].

(1) Cassel, Douglass., (2004), **The Rome treaty for An international Criminal Court** , in: Driscoll, William J, Zompetti, Joseph P, and Zompetti, Suzette, (ed), The International Criminal Court: Global Politics and the Quest for Justice, New York: International Debate Education Association, p120.

(2)Bolton, The United States and the International Criminal Court: Remarks to the Federalist Society. Op. cit.

All Rights Reserved - Library of University of Jordan - Center of Thesis Deposit

المنارة للاستشارات
www.manaraa.com

## American Experience in Supporting International Criminal Tribunals

The United States has taken a leadership role in creating an international safety net of human rights law. From the role of U.S. played at Nuremberg to U.S. leadership in creating and funding the Yugoslavia and Rwanda tribunals, the United States has been the indispensable nation in holding others to account. The US have been the prime movers in transforming state liability into individual liability, a trend that will ultimately reshape the core premises of international law[(1)].

Eleanor Roosevelt championed the Universal Declaration of Human Rights in a vote in the UN General Assembly in 1948. The United States helped to draft the Genocide Convention. It has also worked in the UN treaty guarantees of human rights –the International Covenant on Civil and Political Rights- and supported the work of the UN Human Rights Committee and the Human Rights Commission[(2)].

Finally, it should be indicated that, The United States played a significant role during the drafting of rules of procedure, elements of crimes, and other documents detailing how the ICC will operate[(3)].

Therefore we couldn't look at the US opposition to The International Criminal Court as abandonment from US adherence to Human Rights and international humanitarian law. On the contrary, as indicated by many researchers, the United States proved commitment to

---

(1) Slaughter, Anne-Marie**.**, (2004)**,** The Partial Rule of Law: America's Opposition to the ICC is Self-defeating and Hypocritical**, The American Prospect**, V 15, No10, available at: http://www.prospect.org/web/page.ww?section=root&name=ViewPrint&articleId=8551

(2) Frye, Toward an International Criminal Court: three options presented as presidential speeches**,** op. cit, p54-55.

(3) Elsea, Jennifer K., (2006), **U.S. Policy Regarding the International Criminal Court,** CRS Report for Congress, p18.

All Rights Reserved - Library of University of Jordan - Center of Thesis Deposit

المنارة للاستشارات
www.manaraa.com

Human Rights especially in the years that witnessed great debate about the ICC and the US opposition.

Sean D. Murphy indicated that during 1999-2001, the United States played an active role in developing new treaties and instruments in the field of human rights. At the same time, the united states continued to recognize that promotion of human rights was just one component of overall US foreign policy, which at times must compete with the advancement of US national security and economic interests [(1)].

One of the most interesting aspects of US involvement in human rights law during 1999-2001 continued to be litigation in US courts involving the Alien Tort Claims Act (ACTA) and the Torture Victim Protection Act (TVPA). Both statutes provided causes of actions to persons seeking to vindicate in US court human rights violations that occurred abroad, including violations in which corporations were complicit. Certain high profile cases involving Bosnian Serb leader Karadzic and two Salvadorean generals implicated in the deaths of three US nuns and a missionary were resolved[(2)] .

## American Alternatives to the ICC

Various advisors, government officials and other Americans opposed to the ICC have offered many alternatives to the International Criminal Court. They indicated that stronger domestic accountability is a well-built alternative. According to the State Department, the US would rather be encouraging state to "pursue credible justice at home" than abdicating responsibility to an international body, so "where domestic legal institutions are lacking the domestic will is present." the United States will, as well should the international

---

(1)Murphy, United States Practice in International Law, op. cit , p265 .

(2) Ibid, p265 .

All Rights Reserved - Library of University of Jordan - Center of Thesis Deposit

المنارة للاستشارات
www.manaraa.com

community, be prepared “to assist in creating the capacity to address the violations,” including “political, financial, legal, and logistical support"[(1)].

On the other hand, where domestic will is not-existed to prosecute someone suspected of a crime otherwise handled by the ICC, the international community should then intervene “through the UN Security Council, consistent with the UN charter” [(2)].

These recommendations show that the Bush administration has not been convinced by the promises of the doctrine of complementarity within the ICC, and have labeled it an “assertion, unproven and untested” [(3)].

According to Adam Roberts (a professor of international relations at Oxford University), US support is vital for the International Criminal Court to be effective. He sees that it is possible the United States will find a way to collaborate with the ICC: “in practice, the US often observes provisions of treaties (including law of war) that it has not ratified” [(4)].

However, as seen with the American Service Members’ Protection Act, the UN Security Council Resolution 1422, and the various bilateral Immunity Agreements, American opposition could be terribly detrimental to the integrity and strength of the Court[(5)]. It possibly may be a blessing in disguise for the ICC. Lizzie Rushing , Rik Panganiban, Special Advisor to the World Federalist Movement, views opposition by the United States

---

(1)U.S. Department of State, (2002), **Fact Sheet: The International Criminal Court (U.S. will not become a party to the Rome Statute)**, Available at:

***http://www.uspolicy.be/Article.asp?ID=40115C71-82DD-4E00-8632-8DA43733F033***

(2)Ibid**.**

(3)Bolton, The United States and the International Criminal Court: Remarks to the Federalist Society. Op. cit.

(4)Roberts, Adam., (2001). The International Criminal Court Will Not Be the Threat to the Armed Forces That Some of its Critics Have Feared, **Guardian,** April 4, 2001, available at:

***http://www.globalpolicy.org/wldcourt/icc/2001/0404uk.htm***

(5) Rushing, The International Criminal Court and American Exceptionalism, Op. cit, p12.

All Rights Reserved - Library of University of Jordan - Center of Thesis Deposit

المنارة للاستشارات
www.manaraa.com

as "galvanizing several countries into banding together to support the Court, perhaps in a stronger fashion than if the US was a supporter" [1].

In the end, it is worth mentioning the view of Marc Grossman (Under Secretary for Political Affairs/ 2001-2005) who sees that the entire world must respect the US decision not to join the ICC or place its citizens under the jurisdiction of the court. At the same time he stresses that the US will work with the world to promote real justice, and the existence of a functioning ICC will not cause the United States to retreat from its leadership role in the promotion of international justice and the rule of law[2].

In consequence of this, Marc Grossman indicated that, The United States will[3]:

- Work together with countries to avoid any disruptions caused by the Treaty, particularly those complications in US military cooperation with friends and allies that are parties to the treaty.
- Continue its longstanding role as an advocate for the principle that there must be accountability for war crimes and other serious violations of international humanitarian law.
- Continue to play a leadership role to right the wrongs.
- The armed forces of the United States will obey the law of war, while the US international policies are and will remain completely consistent with these norms.
- The US government will remain committed to promoting the rule of law and helping to bring violators of humanitarian law to justice, wherever the violations may occur.
- The US government will support politically, financially, technically, and logistically any post-conflict state that seeks to credibly pursue domestic humanitarian law.

---

(1) Ibid, p12.

(2) Grossman, American Foreign Policy and the International Criminal Court, op. cit, p156.

(3) Ibid, p157.

All Rights Reserved - Library of University of Jordan - Center of Thesis Deposit

المنارة للاستشارات
www.manaraa.com

- The US government will support creative ad-hoc mechanisms such as the hybrid process in Sierra Leone – where there is a division of labor between the sovereign state and the international community–as well as alternative justice mechanisms such as truth and reconciliation commissions.
- The US government will work with the Congress to obtain the necessary resources to support this global effort.
- The US government will seek to mobilize the private sector to see how and where they can contribute.

The U.S. government will seek to create a pool of experienced judges and prosecutors who would be willing to work on these projects on short-notice.

## Who Needs The Other??

For the peoples of the world, however, and for many Americans, this US proud record (in human rights service) has been almost completely overshadowed by the U.S. opposition to the International Criminal Court (ICC). The US has not only rejected the treaty but has also carved out a zone of immunity for US soldiers in every country with which the US has decent relations. The American Congress even passed a statute that actually authorizes the US military to invade The Hague to rescue any US soldier (or soldier from any allied country). This has come to be known in many corners as the "Hague Invasion Act," occasioning an angry debate in the Dutch parliament and producing sarcastic media scenarios about Delta Force storming Dutch prisons [(1)].

Despite the American formal position which ultimately opposes the ICC, 66 % of US citizens support ratification, even after hearing the U.S. arguments against it, according to a

(1) Slaughter, The Partial Rule of Law: America's Opposition to the ICC is Self-defeating and Hypocritical, Op. cit.

All Rights Reserved - Library of University of Jordan - Center of Thesis Deposit

المنارة للاستشارات
www.manaraa.com

Roper poll 1999. More than 1000 professional associations have joined the NGO (Non-Governmental Organization) Coalition for the International Criminal Court, including: Red Cross, American Bar Association, Amnesty International, Human Rights Watch, Lawyers Committee for Human Rights, and International Commission of Jurists[(1)].

Members of these organizations and most Europeans, Latin Americans, and people in other democracies understand that the benefits of the treaty will far outweigh the costs [(2)]:

***First,*** the costs of ratification are extremely low. The existing treaty meets the dual U.S. interests in an effective court and in protecting itself against inappropriate prosecutions.

***Second,*** although the court will not deter all crimes, its permanent presence and international stature will likely deter at least some atrocities and perhaps a few genocides, and this will serve U.S. interests. If such crimes are not deterred by law, the United States may feel obligated to impose economic sanctions or send soldiers into dangerous contexts, resulting in loss of lives. If the court can as a result save the lives of even a small number of U.S. service men and women, as well as the lives of other victims, it is worth it.

**Third,** the court is a cost-effective institution for addressing violations of international humanitarian law because it will avoid the exhausting need to devote time, energy, and money to establishing less effective ad hoc tribunals. To the extent that it does deter, it will also save the money that otherwise would go into costly U.S. or UN deployments.

The United States objections to the ICC may fairly be viewed as due above all to the ambitions of the superpower which is disappointing but not surprising, for there is similar objection in the US lonely opposition to other widely supported and useful treaties, such as the conventions against land mines and on the rights of the child. The near certainty is that

(1) Roper Poll Survey, (1999) Press Release: available at:
***http://www.ufoevidence.org/documents/doc850.htm***

(2) Johansen, U.S. Opposition to the International Criminal Court: Unfounded Fears, Op. cit.

All Rights Reserved - Library of University of Jordan - Center of Thesis Deposit

المنارة للاستشارات
www.manaraa.com

the US will not ratify the Rome treaty. In fact, there is no significant national interest that weights against the joining to the ICC, [1].

Firstly, it is in the national interest of the United States as seen by Richard Dicker to join the court ,for the ICC is capable of effectively stepping in when national judicial systems are unwilling or unable to prosecute those who commit genocide, crimes against humanity or serious war crimes, the court will help to deter those crimes. Increased prevention will lessen the chances that US military personnel will need to be deployed in response to future Bosnias[2]. And an effective court will help to deter the commission of war crimes against the US military personnel when they deployed overseas.

And according to Alton Frye, The International Criminal Court is also in the US Interest because it can help save the lives of American soldiers. In recent years, the most common reason for deploying US troops overseas has been to stop precisely the kind of slaughter and bloodshed that the court is designed to prevent. So by helping to deter tomorrow's tyrants, the International Criminal Court will reduce the necessity of deploying American soldiers to stop their slaughter. That will mean fewer dangerous assignments for American armed forces and fewer young American lives at risk [3].

Also most nations' desire is to add the United States as a party of the Rome Statute because it alone has the ability to ensure that criminals sought by the ICC are brought to trial. The United States' participation in the ICC, therefore, would provide the credibility and the strength the ICC needs to be effective [4].

---

(1) Cassel, The Rome treaty for An international Criminal Court , op. cit, p120.

(2) Dicker, Richard., (2004), **Is a U.N. International Criminal Court in the U.S. National Interest**, in: Driscoll, William J, Zompetti, Joseph P, and Zompetti, Suzette, (ed), The International Criminal Court: Global Politics and the Quest for Justice, New York: International Debate Education Association, p128.

(3) Frye, Toward an International Criminal Court…**,** op. cit, p24.

(4) Latore, Escape Out The Back Door Or Charge In The Front Door: U.S. Reactions To The International Criminal Court, Op. cit, p165.

All Rights Reserved - Library of University of Jordan - Center of Thesis Deposit

المنارة للاستشارات
www.manaraa.com

What drove many writers to show their sorrow for the American position, in the words of Bahman Naraghi, "It is unfortunate then that the US has decided to actively oppose the International Criminal Court, given the fact that both are working for the same goals"[1].

One positive result of this is that the rest of the world will see the need to cooperate more closely and try to wean them from dependence on the US. In this way, as much as the ICC may need the US in the short-term, its continued effectiveness and functioning would not be solely dependent on US military and economic support[2].

In addition of all the above, there are another view to the future of ICC, sees the future very indistinct regardless the American rejection. According to David Forsythe, The ICC may not be very central to international justice order in the future:

***First***, the principle of complementarity means that. When a state properly investigates and perhaps prosecutes any of the three crimes covered by the Rome Statute, the ICC remains inactive. **Second**, the ICC will probably need to give due respect, or a margin of appreciation, to democratic governments giving priority to truth commissions and other forms of post-conflict social justice in the quest for national resolution. International criminal justice may not be the preferred path to improved world order. ***Third***, a wise prosecutor will also realize that there is not much long-term gain for the ICC in setting against the most powerful state in the world, whose cooperation will probably prove necessary for the arrest of some suspects and the financial and diplomatic well being of the Court. Thus, the ICC may not be as active as its champions assume [3].

(1)Naraghi, Bahman., **Does the ICC Need the USA?: Taking Over What the USA Started**, Civitatis International, p22, available at: www.civitatis.org/pdf/icc.pdf

(2)Ibid, p25

(3) Forsythe, International Criminal Justice and the United States: Law, Culture, Power, op. cit, p75.

All Rights Reserved - Library of University of Jordan - Center of Thesis Deposit

المنارة للاستشارات
www.manaraa.com

But that – as viewed by Rudy Zarzar (Professor of Political Science, Elon University), doesn't mean that the International Criminal Court will disappear from the scene. The international community is in an agreement on the need for such a court. There is also agreement that those who commit crimes are to be held accountable for their nasty deeds. Of course, if the U.S. joins it would lend tremendous prestige to this institution. Also a future president might sign the Rome Agreement [(1)].

## The Latest Developments

The ICC is up and running its approach – as dictated by the Rome Statute – is clear: through focused cases, the ICC must; expose the commission of crimes that have a devastating impact on the societies in which they are committed, and thus asserts that impunity for the perpetrators of genocide, crimes against humanity and war crimes is no longer tolerated[(2)].

The role played by the ICC is a fundamental one. Three opened investigations are before the Court for the first time, The case of Uganda. In December , 2003 , the court received its first referral from the President of Uganda، concerning the conflict in the great Lakes of Africa (mostly in the Congo) .The referral made specific reference to an armed group active in that part of the country : The Lord's Resistance Army (LRA) . The armed group has been carrying out an insurgency against the GOVERNMENT OF Uganda for nearly two decades .This case have now progressed to the judicial case[(3)].

(1) Zarzar, Rudy. Elon University, N.C. USA, Department f Political Science, (2006), Personal Communication.

(2) Bassiouni, M Cherif., (2005), **The Legislative History of the International Criminal Court: Introduction : Analysis, and Integrated Text**, Ardsley, NY: Transnational Publishers, p68.

(3) Bensouda, Fatou., (2006) **The Role OF the ICC in Ending Impunity: The Latest Developments.** ICC Deputy, A paper submitted in the International Criminal Court & Arab National Systems Seminar Amman 15-13 ، February2006 Radisson SAS Hotel.

All Rights Reserved - Library of University of Jordan - Center of Thesis Deposit

المنارة للاستشارات
www.manaraa.com

The case of the Democratic Republic of The Congo (DRC). In March, 2004, the ICC received a referral from the Government of the Democratic Republic of the Congo,. Concerning the gravity killings and other crimes for more than 8000 people between 1998 and 2002, this was caused by numerous armed groups. The most significant developments is the unique investigation opportunity for victims , for it allows for a greater measure of victims participation than was provided for in the ad hoc international criminal tribunals .The final report of the entity has been filed with the court in recent days ,and so the process is near its completion[(1)].

These are two examples of the issues that are now before the Court for the first time which is a significant step for the ICC. The ICC law will emerge more solid from this process and with more solid footing in the fight against impunity.

## Darfur

On July 30, 2004, the United Nations Security Council adopted Resolution 1556 by a vote of 13 in favor, with China and Pakistan abstaining. The US-drafted resolution was co-sponsored by Britain, France, Germany, Chile, Spain and Romania. Acting under Chapter VII of the U.N. Charter, the Security Council expressed its intention "to consider further actions" if the Sudanese government fails to disarm and prosecute the Arab militias known as Janjaweed, who have forced black Africans off their land in the Darfur region of western Sudan through a campaign of killing, rape, and pillage. The resolution sets a 30-day deadline for Sudan to comply with the Security Council's demands[(2)].

(1)http: //www.humanrightsfirst.org/international-justice/regions/drc.htm

(2)Nabati, Mikael., (2004), **The U.N. Responds to the Crisis in Darfur: Security Council Resolution 1556**, The American Society of International Law, available at: http://www.asil.org/insights/insigh142.htm.

All Rights Reserved - Library of University of Jordan - Center of Thesis Deposit

المنارة للاستشارات
www.manaraa.com

**The Conflict Background:**

West Darfur has a population of approximately 1.7 million, predominated by sedentary African farmers such as the Fur, Masalit, and Zaghawa tribes. The rest of the population of Darfur consists of Arab nomadic tribes. Although both the black African and the Arab tribes is Muslim, they have a long-standing history of clashes over land, crops, and resources. Since Sudan independence from the UK in 1956, it has been embroiled in a civil war between the Arab-dominated North and the Christian and animist south.

In February 2003, the conflict in West Darfur began when two rebel groups Justice Equality Movement (JEM) and the Sudan Liberation Army (SLA) , took the arms and attacked government installations. The SLA and the JEM accused the Arab-ruled Sudanese government of oppressing black Africans in favor of Arabs. Khartoum responded by launching air attacks against civilian populations from which the rebels were drawn, followed by ground attacks by militiamen recruited among the Arab tribes, known as the Janjaweed.

There is proof that Janjaweed attacks are supported and aided by the Sudanese military. The Sudanese Government denies the charge and describes the militia as "criminals." In September 2003, the SLA and the Sudanese government reached a fragile cease-fire agreement mediated by the U.S., Italy, Britain and Norway. But soon both sides accused the other of breaking the agreement, and attacks by Janjaweed militias intensified in December 2003[(1)].

The conflict in Darfur has produced what the United Nations is calling one of the world's worst humanitarian disasters. Between 1.45 and 1.6 million people have been internally displaced, close to 200,000 have moved into neighboring Chad, over 70,000 have died, and

(1) Ibid, available at: http://www.asil.org/insights/insigh142.htm.

All Rights Reserved - Library of University of Jordan - Center of Thesis Deposit

المنارة للاستشارات
www.manaraa.com

hundreds of thousands of villages have been looted, burned, or bombarded by aerial raids. The last two years have been characterized by terrifying attacks, destruction of whole villages, gang rapes, forced sexual servitude, abduction, arbitrary killings, and mass displacements [(1)]. The humanitarian consequences of the conflict have been further aggravated by the Sudanese government's refusal to allow unrestricted humanitarian access to Darfur.

**The political situation:**

The U.S. has called the Darfur militia campaign "genocide," and proposed establishing an ad-hoc international court for atrocities there. But European Union countries argued that the ICC was created precisely for such situations as Darfur. Sudan is not an ICC member, so under the Rome Statute, the court could only act there if requested by the U.N. Security Council. So Washington had to choose which it considered worse: lending the ICC the prestige that would come with a Security Council referral or leaving atrocities in Darfur unpunished [(2)].

The United States does everything to avoid having the International Criminal Court deal with the violence in Darfur. Protesting that the United States does not want to be "party to legitimizing the ICC" [(3)]. But despite The United States fundamental objections to the ICC, it chooses not to veto a U.N. resolution. According to US Ambassador in UN, Anne Patterson, the United States continues to "fundamentally object" to the ICC, but did not veto the resolution "because of the need for the international community to work together

(1)Restructuring The ICC Framework To Advance Transitional Justice: A Search For A Permanent Solution In Sudan, **Columbia Law Review**; Jan2006, Vol. 106 Issue 1, p183.

(2) Bravin , Jess., (2006), US Warms to Hague Tribunal: New Stance Reflects Desire to Use Court to Prosecute Darfur Crimes, **Wall Street Journal**, June 14, available at: http://www.globalpolicy.org/intljustice/icc/2006/0614warm.htm.

(3) Justice in Darfur, **Economist**; 2/5/2005, Vol. 374 Issue 8412, p13.

All Rights Reserved - Library of University of Jordan - Center of Thesis Deposit

المنارة للاستشارات
www.manaraa.com

in order to end the climate of impunity in Sudan and because the resolution provides protection from investigation or prosecution for U.S. nationals and members of the armed forces of non-state parties"[(1)].

So In 31 March 2005, The UN Security Council adopted a resolution to refer the cases of Darfur to the International Criminal Court (ICC). This resolution marks the first time the council has referred a case to the ICC since the court came into existence. **Sudan's response to Resolution 1556:**

In the beginning Sudan's government initially rejected the resolution, but later stepped back from its rejection. On August 4, the Sudanese government finalized an agreement with the U.N. Secretary General Special Representative Jan Pronk, which contains detailed steps and policy measures to be taken within the next 30 days to begin to disarm the Janjaweed. Later on August 7, Khartoum announced that Sudan will accept African troops to protect observers, but that any peacekeeping role will be limited to Sudanese forces. Finally, on August 9 Sudan agreed to participate in peace talks with rebel groups[(2)].

This referral represents a watershed moment for the new court and for the Security Council and the United States in their relationships to it. It fulfills the court's core purpose: to redress widespread atrocities when governments cannot or will not do so. Under the spotlight of world attention, the ICC's success or failure in handling this case may well determine its future credibility as a mechanism for accountability[(3)].

---

(1) Ambassador Anne Patterson explains U.S. position on U.N. Darfur War Crimes Resolution, March 31, 2005, U.S. Department of State's Bureau of International Information Programs: available: http://usinfo.state.gov/dhr/Archive/2005/Apr/01-671037.html.

(2)Nabati, The U.N. Responds to the Crisis in Darfur: Security Council Resolution 1556, op. cit, available at: http://www.asil.org/insights/insigh142.htm.

(3)Baylis, Elena., (2005). **Why the International Criminal Court Needs Darfur (More Than Darfur Needs the ICC)**, University of Pittsburgh, School of Law, available at: http://jurist.law.pitt.edu/forumy/2005/06/why-international-criminal-court-needs.php

All Rights Reserved - Library of University of Jordan - Center of Thesis Deposit

المنارة للاستشارات
www.manaraa.com

# CONCLUSION

As of August 22, 2006, 102 countries have ratified the Statute. This adoption marks both the end of a historical process that started after World War I as well as the beginning of a new phase in the history of international criminal justice.

The need for the International Criminal Court is so clear. Too many atrocities have gone unpunished, and too many countries are without the resources or sometimes the will to investigate and punish international crimes that have been clearly established. Therefore, the ICC deserves full support from the international community.

Although The United States played a central role in the modern development of international humanitarian and human rights law; it has been the primary opponent to this court. The United States is not the only country to oppose the treaty, nor even the only permanent member of the UN Security Council (China did not sign the treaty and the Russian Federation has not ratified it), however the several steps that the United States has taken to undermine the court's authority have made the United States the most visible and active opponent, mainly:

- The US has forcefully fought against the birth and the establishment of the ICC.
- They framed their rejection of the ICC in a series of reservations and doubts in front of the International Law Commission.
- They have rephrased articles 13, 16, and 98 to serve their interests. The United States still refused to join the court.

(**Article 98 – forced into being by the United States – states that it is legal that countries sign bilateral agreements**.)

All Rights Reserved - Library of University of Jordan - Center of Thesis Deposit

المنارة للاستشارات
www.manaraa.com

 The United States worked hard for the adoption of Security Council reselution1422 on United Nations peacekeeping; In accordance with article 16 of the Rome statute in order to obtain impunity for US Peace- Keepers.

 According to the US Department Reports as for August 22, 2006,101 bilateral immunity agreements have been concluded to prevent the surrender of its nationals to the jurisdiction of the ICC.

 The United States openly started arm – twisting its closest allies in order for them not to sign to the Rome Statute.

 The Congress passed the American Service members' Protection Act (ASPA), which was signed into law by President Bush on 3 August 2002. The major anti-ICC provisions in ASPA are:

1. A prohibition on U.S. cooperation with the ICC;
2. An "invasion of the Hague" provision: authorizing the President to "use all means necessary and appropriate" to free U.S. personnel (and certain allied personnel) detained or imprisoned by the ICC;
3. Punishment for States that join the ICC treaty: refusing military aid to States' Parties to the treaty (except major U.S. allies);
4. A prohibition on U.S. participation in peacekeeping activities unless immunity from the ICC is guaranteed for U.S. personnel.

However, all of these provisions are off-set by waiver provisions that allow the president to override the effects of ASPA when "in the national interest". The waiver provisions effectively render ASPA meaningless.

All Rights Reserved - Library of University of Jordan - Center of Thesis Deposit

المنارة للاستشارات

www.manaraa.com

 The United States is creating a system for punishing Americans who commit war crimes, crimes against humanity, genocide, and crimes of aggression that the ICC will never come into play for Americans; which is precisely the aim of the ICC.

However the ICC is up and running. in December, 2003; it received its first referral from the President of Uganda . In March,2004,the ICC received another referral from the Government of the Democratic Republic Of the Congo .Towards the end of 2006 both cases have progressed to the judicial phase. A variety of pre-trial proceedings have taken place.

In 31 March 2005, The UN Security Council adopted a resolution to refer the cases of Darfur to the International Criminal Court (ICC). This resolution marks the first time the council has referred a case to the ICC since the court came into existence. And Despite that the United States has fundamental objections to the ICC, it choose not to veto a U.N. resolution. According to US Ambassador in UN, Anne Patterson, the United States continues to "fundamentally object" to the ICC, but did not veto the resolution "because of the need for the international community to work together in order to end the climate of impunity in Sudan and because the resolution provides protection from investigation or prosecution for U.S. nationals and members of the armed forces of non-state parties ".

The diversity is whilst the US is working hard against the ICC it has at the same time approved the purposes of the ICC. How come, then, that the US, after choosing not to veto this resolution continues to "fundamentally object" to the ICC?

To some extent, the answer lies in United States' position in international affairs. The United States is highly exposed economically, politically, ideologically, and in the sheer

All Rights Reserved - Library of University of Jordan - Center of Thesis Deposit

المنارة للاستشارات
www.manaraa.com

power of its military forces. This makes the US the single most powerful country in the world, but at the same time the most vulnerable to attack.

The United States maintains that it must have some way of safeguarding its interests and its people from unwarranted attacks. To the rest of the world, an International Criminal Court may seem as a wonderful idea, but for a country as powerful as the United States, the risks far outweigh the benefits.

The ICC will necessarily have difficulties in its early years, as do many institutions , but in this case is more, because of the US's Bush Administration's opposition to it. The ICC ability to overcome political opposition and to effectively tackle its own inevitable problems will be the main factors that will ensure its success.

## Recommendation

Article 5(1) of the Rome Statute lists the Crime of Aggression as one of the crimes under the jurisdiction of the Court. However, according to Article 5(2), the Court "shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime.

Such a provision shall be consistent with the relevant provisions of the United Nations Charter. It's worth mentioning that the war of aggression was defined 60 years ago during the Nuremberg trials at The International Military Tribunal, Judgment , held between 30 September -1 October 1946 ; "as not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole."

All Rights Reserved - Library of University of Jordan - Center of Thesis Deposit

المنارة للاستشارات
www.manaraa.com

If the establishment of the ICC can be pictured as the conquest of the West, then aggression is the last frontier .Once this is conquered, then the achievement is complete. This frontier should be reached it's a historical duty to do so.

Seven years there after the entry of the force, the statue can be reviewed and may be amended; while there are only two Arab states party to the statute; Politically Arab states, should become members of the ICC in order to have the chance to play a major political role in ratifying the statute in its general context and in particular the crime of aggression.

The statute has given new life to the spirit of resistance in the Arab world, therefore it is time for the Arab states to start taking solid steps through International routes in order to bring about justice to this part of the world especially the area of conflict in Palestine, Syria, Lebanon and lately Iraq.

All Rights Reserved - Library of University of Jordan - Center of Thesis Deposit

المنارة للاستشارات
www.manaraa.com

# REFERENCES

## 1. Periodicals:

- Ambos, Kai,. (1996), Establishing an International Criminal Court and International Criminal Code: Observations from an International Criminal Law Viewpoint, **European Journal of International Law**, Vol7, No4.

- Compounding the Countermajoritarian Difficulty Through "Plaintiff's Diplomacy": Can the International Criminal Court Provide a Solution? (2003), **Brigham Young University Law Review**; Vol. Issue 3.

- Corn, Geoffrey S., and Aldykiewicz, Jan E., (2002), New Options for Prosecuting War Criminals in Internal Armed Conflicts. **Parameters**. Vol. 32 Issue 1.

-Elsea, Jennifer K., (2006), **U.S. Policy Regarding the International Criminal Court,** CRS Report for Congress.

- Franck, Thomas M. And Yuhan, Stephen H., (2003), The United States And The International Criminal Court: Unilateralism Rampant, **International Law And Politics**, Vol. 35.

- Garrett, Stephen A., (1999), The United States and The International Criminal Court. **America Magazine**, Vol. 181 Issue 5.

- Graefrath, Bernhard,. (1990), Universal Criminal Jurisdiction and an International Criminal Court, **European Journal of International Law**, Vol.1, No1.

-Helena, Cobban,. (2006), International Courts**, Foreign Policy**; Issue 153.

- International Criminal Law, (2001), **Harvard Law Review**; Vol. 114 Issue 7.

- Kimura, Akio, Genocide and the modern mind: intention and structure, **Journal of Genocide Research**; Sep2003, Vol. 5 Issue 3.

All Rights Reserved - Library of University of Jordan - Center of Thesis Deposit

المنارة للاستشارات

www.manaraa.com

- Kirsch, Phillipe, Holmes, John T., (1999), The Rome conference on an international criminal court: The negotiating process, **American Journal of International Law**, Vol. 93, Issue 1.

- Kovacs, Peter, (2004), Relativities in Unilateralism and Bilateralism of the International Law of Antiquity**, Journal of the History of International Law**, Vol. 6 Issue 2, p185.

- Landrum, Bruce D.,(2002), The Globalization of Justice : The Rome Statute of the ICC , **Army Lawyer**, Issue 356.

- Latore, Roseann M., (2002), Escape Out The Back Door Or Charge In The Front Door: U.S. Reactions To The International Criminal Court, **Boston College International & Comparative Law Review**, Vol 25, No1.

- Lynch, Colum, (2002), U.S. Seeks Court Immunity for E. Timor Peacekeepers, **Washington Post**, 16 May 2002.

- Lynch, Colum, (2002), U.S. Peacekeepers May Leave E. Timor - Immunity Sought from War Crimes Court**, Washington Post**, 18 May 2002.

- Magliveras, Konstantinos, Bourantonis, Dimitris, (2003), Rescinding the Signature of an International Treaty: The United States and the Rome Statute Establishing the International Criminal Court**, Diplomacy & Statecraft**; Vol. 14 Issue 4.

- Mokhtar, Aly**,** (2003), The fine art of arm-twisting: The US, Resolution 1422 and Security Council deferral power under the Rome Statute**, International Criminal Law Review**, Vol. 3 Issue 4.

-Neier, Aryeh., (1998), Waiting for justice**, World Policy Journal**, Fall, Vol.15, Issue 3.

- Pejic, Jelena, (1996), What is an International Criminal Court?, **Human Rights: Journal of the Section of Individual Rights & Responsibilities;** Vol. 23, Issue 4.

**-** Restructuring The ICC Framework To Advance Transitional Justice: A Search For A Permanent Solution In Sudan. **Columbia Law Review**; Jan2006, Vol. 106 Issue 1.

All Rights Reserved - Library of University of Jordan - Center of Thesis Deposit

المنارة للاستشارات
www.manaraa.com

- Roach, Steven C., (2005), Humanitarian Emergencies and the International Criminal Court (ICC): Toward a Cooperative Arrangement between the ICC and UN Security Council, **International Studies Perspectives**, Vol. 6 Issue 4.

- Scheffer, David J., (1999 ), The United States and the international criminal court, **American Journal of International Law**, Vol. 93, Issue 1.

- Schindler, Dietrich, (2003), International Humanitarian Law: Its Remarkable Development and its Persistent Violation**, Journal of the History of International Law**; 2003, Vol. 5 Issue 2.

-Stahn, Carsten., (2003), The Ambiguities of Security Council Resolution 1422 (2002), **European Journal of International Law**, Vol. 14, No.1.

- Struett, Michael, (2004, The meaning of the International Criminal Court**, Peace Review**; Vol. 16 Issue3.

- Sob, Pierre, (1998), The Dynamics of International Criminal **Tribunals, Nordic Journal of International Law**; Vol. 67 Issue 2.

-Tan Jr., Chet J., (2004), The Proliferation Of Bilateral Non-Surrender Agreements Among Non-Ratifiers Of The Rome Statute Of The International Criminal Court. **American University International Law Review**; 2004, Vol. 19 Issue 5.

- Weller, M., Undoing the global constitution: UN Security Council action on the International Criminal Court. **International Affairs**, Oct2002, Vol. 78 Issue 4.

- Yang, Lijun,. On the Principle of Complementarity in the Rome Statute of the International Criminal Court, **Chinese Journal of International Law**; 2005, Vol.4 Issue1.

- Zwanenburg, Marten,(1999), The Statute for an International Criminal Court and the United States: Peacekeepers under Fire?, **European Journal of International Law**, Vol. 10, No.1.

All Rights Reserved - Library of University of Jordan - Center of Thesis Deposit

المنارة للاستشارات

www.manaraa.com

## 2. Books:

-Bassiouni, M Cherif.,(2005), **The Legislative History of the International Criminal Court: Introduction: Analysis, and Integrated Text**, Ardsley, New York: Transnational Publishers.

- Broomhall, Bruce, (2003), **International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law**. New York: Oxford University Press.

- Frye, Alton., (1999), **Toward an International Criminal Court: three options presented as presidential speeches,** New York**:** Council on Foreign Relations Press.

- Sadat, Leila - -Lee, Roy S., (1999), **The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations and Results,** Boston: Kluwer Law International.

-Murphy, Sean D,. (2006), **United States Practice in International Law**, New York: Cambridge University Press.

- Nadya, (2002), **The International Criminal Court and the Transformation of International Law: justice for the New Millennium**, New York: Transnational Publishers.

- Wladimiroff, Michail, (2004), The Individual within International Law, in Ramesh Chandra Thakur**, From sovereign impunity to international accountability the search for justice in a world of states**, New York: United Nations University Press.

All Rights Reserved - Library of University of Jordan - Center of Thesis Deposit

المنارة للاستشارات

www.manaraa.com

## 3. Chapter in an Edited Book:

-Burchill, Scott (1996), **Liberal internationalism**, in Scott Burchill and Andrew Linklater (eds), Theories of International Relations, New York: St Martin's Press.

- Cassel, Douglass., (2004), **The Rome treaty for An international Criminal Court** , in: Driscoll, William J, Zompetti, Joseph P, and Zompetti, Suzette, (ed), The International Criminal Court: Global Politics and the Quest for Justice, New York: International Debate Education Association.

- Crawford, James., (2003), **The Drafting of the Rome Statute**, in: Sands, Philippe (ed), From Nuremberg to The Hague, New York: Cambridge University Press.

- Dicker, Richard., (2004), **Is a U.N. International Criminal Court in the U.S. National Interest**, in: Driscoll, William J, Zompetti, Joseph P, and Zompetti, Suzette, (ed), The International Criminal Court: Global Politics and the Quest for Justice, New York: International Debate Education Association.

- Forsythe, David P., (2004), **International Criminal Justice and the United States: Law, Culture, Power**, in: Ramesh Thakur and Peter Malcontent (ed), From Sovereign Impunity to International Accountability: The Search for Justice in a World of States, New York: United Nations University Press.

- Fowler, Jerry., (2003), **The Rome Treaty for an International Criminal Court: A Framework of International Justice for Future Generations**, in: Driscoll, William J, Zompetti, Joseph P, and Zompetti, Suzette, (Edi), The International Criminal Court: Global Politics and the Quest for Justice, New York: International Debate Education Association.

All Rights Reserved - Library of University of Jordan - Center of Thesis Deposit

المنارة للاستشارات
www.manaraa.com

- Grossman, Marc., (2003), **American Foreign Policy and the International Criminal Court**, in: Driscoll, William J, Zompetti, Joseph P, and Zompetti, Suzette, (Edi), The International Criminal Court: Global Politics and the Quest for Justice, New York: International Debate Education Association.

- Kirsch, Philippe, and Holmes, John T. and Johnson, Mora,. (2004), **International Tribunals and Courts**, in: Malone, David M., UN Security Council: From the Cold War to the 21st Century, London.

- Weschler, Lawrence., (2000), **Exceptional Cases in Rome: The United States and the Struggle for an ICC**, in: Sewall, Sarah B. and Kaysen, Carl (ed): The United States and the International Criminal Court – National Security and International Law, Maryland: Rowman and Little Publishers.

## 4. Proceedings:

- Bensouda, Fatou., (2006) **The Role OF the ICC in Ending Impunity: The Latest Developments. ICC Deputy**, A paper submitted in the International Criminal Court & Arab National Systems Seminar Amman 15-13 ، February2006 Radisson SAS Hotel.

## 5. Institution Publications:

- Amnesty International, (2003), **International Criminal Court: The unlawful attempt by the Security Council to give US citizens permanent impunity from international justice**, International Secretariat, 1 Easton Street, London Wc1x 0dw, United Kingdom.

## 6. Newspapers:

- Justice in Darfur, **Economist**; 2/5/2005, Vol. 374 Issue 8412.

All Rights Reserved - Library of University of Jordan - Center of Thesis Deposit

المنارة للاستشارات

www.manaraa.com

## 7. Personal Communications:

- Amin, Nasser., (2006), **Personal Communication**, at the International Criminal Court & Arab National Systems conference, 13 - 15 February 2006 Amman, Radisson SAS.

- Bassiouni, M. Cherif., (2006), **Personal Communication**, at the International Criminal Court & Arab National Systems conference, 13 - 15 February 2006 Amman, Radisson SAS.

- Hostettler, Peter., (2006), **Personal Communication**, at the International Criminal Court & Arab National Systems conference, 13 - 15 February 2006 Amman, Radisson SAS.

-Princess Maria Theresa de Bourbon, (2006), **Personal Communication**, 15 February 2006 Amman- Jordan.

-Zarzar, Rudy. Elon University, N.C. USA, Department f Political Science, (2006), **Personal Communication**.

## 8. Internet Resources

-Baylis, Elena., (2005). Why the International Criminal Court Needs Darfur (More Than Darfur Needs the ICC), University of Pittsburgh, School of Law, available at:
**http://jurist.law.pitt.edu/forumy/2005/06/why-international-criminal-court-needs.php**

- Bravin , Jess., (2006), US Warms to Hague Tribunal: New Stance Reflects Desire to Use Court to Prosecute Darfur Crimes, Wall Street Journal, June 14, available at:
**http://www.globalpolicy.org/intljustice/icc/2006/0614warm.htm**.

-Bolton, John R. (2002), The United States and the International Criminal Court: Remarks at the Aspen Institute, Berlin, September 16, 2002, available at: **www.state.gov/t/us/rm/13538.htm**.

- Bolton, John R. (2002), The United States and the International Criminal Court: Remarks to the Federalist Society**.** U.S. Department of State. Washington, DC (14 November 2002), available at **http://www.state.gov/t/us/rm/15158.htm**.

All Rights Reserved - Library of University of Jordan - Center of Thesis Deposit

المنارة للاستشارات

www.manaraa.com

- Boucher, Richard, (2005), U.S. Signs 100th Article 98 Agreement, Press Statement, Released on May 3, 2005, available at:

**http://www.amicc.org/usinfo/administration_policy_BIAs.html**.

- Clinton, William Jefferson, (2002), Our Shared Future: Globalization in the 21st Century. an address in Council on Foreign Relations, June 17, 2002. available at:

**http://www.amicc.org/docs/WJC_CFR.pdf 2004-05-16.**

- Elsea, Jennifer, (2002), Legislative Attorney, American Law Division: U.S. Policy Regarding the International Criminal Court. Report for Congress, Received through the CRS Web. Congressional Research Service, Library of Congress 2002, p3, available at: **http://fpc.state.gov/documents/organization/13389.pdf.**

- Encyclopedia of Political Information, International Criminal Court**,** available at: **http://www.politicalinformation.net/encyclopedia/International_Criminal_Court.htm.**

- Fact Sheet, (2005), U.S. Policy on the International Criminal Court**,** global solutions, available at:

**http://www.globalsolutions.org/programs/law_justice/icc/resources/uspolicy.html**

- Global Policy Forum, (2002), European Parliament Resolution on the Draft American Service Members' Protection Act (ASPA). P5_TA-PROV(2002)0367: Consequences for Transatlantic Relations of Law on the Protection of U.S. Personnel, (4 July 2002). Available at **http://www.globalpolicy.org/intljustice/icc/crisis/0704res.htm**.

- International Criminal Court: Frequently asked questions, available at:

**http://www.icc-cpi.int/**

- International Federation of Human Rights, (2001), The United States Wage War on the ICC, 10 December 2001, Available at **http://www.fidh.org/communiq/2001/ij1212a.htm**.

- Johansen, - Robert C., (2001), U.S. Opposition to the International Criminal Court: Unfounded Fears. Policy Brief 7, The Joan B. Kroc Institute for International Peace Studies, University of Notre Dame, available at:

**http://www.nd.edu/~krocinst/polbriefs/pbrief7.shtml**

All Rights Reserved - Library of University of Jordan - Center of Thesis Deposit

المنارة للاستشارات
www.manaraa.com

- Khan, Paul, M,. (2003), why the United States is so opposed, crimes of war projects, ICC Magazine, available at: **http://www.crimesofwar.org/icc_magazine/index.html.**

- Memo, Cicc., Bilateral agreements proposed by US government, August 23, 2002, **http://www.iccnow.org/html/ciccart98membo20020823.pdf.**

- Nabati, Mikael., (2004), The U.N. Responds to the Crisis in Darfur: Security Council Resolution 1556, The American Society of International Law, available at: **http://www.asil.org/insights/insigh142.htm**.

-Naraghi, Bahman., Does the ICC Need the USA?: Taking Over What the USA Started, Civitatis International, p22, available at: **www.civitatis.org/pdf/icc.pdf**

- Nizkor**,** Equipo., Statement on the War on Iraq: Acts of aggression and breaches of the peace in the Charter of the United Nations**,** available at: **http://www.russfound.org/Enet/nizkor-dec.htm**

-Roberts, Adam., (2001). The International Criminal Court Will Not Be the Threat to the Armed Forces That Some of its Critics Have Feared, Guardian**,** April 4, 2001, available at: **http://www.globalpolicy.org/wldcourt/icc/2001/0404uk.htm**

- Roper Poll Survey, (1999) Press Release: available at: **http://www.ufoevidence.org/documents/doc850.htm**

- Rushing, Lizzie., (2003), The International Criminal Court and American Exceptionalism, International Studies, Organizations, and Social Justice, Geneva, Switzerland, Independent Study Project, p11. available at: **http://www.sit-edu-geneva.ch/international_criminal_court_and.htm#_ftnref38**

- Scheffer, David J., (2000), Statement before the House International Relations Committee, available at: **http://www.state.gov/www/policy_remarks/2000/000726_scheffer_service.html**.

All Rights Reserved - Library of University of Jordan - Center of Thesis Deposit

المنارة للاستشارات
www.manaraa.com

-Slaughter, Anne-- Marie**.,** (2004)**,** The Partial Rule of Law: America's Opposition to the ICC is Self-defeating and Hypocritical**,** The American Prospect, V 15, No10, available at:

**http://www.prospect.org/web/page.ww?section=root&name=ViewPrint&articleId=8551**--

- United Nations, International Criminal Court, Establishment of an International Criminal Court - overview, available at: **www.un.org/law/icc/general/overview.htm**

- United Nations, International Criminal Court:

**http://www.un.org/law/icc/statute/romefra.htm.**

- United States to withdraw some peacekeepers, UN confirms. UN News Centre, available at: **http://www.un.org/apps/news/story.asp?NewsID=11229&Cr=peacekeeping&Cr1=**

- U.S. Department of State, (2002), Fact Sheet: The International Criminal Court (U.S. will not become a party to the Rome Statute), Available at:

**http://www.uspolicy.be/Article.asp?ID=40115C71-82DD-4E00-8632-8DA43733F033**

- Wikipedia Encyclopedia, available at:

**http://en.wikipedia.org/wiki/International_criminal_court** .

**المراجع العربية**

**1- الدوريات**

- الرشيدي، أحمد، (2002). النظام الجنائي الدولي: من لجان التحقيق المؤقتة إلى المحكمة الجنائية الدولية، **مجلة السياسة الدولية**، العدد 150.

**2- الكتب**

- بسيوني، محمود شريف، (2004). **المحكمة الجنائية الدولية: مدخل لدراسة وآليات الإنقاذ الوطني للنظام الأساسي**، القاهرة: دار الشروق.

-ماجد، عادل، (2001). **المحكمة الجنائية الدولية والسيادة الوطنية**، القاهرة: مركز الدراسات السياسية والإستراتيجية .

All Rights Reserved - Library of University of Jordan - Center of Thesis Deposit

المنارة للاستشارات

www.manaraa.com

**السياسة الأمريكية تجاه المحكمة الجنائية الدولية: دراسة في حصانة مواطني الولايات المتحدة من الخضوع للمحكمة الجنائية الدولية**

**إعداد**

**عبير عماري**

**المشرف**

**الدكتور إبراهيم الجازي**

**ملخص**

هدفت هذه الدراسة إلى تقديم تقييم شامل لأسباب ودوافع الموقف الأمريكي المعارض للمحكمة الجنائية الدولية، حيث انطلقت الدراسة من افتراض أساسي مفاده أن معارضة الولايات المتحدة للمحكمة الجنائية الدولية قد تأتى من خلال إدراك الولايات المتحدة أن جيوشها المنتشرة عبر العالم، قد ارتكبت –وسترتكب– العديد من الانتهاكات والجرائم ضد الإنسانية، والتي ستجعلهم عرضة للمقاضاة من قبل المحكمة الجنائية الدولية، مما دعاها للجوء إلى البحث عن الحصانة لمواطنيها من خلال إبرام معاهدات ثنائية مع الدول الأعضاء في ميثاق روما للمحكمة الجنائية الدولية، لضمان استثناء الأمريكيين من سلطة المحكمة.

وجاءت الدراسة في أربعة فصول، حيث تناول الفصل الأول كيفية إنشاء المحكمة وهيكليتها، في حين تناول الفصل الثاني موقف الولايات المتحدة الأمريكية من المحكمة، وتناول الفصل الثالث الدوافع السياسية للرفض الأمريكي للمحكمة وبحثها عن الحصانة لمواطنيها، في حين حاول الفصل الأخير تقديم توضيح لمستقبل لعلاقة بين الولايات المتحدة والمحكمة الجنائية الدولية في ظل هذا الرفض الأمريكي للمحكمة.

وخلصت الدراسة إلى أن الولايات قد اتخذت العديد من الخطوات لتقويض سلطة المحكمة الجنائية الدولية ، مما جعل منها أشد أعداء المحكمة وأكثرهم فعالية. مما سيخلق العديد من الصعوبات أمام هذا المشروع القانوني الناشئ بسبب معارضة إدارة الرئيس الأمريكي بوش، كما أن قدرة المحكمة الجنائية الدولية للتغلب على المعارضة السياسية ومعالجة المشاكل التي تعترض طريقها بفعالية ، ستكون العامل الأساسي الذي يؤكد نجاحها وقوتها وإمكانيات استمرارها.

All Rights Reserved - Library of University of Jordan - Center of Thesis Deposit

المنارة للاستشارات

www.manaraa.com