

THE UNITED STATES AND THE
INTERNATIONAL CRIMINAL COURT:
UNILATERALISM RAMPANT

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I. INTRODUCTION: BEYOND SOVEREIGNTY

One recurring insight to be derived from the ensuing essays by Fellows of the Center for International Studies is the need to move beyond an international system singularly focused on and organized around the sovereign state.¹ These essays examine the lessons to be derived from what has become a major commitment of the multinational system of international organization: the prevention or amelioration of human disasters created by civil wars. The idea that international law is unconcerned by events occurring solely within a sovereign state has been replaced by a notion of global responsibility for the protection of persons from egregious violations of their rights to life and humanitarian treatment.²

The creation of the International Criminal Court (“ICC” or “Court”)—which promises to hold individuals accountable for the most heinous violations of international humanitarian law—is the latest attempt by the international community to effect this paradigmatic shift. Though the United States initially supported the movement to establish the ICC,³ it has since become its most prominent critic, arguing that it might

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1. See Owen Philip Lefkon, *Culture Shock: Bringing Conflict Prevention Under the Wing of U.N. Development . . . and Vice Versa*, 35 N.Y.U. J. INT’L L. & POL. 671 (2003) (“Traditional methods of engaging the sovereign state are insufficient to prevent the types of conflict that threaten peace today.”); see also Margo Kaplan, *Carats and Sticks: The Feasibility of Using the Diamond Trade to Weaken Insurgencies*, 35 N.Y.U. J. INT’L L. & POL. 559 (2003) (arguing that Kimberley Process’s “reliance on internal controls” by participating states hampers efficacy of diamond control regime).

2. See INT’L COMM’N ON INTERVENTION AND STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT 17 (Gareth Evans & Mohamed Sahnoun eds., 2001).

3. See *infra* note 11 and accompanying text.

subject Americans to baseless, politicized prosecutions.⁴ So intense is this animus that, in the summer of 2002, members of the Bush administration, at the U.N. Security Council, threatened to veto the renewal of the peacekeeping operations in Bosnia (UNMIBH).⁵ Though the Security Council ultimately reached a makeshift compromise allowing for the renewal of UNMIBH,⁶ the compromise does not satisfy either proponents of the ICC or its critics.⁷ With the passage of the American Servicemembers' Protection Act⁸—which, *inter alia*, authorizes use of presidential force to prevent U.S. citizens' being brought to trial before the ICC and prohibits U.S. participation in peacekeeping efforts anywhere the ICC might exercise jurisdiction over the peacekeepers⁹—Washington's continued hostility to the Court threatens to complicate greatly international peacekeeping efforts.

This Article critically examines the U.S. position, arguing that the U.S. objections are, at best, exaggerated far out of proportion to any actual risks to be faced by U.S. personnel and, at worst, grounded in untenable extrapolations of international law. In Part II, we examine Washington's criticisms of the Court and how these objections have shaped the misconceived U.S. hostility to it. In Parts III and IV, we look at the reality of U.S. overseas deployment through the lenses of its critics to assess what risks, if any, the ICC might be expected to pose to Americans. In Parts V and VI, we critique the U.S. attack on the Court, examining the vapidness of charges that its establishment violates constitutional and international law, and, ultimately, seek to expose the purely ideological foundations of the U.S. arguments. Finally, in Part VII, we suggest that, contrary to the rhetoric from Washington, participation in the Court may in fact further the public policy interests of the United States.

4. See *infra* notes 26 and 68 and accompanying text.

5. See *infra* notes 25-27 and accompanying text.

6. See S.C. Res. 1422, U.N. SCOR, 56th Sess., 4572d mtg., U.N. Doc. S/RES/1422 (2002); see also *infra* text accompanying note 63.

7. See *infra* text accompanying notes 64-65.

8. American Servicemembers' Protection Act, PUB. L. No. 107-206, 116 Stat. 899 (2002) [hereinafter ASPA].

9. *Id.* §§ 2005, 2007-08.

II. THE U.S. RESPONSE

In the early stages of the development of the ICC, the attitude of the United States was, in the words of one commentator, “cautious and indifferent.”¹⁰ In several public statements, President Bill Clinton indicated his support for the establishment of a permanent international criminal tribunal. For example, on October 15, 1995, in an address at the University of Connecticut, Clinton remarked:

By successfully prosecuting war criminals in the former Yugoslavia and Rwanda, we can send a strong signal to those who would use the cover of war to commit terrible atrocities that they cannot escape the consequences of such actions. And a signal will come across even more loudly and clearly if nations all around the world who value freedom and tolerance establish a permanent international court to prosecute, with the support of the United Nations Security Council, serious violations of humanitarian law.¹¹

While Clinton supported the creation of an international criminal tribunal in principle, that support “was conditional upon the U.S. government being afforded the power to veto prosecutions of American citizens before such a tribunal.”¹² Yet despite—or, perhaps more accurately, because of—these concerns, the Clinton administration was engaged in the negotiations on the Court and sent a delegation, led by Ambassador David Scheffer, to the Rome Conference, which began in June

10. Timothy C. Evered, *An International Criminal Court: Recent Proposals and American Concerns*, 6 PACE INT'L L. REV. 121, 157 (1994).

11. Remarks at the University of Connecticut in Storrs, 31 WEEKLY COMP. PRES. DOC. 1840, 1843 (Oct. 15, 1995); *see also, e.g.*, Remarks Prior to a Meeting with Military Leaders and an Exchange with Reporters in Arlington, Va., 33 WEEKLY COMP. PRES. DOC. 118, 119 (Jan. 29, 1997); Remarks to the 52d Session of the United Nations General Assembly in New York City, 33 WEEKLY COMP. PRES. DOC. 1386, 1389 (Sept. 22, 1997); Remarks Celebrating the 50th Anniversary of the Universal Declaration of Human Rights in New York City, 33 WEEKLY COMP. PRES. DOC. 2002, 2003 (Dec. 9, 1997); Remarks Honoring Genocide Survivors in Kigali, Rwanda, 34 WEEKLY COMP. PRES. DOC. 495, 497 (Mar. 25, 1998).

12. Johan D. van der Vyver, *International Human Rights: American Exceptionalism: Human Rights, International Criminal Justice, and National Self-Righteousness*, 50 EMORY L.J. 775, 795 (2001).

1998.¹³ After participating, Scheffer testified before the Senate Foreign Relations Committee that the Conference had yielded mixed results for U.S. interests.¹⁴ While the U.S. had achieved many of its objectives,¹⁵ Scheffer said, other “critical” objectives were not reached.¹⁶

After Rome, Scheffer and the Clinton administration continued to participate in negotiations over the Rome Treaty, as well as the elements of crimes and the rules of procedure and evidence. By December 31, 2000, the deadline for states to become signatories to the Rome Statute,¹⁷ the United States “had not achieved the silver bullet of guaranteed protection [for U.S. nationals] that many officials within the Clinton Administration had sought for so many years.”¹⁸ President Clinton, nevertheless, decided to sign the treaty. In remarks explaining his decision, Clinton “reaffirm[ed] our strong support for international accountability and for bringing to justice perpetrators of genocide, war crimes, and crimes against humanity.”¹⁹ He added:

In signing, however, we are not abandoning our concerns about significant flaws in the Treaty. In particular, we are concerned that when the Court comes into existence, it will not only exercise authority over personnel of states that have ratified the treaty, but also claim jurisdiction over personnel of states that have not. With signature, however, we will be in a position to influence the evolution of the Court. Without signature, we will not.²⁰

13. See David J. Scheffer, *Staying the Course with the International Criminal Court*, 35 CORNELL INT’L L.J. 47, 74 (2001).

14. See *Is a U.N. International Criminal Court in the U.S. National Interest?: Hearing Before the Senate Subcomm. on Int’l Operations of the Comm. on Foreign Relations*, 105th Cong. 10-28 (1998) [hereinafter 1998 Senate Hearings] (statement of David J. Scheffer, Ambassador-at-Large for War Crimes Issues).

15. *Id.* at 12.

16. *Id.* at 12-15.

17. Rome Statute of the International Criminal Court, *adopted* July 17, 1998, art. 125(1), U.N. Doc. A/Conf.183/9 (entered into force July 1, 2002) [hereinafter Rome Statute].

18. Scheffer, *supra* note 13, at 63.

19. Statement on the Rome Treaty on the International Criminal Court, 37 WEEKLY COMP. PRES. DOC. 4, 4 (Dec. 31, 2000).

20. *Id.*

Indeed, Clinton declared that, until the issue of jurisdiction over nonparties was satisfactorily resolved, “I will not, and do not recommend that my successor, submit the Treaty to the Senate for advice and consent.”²¹

The Bush administration, unlike its predecessor, made no pretense of supporting the ICC.²² On May 6, 2002, the United States notified U.N. Secretary-General Kofi Annan that it “does not intend to become a party to the treaty” and disavowed any “legal obligations arising from its signature on December 31, 2000.”²³ The same day, in an address at the Center for Strategic and International Studies, Under Secretary for Political Affairs Marc Grossman justified Bush’s decision, enumerating five flaws with the Court:

First, we believe the ICC is an institution of unchecked power

The treaty created a self-initiating prosecutor, answerable to no state or institution other than the Court itself

Second, the treaty approved in Rome dilutes the authority of the UN Security Council and departs from the system that the framers of the UN Charter envisioned.

The treaty creates an as-yet-to-be-defined crime of “aggression,” and again empowers the court to decide on this matter and lets the prosecutor investigate and prosecute this undefined crime. This was done despite the fact that the UN Charter empowers only the Security Council to decide when a state has committed an act of aggression

Third, the treaty threatens the sovereignty of the United States. The Court, as constituted today, claims the authority to detain and try American citi-

21. *Id.*

22. See Scheffer, *supra* note 13, at 87 (“As of early 2002, the Bush Administration had not pursued any of these endeavors [to participate in the development of the Court] with the exception of a minimalist, mid-level presence”).

23. Richard Boucher, Press Statement, International Criminal Court: Letter to U.N. Secretary General Kofi Annan (May 6, 2002), at <http://www.state.gov/r/pa/prs/ps/2002/9968.htm>.

zens, even through [sic] our democratically-elected representatives have not agreed to be bound by the treaty. While sovereign nations have the authority to try non-citizens who have committed crimes against their citizens or in their territory, the United States has never recognized the right of an international organization to do so absent consent or a UN Security Council mandate.

Fourth, the current structure of the International Criminal Court undermines the democratic rights of our people and could erode the fundamental elements of the United Nations Charter, specifically the right to self defense.

With the ICC prosecutor and judges presuming to sit in judgment of the security decisions of States without their assent, the ICC could have a chilling effect on the willingness of States to project power in defense of their moral and security interests

Fifth, we believe that by putting U.S. officials, and our men and women in uniform, at risk of politicized prosecutions, the ICC will complicate U.S. military cooperation with many friends and allies who will now have a treaty obligation to hand over U.S. nationals to the Court—even over U.S. objections.²⁴

On the diplomatic front, the Bush administration attempted to leverage its power as a permanent member of the Security Council to carve out for itself an exemption from the Court's jurisdiction. On June 30, 2002, the United States vetoed a resolution to extend for six months the mandate of the U.N. peacekeeping mission to Bosnia.²⁵ In a statement explaining the veto, Ambassador John D. Negroponte attempted to link 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

24. Marc Grossman, American Foreign Policy and the International Criminal Court (May 6, 2002), at <http://www.state.gov/p/9949.htm>.

25. See Serge Schmemmann, *U.S. Vetoes Bosnia Mission, Then Allows 3-Day Reprieve*, N.Y. TIMES, July 1, 2002, at A3.

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 risk of politicized prosecutions before a court whose jurisdiction over our people the Government of the United States does not accept.²⁶

What followed was a two-week standoff in the Security Council pitting the United States against some of its closest allies, including the members of the European Union, Canada, and Mexico. The United States proposed that the Security Council invoke its prerogative under Article 16 of the Rome Statute—whereby the Security Council may indefinitely delay any proceedings before the ICC by passing a resolution under its Chapter VII authority—and enact a resolution exempting for twelve months from the Court’s jurisdiction all peacekeepers of states not party to the Treaty of Rome.²⁷

The U.S. position drew sharp criticism from other delegations. In addition to “send[ing] an unacceptable message that some people—peacekeepers—are above the law,”²⁸ Ambassador Paul Heinbecker of Canada contended, “in the absence of a threat to international peace and security, the Council’s passing a Chapter VII draft resolution on the ICC . . . would in our view be *ultra vires* [and would] undermine the standing and credibility of the Council.”²⁹ Moreover, Heinbecker argued, the U.S. proposal was inconsistent with Article 16:

[T]he proposals now circulating would have the Council, Lewis-Carroll-like, stand article 16 of the Rome Statute on its head. The negotiating history makes clear that recourse to article 16 is on a case-by-case basis only, where a particular situation—for example the dynamic of a peace negotiation—warrants

26. Explanation of Vote on Renewal of the Mandate for the UN Mission in Bosnia and Herzegovina (June 30, 2002) (statement of John D. Negroponte in the U.N. SCOR), at <http://www.state.gov/p/io/rls/rm/2002/11564.htm>.

27. See Serge Schmemmann, *Washington Allows a 12-Day Extension for U.N. Peacekeeping Mission in Bosnia*, N.Y. TIMES, July 4, 2002, at A5.

28. U.N. SCOR, 57th Sess., 4568th mtg. at 4, U.N. Doc. S/PV.4568 (2002) (statement of Amb. Heinbecker).

29. *Id.* at 3.

a 12-month deferral. The Council should not purport to alter that fundamental provision.³⁰

In stretching Article 16 beyond its terms, Heinbecker asserted, the Security Council would effectively be changing the provisions of the Rome Statute, “thereby undermin[ing] the treaty-making process.”³¹

France’s Ambassador Levitte pointed out that the Rome Statute “offers the United States far more substantial safeguards than does the Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY), which, nevertheless, has never elicited the least concern in Washington.”³² Levitte then gave four illustrative examples:

First, the ICTY Statute permits the Tribunal to compel national courts to drop a case and cede it to the ICTY . . . [,] whereas the Rome Statute provides that the Court can prosecute only if competent national courts do not prosecute

Secondly, indictments prepared by the ICTY Prosecutor are confirmed by a single judge, whereas the International Criminal Court (ICC) Prosecutor can undertake a prosecution only with the authorization of a pretrial chamber composed of three judges.

Thirdly, article 98 of the Rome Statute enables any State requested to cooperate with the Court to invoke a bilateral agreement according immunities to the nationals of a third State in order not to comply with the Court’s request

Fourthly and finally, the Security Council, on the basis of article 16 of the Rome Statute, may decide to suspend an action initiated by the Court for a renewable period of a year³³

Levitte also observed that the process for electing judges under the Rome Statute “is scarcely different” from the process in the ICTY Statute.³⁴

30. *Id.* at 4.

31. *Id.* at 3.

32. *Id.* at 11 (statement of Amb. Levitte).

33. *Id.*

34. *Id.*

Regarding Article 16, Levitte stressed that France “cannot accept modification, by means of a Security Council resolution, of a provision of the treaty,” warning that passing such a resolution could ultimately lead to a “conflict of norms” between the Court and the Security Council.³⁵

The meaning of Article 16 was vigorously debated in the Council. The Canadian and French representatives’ concerns were echoed in statements by the ambassadors of New Zealand,³⁶ Denmark (on behalf of the European Union),³⁷ Bulgaria,³⁸ Costa Rica (on behalf of the Rio Group),³⁹ Iran,⁴⁰ China,⁴¹ Russia,⁴² Mongolia,⁴³ Liechtenstein,⁴⁴ Brazil,⁴⁵ Swit-

35. *Id.*

36. *Id.* at 5 (statement of Amb. MacKay) (“To provide such an immunity in any fashion would seem to enshrine an unconscionable double standard To purport to provide a blanket immunity in advance in this way would in fact amount to an attempt to amend the Rome Statute without the approval of its States parties. It would represent an attempt by the Council to change the negotiated terms of a treaty in a way unrecognized in international law or in international treaty-making processes.”).

37. *Id.* at 7-8 (statement of Amb. Løj) (“Article 16 should be invoked only in conformity with the Statute.”).

38. *Id.* at 13 (statement of Amb. Tafrov) (“[T]he search for compromise should not be linked with the weakening of important international treaties such as the Rome Statute.”).

39. *Id.* at 14 (statement of Amb. Chassoul) (“[T]he proposal is completely without legal foundation because article 16 of the Rome Statute, invoked by the proposal’s advocates, refers to an entirely different situation.”).

40. *Id.* at 15-16 (statement of Amb. Fadaifard) (“[T]he [Security] Council is not authorized to interpret or amend treaties concluded among States in accordance with the law of treaties—a law that recognizes that only parties to a treaty are competent to interpret or amend it.”).

41. *Id.* at 17 (statement of Amb. Wang Yingfan) (“[A] solution must respect the letter and spirit of the ICC Statute and accommodate the views and wishes of ICC States Parties.”).

42. *Id.* (statement of Amb. Gatilov) (“We hope a solution will be found to this issue which . . . will not diminish the Statute of the Court, which has entered into force.”).

43. *Id.* at 20 (statement of Amb. Enkhsaikhan) (“I wish to join all other delegations in underlining once again the vital importance of safeguarding not only the integrity of peacekeeping operations but also of the Rome Statute and thus of international law and treaty-making, the rule of law, and the integrity of the Council itself.”).

44. *Id.* (statement of Amb. Fritsche) (The proposal “invokes article 16 of the Rome Statute, while effectively amending it. As has been said by many over the past few days . . . [,] this would constitute an action outside the mandate of the Security Council and fundamentally affect the process of treaty-making as practiced in the United Nations.”).

zerland,⁴⁶ Mauritius,⁴⁷ Mexico,⁴⁸ Thailand,⁴⁹ Venezuela,⁵⁰ Fiji,⁵¹ Ukraine,⁵² Guinea,⁵³ Colombia,⁵⁴ Samoa,⁵⁵ Malaysia,⁵⁶

45. *Id.* at 22 (statement of Amb. Fonseca) (“We strongly discourage proposals or initiatives that ultimately seek to reinterpret or review the Rome Statute, especially with respect to article 16, whose provisions are applicable only on a case-by-case basis and were never intended to give place to *ad aeternam* deferrals of the Court’s jurisdiction.”).

46. *Id.* at 24 (statement of Amb. Staehelin) (“[G]eneralized preventive usage of article 16 would be contrary to the Treaty.”).

47. *Id.* at 25-26 (statement of Amb. Koonjul) (“Mauritius maintains that article 16 of the Rome Statute should be invoked only on a case-by-case basis when the Court is seized of a specific case Doing otherwise would be tantamount to rewriting article 16, which itself could then in fact be challenged by the Court.”).

48. *Id.* at 27 (statement of Amb. Aguilar Zinser) (“Any decision that attempts to extract article 16 from the Rome Statute and to interpret it in isolation in a manner contrary to its original purpose undermines the implementation of the entire Statute and erodes the fundamental principle of the independence of the Court.”).

49. *Id.* at 30 (statement of Amb. Kasemsarn) (“We fear that these developments in the Security Council may erode the sanctity of international law and multilateralism, and we therefore ask all States to safeguard the independence and the effective functioning of the ICC.”).

50. *Id.* at 31 (statement of Amb. Pulido Santana) (“Venezuela hopes that the Security Council . . . will take a decision that respects the letter and the spirit of the Rome Statute.”).

51. U.N. SCOR, 57th Sess., 4568th mtg., at 2, U.N. Doc. S/PV.4568 (Resumption 1) (2002) (statement of Amb. Naidu) (“[T]he Security Council’s functions and powers, including those set out in Chapter VII, do not include amending treaties. To do that would violate established principles of international treaty law.”).

52. *Id.* at 4 (statement of Amb. Kuchinsky) (“We call upon every member of the Security Council to make every possible effort to find a generally acceptable solution which . . . should not harm the integrity of the Rome Statute . . . [and] should not create a precedent of interference by the Security Council with the sovereign rights of the Member States in the treaty-making process.”).

53. *Id.* at 5 (statement of Amb. Diallo) (“In conformity with the principles of international law and bearing in mind the hierarchy of legal norms, no Security Council resolution could therefore modify a provision of an international treaty.”).

54. *Id.* at 6 (statement of Amb. Valdivieso) (“A Security Council resolution issued under Chapter VII . . . cannot interpret the mandates of the [Rome] Statute above and beyond their content, or contradict the purpose of their provisions.”).

55. *Id.* at 7 (statement of Amb. Slade) (“[I]t is apparent on the face of the article that the true meaning and intent is to enable the Security Council

Germany,⁵⁷ Syria,⁵⁸ Argentina,⁵⁹ and Cuba.⁶⁰

U.S. Ambassador John D. Negroponte, however, argued for a broader interpretation of the Rome Statute, asserting that

it is consistent both with the terms of article 16 and with the primary responsibility of the Security Council for maintaining international peace and security for the Council to adopt such a resolution with regard to operations it authorizes or establishes, and for the Council to decide to renew such requests.⁶¹

The most emphatic support for the U.S. proposal came from the Indian representative, who argued that exposing U.N. peacekeepers “to allegations and possible harassment . . . is likely to put these forces on the defensive, constrict their capacity to take firm action when required and, eventually, adversely affect the readiness of potential troop contributors to provide troops to the United Nations for peacekeeping functions.”⁶²

to judge each case on the basis of its particular circumstances. There is clearly no ground for a determination in advance, and then in perpetuity.”).

56. *Id.* at 8 (statement of Amb. Hasmy) (“It is vitally important for the Council not to take a decision that would have the effect of changing or amending the terms of an international treaty, which the United States draft resolution sets out to do in respect of the Rome Statute.”).

57. *Id.* at 9 (statement of Amb. Schumacher) (“[T]he Security Council would do itself and the world community a disservice if it adopted a resolution under chapter VII of the charter to, in effect, amend an important treaty ratified by 76 States.”).

58. *Id.* at 10 (statement of Amb. Wehbe) (“[T]he Security Council does not have the right to take decisions under Chapter VII to amend an international treaty that has entered into force, because this would constitute a precedent that would destabilize and undermine the international legal regime.”).

59. *Id.* at 13 (statement of Amb. Listre) (“The proposals that are being considered in the Security Council . . . might lead to a distortion of the spirit and a departure from the letter of a key provision of the Rome Statute, thus undeniably and seriously weakening the powers of the ICC to render justice in an independent and impartial manner.”).

60. *Id.* at 14 (statement of Amb. Rodriguez Parrilla) (“The Council has no power to amend the legal regime established by a treaty.”).

61. U.N. SCOR, 57th Sess., 4568th mtg., *supra* note 28, at 10 (statement of Amb. Negroponte).

62. *Id.* at 13 (statement of Amb. Nambiar).

Eventually, the Security Council acceded to the U.S. demands and enacted Resolution 1422, which “requests” that the Court not go forward until July 1, 2003, with any case “involving current or former officials or personnel from a contributing State not a Party to the Rome Statute over acts or omissions relating to a United Nations established or authorized operation,” and which “expresses the intention to renew the request . . . for further 12-month periods for as long as may be necessary.”⁶³ Though the members of the Security Council were relieved to have renewed the Bosnia mission, parties on both sides were left unsatisfied by the compromise. Negroponte told reporters that the United States “will use the coming year to find the additional protections we need,”⁶⁴ and Heinbecker continued to insist that the Security Council had gone beyond its mandate by imposing an erroneous interpretation of Article 16 on the ICC.⁶⁵

Earlier in the year, on Capitol Hill, Congress passed the American Servicemembers’ Protection Act (“ASPA” or “Act”),⁶⁶ sponsored by Rep. Tom DeLay (R-TX) and Sen. Jesse Helms (R-NC).⁶⁷ The Act begins with a series of Congressional findings, including, *inter alia*,

(7) Any American prosecuted by the International Criminal Court will, under the Rome Statute, be denied procedural protections to which all Americans are entitled under the Bill of Rights to the United States Constitution, such as the right to trial by jury.

(8) Members of the Armed Forces of the United States should be free from the risk of prosecution by the International Criminal Court, especially when

63. S.C. Res. 1422, *supra* note 6, ¶¶ 1-2.

64. Ambassador John D. Negroponte, Explanation of Vote and Remarks Following the Vote on UN Security Council Resolution 1422 on the International Criminal Court at the Security Council, at http://www.un.int/usa/02_098.htm (July 12, 2002).

65. See Serge Schmemmann, *U.S. Peacekeepers Given Year’s Immunity from New Court*, N.Y. TIMES, July 13, 2002, at A3.

66. ASPA, *supra* note 8.

67. Senator Helms had previously vowed that the Rome Treaty would be “dead on arrival” if it was ever submitted to the Senate for ratification, unless it were modified to provide Washington with the power to block court actions. See Barbara Crossette, *Helms Vows to Make War on U.N. Court*, N.Y. TIMES, Mar. 27, 1998, at A9.

they are stationed or deployed around the world to protect the vital national interests of the United States

(9) . . . No less than members of the Armed Forces of the United States, senior officials of the United States Government should be free from the risk of prosecution by the International Criminal Court, especially with respect to official actions taken by them to protect the national interests of the United States.

(10) Any agreement within the Preparatory Commission on a definition of the Crime of Aggression that usurps the prerogative of the United Nations Security Council under Article 39 of the charter of the United Nations to “determine the existence of any . . . act of aggression” would contravene the charter of the United Nations and undermine deterrence.

(11) It is a fundamental principle of international law that a treaty is binding upon its parties only and that it does not create obligations for nonparties without their consent to be bound. The United States is not a party to the Rome Statute and will not be bound by any of its terms. The United States will not recognize the jurisdiction of the International Criminal Court over United States nationals.⁶⁸

Congress passed the ASPA as an amendment to a broader antiterrorism measure, and it was signed into law on August 2, 2002.

The ASPA prohibits any agency of the government from cooperating with the ICC.⁶⁹ The Act further places restrictions on U.S. military operations, prohibiting U.S. participation in U.N. peacekeeping or enforcement actions in states parties to the ICC unless U.S. personnel have been permanently exempted from the Court’s jurisdiction.⁷⁰ The Act also prohibits the United States from giving military assistance to any state party to the Court, except for NATO allies, “major

68. ASPA, *supra* note 8, § 2002.

69. *Id.* § 2004; *see also id.* § 2006 (prohibiting direct or indirect transfer of classified national security and law enforcement information).

70. *Id.* § 2005.

non-NATO all[ies],” and Taiwan.⁷¹ The Act includes escape clauses that allow the President to waive certain provisions of the Act in order to pursue national interests.⁷² Section 2008 of the ASPA (perhaps the most bizarre of all) authorizes the President “to use all means necessary and appropriate to bring about the release” of any U.S. national being detained by the Court.⁷³ Section 2008 has led critics to refer to the Act as the “Hague Invasion Act,”⁷⁴ in recognition of the location of the new Court and its prison. The Dutch ambassador to the United States remarked, “Even though we do not deem an American invasion of the Netherlands an imminent threat, we do think the language was ill considered, to say the least.”⁷⁵

III. OVERVIEW OF U.S. FORCES STATIONED OVERSEAS

Both U.S. legislation and efforts in the Security Council purported to have as their objective the protection of U.S. service personnel who are stationed around the world to safeguard democracy and peace. Is this a credible claim? To answer that question it is necessary to examine the demographics of U.S. military deployment under U.N. and other international auspices.

As of August 31, 2002, there were a total of 44,260 military observers, troops, and civilian police officers deployed on seventeen U.N. peacekeeping missions.⁷⁶ These peacekeepers originate from ninety countries, with Bangladesh contributing the largest number (5,422). The United States ranks eighteenth⁷⁷ with 692 persons participating in eight U.N.

71. *Id.* § 2007.

72. *See id.* §§ 2003, 2005, 2007.

73. *Id.* § 2008.

74. William Orme, *U.N. Extends Bosnia Missions*, L.A. TIMES, Jul. 4, 2002, at A1.

75. *Id.*

76. *See* U.N. Dep’t of Peacekeeping Operations, *Monthly Summary of Military and Civilian Police Contribution to United Nations Operations*, Aug. 2002, at <http://www.un.org/Depts/dpko/dpko/contributors/August2002Summary.pdf> [hereinafter UN Peacekeeping Contribution Report].

77. The United States ranks behind Bangladesh (contributing 5,422 peacekeepers), Pakistan (4,740), Nigeria (3,400), India (2,857), Ghana (2,478), Kenya (1,841), Jordan (1,766), Uruguay (1,569), Ukraine (1,348), Australia (1,135), Nepal (1,101), Poland (1,015), Zambia (906), Guinea (788), Portugal (720), Fiji (698), and the United Kingdom (694). *Id.*

peacekeeping operations.⁷⁸ The vast majority of these serve in the former Yugoslavia as part of the U.N. Interim Administration Mission in Kosovo (UNMIK) and in Bosnia (UNMIBH).⁷⁹ In addition to Americans present in the Former Yugoslavia, there are U.S. personnel stationed in the Western Sahara (MINURSO) (claimed by both Morocco and by the Sahrawi nationalist movement),⁸⁰ the demilitarized zone between Iraq and Kuwait (UNIKOM),⁸¹ in boundary areas between Ethiopia and Eritrea (UNMEE),⁸² as well as in East Timor (UNMISSET),⁸³ Georgia (UNOMIG),⁸⁴ and parts of Egypt, Israel, Jordan, Lebanon, and Syria (UNTSO).⁸⁵ The number of U.S. personnel in these operations is extremely limited, except, as we have seen, in Kosovo and Bosnia. In these two exceptional instances, however, any obligation of the local authorities to surrender anyone for trial in circumstances of alleged humanitarian offenses or crimes against humanity would arise, not in relation to the ICC, but in relation to the ICTY.⁸⁶ This tribu-

78. *Id.* The United States contributes personnel to the U.N. Mission for the Referendum in Western Sahara (MINURSO), the U.N. Iraq-Kuwait Observation Mission (UNIKOM), the U.N. Mission in Ethiopia and Eritrea (UNMEE), the U.N. Mission in Bosnia (UNMIBH), the U.N. Mission in Kosovo (UNMIK), the U.N. Mission in Support of East Timor (UNMISSET), the U.N. Observer Mission in Georgia (UNOMIG), and the U.N. Truce Supervision Organization (UNTSO). *Id.*

79. *Id.*

80. See Dep't of Cartographic Information, MINURSO Deployment as of January 2003, at <http://www.un.org/Depts/Cartographic/map/dpko/minurso.pdf>.

81. See Dep't of Cartographic Information, UNIKOM Deployment as of April 2002, at <http://www.un.org/Depts/Cartographic/map/dpko/unikom.pdf>.

82. See Dep't of Public Information, UNMEE Fact Sheet, at <http://www.un.org/Depts/dpko/unmee/unmee.pdf>.

83. See East Timor-UNMISSET: Facts and Figures, at <http://www.un.org/peace/timor/unmissetF.htm>.

84. See Dep't of Cartographic Information, UNOMIG Deployment, July 2002, at <http://www.un.org/Depts/Cartographic/map/dpko/unomig.pdf>.

85. See Dep't of Cartographic Information, UNTSO Deployment as of July 1997, at <http://www.un.org/Depts/Cartographic/map/dpko/untso.pdf>.

86. See Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, reprinted in 32 I.L.M. 1192 [hereinafter ICTY Statute], adopted by S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg. at 6, U.N. Doc. S/RES/827 (1993), arts. 9

nal was created at the insistence of the United States⁸⁷ by resolutions of the Security Council.⁸⁸ Notably, the U.S. has never taken exception to that court's jurisdiction over U.S. personnel stationed in the former Yugoslavia.⁸⁹ The total U.S. deployment in U.N. operations is as follows:

TABLE 1. U.S. CONTRIBUTIONS TO U.N.
PEACEKEEPING OPERATIONS⁹⁰

Mission	Military Observers	Troops	Civilian Police	Total U.S. Commitment	% of Mission
MINURSO	7			7	2.9
UNIKOM	11			11	1.0
UNMEE	6	1		7	0.2
UNMIBH			43	43	3.0
UNMIK	2		557	559	12.7
UNMISSET			60	60	1.1
UNOMIG	2			2	1.9
UNTSO	3			3	2.0

As of December 31, 2001, the U.S. Department of Defense has stationed altogether 212,262 military personnel on active duty in foreign countries,⁹¹ as well as 34,727 U.S. civilians employed in a military capacity.⁹² The non-U.N. deployments are covered by various bilateral status of forces agreements (SO-FAs) made between Washington and the receiving state.

It is the policy of the United States that, "[i]n every foreign country where substantial numbers of American troops are stationed for any appreciable length of time[,] the United States will have a Status of Forces Agreement (SOFA) with the

(establishing primacy of ICTY's jurisdiction) & 29 (establishing obligations of states to comply with ICTY's requests for cooperation).

87. See, e.g., Bartram S. Brown, *U.S. Objections to the International Criminal Court: A Brief Response*, 31 N.Y.U. J. INT'L L. & POL. 855, 856-57 ("U.S. initiatives led to the creation of the International Criminal Tribunal for the Former Yugoslavia . . .").

88. See S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/RES/827 (1993).

89. See *supra* text accompanying notes 32-34.

90. See UN Peacekeeping Contribution Report, *supra* note 76.

91. U.S. Dep't of Defense, Directorate for Information Operations and Reports, Worldwide Manpower Distribution by Geographical Area, Dec. 31, 2001, at 12, at <http://www.dior.whs.mil/mmid/m05/m05dec01.pdf> [hereinafter DOD Manpower Report].

92. *Id.* at 17. In addition, there are 23,817 U.S. civilians employed in a civilian capacity.

host country.”⁹³ SOFAs discuss many of the rights and duties of the overseas operation vis-à-vis the receiving state, from relatively mundane administrative details⁹⁴ to key provisions regarding the jurisdictional privileges of the sending and receiving states.⁹⁵

In the thirty-seven countries where the total U.S. presence—including active duty military personnel and U.S. civilians employed in a military capacity—numbers fifty or more,⁹⁶ the rights and duties of the U.S. personnel are covered by SOFAs, these being in force in all but four countries;⁹⁷ only 6,049 Americans (out of the total 239,322 in these thirty-seven countries) are stationed without the protections afforded by SOFAs.⁹⁸

Arguably, the concerns of the United States with respect to the ICC are primarily directed at these “unprotected” nationals.⁹⁹ However, 5,212 are deployed in Serbia (Kosovo) and are thus subject to the primary jurisdiction of the ICTY, to which Washington has taken no objection.¹⁰⁰ An additional 716 of this group are stationed in two countries—China and Cuba (Guantánamo base)—that are neither states parties nor

93. U.S. Dep’t of State, Int’l Information Programs, Backgrounder: Status of Forces Agreements, Jan. 3, 2000, at <http://usinfo.state.gov/regional/ea/easec/newsofa.htm>.

94. See, e.g., Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Forces, June 19, 1951, art. IX, 4 U.S.T. 1792, available at <http://www.nato.int/docu/basicxt/b510619a.htm> [hereinafter NATO SOFA].

95. See, e.g., *id.* art. VII; see also *infra* Part IV.

96. DOD Manpower Report, *supra* note 91, at 8-12. These countries are Australia, Bahrain, Belgium, Bosnia-Herzegovina, Canada, China (including Hong Kong), Colombia, Cuba (Guantánamo), Denmark, Egypt, France, Germany, Greece, Honduras, Iceland, Israel, Italy, Japan, Kenya, Korea, Kuwait, Macedonia, the Netherlands, Norway, Oman, Portugal, Qatar, Russia, Saudi Arabia, Serbia (including Kosovo), Singapore, Spain, Thailand, Turkey, the United Arab Emirates, and the United Kingdom.

97. *Id.*

98. *Id.*

99. Under Article 98 of the Rome Statute, states parties to the Court are not obligated to act in a manner that would contravene any preexisting obligations under bilateral agreements. To the extent that SOFAs provide for the sending states to have exclusive or primary jurisdiction over their nationals under specified conditions, such agreements arguably fall within the ambit of Article 98. See Rome Statute, *supra* note 17, at art. 98.

100. DOD Manpower Report, *supra* note 91, at 2.

signatories to the ICC and therefore are under no obligation to assist the ICC in investigations or prosecutions.¹⁰¹ The Cuban jurisdiction over Americans at Guantánamo is essentially a legal fiction. As for those in China, they may well be covered by diplomatic immunity. For that matter, if faced with a choice between having a U.S. national stand trial before a Chinese domestic tribunal or before the ICC, Washington might well prefer that Beijing surrender an American defendant to The Hague.

The empirical data regarding the deployment of U.S. personnel overseas indicates that the overwhelming majority of U.S. nationals (1) are protected by bilateral SOFAs, (2) are stationed in jurisdictions where the host government is under no obligation to participate in ICC proceedings, or (3) are stationed in Kosovo and Bosnia, and are therefore—irrespective of the existence of the ICC—subject to the jurisdiction of the ICTY.

IV. SOFAs AND THE ICC

In Part III, we demonstrated that the vast majority of Americans stationed abroad are in countries with which the United States has entered into SOFAs. These allocate jurisdiction over offenses committed by Americans, giving the United States exclusive jurisdiction over certain kinds of offenses and preserving the local courts' jurisdiction in others. These agreements are relevant to our discussion of the ICC in two senses. First, the SOFAs establish a pattern of U.S. acquiescence in the exercise of jurisdiction by foreign courts over U.S. personnel stationed abroad. The ICC's jurisdiction thus is not an entirely novel intrusion upon the exclusiveness of U.S. jurisdiction over its military personnel when stationed overseas. Second, the Treaty of Rome itself makes concessions to obligations undertaken by states in which foreign troops are stationed and that are parties to SOFAs, insofar as the SOFAs preserve the priority of the sending state's jurisdiction over its personnel.

The SOFA among the member states of the North Atlantic Treaty Organization, signed in 1951, is typical of the agreements reached between the United States and its allies. It has

101. *Id.*

also been expressly adopted by the non-NATO states participating in the Partnership for Peace,¹⁰² and it serves as the model—at least in terms of the allocation of jurisdiction—for the SOFAs between the United States and its other non-NATO allies.¹⁰³

Article 7 of the NATO SOFA elucidates and allocates the jurisdictional rights of the sending and the receiving states over personnel stationed abroad. Article 7(2) provides that each state will have the right to exercise *exclusive* jurisdiction over acts punishable only under its own law.¹⁰⁴ Where the right to exercise jurisdiction is concurrent, Article 7(3) provides:

- (a) The military authorities of the sending State shall have the primary right to exercise jurisdiction over a member of a force or of a civilian component in relation to
 - (i) offences solely against the property or security of that State, or offences solely against the person or property of another member of the force or civilian component of that State or of a dependent;
 - (ii) offences arising out of any act or omission done in the performance of official duty.
- (b) In the case of any other offence the authorities of the receiving State shall have the primary right to exercise jurisdiction.¹⁰⁵

102. See Agreement Among the States Parties to the North Atlantic Treaty and the Other States Participating in the Partnership for Peace Regarding the Status of Their Forces, June 19, 1995, art. I, at <http://www.nato.int/docu/basicxt/b950619a.htm>.

103. See, e.g., Agreement Concerning the Status of United States Forces in Australia, May 9, 1963, 14 U.S.T. 506; Agreement Concerning Privileges and Immunities of United States Military and Related Personnel in Egypt, July 26, 1981, 33 U.S.T. 3353 (specifying the status of U.S. forces in Egypt); Agreement Under Article VI of the Treaty of Mutual Cooperation and Security: Facilities and Areas and the Status of United States Armed Forces in Japan, Jan. 19, 1960, 11 U.S.T. 1652; Agreement Under Article IV of the Mutual Defense Treaty Between the United States of America and the Republic of Korea, Regarding Facilities and Areas and the Status of United States Armed Forces in the Republic of Korea, 17 U.S.T. 1677, Jul. 9, 1966 [hereinafter U.S.-Korea SOFA].

104. See NATO SOFA, *supra* note 94, art. VII, § 2.

105. *Id.* art. VII, § 3.

In the types of cases that would be prosecutable by the ICC—that is, cases involving alleged acts of genocide, crimes against humanity, or war crimes—existing SOFAs would almost certainly grant primary jurisdiction to the host state. Article 7(3)(a)(i) would not be triggered; indeed, these offenses have been described in the Rome Statute as “threaten[ing] the peace, security, and well-being of the world,”¹⁰⁶ not just of the sending state. Article 7(3)(a)(ii) is arguably relevant insofar as it is conceivable that the crime in question could have been committed “in the performance of official duty.” Under most SOFAs, the sending state’s determination as to whether this is the case will be determinative.¹⁰⁷ Thus, it is theoretically possible that the host state in such a matter would certify the crime, under Article 7(3)(a)(ii), as having been committed pursuant to official duty.

However, Article 7(3)(a)(ii) seems facially irrelevant to genocide, crimes against humanity, or war crimes. It is difficult to imagine a set of facts in which (1) a U.S. servicemember has committed one of these above-mentioned crimes “in the performance of official duty,” and (2) the U.S. government not only has failed categorically to disavow any official connection with the conduct of the accused but in fact

106. Rome Statute, *supra* note 17, at pmbl., cl. 3.

107. *See, e.g.*, Understandings to the Agreement Under Article IV of the Mutual Defense Treaty Between the United States of America and the Republic of Korea, Regarding Facilities and Areas and the Status of United States Armed Forces in the Republic of Korea of July 9, 1966, as Amended, available at http://www.korea.army.mil/sofa/2001sofa_english%20text.pdf (providing that a “duty certificate” issued by (American) Staff Judge Advocate “will be conclusive unless modification is agreed upon”); *see also* Paul J. Conderman, *Jurisdiction*, in THE HANDBOOK OF THE LAW OF VISITING FORCES 111-12 (Dieter Fleck ed., 2001) (further showing that the sending state’s determination is conclusive). However, in exceptional cases where the receiving state disagrees with the sending state’s determination, some SOFAs allow for the receiving state to review the certification through diplomatic negotiations with the sending state. *See id.* at 112 (discussing Germany and Korea); *see also* Mark E. Eichelman, *International Criminal Jurisdiction Issues for the United States Military*, ARMY LAW., Aug. 2000, at 23, 24 (“What is deemed an ‘official duty’ is a unilateral decision made by the United States, though foreign nations can resort to diplomatic negotiations to resolve disputes.”). *But cf.* Gennady M. Danilenko, *The Statute of the International Criminal Court and Third States*, 21 MICH. J. INT’L L. 445, 475 (2000) (arguing that “there seems to be no legal obligation” for receiving state to accept sending state’s determination).

openly has acknowledged that it permitted the conduct to occur under the aegis of official U.S. policy.¹⁰⁸

The jurisdictional framework of the NATO SOFA has been adopted widely in agreements between the United States and its allies; the United Nations and NATO, in stationing their forces abroad, have used a different model for SOFAs involving international or multilateral peacekeeping operations.¹⁰⁹ In these agreements, members of the visiting force “will under all circumstances and at all times be subject to the exclusive jurisdiction of their respective national elements.”¹¹⁰ Such agreements—which categorically vest the sending state with exclusive jurisdiction over its nationals—provide even greater protection for U.S. personnel.

In sum, American personnel accused of genocide, crimes against humanity, or war crimes are subject to the primary concurrent jurisdiction of the host state under NATO-type SOFAs and to the exclusive jurisdiction of the United States in peacekeeping-type SOFAs. It is important to note that the

108. The ICC regime would admittedly undermine the ability of the United States to thwart prosecution by the receiving state by asserting primary jurisdiction and subsequently acquitting the accused, imposing a perfunctory punishment upon conviction, or pardoning the offender. Under most SOFAs, the prohibitions on double jeopardy would bar any further prosecution and make no exception for sham prosecutions. By contrast, Article 20(3) of the Rome Statute expressly empowers the ICC to initiate proceedings notwithstanding the prohibition on double jeopardy if the Court finds that the domestic proceedings “[w]ere for the purpose of shielding the person concerned from criminal responsibility . . .” or “[o]therwise were not conducted independently or impartially in accordance with the norms of due process . . . and were conducted in a manner which . . . was inconsistent with an intent to bring the person concerned to justice.” Rome Statute, *supra* note 17, at art. 20(3).

109. See, e.g., Military Technical Agreement Between the International Security Assistance Force (ISAF) and the Interim Administration of Afghanistan, Annex A, at <http://www.operations.mod.uk/isafmta.doc> [hereinafter ISAF SOFA]; see also Regulation No. 2000/47: On the Status, Privileges and Immunities of KFOR and UNMIK and Their Personnel in Kosovo, Aug. 18, 2000, UN Doc. No. UNMIK/REG/2000/47 [hereinafter KFOR SOFA]; Agreement Between the Republic of Bosnia and Herzegovina and the North Atlantic Treaty Organization Concerning the Status of NATO and Its Personnel, Nov. 21, 1995, 7 Dep’t St. Dispatch 1, 15, 35 I.L.M. 89, 102 (1996); Comprehensive Review of the Whole Question of Peace-Keeping Operations in All Their Aspects, Oct. 9, 1990, UN Doc. No. A/45/594, Annex F: Model Status-of-Forces Agreement for Peacekeeping Operations.

110. ISAF SOFA, *supra* note 109, Annex A at § 1(3).

Treaty of Rome specifically preserves these jurisdictional arrangements. Article 98 of the Rome Statute stipulates:

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.¹¹¹

Article 98(2) is thus consistent with the overarching vision of the ICC as an entity with complementary jurisdiction;¹¹² it deliberately obviates the problem of conflicting duties by enjoining the ICC from obtaining the surrender of persons stationed in states that, by granting such a request, would violate its international obligations under a SOFA. Article 98(2) “was . . . crafted in recognition of the provisions of Status of Forces Agreements, where members of the armed forces of a third State may be present on the territory of the requested State.”¹¹³ Ambassador David Scheffer, who led the U.S. delegation to Rome, has argued that “[e]xisting Status of Forces Agreements already constitute de facto Article 98(2) agreements for personnel in SOFA jurisdictions.”¹¹⁴

111. Rome Statute, *supra* note 17, at art. 98(2).

112. *See id.* at pmb., cl. 10 (“[T]he International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions.”).

113. COMMENTARY ON THE ROME STATUTE OF THE INT’L CRIMINAL COURT 1133 (Otto Triffterer ed., 1999) [hereinafter COMMENTARY ON ROME STATUTE]; *see also* Manoush H. Arsanjani, *The Rome Statute of the International Criminal Court*, 93 AM. J. INT’L L. 22, 41 (1999) (arguing that the main concern of Article 98(2) “is to respect the obligations of host states under status-of-forces agreements”).

114. Scheffer, *supra* note 13, at 90. *Compare* Ruth Wedgwood, *The United States and the International Criminal Court: Achieving a Wider Consensus Through the “Ithaca Package,”* 32 CORNELL INT’L L.J. 535, 541 (1999) (“SOFA agreements bar arrests under ICC jurisdiction . . . in light of Article 98 of the Rome Statute . . .”) with Jordan Paust, *The Reach of ICC Jurisdiction Over Non-Signatory Nationals*, 33 VAND. J. TRANSNAT’L L. 1, 14 (2000) (arguing that existing SOFAs do not qualify as Article 98(2) agreements because they make “no mention of ‘the Court’ created by the Rome Statute and thus [do] not require ‘the consent of a sending State’ ‘to surrender a person of that State to the Court’”) and Danilenko, *supra* note 107, at 474 (“It is not entirely

Thus, it would appear that very few, if any, U.S. operational personnel serve abroad in places where their surrender to the ICC is a realistic issue.

V. THE CONSTITUTIONALITY OF THE ICC

A. *Due Process*

Some commentators argue that U.S. participation in the ICC would be unconstitutional because the ICC does not provide sufficient due process guarantees for U.S. citizens.¹¹⁵ However, this claim is belied by a careful reading of the Rome Statute. Monroe Leigh, former legal adviser of the U.S. Department of State, testified to Congress that “the Treaty of Rome contains the most comprehensive list of due process protections which has so far been promulgated.”¹¹⁶ The Rome Statute expressly provides for many entitlements found in the Bill of Rights as well as those created by American courts, viz., the presumption of innocence,¹¹⁷ the right to a speedy and public trial,¹¹⁸ the right to assistance of counsel,¹¹⁹

clear to what extent the existing status-of-forces agreements provide protection against the ICC’s jurisdiction.”).

Paust is surely correct in his observation that most SOFAs do not expressly discuss the jurisdiction of the ICC. However, it seems reasonable to say that Article 98(2)—which was by all accounts crafted in contemplation of SOFAs—incorporates existing SOFAs into the regime of the ICC. Moreover, since SOFAs do provide that the sending states have *exclusive* or *primary* jurisdiction over their nationals, it would be consistent with the purpose of SOFAs to apply them to the ICC, a body whose jurisdiction is from the outset *complementary*.

To the extent that Danilenko’s argument focuses on the notion that SOFAs only protect against the ICC’s jurisdiction if they provide for “complete immunity,” Danilenko is most likely correct that SOFAs would not block ICC jurisdiction under Article 98(1); however, his argument does not seem particularly relevant with respect to Article 98(2), which raises no questions of immunity at all.

115. See Lee A. Casey & David B. Rivkin, Jr., *The International Criminal Court vs. the American People*, BACKGROUND, Feb. 5, 1999, available at <http://www.heritage.org/Research/InternationalOrganizations/loader.cfm?url=/Commonspot/security/getfile.cfm&PageID=14960.cfm>.

116. *The International Criminal Court: Hearing Before the House Comm. on Int’l Rel.*, 106th Cong. 96 (2000) (statement of Monroe Leigh on behalf of the American Bar Association) [hereinafter Leigh Testimony].

117. Rome Statute, *supra* note 17, at art. 66.

118. *Id.* at art. 67(1), (1)(c).

119. *Id.* at art. 67(1)(b), (d).

the right to remain silent,¹²⁰ the privilege against self-incrimination,¹²¹ the right to a written statement of charges,¹²² the right to confront adverse witnesses,¹²³ the right to compulsory process,¹²⁴ the prohibition against ex post facto crimes,¹²⁵ the protection against double jeopardy,¹²⁶ the freedom from warrantless arrest and search,¹²⁷ the right to be present at trial,¹²⁸ the exclusion of illegally obtained evidence,¹²⁹ and the prohibition against trials in absentia.¹³⁰

One notable feature absent from the safeguards provided by the Rome Statute is trial by jury. As some scholars have written, however, the constitutional issue raised by the prospect of American citizens' being tried without a jury "is not as powerful as it seems."¹³¹ As a practical matter, the crimes triggering the jurisdiction of the ICC "are likely to be committed by Americans, if at all, only in circumstances that would make them subject to American military courts which also do not guarantee trial by jury, even when conducted in the United States."¹³² Leigh pointed this out to the International Relations Committee of the House of Representatives:

[American] servicemen and women . . . are specifically excluded from the guarantee of grand jury presentment in the Fifth Amendment. Under the Sixth Amendment . . . jury trial is guaranteed only "in the State and district wherein the offense shall have been committed." By its terms it has no extraterritorial effect in foreign countries. The Seventh Amendment

120. *Id.* at art. 67(1)(g).

121. *Id.* at arts. 55(1)(a), 67(1)(g).

122. *Id.* at art. 61(3)(a).

123. *Id.* at art. 67(1)(e).

124. *Id.*

125. *Id.* at art. 22.

126. *Id.* at art. 20.

127. *Id.* at arts. 57(3)(a), 58.

128. *Id.* at art. 63.

129. *Id.* at art. 69(7).

130. *Id.* at art. 63.

131. Kristen Boon, *Instances of International Criminal Courts, in* DELEGATING STATE POWERS: THE EFFECT OF TREATY REGIMES ON DEMOCRACY AND SOVEREIGNTY 180 (Thomas M. Franck ed., 2000).

132. *Id.*

by its terms applies only to civil or non-criminal cases, and is therefore not relevant to this issue.¹³³

Meanwhile, U.S. courts have held that jury trials, while important, are not so centrally important as to be constitutionally required in all circumstances, even in the United States. In *Palko v. Connecticut*, Justice Cardozo wrote:

The right to trial by jury and the immunity from prosecution except as the result of an indictment may have value and importance. Even so, they are not of the very essence of a scheme of ordered liberty. To abolish them is not to violate a “principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.”¹³⁴

This is borne out by U.S. extradition practice: Most of the countries to which the United States extradites persons—including American citizens—have no provisions for jury trials. Neither do the Yugoslav and Rwandan Criminal Tribunals. In *Ntakirutimana v. Reno*,¹³⁵ the Fifth Circuit Court of Appeals granted the extradition request of the International Criminal Tribunal for Rwanda (ICTR). Though the Fifth Circuit declined to pass judgment on the adequacy of the ICTR’s due process protections “[d]ue to the limited scope of habeas review,”¹³⁶ the fact that such an inquiry is not included within the scope of habeas review is itself significant.¹³⁷ While it is true that the defendant in *Ntakirutimana* was not a U.S. citizen, the nationality of the defendant did not enter into the court’s decision. As one scholar observed, “[J]ury trials are not an exportable constitutional right”¹³⁸

133. Leigh Testimony, *supra* note 116, at 94.

134. 302 U.S. 319, 325 (1937) (quoting in part *Snyder v. Mass.*, 291 U.S. 97 (1934)).

135. 184 F.3d 419 (5th Cir. 1999), *cert. denied*, 528 U.S. 1135 (2000).

136. *Id.* at 430.

137. *Id.*; *see also* *Garcia-Guillern v. United States*, 450 F.2d 1189, 1192 (1971); *Gallina v. Fraser*, 278 F.2d 77, 79 (2d Cir. 1960) (“We regard it as significant that the procedures which will occur in the demanding country subsequent to extradition were not listed as a matter of a federal court’s consideration”).

138. Boon, *supra* note 131, at 180.

B. Article III

Another constitutional argument against U.S. participation in the ICC is that submitting to the jurisdiction of the Court would violate Article III of the Constitution, which vests exclusive judicial authority in the federal judiciary and the states.¹³⁹ However, as the Supreme Court held in *Hirota v. MacArthur*,¹⁴⁰ U.S. participation in international juridical proceedings—in *Hirota*, holding in custody Japanese prisoners convicted by the International Military Tribunal for the Far East—does not place those courts within the ambit of Article III.¹⁴¹ Though the petitioners in *Hirota* were not American citizens, the nationality of the accused apparently was not relevant to the decision; the *per curiam* opinion reasoned that “the military tribunal . . . has been set up by General MacArthur as the agent of the Allied Powers” and so was not an American court.¹⁴²

In an article examining the constitutional objections to the ICC, Marquardt concluded that the ICC is no more an American court for Article III purposes than are foreign courts to which the United States has extradited suspects:

The crimes with which an accused would be charged would not be derived from United States law[,] . . . the court that tried him would not be an organ of the United States government, and the United States' only role would be to detain and deliver the defendant to the outside jurisdiction and, perhaps, to assist in obtaining evidence or to appear as a complainant.¹⁴³

Louis Henkin has aptly summarized the lack of a constitutional issue with respect to the ICC:

[T]here is nothing in the Constitution that would seem to forbid the United States to agree to an international tribunal, whether sitting in the United States

139. See, e.g., *Senate Comm. on Foreign Relations, International Criminal Court*, S. REP. NO. 103-71, at 24 (1993) (statement of Edwin D. Williamson).

140. 338 U.S. 197 (1948) (*per curiam*).

141. See *id.* at 198 (“We are satisfied that the tribunal sentencing these petitioners is not a tribunal of the United States.”).

142. See *id.*

143. Paul D. Marquardt, *Law Without Borders: The Constitutionality of an International Criminal Court*, 33 COLUM. J. TRANSNAT'L L. 73, 108 (1995).

or elsewhere, that would apply international law to acts committed by individuals in the United States, including U.S. citizens and residents. It would be *international* law that governed their acts and that was being applied by the international tribunal; *international* judicial power which the tribunal was exercising; *international* punishment that was imposed and executed by international authority. The tribunal would not be exercising governmental authority of the United States but the authority of the *international community*, of a group of nations of which the United States was but one, and acting in the same capacity as other states, not as the territorial sovereign.¹⁴⁴

VI. THE LEGALITY OF THE ICC

Critics of the ICC have also argued that the assertion of jurisdiction over U.S. nationals would violate treaty law, asserting that, because the United States is not a party to the Rome Treaty, it and its citizens cannot be made subject to its terms. This objection, however, is a misapprehension of treaty law and, at any rate, ignores the fact that the ICC's jurisdiction is derived from the authority of the states parties—based on principles of universal and territorial jurisdiction—to prosecute heinous violations of international law.

A. *Treaty Law*

Restating customary international law, Article 34 of the Vienna Convention on the Law of Treaties says, "A treaty does not create either obligations or rights for a third State without its consent."¹⁴⁵ By claiming jurisdiction over U.S. nationals, the argument goes, the Court has abrogated the rights of the United States, a nonparty state, in violation of the Vienna Convention.¹⁴⁶

144. LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 269 (2d ed. 1996) (emphasis added) (footnotes omitted).

145. Vienna Convention on the Law of Treaties, *concluded* May 23, 1969, art. 34, 1155 U.N.T.S. 331.

146. See Madeline Morris, *High Crimes and Misconceptions: The ICC and Non-Party States*, 64 *LAW & CONTEMP. PROBS.* 13, 26 (2001) ("The legal objection to ICC jurisdiction over non-party nationals is . . . that, by conferring upon

Yet the United States is a party to several international treaties under which states purport to exercise jurisdiction over nonparty nationals. These include the U.N. Charter,¹⁴⁷ the Geneva Conventions,¹⁴⁸ and the international antiterrorism conventions.¹⁴⁹

The antiterrorism treaties are especially relevant to our inquiry because critics at the time of their negotiation argued that international law did not permit the exercise of jurisdiction over nonparty nationals,¹⁵⁰ while those who defended the treaties responded that limiting the reach of the treaties to nationals of the states parties would frustrate the very purpose of the treaties, i.e., eradicating terrorist activity. That argument has clearly been won by the latter, who argued successfully that

the ICC jurisdiction over non-party nationals, the ICC Treaty would abrogate the pre-existing rights of non-parties which, in turn, would violate the law of treaties.”); David J. Scheffer, *The United States and the International Criminal Court*, 93 AM. J. INT’L L. 12, 18 (1999) (“A fundamental principle of international treaty law is that only states that are party to a treaty should be bound by its terms. Yet Article 12 of the ICC treaty . . . provid[es] the court with jurisdiction over the nationals of a nonparty state (footnote omitted).”).

147. See U.N. CHARTER art. 2, para. 6.

148. See Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, arts. 49-50, 6 U.S.T. 3114, 3146, 75 U.N.T.S. 31, 62 (identifying grave breaches and establishing duty to prosecute); Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, arts 50-51, 6 U.S.T. 3217, 3250, 75 U.N.T.S. 86, 116 (same); Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, arts. 129-30, 6 U.S.T. 3316, 3418-20, 75 U.N.T.S. 136, 236-38 (same) [hereinafter POW Convention]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12 1949, arts. 146-47, 6 U.S.T. 3516, 3616-18, 75 U.N.T.S. 287, arts. 146-47 (same).

149. See Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, art. 4, 22 U.S.T. 1641, 1645, 860 U.N.T.S. 104, 108; Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, art. 5, 24 U.S.T. 565, 570, 974 U.N.T.S. 177, 181; Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, Dec. 14, 1973, art. 3, 28 U.S.T. 1975, 1979, 1035 U.N.T.S. 167, 169; International Convention Against the Taking of Hostages, Dec. 17, 1979, art. 5, T.I.A.S. No. 11,081 at 6, 1316 U.N.T.S. 205, 207.

150. See, e.g., Jordan Paust, *Extradition and United States Prosecution of the Achille Lauro Hostage-Takers: Navigating the Hazards*, 20 VAND. J. TRANSNAT’L L. 235, 254 (1987) (“[U]niversal jurisdiction . . . under the Hostages Convention . . . is highly suspect with regard to defendants who are not nationals of a signatory to the Hostages Convention.”).

any other view “would mean that the community of states is essentially helpless to take legal measures against terrorists who are nationals of states that do not ratify the conventions.”¹⁵¹ The same argument applies in the ICC context: If prosecuting nationals of deviant nonparty states is not the primary impetus for creating the Court, it is surely a significant motivation.

U.S. case law suggests that U.S. courts have accepted the exercise of treaty-based jurisdiction over nonparty nationals. In *United States v. Yunis*,¹⁵² the D.C. Circuit Court of Appeals sustained proceedings against Fawaz Yunis, a Lebanese national accused of hijacking a Jordanian airliner (with two Americans on board) taking off from Beirut. The government had asserted jurisdiction over Yunis pursuant to the Hostage Taking Act,¹⁵³ which implements the Hostages Convention and authorizes the United States to prosecute and punish extraterritorial violations of the Act where the hostages are American nationals. The *Yunis* court affirmed jurisdiction over the accused on the “universal principle” as well as the “passive personal principle.”¹⁵⁴ The fact that Lebanon was not a party to the Hostage Convention and did not consent to the prosecution apparently did not affect the decision of the court.¹⁵⁵ Similarly, in *United States v. Rezaq*,¹⁵⁶ the D.C. Circuit affirmed the prosecution under the Hijacking Convention of a Palestinian national for hijacking an Egyptian aircraft in Greece, despite the fact that he was not the national of a state party to the convention.¹⁵⁷ Thus U.S. foreign policy and case law do not support the notion that treaty law prohibits the exercise of jurisdiction over nonparty nationals.

151. Malvina Halberstam, *Terrorism on the High Seas: The Achille Lauro, Piracy and the IMO Convention on Maritime Safety*, 82 AM. J. INT’L L. 269, 271 n.10 (1988).

152. *United States v. Yunis*, 924 F.2d 1086 (D.C. Cir. 1991).

153. 18 U.S.C. § 1203 (2000).

154. *Yunis*, 924 F.2d at 1091.

155. See Michael P. Scharf, *The United States and the International Criminal Court: The ICC’s Jurisdiction over the Nationals of Non-Party States: A Critique of the U.S. Position*, 64 LAW & CONTEMP. PROBS. 67, 101-02 (2001).

156. 134 F.3d 1121 (D.C. Cir. 1998).

157. *Id.* at 1131 (upholding jurisdiction over Rezaq based on universal jurisdiction).

B. *Jurisdiction of the ICC*

Article 13 of the Rome Statute establishes three avenues by which cases may be brought before the ICC: referral by a state party, referral by the U.N. Security Council acting under Chapter VII of the U.N. Charter, or investigation by the ICC prosecutor.¹⁵⁸ In addition, for any case not referred by the Security Council, Article 12 requires that the Court obtain the consent of the state of the defendant's nationality (here, the United States) or of the territorial state.¹⁵⁹ Since the United States could veto any referrals by the Security Council, that provision does not raise a problem. Any proceedings by the ICC involving U.S. personnel without U.S. consent would have to rest on the two other bases for jurisdiction established by the Treaty of Rome: universality and territoriality.

C. *Universal Jurisdiction*

Under Article 5 of the Rome Statute, which defines the subject-matter jurisdiction of the Court, the ICC has the power to investigate and prosecute crimes of genocide, crimes against humanity, war crimes, and perhaps—once it is defined—the crime of aggression.¹⁶⁰ The basis for this sort of jurisdiction is the principle of universality, whereby “[a] state has jurisdiction to define and prescribe punishment for cer-

158. Rome Statute, *supra* note 17, at art. 13.

159. *Id.* at art. 12(2).

160. *Id.* at art. 5. The Court cannot exercise jurisdiction over the crime of aggression until the Rome Statute is amended in accordance with Articles 121 and 123 to provide a definition of aggression. *Id.* at art. 5(2). The United States has criticized the inclusion of aggression, arguing that the U.N. Security Council has the exclusive prerogative to determine whether or not aggression has taken place. *See supra* text accompanying notes 24 and 68. However, this objection is not a persuasive reason to reject the ICC, since Article 121 provides that the amendment will not become effective until seven years after its adoption, and even then, states parties (but not non-parties) may choose to opt out of the ICC's jurisdiction for the crime of aggression. Consequently, any reservations the United States may have regarding the definition of aggression actually would be better served by full participation within the treaty regime, rather than wholesale rejection. *See Scheffer, supra* note 13, at 97 (“The United States could ‘opt-out’ forever of any amendment that would add an actionable crime of aggression . . . provided, in the event any such amendment is to be acted upon at the seven-year review conference, the United States becomes a State Party prior to that conference.”).

tain offenses recognized by the community of nations as of universal concern.”¹⁶¹ The ICC represents the institutional manifestation of a pooling by states of their several universal jurisdictions and the delegation of that jurisdiction to an international court. This is not a radical innovation in international law, which has long recognized that *erga omnes* crimes could be prosecuted by a sovereign state in its own courts, regardless of whether the accused was a citizen or the act had been committed on the prosecuting state’s territory. If any state may extend its own courts’ jurisdiction to these “universal” offenses against humanity, then a large majority of states acting in concert may surely pool their jurisdictions over such offenses and delegate them to an international tribunal established by them.

Article 6, which defines the crime of genocide, is congruent with the authoritative definition found in Article II of the Genocide Convention.¹⁶² It criminalizes acts “committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group,” including “[k]illing members of the group,” “[c]ausing serious bodily or mental harm to members of the group,” “[d]eliberately inflicting on the group” unlivable conditions, “[i]mposing measures intended to prevent births within the group,” and “[f]orcibly transferring children of the group to another group.”¹⁶³ The United States is a party to the Genocide Convention and has not challenged the definition of genocide under Article 6 or its characterization as an *erga omnes* crime.¹⁶⁴

Article 7 defines “crimes against humanity” to include acts knowingly “committed as part of a widespread or systematic attack directed against any civilian population,” including murder; extermination; enslavement; deportation and forcible transfer; “[i]mprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law”; torture; rape, forced prostitution, and other sexual of-

161. RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES § 404.

162. Convention on the Prevention and Punishment of Genocide, Dec. 9, 1948, art. 2, 78 U.N.T.S. 277, 280.

163. Rome Statute, *supra* note 17, at art. 6.

164. See Scheffer, *supra* note 13, at 13 (“[W]e were prepared to accept a treaty regime in which any state party would need to accept the automatic jurisdiction of [the ICC] over the crime of genocide . . .”).

fenses; “[p]ersecution against any identifiable group or collectivity on . . . grounds that are universally recognized as impermissible under international law”; “[e]nforced disappearance of persons”; apartheid; and “[o]ther inhumane acts of a similar character.”¹⁶⁵ While the universality of crimes against humanity is widely agreed, the specifics cause some difficulty. For example, it has been argued that customary international law requires that the crimes against humanity be committed in connection with an armed conflict.¹⁶⁶

The notion that international law requires a “war nexus” is ultimately based on the Charter for the Nuremberg Tribunals,¹⁶⁷ which defined crimes against humanity as

murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds *in execution of or in connection with any crime within the jurisdiction of the Tribunal* [viz., “crimes against peace” and “war crimes”] whether or not in violation of the law of the country where perpetrated.¹⁶⁸

By requiring that the offenses be committed along with “crimes against peace” and “war crimes,” the Nuremberg Char-

165. Rome Statute, *supra* note 17, at art. 7.

166. See Darryl Robinson, *Defining “Crimes Against Humanity” at the Rome Conference*, 93 AM. J. INT’L L. 43, 45 (1999) (“A minority of delegations participating in the Rome Conference strongly felt that crimes against humanity could be committed only in the context of an armed conflict.”). Some defenders of the Court have argued that the definitional question is solved by looking to Article 22 of the Rome Statute, which adopts the principle of *nullum crimen sine lege* and states, “A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court.” Rome Statute, *supra* note 17, at art. 22. Unfortunately, this appeal to Article 22 fails to resolve the issue. Indeed, the very point in contention is whether the drafters of the Rome Statute remained faithful to Article 22 in defining crimes against humanity and war crimes or whether they overreached by including within the Court’s jurisdiction crimes not yet considered to be offenses of universal jurisdiction.

167. Charter of the International Military Tribunal for the Trial of the Major War Criminals, *appended to* Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis (London Agreement), Aug. 8, 1945, 58 Stat. 1544, as amended, Protocol to Agreement and Charter, Oct. 6, 1945 [hereinafter Nuremberg Charter].

168. *Id.* at art. 6(c) (emphasis added).

ter indirectly required a nexus with an armed conflict. This requirement was adopted in the Charter for the Tokyo Tribunal¹⁶⁹ and most recently in the statute for the ICTY, which provides for jurisdiction over several “crimes *when committed in armed conflict*, whether international or internal in character, and directed against any civilian population.”¹⁷⁰

However, as the International Law Commission noted in its 1996 Report on the Work of Its Forty-Eighth Session to the U.N. General Assembly,¹⁷¹ the war nexus requirement found in the Nuremberg and Tokyo Charters was not adopted in instruments such as the Allied Control Council Law No. 10 establishing lesser tribunals in Germany or in other subsequent instruments.¹⁷² Also, the statute for the ICTR makes no mention of armed conflict in its definition of crimes against humanity.¹⁷³ After the *Tadic* case, it is clear that international law does not require a war nexus.¹⁷⁴

Article 8 of the Treaty of Rome defines war crimes to include grave breaches of the 1949 Geneva Conventions,¹⁷⁵

169. Charter of the International Military Tribunal for the Far East, Jan. 19, 1946 (General Orders No. 1), as amended, General Orders No. 20, Apr. 26, 1946, TIAS No. 1589 [hereinafter Tokyo Charter].

170. Amended Statute of the International Criminal Tribunal for the Former Yugoslavia, at <http://www.un.org/icty/legaldoc/index.htm> (statute updated May 17, 2002) (emphasis added); see also COMMENTARY ON ROME STATUTE, *supra* note 113, at 125 n.22.

171. U.N. GAOR, 51st Sess., Supp. No. 10, U.N. Doc. A/51/10 (1996) [hereinafter ILC Report].

172. See *id.* at 96.

173. *Statute of the International Criminal Tribunal for Rwanda*, S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg., Annex, U.N. Doc S/RES/955 (1994), available at <http://www.ictt.org/wwwroot/ENGLISH/basicdocs/statute.html>; see also COMMENTARY ON ROME STATUTE, *supra* note 113, at 125 n.22.

174. *Prosecutor v. Tadic*, Appeal on Jurisdiction, No. IT-94-I-AR72, ¶ 141 (Int'l Crim. Trib. for the Former Yugoslavia Appeal Chamber, Oct. 2, 1995), at <http://www.un.org/icty/index.html> (“It is by now a settled rule of customary international law that crimes against humanity do not require a connection to international armed conflict. Indeed . . . customary international law may not require a connection between crimes against humanity and any conflict at all.”). The U.S. delegation to Rome itself took this view, arguing that “contemporary international law makes it clear that no war nexus for crimes against humanity is required” (footnote omitted). See Scheffer, *supra* note 146, at 14.

175. See Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, *supra* note 148, art. 50; Geneva Convention for the Amelioration of the Condition of the Wounded,

twenty-six “[o]ther serious violations of the laws and customs applicable in international armed conflict,”¹⁷⁶ as well as other offenses committed in intrastate conflicts.¹⁷⁷ Some have challenged Article 8’s definition of war crimes, arguing that customary international law recognizes universal jurisdiction only for grave breaches of the Geneva Conventions.

However, the distinction between grave breaches of the Geneva Conventions and other violations does not speak to the question of universal jurisdiction, but rather to the question of whether states are specifically *obligated* to bring offenders to trial.¹⁷⁸ Under Article 129 of the POW Convention, states parties are obligated to prosecute grave breaches of the convention;¹⁷⁹ Article 129 also states, however, that states parties “shall take measures necessary for the suppression” of non-grave breaches of the convention.¹⁸⁰ The United States itself has not limited its jurisdiction over war crimes to grave breaches. The 1997 Expanded War Crimes Act establishes extraterritorial jurisdiction for war crimes where the victim or perpetrator is American. The act’s definition of war crimes is not limited to grave breaches of the conventions.¹⁸¹

Sick and Shipwrecked Members of Armed Forces at Sea, *supra* note 148, art. 51; POW Convention, *supra* note 148, art. 130; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, *supra* note 148, art. 147. As codified in the Rome Statute, grave breaches include wilful killing; torture and inhuman treatment; “[w]ilfully causing great suffering, or serious injury to body or health”; “[e]xtensive destruction . . . not justified by military necessity and carried out unlawfully and wantonly”; “[c]ompelling a . . . protected person to serve in the forces of a hostile Power”; “[w]ilfully depriving a . . . protected person of the rights of fair and regular trial”; unlawful deportation, transfer, or confinement; and taking of hostages. Rome Statute, *supra* note 17, at art. 8(2)(a).

176. Rome Statute, *supra* note 17, at art. 8(2)(b).

177. *See id.* at art. 8(2)(c)-(f).

178. *See* Theodor Meron, *International Criminalization of Internal Atrocities*, 89 AM. J. INT’L L. 554, 569 (1995) (“Just because the Geneva Conventions created the obligation of *aut dedere aut judicare* only with regard to grave breaches does not mean that other breaches of the Geneva Conventions may not be punished by any state party to the Conventions.”); Scharf, *supra* note 155, at 92 (“[T]here is a universal *obligation* to prosecute . . . grave breaches and a universal *right* to prosecute . . . other violations” (emphasis added)).

179. *See* POW Convention, *supra* note 148, art. 129.

180. *Id.*

181. *See* 18 U.S.C. § 2441 (2002).

The Rome Statute does not subject U.S. personnel to new liability; acts of genocide, crimes against humanity, and war crimes are subject to universal jurisdiction. Even in the absence of the ICC, a state would be within its prerogatives under customary law to prosecute and punish U.S. nationals who have committed the acts set forth in the Rome Statute.

D. *Territorial Jurisdiction*

In any prosecution or investigation of a U.S. national, the ICC would have to obtain the consent of the territorial state before proceeding. Through its consent, the territorial state delegates its territorial jurisdiction to the Court. The jurisdiction of a state over activities taking place on its territory is firmly rooted in international law.¹⁸² In the United States, the principle of territorial jurisdiction traces back to *Schooner Exchange v. McFaddon*¹⁸³ and persists in section 441 of the *Restatement (Third) of Foreign Relations Law*.¹⁸⁴

182. See LORI F. DAMROSCH ET AL., INTERNATIONAL LAW: CASES AND MATERIALS (4th ed. 2001) § 13.2.A.1 (“It is well settled that a state may exercise jurisdiction with respect to all persons or things within its territory.”).

183. 11 U.S. (7 Cranch) 116, 136 (“The jurisdiction of the nation within its own territory is necessarily exclusive and absolute . . . [and] is susceptible of no limitation not imposed by itself.”).

184. Section 441 of the *Restatement (Third) of Foreign Relations Law* discusses potential conflicts of law between the territorial state and the state of nationality:

- (1) In general, a state may not require a person
 - (a) to do an act in another state that is prohibited by the law of that state or by the law of the state of which he is a national; or
 - (b) to refrain from doing an act in another state that is required by the law of that state or by the law of the state of which he is a national.
- (2) In general, a state may require a person of foreign nationality
 - (a) to do an act in that state even if it is prohibited by the law of the state of which he is a national; or
 - (b) to refrain from doing an act in that state even if it is required by the law of the state of which he is a national.

RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES § 441 (1987). Under § 441, the only state that may require a person to act or forbear in violation of the law of that person’s nationality is the *territorial* state. *But cf. id.* § 403(3) (limiting the exercise of jurisdiction where doing so would be unreasonable).

Recently, moreover, the United States has adopted a particularly assertive form of the territoriality principle known as the “effects theory” or the “objective territorial principle” under which the U.S. government has as-

The European Convention on the Transfer of Proceedings supports the contention that a state may delegate its territorial jurisdiction to another state.¹⁸⁵ The convention complements the standard extradition scenario: If a perpetrator commits a crime in State X and is later apprehended in State Y, the convention provides that State X may request and authorize State Y to prosecute the perpetrator.¹⁸⁶ Similarly, under the Rome Treaty, when the state on whose territory the offense was committed consents to bring the matter before the ICC, the territorial state has in effect “deputized” the Court to proceed in its place.¹⁸⁷

served jurisdiction over offshore activities—typically in cases involving anti-trust claims and drug trafficking—on the grounds that the actions will have effects within the territory of the United States. *See, e.g.*, *Hartford Fire Ins. v. California*, 509 U.S. 764, 796 (1993) (holding that, in antitrust cases, the U.S. government has jurisdiction over offshore activities that produce substantial effects within U.S. territory); *United States v. Aluminum Co. of America*, 148 F.2d 416, 444 (2d Cir. 1945); *United States v. Wright-Barker*, 784 F.2d 161, 168 (3d Cir. 1986); *United States v. Cadena*, 585 F.2d 1252, 1257 (5th Cir. 1978); *United States v. Noriega*, 746 F. Supp. 1506, 1512 (S.D. Fla. 1990), *aff’d*, 117 F.3d 1206 (11th Cir. 1997) (“[T]he United States has long possessed the ability to attach criminal consequences to acts occurring outside this country which produce effects within the United States.”); *cf.* *Strassheim v. Daily*, 221 U.S. 280, 285 (1911) (involving a fugitive indicted for bribery and obtaining money from the state by false pretenses) (“Acts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a State in punishing the cause of the harm as if he had been present at the effect, if the State should succeed in getting him within its power.”). *See generally* DAMROSCH ET AL., *supra* note 182, § 13.2.A.2 (discussing objective territoriality principle).

185. European Convention on the Transfer of Proceedings in Criminal Matters, May 15, 1972, EUROP. T.S. No. 73., art. 8 (providing that a state may vest another state that has custody over an accused offender with its authority to prosecute the offense).

186. *See* van der Vyver, *supra* note 12, at 818.

187. In the typical case, the perpetrator is a national of the territorial state. If the perpetrator is a national of a third state, some have argued that the consent of the state of nationality is required. *Compare* Scharf, *supra* note 155, at 113-15 (“[T]he Convention does in fact permit transfer of proceedings in the absence of the consent of the state of nationality . . .”) and van der Vyver, *supra* note 12, at 818-19 (“Nothing would prevent the custodial State, in the circumstances envisaged by the Convention, to prosecute an offender who is the national of a third State. Nor would consent of the national State in such instances be required for the custodial State to exercise jurisdiction as requested and authorized by the territorial State.”) with Morris, *supra* note 146, at 44 (“[T]here has been no case of a transfer of criminal proceedings under the convention in which the defendant was a

E. Summary

The exercise of jurisdiction by the ICC over a U.S. national would not violate international law. There is ample precedent under treaty law for states to make treaties that recognize jurisdiction over nonparty nationals. Moreover, the jurisdiction of the ICC stems from the principles of universal and territorial jurisdiction. The Court's jurisdiction may be seen as the collective designation by the states parties of their several universal jurisdictions, as well as the deputization by the territorial state of its jurisdiction.

VII. CONCLUSION: U.S. PRIMACY AND INTERNATIONAL INSTITUTIONS

In this Article, we critically analyzed and explored the U.S. objections to the ICC. Upon examining the deployment of U.S. personnel relative to existing SOFAs, we concluded that the objections are not based on realistic fears about the dangers posed to Americans serving abroad, but rather stem from a particular ideology regarding international law and its institutions. After analyzing the legal foundations of the U.S. position, we found that the ideology underlying the U.S. view of the Treaty of Rome also is not supported by international law. At its core, the U.S. position must be viewed as another manifestation of a starkly unilateralist foreign policy.¹⁸⁸

It seems to be Washington's view that the United States enjoys a position of such dominance that it can achieve its policy objectives on its own, without seeking the assistance of the international community, and that its military and economic dominance enables it to compel the support—or at least the acquiescence—of that community. In this view, participation in international bodies such as the ICC offers few benefits and

national of a non-party to the convention and the state of nationality did not consent to the transfer.”). Morris concedes, however, that, even if the third state did not consent, transfer “is not precluded by the terms of that convention.” Morris, *supra* note 146, at 44.

188. The reluctance to participate in international and multilateral regimes is also demonstrated by the unilateral repudiation of the Anti-Ballistic Missile Treaty, as well as by the failure to ratify the Comprehensive Test Ban Treaty, the Kyoto Protocol, and the land mines treaty. See, e.g., Thom Shanker, *White House Says the U.S. Is Not a Loner, Just Choosy*, N.Y. TIMES, July 31, 2001, at A1.

imposes unnecessary constraints on U.S. foreign-policy makers. This view of American primacy has powerful advocates,¹⁸⁹ but even they must be open to evidence that participation in the Treaty of Rome is in our national interest.

First, states parties to the ICC regime enjoy prerogatives denied to nonparty states. Were it a party, the United States would participate in nominating and electing the judges and selecting the prosecutors.¹⁹⁰ As a state party, the United States would have an influential voice in the Assembly of States Parties and the process by which further crimes such as aggression are defined.¹⁹¹ Moreover, as a state party, the United States would have the ability to exempt its nationals from war crimes prosecutions for the first seven years after it begins participating in the Court¹⁹² and would also have the right to exempt itself from prosecution under any amendment that would add any new crime (including aggression) to the ICC's jurisdiction.¹⁹³

Second, even in this age of U.S. predominance, the United States can only rarely achieve fully its foreign-policy objectives without some measure of international cooperation. The relative success of the ICTR and ICTY, strongly supported by Washington, have demonstrated the effectiveness of such institutions in punishing and deterring offenders. They bring the weight of universal public opinion to bear, through respected institutions of international law, on those whose actions violate the *jus cogens* of an incipient international community.¹⁹⁴

189. The hegemony of the United States is pointedly demonstrated by its successes in carving out an exemption for Americans from the jurisdiction of the ICC from the U.N. Security Council, *see supra* note 61 and accompanying text, and in entering into Article 98(2) agreements with the European Union and a growing list of non-E.U. nations (twelve as of October 1, 2002), *see* Paul Meller, *Europeans to Exempt U.S. from War Court*, N.Y. TIMES, Oct. 1, 2002, at A6. It is worth noting, however, that the Article 98(2) agreements also demonstrate that U.S. primacy can to some extent minimize the putative costs of participating in international institutions.

190. *See* Rome Statute, *supra* note 17, at arts. 36(4) (selection of judges), 42(4) (selection of prosecutors).

191. *See id.* at art. 112 (duties of Assembly).

192. *See id.* at art. 124.

193. *See id.* at art. 123(1); *see also supra* note 159.

194. *See, e.g.*, Robert O. Keohane and Lisa L. Martin, *The Promise of Institutional Theory*, in THEORIES OF WAR AND PEACE 384, 387 (Michael E. Brown

Third, active U.S. participation in international bodies that have universal support is presumptively in the national interest. Failing to take this into account has costs.¹⁹⁵ The tendency, especially in recent years, for the United States to opt out of universal regimes may be on the verge of creating a tangible anger against Washington that manifests itself in opposition even to relatively benign American interests and initiatives.¹⁹⁶ None of this argues for U.S. agreement when it is clearly in the national interest to demur. We have argued that this is not such a case. The costs of joining the Treaty of Rome are illusory, the benefits real.

As the most powerful nation in the world, the United States has an opportunity, through participation in the Court, to advance respect for individual human rights and the rule of law. Such institution building has its risks, but without it, every crisis must be faced *de novo* and, too often, alone.

Finally, the unipolar system in which the United States currently operates is extraordinarily unlikely to persist.¹⁹⁷ As such, U.S. policymakers should be guided not only by the immediate costs and benefits of U.S. policies on the interests of

et al. eds., 1995) ("Institutions can provide information, reduce transaction costs, make commitments more credible, establish focal points for coordination, and in general facilitate the operations of reciprocity.").

195. See, e.g., Samuel P. Huntington, *The Lonely Superpower*, FOREIGN AFF., Mar.-Apr. 1999, at 35, 42-43 ("[Many countries] view the United States as intrusive, interventionist, exploitative, unilateralist, hegemonic, hypocritical, and applying double standards, engaging in what they label 'financial imperialism' and 'intellectual colonialism,' with a foreign policy driven overwhelmingly by domestic politics.").

196. This argument admittedly rests on certain assumptions about how states respond to the exertion of diplomatic, economic, or military pressure. While the current unilateralist posture apparently assumes states are increasingly compliant in the face of pressure, it seems at least as reasonable to say that states are more resistant when pressured. See generally STEPHEN M. WALT, *THE ORIGINS OF ALLIANCES* 17-32 (1987) (arguing that states are more likely to align against a perceived rival, especially if the rival state's intentions are seen as aggressive).

197. See, e.g., Christopher Layne, *The Unipolar Illusion*, in *THE COLD WAR AND AFTER: PROSPECTS FOR PEACE* 244, 273 (Sean M. Lynn-Jones & Steven E. Miller eds., expanded ed. 1997) ("Inevitably, a strategy of preponderance will fail. A strategy of more or less benign hegemony does not prevent the emergence of new great powers."). In fact, the extreme unilateralism of the United States may accelerate the relative decline of American dominance insofar as such policies alienate the United States from its European allies and underscore the perceived need for a more united, self-reliant Europe.

the United States in its current capacity as a superpower, but also by how these strategies will affect the United States in what is likely to become, in time, an increasingly multipolar world.¹⁹⁸ It is a shrewd investment for those with a surplus of ready power to invest some of it in institutions of manifest fairness, for they will need to rely on law and fairness when their power no longer suffices to achieve their ends.

198. See Gary Jonathan Bass, *Stay the Hand of Vengeance* 282-83 (2000) ("Liberal states would be better off in a world where aggression and violent bigotry are punished Western militaries . . . have a particular interest in the enforcement of the laws of war.").