Undoing the global constitution: UN Security Council action on the International Criminal Court

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On 1 July 2002 the Statute of the International Criminal Court (ICC) entered into force. This event was the culmination of international law-making of the twentieth century. Throughout the past century, international constitutional structures had gradually emerged. These included the recognition that there exists an international legal community featuring legal rules applicable to all states, whether or not it can be demonstrated in relation to every one of them that they have specifically consented to these rules (general international law). The interests of the 'international community as a whole' in the integrity of the legal system came to be reflected in the doctrine of *jus cogens*. According to this doctrine, no state can contract out of a common core of international legal rules, including the prohibition of the use of force and minimum rules for the protection of human beings. It was also accepted that all states have a legal interest in compliance with these core rules by all other states (*erga omnes* effect). Indeed, through the concept of serious breaches of obligations under peremptory norms of general international law, the international community as a whole is moving towards common action at the state level against violations of these rules. This includes the obligations not to recognize the results of gross or systematic *jus cogens* violations, not to assist the offending state in maintaining in place these results and to cooperate in seeking to reverse the infraction. Finally, through the doctrine of universality, all perpetrators of violations against certain core rules are threatened, directly under international law, with individual criminal responsibility for their conduct. In relation to such offences, any state can act as an agent of the international constitution and exercise jurisdiction on behalf of the international community as a whole.

The Statute of the International Criminal Court strengthens and consolidates the doctrine of universality in three ways. In the first place, the Statute refines the list of international crimes that attract genuinely universal jurisdiction. Second, the Statute affirms the duty of states to exercise their criminal jurisdiction over such crimes. Third, it establishes an international constitutional organ to organize the exercise of jurisdiction in relation to universal crimes by way of multi-level international governance. According to the design of the Court,

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states remain free to exercise jurisdiction over crimes attracting universal jurisdiction. Indeed, they may be obliged to try or extradite to another state willing to exercise jurisdiction. However, where states are unable or unwilling to discharge such a function, or where the United Nations Security Council so decrees in the international community interest, prosecutorial action can now be taken on the international plane. In this way, the ICC adds a missing piece to the international constitutional design for the protection of fundamental values of the international community as a whole.

The achievement of the 1998 Rome Conference that led to the adoption of the Statute is, of course, not free from controversy.[1] To persuade hesitant or reluctant states to support the venture, a number of unhappy compromises had to be made. However, even after the conclusion of the negotiations, the United States launched an aggressive diplomatic campaign to undermine the core concepts that underpin the ICC. This campaign ranged from the deployment of national legislation against the Court, to the obstruction of crucial decisions of the UN Security Council and to pressure directed against individual states to contract out of the ICC regime they had just joined. This programme of action triggered resistance and condemnation by a very large number of other states, claiming to defend the interests of the international community as a whole against this unilateral assault on the ICC. In short, in this instance the vision of a global legal community shared equally by all clashed in the most profound way yet with the newly emerging asymmetrical view of the role of law in the unipolar world represented by Washington. In order to understand the structural issues that underlie this clash, it is first necessary to consider briefly the background to the establishment of the Tribunal, before examining the objections that were put forward individually.

I. Background to the establishment of the ICC

The drafting of the Statute of the International Criminal Court took literally half a century. Work started at the United Nations in 1948, when the horrors of the Second World War were fresh in the minds of diplomats and campaigners

[1] J. R. Bolton, 'The risks and the weaknesses of the International Criminal Court from America's perspective', *Virginia Journal of International Law, Vol.* 41, 2000, p. 186; L A. Casey, 'The case against the International Criminal Court', *Fordham International Law Journal*, vol. 25, 2002, p. 840; J. Gurule, 'United States opposition to the 1998 Rome Statute establishing and International Criminal Court: is the Court's jurisdiction truly complementary to national criminal jurisdictions'? *Cornell International Law Journal*, vol. 46, 2001/2, p. 1; M. Morris, 'High crimes and misconceptions: the ICC and non-party states', *Law and Contemporary Problems,* vol. 64, 2001, p.13; J. Paust, 'The reach of ICC jurisdiction over non-signatory nationals', *Vanderbilt Journal of Transnational Law*, vol. 33, 2000, cited here from *http://vanderbilt.edu/journal/33-1-1.html*; S. Rosenne, 'Poor drafting and imperfect organization: flaws to overcome in the Rome Statute', *Virginia Journal of International Law*, vol. 41, (2000), p. 164; M. P. Scharf, 'The ICC's jurisdiction over the nationals of non-party states: a critique of the US position', *Law and Contemporary Problems*, vol. 67, 2001, p. 67; D. J. Scheffer, 'Staying the course with the International Criminal Court', *Cornell International Law Journal*, vol. 47, 2002, p. 47; J. Washburn, 'The International Criminal Court arrives—the US position: status and prospects', *Fordham International Law Journal*, vol. 25, 2002, p. 873, R. Wedgwood, 'The International Criminal Court: an American view', *European Journal of International Law* (1999), p. 93.

for international justice. The impetus derived from Nuremberg and Tokyo was to be transformed into a permanent court with jurisdiction over the gravest offences against peace and security of mankind, complementing the UN system of collective security. From the beginning, therefore, the Court was conceived as a key element of post war international organization centred on the UN Charter.

Initial progress towards a Court statute was swift—a first draft prepared by a committee of experts was already available in 1951. However, due to Cold War pressures the project could not be completed, despite occasional attempts to do so. The definition of crimes to be covered posed a particular problem. In addition to the uncontroversial international crimes that attract genuinely universal jurisdiction, additional concepts were introduced. These appeared to transport the political disputes of the day into the drafting effort, including debates about the criminal nature of apartheid, the legality of the threat or use of nuclear weapons and the use of force by states as a crime against peace. Moreover, traditional notions of legal positivism emphasizing state sovereignty and the decisive effect of state consent in the creation of international legal rules and institutions regained in strength over the naturalism that had dominated the immediate post war atmosphere. By 1989, however, conditions were right for another attempt. International law had advanced considerably. Human rights and humanitarian law, in particular, had undermined state-centred thinking and there seemed to arise a second chance to institutionalize some of the gains that had been made in this respect through the creation of a permanent international criminal court. Once more, the UN General Assembly invited the UN International Law Commission (ILC) to concern itself with the issue of international criminal jurisdiction.

In fact, the Assembly had initially considered that the Court should act in support of states whose judicial systems were unable to cope with drugs offences and terrorism cases. The experience of small Caribbean island states in relation to the former and that of certain Latin American states in relation to the latter had confirmed the need for a complementary layer of jurisdiction to which recourse could be had by weak states in certain crisis situations. However, by 1990, the invasion by Iraq of Kuwait had led to a change in emphasis in this project. Iraq engaged in considerable violations of humanitarian law in occupied Kuwait and also in serious human rights violations against foreigners trapped in Iraq and Kuwait at the time. It took nearly six months to launch a military campaign to oppose the invasion. During this period of comparative helplessness, the idea of threatening the Iraqi leadership and Iraqi servicemen with internationalized war crimes prosecutions was born. The assertion of individual responsibility at the international level, it was hoped, might deter further excesses. While the United Nations Security Council did not progress beyond a threat of criminal action in relation to occupied Kuwait, it went further when the magnitude of the humanitarian crises became apparent, first in the former Yugoslavia and then in Rwanda. In both cases, decisive military intervention was not contemplated while the atrocities were at their worst. Instead, the threat of the exercise of international criminal jurisdiction was again meant to moderate the

conduct of the local actors and to establish accountability after the event. To make that threat credible, the UN Security Council established the two ad hoc tribunals, covering the former Yugoslavia[2] and Rwanda[3] respectively. The Statutes for both tribunals were drafted in an incredibly short period of time and brought into force through a simple decision of the UN Security Council acting under Chapter VII.

Against this background, it was possible for the International Law Commission to act with speed and decisiveness. The ILC picked up on the original plan for a more comprehensive international criminal court, going beyond drugs offences and terrorism. However, at the same time, it uncoupled the issue of the Court from the more controversial aspects of the 'political' crimes against peace and security of mankind.[4] By 1994 it had generated a compact draft statute for review by a UN *ad hoc* Committee. The draft was addressed to the most serious concerns of the international community as a whole, namely genocide, the crime of aggression, serious violations of the laws and customs applicable in armed conflict, crimes against humanity, and certain other crimes established in treaties and agreed to be linked to the tribunal through an annexe to the statute.[5] While the international community's interest in such grave crimes was recognized, the ILC already introduced the notion of complementarity at this early stage. That is to say, individual states would, in the first instance, be responsible for the exercise of jurisdiction over these crimes. International action would only be envisaged where national trial procedures were not available or were they were ineffective.[6] The UN Security Council would, however, be empowered to refer instances to the tribunal when acting under Chapter VII of the UN Charter. States party to the Genocide Convention could also seek to initiate proceedings in relation to that specific crime. State complaints covering other crimes could also be launched, provided the custodial state of the accused and the state on whose territory the offence had been committed had accepted the jurisdiction of the ICC.[7]

The ILC draft was subjected to intensive review by a UN *ad hoc* Committee and by a Preparatory Committee that was charged with preparing for a Diplomatic

[2] Security Council Resolutions 808 (1992), 827 (1993).

[3] Security Council Resolution 955 (1994).

[4] Instead, a separate Draft Code of Crimes against Peace and Security of Mankind was adopted by the ILC at its 48th session of 1996, 1996 (II) *Yearbook of the International Law Commission*, UN Doc. A/48/10. An earlier draft of 1991 had proven to be highly controversial. That draft included the proposed crimes of aggression, threat of aggression, intervention, colonial domination, genocide, apartheid, systematic or mass violations of human rights, exceptionally serious war crimes, recruitment, use, financing and training of mercenaries, international terrorism and wilful and severe damage to the environment. UN Doc. A/46/10. The 1996 draft, in contrast, reflected the 'new realism' in the ILC, addressing only genocide, crimes against humanity, crimes against UN personnel and war crimes.

[5] Draft Article 20.

[6] Preambular paragraph 3.

[7] However, a complaint concerning aggression could only be brought once the Security Council had first determined that the state subjected to the complaint had committed such an act. No state complaints would be permissible in relation to situations dealt with by the Security Council under Chapter VII, unless the Council decides otherwise.

Conference on the draft Statute to be held in Rome in 1998.[8] The contest over the nature and powers of the Court was carried into the Rome Conference itself, where success or failure was uncertain until the very last day. The Statute was adopted in Rome on 17 July 1998 by a vote of 120 to 7, with 21 abstentions.[9] It represented in some ways a surprising advance on the far more compact ILC draft. While the ILC had let itself be guided by a desire, finally, to produce a modest vision of the Court that would be readily acceptable to most states, Rome proved that the majority of states were in fact ready for a more ambitious instrument. Of course, the battle for the final shape of the Statute was a difficult one. Up to the end, the Conference made concessions to a small number of states opposed to some of the key features of the court that were emerging. These included the question of its jurisdictional reach and the issue of mechanisms triggering the application of the powers of the Tribunal. The United States delegation, in particular, managed to obtain a number of crucial concessions from the conference that were granted in the perhaps unrealistic hope that Washington might, in the end, be persuaded to sign and ratify the Statute. Some of these changes will negatively affect the actual operation of the Court. However, the extremely large number of signatures, and the surprisingly rapid achievement of the 60 ratifications necessary to bring the Statute into force, helped to restore faith and confidence in the project. Indeed, after half a century of abortive attempts, it seemed that the organized international community was almost eager to engage in an act of international constitutional law-making in this instance. The horror of the events in the former Yugoslavia and in Rwanda had undoubtedly contributed to this sense of urgency, as had the extraordinarily well coordinated global campaign of high quality NGOs in support of the Rome Conference.

The surprisingly rapid coming into force of the Statute was mirrored by increasingly vigorous action on the part of the United States government to undermine it.[10] The essence of US objections can be summarized as follows:[11]

- The ICC exposes US citizens to criminal sanction in relation to crimes not established by US legislators;
- The ICC exposes US citizens to an international judicial mechanism not approved by the US government that threatens sovereign decision-making, its right of self-defence and US participation in international humanitarian or anti-terrorism operations;

[8] The important reports of these bodies, revealing the progression of key concepts in the Statute, have been handily assembled in M. C. Bassiouni, ed., *The Statute of the International Criminal Court*, New York: Transnational Publishers, Inc, 1998.

[9] The US was in somewhat odd company among the states voting against: China, Iraq, Libya, Yemen, Quatar and Israel. Israel has since signed.

[10] It is not unusual for documents of this kind to take 10 years of more to attract the ratifications necessary for entry into force, for instance in the case of the UN Covenant on Civil and Political Rights. The US considered it a significant success to have obtained what it considered to be a very high threshold of 60 ratifications of the ICC Statute, assuming that this would put off entry into force to the distant future.

[11] E.g.,: Marc Grossman, Under Secretary for Political Affairs, American Foreign Policy and the International Criminal Court, at *http://www.state.gov/p/9949.htm*, accessed on 1 June 2002.

- The ICC is open to abuse. It is not subject to a system of checks and balances and undermines the pre-eminent role of the UN Security Council.

These challenges will be addressed in turn.

II. Universality of criminal sanctions

The ICC Statute aims to 'put an end to impunity' for the perpetrators of 'the most serious crimes of concern to the international community as a whole'.[12] Initially, the Court exercises jurisdiction over the crime of genocide, crimes against humanity and war crimes.[13] These crimes have been defined in the Statute and also, in greater detail, in the so-called Elements of Crimes adopted by the Preparatory Commission for the ICC. The Statute also foresees jurisdiction over the crime of aggression, although it is first necessary to generate agreement on a definition of that crime among the treaty parties. The treaty parties may also add drugs offences or terrorism to the list, or develop further the definitions of the crimes already established in the Statute. No such changes or additions will occur before a review conference that is to take place after the expiry of seven years from the coming into force of the Statute.

The US objections to the Court have triggered a debate about the nature of universal jurisdiction in international law. Traditionally, it was claimed under the so-called Lotus principle that states are free to claim jurisdiction to legislate, to adjudicate and perhaps also to enforce their laws in relation to all matters. This legal power would only stop where it would collide with the positive rights of other states. However, this proposition is not, in fact, in tune with the realities of international law. Instead, the international constitutional order arranges and delimits the jurisdictional competencies of states. States are entitled to claim jurisdiction in relation to:

- Matters that occur within their own territory. This territorial jurisdiction also applies to foreign actors that have ventured into that territory;
- Certain conduct of their own nationals, even while these may be abroad;
- Matters that take place abroad but have a significant effect within the territorial jurisdiction of the state, including especially those affecting its security;
- Serious offences against its nationals even when these offences take place abroad. This title to jurisdiction is, however, controversial and normally only applied when states have agreed to apply it in a treaty, for example anti-terrorism conventions;
- Universal crimes.

This assignment of jurisdictional powers reveals a fairly simple pattern of territoriality and nationality. In principle, the state enjoys the presumption of complete jurisdiction in relation to its own territory, subject to human rights, immunities

[12] ICC Statute, Preamble.
[13] Article 5.

and the states own constitutional establishment of jurisdiction. The state may also seek to regulate action taken abroad that takes significant effect within its own territory. In relation to other issues taking place outside of the territory of the state, jurisdiction follows its own nationals, as perpetrators or perhaps as victims of crimes.

The entitlement to the exercise of universal jurisdiction breaks this pattern. It is neither based on territory nor on nationality. Instead, it is based on global community interest. Certain types of conduct are deemed so harmful to all mankind that any state can exercise jurisdiction in relation to them. 'Domestic courts and prosecutors bringing the perpetrators to justice are not acting on behalf of their own domestic legal system but on behalf of the international legal order.'[14]

Manifestly, this type of jurisdiction is potentially quite expansive. After all, this doctrine accepts that a state can try a foreigner for a crime committed abroad that has no connection whatever with its territory or nationals. Hence, it can only be applied in cases where the crime subject to universality has been well established in international law and where the crime has been clearly defined. Traditionally, universal crimes were established in customary international law (piracy, slave trade and, later, crimes against humanity). These can be considered genuinely universal crimes, as they are opposable to all states. Since 1945, however, universality of crimes has also been influenced by treaties. For instance, a crime, such as genocide, may be established and defined in a treaty. However, that treaty may not in itself claim universality in relation to the crime.[15] Nevertheless, over time the crime may be endowed with genuine universality by virtue of customary international law.

The situation is more difficult in relation to treaties that seek to establish universality directly. The four 1949 Geneva Conventions, for instance, impose both a right and a duty on states to prosecute grave breaches of the conventions. Hence, a state party to the Conventions may be under a duty to prosecute a national of a non-party state that has not accepted the claim to universality contained in the treaties. In the case of the Geneva law, this issue is easily resolved, inasmuch as the conventions have in fact managed to attract virtual universality in membership. Moreover, it is now uncontroversial that grave breaches of the conventions are also covered by genuine universality in customary law. However, in the case of other treaties, the issue may be more complex. While the treaty may aspire to the achievement of genuine universality, it may, either for a time, or perhaps forever, only attract limited support. Such treaties, which include human rights treaties (torture, apartheid), and anti-terrorism and anti-drugs conventions, establish in the first instance only special universality that operates exclusively among the states party. In some instances,

[14] M. T. Kamminga, 'Lessons learned from the exercise of universal jurisdiction in respect of gross human rights offences', *Human Rights Quarterly*, vol. 23, 2001, p. 941, 943.

[15] In fact, the Genocide Convention only establishes jurisdiction for the state on whose territory the offence occurred and for an international tribunal that might be established, see Article VI of the *Convention on the Prevention and Punishment of the Crime of Genocide*, 1948.

such as the 1984 Convention against Torture, the crime established in the treaty is rapidly accepted into general custom and transformed into genuine universality. But where this does not occur, the question is whether special universality can be opposed to non-parties. Or, to put it in another way, can a state invoke special universality against a national of a state that is not a party to the relevant convention?

This issue has been raised in relation to the ICC in two ways. First, a few US authors have started to doubt whether there are in fact any genuinely universal crimes other than piracy and the slave trade.[16] By undermining the universality of the crimes addressed in the ICC statute, they seek to undermine the legitimacy of the ICC, or rather its legitimacy in relation to non-parties. The listing of crimes subject to ICC jurisdiction in Article 5 of the Statute is thus reduced to a provision of special universality featuring in a new treaty. Hence, this enumeration is taken to be an offer to accept universal jurisdiction in relation to crimes listed. A state that does not accept that offer by ratifying the Statute is not bound to accept the universality of the crimes concerned.

Of course, the ICC Statute does not establish the crimes of genocide, crimes against humanity and war crimes afresh in international law. These already enjoy genuine universality. Hence, the failure of the US to become a party to the ICC does not exempt its citizens from the universality already established.

A slightly more subtle argument put by US opponents of the ICC deserves more attention. While the genuine universality of the crime of genocide, crimes against humanity and grave breaches of the Geneva law is not doubted, it is asserted that the ICC Statute expands upon the definitions of two out of these three crimes. Article 7 of the Statute offers an extensive definition of crimes against humanity. It includes, for instance, deportation or forcible transfer of populations, sexual slavery and other forms of sexual violence, enforced disappearance of persons and the crime of apartheid.[17] Article 8 on war crimes goes beyond the crimes established as grave breaches of the Geneva law, offering 'innovations' such as the intentional attacks on personnel or installations involved in international humanitarian operations or peace-keeping missions. The Statute is also quite liberal in ascribing universality to crimes committed in internal armed conflicts.

As some of the definitions of crimes are expansive and new, it is argued, the ICC Statute as a whole cannot be invoked against non-parties by virtue of genuine universality.[18] This argument misses, however, the influence of the Rome negotiations and of the subsequent work of the Preparatory Committee. Given the virtually universal representation at the Conference, it can be taken to have exercised the function of an international constitutional convention on the issue of universality. The negotiation process itself made manifest universal

[16] E.g., Casey, note 1 above, p. 856.
[17] The chapeau of this provision indicates that these acts must have been committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.
[18] In this sense, see Casey, Morris and Bolton, note 1 above.

agreement on elements of crimes against humanity and war crimes as genuinely universal crimes. Instead of inventing new elements of the crimes at issue, the meeting translated into express and positive terms recent customary law developments in this area. These developments were based, *inter alia*, on the responses of states and international bodies to the conflicts in the former Yugoslavia, Rwanda, Somalia, Liberia, Sierra Leone, Congo, etc.[19]

The US itself was in fact one of the most effective and technically competent delegations in this process, both before the Rome conference, at Rome and even afterwards, when the elements of crimes were being defined.[20] The US government has been one of the keenest advocates of the application of the advanced definitions of crimes against humanity and war crimes in some of the instances noted above. It cannot, credibly, doubt the genuine universality of these crimes after having led their development and after having charged other states with them. Moreover, in an important concession, the US was even given the possibility of opting out of ICC jurisdiction on war crimes for a period of seven years, undermining further opposition to the Statute on grounds of expansive universality.[21]

The US is also objecting to the fact that the conference of state parties can by a majority of seven-eighths amend the definition of crimes and add to them over time, starting seven years after entry into force of the Statute. However, with respect to crimes covered by the jurisdiction of the Court, a state party can opt out of any newly established or modified crime.[22] This would leave a non-state party in the odd position that its nationals would be exposed to this expansion of jurisdiction, whereas state-parties can protect themselves from it. However, it is not really possible that seven-eighths of the expected near universal membership of the ICC (by 2009) would be able to agree on anything other than a confirmation of other genuinely universal crimes, rather than the creation of new crimes that are merely subject to special universality.

III. International law-making and institution-building

The US objection to universality in the ICC Statute is also somewhat odd for another reason. While the Statute and Elements of Crimes provide the most authoritative and up-to-date definition of some crimes that enjoy genuine universality, the ICC itself does not really act on the basis of universality alone. During the negotiations preceding Rome, the German delegation had argued that the Court should be able to exercise its power on the basis of universality. After all, if all states can exercise jurisdiction individually in relation to a universal crime,

[19] See Scharf, note 1 above, p. 88 et seq, also Kamminga, note 1 above, on expanding universality in practice.
[20] See in detail Sheffer, note 1 above.
[21] Article 124. Another protection for the US was included by restricting the jurisdiction of the Court to war crimes 'in particular' when committed as part of a plan or policy or as part of a large-scale commission of such crimes. Article 8 (1).
[22] Article 121 (5). A state may also withdraw with immediate effect if it opposes amendments.

then they can also delegate this power to an international institution. A second approach, proposed by Korea, was more cautious. It proposed that the Court should exercise jurisdiction in relation to universal crimes if at least one of the following had agreed to the exercise of jurisdiction by becoming part of the Statute:

- The state where the offence took place;
- The home state of the victim of the offence;
- The state of nationality of the offender;
- The state of custody of the offender.

Essentially, in this way the ICC would be empowered to act according to the titles to jurisdiction that classically appertain to states in connection with territory or nationality. However, the Rome conference was even more restrictive, in part in response to US pressure. According to Article 12, the ICC can only exercise its jurisdiction if either the State on the territory of which the conduct in question occurred or the state of which the person accused is a national has accepted the jurisdiction of the Court.[23] This restriction has been described as an act of political restraint on the part of the drafters of the Statute.[24]

The US government, however, has regarded this formula as anything but restraint. It has argued that it is unlawful to establish an international institution that can exercise powers in relation to nationals of states that are not party to the arrangement. Defenders of this position have attempted to analogize the establishment of the Court to the creation of a mechanism to settle inter-state disputes. It is still axiomatic in international law that a state cannot be subjected to binding third-party dispute settlement unless it has consented in some way to such a process. Hence, it is asserted, the ICC cannot exercise powers over US nationals unless the US becomes a party to the Statute.[25]

This argument deliberately confuses the concepts of state responsibility and of individual responsibility. While compulsory jurisdiction over states has remained elusive, it is the very essence of the doctrine of universality that it can be applied by any state over the national of any other state without the need to obtain the consent from the latter state. Moreover, as was noted already, in this instance the Tribunal would only be able to exercise jurisdiction in relation to the national of a non-party state if the state where the offence has occurred has accepted the jurisdiction of the Court. It is entirely uncontested that the territorial state of an offence has the legal right to exercise jurisdiction even over foreigners. Still, the question arises as to whether universal jurisdiction, or at least territorial jurisdiction over foreigners committing such crimes, can be assigned to an international institution.

Proponents of the ICC point to the precedent of the Nuremberg or Tokyo Tribunals, and the Yugoslav and Rwanda courts. In these instances, international

[23] Acceptance can take the form of being party to the Statute or ad hoc acceptance of jurisdiction for the case, and also for the wider circumstances surrounding that case.
[24] Scharf, note 1 above, at 77.
[25] This analogy is drawn extensively by Morris, above, note 1, at 16.

institutions were established to administer criminal jurisdiction against nationals of states that had not specifically consented. Opponents invoke the special circumstances of these cases, including the fact that the victorious allies could claim to act for Germany and Japan after their surrender, or the fact that the UN Security Council can act under Chapter VII, whereas a treaty-making conference such as the Rome Conference is lacking such powers.[26] However, this argument misses the point, or rather unhelpfully reverses the burden of proof. The ICC was established through an act of international constitutional law-making by virtually all states.[27] In order to oppose such an act of law-making, the US would need to be able to point to a violation of its rights through this act. This would appear difficult if not impossible. As was already noted, the right to exercise jurisdiction even over US nationals in cases of crimes identified in Article 5 of the Statute cannot be doubted, be it under universality or territorial jurisdiction. There is no international legal obligation that bars the transfer of such jurisdiction an international body. Hence, the right of the US as a State are not at issue. The only relevant legal issue relates to the need for an international tribunal that is constituted virtually by the international legal community as a whole to respect the fair trial and other guarantees that are held by the individual suspects by way of human rights.

IV. Risk of abuse of international constitutional authority

A final US argument points to the risk of abuse of the international constitutional authority that has been claimed by the supporters of the ICC. It is asserted that the Court would function without the application of checks and balances that would normally be expected. One such means of control would be the use of the Security Council as a trigger mechanism for the Court. That is to say, the ICC would only be able to mount an investigation if so instructed by the Council. This argument was lost in the negotiations as early as 1996.[28] As one US commentator puts it, the scheme of the Rome Statute amounts to a 'palace revolution against the competencies assigned by the [UN] Charter itself'.[29] Essentially, the members of the Security Council would lose control over the exercise of international criminal jurisdiction.

Of course, it is not immediately obvious why the exercise of international criminal jurisdiction should be dependent on a positive decision of the Security Council, rather than considerations of law and justice performed by an appropriate legal body. The scheme of the Statute does allow the Security Council to initiate proceedings in the ICC in the exercise of its primary responsibility in relation to international peace and security. However, the Statute also permits

[26] See again the excellent discussion between Morris and Scharf cited above.
[27] A different position might be taken where a small number of states seek to establish an international tribunal with a view to avoiding international responsibility for the misconduct of a trial.
[28] Washburton, note 1 above, p. 868.
[29] Wedgwood, note 1 above, p. 97.

states parties to initiate proceedings and, crucially, also the Prosecutor of the Court. It is this independent exercise of initiative by an objective and authoritative international agency to which the United States objects, fearing politically motivated action.

According to the Statute, the ICC prosecutor will be a legal expert of the highest calibre. Even if he or she would wish to initiate proceedings in the pursuit of unjustified political objectives, a case can only progress once a pre-trial chamber of ICC judges has approved it.[30] Several other challenges to admissibility and to the exercise of jurisdiction are possible at various stages of the proceedings. Most fundamentally, the principle of complementarity imposes an important bar. According to this principle, the Prosecutor must suspend action if he or she is informed that a state entitled to exercise jurisdiction (most likely the home state of the accused or the custodial state) has launched an investigation or prosecution, if such a state has decided not to prosecute after such an investigation, or if the state has already conducted a trial against the accused in the case. In short, a state can protect its nationals from action by the ICC by fulfilling its own jurisdictional powers or responsibilities in relation to him or her.

The ICC can only proceed with a case if it is demonstrated that the relevant state has in fact been unwilling to or unable 'genuinely to carry out the investigation or prosecution'.[31] US opponents of the Court object to the ability of an international body to determine whether or not the US has been willing and able to mount a genuine investigation or prosecution.[32] However, the Statute itself provides a detailed definition of 'unwilling or unable'. The Tribunal would have to find that a state had undertaken the investigation of prosecution with a view to shielding the individual from the exercise of jurisdiction, there had been an unjustified delay inconsistent with an intent to bring the accused to justice or the proceedings were not conducted independently and impartially and consistently with the intent to bring the person concerned to justice. All three grounds appear to be indications of a manifest abuse of the complementarity provision by a state aiming to frustrate the obligation of bringing the accused to trial in any jurisdiction, be it national or international.

In addition to a significant number of quite complex and complicated additional safeguards against excessive prosecutorial zeal that will make it quite difficult for the ICC ever to exercise its jurisdiction, the Security Council has been given the power to request a deferral of a case for a period of 12 months. Acting under Chapter VII, the Council can assert its primary responsibility over international peace and security in specific cases, ensuring that the overall structure of the UN Charter remains unchanged.[33]

[30] According to Article 15 of the Statute, the Prosecutor needs to obtain 'authorization' to proceed even just with an investigation.
[31] ICC Statute, Article 17 (1), see Paust, note 1 above, p. 2.
[32] Casey, note 1 above, p. 865; Gurule, p. 23.
[33] Bolton, note 1 above, p. 198, however this does require an affirmative vote of the Council.

V. US action and the response

The US campaign against the ICC has taken a number of forms. Initially, an attempt was made to secure US interests from within the circle of potential parties to the Statute. The US participated vigorously in the sessions of the Preparatory Commission, seeking to secure opt-outs for itself or exemptions for its service personnel. In addition, further safeguards were negotiated in relation to challenges to the activities of the Prosecutors.[34] On 31 December 2000, the last possible date for signature established at Rome, the waning Clinton administration signed the Convention to ensure a continued voice in the important negotiations on the procedure of the Court. Oddly, this was accompanied by a declaration that the US would not ratify in the foreseeable future.

The second avenue of attack was pursued through the US Congress. In 2000 it debated the extraordinary *American Servicemembers' Protection Act*.[35] That document sought to prohibit any US cooperation with, or support of, the ICC. It also precludes US participation in UN peacekeeping or enforcement missions after entry into force of the Rome Statute, unless a permanent or *ad hoc* exemption of US forces from the purview of the Tribunal has been obtained, or unless the host state of the operation is itself not a party to the Statute. It also precludes US military assistance to any state party, unless that state has concluded an agreement with the US preventing the surrender of US personnel to the Court.[36] In its most celebrated provision, the draft 'authorized' the US President 'to use all means necessary and appropriate to bring about the release from captivity' of US service members and other personnel detained by or on behalf of the Court.[37] While this draft was not initially adopted, budgetary legislation was passed and signed into law by newly installed US President, George W. Bush which precluded US activities in support of the Tribunal. By August 2002, however, the full package of anti-ICC legislation was adopted as part of authorizing instruments for funding the 'war on terror', including the 'invading The Hague' provision and the prohibition of military assistance to states party to the Statute that had not concluded agreements with the US exempting its personnel from it.[38]

In parallel with the adoption of domestic legislation, US foreign policy became more activist. The Bush administration announced very early in its term that it would not ever ratify the Statute. On 6 May, US Under Secretary of State for Arms Control and International Security, John R. Bolton, informed the UN Secretary-General, the depository of the ICC statute, that the US 'does

[34] See the detailed account by Scheffer, note 1 above.
[35] 106th Congress, 2nd Session, H.R. 4654; S. 2726, 14 June 2000.
[36] However, this provision would not apply to NATO members, to other major allies (such as Australia, Egypt, Israel, Japan, the Republic of Korea and New Zealand, or to Taiwan).
[37] The term 'all means necessary' was considered sufficiently similar to UN terminology of 'all necessary measures'—which grants authority to use military force—to impel the Royal Netherlands government to send a high level mission to Washington, seeking assurances that this would not imply a claim to authority to invade The Hague, the seat of the tribunal and the likely location of suspects that might offer themselves for rescue.
[38] Supplemental Appropriations Bill, HR 4775, presented for signature by the US President on 26 July 2002 and signed on 2 August, PL 107-206.

not intend to become a party to the treaty. Accordingly, the United States has no legal obligations arising from its signature on December 31, 2000.'[39]

That same month, with the entry into force of the Statute suddenly looming, the US threatened to obstruct the adoption of a Security Council Resolution concerning East Timor unless US peacekeepers were to be exempted from the purview of the Court.[40] However, the battle was joined in earnest when the UN mandates for Bosnia and Herzegovina came up for renewal. These mandates, due to expire on 21 June, covered the international police task force operating in that state directly under UN control, and the 19,000 member NATO stabilization force.[41] The US contributed some 46 police personnel and 2,500 NATO troops. Washington demanded either a blanket exemption of its personnel from all peacekeeping missions, or a specific exemption for each of those missions that involved US personnel, starting with the two Bosnia operations. When no agreement could be reached on this issue, the mandate was provisionally extended to 30 June, the day before the coming into force of the Rome Statute.[42]

On 30 June, the US government formally vetoed the extension of both mandates.[43] It justified this step with reference to the arguments considered above, and also by pointing to the unique exposure of US personnel to possible prosecution, given its significant role in peacekeeping.[44] This created a grave constitutional crisis for the United Nations. After all, the US government openly admitted that it was strongly in favour of the continuation of the Bosnia operation. Its decision to veto rather seemed to be connected with the battle about the reach and effectiveness of the ICC—a matter extraneous to the issue at hand. Previously, a similar attitude by the government of China, which had brought about the termination of the UN mission in Macedonia at an absolutely critical point in the history of that country, had been rightly condemned.[45]

As the representative of France pointed out during the Security Council debate, the US could not really argue that its opposition to the ICC would necessarily have to result in the termination of the Bosnia mission. Instead of taking this step, it would have been preferable for the US to resolve the issue by removing its small number of police personnel, the French delegate argued.[46]

[39] US Department of State, Press Release, 6 May 2002.

[40] The US participated with only three soldiers in the operation which, it argued, it could withdraw before 1 July. Hence, no veto would be necessary.

[41] Security Council Resolution 1357 (2001).

[42] Security Council Resolution 1418 (2002).

[43] 13 votes in favour, US voting against, Bulgaria abstaining, UN Document S/PV.4363, SC/4737, 30 June 2002. The IPTF mandate was meant to have been extended until the end of the year, when the EU would take over the mission, the SFOR mandate was meant to be extended for a full year.

[44] On this issue, see, e.g., M. Zwanenburg, 'The Statute for an International Criminal Court and the United States: peacekeepers under fire'?, *European Journal of International Law*, vol. 10, (1999), p. 125.

[45] China had reacted to the decision of the FYR of Macedonia to recognize the Taiwan government as the government of China—a move that has been reversed since.

[46] See note 41 above. It was assumed that SFOR could continue operating under the authority of the Dayton accords itself. As Dayton reflected the consent of the government of Bosnia and Herzegovina to the presence of the force on its territory, no Chapter VII would be legally required, it was argued. As the force was not a UN mission, but instead a NATO operation, the latter organization could perhaps provide a mandate under those circumstances.

Rather than withdrawing from the IPTF mission, which was scheduled to be taken over by the EU at the end of the year in any event, the US claimed the right to prevent all other states from continuing the operation unless its demands relating to the ICC were met.

To facilitate further discussions, a further temporary extension of the UN mandate was granted. When the members of the Council attempted to achieve an accommodation of US interests through closed-door meetings and consultations, the government of Canada, whose representative had chaired the Rome Conference and the Preparatory Commission, responded by calling for an open session of the Security Council to address this crisis.[47] 39 delegations addressed the Council, representing all of the major geographical regions and political systems of the world.[48] Most delegates expressly rejected the attempt of one state effectively to rewrite a multilateral treaty concluded by a significant segment of the international community as a whole, abusing its position in the Security Council to that end.[49] After all, at the time of the debate, 139 states, or three quarters of all states, had signed the Statute and 76, close to half, had ratified within only four years. Several states asserted that the US was pushing the Council to exceed its authority and to act unlawfully. In short, in this debate the international community as a whole articulated and defended its entitlement to engage in international constitutional law-making against the wishes of the United States.[50] It was the most pronounced struggle about the nature of international law in the unipolar world thus far.

The relevant Balkans mandates were extended in the end, after the Security Council had approved Resolution 1422 (2002). That resolution was adopted under Chapter VII, although it did not identify the threat to international peace and security justifying such action.[51] It requested that the ICC:

> if a case arises involving current or former officials or personnel from a contributing State not a party of the Rome Statute over acts or omissions relating to a United Nations established or authorized operations, shall for a twelve-month period starting 1 July 2002

[47] UN Documents S/PV.4567; SC/7445/Rev.1, 10 July 2002.

[48] Even the observer for Switzerland took the floor. The UN Secretary-General has also addressed a letter to the US Secretary of State

[49] Canada introduced the debate in this vein, arguing that the Council is not empowered to rewrite treaties. In exceeding its mandate in this way, the Council would undermine its credibility. South Africa, too, expressly denied a mandate of the Council to reinterpret or amend treaties that had been agreed by the rest of the UN membership and noted the disturbing implications for the rest of the UN member states if the US policy of veto over another issue would bring about this result. Similar points were put by Ireland, Costa Rica, speaking on behalf of the Rio Group, Mauritius, Mexico, Colombia, Thailand, Singapore, Venezuela, Fiji, Samoa, Malaysia, Ukraine, Guinea, Brazil, Sierra Leone and Iran. Jordan warned that the Council was edging beyond its authority. New Zealand rejected the attempt to establish a double standard in this way. India, a non-signatory, warned the Council against allowing itself to be undermined by its own decisions, as did fellow non-signatory Cuba. Lichtenstein even threatened that the UN membership might have to question the legality of one of the decisions of the Council, threatening the credibility of the United Nations.

[50] The term 'international community' is sometimes viewed with suspicion by international relations scholars. In international law, however, this term has a technical meaning, relating to the process of generating high status international rules of international constitutional significance.

[51] Article 39 of the UN Charter.

not commence or proceed with investigation or prosecution of any such case, unless the Security Council decides otherwise;

The Council also 'expressed its intention to renew the request' under the same conditions each year for further 12-months periods 'for as long as may be necessary'. Essentially, therefore, the US had obtained for itself and for other non-parties to the ICC Statute a potentially permanent exemption from the purview of the Court with respect to UN established or authorized operations. The decision was highly dubious in terms of the way it had been obtained, given the abuse of the US veto power in relation to the Balkan mission. It was probably unlawful in terms of the UN Charter. Chapter VII of the Charter is not available as a means of legislation, or super-legislation at the behest of the one or other state. The superior powers of the Chapter VII can only be deployed in response to a concrete and actual threat to international peace and security. The possible loss of the US as a force-contributing state cannot conceivably be invoked as such a threat. Finally, the resolution amounts to an interference with the ICC Statute. As several states had argued in the earlier session of the Council, Article 16 of the Statute had not been intended to provide for the possibility of a blanket exemption for a state or a group of states. Instead, it was meant to give the Council the opportunity to assert its primary responsibility over matters of peace and security in very concrete instances, for example when immediate ICC action might have interfered with a peace process. A continuous renewal of an Article 16 action will also have been hardly envisaged.

The adoption of Resolution 1422 (2002) absolved the US from ICC action in relation to UN authorized operations. However, it does not cover operations undertaken by the US outside of a UN mandate, including the so-called war on terror and other unilateral or coalition operations. To address this issue, the US sought to exploit and perhaps misuse another provision in the ICC Statute. According to Article 98, the Court may not proceed with a request for surrender or assistance that would require the requested state to act inconsistently with its obligations under international law. This provision was intended to ensure that a state is not subjected to two conflicting obligations, say one to surrender a suspect to the ICC and another to extradite an individual to his or her home state. In particular, Status of Forces Agreements for armed forces stationed abroad will often assign jurisdiction over crimes committed by the foreign force to their own home state, rather than the receiving state.

Unfortunately, the Military Technical Agreement between the International Security Assistance Force (ISAF) and the Interim Administration of Afghanistan, negotiated in the wake of the Bonn Agreement of 5 December 2001 and Security Council Resolution 1386 (2001), went beyond such standard practice. Paragraph 4 of Annex A to the agreement stated:[52]

[52] On file with the author.

The Interim Administration agree that ISAF and supporting personnel, including associated liaison personnel, may not be surrendered to, or otherwise transferred to the custody of, an international tribunal or any other entity of state without the express consent of the contributing nation.

While the drafters of this provision may not have had the ICC in mind, the US based a campaign to persuade other states to sign agreements precluding transfers of US personnel to the ICC on this purported precedent. A first such agreement was signed on 1 August 2002 with Romania, when the US also announced its intention to conclude similar arrangements with 'a large number of countries'.[53] The US reportedly connected this issue with NATO membership for candidate states and used other means of pressure to achieve its aims, including the threat of the loss of aid.[54] Once again, both style and substance of this campaign was subject to some doubt. Article 98 had been intended principally to protect existing treaty arrangements. It was certainly not meant to provide an open door towards an effective revision of the treaty through an ever denser network of bilateral agreements concluded with only that end in mind.

VI. Conclusion

The US position on the ICC is as simple as it is challenging for the international constitutional order. The ICC, it is feared, would 'transfer the ultimate authority to judge the policies adopted' by the US government to a remote place beyond the control of US legislators and officials. It will do this on the basis of values that may or may not be 'American'.[55] This is particularly unacceptable because it is felt that the US carries greater responsibility for military operations, be they within or outside of the UN framework. Hence, the US personnel and perhaps even politicians would be prime targets of the Tribunal.

On their merits, these views are difficult to understand. The values protected by the ICC are the universally agreed core values of the international community as a whole which the United States has done much to establish and strengthen and to which it claims to remain committed. This certainly covers the prohibition of genocide, crimes against humanity and grave and persistent war crimes. Should there be doubts about the genuinely universal character of some war crimes, an opt-out would have been available to the US for at least seven years in relation to them. The more controversial possible crime of aggression would also not be operational for at least seven years. When this crime is made actionable, it would be on the basis of the universally agreed standards relating to the prohibition of the use of force under the United

[53] *http://www.state.gov/r/pa/prs/ps/2002/12393.htm*, accessed on 15 August 2002.
[54] W. Pfaff, 'The International Criminal Court, if forced to choose, Europe will ditch NATO', *International Herald Tribune*, 17/18August 2002, p. 4, the EU reported answered with threatening that states concluding such agreements would jeopardize their chances of EU membership. E. Becker, US wars that backers of Tribunal may lose aid, *International Herald Tribune*, 12 August 2002, p. 1.
[55] Casey, see note 1 above, pp. 843, 846.

Nations Charter. However, until the end of this present decade, and probably beyond, the US could have obtained the benefits of membership merely by accepting ICC jurisdiction in relation to the uncontroversial international crimes of genocide and crimes against humanity. Moreover, as a party to the ICC, the US would have been able to protect itself against any changes to the jurisdictional reach of the Court, even if these changes had been endorsed by the very high threshold of seven-eighths of its membership, through the opt-out contained in Article 121 of the Statute.

However, one does not gain the impression that US policy-makers would be greatly impressed by whatever arguments one might make to demonstrate that the ICC does not impose upon the US standards of conduct that are not already in existence. Instead, the argument appears to be directed against universality itself, however well established in international constitutional law that concept might be. The idea that jurisdiction may be exercised in the absence of US consent by foreign or international courts in relation to US servicemen and women is deemed highly suspect. The reason appears to be that universality cannot be 'controlled' through unilateral US action. It already exists as part of the global legal order and it seems difficult for the US to extricate itself from the concept. The debate over the ICC, on the other hand, gives rise to the illusion that the US can, after all, in deciding not to join, remove itself from its application.

The US itself has had no hesitation in having its courts apply its jurisdiction extraterritorially.[56] The US is also party to several treaties that claim to establish a jurisdictional base to try nationals of state and non-state parties alike, especially in relation to drugs trafficking and terrorism.[57] The US even invaded Panama, in part to obtain custody of its head of state, General Manuel A. Noriega, for the purposes of trial for drugs offences committed abroad. It required Libya to surrender the Lockerbie suspects to a foreign court, despite Tripoli's assertion that its constitution prohibits the extradition of its own nationals. And the US has been at the forefront in insisting that other states must comply with the international exercise of criminal jurisdiction without having given their consent when this was mandated by the UN Security Council it controls (at least in the negative sense of being able to veto action against itself).

On the other hand, in view of the Pinochet case, and the attempts to indict Henry Kissinger and Ariel Sharon and others abroad, the United States has awakened to what it perceives to be risks of judicial activism connected with universal jurisdiction. However, while these concerns may be warranted in relation to the exercise of universal jurisdiction by some national courts in the future, it seems far-fetched to transpose them to the context of the ICC. The ICC is bounded by narrow limits of temporal and of subject matter jurisdiction. Instead of full universality, it requires the consent of the territorial state of the offence or of the national state of the offender. Its procedure is subject to the all

[56] This is even admitted by Wedgwood, note 1, p. 99.
[57] Sharf, see note 1 above, p. 101.

pervasive principle of complementarity that allows a state to move a case from the Court into its own sphere of control. The Prosecutor is under tight control by highly selected judges and numerous challenges to admissibility and jurisdiction are possible. Through previously existing Article 98 agreements and Article 16 Security Council action the Court can still be divested of authority to proceed in individual cases if all of these hurdles fail to inhibit action. And even if the Court were to proceed, it would do so according to an international interpretation of the standards of international criminal responsibility and under highly developed fair trial safeguards.

Once again, it does not seem that it would be possible to persuade the US government of the benefits of these sadly curtailed powers of the Court in the exercise of the limited jurisdiction it possesses, however strong the points just made. The very principle that an international body can, at least in theory, exercise jurisdiction over US servicemen and women and officials appears unacceptable, whatever the limitations and double or triple safeguards against abuse.[58] However, this principle is not necessarily applicable to all states. At one stage, the US proposed that the exemption from Court action for non-party nationals might not apply in relation to 'rogue' or 'aggressor states'. Hence, only those states 'acting responsibly in the international community and honoring the principle of complementarity' would be safe from the reach of the ICC.[59] Presumably it would be the UN Security Council, controlled by the permanent members, that would lead the determination of which states are not acting responsibly.

In addition to appearing to reject the universality of universality, the second underlying objection thus relates to the establishment by the vast majority of the international community of states of a legal regime that the United States can neither control nor obstruct. In the past, the US has been able to opt out of certain treaty regimes that aspired to universality, whether they relate to weapons bans, prohibitions of the use or testing of certain weapons, humanitarian law, human rights treaties or climate control and environmental regulation. Since treaties do not bind third states, the US remained unaffected by obligations contracted into by others, even if it was virtually the entire organized international community. Some of these regimes could function without the participation of the US, others cannot really achieve their aims in the absence of Washington's adherence and are therefore more or less defunct. The ICC, however, is different. Here, the participant states went beyond what most of them considered reasonable to accommodate US concerns. When it became clear that the US would not participate, the international community refused to desist from its legislative project and instead established a body that exercises functions *erga omnes*. That is to say, the states created a regime that administers universal (or at least territorial) jurisdiction in relation to all individuals, whether

[58] See Bolton, note 1 above, p. 186.
[59] Scheffer, note 1 above, p. 68.

or not they are nationals of state-parties. As such an action does not breach the legal rights of the United States, it is difficult to object effectively. In view of this situation, the US administration had no hesitation to respond by launching a campaign of political blackmail in the UN Security Council that was, unfortunately, not sufficiently resisted. The Council debate provided a forum for a large number of states to record their objection to the attempt of a permanent member to misuse Chapter VII powers. As the UN Secretary-General put it in an unusually tough demarche to the US Secretary of State, this would fly 'in the face of treaty law since it would force States that have ratified the Rome Statute to accept a resolution that literally amends the treaty' and it would greatly discredit the UN.[60] However, Resolution 1422 (2002) was nevertheless adopted, although at least its proposed automatic extension for further 12 months periods could be avoided. As the UN resolution covered only UN mandated operations, the US launched a track-two campaign of pressuring states into abandoning their right and obligation to cooperate with the Court through bilateral treaties. Hence, through a manifest abuse of two provisions in the Statute, Article 16 and Article 98, the US is gradually moving toward the establishment of a *lex USA* in this area of regulation. Significant damage has been done in the process to the credibility of the UN Security Council and to the progress of international constitutional law at the beginning of the new millennium.

[60] Letter from the UN Secretary- General to US Secretary of State Colin Powell, 3 July 2002, on file with the author.