

The U.N. Security Council's Referral of the Crimes in Darfur to the International Criminal Court in Light of U.S. Opposition to the Court:

Implications for the International Criminal Court's Functions and Status

By
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I. INTRODUCTION

On March 31, 2005, the United Nations Security Council referred the situation in Darfur to the International Criminal Court ("ICC"). The decision of the United States to abstain from the Security Council's vote, rather than exercise its veto power as many expected, allows the ICC to exercise criminal jurisdiction over the crimes committed in Darfur. With the United States not pushing their opposition to the Court to the point of blocking the Security Council's referral of the Darfur case, the ICC made an important move from academic exercise to legal reality.¹ Although the State Department did not tire of emphasizing that this abstention does not mark a change in the United State's position on the Court, the first case to be referred by the Security Council is nonetheless an important step for ensuring the ICC's future work. While some celebrated the referral as a "breakthrough" for the Court, others remained skeptical, stressing the unchanged U.S. position towards the ICC and its consequential diminishing of the Court's power and legitimacy.

Part II of this article will address a question prompted by the referral of the Darfur situation and the political debate surrounding the content of Security

1. George P. Fletcher & Jens David Olin, *Reclaiming Fundamental Principles of Criminal Law in the Darfur Case*, 3 J. INT'L CRIM. L. 539, 561 (2005).

Council Resolution 1593, adopted in 2005.² Namely, which actors were the most influential in shaping the referral according to their needs: the United States or the states in favor of the ICC? The analysis of this question is based on Professor David Caron's theoretical approach, which posits that different actors' "bounded strategic actions" shape the structure and the procedural and substantive law of institutions into their ideal form.³ After considering the influence of the actors involved in negotiating the referral and their distinct views regarding the Court's "ideal form," Part III examines whether the Security Council's referral actually mandated the Court with full power to investigate and prosecute the crimes committed in Darfur successfully. Or whether, on the contrary, the United States could shape the referral according to its own interests. Parts IV and V analyze these U.S. interests and relate them to the functions that the Court is supposed to fulfill according to its mandate. Finally, this analysis leads me to address the possibility of transforming the present silence between the ICC and the United States into a constructive dialogue by limiting the strategic space of the former without putting its functions in peril.

II.

BACKGROUND

A. Crimes Committed in Darfur

With the Security Council's referral, the ICC has jurisdiction to prosecute crimes committed in Darfur as far back as July 1, 2002. The proceedings will focus on the deaths of at least 300,000 people⁴ in a barbaric civil war in Sudan that experts believe led to one of the greatest humanitarian disasters on the planet.⁵ Specifically, a massive campaign of ethnic violence in Sudan's western region, Darfur, has claimed more than 70,000 civilian victims and uprooted an additional estimated 1.8 million. The roots of the violence are complex and remain partly unclear. The primary perpetrators of the killings and expulsions are government-backed "Arab" militias, while the victims are mainly members of black "African" tribes.⁶

In early September 2004, after reviewing the results of a government-sponsored investigation of the crimes committed in Darfur, U.S. Secretary of State Colin Powell described the crimes as genocide, and President George W.

2. S.C. Res. 1593, U.N. Doc. S/RES/1593 (Mar. 31, 2005).

3. David D. Caron, *Towards a Political Theory of International Courts and Tribunals*, 24 BERKELEY J. INT'L L. 401, 401-02 (2006).

4. Thomas Darnstaedt & Helene Zuber, *The Hague Takes On the Sudanese Blood Bath*, DER SPIEGEL, Aug. 22, 2005, available at <http://www.globalpolicy.org/intljustice/icc/2005/0822darfur.htm>.

5. Scott Straus, *Darfur and the Genocide Debate*, 84 FOREIGN AFF. 123 (2005); Int'l Com'n for Inquiry on Darfur, *Report of the International Commission for Inquiry on Darfur to the United Nations Secretary-General*, ¶ 50, U.N. Doc. S/2005/60 (Jan. 25, 2005) [hereinafter *Report of the International Commission*], available at http://www.un.org/News/dh/sudan/com_inq_darfur.pdf.

6. *Id.* ¶¶ 5-7.

Bush used this term in a speech to the United Nations several weeks later.⁷ This marked the first time that senior U.S. government officials had ever conclusively applied the term to a current crisis and invoked the Genocide Convention.⁸ Subsequently, the U.N. Secretary General established a Commission of Inquiry to investigate the crimes committed in Darfur.⁹ In January 2005, this Commission reported to the Security Council that, although it could not conclude that Sudanese government authorities had pursued a genocidal policy, other equally serious war crimes and crimes against humanity had been clearly committed in Darfur.¹⁰ Consequently, the Commission recommended that the Security Council immediately refer jurisdiction over the crimes to the ICC.¹¹

B. Referral by the Security Council Pursuant to Article 13(b) of the Statute of Rome

The Security Council passed the referral of the Darfur situation on March 31, 2005 with eleven votes in favor of the referral, none against it, and four abstentions (Algeria, Brazil, China, and the United States). The Resolution was the result of long and intensive debates. Although the international community unanimously condemned and called for justice for the Darfur crimes, the referral to the ICC seemed doomed to fail as the United States clearly supported the idea of a more expensive and time consuming ad hoc mechanism instead.¹² Though the referral procedure had been highly lauded during the negotiations of the Statute of Rome as the most viable and likely “trigger mechanism” for bringing cases before the Court,¹³ it appeared to present an insurmountable obstacle during these negotiations, given the fierce opposition of the United States.

Article 13(b) of the Statute of Rome states that the ICC may exercise jurisdiction in “a situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations.”¹⁴ Having its legal basis in Chapter VII of the Charter, the Security Council’s referral of the crimes in Darfur is conditioned on the determination that they continue to constitute a threat to international peace and security.¹⁵ Where the ICC obtains jurisdiction over a

7. Straus, *supra* note 5. In July 2004, the U.S. Congress had already passed a resolution that the crimes in Darfur qualify as genocide. *Id.*

8. *Id.*

9. S.C. Res. 1564, ¶ 12, U.N. Doc. S/RES/1564 (Sept. 18, 2004).

10. *Report of the International Commission*, *supra* note 5, at 1.

11. *Id.* ¶ 569.

12. Press Release, Security Council, Security Council Refers Situation in Darfur, Sudan, to Prosecutor of International Criminal Court, U.N. Doc. SC/8351 (March 31, 2005) [hereinafter Security Council Press Release], available at <http://www.un.org/News/Press/docs/2005/sc8351.doc.htm>.

13. William A. Schabas, *United States Hostility to the International Criminal Court: It's All About the Security Council*, 15 EUR. J. INT'L L. 702 (2004).

14. Rome Statute of the International Criminal Court, July 17, 1998, art. 13(b), U.N. Doc A/Conf.183/9 (2002) [hereinafter Statute of Rome], available at <http://www.un.org/law/icc/statute/romefra.htm>.

15. S.C. Res. 1593, *supra* note 2, pmb1. Any action of the U.N. Security Council under

case by virtue of such a Security Council referral, its jurisdiction is considered much stronger and truly universal, rendering irrelevant the consent of the state where the crime occurred.¹⁶ The Darfur situation is the third case on the docket of the ICC, but the first in which the Court's jurisdiction is premised on a Security Council referral pursuant to Article 13(b) of the Statute of Rome.

C. The Relevance of the Referral for the Future Shape of the International Criminal Court

With the referral of the crimes committed in Darfur, the U.S. government's opposition to the ICC as an institution came into direct conflict with its interest in justice for the victims in Darfur. Although the United States was not a party to the Statute of Rome, it had the political authority to deprive the Court from exercising jurisdiction in the matter, given its veto power in the Security Council.

It seemed crucial, however, that the ICC have jurisdiction over the crimes committed in Darfur, as the case fell clearly within the Court's limited mandate. The global community faced horrific crimes against humanity and war crimes, that qualified as genocide according to the United States, while the state in whose territory the crimes were committed made no attempt to prosecute the perpetrators. In addition, as the major outbreaks of violence against defenseless civilians occurred in early 2003, these incidents fell within the temporal limits of the ICC's jurisdiction, which started with the entry into force of the Statute of Rome in July 2002.

Considering the fact that the ICC is a very young, still untested, and controversial court, the referral of jurisdiction from the Security Council was crucial for the Court as an institution in order to prove its ability to prosecute the most serious crimes. A failure to refer this case would consequently have prompted the question of whether the ICC could ever exercise universal jurisdiction in any case other than those in which States Parties had consented to jurisdiction. While such a failure might have left the institution's legitimacy intact, it nonetheless would have marginalized the Court and cast doubt on any hopes of its becoming an important instrument for ensuring global accountability for the most serious crimes.

Had it chosen to veto the referral and consequently thwart the Court's jurisdiction, the United States could have unilaterally, and from the outside, considerably restricted the Court's strategic space, as defined by the Statute of Rome. By refraining from exercising its veto power, however, the United States,

Chapter VII of the U.N. Charter presupposes an imminent threat to international peace and security.

16. The referral, according to Article 13(b) of the Statute of Rome is only one of the three trigger mechanisms that establish the jurisdiction of the ICC. First, and most uncontroversial, any State Party has the right to refer a "situation" to the ICC that would fall under its jurisdiction. Statute of Rome, *supra* note 14, arts. 13(a), 14. Second, the ICC prosecutor has the authority to initiate proceedings *proprio motu*. Statute of Rome, *supra* note 14, arts. 13(b), 15. The prosecutor's decision is subject to review by the Pre-Trial Chamber, consisting of three judges. Statute of Rome, *supra* note 14, art. 15(3)-(4).

who in terms of Professor David Caron's theory of bounded strategic space is an outsider lacking direct control over the institution, ultimately contributed to the Court's legitimacy. Nevertheless, during the negotiation of Resolution 1593, the United States insisted on a number of provisions that did significantly limit the strategic space of the ICC and that set precedence for future referrals. These limitations will now be subject to further examination.

III.

ANALYSIS OF SECURITY COUNCIL RESOLUTION 1593

After the referral, both supporters and adversaries of the ICC characterized the text of the Resolution as supporting their positions. Friends of the International Criminal Court stated,

The resolution is . . . a breakthrough for the Court . . . Thus, from now on, it will be impossible for the U.S. to declare that the ICC is useless. Moreover, this action demonstrates that the ICC is the only legitimate international institution able to prosecute reasonably quickly heinous atrocities when states fail to do so.¹⁷

On the other hand, U.S. Ambassador to the United Nations, Anne Woods Petterson, stressed that the United States believed that a better mechanism would have been a hybrid tribunal in Africa.¹⁸

Considering this range of assessments, an analysis of the Resolution's text is necessary for a realistic evaluation of its impact upon the ICC's mandate, or its strategic space through which it can render justice in Darfur. Specifically, some parts of the Resolution provoked serious skepticism about the Court's ability to render justice with the mandate provided by the Security Council.¹⁹ The following therefore analyzes the Resolution's text with respect to the cooperation of non-States Parties, the costs of the proceedings, immunity for non-States Parties, and exemption agreements.

A. The Cooperation of Non-States Parties

Although the Resolution referring jurisdiction to the ICC was made by the Security Council acting on behalf of the global community of states, paragraph 2 of the Resolution states that only the government of Sudan and the other parties to the conflict are under the obligation to cooperate with the ICC.²⁰ In contrast, all other states are merely "urged" to cooperate.²¹ This means that, on the one hand, the international community has mandated that the ICC to exercise juris-

17. Letter from American Non-Governmental Coalition for the International Criminal Court, to members (Apr. 4, 2005), available at <http://www.amicc.org/docs/Darfur%20Referral.pdf>.

18. Security Council Press Release, *supra* note 12.

19. Luigi Condorelli & Annalisa Ciampi, *Comments on the Security Council Referral of the Situation on Darfur to the International Criminal Court*, 3 J. INT'L CRIM. JUST. 590, 593 (2005).

20. Only the government of Sudan and the other parties to the conflict have to "cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution." S.C. Res. 1593, *supra* note 2, ¶ 2.

21. *Id.*

diction; but that, on the other hand, states that are not party to the Statute of Rome, except for Sudan, have no obligation to cooperate or support the ICC in fulfilling this task. This contradiction, inherent in the Security Council's logic, is hardly understandable.

An alternative that would have strengthened the position of the ICC would have imposed obligations on all states, including the United States, to cooperate in the Darfur proceedings. Certainly, according to Article 86(ff) of the Statute of Rome, only States Parties are under an obligation to cooperate with the Court, except where they have not agreed to do so, as treaty-based obligations are not binding on third-party states. Nonetheless, considering the exceptional circumstances in Darfur, the Security Council could have decided otherwise. According to Article 87(5) of the Statute of Rome, non-States Parties can also be brought under an obligation to cooperate with the Court on any other "appropriate basis." Such a basis could be provided by the Security Council acting pursuant to Article 41 of the U.N. Charter.²² Under Article 41, the Security Council could adopt a resolution compelling all member states to give full effect to the Security Council's decision to refer the Sudan case to the ICC.

Not finding such a universal obligation to cooperate seems disturbing, considering that the authority of an ICC prosecutor with full "Chapter VII power" would be much stronger. The fact that not all states are under an obligation to cooperate with the ICC may weaken its position when it comes to pressuring the Sudanese government to surrender accused individuals. By exercising political and economic pressure, together with the ICC member states, the United States could have played a vital role in bringing justice to Darfur.

In the present situation, the Sudanese government could use the lack of universal cooperation as another argument to challenge the legitimacy of proceedings and as a pretext to refuse to surrender suspects. Fifty-one names of suspects were referred under seal to Luis Moreno-Ocampo, Chief Prosecutor of the International Criminal Court. While the "list of 51" remains under U.N. seal,²³ it is clear from the Commission of Inquiry's report that senior Sudanese government officials are implicated by virtue of chains of command and authority.²⁴ The President of Sudan, Omar al-Bashir, already made clear that he would never surrender any Sudanese citizen to the court.²⁵ Given this strong Sudanese opposition and lack of full U.S. government support, it seems predictable that

22. According to Article 41 of the U.N. Charter, the "Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures." See also Condorelli, *supra* note 19, at 593.

23. See OFFICE OF THE PROSECUTOR, INT'L CRIMINAL COURT, SECOND REPORT OF THE PROSECUTOR OF THE INTERNATIONAL CRIMINAL COURT TO THE U.N. SECURITY COUNCIL PURSUANT TO UNSCR 1593, at 3 (2005) [hereinafter SECOND REPORT OF THE PROSECUTOR], available at http://www.icc-cpi.int/library/organs/otp/LMO_UNSC_ReportB_En.pdf.

24. Eric Reeves, *Darfur and the International Criminal Court*, MIDDLE EAST REPORT ONLINE, Apr. 28, 2005, <http://www.merip.org/mero/mero042905.html> (last visited Mar. 9, 2006).

25. *Id.*

only a few of the perpetrators will eventually be held accountable.²⁶ Although the limited duty to cooperate imputed to non-States Parties does not prevent the Court from fulfilling its work, neither does it expand its strategic space in which to tackle this difficult case.

B. Costs of the Proceedings

Another detail introduced by the United States that considerably weakens the ICC's authority in the Darfur case is contained in paragraph 7 of Resolution 1593, which provides that none of the costs incurred in connection with the investigations and prosecutions shall be borne by the United States.²⁷ All such costs shall be covered by the parties to the Statute of Rome and those states that contribute voluntarily. According to the Statute of Rome, however, all funds for the ICC shall be provided by both the States Parties and by "[f]unds provided by the United Nations, subject to the approval of the General Assembly, in particular in relation to the expenses incurred due to referrals by the Security Council."²⁸ The decision of the Security Council that all costs shall only be borne by the ICC's member states therefore contradicts the Statute of Rome and burdens the Court. Further, the U.S. government has even stressed that with respect to the Darfur proceedings, "any effort to retrench on this principle [that all costs be borne by Statute of Rome member states] by [the United Nations] or other organizations to which [the United States] contribute[s] could result in [its] withholding funding or taking other action in response."²⁹ This rigorous position reveals the continuing hostility of the United States towards the ICC, which is even more surprising given that the United States was willing to contribute generously to a hybrid ad hoc tribunal dealing with the same case³⁰ and has emphasized that crimes and atrocities clearly occurred in Darfur and that the violators must be held accountable.³¹

The inconsistencies in the Resolution can hardly be explained from the perspective of international law and logic, but might be understood upon consideration of the politics behind the referral, particularly the United States's intention to strictly limit any obligation to cooperate with the ICC to its member states. However, the Resolution's unreasonable treatment of costs and duties relating to cooperation seem to be the necessary price for the international community and the International Commission for Inquiry's demand that justice be rendered to victims of the Darfur crimes.³²

26. Condorelli, *supra* note 19, at 599.

27. S.C. Res. 1593, *supra* note 2, ¶ 7.

28. See Statute of Rome, *supra* note 14, art. 115(b); Condorelli, *supra* note 19, at 594.

29. Press Release, U.S. Ambassador to the United Nations, Explanation of Vote on the Sudan Accountability Resolution (Mar. 31, 2005), available at <http://www.state.gov/p/io/44388.htm>.

30. See *id.*

31. *Id.*

32. Condorelli, *supra* note 19, at 594.

C. Immunity for Non-States Parties

In paragraph 6 of Resolution 1593, which was included upon the United States's request, the Security Council granted a broad and unprecedented exemption for all American citizens. All Americans, as well as,

current or former officials or personnel from a contributing State outside Sudan which is not a party to the Rome Statute of the International Criminal Court shall be subject to the exclusive jurisdiction of that contributing State for all alleged acts . . . arising out of or related to operations in Sudan³³

This wording represents the broadest exemption for American citizens that the United States has so far achieved, and U.S. representatives considered this language as a "precedent-setting assurance."³⁴ Considering that the United States's main reason for objecting to the ICC's authority is the possible risk of the politically motivated prosecution of U.S. military personnel, the call for blanket immunity for U.S. citizens was predictable; nonetheless, the scope of the granted immunity is surprising as it is not limited to military personnel but covers all U.S. citizens.

Since the entry into force of the Statute of Rome, the United States has made its contribution to military operations adopted by the Security Council dependent upon the condition that the Resolution provides full protection for members of the U.S. armed forces from prosecution by the ICC.³⁵ Security Council Resolutions 1422,³⁶ 1487,³⁷ and 1497,³⁸ granted this immunity, provoking strong criticism from the international community.³⁹ These Resolutions follow Article 16 of the Statute of Rome, which provides that the Security Council may request that the ICC defer its investigations "adopted under Chapter VII of the Charter of the United Nations" for the period of twelve months and may renew this request under the same conditions.

The immunity provided for under Resolutions 1593, and 1497, however, does not meet the requirements for a deferral as provided for in Article 16 of the

33. S.C. Res. 1593, *supra* note 2, ¶ 6.

34. Nicholas Burns, Under Sec'y of State for Political Affairs, Remarks to the Press on Sudan (Apr. 1, 2005), <http://www.state.gov/p/us/rm/2005/44138.htm> (last visited Mar. 9, 2006). Burns states that it was clearly acknowledged that "states that are not party to the Rome statute . . . should not be subject to the ICC jurisdiction without our consent or without referral to the Security Council." *Id.*

35. Neha Jain, *A Separate Law for Peacekeepers?*, 16 EUR. J. INT'L L. 239, 240 (2005); S.C. Res. 1422, U.N. Doc. S/RES/1422 (July 12, 2002); S.C. Res. 1487, U.N. Doc. S/RES/1487 (June 12, 2003); S.C. Res. 1497, U.N. Doc. S/RES/1497 (Aug. 1, 2003).

36. S.C. Res. 1422, *supra* note 35, grants immunity for U.S. soldiers in Bosnia-Herzegovina. The U.S. threatened to veto to stop the renewal of the SC mission in Bosnia-Herzegovina. As a compromise, the Resolution excluded the jurisdiction of the ICC over non-party states. *Id.*

37. S.C. Res. 1487, *supra* note 35. Security Council Resolution 1487 renewed Resolution 1422.

38. S.C. Res. 1497, *supra* note 35. Security Council Resolution 1497 passed in the response to the conflict in Liberia.

39. Jain, *supra* note 35, at 241-42. (explaining his view that the immunity granting provisions were considered largely inconsistent with both the Statute of Rome and international law).

Statute of Rome for two reasons.⁴⁰ First, both Resolutions contain language providing that the state of the potential offender, namely the troop-contributing state, retain *exclusive* jurisdiction.⁴¹ Second, although the immunity reached through a deferral under Article 16 can be renewed repeatedly, as exemplified by the resolution dealing with operations in Bosnia-Herzegovina, the jurisdiction of the ICC and other courts is merely considered suspended.⁴² This is markedly different from Resolutions 1593 and 1497, where jurisdiction other than that of the sending state is permanently barred.⁴³ Barring proceedings in domestic courts is extremely questionable and contradicts the principle of universal jurisdiction, according to which all states are entitled to exercise their general jurisdiction with respect to the most serious crimes against the whole international community. The fact that the United States accomplished precedent-setting immunity for all of its nationals, and not just its military personnel, must be viewed as a substantial setback for the ICC.

D. Exemption Agreements

Paragraph 4 of the Resolution comprises a symbolic reference to the immunity agreements⁴⁴ negotiated by the United States according to Article 98(2) of the Statute of Rome. Article 98(2) refers to the bilateral immunity agreements concluded between the United States and a number of states, which ensure that U.S. military personnel are not surrendered to the ICC without U.S. consent.⁴⁵ Article 98 recognizes that some nations had previously existing agreements obligating them to return personnel sent by another nation when a crime had allegedly been committed. Thus, the delegates at Rome designed Article 98(2) to address any discrepancies potentially arising as a result of these pre-existing agreements and to facilitate cooperation with the ICC.

Critics of the U.S. policy of concluding new agreements claim that Article 98 was not intended to allow new agreements that preclude the possibility of a trial by the ICC when the sending state decides not to exercise jurisdiction over its own nationals.⁴⁶ Indeed, Article 27 provides that no one is immune from the crimes under its jurisdiction. By contrast, the U.S.-introduced immunity in bilateral agreements and the present Resolution expands immunity to a wide-ranging class of persons; in the present Resolution specifically, immunity is expanded to

40. *Id.* at 248, with regard to S.C. Res. 1497, *supra* note 35.

41. Condorelli, *supra* note 19, at 596.

42. *Id.*

43. *Id.* at 594.

44. Coalition for the International Criminal Court, US Bilateral Immunity or So-called "Article 98" Agreements (Apr. 18, 2003), <http://www.globalpolicy.org/intljustice/icc/2003/0606usbilaterals.htm> (last visited Mar. 9, 2006).

45. PHILIPP MEIBNER, THE INTERNATIONAL CRIMINAL COURT CONTROVERSY: AN ANALYSIS OF THE UNITED STATES' MAJOR OBJECTIONS AGAINST THE ROME STATUTE 78 (2005).

46. Hans-Peter Kaul & Claus Kress, *Jurisdiction and Cooperation in the Statute of the International Criminal Court: Principles and Promises*, in 2 Y.B. INT'L HUMANITARIAN L. 143, 165 (1999); MEIBNER, *supra* note 45, at 82.

all U.S. citizens.

Although the Security Council only “acknowledges existence” of these bilateral agreements, which from a strictly legal and formalistic point of view does not imply any approval or a validation, the wording of this passage has to be viewed as a success for the United States.⁴⁷ The acknowledgement of these bilateral agreements in clear opposition to the ICC is a compromise that contradicts the text of the Statute of Rome, even if it does not limit the authority of the Court.

E. Conclusion

This analysis of the referral leads to the question of whether the obtained jurisdiction in the Darfur case can be viewed as a “breakthrough” for the ICC or as an expensive compromise. By referring the Darfur case to the ICC, the Security Council used its power to extend the Court’s jurisdiction beyond that allowed under a traditional state consent regime and consequently conferred jurisdiction over a non-consenting state. This must be viewed as a success for the Court as it puts it in a position to prove its capability and effectiveness. However, the passages included as a result of U.S. efforts to safeguard its national interests and their inevitable practical effects cast some doubt on the extent to which the referral represents a true “breakthrough.”

The Resolution referring the crimes committed in Darfur to the ICC seems to be more a compromise than a vital statement towards the universal jurisdiction of an influential ICC. The United States successfully limited the scope of the Court defined by its member states and introduced its own national interests into the framework of the Statute of Rome. With the ability to threaten any future referral with its veto, the United States has the power to control the ICC through the referral procedure. Thus, though an outsider to the Statute of Rome, the United States nonetheless exercises considerable influence by setting precedents for the referral process, thereby shaping the Court’s future work under that process.

The above analysis prompts an inquiry into the extent to which the Court’s strategic space under the Rome Statute may be altered before it is rendered incapable of achieving its designated function. While it would be far too pessimistic to state that the Darfur referral has already resulted in such an incapacitation, it is necessary to consider just how much external influence the institution can bear without losing credibility and the ability to fulfill its international role.

IV.

WHAT ARE THE IMPLICATIONS OF U.S OPPOSITION FOR THE FUTURE OF THE INTERNATIONAL CRIMINAL COURT?

So far, the United States’s efforts to safeguard its national interests vis-à-

47. Condorelli, *supra* note 19, at 597.

vis the ICC have been very successful: the United States achieved far-reaching immunity for its soldiers in the field and in some cases even for civilians. As an outsider to the Court, but a member of the Security Council, the United States is in a position to successfully control and prevent the referral of any case to the ICC. Why then is the United States still resisting cooperation on a case-by-case basis with the ICC, in cases where the demand for justice is obvious such as in Darfur? This question must be viewed within the broader framework of the relationship between the United States and the Court, and any attempt to answer it would be incomplete without an analysis of the United States's position prior to the entry into force of the Statute of Rome. Specifically, it is necessary to review the United States's historical opposition to the Court, the ICC's functions, and the concerns underlying the United States's opposition to the Court.

A. U.S. Opposition to the International Criminal Court

Up to the present date, the United States has consistently supported the international prosecution of perpetrators of the "most serious crimes."⁴⁸ Since playing a central role in the post-war tribunals of Nuremberg and Tokyo, the United States has taken the initiative in setting up and financing the ad hoc tribunals for the Former Yugoslavia and Rwanda, as well as the Special Court for Sierra Leone.⁴⁹ Additionally, the U.S. delegation actively contributed to the drafting of the Statute of Rome.⁵⁰ David Scheffer, Ambassador at Large for War Crimes Issues and U.S. Chief Negotiator in Rome, stated that the United States "[n]onetheless . . . came very close in Rome in 1998 to supporting the final text of the Treaty."⁵¹ However, on July 17, 1998, when a majority of 120 adopted the Statute of Rome, the United States and seven other states voted against it, and twenty-one states abstained.⁵² Three key concerns were identified as rendering the Statute of Rome flawed from the United States's perspective: (1) the legality of the ICC's jurisdiction over nationals of non-State Parties; (2) the absence of sufficient control mechanisms with regard to the prosecutor, and (3) the lack of control of the ICC through the Security Council.

48. Schabas, *supra* note 13, at 702; Gerhard Haffner, *An Attempt to Explain the Position of the USA Towards the International Criminal Court*, 3 J. INT'L CRIM. JUST. 323 (2005).

49. Schabas, *supra* note 13, at 707.

50. The U.S. delegation, one of the largest delegations present during the negotiations in Rome, played a constructive role by successfully inserting a number of progressive provisions into the Statute of Rome, such as the inclusion of crimes against humanity in internal armed conflicts, as well as a comprehensive set of gender crimes. For more details, see MEIBNER, *supra* note 45, at 77.

51. David Scheffer, *Restoring U.S. Engagement with the International Criminal Court*, 21 WIS. INT'L L.J. 599 (2003); see also Schabas, *supra* note 13, at 709 (describing the role of the United States during the negotiations as active and constructive and arguing that any suggestion that the United States was out to sabotage or defeat the Court is far too simplistic).

52. The vote proceeded unrecorded, and therefore it cannot be determined without doubt which countries voted against the adoption of the Statute of Rome. However, the United States, China, and Israel declared publicly to do so. As to the other four states, speculations include Iran, Iraq, Sudan, Qatar, and Yemen. See Sarah B. Sewall & Carl Kaysen, *THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT* 220 (2000).

The U.S. administration under both Bill Clinton and George W. Bush asserted similar objections to the Statute of Rome. Whereas the Clinton administration pursued a strategy of "constructive engagement,"⁵³ the Bush administration's policy can be characterized as aggressive unilateralism.⁵⁴ Nevertheless, given the arguments advanced by both administrations, a ratification of the Statute of Rome without significant modifications was unlikely under either administration.⁵⁵ Therefore, Clinton's signing of the Statute of Rome on December 31, 2000, the last day that signature without ratification was possible, must be interpreted as a strategic step to remain involved in the continuing negotiation process.⁵⁶ Subsequently in 2001, the Bush administration discontinued participation in ICC meetings and, on May 6, 2002, officially nullified the Clinton administration's signature of the Statute of Rome. In addition to this express rejection of the Court's legitimacy, John Bolton, the present U.S. ambassador to the United Nations, went on to describe the Court as "an organization that runs contrary to fundamental American precepts and basic Constitutional principles of popular sovereignty, checks and balances and national independence."⁵⁷

These objections by the United States to the Court's role and functions have been followed by various measures banning any cooperation between the ICC and the United States. In 2001, the U.S. Congress, by a large majority of both parties, passed the American Service Members Protection Act,⁵⁸ which prohibits any U.S. court or agency from responding to a request from the ICC. The Act further forbids access by ICC members to U.S.-controlled territory for the pursuit of investigations, while providing the possibility of a presidential waiver of this prohibition where national interests are concerned.⁵⁹ The Bush administration has also continued pursuing bilateral agreements according to Article 98 of the Statute of Rome.⁶⁰ According to these agreements, no U.S. military or financial aid will be provided to the government of a party to the ICC unless that state agrees not to surrender any U.S. nationals to the Court.

Apparently, even after the referral of the Sudan proceedings, which could actually have been a starting point for cautious cooperation between the United States and the ICC, the relationship between the two hit bottom. It is difficult to understand why the United States does not support the ICC on an ad hoc basis in the Sudan proceedings, given the fact that accountability for serious violations of humanitarian law is a deeply rooted part of U.S. foreign policy.

53. See BRUCE BROOMHALL, *INTERNATIONAL JUSTICE AND THE INTERNATIONAL CRIMINAL COURT: BETWEEN SOVEREIGNTY AND RULE OF LAW* 168 (2003); Patricia Wald, *Is the United States Opposition to the ICC Intractable?*, 2 J. INT'L CRIM. JUST. 19, 20 (2004).

54. Jean Galbraith, *The Bush Administration's Response to the International Criminal Court*, 21 BERKELEY J. INT'L L. 683, 685 (2003).

55. MEIBNER, *supra* note 45, at 32.

56. Scheffer, *supra* note 51, at 600.

57. See Wald, *supra* note 53, at 19.

58. 22 U.S.C. § 7401 (2002); see also MEIBNER, *supra* note 45, at 77.

59. MEIBNER, *supra* note 45, at 78.

60. Galbraith, *supra* note 54, at 688.

B. Functions of the International Criminal Court

Analyzing the functions of the ICC and distinguishing them from the functions of a domestic court will contribute to an understanding of the Court's strategic space and an evaluation of the relationship between this space and the Court's functions. This relationship might be variable in the sense that a restriction of the strategic space might or might not affect the Court's ability to fulfill its functions. As explained *infra*, the ICC's various objectives and their justifications are complex. They extend well beyond providing punitive or social controls, as is largely the case with domestic courts. While the main purpose of domestic criminal courts is to secure convictions and thereby contribute to lawmaking and enforcement, the functions of the ICC have a wider resonance and include historical and conciliatory as well as preventive and symbolic functions.

1. Punitive and repressive functions

The primary function of the ICC is to investigate and prosecute individuals who commit certain, "most serious crimes of concern to the international community as a whole."⁶¹ These crimes are, for the time being, crimes against humanity, genocide, and war crimes. The primary objective is to hold individuals accountable for atrocities committed in cases where the domestic state is unable or unwilling to prosecute them.

According to the principle of complementarity, the ICC is distinguished from domestic criminal courts in that it *complements* states' domestic criminal laws. Specifically, the ICC may only exercise jurisdiction when the state having domestic jurisdiction over the crime committed on its territory or by its national is unwilling or unable to investigate and prosecute the crime.⁶² In this way, the Court builds on and reinforces the traditional domestic repression system in which states possess the duty to enforce international humanitarian law. In cases where the Court's jurisdiction is established, however, the ICC's functions are comparable to those of a domestic criminal court, where the theoretical reasons for criminal punishment include deterrence of future crimes, incapacitation and rehabilitation of the perpetrator, restoration of the public order, and satisfaction for the victims.

2. Historical and conciliatory functions

There is an increasing hope that the trials of international criminal courts, including the ICC, hybrid courts, and the International Criminal Courts for Yugoslavia and Rwanda, will contribute to the processes of recovery and reconciliation in the respective countries.⁶³ Richard Goldstone, Chief Prosecutor of

61. Statute of Rome, *supra* note 14, art. 5(1).

62. *Id.* art. 17.

63. Daniel Joyce, *The Historical Function of International Criminal Trials: Rethinking In-*

the International Criminal Court for Yugoslavia and International Criminal Court for Rwanda, stressed that a permanent international criminal court "plays an important role not only in serving justice in the immediate present, but in laying the groundwork for preventing future conflicts."⁶⁴ With respect to the International Criminal Court for Rwanda investigations, Goldstone explains that "by assembling evidence, in particular hundreds of first-hand accounts by survivors of the massacres, we established the fact of genocide, that more than 800,000 men, women and children had been systematically murdered in a period of less than a hundred days. We established historical truth."⁶⁵

The historical and reconciliatory functions of international criminal tribunals has also been recognized by the International Criminal Court for Yugoslavia Trial Chamber. In its *Erdemovic* decision, the judges recalled that the tribunal's objectives, as seen by the Security Council, were general prevention, reprobation, and retribution, as well as collective reconciliation. Interpreting these functions, the judges added that "impunity of the guilty would only fuel the desire for vengeance in the former Yugoslavia, jeopardising the return to the 'rule of law', 'reconciliation' and the restoration of 'true peace'."⁶⁶

3. Preventive and symbolic functions

The Court's most important role might be served by its preventive and symbolic functions, which are grounded in the Court's complementarity. This expectation was expressed recently by Goldstone,⁶⁷ who stated that a permanent international criminal court will contribute to preventing conflicts in the future and will enforce prosecution at the domestic level. The principle of complementarity significantly limits the jurisdiction of the ICC by allowing the Court to exercise jurisdiction only where the state having domestic jurisdiction over the crime committed on its territory fails to provide an adequate remedy because of its inability or refusal to investigate and prosecute the case genuinely.⁶⁸ In order to avoid investigation by the Court, states may be motivated to adopt and apply legislation in order to demonstrate their active role in prosecuting individuals accused of the most serious crimes.⁶⁹ If that kind of legislation and its strict ap-

International Criminal Law, 72 NORDIC J. INT'L L. 461 (2004).

64. Richard Goldstone, *Justice Now, and for Posterity*, INT'L HERALD TRIB., Oct. 14, 2005, available at <http://www.globalpolicy.org/intljustice/icc/2005/1014posterity.htm>.

65. *Id.*

66. Prosecutor v. Erdemovic, Case No. IT-96-22, Sentencing Judgment, ¶ 58 (Nov. 29, 1996), available at <http://www.un.org/icty/erdemovic/trialc/judgement/erd-ts961129e.htm>; see also President of the Int'l Criminal Tribunal for the Former Yugo., *Report 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*, ¶¶ 11-16, U.N. Doc. S/1994/1007, A/49/342 (Aug. 29, 1994), available at <http://www.un.org/icty/rappannue/1994/AR94e.pdf>.

67. Goldstone, *supra* note 64.

68. Statute of Rome, *supra* note 14, art. 17.

69. Jason Ralph, *International Society: The International Criminal Court and American Foreign Policy*, 31 REV. FOR INT'L STUD. 27 (2005).

plication result in the prosecution of persons who would otherwise have escaped domestic justice, this would constitute a clear success for the ICC, even without its having played a direct role in the particular case.⁷⁰

The Court can also perform the important task of setting standards that the domestic court must meet to avoid interference by the ICC. The ICC's function here would be performed simply by existing as a backup jurisdiction. Unlike an ad hoc tribunal, which depends on a political decision of members of the Security Council, the ICC has the authority to act independently based on purely factual and judicial motives at any given time. This symbolic function may be underestimated in the controversies surrounding the ICC, as there are no effective means to quantify the conflicts avoided by the presence of the ICC.

V.

U.S. OPPOSITION AND CONCERNS WITH RESPECT TO THE INTERNATIONAL CRIMINAL COURT'S FUNCTIONS

Considering the traditionally supportive attitude that the United States has shown toward previous ad hoc tribunals and its participation during the Statute of Rome negotiations, it would be a misinterpretation of the U.S. position to say that it objects to the general objectives of a permanent criminal court. Summarizing the U.S. position in 2002, David Scheffer stated that "the question . . . has never been whether there should be an international criminal court, but rather what kind of court it should be in order to operate efficiently, effectively, and appropriately within a global system that also requires our constant vigilance to protect international peace and security."⁷¹ In order to understand the rigorous U.S. opposition toward the ICC, I would now like to analyze those aspects of its present form that are allegedly incompatible with U.S. concerns and interests regarding, specifically, national sovereignty and the protection of U.S. military personnel and citizens.

A. Preservation of National Sovereignty Through the Security Council

The most fiercely articulated opposition against the Statute of Rome relates to its Article 12(2), which enables the Court to exercise jurisdiction over nationals of non-consenting, non-States Parties. Indeed, since jurisdiction of the ICC is established when there is the consent of the national state of the individual *or* the territorial state where the crime occurred, U.S. citizens could be indicted before the court for "core crimes" committed on the territory of a state that is party to the Statute of Rome. When the United States un-signed the Statute, on May 6, 2002, Marc Grossman, Under Secretary for Political Affairs, stated that "the U.S. respects the decision of those nations who have chosen to join the ICC; but

70. *Id.* at 37.

71. David Scheffer, *The United States and the International Criminal Court*, 93 AM. J. INT'L L. 12 (1999).

they in turn must respect our decision not to . . . place our citizens under the jurisdiction of the court."⁷²

According to the U.S. position, Article 12 of the Statute of Rome represents a violation of international treaty law as set out in Article 34 of the Vienna Convention of the Law of the Treaties, stating that a "treaty does not create either obligations or rights for a third State without its consent."⁷³ However, this official U.S. position⁷⁴ does not apply to all states: Sudan is not a party to the Statute of Rome and the United States, by qualifying the acts committed in Darfur as genocide, did not challenge the need to convict the perpetrators of the committed crimes before an international tribunal, but only argued that the ICC would not be the right institution to do so.⁷⁵ The main rebuttal to the United States's contention that Article 12 of the Statute of Rome violates its national sovereignty is that the principle of territoriality is well established under international law. According to Hans-Peter Kaul, judge at the ICC, the principle of territorial jurisdiction represents a "universally undisputed standard rule in international criminal law."⁷⁶ Under the terms of this rule, a state has jurisdiction over non-nationals accused of having committed a crime described under the national law of the state, irrespective of whether or not the state of the nationality consents. Consequently, no state is under an obligation to seek the consent of the state of the nationality of the person in custody.⁷⁷ In fact, the United States, in calling for an ad hoc tribunal for Darfur, argued that the core crimes of the Statute *did* in fact demand universal jurisdiction, but refused to acknowledge that this jurisdiction could be exercised by a permanent court.⁷⁸

Universal jurisdiction, as opposed to territorial jurisdiction, does not require any link between the prosecuting state and the indicted individual; however, this basis of jurisdiction is limited to the most heinous crimes, such as genocide, war crimes and crimes against humanity. Stressing the need and legitimacy to bring the Darfur crimes to trial, the United States pointed out that universal jurisdiction over core crimes has been accepted in customary interna-

72. See Schabas, *supra* note 13, at 709 (citing Marc Grossman, U.S. Under Sec'y of State for Political Affairs, Am. Foreign Policy & the Int'l Criminal Court, Remarks to the Center for Strategic and International Studies (May 6, 2002)).

73. See Vienna Convention on the Law of the Treaties, May 23, 1969, art. 34, U.N. Doc. A/Conf.39/27.

74. Richard Boucher, U.S. Dep't of State Spokesman, Daily Press Briefing (Apr. 1, 2005), <http://www.state.gov/r/pa/prs/dpb/2005/44132.htm> (last visited Mar. 9, 2006).

75. SECOND REPORT OF THE PROSECUTOR, *supra* note 23, at 3.

76. Hans-Peter Kaul, *Preconditions to the Exercise of Jurisdiction*, in 1 THE STATUTE OF ROME AND THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 607 (Antonio Cassese et al. eds., 2002).

77. The United States take a less conservative approach to this question when it comes to its national interest. In 1998, the United States took the lead in negotiation the International Convention for the Suppression of Terrorist Bombings without seeking to limit its application to offenses committed by nationals of States Parties to the Convention. See Michael Scharf, *The International Criminal Court Jurisdiction over Nationals of Non-Party States*, in THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT, *supra* note 52, at 220.

78. SECOND REPORT OF THE PROSECUTOR, *supra* note 23, at 3.

tional law. In fact, the jurisdiction of the ICC does not go beyond this and actually does no more than to set up a new and permanent mechanism to enforce this law collectively.⁷⁹

In order to reconcile its rejection of the ICC's jurisdiction with its affirmation of universal jurisdiction, the United States argues that universal jurisdiction can only be exercised by states.⁸⁰ This implies that states are not entitled to delegate their territorial and universal jurisdiction over the most serious crimes to an international court. David Scheffer explains that the jurisdiction *by states* is not equivalent to the *delegated* jurisdiction of the ICC.⁸¹ While recognizing the fact that international courts can prosecute core crimes when the state where those crimes were committed is unwilling or unable to do so, the United States concludes that such jurisdiction can only be referred by the Security Council.⁸² However, the origin of such a far-reaching limitation on state sovereignty is unclear. On the contrary, the Permanent Court of International Justice, in its 1927 *Lotus* decision, held that "[r]estrictions upon the independence of States cannot . . . be presumed," and that states possess considerable discretion, "which is only limited in certain cases by prohibitive rules . . ."⁸³ Far from being outdated today, the *Lotus* holding was confirmed by the United States in its written statement for the International Court of Justice's Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons.⁸⁴

As such, the U.S. argument that the decisions regarding which international crimes shall be prosecuted must remain with the Security Council can only be interpreted as an attempt to maintain hegemonic power over international criminal justice.⁸⁵ A member of the Security Council, the United States is effectively empowered to block prosecutions, whereas under the Statute of Rome U.S. influence on concrete proceedings would be very limited and without legal certainty.⁸⁶ However, it appears inconsistent that the United States even threatened

79. Ralph, *supra* note 69, at 37.

80. David Scheffer, *Staying the Course with the International Criminal Court*, 47 CORNELL INT'L L.J. 47, 65 (2002).

81. *Id.*

82. Ralph, *supra* note 69, at 41.

83. S.S. *Lotus* Case (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 14-15, available at http://www.worldcourts.com/pcij/eng/decisions/1927.09.07_lotus/.

84. See Scharf, *supra* note 77, at 73-74. (quoting the U.S. statement for the International Court of Justice's Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons: "it is a fundamental principle of international law that restrictions on States cannot be presumed but must be found in conventional law specifically accepted by them or in customary law generally accepted by the community of nations").

85. See Ralph, *supra* note 69, at 31. In addition, U.S. officials argue that the United States, as the only superpower on the Security Council, carries unique responsibility to balance the demands of international justice with the maintenance of international peace and security. A politically motivated prosecutor would pose a threat to international peace and security by preventing the United States from contributing to U.N. peacekeeping. The exemption of U.S. service personnel from the Court's jurisdiction is therefore itself a matter of peace and security. See Lawrence Weschler, *Exceptional Case in Rome: The United States and the Struggle for an ICC*, in THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT, *supra* note 52, at 102-03.

86. Schabas, *supra* note 13, at 716.

to use its veto power when the Security Council, acting on the behalf of the world society, actually intended to refer a case to the ICC.

The referral of the Darfur case seems to prevent the United States from continuing to deny the legitimacy of the ICC's prosecution of the most serious crimes. The argument that international criminal justice can solely be attained by states thinly disguises a policy motivated by a desire to decide when and where justice should be done.⁸⁷ In the light of these considerations, the United States' simultaneous support for international criminal justice in Darfur and opposition to the ICC must be interpreted as an attempt to safeguard American exceptionalism and enable the United States to more easily advance its particular interests.⁸⁸ Nonetheless, the fact that the United States refrained from using its veto power in the Security Council to prevent the referral, as well as its emphasis on the urgent need to act in Darfur, should be viewed in a positive light.

B. Protection of U.S. Citizens from an Independent Prosecutor

Another reason for the United States's opposition to the ICC is its independent or *proprio motu* acting prosecutor, provided for in Article 15 of the Statute of Rome. The *proprio motu* prosecutor has the authority to initiate prosecutions independently of the authorization of the Security Council or a State Party. This was a concept heavily opposed by the United States, which supported a much more limited approach where the Prosecutor could only act without prior referral of a case from the Security Council. The present checks and balances controlling the prosecutor were deemed insufficient.⁸⁹ However, in order to limit the broad discretion of the prosecutor, the Statute of Rome does impose control mechanisms through the Pre-Trial Chamber,⁹⁰ though these are purely judicial and not political controls.⁹¹

U.S. officials argue that the United States, being a superpower with military presence in many parts of the world, has a unique responsibility to balance the demands of international justice with the maintenance of "international peace and security".⁹² This task would be set at risk by a prosecutor that can *proprio motu* initiate politically motivated investigations against U.S. military personnel.⁹³ The U.S. administration stresses that the U.S. capacity to carry out worldwide military commitments is threatened by the ICC and that a military action that is seen by the United States as required for reasons of international peace and security would not necessarily be assessed in the same manner by the ICC. However, this argument does not take into account that future political

87. Ralph, *supra* note 69, at 29.

88. *Id.*

89. MEISNER, *supra* note 45, at 50.

90. The prosecutor needs to seek the authorization of the Pre-Trial Chamber, consisting of three judges, before he can commence investigations. Statute of Rome, *supra* note 14, arts. 15(3)-(4)

91. Schabas, *supra* note 13, at 716.

92. Haffner, *supra* note 48, at n.47.

93. *Id.* at 323.

charges would also have to meet the gravity requirement set forth in Article 17 of the Statute of Rome. In addition, the principle of complementarity provides adequate assurance for countries like the United States that possess a working judicial system. In this context, the trials of U.S. military personnel in U.S. military courts on charges of torture committed in Iraq have demonstrated that such cases would remain in domestic forums, where they belong.⁹⁴ The decision of Luis Moreno-Ocampo, Chief Prosecutor of the ICC, not to open investigations on the military operations in Iraq by the coalition forces between March and May 2003 also demonstrates that the gravity threshold is taken seriously by the court.⁹⁵ In February 2006, the Chief Prosecutor concluded that there were no reasonable indices for committed crimes against humanity during military operations.⁹⁶ The Chief Prosecutor also assessed whether the military operations amounted to war crimes and concluded that despite the high number of civilian victims there was no prove for intentional and excessive attacks on civilians by nationals of State Parties to the ICC.⁹⁷ However, the Chief Prosecutor affirmed that there was reasonable basis to believe that inhuman treatment of civilians and mistreatment of prisoners occurred and that such crimes fell within the jurisdiction of the ICC, but concluded that these acts did not meet the gravity threshold set out in the Statute of Rome and denied the large-scale commission of such crimes.⁹⁸

Another very successful tool for preventing politically motivated investigations against U.S. military personnel is the conclusion of agreements pursuant to Article 98 of the Statute of Rome, whereby parties commit not to bring other parties' current or former government officials, military, or other personnel before the jurisdiction of the Court.

Due to the U.S. government's successful policy of seeking immunity for U.S. military personnel acting worldwide, the gravity threshold and the principle of complementarity, the risk that U.S. soldiers can actually be prosecuted by the ICC seems equal to zero. Given the fact that it is very unlikely for any U.S. soldier to become the subject of an investigation, the underlying motivation for U.S. opposition to the ICC must be the fear that officials high in the chain of

94. It is neither established that the incidents in Abu Ghraib would qualify as most serious crimes nor that they would therefore fall under the jurisdiction of the ICC.

95. See generally Response to Communications received by the Chief Prosecutor regarding alleged crimes in Iraq (February 10, 2006), available at http://www.icc-cpi.int/library/organs/otp/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf (last visited Apr. 5, 2006).

96. *Id.* at 4. However, the Chief Prosecutor also states that available information suggests that most of the military activities were carried out by non-State Parties. *Id.* at n. 14.

97. *Id.* at 5.

98. *Id.* at 9. Assessing whether the violations occurred on a large scale, Luis Moreno-Ocampo compared the number of potential victims of willful killing in Iraq with the number of victims found in other situations under investigations by his office. *Id.* at 8-9. While the number of potential victims of willful killing in Iraq is estimated to be 4 to 12 persons and a "limited number of victims of inhuman treatment," the other situations (Northern Uganda, Democratic Republic of Congo, and Darfur) currently under the court's investigation, involved thousands of willful killings as well as intentional and large-scale sexual violence and abductions in hundreds or thousands of cases. *Id.*

command, ultimately the highest state actors, could be subject to the jurisdiction of the ICC.⁹⁹

C. Conclusion

Considering that 100 states¹⁰⁰ have already delegated jurisdiction to the ICC, the United States seems isolated in its opposition to the Court. Remaining outside the framework of the ICC, the U.S. government successfully achieved blanked immunity for its citizens through the policy it has pursued in the Security Council and the conclusion of Article 98 bilateral agreements.

Answering the question of why the United States continues to resist cooperation on a case-by-case basis in cases like Darfur is difficult. Considering the U.S. arguments against a case-by-case cooperation, I posit that the United States's legal arguments and alleged justifications lack foundation in international criminal law and are instead purely political in nature. Highlighting their unfounded fear of a politically motivated prosecutor, the United States favors a solution that places the Court entirely under the control of the Security Council, which itself is a highly politicized body.

VI. OUTLOOK

An evaluation of the political persuasiveness of the United States's arguments is beyond the scope of this note. However, it is worthwhile to consider briefly the possibility of transforming the present silence between the ICC and the United States into a constructive dialogue. How much does the Court's bounded space need to be limited before the United States no longer views it as a threat to its national interests?

Apparently, the quasi-independent prosecutor is the major obstacle to obtaining the more active involvement of the United States. However, modifying the Court's *proprio motu* competencies and subordinating the Court to the Security Council by providing jurisdiction only in cases of referral would transform the ICC into a regime-controlled court. This is a far too expensive price to pay for obtaining U.S. support for the Court. Such a modification would abolish one of the most revolutionary aspects of the Statute of Rome.¹⁰¹ By providing for a trigger mechanism other than a Security Council referral, the Statute of Rome has empowered voices beyond those in the Security Council to bring their claims before the Court. An independent Prosecutor can pursue cases based on evidence presented not only by states, but also by non-governmental organizations. In fact, the Statute of Rome has enabled individuals and groups that are

99. Haffner, *supra* note 48, at 327.

100. As of December 20, 2005, 100 countries are States Parties to the Statute of Rome. See International Criminal Court: The States Parties to the Rome Statute, <http://www.icc-cpi.int/statesparties.html> (last visited Mar. 9, 2006).

101. Ralph, *supra* note 69, at 29.

not necessarily represented by states to have their claims heard in a court.¹⁰² The participation of actors other than states in the investigations and proceedings benefits the Court itself as it increases its legitimacy and information gathering capacity. Additionally, the need to give victims of gross human rights abuses a voice before an international tribunal, when the domestic systems fail to provide them justice, was a driving force when the states designed the concept of an independent prosecutor.¹⁰³

In order to exclude the risk of politically motivated prosecutions, the discretion of the prosecutor is already limited by several mechanisms, some of which were introduced to the U.S. draft.¹⁰⁴ First, before the prosecutor can proceed, he requires the consent of a panel of pre-trial judges. Second, and maybe more importantly, the prosecutor must adhere to the principle of complementarity. As already discussed above, the principle of complementarity should limit the fear of an abusive prosecutor because a state can always avoid its investigation by announcing, within one month of being informed of the case, that it is conducting its own investigation.¹⁰⁵

The United States clearly favors a Court that would be permanent in its design in the sense that the procedural framework is indispensable but ad hoc in its functioning. The advantage of such a permanent ad hoc institution would certainly be that it could investigate within short time limits and would contribute to a unified lawmaking process while acting in a state-controlled bounded space.

How would an ad hoc ICC, acting exclusively upon referral, be able to fulfill the symbolical, preventive, and punitive functions identified in Part VI? The experiences of the International Criminal Courts for Yugoslavia and Rwanda show that the ad hoc tribunals, by successfully prosecuting alleged crimes, do fulfill their punitive function. Goldstone also points out that these courts serve their historical function by collecting a common memory that might facilitate the peace and reconciliation process in the respective country.

However, there is less reason to assume that ad hoc courts subordinate to the Security Council are capable of satisfying their preventive and symbolic functions. It seems doubtful that ad hoc tribunals, mandated to try a limited number of cases in a specified time period, can bring about either significant domestic legislative reforms or increased prosecution of individuals accused of the most serious crimes.¹⁰⁶ A factor that certainly limits the credibility of ad hoc courts is the fact that decisions in the Security Council to refer a case to an international tribunal reflect underlying political and economic interests. States tolerating gross violations of human rights might rely on the little chance that their citizens or leaders will be prosecuted and consequently avoid changing their national legislation or policy. Additionally, by abusing its veto power, a

102. Statute of Rome, *supra* note 14, art. 15.

103. Ralph, *supra* note 69, at 36.

104. Scheffer, *supra* note 51, at 600.

105. Statute of Rome, *supra* note 14, art. 17.

106. Ralph, *supra* note 69, at 37.

permanent member of the Security Council could ensure that its citizen never become subject to the jurisdiction of the ICC.

With the ability to act independent of the political decision-making processes of the Security Council, the ICC has the authority to act exclusively based on purely factual and judicial motives, at any time and free from political influence. I am reluctant to endorse further amendments that weaken the Court's authority if we expect it to perform its symbolic function. It is this symbolic function that makes the ICC valuable and distinct from existing ad hoc tribunals with limited scope and jurisdiction. Consequently, the United States's suggested limitations on the strategic space provided for the Court by the Statute of Rome would endanger the fulfillment of its symbolic function.

It must be noted that the political objections of the United States and the national interests involved render it very unlikely that the U.S. opposition to the Court will change in the foreseeable future. Nevertheless, the parties to the Court will likely continue to defend their defined strategic space of the Court and seek to expand, rather than contract, its scope. Consequently, one need not be a pessimist to perceive the prospects of cooperation between the Court and the United States in the near future as very modest.

To a certain extent, the lack of U.S. support for the Court must be viewed as a factor that weakens its authority, financial capacity, and legitimacy. But, the referral of the Darfur crimes has also highlighted that U.S. objections to the Court will not necessarily cause the United States to exercise its veto power over a referral or to hinder the universal jurisdiction of the Court over non-States Parties in all cases. By shaping the referral according to its national interests, the United States set a precedent for future referrals. Although its limitations on the Court might have betrayed some optimists' hopes that the United States would adopt a more supportive attitude in the face of genocide in Darfur, its implications for the Court's future strategic space has positive aspects. After all, the United States will find it hard to ignore the Court and has now passively admitted the legitimacy of its exercise of universal jurisdiction in cases of violent and horrific crimes.

This precedent gives the Court a chance to prove its capacity and legitimacy for prosecuting the most serious crimes. Backed by the support of 100 member states, the Court will have enough support and funds to fulfill its functions without U.S. support. From the perspective of the states supporting the Court, the high standards of legitimacy and justice, including the independent prosecutor, is a gain that weighs more than the loss of proactive U.S. support. However, it is hoped that the results of a properly working court will calm the fierce concerns of the United States and lead to possible ad hoc cooperation in the long run.