Unilateral Multilateralism: United States Policy toward the International Criminal Court

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Unilateral Multilateralism: United States Policy Toward the International Criminal Court

Diane F. Orentlicher†

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Introduction

United States opposition to the International Criminal Court (ICC), which began its legal life on July 1, 2002, is widely seen as a manifestation of America's deeper—and growing—antipathy toward multilateral institutions. Confrontational measures of U.S. opposition seem, moreover, to be cast from the same mold that has shaped the Bush administration's¹ broader embrace of unilateralism in pursuit of U.S. interests, expressed in unapologetic terms post-September 11, 2001. European support for the ICC is, in contrast, seen to be rooted in Europe's deeper commitment to international law and multilateral institutions.² While each of these perceptions is well grounded, the first is in need of refinement.

The United States has not opposed international criminal courts wholesale (although the Bush administration has a decidedly more skeptical view of such courts than its predecessor). In fact, it was the leading proponent of each of the international criminal tribunals that preceded the ICC.³ Under the Clinton administration, the United States even supported

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1. All references to "the Bush administration" are to the administration of George W. Bush.
3. When the Bush administration explained its reasons for "unsigning" the treaty establishing the ICC, it acknowledged past U.S. leadership with apparent pride: "The United States has been a world leader in promoting the rule of law. From our pioneering leadership in the creation of tribunals in Nuremberg, the Far East, and the International Criminal Tribunals for the former Yugoslavia and Rwanda, the United States has been in the forefront of promoting international justice." Marc Grossman, Under Secretary of State for Political Affairs, American Foreign Policy and the International Criminal Court, Remarks to the Center for Strategic and International Studies, Washington, D.C. 36 Cornell Int'l L.J. 415 (2004)
the creation of a permanent international criminal court.\(^4\) What both the Clinton and Bush administrations as well as Congress have opposed is an international court with jurisdiction over U.S. citizens. Although the ICC's ability to try U.S. nationals is highly attenuated, that it could even theoretically do so has provoked wide-ranging measures of opposition by the current administration and Congress.

Thus, U.S. policy toward the ICC reflects a peculiar brand of unilateral multilateralism—selective support for multilateral institutions that advance American interests while imposing significant constraints on the action of other states.\(^5\) This form of unilateral multilateralism radiates outward from the United States, disciplining the behavior of other states without significantly constraining U.S. action.\(^6\) Although this approach has been pursued with unapologetic zeal since September 11, 2001, a softer version of unilateral multilateralism already defined the basic contours of U.S. policy toward the ICC before then.

As I elaborate in Part I, the United States has at times believed that its national interests would be advanced by establishing multilateral courts that could assert jurisdiction over nationals of other states. But, alongside its commitment to this form of multilateral enforcement, the United States has consistently resisted the model of an international criminal court that could assert jurisdiction over American nationals, at least in the absence of U.S. consent.

\(^{4}\) See infra text accompanying note 15.

\(^{5}\) I do not mean to suggest that unilateral multilateralism describes all facets of U.S. foreign policy. The United States is bound by an extensive network of treaty obligations that constrain U.S. action. The concept nonetheless captures a dominant strain in U.S. policy, which has assumed considerable prominence in the post-9/11 policy of the Bush administration and is especially relevant in explaining U.S. policy toward international criminal courts.

\(^{6}\) The United States pursued a variation of unilateral multilateralism in its policy toward Iraq during 2002-03: It successfully sought a U.N. Security Council resolution demanding Iraqi compliance with various disarmament obligations in November 2002 and relied on that resolution to justify its invasion of Iraq in March 2003. But the Bush administration was unwilling to allow its desire for a second resolution unambiguously authorizing intervention to override its determination to invade Iraq on its preferred timetable. That degree of restraint on unilateral action imposed a greater cost than the administration was prepared to pay for the acknowledged benefits of U.N. authorization.

None of this is to suggest that the United States' Iraq policy was the product of a cost-benefit calculus grounded in a coherent policy uniformly endorsed within the Bush administration. The policy doubtless reflected the resolution of divisions between proponents and opponents of multilateralism within the administration. It has been reported that Secretary of State Colin Powell persuaded the President to seek a Security Council resolution providing a basis for U.S. intervention. See, e.g., Karen DeYoung, For Powell, A Long Path To a Victory, WASH. POST, Nov. 10, 2002, at A1. This led to the adoption of Security Council Resolution 1441, U.N. SCOR 58th Sess., 4644th mtg., U.N. Doc. S/Res/1441 (2002), which required Iraq to cooperate with an intrusive inspections regime on threat of facing serious consequences if it failed to do so. But members of the administration favoring unilateral action prevailed when President Bush decided to invade Iraq despite resistance by other permanent members of the U.N. Security Council.
Another dimension of U.S. policy toward international criminal courts appears to reflect a peculiarly American brand of unilateral multilateralism: While it has opposed ICC jurisdiction over U.S. nationals, the United States was the leading proponent of several international courts that exercised coercive authority against other states, beginning with the Nuremberg tribunal established to prosecute war criminals after World War II. The United States has also conditioned aid to Serbia on its cooperation with the International Criminal Tribunal for the former Yugoslavia (ICTY).  

In the view of critics, this approach represents an unprincipled application of double standards. But in the view of both the Clinton and Bush administrations, the ad hoc tribunals and the ICC are hardly analogous. For one thing, the ICTY (along with a similar tribunal created to prosecute the Rwandan genocide of 1994) was established under the extraordinary powers of the United Nations Security Council, pursuant to Chapter VII of the U.N. Charter, to address a special situation—one that the Council had determined to be a threat to international peace and security. The ICC, in contrast, is a standing court with a potentially global writ created by multilateral treaty. As such, the United States argues, its authority legitimately runs only to suspects whose own states have acceded to the treaty establishing the ICC, the Rome Statute of the International Criminal Court ("Rome Statute").

Perhaps more important, U.S. officials have argued, the Rome Statute fails to reflect the reality of unequal distribution of risk. Clinton administration officials argued that the Rome Statute imposes a formal equality of law in the face of a radical inequality of exposure: With vastly larger military commitments than any other country, the United States is more likely to have soldiers deployed in conflicts that may give rise to war crimes charges.

In this article I assess U.S. policy toward the ICC in light of the principal concern underlying American opposition—apprehension about the prospect of politicized prosecutions of U.S. nationals motivated by resentment of American power. My point of departure is a basic acceptance of the legitimacy of this concern (though, as I will argue, the risk of such prosecutions is small). The two interrelated questions I want to explore are: How well do the policy measures that have been used to oppose the ICC advance U.S. interests? And is there a realistic prospect of reconciling other countries' strong support for the ICC with the concerns underlying U.S. opposition?

7. See infra text accompanying note 64.
11. See id.
In brief, I will argue that the United States' over-reliance on "hard power" to alter the ICC's constitutional framework has diminished its ability to achieve its goals, on a more sustainable basis, through persuasion. At the same time, recent policy measures have been costly: Resentment of aggressive U.S. tactics aimed at securing an ironclad exemption from ICC jurisdiction has radiated across other arenas of national concern, impairing the United States' ability to secure support for other policy objectives. Notably, deepening resentment of U.S. opposition to the ICC and several other widely-supported treaties colored Security Council debates over Iraq. These effects must be assessed in light of the risk that U.S. policy has sought to ward off: politically-motivated prosecutions of Americans. By virtually all reasonable assessments, the risk is remote.

I. U.S. Policy Toward the ICC

As a foundation for this inquiry, it may be useful to recall the broad outlines of U.S. policy toward international criminal courts. The United States was, of course, the chief proponent of the postwar precursors to the ICC—the Nuremberg and Tokyo Tribunals. American and other allied prosecutors countered charges of victors' justice by invoking the universality of the law they enforced, but their arguments were framed in the sanctuary of courts that would judge only nationals of World War II's vanquished nations. Half a century later, the United States again took the lead in establishing an international criminal court, this time with jurisdiction over atrocities committed in the course of Yugoslavia's violent dismemberment. The United States also supported the establishment of a sister tribunal to bring to justice those responsible for the 1994 genocide in Rwanda. Like the ICTY, the International Criminal Tribunal for Rwanda was established by the U.N. Security Council acting under Chapter VII. Along with other countries that voted to create these courts, the United States affirmed that criminal prosecution of those most responsible for "ethnic cleansing" in the former Yugoslavia and for genocide in Rwanda was a necessary foundation for ensuring stability in both regions.

U.S. policy toward a permanent international criminal court—a court with potentially global jurisdiction—has been more complex. President Clinton publicly endorsed the goal of establishing such a court in October 1995, and he and other senior officials in his administration repeatedly

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14. During her tenure as Secretary of State in the Clinton Administration, Madeleine Albright avowed, "There is no turning back from the judicial process evolving in The Hague, [the seat of the Yugoslavia tribunal], and Arusha, home to the International Criminal Tribunal for Rwanda. . . . No matter the crisis of the day, we have to keep our eye on the prize—justice for the perpetrators of genocide, crimes against humanity, and war crimes in our time." Secretary of State Madeleine K. Albright, Remarks at the Seminar for Editors on "Conflicts and War Crimes: Challenges for Coverage," Sponsored by the Crimes of War Project and the Freedom Forum, Arlington, VA (May 5, 2000).
reaffirmed that commitment. Yet the U.S. delegation found itself in a conspicuously small minority of states voting against the text adopted in Rome in 1998. The United States had hoped that the ICC's statute would entrust to the U.N. Security Council the role of gatekeeper to the Court's docket. If the Court could consider cases only with the blessing of the Security Council, U.S. nationals (along with nationals of other veto-wielding Council members) would enjoy effective immunity from ICC scrutiny. The United States delegation in Rome accepted a compromise formula that would allow the Security Council to suspend investigations by the ICC but nonetheless found itself unable to vote for the final text of the Rome Statute.

For the United States, the chief problem with the Rome Statute was and remains the fact that Article 12 contemplates circumstances in which the ICC could theoretically exercise jurisdiction over nationals of non-party states—and thus over U.S. nationals. In brief, Article 12 provides that the Court may assert jurisdiction only with respect to crimes committed (1) on the territory of a state that has either ratified the Rome Statute or provided ad hoc consent to ICC jurisdiction (the "territorial state"), or (2) by nationals of a state that has either ratified the Rome Statute or provided ad hoc consent to the Court's jurisdiction. Thus, to the extent that Article 12 establishes a state consent regime, the necessary consent can be provided by the territorial state even when the state of the defendant's nationality has not accepted ICC jurisdiction.

The territorial state's consent is hardly enough to trigger the exercise of ICC jurisdiction; a host of other preconditions must first be satisfied. Many of these preconditions were the product above all of effective U.S. diplomacy in Rome. Even so, the United States voted against the final text of the Rome Statute, principally because of the Court's latent potential to assert jurisdiction over nationals of non-party states.

Explaining the U.S. delegation's vote in Rome, then-U.S. Ambassador-at-Large for War Crimes Issues David Scheffer testified before the Senate Foreign Relations Committee that the possibility of ICC jurisdiction over nationals of non-party states is not only "contrary to the most fundamental principles of treaty law, it could inhibit the ability of the United States to use its military to meet alliance obligations and participate in multinational operations, including humanitarian interventions." While Ambas-

15. See Scheffer, U.S. and ICC, supra note 10, at 13 & n.3.
17. See id.
18. See infra text accompanying notes 24-27.
sador Scheffer's claim concerning the law of treaties raises important issues,\(^\text{21}\) it is reasonable to suppose that his second point expressed the central concern of the Clinton administration. After all, the United States is a party to a significant number of treaties that require states parties to prosecute individuals suspected of committing specified crimes regardless of whether their own countries have ratified the same treaties\(^\text{22}\)—a practice inconsistent with the claim that treaties may not authorize criminal jurisdiction over the nationals of non-party states.

At the heart of the Clinton administration's opposition to the framework adopted in Rome was its concern that the ICC might not operate in accordance with the Rome Statute.\(^\text{23}\) It understood that, if the ICC operates according to the terms of its statute, the likelihood of a U.S. national being prosecuted before the Court is small indeed. For one thing, the Court has jurisdiction only over "the most serious crimes of international concern"\(^\text{24}\): genocide, crimes against humanity, and serious war crimes. Further, as a non-party state, the United States would not be required to surrender its nationals to the ICC even if the prosecutor has the authority to investigate them.

Most important, the ICC prosecutor cannot proceed with an investigation or prosecution that is being or has been investigated or prosecuted by a state that has jurisdiction unless that state is or was unwilling or unable genuinely to carry out the investigation or prosecution.\(^\text{25}\) This restriction, which reflects the Rome Statute's core principle of "complementarity," operates even if the state in question has decided not to prosecute a suspect after undertaking an investigation, provided the decision was not itself a result of the state's inability or unwillingness to prosecute.\(^\text{26}\) Due principally to the efforts of the U.S. delegation in Rome, the ICC Statute establishes elaborate procedures that can be invoked by the United States to prevent the Court from exercising jurisdiction based on the principle of complementarity.\(^\text{27}\)

In light of these and other provisions, even the most ardent opponents of the Rome Statute within the Clinton administration conceded that, if the treaty operates according to its terms, it is virtually inconceivable that a

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\(^{23}\) Cf. Scheffer, *U.S. Policy*, supra note 19, at 531 (head of U.S. delegation to Rome Conference explains that the United States could not ignore "risks" and assume that ICC would be "infallible").

\(^{24}\) *Rome Statute*, supra note 9, at art. 1.

\(^{25}\) *Id.* at art. 17(1)(a) & (b).

\(^{26}\) *Id.* at art. 17(1)(b).

\(^{27}\) *See id.* at arts. 18-19.
U.S. citizen will face prosecution before the ICC. American forces do not commit genocide or crimes against humanity, and it is unlikely that the U.S. judicial system would fail genuinely to investigate a credible allegation that an American national committed a serious war crime. Thus, for the Clinton administration, the challenge of Rome was the risk of a runaway court—one that would respond sympathetically to politically-motivated charges against U.S. nationals.

After the Rome conference, the Clinton Administration hoped to reconcile the two opposing strands of its policy—support for the basic ICC concept coupled with apprehension about the Court's ability to prosecute U.S. nationals—by seeking a "fix" for what it considered to be key flaws in the Rome Statute. U.S. negotiators proposed a succession of "fixes" aimed at securing effective immunity from ICC prosecution, but the Clinton administration was unable to persuade its negotiating partners to accept any of its proposals. A key problem for the U.S. team was that the Clinton administration was unwilling to offer any significant incentives for further concessions to U.S. anxieties: It was not even prepared to promise to sign the Rome Statute, let alone ratify it, in exchange for such concessions. Still, when the deadline for signing the Rome Statute arrived on December 31, 2000, President Clinton decided that the United States should become a signatory even though it had not yet achieved its negotiating aims.

The Bush administration reversed course. On May 6, 2002—one month after the Rome Statute acquired the number of ratifications needed to bring it into force—the administration notified the United Nations that it did not intend to become a party. While its stated reasons reiterated views put forth by the Clinton administration, the Bush administration's position toward the ICC also embodied significant discontinuities with the policy of its predecessor. Where the Clinton administration saw the ICC as insufficiently hedged with checks, the Bush administration regards it as "an institution of unchecked power." Where the Clinton administration pursued a policy aimed at minimizing the risk of a wayward court, the Bush administration has seemingly assumed that a politicized, anti-American court is all but inevitable.

Of particular relevance to the subject of this symposium issue, the Bush administration also (and perhaps above all) sees the ICC as an unac-

28. These efforts are summarized in BROOMHALL, supra note 16, at 168-78.
29. Negotiators in Rome had already made major concessions to accommodate U.S. concerns in Rome. See id. at 170.
30. See id. at 170-71.
31. The Rome Statute was open for signature only through December 31, 2000. States wishing to become parties thereafter would have to do so without signature. Rome Statute, supra note 9, at art. 125(1).
32. The Rome Statute entered into force on July 1, 2002, which was "the first day of the month after the 60th day following the date of the deposit of the 60th instrument of ratification, acceptance, approval or accession with the Secretary-General of the United Nations." Rome Statute, supra note 9, at art. 126(1).
ceptable hindrance to the projection of U.S. military power.\textsuperscript{34} Explaining the administration's decision to "unsign" the Rome Statute,\textsuperscript{35} Under Secretary of State for Political Affairs Marc Grossman said: "With the ICC prosecutor and judges presuming to sit in judgment of the security decisions of States without their assent, the ICC could have a chilling effect on the willingness of States to project power in defense of their moral and security interests."\textsuperscript{36} The administration's National Security Strategy was even more forthright:

We will take the actions necessary to ensure that our efforts to meet our global security commitments and protect Americans are not impaired by the potential for investigations, inquiry, or prosecution by the International Criminal Court (ICC), whose jurisdiction does not extend to Americans and which we do not accept. We will work together with other nations to avoid complications in our military operations and cooperation, through such mechanisms as multilateral and bilateral agreements that will protect U.S. nationals from the ICC.\textsuperscript{37}

II. The Response of U.S. Allies

It would be an understatement to observe that U.S. policy toward the ICC has antagonized a broad range of American allies. Several days after the Bush administration "unsigned" the Rome Statute, the European Union (EU) expressed its concern "that this unilateral action may have undesirable consequences on multilateral Treaty-making and generally on the rule of law in international relations."\textsuperscript{38} Other measures of opposition have proved even more unsettling to U.S. allies. Bruising battles have been waged on numerous fronts, including the chambers of the U.N. Security Council. On June 30, 2002, the United States vetoed a Security Council resolution that would extend the U.N. peacekeeping mission in Bosnia for six months because the Council declined to grant U.S. participants in the mission immunity from ICC jurisdiction, but then agreed to a brief extension of the mission as negotiations ensued.\textsuperscript{39} On July 12, 2002, Council members, faced with the prospect of having to withdraw peacekeeping mis-

\textsuperscript{34} As noted earlier, this concern was also crucial to the Clinton administration's ICC policy. See supra text accompanying notes 11 and 20.

\textsuperscript{35} Although the United States did not literally unsign the treaty, its notification of its intent not to ratify the Rome Statute has frequently been termed an "unsigning."

\textsuperscript{36} See Grossman Remarks, supra note 3. More generally, the citadel of American sovereignty looms larger in the anti-ICC rhetoric of the Bush administration than in the public statements of its immediate predecessor. See, e.g., id. (asserting that the Rome Statute "threatens the sovereignty of the United States").


\textsuperscript{38} Declaration by the Presidency on behalf of the European Union on the position of the US towards the International Criminal Court, ¶ 2 (May 13, 2002), at http://europa.eu.int/comm/external_relations/human_rights/doc/declicc.htm [hereinafter EU Declaration].

sions deployed "from Kosovo to East Timor,"40 unanimously approved a resolution generally exempting nationals of states that have not adhered to the Rome Statute who participate in U.N. peacekeeping operations from the jurisdiction of the ICC for a renewable twelve-month period.41

On June 12, 2003, the Security Council approved a one-year renewal of the exemption by a vote of 12-0.42 France, Germany and Syria abstained on the ground that the resolution undermines the ICC.43 In the debate preceding the vote, an EU representative said, "The E.U. firmly believes that an automatic renewal of [the previous year's] resolution would be undermining the letter and the spirit of the I.C.C. and its purpose."44 U.N. Secretary-General Kofi Annan said he hoped the decision to renew the 2002 resolution did not become "an annual routine," which "would undermine not only the authority of the I.C.C., but also the authority of this Council and the legitimacy of United Nations peacekeeping."45

On August 8, 2002, Congress enacted U.S. opposition to the ICC into federal law. Among other measures, the American Servicemembers' Protection Act (ASPA)46 prohibits U.S. military assistance to "the government of a country that is a party to the International Criminal Court" subject to various exceptions.47 One provision, which authorizes the President to "use all means necessary and appropriate to bring about the release of any [US national or ally] who is being detained or imprisoned by, on behalf of, or at the request of the International Criminal Court,"48 has led Europeans to refer to the ASPA derisively as "the Hague Invasion Act."49 The ASPA also directs the President to use the U.S. vote in the U.N. Security Council to ensure that any resolution authorizing a peacekeeping operation exempt "at a minimum, members of the Armed Forces of the United States participating in such operation from criminal prosecution or other assertion of jurisdiction by the International Criminal Court for actions undertaken by such personnel in connection with the operation."50

42. Barringer, supra note 40, at A18.
44. Barringer, supra note 40, at A18. The Canadian representative to the U.N. protested as well. "The ICC's principal purpose," he said, "is to try humanity's monsters, the perpetrators of heinous crimes. We are distressed, therefore, that the council, in purporting to act in our names, appears in this resolution to come down on the side of impunity, and for the most serious of international crimes." Lynch, supra note 43, at A24.
45. Baringer, supra note 40, at A18.
47. Id. § 2007.
48. Id. § 2008(a).
49. The epithet evokes the image of U.S. commandos invading the detention facilities of the ICC, which is based in The Hague, the Netherlands.
50. ASPA, supra note 46, § 2005(a).
In the past year, the Bush administration has mounted a concerted campaign to induce countries that have ratified the Rome Statute to conclude bilateral agreements pursuant to which each country would agree that it would not surrender a U.S. national to the ICC if requested to do so by the Court. In a limited concession to the legitimacy of the Rome Statute, these agreements rely upon Article 98(2) of the treaty, which provides:

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

Designed principally to address situations in which a state party to the Rome Statute has undertaken conflicting obligations in an existing Status-of-Forces Agreement governing foreign troops deployed in its territory, Article 98 carves out an exception to the general obligation of states parties to comply with ICC requests for various forms of cooperation, including the transfer of suspects to the Court.

In the view of the European Union and Council of Europe, the sort of blanket immunity deals sought by the United States violate the spirit, if not the express letter, of the Rome Statute. Thus the European Union was alarmed by U.S. efforts to secure Article 98 agreements with countries in line for EU accession as well as with EU member states. In August 2002, the EU urged 13 candidate countries to resist signing Article 98 agreements with the United States until the EU could reach a common policy on the issue.


52. Rome Statute, supra note 9, at art. 98(2). In response to EU concerns about the consistency of these agreements with the Rome Statute, the United States has asserted that they do “not contradict or undermine the ICC.” See Colum Lynch, supra note 51, at A17.


54. On September 24, 2002, the Committee on Legal Affairs and Human Rights of the Council of Europe adopted a report concluding that these agreements are “not consistent with the ... Statute of the ICC” and calling on member and observer States “not to enter into any bilateral 'exemption agreements' which would compromise or limit in any manner their cooperation with the Court.” Risks for the Integrity of the Statute of the International Criminal Court, Report of the Committee on Legal Affairs and Human Rights, Council of Europe, Doc. 9567 (Sept. 24, 2002), at http://assembly.coe.int//Documents/WorkingDocs/doc02/FDOC9567.htm. An initial assessment by the European Commission, the EU’s executive organ, reportedly concluded in August 2002 that the bilateral agreements proposed by the United States were incompatible with Article 98 of the Rome Statute. See Elizabeth Becker, U.S. Issues Warning to Europeans in Dispute Over New Court, N.Y. TIMES, Aug. 26, 2002, at A10. In a compromise position reached one month later, the EU issued guidelines that permit countries to conclude such agreements with the United States under specified conditions. See infra text accompanying note 58.

Soon after, Washington responded with a threat of its own: Secretary of State Colin L. Powell wrote letters to European countries urging them to ignore the EU entreaty and warning that the U.S. role in the North Atlantic Treaty Organization (NATO) would change if the EU refused requests for Article 98 agreements. He added that if countries in line for membership in NATO did not conclude agreements with the United States, “it will be an issue that we will have to discuss in the NATO context.” The Bush administration also warned foreign ministers that their countries could lose military aid pursuant to the ASPA if they became parties to the Rome Statute without concluding an agreement immunizing U.S. nationals. Countries dependent on U.S. aid and desirous of membership in both the EU and NATO were thus presented with a Hobson’s choice.

On September 30, 2002, the EU adopted guidelines for acceptable agreements that represented a compromise position among its members. In April 2003, the EU sent to countries recently admitted to membership a letter urging them to comply with these guidelines. In response, the United States sent EU governments a démarche, warning that the EU’s efforts to dissuade European countries from concluding Article 98 agreements “will undercut all our efforts to repair and rebuild the transatlantic relationship just as we are taking a turn for the better after a number of difficult months.”

By early December 2003, sixty-six countries, most of which are “small, weak or entirely dependent on the United States” had signed Article 98 agreements with the United States. Many if not most did so under the explicit threat of losing U.S. aid if they resisted.

That targets of this campaign included nations formerly constituting Yugoslavia was widely seen as a galling instance of U.S. double standards. Since 2001, United States aid to Serbia has been conditioned on an annual certification that the Serbian and federal governments are cooperating with

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59. Lynch, supra note 51, at A17. The allusion to “difficult months” refers to the transatlantic tensions generated by the U.S.-led intervention in Iraq in March 2003 over the opposition of France and Germany. Both countries were members of the Security Council (France, of course, as a permanent member) during the debate over Iraq immediately preceding the U.S.-led invasion.
In 2001, the Clinton administration certified compliance after Serbian authorities arrested former Yugoslav President Slobodan Milošević, who had been indicted by the ICTY in 1999 (though his arrest was based upon domestic criminal charges). Milošević's transfer to the Hague later that year followed U.S. insistence that it would not participate in a crucial donors' conference for the Federal Republic of Yugoslavia (now Serbia and Montenegro) unless the former president was surrendered to the ICTY. The surrender by Serbian authorities came over the objections of the incumbent president of Yugoslavia as well as the country's constitutional court. Although the move was politically unpopular among Serbs, the Serbian prime minister justified the surrender on the ground that his country could not afford to lose U.S. aid.

Two years later, Serbia faced an explicit threat of losing U.S. aid unless it agreed not to surrender American nationals to the ICC. Serbians wondered "how America can demand that Belgrade extradite all war crimes suspects to stand trial at The Hague tribunal, while simultaneously asking that its citizens be exempt from the same process at the ICC."

Croatians, too, have protested the apparent inconsistency of U.S. policy. Since its transition to democracy following the death of former nationalist leader Franjo Tudjman, the country has substantially (though not entirely) complied with its obligation to surrender suspects to the ICTY. Its democratic leaders have at times braved public opposition to their cooperation with the Hague tribunal. And so the Croatian government faced a doubly acute dilemma when the Bush administration pressed it to assure the immunity of U.S. nationals in Croatia from the jurisdiction of the ICC. In late May 2003, the U.S. Ambassador to Croatia warned the country that it would forfeit $19 million in military assistance if it did not sign an Article 98 agreement and hinted that Croatia might imperil its entry into NATO.

A Croatian writer observed:


67. See Simons with Gall, supra note 66, at A12.


69. Id.


Washington is inconsistent . . . Firstly, the U.S. is exercising its sovereign right to protect its citizens from frivolous and colored lawsuits at universal jurisdiction courts, yet it denies that same right to some other states, one being Croatia . . . The US has insisted that . . . Croatia should cooperate with the Prosecution at the Tribunal, no questions asked, despite strong legal and factual objections in some cases.  

What some have condemned as "blatant hypocrisy" exemplifies—at least in its appearance—the unilateralist dimension of U.S. policy toward international criminal courts: While demanding cooperation with the ICTY by Serbia and Montenegro, the United States insists upon its right to advance what it conceives to be its own national interests vis-à-vis the ICC, even at the cost of other countries' interests.  

III. Assessing U.S. Policy

It has been suggested that the tenacious commitment of countries that have ratified the Rome Statute to the framework established in Rome is driven by a desire to constrain the American behemoth. In the words of one writer, European and other countries' support for the ICC is best understood as a way to "deter and thus constrain America’s forays abroad":

Not to put too fine a point on it, Europe and others cherished this expansion of multilateral oversight precisely for the reason that the United States opposed it. Great powers loathe international institutions they cannot dominate; lesser nations like them the way the Lilliputians liked their ropes on Gulliver. The name of the game was balancing on the sly, and both sides knew it, though it was conducted in the name of international law, not raw power:

I do not believe that this claim accurately reflects the reasoning behind countries' enduring commitment to the Rome Statute in the face of U.S. pressure, although rising anxieties about American unilateralism have doubtless intensified transatlantic confrontations over the ICC. Countries that support the ICC believe that its potential jurisdiction over nationals of non-party states (when other conditions are satisfied) is essential to the Court's effectiveness. If the Court could assert jurisdiction only over nationals of states parties, the most atrocious crimes could escape sanction. It is reasonable to suppose that rogue regimes—those most likely to commit mass atrocities against their own citizens—are unlikely to accept
ICC jurisdiction.\textsuperscript{78} As ICC supporters have repeatedly observed, Article 12 is aimed not at the United States but at citizens of monstrous regimes.\textsuperscript{79} Still, in their view the legitimacy of ICC jurisdiction over the latter would be deeply compromised by a special exemption for U.S. citizens. If the ICC is a court of law—\textit{international} law—it must apply the same law to all countries.\textsuperscript{80} Proponents of the ICC believe that recognizing a U.S.-only exemption would, in effect, be analogous to removing one card from an intricately assembled house of cards; the edifice would collapse. And so countries that support the ICC have sought to reassure the United States that the Court is not aimed at American citizens and is hedged with numerous safeguards against politically-motivated prosecutions of U.S. nationals.\textsuperscript{81} At the same time, they have implored the United States to recognize that an explicitly two-tiered system of justice, applying one law for the United States and a different law for all other countries, would undermine the ICC’s most precious resource—its legitimacy.

If the principal basis of ICC supporters’ resistance to American pressure is their belief that a U.S. exemption would deeply compromise the Court, broader and growing concerns about U.S. unilateralism have doubtless reinforced some states’ determination to maintain their stance. Explaining why European and other countries oppose American efforts to secure blanket immunity from ICC jurisdiction in the aftermath of the U.S.-led invasion of Iraq, one diplomat told the \textit{New York Times}: “The reason this is so hard fought and so emotionally fought—it’s not the substance of it. It’s the politics of law and order in a one-superpower world and who provides that: the one superpower or international bodies and international consensus."\textsuperscript{82}

By equal measure, mounting concerns about the Bush administration’s rejection of the ICC and other widely-supported treaties provided other countries one more reason for hesitation when the United States sought Security Council authorization to invade Iraq in late 2002-early 2003.\textsuperscript{83} This is not to suggest that resistance to U.S. efforts to secure

\textsuperscript{78} See Morris, supra note 21, at 14; see also \textit{Undermining an International Court} (editorial), \textit{N.Y. Times}, July 15, 1998, at A18.


\textsuperscript{80} See \textit{The International Criminal Court: Right to the Brink}, \textit{Economist}, July 6, 2002 (“Europeans argue that, for the court to make a credible claim to even-handedness, no one can be guaranteed a permanent blanket immunity from its reach.”).

\textsuperscript{81} See, e.g., EU Declaration, supra note 38, at ¶3 (“The European Union restates its belief the anxieties expressed by the United States with regard to the future activities of the ICC are unfounded and that the Rome Statute provides all necessary safeguards against the misuse of the Court for politically motivated purposes.”).


\textsuperscript{83} As one writer put it, “Differences over Iraq have been bolted onto a bridge that has already been creaking under many other strains since [George W.] Bush came to
explicit authorization to invade Iraq was merely payback for American unilateralism on other fronts. As Andrew Moravcsik observes, "[s]ober policy analysis underlay the concerns of the doubters" among the Security Council members.  

In light of their legitimate doubts about the wisdom of a precipitous invasion, "most foreign governments sought to exhaust alternatives to war before moving forward and refused to set the dangerous precedent of authorizing an attack simply because the United States requested it."  

But if American diplomacy vis-à-vis Iraq failed on its own terms, rising perceptions of U.S. arrogance doubtless reinforced some Security Council members' determination to hold the line of principle in their deliberations over Iraq. The Bush administration would have improved its prospects for securing support for its Iraq policy had it followed its own prescription for effective leadership, set forth in its National Security Strategy of September 2002. "Effective coalition leadership," the document asserted, "requires clear priorities, an appreciation of others' interests, and consistent consultations among partners with a spirit of humility."

In larger perspective, the perception that the United States has "arrogantly pursued narrow American interests at the expense of the rest of the world" has stoked anti-U.S. sentiment. The terrorists who struck on September 11, 2001 despise the United States for reasons that can not be allayed by more enlightened foreign policy. Yet, as Joseph Nye has observed, their hostility is "unlikely to catalyze broader hatred unless we abandon our values and pursue arrogant and overbearing policies that let the extremists appeal to the majority in the middle."

power: U.S. failure to back the Kyoto accords on global warming, the Biological Weapons Convention, the Landmine Convention, the Comprehensive Test Ban Treaty or the International Criminal Court . . . " J.F.O. McAllister, Mad at America, TIME INTERNATIONAL, Jan. 20, 2003, at 14.


85. Id. "In the end," Moravcsik adds, "the U.S. case for war rested on an open-ended assertion of U.S. security interests, unconstrained by explicit doctrinal constraints [or] a firm commitment to multilateral procedures . . . ." Id. at 79.

86. Moravcsik puts the point this way: "Given the Bush administration's flagrant repudiation of a series of multilateral agreements over the previous two years and its apparent lack of concern for foreign interests, other governments were loath to grant it a free hand" with respect to Iraq. Id.; see also The Price of Opposition (editorial), WASH. POST, May 1, 2003, at A26 ("One reason the Bush administration attracted less diplomatic support than it should have for the war in Iraq was the perception in many nations that President Bush had conducted foreign policy with an arrogance and unilateralism that made the United States appear threatening.").


89. Id. at xi. Paradoxically, overbearing U.S. unilateralism has intensified precisely the sort of anti-American sentiment that Bush administration officials fear may lead to frivolous charges against U.S. nationals before the ICC. Cf. Christopher Marquis, World's View of U.S. Sours After Iraq War, Poll Finds, N.Y. TIMES, June 4, 2003, at A19 (reporting that poll of adults in 20 countries showed marked rise in anti-American sentiment following U.S.-led invasion of Iraq).
In short, U.S. policy toward the ICC has had a corrosive effect on American diplomacy across a spectrum of issues. Thus it is important to ask, have U.S. achievements justified these costs?

Nye's conception of "soft" and "hard" power approaches to diplomacy provides a useful framework for addressing this question. Power, Nye reminds us, is the "ability to effect the outcomes you want, and if necessary, to change the behavior of others to make this happen."\(^9\) In the realm of foreign policy, "[p]roof of power lies . . . in the ability to change the behavior of states."\(^9\) In Nye's conception, hard power entails the use of sticks and carrots to induce others to do something they would not otherwise do.\(^9\) Soft power, in contrast, is "the ability to secure those outcomes . . . by attracting others to want what you want" rather than through coercion.\(^9\)

In general, persuasion through soft power is more likely than coercion to produce enduring policy successes. Other states are more likely to support U.S. policy goals if they have been persuaded to share American aims than if they are pressured to support them on pain of severe penalty if they resist. By appealing to perceptions of legitimacy, persuasion through soft power is likely to draw less resistance than deployment of hard power.\(^9\)

The Clinton administration employed a mix of hard and soft power tools to advance its ICC-related goals. As previously noted, the United States used diplomacy to shape the Rome Statute and actively participated in ICC-related negotiations following the Rome conference. As an engaged negotiating partner, the United States employed soft power tools of persuasion with significant success: the Rome Statute bears a strong U.S. imprint.\(^9\) The Clinton administration's positions carried considerable influence in large measure because other delegations viewed U.S. support as crucial to the ICC's success. But the Clinton administration also employed hard power tactics aimed at dissuading other states from agreeing to ICC jurisdiction over non-party states. For example, the Clinton administration's Secretary of Defense reportedly threatened that the United States would withdraw its troops from Germany if the latter pressed its proposal for broad ICC jurisdiction.\(^9\)

In contrast to the Clinton administration's active engagement in the ICC process, the Bush administration has renounced participation in ICC-
related multilateral negotiations altogether, relying solely on hard power tools of persuasion. This approach has achieved some of the administration's limited objectives: The administration has persuaded a significant number of countries that, for the most part, are politically weak to sign Article 98 agreements on pain of losing U.S. aid or jeopardizing their membership in NATO. But some countries pressed to conclude such agreements have pushed back: In late June 2003, the EU announced that ten countries slated to become EU members in 2004 had decided not to conclude Article 98 agreements with the United States. And, while Romania was the first country to sign such an agreement, its Parliament refused to ratify the accord in light of EU criticism.

The U.S. record at the Security Council is also mixed. The United States has secured a time-limited ICC immunity for participants in peacekeeping missions whose states have not accepted the Rome Statute by threatening to shut down all U.N. peacekeeping missions. But the United States has not achieved its principal aim: it has failed to persuade parties to the Rome Statute to modify the basic framework of the ICC.

Two questions remain to be considered: First, are the risks of U.S. exposure to ICC jurisdiction substantial enough to warrant the considerable costs that the United States has incurred—and imposed—in opposing the Court? Second, would the Bush administration be more likely to secure its goals on an enduring basis if it relied on soft power tools of persuasion?

With respect to the first question, it is relevant to recall that, by widespread consensus, the prospect of U.S. citizens being prosecuted by the ICC is remote. The principal fear is that a runaway court will succumb to politically-motivated efforts to have American nationals prosecuted in the Hague. Addressing this concern, U.S. allies have argued that "the Rome Statute provides all necessary safeguards against the misuse of the Court for politically motivated purposes."

Secondarily, there may be concern that the ICC "will be used as a political forum for raising questions about U.S. foreign policy." But as retired U.S. Army Major General William Nash has noted, few nations have

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97. An exception to the general pattern of countries that have signed Article 98 agreements is Israel, which shares U.S. concerns about the ICC and was one of the first countries to sign such an agreement. See Christopher Marquis, U.S. is Seeking Pledges to Shield Its Peacekeepers From Tribunal, N.Y. TIMES, Aug 7, 2002, at A1.
98. See supra text accompanying notes 60–62.
100. See id.
101. See supra text accompanying notes 39–42.
103. EU Declaration, supra note 38, at ¶ 3.
104. See Nash, supra note 102, at 159.
been convinced by U.S. claims of exemption from ICC jurisdiction.\textsuperscript{105} To the extent, then, that the Court may attract politically-motivated efforts to persuade the ICC prosecutor to investigate U.S. nationals, American opposition will do nothing to abate this risk (which must be distinguished from the more important question whether the ICC prosecutor would take the proverbial bait). If anything, perceptions of American arrogance in opposing the Court are likely to fuel such efforts.

Would the Bush administration achieve greater success in advancing its aims if it employed soft power tools of persuasion? Of course it is impossible to know whether a different strategy would produce an outcome more in line with the administration’s aspirations. What we can know is that the Clinton administration, which employed a mix of soft and hard diplomacy to shape the ICC’s ground rules, was able to secure numerous concessions to its concerns both during and after the Rome conference.\textsuperscript{106} Its negotiating power was exhausted, however, at precisely the point where it was unwilling to offer positive inducements for further accommodations.\textsuperscript{107}

More important, it can hardly be doubted that the ICC is more likely to operate in accordance with America’s vision of the Court if the United States participates in shaping the institution than if it declares open war against it. American influence on the ICTY—an institution that owes its existence above all to U.S. leadership—has been salutary and substantial, as suggested by the fact that two of the ICTY’s four presidents have been U.S. judges.\textsuperscript{108}

It is, finally, useful to remember that the multilateral institutions now denigrated by U.S. officials were largely built on the shoulders of American leadership. The United States dominates the major international organizations it helped create; they, in turn, have done more to advance and amplify U.S. policy goals than to constrain American power. If anything, the United States needs multilateral institutions more than ever, for its recent over-reliance on hard power has diminished America’s ability to lead others through the persuasive power of its perceived legitimacy.

Conclusion

In light of the United States’ hostility toward the Rome Statue, it is easy to forget that Americans embrace the core vision behind the ICC—a fair and effective international court of last resort for victims of monstrous crimes. Surely, then, it would be prudent to address enduring U.S. concerns about frivolous prosecutions through measures that reinforce rather than challenge this vision, the same vision cherished by ICC proponents.

\textsuperscript{105} Id. at 163.
\textsuperscript{106} See supra text accompanying notes 19 and 27.
\textsuperscript{107} See supra text accompanying notes 28-31.
\textsuperscript{108} The first ICTY president was Antonio Cassese, an Italian national. The second was Gabrielle Kirk McDonald, an American national. She was succeeded by French judge Claude Jorda. The incumbent president is Theodor Meron, an American citizen.
Instead, for the past two years the United States has sought to change the Court's constitutional framework through counterproductive measures of coercion. The costs have been broad-ranging and excessive, undermining U.S. diplomacy across a spectrum of foreign policy concerns. A clear-headed cost-benefit assessment suggests that the United States is more likely to secure the assurances it seeks through respectful and engaged diplomacy—through the enduring strength of soft power—than through the blunt force of unilateral threats and sanctions.