

Power from Without: The United States of America and the International Criminal Court

Daglou Makumbe¹

(Dip.Ed. (UZ), BSC, HPOS (UZ), BSC, HAD (UZ), MSc IR (UZ))

Abstract: *The United States of America, which is a member of the Permanent Five (P5) members of the United Nations Security Council, and strictly speaking, which is the Permanent One (P1), has a unique veto of prosecution. This veto power is exclusive to the Permanent Five. The United States of America also has the dominant power and influence of the International Criminal Court yet it is not a state party to the Statute of Rome. The Bilateral Immunity Agreements (BIAs) that the United States of America signed with various states worldwide may justifiably be regarded as not very necessary since the United States of America can veto any decision(s) against its allies or its nationals by the veto of prosecution vested in it. Furthermore, the United States, with its vibrant legal institutions, can utilize the complementarity privilege to outsmart the International Criminal Court by prosecuting its citizens and servicemen for crimes within the jurisdiction of the International Criminal Court without resorting to imported justice. This paper therefore moves that the United States Bilateral Immunity Agreements constitute a duplication of privileges.*

Abbreviations

ASPA	-	American Servicemembers' Protection Act
ASP	-	Assembly of States Parties
BIAs	-	Bilateral Immunity Agreements
NATO	-	North Atlantic Treaty Organisation
NGOs	-	Non-Governmental Organizations
P1	-	Permanent One (USA)
P5	-	Permanent Five (USA, Britain, France, Russia and China)
UN	-	United Nations
UNSC	-	United Nations Security Council
UNSG	-	United National Secretary General
USA	-	United States of America

I. Overview

“Whether we work towards joining or not, we will end hostility towards the International Criminal Court and look for opportunities to encourage effective International Criminal Court action in ways that promote United States interests by bringing war criminals to justice”. Hillary Rodham Clinton – Former United States Secretary of State.

The United States of America was vehemently opposed to the idea of an International Criminal Court from the onset. The United States Congress repudiated to ratify the Statute of Rome, only signing the treaty on the last day, showing lack of seriousness. The Congress cited a number of judicial landmines, amongst them the absence of checks and balances on the powers of the ICC prosecutor and judges, the lack of due processes and the absence of juries. Hoile notes that the Clinton Administration’s ambassador –at-large for war crimes issues, David Scheffer, told the United States Senate Foreign Relations Committee that, “The treaty purports to establish an arrangement whereby US armed forces operating overseas could be conceivably prosecuted by the ICC even if the US has not agreed to be bound by the treaty ... This is contrary to the most fundamental principles of treaty law”.² Grossman consolidates this assertion by noting that, “The primary objection given by the United States in opposition to the treaty is the ICC’s possible assertion of jurisdiction over US soldiers charged with “war crimes” resulting from legitimate use of force, and perhaps over civilian policymakers, even if the United States does not ratify the Rome Statute. The United States sought to exempt US soldiers and

¹ Daglou Makumbe is a former Masters in International Relations student at the University of Zimbabwe. He studied for a Diploma in Education, Bachelor of Science Honours degree in Political Science and a Bachelor of Science Honours degree in Administration and a Master’s Degree in International Relations at the same university. He is the author of the book, “Complementarity, Jurisdiction and Admissibility on International Legal Justice: The International Criminal Court and Kenya”, published by Lambert Academic Publishing, Deutschland (2015), and several articles on the International Criminal court and International Relations.

² Hoile, D. 2010. The International Criminal Court – Europe’s Guantanamo Bay. London: Africa Research Centre.

employees from the jurisdiction of the ICC based on the unique position the United States occupies with regard to international peacekeeping”.³

The United States was also wary of possible politicized prosecutions from either the ICC Chief Prosecutor or the judges. Hoile notes that the US Congress noted that, “We are also concerned there are insufficient checks and balances on the authority of the ICC prosecutor and judges. The Rome Statute creates a self-initiating prosecutor answerable to no state or institution other than the Court itself. Without such an external check on the prosecutor, there is insufficient protection against politicized prosecutions or other abuses”.⁴

II. The United States of America: Power from Without

The United States of America is not party to the Rome Statute that created the International Criminal Court. However, even given such a scenario, the United States has considerable power and influence over the ICC. As the Permanent One (P1) member of the United Nations Security Council, the United States has the unique veto of prosecution which can block or bar any decisions(s) by the court to indict its nationals or other nationals of its allies. This means that the United States, even if its nationals commit heinous crimes, will never be indicted by the ICC since it will exercise its veto of prosecution to thwart such a decision. This idea was consolidated by the former and late British Foreign Secretary Robin Cook who remarked that, “If I may say so, this is not a court set up to bring to book prime ministers of the United Kingdom or presidents of the United States”.⁵

Apart from its political, economic, military as well as veto power, the United States also has power in population numbers. It has a considerable population which, when left outside the court’s jurisdiction, will leave the court’s legitimacy in disarray. This imbalance is consolidated by John Rosenthal, the American commentator, who remarks that, “Seven of the ratifiers (of the Rome Statute) taken together – San Marino, Nauru, Andorra, Liechtenstein, Dominica, Antigua and Barbuda and the Marshall Islands – have a population of roughly 347, 000, which is less than the population of New York’s smallest borough of Staten Island. On the side of non-ratifiers, by contrast, one finds India with its billion inhabitants; China 1.25 billion, and of course the USA 312 million”.⁶ Given such unfortunate ICC statistics that do not tilt in the court’s favour, Hoile supports by remarking that, “Thus, while the ICC may aspire to be a universal court exercising universal jurisdiction, the simple fact is that it does not qualify on either account. Its members only represent 27% of the world’s population. Therefore, for all its publicity and aspirations to universal jurisdiction, the simple fact is that the ICC is little more than a European Court”.⁷

Article 13 (b) and 16 of the ICC’s statute grant special prosecutorial rights to refer or defer an ICC investigation or prosecution to the United Nations Security Council (UNSC), specifically to the Permanent Five (P5) members of the Security Council, the United States included. This means that the USA, as one of the permanent members of the Security Council has considerable power and influence over the ICC even if it is not party to the Statute of Rome. Article 16 also enables the UNSC to delay prosecutions for a year at a time in a process known as deferral. On this note again, the United States as a permanent member of the Security Council also has considerable power and influence to defer prosecutions even if it is not party to the Rome Treaty. This is a privilege which is exclusive to the Permanent Five, and which other states, even those which are signatories and ratifiers of the Rome Statute but are not part of the P5, do not possess. The ICC’s legislative body and management oversight theoretically is the Assembly of States Parties (ASP), which consists of one representative from each state party. The ASP meets in full session once a year in New York, USA, or in The Hague and may also hold special sessions where circumstances require. On this note again, one can see the United States’ power and influence over the ICC. The United States is not a state party to the Rome Statute but the Assembly of States Parties chose New York as one of their possible yearly meeting venues.

III. The United States Stance towards the International Criminal Court

The United Nations, non-governmental organizations, human rights organizations and many states welcomed the idea of an international criminal court to prosecute crimes of an egregious nature. However, the United States was opposed to such a court of last instance under the Bush administration, to the astonishment of many democratic states world over. In May 2002 the Bush administration finally and formally untied its legal umbilical cord with the Rome Statute by notifying the UN Secretary General that, “This is to inform you, in connection with the Rome Statute of the International Criminal Court adopted on July 17, 1998, that the United

³ Grossman, M. 2002. “Remarks to the centre for Strategic and International Studies”, Washington DC, in Elsea, J.K. 2006. US Policy Regarding the International Criminal Court. Congressional Research: The Library of Congress.

⁴ Cited in Hoile, D. 2010. The International Criminal Court – Europe’s Guantanamo Bay. London: Africa Research Centre.

⁵ Cook, R. 2012. “Is the ICC fit for purpose? New African, March, p.9.

⁶ Rosenthal, J. 2012. “Is the ICC fit for purpose? New African, March, p.10.

⁷ Ibid, 2

States does not intend to become a party to the treaty. Accordingly, the United States has no legal obligations arising from its signature on December 31, 2000. The United States requests that its intention not to become a party, as expressed in this letter, be reflected in the depository's status lists relating to this treaty."⁸ This act could be interpreted as a reversal of President Clinton's signature and hence any American quest to be party to the Statute of Rome. Elsea adds a similar view by noting that, "Although some in the media described the act as an "unsigned" of the treaty, it may be more accurately described as a notification of intent not to ratify."⁹

Although the United States was one of the states in the vanguard in initiating the Statute of Rome of 1 July 2002, it however voted against the treaty, citing several legal touchstones. Dissatisfied with the flaws of the Statute of Rome, the United States however stated that although it had repudiated to be party to the Rome Statute and hence the International Criminal Court, it was going to support the ICC and would not antagonize with the functions of this court of the highest order, especially when its national interests were at stake. In her confirmation hearing before the Senate Foreign Relations Committee in January 2009, the then US Secretary of State Hillary Rodham Clinton remarked that, "Whether we work towards joining or not, we will end hostility towards the International Criminal Court and look for opportunities to encourage effective ICC action in ways that promote United States interests by bringing war criminals to justice."¹⁰

Marc Grossman, the United States under Secretary for Political Affairs, consolidated the United States position regarding this issue. Grossman reiterated that, "Notwithstanding our disagreements with the Rome Treaty, the United States respects the decision of those nations who have chosen to join the ICC, but they in turn must respect our decision not to join the ICC or place our citizens under the jurisdiction of the court.

So, despite this difference, we must work together to promote real justice after July 1, when the Rome Statute enters into force. The existence of a functioning ICC will not cause the United States to retreat from its leadership role in the promotion of international justice and the rule of law."¹¹

IV. Reasons for U.S Objection to the International Criminal Court

The United States has the largest United Nations peacekeeping forces in the world. The US rejected the idea of an ICC because of fear that its diplomats and servicemen might be indicted by the court during their peacekeeping and foreign policy initiatives. Elsea notes that, "The primary objection given by the United States in opposition to the treaty is the ICC's possible assertion of jurisdiction over U.S. soldiers charged with "war crimes" resulting from legitimate uses of force, or its assertion of jurisdiction over other American officials charged for conduct related to foreign policy initiatives."¹² The ICC threat of prosecution is viewed to pose as a threat to U.S military and foreign policy initiatives, thereby jeopardizing its sovereignty. This U.S action however can be seen on a different perspective. The U.S may be viewed as attempting to evade international accountability and justice for possible awful crimes that can potentially be perpetrated by its servicemen, officials and other nationals.

a) Jurisdiction over Nationals of Non – Parties

The ICC jurisdiction is embedded in territorial and nationality principles. Nationals of non-states parties to the Statute of Rome may face prosecution if they perpetrate crimes within the jurisdiction of the ICC, in states that are party to the Rome Treaty. However, according to the law of treaties, only nations that sign and ratify treaties are obliged to observe them. The ICC in this case purports to subject nationals of non – states parties territorially within its jurisdiction, thus binding non party nations. Although some ICC pundits and supporters assert that the ICC has jurisdiction over persons and not nations, most perpetrators of heinous crimes that are within the jurisdiction of the ICC are in leadership positions and they commit such command crimes whilst executing state policy. Wedgewood notes that, "ICC opponents, however, may point out that if individuals are charged for conduct related to carrying out official policy, the difference between asserting jurisdiction over individuals and over the nation itself becomes less clear."¹³ Elsea supports by noting that, "After all, it is arguably the policy decision and not the individual conduct that is actually at issue. The threat of prosecution, however, could inhibit the conduct of U.S officials in implementing U.S foreign policy. In this way, it is argued; the ICC may be seen to infringe U.S sovereignty".¹⁴

⁸ Wright, J. 2002. "US Renounces obligations to International Court", Reuters, May 6, in US Policy Regarding the International Criminal Court. Congressional Research: The Library of Congress.

⁹Elsea, J.K. 2006.US Policy Regarding the International Criminal Court. Congressional Research: The Library of Congress.

¹⁰ Clinton, H.R. 2012. "ICC Justice: The World Reacts". New African, April, p.24.

¹¹ Grossman, M. 2002. "Remarks to the Centre for Strategic and international Studies", Washington DC, in Else US Policy Regarding the International Criminal Court.

¹² Ibid, 8

¹³ Wedgewood, R. 2001. The US and the ICC: The Irresolution of Rome, 64 LAW and CONTEMP. PROBS. 193, 199.

¹⁴Ibid, 11.

b) Politicised Prosecution

The United States has the largest number of military men taking part worldwide in peacekeeping initiatives. Due to their large numbers, they are thus more prone to face charges of an egregious nature than any other forces in the world. The U.S Congress noted that, “We are also concerned there are insufficient checks and balances on the authority of the ICC prosecutor and judges. The Rome Statute creates a self-initiating prosecutor answerable to no state or institution other than the Court itself. Without such an external check on the prosecutor, there is insufficient protection against politicized prosecutions or other abuses.”¹⁵ Grossman consolidates by remarking that, “The ICC’s flaws may allow it to be used by some countries to bring trumped – up charges against American citizens, who, due to the prominent role played by the US in world affairs, may have greater exposure to such to such charges than citizens of other nations.”¹⁶

However, the complementarity principle of the ICC states that the court will only exercise its justification only in cases whereby municipal courts are unwilling or unable to prosecute genuinely. Only in those cases will the case be made admissible to the ICC. In the American scenario, due to the affluent nature of the American economy and with its vibrant legal institutions, one is justified to state that this scenario is unthinkable, impossible and unimaginable in the American situation.

The principle of complementarity also goes in favour of affluent and first world states such as the United States concerning their ability to prosecute nefarious crimes as compared to poor states. Professor William Schabas notes that Louise Arbour, for example, argued that “The regime would work in favour of rich, developed countries and against poor countries. Although the court’s prosecutor might easily make the claim that a justice system in an undeveloped country was ineffective and therefore ‘unable’ to proceed, essentially for reasons of poverty, the difficulties involved in challenging a state with a sophisticated and functional justice system would virtually be insurmountable. Certainly, there is danger that the provisions of Article 17 will become a tool for overly harsh assessments of the judicial machinery in developing countries.”¹⁷

The U.S. legal system will thus never be found to be unable to prosecute cases. It can only be found to be unwilling, maybe due to undue procrastination in conducting proceedings or trying to shield a perpetrator of awful crimes. India, which is another refusenik of the ICC, could not imagine the existence of any state on this planet with so defunct judicial systems so as to warrant inability. India noted that “We have always had in mind a court that would deal with truly exceptional situations where the state machinery had collapsed, or where the judicial system was either so flawed, inadequate or non-existent that justice had to be meted out through an international court, because redress was not available within the country. That, however, has not happened.”¹⁸

c) An Unaccountable Prosecutor

The ICC prosecutor is not accountable to anyone except the court itself. The prosecutor may initiate independent investigations by using powers ‘proprio motu’ and this may lead to biased indictments such as in regional favouritism or politicised prosecutions. On this note again, the US congress noted that, “We are also concerned there are insufficient checks and balances on the authority of the ICC prosecutor and judges. The Rome Statute creates a self-initiating prosecutor answerable to no state or institution other than the court itself. Without such an external check on the prosecutor, there is insufficient protection against politicised prosecution or other abuses”.¹⁹ Grossman has a similar view and postulates that, “The Office of the Prosecutor, an organ of the ICC that is not controlled by any separate political authority, has unchecked discretion to initiate cases, which could lead to “politicised prosecutions”.²⁰ However, ICC proponents argue that the ICC prosecutor will only exercise powers ‘proprio motu’ after being granted permission by the Pre-Trial chambers, for example in the Kenyan case.

d) Usurpation of the Role of the UN Security Council

The Statute of Rome gives the ICC the mandate to define as well as to punish acts of aggression. However, under the United Nations Charter, this role is solely the role of the United Nations Security Council. The definition of aggression, which will be decided and voted for after seven years of the Statute of Rome’s existence, may spark definitional controversy and diversity and therefore may fail to pass the unanimity test. It may thus fail to conform to ‘jus cogens’.

¹⁵ Cited in Ibid, 1

¹⁶ Ibid, 10

¹⁷ Cited in Ibid, 1

¹⁸ Cited in Ibid, 1

¹⁹ cited in Ibid, 1

²⁰ Ibid, 10

e) Lack of Due Process Guarantees

Americans perceive the ICC as a court that will fall short of due processes such as the right to a jury trial. Such rights are enshrined in the American Constitution and every American is accorded that right. However, ICC supporters argue that the Rome Statute has similar provisions that accords Americans similar provisions. Elsea however notes that, “Some also note that the US Constitution does not always afford American citizens the same procedural rights. For example, Americans may be tried overseas, where foreign governments are not bound to observe the constitution. Moreover, cases arising in the armed services are tried by court martial, which is exempt from the requirement for a jury trial. The current US policy about the use of military tribunals in the war against terrorism could lead to suggestions of a double standard on the part of the United States with respect to procedural safeguards in war crimes trials”²¹.

V. United States Congressional Safeguards: Duplication of Privileges

The United States Congress could not stomach the unfriendly provisions of the Rome Treaty and therefore could not sit still and watch its international endeavours being cast into jeopardy. The Congress therefore implemented various counter – measures to safeguard its servicemen, diplomats, officials and nationals. These retaliatory measures were implemented by the US Congress to drain away the ICC’s strength in prosecuting Americans. However, such measures could be deemed as a duplication of privileges since the US already had options to outwit the ICC without really implementing such congressional safeguards.

a) Bilateral Immunity Agreements (BIAs)

In pursuance to its hostility towards the ICC, the Bush administration approached and cajoled many states with both positive or negative sanctions to conclude Bilateral Immunity Agreements (BIAs), anchored on Article 98 of the Statute of Rome, excluding US citizens as well as the signatory partner from the jurisdiction of the ICC. Each state party to an Article 98 agreement promises that it will not surrender citizens of the other party to international tribunals or the ICC unless both parties agree in advance. These agreements prohibit the surrender to the ICC of a broad scope of persons including current or former government officials, military personnel and US employees (including contractors) and nationals. Due to the fact that these reciprocal agreements do not include an obligation by the US to subject the perpetrators to investigation and/or litigation, many scholars have concluded that the BIAs are contrary to international law and the Statute of Rome.

The reasons for US opposition to the ICC is the general suspicion of the US congress to multilateral treaties as well as the perceived view that international legal statutes may impinge on the US unilateral foreign policy initiatives by acting as a check and balance. The Carr Centre for Human rights Policy Working Paper notes that, “Part of the explanation is the widespread suspicion in Congress of multilateral institutions in general, and the way they are perceived to encroach on US sovereign prerogatives. But more fundamentally, the ICC highlights the tension that exists among US policy makers between the desire for a cooperative international system based on the rule of law, and the wish to assert the right to use unilateral force in pursuit of policy goals”²².

The US also has the largest, affluent and most influential forces that play a stupendous significance in global peacekeeping. The idea of an intentional criminal court with a potential to prosecute its forces for overseas peacekeeping operations will stand as an elephant in the room to its foreign endeavours. The Carr Centre for Human Rights Policy Working Paper notes that, “United States military capabilities and political influence increase the exposure of US forces deployed internationally. It is tempting for US leaders to see international norms and institutions as checks on their freedom of action rather than as the essential bricks and mortar of a global order that is congenial to US interests”²³.

In actions that are tantamount to political arm-twisting, the US has moved an extra mile by suppressing military assistance to those states, that are party to the Statute of Rome and that repudiated to sign BIAs. The Carr Centre for Human Rights Policy Working Paper further notes that, “While 101 governments have reportedly signed BIAs, less than 40% of these agreements have been ratified by Parliament or signed as an executive agreement. In fact, many legal experts argue that the executive agreements are unconstitutional and require the approval of Parliament, and are thus not valid agreements. Furthermore, more than half of States Parties have resisted signing BIAs – despite large economic penalties imposed by the US – and 53 countries continue to publicly refuse to sign. In addition, several intergovernmental bodies have publicly opposed these agreements and have encouraged other states to resist signing such agreements and continue to uphold the integrity of the Rome Statute”²⁴.

²¹ Ibid, 13

²² Carr Centre for Human Rights Policy Working Paper T-oo-02

²³ Ibid, 21

²⁴ Ibid, 22

It is important to note that instead of embarking on such a cumbersome task of signing BIAs, the United States, as a permanent member of the United Nations Security Council, could just utilize the Security Council privilege of the veto of prosecution. This veto of prosecution can block any decision(s) to indict American citizens or any American allies, for example Russia and China vetoed a UNSC proposal to indict the two warring parties in the Syrian civil war because they are permanent members of the UNSC. The US, apart from the veto power, could also invoke the complementarity principle to prosecute crimes within the jurisdiction of the ICC. This was going to make the US a standalone hence avoiding ICC justice. The US could arrest and prosecute perpetrators of crimes that are within the jurisdiction of the ICC without its citizens being tried by this court of last instance. Furthermore, with or without an ICC, the US can still prosecute egregious crimes committed by its servicemen, as it did in the My Lai Massacre in Vietnam; hence there is no need to sign BIAs. Still on the same footing, since the ICC is predominantly concerned with acts perpetrated in pursuit of a systematic and premeditated plan or policy, sporadic and isolated crimes would generally not meet this test, and it is unimaginable in this 21st century era that US forces can perpetrate such barbaric crimes. Therefore, it is justified that BIAs are a duplication of privileges given that the US has a myriad of ways to attain justice, evade or pre-empt ICC justice.

b) American Servicemembers' Protection Act of 2002

This legislation is informally known as "The Hague Invasion Act". The act contains provisions constricting any cooperation with the ICC and authorizing the president to use his powers and by any means necessary to free US citizens and allies from the custody of the ICC in the Netherlands. In particular, Section 2007 prohibits US military assistance to parties to the ICC that have refused to sign a BIA. The Coalition for the ICC notes that, "Officials of the Bush Administration have used this provision to warn countries that they could lose US military assistance if they became or were members of the ICC without pledging to protect US nationals serving in their countries from the court's reach. The legislation, despite its harsh rhetoric, contains waivers that make all of these provisions non-binding; the Bush Administration had selectively used these waivers but continues to pressure countries around the world to conclude bilateral immunity agreements – or otherwise lose essential US military assistance".²⁵

This act clearly highlights the United States' legal interests by postulating that the ASPA will not bar the US from cooperating with the court if it arrests and prosecutes rogue perpetrators of heinous crimes such as Osama bin Laden and Saddam Hussein. This is also why the Americans did not veto a UNSC referral in Darfur which sent arrest warrants to President Omar al Bashir as well as the former and late Libyan President Muammar Gaddafi. Section 2015 provides clarification with respect to assistance to international efforts. It states that, "Nothing in this title shall prohibit the US from rendering assistance to international efforts to bring to justice Saddam Hussein, Slobodan Milosevic, Osama bin Laden, other members of al Qaeda, leaders of Islamic Jihad, and other foreign nationals accused of genocide, war crimes or crimes against humanity".²⁶

Entities covered in Section 2004 that are prohibited from responding to any request for cooperation by the ICC and providing any specific assistance include aspects such as arrest, extradition, seizure of property, asset forfeiture, service of warrants, searches, taking of evidence and any other related matters. It also prohibits agents of the ICC from carrying out any investigations on US soil on matters pertaining the court. Section 2004 (d) stipulates that the US, "Shall exercise its rights to limit the use of assistance provided under all treaties and executive agreements for mutual legal assistance in criminal matters ... to prevent use by the (ICC of such assistance)".²⁷ The provision does not however restrict the communication to the ICC of American policy or US government assistance to defendants. It does not also prevent private citizens from providing testimonies or evidence to the court. Apart from Section 2004 (d), Section 2006 requires the President to put appropriate measures in place to prevent the direct or indirect transfer of certain classified national security information to the ICC.

VI. American Servicemembers' Protection Act Posture on US–UN Peacekeeping Operations

Section 2005 only grants UN peacekeeping assistance by the US only in those states that the President certifies US troops will not face any ICC indictment thereafter, unless subject to a blanket waiver under Section 2003, or because the Security Council has permanently exempted US personnel from indictment for activity conducted as participants. However, Elsea notes that, "The compromise reached by the UNSC in Resolution 1422 (2002) provided for a one year deferral, thus providing neither immunity nor permanent protection, which would not appear to meet this criterion".²⁸ The US will also provide such peacekeeping assistance if the state is

²⁵ Coalition For The ICC (2002). "Overview of the US' Opposition to the ICC". <http://www.iccnw.org.iccc@iccnw.org>

²⁶ Cited in Ibid, 20

²⁷ Cited in Ibid, 25

²⁸ Ibid, 20

not party to the Statute of Rome that created the ICC and does not accede to its jurisdiction, or has entered into an agreement in accordance with Article 98 of the Treaty of Rome.

Elsea observes some legal loopholes of Article 98 agreements by remarking that, “The latter option may not provide as much assurance as the first, an Article 98 agreement will prevent the surrender of certain persons to the ICC by parties to the Article 98 agreements, but would not bind the ICC if it were to obtain custody of the accused through other means. If the alleged crime is committed on the territory of a state party to the Rome Statute, the consent requirement for the jurisdiction of the ICC would be met, despite the existence of the Article 98 agreement. That country could, however, carry out its own investigation and invoke complementarity to preclude the ICC’s jurisdiction. Additionally, the country that is the object of the peacekeeping mission may consent to the ICC’s jurisdiction over US participants for alleged crimes committed on its territory, whether or not it is a member of the ICC”.²⁹ Since national interests cut across every US spectrum, the restriction may be waived whenever the US President certifies that the peacekeeping mission in question will serve US national interests.

Elsea observes another loophole of Article 98 in a bid by the US to obtain immunity by noting that, “Article 98 appears to cover only persons sent by the government to the requested state on official business, such as officials and military personnel, and would not cover private citizens who are present in the requested state for reasons unrelated to official duty. An agreement signed by the state party to the ICC that promises not to surrender any other citizens of another state to the ICC would appear to be covered by Article 97 of the Rome Statute, which requires the requested state to consult with the ICC if honouring a request for surrender to the ICC would cause the requested state to breach its international obligations”.³⁰

Military Assistance Provision Restriction

With effective from 1 July 2003, the ASPA prohibited military assistance to any state that is a signatory of the Statute of Rome and hence a member of the ICC. This military bombshell only exempted NATO states as well as non-NATO allies such as Egypt, Israel, New Zealand, Australia, Japan, Jordan, Republic of Korea, Taiwan and Argentina. This restriction of provision of military assistance to states that are party to the Rome Treaty may only be waived by the President and this is stipulated by section 2007. This waiver may also be necessitated if the President initiates a blanket waiver, stipulated by Section 2003. Such waivers are granted by the President without consulting the Congress if he determines national interests are at stake or the recipient has entered into an Article 98 by the US to thwart the ICC from conducting its legal proceedings against US nationals present in that state.

United States Authority to Free Persons from ICC Custody

According to Section 2008, the US President is authorised to use all means necessary and appropriate to bring about the release of covered US and allied persons upon the request of the detainee’s state of origin, who are being imprisoned or detained by or on behalf of the Court. This provision does not however define or provide a clear explanation as to what constitutes necessary and appropriate measures to bring out the release of covered persons. It only elucidates that this excludes bribes and the provision of other such incentives. Section 2008 further authorizes the president to assign any federal agency to provide legal assistance as well as the provision of legal representation and corroborating evidence on behalf of covered US or allied persons who are arrested, detained, investigated, prosecuted or imprisoned by the Court, or on behalf of the Court. This section again goes a mile by authorizing the US government to appear before the ICC in defence of US interests.

Covered allied persons include military personnel, elected or appointed officials and other persons working for a NATO country or a major non NATO ally as long as that government is not party to the Rome Treaty and wishes its officials and other persons working on its behalf to be exempted from the jurisdiction of the Court. These covered allies include nationals from states such as Czech Republic, Turkey, Egypt, Israel, Japan, the Republic of Korea and Taiwan. Elsea remarks that, “All of these exempted countries are members of the ICC except the Czech Republic, Israel, Egypt, Turkey, Taiwan and Japan. The Czech Republic, Egypt and Israel signed the Rome Statute but have not ratified it. In August 2002, Israel notified the UN Secretary General that it does not intend to ratify the Rome Statute”.³¹

The Nethercutt Amendment

It was instituted in December 2004 as part of the US Foreign Appropriations Bill. This legislation is more sundry and unbearable than the ASPA because it authorizes the loss of Economic Support Fund (ESF) to all states, including many key US allies that ratified the Rome Treaty but have not entered into a Bilateral Immunity Agreement with the USA. Although the President has the authority to waive the provision of the

²⁹ Ibid, 20

³⁰ Ibid, 28

³¹ Ibid, 29

mandate, threats in severe cuts in foreign aid, funds for cooperation in international security and terrorism, economic and democratic development, human rights, promotion of peace processes are all economic and security benefits that are threatened by this sanctioning provision. Hoile consolidates by remarking that, "Under the 2004 Nethercutt Amendment, ICC states parties who refuse to sign BIAs with the US are penalized with cuts in foreign aid. As of August 2006, over 100 BIAs had been signed and 53 countries had publicly refused to sign."³²

Only states that are eligible for assistance under the Millennium Challenge Act of 2003 are the ones that may continue receiving economic aid. Since national interests cut across every state's spectrum, the US President may waive the prohibition with respect to NATO members as well as major non-NATO allies without prior notice to Congress if the president sees that such measures are in consonance with US national interests. The extent of economic damage posed by the Nethercutt Amendment is highlighted by the Coalition for the ICC who remarked that, "On 28 November 2006, President Bush waived Nethercutt funding restriction on 14 countries that were previously denied Economic Support Fund aid. However, three countries – Ireland, Brazil, and Venezuela – still have a total of approximately \$15 million in Economic Support Fund aid threatened."³³

VII. United States Options to Evade ICC Prosecutions: Avoidance of Duplication of Privileges

The USA has vibrant legal institutions and can therefore successfully outmanoeuvre the ICC by making use of the Rome Statute's complementarity principle. The USA can successfully prosecute any crimes perpetrated by its citizens abroad or servicemen for crimes within the jurisdiction of the ICC such as genocide, war crimes, and crimes against humanity, the crimes of aggression and crimes against the administration of justice. Elesa notes that, "One option might be to implement a policy of investigating, and if warranted, prosecuting, all crimes under the ICC jurisdiction alleged to be committed by a US person, thus pre-empting the ICC through application of the complementary principle. Such a policy, coupled with changes in US statutes to broaden the jurisdiction of federal courts to cover all relevant crimes, could further insulate US citizens from the reach of the ICC. The United States could seek to further enhance its reputation for conducting fair and credible investigations and trials of suspected war criminals, as well as perpetrators of crimes against humanity or genocide, through the use of consistent procedures that are as open as security considerations permit. Such a practice may help to overcome any charges that a US investigation or prosecution of an accused is not "genuine" for the purposes of complementarity."³⁴

This fundamental idea was also supported by the former and late British Foreign Secretary Robin Cook who noted that states such as the USA and Britain will never expose their servicemen or citizens to an international criminal court because they have very sound legal institutions which can successfully prosecute ICC crimes using their internal remedies, thus taking their stand on the Rome Statute's complementarity principle. Cook notes that, "The International Criminal Court will act only where national courts have failed to offer a remedy. Therefore I think the concern about US servicemen is misplaced. There is a strong judicial system in the United States. It can take action itself if there were to be breaches of international humanitarian law by US servicemen..... in those circumstances the ICC does not apply."³⁵ Thus, instead of signing a mushroom of BIAs with several states, which might act as a mere duplication of privileges, the USA can simply resort to the Rome Statute's complementarity principle in order to outwit and pre-empt the ICC.

This complementarity principle is actually a privilege to affluent states such as the US and an option to outflank the ICC. Plessis consolidates the complementarity principle by noting that, "The principle of complementarity ensures that the ICC operates as a system of international criminal justice which buttresses the national justice systems of states parties. It is 'an attempt to balance the principle of state sovereignty and the need to establish an international regime that effectively intervenes when states fail to do so.'³⁶ Therefore, a state like the US will never 'fail to do so' since it has vivacious legal institutions. However, since the BIAs do not give a provision for perpetrators of callous crimes to be prosecuted by the US municipal courts, the US might still be caught on the wrong side of the complementarity principle by being deemed 'unwilling.' Its courts might be found to be unwilling to prosecute heinous crimes, such as shielding perpetrators or conducting sham proceedings.

³² Ibid, 1

³³ Ibid, 24

³⁴ Ibid, 30.

³⁵ Cook, R. 2000. "The United States And The International Criminal Court". Carr Centre for Human Rights Policy Working Paper T-00-01

³⁶ Plessis, M. 2010. "International Criminal Courts, the International Criminal Court and South Africa's Implementation of the Rome Statute", in Dugard, J. 2010. *International Law: A South African Perspective*. Cape Town: Juta and Company

The US Congress also needs to understand that the Rome Statute's complementarity privilege actually works in favour of developed states such as the USA, unlike in third world countries. It is thus to the US' own advantage. This is consolidated by Professor William Schabas who notes that Louise Arbour, for example, argued that, "The regime would work in favour of rich, developed countries and against poor countries. Although a court's prosecutor might easily make the claim that a justice system in an underdeveloped country was ineffective and therefore 'unable' to proceed, essentially for reasons of poverty, the difficulties involved in challenging a state with a sophisticated and functional justice system would virtually be insurmountable. Certainly, there is a danger that the provisions of Article 17 will become a tool for overly harsh assessments of the judicial machinery in developing countries."³⁷

Summatively, since the US has the privilege of complementarity and veto of prosecution, one finds that there was no need for the US Congress to sign BIAs and establish all this innumerable defensive arrays of legislation as a legal buffer against the ICC. It can use its veto of prosecution to block any prosecutorial decisions for its allies or nationals and may also invoke the complementarity principle to deal with its own legal affairs. The United States Congressional safeguards may therefore be justifiably regarded as unnecessary duplication of privileges.

VIII. How States can Evade International Criminal Court Justice

Signatories and Ratifiers

One option for signatories and ratifiers of the Rome Treaty would be to unsign. A written declaration to the ICC by the state parliament that the state concerned is pulling out of the Rome Statute will be an option, for example, Kenya in 2010. Plessis and Gevers note that, "Kenya's political elite have responded aggressively to the ICC's indictments and on 22 December 2010 Kenya's Parliament passed a resolution calling for Kenya's withdrawal from the Rome Statute."³⁸ However, if a state does so, the United Nations Security Council can still refer situations in that state under Chapter VII of the UN Charter over the breach of international peace and security, as long as that state is a member of the United Nations. Sudan and Libya are good examples of such scenarios. In order to avoid this again, a state can further take the anachronistic move of withdrawing from the United Nations. When a state has not ratified the Rome Statute and is not a member of the United Nations, the ICC and the UNSC will not have any grounds to indict nationals of that state. The ICC will only be left with an option of indicting nationals of that state if they perpetrate crimes within the jurisdiction of the ICC in a state party to the Rome Statute (territorially).

For those states that signed the Statute of Rome but did not ratify, for example Israel and USA, the option here is not to ratify. By not ratifying, a state's nationals may still be indicted if the UNSC perceives breaches of international peace and security under the Charter's Chapter VII because the state in question is a member of the United Nations. The next step therefore will be to take the archaic move of withdrawing from the United Nations so that neither the ICC nor the UNSC will have jurisdiction over that state's nationals. That state must only make sure that its nationals do not perpetrate ICC crimes in the territory of a state party to the Rome Statute since they will be liable for arrest by the Statute's territorial principle.

Non – Signatories

Non – signatory states to the Statute of Rome such as Zimbabwe, India and Sudan have an option of evading ICC justice by embarking on an unfortunate move of withdrawing from the United Nations since it is only the UNSC which can refer situations to such states under the UN Charter's Chapter VII. When they do so, neither the ICC nor the UNSC will have any jurisdiction over such a state's nationals. Such a state should only make sure that its nationals do not perpetrate callous crimes within the jurisdiction of the ICC in states that are party to the Statute of Rome since those perpetrators will be liable to arrest by the territorial principle of the Rome Statute.

IX. Some Justification for United States Action

- a) The United States has the largest peacekeeping force in the world and therefore its forces are more prone to crimes of international humanitarian law due to different kinds of situations and environments they are exposed to.
- b) The United States cannot base its faith on the complementarity principle to prosecute heinous crimes using its internal remedies. This is because the government, though it may not be deemed 'unable', can be deemed 'unwilling.' In its BIAs, the US does not state that it will prosecute atrocious crimes in its municipal jurisdictions. Given such a scenario, the US may condone its servicemen and/or other state

³⁷Schabas, W. 2001. *An Introduction to the International Criminal Court*. Cambridge: University Press.

³⁸ Plessis, M.D. and Gevers, C. 2011. "International Justice: Kenyan case a good test of ICC founding principles". *Business day*, 28 January 2011.

officials who commit such callous crimes with impunity, thereby risking the ICC for being ‘unwilling’ to prosecute.

- c) In order for its unilateralism policy, national interests as well as foreign policy goals to flourish, the US has to accomplish all these endeavours without any threatening legal barricades from any international court. The idea of an ICC will therefore threaten these initiatives.
- d) The United States is one of the greatest funders of the ICC and therefore cannot tolerate a situation whereby its nationals are indicted by the court it funds so substantially. He who pays the piper calls the tune.
- e) The United States cannot afford to see an independent and impartial international court that it funds so greatly. The court has to ‘respect’ the US and handle it with kid gloves as compared to other states. Its political, economic and military prowess speaks volumes. Given such a scenario, the ICC cannot be an impediment to US interests and foreign policy goals. The court that is funded so much by the US cannot be the same court that stands as an elephant in the room to its foreign policy aspirations. Thus, the independence and hence impartiality of a court is only as sure as the independence of its financing.
- f) The ICC Chief Prosecutor’s lack of accountability is not legally healthy for international legal justice since this might lead to regional bias and politicised prosecutions. United States forces are the most vulnerable to such legal risks because of the myriad of international operations they undertake.
- g) Lack of due processes in the court such as the absence of juries is a nerve – breaking judicial misfire in international legal justice.
- h) The ICC has jurisdiction over nationals of non-state parties and this is a violation of treaty law. By virtue of being members of the UN, all states virtually become state parties to the Rome Statute due to the Security Council attachment that the Rome Treaty is embedded in. States not parties to the Rome Statute such as the USA will therefore find themselves being state parties to that statute by virtue of being members of the UN. This is rather legally dictatorial, a violation of freedom of choice as well as the fundamental principles of treaty law. The US therefore cannot sit and watch itself being dipped into murky legal waters it did not opt for.
- i) The United States may be accused of being ‘unwilling’ if there are allegations of sham proceedings done for formality purposes with an aim of shielding a perpetrator of egregious crimes. The US will therefore want to avoid ICC justice if such a scenario occurs.
- j) Article 98 agreements are stipulated for and provided for by the Statute of Rome. Therefore the United States, by taking such an option of signing BIAs, has not violated the provisions of the Rome Statute but is acting within the confines of that treaty.

References

- [1]. Carr Centre for Human Rights Policy Working Paper. T-00-02.
- [2]. Clinton, H.R. 2012. “ICC Justice: The World Reacts”. *New African*, April, p.24.
- [3]. Coalition For The International Criminal Court. 2002. “Overview of the US’ Opposition to the ICC”. <http://www.iccnw.org.cicc@iccnw.org>.
- [4]. Cook, R. 2000. “The United States And The International Criminal Court”. Carr Centre for Human Rights Policy Working Paper. T-00-02.
- [5]. Elsea, J.K. 2006. *US Policy Regarding the International Criminal Court*. Congressional Research: The Library of Congress.
- [6]. Grossman, M. 2002. “Remarks to the Centre for Strategic and International Studies”, Washington, DC in Elsea, J.K. 2006. *US Policy Regarding International Criminal Court*. Congressional Research: The Library of Congress.
- [7]. Hoile, D. 2010. *The International Criminal Court – Europe’s Guantanamo Bay*. London: African Research Centre.
- [8]. Plessis, M. 2010. “International Criminal Courts, the International Criminal Court and South Africa’s Implementation of the Rome Statute”, in Dugard, J. 2010. *International Law: a South African Perspective*. Cape Town: Juta and Company.
- [9]. Plessis, M.D. and Gevers, C. 2011. “International Justice: Kenyan case a good test of ICC founding principles”. *Business Day*, 28 January.
- [10]. Rosenthal, J. 2012. “Is the ICC fit for purpose?” *New African*, March, p.10.
- [11]. Wedgewood, R. 2001. *The US and the ICC: The Irresolution of Rome*, 64 *LAW and CONTEMP. PROBS.* 193, 199.
- [12]. Wright, J. 2002. “US Renounces Obligations to International Court”, in Elsea, J.K. 2006. *US Policy Regarding the International Criminal court*. Congressional Research: The Library of Congress.