THE ICC AND NON-PARTY STATES: CONSISTENCY AND CONSENSUS REVISITED

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I thought I would begin with the observation that this conference is called *The International Criminal Court and the Community of Nations*, and so each of our conversations today has been structured around a different "community." When it comes to non-party states, however, I am hard pressed to conceptualize them as forming a community per se. One would expect members of a community to share certain attributes, including at least some sort of shared values or understandings. Nonetheless, as we heard from Diane Amann this morning, there is a refrain that we hear from many of the non-party states. It is a refrain of emphasis on sovereignty, and a distinction between the sovereigntist values of these non-party states and the idea of "global governance" embodied by international institutions and by the International Criminal Court (ICC)—or so the dichotomy is presented.[1] To the extent there is a community at work, perhaps the glue among these disparate states is at least a rhetorical emphasis on sovereignty and a tacit or even explicit assumption that sovereignty is inherently in tension with the treaty mechanisms that were created in Rome in 1998. In my remarks, I will talk about the *who* of this community, the *what* of their complaints about the ICC, and the *why* that animates these complaints.

It is fairly straightforward to identify the *who*. As you all know, at the Rome Conference in 1998, 120 states voted to adopt the treaty.[2] Seven states voted against the treaty, and although it was an anonymous vote, those states have subsequently been identified as China, Iraq, Israel, Qatar, Sri Lanka, Sudan, and the United States.[3] The main objection articulated by the United

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[1] For more on recent U.S. rhetoric and policy regarding the ICC, *see* Chimène Keitner, *Sovereignty on Steroids: International Institutions and the Trump Administration's "Ideology of Patriotism"*, LAWFARE (Sept. 28, 2018), https://www.lawfareblog.com/sovereignty-steroids-international-institutions-and-trump-administrations-ideology-patriotism.

[2] WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 20-21 (3d ed. 2007).

[3] Michael P. Scharf, *Results of the Rome Conference for an International Criminal Court*, 3 AM. SOC'Y INT'L L. INSIGHTS 10 (1998).

States at the time, as you will recall, was a fairly narrow and specific objection: namely, that the treaty structure adopted by these 120 states contains jurisdictional provisions that enable the ICC to exercise jurisdiction over individuals who are nationals of states that have yet to ratify the Rome Statute.[4] Contrary to misrepresentations in popular media, and even statements by some current U.S. officials, the ICC does not purport to exercise an unlimited universal jurisdiction.[5] However, if crimes that fall within the subject matter jurisdiction and the temporal jurisdiction of the court are alleged to have been committed on the territory of a state party to the Rome Statute, then individuals implicated in those crimes, who may be nationals of non-party states, also fall within the enumerated categories of jurisdiction under the statute.[6] This possibility has always been the consistent objection of the United States to the structure of the Rome Statute and to the purported jurisdictional reach of the court that it created.[7] In addition, if a situation is referred to the ICC by the UN Security Council, the fact that a state whose nationals are implicated by the referral has not ratified the Rome Statute will not be a barrier to the ICC exercising its jurisdiction under the terms of the Rome Statute.[8]

Notwithstanding this objection, as you all know, the administration of President Bill Clinton affixed the signature of the United States to the Rome Statute at the very last opportunity.[9] Although the United States is not a party to the Vienna Convention on the Law of Treaties (VCLT), Article 18 of that convention indicates that a signatory to a treaty—not necessarily a party, but a signatory—is obliged not to take any steps to undermine the object and purpose of that treaty.[10] If you are a party to the VCLT, or if you think that Article 18 has some customary international law valence, then you might be concerned about the status of the United States as a signatory. This is not a position the Bush administration, which followed the Clinton administration, was satisfied with, to say the least.[11] In 2001, Senator Jesse Helms gave a speech at the American Enterprise Institute that I quoted in a 2001 article about the ICC and article 98(2).[12] Just to give you a flavor—this is back in the very

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[4] David Scheffer, *The International Criminal Court: The Challenge of Jurisdiction*, 93 AM. SOC'Y INT'L L. PROCEEDINGS 68, 68-69 (1999).

[5] Keitner, *supra* note 1.

[6] Scheffer, *supra* note 4.

[7] *Id*.

[8] *Id*.

[9] *See* Steven Lee Myers, *U.S. Signs Treaty for World Court to Try Atrocities*, N.Y TIMES (Jan. 1, 2001), https://www.nytimes.com/2001/01/01/world/us-signs-treaty-for-world-court-to-try-atrocities.html.

[10] Vienna Convention on the Law of Treaties art. 18, May 23, 1969, 1155 U.N.T.S 331.

[11] Neil A. Lewis, *U.S. Rejects All Support for a New Court on Atrocitie*s, N.Y. TIMES (May 7, 2002), https://www.nytimes.com/2002/05/07/world/us-rejects-all-support-for-new-court-on-atrocities.html.

[12] Chimène I. Keitner, *Crafting the International Criminal Court: Trials and Tribulations in Article 98(2)*, 6 UCLA J. INT'L L. & FOR. AFF. 215, 240 n.53 (2001).

beginning, before the court even existed, before the statute had been ratified by the required 60 states—Jesse Helms said:

> [f]irst, the Bush Administration should simply un-sign the Rome Statute. I mean, quite literally, that the Administration should instruct someone at the U.S. Mission in New York to walk across the street to the UN, ask to see the treaty document, and then take out a pen and draw a line through Ambassador Scheffer's name. I think that will send a clear message.[13]

Well, as all of you know, the United States is reported to have "un-signed" the treaty. In concrete terms, the United States purported to do this by sending a letter, indicating the United States did not intend to ratify the statute and therefore did not consider itself to be bound by any obligation under Article 18 to act consistent with, or not to undermine, the statute.[14] As you may also recall, that letter, which was sent in 2002, was perhaps somewhat unusually signed not by the Ambassador to the United Nations, but by the Under Secretary of State for Arms Control and International Security, coincidentally a gentleman by the name of John Bolton.[15]

Since that 2002 letter from the United States, a number of other signatories to the Rome Statute have also deposited letters indicating they do not intend to become parties and therefore do not consider themselves bound in any way by their signatures.[16] These signatories include Israel in 2002,[17] Sudan in 2008,[18] and Russia in 2016.[19] There are other states that have indicated that they intend to, or have in fact, deposited instruments withdrawing from the Rome Statute or purporting to do so.[20] Burundi and the Philippines, as we

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[13] Senator Jesse Helms, Chairman, Senate Foreign Relations Committee, Towards a Compassionate Conservative Foreign Policy, Address at the American Enterprise Institute (Jan. 11, 2001).

[14] Keitner, *supra* note 12.

[15] Letter from John R. Bolton, Sec'y of State for Arms Control and Int'l Sec., to Kofi Annan, UN Sec'y Gen. (May 6, 2002) (*available at* https://2001-2009.state.gov/r/pa/prs/ps/2002/9968.htm).

[16] Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90.

[17] Declaration of Israel (Aug. 22, 2002), https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&lang=en#4.

[18] Declaration of Sudan (Aug. 26, 2008), https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&lang=en#10.

[19] Declaration of the Russian Federation (Nov. 30, 2016), https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&lang=en#9.

[20] For a table demonstrating the notification of withdrawals deposited by South Africa, Burundi, Gambia, and the Philippines, see Rome Statute, *supra* note 16, n.2, https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&

heard this morning, have done that, as have South Africa and Gambia—although these latter two states subsequently deposited a further notification withdrawing their withdrawal.[21] That is where we stand with respect to the community of non-party states, along with the states that never signed or ratified the Rome Statute to begin with. That is the *who*.

I already talked a little bit about the *what*. The United States' main complaint is the purported exercise of jurisdiction over nationals of non-party states under the terms of the statute.[22] Earlier today, we heard a video message from the ICC prosecutor. I found it interesting that in the catalog of situations that are either being investigated, or that the Office of the Prosecutor (OTP) has made the subject of a preliminary examination, the vast majority of the non-African situations involve acts by nationals of non-party states. There are seven such examinations or investigations, two of which have been concluded by the OTP without a decision to move forward with further action.[23] These are cataloged in a paper by Yaël Ronen from Hebrew University entitled *The ICC and Nationals of Non-Party States*.[24] It is interesting to note that this understandable desire to be more geographically inclusive in the work of the OTP seems to entail—and I would suggest not inevitably—a focus on situations where the question of asserting jurisdiction over nationals of non-party states has become an issue that is front and center. This may exacerbate the backlash in rhetoric and actions that we have seen in certain countries.

I will move on to my last question, the *why*. Why is this objectionable? Why do countries object to the exercise of jurisdiction by an international court over their nationals when most of these countries would accept that, by virtue of the territorial principle of jurisdiction, the states on whose territory the conduct occurred would be able to assert criminal jurisdiction themselves, absent some sort of status or forces agreement or other consensual arrangement? I think the purest expression of the ideological opposition to the court came recently in a September 2018 speech by John Bolton, now National Security Advisor to the President, in remarks to the Federalist Society, and in a speech by President Trump to the General Assembly of the United Nations.[25]

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[21] *Id.*

[22] *See* Scheffer, *supra* note 4.

[23] Yaël Ronen, *The ICC and Nationals of Non-Party States*, T.M.C. ASSER INST. INT'L & EUR. L. (2018).

[24] *Id*.

[25] *See* Keitner, *supra* note 1 (responding to these speeches); *see also* Chimène Keitner, *What Are the Consequences of the Trump Administration's Recent Treaty Withdrawals?*, JUSTSECURITY (Oct. 17, 2018), https://www.justsecurity.org/61101/consequences-trump-administrations-treaty-withdrawals/ (indicating that "National Security Adviser John Bolton made very clear in his speech announcing the [VCDR] Optional Protocol withdrawal that, if he had his druthers, the United States would withdraw from *all* treaty provisions providing for dispute settlement by international tribunals.").

The overarching ideological opposition articulated in those two public statements was between what the President referred to as an "ideology of patriotism" and what he characterized as an "ideology of globalism."[26] This vocabulary has been attributed to one of the President's advisors and speech writers, Stephen Miller,[27] and the language also echoes the rhetoric in a 1990 article written by John Bolton and published in the *Chicago Journal of International Law* entitled "Should We Take Global Governance Seriously?".[28] Now I think if we take a step back, one answer to the challenge posed by this ideology of patriotism is that, as you all know, the ICC exercises complementary jurisdiction to that of nation-states, rather than the primary jurisdiction assigned to the ad hoc international criminal tribunals.[29] However, in a December 2017 statement to the Assembly of States Parties, the U.S. representative indicated this was also objectionable, because the ICC itself determines whether or not a nation-state has in fact conducted the requisite investigation and, if necessary, prosecution needed to prevent a case from going forward in the ICC.[30] The U.S. representative also indicated the United States rejects the ICC's authority to review the adequacy of domestic accountability mechanisms of a non-party state absent the consent of that state or Security Council authorization.[31]

I would like to end my remarks on perhaps a slightly more positive note. The group of non-party states cannot all be tarred with the same brush. Notwithstanding the fairly alarmist, and one might even say incendiary, rhetoric of late, the United States has consistently articulated support for accountability alongside objections to specific accountability mechanisms. For example, if you look at the December 2017 statement that the United States made at the Assembly of States Parties,[32] or the way the OTP is proceeding in the Afghanistan situation from the broader pursuit of accountability for international

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[26] *See, e.g.*, Laura King, *Trump Denounced "Globalism" at the U.N.—But What Does That Word Really Mean?*, LA TIMES (Sept. 26, 2018), https://www.latimes.com/world/la-fg-globalism-explainer-20180926-story.html.

[27] *Id*.

[28] John R. Bolton, *Should We Take Global Governance Seriously?*, 1 CHI. J. INT'L L. 205 (2000).

[29] *Compare* Rome Statute of the International Criminal Court art.17, July 17, 1998, 2187 U.N.T.S. 90, *with* Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, art. 9, S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993).

[30] Representative of the United States, Statement on Behalf of the United States of America at the 16th Sess. of the Assembly of States Parties (Dec. 8, 2017).

[31] *Id*.

[32] *Id*.

crimes,[33] you can see a very conscious effort to separate jurisdictional objections to the ICC. Now I do think, given the current posture of the United States, the profession of support for an emphasis on accountability does ring a bit hollow, especially because we have come to associate the ICC with the international justice project more generally. There is a tendency to perceive opposition to one as opposition to both, and support for one as support for both. But I do think it is important to distinguish between them.

The footnote that I will add to my remarks is an interesting statement that the State Department Deputy Spokesperson issued on March 5, 2019, supporting Germany's request that Lebanon extradite a Syrian general accused of crimes against humanity.[34] The State Department indicated that the United States "would welcome any decision by the government of Lebanon that would facilitate the lawful extradition of Syrian General Jamil Hassan to Germany."[35] Hassan faces charges in Germany for crimes against humanity for the extensive use of torture in Syrian detention centers, and he has already been the subject of sanctions by both the United States and the European Union.

In conclusion, in my 2001 article I suggested that in developing the rules of procedure and evidence for the ICC, the Assembly of States Parties should not attempt to seek consensus at the expense of consistency with uniform values, applied uniformly.[36] With a bit of hindsight, and given today's political situation, it might well be worth focusing on areas where we can develop consensus—even perhaps at the expense of a certain degree of consistency—so that we can move accountability efforts forward in the best way possible.

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[33] *See* Office of the Prosecutor, *Preliminary Examination: Afghanistan*, INT'L CRIMINAL COURT (Apr. 2019), https://www.icc-cpi.int/afghanistan.

[34] Press Release, Robert Palladino, Support for Germany's Request for Lebanon to Extradite Syrian General Jamal Hassan (March 5, 2019), https://www.state.gov/support-for-germanys-request-for-lebanon-to-extradite-syrian-general-jamil-hassan/.

[35] *Id.*

[36] *See generally*, Keitner, *supra* note 12.