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# Between Cosmopolitan and American Democracy: Understanding US Opposition to the International Criminal Court

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## Abstract

The International Criminal Court can be seen as a cosmopolitan response to the problems of global democracy. This article demonstrates how opponents of the Court use a concern for international order to disguise a policy motivated by a narrow conception of the national interest. US opposition reveals the extent to which it fears being held accountable for the way America uses the great power veto on the UN Security Council. America's opposition to the Court has also succeeded in bringing to the surface the extent to which American foreign policy is driven by communitarian conceptions of democracy and international society. Despite promising to hold power accountable for egregious human rights violations, the Court is considered a threat to American sovereignty and dismissed as undemocratic. The article argues that this communitarian understanding of democracy promotion will be increasingly problematic as the processes of globalization undermine the capacity of states to guarantee human rights.

Keywords: *America, cosmopolitan, democracy, International Criminal Court, international society*

## Introduction

America's opposition to the International Criminal Court (ICC) can be interpreted as a further example of the Bush administration's unilateralist foreign policy.[1] The 1998 Treaty of Rome, which established the Court, was the product of multilateral negotiations that involved 140 states. The administration's decision to 'unsign' that Treaty in May 2002 clearly demonstrated that it would not be bound by the results of those negotiations. It would be a mistake, however, to suggest that America's continuing opposition to the Court is limited to those unilateralists who wish to maximize America's room for manoeuvre by avoiding unnecessary commitments. Opposition to the Court is expressed in many places beyond the White House. Congress, for instance, has passed anti-ICC legislation in the form of the American Servicemembers Protection Act (ASPA), and those unwilling to vote for such legislation have only expressed qualified support for the Court. Even the Clinton administration, which supported the Court in principle, initially refused to sign the Rome Treaty. It waited until the last possible moment to do so and even then recommended that the incoming administration seek amendments before sending it to the Senate for ratification. Opposition to the Court stretches beyond the political elite with newspaper editorials consistently reflecting support

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for Bush's stance, and while American activists work hard to change policy it is clear that they are up against a strong tide of opinion that is generally suspicious of the ICC.

It is argued in this article that the ICC should not be seen as a multilateral institution that aims to manage American hegemony by limiting 'the returns to power'.[2] This is certainly a consequence of the Court but it is by no means its main purpose. Rather the ICC should be seen as part of an institutional solution to the problems of democracy in global politics and in this regard US opposition to it reveals something much more fundamental about America's relationship with the world. As institutions that promise to hold unchecked power accountable for human rights violations, one would expect the United States and the ICC to be mutually reinforcing. America's founding documents declare individual rights to be universal and its founding fathers clearly understood the need for political institutions to reform as circumstances change. Yet the ICC has succeeded in bringing to the surface the extent to which American foreign policy is dependent on communitarian conceptions of justice and international society, and this has major implications for those eager to promote cosmopolitan forms of democracy.[3]

Despite its cosmopolitan rhetoric, the fundamental purpose of the American Revolution was to establish an American state and this has conditioned an understanding of international society and democracy itself. In fact, democracy in America was not only the means through which a government of the people, for the people and by the people was created; it actually defined who 'the people' were. In other words, it played a key cultural role in constituting the American nation and fulfilling the need to separate that community from the rest of the world. In this respect, the ICC may promise to hold power to account and is welcomed by some democrats for that reason. Yet it also promises to hold citizens of one state accountable to foreign judges and is therefore considered a threat to *America* and its democracy. The strength of opposition to the ICC suggests that it is the cultural value of democracy, rather than the idea itself, which drives American foreign policy.

It is instructive in this regard to note that all of America's significant foreign policy traditions (including the Wilsonian tradition) have assumed that world society is naturally divided into nation-states. Successive American administrations have, at least rhetorically, supported democracy promotion.[4] Yet America's reaction to the ICC has clearly demonstrated that such support is limited to the promotion of *democratic states*. It has also demonstrated how America is dependent on an understanding of 'international society' that is limited to 'a society of states'.[5] This is not only because the USA is able, through institutions like the UN Security Council, to more easily wield its power in such a society. It is also a reflection of the fact that its identity as an independent sovereign state, which shoulders exceptional international responsibilities and provides a unique example of good democratic governance, is also dependent on this understanding of international society. Such a worldview, however, will become increasingly problematic as the processes of globalization further

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undermine the capacity of states to respond to the needs of their citizens and the USA continues to oppose efforts to democratize global society.

## Cosmopolitan democracy and the ICC

By prosecuting so called 'core crimes' – genocide, crimes against humanity and war crimes[6] – the ICC promises to shape a new normative foundation for the society of states. As of 1 July 2002 when the Court assumed non-retrospective jurisdiction, any individual planning such a crime could not necessarily rely on the failure of states to protect them from justice. Nor could they necessarily rely on the UN Security Council to protect them. The ICC is permanent and independent. Justice will not have to wait, as it had done so in the past, for the Security Council to set up an ad hoc international tribunal. Indeed, the fact that the Independent Prosecutor can launch his or her own investigation and prosecute an individual based on information provided by non-governmental organizations (NGOs),[7] means justice can pursue a path separate from that determined by the 'society of states'. Through the Independent Prosecutor the Rome Statute has empowered what Bull called 'world society' or the 'society of humankind'.[8]

This does not mean that the ICC replaces state sovereignty and the Security Council as the focus of international governance, although it does require certain concessions from these institutions. The ICC does – to use Held's description of cosmopolitan democracy – provide groups and individuals with effective means of suing political authorities for the enactment and enforcement of key rights and obligations, which those individuals would not otherwise have.[9] It will, however, only assume jurisdiction where states are 'unwilling or unable genuinely to carry out the investigation or prosecution' into an alleged core crime.[10] Known as the principle of complimentarity, this ensures that the ICC will, in effect, be an extension of national courts and not their replacement. The Court will always defer to states that are able and willing to conduct their own investigation. Yet if there was an unjustified delay in national proceedings or if those proceedings were not conducted independently or impartially, or deemed to have been 'for the purpose of shielding the person concerned from criminal responsibility', the Court would resume jurisdiction over a case.[11]

In order to gain sufficient political support the Court had to be seen to be impartial. The Court's basic principles, therefore, had to be applied equally to all states. Even though the successful functioning of the national laws of most democracies would be enough to satisfy the Court, leading it to drop its interest in a particular case, democratic states could not be exempt from the Court's oversight. In order to create a Court that sought to hold 'core criminals'[12] to account where states were unwilling or unable to do so, most democratic states were willing to tolerate this additional oversight. Most had confidence that the Court would be satisfied with their national procedures. They argued that the compromise was a small price to pay for a Court that would democratize global

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politics by holding to account those who committed the most serious abuses of human rights.

Thus by the beginning of December 2002, 139 states had accepted this compromise by signing the Rome Treaty and 76 of those states had ratified it. One state, the United States, had signed on 31 December 2000 (the last day that the Treaty remained open for signature), declared that it had no intention of seeking ratification and then, after a change of administration, 'unsigned' the Treaty on 6 May 2002. On that day Undersecretary of State for Arms Control and International Security, John Bolton, put into effect a policy he had advocated nearly 18 months previously.[13] Authorized by Secretary of State Colin Powell, he delivered a letter to the UN Secretary-General which stated that the USA did not intend to become a party to the Rome Treaty and that it had no legal obligations arising from President Clinton's signature of that treaty.[14]

As noted below, opponents of the Court claimed the Rome Statute violated Article 34 of the Vienna Convention on the Law of Treaties, which stated that a Treaty would not be legally binding on non-party states.[15] In his public statements Bolton had argued that unsigning the Treaty was necessary because Article 18 of that Treaty obligated signatories, before ratification, not to pursue a course of action that would work against the purpose of the Treaty. The administration, it seemed, was clearing the way for a policy that embraced the anti-ICC legislation sponsored by Senator Helms and Rep. DeLay which prohibited any co-operation with the Court unless the President determined it to be in America's national interest. What is more, by relying on the Vienna Convention it was arguing that its actions were justified in terms of the law that governed the society of sovereign states. The administration's allies on Capitol Hill also adopted this approach. They argued that President Clinton's statement not to recommend ratification was itself a violation of international law. 'Champions of international law', noted the Chairman of the International Relations Committee, Henry Hyde, 'should focus their fire on the Clinton Administration for the dubious way in which they signed the Treaty'. He argued that international law provides that 'signature [of a treaty] . . . is deemed to represent political approval and at least a moral obligation to seek ratification'. In contrast to the furore surrounding 'unsigning', he argued that President Clinton's decision to sign and not seek ratification was unprecedented and ill-considered.[16]

On the same day as Bolton's letter was sent to the UN, Undersecretary of State for Political Affairs, Marc Grossman, publicly stressed America's commitment to the rule of law. He also restated America's commitment to ending the culture of impunity for human rights abuses.[17] Yet he argued that it was inappropriate to try to prevent these serious offences and promote justice through new international institutions. He gave four reasons why the ICC did not advance these principles:

1. The Rome Statute creates a prosecutorial system that is an unchecked power.
2. The ICC asserts jurisdiction over citizens of states that have not ratified the Treaty. This threatens US sovereignty.

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3. The ICC is . . . open for exploitation and politically motivated prosecutions.
4. The ICC undermines the role of the United Nations Security Council in maintaining international peace and security.

The following sections offer an assessment of these complaints alongside the safeguards built into the Rome Statute. While the points made by the administration are not incorrect, it is argued that they underestimate the strength of these safeguards and exaggerate the threat posed to American democracy. Other democratic states are reassured by the safeguards in the Rome Statute and are able to live with the remote possibility that a panel of international judges might overrule national judges on a case involving core crimes. Yet the political significance of that remote possibility is magnified by a political culture that relies on democratic theory to define a nation. It is perplexing to many observers why the USA should so strongly oppose the ICC when the Court merely reflects the universal values on which America was supposedly founded. Understanding the exceptional role that democracy plays in defining a particular identity, however, makes it easier to comprehend the nature of American opposition.

## Unchecked power and the Bill of Rights

The argument that the ICC is 'an unchecked power' and does not afford individuals the same rights that American citizens expect from the Bill of Rights, is central to the concerns of those democrats who argue they have no option but to oppose the Court. Grossman elaborated on the first of his points by citing the Founding Father John Adams who warned that 'power must never be trusted without a check'. This argument underestimates the safeguards in the Rome Treaty that do check the power of the Prosecutor. For instance, as a complaint is lodged with the Court, the Prosecutor must first satisfy him or herself that a *prima facie* case against an individual exists and that the alleged crime fitted the definition of a core crime. The diplomatic follow-up to the Rome Conference (the PrepCom) defined these crimes in unprecedented detail. The so-called 'Elements of Crimes' defines clearly the kind of actions the Court has jurisdiction over. It will not, as some irresponsible commentators claim, allow the Prosecutor to indict a Texas governor for the use of the death penalty.[18] Moreover, before proceeding with an investigation the Prosecutor would have to submit details of the complaint to a pre-trial chamber.[19] This chamber is made up of not less than six judges[20] and makes sure that any decision to proceed is taken in a collective manner, 'thus preventing possible abuse of power but also shielding the Prosecutor from external influence'.[21] As noted below, the principle of complimentarity means that a state can avoid investigation by the Prosecutor by announcing within one month of being told of the case that it is conducting its own investigation.[22] Furthermore it can appeal against the pre-trial ruling at the Appeals Chamber.[23]

In addition to these safeguards, all Court officials are ultimately accountable to

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the Assembly of State Parties.[24] This does not reassure American democrats. For instance, as Lee Casey notes, the Rome Statute is open to all states, regardless of their form of government. 'Given these facts', he concludes, 'the claims made by the Court's supporters that it will embody "American values", or that democratic accountability will be preserved through U.S. representation in the Assembly of States, are nothing short of fantastic'.[25] To illustrate this, the Court's political opponents seized upon the May 2001 vote that removed the USA from the UN Commission on Human Rights.[26] For instance, when he introduced ASPA to the House of Representatives later that month, Rep. DeLay used the vote to illustrate how 'fickle' international institutions were. His colleague Rep. Hyde also argued that the vote illustrated the dangers of a criminal justice system that could be influenced by the likes of China.[27] Senator Helms, also used the example of the United Nation's conference on racism in Durban to argue that the ICC would 'not merely prosecute, but persecute our soldiers and sailors for alleged war crimes as they risk their lives fighting the scourge of terrorism'.[28]

This 'persecution' would be made easier, opponents claim, because the Court does not afford suspects the same protections as the American Bill of Rights. As Mark Leonard notes, however, these arguments are somewhat of a 'red herring'.[29] The Bill of Rights does not travel with Americans when they go abroad and so there is nothing new about Americans being subject to laws that had not been approved by the American people. In the specific case of American service-members, moreover, the right to a trial by jury does not apply. As Ruth Wedgewood notes, 'When activities have occurred abroad and would otherwise fall within foreign national jurisdiction or when the actors are military, the basis for comparison is not the ordinary trial procedure of a common law court'.[30]

Proponents of the Court, however, are on stronger ground when they identify the rights that the Statute does provide, not least because the American delegation was instrumental in demanding standards of due process.[31] Indeed, the process is considered so thorough that some have argued that it would be in America's interests to see its citizens tried there rather than in a foreign state. For instance, Rep. Delahunt noted that the Statute 'contains perhaps the most extensive list of due process rights ever codified'. On that basis he argued that 'our soldiers are at risk today without this treaty. Today they can be prosecuted by any nation within its borders. The treaty corrects this by giving primary jurisdiction over American soldiers to American courts'. Delahunt concluded that 'We have nothing to fear from this treaty and everything to gain'.[32]

## Jurisdiction

Grossman argued that 'The ICC asserts jurisdiction over citizens of states that have not ratified the treaty'. Although, for reasons described below, this is not inaccurate, his follow-up statement that 'this threatens US sovereignty', could be considered a misrepresentation. Fundamental to the Rome Statute is the principle

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of complimentarity. With the passage of the 1996 War Crimes Act and the 1997 Genocide Convention Implementation Act by the US Congress, the principle of complimentarity makes it highly unlikely that an American charged with any of the core crimes would appear before the Court.[33] The proper prosecution of *American* law in other words would be enough to persuade the Court to drop its interest in a particular case. Yet the fact that Court officials, who are not directly accountable to the American people, are allowed to interpret American law and conceivably overrule the judgement of those officials that are accountable to the American people is too much for 'sovereigntists' to tolerate.[34] The theoretical possibility that the Court could continue to pursue a case after dismissing the American investigation into that same case as implausible, is enough for them to reject the Court out of hand. As Lee Casey argues, the ICC's power to investigate and prosecute government officials:

> transfers the ultimate authority to judge the policies adopted and implemented by the elected officials of the United States . . . away from the American people and to the ICC's prosecutor and judicial bench. This would violate the first principle of democracy – that the American people have an inherent right to choose, directly and indirectly, the men and women who will exercise power over them, and to hold those individuals accountable for the exercise of power.[35]

US opponents of the Court, therefore, are not only motivated by the fact that the Assembly of States contains non-democratic states that may be able to influence the Independent Prosecutor. Should the Assembly of States be dominated by democracies, American sovereigntists would still complain that the ICC threatens American democracy by placing it within the jurisdiction of officials that are not accountable *to the American 'people'*.

Realizing that this kind of argument would heavily influence America's relationship with the Court and probably rule out any hope of ratification, the USA has sought to exempt non-signatories from the Court's jurisdiction. In this regard the US delegation at the 1998 Rome Conference found itself in a paradoxical position. It needed protections for non-party states in order to persuade Congress that the USA should become party to the Treaty by ratifying it. They argued for a Statute that would limit the Court's jurisdiction to nationals of state parties. If the USA did not ratify the treaty, in other words, then its citizens could not be investigated or prosecuted by the ICC. Yet this proposal put the USA in the strange position of defending the tyrants who were the probable targets of the Court. As the Korean delegate at Rome put it, 'what applies to America also applies to [Saddam] Hussein; and simply by not signing, he could buy himself a pass'. He went on:

> In order to protect against the less-than-one-percent chance of American peacekeepers becoming exposed, the U.S. would cut off Court access to well over ninety percent of the cases it would otherwise need to be pursuing. Because what tyrant in his right mind would sign such a treaty?[36]

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The Korean delegation had tabled the broadest proposal regarding jurisdiction. In order for the Prosecutor to claim jurisdiction over any given case, at least one of the following four states would have to be party to the Treaty or accept its jurisdiction on an ad hoc basis: the state where the crime took place; the state of nationality of the accused; the state that had custody of the accused; the state of nationality of the victim. As a compromise it was agreed that the Prosecutor's jurisdiction extended only to those cases where the state of the territory on which the alleged crime took place *or* the state of the nationality of the accused were parties to the Treaty.[37] In this situation, even if the USA was not a party to the Treaty, the ICC could pursue American soldiers if they were alleged to have committed a core crime on the territory of a state party, and the USA itself had failed to genuinely pursue its own investigation or prosecution. Bilateral agreements between a state hosting American servicemembers and the USA could clarify the status of forces to further minimize the likelihood of an American being unduly surrendered to the Court.[38] Yet the theoretical possibility of this happening was enough for the Clinton administration to describe the Rome Statute as significantly flawed and the Bush administration to unsign the Treaty.

Opponents of the Court argued that by not signing the Rome Treaty the USA should be free of ICC oversight and its citizens free from the Court's jurisdiction. They argued that the jurisdiction claimed by the ICC violated Article 34 of the Vienna Convention on the Law of Treaties, which states that treaties cannot bind non-party members. It is interesting to note, however, that the United States has claimed jurisdiction over the nationals of states not party to a specific treaty when it has suited its particular interests. For instance, Professor Scharf notes that in 1998 the USA signed the International Convention for the Suppression of Terrorist Bombings without seeking to limit its application to offences committed by nationals of parties to the Convention. It is now unthinkable, particularly as it conducts a global war on terrorism, that the USA would stop criminal proceedings against a terrorist from a state that was not party to this convention. Yet that is exactly what its position on the ICC, by demanding that nationals of those states not party to a particular treaty be exempt from universal jurisdiction, is arguing should be the basis of international law.[39]

In response to this kind of argument David Scheffer, who headed the American delegation at the Rome Conferences notes that the USA had always argued that universal jurisdiction exercised *by states*, was not equivalent to universal jurisdiction exercised by an international court.[40] Indeed Grossman repeated this line when he stated that 'sovereign nations have the authority to try non-citizens who have committed crimes against their citizens or in their territory'. The USA, he argued, had never recognized the right of an international organization to try and convict individuals in the absence of state consent or a UN Security Council mandate.[41]

Ultimately, Grossman argued, the rule of law could only have 'true meaning' when *national societies* can 'accept their responsibilities and be able to direct their future and come to terms with their past. An unchecked international body should

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not be able to interfere in this delicate process'. Where states failed, America and the society of states would work harder to make them succeed. Thus, in 'situations where violations are grave and the political will of the sovereign state is weak' the USA would work 'to strengthen that will'.[42] The idea that the Bush administration was now committing itself to 'nation-building' and democratization reflected a major turnaround in its worldview. While concessions to that agenda had been made during the military campaign in Afghanistan, the previous opposition to Somalia-type operations clearly casts doubt on America's commitment to assisting weak states that are unable to try core criminals. It is more likely that the Wilsonian agenda is merely a rhetorical device to stave off criticism that America is not being true to its own democratic identity by opposing the ICC.

## Understanding American opposition to the ICC: the cultural role of American democracy

For many Americans nothing has done more to constitute a sense of national identity and separate the United States from the rest of the world than a particular understanding of 'democracy'. In a country lacking the cohesion provided by ethnic, religious or even linguistic bonds, democracy provided the 'nation' with a civic identity around which it could unite. When considering 'American democracy' from this perspective, the adjective is prioritized over the noun. America was not considered a realization of the enlightenment and the promise of liberal democracy, rather the enlightenment and liberal democracy was what enabled America to realize itself. Democracy defined the national community and it was the elected government's task to use its power to defend that community from the corrupting influences of outsiders. Democracy not only had an instrumental role in ensuring accountability, therefore; it also acted as a cultural symbol, a rallying cry for national consensus and patriotic zeal.[43] While the former could, at least theoretically, be applied universally, the latter was unique to America.

The cultural role that 'democracy' plays in defining the American nation has conditioned the way the USA responds to advocates of cosmopolitan democracy and institutions like the ICC. Where other democracies recognize that the compromise in the Rome Treaty is worthwhile because it does not threaten their own self-image and by contributing to the possible democratization of global politics actually reinforces it, the USA makes a different calculation. The ICC may promise to punish otherwise unaccountable elites for the most egregious abuses of inalienable rights, but the USA cannot support it, because to do so would be an attack on the very idea of 'America'. Where other states see themselves as part of a global community and are willing to compromise their sovereignty and identity in order to promote justice and accountability in that wider community, the United States cannot make a similar commitment. As Foley puts it, America's relationship with the world has always 'been coloured by its

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conviction that whilst it is self-evidently *in* the world, it remains convinced that it is not *of* the world'.[44] To compromise its own democracy, even for the sake of those in failed states and dictatorships who wish to see core criminals held accountable for their actions, would be to threaten its own separate identity. Such a cultural trait often requires the construction of an 'other' for America to secure its own sense of community.[45] It is clear from the arguments advanced in opposition to the ICC that proponents of global democracy, despite their commitment to universal human rights, are being cast as America's 'other'. Indeed they are portrayed by some as being impulsively 'dictatorial'.[46]

There is nothing new in arguing that US foreign policy prioritizes the interests of the American community over democracy abroad and even at home. What is new, however, is the claim that this communitarianism is the foundation on which *all* significant American foreign policy traditions rest. The Jacksonian and Hamiltonian traditions have informed a Realist approach to the world which one might expect to oppose the ICC. They may differ on whether to prioritize defence spending or trade policy and pursue a unilateralist or multilateralist approach, but they are both motivated by promoting America's particular interests. The exceptional nature of America's revolution, however, also created a 'national' identity that proclaimed a right and duty to promote democracy. Here the Jeffersonian and Wilsonian traditions have informed a Liberal approach to the world. In contrast to those Jeffersonians who saw America as a 'vindicator only of her own',[47] Wilsonians urged America to 'move beyond example and undertake active measures to vindicate the right'. If it failed to 'bring the world up to their own standard', they warned, 'the world would bring Americans down to its'.[48] In contrast to Realists, these Liberals considered the American Revolution to be unfinished.[49]

Yet even from this Liberal perspective US foreign policy should not put at risk *American* democracy and only promote the kind of democracy that is based on the nation-state. Thomas Jefferson, for instance, may have declared the universal relevance of the American Revolution but he was unwilling to risk the fragile American democracy in order to support those abroad fighting to realize their rights. Indeed America's neutrality towards the French Revolution and its trade agreement with the British was motivated by concern for its own revolution rather than the fate of liberal democracy per se. As William McDougall notes, American exceptionalism was defined by what America *was* at home, not what it did abroad. 'Foreign policy existed to defend, not define, what America was . . . [and] all sorts of tactics might be expedient save only one that defeated its purpose of eroding domestic unity and liberty'.[50] The implication for those who considered the American Revolution to have universal applicability was that the American state would only contribute to that cause by tending to the example American democracy set other states.

Moreover, Woodrow Wilson might have seen a key role for international institutions, yet they were not envisaged as a means by which power could be held accountable for egregious violations of human values. Rather they were to make

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the world safe for *democratic states*. Grossman's pledge to strengthen the political will of the society of states in order to rebuild failed states is more than likely a rhetorical device to avoid the criticism that America is reneging on its duty to promote democracy. Yet it is clear that the administration need not distort the Wilsonian tradition in order to oppose the ICC. The point here is not that support for the Court and cosmopolitan democracy is beyond Wilsonianism or American democracy. Senator Dodd, for instance, has used the Declaration of Independence to support the ICC in the same way President Lincoln used it to oppose slavery:[51]

> Our Founding Fathers did not only talk about those in the United States when they talked about inalienable rights; they wisely wrote about all people, not only those who lived within the borders of the then Thirteen Colonies of what would constitute the United States. They spoke to the aspirations and hopes of other people as well.[52]

Rather it is to note that despite the universalist rhetoric that accompanies America's commitment to democracy, its policy is firmly based on a communitarian worldview.

## International society and America's perception of its responsibilities

The cultural power of the communitarian discourse has also conditioned America's view of international society. In order to defend a fundamentalist interpretation of American sovereignty and the cultural role of democracy, the Bush administration has essentially adopted the language of the 'society of states'. It argues that international law can only govern relations *between* states and cannot be allowed to interfere with relations between the state and its citizens. It prioritizes a strict interpretation of the Vienna Convention and interprets 'universal jurisdiction' in a way that prioritizes the interests of strong states rather than the victims of core crimes. Indeed, Grossman's third point, that the unchecked power of the Independent Prosecutor would be used to pursue an anti-American political agenda, reveals a mistrust of 'world society' and an unwillingness to empower it in ways that cannot be controlled by Washington. Yet, as Grossman's fourth point reveals, it seeks to legitimize this position by evoking the unique responsibility that it and the UN Security Council have in maintaining 'international peace and security'.

At the Rome Conference the USA sought to restrain the power of the Independent Prosecutor by making investigations conditional on Security Council approval. For many other delegations, however, the Court had to remain independent. The legitimacy of the UN-mandated ad hoc Courts in Rwanda and the former Yugoslavia was not doubted. It was clear, however, that justice for the victims of core crimes would always be selective if it was dependent on a Security Council mandate. Many delegations could recall times when human rights abusers had been able to hide behind the veto that their great power patron exercised on

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the Security Council. As Lawrence Weschler put it, 'Pol Pot had the Chinese [and] the Argentine generals had the Americans'.[53]

Thus, while the Security Council's power to initiate Court proceedings under Chapter VII of the UN Charter[54] was recognized by all, not all agreed that it should be the *only* means of referring a case to the Court. To break this monopoly it was proposed that state parties[55] and, more controversially, the Independent Prosecutor could refer cases to the Court if it appeared that a crime within the jurisdiction of the Court would otherwise not be investigated.[56] As noted at the outset, this proposal had the effect of opening up international justice to a society beyond that dominated by powerful states. As the Independent Prosecutor could launch an investigation and indictment on information provided by non-governmental organizations, justice would no longer be the sole preserve of the society of states. For this reason, human rights organizations led a strong campaign in favour of conferring such powers on an Independent Prosecutor. The 'like-minded' group of states, which favoured the establishment of a strong and impartial Court, joined them.[57]

At the Rome Conference the USA strongly opposed the idea of an Independent Prosecutor. Ironically they also argued that the Court should not be politicized but, unlike those who saw the Independent Prosecutor as a way to address this, the USA argued that such a position would lead to politically motivated prosecutions. They argued that the Prosecutor's office would be so overwhelmed by cases that the decision on which cases to prioritize amounted to the kind of selectivity that would be open to political abuse. The USA preferred that the Security Council act as a filter by providing authorization before the Prosecutor could proceed. In effect, both supporters and opponents of the Independent Prosecutor were claiming that their proposal was best able to guarantee the Court's impartiality. Yet for some the US position was not only isolated; it was unreasonable. As Samantha Power notes:

> In saying that it wants to protect itself from a political ICC, the United States is seeking more than reasonable assurances about the Court's responsible execution of its mandate. The United States is reserving the right to define the term *political* in the context of the Court's actions. Of the 180 UN members who do not hold a veto on the Security Council, only some will share America's definition. Many deem the Security Council as the epitome of a politically motivated institution and want an independent ICC precisely because they believe it will not be driven strictly by great power politics.[58]

For American opponents of the Court, however, this was exactly the point. Not all did share America's definition of 'political'. Moreover, they did not understand the unique responsibilities that America shouldered. Ultimately the use of force was necessary either to deter or prevent genocide in the first place, or to bring the accused into custody. As the 'indispensable nation' the USA was in a unique position to conduct such operations, but a failure to exempt US forces from the

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Court's jurisdiction would only deter these kind of humanitarian actions.[59] This argument, of course, ignored the extent to which such a 'chill factor' existed without the ICC. Presumably US military planners could not ignore the War Crimes Act, which the US Congress passed in 1996, even if they were unwilling to submit to the ICC. Thus, when US officials argued that the ICC could indirectly restrain US foreign policy they were not only arguing against international oversight. They were, in effect, also arguing against *any* form of oversight including that passed by the US Congress.

As a permanent member of the Security Council, America has the responsibility to balance the demands of international justice with a responsibility to maintain 'international peace and security'. American perceptions of this responsibility have led it to reserve the right to define the term 'political'. An overzealous Prosecutor, it has insisted, must not be allowed to threaten international peace and security. Prudence inevitably has to condition the judicial process, and the Security Council has to determine when such conditions applied. While these concerns are clearly very important, America's continuing opposition to the Court fails to recognize the extent to which this issue was addressed by the Rome process.

At the July 1998 Conference, in an effort to break the deadlock on this issue, Singapore proposed the UN be allowed to postpone Court proceedings *with an affirmative majority vote of Security Council members*. This made a concession to the argument that concern for international order may sometimes require issues of justice to be forestalled. Yet it also increased the burden of proof on those who wished to make such an argument.[60] For many delegations recognized, to use Ken Booth's words, that 'the rhetoric of prudence can often cloak a conception of human duty, which is stunted for a relatively wealthy and civilised country'.[61] Clearly prudence is a virtue that one would expect a great power to have, but those exercising prudence on behalf of the international community also need to be able to demonstrate that 'international peace and security' is their foremost priority when they act. In this context, advocates of a strong ICC needed the permanent members of the Security Council to be able to demonstrate that they were not using their veto in a way that protected *the particular interests of a single state.* A professed loyalty to 'international peace and security' could not be allowed to disguise a policy that was motivated by a selfish interest that came at the expense of international justice. Raising the threshold at which the Security Council could stop a prosecution, and to make it impossible for any one state to veto an investigation, was considered an appropriate way to do this.

Despite its permanent position on the Security Council, the British delegation at Rome, mindful of the new Labour government's 'ethical foreign policy', recognized this logic. In contrast to the United States, it voted for the Singapore proposal,[62] which eventually gained enough support to be included in the Statute.[63] Such was the US commitment to the Security Council veto, however, it chose to join China, Libya, Israel, Iraq, Qatar, and the Yemen, and vote against the final version of the Rome Treaty.[64] Clearly one cannot compare the USA to such

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regimes. On this particular issue, however, it would be fair to argue that the USA does wish to maintain sufficient flexibility in its foreign policy to be able to prevent 'core criminals' from being brought to justice. The demands of international order may require that such actions be postponed, but it is equally clear that the USA fears being held accountable for the way it uses the Security Council veto in the name of international peace and security. If American officials were certain that the USA would only wish to stop the Court's proceedings when there was a clear threat to international peace and security, then it would have confidence in its ability to marshal the majority in the Security Council that is required by the Rome Statute. The fact that the USA is unable to accept such a system strongly suggests that it wishes to maintain the veto to protect 'core criminals' when the threat is not to international peace and security, but to America's particular interests. The relationship between the Security Council and the Independent Prosecutor, as asserted in the Rome Statute, has exposed the instrumental way in which American foreign policy hides behind the claim that it shoulders exceptional responsibilities. Quite clearly a superpower does have unique responsibilities. When it claims to act for the common good of international society, however, it also has a democratic duty to be accountable to international society for the way it fulfils those responsibilities.

Yet the issues confronting America's relationship with the global community go beyond even this. It is not merely a question of America using its position in the society of states to pursue particular interests at the expense of the common good, and then co-opting the language of 'good international citizenship' in an attempt to legitimize that.[65] It is also a question of whether the USA is willing to negotiate a conception of democracy based on the nation-state and the society of states. America's national identity has always been flexible enough to serve humanity's purpose by assimilating those desperate individuals fleeing tyrannical regimes. However, it now seems that a fundamentalist interpretation of America's democratic identity is, by refusing to tolerate the most minimal of intrusions on its sovereignty and opposing the ICC, sending a very different message to the victims of tyranny.

## Conclusion

The question of accountability is at the heart of this analysis of America's opposition to the ICC. Both opponents and proponents of the Court consider that their arguments are motivated by the need to strengthen accountability and thus both claim to be democrats. The critical question that distinguishes their position of course is: accountable to whom? Supporters of a strong Court seek to strengthen accountability in the community of humankind. This community is constituted by the international and global consensus that gave specificity to the definition of core crimes. These crimes deny the basic rights that all persons can claim by virtue of their human identity. Should this society allow core criminals to

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go unpunished, it weakens the protection that the norm of 'humanity' offers everyone. Justice for the victims of these crimes, therefore, is in the universal interest. Yet those who are persuaded by this argument also recognize that the society of states has failed to protect that norm. As certain states have been unable or unwilling to prosecute such cases, and because 'international society' has not always been reasonable in allowing 'international peace and security' to override international justice, a new international Court needed to be not only permanent but also independent of the society of states. By having these attributes, the ICC represents the hopes of those who seek to democratize global politics by holding to account those who violate its most fundamental values.

America's opponents of the ICC, on the other hand, see the Court's independence and the potential institutional influence of NGOs 'as part of the accountability problem rather than part of the solution'.[66] America's commitment to global democracy is quite clearly limited by its commitment to statehood. It will seek to spread democracy, and certain foreign policy traditions will even support international institutions to make the world safe for democratic states. International institutions, however, cannot directly promote democracy because, according to this view, there is not a single and identifiable community that can hold them accountable. This is a common element across all of America's main foreign policy traditions. It is not limited to the nationalist traditions that is best typified by what Mead calls the Jacksonian tradition although clearly some of the inward-looking patriotism that celebrates a warrior culture ahead of the rule of law accompanies much of the debate.[67] As noted above, even the Wilsonian tradition seeks to promote the kind of democracy that is limited to the nation-state. What we have seen with the Bush administration's rejection of the ICC is as much a Wilsonian and Jeffersonian reaction – it claims, to repeat Grossman, to be committed to promoting democracy by building domestic judicial systems – as it is Jacksonian.

One can conclude from this that American foreign policy starts from a communitarian basis and is dependent on the society of states to confer the leadership role that is demanded by the powerful exceptionalist discourse in American society. Yet as the processes of globalization continue to undermine the strength of states to respond to the needs of their citizens, this communitarian view of democracy will become increasingly problematic. Until the political and intellectual elite begin to engage the literature on cosmopolitan democracy and introduce it into mainstream thinking on international affairs, American foreign policy will continue to find itself on the wrong side of those calling for the democratization of global politics.

## Notes

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