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The ICC and US Judicial Exceptionalism:

The Situation in Afghanistan

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Dedicato ai miei genitori,
perché la vita possa restituirvi
tutto ciò che avete donato al mondo.

In eterna memoria del nonno Adriano,
una nuova stella è appena apparsa nel cielo.

Index

Summary

The present dissertation has contributed to the analysis of the relationship between the United States of America and the International Criminal Court (ICC). Throughout its pages, we have argued that the US attitude towards global justice – and more specifically towards the ICC – has been characterized by the search for judicial exceptionalism. Defined as the US attempt to achieve judicial exceptions and jurisdictional exemptions, US judicial exceptionalism appears to be an essential element of the US role at the international level. Indeed, though the United States have always proclaimed the importance and the respect of international norms, it has also proclaimed its need to some room for action in order to maintain its global leadership in the peace and security domains.

In historical terms, we may sum up the US strategies of judicial exceptionalism in three categories: via the victors' justice, via the silent influence and via international bilateral and multilateral agreements. Firstly, after World War I and World War II, the Allies decided to pursue the perpetrators of war crimes committed during the two world conflicts. However, both the Leipzig Trials on the one hand, and the International Military Tribunal (also known as "Nuremberg Trials") and the International Military Tribunal for the Far East (also known as "Tokyo Trials") represented an unfair application of global justice, where only the defeated side of the wars was prosecuted. However, the United States soon realized that a continuous legitimization of the victors' justice may have proven to be counterproductive in the future, especially if USA ended up being among the defeated ones. Therefore, the second US strategy of judicial exceptionalism materialized in the establishment of the International Criminal Tribunal for the former Yugoslavia (ICTY) and of the International Criminal Tribunal for Rwanda (ICTR) by the United Nations Security Council (UNSC). As the jurisdictional reach of both tribunals was precluded neither to the sole defeated side of the conflicts nor to the domestic actors involved in the war, US nationals could have been theoretically prosecuted before both the ICTY and the ICTR. Yet, once again, the US government was able to secure its servicemembers from the tribunals' jurisdiction via a silent influence, namely the combination of factors through which the US executive was able to sway the tribunals' work. In practical terms, the US heavily contributed to the functioning of the ICTY and the ICTR: it provided the greatest share of the tribunals' budgets and free US personnel, pressured states to cooperate with them and adopted the Rewards for Justice Program in order to collect information on alleged criminals. In other words, since the international criminal tribunals' functioning and their mere existence heavily depended on the US economic and diplomatic support, an investigation over possible US crimes would have proven to be very unlikely. Such a strategy, however, was not feasible towards the ICC, as the USA eventually decided not to ratify the Rome Statute. The White House, however, managed to grant

protection to its soldiers stationed abroad via the signature of bilateral and multilateral Status of Forces Agreements, as well as non-surrender agreements, with the host country where the troops were deployed. Pursuant to these international treaties, the receiving state committed itself to ensure exclusive jurisdiction to the USA over alleged crimes committed by US servicemembers and their liaison personnel.

Chapter 1 is devoted precisely to the US policies and attitudes towards the ICC. Analysing the administrations of Bill Clinton, George W. Bush, Barack Obama and Donald Trump, the dissertation demonstrates that the United States has always endeavoured to achieve jurisdictional exemptions for its troops before the ICC. Already before and during the negotiations over the Rome Statute, the Clinton administration threatened states to withdraw US military troops and reduce its investments if these states did not fulfil the US request of US servicemembers' total immunity before the ICC. In addition, though President Clinton eventually decided to sign the Rome Statute, he publicly asked the then President-Elect George W. Bush not to submit the treaty to the advice and consent of the US Congress as the US main concerns had not been yet properly met. During the first presidential mandate of George W. Bush, the USA implemented a much more aggressive attitude towards the Court by adopting a four-level strategy. First of all, the USA notified UN Secretary General Kofi Annan its decision not to ratify the treaty. In so doing, according to the US executive, the USA would have no more been bound by Article 18(a) of the Vienna Convention of the Law of Treaties, according to which a signatory of a treaty is to refrain from any act which would defeat the object and purpose of the concerned international agreement. The second stage of the US strategy consisted in seeking immunity for US soldiers employed in UN peacekeeping operations. As a matter of fact, UNSC Resolution 1422 succeeded in granting immunity before the ICC to the troops of non-party states of the Rome Statute deployed in the Bosnia and Herzegovina UN mission. Thirdly, the Bush administration implemented a vast campaign of signature of Article-98 agreements, namely bilateral treaties where the contracting parties committed themselves not to surrender any individuals of the other state to the ICC, absent the consent of the concerned state. Finally, the US Congress adopted the American Servicemembers' Protection Act (ASPA) which, *inter alia*, prohibited any cooperation by US individuals or US courts with the ICC. Nevertheless, following the scandal of Abu Ghraib, the Bush administration was compelled to change its attitude towards a form of coexistence with the ICC. Under Barack Obama, the White House adopted a more cooperative stance towards The Hague, by participating in the Kampala review conference on the crime of aggression and heavily contributing to the transfer of Dominic Ongwen and Bosco Ntaganda to the ICC. Yet, once the rumours of a possible investigation of US war crimes in Afghanistan by the ICC Prosecutor became more and more frequent, the Obama administration dismissed the potential prosecution as inappropriate and unwarranted. Finally, under the Trump presidency, the USA returned to its more aggressive posture, by imposing economic sanctions and visa restrictions on ICC personnel

following the ICC Appeals Chamber's authorisation to proceed with an investigation in Afghanistan. Therefore, despite fluctuations between cooperative and aggressive stances towards the Court, all the four administrations, regardless of doctrines or party ideologies, have always endeavoured to secure US servicemembers from the ICC jurisdiction.

Given this historical premise, the dissertation goes on by analysing the US-ICC relationship both from a legal perspective and from the lenses of the International Relations (IR) theories. In particular, chapter 2 firstly assesses the legal critiques that had been advanced by the United States against the ICC through the international law and international criminal law frameworks. More specifically, the United States first and foremost argues that the International Criminal Court is not entitled to pursue US nationals since the USA is not a party to the Rome Statute. While the argument according to which the prosecution of US nationals would infringe the customary principle of *pacta tertiis nec nocent nec prosunt* is quickly dismissed since the Rome Statute does not impose any duty or obligation upon third parties, the analysis on the legal basis of the ICC jurisdiction over non-party nationals requires more attention. Indeed, the USA argues that the ICC would have jurisdiction over the acts committed by US nationals if and only if the USA gave its consent to the Court. The rationale behind such an ability, however, is to be found in the jurisdictional delegation to the Court. In fact, once states decide to ratify the Rome Statute, they automatically accept to delegate their own territorial jurisdiction to the ICC, namely the ability to investigate and to convict whatever crime has been carried out on their own soil, regardless of the alleged perpetrator's nationality. Such a competence is not conceded by other states, thus requiring the approval of the accused's state of nationality, but it is inherent to statehood. In other words, the International Criminal Court is empowered to prosecuted alleged war crimes, crimes against humanity and genocidal acts committed by US nationals not because it enjoys universal jurisdiction, but rather because the territorial state of the *locus commissi delicti* would have the right to pursue them without the previous US consent. Although some authors – such as Madeline Morris – accepted this reasoning, they ended up arguing that the political consequences of a territorial state' and of an international court's jurisdiction would be drastically different. Even if this reasoning may appear to be valid, it amounts solely to a political consideration, not finding any legal basis of justification.

Secondly, the USA affirms that the ability of the ICC Prosecutor to trigger on his/her own initiative the jurisdiction of the Court may represent an instrument for advancing politically motivated charges against the USA. In fact, according to the United States, a Prosecutor may be externally pressured to investigate US servicemembers and authorities due to some states' desires of vengeance towards the USA. However, we argued that such an allegation of impartiality would be acceptable only if the Rome Statute did not provide for checks and control mechanisms over prosecutorial discretion. Conversely, four different checks over the Prosecutor's work are enshrined in the ICC Treaty: (1) the *proprio motu* procedure requires the Prosecutor to ask the

authorisation to proceed to the Pre-Trial Chamber; (2) the principle of complementarity poses a limit to the Prosecutor's ability to investigate inasmuch as it prevents the ICC jurisdiction in case of a previous – or a present – adjudication by domestic courts; (3) the Assembly of States Parties (ASP) of the ICC could remove the Prosecutor from office if it found out prosecutorial abuses of power; (4) the "pragmatic accountability" assumes that states, NGOs and individuals play a watchdog role over the Prosecutor's work, thus publicly accusing the Prosecutor in case of abuse of power. In other words, as it has been just proven, this second critique appears to be once again led by political considerations, rather than legal arguments.

Finally, the USA asserts that the Rome Statute does not provide for the full set of due process rights enshrined in the US Constitution, in particular the right to a jury trial. Although such a claim is correct, the states' decision to establish a system of trials by judges mirrored the fact that the great majority of states at the Rome Conference were a manifestation of the civil law tradition. Besides, the US jurisprudence itself recognised in *Ex parte Milligan* and in *Ex parte Quirin* that the drafters of the US Constitution did not intend to grant the right to a jury trial to aliens or citizens who violated the laws of war. In other words, US soldiers accused of war crimes may not enjoy the right to a jury trial even on US soil.

The second part of chapter 2, instead, proposes an analysis of the US posture towards the ICC and of the US global justice promotion from the IR lenses. The three main IR paradigms (i.e. constructivism, liberalism and realism) are employed as theoretical frameworks. By adopting the constructivist theory on inter-subjective identities, the dissertation emphasises the identity role of the United States in the promotion of global justice. In particular, we argued that throughout the XX century, the US involvement in the establishment of the Nuremberg and the Tokyo tribunals, as well as in the creation of the ICTY and the ICTR, conferred to Washington an internationally recognised role identity in the promotion of global criminal justice. Yet, the US attitude towards the ICC may have undermined the same identity, especially in the eyes of European countries. As a matter of fact, we highlighted three events that may have faltered the US credibility in its role identity of global justice promoter. Firstly, as we have previously mentioned, during the negotiations at the Rome Conference, the military and civilian components of the Pentagon threatened states to reduce military and economic commitments with them unless they fulfilled US requests. Though such an approach proved to be detrimental to the US image in Rome, the US signature of the ICC Treaty momentarily calmed European doubts over the US role identity. Nonetheless, the "unsignature" of the Statute, the adoption of ASPA and the conclusion of Article-98 agreements made other states' concerns over the US role identity rise again. However, it was only with the scandal of Abu Ghraib that the image of the USA seemed suffering from the greatest loss of credibility since a US allegation of politically motivated charges against the ICC would have been seen as a US attempt to hide war crimes and crimes against humanity committed in foreign military operations.

That said, the question turned out to be whether European countries could replace the same role identity of promoters of global justice. In order to answer to that question, we adopted the institutional approach to liberalism, namely the English School. Relying on the notion of pluralist and solidarist international societies, we argued that the Rome Statute may rise as a proposal of change of international society. More specifically, the promotion of individual criminal liability and the irrelevance of immunities may be qualified as institutions of a new solidarist society. The centrality of the individual in the international criminal law may thus constitute – in Leyla Nadia Sadat's words – a "constitutional moment" in the conceptualization of international law *tout court*. The shift from a state-centred to a mankind-centred approach is however far from being complete. Indeed, while European countries pushed for the establishment of an independent ICC and contributed with the greatest financial share to the Court's budget, the functioning of the Court still heavily relies on the cooperation of states. In other words, the true success of this newly proposed solidarist society depends on the greatest powers' acceptance, including the United States of America.

Given these conclusions, we tried to assess whether the membership to the Rome Statute would be beneficial to the US national interests. In particular, we argued that the ICC would be useful – and thus favourable to the US interest in promoting its leadership in the global justice domain – both in the case of deterrent (the sole existence or the jurisdictional trigger of the Court reduces the future commission of crimes) and non-deterrent effects (the ICC does not have any impact on the commission of international crimes) of the Court. The sole condition which would make the ICC useless – and even counterproductive – would be in case of confirmation of the anti-deterrence hypothesis, according to which the Court's functioning favours the commission of international crimes. Although data demonstrates that, in few cases, the number of crimes has arisen following the activation of the Court's jurisdiction, we cannot impute solely to the Court this numerical increase. Furthermore, the overall performance demonstrates that the Court's jurisdiction either reduces the commission of crimes or is neutral from this perspective. Nonetheless, we argued that, in this second case, it is still better to have an international court adjudicating the perpetrators of the most heinous crimes than suffering from their impunity.

Once delineated the general relationship between the USA and the ICC, we approached the case study of the Situation in the Islamic Republic of Afghanistan. The goal of the second part of the dissertation (chapters 3 and 4) was to demonstrate in practical terms US judicial exceptionalism in action. In addition, the Afghan case appeared particularly relevant as it materialised all the main critiques that have been advanced by the United States from the first negotiating steps over the Rome Statute: the ICC investigation over crimes allegedly committed by US nationals, the Prosecutor's *proprio motu* powers and a prosecution in a highly politicised context. Although the case before the International Criminal Court comprises purported crimes committed by the

Taliban and the Afghan National Security Forces, we limited our analysis to the sole allegations against US nationals.

Indeed, after eleven years of preliminary examination, in November 2017, the ICC Prosecutor Fatou Bensouda filed a request for authorisation to investigate, *inter alia*, "acts of torture, cruel treatment, outrages upon personal dignity, rape and sexual violence against conflict-related detainees in Afghanistan and other locations, principally in the 2003-2004 period" committed by US armed forces and CIA personnel. Yet, in April 2019, Pre-Trial Chamber II (PTC) denied the authorisation to the ICC Prosecutor to the extent that the investigation – though complying with all the other necessary criteria – did not serve the interests of justice. The PTC argued that the three pillars upon which it had evaluated the compliance with the interests of justice – "(i) the significant time elapsed between the alleged crimes and the Request; (ii) the scarce cooperation obtained by the Prosecutor throughout this time, even for the limited purposes of a preliminary examination, as such based on information rather than evidence; (iii) the likelihood that both relevant evidence and potential relevant suspects might still be available and within reach of the Prosecution's investigative efforts and activities at this stage" – demonstrated a minimal possibility of conviction of the purported criminals. Thus, the Chamber came to the conclusion that the Prosecutor should have allocated the Court's human and financial resources to other investigations and scenarios which could have had more chances of success.

Legal debates among scholars and academics obviously arose following the PTC's decision. On the one hand, there were those (Jacobs, 2019; Labuda, 2019) who sustained that the PTC should not be entitled to review the Prosecutor's assessment of the interests of justice, as the Rome Statute presumes a compliance with this parameter if all the other required criteria were met. On the other hand, there were those (Akande and Dias, 2019; Heller, 2019) who affirmed that the Pre-Trial Chamber should thoroughly analyse the interests of justice as well. Instead, we placed our reasoning in the middle of the two extremes. From our perspective, the Pre-Trial Chamber should be empowered to review the interests of justice criterion, but this does not enable it to provide a *de novo* evaluation. In fact, the Office of the Prosecutor remains in a better position to properly and factually assess the interests of justice principle, and the PTC should limit its analysis to determinations of warranted or unwarranted prosecutorial evaluations. Besides, we affirmed that the PTC's determination on the budgetary allocation represents an *ultra vires* act since the Office of the Prosecutor retains "full authority" in determining the use of the Court's resources.

From this perspective, we were not satisfied by the motivations that led the Appeals Chamber (AC) to overturn the Pre-Trial Chamber's decision, as well. Indeed, the AC reasoned that the PTC erred in denying the authorisation to proceed with an investigation into the Situation in Afghanistan not due to an unwarranted assessment of the interests of justice, but rather because the provision governing the *proprio motu* procedure does not demand such a determination by the Pre-Trial Chamber. Conversely, we argued that the PTC

should be entitled to review the interests of justice, since the sole evaluations of the reasonable basis test and of the complementarity regime by the PTC would amount to an abdication of its mandated control role over prosecutorial discretion. Admittedly, we need, however, to highlight that the Appeals Chamber also asserted *in dicta* that, if the Pre-Trial Chamber had been entitled to review the interests of justice, the assessment proposed by the PTC was to be deemed "cursory, speculative" and unfounded.

Therefore, starting our case study analysis from the Appeals Chamber's judgement authorising the Prosecutor to investigate the alleged crimes in Afghanistan, we turned back to our main hypothesis, namely the US fight for a judicial exceptionalism before the Court. Indeed, the third historical strategy (i.e. via international agreements) appears to be extremely relevant for the Afghan case. Three international treaties governed the presence of US military troops deployed in Afghanistan when the crimes were allegedly committed: the Status of Mission Agreement of the UNSC-mandated International Security Assistance Force, the Status of Forces Agreement between the USA and the Islamic Republic of Afghanistan and the US-Afghan Article-98 agreement. While the first two agreements establish the exclusive jurisdiction of the USA over any acts carried out by US soldiers and their liaison personnel in Afghanistan, pursuant to the third treaty, the USA and Afghanistan committed themselves neither to extradite nor to transfer any nationals of the other contracting party to the International Criminal Court, absent the previous consent of the concerned state.

While the USA had full authority to sign these treaties without bearing any international responsibility under international law, the situation is a bit more complex for Afghanistan. As a matter of fact, in accordance with Article 18(a) of the Vienna Convention on the Law of Treaties, signatories of an international agreement are to refrain from acts which would imperil the object and purpose of the same treaty. If the whole set of US-Afghan international agreements ended up granting impunity to the perpetrators of those crimes, in fact, Afghanistan would contravene the primary objective upon which the International Criminal Court has been built. This, however, does not mean that the mere signature of these agreements determines the international responsibility of Afghanistan. On this point, we argued that a state's responsibility arises only if the wrongful act is factual – e.g. Afghanistan is compelled to violate the Rome Statute by non-surrendering an individual to the Court – rather than potential – e.g. the signature of an international agreement. Pursuant to Article 98(2) of the Rome Statute, in fact, the Court is under the duty not to request the extradition and/or the transfer of an accused to a state party, if, by complying with the request, the same country would violate its international obligations. In other words, the Rome Statute explicitly tries to avoid a situation of factual treaty conflict.

Conversely, concerning the legal implications of SOFAs and Article-98 agreements on the ICC work, both the Pre-Trial Chamber and the Appeals Chamber refrained from addressing the potential conflict between SOFAs and Article-98 agreements on the one hand, and the Rome Statute on the other

hand. Both chambers limited themselves to determine that these international agreements do not affect the jurisdiction of the Court. In fact, they implicitly reasoned that, once states ratify the Rome Statute, they delegate their own territorial judicial jurisdiction to the Court in its plenitude. In other words, even if Afghanistan's jurisdiction to adjudicate was limited by the ISAF SOMA and the US-Afghan SOFA at the time of the Afghan accession to the Rome Statute, Afghanistan delegated its original sovereign jurisdiction to the Court. That said, even if the ICC holds jurisdiction over crimes purportedly carried out by US nationals, such a capacity does not make the case easier. In fact, given the obligation laid down in Article 98(2) of the Rome Statute, the sole possibility for the ICC will be to request the cooperation of states parties to the Rome Statute other than Afghanistan. Nonetheless, the pending arrest warrant for the former Sudanese President Omar al-Bashir and the precedents of ICC parties' non-compliance with the duty to cooperate with the Court do not confer great hope for a conviction of US nationals before the ICC.

In conclusion, the case study of the Situation in Afghanistan appeared to perfectly fit the general US policy for a judicial exceptionalism in international criminal justice. The US coveted room for action in Afghanistan already materialised with the Bush's memorandum of non-application of common Article 3 of the Geneva Conventions (1949) to al-Qaeda members. Yet, the military intervention would have been undermined if the International Criminal Court had been able to fully prosecute members of US armed forces and personnel of the Central Intelligence Agency. This is the reason why the United States felt the need to complement the US-Afghan SOFAs *lato sensu* with the signature of a non-surrender agreement with the Islamic Republic of Afghanistan. In so doing, the USA forced Afghanistan not to cooperate with the Court, thus pragmatically reducing the chances of a conviction of US nationals before the International Criminal Court.

From 1919 onwards, international criminal tribunals have succeeded one another, but the US posture towards them has never changed. The sole condition for their acceptance by the USA has always been the immunity of US servicemembers and authorities. If their institutive statutes did not provide for such a protection, the United States would have found out new ways how to achieve it.

List of Abbreviations and acronyms

ANSF	Afghan National Security Forces
ASP	Assembly of States Parties of the ICC
ASPA	American Servicemembers Protection Act
BIA	Bilateral Immunity Agreement, or Article-98 Agreements
CIA	Central Intelligence Agency
CJCS	US Chairman of the Joint Chiefs of Staff
DOD	US Department of Defense
DOJ	US Department of Justice
DOS	US Department of State
ECCC	Extraordinary Chambers in the Courts of Cambodia
FPLC	Forces Patriotiques pour la Libération du Congo
GA	General Assembly of the United Nations
ICC	International Criminal Court
ICJ	International Court of Justice of the United Nations
ICTR	International Criminal Tribunal for the former Yugoslavia
ICTY	International Criminal Tribunal for Rwanda
IEEPA	International Emergency Economic Powers Act
ILC	International Law Commission
IMET	International Military Education and Training programmes
IMT	International Military Tribunal of Nuremberg

IMTFE	International Military Tribunal for the Far East
ISAF	International Security Assistance Force in Afghanistan
LMS	Like-minded States
LOAC	Law of Armed Conflict
LoN	League of Nations
LRA	Lord's Resistance Army of Uganda
NSA	US National Security Advisor
NSC	National Security Council of the United States of America
NSS	National Security Strategy of the United States of America
OTP	Office of the Prosecutor of the ICC
PCIJ	Permanent Court of International Justice
P.L.	Public Law of the US Congress
PTC	Pre-Trial Chamber of the ICC
S. Hrg.	US Senate Hearing
SCSL	Special Court for Sierra Leone
SecDef	US Secretary of Defense
SOFA	Status of Forces Agreements
UNCLOS	United Nation Convention on the Law of the Sea
UNSC	Security Council of the United Nations
UNWCC	United Nations War Crimes Commission
VCLT	Vienna Convention on the Law of Treaties
WCRP	US War Crimes Rewards Program

Introduction

Twenty-three years have passed since one hundred and twenty delegations signed the Rome Statute, establishing the International Criminal Court (ICC), in Rome. Born with the aim of ending impunity for the most heinous crimes, such as war crimes, crimes against humanity and genocide, the ICC has been largely criticized for its ineffectiveness. In its nineteen years of activity, in fact, the Court managed to reach only four convictions[1]. In addition, the sentences issued by the Court have all been directed against Africans. This led many African states to question the Court's pursuit of fair global justice, accusing the ICC of double standards application. In fact, in 2016, Burundi, South Africa and Gambia notified their decision to withdraw from the Rome Statute and, in the following year, the African Union (AU) called[2] its members to a massive withdrawal from the International Criminal Court. In particular, the AU's Withdrawal Strategy was moved by the fact that "from the cases of alleged African warlords to the indictment of African leaders, the predominance of African subjects of international criminal justice has created suspicion about prosecutorial justice"[3] as "being reflective of selectivity and inequality"[4]. Fortunately for the ICC, both South Africa and Gambia eventually decided to annul the notification of withdrawal from the Rome Statute and no other African state complied with the African Union's Withdrawal Strategy.

In the meanwhile, the United States of America adopted an attitude of opposition towards the Court. The USA argued that the Court should not be entitled to prosecute nationals of non-party states and the ICC Prosecutor should not be empowered to trigger the ICC jurisdiction on his/her own initiative. Instead, both powers were laid down in the Rome Statute. Fluctuating between aggressive and cooperative stances towards the Court, no US

[1] Decision of the ICC Trial Chamber I, July 20, 2012, ICC-01/04-01/06-2901, *Situation in the Democratic Republic of the Congo in the case of The Prosecutor v. Thomas Lubanga Dyilo, Decision on Sentence pursuant to Article 76 of the Statute*, which was confirmed in appeal by the judgement of the ICC Appeals Chamber, December 1, 2014, ICC-01/04-01/06-3121-Red, *Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction*; Decision of the ICC Trial Chamber II, March 7, 2014, ICC-01/04-01/07-3436-tENG, *Situation in the Democratic Republic of the Congo in the case of The Prosecutor v. Germain Katanga, Judgment pursuant to article 74 of the Statute*; Decision of the ICC Trial Chamber VII, October 19, 2016, ICC-01/05-01/13-1989-Red, *Situation in the Central African Republic in the case of The Prosecutor v. Jean Pierre Bemba Gombo et al., Judgment pursuant to Article 74 of the Statute*. However, Jean Pierre Bemba was eventually acquitted on June 8, 2018, by Decision of the ICC Appeals Chamber, ICC-01/05-01/08-3636-Red, *Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute"*; Decision of the ICC Trial Chamber VIII, September 27, 2016, ICC-01/12-01/15-171, *Situation in the Republic of Mali in the case of The Prosecutor v. Ahmad Al Faqi Al Mahdi, Judgement and Sentence*.

[2] *Draft 2 – Withdrawal Strategy Document*, January 12, 2017. This text was eventually adopted on January 31, 2017, yet carrying no binding value.

[3] *Id.*, para. 2.

[4] *Ibidem*.

administration ever acknowledged the legitimacy of the ICC's potential jurisdiction over US nationals.

These two examples have thus represented the greatest political challenges that the ICC has faced throughout these nineteen years. It was precisely in the framework of the crisis of the ICC legitimacy following the AU's Withdrawal Strategy that, in 2017, the Office of the Prosecutor formally requested to the ICC Pre-Trial Chamber the authorisation to proceed with an investigation in Afghanistan. According to the Prosecutor's findings in the preliminary examination, US servicemembers and CIA personnel allegedly committed war crimes in Afghanistan, mainly in the period 2003-2004. Given the fragile legitimacy of the Court in the eyes of the African states, the potential investigation in Afghanistan appeared to be "exactly the kind of situations for which the ICC was created: it was the Court's legitimacy test case"[5]. On the one hand, the Prosecutor's request represented the possibility for the ICC to respond to all those critiques of double standards application. It could have demonstrated to the world that the ICC was not subjected to the major powers' desires and that all individuals regardless of their nationality are equal before the law. On the other hand, an investigation in Afghanistan would have represented a case test specifically towards the United States of America. In fact, both its trigger mechanism (i.e. via the Prosecutor's *proprio motu* powers) and the jurisdiction of the Court over US armed forces and CIA personnel, as well as an investigation in an highly-politicised context far from being politically settled, represented all the major critiques that had been advanced by the USA since the presidency of Bill Clinton. In other words, the Situation in Afghanistan would have constituted a challenge to the US judicial exceptionalism.

Given this premise, the dissertation thus aims at investigating the US-ICC relationship and its application in the specific Situation in Afghanistan. More specifically, throughout the entire dissertation, we will argue that the US policy towards the International Criminal Court has always been moved by the goal of obtaining judicial exceptions and jurisdictional exemptions with regard to US nationals. Indeed, such an approach – which we call "US judicial exceptionalism" – appears to be essential for the United States of America in maintaining its political and military commitment in the international peace and security domain.

Therefore, Part I deconstructs the general US-ICC relationship from a historical, a legal and an International Relations (IR) theories analysis. In particular, chapter 1 is devoted to the US historical approach to global justice. From 1919 to the establishment of the ICC onwards, the United States of America has always pursued a policy of unequal application of criminal justice: while all the states should respect international norms, the United States should be given some latitude in order to let it exercise its leadership role in global peace and security. The mechanisms of the victors' justice in the post-WWI and post-WWII settlements, the silent influence within the ICTY and the ICTR, and the signature of Status of Forces Agreements, as well as Article-

[5] VASILIEV (2019b).

98 agreements, have all contributed to create that coveted room for action for the USA. Chapter 1, thus, demonstrates that, since the first discussions on the ICC establishment in the 1990s, all the four US administrations, be they Democrat or Republican, have always focused on securing, first and foremost, immunity from the ICC jurisdiction to US servicemembers.

The dissertation then goes on by addressing the way how the United States tried to achieve that goal. Chapter 2 is, in fact, firstly dedicated to the analysis of the US legal objections towards the Court from the lenses of international law and international criminal law. The legal assessment suggests that the US critiques are mainly based on political considerations, rather than legal argumentations. Subsequently, chapter 2 also proposes an IR analysis by employing the three main paradigms of IR theories. More specifically, we assess the US identity role in the promotion of global justice by employing constructivism. Institutional liberalism is, instead, at the core of the analysis of the Rome Statute as a proposal for a new international solidarist society. Finally, we use the realist perspective in order to assess whether the establishment of the ICC is in the national interests of the United States.

Conversely, Part II is dedicated to the study of the Afghan case. We argue that the Situation in Afghanistan constitutes a pragmatic example of the US fight for the achievement of its judicial exceptionalism. More specifically, chapter 3 presents the case study and all the related events within the ICC, from the Prosecutor's request for authorisation to the Appeals Chamber's judgement. Chapter 4, instead, assesses the issue of application of Article 98(2) of the Rome Statute to the Situation in Afghanistan, by emphasising the legal implications that the ISAF Status of Forces Agreement, the US-Afghan exchange of diplomatic notes and the US-Afghan non-surrender agreement may have on the United States of America, on Afghanistan and on the International Criminal Court. Though the ICC retains jurisdiction over the alleged commission of crimes by US soldiers and CIA personnel, the US judicial exceptionalism has made the surrender of US nationals to the Court – and, thus, their prosecutions – highly unlikely.

In conclusion, the Afghan case seems perfectly fitting the US strategy for judicial exceptionalism in international criminal justice. Not being able to sway the Court's work as a party to the Rome Statute, the United States managed to secure its servicemembers and authorities from the ICC jurisdiction by setting up a broad set of international agreements granting exclusive jurisdiction to the USA itself and prohibiting any extradition of US personnel towards the ICC. Despite changes in the US judicial exceptionalism' strategies, the United States has always succeeded in granting protection to its soldiers from international criminal tribunals' and courts' adjudications since 1919. As a matter of fact, the chances of a successful prosecutorial outcome in the Situation of Afghanistan appears to be minimal.

Part I

The US-ICC relationship: the US fight for a judicial exceptionalism

1. The United States and world criminal justice developments: a historical analysis

On December 31, 2000, US Ambassador-at-Large for war crimes issues, David J. Sheffer, was instructed by the then US President Bill Clinton to sign the Rome Statute. On the very last day possible, the United States of America thus became the 138th signatory of the International Criminal Court (ICC) Treaty. Almost twenty years later, on June 11, 2020, the US President Donald J. Trump issued Executive Order No. 13928 imposing individual sanctions on the ICC personnel and their immediate families. In less than twenty years, the US shifted from a potential ICC membership to an aggressive rejection. However, the US policy towards the ICC has never been totally supportive in all the four presidencies analysed in the following pages.

Throughout the XX century, the United States had been a strong advocate of international accountability and global justice. It was under the US pressure that the Nuremberg and the Tokyo trials were set up, and it was primarily due to the US Ambassador Madeleine Albright's advocacy that the two UN *ad hoc* tribunals (the International Criminal Tribunal for the former Yugoslavia – ICTY – and the International Criminal Tribunal for Rwanda – ICTR) were created by the UN Security Council (UNSC). Nevertheless, though publicly proclaiming the importance of global justice, the US took a more cautious position concerning the ICC. In fact, writing in 2009, Professor John Cerone acknowledged three main patterns in the US executives' policies towards the International Criminal Court: up to the end of Obama's second presidential mandate, the White House shifted "from constructive engagement to firm opposition, to pragmatic exploitation"[6] of the ICC.

In order to fully grasp the Afghanistan case and the complex relationship between the USA and the ICC, it is thus essential to historically analyse the US policies towards the Court. This chapter will deal with the four White House presidencies since 1993, namely Bill Clinton's, George W. Bush's, Barack Obama's and Donald J. Trump's administrations. Though a fluctuation between engaged attitudes and explicit hostilities have characterised those years, a historical and political analysis reveals that all the four presidencies have been concerned by the exposure of US servicemembers and authorities to the ICC jurisdiction. In other words, regardless of party ideologies and multilateral commitments, the US presidents always aimed at preserving the American exceptionalist posture in international politics, even from a judicial perspective. This attitude can be better explained by referring to what Malcolm Jorgensen calls the "Scheffer's paradox": "to achieve global justice, it may sometimes be necessary to recognise inequality in American responsibilities before the law"[7]. This eternal attrition between global justice and world security has been a constant in the US behaviour from the beginning of the XX century.

[6] CERONE (2009: 166).
[7] JORGENSEN (2020: 142).

1.1 The US involvement in the development of global criminal justice: from the Peace Treaty of Versailles (1919) to the establishment of the ICTY and the ICTR

As soon as World War I ended, a peace conference was called in Versailles (1919) in order to discuss the future European settlement. Among other things, the issue of war responsibility arose as well. The then three major powers – the United States, the United Kingdom and France – instituted a commission (whose official name was "Commission on Responsibilities of Authors of War and on Enforcement of Penalties") which was charged to study the feasibility of William II's criminal liability for "crimes against peace" (what today would be called crime of aggression) and the German authorities' violations of war crimes enlisted in the Hague Conventions of 1899 and 1907[8]. Nonetheless, the US representatives within the Commission, Robert Lansing and James Brown Scott, expressed great concerns regarding the laws and principles to be applied, the judicial liability of heads of state and the establishment of a special international criminal tribunal. As a matter of fact, their dissenting opinion to the Commission's final report was annexed to the document.

First of all, they argued that the Commission's inquiry exceeded its mandate in ascertaining not only violations of customs of war, but also of "the laws or of the principles of humanity"[9]. According to them, while the former was "a standard certain"[10], the latter "var[ies] with the individual"[11]. Thus, an international tribunal should have only adjudicated war crimes. Secondly, a head of state in charge was politically – not judicially – responsible to his own country and people[12]. On the contrary, "proceedings against [a head of state who has abdicated or has been repudiated by his people] might be wise or unwise, but in any event they would be against an individual out of office and not against an individual in office and thus in effect against the state"[13]. The

[8] Though the Hague Conventions had been thought to impose obligations on states, they were eventually used as a source of law for individual criminal responsibility, SCHABAS (2020: 2-3).
[9] Annex II to Report presented to the Preliminary Peace Conference by the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, April 4, 1919, *Memorandum of Reservations Presented by the Representatives of the United States to the Report of the Commission on Responsibilities*, p. 133.
[10] *Id*., p. 134.
[11] *Ibidem*. In compliance with the Martens Clause of the Hague Convention (1907), the Greek member of the Commission, Nikolaos Politis, pushed for the inclusion of this new category of crimes, specifically in order to adjudicate the Turkish massacre of Armenians. See BERGSMO (2014: 177-178).
[12] "This does not mean that the head of state, whether he be called emperor, king, or chief executive, is not responsible for breaches of the law, but that he is responsible not to the judicial but to the political authority of his country" in *United States Memorandum, supra* footnote 9, p. 135.
[13] *Id.*, p. 136.

US representatives thus recognized the head of state a personal immunity[14] since pursuing him, while in office, before a foreign tribunal would have violated his sovereign rights. However, according to the USA, as William II had abdicated, he could have been pursued for criminal responsibility[15]. Last but not least, the Americans had been strenuous opponents to the creation of a special international criminal tribunal since the beginning[16]. Following their previous objections, in fact, "to the unprecedented proposal of creating an international criminal tribunal […] the US members refused to give their assent"[17]. According to them, the adjudication should have been pursued either in front of a domestic court – which would have been thus competent in judging its own nationals or those crimes committed on its territory – or, in case of a transnational crime, by a temporary mixed tribunal – composed of different domestic military courts applying national legislations and procedures. In other words, as the US President Woodrow Wilson had already emphasized[18], establishing an international court based on the victors' justice would have represented a dangerous precedent in case of a future US military loss. As a matter of fact, Lansing and Scott not only criticized the creation of the international tribunal as being "extra-legal", but also denounced it to be a "political"[19], rather than a judicial, tool.

That said, the Allies eventually found a compromise and decided to explicitly demand a criminal conviction of the former German Kaiser William II. According to Article 227 of the Treaty of Peace between the Allied Powers and Germany (also known as the Peace Treaty of Versailles), "the Allies and Associated Powers publicly arraign William II of Hohenzollern, formerly German Emperor, for a supreme offence against international morality and the sanctity of treaties"[20]. In order to fulfil this task, "a special tribunal will be constituted to try the accused"[21]. In addition, Articles 228 and 229 of the Peace Treaty of Versailles acknowledged the Allies' right to prosecute German officials for war crimes. Yet, the Netherlands – which was granting asylum to

[14] A personal immunity – or *ratione personae* immunity – protects the head of state only during his/her mandate, while a functional immunity – or *ratione materiae* immunity – protects the head of state both during and after his/her mandate. See CORMIER (2020:78-81).
[15] The German Emperor William II of Hohenzollern had abdicated on November 9, 1918. According to the French report *Examen de la Responsabilité pénale de l'empereur Guillaume II*, which was circulated at the Peace Conference in Paris (January 1919) prior to the signature of the Peace Treaty of Versailles, his abdication posed a dilemma: had he not abdicated, he should have enjoyed immunity from criminal responsibility, but since he had, and no more having any official capacity, he could not be pursued before criminal courts for acts committed in his previous official capacity. Article 227 eventually did not grant any immunity, whatever the rank of the convicted. See BERGSMO *et al*. (2014: 200).
[16] CERONE (2009: 134).
[17] *United States Memorandum*, *supra* footnote 9, p. 129.
[18] "It would be creating a dangerous precedent to try our own enemies before judges who represent us", in BERGSMO (2014: 184).
[19] BERGSMO (2014: 182). Note that this critique will be reiterated against the functioning of the ICC, though for different reasons.
[20] HIÉRAMENTE (2008: 19-20).
[21] HIÉRAMENTE (2008: 19-20).

William II – decided not to extradite him to the Allied Powers, thus denying them any possibility of trying the former Kaiser under Article 227 of the Treaty. Furthermore, due to the lack of the Allies' common political will to enforce those provisions of the Treaty[22], Articles 228 and 229 were never applied. The Allied powers thus ended up favouring the original US approach: German domestic legal processes – known as the Leipzig Trials – were set up in order to judge the alleged violators of war crimes. The preference of domestic jurisdiction would have characterised the US approach to global justice developments from 1919 onwards.

It was due to the atrocities committed during World War II that the Allies eventually decided to internationally prosecute the most heinous crimes. Already during the war, the USA, the UK and France agreed in giving birth to the United Nations War Crimes Commission (UNWCC), which would have been competent in collecting information on alleged violations of war crimes by the powers of the Axis and their allies during the conflict[23]. Besides, the signature of the Moscow Declaration (1943) committed most notably the United States, the United Kingdom and the USSR to pursue war criminals of the Axis once the war had terminated[24]. If, after WWI, the UK and France arose as the greatest advocates for an international adjudication of war criminals, in the aftermath of WWII, they would have preferred to just summarily execute them. Conversely, it was mainly due to the US Secretary of War, Henry L. Stimson, that the US President Franklin Delano Roosevelt changed his mind just before the Yalta Conference. Then, the US and the Russians managed to convince the other Allied powers to establish the Nuremberg and the Tokyo Trials[25] (respectively called IMT – International Military Tribunal – and IMTFE – International Military Tribunal for Far East) in order to fulfil the commitment enshrined in the Moscow Declaration.

Even in this case, those tribunals were the representation of the victors' justice, thus exempting any possible crime committed by the Allies during WWII. Article 6 of the London Charter (which instituted the IMT) restricted IMT's *ratione personae* competence to the sole individuals whose nationality was one of the Axis powers but extended its *ratione materiae* jurisdiction even to crimes against humanity (not only war crimes and crimes against peace), whereas Article 7 of the Charter did not recognise any immunity whatsoever rank of the convicted[26]. Furthermore, notwithstanding the functioning of post-war international tribunals, the Allied powers even adopted the Allied Control Council Law No. 10. According to its Article III(a), each occupying authority of Germany (namely the USA, the UK, the USSR and France) was entitled to

[22] BERGSMO (2014: 189).
[23] BASSIOUNI, SCHABAS (2016a: 27-28).
[24] BASSIOUNI, SCHABAS (2016a: 28).
[25] The former was established thanks to the signature of the London Agreement (August 8, 1945) by the USA, the UK, the USSR and France. Conversely, the latter was instituted following the proclamation by the Supreme Allied Commander in the Pacific, General Douglas MacArthur, on April 26, 1946.
[26] HIÉRAMENTE (2008: 21-22).

pursue Nazis accused of having committed crimes against peace and humanity or war crimes in accordance with their own national procedures and legislations[27]. From a quantitative assessment, it should be noted that these domestic trials proved to be even more effective than IMT itself: in effect, the former managed to convict up to fifteen thousand people, compared to the nineteen adjudications of the latter[28]. Besides, Article IV recognised the right of other countries to convict Nazis suspected of having committed the same categories of crimes on the soil of those other countries. The most notable example is surely the Eichmann trial in Jerusalem.

In other words, the two experiences of post-war justice (WWI and WWII) demonstrated how crucial the political will of major powers is, thus perpetually tying global justice developments to international politics perspectives. However, the following years showed the difficulty of maintaining an explicit victors' justice: the major powers – and the USA more specifically – had to find alternative ways in order not to be themselves judged for crimes committed in conflict areas. This was the case of the establishment of the ICTY and the ICTR.

Both international criminal tribunals (ICTs) were the fruit of great efforts of the US administration under President Clinton. In particular, it was the US Ambassador to the UN, Madeleine K. Albright, who persuaded states and managed to find common ground and support within the UNSC for the adoption of the tribunals' institutive resolutions[29]. Both tribunals' jurisdiction was precisely limited to the crimes committed during the war in Yugoslavia and in Rwanda. Nonetheless, their *ratione personae* competence was neither restricted to one specific party to the conflict nor to the sole domestic actors. In other words, the USA and other states' servicemembers were theoretically subject to the Tribunals' jurisdiction, and the ICTY's review of the NATO Bombing Campaign in the Federal Republic of Yugoslavia proved it. However, even in this last case, the ICTY Prosecutor Carla Del Ponte eventually decided not to open a formal investigation[30]. This may be seen as a materialisation of the US "silent influence"[31], namely the combination of factors through which the USA was able to sway the Tribunals' work. In particular,

[27] These trials are known as Subsequent Proceedings.

[28] BASSIOUNI & SCHABAS (2016a: 29). The IMT convicted nineteen Nazis and acquitted three: twelve were condemned to death, three were sentenced to life, while other four had to spend from ten to twenty years in prison.

[29] S/RES/827 of May 25, 1993, establishing the ITCY; S/RES/955 of November 8, 1994, concerning the creation of the ICTR.

[30] To be noted that one hotly debated issue concerned the alleged illegality of the NATO intervention in the former Federal Republic of Yugoslavia, which occurred without prior authorisation of the UNSC. However, the ICTY did not have any jurisdiction over crimes against peace (namely aggression), since it was not mandated to adjudicate *jus ad bellum*, but only *jus in bello*. This had been another US success in the negotiations on the ICTY Statute, which helped to reduce the possibilities of any US servicemembers' conviction. See Report of the Committee on the NATO Bombing Campaign, June 13, 2000, *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia*, paras. 30-34.

[31] CERONE (2009: 144).

the US heavily contributed to the functioning of the Tribunals: it provided the greatest share of the ICTs' budgets and free US personnel, pressured States to cooperate with them and adopted the Rewards for Justice Program[32] in order to collect information on alleged criminals[33]. As a consequence, since the ICTs' functioning and their mere existence heavily depended on the US economic and diplomatic support, an investigation over US crimes committed in the Federal Republic of Yugoslavia or in Rwanda proved to be "an unlikely event"[34].

Finally, the USA promoted the creation of many hybrid and mixed tribunals, namely internationalised courts which complemented the domestic judicial system and applied a combination of international and national legislations and procedures. For instance, this is the case of the Special Court for Sierra Leone (SCSL) or the Extraordinary Chambers in the Courts of Cambodia (ECCC)[35]. Especially regarding SCSL, the Clinton administration started pushing for its creation, but it was ultimately under George W. Bush that the SCSL gained momentum. In such a framework, the US servicemembers are exempted from jurisdiction as peacekeeping operations cannot be pursued before it[36]. In effect, the US President presented the SCSL functioning as representative of the US model for global justice adjudication, alternative to the ICC structure[37].

1.2 The USA and the ICC: a historical-political analysis of four US administrations

Before addressing the four US administrations' posture towards the ICC from 1993 onwards, it is necessary to summarise the first steps undertaken by the international arena in fostering cooperation for the establishment of a permanent international criminal court.

In 1946, under US pressure, the UN General Assembly (UNGA) adopted Resolution 1/95 demanding the codification of the Nuremberg's principles into an International Criminal Code[38]. In the meanwhile, states were already negotiating a Convention on the Prevention and Punishment of the Crime of Genocide. According to its draft Article X, "an international court shall be set up in order to try crimes of genocide". However, the US delegation opposed that proposal since "the task of drafting such a convention [instituting an international criminal court] at least equals that of drafting a convention on

[32] See PUBLIC LAW 105-323, 112 STAT. 3029, October 30, 1998; PUBLIC LAW 106-277, 114 STAT. 813, October 2, 2000.
[33] CERONE (2009: 145).
[34] CERONE (2009: 144).
[35] For further information on SCSL and ECCC, and the US involvement, see CERONE (2009: 167-178).
[36] See Article 1(2) of the Statute of the Special Court for Sierra Leone.
[37] CERONE (2009: 168).
[38] A/RES/1/95, para. 2, December 11, 1946.

genocide"[39]. Furthermore, the Court should have been "consent based" and "no government should [have been] bound to accept the court's jurisdiction for its own nationals"[40]. Therefore, parallel to Resolution 1/95, the UNGA requested another special Committee to study the feasibility of the institutionalisation of an international criminal court[41]. This was just one of the underlying reasons which separated the negotiations over the codification of an international criminal code on the one hand, and the establishment of a permanent international criminal court on the other. In addition, according to Professor Bassiouni[42], this split strategy perfectly fitted the Cold War tactics, and it was the expression of a separation between two international societies by delaying any common project between them. Indeed, a lack of real political support by the superpowers on both projects let them fade away during the Cold War and re-gain momentum at the turn of the 1990s[43].

In 1989, during UN debates on drug trafficking, Trinidad and Tobago proposed the creation of an *ad hoc* international tribunal competent on adjudications over that specific issue. While calling the International Law Commission (ILC) for addressing the topic, the UNGA took the opportunity to extend the possible jurisdiction of the tribunal to crimes against peace and humanity[44]. Also, it must be said that the issue had already been domestically reiterated by the US Congress. As a matter of fact, P.L. 100-690 had asked the US President "to begin discussions with foreign governments to investigate the feasibility and advisability of establishing an international criminal court to expedite cases regarding the prosecution of persons accused of having engaged in international drug trafficking or having committed international crimes"[45]. Nevertheless, the same piece of legislation expressly required the need that "such discussions shall not include any commitment that such court shall have jurisdiction over the extradition of United States citizens"[46]. Indeed, this second statement reminded two core principles that had characterised the US approach on global justice development since the Versailles Peace Treaty: firstly, it wanted to secure a complete jurisdictional exemption of US soldiers

[39] Document of the United Nations General Assembly, October 18, 1947, A/401/Add.2, *Draft Convention for the Prevention and Punishment of Genocide: Commentary by the Government of the United States*, p. 11. As a matter of fact, the language used in that draft Article X was eventually deleted from the final text of the Genocide Convention and in the same Resolution 3/260 of the UNGA where it was adopted the Convention on Genocide, the International Law Commission (ILC) was mandated to "study the desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide or other crimes over which jurisdiction will be conferred upon that organ by international conventions".
[40] CERONE (2009: 141-142).
[41] A/RES/489(V), December 12, 1950.
[42] BASSIOUNI, SCHABAS (2016a: 35 and 67).
[43] The 1951 and 1953 reports on the establishment of a permanent criminal court did not find international common ground. Conversely, the draft Code of Crimes was eventually adopted by the International Law Commission in 1996. For further information relating to the Cold War period and the split strategy, see BASSIOUNI, SCHABAS (2016a: 60-67); CERONE (2009: 140-43).
[44] A/RES/44/39, December 4, 1989.
[45] PUBLIC LAW 100-690, 102 STAT. 4267, SECT. 4108(a), November 18, 1988.
[46] *Id*., SECT. 4108(b).

and citizens from any international adjudication; secondly, as a means of strengthening the first principle, the Capitol re-affirmed the primacy of domestic judicial systems. Specifically on this last point, the United States asserted that "there were already 'effective national and international systems in place' and, as such, it was 'not clear to us that the court would contribute to the existing system'"[47].

Nonetheless, even the White House recognised certain benefits that the ICC would have provided. In particular, during the 1990s, a "tribunal fatigue"[48], namely the perception of an excessive number of international *ad hoc* tribunals and their respective funding requirements, pushed the UN parties to question the practicality of maintaining such an approach to global justice developments. In other words, creating a unique permanent international criminal court would have prevented further *ad hoc* tribunals, thus saving money and time. It was during the Clinton administration that negotiations on the ICC peaked.

1.2.1 The USA and the signature of the Rome Statute: William J. Clinton (1993-2001)

The new administration soon reaffirmed the adoption of a "fresh look" in embracing the creation of the Court, since it was "a serious and important effort which should be continued, and we intend to be actively and constructively involved"[49]. President Bill Clinton even publicly acknowledged the US administration desire to support negotiations on the Court's Statute and the US Congress reiterated the positive impact of the ICC institutionalisation both at the international society level and in the US national interests[50]. The first executive meeting to advance a unified administration position occurred in October 1993. In that occasion, the DOD (Department of Defense) expressed its general support to the ICC, but conditionally to the necessary characterisation of the ICC as a last resort mechanism[51]. In other words, the everlasting US approach to criminal prosecutions – demanding primacy of national proceedings – was reaffirmed by the Pentagon. Some months later, the DOD sent

[47] JORGENSEN (2020: 127).
[48] CERONE (2009: 147); BASSIOUNI, SCHABAS (2016a: 59); SCHARF (1999: 3). The term had been coined by David Scheffer, then Senior Counsel and Advisor to the US Ambassador to the UN, Madeleine Albright, in a speech in 1994 and reaffirmed in SCHEFFER (1996: 48). David Scheffer would have later led the US negotiations at the Rome Conference on the ICC Statute.
[49] These are the DOS Legal Advisor Conrad Harper's words in JORGENSEN (2020: 133).
[50] "It is sense of the Senate that such a court would thereby serve the interests of the United States and the world community", Section 517(b)(2) in PUBLIC LAW 103-236, 108 STAT. 469, April 30, 1994. However, Section 519 of the same piece of legislation affirmed that "the United States Senate will not consent to the ratification of any Treaty providing for United States participation in an international criminal court with jurisdiction over crimes of an international character unless American citizens are guaranteed, in the terms establishing such a court, and in the court's operation, that the court will take no action infringing upon or diminishing their rights under the First and Fourth Amendments of the Constitution of the United States, as interpreted by the United States".
[51] SCHEFFER (2012: 169).

its final position to David J. Scheffer, the then special advisor to the US Ambassador to the UN Albright, on the ICC negotiations' posture: he should have pressured to include the last resort mechanism and all the bilateral Status of Forces Agreements (SOFAs) – that had already been signed by the USA and other States – should have been preserved[52]. As a matter of fact, such SOFAs governed the US military presence in those countries and guaranteed the domestic exclusive jurisdiction of the US courts on crimes committed by US citizens on the soil of those territories. It is, thus, important to signal such DOD initial posture because it would have marked the commonality among the US presidencies from 1993 onwards[53].

Notwithstanding the public support to the Court by the US authorities, the White House maintained a cautious position on the Statute. On the one hand, President Bill Clinton repeatedly signalled the importance of establishing a permanent international criminal court. For instance, in October 1995, he held a speech at the University of Connecticut where he urged all nations respectful of "freedom and tolerance" to set up an international criminal court "to prosecute, with the support of the United Nations Security Council, serious violations of humanitarian law"[54]. However, on the other hand, several concerns on the ICC functioning were raised within the executive. In his memoir, David J. Scheffer enumerated three main debates on the Statute[55]: firstly, the DOD opposed the automatic jurisdiction of the ICC over war crimes and crimes against humanity, thus only accepting it on genocidal allegations. Secondly, the US authorities were inclined to ask either for the inclusion of the consent by the state of nationality of the accused to be tried or the express approval of the UNSC. Indeed, the fear of being prosecuted without any explicit consent spread within the Clinton's administration. Ambassador Albright herself advanced this concern to the appropriation subcommittee of the House of Representatives in August 1996: "We are not going to buy a pig in a poke. […] We will not accept a raid in our sovereignty. The United States is very conscious about our sovereign rights. The key agencies [especially the DOD] have to be comfortable"[56]. Thirdly, the US officials would have preferred to include provisions on amnesties within the Treaty, in order to maintain such negotiatory tool at their disposal in situations of peace discussions.

Nonetheless, it was especially during Clinton's second mandate (1997-2001) that negotiations over the Statute intensified. Clinton's decision to appoint Madeleine K. Albright – the advocate of the ICTY's and ICTR's creation – Secretary of State and David J. Scheffer first US Ambassador-at-Large

[52] SCHEFFER (2012: 171-172).
[53] George W. Bush's first administration later promoted the signature of the so-called "Article-98 agreements", namely non-surrender agreements whose objective was to prevent the effective ability of the ICC to pursue US citizens. The difference between these agreements and the previous SOFAs will be addressed in chapter 4.
[54] Remarks by US President William J. Clinton, October 15, 1995, 31 WEEKLY COMP. PRES. DOC. 1840, *Remarks at the University of Connecticut in Storrs*.
[55] SCHEFFER (2012: 177-178).
[56] SCHEFFER (2012: 180).

for war crimes issues – charged to lead the US negotiations on the ICC – signalled a US positive stance on the establishment of the ICC. Besides, this perception was confirmed by President Clinton and the US Congress. The former urged all States to establish a permanent court "before the century ends"[57], namely before the end of his last presidential mandate. The latter reaffirmed the need to "continue to support and fully participate in the negotiations" on the institutionalisation of the Court[58]. Indeed, in December 1997, the UNGA called[59] for an international conference to be held in Rome in 1998 and, in April 1998, the PrepCom[60] submitted its draft proposal on the ICC Statute.

Nevertheless, there was not common ground within the executive on the US priorities to be pushed for in Rome. On the one side, Scheffer proposed to substitute the DOD consent-based demand with more pressure on the principle of complementarity, thus keeping the primacy on domestic proceedings. However, the Pentagon continued threatening that "the treaty would be unratifiable if there was any exposure of the US military to the court"[61]. Though the French were supposed to favour the US approach due to their own presence in Africa, Sheffer felt a shift in the Hexagon policy and his French counterpart Marc de Brichambaut told him that the Pre-Trial Chamber constituted a "sufficient means to oversee complementarity"[62]. Probably feeling the fear of isolation in the upcoming negotiations, the DOD sent a cable to its allies. The memorandum, firstly, criticised the decision of other states not to involve military authorities in defining their positions on the ICC. Then, it demanded "addressees [of that letter, namely the military *attachés* of more than one hundred embassies in Washington] to engage their high-level military and ministry of defense contacts to facilitate maximum MOD/CHOD [Ministry of Defense/Chief of Defense] and host nation command awareness of the ICC issues and to garner support on key equities that are critical to all militaries"[63]. In other words, the Pentagon strived to gain support on its demand from foreign militaries, since otherwise "individual servicemen and women could be vulnerable to inappropriate investigation and prosecution even if a country had not joined the treaty"[64]. Furthermore, SecDef Bill Cohen was said[65] to have encountered US allies threatening to reduce, or at least to review, the US military presence abroad if the universal extension of jurisdiction had been accorded to the Court.

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[57] Address by President Bill Clinton before the UN General Assembly, September 22, 1997.
[58] Joint Resolution of the US Congress, July 30, 1997, H. J. RES. 89.
[59] A/RES/52/160, December 15, 1997.
[60] The Preparatory Committee on the Establishment of an International Criminal Court had been charged to draft the Statute of the ICC by the UNGA Resolution 51/207 on December 17, 1996.
[61] SCHEFFER (2012: 186).
[62] SCHEFFER (2012: 191).
[63] GRIGORIAN (1999: 30). Scheffer was told by DOD officials that "the sheer global responsibilities of the US, including 200,000 troops deployed in 40 countries, 'had to mean something in the negotiations'" in JORGENSEN (2020: 143).
[64] GRIGORIAN (1999: 30).
[65] SENATE HEARING 105-724, July 23, 1998, p. 18.

David Scheffer knew that, rather than facilitating support to the US requests, the memorandum and the SecDef's initiative had thrown up an opportunity for him to achieve positive results in Rome: looking for immunity for the sole US servicemembers (and not for other states' militaries) would have imperilled the image of the United States as a credible advocate of global justice[66]. It would have been a dangerous – and even counterproductive – representation of the Orwellian quotation that "all animals are equal, but some are more equal than others". Nevertheless, he could not do anything but to follow the DOD instructions. In effect, during the last meeting prior to the flight towards Rome, the First Lady Hillary Clinton alerted him that the President wanted to achieve consensus from the military authorities and, therefore, Scheffer should have done anything in his capacity to attain "full immunity from prosecution by the court as both non-party state and as a possible future party to the court"[67].

On the first day of the Conference, the US Ambassador to the UN, William Richardson, held the opening remarks of the US delegation. Once again, the eternal dilemma between global justice and international peace and security led him to propose an inclusive narrative for all the military powers involved abroad. He argued that, since "many countries shoulder the burden of international security, […] [their] soldiers deployed far from home need to do their jobs without exposure to politicized proceedings"[68]. Thus, as an independent prosecutor may investigate US and other States' servicemembers for political motivations, Richardson's remarks highlighted the necessary discussions on Court's trigger mechanisms, including the Prosecutor's *proprio motu* powers.

However, the Rome negotiations soon proved to be very hard for the US delegation. The US inflexibility on specific issues was felt by other States as a weakness, or as an attempt to blow up the entire Conference. In addition, some diplomats reported that the "U.S. officials were calling capitals threatening to cut off aid [if those countries had not supported the U.S. requests], going after smaller, weaker states, especially in Africa"[69]. What is even more striking is that this practice would have been later institutionalised under the Nethercutt amendment to the ASPA legislation during the Bush administration. Besides, the military requests and some strong opponents[70] within the Congress who threatened to refuse the ratification of the treaty undermined the negotiating position of the United States. In fact, a coalition of like-minded States (LMS) – a set of more than 60 countries, including all the EU Member States except France and the UK – and various NGOs – grouped in the CICC (Coalition for the International Criminal Court) – strongly pushed for a more

[66] JORGENSEN (2020: 143).
[67] SCHEFFER (2012: 196).
[68] LIETZAU (2001: 126).
[69] CERONE (2009: 148).
[70] In particular, Senator Jesse Helms sent a letter to the Secretary of State Albright arguing that the Statute "would be 'dead-on-arrival' in the Senate unless 'a clear U.S. veto' was provided for", in JORGENSEN (2020: 138).

independent ICC, a greater prosecutorial discretion and, in general, the universality[71] of criminal jurisdiction. In effect, the coalition was born with the common purpose of "eliminat[ing] unjustified P5 privileges"[72] even in terms of global justice, which had occurred in the case of the institutive resolutions of the ICTY and the ICTR. Conversely, the P5 strived to maintain preponderance by pressuring for the UNSC trigger mechanism and exemptions from ICC jurisdiction. However, they were never able to sign a strong and effective deal among them, also due to the more flexible stances of France and the UK. A proof of this loose coalition materialised during the last days of negotiations. The P5 advanced a proposal for the exemption of nationals of non-party States and a ten-year protocol recognising the States' right to demand consent to jurisdiction on their own nationals. Nevertheless, once the P5 proposal was made public, the LMS aggressively opposed the draft and, consequently, the British and the French delegations withdrew their support to the proposal, fearing negative consequences on their international image[73].

At the end of the Rome Conference, the USA had been able to achieve important results on hot topics for the White House and the Pentagon. These included the complementarity regime (Article 18 of the ICC Statute), a high number of ratifications necessary for the entry into force of the Statute (Article 126 of the Statute requested at least sixty ratifications) and the provisions for article-98 agreements. Nonetheless, Scheffer had not been able to achieve full immunity for US servicemembers[74] and the ICC Prosecutor was granted with *proprio motu* powers (Article 15 of the Statute), thus giving space to politically motivated charges, according to the USA. Furthermore, the US attempt to include possible states' reservations to the ICC jurisdiction was not achieved and the UNSC control role of the Court just partially mirrored the US request. Such a general outcome would have been unacceptable for the US executive. And, indeed, the Secretary of State Albright even asked Scheffer whether it was possible to blow up the conference[75]. As a matter of fact, this solution could have proven to be even more counterproductive. Therefore, Scheffer rather proposed a last-minute tentative[76], namely a final pressure for introducing the consent of the state of nationality of the accused and for limiting the jurisdictional reach of the Court (Article 12 of the Rome Statute) exempting non-party states. Nevertheless, Norway raised a no-action motion, and the negotiations stopped. According to the chairman of the Drafting Committee at the Conference, Professor Mahmoud Cherif Bassiouni, the Norway's prompt reaction – which was later largely welcomed by delegations in Rome – was a symptom of "a sense of 'enough is enough' with what was perceived

[71] JORGENSEN (2020: 151).
[72] JORGENSEN (2020: 140).
[73] SCHEFFER (2012: 220).
[74] Article 12(2)(a) of the Statute implicitly recognises the possibility of adjudicating nationals of non-party states who are accused to have committed crimes on the soil of a state party to the ICC.
[75] SCHEFFER (2012: 208-209).
[76] BASSIOUNI, SCHABAS (2016a: 100).

as US evasiveness"[77]. Anyway, the LMS just wanted to end the conference by signing the treaty and opposing any further US attempts of undermining the functioning of the Court. Therefore, David J. Scheffer was instructed from the White House not to sign the Treaty and, even if it was not scheduled, he asked for an explicit vote on the Statute. One hundred and twenty delegations voted in favour (including France, the UK and the Russian Federation), twenty-one abstained and seven – including the USA together with Israel, China and what Scheffer called "the rogue gallery"[78], namely Iraq, Cuba, Syria and Yemen – voted against the Statute. Eventually, Scheffer signed formal documents[79] enabling the USA to attend future meetings of the Assembly of States Parties (ASP) as an observer state. Although under George W. Bush such possibility would have never been used by the USA, the Obama administration often attended the meetings, striving to push for a more cooperative engagement with the Court.

As soon as Scheffer landed back in the USA, he was called to instruct the Congress on the results of the Rome Conference. The Ambassador-at-Large expressed the US concerns on the Statute, affirming that "we are not prepared to go forward with this treaty in its current form"[80]. Indeed, Scheffer concluded that the major flaw in the treaty consisted in the universal jurisdiction of the Court which may even pursue nationals of non-party states. Though the ICC Statute does not provide for a universal jurisdiction unless the UNSC refers the situation to the Court, Scheffer's words mirrored the US bipartisan fear of US servicemembers' prosecution. However, different policies were advanced to face this feeling. In fact, during the hearings, two main opinions arose among congressmen and congresswomen. On the one hand, the Democrat Senator Feinstein expressed herself in favour of the institutionalization of a permanent international criminal court, but the US should have not yet signed that flawed Treaty[81]. On the other hand, many Republicans supported the idea that the "Court [was] a monster"[82] and that the USA should have done whatever was necessary to "make sure it [shared] the same fate as the League of Nations"[83]. Representative of this second policy proposal was the former Assistant Secretary of State for international organizations affairs (1989-1993), John Bolton. In his view, the administration should have adopted whatever policies in order to let the Court implode and collapse. In this regard, he proposed the "Three Noes" policy: "no financial support, directly or indirectly; no collaboration; and no further negotiations with other governments

[77] BASSIOUNI, SCHABAS (2016a: 100).
[78] SCHEFFER (2012: 271).
[79] In particular, the Final Act of the Rome Conference, UN Doc A/CONF.183/1, July 17, 1998. Indeed, Article 112 of the Rome Statute acknowledges that "[o]ther States which have signed this Statute or the Final Act may be observers in the Assembly".
[80] SENATE HEARING 105-724, July 23, 1998
[81] *Id*., pp. 4-5.
[82] *Id*., p. 2.
[83] *Id*., p. 4.

to improve the statute"[84]. Under George W. Bush, John Bolton would have been appointed Under Secretary of State for arms control and international security affairs (2001-2005) and significantly put into practice the Three Noes policy. However, already in 1999, the US Congress passed P.L. 106-113 which implemented the first two Bolton's "noes". Section 705(b) affirmed that no funds could be used to support the Court, unless the USA became a party to it, while section 706 prohibited any surrender of US citizens to the ICC[85].

Despite the first signs of friction towards the Court, the White House remained committed to the negotiations throughout 1999 and 2000 in order to "fix"[86] the Statute. In fact, still two important documents had to be discussed and adopted by the PrepCom: the Elements of Crimes, and the Rules of Procedure and Evidence. Concerning this last one, the US delegation circulated an informal proposal on limiting the jurisdictional reach of the Court. The interesting novelty acknowledged the possibility of the state of nationality not to subject its citizens to the ICC if it had recognized that "the individual was acting under its 'overall direction'"[87]. Instead, if the state of nationality consented to or the UNSC referred the situation to the ICC, the Court would have been granted the competence of investigating the case. Nonetheless, this proposal did not find common ground among states and the USA started recognizing the impossibility of achieving full immunity for US servicemembers[88].

In spite of this failure, on June 30, 2000, the PrepCom adopted by consensus the Rules of Procedure and Evidence and the Elements of Crimes. The texts had been largely negotiated by the US delegation throughout 1999 and the first two quarters of 2000: though the USA had been able to address some of its concerns, the main issue of servicemembers' exemption had not been directly addressed. Nevertheless, two key US successes are noteworthy to mention. The first one consisted in Rules 51-56: they were thought to limit the Prosecutor's efforts in evaluating a state's deferral request under Article 18(2) of the Rome Statute[89]. The second one concerned Rule 195(2). This provision acknowledged the impossibility of the Court to "proceed with a request for the surrender of a person without the consent of the sending state if, under article 98, paragraph 2, such a request would be inconsistent with obligations under an international agreement pursuant to which the consent of a sending State is required prior to the surrender of a person of that State to the Court". Although Broomhall reports that other states conceded this provision in order to keep the USA committed to the cause but not recognising the exemption of US

[84] According to Bolton, "this approach is likely to maximize the chances that the ICC will wither and collapse, which should be our objective" in *Id*., p. 32.
[85] PUBLIC LAW 106-113, 113 STAT. 1501A-461, November 29, 1999.
[86] BROOMHALL (2001: 144).
[87] BROOMHALL (2001: 146).
[88] SCHEFFER (2001b: 57).
[89] Article 18(2) of the Rome Statute provides that "a State may inform the Court that it is investigating or has investigated its nationals or others within its jurisdiction with respect to criminal acts which may constitute crimes referred to in article 5 and which relate to the information provided in the notification to States" thus denying jurisdiction of the Court over these crimes.

troops from the ICC jurisdiction[90], it is fair to acknowledge this provision as a US success since it gave emphasis to Article 98(2) of the Rome Statute. Indeed, Rule 195(2) reflected the DOD strategy towards the Court[91] and some congressmen – such as Senator Joe Biden[92] – had recently reaffirmed it during Scheffer's hearing at the Congress.

Following the adoption of both documents, Scheffer started reflecting on the possible signature of the Treaty[93]. In fact, both texts had been central of the US negotiating strategy and had addressed many of the US concerns. Nonetheless, time was running out and the last day possible for signature – namely December 31, 2000 – was approaching. At the December session, when the PrepCom was discussing the language of the UN-ICC Relationship Agreement, the US delegation presented a proposal of a new draft article which would have furtherly strengthened the complementarity regime for states of nationality[94]. All these elements pushed many influential figures of the US executive – such as Secretary of State Madeleine K. Albright and National Security Advisor (NSA) Samuel Berger – to support the US signature of the Statute. According to Scheffer, even if the United States had not achieved the full immunity of US troops, the US delegation had been able to obtain "a sophisticated matrix of safeguards that provided a high degree of protection of US interests and, with the added leverage of signature and strong efforts in subsequent PrepCom sessions, additional safeguards that would achieve the best possible relationship for the US with the ICC"[95]. Though the Chairman of the Joint Chiefs of Staff (CJCS), Hugh Shelton, and the SecDef, William Cohen, adamantly opposed the Treaty, President Bill Clinton eventually instructed David J. Scheffer to sign the Rome Statute on December 31, 2000. However, President Clinton stated that "in signing, […] we are not abandoning our concerns about significant flaws in the treaty"[96], in particular the possibility of adjudicating nationals of non-party states. More specifically, President Clinton criticized that statutory provision as "court jurisdiction over

[90] BROOMHALL (2001: 148).
[91] See *supra* footnote 52.
[92] The then Senator Biden affirmed that "[…] if this treaty goes into effect we may have to review the status of forces agreements now in place to ensure that adequate protections are in place" in SENATE HRG. 105-724, July 23, 1998, p. 20.
[93] SCHEFFER (2001b: 56).
[94] "In order to encourage contributions by States to promote international peace and security, and unless there has been a referral to the Court pursuant to article 13(b) of the Statute, the United Nations and the Court agree that the Court shall determine on its own motion pursuant to article 19(1) the admissibility of a case in accordance with article 17 when there is a request for the surrender of a suspect who is charged in such case with a crime that occurred outside the territory of the suspect's State of nationality" in UN Doc. PCNICC/2000/WGICC-UN/DP.17, December 7, 2000. The proposal was not eventually included in the Negotiated Relationship Agreement between the International Criminal Court and the United Nations, due to Bush's decision not to continue attending PrepCom sessions.
[95] SCHEFFER (2001b: 63).
[96] Remarks by US President William J. Clinton, December 31, 2000, *Statement on the Rome Treaty on the International Criminal Court*.

U.S. personnel should come only with U.S. ratification of the treaty"[97]. Therefore, "given these concerns, I [President Clinton] will not, and do not recommend that my successor submit the treaty to the Senate for advice and consent until our fundamental concerns are satisfied"[98].

So, why did the United States sign the treaty? President Bill Clinton explicitly mentioned three sets of justifications. Firstly, by signing, the USA reaffirmed its commitment to global justice and reassured the International Community of its "moral leadership"[99]. Given the US role in setting up the Nuremberg and the Tokyo trials, as well as the ICTY and the ICTR, not signing the Rome Statute could have been perceived as a rejection of accountability and respect of human rights, thus severely impacting the US image worldwide. Secondly, the signature of the Statute did not oblige the Congress to ratify the treaty, but at the same time guaranteed the possibility of influencing the PrepCom on-going discussions and, maybe, even the ICC functioning as an observer signatory state. In addition, Scheffer argued[100] that the ICC Prosecutor's attitude would have been more positive and cooperative towards Washington in case of US signature. Thirdly, this policy of "dexterous multilateralism"[101] – which stands between safeguarding national interests and ensuring US global leadership – would "enhance [the US] ability to further protect U.S. officials from unfounded charges"[102]. On this point, Scheffer went further by arguing that as a signatory state, the United States would be in a better position to negotiate and sign non-surrender agreements in accordance with Article 98(2) of the Rome Statute with not only member states of the ICC, but even with the Court itself, in order to assure the total exemption of US servicemembers from the Court's jurisdiction[103].

However, the prospects of a possible ratification were nearly absent in the long run, and even less in the short term. As a matter of fact, the incoming administration considered the ICC a threat to the national interest and security and a new policy of open opposition had been promised during the 2000 Bush's presidential campaign. Within the Congress, even a fiercer attitude was advanced by Senator Jesse Helms who publicly affirmed that he would have prioritized the protection of "America's fighting men and women from the jurisdiction of this international kangaroo court"[104] at the Capitol Hill. And he kept the promise.

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[97] *Ibidem*.
[98] *Ibidem*.
[99] *Ibidem*.
[100] SCHEFFER (2001b: 58).
[101] SCHWARTZ (2003: 224).
[102] See *supra* footnote 96.
[103] SCHEFFER (2001b: 59).
[104] SCHEFFER (2001b: 53).

1.2.2 The United States "unsigns" the Rome Treaty: George W. Bush (2001-2005)

The appointment of John Bolton as Under Secretary of State for arms control and international security affairs sent a clear message to the ICC: the United States would have neither cooperated with the Court nor ratified the Rome Statute. Furthermore, he was not the only prominent figure to oppose the Court. During his entire mandate, SecDef Donald Rumsfeld took a strong opposition against the Court giving visibility to Colonel Charles J. Dunlap's notion of "lawfare", namely "the use of law as a weapon of war"[105]. He claimed that the Court and its European allies employed lawfare mechanisms to "harass American officials"[106]. Secretary of State Colin Powell, though recognizing the importance of maintaining the leadership in international global justice coherently with US national interests, reiterated the need to a consent-based approach of international law. His cautious perspective, however, collided with the neoconservative stance of John Bolton, who eventually arose as the major player for two main reasons. Firstly, his neocon attitude was intransigent: he would have never accepted any watered-down compromise with the Court or within the executive on the ICC policy[107]. Secondly, according to Professor Cerone, he had been the cornerstone of George W. Bush's presidential victory[108]. Thus, he could play a very influential role in persuading the President.

On February 8, 2001, a concurrent resolution was adopted urging the President to "declare to all nations that the United States does not intend to assent to or ratify the treaty"[109]. The resolution argued that the Rome Statute threatened the US sovereignty and security, and violated the US Constitution providing for a supranational judicial power in contravention to the Supreme Court's primacy. Indeed, Bush confirmed the administration's desire not to "become a party to the ICC treaty"[110]. This position was even more consistent with the Bush Doctrine and the new US military projection, especially in the 9/11 aftermath, later enshrined in the 2002 National Security Strategy (NSS)[111]. On such an occasion, it was clear that a US commitment to the Court

[105] DUNLAP (2001). The term was originally used to refer to the use of international law as a tool to "make it appear that the U.S. is waging war in violation of the letter or spirit of LOAC", thus forcing the White House either to withdraw its troops or not to intervene. It was thus perceived as an attempt to undermine the US leadership in global security.
[106] JORGENSEN (2020: 161).
[107] JORGENSEN (2020: 165).
[108] CERONE (2009: 151) underlined the crucial role of Bolton as official in the re-counting procedure in California, decisive for the presidential victory.
[109] Concurrent Resolution before the US House of Representatives, February 8, 2001, H. CON. RES. 23.
[110] CERONE (2009: 152).
[111] The 2002 NSS, *inter alia*, affirmed that "[w]e will take the actions necessary to ensure that our efforts to meet our global security commitments and protect Americans are not impaired by the potential for investigations, inquiry, or prosecution by the International Criminal Court (ICC), whose jurisdiction does not extend to Americans and which we do not accept".

could have exposed not only servicemembers, but especially top officials[112] – including the President and the SecDef – to the ICC jurisdiction. Of course, the war in Afghanistan was not necessary to convince the USA not to ratify the treaty, but the new Global War on Terror provided just another reason to continue pursuing an anti-ICC policy.

It was, thus, on May 6, 2002, that John Bolton sent a formal letter to UN Secretary General, Kofi Annan, stating that "the United States does not intend to become a party to the treaty" and, therefore, "the United States has no legal obligations arising from its signature on December 31, 2000"[113]. The notification was a means to reaffirm that the United States would not be bound by any possible duty arising from the Rome Statute and that, according to Washington, the Court would have had no jurisdiction over US nationals. In fact, the move was justified to be in conformity with Article 18(a) of the Vienna Convention on the Law of Treaties (VCLT), according to which a State must refrain from acts which would imperil the application of the signed treaty until it explicitly communicates it will not ratify it[114]. In other words, the US objective was to let the government be in the capacity to do whatever was necessary to de-legitimate the Court and to make it share the same fate of the LoN[115]. In fact, the White House had not been able to convince other governments not to ratify the Statute which entered into force on 1st July 2002[116]. In practical terms, the communication of the "unsignature" was the *conditio sine qua non* in order to create the room for action for a US aggressive policy against the ICC[117], represented by the immunity clauses within UNSC resolutions, the signature of bilateral non-surrender agreements and the adoption of an anti-ICC domestic legislation. Nevertheless, Bolton's note was not permanent: it could have been dismissed whenever any US administration had decided to, while, on the contrary, Scheffer's signature would have always remained on the Statute.

Regardless of legal analyses, Bolton's letter was a clear political move in setting up the first step of a US four-stage juridical attack towards the Court. What Washington seemed firstly to criticize – namely lawfare mechanisms – it ended up by adopting the same tactic. The second stage of the US policy consisted in pushing for US peacekeepers' exemption through the UNSC. Congressmen Henry Hyde, Zell Miller, Jesse Helms and Bob Stump sent a

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[112] BOSCO (2014: 79).

[113] Press Statement by the spokesman of the US Department of State Richard Boucher, May 6, 2002, *International Criminal Court: Letter to UN Secretary General Kofi Annan*. John Bolton later affirmed that that day was "my happiest moment at [the] State [Department]", in BOSCO (2014: 73).

[114] Article 18(a) of VCLT (1969) affirms that "[a] State is obliged to refrain from acts which would defeat the object and purpose of a treaty when: (a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty;".

[115] *Supra*, footnote 83.

[116] In April 2002, ten governments deposed their instruments of ratification to the UN Headquarter in New York, thus raising the number of ratifiers over sixty.

[117] RALPH (2007: 128).

letter to Secretary of State Powell urging the administration to "include in Security Council resolutions establishing U.N. peacekeeping operations a grant of permanent immunity from ICC jurisdiction for personnel participating in the operation"[118]. The first possibility for the United States to propose such a provision arose on May 17, 2002, when the UNSC was called to extend the UN peacekeeping operation in East Timor. Notwithstanding the US Ambassador's threat to withdraw US troops, the Council rejected the proposal and the UNMISET (United Nations Mission of Support to East Timor) was instituted. However, during the following negotiations on the renewal of the UN mission in Bosnia and Herzegovina, the USA took a much stronger position on its request, affirming that it would not take part to the mission, "if there [was] no adequate protection for the US peacekeepers"[119]. Since no common agreement was found within the Council, the USA proposed to invoke Article 16 of the Rome Statute[120], allowing an exemption of any nationals of non-party States to the ICC, involved in the UN peacekeeping operation in Bosnia, for a period of twelve months, automatically renewing the resolution each year unless the UNSC voted against. Being it a vote under Chapter VII of the UN Charter, the USA would have maintained the right to veto the resolution which would have stopped the automatic renewal. In other words, such a proposal would have granted a permanent and eternal US peacekeepers' exemption from ICC jurisdiction thanks to the US veto power. As a matter of fact, UN Secretary General Kofi Annan sent a letter to US Secretary of State Powell arguing that such a proposal would have forced ICC member states to adopt a resolution that amended the ICC Statute, and the UNSC role, in general, and the overall UN peacekeeping system, in specific, would have been put at risk of loss of legitimacy[121]. Therefore, the US proposal was rejected by the Council once again. After one month of negotiations, however, the UNSC members managed to find a compromise. The Council adopted Resolution 1422 which invoked Article 16 of the Rome Statute, but its renewal would have subjected to an affirmative vote of the UNSC[122]. In other words, the other four permanent members would have been granted the veto power to block a possible renewal. US Ambassador Negroponte affirmed that the US would have

[118] MURPHY (2002: 725). The letter specifically mentioned the UN peacekeeping operation in Bosnia to be the first case where the UNSC should have included such provision.
[119] BOSCO (2014: 74).
[120] Article 16 of the ICC Treaty affirms that "[n]o investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions". For further legal interpretations of Article 16, see TRIFFTERER, AMBOS (2016: 770-780).
[121] MURPHY (2002: 727-728).
[122] S/RES/1422, para. 1: "*Requests*, consistent with the provisions of Article 16 of the Rome Statute, that the ICC, if a case arises involving current or former officials or personnel from a contributing State not a Party to the Rome Statute over acts or omissions relating to a United Nations established or authorized operation, shall for a twelve-month period starting 1 July 2002 not commence or proceed with investigation or prosecution of any such case, unless the Security Council decides otherwise".

annually pursued the renewal and, indeed, in 2003, Resolution 1487 was adopted extending Resolution 1422 for other twelve months.

While the second stage of the lawfare tactic strived to achieve immunity from a multilateral perspective, the third stage was pushed through bilateral means. In particular, John Bolton pressured the government to sign immunity agreements with other states in order to include provisions prohibiting any cooperation and any surrender of US nationals to the ICC. It is thus not surprising that, after the US failure to include US exemptions in the UNSC resolution on the East Timor peacekeeping operation, it was specifically East Timor to sign the first (apart from Israel) Article-98 agreement with Washington in August 2002. By June 2005, one hundred countries would have done the same[123]. According to the US government, those treaties were provided for and acknowledged by the Rome Statute itself at Article 98(2), thus also nicknaming them "Article-98 Agreements". However, this legal argumentation was contested by many countries – especially by the member states of the European Union – which considered them to be not consistent with the purpose of the Court's institutive treaty[124].

For the sake of clarity and in the interest of this dissertation, it is important to underline that the US-Afghan non-surrender agreement was signed on September 20, 2002, and entered into force on May 28, 2003. Indeed, in July 2002, President Bush had already promised his troops leaving for Afghanistan that "we will not submit American troops to Prosecutors and judges whose jurisdiction we do not accept", since "[e]very person who serves under the American flag will answer to his or her own superiors and to military law, not to the rulings of an unaccountable international criminal court"[125].

The fourth and final stage of the Bush administration lawfare tactic concerned the adoption of the American Servicemembers' Protection Act

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[123] For the list of all the states which signed BIAs with the United States, visit *Countries that have Signed Article 98 Agreements with the U.S.*, in Georgetown Law Library, available online.

[124] "Entering into US agreements as presently drafted would be inconsistent with ICC States Parties' obligations with regard to the ICC Statute and may be inconsistent with other international agreements to which ICC States Parties are Parties" in Annex to General Affairs and External Relations, September 30, 2002, 2450th Council session, C/02/279, *EU Guiding Principles concerning Arrangements between a State Party to the Rome Statute of the International Criminal Court and the United States Regarding the Conditions to Surrender of Persons to the Court*; see also Resolution of the European Parliament, September 26, 2002, P5_TA(2002)0449, *European Parliament Resolution on the International Criminal Court (ICC)*, preambular paragraph D, "whereas the current worldwide political pressure being exerted by the government of the United States to persuade States Parties and Signatory States of the Rome Statute, as well as non-signatory states, to enter into bilateral immunity agreements which seek, through misuse of its Article 98, to prevent US government officials, employees, military personnel or nationals from being surrendered to the International Criminal Court should not succeed with any country […]".

[125] Remarks by US President, July 19, 2002, *Remarks by President Bush to Troops and Families of the 10th Mountain Division - New York, 10th Mountain Division, Division Hill, Fort Drum, New York*. A thorough assessment of BIAs' conformity with international law and Article 98(2) of the Rome Statute, as well as the difference between Article-98 agreements and SOFAs, will be provided in chapter 4.

(ASPA)[126], renamed by NGOs as "The Hague Invasion Act". As a matter of fact, this piece of legislation had already been proposed during the Clinton administration as an instrument to persuade other states not to ratify the Rome Statute, but it did not receive enough support in order to be adopted[127]. It was only on August 2, 2002, that President Bush eventually signed the act.

As ASPA would have played a crucial role in the US policy towards the Court, it is important here to stress some of its key provisions. In its preamble, ASPA states that "[m]embers of the Armed Forces of the United States should be free from the risk of prosecution by the International Criminal Court, especially when they are stationed or deployed around the world to protect the vital national interests of the United States"[128]. In order to do so, the act regulates the policies that may be undertaken by the administration towards the Court. Firstly, section 2004 prohibits cooperation with the ICC, whereas it does not impose the same limitation with *ad hoc* tribunals, thus once again reaffirming the US global justice policy: no US agency, authority or court can respond to a request of cooperation, support or extradition emanating from the ICC[129]. Secondly, section 2005 stipulates the legal basis for the US strategy within the UNSC to threaten the withdrawal of US nationals involved in UN peacekeeping and peace enforcement operations unless a UNSC resolution granted them immunity from ICC jurisdiction. Thirdly, section 2007 prohibits any US military assistance to states party to the Rome Statute. However, such a provision does not apply in case of NATO members, major non-NATO allies, Taiwan, any government which has signed am Article-98 agreement with the United States or if the US President considers the military intervention in the national interest of the United States. Finally, the President is empowered to waive all these provisions in accordance with section 2003 and, more importantly, he is "authorized to use all means necessary and appropriate to bring about the release [of US servicemembers and officials] who [are] being detained or imprisoned by, on behalf of, or at the request of the International Criminal Court"[130]. While the other provisions recognized negative duties upon the government – which would have not surely facilitated the work of the Court but, at the same time, would have not directly threatened its survival – this last one was perceived as a true attack towards the ICC as all necessary means could theoretically include even military ones[131].

Furthermore, the US domestic anti-ICC legislation was reinforced by the Nethercutt amendment in December 2004[132]. More specifically, Representative George Nethercutt included the prohibition to economically and

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[126] PUBLIC LAW 107-206, 116 Stat. 899, Title II, August 2, 2002.
[127] SCHEFFER (2001b: 48).
[128] Section 2002(8) of ASPA, *supra* footnote 126.
[129] Nonetheless, the Dodd's amendment – namely section 2015 of ASPA – vaguely recognizes the possibility to assist "international efforts" to bring to justice terrorists, and people accused of genocide, war crimes and crimes against humanity. Although section 2015 does not mention ICC, it would be used as legal basis for Obama's pragmatic cooperation with the Court.
[130] Section 2008(A) of ASPA, *supra* footnote 126.
[131] BUCHWALD *et al.* (2021: 8); BOSCO (2014: 81).
[132] PUBLIC LAW 108-447, 118 STAT. 2809, 3027, SEC. 574, December 8, 2004.

financially support any ICC party which had not previously signed an Article-98 agreement with the United States. While ASPA was mainly focused on the military support, the Nethercutt amendment complemented it by introducing economic aid limitations.

Nonetheless, the lawfare tactic started weakening in 2004, when, firstly, the CBS 60 Minutes II aired photos of the US abuses on Iraqi detainees in Abu Ghraib prison, and then a document of the "Torture memos" was leaked to the press. The US administration had been aware and had authorized the use of "enhanced interrogation techniques" on detainees in Abu Ghraib. The scandal obviously endangered the US image worldwide and its lawfare tactic: any further allegation of politically motivated charges by the ICC Prosecutor could have been perceived as a means to hide US abuses worldwide. Besides, the White House would have been no more credible in asking for full immunity for its troops abroad at least in multilateral frameworks. Indeed, the proposal of the renewal of Resolution 1487 was dropped by the US government itself, because it was clear there would have not been enough support within the UNSC. Consequently, Bush's second presidential mandate seemed to shift from an *a priori* firm opposition to an acceptance of coexistence with the ICC.

1.2.3 A coexistence policy: George W. Bush (2005-2009)

Apart from this scandal, many other factors accounted for the shift in US policy towards the ICC. Firstly, the neocons lost influence both in the executive and in the Congress: as a matter of fact, SecDef Donald Rumsfeld resigned, Senator Jesse Helms retired from Congress and fell ill from dementia, and John Bolton did not manage to achieve Congressional support for his position as US Ambassador to the UN[133]. Besides, the new Secretary of State Condoleezza Rice stood up as one of the leading figures of the new administration: she acknowledged the importance of international law and "well-crafted"[134] multilateral institutions to pursue national interests. Secondly, in its first two years of mandate, the ICC Prosecutor Luis Moreno Ocampo adopted a cautious policy of investigation: since he did not want to trigger his *proprio motu* power from the beginning of the Court's life in the interest of legitimizing the ICC via non-debated mechanisms, he convinced the governments of Uganda and DRC to formally ask the ICC investigation by themselves. In addition, the Prosecutor had refrained to investigate possible crimes in Iraq and shifted his attention to contexts "where the United States and other leading powers had few objections to investigations"[135].

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[133] In conformity with Article II, §2, clause 3, of the US Constitution John Bolton had been appointed US Ambassador to the UN by President Bush during the 2005 Senate recess. According to the Constitution, the recess appointment expires at the end of the next Senate session. Since Bolton was nominated on August 1, 2005, his position lasted until the end of the next session, namely the end of 2006, when the Congress would have been called to confirm or reject his appointment.

[134] JORGENSEN (2020: 193).

[135] BOSCO (2014: 106).

The first occasion to prove a shift in policy arrived in 2005. Already in September 2004, Secretary of State Powell publicly declared what happened in Darfur to be a genocide and invoked Article VIII of the Genocide Convention calling the United Nations to take appropriate measures[136]. On September 18, 2004, the UNSC adopted Resolution 1564 which, *inter alia*, called the UN Secretary General to "establish an international commission of inquiry in order immediately to investigate reports of violations of international humanitarian law and human rights law in Darfur by all parties, to determine also whether or not acts of genocide have occurred, and to identify the perpetrators of such violations with a view to ensuring that those responsible are held accountable"[137]. As regards to this last point, however, opinions diverged among permanent members of the Council. On the one hand, the British and the French supported the UNSC deferral to the ICC, while the Americans preferred an *ad hoc* hybrid court or a regional tribunal under the mandate of the UNSC. The US position was motivated both by its long-standing strategy for global justice and its attempt not to legitimise the Court's work. Indeed, the words of Scheffer's successor, Pierre-Richard Prosper, clearly enunciated this second axis of action: "We do not want to be party to legitimizing the ICC"[138]. Conversely, France, one of the greatest advocates of the ICC, "wanted to put the Americans in a position where they would have to oppose something reasonable – and endorse impunity"[139].

On January 25, 2005, the Commission of Inquiry's report was released, indicating that the crimes committed in Darfur did not fit the definition of genocide, but they were rather crimes against humanity. Nonetheless, it recommended the Council to refer the situation to the ICC as the sole effective instrument, since a hybrid Sudan court would have not been possible due to the unwillingness of the Sudanese judicial power to prosecute the crimes and the inadequacy of the domestic legislative framework[140]. Given the fact that Sudan was not a party to the Rome Statute and the purported crimes against humanity were committed by Sudanese people, the only way possible to trigger the ICC investigation would have been a UNSC deferral to the Court. However, the United States was empowered to veto the resolution. Thus, a compromise among Council's members was necessary to seek the deferral, which was eventually adopted on March 31, 2005. The final language of Resolution 1593 included three US requests: first of all, PP4 made reference to non-surrender agreements pursuant to Article 98(2) of the Rome Statute; secondly, para. 6 recognised the exclusive jurisdiction of states not party to the

[136] Testimony before the Senate Foreign Relations Committee of the US Secretary of State Colin L. Powell, September 9, 2004, *The Crisis in Darfur*.
[137] Para. 12 of S/RES/1564, September 18, 2004.
[138] CERONE (2009: 160).
[139] These are the words of the then French Ambassador to the UN, Jean-Marc de la Sablière, in BOSCO (2014: 109).
[140] Report by the International Commission of Inquiry in Darfur, January 25, 2005, *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General*.

ICC over their nationals for purported crimes committed in Sudan[141]; finally, para. 7 declared that any incurring costs of the ICC investigation and prosecution of Sudanese criminals would be financially supported by member states of the ICC, while the UN would have not contributed, thus freeing the United States from any duty of financial cooperation[142]. As part of a coexistence policy but not one of a complete acceptance of the ICC, the United States abstained from the vote: indeed, it had been able to secure its troops and officials from the ICC jurisdiction, but an affirmative vote would have recognised the legitimate international role of the Court's adjudication. At the end, the US vote mirrored its original position in subjecting the ICC to the UNSC control, but the fact that it did not vote against a referral of a case involving a non-party state to the ICC collided with one of its major critiques to the Court[143]. This showed once again that the primary interest of the United States had always been the full immunity of its servicemembers and its authorities, and its critiques were aimed at achieving this objective.

However, some prominent military figures started even questioning the utility of the ASPA provision concerning the threat of cutting military support towards states party to the ICC, unless they signed non-surrender agreements with the United States. Indeed, Chinese diplomats were ready to replace the US military presence in those countries with Chinese support[144]. Furthermore, General Bantz J. Craddock affirmed that "loss of engagement prevents the development of long-term relationships with future [Latin American] military and civilian leaders"[145]. In other words, Bolton's anti-ICC strategy started showing its weaknesses and even the newly appointed Secretary of State Condoleezza Rice acknowledged that "[we are] shooting ourselves in the foot"[146]. A clear shift in the ICC policy by amending ASPA was thus necessary as well. This is exactly what occurred in 2006. While the US strategy of Article-98 agreements started slowing in 2005[147], a new normal in the US-ICC relationship was initially marked by Bush's twenty-one waivers on prohibition of

[141] S/RES/1593, para. 6: "*Decides* that nationals, current or former officials or personnel from a contributing State outside Sudan which is not a party to the Rome Statute of the International Criminal Court shall be subject to the exclusive jurisdiction of that contributing State for all alleged acts or omissions arising out of or related to operations in Sudan established or authorized by the Council or the African Union, unless such exclusive jurisdiction has been expressly waived by that contributing State;".

[142] S/RES/1593, para. 7: "*Recognizes* that none of the expenses incurred in connection with the referral including expenses related to investigations or prosecutions in connection with that referral, shall be borne by the United Nations and that such costs shall be borne by the parties to the Rome Statute and those States that wish to contribute voluntarily;".

[143] BOSCO (2014: 110); JORGENSEN (2020: 209-210).

[144] SCHABAS (2020: 29).

[145] BUCHWALD *et al.* (2021: 10).

[146] CERONE (2009: 163).

[147] From the beginning of 2005 onwards, the United States signed just seven non-surrender agreements: four were signed in 2005 with Angola, Benin, Guinea Bissau and Saint Kitts and Nevis; two in 2006 with Lesotho and Swaziland; and one in 2007 with Montenegro.

military assistance to states party to the ICC[148]. Furthermore, this obligation was amended by the National Defense Authorization Act for Fiscal Year 2007[149], allowing the United States to grant IMET (International Military Education and Training) support even to countries party to the ICC and not signatories of any Article-98 agreements with the US. The complete repeal of section 2007 of ASPA – concerning the "Prohibition of United States military assistance to parties to the International Criminal Court" – was eventually posited in P.L. 110-181, § 1212, of January 28, 2008. Finally, Bush waived the Nethercutt amendment allowing economic and financial support to fourteen countries party to the ICC and not signatories of any non-surrender agreement with the USA[150].

Furthermore, the US authorities started acknowledging the "constructive role of the ICC"[151]. On the one hand, on March 29, 2006, the former President of Liberia, Charles Taylor, was arrested and surrendered to the Special Court for Sierra Leone. However, fearing possible retorsions for the Western African stability because of Taylor's arrest[152], Washington asked for his transfer to the ICC. In other words, though the legal process would have been held by SCSL judges and in accordance with the SCSL Statute, it would have happened in an ICC courtroom by using ICC facilities. Although it could be right to argue that such a case should not account to a form of legitimation of the ICC since the adjudication was not based on the Rome Statute, it is equally correct to affirm that it represented just the first step for enhancing further pragmatic cooperation with the Court. Indeed, the US officials had already started moving away for an aggressive anti-ICC narrative. John Bellinger, DOS Legal Advisor, declared that "[w]hile the United States continues to maintain fundamental objections to the ICC, we did not veto UNSCR 1593, which referred the situation in Darfur to the ICC, because we recognised the need for international community to work together to end the atrocities in Sudan and speak with one voice to bring to account the perpetrators of those crimes"[153]. Later, he even recognised that "the court can have a valuable role to play in certain cases. On this point, Darfur is exhibit A"[154]. In fact, when the African Union criticized the Prosecutor's arrest warrant for Sudanese President Omar al-Bashir for his involvement in the Situation in Darfur and

[148] Presidential Determination, September 29, 2006, No. 2006-27, *Memorandum on Waiving Prohibition on United States Military Assistance With Respect to Various Parties to the Rome Statute Establishing the International Criminal Court*. Pursuant to section 2007 of ASPA, he requested to waive the prohibition of IMET assistance to Barbados, Bolivia, Brazil, Costa Rica, Croatia, Ecuador, Kenya, Mali, Malta, Mexico, Namibia, Niger, Paraguay, Peru, Samoa, Serbia, South Africa, St. Vincent and the Grenadines, Tanzania, Trinidad and Tobago, and Uruguay.
[149] PUBLIC LAW 109-364, § 1222, 120 Stat. 2423, October 17, 2006.
[150] TAFT *et al*. (2009: 14).
[151] CERONE (2009: 164).
[152] CERONE (2009: 174).
[153] CERONE (2009: 162).
[154] CERONE (2009: 162).

invoked Article 16 of the ICC Treaty, the US delegation vehemently opposed the inclusion of such a provision in Resolution 1828 by threating to veto it[155].

To sum up, despite the more cooperative US attitude towards the Court under George W. Bush's second mandate, the White House never put aside its concerns on the ICC structure and Statute. In 2007, the Office of the Prosecutor (OTP) publicly declared the beginning of an ICC preliminary examination for possible war crimes and crimes against humanity committed by the parties to the conflict in Afghanistan – including the United States. As an implicit answer, the United States dissociated from consensus on a UNGA resolution acknowledging the ICC role "in a multilateral system that aims to end impunity" and calling states not-party to the ICC "to consider ratifying or acceding to it without delay"[156]. In the position statement, Deputy US Ambassador to the UN, Alejandro Daniel Wolff, reiterated the need to a UNSC case-by-case assessment of the utility of ICC adjudication and denounced the universal approach of "like-minded states" which might undermine the US efforts for a "pragmatic *modus vivendi*"[157]. However, questions arose whether the new incoming administration would have dismissed Bolton's note and advanced the ratification of the ICC Statute.

1.2.4 A new positive stance: Barack Obama (2009-2017)

The new executive comprised many figures in some way favourable to the Court or linked with the global justice field. For instance, the NSC (National Security Council) special assistant for multilateral affairs and human rights, Samantha Power, was a great advocate of the Sudan referral to the Court and the newly appointed Ambassador-at-Large for war crimes issues, Stephen Rapp, had previously been the SCSL Chief Prosecutor. However, the new DOS legal advisor, Harold Koh, would have played a leading role in shaping the ICC policy of the United States. As a matter of fact, even before being appointed, Koh supported the need to formally dismiss Bolton's May 2002 note on the Rome Statute, in order to show to the world the US commitment to global justice. Finally, during her nomination vote, the new Secretary of State Hillary Clinton had already put forward the imperative of "end[ing] hostility towards the ICC, and look[ing] for opportunities to encourage effective ICC action in ways that promoted US interests by bringing war criminals to justice"[158], substantially mirroring the words that Obama had pronounced some months earlier in his senatorial capacity[159]. Nevertheless, the US concerns regarding the possibility of ICC adjudication of US nationals never faded away. In the meantime, Hillary Clinton reminded that "[a]s

[155] SCHABAS (2020: 38).
[156] UN Doc. A/RES/62/12, December 19, 2007.
[157] UN Doc. A/62/PV.57, November 26, 2007.
[158] Hearing before the Committee on Foreign Relations of the United States Senate, January 13, 2009, Senate Hearing No. 111-249, *Nomination of Hillary R. Clinton to be Secretary of State*.
[159] "The U.S. needs to work with the International Criminal Court (ICC) to ramp up the pace of indictments of those responsible for war crimes and crimes against humanity" (*Id.*, p. 130).

Commander-in-Chief, the President-Elect will want to make sure [US overseas troops] continue to have maximum protection"[160], a position that had already been emphasized by the 1998 Senator – and Obama's Vice-President – Joe Biden[161]. Indeed, the 2010 NSS explicitly stated that the United States would have "always protect[ed] U.S. personnel"[162] and any cooperation with the Court would have been based upon national interests.

Given this understanding of international law and multilateral institutions as a means for furthering national interests, the US started benefitting from its right to attend the ASP (Assembly of States Parties to the ICC) meetings in its capacity of observer state for the first time in November 2009. Indeed, the ICC member states were working for the preparation of the review conference of the Rome Statute to be held in Kampala (Uganda) in 2010. In particular, the Kampala Conference was dedicated to the definition of the crime of aggression and the ICC competence in dealing with it. At that moment, due to the critiques and allegations of US intervention in Iraq to be in violation of international law, the United States was extremely interested in the negotiations over the crime of aggression and, indeed, it actively participated advancing proposals. On the one side, given the UN Charter-enshrined exclusive power of the UNSC to ascertain whether an aggression had occurred, the P5 pushed for the Council's trigger mechanism as the sole viable way not to violate the UN Charter. On the other side, the like-minded states shouldered a disruption in the UNSC monopoly by promoting the Prosecutor's *proprio motu* power.

The Kampala outcome was a pretty advantageous compromise for Washington. Firstly, only the UNSC (Article 15 *ter*) and the Prosecutor (Article 15 *bis*, paras. 6-8) may trigger the jurisdiction of the Court over the crime of aggression. However, for the latter, either it is necessary the UNSC determination of the presence of an act of aggression within six months from the Prosecutor's notification of the desire to investigate the crime, or he/she is subjected to the authorization from the Pre-Trial Chamber. Whatever mechanism is adopted, the UNSC still holds the power to invoke Article 16 of the Rome Statute, thus blocking any investigation for twelve months without limitations of renewals. Secondly, the Kampala amendments provide for an opt-out mechanism for member states on the crime of aggression (Article 15 *bis*, para. 4) and posit that the ICC jurisdiction over it does not reach non-member states' nationals even in case the aggression occurred against an ICC party (Article 15 *bis*, para. 5). In other words, both as a non-member and as a possible future member state, the United States managed to secure full exemption from its troops and authorities over the crime of aggression. Being it the most important achievement for the US delegation in Kampala, once got back to the US, Koh and Rapp welcomed the outcome of the review conference arguing that it "protected our vital interests" and guaranteed "total protection for

[160] *Id.*, p. 131.
[161] *Supra*, see footnote 92.
[162] *National Security Strategy*, May 2010, p. 48.

our Armed Forces and other U.S. nationals going forward"[163]. Thirdly, under US pressure, a series of Understandings – namely interpretations of the Rome Statute – was adopted[164]. Though they do not bind the Court's reasoning, they are of a great political importance. In particular, Understanding 5 denies any universal jurisdiction over the crime of aggression[165] and Understanding 6 implicitly refer to the contrast between global justice and world security, by focusing on the need to assess "all the circumstances of each particular case, including the gravity of the acts concerned and their consequences"[166] for the determination of an act of aggression. On this matter, Ambassador Rapp argued that the "Kosovo precedent" of international humanitarian intervention would have not fallen within the definition of crime of aggression[167]. Finally, the Kampala amendments would have been activated only by an ASP resolution to be adopted from January 1, 2017[168].

The Kampala conference surely scored an important success for Washington, but as it was not intended to revise any other parts of the Statute which did not fall within the scope of the crime the aggression, the traditional US concerns remained unanswered. Therefore, a dismissal of Bolton's note – and even less the submission of the ICC Treaty to advice and consent of the Congress – became more and more unlikely. Contrarily, the Obama administration proved to be in continuity with Bush's requests in UNSC resolutions. For instance, the new Libyan referral to the Court worded exactly as the Sudanese one, including clause 6 exempting nationals of non-party states to the ICC investigation[169]. This time, however, the US Ambassador voted in favour, thus

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[163] Special Briefing by the US Department of State's Legal Advisor Harold Hongju Koh and by the US Ambassador-at-Large for War Crimes Issues Stephen J. Rapp, June 15, 2010, *U.S. Engagement with the ICC and the Outcome of the Recently Concluded Review Conference*.

[164] Understandings regarding the amendments to the Rome Statute of the International Criminal Court on the crime of aggression, Annex III to the Resolution of the ICC Assembly of States Parties, June 11, 2010, Resolution RC/Res.6.

[165] Understanding 5: "It is understood that the amendments shall not be interpreted as creating the right or obligation to exercise domestic jurisdiction with respect to an act of aggression committed by another State" (*Id.*).

[166] Understanding 6: "It is understood that aggression is the most serious and dangerous form of the illegal use of force; and that a determination whether an act of aggression has been committed requires consideration of all the circumstances of each particular case, including the gravity of the acts concerned and their consequences, in accordance with the Charter of the United Nations" (*Id.*).

[167] "Where atrocities are being committed and UNSC approval is not possible, it is possible to proceed with a legitimate action to protect civilians … the Kosovo precedent may be said to have established a new custom, applicable in truly exceptional cases" in JORGENSEN (2020: 246).

[168] Article 15 *bis* (3) and Article 15 *ter* (3). The crime of aggression was eventually activated by consensus on July 17, 2018, twenty years after the adoption of the Rome Statute (ICC-ASP/16/L.10).

[169] On February 26, 2011, the adopted S/RES/1970, para. 6, cited as follows: "*Decides* that nationals, current or former officials or personnel from a State outside the Libyan Arab Jamahiriya which is not a party to the Rome Statute of the International Criminal Court shall be subject to the exclusive jurisdiction of that State for all alleged acts or omissions arising out

marking the first time of a US affirmative vote on the ICC. President Obama loudly promised that "those who are around Colonel Gaddafi […] will be held accountable for whatever violence continues to take place there"[170], but doubts on the US side soon arose on the possible ICC interference with diplomatic negotiations during the on-going Libyan conflict[171]. In 2014, the USA once again supported the ICC referral on the situation in Syria – exactly providing for the same clauses as the Sudanese and the Libyan referrals – but this time the resolution was eventually vetoed by the Russians and the Chinese[172].

Nevertheless, it was the adoption of the DOS War Crimes Rewards Program (WCRP) that became one of the most remarkable US indirect engagements with the ICC. In conformity with Dodd's amendment[173], the WCRP represented a positive commitment to global justice, granting up to $5 million for any information useful for the arrest and prosecution of "those accused of crimes against humanity, genocide, or war crimes by an international criminal tribunal"[174], especially the alleged criminals of the Lord's Resistance Army (LRA) of Uganda, whose investigation was led by the ICC Prosecutor. Thanks to the WCRP, the United States was thus able to obtain relevant information necessary to the surrender of the LRA commander Dominic Ongwen and the FPLC (*Forces Patriotiques pour la Libération du Congo*) leader Bosco Ntaganda to the ICC[175]. The US commitment to the cause led the recently elected ICC Prosecutor, Fatou Bensouda, to visit Ambassador Rapp in Washington in a historic meeting.

Nonetheless, as it has already been mentioned, the US approach on possible ICC investigations on US nationals never changed even during the closest cooperative momentum ever reached between Washington and The Hague. With respect to the OTP (Office of the Prosecutor) on-going assessment of a possible ICC investigation for war crimes and crimes against humanity committed by US servicemembers in Afghanistan, a DOS official clearly reiterated the everlasting US cross-presidency position on a consent-based approach to international law: "We do not believe that an ICC examination or investigation with respect to the actions of US personnel in relation to the

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of or related to operations in the Libyan Arab Jamahiriya established or authorized by the Council, unless such exclusive jurisdiction has been expressly waived by the State"; para. 8: "*Recognizes* that none of the expenses incurred in connection with the referral, including expenses related to investigations or prosecutions in connection with that referral, shall be borne by the United Nations and that such costs shall be borne by the parties to the Rome Statute and those States that wish to contribute voluntarily". They both respectively mirrored paras. 6 and 7 of S/RES/1593. See *supra* footnotes 141-142.

[170] BOSCO (2014: 168).

[171] BOSCO (2014: 169-170).

[172] UN Doc. Draft S/2014/348, May 22, 2014.

[173] Section 2015 of ASPA. See *supra*, footnote 126.

[174] Media Note by the Office of the Spokesperson of the US Department of State, January 16, 2013, 2013/0029, *Enhancement of State Department Rewards Programs*.

[175] BUCHWALD *et al*. (2021: 22). In 2019, the ICC convicted Ntaganda to a thirty-year imprisonment for 18 counts of war crimes and crimes against humanity in 2019. In 2021, Ongwen was eventually charged of 61 counts of war crimes and crimes against humanity and convicted to twenty-five years of imprisonment.

situation in Afghanistan is warranted or appropriate. As we previously noted, the United States is not a party to the Rome Statute and has not consented to ICC jurisdiction"[176]. The issue would have become crucial under Trump's presidency.

1.2.5 A tightening in the US-ICC relationship: Donald J. Trump (2017-2021)

In the first year and a half of the Trump administration, the White House did not push for any specific ICC policy. It is true that, already in November 2017, the OTP formally requested to the ICC Pre-Trial Chamber (PTC) the authorization to proceed with an investigation over "acts of torture, cruel treatment, outrages upon personal dignity, rape and sexual violence against conflict-related detainees in Afghanistan and other locations, principally in the 2003-2004 period"[177] committed by US armed forces and CIA agents. However, it was only with the appointment of John Bolton as National Security Advisor (NSA) in April 2018 that the United States developed a hostile anti-ICC policy both through words and facts.

In his first address as NSA, Bolton vehemently opposed the Court. Firstly, he argued that the Court supporters' main objective had always been to "constrain the United States"[178]. For instance, in his eyes, the November 2017 OTP request of authorization – pursuant to the US-criticised *proprio motu* power – may be considered a proof of this attitude. Therefore, given this framework, Bolton reassured that the administration would have used "*any means necessary* to protect our citizens and those of our allies from unjust prosecution by this illegitimate court"[179]. The use of the phrase "any means necessary" was a clear reference to ASPA, §2008(A), a piece of legislation that had been loudly advocated by Bolton himself as part of his "Three Noes" policy at the beginning of the XXI century. However, this time, the quotation resounded even more dangerous because he claimed that "[w]e will ban its judges and prosecutors from entering the United States. We will sanction their funds in the U.S. financial system, and we will prosecute them in the U.S.

[176] CORMIER (2020: 19). The statement followed the release of the ICC OTP annual Report on Preliminary Examination Activities on November 14, 2016. Para. 230 of the Report affirmed that "[t]he Office is concluding its assessment of factors set out in article 53(1)(a)-(c), and will make a final decision on whether to request the Pre-Trial Chamber authorisation to commence an investigation into the situation in the Islamic Republic of Afghanistan since 1 May 2003, imminently".

[177] Document of the ICC Office of the Prosecutor to Pre-Trial Chamber III, November 20, 2017, Situation in the Islamic Republic of Afghanistan, ICC-02/17-7-Red, *Request for authorization of an investigation pursuant to article 15*, p. 7.

[178] Remarks to Federalist Society by National Security Adviser John Bolton, September 10, 2018, *Protecting American Constitutionalism and Sovereignty from International Threats*.

[179] *Id.*, emphasis added. For further analyses on Bolton's remarks, see SERIO (2019: 203-210).

criminal system. We will do the same for any company or state that assists an ICC investigation of Americans"[180].

In response, the Court issued a public statement declaring to have taken note of Bolton's remarks, but reaffirming its commitment to fight impunity: "The ICC, as a court of law, will continue to do its work undeterred, in accordance with those principles and the overarching idea of the rule of law"[181]. Yet, at the 73rd UNGA session (2018), President Trump asserted that the United States "will never surrender America's sovereignty to an unelected, unaccountable, global bureaucracy" because "[a]s far as America is concerned, the ICC has no jurisdiction, no legitimacy, and no authority"[182]. In a few months, the Trump administration kept its promises.

Firstly, on March 15, 2019, Secretary of State Mike Pompeo "announc[ed] a policy of U.S. visa restrictions on those individuals directly responsible for any ICC investigation of U.S. personnel" since the "entry or proposed activities in the United States [of those individuals] would have potentially serious adverse foreign policy consequences"[183]. Furthermore, he added that if these measures proved to be insufficient, the United States would be ready to even impose economic sanctions. Just less than a month after Pompeo's statement, on April 4, 2019, DOS revoked the US visa to the ICC Prosecutor, Fatou Bensouda, who nonetheless reaffirmed her "commitment 'to undertake that statutory duty with utmost commitment and professionalism, without fear or favor'"[184]. However, just few days after, the PTC rejected to grant authorization to the ICC Prosecutor to investigate US crimes in Afghanistan[185]. The decision was welcomed by President Trump who defined it "a major international victory, not only for these [US] patriots, but for the rule of law"[186]. Yet, at the end of 2019, further international – and domestic – concerns arose after the US President's decision to grant pardon to four militaries convicted for war crimes in Iraq and Afghanistan[187].

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[180] Remarks to Federalist Society by National Security Adviser John Bolton, September 10, 2018, *Protecting American Constitutionalism and Sovereignty from International Threats*.

[181] Statement by the International Criminal Court, September 12, 2018, ICC-CPI-20180912-PR1406, *The ICC will continue its independent and impartial work, undeterred*. See also GALBRAITH (2019b: 172).

[182] Remarks by US President, September 25, 2018, *Remarks by President Trump to the 73rd Session of the United Nations General Assembly*.

[183] Remarks to the Press by the US Secretary of State Michael R. Pompeo, March 15, 2019, *Remarks to the Press*.

[184] GALBRAITH (2019a: 628).

[185] Decision of ICC Pre-Trial Chamber II, April 12, 2019, ICC-02/17-33, Situation in the Islamic Republic of Afghanistan, *Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan*. The motivations behind the rejection will be addressed in chapter 3.

[186] DAILY COMP. PRES. DOC. No. 224, *Statement on the International Criminal Court's Decision Not to Authorize an Investigation into the Situation in Afghanistan*, April 12, 2009.

[187] In the interest of this dissertation, the pardons of two US soldiers for war crimes in Afghanistan were adopted by President Trump on November 15, 2019. It is to be noted that Trump's decision was perceived as a scandal for two reasons: firstly, he granted pardons to war criminals; secondly, the judicial proceeding against one of them – namely Mathew Golsteyn – had not even yet terminated. For further analyses, see GALBRAITH (2020b: 307-312).

A new phase of acute US aggressiveness against the Court returned in June 2020. Just two months before – on March 5, 2020 – the ICC Appeals Chamber had reversed the PTC decision, eventually authorising the ICC Prosecutor to formally open an investigation against, *inter alia*, US militaries and CIA agents for alleged crimes committed in Afghanistan[188]. As a response, President Trump – faithful to his and Pompeo's words – adopted Executive Order 13928, imposing sanctions "on those responsible for ICC's transgressions [as well as] their immediate family members"[189]. In particular, the Order was addressed against those who "ha[d] directly engaged in any effort by the ICC to investigate, arrest, detain, or prosecute any United States personnel without the consent of the United States"[190] or of a US ally without the authorization of that country. According to the Executive Order and pursuant to the International Emergency Economic Powers Act (IEEPA), such a decision was needed since the Appeals Chamber's judgement amounted to a threat to the national sovereignty and security. Accordingly, President Trump declared "a national emergency to deal with that threat"[191]. The Order was unprecedented insofar it was addressed against people involved in a multilateral institution. Furthermore, the extension of the measures to the wives or husbands and the children of those hit by the Order was largely criticized. Nonetheless, it was only on September 2, 2020, that Secretary of State publicly declared that the ICC Prosecutor, Fatou Bensouda, and the ICC Head of the Jurisdiction, Complementarity and Cooperation Division, Phakiso Mochochoko, were hit by the economic sanctions and enlisted among the SDNs (Special Designated Nationals and Blocked Persons)[192].

The Court issued a statement asserting that the Order "constitute[d] an escalation and an unacceptable attempt to interfere with the rule of law […] with the declared aim of influencing the actions of ICC officials in the context of the Court's independent and objective investigations and impartial judicial proceedings"[193]. Notwithstanding the US actions, the ICC "remain[ed]

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[188] Judgement of ICC Appeals Chamber, March 5, 2020, Situation in the Islamic Republic of Afghanistan, ICC-02/17-138, *Judgment on the appeal against the decision on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan*. A thorough analysis on the Situation in Afghanistan in provided in chapter 3.

[189] Executive Order of the Executive Office of the US President, June 11, 2020, Executive Order 13928, *Blocking Property of Certain Persons Associated with the International Criminal Court*. Only almost one year after, on April 1, 2021, President Joe Biden revoked Executive Order 13928.

[190] *Id.*

[191] *Id.*

[192] Press Statement by the US Secretary of State Michael R. Pompeo, September 2, 2020, *Actions to Protect U.S. Personnel from Illegitimate Investigation by the International Criminal Court*.

[193] Statement of the International Criminal Court, June 11, 2020, *Statement of the International Criminal Court on recent measures announced by the US*. As a matter of fact, on the day of the visa restrictions' announcement, Secretary of State Pompeo had clearly affirmed that "with respect to the reason for the actions we're taking today, it's part of a continued effort to convince the ICC to change course with its potential investigation and potential prosecution of Americans for their activities and our allies' activities in Afghanistan", *supra* footnote 183.

unwavering in its commitment to discharging, independently and impartially, the mandate bestowed upon it by the Rome Statute"[194]. Seventy-four ICC parties[195] – including the UNSC permanent members France and the UK[196] – denounced the US actions against the Court. However, these would have been revoked only by President Biden on April 1, 2021.

1.3 The underlying commonality in the four presidencies: the desire to a full US immunity

In the previous pages, the US policy towards the ICTs, in general, and the International Criminal Court, in particular, has been put forward. It is true that a fluctuation among open hostility, pragmatic cooperation and coexistence policies characterized the different administrations. Yet, the purpose of this chapter was not to investigate the different foreign policy doctrines that moved US Presidents to act in specific ways. Rather, the goal was to enumerate the arguments put forward by the US administrations justifying their refusal to ratify the Rome Statute. As the US DOS legal advisor, John Bellinger, asserted in 2008, the fundamental concerns about the ICC Statute remained unchanged during Clinton's and Bush's administrations: "To be sure, there have been differences – sometimes sharp ones – in the tone and means by which these concerns have been advanced at different points and by different U.S. officials. But the substance of U.S. views about the Rome Statute and the ICC has been essentially unchanged"[197]. All the critiques that have put forward by the US authorities – from Clinton to Trump – have always been pointed to seek a total exemption of US servicemembers and officials from the ICC jurisdiction. Here lies the twenty-year commonality. This has been proved both by words and facts.

After the Rome Statute signature, Clinton clearly asked the incoming administration not to submit the treaty to Congress' ratification because of the risk of adjudications over US soldiers. Indeed, during the Rome negotiations, Scheffer had been instructed – and his proposed amendments demonstrate it

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[194] Statement of the International Criminal Court, June 11, 2020, *Statement of the International Criminal Court on recent measures announced by the US.*

[195] "We note that sanctions are a tool to be used against those responsible for the most serious crimes, not against those seeking justice. Any attempt to undermine the independence of the Court should not be tolerated" in Statement by the Permanent Representative of Germany to the United Nations, November 2, 2020, *Statement by Ambassador Christoph Heusgen on behalf of 74 States Parties to the Rome Statute in support of the International Criminal Court on the occasion of the ICC Report to the General Assembly*.

[196] On the day before Trump's Executive Order 13928, ten UNSC members had declared their "commitment to uphold and defend the values enshrined in the Rome Statute and to preserve its integrity and independence undeterred by any threats against the Court, its officials and those cooperating with it". For the full statement, visit *International Criminal Court members of the Council on the ICC and Sudan – Virtual Media Stakeout*, available on YouTube on the official page of the United Nations.

[197] Remarks by US Department of State Legal Advisor John B. Bellinger to the DePaul University College of Law, April 25, 2008, *The United States and the International Criminal Court: Where We've Been and Where We're Going*.

– to find a way not to let the Court be in the capacity to pursue US servicemembers and authorities. The Bush administration strived to attain US exemptions from the ICC jurisdiction both multilaterally via the UNSC resolution clauses and bilaterally through the signature of Article-98 agreements. Even during his second mandate, though a more open policy towards the Court was adopted, the US pushed for an exclusive jurisdiction of nationals of non-party states in the Darfur referral to the Court and Bush himself affirmed that "it's the right move, not to join a foreign court […] where our people could be prosecuted"[198]. In this regard, the Bush administrations demonstrate that, even if the "tone and the means"[199] of the ICC policy may change – namely shifting from an aggressive hostility to a coexistence policy towards the Court – the underlying objective and concern remain the same. Under Barack Obama, the White House adopted a more cooperative attitude towards The Hague by implementing the WCRP, playing a crucial role in the transfer of Dominic Ongwen and Bosco Ntaganda to the Court and participating in the discussions and negotiations of the Kampala Conference. Yet, *inter alia* under the US pressure, the Kampala amendments on the crime of aggression guaranteed total exemption for states not-party to the ICC and an opt-out mechanism for member states. In addition, the language of the Libyan referral included the same exclusive jurisdiction for nationals of non-party states enshrined in the Darfur referral and the Obama administration publicly defined not "appropriate"[200] a possible ICC investigation over US servicemembers' alleged crimes against humanity committed in Afghanistan. Finally, once the OTP requested the authorization to investigate those crimes and the Appeals Chamber accorded it, Trump imposed visa restrictions and economic sanctions on the Court's Prosecutor and the Head of the Jurisdiction, Complementarity and Cooperation Division. Besides, he announced a national emergency due to the ICC investigation, considered to be a threat to the US sovereignty and security.

However, this US posture towards global justice is not peculiar to the ICC policy. Since the first attempt to convict the former Kaiser William II in 1919, the United States has always been concerned by a possible adjudication over its soldiers and authorities. Both post-WWI and post-WWII convictions represented a form of victors' justice over the defeated. However, the US delegation implicitly warned of the possibility of being on the other side and having been imposed others' justice. Therefore, both ICTY and ICTR were intended to pursue all the parties to the conflict, but the United States managed to control both of them via a "silent influence"[201], thus making a conviction of US soldiers and authorities "an unlikely event"[202]. Finally, the proclaimed-US model of global justice – the SCSL – provided for a complete exemption of peacekeepers from its jurisdiction.

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[198] BOSCO (2014: 106).
[199] *Supra*, footnote 197.
[200] *Supra*, footnote 176.
[201] *Supra*, footnote 31.
[202] *Supra*, footnote 34.

The question that should therefore be asked is why the United States has strived not to subject its troops to an international jurisdiction over the most heinous crimes, such as genocide, war crimes and crimes against humanity. The motivations that have been advanced – and which will be addressed in the next chapter – may be considered as mere pretexts not to submit the USA to the ICC reach. It can be thus posited as a hypothesis that the main reason for the US refusal to ratify the Rome Statute is the fear of losing its exceptionalism. The notion of American exceptionalism was originally coined to distinguish the inherently exceptional United States from all the other nations, in terms of values, liberties and policies. Nevertheless, as Malcolm Jorgensen explains, "its increasing use in legal scholarship has more often narrowed the concept to pejorative shorthand for the US practice of seeking 'exceptions' to global legal rules, and therefore as uniformly detracting from the international rule of law"[203]. Especially after the end of the Cold War, the US authorities have often raised the issue of the US leadership in global security and peace in order to justify the need for more room and space of action. In Ambassador Scheffer's words, "the siren of exceptionalism enveloped the entire enterprise of the ICC on my watch"[204] as well. It is not coincidental that the strongest attitudes of US ICC policies occurred when the Global War on Terror was launched and in response to the Appeals Chamber's authorization to investigate. It is not a matter of ideology, but rather of ensuring the American exceptionalism.

In conclusion, given the underlying commonality among the four presidencies and the bipartisan-recognised flaws in the Rome Statute, when it comes to allegations towards US servicemembers or authorities, it is not heuristic to distinguish among different administrations and their respective ICC policies. Therefore, following this premise, this dissertation will address the overall relationship between the International Criminal Court and the United States of America, both taken as unitary actors, not as the fruit of actions undertaken by different Presidents or Prosecutors.

[203] JORGENSEN (2020: 24).

[204] SCHEFFER (2012: 165). David J. Scheffer's definition of exceptionalism in international law: "By 'exceptionalism' in the realm of international law, I mean that the United States has a tradition in leading other nations in global-treaty making endeavours to create a more-law abiding international community only to seek exceptions to the new rules for the United States because of its constitutional heritage of defending individual rights, its military responsibilities worldwide requiring freedom to act in times of war, its superior economy demanding free trade one day and labor protection and environmental concessions the next, or just stark nativism insularity. We sometimes want the rest of the world to 'right itself' but to leave the United States alone because of its 'exceptional' character. The cynics of international law point to the realism of how nations act in their own self-interest. The United States, they argue, is a different nation of extraordinary attributes that simply cannot be lowered (or elevated) to the same level of performance of other nations", in SCHEFFER (2012: 165).

2. An assessment of the US-ICC relationship

In the previous chapter, it has been demonstrated how international politics and global justice are intertwined. The United States has strived to achieve full immunity for its servicemembers and authorities employed abroad in order to preserve its exceptionalism and its role in world peace and security. Many political proposals and international law interpretations have been advanced to justify this request. This chapter will specifically address the US critiques towards the International Criminal Court, assessing their implications through the application of International Relations (IR) theories to the case as well.

During the Rome negotiations, the contraposition between "like-minded states" – mainly led by Germany and other European countries – and the United States was not only of a political nature, but even represented a distinction among different approaches to international law. On the one hand, the like-minded states (LMS) pursued a "legalistic orientation"[205], whose main objective was "to replace *le droit du plus fort* by *la force du droit*"[206]. Hence, LMS advocated for an equality among all the states in the international arena and an independent prosecutor able to resist any attempt of external manipulation or personal hesitance in prosecuting high-ranked officials.

On the other hand, the United States applied the policy-oriented New Haven School to international law, also known as "American legal realism"[207]. This legal doctrine acknowledges that law is not detached from political and historical contexts. Hence, its interpretation should be framed in accordance with the specific spatial and temporal circumstances. In the US eyes, therefore, this also means that the international law-making and law enforcement should take account of the hegemonic role of Washington and its leadership in worldwide peace and security, thus legally and politically rejecting any "interpretations of IL that are inconsistent with [US] exceptionalist values"[208]. From this perspective, for instance, the US insistence on a case-by-case assessment of the ICC jurisdiction exclusively triggered by the UNSC would perfectly fit the New Haven School approach.

This opposition is crucial not only to understand the difference of the Rome Statute's interpretations that had been provided both by the United States and the LMS, but especially because "what the international law should be becomes part of what international law is"[209]. In other words, as it will be explained in the following pages, different conceptions of international law –

[205] BRUBACHER (2004: 73).
[206] MÉGRET (2001: 255).
[207] JORGENSEN (2020: 39).
[208] JORGENSEN (2020: 48). BRUBACHER (2004: 74) defines the New Haven School as follows: "the New Haven School views law not as derived from consent but from elements of authority and control, where authority is derived from the ability of decision-makers to issue decisions that are both in line with the expectation of rightness among a given community and are capable of being effectively implemented".
[209] MÉGRET (2001: 256).

conceived as those norms which regulate inter-state relations – may structure divergent international relations, thus proposing – not necessarily establishing – contrasting international societies.

Therefore, this chapter will address the US critiques from two perspectives. On the one hand, the lenses of international law and international criminal law will be used in order to respond to the major US critiques. In particular, the issue of the ICC jurisdiction over nationals of non-party states, the US concerns on the Prosecutor's *proprio motu* powers and the feared politically motivated charges, as well as the due process rights – or the lack of them – enshrined in the Rome Statute will be assessed. While the international law lens will allow us to deconstruct the US critiques and to properly define the ICC functioning, the IR theories will provide an overall understanding of the US concerns towards the ICC. In particular, an IR comparative assessment based on constructivist, liberalist and realist theories will contribute to grasp the underlying US fear of seeing its exceptionalism undermined by the ICC investigations.

2.1 The US contestation from a legal perspective

The historical review of the US policy on global justice demonstrates a general strong US commitment to the cause. Yet, the White House has always been concerned at preserving the American exceptionalism by creating a sort of pragmatic double standards application of international rules: while all the nations in the world should have been bound by international law norms, the USA – given its leadership in the peace and security domains – would have been granted more space of action. Professor Cesare Romano very clearly summarizes this policy by emphasizing two structural conditions deemed necessary to achieve the US support for the establishment of an international criminal tribunal (ICT): the United States backs ICTs "only when the U.S. government has, or is perceived by its officials to have, a significant degree of control over the court or where the possibility of prosecution of nationals is either expressly precluded or otherwise remote"[210]. The US favourite model of global justice, the Special Court for Sierra Leone, for instance, is governed by a Statute whose drafting was largely influenced by the United States and it was initially led by the US-citizen Prosecutor David Crane[211]. In addition, the SCSL (Special Court for Sierra Leone) Statute explicitly exempts UN peacekeepers from its jurisdiction, thus protecting US soldiers as well. Even in the case of the ICTY and the ICTR which were theoretically able to try US

[210] ROMANO (2009: 432).

[211] This is not to say that the United States controlled David Crane, thus violating the principle of impartiality and independence of the SCSL prosecutor. However, Crane had previously worked at the US DOD and the US authorities strongly lobbied and pushed the then UN Secretary General, Kofi Annan, to appoint him as the first SCSL Prosecutor. For further information, see CERONE (2009: 171).

nationals, the United States managed to control them via a "silent influence"[212], thus making a US conviction highly unlikely.

Instead, both conditions did not materialise in the ICC Statute. The United States did not manage to find ways to fully exempt its servicemembers and authorities from the ICC jurisdictional reach. Furthermore, the independent nature of the ICC granted only a limited power of control by the UNSC[213] over the Court and the US decision not to ratify the Rome Statute did not allow the White House to pursue an internal silent influence strategy. Following Romano's reasoning, it seems thus logical that the United States does not support the International Criminal Court. Indeed, the numerous critiques that had been advanced by the United States prove Washington's opposition to the Court. They can be summed up in three macro categories.

Firstly, according to the United States, the International Criminal Court is illegitimate, since its competence in adjudicating also cases involving ICC non-parties' nationals would violate the international law principle of *pacta tertiis nec nocent nec prosunt*[214]. As a matter of fact, this critique – which is considered the main one among those advanced by the US government[215] – does not actually criticize the imposition of obligations and duties upon third parties to an international treaty, but it rather addresses the issue of jurisdictional consent to an international criminal tribunal and the theory of delegated jurisdiction. Furthermore, the United States denounces a different application of the Rome Statute upon member states and non-parties to the ICC[216]. While the former is entitled to an opt-out mechanism of the ICC war crimes jurisdiction for seven years from the ratification of the Rome Statute (Article 124 of the ICC Statute) and will not be subject to new statutory amendments that it has not agreed to (Article 121, para. 5, of the ICC Statute), the latter cannot enjoy these rights before the Court. Hence, "a third-party state may be subject to broader criminal jurisdiction than a state party"[217].

Secondly, the US military presence worldwide may push states to trigger the Court's jurisdiction against US nationals as a judicial vengeance or as a means to compel the United States to withdraw its troops. In other words, according to the US government, the ICC Prosecutor may be forced to investigate over political cases or could even activate its *proprio motu* powers for politically motivated charges against the United States[218]. In so doing, the ICC

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[212] *Supra* footnote 31.

[213] Namely, the trigger mechanism enshrined in Article 13(b) of the Rome Statute and the deferral power recognised in Article 16 of the Rome Statute.

[214] RUTIGLIANO (2014: 95-97).

[215] AKANDE (2003: 620).

[216] SCHEFFER (2001b: 80-81).

[217] WEDGWOOD (1999: 104).

[218] BOLTON (2001: 173-174); CLINE (2008: 113). It should be noted that the same critique has already been addressed against the International Court of Justice of the United Nations. As BOLTON (2001: 176) notes, "[f]ew Americans argue that the International Court of Justice (ICJ) has garnered the legitimacy sought by its founders in 1945. This is more than ironic, because much of what was said then about the ICJ anticipates recent claims by ICC supporters. […]

Prosecutor's trigger mechanism would overlap with UN-Charter-enshrined UNSC primary role in the international peace and security domain, thus minimising and eroding the Council's international role[219]. Therefore, the Prosecutor would not only be able to undermine the US international military presence by pursuing politically led investigations, but he would do it without any accountability checks[220].

Thirdly, the ratification of the Rome Statute would be in contravention to the US Constitution. Indeed, according to the US government, the presence of an International Criminal Court would violate Article III, Section 1, of the US Constitution which acknowledges that "[t]he judicial Power of the United States, shall be vested in one supreme Court"[221]. In other words, the ICC would infringe the domestic judicial primacy of the US Supreme Court. Furthermore, the ICC would violate the US Constitution inasmuch as it would not be subjected to checks and balances, a core principle of the US system of separation of powers[222]. Finally, Americans argue that the enjoyment of the US due process rights – enshrined in the US Constitution and in the Bill of Rights – are not all guaranteed by the Rome Statute[223]. First and foremost, by adopting a civil law system, the Court would not recognise the right to a jury trial.

The following pages will deconstruct all the three above-mentioned US critiques towards the ICC, once again showing that the US interpretation is mainly guided by political reasonings, rather than mere legal concerns.

2.1.1 The ICC jurisdiction

Before addressing the US critique on the ICC ability to adjudicate nationals of third parties to the Rome Statute, it is necessary to identify the

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Indeed, the United States withdrew from the mandatory jurisdiction of the ICJ after its erroneous Nicaragua decisions, and it has even lower public legitimacy here than the rest of the United Nations. Among the several reasons why the ICJ is held in such low repute, and what is candidly admitted privately in international circles, is the highly politicized nature of its decisions".

[219] RUTIGLIANO (2014: 115-117); AMANN (2002: 386-388).

[220] BOLTON (2001: 174-175).

[221] Article III, Section 1, of the US Constitution: "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office". See also CASEY (2001: 841): "Were the United States to become a state party to the Rome Statute, it would, for the first time since July 4, 1776, acknowledge the superior authority of an institution neither elected by the American people, nor accountable to them for its actions. That institution would then be in a position to interpose itself into the policymaking processes of the United States through the threat of criminal prosecutions against American leaders, officials, officers and soldiers, to and including ordinary American citizens. […] Not surprisingly, ratification of the Rome Statute would also violate the Constitution".

[222] CLINE (2008: 110); CASEY (2001: 847). See also BOLTON (2001: 169): "The ICC's failing stems from its purported authority to operate outside (and on a plane superior to) the US constitution, and thereby to inhibit the full constitutional autonomy of all three branches of the US government, and, indeed, of all states party to the statute".

[223] CLINE (2008: 112).

jurisdictional reach of the Court. First of all, it is thus essential to properly define the concept of "jurisdiction". Indeed, different connotations in international law have been attributed to this notion. Here, two of them are worth to be mentioned. The first one conceives jurisdiction as the "State's general legal competence to exercise authority over territory and persons by virtue of its sovereignty"[224]. From a pragmatic perspective, this sovereign jurisdiction allows the State to adopt domestic laws able to regulate behaviour on the sovereign territory (jurisdiction to prescribe), to prosecute the violators of these norms (jurisdiction to adjudicate) and to enforce domestic courts' and tribunals' judgements (jurisdiction to enforce)[225]. The second connotation of "jurisdiction" relates to "[t]he exercise of judicial powers by courts and associated entities of the domestic judicial system"[226]. In this case, a state has judicial jurisdiction over a specific crime if it is able and competent to investigate it and prosecute the perpetrators. Therefore, while the second connotation of jurisdiction is clearly important for an assessment of the ICC functioning, the first one will be useful to identify the legal basis of the ICC overall judicial competence and, more specifically, its ability to prosecute nationals of non-party states.

In this paragraph, we will focus on the judicial jurisdiction of the ICC. As the ICC Appeals Chamber in *Prosecutor v. Thomas Lubanga Dyilo* affirmed, the Rome Statute acknowledges "four different facets [of jurisdiction]: subject-matter jurisdiction also identified by the Latin maxim jurisdiction *ratione materiae*, jurisdiction over persons, symbolized by the Latin maxim jurisdiction *ratione personae*, territorial jurisdiction – jurisdiction *ratione loci* – and lastly jurisdiction *ratione temporis*"[227]. Concerning the *ratione materiae* competence (Article 5 of the Rome Statute), the Court exercises jurisdiction over "the most serious crimes of concern to the international community as a

[224] CORMIER (2020: 58).

[225] This tripartition had been provided by Section 401 of Restatement (Third) of the Foreign Relations Law of the United States (1986), according to which "[u]nder international law, a state is subject to limitations on its authority to exercise (1) 'jurisdiction to prescribe', i.e., to make its law applicable to the activities, relations, or status of persons, or the interests of persons in things, whether by legislation, by executive act or order, by administrative rule or regulation, or by determination of a court; (2) 'jurisdiction to adjudicate', i.e., to subject persons or things to the process of its courts or administrative tribunals, whether in civil or in criminal proceedings, and whether or not the state is a party to the proceedings; and (3) 'jurisdiction to enforce', i.e., to induce or compel compliance or punish non-compliance with its laws or regulations, whether through the courts or by use of executive, administrative, police, or other non-judicial action" in HOUCK (1986: 1367). For further analyses on the three types of jurisdiction, see CARREAU, MARRELLA (2018: 341-346); FOCARELLI (2017: 255-257).

[226] CORMIER (2020: 59).

[227] Judgement of the ICC Appeals Chamber, December 14, 2006, ICC-01/04-01/06-772, *Prosecutor v. Thomas Lubanga Dyilo, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute of 3 October 2006*, para. 21. For further analyses on the ICC competence, see BASSIOUNI, SCHABAS (2016a: 135-180); RONZITTI (2016: 301-305); CANNIZZARO (2018: 406-408); CARREAU, MARRELLA (2018: 496-500); FOCARELLI (2018: 592-597); SCHABAS (2020: 58-150).

whole"[228], i.e. genocide (Article 6 of the Rome Statute), crimes against humanity (Article 7 of the Rome Statute), war crimes (Article 8 of the Rome Statute) and the crime of aggression (Article 8 *bis* of the Rome Statute). Reservations to the first three above-mentioned ICC crimes are not admissible, but – as explained in the first chapter – non-party states are exempted from the crime of aggression and ICC parties are empowered to declare their non-acceptance of the ICC jurisdiction over the same crime. The ICC exercises *ratione personae* jurisdiction over nationals of ICC states parties, regardless of their official *status* or governmental immunities[229]. Furthermore, the Court is competent in prosecuting nationals of non-party states in two different cases: either if a national of a third state has committed a crime on the territory of a member state of the ICC[230], or if the specific non-party state in question declares the *ad hoc* acceptance of the ICC jurisdiction over its own territory[231]. From the *ratione temporis* perspective, the Court has jurisdiction over all crimes enlisted in the ICC Treaty which have been committed either after the entry into force of the Rome Statute[232] – namely after July 1, 2002 – or after the entry into force of the single state's ratification of the ICC Treaty[233]. Finally, the ICC exercises *ratione loci* competence over the territory (including vessels and aircrafts) of all the states party[234] and over those countries which, though not having ratified the Rome Statute, accept the ICC jurisdiction on a case-by-case basis[235]. In addition, pursuant to a UNSC referral, the Court may be entitled to try whatever individual not only of ICC parties, but also of third states, regardless of the consent of the accused's state of nationality[236].

Once we have defined the four facets of the ICC jurisdiction, it is important to understand the way in which the Court exercises its judicial

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[228] Article 5 of the Rome Statute.

[229] Article 27 of the Rome Statute. The sole limitations to nationals of the ICC parties are enshrined in Article 26 of the ICC Treaty ("The Court shall have no jurisdiction over any person who was under the age of 18 at the time of the alleged commission of a crime") and in Article 20(1) of the ICC treaty, recognising the *ne bis in idem* principle ("Except as provided in this Statute, no person shall be tried before the Court with respect to conduct which formed the basis of crimes for which the person has been convicted or acquitted by the Court").

[230] This is implicitly recognised by Article 12(2)(b) of the Rome Statute. It is on this legal basis that the ICC Prosecutor filed a request for authorization to investigate, *inter alia*, US soldiers and CIA agents for alleged crimes committed on the territory of the ICC party Afghanistan.

[231] Article 12(3) of the Rome Statute. This provision has been applied, for instance, by Ivory Coast in 2003, though it formally ratified the treaty only ten years later. For an assessment of Article 12(3) of the Rome Statute and further examples, see TRIFFTERER, AMBOS (2016: 684-688).

[232] Article 11(1) of the Rome Statute. The principle of non-retroactivity is reiterated in Article 24 of the ICC Statute.

[233] Article 11(2) of the Rome Statute. For instance, Afghanistan ratified the Rome Statute on February 20, 2003, and the treaty entered into force on May 1, 2003. Therefore, the ICC is competent in adjudicating crimes committed on the territory of Afghanistan only from May 1, 2003.

[234] Article 12(2)(a) of the Rome Statute.

[235] Article 12(3) of the Rome Statute.

[236] Article 13(b) of the Rome Statute and Chapter VII of the UN Charter. The legal basis of this provision will be addressed in section 2.1.1.2 (C).

jurisdiction. As a matter of fact, international law literature recognizes five different types of jurisdictional activation[237]. The first – and the most common one – is territoriality. According to it, a state has judicial jurisdiction over a crime which has been perpetrated on its own territory. Since each sovereign state is empowered by its "jurisdiction to adjudicate", then it is uncontested that it has the competence to prosecute violations of national norms which have been committed on its sovereign soil, even if these infringements have been perpetrated by foreigners. Territorial jurisdiction was reiterated by the Permanent Court of International Justice's (PCIJ) judgement in the *Lotus affaire* which affirmed that "in all systems of law the principle of the territorial character of criminal law is fundamental"[238]. Though the PCIJ's *Lotus* judgement has been subjected to several criticisms, the territorial jurisdiction is now widely deemed to form part of customary international law[239].

Secondly, another widely recognized principle of jurisdiction is nationality. In this case, the nexus linking the crime and the State of adjudication resides in the nationality of the perpetrator. Hence, this form of jurisdiction is also known as active personality. A state is entitled to investigate and try its own citizens wherever they have committed a crime, even if it has not occurred on the state's sovereign territory.

Thirdly, the active personality jurisdiction distinguishes itself from the passive personality type, insofar as the latter empowers a state of judicial jurisdiction in case the victim of the crime in question – even if the violation has not occurred on the sovereign territory of that state – is a citizen of that specific country. Nonetheless, while the former is fully recognized in international customary law, divergent practice and contested opinions on the issue arose over the latter[240].

Fourthly, according to the principle of protection, a state has jurisdiction if its own sovereign interests and national security are damaged, threatened or involved by a crime which has occurred outside its territory. According to Cormier, "despite the potentially broad nature of this jurisdictional basis, the invocation of the protective principle has not been particularly controversial"[241].

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[237] SCHABAS (2020: 51); CORMIER (2020: 61-69).

[238] Judgement of the Permanent Court of International Justice, September 7, 1927, Judgement No. 9, *Case of the S.S. Lotus*.

[239] "Under contemporary international law every state has the right to exercise jurisdiction for a crime committed within its territory, irrespective of the nationality of the offender. This constitutes one of the best-established rules of customary international law and treaty law", in VAGIAS (2014: 13-14). Besides, the United States has developed a variant of territoriality, namely the effects doctrine, according to which a state has judicial jurisdiction over crimes which have not been materially committed on the territory of that state, but whose effects occur within the state. The theory is usually associated with crimes of an economic nature, see VAGIAS (2014: 24-31); FOCARELLI (2018: 259-260).

[240] CORMIER (2020: 65-66) argues that "[i]n customary international law, however, there is some question as to whether a permissive rule allowing for jurisdiction based on passive personality does actually exist". Instead, according to FOCARELLI (2018: 262), customary international law recognizes it only for the gravest crimes, such as terrorism.

[241] CORMIER (2020: 66).

Finally, universal jurisdiction allows a state to pursue criminals which are not its own citizens and whose crime has been committed outside the state's territory and does not involve national interests and security. In other words, a state may claim universal jurisdiction over crimes committed in whatever part of the world, without demonstrating any factual nexus with them. Yet not all crimes may be the object of a universality claim. As a matter of fact, the universal jurisdiction principle was originally put forward by the United Kingdom in order to prosecute crimes of piracy committed in the high seas[242]. Being them outside the territorial jurisdiction of all the states, they would not have been otherwise pursued. In fact, the principle was later enshrined in the United Nations Convention on the law of the sea (UNCLOS). According to Article 105 of UNCLOS, "[o]n the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship or aircraft taken by piracy and under the control of pirates, and arrest the persons and seize the property on board"[243]. The rationale behind the universal jurisdiction over the crime of piracy was that the perpetrators were considered *hostis humani generis* and therefore should have been pursued in the interests of the entire mankind[244]. Contrarily, the inclusion of all the crimes enlisted in the *ratione materiae* competence of the ICC in the universality domain is disputed[245]. While the general categories of genocide, crimes against humanity and war crimes may be subject to states' universal jurisdiction, the US government asserts that not all the specific crimes falling within the scope of the ICC – such as the conscription of child soldiers – are customarily subjected to universal jurisdiction[246]. This difference in interpretation was due to the fact that, even though these crimes were qualified as *jus cogens* norms, their definition had not been previously commonly agreed. However, seemingly, despite universal jurisdiction over the crime of piracy was recognised by the US Supreme already in 1820, it was not until UNCLOS (1982) that a proper definition of such a crime was given. Therefore, Scharf concludes that "[t]he historic debate over the definition of the crime of piracy indicates that disagreement over the scope or contours of a universal crime

[242] SCHARF (2001: 81). For the first time, the US Supreme Court recognized the universal jurisdiction over the crime of piracy in *United States v. Smith* (1820): "The definition [of piracy] given by them is certain, consistent, and unanimous; and pirates being *hostis humani generis*, are punishable in the tribunals of all nations. All nations are engaged in a league against them for the mutual defence and safety of all. This renders it the more fit and proper that there should be a uniform rule as to the definition of the crime, which can only be drawn from the law of nations, as the only code universally known and recognized by the people of all countries".

[243] Article 105 of UNCLOS continues as follows: "[…] The courts of the State which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith".

[244] TRIFFTERER, AMBOS (2016: 675).

[245] For literature on the issue, see WEDGWOOD (1999: 99-102); CASEY (2001: 856); MÉGRET (2001: 251); MORRIS (2001: 28); SCHARF (2001: 79-98); AKANDE (2003: 625-626); CORMIER (2020: 169-181); TRIFFTERER & AMBOS (2016: 675-676)

[246] SCHEFFER (1999: 70). See also WEDGWOOD (1999: 100); MORRIS (2001: 28).

does not deprive the offense of its universal character"[247]. Furthermore, if we assume that the two definitional pillars[248] of a universal crime are the gravity of the act and its *locus commissi delicti* – in the sense that no state is territorially entitled to prosecute that crime – we may conclude that, since the Court applies the gravity threshold criterion to assess the admissibility of its own adjudication[249], all the crimes enlisted in the ICC Treaty should fall within the category of universal crimes.

That said, the fact that genocide, crimes against humanity and war crimes may fall within the category of universal jurisdiction does not mean that the ICC is empowered to exercise this type of judicial jurisdiction. As a matter of fact, nothing in the Rome Statute explicitly affirms the universal jurisdiction competence of the ICC. Conversely, Article 12(2) of the ICC Treaty states that "[i]n the case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3: (a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft; (b) The State of which the person accused of the crime is a national". Hence, the sole forms of jurisdiction which are clearly acknowledged by the Rome Statute are territoriality – Article 12(2)(a) – and nationality – Article 12(2)(b)[250]. Only in the case of a UNSC referral, pursuant to Article 13(b) of the Rome Statute, it could be said that the universality principle is applied. However, in the following pages, it will be argued that a UNSC referral should be assessed from the lenses of the UN membership, rather than from universal jurisdiction.

2.1.1.1 The ICC jurisdiction over nationals of third parties: a violation of the *pacta tertiis nec nocent nec prosunt* principle?

One of the most cited US critiques towards the ICC relates to the alleged contravention of the Vienna Convention on the Law of Treaties (VCLT) by the Rome Statute. A 2006 Congressional Research Service (CRS) Report for Congress summarised it by affirming that "[o]nly nations that ratify treaties

[247] SCHARF (2001: 81).
[248] SCHARF (2001: 80).
[249] According to Article 17(1)(d) of the Rome Statute, "Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where: […] (d) The case is not of sufficient gravity to justify further action by the Court". In addition, it should be reminded that the Court is mandated to investigate "the most serious crimes of concern to the international community as a whole" (Article 5 of the Rome Statute). In other words, the ICC has competence over the most grievous crimes among the most serious ones. Consequently, it seems that the gravity pillar for universal crimes is fully complied with.
[250] VAGIAS (2014: 2) criticises this choice by the Rome Statute drafters: "[T]he 1998 ICC Statute is one of the most recent international instruments for the repression of 'core crimes'. Yet it provides for the jurisdiction of the ICC on the basis of rules that have existed approximately since the Peace of Westphalia, if not well before that. The newest and most expansive rules on jurisdiction offered by the science of international law (e.g. universality, passive personality, custodial State jurisdiction) were not preferred".

are bound to observe them. The ICC purports to subject to its jurisdiction citizens of non-party nations, thus binding non-party nations"[251]. As a matter of fact, in a 1998 Senate hearing, attorney Lee Casey had vehemently attacked the Court asserting that ICC parties "have attempted to act as an international legislature, imposing legal obligations and perils on the citizens of the United States without the consent of their government. This action is illegal. Consequently, any attempt by the ICC to exercise its jurisdiction over the citizens or nationals of the United States would constitute a grave violation of international law"[252]. In 1999, on behalf of the US executive, Ambassador Scheffer had reiterated that "[t]he U.S. Government believes that the Vienna Convention on the Law of Treaties states clearly that treaties cannot bind non-party states – particularly with respect to treaty-based international institutions"[253]. In other words, according to the US government, the mere ability of the ICC to prosecute nationals of non-party states that have committed crimes on the territory of an ICC party would violate the *pacta tertiis nec nocent nec prosunt* principle, enshrined in Article 34 of the VCLT.

According to the VCLT, "[a] treaty does not create either obligations or rights for a third State without its consent"[254]. In fact, while member states are bound to respect the treaties they have adhered to[255], a country which has not ratified the same treaty will in no way be bound to respect it or to enjoy rights set out in it. Both principles are nowadays part of customary international law and create the foundations of the treaty law. The US executive thus argues that, since the USA has not given its formal consent to the ICC jurisdiction by deposing its instrument of ratification of the Rome Statute, its nationals cannot be prosecuted. Otherwise, there would be a violation of Article 34 of VCLT.

However, in no part of the Rome Statute, a provision imposes duties of action or obligations not to act[256] upon ICC third states. Conversely, Article 86 of the ICC Treaty requires the sole member states of the International Criminal Court to "cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court"[257]. This obligation may entail different forms of cooperation with the ICC, ranging from the arrest and the transfer of the convicted, to merely providing evidence and information useful for the prosecution[258].

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[251] ELSEA (2006: 4).
[252] S. Hrg. 105-724, July 23, 1998, p. 71.
[253] SCHEFFER (1999: 70).
[254] Article 34 of VCLT.
[255] This is the *pacta sunt servanda* principle, enshrined in Article 26 of the VCLT.
[256] Signatories – but still non-member states – of an international treaty are called to refrain from actions which would imperil the purpose of that treaty (Article 18 of the VCLT). However, this is a general core rule of treaty law, and it is not peculiar to the Rome Statute. In addition, as explained in the first chapter, Bush decided to "unsign" the Rome Treaty in order not to be bound by this general principle. Yet the "unsignature" was unprecedented and its legality was largely contested. For literature on the issue, see BOUQUEMONT (2003: 53-69); SWAINE (2003); JORGENSEN (2020: 171-172).
[257] Article 86 of the Rome Statute.
[258] See Article 93 of the Rome Statute, entitled "Other forms of cooperation". For an analysis of the duty of cooperation, see MALAGUTI (2007) and LIAKOPOULOS (2017).

Of course, the absence of any duty of cooperation upon non-member states does not preclude the possibility for the same state to help the Court. The experience of the United States itself in providing information useful for the arrest of Dominic Ongwen and Bosco Ntaganda to the ICC demonstrates it[259]. In addition, under Article 87(5)(a) of the Rome Statute, "[t]he Court may invite any State not party to this Statute to provide assistance […] on the basis of an *ad hoc* arrangement", this agreement necessarily requiring the non-party state's consent. In this case, it cannot be thus argued that the Rome Statute infringes the *pacta tertiis nec nocent nec prosunt* principle, since it is a sovereign state's decision – being it tacit or express – to cooperate with the Court. Admittedly, it is true that in case of a UNSC referral, all states, including those that are not members of the ICC, are under the duty to cooperate with the Court. For instance, in the Libyan referral, the Council, "while recognizing that States not party to the Rome Statute have no obligation under the Statute, urge[d] all States and concerned regional and other international organizations to cooperate fully with the Court and the Prosecutor"[260]. However, the duty arising from Resolution 1970 finds its legal basis under Chapter VII of the UN Charter, meaning that ICC third parties would be under the duty to cooperate with the Court in their capacity of UN members and not in application of any duty of cooperation under the Rome Statute. In such an occasion, the state consent is unrequired since it is implied by the UN membership[261]. Indeed, the United States never contested this specific imposition of duties on non-party states arising from a UNSC resolution and, in fact, voted in favour to Resolution 1970.

So, the US critique based on an infringement of Article 34 of VCLT has been largely refuted by literature. The US argument is, however, demonstrative of a policy-oriented legal interpretation. In other words, US national interests – not the *pacta tertiis* principle – would have been affected by a possible ICC prosecution over US nationals. The US critique is thus based "on a confusion between the notions of obligation and interest"[262]. While the former

[259] *Supra* footnote 175.

[260] S/RES/1970, para. 5, February 26, 2011.

[261] TRIFFTERER, AMBOS (2016: 108). The same reasoning was confirmed by the Decision of ICC Pre-Trial Chamber I, August 28, 2013, Situation in Libya, ICC-01/11-01/11-420, *The Prosecutor v. Saif al-Islam Gaddafi and Abdullah al-Senussi*, *Decision on the request of the Defence of Abdullah Al-Senussi to make a finding of non-cooperation by the Islamic Republic of Mauritania and refer the matter to the Security Council*, para. 10, where it refused to acknowledge the non-cooperation of Mauritania – which was a non-party state – in accordance with Resolution 1970, arguing that that duty of cooperation was not legally based on the Rome Statute: "At the outset, the Chamber observes that its authority to make a finding of non-cooperation is limited to situations in which a State fails to comply with its obligations *vis-à-vis* the Court. No such competence exists in relation to the alleged breaches by Mauritania of its international obligations concerning the sanctions regime and the prohibition of transfer of Mr Al-Senussi across international borders imposed by the Security Council, or in respect of article 14 of the ICCPR. These obligations are not obligations *vis-à-vis* the Court".

[262] MÉGRET (2001: 249). The same line of thinking has been advanced by AKANDE (2003: 620): "However, there is no provision in the ICC Statute that requires non-party states (as distinct

entails a legal analysis, which nevertheless ended up refuting the US argument, the latter necessitates a political reasoning. From this last perspective, the Unites States may be right or wrong, but as mere political interests are involved, there is no legal basis to argue in favour of the ICC Statute violation of the VCLT.

In conclusion, it should be noted that Professor Madeline Morris – even if she did not formally represent the US government, the White House's representatives often referred to her ICC analyses – recognized a misarticulation of the infringement claim of Article 34 of VCLT, by acknowledging that the Rome Statute did not impose any obligations or duties upon non-state parties. Nevertheless, she reiterated the issue of the consent-based approach to international law from the jurisdictional perspective. Indeed, Morris re-interpreted the US critique "as a claim that, by conferring upon the ICC jurisdiction over non-party nationals, the ICC Treaty would abrogate the pre-existing rights of non-parties which, in turn, would violate the law of treaties"[263]. In other words, the issue at matter was not the violation of Article 34 of VCLT *stricto sensu*, but rather whether an international court was entitled, from an international law perspective, to prosecute individuals of non-party states without the previous consent by the accused's state of nationality. The next paragraph will address this specific issue.

2.1.1.2 The ICC jurisdiction over nationals of third parties: a case for the delegation of domestic territorial jurisdiction

As Ambassador Scheffer argued in 1999, the most problematic issue about the Rome Statute concerns "whether the customary international law of territorial jurisdiction permits the delegation of territorial jurisdiction to an international court without the consent of the state of nationality of the defendant"[264]. In advancing this critique, Scheffer once again referred to the legal analysis proposed by Professor Madeline Morris, and this chapter's section will specifically address the arguments advanced in her notorious essay "High Crimes and Misconceptions: the ICC and non-party states"[265].

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from their nationals) to perform or to refrain from performing any actions. To be sure, the prosecution of non-party nationals might affect the interests of that non-party, but this is not the same as saying that obligations are imposed on the non-party". Seemingly, SCHARF (2001: 98) argues that "it is distortion to say that the Rome State purports to impose obligations on non-party states. Under the terms of the Rome Treaty, the parties are obligated to provide funding to the ICC, to extradite indicted persons to the ICC, to provide evidence to the ICC, and to provide other forms of cooperation to the court. Those are the only obligations the Rome Treaty establishes on states, and they apply only to state parties. Thus, Ambassador's Scheffer's objection is not really that the Rome Treaty imposes obligations on the United States as a non-party, but that it affects the sovereignty interests of the United States - an altogether different matter that does not come within the Vienna Convention's proscription".

[263] MORRIS (2001: 26).

[264] SCHEFFER (1999: 71).

[265] The essay was originally written in March 1999 under the title "Exercise of ICC jurisdiction over Nationals of Non-Party States", but the final version was released in 2001.

Before assessing the US critique, it is however important to provide a theoretical framework of the ICC as an international organization. According to the most common definition, international organizations are characterized by three criteria[266]: firstly, they are established by a plurality of states[267]; secondly, the institutive charter of the international organization needs to be a treaty, determining the functioning and the attributed powers of the organization; thirdly, there must be at least one organ whose "will [is] distinct from the will of its member states"[268]. Applying the three pillars to the case of the ICC, we could affirm that the International Criminal Court is an intergovernmental organization since (1) it is composed of 123 states party, (2) its functioning is regulated by an international treaty – the Rome Statute – and (3) the Office of the Prosecutor (OTP) is independent from member states. Once we have defined the ICC as an international organization, it is important to stress the notion of delegation under international organizations law. According to the doctrine of attributed powers – also known as "principle of speciality"[269] – an international organization is mandated to perform the sole functions that states agreed to confer to it[270]. Sarooshi proposes a typology to distinguish among different forms of attribution: agency, transfer and delegation[271]. In the first case, states control the international organization, maintaining the ability to revoke the conferred powers. Secondly, if the attribution process is performed via transfer, states concede part of their sovereignty to the international organization, thus permanently transferring those powers to it. Finally, delegation

[266] CORMIER (2020: 51-52); KLABBERS (2015: 9-14).

[267] There is not a maximum number, but in order to be an international organization, there should be at least two states (according to some authors, three states). See KLABBERS (2015: 9-10).

[268] KLABBERS (2015: 12-14).

[269] Advisory Opinion of the International Court of Justice, July 8, 1996, General List No. 93, *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, para. 25: "The Court need hardly point out that international organizations are subjects of international law which do not, unlike States, possess a general competence. International organizations are governed by the 'principle of speciality', that is to say, they are invested by the States which create them with powers, the limits of which are a function of the common interests whose promotion those States entrust to them".

[270] KLABBERS (2015: 53-56). CORMIER (2020: 55) also distinguishes between individual and collective conferrals: "Individual delegation occurs when States delegate powers that they possess in their individual capacity to an international organization. Collective conferral occurs when a group of States collectively confer a power or powers that they do not possess individually". According to the ICC Pre-Trial Chamber I, the International Criminal Court represents of a case of collective conferral: "In light of the foregoing, it is the view of the Chamber that more than 120 States, representing the vast majority of the members of the international community, had the power, in conformity with international law, to bring into being an entity called the 'International Criminal Court', possessing objective international personality, and not merely personality recognized by them alone together with the capacity to act against impunity for the most serious crimes of concern to the international community as a whole and which is complementary to national criminal jurisdictions" in Decision of ICC Pre-Trial Chamber I, September 6, 2018, ICC-RoC46(3)-01/18-37, *Decision on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute"*, para. 48.

[271] SAROOSHI (2007: 28-32). We remind the reader that Sarooshi's typology is disputable and criticisable. In fact, it is not widely accepted.

entails that states may revoke powers from the organization, but this last one will retain control over the attributed functions until it is mandated to do so. Adapting Sarooshi's typology to the ICC, we may assert that its powers have been delegated, since states may revise the Rome Statute whenever they want and may withdraw from the ICC Statute[272], but the Court chambers and the OTP, in performing their functions, are theoretically independent from the states' desires.

Pragmatically speaking, ICC parties thus delegated to the Court their ability to criminally prosecute perpetrators of the most heinous crimes. Yet that competence is concurrently held by Court and states, insofar as the ICC jurisdiction is complementary to the sovereign right to judicial jurisdiction. According to the principle of complementarity[273], the Court cannot investigate crimes either if the concerned state has previously prosecuted them or if the domestic process is underway. In other words, states retain primacy over the adjudication of crimes committed on their soil or by their own citizens. Conversely, if the Court makes a finding of the state's "unwillingness" or "inability" to prosecute, then it is entitled to open a formal investigation over these crimes and try the perpetrators.

What the United States denounces is precisely the ICC ability to prosecute nationals of non-party states via delegation of domestic criminal jurisdiction without the consent of the state of nationality. Ambassador Scheffer, once again, very clearly summarised the US concerns by emphasising that the "customary international law does not yet entitle a state, whether as a Party or as a non-Party to the ICC Treaty, to delegate a treaty-based International Criminal Court its own domestic authority to bring to justice individuals who commit crimes on its sovereign territory or otherwise under the principle of universal jurisdiction, without first obtaining the consent of that individual's state of nationality either through ratification of the Rome Treaty or by special consent, or without referral of the situation by the Security Council"[274]. This sentence highlights three important issues which need to be addressed: (A) the contestation of the existence of a customary international norm which explicitly allows states to delegate their own criminal jurisdiction to an international tribunal, (B) the states' presumed incapacity to delegate their own – territorial and/or universal – jurisdiction without the consent of the convict's state of nationality, and, conversely, (C) the ability of the UNSC to let the ICC pursue nationals of non-party states without the consent of the countries concerned.

[272] For instance, on March 17, 2018, Philippines notified their intention to withdraw from the Rome Statute.
[273] Article 17(1)(a) of the Rome Statute: "Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where: (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution".
[274] SCHEFFER (2001b: 65).

A. The legality of jurisdictional delegation

Let's start with the first issue by referring to the argument proposed by Professor Michael Newton[275]. According to him, the ICC jurisdiction over non-party nationals would infringe international law to the extent that it would violate the core principle of *nemo plus juris transferre potest quam ipse habet* (lit. "no one can transfer to another more rights than what it owns"). Newton's reasoning presumes that the ICC would be in a position to exercise more powers that what its member states own by themselves[276].

In the previous pages of this dissertation[277], we have explained that – apart from UNSC referrals – the ICC has jurisdiction over nationals of non-party states in two different situations: either in case of a non-party state's referral of the situation to the Court or if the third-party national's alleged crime has been committed on the territory of an ICC member state. While the former requires the non-party state's consent – thus automatically dismissing any possible critique of ICC illegitimate jurisdiction – the latter does not need any consent of the accused's state of nationality. The legal foundation of this second hypothesis is the sovereign jurisdiction of states[278], meaning that each country in the world is entitled to exercise, *inter alia*, a "jurisdiction to adjudicate" over its own entire territory. This sovereign prerogative does not take account of the nationality of the accused, but rather of the *locus commissi delicti* – namely the territory where the crime has been committed. In conformity with this sovereign territorial jurisdiction, states can thus prosecute even foreigners if the tort or violation these individuals have committed is located on the sovereign soil of that state. Furthermore, it should be stressed that this sovereign right is not conceded by other states via implicit or explicit agreements, but it is inherent and constitutive of each state's sovereignty[279].

Thus, the ICC does not need the consent of the accused's state of nationality precisely because the state of the *locus commissi delicti* would not need it too. As a result, the ICC does not own more rights than its member states, but exercises the same sovereign powers of its parties, thanks to delegation of their adjudicative competence to the Court. Therefore, Newton's general argument on the *nemo plus juris transferre potest quam ipse habet*

[275] He was the senior advisor of the US Ambassador-at-Large for War Crimes Issues from 1999 to 2002, thus serving both David J. Scheffer during the Clinton administration and Pierre-Richard Prosper during George W. Bush's first presidential mandate.
[276] NEWTON (2016).
[277] See section 2.1.1.
[278] The definition previously provided of sovereign jurisdiction entails the "state's general legal competence to exercise authority over territory and persons by virtue of its sovereignty" in section 2.1.1. of this dissertation.
[279] CORMIER (2020: 252). SCHARF (2001: 75) recognises that the state of nationality may diplomatically try to induce the state of the *locus commissi delicti* not to prosecute the perpetrator, but it would not have any legal tool to compel it to refrain from judicial adjudication.

principle should be dismissed as the ICC is empowered of the same rights of its parties[280].

For the sake of clarity, Newton specifically referred to the case of Afghanistan[281], where, in his eyes, the signature of a US-Afghan Status of Forces Agreement limited the domestic criminal jurisdiction of Afghanistan. Consequently, since Afghanistan had conferred its own criminal jurisdiction to the ICC, then the Court should have been bound by the same internal limitations. However, since part I of this dissertation provides an overall assessment of the US-ICC relationship, the specific Afghan case and its implications are left to part II[282]. Here, it suffices to argue that if an international agreement signed only by an ICC party – e.g. Afghanistan – with an ICC non-member state – e.g. the United States of America – bound a third party to that agreement – in this case, the ICC itself – then a violation of the *pacta tertiis nec nocent nec prosunt* principle would do occur[283]. Furthermore, the Court itself has dismissed Newton's argument by affirming that "if a State has conferred jurisdiction to the Court, notwithstanding a previous bilateral arrangement limiting the enforcement of that jurisdiction domestically, the resolution of the State's potential conflicting obligations is not a question that affects the Court's jurisdiction"[284].

On the contrary, Madeline Morris proposes two different explanations on the illegality of delegation of a state's jurisdiction to an international organization without the consent of the accused's state of nationality. First of all, she argues that if a state requested the ICC Prosecutor to investigate a crime committed by high-level officials or heads of states of another country – in their capacity as representatives of that state and, thus, whose acts are to be deemed official – then the ICC would turn to be an inter-state dispute

[280] The same reasoning is proposed by BASSIOUNI, SCHABAS (2016a: 148): "It is clearly established in international criminal law that whenever a crime is committed on the territory of a given State, that State can prosecute or extradite the perpetrator, even when that person is a non-national. Because of that principle, a State may extradite a non-national to another State for prosecution. Thus, every State has the right, in accordance with its constitutional and other legal norms, to transfer jurisdiction to another State that has jurisdiction over an accused, or to an international adjudicating body. Such jurisdictional transfer is an entirely valid exercise of national sovereignty, but it must be done in accordance with international human rights norms. Thus, the ICC does not provide for anything more than already exists in the customary practice of States with respect to the prosecution of a non-party State national who commits a crime on the territory of a State Party".

[281] The example of Afghanistan can obviously be extended to whatever state has signed a Status of Forces Agreement with the United States, despite its ICC membership.

[282] Among other things, chapter 4 of this dissertation specifically deals with the implications of Status of Forces Agreements and non-surrender agreements on Afghanistan and the ICC. Therefore, a thorough analysis is provided there.

[283] This general reasoning would obviously apply to all Status of Forces Agreements.

[284] Document of the ICC Office of the Prosecutor, January 22, 2020, ICC-01/18-12, *Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine*, para. 185.

mechanism[285]. In that case, therefore, the absence of the consent by the accused's state of nationality would be in contravention to the commonly agreed mechanisms of inter-state disputes. In providing support to her own hypothesis, Morris gives the example of the International Court of Justice (ICJ) Statute, where countries may be subject to the ICJ's judgement if and only if all the states involved had given their consent[286]. Nevertheless, this first argument should not be considered valid since the ICC both clearly limits its jurisdiction to individuals[287] and denies any possible state liabilities[288]. Indeed, while an ICJ judgement would be directed only against states, the ICC would convict physical persons to imprisonment or acquit them, but those decisions would in no way juridically affect the guilt's state of nationality. In other words, we may assume that Morris' first critique is representative of a different prioritisation within international law, and specifically international criminal law. While the USA maintains its emphasis on the role of states by reiterating their personification via high-level officials and presidents[289], the ICC – as well as other international criminal tribunals – seems proposing a different paradigm where individuals – not states, because, being an abstract concept, they cannot act but through their own representatives – are to be deemed responsible for their own actions[290].

Morris then advances a second critique, according to which states cannot confer jurisdictional powers to an international court or tribunal on the same basis as among states. While an inter-state conferral of jurisdiction – albeit dubious – may be held valid, the same cannot be said for a state's

[285] "As noted earlier, however, a complexity arises from the fact that, in addition to cases that are purely of the individual-culpability type, the ICC also will hear cases in which official acts – acts that the state in question maintains were lawful or whose very occurrence the state disputes – form the basis for an indictment. In such cases, the lawfulness of the official acts of states will be adjudicated by the ICC. When the ICC is operating in this capacity, it will have less in common with municipal criminal courts and a great deal in common with other international courts such as the ICJ", in MORRIS (2001: 25).

[286] States may give consent to an ICJ inter-state dispute in four different forms: (1) by declaration pursuant to Article 36(2) of the ICJ Statute, member states may declare to accept "as compulsory ipso facto and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court"; (2) states involved in the dispute may decide by a special agreement to submit the case before the ICJ; (3) by enforcement of a compromissory clause of a bilateral/multilateral agreement which obligates states party to that treaty to submit the dispute before the ICJ; (4) by signing a multilateral treaty aimed at fostering the ICJ pronouncement, such as the 1957 European Convention for the Peaceful Settlement of Disputes.

[287] Article 25(1) of the Rome Statute: "The Court shall have jurisdiction over natural persons pursuant to this Statute".

[288] Article 25(4) of the Rome Statute: "No provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law".

[289] Here, it is important to remind the reader that, during the negotiations on the Rules of Procedure and Evidence following the Rome's conference, the US endeavoured to find common agreement on an exception to ICC jurisdiction in case "the individual was acting under [the State's] 'overall direction'", *supra* footnote 87.

[290] Section 2.2.2 is entirely dedicated to the hypothesis of a different interpretation of international law, which would be at the basis of divergent international societies.

delegation towards an international court[291]. Professor Morris explains that, "[b]ecause the consequences of universal jurisdiction would be fundamentally transformed by the delegation itself, consent to the universal jurisdiction of states should not be considered equivalent to consent to delegation of universal jurisdiction to an international criminal court"[292]. Morris thus sustains that the two delegating processes differ inasmuch as they would determine different political interests and implications on the non-party state. For instance, in her opinion, a judgement of an international court would impact more states' relations and develop international law than a domestic court would do[293]. Admittedly, Morris may be right, but once again her argument is politically – not legally – construed[294]. In other words, Morris' argument seems to share the same confusion between political interests and legal issues as for the US *pacta tertiis* critique[295].

In conclusion, we should admit that the general opposition of opinions on ICC delegated jurisdiction relates to the debate over legality of actions under international law in case of the absence of a permissive rule. On the one side, there are those who argue that an action is legal insofar as there is not an explicit prohibition under international law[296]. This position was firstly established by the PCIJ in judgement *Lotus*, thus being nicknamed "the Lotus principle"[297]. Following this reasoning, states would be entitled to transfer their

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[291] "When a new basis for jurisdiction is claimed or proposed, its validity is evaluated by consideration of its appropriateness, measured in terms of the underlying principles and rationales governing jurisdiction under customary international law. Typically, this evaluation of appropriateness has meant a form of nexus analysis. The central question has been whether the conduct to be regulated is sufficiently linked to the legitimate interests of the state claiming jurisdiction to warrant recognition of jurisdiction. […] But this sort of nexus analysis would be inapposite in determining the appropriateness of ICC jurisdiction over non-party nationals. The ICC is not a state and has no "interests" of its own apart from those delegated to it by the states parties to the Treaty. This is where nexus analysis fails us: The legitimacy of the original jurisdiction (universal or territorial) of those states parties, based on their legitimate state interests, is not questioned here. What is at issue, rather, is the validity of the delegation of that jurisdiction, an issue with respect to which nexus analysis is unhelpful", in MORRIS (2001: 49-50).

[292] MORRIS (2001: 29).

[293] "If a guilty verdict were passed by a national court in an official-acts case, the matter would remain a disagreement among equals, one state maintaining that an unlawful act had been committed, the other disputing its occurrence or defending its lawfulness. By contrast, were the ICC to pronounce an official act to constitute a crime, the decision would bear an authoritative weight and resulting political impact of a categorically different nature. The special political impact of ICC decisions will itself create heightened risks for states" in MORRIS (2001: 30).

[294] AKANDE (2003: 625).

[295] *Supra* section 2.1.1.1.

[296] SCHARF (2001: 71-74); HIERAMENTE (2008: 79-80); CORMIER (2020: 63-64).

[297] The PCIJ applied this reasoning to justify the ability of states to exercise universal jurisdiction: "It does not, however, follow that international law prohibits a State from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad, and in which it cannot rely on some permissive rule of international law. Such a view would only be tenable if international law contained a general prohibition to States to extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, and if, as an exception to this general prohibition, it allowed States to do

criminal jurisdiction to an international tribunal because international law does not forbid it. On the other side, there are those who sustain that an action is permissible under international law if and only if there is an explicit norm which allows it. Morris, for instance, argue that the Lotus principle "is not an accurate description of the law now"[298], because otherwise any new legal doctrine would be permissible due to the lack of an explicit prohibition. Therefore, states should provide evidence of the legality of their actions. One way to do it is looking for precedents.

B. What type of criminal jurisdiction delegation in the Rome Statute: looking for precedents

The United States criticises the ICC competence in adjudicating nationals of non-party states both on the basis of the ICC parties' universal and territorial jurisdiction transfers, arguing that the lack of precedents shows the illegality of the jurisdiction delegation without the consent of non-party states[299]. This dissertation sustains that, if states were able to delegate their domestic criminal jurisdiction to other states without the consent of the convict's state of nationality, then they should be legally able to do the same towards an international criminal court. To support this hypothesis, we will look at the European Convention on the Transfer of Proceedings in Criminal Matter (henceforth "European Transfer Convention"). Article 2(1) of the European Transfer Convention recognizes all parties the "competence to prosecute under its own criminal law any offence to which the law of another Contracting State is applicable"[300]. Pursuant to the consent-based approach, the adjudicative power is subject to the necessary request of proceedings by the state of primary jurisdiction[301]. On the contrary, the European Transfer Convention remains silent on the requirement of any authorization by the state of nationality of the accused. Indeed, the Council of Europe's explanatory report on the European Transfer Convention affirms that "usually but not always"[302] the

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so in certain specific cases. But this is certainly not the case under international law as it stands at present. Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable" (*Lotus*, p. 19). This idea is reiterated in the most famous passage in judgement *Lotus*: "Restrictions upon the independence of States cannot therefore be presumed" (*Lotus*, p. 18).

[298] MORRIS (2001: 47).

[299] "This absence of precedent precludes the possibility that delegability has been affirmatively entailed within the customary law of universal jurisdiction as it has developed through state practice and *opinio juris*", in MORRIS (2001: 43).

[300] Article 2(1) of the European Convention on the Transfer of Proceedings in Criminal Matter (1972).

[301] Article 2(2) of the European Transfer Convention (1972).

[302] Report by the Council of Europe, May 15, 1972, European Treaty Series No. 73, *Explanatory Report to the European Convention on the Transfer of Proceedings in Criminal Matters*, para. 28.

state of primary jurisdiction and the state of nationality coincide. Consequently, there could be situations where a foreigner in the state X of primary jurisdiction would be prosecuted by the state Y of conferred jurisdiction, different from the accused's state Z of nationality. On the one hand, Morris acknowledged this theoretical possibility, but ended up arguing there are no supporting examples, thus leaving it a mere theoretical hypothesis and not a true recognition of the state practice[303]. On the other hand, Michael Scharf reported one of the European Transfer Convention drafters' words – Professor Andre Klip – according to whom "such cases [in which the consent of the states of nationality was not requested or given] are not unheard of"[304]. Finally, Dapo Akande affirmed that the absence of any formal condemnation of states of the European Transfer Convention would demonstrate the tacit acquiescence of the legality of the criminal jurisdiction delegation.

So, once state-to-state delegation of jurisdiction is considered valid, why wouldn't the same attribution be possible towards an international criminal court? It is true that there are no clear-cut supporting cases of criminal jurisdiction conferral from a state to an international organization[305], but, at

[303] "The possibility of transfer of jurisdiction where the defendant is a national of a third-party state is not precluded by the terms of that convention […]. It appears that in practice, however, there has been no case of a transfer of criminal proceedings under the convention in which the defendant was a national of a non-party to the convention and the state of nationality did not consent to the transfer", in MORRIS (2001: 44).

[304] SCHARF (2001: 114).

[305] Scholars and international law experts have for long debated on the legality of two cases of jurisdiction conferrals to an ICT in relation to the consent of the concerned state: the Nuremberg trials (International Military Tribunal – IMT) and the ICTY. Concerning the case of the IMT, Scharf (2001) sustains the Nuremberg trials should be distinguished from the IMTFE – International Military Tribunal for Far East (also known as Tokyo trials) – to the extent that the former was established without a clear consent by the territorial state of jurisdiction. Indeed, while the Japanese government accepted the Potsdam Proclamation (July 26, 1945) – which *inter alia* declared that "stern justice shall be meted out to all war criminals" – via the Japanese Instrument of Surrender (September 2, 1945), the same cannot be said as regards to the IMT. As a matter of fact, at the end of the war, the Allies occupied the entire German territory and exercised governmental functions. In other words, no German government existed at that time, thus not formally accepting the IMT jurisdiction. Conversely, others – such as Morris (2001) and Kelsen (1947) – asserted that the IMT establishment was legally founded since the Allies exercised a role of sovereign powers in Germany and therefore their authorization to the IMT trials should be considered equal to the consent of the territorial state. Concerning the case of the ICTY, the issue relates to the implied consent of the territorial state via UN membership. As it will be argued in the following pages, the legal basis which enables the UNSC to set up an international criminal tribunal should be found in the UN membership of the state concerned. In other words, the UNSC was empowered to establish the ICTY to prosecute criminals in Yugoslavia without the consent of the Yugoslav government, thanks to the UN membership of Yugoslavia. In fact, by ratifying the UN Charter, states recognize the UNSC competence in issuing binding resolutions pursuant to chapter VII of the Charter. However, AKANDE (2003: 628) explained that "the question [of the authority of the Tribunals over nationals of UN third parties] has arisen in relation to the prosecution of nationals of the Federal Republic of Yugoslavia (FRY) by the ICTY". Indeed, on September 19, 1992, the UN General Assembly adopted Resolution 47/1 stating that "the Federal Republic of Yugoslavia (Serbia and Montenegro) cannot continue automatically the membership of the former Social Federal Republic of

the same time, the motivations adduced by the United States to deny that possibility are politically construed[306] and do not provide legal justifications. Therefore, since independent states own inherent sovereign jurisdiction to adjudicate any individual who has committed a crime on their territory without the need of any authorizations by the accused's state of nationality and, as sovereign entities, can decide to confer their powers to other states or international organizations, then they should be able to do the same towards the ICC as well[307]. The fact that state-to-state jurisdiction conferrals are legal and no international customary rule denies the possibility of limiting states' sovereign decision to delegate their own jurisdiction to an international criminal court demonstrate that the ICC jurisdiction over nationals of non-party states – as a reflection of ICC parties' domestic territorial jurisdiction – encounters no legal restrictions to this sovereign power of attribution. In addition, it should also be stressed that the Court does not supersede states' primary domestic jurisdiction in adjudicating ICC-mandated crimes but retains an *extrema ratio* competence[308] whenever the ICC Prosecutor makes of finding of unwillingness or inability of the concerned state to prosecute the crimes. Hence, states remain the first forum of conviction and, even if the ICC prosecuted the crime after the complementarity assessment, it would do it on behalf of states in pursuit of the *aut dedere aut judicare* principle.

That said, some authors[309] support the universality hypothesis of the ICC jurisdiction by referring to the state domestic practice and the international treaties against terrorism. On the contrary, others argue that there is not a common *opinio juris* among states, thus denying the inclusion of universality among international customary law rules[310]. However, the US posture towards universal jurisdiction seems to be moved, once again, by political interests. On the one hand, when some Belgian prosecutors started filing complaints on purported US war crimes in Iraq in 2003, the then US SecDef

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Yugoslavia in the United Nations; and therefore decides that the Federal Republic of Yugoslavia (Serbia and Montenegro) should apply for membership in the United Nations and that it shall not participate in the work of the General Assembly". AKANDE (2003: 629-631) thus sustains that the ICTY's convictions in 1999 over crimes in Kosovo would represent a case of prosecutions of third-party nationals without the consent of their state of nationality. Instead, in May 2003, the ICTY Trial Chamber's judgement (Case No. IT-99-37- PT) argued contrary to UNGA Resolution 47/1 affirming that "while the FRY's [UN] membership was lost for certain purposes, it was retained for others", in AKANDE (2003: 629).

[306] *Supra* footnote 294.

[307] Professor William A. Schabas and Giulia Pecorella argue that "[t]erritorial jurisdiction is a manifestation of State sovereignty. A State has plenary jurisdiction over persons, property and conduct occurring in its territory, subject only to obligations or limitations imposed by international law. […] There is no rule of international law prohibiting the territorial State from voluntarily delegating to the ICC its sovereign ability to prosecute", in TRIFFTERER & AMBOS (2016: 681-682).

[308] MÉGRET (2001: 252). AKANDE (2003: 623) describes it as a "secondary jurisdiction by delegation from one of the states of primary jurisdiction".

[309] SCHARF (2001: 76) argues that "the jurisdiction of the ICC can be deemed to be based concurrently on the universal and territorial bases of jurisdiction".

[310] CASEY (2001: 857-859); MORRIS (2001: 35).

Donald Rumsfeld flew to Brussels threatening to move the NATO headquarter away from the Belgian capitol city unless the allegations were dropped[311]. On the other hand, the US tribunals often relied on universality to prosecute terrorists. For instance, in *United States v. Yunis* (1988), the Lebanese citizen Fawaz Yunis was convicted for hijacking the Royal Jordanian Airlines Flight 402. Yet the plane never landed on the US territory nor entered the US airspace, thus lacking any territorial nexus with the USA (the only possible jurisdictional link was the presence of two Americans on the flight). The US court thus asserted that "the Universal and Passive Personality principles, together, provide ample grounds for this Court to assert jurisdiction over Yunis"[312]. What is even more crucial for the present analysis is that the US Court based its jurisdiction on the application of the International Convention against the Tacking of Hostages (1979), whose Article 5(2)[313] grants universal jurisdiction to its members. Lebanon was not at that time party to the convention and, therefore, did not give its consent to the US prosecution of Yunis. In addition, in the following years, other US prosecutions based on the anti-terrorism treaties' universality[314] provided evidence of the US practice in adopting that type of jurisdiction. Hence, all these cases led Professor Scharf to assert that "there is nothing unusual about the conferral of universal jurisdiction over nationals of non-parties through the mechanism of treaty law"[315]. He then went on arguing that "[i]n light of these precedents, the United States' position that international law prohibits the ICC from exercising jurisdiction over the nationals of non-party states is not just unfounded, it also has the potential of negatively affecting existing US law enforcement authority with respect to terrorists and narco-traffickers, as well as torturers and war criminals"[316].

Though precedents might suggest the legality of universal jurisdiction delegation among states, the Rome Statute does not set universality as a jurisdictional option. In the introductory theoretical framework of this chapter's section, we have analysed the Rome Statute as explicitly providing the Court only of territorial and active personality jurisdictions. If the Court had enjoyed universal jurisdiction, it would have been able to pursue whatever alleged criminal in the world, regardless of the location of the crime and of the

[311] BOSCO (2014: 89).
[312] United States District Court, D. Columbia, 681 F. Supp. 896 (D.D.C. 1988), February 12, 1988, *United States v. Yunis*; 924 F. 2d 1086 (D.C. Cir. 1991), *United States v. Yunis*.
[313] Article 5(2) of the International Convention against the Tacking of Hostages (1979): "Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over the offences set forth in article 1 in cases where the alleged offender is present in its territory and it does not extradite him to any of the States mentioned in paragraph 1 of this article".
[314] United States Court of Appeals, District of Columbia Circuit, 134 F.3d 1121, 1130 (D.C. Cir. 1998), *United States v. Rezaq*; United States Court of Appeals, District of Columbia Circuit, 718 F.3d 929 (D.C. Cir. 2013), *United States v. Ali*.
[315] SCHARF (2001: 99). See also CORMIER (2020: 44); AKANDE (2003: 622-625).
[316] SCHARF (2001: 103).

accused[317]. However, no provision in the ICC Treaty clearly concedes this competence to the Court. Indeed, this was the outcome of a general rejection[318] – or at least a compromise[319] among the Rome Statute's drafters – of the German universality proposal: although still subjected to the principles of complementarity and non-imposition of duties upon third parties, the Court would have been able to prosecute individuals without territoriality restrictions[320]. Therefore, the preparatory works for the Rome Statute and, more specifically, the refusal of the German proposal provide further evidence of the Court's inability to apply universality.

C. UNSC referrals: legal foundation for subjecting nationals of ICC third parties to the Court's jurisdiction

Finally, it may be argued that UNSC referrals to the ICC operate along universality since UNSC may bring ICC third parties' nationals before the Court, even if they have committed a crime on the territory of a non-party state. The Sudanese[321], the Libyan[322] and the attempted Syrian[323] referrals are the sole cases where the UNSC intervened requesting an ICC investigation: in all of the three occasions, the concerned state was a third party to the ICC. However, even in this case, UNSC referrals seem not empowering the Court of universal jurisdiction. It is true that Sudan, Libya and Syria are not ICC parties, but they are UN members. By ratifying the UN Charter, UN members accepted, *inter alia*, the primary role of the UNSC in matters of international peace and security and the bindingness of UNSC resolutions pursuant to Chapter VII of the UN Charter. As the Court reasoned that it was not able to make a finding of non-compliance to the duty of cooperation in conformity with UNSC resolutions precisely because that obligation was *vis-à-vis* the UN Charter[324], we may seemingly affirm that the indirect consent of the territorial states to the ICC prosecutions pursuant to UNSC referrals was *vis-à-vis* the UN Charter and not the Rome Statute[325]. Therefore, the UNSC referrals do not provide universal jurisdiction to the Court, but the global geographical reach of the UN Charter – that is to say, all the states in the world, except the Holy

[317] Obviously, the absence of ICC parties' and non-parties' cooperation would make the arrest of the criminal and his transfer to the ICC almost impossible, thus limiting the efficacy of the Court's universal jurisdiction. But the al-Bashir *affaire* shows that this is the case also for the ICC.
[318] TRIFFTERER, AMBOS (2016: 679).
[319] This is Michael P. Scharf's opinion. According to him, the delegations at Rome eventually decided to put the universality proposal aside in order to obtain the broadest possible support for the ICC Treaty. See SCHARF (2001: 77-79).
[320] TRIFFTERER, AMBOS (2016: 675-677).
[321] UN Doc. S/RES/1593, March 31, 2005.
[322] UN Doc. S/RES/1970, February 26, 2011.
[323] UN Doc. Draft S/2014/348, May 22, 2014.
[324] *Supra* footnote 261.
[325] Seemingly, SCHARF (2001: 109) argues that both Yugoslavia and Rwanda did not give direct consent to the establishment of the ICTs by the UNSC, but their authorization was "implied […] by virtue of their obligations as U.N. Members". See also MORRIS (2001: 36-37).

See, or the debated cases of Kosovo and Palestine, are UN members – allows the UNSC to potentially bring any state of the world before the Court. In order to support this hypothesis, Monique Cormier analysed whether a hypothetical UNSC referral to the ICC concerning crimes committed in the Vatican City by Holy See's individuals was legal. She ended up affirming that "[i]f the Council adopted a referral resolution *ultra vires* the Charter, the ICC would technically have jurisdiction in accordance with the Statute. There would not, however, be any legal basis for this jurisdiction because of the fact that the Holy See has not consented to either the UN Charter or the Rome Statute"[326].

To sum up, the ICC exercises its jurisdiction over nationals of non-party states thanks to its member states' delegation of territorial criminal jurisdiction. Indeed, as states are entitled to delegate their jurisdiction among themselves, then there is no legal rule denying the possibility of transferring their adjudicative power to an international criminal tribunal or court. The claim for the ICC universality principle should be abandoned because the Rome Statute does not allow this type of jurisdiction. Even preparatory works during the Rome negotiations confirm it. In addition, the US critiques have been mainly dismissed because politically – not legally – construed[327]. Thus, this section has contributed to demonstrate that the US opposition towards the Court is primarily driven by political interests, rather than legal claims of infringement of international law. The USA does not want its nationals to be pursued before the Court, while it would accept it for other states' citizens. The fact that even Scheffer himself recognized that the US delegation endeavoured to find ways "to subject non-State Party nationals of so-called rogue or aggressor States to the ICC's jurisdiction under certain circumstances even in the absence of a UNSC referral"[328] is indicative of the US exceptionalism. Furthermore, the issue of relationship between state's consent to the ICC and the Court's ability to pursue nationals of third parties thanks to member states' delegated jurisdiction is not only important from a legal perspective, but it is crucial from an IR point of view, as well. As Mégret asserts, "although the [US] argument is plagued by misconceptions, it is nonetheless extremely revealing of a number of emerging fault-lines in the international order that have so far remained under-examined. The existence of such fault-lines can help us better understand what exactly is at stake with the creation of the ICC, and how its creation has the potential for introducing a revolutionary paradigmatic change in our conceptions of international law"[329]. Starting from this line of reasoning, the present dissertation will propose the hypothesis of the ICC establishment as an alternative solidarist international society. The assessment on this specific issue will be provided in section 2.2.2.

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[326] CORMIER (2020: 149).

[327] MÉGRET (2001: 250) peremptorily declares that "[t]he US opposition to ICC non-party jurisdiction was therefore basically the opposition of a state that had decided not to join the ICC for reasons other than non-party jurisdiction".

[328] SCHEFFER (2001b: 64-65).

[329] MÉGRET (2001: 248).

2.1.2 The Prosecutor's *proprio motu* powers

The Prosecutor's trigger mechanism has been largely debated since the beginning of negotiations. In fact, the first ILC draft proposal did not even consider that possibility, because it was deemed to be "not advisable at the present stage of development of the international legal system"[330]. It was under the pressure of the like-minded states that the Prosecutor's *proprio motu* powers were included in the final version of the ICC Statute. The Rome compromise, eventually, granted a balance between the LMS' fear of OTP subjection to the states' will and an excessive prosecutorial discretion which would have led the OTP to act as a "lone ranger running wild"[331]. Nonetheless, the control mechanisms provided by the Statute were not considered sufficient from the US delegation, which feared ICC Prosecutor's politically motivated charges. Before addressing the US critique, however, it is important to provide a theoretical framework of the OTP's work.

As already said, Article 15(1) of the Rome Statute recognizes the ability of the ICC Prosecutor to trigger the Court's jurisdiction by his/her own initiative. However, before submitting the request for authorization before the Pre-Trial Chamber (PTC), the OTP commences a preliminary examination in order to assess, on the information provided to the Prosecutor[332], if "there is a reasonable basis to proceed with an investigation"[333]. Then, the Prosecutor is called to evaluate whether all the admissibility criteria are complied with, namely whether the case falls within the ICC jurisdictional reach[334] and has not been previously adjudicated – or the legal process is not underway[335] – whether the situation involves sufficient gravity[336], and serves the interests of justice[337].

The Statute does not provide a clear-cut definition of "reasonable basis", but the ICC Pre-Trial Chamber II has declared that the phrase indicates that "there exists a sensible or reasonable justification for a belief that a crime falling within the jurisdiction of the Court 'has been or is being

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[330] DANNER (2003: 513). See also TRIFFTERER, AMBOS (2016: 726-729).
[331] DANNER (2003: 513).
[332] The OTP can rely on different sources of information, but they are usually provided by NGOs. In addition, according to Article 15(2) of the Rome Statute, "[t]he Prosecutor shall analyse the seriousness of the information received. For this purpose, he or she may seek additional information from States, organs of the United Nations, intergovernmental or non- governmental organizations, or other reliable sources that he or she deems appropriate, and may receive written or oral testimony at the seat of the Court".
[333] Article 15(3) of the Rome Statute. The procedure which guides the OTP in its preliminary assessment is regulated by Article 53 of the Rome Statute. Besides, Morten Bergsmo *et al*. note that the use of the term "initiate" – rather than "start" – an investigation is indicative of the checks by the PTC: "The Prosecutor can not start investigations on his own motion. States were not prepared to accept such a power for the Prosecutor", in TRIFFTERER & AMBOS (2016: 730).
[334] Article 53(1)(a) of the Rome Statute.
[335] Article 53(1)(b) of the Rome Statute; Article 17(1)(a) of the Rome Statute.
[336] Article 53(1)(c) of the Rome Statute.
[337] Article 53(1)(c) of the Rome Statute.

committed'"[338]. Therefore, the Prosecutor is called, first of all, to assess if the alleged crimes fall within the jurisdiction of the ICC, conceived from all its four facets[339].

Secondly, the OTP is to evaluate the admissibility requirements laid down in Article 17(1) of the Rome Statute, namely the complementarity regime and the gravity principle. Concerning complementarity, the Prosecutor should first understand if the specific purported crime has already been tried or it is underway[340]. In other words, the OTP's evaluation cannot take into consideration "hypothetical national proceedings that may or may not take place in the future"[341]. If no legal processes are recorded for the crime under preliminary examination by the OTP, then the assessment of the complementarity regime is met. Conversely, if they are registered, the ICC Prosecutor should "assess whether such national proceedings are vitiated by an unwillingness or inability to genuinely carry out the proceedings"[342], pursuant to Article 17(2) and (3) of the Rome Statute. Instead, regarding the gravity principle, the OTP should apply both qualitative and quantitative indicators, which were summed up by Pre-Trial Chamber II as follows: ": (i) the scale of the alleged crimes (including assessment of geographical and temporal intensity); (ii) the nature of the unlawful behaviour or of the crimes allegedly committed; (iii) the employed means for the execution of the crimes (i.e., the manner of their commission); and (iv) the impact of the crimes and the harm caused to victims and their families"[343]. According to Magnoux, the gravity test is crucial in the prosecutorial and the chambers' assessments since it is the most easily led by subjectivity, thus putting the ICC under possible politicization allegations[344].

Finally, the Prosecutor is called to make a negative finding of the interests of justice criterion[345]. In other words, "[the OTP] shall proceed with investigation unless there are specific circumstances which provide substantial reasons to believe it is not in the interests of justice to do so at that time"[346]. Despite the Rome Statute does not set a definition of "interests of justice", the OTP has tried to delimit its conceptual boundaries by highlighting those

[338] Decision of Pre-Trial Chamber II, March 31, 2010, Situation in the Republic of Kenya, ICC-01/09-19-Corr, *Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya*, para. 35.
[339] See section 2.1.1.
[340] Note that the assessment is case-specific, meaning that the concerned state must have pursued the same accused for the alleged crimes highlighted by the ICC Prosecutor. See Policy Paper by the ICC Office of the Prosecutor, November 2013, ICC-OTP 2013, *Policy Paper on Preliminary Examinations*, para. 47.
[341] *Ibidem.*
[342] *Id.*, para. 49.
[343] *Supra* footnote 338, para. 62.
[344] MAGNOUX (2017: 21-23).
[345] According to Article 53(1)(c) of the Rome Statute, the "interests of justice" test is to be made only after the positive determination of the jurisdictional reach of the Court and of the admissibility criteria laid down in Article 17 of the Statute.
[346] Policy Paper by the ICC Office of the Prosecutor, September 2007, ICC-OTP-2007, *Policy paper on the Interests of Justice*, p. 3.

factors that should be taken into consideration during the negative assessment: the gravity of the crime, the victims' interests in pursuing justice and the "particular circumstances of the accused", namely his/her infirmity or his/her role in the conduct of the crime in question[347]. In addition, the OTP clarified that "there is a difference between the concepts of the interests of justice and the interests of peace"[348] which eventually distinguishes the Prosecutor from a political mediator. Conversely, Brubacher believes that the OTP "should take account of the broader interests of the international community, including the potential political ramifications of an investigation on the political environment of the state over which he is exercising jurisdiction"[349]. Therefore, the "interests of justice" test requires some degree of prosecutorial discretion.

On the one hand, if the OTP's preliminary examination complies with all the above-mentioned criteria, the Prosecutor should request to the PTC the authorization to proceed with a formal investigation. The PTC would then check whether all the conditions were satisfied as a means of control over the work of the OTP[350]. On the other hand, if the preliminary examination does not reach the conclusion that there is reasonable basis to proceed with an investigation, the Prosecutor shall inform only the source-giver of his/her conclusions[351]. Yet, this neither precludes the possibility of re-assessing the conditions in case of new information[352] nor prevent the PTC to review the Prosecutor's examination[353]. Indeed, the need for the control role played by the PTC both in authorizing the investigation and in reviewing the OTP's assessments was the fruit of a compromise in Rome between those who supported the Prosecutor's independence and those who claimed the need for prosecutorial accountability.

2.1.2.1 The prosecutorial discretion and the limitations to OTP's independence

While the US critique of ICC illegitimacy to prosecute nationals of non-party states entailed a thorough analysis of customary international law, treaty

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[347] *Id.*, pp. 4-7.

[348] *Id.*, p. 1. The Policy Paper then reiterates that "[the interests of justice concept] should not be conceived of so broadly as to embrace all issues related to peace and security. […] The Office will seek to work constructively with and respect the mandates of those engaged in other areas but will pursue its own judicial mandate independently" (*Id.*, p. 8). Even the ICC Prosecutor BENSOUDA (2012: 510) asserted that "in selecting its cases, the Office of the Prosecutor cannot yield to political considerations or adapt its work according to the peace negotiations timetable. It must always conduct its work on the basis of the law and of the evidence it has collected, and act accordingly, in an independent manner".

[349] BRUBACHER (2004: 81).

[350] Rule 50 of the ICC Rules of Procedure and Evidence. See also Article 15(4) of the Rome Statute.

[351] Article 15(6) of the Rome Statute.

[352] Article 53(4) of the Rome Statute.

[353] Article 53(3) of the Rome Statute. The Pre-Trial Chamber may review the Prosecutor's decision on its own initiative, only if the OTP's findings of non-compliance with the "reasonable basis" test rest on solely the assessment of the interests of justice.

law and precedents, the US allegations of politically motivated charges was led by mere political perspectives. The US fear of ICC politicization was mainly moved by the expectation of possible states' vengeance against the US international role in the peace and security domain[354]. In this case, according to the USA, the Prosecutor would be externally pressured to prosecute US servicemembers and authorities. Furthermore, the prosecutorial discretion in filing requests of authorization to investigate – or dropping other cases – and in assessing the satisfaction of the complementarity principle is perceived as a further means of politicization[355]. In both cases, the accountability of the Prosecutor is thus the main issue at stake[356]. As a matter of fact, if the Rome Statute and the whole ICC functioning were able to provide efficient checks and balances upon the OTP's work, then ICC prosecutorial abuses would be controlled and, where appropriate, punished by dismissing the Prosecutor. Therefore, the main question relates to whether the Rome Statute does or does not provide efficient control mechanisms over prosecutorial discretion and independence[357].

The prosecutorial discretion, also called "functional independence"[358], is central to the assessment of the ICC Prosecutor's *proprio motu* powers. Indeed, this last one not only influences the ICC work, but it is crucial in creating or disrupting any external perception of the Court's legitimacy. In opening preliminary examinations and requesting the PTC's authorization to investigate the concerned situations, the Prosecutor will make use of his/her own discretion in two fundamental processes: the selection of cases to be examined and the evaluation of the "reasonable basis" test's criteria. When selecting cases to be examined, the Prosecutor will inevitably have to make decisions on the situations to pursue or not. Indeed, due to the mere nature of *proprio motu* initiatives, the OTP may be overloaded by a great number of allegations and information sent by different NGOs or victims. This would automatically open several possibilities of investigations, thus employing efforts, time and resources in too many cases. Given the scarce material and human resources that have been allocated to the Court by its states party, the Prosecutor will be compelled to prioritize certain situations and dismiss others[359]. As a matter of fact, only the OPT is competent in allocating ICC resources, which inevitably becomes the first possible example of ICC political decisions. Therefore, the USA fears that in screening all the possible investigations, the Prosecutor

[354] ELSEA (2006: 5).
[355] ELSEA (2006: 5-6).
[356] "Quite simply, the United States does not believe that the Rome Statute contains the safeguards necessary to prevent politicized investigations and prosecutions, and thus, it cannot reasonably consider becoming a party to the treaty", in CLINE (2008: 113).
[357] "The role of the international prosecutor is defined by the tension between independence and accountability", in HELLER (2013: 689).
[358] GUERILUS (2013: 113-136).
[359] The prioritization process is based on preliminary examinations' findings. As discussed earlier, the assessments of the gravity and the interests of justice criteria entail the largest degree of prosecutorial discretion. See SCHABAS (2010b); MAGNOUX (2017).

would be led to pursue nationals of major powers just "for the sake of appearing evenhanded"[360].

Yet the OTP's practice seems extremely cautious when pursuing *proprio motu* preliminary examinations. David Bosco's analysis, for instance, demonstrates that there are differences in the Prosecutor's assessments between cases of states' or UNSC's referrals and situations opened by his/her own motion[361]. While the former usually entails an average of less than eight months of preliminary examination, the latter requires around five years (the situation of Afghanistan up to nine years, scoring the longest period[362]). In addition, while states' or UNSC referrals are very likely to be pursued for full investigations (87% of the cases submitted to the OTP), only 21% of the *proprio motu* initiatives reach the stage of investigation[363]. Surely, this might be explained by specific procedural mechanisms and substantial criteria[364], but we can also suppose that the Prosecutor may be led by ICC legitimation considerations[365]. For instance, up to 2009, Prosecutor Luis Moreno Ocampo endeavoured to avoid triggering the ICC jurisdiction on his own motion precisely in order not to foster criticisms towards the Court which might have endangered its legitimation process. Another example may be the positive complementarity, indicating a situation where the Prosecutor's examination is aimed at encouraging the state to domestically prosecute the crimes in question as a tool "to further strengthen the ability of the Office and its partners to close the impunity gap"[366].

The proposed examples are clearly based on a political reasonings of ICC legitimation and, admittedly, they would fit the US policy-oriented

[360] DANNER (2003: 537). In so doing, the Prosecutor would fall in a "selective prosecution", where his/her discretion would be exclusively justified by the nationality of the accused.

[361] "I argue that the prosecutor has, in practice, developed two quite different processes. For member state and Security Council referrals, the prosecutor conducts a review tilted sharply toward opening a full investigation. In proprio motu situations, the presumption appears to be reversed", in BOSCO (2017: 395-396).

[362] BOSCO (2017: 401).

[363] BOSCO (2017: 400-401).

[364] BOSCO (2017: 401-406). Concerning procedure, the Rome Statute determines the Prosecutor's duty to seek PTC's authorization to proceed only in case of a *proprio motu* initiative (Article 15, para. 3, of the Rome Statute). Consequently, the OTP will need the best sources and evidence – thus requiring more time – in support of his analysis to convince the PTC. Furthermore, David Bosco argues that UNSC's and states' referrals usually entails more grievous situations, thus making these cases more important to be investigated. Yet this substantial interpretation does not apply to the Afghan case, which – according to Bosco's estimates – amounts to the greatest number of victims involved (around 24.000).

[365] This would also include Bosco's proposed justifications of seeking states' support as their cooperation is essential for the ICC investigation, in BOSCO (2017: 406-408).

[366] Document of the ICC Office of the Prosecutor, July 17, 2019, *Strategic Plan 2019-2021*, para. 49-51. The positive complementarity has been recognized among the OTP's objectives also in the *Policy Paper on Preliminary Examinations*, para. 100-103. For further analyses, see SHERESHEVSKY (2020).

approach of the New Haven School[367]. Indeed, even Prosecutor Bensouda, though reiterating the independence and the impartiality of the Court, acknowledged that "we operate in a political environment, whether we like that or we don't"[368]. This statement reflects the US fear that "the Prosecutor will be required to make decisions of policy in addition to those of law"[369]. That said, however, the Prosecutor is not an international political actor[370] and, if he/she fell into prosecutorial abuses or politically motivated charges, the Rome Statute would guarantee accountability mechanisms.

Contrarily to John Bolton's argument that "[t]rue political accountability […] is almost totally absent from the ICC"[371], the Rome Statute provides for four main instruments of check over the Prosecutor's independence. Firstly, as already mentioned, the Pre-Trial Chamber plays a crucial control over the Prosecutor. Its re-assessment of all the requirements for opening an investigation is a means of ensuring absence of politically led preliminary reasonings by the OTP. Secondly, the complementarity regime poses a limit to the prosecutorial *proprio motu* powers. In particular, not only the Prosecutor is blocked from investigating if, during his/her preliminary examination, he/she makes a finding that those crimes have already been domestically pursued, but a state may even invoke Article 18(2)[372] of the Rome Statute within one month after the Prosecutor's notification of the beginning of an investigation. In so doing, the concerned state should demonstrate to the Prosecutor that the crimes in question have already been pursued – or are underway – and, consequently, the OTP should refrain from prosecuting.

Here, however, the second US critique of politicization lies. According to the United States of America, the Prosecutor would be in a position of assessing the whole internal judicial system of a state[373], *inter alia* violating the state's internal affairs. Nevertheless, the ICC Prosecutor does not judge the states' domestic judicial system but merely looks whether proceedings on the

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[367] According to BRUBACHER (2004: 94), the Prosecutor should adopt the New Haven School approach, since "[t]o ignore the political realities would subject the Court to a form of suicide in so far as it would be marginalized in its relations with states and, ultimately, in its ability to enforce international justice".

[368] FASSASSI (2014: 54).

[369] Statement of the United States Delegation Expressing Concerns Regarding the Proposal for a Proprio Motu Prosecutor, June 22, 1998, in S. Hrg. 105-724, July 23, 1998, p. 149.

[370] "It is then necessary to distinguish between a Prosecutor under political influence and a prosecutor who is aware of the political environment where his work will take place and who take advice from other organisations, such as the United Nations or NGOS, on the impact of an investigation", in MAGNOUX (2017: 31) (translation added).

[371] BOLTON (2001: 174).

[372] Article 18(2) of the ICC Treaty: "Within one month of receipt of that notification, a State may inform the Court that it is investigating or has investigated its nationals or others within its jurisdiction with respect to criminal acts which may constitute crimes referred to in article 5 and which relate to the information provided in the notification to States. At the request of that State, the Prosecutor shall defer to the State's investigation of those persons unless the Pre-Trial Chamber, on the application of the Prosecutor, decides to authorize the investigation".

[373] "Many U.S. opponents of the ICC express concerns that the ICC will be able to second-guess a valid determination by U.S. prosecutors to terminate an investigation or decline a person", in ELSEA (2006: 5).

same crimes and against the same perpetrators have been pursued[374]. In fact, the ICC Appeals Chamber has emphasised that it is up to states to provide evidence of proceedings, thus avoiding any infringements of states' sovereignty by the OTP[375]. Moreover, in pursuit of transparency, the OTP highlighted the several factors that are to be taken into account during the complementarity assessment[376]. Therefore, the relevance of policy papers relates to the fact that, albeit not binding, the Prosecutor sets *ex ante* specific parameters upon which he will evaluate whether the state was unwilling or unable to prosecute. In so doing, states and individuals will have expectations of the Prosecutor's assessment even before the actual evaluation of complementarity.

This last example allows us to introduce the third tool of control over the prosecutorial discretion: the "pragmatic accountability"[377]. Danner coined this term to describe the implied watchdog role played by states, individuals and NGOs over the work of the Prosecutor. On the one hand, NGOs and states will keep an eye on the ICC Prosecutor's examinations, publicly supporting or denouncing the OTP for politically led charges. Indeed, these opinions may have a great impact on the external perception of the ICC legitimacy. On the other hand, the Prosecutor – and the ICC in general – is totally dependent upon states' financing and cooperation. States can therefore leverage these tools to exercise control over the ICC Prosecutor.

Finally, the Assembly of States Parties (ASP) enjoy a formal check over the Prosecutor. Pursuant to Article 42(4) of the Rome Statute, the ASP elects the Prosecutor and the deputy prosecutors by absolute majority. Besides, ASP can remove the Prosecutor from office in case of misconduct or breach of his/her own duties under the Rome Statute[378]. The fact that the ICC Prosecutor may be removed by an absolute majority of the ASP members while a judge's dismissal will need a qualified majority[379] demonstrates that the Prosecutor's position is much more fragile and power abuses would be easily punished by ASP.

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[374] "An admissibility determination is not a judgement or reflection on the national justice system as a whole. If an otherwise functioning judiciary is not investigating or prosecuting the relevant case(s), the determining factor is the absence of relevant proceedings", in *Policy Paper on Preliminary Examinations*, para. 46.

[375] "As Kenya also acknowledges, a State that challenges the admissibility of a case bears the burden of proof to show that the case is inadmissible. To discharge that burden, the State must provide the Court with evidence of a sufficient degree of specificity and probative value that demonstrates that it is indeed investigating. It is not sufficient merely to assert that investigations are ongoing", in Judgement of the ICC Appeals Chamber, August 30, 2011, ICC-01/09-02/11-274, *The Prosecutor v. Uhuru Muigai Kenyatta, Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled ^'Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute"*, para. 61.

[376] Policy Paper on Preliminary Examinations, para. 49-58. For a more in-depth analysis of the parameters of the complementarity assessment, see RAZESBERGER (2006: 40-57).

[377] DANNER (2003: 525-534).

[378] Article 46(1)(a) of the Rome Statute.

[379] Article 46(2)(a) of the Rome Statute.

To sum up, the US critique of possible politically motivated charges by the Prosecutor may be correct to the extent that it relates to power abuses of an authority. Yet this critique may be moved towards any domestic or international prosecutor. It is true that *proprio motu* powers confer greater investigative competences to the ICC Prosecutor, but the same Rome Statute provides for different accountability and control instruments over the prosecutorial activity. In addition, data demonstrates that, over these years, the Prosecutor has adopted a much more cautious policy in examining and investigating cases on his/her own motion, compared to states' or UNSC's referrals. Finally, states retain pragmatic control mechanisms, such as financing, cooperation and, more importantly, complementarity.

2.1.3 Due process rights in the Rome Statute

The third legal critique that has been advanced by the United States concerns the due process rights recognized in the Rome Statute. More specifically, the USA argues that the ICC Treaty does not provide for those essential legal process rights which are enshrined in the US Constitution and in the Bill of Rights[380]. The right to a jury trial appears to be the most relevant among these ones. As a matter of fact, both Article III, Section 2, clause 3[381], and Amendment VI[382] of the US Constitution recognize the right to be pursued by a jury. Moreover, Associate Justice Antonin Scalia argued that "when the court deals with the content of this guarantee […] it is operating upon the spinal column of American democracy"[383].

The jury trial is surely a fundamental principle of the whole US judicial system. Yet it remains internal to the USA, since neither the US Constitution nor the Bill of Rights require its enjoyment by US nationals before international courts and tribunals. Indeed, Scheffer and Cox emphasized that "federal courts have rejected the notion that 'each element of due process as known to American criminal law must be present in foreign criminal proceeding before

[380] "The ICC will not offer accused Americans the due process rights guaranteed them under the US Constitution, such as the right to a jury trial", in ELSEA (2006: 6). See also Congressman Tom DeLay's words quoted in CERONE (2009: 157): "The ICC would, in effect, disregard not only Federal and State laws, but also the Uniform Code of Military Justice, thereby establishing a rogue court where foreign judges can indict, try and convict American troops for broadly defined and openly interpreted crimes, all without any of the fundamental legal rights guaranteed by the US Constitution".

[381] Article III, Section 2, clause 3 of the US Constitution: "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed".

[382] Amendment VI of the US Constitution: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence".

[383] SCHEFFER, COX (2008: 1034).

Congress may give a conviction rendered by a foreign tribunal binding effect'"[384]. In addition, even the US judiciary history acknowledges exceptions to the enjoyment of the jury trials. On the one hand, in *Ex parte Milligan*, the US Supreme Court implicitly recognized the possibility of military tribunals not to grant a jury trial to the accused[385]. It was however in *Ex parte Quirin* that the Court eventually took a clearer position on the right to a jury trial. The Supreme Court ended up arguing that the petitioners – being "unlawful combatants" – did not enjoy that right since "[w]e cannot say that Congress, in preparing the Fifth and Sixth Amendments, intended to extend trial by jury to the cases of alien or citizen offenders against the law of war otherwise triable by military commission, while withholding it from members of our own armed forces charged with infractions of the Articles of War punishable by death"[386]. Therefore, asserting that US servicemembers and militaries would not be granted the jury trial before the Court makes little sense insofar as they would not necessarily enjoy the same right even before military tribunals on the US soil[387].

Admittedly, the Rome Statute does not provide for a jury trial, but rather for proceedings adjudicated exclusively by judges[388]. The difference relates to the broader debate of judicial traditions, opposing common law to civil law systems. Of course, none of them is more correct than the other one, but the final choice for the civil law system can be easily explained by the fact that only a limited number of states worldwide adopt the common law system[389]. It was thus logical that the Europe-originated civil law system was eventually adopted, reflecting the domestic judicial system of the large majority of delegations at the Rome conference.

Contrarily to the jury trial debate, the US argument that even other due process rights are not guaranteed within the Rome Statute is much more easily dismissible. In fact, the ICC Treaty grants all the rights essential for a fair trial[390]: the *ne bis in idem* principle[391], the right not to incriminate one's self[392] and not to be subjected to coercion[393], to be present at the proceeding[394], to appeal a decision[395], to be presumed innocent[396], to a speedy trial[397], *et cetera*. Indeed, in dismissing the US critique, scholars usually quote a former

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[384] SCHEFFER, COX (2008: 1012).
[385] SCHEFFER, COX (2008: 1037). See *Ex parte Milligan*, 71 U.S. 2 (1866).
[386] *Ex parte Quirin*, 317 U.S. 1 (1942).
[387] SCHEFFER, COX (2008: 1047).
[388] Article 39 of the Rome Statute.
[389] SCHEFFER, COX (2008: 992). On the difference between common law's accusatorial system and civil law's inquisitorial tradition, see CASEY (2001: 867-868).
[390] GRIGORIAN (1999: 19-20); SCHEFFER, COX (2008: 1047-1055); BASSIOUNI, SCHABAS (2016a: 202-208).
[391] Article 20 of the Rome Statute.
[392] Article 55(1)(a) of the Rome Statute.
[393] Article 55(1)(b) of the Rome Statute.
[394] Article 63 of the Rome Statute.
[395] Article 81 of the Rome Statute.
[396] Article 66 of the Rome Statute.
[397] Article 67(1)(c) of the Rome Statute.

representative of American Bar Association, Monroe Leigh, who assessed that "the Treaty of Rome contains the most comprehensive list of due process protections which has so far been promulgated"[398].

In conclusion, this third critique reveals a sense of superiority of the USA in relation to the rest of the world. As Professor Romano described it, "[t]he United States believes itself to have one of the best, if not the best, constitutional systems for guaranteeing of human rights and fundamental freedoms; therefore, it sees little need for any external backup or second-guessing system, especially one that is not subject to the check of the American voters"[399]. Apart from the fact that the Court does not assess domestic judicial systems[400], this sentence is representative of the US exceptionalist posture: the USA considers itself to be exceptional insofar as it, *inter alia*, guarantees the greatest freedoms and rights in the world. Yet even this reasoning does not explain the rejection of the Court, since the ICC has been established to fight impunity. States retain primary jurisdiction over the crimes and the Court intervenes only if states are unwilling or unable to prosecute, that is to say, only when they do not guarantee the right to a fair trial.

2.2 The US contestation from an IR perspective

Section 2.1 of this chapter has been dedicated to the legal analysis of the US critiques towards the Court. The assessment seems revealing a *leitmotiv* throughout all the pages, namely that political interests and advantages supersede legal arguments. In particular, the theme of US exceptionalism is recurrent in all the three critiques. Firstly, the USA criticizes the ICC jurisdiction over nationals of non-party states, but, at the same time, it considers it to be acceptable in case the third party is a "rogue state"[401]. Secondly, the US military involvement worldwide may lead states and the ICC Prosecutor to politically motivated charges against the USA. Thirdly, the United States rejects the ICC to the extent that it does not guarantee the same high standards of due process rights. All the critiques thus demonstrate the presence of a close link between the US critiques towards the ICC and the US worldwide role. Therefore, an IR analysis appears to be compelling for the present dissertation.

In the following pages, we will provide an interpretation based on the three main paradigms of IR: constructivism, liberalism and realism. Firstly, relying on constructivist inter-subjective identities, we will analyse whether the ICC attitude towards the ICC has impacted other states' – mainly European ones' – perceptions of the USA. Secondly, starting from Hedley Bull's concept of international society, the dissertation will argue that the ICC proposes a different international society, founded on a divergent conceptualization of international law compared to that advanced by the United States.

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[398] AMANN (2002: 390). See also SCHEFFER, COX (2008: 1047-1048): "the ICC would provide a US defendant with essentially the same due process rights as enjoyed in US courts".
[399] ROMANO (2009: 432).
[400] *Supra* section 2.1.2.1.
[401] *Supra* footnote 328.

Thirdly, national interests will be at the core of the ICC deterrent hypothesis. Each IR paradigmatic assessment will be firstly introduced by a brief theoretical overview of the IR theory concerned.

2.2.1 Constructivist approach to IR: intersubjective identities

The constructivist approach to IR entails a "sociological perspective of international politics"[402], where states' actions and interests are the product of intersubjectivity. Some authors summed up[403] the three main assumptions at the core of constructivism: firstly, international politics – conceived as the relations among international units – is primarily determined by common values and norms among states, rather than material resources and power. Secondly, the identities and the interests of states are inter-subjectively determined by interactions among states themselves and, therefore, by the social environment of interplay as well. Finally, not only states' identities are dynamic and intersubjective, but international structures and institutions may seemingly change according to the meanings and values provided by states[404]. The concept of "identity" is crucial for the constructivist analysis here proposed, and Alexander Wendt's "Social Theory of International Politics" will provide a theoretical framework upon which the assessment will be based.

Wendt defines identities "as a property of intentional actors that generates motivational and behavioral dispositions"[405]. In other words, each unit conceives a specific identity for itself, but as identities are also the product of interactions among units, then external actors may attach different identities to the same first unit as well. Hence, identities are both internally and externally created, and the two perceptions may even collide. To explain this initial reasoning, Wendt makes the example of a professor who identifies himself as such, but whose students do not for whatever reason[406]. In addition, the same man may play sports, has children and parents, thus respectively being a sportsman, a father and a son. These examples show us that social relations influence the identities of every person in the world. Therefore, each individual does not have a single identity, but each interaction determines a specific one. The same can be said for states. For instance, during the Cold War, Italy conceived the United States as an ally, while the USSR as a rival.

That said, Wendt goes further and distinguishes among four different types of identities: "(1) personal or corporate, (2) type, (3) role, and (4) collective"[407]. Personal identities are the sole ones that are only internally created and, as such, cannot be multiple. Personal identities are the constitutive

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[402] BATTISTELLA *et al.* (2019: 316).
[403] BATTISTELLA *et al.* (2019: 316-318).
[404] Alexander Wendt's concept that "anarchy is what states make of it" is representative of this third pillar.
[405] WENDT (2006: 224).
[406] "John may think he is a professor, but if that belief is not shared by his students then his identity will not work in their interaction", in WENDT (2006: 224).
[407] WENDT (2006: 224-230). See also BATTISTELLA *et al.* (2019: 327-328).

elements which differentiate, for instance, states from families or individuals' groups. Yet, as such, they do not provide large information on what kind of state it is. While personal identities do not provide a distinction among states, type identities characterise them, for instance, by adding information relative to the economic, political, juridical status of the concerned country [408]. Not only each unit may attach different type identities to itself, but also other actors can do it in regard to the same first unit. When the United States described Iraq, Iran, Afghanistan, North Korea, *et cetera*, as rogue states, it attached a type identity to those countries. Conversely, they obviously did not consider themselves to be rogue. Thirdly, role identities are not linked to any specific characteristic of the concerned unit, but they are rather the product of social relations. A professor can be considered such only if his students or the people around him recognize his role as a professor. Therefore, the fact that role identities derive exclusively by social interactions has a crucial impact on units' actions. Indeed, if states consider the United States to be a hegemon, the USA will need to satisfy those states' expectations of action in order to maintain the role identity of hegemon. Otherwise, the same states which conceived the United States a hegemon would automatically start contesting that US role identity[409]. Finally, collective identities reproduce the ultimate stage of social interaction, namely identification, which is "a cognitive process in which the Self-Other distinction becomes blurred and at the limit transcended altogether"[410]. In other words, the identification of units means a merger of themselves into a single unit, thus favouring altruism rather than egoism among actors[411].

The present constructivist analysis will be based on the concept of role identities. In chapter 1, we have shown that, throughout the XX century, the United States have always been an advocate of global justice. It was thanks to the US pressure that the Nuremberg and the Tokyo trials were set up, instead of merely executing the Allies' enemies, as well as it was thanks to Madeleine K. Albright if the ICTY and the ICTR were instituted by the UNSC. In other words, we may affirm that the United States has taken a leading role in the promotion of global justice, attaching itself that role identity. The other states – especially its allies, such as the Europeans – have recognized this role to the

[408] "This simultaneously self-organizing and social quality can be seen especially clearly in the states system, where type identities correspond to 'regime types' or 'forms of state', like capitalist states, fascist states, monarchical states, and so on.", in WENDT (2006: 226).

[409] "This is not to say that enacting role identities is a purely mechanical affair, since most roles allow a measure of freedom or interpretation, but only within certain parameters. When those parameters are breached, or absent to start with, then role identities are contested", in WENDT (2006: 227).

[410] WENDT (2006: 229).

[411] WENDT (2006: 229) says that "whereas role identities do so in order that Self and Other can play different roles, collective identity does so in order to merge them into a single identity. And it builds on type identities because collective identity involves shared characteristics, but not all type identities are collective because not all involve identification. One can be a "French-speaker" without identifying with the French (the example of France's failed effort to form a collective identity with Algeria comes to mind)".

USA, thus further legitimizing the US role identity as promoter of global justice. Yet, as previously said, in order to maintain the same role identity, the United States is to satisfy other states' expectations of action. The "unsignature" of the Rome Statute and the aggressive policy towards the ICC surely does not reflect such expectations. Therefore, the following pages will be devoted to the US role identity in the global justice promotion, analysing whether such a US policy may have undermined its role identity in global justice.

2.2.1.1 The US role identity in the promotion of global justice

In the first years of Clinton's presidency, the United States pushed the UNSC to establish the ICTY and the ICTR in order not to leave an impunity gap in the Yugoslav and Rwandan conflicts. In meantime, the US executive publicly stood for the establishment of a permanent international criminal court and actively committed itself to the drafting of the Rome Statute. Yet the US inflexible goal not to be subjected to the ICC jurisdiction as a reflection of the US exceptionalism impacted the US role identity as leader promoter of global justice. Indeed, we argue that the subsequent stronger rejection of the ICC and the Abu Ghraib scandal did feed Europeans' doubts over that US role identity. Both facts and officials' declarations are tools to provide evidence of this identity crisis.

We can assume that three situations affected the US role identity as global justice promoter. Firstly, the Rome negotiations shed light on the first incongruencies between such a US role identity and the search for legal exceptions in the US conduct of international relations. Before the Rome conference, the US militaries and SecDef Cohen threatened to withdraw – or at least reduce – the US military presence abroad if states did not agree with the US requests of judicial exemptions from the ICC Treaty[412]. This move was perceived by David J. Scheffer himself as counterproductive especially because "pursuing [full immunity for US nationals] risked losing our credibility"[413]. The use of the term "credibility" by Scheffer related to two different contextual applications: on the one hand, the USA would have lost credibility of its negotiating power during the Rome conference, while, on the other hand, a reduced US credibility would have even "wast[ed] valuable political capital", for instance making "[US] human rights initiatives, whenever they may be targeted, […] suffer from an initial credibility gap"[414]. In other words, the US posture "created an impression of the United States 'being opposed to the whole concept' of the ICC"[415].

The signature of the Rome Statute was thus an essential step to be taken in order to foster confidence over the US role identity. First of all, by signing the Treaty, the USA would have not only reinforced its image as global justice

[412] *Supra* footnote 65.
[413] SCHEFFER (2012: 193).
[414] SCHEFFER (2001a: 14).
[415] JORGENSEN (2020: 139).

promoter[416], but it would have maintained the possibility of influencing the ICC functioning in the subsequent negotiations. Secondly, the refusal to sign the Rome Statute would have associated the USA to other non-signatories, such as what Scheffer called "the rogue gallery"[417], thus dangerously damaging the US image and its legitimacy as the leading global justice promoter. The US signature of the Rome Statute, however, just temporarily calmed other states' doubts over that US role identity.

Though the US executive thought that "[t]he 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"[418], we argue that the US aggressive policy towards the ICC did not reflect other states' expectations as regard to the US role identity as leading promoter of global justice. Indeed, the revival of US rejection towards the ICC via the adoption of ASPA and Article-98 agreements, as well as the "unsignature" of the Rome Statute pushed Europeans to challenge the US role identity in global justice once again. By adopting these three policies, the USA sent a clear message of rejection towards the ICC. In addition, this one was accompanied by other states' perception[419] that the White House was looking for granting impunity to its own servicemembers and authorities. In particular, ASPA and bilateral immunity "inflicted great harm on US credibility"[420].

This is not to say that the United States promoted impunity against the most heinous crimes. What these lines suggest is the fact that identity-creation is both internal and external to the unit concerned. ASPA, Article-98 agreements and the "unsignature" of the ICC Treaty fed the external perception of the US pursuit of US nationals' impunity, while that was not – at least publicly – the US objective. According to Ralph, in fact, the US objection to the ICC was part of a broader self-reaffirmation of the US image: in Ambassador Negroponte's words, "[t]he history of American law is very largely the history

[416] "As a signatory, the United States would sustain its leadership on international justice issues. That leadership is critical in order to continue to pursue non-ICC criminal justice initiatives in regions around the world. […] As a non-signatory, U.S. credibility to pursue ad hoc initiatives would rapidly decline", in SCHEFFER (2001b: 58-59).

[417] Supra footnote 78. See also SCHEFFER (2001b: 67): "Signature was the right action to take on December 31, 2000, because it would keep the United States 'in the game' to finish the work that had to be done to ensure favorable consideration of the Treaty in the United States Senate some day. For the United States to have entered 2001 as a non-signatory of the ICC Treaty would have aligned us, whether fairly or not, with such non-signatory states as the People's Republic of China, Pakistan, North Korea, Libya, Cuba, Vietnam and Iraq as seeming rejectionists of international justice".

[418] ELSEA (2006: 2).

[419] "The second problem is the appearance of impunity by the US government. The Article 98(2) agreements lack any requirement that in the event an American citizen on the receiving State's territory is sought by the ICC for alleged commission of an atrocity crime, the United States would investigate and conduct any necessary prosecution of that individual in the US courts, obligating the receiving State to extradite him or her to the United States for that purpose", in SCHEFFER, COX (2008: 1002).

[420] SCHEFFER (2012: 225). See also BUCHWALD *et al*. (2021: 18): "Many of our interlocutors told us that the net result had been to diminish U.S. credibility on issues of international justice generally and waste the expenditure of political capital on trifling text with little actual impact".

of that balance between the power of the government and the rights of the people. We will not permit that balance to be overturned by the imposition on our citizens of a novel legal system they have never accepted or approved, and which their government has explicitly rejected"[421]. It is clear that the externally-created and internally-affirmed identities here collide: while other states perceived the US policy to be contrary to the role identity in global justice, the United States itself considered it to be perfectly in accordance with its identity thanks to the domestic judicial system. Nevertheless, as constructivism assumes that role identities are the product of social interactions at the international level, an externally-perceived incoherence of expectation over a state's role identity may undermine the same identity.

The second crisis of the US role identity was thus marked by an increasing gap in the characterization of the US role identity as leading advocate of global justice. In 2002, the year of greatest opposition towards the Court, Scheffer's words described it as follows: "The credibility of the United States is beginning to falter considerably to be able to pursue [the exemption of US servicemembers], because so many of our friends and allies, such a larger number of them, are strong supporters of this court, are parties to this court and will not listen to those kinds of proposals in the future, because their game is in the ICC"[422].

Finally, the third crisis of the US role identity broke out with the leak of the Torture Memos. From that moment onwards, "the image of the US soldier around the world became associated with the depravity of Abu Ghraib"[423]. It is not important if such an association is correct or not, but rather whether that external perception did exist. The fact that, after the leak of the Torture Memos, the US government adopted a radically different policy towards the ICC can be considered a proof of the necessary US reaction to other states' perceptions, merely aimed at trying to keep legitimacy as the leading power in global accountability.

To sum up, a constructivist approach to the US-ICC relationship does not shed light to every implication it may have on the international relations. The proposed hypothesis affirms that the US rejection of the ICC may have seriously undermined the external perception of the US leading role in promoting a fair and just world[424]. It is true that the USA remains committed to the cause, but the friction between the possibility of ICC investigation over nationals of non-party states – e.g. US nationals – and the US desire of keeping

[421] ROACH (2009: 149).
[422] SCHEFFER (2002: 49-50).
[423] JORGENSEN (2020: 208).
[424] Ralph is supportive of this constructivist assessment as well: "A Wendtian analysis might also claim that there is inevitability to this process, and that by being so opposed to the ICC, the United States is not only missing an opportunity to shape the institutions that are emerging at a supranational level, but that it is also wasting valuable political capital.[…] Indeed, the evidence presented in these final sections demonstrates that if US opposition to the Court is not unsustainable, it is at least highly costly in ideological terms. And to the extent that it damages America's image as a leader that others wish to follow, it is ultimately counterproductive", in ROACH (2009: 147).

its exceptionalism may push US allies – in particular Europeans – to consider the US promoting role of global justice no more credible. The question at stake, thus, turns to be whether the Europeans are trying to supplant the US role identity as leading advocate of global justice. According to Scheffer, "it was clear […] that France wanted to come out the leader in Rome and be viewed as such"[425]. In order to clarify the European powers' role in promoting the ICC, we will apply another IR paradigm: liberalism, and in particular the English School.

2.2.2 The English School's institutional liberalism: the notions of international society and its institutions

The English School of IR proposes a perspective of international politics based on international order among states, this one conceived as "a pattern of activity that sustains the elementary or primary goals of the society of states, or international society"[426]. In order to fulfil these objectives – which Hedley Bull summed up in (1) the maintenance of the international system and society, (2) as well as of the states' sovereignty, (3) the pursuit of peace and (4) the limitation of violence – states establish norms of relationship which constitute the foundational basis of international societies. Therefore, an international society "exists when a group of states, conscious of certain common interests and common values, form a society in the sense that they conceive themselves to be bound by a common set of rules in their relations with one another, and share in the working of common institutions"[427]. This notion differentiates from the concept of international system[428], insofar as it requires the presence of values and rules which are shared and recognised among members of the international society.

In addition, Bull theorised the existence of two different conceptions of international societies: solidarist and pluralist ones[429]. In a solidarist – or Grotian – society, states found their relations upon "solidarity, or potential solidarity, with respect to the enforcement of law"[430]. Conversely, in a pluralist – or Oppenheim's – society, "states do not exhibit solidarity of this kind, but are capable of agreeing only for certain minimum purposes which fall short of that of the enforcement of the law"[431]. For the present analysis, it is important to stress two distinctions between types of international societies. Pluralist ones consider customary and treaty-based rules as the sole accepted sources

[425] SCHEFFER (2012: 190).
[426] BULL (2002: 8).
[427] BULL (2002: 13).
[428] BULL (2002: 9-10) defines an international system as the condition "when two or more states have sufficient contact between them, and have sufficient impact on one another's decisions, to cause them to behave - at least in some measure - as parts of a whole". In other words, there is an international system when its members interact among themselves and "the behaviour of each [becomes] a necessary element in the calculations of the other".
[429] See BULL (2019).
[430] BULL (2019: 72).
[431] BULL (2019: 72).

of law among nations, since they are the only ones that states have tacitly or explicitly consented to. On the contrary, the Grotian tradition recognises the primacy to natural law, thus possibly extending the variety of laws regulating relations among nations to those rules which have not been agreed to by states[432]. The second distinction concerns the position of individuals in those societies. Oppenheim adopted a top-down approach to international law, meaning that individuals may enjoy rights and duties, but these are derivative from the agreements of states. In other words, individuals are the object of international law. Conversely, solidarist societies conceive a bottom-up perspective of international law, individuals retaining the primary role. Indeed, according to this approach, "natural law […] is one which binds all human beings"[433]. Therefore, since individuals are the subject of international law, states are just the product of individuals' decisions.

The definition of an international society presumes, *inter alia*, the existence of common rules and institutions. While the former "provide precise guidance as to what behaviour is consistent with [societal] goals"[434], the latter identify "a set of habits and practices shaped towards the realisation of common goals"[435]. In other words, institutions are the tools that states use in order to encourage respect and enforce rules. They are the materialisation of interstate cooperation which enables international societies to perform their functions. As institutions are the product of states' cooperation, they may vary according to the temporal and political contexts in which they operate, as well as to the rise and fall of leading powers within the international system. Seemingly, international societies are dependent upon the contextual political and economic framework of the international system.

Throughout the entire history, indeed, different international societies have succeeded one another[436]. At the time of the writing of "The Anarchical Society", Bull asserted that peoples were living in the world international society, where not only states, but also international organizations, non-state actors and individuals were "bearer[s] of rights and duties"[437]. The establishment of the United Nations had been central to the development of that pluralist society, which differentiated from the previous *res publica Christiana* and the European international society to the extent that the world society of states was not the representation of any specific culture or civilization. Any state of the international system – whatever its economic model or political and juridical status – could claim membership of this international society.

Bull's historical analysis is here relevant because it acknowledges the possibility of challenges against an international society, and even shifts

[432] BULL (2019: 87-88).
[433] BULL (2019: 88).
[434] BULL (2002: 64)
[435] BULL (2002: 71).
[436] BULL (2002: 26-38). Bull recognized the succession of three main international societies: the Christian international society, the European international society and the world international society.
[437] BULL (2002: 37).

among different ones. History has shown that three categories of actors may pose these challenges[438]. Firstly, major powers – eager to build up a new international society favourable to their pre-eminence – may commit themselves to overthrow the international society in place at that moment. Louis XIV's France can be included in this first category. Secondly, non-state actors – e.g. international organizations – may favour these changes in order to deprive dominant states from their supremacy in international politics. Finally, "sub-state" or "trans-state" units – such as individuals involved in the French and the Russian revolutions – may challenge state-based international societies.

In other words, no one could categorically exclude the possibility that Bull's world international society might be challenged and supplanted by another one in the future. As a matter of fact, Bull's perspective was temporarily framed within the Cold War (the book was published in 1977), when the USA and the USSR – each being representative of different economic and political models – shared the destinies of the world. With the end of the Cold War and the emergence of the United States as the sole global power, the XX-century international pluralist society may have undertaken the path towards another transformation. This is not to say that, nowadays, membership of the international society is linked to a specific democratic governmental model, but some institutions may have acquired greater attention in international politics. The next section will specifically address them.

2.2.2.1 The Rome Statute as a new conceptualization of international law

Professor Jason Ralph argues that the occurrence of the Srebrenica and the Rwandan genocides pushed states to conceive international criminal justice as an institution of the international society[439]. Although Ralph is right, this statement does not take account of the distinct impact that the ICC may have had comparatively to the ICTY and the ICTR. Indeed, while the UNSC tribunals were *ad hoc* and temporary solutions, the International Criminal Court is permanent. The ICC nature may thus imply structural consequences on the approach to international criminal justice. This chapter's section will be devoted to the Rome Statute in specific, arguing that it goes beyond a mere international institution, but it rather proposes a different prevailing vision within the modern international society inasmuch as it advances a radically different conceptualization of international law.

Already at the beginning of the XXI century, the realist IR expert, Robert Kagan, underlined a contraposition in the world vision between Americans

[438] BULL (2002: 16).

[439] "The character of international society has changed radically since Bull first painted this picture in 1977. The change most relevant to our concerns of course is the emergence of international criminal justice as an institution of international society", in ROACH (2009: 134).

and Europeans[440]. The former still conceives international politics as framed by the Hobbesian lenses of "possession and use of military might"[441], where international rules can do little to stop the cycle of violence. Instead, the latter "is moving beyond power into a self-contained world of laws and rules"[442], in pursuit of the Kantian perpetual peace. Hence, Kagan came to the conclusion that "on major strategic and international questions today, Americans are from Mars and Europeans are from Venus. They agree on little and understand one another less and less. And this state of affairs is not transitory — the product of one American election or one catastrophic event. The reasons for the transatlantic divide are deep, long in development, and likely to endure"[443]. Kagan's essay became influential within the Bush's administration circles and its reasoning was indeed confirmed by the US global war on terror. Nevertheless, Kagan's argument relied on a realist approach to IR, according to which Europeans adopted such a policy because forced by their weaker status in the international system[444]. What is essential to keep in mind from Kagan's analysis does not only relate to the differentiation between the two peoples, but also to the fact that Europeans seem to be moved by a desire to control the United States. In fact, following the collapse of the USSR and the subsequent dissolution of the communist threat, Europeans started frightening "an

[440] "It is time to stop pretending that Europeans and Americans share a common view of the world, or even that they occupy the same world. On the all-important question of power — the efficacy of power, the morality of power, the desirability of power — American and European perspectives are diverging. Europe is turning away from power, or to put it a little differently, it is moving beyond power into a self-contained world of laws and rules and transnational negotiation and cooperation. It is entering a post-historical paradise of peace and relative prosperity, the realization of Kant's "Perpetual Peace." The United States, meanwhile, remains mired in history, exercising power in the anarchic Hobbesian world where international laws and rules are unreliable and where true security and the defense and promotion of a liberal order still depend on the possession and use of military might", in KAGAN (2002).

[441] KAGAN (2002).

[442] KAGAN (2002). See also MÉGRET (2001: 256-260).

[443] KAGAN (2002).

[444] "Indeed, [the Europe's military weakness] has produced a powerful European interest in inhabiting a world where strength doesn't matter, where international law and international institutions predominate, where unilateral action by powerful nations is forbidden, where all nations regardless of their strength have equal rights and are equally protected by commonly agreed-upon international rules of behavior. Europeans have a deep interest in devaluing and eventually eradicating the brutal laws of an anarchic, Hobbesian world where power is the ultimate determinant of national security and success. This is no reproach. It is what weaker powers have wanted from time immemorial. […] In an anarchic world, small powers always fear they will be victims. Great powers, on the other hand, often fear rules that may constrain them more that they fear the anarchy in which their power brings security and prosperity", in KAGAN (2002).

American leviathan unbound"[445], or in Bull's words, "the great irresponsible"[446]. As a consequence, they promoted new principles and international societies' institutions in order to repair "the 'instability' of an international society that enabled unaccountable great powers to decide when and where international criminal justice was done and to effectively grant for themselves exceptions to the laws they applied to others"[447]. In other words, Europeans challenged the American exceptionalism.

Therefore, we may assume that at the basis of the US opposition to the ICC, there is a radically different understanding of the role of international law in international politics. This, of course, ends up affecting the characterization itself of international institutions. One way through which Europeans have tried to keep control over the US search for exceptionalism has been the Rome Statute. First and foremost, the ICC institutive treaty puts individuals at the center of international politics, thus challenging the Westphalian primacy of states. In fact, individuals are held responsible for their own actions, even if pursued under the official capacity of representatives of states. This reflects the development of the state conceptualization: states are no more personified in their heads of states. Indeed, pragmatically speaking, the Rome Statute does not even recognize their immunity. The individual liability thus advances a new perspective comparatively to the UN-Charter-based international society: while the UN Charter and the ICJ Statute acknowledge states' responsibility, the Rome Statute does not link individuals' actions to states' liability. As a direct consequence, we may assume that norms in international criminal law bind human beings (these becoming subjects of international law) and decision-makers, rather than states.

That said, the shift from a state-based international society to a mankind-focused society of states is far from being complete. The Rome Statute still recognizes the primary role of states in prosecuting the most heinous crimes in conformity with the complementarity principle and heavily depends on states' cooperation. This is the main reason why this dissertation argues that like-minded states – and Europeans in particular – proposed, and not established, a gradual shift of focus on individuals by signing the ICC Treaty. In other words, the Rome Statute seems suggesting the first step towards a new solidarist international society where individuals are the main actors, while the respect of human rights, the centrality of international law and the

[445] KAGAN (2004: 87). See also KAGAN (2004: 71): "European do not fear that the United States will seek to control them; they fear that they have lost control over the United States and, by extension, over the direction of world affairs. If the United States is suffering a crisis of legitimacy, then, it is in large part because Europe wants to regain some measure of control over Washington's behaviour".

[446] "The disintegration of the international order at the present time has other sources besides the recent behaviour of the superpowers, and there is no more shallow diagnosis of our present discontents than that which attributes them solely to what has been done or not done by the United States and the Soviet Union, but it is difficult to find evidence in any part of the world that they are still viewed as the 'great responsibles'", in BULL (1980: 447).

[447] ROACH (2009: 135). The notion of "instabilities" of an international society comes from WENDT (2003).

individual criminal accountability are its cardinal institutions. Europeans have been the greatest politically and financially advocate of this shift[448], being inspired by their own regional pacification. This brought them to be eager to export the rule-based European model beyond the continental boundaries, thus making it "Europe's new *mission civilisatrice*"[449].

These lines suggest that there is a specific culture at the roots of such a solidarist conception of international law. The Rome Statute seems even to confirm it, by adopting three times the term "international community"[450]. This last one is not a scientific concept – such as "international society" – but it rather encompasses a sort of Western culture based on respect of human rights, liberal democracy and free market[451]. For instance, the US-coined "rogue state" label may be understood as aiming at identifying those states that cannot in any way be considered members of this international community, though being formally recognized as members of the UN-Charter-based pluralist international society. Nonetheless, our hypothesis is that the Rome Statute substitutes the liberal democracy and free market pillars with the individual accountability principle and the centrality of mankind.

In these terms, we can so understand why Leila Nadya Sadat coined the term "constitutional moment" to mean the Rome Statute adoption: "the Rome Conference represented a Constitutional Moment in international law – a decision to equilibrate the constitutional, organic structure of international law, albeit *sotto voce* [… which] suggest[s] an important shift in the substructure of international law upon which the Court's establishment is premised. Unable to effectuate the change explicitly, through formal amendment to the [UN]

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[448] The budget shares clearly demonstrate the European preponderance in the International Criminal Court's funding. In 2004, Germany's, France's, UK's and Italy's contributions accounted together for 53.2% of the ICC total budget, respectively scoring 19.4%, 12.8%, 11% and 10%. Data is taken from BOSCO (2014: 83).

[449] KAGAN (2002).

[450] The first one is in preambular paragraph 4 of the Rome Statute: "Affirming that the most serious crimes of concern to the *international community* as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation" (emphasis added). Then, at preambular paragraph 9: "Determined to these ends and for the sake of present and future generations, to establish an independent permanent International Criminal Court in relationship with the United Nations system, with jurisdiction over the most serious crimes of concern to *the international community* as a whole" (emphasis added). Finally, international community is employed in one of the most crucial articles of the Rome Statute. As a matter of fact, Article 5 states that "[t]he jurisdiction of the Court shall be limited to the most serious crimes of concern to the *international community* as a whole" (emphasis added).

[451] "The term 'community' signifies a normative structure that is prior to, or at least independent of, that which is created solely by the interaction of states. The term 'international community' is in this regard better suited to the kind of association that is structured by rules that states have not necessarily consented to. This view is associated with the Grotian tradition of international thought. This sees states as bound either by natural law or, in the case of neo-Grotian tradition, customary international law. […] Using Tönnies' distinction therefore, one might suggest that 'international community' is not the same as 'international society'. In the former, states have the obligations to a prior community of humankind, while in the latter states are only obliged to observe contracts they have consented to", in RALPH (2007: 8-9).

Charter, the international community, including not only States but global civil society, seized upon imaginative ways to bring about the shifts in constitutional structure necessary to permit international law to respond to the needs of international society and changing times"[452]. According to Sadat, the constitutional process of the Rome Statute has shifted the focus from states' authority to the "circumstances under which the international community may prescribe rules of international criminal law and punish those who breach such rules"[453]. Sadat's constitutional moment may even suggest that the Rome Statute "equates [the revolutionary impact of] the 1648 Treaty of Westphalia"[454]. This last statement is surely imbued with idealistic perspectives, but this dissertation's general premise assumes that the Rome Statute is just the last step of a systemic change of international law conceptualization, which started back in Nuremberg and reinforced itself with the establishment of the ICTY and the ICTR.

To sum up, we argue that the Rome Statute's impact on the contemporary international society has been far stronger than ICTY's and ICTR's. While the latter – being *ad hoc* institutions – may be just conceived as a temporary and a case-by-case solution, the permanent nature of the ICC presents the Rome Statute as a systemic approach to international criminal justice, thus being able to shape the founding rules of the international society. Indeed, this section has advanced the hypothesis that the Rome Statute provides for a completely different conceptualization and understanding of international law. The main issue at stake relates to a Kantian focus on individuals and mankind and a gradual shift towards a solidarist international society. The reference to "international community" within the Rome Statute may be understood as evidence of a solidarist perspective. This is the reason why this dissertation agrees with Sadat in affirming that the International Criminal Court does not only present a new institution in the international society, but it may rather foster a revolutionary change. Nevertheless, the constitutional moment of the Rome Statute appears to be incomplete[455]: the ICC still heavily relies on states' cooperation and intervenes only if states are unable or unwilling to investigate the most heinous crimes. In other words, the Rome Statute still recognizes the primary role of states in global justice. This is logical since a shift in international law conceptualization cannot be done overnight: it necessitates time and states' internalization.

That said, however, the success of the establishment of a new international society and its related institutions heavily depends on their acceptance

[452] CRYER (2005: 984).
[453] CRYER (2005: 991).
[454] RALPH (2007: 2).
[455] Sadat herself acknowledges this early stage of development: "[t]he negotiation of the Rome Treaty has worked a quite, albeit uneasy, revolution that has the potential to profoundly alter the landscape of international law. Yet no revolution would be complete without a counterrevolution, and many aspects of the Statute reflect the constraints of classical international law that did not yield to the forces of innovation and revolution at Rome", in CRYER (2005: 982-983).

by great powers[456]. Notwithstanding the ratification of the Rome Statute by 123 states parties which might foster significative developments in the conception of international law[457], the absence – and even more, the rejection – of the ICC Treaty by the greatest power in the Western world may dramatically impact the ICC success. Indeed, without the support of major states – and therefore without their power of example – the new institutions may leverage little support and never gain momentum. This is the reason why this dissertation asserts that Europeans – and the Rome Statute itself – are just proposing a different characterization of the international society, rather than establishing it. Furthermore, the absence of the US membership to the ICC might have an impact on the perception of the ICC efficacy in the international sphere. Therefore, the last section of this chapter will precisely deal with the critique over the deterrent effects of the International Criminal Court. The realist approach to the IR will be the theoretical framework of this analysis.

2.2.3 The realist approach to IR: national interests

In 1994, the US Congress adopted P.L. 103-236, affirming that "[i]t is the sense of the Senate that such a [permanent international criminal] court would thereby serve the interests of the United States and the world community"[458]. Yet the United States never acceded the ICC as a member state. In order to assess whether the ICC would actually "serve the interests of the United States", we need firstly to clarify the meaning of national interests by adopting a realist approach to IR.

Realism is based upon four main theoretical assumptions[459]. Firstly, the absence of an ultimate authority among nations makes states behave according to a permanent state of war. Secondly, since the international system is based upon the relations among countries, states are nowadays the primary and foremost actors of international politics. Thirdly, a balance of power is the only means which may grant a precarious international order among states. Finally, states act according to their own national interests whose main aim is the states' maximization of power. We can thus understand that national interests are not a tool to achieve greater objectives, but they are the end in themselves[460]: according to realists, states' primary national interest is power and/or security. Apart from this, Raymond Aron recognized also glory and idea as states' main interests. Glory is the condition of "*amour-propre* that animates men once they measure themselves against each other"[461], a sort of

[456] RALPH (2005: 30).
[457] "The Statute's wide ratification is likely to have some broader influence on the development of international criminal law, and any normative consequences of the Rome Statute will not be limited to States Parties. […] The fact that more than 120 States have so ratified the Rome Statute means that it has the potential to generate new customary law, particularly with respect to the elements of the crimes elaborated in the Statute", in CORMIER (2020: 18).
[458] PUBLIC LAW 103-236, 108 STAT. 469, SECTION 517(b)(2), April 30, 1994.
[459] BATTISTELLA *et al.* (2019: 122).
[460] BATTISTELLA *et al.* (2019: 127-128, 134).
[461] ARON (2017: 73).

power recognition by the other actors. Instead, the search for the triumph of an idea relates to the states' desire to elevate a specific world vision, or a cultural, social, economic or political idea as a universal truth[462]. While "an idea has a specific content, […] glory cannot be grasped since it is linked to the dialogue of men"[463].

Being states rational actors, the delineation of tools for achieving national interests will be based on rationality. This is the reason why, in the following pages, we will question whether the establishment of the International Criminal Court brought more benefits than costs, or *vice versa*. In fact, such an assessment is essential to understand if states could end up ratifying the Rome Statute or if there is a systemic problem where costs overcome benefits. According to realists, international law and international organizations exist inasmuch as they are beneficial to the major powers' national interests. In other words, no ethic or moral reasoning may be advanced from a realist perspective of the ICC. The USA may ratify the ICC Treaty only if the ICC would be perceived as a tool through which pursuing US national interests, not merely for the sake of punishing the violators of international law. For instance, from a realist perspective, the United States might claim to fight impunity, but that move would be justified by the US desire to promote the image of the USA in accordance with its role identity in the global justice domain. In other words, the final goal would not be the respect of international law, but rather the glory of the US leadership and the US idea of global justice.

Since neither the ICC itself nor the principle of individual criminal responsibility could account for a US realist-based national interest, but merely as instruments for pursuing the real interests, then the following pages will adopt an "instrumental approach"[464]. The former DOD legal adviser, John Bellinger, confirmed this perspective: "Our general approach to international courts and tribunals is pragmatic. In our view, such courts and tribunals should not be seen as an end in themselves but rather as potential tools to advance shared international interests in developing and promoting the rule of law, ensuring justice and accountability, and solving legal disputes"[465]. The issue at stake will concerns the debate over the deterrent effects of the ICC, or, put in other words, the efficacy of the ICC as a tool for pursuing national interests.

2.2.3.1 The US critique to the ICC's deterrent effects

Preambular paragraph 5 of the Rome Statute proclaims states parties' determination "to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes". In Rome, states agreed that the ICC did not endeavour only to punish the perpetrators of the most heinous crimes in the world, but the institutionalization of a permanent international criminal court would have also deterred the commission of

[462] ARON (2017: 75).
[463] ARON (2017: 76).
[464] ROMANO (2009: 421).
[465] ROMANO (2009: 419).

further similar crimes. The ICC deterrence hypothesis has been largely debated and, since it relies on the prevention of a crime occurrence, it is not easy to quantitatively analyse it[466]. On the contrary, from a qualitative perspective, we argue that the ICC would be useful – and thus favourable to the US interest in promoting its leadership in the global justice domain – both in the case of deterrent and non-deterrent effects. The only situation where the costs of instituting the ICC would overcome the benefits of its place in the global justice development would be in case of a confirmation of the anti-deterrent hypothesis, namely a condition where rather than preventing the commission of crimes, it would indirectly end up favouring it.

There is no doubt that deterrence was among the main drivers in the creation of the ICC[467]. But has the ICC actually achieved it? In trying to respond to this question, we will apply the deterrence theory. While the specific deterrence hypothesis assumes that a criminal who has been caught and prosecuted for the commission of a crime will be deterred to commit it in the future, general deterrence presumes that the knowledge of legal sanctions would *a priori* refrain actors to commit crimes[468]. This second hypothesis relies upon both legal and extra-legal sanctions: the former includes "certainty, celerity and severity of punishment"[469] as crime prevention tools, whereas the latter envisions conditions of "social censure (such as social isolation, reduced community respect, and the loss of interpersonal contacts) and self-disapproval (such as feelings of shame)"[470] as the main deterrent instruments.

Provided this general theoretical overview, we will look at the specific case of the International Criminal Court. In signing the Rome Treaty, President Clinton publicly declared that "a properly constituted and structured International Criminal Court would make a profound contribution in deterring egregious human rights abuses worldwide"[471]. Such a perspective was later reiterated by David J. Scheffer who acknowledged that "when you have a permanent international court standing, I think there will be a possible deterrence effect"[472]. Then, how could that be possible? A quantitative assessment would say little about the ICC deterrence ability. As a matter of fact, a low number of cases brought before the Court may be understood in two opposite ways. On the one hand, we may assert that few judgements are the fruit of the ICC

[466] In Ambassador Scheffer's words, "[f]or people that say there will be no deterrence at all is as factually unprovable as to say there will be deterrence. You can't prove that. How do you prove that? How do you prove the state of mind of a perpetrator of these crimes, or a likely perpetrator who suddenly says, if I do this, yeah, there is a chance they'll go after me very quickly, because there's a permanent court that can do so", in SCHEFFER (2002: 51).
[467] "The purposes of the ICC include: […] most importantly, deterring and preventing future human depredations", in BASSIONI, SCHABAS (2016a: 47). See also HODGSON (2020: 2): "Indeed, Klabbers argued that the deterrence was 'one of the main reasons (perhaps the main reason) underlying the creation of the ICC'".
[468] HODGSON (2020).
[469] HODGSON (2020: 4).
[470] HODGSON (2020: 4).
[471] Remarks by US President William J. Clinton, December 31, 2000, *Statement on the Rome Treaty on the International Criminal Court*.
[472] SCHEFFER (2002: 51).

deterrent effect[473]. On the other hand, we could also argue that a limited number of prosecutions would account for the ICC inefficacy to truly pursue criminals[474]. Furthermore, scholars have demonstrated that the ICC intervention sometimes reduced the duration of conflicts, but this data "was not statistically significant and thus it could not be definitively concluded that ICC involvement compels the conclusion of conflict"[475].

Conversely, a qualitative analysis may provide more persuasive arguments in favour of the deterrence hypothesis. Assuming that ICC crimes are committed or ordered by high-rank officials, who, in realist terms, adopt a rationalist approach in their decision-making process, they will take into consideration both legal and extra-legal sanctions arising from the commission of such crimes. Nevertheless, the ICC dependence over states' cooperation and the limited budgetary resources available to the OTP makes the Court legal sanctions uncertain. In addition, even the severity pillar of legal sanctions does not appear to be very influential, since punishments are understood to be not as severe as they should do for the category of crimes concerned by the Rome Statute[476]. Conversely, concerning extra-legal sanctions, the ICC plays the "role as a 'stigmatiser' in the international community"[477]. By raising awareness and attention on the crimes committed, the Court may radically impact the image of a certain head of state within the international and domestic public opinion and among states, thus affecting international relations with that country as well. Yet, we cannot posit a deterrence formula, since each officials' or head of states' decision and image depends on the communitarian context. In other words, extra-legal sanctions are conditional to the community's perspective. There can be cases where domestic public opinion would

[473] The first ICC Prosecutor, Luis Moreno-Ocampo, would stand for this second explanation: "The efficiency of the International Criminal Court should not be measured by the number of cases that reach the Court or by the content of its decisions. Quite on the contrary, because of the exceptional character of this institution, the absence of trials led by this Court as a consequence of the regular functioning of national institutions would be its major success", in BOSCO (2016: 88).

[474] This is usually one the mainstream critiques advanced against the Court. John Bolton, for instance, affirmed: "Third, the International Criminal Court fails in its fundamental objective to deter and punish atrocity crimes. Since its 2002 inception, the Court has spent over $1.5 billion dollars, while attaining only eight convictions", in Remarks to Federalist Society by National Security Adviser John Bolton, September 10, 2018, *Protecting American Constitutionalism and Sovereignty from International Threats*.

[475] HODGSON (2020: 8).

[476] HODGSON (2020: 9). See also POHRIB (2013: 230-232).

[477] HODGSON (2020: 11). Also, Emile Durkheim advanced a similar reasoning, in 1933, on the general effectiveness of punishing criminals: "[the] real function [of the punishment of criminals] is to maintain inviolate the cohesion of society by sustaining the common consciousness in all its vigor. If that consciousness were thwarted so categorically, it would necessarily lose some of its power, were an emotional reaction from the community not forthcoming to make good that loss. Thus, there would result a relaxation in the bonds of social solidarity. That consciousness must therefore be conspicuously reinforced the moment it meets with opposition. The sole means of doing so is to give voice to the unanimous aversion that the crime continues to evoke, and this by an official act, which can only consist in suffering inflicted on the wrongdoer", in ROACH (2009: 137).

strongly condemn the perpetrators, whereas there can be situations – such as in Kenya – where the head of state would exploit the ICC investigation as an "anti-Western rhetoric"[478] tool. In the case of the United States, however, the ICC investigation may impact the US image worldwide and undermine the US role identity in the global justice advocacy.

Instead, the greatest rejectionists of the ICC within the US executive circles claim that the Court does not produce any deterrent effect. Firstly, according to John Bolton, since deterrence heavily relies upon perceptions of effectiveness, which lack in the ICC case, then "the court and the prosecutor will not achieve their central goal because they do not, cannot, and should not have sufficient authority in the real world"[479]. On the contrary, Professor Madeline Morris proposes a different explanation: "[t]he very states that are most likely to be implicated in serious international crimes are the least likely to grant jurisdiction over their nationals to an international court"[480]. However, this reasoning neglects the geographically-speaking universal reach of UNSC's referrals and presumes the absence of any extra-legal sanctions. Finally, the example of the ICTY has been adduced, as well, to demonstrate the absence of any deterrent ability of the international criminal tribunals[481]. In fact, the ICTY was created in 1993, and it did not manage to prevent the occurrence of the Srebrenica genocide in 1995.

Even if all these arguments were correct, we could anyway affirm that a lack of deterrent ability of the ICC would not automatically make the Court a useless international criminal tribunal. Insofar as the International Criminal Court tries perpetrators of the most heinous crimes, it contributes to the fight against impunity. In other words, the benefits of an ICC standing would be greater that the costs of its non-existence.

The only situation where the establishment of the ICC would produce more costs than benefits would be in case of systemic anti-deterrence consequences. Frédéric Mégret defined it as "the possibility that international criminal justice might actually provoke crime"[482]. This criminogenic hypothesis could be explained by (1) an increase of violence by the same perpetrators because aware that a pacific and legal resolution would be detrimental to themselves, or (2) by an increase of violence by the victims as a form of vengeance against *hostis humani generis*; (3) by a lack of credible threat of severe punishment by the ICC or (4) by the selectivity of the ICC and the critique of double standards application which ends up delegitimising the work of the Court and encouraging anti-ICC narratives[483]. For instance, statistics show that while "there was a decline in violence following ICC involvement in the Democratic Republic of the Congo, Uganda, Sudan, and Libya, […] a spike

[478] HODGSON (2020: 11).
[479] BOLTON (2001a: 175).
[480] MORRIS (2001: 13).
[481] ROACH (2009: 143); SMIDT (2001: 187-195).
[482] MÉGRET (2020: 2).
[483] For a thorough analysis on the ICC anti-deterrence hypothesis and its causes, see MÉGRET (2020).

in violence following ICC involvement [occurred] in the Central African Republic and Nigeria"[484]. Nevertheless, Mégret himself argues that, firstly, an anti-deterrence condition would not be determined by the sole international criminal justice, but it would be the consequences of multiple factors, including the political and societal contexts. Therefore, arguing that the ICC would encourage individuals to commit crimes would be a reductive statement. Secondly, a confirmation of the anti-deterrence hypothesis does not posit that international criminal justice encourages people to commit crimes, but rather that there could be limited cases of anti-deterrence, due to the combination of multiple factors, albeit an overall deterrence effect by the same international criminal tribunals[485].

The US main objection to the deterrence hypothesis of the ICC, however, neither relies upon a lack of deterrence nor on criminogenic effects of the Court's jurisdiction. Instead, the USA argues that, due to politically motivated charges, be them the fruit of enemies' attempted vengeance through states' referrals or via Prosecutor's *proprio motu*, the Court would end up promoting the wrong deterrence, namely preventing military interventions by the United States[486]. This adverse implication would be twofold. On the one hand, the United States considers military intervention or its threat as the best deterrent method to prevent further violence by oppressor states[487]. Therefore, reducing military presence abroad would automatically limit the US abilities of deterrence. On the other hand, by promoting the wrong deterrence, the Court would compel the United States to (partly) renounce to its leadership in the peace and security domain worldwide. This second option has been clearly described by Major Michael L. Smidt who – adding an anti-deterrence perspective as well – asserted that "[p]olitical prosecutions before the ICC are so probable that the forces of good may be deterred from taking on the forces of evil. Since the forces of evil will recognize the deterrent influence of such politically based prosecutions on potential responders, the leaders of these regimes may make entirely rational decisions to commit acts of aggression, knowing they can act without fear of military intervention from foreign forces"[488]. Nevertheless, the Court does not coerce states to desist from the use of legitimate force. It does only intervene when that force is implemented without any regard for the obligation to refrain from the commission of genocide, crimes against humanity and war crimes. Furthermore, Smidt claimed that "it is both unrealistic and dangerous to scrutinize and judge in a court of law every action [of the soldiers] on the battlefield", since "[h]olding the common soldier criminally culpable for even the smallest violation of the laws of

[484] HODGSON (2020: 8).
[485] HODGSON (2020: 2).
[486] ELSEA (2006: 4): "The threat of prosecution, however, could inhibit the conduct of U.S. officials in implementing U.S. foreign policy".
[487] Senator Rod Grams claimed: "The fact remains, the most effective deterrent is the threat of military action; and this court is undermining the ability of the United States to do that very thing", in S. Hrg. 105–724, July 23, 1998, p. 2.
[488] SMIDT (2001: 158).

war may distract the international community from the real threat to society and world peace: aggressive and oppressive regimes"[489]. This statement, however, misinterprets the Rome Statute. Indeed, the ICC Treaty is very clear in defining crimes against humanity as "part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack"[490], and war crimes as "part of a plan or policy or as part of a large-scale commission of such crimes"[491]. Hence, servicemembers and authorities would not be criminally prosecuted for "the smallest violation of the laws of war"[492], but rather for systemic and planned infringements of these norms. The application of the gravity principle and the OTP's commitment to punish "those who bear the greatest responsibility"[493] appears to demonstrate the rejection of Smidt's argument.

In conclusion, this section did not aim at stating that the non-ratification of the Rome Statute would be contrary to the US national interests. Indeed, the definition of national interest is determined by heads of states and high-level officials, as representatives of their population. What we can just do is explaining the benefits of acceding, or at least cooperating with, the Court, and these are largely consistent with the role identity of the USA in the global justice domain. Apart from morale and ethics – which are not taken into account by the realist approach to IR – a more positive attitude towards the Court would demonstrate to the US' allies that the White House has never declined to stand up as leading advocate of global justice. Such a move would be coherent with the US search for glory and idea, but admittedly, in the US eyes, it may compel the United States to use power without legal exceptions. Whatever the conclusions are, the friction between the ICC and the US exceptionalism is evident.

Conclusion to Part I

Part I of this dissertation has been devoted to a general analysis of the relationship between the USA and the ICC. In chapter 1, we have argued that, regardless of presidents or leading political parties, the United States has always tried to obtain immunity for its servicemembers and authorities. Indeed, both Republicans and Democrats have been concerned of possible ICC investigations against US nationals, which might affect the US global military role by exposing its troops to politically motivated charges.

Chapter 2, instead, was aimed at explaining the interconnection between the US-ICC relationship and US exceptionalism. Eager to deconstruct this linkage, we have, firstly, addressed the main US critiques from a legal perspective. Many of them have once again revealed an exceptionalism-based

[489] SMIDT (2001: 159, 209-210).
[490] Article 7 of the Rome Statute.
[491] Article 8 of the Rome Statute.
[492] SMIDT (2001: 159).
[493] Policy Paper by the ICC Office of the Prosecutor, September 2003, ICC-OTP 2003, *Paper on some policy issues before the Office of the Prosecutor*, p. 7.

political reasoning at their roots. Then, we have moved towards an IR assessment, by adopting its three main theories: constructivism, liberalism and realism. The English School approach has been particularly relevant to grasp the friction between two different conceptions of international law: a state-based approach against a mankind-focused perspective.

In conclusion, Part I has provided a general theoretical framework to better understand the Afghanistan case before the ICC. In other words, the Prosecutor's investigation represents everything that the United States has striven for years to prevent: the ICC jurisdiction over nationals of non-party states, the activation of the *proprio motu* powers and an investigation in a highly politicised context. The following pages will, therefore, present the Situation in Afghanistan and its implications both for the United States and for Afghanistan.

Part II

The USA in Afghanistan: a case study of US judicial exceptionalism before the ICC

3. The Situation in the Islamic Republic of Afghanistan: the authorisation to investigate to the ICC Prosecutor

Soon after the 9/11 attacks, the United States intervened in Afghanistan – pursuant to Operation Enduring Freedom – where the Taliban government was said to give protection to the terrorist organisation of al Qaeda, accused to have organised the attacks. In less than three months, the United States overthrew the Taliban regime and instituted an *interim* government, led by Hamid Karzai. In December 2001, the UNSC adopted Resolution 1386, establishing the International Security Assistance Force (ISAF) which was committed to "the maintenance of security in Kabul and its surrounding areas"[494]. Although the USA contributed to ISAF, it also maintained its troops involved in Operation Enduring Freedom, whose main aim was to eradicate al Qaeda and its affiliated groups. Yet, the Taliban never surrendered and resorted to a guerrilla warfare against the Afghan government, the Afghan National Security Forces (ANSF)[495] and its international allies, including the United States of America. It was during this conflictual condition that many alleged war crimes and crimes against humanity were committed by the Taliban and their affiliated armed groups, by the ANSF, and, more importantly for the interest of this dissertation, by US soldiers and Central Intelligence Agency (CIA) personnel.

In 2006, the ICC Prosecutor Luis Moreno Ocampo opened a preliminary examination on alleged crimes committed in Afghanistan, but it was not until November 2007 that he made his decision public. It was only from 2011 that the ICC Prosecutor annually updated on his/her own findings on the Situation in Afghanistan[496] and, in 2016, the ICC Prosecutor Fatou Bensouda declared that the OTP would have adopted "a final decision on whether to request the Pre-Trial Chamber authorisation to commence an investigation into the situation in the Islamic Republic of Afghanistan since 1 May 2003,

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[494] UNSC Resolution, S/RES/1386, December 20, 2001, para. 1. The creation of ISAF had already been preconized by Annex I to the Agreement on provisional arrangements in Afghanistan pending the re-establishment of permanent government institutions (also known as "Bonn Agreement").

[495] The acronym ANSF regroups the Afghan National Army (ANA), the Afghan Air Force (AAF), the Afghan National Police (ANP), the Afghan Local Police (ALP) and the National Directorate of Security (NDS). For further information on its structure and coordination, see Document of the ICC Office of the Prosecutor to Pre-Trial Chamber III, November 20, 2017, Situation in the Islamic Republic of Afghanistan, ICC-02/17-7-Red, *Request for authorization of an investigation pursuant to article 15* [henceforth "*Request for authorisation*"], paras. 64-67.

[496] OTP's report, December 13, 2011, *Report on Preliminary Examination Activities (2011)*, paras. 20-30; OTP's report, November 22, 2012, *Report on Preliminary Examination Activities (2012)*, paras. 20-39; OTP's report, November 25, 2013, *Report on Preliminary Examination Activities (2013)*, paras. 19-56; OTP's report, December 2, 2014, *Report on Preliminary Examination Activities (2014)*, paras. 75-102; OTP's report, November 12, 2015, *Report on Preliminary Examination Activities (2015)*, paras. 111-135; OTP's report, November 14, 2016, *Report on Preliminary Examination Activities (2016)*, paras. 192-230; OTP's report, December 4, 2017, *Report on Preliminary Examination Activities (2017)*, paras. 230-281.

imminently"[497]. Indeed, on October 30, 2017, Bensouda formally filed a request for authorisation to investigate alleged war crimes and crimes against humanity committed in Afghanistan.

3.1 The Prosecutor's preliminary examination and the request for authorisation to proceed to Pre-Trial Chamber II

As previously discussed in section 2.1.2, in requesting the authorisation to proceed with an investigation into the Situation in Afghanistan, the ICC Prosecutor had to assess, firstly, whether there was reasonable basis to believe that crimes had been committed and if the jurisdiction, the admissibility and the interests of justice criteria were complied with. In eleven years of preliminary examination, the Prosecutor managed to collect enough detailed information, as well as victims' and NGOs' communications, relating to war crimes and crimes against humanity committed in Afghanistan, from 2003 onwards. Despite some problems in the identification of the perpetrators of such crimes[498], she ended up requesting a formal investigation against crimes carried out by the Taliban and affiliated armed groups[499], by the ANSF, as well as by US servicemembers and CIA personnel. From a quantitative perspective, the Taliban are surely the main perpetrators, whose acts were executed against more than fifty thousand victims[500]. Yet, given the specific purpose of this dissertation, we will solely focus on the request for investigation for crimes committed by US armed forces and CIA personnel.

The first step of the Prosecutor's preliminary examination consisted in collecting data suitable for corroborating a positive assessment of the "reasonable basis" test. Relying on documents disclosed by FOIA (Freedom of Information Act) requests and on findings of two US congressional inquiries, namely the Senate Committee on Armed Services Inquiry into the Treatment of Detainees in US Custody[501] and the Senate Report on CIA's Detention and Interrogation Program[502], the Prosecutor came to the conclusion that "there is

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[497] *Report on Preliminary Examination Activities (2016)*, *supra* footnote 496, para. 230.
[498] *Request for authorisation*, *supra* footnote 495, para. 30.
[499] The ICC Prosecutor specified the term "affiliated armed groups" as meaning "all armed groups […] engaged in hostilities against the Government of Afghanistan and its supporters". In practical terms, it includes the Haqqani Network, the Hezb-e-Islami Gulbuddin (HIG) and al Qaeda. For further information relating to these groups, see *Request for authorisation*, *supra* footnote 495, paras. 57-62.
[500] The Prosecutor precisely asserted that "[i]n terms of scale and temporal spread, between 2009-2016, UNAMA documented over 50,000 civilian casualties (over 17,700 deaths and over 33,300 injuries) attributed to the Taliban and other anti-government elements, including 6,994 civilian casualties in 2016 alone" (*Id.*, para. 93). Conversely, concerning crimes committed by ANSF (*Id.*, paras. 161-186).
[501] Report of the Committee on Armed Services of the United States Senate, November 20, 2008, *Inquiry into the Treatment of Detainees in the U.S. Custody*.
[502] Report by the United States Senate, December 9, 2014, No. 113-288, *Senate Select Committee on Intelligence Committee study of the Central Intelligence Agency's detention and interrogation program together with forward by Chairman Feinstein and additional and minority views*.

overall consistency in the detailed allegations regarding the conditions of detention and treatment in the detention facilities run by both the ANSF as well as by the US armed forces and the CIA"[503]. Therefore, "the information available provides a reasonable basis to believe that members of United States of America ('US') armed forces and members of the Central Intelligence Agency ('CIA') committed acts of torture, cruel treatment, outrages upon personal dignity, rape and sexual violence against conflict-related detainees in Afghanistan and other locations, principally in the 2003-2004 period"[504].

Once the "reasonable basis" criterion was met, the Prosecutor assessed whether the crimes fell within the ICC jurisdiction. Information available to the OTP revealed that acts carried out by both US armed forces and CIA personnel fell within the *ratione materiae* of the Rome Statute, specifically amounting to war crimes. In particular, the US servicemembers and CIA officials are alleged to have perpetrated acts of "torture and cruel treatment (article 8(2)(c)(i)), outrages upon personal dignity (article 8(2)(c)(ii)) and rape and other forms of sexual violence (article 8(2)(e)(vi)"[505] respectively against at least fifty-four and twenty-four detainees[506]. Yet a three-level distinction between the two conducts should be highlighted. Firstly, the acts committed by the US servicemembers amounted to "a relatively small percentage of all persons detained by US armed forces which, during the period when the alleged crimes occurred, totalled approximately 10,000 persons"[507]. On the contrary, albeit the smaller number of cases, CIA's use of these techniques was much more widespread and fell within a broader policy framework. As it will be explained in the following pages, this distinction does not, however, affect the gravity of the crimes perpetrated by US nationals.

A second crucial distinction concerns the existence of an overall policy of approval. In both cases, the use of such techniques was implemented "cumulatively and consistently for extended periods"[508] with the aim of obtaining intelligence information on activities, locations, and capabilities of the Taliban and al Qaeda. That said, a slight difference should be underlined. In the case of the US armed forces, although DOD (Department of Defense) high-level officials – including the Secretary of Defense – were aware of the use of such techniques, there had never been a formal authorisation to their implementation. Indeed, the official consent to the use of such enhanced interrogation

[503] *Request for authorisation*, *supra* footnote 495, para. 36.
[504] *Id.*, para. 4.
[505] *Id.*, para. 187.
[506] *Id.*, para. 189. Since these crimes have been committed within the framework of a non-international armed conflict, they represent cases of war crimes and not of crimes against humanity. On the contrary, "the contextual elements of crimes against humanity require: (i) an attack directed against any civilian population amounting to a course of conduct involving the multiple commission of acts referred to in article 7(1) of the Statute; (ii) pursuant to or in furtherance of a State or organisational policy to commit such attack; (iii) the widespread or systemic nature of the attack; (iv) a nexus between the individual act and the attack; and (v) the perpetrator's knowledge of the attack and that his or her acts form part of it" (*Id.*, para.73).
[507] *Id.*, para. 355.
[508] *Id.*, para. 192.

techniques was only given by the local US commanders CJTF-180 (Combined Joint Task Force – 180) in Afghanistan[509]. On the contrary, the CIA interrogation program had been reviewed and approved as "official policy"[510] by the CIA Director himself, who listed twelve different techniques which could be used in order to extrapolate useful information on the Taliban and al Qaeda[511]. Nevertheless, even if a difference between approvals may be rightly affirmed, we should also remind the reader that on February 7, 2002, the then US President George W. Bush signed a memorandum which affirmed that "common Article 3 of Geneva [Conventions of 1949] does not apply to either al Qaeda or Taliban detainees"[512]. In other words, there was a general acquiescence to the use of enhanced interrogation techniques against terrorists.

Finally, the third difference relates to the *locus commissi delicti*. While all the crimes purportedly carried out by the armed forces occurred on the detention centres in Afghanistan – mainly, but not solely, at the Bagram and Kandahar airbases[513] – the CIA used "black sites"[514], namely secret detention facilities whose precise location in Afghanistan is still publicly unknown. In addition, CIA sometimes transferred detainees to other black sites outside the Afghan borders, such as in Stare Kiejkuty (Poland), in Antaviliai (Lithuania)

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[509] The ICC Prosecutor concluded that "the available information shows that (i) CJTF-180 Command approved an interrogation policy that included the use of the enhanced interrogation techniques describes above; (ii) this interrogation policy was brought to the attention of DOD Working Group on Interrogations and to the Office of the Secretary of Defense (although it was neither formally approved nor rejected); (iii) there is reasonable basis to believe that a number of conflict-related detainees in Afghanistan were in fact subjected to those techniques; and (iv) there is reasonable basis to believe that such conduct constitutes torture, cruel treatment, outrages upon personal dignity, rape and/or sexual violence", (*Id.*, para. 228).

[510] *Id.*, para. 245.

[511] *Id.*, para. 241.

[512] Memorandum by the White House, February 7, 2002, No. 499, *Humane treatment of al Qaeda and Taliban detainees*. Common Article 3 of the four Geneva Conventions (August 12, 1949) reads as follows: "In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions: (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed ' hors de combat ' by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons: (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (b) taking of hostages; (c) outrages upon personal dignity, in particular humiliating and degrading treatment; (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples. (2) The wounded and sick shall be collected and cared for. An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict. The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention. The application of the preceding provisions shall not affect the legal status of the Parties to the conflict".

[513] *Request for authorisation*, *supra* footnote 495, para. 200.

[514] "The information available indicates that at least four such facilities were situated on the territory of Afghanistan: 'Cobalt', 'Gray', 'Orange' and 'Brown'" (*Id.*, para. 201).

and others in Romania[515]. In all of these cases, however, the ICC has *ratione loci* jurisdiction since Afghanistan, Poland, Lithuania and Romania are all parties to the Rome Statute. The only implication concerns the *ratione temporis* jurisdiction of the Court, given the different date of the entry into force of the Rome Statute: while in Afghanistan, crimes can be investigated only from May 1, 2003, onwards, the Rome Statute entered into force on July 1, 2002, for Poland and Romania, and on August 1, 2003, for Lithuania.

The ICC Prosecutor even approached the possibility of extending the investigation into Afghanistan, while respecting the jurisdictional scope laid down in the Request. According to her, "should the Pre-Trial Chamber decide to authorise an investigation under article 15(4), this should not limit the Prosecution's investigation into only the specific crimes set out in this Request; rather, the Prosecution should be able to conduct an investigation into any other alleged crimes that fall within the scope of the authorised situation"[516]. Indeed, given the continued condition of conflict among parties in Afghanistan which may lead to the commission of further crimes, Bensouda reasoned that the OTP should be empowered to investigate other acts which are "sufficiently linked to the authorised situation"[517].

Then, the ICC Prosecutor moved to the assessment of the admissibility criteria, namely complementarity and gravity. Concerning Afghan domestic proceedings on US nationals, the Prosecutor was fast in asserting that "no national investigations or prosecutions have been conducted or are ongoing in Afghanistan with respect to crimes allegedly committed by members of international forces, in line with status of forces agreements in place between Afghanistan and the United States as well as between Afghanistan and ISAF troop contributing countries, which provide for the exclusive exercise of criminal jurisdiction by the authorities of the sending State"[518]. Notwithstanding this national impediment, the ICC Prosecutor implicitly argued that, since the Afghan judiciary is unable to investigate crimes committed by the US nationals pursuant to the US-Afghan SOFA – as well as the Article-98 agreements – the ICC owns jurisdiction to pursue them. In other words, the Prosecutor implicitly denied any legal effect of SOFAs and Article-98 agreements on the ICC jurisdiction.

Instead, the Prosecutor's assessment of complementarity with regard to US national proceedings was different. Contrarily to Afghanistan, the United States declared to the ICC Prosecutor that "it ha[d] conducted thousands of investigations into detainee abuse"[519]. Yet, the Prosecutor noted that the

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[515] *Id.*, para. 203.
[516] *Id.*, para. 38.
[517] *Ibidem*.
[518] *Id.*, para. 289. We should note that the issue of the Article-98 agreements' implications on the ICC jurisdiction was almost totally neglected both by the OTP and by the Chambers (the PTC II and the Appeals Chamber). Therefore, this matter will not be addressed here, but next chapter will be dedicated to it as a reflection of the conflict between the US search for exceptionalism and the Rome Statute.
[519] *Id.*, para. 300.

United States did not provide "specific information with a sufficient degree of specificity and probative value that demonstrates that proceedings were undertaken with respect to cases of alleged detainee abuse by members of the US armed forces in Afghanistan within the temporal jurisdiction of the Court"[520]. As we have previously analysed in section 2.1.2.1, it is up to the concerned states to provide sufficient evidence demonstrating that proceedings have been conducted – or are underway – for the specific crimes and against the same perpetrators of the Prosecutor's preliminary examination. However, at the moment of filing the *Request for authorisation*, the OTP could not affirm to be satisfied by the US response. Therefore, Prosecutor Bensouda acknowledged the admissibility of the case before the ICC until "the US authorities choose to provide [probative information on such convictions] in the context of article 18 proceedings or during the course of subsequent case-specific investigative inquiries, should the Chamber grant this request"[521].

On the contrary, pertaining to CIA's alleged crimes, it seems that high-level authorities of the Central Intelligence Agency actively intervened in order not to be inquired by the US Congress, including by ordering the destruction of CIA interrogations' videotapes[522]. Moreover, the US Attorney General clarified that "the Department of Justice [would have] not prosecuted anyone who acted in good faith and within the scope of the legal guidance given by the Office of the Legal Counsel regarding the interrogation of detainees"[523]. In other words, those who followed the DOJ instructions – including the non-application of common Article 3 of the Geneva Conventions (1949) to the Taliban and the terrorists – would have not been pursued. Therefore, given the absence of recorded domestic proceedings on the purported CIA crimes, the Prosecutor recognized the admissibility of the case.

Finally, concerning the CIA crimes committed in the black sites in Poland, Romania and Lithuania, the OTP acknowledged that investigations were already underway in all of the three states parties. Therefore, in case of PTC's authorisation, the OTP would have continued to check whether those national prosecutions were directed towards the same perpetrators and against the same crimes as set out in the Request[524].

The second admissibility parameter concerns gravity. Indeed, even though the OTP highlighted a difference in conduct of armed forces and CIA personnel – the former carrying out war crimes on a limited number of detainees, while the latter as part of an official policy – the Prosecutor's preliminary examination highlighted that both met the gravity criterion. Indeed, the commission of torture amounted to a violation of a *jus cogens* norm, thus raising the level of gravity of these acts. Besides, the fact that these crimes were "committed with particular cruelty […] over prolonged periods"[525] corroborated

[520] *Id.*, para. 296.
[521] *Ibidem*.
[522] *Id.*, para. 313.
[523] *Id.*, para. 322.
[524] *Id.*, paras. 329-334.
[525] *Id.*, para. 354.

their grievous nature. Therefore, the Prosecutor concluded that the second admissibility parameter was complied with, as well.

Finally, the OTP had to assess whether "there [were] nonetheless substantial reasons to believe that an investigation would not serve the interests of justice"[526]. The Prosecutor asserted that the victims "manifested their interest in seeing justice done"[527]. As a matter of fact, the ICC Registry received 794 individual and collective victims' representations, whose 699 were dispatched to Pre-Trial Chamber II[528]. In parallel to the interests of victims, the gravity of the crimes committed as well as the "recurring patterns of criminality"[529] led the Prosecutor to favourably assess the compliance with the interests of justice parameter.

In conclusion, having positively noted that all the necessary requirements were met, the ICC Prosecutor asked "the Pre-Trial Chamber to authorise the commencement of an investigation in the Islamic Republic of Afghanistan in relation to alleged crimes committed in the territory of Afghanistan in the period since 1 May 2003, as well as other alleged crimes that have a nexus to the armed conflict in Afghanistan and are sufficiently linked to the situation and were committed on the territory of other States Parties in the period since 1 July 2002"[530].

3.2 The Pre-Trial Chamber II's denial of authorisation (2019)

On April 12, 2019, Pre-Trial Chamber II unanimously denied the Prosecutor's request to open an investigation into the Situation in Afghanistan on the basis of the interests of justice test (henceforth "*PTC's Afghanistan Decision*"[531]). Yet, before reaching such a conclusion, the PTC analysed each of the required procedural assessments made by the Prosecutor[532]. First of all, the Pre-Trial Chamber acknowledged that reliable and authoritative information provided substantial reasons to believe that such crimes had been committed[533] and that they fell within the four caveats (*ratione materiae*, *ratione personae*, *ratione loci* and *ratione temporis*) of the Court's jurisdictional reach[534].

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[526] Article 53(1)(c) of the Rome Statute.
[527] *Request for authorisation*, *supra* footnote 495, para. 365.
[528] Report of the ICC Registrar, ICC-02/17-29-AnxI-Red, February 20, 2018, *Annex I-Red to the Final Consolidated Registry Report on Victims' Representations Pursuant to the Pre-Trial Chamber's Order ICC-02/17-6 of 9 November 2017***,** para. 15-16. Some of them had been transmitted by NGOs, including one representing more than seven million people.
[529] *Request for authorisation*, *supra* footnote 495, para. 364.
[530] *Id.*, para. 376.
[531] Decision of ICC Pre-Trial Chamber II, April 12, 2019, ICC-02/17-33, Situation in the Islamic Republic of Afghanistan, *Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan* [henceforth "*PTC's Afghanistan Decision*"].
[532] This obligation is required by Article 15(4) of the Rome Statute. This provision has been previously considered as one of the checks over the prosecutorial discretion in order to avoid any politically motivated charges (see *supra* section 2.1.2.1).
[533] *PTC's Afghanistan Decision*, *supra* footnote 531, para. 48.
[534] *Id.*, paras. 49-66.

On this point, however, one theoretical issue is worthy to be mentioned, since it was at the core of Judge Antoine Kesia-Mbe Mindua's concurring opinion[535] to the *PTC's Afghanistan Decision*. The Pre-Trial Chamber argued that the authorisation cannot automatically expand the jurisdictional scope of the investigation to "sufficiently linked" crimes that may have been – or may be – committed in the framework of the Afghan situation[536]. Since the Rome Statute requires the PTC to assess whether the case falls within the scope of the Court's jurisdiction and is admissible in accordance with the Rome Statute exclusively on the information provided by the OTP at the moment of the request, then the Pre-Trial Chamber reasoned that such an authorisation could not presume an implied approval of further crimes' investigations on the basis of a sufficient link with the previously authorised prosecution. In other words, the PTC pointed out that the authorisation would enable the Prosecutor only to charge those crimes and those perpetrators that are enlisted in the OTP's *Request for authorisation*, "or [those that are] closely linked to it"[537]. According to the Pre-Trial Chamber, if the authorisation was able to stretch the investigation to further crimes, it would transform itself into a "blank cheque"[538], thus losing its inherent nature of prosecutorial discretion control mechanism. In practical terms, this would mean that, if the Prosecutor obtained new authoritative information which would expand the investigation into the Situation in Afghanistan, she should ask for another authorisation to the Pre-Trial Chamber unless such new crimes are "closely linked" – not "sufficiently linked" – to the jurisdictional scope of the investigation[539].

This part of *PTC's Afghanistan Decision* was largely criticized by scholars[540] and by Judge Antoine Kesia-Mbe Mindua himself. In his concurring opinion, Judge Mindua dissented from the PTC's reasoning affirming that such a conclusion would be "too restrictive"[541]. Indeed, he highlighted that such an approach would "prolong unnecessarily the pre-trial procedures"[542], requiring the Prosecutor to file "a multitude of mini-requests"[543] before the PTC. Furthermore, he noted that since the authorisation is the *conditio sine qua non* to the commencement of an investigation, it seems logical that the Prosecutor does not yet have enough detailed information on all the crimes and on the specific accused to be prosecuted. As a matter of fact, the same investigation, pursuant to the PTC's authorisation, would later clarify – and

[535] A concurring opinion is the written submission of one of the adjudicating judges who, though agreeing with the general conclusion of the decision, does not conform himself to the reasoning or parts of the reasoning of the judgement.
[536] *PTC's Afghanistan Decision*, *supra* footnote 531, para. 41.
[537] *Id.*, para. 40.
[538] *Id.*, para. 42.
[539] *Id*., para. 41.
[540] JACOBS (2019a). POLTRONIERI ROSSETTI (2019: 591) described the PTC's approach as a "micro-management of prosecutorial investigative choices".
[541] Annex to PTC's Afghanistan Decision, May 31, 2019, ICC-02/17-33-Anx-Corr, *Concurring and separate opinion of Judge Antoine Kesia-Mbe Mindua*, para. 5.
[542] *Id.*, para. 9.
[543] *Ibidem.*

maybe find out new information – on the acts and perpetrators to be tried[544]. Therefore, precluding the OTP's ability to extend the investigation to other crimes sufficiently linked to the situation would prove to be a major obstacle to the achievement of justice. In addition, the Court was silent in determining the threshold between a sufficient and a close link to the jurisdictional scope of the investigation, thus making its pronouncement devoid of any substantial clarification[545]. Finally, the *PTC's Afghanistan Decision* appears to be in contradiction to the previously adopted approach. Indeed, in the *Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Burundi*, Pre-Trial Chamber III authorized the Prosecutor to materially extend the investigation to any crime over which the ICC has jurisdiction[546] – not only over those whose authorisation has been requested – and to even temporarily expand the jurisdictional scope of the OTP over those crimes which continued after Burundi's withdrawal from the Rome Statute in October 2017[547].

That said, this theoretical issue did not affect the overall authorisation to investigate the crimes enlisted in the Prosecutor's request. Besides, the PTC acknowledged the admissibility of the case in compliance with both the complementarity[548] and the gravity[549] criteria. It was indeed solely on the interests of justice test that the Pre-Trial Chamber II denied the authorisation to investigate to the Prosecutor.

First of all, the Pre-Trial Chamber asserted that, albeit not explicitly mentioned in Article 15(4) of the Rome Statute, the PTC's judicial review must include "a positive determination to the effect that investigations would be in the interests of justice"[550]. Although the Rome Statute requires a negative assessment of the interests of justice criterion[551], the PTC argued that the same provision implicitly demands the Pre-Trial Chamber, first and foremost, to positively assess the presence of substantial grounds to believe the

[544] *Id.*, para. 10.
[545] POLTRONIERI ROSSETTI (2019: 591). As a matter of fact, Pre-Trial Chamber II only asserted that "[t]he closeness of this link cannot be predefined once for all; it is to be assessed taking into account the temporal, territorial and material parameters of the authorisation as granted. Proximity in time and/or in location, identity of or connection between alleged perpetrators, identity of pattern or suitability to be considered as expression of the same policy or programme, are some among the factors allowing a Chamber to establish such connection", in *PTC's Afghanistan Decision*, *supra* footnote 531, para. 41.
[546] Decision of ICC Pre-Trial Chamber III, November 9, 2017, Situation in the Republic of Burundi, ICC-01/17-9-Red, *Public Redacted Version of "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi", ICC-01/17-X-9-US-Exp, 25 October 2017*, para. 193.
[547] *Id.*, para. 192.
[548] *PTC's Afghanistan Decision*, *supra* footnote 531, paras. 78-79.
[549] *Id.*, paras. 83-86.
[550] *Id.*, para. 35.
[551] Article 53(1)(c) of the Rome Statute: "Taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice". See *supra* section 2.1.2.

investigation would do serve the interests of justice[552]. However, in so doing, the Court needed to be clear on the definition of the "interests of justice". This is the reason why the PTC explicitly identified it as the cumulative assessment of the compliance with the ICC Treaty's main purposes: "the effective prosecution of the most serious international crimes, the fight against impunity and the prevention of mass atrocities"[553]. Contrarily to the question of the close-sufficient link, the PTC was clear in determining the three pillars that should be taken into account in order to evaluate the compliance with the Rome Statute's goals, but it still remained silent on the thresholds of their assessments: "(i) the significant time elapsed between the alleged crimes and the Request; (ii) the scarce cooperation obtained by the Prosecutor throughout this time, even for the limited purposes of a preliminary examination, as such based on information rather than evidence; (iii) the likelihood that both relevant evidence and potential relevant suspects might still be available and within reach of the Prosecution's investigative efforts and activities at this stage"[554]. Therefore, the Pre-Trial Chamber concluded that an investigation would serve the interests of justice if and only if "it appeare[d] suitable to result in the effective investigation and subsequent prosecution of cases within a reasonable time frame"[555].

Given this theoretical framework, the PTC then went on assessing whether, on the information provided by the OTP, the three pillars were met. Firstly, the amount of time passed between the opening of the preliminary examination and the OTP's formal request for investigation – namely eleven years – was obviously considered "particularly long"[556]. Indeed, we reached the same conclusion in section 2.1.2.1 when we showed that the Afghanistan preliminary examination was largely above the average length (around five years) of *proprio motu* preliminary examinations[557]. Secondly, even the ICC Prosecutor acknowledged a lack of cooperation from the US and the Afghan authorities on the cause. Moreover, the PTC inferred that the continuous conflictual condition in Afghanistan and the instable political settlement would furtherly make "reasonable to believe that these difficulties [in achieving cooperation from the US and the Afghan authorities] will prove even trickier in the context of an investigation proper"[558]. Thirdly, the prospects of a successful investigation would be extremely limited given the highly politicised context of the Afghanistan case[559]. Besides, as a formal investigation into the Situation in Afghanistan would presumably require a great amount of time,

[552] *PTC's Afghanistan Decision*, *supra* footnote 531, para. 90; see also *Concurring and separate opinion of Judge Antoine Kesia-Mbe Mindua, supra* footnote 541, para. 23.
[553] *PTC's Afghanistan Decision*, *supra* footnote 531, para. 89.
[554] *Id.*, para. 91. According to Judge Mindua, the threshold should be established on a case-by-case basis, in *Concurring and separate opinion of Judge Antoine Kesia-Mbe Mindua, supra* footnote 541, para. 39.
[555] *PTC's Afghanistan Decision*, *supra* footnote 531, para. 89.
[556] *Id.*, para. 92.
[557] *Supra* footnote 362.
[558] *PTC's Afghanistan Decision*, *supra* footnote 531, para. 94.
[559] *Id.*, para. 96.

personnel and financial resources, the PTC asserted that such efforts would be better employed in "other scenarios (be it preliminary examinations, investigations or cases) which appear to have more realistic prospects to lead to trials and thus effectively foster the interests of justice"[560].

Therefore, Pre-Trial Chamber II rejected the ICC Prosecutor's request to investigate the alleged crimes committed on the territory of Afghanistan by all the purported perpetrators – including the US servicemembers and the CIA personnel – since such a prosecution would not serve the interests of justice.

3.2.1 A positive assessment of the interests of justice

The PTC's conclusions were largely criticised by several scholars[561]. Two questions of debate mainly arose among experts of international criminal law: firstly, whether the PTC is entitled to review the Prosecutor's assessment of the interests of justice and, secondly, if the Pre-Trial Chamber may take account of extra-legal considerations in its reasoning.

Three different positions arose concerning the PTC's ability to review the prosecutorial analysis of the interests of justice. On the one hand, there were those[562] who considered it as an *ultra vires* act by the PTC. Dov Jacobs, for instance, asserted that the PTC would not be competent in reviewing the Prosecutor's assessment of the interests of justice since Article 53(1) of the Rome Statute makes a distinction between the positive assessment of the reasonable basis test and the admissibility of the case, and the negative analysis of the interests of justice. Hence, Jacobs argued that this difference is symptomatic of the PTC's ability to positively review the interests of justice only in case the Prosecutor has previously concluded that there were grounds to believe the investigation would be contrary to the interests of justice[563]. In other words, according to him, the Rome Statute implicitly presumes the compliance with the interests of justice in case of the positive assessment of all the other required criteria (i.e. jurisdiction, complementarity and gravity)[564]. Therefore, in his view, the PTC's reasoning granting the ability to positively evaluate the compliance with the interests of justice test in the judicial review should be dismissed.

On the other hand, there were those[565] who affirmed that the Rome Statute implies the necessary evaluation of the interests of justice by the PTC.

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[560] *Id.*, para. 95.

[561] See AKANDE, DIAS (2019); AMBOS (2019); BUCHWALD (2019); HELLER (2019b; 2019d); JACOBS (2019a, 2019b); LABUDA (2019); POLTRONIERI ROSSETTI (2019); VARAKI (2019); VASILIEV (2019a, 2019b); WHITING (2019).

[562] JACOBS (2019a, 2019b); LABUDA (2019).

[563] Article 53(3)(b) of the Rome Statute.

[564] JACOBS (2019b).

[565] AKANDE, DIAS (2019); HELLER (2019d). This position reflects Judge Hans-Peter Kaul's perspective in his dissenting opinion to Decision of Pre-Trial Chamber II, March 31, 2010, Situation in the Republic of Kenya, ICC-01/09-19-Corr, *Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya*, para. 19.

Indeed, as Kevin Jon Heller asserted, combining the provisions set out in Articles 15(4) and 53(1) of the ICC Treaty, the Pre-Trial Chamber would be compelled to assess if the case falls within the ICC jurisdiction, is admissible in conformity with the Rome Statute and serves the interests of justice. The absence of any of these requirements would push the PTC to determine the absence of "a reasonable basis to proceed with an investigation"[566]. From this perspective, even the argument that the Rome Statute presumes the compliance with the interests of justice test would not deprive the PTC of the ability of assessing such a criterion.

The third option lies in the middle of these extremes. According to Professor Kai Ambos (2019) and post-doctoral researcher Luca Poltronieri Rossetti (2019), the PTC is empowered to review the interests of justice. Yet, the Pre-Trial Chamber's assessment should "recognize a good margin of deference towards the OTP concerning the concrete factual assessment of the interests of justice, which remains primarily in the domain of the prosecutorial discretion"[567]. In so doing, this intermediate approach would avoid any dangerous transformation of the Pre-Trial Chamber's review of the interests of justice into a "mere, free floating policy factor"[568] under PTC's control.

We find this third approach the most convincing among those proposed. Indeed, bearing the primary competence of controlling the Prosecutor's discretion, the Pre-Trial Chamber should be entitled to review every criterion that has been analysed by the Prosecutor. However, the PTC should also acknowledge that the Office of the Prosecutor remains in a better position to properly assess the interests of justice principle[569]. Therefore, the Pre-Trial Chamber should limit its judicial review to considerations of warranted or unwarranted reasonings by the OTP, and it would be in no way authorised to make a *de novo* evaluation of the interests of justice[570]. As a matter of fact, this third perspective appears even more convincing if combined with the second issue of debate, namely whether the PTC should be entitled to introduce extra-legal considerations in its assessment of the interests of justice.

As we previously discussed, the Pre-Trial Chamber took account of the feasibility of a successful prosecution into the Situation in Afghanistan as the primary parameter of evaluation. It considered that, given the limited cooperation from the US and the Afghan authorities, as well as the political instability of the context, it is unlikely that a formal investigation would end up in the conviction of criminals. Thus, the PTC suggested that it would be better to allocate the ICC resources on other "scenarios" which are more likely to be

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[566] Article 15(4) of the Rome Statute.

[567] POLTRONIERI ROSSETTI (2019: 594). This argument mirrors Separate opinion of Judge Fernandez de Gurmendi, October 5, 2011, Situation in the Republic of Côte d'Ivoire, ICC-02/11-15-Corr, *Corrigendum to "Judge Fernandez de Gurmendi's separate and partially dissenting opinion to the Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire"*, paras. 15-16.

[568] AMBOS (2019).

[569] POLTRONIERI ROSSETTI (2019: 608); HELLER (2019b).

[570] HELLER (2019b).

successfully pursued[571]. From a first sight, it appears clear that, here, the PTC included non-legal considerations in its assessment, mainly endeavouring to grant more credibility and perceptions of effectiveness to the ICC. Yet, this argument was subjected to many critiques.

First of all, despite the likelihood of lack of cooperation, dismissing *a priori* the authorisation to investigate without one hundred percent certainty of unsuccess appears to be an excessively restrictive approach. Indeed, even if the chances of success are minimal, they are not absent since the duty of cooperation upon states parties arise only during the investigative stage[572]. Secondly, we share Professor Kai Ambos' view[573] that non-legal considerations may be included in the assessment of the interests of justice criterion. Yet, they should not account for the primary parameter of evaluation, but they should be complemented with analyses of the gravity of the crimes and the interests of victims. The PTC's assessment of the interests of justice, on the contrary, does not mention at all gravity and gives little attention to the interests of victims[574]. Thirdly, we disagree with the opinion that "budgetary constraints" should be comprised in the PTC's reasoning[575]. In fact, on this specific point, we argue that the Pre-Trial Chamber contravened the OTP's "full authority"[576] in deciding the allocation of resources to the preliminary examinations and investigations, enshrined in Article 42(2) of the ICC Statute. Indeed, according to Vasiliev, "judges should have granted the request, leaving to the Prosecution to decide whether and when parts of it should be pursued or de-prioritised"[577]. In addition, even assuming that the PTC should be entitled to adopt financial considerations, Pre-Trial Chamber II did not explain why the Afghan case would be less likely to be successful than the Situation in Bangladesh/Myanmar where "the prospects of Myanmar's cooperation are less than zero"[578].

Therefore, the Pre-Trial Chamber's decision appeared to be imbued with excessive political reasonings. From a global justice perspective, this

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[571] *Supra* footnote 560.
[572] HELLER (2019b); POLTRONIERI ROSSETTI (2019: 595).
[573] AMBOS (2019).
[574] POLTRONIERI ROSSETTI (2019: 598); VASILIEV (2019a).
[575] In the literature, this perspective has been advanced by AKANDE, DIAS (2019).
[576] Article 42(2) of the Rome Statute: "[…] The Prosecutor shall have full authority over the management and administration of the Office, including the staff, facilities and other resources thereof". See also *supra* section 2.1.2.1.
[577] VASILIEV (2019b).
[578] HELLER (2019b). Professor HELLER (2019b) had in fact interpreted the Decision of ICC Pre-Trial Chamber I, September 6, 2018, ICC-RoC46(3)-01/18-37, *Decision on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute"* as "basically order[ing] the OTP […] to investigate the Rohingya situation". His view was later confirmed on November 14, 2019, when Pre-Trial Chamber III authorized the Prosecutor to open an investigation into the Situation in Bangladesh/Myanmar (see Decision of the ICC Pre-Trial Chamber III, November 14, 2019, ICC-01/19-27, *Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar*). Concerning the absence of clarity on the distinction among cases, see also BUCHWALD (2019); JACOBS (2019a).

"dangerous precedent"[579] may be extremely detrimental to the ICC overall effectiveness, since it implicitly affirms that, once states make explicit their unwillingness to cooperate with the Court, the PTC should not grant any authorisation to proceed with the OTP's investigation. Assistant Professor Sergey Vasiliev was right in affirming that "Afghanistan is exactly the kind of situations for which the ICC was created: it was the Court's legitimacy test case"[580] and provided the possibility to address criticisms of double standards. Yet, in 2019, some authors[581] perceived the *PTC's Afghanistan Decision* as a submission to major powers' will, reflecting the US approach to global justice via the policy-oriented New Haven School. This is not to say that the United States of America influenced the PTC's reasoning, but rather that such a decision might have produced high costs of legitimacy for the whole International Criminal Court.

3.3 The Prosecutor's leave for appeal pursuant to Article 82(1)(d) of the Rome Statute

Given all the previous motivations, there was "a striking consensus"[582] among experts and academics that the *PTC's Afghanistan Decision* was unwarranted. Indeed, many of them[583] called the Prosecutor to appeal it. However, Article 82(1)(a) of the Rome Statute[584] grants the ICC Prosecutor the possibility to do it only on the base of the jurisdiction and/or the admissibility criteria. It does not leave any explicit grounds for appeal on the interests of justice. Conversely, Article 82(1)(d) posits that "[e]ither party may appeal […] [a] decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings".

Albeit jurisprudential debates on the legality of the invocation of Article 82(1)(d) procedure following the *PTC's Afghanistan Decision*[585], on June 7, 2019, Prosecutor Bensouda formally appealed the *PTC's Afghanistan Decision* pursuant to Article 82(1)(d) of the Rome Statute. From her perspective, in fact, the appeal procedure was admissible inasmuch as "any determination that the Pre-Trial Chamber erred with respect to any of these issues would

[579] OCHS (2019: 96); see also HELLER (2019b); JACOBS (2019a); LABUDA (2019).
[580] VASILIEV (2019b). According to Varaki, the PTC did not exercise *phronesis*, namely judicial wisdom, in VARAKI (2019).
[581] OCHS (2019: 99); VASILIEV (2019a, 2019b); WHITING (2019).
[582] VARAKI (2019).
[583] HELLER (2019a); JACOBS (2019a).
[584] Article 82(1)(a) of the Rome Statute: "Either party may appeal any of the following decisions in accordance with the Rules of Procedure and Evidence: (a) A decision with respect to jurisdiction or admissibility".
[585] On the one hand, HELLER (2019c) sustained that Article 82(1)(d) of the ICC Treaty applied only to proceedings. On the other hand, JACOBS (2019a) argued that "82(1)(d) applies to all decisions that do not fall under the other three categories, whatever the phase of the proceedings".

materially affect the Decision and thus might permit the immediate opening of an investigation"[586]. The three grounds of appeal mirrored the main areas of debate that we have analysed in the previous pages: (1) "whether articles 15(4) and 53(1)(c) require or even permit a Pre-Trial Chamber to make a positive determination to the effect that investigations would be in the interests of justice"[587]; (2) "whether the Pre-Trial Chamber properly exercised its discretion in the factors it took into account in assessing the interests of justice, and whether it properly appreciated those factors"[588]; and (3) "whether article 15, or any other material provision of the Statute, limits the scope of any investigation that the Pre-Trial Chamber may authorise to the particular incidents identified by the Prosecutor in her application under article 15(3), and incidents closely linked to those incidents"[589].

Notwithstanding PTC's doubts[590] on the legality of Article 82(1)(d) invocation to the situation, Pre-Trial Chamber II granted this opportunity to the Prosecutor because of "the novel and complex nature of the matter, as well as of the impact that a decision sanctioning the inapplicability *in limine* of article 82(1)(d) may have in the context of these specific proceedings"[591]. Thus, on September 17, 2019, PTC conceded leave for appeal on the first two issues, while rejected the appeal on the third question as it had not affected the PTC's overall decision[592].

3.4 States' comments

Following the PTC's grant to the Prosecutor leave for appeal, the ICC Appeals Chamber undertook a three-day hearing of the parties involved and the victims concerned by the Afghanistan case, welcoming comments by experts and NGOs as well. During these days, therefore, both the United States of America and the Islamic Republic of Afghanistan had the opportunity to formally present their concerns and their opinions on the Prosecutor's findings in the preliminary examination and on her decision to appeal.

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[586] Document of the ICC Office of the Prosecutor to Pre-Trial Chamber II, June 7, 2019, Situation in the Islamic Republic of Afghanistan, ICC-02/17-34, *Request for Leave to Appeal the "Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan"*, para. 37.
[587] *Id.*, para. 15.
[588] *Id.*, para. 19.
[589] *Id.*, para. 24.
[590] Decision of ICC Pre-Trial Chamber II, September 17, 2019, Situation in the Islamic Republic of Afghanistan, ICC-02/17-62, *Decision on the Prosecutor and Victims' requests for leave to appeal 'The Decision pursuant to Article 15 of the Rome Statute on the Authorisation of an investigation into the situation of the Islamic Republic of Afghanistan*", para. 29.
[591] *Id*., para. 33.
[592] *Id.*, para. 41. In the same decision, Pre-Trial Chamber II dismissed the leave for appeal presented by the victims, since, at that procedural stage, these ones were still to be considered "potential victims" (*Id.*, para. 20).

3.4.1 The US position

Notwithstanding the US government was given the opportunity to formally present its concerns, the Trump administration refused this right[593]. Nonetheless, lawyer Jay Alan Sekulow, member of Trump's legal team, appeared before the Chamber. Although he did not formally represent the US government, his comments mirrored the US executive's official position[594].

Apart from the traditional US critiques against the ICC ability to prosecute nationals of non-party states[595], Sekulow highlighted the issue of the US "principled non-cooperation"[596]. According to him, the Prosecutor's opinion that granting the authorisation to investigate may have the effect of securing greater cooperation both from the Afghan and the US government is contrary to the US historical approach towards the ICC on the matter of US nationals' prosecutions[597]. The ASPA legislation, as well as the US-Afghan agreement granting exclusive jurisdiction on US nationals to the USA, should be considered proof of the US principled non-cooperation.

At this stage, however, we will not address this issue. Such a decision is justified by the fact that the ICC – both via the Pre-Trial Chamber II's and the Appeals Chamber's decisions – seemed not to take even into consideration the impact that such agreements may have on the ICC jurisdiction. Yet, since we conceive Status of Forces Agreements (SOFAs) and Article-98 agreements as some of the instruments through which the United States endeavoured to achieve its judicial exceptionalism, chapter 4 will be completely dedicated to the issue.

3.4.2 The Afghan position

Contrarily to the stance adopted by the US authorities, the government of the Islamic Republic of Afghanistan actively participated to the Appeals Chamber's hearings, by presenting both written[598] and oral[599] submissions.

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[593] BUCHWALD *et al.* (2021: 30).

[594] Document of the ICC Appeals Chamber, December 4, 2019, ICC-02/17-T-001-ENG ET WT, *Appeals Hearing*, pp. 84-87; Document of the ICC Appeals Chamber, December 5, 2019, ICC-02/17-T-002-ENG ET WT, *Appeals Hearing*, pp. 100-104.

[595] Document of the ICC Appeals Chamber, December 5, 2019, ICC-02/17-T-002-ENG ET WT, *Appeals Hearing*, pp. 101-102. A thorough analysis on the issue had been provided in sections 2.1.1.1 and 2.1.1.2.

[596] ICC-02/17-T-002-ENG ET WT, p. 104. Sekulow defined it as the US historical approach that "through its many administrations, through its policy statements, through the issues that have been raised even recently, [the United States] have expressed consistently concern over jurisdiction of this Court over non-Member States that would include nationals" (*Id*., p. 114).

[597] *Id.*, p. 104.

[598] Document of the Government of the Islamic Republic of Afghanistan to the ICC Appeals Chamber, December 2, 2019, ICC-02/17-130, *Written Submissions of the Government of the Islamic Republic of Afghanistan*.

[599] Document of the ICC Appeals Chamber, December 5, 2019, ICC-02/17-T-002-ENG ET WT, *Appeals Hearing*, pp. 19-32; Document of the ICC Appeals Chamber, December 6, 2019, ICC-02/17-T-003-ENG ET WT, *Appeals Hearing*, pp. 48-52.

The Afghan representative Mohammad H. Azizi firstly reminded the Appeals Chamber of the structural and institutional reforms undertaken by the Afghan government in the judicial domain with the aim of bringing the perpetrators of international crimes to justice. He also reiterated that "many thousands of investigations and prosecutions are underway"[600], though not specifying whether they are directed against the same alleged criminals of the Prosecutor's *Request for authorisation*. Consequently, he underlined that the principle of complementarity should lead to the conclusion that "there is no need to authorise an ICC investigation at this stage"[601]. However, the fact that Mr. Azizi did not mention – and therefore did not contradict – the Prosecutor's assessment that Afghanistan had not undertaken proceedings against US nationals should be perceived as a tacit confirmation. Indeed, this is the pragmatic consequence of US-Afghan SOFAs and Article-98 agreements.

Furthermore, the state representative emphasised that "Afghanistan must be given some latitude to achieve peace first and foremost for the victims of the violence, and in order to allow for justice and reparation to follow"[602]. In other words, he seemed to implicitly assert the superiority of the interests of peace over the interests of justice. Thus, as long as the interests of peace are not fully achieved, there cannot be space for the interests of justice in Afghanistan.

3.5 The Appeals Chamber's authorisation to investigate (2020)

On March 5, 2020, the ICC Appeals Chamber (AC) overturned the *PTC's Afghanistan Decision*, eventually granting the authorisation to the ICC Prosecutor to open an investigation into the Situation in Afghanistan[603]. The AC did not only limit its reasoning on the two grounds of appeal granted by Pre-Trial Chamber III in July 2019, but it also addressed other erroneous parts of the *PTC's Afghanistan Decision* (i.e. the possibility of extending the scope of the authorisation to acts "sufficiently linked" to the incidents cited in the *Request for authorisation* and to crimes committed on victims captured outside the Afghan territory). Nevertheless, the way how the Appeals Chamber reasoned in order to reach its final judgement is questionable.

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[600] *Appeals Hearing*, December 5, 2019, ICC-02/17-T-002-ENG ET WT, p. 20.

[601] *Id.*, p. 23; see also *Written Submissions of the Government of the Islamic Republic of Afghanistan*, *supra* footnote 598, para. 6.

[602] He continued as follows: "These considerations should be taken into account by the ICC because the authorisation of an ICC investigation, which we oppose, would jeopardise both national and international efforts to forge justice", in *Appeals Hearing*, December 5, 2019, ICC-02/17-T-002-ENG ET WT, p. 21.

[603] Judgement of ICC Appeals Chamber, March 5, 2020, Situation in the Islamic Republic of Afghanistan, ICC-02/17-138, *Judgment on the appeal against the decision on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan* [henceforth *Appeals Chamber's Afghanistan Judgement*].

3.5.1 The difference between Articles 15 and 53(1) of the Rome Statute

First of all, the ICC Appeals Chamber assessed "whether articles 15(4) and 53(1)(c) require or even permit a Pre-Trial Chamber to make a positive determination to the effect that investigations would be in the interests of justice"[604]. According to AC, "the Pre-Trial Chamber erred in its interpretation of article 15(4) of the Statute when it found itself bound to assess the factors under article 53(1) of the Statute"[605]. In other words, the Appeals Chamber asserted that the Pre-Trial Chamber was not entitled to review the interests of justice as the Rome Statute did not grant to it that possibility.

According to the AC, a careful reading of Articles 15 and 53(1) of the Statute allows to reach such a conclusion. While the former governs the *proprio motu* procedure, the latter regulates the Prosecutor's opening of an investigation following a state party or a UNSC referral. Consequently, the AC argues that the PTC's judicial review should be consistent with the specific procedure that has been activated. On the case of a *proprio motu* request for authorisation, the PTC "needs only consider whether there is a reasonable factual basis to proceed with an investigation, in the sense of whether crimes have been committed, and whether potential case(s) arising from such investigation appear to fall within the Court's jurisdiction"[606]. This determination would be the literal interpretation of Article 15(4) of the ICC Treaty[607] where only the reasonable basis test and the jurisdiction criterion are explicitly mentioned. Conversely, in case of a state party or a UNSC referral, the PTC should assess whether all the criteria laid down in Article 53(1) of the Rome Statute – namely the reasonable basis test, the admissibility criteria, the gravity of the crimes, the interests of victims and the interests of justice – are all complied with[608]. Therefore, the Appeals Chamber concluded that "the content and placement of articles 15 and 53(1) of the Statute make it clear that these are separate provisions addressing the initiation of an investigation by the Prosecutor in two distinct contexts"[609], thus requiring different procedures of the PTC's judicial review.

In order to sustain its reasoning, the Appeals Chamber referred to Rule 48 of the Rules of Procedure and Evidence, to Regulation 49(1) of the Regulations of the Court and to the preparatory works of the Rome Statute. Firstly, Rule 48 of the Rules of Procedure and Evidence posits that "[i]n determining whether there is a reasonable basis to proceed with an investigation under

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[604] *Supra* footnote 587.
[605] *Appeals Chamber's Afghanistan Judgement*, *supra* footnote 603, para. 25.
[606] *Id.*, para. 34.
[607] Article 15(4) of the Rome Statute: "If the Pre-Trial Chamber, upon examination of the request and the supporting material, considers that there is a reasonable basis to proceed with an investigation, and that the case appears to fall within the jurisdiction of the Court, it shall authorize the commencement of the investigation, without prejudice to subsequent determinations by the Court with regard to the jurisdiction and admissibility of a case".
[608] *Appeals Chamber's Afghanistan Judgement*, *supra* footnote 603, para. 28.
[609] *Id.*, para. 33.

article 15, paragraph 3, the Prosecutor shall consider the factors set out in article 53, paragraph 1 (a) to (c)". However, in AC's view, since Rule 48 does not explicitly mention the PTC and there is not a similar provision in the Rules of Procedure and Evidence regulating the PTC's judicial control, then the Pre-Trial Chamber should not be empowered to review all the criteria set out in Article 53(1)(a) to (c)[610]. Secondly, Regulation 49(1) of the Regulations of the Court requires the Prosecutor, who is willing to commence a *proprio motu* investigation, to submit a written request to the PTC only demonstrating "a reasonable basis to believe that those crimes have been or are being committed" and that they "fall within the jurisdiction of the Court"[611]. As a consequence, both Rule 48 and Regulation 49(1) brought the Court to determine that the Pre-Trial Chamber should be authorised to check whether only the reasonable basis test and the jurisdictional reach of the Court are met[612]. Following this conclusion, the PTC would not only be refrained to assess the interests of justice, but the admissibility of the case (i.e. complementarity and gravity) as well. Indeed, the Appeals Chamber referred to a third element in order to prove the inability of the PTC to review the admissibility criteria. It reasoned that, since in the preparatory works at the Conference in Rome, the Argentinian-German proposal[613] – which *inter alia* would have demanded the Pre-Trial Chamber to assess the admissibility of the case in granting the authorisation – was eventually deleted, then we should infer that PTC is not called to assess neither complementarity nor gravity in its judicial control.

Of course, such a reasoning is largely questionable and criticisable. In section 3.2.1, we have in fact argued that the PTC is entitled to check the OTP's assessment of the interests of justice, but it is not authorised to produce a *de novo* analysis. In our view, Articles 15 and 53(1) do not create different judicial review procedures since such a distinction would be contrary to the states' original compromise in Rome[614]. As a matter of fact, in chapter 1, we have explained that at the Rome Conference, there were two contraposing perspectives on the role of the ICC Prosecutor. On the one hand, the like-minded states pushed for an independent Prosecutor who should have been granted the ability to prosecute on his/her own motion. On the other hand, the United States, fearing politically motivated charges, pressured to allow only states parties and the UNSC to trigger the ICC jurisdiction. A compromise was found in final language of the Rome Statute, where the ICC Prosecutor would

[610] *Id.*, para. 35.
[611] Regulation 49(1) of the Regulations of the Court: "A request by the Prosecutor to a Pre-Trial Chamber for authorisation of an investigation pursuant to article 15, paragraph 3, shall be in writing and shall contain: (a) A reference to the crimes which the Prosecutor believes have been or are being committed and a statement of the facts being alleged to provide the reasonable basis to believe that those crimes have been or are being committed; (b) A declaration of the Prosecutor with reasons that the listed crimes fall within the jurisdiction of the Court".
[612] *Appeals Chamber's Afghanistan Judgement*, *supra* footnote 603, para. 45.
[613] Document of the Preparatory Committee on the Establishment of an International Criminal Court, Working Group on Procedural Matters, March 25, 1998, A/AC. 249/1998/WG.4/DP.35, *Proposal Submitted by Argentina and Germany*.
[614] HELLER (2020) agrees with this reasoning, too.

have been able to commence an investigation on his/her own initiative, but only after the authorisation of the PTC. In pragmatic terms, the Pre-Trial Chamber would have been the first control mechanism over prosecutorial discretion. Therefore, affirming that the PTC should only be able to assess the reasonable basis test and the Court's jurisdiction would represent an abdication of its own primary role. In fact, as Kevin Jon Heller rightly argues, "[n]ot even the roguest of rogue prosecutors would try to investigate a situation in which there were no crimes at all, the crimes were not international, the crimes were committed before 1 July 2002 (or whatever the relevant temporal limit is), or the crimes were not committed on the territory of a state party or by a national of a state party"[615]. In other words, the PTC's judicial review would transform itself into a mere formal step which would just need to be accomplished, thus departing from its original role of effective control over the OTP.

Admittedly, the Rome Statute is in many parts – including Articles 15 and 53(1) – pretty vague and unclear. In order to overcome this hurdle, Heller reminded us that the same word in a treaty should be interpreted with the same meaning throughout the whole text. Thus, by employing this interpretative mechanism, he came to the conclusion that the phrase "reasonable basis" – which is mentioned both in Article 15 and Article 53(1) of the Rome Statute – should mean equally in the two provisions[616]. Given the fact that Rule 48 of the Rules of Procedure understands "reasonable basis" as requiring the Prosecutor to assess all the elements enshrined in Article 53(1)(a) to (c), then the PTC should be authorised to also consider the admissibility of the case and the interests of justice in its judicial review of a *proprio motu* request for authorisation to proceed[617]. Moreover, as the Regulations of the Court had been adopted by judges – not by the states parties to the Rome Statute – they should be subject to the interpretation of both the ICC Treaty and the Rules of Procedure and Evidence[618]. Finally, "it is anything but clear that the deletion [of the Argentinian-German proposal] reflected states' desire to prevent the PTC from considering admissibility when deciding whether to authorize a proprio motu investigation"[619].

Nevertheless, given the previously mentioned motivations, the Appeals Chamber overturned the *PTC's Afghanistan Decision*, thus granting the Prosecutor the authorisation to investigate the alleged crimes committed in Afghanistan, precisely because PTC II was not empowered to review the interests of justice. Having reached such a determination, the Appeals Chamber decided not to address the second ground of appeal, namely whether the PTC had erred in its own assessment of the interests of justice. Nonetheless, the Appeals Chamber felt relevant to affirm that "[t]he Pre-Trial Chamber's reasoning in support of its conclusion regarding the 'interests of justice' was

[615] HELLER (2020).
[616] HELLER (2020).
[617] HELLER (2020). See also EVANS, SHAH (2020); KAUSHIK (2020: 1161-1173); TRIFFTERER, AMBOS (2016: 733).
[618] HELLER (2020).
[619] HELLER (2020).

cursory, speculative and did not refer to information capable of supporting it"[620]. In other words, the AC seemed to affirm that, even if the PTC had been able to the review the interests of justice, it would have not done it properly[621].

3.5.2 The scope of the authorisation to investigate

Despite it was not called to intervene on the question, the Appeals Chamber addressed the issue of the scope of the authorisation. The Pre-Trial Chamber had asserted that, if the OTP had found new information capable of extending the investigation to crimes not enlisted in the Prosecutor's preliminary examination, it should have asked the PTC's authorisation again, unless these crimes were "closely linked"[622] with the OTP's request for prosecution. In section 3.2, we have argued that such an approach would be detrimental and unsustainable to the Prosecutor's investigation, since the OTP would have been compelled to ask for authorisation whenever it obtained new information, thus excessively prolonging the prosecution. Indeed, during the preliminary examination stage, the Prosecutor has not yet obtained full knowledge about all the alleged perpetrators and crimes, and may logically collect new information in the investigative stage, where states parties are statutorily compelled to cooperate with the Court. Furthermore, the PTC's determination lacked any threshold criterion which the Prosecutor should have used to distinguish between sufficient and close links. As a matter of fact, the Appeals Chamber's reasoning exactly mirrored our analysis[623]. This is the reason why the AC eventually stated that "authorisation for an investigation should not be restricted to the incidents specifically mentioned in the Prosecutor's Request and incidents that are 'closely linked' to those incidents in the manner described by the Pre-Trial Chamber"[624].

Besides, the Appeals Chamber even considered "whether certain acts committed outside Afghanistan would amount to war crimes if the victims of these acts were captured outside Afghanistan"[625]. In particular, the issue was relevant inasmuch as it referred to the CIA's war crimes committed in the black sites in Poland, Romania and Lithuania. The PTC had reasoned[626] that such acts would fall within the ICC jurisdiction only if the capture of victims had occurred on the Afghan territory. Otherwise, the characterising nature of war crimes as determined by the nexus between the presence of an armed conflict and the alleged acts which are to be committed "in the context of and [are] associated with"[627] the said conflict would lack. Nevertheless, the Appeals Chamber contrasted this position by affirming that common Article 3 of

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[620] *Appeals Chamber's Afghanistan Judgement*, *supra* footnote 603, para. 49.
[621] TRAHAN (2020).
[622] *Supra* footnote 537.
[623] *Appeals Chamber's Afghanistan Judgement*, *supra* footnote 603, paras. 57-64.
[624] *Id.*, para. 61.
[625] *Id.*, paras. 65-77.
[626] *PTC's Afghanistan Decision*, *supra* footnote 531, paras. 62-66.
[627] Elements of Crimes of the ICC, Article 8, Introduction (c).

the Geneva Conventions (1949)[628] "does not suggest that the requisite nexus with the armed conflict in Afghanistan cannot exist if the criminal conduct occurred outside Afghanistan and the victim was not captured in Afghanistan"[629].

3.6 States' reactions: the Afghanistan's deferral request and the US sanctions against ICC personnel

Following the Appeals Chamber's pronouncement, both the Islamic Republic of Afghanistan and the United States of America adamantly opposed the judgement. Yet, their pragmatic reactions were different.

On March 26, 2020, the Afghan Ambassador to the Netherlands, H.E. Homayoon Azizi, sent a letter to the OTP invoking Article 18(2) of the Rome Statute[630]. The Afghan representative argued that "the Government is investigating or has investigated its nationals or others within its jurisdiction with respect to criminal acts allegedly committed within the authorised parameters of the Situation in Afghanistan"[631]. Yet, even in this case, the letter did not mention at all the US armed forces or the CIA personnel, but it merely referred to "allegations of crimes committed by […] international forces"[632]. However, the information provided by Afghanistan were deemed insufficient from the Office of the Prosecutor, which formally requested further details from the government of the Islamic Republic of Afghanistan. On January 15, 2021, Afghanistan sent a 3500-page confidential report to the Office of the Prosecutor on the issue. The investigation into the Situation in Afghanistan is thus temporarily paused to let the Prosecutor assess the information contained in the Afghan report[633].

Conversely, although the US government had the right to challenge the ICC jurisdiction by invoking the complementarity regime as well[634], it

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[628] *Supra* footnote 512.

[629] *Appeals Chamber's Afghanistan Judgement*, *supra* footnote 603, para. 74.

[630] Article 18(2) of the Rome Statute reads as follows: "Within one month of receipt of that notification, a State may inform the Court that it is investigating or has investigated its nationals or others within its jurisdiction with respect to criminal acts which may constitute crimes referred to in article 5 and which relate to the information provided in the notification to States. At the request of that State, the Prosecutor shall defer to the State's investigation of those persons unless the Pre-Trial Chamber, on the application of the Prosecutor, decides to authorize the investigation".

[631] Annex 1 to the Notification to the Pre-Trial Chamber of the Islamic Republic of Afghanistan's letter concerning article 18(2) of the Statute, March 26, 2020, Situation in the Islamic Republic of Afghanistan, ICC-02/17-139-Anx1, *Deferral Request made by the Government of the Islamic Republic of Afghanistan pursuant to Article 18(2) of the Rome Statute*.

[632] *Ibidem.*

[633] Document of the ICC Office of the Prosecutor to Pre-Trial Chamber II, April 16, 2021, Situation in the Islamic Republic of Afghanistan, ICC-02/17-142, *Notification on status of the Islamic Republic of Afghanistan's article 18(2) deferral request*.

[634] Article 19(2)(b) of the Rome Statute posits that "[c]hallenges to the admissibility of a case on the grounds referred to in article 17 or challenges to the jurisdiction of the Court may be

eventually decided to aggressively react to the Appeals Chamber's judgement. The Trump administration thus imposed visa restrictions and economic sanctions against the ICC Prosecutor, Fatou Bensouda, and the ICC Head of the Jurisdiction, Complementarity and Cooperation Division, Phakiso Mochochoko[635]. The inscription of the names of Bensouda and Mochochoko on the list of the Special Designated Nationals and Blocked Persons was perceived as "an unprecedented decision"[636] as it put ICC personnel on the same footing as terrorists and criminals. Notwithstanding President Joe Biden's following decision to lift the sanctions[637], the United States did not turn towards a cooperative stance with the Court. Indeed, Secretary of State Anthony Blinken reiterated that the US government "continue to disagree strongly with the ICC's actions relating to Afghanistan [… and] maintain [its] longstanding objection to the Court's efforts to assert jurisdiction over personnel of non-States Parties such as the United States"[638].

made by: (b) A State which has jurisdiction over a case, on the ground that it is investigating or prosecuting the case or has investigated or prosecuted". See also, Document of the ICC Appeals Chamber, December 4, 2019, ICC-02/17-T-001-ENG ET WT, *Appeals Hearing*, p. 101.

[635] See section 1.2.5.

[636] KREß (2020: 791).

[637] Press Statement by the US Secretary of State, Anthony J. Blinken, April 2, 2021, *Ending Sanctions and Visa Restrictions Against Personnel of the International Criminal Court*.

[638] *Ibidem.*

4. The US search for judicial exceptionalism: SOFAs and Article-98 agreements

Since the beginning of this dissertation, we have argued that the United States endeavoured throughout the XX century to prevent any international adjudication of its own soldiers and authorities. In addition, chapter 1 proved that all the four presidencies, be they Democrat or Republican, that have had relations with the ICC – from the negotiating process of the Court's institutive statute onwards – always focused on granting exemptions to US servicemembers and authorities from ICC jurisdiction. In order to achieve that objective, the Bush administration undertook a four-stage lawfare strategy[639] against the ICC, *inter alia* by signing one hundred non-surrender agreements, also known as "Article-98 agreements".

Following the 2001 military intervention in Afghanistan, the United States signed such treaties – as well as Status of Forces Agreements (SOFAs) *lato sensu* – with the Afghan government. Pursuant to them, the US executive was thus able to secure exclusive jurisdiction over its own servicemembers and authorities, as well as to theoretically prevent the intervention of the ICC over possible alleged crimes committed by US nationals on the Afghan territory. Yet, both the Pre-Trial Chamber and the Appeals Chamber seemed to give little attention and importance to these agreements in defining whether the International Criminal Court had jurisdiction over the case. The conflict between the ICC jurisdiction over the purported commission of crimes by US armed forces and CIA personnel, and the US invocation of SOFAs, as well as US-Afghan non-surrender agreements, will precisely be at the core of this final chapter. Indeed, once again, our main hypothesis turns to be one of the possible interpretations of the US opposition towards the ICC. During George W. Bush's first presidential mandate, the United States tried to secure its troops by campaigning the adoption of Article-98 agreements in order to achieve a judicial exceptionalism with regard to the International Criminal Court's jurisdictional reach. The United States publicly declared that such a policy was justified by the fear of politically motivated charges against US personnel as a form of revenge against US military interventions[640]. However, we argue that the rationale behind the signature of non-surrender agreements both with states parties – including the Islamic Republic of Afghanistan – and third parties to the Rome Statute was aimed at granting immunity to its servicemembers employed in foreign military operations abroad. If US soldiers had been pursued before an international criminal court or tribunal, then the US global exceptionalism – understood as the US need for room for action to ensure its leadership in the peace and security domains – would have been seriously undermined. Therefore, under such premises, the Afghan case assumes even more importance in studying the US judicial exceptionalism before the ICC.

[639] The lawfare strategy has been described in section 1.2.2.
[640] DIETZ (2004: 146); GRANGER (2005: 76); SCHUERCH (2017: 267).

4.1 The original and subsequent US interpretations of Article 98(2) of the Rome Statute

Combining the assessment on US judicial exceptionalism and the study of Article 98(2) of the Rome Statute appears to be paramount for two main reasons. First of all, the White House precisely based its campaign of non-surrender agreements on this specific statutory provision, arguing that the Rome Statute itself allows states to sign international treaties in order to protect their own nationals[641]. Secondly, the US concerns on the ICC jurisdiction over US nationals has characterised the US negotiating stance since the first discussions on the ICC. The US negotiators, indeed, have been focusing their efforts on such a provision since 1995-1996 and the final adoption of Article 98(2) of the ICC Treaty – combined with Rule 195(2) of the Rules of Procedure and Evidence – proved to be "essential to the [US] decision to sign the Rome Statute on 31 December 2000"[642]. In other words, we may assume that President Clinton eventually decided to sign the treaty only because the statutory provisions acknowledged some instruments of US nationals' protection from the ICC adjudicative competence.

Article 98 of the Rome Statute imposes two different obligations on the Court. On the one hand, paragraph 1 posits that "[t]he Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity". According to Article 98(1) of the Rome Statute, the Court cannot request to a state party the surrender of a foreigner accused of whatever crime under the ICC jurisdiction, whose extradition would compel the state party to contravene the internationally recognised diplomatic immunity of that individual[643]. Nevertheless, Article 27 of the Rome Statute asserts the irrelevance of an accused's official capacity[644] and reiterates that immunities "shall not bar the Court from exercising its jurisdiction over such a

[641] SCHEFFER (2005: 336).
[642] SCHEFFER (2005: 335).
[643] LARBI (2005: 182). In fact, SCHEFFER (2005: 336-337) argued that the requested state would either "honour such immunity to the extent that a third-State waiver were not obtained by the ICC" or "might choose to declare the suspect *persona non grata* and deport the suspect back to his or her national jurisdiction if it decides that permitting such an individual to remain on its territory with immunity from prosecution (before its national courts or the ICC) would be politically untenable or a denial of justice, or both".
[644] Article 27(1) of the Rome Statute: "This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence".

person"[645]. As a matter of fact, the ICC Treaty is extremely vague and unclear on the issue of immunities and the two provisions seem even to contradict one another. Besides, the case of the ICC arrest warrant of the former Sudanese President Omar al-Bashir – and the related non-compliance with the obligation to arrest by states parties to the Rome Statute – did not shed any light on the incongruencies of the text[646]. However, we will not address this legal issue as Article 98(1) of the Rome Statute is not relevant for the present analysis of the US non-surrender agreements.

Conversely, the US campaign relied on paragraph 2 of Article 98 of the ICC Treaty, which states that "[t]he Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender". While paragraph 1 solely referred to sovereign and diplomatic immunities, paragraph 2 focuses on the broader range of states' obligations arising from the signature of international agreements. Yet, scholars and experts of international criminal law have debated over the correct interpretation of Article 98(2) of the Rome Statute[647]. As a matter of fact, the main issues of controversy relate to the use of both terms "sending

[645] Article 27(2) of the Rome Statute: "Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person".

[646] Decision by Pre-Trial Chamber I, March 4, 2009, ICC-02/05-01/09-3, *Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir*, paras. 41-45; Decision by Pre-Trial Chamber I, December 13, 2011, ICC-02/05-01/09-140-tENG, *Decision pursuant to article 87(7) of the Rome Statute on the refusal of the Republic of Chad to comply with the cooperation requests issued by the Court with respect to the arrest and surrender of Omar Hassan Ahmad Al Bashir*; Decision by Pre-Trial Chamber I, December 13, 2011, ICC-02/05-01/09-139-Corr, *Corrigendum to the Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir*, paras. 36-43 (here, at para. 37, the PTC itself recognised that "there is an inherent tension between articles 27(2) and 98(1) of the Statute and the role immunity plays when the Court seeks cooperation regarding the arrest of a Head of State"); Decision by Pre-Trial Chamber II, April 9, 2014, ICC-02/05-01/09-195, *Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court*, paras. 25-29; Decision by Pre-Trial Chamber II, July 6, 2017, ICC-02/05-01/09-302, *Decision under article 87(7) of the Rome Statute on the non-compliance by South Africa with the request by the Court for the arrest and surrender of Omar Al-Bashir*, paras. 64-109; Decision by Pre-Trial Chamber II, December 11, 2017, ICC-02/05-01/09-309, *Decision under article 87(7) of the Rome Statute on the non-compliance by Jordan with the request by the Court for the arrest and surrender or Omar Al-Bashir*, paras. 27-45; Judgement by Appeals Chamber, May 6, 2019, ICC-02/05-01/09-397-Corr, *Judgment in the Jordan Referral re Al-Bashir Appeal*, paras. 100-162. For a thorough analysis of the case, see CORMIER (2020: 84-91); TRIFFTERER, AMBOS (2016: 2123-2142). See also BASSIOUNI, SCHABAS (2016a: 162).

[647] BARNIDGE (2003); ROSENFELD (2003); BENZING (2004); DIETZ (2004); LARBI (2004); TALLMAN (2004); TAN (2004); BOGDAN (2008); O'KEEFE (2010, 2016); BASSIOUNI, SCHABAS (2016a: 162-164); TRIFFTERER, AMBOS (2016: 2142-2146); SCHUERCH (2017: 265-285); CORMIER (2018).

state" and "person" in the provision. A clarification of them will be useful in order to grasp the shift from the US "original intent"[648] and the subsequent practice of the Bush's administration.

The employment of the term "sending state" in Article 98(2) of the Rome Statute should be considered as symptomatic of the then concerns over the possible treaty conflict between the ICC Treaty, and Status of Forces Agreements (SOFAs) or Status of Mission Agreements (SOMAs), namely bilateral and multilateral treaties governing the status of soldiers and associated civilian personnel employed in a foreign military operation. In fact, SOFAs and SOMAs usually establish the exclusive criminal jurisdiction of the sending state over possible crimes committed by its own armed forces during foreign military operations[649]. Given the obligations arising from SOFAs and SOMAs, in particular on the jurisdiction over soldiers' acts, the receiving state – which is also a party to the Rome Statute – would not be able comply with the duty of cooperation[650] with the Court, for instance by surrendering purported criminals to the ICC. The rationale behind the introduction of Article 98(2) was thus to grant the continued implementation of SOFAs and SOMAs even by states parties to the Rome Statute[651].

However, the original intend should not be interpreted as a preclusion for the application of Article 98(2) to treaties other than SOFAs or SOMAs[652]. This conclusion can be inferred precisely from the use of the term "sending state". It is right to argue that this term is usually employed in SOFAs and SOMAs, meaning "the Contracting State to which the Force belongs"[653]. However, it is not peculiar only to these agreements. For instance, the term is employed in extradition or diplomatic[654] and consular[655] treaties as well. Given this conclusion and in accordance with Article 31(1) of the Vienna Convention on the Law of Treaties (VCLT), we should thus interpret "sending state" with its "ordinary meaning"[656]. In other words, a sending state is the country "whose armed forces or police or other official or government-employed or -contracted personnel are stationed or otherwise deployed in the territory of another state pursuant to some sort of agreement"[657]. Consuls, diplomats, military personnel or whatever person who operates on a foreign territory as the direct consequence of having been sent there by a state in accordance with a

[648] SCHEFFER (2005).
[649] For a more in-depth analysis of SOFAs *lato sensu*, see VOETELINK (2015).
[650] Article 86 of the Rome Statute. In addition, according to Article 89(1) of the ICC Treaty, a state party is obliged to comply with a request of surrender or assistance issued by the Court.
[651] SCHEFFER (2005: 338); NEWTON (2016: 392); TRIFFTERER, AMBOS (2016: 2143).
[652] TAN (2004: 1138-1139); O'KEEFE (2010: 5); SCHUERCH (2017: 274). Conversely, BOGDAN (2008: 23) argued that "it appears that the provision was intended to include only SOFAs".
[653] SCHEFFER (2005: 339). See also O'KEEFE (2010: 5); TALLMAN (2004: 1046-1047); BOGDAN (2008: 22).
[654] Vienna Convention on Diplomatic Relations, April 18, 1961.
[655] Vienna Convention on Consular Relations, April 24, 1963.
[656] Article 31(1) of the Vienna Convention on the Law of Treaties: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".
[657] O'KEEFE (2010: 5).

prior treaty is thus covered by Article 98(2) of the Rome Statute. This is the reason why a correct interpretation of Article 98(2) should not be limited to the sole SOFAs or SOMAs, but it should also encompass all those agreements which presuppose the presence of sending and receiving states[658]. If the drafters had wished to limit the application of Article 98(2) to the sole SOFAs and SOMAs, they would have probably made it explicit. However, the literal reading of the provision does not advance such an interpretation.

Once we have clarified the notion of sending state, we should focus on the use of the term "person" in the concerned provision. Indeed, the two concepts (i.e. "sending states" and "person") are strictly correlated one another. The definition of "sending state" that we have just proposed presumes the presence of a "nexus between the person present on the territory of a state party, and his/her own sending state"[659]. Such a link, however, should not be interpreted as a nationality nexus, which would otherwise include private citizens – such as tourists, businessmen or whatever person abroad in private capacity – owning the nationality of one of the contracting parties to the international agreement and excluding individuals who – though working in the sending state's foreign mission – do not possess the state's citizenship. It rather requires the quality of being sent abroad in official capacity[660], be it in representation of the state (such as in the case of consuls and diplomats), members of the armed forces and/or associated civilians of the state's diplomatic, consular and military missions. This understanding was also shared by the Council of the European Union's Guiding Principles on Article-98 agreements, according to which "[a]ny solution should cover only persons present on the territory of a requested State because they have been sent by a sending State"[661]. This interpretation of the term "person" was however a departure from the narrower meaning of the same word employed in SOFAs. In fact, the US Supreme Court had previously declared that civilians could not be tried by martial courts and therefore the jurisdiction over their actions could not have been governed by a Status of Forces Agreement *lato sensu*[662]. Therefore, the extension of the definition of "person" was obviously welcomed by the United States, as it would have been able to even protect "the US diplomatic corps, Peace Corps workers, officials of the US Agency for International

[658] O'KEEFE (2010: 5); TRIFFTERER, AMBOS (2016: 2143); SCHUERCH (2017: 274). In addition, the wording of Article 98(2) of the ICC Treaty does not restrain its application to international agreements signed only by non-states parties, or by a member state and a third party to the ICC. In other words, Article-98 agreements should be considered legal also in case their signatories are states parties to the Rome Statute. On this specific issue, see SCHABAS (2010a: 16); TRIFFTERER, AMBOS (2016: 2143).
[659] SCHUERCH (2017: 274).
[660] CLINE (2008: 115-116); DIETZ (2004: 175-176); SCHUERCH (2017: 274); TRIFFTERER, AMBOS (2016: 2143-2144).
[661] Annex to General Affairs and External Relations, September 30, 2002, 2450th Council session, C/02/279, *EU Guiding Principles concerning Arrangements between a State Party to the Rome Statute of the International Criminal Court and the United States Regarding the Conditions to Surrender of Persons to the Court*.
[662] DIETZ (2004: 146).

Development, and US civilian and military leaders who travel officially abroad"[663] from an ICC arrest warrant.

Provided this theoretical framework, we can easily highlight an evident shift from the US "original intent"[664] with regard to Article 98(2) of the Rome Statute and the subsequent US practice. According to the US lead negotiator at the Rome Conference, Ambassador David J. Sheffer, "[i]t was not the intention of the United States to shield individuals acting in a private capacity"[665] and "to seek immunity from surrender to the ICC of US citizens who act as mercenaries or in other strictly private capacities (however noble) overseas"[666]. The United States' first objective was just the preservation of SOFAs' and SOMAs' implementation and, subsequently, the negotiation of Article-98 agreements aimed at securing "personnel of the US Government"[667] from the ICC jurisdictional reach. In other words, Scheffer argued that the US original interpretation was based on the "official capacity" nexus. Indeed, the March 2000 proposal to the Rome Statute – which envisaged the exemption from ICC jurisdiction if the individual's action had been undertaken under "the overall direction"[668] of his/her own state – may be adduced as a proof of the US reliance on the "official capacity" nexus.

Yet, the subsequent practice of the Bush's administration proved to be very different from the one articulated by Scheffer. As a matter of fact, the standard model of the one hundred non-surrender agreements signed by the United States between 2002 and 2006 defines "persons" as "current or former Government officials, employees (including contractors), or military personnel or nationals of one Party"[669]. The inclusion of "nationals" obviously departed from the "official capacity" nexus implicitly required by Article 98(2) of the ICC Treaty. In other words, as Scheffer summed up, "the Bush Administration would read 'sending State' in Article 98(2) to mean both the 'sending State' of the official and military personnel, including national and non-national employees, and the State of nationality of the person (acting in any capacity abroad) for whom the government seeks protection under Article 98(2)"[670]. However, such an interpretation – which was qualified as

[663] SCHEFFER (2005: 339).
[664] Claus Kreß and Kimberly Prost – who participated to the Rome negotiations on Article 98 of the Rome Statute respectively as German and Canadian representatives – openly criticised David J. Scheffer's words, by asserting that "if this was indeed 'America's Original Intent', it was most probably articulated very late in the day. For those and other reasons America's alleged 'Original Intent' cannot be equated with 'the drafters' intent' behind article 98 para. 2", in TRIFFTERER, AMBOS (2016: 2122).
[665] SCHEFFER (2005: 339).
[666] SCHEFFER (2005: 339).
[667] SCHEFFER (2005: 339).
[668] *Supra* footnote 87.
[669] See, for instance, Article 1 of the *Agreement between the Government of the Transitional Islamic State of Afghanistan and the Government of the United States of America regarding the surrender of persons to the International Criminal Court*, which was signed at Washington on September 20, 2002, and entered into force on August 23, 2003.
[670] SCHEFFER (2005: 346).

"creative"[671] by Professor William Schabas – may raise doubts of legality of these international agreements with regard to Article 98(2) of the Rome Statute[672]. In addition, we could even question the overall conformity of these agreements with the main purpose of the ICC Treaty, namely the states' commitment to end impunity. This second ground of analysis will be, nonetheless, addressed in the following pages.

In addition, the US campaign of Article-98 agreements raised another legal debate, namely whether Article 98(2) precluded its application only to the sole treaties that had been signed prior to the signature of the Rome Statute, or if it covered subsequent international agreements as well. On the one hand, some experts and delegations limited the application of Article 98(2) to treaties which had been signed before the Rome Statute, including the renewals of the same agreements even if concluded after the signature of the ICC Treaty[673]. For instance, the European Union took this position in its Guiding Principles on Article-98 agreements[674].

Contrarily, the United States interpreted – and some experts of international criminal law espoused the same view[675] – Article 98(2) of the ICC Treaty as "a means within the Rome Statute to negotiate future international agreements for non-surrender of US personnel"[676]. In fact, this can be proven by the fact that the United States was originally determined to negotiate an Article-98 agreement with the International Criminal Court itself, thus granting total immunity for its servicemembers and authorities[677]. Though such a policy was not eventually put forward since it would have constituted "an unacceptable application of exceptionalism"[678], the US practice in convincing both states parties and non-member states to the Rome Statute to sign non-surrender agreements – even after the entry into force of the Rome Statute – is a confirmation of the US original understanding of Article 98(2)'s temporal scope.

Yet, for the present analysis, this question remains a theoretical debate, as both the US-Afghan SOFA and the ISAF SOMA, as well as the US-Afghan

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[671] SCHABAS (2010a: 4).
[672] SCHUERCH (2017: 277-278). Indeed, SCHEFFER (2005: 352) suggested that the best way not to undermine the whole campaign of Article-98 agreements would be to "[rectify] existing bilateral non-surrender agreements […] with a US public declaration confirming that the reference to 'nationals' in such agreements will be interpreted by the US Government to mean US civilian component of a military deployment".
[673] HIÉRAMENTE (2008: 83-84); VOETELINK (2015: 216-217); TRIFFTERER, AMBOS (2016: 2146).
[674] *Supra* footnote 661.
[675] WEDGWOOD (1999: 103); ROSENFELD (2003: 277); BASSIOUNI, SCHABAS (2016a: 162-164); NEWTON (2016: 392); SCHUERCH (2017: 276).
[676] SCHEFFER (2005: 340-341).
[677] *Supra* footnote 103. Such an interpretation was contraposed by the German perspective, according to which "it is generally understood that Rule 195(2) [of the Rules of Procedure and Evidence] should not be interpreted as requiring or in any way calling for the negotiation of provisions in any particular international agreement by the Court or by any other international organization or state", in TAN (2004: 1140).
[678] SCHEFFER (2005: 342).

non-surrender agreement, were signed before the signature of the Rome Statute by the Islamic Republic of Afghanistan[679].

4.1.1 SOFAs, SOMAs and Article-98 agreements: differences and commonalities

In the first chapter of this dissertation, we have explained that, as soon as the negotiations over the establishment of an international criminal court got to the heart, the US Department of Defense instructed Ambassador Scheffer to, first and foremost, guarantee the preservation of US Status of Forces Agreements worldwide[680]. Eight years later, the Bush's administration started a global campaign of Article-98 agreements, though the SOFAs and the SOMAs signed by the United States were still in place. The Bush's desire to sign Article-98 agreements worldwide, despite the contemporaneous application of SOFAs and SOMAs, lead us to investigate the differences and the commonalities between the two types of international agreement.

As we have previously explained, Status of Forces Agreements (SOFAs) and Status of Mission Agreements (SOMAs) are international bilateral and multilateral treaties governing the legal status of the troops deployed in foreign military operations and, more importantly, the jurisdiction over their acts[681]. In particular, a Status of Forces Agreement *lato sensu* is "an arrangement, no matter in what form, delineating the legal status of servicemen from a sending state who stay with the consent of the host state on its territory, and that at least includes rules on the exercise of criminal jurisdiction over the sending state's servicemen"[682]. This type of agreement was initially developed in the Cold War as a means for the United States to regulate the presence of its troops in an allied host country[683]. In fact, the first agreement of this sort was the "Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces" (henceforth "NATO SOFA"), signed in London on June 19, 1951. The NATO SOFA would have later become a model for subsequent specific bilateral and multilateral Status of Forces Agreements.

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[679] The *Military Technical Agreement between the International Security Assistance Force (ISAF) and the Interim Administration of Afghanistan* was signed on January 4, 2002, and entered into force on January 4, 2002. The *Exchange of Notes between the US Embassy in Afghanistan and the Ministry of Foreign Affairs of the Transitional Islamic State of Afghanistan* – governing the status of US military troops employed in Operation Enduring Freedom – was signed on September 26, 2002, and entered into force on May 28, 2003. Finally, the *Agreement between the Government of the Transitional Islamic State of Afghanistan and the Government of the United States of America regarding the surrender of persons to the International Criminal Court* was signed on September 20, 2002, and entered into force on August 23, 2003. Conversely, the Islamic Republic of Afghanistan acceded the Rome Statute on February 10, 2003, and the treaty entered into force on May 1, 2003.

[680] *Supra* footnote 52.

[681] ROSENFELD (2003: 280); TAN (2004: 1136-1137); FOCARELLI (2017: 318-320).

[682] VOETELINK (2015: 17).

[683] ROSENFELD (2003: 280).

Besides, in 1990, the United Nations adopted the "UN Model SOFA"[684] in order to harmonize the treaties governing all the UN peacekeeping operations. While the NATO SOFA provided for both exclusive and concurrent jurisdictions over actions committed by the sending state's troops[685], the UN Model SOFA established that the "military members of the military component of the United Nations peace-keeping operation shall be subject to the exclusive jurisdiction of their respecting participating States in respect of any criminal offences which may be committed by them in host country"[686].

In other words, SOFAs clarify which country would have jurisdiction in case of crimes committed by the sending state's troops. From this perspective, the UN Model SOFA appears to be more protective towards its military component inasmuch as it grants exclusive jurisdiction to the peace-keeping operation's contributing state even if the alleged crimes are in contravention with the host state's laws. On the contrary, Status of Forces Agreements modelled upon the NATO SOFA did not secure the sending states' soldiers for any action committed in the host state's territory. Thus, the United States risked seeing its servicemembers being extradited before the International Criminal Court as a consequence of the host state's decision to delegate its exclusive jurisdiction to the ICC. As Rosenfeld rightly pointed out in 2003, "[i]n their current form, US SOFAs alone provide insufficient protection against possible ICC jurisdiction over US military personnel stationed abroad"[687]. In fact, "[w]hile SOFAs do not explicitly provide for transfer of individuals to other jurisdictions, they do not prohibit such transfers either"[688]. The rationale behind the Bush's administration's Article-98 agreement global campaign was thus aimed at avoiding this possibility.

What we here define "Article-98 agreements" more generally refer to all those international treaties that the US endeavoured to sign with the greatest possible number of states in order to prevent the extradition of US nationals to the International Criminal Court. Given their specific function, they are also known as "non-surrender agreements". In fact, Article 2(a) and (b) of the standard version of US Article-98 agreements establish the contracting states' obligation, "absent the expressed consent of the first Party"[689], neither to surrender nor to transfer any "person" – conceived both as a national and/or as

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[684] Document of the United Nations General Assembly, October 9, 1990, A/45/594, *Draft model of status-of-forces agreement between the United Nations and host countries*.

[685] More specifically, Article VII(2)(a) and (b) of the *Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces* confers exclusive jurisdiction on the sending state for violation of the sending state's laws and exclusive jurisdiction on the host states for acts in contravention to its own domestic laws. Conversely, there is concurrent jurisdiction if the act violates both the sending and the host state's domestic laws.

[686] *Model status-of-forces agreement for peace-keeping operations*, *supra* footnote 684, para. 47(b). For an analysis on the UN Model SOFA, see TAN (2004: 1150-1153).

[687] ROSENFELD (2003: 292).

[688] ROSENFELD (2003: 292).

[689] See, for instance, Article 2 of *Agreement between the Government of the Transitional Islamic State of Afghanistan and the Government of the United States of America regarding the surrender of persons to the International Criminal Court*, *supra* footnote 669.

an individual with an "official capacity" nexus with a state party to the agreement – to the ICC or to a third party whose intent would be the surrender and/or the transfer of the concerned person to the Court. Besides, the most common version of US Article-98 agreements also reiterates the states parties' reciprocal commitment to ensure that the extradition of a contracting state's individual to a third party will not be allowed if the receiving country's final objective was the surrender of the accused to the ICC[690]. Finally, albeit the mention of "the importance of bringing to justice those who commit genocide, crimes against humanity and war crimes"[691], the US non-surrender agreements do not explicitly impose an obligation to carry out investigations and proceedings over the alleged commission of such crimes[692].

In light of the above description, we could infer that Article-98 agreements do not constitute a special form of SOFAs, but they rather complement and fill the gaps of US Status of Forces Agreements *lato sensu*. Nonetheless, according to the United States of America, both types of treaties fall within the application of Article 98(2) of the Rome Statute.

4.2 The Afghan case: SOFAs, SOMAs and Article-98 agreements

After the end of the Cold War, given the more and more intense commitment of the United States in global peace and security, the US executive undertook a vast campaign of signature of SOFAs and SOMAs. In addition, fearing the potential prosecution by the International Criminal Court of alleged crimes committed abroad, the White House managed to convince one hundred states in the world to sign non-surrender agreements with the USA. The Islamic Republic of Afghanistan – being one of the most controversial and, as the following years would have proven, long-lasting US military commitments – was obviously deemed by the USA to be a country where the signature of both types of agreements was essential. In particular, three international agreements are relevant for the present analysis: (a) the Military Technical Agreement between the International Security Assistance Force (ISAF) and the Interim Administration of Afghanistan; (b) the Exchange of Notes between the US Embassy in Afghanistan and the Ministry of Foreign Affairs of the Transitional Islamic State of Afghanistan, and (c) the Agreement between the Government of the Transitional Islamic State of Afghanistan and the Government of the United States of America regarding the surrender of persons to the International Criminal Court.

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[690] *Id.*, Articles 3 and 4. DIETZ (2004: 148), however, noted the existence of Article-98 agreements where the bilateral commitment is supplanted by the sole "unilateral US immunity from the ICC". In other words, under these agreements, the United States is not compelled to ask for the other contracting state's consent to surrender an individual to the ICC.

[691] See, for instance, preambular paragraph 1 of *Agreement between the Government of the Transitional Islamic State of Afghanistan and the Government of the United States of America regarding the surrender of persons to the International Criminal Court*, *supra* footnote 669.

[692] BARNIDGE (2003: 746).

First of all, the UNSC-mandated international mission, the International Security Assistance Force (ISAF), signed a Status of Mission Agreement on January 4, 2002, with the Afghan interim government, which entered into force in very same day[693]. Apart from reiterating the ISAF's role in "assist[ing] the Interim Administration in the maintenance of security in the AOR [Area of Responsibility]"[694], the agreement asserted that "the ISAF and supporting personnel, including associated liaison personnel, [would] under all circumstances and at all times be subject to the exclusive jurisdiction of their respective national elements in respect of any criminal or disciplinary offences which may be committed by them on territory of Afghanistan"[695]. Therefore, "the ISAF and supporting personnel, including associated liaison personnel, [would] be immune from personal arrest and detention"[696] and, if they were "mistakenly arrested or detained, [they would] be immediately handed over to ISAF authorities"[697]. In other words, this SOMA reflected the UN Model SOFA, thus denying any concurrent or exclusive jurisdiction to Afghanistan.

The second international agreement in force at the time of the alleged commission of war crimes in Afghanistan was the Status of Forces Agreement governing the presence of the US troops on the Afghan territory pursuant to Operation Enduring Freedom. However, in this case, such an international undertaking took the form of an exchange of diplomatic notes[698] between the US Embassy in Kabul and the Ministry of Foreign Affairs of the Afghan interim government. In particular, the US Embassy in Kabul asked to the Afghan executive to grant to the US soldiers deployed in Afghanistan "a status equivalent to that accorded to the administrative and technical staff of the Embassy of the United States of America under the Vienna Convention on Diplomatic Relations of April 18, 1961"[699]. Article 31(1) of the cited convention, in fact, ensures that "[a] diplomatic agent shall enjoy immunity from the criminal

[693] Annex to the letter dated 14 January 2002 from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the President of the Security Council, January 25, 2002, S/2002/117, *Military Technical Agreement between the International Security Assistance Force (ISAF) and the Interim Administration of Afghanistan ("Interim Administration")*. The ISAF SOFA was substituted by the Exchange of letters between NATO and Afghanistan of September 5, 2002, and November 22, 2004. See CORMIER (2020: 95-96).

[694] *Id.*, Article IV(1).

[695] Annex A to the Military Technical Agreement between the International Security Assistance Force (ISAF) and the Interim Administration of Afghanistan ("Interim Administration"), S/2002/117, January 25, 2002, *Arrangements Regarding the Status of the International Security Assistance Force*, Section 1, para. 3.

[696] *Id*, Section 1, para. 4.

[697] *Ibidem*.

[698] The *Diplomatic note from the Embassy of the United States of America*, No. 202, September 26, 2002, explicitly clarified that the "note, together with Ministry's reply to that effect, shall constitute an agreement between the two governments which shall enter into force on the date of the Ministry's reply" [i.e. on May 28, 2003].

[699] *Id*.

jurisdiction of the receiving State"[700]. In practical terms, the Islamic Republic of Afghanistan "authorise[d] the United States Government to exercise criminal jurisdiction over United States personnel"[701] and "confirme[d] that such personnel may not be surrendered to, or otherwise transferred to, the custody of an international tribunal or any other entity or state without the express consent of the Government of the United States"[702]. Upon confirmation of the Afghan Ministry of Foreign Affairs[703], the US Diplomatic Note entered into force on May 28, 2003.

Finally, on September 20, 2002, the USA and Afghanistan signed at Washington an Article-98 agreement, namely the *Agreement between the Government of the Transitional Islamic State of Afghanistan and the Government of the United States of America regarding the surrender of persons to the International Criminal Court*[704]. Its wording precisely mirrored the standard model of US non-surrender agreements, thus prohibiting any surrender or transfer of "current or former Government officials, employees (including contractors), or military personnel or nationals of one Party"[705] to the ICC or a third party whose intent would be the surrender or transfer of that individual to the Court.

Therefore, all the three international treaties combined precluded Afghanistan from pursuing any US nationals – or any person sent by the USA to the Islamic Republic of Afghanistan in official capacity – before its domestic courts. More importantly, they denied to Afghanistan any capacity to respond to an ICC arrest warrant directed to US servicemembers and authorities for the alleged commission of war crimes, crimes against humanity and genocide.

4.2.1 The impact of US judicial exceptionalism on Afghanistan and on the ICC

In the final section of this chapter, we will analyse the legal implications of these three agreements on all the actors involved in the Situation in Afghanistan. The last pages of this dissertation will prove that the United States managed to build up an effective judicial exceptionalism. As a matter of fact, albeit the theoretical ability of the ICC to investigate war crimes committed by the

[700] Although Article 31(4) of the Vienna Convention on Diplomatic Relations (1961) clarifies that paragraph 1 does not preclude the sending state's jurisdiction over a diplomatic agent, it does not impose any obligation of prosecution and investigation in case of a commission of crimes by diplomats.

[701] The *Diplomatic note from the Embassy of the United States of America*, *supra* footnote, 698.

[702] *Ibidem*.

[703] Document No. 93, May 28, 2003, *Note of the Ministry of Foreign Affairs of the Transitional Islamic State of Afghanistan*.

[704] This treaty was qualified as an executive agreement, thus not necessitating any Senate's ratification. Therefore, the *Agreement between the Government of the Transitional Islamic State of Afghanistan and the Government of the United States of America regarding the surrender of persons to the International Criminal Court* entered into force on August 23, 2003, without any discussion before the US Senate.

[705] This is the definition of "person" employed in the US-Afghan Article-98 agreement. See *supra* footnote 669.

US armed forces and CIA personnel, such instruments make the prosecution of US nationals extremely difficult due to the lack of cooperation from the USA and Afghanistan. In other words, the US political and legal efforts could end up achieving that objective the International Criminal Court promised to fight and to terminate, namely impunity for the most heinous crimes in international criminal justice.

A. Legal implications on the USA

First of all, it is necessary to present the possible implications on the United States of America. The USA had full authority to sign such international agreements[706]. In fact, as we have ascertained in section 1.2.2, by "unsigning" the Rome Statute, the US executive wanted to clarify its intention not to ratify the ICC Treaty, thus not formally acceding the International Criminal Court. From the perspective of the law of treaties, this had the pragmatic consequence of untying the United States from the obligation not to adopt actions which would have "defeated the object and purpose"[707] of the Rome Statute. Therefore, by signing the US-Afghan Article-98 agreement, as well as the ISAF and the bilateral SOFA, the USA no more infringed Article 18(a) of the Vienna Convention on the Law of Treaties (VCLT)[708].

This issue will be re-assessed when considering the legal implications on Afghanistan, being it a state party to the ICC. Here, it is just sufficient to remind the reader that the main purpose of the Rome Statute concerns the end of impunity and the achievement of global justice against the commission of the international crimes enlisted in the ICC Treaty. If these international agreements were determined to be in contravention to Article 18(a) of VCLT, such a conclusion would not appear to be irrelevant for the United States of America. In fact, it would be source of US concerns not only because a treaty conflict could undermine the mere application of SOFAs, SOMAs and Article-98 agreements – thus seriously jeopardising the US judicial exceptionalism before the Court – but also because some commentators have argued that it might entail the responsibility of the United States of America under international law[709]. More precisely, the issue at stake would be whether the USA might be held responsible for having strongly encouraged – sometimes even by threatening to withdraw military troops or economic investments on the state which

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[706] LARBI (2004: 185); TAN (2004: 1133); HIÉRAMENTE (2008: 81).
[707] Article 18(a) of the Vienna Convention on the Law of Treaties (1969), *supra* footnote 114.
[708] *Supra* footnote 117.
[709] Report by Amnesty International, August 2002, *International Criminal Court: US efforts to obtain impunity for genocide, crimes against humanity and war crimes*. The report affirmed that "[a] non-state party that incites another state to violate its obligations under international law as a state party or as a signatory to a treaty by entering into a new agreement itself violates international law and under the principle, *nullus commodum capere de sua injuria propria*, cannot claim any rights under that new agreement" (*Id*., p. 17). For a critique of Amnesty International's reasoning, see TALLMAN (2004: 1049-1050).

refused[710] – the signature of these agreements by other states which were parties to the Rome Statute. Professor Roger O'Keefe was, however, rightly trenchant in asserting that "inducing breach of treaty"[711] by encouraging states to sign an illegal international agreement does not fall within the conditions defining the states' responsibility for wrongful acts[712]. Therefore, the signature of Article-98 agreements cannot be conducive of any US responsibility under international law.

B. Legal implications on Afghanistan

Things may appear less clear in respect to Afghanistan. Indeed, even if such agreements were in contravention to the Rome Statute, the USA – as a third party to the agreement – would not be bound to respect the treaty. Instead, as a party to the Rome Statute, Afghanistan cannot act contrarily to the purpose of the treaty. When dealing with Article 18(a) of VCLT, we should ask ourselves if such agreements do really run counter to the spirit and the purpose of the Rome Statute. In the previous pages, we have highlighted their focus on granting exclusive jurisdiction to the United States over its own nationals or persons deployed in official capacity in foreign missions. Therefore, by reading these texts from the lenses of the Rome Statute, such a commitment may be understood as a form of reaffirmation of the principle of complementarity[713], as such being totally in conformity with the ICC Treaty. The US delegation itself seemed to confirm this objective: "SOFAs ensure that the state having the exclusive or primary right to exercise criminal jurisdiction does so, and that the interests of justice are served for all concerned. The ICC should remain, therefore, a court of second resort in such instances, becoming involved only where the sending and the receiving states are unable or unwilling to comply with their agreements regarding the exercise of criminal jurisdiction, for those crimes defined by the statute of the ICC, under applicable SOFAs"[714]. However, it would count as a true complementarity enforcement mechanism if and only if these agreements imposed an obligation to investigate and prosecute the perpetrators of war crimes, crimes against humanity and genocide over the sending state. Here, the study of Article-98 agreements' and SOFAs' compliance with the core purpose of the Rome Statute lies.

As we previously discussed, the preambular paragraphs of the US-Afghan non-surrender agreements reiterate the importance of "bringing to

[710] Section 2007 of the American Servicemembers' Protection Act threatens the withdrawal of military assistance, unless states signed an Article-98 agreement with the United States of America. The ASPA legislation has been addressed in section 1.2.2.
[711] O'KEEFE (2010: 13).
[712] Annex to UNGA Resolution 56/83, December 12, 2001, *Draft articles on Responsibility of States for Internationally Wrongful Acts*. We should, however, remind the reader that the text has not yet been finalized in an international treaty. Instead, it still remains a draft of an international convention proposed by the International Law Commission.
[713] BASSIOUNI, SCHABAS (2016a: 162).
[714] SCHUERCH (2017: 279-280).

justice"[715] purported criminals and, more importantly, reaffirm the contracting states' "intention to investigate and to prosecute where appropriate acts within the jurisdiction of the International Criminal Court alleged to have been committed by its officials, employees, military personnel or other nationals"[716]. That said, however, this wording does not impose any duty of investigation[717], but it merely limits itself to assert "the intention" to do it, if the investigation of these individuals was deemed "appropriate" by the concerned state. In other words, we should not *a priori* dismiss neither the prosecution of these individuals nor the potential immunity of the same persons, since it is up to the state to decide what decision is to be taken.

Let's consider the case of the US-Afghan non-surrender agreement. The US executive may decide either to try its own nationals alleged to have committed war crimes or grant them immunity. The second choice would be not in contravention to Article 18(a) VCLT from the US perspective. However, it would be such for Afghanistan, which, though relying on the US decision not to prosecute its own nationals, could be held responsible for having defeated the Rome Statute's core purpose. The complexness of this treaty conflict, thus, relies on an assessment of potential and factual violation of Article 18(a) of VCLT. As the US-Afghan non-surrender agreement do neither impose a duty of prosecution nor explicitly establish the immunity of the contracting states' persons sent under official capacity, we cannot *a priori* assert that the mere signature of such an agreement by a state party to the Rome Statute would entail a contravention of Article 18(a) of VCLT[718]. Contrarily, the violation may arise as soon as the potential contravention is supplanted by a factual infringement of the provision[719]. In other words, Afghanistan would defeat the spirit of the Rome Statute only if the US-Afghan non-surrender agreement ended up granting immunity from prosecution to US armed forces and CIA personnel. Conversely, if US courts prosecuted them, then the US-Afghan non-surrender agreement would play a role of complementarity affirmation mechanism.

The issue of a possible Afghan treaty conflict between the Rome Statute and the non-surrender agreement is particularly tricky because international law is not clear on the settlement of this specific situation[720]. When a legal contradiction arises among international agreements signed by the same

[715] *Supra* footnote 691.
[716] Preambular paragraph 4 of the *Agreement between the Government of the Transitional Islamic State of Afghanistan and the Government of the United States of America regarding the surrender of persons to the International Criminal Court*, *supra* footnote 669.
[717] SCHUERCH (2017: 278).
[718] DIETZ (2004: 155-156); TAN (2004: 1126); O'KEEFE (2010: 11); VOETELINK (2015: 217). On the contrary, TALLMAN (2004: 1047) argued that "[s]igning an Article-98 agreement runs counter to the very object and purpose of the Rome Statute".
[719] O'KEEFE (2010: 9); TRIFFTERER, AMBOS (2016: 2146).
[720] TALLMAN (2004: 1052); NEWTON (2016: 377); CORMIER (2018: 1060-1061).

parties, the last international agreement which has been signed prevails[721]. Here, however, the parties to the treaties differ inasmuch as the United States is party to the non-surrender agreement but did not accede the ICC Treaty. In other words, the non-surrender agreement applies between Afghanistan and the USA, while the Rome Statute binds Afghanistan and all the other parties to it[722]. It is, thus, only Afghanistan which is concerned by the treaty conflict. Apart from the role played by the International Criminal Court – which we will address in the following pages – pertaining to the interpretation of Article-98 agreements, if the conditions compelled Afghanistan to factually contravene one of the two treaties, the Afghan executive would be forced to politically decide the treaty to be implemented and the one to be disregarded[723]. Therefore, only following such a political decision, Article-98 agreements could be deemed in violation of the Rome Statute.

C. Legal implications on the International Criminal Court

The previous lines seem suggesting that in the Situation in Afghanistan, the international responsibility of Afghanistan arising from a treaty conflict is inevitable. However, this is not true. In fact, Article 98(2) of the Rome Statute was included in the final version of the ICC institutive treaty precisely in order to avoid such a situation. The language of the concerned provision imposes the obligation upon to Court – not upon states – to refrain from requesting states parties to the Rome Statute to extradite and/or transfer any accused – which has been sent on its own territory under official capacity by another state – if this act compelled them to contravene previous international

[721] The principle of *lex posterior derogat priori* among states parties to the same treaties is implied in Article 30(3) of the Vienna Convention on the Law of Treaties (1969), according to which "[w]hen all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty".

[722] Article 30(4)(b) of the Vienna Convention on the Law of Treaties (1969) reads as follows: "When the parties to the later treaty do not include all the parties to the earlier one: (b) as between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations".

[723] CORMIER (2018: 1061) summed it up in the following terms: "In cases like this one where is no commonality of parties, it is sufficient to acknowledge that 'neither the VCLT nor the customary canons of treaty construction offer a ready solution to such conflicts'. It may be that in this situation, Afghanistan has essentially resorted to the principle of political decision, which Jan Klabbers describes as applying where 'the state concerned simply has to make a political decision which commitment to prefer'". On the contrary, according to SCHEFFER (2005: 353), the United States should avoid this conflict by "issu[ing] a declaration that designates all US SOFAs and SOMAs covering US personnel as Article 98(2) agreements to the extent that their terms (which can vary) require criminal jurisdiction to be allocated in a specific manner between the parties to such agreements and such criminal jurisdiction covers the atrocity crimes within the jurisdiction of the ICC. The bottom line of such a declaration must be that a suspect of an atrocity crime will be investigated and, if merited, prosecuted pursuant to the procedures of the SOFA or SOMA".

undertakings[724]. In other words, Afghanistan should not end up deciding which treaty to implement and which one to disregard, since the Court should not make the Afghan government be in such a position[725].

However, as we previously affirmed, Article-98 agreements and SOFAs *lato sensu* may factually contravene the Rome Statute, thus granting immunity to individuals and undermining the ICC's ability to achieve its mandated goal of ending impunity. On this point, we should remind the reader that Article 119(1) of the Rome Statute enables the Court to adjudicate on "[a]ny dispute concerning the judicial functions of the Court"[726]. In so doing, the Court would thus be able to disregard any international agreement which would be in violation of Article 18(a) of the VCLT and, as such, an invalid means to block the Court's surrender request to its states parties. In other words, "[t]he competence to decide whether a state party legitimately relies on a conflicting international obligation under Article 98(2) [of the Rome Statute] rests within the Court itself"[727].

Nevertheless, the most important issue to be addressed here concerns the delegation of jurisdiction to the ICC by its states parties. In section 2.1.1.2, we have asserted that the International Criminal Court can prosecute nationals of third parties to the Rome Statute if these ones have committed war crimes, crimes against humanity and/or genocide on the territory of a state party. The legal basis for this competence should be found in the sovereign jurisdiction to adjudicate of its states parties, according to which a state has inherent and natural competence in pursuing individuals who have committed crimes on its own territory. Therefore, as states delegated their jurisdiction to the ICC upon ratification of the Rome Statute, the International Criminal Court is entitled to prosecute nationals of third parties inasmuch as states parties to the Rome Statute would be able to try them on their territory.

However, Professor Michael Newton argued that this condition does not subsist in the case of the Islamic Republic of Afghanistan. In fact, according to him, by signing the ISAF SOMA, the US-Afghan non-surrender agreement and accepting the dispositions of the US Embassy's diplomatic note, Afghanistan limited its own jurisdictional reach by denying any possibility to criminally prosecute US nationals and persons sent on the Afghan soil by the USA under official capacity[728]. In so doing, Afghanistan delegated to the ICC its jurisdictional capacity with all its limitations attached. Therefore, "if the territorial state has no legally cognizable claim […] to criminal jurisdiction over a particular class of perpetrators at the time of the alleged offense/s, then it has nothing to transfer to the supranational court irrespective of ostensible

[724] DIETZ (2003: 152-153); LARBI (2004: 182); TAN (2004: 1125-1126); O'KEEFE (2016: 2); SCHUERCH (2017: 272-273); CORMIER (2018: 1055).
[725] O'KEEFE (2010: 5).
[726] Article 119(1) of the Rome Statute: "Any dispute concerning the judicial functions of the Court shall be settled by the decision of the Court".
[727] SCHUERCH (2017: 273). See also TAN (2004: 1158-1162); KLAMBERG (2017: 665).
[728] NEWTON (2016).

obligations under the Rome Statute"[729]. In other words, the ICC would not be entitled to prosecute US nationals under official capacity to the extent that Afghanistan is not able to do it[730].

Newton's argument was, however, largely criticized by the doctrine[731], because it was "based on a misconception of delegated jurisdiction in international law"[732]. Under international customary law, a state is empowered to exercise jurisdiction over its own territory – regardless of the alleged criminal's nationality – because that is a natural constitutive element of statehood. No state can concede or remove that right from other countries, neither can do it an international treaty of whatsoever form or substance. Pursuant to SOFAs, SOMAs, Article-98 agreements or whatever other treaty, a country can impose limitations on the exercise of its own jurisdiction, but that does not mean that it loses its natural sovereign jurisdiction[733]. Since such a state "still retains [its own jurisdictional rights], [it] is competent to confer them in their plenitude on the ICC"[734]. In fact, the states' conferral of jurisdiction to the Court "is a general delegation, not a specific one"[735]. As Professor Roger O'Keefe rightly pointed out[736], Newton's reasoning seems thus confusing the concepts of jurisdiction to enforce with jurisdiction to prescribe and to adjudicate[737]. While the signature of SOFAs and SOMAs precluded the exercise of Afghan criminal jurisdiction to enforce over acts committed by persons sent by the USA to Afghanistan, the same international treaties did not affect Afghanistan's overall right to sovereign jurisdiction to prescribe and to adjudicate[738].

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[729] NEWTON (2016: 399).

[730] CORMIER (2018: 1049) summed it up as follows: "In agreeing to be bound by the SOFA, the argument goes, Afghanistan has renounced its right to prosecute US service members for any crimes they commit on its territory. Afghanistan no longer 'possesses' such jurisdiction, and therefore it cannot delegate to the ICC what it does not have". Seemingly, CLINE (2008: 115) affirmed that "Article 98 do not modify criminal jurisdiction. Instead, they do not permit the ICC to exercise jurisdiction over nationals of parties to the Article 98 agreements without the consent of the country concerned. Moreover, an article 98 agreement does not effect a change in international law and practice; rather, it simply preserves the status quo between the United States and another nation, prior to that nation becoming a party to the ICC".

[731] LARBI (2004); O'KEEFE (2016); CORMIER (2018); JACOBS (2019a); CORMIER (2020).

[732] CORMIER (2018: 1049).

[733] CORMIER (2020: 97).

[734] O'KEEFE (2016: 2). See also CORMIER (2018: 1053). Professor O'KEEFE (2016: 2) explains his reasoning by highlighting that "[t]he question […] is less *quantum iuris*, or how much right a state possesses and passes on, than *quid ius* or *quia iura*, or which right or rights. Jurisdiction is a solid block of 'right'".

[735] JACOBS (2019a).

[736] O'KEEFE (2016: 6).

[737] These three notions have been defined in section 2.1.1.

[738] Few weeks before the judgement of the Appeals Chamber on the Situation in Afghanistan, the Office of the Prosecutor (OTP) formally requested Pre-Trial Chamber I to determine whether ICC has jurisdiction over Palestine. In presenting its request, the OTP argued that "the provisions of Oslo II regulating the [Palestinian Authority]'s exercise of criminal jurisdiction relate to the [Palestinian Authority]'s enforcement jurisdiction, namely its prerogative to enforce or ensure compliance with its legislation and to punish non-compliance with respect to certain issues and persons. Enforcement jurisdiction is different from prescriptive jurisdiction,

Seemingly, Article 98(2) of the Rome Statute does not affect the Court's jurisdiction, but it merely restrains the ICC's ability from requesting an extradition of a purported criminal to Afghanistan. This reasoning leads us to assert that, albeit SOFAs, SOMAs and Article-98 agreements, the ICC would however hold jurisdiction over the case[739]. As a matter of fact, this position has been firstly affirmed by the Office of the Prosecutor[740] in its request for authorization to proceed, and it represents one of the few considerations where Pre-Trial Chamber II[741] and Appeals Chamber[742] agreed.

That said, acknowledging the Court's jurisdiction over alleged crimes committed by US armed forces and CIA personnel does not however make the case easy. In fact, the ICC will be compelled to bypass the prohibition under Article 98(2) of the Rome Statute by requesting cooperation to states parties other than Afghanistan[743]. This is possible because the US-Afghan non-surrender agreements only binds the parties to that agreement, namely the

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which is the capacity to make the law, including the ability to vest the ICC with jurisdiction. Thus, '[t]he right to delegate jurisdiction is reflective of an internationally recognized legal authority, and not of the material ability of actually exercising jurisdiction over either the territory in question or over certain individuals within or outside that territory'", in Document of the ICC Office of the Prosecutor, January 22, 2020, ICC-01/18-12, *Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine*, para. 184.

[739] O'KEEFE (2016: 7); JACOBS (2019a); CORMIER (2020: 99).

[740] "Moreover, the conclusion of an agreement pursuant to article 98 of the Statute between the Government of Afghanistan and a third State does not impact on the exercise of jurisdiction by the Court. This is because article 98, which falls within Part 9 of the Statute, serves to qualify the cooperation obligations of States Parties concerning the surrender of persons sought by the Court, not the exercise of jurisdiction by the Court, which is regulated in Part 2. Indeed, the very purpose of article 98 is to regulate how the Court's exercise of jurisdiction should be enforced. Similarly, the conclusion of a Status of Forces Agreement ('SOFA') by which Afghanistan has ceded exclusive criminal jurisdiction to a sending State with respect to alleged crimes committed by that sending State's nationals on Afghan soil does not affect the Court's jurisdiction. In fact, this might constitute a relevant ground for admissibility in view of the resultant inaction, or otherwise unwillingness or inability, of the territorial State to exercise criminal jurisdiction with respect to a particular category of persons or groups", in *Request for authorisation of an investigation pursuant to article 15*, *supra* footnote 495, para. 46.

[741] "[…] the Chamber concurs with the Prosecution that agreements entered into pursuant to article 98(2) of the Statute do not deprive the Court of its jurisdiction over persons covered by such agreements. Quite to the contrary, article 98(2) operates precisely in cases where the Court's jurisdiction is already established under articles 11 and 12 and provides for an exception to the obligation of States Parties to arrest and surrender individuals", in *PTC's Afghanistan Decision*, *supra* footnote 531, para. 59.

[742] "Arguments were also advanced during the hearing that certain agreements entered into between the United States and Afghanistan affect the jurisdiction of the Court and should be a factor in assessing the authorisation of the investigation. The Appeals Chamber is of the view that the effect of these agreements is not a matter for consideration in relation to the authorisation of an investigation under the statutory scheme. As highlighted by the Prosecutor and LRV 1, article 19 allows States to raise challenges to the jurisdiction of the Court, while articles 97 and 98 include safeguards with respect to pre-existing treaty obligations and other international obligations that may affect the execution of requests under Part 9 of the Statute. Thus, these issues may be raised by interested States should the circumstances require, but the arguments are not pertinent to the issue of the authorisation of an investigation", in *Appeals Chamber's Afghanistan Judgement*, *supra* footnote 603, para. 44.

[743] TRIFFTERER, AMBOS (2016: 2146). See also BARNIDGE (2004: 748).

USA and Afghanistan. Since the International Criminal Court's jurisdiction over the Situation in Afghanistan cannot be affected by any treaty signed between the United States and Afghanistan, the Court may issue a request for surrender and/or transfer to other states parties to the Rome Statute. If the alleged US perpetrators of war crimes were present on one of these countries, then this state would be obliged to comply with the Court's request.

In conclusion, the US campaign of Article-98 agreements has proven to be an obstacle to the Court's pursuit of global justice. In fact, while the ICC's jurisdiction is not affected by these international agreements, the Court's ability to effectively prosecute US servicemembers and CIA personnel has been seriously undermined. Although Article 98(2) of the Rome Statute was not drafted to grant impunity and immunity to criminals, "the reality, however, is that politically and practically it will be very difficult for the ICC to gain custody of any US national"[744]. In other words, the US long-lasting fight for a judicial exceptionalism in global justice risks to represent the major hurdle in the prosecution of US crimes in the Situation in Afghanistan.

[744] CORMIER (2018: 1062).

Conclusion

The present dissertation has contributed to deconstructing the overall US-ICC relationship by proposing a different tool of interpretation, namely US judicial exceptionalism. In fact, the underlying hypothesis of the whole dissertation presumes that, in order to maintain its global commitment and leadership to the peace and security domains, the United States has always felt the need to be granted some room for action. Therefore, the United States has endeavoured to seek judicial exceptions and jurisdictional exemptions from the ICC jurisdiction since Bill Clinton's tenure. Despite fluctuations between aggressive and cooperative attitudes towards the Court, the administrations of Bill Clinton, George W. Bush, Barack Obama and Donald Trump all shared the constant concerns over the potential prosecution of US servicemembers before the ICC and never legitimised the potential ICC jurisdiction over US nationals. In order to do so, the United States of America advanced three main sets of legal critiques. First of all, the US argued that the ICC is not entitled to prosecute nationals of non-party states to the Rome Statute. Secondly, enabling the ICC Prosecutor to trigger on his/her own motion the jurisdiction of the Court would make the Office of the Prosecutor a viable means for externally pressured politically motivated charges against the United States. Thirdly, the US nationals would not enjoy the right to a jury trial before the Court. By adopting the lenses of international law and international criminal law, we managed to address every subtlety pertaining to the three US critiques and we came to the conclusion that they are all primarily based on political considerations, rather than legal argumentations. As such, they cannot be accepted from the international law *lato sensu* perspective.

On the same vein, we proposed an International Relations theories analysis on the US-ICC relationship as well. By relying on the constructivist intersubjective identities, we argued that three historical turning points may have ended up faltering the US role identity as global justice promoter: the Pentagon's aggressive negotiating stance during the Rome Conference, the Bush's lawfare strategy and the Abu Ghraib scandal. Yet, the European countries do not seem to be willing to totally supplant the US role identity with their international posture. Indeed, the institutional liberalism approach led us to assert that the Rome Statute proposes a shift towards an international solidarist society, whose acceptance and institutionalisation, however, needs the legitimization by the United States of America as well. Therefore, we finally assessed whether a US membership to the Rome Statute would be beneficial to the US role identity in global justice. Combining the realist approach to IR and a deterrence analysis of the Court's work, we came to the conclusion that the sole criminogenic hypothesis of the Court's functioning would be detrimental to the US role identity. Yet, that possibility is quantitatively limited and asserting that only the Court's functioning would increase the commission of international crimes would represent a reductive statement.

Given this theoretical and overall assessment, the dissertation turned towards the case study of the Situation in Afghanistan. We argued that –

though disputable reasonings both by Pre-Trial Chamber II and the ICC Appeals Chamber – the final authorisation to proceed with a formal investigation in Afghanistan would have represented a test for the US-ICC relationship and a possibility for the Court to dismiss any allegation of double standards application. Yet, the Afghan case proved to perfectly fit the US strategy of judicial exceptionalism. The ISAF SOMA, the exchange of diplomatic notes between the US Embassy in Kabul and the Afghan Ministry of Foreign Affairs, as well as the US-Afghan non-surrender agreement, built up a system of pragmatic protection of US servicemembers and authorities before the International Criminal Court. Indeed, while the Court's jurisdiction is not affected by the provisions of these international agreements, it is compelled to ask the cooperation of states parties other than Afghanistan. In light of the precedent of the former Sudanese President Omar al-Bashir, a successful outcome of the ICC investigation proves to be very unlikely.

The new presidency of Joe Biden may rightly pose the doubt of a more cooperative US approach towards the Court. Nonetheless, his posture does not seem to deviate from the historical ICC policy of the United States of America. In fact, albeit the removal of US economic sanctions and visa restrictions to the former Prosecutor Fatou Bensouda and to the Head of the Jurisdiction, Complementarity and Cooperation Division of the Court, Phakiso Mochochoko, in April 2021, the Biden's administration reiterated that "[it] maintain[ed] [the US] longstanding objection to the Court's efforts to assert jurisdiction over personnel of non-States Parties such as the United States"[745]. As a matter of fact, already in 1998, the then Senator Biden explicitly suggested the need to seek immunity for US soldiers by "review[ing] the status of forces agreements now in place to ensure that adequate protections are in place". In other words, Biden himself preconised the importance of adopting new international agreements able to prevent the ICC jurisdiction over US personnel employed abroad. He did it four years before the Bush's worldwide campaign of non-surrender agreements based on Article 98(2) of the Rome Statute. Therefore, affirming that the Biden's administration may drastically change the US long-lasting policy towards the Court is utopistic or, at least, does not grasp reality.

Besides, a recent decision by the ICC Appeals Chamber (AC) suggests that the US judicial exceptionalism remains an effective tool to grant immunity before the ICC. On May 28, 2020, the Appeals Chamber of the ICC reviewed the conditions for the release of Laurent Gbagbo and Charles Blé Goudé. According to par. 25(i), the Appeals Chamber, however, decided that Mr. Gbagbo and Mr. Blé Goudé must "accept that the appeal proceeding before this Chamber may proceed in their absence, if they fail to appear before the Court when so ordered"[746]. The Appeals Chamber justified this possibility

[745] Press Statement by the US Secretary of State, Anthony J. Blinken, April 2, 2021, *Ending Sanctions and Visa Restrictions Against Personnel of the International Criminal Court*.

[746] Decision of the ICC Appeals Chamber, May 28, 2020, ICC-02/11-01/15-1355-Red-tFRA, *Décision relative à la requête présentée par le conseil de Laurent Gbagbo aux fins de reconsidération de l'Arrêt relatif à l'appel interjeté par le Procureur contre la décision rendue*

by arguing that Article 63(1) of the Rome Statute[747] had been written in order not to allow *in absentia* proceedings[748] only if the accused – though willing to be present – was unable to participate physically to the trial due to reasons not under his control[749]. On the contrary, the Court affirmed that this disposition would lose its *raison d'être* if the accused voluntarily wanted to block a proceeding by absenting physically"[750]. In such a case, therefore, the proceeding may be held in the absence of the accused.

At the first sight, the imposition of such a condition might thus appear to be extremely relevant not only because it may pave the way for a new approach to *in absentia* proceedings before the International Criminal Court, but especially because it may undermine the US judicial exceptionalism strategy. Indeed, the US-Afghan non-surrender agreement secures US servicemembers and CIA personnel from the ICC jurisdiction to the extent that these individuals cannot be physically surrendered to the Court. If the Court was able to prosecute them *in absentia*, then the US-Afghan non-surrender agreement could no longer ensure judicial exceptionalism to US nationals. However, the Appeals Chamber set out a fundamental *conditio sine qua non* for the

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oralement par la Chambre de première instance I en application de l'article 81-3-c-i du Statut et de réexamen des conditions de mise en liberté de Laurent Gbagbo et Charles Blé Goudé, para. 25(i) (translation added). The original French version reads as follows: "À la lumière de ce qui précède, la Chambre d'appel a énoncé, au paragraphe 60 de l'Arrêt, les conditions imposées à Laurent Gbagbo et à Charles Blé Goudé : i) S'engager par écrit à se conformer à toutes les instructions et ordonnances de la Cour, notamment en comparaissant devant la Cour lorsque celle-ci l'ordonnera, et accepter que la procédure d'appel devant la présente Chambre pourrait se poursuivre en leur absence, s'ils ne se présentaient pas devant la Cour après en avoir reçu l'ordre".

[747] Article 63(1) of the Rome Statute: "The accused shall be present during the trial".

[748] We should however note that, so far, the ICC judicial precedents and the Rules of Procedure and Evidence acknowledged some conditions were *in absentia* trials could have been undertaken. On the on hand, in Decision by Trial Chamber V(a), ICC-01/09-01/11-777, June 18, 2013, *Situation in the Republic of Kenya in the case of The Prosecutor v. William Samoei Ruto and Joshua Arap Sang, Decision on Mr Ruto's Request for Excusal from Continuous Presence at Trial*, para. 104, the Court asserted that "presence of the accused during the trial is not only a right (by virtue of Article 67(l)(d)), but also a duty on the accused (by virtue of Article 63(1)). From the perspective of the imperatives of judicial control, the presence of the accused as a question of his duty establishes the default position. But reading the Statute as a whole and taking into account, in its interpretation and application, the general body of international law, of which the Statute forms a part, there remains a residue of discretion in the Trial Chamber to permit reasonable exceptions to that default position. This is to be done on a case-by-case basis. And it requires the balancing of all the interests concerned. Hence, the Chamber's grant of the Defence's request for Mr Ruto's excusal from continuous presence during the trial is an exception to the general rule". On the other hand, on November 27, 2013, the Assembly of States Parties adopted Rules 134*bis*¸134*ter* and 134 *quarter*, respectively allowing the accused to attend the proceeding via technological means, thus exonerating him to be physically present in the courtroom; granting the possibility to the accused to file a written submission requesting the absence to the proceeding "if exceptional circumstances exist to justify such an absence"; and ensuring the possibility to the accused to waive his/her right to be present at trial if he/she "is mandated to fulfill extraordinary public duties at the highest national level" (see Resolution ICC-ASP/12/Res.7). See also TRIFFTERER, AMBOS (2016: 1563-1587).

[749] *Supra* footnote 746, para. 69.

[750] *Supra* footnote 746, para. 68.

application of this reasoning: in accordance with Article 60 of the Rome Statute, the accused is to be considered aware of the concerned proceeding "[u]pon the surrender of the person to the Court, or the person's appearance before the Court voluntarily or pursuant to a summons". In other words, the Appeals Chamber asserted that the proceeding could be held *in absentia* if only if the threshold criterion enshrined in Article 60 of the Rome Statute was met[751] and if the accused did not voluntarily attend the trial in order to block the legal process. This condition, thus, applies only in case US servicemembers and authorities have already been surrendered or have voluntarily presented themselves before the Court. As the US non-surrender agreements were precisely aimed at denying such a possibility, then it would appear almost impossible that the US alleged perpetrators of war crimes in Afghanistan were successfully prosecuted. This example allows us to understand, once more, the effectiveness of US judicial exceptionalism with regard to the ICC.

The recent political developments in Afghanistan with the return to power of the Taliban may hypothetically lead Afghanistan to cooperate more with the ICC. However, such an attitude would probably raise even more doubts of legitimacy and critiques to the ICC from the US side for two main reasons. Firstly, the Taliban's cooperation with the Court would probably be seen by the USA as a vengeance through the materialisation of a politically motivated charge against the US troops and the CIA personnel. In fact, we should remind the reader that the greatest alleged perpetrators of war crimes and crimes against humanity in the Situation in Afghanistan are the Taliban themselves. Therefore, any cooperation from the Taliban would be limited to the sole crimes committed by US nationals and by the Afghan National Security Forces, obviously omitting any information pertaining to crimes carried out by the Taliban themselves. Secondly, in light of what has just been said, the Taliban's assistance towards the Court would not only be deemed of a political vengeance nature, but it could also be depicted as a form of "terrorist justice". Though the judicial process will be in any way held by the ICC judges and will be based on the Rome Statute's provisions, the US narrative could still rely on the fact that assistance towards the Court was given by terrorists[752]. As a matter of fact, since the first discussions on the establishment of an international criminal court, the United States of America made it clear that it would have considered whatever international tribunal or court which allowed terrorists to sue US nationals to be illegitimate.

In conclusion, despite the Appeals Chamber has asserted the ICC jurisdiction over acts committed by US personnel in Afghanistan and has authorised the ICC Prosecutor to open a formal investigation into the Situation in Afghanistan, a successful justice outcome is very unlikely, especially with

[751] *Ibidem*.

[752] We remind the reader that the Prime Minister of the new Taliban government in Afghanistan is Mohammad Hasan Akhund, whose name is present in the United Nations Security Council Consolidated List, where all the individuals subject to UN sanctions are reported. His name has been present in the list since January 25, 2001, when he was Ministry of Foreign Affairs of the Taliban regime in Afghanistan.

regard to US servicemembers and CIA personnel. The International Criminal Court will be forced to ask the cooperation of third parties to the case, but the precedent of the ICC arrest warrant of the former Sudanese President Omar al-Bashir and the non-compliance of members states to the Rome Statute to the duty of extradition to the Court does not confer great hope of success in the Situation in Afghanistan. The United States of America seems, once again, to have been able to set up a system of protection and immunity of its own servicemembers before the International Criminal Court.

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