

Politics by Other Means: The Law of the International Criminal Court

Diane F. Orentlicher

Follow this and additional works at: <http://scholarship.law.cornell.edu/cilj>

 Part of the [Law Commons](#)

Recommended Citation

Orentlicher, Diane F. (1999) "Politics by Other Means: The Law of the International Criminal Court," *Cornell International Law Journal*: Vol. 32: Iss. 3, Article 6.

Available at: <http://scholarship.law.cornell.edu/cilj/vol32/iss3/6>

This Article is brought to you for free and open access by Scholarship@Cornell Law: A Digital Repository. It has been accepted for inclusion in Cornell International Law Journal by an authorized administrator of Scholarship@Cornell Law: A Digital Repository. For more information, please contact jmp8@cornell.edu.

Politics by Other Means: The Law of the International Criminal Court

Diane F. Orentlicher*

Recent debate concerning the International Criminal Court (ICC) has once again reminded us that, in international society, even small minorities can play a central role in defining and driving public policy debate. Although the Rome Statute of the International Criminal Court¹ (Rome Statute) was approved by 120 States, with only seven casting votes against the text, public discourse about the Statute since its adoption has been overwhelmingly dominated by concerns of the opposing minority.

Claims that some provisions of the Rome Statute violate international law have figured prominently in critiques by these States. The principal claim in this regard, which has been vigorously pressed by the U.S. government, is that mechanisms for establishing the Court's jurisdiction set forth in the Statute breach fundamental principles of treaty law. This criticism, which has also been advanced by the Indian government, centers on the possibility of establishing ICC jurisdiction over nationals of a non-State Party.

In addition, some States have argued that the Rome Statute contemplates an illegal role for the United Nations Security Council. This view, of which the Indian government has been the leading proponent, rests upon the claim that the Rome Statute enlarges the powers of the Council beyond those established by the UN Charter.

Although framed in terms of international law, the arguments advanced by the U.S. and Indian governments are in essence proxies for claims concerning the proper distribution of authority within the emerging system of international criminal jurisdiction. These are, to be sure, substantial issues, and they deserve the most considered deliberation. But, to the extent they are cast as legal arguments, they are fundamentally flawed.

* Professor of Law and Director of the War Crimes Research Office, Washington College of Law, American University. I am grateful to Jelena Pejic for comments on an earlier draft of this Article and to Laina Wilk for research assistance.

This Article is based upon my commentary on the presentations of co-panelists at the Cornell International Law Journal 1999 Symposium, *The International Criminal Court: Consensus and Debate on the International Adjudication of Genocide, Crimes Against Humanity, War Crimes and Aggression* at Cornell Law School on March 5-6, 1999. Because my co-panelists included representatives of the U.S. and Indian governments, my commentary at that conference inevitably focused upon the concerns which they articulated on behalf of their respective governments. This Article reflects that emphasis.

1. Adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998, U.N. Doc. A/CONF.183/9 (1998) [hereinafter Rome Statute].

I. Jurisdiction Over Nationals of Non-Parties

As Ambassador Scheffer's remarks reflect, the U.S. government's principal criticism of the Rome Statute is that nationals of non-States Parties can theoretically be prosecuted before the ICC. By virtue of Article 12 of the Statute, when an investigation has been triggered by either the Prosecutor or a State Party, the ICC can exercise jurisdiction only if at least one of the following States is a Party to the Rome Statute or has accepted the Court's jurisdiction with respect to the crime in question: 1) the State in whose territory the crime occurred, and 2) the State of which the accused is a national.² Theoretically, then, a national of a non-State Party alleged to have committed a crime within the territorial jurisdiction of a State Party could be prosecuted before the Court.³

In the view of the U.S. and Indian governments, this provision violates a basic rule of international law: a treaty may not impose obligations upon a non-State Party without its consent.⁴ But this argument is misplaced. Article 12 does not impose obligations upon non-States Parties. Rather, it establishes further preconditions to the exercise of jurisdiction that must be satisfied when the ICC's jurisdiction has been triggered either by the Prosecutor pursuant to Article 13(c) or by a State Party pursuant to Article 13(a). Non-Parties to the Rome Statute have no obligation to assist the ICC when it exercises jurisdiction pursuant to these provisions. In contrast, States Parties assume various obligations relating to the arrest and surrender of individuals indicted by the Prosecutor.⁵ Thus, while Article 12 has potential implications for *nationals* of non-States Parties, it does not impose corresponding *obligations* upon those States.⁶

This point is by no means a mere technicality. It reflects the fundamental nature of the Court's jurisdiction. Empowered to exercise jurisdic-

2. *Id.* art. 12(2) and (3). These preconditions do not apply when the Court's jurisdiction has been triggered by a Security Council referral pursuant to Article 13(b).

3. In view of frequent confusion surrounding this issue, it should be emphasized that satisfying the conditions set forth in Article 12 by no means assures that the ICC will assert jurisdiction. Even when those conditions have been satisfied, individuals may not be prosecuted before the ICC unless its jurisdiction has been triggered by one of the mechanisms contemplated in Article 13 with respect to a crime within the jurisdiction of the ICC, *see* Article 5, and a range of admissibility issues have been resolved in favor of jurisdiction. *See* Articles 17-19.

4. The general rule is set forth in Article 34 of the Vienna Convention on the Law of Treaties, *concluded* May 23, 1969, U.N. Doc. A/CONF.39/27 (*entry into force* Jan. 27, 1990). Article 35 provides that a treaty can establish an obligation for a non-State Party if the Parties so intend and the non-State Party "expressly accepts that obligation in writing."

5. *See, e.g.,* Rome Statute, *supra* note 1, art. 89(1) (requiring States Parties to comply with requests for arrest and surrender).

6. The fact that the Rome Statute potentially enables the ICC to assert jurisdiction over nationals of non-States Parties does not in itself breach any principle of treaty law. It is well established that, once a group of States has created an international organization through a multilateral treaty, that organization possesses an objective legal personality even *vis-à-vis* States that are not parties to its constituent treaty. *See* *Reparation for Injuries Suffered in the Service of the United Nations*, 1949 I.C.J. 174, 179 (Advisory Opinion of April 11, 1949). This principle is equally relevant to an international court established by multilateral treaty.

tion “over *persons* for the most serious crimes of international concern,”⁷ the ICC was established to enforce a body of law whose very essence is its direct application to individuals – not States. The principle of individual responsibility was, of course, the central idea of Nürnberg, and is the foundation of the ICC’s jurisdiction as well.⁸

This is not to say that international criminal law is impervious to the concerns of States with respect to prosecution of their nationals. Some treaties reflect those interests by recognizing that, as between the treaty Parties, primary or even exclusive jurisdiction over certain crimes lies with courts of the alleged perpetrators’ State of nationality. For example, Status of Forces Agreements frequently contain provisions vesting primary or exclusive jurisdiction over certain types of crimes allegedly committed abroad by servicemen deployed by States Parties in the courts of the defendants’ State of nationality.⁹ In a similar vein, many extradition treaties include a provision to the effect that States Parties are not required to extradite their own nationals,¹⁰ though such treaties commonly require authorities to submit otherwise extraditable offenses to their own criminal justice system if they decline to extradite suspects on this ground.¹¹

It is simply incorrect, however, to suggest that the Rome Statute violates international treaty law by exposing nationals of non-adhering States to potential prosecution without the consent of their governments. Many bilateral extradition treaties and a growing roster of multilateral treaties allow or require States Parties to prosecute or extradite individuals alleged to have committed certain crimes, regardless of the nationality of the suspect and regardless of whether his or her State of nationality is a Party to the Treaty; the United States is a Party to a number of these treaties. For example, the Convention against Torture and Other Cruel, Inhuman or

7. Rome Statute, *supra* note 1, art. 1 (emphasis added).

8. The Nürnberg Tribunal took pains to emphasize that those who commit “acts which are condemned as criminal by international law” do not enjoy the protection generally accorded persons acting on behalf of their States pursuant to “the doctrine of the sovereignty of the State.” *Nazi Conspiracy and Aggression: Opinion and Judgment*, at 52-53 (Oct. 1, 1946), *reprinted* by United States Government Printing Office (1947) [hereinafter Nürnberg Judgment]. The Tribunal thus made clear that individuals who commit international crimes generally are not to be assimilated to their States, but rather stand directly before the bar of international justice.

9. *See, e.g.*, Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces, June 19, 1951, art. VII(1)(a), (2)(a), and (3)(a), 199 U.N.T.S. 68, 76-78. Other provisions of this treaty vest primary or exclusive jurisdiction over crimes committed by forces of a sending State in the courts of the receiving State. *See id.* art. VII(1)(b), (2)(b), and (3)(b).

10. *See* Siegfried Wiessner, *Blessed Be the Ties that Bind: The Nexus between Nationality and Territory*, 56 *Miss. L.J.* 447, 525 (1986). Although the United States is a Party to several extradition treaties that include such a provision, contemporary U.S. policy does not generally aim at excepting U.S. citizens from extradition. *See id.* at 526-29.

11. Examples of multilateral treaties with similar provisions include the European Convention on Extradition, Dec. 13, 1957, art. 6(1)(a) and 2, 359 U.N.T.S. 273; and the Organization of American States Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortion that Are of International Significance, Feb. 2, 1971, art. 5, 27 U.S.T. 3949, T.I.A.S. 8413.

Degrading Treatment or Punishment¹² (Torture Convention) requires each State Party to “take such measures as may be necessary to establish its jurisdiction over [torture and certain related offenses] in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him”¹³ The treaty imposes this obligation in addition to States Parties’ duties to establish jurisdiction over acts of torture committed in their territorial jurisdiction or by their nationals.¹⁴ In effect, then, the Torture Convention establishes a system of mandatory universal jurisdiction that binds States Parties but potentially operates vis-à-vis nationals of non-States Parties.

Each of the four Geneva Conventions of 1949 establishes a similar system of mandatory universal jurisdiction. All four Conventions identify certain violations as “grave breaches” and impose upon each High Contracting Party “the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and [to] bring such persons, regardless of their nationality, before its own courts” unless it hands those persons over for trial to another High Contracting Party.¹⁵

The United States is also a Party to several anti-terrorism conventions that require each State Party either to prosecute or to extradite persons alleged to have committed defined offenses when those persons are present in its territory.¹⁶ Like similar provisions in the Torture Convention and the Geneva Conventions of 1949, the provisions in these treaties apply regardless of the nationality of the suspect or the site of the alleged crime.

Does this mean that States enjoy unfettered power to subject any individual to the jurisdiction of their own courts or to that of an international court merely by concluding a treaty between at least two of them? Of course not. But Article 12 vests the ICC with potential jurisdiction only under conditions clearly permitted by international law.

As noted, outside the context of Security Council referrals, nationals of States that have not adhered to the Rome Statute can be prosecuted before the ICC only with the consent of at least one of the following: the State in whose territory the alleged crime occurred, or the State whose

12. *Adopted and opened for signature, ratification and accession* by G.A. Res. 39/46, U.N. GAOR, 39th Sess., U.N. Doc. A/45/47 (1984) (*entered into force* June 26, 1987).

13. *Id.* art. 5(2). The United States ratified the Torture Convention in 1994.

14. *Id.* art. 5(1)(a) and (b). These provisions of the Torture Convention were modeled upon similar provisions in various anti-terrorism conventions cited *infra* note 16.

15. *See, e.g.*, Geneva Convention Relative to the Protection of Civilian Persons in Time of War, *adopted* Aug. 12, 1949, art. 146, 6 U.S.T. 3516, 75 U.N.T.S. 287.

16. These include, *inter alia*, the International Convention Against the Taking of Hostages, Dec. 17, 1979, arts. 5(2) and 8, G.A. Res. 34/146, U.N. GAOR, 34th Sess., Supp. No. 39, U.N. Doc. A/34/36 (1979); the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, Dec. 14, 1973, arts. 3(2) and 7, 28 U.S.T. 1975, T.I.A.S. No. 8532; the Convention on the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, arts. 4 and 7, 22 U.S.T. 1641, T.I.A.S. No. 7192, 860 U.N.T.S. 105; and the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, arts. 5 and 7, 24 U.S.T. 565.

nationality the alleged perpetrator possesses.¹⁷ These two categories correspond to circumstances in which international law permits States to exercise prescriptive jurisdiction — that is, to apply their national law to conduct and to persons. Under well-established principles of international law, States may apply their law to conduct that occurs in their own territory pursuant to the territorial principle of prescriptive jurisdiction, and to conduct of their nationals, wherever it occurs, pursuant to the nationality principle. Thus, the Rome Statute allows the Court to exercise jurisdiction over individuals only with the consent of at least one State that, consistent with international principles governing allocation of jurisdiction, could have exercised national jurisdiction over those same persons.

This consent regime provides a solid foundation in international law for the ICC's authority to exercise jurisdiction over nationals of non-States Parties — if, that is, international law enables States to clothe a multilateral court with their own jurisdictional authority. Whether States can pool their respective jurisdictional authority and vest the resulting jurisdiction in such a court was addressed in the Judgment of the International Military Tribunal (IMT). In its view, States' ability to do so was clear.

Although the IMT's jurisdictional power was supported by several principles of international law,¹⁸ the key passage of its Judgment for present purposes focused on one in particular — the authority of the four signatory States of the Nürnberg Charter deriving from their status as occupation forces in post-war Germany. The Tribunal observed:

The jurisdiction of the Tribunal is defined in the . . . Charter

The making of the Charter was the exercise of the sovereign legislative power by the countries to which the German Reich unconditionally surrendered; and the undoubted right of these countries to legislate for the occupied territories has been recognized by the civilized world. . . .

The Signatory Powers created this Tribunal, defined the law it was to administer, and made regulations for the proper conduct of the trial. *In doing so, they have done together what any one of them might have done singly*; for it is not to be doubted that any nation has the right thus to set up special courts to administer law.¹⁹

Unlike the 1984 Torture Convention and the Geneva Conventions of 1949, the Rome Statute does not establish a system of universal jurisdic-

17. As noted above, even when a State has not ratified the Rome Statute, it may consent to ICC jurisdiction over one of its nationals on an ad hoc basis.

18. See Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 *YALE L.J.* 2537, 2555 and 2557 n. 79 (1991).

19. Nürnberg Judgment, *supra* note 8, at 48 (emphasis added). While this passage focuses upon the territorial basis of jurisdiction deriving from the Four Powers' status as occupation forces, the basic principle that States can "do together" jurisdictionally "what any one of them might have done singly" would be equally relevant with respect to any basis for exercising national jurisdiction established in international law. Thus, for example, since international law permits any State to exercise prescriptive jurisdiction with respect to conduct of its nationals, two or more States could agree to pool their jurisdictional authority in a new court that they have empowered to exercise jurisdiction over certain conduct committed by the nationals of any of those States.

tion (as Ambassador Scheffer's remarks may imply²⁰). Even so, the principle of universal jurisdiction bolsters the validity of the more circumscribed approach taken in Article 12 of the Statute. Universal jurisdiction exists with respect to virtually all of the crimes encompassed by the ICC's subject matter jurisdiction. Since any State could prosecute those crimes regardless of the nationality of the victim or perpetrator and regardless of where the crime took place, it is difficult to fathom how a non-State Party's rights under international law could be violated by a treaty that enables an international court to prosecute its nationals for those same crimes.

In short, to the extent that the Clinton Administration's concerns relating to Article 12 have been advanced as legal claims, its position is fundamentally flawed. Indeed, even as the U.S. government has opposed Article 12 on the ground that it impermissibly imposes obligations upon non-States Parties, it has acknowledged that various treaties—including treaties ratified by the United States—establish obligations regarding prosecution that may operate with respect to nationals of non-States Parties.²¹ Further, U.S. officials have implicitly conceded that the Rome Statute could lawfully establish ICC jurisdiction over nationals of non-States Parties. This concession is latent in the U.S. delegation's efforts in Rome to exempt from the ICC's jurisdiction conduct arising from official actions of a non-adhering State acknowledged as such by its government.²² Had this proposal been accepted, the Rome Statute would have contemplated the possibility of ICC jurisdiction over nationals of non-Parties in other circumstances.

None of this is to deny the importance of the concerns underlying the U.S. government's position vis-à-vis the Rome Statute. As I have noted, international criminal law is by no means insensitive to the desire of many governments to shield their nationals from the jurisdiction of courts other than those of their own State.

But if the concerns underlying the U.S. position are legitimate, they have scarcely been trampled by the Rome Statute. Just as the aforementioned treaties allow States to decline to extradite their nationals provided they institute criminal proceedings in appropriate circumstances, the Rome Statute requires the ICC Prosecutor to defer to the jurisdiction of a State that is carrying out or has undertaken a genuine investigation of its own nationals.²³ As Ambassador Scheffer noted, these provisions were largely the result of U.S. negotiating efforts.²⁴

20. See David J. Scheffer, *U.S. Policy and the International Criminal Court*, 32 CORNELL INT'L L.J. 529-534 (1999) (asserting that "the universal jurisdiction created by Rome would mean something new, at least for American troops stationed abroad"). There were proposals to establish such a system, but these did not garner sufficient support to be included in the Rome Statute.

21. See, e.g., *id.* at 533-34.

22. See *id.* at ____.

23. See Rome Statute, *supra* note 1, arts. 17-18.

24. Scheffer, *supra* note 20, at 529-530. In addition to the "complementarity regime" that lies at the heart of the Rome Statute, U.S. concerns relating to prosecution of its nationals, which pertain principally to members of its armed forces, are also addressed

The Rome Statute does not, however, include an ironclad promise that U.S. nationals will never be prosecuted before the ICC without U.S. consent (though the Statute's "complementarity regime" makes the prospect of their prosecution virtually unthinkable).²⁵ Is the United States entitled to such an assurance?

Any such claim must find support in the imperatives of the international political system, for they have scant basis in international law. And indeed, U.S. officials have periodically suggested that U.S. nationals might be entitled to exceptional protection against the jurisdiction of the ICC because U.S. soldiers bear an exceptional burden when it comes to maintaining international peace and security. It was, of course, perfectly legitimate for the U.S. delegation at Rome to press this view; it may have been unrealistic to expect most States to agree.

II. The Role of the Security Council

A second set of challenges to the Rome Statute relate to the role of the Security Council in triggering the jurisdiction of the ICC. Pursuant to Article 13 of the Statute, a referral by the Security Council acting under Chapter VII of the UN Charter is one of three possible ways to trigger the jurisdiction of the ICC.²⁶ While Article 13 also enables the Prosecutor to initiate an investigation on her own authority²⁷ or upon referral of a situa-

through Article 98(2). That provision states that the ICC "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." See Rome Statute, *supra* note 1, art. 98(2). The United States can, of course, seek to establish treaty agreements of this nature with States in which members of its armed forces are stationed, thereby further minimizing the already remote risk that its nationals will be prosecuted before the ICC.

25. As Ambassador Scheffer noted, during the final week of the Rome Conference the United States sought to achieve such an assurance through a proposal that, in his words, would "exempt from the ICC's jurisdiction conduct that, in the absence of a Security Council referral, arises from the official actions of a non-party state acknowledged as such by that non-party." *Id.* at 534. The United States has continued to advance a variation on this proposal in the aftermath of the Rome Conference. As it has been publicly framed, this proposal raises troubling questions. Beyond the obvious issues of principle (why, after all, should a rogue regime be able to shield its most depraved offenders from justice merely by acknowledging that their depredations were a matter of state policy?), the proposal seems to rest upon a manifestly false premise—that the United States could invoke this exemption merely by "confirm[ing] . . . its participation in international peacekeeping and enforcement actions" while "odious non-party regimes" would have to admit "genocide as an official state policy" in order to benefit from that same exemption. *Id.* If the proposed exemption merely required a non-State Party to acknowledge that alleged crimes were carried out in the course of an officially-acknowledged operation, States would have little incentive to refrain from claiming the exemption. If, instead, it required the non-State Party to acknowledge that international crimes were committed pursuant to a criminal state policy, it is difficult to imagine the United States claiming such an exemption.

26. See Rome Statute, *supra* note 1, art. 13(b).

27. See *id.* art. 13(c).

tion by a State Party,²⁸ Article 16 subjects her ability to initiate or continue an investigation or prosecution to the overriding authority of the Security Council: "No 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."

India has taken the lead in objecting to these provisions. In the view of its government, the Rome Statute violates the cardinal principle of the sovereign equality of States by contemplating a Security Council role in triggering the jurisdiction of the ICC.²⁹ More fundamentally, in India's view the Rome Statute violates international law by enlarging the powers of the Council beyond those conferred by the UN Charter.³⁰ Explaining his country's vote against the Rome Statute, the head of India's delegation to the Rome Conference asserted that "the Statute gives to the Security Council a role in terms that violate international law."³¹ He elaborated:

The power to bind non-States Parties to any international treaty is not a power given to the Council by the [UN] Charter. Under the Law of Treaties, no state can be forced to accede to a treaty or be bound by the provisions of a treaty it has not accepted. The Statute violates this fundamental principle of international law by conferring on the Council a power which it does not have under the Charter, and which it cannot and should not be given by any other instrument. This is even more unacceptable, because the Council will almost certainly have on it some non-States Parties to this Statute. The Statute will, therefore, give non-States Parties, working through the Council, the power to bind other non-States Parties.³²

Like the objections of the U.S. government to Article 12 of the Rome Statute, India's position vis-à-vis the role of the Security Council is deeply flawed as a legal claim. The pith of the Indian government's position is that the Rome Statute enlarges the power of the Security Council. But the Council already possesses the authority, when acting under Chapter VII of the UN Charter, to refer situations for prosecution to an international criminal court — as it has twice done in this decade.³³ The Rome Statute

28. See *id.* art. 13(a). As previously noted, before the ICC can exercise jurisdiction upon referral by a State Party or pursuant to the Prosecutor's action *proprio motu*, the preconditions established by Article 12 must be satisfied.

29. Mr. Narinder Singh, Remarks at the Cornell International Law Journal 1999 Symposium (March 5-6, 1999).

30. See *Explanation of Vote by Mr. Dilip Lahiri, Head of Delegation of India, on the Adoption of the Statute of the International Court*, July 17, 1998 [hereinafter *Explanation of Vote*]. In notable contrast, the U.S. government would have preferred that the Council play the role of gatekeeper with respect to the Court's docket. See Editorial, *An Effective International Court*, N.Y. TIMES, Dec. 15, 1997. At the Rome Conference, the U.S. delegation supported allowing States Parties to the Rome Statute, as well as the Security Council, to refer situations to the Prosecutor—a position that enjoyed general support.

31. *Explanation of Vote*, *supra* note 30.

32. *Id.*

33. See U.N. SCOR, 22d Sess., 3217th mtg. at 19, U.N. Doc. S/RES.827 (1993) (establishing the International Criminal Tribunal for the former Yugoslavia); S.C. Res. 955 (1994) (establishing the International Criminal Tribunal for Rwanda).

merely makes a particular institution, the ICC, available for such referrals so that the Security Council does not have to create a new court each time it wishes to exercise its authority in this fashion.

Although framed in terms of international law, the Indian government's position with respect to the role of the Security Council is probably best understood as a claim about the proper allocation of political authority at the dawn of a new century. Just as the United States may have hoped to recreate in the Rome Statute the special status it enjoys in the UN Charter, India may have wished to rewrite the Charter in a fashion that eradicates the special powers of the five permanent members of the Council.

Conclusion

Although the United States and Indian governments have been allied in opposing the Rome Statute, fundamentally different concerns have animated each country's position. In the view of the former, the Rome Statute should have replicated the privileged position of the United States on the U.N. Security Council by, in effect, ensuring that U.S. authorities could veto any ICC prosecution of a U.S. national. In the view of the latter, what may be most troubling about the Rome Statute is precisely the extent to which it imports the exceptional powers of the Security Council — and, in consequence, the imbalanced power exercised by its five permanent members — into the ICC's jurisdictional provisions.

Having failed to prevail in the political arena of a diplomatic conference, both governments now seek to challenge the outcome of the Rome Conference in the domain of international law. But as I have argued in this Article, the U.S. and Indian governments' legal arguments are fundamentally flawed — so clearly so, in my view, that they are best understood as proxies for the respective proponents' claims about the appropriate distribution of political power at the dawn of a new millennium.

