The United States and the International Criminal Court

- An Identity Approach

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The aim of this thesis is to understand the reasons behind the decision of the United States to stand in opposition to the International Criminal Court. This policy seems to contradict the United States’ leading role in international justice and commitment to universal human rights. The opposition to the ICC presents an apparent contradiction between principles and interests, and provokes the question of what role power, identity and principles play in the formation of national interest.

The author reviews the concept of national interest in International Relations theory. It is found that only a constructivist identity approach takes account of both power and identity in the formation of national interest. The constructivist identity approach presents the concept of national interest as endogenous to social interaction and linked to identity. National interest is thus not seen as an objective analytical concept from which one can derive and explain rational behavior by rational actors, but as the very phenomenon that we are trying to understand. This theoretical framework is firmly located in an understanding tradition.

In the search for an understanding of why the United States’ decision-makers considered
opposition to the ICC to be in the national interest of the United States, role theory serves as a method. The empirical part of this thesis consists of analysis of speeches and statements, and of role conceptions found therein.

The results of this approach show that the apparent contradiction between principles and interests does not exist. The reason why the behavior examined appears to be contradictory is that the spectator lets his or her own expectations of behavior appropriate for a certain belief or a certain role conception stand as a guide. The only way we can understand the reasons behind a given behavior is by looking at the actors’ view of the problem and what beliefs and role conceptions come into play for the actors when they face a foreign policy issue.

The analysis makes it clear that the United States views its behavior as contradictory neither to its principles, nor to its perceived roles. Instead, it is the roles of the United States, the sources of which include both principles and capabilities, that are the reasons behind the policy.

Nyckelord
Keyword
United States, International Criminal Court, International Relations, Identity, Power, National Interest, Constructivism, Role Theory
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<th>Description</th>
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<tr>
<td>ASPA</td>
<td>American Servicemember’s Protection Act, Title II of the supplemental appropriations bill for 2002, limits U.S. government support and assistance to the ICC.</td>
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<td>ECOSOC</td>
<td>United Nations Economic and Social Council</td>
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<td>ICC</td>
<td>International Criminal Court</td>
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<tr>
<td>ICT</td>
<td>International Criminal Tribunal</td>
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<td>ICTR</td>
<td>International Criminal Tribunal of Rwanda</td>
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<td>ICTY</td>
<td>International Criminal Tribunal of former Yugoslavia</td>
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<td>ILC</td>
<td>International Law Commission</td>
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<tr>
<td>IR</td>
<td>International Relations (the discipline)</td>
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<tr>
<td>Non-Party State</td>
<td>A state that has not become party to, not joined, the International Criminal Court, has not ratified the Rome Statute</td>
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<td>Prep Com</td>
<td>Preparatory Commission for the ICC</td>
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<tr>
<td>Rome Statute</td>
<td>The treaty establishing the ICC</td>
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<tr>
<td>State Party</td>
<td>A State that has become party to, or joined, the International Criminal Court, by ratifying the Rome Statute of the International Criminal Court</td>
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<tr>
<td>SOFA</td>
<td>Status of Forces Agreement</td>
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<td>UK</td>
<td>United Kingdom</td>
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<tr>
<td>UN</td>
<td>United Nations</td>
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<td>U.S.</td>
<td>United States</td>
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<td>USSR</td>
<td>Union of Soviet Socialist Republics</td>
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1 Introduction

In 1998, the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, convened by the United Nations General Assembly, adopted a treaty on the establishment of an international criminal court (The Rome Statute). This international criminal court (ICC) would deal with an individual’s responsibility in crimes against humanitarian law. As first of its kind, since the International Court of Justice only can deal with states, it is generally seen as a major development in International Criminal Justice.¹

Everyone does not share the joy, however. Being one among a minority of states, the United States voted against the adoption of the statute, and has made it clear that it will not ratify it. The United States has expressed concern about Americans being indicted in an international court, without any influence of the United States, and has claimed a right to exemption as one of the main enforcers of international peace and security.²

The Rome Statute came into force on July 1, 2002.³ After much debating, UN peacekeepers who are nationals of the United States and all other countries that have not become parties to the Rome Statute were granted immunity from prosecution by the court for one year from July 1, 2002.⁴ This immunity was prolonged for one year by a Security Council resolution of June 12, 2003.⁵

The United States has had a leading role in developing and strengthening international law.⁶ The United States is clearly committed to universal human rights. Even in the founding document of the nation, the Declaration of Independence, there is a clear assertion of this commitment.⁷ However, the case of the Rome Statute is not the first occasion the United States has been reluctant to bind itself and its citizens to an international law treaty.⁸

The Genocide Convention of 1948 can be taken as an example. The United States was leading in the creation and adoption of the Convention and was the first country to sign it. However, it caused controversy and skepticism in the American Senate, where it was

⁷ Weschler, Lawrence: Exceptional Cases in Rome: The United States and the Struggle for an ICC. Chapter 5 in Sewall and Kaysen 2002 p 111
⁸ Sewall, Kaysen and Scharf 2000 p 12
defeated. Not until 40 years later did the United States ratify the Genocide Convention, with reservations. The main issues behind the defeat were the definition of the term genocide, and the threats that international law and institutions posed to U.S. sovereignty.\footnote{Power, Samantha: *The United States and Genocide Law: A History of Ambivalence*. Chapter 10 in Sewall and Kaysen 2000 p 166-167}

There is an apparent contradiction in the American commitment to human rights and international rule of law, which has been promoted as important for the American national interest, and the reluctance to bind itself and its own citizens to international law conventions. Principles and interests do not seem to converge. It is this apparent contradiction between principles and interests that forms the basis for the research problem explored in this thesis.

The main objections of the United States against the ICC are legal in character. However, the great concern of U.S. leadership about the possibility of Americans being tried by the ICC seems to be caused by a fear of a politicized court.\footnote{Sewall, Kaysen and Scharf 2000 p 3} A politicized ICC is according to this view sure to work against the United States, have serious implications for U.S. military and political power, and may deter states from acting to protect international peace and security.\footnote{Sewall, Kaysen and Scharf 2000 p 9}

The U.S. rejection of the ICC has caused frustration internationally. At the Rome Conference, the U.S. had the company of only six other states in voting against the adoption of the statute.\footnote{Bring, Ove: *International Criminal Law in Historical Perspective - Comments and Materials*. Elanders Gotab, Stockholm 2001 p 35} Most countries, then, including virtually all allies of the United States, seem to have concluded that support of the ICC complies with the promotion of their national interest. What can explain the fact that the U.S. came to the opposite conclusion?

\section*{1.1 Purpose and Approach}

The purpose of this study is to understand the reasons behind the decision of the United States to stand in opposition to the International Criminal Court.

The issue of the United States and the International Criminal Court concerns fundamental questions of International Relations, such as the role of international law, state sovereignty, human rights, national interest, power, and identity, and their consequences for foreign policy.

It could be argued that the basic issue for the U.S. relationship with International Criminal Justice is a tension between a commitment to an international normative framework, and protection of its perceived national interest. In order to find the reasons behind U.S. policy and attitudes towards the ICC, the main task would then be to
understand the processes behind the formation and definition of the national interest. How can this be understood?

Two different perspectives can be discerned in descriptions and analyses of U.S. policy towards the ICC, and often also of current U.S. foreign policy in general.

1.1.1 Power and Identity

The first perspective points toward the importance of power in shaping U.S. foreign policy, and the decision to oppose the ICC. In his recently published, highly topical book - Of Paradise and Power - Robert Kagan states that Europe and the U.S. have very different strategic perspectives today. However, according to Kagan, this is not naturally caused by differences in national characters of Americans and Europeans. Instead, it has a lot to do with power. It is obvious that a great, and growing, disparity of power creates big and growing differences in strategic "cultures" - meaning different measurements of risks and threats, different definitions of security, and different levels of tolerance. In anarchy, it is natural for small powers to fear to become victims, and for great powers to fear rules that might constrain their actions more than anarchy itself.

If we consider power and strategic perspectives in relation to the ICC, what seems to be of highest relevancy is that the United States has the predominant military force in the world today, and acts much like an international sheriff. It is therefore bound to be criticized internationally, and this is the foundation of stated U.S. fears of a politicized court.

The second perspective points toward the importance of identity. Returning to Kagan’s U.S. – Europe contrast, power capabilities is not the only difference between the United States and Europe, for example, there clearly exist broad ideological differences as well, especially regarding ideals and principles of both the utility and the morality of power. There are deep differences between Europe and the United States in the way they view the world, how it should be governed, the role of international institutions and international law, and the use of force. According to Philip Gordon, it is possible to discern fundamental differences in American and European attitudes toward power, sovereignty and security, as explanatory variables of differences in specific issues.

Many commentators on U.S. policy towards the ICC have linked U.S. behavior internationally to a phenomenon referred to as American exceptionalism. According to Kagan, a crucial part of the national identity of Americans is the belief that the principles

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14 ibid p 27
15 ibid p 38
17 Kagan 2003 p 11
18 ibid p 37
19 Gordon, Philip: Bridging the Atlantic Divide. Foreign Affairs Jan/Feb 2003 Vol 82, Issue 1 p 70-83. P 73
their nation was founded upon are superior. There has always been a tendency for Americans to equate their own interests with the interests of humanity, and therefore their nation has an exceptional role to play in the world. Legitimacy for actions then need not be sought from international institutions, but from their own principles.\(^{20}\) David Forsythe also emphasizes the importance of exceptionalism in American identity. According to Forsythe, the dominant self-image of Americans have been that "of a good and great people, divinely inspired to lead the world - by example at home or activism abroad - to greater respect for personal freedom". This view has reinforced a pride of U.S. laws and the U.S. legal system, which in turn has created an unwillingness to agree to erosion of sovereignty.\(^{21}\) According to Forsythe, the identity of the U.S. has been constructed from below, and national law has been seen as supreme over international law. Most nations see themselves in a positive light, and consider their views to be right. What is different about American exceptionalism, however, is according to Forsythe that it is hard to combine with multi-lateralism. U.S. opposition to an International Criminal Court is not necessarily due to an opposition to international law as such, but to erosion of U.S. sovereignty.\(^{22}\)

Since there is an apparent contradiction between principles and interests in the U.S. opposition to the ICC, in order to understand the motivations behind this opposition an understanding of both power and identity appear to be of importance.

The concept of power is primarily related to a realist approach, in which the concepts of power, national interest, and international anarchy are important. However, can power as a factor be enough to explain the reasons behind U.S. opposition to the ICC? If so, do power factors always override principles in the formation of national interest, or how else can we understand this apparent contradiction between principles and interest? We need to know how power and principles are accounted for in the formation and definition of national interest.

### 1.1.2 Structure of Thesis

Thus, to find the reasons behind the United States’ opposition to the ICC, a framework for analyzing the formation and definition of its national interest in this question, that takes account of both power and identity, is needed.

For this purpose, a constructivist identity approach, with identification theory, has been chosen. This has been done after exploring the three concepts of national interest, power and identity in IR theory in Chapter 2. The main reason for choosing this framework is that, accounting for power and capabilities as parts of a nation’s identity and self-image, it takes account of both identity and power in the formation of national interest. This is further explained in Chapter 2.

\(^{20}\) Kagan 2003 p 87-88  
\(^{21}\) Forsythe 2002 p 975  
\(^{22}\) ibid p 979
The method and approach of this thesis is based on *role theory*, which is consistent with the identity approach. Role theory and how it is applied is described in Chapter 3. The empirical material consists of speeches and statements, for which *role conceptions* have been analyzed. Whereas identification theory provides the *theoretical* link between identity and U.S. policy towards the ICC, role theory provides the *analytical* link.

Chapter 2 and Chapter 3 thus arrive at a specific approach for this thesis, the theoretical framework and the method, and at the end of Chapter 3 (p 27) the purpose and the research questions for the empirical part of the thesis are specified.

Chapter 4 gives an introduction to the process leading up to the establishment of the ICC, what it is, its jurisdiction, and how it operates.

Chapter 5 presents U.S. policy towards the ICC, the main concerns it has shown towards the court, and the main arguments for opposing it.

In Chapter 6, the results of the role analysis are presented.

The thesis ends with a concluding chapter.
2 Theoretical Framework

"In the attempt to bring intellectual order and comprehension to the grand kaleidoscope of human behavior, it is essential either to categorise or to abstract... [The concepts] are lenses through which behavior is examined, rather than behavior itself perceived in new forms." 23

William Bloom

The aim of this chapter is to arrive at an appropriate theoretical framework for this thesis. The starting-point is the concept of national interest. First, the use of the concept in International Relations theory is explored, with the objective to see what impact different traditions ascribe to power and identity. Following a constructivist view of national interest, the author goes on to explore the concept of identity further. Using identification theory in order to specify the relationship between identity and foreign policy, and define national interest, the author arrives at a theoretical framework appropriate for this thesis.

2.1 National Interest in International Relations Theory

2.1.1 Explaining versus Understanding in International Relations Theory

Hollis and Smith argue that there are two ways to describe international relations, either through explaining or through understanding. These two traditions (within which there are of course many different theories) differ in three main aspects: Perspective, Method and Goal.24

A researcher who strives for explanation works in a manner resembling that of a natural scientist, from an outsider’s perspective.25 The explaining tradition builds on methods of natural science, and is a “search for causes” within structures, based on generalizations and laws.26

A researcher whose goal is understanding works more from the inside, to try to find an understanding of “what the events mean”. Researchers who identify with the

25 ibid p 1
26 ibid p 3
understanding approach tend to look at actors, and their definitions of situations, beliefs, goals etc. either at an individual or at a societal level.\textsuperscript{27}

In other words, the explaining tradition adheres to a “scientific” method, and the understanding tradition to an interpretative method.\textsuperscript{28}

2.1.2 Explaining: Realism

The most dominant and well-known tradition on the explaining side of International Relations (IR) theory is realism. It was within this approach that the traditional use of the concept of National Interest in IR was born. The objective of realism is to describe the world as it is. The nation state is given a central place in this tradition, emphasized, as well as the role of power and the importance of Great Powers.\textsuperscript{29}

Since the nation state is seen as the main actor, the concept of national interest has had an important position in realist theory, and has been seen as the main driving force in international affairs. Interest is defined in terms of power (strategic and economic capability), and ideology is not given attention. True, says Morgenthau, political leaders may justify their policies in ideological terms, but, moral and ethical concerns or political philosophy cannot play a part in the formation of foreign policy, since the relative power of the state will always put constraints on actions. Therefore, power is the only relevant variable in the formation of national interest.\textsuperscript{30} Carr explains the irrelevancy of norms and principles as explanatory variables of national interest in this way: "peace, harmony of interests, collective security and free trade" are "not principles at all, but the unconscious reflexions of national interest at a particular time".\textsuperscript{31}

The important trait explaining theories share is that they to a large extent treat states and their identities and interests as given, and emphasize the importance of material factors such as power, security and welfare.\textsuperscript{32}

2.1.3 Understanding: Constructivism

In Constructivist theory, normative structures are seen as being as important as material structures. By shaping actors’ identities, they have an indirect impact on the formation of their interests.\textsuperscript{33}

\begin{footnotes}
\footnote{Hollis and Smith 1991 p 1-2}
\footnote{ibid p 4}
\footnote{Burchill, Scott: Realism and Neo-Realism. Chapter 3 in Burchill, Scott (ed): Theories of International Relations. Palgrave, New York 2001 p 70}
\footnote{ibid p 79}
\footnote{Ruggie, John Gerard: Constructing the World Polity - Essays on International Institutionalization. Routledge, Clays Ltd, St Ives, Great Britain 1998 p 9}
\footnote{Reus-Smit, Christian: Constructivism. Chapter 8 in Burchill 2001 p 217}
\end{footnotes}
Constructivism differs from explaining traditions in three important ways:

- actors are treated as deeply social, and not atomistic egoists,
- interests are treated as endogenous to social interaction, and not exogenous,
- society is treated as a constitutive realm, not a strategic.\footnote{Reus-Smit 2001 p 219}

In other words, actors exist in, and are part of, a social world, and in this social world, there are collective ways of seeing the world, a common language to describe it, and common institutions.\footnote{Hollis and Smith 1991 p 90} Human identities are constituted by such norms, values, and ideas that exist in their social environment. Actors’ interests cannot be understood without reference to social interaction. Society is what makes social and political agents who they are.\footnote{Reus-Smit 2001 p 219}

Normative and ideational structures shape actors’ identities through three mechanisms:

- Imagination – they affect what actors see as possible, practically and ethically.
- Communication – when trying to justify behavior, an individual or state will appeal to established norms of legitimate conduct. Since norms may often conflict, arguments are often made about the relative importance of different norms.
- Constraint – they can put constraints on actors’ conduct.\footnote{ibid p 218}

Constructivism as a theory of International Relations pays attention to the social construction of identities and interests of states, and the factors that shape attitudes and behavior, such as culture, ideology, and beliefs.\footnote{Ruggie 1998 p 33} Constructivists talk of a society of states, a society constructed by values, rules, and institutions which make it possible for the system of states to function.\footnote{ibid p 11}

According to Holsti, "Values point out the general direction toward which our actions should be directed... and for policy makers they also serve as reasons and justifications for goals, decisions, and actions."\footnote{Holsti quoted in Aggestam, Lisbeth: National Identity, the State, and Foreign Policy in Western Europe. Chapter 1 in Identitet, Politisk Kultur och Internationalisering. Stockholms Universitet 1998 p 6}

### 2.1.4 Choice of Approach

In order to choose an appropriate approach for this thesis, the question that needs to be asked is not what theory is more true, but rather what theoretical framework would be most fruitful to use with the problem that is being researched. That is, which approach seems to have more to say about this issue?
In the introduction, it was made clear that three concepts were of importance for the understanding of this issue: power, identity, and national interest. An *explaining* approach neglects *identity* as a factor in the formation of national interest, and concentrates on *power*. It is not an appropriate approach to the issue of the United States and the ICC, because power alone cannot explain why the U.S. would perceive it to be in their national interest to abstain from joining the ICC. Concentrating on causal explanation, power alone can only explain how the U.S. was *able* to do so. In other words, an *explanation* approach will not be enough to understand the formation of the perceived national interest of the United States in this issue, not *why* they thought it in their interest to do so.

In order to explain this issue, an “understanding” approach is more appropriate, because the goal is to understand a country’s decision-makers’ view of the issue, by looking at the reasons they give for their choice. It should be clear that this is not to say that power is not relevant, rather that it is insufficient.

Having decided on an understanding approach because it takes account of identity, as well as power, the next task will be to look closer at the concept of identity.

### 2.2 The Concept of Identity in International Relations Theory

#### 2.2.1 Emergence

Most ideas around the concept of identity have developed within psychology. Sociologists and anthropologists have always been interested in how societies view the world. This stems from the fact that if one compares world views of different societies one is bound to find that there are different ways to view reality, and the view of reality is believed to have consequences on behavior.\(^41\)

Largely due to the dominance of the realist tradition in IR and its rejection of analysis of identities of states, identity was for a long time not given attention in IR research.\(^42\) The dominant realist view was, in Morgenthau’s words, that "ideological justifications" concealed "the true nature of foreign policy". Thus, within the realist approach, beliefs and ideologues were not seen as an interesting area of study. Rather, the existence of such was making the study of international politics harder. What really mattered was balance of power.\(^43\)

Not until the emergence of behaviorism in the 1960s, did the importance of the psychological dimension of IR start to gain acceptance, and an interest for identity was born.\(^44\) At this time, many came to pay attention to the important impact different reality


\(^{42}\) Little, Richard and Smith, Steve: *Introduction*. Chapter 1 in Little and Smith 1988 p 1

\(^{43}\) ibid p 3

\(^{44}\) ibid p 1
views could have on behavior. It did not seem to be possible to explain behavior through rational, objective laws. Therefore, it was widely accepted that there was a need to look at beliefs and their consequences for foreign policy and international behavior.\footnote{Little and Smith 1998 p 5}

A growing discontent with the dominant realist view gave rise to a sub-field of IR called \textit{Foreign Policy Analysis}.ootnote{Smith 1998 p 14} The interest in and attention to state and national identities has had its major impact on foreign policy analysis. This is so because foreign policy is seen as closely connected with a national \textit{self-conception} of the state, a self-conception that is based on values, assumptions and expectations of the national society.\footnote{Aggestam 1998 p 5} I will return to the concept of national self-conception in the section on role theory in the following chapter, but let us first look closer at the idea of \textit{collective identity}.

### 2.2.2 Collective Identity

An important assumption behind the concept of collective identity is that human beings have a desire to understand the social world. However, a human being can only process a limited amount of information, and must therefore choose which information to take in, and how to interpret that information. This selection process is where beliefs and values come in. According to Jervis, set patterns of comprehension, expectation and perception determine this process. Consequently, in contrast with realism and rationalism, this approach holds that neither decision-makers’ motivations nor decision-making processes are necessarily rational.\footnote{Bloom 1990 p 22}

Most people would probably agree with the claim that a person’s identity, reality views, beliefs and values do, if not determine, then at least affect that person’s behavior. How do we go from there to group level, society level and a collective identity?

In line with constructivist thought, the same way as a person’s identity, a collective identity consists of \textit{shared} (or common) beliefs and values. The foundation of the \textit{national identity} is the citizen’s identification with the state. The interest in, and the claim that there can exist, a national identity comes from the "sense of belonging" that seems to exist within a political community that offers protection from external threat. According to identity theories, this identification is based on a \textit{"socio-political imagination of a collective identity"}, which includes a sense of shared memories and common destiny.\footnote{Aggestam 1998 p 2-3} This socio-political imagination of a collective identity, and the cultural mores and political norms connected to it are passed down from generation to generation by the process of \textit{political socialization}.\footnote{Bloom 1990 p 18} There is disagreement about how strong this identification of the citizen with the state really is. However, it is certain to always exist at least as a "background condition".\footnote{Aggestam 1998 p 2-3}
The state itself is of course an abstraction, and can therefore not be said to possess motivations, emotions, or beliefs in the same way as a human being. There seems to be a problem, then, in the fact that beliefs and values (which are said to make up identity) really only can be held by individuals. However, does this mean that all beliefs are individual beliefs, or "reducible to individual beliefs"? Not according to Ruggie, who says that in any society, there also exist "intersubjective beliefs" - "social facts" - that rest on "collective intentionality". The concept of WE, or US, is a requisite for these beliefs to exist. The idea of intersubjective beliefs is the very foundation constructivist thought is built on. The existence of such is also necessary for a collective identity to exist.

2.2.3 Dynamism of Identity, Foreign Policies, and Legitimization

National identity is dynamic, that is, not a static phenomenon, but continually in transformation. This dynamism causes a competition domestically, between parties and factions, for influence in the process of defining and enhancing national identity.

The foreign policy of a state must have the support of the people, and foreign policy-makers therefore must justify their actions, and mobilize support. This activity is closely linked to the use of symbols, such as the concept of sovereignty, and symbols in turn are linked to the very idea of an identity of the state. Myths and symbols play a crucial role in underpinning sentiments of national solidarity. Foreign policy can aid this process, in particular by making a distinction between Us and Them.

One main reason why identity was introduced to IR rather late is that there are problems inherent in the definition of state - or national - identity. There is certainly no shortage of definitions. Rather, there exists a confusingly large amount of definitions, each emphasizing a particular aspect. IR theory was not able to provide a method to understand the relationship, or linkage, between the national population and the state, and thereby the foreign policy of the state and international relations. In other words, how could one explain the relationship between individual attitudes and mass national attitudes, and then how could one explain the relationship between mass attitudes and foreign policy decisions? Without a direct link between beliefs and actions, how can an identity approach help us understand foreign policy? Identification theory, introduced by Bloom, provides a solution to the problem of how to analyze the linkage between national identity and foreign policy.

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52 Ruggie 1998 p 20
53 Aggestam 1998 p 8
54 Aggestam 1998 p 6
55 Lapid, Yosef: *Culture’s Ship: Returns and Departures in International Relations Theory*. Chapter 1 in Lapid, Yosef, and Kratochwil, Friedrich: *The Return of Culture and Identity in IR Theory*. Lynne Rienner Publisher, Inc London 1996 p 8
56 Bloom 1990 p 3
2.3 Identification Theory

2.3.1 National Identity: Identification

Let us start with the link between the national population and the state. The source of collective identity is the citizen’s identification with the state. Earlier, this identification was not clearly defined. It seemed very vague as a concept, and it was uncertain how strong it was. Bloom specifies the identification process, which creates a common identity and makes a people act together as a unit. Two assumptions are important in this regard:

1. "In order to achieve psychological security, every individual possesses an inherent drive to internalise - to identify with - the behavior, mores and attitudes of significant figures in her/his social environment: i.e. people actively seek identity."

2. "Moreover, every human being has an inherent drive to enhance and to protect the identifications he or she has made: i.e. people actively seek to enhance and protect identity."

Embracing these two statements means to accept that, in any society, there will exist an identification process, resulting in collective identity. This collective identity (or identities) does not necessarily need to be a national identity, however. What are the defining characteristics of a national identity? Bloom defines National Identity in the following way:

"National Identity describes that condition in which a mass of people have made the same identification with national symbols - have internalised the symbols of the nation - so that they may act as one psychological group when there is a threat to, or the possibility of enhancement of, these symbols of national identity."

Since a people “actively seeks to enhance and protect identity” national identity will be the most salient when there is a “threat to” or “possibility of enhancement of” symbols of national identity. This brings us back to the importance of the dynamism of national identity. Bloom defines the national identity dynamic this way:

"National Identity Dynamic describes the potential for action which resides in a mass which shares the same national identification."

Thus, the process of identification provides the linkage between an individual citizen and the mass national public, through the national identity dynamic.

57 Bloom 1990 p 23
58 Bloom 1990 p 23
59 Bloom 1990 p 74
60 Bloom 1990 p 75
2.3.2 National Identity and Foreign Policy

What, then is the relationship between foreign policy of a national government, and national identity?

The relationship between the government and the national public is founded on the fact that somehow, at least somewhat, governments need to take account of the “general will” of the mass national public.\textsuperscript{61} National identity is volatile, and therefore nation-building will always be necessary. Governments thus need to pay attention to how the mass public perceives their actions in relation to national identity.\textsuperscript{62}

The strength of the national identity depends on the successfulness of nation-building. If it has been successful, then an individual citizen is linked to the mass national public through the identification, which results in a national identity, and the national identity dynamic:\textsuperscript{63}

“If there has been a general identification made with the nation, then there is a behavioral tendency among the individuals who made this identification and who make up the mass national public to defend and to enhance the shared national identity.”\textsuperscript{64}

Identification will be at work whenever international events are presented so that either national identity is perceived to be threatened, or there is a perceived opportunity to enhance national identity. The national identity dynamic can be described as a social-psychological dynamic, which can mobilize a mass national public.\textsuperscript{65}

This can be described in terms of a triangular relationship, shown in Figure 2.1 on the next page.

In sum, the way identification and foreign policy interact is that images can get the identity dynamic started (2), the government may either try to create these images to appeal to national identity (1), or they can be created by other factors, beyond the government's control. In that case, the government may try to manipulate these images (1). The mobilized national identity dynamic may then affect foreign policy-making (3).\textsuperscript{66} National identity is therefore important for foreign policy in three ways. Firstly, it can function as a foreign policy resource for nation-building, secondly, foreign policy can work as a tool for nation-building, thirdly, national identity can influence foreign policy (especially when factors starting the process are not caused purposely by the government).\textsuperscript{67}

\textsuperscript{61} Bloom 1990 p 77
\textsuperscript{62} Bloom 1990 p 81
\textsuperscript{63} Bloom 1990 p 79
\textsuperscript{64} Bloom 1990 p 79
\textsuperscript{65} Bloom 1990 p 79
\textsuperscript{66} Bloom 1990 p 80
\textsuperscript{67} Bloom 1990 p 89
Mobilization of the mass national sentiment, is arguably the “widest possible mobilisation that is available within a state”. Therefore, and since the national identity dynamic is volatile, there will be a domestic competition for manipulation of symbols of identity. This is according to Bloom a “permanent feature of all domestic politics”. Nation-building is also always necessary to maintain integration and stability. This means that all governments must pay attention to how the mass national public perceives its actions.69

To get the identity dynamic started, political ideologies and ideas of nationalism are important, but they must provide more direct symbols, beliefs and values. For example how to act, and what attitudes are right.70

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68 Figure drawn by the author, with reference to Bloom’s description in Bloom 1990 p 80
69 Bloom 1990 p 81
70 ibid p 73-74
This might remind the reader of what Morgenthau said about political rhetoric: that political leaders use ideology in their justifying language (p 10), but that is the only part ideology or identity can play, and foreign policy is always determined by power. The competition among political factions for manipulation of images and the need for a government to “nation-build” may give credit to Morgenthau’s argument. In an understanding approach, however, communication, ideas, and identity are seen as important. How does this make sense?

It is very important to realize that this social-psychological connection does not have to be understood by the decision-makers. It can be, but it does not have to be. For the purpose of analysis, it does not matter if they are completely unaware of it, the theory still holds that this will exist. Obviously, political decision-makers are also citizens, and therefore parts of the national community, and in theory therefore identify with the nation state. It is almost certain that they do not think in terms of “manipulating” or “triggering the national identity dynamic”.

2.4 Defining National Interest, Taking Account of Identity

Now, taking national identity and identification theory into account, it is possible to define national interest in a very different way from Morgenthau:

"National Interest is that which:

(a) can be perceived as being a part of national identity  
    and thus

(b) is capable of triggering national mass mobilisation to defend or enhance it" 72

This definition of national interest differs from classical definitions, in that it acknowledges the important part played by, and the direct link with, national identity. Classical definitions emphasize protection and enhancement of security of territory and core values of citizens, but the latter has not really been accounted for. According to this definition, the national interest is that which is directly connected to identity, and thereby directly linked to the national identity dynamic.

If this definition is accepted, then it is clear that the concept of national interest cannot be used the way it has been used by realists, as an analytical tool to analyze foreign policy, because national interest is entwined in value-based ideas about what is best for the nation. 74 Thus, it is impossible to reach a conclusion about what the objective national interest of a nation “should” be, and then explain actions with reference to this national interest. In relation to the topic of this thesis, it would be erratic to say that the U.S. acted against its own national interest, and try to find the reasons why. Instead of being a

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71 Bloom 1990 p 82
72 ibid p 83
73 ibid p 83
74 ibid p 83
causal factor, an analytical concept that is used to explain behavior, the concept of national interest becomes the phenomenon that we are trying to understand.

Consequently, discourse about national interest is certain to involve factors that affect the national identity dynamic. The concept of national interest plays a decisive role in framing and legitimating political rhetoric. Thus, the purpose of using the concept of national interest in political rhetoric, or the reason why it is used, is to start the process of the national identity dynamic.75

2.5 Understanding Identity

Although identification theory provides a theoretical explanation of the linkage between foreign policy and identity, the objection could still be made that it would be problematic to use in analysis of foreign policy decisions, since so many things are at play, especially the details of the specific situational context. Thus, identification theory does not provide a clear causal link between national identity and foreign policy.

This again takes us to the differentiation between explaining and understanding in IR. The emphasis on cause and effect comes from traditional realist and rationalist thinking, the explaining tradition. According to the understanding approach, although it would be hard to find a direct causal link between identity and foreign policy decisions, it is not unnecessary to study the impact of identity. A constructivist approach thus aspires to arrive at a "narrative" explanation. In order to arrive at such an explanation, concepts are used to "help interpret the meaning and significance actors ascribe to the collective situation in which they find themselves".76

Non-causal explanations can be as important as causal explanations. According to Ruggie, non-causal explanations would explain the reasons for action rather than the causes for action, that is "the reason the direct causal factors have had their causal capacity".77

Something that has not been made clear so far, is this thesis’ position on the distinction between inside and outside approaches. Most analysts of IR would agree that there are both internal (domestic/unit) and external (international/system) sources of foreign policy.78 The “understanding”, constructivist approach within which this thesis has been placed is to a high degree associated with an “inside” approach. Using an identity perspective and identification theory, however, there is no need to place the approach firmly within one of the two. There is no need to argue that either context, domestic or international, will dominate in the construction of state identity.

75 Bloom 1990 p 84
76 Ruggie 1998 p 34
77 ibid p 22
78 Aggestam 1998 p 5
This far, attention has been more focused on the inside of identity. However, it has also been made clear that search for security and protection is an important factor contributing to the identification process, which implies an influence from outside factors.

In this chapter, the theoretical framework of this thesis has been explained. It builds on a constructivist identity approach, with Bloom’s identification theory as the main resource. It has not yet been made clear, how this will be used in this thesis.

The next chapter sets out to specify the research problem and the method of this thesis.
3 Problem and Approach

"Communication involves more than the spoken word: it is fundamentally affected by underlying beliefs".79

Richard Little

The purpose of this chapter is to specify the problem and approach of this thesis, including purpose, method and material. The method builds mainly on role theory, and therefore this chapter starts with a short introduction to the use of role theory in the discipline of International Relations.

3.1 Role Theory Introduced

Role theory has a similar foundation to identity theories, and has been used by anthropologists, sociologists, and psychologists. It is based on the premise that social behavior largely can be explained by norms and expectations that are attached to, or at least associated with, different locations and positions in the social system held by individuals.80

Role theory and identity theory also share the fundamental presumption that international behavior is based on both capability and motivation, as can be seen in Figure 3.1 below. National attributes, such as size or power, economic development and political orientation affect foreign policy behavior both directly, by determining capability in foreign policy (1), and indirectly, in influencing foreign policy-makers’ perceptions of their nation’s position (or positions) in the international system, or society(2), which according to role theory affects foreign policy behavior (3).81

![Figure 3.1: Capability, Motivation and Foreign Policy](image)

81 Wish, Naomi Bailin: National Attributes as Sources of National Role Conceptions; A Capability-Motivation Model. Chapter 6 in Walker 1987 p 96
82 Recreated from Wish’s Figure 6.1: Relationships between national attributes, role conceptions, and foreign policy behavior. Wish 1987 p 96
Three concepts are of major importance in order to understand role theory:

**Role conception** is an actor’s “own conceptions of his position and functions, and the behavior appropriate to them.”  

**Role performance** is the same thing as behavior by a role occupant - that is “attitudes, decisions, and actions”.  

**Role prescription** is “the norms and expectations cultures, societies, institutions or groups attach to particular positions”.

As mentioned in the previous chapter, identity research in IR has had its major impact on Foreign Policy Analysis. The same is true for role theory. The use of role analysis in foreign policy research was first introduced by Holsti in 1970, with the introduction of the concept of a *national role conception*, which was defined as including:

"the policymakers’ own definitions of the general kinds of decisions, commitments, rules and actions suitable to their state, and of the functions, if any, their state should perform on a continuing basis in the international system or in subordinate regional systems. It is their image of the appropriate orientations or functions of their state toward, or in, the external environment.”

With the state as a role occupant, the *national role performance* becomes:

“the general foreign policy behavior of governments. It includes patterns of attitudes, decisions, responses, functions, and commitments towards other states.”

The sources of *role prescription* then come from: “international legal norms, expectations of other governments, or world opinion”.

In foreign policy analysis based on role theory, the role performance of governments (foreign policy behavior) is understood by reference to policymakers’ conceptions of their nation’s role internationally. This can be seen in Figure 3.2 on the next page.

Now, arguably, since behavior (or role performance) is the result of a combination of role conception, role prescription and situational variables - to give a 100 % certain and correct understanding of the reasons behind behavior, a researcher would have to study all of these. In foreign policy studies, however, Holsti argues that role conceptions are the most important variable. There are several reasons for this. Role prescriptions are not as

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84 ibid p 8
85 ibid p 7
86 Holsti, K.J.: *National Role Conceptions in the Study of Foreign Policy*. Chapter 2 in Walker 1987 p 12
87 ibid p 12
88 ibid p 10
89 ibid p 8
90 ibid p 7
strong in international relations as for an individual social position. They are more flexible, weaker and not as well-defined. The main reason for this is the existence of state sovereignty. Because a state is sovereign the sources of its role performance (foreign policy behavior) are primarily policymakers’ role conceptions (1), current domestic factors (needs and demands), and external factors (events and trends in the external environment), and role prescriptions from alters (2, and 3) do not have such an important part to play. This is not to say that they do not matter, but they are less important in international relations, and therefore it can be justified to focus on role conceptions.\(^1\)

\[
\text{Figure 3.2: Role Theory and Foreign Policy According to Holsti}^{92}
\]

The assumption, then, is that foreign policy behavior is to a large extent role performance, and therefore can be understood by analyzing decision-makers’ national

\(^1\) Holsti 1987 p 10

\(^{92}\) Drawn from Figure 2.2. *Role theory and foreign policy: role conceptions and prescriptions as independent variables* Holsti 1987 p 11
role conceptions. National foreign policy roles are determined by beliefs of the nation’s decision-makers. Such beliefs are convictions shared by decision-makers about their own nation and its relationship to other entities in the world, and about how the international system operates. Based on these beliefs and norms, the decision-makers involved in one issue or situation will have certain expectations about the pattern of foreign policy behavior or activity that their government will follow – that is expectations about roles, which influence role performance.

States are thought to be occupants of several different roles in international politics, as well as being involved in several different relationships.

Role theory research has listed common roles adopted by states and their effects on foreign policy. Holsti was the first one to provide a typology of roles, and this basic typology has been used in most subsequent works. Holsti reviewed and content analyzed a large number of general foreign policy statements by leaders of seventy-one governments, parliamentary debates, radio broadcasts, official communiqués, and press conferences, between 1965 and 1967. This resulted in a list of national roles, shown in Table 3.1 below.

<table>
<thead>
<tr>
<th>Regional sub-system collaborator</th>
<th>Independent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Liberator-supporter</td>
<td>Faithful ally</td>
</tr>
<tr>
<td>Mediator-Integrator</td>
<td>Internal development</td>
</tr>
<tr>
<td>Developer</td>
<td>Anti-imperialist agent</td>
</tr>
<tr>
<td>Example</td>
<td>Active independent</td>
</tr>
<tr>
<td>Defender of the faith</td>
<td>Bastion of the revolution-liberator</td>
</tr>
<tr>
<td>Regional protector</td>
<td>Isolate</td>
</tr>
<tr>
<td>Isolate</td>
<td>Regional leader</td>
</tr>
<tr>
<td>Regional leader</td>
<td>Bridge</td>
</tr>
<tr>
<td>Protectee</td>
<td>Other</td>
</tr>
</tbody>
</table>

Table 3.1: Role Conceptions Defined by Holsti.

The relationship between national role conceptions and foreign policy behavior has been empirically analyzed by, among others, Walker (1979) and Wish (1980). Wish categorized national role conceptions and then examined how they related to actual

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93 Wish 1987 p 94
94 Hermann, Margaret G.: Foreign Policy Role Orientations and the Quality of Foreign Policy Decisions. Chapter 8 in Walker (ed) 1987 p 220
95 Singer and Hudson 1987 p 201
96 Singer and Hudson 1987 p 202
97 Holsti 1987 p 13
98 Holsti 1987 p 35
behavior. In these studies, the results have shown a strong correspondence between role conceptions and foreign policy behavior.\textsuperscript{99} I will return to Wish’s categorizations in the method section.

Since a state has several different roles, sometimes a state can face a \textit{role conflict}. This occurs when several different roles are applicable in the same issue, and their respective expectations and norms are in conflict, and thereby in competition with each other.\textsuperscript{100}

A state can deal with a role conflict in different ways. States tend to avoid enacting one role at the expense of another, and will rather try to merge or alter one or several roles. If the state still has to make a choice, it will choose the role that conforms the most to conceptions, expectations, or demands, domestically or internationally.\textsuperscript{101}

### 3.2 Approach

As explained in the previous chapter, an understanding approach focuses on actors and their beliefs and definitions of situations. In the practical task of analyzing how American actors perceive the issue of the International Criminal Court, the researcher needs to know what to look for, and how. In Hopf’s words, “\textit{norms bind action via internal commitments that are not empirically available}.”\textsuperscript{102} We need a tool to uncover these internal commitments. This is where role theory comes in.

The previous chapter provided us with a theoretical framework. The question remained, however, of how to proceed with the investigation. Holsti’s definition of national role conception provides us with a tool to investigate, which complies with my identity approach. Using the concept of national role conception creates a focus on the decision-makers as the relevant actors. By looking at their beliefs about the proper roles of their state, we can learn about state identity and reality views. Thus, identification theory provides the \textit{theoretical} link between identity and foreign policy, and role theory provides the \textit{analytical} link.

As explained in the previous chapter, constructivism tells us that norms, values and identities affect actors’ behavior through Imagination, Communication and Constraint. Applied to role theory, this means that role conceptions both constrain role performance and function as sources of imagination, which help define acceptable goals and means.\textsuperscript{103} The communication mechanism tells us that we should be able to find these role conceptions by looking at communicated acts.

\textsuperscript{99} Wish 1987 p 95
\textsuperscript{100} Walker, Stephen G. and Simon, Sheldon W.: \textit{Role Sets and Foreign Policy Analysis in Southeast Asia}. Chapter 9 in Walker (ed) 1987 p 142
\textsuperscript{101} Walker and Simon 1987 p 143
A combination of an understanding approach and role theory to understand this issue means a focus on role conceptions rather than role prescriptions. It has already been discussed why this can be justified in IR. This can be seen as a delimitation, but it is a justified one, and it is in line with an understanding approach to focus on this side of identity instead of more systemic factors such as role prescriptions. Studies of the impact of role prescriptions have focused on role sets in which the actors (states) and the impact of their relations with and expectations of each other have been analyzed. This would clearly not be a realistic task for this thesis, since the issue of the ICC involves in principle the whole world. Role sets and role prescriptions are not entirely excluded in this thesis, however. Rather, since role prescriptions have an indirect impact on role conceptions (see Figure 3.2), they are indirectly accounted for. It is also beyond the purpose of this thesis to trace the sources of these conceptions.

It may be that a role conception is found that does not seem to correspond to behavior. Possible behaviors covered by role conceptions will vary with how specified they are. If a government subscribes to several different and incompatible national role conceptions, it may take several decisions that appear contradictory, or surprising. If two role conceptions are found that seem incompatible, the researcher first needs to look towards what relationships these roles are directed. A government can be expected to conceive of different roles in different role sets. Similarly, the impact of a role conception is different depending on situation and time.

How do we know that role theory is appropriate to explain behavior in this particular issue, then? Obviously, it must be possible for decision-makers to come to different conclusions about expected behavior, even if they share the same fundamental beliefs. For role analysis to be fruitful then, role and issue must be perceived to be linked. If they are not, role conceptions cannot help predict behavior (role performance). Are role and issue linked in the case investigated in this thesis? We cannot evaluate the usefulness of role theory until we have tried it. Several facts point toward the probability that it will enlighten us, however. First, the task in this case is not to predict behavior, but to understand the reasons behind a given behavior. Bloom’s identification theory told us that identity will be the most influential when there is “a threat to” or “possibility of enhancement of” identity. The very reason why the identity approach seems appropriate for the analysis of this issue is that this is an issue that concerns the question of sovereignty. Decision-makers can therefore be expected to reflect upon identity issues. Depending on how they see the issue, the ICC could be perceived as either a threat to or possibility of enhancement of identity. What the researcher needs to find out is what beliefs and roles come into play when they face this foreign policy problem.

104 Holsti 1987 p 40
105 ibid p 40-41
106 Aggestam 1998 p 21
107 Holsti 1987 p 40
108 Bloom 1990 p 74
3.2.1 Purpose, Research Questions and Disposition

With this approach the problem that will be examined can now be defined:

The purpose of the study is to understand the reasons behind the decision of the United States to stand in opposition to the International Criminal Court. This will be done by seeking to understand what the motivations behind the policy are, in particular the impact of identity. With the perceived national interest – opposition to the International Criminal Court, already given, this national interest becomes the very phenomenon that the author will seek to understand.

In order to fulfill this purpose, the following questions need to be answered:

- Who are the relevant actors involved (decision-makers, policy-makers)
- What has been, and what is, U.S. policy towards the ICC?
- What arguments does U.S. leadership use to explain this policy?
- What role conceptions may be identified in the discourses concerning this issue?
- In what way can an identity approach help us understand U.S. policy?

For a background understanding of the issue, Chapter 4 gives an introduction to the process leading up to the establishment of the ICC, what it is, its jurisdiction, and how it operates.

So far, vague references have been made to “actors” and “decision-makers”. The relevant American actors involved in the ICC issue are defined in Chapter 5, in which the American process of accepting to be bound by an international treaty is explained. U.S. policy towards the ICC is the role performance that will be analyzed. This will be described in Chapter 5, where U.S. attitudes towards, concerns about and standpoint towards the ICC is presented, with references to the arguments and justifications given in speeches and statements.

Role conceptions found in the discourse, and the results of the role analysis will then be presented in Chapter 6.

In the concluding chapter 7, the findings of the thesis are presented, with the aim to answer the final question.

3.2.2 Method and Material

The material used for the background chapter on the ICC is the Rome Statute of the International Criminal Court, the official web site of the International Criminal Court\textsuperscript{109}, and Sewall’s and Kaysen’s compilation of essays on the ICC.\textsuperscript{110}

\textsuperscript{109} http://www.icc-cpi.int/php/show.php?id=home&l=EN
\textsuperscript{110} Sewall and Kaysen 2000
Chapter 5 and 6 are mainly founded on speeches and statements, official documents of negotiations for the ICC, and official information documents of the U.S. government.

According to Aggestam, foreign policy speeches are important for understanding the role of identity, since they often express "we-feelings" and include expressions of identity - and reveal how the speakers view past history, present, and future political choices. These accounts of national identity may become part of the political culture and "national style" of a state's foreign policy.\footnote{Aggestam, Lisbeth: \textit{National Identity, the State, and Foreign Policy in Western Europe}. Chapter 1 in \textit{Identitet, Polityk Kultur och Internationalisering}. Stockholms Universitet 1998 p7-8} The main task will then be to analyze speeches and statements in search for expressions of identity, and role conceptions.

The most common, or at least well-known, criticism against the use of speeches in analysis is that which was brought up in the previous chapter – that leaders use moral language in statements, but that it does not have anything to do with actual behavior. Let us consider this for a moment. If we want to find the reasons behind a certain decision or policy, by looking at statements by political leaders, do we not have to take into account that these statements are made to convince people? In other words, how do we take account of the fact that the reasons decision-makers’ state for their decisions, may not be the actual reasons behind them?

The answer lies in the existence of a shared morality. It is those who deny the existence of a shared morality (mainly realists) that bring forward this argument.\footnote{Hollis and Smith 1991 p 86} If we accept the existence of a shared morality and a shared communication, or, in the words of Bloom, a social-psychological dynamic, then it becomes irrelevant whether what is communicated is planned to persuade, or are the "true" reasons in any objective sense. What is said still has effects, and the way a speaker states reasons reveals things.

The reason speeches are used for the analysis is that the spoken word is where social structures can best be illustrated. A critical assumption is that the individuals behind speeches or statements reveal what identities there are, how they relate to each other, what understandings that are possible, and how reality can be viewed. They do this either explicitly or implicitly, without necessarily being aware of it.\footnote{Hopf 2002 p 26} In fact, the \textsl{intentions} of the actors are not necessary or even fruitful to obtain, because they are not evidence of identities.\footnote{ibid p 11}

The method used in this thesis is based on the role conceptions defined by Holsti (Table 3.1). It is important to have these role conceptions as a reference, since the purpose of the thesis is to understand a certain behavior, rather than to find out what role conceptions there are in U.S. foreign policy in general. However, the analysis must remain open, and will not be strictly bound by this typology. In other words, it would not be very fruitful to look for these roles only, and count the times they appear. In line with the understanding...
approach, a qualitative method will be applied in which induction and interpretation are most important.

Thus, the method has to balance openness and specification. Too much specification can lead to blindness, and subjectivity. For example, “as researchers we may judge a role to be appropriate for a given core belief about the world, it is not assumed that a given national government will necessarily use that role even though they adhere to the belief”. However, too little methodological specification will also lead to subjectivity.

With Holsti’s role typology as a reference, speeches and statements will be analyzed, in search for role conceptions. In the analysis, Wish’s categorizations of national role conceptions will be used. Wish’s categorization takes account of both capability and motivation. Capability influences motivation, and by looking at the actors’ own perceptions of capability, we can find the reasons behind a decision, without having to do a quantitative analysis of capabilities or power.

Wish analyzes national role conceptions with reference to three categories:

1. **Status**, that is perception of status, which is related to power and influence. These role conceptions usually refer to perception of domain and degree of influence.
2. **Motivational orientation** – the role conceptions are individualistic, cooperative, competitive, or mixed.
3. **Issue or substantive problem area** – what kind of issue area does the role conception refer to? Does it have to do with territorial or defense issues, ideological, political or diplomatic, universal value, or economic issues?

A total number of 38 speeches and statements have formed the basis for this research. The timeline is from 1998 – the year of the Rome Conference – to 2004 – the time of writing. A full account of U.S. policy towards the ICC is needed, from the beginning, and thus speeches given before the adoption of the statute were needed. Given the approaching of the Rome Conference, 1998 is the time when speeches and statements are given more frequently, and with more detail.

As explained in the section on the U.S. Ratification Process in Chapter 5, the Executive branch has been the major party involved, and thus the presidential administrations are in focus. Two Presidential Administrations have been involved: the William J. Clinton (1998-2000) and George W. Bush (2001-2004) administrations. 11 of the speeches analyzed are from the Clinton administration, and 27 are from the Bush administration. This is partly because more speeches and statements are available from the incumbent Bush administration, and partly because the time span is longer for the latter administration.

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115 Hermann 1987 p 227
117 Wish 1980 p 538
118 ibid p 539-40
The speeches and statements have been obtained through searches of UN resources, the web site of the Presidential Administration\textsuperscript{119}, the U.S. State Department web site\textsuperscript{120}, the U.S. Department of Defense web site\textsuperscript{121}, and U.S. embassies web sites. The web sites of the International Coalition for the ICC\textsuperscript{122} and the American Coalition for the International Criminal Court\textsuperscript{123} have been helpful in finding speeches and statements. However, when the primary source for these speeches and statements have not been found, they have not been used in the analysis, and thus the references to the speeches do not include these sources. Further, speeches have been selected according to the relevance of the subject, which means that speeches and statements the whole of which, or sections of which, focus on the issue of the International Criminal Court have been chosen. Many statements that have been gone through are very similar to each other, often using the exact same wording, and thus only one of these have been chosen. A complete list of the statements and speeches can be found in Appendix II p 91. The speeches directly referenced to in this thesis are also included in the list of References, p 82.

\begin{itemize}
\item \textsuperscript{119} http://www.whitehouse.gov
\item \textsuperscript{120} http://www.state.gov
\item \textsuperscript{121} http://www.defense.gov
\item \textsuperscript{122} http://www.iccnow.org
\item \textsuperscript{123} http://www.amicc.org
\end{itemize}
4 Introduction to the International Criminal Court

“Crimes against international law are committed by men, not abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.”

Nuremberg Tribunal

This chapter introduces the International Criminal Court, to provide a background understanding of the issue that U.S. foreign policy makers face. After a brief summary of the process leading up to the establishment of the International Criminal Court (ICC), the functions, jurisdiction, and structure of the court are explained.

4.1 A Brief History of International Criminal Justice

International humanitarian law has existed for a long time. However, there has so far not existed any permanent international institution able to enforce these laws. A proposal for a Criminal High Court of International Justice able to prosecute individuals was put forward already in 1920, when the Permanent Court of International Justice was established for inter-state disputes, but was shelved for an indefinite future.

The next serious proposal was made in 1937, when the League Committee for Repression of Terrorism put forward two Conventions, one against terrorism, and one for an ICC with a narrow jurisdictional competence. Little progress was made during these war years, however, and there were no serious negotiations about the latter convention, which never entered into force.

In the final war years, however, when the Allied Powers started to plan for the international environment to come after the war, some progress was made. In October 1943, a UN Commission for the Investigation of War Crimes, consisting of 17 allied nations, was established. It was given the assignment to consider a creation of an international tribunal for the trial of war criminals.

In the Moscow declaration of 1943, the U.S., USSR, and the UK agreed on the handling of criminal cases after the war. Domestic courts would handle limited war crimes, and the allies should handle the prosecution of major war crimes together.

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126 Bring 2001 p 15
127 ibid p 16
128 ibid p 16
129 ibid p17
The 1945 *London Agreement* established the International Military Tribunals for major war crimes (held in Nuremberg, Germany and Tokyo, Japan). Nineteen allied countries became parties to the agreement. The Nuremberg Trial dealt with three types of crimes with individual responsibility: Crimes against Peace, War crimes and Crimes against Humanity.  

The Nuremberg and Tokyo trials set important precedents and came to be used as guidelines for UN resolutions, treaties, customary law, and, in the 1990’s, other trials. The Judgment of the Nuremberg Tribunal laid down the principle of individual criminal accountability for international crimes.

The Nuremberg judgment was groundbreaking. International law has traditionally only regulated affairs of states. It has set up principles governing relations between states, and prescribed rights and duties upon states. Nuremberg established the principle of individual responsibility directly under international law. Two basic principles of international law has legitimated this intrusion of state sovereignty:

- protection of international peace and security, developed in the UN Charter.
- the collective conscience of humankind, developed in Human Rights law.

After World War II, it was considered very important to develop international humanitarian law and to prevent grave crimes against humanity in war. In 1946, the UN General Assembly adopted Resolution 96(1) on Genocide, which called upon the UN Economic and Social Council (ECOSOC) to prepare a draft convention on the crime of genocide, and the punishment of that crime. In a second part to the Draft Convention, ECOSOC recommended that an international criminal court be established, as a supplement to national courts, to try the crimes of the Genocide Convention. The Genocide Convention was adopted in 1948. However, the question of an international criminal court was not decided on, but was referred to the International Law Commission (ILC). (The ILC is a commission established by the UN General Assembly, to promote development of international law and its codification.) Besides the Genocide Convention, major developments were the Universal Declaration of Human Rights in 1948 and the four Geneva Conventions for the Protection of Victims of War from 1949.
Since then, additional conventions have entered into force. The perhaps most important trait of these conventions, from an international law perspective, is that not only states, but also individuals are bound by them. However, there has not existed any sanction system tied to these laws and conventions, and there has so far not existed any permanent international institution able to enforce these laws in spite of the early acknowledgement of the need for one, and the commitment to establish one. (The judicial organ of the United Nations, the International Court of Justice, can only deal with states.) In 1950, the ILC started work on a Code of Offences against the Peace and Security of Mankind, which it submitted a report on in 1954. In that report, the crime of 
\textit{aggression} was one of the major crimes. There existed no agreed definition of this crime, and the whole project was put on hold.

\subsection*{4.2 Birth of the ICC}

The reasons behind the elapse of long time between the idea formation and the coming into being of an international criminal court were not only a lack of definition of the crime of aggression, or the atmosphere of the Cold War. An international court capable of prosecuting individuals was generally seen by states as a dangerous infringement on sovereignty.

It was not until after the end of the Cold War that any serious progress was made on the establishment of an international criminal court. In 1989, the UN General Assembly requested the ILC to again address the question. The ILC issued a Draft Code for an International Criminal Court in 1991. The issue received more attention and support after the successful set-up of the first war crime tribunals since Nuremberg and Tokyo: the International Criminal tribunals for former Yugoslavia (ICTY) and Rwanda (ICTR) in the beginning of the 1990’s. These tribunals were mandated by decision of the United Nations Security Council.

An Ad Hoc Committee of the General Assembly presented a report in 1995, after which a Preparatory Committee was set up to prepare a Draft Statute for a criminal court. The Preparatory Committee held six sessions between 1996 and 1998. All Member States of the United Nations participated in these negotiations. A report and a Draft Statute were presented in April of 1998. The Draft Statute served as the foundation for a diplomatic conference, which was held in Rome in June and July of 1998, attended by representatives of 160 states, 33 Inter-governmental Organizations, and a coalition of 236

\begin{thebibliography}{99}
\item\textsuperscript{138} Dolfe, Ingemar: \textit{Internationell tribunal för brott mot humanitär rätt i f d Jugoslavien}. Utrikesdepartementet, Stockholm 1994 p 7
\item\textsuperscript{139} International Court of Justice: \textit{General Information – The Court at a Glance}. \url{http://212.153.43.18/icjwww/igeneralinformation/icjgnnot.html} 2004-03-30
\item\textsuperscript{140} Bring 2001 p 28
\item\textsuperscript{141} Sewall, Kayson and Scharf 2000 p 5
\item\textsuperscript{142} Sadat, Leila Nadya: \textit{The Evolution of the ICC: From the Hague to Rome and Back Again}. Chapter 2 in Sewall and Kayson 2000 p 38
\item\textsuperscript{143} 1992: 	extit{Krig och Kriser ökar kraven på FN}. In Eriksson, Lars (redaktör): \textit{FN - Globalt Uppdrag}. Sveriges Utbildningsradio AB. Gummerus Printing, Jyväskylä 1995 p 292
\end{thebibliography}
Non-Governmental Organizations. On July 17, 1998, the Rome Statute of the International Criminal Court was adopted. 120 states voted in favor, 7 against, and 21 abstained.

139 states signed the Rome Statute before the deadline on December 31, 2000. After the Rome Conference and the adoption of the Rome Statute, much work remained to be done before the court could come into being. The Rome Statute established a Preparatory Commission for the International Criminal Court (Prep Com), which was given the mandate to prepare proposals for practical arrangements for the establishment of the court. It was to prepare draft texts for:

- Rules of procedure and evidence
- Elements of crimes
- A relationship agreement between the court and the United Nations
- Basic principles governing a headquarters agreement to be negotiated between the court and the host country
- Financial regulations and rules
- An agreement on the privileges and immunities of the court
- A budget for the first financial year
- Rules of procedure of the Assembly of States Parties

Regarding the crime of aggression, it was to prepare proposals for its provision in the statute, including definition, elements of crimes and conditions under which the ICC should have jurisdiction over that crime. Those proposals were to be submitted to the Assembly of States Parties at a Review Conference. The first Review Conference of the Rome Treaty will be seven years after the entry into force – that is in July 2009. After this conference, more review conferences may be convened by the UN Secretary General if requested by a majority of the States Parties.

Participation in the Commission was open to representatives of States that had signed the Final Act. The Commission held ten sessions, it adopted the Rules of Procedure and

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Evidence and the Elements of Crimes on June 30 2002 and on July 12 2002, it submitted its report to the Assembly of States Parties.\textsuperscript{151}

60 days after the 60\textsuperscript{th} state had ratified the statute, on July 1 2002, it entered into force, and the ICC was born, the first global permanent international criminal court with jurisdiction to prosecute individuals for crimes. The seat of the court is the Hague in the Netherlands.\textsuperscript{152}

The first Assembly of States Parties met in September 2002, from which date the Prep Com ceased to exist, and the Assembly took over as the governing body to oversee implementation of the Rome Statute.\textsuperscript{153}

As of May 3 2004, 94 countries are States Parties to the Rome Statute. 24 are African Countries, 11 are from Asia, 15 are from Eastern Europe, 18 are from Latin America and the Caribbean, and 26 are from Western Europe and other states.\textsuperscript{154}

4.3 Functioning of the ICC

The ICC is set up as a permanent body, independent of the United Nations, with an independent budget. The relationship with the UN is governed by an agreement concluded between the court and the UN.\textsuperscript{155}

As a State Party to the Rome Statute, a state is required to contribute to the funding of the court, extradition, provision of evidence, and general cooperation with the court.\textsuperscript{156} A state that is not a party to the statute is not obligated to provide evidence or to surrender accused persons within its territory.\textsuperscript{157}

4.3.1 Jurisdiction

The Rome Statute sets up an International Criminal Court, capable of prosecuting individuals for the “most serious crimes of concern to the international community as a whole”.\textsuperscript{158} The ICC will be able to try crimes that have been committed by individuals

\textsuperscript{153} Elsea 2002 p 19
\textsuperscript{156} Chayes and Slaughter 2000 p 238
\textsuperscript{157} Schaf 2000 Chapter 13 p 213
after July 1 2002, when the treaty entered into force. The court can only prosecute natural persons, who were at least 18 years old when the crime was committed. The covered crimes are:

- GENOCIDE – defined as in the Genocide Convention of 1948: “killing” or “other listed forms of mistreatment” “committed with intent to destroy, in whole or in part, a national, ethnical, racial, or religious group, as such”.

- CRIMES AGAINST HUMANITY – defined according to an exhaustive list of crimes in Art 7(1) of the statute, when committed as “part of a widespread or systematic attack directed against any civilian population”. For an individual to be convicted of this crime, he or she must have had “knowledge” of the fact that the act was part of such an attack, which must be a policy of a state or political organ.

- WAR CRIMES – this is the broadest category of acts, with several sources of law, both treaty and customary international law. Article 8 of the statute includes a list of the crimes.

- AGGRESSION – a crime that is not yet defined, and will only be part of the jurisdiction of the court when a definition has been agreed upon. This definition, must be “consistent with the relevant provisions of the Charter of the United Nations”, so that the special role of the Security Council in determining whether an act of aggression has occurred is taken into account.

The crimes included in the jurisdiction of the ICC are only crimes already prohibited under international law. These are by far not all crimes covered by international law, only the ones deemed to be the most serious ones, of concern to everyone (as can be seen in the quotation above). The crime definitions in the Rome Statute are narrower than in international law. The reason behind this caution is an attempt to balance the principle of state sovereignty with the objective to end impunity for crimes forbidden by international law.

For the same reason, there are other limitations to the jurisdiction of the ICC. The most important one is the principle of complementarity (Art 17), which means that the court should complement national courts. In line with this principle, the court can only exercise its jurisdiction if either the state in whose territory the crime was committed, or the state of nationality of the accused, gives its consent. A state that is a Party to the court (has ratified the Rome Statute) has thereby given its consent for all cases. A state that is not a Party can give its consent for a specific case. The only case in which consent is not required is when a case is referred to the court by the UN Security Council according to

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162 ibid p 70
163 ibid p 68
164 ibid p 67
165 Scharf 2000 Chapter 13 p 217
166 Brown 2000 Chapter 4 p 66-67
167 ibid p 66
its responsibilities under the UN Charter.\textsuperscript{168} The complementarity principle also stipulates that a case should be determined inadmissible if:

- It has already been, or is being, investigated or prosecuted by a state with jurisdiction, unless the state is \textit{unwilling} or \textit{unable} to carry out this investigation genuinely.
- It has been investigated by a state which decided not to prosecute, unless that decision resulted from an \textit{unwillingness} or \textit{inability} of that state genuinely to prosecute
- It has already been tried, and trial by court is not permitted under article 20 (3)
- The case is not of sufficient gravity to justify further action by the court.\textsuperscript{169}

Thus, as a complement to national courts, the ICC will only be able to exercise its jurisdiction when a national court is \textit{unwilling} or \textit{unable} to judge. The judges will determine if such is the case.\textsuperscript{170}

The court also has to defer to a proclaimed national amnesty, if the UN Security Council adopts a resolution under chapter 7 of the UN Charter, requesting the court not to begin proceedings.\textsuperscript{171} Two requirements have to be met by the Security Council:

- A threat to peace, breach of peace, or act of aggression must have been determined
- The resolution and request must be consistent with UN purposes and principles\textsuperscript{172}

Without such a resolution, the court’s prosecutor can decide to respect an amnesty for peace if he or she concludes that there are “\textit{substantial reasons to believe that an investigation would not serve the interests of justice}”.\textsuperscript{173}

The decision of whether the court will exercise jurisdiction ultimately rests with the court itself. If it does exercise its jurisdiction, the jurisdiction will be exclusive, which means that the same case cannot be prosecuted in a national court at another time. However, a state can still prosecute other cases arising from the same context of mass crimes as long as the case in question has not been prosecuted before (protection against double jeopardy).\textsuperscript{174}

\subsection*{4.3.2 Structure}

The states that are Parties to the statute are all represented by one delegate in the \textbf{Assembly of States Parties}. This assembly oversees the management of the court, and is also its legislative body. It has a bureau and a permanent secretariat for assistance. It

\begin{itemize}
\item \textsuperscript{168} Brown 2000 Chapter 4 p 73
\item \textsuperscript{169} Everett, Robinson O. \textit{American Servicemembers and the ICC}. Chapter 8 in Sewall and Kaysen 2000 p 141-142
\item \textsuperscript{170} \textit{International Criminal Court – Jurisdiction}. Official Website of the ICC \url{http://www.icc-cpi.int/php/show.php?id=jurisdiction} 2004-03-30
\item \textsuperscript{171} ibid p 187
\item \textsuperscript{172} ibid p 188
\item \textsuperscript{173} ibid p 188
\item \textsuperscript{174} Morris, Madeline: \textit{Complementarity and Conflict: States, Victims and the ICC}. Chapter 12 in Sewall and Kaysen 2000 p 202-203
\end{itemize}
adopts the budget, elects the judges and the prosecutor. In taking decisions, the assembly strives for consensus, and it is only when it cannot be reached, despite efforts, that decisions are taken by vote.\textsuperscript{175}

There are \textbf{18 judges} serving on the court. They are elected by the Assembly of the States Parties to serve for a term of nine years. They cannot be reelected. (The first 18 judges will be elected for three, six or nine years, in order to get a continuing rotation of judges). They are all nationals of States Parties, and in the election representation of the principal legal systems in the world, geographical representation, and a fair representation of female and male judges are taken into account.\textsuperscript{176}

The ICC has four principal organs:

- The \textbf{Presidency}
- The \textbf{Registry}
- The \textbf{Office of the Prosecutor}
- The \textbf{Chambers} – the judiciary branch, composed of the
  - Pre-Trial Division
  - Trial Division
  - Appeals Division\textsuperscript{177}

The \textbf{Presidency} has a President, and a First and a Second Vice-President, elected among the judges for a three-year renewable term by an absolute majority of the 18 judges. It is responsible for the administration of the court, except for the Office of the Prosecutor.\textsuperscript{178}

The \textbf{Registry} handles the administration that is non-judicial, such as legal aid, court management, victims and witnesses, defense counsel, detention unit, finance, translation, building management, personnel etc. As a receiver, obtainer, and provider of information, it also acts as the bridge between the organs of the court, and between the court and third parties. The top position, Registrar is elected by secret ballot by an absolute majority of judges.\textsuperscript{179}

The \textbf{Office of the Prosecutor} receives referrals of cases or situations and information on crimes. Its task is to investigate and prosecute crimes within the court’s jurisdiction. The Chief Prosecutor, who is elected by the Assembly of States Parties for a single nine-year term, has the full authority over the Office. The prosecutor may start an investigation after referral, or based on information from other sources, in which case he or she needs

\textsuperscript{175} \textit{International Criminal Court – Assembly of States Parties}. Official Website of the ICC \url{http://www.icc-cpi.int/php/show.php?id=asp} 2004-03-30
\textsuperscript{176} \textit{International Criminal Court – Organs of the Court}. Official Website of the ICC \url{http://www.icc-cpi.int/php/show.php?id=organs} 2004-03-30
\textsuperscript{177} \textit{International Criminal Court – Organs of the Court}. Official Website of the ICC \url{http://www.icc-cpi.int/php/show.php?id=organs} 2004-03-30
\textsuperscript{178} \textit{International Criminal Court – Organs of the Court}. Official Website of the ICC \url{http://www.icc-cpi.int/php/show.php?id=organs} 2004-03-30
\textsuperscript{179} \textit{International Criminal Court – The Registry}. Official Website of the ICC \url{http://www.icc-cpi.int/registry/home.php} 2004-03-30
an authorization by the Pre-Trial Chamber. The office is independent, and no one may take instructions from any external source.\textsuperscript{180}

The Chambers carry out the judicial functions of the court. The Pre-Trial Division consists of seven judges, including the First Vice-President, serving for three years. A Pre-Trial Chamber is composed of either a single judge, or three judges, depending on the case. The chamber authorizes an investigation, and makes a preliminary decision as to whether the case is within the jurisdiction of the court. It issues warrants of arrests and summons to appear before the court, provides for protection and privacy of victims and witnesses, preserves evidence, and protects national security information.\textsuperscript{181}

The Trial Division consists of six judges, including the Second Vice-President, serving for three years. A Trial Chamber is composed by three judges from the division. It adopts all necessary procedures to ensure fairness and expediency of a trial, as well as full respect for the rights of the accused, and protection of victims and witnesses. It determines the innocence or guilt of the accused, and determines the punishment. The trial is held in public hearings, unless there are special circumstances, such as confidential information or protection of witnesses and victims.\textsuperscript{182}

The Appeals Division consists of the President and four other judges. The Appeals Chamber is composed of all five of these judges. It deals with cases that have been appealed from the Trial Chamber by the prosecutor or the defense. It can reverse or amend the decision and the sentence, or order a new trial before another Trial Chamber.\textsuperscript{183}

\section*{4.3.3 Bringing a Case to the ICC}

In sum, the court’s handling of a case can be described in these nine steps:

1. **Acceptance of jurisdiction.** Unless the United Nations Security Council refers the case, the jurisdiction of the ICC needs to be accepted by either the territorial state, or the state of nationality of the accused. (Art 12(2)).\textsuperscript{184}

2. **Initiation of investigations and prosecutions.** A State-Party or the UN Security Council can refer a situation to the prosecutor. The prosecutor can also initiate an investigation on his or her own initiative. Based on the received information, the prosecutor decides whether he or she should proceed with the investigation. This decision should be based on an evaluation of the credibility that a crime has occurred, that it would be admissible, and that an investigation would serve the interests of

\begin{flushleft}
\textsuperscript{180} Office of the Prosecutor at a Glance. Official Website of the ICC \url{http://www.icc-cpi.int/otp/ataglance.php} 2004-03-30
\textsuperscript{181} International Criminal Court – Chambers. Official Website of the ICC \url{http://www.icc-cpi.int/chambers/pretrial.php} 2004-03-30
\textsuperscript{182} International Criminal Court – Chambers. Official Website of the ICC \url{http://www.icc-cpi.int/chambers/trial.php} 2004-03-30
\textsuperscript{183} International Criminal Court – Chambers. Official Website of the ICC \url{http://www.icc-cpi.int/chambers/appeals.php} 2004-03-30
\textsuperscript{184} Brown 2000 Chapter 4 p 73
\end{flushleft}
Introduction to the International Criminal Court

justice. If he or she decides not to proceed, the Pre-Trial Chamber and the referring party is notified. The Pre-Trial Chamber may then review the decision, on its own initiative, or at the request of the referring party. (Art 53) If the investigation proceeds, the prosecutor starts collecting evidence and testimonies.\textsuperscript{185} If the investigation is initiated on the prosecutor’s initiative, he or she needs to seek the approval by the Pre-Trial Chamber, which bases its decision on whether there is “reasonable basis to proceed” and whether the case is preliminarily deemed to be within the jurisdiction of the court. (Art 15).\textsuperscript{186} When the UN Security Council has referred the situation, the court may exercise its jurisdiction in all cases, without preconditions. If that is the case, the next step will be step 5.\textsuperscript{187}

3. Admissibility. When it is not, the handling of the case can only proceed if the case is not being investigated or prosecuted by a State with jurisdiction. The prosecutor must notify all states with jurisdiction of the started investigation. They then have one month to notify the prosecutor of own investigations. It shall not proceed if the person has already been tried for the crime, or it has been investigated by a State that decided not to prosecute. The exception to this deferral to national courts is if the state is “unwilling or unable genuinely to carry out the investigation or prosecution”.\textsuperscript{188} Unwillingness is if the state is conducting the proceedings, or decides not to prosecute, only to “shield the person from criminal responsibility”. Likewise, if there are unjustified delays in the proceedings, or if they are not being conducted independently or impartially.\textsuperscript{189} Inability is due to a “total or substantial collapse or unavailability of its national judicial system” (Art 17). The decision of admissibility is taken by the Pre-Trial Chamber. A state can then appeal that decision.

4. Possible deferral after decision of the UN Security Council. The UN Security Council has the power to suspend an investigation or prosecution for 12 months, which can be renewable. This decision needs to be taken under Chapter 7 of the UN Charter (action with respect to threats to the peace, breaches of the peace, and acts of aggression). (Art 16).\textsuperscript{190}

5. Issuance of orders and warrants. The prosecutor requests the Pre-Trial Chamber to issue summons to appear, arrest warrants, and measures to preserve evidence. (Art 57-58).\textsuperscript{191}

6. Confirmation of charges. Before trial, the Pre-Trial Chamber holds a hearing where the defense and the prosecutor participate. The prosecutor needs to support each charge with sufficient evidence so that there are “substantial grounds” to believe that the accused committed the crime. The Pre-Trial Chamber then confirms or dismisses each charge. (Art 61).\textsuperscript{192}

7. Trial. The trial occurs in the Trial Chamber. The prosecutor needs to prove guilt beyond reasonable doubt.\textsuperscript{193} The trial cannot be conducted without the presence of the

\textsuperscript{185} Brown 2000 Chapter 4 p 76
\textsuperscript{186} ibid p 73
\textsuperscript{188} Brown 2000 Chapter 4 p 75
\textsuperscript{189} ibid p 76
\textsuperscript{190} Brown, Bartram S. Bringing a Case to the ICC: Pathways and Thresholds Appendix in Sewall and Kaysen 2000 p 254
\textsuperscript{191} Brown 2000, Appendix p 254
\textsuperscript{192} Brown 2000 Chapter 4 p 77
accused. The accused has a right to a defense lawyer. The decision of guilt is taken by a majority of the three judges. Life imprisonment is the highest penalty. Fines and confiscation of profits can be added to this. 193

8. **Appeal.** If the case is appealed by either the prosecutor or the defense, it is taken before the Appeals Chamber. 194 It may be appealed on the grounds of new evidence, procedural error, error of fact, error of law, or fairness and reliability of proceedings or decision. 195

9. **Serving of sentence.** The sentence is served in a State appointed by the court from a list of states willing to accept convicted. After 2/3 of the sentence has been served, the court must re-examine the sentence to see if there is reason to reduce it. 196
5 U.S. Policy Towards the ICC

“We believed that a properly created court could be a useful tool in promoting human rights and holding the perpetrators of the worst violations accountable before the world – and perhaps one day such a court will come into being. But the International Criminal Court... will not effectively advance these worthy goals.”

Marc Grossman, U.S. Under Secretary for Political Affairs, 2002

This chapter aims to clarify the role performance that is being analyzed, that is U.S. policy towards the ICC. It starts with the definition of the political actors involved in the formation of the American policy towards the ICC. U.S. policy toward the ICC is then explained in rough chronological order, including a presentation of the main objections against the ICC and arguments for rejection and opposition. The chapter ends with a discussion of the policies of the two presidential administrations, and the arguments behind opposition.

5.1 Actors

The responsibility for negotiation of international treaties in the U.S. rests with the Executive Branch. The Department most directly involved in this is the Department of State, which gives detailed instructions to negotiating representatives. After the negotiations are done, the Executive takes a decision on whether to sign the treaty. When a treaty has been signed, the ratification process begins. The President submits the treaty to the U.S. Senate (where all U.S. states are represented), from which body he or she needs an approval for ratification. The Senate Foreign Relations Committee studies the treaty and submits a report to the Senate, upon which the Senate votes, and needs a 2/3 majority for an authorization. Upon this authorization, the President of the United States proclaims the entry into force of the treaty.

Thus, the actors most directly involved in the ICC issue are primarily the Presidential Administration, in which the U.S. State Department has the major part, and the U.S. Senate, for which the Foreign Relations Committee is responsible for the investigation.

The Rome Treaty has never been submitted to the U.S. Senate, and therefore, the role performance that will now be described is primarily the policy pursued by the U.S. government, that is the presidential administration in power. In this case, two presidential administrations have been involved: The William J. Clinton and the George W. Bush

administrations, and the description below is structured accordingly. However, it should be realized that this government policy is based on what is perceived to be the opinion of other domestic actors, primarily the U.S. Senate, from which approval would need to be sought for an eventual ratification of the treaty.

The U.S. delegation to the Rome Conference consisted of lawyers and other officials from the Departments of State and Justice, Office of the Secretary of Defense, Joint Chiefs of Staff, U.S. Mission to the United Nations, and from the private sector. ¹⁹⁹

### 5.2 Initial Response to Creation of an ICC

There can be no doubt about the positive attitude the United States initially had toward the creation of an ICC. The United States was a main supporter of the International Criminal Tribunals in Rwanda and former Yugoslavia in the beginning of the 1990’s, which set important precedents for a permanent international criminal court. The United States repeatedly gave its clear and strong support to the idea of creating an international criminal court:

“The United States has a deep and unwavering commitment to the cause of international justice. Where national legal systems cannot or will not do the job, we have joined with other governments to create ad hoc international criminal tribunals, such as those for the former Yugoslavia and Rwanda. These courts demonstrate that the world can confront evil, secure justice and ensure international peace and security through the application of international law.” ²⁰⁰

Although the ICT’s were seen as a major step forward, there were also problems inherent in the workings of those courts. The work progress was really slow, and it took a lot of resources to set up. This was one of the major reasons behind the idea of the ICC. With a permanent court, investigations could start much sooner and prosecutions would be much more cost-efficient. ²⁰¹

Before Rome, anticipation was mixed with precaution from the U.S. camp. The possible imminent creation of a court would “make real the aspirations of the past fifty years” ²⁰², and the time before Rome was a “threshold of a new era in international affairs” ²⁰³. ²⁰⁰

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²⁰⁰ RICHARDSON Bill, United States Permanent Representative to the United Nations.  

²⁰¹ SCHEFFER July 23, 1998 Paragraph 3

²⁰² SCHEFFER July 23, 1998 Paragraph 3

²⁰³ SCHEFFER David J, Ambassador-at-Large for War Crimes Issues, US Department of State.  
“desperately needed”.

It was emphasized, however, that in the making of the court, the countries “must recognize the reality of the international system today”. The court must not become a “political forum” and thereby “handcuff governments that are prepared to take risks to promote peace and security and to undertake humanitarian missions”.

Thus, the United States was not exclusively optimistic before the Rome Conference. It was emphasized that in order for the court to come into being, the participants would have to reach agreement on the “fundamental issues”, which would not be easy.

### 5.3 The Rome Conference

Very influential in the negotiations in Rome became what was known as the like-minded group, which was a loose coalition of some 60 countries working for a robust court. Countries included in this negotiating group were Australia, New Zealand, Canada, most European countries, most newly democratizing countries in Latin America and Sub-Saharan Africa.

As the Rome Conference proceeded, it became clear that the U.S. had major issues with the negotiations as they were developing. What bothered the U.S. were the often time mentioned “fundamental issues”, which had to be solved in order to arrive at “a properly constituted international court” but which did not seem to be headed towards solutions the U.S. could support.

#### 5.3.1 The Fundamental Issues

**1. The Role of the Security Council**

The United States wanted the United Nations Security Council to play a major role and have a major influence in the workings of the court. Due to its responsibilities under Chapter 7 of the UN Charter, the United States wanted a requirement of Security Council consent for every case brought to the ICC. This was unacceptable for the like-minded states. The result was the Singapore Compromise, which instead of requiring permanent five unanimity for launching an investigation, requires it for blocking (delaying) an investigation.

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204 SCHEFFER MAY 13, 1998 Paragraph 2 LINE 10
205 RICHARDSON JUNE 17, 1998 LINE 23.
207 SCHEFFER May 13, 1998 Paragraph 17 under Heading International Criminal Court
208 Schenkl 2000 p 93
209 SCHEFFER APRIL 22, 1998 LINES 302-303
210 Schenkl 2000 p 93
2. An Independent Prosecutor

The United States was also very much against the idea of an independent prosecutor, able to launch investigations and prosecutions on his or her own initiative. The U.S. proposed that in order for the prosecutor to initiate an investigation, either the Security Council or a State Party must first refer a case to his or her office.\(^{211}\)

With the like-minded group at the forefront, a majority of states argued that this independence was needed in order to be efficient and free of political coercion. The U.S. and others argued that this would lead to a work overload, which would force the prosecutor to take political decisions. According to the U.S., this was a much more serious problem considering the court would exist in an international system, as different from a national system where prosecutors exist in a framework of accountability with *checks and balances*.\(^{212}\) As first of its kind, according to the U.S. view, for this international court to have an independent prosecutor was premature.\(^{213}\)

3. Jurisdiction

The U.S. was in favor of a statute that would provide the court with universal jurisdiction over the crime of genocide, but jurisdiction over war crimes and crimes against humanity only if committed by nationals of a State Party, unless the state of nationality of the accused gave its consent.\(^{214}\)

As it became evident that this proposal would not go through, at the last session of the conference, the U.S. proposed an amendment to the treaty that was going to be voted on. It would block jurisdiction over nationals of a Non-Party State if the state acknowledged that the individual had been acting as an agent of the state, performing official actions of the state. This amendment was defeated by a no-action vote.\(^{215}\)

Another issue the U.S. had with the jurisdiction over Non-Party States is an opt-out possibility for state parties. The U.S. had proposed that a state would be able to opt out of jurisdiction over war crimes and crimes against humanity, not genocide, for a 10-year period.\(^{216}\) In the final treaty of Rome, there is an opt-out clause permitting state parties to opt out of jurisdiction of war crimes only, for a period of seven years.\(^{217}\) However, Non-Party States do not have this option, and therefore their nationals can be prosecuted.\(^{218}\)

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\(^{211}\) Scheffer April 22, 1998 Lines 259-60
\(^{212}\) Weschler 2000 p 94
\(^{213}\) Richardson June 17 1998 Paragraph 13
\(^{214}\) Scharf 2000, Chapter 13 p 216
\(^{215}\) ibid p 216
\(^{216}\) Scheffer July 23, 1998 Paragraph 10
\(^{217}\) Weschler 2000 p 102
\(^{218}\) Scheffer July 23, 1998 Paragraph 12
Similarly, the amendment process of the Rome Treaty stipulates that when an amendment is adopted that adds a new crime to the jurisdiction of the court, or changes the definition of a crime, a State Party can immunize its officials from prosecution for that crime by not ratifying the amendment. Non-Parties, however, have no option of doing this.  

The U.S. was also against the inclusion of the crime of aggression. “Aggression carries with it an extremely problematic process of definition. How this issue will be resolved is too unclear for so important an issue”.  

“Neither we nor the Court should seek to legislate new crimes that are not already established. For that reason, we believe it remains premature to attempt to define a crime of aggression for purposes of individual criminal responsibility, a task that even the International Law Commission ultimately left undone.”  


As revealed by the quotation above, the one thing the U.S. emphasized the most before and during the Rome Conference, was that the court must complement national judicial systems, and that national action is the preferred action, and should be encouraged. “A primary aim of an international court must be to compel national judicial systems to do the job they are supposed to be doing”. However, the complementarity regime stipulated by the Treaty of Rome was not viewed as satisfactory. The fundamental concern was the jurisdiction over Non-Party nationals, even when not referred by the Security Council. 

5.3.2 Outcome

After the amendment proposed by the U.S. had been defeated by a no-action vote, as one of seven states, the U.S. delegation voted against the adoption of the Rome treaty. Other states who voted against it were China, Iraq, Israel, Libya, Qatar, and Yemen. 

Shortly after the conference, in a testimony before the Senate Committee on Foreign Relations, Scheffer accounted for the U.S. views on the result of the negotiations.

The U.S. had indeed had a big influence in the final draft of the treaty, and had achieved many objectives. In his testimony, Scheffer accounted for the following achieved objectives:

- a certain degree of complementarity
- a role for the UN Security Council and a possibility to intervene

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219 Scheffer, David J: The U.S. Perspective on the ICC. Chapter 6 in Sewall and Kaysen 2000 p 117
220 Scheffer 2000 p 117
221 SCHEFFER David J., United States Ambassador-at-Large for War Crimes Issues, Statement before the Sixth Committee of the 53rd General Assembly: The International Criminal Court. OCTOBER 21, 1998 USUN PRESS RELEASE #179 (98) AS PREPARED FOR DELIVERY. http://www.un.int/usa/98_179.htm 2003-12-22
LINES 67-69 (Regarding the crime of aggression, the UN General Assembly adopted a resolution in 1974 that lists offenses that count as aggression, but left the specific definition of the crime to the Security Council. Elsca 2002 p 7)
222 SCHEFFER MAY 13, 1998 Paragraph 9 under heading International Criminal Court LINES 10-12
223 SCHEFFER October 21, 1998 Paragraph 8
224 Nash 2000 p 153
- protection of national security information
- recognition of national judicial procedures in cooperation with the ICC
- internal conflicts as well as international conflicts were covered
- due process protections
- definitions of crimes, including the inclusion of a list of elements of offenses
- gender issues had been considered
- command responsibility and superior orders
- qualifications for judges
- State Party funding
- an Assembly of States Parties, and amendment procedures
- a sufficient number (60) of ratifying states demanded before the entry into force of the treaty.225

However, Scheffer goes on to say,

“The U.S. delegation also sought to achieve other objectives in Rome that in our view are critical. I regret to report that certain of these objectives were not achieved and therefore we could not support the draft that emerged on July 17th.”226

These “critical objectives” were the fundamental issues described above. The jurisdiction over nationals of Non-Party States was the most serious of these.

In essence, what bothered the U.S. administration was that “U.S. armed forces operating overseas could be conceivably prosecuted by the international court even if the United States has not agreed to be bound by the treaty”...”it could inhibit the ability of the United States to use its military to meet alliance obligations and participate in multinational operations, including humanitarian interventions to save civilian lives.”227

The only acceptable way to prosecute a national of a Non-Party States would, according to the U.S. view, be by a referral of a case by the UN Security Council in its capacity to uphold international peace and security.228

The underlying fear is that the court may become a political forum, used to “challenge controversial actions of responsible governments by targeting their military personnel for criminal investigation and prosecution”.229

5.4 Post-Rome Preparatory Commission

After the Rome Conference, the Clinton administration still did not rule out the possibility that the U.S. would one day join the ICC.
“The Administration hopes that in the years ahead other governments will recognize the benefits of potential American participation in the Rome treaty and correct the flawed provisions in the treaty.”

Although there were no plans to sign the treaty as it was, the Clinton administration still continued to participate in the following Prep Com, to continue to try to achieve satisfactory solutions to its fundamental issues. The aim was to be "constructively engaged" in the Prep Com in particular to limit the court's effective powers with respect to Non-Party States.

The U.S. was very active in the negotiations of *The Rules of Procedure and Evidence* and *Elements of Crime*, and viewed it as very important to develop detailed and clear criminal provisions. With respect to this, the engagement in the Prep Com process resulted in provisions that the U.S. viewed as satisfactory.

What characterized U.S. participation in the Prep Com process, however, was its continued search for protection against jurisdiction of Americans, as nationals of a Non-Party State. Thus, it did not seem like the United States would ever join the court. Instead, the U.S. approach was more disposed toward a friendly relationship with the court. In Scheffer’s words, it must be "a good neighbor to the court" in order to "undertake cooperative measures with it". For that to be possible, one fundamental issue would need to be resolved: for cases which had not been referred to the court by the UN Security Council, the U.S. wanted a means to prevent surrender to the court of official personnel of a “non-party State acting responsibly in the international community, and willing to exercise and capable of exercising complementarity with respect to its own personnel”.

The U.S. made several attempts during the Prep Com process between 1998 – 2000 to solve this fundamental issue. None was successful. The most important ones were:

*Broadening Deference to States through the Rules of Procedure and Evidence:* In 1999 the U.S. put forward a proposal for the Rules of Procedure and Evidence that suggested that three more factors concerning the state of nationality of the accused should be taken into account when the court determined admissibility of a case: independence of the

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230 SCHIEFFER JULY 23, 1998 LINES 147-48
232 Broomhall 2003 p 168
235 Broomhall 2003 p 171
237 Broomhall 2003 p 172
country’s justice system, past practice of that system, and whether the state in question has communicated to the court that the acts in question were performed in the course of official duties. This was not acceptable for a majority of states, since it would require the court to judge the general independence and effectiveness of national justice systems, and not only the investigation and prosecution of the case in question.238

**A Broader Deference to “responsible nations”:** In the Nov –Dec 2000 Prep Com the U.S. delegation presented a proposal that was appended to the proceedings without any discussion as a “further issue for consideration by the Preparatory Commission”. The aim of the proposal is to include factors such as “the context in which an alleged crime has occurred, and a State’s contribution to international peace and security” in the “investigation, prosecution and surrender of suspects”.239 It was not a detailed proposal, and was never voted on, but made it possible to continue to build on.240

Somewhat surprisingly, on the deadline date for signature, on December 31 2000, President Clinton signed the Treaty of Rome for the United States, despite its concerns. In his Statement, President Clinton gave two main reasons for signing the statute:

“We do so to reaffirm our strong support for international accountability and for bringing to justice perpetrators of genocide, war crimes, and crimes against humanity. We do so as well because we wish to remain engaged in making the ICC an instrument of impartial and effective justice in the years to come.”241

The fundamental issues remained, but as a signatory of the statute, according to Clinton, the U.S. would be allowed to continue participation in the Prep Com: “Signature will enhance our ability to further protect U.S. officials from unfounded charges and to achieve the human rights and accountability objectives of the ICC.”242

“Given these concerns, I 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.”243

238 Broomhall 2003 p 172-173
240 Broomhall p 177
5.5 New Presidential Administration: Abandonment of Prep Com and Unsigning of Treaty

When George W. Bush took over the presidency in 2001, participation in the Prep Com process decreased. The U.S. was still represented by smaller delegations in the Prep Com sessions of 2001, in the discussions on aggression and financing. As advised by the former administration, the Bush administration did not submit the Rome Statute to the Senate for ratification.

Beginning in 2002, the United States withdrew completely from the Prep Com process, and stopped sending delegations to its sessions. On April 11, 2002 the number of ratifications of the Rome Statute increased to 66, which meant that the treaty would enter into force on July 1, 2002. This brought some urgency to determining future U.S. policy towards the ICC.

In May 2002, the United States made clear that it would not participate in the ICC, and would not cooperate with the ICC once it was established. In a letter sent to UN Secretary General Kofi Annan May 6 2002, the U.S. Under Secretary of State for Arms Control and International Security, John R. Bolton, communicated the following statement from his government:

"Dear Mr. Secretary-General:
This is to inform you, in connection with the Rome Statute of the International Criminal Court adopted on July 17, 1998, that the United States does not intend to become a party to the treaty. Accordingly, the United States has no legal obligations arising from its signature on December 31, 2000. The United States requests that its intention not to become a party, as expressed in this letter, be reflected in the depositary's status lists relating to this treaty.

Sincerely,
S/John R. Bolton"

This decision was explained by U.S. officials as the “only alternative” remaining with reference to President Clinton’s signature statement, which had expressed hope that signature would enable the U.S. to influence and “fix” the treaty. Although U.S. officials had been able to address many concerns, especially as the U.S. had taken “a leadership role in drafting the elements of crimes and the procedures for the operation of the court”;

245 Elsea 2002 p 2
246 Info About the US and ICC. http://www.amicc.org/info.html 2004-05-05
248 Broomhall 2003 p 178
250 GROSSMAN MAY 6, 2002 LINE 30
they had been “ultimately unable to obtain the remedies necessary to overcome our fundamental concerns.” However, at this time, as the Rome Statute had been ratified by enough countries “the treaty contains the same significant flaws President Clinton highlighted”.

“When the ICC treaty enters into force this summer, US citizens will be exposed to the risk of prosecution by a court that is unaccountable to the American people, and that has no obligation to respect the Constitutional rights of our citizens. The United States understandably finds that troubling and unacceptable.”

With the “unsigned” of the treaty, the U.S. considered itself not to be bound by the obligation as a signatory, which is not to conduct activity in contravention of the object and purpose of the treaty. This would provide more options for means to protect Americans from possible prosecution by the ICC.

For the primary objection of the Bush administration, as well as the Clinton administration, against the Treaty of Rome was, and still is, the possibility of prosecution of U.S. soldiers arising from legitimate uses of force even if the U.S. does not ratify the statute. Therefore, after the unsigned of the treaty, U.S. policy towards the ICC has been founded on the search of means to exempt U.S. citizens from the jurisdiction of the ICC.

As a Non-Party, the United States will have no vote in neither the Assembly of States Parties nor in the Review Conferences. However, as a signatory, it will remain eligible to participate in both as an observer. The “unsigned” of the treaty by the Bush administration is in effect a notification of its intent not to ratify the statute. This can be seen as a statement of an intent not to participate as an observer, but should not have any effect on its rights to participate as an observer. An observer may participate in debates and respond to proposals, but not make its own proposals, and not make motions during the debate.

With the abandonment of the Prep Com process and the coming into being of a court it officially declared to stand in direct opposition to, the means of the Bush administration were different from the Clinton administration.

With a court deemed impossible for the U.S. to support, the U.S. has been careful to emphasize its continued support for international criminal accountability, and the promotion of this through alternative means.

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252 GROSSMAN MAY 6, 2002 LINES 87-88, 90-91
253 GROSSMAN MAY 6, 2002 LINES 97-98
255 Elsea 2002 p 2
256 ibid p 3
257 ibid p 20
The alternative is to encourage national courts to ensure accountability. In situations where the political will of a state is lacking, the international community should intercede through the UN Security Council, as was done with the set ups of the international tribunals ICTY and ICTR.

5.6 Search for Immunity

5.6.1 Security Council Blocking of Investigations

In May 2002, when the UN Security Council was considering a resolution on deployment of peacekeeping forces in East Timor, the U.S. searched for assurances that all peacekeepers would be excluded from prosecution by the ICC. However, this provoked strong opposition from ICC supporters, and it was not able to achieve this.

In June of 2002, the differences between the U.S. and ICC supporters culminated, as on June 30, after again being unsuccessful in its attempts to exempt U.S. peacekeepers from the jurisdiction of the ICC, the U.S. vetoed a resolution on an extension of the Bosnia peacekeeping operation (UNMIBH).

The United States was determined to secure protection for its forces:

“...the bottom line that the United States will not endanger US citizens to the reach of the ICC treaty, that we have not agreed to, is firm principal that has been laid out by the US government time and again.”

[The U.S. veto did] “reflect our frustration at our inability to convince our colleagues on the Security Council to take seriously our concerns about the legal exposure of our peacekeepers under the Rome Statute”.

“Obviously, if we are prepared to veto the Bosnia resolution because of our interests with respect to the ICC, clearly, it is a very, very important question for the United States.”

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258 GROSSMAN MAY 6, 2002 Paragraph 35
259 Grossman May 6, 2002 Paragraph 37
261 Elsea 2002 p 3
In the search for a compromise, UNMIBH was given several very brief extensions.\(^{266}\) The issue was finally resolved on July 12, 2002, as the UN Security Council unanimously adopted Resolution 1422 on United Nations peacekeeping. In accordance with Article 16 of the Rome Statute, it requests that, unless the Security Council decides otherwise, the ICC does not investigate or prosecute any case involving officials or personnel from a contributing state that is not party to the Rome Statute, for one year from 1 July 2002 (the date of entry into force of the Rome Statute). It also expresses the intent to renew the resolution for as long as may be necessary.\(^ {267}\)

The resolution was renewed on June 12, 2003. This resolution has the same effect as the previous one, but for the period of 12 months starting July 1, 2003. It also states the intent to renew the request under the same conditions every July 1 “for as long as may be necessary”.\(^ {268}\)

The issue was still very controversial, and many spoke against the adoption of the resolution, including UN Secretary General Kofi Annan.\(^ {269}\)

The exemption from the jurisdiction of the ICC provided for in these resolutions was neither permanent nor absolute. This means that should the UN Security Council eventually decide not to extend this request, it could be possible for the ICC to investigate and prosecute crimes that are claimed to have occurred at any time after the Rome Statute’s entry into force. Most importantly for the U.S., this exemption only covers U.S. persons engaged in UN established or authorized peacekeeping or military operations.\(^ {270}\)

This led the U.S. to continue to search for immunity by other means.

“This resolution is a first step. The President of the United States is determined to protect our citizens ... from the International Criminal Court. ... Should the ICC eventually seek to detain any American, the United States would regard this as illegitimate – and it would have serious consequences. No nations should underestimate our commitment to protect our citizens.”\(^ {271}\)

In 2004, the U.S. again put forward a proposal to extend the UN resolution. However, after hard criticisms from among others UN Secretary General Kofi Annan, and

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\(^ {265}\) NEGROPONTE, John D., United States Permanent Representative to the United Nations: Remarks following the vote on the renewal of the mandate of the UN Mission in Bosnia and Herzegovina. at the Security Council Stake-Out JUNE 30, 2002 USUN PRESS RELEASE # 88 (02) [http://www.un.int/usa/02_088.htm](http://www.un.int/usa/02_088.htm) 2004-01-29 LINES 9-11

\(^ {266}\) Info about the US and ICC – Peacekeeping. [http://www.amicc.org/usinfo/administration_policy_pkeeping.html](http://www.amicc.org/usinfo/administration_policy_pkeeping.html) 2004-05-15


\(^ {270}\) Elsea 2002 p 24

statements from several countries saying that they would abstain in the case of a vote in the Security Council, on June 23 the U.S. withdrew its proposal.\textsuperscript{272}

“We believe the draft and its predecessors fairly meet the concerns of all. Not all Council Members agree, however, and the United States has decided not to proceed with further consideration and action on the draft at this time to avoid a prolonged and divisive debate.”\textsuperscript{273}

The U.S. has since withdrawn American personnel from two UN peacekeeping missions.\textsuperscript{274}

### 5.6.2 Article 98 Agreements

After the U.S. officially abandoned the Prep Com process, the number one means to prevent possible prosecution of Americans became conclusion of bilateral agreements with states (in accordance with Art 98(2) of the Rome Statute) that included a promise not to surrender U.S. nationals to the ICC. Since the UN Security Council Resolutions did not provide permanent immunity, and only covered UN peacekeepers, this has remained the most important means.\textsuperscript{275}

The agreements are similar to so called SOFA’s – Status of Forces Agreements – that are negotiated with host countries when U.S. military are stationed abroad.\textsuperscript{276} Under most of these SOFA’s, an act by an American service-member that violates military law but not the law of the host country will face a U.S. courts-martial. Vice versa, courts of the host country have exclusive jurisdiction to try acts prohibited by the law of that country but not prohibited by U.S. military law. For acts that violate both, there is concurrent jurisdiction. In these cases, U.S. courts-martial has the primary right to try crimes committed against the security or property of the U.S., U.S. personnel or their property, and acts taken in the performance of official duty. In all other instances, the host country has the primary right. However, the host country has an obligation to “give sympathetic consideration to” a request from the U.S. for a waiver if it is of particular importance to the U.S. Civilians are to be tried in the courts of the host country.\textsuperscript{277}

\begin{itemize}
\item \textsuperscript{272} US drops measure on immunity for troops in UN peace operations. UN News Centre \url{http://www.un.org/apps/news/storyAr.asp?NewsID=11129&Cr=international&Cr1=court&Kw1=International+Criminal+Court&Kw2=&Kw3=}
\item \textsuperscript{273} CUNNINGHAM, James B., Deputy U.S. Representative to the United Nations: Statement on the ICC. Security Council Stakeout, JUNE 23, 2004. LINES 37-40. USUN PRESS RELEASE # 111 (04) \url{http://www.un.int/usa/04_111.htm}
\item \textsuperscript{274} United States to withdraw some peacekeepers, UN confirms. UN News Centre \url{http://www.un.org/apps/news/storyAr.asp?NewsID=11229&Cr=peacekeeping&Cr1=&Kw1=International+Criminal+Court&Kw2=&Kw3=}
\item \textsuperscript{275} Broomhall 2003 p 179
\item \textsuperscript{276} Elsea 2002 p 24
\item \textsuperscript{277} Everett 2000 p 138-39
\end{itemize}
Thus, the main difference between SOFA’s and the Article 98 agreements is that SOFA’s cover only specified personnel, and not all U.S. nationals. Article 98 agreements also only deal with surrender to the ICC.  

These bilateral agreements cannot achieve complete immunity from jurisdiction of the ICC. They only guarantee that the state that enters into the agreement will not extradite an American citizen present on its territory to the ICC at its request. According to Art 98 of the Rome Statute, the ICC has to respect this obligation. However, the ICC can still start an investigation, or issue an indictment of the U.S. national. Further, there is no provision for accused persons or their states of nationality to challenge the jurisdiction of the ICC based on a violation of a bilateral agreement. Were the ICC to gain custody over the accused through other means, its jurisdiction would not be affected by a bilateral agreement.

Today, the United States is seeking bilateral Article 98 agreements with as many states as possible.

“Our ultimate goal is to conclude Article 98 agreements with every country in the world, regardless of whether they have signed or ratified the ICC, regardless of whether they intend to in the future.”

5.6.3 The American Service-Members’ Protection Act

The third means in the protection of Americans against the ICC has been domestic legislation. The U.S. Congress has passed several riders prohibiting the use of funds to support the ICC. The most important legislation is the American Service-Members’ Protection Act (ASPA) passed as title II of the supplemental appropriations bill for 2002 and signed into law by President Bush on August 2, 2002.

This act has the purpose of protecting American service-members from prosecution by the ICC, by limiting U.S. government support and assistance to the ICC. All U.S. courts, agencies, or entities of the federal, state, or local government are prohibited from cooperating with the ICC. Such cooperation can be responding to a request from the ICC, or extradition of an American citizen or permanent resident, specific assistance in investigation such as arrest, detention, or prosecution of a United States citizen or

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279 Broomhall 2003 p 180
280 Elsea 2002 p 25
282 Elsea 2002 p 8
283 American Servicemembers’ Protection Act (ASPA), H.R. 4775 Section 2004 b http://www.usaforicc.org/ASPA.htm 2004-05-06
284 ASPA Section 2004 b
285 ASPA Section 2004 d
permanent resident.\textsuperscript{286} Agents of the ICC are prohibited from conducting investigative activity on U.S. soil.\textsuperscript{287} However, it allows the communication to the ICC of U.S. policy or assistance to defendants\textsuperscript{288}, and it does not prevent a private citizen from providing testimony or evidence to the ICC.\textsuperscript{289}

The ASPA also prohibits U.S. participation in UN peacekeeping operations from July 1, 2003 for missions where it has not been certified that U.S. troops may participate without risk of prosecution by the ICC.\textsuperscript{290} This would be the case if the UN Security Council has permanently exempted U.S. personnel from prosecution for activity conducted as participants, or if every other country participating in the mission is either not a party to the ICC and does not consent to its jurisdiction, or has entered into an article 98 agreement. This prohibition can be waived if it is in the national interests of the United States to participate (determined by the President).\textsuperscript{291}

From July 1, 2003, the ASPA also prohibits military assistance to any country that is a member of the ICC, except for NATO countries and major non-NATO allies, unless the President waives the restriction because of “national interest”.\textsuperscript{292} Military assistance includes foreign assistance and defense articles and services financed by the government, including loans and guarantees.\textsuperscript{293} If a country has entered into an Article 98 agreement with the U.S., the President may waive the prohibition.\textsuperscript{294}

Most controversially, the ASPA authorizes the President to use “all means necessary and appropriate” to bring about the release of covered U.S. citizens or permanent residents, and citizens of allied countries upon request of their government who are being detained or imprisoned by or on behalf of the ICC. There is no definition of possible means, except for the exclusion of bribes and provision of other such incentives. The President is authorized to direct any federal agency to provide legal representation and other legal assistance, as well as exculpatory evidence on behalf of covered U.S. or allied persons who are arrested, detained, investigated, prosecuted or imprisoned by, or on behalf of, the ICC.\textsuperscript{295}

If the ICC enters into an agreement where it certifies not to seek to assert jurisdiction over any covered U.S. or allied person with respect to actions undertaken by such person in an official capacity, the President may waive the restriction on participation in UN peacekeeping and the prohibition on military assistance.\textsuperscript{296} The President can also allow cooperation with the ICC for a specific case if such an agreement exists, if there is reason

\begin{footnotesize}
\textsuperscript{286} ASPA Section 2004 f
\textsuperscript{287} ASPA Section 2004 h
\textsuperscript{288} ASPA Section 2004 a 2 B
\textsuperscript{289} Elsea 2002 p 9
\textsuperscript{290} ASPA Section 2005 b
\textsuperscript{291} ASPA Section 2005 c
\textsuperscript{292} ASPA Section 2007
\textsuperscript{293} Elsea 2002 Report to Congress p 11
\textsuperscript{294} ASPA Section 2007 c
\textsuperscript{295} ASPA Section 2008
\textsuperscript{296} Elsea 2002 p 16 (refers to Section 2003 ASPA)
\end{footnotesize}
to believe that the accused is guilty, it is in the national interest, and the investigation will not result in investigation or arrest of an American citizen or permanent resident.  

Article 2015 of the ASPA provides that nothing in the act shall prohibit assistance to international efforts to bring to justice Saddam Hussein, Slobodan Milosevic, Osama bin Laden, and other foreign nationals accused of genocide, war crimes or crimes against humanity.

5.7 Fundamental Issues Under Bush

5.7.1 Jurisdiction

Without doubt, U.S. policy towards the ICC under Bush has been completely based on its opposition to the ICC’s jurisdiction over nationals of Non-Parties. The United States has taken the stand that the jurisdiction of the ICC over nationals of Non-Party States is an overreach, since only nations that ratify treaties can be bound by them. Most commentators are of the opinion that the U.S. legal argument of Non-Party States does not hold, because the ICC does not judge states or governments, only persons. The treaty does not obligate or impose any duties on a Non-Party State, which has no obligation to cooperate with the court.

The U.S., however, holds that the Rome Statute threatens the sovereignty of the United States:

“This is a deviation from hundreds of years of international legal practice. It is an innovation that – that violates the principles of sovereignty that have been basic to the relations among states for centuries.”

Complementarity is not seen as a satisfying guarantee against an “illegitimate” investigation or prosecution of an American citizen. The determination of inability or unwillingness of a state rests with the ICC, which is described as a serious breach of the principle of sovereignty. It would “allow the ICC to review and possibly reject a sovereign state’s decisions not to prosecute or a sovereign state’s court decisions not to convict in specific cases.”

297 Elsea 2002 p 16
The United States is determined to protect Americans from possible prosecution of the ICC. Besides the view of this as illegitimate as long as the United States is a Non-Party, the main reason given for the fear of this happening, is the risk of *politically motivated prosecutions*. There is a fear that the threat of politically motivated prosecutions could hinder the United States in the enactment of its foreign policy, and military operations, which would also be an indirect impingement on U.S. sovereignty.\textsuperscript{302} The ICC could provide a forum for false charges of “unfriendly countries” who often argue that U.S. foreign policy is criminal.\textsuperscript{303} This is even more concerning in the midst of the war on terrorism.\textsuperscript{304}

Even with a decision not to prosecute, it could be enough for an investigation to be commenced for the U.S. national interest to potentially be harmed, because of the attention that it would bring.\textsuperscript{305}

As under the Clinton administration, objections are also made against the possible opt-out for States Parties that Non-Parties cannot take advantage of,\textsuperscript{306} and the fact that states cannot make reservations to the treaty.\textsuperscript{307} The inclusion of the crime of aggression is also protested against.\textsuperscript{308}

### 5.7.2 Structure

Other issues that are stated as reasons for standing in opposition to the court also mirror the Clinton administration concerns.

The self-initiating power of the prosecutor deepens the concerns about politically motivated prosecutions.\textsuperscript{309}

“In Rome, the United States said that placing this kind of unchecked power in the hands of the Prosecutor would lead to controversy, politically motivated prosecutions, and confusion.”\textsuperscript{310}

Supporters behind a self-initiating prosecutor, many of whom wanted a completely independent prosecutor, but who agreed to the limitations now present in the Statute, have a quite different view, according to which independence of the prosecutor is vital for the enforcement of international law to be free from political control. The U.S. Rome proposal of enabling the UN Security Council to overlook the prosecutor would

\textsuperscript{302} Elsea p 3  
\textsuperscript{303} ibid p 5  
\textsuperscript{304} RUMSFELD MAY 6, 2002 Paragraph 4  
\textsuperscript{305} RUMSFELD, Donald, Secretary of Defense: *News Briefing at the Foreign Press Center* JUNE 21 2002  
\textsuperscript{306} Fact Sheet: *The International Criminal Court*. Office of War Crimes Issues, Washington DC MAY 6, 2002  
\textsuperscript{307} Fact Sheet: *The International Criminal Court*. Office of War Crimes Issues, Washington DC May 6, 2002  
\textsuperscript{308} Elsea 2002 p 6  
\textsuperscript{309} Fact Sheet: *The International Criminal Court*. Office of War Crimes Issues, Washington DC May 6, 2002  
\textsuperscript{310} GROSSMAN MAY 6, 2002 LINES 58-59
according to this view pose an even greater danger of politicized prosecutions, based on the national interests of powerful nations.  

In their arguments, American officials compare the ICC to the judicial branch of the American government.

“We believe the ICC is an institution of unchecked power. In the United States, our system of government is founded on the principle that…power must never be trusted without a check.”

 “[The court and its Prosecutor] are effectively accountable to no one. The Prosecutor will answer to no superior executive power… Nor is there any legislature anywhere in sight… The Prosecutor is answerable only to the Court, and then only partially.” “The Europeans may be comfortable with such a system, but Americans are not.”

These arguments reveal a concern that makes one question whether there could be any International Criminal Court that the United States would be willing to support. It draws a clear difference between the international system and a national system, founded on a basic difficulty with the ICC:

“The ICC does not, and cannot, fit into a coherent, international structural “constitutional” design that delineates clearly how laws are made, adjudicated or enforced, subject to popular accountability and structured to protect liberty. There is no such design, nor should there be. Instead, the Court and the Prosecutor are simply “out there” in the international system.”

Connected with this comparison with the American governmental system, are concerns that did not show up under the Clinton administration - and that were actually mentioned as one of the achieved objectives at the Rome Conference – of rights the U.S. constitution provides American citizens in the judicial process, that are not present in the ICC.

“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.”

“Across the political aisle in Washington, there was and is a consensus view that the Rome Statute is incompatible with US standards of justice.”

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311 Elsea 2002 p 6
312 GROSSMAN MAY 6, 2002 LINES 45-47
314 BOLTON November 14, 2002 LINES 46-48
315 Elsea p 7
The ICC does not perfectly mirror the American judicial system. It is hard to see how it could, since the U.S. adheres to a common-law system, with many differences to the civil law system, which apply in most other countries. A closer look at these arguments again makes one question whether it was possible at all to have an International Criminal Court, the jurisdiction of which the U.S. would be prepared to subject its citizens to.

“We had a problem with that court because of the nature of our constitutional system and the obligations we believe we have to bring American servicemen and women and other officials in our government...before our system and not an international system that is not represented by a parliament in any way, it’s just a free standing international body.”

If we remind ourselves of the supportive statements before the Rome Conference, however, there were clear cautions being made already back then. The key to U.S. support seems to have been a greater role for the UN Security Council, and this is reiterated repeatedly under the Bush administration. A greater role for the Security Council seems to have been what the U.S. had in mind as a framework of accountability for an international criminal court, a court that it could support as a State Party.

“Under the UN Charter, the Security Council has primary responsibility for the maintenance of international peace and security. The ICC’s efforts could easily conflict with the Council’s work. Indeed, the Statute of Rome substantially minimized the Security Council’s role in ICC affairs...The Council now risks having the ICC interfering in its ongoing work, with all of the attendant confusion between the appropriate roles of law, politics, and power in settling international disputes. It seriously undercuts the role of the five Permanent Members of the Security Council, and radically dilutes their veto power.”

The argument of the dilution of the power of the UN Security Council comes up in comments on the inclusion of the crime of aggression, the lack of Security Council check on the prosecutor’s powers, and the requirement of Security Council majority to stop an investigation, instead of a requirement of its approval to continue with a case.

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319 BOLTON September 16, 2002 LINES 75-82
320 GROSSMAN May 6, 2002 Paragraph 18
321 GROSSMAN May 6, 2002 Paragraph 15
322 BOLTON September 16, 2002 Paragraph 19
5.8 Differences Between the Clinton and the Bush Administrations

As has been made clear from the presentation above, U.S. policy towards the ICC has been aimed at the same goals, and has been founded on the same fundamental issues under both the Bush and the Clinton administrations. The only issue that seems to have been raised by the Bush administration, and not the Clinton administration, is the issue of “due process” guarantees – such as the American constitutional right to a jury trial - which the Bush administration has not viewed as satisfactory in the ICC.

The main difference in policy that can be found between the two administrations is the final, complete opposition to the court by the Bush administration following the notification of its intent not to ratify the statute. The Clinton administration spoke against adoption of the ASPA, although the version in point then did not have as many possibilities for waivers as the final version signed by Bush. The major reason given was that it may only hurt their ability to achieve the objectives through the negotiations. It would also seriously damage U.S. national policy objectives, by restraining possible actions by U.S. government to fulfill national security and foreign policy interests. Of course, with the court already coming into being at the time of the passing of the ASPA, the possibility to achieve any more objectives in the negotiations did no longer exist. Subsequently, Clinton has stated that he disagrees with the Bush administration’s decision to completely withdraw from the ICC.

What does this mean, then? It means that under a different President, the United States may have acted slightly different towards the ICC. The ASPA may not have been in effect, and the United States may have participated more actively as an observer in the Assembly of States Parties. Another President may have chosen slightly different means, but the goals of the policy would have been the same: first, to gain an exemption for American citizens, and second, to try to protect American citizens from jurisdiction of the ICC though other means. It is beyond the purpose of this thesis to analyze the different approaches of the Clinton administration and the Bush administration to human rights, or to the ICC. It would also seem like a daunting task, since it would require hypothesizing about how the Clinton administration would have acted in the circumstances that the Bush administration faced.

Does the possible differences between these two administrations have any consequences for the role conception analysis? As stated in chapter 3, it must be possible for decision-makers to come to different conclusions about expected behavior even if they share the same fundamental beliefs. The author is not trying to argue that every individual actor in point agrees fully with the exact means used.

What will be presented in the next chapter are the role conceptions behind the role performance that has been described in this chapter. For this role analysis to be fruitful, role and issue must be perceived to be linked. In order to understand the reasons behind U.S. opposition to the court, and the values and beliefs linked to identity, it is necessary to define the problem from the view of the decision-makers’ standpoint. Only then can we know what the behavior is a response to, and then can we try to understand what beliefs and roles are activated when the actors face this foreign policy problem.325

The Bush and the Clinton administrations face the same foreign policy problem, and in order to find out if an identity approach can teach us something about this issue and explain the apparent contradiction, the next chapter seeks to find out what beliefs and roles come into play when they face this foreign policy issue. This means that the role conceptions found under the Clinton administration, and its connection with its role behavior, is analyzed, as well as the role conceptions found under the Bush administration, in connection with its role behavior.

5.9 Discussion of Arguments

Before going ahead with the role concept analysis, it is worth commenting on the main U.S. concerns with the ICC accounted for in this chapter.

The legal arguments the United States has brought forward against the ICC’s jurisdiction over nationals of Non-Party States are generally thought to be weak. For a discussion of the bases of this jurisdiction, and the legal arguments that have been brought forward for and against this jurisdiction, see Appendix I.

The principle of complementarity in the Rome Statute means that the ICC could only investigate Americans if the United States proves unwilling or unable to investigate or prosecute. This has lead many commentators to conclude that unless there is a breakdown of the justice system within the U.S., no American would ever be tried in front of the ICC.326 It is true, however, that complementarity does not give absolute protection against trial of the ICC. For example, if an American is falsely accused of war crimes, it may be deemed politically infeasible to investigate or to prosecute, because it could be perceived as admitting that the activity was criminal. In such a case, the ICC could deem the United States to be unwilling.327 Thus, in spite of the principle of complementarity, and other safeguards in the Rome Statute, the possibility still exists that an American can be tried before the ICC, whether or not the United States is a State Party to the court. How likely this possibility is, is a matter of dispute.

It is deemed by most commentators as from highly unlikely to impossible. As noted above, Americans are subject to foreign prosecution even without the ICC, and the ICC’s procedures may be more similar to U.S. law than another state’s system. The arguments

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325 Singer and Hudson 2000 p 203
326 Wedgwood 2000 p 127
327 Everett 2000 p 147
of due process concerns made by the Bush administration are thereby not considered valid, since the Rome Statute does contain many procedural safe-guards. The main difference of an ICC trial from an American trial would be that it would not be a trial by jury. In fact, U.S. service-members tried under a military court martial do not get a jury trial either. However, it is argued that these martials have a unique understanding of the military society that the ICC cannot have.

The main concern of the United States does not seem to be the risk for an American citizen to face an unfair trial, however. The main concern with the structure of the court – the independent prosecutor – is the risk it creates for political prosecutions. The legal concerns may therefore not be that important. The absolutely most important concern regarding the jurisdiction and the structure of the ICC is the possibility that it will be used as a political forum, to question U.S. foreign policy. Of course, this possibility is also debatable.

Many commentators are of the opinion that U.S. national interests would be better served by joining the court. The disadvantages coming from being a Non-Party are that it prevents participation in the Assembly of States Parties, and leaves the U.S. with no oversight of the court, and no influence in the negotiations on the definition of aggression, no possibility of opt-outs, and no participation in the appointment of judges.

The main foundation of this opinion, however, is the view that U.S. national security does not consist of just winning specific military campaigns, and that the court would contribute to an international environment that would serve the U.S. in the long run.

The International Criminal Court is very important for many states, especially the like-minded states, which include in principle the whole European Union (before the enlargement). The ICC has become a serious issue in U.S. relations with these states. All these states have expressed the view that the U.S. position on the ICC, and its means to seek to ensure exemption, is inconsistent with its pursuit of international rule of law, and its leadership in securing accountability through international tribunals.

The U.S. search for exemption from ICC jurisdiction is seen by supporting states as evidence of an unwillingness to abide by laws that other nations need to abide by, and a unilateral approach to world affairs that is very much resented.

The presentation of U.S. policy towards the ICC, and the justifications made for it, has shown that there exist virtually two different ways to see the ICC’s impact on U.S.

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328 Everett 2000 p 140
329 ibid p 137
330 Nash 2000 p 153
331 Broomhall 2003 p 182
332 Nash 2000 p 162
334 Elsea 2002 p 22
national interests. It could be, and in the beginning it was, seen as a positive foreign policy tool to deter crimes against humanity, and as a step forward in the effort to end impunity for egregious mass crimes. It could also be seen as a threat to its armed forces, policy-makers, other citizens, and to U.S. defense and foreign policy.\textsuperscript{335}

The aim of the role analysis in the next chapter is to understand this tension, or contradiction.

\textsuperscript{335} Elsea 2002 p 21
Role Conceptions in Speeches and Statements

“The problems inherent in the ICC are more than abstract legal issues – they are matters that touch directly on our national security and our national interests.”

John R. Bolton, Under Secretary for Arms Control and International Security, 2002

In the previous chapter, it was clear that in principle, the creation of an international institution that would provide international criminal accountability would be something that the United States would support.

The analysis of speeches has shown that the reasons behind U.S. opposition to the ICC are more than a few legal issues. Several role conceptions have been found in the speeches and statements, and by helping us understanding the issue of the ICC from the American actors’ standpoint, we can gain an understanding of the reasons behind U.S. opposition to the International Criminal Court.

6.1 Example and Developer of International Justice

One role conception that appears with references to U.S. involvement historically, is the role of the United States in developing International Justice:

“Our leadership in supporting the ad hoc tribunals for former Yugoslavia and Rwanda, as well as our current efforts to establish an ad hoc tribunal to prosecute senior Khmer Rouge leaders in Cambodia, demonstrates powerfully that the Clinton administration seeks international justice for the architects of mass killings.”

“Ever since we chaired the committee that drafted the Universal Declaration on Human Rights more than 50 years ago, the United States has consistently led the effort to strengthen international justice and accountability.”

Under the Clinton administration, it appears with expressions of support for the creation of an ICC. Under the Bush administration, after the decision to stand in direct opposition to the court, this conception is found together with a statement of a commitment to such a role in the future:

“The existence of a functioning ICC will not cause the United States to retreat from its leadership role in the promotion of international justice and the rule of law.”

336 BOLTON NOVEMBER 14, 2002 LINES 3-5
337 SCHEFFER MAY 13, 1998 Paragraph 4 under heading International Criminal Court LINES 1-6
338 NEGROPONTE JULY 10, 2002 LINES 5-7
339 GROSSMAN MAY 6, 2002 LINES 139-40
These role conceptions are clear examples of Holsti’s *example* and *developer* conceptions. The U.S. is presented as a *leader* in this area, but not a regional leader in this context, but a *leader* for the rest of the world.

If we put this in the context of Wish’s categorizations, we can determine that the *issue area* these conceptions refer to (international justice) is one of a *universal value*, and the motivational orientation is *cooperative*. The size of the influence domain is the whole world, and the conception thus reveals a perception of high status.

Although *rule of law* can be understood as an ideological commitment, it is presented as a universal value, and the perception of status is the foundation for the role of the United States as a leader in promoting international justice:

“As the most powerful nation committed to the rule of law, we have a responsibility to confront these assaults on humankind.”  

The *leader* role conception thus emanates from a perception of a *responsibility* to fulfill a value that is viewed as universal:

“We have a responsibility, in this generation of Americans, not only to respond to these heinous crimes, to this barbarity, with effective mechanisms of accountability and real-time measures, but also to deter the commission of such crimes in the future.”

### 6.2 Possible Vital Role in the ICC

Given this perceived role of leadership, the future role the U.S. can play in the ICC is seen as vital, and even as a precondition for the court to achieve its aims:

“If one is truly seeking a strong and effective international criminal court, as we are, then it would be folly to ignore U.S. interests or seek any path that would exclude the United States from participation either in the negotiations or in the work of an established court.”

This is because of the perceived status of the United States internationally, perceived from a measurement of its capabilities.

“If such a court is to succeed, it will need the United States as its strongest pillar of support. It has been demonstrated time and time again that when diplomatic, economic, or military clout is needed to achieve the aims of international justice, the world looks to the United States for assistance”.

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340 SCHEFFER JULY 23, 1998 LINES 10-11  
341 SCHEFFER MAY 13, 1998 Paragraph 2 LINES 13-17  
342 SCHEFFER MAY 13, 1998 Paragraph 4 under heading *International Criminal Court* LINES 9-13  
343 SCHEFFER APRIL 22, 1998 Paragraph 24 under heading *A Permanent International Criminal Court* LINES 3-6
6.3 Guarantor of International Peace and Security

However, the initial, very supportive attitude the U.S. showed towards the establishment of a permanent International Criminal Court was limited to the specific image of the kind of court that the U.S. wanted, that would take account of the vital role the United States could play as a supporter of the ICC. A success at the Rome Conference would in the U.S. view be:

“a treaty that melds effectively the proper roles of individual states, their national judicial systems, the Security Council, and the Court itself”. 344

As it turned out, it did not view the Rome Treaty as successful according to these criteria. This statement points towards identity as a very important factor in U.S. policymakers’ response to the ICC. Interestingly, it reveals a view of reality in the form of different functions, or roles, for different actors.

U.S. arguments concerning the jurisdiction of the court, and the persistent attempts to try to prevent any possibility of an American being brought before the court reveals a role conception that is closely connected with the idea of responsibility as a leader. The issue area in this case, however, is international peace and security:

“The United States has a unique role and responsibility to help preserve international peace and security.” 345

“The world is a more peaceful and stable place, as dangerous and untidy as it may be, because of the United States of America working with its coalition partners and alliances and UN peacekeeping groups and NATO peacekeeping groups around the world.” 346

The goal was, of course, that the court would take into account the special responsibilities that the U.S. claims to have in relation to the international use of force, before requesting the surrender of a U.S. national. 347

“I think it’s unfortunate that there were developments in Rome whereby that -- those responsibilities of the United States tended to be diminished in the thinking of those who were trying to put the international criminal court together.” 348

The role conception of the United States as a protector, or guarantor, of international peace and security, is the most common role conception found in the speeches. It reveals

344 RICHARDSON JUNE 17, 1998 Paragraph 20 LINES 1-2
345 GROSSMAN MAY 6, 2002 LINE 86
347 Broomhall 2003 p 176-177
a perception of status as even more dominant in the issue area of international peace and security than in international rule of law. The motivational orientation of this conception is to a high degree individualistic, in that it implies a high degree of independence in exercising this role, although it could also be a mix between individualistic and cooperative, since it does see other actors as important in the maintenance of international peace and security.

It is clear that the actors view this as an involuntary role, a role that the United States has to play, due to its capabilities and its interests:

“So we're going to end up having to deal with this issue for Americans all around the world because we do have a special role. We do have a broad range of commitments, and often in many dangerous and controversial situations. The United States plays a role in the world unlike any other, and therefore this affects us unlike any other nation.”

“The United States is a nation of immigrants; we have familial ties to localities all over the world. Our national interests know no bounds: we have diplomatic representation almost everywhere, and our private businesses and educational institutions are similarly represented far and wide.”

This role conception is the source of the concerns about the risk of a politicized court:

“So more than any country on earth, our people are vulnerable to politicized prosecution.”

“We cannot accept a structure that may transform the political criticism of America’s world role into the basis for criminal trials of Americans who have put their lives on the line for freedom.”

Thus, an exemption for American citizens from the jurisdiction of the ICC is presented as in compliance with the goals of the ICC and the interests of the whole world:

“By putting US men and women in uniform at risk of politicized prosecutions, the ICC could well create a powerful disincentive for US military engagement in the world. If so, it could be a recipe for isolationism – something that would be unfortunate for the world, given that our country is committed to engagement in the world and to contributing to a more peaceful and stable world.”

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350 BLOOMFIELD SEPTEMBER 12, 2003 LINES 127-30


352 NEGROPONTE JULY 12, 2002 LINES 41-43

353 RUMSFELD MAY 6, 2002 LINES 39-43
This is the source of protests against American exceptionalism. Interestingly, the concept of “exceptionalism” is used by both opponents of U.S. policy, and by U.S. policymakers in their explanations of and justifications of their policies. However, U.S. exceptionalism in the view of the actors, is not founded on a view of the Americans as a better people, but on their role internationally, whereas the example conception serves as a direct justification for an exemption:

“The United States military is unique in its global presence and operations. Our personnel were found in over 100 countries over the past year. At one point in 2003, more that 400,000 U.S. military personnel were serving outside American territory. By next year, the U.S. will have over 50 treaty alliance commitments to defend the security of countries all over the world. One does not have to hold a view of American exceptionalism to acknowledge the profile and symbolic resonance of the American identity in the world.”  

“The U.S. does not seek to put its people "above the law," rather we want to ensure that our nationals are dealt with by our system of laws and due process. We as a nation believe in justice and the rule of law, and in accountability for war crimes, crimes against humanity, and genocide, and have vigorously pursued the highest standards in this regard. We accept the responsibility to investigate and prosecute our own citizens for such offenses should they occur.”

6.4 Peace Versus Justice: Merging of Roles

These role conceptions give rise to the question of whether the United States was ever prepared to let Americans fall under the jurisdiction of the ICC even as State Parties to the court? The intentions of the policymakers are impossible to obtain. However, considering all the arguments made, and the role conceptions found in the speeches, it is clear that the United States wanted a court that it would have more control over in various ways.

“We had to pay attention to the non-party status of any government. ...And we certainly have no guarantee of when the United States government, even if we got a perfect treaty, would have been in a position to actually fully ratify and join the treaty.”

U.S. argumentation is very much founded on the view of peace and justice as many times incompatible ends.

The tension between these goals is not a view held only by the United States, but is an issue many IR scholars have dealt with. In chapter 4, p 30, two basic principles of
international law were stated as the legitimating source of the intrusion of state sovereignty that individual responsibility directly under international law permits: *protection of international peace and security*, and *the collective conscience of humankind.*  

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The issue of the ICC brings forward U.S. conceptions about these two principles. According to the U.S. arguments, international peace and security must not be sacrificed for the sake of international justice:

“The credibility of the court will be demonstrated in...how well it supports and is supported by, the requirements of international peace and security.”  

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In the work to uphold human rights, not only accountability, but also freedom in acting to uphold international peace and security is vital:

“The principled projection of force by the world’s democracies is critical to protecting human rights – to stopping genocide or changing regimes like the Taliban, which abuse their people and promote terror against the world.”  

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“The treaty holds the potential of inhibiting enforcement of international law by the very countries most capable and willing to use military force for the protection of human rights.”  

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This tension also creates a tension between the two role conceptions of guarantor of peace and security and developer of international justice. The U.S. actors’ understanding of this tension is the key to understanding what was presented as an apparent contradiction between values adhered to and perceived interest.

“we will articulate our exact steps that we will take and that we believe are needed in order to not only protect our interests but also confirm our commitment to combating war crimes as they occur.”  

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Facing the issue of the ICC the role of peace and security guarantor is emphasized by American actors:

[To fix this treaty] “is going to require governments to recognize that when it comes to international peace and security and those responsibilities, that there are circumstances

357 Broomhall 2003 p 3
358 SCHEFFER OCTOBER 21, 1998. LINES 92-94
359 GROSSMAN MAY 6, 2002 LINES 80-82
that have to be taken into account. There is a reality that has to be taken into account.”

“We would like to continue to participate as a leader in international justice. But it has to be international justice that does not ignore our responsibilities for international peace and security. In the end, it’s those countries that can make the greatest contribution to international peace and security, which can also make the greatest contribution to international justice.”

Thus, U.S. policy towards the ICC can be seen as a role performance founded on the role conceptions as a leader and example in the areas of international justice and guarantor of international peace and security.

Since several different roles are applicable in this issue, there is the potential for role conflict. Whether the policy-makers experienced a role conflict or not is unknown. After finding two major role conceptions in the speeches, it is easy to conclude that the role performance of opposing an International Criminal Court does not correspond to the role conception of the United States as a leader in promoting international justice. Thus, it lies near at hand to conclude that the ICC issue gives rise to a role conflict between the U.S. as a leader of international justice and accountability, and guarantor of peace and security, and that the actors chose to emphasize the latter over the former. However, as stated in Chapter 3, the possible behavior corresponding to each role varies with the specification of the role conception. Leader, developer, example, and guarantor, are not very specified role conceptions.

A closer look at the presentation of arguments, and the way role conceptions are stated, suggests that the actors do not experience that they are exercising one role at the expense of the other. What can be perceived as a role conflict and a contradiction is not necessarily so. The role performance is perceived by the actors as consistent with its principles:

“The United States has a record that is second to none in holding its own officials accountable for such crimes... - and, in training all members of our Armed Forces in their obligations under international law and holding them accountable. Properly understood, therefore, our lack of support for the ICC reflects our commitment to the rule of law, not our opposition to it.”

It is therefore also fully consistent with its role conceptions as guarantor of international peace and security and leader of international justice:

“United States yields to no country its historical leadership in the struggle for international justice and international humanitarian law – and an original participant in

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362 SCHEFFER JULY 31, 1998 Paragraph 63 LINES 5-8
363 SCHEFFER July 31, 1998 Paragraph 52 LINES 2-7
the creation of every successful international effort to date to adjudicate allegations of war crimes and crimes against humanity. It has been and will continue to be a strong supporter of the tribunals established under the aegis of this Council. But unlike the ICC, those tribunals are accountable to the Security Council”.

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http://www.un.int/usa/03_085.htm 2004-01-30
7 Conclusions – The Gains of an Identity Approach

What has the research of this thesis achieved? It has not provided a clear causal link between identity and behavior – U.S. policy towards the ICC, which it did not set out to do. It has provided, in Ruggie’s words, a narrative explanation, or an understanding of the reasons behind the United States policy towards the International Criminal Court.

We searched for an understanding of why the United States decision-makers considered it to be in the national interest of the United States not to join the ICC, and to stand in opposition to it.

In the Introduction, the fact that the United States has had a leading role in developing international law and still has been very reluctant to bind itself to a law treaty was presented as an apparent contradiction between principles and perceived national interests. It may have seemed like Carr was right in saying that norms and principles were irrelevant because they were only reflections of the national interest. Principles seemed to have been overridden by the pursuit of national interests.

The issue of the United States and the ICC is one of several current issues involving U.S. foreign policy that have given rise to frustration internationally. In the analyses of U.S. foreign policy, many have been quick to draw the conclusion that, somehow, it is “natural” for the United States to act the way it does because of its position as the only Great Power. Capabilities then are the reason behind differing strategic perspectives – which form the basis of foreign policy. Coupled with the American people’s perception of itself as an exceptional people, with superior principles, and its interests equated with the rest of humanity, many seem to be of the opinion that they have the indisputable explanation of both unilateralism in U.S. foreign policy in general, and U.S. opposition to the ICC.

For this author, the issue of the United States and the ICC evoked fundamental questions about the motivations behind foreign policy behavior, and the meaning of identity and beliefs in world affairs. Since the adherence to and belief in principles such as human rights has led countries to act to set up policy goals to promote these principles internationally, must not principles also have a part in the formation of national interest?

The only way to demystify the apparent contradiction was to look at what role principles have in the formation of national interest. The constructivist identity approach and the role theory methodology took account of both power and identity in shaping national interest. It presented the concept of national interest as endogenous to social interaction, and thereby linked to identity, not as an objective analytical concept, from which one can derive and explain rational behavior by rational actors.

The results of this approach show that the apparent contradiction does not exist. On the contrary, U.S. policy towards the ICC can only be understood in light of the impact of capabilities and beliefs, which together form an identity that has consequences for how
actors view the world, how they view others, themselves, and the role of their state internationally.

The idea of American exceptionalism presented in the Introduction, is a very loaded concept. Interestingly, it is a term that is used by American actors as something positive, and by other actors as something negative about American policy. True, the speech analysis reveals that certain principles that America adheres to are seen as superior, or, rather, universal values that should be promoted. This is not surprising, since they are the national images that have a special role in communication. Especially rule of law and accountability, and the United States conceives of itself as an example in this regard.

Thus, the view of the United States as an exceptional country is the main reason behind the fundamental issues that the United States has with the International Criminal Court. This view is to a certain degree based on an ideological distinction between Us and Them, Them being rogue states, towards whom the actions of the court should be aimed. However, the exceptionalism is very different from the way it is defined by others. There is a conception of the United States as having an exceptional role in the world, not of the American people as an exceptional people. The fundamental issues and the role behavior is very much based on the role conceptions of the United States as playing an exceptional role in the world, whether it likes it or not.

The very principles that appeared to have been overridden; promotion of human rights, international rule of law, and accountability for crimes against human rights; thus are not overridden in the view of the actors, but are parts of the reasons behind U.S. policy towards the ICC. These principles are (some of the) sources of the role conception of the United States as a leader and example in the development of international justice.

The important role played by the United States in this field is not disputed but recognized also by others, and this seems to be the cause of the apprehension of U.S. behavior as being inconsistent with its principles. The error that is made in drawing this conclusion is that the spectator lets his or her own expectations of behavior appropriate for a certain belief or a certain role conception stand as a guide.

The only way we can understand the reasons behind a given behavior, is by looking at the actors’ view of the problem, and what beliefs and role conceptions comes into play for the actors’ when they face a foreign policy issue.

When the role conception of guarantor of international peace and security and the perception of a tension between the promotion of international peace and international justice are added to the role conception of leader and example of international justice, it becomes clear that the United States does not view its behavior as contradictory neither to its principles, nor to its perceived role. Instead, it is the roles of the United States, the sources of which includes both principles and capabilities, that are the reasons behind the policy.

366 Scheffer July 23, 1998 P 3 Paragraph 5
The link between national identity and foreign policy was provided by Bloom’s identification theory. It told us that a mass of people made the same identification with national symbols, and that they may act as one psychological group when there is a threat to, or the possibility of enhancement of, these symbols.

National symbols involved in the communication are the principles adhered to, such as rule of law, accountability, promotion of human rights, peace and security, constitutional democracy, and sovereignty.

These are all values that the issue of the International Criminal Court concerns. This fact makes it clear that this issue can be expected to start the identity dynamic. It can be viewed both as a threat to, and a possibility of enhancement of, national identity.

According to Bloom’s theory, there will then be a readiness to protect and enhance national identity. It is beyond the purpose of this thesis to try to determine whether these national images were created or manipulated by the government, and whether this was conscious or not. The author is not trying to argue that the actors did not base their decision on strategic calculations, or that the intent of the actors were the same as the stated justifications. Again, the point is that the intent of the actors does not need to be obtained, because the way they state things, the communication, is influenced by the national identity, whether they are purposely trying to appeal to it or not.

Different calculations of risks and threats weighed against possible positive aspects may have been the direct causal factors behind U.S. policy. For example, the likelihood of the ICC being used in an unjustified way against U.S. citizens may be small, but support of the court may be even less likely to have direct and tangible positive effects for American citizens. However, the identity approach has been able to provide the reason the direct causal factors have had their causal capacity.
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Appendix I: Legal Discussion of ICC Jurisdiction over Nationals of Non-Party States

The treaty adopted in Rome stipulates that, although subject to certain conditions, the court can prosecute a person even if the person is a citizen of a state that is not a party to the statute. The United States argued, and is still arguing, that this is contradictory to international treaty law, in particular the Vienna Convention on Treaties, according to which no state can be held to the provisions of a treaty it has not itself ratified. Scheffer has stated that this was the “single most fundamental flaw in the Rome treaty that makes it impossible for the United States to sign the present text”.

Without going too deep into a legal analysis, it can be helpful to explore the basis of this legal argument a little further. Mind the reader that the author takes no position on the correctness of either side of this legal discussion.

What does international law say about jurisdiction over individuals accused of a crime? The jurisdiction of national courts is determined mainly by national laws. However, in criminal cases, international law does place a few limitations on states to exercise jurisdiction. There are several principles of international law that can be used as bases of jurisdiction by states. Four of them are of special importance:

- The territorial principle is founded on the territorial sovereignty of a state, which means that no state has the authority to go into the territory of another state to arrest an alleged criminal, even if the suspect is charged with an international crime. Thus, every state claims jurisdiction over crimes committed in its own territory, even when committed by foreigners.

- According to the nationality principle, a state may prosecute its nationals for crimes committed anywhere in the world (active nationality principle). This is universally accepted. Some states also derive from this principle a right to exercise jurisdiction over foreigners for crimes committed abroad that affect one of their nationals. This is not as widely accepted.

- The protective principle gives jurisdiction to a state for all acts, even if they are committed by foreigners abroad, if those acts are prejudicial to the state’s security, – for example plots to overthrow its government, espionage etc.

- Finally, the universality principle gives states right to exercise universal jurisdiction over certain acts which threaten the international community as a whole, and which are criminal in all countries.

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367 Weschler 2000 p 101
368 Scharf, Michael P.: ICC Jurisdiction over Nationals. Chapter 13 in Sewall and Kaysen 2000 p 214
370 Malanczuk 1997 p 110
371 Malanczuk 1997 p 111
372 Malanczuk 1997 p 111-112
373 Malanczuk 1997 p 112 Restatement (Third), para 404 at 254
Appendix I: Legal Discussion of ICC Jurisdiction over Nationals of Non-Party States

The principles considered legitimate bases for this ICC jurisdiction over Non-Party States are the principles of *universal jurisdiction* and *territoriality jurisdiction*. Most states and commentators consider the crimes covered under the statute to be subject to *universal jurisdiction*.\(^{374}\)

Without the existence of the ICC, who can have jurisdiction over Americans accused of crimes covered by the Rome Statute? Of concern are actions by Americans abroad, outside the U.S. (The ICC could not exercise jurisdiction over an American without U.S. consent if the U.S. is both the territorial state and the state of nationality of the accused). As mentioned earlier in this chapter, unless a SOFA regulates otherwise, these crimes would normally fall within foreign national jurisdiction. A SOFA does not regulate jurisdiction of civilians accused of a crime. The Article 98 agreements would.\(^{375}\) Many argue that, according to the universality principle, any foreign country would be entitled to try any person accused of grave war crimes under its local criminal procedure, no matter where the battle took place or the offense was committed.\(^{376}\)

Are all crimes covered by the Rome Statute subject to universal jurisdiction? There does not exist full agreement on this point. Universal jurisdiction provides every state with jurisdiction over certain offenses that are recognized as of universal concern regardless of where the crime was committed, the nationality of the perpetrator, or of the victim.\(^{377}\) It is based either on the gravity of the crime – it offends the interest of all humanity (an offense *hostis humani generis* - against all mankind), or the place of the act – if committed in territory where no country has jurisdiction, or the territorial state is unlikely to exercise jurisdiction. The Nuremberg and Tokyo trials are considered to have been based on universal jurisdiction of war crimes and crimes against humanity.\(^{378}\)

Under the Geneva Conventions of 1949, any country that encounters a person accused of war crimes amounting to a grave breach – including murder or torture of civilians or prisoners of war or systematic rape – may try or otherwise extradite the suspect to another country for trial.\(^{379}\)

The United States accepts universal jurisdiction for crimes “*recognized by the community of nations as of universal concern, such as piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism*”.\(^{380}\)

Since there are several principles of international law concerning jurisdiction over crimes, and they are to a large degree a matter of unwritten customary law, and not all states adhere to the same interpretation of these principles, there is of course room for disagreement, especially when it comes to an issue like the International Criminal Court, which is unprecedented in international affairs.

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\(^{374}\) Scharf 2000 Chapter 13 p 215  
\(^{377}\) Scharf 2000 Chapter 13 p 215  
\(^{378}\) Scharf 2000 Chapter 13 p 217-18  
\(^{379}\) Wedgwood 2000 p 125  
The United States has disputed the view that all crimes under ICC jurisdiction fall under universal jurisdiction. According to Scheffer, if they did, there would be no need for consent of the territorial state for the exercise of jurisdiction. This is an indisputable fact. What is argued by others however, is that this requirement in the Rome Statute is not a rejection of universal jurisdiction, but merely an extra limit on the jurisdiction of the court that was agreed upon as a concession to the sovereignty of states – a political compromise, not a legal concern.\textsuperscript{381}

The crimes were considered to fall under universal jurisdiction by most states and commentators.\textsuperscript{382} ICC supporters argue that, since the ICC only has jurisdiction over crimes already prohibited under international law, either by treaty or under the concept of “universal jurisdiction”, or both, all nations have jurisdiction to try persons for these crimes. The ICC is merely exercising a \textit{collective jurisdiction} of its members. The jurisdiction of the court is thus founded on both the universality principle and the territoriality principle.\textsuperscript{383} The main reason why ICC supporters considered it to be of importance for the ICC to have the possibility, even if restricted, to assert jurisdiction over nationals of Non-Party States, is that otherwise so called \textit{rogue regimes} could insulate themselves and their nationals from the ICC by not ratifying the Rome Statute. The ICC would then not achieve the goal it was established to achieve.\textsuperscript{384}

There is an important difference between jurisdiction of a state and collective jurisdiction of states that needs to be taken into account when one considers the universality and territoriality principle basis of ICC jurisdiction. In the case of the ICC, the state is not prosecuting in its domestic courts but has delegated this authority to an international treaty-based body. This is compared by most commentators to the Nuremberg precedent. A legal analysis of this precedent would require determination of whether the states of the nationality of the accused can be seen as having given their indirect consent or not. The ICTY and the ICTR are also cited as precedents. These were, however, established by a binding decision of the UN Security Council, not by a treaty.\textsuperscript{385}

The US has stated that it recognizes the authority of \textit{sovereign states} to try non-citizens for crimes committed in their territory, but that it has never recognized the right of an international organization to do this without UN Security Council consent or mandate.\textsuperscript{386} The US government “does not believe that 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”.\textsuperscript{387}

\textsuperscript{381} Scharf 2000 Chapter 13 p 215-216
\textsuperscript{382} Scharf 2000 Chapter 13 p 217
\textsuperscript{383} Elsea, Jennifer, Legislative Attorney, American Law Division: \textit{U.S. Policy Regarding the International Criminal Court}.\textsuperscript{384} Report for Congress, Received through the CRS Web.\textsuperscript{385} Congressional Research Service, Library of Congress 2002 p 4
\textsuperscript{386} Elsea 2000 p 5
\textsuperscript{387} GROSSMAN MAY 6, 2002 Paragraph 13
\textsuperscript{388} SCHARF, David quoted in Scharf 2000 Chapter 13 p 226 - referring to Statement: \textit{International Criminal Court; The Challenge of Jurisdiction} address at the Annual Meeting of the American Society of International Law, March 26, 1999
Scharf, however, argues that international law and principles do permit such a delegation of territorial jurisdiction to a third state. Also Nuremberg was based on the territoriality and the universality principle, and so is arguably also the jurisdiction of the ICC.\textsuperscript{388}

Concerning the Vienna Treaty basis of the US argument, others say that this is not valid in this case because the Rome Statute does not impose obligations on Non-Party States.\textsuperscript{389} The ICC only claims jurisdiction over persons, not nations. Non-Party States are not obligated to do anything under the treaty. They may cooperate or they may defend their own interests. The opposite view is that when an American individual is charged for conduct related to the official policy of the United States, the difference between state and individual is not clear. The threat of prosecution could therefore inhibit the conduct of U.S. officials in implementing U.S. foreign policy, which is an infringement on U.S. sovereignty.\textsuperscript{390}

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\textsuperscript{388} Scharf 2000 Chapter 13 p 228
\textsuperscript{389} Scharf 2000 Chapter 13 p 220
\textsuperscript{390} Elsea 2000 p 4
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Appendix II: Speeches and Statements Used in the Analysis

Under the Clinton Administration

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Appendix II: Speeches and Statements Used in the Analysis


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