REVIEW

Contingent or Unconditional Hostility? U.S. Political Culture and the International Criminal Court

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All the Missing Souls: A Personal History of the War Crimes Tribunals by David Scheffer, Princeton and Oxford: Princeton University Press, 2012, ISBN: 9780691140155, 568 pages.

Defending the Society of States: Why America Opposes the International Criminal Court and Its Vision of World Society by Jason Ralph, Oxford: Oxford University Press, 2007, ISBN: 9780199214310, 244 pages.

Introduction

Reviewing two books dealing with a similar topic from very different perspectives is never an easy task. Jason Ralph's *Defending the Society of States* is an academic work that aims to explain the main causes of U.S. opposition to the 1998 Statute on the International Criminal Court (ICC). Ralph is a professor of international relations whose analysis relies on the English School approach to argue that specific characteristics of U.S. political culture prevent the superpower from endorsing the most relevant development of international criminal responsibility.

Ambassador David Scheffer's *All the Missing Souls* is not, strictly speaking, an academic book. A prominent international lawyer, the author was appointed ambassador-at-large for war crimes issues by President Clinton in 1997. As the main figurehead in U.S. foreign policy on international justice in that period, Scheffer presents an invaluable recollection of one of his country's most important negotiations between 1997 and 2001.

Despite their different backgrounds and intents, both books provide us with relevant material to explore the uneasy relationship between international justice and power politics. As indicated by Scheffer, this relation often reveals "how fragile the weapons of international justice can be when confronting political and military interests" (p. 293). Both Ralph and Scheffer guide us through the complex world of U.S. political and bureaucratic cultures and offer an exhaustive analysis of the highly political nature of processes related to the construction of international regimes, especially when these involve crucial national and security interests.

Ralph puts forward a well-argued interpretation of U.S. foreign policy as "driven by deep-rooted cultural and political factors" (p. 3), which are at the basis of the erratic relation between the identity of the country and international law. Scheffer, despite his academic background, focuses more on the "policy" part of the story by identifying bureaucratic inefficiency and competition among governmental agencies as the main factor behind U.S. inconsistencies and contradictions in the building of international criminal justice. Together, the books shed light on U.S. behavior towards the complexities of international norms and regulations. Moreover, they correctly highlight how the task of understanding U.S. attitudes toward inter-

national law cannot be merely read through the lenses of international legal analysis.[1] Drawing from different sources and arguments, Ralph and Scheffer provide us with a complete picture of the issue. In a way, their contributions complement one another, representing respectively the official and unofficial stories of U.S. strategy toward international justice. Thus, their analyses may guide scholars and observers interested in the debate on continuity and change in U.S. foreign policy.

U.S. Politics and the ICC Treaty: Westphalia all over Again?

Published during the most difficult years of the U.S. occupations of Iraq and Afghanistan, *Defending the Society of States* may be intellectually located in the international relations debate concerning the evolution and consolidation of international constitutional structures intended as sets of fundamental rules capable, under specific conditions, of guiding the behavior of actors.[2] As the author explains, the 1990s were characterized by a "call for change in the constitutional rules of global politics" (p. 23). This process found a "tipping point" in the ICC, which is the first permanent international criminal court and promises to enforce justice without merely depending on the will of states or the Security Council.

Drawing on Hedley Bull's classification of international societies, Ralph interprets the ICC as a significant step toward a Kantian "world society" in which transnational tribunals would enforce a universal interest in prosecuting war criminals in an impartial manner. However, Ralph does not ignore the idea that international norms should limit state sovereignty and be enforced transnationally still encounters large contestation.[3] During the negotiations for the ICC, for example, the U.S. exerted a powerful opposition against attaching any universal meaning to the court.

For Ralph, this attitude is the product of a domestic alliance composed of congressmen, scholars, and executive leaders, often regardless of their ideological affiliations. On the one hand, there are those who believe in a Westphalian international system made up of states and their security exigencies. On the other hand, this *realpolitik* interpretation of U.S. interests often fuses with a certain brand of American nationalism, which is driven by an understanding of the U.S. Constitution as based on the notion of "popular . . . accountability" (p. 122). According to Ralph, Americans have a constitutive skepticism toward institutions and tribunals that aim to enforce international law without being authorized by the American people. Thus, the U.S. is not against the ICC Treaty *per se* but rather against some specific provisions, such as the power of the prosecutor to independently start an investigation,[4] the impossibility for veto members of the Security Council to block any proceedings,[5] and especially the fact that the court has jurisdiction over citizens of states that have not previously agreed on

1. One of the main characteristics of the literature on the ICC is that it mostly belongs to the legal realm. This has often meant a lack of political and sociological analyses of the phenomenon, for example, in terms of its impact on the foreign policy of states. Analyzed as a mostly juridical problem, there has been a tendency to overlook its highly political nature both in terms of functioning and outcomes. The few political scientists that have dealt with the issue have recognized the problem. See for example, Benjamin N. Schiff, *Building the International Criminal Court* (Cambridge: Cambridge University Press, 2008); Joshua W. Busby, *Moral Movements and Foreign Policy* (Cambridge: Cambridge University Press, 2010): 210–53. Michael J. Struett and Steven A. Weldon, "Explaining State Decisions to Ratify the International Criminal Court," paper presented at the American Political Science Association, Annual Meeting, September 2, 2006, Philadelphia, PA. David Wippman, "The International Criminal Court" in *The Politics of International Law*, ed. Christian Reus-Smith (Cambridge: Cambridge University Press, 2004): 151–88.

2. The literature on this theme is quite large. Some seminal examples are Friedrich V. Kratochwil, *Rules, Norms, and Decisions: On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs* (Cambridge: Cambridge University Press, 1989); Peter Katzenstein, *The Culture of National Security: Norms and Identity in World Politics* (New York: Columbia University Press, 1996); Christian Reus-Smith, "The Constitutional Structure of International Society and the Nature of Fundamental Institutions," *International Organization* Vol. 51, No. 4 (1997): 555–89.

3. For contributions on the contested meaning of norms, see Antje Wiener, "Contested Meanings of Norms: A Research Framework," *Comparative European Politics* No. 5 (2007): 1–17; Uwe Puetter, Antje Wiener, "Accommodating Normative Divergence in World Politics: European Foreign Policy Coordination," *Journal of Common Market Studies* Vol. 45, No. 5 (2007): 1063–86.

4. Rome Statute of the International Criminal Court, art. 53.

5. Under art. 13(b) of the ICC, the Security Council may refer a situation to the court. However, according to art. 16 the Security Council may block a proceeding or an investigation for a period of twelve months (renewable) but only in case a resolution is adopted under chapter VII of the Charter.

its jurisdiction.[6] Specifically, this latter point represents the main attack on the way the U.S. interprets the international system, which is mostly based on sovereignty and state consent.

Along these lines, Ralph indicates that this domestic alliance between realists and nationalists finds a favorable terrain in a prevailing Vattelian legal culture, which orients the mentality of the country on issues like what ought to be considered legitimate sources of law (ch. 2) or who is entitled to prosecute individuals in an international system (ch. 3). The U.S. has a clear answer to both: State consent should be the main source of international law, and states should be in control of international criminal prosecutions. These two answers respond to a strict logic based on persistent and change-resistant notions of both exceptional responsibilities (national interests) and values (constitutional patriotism). As a result, continuity is the most important characteristic of U.S. foreign policy. Any international regime that goes toward a supranational community is very likely to find U.S. rejection. Any regime that does not respect its vision of popular sovereignty or national interest is deemed to live without U.S. participation.

For these reasons, Ralph dedicates several chapters to U.S. unilateralism under the Bush administration. Both U.S. policies to boycott the ICC after its entry into force (ch. 6) and the philosophy of the global war on terror (ch. 7) are studied as examples of how universalist conceptions of justice represent a "threat not just to a set of legal principles but to a specific national identity" (p. 143), the U.S. Constitution providing the ultimate benchmark to measure whether international norms are consistent with U.S. values and interests.

U.S. Opposition to the ICC: The Return of Exceptionalism?

Ralph explains the largely political nature of the ICC debate through an elegant application of the English School approach. The ICC challenges traditional interpretations of sovereignty, of which states are still very jealous. By focusing on this conflict of legitimacy, Ralph effectively summarizes the main reasons for U.S. opposition: the independence of the prosecutor and the jurisdiction over nationals of third states. This position depends on a set of constitutive and structural characteristics of U.S. political culture, which Ralph shows by focusing, for instance, on the bipartisan nature of Congressional opposition to the court. Even though admittedly "a . . . Democrat administration would not have been as forceful" (p. 157) in its fight against the court as the Bush administration, Ralph notes that few democrats would make a strong effort in favor of the treaty. This was witnessed by their substantial support for the Bush administration in its search for exemption of U.S. citizens from the court's jurisdiction.[7] Ralph's argument is particularly convincing when he explains that the U.S. "had always supported the idea of a permanent international court if the sole means of referral was through the Security Council" (p. 177). Not unlike other perspectives on the issue,[8] Ralph concludes that any court that cannot guarantee complete control on its activation and jurisdiction is very likely to be "dead on arrival" in the U.S. Senate.

Ralph's analysis has many merits and offers a particularly useful account of U.S. foreign policy on international justice. However, the main argument somewhat reifies U.S. political culture and its foreign policy. It is not always clear whether the ICC is objectively a step toward a Kantian world society for Ralph or whether he considers this representation of the

6. Art. 12.2.

7. For a good and synthetic account of the conflictive approach of the Bush Administration toward international law, see Dowling J. Campbell (ed.), *A Bird in the Bush: Failed Domestic Policies of the George W. Bush Administration* (New York: Agora, 2008): chapter 3 on the Kyoto Protocol and 6 on the ICC; John R. Bolton, then U.S. ambassador at the UN under the Bush administration. He provided one of the most authoritative conservative arguments against the ICC in "Courting Danger: What's Wrong with the International Criminal Court," *National Interest*, No. 54 (Winter 1998–9).

8. Sarah B. Sewall, Carl Kaysen, and Michael P. Scharf, "The United States and the International Criminal Court: An Overview," in *The United States and the International Criminal Court. National Security and International Law*, ed. Sarah B. Sewall and Carl Kaysen (Lanham: Rowman & Littlefield Publishers, 2000); Paul W. Kahn, "Speaking Law to Power: Popular Sovereignty, Human Rights, and the New International Order," *Chicago Journal of International Law*, Vol. 1, No. 1 (Spring 2000); Stewart Patrick and Shepard Forman (eds.), *Multilateralism and U.S. Foreign Policy. Ambivalent Engagement* (Boulder, London: Lynne Rienner, 2002). William A. Schabas, "United States Hostility to the International Criminal Court: It's All about the Security Council," *European Journal of International Law*, Vol. 15, No. 4, 701–20.

ICC as a rhetorical device employed by U.S. policy makers to politicize the debate and make the court appear unacceptable (pp. 99–122). Numerous American scholars have participated in this debate in order to underscore the limited nature of the court as based on the principle of complementary jurisdiction according to which the prosecutor can act only in case of inability or unwillingness of states to prosecute.[9] Additional elements contribute to qualifying and limiting the powers of a prosecutor that seem quite far from the fears of those who worry of the creation of an all-powerful and unaccountable world magistrate.[10]

This partial misunderstanding leads Ralph to excessively rely on an exceptionalist view of U.S. democracy to explain U.S. opposition to the ICC. The court is interpreted as a body that "fundamentally challenges America's understanding of itself" (p. 122), because it strips the U.S. of the possibility to exert a democratic review of the court. The fear that U.S. federalism and democracy would be contaminated by excessive concessions to democratically unaccountable international institutions has always been present in U.S. political discourse. Nevertheless, positivist conceptions of international law as based on state consent and "exceptionalist" views of U.S. democracy seem to be the expression of one specific part of U.S. political culture.[11] Hence, former U.S. Ambassador to the UN John Bolton's views of a Hobbesian international system in which the U.S. has to take care of its interests unilaterally do not exhaust the entire debate on America's role in the world.[12] Ralph proves to be aware of this debate, for example, in his reference in chapter 2 to rulings of the Supreme Court that recognize the legitimacy of international customary law.

In conclusion, alternative and equally powerful views of international relations and justice would have deserved greater attention. For example, the liberal internationalist tradition is substantially absent from the analysis. Such a tradition has always influenced U.S. foreign policy to varying degrees, depending on the administration in charge and on the general political mood of the country. An explanation of how and why this tradition was somehow marginalized during the closing years of the Clinton presidency, and especially during the George W. Bush administration, could have been appropriate. The portrait of a Hobbesian and Vattelian United States opposing its Kantian and post-Westphalian European allies (p. 154) might reinforce a historical image of America as a superpower incapable of accepting and implementing international norms.

An "Ambassador to Hell": On the Difficult Enterprise of International Justice

Scheffer's analysis takes a very different viewpoint. As the memories of the U.S. chief negotiator on international tribunals, the book contains a large amount of detail on recent U.S. attitudes toward international justice. The most interesting part is section II, containing three chapters on the ICC Treaty.

As opposed to Ralph, Scheffer does not seem to interpret U.S. opposition as the result of constitutional, political, or cultural factors that prevent the country from recognizing the legitimacy of the ICC. Although he does not deny that some aspects of its statute, especially jurisdiction over nationals of third party states, were particularly difficult to accept for a bipar-

9. See for example, Bartram Brown, "U.S. Objections to the Statute of the International Criminal Court: A Brief Response," *Journal of International Law and Politics* Vol. 31 (1999): 854–91. M. Cherif Bassiouni, "Policy Perspectives Favouring the Establishment of the International Criminal Court," *Journal of International Affairs* Vol. 52, No. 2 (Spring 1999): 795–810; Michael P. Scharf, "The Politics Behind U.S. Opposition to the International Criminal Court," *Brown Journal of World Affairs* Vol. 6, No. 1 (Winter/Spring 1999): 97–105. Monroe Leigh, "The United States and the Statute of Rome," *The American Journal of International Law*, Vol.95, No.1 (January 2001): 124–31; Diane Marie Amann and M.N.S. Sellers, "The United States of America and the International Criminal Court," *The American Journal of Comparative Law*, Vol. 50, Supplement: American Law in a Time of Global Interdependence: U.S. National Reports to the 16th International Congress of Comparative Law (Autumn, 2002): 381–404.

10. Rome Statute of the International Criminal Court, see articles 13(c), 15 and 53(1).

11. Some of the foundations of the "exceptionalist" interpretation of U.S. historical experience, which still has large impact at least in terms of political discourse, can be found in Louis Hartz, *The Liberal Tradition in America: An Interpretation of American Political Thought Since the Revolution* (Harcourt: Brace, 1955) and Seymour Martin Lipset, *The First New Nation: The United States in Historical and Comparative Perspective* (New York: Basic Books, 1963).

12. John Bolton, "Why an International Criminal Court Won't Work," *Wall Street Journal*, March 30 1998.

tisan array of U.S. domestic actors, Scheffer's account of how things went tends to focus on more contingent reasons. These have to do with bureaucratic competition among governmental agencies and an absence of pro-ICC sentiments in the U.S. Senate.

The main goal of the book is to illustrate "the tug-of-war between peace and justice" (p. 4) through a historical account of recent U.S. policy on international tribunals. From international action to create international tribunals for Rwanda and the Former Yugoslavia to the effort to make the ICC acceptable for the U.S., Scheffer had to learn how to be an international lawyer and a diplomat at the same time. This meant constantly dealing with "the realism of political negotiations" (p. 312), as opposed to the abstractions of legal theory. This makes the book a great contribution for all those interested in seeing how in-practice justice and power interact at the international level.

The book does not linger on a general explanation of America's inconsistent behavior on international justice. Scheffer's is not the analysis of how two different world views (Westphalian and Kantian) fought one another in Rome but rather "a story of trial and error, innovative lawmaking, political intrigue, and obstinate personalities" (p. 12). It is the story of the fight of a diplomat with an academic background against the Washington bureaucracy and its political gridlocks.

Large portions are dedicated to the powerful influence of domestic politics on negotiations. The problem is not only that "no member of Congress wins votes back home for the building of courts overseas" (p. 28). Also, governmental bureaucracies can often exert a considerable capacity to freeze debates and resist innovative interpretations of international law, which can easily lead to inaction and decision paralysis. Chapter 2, on whether widespread violence in Rwanda in 1994 amounted to genocide, is an illuminating example, and a harsh critique, of how bureaucrats can get hopelessly distracted by second-class priorities when pursuing international justice.[13]

The Rome Conference on the ICC: From 'Engaged Opposition' to Diplomatic Failure

An interesting example of the influence and power of governmental and legislative bureaucracies played out at the Rome Conference on the ICC where Scheffer led the U.S. diplomatic delegation. The author describes the way in which hostile domestic actors hindered U.S. negotiating capacity by undermining coordination between negotiators in Rome and bureaucrats and politicians in Washington. As he argues, this sort of "dialogue of the deaf" was at the basis of one of the U.S. biggest diplomatic failures.

Scheffer provides many examples of negotiations on specific parts of the treaty in which the U.S. delegation had very little leverage due to a mix of presidential indecisiveness and open opposition by sectors of Congress, the Pentagon, and the Justice Department. Scheffer proved pragmatic enough to ensure a U.S. contribution on highly important parts of the treaty, such as the definition of crimes and the qualifications of the power of the prosecutor. Nevertheless, with a president overwhelmed by the Lewinsky scandal, domestic opponents to the ICC Treaty did not find it hard to let their voice be clearly heard in Rome.

The U.S. government's main line of opposition focused on the already mentioned jurisdiction over nationals of third states. Scheffer argued both during and after the conference about the legal weakness of that provision. Nevertheless, his position and that of many other U.S. lawyers and members of the delegation was the U.S. should have offered reasonable compromises on other parts of the treaty in order to "stay engaged" and soften opposition by the strongest supporters of the court, for example EU members, including the UK.[14] Instead, the U.S. distinguished itself in this phase only for its request of total immunity. The author soon realized

13. For an academic analysis of these events, see Michal N. Barnett, "The UN Security Council, Indifference and Genocide in Rwanda," *Cultural Anthropology* Vol. 12 No. 4 (1997): 551–78.

14. Engagement with the ICC was theorized by Scheffer in several articles, such as "Staying the Course with the International Criminal Court," *Cornell International Law Journal* Vol. 35 (2001–2): 47–100.

that offers for compromise were not acceptable to the majority of states, in whose eyes U.S. credibility in Rome was constantly jeopardized by domestic anti-ICC hardliners. Nobody was ready to make concessions to a delegation whose senate was largely influenced by "far right extremists" for whom "international treaties . . . somehow will rob the country of its sovereignty or will threaten federalism and democracy within our borders" (p. 162).

Genuine attempts to reach diplomatic deals in Rome clashed with the instructions from Washington, which only focused on full exemption for U.S. nationals. Many of these requests usually reached the media before any important negotiations, which created the disastrous impression, even among traditional European allies, of a superpower bent on shielding its citizens from the court's jurisdiction.

President Clinton's direct intervention could have solved various policy gridlocks. However, such help only came after the conference on the very last day available for signature of the treaty. Thus, thanks to Clinton, the U.S. signed the treaty on 31 December 2000. But the administration's lack of a serious policy on the issue practically left the faith of the treaty in the hands of a powerful and highly unfavorable Senate Committee on Foreign Relations.

In conclusion, for Scheffer the negotiation of the ICC was a story of regrets and missed opportunities. The main culprit was a coalition of highly organized and politically capable bureaucrats and politicians, which still believe that "the United States is a different nation of extraordinary attributes that simply cannot be lowered . . . to the same level of performance as other nations" (p. 165). Scheffer tried to oppose the principles of reciprocity and equality of nations that hold that "no nation and no people have superior rights or exceptional privileges" (p. 166). His notable criticism against a treaty that extends the court's jurisdiction even over nationals of third party states was not reason enough for Scheffer to consider the ICC as a "world court" that can challenge the stability of an international system based on sovereignty and national interests. Several months after the conference, Scheffer realized that the entry into force and non-retroactivity clauses contained in the treaty could probably constitute good enough protection against the risk of prosecutions targeting U.S. citizens.[15]

Interestingly, the book interprets exceptionalism as a generic excuse that can be indistinctively used by any state whenever sensitive interests are at stake, rather than as a specific characteristic of U.S. foreign policy. Scheffer's experience in post-conflict theatres actually reveals that the feeling that "our own" nation is different may be found in many other contexts. For example, African Union members strongly lobbied against ICC attempt to arrest Sudanese President Al Bashir by relying on a specific form of exceptionalism mostly driven by anti-colonial sentiments (pp. 415–16). Any individual or state looking for impunity and exemption from international tribunals will tend to argue in favor of a sort of self-proclaimed right to be left alone. At the basis of state reluctance to recognize or collaborate with international tribunals there is a rather "ordinary" problem: States, especially the most powerful, are quite jealous of their sovereignty. Despite attempts to base their opposition on the existence of some supposed "special rights," states mostly worry about more immediate and contingent interests. Winners and losers in the struggle for international justice often depend on political battles and debates that are won or lost at the domestic level. States do not seem to be bound by history or culture to oppose the evolution and consolidation of international criminal responsibility.

Being mostly a book of memoirs and personal recollections, *All the Missing Souls* leaves various theoretical questions unanswered. For example, more analysis could have been dedicated to the relationship between international justice and national security, which poses the fundamental problem of how to effectively combine these two dimensions in the foreign policy making of the U.S. superpower. Scheffer decidedly argues in favor of making political lead-

15. The compatibility of the ICC Treaty with the U.S. constitutional system has been argued by Scheffer in, for example, "The Constitutionality of the Rome Statute on the International Criminal Court," (with Ashley Cox) *The Journal of Criminal Law and Criminology* Vol. 98, No. 3 (2008): 983–1068; David J. Scheffer, Richard Cooper, and Juliette Voinov Kohler, "The End of Exceptionalism in War Crimes," *Harvard International Review* (August 12, 2007).

ers accountable for criminal justice in case of serious violations of human rights. In one of the last sections (pp. 437–40), the ambassador includes some former U.S. politicians as examples of leaders who could have been prosecuted by an international criminal court. In an idealistic fashion, Scheffer concludes by arguing that international justice should appraise any violations of human rights no matter who commits them. This abstract principle requires a discussion on how to make it possible in a world of independent and sovereign nations that are still very preoccupied with defending the interests of their populations from unpredictable and asymmetrical threats, such as international terrorism. The battle for better international justice should always take into account that justice and peace do not always go together, and sometimes leaders have to be ready to partially compromise on the pursuit of international justice in order not to jeopardize their security. Failure to pursue such interests may lead to worse violations of justice, security, and peace.

Conclusion

Both volumes contribute to the debate on continuity and change in U.S. foreign policy and on the capacity for international constitutional structures to consolidate and win state consent. In their approach to the issue, the authors embark on two very different undertakings and reach partially different conclusions.

Hence, both books also contribute to the debate on U.S. capacity of supporting and contributing to international norms and institutions. Long studied as mere legal instruments, international tribunals must really be explained with reference to their highly political nature. On the one hand, they are judicial institutions for the enforcement of international criminal responsibility. On the other, they are international organizations that need to elaborate specific strategies to achieve their purpose and, above all, to win the support of international and domestic actors. Relying on state support means, for example, that while acting as criminal courts, these tribunals face "highly politicized environments"[16] and should accommodate the interests of a wide range of domestic, political, and legal cultures. Both volumes help to understand the difficult question of domestic responses to international norms, in this case international criminal responsibility. The nature of the U.S. political system and the sometimes equivocal character of its foreign policy, composed of different views of the international system and partially distinct political cultures,[17] create ambiguities and misunderstandings that require complex analyses. Combining a theoretical explanation of U.S. political and legal culture (Ralph) with a detailed story of how things went during the Rome Conference on the ICC (Scheffer) significantly augments our knowledge of the difficulties related to processes of norm consolidation.

16. Benjamin Schiff, *Building the International Criminal Court*, 258.

17. On the issue, see the seminal work by Walter Russell Mead, *Special Providence: American Foreign Policy and How it Changed the World* (New York: Alfred A. Knopf, 2001).