The Security Council and the International Criminal Court: Who’s Feeling Threatened?

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It was to keep the peace, not to change the world order, that the Security Council was set up.¹

1. Introduction

The United States’s (US’s) objections to the existence, or, more specifically the jurisdiction, of the International Criminal Court² are as well known as they are unconvincing, at least to a majority of international lawyers.³ The objections, whether

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they are agreed with or not, are in fact better framed as political, rather than legal propositions. Fundamentally, the objections raised can be reduced to a simple position adopted by the United States. This is that no international body or organisation should exercise jurisdiction over US nationals (especially members of the US armed forces) without express US consent. Nonetheless, despite a heavy presence at the Rome conference, which drafted the Statute of the International Criminal Court (ICC Statute), and strong lobbying there, as at later PREPCOMs, the US was unable to obtain an absolute guarantee of immunity for its nationals. In spite of US concerns, and the fact that it repudiated its signature of the ICC Statute in May 2002, the number of ratifications of the Rome Statute grew inexorably throughout the period following the Rome conference. The necessary number of ratifications required to bring the ICC Statute into force (60) was reached slightly before the US purported "unsigning", 10 ratifications being submitted simultaneously on 16 April 2002. The jurisdiction of the ICC thus began on 1 July 2002.

In a last-ditch attempt to ensure that, notwithstanding the entry into force of the ICC Statute, its nationals would not be subject to the jurisdiction of the ICC, the US shifted the focus of its efforts to the Security Council. In the Security Council, unlike in the Rome Conference or PREPCOMs, its position as a permanent member gave the US a veto over any action by that body, thus greater negotiating strength. The US invoked the veto power, the use of which by any permanent member had significantly decreased in the post-Cold War era, on 30 June 2002, to prevent the extension of the mandate of UNMIBH, the peacekeeping operation in Bosnia-Herzegovina. The US made it express that its reason for doing so was its concern that US personnel involved in UNMIBH would be subject to the jurisdiction of the ICC. A crisis loomed. The United States made it clear that, in order to obtain

5 A/CONF.183/9*
8 Pursuant to Article 36 of the ICC Statute.
9 In fact a notification to the Secretary-General of the UN, as depository, that the US did not intend to become a party to the ICC Statute, thus it did not consider itself bound to uphold the object and purpose of the treaty, see letter from John H. Bolton to Kofi Annan, supra note 7.
10 Which brought the number of ratifications up from 56 to 66.
11 See UN Charter Article 27.
13 S/PV 4568 (10 July 2002) p. 9. This was despite the fact that, as the Secretary-General noted in a letter to Colin Powell on 3 July 2002, such persons were already subject to the jurisdiction of the International Criminal Tribunal for the Former Yugoslavia (ICTY).