

The International Criminal Court-A Case For Conservatives

Since negotiations on the first permanent International Criminal Court (ICC) began in New York in 1995 conservatives in the United States have been concerned about its creation and its implications for American sovereignty and international actions. The Court is unprecedented as a permanent tribunal to try individuals, regardless of nationality, for the most serious crimes such as genocide, crimes against humanity, and war crimes. While the 1998 Rome Statute, which is the charter for the ICC, is by no means perfect there are compelling reasons for conservative support of the ICC. The reality of the Court is imminent. As of February 26, 2001, the treaty had 139 signatories and 29 of the 60 required ratifications. Most observers believe the Court will come into existence by 2002.

Conservatives are worried about the potential ability of this Court to prosecute Americans and many have concluded the Court does not merit US support and involvement. Nonetheless, the motives behind the Court and the values embodied in its statute express the fundamental beliefs of all Americans. These values require that the US support and participate in the court. The preamble of the Rome Statute notes that the Court is “mindful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity.” This reminds us that the ICC arose from a century of violence and a global movement to protect and preserve individual human rights. The history behind the ICC is clear and horrible. Nations and peoples were violently and shockingly confronted with issues of genocide, ethnic cleansing, and war crimes during the Holocaust. We were made brutally aware of the power of ethnic hate, the evil of unaccountable leaders, and the horror of their atrocities. The liberation of Nazi concentration camps by American troops was a noble role played by the United States in ending these atrocities. The subsequent Nuremberg trials established the principle of individual accountability for war crimes. By these actions, America, along with other nations, declared that it would not stand for a repeat of the Holocaust. This was a transcendent moment in our history, one of many that make us proud to be Americans.

Although “Never Again” was the battle cry after World War II, the success of the Nuremberg and Tokyo tribunals did not lead to the establishment of a permanent war crimes tribunal. The consequences of this failure are apparent, along with other cases, in the recent history of Sierra Leone, Rwanda, East Timor, and the former Yugoslavia. The atrocities committed in these nations make it obvious that the evil in human nature often is too monstrous to ignore. We cannot deal with war criminals only politically and militarily and solely after they have already killed, maimed and murdered the spirits of hundreds of thousands of men, women and children. Although ad hoc tribunals and truth commissions help a great deal, they deter little because they are established only after the crimes with which they deal. The ICC will be permanently in place for all future crimes. The Court will be the final and ultimate place to condemn and punish genocidists and war criminals. Among these will be the vicious leaders who promote atrocities for their squalid political goals.

Conservatives often support humanitarian efforts to help those in need. They frequently mount substantial efforts to establish and carry on community based aid to individuals victimized by violent conflict, genocide, and political upheaval. Conservatives respect and make sacrifices for the principle that to ignore a mutilated man, a

raped woman or a starving child, no matter how far overseas, is a moral outrage. Yet it is often overlooked that these situations result from the implied permission that powerful nations like the United States give to unaccountable leaders and governments when they fail to take decisive action. The mere existence of the ICC would send a powerful message that justice is still as important to America and Americans, and to nations and peoples everywhere, as it was over 50 years ago in Nuremberg. Although humanitarian efforts are crucial and greatly aid victims, the goal should be to prevent these atrocities, punish the perpetrators and reduce the need for aid which demonstrates compassion and gives badly needed relief, but rarely leads to a permanent solution.

Although it is too early to speculate on the true deterrent effect of the ICC most societies believe that Courts and laws are worth maintaining because of their ability to prevent crimes. Aside from moral and religious restraints, people do not steal because they know the law prohibits the practice and they will be punished should they disobey that law. Similarly, the ICC may have a powerful deterrent effect especially since the genocide, war crimes and crimes against humanity which the Court will try must be calculated and well planned. This deliberation stage means that the would-be perpetrator will have time to consider the consequences of his actions.

The American people overwhelmingly support humanitarian efforts, but their resolve is often tested by the substantial costs in American lives and tax dollars. If the ICC deters, much of the great deal of humanitarian work sponsored by the US abroad may no longer be necessary. The need for humanitarian and peacekeeping missions may be reduced. This would allow the American people to continue to advance their humanitarian ideals while potentially avoiding the deaths of American soldiers and rerouting the millions spent on humanitarian aid to support prevention.

The creation of a permanent tribunal to deal with these atrocities is not an attempt to check American power, nor a step toward world government. It is a reaction to a brutal history and a refusal to accept the status quo. Moral considerations, not a desire for world government, prompted the creation of the ICC. The creation of the ICC by a group of nations indicates that it is not an outside institution which simply materialized of its own accord to impose its will on the United States. Rather than being a violation of the principle of sovereignty, the ICC is its expression. The countries drafting the Rome Statute and subsequently signing and ratifying it, are exercising their sovereign right to create an international organization. The countries creating the Rome Statute have the right to legislate and enforce the law within their own borders. As long as America is not party to the Statute and does not wish to make its nationals available to the Court, the ICC will only be able to prosecute Americans who are in foreign nations which would have primary jurisdiction over them even without the ICC.

The ICC is designed not to curb the sovereignty of nations but to act when a nation is unable or does not wish to exercise that sovereignty. The Rome Statute stresses the primary responsibility of national legal systems to prosecute offenders for war crimes, genocide and crimes against humanity. The Statute begins by saying that the jurisdiction of the Court "shall be complementary to national criminal jurisdiction". A case may not be brought before the Court if it is being investigated by a concerned state. The Statute, as nations ratify it, has already succeeded in inducing them to be more effective in prosecuting these crimes domestically through changes in their constitutions and laws. Moreover, proponents of the ICC are well aware that this is to be a court, not an institution of world government. Its restricted jurisdiction is deliberate. The great deal of logistical co-ordination and financial

support needed to conduct even a single investigation and prosecution will further contain the Court. The ICC is specifically intended to be a last resort, used only when concerned countries are unwilling or unable to prosecute crimes so monstrous that they arouse international attention and horror. In a sense, this court has been unwillingly created. It is a product of grave necessity, not the result of a desire to create yet another supranational institution.

Painful historic memories also explain the absence of the death penalty from the Rome Statute. Many nations involved in ICC negotiations have only recently emerged from dictatorship into democracy. Because of this unstable and often violent past they did not trust any government with the right to execute and banned the death penalty in their constitutions. These new democracies were also strong supporters of the ICC and wanted to ensure ratification by their legislative branches. Ratification of a Statute which contradicted their domestic constitutions would have been impossible. Thus, it was necessary to exclude the death penalty from the Rome Statute.

Present concerns over US sovereignty and the possible political abuse of the ICC to harass American service members and officials are unnecessary because the ICC was not designed to prosecute those serving democratic countries which do not plan atrocious crimes. The provisions of the Rome Statute and the subsequent rules for the Court's procedures clearly indicate that countries like Iraq and not the US are the targets. Furthermore, although the Court is an independent institution outside of the UN system, this does not mean it will be unaccountable for its actions. The separation from the UN system was necessary to ensure an unbiased, independent body above UN politics and with the freedom to create rules and procedures specific to a criminal court. The separation was thus an attempt to ensure that the Court would be accountable. The Court and its employees are subject to review by the Assembly of States Parties, which is composed of nations ratifying the Rome Statute. These nations control major aspects of the Court such as electing and removing judges, prosecutors and committee members to name a few. What this means for America is that the Court will be controlled by states, not faceless bureaucrats with world government objectives. Many of these states are our allies, whose national interests are close to our own. Thus, if America ratifies the Rome Statute, we will have the power to work with our allies in the Assembly to shape the work of the court and hold it accountable.

America now has the historic chance to contribute to a court which embodies the basic principles of our democracy and the beliefs of our citizens: a court which protects the equality of women, the right of children not to be soldiers, the sanctity of the family, the rule of law, and numerous other rights fundamental to our society and law. The American example has encouraged peoples everywhere to urge their leaders to bring law, morality and ethics to domestic and international politics. They recognize that in our country basic standards of personal independence, freedom and accountability have been especially important and protected by laws and courts. Personal accountability is not simply a distant principle established in Nuremberg. It is a fundamental value on which America was built. From Horatio Alger's tales of a brutal world, personal perseverance and triumph to the present stress on individual responsibility in our welfare policy, America has always revered the individual who does the right thing regardless of the circumstances. It is precisely this value that the ICC seeks to uphold: the responsibility of every individual to act morally and to think for himself regardless of the world's brutality. In turning away from the Court, we turn away from the values of the American people, which our soldiers die to protect, and from the millions who rely on us to uphold these standards in international life.

Most nations are aware of their primary responsibility to prosecute and conduct in depth investigations, and therefore they gave very high thresholds to the crimes the ICC will try. These crimes must be extremely serious and executed as a matter of policy, within a repeated pattern of human rights abuse. This ensures that only a very particular type of criminal will come before the Court. The crime of genocide requires the intent to destroy a national, ethnic, racial or religious group. It is unthinkable that an American official would ever commit such a crime. A crime against humanity, again, would have to be committed as part of a larger and consistent policy. This does not allow for prosecution by the court based on an isolated incident. Similarly war crimes must be committed as part of a broad, deliberate strategy. The United States need not fear prosecution from an error or combat miscalculation. United States military strategies do not include systematic bombing campaigns which intend to cause loss of civilian lives, nor does the US use starvation of civilians as a way to achieve military objectives. The war crimes the Statute describes can be found in the military manuals of the US army and the definitions of their elements were shaped, supported and finally approved by the United States in negotiations on the ICC at the United Nations. Claiming that these war crimes provisions pose a danger to our soldiers undermines our own values and integrity. They amount to an acknowledgment of the accusation that we are trying to escape our own military codes.

Our government's concern over possible ICC prosecution of aggression is understandable since the United States has so many military operations abroad. However, ICC jurisdiction over the crime of aggression will be exercised only once a provision is adopted defining the crime and the conditions for such jurisdiction. If the United States ratifies before such a definition is adopted, it will have the right to reject the definition and thus not be bound by the Court's jurisdiction with respect to aggression.

In fact, after the US ratifies, it could opt out of jurisdiction over any new crimes added to the Statute thereafter. Thus, for the United States the jurisdiction of the court can easily remain only war crimes, genocide, and crimes against humanity. US companies will not be tried for environmental violations nor will US drug enforcement strategy be compromised even in the very unlikely event that those might be added to the Rome Statute in the future. Since the ICC is almost certain to start in 2002, the United States and Americans need to recognize and act on this option now.

Although in theory the ICC could prosecute Americans, this is extraordinarily unlikely. This is partly, but not only, because of the high threshold of admissibility and the limited kinds of crimes under ICC jurisdiction. In a world where mutilating children's limbs with machetes is a military strategy, the ICC will have neither the resources nor the interest in concerning itself with politically motivated prosecutions against Americans. Despite anti-American feelings which do exist around the world, the United States is a country known and esteemed for its respect for human rights, liberty and justice. However, if US enemies do seek to use the ICC to achieve anti-American political objectives there are numerous safeguards against this. Attempts to politically pervert other international forums are well known. They were thus anticipated by the negotiators of the Rome Statute. Quite wisely, they took careful precautions to prevent the successful abuse of the court for political gain.

Complete American exemption from the ICC, or exemption for any other nation, would severely damage the credibility and impartiality of the Court. For this reason, the majority of nations involved in the negotiations determined that an exemption was impossible. Instead the Statute provided safeguards which used in conjunction

may provide nearly total exemption. The Security Council can defer ICC investigation for 12 months and renew this deferral indefinitely. The Statute gives states priority in investigating and trying crimes and requires the ICC to defer to these national actions. A state may withhold information or documents which would prejudice its national security interests. Moreover, the ICC must give precedence to existing extradition and status of forces agreements between states. A state which has not ratified the Rome Statute may nevertheless bring a claim before the ICC. This may seem like an easy way to bring a case with the sole purpose of politically harassing the United States. In fact, the Statute strongly discourages this by requiring the state bringing the charge to accept the Court's jurisdiction over the entire situation of which the alleged crime is a part. A nation would not be able to bring to the Court a single crime but would have to expose its own behavior and the entire situation to the Court's scrutiny and its nationals to the Court's jurisdiction.

What if, against all odds, an American service member were tried by the Court? Suppose such an American commits crimes of the horrible nature described in the Statute. Suppose the US does not investigate or a trial by one of the most respected legal systems in the world is deemed biased by the ICC. Suppose, neither the US nor its allies can convince the ICC prosecutor not to investigate, and the Pre-Trial Chamber of the Court, composed of elected judges, approves the Prosecutor's decision to investigate. Finally, despite US influence, the Security Council refuses to defer the investigation. Even then, the accused American would come before a court whose due process provisions are almost identical to those provided in US courts by the Bill of Rights. It would not be, as is often suggested, a biased, vindictive body which is not required to honor due process rights.

Americans who commit or are suspected of committing crimes abroad are tried in foreign courts frequently. Such courts are often a far cry from American ones and frequently do not provide the most fundamental due process protections. The advantage of the ICC is that an American tried by the Court will enjoy the due process provisions absent in many foreign courts. The Statute is an example of the transformation of the due process provisions of the American constitution into international standards declared and implemented in various human rights treaties and the legal codes of many nations. As a result, the due process provisions of the Rome Statute, although written in 20th century English, are identical to those in the US Bill of Rights. The one exception is the absence of a trial by jury. This does not indicate an attempt to deny due process or to put America in its place. Rather, a jury trial for Pol Pot, Idi Amin, or Hitler would be an impractical mockery of the whole meaning and purpose of juries. Here again the Statute respectfully embodies the principles and rights enshrined in the American Constitution and the Bill of Rights, the institutional incarnation of American morals and ideals.

Of course, simply setting out due process rights on paper will not ensure that an American will receive just treatment. A popular example is the early corruption of the International Criminal Tribunal for Rwanda, the chaotic start of the International Criminal Tribunal for the former Yugoslavia, and the occasional failure of those tribunals to follow the rules and safeguards in their statutes. The advantage of the ICC is that it can learn from the experience of these ad hoc tribunals. In fact their representatives were and continue to be closely involved in ICC negotiations. Furthermore, the setbacks of the ICTY and ICTR came from their improvised nature, lack of a permanent mandate and inadequate oversight by the Security Council. As each was established, it had to start from scratch in operations, investigation, prosecution, personnel recruitment and financing.

The ability of the ICC to settle its logistics permanently before arresting people gives the institution a huge advantage over the ad hoc tribunals and a much better chance of making good on the provisions in its Statute. The ICC will have its own set of rules and standards for procedure and evidence, personnel recruitment, election of judges, all of which will have been carefully discussed and crafted in nine meetings of the UN Preparatory Commission for the ICC and reviewed before approval by the Assembly of States Parties. In that time the details, so often overlooked in the creation of ad hoc tribunals, will be worked out thoroughly to create a Court much more efficient than the improvised courts. This permanent Court will be better equipped to deal with horrible atrocities like those committed in Rwanda and Yugoslavia. These are cases which require intensive investigation, large costs (and hence careful budgeting), sufficient provisions for the victims and witnesses of the crimes, and most important, recruitment of the best qualified personnel. Creating a court is an enormous undertaking, one which cannot be completed in a year or two as experience with the temporary tribunals has shown. A permanent court is necessary not only for moral reasons, but also because it is economically efficient and in the end more just for everyone.

Facing the imminent creation of the Court, which will end the practice of creating temporary tribunals, the United States stands to benefit from active participation in the ICC. In order to fulfill the Nuremberg principle, an American may be subject to ICC jurisdiction even if the US has not ratified the Statute. If a US citizen does indeed come before the Court he or she would benefit from American influence in shaping and overseeing the ICC. An accused soldier will gain little in the Court from American hostility to the ICC. The Rome Statute is not perfect and much work remains to be done. This is precisely why it is important for America to remain involved and influential, able to exercise its rightful leadership. As a party to the Statute, the US would be able to lead in shaping the Court. Moreover, US refusal to support the Court has already resulted in tensions with its allies. Relations with them will continue to be affected if the US proclaims a desire to curtail or undermine the ICC.

Nonetheless America's relationship with its allies is certainly not more important than the relationship of our government with its own people. In public statements senior administration officials have said that they would have a problem with telling young soldiers and their parents that there is a possibility they may be tried by a Court which does not provide due process. Actually, as we have seen, the Court will be required to carry out our Bill of Rights. So the problem these officials really face is telling the American people that the values they grew up with do not apply abroad. That liberty and justice are paramount, but only within our own borders. That the rights of women and children matter, but only if they have a US passport. That family values are important but not in Rwanda. That faith, race and ethnicity should not determine whether you live or die, except in Yugoslavia. That we are responsible for our own destinies and will be held accountable for our triumphs and failures, but only if we are in our own country. The question of supporting or not supporting the ICC comes down to our fundamental morals and beliefs, the things we stand for as a nation and the principles we live by. The Court will exist to uphold them for all victims. By rejecting it we tarnish them and demean ourselves.

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