

AMICC'S ANALYSIS OF THE BACKGROUNDER PUBLISHED BY THE HERITAGE FOUNDATION: "AN INCONVENIENT FOUNDING: AMERICA'S PRINCIPLES APPLIED TO THE ICC" BY MARION SMITH

In the Backgrounder "An Inconvenient Founding: America's Principles Applied to the ICC," written by Marion Smith and published on February 18, 2010 by The Heritage Foundation, the author argues that the Obama administration's reengagement with the International Criminal Court is a case for serious concern. The paper begins by providing an extensive historical background on the development of due process rights in US courts. The author's central argument is that the ICC is incompatible with the US Constitution and American politics, and undercuts several due process rights guaranteed by the US judicial system. The paper also includes misleading or distorted information about the Rome Statute, the treaty that established and now governs the Court, as well as the ICC's work and its relationship with domestic courts.

AMICC's analysis of the Heritage Backgrounder quotes relevant excerpts and provides clarification about the information provided and the author's analysis. The page references are to the PDF version of the report, available at <http://www.heritage.org/Research/InternationalOrganizations/bg2370.cfm>.

Sovereignty and the ICC

Page 2: "The Obama Administration's direction on human rights and global engagement is consistent with the prevailing international mood. Pooled sovereignty is all the rage among governance experts and practitioners throughout Europe and elsewhere."

Page 7: "The ICC's interpretation of its jurisdiction could result in the prosecution of U.S. citizens (both military and non-military personnel) for alleged crimes occurring in the territory of an ICC party, such as Afghanistan."

Page 11: "The current trend in global law inevitably diminishes the sovereignty of nation-states, and thereby renders constitutionalism obsolete, because the settled will of the people can no longer limit the actions of government."

Clarification: A nation's sovereign decision to ratify the Rome Statute and thereby permit the Court to hear cases against individuals suspected of genocide, crimes against humanity and war crimes if it or another country fails to do so does not in any way "pool" sovereignty or diminish the sovereignty of nations. Participation in a treaty or international organization almost always involves the acceptance of certain rules or limits in exchange for the acceptance of the same rules or limits by other nations. The ICC deals with individuals who may become subject to the jurisdiction of the Court due to the sovereign right of nations over their territory and nationals. The ICC investigates and tries individuals, not countries. The countries that have ratified the Rome Statute have exercised their sovereign rights to determine how crimes within their borders and by its nationals are dealt with. Territorial jurisdiction is an essential attribute of sovereignty. If a non-State Party national commits a crime on the territory of a State Party, that country can decide how that crime is dealt with. To say that a country cannot make such a decision is an attack on a country's sovereignty. Furthermore, the ICC is required to defer to the proceedings of any countries which have jurisdiction over a particular case if that country so requests.





Approaches of Previous US Administrations

Page 6: “Although the United States signed the Rome Statute in 2000, President Bill Clinton refused to submit it to the Senate for the advice and consent necessary for ratification because of “serious flaws” in the treaty that first needed to be addressed. The Bush Administration concurred.” [footnote omitted]

Clarification: The Clinton and Bush administrations took very different approaches to the ICC. The US under President Clinton sought to stay engaged with the ICC and make improvements to it while actively involved in meetings leading up to the Court’s establishment. The decision to sign the Rome Statute was based on the desire to maintain access and credibility in working to achieve improvements in the future. Beginning in 2002, the Bush administration stopped attending ICC meetings, actively sought to undercut the Court, and supported legislative and executive actions which angered allies which had joined or wished to join the ICC. In its second term, the Bush administration softened its anti-ICC rhetoric and did not veto a UN Security Council referral of the situation in Darfur to the ICC. Elements of counter-productive legislation were waived and/or repealed.

Approach of the Obama Administration

Page 6: “The Obama Administration’s enthusiastic engagement with the ICC represents a significant shift in the U.S. approach. The United States remains ill served by participating in the ICC before achieving a fundamental revision of its mandate and procedures.”

Clarification: While the Obama administration has sought to differentiate its policy from that of the Bush administration, its engagement thus far has been cautious and limited. To date the US under Obama has only participated as an observer in one meeting of the ICC’s Assembly of States Parties. It also plans to attend the Review Conference of the Rome Statute in May and June 2010 in Kampala, Uganda, in part to share its views and concerns about the Court. The US under President Obama has also undertaken a full interagency review of US policy toward the ICC but has not taken any other significant action which would bind the US with respect to the ICC.

The Crime of Aggression

Page 6: “One of the Rome Statute’s more troubling deficiencies is the lack of a definition for the prosecutorial crime of ‘aggression.’ The crime of aggression will be clarified by a two-thirds majority of the Assembly of State Parties, almost ensuring that at least some signatory states will disagree with any efficacious definition. This scenario also highlights the political nature of the ICC’s mandate and reach.”

Clarification: The ICC cannot now try individuals for the crime of aggression because the Court’s jurisdiction over the crime has not yet been activated. This requires defining the crime and setting out the conditions for the exercise of the Court’s jurisdiction over it. The Rome Statute specifically requires this to happen before the ICC can deal with the crime of aggression and that any amendment activating the Court’s jurisdiction “be consistent with relevant provisions of the Charter of the United Nations.” A Review Conference, scheduled to take place in May and June 2010, will consider possible amendments on the crime which may lead to its activation as the fourth crime. The provision, to be adopted, must be supported by at least two-thirds of all ICC States Parties





present and voting, though it would take on legal force only for those countries that ratify the amendment. If a definition is adopted and ratified, the Court will not have retrospective jurisdiction. That is to say, the Court will not be able to investigate and prosecute crimes allegedly committed before the aggression amendment enters into force.

US participation in the Review Conference offers an opportunity for the US to pursue its concerns about the ICC and learn about the Court, including the negotiation to define the crime of aggression. The US is not required to ratify the Rome Statute in order to participate in the Review Conference; it is already entitled to attend as an observer with all rights but voting.

The Rome Statute and the US Constitution

Page 6: “The substance of the Rome Statute is heavily influenced by a global governance approach, a fact that makes it difficult for some constitutional democracies both to honor their constitutions and to promote the international legal enforcement of human rights through the ICC.”

Pages 6-7: “In effect, ratification of the Rome Statute would make the ICC the high court of last resort, superseding the legal authority of the U.S. Supreme Court and replacing the Constitution as the supreme law of the land.”

Page 7: “The due process of a speedy trial is also effectively absent in the Rome Statute. ICC operating procedure allows for indicted persons to be detained for years before trial, and there is effectively no presumption of innocence.”

Page 10: “As it currently stands, the International Criminal Court is fundamentally incompatible with the political and constitutional principles of the United States.”

Clarification: The Rome Statute is a rejection of a global governance approach because, like other international organizations, the ICC is controlled by the 110 States Parties which have joined the Court to date. The ICC’s membership now includes most US allies, including Canada, Australia, Japan, all members of the European Union, and all members of NATO except Turkey and the US.

Most US legal scholars agree that the Rome Statute is compatible with the US Constitution. The ICC is established as an international organization, and thus is not an “inferior court” established by the US Supreme Court under Article III, Section 1 of the US Constitution. The US Supreme Court will always retain its competence to have the last word in any US case.

The Rome Statute provides for all due process rights enjoyed under the US Constitution and Bill of Rights, with the exception of the right to a jury trial. Article 67 of the Rome Statute requires an accused “[t]o be tried without undue delay,” among other rights. Under Article 66, “Everyone shall be presumed innocent until proved guilty before the Court in accordance with the applicable law.” With respect to jury trials, the US has repeatedly recognized that it is not feasible for individuals to be tried by a jury of peers in international





tribunals. In addition, the US permits Americans to be tried by military courts-martial and for crimes overseas without juries.

The ICC and Universal Jurisdiction

Page 6: “First, the ICC’s jurisdiction is theoretically universal...”

Clarification: While the above-quoted passage may be referring to the universal acceptance of the ICC’s jurisdiction by all nations, it is important to note that the ICC does not exercise universal jurisdiction. Some domestic courts exercise universal jurisdiction by investigating and trying individuals for violations of international legal norms. The ICC only exercises jurisdiction over individuals if their country of nationality ratified the Rome Statute or if they committed a crime on the territory of an ICC State Party, or if the UN Security Council refers a matter to the Court. The ICC can only try crimes that are set out in the Rome Statute

Review of Domestic Proceedings by the ICC

Page 6: “Thus, any U.S. investigation or trial, no matter how robust, could face review by the ICC and even be overturned by a subsequent trial at The Hague.”

Clarification: Like any court, the ICC must satisfy itself that it has jurisdiction over the matters before it. If a case has been investigated or prosecuted domestically, the ICC judges will examine whether those proceedings were genuine and not intended to shield the individual from justice. There are several opportunities in the course of ICC proceedings for a nation to challenge the admissibility of a case, and the Court’s decisions are subject to appeal.

Surrender of US Nationals to the ICC

Page 7: “The United States has attempted to protect its citizens from ICC jurisdiction in places such as Afghanistan through bilateral Article 98 agreements and status of forces agreements (SOFAs), but these protections are imperfect. SOFAs can be altered unilaterally by foreign governments and are vulnerable to domestic political changes.”

Page 7: “For instance, a U.S. military officer or enlisted soldier could be indicted by the ICC for alleged crimes in Afghanistan, be protected by the Afghan Article 98 agreement and SOFA, but be arrested and transferred to the ICC when he is redeployed to Japan, South Korea, or the United Kingdom because the U.S. does not currently have Article 98 agreements with those countries.”

Clarification: The Rome Statute and the ICC’s jurisprudence make it very unlikely that a US servicemember would be brought before the Court. The principle of complementarity requires the Court to defer prosecution of a case to a country that claims jurisdiction over it unless it is unable or unwilling to prosecute. The US has a functioning legal system with which cases can be dealt with accordingly. US military courts are prepared to handle war crimes committed by military personnel or civilian personnel accompanying the military. Complementarity therefore serves to protect military personnel from frivolous international cases.





The Rome Statute recognizes that countries form bilateral and multilateral agreements all the time on various issues, from trade to military. Therefore, Article 98(2) does not require a country to violate Status of Forces Agreements (SOFAs) or Status of Mission Agreements (SOMAs) to comply with the Rome Statute. This allows states to recognize a SOMA or SOFA without violating the Rome Statute and continue to enter into agreements with other countries. The current agreements as entered into reach beyond US military personnel and diplomatic officials, as intended by Article 98, to US contractors and civilians. In their current form, the overreaching Article 98 agreements may not be valid under the Rome Statute. It would be in the best interests of the US to rely on SOFAs and SOMAs in order to ensure that it can try its own military and diplomats in US courts. The US currently has valid SOFAs and SOMAs with Japan, South Korea, the United Kingdom and other nations which would adequately protect US service personnel and diplomatic officials.

ICC Checks and Balances

Page 7: “No formal mechanisms control or limit the ICC other than its likely inability to enforce its decisions.”

Page 8: “The ICC’s current practices suggest its bias and ineffectiveness as a permanent court of international criminal prosecution. Because the ICC does not have jurisdiction over a global polity and receives no authority from an enforcing government, its most valuable role would be in continuing to serve as an ad hoc arbiter in extraordinary situations resulting from international conflict.”

Page 10: “A court can be legitimate only as part of an existing body of laws or constitution to which the people have consented.”

Clarification: The ICC, like other international organizations, derives its power from its member countries. The ICC’s governing body, the Assembly of States Parties, is composed of the nations that have ratified the Rome Statute. The Assembly has broad oversight power, including electing and removing for misconduct the Court’s prosecutors and judges. The Assembly also has extensive control over the Court’s budget and has ultimate oversight over the Court. As a true criminal court similar to those in the US, however, the ICC must be able to decide when it has jurisdiction to hear a case. The ICC judges only settle disputes over the Court’s judicial functions that have to do with the Court’s actual proceedings. It should be noted that the Statute requires the Court to honor a resolution by the UN Security Council to defer specified investigations or prosecutions for a 12-month period, and can renew that request indefinitely.

Page 7: “The unaccountable and permanent office of the ICC independent prosecutor presents a unique opportunity for politically charged investigations.”

Clarification: The power of the ICC Prosecutor is not unchecked. In order to exercise jurisdiction over any alleged crimes, a matter must be referred to the Court by a State Party or by the UN Security Council. In addition, the Prosecutor may seek the permission of a three-judge Pre-Trial panel in order to initiate an investigation *proprio motu* (on his or her own initiative). The Prosecutor’s limited powers are thereby checked, and already have been, by the elected judges and thus he or she would be severely limited in bringing politically motivated charges against US nationals. The Prosecutor is also accountable to and elected by the Assembly of States Parties and may be removed or disciplined for acts of misconduct.





ICC Crimes

Page 8: “The problematically broad definitions of the crimes for which the ICC is responsible make possible an infinite number of disastrous scenarios in which a politically motivated prosecution could do great harm to U.S. interests.” [footnote omitted]

Page 8: “At present, the U.N. and the ICC are attempting to establish the Hague-based tribunal as an international high court that can adjudicate at will the ordinary actions of national governments. Such an entity is at best an illegitimate international tribunal that does not enjoy the democratic support of any polity, and its decisions cannot be neutrally enforced by any country.”

Clarification: The Court, on behalf of the international community which established it, aims to hold individuals to account for widespread and severe atrocity crimes which shock the conscience of humanity: genocide, war crimes and crimes against humanity. The Court does not investigate or try sovereign nations. The definitions of the crimes are directly based on and usually use the language of international treaty law and custom at the time of the Rome Statute’s adoption. At Rome, the US agreed to the inclusion of genocide, war crimes and crimes against humanity. In 2000, the Elements of Crimes document was negotiated under the leadership of an official of the Department of Defense and with the approval of a US delegation which participated in its adoption.

The Work of the ICC

Page 8: “In the court’s short history, opponents of the Iraq war have attempted to use the ICC to punish U.S. officials, and an investigation is currently ongoing in Afghanistan. The prosecutor is also investigating alleged crimes committed by Israel in Gaza, despite the fact that neither Israel nor the Palestinian Authority is party to the Rome Statute. Indeed, the ICC’s present trajectory accommodates politically motivated charges and risks subverting domestic legal systems and turning international criminal law into a politically charged free-for-all under the guise of impartial justice. Indeed, the ICC’s present trajectory accommodates politically motivated charges and risks subverting domestic legal systems and turning international criminal law into a politically charged free-for-all under the guise of impartial justice.”

Clarification: The ICC Prosecutor receives communications about possible crimes but is not required to act on them. In order to do so, he must ask a three-judge panel for permission to initiate an investigation. He declined to do so with respect to Iraq because he concluded that the Court does not have jurisdiction. The Prosecutor is monitoring information he receives about Afghanistan or Gaza. He cannot, however, act on either case without first seeking permission from the Pre-Trial Chamber to begin a formal investigation. The Pre-Trial judges have the final authority over the Prosecutor’s ability to open an investigation.

Updated February 22, 2010

