

AMICC

THE INTERNATIONAL CRIMINAL COURT: A CASE FOR CONSERVATIVES

Since negotiations began on the first permanent International Criminal Court (ICC or Court) in 1995, conservatives in the United States have been concerned about its creation and its implications for American sovereignty and international actions. This range of concerns has led many conservatives to conclude that the Court does not merit U.S. support and involvement.

This paper examines the important concerns that conservative Americans have expressed regarding the ICC, and responds to them. Close examination of the Court indicates that the values that are important to conservatives are implemented and carried out by the ICC.

THE ICC IN OPERATION

On July 1, 2002, the ICC came into existence following the necessary 60th ratification of its Rome Statute, with jurisdiction over crimes committed after this date. The ICC advances global peace through internationally administered justice. It is unprecedented as a permanent tribunal to try individuals, regardless of nationality, for the most serious crimes, including genocide, crimes against humanity, war crimes, and when defined, the crime of aggression. The states which support the ICC are democratic and free, thus the judges elected will be from democratic countries, as evidenced in those that have been elected so far. Moreover, the staff of the ICC is drawn from countries all over the world, both members and non-members of the Court. For example, an American is a senior prosecutor, responsible for managing the Uganda case.

The ICC is up and running, with the support of nearly 100 countries that have ratified the Rome Statute. The governments of the Democratic Republic of the Congo (DRC), Uganda and the Central African Republic (CAR) are among the first to refer situations to the ICC. In addition, the United Nations Security Council has referred the situation in Darfur (Sudan) to the ICC, and the Ivory Coast has consented to the Court's jurisdiction. Investigations have already begun in the DRC, Uganda and Darfur, and arrest warrants are expected soon.

Conservative support was among the factors encouraging the Bush administration to abstain on the Darfur referral, which allowed the referral to take place. Conservatives thus spearheaded an important international action against the atrocities. Americans overwhelmingly supported the referral. Public opinion polls indicate that 91% of Americans feel that the U.S. should cooperate with the ICC to help bring to justice those responsible for the atrocities in Darfur. In light of the recent actions concerning the Court, namely the Darfur referral, some conservatives have begun to reexamine their concerns about the Court.

HISTORY

The sheer scale of horror committed during the Holocaust made the international community brutally aware of the power of ethnic hate, and the evil of leaders who are not called to account

for planning and creating atrocities. American troops led the effort to liberate Nazi concentration camps, playing a noble role to end the atrocities. The United States also led the effort to establish the subsequent Nuremberg and Tokyo tribunals, holding the perpetrators to account, and helping to establish the principle of individual accountability for war crimes.

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 court to try such crimes. The Cold War made it impossible politically to create a court. The consequences of this failure are apparent in the recent atrocities committed in Sierra Leone, Rwanda, East Timor, and the former Yugoslavia, along with other cases. The ad hoc tribunals were the pilot project, but their experiences made it evident that a permanent court was needed and that the UN Security Council could not create it.

MOTIVES THAT LED TO THE CREATION OF THE COURT

The motives of other countries and their historical experiences were among the factors that led to the creation of the ICC. Many countries who drafted the Rome Statute recently emerged from dictatorships to democracy. It was their unstable and violent past, coupled with the desire to have a permanent court to deal with atrocities that continue to happen around the world, which led them to create the Court.

The experience of the ad hoc tribunals also motivated the creation of the ICC. Although there have been difficulties with their operation, the tribunals have worked. Currently more than 50 individuals have been prosecuted and are serving sentences for the crimes they committed in the former Yugoslavia and Rwanda. This demonstrates that tribunals such as these can be successful, but their cost, their temporariness, and their inability to deter continuing crimes because they act only after the atrocities are over, makes the need for a permanent court obvious.

CONCERNS

The ICC implements most American values about trials and justice, and has thus far demonstrated its impartiality, independence and international acceptance. However, in the United States there is still fear and deep doubt about the reach, mandate and operation of the Court. The concerns of conservatives include: that the Court will be able to try and prosecute Americans, that U.S. participation may be unconstitutional, that there will be a loss of American sovereignty, that there is an absence of safeguards, especially when the U.S. is not a party to the Court, that the Court will have the defects of the ad hoc tribunals and finally, that the Court will limit America’s ability to act in its national interest.

CONCERN 1: THE ABILITY OF THE COURT TO PROSECUTE AMERICANS

It is highly unlikely that the Court will ever prosecute Americans. This is partly, but not only, because of the calculated and widespread manner in which the crimes must be committed, and the limited kinds of crimes that the ICC can prosecute. Countries such as America reject and abhor the kind of atrocities that the Court has been created to adjudicate. It is only the tyrannical

leaders of countries that repeatedly violate the most fundamental and basic human rights that will be brought before the Court and held to account. The Rome Statute also limits the Court's jurisdiction to individuals who are citizens of a country party to the ICC or who have committed crimes in the territory of such a country. Only if the Security Council refers a case, or a country accepts the Court's jurisdiction, can the ICC act when the states involved are not party to the Court.

In order for an American servicemember to be tried before the ICC, an American would have to commit crimes of the horrible nature described in the Statute, the U.S. would not investigate the crime or a trial by one of the most respected legal systems in the world would be deemed biased by the ICC, neither the U.S. nor its allies could convince the ICC prosecutor not to investigate, and/or the Pre-Trial Chamber of the Court, composed of elected judges, would approve the Prosecutor's decision to investigate. Finally, despite U.S. influence, the Security Council would also have to refuse to defer the investigation, which is under its mandate.

Even if such an unlikely scenario should occur, the accused American would come before a court whose due process requirements are virtually identical to those provided in U.S. courts. These provisions of the Rome Statute are identical to those in the U.S. Bill of Rights. The Statute includes rights such as the right to a speedy trial, the right to remain silent and the right to be questioned with counsel present. The only difference between the rights provided for Americans in U.S. courts and the ICC is that there is no trial by jury. However, a jury trial for Pol Pot, Idi Amin, Saddam Hussein or Adolf Hitler would be an impractical mockery of the whole meaning and purpose of juries. Who exactly would be the peers of such men? The ICC provides instead for trial by judges schooled in the highest legal principles of the Court, thus ensuring that their rulings will be rooted in them. It is clear that the ICC is not a biased, but is rather a court that is founded on the basic rights and privileges awarded to all Americans, ensuring that Americans would receive a proper and fair trial before the ICC.

CONCERN 2: U.S. PARTICIPATION IS UNCONSTITUTIONAL

Some Americans declare that U.S. participation in the ICC will be unconstitutional. They argue that the Court circumvents the powers of Congress to establish the federal judicial system and that an American who has committed a crime in the U.S. cannot be tried in a court located outside of the country, one which Congress neither created nor drafted its rules.

This would not be the first time that the United States would subject its nationals to be tried in a judicial system other than an American one. The U.S. has entered into previous treaties that allow its nationals to be brought before foreign courts. Examples of such extraterritorial judicial reach are the extradition treaties that the U.S. has established and continuously honors with many countries. For example, if an American commits a crime in another country, and the United States has an extradition treaty with that country, the U.S. is obliged to send that person to that country. A state has absolute and exclusive jurisdiction over those who commit crimes within its territory. This has been an accepted concept that has been a part of American law as far back as 1812. Furthermore, Supreme Court cases have made apparent that it is not unconstitutional to try Americans in foreign courts. It is abundantly clear from these cases that Americans can be

extradited, and have been extradited, to countries whose judicial systems are very dissimilar to American courts – for example, courts that do not have trial by jury.

The ICC is not the kind of American court in which the Congress is authorized to establish under Article III of the U.S. Constitution. Instead, it is a court outside the U.S. and in that respect is similar to the courts of foreign countries. Therefore, the U.S. is not escaping the Court's jurisdiction if it does not sign onto the ICC. 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 physically in foreign nations, which would have primary jurisdiction over them even without the ICC. In fact, given this reach of foreign courts even without American endorsement of the ICC, U.S. membership in the Court may actually serve to increase its influence and clout in such cases.

CONCERN 3: LOSS OF AMERICAN SOVEREIGNTY

The creation of this Court is not an attempt to check American power, nor a step toward world government. Moral considerations prompted the ICC's formation. The Court was a reaction to a brutal history and a refusal to accept perpetual atrocities. The fact that the ICC was created by a group of nations indicates that it is not an outside institution which simply materialized by its own accord to impose its will on the United States. Rather than violate the principle of sovereignty, the ICC is its expression. It is an act of sovereignty for countries to join treaties and organizations. The countries that drafted the Rome Statute, and subsequently signed and ratified it, are exercising their right to create an international organization. These countries still have the right to legislate and enforce the law within their own borders, and they are encouraged to do so. The Court's restricted jurisdiction is deliberate.

The Court's Statute begins by stating 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. This principle of complementarity ensures that sovereignty is not lost, but rather upheld and "complemented" when a nation becomes a party to the ICC. It is only when ICC judges determine that a country cannot or will not try someone that the Court may refuse to defer to a national legal system.

In addition, Americans are concerned that it is an invasion of our sovereignty for ICC judges to have the power to determine whether a criminal proceeding was conducted in good faith. If the ICC ever had to make such a decision, it would apply only to the particular case involved and would not be an overall judgment of the U.S. legal system. Such a judgment would only be an examination of what the U.S. did or did not do in a particular situation. It is of fundamental importance, if the Court is to function effectively, that its judges be able to independently determine the quality of a trial. Although there is a technical possibility that judges could conclude that a U.S. trial was not conducted in good faith, this is very unlikely since the international community is very aware that the U.S. judicial system has functioned with judicial rigor and independence over the last 200 years.

CONCERN 4: NO SAFEGUARDS OR A SYSTEM OF CHECKS AND BALANCES

Conservatives are worried that the Court does not have the necessary safeguards to prevent politically motivated investigations and prosecutions, especially against Americans. However, the Court only has jurisdiction over “the most serious crimes of concern to the international community as a whole,” which necessitates that criminal acts must have occurred on a large scale and be the result of deliberate plans or policies by a nation or organization.

If U.S. enemies do seek to use the ICC to achieve anti-American political objectives, there are numerous safeguards against this. The negotiators of the Rome Statute anticipated attempts to politically pervert the Court and quite wisely took careful precautions to prevent the abuse of the Court for political gain. If used in conjunction, such protections may provide nearly total exemption for any country with a well-functioning legal system.

Perhaps the most significant limitation and check on the Court is that it is a court of last resort. As discussed above, the Court is obliged to defer to national proceedings unless it can be shown that the state with jurisdiction over a case is unable or unwilling to act. Such a state must be notified if the Court is beginning an investigation and therefore has the ability to invoke complementarity to demonstrate that it can try the resulting cases.

Moreover, the ICC has four independent organs that serve as a check for one another. The Assembly of States Parties (ASP), the governing body of the Court, is comprised of the states that have ratified the Court’s statute. The ASP has ultimate oversight authority over the Court. It is the Assembly, not the Court that is responsible for managing the administration of the Court, deciding what measures to take when a member fails to cooperate, and controlling the budget. In addition, if a judge, the Prosecutor, or the Registrar does not act independently or is biased, the Assembly can remove him or her. The ASP demonstrates that the ICC is controlled by states, not faceless bureaucrats. 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 to shape the work of the ICC and hold it accountable.

There are also provisions that limit the powers of the Prosecutor. For instance, the Prosecutor’s office has no authority to decide on its own to pursue a case. He or she cannot begin a formal field investigation without the approval of the Pre-Trial Chamber of judges. Furthermore, the judges and Prosecutor are responsible for overseeing each other’s impartiality whenever it might reasonably be doubted on any ground. Additionally, the Security Council can defer an investigation for 12 months and renew deferrals indefinitely.

The ICC judges not only should have very high credentials to be nominated, but must also be elected by a two-thirds majority of the ASP. In addition, no two judges may be nationals of the same state. Similarly, the Prosecutor and Deputy Prosecutor must be elected by an absolute majority of the ASP and must be of different nationalities. The election of the first 18 judges demonstrates a precedent of required excellence. American participation would be a very powerful way to ensure that this continues to happen.

CONCERN 5: THE COURT WILL BE LIKE THE AD HOC TRIBUNALS

Although previous ad hoc tribunals have helped a great deal in bringing to justice those responsible for the atrocities committed in the former Yugoslavia and Rwanda, they have failed to deter atrocities because they are established only after the crimes they address have been committed. 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 the tribunals to follow the rules and safeguards in their statutes, are all pointed to as failures of the process. The setbacks of the tribunals 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, investigations, prosecutions, personnel recruitment and financing.

The permanence of the Court greatly reduces these problems. For example, the Court has its own set of rules and standards for procedure and evidence, personnel recruitment and the election of judges, all of which are carefully discussed and reviewed before approval by the ASP. The ability of the ICC to organize itself permanently before its first indictments gives the institution a huge advantage over the ad hoc tribunals. In fact, many of the tribunals' staff were closely involved in ICC negotiations, and some have even been elected to serve as judges or members of the Registry. These individuals can take their past experiences and transform them into positive reinforcement for the Court.

CONCERN 6: THE COURT WILL LIMIT AMERICA'S ABILITY TO ACT IN THE NATIONAL INTEREST

A final concern is that the ICC will inhibit policymakers to act or make choices in the interest of the country. One fear, especially felt by many military officials, is that military operations may constitute crimes against humanity, or, once defined, the crime of aggression. Such concerns are unnecessary because the ICC was not designed to prosecute citizens of democratic countries which normally do not plan and commit atrocities. In fact, it is unthinkable that Americans would ever commit such crimes since they are calculated and strategic, not the collateral damage of warfare.

The crimes under the Court's jurisdiction must be extremely serious and executed as a matter of official policy, within a repeated pattern of abuse. This ensures that only a very particular type of criminal will come before the ICC. The war crimes the Statute describes can be found in the military manuals of the U.S. army and the definitions of their elements were shaped, supported and finally approved by the U.S. and Department of Defense in negotiations on the ICC. The crime of genocide requires the intent to destroy a national, ethnic, racial or religious group. Crimes against humanity and war crimes have to be committed as part of a broad and consistent policy, not an inadvertent act. Therefore the U.S. need not fear prosecution from an error or combat miscalculation. It is unthinkable that a U.S. official would ever commit such crimes. Since the end of World War II, it is arguable that no actions taken by Americans would qualify for the ICC's jurisdiction.

In addition, conservatives should not fear that the worldwide deployment of Americans to serve our country will expose them to the political abuses of the ICC. Article 98 of the Statute provides for protection of U.S. citizens serving in the military or as officials abroad. It requires the ICC to defer to Status of Forces Agreements (SOFAs), which protect U.S. soldiers, sailors, air force personnel and marines abroad, and to Status of Mission Agreements (SOMAs) for U.S. officials. Therefore, it may even be argued that the Court will aid in the protection of Americans, especially servicepersons, because of its many protective provisions.

Concern over possible prosecution for the crime of aggression is understandable. However, there will be jurisdiction over the crime of aggression only when a provision is adopted defining the crime and the conditions for such jurisdiction. If the U.S. ratifies the Statute before such a definition is adopted, it will be able to participate in negotiations surrounding its adoption. As a State Party, the U.S. will also have the right to reject the definition and thus not be bound by the ICC's jurisdiction for this crime. Thus, for the U.S., the jurisdiction of the court can easily remain only war crimes, genocide, and crimes against humanity.

CONCLUSION

Freedom, democracy and equality – these are all profoundly American values upon which the United States was founded. The U.S. should use its strength and influence in the world to support those values on an international scale and thus put its power to good use. Personal accountability and respect for the rule of law is a fundamental value on which America was built, protection of which is also fundamental at the international level.

Many conservatives often support humanitarian efforts to help those in need. They frequently mount substantial efforts to aid individuals victimized by violent conflict, genocide, and political upheaval. Conservatives respect and make sacrifices for the principle that ignoring a mutilated man, a raped woman or a starving child, no matter how far overseas, is a moral outrage. Although the American people overwhelmingly support humanitarian efforts, their resolve is often tested by the substantial costs in American lives and tax dollars. In addition, humanitarian relief efforts rarely lead to a permanent solution. If the ICC does indeed have a deterrent effect, much of the humanitarian work sponsored by the U.S. abroad may no longer be necessary, allowing Americans to continue to advance their humanitarian ideals while potentially avoiding the deaths of American soldiers and rerouting the millions spent on humanitarian aid.

While such efforts are crucial and greatly aid victims, the goal should be to prevent these atrocities when they occur, and to punish the perpetrators. This is the mandate of the ICC. It holds to account individuals that commit horrible acts. Americans fight to end horrible crimes such as human trafficking, slavery, religious persecution and mutilation. Such crimes are included in the jurisdiction of the Court. The Court's aims and objectives demonstrate that the ICC shares similar values and moral history that America was founded upon, and that common ground exists both for the Court and U.S. acceptance of it.

Written and researched by AMICC Professional Volunteer Associate: Briony MacPhee

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