WHY THE INTERNATIONAL CRIMINAL COURT IS IN THE UNITED STATES' NATIONAL INTEREST

Traditional opponents of the International Criminal Court (ICC) have argued that the Court is undemocratic, undermines sovereignty and damages the interests of the United States. However, in the last National Security Strategy report, President Obama recognized the Court's importance to the emphasis of his foreign policy on multilateral relations. It is now time for those who oppose the Court in Congress and in American public to take a second look of the ICC. The purpose of this paper is twofold. First, it will analyze how the ICC embodies some of the main American values and interests. Second, it will demonstrate that by welcoming the ICC, the US will fortify its global image and therefore sustain its moral leadership in the world and thus its soft power.

The NSS: ICC as Part of Multilateral Approach to Foreign Policy

Since assuming the presidency, President Obama has taken a series of steps to return the US to multilateral engagement. This shift in American foreign policy is reflected in the National Security Strategy (NSS)[1] report released over his signature which specifically mentions the need of *sustaining broad cooperation on key global challenges*. The Obama administration has made a strategic calculation that working within international institutions is preferable to marginalizing them. International institutions are essential and unavoidable for dealing with all major international problems. In addition to that, international institutions are potential vehicles for legitimating American leadership. This idea is also contained in the NSS which advocates for s*trengthening institutions and mechanisms for cooperation*.

The NSS specifically mentions the ICC. It recognizes that supporting the Court is not only a moral imperative, but a pragmatic national security one as well. The end of impunity and the promotion of justice are stabilizing forces in international affairs. Recognizing this, the NSS states that those who intentionally target innocent civilians must be held accountable. Here is an acknowledgement that justice, of course, is only one element of foreign policy, but it is an important one. Historically, America has led efforts of the international community to bring justice to victims of atrocious crimes. America should continue to support institutions and prosecutions that advance this important interest and it should fully embrace the ICC as an expression of its values and interests.

American Values and Interests and the ICC

Traditional arguments by American opponents of the ICC have failed the test of reality. The ICC is compatible with the world envisioned by the US – a democratic and just world – because the ICC embodies some of the most relevant American values and interests.

Democracy

The ICC is a democratic organization; its structure and governance, as well as the nature of most of its members, demonstrate this. Moreover, the ICC also helps to promote democracy around the world.

[1] http://www.whitehouse.gov/sites/default/files/rss_viewer/national_security_strategy.pdf

Membership. Most of the Court's member states are democratic and the vast majority of them are also allies of the US. Only a few non-democratic states have ratified the Rome Statute. This is not surprising. On the one hand, governments lacking democratic legitimacy are more likely to commit atrocities as a means to keep power. Thus, repressive governments would not want to ratify the Statute out of the fear of prosecution. On the other hand, the ICC is a positive attraction for democratic governments as a proof of their commitment to the rule of law and due process. Joining the ICC is also an expression, which democracy makes possible, of the outrage of peoples and governments over atrocities. The ICC has, therefore, become an association of predominantly democratic and free states. The US should work closely with the ICC and with its major allies in the Court as part of its renewed multilateral approach to international affairs and so as to promote democracy.

ICC officials. A criminal justice system that is honest, fair and effective is one of America's most important institutions. It is equally important for the ICC to ensure the professionalism, effectiveness and independence of its officials, judges and prosecutor. To this end, ICC officials have specific functions and limitations and as well they are subject to strict control mechanisms to prevent misconduct.

The 18 judges of the ICC are accomplished legal experts and practitioners, all from democratic countries. As in the US, judicial independence and impartiality are two of the main principles of the ICC judiciary. The Rome Statute establishes certain measures to protect judges from improper influences from outside the ICC. Judges are elected to the Court by the Assembly of States Parties (ASP). They serve nine-year terms and are not generally eligible for re-election. All judges must be nationals of states parties to the Rome Statute, and no two judges may be nationals of the same state. They must be persons of high moral character, impartiality and integrity who possess the qualifications required in their respective States for appointment to the highest judicial offices. Through processes similar to the impeachment process in the US system, the ASP can remove judges of the ICC from office if they are found to have committed serious misconduct. The removal of a judge must be recommended to the ASP by two-thirds majority of the other judges and two-thirds of the States Parties must vote to approve his or her removal. Judges could also be disqualified from any case in which his or her impartiality might be doubted.

The first prosecutor, Luis Moreno-Ocampo, is an Argentine lawyer and former Harvard visiting professor who has won worldwide recognition for his work in battling corruption in several countries and prosecuting human rights abuses committed by Argentina's former military regime. The Rome Statute provides that the Office of the Prosecutor shall act independently. No member of the Office may seek or act on instructions from any external source, such as states, international organizations, non-governmental organizations or individuals. Any person being investigated or prosecuted may request the disqualification of a prosecutor from any case in which his or her impartiality might reasonably be doubted on any ground. The Appeals Chamber would decide on his or her disqualification. In addition, the ICC Prosecutor may be removed from office by an absolute majority of the States Parties if he or she is found to have committed serious misconduct or a serious breach of his or her duties or is unable to exercise his or her functions. This is similar to what happens in the US where each federal prosecutor is subjected, by law, to removal by the President.

Promotion of democracy by the ICC. The ICC is not only an agent of the international community, determined to prevent the commission of human rights atrocities. Also, for many individual states, joining the Court gives them another way to protect their citizens against atrocities. In this way, the ICC contributes to the

promotion of democracy. It is certainly the case that democratic institutions constitute a formidable barrier to the commission of atrocities. That barrier is strengthened when a country ratifies the ICC, thereby making its citizens and people on its territory vulnerable to international prosecution for the commission of such crimes. The ICC helps to promote democracy in two specific ways.

First, the ICC enables ratifying states to warn anti-democratic actors that any resort to atrocities will result in a potential ICC prosecution. The Court has a state-building rather than an interventionist character. The ICC can coordinate legal assistance with a government that struggles to maintain law and order. Second, ratification is a courageous act by which a country publicly pledges itself to the prevention of atrocities. By ratifying the Rome Statute, a State Party gives itself an added incentive to uphold the democratic institutions that make atrocities far less likely.

The promotion of democracy is a central US interest. As the recent NSS clearly states, the US supports the expansion of democracy and human rights abroad because governments that respect these values are more just, peaceful, and legitimate. The US also does so because their success fosters an international environment that supports America's national interests. Political systems that protect universal rights are ultimately more stable, successful, and secure. Since one of the most positive effects of the Court's work is promoting democracy, the US should work closely with the ICC.

Rule of Law

Historically, the US has led in promoting the rule of law worldwide and, specifically, in the development of international criminal justice. The ICC is the current culmination of this process and a key piece in the present international system of criminal justice. US support and cooperation with the ICC will serve the American role in promoting the rule of law.

From Nuremberg to the ICC. The US was the main force in promoting the Nuremberg tribunals and continually supported the trials. After Nuremberg, the UN recognized the need for a permanent international court to deal with atrocities of the kind committed during World War II but the Cold War made the establishment of an international criminal court politically unrealistic. The idea was revived in 1989[2] and the work on drafting a statute began. However, before the statute was finished, the events in Rwanda and Yugoslavia compelled the international community to establish two ad hoc tribunals to try atrocities committed during these two conflicts. Pursuing the idea that those atrocities must be punished, the US strongly supported the creation of these two criminal tribunals. Their work further highlighted the need for a permanent international criminal court. Such a court would allow the international community to initiate prosecutions of future atrocities without having to start from scratch each time. After years of negotiations, the General Assembly convened a conference in Rome in June 1998, with the aim of finalizing a treaty to create such a court. On July 17, 1998, the Rome Statute of the International Criminal Court was adopted.

The ICC is the culmination of the process initiated in Nuremberg in 1948 by the US and other countries. If the US wants to maintain international credibility in its pursuit of the global rule of law it needs to be sure that its current position carries forward the legacy of Nuremberg.

[2] Trinidad and Tobago proposed the creation of a permanent international court to deal with the illegal drug trade.

Filling the gaps: the principle of complementarity. According to the United Nations Charter, each nation, including the US, should be able to deal with its own internal issues and exercise its sovereignty in the most effective and responsible way. A responsible exercise of a country's sovereignty includes a judicial response when atrocities occur. The US is thus working to strengthen national justice systems so that every country could fairly and effectively address its own internal problems. This is exactly the main goal of the ICC. The ICC is a final option that is only available when domestic courts and procedures cannot deal with atrocities. This is referred to as the principle of complementarity.

Thus, the ICC is complementary to other courts. First, the ICC encourages national governments to strengthen their own enforcement of international atrocity law. However, when national jurisdictions are unable or unwilling to investigate atrocities, the ICC may take jurisdiction. Secondly, the ICC coexists with other national and international tribunals that deal with atrocity crimes, just as the gacaca courts in Rwanda work national in parallel with the UN International Criminal Tribunal for Rwanda (ICTR).

The Court itself does respect national sovereignty, including US sovereignty, because it does not have universal jurisdiction. The ICC can hear cases involving only four categories of crimes: genocide, crimes against humanity, war crimes and crimes of aggression. Even within these categories, the ICC can only take cases that involve severe and grave abuses. Furthermore, unless it is responding to a Security Council referral or a voluntary submission by a country, the Court can only consider cases if the events took place on the territory of a State Party or if the accused is a national of a State Party. In addition, the ICC cannot intervene if a nation investigates an allegation in good faith, even if it declines to prosecute.

The central purpose of the ICC is to try genocide, war crimes, crimes against humanity and crimes of aggression. The Court aims to end impunity for international atrocities. The further mission of the Court is to deter these crimes and thus to protect individuals from them. The US will continue to work to strengthen national criminal systems. However, this is not enough. Sometimes, national jurisdictions are not prepared or willing to deal effectively with atrocities. This is why the ICC is still necessary to promote the rule of law. The US is not a State Party to the Rome Statute but has a long history of cooperation with other nations in promoting the rule of law. This is why the limited US engagement with the ICC has been so disappointing. If the US really wants to promote the rule of law around the world, it should actively support the ICC since this Court fills the gaps where the other mechanisms fail, through the principle of complementarity.

Justice

America is a nation that strongly believes in law and justice, not only in order to bring justice to the victims but also to assure procedural guarantees for the defendants. The US criminal justice system upholds a defendant's rights to a fair and regular trial and also has laws in place to ensure that criminals are not abused or cruelly punished. Bringing justice to victims is the central purpose of the ICC. However, the Court recognizes that it is equally important to protect the rights of the accused during prosecution and trial, just as the US does.

The Rome Statute provides extensive protections to persons being investigated and those eventually accused of crimes. It gives broad rights to persons under investigation by the Court. These rights include: the right to remain silent, the right to speedy trial, the right not to be subject to arbitrary arrest or detention and the right to have legal counsel provided when he or she cannot afford it, among others. After charges have been confirmed,

the Statute expands upon the rights already mentioned. It provides that the accused has to be tried without undue delay, will have adequate time and facilities for the preparation of defense, and will have, free of cost, an interpreter and translation as necessary for the defense.

Defendants at the ICC enjoy all the due process rights of defendants in US courts except trial by jury. However, as it has been pointed out numerous times, the Bill of Rights has some limitations. First, if the crime is committed by military servicemembers, the US military courts-martial do not provide jury trials. Secondly, there is nothing new about Americans being subject to foreign laws when they commit the crime outside the US. Moreover, The US has also extradited Americans for trials in countries which do not use juries and has strongly supported the International Criminal Tribunal for the former Yugoslavia (ICTY) and ICTR, neither of which provides for trials by jury.

The ICC perfectly embodies the principle of justice in which America strongly believes. The Court offers to the defendant all rights that the US criminal justice system recognizes to the accused, except trial by jury. The misconception that the Court lacks enough protections for the defendant should not prevent the US from supporting actively the ICC.

Development of International Law

As mentioned above, America is a nation that strongly believes in the importance of law both the domestically and internationally. The ICC boosts the prestige and importance of international law. It helps to remind the international community that, despite the legal maneuvers and atrocious practices of dictatorial regimes, violations of the most fundamental rights remain forbidden and punishable under international law.

The Rome Statute is regarded as one of the most important multilateral instruments negotiated in the last decade of the twentieth century. The Statute codifies international law, for the purpose of the ICC, regarding genocides, war crimes, crimes against humanity and crimes of aggression. During the negotiations for the Rome Statute, in which the US was an active participant, momentum developed to write a treaty that further improved international protection against atrocities. Building upon the statutes and judicial decisions of the Tribunals for Rwanda and the Balkans, the Rome Statute consolidates and develops international criminal law in four particular areas, for the purpose of the ICC:

- The Statute spells out with greater precision prohibitions against sexual crimes.
- It extends war crimes provisions to internal as well as international conflicts.
- It does not require that an international conflict takes place to consider crimes against humanity.
- It refuses immunity based on official capacity.

These developments represent significant advances in the protection against atrocities. They also represent American contributions to international law as well as implementation of US national interests in international action against atrocities.

The Power of Example: Coherence and Consistency

US power has been unrivaled in many dimensions: the hard power of military strength, the economic power that stems from the world's largest economy, the soft power that comes from being associated with the promotion and protection of human rights. This is no longer the case. Military superiority is not always enough to ensure national safety and social and economic development worldwide. American economic power is no longer as exceptional as it used to be due to the growth of economies such as China and Brazil. But probably it is the American reputation as a moral leader which has been harmed the most in the last decade. In order to once again attract nations and peoples to its values, the US needs to rethink the face it presents to the world and recover its status as a moral leader.

Not being part of the ICC damages the US position in international relations, creating conflict with allies and causing disassociation from the some of the most important American values and interests – democracy, rule of law, justice and development of international law. If the US fortifies its standing by acting coherently and consistently, it will sustain a key source of its strength and leadership in the world.

The ICC has matured independently and responsibly while the US has, until recently, remained officially outside, and sometimes even manifestly opposed the Court. Now, it is time for the US to participate actively in the ICC and renew its own moral leadership. The ICC embodies values of justice and democracy that the US supports for a just and democratic world. The US has led the long process of creating an international system of criminal justice that would end impunity, and the ICC is a major step forward and a culmination of this process. The Obama administration should expand and deepen the renewed engagement with the Court which it has begun cautiously.

Conclusion

The Obama administration has understood and begun to act on the perception that America needs to rethink its position towards the ICC. Law is, of course, only one element of foreign policy, but it is a powerful one. By appealing to principle, the US can better persuade. By acquiring legitimacy, the US actions take on a new authority. By delivering justice, America can win hearts and minds. If the US embraces the ICC, the US would better defend its values and interests. As a result, America will have the opportunity to cultivate trust and trustworthiness at the international level, to foster a circle of fairness and legitimacy in the global enforcement of human rights, and thus to promote the twin goals of justice and peace.

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