The American Non-Governmental Organizations Coalition for the International Criminal Court

AMICC

AMICC'S ANALYSIS OF THE POLICY PAPER OF THE ATLANTIC COUNCIL OF THE UNITED STATES: "LAW & THE LONE SUPERPOWER: BUILDING A TRANSATLANTIC CONSENSUS ON INTERNATIONAL LAW" BY WILLIAM H. TAFT IV AND FRANCES G. BURWELL

Transatlantic divide over the ICC

Page 1: "This divide should not be viewed as another transatlantic disagreement that can be blamed on the policies of the Bush administration — disagreements over the ICC and the de-mining convention surfaced during the Clinton administration and reflect widely held views within the U.S. legal establishment."

Clarification: The ICC has been formally endorsed by the American Bar Association Section of International Law, Section of Criminal Justice and Section of Individual Rights and Responsibilities; the National Association of Criminal Defense Lawyers; and the bar associations (or sections thereof) of the state of Alaska and the cities of New York, Philadelphia and San Francisco, among others. Although the American Society of International Law does not take institutional positions, a review of its Journal and proceedings of its meetings will show strongly favorable treatment of the ICC. Against this background, claims about widely held views in the US legal community should cite to data and publications. While there is little data to support such widely held views within the US legal establishment, public opinion polls in the US consistently show 60-70% support for US participation in the ICC.

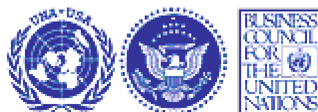
Page 7: "In contrast, all European Union members have signed the ICC statute. Some, such as France, have issued special interpretations of particular clauses, but overall support for the ICC is very strong throughout Europe."

Clarification: All EU members, with the exception of the Czech Republic, have ratified or acceded to the Rome Statute. All of the ICC States Parties have respected the ban on reservations provided for in Article 120 of the Rome Statute.

The relationship between domestic and international law

Page 1: "Many Europeans are comfortable ceding significant decision-making powers to an international organization with the potential to extend its responsibilities beyond the original mandate. But many in the U.S. legal community remain concerned that this goes beyond the consent given by democratically elected governments and worry about how the ICC might interpret its own powers in some unforeseen future circumstance."

Page 4: "The EU was willing to compromise the sovereignty of its member states to develop a more comprehensive international legal order that could respond to a growing number of global issues."



Page 8: "Precisely because the Court's supporters — including many Europeans — have envisioned it as a step toward a more supranational legal system, the ICC has raised U.S. suspicions in the key areas of consent, compliance, domestic vs international law, and the definition of crimes."

Page 9: "In Europe, however, the principle — and practice — of supranational jurisdiction is already well established. The European Court of Justice can find EU member states in violation of their obligations as members, and individual European citizens can sue their governments for a broad range of human rights violations before the European Court of Human Rights. The new European Arrest Warrant requires any European country to accept an arrest warrant from any other EU member, giving other member states a very real jurisdiction over their own citizens."

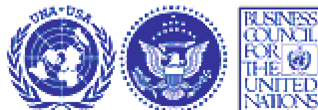
Clarification: There is no evidence that the ICC is a "step toward a more supranational legal system" to which European nations and other States Parties have ceded significant decision-making powers. Japan, which will become the 105th State Party in October 2007, and others are not interested in supranational legal systems. The Court is a free standing international organization, the use of which is a sovereign option by its States Parties and specially consenting countries except in the case of UN Security Council referrals and failed or unwilling domestic court systems.

The ICC was established as the first permanent international criminal court with a limited mandate to investigate and try individuals bearing the greatest responsibility for genocide, crimes against humanity and war crimes. Under the principle of complementarity, set out in Article 17 of the Rome Statute, a case is only admissible before the ICC when national courts are genuinely unwilling or unable to act. Article 18 requires the ICC to defer to national investigations upon the request of a State. The UN Security Council may also defer investigations and prosecutions for renewable periods of 12 months. Any changes to the ICC's jurisdiction must be approved by the Court's Assembly of States Parties. These limitations prevent the Court from being a supranational institution outside of the control of its States Parties.

Page 5: "The second view sees such an evolution of international law as inadequately protecting the interests or sovereignty of states or their necessary freedom of action. Of particular concern is the tendency to omit "escape clauses," in the form of vetoes, national security exemptions, derogation and withdrawal rights, etc., from some of the recent multilateral conventions, thus reducing the ability of states to deal with unforeseen future circumstances."

Clarification: The Rome Statute includes a national security protection provision (Article 72) and permits States Parties to withdraw from the Statute (Article 127). In addition, the UN Security Council may defer investigations and prosecutions for renewable periods of 12 months (Article 16). The Rome Statute does not permit reservations so as to preserve the consistency of its jurisdiction and procedures (Article 120).

Page 6: "In Europe, law created at the European Union level is assumed to take precedence over national law, and increasingly international treaties and customary law are regarded in the same way. In the United States, however, international treaties and other laws are generally only given domestic effect through the passage of



implementing legislation. Only rarely has the U.S. court system referred to international law, either in terms of creating obligations or precedents, in determining the validity of a particular U.S. law."

Clarification: International law, once implemented into US law, is the law of the land, on par with federal legislation. The hierarchy of laws in Europe as it applies to member states is similar to the relationship between federal legislation and state legislation in the US. In order to fully implement the Rome Statute, States Parties are expected to implement national laws with respect to the crimes within the Court's jurisdiction. In the US, courts often cite to and rely on international law to decide cases. For example, there are numerous cases in which federal courts have adjudicated apparent conflicts between US laws and treaty obligations. Federal courts also frequently have to determine the state of international law on a particular subject. Thus, 17 US federal court cases in eight district courts and three appellate circuit courts have cited to the Rome Statute since 1999.

Page 8: "The UN Security Council can also refer cases to the ICC, even those involving non-state parties, such as happened in Resolution 1593, giving the court jurisdiction over the Darfur conflict on the grounds that the Sudanese government was unwilling or unable to address such crimes through its own legal system."

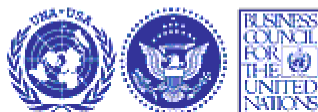
Clarification: UN Security Council Resolution 1593, which referred the situation in Darfur to the ICC, made no finding in respect of Sudan's legal system. As provided for in Article 13, paragraph (b) of the Rome Statute, the Security Council referred the Darfur situation to the Court on the basis of Chapter VII of the UN Charter. It is left to the Court to determine whether the Sudan courts are unwilling or unable to investigate and prosecute the alleged crimes.

Page 9: "Many Europeans have tried to reassure U.S. officials by noting that the ICC is only intended to apply to individuals if a national legal system is not effective (and they note that the United States did deal with the Abu Ghraib prison scandal). Nevertheless, U.S. officials remain sensitive to the risks such a broad jurisdiction could pose to U.S. personnel."

Clarification: The Rome Statute limits the ICC to the investigation and prosecution of only those individuals bearing the greatest responsibility for genocide, crimes against humanity and war crimes. The jurisdiction of the ICC with respect to national legal systems is limited to cases when national courts are genuinely unwilling or unable to act in the case at hand.

Page 10: "A new emphasis should be placed on the competence of domestic legal systems, because the ICC only becomes relevant when that competence is lacking."

Clarification: The ICC is intended to complement rather than replace domestic legal systems. The ICC will act only where national courts have failed to do so in a particular case. Article 93, paragraph 10 of the Rome Statute provides that the Court may provide cooperation and assistance to national legal systems conducting investigations or trials of conduct which constitutes a crime within the jurisdiction of the Court or a serious crime under national law.



Accountability of judges and prosecutors to States Parties

Page 8: "Judges and prosecutors would play a very large role in determining the processes and decisions of the Court. A UN tribunal would end once it had concluded work on its particular conflict, ensuring that undesirable officials or procedures could be abandoned. Critics of the ICC feared, however, that its permanence might offer the opportunity for personnel to take the Court in a direction that had little relationship to the desires of the states party to the statute."

Clarification: The judges and prosecutors of the ICC are accountable to the Court's Assembly of States Parties. The judges and prosecutors are elected by the Assembly of States Parties for terms of nine years and are not eligible for reelection. Article 46 of the Rome Statute provides that the Assembly of States Parties may remove judges and prosecutors from office for serious misconduct or a serious breach of his or her duties under the Rome Statute.

Amendments to the Rome Statute

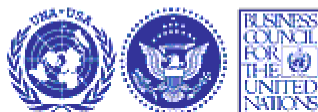
Page 6: "U.S. opposition to the ICC is based to a great extent on concerns that there would be no effective way of withholding consent from future developments. In this view, states are obliged to abide by the specific agreements they have made, but those agreements cannot be expanded without explicit consent."

Clarification: There are modalities for withholding consent to amendments to the Rome Statute. Under Article 121, paragraph 5 of the Rome Statute, any amendment to articles which specify the Crimes within the jurisdiction of the Court and define genocide, crimes against humanity and war crimes for the purposes of the ICC (Article 5-8) only enters into force for those States Parties which have accepted the amendment. The Court cannot exercise its jurisdiction regarding a crime covered by an amendment when committed on the territory or by nationals of a State Party which has not accepted the amendment. Agreements to create international organizations from the UN on down always present the possibility that in the future the organizations will try to take unforeseen actions and decisions. The organizations' governing bodies, like the ICC's Assembly of States Parties, have, among others, the important function of overseeing these actions and decisions.

Opt-out provisions and the crime of aggression

Page 9: "But states that are party to the Rome statute can opt out of the Court's jurisdiction in particular respects for a period of years, reducing the chance that their citizens will be prosecuted."

Clarification: Article 124 of the Rome Statute permits a State Party to declare that it does not accept the jurisdiction of the Court with respect to war crimes alleged to have been committed by its nationals or on its territory for a period of seven years. This opt out provision only applies to war crimes. There are no such provisions for any of the other crimes within the Court's jurisdiction.



Page 10: "Currently, states that have signed up to the ICC can temporarily opt out of being prosecuted for some crimes, especially 'crimes of aggression.' In the interests of treating non-members and members equally, a similar provision should be considered for states that have not acceded to the statute."

Clarification: The ICC never has jurisdiction over States and can only prosecute individuals, not States. With the exception of war crimes, States Parties cannot opt out of the Court's jurisdiction over their citizens or crimes committed within their territories. Article 121, paragraph 5 of the Rome Statute provides that a State Party must accept any amendment with respect to the crimes within the Court's jurisdiction and the definitions of the crimes in order for the Court to exercise jurisdiction regarding a crime covered by the amendment when committed by that State Party's nationals or on its territory. Any future amendment to the definitions of crimes, such as an amendment to include a definition of the crime of aggression in the Rome Statute, must be approved by a State Party in order for the Court to exercise its jurisdiction over a State Party's nationals or territory.

The crime of aggression is not a foreign concept in the US, as suggested by the quotation marks in this excerpt. At Nuremberg, US Chief Prosecutor Robert H. Jackson stated, "To initiate a war of aggression, therefore, is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole." In 1974, the US helped to define aggression in the drafting and approval of UN General Assembly Resolution 3314 (XXIX).

Article 98 agreements

Page 7: "U.S. concerns about its soldiers serving abroad being subject to the ICC led the Bush administration to pressure other countries to sign 'Article 98' agreements, under which an ICC member promised immunity to U.S. citizens. This was especially problematic for the EU candidate countries of central Europe, who found themselves in the middle between the European Union, which argued that Art. 98 agreements of the sort put forward by the United States were contrary to at least the spirit of the ICC, and the United States, which threatened to withdraw military assistance to all those who failed to sign, unless they were already a NATO member."

Clarification: While Article 98 agreements are intended to shield US citizens from the jurisdiction of the ICC, they do not in fact promise immunity to US citizens. Article 98 agreements require nations not to hand over without the consent of the US government to the ICC or any third country that may do so a US citizen whom the ICC has requested be delivered to it. Also, the European argument against Article 98 agreements is not that they are counter to the spirit of the Rome Statute but rather that they are inconsistent with States Parties' obligations under the Rome Statute. Article 98 specifically covers only civilian officials or military personnel in another country on official business and does not extend to civilians in general. See Council of the European Union, EU Guiding Principles concerning Arrangements between a State Party to the Rome Statute of the International Criminal Court and the United States Regarding the Conditions to Surrender of Persons to the Court, Annex to Annex II, at http://register.consilium.eu.int/pdf/en/02/st12/st12516en02.pdf.

Page 9: "Many in the United States remain very leery of any international attempt to judge U.S. personnel, especially if that might include military personnel carrying out their duties. U.S. personnel serving overseas are subject to Status of Forces Agreements (SOFAs), but these are negotiated on a bilateral basis with the host government and thus can be very specific about the circumstances in which U.S. personnel would be subject to foreign jurisdiction."

Page 10: "Instead of seeking immunity for its citizens through Article 98 accords, the U.S. administration should pursue bilateral agreements in which it promises to exercise its own jurisdiction in the cases that might otherwise fall within the ICC's jurisdiction."

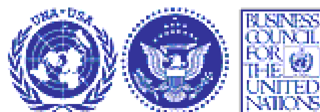
Clarification: Article 98 specifically permits parties to Status of Forces Agreements and Status of Mission Agreements to honor them before any relevant obligation the parties might have to the ICC. If necessary, these agreements could be amended to invoke this protection of US servicemembers from the jurisdiction of the ICC.

<u>Definitions of crimes</u>

Page 9: "Definition of crimes — Currently, there is a transatlantic consensus that the specific crimes laid out in the Rome statute are deserving of international prosecution if no national authority has jurisdiction. However, because the ICC is permanent, there will be an opportunity for the definition of those crimes to evolve considerably. To limit such evolution, the U.S. administration had sought more precise definitions of certain crimes listed in the Rome statute, but no agreement on this was reached. This leaves open the possibility that, for example, European criticism of the U.S. detention facility in Guantanamo and of 'extraordinary renditions' could be reflected in an expanded definition of war crimes that includes 'illegal detentions.'"

Page 10: "The definition of crimes should be tightened, so that there is less chance that zealous judges and prosecutors will expand the definition beyond that acceptable to states party to the statute. The notion of 'crimes of aggression' is of particular concern to the U.S. legal community."

Clarification: The definition of crimes will only evolve to the extent that the Rome Statute is amended by the States Parties. Article 9 of the Rome Statute requires that the Court be assisted in its interpretation and application of crimes by the Elements of Crimes document which was negotiated under the leadership and with the approval of a US delegation led by an official of the Department of Defense in 2000. This document was approved by the UN Preparatory Commission for the International Criminal Court on June 30, 2000 in a consensus decision in which the US delegation formally joined. It was subsequently approved and made binding on the judges by a resolution of the Court's Assembly of States Parties on September 9, 2002. Article 46 of the Rome Statute provides that the Assembly of States Parties may remove judges and prosecutors from office for serious misconduct or a serious breach of his or her duties under the Rome Statute. The US could participate as an observer in meetings of the ICC, including those of the Assembly of States Parties, the Special Working Group on the Crime of Aggression and the Review Conference, in order to discuss and learn about the work of the Court as well as express its concerns about interpretations of the Rome Statute.



US participation in the ICC as a non-State Party

Page 3: "Working together to reduce the prospects of discord between states party to the ICC, and those that have not joined, by reaching agreement on such issues as the definition of 'crimes of aggression' and the possibility of 'opt-outs' for non-state parties."

Pages 10-11: "Finally, the United States has much to gain by being as influential as possible in the development of the Court, which will undoubtedly foster developments in international jurisprudence that will affect the U.S. and its citizens. For that reason, the U.S. government should, in appropriate cases, provide assistance to the ICC in the form of technical expertise and evidence, as it does with the UN tribunals. This will give the United States more access to the procedures of the ICC, and may encourage its development in directions more compatible with U.S. practice."

Clarification: In addition to assisting the Court in appropriate cases, the US could learn about and influence the development of the Court by participating as an observer with all rights except the vote in meetings of the ICC, including those of the Assembly of States Parties, the Special Working Group on the Crime of Aggression and the Review Conference.

US position on international tribunals

Page 8: "In contrast to their differences over the ICC, the U.S. and European governments have worked closely together over many years to establish internationally mandated tribunals for specific conflicts. The United States was the moving force behind the Nuremburg war crimes trials, which established the principle of internationally mandated justice following World War II. More recently, the United States and its European partners have supported the creation of UN-mandated war crimes tribunals following the conflicts in Sierra Leone, Rwanda, Cambodia, and the former Yugoslavia. Along with Truth Commissions — as in El Salvador, South Africa, and many other places — these tribunals demonstrate the growing international recognition that cultures of impunity cannot be allowed to persist."

Page 15: "Transatlantic differences over the ICC and other forms of international tribunals are likely to remain sharp, yet there is clearly a trend toward the internationalization of justice, as demonstrated by U.S. and European support for an international investigation in the case of the assassination of leading Lebanese political figure Rafiq Harari."

Clarification: As summarized in the first excerpt, there are few, if any, transatlantic differences over other forms of international tribunals as suggested in the second excerpt.

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